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NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2002-CA-001796-MR

DAVID ROY STEPHENSON — APPELLANT

APPEAL FROM GREENUP CIRCUIT COURT
HONORABLE LEWIS D. NICHOLLS, JUDGE
v. ACTION NO. 01-CI-00596

CSX TRANSPORTATION, INC. — APPELLEE

OPINION
REVERSING AND REMANDING

** ** ** ** ** ** **

BEFORE: PAISLEY AND TACKETT, JUDGES; HUDDLESTON, SENIOR JUDGE.[1]

TACKETT, JUDGE. David Roy Stephenson has appealed from an order of the Greenup Circuit Court that denied his motion to amend the complaint brought pursuant to Kentucky Rules of Procedure (CR) 15. We hold that the trial court erred, and thus, reverse and remand.

Stephenson became employed by a predecessor railroad to CSX Transportation, Inc. (hereinafter CSXT) in 1974,

[1] Senior Judge Joseph R. Huddleston sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

primarily as a brakeman in the rail yard. In 1988, he also performed services as a hostler in addition to his duties as a brakeman, both of which required him to be exposed to noise from running locomotive engines, retarders on coal cars, and exploding torpedoes. In November 1990, Stephenson was informed that his periodic hearing test administered by CSXT indicated that he had some mild hearing loss. He subsequently filed a hearing loss claim with CSXT that resulted in a settlement between the parties with Stephenson receiving a $3,300.00 lump sum payment.

On December 11, 1998, an air hose ruptured as Stephenson was assisting in the connection of two locomotive engines to a group of railcars. Following the explosion, Stephenson experienced ringing in his ears and hearing problems. Shortly thereafter, he was examined by Dr. Ernest Behnke, an otolarynologist, who performed audiological testing that revealed mild to severe hearing loss. Stephenson continued working but eventually stopped working in approximately 2001 due to various physical problems including his hearing loss.

On December 11, 2001, Stephenson filed a complaint in Greenup Circuit Court seeking compensation for hearing impairment due to negligence by CSXT in violation of the Federal Employer's Liability Act (FELA), 45 U.S.C. §§ 51-60. Stephenson alleged that in the course of his employment with CSXT, he was

"required to work amidst excessive, extreme and continuous noise . . . which caused his severe and permanent injuries" resulting in "hearing impairment and disability." In the ensuing months, the parties exchanged interrogatories and documents. In June 2002, Stephenson was deposed by CSXT and stated that the primary focus of his suit involved the December 11, 1998 incident.

On June 24, 2002, Stephenson filed a motion to amend the complaint pursuant to CR 15 to add a paragraph specifically stating that on December 11, 1998, he suffered a traumatic hearing loss and that he suffered from depression related to the hearing loss injuries. He also requested that the amendment relate back to the filing date of the original complaint pursuant to CR 15.03. On June 26, 2002, CSXT filed a response opposing the amendment arguing that it involved a new cause of action barred by the three-year statute of limitations. See 45 U.S.C. § 56. On July 1, 2002, CSXT filed a supplemental response reiterating its previous argument and citing O'Loughlin v. National R.R. Passenger Corp., 928 F.2d 24 (1st Cir. 1991).

On July 9, 2002, the trial court entered an order denying the motion to amend the complaint finding the O'Loughlin case controlling. On July 17, 2002, Stephenson filed a motion to vacate the order denying his motion to amend. Following a response by CSXT and a hearing, the trial court denied the motion to vacate. This appeal followed.

Stephenson contends that the trial court erred in refusing to allow him to amend his complaint. The importance of the amendment implicates the application of the statute of limitations and the relation-back principle. As stated earlier, actions under FELA are restricted by a three-year limitations period. Because the motion to amend to add the language concerning the December 11, 1998 incident was filed on June 24, 2002, more than three years after the incident, Stephenson also sought application of the relation-back principle.[2]

As an initial matter, we address CSXT's assertion that the federal rules of civil procedure, rather than the Kentucky rules of civil procedure, apply to the amendment of Stephenson's complaint in this action filed pursuant to FELA. This action was brought in the state circuit court under provisions in FELA that authorize concurrent jurisdiction of federal and state courts. See 45 U.S.C. § 56. Because the plaintiff's claim arises under this federal statute, state courts are required to apply federal law as stated in the provisions of the statute and interpretive decisions of the federal courts construing the statute as to "substantive" legal issues. See, e.g., Louisville & N.R. Co. v. McCoy, 270 Ky. 603, 110 S.W.2d 433, 435 (1937); St. Louis Southwestern Ry. Co. v. Dickerson, 470 U.S. 409, 411,

[2] We note that the original complaint was filed on December 11, 2001, exactly three years after the incident with the ruptured air hose.

