

1 IN THE SUPREME COURT OF THE UNITED STATES

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3 NORFOLK & WESTERN RAILWAY :

4 COMPANY, :

5 Petitioner :

6 v. : No. 01-963

7 FREEMAN AYERS, ET AL. :

8 - - - - -X

9 Washington, D. C.

10 Wednesday, November 6, 2002,

11 The above-entitled matter came on for oral
12 argument before the Supreme Court of the United States at
13 10:04 a.m.

14 APPEARANCES:

15 CARTER G. PHILLIPS, ESQ., Washington, D. C. ; on behalf of
16 the Petitioner.

17 DAVID B. SALMONS, ESQ., Assistant to the Solicitor
18 General, Department of Justice, Washington, D. C. ; on
19 behalf of the United States, as amicus curiae,
20 supporting the Petitioner.

21 RICHARD J. LAZARUS, ESQ., Washington, D. C. ; on behalf of
22 the Respondents.

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1 P R O C E E D I N G S

2 (10:04 a.m.)

3 CHIEF JUSTICE REHNQUIST: We'll hear argument
4 now in Number 91 -- or rather, 01-963, Norfolk & Western
5 Railway Company versus Freeman Ayers.

6 Mr. Phillips.

7 ORAL ARGUMENT OF CARTER G. PHILLIPS

8 ON BEHALF OF THE PETITIONER

9 MR. PHILLIPS: Thank you, Mr. Chief Justice, and
10 may it please the Court:

11 In 1997, this Court recognized that there is an
12 asbestos litigation crisis confronting the Nation, and
13 nothing in the last five years has -- done anything other
14 than to show that that crisis is more acute now than at
15 any other time in our history. The Rand Corporation in a
16 report just two months ago concluded that there are now
17 6,000 defendants confronted with asbestos litigation
18 claims, that the estimated value of those claims in
19 litigation costs exceeds \$200 billion.

20 The six plaintiffs who are involved in this
21 case, the respondents here today, are emblematic of at
22 least a fundamental element of the problem that confronts
23 asbestos litigation. Each of them received close to, and
24 in some instances more than a million dollars in
25 compensatory damages for claims of asbestosis. The basis

1 for their claim, the primary basis for their claim was
2 that they confronted a fear of cancer.

3 Asbestosis does not convert into cancer --

4 QUESTION: How do we know that? I mean, I
5 notice that the awards there seem to grow with age, and
6 they don't seem to vary depending upon smoking. I mean,
7 they're inversely related to age, they don't seem to be
8 affected by smoking, and that suggested to me that maybe
9 it didn't play a major part, this fear of cancer. How do
10 we know that it played a major part?

11 MR. PHILLIPS: Well, there is a legal answer and
12 there is a factual answer. The legal answer is that you
13 have to assume it because the jury was instructed to
14 include it as an element, and under West Virginia law, it
15 is absolutely settled and respondents don't contest it.

16 QUESTION: Well, but that, the fact that it's
17 one element doesn't mean it's the primary element, does
18 it? They did all suffer physical impairment as a result
19 of the asbestosis itself, did they not?

20 MR. PHILLIPS: They all suffered asbestosis, and
21 they all suffered some physical elements of it.

22 QUESTION: And how do you know that the physical
23 impairment was not the primary ingredient in the jury
24 verdict. I don't understand that.

25 MR. PHILLIPS: I don't know that it's not the

1 primary ingredient, Justice Stevens. What I do know is
2 that as a matter of law, you can't ignore the fact that
3 the -- that fear of cancer was put before the jury as a
4 significant component of the plaintiff's case in chief,
5 that the jury was instructed to include that, and that --

6 QUESTION: Yes, but you said it was the primary
7 element of damages, and that's what I think Justice Breyer
8 and I are wondering whether the record really
9 supports that element --

10 MR. PHILLIPS: Well, I think the record supports
11 it in the sense that we know that these are asbestosis
12 claims that even the respondents' expert testified were
13 mild, for the most part. One or two differences about
14 that, but these are still relatively mild asbestosis
15 claims, and mild asbestosis claims do not typically
16 generate million-dollar damages awards --

17 QUESTION: Did the defendant --

18 MR. PHILLIPS: -- particularly where there's no
19 cost of medical care as part of the component.

20 QUESTION: Mr. Phillips, did the defendant
21 attempt to test this by seeking a special verdict so that
22 the damages could be broken down by the jury? This was a
23 general verdict, so we don't know how much they gave for
24 anything.

25 MR. PHILLIPS: No, the defendants didn't -- the

1 defendant did not ask for that.

2 QUESTION: But it could have --

3 MR. PHILLIPS: What the defendant did ask for,
4 Justice Ginsburg, was to have fear-of damages eliminated
5 as a component of the case in a case like this --

6 QUESTION: But they could have -- if they tested
7 this, isolated this, and then we'd know how much was
8 actually allocated, whether it was as he initially said
9 the primary, or whether it was a lesser thing. We just
10 don't know.

11 MR. PHILLIPS: Oh, and that's because it's the
12 plaintiff's burden. If they didn't want to have -- if
13 they didn't want to take the risk of a general verdict
14 being set aside because there's an element of damages
15 that's included that the court ultimately decides should
16 be excluded as a matter of law, they then bear the risk
17 and the burden of having the case sent back for a new
18 trial.

19 QUESTION: Oh, but the relevance of this, I
20 think your overall point, in my mind, is that the other
21 side would say, I think they do say that this is a case in
22 which there was an impact, and as a result of the
23 impact -- the thickening of the lungs -- the person does
24 have a fear of getting cancer greater than most people,
25 that that's -- entitles them under traditional law to some

1 damages, and where you can get a special verdict, it's
2 easy to see, if the jury has awarded too much damage for
3 that, in which case you get a reversal under -- you get a
4 reversal if they give too much for it, and -- so what's
5 the problem here that has anything to do with there being
6 6,000 plaintiffs and enormous damage and problems overall?

7 MR. PHILLIPS: Well, the problem's easy to
8 identify, that is that if the instruction is that everyone
9 who suffers a diagnosed case of asbestosis is entitled to
10 go to the jury on fear of cancer claims, then the amount
11 of damages that will be generated as a consequence of that
12 will run completely out of sync --

13 QUESTION: Why?

14 MR. PHILLIPS: -- with the damages that --

15 QUESTION: Why would it? Why -- maybe they're
16 entitled to some fear. A person who has no problem in the
17 world has a 1 in 4 chance of dying in cancer. A person
18 who's subjected to asbestos may have a 1 in 3 chance.

19 MR. PHILLIPS: But this Court --

20 QUESTION: That gives them entitlement to some
21 little amount, anyway.

22 MR. PHILLIPS: Justice Breyer, you said, or the
23 Court said in Buckley that you don't analyze these issues
24 case by case. What you have to do is make a judgment
25 about the category of cases that's based on the policies

1 of the Federal Employers Liability Act, and the policy --

2 QUESTION: Mr. Phillips, under West Virginia
3 practice, is it -- if a plaintiff or a defendant requests
4 a special verdict, is it automatically allowed, or is it
5 in the discretion of the trial court?

6 MR. PHILLIPS: It's in the discretion of the
7 trial court, and it is also clear under West Virginia law
8 that if two theories are put before the jury with respect
9 to damages and one of them is impermissible, the answer is
10 you strike down and you get a new trial on damages, so
11 that's -- that's clear. And I don't -- I don't hear the
12 respondents as arguing anything to the contrary.

13 QUESTION: Mr. Phillips, do we look at this case
14 as one of a claim for traditional pain and suffering
15 damages? Is that how we should view it?

16 MR. PHILLIPS: No. This Court said in Gottshall
17 that pain and suffering damages are describable as
18 sensations stemming directly from a physical injury or
19 condition.

20 The physical injury that -- that's identified
21 here is asbestosis, and to be sure, the pain and suffering
22 that an asbestotic would be allowed to recover for might
23 be a fear of shortness of breath or other symptoms that
24 arise out of asbestosis, but the notion that cancer that
25 doesn't exist currently, may never take place, stems from

1 the existence of asbestosis is not a fair application of
2 that rule of law, particularly when there is no evidence,
3 and again, I don't think respondents challenge this, that
4 asbestosis does not cause cancer, it does not lead to
5 cancer.

