SUPREME COURT OF KENTUCKY
No. 2008-SC-0784-D

EMMETT E. COOMER, APPELLANT,

v.

CSX TRANSPORTATION, INC, APPELLEE.

APPEAL FROM COMMONWEALTH OF KENTUCKY
COURT OF APPEALS
No. 2006-CA-002054-MR

BRIEF FOR APPELLANT EMMETT E. COOMER

Alva A. Hollon, Jr.
John O. Hollon
SAMS & HOLLON, P.A.
9424 Baymeadows Road • Suite 160
Jacksonville, Florida 32256-7967
904-737-1995 Telephone
904-737-3838 Facsimile

Co-counsel for Appellant

Thomas I. Eckert
P.O. Box 7272
Hazard, Kentucky 41702
606-436-4445 Telephone
606-439-0748 Facsimile

Co-counsel for Appellant

CERTIFICATE OF SERVICE

I hereby certify that on this 12th day of June, 2009, copies of this Brief for Appellant were served by U.S. Mail, postage prepaid, on: Darryl S. Lavery, Esquire, Boehl, Stopher & Graves, 2300 Aegon Center, 400 West Market Street, Louisville, Kentucky 40202, counsel for Appellee; Sam Givens, Clerk, Kentucky Court of Appeals, 360 Democrat Drive, Frankfort, KY 40601; and The Honorable William Engle, III, Circuit Judge, Hall of Justice, 545 Main Street, Hazard, Kentucky 41701.

John O. Hollon

One of the Counsel for Appellant

INTRODUCTION

This is a FELA case in which the trial court granted Defendant/Appellee, CSX Transportation, Inc., summary judgment on the grounds of res judicata after Plaintiff/Appellant's, Emmett Coomer, earlier FELA case filed in the Jefferson Circuit Court was dismissed. Mr. Coomer appeals the Court of Appeals' Opinion affirming the Perry Circuit Court's Order granting summary judgment.

STATEMENT CONCERNING ORAL ARGUMENT

Plaintiff/Appellant desires oral argument and believes that oral argument will assist this Court in reaching a full understanding of the issues and underlying facts. Oral argument will also allow the attorneys for both parties to address any factual and/or legal issues that this Court deems relevant.

STATEMENT OF POINTS AND AUTHORITIES

Page(s)

I. STATEMENT OF THE CASE

This case was filed pursuant to the Federal Employers' Liability Act, 45 U.S.C. §§ 51-60 (hereinafter referred to as "FELA"), wherein the Plaintiff/Appellant, Emmett E. Coomer (hereinafter referred to as "Mr. Coomer") seeks damages for injuries that occurred while working in the course and scope of his employment for Defendant/Appellee, CSX Transportation, Inc. (hereinafter referred to as "CSXT"). (Record on Appeal, "R.A.", vol. 1, pp. 1-6). More specifically, he alleged that the "was required to lift heavy pieces of equipment without proper assistance and this placed excessive and cumulative strain on his neck, shoulders, back and knees." (R.A., vol. 1, pp. 1-6).

A. Statutory Background

The FELA was enacted by Congress in 1908. Section 1 of the FELA provides that a railroad will be "liable in damages to any person suffering injury while he is employed by such carrier . . . for such injury . . . resulting **in whole or in part** from the negligence of any of the officers, agents, or employees of such carrier." 45 U.S.C. §51 (emphasis added). It is important to note that the FELA contains significant features including the creation of liability for any injury "resulting in whole or in part" from the employer's negligence. 45 U.S.C. §51. This reflected the goal of Congress to shift part of the "human overhead" of conducting business from railroad workers to the railroad. See Norfolk & W. Ry. Co. v. Ayers, 538 U.S. 135, 161 (2003); Consolidated Rail Corp. v. Gottshall, 512 U.S. 532, 542 (1994).

