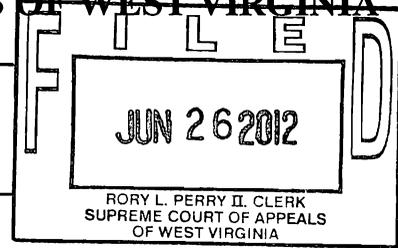


IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

12-0420

~~NO. 12-0240~~



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 BRIEF

Richard N. Shapiro, Counsel for Petitioner
WV Bar No. 7030
Shapiro, Lewis & Appleton, P.C.
1294 Diamond Springs Road
Virginia Beach, VA 23455
757-460-7776
757-460-3482 fax
rshapiro@hsinjurylaw.com

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ASSIGNMENTS OF ERROR

I. Granting Rule 56 Summary Judgment on the statute of limitations was made in error because Gary Caudill (“Petitioner”) did not believe, and had no reasonable basis to believe, that his injuries were related to his work with CSX Transportation, Inc. (“Respondent”) until 2008. In 2008, Petitioner’s neurosurgeon informed him that his injury was work-related.

II. Granting Rule 56 Summary Judgment on the statute of limitations was made in error because there is no evidence that Petitioner’s progressive, disabling back condition manifested itself as of 2005. Petitioner did suffer episodic back and hip pain prior to 2008, but these sporadic incidents were different and distinct from the constant, disabling back pain symptoms which Petitioner first suffered in 2008. Furthermore, the November 2005 lumbar x-ray findings that the Circuit Court relied on to show that Petitioner “should have known” of the injury were never communicated to Petitioner.

III. The rationale behind granting Rule 56 Summary Judgment on the statute of limitations was rooted in error since the Circuit Court asserted that, as a matter of law, Petitioner "should have known" of his spinal injury and that his injury was caused by railroad work he did more than three years before filing his Complaint. Controlling federal and state decisions construing the Federal Employers Liability Act (“FELA”) mandate that whether a worker "should have known" of accrual of the cause of a progressive occupational injury is a material fact that to be decided by a jury. Viewing all facts in a light most favorable to Petitioner, the non-moving party, requires that the statute of limitations defense be submitted to a jury because the facts or inferences of fact are in dispute.

STATEMENT OF THE CASE

Petitioner worked for Respondent as a freight conductor from 1977 to 2008. [R. 91-110: Caudill Dep., p. 21:16-21]. In that time, Petitioner consistently rode on engines in seats that lacked proper ergonomic support. [R. 125, Tubbs Dep. p. 48]. This subjected Petitioner to significant jarring, shock and vibration on his lumbar spine. [R. 101: Caudill Dep., p. 42:5-14]. Petitioner last worked for Respondent on June 28, 2008, when Petitioner's family internist, Dr. John Darnell ("Dr. Darnell") diagnosed serious lumbar back injuries. [R. 208: Darnell Dep. pp. 14-16]. After viewing his lumbar MRI, Dr. Darnell referred him to Dr. Philip A. Tibbs, a UK neurosurgeon ("Dr. Tibbs"). *Id.* Petitioner was diagnosed with back and leg pain, nerve entrapment and spondylolisthesis (i.e. slippage of vertebrae forward on the pelvis) by Dr. Tibbs. [R. 116-117: Tibbs Dep., pp. 13-14:24-14]. Dr. Tibbs then conducted a back fusion surgery on September 5, 2008. [R. 124: Tibbs Dep., p. 44:12-16]. Dr. Tibbs later opined that Petitioner's condition was disabling and medically disqualified Petitioner from his conductor job at age 55. [R. 124-125: Tibbs Dep., pp. 45-46:24-15]. Before 2008, Petitioner had a history of intermittent back pain and episodic chiropractic treatment in the 2000's (2001-2005, four total visits), occasional visits to Dr. Darnell for hip pain (notably of relevance, in late 2005), and further chiropractic care (2006-07, seven total visits), all the while working full time as a conductor. [R. 74-87: Pl. Opp'n Memo].

In 2008, Petitioner's low back pain changed and became progressively symptomatic and disabling. [R. 98: Caudill Dep., p. 31:9-22]. Petitioner, a high school graduate with no college education, first learned that his progressive, disabling back injuries were caused by the railroad-related shock, jarring and poor seating from his neurosurgeon, Dr. Tibbs, in 2008. [R. 125: Tibbs Dep. pp. 48-49].

