STATE OF MICHIGAN

COURT OF APPEALS

JAMES STEPHENS,

Plaintiff-Appellant,

v

CSX TRANSPORTATION, INC.,

Defendant-Appellee.

UNPUBLISHED
March 19, 2002

No. 225003
Wayne Circuit Court
LC No. 99-921705-NO

Before: O'Connell, P.J., and White and Cooper, JJ.

PER CURIAM.

Plaintiff sued his employer, defendant CSX Transportation, Inc., under the Federal Employers' Liability Act (FELA), 45 USC 51 *et seq.*, for a hearing loss that plaintiff suffered as a result of working for defendant as a railroad conductor. Defendant moved for summary disposition under MCR 2.116(C)(7) on the basis of a release agreement that plaintiff signed in 1990, when settling a similar claim against defendant that also involved a work-related hearing loss. The trial court granted defendant's motion in an order entered January 13, 2000. We reverse and remand.

Although plaintiff 's claim was brought under federal law, an action under the FELA filed in state court is subject to state procedural rules. *Gortney v Norfolk & W R Co*, 216 Mich App 535, 538; 549 NW2d 612 (1996). Accordingly, we apply the Michigan Court Rules of 1985 to review the trial court's decision. *Id*. We review de novo a trial court's decision to grant summary disposition. *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998). Defendant moved for summary disposition under MCR 2.116(C)(7). We apply the following standard when reviewing such a motion.

> A defendant who files a motion for summary disposition under MCR 2.116(C)(7) may (but is not required to) file supportive material such as affidavits, depositions, admissions, or other documentary evidence. MCR 2.116(G)(3); *Patterson v Kleiman*, 447 Mich 429, 432; 526 NW2d 879 (1994). If such documentation is submitted, the court must consider it. MCR 2.116(G)(5). If no such documentation is submitted, the court must review the plaintiff 's complaint, accepting its well-pleaded allegations as true and construing them in a light most favorable to the plaintiff. [*Turner v Mercy Hosps & Health Services of Detroit*, 210 Mich App 345, 348; 533 NW2d 365 (1995).]

In the instant case, where plaintiff submitted an affidavit and documentary evidence in opposition to defendant's motion, we must view the evidence in a light most favorable to plaintiff, the nonmovant. *Gortney, supra* at 539. Summary disposition under this subrule is appropriate "only if no factual development could provide a basis for recovery." *Romska v Opper*, 234 Mich App 512, 515; 594 NW2d 853 (1999). Although claims brought in state court under the FELA are decided under state procedural rules, federal law applies regarding the substance of the claim. See *Boyt v Grand Trunk W RR*, 233 Mich App 179, 183; 592 NW2d 426 (1998); *Gortney, supra* at 539; *Gust v Consolidated Rail Corp*, 116 Mich App 90, 92; 321 NW2d 852 (1982).

Pursuant to 45 USC 55, railroad employers generally may not seek to exempt themselves from liability for injuries to their employees. *Babbitt v Norfolk & W R Co*, 104 F3d 89, 91 (CA 6, 1997). However, releases executed as part of the settlement or compromise of a claim for a specific injury may be valid under 45 USC 55. *Id*. at 93. Here, the parties do not dispute that the 1990 release agreement between the parties is valid and enforceable. The disagreement here concerns whether the more recent claim plaintiff advances falls within the scope of the 1990 release agreement.

The parties' 1990 agreement included a release of liability for a hearing loss injury. While the parties' agreement indicates that the release applied even if plaintiff's earlier hearing loss became worse in the future, the agreement specifically provided that plaintiff was not releasing defendant from any claim he may have in the future arising from a new and distinct hearing loss or a separate aggravation of his prior condition caused by his employment.[1]

Moreover, in response to defendant's motion for summary disposition, plaintiff submitted the affidavit of audiologist Dale O. Robinson, Ph.D., who averred that he had compared plaintiff's audio tests from 1990 to audio tests from 1999 and concluded that plaintiff had suffered "an additional hearing loss since 1990." In our opinion, Dr. Robinson's affidavit, viewed in the light most favorable to plaintiff, establishes that plaintiff suffered a new and distinct hearing loss or a separate aggravation of his previous hearing loss after 1990, as diagnosed in 1999. See *Wilson v CSX Transportation, Inc*, 83 F3d 742 (CA 6, 1996); *Cordiano v Consolidated Rail Corp*, 87 Ohio App 3d 398; 622 NE2d 406 (1993).[2]

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[1] The specific language of the April 18, 1990, release provided in pertinent part:

> This RELEASE AGREEMENT does not release any claim which I may have in the future for a solely new and distinct HEARING LOSS OR RELATED DISORDER or separate aggravation which is caused by my exposure to noise or sounds which occur in my work environment in the future and which exposure(s) are the result of CSXT's negligence. However, those whom I am now releasing may assert any defense including statute of limitations and set off against any future claim.

[2] Defendant relies on *Mounts v Grand Truck W RR*, 198 F3d 578 (CA 6, 2000) as support for its position that plaintiff suffered only a single hearing loss. The facts of that case are distinguishable from those here. In *Mount, supra* at 582, the plaintiff did not bring forth

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Further, we reject defendant's argument that Dr. Robinson's affidavit may not properly be considered because it conflicts with an earlier letter that he wrote to plaintiff's attorney regarding plaintiff's condition. The rule on which defendant relies precludes a party from submitting an affidavit that contradicts the person's clear deposition testimony in an attempt to create a genuine factual dispute. *Dykes v William Beaumont Hosp*, 246 Mich App 471, 480-481; 633 NW2d 440 (2001); *Gamet v Jenks*, 38 Mich App 719, 726; 197 NW2d 160 (1982). In this case, it does not appear from the record that Dr. Robinson was deposed, and a review of the July 23, 1999, letter to plaintiff's attorney does not reveal that Dr. Robinson expressly dismissed the possibility that plaintiff's latest hearing loss was new and distinct from the hearing loss in 1990, or involved a separate aggravation of the prior hearing loss. Thus, we do not view Dr. Robinson's letter and affidavit as being clearly inconsistent. Accordingly, because the record evidence, viewed in the light most favorable to plaintiff, established that plaintiff suffered a new hearing loss, the trial court erred in granting defendant's motion for summary disposition under MCR 2.116(C)(7).

Reversed and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Peter D. O'Connell
/s/ Helene N. White
/s/ Jessica R. Cooper

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evidence to support his claim that he had suffered a separate injury within the three-year limitation period. At best, the plaintiff in *Mounts, supra* at 582-584, could only show that his original condition had worsened, and therefore, his claim was barred when it was not timely filed.