FELA requires that an employee file his claim within three years from the day that the cause of action accrues. 45 U.S.C. § 56. The critical question often becomes when did the cause of action accrue. This question can be very difficult to answer when dealing

with claims for injuries, such as Mr. Coomer's injuries, that occur over an extended period of time rather than those injuries resulting from one single traumatic event. In Lipsteur v. CSX Transportation, Inc., 37 S.W.3d 732 (Ky. 2000), this Court applied the discovery rule to determine when a cause of action accrues under the FELA. Specifically, this Court held "that a cause of action accrues when a plaintiff knows or, in the exercise of reasonable diligence, should know of both the injury and its cause." Id. at 737.

B. Factual Background

This FELA case was filed in Perry Circuit Court on June 24, 2003, wherein Mr. Coomer sought damages for injuries resulting from excessive and harmful cumulative trauma/stress to his neck, back, shoulders and knees from the type of work he performed for CSXT. (R.A., vol. 1, pp. 1-6). In his Complaint, Mr. Coomer alleged that he "was required to lift heavy pieces of equipment without proper assistance." (Id.). CSXT filed an Answer denying negligence and also raised the issue of res judicata. (R.A., vol. 1, pp. 8-10). (Perry Circuit Complaint, Appendix, pp. 1-6).

When Mr. Coomer filed the Perry Circuit case, he had another case against CSXT pending in Jefferson Circuit Court wherein he sought damages for personal injuries to his upper extremities, i.e., carpal tunnel syndrome and ulnar neuropathy. In his Jefferson Circuit case, Mr. Coomer alleged that he "was required to perform his job duties as a trackman utilizing equipment which produced excessive and cumulative strain on his upper extremities." (Jefferson Circuit Complaint, ¶ 7). (Appendix, pp. 7-11).

While the Jefferson Circuit Court case was pending, Mr. Coomer first learned that the pain he was experiencing in his neck, back and knees was work-related when one of his treating physicians, Craig A. Beard, M.D. of Bowling Green, Kentucky, wrote a letter

dated October 4, 2002, stating that Mr. Coomer's injuries to his neck, back and knees were partially caused by his job duties. A copy of the letter from Craig A. Beard, M.D. is attached in the Appendix at page 12. Prior to the jury trial that was scheduled for July 29, 2003, counsel for Mr. Coomer inquired if CSXT would be agreeable to amending the Complaint in the Jefferson Circuit case to include the injuries to his neck, back and knees since Dr. Beard opined that these injuries were partially caused by his job duties. CSXT opposed any amendment to the Complaint. In fact, it was the position of CSXT that "should you and your client wish to pursue a cause of action for any injuries in addition to those set forth in your initial Complaint, you will need to file a separate action." A copy of the June 2, 2003 correspondence from counsel for CSXT is attached hereto in the Appendix at p. 13. (emphasis added).

In response to this letter, Mr. Coomer filed the instant action in Perry Circuit Court on June 24, 2003. (R.A., vol. 1, pp. 1-6). On July 21, 2003, the Jefferson Circuit Court entered an Order granting CSXT summary judgment that dismissed the Jefferson Circuit case dealing with his carpal tunnel syndrome and ulnar neuropathy. Mr. Coomer appealed the dismissal of the Jefferson Circuit case. On July 30, 2004, the Court of Appeals affirmed the dismissal.

On March 31, 2006, CSXT filed a Motion for Summary Judgment and Supporting Memorandum of Law in the Perry Circuit case arguing that the Perry Circuit case was barred by the doctrine of res judicata as a result of the disposition of the Jefferson Circuit case. (R.A., vol. 1, pp. 132-290). In his response, Mr. Coomer argued that the doctrine of res judicata is inapplicable because the Perry Circuit case and the Jefferson Circuit case are separate and distinct causes of action concerning not only different injuries, but also

different mechanisms of injury. (R.A., vol. 1, pp. 291-302). As such, Mr. Coomer argued that genuine issues of material fact precluded summary judgment.

