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Commonwealth of Kentucky

Court of Appeals

NO. 2006-CA-002593-MR

CSX TRANSPORTATION, INC. APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE TOM MCDONALD,[1] SENIOR JUDGE
HONORABLE ROGER L. CRITTENDEN, SENIOR JUDGE
ACTION NO. 00-CI-007904

TERRY WILLIAMS APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: CLAYTON AND VANMETER, JUDGES; KNOPF,[2] SENIOR JUDGE.

CLAYTON, JUDGE: This is an appeal from a verdict awarding the appellee, Terry Williams, $1,498,500 under the Federal Employees' Liability Act based

[1] Senior Judge Tom McDonald presided over the jury trial in this action with Senior Judge Roger L. Crittenden handling post-trial motions.

[2] Senior Judge William L. Knopf sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statutes (KRS) 21.580.

upon the negligence the jury found on the part of defendant, CSX Transportation, Inc. (CSX) in exposing him to a harmful work environment.

FACTUAL SUMMARY

Mr. Williams began his employment with CSX on August 12, 1966, as a machinist apprentice at the Louisville & Nashville Company's (L&N) South Louisville locomotive repair and maintenance shops. Mr. Williams's duties included cleaning electrical equipment and locomotive parts using mineral spirits and "Dowclene,"[3] a solvent which was 75% 1,1,1 trichloroethane (TCA) and 25% perchloroethylene.

In 1971, Mr. Williams became a journeyman machinist and was later promoted to supervisor. In 1992, Mr. Williams began working as a warranty officer. In this position, he traveled a five-state area analyzing and evaluating equipment issues and training others how to identify and submit warranty requests. He stayed in this position until 2000. At that time, Mr. Williams was offered a supervisory position in CSX's Nashville shops. While his warranty officer position had been eliminated, CSX continued his $57,000.00 per year salary. Mr. Williams left this job asserting that his brain injury forced him to quit.

On December 11, 2000, Mr. Williams brought the action appealed from in Jefferson Circuit Court. During the trial, Mr. Williams provided evidence

[3] According to CSX records, OSHA inspection records and the Jefferson County Pollution Control inspection records, what CSX workers referred to as "Dow Clean" or "Dow Cleaner" was pure 1,1,1 trichloroethane ("TCA"). There is no record of CSX using "DowClene, EC" a trade name of an electrical parts cleaner made by Dow Chemical, containing a mix of TCA and perchloroethylene: "Dow Clean" was simply a name utilized by the employees when referring to the electrical parts cleaner known as L&N #3.

and testimony of CSX's knowledge of the harmful effects of the solvents being used by its workers and its negligence in not providing a safe work environment for Mr. Williams.

Specifically, there was testimony of Mr. Williams working on "passenger gangs," where machinists, electricians and other craftsmen used Dowclene. As a result of the "passenger gang" way of working, all employees involved were exposed to the chemicals regardless of which employee was actually using them. Mr. Williams presented testimony and evidence which convinced the jury that CSX was negligent and that its negligence caused him to be permanently damaged. The jury found that Mr. Williams's own negligence was 10% of the fault for his injuries. CSX now seeks a review of that judgment. For reasons stated herein, we affirm.

DISCUSSION

Mr. Williams brought this action under the Federal Employees' Liability Act (FELA). Under FELA, a railroad carrier is liable for damages to any of its employees if their injuries arise as a result of the negligence of the carrier's officers, agents or employees. 45 U.S.C.A. § 51. "Congress intended FELA to be a departure from common law principles of liability as a 'response to the special needs of railroad workers who are daily exposed to the risks inherent in railroad work and are helpless to provide adequately for their own safety.'" *Hardyman v. Norfolk & Western Railway Co*., 243 F.3d 255, 258 (6th Cir. 2001) (citations and quotations omitted.)

CSX begins its arguments on appeal with the contention that it is entitled to a new trial because prejudicial publicity was distributed during the trial. CSX moved the trial court for a new trial or for judicial inquiry into juror and/or counsel misconduct after trial. The trial was held from August 28, 2006, through September 11, 2006. CSX's allegation of error stems from an article and an editorial in the *Courier-Journal*, a newspaper widely distributed in Louisville, Kentucky. The articles were published on Tuesday, September 5, 2006, and Saturday, September 9, 2006. Neither the article nor the editorial specifically mentioned this case or Mr. Williams.

CSX first contends that the trial court erred in refusing to conduct a post-judgment inquiry into the exposure of the jurors to the prejudicial publicity and Mr. Williams's counsel's role in procuring that publicity.