6 QUESTION: But, it sounds like you want us to
7 say there is some limitation on the availability of pain
8 and suffering damages in the context of an asbestosis
9 case.

10 MR. PHILLIPS: All -- Not --

11 QUESTION: It would be something different than
12 one would think of in a traditional pain and suffering
13 case, wouldn't it?

14 MR. PHILLIPS: Well, I think it's the
15 respondents who are asking you to do something different
16 with a pain and suffering case, and actually I'm not even
17 sure that's a fair way to characterize the respondents'
18 argument. I don't understand them to be arguing that this
19 is a classic pain and suffering --

20 QUESTION: Well, I'm trying to find out what
21 you're arguing.

22 MR. PHILLIPS: Right, and my argument is, this
23 is not under any circumstances the kind of pain and
24 suffering that we traditionally think of. It's not
25 something that emanates directly out of the existing

1 injury. Second, it's not negligent infliction of
2 emotional distress, and it's not emotional injury as a
3 component of a negligence claim

4 QUESTION: Well, what was it -- was the case
5 presented as a separate claim for negligently-caused
6 emotional distress?

7 MR. PHILLIPS: No. It was --

8 QUESTION: No. It was a pain and suffering
9 argument. That's what it was, wasn't it?

10 MR. PHILLIPS: Well, it wasn't clear exactly
11 what it was until the jury -- until we got to the jury
12 instructions. At that point, the trial judge did say, I
13 view these as pain and suffering.

14 QUESTION: As pain and suffering. .

15 MR. PHILLIPS: Yes.

16 QUESTION: I mean, I thought that's what we were
17 confronting here.

18 MR. PHILLIPS: Well, except that the traditional
19 standard for pain and suffering doesn't permit the kind of
20 disconnect between the fear of cancer that you're talking
21 about here and asbestosis. You normally associate pain
22 and suffering as sensations that emanate directly from the
23 injury itself, and fear of cancer doesn't emanate at all
24 from asbestosis.

25 QUESTION: But it can include fright.

1 MR. PHILLIPS: Fright from asbestosis --

2 QUESTION: Yes.

3 MR. PHILLIPS: -- to be sure.

4 QUESTION: Is it conceded -- I think you said it
5 was conceded, but is it conceded that fear of cancer does
6 not emanate from asbestosis? If it's clear that you have
7 a greater risk of cancer if you have contracted
8 asbestosis, why isn't the fear connected to the
9 asbestosis?

10 MR. PHILLIPS: Well, it's interesting, you know,
11 the testimony itself was simply, do you have a fear
12 because of exposure to asbestos now that you have
13 asbestosis. They didn't even ask the question whether the
14 fear arises out of the asbestosis.

15 QUESTION: Did you ask questions about the
16 causation theory that you're now espousing?

17 MR. PHILLIPS: No. Our argument, Justice
18 Souter, was that fear of cancer is too unrelated, as a
19 matter of law, to be an element of pain and suffering.

20 QUESTION: Okay, but I take it your argument is
21 that the mere fact that there is an association between
22 asbestosis and a higher risk of developing cancer,
23 depending on whether you smoke and so on, is not enough of
24 an association to support a -- in effect, a separate
25 element of damages for fear of cancer?

1 MR. PHILLIPS: Yes, Your Honor.

2 QUESTION: What is your authority for that? In
3 other words, you're saying there's got to be some kind of
4 a different, or more intense causal relationship than
5 simply this association that can statistically be shown.

6 MR. PHILLIPS: I think --

7 QUESTION: What's the basis for that?

8 MR. PHILLIPS: Buckley, frankly, is as close to
9 anything on that score, because Buckley says even if you
10 accept as an article of faith, as I think the Court did,
11 that each of those individuals who'd been exposed to
12 asbestos felt that he or she would be more seriously at
13 risk --

14 QUESTION: Did they have asbestosis?

15 MR. PHILLIPS: No, none of the --

16 QUESTION: No --

17 MR. PHILLIPS: No.

18 QUESTION: -- they didn't, and the point here
19 is that there is proof of asbestosis, and there is a
20 statistical showing that you don't deny, I think, of a
21 higher degree of risk, what -- however the causal chain
22 works -- which associates asbestosis with fear of cancer,
23 so this is not a Buckley situation, and my question is,
24 why isn't that statistical association sufficient to
25 ground an instruction allowing for compensation for fear

1 that results from this association?

2 MR. PHILLIPS: There are two answers to that,
3 Justice Souter. In the first place, the -- there is no
4 strong common law doctrine that says that those -- that
5 that kind of a disconnect between the damages is a core
6 element of what the common law routinely grants for --

7 QUESTION: Well, you call it disconnect, he
8 calls it a connect. What it is, there is, I take it, an
9 undeniable statistical association between asbestosis and a
10 probability of developing cancer --

11 MR. PHILLIPS: Right.

12 QUESTION: -- and that's the basis for the claim
13 of the fear. Why is that inconsistent with a common law
14 theory of pain and suffering damages?

15 MR. PHILLIPS: Well, the core of the pain and
16 suffering -- the pain and suffering theory is that it is a
17 fright that emanates directly out of the particular
18 condition you have, which is asbestosis.

19 QUESTION: All right, if you want to use that
20 kind of terminology, I don't see why you haven't got it
21 here. The reason these people are worried is that they've
22 got asbestosis, and people with asbestosis have a higher
23 chance of developing cancer. Isn't that enough out of, in
24 your terms?

25 MR. PHILLIPS: No. Even if you accept that

1 premise, Justice Souter, you still have to confront the
2 overall policies of the Federal Employers Liability Act,
3 and the question of whether not allowing a recovery that
4 might otherwise be legitimate -- and that is precisely
5 what the Court said --

6 QUESTION: So, are you saying that even if the
7 common law allowed it, we should not allow it under the
8 act, or the act doesn't allow it?

9 MR. PHILLIPS: Well, I don't think the common
10 law clearly allows it.

11 QUESTION: Okay. Have you got any authority for
12 that proposition --

13 MR. PHILLIPS: No, because --

14 QUESTION: -- that an association between these
15 two conditions is insufficient to support a damage award?

16 MR. PHILLIPS: There are lower court -- we cite
17 the Pennsylvania Supreme Court decisions, the Eleventh
18 Circuit decisions -- there are decisions out there that
19 have said we're not going to allow fear of cancer in cases
20 involving asbestosis, but I --

21 QUESTION: Well, there does appear to be a
22 minority of jurisdictions that have said -- and have
23 held -- that you have to show as a plaintiff in a case
24 like this a verifiable causal nexus between cancer and the
25 injury suffered in cases where you're dealing with

1 exposure to a hazardous material. That -- maybe that's a
2 reasonable requirement, but it appears to be a minority
3 view. Are you suggesting that we should adopt that here?

4 MR. PHILLIPS: Well, I'm not asking you to -- I
5 don't think the answer to this case resides in the common
6 law, because I think the common law is essentially a
7 muddle. There are cases on both sides.

8 QUESTION: Well, are you -- do you think we
9 should adopt an interpretation of FELA that says there has
10 to be some verifiable causal nexus?

11 MR. PHILLIPS: Absolutely, Justice O'Connor, and
12 the reason to do that --

13 QUESTION: Do you acknowledge that that is a
14 view that is generally a minority view in the country?

15 MR. PHILLIPS: I -- I -- I'll concede that it is
16 a minority view in the sense that there are maybe five
17 cases on one side --

18 QUESTION: Yes.

19 MR. PHILLIPS: -- and three or four on the
20 other.

21 QUESTION: Yes.

22 MR. PHILLIPS: This is not an area that's been
23 litigated sufficiently to be able to say where the trends
24 are.

25 QUESTION: It may make sense, but I just want to

1 know where we are here.

