IN THE COURT OF APPEALS 06/18/96

OF THE

STATE OF MISSISSIPPI

NO. 94-CA-00867 COA

NORFOLK SOUTHERN RAILWAY COMPANY

APPELLANT

v.

MACK CHARLES BONNER

APPELLEE

THIS OPINION IS NOT DESIGNATED FOR PUBLICATION AND

MAY NOT BE CITED, PURSUANT TO M.R.A.P. 35-B

TRIAL JUDGE: HON. ROBERT G. EVANS

COURT FROM WHICH APPEALED: JASPER COUNTY CIRCUIT COURT

ATTORNEYS FOR APPELLANT:

BROOKE FERRIS AND ROMNEY H. ENTREKIN

ATTORNEY FOR APPELLEE:

LARRY STAMPS

NATURE OF THE CASE: FEDERAL EMPLOYERS' LIABILITY ACT

TRIAL COURT DISPOSITION: JURY VERDICT FOR BONNER IN THE SUM OF $2,000,000.00; ORDER OF REMITTITUR IN THE SUM OF $1,254,500.00

BEFORE THOMAS, P.J., BARBER, AND PAYNE, JJ.

BARBER, J., FOR THE COURT:

SUMMARY

Mack Bonner filed suit against Norfolk Southern Railway Company (the "Railroad") under the Federal Employers' Liability Act ("FELA"), 45 U.S.C. § 51, alleging that the Railroad's failure to provide him a safe place to work resulted in injuries to his left knee. The jury found in favor of Bonner and assessed his damages at two million dollars. The trial judge found that the amount of the jury's verdict was against the overwhelming weight of the evidence and evinced bias and prejudice, which resulted in an order of remittitur, thereby reducing Bonner's damages in the verdict to $ 745, 500.00. The Railroad appeals, assigning six issues as error. Bonner cross appeals on one issue. Finding no error in the proceedings below, we affirm.

FACTS

Bonner was employed by the Railroad as a track laborer from 1973 until 1992. His duties required him to work along the railroad track performing various duties while walking on ballast. Ballast is large rock material used to support the track surface. Track laborers are occasionally required to unload ballast trains which are used to resurface the track. In order to unload these trains, Railroad employees must walk along the side of the train.

Bonner testified at trial that he fell and injured his left knee while on the job in 1988. Bonner was treated by several physicians and underwent two arthroscopic knee surgeries on his left knee to repair a tear of the lateral meniscus. The doctor for the Railroad released Bonner to return to work in 1989.

Bonner testified at trial that he sustained a new injury to his left knee in 1992 when he fell while unloading a ballast train. One of Bonner's co-workers also testified that he saw Bonner fall while unloading the train. Bonner stated that the train sped up while he was unloading the ballast, and he was forced to "jog" or "trot" in order to keep up to the train. Bonner asserts that he fell because he was forced to jog on the ballast. Bonner underwent a third surgery on his left knee in July 1992. Bonner filed suit in June 1993.

I. IS BONNER'S CLAIM BARRED BY THE STATUTE OF LIMITATIONS?

The first of the seven issues presented to us for consideration is whether Bonner's claim was barred by the statute of limitations imposed by the Federal Employers' Liability Act (FELA). The testimony at trial was that Bonner received a physician's permission slip to return to work at the railroad on August 14, 1989 with no restrictions. When the Plaintiff returned to work in August of 1989, he was given a full release by Dr. Hand, Norfolk's own physician, to return to the same physically demanding manual labor as before, with no limitations.

Bonner testified it was subsequent to this, in 1992, that he experienced a traumatic injury which ended his career as a track laborer. After undergoing corrective surgery, Bonner was given a 10% impairment to the whole body, and 22% for the lower extremity. A vocational rehabilitation specialist asserted at trial that Bonner was at the time 100% functionally disabled.

Further testimony by a corporate representative and foreman revealed that the trackmen occasionally had to jog on large rocks while unloading the slag train. These rocks were uneven, jagged, loose and

had a tendency to shift. This same corporate representative also testified that he was an eyewitness to Bonner's fall in July of 1992. Based upon this testimony, there was sufficient evidence for the jury to conclude that Bonner's injury had indeed occurred in the Spring of 1992, well within the three-year statute of limitations provided for by the FELA.

The dissent does not find that Bonner's claim was barred by the statute of limitations. Rather it concludes that the court failed to submit this issue to the jury and in doing so, effectively granted a directed verdict for Bonner on the factual issue of when his cause of action accrued. With all deference, we cannot agree with this reasoning.

