

SUPERIOR COURT OF NEW JERSEY
MIDDLESEX COUNTY, CIVIL PART
DOCKET NUMBER MID-L-3932-03

FUCCILLI,	:	
	:	EXCERPT OF
Plaintiff,	:	
	:	PROCEEDINGS
- vs -	:	
	:	
NEW JERSEY TRANSIT,	:	
CNJ,	:	OPENING STATEMENT
	:	
Defendants.	:	OF BARRY EICHEN

Place: Middlesex County Court
New Brunswick, N.J.

Date: July 14, 2005

BEFORE:

THE HONORABLE ANN G. MC CORMICK, J.S.C.

TRANSCRIPT ORDERED BY:

RICHARD VOGEL (Eichen Levinson)

APPEARANCES:

BARRY EICHEN, ESQ. (Eichen Levinson)

-and-

WILLIAM LEVINSON, ESQ. (Eichen Levinson)
Attorneys for Plaintiff.

ALAN B. GRANT, ESQ. (Mauro, Savo, Camerino &
Grant)

-and-

SAMUEL ROSENBERG, ESQ.
Attorneys for Defendant New Jersey Transit.

- - -

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1 MR. EICHEN: Your Honor, I'm
2 sorry, counsel, as you know, my name is Barry
3 Eichen, and I represent the Fuccilli family along
4 with my partner, Bill Levinson. I want to take
5 you to Freehold, New Jersey. I want to take you
6 to a house. And as you open the front door of
7 that house --

8 THE COURT: Mr. Eichen, you are
9 going to have to speak up.

10 MR. EICHEN: I'm sorry.

11 THE COURT: Thank you.

12 MR. EICHEN: And as you open the
13 front door of this house, on a typical day what
14 you might see is a mother in the kitchen with her
15 two daughters helping out, and you may see two
16 children, two other male children in the house,
17 one helping out and one a special child. One
18 child is autistic. You'd see everybody in that
19 house taking care, making sure that one special
20 child is taken care of and he feels save and
21 comfortable and loved. And in that same house,
22 you'd see a father, a very proud father who worked
23 hard to provide for that family, who was there for
24 those children every step of the day. He wasn't
25 only there when they were grown, he helped when

1 they were little. He brought them up, he raised
2 them, he changed them, and he was there in every
3 step. He took his little girls, even when he did
4 his karate and had his own little karate place, he
5 took them and made sure they could protect
6 themselves and took them with him, all of his
7 children.

8 And now I want to take you to a
9 little bit different place. I want you to take
10 you to CentraState Hospital. And as you go
11 through the front doors of this hospital, you're
12 going to go through a few corridors and you're
13 going to come to the intensive care unit. And in
14 that intensive care unit, you're going to see a
15 man attached to a machine with a tube down his
16 throat forcing oxygen to his lungs so he can
17 breathe. And surrounded -- you're going to see
18 him surrounded by those same children he brought
19 up and now those same children he brought up are
20 going to be taking care of him. Those two little
21 girls that were there for him are now grown women.
22 And they are saying, you know what, Dad? Now
23 we're here for you. Now we're here for you. Now
24 they're going to take turns shaping their father,
25 holding his hand and saying, you know what, Dad?

1 You're not in this alone, we're here with you.
2 And you're going to see that family, that
3 dedicated family there every night for six months
4 while their father suffocated to death up until
5 midnight. You'll see that family there as he
6 suffocated to death from an occupational exposure.
7 Roger Fuccilli was a railroad worker, and he put
8 his heart into his job, and he showed up for his
9 job and it was a very difficult, difficult job
10 that exposed him to very bad toxic fumes and
11 substances including asbestos, including sand and
12 silicone, including dust, including metal dust
13 from grinding. And that railroad didn't provide
14 him the proper respirator. They didn't provide
15 him proper equipment. They never warned him,
16 never warned him not once that these substances
17 could kill him.

18 This case falls under FELA, a
19 Federal Employers Liability Act. A long time ago
20 when the country and the government wanted to
21 expand this country to the west, they made a deal
22 with the railroads. They said, "We'll give you
23 175,000,000 acres but we have the right to
24 regulate you" and that's why railroads are heavily
25 regulated. And after they saw the dangerous work

1 that these railroad workers were doing, they
2 passed FELA to level the playing field. And FELA
3 says, just as a background and just as a road map,
4 the judge is going to tell you, that the slightest
5 neglect from a railroad that contributes even in
6 the slightest way to an injury makes that company
7 responsible for that worker's injury.