2 MR. PHILLIPS: Right. Well, I've only got two
3 or three cases that identify it in the context -- the way
4 you just did, Justice O'Connor, and my colleague on the
5 other side will identify four or five cases that don't
6 impose that requirement, but what remains absolutely
7 critical in the analysis of this case, I think, is the
8 core policy that this Court identified in *Gottshall* and in
9 *Buckley* that says if you don't have a clear answer from
10 the common law, you have to look to see whether or not
11 this particular damages remedy creates the possibility of
12 unpredictable and unlimited damages, and that's the reason
13 why the Court needs to adopt a more restrictive view of
14 the standard to be applied under the Federal Employers
15 Liability Act.

16 That may not be the rule that would be required
17 as a matter of common law in any particular State, but
18 under FELA, the notion that you're going to create
19 unlimited liability in circumstances in which the
20 plaintiffs are allowed significantly reduced requirements
21 in order to prove the basis for their claim suggests that
22 this Court has consistently taken the position that it
23 must cut back and not allow on a category basis -- on a
24 categorical basis -- not allow damages to extend to --

25 QUESTION: But what -- I mean, what -- unlimited

1 damages, I don't know what you want us to do. What if the
2 statistical chance of your getting cancer if you have
3 asbestosis is -- is your chances are doubled. Would that
4 be enough to create the kind of a fear that we could allow
5 damages for it?

6 MR. PHILLIPS: No, I don't think so --

7 QUESTION: I see.

8 MR. PHILLIPS: -- Justice Scalia.

9 QUESTION: What if it's 90 percent certain that
10 if you have developed asbestosis, you will develop cancer?

11 MR. PHILLIPS: I think that would be a different
12 case. I think once you get past more likely than not --

13 QUESTION: Okay, so it's somewhere between 50
14 and 90 percent?

15 MR. PHILLIPS: I think when you get past more
16 likely than not that you will incur cancer, there is a
17 risk, then at that point -- but remember, the flip side of
18 this is the two-disease rule, and that's an important
19 element in how the Court ought to analyze this problem,
20 because not only -- by allowing fear of cancer damages
21 now, you essentially say to the world, the sky is the
22 limit, inconsistent with what the Court said in Gottshall
23 and Buckley.

24 The flip side is, if you don't allow the fear of
25 cancer damages now, but allow fear of -- but allow the

1 plaintiff to come back after he or she contracts cancer
2 and allows as a part of that recovery for fear of cancer,
3 then the people who are most seriously injured are made
4 whole at the appropriate time in the appropriate
5 circumstances.

6 QUESTION: Mr. Phillips, I know your light is
7 on, but there's a second question and you haven't even
8 talked about it, the joint and several liability --

9 MR. PHILLIPS: The apportionment.

10 QUESTION: -- the apportionment.

11 MR. PHILLIPS: Thank you, Justice O' Connor.

12 QUESTION: And I wasn't sure that there was any
13 support in the statute or in the evidence at trial here
14 for how some apportionment should have been made.

15 MR. PHILLIPS: Well, the quick answer on
16 apportionment is that in 1908, it was absolutely clear
17 there was several liability. You're only liable for the
18 injuries you cause. That's embodied, I think, in the
19 statutory language that says that the railroad is
20 responsible for the injuries while employed. That
21 language has been interpreted as recognizing we only pay
22 for the things that we cause.

23 The Third Restatement --

24 QUESTION: Cause in whole or in part?

25 MR. PHILLIPS: But that goes to the question of

1 what you need to show a jury in order to get a negligence
2 claim to the jury in the first instance. It doesn't say
3 you're -- you're liable for the entirety of the damages in
4 whole or in part.

5 QUESTION: It could be read to say that.

6 MR. PHILLIPS: It could, but I don't think
7 that's the most natural reading of that particular
8 language, and I don't think it's an appropriate one where
9 the policies in 1908, and the policies of the law under
10 the Third Restatement quite clearly say that you should
11 apportion, because that is the fair way in order to ensure
12 that a defendant is not -- does not -- is not forced to
13 overcompensate.

14 QUESTION: It's really a question of who should
15 bear the burden of bringing in those other people. If
16 it's joint and several, you could join other people. On
17 your view, you say to the plaintiff, "Unless, plaintiff,
18 you bring in all these other people, you can only get a
19 small piece from any particular one."

20 MR. PHILLIPS: Right, and I think the statute
21 and the existing common law clearly suggest that the right
22 answer is that because you've reduced the burden of the
23 plaintiff in order to get into court and to be able to
24 make a case, the quid pro quo for that ought to be that
25 you only hold the railroad liable for the amount of the

1 injury it caused, and here it is not contested that -- and
2 Mr. Butler's case is the prototype example of it -- he had
3 three months of exposure when he was with Norfolk &
4 Western, he had 30 years of exposure with others. That is
5 a reasonable basis on which to apportion for cause, and
6 that -- and no one has contested that.

7 I'd reserve the balance of my time.

8 QUESTION: Very well, Mr. Phillips.

9 Mr. Salmons, we'll hear from you.

10 ORAL ARGUMENT OF DAVID B. SALMONS
11 ON BEHALF OF THE UNITED STATES, AS AMICUS CURIAE,
12 SUPPORTING THE PETITIONER

13 MR. SALMONS: Mr. Chief Justice, and may it
14 please the Court:

15 Respondents may not recover damages under FELA
16 for their anxiety about developing cancer in the future as
17 part of their emotional injuries from the separate disease
18 of asbestosis. The overwhelming majority of courts that
19 have considered the relationship between asbestosis and
20 cancer have concluded that they are separate diseases that
21 result in separate injuries to the plaintiff --

22 QUESTION: May I ask in that --

23 MR. SALMONS: -- and give rise to separate --

24 QUESTION: May I ask this question? I really
25 wanted to ask it of Mr. Phillips, but his time was running

1 out. Would you draw a distinction between a case in which
2 the asbestosis actually is a cause of cancer, as opposed
3 to a case like this, in which asbestos and cancer --
4 asbestosis and cancer -- are the result of a common cause?

5 MR. SALMONS: Your Honor, I do think there would
6 be a difference between those two instances. Here, the
7 Court can look to the evolving tort law principles in
8 cases involving asbestos, where the overwhelming majority
9 of courts have concluded they are, indeed, separate
10 diseases with no causal connection between them only in
11 the sense that they both stem from the same exposure --

12 QUESTION: -- that in this

13 MR. SALMONS: -- to asbestos.

14 QUESTION: that in this case, then, if it were
15 true, which I understand it is not, that the asbestosis
16 itself is a contributing cause to cancer, that then there
17 would be liability?

18 MR. SALMONS: Well, Your Honor, I think that --
19 you know -- the Court may still need to look at what
20 type -- what exactly the causal connection is -- and it
21 would still need to take into account both the text and
22 the purposes of FELA, and -- and in particular, the
23 concern --

24 QUESTION: But taking all those things into
25 account, what do you do in a case in which the cancer is a

1 result of the asbestosis rather than the result of a
2 common source?

3 MR. SALMONS: I -- I do think, Your Honor, that
4 if -- that if the cancer, in fact, results directly from
5 the disease of asbestosis, then that puts you more
6 directly in the category of pain and suffering damages
7 that would be available traditionally in tort law, and
8 that probably would be recoverable there, but --

9 QUESTION: Why --

10 QUESTION: Isn't that a jury question? Do we
11 know for sure that the one does not lead to the other?

12 MR. SALMONS: I do think, Your Honor, that this
13 Court can look to the experience of courts that have
14 considered the relationship between the two diseases, and
15 have adopted legal rules to govern the disposition of
16 these claims, and have concluded that they are separate
17 diseases that result in separate injuries and give rise to
18 separate causes of action, and I think this Court can look
19 to that and -- and -- and can conclude that as a matter of
20 law both because of --

21 QUESTION: Do the respondents agree with you on
22 that factual point?

23 MR. SALMONS: That the majority of courts have
24 concluded --

25 QUESTION: No -- no, that -- that asbestosis

1 does not lead to cancer, but rather, is -- is produced by
2 the same -- by the same cause that produces cancer?

3 MR. SALMONS: Your Honor, I do think that the
4 respondents have taken that position in this case. On
5 page 20 of their brief, they say that the relationship
6 between asbestosis and cancer is two-fold.

