STATE OF MICHIGAN

COURT OF APPEALS

RICHARD I. OWENS, Plaintiff-Appellee,	UNPUBLISHED October 12, 2010
v	No. 291427 Wayne Circuit Court
CSX TRANSPORTATION, INC., Defendant-Appellant.	LC No. 07-700248-NI

Before: ZAHRA, P.J., and TALBOT and METER, JJ.

PER CURIAM.

Richard Owens sought benefits under the Federal Employers' Liability Act (FELA)[1] for injuries allegedly incurred in conjunction with his work as a railcar repairman for CSX Transportation, Inc. CSX contends the applicable three-year statute of limitation bars Owens' claim. CSX also argues that Owens lacked standing to pursue the claim because of his filing of a Chapter 7 bankruptcy petition and the doctrine of judicial estoppel. CSX also takes issue with the lower court's denial of a request to prevent Owens' expert from testifying at trial and the failure to provide the jury with a repetition of all requested instructions during their deliberation. We affirm.

Owens does not claim an injury based on a specific accident date, but rather seeks compensation for injuries allegedly incurred through the repetitive nature of his job responsibilities. Specifically, as a carman, Owens is required to open and close auto rack railcars, raise the decks on tri-level railcars and install and remove deck plates. The railroad cars were often in a deteriorated condition, which allegedly required Owens to use excessive physical force and to be in awkward positions to perform the assigned tasks to ready the railcars for loading. Owens contends CSX was negligent in failing to provide him with adequate/safe employment conditions and assistance resulting in the injury sustained to his right shoulder. The jury found CSX negligent and awarded Owens $25,000 in economic damages and $210,000 in noneconomic damages. The jury attributed 27 percent of the negligence to Owens, reducing the overall award by a commensurate amount.

[1] 45 USC § 51.

The accrual date of Owens' right shoulder injury comprised the first point of contention in the lower court with CSX arguing Owens was aware of the injury and its source in 2003. Owens asserted the earliest accrual date to be late 2004 or early 2005. The applicable statute of limitation in this action is governed by FELA, which provides in pertinent part: "No action shall be maintained under this chapter unless commenced within three years from the day the cause of action accrued."[2] Because Owens filed his claim on January 3, 2007, to be precluded by the statute of limitation it must be demonstrated that he was aware of his injury and its origin before January 3, 2004.

In suggesting that Owens was aware of his injury and its relationship to his work, CSX relies on Owens' consultation with Dr. Richard Singer on February 27, 2004. At that time, Owens complained of:

> [D]orsal numbness and tingling of the hands, right greater than left, and pain over the palmar wrist. In addition, he has pain over the second and third metacarpals and dorsal forearm pain on the left. The symptoms were worse at Christmastime. In June or July of last year, he had an EMG, which showed right-sided carpal tunnel syndrome.

In his evaluation, Dr. Singer indicated that most of the tests performed on Owens were negative or unremarkable and diagnosed "radial nerve irritation, left." In conjunction with this appointment, Owens completed forms for Dr. Singer where he disclosed that he "first noticed" the problems being experienced "10 months" earlier and that his physical complaints involved "pain in hands and arms and right shoulder." On the form, when asked to indicate the relationship of the problems being experienced to "employment," "auto accident" or "other," Owens responded "don't know."

In further support of its position, CSX selectively cites portions of Owens' deposition indicating awareness of the relationship of his injury to his work. The juxtaposition of the cited exchange in CSX's brief implies that Owens suspected the relationship of his injury to his work when he consulted with Dr. Singer in February 2004. In actuality, the cited discourse was immediately preceded by an exchange, which asserts an awareness of the source of his injury to an alternative timeframe of late 2004 or early 2005 for development of his symptomology.

