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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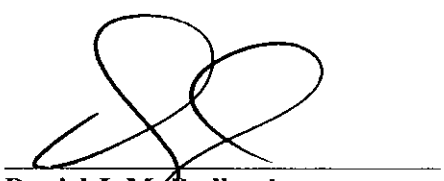

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II. Whether the trial court erred when it decided disputed factual issues in granting plaintiffs' motion to enforce settlement which was in essence a grant of summary judgment.

III. Alternatively, whether the trial court's enforcement of the purported settlement agreement was clearly erroneous and constitutes an abuse of discretion.

IV. Alternatively, whether Illinois Central was erroneously denied discovery (1) related to the unreliable B-reads tendered by plaintiffs in support of their claims; and (2) related to the effect of prior occupational releases on plaintiffs' current claims.

V. In the alternative, whether the "settlement agreement" was unenforceable under the Mississippi statute of frauds.

STATEMENT OF THE CASE

I. Nature of the Case, Course of the Proceedings, and its Disposition Below

The original action was brought by 216 former employees of Illinois Central Railroad Company ("Illinois Central," Appellant herein) in the Circuit Court of Holmes County, Mississippi, on December 19, 2002. (R. 7 – 22; R.E. 147 – 162). The former employees asserted claims under the Federal Employers' Liability Act (FELA) for various personal injuries allegedly caused by their occupational exposure to asbestos. (*Id.*). Illinois Central was the sole defendant in the case. (R. 7; R.E. 147). Illinois Central timely answered the complaint, including objections to, *inter alia*, the improper mass joinder and improper venue of the plaintiffs' claims. (R. 36 – 43).

On January 23, 2004, plaintiffs' counsel Robert Peirce ("Peirce") met with Illinois Central's counsel Thomas Peters ("Peters") in Peirce's Pittsburgh, Pennsylvania office to discuss multiple issues including the possible settlement of plaintiffs' claims in the instant case. ("Pittsburgh meeting"). (R. 521; R.E. 172). The substance of the Pittsburgh meeting – whether the parties entered into a binding settlement agreement or agreed only to a conditional settlement process – is contested by the parties. (R. 511 – 514; R.E. 168 – 171; R. 521 – 525; R.E. 172 – 176). After the meeting, IC agreed to settle all but 34 of the 216 claims. (R. 524; R.E. 175). On June 23, 2006, plaintiffs' counsel filed a pleading captioned "Motion for Enforcement of Settlement" on behalf of 25 of the remaining 34 plaintiffs.[1] (R. 70 – 228; R.E. 70 – 73). Plaintiffs' counsel argued that the parties entered into a binding settlement agreement at the Pittsburgh meeting by which all claims were settled. (R. 71; R.E. 164). Plaintiffs asked the

[1] Plaintiffs' counsel originally filed the "Motion to Enforce Settlement" on December 20, 2004, but withdrew the motion on September 15, 2005 to pursue the claim in another forum before any further action was taken. (R. 52; R. 65). The plaintiffs filed a petition to enforce settlement in a Pennsylvania court, but the court dismissed the claim for lack of jurisdiction. (R. 72).

court to enforce that agreement and to order Illinois Central to pay the 25 plaintiffs' claims. (*Id.*).[2]

Illinois Central timely responded in opposition to plaintiffs' motion to enforce and simultaneously filed a motion to sever and dismiss the remaining 34 plaintiffs' claims due to improper joinder and venue. (R. 278 – 307; R.E. 187 – 192; R. 308 – 483; R.E. 193 - 208). The remaining plaintiffs lacked a distinct litigable event to connect their claims and to warrant joinder under Mississippi law. (R. 278 – 307; R.E. 187 – 192). Furthermore, of the 25 remaining plaintiffs included in the motion to enforce, only eight (8) claimed residency in Mississippi at the time of the filing of the complaint. (R. 13 – 22; R.E. 153 – 162). Illinois Central asked the court to sever the remaining plaintiffs' claims and dismiss those plaintiffs who had improperly filed suit in Holmes County. (R. 279; R.E. 188). Illinois Central argued that the court should decide the motion to sever and dismiss *first* – because the remaining plaintiffs' claims were improperly before the court, the court lacked jurisdiction to decide their motion to enforce. (R. 308; R.E. 193; Nov. 6, 2006 Hrg. Transcr. 15:5-9, 39:4-11; Sept. 27, 2007 Hrg. Transcr. 21:1-7).[3] Illinois Central further objected to the court deciding the disputed factual issues surrounding the purported "settlement agreement" and the Pittsburgh meeting. (R. 309 n. 2; R.E. 194; Nov. 6, 2006 Hrg. Transcr. 24:4-19, 66:6-13).

Alternatively, Illinois Central argued that the remaining plaintiffs' claims were not settled. (R. 309 – 322; R.E. 194 – 207). Illinois Central contended that at the Pittsburgh meeting the parties agreed only to engage in a conditional settlement process by which plaintiffs' claims would be settled on a case-by-case basis *if* certain criteria were met. (R. 309; R.E. 194; R. 521 – 525; R.E. 172 – 176; Nov. 6, 2006 Hrg. Transcr. 19:16-20:2). It is undisputed that each plaintiff

[2] While there are 28 plaintiffs listed in the motion, the trial court's final order pertains to 25 plaintiffs. (R. 1883; R.E. 9).

[3] The transcripts for the November 6, 2006 and September 27, 2007 hearings are included in the Appellant's Record Excerpts, Tabs 6 and 7 respectively (R.E. 15 – 146).

wishing to settle his or her claim was required to submit a completed and signed questionnaire, a B-read by a qualified and competent B-reader[4] with a profusion of 1/0 or greater, and proof of employment with Illinois Central. (R. 523; R.E. 174; Nov. 6, 2006 Hrg. Transcr. 15:13-16:2, 47:2-48:19). In addition, Illinois Central expressly and unconditionally excluded two specific types of claims from the settlement process: (1) claims of plaintiffs who had executed a prior occupational release in favor of Illinois Central, and (2) plaintiffs' claims that suffered from statute of limitations problems. (R. 521 – 522; R.E. 172 – 173; Nov. 6, 2006 Hrg. Transcr. 17:4-9; Sept. 7, 2007 Hrg. Transcr. 34:25-35:2, 37:19-27). The remaining 25 plaintiffs seeking enforcement, Illinois Central contended, had failed to meet one or more of the conditions precedent and/or involved one of the excluded claim types. Illinois Central, therefore, was under no obligation to settle those claims. (R. 525; R.E. 176).

The court heard oral arguments on the motion to enforce and the motion to sever and dismiss, and on November 17, 2006, the Honorable Robert L. Goza, Jr. entered an interim order severing and dismissing only the claims of the nine plaintiffs who were not subject to the motion to enforce. (R. 535; R.E. 14). The court entered a second order that same day stating that the remaining 25 plaintiffs' claims were settled, rejecting Illinois Central's contention that the parties agreed only to a conditional settlement process, and making specific factual findings as to the terms of the settlement agreement. (R. 533 – 534; R.E. 12 – 13). In particular, the court found that there was no agreement to exclude from the settlement process plaintiffs with prior occupational releases and statute of limitations problems. (*Id.*). The court did, however, recognize that the credibility of Dr. Ray Harron, the doctor who authored the remaining

[4] A "B-reader" is a doctor certified by the National Institute for Occupational Safety and Health to identify the presence of asbestos- and silica-related disease precursors on chest x-rays. *See Choctaw, Inc. v. Campbell-Cherry-Harrison-Davis and Cove*, 965 So. 2d 1041, 1047 n. 10 (Miss. 2007).

plaintiffs' B-reads, had been seriously compromised due to developments in related litigation.[5] (Sept. 7, 2007 Hrg. Transcr. 48:26:-49:6). The court consequently ordered the 25 remaining plaintiffs to submit to Illinois Central new B-reads by a competent and credible B-reader. (R. 534; R.E. 13).