Apparently, the dissent finds that because certain defense instructions pertaining to apportionment of damages were denied, the issue of when the injury occurred was barred from consideration by the jury. We disagree that this was the result of the ruling. The jury was instructed that the Plaintiff, Bonner, had the burden of proving each element of his claim by a "preponderance of the evidence." The statute of limitations issue was vehemently argued at trial and there was extensive testimony regarding this matter. Thus, the jury, in finding for Bonner, necessarily concluded that Bonner proved, by a preponderance of the evidence, that he sustained a separate and distinct injury in 1992.

II. DID BONNER FAIL TO PROVE A PRIMA FACIE CASE OF NEGLIGENCE?

In its second assertion of error, Norfolk claims that Bonner failed to prove a *prima facie* case of negligence as required by FELA. In passing upon whether a railroad has breached its duty, federal law is controlling. *Monessen Southwestern Ry. v. Morgan*, 486 U.S. 330, 335 (1988). Although the plaintiff's burden of establishing causation is relaxed under FELA, the plaintiff is otherwise held to a common law standard of negligence. FELA is not a workers' compensation system, and employer's negligence is a prerequisite to liability. *Soto v. Southern Pacific Transp. Co.*, 644 F.2d 1147, 1148 (5th Cir. 1981). The Fifth Circuit has indeed held that a railroad is not an insurer of the safety of its employees. *Atlantic Coast Line R..R. v. Dixon*, 189 F.2d 525, 526-27 (5th Cir. 1951). It is also undisputed that the railroad, by its very nature, is a dangerous place to work.

With that being said, it is important to recognize that FELA was passed in 1908 as a means of providing a tort compensation system for workers in the railroad industry, which was experiencing a great number of injuries and deaths to trainmen every year. Jerry J. Phillips, *An Evaluation of the Federal Employers' Liability Act*, 25 San Diego L. Rev. 49,51 (1988). The background and development of the Federal Employers' Liability act reveals that:

> FELA preceded the wide adoption of workers' compensation systems in this county. It retained the tort characteristics of fault-based liability and compensatory damages based upon actual damages suffered, rather than upon a fixed or arbitrary scale of benefits. FELA adopted a pure comparative fault standard, except that assumption of risk was no defense in cases where the employer was guilty of negligence per se in violating a federal safety statute or regulation. In 1910 FELA was amended to provide concurrent state and federal jurisdiction and nonremovable venue in any jurisdiction where the defendant resided or did business, or where the cause of action arose. In 1939 Congress eliminated the defense of assumption of risk, established a three-year statute of limitations, and made it a crime for any person to attempt to prevent the furnishing of information relating to the injury or death of an employee.

> In a series of decisions, notably *Rogers v. Missouri Pacific Railroad* and *Gallick v. Baltimore & Ohio Railroad*, the United States Supreme Court broadened and liberalized the definitions of fault and proximate cause as applied under FELA. *Rogers* held that a jury question of fault is presented if 'employer negligence played any part, even the slightest, in producing the injury or death for which damages are sought.' In *Gallick* the Court ruled that a jury question of causation is presented where there is 'evidence that any employer negligence caused the harm, or, more precisely, enough to justify a jury's determination that employer negligence had played any role in producing the harm.' The salutary effect of these decisions was to present a jury question of fault and causation in all but the clearest instances. As a result, FELA cases generally are decided by a panel of one's peers.

Id. (footnote omitted).

The Mississippi Supreme Court, in an opinion written by Presiding Justice Prather, has adopted the negligence standard from *Rogers v. Missouri Pacific Railroad Co.*, 352 U.S. 500 (1957), to be applied in FELA cases which stated:

> Under [F.E.L.A.], the test of a jury case is simply whether the proofs justify with reason the conclusion that employer negligence played any part, even the slightest, in producing the injury or death for which damages are sought. It does not matter that, from the evidence, the jury may also with reason, on grounds of probability, attribute the result to other causes, including the employee's contributory negligence. Judicial appraisal of the proofs to determine whether a jury question is presented is narrowly limited to the single inquiry whether, with reason, the conclusion may be drawn that negligence of the employer played any part at all in the injury or death. Judges are to fix their sights primarily to make that appraisal and, if that test is met, or [sic] bound to find that a case for the jury is made out whether or not the evidence allows the jury a choice of other possibilities. The statute expressly imposes liability upon the employer to pay damages for the injury or death due "in whole or in part" to its negligence.
>
> The law was enacted because the Congress was dissatisfied with the common law duty of the master to his servant. The statute supplants that duty with the far more drastic duty of paying damages for injury or death at work due in whole or in part to the employer's negligence. The employer is stripped of his common law defenses and for practical purposes the inquiry in these cases today rarely presents more than the single question whether negligence of the employer played any part, however small, in the injury or death which is the subject of the suit. *The burden of the employee is met, and the obligation of the employer to pay damages arises, when there is proof, even though entirely circumstantial, from which the jury may with reason make that inference.*

