

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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ELMER VAN GORDER,

Plaintiff-Appellee,

v

GRAND TRUNK WESTERN RAILROAD,  
INCORPORATED,

Defendant-Appellant.

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UNPUBLISHED

August 10, 2010

No. 290104

Genesee Circuit Court

LC No. 08-088193-NO

Before: SHAPIRO, P.J., and JANSEN and DONOFRIO, JJ.

PER CURIAM.

Defendant, Grand Trunk Western Railroad, Inc., appeals by leave granted an opinion and order denying defendant's motion for summary disposition in this action brought under the Federal Employer's Liability Act (FELA), 45 USC 51 *et seq.* While defendant has not shown that the doctrine of *res judicata* bars the instant claim, defendant has established that plaintiff violated the applicable three-year statute of limitations under FELA, and, therefore, we reverse and remand for entry of an order of dismissal.

Plaintiff, Elmer Van Gorder, born July 4, 1952, worked for defendant for over 33 years as a T-carman and then a carman out of defendant's Flint rail yard. Plaintiff worked the day shift. His primary job was placing bridge plates between bi-level railcars that had been delivered to the loading dock to make sure the railcars are properly spaced, then taking off the plates in between the railcars, and finally sealing the railcar by closing the door. On October 17, 2003, while plaintiff was performing his normal duties, he injured his right shoulder when a door he was closing on a railcar jammed and stopped so suddenly that his hands slipped off and he nearly fell. He suffered a sharp pain in his right shoulder and fingers. A post-accident inspection of the door conducted by defendant confirmed that the door could only be closed partway due to a defective and worn canopy bolt. It was concluded that the defective condition of the bolt was not visible from the ground, or from above, due to its placement, and the defect would only manifest itself when someone attempted to close the door.

With regard to his shoulder injury, plaintiff immediately reported it to superiors and submitted himself to a medical examination and treatment at McLaren Medical Center, where he was diagnosed with a sprained shoulder. An MRI of plaintiff's shoulder was performed on November 9, 2003. The MRI showed partial tears of the upper rotator cuff muscles, severe thinning of the shoulder joint cartilage, and multiple subchondral cysts. Shortly thereafter, on

November 26, 2003, plaintiff was diagnosed with “[d]egenerative arthritis of the right shoulder with partial rotator cuff tear.” Plaintiff never returned to work after the accident. In May 2004, the United States Railroad Retirement Board certified defendant as disabled.

In February 2005, plaintiff filed a complaint with the United States District Court Eastern District of Michigan. He alleged a claim under the FELA, asserting that while in the process of performing his duties for defendant he suffered an injury. On September 27, 2006, the federal district court entered a judgment dismissing plaintiff’s claim with prejudice on defendant’s motion for summary judgment in an order and opinion. The federal court found that plaintiff failed to establish a negligence claim and also noted that he had not alleged the applicable standard of care.<sup>1</sup> Also in September 2006, plaintiff filed a second action in federal district court, alleging a claim under the Federal Safety Appliance & Equipment Act, 49 USC 20302. In a November 10, 2008 opinion and order, the district court dismissed this action on defendant’s motion for summary disposition.

Plaintiff filed the action at bar in Genesee Circuit Court in March 2008. In the instant complaint, plaintiff alleged he had suffered a repetitive motion injury as a result of his position at the railroad, specifically alleging in part:

10. In the course of performing his duties for the Defendant, throughout his career, the Plaintiff was continuously and repeatedly exposed to excessive vibration, was required to perform repetitive and forceful motions utilizing his upper extremities and was caused to use excessive force and awkward upper extremity postures which caused the Plaintiff to sustain severe and permanent injuries to his upper extremities including but not limited to his shoulders, joints and nervous system.

