IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, LAW DIVISION

Deanna Cox, as representative pursuant to power of attorney for Bobby J. Earls, Plaintiff, v. Penn Central Corporation, a/k/a American Premier Underwriters, Inc., c/o C.T. Corporation Systems and Consolidated Rail Corporation, d/b/a ConRail, Defendants.	))))))))))))	No. 20 L 550

MEMORANDUM OPINION AND ORDER

Summary judgment is appropriate only if no question of material fact exists and the moving party deserves judgment as a matter of law. In this case, the admissibility of the plaintiff's expert witness testimony is a question best reserved for a trial judge. If admissible, plaintiff's expert witness testimony raises a genuine issue of material fact. The defendants' summary judgment motion must, therefore, be denied.

Facts

Deanna Cox represents Bobby J. Earls pursuant to valid power of attorney. Penn Central Corporation and Consolidated Rail Corporation (ConRail) are railroad corporations. From 1969 to 1999, Earls worked as a fireman and engineer, first for Penn Central and then for Conrail. Doctors diagnosed Earls with non-Hodgkin's lymphoma, which Cox alleges resulted from the working conditions at Penn Central and Conrail that exposed Earls to unreasonable levels of diesel exhaust, benzene, and polycyclic aromatic hydrocarbons.

Cox filed this lawsuit pursuant to the Federal Employers' Liability Act (FELA), and Earls's claims are supported by expert testimony from Dr. Ernest Chiodo. Conrail filed a motion to exclude Chiodo's testimony, a motion Penn Central joined. Conrail also filed a summary judgment motion that Penn Central also joined. After the parties had fully briefed these motions, Cox filed a motion to supplement her response brief by adding authority to the effect that Chiodo's testimony should be admitted.

Analysis

Conrail argues first that Cox's expert opinions are inadmissible on the issue of causation because they fail under Rule of Evidence 702 and the *Frye* test. Ill. R. Evid. 702; *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923). "The purpose of the *Frye* test is to exclude new or novel scientific evidence that undeservedly creates 'a perception of certainty when the basis for the evidence or opinion is actually invalid.'" *People v. New*, 2014 IL 116306, ¶ 26 (quoting *Donaldson v. Central Ill. Pub. Serv. Co.*, 199 Ill. 2d 63, 78 (2002)). Whether a *Frye* hearing is necessary and whether there is general acceptance of the disclosed opinions in the relevant scientific community are questions reviewed by an appellate court *de novo*. *Id.*

For at least two significant reasons, this court is not inclined to take Conrail's suggestion that it consider the admissibility of Chiodo's expert testimony at this stage of the litigation. First, Conrail does not point to a single instance of expert testimony being excluded for *Frye* deficiencies by a judge sitting in the Law Division's motions section. It should be noted that this court is unaware of any such instances. Certainly, all reported cases with which this court is familiar indicate that *Frye* determinations are made by trial judges, not motions judges. Placing expert evidentiary issues before a trial judge makes sense because that judge is used to ruling on admissibility issues; a motions judge is not.

Second, a ruling on admissibility at this point could be highly prejudicial to both sides. It is certainly possible that a trial judge could disagree with this court's *Frye* ruling. The parties would have, therefore, prepared for trial in one way, only to find out at the motion *in limine* stage of an evidentiary sea change. In sum, the question of admissibility of expert testimony is, in this circuit's bifurcated system, best left to the trial judge; consequently, the defendants' motion as to the admissibility of expert testimony is entered and continued to the trial judge. The same reasoning and result applies to Cox's motion to supplement her response brief, which is brought exclusively to support the admissibility of Chiodo's testimony.

To the extent that Conrail's summary judgment motion relies on the purported deficiency of Chiodo's expert testimony, those arguments cannot be considered until the trial judge determines whether the testimony is admissible. Conrail also argues, however, that even if Chiodo's testimony were admissible, it still does not raise a genuine issue of material fact. This court disagrees.

The Code of Civil Procedure authorizes the issuance of summary judgment "if the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." 735 ILCS 5/2-1005. The purpose of summary judgment is not to try a question of fact, but to determine whether one exists that would preclude the entry of judgment as a matter of law. *See Land v. Board of Educ. of the City of Chicago*, 202 Ill. 2d 414, 421, 432 (2002).

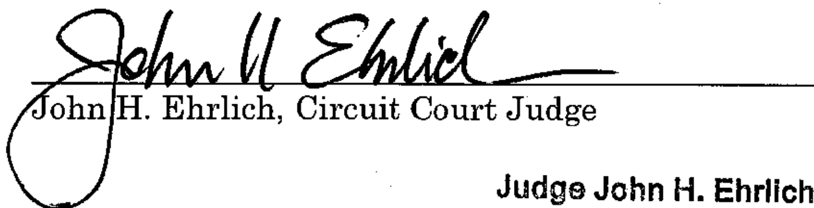
"In light of the standard, the trial court does not have any discretion in deciding the matter." *Loyola Academy v. S & S Roof Maintenance, Inc.*, 146 Ill. 2d 263, 272 (1992).

A FELA claim requires a plaintiff to plead four elements: (1) the defendant was a common carrier engaged in interstate commerce, (2) the plaintiff was employed by the defendant, (3) the plaintiff sustained injuries while employed by the defendant, and (4) the defendant's negligence caused those injuries. *Adams v. CSX Transp.*, 899 F.2d 536, 538-39 (6th Cir. 1990) (citations omitted). Conrail argues that Chiodo's testimony fails to establish that Earls's injury was caused by the railroad's negligence, because he does not evaluate either the level of Earls's exposure to benzene and diesel exhaust or the level that would be necessary to cause non-Hodgkin's lymphoma. This argument fails for at least two reasons. First, Chiodo did evaluate Earls's exposure to be above-background levels as a result of his employment. As Cox argues, an exact dosage is not required, and indeed, would likely be impossible to calculate in an occupational exposure case such as this. Second, Chiodo also found that Earls's above-background exposure was sufficient to be a general cause of non-Hodgkin's lymphoma and a specific cause of Earls's non-Hodgkin's lymphoma. Assuming Chiodo's testimony is admissible, a reasonable jury could credit his conclusions and find Penn Central, Conrail, or both, liable.

Conclusion

Based on the foregoing, it is ordered that:

1. The defendants' motion to exclude Chiodo's expert testimony is entered and continued to the trial judge;
2. The plaintiff's motion to supplement his response brief is entered and continued to the trial judge; and
3. The defendants' summary judgment motion is denied.



John H. Ehrlich, Circuit Court Judge

Judge John H. Ehrlich

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