[Cite as *Arpin v. Consol. Rail Corp.*, 2016-Ohio-8313.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 104279

RICHARD C. ARPIN

PLAINTIFF-APPELLEE

vs.

CONSOLIDATED RAIL CORPORATION, ET AL.

DEFENDANTS-APPELLANTS

JUDGMENT:
AFFIRMED

Civil Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CV-14-833673

BEFORE: S. Gallagher, J., E.A. Gallagher, P.J., and Blackmon, J.

RELEASED AND JOURNALIZED: December 22, 2016

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SEAN C. GALLAGHER, J.:

{¶1} Defendants-appellants, Consolidated Rail Corporation ("Conrail") and American Premier Underwriters, Inc. ("APU"), appeal the trial court's decision that denied their motion for summary judgment against plaintiff-appellee Richard C. Arpin. Upon review, we affirm the decision of the trial court.

ISSUES

{¶2} In this appeal, we are asked to decide (1) whether a release executed by Arpin in settlement of a previous nonmalignant asbestos-related claim is valid under Section 5 of the Federal Employers' Liability Act ("FELA"), 45 U.S.C. 51 et seq., as applied to his present cancer-related claim; and (2) whether the decision in *Anderson v. A.C. & S. Inc.*, 154 Ohio App.3d 393, 2003-Ohio-4943, 797 N.E.2d 537 (8th Dist.), which adopted a "bright-line rule" using a "known claim" test, should not be followed. We answer both questions in the negative.

OVERVIEW

{¶3} In October 2014, Arpin filed this action against Conrail and APU, pursuant to FELA for occupationally related lung cancer. Arpin alleged the lung cancer was caused, at least in part, from his continuous exposure to various toxic substances, including asbestos, asbestos dust, and toxic dust and fumes, throughout his years of employment with the defendants and their predecessors.

{¶4} In the course of proceedings, Conrail filed a motion for summary judgment, which was joined in by APU. They argued that Arpin's claims were barred by a release

executed by Arpin in 2007 in connection with the settlement of a prior FELA claim, brought in 2004, which also arose from his employment-related exposures to toxic substances including asbestos, asbestos dust, and diesel fumes and exhaust. The complaint in that action alleged the plaintiffs had suffered injuries to their lungs, respiratory system, nerves, and nervous system. Damages were sought for harms that, among others, "may include * * * fear of cancer." An interrogatory response in that action indicated that Arpin suffered from asbestosis, other nonmalignant conditions and diseases, and "an increased risk of cancer and fear of cancer." Arpin was paid $12,500 in exchange for the settlement and release of that claim. He did not have lung cancer when he signed the release.

{¶5} The language of the release provides in pertinent part:

> I, RICHARD C. ARPIN, * * * in consideration of the sum of Twelve Thousand Five Hundred Dollars ($12,500.00) * * * hereby release and forever completely discharge * * * [Conrail, APU] * * * from any and all losses, claims, liabilities, actions * * * of whatsoever kind or nature * * * which I have or to which I claim to be entitled by reason of any injuries, known or unknown, foreseen or unforeseen, (including but not limited to: pulmonary disorders of any type; silicosis, pleural plaque(s), calcification and/or thickening; fibrosis of any kind; asbestosis; mesothelioma; chronic obstructive pulmonary disease; coronary artery disease or heart conditions of any type, nature or origin, cancer(s) of any type, origin or nature; death;

anxiety or far of contracting cancer or some other physical condition; and/or any increased risk of contracting cancer) * * * which now exist or which may arise in the future, arising or which may arise as a result of or in any way connected with the alleged exposure of RELEASOR to toxic materials, including but not limited to asbestos, asbestos-containing products and/or diesel fumes * * * toxic substances of any nature supplied or permitted to exist by RELEASES and/or arising out of or which may or did arise out of any working condition, of any kind, during RELEASOR'S employment by RELEASES * * *.

