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

APPELLANT'S REPLY BRIEF

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CERTIFICATE OF SERVICE

I hereby certify that on this 13th day of October, 2009, copies of this Appellant's Reply Brief 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. The undersigned further certifies that the record on appeal was not removed from the Perry Circuit Court Clerk's Office.

John O. Hollon

One of the Counsel for Appellant

STATEMENT OF POINTS AND AUTHORITIES

I. ARGUMENT

A. The Doctrine of Res Judicata was improperly applied as the two causes of action are not identical.

In support of its argument that there is an identity of the causes of action set forth in the Perry Circuit case and the Jefferson Circuit case, CSXT relies on several cases that are factually distinct from the case at hand, and therefore, do not apply in this situation.

First, CSXT's reliance on Van Gorder v. Grand Trunk Western Railroad, Inc., 2008 U.S. Dist. LEXIS 94027 (E.D. Mich. Nov. 10, 2008) is misplaced. In Van Gorder, the plaintiff injured his right shoulder on October 17, 2003 when he attempted to close a railcar door. Id. at *2. He filed his first case on February 2, 2005, pursuant to the FELA wherein he alleged that his railroad employer negligently failed to inspect the railcar door. Id. This case was ultimately dismissed when summary judgment was entered. Id. at *2-3.

The plaintiff then filed a second case regarding the exact same injury to his right shoulder that occurred on the exact same date as in the first case pursuant to the Federal Safety Appliance Act. Id. at *3-4. In granting the railroad's motion for summary judgment in the second case, the court relied on the doctrine of res judicata. The court concluded that there was an identity of the two causes of action. Specifically, the court noted that "[i]n this case, Plaintiff's factual allegations in the earlier complaint and the instant action are identical: **same date of injury, same location of injury, same method of injury.**" Id. at *12 (emphasis added).

As such, the Van Gorder case is clearly different from the case at hand. First, unlike Van Gorder, Mr. Coomer does not have the same date for his injuries. In fact, the Court

of Appeals acknowledged in its Opinion that the Perry Circuit cases did not even accrue until October 4, 2002, which is almost one year after the Jefferson Circuit case was filed. Opinion Affirming, 7/3/08, p. 8, Appellant's Appendix to Brief, pp. A21-A30. Second, unlike Van Gorder, Mr. Coomer did not have the same location of injuries in the two causes of action. In fact, during the hearing on CSXT's Motion for Summary Judgment, he asserted that the two causes of action involve different injuries, which CSXT acknowledged. (TAPE 1; 4/19/06; 01:47:54 and 02:08:36). Third, unlike Van Gorder, Mr. Coomer has alleged different mechanisms of injury. Mr. Coomer presented the Affidavit of Tyler A. Kress, Ph.D. regarding whether or not the mechanisms of injury in the two cases are identical. Dr. Kress clearly states that the mechanisms of injury in the respective cases are different. In Van Gorder, even though there were two cases, there was only one traumatic event, i.e., the plaintiff injured his right shoulder (the only injury) on October 17, 2003 (only one date of injury) when he closed the railcar door (the only method of injury).

Additionally, CSXT's reliance on Preferred Automotive Sales, Inc. v. DCFS USA, LLC, 625 F.Supp.2d 459 (E.D. Ky. 2009) to support its argument that res judicata was proper is misguided as it is factually different from the case at hand. It is clear in Preferred Automotive Sales that there is an identity of the causes of action because both claims revolve around the single transaction of the sale of one vehicle. As noted above, Mr. Coomer alleged different injuries that occurred at different times as a result of different mechanisms of injury.

Since there is not an identity of the causes of action in the Perry Circuit case and the Jefferson Circuit case, it was improper to dismiss the Perry Circuit case on the grounds of res judicata.

B. The Perry Circuit case is not identical to the Jefferson Circuit Case.

The two cases are not identical as the injuries are different, the mechanisms of injury are different, and the two causes of action accrued at different times. Based upon the foregoing, it is illogical to state that the two causes of action are identical.

Under the FLEA, Mr. Coomer must file his claim "within three years of the date the cause of action accrued." 45 U.S.C. § 56. Pursuant to the FELA, Mr. Coomer has three years to file a claim once it accrues. However, the improper application of the doctrine of res judicata to the Perry Circuit case essentially rewrote 45 U.S.C. § 56.

