Circuit Court for Baltimore City
Case No. 24-C-20-000541

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 376

September Term, 2020

MARY STAUBS

v.

CSX TRANSPORTATION, INC.

Fader, C.J.,
Reed,
Beachley,

JJ.

Opinion by Fader, C.J.

Filed: June 22, 2021

This appeal concerns a claim for damages arising from an employer's negligence under the Federal Employers' Liability Act ("FELA"), 45 U.S.C. §§ 51 – 60. The question we must address is whether a final judgment on a FELA claim based on the plaintiff's development of one disease resulting from toxic exposure bars a subsequent FELA claim based on a different, latent disease resulting from essentially the same toxic exposure, where the second disease was unknown until after the first judgment was rendered. Applying federal law, we hold that it does not.

In 2020, Mary Staubs, in her capacity as the administratrix for the Estate of Floyd L. Staubs, Jr. ("Ms. Staubs"), the appellant, sued CSX Transportation, Inc. ("CSXT"), the appellee, under FELA for negligence resulting in Mr. Staubs's development of kidney cancer and subsequent death due to exposure to toxic substances while employed by CSXT. The Circuit Court for Baltimore City concluded that Ms. Staubs's claims were barred by res judicata based on a 2010 dismissal with prejudice of a prior FELA action, which had been filed on behalf of Mr. Staubs and 99 other plaintiffs in West Virginia. On appeal, Ms. Staubs contends that the court erred in applying res judicata to her claim because (1) she was not in privity with Mr. Staubs at the time of the earlier action, and (2) her present cause of action against CSXT for Mr. Staubs's kidney cancer is not the same as the prior cause of action litigated in West Virginia.

Although we disagree with Ms. Staubs's privity argument, we agree that the present cause of action is not the same as that previously litigated in West Virginia. Under the "separate disease rule," which we conclude applies to FELA actions, a cause of action based on the development of one disease resulting from toxic exposure is not the same as

a cause of action based on the later development of a different disease resulting from the same toxic exposure. Because CSXT did not demonstrate that Ms. Staubs's current action premised on Mr. Staubs's development of kidney cancer is the same as the action previously litigated in West Virginia, the circuit court erred in dismissing Ms. Staubs's complaint under the doctrine of res judicata. Accordingly, we must reverse.

BACKGROUND

CSXT operates a line of railroads and conducts business in Maryland and West Virginia, among other states. Mr. Staubs was employed by CSXT as an engineer from 1978 through December 29, 2011. Because CSXT is a "common carrier by railroad" that was engaged in interstate commerce during the term of Mr. Staubs's employment, FELA provides the exclusive right of recovery for injuries he sustained as a result of his employment. *See Erie R.R. Co. v. Winfield*, 244 U.S. 170, 172 (1917).

The West Virginia Action

In 2002, Mr. Staubs and 99 other individuals were named as plaintiffs in a FELA action filed against CSXT in state court in West Virginia. *See Shirley Amos, et al. v. CSX Transp., Inc.*, Circuit Court for Marshall County, West Virginia, No. 02-C-93K (the "West Virginia action"). The only paragraph of the complaint specific to Mr. Staubs identified his social security number and stated that he was "an adult individual" who resided in West Virginia and had worked for CSXT. Other than paragraphs with similarly limited information identifying the other 99 plaintiffs, the remaining allegations of the complaint were not specific to any particular plaintiff.

The complaint generally alleged that CSXT negligently exposed its workers to a variety of toxic substances and failed to provide them with a safe workplace. The allegations included the following:

- "While working for the defendant, the plaintiffs were exposed to and caused to inhale asbestos fibers, free silica, diesel fumes, solvent fumes, gasoline fumes, fibrogenic materials, carcinogenic materials and other substances deleterious to the respiratory system."

- Within the statute of limitations period, "the plaintiffs learned that he [sic] suffered from an occupationally related lung disease, including, without limitation, asbestosis, asbestos related pleural disease; silicosis, mixed dust pneumoconiosis, chronic obstructive pulmonary disease, occupational asthma, occupational bronchitis, cancer, an increased risk of cancer, and other serious and severe pulmonary diseases."