{¶6} The release further provides:

IT IS EXPRESSLY UNDERSTOOD AND AGREED THAT THIS RELEASE AND SETTLEMENT IS TO AND DOES FULLY AND COMPLETELY SATISFY ANY AND ALL CLAIMS ACTUALLY INCURRED AND SPECIFICALLY CAUSED BY ASBESTOS EXPOSURE, THAT RELEASOR MAY IN THE FUTURE HAVE AGAINST RELEASEE(S), FOR OR RESULTING FROM ANY TYPE OF OCCUPATIONAL DISEASE, INDUSTRIAL DISEASE, ILLNESS, MEDICAL CONDITION AND/OR THE LIKE, INCURRED BY RELEASOR AT ANY TIME.

{¶7} Following an oral hearing, the trial court denied the motion for summary judgment. In denying the motion, the trial court relied on the authority of the Eighth District's decision in *Anderson*, 154 Ohio App.3d 393, 2003-Ohio-4943, 797 N.E.2d 537.

{¶8} The case proceeded to a jury trial. The jury returned a verdict in Arpin's favor, awarded damages, and assigned percentages due to the negligence of each of the defendants and the plaintiff. Arpin, who was a heavy smoker, was found 70 percent at fault for his injuries.

{¶9} Conrail and APU timely filed this appeal.

ASSIGNMENTS OF ERROR

{¶10} Appellants raise two assignments of error for our review, which are as follows:

> 1. The trial court erred in holding that a release that would otherwise bar a claim brought by plaintiff-appellee Richard C. Arpin under [FELA] is invalid under Section 5 of the Act.
>
> 2. The trial court erred in relying upon *Anderson v. A.C. & S., Inc.*, 154 Ohio App.3d 393, 2003-Ohio-4943, 797 N.E.2d 537 (8th Dist.).

ANALYSIS

{¶11} We review the trial court's denial of summary judgment de novo. *State ex rel. Sunset Estate Properties, L.L.C. v. Lodi*, 142 Ohio St.3d 351, 2015-Ohio-790, 30 N.E.3d 934, ¶ 6. The validity of a release under FELA is a federal question to be determined by federal rather than state law. *Maynard v. Durham & S. Ry. Co.*, 365 U.S.

160, 161, 81 S.Ct. 561, 5 L.Ed.2d 486 (1961); *Dice v. Akron, C. & Y. RR. Co.*, 342 U.S. 359, 361, 72 S.Ct. 312, 96 L.Ed. 398 (1952).

{¶12} FELA provides railroad employees a right to recover fair compensation for injuries negligently caused by their employers. *Wilson v. CSX Transp*., 83 F.3d 742, 745 (6th Cir.1996), citing *Dice*, 342 U.S. at 362. Section 5 of FELA limits a railroad company's ability to escape liability by providing:

> Any contract, rule, regulation, or device whatsoever, the purpose or intent of which shall be to enable any common carrier to exempt itself from any liability created by this chapter, shall to that extent be void * * *.

45 U.S.C. 55.

{¶13} In *Callen v. Pennsylvania RR. Co.*, 332 U.S. 625, 68 S.Ct. 296, 92 L.Ed. 242 (1948), the United States Supreme Court recognized that Section 5 of FELA does not prevent parties from settling their claims and executing a release for a claimed liability where controversies exist. *Id*. at 631. In *Callen*, the FELA action was based on a back injury that Callen claimed he sustained in an occurrence during the course of his employment. *Id*. at 626. Prior to the action, Callen had executed a general release relieving the railroad company from liability for personal injuries sustained in the occurrence. *Id*. at 626-627. Although the back injury was known at the time of the release, Callen claimed that he did not know the injury was permanent and that he relied on the claim agent's assurances when he executed the release. *Id*. at 627. The court found that "the releases of railroad employees stand on the same basis as the releases of

others[,]" and that "[o]ne who attacks a settlement must bear the burden of showing that the contract he has made is tainted with invalidity, either by fraud practiced upon him or by a mutual mistake under which both parties acted." *Id*. at 630. In the context of resolving an actual controversy under FELA, the Court recognized that "a release is not a device to exempt from liability but is a means of compromising a claimed liability" and "*where controversies exist* as to whether there is liability, and if so for how much, Congress has not said that parties may not settle their claims without litigation." (Emphasis added.) *Id*. at 630-631.

