IN THE SUPREME COURT OF MISSISSIPPI

No. 2009-CA-00065

ILLINOIS CENTRAL RAILROAD COMPANY

Defendant/Appellant

vs.

GARY R. BYRD, et al.

Plaintiffs/Appellees

APPEAL FROM THE CIRCUIT COURT
OF HOLMES COUNTY, MISSISSIPPI

HONORABLE ROBERT L. GOZA, SPECIAL CIRCUIT JUDGE

REPLY OF APPELLANT, ILLINOIS CENTRAL RAILROAD COMPANY

Oral Argument Requested

Thomas R. Peters
[redacted]
[redacted]7
BOYLE BRASHER LLC
5000 West Main Street
P.O. Box 23560
Belleville, Illinois 62223-0560
(618) 277-9000

Daniel J. Mulholland
M[redacted]3
Tanya D. Ellis
M[redacted]5
FORMAN PERRY WATKINS
KRUTZ & TARDY LLP
200 South Lamar Street
City Centre, Suite 100
Jackson, Mississippi 39201-4099
(601) 960-8600

Attorneys for Illinois Central Railroad Company

TABLE OF CONTENTS

TABLE OF AUTHORITIES

FEDERAL

STATE

INTRODUCTION TO REPLY

Plaintiffs/appellees did not cite a single authority to support the trial court's decision to rule on their motion to enforce settlement *before* addressing the threshold question of whether the court had jurisdiction over plaintiffs' claims. Instead, plaintiffs argued that their claims were properly joined and brought in Holmes County. (Response at 6). The trial court, however, should have made that determination before ruling on plaintiffs' motion to enforce, and its failure to do so was plain error. Because the trial court never reached the merits of Illinois Central's motion to sever and dismiss and because this Court has held that joinder and venue are jurisdictional matters, the Court should employ a *de novo* standard of review rather than the abuse of discretion standard argued for by plaintiffs and reverse the trial court's judgment.

Assuming the trial court had jurisdiction to consider plaintiffs' motion, the trial court nonetheless committed reversible error by deciding, over the repeated objections of Illinois Central, the myriad disputed issues of material fact surrounding the Pittsburgh meeting and the purported settlement agreement. While plaintiffs styled their pleading as a "motion to enforce settlement," the motion was in essence a summary judgment motion, and, therefore, necessitates *de novo* review by this Court. *Alternatively*, if this Court determines that the trial court properly decided disputed issues of material fact, Illinois Central was entitled, at the very least, to an evidentiary hearing. Plaintiffs have wholly confounded these two, separate arguments, and contend that Illinois Central has contradicted itself by, on the one hand, arguing that the trial court erred by making factual determinations, and, on the other, asking for an evidentiary hearing in which the trial court would make factual determinations. (Response at 9-12). As plainly stated in Illinois Central's brief, these are alternative arguments, and neither weakens or "hurts" the other as plaintiffs claim. (Response at 11).

Furthermore, the trial court's decision to enforce the purported settlement agreement is not sufficiently supported by the evidence in the record and, as established in Appellee's Brief, was based on sworn misrepresentations made by plaintiffs' counsel. At the trial court's express request that plaintiffs explain the origin of the settlement amounts contained in plaintiffs' releases, Robert Peirce (counsel for plaintiffs) executed an affidavit in which he represented that specific numbers were discussed and negotiated with Thom Peters (counsel for Illinois Central) at the Pittsburgh meeting. (R. 974; R.E. 182). In their response, however, plaintiffs recanted this version of events, and admitted that Peters and Peirce did *not* discuss specific settlement numbers at the Pittsburgh meeting, much less agree upon them. (Response at 14). Plaintiffs further admitted that Peirce lacked the most fundamental ability to enter into a settlement agreement – authority from his clients to settle their claims. (*Id.*). There was no meeting of the minds in Pittsburgh. The parties could not and did not enter into a settlement agreement, and the trial court's decision to enforce any such agreement was clearly erroneous.

Plaintiffs repeatedly argue that, because Illinois Central paid 180 of the more than 200 plaintiffs' claims, then the parties must have entered into a binding settlement agreement at the Pittsburgh meeting. (Response at 1, 4, 14, 15, 17). That conclusion, however, does not follow, especially in light of the fact that plaintiffs now admit that *Peters's* version of the settlement negotiations is correct – that each plaintiff made individual settlement offers to Illinois Central *after* the Pittsburgh meeting and *after* Peirce received authority to settle the claims. (Response at 14). Illinois Central ultimately accepted 180 of those offers and rejected the remaining plaintiffs' offers, a decision that plaintiffs now admit was within Illinois Central's discretion. (*Id.*).

