IN THE SUPREME COURT OF MISSISSIPPI

No. 2009-CA-00065

ILLINOIS CENTRAL RAILROAD COMPANY

Defendant/Appellant

vs.

GARY R. BYRD, *et al.*

Plaintiffs/Appellees

CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that the Justices of the Supreme Court and/or the Judges of the Court of Appeals may evaluate possible disqualification or recusal:

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STATEMENT OF THE CASE

This appeal surrounds the case of Bobby McElhenney, *et al.* v. Illinois Central Railroad Company, CA-2002-495, filed in 2002 in the Circuit Court of Holmes County, Mississippi. The individual plaintiffs listed on the Complaint alleged personal injuries related to asbestos exposure while in the employ of the Defendant-Appellant, Illinois Central Railroad Company (referred to hereinafter as "ICRC")

After the case was filed in Holmes County in 2002, attorneys for the plaintiffs-appellees (referred to hereinafter as "plaintiffs") and defendant-appellant met in January 2004 to discuss potential settlement of the cases of all 216 plaintiffs listed on the above-referenced Complaint. Robert N. Peirce, Jr, Esquire, on behalf of the plaintiffs; and Thomas R. Peters, Esquire, on behalf of the defendant, met in the Pittsburgh, Pennsylvania office of Mr. Peirce and engaged in these discussions. What occurred at that meeting is the subject of this appeal.

A settlement of all of the cases occurred at the January 23, 2004 meeting. Settlement figures were discussed with Mr. Peters, and Mr. Peirce took those figures to his clients for approval. Once all 216 clients approved the settlement figures, using ICRC draft language, Mr. Peirce's firm prepared the releases pursuant to prior procedure. Mr. Peters and Mr. Peirce had settled similar cases with the same procedure – Mr. Peirce would notify the client of the settlement amount, and upon approval, the settlement amount was confirmed, either via email, telephone or correspondence, with Mr. Peters. The clients signed the releases and they were mailed them to Mr. Peters for processing and payment. Following this delivery, in approximately March and April 2004, and throughout the next year or so, 180 plaintiffs of the original 216 were paid in settlement of their cases pursuant to the terms of the release. While payment was pending, and after most of the 216 were paid, ICRC was purchased by Canadian National Railroad, and ICRC began resisting payment of the remaining releases. After it became apparent

that ICRC was not going to render settlement payments in the remaining 36 cases, plaintiffs filed a Motion to Enforce Settlement on June 23, 2006 in Holmes County, Mississippi.

Motions, responses, briefs and affidavits were exchanged following the plaintiffs' Motion to Enforce Settlement. Hearings before the Honorable Robert Goza occurred on November 6, 2006 and September 27, 2007. Both parties were given the opportunity to present their sides of the case. After careful consideration, the trial court issued a Final Order, enforcing settlement as to 27 plaintiffs on December 11, 2008. This appeal timely followed.

SUMMARY OF THE ARGUMENT

The facts of instant appeal is entirely analogous to the cases of Illinois Central Railroad Company v. McDaniel, 951 So.2d 523 (Miss.2006) and Illinois Central Railroad Company v. Acuff, 950 So.2d 947 (Miss.2006). Therefore, the facts and case law surrounding those decisions should be applied to the instant case, and the trial court's order enforcing settlement should be affirmed.

In both the McDaniel and Acuff cases, a large settlement agreement of many cases was agreed to between plaintiffs and defendant, ICRC, for release of conditions arising from asbestos-related diseases. Pursuant to the terms of the settlement agreements in McDaniel and Acuff, ICRC rendered payment to a majority of the plaintiffs, but for a myriad of reasons, ICRC stopped payment and plaintiffs were forced to file a Motion to Enforce Settlement. Following litigation and appeals surrounding the Motions to Enforce Settlement, the McDaniel and Acuff appeals followed, and the trial court's grant of plaintiffs' motion to enforce settlement was affirmed, and plaintiffs were finally paid in due course.

Plaintiffs filed a Motion to Enforce Settlement on June 23, 2006. (R.E.163-167). Thereafter, Special Circuit Judge Robert L. Goza held two hearings, on November 6, 2006 and September 27, 2007, where he reviewed both parties' affidavits, heard oral argument from attorneys and/or parties from both sides, and concluded that the parties entered into an enforceable contract following the settlement discussions on January 23, 2004. (R.E.15-71, 72-146).

ICRC, in this appeal, has endeavored to turn the attention away from what really happened on January 23, 2004. They are attempting to raise issues that were never raised prior to the settlement of the cases. Such arguments – improper venue, release language, Statute of

Frauds – should be considered waived and have no effect on the instant appeal. In the event this Court visits the merits of those arguments, they should also fail.

In the end, ICRC paid 180 of the original 216 plaintiffs, and for various and sundry unrelated reasons, decided not to pay the remaining plaintiffs. Whether their reasoning was founded on buyer's remorse or upon the purchase of ICRC by Canadian National Railroad, it is flawed and improper.