8 Now I want to go over Roger's
9 work, where Roger Fuccilli worked and what he did
10 for the different railroads. Roger Fuccilli
11 worked for Central New Jersey Railroad. And at
12 Central New Jersey Railroad, he was on what was
13 called the caboose project up here. And what he
14 did in the caboose project is he built cabooses.
15 He completely refurbished them. And they were
16 cabooses that were built from 1940 to 1942. They
17 were old. They were lined with asbestos
18 throughout and a lot of times they would catch
19 fire because of the wooden ovens in them. He
20 ripped them apart and he went into these enclosed
21 cabooses without respirator equipment and he did
22 that for a full year. His employment is
23 14 months, but he actually missed two but he was a
24 full year doing that project. His exposures were
25 wood dust, metal dust, asbestos and silica. His

1 respiratory protection was none.

2 Now the next railroad he was at
3 was Conrail. And I will tell you when this case
4 again with Central New Jersey Railroad, Conrail
5 and New Jersey Transit, Conrail has settled their
6 claim. But here's what he did at Conrail. He did
7 car repair, carpentry, painting, sanding, grinding
8 and he changed brakes. His exposures were wood
9 dust, metal dust, asbestos, silica, isocyanates
10 and diesel fumes. You'll hear from industrial
11 hygienists about these particular materials, and
12 you'll hear from doctors. And the respiratory
13 protection he received there -- let me go back a
14 step. At Conrail, he mostly did painting and
15 scraping of engines. His exposures at Conrail
16 were more metal dust and paint, okay? The paper
17 masks they provided him were these paper masks and
18 right on them they say, "This mask does not
19 protect your lungs." That's what they gave him.
20 These are paper and they can rip pretty easy. And
21 they are not protection for your respiratory
22 system and they say it right on them and, yet,
23 that was what was supplied.

24 Now the next railroad he was at
25 and for the most significant amount of time is New

1 Jersey Transit. And you're going to hear from
2 Roger Fuccilli from his videotape his history and
3 you are going to hear from other workers about
4 what he did, how much work he did, and what kind
5 of work he did. And you are going to hear that he
6 wasn't provided -- go ahead, Rich, you can put up
7 the next thing. You're going to hear that he
8 changed brakes over there and he was exposed to
9 silica and to asbestos and to the same, same
10 materials. And when he changed brakes, you'll
11 hear testimony that he changed thousands of
12 brakes, thousands. He was often in a building
13 where they did welding and they did painting and
14 they did a lot of things altogether with very poor
15 ventilation in these buildings. As a matter of
16 fact, one of the buildings was a very long -- all
17 three exposures were at one of the buildings
18 called E Port. And this huge building only had
19 two fans and that was it. No ventilation. And
20 all of this dangerous work and these fumes were
21 contained in one big building. And all three
22 railroads overlapped this particular facility and
23 you'll hear about all the other facilities also.
24 You won't only hear about witnesses who are still
25 New Jersey Transit employees, but you'll hear from

1 witnesses on behalf, who are here today on behalf
2 of New Jersey Transit who will not be able to deny
3 what facilities had -- the facilities had asbestos
4 and had silica and had metal fumes and different
5 dusts that were very toxic to the lungs, and
6 you'll see that.

7 So you're probably going to ask
8 yourself, you know, what laws are in place.
9 Aren't their laws that protect workers? Well,
10 yeah, there are plenty of guidelines and safety
11 guidelines but these railroads did not follow them
12 at all, they didn't follow them. They didn't
13 provide the right respirators. They never told
14 Roger Fuccilli that these substances could kill
15 you or harm you, never. And the respirators at
16 New Jersey Transit were no better. They were the
17 same paper respirators. At one point they had the
18 double respirators with never having refill
19 cartridges. They were never available. They were
20 black and dirty and New Jersey Transit did not
21 make them available, the new cartridges even when
22 they had those for, some allegations, for a little
23 period of time. As a result of this negligence on
24 the part of the railroad, Roger suffered from a
25 disease called interstitial pulmonary fibrosis,

1 and it's a very horrible disease. I'm not a
2 doctor. You're going to hear from a doctor. But
3 with interstitial pulmonary fibrosis, your lungs
4 branch out on both sides just like a tree. And if
5 you look at it microscopically, these are air
6 sacs. When these become inflamed and scar, that's
7 called fibrosis. That's why it's interstitial
8 pulmonary fibrosis, they become scarred. And
9 these walls between these air sacs are called the
10 interstitial, they become scarred. And in the
11 very worst cases when the exposures are very bad
12 -- because people live with this -- but in the
13 very bad cases these air sacs close and there
14 cannot be an exchange, an oxygen exchange. Your
15 body cannot take in oxygen and exchange carbon
16 dioxide and you suffocate to death. And it's not
17 a fast death. Every day you breathe a little less
18 and a little less and a little less and it's
19 painful and it's a bad, bad disease. And that's
20 what happened to Roger Fuccilli. Now, you're
21 probably going to ask with regard to diagnosis,
22 how is the diagnosis made? Well, when Roger first
23 started having some problems, he couldn't breathe
24 well and he went to his primary care physician.
25 And what physicians do when they're diagnosing