Defendant moved for summary disposition pursuant to MCR 2.116(C)(7), asserting that plaintiff’s claim is barred by the statute of limitations and res judicata. According to defendant, plaintiff’s claim is barred by the three-year limitations period set forth in FELA, 45 USC 56. Defendant argued that plaintiff’s injury manifested itself at the time of the October 17, 2003 incident and that his claim accrued on that date because plaintiff became aware at that time that his employment caused his injuries. In the alternative, defendant argued that plaintiff’s claim accrued at the latest on August 17, 2004, the date of his shoulder replacement surgery. It asserted that as of that date, plaintiff was either “aware, or should have been aware, that the governing cause of these repetitive motion injuries was from his employment with defendant.” Defendant also argued plaintiff’s claim is barred by res judicata because it was the subject of the earlier federal court action.

In response, plaintiff agreed that the claim for the injury arising from the injury he sustained as a result of the incident that occurred on October 17, 2003 is barred by the three-year statute of limitations. However, he argued, the claim alleged in this action is separate from that

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<sup>1</sup> The Sixth Circuit Court of Appeals affirmed the district court’s decision in a December 11, 2007 opinion. *Van Gorder v Grand Trunk W RR, Inc*, 509 F3d 265 (CA 6, 2007).

associated with the October 17, 2003 injury. Plaintiff's current claim is for an injury that was caused over time as a result of the conditions of his job activities. He asserted that he first knew the cause of his deteriorating shoulder condition through a November 2005 medical report issued by Dr. Steve R. Geiringer. He asserted that his cause of action associated with this injury accrued on November 21, 2005, the date of Geiringer's report, and therefore his March 2008 complaint was timely. Plaintiff also argued that res judicata does not bar this claim because it is separate from that arising from the October 2003 injury.

The trial court rejected defendant's argument that plaintiff's claim was barred by the statute of limitations stating that it was not until Geiringer's November 21, 2005 report eliminating the October 17, 2003 injury as the cause of plaintiff's ongoing medical problems that plaintiff became aware that his problems were consistent with the years of repetitive motion work he performed with defendant. The trial court also rejected defendant's argument that plaintiff's current action is barred by res judicata based on the 2005 federal action. The trial court found that defendant failed to establish the fourth element for application of res judicata, identity of claims, because plaintiff's 2005 action arose out of the shoulder injury associated with the October 2003 work incident and that the current action is for recovery based on "cumulative repetitive motion injuries suffered throughout the course of plaintiff's employment with defendant." Thus, the trial court denied defendant's motion for summary disposition based on both the FELA statute of limitations and res judicata. Defendant now appeals by leave granted.

The FELA imposes liability for work-related injuries while working for a common carrier engaging in interstate or international commerce if those injuries were caused by the carrier's negligence. 45 USC 51. A claim may be brought in either federal or state court. 45 USC 56. "When a party files a FELA case in state court, we apply federal substantive law to adjudicate the claim while following state procedural rules. Accordingly, we review the trial court's ruling on a motion for summary disposition de novo. Whether a statute of limitations bars a cause of action is a question of law that we also review de novo." *Hughes v Lake Superior & I R Co*, 263 Mich App 417, 421; 688 NW2d 296 (2004) (internal footnotes and citations omitted.)

MCR 2.116(C)(7) permits summary disposition when a claim is barred by a statute of limitations or under the doctrine of res judicata. A party is entitled to summary disposition under MCR 2.116(C)(7) if the opposing party's claim or claims are barred under the applicable statute of limitations. The parties may support or oppose a motion for summary disposition under MCR 2.116(C)(7) with affidavits, depositions, admissions, or other documentary evidence. *Odom v Wayne Co*, 482 Mich 459, 466; 760 NW2d 217 (2008); MCR 2.116(G). In reviewing motions under MCR 2.116(C)(7), this Court will accept the plaintiff's well-pleaded factual allegations as true unless contradicted by the parties' supporting affidavits, depositions, admissions, or other documentary evidence. *Odom*, 482 Mich 466. This Court will construe the parties' submission in the light most favorable to the non-moving party. *Alcona Co v Wolverine Environmental Production, Inc*, 233 Mich App 238, 246; 590 NW2d 586 (1998). However, if no material facts are in dispute and reasonable minds could not differ on the legal effect of those facts, whether the statute of limitations bars the plaintiff's claim is a matter of law for the Court. *Guerra v Garratt*, 222 Mich App 285, 289; 564 NW2d 121 (1997).