In response to the court's order, the remaining plaintiffs submitted a second B-read to Illinois Central. These B-reads were authored by one of three litigation screening doctors – Dr. Donald Breyer of California, Dr. Robert Mezey of Florida, and Dr. James Krainson of Florida. (Sept. 27, 2007 Hrg. Transcr. 18:16-27). Illinois Central believed that the second B-reads suffered from the same credibility problems as the first and propounded a targeted set of discovery to the remaining plaintiffs directed at discovering the methodology and procedure employed by these doctors. (R. 554 – 560; Sept. 27, 2007 Hrg. Transcr. 43:12-16). Each plaintiff responded with identical objections and refused to provide Illinois Central with even the most basic information regarding the "new" B-reads. (R. 653 – 667). Since the remaining plaintiffs had yet to comply with the conditions precedent to settlement, Illinois Central was under no obligation to settle those claims.

On September 11, 2007, the remaining plaintiffs filed yet another motion styled "Motion for Enforcement of Settlement." (R. 930 – 935; R.E. 214 – 219). The court held a hearing on the motion to enforce as well as other related motions. On September 26, 2008, the trial court entered an order containing its findings and conclusions, which are the subject of this appeal. (R.

[5] Illinois Central's concerns were founded in Dr. Harron's admissions made throughout proceedings held in *In re Silica Prod. Liability Litigation*, No. MDL 1553, 398 F. Supp. 2d 563, 604 (S.D. Tex. June 30, 2005) and the extensive evidentiary record presented and the findings made in that litigation. These concerns were further amplified by subsequent actions by courts and bankruptcy settlement trusts in response to the information disclosed in MDL 1553, as well as by grand jury proceedings inquiring into Dr. Harron's conduct, a congressional investigation of that conduct, and the subsequent activities of Dr. Harron and others who have repeatedly invoked their Fifth Amendment privilege against self-incrimination when questioned about their litigation screening practices. (R. 310 – 320; R.E. 195 – 205).

1879 – 1884; R.E. 5 – 10). The trial court found that the remaining plaintiffs had "fully complied with the conditions precedent to payment," that their claims were settled, and that they were awarded specific monetary judgments listed in the order.[6] (*Id.*) Illinois Central filed a motion to amend the judgment and findings of the trial court, but, on December 11, 2008, the court denied the motion. (R. 1885; R.E. 227; R. 1907; R.E. 11). Illinois Central timely filed its notice of appeal on January 9, 2009. (R. 1908).

II. Statement of the Facts Relevant for the Issues on Review

This case originally involved the FELA claims of 216 former Illinois Central employees for various personal injuries allegedly caused by occupational exposure to asbestos. (R. 7 – 22; R.E. 147 – 162). The claims of the 216 plaintiffs were joined in one suit filed in Holmes County, Mississippi on December 19, 2002. (*Id.*). The plaintiffs included both in-state and out-of-state residents, some having no connection whatsoever to Holmes County or Mississippi. (*Id.*). Illinois Central timely objected to the misjoinder and improper venue of the claims in its answer to the plaintiffs' complaint. (R. 36 – 43). After Illinois Central filed its answer, the case remained dormant until counsel for plaintiffs and counsel for Illinois Central agreed to meet in Pittsburgh, Pennsylvania on January 23, 2004 to discuss resolving the claims. (*See generally* R. 3; R.E. 1).

The Pittsburgh meeting is the focal point of numerous disputed issues of material fact. The only two people present for most of the meeting were Thomas Peters, counsel for Illinois Central, and Robert Peirce, counsel for plaintiffs. (R. 521; R.E. 172; R. 981; R.E. 177; Nov. 6, 2006 Hrg. Transcr. 46:9-13). Despite the fact that no written agreement exists, plaintiffs claim

[6] These individuals are: Gary R. Byrd; Robert Bowden; William L. Cook; John Curlin; Lyle N. Ernest; George A. Fouse; Gary A. Frederickson; Franklin D. Gossum; Q.B. Gray; John Ed Howell; Willie Johnston; Gary Jolly; E.J. Ledbetter, Jr; Bobby Lessel, Sr.; Thomas G. Mudd; Jerry C. McKissack; Lyle McMannis; Ronald E. Miller; Ted E. Morrison; Charles Payne; Robert D. Payne; Kenneth Rounders; Fred L. Rogers, Jr.; Billy Wayne Sims; and William J. Taylor. (R. 1883; R.E. 9).

that the parties entered into a binding settlement agreement at the meeting and that Illinois Central agreed to settle all 216 of the plaintiffs' claims. (Nov. 6, 2006 Hrg. Transcr. 6:1-7:2). Peters and Peirce have provided affidavits describing contrary versions of the conversations they had during the meeting and of the agreements, if any, they made. (R. 511 – 514; R.E. 168 – 171; R. 521 – 525; R.E. 172 – 176; R. 974 – 975; R.E. 182 – 183; R. 981 – 985; R.E. 177 – 181).

At the Pittsburgh meeting, Peters specifically advised Peirce that Illinois Central would not settle any of the claims of plaintiffs with prior occupational releases, regardless of the type of release or when it was executed. (R. 521; R.E. 172). Although Peirce suggested that the two discuss settlement of claims involving prior occupational releases and consider submitting the question (of whether the prior releases barred plaintiffs' claims) to the court to decide, Peters advised Peirce that he did not have authority to agree to such a submission. (R. 522; R.E. 173). Peters also advised Peirce that Illinois Central would not settle claims that were potentially barred by the statute of limitations. (*Id.*).

As part of Illinois Central's conditional offer to plaintiffs who qualified under these terms and conditions, each claimant was required to provide a completed and signed questionnaire, a B-read by a qualified B-reader with a profusion of 1/0 or greater, and proof of employment via a standard report from the Railroad Retirement Board. (R. 523; R.E. 174; Nov. 6, 2006 Hrg. Transcr. 15:13-16:2, 47:2-48:19). Peters and Peirce did not discuss specific monetary amounts for each plaintiff (except for a handful of cases described by Peters in his affidavit which are irrelevant to the instant appeal.) (R. 521 – 524; R.E. 172 – 176; R. 995; R.E. 184). Rather, Peirce proposed the concept of average settlement amounts. (R. 523; R.E. 174; R. 995; R.E. 184). After further negotiations, Peters agreed on behalf of Illinois Central to pay an average of $18,100.00 to the non-Mississippi plaintiffs and $27,000.00 to the Mississippi plaintiffs, as long

as the plaintiffs did not have prior occupational releases or statute of limitations issues and submitted the requisite documentation. (*Id.*).

Peirce indicated that he had to contact the individual plaintiffs and determine the extent of his authority, i.e., the amount to which each individual plaintiff would agree which would satisfy the averages discussed by Peters and Peirce. (R. 523; R.E. 174; R. 996; R.E. 185). After the meeting, in mid to late February of 2004, having had no further communication with plaintiffs' counsel, Peters began receiving boxes of unilaterally executed releases from the plaintiffs. (R. 524; R.E. 175; R. 995; R.E. 184). Peters began processing the claims with Illinois Central personnel and seeking approval from Illinois Central to settle specific plaintiffs' claims. (R. 524; R.E. 175). Through this process, Illinois Central settled approximately 180 claims. (R. 512; R.E. 169). Illinois Central declined, however, to settle the claims of the remaining 34 plaintiffs because they failed to meet one or more of the terms and conditions of the settlement procedure, i.e., submission of required documentation and/or existence of prior occupational release or statute of limitations problems. (R. 525; R.E. 176).

Ultimately, 25 of the remaining 34 plaintiffs moved to enforce a "settlement agreement" that they claimed they entered into with Illinois Central at the Pittsburgh meeting. (R. 1883; R.E. 9). The court ruled in favor of the remaining 25 plaintiffs over Illinois Central's objections (1) that the court lacked jurisdiction to decide the motion to enforce because the joinder and venue of the remaining plaintiffs' claims was improper; (2) that the trial court lacked authority to decide disputed issues of material fact regarding the existence and terms of the purported settlement agreement; and (3) that, alternatively, the plaintiffs' claims were not settled because of their failure to meet the conditions precedent to settlement. (R. 533 – 534; R.E. 12 – 13; R. 1879 – 1884; R.E. 5 – 10). The trial court made numerous factual findings, based solely on the arguments of counsel without the benefit of an evidentiary hearing, regarding the Pittsburgh

meeting, the parties' intentions to settle the case, the terms and conditions of the purported settlement agreement, and the remaining plaintiffs' compliance with those terms and conditions. (*Id.*). The court ordered Illinois Central to pay the remaining 25 plaintiffs' claims, and it is from this order that Illinois Central brings the instant appeal. (R. 1879 – 1884; R.E. 5 – 10).