Because the trial court (1) failed to address jurisdictional matters before deciding plaintiffs' motion to enforce; (2) improperly decided disputed issues of material fact over Illinois

Central's repeated objections; (3) erroneously determined that the parties entered into a settlement agreement; and (4) improperly denied Illinois Central essential discovery to determine whether plaintiffs met the terms and conditions of the purported settlement, the judgment of the trial court should be set aside and the case remanded.

REPLY ARGUMENT AND AUTHORITIES

I. The trial court should have decided the jurisdictional matters of venue and joinder before ruling on plaintiffs' motion to enforce settlement.

Plaintiffs did not and cannot rebut Illinois Central's showing that the trial court committed plain error by ruling on plaintiffs' motion to enforce settlement *before* addressing the threshold question of whether the court had jurisdiction over plaintiffs' claims. The trial court acknowledged that the more than 200 in-state and out-of-state plaintiffs' claims were improperly joined and brought in Holmes County. (Nov. 6, 2006 Hrg. Transcr. 36:4-6). Yet, the trial court dismissed Illinois Central's motion to sever and dismiss, not on the merits of the motion, but rather on the erroneous conclusion that the remaining plaintiffs' claims were settled. Venue and joinder, however, are "jurisdictional matter[s]" that the trial court should have decided before moving on to the plaintiffs' motion to enforce. *Creel v. Bridgestone/Firestone North Am. Tire, LLC*, 950 So. 2d 1024, 1028 (Miss. 2007); *see also In re Bridgestone Firestone Inc. Tires Products Liability Litig.*, 2009 WL 103647, at *1 (S.D. Ind. Jan. 9, 2009).

Plaintiffs contend, with no supporting authority, that Illinois Central somehow waived its objections to venue and joinder. That contention is not supported by the record. **First**, Illinois Central properly preserved its objections to the joinder and venue of plaintiffs' claims in its answer to plaintiffs' complaint, in its motion to sever and dismiss plaintiffs' claims based on improper joinder and venue, and at both hearings before the trial court. (R. 36, 38 – 39; R. 278 – 283; Nov. 6, 2006 Hrg. Transcr. 15:5-9, 24:10-15, 39:4-11; Sept. 7, 2007 Hrg. Transcr. 21:2-6). Additionally, this Court has held that a defendant timely objected to the joinder and venue of the plaintiffs' claims, for the purposes of arguing those objections on appeal, by making the objections in the answer followed by a motion to sever and dismiss. *Miss. Farm Bureau Fed'n v. Roberts*, 927 So. 2d 739, 743 (Miss. 2006); *Citifancial, Inc. v. Moody*, 910 So. 2d 553, 556

(Miss. 2005). Timely objections to improper venue "*must* be honored." *The Park on Lakeland Drive, Inc. v. Spence*, 941 So. 2d 203, 207 (Miss. 2006) (emphasis added).

Second, while Illinois Central did accept settlement offers from a group of out-of-state plaintiffs, it did not consent to a court in a county and state with no connection to numerous claims filed there deciding substantive issues regarding those claims. Illinois Central's acceptance of settlement offers from some out-of-state plaintiffs had no effect on its proper and timely objections to the joinder and venue of those claims.

The trial court even indicated that Illinois Central's motion to sever and dismiss would "certainly" be granted *if* the court would have considered it. (Nov. 6, 2006 Hrg. Transcr. 36: 4-6). As set forth in Illinois Central's Brief of Appellant at pp. 11 – 14, plaintiffs failed to allege a distinguishable litigable event which connected them and which would support the mass joinder of their claims. Plaintiffs further failed to offer sufficient facts which would have enabled the trial court to determine if at least 17, of the remaining 25, plaintiffs who resided out-of-state met the requirements of the general venue statute. In *Albert v. Allied Glove Corp.*, 944 So. 2d 1, 4 (Miss. 2006), this Court explained that judicially enunciated rules governing Rule 20's requirements are to be applied retroactively:

> This Court will continue to recognize the precedent of *Armond* and *Mangialardi* and its application to all pending cases in the State of Mississippi, which held plaintiffs may not be joined under Rule 20 unless their claims are connected by a distinct, litigable event. . . . We have made it expressly clear by this line of evolving venue and joinder cases that we will no longer tolerate the presence of cases which do not belong in Mississippi. If we do not apply *Mangialardi* and the other cases, alongside the changes in Rule 20, to pending suits we will strip our trial courts of a valuable tool in guarding the integrity of our court system. Every case filed involving out-of-state litigants with no connection to Mississippi depletes away the judicial resources of this state.