Plaintiffs' Motion to Enforce Settlement, granted in the trial court below, should be given full effect and the trial court's decision to enforce settlement for 27 plaintiffs should be upheld. (R.E. 5-10)

ARGUMENT

I. The trial court did not lack jurisdiction to adjudicate plaintiffs' Motion to Enforce Settlement. To the contrary, plaintiffs' claims were properly joined and were properly brought in Holmes County.

a. Standard of Review

The standard of review for a trial court's decision on joinder and venue is abuse of discretion. Mississippi Farm Bureau Federation v. Roberts, 927 So.2d 739, 741 (Miss.2006); The Park on Lakeland Drive, Inc. v. Spence, 941 So.2d 203, 206 (Miss.2006). Therefore, a trial court's decision on proper joinder and proper venue should not be disturbed but for such abuse of discretion. Id.

b. The trial court acted properly when it decided the merits of plaintiffs' Motion to Enforce Settlement before determining the issue of whether plaintiffs' claims were properly before the court.

As the trial court stated at the November 6, 2006 hearing on this matter, "[i]f there is an enforceable settlement, then there is nothing to transfer and sever, you see." (R.E. 17) If there was no settlement, as a threshold issue, there is no reason to determine the propriety of the plaintiffs' claims related to joinder and venue.

Improper venue is an affirmative defense. While ICRC did generally raise improper venue and improper joinder in its Answer to Plaintiffs' Complaint, it failed to reach the merits, and failed to pursue a dismissal due to improper venue and joinder until after the cases were settled, or at least until after the settlement negotiations had occurred and this litigation ensued. (R. 36-43) ICRC filed an Answer to Plaintiffs' Complaint on January 24, 2003. (R.E. 1, R.36-43) ICRC's claims of improper joinder and improper venue should have been made at an earlier juncture – following its Answer to Plaintiffs' Complaint, and not when it attempted to get out from under a large number of settlements it had no interest in paying. Further, Mr. Peters has

admitted consistently throughout this litigation that ICRC was willing to pay different amounts for Mississippi and non-Mississippi residents, an admission that ICRC had no problem settling a case with a non-resident plaintiff. (R.E. 174, R.E. 182). Most importantly, out of the 180 cases that have been paid from the original filing, 121 of the 180 plaintiffs were non-Mississippi residents. (R.E. 153-162). ICRC's willingness to pay cases from this original filing, irrespective of venue and joinder, illustrates ICRC's obstreperous and obstructive behavior surrounding these settlements, and goes to prove that ICRC has decided on a whim to withhold payment and/or had no basis to withhold payment for the remaining plaintiffs. Accordingly, ICRC's complaints of improper venue and joinder are waived, and should not be heard at this juncture.

Alternatively, should this Court wish to decide the merits of the venue issue, "[v]enue is a function of statute." Park on Lakeland Drive, 941 So.2d at 206, citing Flight Line, Inc. v. Tanksley, 608 So.2d 1149, 1155 (Miss.1992). At the time of the filing of this initial lawsuit, the venue statute in Mississippi, Miss.Code Ann. Section 11-11-3 read: "[c]ivil actions of which the circuit court has original jurisdiction shall be commenced in the county in which the defendant resides or in the county where the alleged act or omission occurred or where the event that caused the injury occurred." Miss. Code Ann. Section 11-11-3 (2002). Therefore, according to the elder venue statute in place at the time of the filing in 2002 venue was proper in a county were "the defendant resides." It is well-known that ICRC has track in Holmes County, passing through Durant, a city situated in Holmes County. See http://cnebusiness.geomapguide.ca. Therefore, regardless of the plaintiffs' residences, the defendant, ICRC, resided in Holmes County, making venue proper there in 2002.

In light of the foregoing, the trial court's decision to decide the threshold issue of settlement should be upheld and the trial court's denial of defendant's Motion to Dismiss and Sever should similarly be upheld.

II. The trial court acted properly, and did not abuse its discretion, when it decided disputed, material factual issues over Illinois Central's objections

a. Standard of Review

A review of the trial court's decision on disputed issues of fact should not be overturned but for an abuse of discretion. Howard v. Totalfina E&P USA, 899 So.2d 882 (Miss.2005). The circuit court's decisions are given the same deference as that of a chancellor. Id.

b. Plaintiffs' Motion to Enforce Settlement should not be considered a Motion for Summary Judgment under Mississippi Rule of Civil Procedure 56 because the trial court was within its discretion to decide issues of fact. Therefore, the trial court did not err when it decided disputed issues of fact related to the existence of the settlement agreement without an evidentiary hearing.

ICRC alleges that plaintiffs' Motion to Enforce Settlement should have been treated as a Motion for Summary Judgment under Mississippi Rule of Civil Procedure 56. This allegation is incorrect and procedurally defective.

