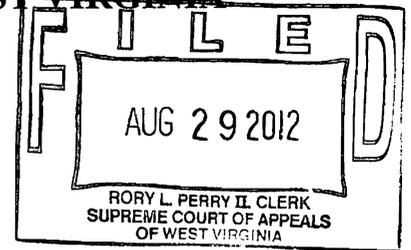


IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

NO. 12-0240-
0420



Gary L. Caudill,
PETITIONER,
v.
CSX Transportation, Inc.,
RESPONDENT

ON APPEAL FROM THE CIRCUIT COURT OF MINGO COUNTY
HONORABLE JUDGE MICHAEL THORNSBURY

Civil Case No. 10-C-304

PETITIONER'S REPLY BRIEF

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SUMMARY OF REPLY ARGUMENT

Respondent, CSX Transportation, Inc.'s ("CSX") argument is not that Caudill actually knew that his back problems were work related more than three years before he filed suit. Nor does it claim that a health care provider actually told Caudill that his back problem was work related more than three years before he filed suit. Instead, CSX's claim is "Because Caudill did not diligently investigate his injuries and did not file this lawsuit until September 2010, his claim is barred by FELA's three-year statute of limitations." CSX Brief p.1. The brief submitted by CSX fails to specifically address material facts that were in dispute in this FELA action and follows the same inappropriate analysis that was adopted by the Circuit Court below – grasping for any material facts that could possibly support summary Rule 56 dismissal in CSX's favor. CSX never questions that Caudill's spinal condition was a progressive or creeping condition called "cumulative trauma". See CSX Brief, generally. When a railroad worker should have 1) known of the condition, and 2) known of the cause of such a condition is a factual determination for the jury. Gaither v. City Hosp., Inc., 487 S.E.2d 901, 909 (W.Va. 1997); Millner v. N&W Ry., 643 F2d 1005, 1070 (4th Cir. 1981); and cases collected on pp. 15-16, f. 1 in Petitioner's Initial Brief.

REPLY ARGUMENT

A. CSX'S FACTUAL BACKGROUND AND RECOUNT OF CIRCUIT COURT PROCEEDINGS ARE FLAWED AND INACCURATE AS GARY CAUDILL DID NOT KNOW THAT HIS WORK CAUSED HIS CONDITION UNTIL 2008, WHICH WAS THE FIRST TIME A DOCTOR TOLD HIM OF THE RELATIONSHIP

CSX's characterization of the medical evidence is seriously flawed in its brief. First, neither CSX, nor the Circuit Court below, ever contended that Caudill was *actually* made aware

of any connection between his back problems and his workplace, prior to 2008. In 2008, Caudill's surgeon, Dr. Tibbs, advised Caudill of the connection. [A.R. 75]. The CSX medical argument is that Caudill was diagnosed with "bilateral spondylolysis" by Dr. Tibbs in 2008, but he carried the same diagnosis by virtue of a lumbar X-ray done in late 2005, ordered by Dr. Darnell, Caudill's internist [CSX brief, p. 1], and therefore, he "should have known" he suffered a significant spinal condition, as well as its occupational cause. There is absolutely no evidence that Dr. Darnell or any other health care provider told Caudill in 2005 that the problems he was having had anything to do with his work at the railroad. Likewise, there is simply nothing in the record to indicate that Caudill believed or should have known that his problems were work related.

Spondylolysis is a structural pars defect, like a stress fracture, of a vertebra at the pars interarticularis area of the L5-S1 spinal area that affects at least 8% of men. [A.R. 128-Dr. Tibbs testimony]. Dr. Tibbs, Caudill's treating neurosurgeon, chairman of the neurosurgery department of the University of Kentucky medical center at Lexington, explained that it is probably a stress fracture of the pars, which usually occurs in adolescence or in the young adult spine, and predisposes one to eventually developing vertebral slippage of the spine, medically defined as spondylolisthesis. [A. R. 115, 124]. "When the [pars] bridge of bone is intact it's impossible for the bone to slip. But in [Caudill's] case there was a defect...and when this happens, the bone can separate." [A.R. 117].

After reviewing the MRI and examining Caudill in 2008, Dr. Tibbs added:

"[T]he diagnosis was clear, spondylolisthesis...the patient had...motor deficit, a strength deficit in the leg...[t]he L-5 nerve, which was compressed in this man's case, is the nerve that lifts your foot when you walk....if that nerve becomes severely involved it can cause what's called a foot drop...[s]o this patient had incapacitating pain. He was unable to work....[a]nd he had

nerve entrapment with weakness in the ankle, and the risk of developing a foot drop.”