Defendant first argues that plaintiff's claim is barred by the statute of limitations because his injuries manifested themselves on October 17, 2003 and that he knew or should have known that the injuries resulted from his work activities at the very latest in August 2004, when he had

his shoulder replacement surgery. Plaintiff responds that his cause of action associated with this repetitive motion injury accrued on November 21, 2005, the date of Geiringer's report and therefore his March 2008 complaint was timely.

An action under the FELA must be commenced within three years from the day the cause of action accrues. 45 USC 56. With respect to "gradual injuries" the Supreme Court has adopted the discovery rule holding that the FELA statute of limitations accrues when the injury "manifest[s]" itself, taking into account whether the plaintiff "should have known" of his injury. *Urie v Thompson*, 337 US 163, 170; 69 S Ct 1018; 93 L Ed 1282 (1949); *Mix v Delaware and Hudson Ry Co*; 345 F3d 82, 86 (CA 2, 2003). In *Hughes*, *supra*, this Court held that the proper standard for determining the accrual of all FELA claims is the discovery rule. *Hughes*, 263 Mich App 428; see also *Fonesca v CONRAIL*, 246 F3d 585, 588 (CA 6, 2001). "Under the discovery rule, a cause of action is deemed to have accrued when 'the plaintiff reasonably should have discovered both cause and injury.'" *Fonesca*, 246 F3d 588 (citation omitted).

"[T]he goal of the discovery rule is to encourage an employee to inform himself about his condition and promptly bring his claim." *Hughes*, 263 Mich App 428. According to *Hughes*, "[t]he discovery rule imposes an affirmative duty on the plaintiff to exercise reasonable diligence to investigate the cause of a known injury. The relevant inquiry under the discovery rule is when the plaintiff knew or should have known that there was a causal connection between his employment and his injury, not when he knew that the repetitive exposure to the cause was the specific cause of that injury." *Hughes*, 263 Mich App 428 (internal footnotes omitted.) The rule applies in those situations that involve latent injuries which cannot be immediately discovered or "where the injury has an indefinite onset and progresses over many years unnoticed." *Matson v Burlington N Santa Fe RR*, 240 F3d 1233, 1235 (CA 10, 2001).

In this case, plaintiff first complained of his work-related shoulder pain on October 17, 2003 when a railcar door he was closing suddenly stopped and he suffered a shoulder injury during his shift. On November 26, 2003, plaintiff was sent to see Dr. Paul J. Siatczynski at Rochester Knee and Sports Medicine, P.C. for evaluation. Plaintiff's chief complaint was right shoulder pain. Dr. Siatczynski took a history of plaintiff's present illness. Plaintiff explained that he was injured on October 17, 2003, when he "was closing the door on the bilevel and the door hung up and he felt a pop in his shoulder and has had pains since. He has had aches and pains in the shoulder before, but nothing this serious." Dr. Siatczynski specifically noted that plaintiff had undergone "an MRI that showed some degenerative changes at the joint and partial tearing of the rotator cuff." After performing a physical examination of plaintiff and reviewing both plaintiff's MRI and shoulder X-rays, Dr. Siatczynski's diagnosis was: "[d]egenerative arthritis of the right shoulder with partial rotator cuff tear." In his report, Dr. Siatczynski's plan stated as follows:

I cannot tell at this point, which is more likely the cause of his problems. We will do an injection into the bursa today with Lidocaine and Kenalog. We will send him to therapy to see how things respond over the next month. If there is a rotator cuff problem, therapy injections may help but if it is arthritis of the shoulder flaring up, this may respond to arthroscopy or may, in fact, even require a shoulder replacement. We will certainly see how things progress over the next month. He is not yet ready to return to work. We will see how he responds to therapy and reevaluate him next month.

