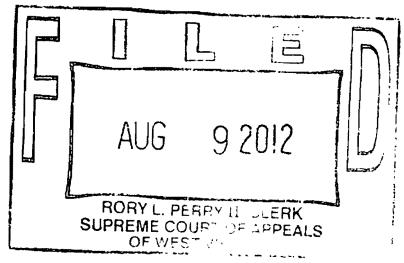
IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

Docket No. 12-~~0240~~ 0420



GARY L. CAUDILL,
Plaintiff Below, Petitioner

v.

CSX TRANSPORTATION, INC.,
Defendant Below, Respondent

Appeal from a Final Order of the
Circuit Court of Mingo County
(Civil Action No. 10-C-304)

RESPONDENT'S BRIEF

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STATEMENT OF THE CASE

Gary Caudill filed this action under the Federal Employers' Liability Act ("FELA"), 45 U.S.C. §§ 51-60, in September 2010, alleging that he suffers back and spine injuries due to allegedly unsafe working conditions provided by his former employer, CSX Transportation, Inc. ("CSXT"). Although Caudill has a long history of back problems, including numerous visits to chiropractors between 2001 and 2007, he admits that for many years he "never paid no attention to" his back pain, brushing it off as "just part of life and getting older." (A.R. 96.) Caudill further admits that the principal working condition he blames for his injuries—the lack of back support in locomotive seats he rode in—is one that he had complained about for decades. And the medical condition he seeks to recover for, bilateral spondylolysis, was revealed in x-rays ordered by Caudill's physician in November 2005. 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.

A. Legal Background

FELA establishes the compensation scheme for injuries sustained by railroad employees in the workplace. Whether filed in state or federal court, FELA actions are governed by federal law. *Norfolk S. Ry. Co. v. Sorrell*, 549 U.S. 158, 165 (2007); Syl. pt. 4, *McGraw v. Norfolk & W. Ry. Co.*, 201 W. Va. 675, 677, 500 S.E.2d 300, 302 (1997). State courts are thus "constrained to follow federal case law interpreting FELA." *McGraw*, 201 W. Va. at 679, 500 S.E.2d at 304.

FELA's statute of limitations, 45 U.S.C. § 56, states that "[n]o action shall be maintained under this chapter unless commenced within three years from the day the cause of action accrued." In FELA cases, unlike in common-law cases, "this statute of limitations is not an affirmative defense; instead, compliance with 45 U.S.C. § 56 is a condition precedent to recovery under the Act." *Johnson v. Norfolk & W. Ry. Co.*, 985 F.2d 553 (table), 1993 WL 17061, at *1

(4th Cir. 1993). Accordingly, the plaintiff in a FELA action bears the burden "'to allege and to prove that his cause of action was commenced within the three-year period.'" *Id.* (quoting *Emmons v. S. Pac. Transp. Co.*, 701 F.2d 1112, 1118 (5th Cir. 1983)); *accord Brassard v. Boston & Me. R.R.*, 240 F.2d 138, 141 (1st Cir. 1957); *Rohner v. Union Pac. R.R.*, 225 F.2d 272, 274 n.7 (10th Cir. 1955); *Carpenter v. Erie R.R.*, 132 F.2d 362, 362-63 (3d Cir. 1942) (per curiam); *see also Nat'l R.R. Passenger Corp. v. Krouse*, 627 A.2d 489, 493 (D.C. 1993) ("[T]he burden is nevertheless on the plaintiff to establish that his case falls within an exception if brought outside of a three year time frame.").

B. Factual Background

CSXT hired Gary Caudill in 1977 as a road brakeman working out of its terminal in Russell, Kentucky. (A.R. 98.) Caudill was responsible for inspecting train cars before departure and riding the train to its destination. (A.R. 99-100.) For his first ten years, Caudill worked "all over the railroad system, all over the railroad's lines." (A.R. 99.) He estimates that during this time he spent five hours each day riding trains. (*Id.*) In 1987, Caudill was assigned to a regular route between Russell and Columbus, Ohio, which he continued to operate until he left the railroad in 2008. (A.R. 101.) The trip between Russell and Columbus takes approximately six hours each way (A.R. 104), with Caudill typically riding in the locomotive (A.R. 101).

Caudill experienced recurring back problems throughout his three decades with the railroad. Medical records show that he first consulted a doctor about lower-back pain in October 1985. (A.R. 30.) During that visit, he told his doctor that his back pain "ha[d] been going on for one year" and that he had experienced "intermittent . . . pain in the past." (*Id.*) Starting in 2001, and continuing through 2007, Caudill made repeated visits to chiropractors to receive treatment for his back pain. (A.R. 31-44; *see also* A.R. 97, 212-213.) Caudill reports that in

approximately 2003 his "back went out while [he] was on the job over in Columbus" and he had to go to the hospital. (A.R. 97.)