- "The injuries, disease and disability of the plaintiffs were caused by exposure to the aforementioned deleterious substances while working for the defendant, during the term of his [sic] employment with the defendants [sic]."

- In addition to other negligent acts and omissions, CSXT failed to provide the plaintiffs with a safe workplace and safe working materials; failed to warn them of the dangers of the toxic substances to which they were exposed; and failed to conduct adequate testing and provide adequate instructions, training, and equipment.

- As the result of CSXT's negligence, "the plaintiffs have developed asbestosis, asbestos related pleural disease, silicosis, mixed dust pneumoconiosis, chronic obstructive pulmonary disease, occupational asthma, occupational bronchitis, cancer, an increased risk of cancer, and/or other serious and severe respiratory diseases, and have suffered other bodily injuries, including a greatly increased risk of developing mesothelioma, bronchogenic carcinoma, or other cancerous conditions, and suffer difficulty breathing, as well as other serious and severe injuries which may be permanent. Further, some of these plaintiffs have died as a result of the above conditions[.]"

- As a result of CSXT's negligence, the plaintiffs suffered a variety of types of economic and other damages.

The complaint also identified a series of additional damages applicable to "plaintiff decedent," without identifying the plaintiff(s) to whom that applied.

It appears that the West Virginia action was inactive until April 2009, when the Supreme Court of Appeals of West Virginia transferred "all pending . . . cases in West Virginia asserting claims under FELA for personal injury . . . from exposure to asbestos" to the Circuit Court for Kanawha County for consolidation with *In re: FELA Asbestos Cases*, Civil Action No. 02-C-9500. *See* Administrative Order, Supreme Court of Appeals of West Virginia, at 2 (Apr. 29, 2009), http://www.courtswv.gov/lower-courts/mlp/mlp-orders/AsbestosFELALitigation_04-29-09.pdf (last visited June 21, 2021). The West Virginia action was among the cases transferred.

On June 11, 2010, the Kanawha County court entered an order that dismissed with prejudice the claims of the plaintiffs in 14 asbestos-exposure lawsuits, including the West Virginia action, excepting only the claims of 66 individual plaintiffs.[1] Of the claims that were not dismissed: (1) two were to remain on the inactive docket; (2) two plaintiffs were granted leave to file new complaints asserting only malignant injuries; and (3) 62 plaintiffs were identified on a list that their counsel submitted to the court as "accurately summariz[ing] all claims currently pending in West Virginia where plaintiffs are alleging an asbestos-related lung cancer." The list was sent in compliance with a requirement of

[1] The order recites that: (1) the plaintiffs in the relevant cases had sought dismissal of the claims without prejudice; (2) CSXT had countered with a motion for dismissal with prejudice; and (3) "Plaintiffs' counsel voluntarily withdrew their objection and stipulated to dismissal of the [claims] with prejudice."

the applicable case management order that plaintiffs "provide[] notice of intent to pursue recovery for malignant injuries" by a date certain. The claims of all remaining plaintiffs in all 14 cases who had not identified malignant injuries, including 97 of the 100 plaintiffs in the *Amos* case, were dismissed with prejudice. Because Mr. Staubs was not identified as a plaintiff alleging malignant injury, his claim was among those dismissed with prejudice.

The Maryland Action

On August 31, 2016, Mr. Staubs died of kidney cancer. On January 29, 2020, Ms. Staubs filed a complaint in the Circuit Court for Baltimore City under FELA in which she alleged that Mr. Staubs's development of kidney cancer and death were caused by CSXT's negligence (the "Maryland action").[2] The complaint alleged that while employed by CSXT from 1978 through December 29, 2011, Mr. Staubs "was exposed on a daily basis to excessive amounts of diesel exhaust/fumes, benzene, asbestos, polycyclic aromatic hydrocarbons and second hand smoke," and that he developed kidney cancer as a result of his cumulative exposure to those substances during that period. Ms. Staubs alleged that Mr. Staubs's injuries and death resulted from CSXT's negligence in failing to provide a safe workplace, to test and monitor for exposure to hazardous substances, and to warn of the risks of exposure to those substances. As relief, Ms. Staubs sought "all damages recoverable under the FELA for wrongful death and/or survival actions."