7 First, the asbestosis confirms the extent and
8 severity of the initial exposure to asbestos which, of
9 course, under Buckley is not a separate injury or impact
10 that can give rise to liability under FELA, and second,
11 that they both -- both the cancer and the asbestosis would
12 result from the same negligent conduct of the defendant,
13 but I do not read respondents to be alleging in this Court
14 that there is any causal relationship between cancer and
15 asbestosis in terms of asbestosis actually turning into
16 cancer.

17 There may be a correlation, but you know,
18 that -- the reasonableness of the fears is really not the
19 question.

20 QUESTION: The question I had is, if there is a
21 causal correlation, if 50 percent of the people who have
22 contracted asbestosis as a result of exposure to asbestos
23 will also contract cancer, why does that matter? That's
24 what I didn't quite see.

25 MR. SALMONS: I -- I think --

1 QUESTION: Because I understand -- I think you
2 do correctly state their -- they agree with you on the
3 facts on this.

4 MR. SALMONS: Yes, Your Honor. I think that in
5 terms of -- of the existing tort law principles that, as
6 this Court noted in Gottshall, and even prior to that
7 around the time of the enactment of FELA, that pain and
8 suffering damages are limited to those damages that flow
9 directly from the injury that allows you to sue, and
10 that --

11 QUESTION: But both of those cases were a self-
12 standing claim of emotional distress. It wasn't pinned to
13 any existing injuries.

14 Here, the difference, and at least as portrayed
15 by the judge who made it part of pain and suffering, is
16 you do have an injury, you have the asbestosis, and one of
17 the elements of damages is pain and suffering, and this is
18 included in pain and suffering. At least that's the way
19 the judge saw it, as distinguished from Buckley and
20 Gottshall, which were self-standing claims of emotional
21 distress not tied to any preexisting injury.

22 MR. SALMONS: Yes, Your Honor, that is the way
23 the court below approached the question. We think the
24 problem with that is that, as the overwhelming majority of
25 courts that have considered the issue of the relationship

1 between the diseases have concluded, they are separate
2 diseases that result in separate injuries and separate
3 causes of action, and the test of FELA --

4 QUESTION: But doesn't it matter what form --
5 I'm familiar with one of those cases, and that was the
6 question --

7 MR. SALMONS: Yes, Your Honor.

8 QUESTION: -- when does the statute of
9 limitations start to run when you get the virulent form of
10 cancer? Does it begin to run when you got the asbestosis,
11 because that should have tipped you off and you should
12 have sued then?

13 The answer in that context, and there are many
14 courts that say that cancer is a separate claim, is not
15 necessarily what it should be in this context.

16 MR. SALMONS: We do think it is instructive,
17 however, Your Honor, and that's particularly true because
18 FELA provides for liability -- to any person suffering
19 injury while employed -- for such injury, and we think,
20 consistent with the text of that statute, which limits the
21 employer's liability to the injury that's actually
22 suffered, and not the fear of suffering a future -- injury
23 in the future -- that the rule we are propounding today is
24 the most consistent with that text and the most consistent
25 with the purposes and -- and policy considerations this

1 Court articulated in both Gottshall and Buckley, and in
2 particular --

3 QUESTION: You did say -- you said in your brief
4 that it's a question of not whether, but when, because
5 when you get cancer, if you get cancer, you get the
6 damages for past, present, and future pain and suffering,
7 but that's not quite right, is it, because you are leaving
8 out the category of person who has asbestosis and never
9 gets cancer, which will be most of these people? Those
10 people -- for them, it is a question of whether, not when,
11 right?

12 MR. SALMONS: It is true, Your Honor, that
13 people who now have asbestosis and fear getting cancer in
14 the future may never get cancer. In fact, the
15 overwhelming number of them won't get cancer --

16 QUESTION: And then they --

17 MR. SALMONS: But --

18 QUESTION: -- they never -- they can never
19 collect for this alleged fear.

20 MR. SALMONS: That is true, Your Honor, and
21 that's also true for the snowmen of Metro-North that were
22 at issue in Buckley. The Court -- this Court did not say,
23 though, their fears were not reasonable. In fact, the
24 court of appeals in that case had found that they were.

25 What this Court said was, they didn't fit within

1 the common law categories that allowed recovery because
2 the exposure itself was not an impact or injury, and our
3 position is that while the asbestosis gives them an
4 ability to sue for their injuries related to that
5 asbestosis, they cannot reach back to that initial
6 exposure and recover the damages that were precluded in
7 Buckley, namely --

8 QUESTION: But here -- here we've got something
9 more. We've got the proof that this is a serious risk,
10 and that proof consists of the fact that asbestosis has,
11 in fact, developed.

12 MR. SALMONS: That is correct, and they can
13 recover for all of their harms related directly to that
14 asbestosis, but our position is they can't recover for
15 their fears of the future disease of cancer --

16 QUESTION: I know that that's your position, but
17 once we cross that threshold, as we have in this case --
18 the threshold that shows that the fear is, in fact, a
19 serious one, because at least asbestosis has now
20 developed, why isn't their fear of cancer just as
21 reasonable whether that fear rests upon the fact that in
22 10 percent of asbestosis cases, the asbestosis progresses
23 to cancer -- which isn't true -- or, on the other hand, in
24 the same percentage of asbestosis cases, cancer will also
25 develop as a result of the common cause for which the

1 employer is liable?

2 Why is the fear any less reasonable in either of
3 those cases?

4 MR. SALMONS: Your Honor, with respect, we don't
5 think the question is whether their fears are reasonable,
6 but their question is whether their fears are recoverable
7 at this time.

8 QUESTION: Well, I know that, and one of the
9 questions we want to know in determining whether recovery
10 is possible is whether the fear is reasonable.

11 MR. SALMONS: And we do not --

12 QUESTION: One threshold test that we all agree
13 on is, the fear has at least got to be confirmed by some
14 physical manifestation. Okay, we've got this here.

15 Once the physical manifestation is shown, why is
16 reasonable fear -- why should reasonable fear -- not be
17 enough for recovery, whether the causal connection goes
18 from asbestosis to cancer, or common cause to cancer?

19 MR. SALMONS: Your Honor, we think that one of
20 the primary reasons why it should not be enough -- that
21 reasonableness of the fear should not be enough in and of
22 itself -- even assuming for a moment that the statistics
23 that are at -- that were in evidence here are, in fact,
24 sufficiently conclusive to draw those assumptions -- I
25 mean, I do think it's important to remember that this

1 Court in Buckley referred to these same types of figures
2 as being uncertain and controversial, and I think that
3 that description is probably still true here.

4 But the purposes and policies of FELA, which
5 this Court recognized in Buckley, and in particular the
6 fear that plaintiffs with relatively minor injuries now
7 will come into court being drawn by the opportunity to get
8 front-loaded, significant damages for future harms, will
9 end up frustrating the system, and will end up hurting the
10 plaintiffs that in fact develop cancer later, and I think
11 that this case implicates those policies and concerns of
12 FELA and tort law generally just as much as was the case
13 in Buckley, that the vast majority, the number of people
14 that will actually get cancer in the future is relatively
15 low, and there is a significant risk --

16 QUESTION: Thank you, Mr. Salmons.

17 MR. SALMONS: Thank you.

18 QUESTION: Mr. Lazarus, we'll hear from you.

19 ORAL ARGUMENT OF RICHARD J. LAZARUS

20 ON BEHALF OF THE RESPONDENTS

21 MR. LAZARUS: Mr. Chief Justice, and may it
22 please the Court:

23 The only issue raised by the first question
24 presented in the cert petition is whether the trial
25 court's jury instruction correctly described the legal

1 standard for when a physically injured plaintiff can
2 recover for related emotional distress injury, and the
3 sufficiency of the evidence and the jury's application of
4 that legal standard to the evidence at trial is not one of
5 the questions presented in this case, and it is quite
6 clear that the --

7 QUESTION: Well, the question presented doesn't
8 speak in terms of the instruction, as I read it.

9 MR. LAZARUS: No, but the question poses a pure
10 question of law, and that is whether, when you have a
11 physical injury, what the relationship has to be between
12 the emotional distress and the physical injury, and our
13 argument, Your Honor, is that under traditional tort law,
14 it is not required that the emotional stress immediately
15 accompany the physical injury; that it have its own
16 physical manifestations; that it be severe.

