No. 01-963

IN THE

Supreme Court of the United States

NORFOLK & WESTERN RAILWAY COMPANY,
Petitioner,

v.

FREEMAN AYERS, *et al.*,
Respondents.

On Writ of Certiorari to the Circuit Court of Kanawha County, West Virginia

REPLY BRIEF

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REPLY BRIEF

Respondents seek an unwarranted expansion of the damages recoverable under FELA. There is no sound basis in the historical or evolving common law for plaintiffs diagnosed with mixed-dust pneumoconiosis or asbestosis to recover damages for fear or concern, based solely on their perceptions of the statistical risk that in the future they may develop a distinct cancerous disease that does not result from their present injury. Nor is there any basis for their claim that no matter how minimal their asbestos exposure during railroad employment, the railroad must pay the entirety of their asbestos-related damages. FELA expressly limits railroad liability to injury incurred in railroad employment caused by the railroad's negligence, and the common law has always required apportionment of injury by cause on any reasonable basis. Because lung scarring occurs as a result of the body's response to individual retained fibers, and the damage caused by railroad exposure is separate even if unobservable, asbestosis is a divisible injury for which damages can and should be apportioned by cause.

1. Respondents' claim that the jury was properly instructed to award damages for fear of cancer as "pain and suffering," JA 573, is insupportable. As this Court has recognized, this term refers to distress "'stemming directly from,'" or "directly brought about by a physical injury." *Consol. Rail Corp.* v. *Gottshall*, 512 U.S. 532, 544 (1994). Pain and suffering was the earliest form of mental anguish for which the common law permitted recovery because of the indivisibility of mental pain and suffering, Pet'r Br. 14-15, and encompasses anguish that is "'the outgrowth or result of the physical suffering.'" C. McCormick, *Handbook on the Law of Damages* § 88, at 315 n.3 (1935). Accordingly, this Court in the era of FELA's enactment rejected a challenge to a jury instruction allowing damages for mental suffering because the instruction properly limited them to those that were "a direct and necessary consequence of the physical injury."

McDermott v. *Severe*, 202 U.S. 600, 611 (1906); *Kennon* v. *Gilmer*, 131 U.S. 22, 26-28 (1889). This is still the accepted understanding. *Gottshall*, 512 U.S. at 544; D. Dobbs, *The Law of Torts* § 311, at 844 (2000); *Potter* v. *Firestone Tire & Rubber Co.*, 863 P.2d 795, 805, 807-08 (Cal. 1993).

Respondents and their *amici* do not dispute that there is no accepted medical evidence that lung cancer—much less mesothelioma (a cancer of the pleura or peritoneum, not the lung tissue)—results from, or is a complication of, asbestosis. Resp'ts Br. 13; Pet'r Br. 2-3; U.S. Br. 11-12. Fear of cancer is thus not compensable as pain and suffering from asbestosis. Respondents' dog-bite cases are readily distinguishable. Tetanus (lockjaw) and hydrophobia (rabies) both result from the wound.[1] Similarly, no reliance can be placed on cases permitting damages for fear of cancers that are complications of the physical injury (such as radiation burns). *E.g.*, *Anderson* v. *Welding Testing Lab., Inc.*, 304 So. 2d 351, 354 (La. 1974). See *Barron* v. *Martin-Marietta Corp.*, 868 F. Supp. 1203, 1212 (N.D. Cal. 1994) (a physical injury permits fear of cancer damages only "where there is a verifiable causal nexus between the injury and developing cancer").

Respondents point to the second clause of section 456(a) of the *Restatement (Second) of Torts* (1965) ("*Restatement (Second)*"), which declares that a person who has suffered compensable bodily harm may recover for "fright, shock, or other emotional disturbance resulting from the bodily harm *or from the conduct which causes it*" (emphasis added). But this second clause (italicized above) refers not to pain-and-suffering damages, but to the traditional "physical impact" rule. *Id.* cmts. d, e; *Beynon* v. *Montgomery Cablevision Ltd.*

[1] *See American Heritage College Dictionary* 1124, 1402 (3d ed. 1997) (tetanus is caused by a bacterial toxin "which typically infects the body through a deep wound"; rabies is "transmitted by the bite of infected animals"). Respondents' cases allow damages for disease fears "'occasioned by the bite.'" *Buck* v. *Brady*, 73 A. 277, 279 (Md. 1909); *Ayers* v. *Macoughtry*, 117 P. 1088, 1090 (Okla. 1911); *Godeau* v. *Blood*, 52 Vt. 251, 251 (1880); *Heintz* v. *Caldwell*, 9 Ohio Cir. Dec. 412, 412 (1898).

P'ship, 718 A.2d 1161, 1166-67, 1184-85 (Md. 1998); *cf. Gottshall*, 512 U.S. at 547 (noting that the impact rule applies to emotional distress that is "contemporaneously sustained" with "injury" or physical contact); *Nelson* v. *Metro-N. Commuter R.R.*, 235 F.3d 101, 107, 108 n.6, 110 (2d Cir. 2000) (Calabresi, J.) (noting that "[a]s originally formulated, the physical impact rule required a physical *injury*," and that *Metro-North Commuter Railroad* v. *Buckley*, 521 U.S. 424, 437 (1997), correctly "restated the traditional rule that an event cannot constitute a physical impact, even if it entails contact, unless it has a physically harmful effect on the body").