SUMMARY OF THE ARGUMENT

The trial court committed plain error in ruling on the plaintiffs' "Motion for Enforcement of Settlement" *prior* to resolving threshold jurisdictional questions raised by Illinois Central in its motion to sever and dismiss. Over 200 in-state and out-of-state plaintiffs were improperly joined in the same suit in Holmes County, Mississippi. Plaintiffs' complaint failed to properly allege a "distinct litigable event" or to otherwise provide information sufficient to justify the mass joinder of the plaintiffs' claims. Furthermore, the complaint wholly lacked any factual detail by which Illinois Central or the court could determine whether venue was proper in Mississippi, much less in Holmes County. The trial court never reached the merits of Illinois Central's motion to sever and dismiss, but, instead, summarily ordered that the plaintiffs' claims were settled. The trial court's failure to first determine whether the plaintiffs' claims were properly before the court was plain error.

Assuming the trial court had jurisdiction to rule on the plaintiffs' motion to enforce, it nonetheless abused its discretion when it decided material, disputed issues of fact over the repeated objections of Illinois Central. The parties disputed (and swore to differing versions of) nearly every aspect of the "settlement." Plaintiffs' motion to enforce settlement was in essence a motion for summary judgment, and, therefore, should have been decided under Rule 56. Yet, the trial court decided numerous, disputed factual issues including (1) the existence of a settlement agreement; (2) the terms and conditions of the settlement; and (3) the plaintiffs' compliance with those terms and conditions. At the very least, Illinois Central was entitled to an evidentiary

hearing to fully develop a record for its position that the claims of the remaining plaintiffs were not settled. Additionally, Illinois Central was erroneously denied discovery regarding essential factual matters concerning the circumstances surrounding the "settlement."

Assuming that the trial court had jurisdiction to entertain plaintiffs' motion to enforce settlement and further assuming that it was within the province of the trial judge to determine disputed issues of material fact, the trial judge's decision to enforce settlement was nonetheless erroneous. The plaintiffs failed to prove by a preponderance of the evidence that there was a meeting of the minds as to the existence of the oral agreement and the terms and conditions thereof. Illinois Central expressly and unequivocally excluded from the settlement process those plaintiffs who had executed prior occupational releases in favor of Illinois Central and those plaintiffs who had statute of limitations issues. The trial court's analysis of the merits of Illinois Central's exclusion of such plaintiffs under *McDaniel* was therefore irrelevant to the inquiry regarding the existence of a settlement agreement and its terms and conditions. Furthermore, assuming the *McDaniel* case was relevant, the trial court's analysis was nonetheless improper.

Alternatively, in the event that the validity or effect of prior occupational releases was properly before the trial court, it abused its discretion in denying Illinois Central discovery regarding whether a plaintiff was aware of his prior asbestos-related claim at the time he executed his prior occupational release. The trial court also erroneously denied Illinois Central's motion to compel discovery regarding plaintiffs' compliance with what the trial court determined to be terms and conditions of the settlement process.

Alternatively, any purported settlement agreement is unenforceable for failure to satisfy the Mississippi statute of frauds. It is undisputed that no written agreement exists. Additionally, the plaintiffs adopted continually shifting positions as to the date of the alleged settlement

agreement and the terms and conditions of the purported agreement, and thus failed to demonstrate that performance under the agreement could occur within fifteen months.

ARGUMENT AND AUTHORITIES

I. The trial court lacked jurisdiction to adjudicate plaintiffs' motion to enforce settlement because the plaintiffs' claims were improperly joined and brought in Holmes County.

A. Standard of Review

Jurisdiction is a question of law which the Court reviews *de novo*. *RAS Family Partners, LP, et al. v. Onman Biloxi, LLC*, 968 So. 2d 926, 928 (Miss. 2007) (citations omitted). "In reviewing questions of jurisdiction this Court is in the same position as the trial court, since all the facts are set out in the pleadings or exhibits." *City of Cherokee, Ala. v. Parsons*, 944 So. 2d 886, 888 (Miss. 2006) (quoting *Yatham v. Young*, 912 So. 2d 467, 469 (Miss. 2005)).

B. The trial court erred when it decided the merits of plaintiffs' motion to enforce settlement *before* determining the threshold issue of whether the plaintiffs' claims were properly before the court.

The court erred in deciding plaintiffs' motion to enforce settlement *prior* to resolving Illinois Central's motion to sever and dismiss. The plaintiffs' claims suffered from many of the problems that plagued Mississippi courts before tort reform – the mass joinder of large volumes of claims with no common litigable event; the improper venue of numerous plaintiffs with no connection to Holmes County and many with none to Mississippi whatsoever; and the inadequate pleading of basic facts to enable the trial court to determine whether the plaintiffs claims were properly brought in Holmes County, Mississippi. (R. 278 – 307). The trial court never reached the merits of the joinder and venue motion; rather, it summarily denied Illinois Central's motion to sever and dismiss based on the erroneous conclusion that plaintiffs' claims were settled. (Nov. 6, 2006 Hrg. Transcr. 4:1-5, 40:4-10; R. 534; R.E. 13).

The court clearly stated its position: "if there is an enforceable settlement, then there is nothing to transfer and sever, you see. So I think the settlement issue has got to be addressed first." (Nov. 6, 2006 Hrg. Transcr. 4:2-5). The court countered that position by stating that "if there is no settlement, [] the motion to sever is *certainly* granted and the motion to dismiss and whatever the latest Supreme Court pronouncement is." (*Id.* at 36:4-6) (emphasis added). Joinder and venue are threshold questions – without proper joinder and venue, the court lacked jurisdiction to adjudicate the plaintiffs' motion to enforce settlement. *Creel v. Bridgestone/Firestone North American Tire, LLC*, 950 So. 2d 1024, 1028 (Miss. 2007).

The plaintiffs generically claimed that venue was appropriate as to all 216 plaintiffs under Mississippi Code Annotated section 11-11-3 (2004). (R. 8; R.E. 148). The plaintiffs' complaint, however, lacked any factual detail by which Illinois Central or the court could determine if, in fact, the plaintiffs' claims met the requirements of the stated venue statute. (R. 7 – 22; R.E. 147 – 162). Rather than provide factual support for the claims of each of the over 200 original plaintiffs, the complaint merely referenced an attached document containing only plaintiffs' names, addresses, and Social Security numbers. (R. 13 – 22; 153 – 122). At least 17 of the 25 remaining plaintiffs subject to the instant appeal are *not* residents of the State of Mississippi. (*Id.*). Furthermore, there is no stated "distinct litigable event" described in the complaint which would warrant the mass joinder of the plaintiffs' claims. Miss. R. Civ. P. 20(a); *Ill. Cent. R.R. Co. v. Adams*, 922 So. 2d 787, 790-91 (Miss. 2006) ("The forty-seven plaintiffs clearly have not alleged a distinguishable litigable event which connects them and they therefore were improperly joined. . . . [T]he complaint must disclose, in general terms, what each defendant did wrong to each plaintiff, and when and where the alleged wrong took place.").

This Court in *Creel* stated that "claims of out-of-state plaintiffs with no connections to Mississippi whose claims accrued outside of the state and who do not meet the joinder

requirements of Rule 20 must be dismissed without prejudice *as a jurisdictional matter*." *Creel*, 950 So. 2d at 1028 (emphasis added); *see also In re Bridgestone Firestone Inc. Tires Products Liability Litigation*, 2009 WL 103647, at *1 (S.D. Ind. Jan. 9, 2009) (citing *Creel* for the proposition that since "proper jurisdiction before the Mississippi lower courts had never been established. . . . [p]laintiff's claim was therefore dismissed without prejudice"). The plaintiffs presented no evidence and the trial court made no findings as to whether the plaintiffs claims were properly before the court. (R. 475 – 476; R. 534; R.E. 13; Nov. 6, 2006 Hrg. Transcr. 4:1-5, 40:4-10). The trial court, therefore, committed plain error by deciding the plaintiffs' motion to enforce settlement before determining if the court had jurisdiction over the plaintiffs' claims.

