RENDERED: JANUARY 29, 2010: 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2008-CA-000890-MR

PATSY J. CRANE, ADMINISTRATRIX
OF THE ESTATE OF BOBBY CRANE,
DECEASED — APPELLANT

v.

APPEAL FROM MCCRACKEN CIRCUIT COURT
HONORABLE CRAIG Z. CLYMER, JUDGE
ACTION NO. 99-CI-00502

ILLINOIS CENTRAL RAILROAD CO. — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: COMBS, CHIEF JUDGE; THOMPSON, JUDGE; BUCKINGHAM,[1] SENIOR JUDGE.

THOMPSON, JUDGE: Patsy J. Crane, Administratrix of the Estate of Bobby Crane, appeals from an order of the McCracken Circuit Court denying her motion to amend the complaint and dismissing with prejudice the original complaint

[1] Senior Judge David C. Buckingham sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

against Illinois Central Railroad (ICRR), alleging exposure to asbestos and asbestos containing products during the course of Bobby Crane's employment with ICRR. Because the circuit court properly found that the motion to amend the complaint was precluded by the three-year statute of limitations of the Federal Employers Liability Act (FELA) and that the complaint was properly dismissed for failure to prosecute, we affirm.

On May 25, 1999, Bobby Crane filed his complaint against ICRR asserting his claim under the FELA, 45 U.S.C. §51 *et. seq*., and, in August of that same year, amended his complaint to include a claim under the Locomotive Boiler Inspection Act, 49 U.S.C. §20701 *et. seq.*, alleging his injury as "lung disease." ICRR timely filed answers to both the original and amended complaints denying the allegations and asserting numerous affirmative defenses.

Seventeen months later, ICRR filed a motion to compel discovery. Crane responded by requesting additional time to respond to ICRR's discovery requests propounded on August 4, 1999. Although the trial court ordered Crane to respond to discovery requests by January 31, 2001, Crane delayed his response an additional ten months after that date.

No further action was taken until May 21, 2004, when Crane filed a "Motion to set in a Trial Group before a Jury" pursuant to the "McCracken County's Master Order Regarding Asbestos Personal Injury Litigation." On June 3, 2004, an agreed order was entered setting Crane's case and six other cases for trial on November 7, 2005. However, the cases were to be tried separately.

Additionally, the trial court's order warned that "[a] failure by a party to comply with the above deadline or in complying with the requirements of the Master Order may subject the non-complying party to sanctions which the court may deem appropriate under the circumstances including, but not limited to, the sanctions outlined in CR 37."

Following the warning, the case remained inactive until April 22, 2005, when ICRR filed a motion to dismiss for failure to prosecute. The trial court denied the motion and scheduled a status conference on June 21, 2005, for the entire trial group, including Crane's claim.

Approximately six years after filing his original complaint, on October 4, 2005, Crane filed a motion to file an amended complaint alleging that third parties caused Crane to be exposed to cylinders containing radioactive material which resulted in lung and liver cancer. He also moved to continue the trial. His motions were denied on October 13, 2005, and a final pretrial conference was scheduled for November 1, 2005. Prior to the pretrial conference, Crane died and the case was continued.

Nothing further occurred until October 5, 2006, when a motion was filed to revive the action in favor of Patsy Crane, administratix of Crane's estate, which was granted on November 1, 2006. The case was again dormant until December 10, 2007, when the estate filed a motion to file a second amended complaint which sought to assert a new cause of action against ICRR alleging

exposure to radiation resulting in lung cancer and to name a new party, Paducah & Louisville Railway.

ICRR objected arguing that the amendment should be denied because it was precluded by the three-year discovery rule applicable to a FELA claim and, therefore, the filing was futile, untimely, and prejudicial. It also filed a motion to dismiss the original action for lack of prosecution. The estate responded that the proposed amendment was filed within the statute of limitations because the radiation claim did not accrue until December 9, 2004.

At the hearing on the motions, the trial court's attention was directed to Crane's deposition. Crane testified that he knew he had lung cancer in November 2004, and that it might have been caused by his employment at ICRR. ICRR further pointed out that in Crane's motion for leave to file a second amended complaint on October 4, 2005, Crane alleged that in November 2004, he learned that he had lung cancer caused by exposure to radioactive materials while employed by ICRR. Additionally, Crane was diagnosed with stage IV cancer in November 2004.