Respondents cannot find shelter under the "physical impact" rule. This rule addresses emotional injury from immediately traumatizing conduct that is coincident with (and not derived from) compensable physical injury. See *Buckley*, 521 U.S. 424 at 430-31 (citing cases requiring actual or threatened "immediate traumatic harm"). That is evident from the commentary upon *Restatement (Second)* section 456. Comment d states that the rule gives recovery for "*immediate* emotional disturbance accompanying the bodily harm, or following *at once* from it" in addition to pain and suffering (*i.e.*, the "subsequent emotional disturbance brought about by the bodily harm itself"). *Id.* § 456 cmt. d (emphasis added). The lone example in the Restatement of emotional injury recoverable under the physical impact rule is fright in anticipation of immediate trauma. *Id.* § 456 cmt. e. ("one who is struck by a negligently driven automobile and suffers a broken leg may recover not only for his pain, grief, or worry resulting from the broken leg, but also for his fright at seeing the car about to hit him"). Indeed, when pain and suffering (which need not arise immediately, *id.* § 456 cmt. d) is excluded, the "fright, shock, or other emotional … disturbance" compensable under section 456(a) is the same as the "fright, shock, or other immediate emotional disturbance" compensable under section 436(2) when there is only a risk of

physical injury. *Id.* § 436(2). "[T]he emotional disturbance must be the immediate result of the actor's negligent conduct," and "[s]ubsequent brooding over the actor's misconduct or the danger in which it had put the other is not enough to make the negligent actor liable for an illness so brought on." *Id.* § 436 cmt. c.[2] See Pet'r Br. 20-22.

Because respondents cannot satisfy the immediacy requirement of the common law, respondents seek a dramatic extension of the physical impact rule, not the application of settled tort principles, as they claim. See *Nutt* v. *A.C. & S., Inc.*, 466 A.2d 18, 25 (Del. Super. Ct. 1983) (the "nature of the asbestos related injury … is clearly incompatible with the traumatic event requirement for recovery of mental anguish"), *aff'd*, 480 A.2d 647 (Del. 1984). Petitioner's failure to warn of the dangers of asbestos in the 1940s to 1970s was not a harrowing experience for respondents that struck fear in their hearts. Respondents are not claiming fright experienced from dangerous conduct, but rather concern about cancer from asbestos exposure, JA 116-17, 255, 277, 298-99, 331-32, appearing decades after the conduct. That apprehension is based only on after-acquired information and perceived

[2] It has never been the rule that any physical injury caused by a defendant's negligence permits unfettered recovery of all emotional distress connected to the conduct. Thus, in *McMahon* v. *Bergeson*, an accident case where the emotional distress did not arise from the physical injury or from the collision itself, the court denied recovery even though "[t]here is no question that the plaintiff did suffer physical injury"; the court held that "the same rule of damages [must] be applied as in the cases in which recovery is allowed for emotional distress alone." 101 N.W.2d 63, 71-72 (Wis. 1960). Indeed, respondents' proposed rule—that any physical injury, no matter how remote in time, permits recovery of all emotional injury causally linked to the defendant's negligence—would swallow *Gottshall*'s zone-of-danger rule, as a number of courts have ruled. *See Smith* v. *Union Pac. R.R.*, 236 F.3d 1168, 1171-72 (10th Cir. 2000); *Szymanski* v. *Columbia Transp. Co.*, 154 F.3d 591, 594 (6th Cir. 1998) (rejecting argument that Jones Act plaintiff's non-immediate heart attack made *Gottshall*'s zone-of-danger test inapplicable); *Capriotti* v. *Consol. Rail Corp.*, 878 F. Supp. 429, 432-33 (N.D.N.Y. 1995) (same for exacerbation of heart condition).

statistical risks of contracting distinct diseases (lung cancer and mesothelioma) based on extrapolations from risk-factor studies of unrelated occupational groups. Indeed, respondents' proposed rule is boundless. If the physical impact rule applied beyond immediate trauma, *any* asbestos-related physical injury—such as asbestos pleural disease, *cf. Sheppard* v. *A.C. & S. Co.*, 498 A.2d 1126, 1128 n.3 (Del. Super. Ct. 1985), *aff'd*, 503 A.2d 192 (Del. 1986)—would open the door for unrestricted jury discretion in awarding fear-of-cancer damages. Even more absurdly, because section 456(a) allows recovery for "pre-impact fright," *Beynon*, 718 A.2d at 1184-85; *Restatement (Second)* § 456 cmt. e, respondents' proposed rule would allow a plaintiff who develops any asbestos disease to recover decades worth of "fear of cancer" dating back to exposure—the very recovery denied in *Buckley*. Asbestosis does not materially distinguish respondents from heavily exposed plaintiffs like the one in *Buckley*, 521 U.S. at 427. Such plaintiffs have a certain risk of asbestosis and lung cancer, *id.*; having proven asbestosis, respondents are simply claiming a different statistical risk of lung cancer.