Illinois Central expressly stated its position in this regard: "The court has expressed its feeling that we needed to address the motion to enforce first, and that's what I intend to do, without waiving our position that the first thing the court needs to do is sever and dismiss these cases." (November 6, 2006 Hrg. Transcr. 15:5-9). Illinois Central's counsel repeated its position that joinder and pleading issues must be decided prior to the trial court's consideration of the plaintiffs' motion to enforce settlement as the claims did not satisfy the applicable criteria under this Court's decision in *Harold's Auto Parts, Inc. v. Mangialardi*, 889 So. 2d 493, 493 (Miss. 2004), and subsequent cases regarding joinder, sufficiency in pleading, and venue:

> We have not agreed to any such determinations of disputed fact by the court in this case. Which is all the more reason that we believe these claims ought to be severed and dismissed, because they don't meet the *Adams*, *Smith* and *Mangialardi* criteria.
>
> . . . .
>
> The ramifications of not granting our motion, we think, are that this court will be ruling on issues that never should have been before this particular court in any event. Because if you look at the complaint, there are no allegations properly joining any of these plaintiffs. There are no proper allegations regarding venue, and there are no proper allegations under the *Mangialardi* doctrine.

(*Id.* at 24:10-15, 39:4-11); (*see also* Sept. 7, 2007 Hrg. Transcr. 21:2-6) (counsel for Illinois Central "incorporate[d]" the objection "that these cases should be severed before any decision to be made on any kind of settlement issue").

The trial court essentially stated that Illinois Central's motion to sever and dismiss should be granted on the merits. (Nov. 6, 2006 Hrg. Transcr. 36:4-6). In its interim order, however, the trial court summarily stated, "the Court has jurisdiction of the parties and of the subject matter of the Motion and the Defendants [sic] motion to sever and dismiss the claims of the moving Plaintiffs is not well taken and should be denied." (R. 533; R.E. 12). Because the trial court was required, as a jurisdictional matter, to assess the propriety of joinder as to the out-of-state plaintiffs, and in so doing, the sufficiency of the allegations set forth in the plaintiffs' complaint, the trial court committed plain error when it proceeded to decide factual issues surrounding the existence of the purported settlement agreement. *See Creel*, 950 So. 2d at 1028.

II. The trial court abused its discretion when it decided disputed, material factual issues over Illinois Central's objections.

A. Standard of Review

The trial court's ruling on plaintiffs' "Motion for Enforcement of Settlement" was a grant of summary judgment. *See Rankin v. Clements Cadillac, Inc.*, 903 So. 2d 749, 751 (Miss. 2005). This Court, therefore, should review the trial court's judgment *de novo*. *Id.* (citing *Hardy v. Brock*, 826 So. 2d 71, 74 (Miss. 2002)). The evidence must be viewed in the light most favorable to Illinois Central – the non-moving party. *Id.* The Plaintiffs, as the moving party, had the burden of proof to show that no genuine issue of material fact existed regarding whether the parties entered into a binding settlement agreement at the Pittsburgh meeting. *Duckworth v. Warren*, 10 So. 3d 433, 437 (Miss. 2009). "Where material facts are disputed, or where different

interpretations or inferences may be drawn from undisputed material facts, summary judgment is inappropriate." *Rankin*, 903 So. 2d at 751.

B. The trial court erred when it decided disputed issues of fact regarding the existence of any settlement agreement; plaintiff's motion to enforce settlement was in essence a motion for summary judgment and, as such, should have been decided under Mississippi Rule of Civil Procedure 56.

The trial court improperly made factual findings, over Illinois Central's objections, regarding the existence of the purported settlement agreement, the terms and conditions of any such agreement, and plaintiffs' compliance with those terms and conditions. (R. 1879 – 1884; R.E. 5 – 10). Plaintiffs' submission filed on June 23, 2006, although titled "Motion for Enforcement of Settlement," was in essence a motion for summary judgment, and thus governed by Mississippi Rule of Civil Procedure 56. *Rankin*, 903 So. 2d at 751 (trial court's grant of motion to enforce settlement was "in effect" "a grant of summary judgment"); *Ammons v. Cordova Floor, Inc.*, 904 So. 2d 185, 190 (Miss. Ct. App. 2005) (stating that Rule 56 was "more appropriate procedure for ruling on" a motion to enforce settlement). Accordingly, the trial court was without authority to decide the myriad issues of disputed facts surrounding the existence of the purported settlement agreement. *Waggoner v. Williamson*, 8 So. 3d 147, 153 (Miss. 2009); *Murphree v. Federal Ins. Co.*, 707 So. 2d 523, 529 (Miss. 1997).

What the parties agreed to at the Pittsburgh meeting is the crux of this factual dispute. "Whether or not the attorney has agreed to a settlement on behalf of the client is a question of fact." *Parmley v. 84 Lumber Co.*, 911 So. 2d 569, 573 (Miss. Ct. App. 2005). Peters and Peirce were the only two individuals present for the duration of the meeting. (R. 521; R.E. 172; R. 981; R.E. 177; Nov. 6, 2006 Hrg. Transcr. 46:9-13). It is undisputed that no written document, agreement, or contract exists memorializing any agreement reached at the meeting. (Nov. 6, 2006 Hrg. Transcr. 6:22-7:6). Peirce has submitted three affidavits which collectively contain

his version of events surrounding the meeting and his understanding of what the parties agreed to. (R. 511 – 514; R.E. 168 – 171; R. 974 – 975; R.E. 182 – 183; R. 981 – 985; R.E. 177 – 181). Likewise, Peters has submitted two affidavits which contain his very different account of the events surrounding the Pittsburgh meeting and of what the parties agreed to. (R. 521 – 525; R.E. 172 – 176; R. 995 – 997; R.E. 184 – 186). "Issues of facts sufficient to require denial of a summary judgment motion are *obviously* present where one party swears to one version of the matter in issue and another says the opposite." *Dawkins and Co. v. L & L Planting Co.*, 602 So. 2d 838, 841-42 (Miss. 1992) (citations omitted) (emphasis added).

The parties disputed nearly every aspect of the meeting and the agreements made that day. Yet, the trial court concluded (1) that there was in fact a settlement agreement reached at the meeting; (2) that the parties did not exclude plaintiffs with prior releases and statute of limitations problems from the settlement; (3) that the remaining plaintiffs had submitted the requisite documentation to Illinois Central (including credible B-reads); and (4) that the parties agreed to the specific dollar amounts listed in the court's order. (R. 1879 – 1884; R.E. 5 – 10).

The court sitting in diversity in *Volland v. Principal Residential Mortgage, et al.*, 2009 WL 1293547, at *1 (S.D. Miss. May 7, 2009) was presented with a motion to enforce a *written* settlement agreement. The plaintiff settled a claim with the defendant insurance company regarding one property and later brought a separate action regarding a second property that was also insured by the defendant insurance company. *Id.* at *2. The insurance company argued that the settlement agreement on the first property encompassed the second property and that plaintiff's claim was therefore already settled. *Id.* at *1. The court decided the issue under Federal Rule 56 and stated:

> [T]here is at present a genuine issue of material fact as to whether the scope of the settlement agreement is a product of mistake or indefiniteness. Under the entirety of the circumstances (which is most certainly subject to further development) and

> for the purposes of Rule 56, **it is not for the Court to weigh the evidence or evaluate the credibility of witnesses**, but to consider the evidence submitted by the parties in support of and in opposition to the motion and grant all reasonable inferences to the non-moving party . . . . In other words, that evidence and those inferences drawn from it are viewed in the light most favorable to the non-moving party.

Id. at *3 (emphasis added).[7] The court denied the motion to enforce settlement. *Id.*

Illinois Central objected to the trial court acting as the trier of fact. In its response to plaintiffs' motion to enforce, Illinois Central expressly stated: "Illinois Central does not consent to any determination of disputed fact by the Court. Illinois Central agrees that this Court is empowered to render rulings of law based on undisputed facts." (R. 309 n. 2; R.E. 194). Illinois Central further preserved its objection throughout the proceedings. At the hearing on November 6, 2006, counsel for Illinois Central stressed to the trial court that Illinois Central "ha[d] not agreed to any such determinations of disputed fact by the court in this case." (November 6, 2006 Hrg. Transcr. 24:10-12). Because the trial court improperly decided disputed, material factual matters based largely on the credibility determinations it made from the opposing affidavits of Peters and Peirce, the judgment of the trial court enforcing the "settlement agreement" and summarily dismissing the case must be reversed.