Owens contends that he was unaware of his condition and its origin until, at the earliest, late 2004 or early 2005. This is consistent with averments in his affidavit and the consultation in February 2006 with Dr. Michael Baghdoian, where it was indicated, "patient has a one year history of problems in the right shoulder." Compared to his consultation with Dr. Singer, Owens complained to Dr. Baghdoian of a "painful right shoulder" described "as a steady, constant, aching, throbbing, sharp, burning and numb-like pain." An x-ray of the shoulder in 2006 showed "an inferior osteophytic spurring of the distal clavicle as it articulates with the acromioclavicula articulation." In contrast, when evaluated by Dr. Singer in 2004, it was noted that Owens' "neck, shoulder, and elbow motions are full" with his x-rays being "unremarkable." While Owens'

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[2] 45 USC § 56.

primary complaints to Dr. Singer involved pain and numbness in his hands and arms, Dr. Baghdoian's report minimizes such complaints. Relevant diagnostic impressions by Dr. Baghdoian included:

1. Arthralgia of right shoulder with impingement syndrome.

2. Mild AC joint arthrosis with spur formation.

3. Probable rotator cuff tendinopathy with adhesive capsulitis, right shoulder.

At trial, Dr. Baghdoian opined, "the types of work that [Owens] was doing would certainly be compatible with the problem he developed." But at his February 2004 evaluation Dr. Singer specifically opined that Owens complaints showed "no correlation with his job at this point."

"The FELA makes common carrier railroads liable to employees who suffer work-related injuries caused by the railroad's negligence and it is the sole remedy available to railroad employees for injuries sustained while engaged in interstate commerce."[3] FELA restricts claims to those arising "within three years from the day the cause of action accrued."[4] In determining when an action accrues, this Court has previously indicated that the discovery rule is to be applied "in determining whether a claim falls within FELA's statutory period of limitations."[5] In application:

> The discovery rule imposes an affirmative duty on the plaintiff to exercise reasonable diligence to investigate the cause of a known injury. The relevant inquiry under the discovery rule is when the plaintiff knew or should have known that there was a causal connection between his employment and his injury, not when he knew that the repetitive exposure to the cause was the specific cause of that injury.[6]

The discovery rule has been held applicable in cases involving latent injuries that are not immediately ascertainable or "where the injury has an indefinite onset and progresses over many years unnoticed."[7]

Under the factual circumstances of this case, the injury complained of by Owens in 2004 is substantively different from that which is the subject of this litigation and is, therefore, not precluded by the three-year statute of limitation. While Owens is precluded from now asserting a claim under FELA regarding Dr. Singer's diagnosis of nerve impingement based on the

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[3] *Hughes v Lake Superior & Ispheming R Co*, 263 Mich App 417, 422; 688 NW2d 296 (2004) (footnotes and citations omitted).

[4] 45 USC § 56.

[5] *Hughes*, 263 Mich App at 423.

[6] *Id.* at 428 (footnotes omitted).

[7] *Matson v Burlington N Santa Fe R*, 240 F3d 1233, 1235 (CA 10, 2001).

elapsed time frame, there is no indication that his 2004 complaints are related, or even similar, to the conditions diagnosed and treated by Dr. Baghdoian, which arose in late 2004 or early 2005. Further support for this conclusion is provided by Dr. Singer's failure to attribute Owens' 2004 condition to his employment, as it cannot be demonstrated that Owens knew or had reason to know that "there was a causal connection between his employment and his injury."[8] This is not to suggest, as argued by Owens, that it was necessary for him to have received a definitive diagnosis by Dr. Baghdoian for the statute of limitations to accrue. Rather, it would be reasonable for Owens to suspect that his right shoulder pain was causally related to his employment given the "'very physical nature' of his job."[9] This is consistent with the requirements of the discovery rule, which places the burden on a plaintiff, by exercising reasonable diligence, to attempt to ascertain the cause of his injuries including whether repetitive workplace activities were a contributing factor to his physical condition.

On February 16, 2005, Owens filed a voluntary Chapter 7 bankruptcy petition. The Bankruptcy Court entered an order of discharge on July 19, 2005, and the bankruptcy case was officially closed on September 2, 2005. The filing of the bankruptcy petition, combined with the disputed accrual date of Owens' injury, serves as the basis for CSX's contention that Owens' claim was precluded because the bankruptcy trustee was the real party in interest and the doctrine of judicial estoppel.

