SUPREME COURT OF KENTUCKY
CASE NO. 2008-SC-0784-D

EMMETT COOMER — APPELLANT

V.

APPEAL FROM COMMONWEALTH OF KENTUCKY
COURT OF APPEALS
NO. 2008-CA-002054

CSX TRANSPORTATION, INC. — APPELLEE

BRIEF FOR APPELLEE
CSX TRANSPORTATION, INC.

Edward H. Stopher
Darryl S. Lavery
BOEHL STOPHER & GRAVES, LLP
Aegon Center, Suite 2300
400 West Market Street
Louisville, Kentucky 40202
Phone: (502) 589-5980
Fax: (502) 561-9400
estopher@bsg-law.com
dlavery@bsg-lw.com
COUNSEL FOR APPELLEE

CERTIFICATE OF SERVICE

I hereby certify that on the 4th day of September, 2009, a true and complete copy of Brief for Appellee was served by U.S. First Class Mail with sufficient postage affixed to Hon. William Engle, III, Perry Circuit Judge, Hall of Justice, 545 Main Street, Hazard, Kentucky 41701, Sam Givens, Clerk Kentucky Court of Appeals, 360 Democrat Drive, Frankfort, Kentucky 40601; Alva A. Hollon, Jr., John O. Hollon, SAMS & HOLLON, P.A., 9424 Baymeadows Road, Suite 160, Jacksonville, Florida 32256-7967 and Thomas I. Eckert, P.O. Box 7272, Hazard, Kentucky 41702. The undersigned further certifies that the record on appeal was not removed from the Perry Circuit Court Clerk's Office.

COUNSEL FOR APPELLEE

I. STATEMENT CONCERNING ORAL ARGUMENT

Appellee, CSX Transportation, Inc. ("CSX"), desires oral argument and agrees with Appellant, Emmett E. Coomer ("Mr. Coomer"), that oral arguments will assist the Court in reaching a full understanding of the legal issues and underlying facts involved in this appeal, particularly in light of the lengthy and interwoven procedural history involved in this case.

II. COUNTERSTATEMENT OF POINTS AND AUTHORITIES

I. STATEMENT CONCERNING ORAL ARGUMENT i

II. COUNTERSTATEMENT OF POINTS AND AUTHORITIES ii

III. COUNTERSTATEMENT OF THE CASE 1

A. INTRODUCTION 1

Federal Employers' Liability Act ("FELA"), 45 U.S.C. §§ 51 1

B. PROCEDURAL HISTORY—*JEFFERSON CIRCUIT CASE* 3

C. PROCEDURAL HISTORY—*PERRY CIRCUIT CASE* 4

IV. ARGUMENT 7

A. MR. COOMER'S PERRY CIRCUIT CASE WAS PROPERLY DISMISSED BASED ON THE DOCTRINE OF *RES JUDICATA* 7

The Doctrine of *Res Judicata* Under Kentucky Law (Issue and Claim Preclusion) 7

Slone v. R&S Mining, Inc., Ky., 74 S.W.3d 259, 261 (2002) 7
Yoeman, M.D. v. Commonwealth of Kentucky's Health Policy Board, Ky., 983 S.W.2d 459, 465 (1998) 7, 8
Restatement (Second) of Judgments § 24 8
Neil Smith v. Bob Smith Chevrolet, 275 F.Supp 808, 813 (W.D.Ky. 2003) 8, 10
Gorder v. Grand Trunk Western Railroad, Inc., 2008 WL 4901090 (E.D.Mich 2008) 8, 10, 28
Preferred Automotive Sales, Inc. v. DCFS USA, LLC, 2009 WL 1586728 (E.D.Ky. 2009) 8, 9, 10

B. MR. COOMER'S PERRY CIRCUIT CASE WAS IDENTICAL TO, AND INVOLVED THE SAME ISSUE AND CONTROVERSY IN, THE JEFFERSON CIRCUIT CASE 10

C. MR. COOMER MAY NOT SPLIT HIS CAUSE OF ACTION AND HAVE IT TRIED PIECEMEAL 13

Johnson v. Dry Creek Oil & Gas Co., Ky.App. 141 S.W.2d 263, 265 (1040) 13
Restatement (Second) of Judgments, §§ 24 and 26 13

Capital Holding Corp. v. Bailey, Ky., 873 S.W.2d 187, 193 (1994) 13
Newman v. Newman, Ky.App., 451 S.W.2d 417, 419 (1970) 13
Hays v. Sturgill, Ky.App., 193 S.W.2d 648 13
Whittaker v. Cecil, Ky., 69 S.W.2d 69 (2002) 14
Wenk v. Ruby, Ky.App., 412 S.W.2d 247, 249 (1967) 14
Karr's Adm'R v. Harmon, Ky.App., 116 S.W.2d 947 (1938) 14

D. MR.COOMER MAY NOT SPLIT HIS DAMAGES OR INJURIES INTO MULTIPLE SUITS 14

Travelers Indemnity Co. v. Moore, Ky.App., 201 S.W.2d 7, 9 (1947) 14, 15
Ison v. Thomas, Ky.App., 2007 WL 1194374 (2007) 15
Restatement (Second) of Judgments § 24 (1982) 15
Restatement (Second) of Judgments § 24 (2009) 15

E. MR. COOMER MAY NOT SPLIT A CAUSE OF ACTION MERELY BECAUSE OF THE INVOLVEMENT OF DIFFERENT THEORIES OF LIABILITY OR RECOVERY OR DIFFERENT MECHANISMS OF INJURY 16

Davis v. Unites States Steel, 688 F.2d 166, 171 (3rd Cir. 1982) 16
Lubrizol Corp. v. Exxon Corp., 929 F.2d 960, 964 (3rd Cir. 1991) 16
Baltimore S.S. Co. v. Phillips, 274 U.S. 316 (1927) 16, 20

F. MR. COOMER HAS NOT AND CANNOT DEMONSTRATE THAT ANY EXCEPTION TO THE RULE AGAINST CLAIM SPLITTING APPLIES IN THIS CASE 18

Watts v. KS&H Partnership, Ky., 957 S.W.2d 233 (1998) 18
Hopkins v. Ratliff, Ky.App., 957 S.W.2d 300, 301 (1997) 26

G. THE DOCTRINE OF RES JUDICATA EQUALLY APPLIES IN FELA ACTIONS AND ITS APPLICATION DOES NOT INTERFERE WITH MR. COOMER'S SUBSTANTIVE DUE PROCESS RIGHTS 27

Swindell v. Florida East Coast Railway Company, 178 Fed.Appx. 989 (11 Cir. 2006) 29
Cano v. Everest Minerals Corp. et. al., 2004 WL 502628 (W.D. Tex. 2004) 30, 31

H. MR. COOMER'S ESTOPPEL ARGUMENT IS BOTH NOVEL AND TOTALLY WITHOUT MERIT 32

Greathouse v. Shreve, Ky., 891 S.W.2d 387 (1995) 36
Camenisch v. City of Standford, Ky.App., 140 S.W.3d 1 (2003) 36

V. CONCLUSION 38

VI. APPENDIX 39

III. COUNTERSTATEMENT OF THE CASE

Mr. Coomer omitted matters essential for a fair and accurate statement of the case.

A. INTRODUCTION

On June 24, 2003, Mr. Coomer filed suit in the Perry Circuit Court for personal injuries he sustained as a result of his alleged exposure to harmful and excessive repetitive stress and cumulative trauma over the course of his 20+ year career working for CSX. Mr. Coomer's claim was brought under the Federal Employers' Liability Act ("FELA"), 45 U.S.C. §§ 51 et. seq., which provides the exclusive remedy for railroad employees injured on the job. (Record on Appeal, Vol. 1, pp. 1-6)("RA").

Twenty months prior to the filing of the Perry Circuit Complaint, Mr. Coomer filed an identical cause of action in the Jefferson Circuit Court which (1) identified the **same theory of liability and recovery**, (2) asserted the **same allegations of negligence**, (3) involved the **same mechanism of injury** (i.e., repetitive stress/cumulative trauma), (4) over the **same time period** (i.e., during his 20+ year career working for CSX), and (5) concerned similar and overlapping injuries allegedly stemming from the **same mechanism of injury and allegedly tortious conduct**. (RA, Vol. 1, pp. 1-6; Vol. 2, pp. 132-147). The Jefferson Circuit Complaint was adjudicated on the merits and summarily dismissed with prejudice by Judge Clayton on July 21, 2003 based upon a finding of no negligence on the part of CSX. (RA, Vol. 2, pp. 132-147). In anticipation of this dismissal, and only **twenty-six days** before Judge Clayton entered her Order granting summary judgment, Mr. Coomer filed the same cause of action involving the same issue and controversy in Perry Circuit Court.