Seaboard Systems R.R., Inc. v. Cantrell, 520 So. 2d 479, 483 (Miss. 1987) (emphasis added)

(quoting *Rogers v. Missouri Pacific Railroad*, 352 U.S. at 506-508).

It is against this backdrop that we address Norfolk's second assertion of error. The evidence submitted at trial, taken in the light most favorable to Bonner, shows that (1) Bonner's job required him to unload slag or ballast from a moving train by walking along side the train and holding the door open in order to allow the ballast to pour out; (2) several witnesses testified that moving the ballast train faster than a walking pace was unsafe; (3) Bonner fell while trotting to keep up with the ballast train which was traveling at a speed which was faster than a walking pace; and (4) this fall resulted in the injury to Bonner's left knee.

Furthermore, testimony revealed that Norfolk knew or should have known that a moving ballast train traveling at greater than walking speed would impose a greater risk of injury to Bonner or those similarly situated to him. One of the railroad's employees, Bankston, testified that the safest way to unload a ballast train was at walking speed. Another railroad employee testified that normally, the ballast trains travel at a walking speed. He also stated, however, that at times the trains will travel at greater than walking speed until a supervisor contacts the train to slow it down. Until then, the track laborer would be required to "trot" along side the train. The Plaintiff's expert, Jack Larks, testified that the ballast is a sharp angular rock that composes a surface that is loose, difficult to walk on, and is subject to shift under a person's foot. When a person jogs or trots, the impact exacerbates these adverse conditions.

Based on these facts, it cannot be said that employer negligence played no part in producing Bonner's injuries, thereby warranting that this issue be removed from jury consideration. Thus, given the relaxed element of causation which must be proved in FELA cases, we cannot find that the jury verdict must be reversed. In the case of *Webb v. Illinois Central Railroad Co.*, 352 U.S. 512, 515 n.6 (1957), the Supreme Court stated that:

> It is no answer to say that the jury's verdict involved speculation and conjecture. Whenever facts are in dispute or the evidence is such that fair-minded men may draw different inferences, a measure of speculation and conjecture is required on the part of those whose duty it is to settle the dispute by choosing what seems to them to be the most reasonable inference.

Arguably, the jury in this case could have reasonably concluded that Norfolk did not breach its duty to provide a safe workplace, or that Bonner did not prove his injuries were the result of his fall. The fact that they did not, does not render their verdict void where, as here, there is evidence to support a converse result. Therefore, we find Norfolk's second assertion of error without merit.

> III. IS THE RAILROAD ENTITLED TO A NEW TRIAL BASED UPON THE SIZE OF THE JURY VERDICT?

As its third assertion of error, Norfolk claims that it is entitled to a new trial based upon the size of

the jury verdict. At the conclusion of trial, the jury awarded a verdict in favor of Bonner in the amount of $2,000,000. Pursuant to Norfolk's motion for JNOV, new trial or remittitur, the trial judge, concluded that the $2,000,000 verdict "was against the overwhelming weight of the credible evidence and evinced bias, prejudice, and passion on the part of the jury." The judge then ordered a remittitur in the amount of $1,254,500, letting stand a verdict in the amount of $745,500. Norfolk now contends that in view of the trial judge's finding that bias, prejudice and passion played a part in the jury's deliberations, the trial judge erred in awarding a remittitur and the only appropriate remedy was to grant a new trial. We disagree.

First, we note that paragraph ten of Norfolk's motion argued that the jury's verdict "shocks the enlightened conscience and evinces bias, passion and prejudice on the part of the jury against the defendant." Norfolk made this argument, however, within the context of explicitly asking for the alternative remedy of a remittitur. Put another way, Norfolk implicitly conceded that if the trial court found that the amount of the verdict was excessive and a product of bias, prejudice and passion, that it would settle for a remittitur instead of a new trial. Thus, the trial court was never presented with or allowed to pass upon the issue of whether a new trial was the only correct remedy in those instances where the jury's verdict was the product of bias, prejudice or passion. Instead, it was implicitly led by Norfolk to the conclusion that a new trial or a remittitur would be an acceptable remedy in such a circumstance.