In November 2005, Caudill visited his family physician, Dr. John Darnell, "complaining of several things, one being hip pain." (A.R. 213.) Following a physical examination, Dr. Darnell ordered x-rays not only of Caudill's hip, but also of his back. (*Id.*) Caudill's lumbar spine x-ray revealed "marked degenerative changes," including "bilateral spondylolysis" (A.R. 49), a medical term indicating slippage of the vertebrae (A.R. 116-117).

Caudill now claims, however, that he never learned the results of these x-rays. According to Caudill, his hip problem "resolved after one visit," so he did not schedule a follow-up visit with Dr. Darnell to discuss his x-ray results. (Br. 7; *see* A.R. 213.) Although Caudill made two additional visits to Dr. Darnell in subsequent weeks seeking treatment for anxiety (A.R. 219-220), Caudill apparently did not bother to ask his doctor about the results of the x-rays that were taken just two to five weeks earlier.

Although Caudill's back problems continued to "flare[] up" (A.R. 213) throughout the 2000s, he paid them little attention except for his occasional visits to a chiropractor. As his back pain worsened over time, the frequency of his chiropractor appointments increased—from four visits between 2001 and 2005 (A.R. 31-38) to "once a month" in 2006 and 2007 (A.R. 97; *see* A.R. 39-44). Instead of further investigating the cause of his back pain, Caudill says that he "never paid no attention to it" and chose to brush it off as "just part of life and getting older." (A.R. 96.)

It was not until June 2008, when his back pain became so debilitating that it "was interfering with [his] ability to work as a conductor" (A.R. 213), that Caudill finally consulted a specialist about his injuries. Caudill was referred to Dr. Phillip Tibbs, the chairman of the

department of neurosurgery at the University of Kentucky. (A.R. 115.) Dr. Tibbs reviewed an MRI of Caudill's spine and immediately diagnosed him with spondylolysis (A.R. 116-117; *see also* A.R. 45-48)—the same injury that was revealed in Caudill's 2005 lumbar x-ray. Upon reviewing Caudill's full medical history, including the 2005 x-ray, Dr. Tibbs opined that Caudill's spondylolysis "had been going on for at least five or seven years" before Caudill sought treatment. (A.R. 57.)

Although Caudill waited to seek medical treatment for his back problems, he frequently complained that the locomotive seats he rode in did not provide him with enough back support. Caudill says that he repeatedly "complained to the railroad officers and the trainmasters" that the locomotive seats "weren't supportive" because "[t]hey were hard and the backs of the seat were straight up and down and short, meaning they weren't real tall in the back." (A.R. 26; *see also* A.R. 27 ("I told [them] they were uncomfortable to ride in and they weren't supportive to your back").) Caudill also says that he raised this complaint with his union officers at safety meetings on "several" occasions. (A.R. 27-28.) And Caudill specifically states that he made "the same complaint" to "the officer on duty, the trainmaster" about the seats on the locomotives he rode between Russell and Columbus. (A.R. 100.) According to Caudill, the lack of support and the low backs in these seats meant that when the locomotive hit a bump in the tracks "the impact . . . would only end up right in your back." (A.R. 103.) Caudill maintains, however, that he never considered whether the lack of back support in the locomotive seats might have any connection to his recurring back problems until he was formally diagnosed with spondylolysis some 25 years later.

C. Proceedings in the Circuit Court

Caudill filed his complaint on September 16, 2010, alleging a single claim under FELA. (A.R. 1-4.) Specifically, the complaint alleges that Caudill suffers from spinal injuries caused by

"cumulative trauma .... during the course of [his] career" working for CSXT. (A.R. 2.) Following discovery, CSXT moved on January 27, 2012 for summary judgment on the ground that the complaint was filed more than three years after Caudill's FELA claim accrued and is therefore barred by the statute of limitations. (A.R. 15-20, 58-72.)