Federal bankruptcy law requires that any property owned by a debtor, at the time a petition is initiated, including causes of action, become a part of the bankruptcy estate.[10] "It is well established that the 'interests of the debtor in property' include 'causes of action.'"[11] "A cause of action is a property right which passes to the trustee in bankruptcy, even if such cause of action is not included in schedules filed with the bankruptcy court. "Therefore, upon filing a petition for bankruptcy, a debtor loses standing to pursue any claims because those claims become part of the bankruptcy estate."[12] "Those actions remain part of the bankruptcy estate and may only be dealt with by the bankruptcy trustee unless the claim is abandoned pursuant to the requirements of Title 11, United States Code section 554(a) or (b)."[13] Similarly, MCR 2.201(B) mandates that "[a]n action must be prosecuted in the name of the real party in interest." A "real party in interest" has been defined as "one who is vested with the right of action on a given claim, although the beneficial interest may be in another."[14] "This standing doctrine recognizes

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[8] *Hughes*, 263 Mich App at 428 (footnotes omitted).

[9] *Id.*

[10] 11 USC § 541.

[11] *Sharp v Oakwood United Hosps*, 458 F Supp 2d 463, 469 (ED Mich, 2006) (internal citations omitted).

[12] *Carlock v Pillsbury Co*, 719 F Supp 791, 856 (D Minn, 1989).

[13] *Sharp*, 458 F Supp 2d at 469 (internal citations omitted).

[14] *Miller v Chapman Contracting*, 477 Mich 102, 105-106; 730 NW2d 462 (2007).

that litigation should be begun only by a party having an interest that will assure sincere and vigorous advocacy."[15]

CSX contends that, even if the late 2004 or early 2005 date of accrual is applicable. Owens was not the real party in interest and was precluded from pursuing his claim in the circuit court. Having rejected CSX's assertion that Owens' claim accrued in 2003, this Court is asked to determine whether knowledge of an injury in late 2004 or early 2005 was sufficient to require Owens to include the claim that serves as the basis for this underlying lawsuit within his bankruptcy petition, thus precluding his retention of standing in the circuit court. To ascertain whether Owens or the bankruptcy trustee was the "real party in interest" with the right to pursue this underlying claim, certain relevant dates must be addressed.[16]

"Ordinarily, a personal injury is not a 'claim' until it accrues. All of the elements of a personal injury must occur before the claim accrues, including damages and, often, reasonable awareness of those damages."[17] In the factual circumstances of this case, Owens became aware of a physical injury or complaint in late 2004 or early 2005. He was not actually diagnosed or treated until February 2006. His bankruptcy petition was filed in February 2005 and his bankruptcy case was finally closed on September 2, 2005. Reportedly, Owens did not lose any income or time off from work before May 2006 for his shoulder injury. Because his claim could not accrue, for purposes of filing the underlying lawsuit, until he incurred damages such as wage loss attributable to the injury he could not include this claim on his bankruptcy petition. Owens was not aware and did not incur compensable damages until May 2006, at least seven months after the discharge and closing of his bankruptcy claim. As CSX has failed to demonstrate that Owens knew he maintained a valid claim before the filing, discharge and closing of his bankruptcy petition, their assertion that he could not pursue this lawsuit as the real party in interest is not sustainable.

CSX also contends preclusion in accordance with the equitable doctrine of judicial estoppel.[18] The purpose underlying the doctrine is "to preserve the integrity of the courts by preventing a party from abusing the judicial process through cynical gamesmanship, achieving success on one position, then arguing the opposite to suit an exigency of the moment."[19] Courts have indicated that the doctrine of judicial estoppel is to "be applied with caution to 'avoid impinging on the truth-seeking function of the court, because the doctrine precludes a

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[15] *Id.* at 106 (citation omitted).

[16] Owens filed the lawsuit pertaining to this appeal on January 3, 2007. He filed his petition for Chapter 7 bankruptcy on February 16, 2005. The bankruptcy court entered an order of discharge on July 19, 2005, with the bankruptcy case officially closed on September 2, 2005.

[17] *Herring v Texaco, Inc*, 161 Wash 2d 189, 197; 165 P3d 4 (2007) (citation omitted).

[18] See *Sharp*, 458 F Supp 2d at 471.