The issue on appeal is whether the long standing, well recognized doctrine of *res judicata* bars Mr. Coomer's "second chance" FELA suit filed in the Perry Circuit Court. For *claim preclusion* purposes, the resolution of this issue turns on whether Mr. Coomer's two FELA suits filed in the Jefferson and Perry Circuit Courts involve "identical causes of action"—as Mr. Coomer does not challenge CSX's satisfaction of the two remaining prerequisites for the application of claim preclusion ("identity of the parties" and "resolution of the first action on the merits"). For *issue preclusion* purposes, the resolution of this issue turns on whether the "issue" in the second case was the same as the "issue" in the first case—as Mr. Coomer does not challenge CSX's satisfaction of the two remaining prerequisites for the application of issue preclusion (that the issue was "actually litigated and decided in the first action" and that the decision on the issue in the prior action was "necessary to the court's judgment").

Mr. Coomer's two FELA suits are identical causes of action which involve the same issue, despite Mr. Coomer's multiple attempts to manipulate—or ignore—certain facts in the hope of fabricating distinguishing characteristics between the two suits, which simply do not exist. Mr. Coomer is mistaken in his assertion that the proper application of the doctrine of *res judicata* somehow violates or is overridden by his claimed absolute, unconditional right to file his FELA suit whenever he sees fit. Rather, the doctrine of *res judicata* is alive and well in FELA actions and, more importantly, when applied to the particular facts as they actually exist in this case, Mr. Coomer's claim is barred. Mr. Coomer's estoppel argument is, as the Court of Appeals characterized it, indeed "novel" and "totally without merit." (See Kentucky Court of Appeals Opinion, No. 2006-CA-002054-MR, pp. 8-9, attached as part of Appendix; Appendix 1.)

B. PROCEDURAL HISTORY—*JEFFERSON CIRCUIT CASE.*

On October 8, 2001, Mr. Coomer filed a Complaint in the Jefferson Circuit Court under the FELA. The Complaint alleged that Mr. Coomer was exposed to excessive and harmful repetitive, cumulative trauma to his body over the course of his 20+ year career working for CSX which caused various injuries to him. The Complaint further alleged that CSX failed to provide Mr. Coomer with a reasonably safe place to work, the ultimate issue in any FELA action. (RA, Vol. 2, pp. 132-147). Mr. Coomer's allegations of negligence against CSX were actively litigated in the Jefferson Circuit Court for twenty-one months (October, 2001—July, 2003). (RA, Vol. 2, pp. 132-147).

On April 30, 2003, CSX filed a Motion for Summary Judgment in the Jefferson Circuit Court. CSX's Motion was largely based upon Mr. Coomer's own deposition testimony, which removed any question of fact as it related to CSX's alleged negligence. In no uncertain terms, Mr. Coomer testified that there was nothing wrong with the tools and equipment with which he worked at CSX and that they were all well suited for the tasks at hand. Mr. Coomer also testified that there was nothing unsafe that CSX created or made him do that caused his injuries in any way. (RA, Vol. 2, pp. 132-147).

Judge Clayton ultimately granted CSX's Motion for Summary Judgment. The Opinion and Order provided: "There is no indication from this record that there is any issue of material fact as to CSX's negligence . . . Since there is no evidence of negligence, this Court will grant CSX's Motion for Summary Judgment." (RA, Vol. 2, pp. 132-147).

In the spring and early summer of 2003, several procedural matters were occurring in the Jefferson Circuit Case leading up to the July 29, 2003 trial date. First, as

mentioned earlier, CSX filed its Motion for Summary Judgment. Second, on June 26, 2003, CSX filed a Motion to Strike Mr. Coomer's Witnesses and Exhibits on the ground that they were untimely disclosed. Recognizing the very real prospect that Judge Clayton would grant these motions, Mr. Coomer moved the Jefferson Circuit Court on July 1, 2003 to voluntarily dismiss his claim. Mr. Coomer's goal in seeking a voluntary dismissal just days before trial was to avoid any adverse, dispositive rulings and instead, start his case anew in what he believed would be a more friendly forum (i.e., Perry Circuit Court). As an additional safeguard, Mr. Coomer filed a Motion to Continue the Trial on July 9, 2003. On July 21, 2003, Judge Clayton granted CSX's Motion for Summary Judgment, thereby rendering Mr. Coomer's Motion to Voluntarily Dismiss and Motion to Continue as moot. (RA, Vol. 2, pp. 132-147).

C. PROCEDURAL HISTORY—*PERRY CIRCUIT CASE.*

It was in the context of the Jefferson Circuit Case that Mr. Coomer's Perry Circuit Case was filed. By July of 2003, Mr. Coomer's Jefferson Circuit Case was on the eve of being dismissed. In a desperate attempt to start his case anew, Mr. Coomer simply filed a new case in the Perry Circuit Court on June 24, 2003, which was premised on the same mechanism of injury and acts of negligence actively litigated (and ruled upon) in the Jefferson Circuit Court and involved injuries Mr. Coomer knew about while the Jefferson Circuit Case was pending and many months before it was ultimately dismissed (i.e., injuries to his neck, back, knees and shoulders).

Despite knowing of additional injuries to his neck, back, knees and shoulders, Mr. Coomer never sought leave of court to amend his Jefferson Circuit Complaint to add these injuries. The Perry Circuit Case was filed for no other reason than to litigate the

same matter which Mr. Coomer unsuccessfully litigated in another court. The fact that Mr. Coomer chose Perry County, a county 180 miles away from Jefferson County where he has never resided, in which to file his "second chance suit" demonstrates that Mr. Coomer was forum shopping in an attempt to re-litigate a case previously adjudicated (unsuccessfully) on the merits. (RA, Vol. 2, pp. 132-147).

In light of Judge Clayton's grant of Summary Judgment, coupled with the filing of Mr. Coomer's "second chance suit," and the *res judicata* issues presented by that suit, CSX moved the Perry Circuit Court to stay all proceedings until the Kentucky Court of Appeals ruled upon Mr. Coomer's appeal of the award of Summary Judgment. CSX's Motion to Stay was ultimately granted pending the outcome of the appeal. (RA, Vol. 2, pp. 132-147).

On July 30, 2004, the Kentucky Court of Appeals unanimously affirmed the Jefferson Circuit Court's dismissal of Mr. Coomer's FELA claim on the grounds that Mr. Coomer failed to proffer more than a scintilla of evidence that CSX was negligent and failed to satisfy his burden to prove that CSX knew or should have known that the conditions of his workplace posed an unreasonable risk of any cumulative trauma injury. (RA, Vol. 2, pp. 132-147). Thereafter, on April 3, 2006, CSX filed its Motion for Summary Judgment on the ground that Mr. Coomer's Perry Circuit Court Complaint was barred by the doctrine of *res judicata.* (RA, Vol. 2, pp. 132-147).

The Perry Circuit Court granted CSX's Motion for Summary Judgment on May 2, 2006. The Court's Opinion, in relevant part, provided:

> CSX has demonstrated that all essential parts for both subparts of the doctrine of *res judicata* to apply—claim preclusion and issue preclusion...[I]t is the opinion of the Court that the injuries at issue in the present matter **arose out of the same transactional nucleus of facts**, that

> is, that Plaintiff was negligently exposed to excessive and harmful repetitive stress/cumulative trauma (the alleged mechanism of injury in both suits) over the course of his career at CSX which allegedly caused his claimed injuries. The issue of negligence as it relates to the mechanism of injury (repetitive stress/cumulative trauma) was **actively litigated** in the Jefferson Circuit Court and **adjudicated on the merits** in that Court. Plaintiff is therefore **barred as a matter of law**, based upon the doctrine of *res judicata*, **from splitting his cause of action (and in particular, splitting his damages)** between the Jefferson Circuit Court and the Perry Circuit Court. To the extent Plaintiff suffered additional injuries allegedly linked to Defendant's allegedly negligent act of exposing Plaintiff to excessive and harmful repetitive stress/cumulative trauma, it is clear from the record that **those claims could have and should have been raised in the Jefferson Circuit Court action.**

(RA, Vol. 3, pp. 344-347; attached as part of Appendix; Appendix 2).

On July 3, 2008, the Kentucky Court of Appeals unanimously affirmed the Perry Circuit Court's dismissal of Mr. Coomer's FELA claim on the ground that Mr. Coomer failed to establish any exception to the proper application of the doctrine of *res judicata* to the facts of his case. The Court of Appeals went on to state that the "evidence conclusively established that while the Jefferson Circuit Court case was pending, 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." Accordingly, the Court held, "since Coomer discovered the cause of the injuries to his back, neck, shoulders and knees while the Jefferson Circuit Court case was pending, the proper procedure would have been for Coomer to file a motion to amend his complaint in his pending litigation," which Mr. Coomer failed to do. (See Kentucky Court of Appeals Opinion, No. 2006-CA-002054-MR, pp. 8-9) (Appendix 1).