It is well established that we will not pass upon an issue that was not first presented to the trial court for decision. Because Norfolk did not raise its present argument at the trial level, we hold that the issue is procedurally barred.

Even if we did not hold that the issue is procedurally barred, we would still find no merit in Norfolk's present argument. Norfolk argues that a new trial is the only acceptable remedy in those cases where the jury's verdict is the product of bias, prejudice or passion and does so by citing numerous federal decisions that so hold. Norfolk further argues that because state courts are required to apply federal substantive law in adjudicating FELA claims, *see Monessen Southwestern R.R. v. Morgan*, 486 U.S. 330, 335 (1988), that we should apply the holdings of these cases and remand for a new trial. We have examined the federal decisions that Norfolk cites, however, and have come to the conclusion that the rule that Norfolk now urges us to apply is not a substantive rule, but is instead a procedural rule that applies to a wide variety of cases brought under various statutory schemes and not just FELA. Because we are of the opinion that the federal rule that Norfolk now urges us to adopt is procedural rather than substantive, we are under no obligation to apply it in the present case. Finally, because our State's procedural rules permit our trial courts to grant remittiturs in such instances, *see* Miss. Code Ann. § 11-1-55 (1972), we hold that the trial judge did not err in choosing to refuse the remedy of a new trial and instead grant the remedy of a remittitur.

IV. DID THE TRIAL COURT ERR IN OVERRULING DEFENDANT'S OBJECTION TO PLAINTIFF'S EXPERT WITNESS, JACK LARKS?

At trial, the Plaintiff presented the testimony of Jack Larks, an independent consultant with extensive credentials in the area of safety engineering and ergonomics, explaining the nature and interaction of the forces that affected on the Plaintiff's knee during the period that he worked on the large ballast

rock surfaces of the Norfolk railroad beds. Although Norfolk brought a motion in limine and made numerous objections to this testimony in an attempt to prevent Larks from testifying, the trial court consistently overruled these efforts. Norfolk now contends that the trial court erred in allowing Larks to testify because he was not qualified to testify as to the causes of the Plaintiff's knee injury and because his testimony was cumulative.

Rule 702 of the Mississippi Rules of Evidence states:

> If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.

M.R.E. 702. The Mississippi Supreme Court has stated, "It is within the sound discretion of the trial court to determine whether a proffered expert is qualified to testify and that decision will be reversed on appeal only where there has been an abuse of discretion." *West v. Sanders Clinic for Women*, 661 So. 2d 714, 720 (Miss. 1995).

The record makes clear that Larks has been a registered engineer since 1952, a registered surveyor, a member of the National Safety Council, and the holder of bachelor of science and master of science degrees in engineering from the Massachusetts Institute of Technology and a master of science degree from the University of Houston in technical vocational education. In addition, the substance of Larks' testimony consisted of an explanation and demonstration of the vector forces that impinged upon the Plaintiff's knee as the result of the constant movements necessary to perform the Plaintiff's job functions as he worked on the large ballast railroad beds. He testified as to how these forces would exert lateral pressure and ensuing strain on the knee and as to how those forces could be minimized if Plaintiff's work were to be performed on small ballast rocks. He explained how lateral forces tend to throw the knee joint out of alignment and how such motions can contribute to and cause knee strain because such out-of-alignment motions go against the natural movements of the human body.

We cannot say that Larks was not qualified to testify as to these matters by virtue of his knowledge, experience and education. We also cannot say that such scientific or technical testimony would not assist the trier of fact in determining whether the Plaintiff's work conditions injured him. In short, we cannot hold that the trial court abused its discretion in admitting Larks' testimony and we also reject the notion that only a medical doctor would have been qualified to testify as to the forces that were brought to bear and the effects that ensued as a result of the Plaintiff's work conditions.

We also decline to hold that Larks' testimony was cumulative in view of the fact that the Plaintiff offered testimony from medical experts who testified as to the cause of the Plaintiff's knee injuries. While it may be open to debate whether Larks' perspective as an ergonomic expert was any more enlightening in view of the Plaintiff's medical experts' testimony, the fact that it is so counsels against our concluding that the trial judge abused his discretion in deciding to admit it.