> The trial court has broad discretion in assessing the impact of extra-judicial information in a variety of settings. Before trial, its decision to deny a motion for change of venue because of pre-trial publicity or other extra-judicial information will be honored unless there is a showing of actual prejudice or if prejudice can be clearly implied. *Montgomery v. Commonwealth,* 819 S.W. 2d 713, 716 (Ky. 1991), *citing Brewster v. Commonwealth,* Ky., 568 S.W.2d 232 (1978). During the jury selection process, the trial court is again invested with discretion to determine, based upon the totality of the circumstances, whether extra-judicial information has infringed upon a prospective juror's "mental attitude of appropriate indifference." *Montgomery* at 718. We see no reason why the manner or legal standard for assessing the impact of extra-judicial information should differ once the jury has been sworn. The trial judge we entrust with this responsibility in earlier stages of the proceedings is still closest to the pulse of the jury and

> remains the best person to make this determination once the offer of proof has begun.

Gould v. Charlton Co., 929 S.W.2d 734, 739 (Ky. 1966). In this action, the trial judge had admonished the jurors as to the fact that they should avoid discussions regarding the case outside the trial. CSX has not provided any proof that this admonition was not followed.

Mr. Williams has provided the affidavits of Lawrence Sheehan, Jill Grubbs, Robin Sharp, Andrea Watson Lucas, Ron Shehan and Mary Stillwell, jurors on his case. Each of these jurors deliberated on the case with the exception of Ron Shehan. Of those who did deliberate, all stated in their affidavits that there was no discussion regarding the *Courier-Journal* article and editorial and that they followed the trial judge's admonition regarding information obtained from outside the courtroom.

CSX has supplied the affidavits of Rod Payne, Darryl Lavery and Rebecca Berthard. These individuals were each involved with Boehl, Stopher & Graves, the law firm which represented CSX in this action. Those individuals state that they had conversations with various jurors regarding the juror's discussions about the newspaper articles. In the affidavit of Mr. Lavery, he states that Mr. Shehan indicated several of the jurors had seen and discussed the article. Mr. Shehan, however, states in his affidavit that he advised an attorney for CSX that the attorney was "twisting the truth" and that, in fact, no misconduct occurred during his time on the panel.

CSX has not provided any statements from jurors which indicate there was any misconduct warranting a new trial. CSX argues that the information was "inherently prejudicial" and warranted a new trial even absent actual prejudice which was required in *Davis v. Commonwealth*, 147 S.W.3d 709, 729 (Ky. 2005). We disagree with their arguments. Given the affidavits provided by Mr. Williams, we cannot find a new trial should be granted due to juror misconduct associated with the *Courier-Journal* articles.

CSX also contends, however, that counsel for Mr. Williams was involved in the *Courier-Journal* article and that his involvement also warranted a new trial be granted. Specifically, it cites Supreme Court Rules (SCR) 3.130(3.6(a)) which prohibits lawyers from making any:

> [E]xtrajudicial statement that a reasonable person would expect to be disseminated by means of public communication if the lawyer knows or reasonably should know that it will have a substantial likelihood of materially prejudicing an adjudicative proceeding.

Examples of such information include that "[i]nformation the lawyer knows or reasonably should know is likely to be inadmissible as evidence in a trial and would if disclosed create a substantial risk of prejudicing an impartial trial." SCR 3.130(3.6(b)(3)), (b)(5)).

The specific quote involving Mr. Williams's counsel is:

> Joe Satterley, a Louisville attorney who represents railroad workers, said he's aware of at least 100 pending lawsuits in Kentucky and elsewhere that were filed in the last few years.

> The study, he said, "substantiates everything we've been saying all along."

The *Courier-Journal*, September 5, 2006, Section A, p. 1.

There is also a quote from a CSX spokesperson, Gary Sease that "the company continues to believe there is no credible and conclusive scientific basis to support claims that solvent exposure harmed company workers." *Id*.

SCR 3.130(3.6(c)) provides that "[n]otwithstanding paragraphs (a) and (b)(1-5), a lawyer involved in the investigation or litigation of a matter may state without elaboration . . . [t]he general nature of the claim or defense." In this case, Mr. Satterley was a lawyer involved in the litigation of cases against CSX and he was stating the existence of the pending lawsuits and the nature of those claims. The *Courier-Journal* article clearly provided both sides of the litigation a chance to verbalize their positions and both sides did. Mr. Satterley did not reveal any information other than the existence of the pending lawsuits. Thus, CSX has not shown that he violated SCR 3.130 and no new trial is warranted.

Next, CSX contends that the trial court committed reversible error by failing to instruct the jury that Mr. Williams had a duty to mitigate his damages. While CSX request a mitigation of damages instruction, the trial court did not give one.