IV. ARGUMENT

A. MR. COOMER'S PERRY CIRCUIT CASE WAS PROPERLY DISMISSED BASED ON THE DOCTRINE OF *RES JUDICATA*.

The Doctrine of *Res Judicata* Under Kentucky Law (Issue and Claim Preclusion)

The doctrine of *res judicata* has been an established principle of Kentucky law for decades. In fact, the Kentucky Supreme Court held that "the doctrine of *res judicata* (also known as the doctrine of the finality of judgments) is basic to our legal system and stands for the principle that once the rights of the parties have been finally determined, litigation should end." *Slone v. R&S Mining, Inc.*, Ky., 74 S.W.3d 259, 261 (2002)(Emphasis added). The Kentucky Supreme Court has similarly held that "the rule that issues which have been once litigated cannot be the subject of a later action is not only salutary, but necessary to the speedy and efficient administration of justice." *Yoeman, M.D. v. Commonwealth of Kentucky's Health Policy Board*, Ky., 983 S.W.2d 459, 465 (1998).

The doctrine of *res judicata* is formed by two subparts: claim preclusion and issue preclusion. 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. For claim preclusion to bar further litigation, certain elements must be present—(1) an identity of the parties, (2) an identity of the causes of action and (3) resolution on the merits. *Yoeman*, Ky., 983 S.W.2d at 465.

Issue preclusion bars the parties from re-litigating any issue actually litigated and finally decided in an earlier action. For issue preclusion to operate as a bar to further litigation, certain elements must also be present—(1) the issue in the second case must be

the same as the issue in the first case, (2) the issue must have been actually litigated and actually decided in the first action and (3) the decision on the issue in the prior action must have been necessary to the court's judgment. *Yoeman*, Ky., 983 S.W.2d at 465.

For issue preclusion purposes, the key inquiry in deciding whether the lawsuits concern the same controversy (or issue) is whether they "**both arise from the same transactional nucleus of facts**." If the two suits concern the same controversy, "then the previous suit is deemed to have adjudicated every matter **which was or could have been brought** in support of the cause of action." *Yoeman*, Ky., 983 S.W.2d at 465. (Emphasis added.)

For claim preclusion purposes, Kentucky Courts utilize the same "transactional approach" set forth in the Restatement (Second) of Judgments § 24 to determine whether there is an identity of the causes of action. The transactional approach "looks beyond the legal theories asserted to see if the two claims stem from the **same underlying circumstances**" and "requires the Court to look at a 'claim' in factual terms and to make it coterminous with the transaction regardless of the number of substantive theories or variant forms of relief flowing from those theories that may be available to the plaintiff." *Neil Smith v. Bob Smith Chevrolet*, 275 F.Supp 808, 813 (W.D.Ky. 2003). Stated somewhat differently, an identity of the causes of action exists "if the claims arose out of the **same transaction or series of transactions** or if the claims arose out of the **same core of operative facts.**" *Gorder v. Grand Trunk Western Railroad, Inc.*, 2008 WL 4901090 (E.D.Mich 2008)(Emphasis added).

An analytical criteria for determining whether two suits involve the same controversy or issue for *res judicata* purposes can be found in *Preferred Automotive*

Sales, Inc. v. DCFS USA, LLC, 2009 WL 1586728 (E.D.Ky. 2009). In *Preferred Automotive Sales*, the plaintiff, a used car dealer ("Preferred"), sold a Mercedes-Benz to Charles Allen which allegedly contained certain undisclosed defects. Mr. Allen filed suit against Preferred asserting claims for fraud and violations of the Kentucky Consumer Protection Act, alleging that Preferred knowingly failed to disclose certain defects at the time of sale.

Preferred later filed a third party complaint against MSC, the owner of the auction at which the Mercedes was purchased, alleging that MSC was liable to it under a theory of common law indemnity. Preferred also asserted additional allegations that MSC failed to inform it of certain defects in the car and that MSC made false assertions that the car had no defects.

Preferred's indemnity/contribution action against MSC was dismissed via summary judgment because, under Kentucky law, a party may not seek common law indemnity or contribution from another for its allegedly intentional or grossly negligent acts. Mr. Allen, however, prevailed against Preferred at trial on his fraud and Consumer Protection Act claims.

After losing at trial, Preferred filed a separate lawsuit against MSC alleging breach of contract, negligence, and fraud based on the facts set forth in its third party complaint in the Allen lawsuit. MSC argued that *res judicata* precluded Preferred from bringing those claims because it did not raise them along with its claim for indemnity in the Allen matter. The Court agreed. Because the claims asserted in the first action were **"germane to, implied in and essentially connected with the present claims"** and

because both claims involved the **"same basic legal theory,"** the court held that the two claims involved the same controversy or issue:

> Preferred's claim for common law indemnity raised before the Jefferson County Circuit Court is **"germane to, implied in, or essentially connected with" its present claims** raised in this Court for breach of contract, negligence, and fraud. **The basic legal theory for each of the claims is the same**: MSC had a duty to accurately and completely inform Preferred of defects in the Mercedes, MSC breached that duty, misrepresenting the condition of the vehicle, and, as a result, damages occurred for which MSC is responsible. In other words, Preferred could have raised the claims averred before this Court at the same time as its claim for common law indemnity before the Jefferson Circuit Court, but it chose not to do so. These claims are now precluded by the doctrine of *res judicata* and shall be dismissed.

Id. at *4.

B. MR. COOMER'S PERRY CIRCUIT CASE WAS IDENTICAL TO, AND INVOLVED THE SAME ISSUE AND CONTROVERSY IN, THE JEFFERSON CIRCUIT CASE.

In order to determine whether Mr. Coomer's Perry Circuit and Jefferson Circuit cases involve an identity of the causes of action and the same issue or controversy, this Court must analyze both cases to determine whether they involve claims which (1) arise from the same transactional nucleus of facts (*Yoemen*), (2) stem from the same underlying circumstances (*Bob Smith Chevrolet)*, (3) arise from the same transaction or series of transactions (*Grand Trunk*), (4) arise from the same core of operative facts *(Grand Trunk*) and (5) involve the same basic legal theories (*Preferred Auto*). This Court must also determine whether Mr. Coomer's claims asserted in the first action (Jefferson Circuit) are "germane to, implied in and essentially connected with" the claims presented in the second action (Perry Circuit)(*Preferred Auto*).

A comparison of the Complaints filed in each action leads to only one conclusion, both cases involve an identity of the causes of action.

- Both cases involved allegations of negligence against CSX over the course of Mr. Coomer's 20+ year career working for CSX which allegedly caused and/or contributed to Mr. Coomer's alleged injuries;

- Both cases involved allegations that CSX exposed Mr. Coomer to excessive and harmful repetitive, cumulative trauma to his body parts;

- Both cases involved allegations that CSX failed to provide Mr. Coomer with a reasonably safe place to work;

- Both cases involved allegations that CSX failed to warn Mr. Coomer of certain risks, dangers and harm regarding his alleged exposures to excessive and harmful repetitive, cumulative trauma to his body parts; and

- Both actions involved allegations that CSX failed to take certain actions to reduce the alleged excessive and harmful repetitive, cumulative trauma to which Mr. Coomer was allegedly exposed.

(RA, Vol. 1, pp. 1-6). (RA, Vol. 2, pp. 132-147).

Both actions involved the same issues—whether CSX provided Mr. Coomer with a reasonably safe place to work over the course of his career and if not, whether any of Mr. Coomer's alleged injuries were caused by CSX's failure to provide Mr. Coomer with a reasonably safe place to work. But more importantly and more specifically, both actions concerned (1) whether CSX exposed Mr. Coomer to excessive and harmful repetitive, cumulative trauma to his body parts, (2) whether CSX failed to warn Mr. Coomer of certain risks, dangers and harm regarding his alleged exposures to excessive and harmful repetitive, cumulative trauma to his body parts, and (3) whether CSX failed to take certain actions to reduce the alleged excessive and harmful repetitive, cumulative trauma to which Mr. Coomer was allegedly exposed. All of these issues were raised in Jefferson Circuit Court. Allowing these issues to be raised yet again in the Perry Circuit Court violates the doctrine of *res judicata.* (RA, Vol. 2, pp. 132-147).

In both cases, the "transactional nucleus of facts," "series of transactions," "underlying circumstances," and "core of operative facts" was Mr. Coomer's 20+ year career working at CSX during which he engaged in certain tasks and used certain tools, equipment and machinery. The "same basic legal theory" in both cases was that his performance of certain tasks and his use of certain tools, equipment and machinery at CSX's request exposed his various body parts to "repetitive, cumulative trauma" which allegedly caused various injuries to various parts of his body. As a result, an identity of the causes of action is present.