[2] Ms. Staubs initially filed the complaint in February 2018 in Pennsylvania. That complaint was subsequently dismissed without prejudice for her to refile in Maryland.

The Motion to Dismiss

CSXT filed a motion to dismiss the Maryland action or, in the alternative, for summary judgment. According to CSXT, the dismissal with prejudice of the West Virginia action barred the Maryland action because the injuries Ms. Staubs alleged, "including cancer and an increased . . . risk of cancer," had also been alleged in the West Virginia action and "ar[ose] out of the same occupational exposures to fumes, substances, and chemicals that [we]re at issue in" that action. In the alternative, CSXT asked the court to enter summary judgment in its favor because Ms. Staubs failed to state a claim under FELA as a matter of law.

In opposition, Ms. Staubs contended that res judicata did not bar the Maryland action both because she was not in privity with Mr. Staubs during the pendency of the West Virginia action and because the causes of action were not identical. On the latter point, Ms. Staubs asserted that her complaint was based on Mr. Staubs's development of kidney cancer, whereas the West Virginia action "was limited to pulmonary and respiratory diseases" and "did not extend to a cause of action for a Decedent's unknown, and not yet diagnosed kidney cancer."

In April 2020, after hearing argument, the circuit court ruled that the Maryland action was barred under res judicata and granted the motion to dismiss with prejudice. The court concluded that Ms. Staubs was in privity with Mr. Staubs and that the causes of action in the two lawsuits were identical because the West Virginia action was "designed to state

[a] cause of action for all conditions, including cancer, the non-pulmonary type," and the claims in Ms. Staubs's complaint were "the same."

Following the entry of a written order, Ms. Staubs timely appealed.

DISCUSSION

This Court reviews the grant of a motion to dismiss without deference to determine "whether the trial court was legally correct." *D.L. v. Sheppard Pratt Health Sys., Inc.*, 465 Md. 339, 350 (2019) (quoting *Blackstone v. Sharma*, 461 Md. 87, 110 (2018)). In doing so, we "must assume the truth of, and view in a light most favorable to the non-moving party, all well-pleaded facts and allegations contained in the complaint, as well as all inferences that may reasonably be drawn [therefrom.]" *Spangler v. McQuitty*, 449 Md. 33, 47 (2016) (alteration in *Spangler*) (quoting *McHale v. DCW Dutchship Island, LLC*, 415 Md. 145, 155 (2010)). We will affirm an order of dismissal "only if the allegations and permissible inferences, if true, would not afford relief to the plaintiff, *i.e.*, the allegations do not state a cause of action for which relief may be granted." *Id.*

The substantive law governing Ms. Staubs's FELA claims is federal law. *CSX Transp., Inc. v. Miller*, 159 Md. App. 123, 132-33 (2004). With respect to res judicata, "in applying full faith and credit" to the judgment of another state's courts, we "must treat the judgment precisely the same as it would be treated in [the other state's] court, and that requires that we apply the preclusion rules that would be applied in [the other state]." *Rourke v. Amchem Prods., Inc.*, 384 Md. 329, 351 (2004). Because a West Virginia court

issued the 2010 order that is asserted to have preclusive effect, we will apply res judicata according to West Virginia law.

I. OVERVIEW OF FELA

Enacted in 1908, FELA was intended to create national uniformity in negligence actions brought by railroad employees against their employers, *see Norfolk & W. Ry. Co. v. Liepelt*, 444 U.S. 490, 493 n.5 (1980), and "to establish a dependable tort remedy for railroad workers" while "encourag[ing] safety within the industry," *Ries v. Nat'l R.R. Passenger Corp.*, 960 F.2d 1156, 1158 (3d Cir. 1992). Although FELA "bears a strong resemblance to workers' compensation laws," a FELA claim must be predicated on a railroad employer's negligence. *Miller*, 159 Md. App. at 133-35.

