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(FILE NO. 2007-SC-000915-D)**

Commonwealth of Kentucky
Court of Appeals

NO. 2006-CA-000912-MR

SPENCER LLOYD — APPELLANT

v.

APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE JUDITH MCDONALD-BURKMAN, JUDGE
ACTION NO. 03-CI-003260

CSX TRANSPORTATION, INC. — APPELLEE

OPINION
REVERSING AND REMANDING

** ** ** ** **

BEFORE: DIXON AND THOMPSON, JUDGES; HENRY,[1] SENIOR JUDGE.

THOMPSON, JUDGE: Spencer Lloyd appeals from a summary judgment dismissing his complaint filed against CSX pursuant to the Federal Employer's Liability Act, 45 U.S.C. § 51-60 (FELA), as barred by the applicable statute of limitations. In his complaint, Lloyd alleged that he developed toxic encephalopathy from employment-related exposure

[1] Senior Judge Michael L. Henry sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

to toxic solutions. The issue on appeal is whether there is a genuine issue of material fact as to when the cause of action was known or should have been known by Lloyd. We find that the evidence is sufficiently conflicting so as to present a jury question; we, therefore, reverse and remand for further proceedings.

From 1974 through 1980, Lloyd was employed by CSX, formerly L & N Railroad Company, first as a service attendant and was later promoted to electrician's helper and finally to trainman. During his employment as a service attendant, he was exposed daily to chemicals and solvents, including DowClene.[2]

Beginning in November 1994, Lloyd consulted various doctors in the Louisville area complaining of headaches, gastrointestinal problems, depression, anxiety, mood swings and challenges with his memory and attention. At that time, he expressed his concern to the doctors that his health problems were related to his exposure to DowClene and other solvents.

In 1995, Lloyd provided Dr. Milton Young, an internist, a list of chemicals to which he was exposed and which Lloyd believed contributed to his health problems. Dr. Young's records of a January 1995 appointment state that: "there is currently an occupational health physician Dr. R. Michael Kelly of Lansing, Mich. (517)377-0309 at St. Lawrence Hosp. (517)372-3610 who is researching the chemicals (neurotoxins trichloroethane and perchloroethylene) and there (sic) effects on humans. The pt would like for Dr. Young to give him (Dr. Kelly) a call concerning his case." Dr. Young's records state that on April 3, 1995, Lloyd related that he was "to see Dr. R. Michael Kelly concerning neurotoxin." Dr. Young's records further state on April 30, 1996, Lloyd told Dr. Young that he was "to see environmental specialist (M.D.) in 2 wks." Dr. Young

[2] DowClene and Dow Cleaner are used interchangeably in the record.

testified that he attempted to secure approval from Aetna Managed Choice, Lloyd's insurance provider, for treatment by Dr. Kelly but his request was refused. Instead, Aetna Managed Choice made the decision that Lloyd would have to see Dr. Hedvika Heinicke regarding his suspicion that DowClene was causing his symptoms. Lloyd thereafter was never seen by Dr. Kelly.

On February 13, 1995, Lloyd saw neurologist, Dr. Heinicke. Lloyd specifically mentioned trichloroethane, perchloroethylene, and DowClene to Dr. Heinicke. Dr. Heinicke's records also reflect that Lloyd informed her that he was "told to see Dr. Kelly in Michigan @ Dow Cleaner for memory problems." Dr. Heinicke failed to diagnose Lloyd with toxic encephalopathy and, instead, diagnosed Lloyd with migraine headaches.

Lloyd also saw a psychiatrist, Dr. Paul Adams. Those records indicate that on April 6, 1996, Lloyd told Dr. Adams that he had experienced headaches since 1978 and thought the cause could be DowClene but that an expert on the effects of exposure to the solvent was in Michigan. Dr. Adams' April 23, 1996, records further state: “concerned re Dow cleaner, a degreaser to clean armatures and engines – Dr. Kelly in Lansing, MI, says 'neurotoxins, trichloroethane, perchloroethylene.' “

In June 2001, psychologist Dr. Martine RoBards diagnosed Lloyd with toxic encephalopathy and attributed the disorder to chemical exposure. This litigation was commenced on April 10, 2003. After considerable discovery, CSX filed a motion for summary judgment on the basis of the statute of limitations. In its order summarily dismissing Lloyd's complaint, the trial court stated as follows:

> Throughout the medical records and depositions of several physicians, it is apparent that Plaintiff related his

> symptoms to his exposure to Dowclene while working at CSX and was aware of and informed and/or intended to see Dr. Kelly in Michigan about his beliefs. Plaintiff apparently did not pursue evaluation with Dr. Kelly and waited six years (February 1995 to June 19, 2001) to consult with Dr. RoBards, who diagnosed toxic encephalopathy. Plaintiff then filed suit April 10, 2003, almost nine years after his symptoms appeared. For commencement purposes, sufficient evidence shows that Plaintiff knew his headaches and GI problems were related to his work at CSX. It is not necessary that Plaintiff be formally advised by a physician that his injury is in fact work related.

This appeal followed.