Furthermore, the rationale for allowing recovery of emotional injury coincident with physical injury is the single-action rule. W. Hale, *Handbook on the Law of Damages* §§ 33, 40-41 (R. Cooley ed., 2d ed. 1912). Courts, however, generally have abandoned the single-action rule in asbestos cases, allowing recovery in separate lawsuits at different times for different harms. See *Wilson* v. *Johns-Manville Sales Corp.*, 684 F.2d 111, 120-21 (D.C. Cir. 1982) (Ginsburg, J.). Thus, even if damages for statistically derived fear of cancer were permissible under FELA, no inexorable rule of tort law requires that such damages be awarded in an action to recover for asbestosis. "If cancer later develops, a plaintiff can bring a second action to recover for the cancer and all of the past, present and future emotional distress or mental anguish associated with the cancer, including fear of contracting cancer." *Cleveland* v. *Johns-Manville Corp.*, 690

A.2d 1146, 1150 n.10 (Pa. 1997); *Sopha* v. *Owens-Corning Fiberglas Corp.*, 601 N.W.2d 627, 635 (Wis. 1999).

Given that respondents did not "contemporaneously sustain[]" both injury and fear of cancer from petitioner's conduct, *Gottshall*, 512 U.S. at 547, the physical-impact prong of *Restatement (Second)* section 456(a) is wholly inapplicable. Respondents' development of a slowly progressive disease that becomes manifest after a long latency period is not a "physical impact." Nor were respondents at "immediate risk" of physical impact. 512 U.S. at 547-48. Thus, fear-of-cancer claims are not compensable as pain and suffering "resulting from the bodily harm" of asbestosis, *Restatement (Second)* § 456(a), or under the independent tort of negligent infliction of emotional distress. But even if this Court were to expand the concept of "zone of danger" to fears of a disease for which the physical injury is a statistical risk factor, respondents still could not recover. Under the zone of danger test, even FELA plaintiffs with asbestosis must show physical or other objective manifestations of severe emotional distress. *Jones* v. *CSX Transp.*, 287 F.3d 1341, 1342 n.1, 1348 (11th Cir. 2002); Pet'r Br. 26-31; U.S. Br. 23-26.

Respondents' proposed broadening of the physical impact rule to encompass statistical-risk fears is particularly unwarranted given the nature of asbestos litigation and the underlying epidemiology. Respondents understandably do not confront the shaky foundations of their claims, and their *amici* mischaracterize petitioner's arguments. Petitioner does not dispute that asbestosis can be "a clinically serious, often disabling, and progressive disease." APHA Br. 3-4. Rather, petitioner has made the uncontroversial point that "[t]here may be great difficulty … in diagnosing the disease in its early stages." R. Doll & J. Peto, *Effects on Health of Exposure to Asbestos* 2 (1985); Pet'r Br. 3-5. The ATS guidelines themselves warn of the substantial risk of diagnostic error when there are partial and mild symptoms, for the markers of asbestosis are not specific to the disease.

Resp'ts Br. A7, A14-21. These uncertainties are exploited in litigation, and few claimants are found to have asbestosis when subject to independent medical scrutiny.[3]

Respondents here claimed "mixed dust pneumoconiosis" or asbestosis, *e.g.*, JA 224-25, 194, 200, based on partial, mild and disputable symptoms with many possible causes. The diagnosis of asbestosis depended almost entirely on the respondent's subjective account of his exposure. Indeed, respondents' expert found such a condition even when the x-ray evidence was *inconsistent* with asbestosis, solely because a respondent said that he had asbestos exposure. Pet'r Br. 7. Even if such uncertain proof is enough to sustain a liability verdict for physical injury, it militates strongly against the broad expansion of the physical impact rule respondents seek.

The epidemiology also does not support this expanded recovery. Petitioner has never contended that "a diagnosis of

[3] R. Reger et al., *Cases of Alleged Asbestos-Related Disease: A Radiologic Re-Evaluation*, 32 J. Occ. Med., 1088, 1089 (1990); C. Rubin & L. Ringenbach, *The Use of Court Experts In Asbestos Litigation*, 137 F.R.D. 35, 39-40 (1991). Such claims are proliferating against railroads far beyond any reasonable expectation. Because asymptomatic pleural plaques do not constitute physical injury, *Simmons* v. *Pacor, Inc.*, 674 A.2d 232, 236-38 (Pa. 1996), and thus are not actionable under FELA, 45 U.S.C. § 51, FELA plaintiffs without pleural disease who allege asbestos-related injury generally must at least prove asbestosis to prevail. The federal government reports only 8 asbestosis deaths per year (1987-1996) among workers whose principal occupation was railroad worker; the proportionate mortality ratio of railroad workers from asbestosis (versus a standard population) is only 2.8, compared to 192 among insulation workers, 34 for shipbuilders, and 20 for plumbers and pipefitters. National Inst. for Occupational Safety & Health, *Work-Related Lung Disease Surveillance Report* 20-22 tbls. 1.8, 1.9 (1999). Although this data is incomplete and does not capture nonfatal asbestosis, it suggests a comparatively low incidence of asbestosis (and certainly serious asbestosis) among railway workers. Yet over 5,500 asbestos-injury claims have been filed in West Virginia alone against railroads that have operated in that state. Brief of *Amicus Curiae* Association of American Railroads, at 2, *Mobil Corp.* v. *Adkins*, No. 02-132 (U.S. filed Aug. 28, 2002).

asbestosis is irrelevant to any asbestos-related increased risk of cancer and that an increased risk is actually speculative, controversial and uncertain." APHA Br. 12. Petitioner's point is that the epidemiological risk determinations, based on studies of heavily exposed asbestos workers from different occupations, cannot validly support any quantification of the cancer risks of railway workers, asbestotic or not, and fear-of-cancer claims, which are inevitably based on such studies, should not be cognizable under FELA.