{¶14} *Callen* did not resolve, and the United States Supreme Court has not addressed, the issue of whether Section 5 of FELA permits a release that extinguishes future claims for known risks or for unknown injuries. The federal circuit courts have diverged on the issue, with the Sixth Circuit and Third Circuit having adopted different views.

{¶15} In *Babbitt v. Norfolk & W. Ry.*, 104 F.3d 89, 93 (6th Cir.1997), the Sixth Circuit adopted what is known as the "bright-line rule" that deems a release valid under FELA only when it was executed as part of a specific settlement of a known claim for the specific injury at issue. The plaintiffs in *Babbitt* were former employees of the defendant railroad who had executed a resignation and general release upon their separation from employment and subsequently brought FELA claims for occupational hearing loss. *Id*. at 90. The court held that to be valid under FELA, "a release must reflect a bargained-for settlement of a known claim for a specific injury, as contrasted with an attempt to

extinguish potential future claims the employee might have arising from injuries known or unknown by him." *Id*. at 93. The Sixth Circuit reversed the grant of summary judgment for the railroad and remanded the case for a determination of whether the release "was intended to resolve a claim of liability for the specific injuries in controversy." *Id*.

{¶16} In *Wicker v. CONRAIL*, 142 F.3d 690 (3d Cir.1998), the Third Circuit adopted a fact-intensive approach that focuses on the parties' intent and whether the employee made a reasoned decision to release specific known risks at the time the release is signed. The court held that "a release does not violate [Section] 5 provided it is executed for valid consideration as part of a settlement, and the scope of the release is limited to those risks which are known to the parties at the time the release is signed." *Id*. at 701. The court recognized that a release that spells out "the scope and duration of the known risks" would be strong evidence to support the release defense; however, it is not conclusive. *Id*. The court also recognized that "[w]here a specific known risk or malady is not mentioned in the release, it would seem difficult for the employer to show it was known to the employee and that he or she intended to release liability for it." *Id*. Furthermore, the court indicated that a release can be attacked as "boiler plate" where it "details a laundry list of diseases or hazards[.]" *Id*. As pronounced in *Wicker*, a release may not be "merely an engine by which an employer can evade FELA liability." *Id*. at 700.

{¶17} In an excellent overview of this unsettled area of FELA law, a convincing law review publication advocated for the bright-line rule articulated by the Sixth Circuit because it is "more congruent with FELA's remedial purpose and history of being more protective of railroad workers' rights," unlike the approach advocated by the Third Circuit, which "allow[s] releases that extinguish the railroad company's liability for future undiagnosed claims." Granger, Comment: *Known Injuries vs. Known Risks: Finding the Appropriate Standard for Determining the Validity of Releases under the Federal Employers' Liability Act*, 52 Hous.L.Rev. 1463, 1495-1496 (2015).

{¶18} In *Anderson*, 154 Ohio App.3d 393, 2003-Ohio-4943, 797 N.E.2d 537 (8th Dist.), this court followed the Sixth Circuit's bright-line rule. In that action, Anderson, a former railroad employee, had executed a covenant not to sue and to cease suing in connection with the settlement of a FELA claim brought after Anderson had been diagnosed with asbestosis. *Id*. at ¶10-11. The covenant purported to extinguish any future claims relating to asbestosis or asbestosis-related disease, including "any and all forms of cancer or mesothelioma[.]" *Id*. at ¶ 11. Years later, Anderson died from mesothelioma and his surviving wife, individually and as executrix of her deceased husband's estate, brought a survivorship claim and a wrongful death claim under FELA. *Id*. at ¶ 1-2. The trial court found that the survivorship claim was extinguished by the release in the covenant not to sue, and found the release was signed after consulting with counsel and with awareness of the potential risks of contracting other lung diseases and cancer. *Id.* at ¶ 7. On appeal, this court reversed the trial court's decision on that claim

upon finding the release was not valid to exempt the railroad defendants from liability. *Id*. at ¶ 51.

{¶19} The *Anderson* court followed *Babbitt*, 104 F.3d 89, and held that "[a] release cannot bar [a] non-accrued claim for an unknown injury" and that "under FELA, a release is valid only where it disposes of an accrued claim for a known injury." *Anderson* at ¶ 43. The court determined that "although Anderson may have been aware of the risk of developing mesothelioma as a result of his exposure to asbestos, because he did not have mesothelioma when he signed the release, his claim had not yet accrued, therefore, he could not release it." *Id*. at ¶ 45.