Future applications of the lower courts' ruling and/or rationale will lead to unjust results. For example, if we assume that Mr. Coomer had complained about ringing in his ears while working with loud, vibratory equipment during his employment with CSXT before the first case was filed and after the first case (i.e. hearing loss) is dismissed he subsequently develops carpal tunnel syndrome at some point in the future as a result of his use of the same equipment, CSXT will undoubtedly argue that the doctrine of res judicata bars the carpal tunnel claim. CSXT will argue that there is an identity of the causes of action in that they both allegedly involve the same transaction, i.e., his use of certain equipment and performance of certain tasks throughout his railroad career.

Moreover, CSXT ignored the case of Blevins v. Johnson, 344 S.W.2d 375 (Ky. 1961). In Blevins, the court discussed res judicata and made it clear that "[u]ndoubtedly, the subject matter 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 . . . . " Blevins, 344 S.W.2d at 377 (emphasis added).

CSXT also ignored Campbell v. Consolidated Rail Corp., et al., 2008 U.S. Dist. LEXIS 61757 (N.D. N.Y. August 8, 2008). In Campbell, the plaintiff pursued a FELA claim for injuries that allegedly occurred over the course of his railroad career. After settling a claim for bilateral carpal tunnel syndrome, the plaintiff pursued a second claim for various injuries including arthritic changes to his hands. Id. at *2. The railroad filed a motion for summary judgment arguing that claim preclusion barred the second case because of the earlier settlement. In rejecting this argument, 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. at *20. 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.

C. Mr. Coomer did not split a cause of action.

In Capital Holding Corp. v. Bailey, 873 S.W.2d 187, 193 (Ky. 1994), this Court stated that "the rule against splitting causes of actions, found in Restatement (Second) of Judgments, §§ 24 and 26, is an equitable rule, limiting all causes of action arising out of a 'transaction' to a single procedure." The Court also acknowledged that a cause of action does not exist until it has accrued.

The Court of Appeals acknowledged that Mr. Coomer's Perry Circuit case did not accrue until after the Jefferson Circuit case had been filed. Mr. Coomer did not split a

cause of action because the Perry Circuit cause of action did not even exist at the time the first one accrued. When it accrued, a second cause of action was born that was subject to the three year statute of limitation set forth in 45 U.S.C. § 56. For the purposes of this Brief, even if we assume that Mr. Coomer's entire railroad career is one transaction, it is clear 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 . . . ." Blevins v. Johnson, 344 S.W.2d at 377.

D. Mr. Coomer did not split his damages into two suits.

Once again, Mr. Coomer suffered different injuries at different times, and therefore, his two causes of action accrued at different times. The cases relied upon by CSXT are easily distinguished from the case at hand. In Ison v. Thomas, 2007 WL 1194374 (Ky. App. 2007), the parties were involved in a motor vehicle accident resulting in both property damage and personal injuries. After successfully recovering damages at trial for the property damage to his vehicle, he filed a second case for personal injuries. The second case was barred by res judicata because the personal injury claim should have been pursued in the first claim.

In Ison, there was only one accident. The claims for property damage and personal injuries both accrued on the same day. This is very different from the case at hand where the Court of Appeals has acknowledged different accrual dates for the two causes of action. CSXT also acknowledged at the hearing on the Motion for Summary Judgment that the two causes of action deal with different injuries. Additionally, Mr. Coomer presented the Affidavit of Dr. Kress as evidence of the different mechanisms of injury. Finally, as in Campbell v. Consolidated Rail Corp., et al., 2008 U.S. Dist. LEXIS 61757 (N.D. N.Y.

received an October 4, 2002 letter from Craig A. Beard, M.D. In this letter, Dr. Beard opined that his back, neck and knee injuries were partially caused by his job.

Pursuant to 45 U.S.C. § 56, Mr. Coomer has three years from the date that the Perry Circuit cause of action accrued in which to file it.

G. In this case, the application of the Doctrine of Res Judicata rewrites the federal statute of limitations.

The doctrine of res judicata was improperly applied based upon the facts of this case. Once again, CSXT's reliance on Van Gorder v. Grand Trunk Western Railroad, Inc., 2008 U.S. Dist. LEXIS 94027 (E.D. Mich. Nov. 10, 2008) is misplaced. As previously noted, Van Gorder is easily distinguished from the case at hand. In Van Gorder, the second case was barred by res judicata in that it dealt with the exact same date of injury, exact same injury, and exact same mechanism as the first case. As such, Van Gorder is factually different than this case.