[A.R. 117]. Dr. Tibbs further explained that a *pars defect* (synonymous with the term “*spondylosis*”) never becomes symptomatic in most people. [A.R.124]. Dr. Tibbs explained that a small percent of patients, like Caudill, develop overt spondylolisthesis and nerve entrapment, and he opined that “[Caudill] moved from the relatively asymptomatic to a severely symptomatic state as a consequence of these repetitive stresses that he received in the course of his work activities over 31 years.” [A.R. 124]. There was no evidence in the Circuit Court’s record that Caudill suffered or manifested any spondylolisthesis, or was diagnosed with this condition, prior to 2008. [A.R. 46, 49, *see* Exhibits 1 and 2, attached.] The record facts considered by the Circuit Court showed that in 2005, Caudill received treatment from Dr. Darnell, his internist, and had a lumbar x-ray, but no part of Dr. Darnell's medical records in 2005 reflect a medical diagnosis of a spinal problem, much less spondylolisthesis. [A.R. 49].

Besides miscasting the medical evidence, CSX incorrectly argued in its brief that Caudill was diagnosed in 2008 with the “very same” condition he had in 2005, or even 25 years before, claiming Caudill had an implied duty to investigate this condition. CSX fails to mention that the condition was essentially asymptomatic or caused intermittent back pain that was treated by chiropractors only on an occasional basis. [CSX Brief, pp. 3-4]. CSX’s argument is speculation built on a foundation of, at best, inferences construed in favor of CSX, not the non-moving party. In the records available to the Circuit Court when considering the Rule 56 motion, no evidence was presented that Caudill suffered from spondylolisthesis, nerve entrapment, neurological deficit, or intractable pain until 2008, all as described by Dr. Tibbs in his testimony [Compare A.R. 117, 124 and A.R. 49]. Accordingly, Caudill did not know and could not reasonably have known that he had an injury until that time.

Another inaccurate portion of CSX's factual background is that Caudill's Complaint only contended that the seats in CSX's locomotives lacked "enough back support" [CSX brief at 4]. In actuality, as discussed by Dr. Tibbs, Caudill's cumulative trauma was a result of not only improper seats, but riding in inadequate locomotive seats overlaid on constant and repetitive "oscillation" and "vibration" attendant to railroad industry work on moving freight trains. [A.R. 124-25].

B. CASES CITED BY CSX REGARDING ACCRUAL OF LIMITATIONS PERIOD ARE DISTINGUISHABLE FROM THIS CASE

In attempting to support the Circuit Court's Rule 56 dismissal, CSX cites many cases that seek to imply accrual of the statute of limitations, some involving creeping or progressive diseases. [CSX Brief p. 10]. What summarily distinguishes those cases from this case is that each case cited had valid, record material facts that were uncontradicted to support accrual of the statute of limitations. As outlined in Caudill's initial brief, there are no record facts to support an implied accrual of the statute of limitations as of late 2005. [Petitioner's Brief pp. 15-16]. There was no diagnosis of a condition, and no condition imparted to Caudill. *Id.* There was no information made known to Caudill of the connection between a spinal condition and Caudill's workplace. *Id.* A mere reference to spondylosis in a radiology report in 2005 cannot serve as an undisputed fact and basis for summary judgment, whether or not one considers a subjective or objective standard. Spondylolysis is a long standing condition that Caudill had for years, or decades, but standing alone was not the reason Caudill consulted with a surgeon in 2008. Furthermore, none of the material symptoms and complications Caudill suffered in 2008, manifested before 2008, or were ever diagnosed or imparted to Caudill before 2008, namely disk bulge, disk protrusion, impingement on the thecal sac, and 10 mm slippage of vertebra. [A.R. 117, A.R. 46]

C. UNDER CLEAR PRECEDENT JURIES ARE SUPPOSED TO DECIDE FACTUAL DISPUTES IN FELA CASES

Lost and unmentioned in CSX's brief is the liberal, remedial construction of the FELA, the tremendous weight of authority favoring submitting factual disputes over accrual of the FELA statute of limitations to juries, most notably in progressive condition cases, and that CSX's argument, if adopted, is a major restriction on overall access to the courts. *See e.g.*, Fonseca v. Conrail, 246 F.3d 585 (6th Cir. 2001) (Rule 56 dismissal reversed, when worker “should have known” cause of injury is a jury issue); Green v. CSX, 414 F.3d 758, 763-64 (7th Cir. 2005) (Rule 56 dismissal reversed, material facts in dispute as to when a worker “should have known” cause of cumulative trauma injuries was jury issue); Gay v. N&W, 483 S.E.2d 216, 219 (Va. 1997) (Rule 56 dismissal reversed, when material facts are in dispute as to when worker “should have known”, issue must be submitted to the jury).