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[7] *See also* MISS. CIV. PROC. § 11:16 (2000) (if a witness's credibility can affect the outcome of the case, summary judgment is inappropriate; judge cannot assess credibility by reviewing an affidavit or a deposition when ruling on a summary judgment motion); *see generally, Stegall v. WTWV, Inc.*, 609 So. 2d 348, 352-53 (Miss. 1992); *see also Daniels v. GNB, Inc.*, 629 So. 2d 324, 327 (Miss. 1993) (credibility issue present when parties' affidavits present opposite versions of facts); *Nichols v. Tri-State Brick & Tile Co.*, 608 So. 2d 324, 327 (Miss. 1992) ("The record on appeal . . . is fraught with factual disputes and issues of credibility."); *Crystal Springs Ins. Agency v. Commercial Union Ins. Co.*, 554 So. 2d 884, 886 (Miss. 1989) ("best way and perhaps only way" for plaintiff to prove fraud "would be at trial in which he could test the credibility of the persons whom he claims made the promise to him").

C. Illinois Central was entitled, at the very least, to an evidentiary hearing on the disputed factual issues surrounding the existence of the purported settlement agreement, the terms and conditions of the agreement, and plaintiffs' compliance with those terms and conditions.

Regardless of the procedural posture by which Plaintiffs' "Motion for Enforcement of Settlement" was considered by the trial court, Illinois Central was entitled to be heard, to cross-examine plaintiffs' witnesses under oath, and to introduce evidence as to the facts surrounding the Pittsburgh meeting – facts which were the primary basis of the trial court's order enforcing the settlement agreement. (*See* Nov. 6, 2006 Hrg. Transcr. 6:22-7:6). The trial court's failure to conduct an evidentiary hearing was an abuse of discretion and this Court should reverse and remand so that the facts may be fully developed.

In *Gulfport Pilots Assoc., Inc. v. Kopszywa*, a majority of the Mississippi Court of Appeals affirmed a trial court's enforcement of a settlement reached between an injured plaintiff and his employer. 743 So. 2d 1036 (Miss. Ct. App. 1999). Like the case at bar, the parties disputed many of the facts surrounding the oral settlement. *Id.* at 1040-41. The majority found that the facts supported the trial court's decision to enter judgment against the employer and affirmed. *Id.* at 1039. Judge McMillin, however, in a lengthy dissenting opinion joined by Judge Southwick and Judge Coleman, noted that "[w]hether the insured is to be bound by its insurer's negotiations is a fact question, not a question of law. This suggests that the trial court acted precipitously in entering judgment against [the employer] without an evidentiary hearing to determine the settlement terms negotiated by the attorneys." *Id.* at 1040 (further stating that "[b]ecause there ha[d] been no evidentiary hearing, it is somewhat difficult to reconstruct the pertinent facts"). In articulating the view that reversal and remand was warranted, the dissent provided:

> There has been no evidentiary hearing to determine what the parties agreed to insofar as the source of funding or the settlement. The trial court had nothing to

> go on beyond the representations made to the court by the attorneys in the course of argument. Even these arguments show that there is a genuine dispute of fact as to what Gulfport Pilots (and not its insurer, Paramount) agreed to do in regard to settling this claim. **Argument of counsel is not evidence upon which the trial court may draw to resolve disputed issues of fact. Until an appropriate evidentiary hearing has been conducted to determine the true terms of the settlement agreement, this case cannot be properly decided.**

Id. at 1042 (emphasis added).

The Fifth Circuit reversed the lower court's summary enforcement of a disputed, oral settlement agreement in *Mass. Casualty Insurance Co. v. Forman*, 469 F.2d 259, 260 (5th Cir. 1972). The court stated that "where 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." *Id.* The Fifth Circuit reversed and remanded for an evidentiary hearing, noting:

> "Settlement agreements are highly favored in the law and will be upheld whenever possible. . . ." [citation omitted]. However, this policy is not always served by enforcement of an alleged settlement in a summary proceeding. Where representations of counsel indicate a material dispute whether or not preliminary negotiations reached the level of a binding agreement, both parties should be given a full and fair opportunity to prove their version. A contrary procedure in those relatively few cases where an honest dispute develops over offer and acceptance would discourage preliminary negotiations toward settlement.

Id. at 261. The parties in the case at bar engaged in oral, preliminary negotiations and whether those negotiations resulted in a settlement is disputed. (Nov. 6, 2006 Hrg. Transcr. 6:22-7:6). Illinois Central should be given a "full and fair opportunity" to prove its version of the story.

In reaching its conclusion that an evidentiary hearing was necessary when disputed issues of fact exist regarding a purported settlement agreement, the *Forman* court relied on the similar case of *Autera v. Robinson*, 419 F.2d 1197 (D.C. Cir. 1969) in which the plaintiffs asserted, via affidavit, that no agreement to settle had ever been reached. *Id.* While the lower court had held a brief hearing consisting of remarks by counsel, no cross-examination of witnesses or testimony

was allowed before the court granted the defendants' motion to enforce settlement. *Id.* at 1199. On appeal, the United States Court of Appeals for the District of Columbia stated, in part:

> [I]t is apparent that the summary procedure for enforcement of unperformed settlement contracts is not a panacea for the myriad types of problems that may arise. The summary procedure is admirably suited to situations where, for example, a binding settlement bargain is conceded or shown, and the excuse for nonperformance is comparatively unsubstantial. On the other hand, it is ill-suited to situations presenting complex factual issues related either to the formation or the consummation of the contract, which only testimonial exploration in a more plenary proceeding is apt to satisfactorily resolve.

Id. at 1200.[8]

Illinois Central was denied the opportunity to fully develop a record on its position. Discovery was absolutely necessary to develop the record regarding essential factual matters concerning the Pittsburgh meeting, and more importantly, the sufficiency of the plaintiffs' submissions under what the trial court found to be the terms and conditions of the "settlement agreement." Illinois Central was erroneously denied an evidentiary hearing on the underlying matters, and the order granting plaintiffs' motion for summary judgment must be reversed, and the matter remanded for further proceedings.

III. Alternatively, the trial court's decision to enforce the purported settlement agreement was clearly erroneous; the plaintiffs failed to prove by a preponderance of the evidence that there was a meeting of the minds between the parties.

A. Standard of Review

A settlement is a contract. *Hastings v. Guillot*, 825 So. 2d 20, 23 (Miss. 2002). "It is elementary that in order for there to be a settlement there must be a meeting of the minds." *Viverette v. State Highway Comm'n of Mississippi*, 656 So. 2d 102, 102 (Miss. 1995). The

[8] The court additionally noted: "[S]ubstantial issues of a factual nature, material to the validity of any agreement on settlement, were raised in the affidavits appellants presented to the court. Just what consideration the judge may have given to this facet of the situation is not at all apparent." *Autera*, 419 F.2d at 1200.

burden is upon the party claiming the benefit of the settlement to demonstrate by a preponderance of the evidence that there was a meeting of the minds. *Id.*

"The existence of an oral contract is a fact issue." *WRH Properties, Inc. v. Estate of Johnson*, 759 So. 2d 394, 396 (Miss 2000) (citing *Harris v. Williams*, 43 So. 2d 364, 365 (Miss. 1949)). "'[A] circuit court judge sitting without a jury is accorded the same deference with regard to findings as a chancellor,' and his findings are safe on appeal where they are supported by substantial, credible, and reasonable evidence." *Ammons*, 904 So. 2d at 189 (quoting *Wilson v. Greyhound Bus Lines, Inc.*, 830 So. 2d 1151, 1155 (Miss. 2002) (citations omitted)).

The trial court's decision to enforce settlement was clearly erroneous and should be reversed. The plaintiffs failed to prove by a preponderance of the evidence that there was a meeting of the minds between the parties. The trial judge, therefore, abused his discretion by enforcing the purported settlement agreement.

B. The informal discussions between counsel for the parties at the Pittsburgh meeting were preliminary negotiations and did not result in a firm settlement agreement.