This FELA suit was filed on September 17, 2010. [R. 1-4: Compl.]. Dr. Tibbs testified in this case that the engine seats, and the "oscillations, vibrations...superimposed upon a moderated degree of preexisting degeneration eventuated a nerve entrapment, which caused incapacitating pain, a significant

neurological deficit, which in turn required the surgical intervention....” [R. 125: Tibbs Dep., p. 48:7-23]. Dr. Tibbs specifically conducted a differential diagnosis and ruled out any other causes. *Id.* at pp. 47-52. Petitioner believed his prior sporadic back pain was “just part of life and getting older.” [R. 96: Caudill Dep., p. 24:16-18]. Furthermore, on the patient intake forms Petitioner completed with two different chiropractic clinics, Petitioner never checked off any boxes correlating his back pain to his work with CSX. [R. 215-222: Medical R.]

In January 2012, Respondent filed numerous motions, including a Motion for Summary Judgment and a memo in support of that motion. [R. 15-21: Def. Mot. for Summ. J.]. The motion argued that the statute of limitations barred Petitioner’s action. *Id.* Petitioner filed a memo in opposition on February 2, 2012. [R. 74-87: Pl. Opp’n Memo]. The Circuit Court heard oral argument on the Summary Judgment motion, as well as other motions, on February 6, 2012. [R. 167-190: Tr. of Pre-Trial Hr’g]. On February 27, 2012 the Circuit Court summarily dismissed Petitioner’s FELA claim, under WV RCP 56, the day before the jury trial was set to begin. [R. 191-200: Final Order Granting Def. Mot., ¶8]. The Circuit Court concluded that deposition testimony of Petitioner and his neurosurgeon, as well as several selected medical records in Petitioner’s internist medical file, supported summary judgment. *Id.* at ¶¶27-34.

Once the Circuit Court dismissed the action, Petitioner immediately filed a Rule 59(e) motion for reconsideration, providing the Circuit Court with a deposition of Dr. Darnell which was not filed previously, Petitioner’s own affidavit, and several medical records of the internist and chiropractic clinic. [R. 205-211: Darnell Dep., R. 212-214: Caudill Aff., and R. 215-222: Med. R.]. Notably, Dr. Darnell testified that he never discussed any back injury diagnosis with Petitioner in any 2005 visit or treatment of Petitioner. [R. 207: Darnell Dep., pp.10-11]. Furthermore, Petitioner’s actual medical records reflect no discussion in 2005 of back pain whatsoever, as Petitioner’s *hip pain* complaints had resolved after one visit in late 2005. [R. 212-214: Caudill Aff., ¶¶ 6,7]. Although the evidence shows Petitioner suffered

intermittent back pain for many years, the disabling back condition that manifested itself in 2008 and resulted in nerve entrapment, leg pain and ultimate surgery, did not manifest itself in 2005. *Id.* There was no written evidence, affidavit, deposition or medical record showing Petitioner suffered a debilitating, permanent back condition in 2005. *Id.* The Circuit Court’s original conclusion of law that Petitioner “should have known” in late 2005 of the cause of his back condition was based on one radiology x-ray report provided to Dr. Darnell. [R. 191-200: Final Order Granting Def. Mot., ¶26]. However, no affidavit, testimony or medical evidence showed this November 2005 x-ray report was ever discussed with Petitioner. [R. 212-214: Caudill Aff., ¶¶ 6,7]. There is no evidence of record to support the Circuit Court’s conclusion of law that Petitioner’s relevant statute of limitations accrued as of November 2005 or any other date before the actual 2008 diagnosis by Dr. Tibbs.

On March 12, 2012 the Circuit Court denied Petitioner’s Rule 59(e) motion by order, reasoning that Dr. Darnell’s deposition was not “newly discovered evidence,” and “does not negate the remaining supporting evidence” although the Circuit Court did not name or cite the “remaining evidence” nor provide any new findings of fact. [R. 223-226: Final Order Den. Pl. Mot. to Alter/Am.]. This appeal then followed.