> V. DID THE TRIAL COURT ERR IN GRANTING PLAINTIFF'S REQUESTED INSTRUCTIONS P-5, P-6, P-7, P-8 AND P-9?

Norfolk complains that the liability instructions P-5, P-6, P-7, and P-8 were erroneously given in that the instructions were so broadly drawn that they allowed the jury to determine whether the Defendant had breached its duty of care without the Plaintiff ever having established what the standard of care was. Additionally, Norfolk complains that the instructions were vague, ambiguous, and unsupported by the record. Because of this, Norfolk requests a new trial. Other than this bald assertion, Norfolk fails to cite any authority on point on this matter. Thus, we find Norfolk's argument as to these instructions to be unpersuasive. Instead, we find upon review that the instructions, taken as a whole, fairly instruct the jury on the applicable rules of law. *Burton v. Barnett*, 615 So. 2d 580, 583 (Miss. 1993).

Next, Norfolk argues that damages instruction P-9 was erroneously given because it allowed the jury to award damages for Plaintiff's "pain and suffering," "mental anguish and emotional distress," and also for the "loss of the enjoyment of life." Norfolk claims that this was a pyramiding instruction that informed the jury that hedonic damages were a separate and distinct element of recovery. We fail to find that this constitutes a pyramiding of damages or that there is a double assessment of damages for the same item. *See T.K. Stanley, Inc. v. Cason*, 614 So. 2d 942, 953-54 (Miss. 1993); *see Flight Line, Inc. v. Tanksley*, 608 So. 2d 1149, 1162 (Miss. 1992).

Furthermore, in *Gillis v. Sonnier*, 187 So. 2d 311, 314 (Miss. 1966), the court stated that:

> The instructions must be so framed as not to mislead the jury into a duplication of the elements of recovery, or into an award of damages twice for the same loss, although instructions enumerating different items of recovery, even if redundant or repetitive in character, are not objectionable if so worded that no reasonable jury would construe them as permitting double or duplicate recovery for single items, as where the alleged duplicating language is used merely in apposition to, and in explanation of, what preceded, and in determining whether or not a double award has likely been made, the appellate court will consider the whole charge, evidence, and verdict.

Thus, as in *Gillis*, given arguendo, that the instruction was not perfect in its form and verbiage, we cannot find that reasonable jurors could have been mislead into believing that the court was advising them they could return two sums for the same thing.

> VI. DID THE TRIAL COURT ERR IN REFUSING DEFENDANT'S REQUESTED JURY INSTRUCTIONS D-1, D-15, AND D-16?

Norfolk concisely argues this issue in their brief by referring the court to its arguments presented in issues I and II. Instruction D-1 was a peremptory instruction directing the jury to find for the Defendant. Jury Instructions D-15 and D-16 relate to apportionment of damages between Bonner's earlier injuries in 1988 and the injury claimed in 1992. The trial court found that these instructions were not warranted because Bonner claimed no damages prior to the 1992 injury. We can find no

error in the trial court's assessment of this issue. As previously stated, Norfolk makes the same argument regarding this issue as was made in issues I and II. We deem them to be no more persuasive at this juncture. Accordingly, we find no merit in this contention of error for the same reasons as were set forth in the discussion of issues I and II.

> VII. DID THE TRIAL COURT ERR IN GRANTING THE REMITTITUR OF THE JURY VERDICT?

Finally, we must address the issue of Bonner's cross appeal. Bonner claims that the trial court committed error in granting the remittitur of the jury verdict.

After the jury returned a verdict in favor of Bonner in the amount of $2,000,000, the trial judge granted Norfolk's motion for remittitur and reduced this award to $745,500. On cross appeal, Bonner assigns as error this action by the trial court. In response, Norfolk contends that because the Plaintiff effectively accepted this remittitur by not bringing a motion for a new trial within ten days of its entry, this issue is procedurally barred and that we should therefore not consider it. Norfolk's contention rests upon the proposition that federal law prevents a plaintiff who has accepted a trial judge's remittitur from appealing from that remittitur, even when the plaintiff does so on cross appeal. We reject Norfolk's contention.

