2018-SC-191-D and 2018-SC-440-D

IN THE SUPREME COURT
OF THE COMMONWEALTH OF KENTUCKY

LARRY M. BOGGS,
Plaintiff / Appellee / Cross-Appellant,

v.

CSX TRANSPORTATION, INC.,
Defendant / Appellant / Cross-Appellee.

On Appeal from the Jefferson Circuit Court, Division IV,
Civil Action No. 09-CI-000800 and the Court of Appeals of the
Commonwealth of Kentucky, 2016-CA-001849

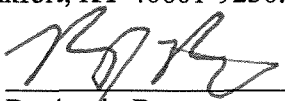
AMICUS BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES IN SUPPORT OF CSX TRANSPORTATION, INC.

Benjamin Beaton (KY 93960)
Jeffrey W. DeBeer (KY 97957)
SQUIRE PATTON BOGGS (US) LLP
201 East Fourth Street, Suite 1900
Cincinnati, Ohio 45202
Telephone: (513) 361-1200
benjamin.beaton@squirepb.com

Counsel for Amicus Curiae Chamber of Commerce of the United States of America

CERTIFICATE OF SERVICE

I hereby certify that copies of this brief was mailed on this 19th day of February, 2019 to the following: Alva A. Hollon, Jr., Sams & Hollon, P.A., 9424 Baymeadows Road, Suite 160, Jacksonville, FL 32256-7967; Allen K. Gruner, 239 S. Fifth Street, Suite 1800, Louisville, KY 40202; Rod Payne, Boehl Stopher & Graves, LLP, 400 W. Market St., Suite 2300, Louisville, KY, 40202; Evan M. Tager, Carl J. Summers, Mayer Brown, LLP, 1999 K Street, N.W., Washington, DC 20006; Hon. Charles Cunningham, Jefferson Circuit, Division 4, 700 W. Jefferson St., Louisville, KY 40202; and Samuel P. Given, Jr., Clerk, Court of Appeals, 360 Democrat Drive, Frankfort, KY 40601-9230.



Benjamin Beaton

STATEMENT OF POINTS AND AUTHORITIES

INTRODUCTION

This case concerns the Court of Appeals' abandonment of settled caselaw where certainty is at its most important: the accrual and effectiveness of the statute of limitations. In rejecting the Circuit Court's instruction and the jury's verdict, the decision below misinterpreted the text of the Federal Employers' Liability Act, departed from authoritative precedent, and risked far-reaching repercussions wherever litigants might twist the "discovery rule" to excuse their lack of diligence or timeliness.

PURPOSE AND INTEREST OF *AMICUS CURIAE*

The Chamber of Commerce of the United States of America ("U.S. Chamber") is the world's largest business federation. The U.S. Chamber represents 300,000 direct members and indirectly represents the interests of more than 3 million businesses and professional organizations of every size, from every industry sector, in every region of the nation. In particular, the U.S. Chamber has many members located in Kentucky and others who conduct substantial business in the Commonwealth. These members have a significant interest in the sound and equitable development of Kentucky and federal law regarding civil procedure and statutes of limitations. The U.S. Chamber regularly advocates for the interests of the business community in courts across the nation by participating as *amicus curiae* before this Court, the Supreme Court of the United States, federal courts of appeal and district courts, and other state courts in cases, like this one, that involve issues of importance to the business community.

BACKGROUND

The Circuit Court applied longstanding and straightforward FELA precedent when it instructed the jury that plaintiff Larry Boggs must have sued within three years after he knew or should have known "that his work on the railroad was a *potential cause of [his] injury*." (CSX App'x at 4.) In light of Boggs's own statements, made more than three years before he brought suit, that his degenerative disc disease might have come from his repetitive activities at work, the record amply supported the jury's conclusion that his claim was time-barred. (CSX Br. at 1–5.)

This did not satisfy the Court of Appeals, however. Even though Boggs "suspect[ed]" his work "potentially caused" the injury, this purportedly did *not* trigger his duty to investigate and sue within three years. (CSX App'x at 6–7.) Instead, the Court of Appeals borrowed a Montana court's "summary" of the FELA discovery rule that no other court has adopted. And for good reason: the block-quoted passage cites no authority, never mentions a plaintiff's diligence, and deems it "immaterial" whether an injury was "discovered more than three years before the action was filed." *Id.* at 9–10 (quoting *Anderson v. BNSF Ry.*, 380 Mont. 319, 339–40 (2015)).

