

NOTICE

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2016 IL App (4th) 150848-U

NO. 4-15-0848

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

FILED

October 18, 2016
Carla Bender
4th District Appellate
Court, IL

BRIAN MCGOWAN, Special Administrator of)	Appeal from
the Estate of PAUL MCGOWAN, Deceased, and)	Circuit Court of
BARBARA MCGOWAN, Individually.)	McLean County
Plaintiffs-Appellees,)	No. 08L177
v.)	
ILLINOIS CENTRAL RAILROAD COMPANY,)	Honorable
)	Rebecca Simmons Foley,
Defendant-Appellant.)	Judge Presiding.

JUSTICE STEIGMANN delivered the judgment of the court.
Justices Holder White and Appleton concurred in the judgment.

ORDER

¶ 1 *Held:* In this negligence action brought under the Federal Employers' Liability Act, the appellate court affirmed the jury's verdict against the defendant, Illinois Central Railroad Company, but vacated the award of damages and remanded for a new damages hearing.

¶ 2 In September 2003, the decedent, Paul McGowan, was diagnosed with lung cancer. He succumbed to the cancer in December 2003.

¶ 3 In December 2008, the administrator of Paul's estate, his son, Brian McGowan, filed a 13-count complaint seeking damages from various defendants because of Paul's lung cancer and resulting death. This appeal involves only one count as alleged against defendant, Illinois Central Railroad Company (Central). Accordingly, we limit our discussion to the issues surrounding that count.

¶ 4 In count IV of his complaint, Brian sought damages under the Federal Employers'

Liability Act (FELA) (45 U.S.C.A. §§ 51 to 60 (2006)), alleging that Paul had worked for Central, where he was exposed to asbestos as a result of Central's negligence, which caused his lung cancer and resulting death.

¶ 5 In February 2009, Central moved to dismiss count IV, arguing that Brian brought that claim outside the three-year statute-of-limitations period provided by section 56 of FELA (45 U.S.C.A. § 56 (2006)). The trial court denied that motion.

¶ 6 In February 2015, a jury trial began on count IV. After the close of evidence, the trial court gave the jury a special interrogatory, asking whether count IV complied with the limitations requirements of section 56. The jury answered in the affirmative.

¶ 7 Thereafter, the jury returned a verdict for Brian and against Central, awarding Brian a total of \$3,452,500 in damages (\$2,055,833 for "pecuniary loss" to Paul's family members because of Paul's death and \$1,396,667 for pain, suffering, and loss of life to Paul). The trial court later reduced the damages award to \$2,940,583 in response to Central's posttrial motion.

¶ 8 On appeal, Central raises various issues concerning the statute of limitations and damages. For the reasons that follow, we affirm the jury's verdict but vacate the damages award and remand for a new damages hearing.

¶ 9 I. BACKGROUND

¶ 10 In September 2003, Paul was diagnosed with lung cancer. He died on December 4, 2003. In December 2008, Brian was appointed special administrator of Paul's estate.

¶ 11 On December 5, 2008, Brian filed a complaint. Pertinent to this appeal is count IV, in which Brian alleged, under FELA, that Central's negligence caused Paul to be exposed to asbestos, which caused his lung cancer and eventual death.

¶ 12 In February 2009, Central filed a motion to dismiss count IV of Brian's complaint.

(Central did not cite any state or federal statute under which the motion to dismiss was brought.)

Central argued that Brian's claim fell outside the applicable statute of limitations, governed by section 56 of FELA (45 U.S.C. § 56 (2006)). The trial court denied Central's motion.

¶ 13 In February 2015, the cause proceeded to a jury trial. Brian presented evidence supporting his claim that Central's negligence caused Paul to be exposed to asbestos during his employment with Central, which, in turn, caused Paul's lung cancer and eventual death.