[19] *Id.*, citing *Teledyne Indus, Inc v NLRB*, 911 F2d 1214, 1218 (CA 6, 1990).

contradictory position without examining the truth of either statement.'"[20] Three considerations have been identified as being relevant to the application of judicial estoppel:

> (1) "a party's later position must be clearly inconsistent with its earlier position"; (2) "whether the party has succeeded in persuading a court to accept that party's earlier position, so that judicial acceptance of an inconsistent position in a later proceedings would create the perception that either the first or the second court was misled"; and (3) "whether the party seeking to assert an inconsistent position would derive an unfair advantage or impose an unfair detriment on the opposing party if not estopped."[21]

In applying these factors it is generally recognized that the doctrine of judicial estoppel serves to bar an individual from "(1) asserting a position that is contrary to one that the party has asserted under oath in a prior proceeding, where (2) the prior court adopted the contrary position 'either as a preliminary matter or as part of a final disposition.'"[22]

According to our Supreme Court, the touchstone of judicial estoppel is the assertion of inconsistent *positions.*[23] In this instance, Owens' position is not inconsistent as required by the first of the designated factors identified for the imposition of judicial estoppel. In the bankruptcy court Owens did not indicate knowing of the existence of a potential claim at the time of filing his petition or when the bankruptcy estate was closed. Consistent with that position, in the litigation underlying this appeal, Owens contends that he did not incur any damages until May 2006, at least seven months after the bankruptcy action was fully finalized. The bankruptcy court's acceptance of Owens' position does not serve to suggest that the circuit court was somehow "misled" in the later proceeding as necessitated by the second factor as the outcome of both proceedings are not inherently inconsistent.

CSX completely ignores the third factor of whether in permitting Owens to proceed would allow him to "derive an unfair advantage or impose an unfair detriment . . . if not estopped." CSX suffers no prejudice from permitting Owens to proceed with his claim in the circuit court. CSX is accused of negligence in the workplace and suffers no "unfair detriment" from Owens position in either legal proceeding, as CSX had no stake in the bankruptcy.[24] To adopt CSX's argument would result in absolving it of all liability even though CSX has not incurred an injury. Such a result would be contrary to the purpose or intent of the doctrine of judicial estoppel.

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[20] *Eubanks v CBSK Fin Group, Inc*, 385 F3d 894, 897 (CA 6, 2004) (citation omitted).

[21] *New Hampshire v Maine*, 532 US 742, 750-751; 121 S Ct 1808, 149 L Ed 2d 968 (2001) (internal quotations and citations omitted).

[22] *Browning v Levy*, 283 F3d 761, 775 (CA 6, 2002) (citation omitted).

[23] *Paschke v Retool Indus*, 445 Mich 502, 509-510; 519 NW2d 441 (1994) (emphasis added).

[24] See *New Hampshire*, 532 US at 751.

CSX also takes issue with the trial court's response to the jury's request for the repetition of the FELA instruction. CSX does not take issue with the repetition of the one instruction provided by the trial court, but rather contends that the trial court erred in failing to repeat two other instructions pertaining to FELA to the jury. Contrary to the position taken by CSX, there is nothing in the lower court record to support this contention.

A trial court may repeat an instruction at the behest of the jury.[25] Notably, when the trial court inquired of the jury to confirm that it wanted the court "to reread the FELA instruction," the jury foreperson responded affirmatively. The request appears to have been for the repetition of a single instruction based on this wording and response. Contrary to CSX's contention, only two instructions given by the trial court specifically made reference to FELA. The one instruction pertaining to "Section 1 of the Federal Employer's Liability Act" was provided to the jury. This instruction contained the actual wording comprising the FELA provision. It would be reasonable to assume that this was the instruction referenced by the jury as the transcript of the lower court proceeding indicates that errors in wording or pronunciation occurred that could have resulted in confusion. After re-reading this instruction twice, the jury indicated that it was satisfied.

The only other instruction given by the trial court that specifically referenced FELA was that pertaining to the definition of negligence. The instruction on negligence was detailed and only referenced FELA in general terms; it did not suggest that it was a direct recitation of the statutory language. The instruction on negligence was also provided "[i]n other words," which may have served to obviate the jury's need to seek repetition of this instruction.

The trial court sought to clarify the jury's request and repeated only the instruction indicated by the jury foreperson to be the one sought. While a trial court should resolve difficulties identified by a jury with "concrete accuracy,"[26] in doing so a trial court may exercise its "sound discretion" in determining how to respond to inquiries by a jury during its deliberative stage.[27] Based on the efforts of the trial court to ascertain the limits of the jury's request and the jury's subsequent indication of satisfaction, any assertion by CSX that the trial court's failure to respond in full by re-reading additional instructions is purely speculative. This seems particularly true, as the jury did not subsequently seek any additional instruction from the trial court before reaching their verdict.