The circuit court granted CSXT's motion. (A.R. 191-200.) It found that Caudill "has a long and documented history of back problems" dating back to at least October 1985. (A.R. 196.) The court noted that Caudill "was seen by a chiropractor on multiple occasions between 2001 and 2005, with additional treatments occurring between June 19, 2006 and October 30, 2007." (A.R. 197.) Although Caudill claimed that he had no notice of his spinal injury until his MRI was taken in June 2008, the court observed that the same condition "was also diagnosed with a November 2005[] lumbar spine x-ray," and Caudill's neurosurgeon confirmed "that it had been going on for at least five or seven years." (*Id.*) Moreover, the court noted, Caudill "linked his back problems with his employment conditions" (*id.*), as evidenced by his complaints to supervisors and to union safety officers that the locomotive seats "weren't supportive to [his] back" (A.R. 198). Accordingly, the circuit court determined that "the injury complained of manifested itself well in excess of three years preceding th[e] date" the complaint was filed and that Caudill "knew, or reasonabl[y] should have known, that the seats were the cause of his injury" (A.R. 199), and hence his claim is time-barred.

Caudill subsequently moved under Rule 59(e) to alter, amend, or vacate the judgment. (A.R. 201-204.) He argued that, in ruling on the summary-judgment motion, the court "did not have the benefit of" deposition testimony from Caudill's family physician indicating that "he never . . . discussed musculoskeletal back problems with [Caudill] during late 2005." (A.R. 202.)

Attached to the motion was a transcript of the deposition of Dr. John Darnell, taken on August 25, 2011. (A.R. 205-211.)

The court denied Caudill's Rule 59(e) motion on two independent grounds. (A.R. 223-226.) First, because the deposition at issue was taken months before the motion for summary judgment, and because Caudill offered no explanation for his failure to submit it to the court when that motion was pending, the deposition testimony "was not newly discovered evidence justifying a reconsideration of the Court's Final Order" under Rule 59(e). (A.R. 225.) Second, the court held that even if the deposition testimony is considered, "it does not negate the remaining supporting evidence" demonstrating that Caudill knew or should have known of the basis for his claim more than three years before filing his complaint. (A.R. 225-226.)

SUMMARY OF ARGUMENT

Under FELA's statute of limitations, a plaintiff's claim is time-barred unless he establishes that he neither knew nor should have known of the basis for his claim more than three years before filing his complaint. It is not enough for a plaintiff to assert that he was actually ignorant of his claim; instead, the limitations period begins to run as soon as the plaintiff has constructive knowledge—that is, as soon as a reasonably diligent plaintiff *should have known* of the basis for the claim. Moreover, a plaintiff who experiences symptoms of an injury has a duty to investigate the injury and its possible cause.

The circuit court correctly concluded that Caudill has failed to adduce evidence from which a reasonable jury could find that he neither knew nor should have known of his injury and its possible work-related cause more than three years before filing his complaint. It is undisputed—indeed, Caudill openly concedes (Br. 6, 7-8)—that Caudill has a long history of back problems. It is also undisputed that Caudill complained to railroad supervisors and to union safety officials that the locomotive seats he rode in did not provide him with enough back

support. And it is undisputed that a lumbar spine x-ray taken in November 2005—almost five years before Caudill filed suit—showed that Caudill had bilateral spondylolysis. The summary judgment record thus conclusively establishes that Caudill's FELA claim accrued more than three years before the complaint was filed.

Caudill's belated attempt to introduce "new evidence" after summary judgment was granted—an affidavit and deposition testimony suggesting that Caudill never inquired into the results of his x-rays—does not call the judgment into question. First, Caudill was not entitled to reopen the judgment under Rule 59(e), because his "new" evidence was in fact available months before the summary judgment motion was filed, and Caudill does not offer any justification for his failure to timely present all evidence to the court. Second, the possibility that Caudill might not *actually* have known of the results of his November 2005 x-ray does not negate the other undisputed evidence that Caudill had long-running back problems and that he knew the locomotive seats might provide inadequate back support; nor does it undermine the circuit court's conclusion that he reasonably *should have known* that he had an injury with a possible work-related cause.

Caudill's remaining arguments are contradicted by overwhelming authority. Caudill suggests that the statute of limitations could not begin to run until he first learned of his formal diagnosis of spondylolysis in June 2008, but it is well established that a plaintiff need not receive a medical diagnosis for his cause of action to accrue. And Caudill's suggestion that a statute-of-limitations defense can *never* be resolved on summary judgment is frivolous. Although the date a plaintiff's claim accrues is typically a question of fact for the jury, numerous courts have upheld summary judgments in favor of FELA defendants when, as here, the facts conclusively

established that the plaintiff's claim was time-barred. The judgment of the circuit court should therefore be affirmed.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

CSXT does not believe that oral argument is warranted in this case. The facts and legal arguments are adequately presented in the briefs and record on appeal, and the decisional process would not be significantly aided by oral argument. *See* W. Va. Revised R. App. P. 18(a). CSXT further submits that this case would be appropriate for affirmance by memorandum decision. *See* W. Va. Revised R. App. P. 21(a), (c).