1 something is they do what's called a differential
2 diagnosis. And I don't mean to get technical. I
3 didn't know this very well and I had to learn it,
4 but you need to know this. On a differential
5 diagnosis when you go to a doctor in order for him
6 to determine whether you have pneumonia or strep
7 or whatever you have, a doctor goes and he tells
8 you what, in fact, the possible symptoms are, and
9 then they rule out what it's not. And that's how
10 you come to find out what's left, what is left and
11 that's how they diagnose a disease. So he went to
12 his primary care physicians and they didn't know.
13 They had some differential, they had some guesses,
14 and they sent him to Deborah. He finally got to
15 Deborah Heart and Lung. Many of you know it.
16 Deborah is this special place because they treat
17 you regardless of your ability to pay, race,
18 creed, color. They want to do their job. So when
19 he went to Deborah, he was not in good shape. He
20 needed a lung transplant so he saw Dr. Murphy.
21 And Dr. Murphy tried to arrange that. And before
22 Dr. Murphy had an appropriate history, before Dr.
23 Murphy could get the list of exposures at the
24 railroad because he needed to know what was he
25 exposed to. Before he could get any of that, Dr.

1 Murphy was concentrating on making sure he could
2 possibly get a lung transplant. And he used the
3 word "etiopathic," that is, he wasn't sure at that
4 point what it was. And he was -- Mrs. Fuccilli
5 and Roger and the family were told, you know, you
6 need to see an occupational, occupational medicine
7 and disease doctor. And through some referrals,
8 she finally found in her own research, she finally
9 found Dr. Udasin at UMDNJ, a professor, someone
10 who treats occupational disease. And the first
11 thing she said was, you know what? I need Roger
12 Fuccilli's work history. I need a thorough
13 history so I can determine what the cause is here.
14 And I also need the MSDS, just fancy words for
15 material safety data sheets, what are the list of
16 the exposures, what was here. And she tried to
17 get them. We tried as best as we could to get as
18 much from the railroads. And then Dr. Udasin
19 wanted to visit the railroads, but New Jersey
20 Transit wouldn't let her in so she couldn't see
21 the facilities. But she had enough and she had
22 the research, she had the history, she had the
23 epidemiology, fancy word for the studies, and she
24 was able to determine unquestionably that this
25 occupational exposure was the cause of Roger

1 Fuccilli's pulmonary fibrosis. You'll hear from
2 her. She's credible. She treated Roger. She's a
3 treating doctor that tried to help him. Dr.
4 Murphy later got a better history and was able to
5 review everything. And Dr. Murphy then agreed
6 this is absolutely an occupational exposure,
7 absolutely caused by these exposures at the
8 railroad, unprotected. Also, what the doctors
9 were able to do was now get some objective
10 evidence. You'll hear from a doctor who saw films
11 that were consistent with asbestos exposure.
12 You'll see another doctor that was involved and
13 used a special microscope, polarized lens so he
14 could see crystals. He said, you know what?
15 There are birefringent materials here, stuff
16 that's not supposed to be here. That's just a
17 fancy word for things that are not supposed to be
18 in the lungs that were actually in the lungs. And
19 there was silica. So we got further proof.

20 So with all that, the defendants
21 decided to hire some of their own doctors and
22 their own experts. And I want you to listen to
23 their experts especially well, because they have a
24 Dr. Craighead. And Dr. Craighead in his testimony
25 you'll see he's had at least a thousand depositions at

1 least a thousand all on behalf of the railroad and
2 all saying that an employee is not hurt. You'll
3 see that's an industry friend. And they have an
4 occupational person named Dr. Sander and Dr.
5 Sander has never treated a patient. You're going
6 to hear from another doctor from the railroad.
7 He's actually not a doctor. He's an industrial
8 hygienist. And when we asked, it seems like
9 you're the go-to guy for the railroad, are you?
10 And his answer was, yes, I am the go-to guy. I do
11 not think -- and you don't have to listen to me.
12 You're going to listen to the evidence and make
13 your own judgments in this case, but I do not
14 think you're going to find those doctors credible.
15 I think you're going to have a problem with their
16 credibility and their objectiveness, but you'll
17 make that decision yourself.

18 Let's talk about what theories
19 these doctors espouse. First, they are going to
20 talk about maybe smoking was an issue. There was
21 no smoking illness in this case at all. But let's
22 go and see what the first is.