¶ 14 After Brian finished presenting evidence, Central moved for a directed verdict under section 2-1202 of the Code of Civil Procedure (735 ILCS 5/2-1202 (West 2008)), arguing, *inter alia*, that Brian's claim was barred by the statute of limitations. The trial court denied that motion, concluding that the jury should determine certain factual issues that control when the statute of limitations began to run.

¶ 15 After presenting its case, Central again moved for a directed verdict, renewing its claim that Brian's cause of action was barred by the statute of limitations. The trial court denied that motion.

¶ 16 The trial court then conducted a jury instruction conference, at which Central tendered several jury instructions on the following issues: (1) the applicable statute of limitations; and (2) damages. The court denied the instructions tendered by Central on those issues and, instead, granted and gave the instructions tendered by Brian.

¶ 17 In addition, the jury received the following special interrogatory:

¶ 18 "Was the complaint filed within three years from the date on which the estate's administrator knew, or reasonably should have known both a death occurred and that the death was wrongfully caused?"

¶ 19 The jury answered the interrogatory in the affirmative and returned a verdict for Brian and against Central.

¶ 20 The jury awarded Brian \$3,452,500 in damages, \$2,055,833 of which was awarded for pecuniary losses suffered by Paul's family as a result of his death. The jury found further that Paul was contributorily negligent in the amount of 10%, which reduced the award to \$3,107,250. The trial court later entered judgment on the jury's verdict.

¶ 21 In April 2015, Central filed a motion for judgment notwithstanding the verdict. In September 2015, after conducting hearings, the trial court denied the motion, except as to the issue of a setoff. Accordingly, the court reduced the damages award to \$2,940,583.

¶ 22 This appeal followed.

¶ 23 II. ANALYSIS

¶ 24 Defendant raises multiple arguments concerning the following topics: (1) the statute of limitations and (2) damages. We address those two areas in turn.

¶ 25 A. Statute of Limitations

¶ 26 Central raises various arguments concerning the statute of limitations. As best we can tell, Central's arguments fall into two general categories: (1) issues of law concerning the content of the special interrogatory and the jury instructions; and (2) issues of fact concerning whether the jury's interrogatory finding that Brian's claim complied with the statute of limitations was against the manifest weight of the evidence. We address those arguments in turn and reject them all.

¶ 27 1. *Statutory Language and the Standard of Review*

¶ 28 Although Central did not describe its motion to dismiss as such, we interpret that filing as a motion to dismiss pursuant to section 2-619(a)(5) of the Code of Civil Procedure (735

ILCS 5/2-619(a)(5) (West 2008)), for an "action [that] was not commenced within the time limited by law." We review a trial court's decision whether to dismiss a cause of action under section 2-619(a)(5) *de novo*. *Klancir v. BNSF Ry. Co.*, 2015 IL App (1st) 143437, ¶ 16, 40 N.E.3d 438 (addressing the dismissal of the plaintiff's FELA claim under section 2-619(a)(5)).

¶ 29 Section 56 of FELA provides that "[n]o action shall be maintained under this chapter unless commenced within three years from the day the cause of action accrued." 45 U.S.C.A. § 56 (2006). Under the federal discovery rule, a cause of action accrues "when a reasonable person knows or in the exercise of reasonable diligence should have known both of the injury and its governing cause." *Fries v. Chicago & Northwestern Transportation Co.*, 909 F.2d 1092, 1095 (1990). For cases brought under FELA, the three-year statute-of-limitations period is "a condition of liability constituting a substantial part of the right created" and "federal law controls all substantive rights." (Internal quotations omitted.) *Noakes v. National R.R. Passenger Corp.*, 312 Ill. App. 3d 965, 967, 729 N.E.2d 59 (2000) (superseded by statute on other grounds). Compliance with the three-year statute of limitations contained in section 56 of FELA is a "condition precedent" to recovery. *Emmons v. Southern Pacific Transportation Co.*, 701 F.2d 1112, 1117 (West 1983). The burden is therefore on the plaintiff to establish compliance with the limitations period. *Axe v. Norfolk Southern Ry. Co.*, 2012 IL App (5th) 110277, ¶ 11, 972 N.E.2d 243.