ARGUMENT

As this Court has long recognized, summary judgment is "a device designed to effect a prompt disposition of controversies on their merits without resort to a lengthy trial, if in essence there is no real dispute as to salient facts or if only a question of law is involved." *Hanks v. Beckley Newspapers Corp.*, 153 W. Va. 834, 836-37, 172 S.E.2d 816, 817 (1970); *accord, e.g.*, *Gibson v. Little Gen. Stores, Inc.*, 221 W. Va. 360, 362-63, 655 S.E.2d 106, 108-09 (2007) (per curiam); *Williams v. Precision Coil, Inc.*, 194 W. Va. 52, 58, 459 S.E.2d 329, 335 (1995). The Court has thus declared that summary judgment "plays an important role in litigation in this State" by "isolat[ing] and dispos[ing] of meritless litigation." *Williams*, 194 W. Va. at 58, 459 S.E.2d at 335 (internal quotation marks omitted).

"Summary judgment is appropriate where the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party, such as where the nonmoving party has failed to make a sufficient showing of an essential element of the case that it has the burden to prove." Syl. pt. 4, *Painter v. Peavy*, 192 W. Va. 189, 190, 451 S.E.2d 755, 756 (1994). Although "the initial burden of production and persuasion is upon the party moving for summary judgment," the nonmoving party "must nonetheless offer some concrete evidence from which a

reasonable finder of fact could return a verdict in its favor or other significant probative evidence tending to support the complaint." *Williams*, 194 W. Va. 60, 459 S.E.2d at 337 (internal quotation marks and alterations omitted).[1]

Summary judgment was proper here because the record conclusively establishes that Caudill should have known of his injury and its possible work-related cause more than three years before he filed his complaint in September 2010. Moreover, because the complaint was not filed within three years of Caudill's injury (which was evident in x-rays by November 2005), it is his burden under FELA to prove that he neither knew nor reasonably could have known of the injury and its possible work-related cause more than three years before filing suit. *See* pp. 1-2, *supra* (collecting cases). Caudill has failed to present evidence from which a reasonable jury could rule in his favor.

A. The Record Establishes That Caudill's Claim Is Time-Barred.

A plaintiff's cause of action under FELA "accrues when the plaintiff knew or should have known of the injury and its cause." *Reed v. CSX Transp., Inc.*, 12 F.3d 205 (table), 1993

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[1] Caudill's contention that *CSX Transportation, Inc. v. McBride*, 131 S. Ct. 2630 (2011), supports a lower standard of proof when applying FELA's statute of limitations (Br. 12) is misguided. *McBride* held that FELA incorporates a relaxed standard *of causation* compared to common-law cases because the statutory language specifically permits recovery for workplace injury "resulting in whole or in part" (45 U.S.C. § 51) from railroad negligence. 131 S. Ct. at 2636, 2639, 2642-43, 2644 & n.14. FELA also expressly abrogates the defenses of contributory negligence, assumption of risk, contractual release, and the fellow-servant rule. 45 U.S.C. §§ 51, 53-55; *see Consol. Rail Corp. v. Gottshall*, 512 U.S. 532, 542-43 (1994). But apart from these "'explicit statutory alterations,'" FELA follows traditional common-law principles. *Norfolk & W. Ry. Co. v. Ayers*, 538 U.S. 135, 145 (2003) (quoting *Gottshall*, 512 U.S. at 544); *see also Urie v. Thompson*, 337 U.S. 163, 182 (1949) ("[T]he Federal Employers' Liability Act is founded on common-law concepts . . . subject to such qualifications as Congress has imported into those terms."). Neither *McBride* nor FELA's statutory language offers any basis for applying a relaxed standard to elements other than causation, and they certainly do not alter a plaintiff's duty to diligently investigate his injury or to timely file his complaint. Even if some relaxed standard of proof did apply, however, the summary judgment record in this case still offers no basis from which a reasonable jury could find that Caudill's claim is not time-barred.

WL 475971, at *1 (4th Cir. 1993) (per curiam). This test requires not only that a court consider what the plaintiff actually knew, but also that it conduct "an objective inquiry" into what the plaintiff "should have known, in the exercise of reasonable diligence." *Fries v. Chi. & Nw. Transp. Co.*, 909 F.2d 1092, 1095 (7th Cir. 1990); *see also Tolston v. Nat'l R.R. Passenger Corp.*, 102 F.3d 863, 865-66 (7th Cir. 1996).