Assuming that the trial court had jurisdiction to entertain plaintiffs' motion to enforce settlement and further assuming that it was within the province of the trial judge to determine disputed issues of material fact, the trial judge's decision to enforce settlement was nonetheless erroneous. Despite the fact that no written agreement exists, the plaintiffs contended that the parties entered into a binding settlement agreement at the Pittsburgh meeting. (Nov. 6, 2006 Hrg. Transcr. 6:1-5, 6:22-7:6). The plaintiffs, therefore, bore the burden of establishing by a preponderance of the evidence that there was a meeting of the minds as to the existence of an oral agreement and its terms and conditions. *Viverette*, 656 So. 2d at 102. The plaintiffs failed to meet their burden of proof, and the order of the trial court enforcing the purported settlement agreement should, therefore, be reversed.

In *Howard v. Totalfina E & P USA, Inc.*, this Court affirmed a trial court's denial of a motion to enforce a purported settlement agreement based on the fact that there was no meeting of the minds between the parties. 899 So. 2d 882, 889 (Miss. 2005). The *Howard* plaintiff asserted that letters and documents attached to her brief demonstrated a meeting of the minds between the parties. *Id.* This Court, however, stated that "in order to have an effectuated settlement, you have to have a meeting of the minds . . . and **it has to be expressed to where there is nothing of consequence left undone**." *Id.* (emphasis added). The Court concluded by holding that where "there are too many unanswered questions" there is "no substantive evidence of assent." *Id.* at 890.

There were many unanswered questions after the Pittsburgh meeting. No specific amounts for any of the plaintiffs were discussed at the meeting, much less agreed upon. (R. 523 – 524; R.E. 174 – 175; R. 995 – 997; R.E. 184 – 186; Nov. 6, 2006 Hrg. Transcr. 42:21-46:13); *see Southern Pine Superior Stud Corp. v. Herring*, 207 So. 2d 632, 634 (Miss. 1968) (stating that an agreement which did not include the amount to be paid "invited controversy in the future and was too indefinite to be enforceable even if we assume the other formalities necessary to a binding contract existed"). While the plaintiffs included specific dollar amounts in the releases they unilaterally executed and delivered to Illinois Central, they could not articulate the origin of those numbers. (Nov. 6, 2006 Hrg. Transcr. 42:21-46:13). The plaintiffs' position on where the specific dollar amounts came from was a moving target:

- Peirce's first affidavit, dated September 28, 2006, was silent on this point. (R. 511 – 514; R.E. 168 – 171)

- At the first hearing on plaintiffs' motion to enforce settlement, the plaintiffs joined Illinois Central's position that Peters and Peirce agreed only to average numbers at the Pittsburgh meeting:

> The Court: I'm not trying to put words in your mouth, Ms. Fondren [plaintiffs' counsel], but I do need to understand it. Is it the

plaintiffs' position, then, that there was no specific amount discussed by Mr. Peters and Mr. Pierce [sic] as to any individual claim?

Ms. Fondren: My understanding, Your Honor, is they were to arrive at an average number after – between all of the plaintiffs.

The Court: Okay. Pretty much what Mr. Beckham said. What's in Mr. Peters' affidavit.

Ms. Fondren: That's my understanding, Your Honor, yes.

(November 6, 2006 Hrg. Transcr. 44:5-16) (emphasis added). After plaintiffs' counsel described the confusion as to how these numbers came about as "quite a messy situation," the trial court noted that "**this is just a classic illustration of the benefit of having something written down and signed by somebody**." (*Id.* at 46:4-13) (emphasis added);

- Peirce's second affidavit was in keeping with the plaintiffs' initial assertion. Peirce stated that each plaintiff's settlement "was individually negotiated with the plaintiff. After the case settled, I informed Mr. Peters of the settlement amount and subsequently sent Mr. Peters an executed Release . . . ." (R. 982; R.E. 178);

- In his October 10, 2007 affidavit, however, Peirce's story changed. Peirce represented that, at the Pittsburgh meeting, he and Peters had "discussed specific monetary amounts that Illinois Central was willing to pay each plaintiff to settle his individual case." (R. 974; R.E. 182). Peirce claimed that "after the meeting, [he] personally spoke with each of the clients . . . . Each individual indicated his acceptance of the specific monetary amount offered to him by Peters." (*Id.*).

Plaintiffs' inconsistent (and sworn) representations are far from proof by a preponderance of the evidence that a meeting of the minds occurred. In fact, plaintiffs' variations on the "most important part of the contract" illustrate the contrary – that no settlement agreement was entered into at the Pittsburgh meeting.[9] *Southern Pine*, 207 So. 2d at 634 (referring to the "amount to be paid").

[9] Plaintiffs also offered varying accounts of when the Pittsburgh meeting occurred (and therefore, when the "settlement" occurred): plaintiffs initially alleged that "[a]round April 2004, the Plaintiffs, through their attorney, negotiated a settlement with Illinois Central for payment of their respective asbestos cases against Illinois Central." (R. 52) (emphasis added); later, plaintiffs asserted that "[i]n January of 2004, counsel for Plaintiffs, Robert N. Peirce, Jr., met with counsel for Defendant Illinois Central, Tom [sic] Peters, in Pittsburgh, Pennsylvania, and settled all of the Plaintiffs' claims." (R. 71) (emphasis added); on yet another occasion, plaintiffs stated that "both groups met and discussed these

"Whether contracting parties are bound by an informal agreement prior to the execution of a contemplated formal writing is a mater of intention to be determined by the surrounding facts and circumstances of each particular case." *WRH Properties, Inc. v. Estate of Johnson*, 759 So. 2d 394, 397 (Miss. 2000) (holding that a conversation between the parties regarding settlement was not enough to bind the parties). It is undisputed that the plaintiffs, in order to qualify under the settlement procedure, were required to submit a completed and signed questionnaire, a B-read by a qualified and competent B-reader with a profusion of 1/0 or greater, and proof of employment with Illinois Central. (R. 523; R.E. 174; Nov. 6, 2006 Hrg. Transcr. 15:13-16:2, 47:2-48:19). The existence of these conditions indicates that a firm agreement to settle all plaintiffs' claims had not been reached. These conditions are "indicative of a *proposed* settlement that provides a conceptual framework for the [defendant] and [plaintiff] to further negotiate in an attempt to reach a firm settlement." *Howard*, 899 So. 2d at 889-90 (emphasis added).[10]

The trial court acknowledged these conditions and expressly found that the plaintiffs had not complied because they failed to submit a B-read by a "competent" B-reader. (Sept. 7, 2007 Hrg. Transcr. 48:26-49:6). Peirce likewise acknowledged that Illinois Central was not bound to settle each and every plaintiff's claim and could exercise discretion in making the determination to settle based on the aforementioned conditions:

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claims on January 4, 2004." (R. 489) (emphasis added); and, in Peirce's first affidavit, he represented that "[o]n January 6, 2004, Thomas Peters . . . visited me in my Pittsburgh office, and we settled all of the 207 cases in the Bobby McElhenney group." (R. 512; R.E. 169) (emphasis added). In order to correct the record, Peters submitted his own affidavit to the trial court in which he stated that he met with Peirce at his office in Pittsburgh, Pennsylvania on January 23, 2004, and not January 6, 2004. (R. 521; R.E. 172). Peirce, in a subsequently produced affidavit, agreed with Peters's recollection that the Pittsburgh meeting occurred on January 23, 2004. (R. 981; R.E. 177).

[10] The statement the *Howard* court determined was indicative merely of a "conceptual framework" came from a letter between the parties: "[T]he proposed settlement would include payment of $380,000 and transfer of the title of the property to a corporate entity." *Howard*, 899 So. 2d at 890.

> We understood that there may be situations where Illinois Central wanted us to provide information confirming employment with Illinois Central and we agreed to do so. Based upon previous settlement negotiations with Mr. Peters, we were aware that it was possible that one of our clients previously may have executed an asbestos Release with another law firm or with the claims agent. As we had done on previous occasions, we agreed that if we found a client who had already settled his asbestos case with the railroad, then obviously we would not pursue that case.