Id. (emphasis added). Plaintiffs' asserted claims were insufficient to establish jurisdiction in the Holmes County trial court, and should have been severed and dismissed without prejudice. *See Creel*, 950 So. 2d at 1028.

The trial court should have ruled on the merits of Illinois Central's joinder and venue arguments before considering plaintiffs' motion to enforce, and its failure to do so was plain error. Illinois Central requests that this Court remand the case for a determination on the merits of its motion to sever and dismiss.

II. The trial court's decision to grant plaintiffs' motion to enforce, which was in essence a summary judgment motion, was reversible error and is subject to *de novo* review by this Court.

Assuming the trial court had jurisdiction to consider plaintiffs' motion, the trial court nonetheless committed reversible error by deciding the myriad disputed issues of material fact surrounding the Pittsburgh meeting, the purported settlement agreement, the terms and conditions of the settlement agreement, and plaintiffs' compliance with those terms and conditions. While plaintiffs styled their pleading as a "motion to enforce settlement," the motion was in essence a summary judgment motion, resulting in a complete disposition of plaintiffs' claims. *Rankin v. Clements Cadillac, Inc.*, 903 So. 2d 749, 751 (Miss. 2005); *Ammons v. Cordova Floor, Inc.*, 904 So. 2d 185, 190 (Miss. Ct. App. 2005). The trial court's decision to grant the motion, therefore, is subject to *de novo* review by this Court and not the abuse of discretion standard urged by plaintiffs.

In Appellees' Brief, plaintiffs contend that because Illinois Central did not "indicate a desire to style plaintiffs' Motion to Enforce Settlement as a Motion for Summary Judgment" or take "umbrage with the trial court's ability to sit as 'chancellor' and decide issues of fact" that Illinois Central should be procedurally barred from doing so on appeal. (Response at 7-8) (citing *Ammons v. Cordova Floor, Inc.*, 904 So. 2d 185, 190 (Miss. Ct. App. 2005)). This argument, however, is inconsistent with the record below. Illinois Central expressly stated in its response to plaintiffs' motion to enforce that it "does not consent to any determination of disputed fact by the Court." (R. 309 n. 2; R.E. 194). At the hearing on plaintiffs' motion, Illinois Central

unequivocally stated that it "ha[d] not agreed to any such determinations of disputed fact by the court in this case." (Nov. 6, 2006 Hrg. Transcr. 24:10 – 12). In fact, plaintiffs, in Appellees' Brief, later admit that Illinois Central did not "stipulate to have the trial court judge sit as a chancellor and decide findings of fact and conclusions of law." (Response at 11). Illinois Central preserved its objections to the trial court sitting as the fact-finder, and, therefore, this Court should consider plaintiffs' motion to enforce under the standards set forth in Rule 56.

In addition to the authorities previously discussed in Illinois Central's original brief, numerous appellate and district courts in other jurisdictions recognize that pleadings seeking enforcement of purported settlements and the resulting judgments are properly governed by summary judgment standards and are subject to *de novo* review. These courts have consistently held that, in the absence of a plenary hearing, such motions must be denied when factual disputes are present or when the existence of a settlement or contract hinges upon credibility determinations. *See, e.g., Kukla v. Nat'l Distillers Products Co. v. Penn Cent. Transp. Co.*, 483 F.2d 619, 622 (6th Cir. 1973) ("[W]here material facts concerning the existence of an agreement to settle are in dispute, the entry of an order enforcing an alleged settlement agreement without a plenary hearing is improper."); *Diaz v. Rio Grande Resources Corp.*, 2006 WL 3337520, at *5 (W.D. Tex. Nov. 15, 2006) ("Treating . . . the current brief in support of the motion to enforce settlement as a motion for summary judgment, the Court concludes that fact issues exist that would preclude summary judgment."); *City of Chicago v. Ramirez*, 852 N.E.2d 312, 323 – 24 (Ill. App. Ct. 2006) (applying *de novo* review in affirming trial court's denial of a "motion to enforce settlement," which was viewed as a motion for summary judgment concerning the issue of settlement); *Voicestream Minneapolis, Inc. v. RPC Properties, Inc.*, 743 N.W.2d 267, 273 (Minn. 2008) (holding that a trial court "shall treat a motion to enforce a settlement agreement as it would a motion for summary judgment, and explicitly grant or deny each claim"); *Staley v.*