As relevant here, two different provisions of FELA create claims for a railroad employee's injuries resulting from an employer's negligence. 45 U.S.C. § 51 provides:

> Every common carrier by railroad . . . shall be liable in damages to any person suffering injury while he is employed by such carrier . . . or, in 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 . . . for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier[.]

45 U.S.C. § 59 further provides that "[a]ny right of action given by this chapter to a person suffering injury shall survive to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee . . . but in such cases there shall be only one recovery for the same injury."

When the injured employee is deceased, the statute thus creates two separate claims that the employee's personal representative may bring: (1) a wrongful death claim pursuant

to § 51; and (2) a survival claim pursuant to § 59.[3] The two claims constitute "two distinct and independent liabilities, resting, of course, upon the common foundation of a wrongful injury, but based upon altogether different principles." *Michigan Cent. R.R. Co. v. Vreeland*, 227 U.S. 59, 65 (1913). The United States Supreme Court explained the relationship between the two claims as follows:

> [T]he personal representative is to recover on behalf of the designated beneficiaries, not only such damages as will compensate them for their own pecuniary loss [in the wrongful death claim], but also such damages as will be reasonably compensatory for the loss and suffering of the injured person while [the employee] lived [in the survival claim]. Although originating in the same wrongful act or neglect, the two claims are quite distinct, no part of either being embraced in the other.

St. Louis, Iron Mountain, & S. Ry. Co. v. Craft, 237 U.S. 648, 658 (1915). A personal representative may therefore pursue and recover for both claims in a single action. *Id.* at 658-59.

Although a survival claim and a wrongful death claim are separate, a personal representative's ability to pursue a wrongful death claim is "dependent upon the existence of a right in the decedent immediately before . . . death to have maintained an action for [the decedent's] wrongful injury." *Vreeland*, 227 U.S. at 70. Thus, if an employee was

[3] Under the common law, an employee's own claim for damages, such as that provided in 45 U.S.C. § 51, automatically expired upon death. *See, e.g.*, *Michigan Cent. R.R. Co. v. Vreeland*, 227 U.S. 59, 67 (1913) ("Nothing is better settled than that, at common law, the right of action for an injury to the person is extinguished by the death of the party injured."). What is now codified as 45 U.S.C. § 59 was added to FELA in 1910 to authorize a personal representative to pursue such a claim after the employee's death as a survival action. *See St. Louis, Iron Mountain, & S. Ry. Co. v. Craft*, 237 U.S. 648, 657 (1915).

precluded from bringing a FELA claim at the time of death—whether as a result of a release,[4] expiration of the statute of limitations, entry of a final judgment in a prior action, or another reason—the employee's personal representative is thereafter precluded from bringing either or both a survival claim or a wrongful death claim. *See, e.g.*, *Mellon v. Goodyear*, 277 U.S. 335, 344 (1928) ("A settlement by the wrongdoer with the injured person, in the absence of fraud or mistake, precludes any remedy by the personal representative based upon the same wrongful act."); *Flynn v. New York, N.H. & H.R. Co.*, 283 U.S. 53, 56 (1931) (same with respect to expiration of the statute of limitations before death); *Waldron v. S. Pac. Co.*, 447 F.2d 930, 932 (9th Cir. 1971) (stating that a final judgment on a FELA claim entered before an employee's death "extinguishe[s a] cause of action[] as effectively as a release" (quoting *Flynn*, 283 U.S. at 56)). As the United States Court of Appeals for the Fifth Circuit concisely stated more than a century ago: "If, during the life of the injured employe[e], [the] employer's liability for the tort is extinguished by any occurrence ordinarily having that effect, the employe[e]'s personal representative has