23 DIP. There are three pulmonary
24 internists, three pulmonary doctors hired by the
25 railroad. We just have the treater. We are only

1 bringing the treater. But the three they hired,
2 two of them say smoking has nothing to do with
3 this case. One of them says, well, you know what?
4 I think smoking does, and I think DIP is
5 something, desquamative interstitial pneumonitis.
6 With DIP, it improves when smoking stops, it
7 responds to steroid treatment, and the length of
8 illness to death is ten plus years. Roger stopped
9 smoking and he didn't improve. He took steroids
10 and didn't respond at all, and Roger Fuccilli
11 lived 18 months from the time he was diagnosed to
12 his death. There is zero scientific proof for DIP
13 in this case.

14 Now smoking consequences. The
15 consequences of smoking are: Emphysema, lung,
16 pharynx and larynx -- your throat -- cancer and
17 chronic obstructive pulmonary disease. Roger did
18 not have emphysema, Roger did not have cancer, and
19 Roger did not have chronic obstructive pulmonary
20 disease. So that's not really in the case. They
21 are what's called and known as red herrings.

22 The next is acid reflux. This
23 disease, one of the doctors -- remember I told you
24 about a differential diagnosis? One of the
25 doctors early on said, well, he had acid reflux

1 and we should look into that. This disease that
2 Roger had does not present and no doctor will say
3 in this case in any way, shape or form that the
4 way his lungs were destroyed presented anything
5 like gastric reflux. There is zero basis for it.
6 But it is mentioned by someone that was
7 determining, well, these are things we should
8 check out.

9 Now, next medically they may say,
10 well etiopathic, we don't know. Well, we didn't
11 know until we got the exposures and the
12 appropriate material safety data sheets and the
13 history and now we do. And they are going to hang
14 on to etiopathic. They are going to hang on to
15 this word. That is just not in the case. It's
16 not etiopathic. Now if the medicine -- there are
17 other theories. This is the time that Roger
18 Fuccilli worked at the various railroads, the red
19 being -- and you can take off almost a third of
20 that red for CNJ because he was there only about a
21 year and that's a little less off. Then he was at
22 Conrail for that area, the bluish area, and the
23 gray represents the entire time at New Jersey
24 Transit. And Transit said, well, it couldn't be
25 us because he had some time off. The light gray

1 area equals the time off. Roger did have time
2 off. It was a hard, dangerous job. He hurt
3 himself once or twice, and he took some time off
4 to take care of his child once. And he was
5 suspended once because he wouldn't do something
6 that he considered to be unsafe. It went to the
7 union and he got his job back. But that light
8 gray area represents that time off. All that time
9 right there is his exposure time. So I don't
10 think it's a meritorious argument.

11 The next is, Roger owned real
12 estate. Roger Fuccilli owned real estate. My
13 problem with that argument is if their doctors are
14 going to say that the illness wasn't caused by
15 exposures and then say, well, Roger worked hard
16 for his family, he bought a couple buildings that
17 he owned with partners, and they were supers and
18 he may have changed the window or worked on a door
19 and that's what caused it, you can't have it both
20 ways. Either exposure is causing it or they don't
21 cause it. But even if the exposure, he had some
22 exposure because he changed the window or worked
23 on a door, certainly most of his exposure by the
24 vast, vast majority is exposures from these hard,
25 dangerous work at the railroad, not from changing

1 a door in an apartment building he may have owned.
2 And regardless, it's not relevant. Because the
3 slightest negligent even if it contributes in the
4 slightest way, it's the railroad regardless of the
5 fact that there were other exposures. And that's
6 the law, and the judge will give you that at the
7 end of this case. This is a unique case and the
8 law is a little different, so you will have to
9 listen carefully to that. And then at the end of
10 this case you are going to have a lot of
11 credibility judgments to make, and this is a very
12 serious, very serious case and effecting a family
13 in a very serious way. And you are going to have
14 some very tough choices and a very tough job here,
15 very tough job. And I think after you hear all of
16 the evidence, I think you will make the right
17 choice. I appreciate your time very much. Thank
18 you.

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CERTIFICATE

1
2
3 I, Sandra Robertson, a Notary
4 Public and Certified Court Reporter of the State
5 of New Jersey, do hereby certify that prior to the
6 commencement of the examination, the witness was
7 duly sworn by me to testify to the truth, the
8 whole truth and nothing but the truth.

9 I DO FURTHER CERTIFY that the
10 foregoing is a verbatim transcript of the
11 testimony as taken stenographically by and before
12 me at the time, place and on the date hereinbefore
13 set forth, to the best of my ability.

14 I DO FURTHER CERTIFY that I am
15 neither a relative nor employee nor attorney nor
16 counsel of any of the parties to this action, and
17 that I am neither a relative nor employee of such
18 attorney or counsel, and that I am not financially
19 interested in the action.
20
21
22

23 _____
SANDRA A. ROBERTSON, CCR
24 Notary Number: 2108796
Notary Expiration: 4/21/09
25 CCR Number: XI 02095