Herblin, 188 S.W.3d 334, 336 (Tex. App. 2006) ("Where fact issues are raised or consent has been withdrawn, the only method available for enforcing a settlement agreement is through summary judgment or trial."); *Barnes v. Lagoon Corp., Inc.*, 2006 WL 829114, at *1 (Utah Ct. App. Mar. 30, 2006) (holding that a trial court's finding of an agreement would necessarily have "required it to weigh evidence and judge credibility without the benefit of hearing actual testimony from the parties and without the benefit of cross-examination[,]" and that "such summary resolution of conflicting facts presented wholly in affidavits is improper").

Plaintiffs have not cited any authority, to the trial court or now on appeal, to support their pleading styled "motion for enforcement of settlement." As this Court and many others have concluded, plaintiffs' motion should have been considered a summary judgment motion. Because the trial court decided disputed issues of material fact surrounding nearly every aspect of the purported settlement agreement over Illinois Central's objections and because the trial court failed to view all facts in the light most favorable to Illinois Central, the judgment enforcing settlement should be set aside.

III. The trial court's decision to enforce the purported settlement agreement is not supported by the evidence in the record; plaintiffs failed to prove by a preponderance of the evidence that there was a meeting of the minds as to the settlement and its terms and conditions.

It is undisputed that plaintiffs had the burden of proof by a preponderance of the evidence to prove that there was a meeting of the minds between the parties as to any settlement agreement – that there was "nothing of consequence left undone" after the Pittsburgh meeting. *Howard v. Totafina E & P USA, Inc.*, 899 So. 2d 882, 889 (Miss. 2005). Plaintiffs' most recent rendition of what occurred at the Pittsburgh meeting and immediately thereafter illustrates the contrary, that everything of substance remained undone after the meeting. Furthermore, plaintiffs' recently reprised account directly contradicts sworn statements made by Peirce to the trial court regarding how the specific settlement amounts came about.

At the September 7, 2007 hearing, the trial judge questioned both parties about "the most important part of the contract" – the settlement amounts. *Southern Pine Superior Stud Corp. v. Herring*, 207 So. 2d 632, 634 (Miss. 1968). The trial judge specifically asked Peirce to explain the origins of those numbers in his next filing with the court. (Sept. 7, 2007 Hrg. Transcr. 60:15 – 62:14). In response to the court's request, Peirce submitted his October 10, 2007 affidavit which purportedly "explain[ed] how the amounts were arrived at." (R. 968). In that affidavit, Peirce made the following sworn statements to the trial court:

- "Mr. Peters and I discussed specific monetary amounts that Illinois Central was willing to pay to each Plaintiff to settle his individual case." (R. 974; R.E. 182).
- "I advised Mr. Peters that I would contact the clients and recommend the settlements to them." (*Id.*).
- "If the client agreed to the settlement I would advise Mr. Peters of this fact and prepare a release and mail it to the client for the client's signature." (*Id.*).
- "After the meeting, I personally spoke with each of the clients whose names are listed in Paragraph 13 of the Plaintiff's Motion for Enforcement of Settlement filed on September 7, 2007." (*Id.*).
- "Each individual indicated his acceptance of the specific monetary amount offered to him by Mr. Peters." (*Id.*).

The trial court considered the origin of the settlement amounts to be an "issue," and, based on Peirce's representations, enforced the settlement. (Sept. 7, 2007 Hrg. Transcr. 62:1-3). It now appears that those representations were false.

In Appellees' Brief, plaintiffs now contend that Peirce and Peters *did not* discuss specific settlement amounts at the meeting and that Peters could have "objected" to any of the settlement amounts after they were negotiated with each plaintiff and *after* the Pittsburgh meeting. (Response at 14). Perhaps most egregious is plaintiffs' admission that Peirce did not have authority to settle plaintiffs' claims at the Pittsburgh meeting. (*Id.*). If Peirce did not have authority and Peters and Peirce did not discuss, much less agree upon, specific settlement

amounts, how did the parties enter into a binding settlement agreement that day as plaintiffs contend?