In addition, a plaintiff who experiences symptoms of an injury has a duty under FELA to diligently investigate the injury and its possible causes. *See, e.g.*, *Mix v. Del. & Hudson Ry. Co.*, 345 F.3d 82, 87 (2d Cir. 2003) (noting plaintiff's "duty of exercising due diligence based upon strong indications that he did, in fact, have an injury"); *Campbell v. Grand Trunk W. R.R.*, 238 F.3d 772, 777 (6th Cir. 2001) (plaintiff "had a duty to investigate his known physical problem while working for" the railroad); *Fries*, 909 F.2d at 1096 ("[U]pon experiencing symptoms[,] a plaintiff has a duty to investigate both the injury and any suspect cause."); *see also Albert v. Me. Cent. R.R.*, 905 F.2d 541, 544 (1st Cir. 1990) ("Once each appellant . . . believed he had [an injury] and . . . believed that the injury was caused by his employment, . . . he had a duty to investigate the situation in order to confirm or deny that belief."). FELA does not "'allow a plaintiff to unilaterally postpone the running of the statute of limitations by negligently failing to investigate the fact of and cause of his injury.'" *Fries*, 909 F.2d at 1095-96 (citing *United States v. Kubrick*, 444 U.S. 111, 123 (1979)).

The circuit court correctly concluded that Caudill has failed to adduce evidence from which a reasonable jury could find that he neither knew nor should have known of his injury and its possible work-related cause more than three years before filing his complaint.

First, it is undisputed that Caudill's injury dates back to well over three years before the filing of the complaint. Caudill's bilateral spondylolysis was diagnosed in an x-ray taken in

November 2005, nearly five years before Caudill filed this lawsuit. (A.R. 49.) That is the very same condition Caudill's neurosurgeon re-diagnosed in June 2008 and the same injury on which Caudill's FELA claim is based. And Caudill's neurosurgeon testified that, based on Caudill's medical records, his spondylolysis "had been going on for at least five or seven years." (A.R. 57.)

Second, Caudill's many years of severe and recurring lower back pain should have alerted him to the existence of a possible injury. Caudill acknowledges that he "had a history of intermittent back pain and episodic chiropractic treatment in the 2000's" (Br. 6) and that "the evidence shows [that he] suffered intermittent back pain for many years" (Br. 7-8). That history includes numerous visits to chiropractors between 2001 and 2007, with the frequency of these visits increasing over time. (A.R. 31-44, 97.) During this time, Caudill admittedly "never paid no attention to" his back pain and brushed it off as "just part of life and getting older." (A.R. 96.)

Had Caudill acted with reasonable diligence and consulted a specialist when he began experiencing recurring back pain in the early 2000s—or had he even asked his physician about the results of the back x-ray he sat for in November 2005—he indisputably would have known of his spondylolysis more than three years before September 2010. Although Caudill says that he did not investigate his injury until 2008 because "the pain up to th[at] time . . . did not interfere with [his] conductor job" (A.R. 213), a FELA plaintiff is not entitled to wait until an injury becomes disabling before filing suit. *See Fries*, 909 F.2d at 1096 ("[t]hat defendant's injury had not reached its maximum severity in 1981 but continued to progress does not affect" the statute of limitations); *see also, e.g.*, *Mix*, 345 F.3d at 85-87; *Campbell*, 238 F.3d at 776-77. Caudill

thus had constructive notice of his injury—even if he insists that he did not have actual notice—more than three years before filing his complaint.

Third, Caudill indisputably knew, or at a minimum should have known, that his back problems had a possible work-related cause. Caudill testified that he repeatedly complained during his first ten years on the job that the locomotive seats "weren't supportive to [his] back." (A.R. 27.) And for the next 20 years, throughout his time working the route between Russell and Columbus, Caudill continued to raise "the same complaint" to "the officer on duty, the trainmaster." (A.R. 102.) Caudill explains that the seats "were hard and the backs of the seat were straight up and down and short, meaning they weren't real tall in the back." (A.R. 26.) This meant, according to Caudill, that when the train hit a bump in the tracks, "the impact . . . would only end up right in your back." (A.R. 103.) Caudill evidently recognized that this was more than a mere comfort issue because, he says, he "brought it up during the safety meetings" with his union officers. (A.R. 27.) The unavoidable conclusion is that Caudill thought the locomotive seats unsafe precisely because he believed that they could be a source of back injuries.