As explained below, this turns the "discovery rule" into a "diagnosis rule": any plaintiff could wait until he not only suspected (*id.* at 6–8) but concluded that work caused his injury. This misinterprets FELA and subverts the reasons why legislatures enact statutes of limitations. As this Court and many others have long recognized, the discovery rule is intended to reinforce rather than undermine the certainty, diligence, and repose provided by statutes of limitations.

ARGUMENT

I. THE DISCOVERY RULE TURNS ON REASONABLE SUSPICION, NOT CERTAINTY.

The Court of Appeals held that the Circuit Court's "instructions were clearly erroneous . . . because they did not fully and fairly inform the jury on the applicable law." (CSX App'x at 8.) The opinion below, however, never said how the trial judge's instruction should have differed. Nor did it cite Kentucky or federal authority identifying any error in the jury instruction. It simply asserted that "mere suspicion," "first suspect[ing]," or knowing a "potential[] cause[]" was not enough. *Id.* at 6–8.

The caselaw the Court of Appeals ignored, however, showed that its own decision was the one that departed from precedent without support or justification. The Circuit Court's FELA instruction, by contrast, reflected a "long stream of cases" in the U.S. Supreme Court, the federal courts of appeal, and this Court. *Lipsteuer v. CSX Transp., Inc.*, 37 S.W.3d 732, 735–37 (Ky. 2000).

The Circuit Court's instruction directly implemented this line of overwhelming authority, and cannot possibly be held to have been erroneous. (*See* CSX Br. at 26–27.) Federal courts have consistently held that a FELA claim accrues when a plaintiff knows, or should have known, about the *possibility* that the employer caused the injuries. *See, e.g.*, *United States v. Kubrick*, 444 U.S. 111, 118 (1979) (plaintiff "aware of his injury and its *probable cause*") (FTCA decision adopted in FELA cases); *Matson v. Burlington N. Santa Fe R.R.*, 240 F.3d 1233, 1236 (10th Cir. 2001) (plaintiff "should have known that his employment . . .was a *potential cause* of that injury"); *Fries v. Chicago & Nw. Transp. Co.*, 909 F.2d 1092, 1095 (7th Cir. 1990) (plaintiff "only need know or have reason to know of a *potential cause*"); *Albert v. Maine C. R. Co.*, 905 F.2d 541, 544 (1st Cir. 1990) (rejecting

"definite knowledge" requirement in favor of a "duty to investigate" standard); *Townley v. Norfolk & W. R. Co.*, 887 F.2d 498, 501 (4th Cir. 1989) (plaintiff "*suspected* that [the injury] . . . was caused by his work"); *Kichline v. Consol. Rail Corp.*, 800 F.2d 356, 358 (3d Cir. 1986) ("plaintiff knew of . . . the *possible cause* of his injury"); *Wells v. Norfolk S. Ry.*, 1997 U.S. App. LEXIS 4347, at *4–5, 8 (6th Cir. Mar. 6, 1997) ("a plaintiff who has *reason to suspect* that his injury is work related" or "*might be related*"); *McNutt v. CSX Transp., Inc.*, 2010 U.S. Dist. LEXIS 40463, at *6 (W.D. Ky. Apr. 26, 2010) ("A medical *diagnosis . . . is not required* for a plaintiff to reasonably know that his injury is *possibly related* to his work.") (all emphases added).

The Circuit Court's direct application of federal FELA authority was entirely consistent with Kentucky courts' straightforward articulation of the discovery rule. Certainty is not required; a reasonable possibility or suspicion is enough. This Court in *Lipsteur* recognized that a FELA cause of action accrues when a plaintiff "*in the exercise of reasonable diligence*[] should know" that "his injury *and* its cause . . . *could be* work-related." 37 S.W.3d at 737 (emphasis added). That articulation of the FELA standard reflected this Court's adoption of the common-law discovery rule, which requires reasonable diligence, not absolute certainty:

> A cause of action will not accrue under the discovery rule until the plaintiff discovers or in the exercise of reasonable diligence should have discovered not only that he has been injured but also that his injury *may have been caused* by the defendant's conduct.