{¶20} The *Anderson* court also rejected the notion that the release was not a blanket waiver of liability, but merely a settlement of Anderson's claims for injuries resulting from asbestos exposure. *Id*. at ¶ 46-47. The court found that the broad language of the release, which purported to release the railroads from any potential future claims relating "in any manner to exposure" of "any substance" was "clearly not a bargained-for settlement of only Anderson's asbestosis claim and injuries related to that claim." *Id*. at ¶ 47.

{¶21} Finally, the *Anderson* court rejected the argument that Anderson's claim was barred because Anderson already recovered for the alleged wrongful act of the railroad defendants. *Id*., 154 Ohio App.3d 393, 2003-Ohio-4943, 797 N.E.2d 537, at ¶ 49. The court adhered to the "separate disease rule" and found that the settlement of an asbestosis claim does not bar a subsequent claim for mesothelioma under FELA. *Id*. at ¶ 50.

{¶22} Indeed, it has been recognized that asbestosis and asbestos-related cancer, although both caused by asbestos exposure, are separate and distinct diseases for which the statute of limitations runs separately. *Wilson v. Johns-Manville Sales Corp*., 684 F.2d 111, 121 (D.C. Cir.1982); *Anderson* at ¶ 50. "Under the separate disease rule, a plaintiff may bring suit for a nonmalignant asbestos-related disease without triggering the statute of limitations for any malignant asbestos-related diseases which may later develop." *Nelson v. A.W. Chesterton Co.*, E.D.Pa. No. 2:10-cv-69365, Consolidated Under MDL 875, 2011 U.S. Dist. LEXIS 142970, *4, fn. 1 (Oct. 27, 2011).

{¶23} There is a growing trend among states to apply the separate disease rule, also known as the "two-disease rule," and state and federal court decisions have applied the rule to federal causes of action in the asbestos context. *Id.*; *Clayton v. Burlington N. & Santa Fe Ry. Co.*, E.D.Pa. No. 2:10-07082-ER, Consolidated Under MDL 875, 2012 U.S. Dist. LEXIS 150870, *1, fn.1 (Aug. 27, 2012); *In re Asbestos Prods. Liab. Litigation,* E.D.Pa. No. 2 MDL 875, 1996 U.S. Dist. LEXIS 6199, *15 (May 1, 1996); *see also Norfolk & Western Ry. Co. v. Ayers*, 538 U.S. 135, 174, 123 S.Ct. 1210, 155 L.Ed.2d 261 (2003) (Kennedy, J., concurring in part and dissenting in part) (recognizing the vitality of the "separate disease rule" and noting the majority of the Court "does not suggest that it would not apply in cases brought under FELA"). As noted by Justice Kennedy in *Ayers*,

> The separate disease rule is pertinent for at least two reasons. First, it illustrates that courts have found it necessary to construct fair and sensible common-law rules for resolving the problems particular to asbestos litigation. Second, it establishes that a person with asbestosis will not be

> without a remedy for pain and suffering caused by cancer. That person can and will be compensated if the cancer develops.

Ayers at 174 (Kennedy, J., concurring in part and dissenting in part).

{¶24} We are cognizant that Ohio is among the states that have adopted the separate disease rule and that Ohio public policy favors its application in the asbestos context. Though not controlling herein, R.C. 2307.94 provides that "an asbestos claim that arises out of a nonmalignant condition shall be a distinct cause of action from an asbestos claim relating to the same exposed person that arises out of asbestos-related cancer." R.C. 2307.94(B). The statute also provides that "[n]o settlement of an asbestos claim for a nonmalignant condition * * * shall require, as a condition of settlement, the release of any future claim for asbestos-related cancer." R.C. 2307.94(C).[1]

{¶25} We recognize that in *Ayers* the United States Supreme Court held that a plaintiff who has asbestosis can seek damages for "fear of cancer" under FELA as an element of his asbestosis-related pain and suffering damages if the alleged fear is genuine and serious. *Id*. at 157. The Court stated:

> Norfolk presented the question "whether a plaintiff who has asbestosis but not cancer can recover damages for fear of cancer under the FELA without proof of physical manifestations of the claimed emotional distress." Our answer is yes, with an important reservation. We affirm only the qualification of an asbestosis sufferer to seek compensation for fear of cancer as an element of his asbestosis-related pain and suffering

[1] We note that unlike federal law under FELA, the Ohio statute precludes an award of damages "for fear or risk of cancer in any tort action asserting only an asbestos claim for a nonmalignant condition." R.C. 2307.94(B).