ICRC cites to Ammons v. Cordova Floors, Inc., 904 So.2d 185, 190 (Miss.Ct.App. 2005) in support of its contention that Plaintiffs' Motion to Enforce Settlement should be characterized as a Motion for Summary Judgment. In its citation of this case, ICRC fails to provide the true holding of Ammons. In order for a Motion to Enforce Settlement to be treated as a Motion for Summary Judgment under Rule 56 of the Mississippi Rules of Civil Procedure, the parties must instruct the trial court that the Motion should be treated as such. The Ammons court instructs:

> "Neither party informed the trial court, either at the hearing or on motion to reconsider, that the motion was governed by Rule 56 of the Mississippi Rules of Civil Procedure and that, under that rule, the trial court was not entitled to rule on the disputed issue of fact. **We find that the Ammons' failure to object to the procedure employed by the circuit court and their arguing the conflicting affidavits on the merits rather than as a procedural limitation on the circuit judge's authority to rule, waived any objection to the trial court's deciding the disputed issue.** Therefore, we decline to hold the trial judge in error and

> review his findings under the same deferential standard accorded those of a chancellor."

Ammons, 904 So.2d at 190. (Emphasis added).

At no time during either the November 6, 2006 or the September 27, 2007 hearings, or in any of the pleadings, did counsel for ICRC indicate a desire to style plaintiffs' Motion to Enforce Settlement as a Motion for Summary Judgment. (R.E. 15-71, 72-146). Oral arguments were held on two occasions, as mentioned above, and various attorneys for both parties attended. No one present at these hearings expressed a desire to have the Motions heard as Motions for Summary Judgment, and likewise, no one present at these hearings took umbrage with the trial court's ability to sit as "chancellor" and decide issues of fact.

Plaintiffs' Motion to Enforce Settlement, originally filed on June 23, 2006, operated as a method to ensure that the plaintiffs who settled their cases and signed releases would be paid. (R.E. 163-167) On one hand, ICRC complains that the trial court should have been sitting as the factfinder and should have held additional evidentiary hearings and/or what it considers a "plenary hearing." Autera v. Robinson, 419 F.2d 1197 (D.C. Cir.1969). But, on the other hand, ICRC complains that the trial court should not have decided facts at issue because there was no stipulation to grant the circuit court such authority. See Appellant's Brief, p. 14-20. ICRC cannot cling to this contradictory argument in support of its position. Plainly and simply, the remaining plaintiffs should be paid settlement monies in due course, as the trial court was well within its authority to decide disputed issues of fact.

In addition, Illinois Central was not entitled to an evidentiary hearing o the disputed issues of fact related to the existence of the settlement agreement. ICRC relies upon an insignificant piece of dicta in the dissenting opinion from Gulfport Pilots Association, Inc. v. Kopszywa, 743 So.2d 1036 (Miss. 1999) in support of its contention that the trial court should

have held an evidentiary hearing about the disputed issues of fact that are the subject of this appeal. Such a reliance is misplaced and improper.

The facts of the Gulfport Pilots case deal with a Motion for Enforcement of Settlement under the Jones Act. While it may seem that the facts should be analogous to the instant matter, they are in fact distinct and do not provide support for ICRC's argument. In Gulfport Pilots, a dispute arose over an agreed-to settlement between plaintiff and his employer, the defendant, which then prompted the plaintiff/appellee to file a Motion to Enforce Settlement. Insolvency issues plagued the defendant's insurance carrier, which caused impediments to payment of the settlement funds. The trial court found that a meeting of the minds occurred, and rendered an opinion declaring that the plaintiff must be paid the settlement funds, regardless of where the money comes from. The defendant appealed, and the Supreme Court of Mississippi affirmed.

First, ICRC's reliance on this case is misplaced. Gulfport Pilots is factually dissimilar in that it deals with an insolvent insurance carrier and its obligation to the plaintiff following a settlement and following its decree of insolvency. Gulfport Pilots, 743 So.2d at 1037-1038. It is undisputed that an agreement to settle occurred in Gulfport Pilots, unlike in the case at bar, and the disputed issues surrounding the method of funding for plaintiff's settlement.

Secondly, ICRC has omitted an important piece of the Majority Opinion in Gulfport Pilots – "[w]hen the employer and employee reach a settlement it becomes enforceable against the parties to the lawsuit. How the employer intends to satisfy the settlement amount is immaterial to the employee's claim under the settlement." Id. at 1040. In the Dissenting Opinion, readily cited by ICRC herein, Justices Southwick and Coleman joined Chief Justice McMillin's position that a hearing was necessary. ICRC's reliance on the dicta of the *dissenting opinion* should not be given any weight in this appellate setting. (Emphasis added). The Gulfport Pilots dissent does not cite to any case law to support the contention that an evidentiary hearing should

have been conducted to determine the method of settlement in the Gulfport Pilots case. To assume otherwise is incorrect and misleading.