105 S.Ct. 1347, 1348, 84 L.Ed.2d 303 (1985); Morant v. Long Island R.R., 66 F.3d 518, 522 (2nd Cir. 1995). While federal law controls issues of substantive law, state courts are free to apply state law to procedural issues. See St. Louis Southwestern Ry. Co., supra; Atlantic Coast Line R.Co. v. Mims, 242 U.S. 532, 37 S.Ct. 188, 61 L.Ed. 476 (1917); Crafton v. Union Pacific R. Co., 7 Neb. App. 793, 585 N.W.2d 115, 121 (1998). Cf. Monessen Southwestern Ry. Co. v. Morgan, 486 U.S. 330, 108 S.Ct. 1837, 100 L.Ed.2d 594 (1988). However, state procedural law will not apply if it results in a denial of a federal right under FELA. See, e.g., Brown v. Western Ry. of Alabama, 338 U.S. 294, 70 S.Ct. 105, 94 L.Ed. 100 (1949); Dice v. Akron, C & Y. R. Co., 342 U.S. 359, 72 S.Ct. 312, 96 L.Ed. 398 (1952); Lund v. San Joaquin Valley R.R., 31 Cal.4th 1, 6, 71 P.3d 770, 773 (2003).

CSXT argues that because the applicability of the statute of limitations is generally considered a substantive matter, see, e.g., Emmons v. Southern Pacific Transportation Co., 701 F.2d 1112 (5th Cir. 1983); Huett v. Illinois Central Gulf R. Co., 644 N.E.2d 474 (Ill. App. 1994), the federal rules of civil procedure, rather than the Kentucky rules of civil procedure, should apply to the amendment and relation-back of Stephenson's amended complaint. The courts have recognized the difficulty in distinguishing substantive from procedural issues.

See, e.g., Brown, supra; Guaranty Trust Co. of N.Y. v. York, 326 U.S. 99, 65 S.Ct. 1464, 89 L.Ed 2079 (1945). Generally, the question of applicability of a state rule of procedure must be resolved in light of the particular circumstances and principles of noninterference with federal rights. Courts have recognized rules involving burden of proof, sufficiency of the evidence, and the measure of damages as being "substantive" and governed by federal law; whereas, formal rules of pleading, discovery, the form of instructions, and evidence apart from sufficiency of the evidence have been treated as "procedural" and governed by state law absent interference with a federal substantive right. See Annotation: Applicability of State Practice and Procedure in Federal Employers' Liability Actions Brought in State Courts, 79 A.L.R. 2d 553 (1961 & Supplement).

Although of rather ancient origin, the United States Supreme Court indicated in Seaboard Air Line Ry. v. Renn, 241 U.S. 290, 293, 36 S.Ct. 567, 568, 60 L.Ed.2d 1006 (1916), that permitting an amendment to the complaint beyond the limitations period with relation back to the date of the original complaint was a federal question. See also Hogarty v. Philadelphia & R. Ry. Co., 255 Pa. 236, 99 A. 741 (1916); Williams v. Trustees of New York, N.H. & H.R. Co., 325 Mass. 244, 90 N.E.2d 320 (1950); Graham v. Atlantic Coast Line R. Co., 240 N.C. 338, 82 S.E.2d 346 (1954). The Court stated that if the amendment introduced a

"new or different cause of action," it would not be treated as satisfying the limitations requirement. However, "[i]f the amendment merely expanded or amplified what was alleged in support of the cause of action already asserted, it related back to the commencement of the action and was not affected by the intervening lapse of time." 241 U.S. at 293-94, 36 S.Ct. at 568. Despite the ambiguity surrounding the language and lack of more recent case law in this area, we will assume that federal law of civil procedure governs the issues in this case.[3] While a trial court's decision whether to allow an amendment under Rule 15(a) is reviewed for abuse of discretion, the issue of relation-back under Rule 15(c) is subject to de novo review. See Miller v. American Heavy Lift Shipping, 231 F.3d 242 (6th Cir. 2000); In re Dominguez, 51 F.3d 1502 (9th Cir. 1995).