Whether plaintiff's claim is barred as untimely or rescued by the fact that plaintiff claims the exact cause of his injury was not revealed to him until November 2005 in Dr. Geiringer's report turns on when plaintiff "knew or should have known that there was a causal connection between his employment and his injury, not when he knew that the repetitive exposure to the cause was the specific cause of that injury." *Hughes*, 263 Mich App 428. The record is beyond doubt that Dr. Siatczynski diagnosed plaintiff with "[d]egenerative arthritis of the right shoulder with partial rotator cuff tear" on November 26, 2003. Indeed, Dr. Siatczynski's report further reveals that he could not tell with specificity the exact cause of plaintiff's problems. However, it was plaintiff's duty under the discovery rule to endeavor to determine, through the exercise of reasonable diligence, the cause of his injuries including whether the repetitive workplace activities and vibrations he alleges were a contributing cause of his degenerative shoulder condition. *Id.*

While plaintiff claims that he believed the cause of his injuries was directly and solely related to the acute trauma he suffered on October 17, 2003 until he received Dr. Geiringer's report of November 21, 2005, we reiterate that the relevant inquiry for purposes of the FELA "is when the plaintiff knew or should have known that there was a causal connection between his employment and his injury, not when he knew that the repetitive exposure to the cause was the specific cause of that injury." *Hughes*, 263 Mich App 428. On this record, we perceive no reason why plaintiff should not have discovered "that there was a causal connection between his employment and his injury" soon after his MRI results and the explicit diagnosis of "[d]egenerative arthritis of the right shoulder" in November 2003.

Defendant, as the moving party, had the initial burden to support its claim for summary disposition under MCR 2.116(C)(7) by admissible documentary evidence. *American Federation of State, Co and Municipal Employees v Detroit*, 267 Mich App 255, 261; 704 NW2d 712 (2005). Defendant met its burden by attaching Dr. Siatczynski's report diagnosing plaintiff with "[d]egenerative arthritis of the right shoulder" as of November 26, 2003 to its motion for summary disposition. The burden then shifted to plaintiff to demonstrate the existence of a factual dispute regarding the accrual of his claim. *Id.* However, plaintiff failed to present any medical or other documentary evidence showing that, despite Dr. Siatczynski's diagnosis, plaintiff did not know or should not have known that there was a causal connection between his "[d]egenerative arthritis of the right shoulder" and his repetitive workplace activities and repeated exposures to vibration as soon as he received Dr. Siatczynski's diagnosis in November 2003. *Hughes*, 263 Mich App 428. Therefore, by operation of the discovery rule, even viewing the evidence in the light most favorable to plaintiff, plaintiff had or should have had knowledge of his injuries and their causes more than four years before filing suit. As such, plaintiff's present claim accrued in November 2003 or soon thereafter, when plaintiff reasonably should have discovered that the repetitive workplace activities and vibrations were a cause of his degenerative shoulder condition.

Moreover, we cannot overlook the fact that plaintiff twice filed federal claims against his employer for the October 17, 2003 incident. Plaintiff filed the first federal action in February 2005 which was more than three years before his filing of the instant state action. While both federal claims were ultimately dismissed in the United States District Court for liability reasons, we cannot perceive a circumstance where plaintiff would be unaware of Dr. Siatczynski's November 2003 diagnosis of the underlying degenerative condition and his repetitive workplace

activities and repeated exposure to vibration in the work environment. This is especially true where plaintiff was required by the nature of the actions filed to show damages in excess of the jurisdictional amount. Plaintiff failed to raise a justiciable question of fact on when he should have known of the relationship between his injuries and his workplace activities. Because plaintiff filed the present action more than three years after his claim accrued, plaintiff's claim is time barred under 45 USC 56 and the trial court should have granted summary disposition in favor of defendant under MCR 2.116(C)(7).