(R. 981; R.E. 177). Not surprisingly, Peirce contradicted the above sworn statement in other affidavits. Peirce claimed that there "were no pre-conditions to this settlement. All of the conditions relating to settlement of these cases were contained in the written release." (R. 511; R.E. 168). There were no conditions contained in the releases. What if a plaintiff could not provide "information confirming employment" with Illinois Central or did not produce evidence of a diagnosis of an asbestos-related disease – was Illinois Central nonetheless bound to pay that claim simply because the plaintiff unilaterally signed a release? The plaintiffs may not admit to the conditions that they can satisfy and deny those that they cannot.

The plaintiffs have failed to prove by a *preponderance of the evidence* that the parties entered into a settlement agreement. There was no meeting of the minds as to the amount to be paid to each plaintiff. There was no meeting of the minds as to the conditions of the settlement procedure. How can the plaintiffs definitely show that there was a meeting of the minds when their own position shifts on these two crucial aspects of the "agreement." The parties merely agreed to a conceptual framework to follow in attempting to resolve the plaintiffs' claims. Some of the plaintiffs' claims were resolved within that framework. The claims of the remaining plaintiffs, however, do not meet the conditions precedent to settlement, and the trial court's order enforcing settlement was clearly erroneous and should therefore be reversed.

C. The trial court abused its discretion by deciding that the terms of the "settlement agreement" included the settlement of plaintiffs' claims who signed prior occupational releases in favor of Illinois Central.

Illinois Central expressly and unequivocally excluded from the settlement process those plaintiffs who had executed prior occupational releases in favor of Illinois Central. (R. 521 – 522, 523; R.E. 172 – 173, 174). Whether the release was for a hearing loss claim (or any other work-related injury) or whether the prior release included a release of asbestos claims was irrelevant – those plaintiffs were excluded. (*Id.*). The plaintiffs claimed that Illinois Central did not exclude plaintiffs with prior occupational releases from the settlement process and that any such exclusion was nonetheless improper based on this Court's decision in *McDaniel*.[11] (R. 513; R.E. 170; Nov. 6, 2006 Hrg. Transcr. 61:11-62:16). The only question for the trial court to consider was whether Illinois Central excluded plaintiffs with prior occupational releases from the settlement process. (R. 309; R.E. 194). The trial court's analysis of the merits of the exclusion was therefore improper.

At the November 6, 2006 hearing, the trial court summarized its inquiry as follows:

> You disagree on the prior releases, I know, and that's going to be a *question of law* as to whether or not, you know, a release as to future injuries under these circumstances is binding. But taking that out, let's just assume, if that is resolved in [Illinois Central's] favor, then, of course, [the plaintiffs] fail. If that's found to be a condition of the release, then [the plaintiffs] fail. If that's decided in [the plaintiffs'] favor, though, then the only other thing you've got to decide is whether or not you've complied with the two conditions that you've agreed to. One is the proper questionnaire and the other is a correct B read, right?

(Nov. 6, 2006 Hrg. Transcr. 57:21-58:8). Plaintiffs' counsel agreed. (*Id.* at 58:9). Although Illinois Central never agreed to submit the issue of the validity of the prior releases to the trial court for determination of their effect, the trial court ultimately found that: (1) "the execution of

[11] The initial *McDaniel* opinion was handed down from this Court on June 15, 2006, *see Ill. Cent. R.R. Co. v. McDaniel*, No. 2005-CA-00389-SCT (June 15, 2006); but, this opinion was later withdrawn and superceded on denial of rehearing by this Court at *Ill. Cent. R.R. Co. v. McDaniel*, 951 So.2d 523 (Aug. 31, 2006). Notably, Plaintiffs filed their "Motion for Enforcement of Settlement" and accompanying memorandum on June 23, 2006.

a prior release for an injury unrelated to asbestos exposure is not a bar to the subsequent claim for an asbestos related injury (*see ICRR v. McDaniel, __ So. 2d __, 2002 WL 256739*) [12] [sic]" and (2) "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. 534; R.E. 13). This finding was also incorporated into the final order entered by the trial court on September 26, 2008. (R. 1881; R.E. 7).

First, the trial court erroneously concluded that Illinois Central did not exclude those plaintiffs with prior occupational releases from the settlement process. Peters, in multiple sworn statements, stated that he told Peirce at the Pittsburgh meeting that these plaintiffs were excluded. (R. 521 – 522, 523; R.E. 172 – 173, 174). Peirce swore to the opposite. (R. 512; 169). There is no written document memorializing any "agreement" from the Pittsburgh meeting, and Peters and Peirce were the only two present for the duration of the meeting. (R. 521; R.E. 172; R. 981; R.E. 177; Nov. 6, 2006 Hrg. Transcr. 6:22-7:1, 46:9-13). This is further evidence that no meeting of the minds between the parties occurred.

The plaintiffs pointed to the fact that Illinois Central settled several plaintiffs' claims who had prior occupational releases as evidence that Illinois Central never intended to exclude these plaintiffs from the settlement process. (R. 490 n. 1; R. 512; R.E. 169). Since there was no binding settlement agreement between the parties, Illinois Central regarded each of the unilaterally executed releases as an independent settlement offer. (R. 524; R.E. 175). While Illinois Central accepted some of those offers, including offers from plaintiffs with prior occupational releases, Illinois Central always reserved the right to deny any offer from a plaintiff

[12] Because the original *McDaniel* opinion, presumably relied upon by the trial court, was actually filed on June 15, 2006, and later withdrawn and superceded on denial of rehearing on August 31, 2006, it is not clear what opinion the trial court was referencing in its orders based on its erroneous citation to a 2002 case. *Reconcile Illinois Cent. R. Co. v. McDaniel*, No. 2005-CA-00389-SCT (Miss. June 15, 2006); *Illinois Cent. R. Co. v. McDaniel*, 951 So. 2d 523 (Miss. Aug. 31, 2006).

who had a prior occupational release or who failed to meet any of the other conditions discussed above. (R. 521 – 525; R.E. 172 – 176). Many of the remaining plaintiffs executed prior occupational releases in favor of Illinois Central.[13] (R. 309; R.E. 194; R. 525; R.E. 176). Illinois Central was not, therefore, obligated to settle those claims.

Interestingly, though the trial court presumably held that Illinois Central did not exclude plaintiffs with prior occupational releases from the settlement process, the court dismissed two of the remaining plaintiffs' claims because they executed prior (unrelated) occupational releases. (R. 1882 – 1883; R.E. 8 – 9). The court vacated its order enforcing settlement as to these two plaintiffs because it made the factual determination 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**." (*Id.*) (emphasis in original). Implicit in this decision is recognition that Illinois Central excluded those plaintiffs with prior releases from the settlement process.

Second, the *McDaniel* decision had not been issued by this Court at the time of the Pittsburgh meeting. The effect of the prior releases was, therefore, irrelevant to the trial court's analysis of whether a settlement agreement existed and what the terms and conditions of that agreement were. Furthermore, Illinois Central 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. Transcr. 23:17-24:22, 66:2-13). In *McDaniel*, the Court necessarily included in its inquiry the factual determination of what the plaintiff knew about other possible injuries, including asbestos related injuries, at the time the prior release was executed, stating, "there is no evidence

[13] The remaining plaintiffs who executed prior occupational releases include: Gary Bird, R.W. Bowden, William L. Cook, John Curlin, Lyle D. Ernst, George Fouse, Gary Frederickson, Frank Gossum, John Ed Howell, Willie E. Johnston, Gary M. Jolly, Emmett J. Ledbetter, Jr., Bobby L. Lessel, Jerry C. McKissick, Lyle McMannis, Ted E. Morrison, Thomas G. Mudd, R. D. Payne, Kenneth Pounders, Fred L. Rogers, Jr., Billy Wayne Sims, and William Taylor. (R. 324 – 366).

McDaniel was aware he may have a potential asbestos-related injury." *McDaniel*, 951 So. 2d at 531.

"The key inquiry is whether or not the risk of developing an asbestos-related illness was known and contemplated by each plaintiff at the time he signed the release." *Ill. Cent. R.R. Co. v. Acuff*, 950 So. 2d 947, 960 (Miss. 2006). Unlike the present case, the trial court in *Acuff* was "designated by the parties as the finder of fact." *Id.* at 961. The trial court's articulation of the relevant standard for its determination of the "release issue" under *McDaniel* and *Acuff* as a question of law was incorrect. Illinois Central submits that this flawed analysis, which constituted at the least, a partial basis for the trial court's decision to enforce settlement, warrants reversal.

