

Case Name: Thurston Hensley v CSX Transportation

Date Decided: August 26th, 2009

Originally Filed in: ()

Decided by: (State)

Court: Court of Appeals of Tennessee

Judge: Judge Susano

Citation: 2009 WL 2615849 (Tenn.Ct.App)

Background:

This was a case brought before this Court on remand from the United States Supreme Court. The case was first before this Court following a judgment in entered on a jury verdict in the amount of \$5million in favor of Thurston Hensley ("Hensley") who had sued pursuant to the Federal Employer's Liability Act ("FELA") to recover for asbestosis, a lung disease caused by his exposure to asbestos while working for the Railroad, CSX Transportation ("CSX") for 30+ years, and toxic encephalopathy, a brain illness caused by exposure to a solvent employee used for many years. This Court affirmed the judgment, holding that the trial court did not err in refusing to instruct the jury, as requested by the Railroad, that Hensley's fear of cancer must be "genuine and serious" to be compensable. The finding by this Court was reversed holding that the trial court should have given the substance of the requested instructions and that because there is a "reasonable probability" under federal law that the error affected the judgment, this court reversed the judgment of the trial court and remanded for a new trial limited to the issues of damages. Now, on remand from the Supreme Court, are the following issues.

Issue:

(1) Does the US Supreme Court opinion preclude the Tennessee Court of Appeals from reviewing the record of the trial court's proceeding to determine whether the failure to charge the jury on the standard for fear-of-cancer damage is an "error involving a substantial right more probably not affected the judgment?" (2) Did the error of the trial court in failing to charge the jury on the standard for "fear-of-cancer damages amount to an "error involving a substantial right that more probably than not affected the judgment?"

Overall Issues Discussed or Touched Upon in this Case:

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Held:

Under FELA a fear of cancer is a recoverable aspect of damages, but only if the fear is genuine and serious. CSX argued that the a statement in one of the proceedings was inconsistent with the result that the missing instruction was a harmless error: "Instructing the jury on the standard for fear-of-cancer damages would not have been futile". This Court found

that this statement is not dispositive as to whether the failure to direct the jury was a harmless error or not. This Court reasoned that Justice Steven's statement that "the question of whether the instructional error was nevertheless harmless remains open to review on remand by [this Court]". The Accordingly the Court found that the Supreme Court left open the ability of this Court to review whether the error was harmless or not. The Court then considered whether the missing instruction was a harmless error. The harmless error rule, under Tennessee law, looks at whether or not the error "more probably than not affected the judgment". The federal standard is "a reasonable probability that, but for the error claimed, the result of the proceeding would have been different". The purpose of the "genuine and serious" requirement is to protect defendants from excessive verdicts based on appeals to jurors' passions with the deeply emotional issue of cancer. The suggestion of a mere possibility of cancer will evoke raw emotions. Moreover, an instructional error is more likely to be harmful if the evidence on the question is close. When the evidence is close, the missing instruction may have been the "single factor that turned the tide". This Court found that the evidence, while legally sufficient to sustain the verdict, was close and therefore weighs against finding the error harmless. This Court ultimately held that the omission of the "genuine and serious" instruction was probably a substantial error and therefore, not harmless. The holding is cemented by the fact that the mention of cancer invokes raw emotion and therefore without limiting the fear it may lead to an excessive award. The judgment of the trial court was reversed, and remanded to the trial court. This Court further instructed the trial court to add the "genuine and serious" instruction in the jury instruction if the employee wishes to recover on a fear of cancer theory.

Comments:

FELA provides that if an employee has a "fear of cancer" as a result of negligent conditions caused by his employer than he/she may recover damages for this fear. However, as illustrated in this case, the fear must be "genuine and serious" as to limit the award a jury may give for long reaching fear of cancer claims. Steve Gordon <http://www.Gordon-Elias.com>