[3] In fact, the Kentucky rules of civil procedure dealing with amendments and relation-back, CR 15.01 and CR 15.03 are modeled after the federal rule, Fed. R. Civ. P. 15. CR 15.01 states that after a responsive pleading has been served, "a party may amend his pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires . . . ." CR 15.03(1) provides: "Whenever the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading, the amendment relates back to the date of the original pleading." In addition, Kentucky courts accept guidance from federal authorities in construing similar procedural rules. See, e.g., Sexton v. Bates, Ky. App., 41 S.W.3d 452 (2001); Jackson & Church Division, York-Shipley Inc. v. Miller, Ky., 414 S.W.2d 893 (1967). CSXT has not shown or maintained that there is a decisive variance between the federal and state law affecting the outcome of this appeal.

The current federal law on amendment of pleadings and relation-back is reflected in Fed. R. Civ. P. 15, which states in relevant part:

> (a) A party may amend the party's pleading once as a matter of course at any time before a responsive pleading is served . . . . Otherwise a party may amend the party's pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires. . . .
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> . . .
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> (c) An amendment of a pleading relates back to the date of the original pleading when
>
> > (2) the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading . . . .

As the language of Rule 15(a) indicates, leave to amend is within the discretion of the trial court, but the court is directed to exercise its discretion freely in favor of permitting amendment. Although the decision whether to permit amendment to a complaint is committed to the discretion of the trial court, "[t]he thrust of Rule 15 is . . . that cases should be tried on their merits rather than the technicalities of pleadings." Tefft v. Seward, 689 F.2d 637, 639 (6th Cir. 1982). See also General Electric Co. v. Sargent & Lundy, 916 F.2d 1119, 1128 (6th Cir. 1990). Leave should also be allowed absent undue

delay, bad faith or dilatory motive of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party, or futility of the amendment. Foman v. Davis, 371 U.S. 178, 182, 83 S.Ct. 227, 230, 9 L.Ed.2d 222 (1962); Hahn v. Star Bank, 190 F.3d 708, 715 (6th Cir. 1999). Delay alone, absent substantial prejudice because of the delay, will not justify denial of leave to amend. See Security Ins. Co. of Hartford v. Kevin Tucker & Associates, Inc., 64 F.3d 1001, 1009 (6th Cir. 1995)(citing Moore v. City of Paducah, 790 F.2d 557, 561 (6th Cir. 1986)). Prejudice resulting in an unfair disadvantage or deprivation of the opportunity to present facts or evidence is the touchstone for denial of an amendment. Dole v. Arco Chemical Co., 921 F.2d 484, 488 (3rd Cir. 1990). 6 Charles Alan Wright, Arthur R. Miller, and Mary Kay Kane, Federal Practice and Procedure § 1487 (1990)(hereinafter Wright and Miller).

While Rule 15(a) concerns all amendments, Rule 15(c) and the relation-back principle are directed primarily at the issue of the limitations period. It is designed to ameliorate the effect of the statute of limitations and "[t]he linchpin to Rule 15(c) is notice before the limitations period expires." Kidwell v. Board of County Commissioners of Shawnee County, 40 F. Supp. 2d 1201, 1217 (D. Kan. 1998)(quoting Marsh v. Coleman Co., Inc., 774 F. Supp. 608, 612 (D. Kan. 1991)); Moore v.