As we have already discussed, federal law governs FELA cases brought in state courts. *Monessen Southwestern R.R.. v. Morgan*, 486 U.S. 330, 335 (1988). However, issues of pleading, practice and procedure in such cases are governed by state law. *Ross. v. Louisville & N.R. Co.*, 178 Miss. 69, 80 (1937); *see also Missouri Pacific R. R. v. Tircuit*, 554 So. 2d 878, 880 (Miss. 1989) ("When a railroad worker elects to bring his FELA action in state court, the state's law of venue controls."). The question of whether a plaintiff who accepts a remittitur can bring a cross appeal from that determination after the defendant brings an appeal is procedural in nature. And section 11-1-55 of the Mississippi Code speaks directly to this issue by providing:

> If . . . remittitur is accepted and the other party perfects a direct appeal, then the party accepting the . . . remittitur shall have the right to cross appeal for the purpose of reversing the court in regard to the . . . remittitur.

Miss. Code Ann. § 11-1-55 (1972). Accordingly, we hold that Bonner is not barred from bringing a cross appeal even though he may be deemed to have accepted the remittitur. We may therefore consider the merits of his assignment of error.

Having stated this, however, we do not find error in the trial court's remittitur. The grant or denial of a remittitur rests largely within the discretion of the trial judge and will only be reversed if that discretion has been abused. *Anchor Coatings Inc. v. Marine Indus. Res. Insulation*, 490 So. 2d 1210, 1220 (Miss. 1986). The only necessary finding that a trial judge must make in ordering a remittitur is that the jury's award was so shocking to the conscience that it evinced bias, passion, and prejudice on the part of the jury or the verdict was against the overwhelming weight of the credible evidence. *McIntosh v. Deas*, 501 So. 2d 367, 368-69 (Miss. 1987). In granting the remittitur, the trial judge made precisely these findings. More importantly, the trial judge's remittitur did not entail an abuse of

discretion. We therefore find no merit in Bonner's assignment of error.

For the above mentioned reasons, the decision of the trial court is affirmed.

THE JUDGMENT OF THE JASPER COUNTY CIRCUIT COURT IS AFFIRMED. STATUTORY DAMAGES AND INTEREST ARE AWARDED. COSTS ARE ASSESSED TO THE APPELLANT.

BRIDGES, P.J., COLEMAN, DIAZ, KING, AND PAYNE, JJ., CONCUR. THOMAS, P.J., DISSENTS WITH SEPARATE WRITTEN OPINION JOINED BY FRAISER, C.J., MCMILLIN AND SOUTHWICK, JJ.

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THOMAS, P.J., DISSENTING:

Since the statute of limitations issue was never presented to the jury for resolution and the trial court erred in denying Norfolk's jury instructions regarding apportionment of damages, I must dissent.

I. STATUTE OF LIMITATIONS

A. Was the statute of limitations issue submitted to the jury as a question of fact ?

Bonner asserts that the issue of whether or not he sustained an injury in 1992 was presented to the jury as a question of fact. The majority accepts this proposition by reasoning that since the jury was instructed that Bonner had the burden of proving each element of his negligence claim, the jury necessarily concluded that Bonner had sustained a new injury in 1992. The majority relies on the testimony supporting Bonner's contention that he sustained a new injury as grounds for its holding that the jury properly considered the statute of limitations issue. However the trial court clearly ruled that the statute of limitations issue was a question of law for the court, and the court made a factual finding that Bonner's claim was not barred.

Further, even if the trial court had not made a factual finding on the issue of when the injury occurred when denying Norfolk's motion for a directed verdict, I fail to see how this issue could be regarded as having been submitted to the jury since the jury was not instructed on this issue. A party has a right to have jury instructions on all material issues presented in the pleadings or evidence. *Steele v. Holiday Inns, Inc.*, 626 So. 2d 593, 602 (Miss. 1993); *PACCAR Fin. Corp. v. Howard*, 615 So. 2d 583, 590 (Miss. 1993); *Glorioso v. Young Mens Christian Ass'n*, 556 So. 2d 293, 295 (Miss. 1989) .

Bonner was correct in his assertion that he, as a plaintiff in a FELA action, has the burden of proving that his cause of action was commenced within three years of his injury. However, the jury was not instructed to consider this issue as an element of his claim. *Emmons v. Southern Pacific Trans. Co.*, 701 F.2d 1112, 1116 (5th Cir. 1983). The jury received only the following instructions regarding the Plaintiff's burden of proof :

Instruction P-3 -- The Plaintiff, Mack Charles Bonner, has the burden of proving each element of his claim by a "preponderance of the evidence." The phrase "preponderance of the evidence" means that evidence which is most consistent with the truth as measured by the experience and judgment of the jury; that which accords best with reason and probability. . . . .