¶ 30 *2. The Special Interrogatory*

¶ 31 Central raises both an issue of law and an issue of fact as to the special interrogatory. First, as to the law, Central argues that the special interrogatory improperly described the law surrounding the FELA statute of limitations. Second, as to the facts, Central argues that, even if the interrogatory accurately reflected the statute-of-limitations law, the jury's "Yes" find-

ing was against the manifest weight of the evidence. (Importantly, Central does *not* argue that the trial court erred by referring the statute-of-limitations issue to the jury.)

¶ 32 a. Did the Special Interrogatory
Accurately Describe the Statute of Limitations?

¶ 33 The trial court issued the following special interrogatory to the jury:

"Was the complaint filed within three years from the date on which the estate's administrator knew, or reasonably should have known both a death occurred and that the death was wrongfully caused?"

¶ 34 Central argues that the special interrogatory was flawed as a matter of law in the following two ways: (1) the interrogatory asked whether Brian filed his complaint within three years of when he knew or should have known that Paul's death was "wrongfully" caused; and (2) the interrogatory was based on the trial court's understanding of the Illinois state law discovery rule instead of the applicable federal discovery rule.

¶ 35 i. *State vs. Federal Discovery Rule*

¶ 36 Central argues that the trial court erred by incorporating Illinois' state law discovery rule in the interrogatory instead of the federal discovery rule. While we agree with Central that the federal discovery rule applied, we disagree with its contention that the court applied the state rule instead of the federal one. And, regardless, Central's argument highlights a distinction without a difference.

¶ 37 As we explained earlier, the federal discovery rule provides that the statute of limitations begins to run when the claim accrues, which occurs "when a reasonable person knows or in the exercise of reasonable diligence should have known both of the injury and its governing cause." *Fries*, 909 F.2d at 1095. The special interrogatory accurately reflected that doctrine,

which clearly mandates an objective "reasonable person" inquiry.

¶ 38 Central claims that the trial court improperly modeled the interrogatory after the Illinois discovery rule, which, according to Central, involves a "subjective inquiry." In its brief, Central fails to include any citations to the record to establish that the court "appl[ied] an Illinois state law discovery rule." Central's brief on this issue is therefore in violation of Illinois Supreme Court Rule 341(h)(7) (eff. Jan. 1, 2016), which provides that the appellant's brief must include "[a]rgument, which shall contain the contentions of the appellant and the reasons therefor, with citation of the authorities *and the pages of the record relied on.*" (Emphasis added.) Further, we do not understand how the "reasonably should have known" language from the interrogatory could possibly describe anything but an objective test.

¶ 39 ii. *The Interrogatory's Use of the Term "Wrongfully"*

¶ 40 Central also argues that the trial court incorporated into the interrogatory an erroneous version of the federal discovery rule because the interrogatory asked when Brian should have known that the injury was "wrongfully caused," when the federal discovery rule actually looks to when a plaintiff should have known of the injury's "governing cause."

¶ 41 Central, in its brief, contends that the trial court "erroneously derived this standard from its *sua sponte* adoption of *Hollander v. Brown*, 457 F.3d 688 (7th Cir. 2006)," which ostensibly was a case interpreting Illinois' discovery rule for personal injury claims, not the federal FELA discovery rule. Again, Central provides no citation to the voluminous record in this case, where this court might be able to confirm Central's contentions about the trial court's understanding of this issue. Therefore, we need not even consider Central's argument.

¶ 42 Nonetheless, Central's argument fails on its merits. Of utmost importance is the fact that *Central itself tendered the interrogatory in the trial court.* Under the "invited error rule,

his claim "within three years from the date on which the estate's administrator knew, or reasonably should have known *** that the death was wrongfully caused" was therefore not unreasonable or arbitrary and, instead, was based on evidence.