Caudill nonetheless argues that a jury could infer that he was not *actually* aware that his injuries might be work-related because, "on the patient-intake forms [he] completed with two different chiropractic clinics, [he] never checked off any boxes correlating his back pain to his work at CSXT." (Br. 7; *accord* Br. 8, 14.) But even if Caudill was not actually, subjectively aware that his symptoms pointed to a work-related injury, the statute of limitations under FELA does not turn on the plaintiff's subjective knowledge. Instead, FELA employs an "objective inquiry," *Fries*, 909 F.2d at 1095, into "when the plaintiff kn[ew] *or should have known*, in the exercise of reasonable diligence, the critical facts of his injury and its cause," *Johnson v. Norfolk*

& W. Ry. Co., 836 S.W.2d 83, 85 (Mo. Ct. App. 1992); *see also id.* at 85-86; *Tolston*, 102 F.3d at 865-66; *Albert*, 905 F.2d at 544. And Caudill cannot seriously contend that, after decades of complaining to supervisors and union officials that he believed the lack of back support in the locomotive seats to be a safety hazard, he had no reason to think that his rapidly worsening back pain could be work-related.

Finally, Caudill appears to believe that he should be relieved of his obligation to connect the dots between his injuries and his work because he is "a high school graduate with no college education." (Br. 6.) But as this Court and others have made clear, the date on which a claim accrues is based on an objective, reasonable-person test that does not turn on the intelligence or other characteristics of a particular plaintiff. *See* Syl. pt. 4, *Dunn v. Rockwell*, 225 W. Va. 43, 46, 689 S.E.2d 255, 258 (2009); *Martinez v. Cooper Hosp.-Univ. Med. Ctr.*, 747 A.2d 266, 272 (N.J. 2000) ("[A] plaintiff's subjective characteristics, standing alone, will not absolve him or her of the obligation to file a claim within the relevant statutory period. Thus, a litigant generally will not succeed under discovery rule analysis by claiming illiteracy or lack of education as the basis for having failed to appreciate either the existence of an injury or the fault of another."); *cf. Alaska Elec. Pension Fund v. Pharmacia Corp.*, 554 F.3d 342, 347 (3d Cir. 2009) (discussing statutes of limitations under federal law). Caudill's own education and training have no bearing on this objective, reasonable-person analysis. Even if Caudill himself was unable to connect the lack of back support in the locomotive seats to his back injuries—a contention belied by his testimony that he specifically recognized the lack of back support to be a safety issue—a reasonable plaintiff undoubtedly should have recognized the possible connection.

In view of these undisputed facts, no reasonable jury could find that Caudill did not have constructive notice of his back injury and its possible work-related cause more than three years

before filing his complaint in September 2010. On this record, the circuit court correctly granted summary judgment in favor of CSXT.

B. Caudill's Rule 59(e) Motion Was Properly Denied.

The circuit court likewise did not err in denying Caudill's Rule 59(e) motion to alter, amend, or vacate the judgment. Caudill's motion plainly did not meet the requirements to reopen a judgment under Rule 59(e); but even if it did, the "new evidence" Caudill sought to introduce would not suffice to enable a jury to find that that he could not reasonably have known of its injury and its possible cause until three years before he filed suit.

1. Caudill Was Not Entitled To Reopen The Judgment Under Rule 59(e).

This Court has admonished that "the reconsideration of a judgment [under Rule 59(e)] after its entry is an extraordinary remedy which should be used sparingly." *Mey v. Pep Boys—Manny, Moe & Jack*, 228 W. Va. 48, 57, 717 S.E.2d 235, 244 (2011). Although a Rule 59(e) motion is permitted when "new evidence not previously available comes to light," Syl. Pt. 2, *Mey*, 228 W. Va. at 50, 717 S.E.2d at 237, the Court requires that "a party who relies on newly discovered evidence 'must produce a legitimate justification for not presenting the evidence during the earlier proceeding,'" *id.* at 57, 717 S.E.2d at 244 (quoting *Small v. Hunt*, 98 F.3d 789, 798 (4th Cir. 1996)).

The circuit court correctly denied Caudill's Rule 59(e) motion under this standard. As the circuit court noted, Dr. Darnell's deposition is "not newly discovered evidence" (A.R. 225) that was not previously available. The deposition took place on August 25, 2011. (A.R. 205.) CSXT's motion for summary judgment was not filed until January 27, 2012—more than five months later; Caudill's opposition was not filed until February 2, 2012; and the order granting summary judgment was not filed until February 27, 2012. Caudill does not even attempt to

articulate a legitimate justification for his failure to timely present all evidence to the circuit court.