Not only did plaintiffs submit a completely different version of the Pittsburgh meeting in Appellees' Brief, but Peirce recently testified to yet *another* version of the events that supposedly took place in Pittsburgh on January 23, 2004:

> Q: [] did you and Mr. Peters discuss particular amounts for settlement of each of those cases at this January meeting, or how did that work?
>
> A: Well, none of this involves Tice. We basically talked about the McElhenney cases, and we had various discussions about the potential values of these cases, and we had general discussion about - - and I did a lot of listening to Mr. Peters to indicate what - - he was telling me what he thought the cases might be worth.
>
> Q: Okay. Back to my question, though. Did you all reach an agreement as to a specific amount for each of the cases?
>
> A: **No, not at that meeting**.
>
> Q: Okay. Did you reach any agreement at that meeting?
>
> A: As I said, there may have been a few cases that we agreed to settle. I'm not sure of that, but - -
>
> Q: Well, other than those few cases that you may have agreed to settle, did you reach any - -
>
> A: No, I was to call the client and get authority to settle and convey the offers - - or the demands to Mr. Peters or the settlement amounts of what we settled the cases, what I would recommend a settlement for.
>
> * * * *
>
> Q: Okay. Did Mr. Peters give you specific amounts for the cases at the January meeting?
>
> A: No.
>
> Q: Did he ever give you specific amounts for the cases?

A: Well, Mr. Peters approved - - eventually approved settlement amounts for the individual cases.

* * * *

Q: All right. And then do you recall - - so, as to the group of McElhenney cases, the small more than 5, less than 10 group aside, you didn't have a specific agreement for settlement as of the end of that meeting in January 2004; is that right?

A: No, we had - - I had guidelines and ranges and the type of payment that - - the type of range that I thought was appropriate and that Mr. Peters had indicated that he felt was agreeable.

Nov. 2, 2009 Depo. of Robert Peirce, attached as Exhibit A to Illinois Central's Motion to Supplement the Record on Appeal.[1] Peirce admitted that he and Peters did not enter into an agreement in Pittsburgh. In fact, Peirce could not have entered into an agreement that day because, as he now acknowledges, he lacked authority from plaintiffs to do so.

Even if the Court does not consider Peirce's recent deposition testimony, the record before this Court speaks for itself as to plaintiffs' inability to credibly and consistently explain the origins of the alleged final settlement amounts set forth in the trial court's final order. The trial court's decision to enforce a settlement agreement was not based on substantial, credible, or reasonable evidence, because Plaintiffs' accounts of the origins of "the most important part" of the agreement, a specific dollar figure, have varied substantially throughout the course of the proceedings. *Southern Pine*, 207 So. 2d at 634 (referring to "the amount to be paid"). Additionally, Plaintiffs cannot reconcile their current position, that a "meeting of the minds" occurred at the Pittsburgh meeting, with their admissions that specific settlement amounts as to individual plaintiffs were not discussed until afterwards. *See Hunt v. Coker*, 741 So. 2d 1011,

[1] Illinois Central has, along with the filing of this brief, moved the Court pursuant to Mississippi Rules of Appellate Procedure 10(e) to supplement the record with Peirce's November 2, 2009 deposition transcript.

1014 (Miss. Ct. App. 1999) ("If any essential terms are left unresolved, then no contract exists.").

Peirce's first affidavit, dated September 26, 2006, was silent regarding the origins of specific dollar amounts. (R. 511 – 514; R.E. 168 – 171). At the November 6, 2006 hearing before Judge Goza, Plaintiffs' counsel acknowledged that there was no specific amount discussed by Peters and Peirce at the Pittsburgh meeting as to any individual claim. (November 6, 2006 Hrg. Transc. 44:5-16). Similarly, Peirce, in his November 7, 2006 affidavit, stated that "[e]ach individual settlement with the plaintiffs that are the subject of the Motion to Enforce Settlement was individually negotiated with the plaintiff. After the case settled, I informed Mr. Peters of the settlement amount. . . ." (R. 982; R.E. 178) (emphasis added). Again, the sworn assertions in Peirce's aforementioned affidavit from October 10, 2007 – in which he claimed, for instance, that "Mr. Peters and I discussed specific monetary amounts that Illinois Central was willing to pay to each Plaintiff to settle his individual case" – were wholly inconsistent with plaintiffs' previous accounts, as well as the version presently offered by plaintiffs in Appellees' Brief. (R. 974; R.E. 182).