> damages. It is incumbent upon such a complainant, however, to prove that his alleged fear is genuine and serious.

Id. (internal alteration omitted). However, those damages relate to recovery for mental anguish caused by a present physical injury — asbestosis. There is no causal link to an injury that has not yet occurred, and there is no relation to a future claim that is brought if the plaintiff later develops cancer. As recognized by the United States Supreme Court, a railroad worker who has been negligently exposed to asbestos cannot recover under FELA for the fear of developing cancer, absent a physical manifestation of a disease. *Metro-N. Commuter RR. v. Buckley*, 521 U.S. 424, 426-427, 117 S.Ct. 2113, 138 L.Ed.2d 560 (1997).

{¶26} Appellants' reliance on *Mellon v. Goodyear*, 277 U.S. 335, 48 S.Ct. 541, 72 L.Ed. 906 (1928), is misplaced. *Mellon* dealt with restrictions placed on wrongful death recovery under FELA when the decedent had recovered for his injuries during his lifetime. *Id.* In *Mellon*, the court recognized that the ability to recover damages for the benefit of dependents was dependent upon "the existence in the decedent at the time of his death of a right of an action to recover for such injury." *Id*. at 344. Thus, when the decedent recovers for injuries during his lifetime, "[a] settlement by the wrongdoer with the injured person * * * precludes any remedy by the personal representative based upon the same wrongful act." *Id*.; *see also Flynn v. New York, N.H. & H. R. Co.*, 283 U.S. 53, 51 S.Ct. 357, 75 L.Ed. 837 (1931) (recognizing that the right to bring a wrongful-death lawsuit was derivative of the decedent's right to sue at the time of his death). *Mellon* is

inapplicable to this action because Arpin never extinguished his right to bring a future claim under FELA arising from his development of lung cancer.

CONCLUSION

{¶27} We are not persuaded by appellants' arguments on appeal. Upon our review, we are inclined to follow the bright-line rule adopted by the Sixth Circuit in *Babbitt*, 104 F.3d 89, which was followed in *Anderson*, 154 Ohio App.3d 393, 2003-Ohio-4943, 797 N.E.2d 537. "To be valid, a release must reflect a bargained-for settlement of a known claim for a specific injury[.]" *Babbitt* at 93. In this matter, because the release attempted to extinguish future claims for injuries that had not yet accrued, the release is invalid under Section 5 of FELA.

{¶28} We further recognize that the release in this case was of the boilerplate variety warned against in *Wicker*, 142 F.3d at 701. Appellants offer no evidence, other than the language of the release, to demonstrate that Arpin intended to release a future claim arising from his development of cancer. The release did not detail the quantity, location, and duration of potential risks to which Arpin had been exposed, or the probability that he would develop cancer. The release was clearly not "a bargained-for settlement" of only Arpin's asbestosis-related claim and injuries related to that claim.

{¶29} Finally, even if Arpin knew of a risk of developing cancer and sought damages for the fear of developing cancer in the prior action, those damages related to the asbestosis-related claim that was in controversy. *See Ayers*, 538 U.S. at 157, 123 S.Ct.

1210, 155 L.Ed.2d 261. Under the separate-disease rule, a new lawsuit may be brought for Arpin's cancer-related claim. *See Wilson*, 684 F.2d at 120-121 (D.C. Cir.1982).

{¶30} Upon our review, we overrule appellants' assignments of error and affirm the judgment of the trial court.

{¶31} Judgment affirmed.

It is ordered that appellee recover from appellants costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate be sent to said court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

SEAN C. GALLAGHER, JUDGE

EILEEN A. GALLAGHER, P.J., and
PATRICIA ANN BLACKMON, J., CONCUR