Having failed to present the circuit court with all potentially relevant evidence in response to CSXT's motion to dismiss, Caudill is not entitled to reopen the judgment against him unless doing so is necessary "to prevent obvious injustice." Syl. Pt. 2, *Mey*, 228 W. Va. at 50, 717 S.E.2d at 237; *see also Hutchinson v. Staton*, 994 F.2d 1076, 1081 (4th Cir. 1993) (demanding a showing of "manifest injustice"). But there is nothing unjust, much less obviously so, about the circuit court's conclusion that Caudill's failure to timely present his evidence to the court precludes him from reviving a suit that is time-barred due to his failure to timely file his claim.

2. Caudill's Rule 59(e) Motion Did Not Call The Judgment Into Question.

Even if this Court were inclined to consider Caudill's purported "new evidence," that evidence does not call the judgment into question. Caudill contends that Dr. Darnell "testified that he never discussed any back injury diagnosis . . . in any 2005 visit or treatment of [Caudill]" (Br. 7), meaning that "th[e] November 2005 x-ray report was [n]ever discussed with [him]" (Br. 8).[2] Dr. Darnell's deposition thus establishes at most that Caudill was not actually aware of the results of that particular x-ray, but that has no bearing on the judgment.

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[2] We note that Caudill mischaracterizes Dr. Darnell's testimony. Dr. Darnell could not affirmatively rule out discussing Caudill's x-rays or his back pain because, according to his actual testimony, Dr. Darnell does not "have an[y] independent recollection of Mr. Caudill other than what's contained in his medical records." (A.R. 206.) What Dr. Darnell instead testified was that his medical records from 2005 did not appear at a glance to discuss back problems. (A.R. 207.) Even then, Dr. Darnell cautioned that "when we start going into these records . . . I start to have a little bit of a problem being able to tell what he was complaining about in this stuff. . . . I was just having a hard time kind of parsing together everything that was on here." (*Id.*)

To begin with, as the circuit court explained, disregarding the November 2005 x-ray "does not negate the remaining supporting evidence" (A.R. 225-226) that Caudill's injury manifested more than three years before the filing of suit. It remains undisputed that Caudill suffered from recurring back problems over many years; that Caudill made numerous visits to chiropractors to treat his back pain; and that Caudill needed to seek chiropractic treatment with increasing frequency as the years progressed. As Caudill's neurosurgeon testified about his June 2008 diagnosis, Caudill "had some symptoms in the past, but it became worse for at least two years, and in other notes I noticed that it had been going on for at least five or seven years."[3] (A.R. 57.) Even if Caudill became aware of his injury only "two years" earlier, when his symptoms "became worse," his complaint would still be untimely.

Moreover, the circuit court's conclusion was not simply that Caudill *actually* knew of his injury (as would be the case had he been told the results of the November 2005 x-ray), but rather that he "knew[] *or reasonabl[y] should have known*" of a possible work-related injury. (A.R. 199 (emphasis added); *see also* A.R. 226.) Having undergone x-rays at the order of a physician, a reasonably diligent patient should be expected to follow up and inquire into the results—especially when, as here, the plaintiff attended two other appointments with his physician in the five weeks after the x-rays were taken (*see* A.R. 219-220). Caudill contends that he should be excused from asking about the results of his back x-ray because he originally sought treatment for hip pain (*see* Br. 7, 13), but a patient with Caudill's long history of back problems cannot reasonably undergo a lumbar x-ray and then elect to remain ignorant of its results. And even putting aside that particular x-ray and its diagnosis, Caudill's severe and recurring back problems

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[3] Although Caudill's neurosurgeon did not state which "other notes" he was referring to, they had to include evidence other than the November 2005 x-ray, because that x-ray was taken less than three years before June 2008.

would have led a reasonably diligent plaintiff to seek further treatment and diagnosis from a specialist or another physician years before Caudill did. Because a reasonably diligent plaintiff should have discovered the details of his injury more than three years before Caudill filed his complaint, Caudill's failure to diligently investigate his injury did not prevent his FELA claim from accruing.