Respondents blithely assert as a categorical truth that "10 percent of individuals with asbestosis contract mesothelioma[,] [and] 39 percent of those with asbestosis who also smoke contract fatal lung cancer, while the rate for nonsmokers with asbestosis is 2-5 percent." Resp'ts Br. 20. There is absolutely no scientific basis for generalizing these results to respondents, or indeed, any railway worker. The cited study reports the cause of death for certain heavily exposed British workers (largely insulation workers) who had previously been certified by Pneumoconiosis Medical Panels as having disabling asbestosis; the extent of disability was the leading predictor of cancer mortality. G. Berry, *Mortality of Workers Certified by Pneumoconiosis Medical Panels As Having Asbestosis*, 38 Brit. J. Indus. Med. 130, 135 (1981). Asbestosis is not regarded as a risk factor for mesothelioma, which is not a lung-tissue cancer. See J. Hughes & H. Weill, *Asbestosis As a Precursor of Asbestos Related Lung Cancer*, 48 Brit. J. Indus. Med. 229, 229 (1991).

Moreover, respondents' claim violates the basic tenet that risk estimates from a cohort study cannot safely be extrapolated to individuals in different populations with different exposures that will affect population risk. See D. Kaye & D. Freedman, *Reference Guide on Statistics* 96 & n.38, *in Reference Manual on Scientific Evidence* (2d ed. 2000). The definitive studies in the field (unquestioned by respondents and their *amici*) show a wide variance in cancer risks across different occupational groups, Pet'r Br. 23-24 &

n.18, and there is no basis for the claim that railway workers face the same risks as more heavily exposed insulation workers, asbestos factory workers, and asbestos miners. F. Liddell & J. McDonald, *Radiological Findings as Predictors of Mortality in Quebec Asbestos Workers*, 37 Brit. J. Indus. Med. 257, 266 (1980) ("These conclusions may not apply to other types of asbestos fibre or industrial exposure where the risks of cancer, relative to fibrosis, differ ….").[4] Notably, the studies (ignored by respondents and their *amici*) that have systematically assessed lung cancer rates among railroad

[4] *See* D. Henderson et al., *Asbestos And Lung Cancer: Is It Attributable to Asbestosis or to Asbestos Fiber Burden*, *in Pathology of Lung Cancer* 83, 83 (B. Corrin ed. 1997) (discussing studies and noting that lung cancer risk "appears to increase with the severity of the pulmonary fibrosis and hence with the inhaled dose of asbestos") (footnotes omitted). Aside from the extrapolation error, it is a fallacy to claim that testimony that respondents have "mixed dust pneumoconiosis" or asbestosis means that all asbestotic study results apply to them and provide a basis for quantification of their personal risk (which is the critical question, given the high background rates of cancer in the general American population, Pet'r Br. 23). In some studies, the determinations were based on tissue analyses from autopsies. G. Sluis-Cremer & B. Bezuidenhout, *Relations Between Asbestosis and Bronchial Cancer in Amphibole Asbestos Miners*, 46 Brit. J. Indus. Med. 537, 537 (1991); R. Doll, *Mortality from Lung Cancer in Asbestos Workers*, 12 Brit. J. Indus. Med. 81, 81 (1955). Moreover, the studies that are based on systematic, disinterested x-ray readings report excess cancer risks for the *entire* study subpopulation with x-ray abnormalities, which are often dominated by individuals with high degrees of abnormality. *See*, *e.g.*, H. Kipen, *Pulmonary Fibrosis in Asbestos Insulation Workers with Lung Cancer: A Radiological and Histopathological Evaluation*, 44 Brit. J. Indus. Med. 96, 97-99 (1987); W. Cookson et al., *Compensation, Radiographic Changes, and Survival in Applicants for Asbestosis Compensation*, 42 Brit. J. Indus. Med. 461, 464 (1985); Liddell & McDonald, *supra*, at 264. Those risk calculations *do not* represent the actual risks of the respondents with the slightest x-ray abnormalities (1/0 and 1/1 ratings). Moreover, even deriving individual risk estimates from reported "relative risk" in such studies is unwarranted. *See* G. Taubes, *Epidemiology Faces Its Limits*, Science, July 1995, at 164; Kaye & Freedman, *supra*, at 96 n.38.

workers have found no overall increased risk of this cancer.[5] The risks of railway workers with mild mixed-dust pneumoconiosis or asbestosis are not known. In any event, the epidemiological studies of asbestotics do not create jury questions as to the reasonableness of a particular plaintiff's fear, as respondents claim. All FELA fear-of-cancer claims are necessarily based solely on risk extrapolations from these studies, however summarily conveyed to the plaintiff by a lawyer or more rarely a doctor. It is for this Court to decide as a matter of law whether the physical impact rule should be extended to allow fear-of-cancer damages on such bases.