¶ 47 *3. Jury Instructions*

¶ 48 Central argues that the trial court abused its discretion by tendering an instruction to the jury containing the "wrongfully caused" language that was also included in the interrogatory that Central tendered.

¶ 49 *a. Standard of Review*

¶ 50 "Generally, a trial court's decision to grant or deny [a jury] instruction is reviewed for abuse of discretion." *Studt v. Sherman Health Systems*, 2011 IL 108182, ¶ 13, 951 N.E.2d 1131. A court acts within its discretion so long as the instructions, "taken as a whole *** fairly, fully, and comprehensively apprised the jury of the relevant legal principles." *Pister v. Matrix Service Industrial Contractors, Inc.*, 2013 IL App (4th) 120781, ¶ 74, 998 N.E.2d 123. On review, we will "ordinarily *** not reverse a trial court for giving faulty instructions unless they clearly misled the jury and resulted in prejudice to the appellant." *Id.*

¶ 51 *b. This Case*

¶ 52 At the jury instruction conference, Brian tendered, as relevant here, two proposed instructions about the statute of limitations.

¶ 53 Brian's first proposed instruction (plaintiff's No. 21) on the statute of limitations provided, in pertinent part, the following:

"If the injured party dies within [three] years of injury, then the decedent's estate has [three] years from the date when the estate's administrator knows, or reasonably should know, that both a death occurred, and that the death was

wrongfully caused." (Emphasis added.)

Central objected to that instruction on the grounds that "[i]t doesn't discuss the exercise of reasonable diligence that a plaintiff must make in order to discover the cause of an injury. It doesn't discuss that the burden is on the plaintiff *** to show that he has complied with the statute of limitation." Central did not object to the instruction's use of the word "wrongfully."

¶ 54 In addition, Brian submitted the following instruction (plaintiff's No. 40):

"A party does not have an obligation to investigate the cause of an injury until the party learns both that an injury has occurred and that it was *wrongfully* caused." (Emphasis added.)

Central objected to that instruction on the grounds that the instruction "misstates the duty to investigate." Central argued further that the instruction was faulty because, in Central's opinion, the plaintiff's duty to investigate "arises when the injury has occurred." Again, Central did not take issue with the instruction's use of the word "wrongfully. "

¶ 55 The trial court granted both of Brian's tendered instructions and denied Central's proposed instructions on the statute-of-limitations issue.

¶ 56 On appeal, Central argues that the trial court abused its discretion by granting Brian's proposed instructions because those instructions included the word "wrongfully." Central has forfeited this argument by failing to raise it in the trial court. "Generally, a defendant forfeits review of any supposed jury instruction error if he does not object to the instruction or offer an alternative at trial and does not raise the issue in a posttrial motion." *People v. Piatkowski*, 225 Ill. 2d 551, 564, 870 N.E.2d 403, 409 (2007). The record in this case shows that although Central objected to the proposed instructions, it did not object specifically to the inclusion of the word "wrongfully." As a result, Central forfeited that argument, and we do not consider it on

appeal.

¶ 57

B. Damages

¶ 58 Central argues that the trial court abused its discretion by (1) denying Central's proposed instruction No. 13 and (2) granting plaintiff's instruction No. 18 on the issue of pecuniary damages for Paul's children and grandchildren. Essentially, Central argues that the court abused its discretion by instructing the jury that, should the jury find for Brian on the issue of liability, the jury must award damages for the pecuniary loss to the following people: Barbara; Brian; Paul's living children at the time of trial—Doug and Paul; and Paul's grandchildren whose parents (Paul's daughters) had died by the time of trial—Derek Duckett, Daniel Duckett, Dylan Duckett, Bruce McGowan, and Mathew Hooper. As a result, Central argues that the jury's original award of \$2,055,833 in pecuniary damages (before the court reduced it for contributory negligence and setoff) was erroneously inflated and must be vacated. We agree.