On April 19, 2006, a hearing on CSXT's Motion for Summary Judgment was conducted in Perry Circuit Court. During the hearing, CSXT argued that the causes of action in the Perry Circuit case and the Jefferson Circuit case are identical. (TAPE 1; 4/19/06; 01:42:28). CSXT also argued, inter alia, that both Complaints allege the exact same mechanism of injury. (TAPE 1; 4/19/06; 01:53:25). However, Mr. Coomer asserted that the two causes of action involve not only different injuries, which CSXT acknowledged, but also different mechanisms of injury. (TAPE 1; 4/19/06; 01:47:54 and 02:08:36). Mr. Coomer argued that the two causes of action are therefore different, and as such, res judicata does not apply. He also asserted that in regard to his neck, back and knee injuries (Perry Circuit case), he did not even have a cause of action until Dr. Beard causally related it to his job. (TAPE 1; 4/19/06; 02:24:50).

The Perry Circuit Court also expressed concerns with the letter from CSXT stating that "should your and your client wish to pursue a cause of action for any injuries in addition to those set forth in your initial Complaint, you will need to file a separate action." (See Appendix, p. 13 and TAPE 1; 4/19/06; 02:31:32). The Court was not aware of any case law regarding the impact of the letter, but was concerned with what was right and wrong.

On May 2, 2006, the Perry Circuit entered an Opinion and Order granting CSXT's Motion for Summary Judgment. In the Opinion and Order, the Perry Circuit Court stated:

> . . . it is the opinion of this Court that the injuries at issue in the present matter arose out of the same transactional nucleus of facts, that is, that plaintiff was allegedly exposed to excess and

> harmful repetitive stress/cumulative trauma (the alleged mechanism of injury in both matters) over the course of his career at CSX which allegedly caused his claimed injuries.

(R.A., vol. 1, pp. 344-347). The Court stated that "it is the duty of a plaintiff to assert his entire cause of action resulting from a single tort . . .." (Id.)(Defendant CSXT's Proposed Opinion and Order, Appendix, pp. 14-17).

On July 7, 2006, the Perry Circuit Court conducted a hearing on Mr. Coomer's motion to vacate summary judgment. During the hearing, Mr. Coomer argued that there are questions of fact as to the mechanisms of injury in the respective cases. (TAPE 2; 7/7/06; 11:11:53). Counsel for Mr. Coomer advised the court that he had an unsigned affidavit of Tyler A. Kress, Ph.D., which the court accepted. (TAPE 2; 7/7/06; 11:11:53). In his affidavit, Dr. Kress, who is a biomechanical engineer and a board certified industrial ergonomist, addressed the critical question of whether the mechanisms of injury are identical or different and opined that "simply stated, the mechanism of injury for back injury for Mr. Coomer is primarily lifting/load-related as opposed to the primary mechanism of injury to his upper extremity, which is use of hand tools and vibration." (R.A., vol. 1, pp. 361-365). A copy of Dr. Kress' signed affidavit is attached in the Appendix at pages 18-20. Despite the unambiguous affidavit of Dr. Kress, CSXT simply reiterated its unsupported statement that the respective mechanisms are identical. (TAPE 2; 7/7/06; 10:57:37).

On July 14, 2006, the court entered an Order that Mr. Coomer's Motion to Vacate Summary Judgment is overruled in its entirety. (R.A., vol. 1, pp. 366).

C. The Court of Appeals' Decision

Mr. Coomer appealed the trial court's decision. He argued that summary judgment was improperly granted because the doctrine of res judicata was inapplicable because the

two causes of action are separate and distinct. In support of his argument, he argued that the two causes of action are separate and distinct because they accrued on different dates, involved different mechanisms and dealt with different injuries.

The Court of Appeals affirmed the trial court's decision. (Appendix, pp. 21-30). The Court noted that "the contested issues in this appeal are whether Coomer's first and second actions arose from the same transactional nucleus of facts so that the issues presented in the second litigation either were or should have been decided in the first litigation." Opinion Affirming, 7/3/08, pp. 6-7. To assist in answering this question the Court noted the importance of determining when a cause of action accrues under the FELA. The Court acknowledged that the Perry Circuit case did not accrue until 10/4/02 which is after the Jefferson Circuit case was filed. Id., p. 8. Even though the Court acknowledged that the two actions had different accrual dates, it ruled that Coomer "was aware of his back, neck, shoulders and knee conditions and discovered that his repetitive and excessive trauma incurred as a trackman was the alleged cause" during the pendency of the first action. Id., p. 8.

