

**STATE OF WEST VIRGINIA
SUPREME COURT OF APPEALS**

**Jimmie Gillon,
Plaintiff Below, Petitioner**

vs) **No. 11-0498** (Kanawha County 02-C-9500)

**CSX Transportation, Inc.,
Defendant Below, Respondent**

FILED
October 11, 2011
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

MEMORANDUM DECISION

Petitioner Jimmie Gillon appeals from the circuit court's order granting summary judgment in favor of respondent CSX Transportation, Inc. (hereinafter "CSX"), on the basis of a prior settlement and release agreement executed by the parties. Petitioner asserts that the motion for summary judgment should have been denied because the prior release did not discharge CSX from liability and damages for his lung cancer.

This Court has considered the parties' briefs and the record on appeal. This matter has been treated and considered under the Revised Rules of Appellate Procedure pursuant to this Court's order entered in this appeal on May 31, 2011. The facts and legal arguments are adequately presented in the parties' written briefs and the record on appeal, and the decisional process would not be significantly aided by oral argument. Upon consideration of the standard of review, the briefs, and the record presented, the Court finds no substantial question of law and no prejudicial error. For these reasons, a memorandum decision is appropriate under Rule 21 of the Revised Rules.

I. Factual and Procedural Background

On May 19, 2003, petitioner commenced an action¹ against CSX under the Federal Employers' Liability Act ("FELA"), 45 U.S.C. §51, et seq.,² alleging that he had suffered asbestos-related injuries, including lung cancer, as a result of his exposure to asbestos during his employment with CSX. CSX filed its answer in June of 2003. In June of 2009, petitioner

¹The action originated in the Harrison County Circuit Court but was later transferred to the Kanawha County Circuit Court as a part of a mass litigation lawsuit.

²The Federal Employers' Liability Act, 45 U.S.C. §51, et seq., governs injuries sustained by railroad employees in the workplace.

sought to have the case set for trial and served his first set of discovery requests upon CSX.

On August 19, 2010, CSX filed its motion for summary judgment on the basis of its prior settlement agreement and release agreement with petitioner. CSX argued in its motion that petitioner had signed the release agreement dated May 18, 1995 (hereinafter “Release”), in the context of his earlier action against CSX in the State of Virginia for injuries allegedly resulting from occupational exposure to asbestos. Petitioner settled his earlier claim for \$12,000. In that Release, petitioner discharged CSX from “all claims for all known and unknown, manifested and unmanifested, suspected and unanticipated occupational diseases or injuries, including *cancer*, arising from or contributed to by exposure to any and all toxic and pathogenic particulate matter, including but not limited to, *asbestos*” (emphasis added).

CSX states that the Release expressly and explicitly covered claims arising under the FELA. CSX adds that petitioner acknowledged in the Release that a “portion of the monies paid for this RELEASE AGREEMENT is for . . . possible future manifestation of either the effects of and/or injury or disease due to alleged exposure to such substances” CSX notes that petitioner executed the Release upon the advice and approval of his legal counsel at the time, as reflected in the Release.³

Petitioner states that he was diagnosed with lung cancer in March of 2003, which was nearly eight years after he signed the Release. Petitioner states that lung cancer and its causes were unknown to him, at least until the date of his diagnosis in March of 2003, and that he was previously without knowledge of the potential risks of lung cancer arising from asbestos exposure. Petitioner filed a response to the motion for summary judgment, and CSX filed a reply to petitioner’s response.

On September 16, 2010, the circuit court held a hearing on CSX’s motion for summary judgment. On October 18, 2010, the circuit court entered an order granting the motion.⁴ The circuit court found that petitioner executed the earlier Release in the context of settling FELA claims; that the Release specifically released future cancer claims caused by asbestos exposure; that it was clear from the language of the Release that petitioner was well

³In this regard, the Release Agreement provides that “THE UNDERSIGNED hereby declares I have executed this RELEASE AGREEMENT upon the advice and approval of my attorney and that I have had this RELEASE AGREEMENT explained to me by my attorney”

⁴ The summary judgment order also granted summary judgment in favor of CSX and against another plaintiff in the action, Larry Lockridge. Mr. Lockridge’s claim is not a part of the instant appeal.

aware that he was at risk of developing cancer from his alleged occupational exposures when he executed the Release; that petitioner had been represented by counsel at the time; and that petitioner had “knowingly and upon the advice of counsel comprised [his] future cancer claim when [he] executed” the Release.

II. Summary Judgment

Petitioner asserts that the circuit court erred in granting summary judgment in favor of CSX. Petitioner contends that the Release contravenes 45 U.S.C. §55, which proscribes the use of any contract or device for the purpose of enabling a common carrier to be exempt from FELA liability. Petitioner asserts that under *Wicker v. Consolidated Rail Corporation*, 142 F.3d 690, 701 (3rd Cir. 1998), a release is limited to those risks known to the parties at the time it is signed and that claims relating to unknown risks do not constitute “controversies” and may not be waived under §5 of the FELA. *Wicker* at 701⁵.