17 Tort law, as this Court explained in the Metro-
18 North case, approaches the recovery for emotional distress
19 injury from a categorical perspective, and tort law
20 categorically distinguishes between two different
21 situations.

22 First, the situation where one has a stand-
23 alone claim for negligent infliction of emotional distress
24 where the emotional injury itself the element of the
25 offense, the injury element, and second, the so-called

1 parasitic damage context, where there is a threshold
2 physical injury which supplies the essential element, and
3 what many courts do is they impose very significant
4 limitations on the recovery of emotional distress in the
5 stand-alone context such as physical manifestations,
6 immediacy, and severity, but --

7 QUESTION: And you say this case is not brought
8 on this theory?

9 MR. LAZARUS: The jury instruction is reproduced
10 on page 573 of the joint appendix.

11 QUESTION: Where do we -- 573?

12 MR. LAZARUS: 573 on the joint appendix, and
13 that jury instruction makes it absolutely clear that
14 respondents were entitled to recover for their reasonable
15 fear of cancer as part of their overall damages only to
16 the extent that that fear related to -- the Court's
17 words -- related to proven physical injury, and there is
18 absolutely no merit to petitioner's argument --

19 QUESTION: Do some jurisdictions go further
20 these days and require there be a reasonable causal nexus?

21 MR. LAZARUS: Your Honor, almost no
22 jurisdictions do. There are really only two cases --

23 QUESTION: I thought there were a few that did.

24 MR. LAZARUS: But almost all the cases go the
25 other way, and the reason, Your Honor, is because --

1 there's some confusion in petitioner's argument here about
2 what "pain and suffering" means. If you look at the jury
3 instruction very closely on page 573, the trial judge in
4 this case was very careful, knew exactly what he was
5 doing.

6 In the paragraph right before the "fear of
7 cancer" paragraph, he refers to the entitlement of a
8 physically injured plaintiff to recover for physical and
9 mental pain and suffering. In the next paragraph, where
10 he refers to reasonable fear of cancer, he refers only to
11 mental pain and suffering, and this is a longstanding
12 distinction in tort law. Physical pain and suffering is
13 the kind of pain which is immediate and intimately
14 associated with the bodily injury.

15 QUESTION: All that is true, what you say, but I
16 felt the question was open, and the reason that I thought
17 it was open is because probably I once learned that this
18 area of the law arose out of an English case where
19 somebody is watching a coffin fall off in an accident, and
20 the rule was that you can't recover unless something hits
21 you, but what you were recovering for was the coffin, and
22 the pain and suffering that a family member would feel.

23 MR. LAZARUS: Right.

24 QUESTION: That was immediate, directly related
25 to the accident, and quite clearly present and measurable.

1 MR. LAZARUS: Right.

2 QUESTION: This is the kind of thing that is not
3 immediate. It's a fear of something way in the future.
4 It is very hard to determine whether it is right or wrong,
5 and it has no causal relation to the physical thing, and
6 therefore, I thought that it's open.

7 MR. LAZARUS: Your Honor, it's really --

8 QUESTION: You want to say -- I'll look it up,
9 but if you were to say it's absolutely not open, I mean,
10 they have, you know, lots of briefs where they've made a
11 pretty good case it's at least open.

12 MR. LAZARUS: It's open and shut.

13 QUESTION: Oh, all right.

14 (Laughter.)

15 MR. LAZARUS: If one looks to the Restatement of
16 Torts, section 456, which ascribed -- well-settled, widely
17 applied, and it describes the circumstances when a
18 physically injured plaintiff can recover for related
19 emotional distress injuries. It fits this case, and it
20 includes in comment c, it expressly denies the validity of
21 their physical manifestation requirements --

22 QUESTION: No. I mean, you saw their reply
23 brief, and their reply briefed that is that the underlined
24 phrase -- the italicized phrase -- or from conduct which
25 causes it, is not really what's at issue. What's issue

1 are the words in that called "emotional disturbance," and
2 the question is, what kind of emotional --

3 MR. LAZARUS: Yes.

4 QUESTION: -- disturbance, and I think that
5 their argument is, which if I put numbers on it is, each
6 one of us in this room has 1 in 4 chance that we will die
7 of cancer, and the difference between us and a plaintiff
8 in this case is that he has a 1 in -- 1 in 5 -- 1 in 5 --
9 wait -- We have 1 in 5, 1 in 5 and he has 1 in 4, and what
10 they're saying is, I think, that the difference between a
11 1 in 5 chance of dying of cancer, and a difference of 1 in
12 4 chance of dying of cancer is intangible -- hard to
13 measure in anyone's psychology. Nobody really makes such
14 distinctions rational, and therefore don't open this up to
15 juries awarding large amounts of money.

16 MR. LAZARUS: Your Honor, one really can't in
17 the beginning start to entertain their evidence that
18 they've introduced which wasn't part of the trial record
19 in this case. The trial record --

20 QUESTION: No, I don't think their evidence is
21 relevant.

22 MR. LAZARUS: Right.

23 QUESTION: I would say this is a question that's
24 being put to us as a matter of law.

25 MR. LAZARUS: Right.

1 QUESTION: And it is up to us to look at the
2 numbers.

3 MR. LAZARUS: Right.

4 QUESTION: And in reaching those numbers I gave
5 you, I've assumed everything in your favor. That is, it's
6 really -- because you're a railroad and not the kind of
7 thing that was involved in the studies you cite -- it
8 could be a lot less than what I say, but it's not going to
9 be more.

10 MR. LAZARUS: Well, actually, it may well be
11 more, but let's put that aside. What is quite clear, Your
12 Honor, as this Court explained in the Metro-North case, is
13 that just because there are background risks, that doesn't
14 mean that one can't have a reasonable apprehension based
15 on an increased risk.

16 For instance, it is 100 percent sure, Your
17 Honor, that every one of us in this room will die. We
18 have a background risk. But the fact that someone through
19 negligent conduct causes us a physical injury which
20 increases our risk of dying sooner does not mean we can
21 recover for that.

22 And the place to look in the Restatement of
23 Torts, Your Honor, to see that this is a classic thing
24 that one can recover for, if you look to section 456, you
25 look to comment c, and then it referenced comment -- it

1 referenced Restatement section 905, and Restatement -- and
2 it says that when you have a physical injury, then it
3 triggers the whole panoply of emotional distress injuries,
4 and section 905 of the Restatement of Torts describes what
5 is encompassed by "emotional distress," and comment e
6 describes how it goes, as always, to fear, anxiety,
7 apprehension of future consequences.

8 QUESTION: Mr. Lazarus --

9 QUESTION: Well, Mr. Lazarus, what if you put a
10 physician on the stand, and the physician says, this man
11 was 25 years old when he was injured, he ordinarily would
12 be expected to live to be 75, but as a result of this
13 injury he's only going to live to be 72? Now, is that the
14 sort of thing that's compensable?

15 MR. LAZARUS: Well, Your Honor, I don't know.
16 I don't know -- I don't doubt, Your Honor, that in tort
17 law, that there is a level of probability of risk below
18 which one can say as a matter of law there's not a
19 reasonable apprehension. I don't think, though, in this
20 case, first of all, that there's any question that
21 statistics support a reasonable apprehension, but even
22 more importantly, the question whether they do or don't in
23 this case is not one of the issues here. The issue is
24 whether that's enough. The issue is whether you --

25 QUESTION: Mr. Lazarus, may I ask you on that

1 point -- let's for a moment not think of ourselves as
2 lawyers. Here are two people, the person in Buckley, the
3 snowman, and the person who has asbestosis, both of those
4 people may have a real fear of cancer, and we may find
5 them credible witnesses.

6 I thought in the Buckley situation that one
7 concern is, it's too easy to make this up, and for some
8 people facing that risk, they'll say, "Well, yeah, I might
9 be run over tomorrow, it doesn't bother me." Isn't the
10 real problem that the fear of something, when that fear
11 doesn't have the physical manifestation, that these things
12 are too easy to make up, too uncontrollable, and I frankly
13 can't see the difference from the point of view of a
14 sufferer between the person in Buckley and the person
15 here.