Instruction P-5 -- For purposes of this action, injury or damage is said to be caused or contributed to by an act or failure to act when it appears from a preponderance of the evidence in the case that the act or omission played any part, - in bringing about or actually causing the injury or damage. So if you should find from the evidence in this case that *any negligence* of the defendant *contributed* any way toward *any injury or damage* suffered by the plaintiff, Mack Charles Bonner, you may find that such injury or damage was caused by the defendant's negligence. Stated another way, any negligence of the defendant is the cause of injury or damage if the injury or damage would not have occurred but for the negligence of defendant, even though the defendant's negligence combined with other causes.

Instruction P-6 -- The plaintiff is making a claim under the Federal Employers Liability Act. If you find from a preponderance of the evidence in this case that: 1. At the time of Plaintiff's injury, he was an employee of the defendant performing duties in the course of his employment; 2. The defendant, Norfolk Southern Railway Company, was at such time a common carrier by railroad, engaged in interstate commerce; 3. The defendant was negligent; and 4.defendant's negligence, if any, resulted in damages sustained by plaintiff then your verdict shall be for the plaintiff, Mack Charles Bonner.

(Emphasis added).

Clearly, the jury was never instructed that Bonner had to prove the requisite element that he was injured within three years of the date on which he instituted his cause of action. Bonner was only required to prove that (1) he was employed, (2) by a railroad, (3) the railroad was negligent (in *any* manner or at *any* time), and (4) Bonner was injured (at *any* time) by the railroad's negligence.

By failing to submit this issue to the jury, the trial court, in effect, granted a directed verdict for Bonner on the factual issue of when his cause of action accrued. In order to affirm, the majority must find that there is no genuine issue of material fact as to when Bonner's cause of action accrued. *Fries v. Chicago & Northwestern Trans. Co.*, 909 F.2d 1092, 1094 (7th Cir. 1990); *Emmons*, 701 F.2d at 1119. *See Wilson v. Zapata Off-Shore Co.*, 939 F.2d 260, 266 (5th Cir. 1991) (action under the LHWCA which is treated as a FELA action.); s*ee also Schiro v. American Tobacco Co.*, 611 So. 2d 962, 962 (Miss. 1992); *Smith v. Sanders*, 485 So. 2d 1051, 1053 (Miss. 1986) (holding that the statute of limitations is occasionally a question of fact for the jury which is only taken away from the jury if reasonable minds could not differ as to the conclusion of whether the statute had run.)

B. Is there a genuine issue of material fact regarding the statute of limitations issue ?

The majority emphasizes the factors supporting Bonner's assertion that he sustained a new injury in 1992. However, there is also compelling evidence to support Norfolk's contention that Bonner's claim is barred since it accrued in 1988. Bonner admits that he suffered an injury to the lateral meniscus of his left knee in 1988 and that he underwent two surgeries prior to 1992 on his left knee. Bonner claims to have fallen and suffered an entirely new injury to the lateral meniscus of his left knee in 1992. However, both Bonner and his expert medical witness testified at trial that Bonner continued to have problems with his left knee during the entire time period of 1988 to 1992. Bonner also testified that he did not report the 1992 fall. He continued to work the entire day that he allegedly reinjured his knee. He also went back to work as usual on the next work day. Further, all of the medical experts, including Bonner's, testified that his present problems with his knee were related to the 1988 injury and his prior surgeries. The medical experts also testified that Bonner has arthritis in his knee and has undergone degenerative changes in his knee.

Finally, the majority relies on the fact that Bonner was released to return to work in 1989 as evidence that Bonner must have sustained a new injury in 1992. However, even Bonner's own medical expert admitted at trial that the mere fact that Bonner was released to work did not indicate that his knee injury had been fully corrected at that time.

Certainly this countervailing evidence supporting Norfolk's position that Bonner's claim is barred is sufficient to establish an issue of material fact as to when Bonner's injury occurred, which necessarily precludes the trial court from making such a factual determination. Since I cannot agree with the majority's reasoning that this issue was submitted to the jury and the trial court should not impinge on the province of the jury by finding that there was no genuine issue of material fact regarding the running of the statute of limitations, I would reverse and remand this action for a factual determination by the jury.