[4] The validity of a release of a FELA claim is governed by federal law. *Dice v. Akron, Canton & Youngstown R.R. Co.*, 342 U.S. 359, 361-62 (1952). Pursuant to 45 U.S.C. § 55, any "contract, rule, regulation, or device whatsoever" that purports to "enable any common carrier to exempt itself from any liability created by [FELA], shall to that extent be void." A railroad is thus prohibited from entering an agreement with an employee that prospectively waives, settles, or releases a FELA claim. *See Babbitt v. Norfolk & W. Ry. Co.*, 104 F.3d 89, 93 (6th Cir. 1997) (explaining that "§ 55 precludes the employer from claiming the release as a bar to liability . . . [as] an attempt to extinguish potential future claims the employee might have"). Section 55 does not, however, preclude an employee from releasing a claim for damages that has already accrued. *See id.* ("FELA is not offended when there is a compromise of a claim of liability that settles a specific injury sustained by an employee.").

no right of action for the injury, as the single cause of action upon which a suit by [the employee] must be based has ceased to exist."[5] *Seaboard Air Line Ry. Co. v. Oliver*, 261 F. 1, 4 (5th Cir. 1919).

Based on these principles, if at the time of Mr. Staubs's death, he was barred by res judicata from bringing a FELA action against CSXT for damages resulting from his development of kidney cancer, then Ms. Staubs's survival and wrongful death claims also are barred. It is to that question that we now turn.

II. THE CIRCUIT COURT ERRED IN CONCLUDING THAT THE MARYLAND ACTION WAS BARRED UNDER THE DOCTRINE OF RES JUDICATA.

Ms. Staubs contends that the trial court erred in dismissing her complaint because the elements of res judicata were not satisfied. Specifically, she contends that (1) she was not in privity with Mr. Staubs, and (2) the claims presented in the two actions were not identical and her current claims could not have been brought in the West Virginia action. We will address each argument in turn.

A. The Doctrine of Res Judicata Under West Virginia Law

In West Virginia, under the doctrine of res judicata, "a judgment on the merits in a prior suit bars a second suit involving the same parties or their privies based on the same cause of action." *Blake v. Charleston Area Med. Ctr.*, 498 S.E.2d 41, 48 (W. Va. 1997)

[5] This aspect of FELA differs from Maryland law. Maryland is one of "a minority of jurisdictions [that] have held that neither a judgment in favor of the decedent, nor a release of liability prior to the decedent's death, bars a subsequent wrongful death action." *Spangler*, 449 Md. at 61; *see also Mummert v. Alizadeh*, 435 Md. 207, 228 (2013) (holding that a plaintiff's wrongful death suit generally is "not contingent on the decedent's ability to file a timely negligence claim prior to her death").

(quoting *Porter v. McPherson*, 479 S.E.2d 668, 676 (W. Va. 1996)). Res judicata, which is also known as claim preclusion, "assures that judgments are conclusive, thus avoiding relitigation of issues that were or could have been raised in the original action." *Dan Ryan Builders, Inc. v. Crystal Ridge Dev., Inc.*, 803 S.E.2d 519, 529 (W. Va. 2017); *see Conley v. Spillers*, 301 S.E.2d 216, 220 (W. Va. 1983) ("[T]he central inquiry on a plea of *res judicata* is whether the cause of action in the second suit is the same as in the first suit."). The doctrine "precludes piecemeal litigation" and situations where parties may attempt to "split[] a single cause of action or relitigat[e] . . . the same cause of action on a different legal theory or for different relief." *Dan Ryan Builders*, 803 S.E.2d at 529 (quoting *Gonzales v. California Dep't of Corr.*, 739 F.3d 1226, 1232 (9th Cir. 2014)).

To determine whether an action is precluded under res judicata, the following three elements must be satisfied:

> First, there must have been a final adjudication on the merits in the prior action by a court having jurisdiction of the proceedings. Second, the two actions must involve either the same parties or persons in privity with those same parties. Third, the cause of action identified for resolution in the subsequent proceeding either must be identical to the cause of action determined in the prior action or must be such that it could have been resolved, had it been presented, in the prior action.