Regardless of the ultimate legal effect of the remaining plaintiffs' prior releases under *McDaniel* and its progeny, Illinois Central expressly declined negotiation of settlements involving plaintiffs with prior occupational releases. (R. 521 – 522, 523; R.E. 172 – 173, 174). The trial court's inconsistent findings as to whether Illinois Central did in fact exclude those claims was an abuse of discretion. Furthermore, the trial court's decision to analyze the release issue under the *McDaniel* case was an improper undertaking and the analysis it conducted was flawed.

IV. In the alternative, Illinois Central was improperly denied discovery as to whether the remaining plaintiffs properly complied with the terms and conditions of the settlement process.

A. Standard of Review

The trial court's granting or denying of a motion to compel is subject to an abuse of discretion standard of review on appeal. *Taylor Mach. Works, Inc. v. Great American Surplus Lines Insurance Co.*, 635 So. 2d 1357 (Miss. 1994); *Smith v. Ameristar Casino Vicksburg, Inc.*, 991 So. 2d 1228, 1230 (Miss. App. 2008). Where limitations on discovery are improvidently

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

B. In the event that the issue of the validity or effect of prior occupational releases was properly before the trial court, Illinois Central was entitled to discovery, which was erroneously denied.

Even if *McDaniel* were applicable to the trial court's analysis of whether a settlement agreement existed, *McDaniel* clearly indicates that the determination of whether a plaintiff had been aware of his asbestos-related claim at the time of his signing a release is a factual inquiry worthy of relevant discovery, which was erroneously denied in this case.

Defendant repeatedly voiced its opposition to the trial court's determination of disputed facts in this case, as evident by the previously discussed pleadings submitted throughout the proceedings, and exemplified by the following exchange at the hearing on November 6, 2006:

> 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 are, you would understand.

(Nov. 6, 2006 Hrg. Transcr. 66:2-13). As further noted by Peters at the later hearing on September 27, 2007, Illinois Central never agreed to submit the occupational release issue to any court or tribunal. (Sept. 27, 2007 Hrg. Transcr. 39:5-13).

In *McDaniel*, the Court recognized that "the circuit court reopened discovery and directed both parties to file briefs in anticipation of a final hearing on the settlement issues." 951 So. 2d

at 525. Such discovery was denied in the instant case. Furthermore, *Illinois Central Railroad Company v. Acuff*, 950 So. 2d 947 (Miss. 2006) is distinguishable from the present scenario. In *Acuff*, as to determining the application of a prior release to bar a future claim, this Court specifically held: "the key inquiry is whether or not the risk of developing an asbestos-related illness was known and contemplated by each plaintiff at the time he signed the release." *Id.* at 960. Again, unlike the present case, the trial court in *Acuff* was "designated by the parties as the finder of fact". *Id.* at 961.

Because the trial court did proceed, despite Illinois Central's objections, to determine factual issues regarding the effect of the prior releases, Illinois Central was first entitled to conduct discovery to pursue this factual inquiry prior to any decision of the trial court regarding the prior occupational releases, as asserted by Peters at the hearing on September 27, 2008:

> [O]n McAlexander and Stillwell, the fact of the matter is the *McDaniel* case did find that the hearing loss issue is a fact-intensive inquiry, that all the facts are important, that you consider what was going on at the time, not just the release itself, what kind of claims the person knew about, his knowledge. I mean, there's several – many factors.
>
> And, because of the way this happened, we were never allowed to obtain those factors from the plaintiffs and present them to the Court. And we think those factors would be necessary before any tribunal would take over a decision of the hearing loss issue.

(Sept. 27, 2007 Hrg. Transcr. 39:17-40:2).

The trial court did, in fact, specifically exclude McAlexander and Stillwell – two individuals who had originally been named within the scope of the November 17, 2006 interim order enforcing settlement. (R. 1883 – 1884; R.E. 8 – 9). This amounted to a determination by the trial court of a factual dispute applicable to the vast majority of Plaintiffs in this appeal. The denial of Illinois Central's requests for an order compelling discovery as to <u>all</u> Plaintiffs with prior occupational releases constituted an abuse of

V. Alternatively, any purported settlement agreement is unenforceable for failure to comply with the Mississippi statute of frauds.

A. Standard of Review

"[T]he interpretation of a statute is a question of law requiring this Court to apply a de novo standard of review." *Hedgepath v. Johnson*, 975 So. 2d 235, 237 (Miss. 2008) (citing *Champluvier v. State,* 942 So. 2d 145, 150 (Miss.2006)).

B. The oral "settlement agreement" could not be performed within fifteen months and was, therefore, unenforceable.

Under the statute of frauds, any agreement, not in writing and signed by the parties, that cannot be performed within fifteen months is unenforceable. Miss. Code. § 15-3-1(d) (Rev. 2003). "The purpose of the statute of frauds is that persons will not be 'held to contracts they did not make.'" *Scarbrough v. Long*, 112 F. Supp. 2d 609 (S.D. Miss. 2000) (quoting *Putt v. City of Corinth,* 579 So. 2d 534, 538 (Miss. 1991).

Plaintiffs, in arguing that a settlement agreement existed, stipulated that no written agreement exists:

> The Court: All right. Is there any writing which memorializes the agreements you contend exist?
>
> Ms. Fondren: Unfortunately, Your Honor, I don't believe there is. The only form of memorialization –
>
> The Court: No correspondence?
>
> Ms. Fondren: Sir?
>
> The Court: No correspondence?
>
> Ms. Fondren: No, sir.

(Nov. 6, 2006 Hrg. Transcr. 6:22-7:6). Illinois Central, in its response to the plaintiffs' motion to enforce settlement, asserted that the "agreement" was unenforceable for failure to comply with the statute of frauds. (R. 321). Plaintiffs, in adopting continually shifting positions as to the

date that any alleged settlement occurred and the terms and conditions of such alleged agreement, failed to demonstrate to the trial court that performance under any such agreements could occur within fifteen months. The trial court wholly failed to rule on Illinois Central's argument and, therefore, made no findings regarding the statute of frauds. (*See* Court Orders, R. 533 – 534, 1879 – 1884; R.E. 12 – 13, 5 – 10). Accordingly, the trial court's holding that an enforceable settlement agreement existed should be reversed for failure to satisfy the Mississippi statute of frauds.

CONCLUSION

The trial court committed plain error in deciding the plaintiffs' motion to enforce settlement before determining whether the plaintiffs' claims were properly before the court. The trial court further erred when it decided numerous disputed factual issues, over Illinois Central's objections, and summarily enforced the purported settlement agreement. Illinois Central was, at the very least, entitled to an evidentiary hearing to fully prove its version of the "settlement agreement" and the terms and conditions thereof. The trial court erred on numerous additional points including denying Illinois Central discovery into the myriad, disputed factual issues. For all the reasons stated above, this Court should reverse the trial court's judgment and render in favor of Illinois Central.

Respectfully submitted this the 10th day of August, 2009.

ILLINOIS CENTRAL RAILROAD COMPANY

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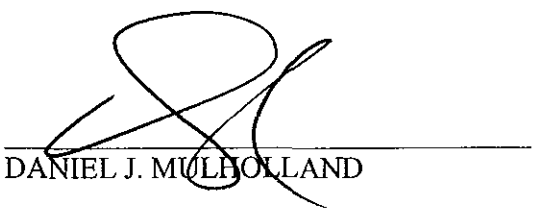
CERTIFICATE OF SERVICE

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 Brief of Appellant Illinois Central Railroad Company and Appellant's Record Excerpts to all counsel of record.

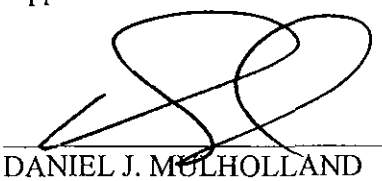
THIS, the 10th day of August, 2009.



DANIEL J. MULHOLLAND

CERTIFICATE OF FILING

I, Daniel Mulholland, certify that I have hand-delivered the original and three (3) copies of the Brief of Appellant Illinois Central Railroad Company and an electronic diskette containing same on August 10, 2009, addressed to Ms. Betty W. Sephton, Clerk, Supreme Court of Mississippi, 450 High Street, Jackson, Mississippi 39201.



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