In an attempt to distinguish the two cases, Mr. Coomer disregards the analysis adopted by Kentucky courts and instead, creates his own criteria for determining whether the two cases involve an identity of the causes of action and the same issue or controversy. According to Mr. Coomer's criteria, if two cases involve new or different injuries or assert new or different theories of liability/recovery or mechanisms of injury, such distinctions preclude *res judicata*, regardless of whether such injuries and theories arise out of the same underlying transaction or series of transactions (i.e., alleged exposure to repetitive, cumulative trauma over the course of one's railroad career). In other words, under Mr. Coomer's criteria, parties are permitted to split their claims into separate causes of action and have them tried in a piecemeal fashion.

Applying Mr. Coomer's criteria to the facts of this case, Mr. Coomer should be permitted to file one suit for injuries to his upper extremities and another suit for injuries to his neck, back, shoulders and knees, even if he knows of all injuries during the pendency of the first suit and is advised that such injuries were caused by his work activities during the pendency of the first suit. He should similarly be permitted to file

one suit for excessive vibration and another suit for excessive lifting. Kentucky courts have flatly rejected this approach.

C. MR. COOMER MAY NOT SPLIT HIS CAUSE OF ACTION AND HAVE IT TRIED PIECEMEAL.

Kentucky courts have consistently held that the rule of *res judicata* has long recognized that a party may not split his cause of action and have it tried piecemeal. "No doctrine is more firmly established than that a party may not split a cause of action and that a second suit may not be maintained upon a cause which **existed at the time of the former one** between the same parties involving the same subject matter." *Johnson v. Dry Creek Oil & Gas Co.*, Ky.App. 141 S.W.2d 263, 265 (1040)(Emphasis added). "The rule against splitting causes of actions, found in the Restatement (Second) of Judgments, §§ 24 and 26, is an equitable rule, limiting all causes of action arising out of a single 'transaction' to a single procedure." *Capital Holding Corp. v. Bailey*, Ky., 873 S.W.2d 187, 193 (1994).

In Kentucky, if a cause of action should have been presented and the party failed to do so and the latter should again arise in another action, "it will be held that the first action was *res judicata* as to all causes of action that **should have been presented.**" *Newman v. Newman*, Ky.App., 451 S.W.2d 417, 419 (1970)(Emphasis added). On that same note, the Court of Appeals in *Newman* cited their previous ruling in *Hays v. Sturgill*, Ky.App., 193 S.W.2d 648, in which they held:

> The rule that issues which have been once litigated cannot be the subject of later action is not only salutary but necessary in the administration of justice. The subsidiary rule that one may not split up his cause of action and have it tried piecemeal rests upon the same foundation. To permit it would not be just to the adverse party or fair to the courts. **The rule is elementary that, when a matter is litigated, parties are required to bring forward their <u>whole case</u>; and the plea of *res judicata* applies not**

> **only to the points upon which the court was required by the parties to form an opinion and pronounce judgment, <u>but to every point which properly belonged to the subject of the litigation, and which the parties, exercising reasonable diligence, might have brought forward at that time</u>.**

Newman, Ky.App., 451 S.W.2d at 419 (Emphasis added); See also, *Whittaker v. Cecil*, Ky., 69 S.W.2d 69 (2002)("A corollary of the [res judicata] doctrine is that a party may not split a cause of action. As a result, a final judgment precludes subsequent litigation not only of those issues upon which the court was required to form an opinion and pronounce judgment, but also of **matters included within those issues and matters that, with the exercise of reasonable diligence, might have been raised at that time.**"). *Id.* at 72. (Emphasis added); *Wenk v. Ruby*, Ky.App., 412 S.W.2d 247, 249 (1967) ("It has been a longstanding matter of law that Kentucky Courts adhere to the principle that piecemeal litigation is contrary to the public policy of the courts."); and *Karr's Adm'R v. Harmon, Ky.App.*, 116 S.W.2d 947 (1938)("[I]t is a fixed policy of the law that litigation be terminated as speedily as is consistent with the orderly administration of justice, and to that end litigants are required to seasonably assert all their causes of action or defenses and may not try them by piecemeal.").

D. MR.COOMER MAY NOT SPLIT HIS DAMAGES OR INJURIES INTO MULTIPLE SUITS.

The prohibition against splitting causes of action equally applies to situations in which parties attempt to maintain separate actions for separate damages or injuries sustained from the same tort. "[O]ne sustaining an injury with consequent damage consisting of more than one item of damage may not split his cause of action by maintaining in his name separate suits against the same tortfeasor for each item of damage sustained." *Travelers Indemnity Co. v. Moore*, Ky.App., 201 S.W.2d 7, 9 (1947).

The Court in *Travelers* held that it was a well-settled rule that a damaged party may not split his single cause of action for one item of damage sustained by him by a tortfeasor and then later maintain an independent action against the same defendant to recover another item of damage produced by the same tort. Id. at 9. (Emphasis added.) According to the Court in *Travelers*, "The reason for such a declared rule is that **it is the duty of a plaintiff to assert his entire cause of action resulting from a single tort, and upon his failure to do so he, in effect, renounces his right to recover other items of damages in subsequent actions.**" *Id.* at 10. (Emphasis added). (RA, Vol. 2, pp. 132-147).

A similar holding can be found in *Ison v. Thomas*, Ky.App., 2007 WL 1194374 (2007). In *Ison*, the parties were involved in a motor vehicle accident. Ison sued Thomas for property damage to his vehicle. At trial, Ison was awarded $5,000 for property damage. Ison later brought a separate action against Thomas for personal injuries arising out of the same motor vehicle accident. However, the Court ruled that Ison's personal injury claim was barred by *res judicata* because the claim was part of the same cause of action as his previously litigated property damage claim. Further, Ison was not permitted to bring two separate damage actions because each type of alleged damage arose from the same operative facts. In so holding, the Court relied on the Restatement (Second) of Judgments § 24 (1982):

> When a valid and final judgment rendered in an action extinguishes the plaintiff's claim ... the claim extinguished includes all rights of the plaintiff to remedies against the defendant with respect to **all or any part of the transaction, or series of connected transactions, out of which the action arose.**[1]

[1] Comment (b) of the Restatement (Second) of Judgments § 24 (2009) is further instructive regarding the analysis one should undertake to determine whether two suits actually constitute a single claim. "Among the factors relevant to a determination of whether the facts are so woven together as to constitute a single

Id. at *1. (Emphasis added). Applying the foregoing rule of law, the Court held, "Ison's first suit, whatever else it may have sought, did seek negligence damages against Thomas. Ison was thus obliged to seek recovery for the full extent of Thomas's liability in a single suit." *Id.* at 2. Thus, Ison was not permitted to bring two different suits for different types of injuries arising out of the same circumstances.

E. MR. COOMER MAY NOT SPLIT A CAUSE OF ACTION MERELY BECAUSE OF THE INVOLVEMENT OF DIFFERENT THEORIES OF LIABILITY OR RECOVERY OR DIFFERENT MECHANISMS OF INJURY.

The prohibition against splitting causes of action equally applies to situations in which parties attempt to maintain separate actions for allegedly different theories of liability or recovery or, stated differently, different mechanisms of injury. It is well known that a single cause of action may comprise claims under a number of different statutory or common law grounds. *See, e.g., Davis v. Unites States Steel*, 688 F.2d 166, 171 (3rd Cir. 1982). It is equally well known that a single cause of action can assert different theories of recovery. For this reason, "multiple claims do not arise merely because the several legal theories depend upon different shadings of the facts or would emphasize different elements of the facts." *Lubrizol Corp. v. Exxon Corp.,* 929 F.2d 960, 964 (3rd Cir. 1991). The application of these principles are demonstrated in the court's opinion in *Baltimore S.S. Co. v. Phillips*, 274 U.S. 316 (1927).

In *Baltimore S.S. Co.*, the plaintiff worker was injured when a supportive joist on the defendant's ship fell and struck him. The plaintiff sued the ship operator and the

---

claim are their relatedness in time, space, origin, or motivation, and whether, taken together, they form a convenient unit for trial purposes. Though no single factor is determinative, the relevance of trial convenience makes it appropriate to ask how far the witnesses or proofs in the second action would tend to overlap the witnesses or proofs relevant to the first. If there is a substantial overlap, the second action should ordinarily be held precluded."

United States in admiralty in the United States District Court in Maryland alleging that they were negligent in failing to provide a safe place to work and for supplying unseaworthy gear and tackle on the vessel. The district court later held that the defendants were not negligent.

The plaintiff worker then filed a subsequent action against only the ship operator in New York state court, which was later removed to the United States District Court for the Eastern District of New York. The second suit alleged that the injury occurred under the same circumstances as the first suit, but alleged a different theory of liability – namely that the ship operator and its employees negligently controlled and operated the vessel and its appliances. The plaintiff claimed that the "grounds of negligence pleaded were distinct and different in character; the ground alleged in the first case being the use of defective appliances, and in the second, the negligent operation of the appliances by the [employees of the ship]."