SUMMARY OF THE ARGUMENT

As this Court has held in the non-FELA tort context, when a worker “should have known” of the cause of a progressive or creeping condition is a factual determination for the jury. Gaither v. City Hosp., Inc., 487 S.E.2d 901, 909 (W.Va., 1997). The overwhelming majority of courts interpreting the FELA agree and hold that accrual of the FELA limitation period is preserved to the jury or fact finder. *See* Millner v. N&W Ry., 643 F.2d 1005, 1010 (4th Cir. 1981). In this case, the Circuit Court usurped the role of the jury as fact finder and failed to evaluate or consider the material facts in a light most favorable to Petitioner. In fact, the Circuit Court did the opposite. Proper consideration was not given to the fact that, at no time prior to Petitioner’s 2008 diagnosis, did Petitioner learn or suspect that there was a correlation between the engine seats lacking ergonomic support together with the shock, vibration or jarring on Respondent’s engines combining to cause his disabling back condition. The medical records, the deposition of Petitioner, and the deposition of Petitioner’s internist show no manifestation of a debilitating back condition in 2005. There was no diagnosis or discussion of any occupational cause of back pain or debilitating back condition in 2005, or any time before 2008. Furthermore, the collateral patient intake records of Petitioner’s chiropractic care in 2006 reflect that he was still unaware of any connection between his back pain and his work, and he continued with his full time railroad conductor job until May 2008.

Under these facts, considered in a light most favorable to the party opposing Rule 56 Summary Judgment, material disputes of fact exist, and the Circuit Court erred in granting Summary Judgment and dismissal based on the statute of limitations. In fact, it is dubious on this record that the defense is supported by enough credible evidence to submit it to a jury. Sabalka v. BN, 54 S.W.3d 605, 612 (Mo. App. 2001) (limitations defense based on prior transitory pain was not credible, reversing instructing the jury on the defense at trial).

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Rule 19 oral argument is requested in this case given the overwhelming majority of FELA cases with similar facts decided in favor of Petitioner.

ARGUMENT

A. STANDARD OF REVIEW AND CONTROLLING LAW

The standard of review of a summary judgment dismissal is *de novo*. Ratliff v. NS, 680 S.E.2d 28, 32 (WV 2009). Under the FELA, substantive issues “are determined by the provisions of the federal statute and interpretative decisions of the FELA given by the federal courts.” Jenkins v. CSX, 649 S.E.2d 294, 298 n. 5 (2007). Federal law controls on uniform application of the FELA, and the statute of limitations, 45 U.S.C. ¶56 is one of the FELA provisions. Dice v. Akron, Canton, 342 U.S. 359, 361 (1952). A motion for summary judgment should only be granted when there is no genuine dispute of material facts or inferences therefrom which make judgment as a matter of law proper. Aetna Casualty v. Federal Insurance Company, 133 S.E.2d 770 (WV 1963). It is well established that the substantive evidentiary burden in FELA actions is considerably lessened for plaintiffs such that “a FELA plaintiff need only present a minimum amount of evidence in order to defeat a summary judgment motion.” Hines v. Consolidated Rail Corp., 926 F.2d 262, 268 (3rd Cir. 1991). In the summary judgment context, “evidence scarcely more substantial than pigeon bone broth” is enough to put a FELA action in front of a jury. Harbin v. BN, 921 F.2d 129, 132 (7th Cir. 1990). Furthermore, under Rule 56, a trial court must consider all material facts in a light most favorable to the nonmoving party, here, the Petitioner. *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)).

In 2011, Respondent lost its U.S. Supreme Court appeal in which Respondent attacked a century of FELA precedent by arguing for a higher causation standard. CSX Transportation, Inc. v. McBride, — U.S. —, 131 S.Ct. 2630, 2635 (2011)(CSX argued that plaintiff must show that defendant’s negligence was the proximate cause of plaintiff’s injury). In McBride, the Supreme Court majority rejected the CSX position, affirming that if the railroad’s negligence played *any part-no matter how small-in bringing about the injury*, the railroad is liable. *Id.* at 2637. The policy rationale behind the relaxed causation standard of FELA actions is relevant to this appeal: rail workers do not have worker’s compensation and FELA is their exclusive remedy for on the job injuries, and compensation under the act is construed liberally because Congress intended to shift part of the “human overhead” of doing business from employees to their railroad employers. Tiller v. Atlantic Coast Line R. Co., 318 U.S. 54, 58 (1943). The tentacles of this liberal construction plainly extend to consideration of any railroad summary judgment motion, causing a Seventh Circuit Court to note that as little as “pigeon bone broth” is necessary for a worker to defeat the summary dismissal of FELA actions. Harbin v. BN, 921 F.2d 129, 132 (7th Cir. 1990).