Defendant also argues that plaintiff's claim is barred by res judicata as a result of the prior federal case. Whether a claim is barred by res judicata is a question of law, which this Court reviews de novo. *Washington v Sinai Hosp*, 478 Mich 412, 417; 733 NW2d 755 (2007). Res judicata is a doctrine that "bars relitigation of claims that are based on the same transaction or events as a prior suit." *Stoudemire v Stoudemire*, 248 Mich App 325, 334; 639 NW2d 274 (2001). Because the prior action occurred in federal court, the applicability of res judicata must be determined under federal law. *Pierson Sand & Gravel, Inc v Keeler Brass Co*, 460 Mich 372, 380-381; 596 NW2d 153 (1999); *Beyer v Verizon North Inc*, 270 Mich App 424, 428-429; 715 NW2d 328 (2006). The federal doctrine of res judicata is substantially similar to the res judicata of Michigan law. *Pierson Sand & Gravel*, 460 Mich at 380. The United States Court of Appeals for the Sixth Circuit has recognized that, "res judicata has four elements: (1) a final decision on the merits by a court of competent jurisdiction; (2) a subsequent action between the same parties or their privies; (3) an issue in the subsequent action which was litigated or which should have been litigated in the prior action; and (4) an identity of the causes of action." *Kane v Magna Mixer Co*, 71 F3d 555, 560 (CA 6, 1995).

Here, clearly the first two elements of res judicata were satisfied. Both the 2005 suit in federal court and the instant suit involved the same parties and the 2005 suit was disposed of by way of a final decision on the merits. See *Capital Mortgage Corp v Coopers & Lybrand*, 142 Mich App 531, 536; 369 NW2d 922 (1985) ("summary judgment is the procedural equivalent of a trial and is a judgment on the merits which bars relitigation on principles of res judicata"). With regard to the third element, plaintiff should have been aware of the cause of his injury at the time of the prior action, thus plaintiff could have raised it in the earlier action. However, with regard to the fourth element, defendant cannot establish identity of claims.

The fourth element, the identity of claims factor, is satisfied when the claims asserted "arose out of the same transaction or series of transactions" or "the same core of operative facts." *Winget v JP Morgan Chase Bank, NA*, 537 F 3d 565, 580 (CA 6, 2008) quoting *Browning v Levy*, 283 F 3d 761, 773-774 (CA 6, 2002) (internal citation omitted). The matter contested in the present case involves plaintiff's allegations of repetitive motion injuries he suffered over the course of his employment as a result of "repetitive motions, forced positions, and constant exposure to vibration" while performing his daily job duties for defendant resulting in his diagnosis of degenerative arthritis. In contrast, the earlier 2005 case arose solely out of the incident that occurred at the rail yard on October 17, 2003 when plaintiff suffered a traumatic injury to his right shoulder when he attempted to close a door that hung up and jammed as a result of a worn bolt likely causing plaintiff's rotator cuff tear. Plaintiff's asserted claims plainly do not "[arise] out of the same transaction or series of transactions" or "the same core of operative facts." *Id.* As such, defendant cannot establish the fourth element for application of res judicata, identity of claims. For these reasons, the trial court properly denied defendant's

motion for summary disposition based on res judicata for the reason that “an identity of the causes of action cannot be established between” the two cases.

In sum, while defendant has not shown that the doctrine of res judicata bars the instant claim, defendant has established that plaintiff violated the applicable three-year statute of limitations under FELA, and, therefore, we reverse the trial court’s denial of defendant’s motion for summary disposition.

Reversed and remanded for entry of an order of dismissal. Defendant, being the prevailing party, may tax costs pursuant to MCR 7.219.

/s/ Douglas B. Shapiro

/s/ Kathleen Jansen

/s/ Pat M. Donofrio