Dan Ryan Builders, 803 S.E.2d at 530 (quoting *Blake*, 498 S.E.2d at 44). A cause of action refers to "the fact or facts which establish or give rise to a right of action, the existence of which affords a party a right to judicial relief." *Dan Ryan Builders*, 803 S.E.2d at 530 (quoting *Slider v. State Farm Mut. Auto. Ins.*, 557 S.E.2d 883, 885 (2001)). Under West Virginia law, "to determine if the . . . cause of action involved in the two suits is identical

is to inquire whether the same evidence would support both actions[.]"[6] *Id.* "If the two cases require substantially different evidence to sustain them, the second cannot be said to be the same cause of action[.]" *Id.* In considering whether a claim could have been litigated in a prior action, "[i]t is not essential that the matter should have been formally put in issue" in that action, "but it is sufficient that the *status* of the suit was such that the parties might have had the matter disposed of on its merits." *Blake*, 498 S.E.2d at 49 (quoting *Conley*, 301 S.E.2d at 217).

Here, the parties do not dispute that the dismissal with prejudice of Mr. Staubs's claims in the West Virginia action constituted a final judgment on the merits that satisfies the first element of res judicata. *See State v. Stephens*, 452 S.E.2d 432, 434 (W. Va. 1994) ("An action dismissed, with prejudice, . . . is a final, appealable order."). Our resolution of this appeal therefore turns on whether the second and third elements have been met.

B. Ms. Staubs, in Her Capacity as Administratrix, Is in Privity with Mr. Staubs for Purposes of Her Survival Claim.

The second element of res judicata requires that the two actions "involve either the same parties or persons in privity with those same parties." *Dan Ryan Builders*, 803 S.E.2d

[6] West Virginia courts employ a "narrow, 'same evidence'" test in examining the third element of res judicata. *Dan Ryan Builders*, 803 S.E.2d at 528 n.26. By contrast, Maryland has adopted the broader "transactional test" of the Restatement (Second) of Judgments § 24, under which "if the two claims or theories are based upon the same set of facts and one would expect them to be tried together ordinarily, then a party must bring them simultaneously." *Anne Arundel County Bd. of Educ. v. Norville*, 390 Md. 93, 109 (2005). In determining what constitutes a transaction for purposes of that test, Maryland courts consider, among other things, "whether the facts are related in time, space, origin, or motivation[.]" *Id.* (quoting Restatement (Second) of Judgments § 24).

at 530 (quoting *Blake*, 498 S.E.2d at 44). "[P]rivity, in a legal sense, ordinarily denotes 'mutual or successive relationship to the same rights of property.'" *Beahm v. 7 Eleven, Inc.*, 672 S.E.2d 598, 602 (W. Va. 2008) (quoting *West Virginia Hum. Rts. Comm'n v. Esquire Grp., Inc.*, 618 S.E.2d 463, 469 (W. Va. 2005)). For purposes of res judicata, privity entails "the sharing of the same legal right by parties" to guarantee "that the interests of the party again[st] whom preclusion is asserted have been adequately represented." *Id.*

Our discussion above of well-established principles applying to FELA claims resolves Ms. Staubs's contention that she was not in privity with Mr. Staubs at the time of the West Virginia action because, under FELA, a personal representative (1) is expressly authorized to bring survival and wrongful death claims arising from an injury sustained by a deceased employee but (2) may do so only if the injured employee possessed the right to bring a claim based on the same injury immediately before death. *See Vreeland*, 227 U.S. at 70. Because the relevant question is therefore whether Mr. Staubs would have been barred by res judicata from bringing a claim for damages immediately before his death, privity is not a barrier to the application of res judicata.[7] Ms. Staubs's right to pursue both her survival and wrongful death claims thus hinges on the third element of res judicata.

[7] In arguing that she was not in privity with Mr. Staubs because she "did not share the same legal right" when he was named in the West Virginia action, Ms. Staubs overlooks that her survival claim was not brought in her personal capacity but in her capacity as administratrix of Mr. Staubs's estate. For a survival claim under FELA, "[p]rivity between the deceased and his personal representative is established implicit[l]y by the terms of the survivorship statute provided in Section 59[.]" *Mid-City Bank & Tr. Co. v. Reading Co.*, 3 F.R.D. 320, 324 (D.N.J. 1944). By contrast, Ms. Staubs's wrongful death claim is "quite distinct" from her survival claim, *Craft*, 237 U.S. at 658, "is independent of any cause of

C. CSXT Has Not Demonstrated that Ms. Staubs's Current Cause of Action Was Identical to that in the West Virginia Action or that It Could Have Been Resolved in the West Virginia Action.