B. THE CIRCUIT COURT USURPED THE ROLE OF THE JURY BY MISTAKENLY GRANTING SUMMARY JUDGMENT ON AN ISSUE INVOLVING DISPUTED MATERIAL FACTS.

The Circuit Court usurped the role of the jury by deciding an issue involving disputed material facts. Petitioner presented numerous material facts to dispute the statute of limitations defense by Respondent. In Urie v. Thompson, 337 U.S. 163 (1949), the Supreme Court first articulated the FELA occupational injury “discovery rule” and observed that the congressional purpose in enacting the FELA would be thwarted if a plaintiff were charged with knowledge of the slow progress of an injury or disease "at some past moment in time, unknown and inherently unknowable even in retrospect." *Id.* at 169. FELA

decisions following Urie are completely in lockstep with this Court's previous holding in Gaither v. City Hosp., Inc., 487 S.E.2d 901, 909-10 (W.Va., 1997). In Gaither, this Court held that in the great majority of cases, including progressive injury or disease, the issue of whether a claim is barred by the statute of limitations is a question of fact for the jury:

“Where a cause of action is based on tort. . . the statute of limitations does not begin to run until the injured person knows, or by the exercise of reasonable diligence should know, of the nature of his injury, and determining that point in time is a question of fact to be answered by the jury.”

Gaither at 910 (citing Stemple v. Dobson, 400 S.E.2d 561 (1990)).

FELA decisions repeatedly contain the same mantra: whether a Petitioner “should have known” of the cause of their occupational injury under the FELA statute of limitations is a factual determination for the jury.

An examination of the materials the Circuit Court reviewed in arriving at its decision provide no evidence to support the assertion that Petitioner had *actual* knowledge of accrual of the statute of limitations more than three years before suit was filed. The Circuit Court even acknowledged that Dr. Tibbs diagnosed the “substantial cause” of the cumulative trauma back injuries after the June 26, 2008 lumbar MRI was conducted. [R. 191-200: Final Order Granting Def. Mot., ¶26]. The Circuit Court concluded, as a matter of law, that Petitioner “should have known his employment with [Respondent] was the cause” of his cumulative trauma back injuries by November 2005 because the back condition was essentially “diagnosed with a November 2005 lumbar spine x-ray.” *Id.* at ¶¶26, 31. Dr. Darnell, Petitioner’s family doctor, ordered this lumbar x-ray when Petitioner visited him in 2005 complaining of *hip* pain, but Dr. Darnell *never told* Petitioner the results of the x-ray or that the x-ray showed any injury that was related to Petitioner’s railroad work. [R. 207: Darnell Dep., pp. 10-12].

The Circuit Court also cited Petitioner's deposition testimony, as Petitioner had intermittently noted that the engine seats were uncomfortable during the 1980s and 1990s. [R. 191-200: Final Order Granting Def. Mot., ¶28]. The Circuit Court concluded that Petitioner "should have known" of the medical connection between the improper locomotive engine seating, the jarring and vibration on trains he was subjected to on a regular basis and his back injury. *Id.* at p. 9, ¶29. This conclusion was made irrespective of the fact that the first actual medical diagnosis of cumulative trauma as a cause of Petitioner's condition was not made until 2008. [R. 114-131: Tibbs Dep., p. 48:7-23]. The Circuit Court's analysis is partly inference, partly evidentiary facts, and partly engaging in sheer speculation, but in no way does it construe record facts in favor of the party opposing summary judgment dismissal.