Most important to the determination of whether an evidentiary hearing should have been conducted in the instant case is a portion of the holding from Illinois Central Railroad Company v. McDaniel, *et al.*, 951 So.2d 523 (Miss. 2006). While McDaniel is a landmark case related to many issues of settlement with ICRC, it also stands for the proposition that an evidentiary hearing is not necessary in an instance such as this. Id. at 529. There, counsel for ICRC complained that the trial court did not make any findings of fact and conclusions of law on which to rely. In lieu of an evidentiary hearing, according to the Mississippi Supreme Court, a trial court may make findings on the record similar to and sufficient for any formalized findings of fact and conclusions of law. The McDaniel court said:

> "In this case, the circuit court made several findings on the record regarding its decision to deny ICRR's motion. Moreover, these findings are sufficiently situated as to allow this Court to make its own findings. In accordance with the circuit court's on-the-record findings, we find the circuit court did not abuse its discretion when it denied ICRR's motion. Thus, this issue is without merit."

Id. at 529.

Much like the McDaniel holding, many findings of fact were put on the record by the trial court over the course of various hearings. Two hearings were conducted – November 6, 2006 and September 27, 2007 – wherein the trial court opined on many issues and also decided many issues of fact. Attorneys for both parties attended the hearings, including Mr. Peters himself, and the trial court was availed of an opportunity to hear both sides of the story as it related to disputed issues of fact. Similarly, both Mr. Peters and Mr. Peirce submitted various affidavits pursuant to this litigation, describing their understanding of the settlement discussions. (R.E. 168-186) ICRC had not complained of the lack of and/or need for an evidentiary hearing until this late juncture. It is not as if ICRC had asked for an evidentiary hearing and was denied

that opportunity. To the contrary, two separate hearings were held relative to these settlements. Those hearings were quite lengthy and allowed each party to submit their positions, virtually without interruption, and explain to the trial court the situation at hand. (R.E. 15-71, 72-146). Had ICRC wished to discover further information from Mr. Peirce, a deposition might have been scheduled. No deposition was ever scheduled, and ICRC was content to garner Mr. Peirce's side of the story from his three affidavits until this time.

At the November 6, 2006 hearing relative to this matter, counsel for ICRC admitted that he did not want to stipulate to have the trial court judge sit as a chancellor and decide findings of fact and conclusions of law. The following exchange occurred:

MR. BECKHAM: If I may, plaintiff cited one case, the McDaniel case. There is a very important difference between the issue in McDaniel and the issue here, and that is this. Even though we're dealing with the issue of prior releases and terms of settlement, that is, in that case, we stipulated that the circuit court judge could be a finder of disputed facts. When we had a hearing like this one, we made that stipulation in that case.

THE COURT: You won't let me do that.

MR. BECKHAM: Knowing where we were, you would understand.

(R.E. 68-69).

However, at this juncture, ICRC complains that there was no proper evidentiary hearing held in order to discuss factual discrepancies related to this issue. ICRC should not be permitted to complain that no proper evidentiary hearing was held when they refused to stipulate to such at the two prior hearings involved in this matter. ICRC has waived its ability to claim that the trial court erred in not ordering an evidentiary hearing to elucidate the factual issues and legal disputes surrounding this case. Be it as it may, it appears that it was ICRC's inability and unwillingness to enter into a stipulation to permit the trial court to sit as chancellor that has now come back to hurt their position.

ICRC also cites to the case of Mass. Casualty Insurance Co. v. Forman, 469 F.2d 259, 260 (5th Cir.1972) in support of its contention that some type of evidentiary hearing is required before a court enforces a settlement agreement. However, the type of hearing ICRC is calling for has already occurred – twice. Members of both parties availed themselves to the court for two hearings. Both hearings focused on general issues surrounding the Motion to Enforce Settlement at issue.

In sum, because the trial court acted within its discretion to sit as chancellor, ICRC's argument that plaintiffs' Motion should be treated as a Motion for Summary Judgment must fail. Similarly, once the court properly decided to act as chancellor, ICRC, if it desired an evidentiary hearing, should have asked for one. It failed to do so, and as such, any argument that an evidentiary hearing was necessary comes far too late, and has been waived.

III. The plaintiffs have proved by a preponderance of the evidence that there was a meeting of the minds between the parties; therefore, the trial court's decision to enforce the settlements was not erroneous

a. Standard of Review

The Supreme Court of Mississippi has consistently held that "[t]his court will not disturb the findings of the chancellor unless it is shown the chancellor was clearly erroneous and the chancellor abused his discretion." Illinois Central Railroad Company, Inc. v. McDaniel, *et al.*, 951 So.2d 523, 526 (Miss.2006) citing Howard v. Totalfina E&P USA, Inc., 899 So.2d 882, 888 (Miss.2005). An abuse of discretion is present "when the reviewing court has a 'definite and firm conviction' that the court below committed a clear error of judgment and the conclusion it reached upon a weighing of the relevant factors." Id.

There is no abuse of discretion present in the instant case, as the trial court clearly decreed its 'definite and firm conviction' as related to this appeal. Hearings, motions, briefs and

the like occurred over a span of two years, and throughout all of the litigation surrounding these cases, the trial court remained steadfast in its holdings, showing clear judgment and an equitable weighing of the factors.

b. The discussions of January 23, 2004 were not informal and resulted in a firm settlement agreement, as evidenced by 180 other settlements that originated from those discussions

ICRC attempts to minimize the discussions held between Mr. Peters and Mr. Peirce on January 23, 2004, calling them "informal" and alleging that many things were left undone following those talks. To the contrary, a meeting of the minds occurred, and the settlement agreements should be enforced.