Louisville Trust Co. v. Johns-Manville Products, 580 S.W.2d 497, 501 (Ky. 1979) (quoting *Raymond v. Eli Lilly & Co.*, 117 N.H. 164, 171 (1977)) (emphasis added). This Court reiterated that test in 2010 in *3M v. Engle*, 328 S.W.3d 184, 189 & n.21 ("cause of action

accrues when he discovers, or in the exercise of reasonable diligence should have discovered . . . that his injury may have been caused by the defendant.") (citing *id.*).

Kentucky authority, moreover, consistently emphasizes the plaintiff's obligation to reasonably investigate a potential claim before letting it grow stale. *See, e.g., R.T. Vanderbilt Co. v. Franklin*, 290 S.W.3d 654, 659 (Ky. Ct. App. 2009) (discovery rule applies if plaintiff "exercised reasonable diligence in obtaining knowledge that he has a claim against the tortfeasor"); *Bennett v. Nicholas*, 250 S.W.3d 673, 677 (Ky. 2007) (constructive knowledge applies where knowledge should have led plaintiff "at least [to] have conducted further inquiry"); *Queensway Fin. Holdings Ltd. v. Cotton & Allen, P.S.C.*, 237 S.W.3d 141, 151 (Ky. 2007) ("A person who knows he has been injured has a duty to investigate and discover the identity of the tortfeasor within the statutory time constraints.") (internal quotation marks and citation omitted).[1]

The Court of Appeals accepted that plaintiff has a duty of due diligence under the governing law. (*See* CSX App'x at 6 (citing *Kubrick*, 444 U.S. at 122–23).) Yet the ruling below completely undermines that duty—and its corresponding incentive for prompt disclosure and resolution. *Vandertoll v. Commonwealth*, 110 S.W.3d 789, 797 (Ky. 2003) (acknowledging that "statutes of limitation serve to bar stale claims by favoring prompt resolution of those claims[.]") (citation omitted). A due diligence requirement necessarily

[1] *Cf. Fluke Corp. v. LeMaster*, 306 S.W.3d 55, 60 (Ky. 2010) ("Under the discovery rule, a cause of action will not accrue until the plaintiff discovers (or in the exercise of reasonable diligence should have discovered) not only that he has been injured, but also that this injury *may have been caused* by the defendant's conduct.") (emphasis added); *Golden Oak Mining Co. v. Lucas*, 2011 Ky. App. Unpub. LEXIS 952, at *17–18 (Ct. App. June 17, 2011) (certainty about causation is not required; suspicion is enough).

presumes that claims may accrue *before* plaintiffs are certain whether their claims exist; the Court of Appeals, by contrast, allows uncertain plaintiffs to wait and see.

II. THE COURT OF APPEALS' ONLY SUPPORT IS MISCONSTRUED AND UNPERSUASIVE.

A. The Court of Appeals overlooked the great mass of dispositive precedent set forth above. It focused on a single federal decision, the Seventh Circuit's opinion affirming dismissal of a FELA suit as time-barred (CSX App'x at 7–8 (citing *Fries*, 909 F.2d 1092)), although CSX's appellee brief cited no fewer than five of the precedents identified above, and more besides.

In any event, the Court of Appeals badly misconstrued the single federal decision that it paused to examine. The court stated that the "full holding of *Fries* does not support the assertion of CSX that an employee's mere suspicion of an injury or its probable cause, standing alone, is the correct standard for determining when a cause of action accrues under FELA." *Id.* at 8. Yet *Fries* (like several other decisions set forth above) held exactly the opposite, expressly rejecting the notion "that a plaintiff's cause of action does not accrue until suspicion of causation ripens into actual knowledge . . . ." 909 F.2d at 1096. The opinion could hardly be clearer—or more clearly opposite to Boggs's position:

- "[T]he injured plaintiff need not be certain which cause, if many are possible, is the governing cause but only need know or have reason to know of a potential cause" (*id.* at 1095 (citations omitted));
- "[T]his rule imposes on injured plaintiffs an affirmative duty to investigate the potential cause of his injury" (*id.*);
- The Supreme Court "did not . . . provide an escape for plaintiffs who are aware that some type of injury exists yet who choose to ignore it by failing to seek diagnosis and investigate the cause" (*id.* (citations omitted)); and
- "[U]pon experiencing symptoms a plaintiff has a duty to investigate both the injury and any suspect cause" (*id.* at 1096 (citations omitted)).