The Court rejected the plaintiff's argument that he had presented two separate and distinct causes of action. The Court explained:

> [I]t is perfectly plain that the respondent suffered but one actionable wrong, and was entitled to but one recovery, whether his injury was due to one or the other of several distinct acts of alleged negligence, or to a combination of some or all of them. In either view, there would be but a single wrongful invasion of a single primary right of the plaintiff, namely, the right of bodily safety, whether the acts constituting such invasion were one or many, simple or complex ... The injured respondent was bound to set forth in his first action for damages **every ground of negligence** which he claimed to exist and upon which he relied, and cannot be permitted, as was attempted here, to rely upon them by piecemeal in successive actions to recover for the same wrong and injury.

Id. at 321-322. (Emphasis added).

F. MR. COOMER HAS NOT AND CANNOT DEMONSTRATE THAT ANY EXCEPTION TO THE RULE AGAINST CLAIM SPLITTING APPLIES IN THIS CASE.

In Kentucky, there are only two recognized limitations to the rule against claim splitting. First, Kentucky Courts hold that a prior claim will not preclude a subsequent claim if the subsequent claim was not yet ripe during the prior claim. In other words, the defense that a plaintiff has improperly split his cause of action cannot be used to cut off a cause of action before it accrues. Second, Kentucky Courts will not preclude a subsequent claim if the prior claim was based on matters which are "not germane to, implied in or essentially connected with the actual issues in the second case." *Watts v. KS&H Partnership*, Ky., 957 S.W.2d 233 (1998).

Mr. Coomer has not demonstrated and cannot demonstrate that any exception to the rule against claim splitting applies in this case for several reasons. First and foremost, it is undisputed that Mr. Coomer knew he suffered from additional injuries other than to his upper extremities at the time his Jefferson Circuit Case was pending (i.e., knowledge of injuries to his neck, back, shoulders and knees). More importantly, Mr. Coomer knew that these additional injuries were causally linked to his alleged repetitive, cumulative work at CSX while the Jefferson Circuit Case was pending.

During the October 2001-July 2003 timeframe in which Mr. Coomer's Jefferson Circuit Case was actively litigated, Mr. Coomer knew he suffered from additional injuries not identified in his Jefferson Circuit Complaint, injuries which were later identified in his Perry Circuit Case (i.e., neck, back, shoulders and knees). For example, Mr. Coomer was served with an Interrogatory in the Jefferson Circuit Case which asked him to identify all current and prior medical conditions. Mr. Coomer answered that

Interrogatory on May 11, 2002, over **one year** before the Jefferson Circuit Case was dismissed, and identified a traumatic back injury, prior traction to benefit the neck or back, a prior history of back and/or neck pain, sprains and numbness, and tingling and pain in the arms, hands, legs or feet. (See Interrogatory Answer No. 16, included as part of the Appendix; Appendix 3).

Mr. Coomer also repeatedly testified during his October 29, 2002 deposition taken in the Jefferson Circuit Case that he had problems with both knees, both shoulders, back and neck and that he had these problems for years. In fact, Mr. Coomer was prescribed various forms of treatment for these injuries. Deposition testimony from Dr. Beard (Plaintiff's treating orthopedic surgeon) also revealed that Mr. Coomer was actively treated for the very injuries later identified in the Perry Circuit Case at the same time the Jefferson Circuit Case was pending. Dr. Beard testified as follows:

> Q. From July of 2000 until March of 2003, what other areas of the body did you examine and treat?
>
> A. We dealt with both upper extremities, both right and left, as far as wrist and elbow. We dealt with left shoulder, lower back, and both knees.

(RA, Vol. 2, pp. 132-147).

At the same time Mr. Coomer had knowledge of additional injuries (i.e., while the Jefferson Circuit Case was pending), Mr. Coomer also knew that his treating orthopedic surgeon, Dr. Beard, casually linked those injuries to his work activities at CSX which were at the very heart of his Jefferson Circuit Case. In fact, Dr. Beard put his opinion in writing for Mr. Coomer's benefit in a "to whom it may concern" letter dated October 4, 2002, which stated: "He [Mr. Coomer] continues to have symptoms related to both his neck,

back and knees, which I do feel like are 50% related to his weight and 50% related to his job." (RA, Vol. 2, pp. 132-147).

Mr. Coomer knew in the 2001-2003 time frame during which the Jefferson Circuit Case was pending that he had injuries to the very parts of his body later identified in the Perry Circuit Case (i.e., neck, back, knees and shoulders). Mr. Coomer also believed at that time that the allegedly excessive and harmful repetitive, cumulative trauma played a role in his injuries and he also knew that one of his physicians (Dr. Beard) casually linked those injuries to his work activities.

Given these undisputed facts, there can be no question that Mr. Coomer's claim for additional injuries was indeed **ripe** at the time the Jefferson Circuit Case was pending. Despite that fact, Mr. Coomer never sought leave to amend his Complaint in the Jefferson Circuit Case, which he was required to do under the long line of cases which require litigants to bring forth their whole case and entire cause of action in one proceeding. Because Mr. Coomer failed in this regard, the doctrine of *res judicata* bars Mr. Coomer's claims for additional injuries which properly belonged to the subject of the first lawsuit and which Mr. Coomer, exercising reasonable diligence, could and should have brought forward at that time. (RA, Vol. 2, pp. 132-147).

Second, Mr. Coomer's assertion that the two cases involved different theories of liability/recovery or different mechanisms of injury that therefore preclude the application of *res judicata* also fails. To begin, as demonstrated by the court's holding in *Baltimore S.S. Co.*, "the fact that one suffers an injury from one or the other of several distinct acts of negligence or from a combination of some or all of them, does not negate the fact that the person suffers but one actionable wrong." The same is true here.

Regardless of whether Mr. Coomer's injuries arose from his use of vibratory tools, lifting heavy equipment, or some other work activity, they all arose from the same actionable wrong identified by Mr. Coomer in both cases—his alleged exposure to repetitive, cumulative trauma over the course of his railroad career. Accordingly, all injuries and all theories of liability could and should have been asserted in the original Jefferson Circuit Case.

Third, it must be pointed out that that claimed distinction between the two cases in terms of the mechanism of injury involved is merely a ploy to avoid the proper application of *res judicata*. At the time both cases were filed, Mr. Coomer never made the distinction that the first case was a vibration case involving one set of injuries and that the second case was a lifting case involving a different set of injuries. Rather, the pleadings reveal that the claims in both cases were broadly plead as repetitive stress, cumulative trauma clai ms involving injuries which occurred over the course of Mr. Coomer's 20+ year career at CSX.

The very terms chosen by Mr. Coomer to describe his Jefferson Circuit Case—*repetitive* stress and *cumulative* trauma—demonstrate that no one, single, solitary event (i.e., vibration or lifting) caused his alleged injuries. In fact, Mr. Coomer's Answers to Interrogatories served in the Jefferson Circuit Case clearly state "Since this is a repetitive stress case, there was no specific incident." (See Answer to Interrogatory No. 5, Appendix 3).

In another Interrogatory Answer, Mr. Coomer characterized the nature of his injuries "being due to repetitive **motion**." (See Answer to Interrogatory No. 6, Appendix 3). In essence, Mr. Coomer claims that the repetitive and cumulative nature of

performing various tasks and working with and handling various tools and equipment, over a period of many years, caused his injuries. Mr. Coomer's claim is that a series of events (or series of transactions) took place over a period of many years and when combined together, constituted a single event which resulted in various injuries to various parts of his body. There is simply no way to link up any particular injury to any particular work task/activity, performed at a particular time. In fact, Mr. Coomer never attempted to do so because of his own characterization of his injuries (i.e., resulting from repetitive stress/cumulative trauma over a period of many years). (RA, Vol. 2, pp. 303-313). Characterized in this way, Mr. Coomer cannot now, when faced with a *res judicata* defense, make distinctions which were never previously made by him.

Mr. Coomer's Jefferson Circuit Case was never limited to excessive vibration as the *exclusive* mechanism of injury. In fact, one need only review Mr. Coomer's discovery responses filed in the Jefferson Circuit Case to see that he identified numerous repetitive work activities performed as part of his job at CSX, such as bending/rotating his back and neck, lifting objects, squatting, stooping, pushing, pulling, swinging motions and extensions/flexions of his shoulder. Mr. Coomer described doing these motions "all day long with the exception of a 30 minute lunch break." Mr. Coomer went on state in his discovery responses that he would lift items which weighed as much as 200 lbs. (See Answer to Interrogatory No. 9, Appendix 3).