Lloyd contends his cause of action accrued in 2001 when Dr. RoBards diagnosed him with toxic encephalopathy and that genuine issues of material fact exist which preclude summary judgment.

While federal law governs substantive issues in a FELA case, this Commonwealth's procedural law is applicable including the determination as to whether summary judgment was properly granted. *Lipsteuer v. CSX Transp., Inc.*, 37 S.W.3d 732, 735 (Ky. 2000). Recently in *Ross v. Powell*, 206 S.W.3d 327, 330 (Ky. 2006), the Kentucky Supreme Court reiterated the standard for granting summary judgment:

> Summary judgment is authorized by CR 56.01 et seq. and is intended to expedite the disposition of cases. If the grounds provided by the rule are established, it is the duty of the trial judge to render appropriate judgment. The basis for summary judgments involve: 1) there is no genuine issue as to any material fact; and 2) that the moving party is entitled to a judgment as a matter of law. As originally noted in *Paintsville Hospital Co. v. Rose*, 683 S.W.2d 255 (Ky. 1985), and later in *Steelvest, Inc. v. Scansteel Service Center, Inc.*, 807 S.W.2d 476 (Ky. 1991), as well as in *James Graham Brown Foundation, Inc. v. St. Paul Fire & Marine Ins. Co.*, 814 S.W.2d 273 (Ky. 1991), the summary judgment procedure is not a substitute for trial. *See also City of Florence v. Chipman*, 38 S.W.3d 387 (Ky. 2001), for an

> extended discussion of the application of the summary judgment rule.
>
> Suffice it to say that the circuit judge must examine the evidentiary matter, not to decide any issue of fact, but to discover if a real or genuine issue exists. All doubts must be resolved in favor of the party opposing the motion. The movant should not succeed unless a right to judgment is shown with such clarity that there is no room left for controversy and it is established that the adverse party cannot prevail under any circumstances.
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> *Steelvest, supra*, originally stated that the test would include the word "impossible" for the non-moving party to prevail at trial. This Court later clarified that the word "impossible" is used in the practical sense and not in the absolute sense. *Perkins v. Hausladen*, 828 S.W.2d 652 (Ky. 1992). The party opposing a summary judgment can defeat it with some affirmative evidence to show the existence of a genuine issue of material fact. As noted in *Chipman, supra*, this Court stated in *Hoke v. Cullinan*, 914 S.W.2d 335 (Ky. 1995), that "contrary to the view of some, our decision in *Steelvest* . . . does not preclude summary judgment." If the litigants are given an opportunity to present evidence which reveals the existence of disputed material facts and upon the trial court's determination that there are no such disputed facts, summary judgment is appropriate. The differences between the federal and state approach to summary judgment are further outlined in *Chipman*, *supra*.

We review a summary judgment *de novo* "because only legal questions and no factual findings are involved." *Hallahan v. The Courier Journal*, 138 S.W.3d 699, 705 (Ky.App. 2004).

An action brought pursuant to FELA must be commenced within three years from the day the cause of action accrued. 45 U.S.C. §56. Lloyd filed his claim on April 10, 2003, thus, the question is whether the action accrued on or before April 10, 2000.

In FELA cases where progressive trauma or disease is alleged and the exact date of the injury is indeterminate, the courts have applied the discovery rule to determine when the action accrued. Under that rule, an action accrues when a reasonable person knows, or in the exercise of due diligence should know, of his injury and its cause. *United States v. Kubrick*, 444 U.S. 111, 122, 100 S.Ct. 352, 62 L.Ed.2d 259 (1979); *Mounts v. Grand Trunk Western R.R.,* 198 F.3d 578, 581 (6th Cir. 2000). The rule was further explained in *Fries v. Chicago & Northwestern Transportation Compan*y, 909 F.2d 1092, 1095 (7th Cir. 1990) where the court stated:

> Both components require an objective inquiry into when the plaintiff knew or should have known, in the exercise of reasonable diligence, the essential facts of injury and cause. Moreover, the injured plaintiff need not be certain which cause, if many are possible, is the governing cause but only need know or have reason to know of a potential cause. That this rule imposes on injured plaintiffs an affirmative duty to investigate the potential cause of his injury has not been lost on the courts. However, to apply any other rule would thwart the purposes of repose statutes which are designed to apportion the consequences of time between plaintiff and
>
> defendant, and to preclude litigation of stale claims. (citation and parenthetical information omitted).

In *Lipsteuer*, 37 S.W.3d at 737, our Supreme Court considered the discovery rule as applied to a FELA claim and, in conformity with federal authority, held that the cause of action accrues when "a plaintiff knows or, in the exercise of reasonable diligence, should know of both the injury and its cause." (citations omitted). Whether the plaintiff was put on notice regarding the cause of his injury, the Court stressed, is a question of fact that should be addressed by a jury. *Id.* We find that the law as stated in *Lipsteuer* compels a result contrary to that reached by the circuit court. *See also CSX Transp., Inc. v. Miller*, 159 Md.App. 123, 858 A.2d 1025 (2004); *Batten v. CSX Transp.,*

Inc., 811 So.2d 673 (Fl.App. 1 Dist. 2001); *CSX Transp. Inc. v. Adkins,* 264 Ga. 203, 442 S.E.2d 737 (1994).