It now appears that the trial court based its decision to enforce settlement on misrepresentations made by plaintiffs' counsel as to the very core elements of the purported contract. Not only do Peirce's shifting explanations of the origins of alleged individual settlement amounts wholly lack credibility on this key issue, deeming the trial court's corresponding findings and resulting judgment reversible as an abuse of discretion, they further demonstrate that no enforceable settlement agreement could have occurred on January 23, 2004. The trial court's determination that an enforceable settlement agreement existed was clearly erroneous. Accordingly, the judgment of the trial court enforcing settlement as to the remaining plaintiffs must be reversed.

IV. Alternatively, discovery was erroneously denied to Illinois Central.

"Erroneous denial of discovery is ordinarily prejudicial in the absence of circumstances showing it is harmless." *Dawkins v. Redd Pest Control, Inc.*, 607 So. 2d 1232, 1235 (Miss. 1992). Where limitations on discovery are improvidently ordered or allowed and important information is denied a litigant, reversal will obtain. *Id.* at 1236.

A. Discovery relating to plaintiffs' prior occupational releases.

Illinois Central never agreed to submit the validity of prior executed releases for determination by the trial court, and it expressly objected to the trial court determining disputed issues of fact regarding the prior releases. (R. 309 n. 2; R.E. 194; Nov. 6, 2006 Hrg. Transc. 23:17-24:22, 66:2-13). Regardless of the validity of prior occupational releases, Illinois Central expressly declined negotiation of settlements involving plaintiffs with prior releases at the Pittsburgh meeting. (R. 521 – 522, 523; R.E. 172 – 173, 174). The validity of the releases was, therefore, irrelevant to the issues of the existence of a settlement agreement on January 23, 2004 or what the terms and conditions of that agreement were.[2] The trial court, nonetheless, proceeded to adjudicate the effect of the prior releases, despite the absence of any facts in the record upon which it could justify its decision. "Evaluating releases under Section 5 of FELA is undeniably a fact-intensive process, and an assessment of the parties' intent at the time of the agreement 'is an essential element of this inquiry.'" *Ill. Cent. R.R. Co. v. Acuff*, 950 So. 2d 947, 960 (Miss. 2006) (quoting *Wicker v. Consolidated Rail Corp.*, 142 F.3d 690, 700 – 701 (3rd Cir. 1998)).

The trial court was without sufficient facts to rule upon the enforceability of any prior release of many of the remaining plaintiffs, even if that determination were necessary. Deciding the validity of a prior release is clearly a fact-intensive process, and the trial court's denial of

[2] Again, the *McDaniel* decision was not issued by this Court until well over two years after the Pittsburgh meeting took place.

discovery as to this issue was an abuse of discretion. *Distinguish Ill. Cent. R.R. Co. v. McDaniel*, 951 So. 2d 523, 525 (Miss. 2006) (recognizing that "the circuit court reopened discovery and directed both parties to file briefs in anticipation of a final hearing on the settlement issues."). Illinois Central was prejudiced by the trial court's erroneous denial of discovery regarding "the key inquiry of whether or not the risk of developing an asbestos-related illness was known and contemplated by" a vast majority of the remaining plaintiffs who signed prior releases at the time they signed such releases. *Acuff*, 950 So. 2d at 960.

In fact, the trial court did vacate and dismiss the claims of plaintiffs McAlexander and Stillwell, based on a finding that they "knew that they had been diagnosed with pneumoconiosis at the time they executed their prior releases to the Defendant in settlement of other claims and consequently do not come within the decision of the ***McDaniel Case***." (R. 1882 – 1883; R.E. 7 – 8) (emphasis in original). Illinois Central stresses that it does not challenge the aspect of the final order vacating and dismissing the claims of McAlexander and Stillwell; however, the trial court's decision to exclude these two plaintiffs, who had originally been named within the scope of the interim order enforcing settlement, was based on their knowledge at the time they executed prior occupational releases, as argued by Peters at the second hearing before Judge Goza. (Sept. 27, 2007 Hrg. Transc. 39:17-40:2). The correct decision of the trial court to exclude these two plaintiffs in its final order highlights the inconsistency in its denial of discovery to Illinois Central as to the remaining plaintiffs with prior occupational releases. (R. 1883 – 1884; R.E. 8 – 9).