16 The person in the Grand Central Station case
17 could say "I had the same fear that that person has. He
18 hasn't proved his fear any more than I proved mine, why
19 should he recover and not me?"

20 MR. LAZARUS: Well, Your Honor, because as the
21 Court, I think, explained quite well in Buckley, the way
22 tort law approaches the question is on a categorical basis
23 and distinguishes between those with physical injury,
24 because if you have that threshold physical injury, that
25 gives you the corroborating evidence you need that you

1 have, now, a legitimate plaintiff -- a legitimate
2 plaintiff -- who has established their cause of action.
3 You're not adding new cases to the docket, and even more
4 importantly, as the court has --

5 QUESTION: Well, what's more legitimate -- and
6 there was no doubt about the conditions under which the
7 people worked in Grand Central Station -- that they were
8 exposed to asbestos, that they should have been told much
9 earlier about their exposure, and they must have been very
10 angry that they weren't told.

11 MR. LAZARUS: Well, Your Honor, first of all,
12 those who have asbestosis, as the trial record in this
13 case referred, those with asbestosis have a statistically
14 higher significance of getting the other kinds of cancers,
15 because what -- it's not just a mere exposure, unimpaired,
16 and what the asbestosis requirement does by requiring that
17 kind of serious physical injury is, as everyone
18 understood, and the rail industry argued in Metro-North,
19 it dramatically limits the number of --

20 QUESTION: Well, is there --

21 MR. LAZARUS: -- possible plaintiffs.

22 QUESTION: Mr. Lazarus, is their increased
23 chance of cancer because they have asbestosis, or because
24 the asbestosis originates from their exposure to asbestos,
25 and it's the exposure to asbestos, not the asbestosis,

1 that will cause cancer?

2 MR. LAZARUS: Your Honor, we do not know, and no
3 one knows, whether the asbestosis itself transforms itself
4 into cancer.

5 QUESTION: Well, I -- then you do challenge the
6 statement by your opponents that asbestosis itself cannot
7 change into cancer?

8 MR. LAZARUS: No, Your Honor, their own
9 experts --

10 QUESTION: Well, no, now, wait a minute --

11 MR. LAZARUS: Yes. Yes. I --

12 QUESTION: -- I asked you a question. What's
13 the answer?

14 MR. LAZARUS: -- I do. I do challenge that.

15 QUESTION: You do challenge that?

16 MR. LAZARUS: Their own expert, Your Honor, on
17 page 470 of the joint appendix, Dr. Renn -- their
18 expert -- testified on page 470 that one could not
19 contract lung cancer from exposure to asbestos until one
20 had asbestosis.

21 We're willing to admit that the science is more
22 unclear that asbestos -- whether it actually transforms
23 itself or not, we don't know, and we don't think as a
24 matter of law it's necessary. It was their expert at
25 trial who testified that actually to get lung cancer from

1 asbestos exposure, it was a necessary prerequisite to
2 first have asbestosis. We think --

3 QUESTION: Well, can I ask you one other --

4 QUESTION: That question wasn't put to the jury.
5 I mean, the fact is that the jury was not required to find
6 that the fear was a fear that the asbestosis would turn
7 into cancer.

8 MR. LAZARUS: That's absolutely right, Your
9 Honor. We -- and we think that was not an error in the
10 jury instructions. There's many cases out there -- let me
11 refer to this one case, a case they cite in their reply
12 brief on page 2 --

13 QUESTION: Why wouldn't that be error? I mean,
14 the instruction does say that a plaintiff who's
15 demonstrated that he's developed a reasonable fear of
16 cancer related to the proven physical injury from asbestos
17 can be compensated for the fear.

18 MR. LAZARUS: Right, and it has to be related to
19 the proven physical injury, and it was in this case.

20 If I can give the example --

21 QUESTION: But it's so -- in the same
22 instruction the court says, you cannot award damages for
23 cancer or any increased risk of cancer.

24 MR. LAZARUS: Right, Your Honor, and that's
25 where the court got it actually --

1 QUESTION: Which is so contradictory.

2 MR. LAZARUS: No. No, it's not, Your Honor.

3 What the court is doing here is exactly what courts do who
4 adopt the separate disease rule which says, you can only
5 recover for your present injuries now, and you can't
6 recover for future injuries. The cancer itself, or the
7 risk, is a future injury.

8 QUESTION: I was going to ask this. What if one
9 of these -- if you prevail, and then one of these
10 plaintiffs develops cancer, I assume he can go in and sue
11 again?

12 MR. LAZARUS: That's right, yes, for the cancer.

13 QUESTION: All right. Is there some kind of a
14 discount now for the fear that he --

15 MR. LAZARUS: No, no, just like there are
16 separate causes of action for assault and battery. Those
17 are two different injuries. The apprehension of something
18 is a separate injury, and for these plaintiffs -- the
19 respondents -- it is a current --

20 QUESTION: So the fear that you're going to die
21 of cancer is compensable before you get it, and it's
22 compensable again after you get it?

23 MR. LAZARUS: No. No. The fear would not be --
24 the cancer would be --

25 QUESTION: Oh, I thought that the -- you can

1 recover for the fear in both cases under your theory.

2 MR. LAZARUS: I -- sorry, I wasn't -- if you've
3 recovered once, you aren't going to be allowed to recover
4 again.

5 QUESTION: So there would be a discount.

6 MR. LAZARUS: Yes. If you'd brought the
7 first --

8 QUESTION: All right. So then your first answer
9 was, you changed it from --

10 MR. LAZARUS: I'm sorry. I thought your
11 question was whether they could recover for cancer in the
12 second one. I didn't understand you were referring to --

13 QUESTION: Do we have cases in the law where you
14 give discounts for the first verdict?

15 MR. LAZARUS: Your Honor, I'm not sure. I don't
16 think this issue has come up, but I don't think it's a bar
17 to the recovery here.

18 If I can refer to the radiation burn case that
19 they referred to on page 2 of the reply brief --

20 QUESTION: Well, but it indicates that maybe the
21 recovery now is problematic.

22 MR. LAZARUS: No, Your Honor, it's not
23 problematic, because we have a present injury, and where
24 you have a present physical injury and you have a present
25 emotional injury, an apprehension based on that, those are

1 two types of injuries.

2 QUESTION: Well, don't you think that emotional
3 fear ought to be one that is reasonable?

4 MR. LAZARUS: Yes.

5 QUESTION: And a causal nexus there between the
6 asbestosis and the fear?

7 MR. LAZARUS: Well, Your Honor, we do think
8 there is a causal nexus --

9 QUESTION: There should be, shouldn't there?

10 MR. LAZARUS: We -- but we do think there's a
11 causal nexus here, and under the Restatement of Torts, all
12 right, there are two different possible causal nexus under
13 section 456 of the Restatement. We actually think both of
14 those are met, and that is, we think that the fear is
15 caused by the physical injury. It's also caused by the
16 same negligent conduct, but that is also a sufficiency of
17 the evidence question, and what they are positing here is
18 what the legal standard should be for physically injured
19 plaintiffs and the recovery for related emotional stress
20 harm.

21 An example, the Anderson case they cite on
22 page 2 of their reply brief -- a radiation burn case --
23 which they say is distinct from this case. It's exactly
24 the same as this case.

25 QUESTION: I think you're right, and the dog

1 bite cases support you, and the radiation cases support
2 you, and if it's cut-and-dried, as you say, then you win.

3 But if, when I look at all this stuff again, and
4 I come to the conclusion -- if I were to come to the
5 conclusion that it wasn't cut-and-dried, then I'm much
6 more at sea, and I want you to see why.

7 One was the reason I gave, which is the risk
8 problems, and the other, which is driving that, and I'd
9 just like you to comment on this, is -- is my concern that
10 if we begin to compensate people for fear of small changes
11 in risks when the law doesn't -- is open on the point --
12 what will happen in the asbestos cases, and that was their
13 initial point, is that we will -- there's \$200 billion at
14 stake, and the fund will run dry.

15 When the people who really get the cancer come
16 into court, the cupboard will be bare, and I think that's
17 a serious policy problem, and it's worrying me quite a
18 lot, and that's why I keep coming back to the open nature
19 of this.