An agreement to settle is a contract. McManus v. Howard, 569 So.2d 1213 (Miss. 1990). In order for a settlement contract to be enforced, the party wishing to enforce the settlement must prove by a preponderance of the evidence that there was a meeting of the minds. See Viverette v. State Highway Com'n of Mississippi, 656 So. 2d 102, 103 (Miss.1995), citing Warwick v. Matheney, 603 So.2d 330, 336 (Miss.1992).

In support of its contentions, ICRC cites to Howard v. Totalfina E&P USA, Inc., 899 So.2d 882, 889 (Miss. 2005) to argue that in order for a meeting of the minds to be present "[t]here is nothing of consequence left undone." Plaintiffs are in agreement with this notion, and argue that nothing of consequence was left undone following the talks in January 2004. As the trial court order states: "[t]here is an enforceable agreement between the parties to settle the claims of the unpaid plaintiffs in this civil action for amounts specified in the motion for enforcement upon the submission of a release for the specified amount, a pulmonary questionnaire, proof of employment and a B-read from a competent reader." (R.E. 7).

ICRC contends that no specific amounts were agreed upon between the parties at the Pittsburgh meetings, and that Mr. Peirce's position was a "moving target." See Brief of Appellant, p. 22-23. These contentions do not tell the whole story. It is correct that Mr. Peters and Mr. Peirce discussed amounts at the Pittsburgh meeting. Following the meeting, Mr. Peirce did individually negotiate settlement amounts with each plaintiff, and received the authority to settle the individual cases. (R.E. 178, R.E. 183) Once the clients assented to the settlements, Mr. Peirce prepared releases, upon receiving approval from ICRC to send the releases, and on the instruction of Mr. Peters and based upon past dealings with ICRC, and forwarded them to Mr. Peters' office for processing. (R.E. 178, R.E. 183) ICRC's characterization of Mr. Peirce's accounts as "moving targets" and the implication that Mr. Peirce changed his story about how the negotiations took place is disingenuous. Past practice had revealed that Mr. Peters and Mr. Peirce would discuss a case or multiple cases, which would then prompt Mr. Peirce to telephone each client to obtain his authority to settle the case for a specific amount. (R.E. 178) Once Mr. Peirce received the requisite authority to settle a case, he would notify Mr. Peters of the amount and forward a signed release to ICRC for processing, unless Mr. Peters objected. (R.E. 178, R.E. 183) Mr. Peters never objected to these amounts. Mr. Peters was fully aware of this procedure, and for him to state otherwise is incorrect.

The most glaring evidence that there was a meeting of the minds at the January 23, 2004 settlement talks is that 180 of the 216 plaintiffs were paid and settled. (R.E. 57) Pursuant to the settlement agreement, Mr. Peirce forwarded all of the releases, pulmonary questionnaires, B-readings and Railroad Retirement Board employment information to ICRC and 180 of those claims were processed without incident. (R.E. 178) The 36 remaining plaintiffs were the last to be handled, and at some point ICRC unilaterally decided that it no longer wanted to honor the

agreement made in Pittsburgh in January 2004. The first hearing held on the issue, on November 6, 2006, illustrates the trial court's rationale as to why there was a meeting of the minds:

> THE COURT: However, if there are people on this list that you're claiming are entitled to payment under that agreement, if the Illinois Central Railroad paid some of those people according to the agreement that you say was in existence, that is evidence that there was an agreement....

(R.E. 22).

The presence of 180 settlements from the original group of 216, in addition to the past practices in which the parties engaged, should be used as evidence that a meeting of the minds took place during the settlement discussions on January 23, 2004. Accordingly, the trial court's decision to enforce settlement based on a meeting of the minds should be affirmed.

c. Prior occupational releases signed by several plaintiffs should not be a bar to the settlement agreement

ICRC alleges that because several of the remaining plaintiffs signed releases for prior injuries endured while in the employ of ICRC they should not be able to gain settlement monies from the instant suit. This argument is spurious and without merit. Additionally, pleading a release is an affirmative defense that should have been raised before settlement of these cases, and not after.

Under the Federal Employers' Liability Act (referred to hereinafter as "FELA"), 45 U.S.C. §§ 51, *et seq.*, a railroad employer is required to provide a safe working environment for its employees and is liable for any negligence, "even the slightest," imparted to the employer for injuries suffered by an employee. See Rogers v. Missouri Pac.R.Co., 352 U.S. 500 (1957). FELA specifically provides: "[a]ny contract, rule, regulation, or device whatsoever, the purpose or intent of which shall be to enable any common carrier to exempt itself from any liability created by this chapter, shall to that extent be void..." 45 U.S.C. §55. Accordingly, inhalation of

deleterious substances while working for the railroad, including asbestos and asbestos-containing products, and the diseases that are spawned therefrom, are the liability of the employer-defendant, ICRC. In yet another attempt to get out from under the settlements negotiated in these cases, ICRC hopes to use the shield of a prior occupational release to obviate its obligation to pay plaintiffs.