II. ARGUMENT

In affirming the Perry Circuit Court's Order granting CSXT summary judgment on the grounds of res judicata, the Court of Appeals erred in several respects. First, the doctrine of res judicata was erroneously applied in that the two actions involved not only different injuries, which CSXT acknowledged, but also different mechanisms of injury. Mr. Coomer presented the uncontradicted affidavit of Tyler Kress, Ph.D., explaining the clear differences in how the different injuries occurred. CSXT did not present any evidence to challenge the affidavit of Dr. Kress.

Moreover, in affirming the Perry Circuit Court's application of res judicata to the facts of this case, the Court of Appeals erred in an important respect. The rule of the Court affects or alters the federal substantive rights of Mr. Coomer. The Court of Appeals acknowledged that the two actions accrued on different dates. However, the Court's ruling drastically alters the statute of limitations under FELA which requires that an employee file his claim within three years from the day that the cause of action accrues. 45 U.S.C. § 56. The effect of the rule is that the three year statute of limitations for the second action is subsumed into the first action. As such, the impact of this ruling will dramatically impact the federal rights guaranteed by 45 U.S.C. § 56.

A. The lower court's ruling adversely affects or alters the Federal substantive rights of Mr. Coomer.

The relevant Kentucky law concerning summary judgment practice is based upon C.R. 56.03, which authorizes the court to enter summary judgment " . . . if the pleadings, depositions, answers to interrogatories, stipulations, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." The seminal case of Steelvest, Inc. v. Scansteel Service Center, Inc., 807 S.W. 2d 476 (Ky. 1991), sets forth various criteria that a trial court should follow when faced with a motion for summary judgment. In this regard, the court in Steelvest held:

> this Court has also repeatedly admonished that the rule [C.R. 56] is to be cautiously applied. . . The record must be viewed in a light most favorable to the party opposing the motion for summary judgment and all doubts are to be resolved in his favor. Even though a trial court may believe the party opposing the motion may not succeed at trial, it should not render a summary judgment if there is any issue of material fact. The trial judge must examine the evidence, not to decide any issue of fact, but to discover if a real issue exists.

Id. at 480 (internal citations omitted). The party moving on a motion for summary judgment should not succeed unless the right to judgment is shown with such clarity that there is no room left for controversy, and it appears impossible for the party against whom the motion is made to produce evidence at trial which would warrant a judgment in his favor. Id.; Capital Cadillac Olds, Inc. v. Roberts, 813 S.W. 2d 287 (Ky. 1991)(when facts or reasonable inferences to be drawn from those facts are in dispute, summary judgment is improper and the issue should be tried).

More recently, the Supreme Court reiterated that summary judgment "is to be cautiously applied." Lipsteuer v. CSX Transportation, Inc., 37 S.W.3rd 732, 735 (Ky. 2001), citing Steelvest at 480. In Scifres v. Kraft, 916 S.W.2d 779, 781 (Ky. 1996), the court held that "[t]he standard of review on appeal of a summary judgment is whether the trial court correctly found that there were no genuine issues as to any material fact and that the moving party was entitled to judgment as a matter of law." Working within this framework, the Trial Court improperly granted summary judgment as there is a genuine issue of material fact as to whether or not the two causes of action are identical.

In Yeoman v. Commonwealth of Kentucky, 983 S.W.2d 459 (Ky. 1998), this Court noted that the doctrine of res judicata has two sub-parts: claim preclusion and issue preclusion. This Court stated that "claim preclusion bars a party from re-litigating a previously adjudicated cause of action and entirely bars a new lawsuit on the same cause of action." Yeoman, 983 S.W.2d at 465. However, in order for claim preclusion to bar subsequent litigation, certain elements must be present. Specifically, the following elements must be present: "First, there must be identify of the parties. **Second, there must be identify of the causes of action.** Third, the action must have been resolved on

the merits." Id. at 465 (internal citations omitted)(emphasis added). This Court also made it clear that in order "for claim preclusion to apply, the subject matter of the subsequent suit must be identical." Id.