CSX also asserts as error, the lower court's failure to preclude the testimony of Owens' biomechanical engineering expert, Tyler Kress, Ph.D., at trial. CSX contends Kress should not have been permitted to testify because Owens failed to provide full and complete disclosure of his expert's opinion, along with any reports and documents relied on for the formulation of that opinion. At the time of trial, CSX objected to Kress' testimony premised on the inclusion in the expert's file of materials pertaining to another case identified as "*Davis vs. Norfolk Southern*."

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[25] *VanBelkum v Ford*, 183 Mich App 272, 274; 454 NW2d 119 (1989); MCR 2.516(B)(4).

[26] *Bollenback v United States*, 326 US 607, 612-613; 66 S Ct 402; 90 L Ed 350 (1946).

[27] *United States v Brown*, 276 F3d 211, 216 (CA 6, 2002).

CSX contended that Kress had reviewed these materials "with respect to this case and is going to offer opinions in this case using those records." The trial court indicated such information would be irrelevant and that it would preclude any testimony regarding "other cases" and invited CSX to object as appropriate and permitted Kress to testify.

A trial court may impose sanctions for a party's failure to comply with a discovery order.[28] Specifically, a court may preclude a litigant from introducing an expert's testimony at trial as a sanction for failing to comply with a discovery order.[29] Imposition of a severe sanction, such as dismissing an action, is generally appropriate "only when there has been a flagrant and wanton refusal to facilitate discovery and not when failure to comply with a discovery request is accidental or involuntary."[30] A trial court should evaluate the following non-exhaustive list of factors when it seeks to determine an appropriate discovery sanction to impose:

> (1) whether the violation was wilful or accidental, (2) the party's history of refusing to comply with discovery requests (or refusal to disclose witnesses), (3) the prejudice to the defendant, (4) actual notice to the defendant of the witness and the length of time prior to trial that the defendant received such actual notice, (5) whether there exists a history of plaintiff engaging in deliberate delay, (6) the degree of compliance by the plaintiff with other provisions of the court's order, (7) an attempt by the plaintiff to timely cure the defect, and (8) whether a lesser sanction would better serve the interests of justice.[31]

At the outset, we note that the contention of CSX is inconsistent. On the one hand CSX asserts, "the sheer inadequacy and generality of Appellee's responses, CSXT" led to its determination "that deposing Dr. Kress was unnecessary and decided not to retain an expert of its own." Contrary to its stated position, it would seem more reasonable to assume that such a state of events would lead most litigators to schedule a deposition in order to clarify and solidify an understanding of their opponent's position.

According to Owens, he provided supplemental responses to CSX's interrogatories more than 13 months before trial. He identified his expert by name, his address, opinion and the documents provided to the expert for review. When CSX filed its motion in limine, it did not initially seek to exclude the expert's testimony but rather to preclude any reference or use of documents not timely provided. Kress was not questioned and did not try to insert into his testimony any reference to the precluded materials. The only objections actually raised by CSX during Kress' testimony involved certain Association of American Railroad (AAR) documents, which were produced in advance of trial. CSX specifically acquiesced to permitting such

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[28] MCR 2.313(B).

[29] MCR 2.313(B)(2)(b); *LaCourse v Gupta*, 181 Mich App 293, 296; 448 NW2d 827 (1989).

[30] *Traxler v Ford Motor Co*, 227 Mich App 276, 286; 576 NW2d 398 (1998) (citation omitted).

[31] *Dean v Tucker*, 182 Mich App 27, 32-33; 451 NW2d 571 (1990) (footnotes omitted).

testimony, as long as any inquiry was limited to the specified documents. The only other objection raised was unrelated to discovery or the basis for the expert's opinion.

A reading of the cross-examination of the expert demonstrates that CSX was amply prepared as it included questioning of Dr. Kress regarding his deposition testimony in other cases, his fees and professional associations. At this point it simply appears that CSX regrets its decision to not depose this individual or retain its own expert. The trial court's decision to preclude the expert from testifying regarding documents not disclosed or not pertaining specifically to this plaintiff is consistent with both the requirements of discovery and the imposition of a measured sanction for the failure of a party to comply with a discovery order.

Affirmed.

/s/ Brian K. Zahra
/s/ Michael J. Talbot
/s/ Patrick M. Meter