The record facts properly considered in a light most favorable to Petitioner are as follows: Petitioner had some back problems as early as 1985. [R. 212-214, Caudill Aff., ¶ 3]. He visited chiropractors occasionally from 2001 to 2007, but on his patient intake forms he never linked any railroad work conditions to his episodic back pain. *Id.* at ¶¶4, 5. Petitioner had one visit during 2005 with his family doctor, Dr. John Darnell ("Dr. Darnell"), when he complained of hip pain. *Id.* at ¶ 6. Dr. Darnell ordered a lumbar x-ray but never diagnosed Petitioner with any back condition, nor did he ever discuss a work-related cause. [R. 207, Darnell Dep., pp. 10:20-25]. Petitioner continued working full time with Respondent railroad during 2005 and up until 2008 when his debilitating back pain forced him out of work. [R. 212-214, Caudill Aff., ¶ 15]. Petitioner began suffering from debilitating pain in the spring of 2008. [R. 212-214, Caudill Aff., ¶¶ 13,14]. Dr. Tibbs, Petitioner's neurosurgeon, examined Petitioner and reviewed his lumbar x-ray during July 2008. Dr. Tibbs diagnosed Petitioner with back and leg pain, nerve entrapment and spondylolisthesis (i.e. slippage of vertebrae forward on the pelvis). [R. 116-117: Tibbs Dep., pp. 13-14:24-14]. In the spring of 2008, Petitioner suffered from incapacitating pain, and significant neurological deficit which ultimately required back fusion surgical intervention. [R. 124: Tibbs Dep., p.

44:12-16]. The 2008 diagnosis by Dr. Tibbs was the first lumbar spine medical diagnosis and manifestation of nerve entrapment and spondylolisthesis. [R. 212-214, Caudill Aff., ¶¶ 16, 17]. There is no medical diagnosis of this type of lumbar condition or disease at any earlier time. *Id.*

These material facts, construed in a light favorable to Petitioner, are strong proof that the pertinent lumbar spine disease did not manifest into debilitating back pain until 2008. Petitioner did undergo a lumbar x-ray in 2005, but this x-ray was not coupled with any medical chart or reference to a causal connection to Petitioner's railroad work, nor with any other evidence indicating to Petitioner that there was a work-related cause. The 2005 x-ray does not support any inference that Petitioner "should have known" of any connection between his railroad work and the episodic back pain that existed prior to 2008.

C. ACCRUAL OF THE STATUTE OF LIMITATIONS IS A JURY ISSUE UNDER GOVERNING FELA CASE PRECEDENT.

Precedent overwhelmingly supports Petitioner's side in this case. A myriad of cases, involving similar facts to this case, in numerous federal and state jurisdictions establish that the FELA statute of limitations is a jury issue.¹ In fact, Respondent railroad has lost on the same statute of limitations issue

¹ See, e.g., Millner v. N&W Ry., 643 F.2d 1005, 1010 (4th Cir. 1981)(whether an employer should be estopped to plead statute of limitations is a jury issue); 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); Rice v. BN, 346 S.W.3d 360, 371 (Mo. App. 2011) (when date of accrual is factually disputed, question of fact for jury); Parson v. CSX, 714 F.Supp.2d 839, 845 (N.D. Ohio 2010) (when connection between injury and cause are contested, a jury issue is presented); National RR Passenger Corp. v. Krouse, 627 A.2d 489, 491 (D.C. 1993) (when worker should have known cause of injury under statute of limitations presented a factual question for jury); Seaboard Air Line R. Co. v. Ford, 92 So.2d 160, 165 (Fla. 1955) (when employee

many times under similar facts in other cases. See Lipsteuer v. CSX, 37 S.W.3d 732, 736 (Ky., 2000) (Rule 56 dismissal reversed, when worker was put on notice of cause of injury is a question of fact for jury); Zapp v. CSX, 300 S.W.3d 219, 221 (Ky. App., 2009) (directed verdict based on statute of limitations was reversed and remanded on appeal); Coomer v. CSX, 319 S.W.3d 366, 374 (Ky., 2010) (Rule 56 dismissal reversed, when worker was put on notice of cause of injury is question of fact for jury).

**D. PETITIONER HAD NO KNOWLEDGE OR SUSPICION THAT HIS WORK
CONDITIONS WERE CORRELATED TO HIS DEBILITATING BACK INJURY
UNTIL 2008.**

“A medical judgment that eluded the specialist cannot reasonably be expected from the plaintiff.” Young v. Clinchfield RR Co., 288 F.2d 499, 503-504 (4th Cir. 1961). In this case, Dr. Tibbs did not provide a medical opinion of the connection to cumulative trauma from Petitioner’s work before 2008, and there is no basis to imply any earlier accrual date on the Petitioner. Dr. Darnell’s purported receipt of a 2005 radiology report, which was never even communicated to Petitioner, is insufficient to impart anything of legal relevance in the statute of limitations defense. In fact, Petitioner only complained of hip pain in 2005, not spinal pain. [R. 212-214: Caudill Aff., ¶¶ 6,7]

