

Case Name: Dennis Radder v. CSX Transportation

Date Decided: December 30th, 2009

Originally Filed in: New York (State)

Decided by: New York 4th Department (State)

Court: Supreme Court, Appellate Division, Fourth Dept., New York

Judge: Judge Hurlbutt, Judge Smith, Judge Centra, Judge Green, Judge Pine

Citation: 2009 WL 5127938 (N.Y.A.D. 4 Dept.)

Background:

Plaintiff, Dennis Radder, filed this action under the Federal Employers' Liability Act, FELA, seeking damages for injuries sustained during the course of employment for defendant, CSX Transportation. While Radder's action was pending, another CSX employee was injured and retained the firm of Radder's counsel to represent him. Shortly before Radder's case went to trial, the other employee disclosed to his attorneys, and CSX's attorneys, that he had forged an inspection report related to the piece of equipment that had caused Radder's injuries. CSX moved to preclude the second employee's testimony contending that the law firm, employed by plaintiff, had violated disciplinary rules by interviewing the second employee. The Supreme Court denied that motion, and granted a motion for a mistrial, and CSX's motion for a new trial. The jury ultimately returned a verdict in favor of Radder awarding him \$550,000 for past pain and suffering, and \$1 million for future pain and suffering to cover 24.1 years. The Court then reduced the future pain and suffering to \$650,000. CSX appealed the court's ruling that the law firm, Kantor & Godwin, did not violate Disciplinary Rules.

Issue:

Issue: Did the trial court err in holding that Kantor & Godwin did not violate Disciplinary Rule 7-104 by interviewing the second injured employee [also K&G's Client]?

Overall Issues Discussed or Touched Upon in this Case:

- *Reduction of Damages*
- *Procedural Issues - State*

Held:

CSX contended that K & G violated Disciplinary Rules and that warranted suppression of the information improperly obtained by Radder's attorneys. Under DR 7-104(a), provided that during the course of representation, the lawyer shall not , communicate or cause another to communicate on the subject of representation with a party the lawyer knows to be represented by a lawyer in a matter unless they have prior consent. However, this Court found, that at the time of Radder's accident, the other employee was an employee deemed to be represented by the attorneys for CSX. However, at the time of his interview, the second employee was no longer an employee of CSX. Therefore, there was no violation of DR 7-104(a) CSX further

argued that K & G violated former DR 5-105(b) " (d) because it was representing two claims with differing interests. This Court found, however, had there been an impermissible conflict of interest, it would be a breach of duty to K & G's clients. Finally, CSX contended that the award for damages for past and future pain and suffering should be reduced because they deviate materially from what would be reasonable compensation. However, the federal standard, applied to FELA cases, mandates that a jury award shall be upheld unless it is so excessive as to "shock the judicial conscience". Here, this Court found that Radder's award did not do that. Accordingly this Court upheld the award and judgment in favor of Radder.

Comments:

Generally, absent some constitutional, statutory, or precedential authority mandating the suppression of evidence, it will be admissible even if procured by unethical means. Here, the attorneys for K & G arguably damaged the credibility of their own client to bolster the case of Radder, their first client. However, this Court found that if there was any breach owed by Kantor & Godwin's second client, there would be a breach of duty to that plaintiff which would be completely separate to this current action. As such, the Court upheld the suppression of the second plaintiff's testimony.

This is a very odd case. I have two comments:

First, I believe that K&G should have withdrawn immediately from both cases when they found out that there was fraudulent evidence production by one of their client's in another one of their client's cases.

Second, under Section 60 of FELA, it is a crime for the railroad to perform any act that would "chill" a co-employee from giving a statement. DR 7-104 is a state ethic's rule. There are scant few jurisdictions that have held that Secion 60 trumps Section 7-104 but I believe it should.

Steve Gordon