II. APPORTIONMENT OF DAMAGES

The trial court incorrectly denied jury instructions submitted by Norfolk which would have prevented Bonner from recovering for injuries received more than three years prior to the filing of suit. Norfolk

submitted the following instructions :

Instruction D-15 -- The Court instructs the jury that under the law applicable to this case, no action shall be maintained for claims accruing more than three (3) years before suit is filed. If you return a verdict for the plaintiff, Mack Charles Bonner, you shall first determine which portion of Mr. Bonner's damages, if any, resulted from injuries or incidents occurring on or before June 2, 1990, and then you shall proceed as follows: 1. Determine the total amount of damages suffered by the plaintiff, Mack Charles Bonner; 2. Determine the extent to which injuries and incidents occurring before June 2, 1990, contributed to Mr. Bonner's total damages; and 3. Reduce the amount of Mr. Bonner's total damages by the portion of his injuries resulting from injuries and incidents occurring before June 2, 1990.

Instruction D-16 -- Special Interrogatories 1. Do you find that any portion of Mack Charles Bonner's injuries and resulting damages occurred before June 2, 1990? Answer: Yes_____ No_____ 2. If the answer to Question 1 is "Yes", then what percentage of Mr. Bonner's injuries and resulting damages occurred before June 2, 1990? Answer: _____

Not only did the trial court preclude the jury from deciding whether either all or a portion of Bonner’s injuries were barred by the statute of limitations, it also allowed Bonner to possibly recover for injuries sustained in 1988 by granting the following jury instruction while denying Instructions D-15A and D-16 :

Damages is a word which expresses in dollars and cents the injuries sustained by a Plaintiff. The damages to be assessed by a jury cannot be assessed by any fixed rule, but is in your discretion and judgment; and in fixing the amount of damages, you should be governed by the application of a sense of justice and right to the facts in this case. In computing damages, you should take into consideration all facts and circumstances as testified to by the witnesses in this case and fix the amount of such actual damages at such sum as you believe from a preponderance of the evidence in this case the Plaintiff is entitled receive. Should your verdict be for the Plaintiff, you may consider the following factors in determining the amount of damages to be awarded as may be shown by a preponderance of the evidence: 2. medical expenses--past, present and future; 3. pain and suffering--past, present and future; 4. mental anguish and emotional distress--past, present and future; 6. Lost wages and benefits--past, present future; 7. hedonic damages, which is the inability to carry out and enjoy the usual and normal activities of life.

The damages listed above are called compensatory or actual damages and are awarded for the purpose of making the Plaintiff whole again, insofar as a money verdict can accomplish that purpose.

The trial court denied Norfolk’s instructions on apportionment on the grounds that there was no testimony at trial regarding damages Bonner sustained prior to 1992. However, the record is replete with damages testimony relating back to the 1988 injury. First, Bonner testified that he has suffered

pain, mental anguish and emotional distress as a result of his condition since 1988. Bonner also testified that his life activities have been adversely affected as a result of his knee condition. Second, Bonner's impairment rating given by his own medical expert, Dr. Knight, is based on all three surgeries and the initial 1988 injury. Bonner's vocational rehabilitation expert witness relied upon all of Bonner's medical records, including the pre-1992 records, as well as Dr. Knight's impairment rating to determine the extent to which Bonner was functionally disabled. Dr. Lee, Bonner's economic expert, testified that he relied upon Bonner's vocational rehabilitation expert's finding of one hundred percent functional disability in arriving at Bonner's actual damages.

The trial court erred in not instructing the jury to limit Bonner's recovery to damages sustained after 1990, three years prior to the filing of his lawsuit. *See Wilson,* 939 F.2d at 269. On this basis as well, I must respectfully dissent.

Although I would not reverse on this issue alone, on remand I would charge the trial court to look closely at the admissibility of the testimony of Bonner's expert witness Jack Larks. The testimony of an expert witness must not invade the province of the jury. *Mitcham v. Illinois Cent. R.R..,* 515 So. 2d 852, 858 (Miss. 1987). Further, although I need not address the issue of hedonic damages, I think that the trial court should be extremely cautious in granting a hedonic damage instruction since it is unclear whether the Mississippi Supreme Court would uphold the granting of such an instruction in the instant case. *See T. K. Stanley v. Cason*, 614 So. 2d 942, 953-54 (Miss. 1992); *Flight Line Inc. v. Tanksley*, 608 So. 2d 1149, 1162 (Miss. 1992); *Jones v. Schaffer*, 573 So. 2d 740, 743 n. 2 (Miss. 1990); *see Dugas v. Kansas City S. Ry.*, 473 F.2d 821, 828 (5th Cir. 1973).

FRAISER, C.J., MCMILLIN AND SOUTHWICK, JJ., JOIN THIS DISSENT.