CSX's argument would have this Court hold that a railroad worker's case ripened and expired prior to any medical diagnosis or manifestation of spondylolisthesis, nerve entrapment, disk bulges, disk protrusions and the like—the entire reason Caudill was referred to a surgeon in 2008. This is precisely what the U.S. Supreme Court rejected over sixty years ago in Urie v. Thompson, 337 U.S. 163 (1949). In Urie, the Supreme Court found that a plaintiff should not be charged with the knowledge of the slow progress of an injury or a disease at some past moment in time, unknown and inherently unknowable even in retrospect. And, as the Fourth Circuit held in Young v. Clinchfield RR Co., 288 F. 2d 499, 503-504 (4th Cir. 1961), if a medical diagnosis of a progressive disease was not made [here, before 2008], a medical judgment that eluded a specialist cannot reasonably be expected from the plaintiff. *Id.*

Following the public policy argument that Caudill advances, Caudill merely gets his day in court and a jury is entitled to determine whether, at some implied date before 2008, Caudill

possessed any of the facts that were critical to allow any understanding of a connection between his back problems and the railroad workplace. While Caudill contends CSX's position is meritless, if an evidentiary dispute is presented at trial CSX may submit it to the jury. Leaving the decision to the jury promotes both the remedial purposes of the FELA articulated by the U.S. Supreme Court, and promotes access to the courts and the seventh amendment right to trial by jury of factual disputes. The argument advanced by CSX elevates its arguable "inferences" while completely ignoring the considerable material facts of record in a light most favorable to the non-moving party, Caudill. Also, CSX's position further erodes the seventh amendment and the FELA right to trial by jury of material factual disputes.

D. CSX SUMMARY JUDGMENT WAS IMPROPER WITH OR WITHOUT THE RULE 59(e) MOTION MATERIALS

Whether or not this court considers anything filed with, or argued in, the Rule 59(e) Motion, Rule 56 summary judgment was improper. The Court below did not properly view the Rule 56 motion in the light most favorable to the non-moving party, Caudill. *See McGray v. Norfolk & Western Ry. Co.*, 201 W.Va. 675, 679 (1997) ("At the summary judgment stage, the circuit court's function is not "to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial"...this Court must, therefore, draw any permissible inference from the underlying facts in the light most favorable to the nonmoving party.) and *Casto v. DuPuy*, 204 W.Va. 619, 624 (1999) ("In considering a motion for summary judgment, all facts and inferences are viewed in the light most favorable to the nonmoving party.") (quoting *Williams v. Precision Coil, Inc.*, 194 W.Va. 52, 60 (1995)).

Besides a few entirely uncontested background facts [A.R. 191-92, ¶ 1 -3], there is virtually no reference and analysis in the lower Court's Rule 56 dismissal opinion of material

facts which Caudill asserted in opposition to summary dismissal [Petitioner Caudill's opposition to the Rule 56 motion, A.R. 74-90 and in Caudill's Petitioner's Brief at pp. 13-14]. This was patent legal error.

Once a Circuit Court decides to consider a Rule 59(e) motion, it has the discretion to consider depositions and affidavits filed in support of a motion to alter or amend judgment to prevent manifest injustice. *See e.g., Zinkand v. Brown*, 478 F.3d 634, 636-637 (4th Cir. 2007); *Ingle v. Yelton*, 439 F.3d 191, 197 (4th Cir.2006); *E.E.O.C. v. Lockheed Martin Corp., Aero & Naval Systems*, 116 F.3d 110, 111-112 (4th Cir. 1997). The Circuit Court below fully considered the 59(e) motion and the additional materials provided with that motion. The Circuit Court never "rejected" the materials but instead stated that the materials did not negate materials already of record [A.R. 223-227]. The Circuit Court then entered a new final Dismissal Order triggering new deadlines for appeal of this action. Notably, CSX never moved to strike either the Dr. Darnell deposition or Caudill's own affidavit with the attached medical records, after Caudill filed his Rule 59(e) motion, nor after the court denied Plaintiff's motion and entered an opinion and new final dismissal order. A party that fails to object or move to strike supporting depositions or affidavits offered in support of a Rule 59(e) motion waives objections to those filings being considered by either the circuit court or by this Court on appeal. This court should fully consider the Rule 59(e) materials Caudill filed for these reasons.

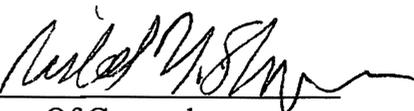
Summary Rule 56 dismissal was improper under the law, with or without consideration of a single word in the 59(e) motion or its attachments. Caudill's own affidavit merely confirmed other facts already in the record, because no record evidence showed any diagnosis of a spinal condition imparted to Caudill in 2005. Caudill's affidavit merely reinforced this fact. The deposition of Dr. Darnell verified what the limited medical records CSX filed already

verified - nothing in the 2005 medical records showed any discussions or diagnosis of a back abnormality. The affidavit and deposition were relevant to prevent a “manifest injustice” since summary Rule 56 dismissal is plainly an injustice if based on misapplication of the law and facts.

CONCLUSION

For all the foregoing reasons, Caudill moves this court to grant this appeal and reverse the summary Rule 56 dismissal. The material facts are in dispute and therefore any statute of limitations defense is a jury question, which may be addressed in jury interrogatories at trial.

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CERTIFICATE OF SERVICE

I hereby certify that on this 28th day of August, 2012, a true and correct copy of the foregoing pleading was served upon the following:

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