¶ 59

1. *Statutory Language and Standard of Review*

¶ 60 As we mentioned above, generally, a trial court's decision to grant or deny a jury instruction is reviewed for an abuse of discretion. *Studt*, 2011 IL 108182, ¶ 13, 951 N.E.2d 1131. A court acts within its discretion so long as the instructions, "taken as a whole[,] *** fairly, fully, and comprehensively apprised the jury of the relevant legal principles." *Pister*, 2013 IL App (4th) 120781, ¶ 74, 998 N.E.2d 123. On review, we will "ordinarily *** not reverse a trial court for giving faulty instructions unless they clearly misled the jury and resulted in prejudice to the appellant." *Id.*

¶ 61

Section 51 of FELA provides that an employer railroad shall be liable in damages to the following:

"[A]ny person suffering injury while he is employed by [a railroad] ***, or, in the

case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee; and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee, for such injury or death ***." 45 U.S.C.A. § 51 (2006).

¶ 62 Section 59 of FELA provides further that, should an injured railroad employee die, his cause of action survives in the following manner:

"[The claim] shall survive to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee, and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee, but in such cases there shall be only one recovery for the same injury." 45 U.S.C.A. § 59 (2006).

¶ 63 FELA provides for recovery of pecuniary loss only. *Miles v. Apex Marine Corp.*, 498 U.S. 19, 32 (1990).

¶ 64 *2. This Case*

¶ 65 At the jury instruction conference, Brian proposed plaintiff's instruction No. 18 (modified from IPI Civil No. 160.15), which stated as follows:

"As to defendant [Central], if you decide for [Brian], on the question of liability, you must then fix the amount of money which will reasonably and fairly compensate Barbara McGowan, [Brian], Doug McGowan, [Paul], Derek Duckett, Daniel Duckett, Dylan Duckett, Bruce McGowan, and Mathew Hooper, for the pecuniary loss proved by the evidence to have resulted to [Barbara], [Brian],

[Doug], [Paul], [Derek], [Daniel], [Dylan], [Bruce], and Mathew Hooper from the death of [Paul]. 'Pecuniary loss' may include loss of money, benefits, goods, services.

In determining pecuniary loss, you may consider what the evidence shows concerning the following:

1. What money, benefits, goods, and services the decedent customarily contributed in the past;

2. What money, benefits, goods, and services the decedent was likely to have contributed in the future;

3. The decedent's personal expenses;

4. What instruction, moral training, and superintendence of education the decedent might reasonably have been expected to give his children had he lived;

5. His age;

6. His sex;

7. His health;

8. His habits of industry, sobriety, and thrift;

9. His occupational abilities.

The contributions and benefits which you may consider must be only those contributions and benefits upon which a money value can be placed. You are not permitted to award any amount for the grief or loss of society and companionship caused [to] any survivor by the death of [Paul]."

¶ 66 Central objected, citing the fourth category listed in plaintiff's No. 18. Central argued that no evidence was presented showing the financial dependence necessary to support a pecuniary award to Paul's children or grandchildren. Central explained that it was objecting to the inclusion of anyone other than Barbara in the instruction about pecuniary damages. The trial court decided to give plaintiff's No. 18 over Central's objection.

¶ 67 In this case, no evidence was presented to show that Paul's children or grandchildren suffered any pecuniary loss as a result of Paul's death. Because FELA provides for pecuniary damages only, none of Paul's children or grandchildren were entitled to recover. As a result, the trial court's decision granting plaintiff's instruction No. 18 was an abuse of discretion because it clearly misled the jury and resulted in prejudice to Central.

¶ 68 As a result, we vacate the jury's award of \$2,055,833 in pecuniary damages and remand for a new damages hearing to determine the proper amount of pecuniary damages that should be awarded.

¶ 69 **III. CONCLUSION**

¶ 70 For the foregoing reasons, we affirm the jury's verdict concerning liability, vacate the damages award, and remand for a new damages hearing.

¶ 71 Affirmed in part and vacated in part; cause remanded with directions.