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Commonwealth Of Kentucky

Court of Appeals

NO. 2005-CA-000226-MR
AND
NO. 2005-CA-000455-MR

DAVID RAY BURTON — APPELLANT

APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE A.C. MCKAY CHAUVIN, JUDGE
v. HONORABLE KATHLEEN VOOR MONTANO, JUDGE
ACTION NO. 00-CI-005983

CSX TRANSPORTATION, INC. — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: COMBS, CHIEF JUDGE; GUIDUGLI AND HENRY, JUDGES.

COMBS, CHIEF JUDGE: David Ray Burton appeals from a judgment of the Jefferson Circuit Court entered on a jury verdict in favor of appellee, CSX Transportation, Inc, (CSX). Burton had filed a lawsuit against CSX under the Federal Employers' Liability Act (FELA) for its alleged failure to provide a safe workplace. Burton raises several arguments on appeal: that the court improperly limited his introduction of evidence related to

several aspects of his case, that it erred in allowing CSX to present an unqualified expert, and that it failed to provide a non-delegable duty instruction to which he believed he was entitled. After our review, we affirm.

Burton worked at CSX's South Louisville Shops from 1978 to 1991 in various capacities -- as a service attendant, machinist apprentice, and machinist. He was often required to clean locomotives with a combination of a solvent (DowClene) and a soap (Brown Soap). The use of these chemicals exposed Burton and the other employees to fumes. Burton also worked around lye vats and a vapor phase degreaser, both of which exposed him to fumes as well.

Burton claims that CSX never provided him safety training, never gave him a respirator, and never warned him that the chemicals being used were potentially dangerous. While he was given a safety manual, no one ever discussed its contents with him. By his own testimony, he characterized the manual as a "waste of paper."

Witness Larry Elmore, union safety director, testified that CSX knew that the solvents were hazardous when used without proper protective gear. Ronald Postlewait, a supervisor at CSX, testified that occasionally someone would pass out from exposure to the fumes from DowClene and would have to be carried outside for fresh air; employees also had to take "fresh air breaks"

after exposure to the fumes. Burton said that he often felt lightheaded and experienced headaches or an upset stomach after exposure. CSX performed no monitoring of its employees' exposure levels to the chemicals with which they worked.

Burton stopped working at CSX in 1991 because the company was unable to offer him full-time employment. He found employment at Lawson Mardon in 1991 as a machinist, where he worked until he had to take disability benefits in 2001. At the time he stopped working for CSX, he had no health problems and had never been treated by a doctor for any of the problems related to his solvent exposure at CSX.

In 1995, four years after he left employment at CSX, Burton began suffering from various chronic symptoms, including dizziness, mood changes, forgetfulness, and vision problems. These symptoms grew progressively worse and caused him to seek medical help. Dr. Lynn Simon diagnosed him with multiple sclerosis. Burton was treated for MS for the next five years.

In 2000, Burton was examined by Dr. Martine RoBards, who was studying workers at the South Louisville Shops who had been exposed to solvents over a prolonged period. Dr. RoBards evaluated Burton and concluded that he had toxic encephalopathy syndrome, which she attributed to his exposure to dangerous fumes while working at CSX. Burton was also examined by Dr. Douglas Linz and Dr. Lisa Morrow, who both diagnosed toxic

encephalopathy as well. This lawsuit was filed shortly after this diagnosis.

His trial began on June 21, 2004, and concluded on July 9, 2004. In the course of the rather lengthy trial, thirty (30) lay and expert witnesses testified in the case. Burton sought to prove that work conditions at CSX had resulted in a permanent and disabling condition of toxic encephalopathy. CSX contended that Burton was suffering from multiple sclerosis rather than from a syndrome caused by exposure to toxic solvents. The jury found that CSX did not fail in its duty to provide a safe workplace to Burton and that Burton's illness was not caused by the conditions of the workplace. This appeal followed.

Burton presents several issues on appeal. They fall into three categories: (1) evidence excluded or limited by the court; (2) evidence admitted; and (3) jury instructions. We shall address each classification separately.