During Mr. Coomer's deposition taken in the Jefferson Circuit Case, he continued to identify several work tasks/activities of a repetitive nature which he claimed caused his injuries. At no time did Mr. Coomer ever limit the scope of his allegations to tools and equipment which involved excessive vibration. For example, the excerpts below were

taken from Mr. Coomer's deposition in which he testified to matters (which had absolutely nothing to do with excessive vibration) which he claimed caused his injuries:

Q: Well, what do you mean its job related? What on the job caused it? Was it the reachers?
A: The repetitive motion.
Q: What repetitive motion?
A: Throwing spikes, throwing plates, different jobs.
Q: Just doing work?
A: Doing repetitive motion work.
Q: Well, what repetitive motion work did you do?
A: Throwing spikes, throwing plates, plugging, knocking on anchors.

(RA, Vol. 2, pp. 303-313). (RA, Vol. 2, pp. 132-147).

Elsewhere in Mr. Coomer's deposition he complained about having to walk on uneven surfaces, such as slopes, and having to bend and squat multiple times throughout a work day, all of which he believed caused his knee problems. (Mr. Coomer's depo., pp. 144-145, attached as part of the Appendix; Appendix 4). All of this testimony demonstrates that Mr. Coomer never limited his claim in the Jefferson Circuit Court to excessive vibration. To the contrary, he asserted a very broad and general claim of having to do "repetitive motion work," which included lifting and throwing heavy railroad equipment, all of which was precisely the same allegedly negligent work at issue in his Perry Circuit Case. (RA, Vol. 2, pp. 303-313).

The fact that both cases involved the same tools and equipment is yet another illustration that both cases entailed the same "repetitive motion work." Specifically, on June 2, 2003, while the Jefferson Circuit Case was pending, Mr. Coomer's counsel wrote to Defense Counsel requesting an inspection of certain tools and equipment which he claimed involved excessive vibration. (RA, Vol. 2, pp. 303-313). On July 23, 2003, as part of the Perry Circuit Court case, Mr. Coomer filed a Request for Entry Upon Premises

to examine certain tools and equipment. (RA, Vol. 2, pp. 303-313). **The tools and equipment identified in the June 2, 2003 letter and the July 23, 2003 pleading were exactly the same**. One of the primary reasons for the inspection in both cases was for Mr. Coomer's biomechanical expert (Tyler Kress, PhD) to weigh the items in order to support Mr. Coomer's lifting claim. In fact, as mentioned earlier, Mr. Coomer made it a point to mention in his discovery responses served in the Jefferson Circuit Case that certain hand held tools he used were "heavy and bulky." (See Answer to Interrogatory No. 10, Appendix 3).

Vibration would have been an issue in the Perry Circuit Case just as much as lifting and other work tasks/activities were indeed a part of the Jefferson Circuit Case under the broad umbrella of repetitive stress/cumulative trauma. In fact, the Perry Circuit Complaint itself identifies the use of hydraulic tools and jackhammers as a source of Mr. Coomer's injuries (i.e., because of the vibration and lifting components). To be sure, there is only one, single transaction in both cases—repetitive stress/cumulative trauma over a period of many years. (RA, Vol. 2, pp. 303-313).

Mr. Coomer purposely pled very broad allegations of negligence in his repetitive stress/cumulative trauma case filed in the Jefferson Circuit Court in order to bring every possible work task/activity under the broad umbrella of repetitive stress/cumulative trauma. While the Jefferson Circuit Case may very well have addressed excessive vibration, that case was never solely limited to that very specific, narrowly tailored mechanism of injury. Mr. Coomer's own deposition testimony and discovery responses cited above clearly demonstrate that other specific mechanisms of injury were

contemplated (i.e., lifting and throwing heavy railroad equipment and tools)—all under the broad umbrella of repetitive stress/cumulative trauma. (RA, Vol. 2, pp. 303-313).

Because the Jefferson Circuit Complaint was pled in a broad fashion, Mr. Coomer was properly precluded from maintaining another action for the same mechanism of injury identified and pled in his earlier Jefferson Circuit Complaint—repetitive stress/cumulative trauma. To illustrate, Mr. Coomer cannot file a broadly pled repetitive stress/cumulative trauma claim in Jefferson County and upon the dismissal of his claim on the merits, file a subsequent repetitive stress/cumulative trauma claim in Perry County for "excessive lifting," followed by a repetitive stress/cumulative trauma claim in Fayette County for "awkward postures," followed by a repetitive stress/cumulative trauma claim in Warren County for "excessive vibration"—particularly when injuries associated with each particular activity were known at the time the initial suit was filed. (RA, Vol. 2, pp. 303-313).

Finally, in support of his inaccurate claim that the Jefferson and Perry Circuit Court actions involved separate and distinct claims involving separate and distinct mechanisms of injury, Mr. Coomer primarily relies upon an Affidavit of Tyler Kress, Ph.D., which was never presented to Judge Engle at the time he considered and granted CSX's Motion for Summary Judgment. For this reason, CSX never had an opportunity to contest the assertions in it. Rather, Mr. Coomer improperly submitted Dr. Kress' purported "uncontradicted" Affidavit as part of the proceeding on his Motion to Reconsider the grant of summary judgment. A party, however, cannot use a motion to alter, amend or vacate judgment to raise arguments and introduce evidence that could have and should have been presented during proceedings before entry of judgment.

Hopkins v. Ratliff, Ky.App., 957 S.W.2d 300, 301 (1997). Accordingly, Dr. Kress' Affidavit should not be considered as part of this appeal.

Even if considered, Dr. Kress' Affidavit is insignificant. Nowhere in Dr. Kress' Affidavit is there a denial that the injuries in both cases allegedly stem from repetitive stress/cumulative trauma (the single transaction or mechanism of injury at issue in both cases). Rather, the Affidavit advocates a scenario in which Mr. Coomer could have dozens of particularized, super specific claims arising out of repetitive stress/cumulative trauma—one for lifting, one for awkward positions, one for vibration, etc. These claims can then be further split into additional claims separated by injury (i.e., a lifting case for Mr. Coomer's shoulders, a lifting case for his back, etc.). This scenario is contrary to the long-standing law on the doctrine of *res judicata* and would flood the courts with repetitious, never ending cases.

Mr. Coomer's Brief also erroneously states that "CSX did not present any evidence to support their argument that the two claims are identical or even connected." (Appellant's Brief, p. 11). To be clear, CSX presented such evidence, which came in the form of Mr. Coomer's own pleadings and his phrasing of allegations within those pleadings. Mr. Coomer's Complaint filed in the Jefferson Circuit Court, for example, contained the following allegations:

- "Mr. Coomer . . . in the usual course and ordinary scope and course of his duties was exposed to **excessive and harmful cumulative trauma** . . ."
- "Mr. Coomer discovered he suffered from occupationally caused carpal tunnel syndrome and other physical maladies as a result of **repetitive and cumulative trauma** . . ."
- "The injuries and disabilities of Mr. Coomer were caused by exposure to **excessive, repetitive trauma** . . ."

(RA, Vol. 2, pp. 355-360). (RA, Vol. 2, pp. 132-147). Similarly phrased and broadly based claims were also alleged in Mr. Coomer's Perry Circuit Court Complaint as well.

The very Complaints filed by Mr. Coomer clearly demonstrate that he never limited his repetitive stress/cumulative trauma claim filed in the Jefferson Circuit Court to ***one particular work activity*** (i.e., lifting, bending, twisting, vibration, walking, etc.) or ***one particular body part*** (i.e., hand, back, shoulders, knees, etc.). Similarly, Mr. Coomer never limited his repetitive stress/cumulative trauma claim filed in the Perry Circuit Court to ***one particular work activity*** or ***one particular body part.*** Instead, Mr. Coomer broadly plead both actions so that he could lump a variety of particular activities and injuries together at trial—all under the broad category of "excessive and harmful repetitive stress/cumulative trauma." Only when faced with a *res judicata* defense does Mr. Coomer try to inappropriately split hairs by conveniently arguing that the present matter involves a different work activity or mechanism of injury and a different injury, and his reason for doing so is abundantly transparent—he wants to avoid the proper application of *res judicata.* (RA, Vol. 2, pp. 303-313).

G. THE DOCTRINE OF RES JUDICATA EQUALLY APPLIES IN FELA ACTIONS AND ITS APPLICATION DOES NOT INTERFERE WITH MR. COOMER'S SUBSTANTIVE DUE PROCESS RIGHTS.

Mr. Coomer argues that the doctrine of *res judicata* can never be applied in any FELA case in which multiple injuries are involved because of FELA's adoption of the discovery rule. Under this rule, the three-year statute of limitation applicable to FELA claims is tolled until a plaintiff knows or, in the exercise of reasonable diligence, should know of both his injury and its cause. Accordingly, Mr. Coomer claims that to the extent his or any FELA claim involves multiple injuries with different accrual dates, each injury

can be tried separately without violating the doctrine of *res judicata* because different accrual dates preclude the necessary finding of an identity of the causes of action. Mr. Coomer goes even further to state that if this Court (or any court for that matter) applies the doctrine of *res judicata* in cases involving injuries with different accrual dates, then the Court is violating Mr. Coomer's federal substantive rights under the FELA because the court is shortening his three-year statutory period for filing suit.