20 MR. LAZARUS: Your Honor, I think that the way
21 to address that kind of issue is not to change decades of
22 settled tort --

23 QUESTION: Well, I say, is there any answer --

24 MR. LAZARUS: Yes, there is.

25 QUESTION: -- other than the law that is

1 clear --

2 MR. LAZARUS: There is. There is --

3 QUESTION: Yes.

4 MR. LAZARUS: -- and what can be done in a case
5 like that is, the defendant in that case can request a
6 verdict form which requires the jury to allocate out, and
7 that would allow a judge and an appellate, if appropriate,
8 to review, and jury trials --

9 QUESTION: Yes, but --

10 MR. LAZARUS: -- trials, it happens all the
11 time.

12 QUESTION: -- that isn't automatic in most
13 jurisdictions, Mr. Lazarus. You can't say "I want a
14 special verdict," and if the court says "No, I don't think
15 I'll give you one," that's pretty much the end of it,
16 isn't it?

17 MR. LAZARUS: Your Honor, they didn't request
18 one here, but that is the proper way to address the issue,
19 and that's why you see --

20 QUESTION: I don't understand what you're
21 saying. What -- allocate out -- how does that -- the
22 money is still paid to this claimant, so that when the
23 person who actually has cancer comes into court, this
24 company is bankrupt.

25 MR. LAZARUS: No, but Your Honor, it addresses

1 Justice Breyer's concern, and that is, it allows you to
2 have a record upon which one can make sure that the jury
3 hasn't awarded a disproportionate amount based upon this
4 one element, that you don't have the tail wagging the dog.

5 QUESTION: But what's disproportionate?

6 QUESTION: What's disproportionate?

7 QUESTION: Suppose you take one plaintiff who is
8 very nervous, very apprehensive, and for that person this
9 increased risk --

10 QUESTION: Right.

11 QUESTION: -- is going to be much more
12 aggravated. Then, take another person who's subject to
13 the same risk, but has a thicker skin and says, "Well,
14 I'll take it in stride."

15 MR. LAZARUS: Well, Your Honor, it's a
16 reasonable apprehension. This is why there's an objective
17 standard which applies to emotional recovery which doesn't
18 require the physical. It has to meet an objective
19 standard.

20 If someone has a very, very thick skin in tort
21 law and they, in fact, as a result of that, don't suffer
22 damage, then they haven't suffered damage. If they have a
23 very, very, very thin skin, and they suffer a lot of
24 damage, then they don't recover everything --

25 QUESTION: When the person gets cancer --

1 MR. LAZARUS: -- unless it's a reasonable
2 apprehension.

3 QUESTION: If a person gets cancer -- and I take
4 it you agree with the Government that such a person could
5 get past, present, and future anxiety as part of pain and
6 suffering, but suppose that person had earlier had
7 asbestos, and then brings his claim for lung cancer,
8 couldn't -- if you prevail today -- the defendant say
9 "Well, at least for the apprehension in the past, you know
10 you're precluded, because you could have brought that
11 claim when you got asbestosis"?

12 MR. LAZARUS: Your Honor, that might be
13 possible. That is not an issue which has been addressed
14 here before this Court, and I haven't looked at the issue
15 preclusion there between the two.

16 What is clear is, if you have a current physical
17 injury --

18 QUESTION: It would be claim preclusion.

19 MR. LAZARUS: Yes, right, and it's not an issue
20 which has been briefed here, because I think that when you
21 have a case like this with a present physical injury, and
22 you have a present emotional injury based on that, or as
23 this Court has actually said in Metro-North, related to
24 the physical injury, that's sufficient.

25 I would like -- if -- to address the second

1 issue, with the Court's --

2 QUESTION: Before you do, may I ask one --

3 QUESTION: Let me ask one -- please.

4 QUESTION: Just one quick question. Do you
5 agree with Mr. Phillips' appraisal of the facts as -- we
6 should assume that the fear of cancer was the major
7 element of damages?

8 MR. LAZARUS: No, Your Honor. All one has to
9 assume here is that there was sufficient evidence that a
10 reasonable jury could give some money based on fear of
11 cancer, not that they had to, and not, certainly, that
12 they gave \$4.4 million, just sufficient evidence that a
13 reasonable jury could have given a dollar, or some money.
14 That's all that would be necessary.

15 The second -- sorry.

16 QUESTION: Was there testimony here that
17 plaintiff A had heavy, or severe asbestosis and
18 plaintiff B had mild, and was it based on any lung X-rays
19 to show that this person's very badly infected and the
20 other wasn't?

21 MR. LAZARUS: Yes, Your Honor. There is --
22 there's lots of record evidence in this case to establish
23 the asbestosis and how there may have been different
24 degrees of asbestosis.

25 QUESTION: All right, and since that's dependent

1 on dosage, why isn't this a case in which we can apportion
2 causation?

3 MR. LAZARUS: Your Honor, for very simple a
4 reason. The first reason is that we think that FELA
5 itself on its face actually directs there to be joint and
6 several liability when you have single injuries. That's
7 our first argument, that FELA on its face answers the
8 question, or that FELA provides that the railroad should
9 be liable, quote, "for such injury or death resulting in
10 whole or in part from the negligence of the railroad."

11 QUESTION: Correct me if I'm wrong, is it a
12 principle of tort law that if causation can be
13 apportioned, that the injury is -- that there is then
14 several liability on that tort --

15 MR. LAZARUS: Your Honor --

16 QUESTION: -- or am I wrong about that?

17 MR. LAZARUS: No. The background principle of
18 the common law of torts here is that there are -- if there
19 is a single injury, then there is joint and several
20 liability unless there's a reasonable basis for
21 apportionment. Our threshold argument --

22 QUESTION: And since asbestosis is peculiarly
23 related to dosage and exposure, why isn't that a proper
24 ground for apportionment here?

25 MR. LAZARUS: Assuming that FELA doesn't answer

1 the question, let me answer it based upon the common law.
2 Because the plaintiff has the burden -- sorry, the
3 defendant -- petitioner has the burden in that case to
4 establish 1) what the doses were, and 2) what the dose
5 relationship was, and the one thing we know here, the
6 prototype example that Mr. Phillips referred to is
7 Mr. Butler, and the fact is that Mr. Butler apparently
8 worked for three months exposed to asbestos for
9 petitioner, and for many, many years exposed to asbestos
10 at other workplaces.

11 While we don't know what the dose relationship
12 is, Your Honor, we do know for the record the one thing
13 the dose relationship isn't is time. One can't compare
14 one time to another. Let me tell you why we know that.
15 On page 420 of the joint appendix, their expert testified
16 that one is far more likely to contract asbestosis from
17 high concentrations over a short period of time than low
18 concentrations over a long period of time, and there's a
19 reason for that.

20 As Dr. Brody explains on page 87 of the joint
21 appendix, the lungs can naturally rid themselves of the
22 fibers at the low concentrations. It's only at the high
23 concentrations -- the macrophages. It's only at the high
24 concentrations that the lungs can't rid themselves of the
25 fibers.

1 While we have no idea how low the concentration
2 levels were at these other workplaces, we do know how high
3 the concentrations levels were at petitioner's workplace,
4 because Mr. Butler testified on page 249 of the joint
5 appendix that during those three months, he worked in the
6 location of petitioner's workplace where the asbestos
7 concentrations were at the highest. Mr. Butler testified
8 that he worked in the room where the engines were stripped
9 of their fibers, and more fibers were placed on.

10 He testifies on page 249 he looks at these same
11 pictures, which were trial exhibits -- they're reproduced
12 in our brief. He looks at these pictures and he says,
13 yes, that's the kind of room I worked in. This is 249
14 and 250. Yes, that's the kind of exposure I faced.

15 QUESTION: Well --

16 MR. LAZARUS: So we know he had the very high
17 concentrations --

18 QUESTION: Well now, how do we know that?
19 You're saying he worked in the place with the highest
20 concentrations so far as the railroad is concerned, but
21 how do we know how that compares with where he worked
22 elsewhere?