The Court of Appeals' only response was to note that *Fries* distinguished another precedent. (*See* CSX App'x at 8 (discussing but not citing *Stoleson v. United States*, 629 F.2d 1275 (7th Cir. 1980)).) *Fries*'s distinguishing of the *Stoleson* precedent, however, is entirely irrelevant. *Stoleson* tolled the limitations period during a time before the medical community had recognized a causal connection between the plaintiff's injury and working condition. *Stoleson*, 629 F.2d at 1270. That factual scenario, of course, is as irrelevant to Boggs's case as it was to Fries's—which is why the Seventh Circuit distinguished *Stoleson* and the Court of Appeals should have. What is more, the *Stoleson* decision is entirely consistent with CSX's position and the limited reason the discovery rule exists: to avoid a conundrum in which plaintiffs, through no fault of their own, *could not have known* about a potential cause of their injuries. *See, e.g.*, *Urie v. Thompson*, 337 U.S. 163, 169 (1949) (applying discovery rule to FELA action in which employee otherwise would have been "charged with knowledge" of an injury "unknown and inherently unknowable even in retrospect"). The decision below, however, turns the discovery rule's exception to normal rules for accrual on its head: regardless of when the plaintiff could have known about a potential cause of his injury, the discovery rule will toll the limitations period until the plaintiff is in fact "aware of the causal connection between his injuries and his workplace." (CSX App'x at 6.) This is simply not the law.

B. Even further afield is the Court of Appeals' reliance on the Montana Supreme Court's outlier decision in *Anderson v. BNSF Railway.* No other court has followed Montana's creative re-interpretation of the FELA statute of limitations. And for good reason. It would treat a claim as timely "even if [the injury] were discovered more than three years before the action was filed." (CSX App'x at 9–10.) This directly contradicts the

U.S. Supreme Court's interpretation that a claim accrues when the plaintiff is "aware of his injury and its probable cause." *Kubrick*, 444 U.S. at 118.

Montana enjoys a well-earned reputation for such outlier interpretations in FELA litigation. *See Getting Back on Track:* BNSF Railway Co. v. Tyrrell *Clarifies FELA Jurisdiction and Venue in State Court*, 79 MONT. L. REV. 145, 165 (2018) (noting the court's "long history of broadly construing FELA"); *BNSF Ry. v. Tyrrell*, 137 S. Ct. 1549, 1559 (2017) (lopsided 8-1 reversal of decision extending jurisdiction to all FELA claims, no matter where based, if defendant did business in Montana). Its decision in *Anderson* does not disappoint.

The Montana Supreme Court's opinion expressly and unabashedly creates a split with other courts—indeed, *every other court*—on the proper interpretation of the FELA statute of limitations. *Anderson*, 380 Mont. at 331–32, 334 (citing 1st, 2d, 3d, 4th, 5th, 6th, 7th, and 10th Circuit authority refusing to treat a repetitive-exposure injury as a "continuing tort"). In the sole passage the court below cited (CSX App'x at 9–10), *Anderson* promulgated a detailed set of proposed jury instructions worthy of a code book—albeit utterly untethered to FELA's text, history, structure, or precedent. The only support marshaled for Montana's riff on the FELA statute of limitations was "the plain language of 45 U.S.C. § 51." *Anderson*, 380 Mont. at 339. The main problem with that approach, however, is that § 51 is *not FELA's limitations provision.* Rather, § 51 sets forth FELA's *cause of action* provision, while the straightforward text of § 56, the separate limitations provision, goes unmentioned. *See* 45 U.S.C. § 56 ("[N]o action shall be maintained under this act unless commenced within three years from the day the cause of action accrued."). There is simply no way to tease out a rule that plaintiffs may "recover damages for the full

scope of his or her injury," even if "a worker discovered his or her work-related injury *more* than three years prior to filing suit." *Anderson*, 380 Mont. at 339–40; *contra Lipsteuer*, 37 S.W.3d at 737 ("[A] cause of action accrues when a plaintiff knows or . . . should know of both the injury and its cause.") (citing *Kubrick*).[2]