Baker, 989 F.2d 1129, 1131 (11th Cir. 1993). Both statutes of limitations and the relation-back doctrine embody notice principles. The theory underpinning Rule 15(c) is that "once litigation involving particular conduct or a given transaction or occurrence has been instituted, the parties are not entitled to the protection of the statute of limitations against the later assertion by amendment of defenses or claims that arise out of the same conduct, transaction, or occurrence as set forth in the original pleading." 6A Wright and Miller, Federal Practice and Procedure § 1496 at 64. See also Intrepid v. Pollock, 907 F.2d 1125, 1130 (Fed. Cir. 1990). Because the effect of Rule 15(c) is to avoid the impact of the statute of limitations, the sufficiency of the notice should be evaluated in light of the policy objectives of the limitations requirement, such as avoidance of undue surprise and hindrance of the ability to investigate and collect evidence because of stale claims. Kirk v. Cronvich, 629 F.2d 404, 408 (5th Cir. 1980). Generally, amendments relate back if they amplify the facts previously alleged, correct a technical defect in a prior complaint, assert a new legal theory, or add another claim arising out of the same general fact situation. See F.D.I.C. v. Conner, 20 F.3d 1376, 1385-86 (5th Cir. 1994). There is no requirement that the claim be based on an identical theory of recovery. Bularz v. Prudential Ins. Co. of America, 93 F.3d

372, 379 (7th Cir. 1996)(citations omitted); Hageman v. Signal L.P. Gas, Inc., 486 F.2d 479, 484 (6th Cir. 1973). In determining whether an amendment should relate back under Rule 15(c), courts look to the general factual nexus between the amendment and original complaint, and whether the defendant had notice and will not be prejudiced. See Grattan v. Burnett, 710 F.2d 160, 163 (4th Cir. 1983).

CSXT emphasizes the language in Seaboard Air Line Ry. v. Renn suggesting that a "new cause of action" should not relate back. CSXT's position is myopic. Rule 15(c) speaks in terms of a "claim or defense." As discussed above, the main focus is on notice, not a technical analysis of whether an amendment constitutes a new "cause of action." For example, in New York Cent. & H.R.R. Co. v. Kinney, 260 U.S. 340, 346, 43 S.Ct. 122, 123, 67 L.Ed 294 (1922), the Supreme Court sanctioned amendment of a complaint to include a new claim under FELA citing the language in Renn authorizing an amendment which "'merely expanded or amplified what was alleged in support of the cause of action already asserted.'" In Kinney, the Court stated, "when a defendant has had notice from the beginning that the plaintiff sets up and is trying to enforce a claim against it because of specific conduct, the reasons for the statute of limitations do not exist, and we are of opinion [sic] that a liberal rule should be applied." Id. In Wiren v. Paramount

Pictures, 206 F.2d 465 (D.C. Cir. 1953), the court noted that while the adoption of the civil rules in 1938 did not abandon the prior law on relation-back, the meaning of the term "cause of action" had been liberalized and broadened as evidenced by the use of the term "claim." Id. at 468. "The emphasis of the courts has been shifted from a theory of law as the cause of action, to the specified conduct of the defendant upon which the plaintiff tries to enforce his claim." Id. (quoting White v. Holland Furnace Co., 31 F. Supp. 32, 34 (S.D. Ohio 1939)). See also 61B Am.Jur.2d Pleading § 850 at 101 (1999)(stating courts have rejected cause of action concept as out of harmony with the Federal Rules of Civil Procedure); Brown v. New York Life Ins. Co., 32 F. Supp. 443, 444 (D.N.J. 1940)("technical rules will not be applied in determining whether the cause of action stated in the original and amended pleadings are identical, since in a strict sense almost any amendment may be said to change the original cause of action.") Rule 15(c) represents a shift from the rigid motion of causes of action to more functional concepts phrased in terms of underlying conduct, transaction or occurrence involving the background of the dispute. 6A Wright and Miller, Federal Practice and Procedure § 1497 at 94.

Factors relevant to determining whether a claim arose out of the same conduct, transaction or occurrence include: (1) whether the defendant had notice of the claim now being

asserted; (2) whether the plaintiff will rely on the same kind of evidence offered in support of the original claim to prove the new claim; and (3) whether unfair surprise to the defendant would result if relation back is allowed. See 3 Moore's Federal Practice-Civil § 15.19[2] (2003). "An approach that better reflects the liberal policy of Rule 15(c) is to determine whether the adverse party, viewed as a reasonably prudent person, ought to have been able to anticipate or should have expected that the character of the originally pleaded claim might be altered or that other aspects of the conduct transaction or occurrence set forth in the original pleading might be called into question." 6A Wright and Miller, Federal Practice and Procedure § 1497 at 93.