This Court looks to the damages rule that is most consonant with FELA. *Monessen S.W. Ry.* v. *Morgan*, 486 U.S. 330, 337-39 (1988) (denying prejudgment interest damages); *Mich. Cent. R.R.* v. *Vreeland*, 227 U.S. 59, 73-74 (1913) (denying loss of consortium damages); *Buckley*, 521 U.S. at 444 (denying lump-sum medical monitoring damages). In so doing, this Court "must consider the general impact, on workers as well as employers, of the general liability rules they would thereby create." 521 U.S. at 438. Here, the Court must also bear in mind that "[t]ranslating pain and anguish into dollars can, at best, be only an arbitrary allowance, and not a process of measurement." McCormick, *supra*, § 88, at 318. Given the rapid acceleration of asbestos claims, allowing juries unrestricted power to award emotional damages for the specter of deadly cancer plaintiffs may never contract would create just the "unlimited and unpredictable liability" the law has always resisted, *Gottshall*, 512 U.S. at 557, and "diminish the likelihood of recovery by those who later suffer from the disease," *Buckley*, 521 U.S. at 435-36.

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[5] Pet'r Br. 23-24 & n.18. Respondents' emphasis on asbestos exposure during locomotive overhaul, Resp'ts Br. 1-2, is ironic. None of them ever worked in central overhaul facilities, and only one was "directly involved" in stripping or applying asbestos to steam engines for a short time. *Id.* at 5 n.3; JA 360-64. The others principally predicate their claim on occasionally working in or around roundhouses (like vast numbers of rail workers) where they claimed sporadic exposure. Resp'ts Br. 5 n.3.

It is clear that "fear of cancer" based on statistical risk factors is not compensable under traditional common law principles and should not be compensable under FELA. This Court should not eliminate the immediacy requirement from the physical-impact rule, and should not allow any cancer-related distress damages unless the plaintiff has cancer. *Cleveland*, 690 A.2d at 1150 n.10. Alternatively, this Court should adopt the rule that an asbestotic may not recover for fear of cancer unless it is more probable than not that cancer will develop. *Watson* v. *Norfolk & W. Ry.*, 507 N.E.2d 468, 471-72 (Ohio Ct. App. 1987) (FELA). Other courts have adopted this rule when the fear is predicated on exposure which, like asbestosis, is similarly just a risk factor for cancer.[6] Respondents cannot make this showing. JA 573; Resp'ts Br. 8. Finally, because the claimed damages are novel and the risk of error is high, if this Court were to allow their recovery, it should do so only upon the traditional showing of severe emotional injury corroborated by physical or other objective manifestations. Pet'r Br. 16-31. Respondents also cannot make this showing. *Id.* at 8-9, 31. In all events, this Court should not grant juries the ruinous and unbounded power to award massive verdicts for cancer fears on the kind of evidence presented by these respondents.

2. Section 1 of FELA provides that "[e]very common carrier by railroad while engaging in [interstate] commerce . . . shall be liable in damages to any person *suffering injury while he is employed by such carrier in such commerce*." 45 U.S.C. § 51 (emphasis added). Where there are independent causes outside of railroad employment of a plaintiff's injury, the injury must be apportioned by causal contribution on any practicable basis, and the railroad may be held liable only for the injury it caused. That was the

[6] *Potter*, 863 P.2d at 816; *Doner* v. *Ed Adams Contacting., Inc.*, 617 N.Y.S.2d 565, 565 (N.Y. App. Div. 1994); *Barron*, 868 F. Supp. at 1212; AIA Br. 20-24.

common-law rule at the time of FELA's enactment, Pet'r Br. 35-39, and it is the rule now, *id.* at 40-42.

Respondents argue that the common law in 1908 was muddled, quoting Judge Cooley to claim that there was "'considerable difference of opinion' in 1908 concerning the precise scope of joint and several liability." Resp'ts Br. 41. But Cooley was discussing the judicial divide over whether joint and several liability was limited to actors in concert or with common design or duty, or extended to circumstances "where the negligences of two or more persons concur in producing a single, indivisible injury." 1 T. Cooley, *A Treatise on the Law of Torts* 247 (J. Lewis ed., 3d ed. 1906). Petitioner has acknowledged that several liability was not the rule in 1908 for concurrent tortfeasors causing indivisible injury, Pet'r Br. 35-36 & n.29, but this is not such a case. Our position is that "the dominant rule" of the common law in 1908 was "several liability, where an injury was caused by successive independent causes." *Id.* at 32. Respondents and their *amici* do not muster a single case to the contrary. Prosser confirms that this was the prevailing and just rule at common law:

> The injuries inflicted may be severable in point of time. If two defendants, independently operating the same plant, pollute a stream over successive periods, it is clear that each has caused separate damage, limited in time, and that neither has any responsibility for the acts of the other. *The same may be true where a workman's health is impaired through the negligence of successive employers*, or where there are successive assaults upon the plaintiff. In such cases there is available a logical basis for the apportionment of the loss …. It is possible to say, in theory at least, where one defendant's wrong left off and the other's began. As a practical matter, it may be difficult or impossible to produce satisfactory evidence as to the extent of the damages caused by each;

> but this is no sufficient reason for holding a defendant liable for damages with which he had no connection.