Although the *Anderson* decision is far from clear, its holdings boil down to this: repetitive workplace injuries should be deemed "continuing torts" that effectively start the limitations period at an injury's end, not its beginning. *See* 380 Mont. at 332 (criticizing other courts for holding "that a worker's repetitive exposure to dangerous working conditions does not transform a 'definite and discoverable' injury into a continuing tort") (quoting *Matson*, 240 F.3d at 1237). This approach, however, contradicts federal caselaw—as the Montana Supreme Court freely admits. *See id.* at 332–34. And relatedly, in Kentucky, "the continuing violation doctrine does not apply" because "Kentucky courts and the Sixth Circuit are only willing to apply [it] to certain employment discrimination claims and common law property claims with well-established continuing violation exceptions—unless, of course, the Kentucky legislature explicitly directs otherwise." *Ellis v. Arrowood Indem. Co.*, 2015 U.S. Dist. LEXIS 56515, at *9–10 (E.D. Ky. Apr. 30, 2015).

Suffice it to say, the Court of Appeals' cursory incorporation of the Montana Supreme Court's approach is not supported by any analysis of the federal or Kentucky authority that might hypothetically justify such a departure from FELA's text and

[2] *See also Fries*, 909 F.2d at 1095 ("The tolling permitted by *Urie* only extends the limitations period to the date when the injury manifests itself, not beyond."). It is unsurprising, therefore, that federal courts have routinely rejected *Anderson*'s "aggravation" approach. *See Aparicio v. Norfolk & W. Ry.*, 84 F.3d 803, 815 (6th Cir. 1996), *abrogated on other grounds*, *Reeves v. Sanderson Plumbing Prods.*, 530 U.S. 133 (2000); *Campbell v. Grand Trunk W. R.R. Co.*, 238 F.3d 772, 776–77 (6th Cir. 2001).

precedent. Neither party even briefed or advocated below for the *Anderson* approach. Perhaps, if they had, the Court of Appeals would have noticed that the Montana Supreme Court *itself* saw fit to preserve the discovery rule outside the "continued negligence" context. *Bridgman v. Union Pac. R.R.*, 372 Mont. 124 (2013). There the Montana Supreme Court interpreted the discovery rule consistently with many of the same federal authorities discussed above, and in direct contradiction to many of the arguments accepted in the decision below:

> To keep the limitations period from being too open-ended, the discovery rule imposes an affirmative duty upon plaintiffs to exercise reasonable diligence and investigate the cause of a known injury. It is enough to know that work is a *possible* cause of an injury to trigger a duty to investigate work conditions and pursue potential claims. *Matson*, 240 F.3d at 1235–36. Although *Urie* allowed for tolling the limitations period while an injury is undetectable, it did not extend that tolling to plaintiffs who are aware that some type of injury exists yet do not "seek diagnosis and investigate the cause." *Fries*, 909 F.2d at 1095 (citing *Kubrick*, 444 U.S. at 120–21).

Bridgman, 372 Mont. at 129.

Rather than disagreeing with the Circuit Court's instruction, therefore, even the binding Montana authority the court below retreated to—in the end—undermines its reasoning. There is no warrant, therefore, to contort the discovery rule in a way that ignores the "affirmative duty upon plaintiffs to exercise reasonable diligence," the "*possible* cause of an injury," or the risk that "the limitations period [could become] too open-ended." *Id.* (emphasis in original). The Court of Appeals' was wrong to go even further in this case.

III. THE COURT OF APPEALS' DECISION FRUSTRATES THE REASONS WHY CONGRESS AND STATE LEGISLATURES ENACT STATUTES OF LIMITATIONS.