Burton first argues that the court improperly limited his ability to prove his case by excluding critical relevant information about the studies conducted on the employees at the South Louisville Shops by Drs. RoBards, Linz, and Morrow. Dr. RoBards examined sixty-nine (69) workers at the facility in the course of her research, and Burton was among them. Dr. Linz and

Dr. Morrow relied heavily on Dr. RoBards's study in the course of their own research.

Dr. RoBards suffered a serious accident prior to trial, leaving her unable to testify. In lieu of her live testimony, Burton offered the results of her study. At a hearing on a motion *in limine*, CSX sought to limit the introduction of this report as it related to other workers at the South Louisville Shops. The court agreed and ruled that any reference in the report to other CSX workers would be highly prejudicial to CSX. Burton did not offer by avowal either the deposition of Dr. RoBards or the excluded portions of the report.

The report of Dr. RoBards consists of information obtained from Burton, tests that she administered to him, her conclusions, and a detailed discussion of her surveys of other CSX employees. CSX criticizes the information about the surveys as pertaining to "employees who purportedly had been exposed to unspecified solvents, in unspecified amounts, at unspecified times while working in some unspecified capacity for CSX." Appellee's brief at 6.

CSX's characterization of the surveys essentially focuses on relevancy concerns as to the admission of those portions of Dr. RoBards's report that do not directly pertain to Burton. Burton argues that this evidence should have been

admitted as properly relating to evidence of the occurrence or non-occurrence of other similar accidents or injuries. Harris v. Thompson, 497 S.W.2d 422 (Ky. App. 1977), Montgomery Elevator Co. v. McCullough, 676 S.W.2d 776 (Ky. 1984).

After our review of the report, we cannot conclude that the trial court abused its discretion in excluding that portion pertaining to employees other than Burton. There is not enough detailed information to establish a reliable similarity between the particulars of Burton's exposure and the exposure of the unnamed individuals who also participated in Dr. RoBards's study. We need not address the contention that the report was admissible under an exception to the hearsay rule as it was excluded for reliability reasons other than and completely independent of the hearsay rule. Burton also argues that the doctor's deposition testimony would have been admissible. Since it was never offered into evidence -- even by avowal, that issue is not properly preserved for our review. We note that the testimony of Burton's co-workers was available to offer direct evidence of the exposure that they suffered, employees who were exposed to the very conditions that had been the subject of Dr. RoBard's study.

The court excluded evidence of the diagnosis of toxic encephalopathy by Dr. Lisa Morrow, an associate professor of psychiatry at the University of Pittsburgh Department of

Psychiatry. Burton contends that the exclusion of that diagnosis was clearly erroneous because Dr. Morrow was qualified to testify under Kentucky law. Penry v. Johnson, 532 U.S. 782 (2001); Mosley v. Commonwealth, 420 S.W.2d 679 (Ky. 1967); and KRS[1] 319.010.

It is well established that a psychologist may testify about his or her diagnosis of a patient or a patient's mental condition. Perry, supra, holds that a neuropsychiatrist's opinion can address organic brain impairments. However, Dr. Morrow herself testified that she is **not qualified** to form an opinion on the causative link between the solvent exposure and Burton's condition. The court permitted her to testify that Burton's cognitive changes are consistent with solvent exposure. She testified that those changes, however, were also consistent with multiple sclerosis, a condition which she admitted that she is not qualified to diagnose. We are persuaded that the court properly allowed Dr. Morrow to testify about the subject matter upon which she was qualified to offer her expert opinion. The cases upon which Burton relies do not expand the scope of testimony permitted from Morrow. The court properly limited the range of testimony from Dr. Morrow, and we cannot find any abuse of discretion.

[1] Kentucky Revised Statutes.