W. Prosser, *Joint Torts and Several Liability*, 25 Cal. L. Rev. 413, 434-35 (1937) (emphasis added and footnotes omitted).[7]

In *McGannon* v. *Chicago & Northwest Railway*, recognized by Prosser and others as a leading case demonstrative of the general rule,[8] the Minnesota Supreme Court refused to hold successive railroad employers jointly liable for a worker's cumulative lung injury suffered from the inhalation of fine dusts during the course of his employment with each. 199 N.W. 894, 894 (Minn. 1924). *Amici* "American Law Professors" note that *McGannon* is a joinder case, and claim that Petitioner (and presumably Prosser) have "confus[ed]" the concepts of joint and several liability and joinder. Profs. Br. 3-4 & n.1. The confusion is theirs. Petitioner has never contended that joint and several liability was coextensive with joinder; it argued the converse, which is true, that there could be no joinder if liability were not joint. Pet'r Br. 37. *McGannon*, distinguishing concurrent tortfeasor cases, expressly holds that there is no joinder because there is no

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[7] Cooley himself recognized that in the cases most analogous here—where multiple tortfeasors separately release pollution—their actions are to be treated separately, and damages must be apportioned between them. Cooley, *supra,* at 250-52 & n.25. Respondents rely on cases that apply joint and several liability where there are "successive" tortfeasors in a single chain of events leading to injury (typically collision cases). Resp'ts Br. 41 & n.25; Profs. Br. 9-11. However, as Prosser states, these are subject to a different rule than successive torts severable in time. Prosser, *Joint Torts*, at 432-33; *see also Restatement (Second)* § 433A cmt. i.

[8] Prosser, *Joint Torts*, at 434 n.139; R. Jackson, *Joint Torts and Several Liability*, 17 Tex. L. Rev. 399, 419-20 & n.91 (1939); G. Boston, *Apportionment of Harm in Tort Law: A Proposed Restatement,* 21 U. Dayton L. Rev. 267, 282 (1996) (the "classic cases" for apportioning harms by severability in time "involve separate batteries inflicted on a plaintiff or impairment of an employee's health by toxic exposure from successive employers").

liability for the successive negligence of another.[9] Regardless of whether the tort involved injury to person or to property, courts uniformly recognized that defendants should not be held liable for harms they did not cause. Pet'r Br. 36-37; *Albrecht* v. *St. Hedwig's Roman Catholic Benevolent Soc'y*, 171 N.W. 461, 462 (Mich. 1919) (assaults separate in time do not give rise to joint liability simply "because the amount of damages done by each of the claimed assailants cannot be separated," and distinguishing concurrent tortfeasor liability). Because plaintiffs bore the burden of proving injury caused by the defendant, that often meant that the plaintiff had no recovery. *Restatement (Third) of Torts: Apportionment of Damages* § 26 cmt. h, rptr's note cmt. h (2000) ("*Restatement (Third)*"). To mitigate that burden, courts reduced the burden of production, and liberally apportioned damages based on relative causal contributions on any available evidence. Pet'r Br. 37-39 & nn.31-32; *Restatement (Second)* § 433A cmt. d, illus. 4-5; *id.* § 881 illus. 1-2.

Apportionment is also the modern rule. Harms must be apportioned when they are "divisible"—*i.e.*, when "there is a reasonable basis for determining the contribution of each cause to a single harm." *Restatement (Second)* § 433A(1)(b); *Restatement (Third)* § 26. In particular, modern authorities continue to recognize that harms "may be conveniently severable in point of time" and that when actors "cause[] a separate amount of harm, limited in time," then "neither has any responsibility for the harm caused by the other."

[9] "The railway company could not be liable for negligence in the operation of the system during that time [the previous employment] any more than could the Director General be held liable for acts occurring subsequently while the company was in control." 199 N.W. at 894. The professors weakly try to limit *McGannon* by postulating that the court must have assumed that there were two separate injuries. Profs. Br. 4 n.1. To the contrary, the court recognized that it was a single lung injury "aggravated" by the subsequent tort. 199 N.W. at 894. *Amici* are likewise wrong that the other cases cited in petitioner's opening brief concern only joinder; they clearly concern substantive liability. *See* Pet'r Br. 35 n.28.

Restatement (Second) § 433A cmt. c; 4 F. Harper et al., *The Law of Torts* § 20.3, at 122 (2d ed. 1986); W. Keeton et al., *Prosser & Keeton on the Law of Torts* § 52, at 352 (5th ed. 1984) ("*Prosser on Torts* (5th ed.)"); *Restatement (Third)* § 26 rptr's note cmt. f. Divisibility is a question of fact for the jury. *Id.* cmts. f, h.

Notwithstanding these settled principles, respondents flatly proclaim a *per se* rule that asbestosis is "quintessentially an 'indivisible' personal injury under longstanding and contemporary tort principles." Resp'ts Br. 43.[10] To the contrary, courts have apportioned asbestos-related injuries, see Pet'r Br. 42 n.36, and the *Restatement (Third)* specifically discusses asbestosis cases as an example of an "enhanced-injury case" which "requires causal division between the plaintiff's original damages and the enhanced damages." *Restatement (Third)* § 26 rptr's note cmt a. Professor Boston, whose analysis is praised by the Restatement reporters, *id.*, also recognizes asbestos-related disease (including cancer) as apportionable. Boston, *supra*, at 313-14, 328-34. Respondents rely heavily on the recognition that single physical injuries may "normally" be indivisible, *Restatement (Second)* § 433A cmt. i, but that principle is neither immutable nor applicable here. It developed at common law in "single wound" cases—involving a broken leg, for instance, where there is one snap of the bone, and causal apportionment is impossible. *Id.* But "[i]n personal-injury cases, determining whether damages are indivisible or divisible depends on careful attention to the facts and the nature of the damages." *Restatement (Third)* § 26 rptr's note cmt. l.

