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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2006-CA-002054-MR

EMMETT E. COOMER — APPELLANT

v.

APPEAL FROM PERRY CIRCUIT COURT
HONORABLE WILLIAM ENGLE, III, JUDGE
ACTION NO. 03-CI-00363

CSX TRANSPORTATION, INC. — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: KELLER, THOMPSON AND WINE, JUDGES.

THOMPSON, JUDGE: This is an action commenced pursuant to the Federal Employer's Liability Act, 45 U.S.C. § 51 *et. seq*. (FELA) by Emmett Coomer against CSX Transportation, Inc., alleging that as a result of repetitive stress and cumulative trauma, he sustained injuries to his neck, back, shoulders and knees. The Perry Circuit Court granted summary judgment to CSX on the basis of the

doctrine of *res judicata* after Coomer's previous FELA claim against CSX filed in the Jefferson Circuit Court was dismissed.

Coomer was employed by CSX for approximately twenty-four years as a trackman. As a part of his duties, he operated hydraulic tools and jackhammers. On October 8, 2001, he filed a complaint in the Jefferson Circuit Court alleging that the vibrations caused by the use of the equipment caused excessive and cumulative strain on his upper extremities. He further alleged that in July 2000, he discovered he suffered from carpal tunnel syndrome and "other maladies" to his hands, wrists, and arms. He alleged that CSX failed to provide a safe work place, failed to exercise reasonable care to warn him of the risks associated with the work and negligence.

On July 22, 2003, the Jefferson Circuit Court dismissed the complaint on the basis that Coomer failed to present evidence that CSX was negligent. Coomer appealed and, in an unpublished opinion, this Court affirmed.

While the Jefferson Circuit Court case was pending, Coomer was informed by his treating physician that the pain he experienced in his neck, back, shoulders and knees was caused by his work. In a letter, Coomer's counsel requested that CSX agree to amend the Jefferson Circuit Court complaint to include those injuries. In response, CSX took the position that Coomer should file a separate action and opposed an amendment. Coomer then filed the present action in the Perry Circuit Court. Following this Court's decision affirming the Jefferson

Circuit Court, CSX moved for summary judgment in the Perry Circuit Court case based on the doctrine of *res judicata.*

CSX argued before the trial court that both the Jefferson Circuit Court complaint and the Perry Circuit Court complaint alleged the same mechanism of injury and, therefore, the second action was barred by *res judicata*. Coomer countered with the assertion that the mechanisms of injury were not identical. In support, he submitted an affidavit of Tyler Kress, Ph.D., a biomechanical engineer and Board Certified Industrial Ergonomist who specializes in ergonomic and industrial safety/engineering practices, biomedical engineering, and injury causation and prevention. He opined that the mechanism of injury that caused Coomer's back injury was primarily lifting/loading as opposed to the primary mechanism of injury to his upper extremities, which was the use of hand tools and the resulting vibration.

The Perry Circuit Court granted CSX's motion for summary judgment. It reasoned that the action arose from the same transactional nucleus of facts as the Jefferson Circuit Court action, and therefore, the cause of action for injuries to his neck, back, shoulders and knees should have been included within that action; therefore, the claim was barred by the doctrine of *res judicata*.

The standard of review applicable when a summary judgment is granted is aptly recited in *Hallahan v. The Courier Journal*, 138 S.W.3d 699, 704 -705 (Ky.App. 2004) as follows:

> The standard of review on appeal when a trial court grants a motion for summary judgment is whether the trial court correctly found there were no genuine issues as to any material fact and that the moving party was entitled to judgment as a matter of law. The movant bears the initial burden of convincing the court by evidence of record that no genuine issue of fact is in dispute, and then the burden shifts to the party opposing summary judgment to present at least some affirmative evidence showing that there is a genuine issue of material fact for trial. The party opposing summary judgment cannot rely on their own claims or arguments without significant evidence in order to prevent a summary judgment. The court must view the record in the light most favorable to the nonmovant and resolve all doubts in his favor. The inquiry should be whether, from the evidence of record, facts exist which would make it possible for the nonmoving party to prevail. In the analysis, the focus should be on what is of record rather than what might be presented at trial. An appellate court need not defer to the trial court's decision on summary judgment and will review the issue *de novo* because only legal questions and no factual findings are involved. (internal citations and quotations omitted).

Coomer contends that because the injuries to his neck, back, shoulders and knees are separate and distinct from his carpal tunnel syndrome and there is a genuine issue of material fact that the injuries were caused by separate mechanisms, summary judgment on the basis of *res judicata* was precluded.

The doctrine of *res judicata* evolved to avoid repetitious litigation. It consists of two subparts: claim preclusion and issue preclusion.

> Claim preclusion bars a party from re-litigating a previously adjudicated cause of action and entirely bars a new lawsuit on the same cause of action. Issue preclusion bars the parties from relitigating any issue actually litigated and finally decided in an earlier action. The issues in the former and latter actions must be

> identical. The key inquiry in deciding whether the lawsuits concern the same controversy is whether they both arise from the same transactional nucleus of facts. If the two suits concern the same controversy, then the previous suit is deemed to have adjudicated every matter which was or could have been brought in support of the cause of action.

Yeoman v. Com., Health Policy Bd., 983 S.W.2d 459, 465 (Ky. 1998).

Claim preclusion requires three elements: (1) there must be identity of the parties; (2) there must be identity of the causes of action; and (3) the action must have been resolved on the merits. *Id.* Although claim preclusion is dependent upon the mutuality of the parties, issue preclusion is not.