Despite such bold arguments, Mr. Coomer doesn't cite a single source or any support whatsoever for his claims and for good reason, he has none. Rather, the doctrine of *res judicata* is alive and well in FELA cases, including cases in which plaintiffs allege multiple or subsequent injuries with different accrual dates arising from the same transactional nucleus of events. Courts that have confronted Mr. Coomer's novel argument have flatly rejected it and have held to the contrary; that is, when the injury is known during the prior suit (as was the case here), the principles behind the discovery rule must yield to the purpose of *res judicata.*

It is well settled that the principles of *res judicata* set forth in all of the above-referenced cases are no less applicable to FELA cases than any other state or federal case. *See, e.g., Gorder v. Grand Trunk Western R.R Inc.*, 2008 WL 4901090 (E.D.Mich. 2008). In *Gorder*, a railroad employee filed a negligence suit against his employer under the Federal Employer's Liability Act for an injury he sustain to his right shoulder when he attempted to close a door on an auto carrier railcar. Plaintiff's railroad employer was later granted summary judgment due to plaintiff's failure to produce evidence from which a jury could conclude that his employer was negligent. Plaintiff then filed a subsequent lawsuit against his employer alleging violations of the Federal Safety Appliance Act

("FSAA") (a purported different theory of recovery) for the same shoulder injury. The United States District Court for the Eastern District of Michigan later dismissed plaintiff's FSAA claim based on its finding that *res judicata* applied and that plaintiff's claim was barred by claim preclusion.

The application of *res judicata* does not improperly shorten a plaintiff's statutory period to bring his claim and therefore, does not impermissibly interfere with a plaintiff's due process rights. In fact, courts have routinely dismissed cases filed by plaintiffs for new or different injuries even though such injuries have a different accrual period for statute of limitations purposes than the injuries identified in prior suits (i.e., because of the discovery rule). In doing so, courts recognize that all injuries which arise out of the same transactional nucleus of events must be litigated in one suit. This is particularly true in cases in which plaintiffs (like Mr. Coomer) are aware of the purported new or different injury at the time the first suit is pending. *See, e.g., Swindell v. Florida East Coast Railway Company*, 178 Fed.Appx. 989 (11 Cir. 2006).

In *Swindell*, a FELA plaintiff sued his railroad employer for various respiratory injuries arising from his exposure to industrial pollutants over the course of several years. His claim was later dismissed on statute of limitations grounds. Swindell then filed a subsequent case alleging, more specifically, COPD as a result of his exposure to industrial pollutants. Because the Court found that Swindell knew of his COPD diagnosis at the time his first suit was pending, it ruled that the doctrine of *res judicata* barred his COPD claim. Specifically, the Eleventh Circuit ruled that Swindell's claim based on COPD or emphazema was not a "second injury" that would trigger a new statute of limitation, but instead was a claim that was previously litigated in his earlier

suit and was therefore barred by the doctrine of *res judicata*. The court concluded by noting that "this bar [res judicata] pertains not only to claims that were raised in the prior action, but also to claims that **could have been raised previously**." *Id.* at 2.

A similar ruling can be found in *Cano v. Everest Minerals Corp. et. al.*, 2004 WL 502628 (W.D. Tex. 2004). In *Cano*, plaintiffs filed suit alleging property damage and personal injuries caused by defendant's uranium mining operation. The court dismissed the first action with prejudice for failure to comply with a scheduling order, resulting in a final judgment on the merits. Plaintiffs then filed a subsequent suit seeking recovery for their cancers, claims not asserted in the prior litigation. Notably, one of the plaintiffs in *Cano* received a diagnosis of thyroid cancer just over a month before the court dismissed the first suit.

The court in *Cano* held that in cases such as these, "although the discovery rule permits a plaintiff to delay filing suit until a claim is no longer speculative, **when the injury is known during the prior suit, the principles behind the discovery rule must yield to the purpose of *res judicata* to protect defendants from serial litigation arising out of the same subject matter."** *Id.* at 8. (Emphasis added). Despite the plaintiff's claim that she did not attribute her cancer to defendant's conduct until after the first suit was dismissed, the court held that, "in the exercise of due diligence, Cano could have litigated her claim for personal injury for thyroid cancer in the prior lawsuit." *Id.* at *9.

The court in *Cano* went on to explain the different analyses applied to statute of limitation and res judicata issues:

> Although Plaintiffs seek to incorporate the discovery rule into the *res judicata* equation in toto, *res judicata* and limitations involve somewhat

> different purposes. Thus, the fact that a plaintiff who knows of his injury but has not necessarily tied the injury casually to the defendant may delay accrual for purposes of limitations **does not necessarily preclude the application of *res judicata.***
>
> *** *** ***
>
> Thus, if a plaintiff has and knows of the injury during the prior action, it is no excuse that the plaintiff has not adduced the likely cause of that injury, and a subsequent suit against the same defendant to recover for that injury is barred by *res judicata*. Although the discovery rule permits a plaintiff to delay filing suit until a claim is no longer speculative, **when the injury is known during the prior suit, the principles behind the discovery rule must yield to the purpose of res judicata to protect defendants from serial litigation arising out of the same subject matter.**

Id. at *8. (Emphasis added). Based on this analysis, and its application to the particular facts in *Cano*, the court held:

> Because Cano was suffering from thyroid cancer during the prior lawsuit, there is no doubt she could have asserted the claim for that cancer at that time. Although Cano attests that she did not attribute her thyroid cancer to the uranium mining and milling until after the prior suits were dismissed, the court finds that, **in the exercise of due diligence, Cano could have litigated her claim for personal injuries for thyroid cancer in the prior lawsuit.** Accordingly, her claim in the present suit is barred by *res judicata.*

Id. at *9. (Emphasis added).

Based on these rulings, Mr. Coomer's argument that the application of the doctrine of *res judicata* violates his substantive due process rights fails as a matter of law. Because Mr. Coomer knew of **all of his injuries** at the time his Jefferson Circuit Case was pending and because such injuries allegedly **arose from the same transactional nucleus of events** (i.e., Mr. Coomer 20+ years of being exposed to repetitive, cumulative trauma), he could and should have raised them during the pendency of his first suit. The fact that certain injuries may have different accrual dates does not eliminate Mr. Coomer's obligation to bring forth his whole case in one proceeding, particularly under

the circumstances here, where Mr. Coomer knew of all his injuries many months before the Jefferson Circuit Case was dismissed. In this case, the principles of the discovery rule must yield to the important purpose of *res judicata.*

H. MR. COOMER'S ESTOPPEL ARGUMENT IS BOTH NOVEL AND TOTALLY WITHOUT MERIT.

Prior to addressing the subjects of estoppel and waiver as they purportedly relate to CSX's refusal to agree to an amendment of the pleadings in the Jefferson Circuit Case, it is important to describe the context in which such refusal was conveyed to Mr. Coomer.

In early May, 2003, while the Jefferson Circuit Case was pending, Mr. Coomer's counsel called Defense Counsel and indicated a desire to amend Mr. Coomer's Complaint to add **additional injuries** identified during Mr. Coomer's deposition taken **six months** prior on October 30, 2002. The request to amend Mr. Coomer's Complaint was made just days *after* CSX's Motion for Summary Judgment was filed in the Jefferson Circuit Court. In response to this request, Defense Counsel wrote to Mr. Coomer's counsel on May 6, 2003 and advised of his objection to the filing of an Amended Complaint and the grounds supporting the objection (i.e., the request was untimely made many months (in fact years) after Mr. Coomer knew of additional injuries, just weeks before trial was set to commence, and after costly independent medical exams were completed). (RA, Vol. 2, pp. 303-313).

Despite Defense Counsel's refusal to voluntarily agree to the filing of an Amended Complaint, Mr. Coomer never sought leave of court to amend his complaint. Instead, in light of the particular objections raised, Mr. Coomer's counsel filed a Motion to Continue Trial on May 21, 2003 on the purported ground that he needed additional

time to conduct a site inspection. Mr. Coomer's Motion to Continue was denied by Judge Clayton on May 29, 2003. (RA, Vol. 2, pp. 303-313).

On the same day Mr. Coomer's Motion to Continue was denied, Mr. Coomer's counsel wrote to Defense Counsel. Mr. Coomer's counsel's letter provided:

> In speaking with Mr. Coomer today, he mentioned his knees and shoulders as having degenerative changes and bone spurs in his back and neck. He is interested in pursuing a claim against CSX Transportation, Inc. for those **repetitive stress injuries**. Unfortunately, due to the judge's ruling, I suppose I have no alternative but to file another suit for these particular injuries.