In actions brought under FELA, federal substantive law governs. *Booth v. CSX*, 211 S.W.3d 81,83 (Ky. App. 2006) *citing* *St. Louis Southwestern Ry. Co. v. Dickerson*, 470 U.S. 409, 411, 105 S. Ct. 1347, 84 L. Ed. 2d 303 (1985).

> [A] FELA plaintiff asserting a cause of negligence against its employer must prove the traditional common law elements of negligence, duty, breach, foreseeability, and causation.' *Id.* (citations and quotations omitted). However, FELA plaintiffs have a lower standard of proof than plaintiffs in ordinary negligence cases. *See Harbin v. Burlington Northern R.R. Co.*, 921 F.2d 129, 131 (7th Cir. 1990). *Id*. at 83-84.

CSX maintained at the trial level that solvents do not cause brain damage. As a result, the trial court originally denied their motion to allow them to present evidence regarding Mr. Williams's knowledge of the dangerous propensities of solvents. Thereafter, the trial court allowed CSX some leeway into cross-examining Mr. Williams regarding his knowledge of the harmful effects of solvents and his failure to use any safety equipment provided by his employer.

CSX was also allowed to present evidence during its case-in-chief regarding any fault which Mr. Williams may have had for his injuries. The trial court did not provide a mitigation instruction, however, there is no evidence that one could have been given due to the lack of mitigation evidence presented to the jury.

Finally, CSX contends that the trial court committed numerous evidentiary errors requiring a new trial. First, it contends that the trial judge committed reversible error by ruling that CSX could not introduce evidence of comparative negligence and failing to reverse that ruling until the conclusion of plaintiff's case.

In a motion *in limine*, CSX moved to introduce evidence of Mr. Williams's contributory negligence. Specifically, it asked to be allowed to introduce evidence regarding his knowledge of the dangerous effects of solvent exposure. The trial court did not allow introduction of this evidence and, as stated above, we find that it did not err in doing so.

While CSX contends its motion *in limine* was sufficient without avowal testimony, Mr. Williams contends that a motion *in limine* is not sufficient. "Usually, a motion *in limine* requests an advance ruling on a specific evidentiary fact, not a theory of the case requiring proof by multiple facts." *Davis,* 147 S.W.3d at 722.

The broad theory of contributory negligence would need continuing objections for preservation. Regardless, the trial court allowed CSX some probing into a contributory negligence theory.

Near the conclusion of the plaintiff's case-in-chief, however, the trial court accepted additional arguments from counsel for CSX and allowed questioning regarding his use of respiratory equipment and his comparative fault in general.

45 U.S.C.A. § 53 provides that:

> the fact that the employee may have been guilty of contributory negligence shall not bar a recovery, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee[.]

The jury considered Mr. Williams to be 10% responsible for his injuries and his judgment was reduced accordingly. CSX, however, contends that the amount of fault attributed to him would have been even higher had they been allowed to cross-examine fellow employees Larry Elmore, Jesse Riggs, John Newell and Julian Phillips regarding his failure to utilize safety equipment, avoid overexposure to solvents and his failure to report symptoms.

Beginning with Mr. Williams's testimony, CSX was allowed to introduce evidence of fault. Through its own experts and lay witnesses, CSX put before the jury that respiratory equipment was available, that Mr. Williams did not use it routinely and that he did not always report symptoms he suffered to CSX personnel. Thus, CSX has not shown any prejudice it suffered as a result of the trial judge's ruling.

Next, CSX contends that the trial court committed reversible error by barring evidence of Mr. Williams's lack of motivation to work due to receipt of railroad retirement benefits (RRBs). In *Eichel v. New York City Central RR Co*., 375 U.S. 253 84, S. Ct 316 (1963), the rule that evidence of RRBs is not generally admissible in FELA cases was reiterated. While *McGrath v. Consolidated Rail Corp.*, 136 F.3d 838 (1st Cir. 1998) interpreted *Eichel* to allow for the receipt of collateral source benefits into evidence as long as a Rule 403 balancing test was performed, *Eichel* is more similar to the case before us. Regardless, we would review any error for abuse of discretion and there was no such abuse in this case.

CSX next asserts that the trial court committed reversible error by allowing evidence of dissimilar claims of other railroad workers. In a motion *in limine*, CSX argued that evidence of other claims and injuries by railroad workers exposed to solvents should not be allowed. The trial judge ruled that only claims which Mr. Williams established to be substantially similar could be introduced. CSX argues that the trial judge nonetheless allowed in evidence of (1) a 1978 accident report involving John Newell in which he claimed that he became dehydrated at home after being exposed to solvents; (2) testimony of Larry Elmore regarding Mr. Newell's claim; (3) the introduction of a medical report involving Tom Whalen concerning a one-time acute incident; and (4) questioning of CSX's experts regarding litigated claims of other railroad workers filed after Mr. Williams's exposure ended.