CSXT argues that Stephenson's proposed amendment was properly denied because it involved the addition of a new cause of action. CSXT contends that the amendment deals with a single traumatic episode as opposed to the original complaint's long-term exposure to continuous noise. Our research reveals that the courts have utilized various principles in applying the statute of limitations for FELA claims based on the type of injury and the facts concerning causation. Generally, the courts have recognized a "discovery" rule for latent injuries, which states that a cause of action accrues under FELA when a claimant is aware or has reason to be aware of both an injury

and the cause of the injury, see, e.g., Urie v. Thompson, 337 U.S. 163, 69 S.Ct. 1018, 93 L.Ed. 1282 (1949); Aparicio v. Norfolk & Western Ry. Co., 84 F.3d 803 (6th Cir. 1996), and a time-of-event rule, which states a cause of action accrues at the moment of the tortious act if there is greater than de minimus harm, for a traumatic event with noticeable injury, see, e.g., Fonseca v. Consolidated Rail Corp., 246 F.3d 585 (6th Cir. 2001); Matson v. Burlington Northern Santa Fe R.R., 240 F.3d 1233 (10th Cir. 2001). As with the discovery rule, some courts have recognized a "continuing torts" doctrine to toll the accrual of the statute of limitations. See, e.g., Kichline v. Consolidated Rail Corp., 800 F.2d 356 (3d Cir. 1986); McCoy v. Union Pacific R. Co., 102 Ore. App. 620, 796 P.2d 646 (Ore. App. 1990). Under the continuing tort doctrine, "where a tort involves a continuing or repeated injury, the cause of action accrues at, and limitations begin to run from, the date of the last injury, or when the tortuous overt act ceases[,]" and each day is considered a separate cause of action. 54 C.J.S. Limitations of Actions § 177 at 230-31 (1987). See also 51 Am.Jur.2d Limitation of Actions § 168 (2000); Matson v. Burlington Northern Santa Fe R.R., 240 F.3d 1233, 1237 (10th Cir. 2001); Chatham v. CSX Transp., Inc., 613 So.2d 341 (Ala. 1993). However, several courts have declined to apply the continuing tort doctrine in cases of hearing loss in favor of the discovery

rule. See, e.g., Mounts v. Grand Trunk Western R.R., 198 F.3d 578 (6th Cir. 2000); Bealer v. Missouri Pacific R. Co., 951 F.2d 38 (5th Cir. 1991); Fries v. Chicago & Northwestern Transp. Co., 909 F.2d 1092 (7th Cir. 1990); Whitman v. CSX Transp., Inc., 887 F. Supp. 983 (E.D. Mich. 1995); Chatham v. CSX Transp., Inc., 613 So.2d 341 (Ala. 1993)(continuing tort doctrine not applied to original injury but could be applied to aggravation claim); Lloyd v. Missouri Pacific R. Co., 832 S.W.2d 310 (Mo. Ct. App. 1992).

CSXT's facile conclusion that the amendment was improper because it stated a different cause of action involving a traumatic event while the original complaint involved a continuing tort misses the point. First, it misinterprets the original complaint to cover only a cumulative injury. Although the original complaint uses general language and describes an ongoing situation of negligent conduct and noise, it merely states the situation caused severe injury "resulting in his hearing impairment." This language is not restricted to a cumulative effect. In addition, a continuing tort necessarily is made up of individual events of various degrees including so-called traumatic events. Finally, evidence of the December 1998 incident was relevant to the claim asserted in the original complaint.

Both the original complaint and amended complaint are based on negligent conduct of CSXT in failing to provide a safe work place, which resulted in excessive noise and injury causing hearing loss. The identification of a specific incident compliments the more general language by providing greater specificity and does not conflict with the original complaint. In Miller v. American Heavy Lift Shipping, supra, which involved addition of a claim for exposure to benzene to a complaint originally claiming exposure to asbestos and "other hazardous substances", the court eschewed use of a narrow, mechanical test for Rule 15(c) and applied a liberal approach approving amendments with claims involving the same general set of facts as the original complaint. See also Tiller v. Atlantic Coast Line R. Co., 323 U.S. 574, 65 S.Ct. 421, 89 L.Ed. 465 (1945). We conclude that Stephenson's amendment arose out of the same conduct, transaction, or occurrence as set forth or attempted to be set forth in the original pleading.