In Swindell v. Florida East Coast Rwy., et. al., 178 Fed. Appx. 989 (11th Cir. 2006), the doctrine of res judicata was applied to bar a second case. In Swindell, the plaintiff filed successive cases regarding respiratory injuries. In dismissing the second case, the court noted that the plaintiff knew, or should have known about his emphysema or chronic obstructive pulmonary disease (COPD) prior to his first lawsuit. Id. at 991. The court ruled that the second claim did not allege "a 'second injury' that would trigger a new statute of limitation . . . " Id. The two causes of action were identical because both claims dealt with exposure to industrial pollutants allegedly resulting in COPD. Id.

In the case at hand, Mr. Coomer's second claim did not accrue until approximately one year after the first claim had been filed. Another difference from Swindell is that the

two causes of action deal with different injuries. 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 rewrote 45 U.S.C. § 56 which provides a three year statute of limitations once a claim accrues.

Finally, Cano v. Everest Minerals Corp., et al., 2004 U.S. Dist. LEXIS 3963 (W.D. Tex. March 10, 2004) is factually different from the case at hand. As CSXT noted in its Brief, Plaintiff Cano's second case alleging that her cancer was caused by the defendant's uranium mining and milling operations was dismissed on the grounds of res judicata even though her thyroid cancer was diagnosed approximately one month before her first case was dismissed. Cano, 2004 U.S. Dist. LEXIS 3963, *24. While the two cases dealt with different injuries, the method of injury, i.e., the defendant's uranium mining and milling operations, was the alleged cause in both cases. While there were different damages, they arose out of the very same occurrence. Id. at *17.

While the cases in Cano revolve around a single method of injury, Mr. Coomer presented the Affidavit of Dr. Kress wherein he states that the method of injury in the two cases is quite different. If we consider Mr. Coomer's entire railroad career as a single transaction or occurrence, it will lead to unjust and inequitable results. Moreover, it is clear that ". . . the same transaction or state of facts may give ruse to distinct or successive causes of action, and a judgment on one will not necessarily bar a suit on another . . .." Blevins v. Johnson, 344 S.W. at 377.

Moreover, Mr. Coomer does not contend that the doctrine of res judicata can never apply in a FELA case. However, it simply does not apply in the case at hand. If Mr. Coomer sustained injuries to his neck, back and shoulders operating a faulty brake switch

on a date certain and then filed successive lawsuits for the different injuries, the doctrine of res judicata would apply. There would be an identity of the causes of action because they revolve around the single occurrence of operating a faulty brake switch. This hypothetical is similar to the facts of Van Gorder and Baltimore S.S. Co. which deal with injuries occurring from one accident on a date certain. However, it is a different situation to compare one's entire railroad career to the single occurrences discussed in those cases.

As such, the lower courts improperly applied the doctrine of res judicata to this case as there is not an identity of the causes of action since there are different injuries, different dates of injuries and different methods of injuries. Also, the application of res judicata to this case rewrote the three year statute of limitations provided by 45 U.S.C. § 56.

H. CSXT should be estopped from relying on the doctrine of res judicata.

When counsel for Mr. Coomer approached CSXT about the possibility of amending the complaint in the Jefferson Circuit case to include the new claim for injuries to his neck, back and knees that did not accrue until October 4, 2002, CSXT opposed the amendment. CSXT took the position 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." Appellant's Appendix to Brief, p. A13. Mr. Coomer subsequently filed the instant action in Perry Circuit Court. (R.A., Vol. 1, pp. 1-6).

In Glus v. Brooklyn Eastern District Terminal, 359 U.S. 231 (1959), the Court held that it was improper to dismiss the case on the ground that the statute of limitations barred the action based on the defendant's representations that the plaintiff had seven years rather than three in which to file the Complaint. The Court stated that "to decide the case

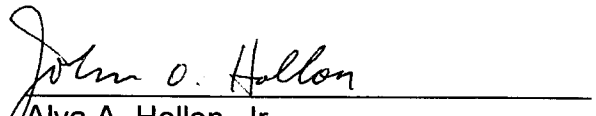
we need look no further than the maxim that no man may take advantage of his own wrong." Id. at 232. The Court explained that "the principle is that where one party has by his representations or his conduct induced the other party to a transaction to give him an advantage which it would be against equity and good conscience for him to assert, he would not in a court of justice be permitted to avail himself of that advantage." Id. at 234, citing Insurance Co. v. Wilkinson, 13 Wall. 222, 233. While the Perry Circuit court did not address the letter in the estoppel argument in its Opinion and Order, it 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 asserting the doctrine of res judicata.

II. CONCLUSION

Based upon the foregoing, 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,



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