All dose-related diseases are apportionable, and asbestosis in particular is clearly an injury capable of division by cause. As respondents admit, asbestosis is diagnosed when the

[10] Respondents cite only two cases in support of this proposition, one of which simply concludes that insufficient evidence was put forward in that case for damages to be divided. *Owens Corning Fiberglas Corp.* v. *Parrish*, 58 S.W.3d 467, 476-77 & n.27 (Ky. 2001).

cumulative scarring of the lung tissue progresses to the point where breathing functions are impaired (often approximately a third of the lung). Resp'ts Br. 2-3. The key insight is that, as respondents' expert testified, scarring occurs because of the body's reaction to individual retained fibers that are not expelled by the lung's clearance mechanisms. Tr. III, 91-115 (Apr. 15, 1998). The lung tissue is injured "by direct action of the fiber on cells or through the mediation of factors released from activated macrophages." D. Riley, *Pulmonary Connective Tissue in Occupational Lung Disease, in Occupational Lung Disease* 1, 14-15 (J. Gee ed. 1984) (footnote omitted). Macrophages are defensive cells in the lung that attempt unsuccessfully to ingest the fiber as a foreign body (a process known as phagocytosis), stimulating a host of chemical reactions that lead to fibrosis (scarring). *Id.*; W. Parkes, *Occupational Lung Disorders* 427-29 (3d ed. 1994). While the cumulative fibrosis from all sources must progress to the point of asbestosis in order for there to be actionable "injury" under FELA, cf. *Urie* v. *Thompson*, 337 U.S. 163, 169-71 (1949) (silicosis),[11] it is clear that the railroad has only caused the scarring that occurs around the fibers retained from the railroad exposure. The railroad has not caused the scarring caused by the fibers that were deposited in Butler's lungs from his thirty-three years as a pipefitter, or in the decades Ayers spent as an auto mechanic. Because the railroad has "caused a separate amount of harm, limited in time," it has no "responsibility for the harm caused by the other." *Restatement (Second)* § 433A cmt. c. To be sure, the fibers and the scarring from railroad exposure cannot be observed, no more than can the effects of separate pollution in a toxic lake. But that is "no sufficient reason for holding a defendant liable for damages with which he had no connection." Prosser, *Joint Torts* at 434-35.

[11] Contrary to the claims of respondents' *amici*, *Urie* concerns only the accrual of injury for purposes of the statute of limitations, and says nothing about divisibility. 337 U.S. at 169-71.

The record below clearly provides "a factual basis … for some rough practical apportionment," which is all the common law has ever demanded. *Prosser on Torts* § 52, at 345 (5th ed.); Pet'r Br. 39-45.[12] Respondents' intimation that petitioner did not create an adequate record or properly raise the issue is baseless. Resp'ts Br. 45-46. Petitioner cross-examined Butler and Ayers at length not only about their time of outside employment, but also about the nature of their asbestos exposures there, which the jury would have been free to consider. JA 256-61, 274-75; see also *id.* at 182-83, 201-05. Petitioner filed motions on apportionment, and proposed jury instructions and verdict forms permitting the jury to apportion between railroad and outside employment; the court denied these requests and instructed the jury not to consider nonrailroad exposures. *Id.* at 526-38, 539, 549-60, 568-70.

Nothing supports respondents' claims that petitioner had to provide evidence from outside employment of factors that have been scientifically found to be correlated with asbestos injury, such as fiber type or intensity or duration of exposure. Resp'ts Br. 46. Indeed, courts have not held the plaintiff to such proof in establishing causation. Apportionment has never required greater proof than causation, and Prosser notes that "courts necessarily have been very liberal in awarding damages where the uncertainty as to their extent results from the nature of the wrong itself," Prosser, *Joint Torts* at 438-39:

> All of these cases point rather definitely to the conclusion that the test of entire liability is the absence of any logical basis for apportionment of the damages. If any such basis exists, and the court can say definitely that separate portions of the loss are to be attributed to each individual defendant, then neither is liable for what the other has caused. Difficulty of proof does not

[12] *See also Restatement (Third)* § 26 rptr's note cmt. h, at 333-34; *Prosser on Torts* § 52, at 350 (5th ed.) ("The difficulty of any complete and exact proof … has not been regarded as sufficient justification for entire liability."); Hale, *supra*, § 31, at 100; Pet'r Br. 36-39 & nn.31-32.

> impose liability upon either, but it is met to some extent by giving the jury a comparatively free hand.

Id. at 439. The evidence here was more than sufficient to permit apportionment. Indeed, respondents' counsel acknowledged that it was "common sense" that time of exposure is correlated with relative contribution to disease. *Id.* at 476. Respondents' expert testified on that basis that Butler's railroad exposure was a "minimal factor" in the development of his disease, and that Ayers' railroad and outside exposures were "equivalent" in their heaviness and significance. JA 195, 205, 228, 236-37. A jury could also consider, for example, that Butler's asbestosis risks were greatly increased by his work as a pipefitter. *Supra* n.3. The trial court erred in not permitting apportionment by cause.