23 MR. LAZARUS: Your Honor, we have no idea, and
24 they -- because they never introduced or sought to
25 introduce any evidence, but what we do know is that very

1 low concentrations -- here we can turn to the Rand report,
2 which they filed with this Court -- lodged with the
3 Court -- just two weeks ago. The Rand report and the
4 testimony of this case makes absolutely clear that in low
5 concentration employment centers, at low concentration
6 exposures, one is very unlikely to have any kind of
7 physical injury, asbestosis or cancer ever develop, which
8 is why there are hundreds and hundreds of thousands of
9 plaintiffs, many of which come from low exposure, which,
10 as the Rand report makes clear, is not likely to lead to
11 any kind of disease. We have no idea how low it was here.
12 We know how high it was here.

13 I have no doubt, Your Honor, that petitioner
14 would have been very hard-pressed at trial to actually
15 show what the doses were, and to show what the dose
16 relationship is, but what I do know is, whatever their
17 reason was at trial for never trying to introduce this
18 evidence, and they never -- if you looked at their motion,
19 where they made the motion for this jury instruction, they
20 never even remotely suggest what the basis for
21 apportionment would be, but whatever their strategic
22 reason for doing that at trial, what is absolutely clear
23 is they are not allowed in the first instance to come to
24 the United States Supreme Court and proffer newspaper
25 articles, magazine articles, selected journal articles and

1 try to argue that there is a reasonable basis for
2 apportionment, or they're entitled to a remand to litigate
3 a issue which they failed to litigate in the first
4 instance.

5 The simple truth, Your Honor, is that at trial
6 in this case the respondents established all of their
7 essential elements of their negligent cause of action.
8 They established their physical injury, and they received
9 a jury award which certainly, compared to the jury awards
10 that I see mentioned in the amicus briefs, is a jury award
11 which seems relatively modest, and certainly a jury award
12 which on its face doesn't suggest that there was some
13 outrageous amount given for reasonable fear of cancer.

14 QUESTION: May I just ask you, you say there's
15 no evidence of what the degree of exposure in other areas,
16 and so forth and so on. Didn't they make any offers of
17 proof with, or did they just the prove the time that they
18 worked --

19 MR. LAZARUS: They really just proved the time.
20 They -- we know the nature of the work, but what we don't
21 know, Your Honor --

22 QUESTION: Well, but then that would be a
23 question of the weight of that evidence, rather than
24 whether they preserved the point.

25 MR. LAZARUS: Well, Your Honor, I'm not -- they

1 never offer a basis of apportionment. We'd have to know,
2 and the evidence at trial made clear, to know the dose and
3 dose relationship you'd have to know the air flow rates,
4 the pathways of exposure --

5 QUESTION: At what point in the trial did it
6 become clear, by a ruling of the trial judge, that they
7 could not rely on the exposure in other areas?

8 MR. LAZARUS: Your Honor, they were not denied
9 this opportunity at trial to introduce the evidence with
10 respect to the non-railroad employment, and you can see
11 that because they actually did do some cross-examination,
12 they did try to introduce the evidence of three months,
13 they did try to refer to the other workplaces, they could
14 have tried to introduce more evidence.

15 QUESTION: Well, why was that relevant if
16 there's joint liability?

17 MR. LAZARUS: Well, we thought it was
18 irrelevant, Your Honor, but they were clearly thinking
19 about the possibility of requesting an apportionment
20 instruction, but the fact is, they never laid out a
21 reasonable basis.

22 If you look at the memorandum --

23 QUESTION: Oh, but they did request an
24 instruction, didn't they?

25 MR. LAZARUS: They did request the instruction,

1 but --

2 QUESTION: So the point was preserved.

3 MR. LAZARUS: Right, but the trial court was
4 correct in denying the instruction because they had not
5 met their burden of proffering a reasonable basis for
6 apportionment, and in the absence of that evidentiary
7 basis, the trial court was absolutely correct in denying
8 it. This was a jury verdict, Your Honor, this was
9 reached.

10 QUESTION: Oh, but that theory, then, is that
11 several liability would have been appropriate if the
12 evidence were sufficient?

13 MR. LAZARUS: Well, no, Your Honor. Our
14 threshold argument is that it would not -- asbestosis,
15 this is a classic individual injury. There are many
16 courts who have talked about this, and they said, well, in
17 theory, asbestosis is dose-related.

18 QUESTION: With respect, Mr. Lazarus, isn't
19 your -- the bottom line in this argument that this is
20 simply not an issue in the case, because they didn't
21 provide a basis?

22 MR. LAZARUS: Yes, that's absolutely right.

23 QUESTION: So you're saying, forget it.

24 MR. LAZARUS: That's right. They had the burden
25 and they simply didn't meet their burden.

1 QUESTION: And they say you had the burden.

2 MR. LAZARUS: Well, but it's quite --

3 QUESTION: It seems to me that argument goes to
4 the weight of the evidence they offered, rather than to
5 the -- your legal position. I may be missing something.

6 MR. LAZARUS: Well, Your Honor, no, they have to
7 as a matter of law, right, proffer some kind, and here
8 there's absolutely nothing --

9 QUESTION: Well, but they did proffer -- if I
10 remember it, they did proffer evidence as to the time that
11 these people worked in other areas where they were exposed
12 to asbestos, didn't they?

13 MR. LAZARUS: There is some evidence --

14 QUESTION: But you're saying that's not enough.

15 MR. LAZARUS: There's some evidence as to that,
16 but in fact if you can look to their instruction they
17 don't even say what -- that time is the relevant factor,
18 and I think the evidence at trial shows that time is not
19 even close to establishing what the dose relationship
20 would be. This is very complicated.

21 QUESTION: But aren't you really saying that
22 unless there's an abuse of discretion on the part of the
23 trial judge in refusing to send this to the jury, based on
24 what you've just described, insufficiency of evidence on
25 their part, that it's not in the case for us?

1 MR. LAZARUS: That's absolutely right, Your
2 Honor.

3 Thank you.

4 QUESTION: Very well, Mr. Lazarus.

5 Mr. Phillips, you have two minutes remaining.

6 REBUTTAL ARGUMENT OF CARTER G. PHILLIPS

7 ON BEHALF OF THE PETITIONER

8 MR. PHILLIPS: Thank you, Mr. Chief Justice.

9 I want to be absolutely clear about the
10 apportionment in this case. We put in an instruction on
11 apportionment based on a reasonable basis following
12 Justice Kennedy's analysis of the law, which says if
13 there's a reasonable basis to apportion, you do that.

14 The trial judge did not reject that on the basis
15 of insufficient evidence. What he said at page 179,
16 volume 9 of the transcript is, if you've got a joint tort-
17 feator, that tort-feator is liable for all of the
18 injuries. He said it as a matter of law. It's joint and
19 several liability. There is no apportionment. That's the
20 ruling we challenged. That's the legal issue before this
21 Court.

22 The second question, then, with your leave, is
23 to --

24 QUESTION: Well, but should we adopt your
25 position if it's as difficult to show this separate

1 causation as your brother argues?

2 MR. PHILLIPS: Well, Dean Prosser said from day
3 one it's always going to be difficult to apportion, but
4 that's no reason not to have the jury undertake to
5 apportion. There are lots of decisions that juries make
6 that are very hard to make, but the better rule is to
7 apportion, because that's the fair outcome that will arise
8 in these cases.

9 With respect to the fear of cancer damages, the
10 key to this case, it seems to me, is just how big a
11 gatekeeper function the fact of asbestosis can be, and
12 my -- the argument is, asbestosis is extraordinarily easy
13 to diagnose. There are currently 5,500 cases under FELA
14 in West Virginia. Every single one of them involves a
15 claim of asbestosis. Every single one of them will be
16 supported by an expert.

17 What you get is, that's not a gatekeeper. Those
18 cases are going to come in, and then you're going to have
19 exactly the kinds of evidence you had in this case, I'm
20 afraid of cancer, give me whatever you think is the right
21 number. That is the essence of unpredictable and
22 unlimited damages. This Court declined to allow that
23 under FELA in Buckley. It should decline to allow that
24 under FELA in this case as well.

25 If there are no questions, I'll reserve --

1 CHIEF JUSTICE REHNQUIST: Thank you,
2 Mr. Phillips. The case is submitted.

3 (Whereupon, at 11:03 a.m., the case in the
4 above-entitled matter was submitted.)

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