Twenty-two of the remaining plaintiffs had signed occupational releases in the early to mid-1990s for the release of a hearing loss claim against ICRC. See (R.324-265). In those releases, the following language is present:

> This release specifically excludes any personal injury claim or lien pending against Illinois Central Gulf Railroad, or Illinois Central Railroad Company, other than for occupational, disease-type illness, or illnesses, to wit, including but not limited to, asbestosis, lead, dust, sand, diesel fumes, paint, PCB, Dioxin, or other toxic or noxious chemical exposure, which claims are specifically released by this document.

R.324-365.

An analysis of the existing state of case law relative to FELA releases is necessary to elucidate ICRC's incorrect analysis of how these releases should be treated relative to plaintiffs' existing settlements. Both the Sixth Circuit and the Third Circuit have spoken on the issue, setting forth the prevailing case law on how FELA releases should be handled. The Third Circuit case of Wicker v. Consolidated Rail Corporation, 142 F.3d 690, 692-693 (3d Cir.1998) held that for those employees exposed to toxic materials while in the employment of the railroad, decisions related to the validity of a release must be "fact-driven and consequently do not provide a generally applicable rule of law" such that "[t]o be valid under FELA, a release must at least have been executed as part of a negotiation settling a dispute between an employee and the employer." Id. at 698, 700. The Third Circuit held:

> A release does not violate §5 provided it is executed for valid consideration as part of a settlement, and the scope of the release is limited to those risks which are

> known to the parties at the time the release is signed. Claims relating to unknown risks do not constitute 'controversies' and may not be waived under §5 of FELA.

Id. at 701.

The Supreme Court of Mississippi, in a case dealing with the exact same release language, held that the Wicker rationale should be applied in Mississippi, and "the releases signed by the plaintiffs were the type of 'laundry list/boilerplate' documented criticized in Wicker." Illinois Central v. Acuff, 950 So.2d 947, 961 (Miss.2006). Given the amount of time that elapsed between the signing of the hearing loss releases and the asbestosis releases, approximately ten to fourteen years, it is reasonable for this Court to assume that the plaintiffs did not contemplate an asbestos-related injury at the time of the signing of the hearing loss releases.

It is very important to note that ICRC settled and paid claims with many plaintiffs in the group of 216 who had signed previous hearing loss releases. Of the 180 settled claims in the group, approximately 88 had signed a previous hearing loss release, but were still paid under the terms of this settlement. (R.E. 998-1017) ICRC again attempts to ignore the strong evidence that a settlement was reached, and that it was reached despite the ineffectual prior releases. ICRC's settlement of a large number of claims resulting from the same settlement negotiations is strong evidence that the claims at issue should also be paid. ICRC cannot differentiate these remaining plaintiffs in any way, except to say that they unilaterally refused to pay without reason.

ICRC also attempts to use these hearing loss releases as a shield for reasons not to pay plaintiffs; however, it has failed to include reference to the particular language of the release in its Brief or reproduced excerpts. Without this reproduction, the Court is without the ability to rightfully decide the validity of the release.

As mentioned above, the language of the releases used in Wicker and Acuff and the instant case are identical. The language used was found by the Wicker and Acuff courts to be the type of "laundry list" language that is disfavored by the courts. Id. It is important to note that the laundry list and boilerplate language in these releases, and those in Wicker and Acuff were ultimately held to be unenforceable. Accordingly, the previously signed occupational releases of the remaining plaintiffs should not act as a bar to the within settlements.

IV. Illinois Central was not improperly denied discovery as to whether the remaining plaintiffs complied with what Illinois Central perceived as terms and conditions of a settlement process

a. Standard of Review

A review of the trial court's decision to deny discovery must be completed with an abuse of discretion standard. Illinois Central Railroad Company v. Acuff, 950 So.2d 947, 956 (Miss.2006)

b. The issue of validity or effect of prior occupational releases was properly before the trial court, and the trial court properly denied Illinois Central's discovery on the issue

As mentioned above, the releases at issue in this matter, which have not been specifically included and/or referred to in ICRC's Brief, and the validity thereof, were properly before the trial court, and the trial court properly denied Illinois Central's Motion to Compel discovery on the issue.

As the prior occupational releases have no effect, given the holdings of Wicker and Acuff; and as ICRC insisted that a settlement could not be achieved given the effect of the prior release, there is no more discovery to be conducted. To discover the intent of the plaintiffs at the time they signed the releases is immaterial and unnecessary given the holding of Wicker, whose

rationale has been adopted in the Supreme Court of Mississippi in Acuff. According to Wicker, and subsequently according to Acuff, "what is involved is a fact-intensive process, but trial courts are competent to make these kinds of determinations." Wicker, 142 F.3d at 701. The trial court acted well within its discretion when it provided general factual findings and found "the execution of a prior release for an injury unrelated to asbestos exposure is not a bar to the subsequent claim for an asbestos related injury...and there was no agreement between the parties to disqualify a Plaintiff who had executed a release of this nature from the settlement agreement or agreed settlement process." (R.E. 7). See Acuff, 950 So.2d 947, 957 (Miss.2006)(a trial court can make general findings of fact and conclusions of law where a record is more than sufficient for appeal).