"[W]e review a trial court's evidentiary rulings for abuse of discretion." *Hamilton v. CSX Transportation, Inc.,* 208 S.W.3d 272, 279-80 (Ky. App. 2006) *citing Goodyear Tire and Rubber Co. v. Thompson*, 11 S.W.3d 575, 577 (Ky. 2000). "The test for abuse of discretion is whether the trial judge's decision was arbitrary, unreasonable, unfair, or unsupported by sound legal principles." *Commonwealth v. English*, 993 S.W.2d 941, 945 (Ky. 1998).

Evidence of a prior incident is not admissible at trial unless the incident sought to be introduced occurred under substantially similar circumstances as that of the plaintiff. *Hartel v. Long Island R. Co.,* 476 F.2d 462 (2nd Cir. 1973).

The evidence cited to above does indicate that CSX was aware that workers were becoming ill after exposure to solvents.

Finally, CSX contends that the jury's finding of liability and award of damages was not supported by the evidence. Specifically, CSX contends that it was entitled to a directed verdict or a new trial on Mr. Williams's claim for future medical expenses; for future loss wages; and because permanent irreversible brain damage was not a foreseeable result of exposure to solvents.

The denial of a directed verdict by a trial court should only be reversed on appeal when it is shown that the verdict was flagrantly against the evidence such that it indicates the jury reached the verdict as a result of passion or prejudice. *Bierman v. Klapheke*, 967 S.W.2d 16, 18-19 (Ky. 1998).

Mr. Williams provided evidence and testimony that L&N and CSX were aware of the danger of solvents as early as 1937, when the Association of Railway Claims Agents met in Cincinnati, Ohio, and a speaker at the event, Dr. Hayhurst, warned of the dangers of working with mineral spirits as they were petroleum solvents. Railway Claims Agents were individuals who handled claims for employee injury on behalf of their employers.

Mr. Williams also introduced a 1953 internal document wherein C&O Railroad (CSX's predecessor in interest) stressed the need for proper safety precautions when using TCA. An expert witness, Dr. Michael Ellenbecker, testified that the industry standard at the time was the use of respiratory protection.

While Mr. Williams also testified that he was given such protection, he stated that he did not use it often and that there was no requirement by CSX that he do so.

In a 1975 TCA specification, there was an advisement that workers should not inhale TCA as the vapors were harmful. Mr. Williams testified that he was unaware of any of the harmful effects associated with the use of these solvents.

Mr. Williams introduced evidence of injury reports filed by Tom Whalen and John Newell regarding overexposure to solvents while working. Expert witnesses for the plaintiff testified that it was known within the industry that the solvents used by CSX's employees, specifically Mr. Williams, could cause serious injuries including death. CSX continued to use these products into the late 1990's.

Mr. Williams testified that he was never trained on the use of the respirators provided by CSX, nor was he trained on the proper use of the solvents. There was also testimony that CSX had taken labels off containers of the solvents which provided warnings regarding their use.

Dr. Douglas Linz testified that Mr. Williams has chronic toxic encephalopathy due to his exposure to solvents while he was an employee of CSX. Dr. Linz is a board certified occupational medicine specialist and is a published author on the topic of solvent induced encephalopathy. Dr. Linz examined Mr. Williams and his medical records. This evidence is ample and reasonable to prove that Mr. Williams will incur future loss of wages and medical costs due to a brain

injury caused by CSX's negligence and that CSX was aware of the harmful effects of solvents.

Finally, as to the issue of foreseeability, in *Gallick v. Baltimore & Ohio Railroad Co.,* 372 U.S. 108, 83 S. Ct. 659, 120 (1963), the United States Supreme Court held that it was an element in a FELA case. Mr. Williams put forth into evidence the claims of other workers regarding the damage they sustained after their exposure to solvents such as the ones with which Mr. Williams worked. This evidence is sufficient to sustain the jury's decision that CSX should have foreseen the damage exposure to solvents without the use of safety equipment could cause. Thus, no new trial is warranted.

ALL CONCUR.

BRIEFS AND ORAL ARGUMENT FOR APPELLANT:	BRIEF AND ORAL ARGUMENT FOR APPELLEE:
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ORAL ARGUMENT FOR APPELLANT:	ORAL ARGUMENT FOR APPELLEE:
David T. Klapheke	Joseph D. Satterley