In Yeoman, this Court also stated that "issue preclusion bars the parties from re-litigating any issue actually litigated and finally decided in an earlier action." Id. In order for issue preclusion to bar subsequent litigation, certain elements must be present. First, the issue in the second case must be the same as the issue in the first case. Second, the issue must have been actually litigated in the first case. Third, the issue is actually decided in the first case. Fourth, the decision on the issue in the first case must have been necessary to the Court's judgment. Id.

In considering the doctrine of res judicata, this Court has stated that "'[i]dentity of the subject matter and the parties is not alone a sufficient test for a former judgment to be res judicata of a later action; the true requirement is that the causes of action in the two suits shall be the same.'" 3D Enterprises Contracting Corporation v. Louisville & Jefferson County Metropolitan Sewer District, 174 S.W.3d 440, 448 (Ky. 2005), citing Blevins v. Johnson, 344 S.W.2d 375, 377 (Ky. 1961). The Blevins Court also made it clear that "[u]ndoubtedly, the subject matter involved in the two actions must be the same, for otherwise there could not be identity of the causes of action, but **the same transaction or state of facts may give rise to distinct or successive causes of action, and a judgment on one will not necessarily bar a suit on another** (50 C.J.S. Judgment § 652, p. 96, et seq)." Blevins, 344 S.W.2d at 377 (emphasis added).

The Court of Appeals improperly affirmed the trial court's order granting CSXT summary judgment on the grounds of res judicata. There are several material questions

of fact which preclude summary judgment. There are at least three significant differences between the two cases which lead to the conclusion that the two causes of action are separate and distinct.

First, the injuries in the two cases are clearly separate and distinct. In fact, during the hearing on CSXT's Motion for Summary Judgment, CSXT acknowledged that the two causes of action involve different injuries. (TAPE 1; 4/19/06; 01:47:54). The Jefferson Circuit case dealt with injuries to Mr. Coomer's upper extremities, i.e., carpal tunnel syndrome and ulnar neuropathy. The Perry Circuit case deals with injuries to Mr. Coomer's back, neck, shoulders and knees.

Second, there is a material question of fact as to the mechanism of injury for the two cases. Mr. Coomer argued in the Perry Circuit Court and the Court of Appeals that the mechanism of injury in the two respective cases are clearly different. Mr. Coomer presented the uncontradicted affidavit of Tyler A. Kress, Ph.D., that clearly states the mechanism of injury in the two cases is quite different. In fact, Dr. Kress states that "when trying to understand back injuries versus upper extremity problems, one should recognize that their respective mechanisms of injury are different." (R.A., vol. 1, pp. 361-365, ¶4). Dr. Kress added that "simply stated that the mechanism for back injury [Perry Circuit case] for Mr. Coomer is lifting/load-related as opposed to the primary mechanism of injury to his upper extremity [Jefferson Circuit case], which is use of hand tools and vibration." (Id.) The response of CSXT to the affidavit of Dr. Kress is that the only mechanism of injury was the repetitive stress/cumulative trauma over the course of his railroad career. This general statement is not supported by any evidence and creates a question of fact. As noted in Blevins, the same transaction or set of facts may give rise to distinct or successive causes

of action and a judgment on one will not necessarily bar a suit on another. Blevins, 344 S.W.2d at 377.