ICRC was properly denied discovery on the issue of plaintiffs' contemplation of asbestos-related injuries at the time of the signing of occupational hearing loss releases more than ten years prior to the settlement of these cases.

c. The trial court did not err in denying Illinois Central's Motion to Compel Discovery related to B-reads tendered in support of plaintiffs' claims

Given ICRC's unilateral decision to characterize the B-readers used by plaintiffs as incompetent or unqualified, and to summarily rely on that rationale to obviate payment of these claims, no further discovery should have been granted by the trial court.

ICRC relied on the B-readings of Dr. Ray Harron in the settlement of the original 180 plaintiffs. However, after Dr. Harron was potentially discredited by a judge in Texas as related to silica cases there, railroads like ICRC began to insist that an additional B-reader look at the x-rays Dr. Harron had examined. Plaintiffs understood this concern, and following outcry from ICRC that Dr. Harron was discredited, plaintiffs' counsel undertook to have each remaining plaintiff's x-ray re-read by competent B-readers, Dr. Breyer, Dr. Mezey and Dr. Krainson. (R.E.

121) Following the second B-reads, plaintiffs forwarded the findings to ICRC in order to be in compliance with their requirements for settlement. Sometime thereafter, ICRC propounded discovery on plaintiffs, inquiring into the qualifications of the B-readers used the second time around. (R.E. 2, R.E. 554-561) Plaintiffs responded in a timely fashion, and ICRC filed a Motion to Compel more complete answers related to these Interrogatories. The trial court denied such Motion.

When the agreement to settle was made, there was no definition of what was to be considered a "competent" B-reader. Similarly, following the November 6, 2006 hearing, there was also no definition of what was to be considered a "competent" B-reader. Plaintiffs complied with the Order of the trial court, asking for additional B-reads and forwarded them to ICRC. It should be noted that all three doctors used for the second B-reads were certified by the National Institute for Occupational Safety and Health ("NIOSH") and were qualified B-readers.

At the November 6, 2006 hearing, the following exchange occurred:

THE COURT: I'm saying that if the reason for not paying, or if one of the reasons for not paying these 30 claims is the B read by Dr. Harron, and if they conceded that Dr. Harron was in disrepute and that you were justified in refusing to pay based on his opinion, and they submitted another B read from somebody else that did meet the criteria, wouldn't you be obligated to pay them, if the release and statute of limitations ---

MR. BECKHAM: If there was no other barrier to payment, and that B reader were a qualified reader.

(R.E. 60-61)

Interestingly enough, similar, if not the same events happened in litigation surrounding Illinois Central Railroad Company v. Acuff, 950 So.2d 947 (Miss.2006). After ICRC attacked the credibility of plaintiffs' B-reader, Dr. William C. Pinkston, they summarily refused to pay any settlement monies. The Supreme Court said:

> ICRR's contentions are irrelevant. The Settlement Procedure required an ILO form by a certified B-reader and a report from an examining physician identifying the physical findings and establishing a diagnosis. Each plaintiff complied with these requirements. The agreement did not place restrictions on the B-readers or evaluating physician, and ICRR cannot fault plaintiffs for following the requirements of an agreement it now dislikes.

Id. at 965.

The trial court was correct in its determination that the plaintiffs had spoken loud enough with their second B-reads and were not required to produce any additional information on B-readers who were fully qualified and competent to render their findings.

V. The Statute of Frauds is inapplicable to the case at bar

a. Standard of Review

Questions of fact should not be reversed but for an abuse of discretion. The standard of review for findings of fact by the trial court is that such findings will not be disturbed on appeal unless they are manifestly wrong, clearly erroneous, or not supported by substantial credible evidence. Sandlin v. Sandlin, 699 So.2d 1198, 1202 (Miss.1997).

b. The settlement agreement is a contract that can be performed within fifteen months, and thus, is outside the Statute of Frauds

ICRC argues that plaintiffs' settlements are barred by the Statute of Frauds because the agreement "cannot be performed within fifteen months." See Appellant's Brief, p. 34; Miss. Code § 15-3-1(d) (Rev. 2003). ICRC's reliance on a Statute of Frauds argument is spurious at best, and incorrectly states the essence of the Statute of Frauds.