Plaintiffs, at page 17 of Appellees' Brief, state that this Court is "without the ability to rightfully decide the validity of the release." Illinois Central is not seeking any such determination by this Court at this time, and plaintiff's continuing argument mischaracterizes Illinois Central's position entirely, and further underscores the prejudicial effect of the trial

court's denial of discovery. The utter lack of facts in the record regarding each remaining plaintiff who executed a prior release prevents this Court from determining the validity of the prior releases, thus, any such endeavor would be premature until discovery on this issue is permitted. *Acuff*, 950 So. 2d at 960-61; *see also McDaniel*, 951 So. 2d at 525, 531 (in which trial court reopened discovery); *Wicker*, 142 F.3d at 701 (holding that inquiry as to validity of a written release is "a fact-intensive process").

B. Discovery relating to the competency of plaintiffs' supporting medical evidence.

The trial court properly found that, as conditions precedent to the purported settlement agreement, plaintiffs were obligated to submit to Illinois Central a B-read from a competent medical doctor. (R. 533 – 34; R.E. 12 – 13). The trial court concluded that the first B-reads submitted by plaintiffs were not performed by a competent medical doctor. (*Id.*). If a settlement agreement existed, plaintiffs failed to meet the conditions of that settlement. Instead of finding that the purported settlement failed, the trial court allowed the plaintiffs to submit a second B-Read, a procedure that was not contemplated by any party. Furthermore, the doctors who authored the second B-reads suffer from the same credibility problems as the first. Illinois Central should not be obligated to pay claims based on medical "diagnoses" generated by procedures not generally accepted in the medical community. At the very least, since Illinois Central demonstrated to the trial court that its concerns about the new doctors were justified, Illinois Central should have been allowed to conduct discovery into the methods employed by those doctors. The trial court's denial of that discovery was an abuse of discretion, and this Court should reverse and remand.

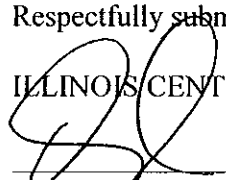
V. Conclusion

Illinois Central respectfully submits that the trial court (1) failed to address jurisdictional matters before deciding plaintiffs' motion to enforce, (2) improperly decided disputed issues of

material fact over Illinois Central's repeated objections, (3) erroneously determined that the parties entered into a settlement agreement, and (4) improperly denied Illinois Central essential discovery to determine whether plaintiffs met the terms and conditions of the purported settlement. For these reasons, the judgment of the trial court should be set aside and the case remanded.

Respectfully submitted,

ILLINOIS CENTRAL RAILROAD COMPANY



DANIEL J. MULHOLLAND (MSB#3643)

CERTIFICATE OF SERVICE

I, the undersigned attorney on behalf of Appellant, Illinois Central Railroad Company, do hereby certify that I have hand-delivered to the Clerk of the Mississippi Supreme Court and served by United States mail, postage prepaid, and/or via electronic correspondence, a true and correct copy of the above and foregoing Reply Brief of Appellant Illinois Central Railroad Company to the following trial judge and counsel of record:

Honorable Robert L. Goza
Copeland Cook Taylor & Bush
1076 Highland Colony Parkway
Concourse 600, Suite 100
Ridgeland, MS 39157

Louis H. Watson, Jr., Esq.
Louis H. Watson, Jr., P.A.
520 East Capitol Street
Jackson, MS 39201-2703

Robert N. Peirce, Jr., Esq.
Elizabeth Chiappetta, Esq
Robert Peirce and Associates, P.C.
2500 Gulf Tower
Pittsburgh, PA 15219

Thomas R. Peters, Esq.
Boyle Brasher LC
5000 West Main Street
P.O. Box 23560
Belleville, IL 62223-0560

Glenn F. Beckham, Esq.
Upshaw, Williams, Biggers, Beckham & Riddick
309 Fulton Street
P.O. Drawer 8230
Greenwood, MS 38930-8230

C. E. Sorey, II, Esq.
Law Offices of William S. Guy
Post Office Box 509
McComb, MS 39649-0509

CERTIFICATE OF FILING

I, Daniel Mulholland, certify that I have hand-delivered the original and three (3) copies of the Reply Brief of Appellant Illinois Central Railroad Company and an electronic diskette containing same on November 30, 2009, addressed to Ms. Betty W. Sephton, Clerk, Supreme Court of Mississippi, 450 High Street, Jackson, Mississippi 39201.

This the 30th day of November, 2009.

DANIEL J. MULHOLLAND