The Circuit Court cited Young in its order granting Rule 56 Summary Judgment [R. 196: Final Order Granting Def. Mot., ¶ 18]. However, the Court missed the main import of Young: the statute of

should have known of his occupational disease was factual question for jury); Baggarley v. UP, 268 P.3d 650, 655 (Ore. App. 2011) (court reversed Rule 56 dismissal, when worker “should have known” cause of injury presented question of fact for jury to decide); Nichols v. Burlington Northern, 56 P.3d 106, 109 (Co. Ct. App. 2002) (Rule 56 dismissal reversed, when worker “should have known” of cumulative trauma cause is fact question for jury); Sandoval v. Union Pacific, 396 F.Supp.2d 1269, 1272 (D.N.Mex. 2005) (summary judgment denied, when worker “should have known” cause was for jury to decide).

limitations does not begin to accrue simply because a worker suffered some symptoms years before a medical diagnosis occurs. *See Young* at 503-504.

Petitioner's disabling back condition did not manifest itself until 2008. Having intermittent back pain and transitory symptoms for over a decade is insufficient to create a legal basis for accrual of the statute of limitations at some inherently unknowable prior date. Indeed, Respondent would have simply defended such an illustrative action, if filed in 2005, by stating that Petitioner did not state a legal cause of action because no medical doctor diagnosed him with any medical condition during 2005 to serve as a valid occupational claim.

This Court should clarify that intermittent and transitory past symptoms, untethered to a medical diagnosis communicated to a railroad worker, is not a “manifested condition” under the FELA. Urie v. Thompson, 337 U.S. 163 (1949) and Gaither v. City Hosp., Inc., 487 S.E.2d 901, 909 (W.Va., 1997).

CONCLUSION

An error of law was committed by granting summary judgment based on the statute of limitations since the FELA preserves to the jury, or fact finder, disputed material facts regarding accrual of the statute of limitations for an injury or condition connected to railroad work. Millner v. N&W Ry., 643 F.2d 1005, 1010 (4th Cir. 1981)(“In an FELA action, even the questions whether an employer should be estopped to plead limitations...are triable to a jury as of right”). Not only did the Circuit Court erroneously ignore the material facts in dispute, the defense asserted in the Respondent’s motion below lacks an evidentiary underpinning to allow the Circuit Court to send the defense to the jury on remand.

WHEREFORE, for the foregoing reasons, Petitioner respectfully requests that this Court grant this petition for appeal, reverse summary judgment for Respondent and remand this case back to Circuit Court with instructions to submit the limitations defense for jury determination, but only if credible evidence warrants submission.

GARY CAUDILL

By:  _____

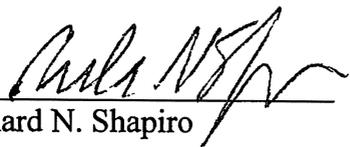
Of counsel

Richard N. Shapiro, Esquire (WV # 7030)
SHAPIRO, LEWIS & APPLETON, P.C.
1294 Diamond Springs Road
Virginia Beach, VA 23455
(757) 460-7776
Counsel for Gary Caudill

CERTIFICATE OF SERVICE

I hereby certify that on this 25th day of June, 2012, a true and correct copy of the foregoing pleading was served upon the following:

J. David Bolen, Esquire
Todd R. Meadows, Esquire
Huddleston, Bolen, LLP
Post Office Box 2185
Huntington, WV 25722


Richard N. Shapiro

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

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Richard N. Shapiro, Esquire
WV Bar No. 7030
Shapiro, Lewis & Appleton, P.C.
1294 Diamond Springs Road
Virginia Beach, VA 23455
757-460-7776
757-460-3428 fax
rshapiro@hsinjurylaw.com

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

NO. 12-0420

GARY L. CAUDILL,

PETITIONER

v.

CSX TRANSPORTATION, INC.,

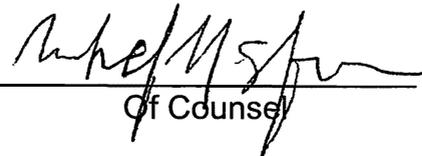
RESPONDENT.