3. Respondents alternatively contend that this Court's causation decisions in *Coray* v. *Southern Pacific Co.*, 335 U.S. 520 (1949), and *Rogers* v. *Missouri Pacific Railroad,* 352 U.S. 500, 506 (1957), somehow abrogate the doctrine of apportionment. Resp'ts Br. 34-36. They did nothing of the kind. The longstanding rule of causation under FELA before and after those decisions is proximate cause. *Carter* v. *Atlanta & St. Andrews Bay Ry.*, 338 U.S. 430, 435 (1949) ("We made clear in *Coray* … that if the jury determines that the defendant's breach is 'a contributory proximate cause' of injury, it may find for the plaintiff.").[13] As respondents recognize, *Rogers* "reversed a state court ruling that had construed FELA to impose a test of causation under which the railroad defendant's negligence had to be 'the sole, efficient, producing cause of injury.'" Resp'ts Br. 34. Relying on

[13] *See also Brady* v. *S. Ry.*, 320 U.S. 476, 483 (1943); 2 M. Roberts, *Federal Liability of Carriers* § 871, at 1698-1701 & n.9; *id.* § 872, at 1705 & nn.15-16 (1929) (citing cases). To remove the common-law requirement of proximate cause would render FELA a workers' compensation scheme (a result that this Court has rejected, *Buckley*, 521 U.S. at 429), and would lead to absurd results—rendering a railroad liable for an employee's entire asbestos-related damages if the employee had one day of railroad exposure.

FELA's "in whole or in part" language, 45 U.S.C. § 51, *Rogers* held that "the test of a jury case is simply whether … employer negligence played any part, even the slightest, in producing the injury or death for which damages are sought." 352 U.S. at 506; 2 Roberts, *supra*, § 873, at 1706 ("in whole or in part" "means only that the negligent act charged to the carrier must be one of the proximate causes of the injury"). *Coray* and *Rogers* establish a "relaxed standard of causation," *Gottshall*, 512 U.S. at 543, that prevents courts from removing cases from juries based on restrictive rules of proximate causation.[14] But a jury still must find the essential element of any proximate cause rule: *i.e.*, that the railroad's negligent exposure of the plaintiff to asbestos was a "substantial factor" in his development of disease. *Restatement (Second)* § 431(a); Pet'r Br. 48 n.45.

Regardless, the rule for establishing legal causation does not affect apportionment. Legal causation is established, *Restatement (Second)* §§ 431-433, then the injury is apportioned among causes, *id.* § 433A. Indeed, respondents concede that *Rogers* does not address the scope of damages recoverable against the railroad. Resp'ts Br. 35. Respondents make the puzzling claim that there is a "virtual absence in almost a century of FELA litigation" of any decision apportioning injury by cause. *Id.* at 36. But apportionment has always been applied under FELA, for example, to pre-existing conditions. Pet'r Br. 34; *Restatement (Second)* § 433A cmt. e. Indeed, respondents' own *amicus* concedes that damages should be apportioned here on the same principle. UTU Br. 4-5. Finally, as a matter of text, apportionment is driven by the limitation that a railroad employer is liable only for injuries that an employee suffers "while he is employed by such carrier." 45 U.S.C. § 51. A railroad is liable only for damages arising from railroad employment that its negligence

[14] Indeed, it is this disjunction of the rules under federal and state law that undermines respondents' claim that contribution actions under state law are an adequate substitute for apportionment. *See* Pet'r Br. 47.

caused, and not for damages suffered by an employee outside of railroad employment.[15] Thus, where there are multiple causes, a plaintiff must prove that the railroad exposure was a "substantial factor" in causing asbestos-related injury: *i.e.*, that the railroad's negligence was "sufficient to bring about harm to another." *Restatement (Second)* §§ 431(a), 432, 433. If it is, then the harm must still be apportioned among all causes, innocent or tortious, on any "reasonable basis." *Id.* § 433A(1)(b); *Restatement (Third)* § 26.

Finally, to the extent respondents' injuries are attributable to railroad employment, damages also should be apportioned by fault relative to the asbestos manufacturers, who bear the principal responsibility even for railroad injury. JA 131. This Court should not adhere to a rule of pure joint and several liability that has been abandoned in all but 14 states. Pet'r Br. 42-43. In an age where the progress of the common law is dominated by statutes, G. Calabresi, *A Common Law for Our Age of Statutes* (1982), nothing prohibits this Court from taking legislative changes into account, *Moragne* v. *States Marine Lines, Inc.*, 398 U.S. 375, 389-92 (1970). Comparative fault must already be determined relative to plaintiffs, 45 U.S.C. § 53, and to settling joint tortfeasors, *McDermott, Inc.* v. *AmClyde*, 511 U.S. 202 (1994), and nothing in FELA prevents the Court from adopting similar principles as to liability. The jury should have been instructed to apportion damages on this basis as well.

[15] *See* 42 Cong. Rec. 4536 (1908) (Remarks of Sen. Heyburn) ("Of course it is obvious that the committee in both the House and the Senate intended that the injury should result from the employment, and not the injuries that might result from some cause entirely outside of the employment. In other words, it was not intended that the employer should insure the safety of the employee against outside attack or the result of injuries from some cause not included in the employment.").

CONCLUSION

The judgments of the Circuit Court should be vacated and the cases remanded for a new trial.

Respectfully submitted,

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