Following the hearing, the circuit court concluded that because the estate did not submit any affirmative evidence that in November 2004, Crane was unaware of his cancer and its cause, the second amended complaint was barred by the three-year statute of limitations. It further held that the failure to amend the complaint in a timely manner and the delay clearly prejudiced ICRR's ability to

defend the claim. Finally, pursuant to CR 41.02, the circuit court dismissed the complaint.

We first address the timeliness of the amended complaint. Under FELA, an action must be commenced "within three years from the day the cause of action accrued." 45 U.S.C. §56. A cause of action accrues under the Act "when a plaintiff knows or, in the exercise of reasonable diligence, should know of both the injury and its cause." *Lipsteuer v. CSX Transp. Inc*., 37 S.W.3d 732, 737 (Ky. 2000). To commence the running of the statute of limitations under FELA, a plaintiff does not need to be certain of the cause of his injury but only needs to know or have reason to know of a potential cause. "Actual knowledge by the plaintiff of causation is not necessary to a finding that a cause of action has accrued." *Fries v. Chicago & Northwestern Transp. Co.,* 909 F.2d 1092, 1096 (Wis. 1990). Generally, the issue of when the cause of action accrues is a question of fact for the jury. *Lipsteuer*, 37 S.W.3d at 732. However, in this case, Crane failed to present any affirmative evidence that there was a genuine issue of material fact for trial. Therefore, his motion to amend the complaint was properly denied.

Crane admitted in his deposition that he was aware that he had cancer and that the potential cause was his exposure to radioactivity at ICRR. He testified:

> Q. Has anybody told you that you were exposed to any radioactivity material while working at Illinois Central?

A. Well, I have got cancer of the lung and my doctor said that caused that.
Q. What caused that?
A. The radioactive.
***
Q. What doctor told you that this was related to this radioactive material?
A. Harry Carloss.
***
Q. Was November 2004 the first time he [Dr. Carloss] diagnosed you with this cancer?
A. Yeah.

Additionally, on October 4, 2005, Crane filed a motion to file a second amended complaint and expressly alleged that in November 2004, he learned that he had lung and liver cancer caused by radioactive materials.

Despite Crane's admissions, the estate argued to the circuit court that Crane knew that he had lung cancer in November 2004, and that he did not know its cause. However, the estate offered no affirmative evidence to refute the facts in the record.

Because there was no issue of material fact, the motion to amend the complaint was properly denied.

Our discussion now turns to the appropriateness of the dismissal of the action pursuant to CR 41.02(1). "The power of dismissal for want of prosecution is an inherent power in the courts and necessary to preserve the judicial process." *Nall v. Woolfolk*, 451 S.W.2d 389, 390 (Ky.App. 1970). It is a matter entrusted to the sound discretion of the trial court and reversal of its

determination is warranted only where that discretion has been abused. *Thompson v. Kentucky Power Co*., 551 S.W.2d 815 (Ky.App. 1977).

Since its rendition, *Ward v. Hausman,* 809 S.W.2d at 717 (Ky.App. 1991), has been the pivotal case applicable to CR 41.02 motions for dismissal. In *Ward*, the court enunciated factors to be considered when deciding the motion, including:

> 1) the extent of the party's personal responsibility;
>
> 2) the history of dilatoriness;
>
> 3) whether the attorney's conduct was willful and in bad faith;
>
> 4) meritoriousness of the claim;
>
> 5) prejudice to the other party; and
>
> 6) alternative sanctions.

Id. at 719.

Recently, in *Jaroszewski v. Flege*, 297 S.W.3d 24 (Ky. 2009), our Supreme Court reaffirmed that dismissals cannot be based on a single dilatory act and clarified that although the *Ward* factors are helpful guidelines, ultimately the court's decision must be based on the totality of the circumstances. *Id.* at 33.

In this case, the circuit court considered the *Ward* factors and made specific findings in regard to each factor and considered the totality of the circumstances. It recognized that although the case involved complex legal issues, the estate or its counsel had over nine years to develop the cause of action, yet,

failed to advance the case. The estate's repeated delays and failure to take steps to prepare for trial left the circuit court with no viable alternative but dismissal.

Under the totality of the circumstances, we conclude that the circuit court did not abuse its discretion in dismissing the action.

The orders denying the motion for leave to file a second amended complaint and granting ICRR's motion to dismiss for failure to prosecute are affirmed.

ALL CONCUR.

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