Moreover, regardless of whether a single traumatic episode constitutes a different cause of action than a continuing tort situation, the focus under Rule 15(c) is on notice and undue prejudice to the defendant from relation-back of the amendment. As Stephenson points out and CSXT does not dispute, CSXT had notice of the December 11, 1998, incident from various sources including an accident report filed by Stephenson

on the day of the incident, and a settlement demand letter sent to CSXT in October 2001, prior to the filing of the original complaint. Stephenson also provided information to CSXT during discovery on the incident including medical records. CSXT cannot claim unfair surprise by the amendment. CSXT's allegation of prejudice to its ability to investigate the December 1998 incident also is not persuasive in light of its knowledge that the incident was a major aspect of Stephenson's claim before and shortly after the original complaint was filed. CSXT has not shown any undue prejudice related to the period between the date of the original complaint and the request to amend the complaint.

CSXT's and the trial court's reliance on O'Loughlin v. National Railroad Passenger Corp., supra is misplaced.[4] In O'Loughlin, the appeals court affirmed the district court's failure to allow the plaintiff to amend his complaint to change the date of the incident on which the injury supporting his FELA claim occurred and relate back to the date of the original complaint. The court stated:

[4] We also note that the trial court's belief that the First Circuit Court of Appeals' decision is controlling is erroneous. While the United States Supreme Court's decisions on questions of federal law are binding on state courts, the decisions of the lower federal courts, although persuasive, are not binding. See Bogart v. Cap Rock Communications Corp., 69 P.3d 266 (Ok. 2003); Community Hospital v. Fail, 969 P.2d 667 (Colo. 1998); Wagner v. Apex Marine Ship Management Corp., 83 Cal.App.4th 1444, 100 Cal.Rptr.2d 533 (1st Dist. 2000).

> We have scoured the original complaint and can find no allegation of facts that could be said to give Amtrak fair notice of the general fact situation out of which the claim in the amended complaint arose. The original complaint simply asserts: "On or about August 6, 1987, the Plaintiff, while working within the scope of his employment in Boston, Massachusetts, was injured due to unsafe and inadequate working conditions." As reports relating to two incidents had been earlier submitted, one on June 8, 1987, and the other on August 6, 1987, it could be ascertained from the original complaint that O'Loughlin was suing for the separate injury he had sustained on June 8, 1987. As he had a continuing relationship as an employee with the company, O'Loughlin could have been injured "due to unsafe and inadequate working conditions" on either date. The original complaint provides no hint that O'Loughlin was attempting to assert a claim for the June 8, 1987 train collision and the amended complaint asserting such a claim therefore cannot relate back. (Emphasis added).

927 F.2d at 27 (footnote omitted). The court further held that the plaintiff could not use extrinsic evidence to establish notice of the amendment and that the complaint itself must provide the notice. "Extrinsic evidence would be used not just to simplify but to contradict the original complaint on the only point that provides notice of the occurrence on which the complaint is based —-- the date . . . . If the original complaint, as here, specifies an entirely different factual situation from the amendment, it cannot be said even 'to attempt' to set forth the latter." Id.

The above excerpts reveal significant factual distinctions between O'Loughlin and the current case. As discussed earlier, Stephenson's original complaint uses broad, general language that encompasses specific incidents. Stephenson's original complaint does not specify an entirely different factual situation from the amendment and cannot be said to provide "no hint" that he was asserting a claim concerning the December 1998 incident. Consequently, extrinsic evidence can be used to determine notice to CSXT because it is not being used to "contradict" the original complaint.

In conclusion, we hold that the trial court abused its discretion in refusing to allow Stephenson to amend his complaint and erred in deciding that the proposed amendment could not relate back to the date of the original complaint. As a result, we reverse the order of the Greenup Circuit Court, and remand for further proceedings consistent with this opinion.

PAISLEY, JUDGE, CONCURS.

HUDDLESTON, SENIOR JUDGE, CONCURS IN RESULT ONLY.

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