C. A Formal Diagnosis Is Not Required For A FELA Claim To Accrue.

Caudill cannot stave off the running of the statute of limitations by arguing that he did not receive a formal diagnosis until June 2008. Caudill argues both that the November 2005 x-ray is irrelevant because a formal diagnosis was not communicated to him at that time (Br. 7) and, in the alternative, that his claim could not accrue until June 2008 because that was the first time he was diagnosed with spondylolysis *and* nerve entrapment (Br. 15). These arguments, however, run headlong into a wealth of authority holding that a plaintiff need not receive a medical diagnosis for his cause of action to accrue. *See, e.g.*, *Mix*, 345 F.3d at 87 ("Regardless of whether he received an actual diagnosis," plaintiff's claim was time-barred "based upon strong indications that he did, in fact, have an injury."); *Campbell*, 238 F.3d at 774, 776 (plaintiff's FELA claim accrued when he began experiencing daily symptoms at work in 1994, even though he did not receive a formal diagnosis until 1998); *Albert*, 905 F.2d at 544 (rejecting "claim that an injured party is ignorant on medical causation issues until he has received a medical diagnosis that his injury is work related"); *Bealer v. Mo. Pac. R.R.*, 951 F.2d 38, 39-40 (5th Cir. 1991) (per curiam) (rejecting plaintiff's argument that he was not aware of his injury and its cause until receiving a letter from his doctor); *Fries*, 909 F.2d at 1095 (rejecting plaintiff's argument that the statute of limitations was tolled until he received a formal diagnosis); *Emmons*, 701 F.2d at 1122 & n.10 ("[W]e think it sufficient for purposes of commencement of the limitations period that the plaintiff knew his complained of condition was work related, and that it is not additionally

necessary that he have been formally so advised by a physician."); *Johnson*, 836 S.W.2d at 86 ("we reject Johnson's contention that his cause of action [did not accrue until] January 1989, when he was diagnosed"). Accordingly, Caudill cannot evade summary judgment on the ground that he did not receive a formal diagnosis of spondylolysis until June 2008.

D. A FELA Statute-Of-Limitations Defense May Be Resolved On Summary Judgment.

Finally, Caudill appears to argue that the date on which a FELA claim accrued must always be presented to the jury and therefore cannot be decided on summary judgment. (Br. 15-16.) That position is frivolous. Although the date on which a claim accrued is a question of fact that is ordinarily left to the jury, it is nonetheless proper to award summary judgment "if, from the totality of the evidence presented, the record could not lead a rational trier of fact to find for the nonmoving party." Syl pt. 2, *Williams*, 194 W. Va. at 56, 459 S.E.2d at 333. Caudill cites a smattering of cases each holding that a statute-of-limitations issue should have been submitted to the jury on a particular set of facts (Br. 15 n.1), but none holds that the accrual date of a FELA claim must *always* be submitted to a jury. To the contrary, numerous courts have affirmed a summary judgment in favor of a FELA defendant on statute-of-limitations grounds. *See, e.g.*, *Reed*, 12 F.3d 205; *Johnson*, 985 F.2d 553; *Selsor v. CSX Transp., Inc.*, 993 F.2d 1539 (table), 1993 WL 192518 (4th Cir. 1993) (per curiam); *Lampert v. Norfolk & W. Ry. Co.*, 966 F.2d 1442 (table), 1992 WL 122294 (4th Cir. 1992) (per curiam); *see also, e.g.*, *Tolston*, 102 F.3d 863; *Mix*, 345 F.3d 82; *Campbell*, 238 F.3d 772; *Albert*, 905 F.2d 541; *Bealer*, 951 F.2d 38; *Fries*, 909 F.2d 1092; *Emmons*, 701 F.2d 1112; *cf. Crowther v. Consol. Rail Corp.*, 680 F.3d 95, 97 (1st Cir. 2012) (Souter, J., sitting by designation) ("Although [the plaintiff] stresses at length that the cases construing a FELA plaintiff's right to get his case before a jury require not much more than a scintilla of evidence in plaintiff's favor on a disputed point, nothing but sympathy could

obscure the apparent untimeliness of the knee claim here, and the Rule 50(a) judgment was undoubtedly correct.") (citation omitted).

CONCLUSION

FELA does not "'allow a plaintiff to unilaterally postpone the running of the statute of limitations by negligently failing to investigate the fact of and cause of his injury'"; nor does it "provide an escape for plaintiffs who are aware that some type of injury exists yet who choose to ignore it by failing to seek diagnosis and investigate the cause." *Fries*, 909 F.2d at 1095-96 (citing *Kubrick*, 444 U.S. at 123). Instead, even if Caudill was in fact ignorant of his injury, his FELA claim would still have accrued when he experienced symptoms that would lead a reasonably diligent plaintiff to investigate and discover the details of his injury and its cause. That point was indisputably surpassed more than three years before the complaint was filed. Accordingly, Caudill's FELA claim is time-barred, and the judgment of the circuit court should be affirmed.

DATED: August 9, 2012

Signed: _____

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CERTIFICATE OF SERVICE

I hereby certify that on this 9th day of August, 2012, true and accurate copies of the foregoing **RESPONDENT'S BRIEF** were deposited in the U.S. Mail contained in postage-paid envelope addressed to counsel for all other parties to this appeal as follows:

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