Toxic encephalopathy is a progressive disease and its symptoms mimic those of other conditions. In Lloyd's case, the difficulty in its diagnosis is highlighted. Despite that he sought medical attention from five different highly educated physicians, Lloyd's condition went undiagnosed for seven years. Although Lloyd, a layman, suspected that the cause of his symptoms was his exposure to DowClene for over seven years, the various physicians contradicted his suspicions and, instead, attributed his symptoms to other causes. Moreover, although Lloyd on more than one occasion suggested that he be sent to Michigan to see Dr. Kelly, the insurance company rejected his requests and sent him to yet another physician who did not diagnose Lloyd with toxic encephalopathy. A reasonable jury could find that Lloyd in the exercise of due diligence had no duty to travel to Michigan at his own expense, to pay a physician at his own expense, and to secure a sixth medical opinion as to the cause of his symptoms.

Based on the state of the record, a reasonable jury could find that Lloyd did not become aware of his injury, and its cause, until he was diagnosed by Dr. RoBards. The summary judgment is, therefore, reversed and the case remanded to allow a jury to determine, as finders of fact, when Lloyd knew or should have known of his condition.

DIXON, JUDGE, CONCURS.

HENRY, SENIOR JUDGE, DISSENTS AND FILES SEPARATE OPINION.

HENRY, SENIOR JUDGE, DISSENTING: I respectfully dissent. The majority recognizes that the controlling federal cases establish that a cause of action

accrues in a FELA occupational disease or latent injury case when a plaintiff possesses the "critical facts" of his injury and the cause of the injury. *United States v. Kubrick*, 444 U.S. 111, 122, 100 S.Ct. 352, 62 L.Ed.2d (1979); *Mounts v. Grand Trunk Western R.R.,* 198 F.3d 578, 581 (6th Cir. 2000). And as noted in the majority opinion, "the injured plaintiff need not be certain which cause, if many are possible, is the governing cause but only need know *or have reason to know* of a potential cause." *Fries v. Chicago & Northwestern Transportation Compan*y, 909 F.2d 1092, 1095 (7th Cir. 1990) (emphasis supplied). Once a plaintiff knows the "critical facts," he has an affirmative duty to investigate the injury and its cause. *Id.*

It is established without contradiction in the record of this case that from January 1995 through April 1996, Lloyd consistently informed his doctors that he attributed his headaches, attention and memory challenges, anxiety and depression to his exposure to DowClene. Clearly, Lloyd at the very least "had reason to know" of the existence of his injury and its cause at that time. During the course of his examinations by his doctors Lloyd even named the specific chemicals in DowClene (trichloroethane and perchloroethylene) which he suspected of causing his injury, identified Dr. R. Michael Kelly in Lansing, Michigan, as having expertise in determining the effects of exposure to chemicals and solvents, and informed his doctors that he intended to see Dr. Kelly. Yet he waited until April 10, 2003, to file suit.

The majority expresses the opinion that *Lipsteuer v. CSX Transp., Inc.*, 37 S.W.3d 732 (Ky. 2000), requires that this case be sent back to the circuit court for a determination of when Lloyd was put on notice about the cause of his injury. I must respectfully disagree. Justice Cooper's rueful dissent in *Lipsteur* notwithstanding, even

the *Lipsteur* majority at least gave lip service to the long-honored proposition that "[i]n those cases where there is no genuine issue of material fact, summary judgment should be granted." *Lipsteur* at 736.

By our holding in this case, we are making a new rule of law, not found in the controlling federal cases, that a FELA occupational disease or latent injury claimant cannot be charged with notice of the cause of his injury until it has been diagnosed by a physician. If we do not do so outright, we come very near to precluding summary judgments on the issue of notice in these cases altogether, thereby requiring that the issue be determined in all cases by a jury. My objection is much the same as that of Justice Cooper in *Pan-American Life Ins. Co. v. Roethke,* 30 S.W.3d 128, 134 (Ky. 2000), wherein he lamented that "[t]oday's decision reaffirms that summary judgment is dead in Kentucky, at least with respect to determining whether there exists a genuine issue of material fact."

It seems to trouble the majority that the insurance company would not pay for Lloyd to go to Michigan to get Dr. Kelly to give him a diagnosis of toxic encephalopathy. The insurance company had a contractual obligation to pay for medical treatment of Lloyd's injury or disease, and as far as I can tell it fulfilled its obligation. Whether or not the company would pay for Lloyd to cross several states to see a doctor whom he believed would give him a diagnosis that would assist him in a lawsuit has, in my view, no bearing on this case. The question is simply when Lloyd knew, or should have known, that he was injured by his exposure to the chemicals in DowClene. His doctors' notes from 1995 and 1996 indicate that he told them that he believed that he was injured by his exposure to DowClene then, at least seven years before he filed suit. That

proof is uncontradicted. It would seem to follow in logic that if a person states that he believes something to be true, he must either know it, or at least be chargeable that he should have known it at the time he said it. Requiring a jury determination in such a situation is in my view unnecessary, and I would therefore affirm the circuit court.

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