CERTIFICATE OF PETITIONER

COMES NOW the Petitioner, Gary L. Caudill, by counsel, and in accord with Revised Rule of Appellate Procedure 7, states as follows:

- (a) The contents of the Appendix are true and accurate copies of items contained in the record of the Mingo County Circuit Court; and,
- (b) The Petitioner has conferred in good faith with all parties to the appeal in order to arrive at the contents of the appendix.

GARY L. CAUDILL

By 
Of Counsel

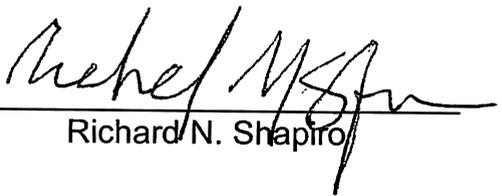
Richard N. Shapiro, Esquire
WV Bar No. 7030
Shapiro, Lewis & Appleton, P.C.
1294 Diamond Springs Road
Virginia Beach, VA 23455
757-460-7776
757-460-3428 fax
rshapiro@hsinjurylaw.com
Counsel for Plaintiff

CERTIFICATE OF SERVICE

I hereby certify that on this 25th day of June, 2012, a true and correct copy of the foregoing pleading was sent via facsimile and U.S. Mail upon the following:

Grant Preece, Circuit Clerk
Mingo County Courthouse
75 East Second Avenue
Williamson, WV 25661

J. David Bolen, Esquire
Todd R. Meadows, Esquire
Huddleston, Bolen, LLP
Post Office Box 2185
Huntington, WV 25722


Richard N. Shapiro

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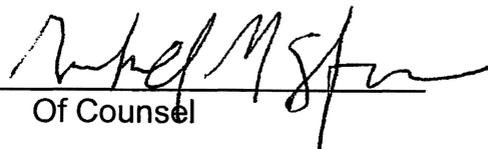
AGREED RECORD ON APPEAL SUBMITTED
JOINTLY BY PETITIONER AND RESPONDENT

COME NOW the parties and jointly consent to the following "Record on Appeal":

| <u>Pleading</u> | <u>Date</u> | <u>Bates No.</u> |
|---|--------------------|------------------|
| 1. Plaintiff's Complaint and Request for Jury Trial | September 17, 2010 | 000001 |
| 2. Answer of Defendant, CSX Transportation, Inc., to Complaint of Plaintiff, Gary L. Caudill | October 20, 2010 | 000006 |
| 3. Court Scheduling Order | November 16, 2010 | 000012 |
| 4. Defendant, CSX Transportation, Inc.'s, Motion for Summary Judgment and Memorandum of Law in Support of Its Motion for Summary Judgment (including all exhibits filed with the clerk) | January 27, 2012 | 000015 |
| 5. Plaintiff's Opposition Memorandum in Response to CSX's Statute of Limitations Summary Judgment Motion (including all exhibits filed with the clerk) | February 2, 2012 | 000074 |
| 6. Transcript of Pre-Trial Hearing (including all motions) | February 6, 2012 | 000167 |

| <u>Pleading</u> | <u>Date</u> | <u>Bates No.</u> |
|--|-------------------|------------------|
| 7. Final Order Granting Defendant's Motion for Summary Judgment Based Upon the Statute of Limitations | February 27, 2012 | 000191 |
| 8. Plaintiff, Gary Caudill's, Motion to Alter/Amend Under West Virginia Rule of Civil Procedure 59(e) and Motion for Reconsideration and Memorandum in Support (including all exhibits filed with the clerk) | March 7, 2012 | 000201 |
| 9. Final Order Denying Plaintiff's Motion to Alter/Amend Under West Virginia Rule of Civil Procedure 59(3) and Motion for Reconsideration | March 12, 2012 | 000223 |
| 10. Notice of Appeal (WV Supreme Court of Appeals) | March 23, 2012 | 000227 |
| 11. Certified Copy of Mingo County Circuit Court Docket Sheet | | |

GARY CAUDILL

By 
Of Counsel

Richard N. Shapiro, Esquire
 WV Bar No. 7030
 Shapiro, Lewis & Appleton, P.C.
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A handwritten signature in black ink, appearing to read "Todd R. Meadows", is written over a horizontal line. The signature is stylized and cursive.