For issue preclusion[1] to apply, the issue in the second case must be the same as that in the first and must have been actually litigated and decided. Finally, the decision on the issue in the prior action must have been necessary to the court's judgment. *Id*.

Also part of the *res judicata* doctrine is the subsidiary rule which states that a cause of action cannot be split and tried piecemeal. The rule prohibiting splitting causes of action applies to "every point which properly belonged to the subject of the litigation in the first action and which in the exercise of reasonable diligence might have been brought forward at the time." *Egbert v. Curtis*, 695 S.W.2d 123 (Ky.App. 1985).

[1] Issue preclusion is sometimes referred to as collateral estoppel.

As applied to the present case, the above cited modern doctrines, designed to promote judicial efficiency and prevent endless litigation between the parties, require that we affirm the Perry Circuit Court.

Because a FELA action is a negligence case, the plaintiff is required to prove that his injuries are the result of his employer's negligence. *Doty v. Illinois Central Railroad Company*, 162 F.3d 460 (7th Cir. 1998). Thus, we must address whether the initial action in which Coomer failed to proffer even a scintilla of evidence in support of his negligence claim against CSX precludes the present claim.

There is no dispute that the parties are identical. Moreover, it cannot be reasonably debated that the summary judgment was a decision on the merits. *See Waddell & Reed Financial, Inc. v. Torchmark Corp.*, 243 F.Supp.2d 1232 (D. Kan. 2003). The contested issues in this appeal are whether Coomer's first and second actions arose from the same transactional nucleus of facts so that the issues presented in the second litigation either were or should have been decided in the first litigation.

Pertinent to the present discussion is the time when an action accrues under FELA. In *Urie v. Thompson*, 337 U.S. 163, 69 S.Ct. 1018, 93 L.E.2d 1282 (1949), the United States Supreme Court developed the "discovery" rule, holding that a cause of action accrues under FELA when the injury manifests itself. As later explained by the Kentucky Supreme Court in *Lipsteuer v. CSX Transp., Inc.,* 37 S.W.3d 732, 737 (Ky. 2000), the cause of action accrues when a plaintiff

knows or, in the exercise of reasonable diligence, should know of both the injury and its cause. Premising his reasoning on the discovery rule, Coomer contends that he could not have pursued his present claim until the action accrued.

This Commonwealth has recognized that the rule against splitting causes of action is an equitable rule and, as such, there are exceptions when equity demands. One such exception is that it will not apply to preclude a cause of action before it exists. *See Capital Holding Corp. v. Bailey*, 873 S.W.2d 187 (Ky. 1994). Coomer properly argues that until he learned of the causal link between his present complaints and his employment, his action did not accrue. Until that time, his claim would have been subject to dismissal for lack of an evidentiary foundation and its pursuit futile. *Fonseca v. Consolidated Rail Corporation*, 246 F.3d. 585, 592 (6th Cir. 2001).

The fallacy in Coomer's assertion is that his cause of action accrued when he learned on October 4, 2002, that his complaints were related to his work. While we are not in disagreement with his legal recitations, we cannot agree that any exception to the rule is applicable.

Even when viewed most favorably to Coomer, the evidence conclusively established that while the Jefferson Circuit Court case was pending, Coomer was aware of his back, neck, shoulders and knee conditions and discovered that his repetitive and excessive trauma incurred as a trackman was the alleged cause. Although the manifestation of the injury was distinct, the repetitive stress and cumulative trauma allegedly caused his carpal tunnel syndrome and the

injuries of which he now complains. Dr. Kresses' affidavit, while attempting to distinguish the specific work activities performed by Coomer and the injuries caused, does nothing to refute that Coomer's Jefferson Circuit Court case and the present case are premised on his contention that his twenty-four years of repetitive and strenuous labor caused his physical injuries.

Coomer's final argument is the application of equitable estoppel. He contends that CSX's refusal to agree to an amendment of the complaint and that its suggestion he file a separate complaint warrants the application of the doctrine which prohibits CSX from raising the *res judicata* defense.

Since Coomer discovered the cause of the injuries to his back, neck, shoulders and knees while the Jefferson Circuit Court case was pending, the proper procedure would have been for Coomer to file a motion to amend his complaint in his pending litigation before the Jefferson Circuit Court. CR 15. Had he done so, and the Court denied the motion, the issue could have been raised in the appeal of the final Jefferson Circuit Court judgment. Coomer, however, argues that he did not pursue this course of action because of opposing counsel's statements that the proper procedure was to "file a separate action."

Coomer's contention is novel. Unfortunately for him, it is totally without merit. "Equitable estoppel . . . . may be invoked by an innocent party who has been fraudulently induced to change their position in reliance on an otherwise unenforceable oral agreement." *Rivermont Inn, Inc. v. Bass Hotels & Resorts, Inc*., 113 S.W.3d 636, 643 (Ky.App. 2003). The elements of the doctrine include:

"(1) lack of knowledge and of the means of knowledge of the truth as to the facts in question; (2) reliance, in good faith, upon the conduct or statements of the party to be estopped; and (3) action or inaction based thereon of such a character as to change the position or status of the party claiming the estoppel, to his injury, detriment, or prejudice." *Id*.

CSX's counsel simply refused to agree to an amendment of the complaint. Although it was suggested that Coomer file a separate complaint, the statement was not made as one of fact or one upon which reasonable opposing counsel would rely to the detriment of his client. Succinctly stated, Coomer's contention that CSX is precluded from raising the issue of *res judicata* is incongruous.

Based on the foregoing, the judgment of the Perry Circuit Court is affirmed.

ALL CONCUR.

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