In Campbell v. Consolidated Rail Corp., et al., 2008 U.S. Dist. LEXIS 61757 (N.D. N.Y. Aug. 8, 2008), the plaintiff pursued a FELA claim for his alleged work related injuries that occurred over a period of time. The defendant filed a motion for summary judgment asserting that the claims were barred by the statute of limitations, and more important to this case, that claim preclusion barred his claim. In 1998, the plaintiff settled an earlier case against his employer for bilateral carpal tunnel syndrome. Campbell, 2008 U.S. Dist. LEXIS at *2. Subsequent to the settlement, the plaintiff experienced problems in his hands and knees. Id. In the plaintiff's second case, he sought damages for arthritic changes in his hands and pain in his knees. With regards to the claim for injuries to the plaintiff's hands, the railroad argued that claim preclusion bars the second case because of the prior settlement for bilateral carpal tunnel syndrome. The railroad argued that the second claim is not new and distinct from the first claim dealing with bilateral carpal tunnel syndrome. Id. at *20. In rejecting this defense and denying the railroad's motion for summary judgment, the Court noted that the railroad failed to submit an affidavit from any expert who examined the medical records and reached any conclusion as to whether the claims in the two cases are connected. Id. The Court stated that "without any medical evidence or records demonstrating that the injuries are factually or medically indistinct, the Court cannot make a legal determination that the 1998 release is even relevant in this case." Id. at *20-21.

As in Campbell, CSX did not present an affidavit of an expert or even any evidence to support their argument that the two claims are identical or even connected. The only

evidence presented indicates that the mechanisms of injury for the two cases are quite different. In light of the uncontradicted affidavit of Dr. Kress, it was an error to grant summary judgment on the grounds of res judicata.

The third fact that displays that the two causes of action are not identical, as argued by CSXT, is that the two causes of action accrued at different times. The cause of action set forth in the Perry Circuit case did not accrue until the October 4, 2002 letter from Dr. Craig Beard. This was almost one year later than the Jefferson Circuit case was filed. The Court of Appeals even acknowledged the different accrual dates when it stated that the cause of action in the Perry Circuit case accrued on October 4 ,2002, which is subsequent to the filing of the Jefferson Circuit case. See, Appendix at p. 28. Since the two causes of action accrued on different dates, it is illogical to state that they are identical. Moreover, the ruling of the Perry Circuit Court and the Court of Appeals impermissibly infringe on Mr. Coomer's federal substantive rights.

Under the FELA, Mr. Coomer must file his claim "within three years of the date the cause of action accrued." 45 U.S.C. § 56. As such, Mr. Coomer has three years once a claim accrues to decide if he wants to pursue such a claim. By improperly applying the doctrine of res judicata to the two causes of action, which the Court of Appeals acknowledged accrued at different times, the trial court and the Court of Appeals essentially rewrote 45 U.S.C. § 56 that provides a three year statute of limitations.

In cases such as this, it can be difficult to determine when a cause of action accrues. However, this Court has provided guidance in answering the critical question of when a cause of action accrues. In Lipsteur v. CSX Transportation, Inc., 37 S.W.3d 732, 737 (Ky. 2000), this Court applied the discovery rule and stated that the applicable rule is

"that a cause of action accrues when a plaintiff knows or, in the exercise of reasonable diligence, should know of both the injury and its cause." In order to answer this question, "it needs to be determined when Appellant was put on notice about the cause of his injury, and if that notice was within the statute of limitations. The first is a question of fact and should therefore be answered by a jury. The latter, however, is a question of law." Id. (internal citation omitted).

As noted above, the Court of Appeals acknowledged that different accrual dates when it stated that the Perry Circuit case accrued on October 4, 2002, which is almost one year after the Jefferson Circuit case was filed. However, the ruling of the trial court and the Court of Appeals circumvents the three year statute of limitations provided by the FELA. Moreover, issues dealing with the FELA statute of limitations are a matter of federal law rather than state law. In Lipsteur, this Court stated that ". . . statute of limitations issues are substantive rather than procedural." Lipsteur, 37 S.W.3d at 736. In Hassell v. Missouri Pac. R.R. Co., 880 S.W.2d 39 (Tx. App. Tyler 1994), it was noted that "[t]hough procedural matters in FELA cases filed in state court are generally governed by state rather than federal procedural law, **compliance with the three-year limitations in 45 U.S.C. § 56 is a substantive condition precedent to recovery under the FELA."** Id. at 44 (internal citation omitted)(emphasis added).