Dr. Steve Simon prepared a report in connection with Burton's disability claim before the Social Security Agency (SSA). Burton claims that it should have been admitted into evidence under the public records exception to the hearsay rule. That exception allows admission of records of public agencies kept in the course of recording their normal activities. In Re: Japanese Electronic Products Antitrust Litigation, 723 F.2d 238 (3rd Cir. 1983), Burton argues: "The indices of reliability for the governmental investigative report is the fact that it is prepared pursuant to a duty imposed by law." Id. at 268. We do not agree that the report of Dr. Simon falls within this exception.

Dr. Simon was not reported as a witness in pre-trial witness disclosure documents, nor was his report disclosed as an exhibit to be introduced. While Dr. Simon evaluates claimants on referral from the SSA, he is not an employee or agent of the SSA. Thus, his report is not a "governmental investigative report" prepared pursuant to a duty imposed by law. It was prepared in the context of the administrative hearing between the claimant and the SSA.

Recognizing this distinction in its ruling, the court properly held that the report did not fall under the public records exception. Burton was allowed to use the report in impeaching other testimony, and he was permitted to introduce

the interview portion of Dr. Simon's report as an exhibit. We conclude that the court did not abuse its discretion in its limitations on the admissibility of the report.

We shall now address that category of evidence that Burton claims was improperly admitted. He objected to CSX's expert witness, Dr. William Waddell. Until his retirement in 1998, Dr. Waddell was the chairman of the Department of Pharmacology and Toxicology at the School of Medicine of the University of Louisville. In his testimony, he criticized as flawed the literature that causally links long-term exposure to chlorinated hydrocarbons with permanent, irreversible brain damage. He based his criticism on the failure of the existing studies to identify the particular solvents, to control for confounders, and to establish a dose-response.

Dr. Waddell also referred to a request for applications by the National Institute of Occupational Safety and Health. The Institute sought to fund additional studies of neurological effects from long-term exposure to solvents because of its conviction that "the neurological effects of long-term exposures in the workplace are not well understood." Dr. Waddell reached the same conclusion as the Institute about the imperfect state of knowledge of the subject. Burton argues that Waddell "essentially sold his resume as a medical doctor and professor of toxicology and was allowed to testify to a jury

that peer-reviewed literature should be ignored." Appellant's brief at 19.

In determining the admissibility of evidence in its role as a "gatekeeper," a trial court is governed by Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579 (1993). Daubert requires that a judge first determine whether an expert intends to testify about scientific knowledge that will assist the trier of fact in determining a fact in issue. This judicial determination necessarily:

> entails a preliminary assessment of whether the reasoning or methodology underlying the testimony is scientifically valid and whether that reasoning or methodology properly can be applied to the facts in issue.

Daubert at 592-93. The court allowed Dr. Waddell to criticize the existing studies which show a causal link between long-term exposure to solvents in the workplace and brain damage. He was allowed to discuss the status of scientific knowledge of the matter. One of Burton's own experts, Dr. Rodgers, testified about the same subject matter and reached the opposite conclusion. We believe the court properly exercised its Daubert duties with respect to the scientific evidence. We find no abuse of discretion in the court's decision to admit Dr. Waddell's testimony.

Finally, we turn to Burton's third and last category of challenged issues: his claim that he was entitled to a non-delegable duty instruction. Burton contends that CSX improperly attempted to shift its responsibility for maintaining a safe workplace onto the union to which Burton belonged. Three witnesses, Larry Elmore, Oma Coker, and Ronald Postlewait, were called by Burton to establish that CSX was aware that workers were becoming sick from solvent fumes and that workers had complained.

Elmore was the head of the Shop Safety Committee for five years. On cross-examination, CSX asked him whether the union had ever filed a grievance regarding the use of the solvents. CSX did attempt to impeach the testimony of the witnesses and to show their lack of knowledge or alarm as to a significant safety concern. But the record also reveals that CSX did not directly argue that the union shared responsibility for the conditions of the workplace, nor did it otherwise suggest that the union bore some measure of liability. It did not attempt to divert to the union its own responsibility for maintaining a safe working environment. Under these circumstances, we do not agree that a non-delegable duty instruction was required. We find no error.

We affirm the judgment of the Jefferson Circuit Court.

ALL CONCUR.

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