The discussion above highlights many of the perverse effects of the Court of Appeals' "actual knowledge" requirement. The decision below manages to thwart

practically all of the policy goals that courts ascribe to statutes of limitations—prompt resolution, diligent investigation, avoidance of stale claims, certainty and repose. To be sure, these aims come with a tradeoff any time a potentially meritorious claimant is barred from suit because of the plaintiff's delay. But that is a policy decision that legislators have made and courts are bound to respect. As the U.S. Supreme Court has noted, the FELA statute of limitations reflects Congress' weighing of plaintiffs' interests against those of defendants:

> Statutes of limitation[s] are primarily designed to assure fairness to defendants. Such statutes promote justice by preventing surprises through the revival of claims that have been allowed to slumber until evidence has been lost, memories have faded, and witnesses have disappeared. The theory is that even if one has a just claim it is unjust not to put the adversary on notice to defend within the period of limitation and that the right to be free of stale claims in time comes to prevail over the right to prosecute them. Moreover, the courts ought to be relieved of the burden of trying stale claims when a plaintiff has slept on his rights.

Burnett v. N.Y. C. R. Co., 380 U.S. 424, 428 (1965) (internal citations and quotation marks omitted) (analyzing the timeliness of a FELA claim).

Rather than encourage the diligent investigation and prompt resolution of claims, however, the decision below excuses (or even rewards) plaintiffs who sit on their claims. "The rationale underlying statutes of limitations is fourfold: to ensure fairness to defendant; to encourage prompt prosecution of causes of action; to suppress stale and fraudulent claims; and to avoid the inconvenience engendered by delay, specifically the difficulties of proof present in older cases." *Lutz v. Chesapeake Appalachia, L.L.C.*, 717 F.3D 459, 471 (6th Cir. 2013) (internal quotation marks and citation omitted). Nothing in the statutory text, the caselaw, or the reasoning of the decision below justifies a free pass for plaintiffs who, despite suspecting a work-related injury, do nothing to pursue their rights. (CSX

App'x at 6–7 (rejecting the notion that Boggs's "activ[e] investigati[on]" of the possible cause of his injury, including through "discussions with his healthcare providers" was relevant to the limitations analysis).)

Even setting aside the interests of defendants, neither plaintiffs nor trial courts benefit when claims sit on the shelf without investigation and resolution. Plaintiffs may remain in suboptimal conditions or forgo beneficial medical intervention that they would otherwise have received had they diligently investigated their claims. And the reliable administration of justice in the trial courts benefits from the litigation of fresh claims before memories fade and witnesses disappear. *See Alcorn v. Gordon*, 762 S.W.2d 809, 812 (Ky. Ct. App. 1988) ("The purpose of these statutes is to prevent the bringing of claims when, due to the passage of time, evidence is lost, memories have faded and witnesses are unavailable.") (citation omitted).

And "at some point," as courts consistently recognize, "the right of a defendant to be free from stale claims, even if meritorious, prevails over the right to prosecute them." *Id.* (citation omitted). The goals of stability and repose in legal contingencies are ones embodied in every statute of limitations. The legislature, by selecting a one- or two- or three-year limitations period in a manner responsive and accountable to the voters, balances these difficult policy choices so that courts do not have to. The FELA discovery rule has been in place since the 1940s, yet Congress has not seen fit to expand or amend it in the manner the court below (or the Montana Supreme Court) advocates. Doing so here "would thwart the purposes of repose statutes." *Fries*, 909 F. 2d at 1095 (the law "imposes on injured plaintiffs an affirmative duty to investigate the potential cause of his injury").

Finally, the decision below plainly invites forum shopping and adventurous claims in Kentucky state courts that would never survive elsewhere. That divergence in "[t]he period of time within which an action may be commenced" undermines the "uniformity of operation" which Congress, in enacting FELA, did not wish "to be destroyed by the varying provisions of the state statutes of limitation[s]." *Engel v. Davenport*, 271 U.S. 33, 39 (1926). This Court has no basis to foster such uncertainty in the Kentucky legal and business communities by reading a "certainty" requirement into a statute of limitations where none exists.

CONCLUSION

The U.S. Chamber respectfully urges this Court to reverse the Court of Appeals' decision and reinstate the Circuit Court's judgment.

Date: Feb. 19, 2019

Respectfully submitted,

Benjamin Beaton
SQUIRE PATTON BOGGS (US) LLP
201 E. Fourth Street, Suite 1900
Cincinnati, OH 45202
Telephone: (513) 361-1200
Facsimile: (513) 361-1201

Counsel for Amicus Curiae Chamber of Commerce of the United States of America