By improperly applying the doctrine of res judicata to the two causes of action which the Court of Appeals acknowledged accrued at different times, the lower courts essentially rewrote 45 U.S.C. § 56 which provides a three year statute of limitations once a claim accrues. Future applications of the lower courts' ruling and/or rationale will have unintended results in that it will adversely affect or alter the federal substantive rights of

railroad employees seeking redress under the FLEA. Assume that a plaintiff files a FELA claim for carpal tunnel syndrome allegedly caused by the use of hydraulic equipment that produced excessive vibration. Also assume that one month prior to trial the plaintiff is diagnosed with a hearing loss after years of working with the hydraulic equipment. The impact of the ruling below would require the plaintiff to hastily file a motion to amend the Complaint in order to assert the second cause of action. Essentially, the plaintiff would have a one month statute of limitations. This is contrary to 45 U.S.C. § 56 which provides a three year statute of limitations. In this hypothetical, the plaintiff would not have the benefit of the three year statute of limitations to investigate his claim and make an informed decision as to whether or not to even pursue the newly accrued cause of action. If the plaintiff waited until after the trial to file his new cause of action for the hearing loss, the railroad would argue that the new claim is barred by res judicata because the mechanism of injury is allegedly the same, i.e., the use of hydraulic equipment. In essence, the impact of the ruling would rewrite the federal statute of limitations, and as such, adversely affect Mr. Coomer's federal substantive rights as provided by 45 U.S.C. § 56.

The case at hand, which Mr. Coomer asserts involves different mechanisms of injury, and the above hypothetical are certainly situations envisioned by the Blevins court when it stated that ". . . the same transaction or state of facts may give rise to distinct or successive causes of action, and a judgment on one will not necessarily bar a suit on another (50 C.J.S. Judgment § 652, p. 96, et seq)." Blevins, 344 S.W.2d at 377.

Moreover, the rule against splitting a cause of action is inapplicable. The trial court held that "it is the duty of a plaintiff to assert his entire cause of action resulting from a single tort . . . ." (R.A., vol. 1, pp. 344-347). It is undisputed that Mr. Coomer's causes of

action accrued at different times. The ruling of the trial court implies that there is one cause of action. However, as the Court of Appeals acknowledged the two claims accrued on different dates. As such, there are two, not one, causes of action. This is not a situation where Mr. Coomer was injured in a motor vehicle accident and pursued a claim for personal injuries in one county and a claim for property damages in another county. Nor is it a situation where an individual pursued a cause of action for personal injuries in one county and a second cause of action in a different county for additional personal injuries that accrued at the very same time as the first claim. It is illogical to claim that Mr. Coomer split a single cause of action when the two claims accrued at different dates which the Court of Appeals acknowledged.

B. CSXT should be estopped from asserting the defense of *res judicata.*

While it continues to be Mr. Coomer's position that the doctrine of *res judicata* does not apply as the two causes of action are not identical in that they accrued at different times, CSXT should be estopped from even asserting the doctrine based on the actions in the Jefferson Circuit case. As previously noted, the Jefferson Circuit case's damages for personal injuries to Mr. Coomer's upper extremities, i.e. carpal tunnel syndrome and ulnar neuropathy allegedly resulting from his use of vibratory equipment that exposed his upper extremities to excessive vibration. After the Jefferson Circuit case had been pending for almost one year, Mr. Coomer learned that the pain he was experiencing in his neck, back, and knees were partially caused by his job duties when one of his treating physicians, Craig A. Beard, M.D. made the causal connection. Prior to the jury trial scheduled for July 29, 2003, counsel for Mr. Coomer inquired if CSXT would be agreeable

to Mr. Coomer amending the complaint in the Jefferson Circuit case to include the new claim for injuries to his neck, back, and knees that, as the Court of Appeals noted, did not accrue until October 4, 2002. CSXT opposed the proposed amendment to include these new injuries. In fact, it was the position of CSXT that "should you or your client wish to pursue a cause of action for any injuries in addition to those set forth in your initial Complaint, you will need to file a separate action. In response, Mr. Coomer filed the instant action in Perry Circuit Court on June 24, 2003. (R.A., Vol. 1, pp. 1-6).