While plaintiffs agree that no written agreement existed, in order to rely on a Statute of Frauds defense, it must be impossible that a contract could not be performed within fifteen months of its creation. American Chocolates, Inc. v. Mascot Pecan Company, Inc., et al., 592 So.2d 93 (Miss. 1991). In American Chocolates, American Chocolates, Inc. and Mascot Pecan Company, Inc. formed an oral brokerage agreement. Pursuant to the agreement, if American Chocolates secured a relationship with Henco, a customer of Mascot Pecan Company, then Mascot Pecan Company would pay American Chocolates five percent of the sales price of all products sold by Mascot Pecan Company to Henco. American Chocolates did in fact secure Henco as their customer; however, after meager sales, Mascot Pecan Company terminated its agreement with American Chocolates and refused to pay the commission. After American Chocolates filed suit for breach of contract against Mascot Pecan Company and Henco, Mascot

and Henco invoked the Statute of Frauds, claiming that the contract was one unable to be performed within fifteen months of its inception. The Supreme Court of Mississippi cited to Gibbons v. Associated Distributors, 370 So.2d 925, 927 (Miss.1979) and Pountaine v. Fletcher, *et al.*, 126 So. 471 (Miss.1930) in support of its holding that this agreement was outside the Statute of Frauds because one party, American Chocolates, completely performed its end of the agreement. The seminal Pountaine case held, "[t]he statute of frauds has no application where there has been a full and complete performance of the contract by one of the contracting parties, and the party so performing may sue upon the contract in a court of law; he is not compelled to abandon the contract and sue in equity..." The Gibbons court held: "[t]he general rule is that the complete performance by one party of an oral contract not to be performed within the statutorily prohibited period – fifteen months – takes the contract outside of the statute of frauds." American Chocolates, 592 So.2d at 95, citing Gibbons v. Associated Distributors, 370 So.2d 925, 927 (Miss.1979).

Similarly, the American Chocolates court held "where the contract is for an indefinite period with a possibility of performance within fifteen months, it is not within the statute of frauds." American Chocolates, 592 So.2d at 95.

The agreement to settle most certainly could have been performed within fifteen months of the January 23, 2004 talks between Mr. Peirce and Mr. Peter, and ICRC's continued refusal to honor the terms of the release, in spite of the appellees' completion of their end of the bargain, does not change that fact. As the parties had agreed, in order for settlement to occur, appellees would produce a B-reading from a competent B-reader, a completed questionnaire and proof of employment with ICRC. Additionally, appellees went one step further and produced signed full and final releases for each plaintiff. The appellees went above and beyond their duties under the agreement, and ICRC's unilateral decision to terminate its obligations under the agreement

cannot fall within the Statute of Frauds. ICRC should not be able to seek shelter from the Statute of Frauds because it simply decided that it no longer wanted to honor its agreement with the appellees. Additionally, the agreement formed between Mr. Peters and Mr. Peirce could be characterized as being for an "indefinite period with the possibility of performance within fifteen months," thus, prompting complete performance by ICRC. Many of the plaintiffs whose claims were paid by ICRC subsequent to the January 23, 2004 settlement talks were most certainly paid well within the fifteen months following the agreement. ICRC's performance under those agreements should be used as proof that these agreements are outside the Statute of Frauds.

Accordingly, the Statute of Frauds should not be applied to prevent plaintiffs' claims from being settled and paid in due course.

CONCLUSION

Accordingly, plaintiffs-appellees respectfully request that this Court affirm the findings of the trial court below, in favor of plaintiffs-appellees and enforce the following settlements in favor of plaintiffs-appellees, in the following amounts:

Gary R. Byrd	$18,000.00	E.J. Ledbetter, Jr.	$18,000.00
Robert Bowden	$15,000.00	Bobby Lessel, Sr.	$21,000.00
William L. Cook	$25,000.00	Thomas G. Mudd	$22,000.00
John Curlin	$18,000.00	Jerry C. McKissick	$27,000.00
Lyle N. Ernst	$16,000.00	Lyle McMannis	$20,000.00
George A. Fouse	$18,000.00	Ronald E. Miller	$30,000.00
Gary A. Frederickson	$26,000.00	Ted E. Morrison	$30,000.00
Franklin D. Gossum	$18,000.00	Charles Payne	$19,000.00
Q.B. Gray	$25,000.00	Robert D. Payne	$18,000.00
John Ed Howell	$15,000.00	Kenneth W. Pounders	$25,000.00
Willie Johnston	$25,000.00	Fred L. Rogers, Jr.	$18,000.00
Gary Jolly	$27,000.00	Billy Wayne Sims	$25,000.00
William J. Taylor	$19,000.00		

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CERTIFICATE OF SERVICE

I, the undersigned attorney, on behalf of Appellees, Gary R. Byrd, *et al.*, do hereby certify that I caused to be delivered to the Clerk of the Mississippi Supreme Court, by United Parcel Service overnight delivery; and to all counsel of record by first class United States mail, postage prepaid; a true and correct copy of the foregoing Brief of Appellees.

THIS, the 12th day of October, 2009.

ELIZABETH A. CHIAPPETTA
Counsel for Appellees

CERTIFICATE OF FILING

I, Elizabeth A. Chiappetta, certify that have caused to be delivered to the Clerk of the Mississippi Supreme Court, by United Parcel Service overnight delivery, an original and three copies of the foregoing Brief of Appellees, and an electronic disc containing the same addressed to Ms. Kathy Gillis, Clerk, Supreme Court of Mississippi, 450 High Street, Jackson, MS 39201-1082.

ELIZABETH A. CHIAPPETTA
Counsel for Appellees