(RA, Vol. 2, pp. 303-313). Contemporaneous to Defense Counsel's receipt of this letter, Mr. Coomer's counsel also spoke with Defense Counsel in a telephone conversation during which he indicated a desire to amend Mr. Coomer's Complaint in order to add *additional injuries*. **No mention was ever made about adding any different or additional mechanisms of injury or any new or additional causes of action.** Mr. Coomer's counsel encouraged Defense Counsel to speak with CSX to determine whether they would permit Mr. Coomer to amend his Complaint in exchange for avoiding a separate suit, which Mr. Coomer's counsel stated he would file if not permitted to file an Amended Complaint. (RA, Vol. 2, pp. 303-313).

Defense Counsel then spoke with CSX and the consensus on how to handle Mr. Coomer's request was memorialized in the June 2, 2003 letter currently at issue. In essence, Defense Counsel reiterated the same objections to the filing of an Amended Complaint as previously raised and simply advised Mr. Coomer that if he wished to add additional injuries, he would have to proceed in the manner he outlined in his earlier correspondence and telephone conversation (i.e., file a separate suit). (RA, Vol. 2, pp. 303-313).

Despite CSX's objection to the filing of an Amended Complaint, Mr. Coomer never sought leave of court to amend his complaint. Instead, Mr. Coomer chose yet another strategy. This time, Mr. Coomer sought to voluntary dismiss his claim in the Jefferson Circuit Court and re-file his claim in what he perceived to be a more friendly forum (Perry Circuit Court). In fact, Mr. Coomer's counsel wrote in a letter dated June 10, 2003, "In order to avoid having to file a separate lawsuit for the **other repetitive stress injuries** [again, no mention of different mechanisms of injury], I would propose dismissal of this lawsuit without prejudice in order that I can file **all of the claims at one time,**" something Mr. Coomer should have done many months earlier. (RA, Vol. 2, pp. 303-313). Throughout this entire process, no effort was ever made to seek leave of court to amend Mr. Coomer's Complaint, which is precisely what should have been done. In fact, Mr. Coomer's counsel himself admitted in a letter dated June 19, 2003 as follows:

> "It seems illogical to require him [Mr. Coomer] to maintain two separate lawsuits **for repetitive stress injuries**. **The proper thing to do would be to amend the complaint.**"

(RA, Vol. 2, pp. 303-313). (Emphasis added). Rather than attempting to follow the proper procedure, Mr. Coomer chose the improper procedure of filing a separate lawsuit, which is now barred by the doctrine of *res judicata.*

Defense Counsel's June 2, 2003 letter does not constitute a waiver of its *res judicata* defense or any other defense for that matter, nor is CSX estopped from raising its *res judicata* defense. Simply because one party places an objection to the proposed action of another party (i.e. the filing of an Amended Complaint), never means that the objecting party then acquiesces to the proposed action of the other party taken in response to the objection (i.e., the filing of a separate action).

In the Jefferson Circuit Case, Mr. Coomer requested CSX to voluntarily agree to amend his Complaint and stated that if CSX did not agree to do so, he would file a separate action. Defense Counsel's simple act of reiterating in a letter a course of action initially proposed by Mr. Coomer's Counsel does not mean that Defense Counsel agreed with the course of action, waived its defense to the course of action, or believed that the course of action was meritorious. By analogy, in the context of a discovery dispute, if Mr. Coomer's counsel stated that if CSX didn't produce document X that a Motion to Compel would be filed and in response, Defense Counsel, in the course of reiterating CSX's objection stated, "if you want this document, you'll need to file a motion to compel," that statement would never be construed to mean that Defense Counsel acquiesced to Mr. Coomer's motion to compel, agreed with the motion, waived its defense to the motion, or believed that the motion was meritorious. The same logic applies here, not just as a matter of law but as a matter of common sense. (RA, Vol. 2, pp. 303-313).

It is not Defense Counsel's obligation to provide legal advice to Mr. Coomer's counsel. Defense Counsel had absolutely no obligation to advise Mr. Coomer's counsel in the June 2, 2003 letter at issue that if a subsequent suit was filed, the doctrine of *res judicata* would be asserted. In fact, before the Perry Circuit Court Complaint was actually filed, CSX had absolutely no obligation to identify any of its defenses. Consider for a moment if the defense at issue concerned a statute of limitations as opposed to the doctrine of *res judicata*. Under Mr. Coomer's rationale that Defense Counsel's July 2, 2003 letter constituted a waiver, Defense Counsel would then have presumably waived a statute of limitations defense as well, after all, Defense Counsel never advised Mr.

Coomer's Counsel in advance what defenses he intended to raise in the event a subsequent suit was filed and arguably, by silence, Defense Counsel gave the impression that in the event a subsequent suit was filed, that no such defense would be raised. That logic is both flawed and ridiculous. (RA, Vol. 2, pp. 303-313).

In all of the letters cited above, CSX consistently maintained that additional injuries, to the extent any existed, should have been raised in a timely manner. This is precisely what Kentucky courts routinely require when they include deadlines for the amendment of pleadings in their scheduling orders. Because Mr. Coomer waited until the eleventh hour to identify additional injuries and, consequently, drew an objection from Defense Counsel regarding the filing of an Amended Complaint, does not mean that CSX waived its defenses in the event Mr. Coomer chose another forum in which to raise additional injuries. More significantly, it was not CSX's obligation to warn Mr. Coomer of the consequences of taking certain actions (in this case, the filing of a separate complaint) prior to doing so and no reasonable person would think it was. (RA, Vol. 2, pp. 303-313).

Waiver is a "voluntary and intentional surrender or relinquishment of a known right." *Greathouse v. Shreve*, Ky., 891 S.W.2d 387 (1995). There is absolutely nothing in Defense Counsel's June 2, 2003 letter to even suggest (much less prove) that CSX voluntarily and intentionally relinquished its absolute right to assert any and all defenses, including the defense of *res judicata*, in the event a subsequent suit was filed. (RA, Vol. 2, pp. 303-313).

As this Court is well aware, in order to prevail on an estoppel argument, a party must show that he relied upon another party's position to his detriment. *Camenisch v.*

City of Standford, Ky.App., 140 S.W.3d 1 (2003). That cannot be, and has never been, shown in this case. According to Mr. Coomer, the two actions at issue are separate and distinct claims and *res judicata* does not apply. For Mr. Coomer or his counsel to now assert that they relied upon the June 2, 2003 letter as a representation that CSX would not assert a *res judicata* defense in any subsequent suit filed is illogical and patently untrue. There was no detrimental reliance because the issue of *res judicata* was never discussed until after Mr. Coomer's suit was filed and after CSX obtained Summary Judgment. To the extent Mr. Coomer's counsel believed *res judicata* was an issue before the Perry Circuit Complaint was filed, that is simply one more piece of evidence which demonstrates that *res judicata* was most certainly an issue, a dispositive issue, and Mr. Coomer should have taken additional steps to prevent it from becoming an issue, such as filing a motion to amend Mr. Coomer's Complaint, which was never done. (RA, Vol. 2, pp. 303-313).

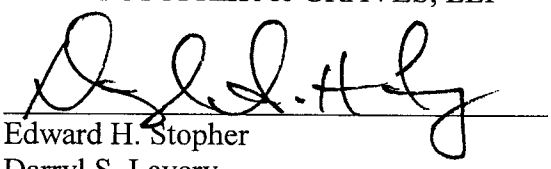
The Kentucky Court of Appeal's opinion regarding Mr. Coomer's estoppel argument is squarely on point. Mr. Coomer's contention that CSX should be estopped from raising the *res judicata* defense is indeed "novel" and "totally without merit." Further, as the Kentucky Court of Appeals correctly noted, Mr. Coomer has never shown that he was "fraudulently induced" by CSX to change his position in light of CSX's refusal to agree to amend his pleading. In addition, CSX's refusal to agree to an amendment of the pleadings was certainly "not one upon which reasonable counsel would rely to the detriment of his client." (See Kentucky Court of Appeals Opinion, No. 2006-CA-002054-MR, pp. 9-10) (Appendix 1).

V. CONCLUSION

Based on the foregoing, Appellee, CSX Transportation, Inc., respectfully requests this Honorable Court to affirm the Kentucky Court of Appeal's unanimous affirmation of Judge Engle's grant of summary judgment.

Submitted by:

BOEHL STOPHER & GRAVES, LLP



Edward H. Stopher
Darryl S. Lavery
Aegon Center, Suite 2300
400 West Market Street
Louisville, Kentucky 40202
(502) 589-5980
(502) 561-9400
COUNSEL FOR APPELLEE

265121.1