To underscore the importance of the letter, it should be noted that the letter was written by CSXT's attorney after consultation with his client. In addressing the attorney/client relationship our Supreme Court made the following observation:

> The relationship is generally that of principal and agent; however, the attorney is vested with powers superior to those of any ordinary agent because of the attorney's quasi-judicial status as an officer of the court; thus the attorney is responsible for the administration of justice in the public interest, a higher duty than any ordinary agent owes his principal.

Clark v. Foley L. Burden Jones Buick GMC Trucks, Inc., 917 S.W.2d 574, 575 (Ky. 1996), citing Daugherty v. Runner, 581 S.W.2d 12, 16 (Ky. App. 1978). CSXT had an opportunity to consider Mr. Coomer's request to amend the Complaint and expressed its position in its letter telling Mr. Coomer to file a separate action. CSXT was most likely opposed to Mr. Coomer's request to add this new cause of action to the Jefferson Circuit case because it would most likely have led to a continuance. In any event, it had an opportunity to consider the request and it expressed its opinion that Mr. Coomer should file a "separate action."

In Rivermont Inn, Inc. v. Bass Hotels & Resorts, Inc., et al, 113 S.W.3d 636 (Ky.

App. 2003), the court discussed *inter alia*, the concepts of promissory estoppel and equitable estoppel. Discussing equitable estoppel, the Court stated that

> ". . .[t]o invoke the doctrine, a party must show (1) lack of knowledge and of the means of knowledge of the truth as to the facts in question; (2) reliance, in good faith, upon the conduct or statements of the party to be estopped; and (3) action or inaction based thereon of such a character as to change the position or status of the party claiming the estoppel, to his injury, detriment or prejudice."

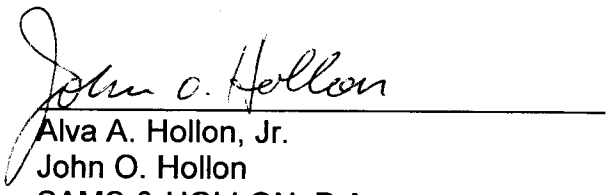
Id. at 643. At the time of the filing of the Perry Circuit case, Mr. Coomer had no reason to believe that CSXT would change its position and argue that the new cause of action was part of the Jefferson Circuit case and should have been asserted in that claim. The letter from CSXT clearly states that if Mr. Coomer wished to pursue a cause of action for the new injuries, he should file a separate action. Since he had no reason to believe that CSXT would change its position, he relied in good faith on the letter and filed the instant action. After the instant case was filed, CSXT changed its position and when the Jefferson Circuit case was dismissed, it was to the detriment of Mr. Coomer. While the Perry Circuit court did not address the letter in the estoppel argument in its opinion and Order, the Perry Circuit court was bothered by the letter and expressed concerns as a practical matter with the effect of CSXT's letter. (TAPE No.1; 4/19/06; 02:31:26-02:33:15).

Based on the foregoing, CSXT should be estopped from changing its position when Mr. Coomer, had no reason to believe CSXT would change its position, relied on good faith on the letter written by CSXT's counsel and filed the Perry Circuit case.

CONCLUSION

Plaintiff/Appellant, Emmett E. Coomer respectfully requests that this Court reverse the opinion affirming the Perry Circuit Court's dismissal of the Complaint.

Respectfully submitted,



Alva A. Hollon, Jr.
John O. Hollon
SAMS & HOLLON, P.A
9424 Baymeadows Road • Suite 160
Jacksonville, Florida 32256-7967
904-737-1995 Telephone
904-737-3838 Facsimile

Co-counsel for Appellee

Thomas I. Eckert
P.O. Box 7272
Hazard, Kentucky
606-436-4445 Telephone
606-439-0748 Facsimile

Co-counsel for Appellee

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