Petitioner argues that under *Wicker*, his Release does not bar his claims for lung cancer. Petitioner states that at the time summary judgment was entered, discovery had not been conducted to determine his intent when he executed the Release in 1995, nor had he been questioned regarding the risks explained to him by his former counsel in the context of executing that Release. Petitioner adds that CSX failed to present evidence that he knew the risks of developing lung cancer associated with long-term asbestos exposure when he executed the Release.

Petitioner argues that while the term “cancer” is in the Release, the term “lung cancer” is not, which should have been fatal to CSX’s motion for summary judgment. Petitioner contends that CSX’s argument that “cancer” means “cancer” and all of its forms is contrary to §5 of FELA (45 U.S.C. § 55) and the holding in *Ratliff v. Norfolk Southern Railway Company*, 224 W.Va. 13, 680 S.E.2d 28 (2009).

Last, petitioner argues that the settlement amount (\$12,000) associated with the Release does not comport with the release of a future death-causing illness. Petitioner asserts that his filing of the current litigation reflects that he never believed that the Release discharged his lung cancer injury.

⁵ Petitioner states that the subject release did not contain an explanation of the “quantity, location, and duration” of his exposure to asbestos or other toxic substances, as contemplated in *Wicker*, in determining whether an employee has made a reasoned decision to release his employer from liability for future injuries of specifically known risks. CSX counters that there is nothing in *Wicker* that requires specificity as to “quantity, location, and duration” of exposure to asbestos.

CSX responds that this Court concluded in *Ratliff* that the standard set forth in *Wicker* was the correct standard for evaluating the enforceability of a release, like petitioner's, which was executed in the course of settling a FELA claim. *Id.* CSX asserts that under *Ratliff* and *Wicker*, a release does not violate §5 of FELA if it is executed for valid consideration as part of a settlement and its scope is limited to the risks known to the parties at the time it is signed, which is the analysis utilized by the circuit court when it found that the Release barred petitioner's claims. CSX argues that the Release unambiguously extended to future cancer claims arising from asbestos exposure and, as the circuit court recognized, the language in the Release itself reflected that petitioner was aware that he was at risk of developing cancer from his alleged occupational exposures and that he was signing the Release in compromise of litigation, which is valid under §5 of FELA.

CSX asserts that petitioner does not cite any authority for his argument that the word "cancer" in the Release does not include "lung cancer." CSX contends that it is a matter of common sense that the word "cancer" means cancer and all of its forms. CSX adds that under *Ratliff* and *Wicker*, the settlement of a FELA claim may embrace damages related to known risks, even if there is no present manifestation of injury. CSX asserts that under *Wicker*, a release may cover potential risks from the same sort of toxic exposure that gave rise to the controversy resolved by the release. Here, petitioner released future claims for the risk that he might later develop cancer related to his lung condition when he signed the Release.

CSX asserts that extrinsic evidence could not be offered to alter the Release's unambiguous terms, which terms made petitioner aware that there was a risk that he could develop cancer from his occupational asbestos exposure. CSX asserts that there was nothing that petitioner could have adduced through additional discovery that would have invalidated the Release. CSX argues that under *Ratliff*, a party who attacks a FELA settlement "must bear the burden of showing that the contract he has made is tainted with invalidity. . . ." *Ratliff*, 224 W.Va. at 19 n.15, 680 S.E.2d. at 34 n.15 (quoting *Callen v. Pennsylvania R.R. Co.*, 332 U.S. 625, 630 (1948)). CSX contends that once it met its summary judgment burden by showing affirmative evidence that the Release barred petitioner's claim, the burden shifted to petitioner to prove the invalidity of the Release, which he failed to do.

As to the amount of the settlement paid in connection with the subject Release, CSX notes that petitioner does not cite any authority in support of the view that §5 of the FELA allows courts to second-guess how much was paid for a release. CSX asserts that petitioner's regret for the Release is not a basis for voiding the Release.

III. Conclusion

"A circuit court's entry of summary judgment is reviewed *de novo*." Syl. Pt. 1, *Painter v. Peavy*, 192 W.Va. 189, 451 S.E.2d 755 (1994). Having reviewed the briefs of the parties

and the record on appeal under the standard set forth above, as well as the circuit court's well-reasoned summary judgment order, this Court hereby affirms the award of summary judgment in favor of CSX. The Court agrees with the circuit court that it is clear from the unambiguous terms of the Release, which petitioner signed with the advice of legal counsel in an earlier FELA claim, that petitioner was aware that he was releasing, *inter alia*, any future claim that he might have associated with the development of cancer and, that under the *Wicker* standard, as approved by this Court in *Ratliff*, CSX is entitled to judgment in its favor on the basis of the prior Release. For these reasons, we affirm.

Affirmed.

ISSUED: October 11, 2011

CONCURRED IN BY:

Chief Justice Margaret L. Workman
Justice Robin Jean Davis
Justice Brent D. Benjamin
Justice Menis E. Ketchum
Justice Thomas E. McHugh