Under the third element of res judicata, we assess whether Ms. Staubs's claims in the Maryland action were "identical to the cause of action" resolved in the West Virginia action, or "could have been resolved . . . had they been raised" in that action. *Beahm*, 672 S.E.2d at 604 (quoting *Blake*, 498 S.E.2d at 44). Ms. Staubs provides two main arguments for her contention that the claims were not the same: First, she argues that the West Virginia action "was limited to pulmonary and respiratory diseases" and so it did not include a claim for Mr. Staubs's later-diagnosed kidney cancer. Second, she argues that her claim is based on Mr. Staubs's exposure to toxic substances that continued until December 2011, nine years after the West Virginia action was filed and one-and-a-half years after it was dismissed.

CSXT disagrees that the West Virginia action was limited to pulmonary and respiratory diseases, insisting that that complaint broadly alleged that the plaintiffs, including Mr. Staubs, suffered injuries including cancer, "increased risk of cancer," and "other cancerous conditions," allegations that are necessarily broad enough to encompass

action which the decedent had," *Vreeland*, 227 U.S. at 68, "includes no damages which [Mr. Staubs] might have recovered for his injury if he had survived," *id.* at 70, and did not and "could not arise until [Mr. Staubs]'s death," *Flynn*, 283 U.S. at 56. Nevertheless, because under FELA the existence of a wrongful death claim is "dependent upon the existence of a right in the decedent immediately before . . . death to have maintained an action for [the decedent's] wrongful injury," *Vreeland*, 227 U.S. at 70, the absence of privity with respect to such a claim is irrelevant if res judicata would have barred Mr. Staubs from bringing a claim for his own injuries prior to his death.

his kidney cancer. Furthermore, CSXT argues, Ms. Staubs's complaint was based on Mr. Staubs's exposure to toxic substances throughout his employment, not limited to the period after the West Virginia action was dismissed.

1. The Separate Disease or Two-Disease Rule

An unstated premise underlying the arguments of both parties in this appeal is that the cause of action Mr. Staubs pursued in West Virginia will satisfy the third element of res judicata only if it encompassed, or could have encompassed, a claim for damages based on his development of kidney cancer. Before we turn directly to assessing the parties' positions concerning the third element of res judicata, we pause to consider whether the separate disease rule, also called the two-disease rule, applies to FELA claims.

Outside the context of toxic exposure litigation, the ordinary rule is that "if an action is brought for a part of a claim, a judgment obtained in the action precludes the plaintiff from bringing a second action for the residue of the claim." *Dill v. Avery*, 305 Md. 206, 209 (1986) (quoting 46 Am. Jur. 2d *Judgments* § 405 (1969)). Under both the transaction test employed by Maryland and the same evidence test employed by West Virginia, a cause of action ordinarily encompasses all injuries resulting from the same conduct regardless of when the injuries arise. *See, e.g.*, *Dill*, 305 Md. at 210 (stating that a judgment in an action extinguishes all rights to a remedy with respect to the transaction from which the action arose, even if the plaintiff presents new facts and theories or seeks new remedies or forms of relief in a subsequent action); *Warner v. Hedrick*, 126 S.E.2d 371, 374 (W. Va. 1962) (stating that if claims are identical, "there can be but one action, *regardless of how many*

injuries are inflicted[.]" (quoting 1 Am. Jur. 2d Actions, § 146) (emphasis added in *Warner*)); *Jones v. Trs. of Bethany Coll.*, 351 S.E.2d 183, 185-87 (W. Va. 1986) (stating that "[w]here there has been a noticeable injury caused by a traumatic event, the fact that there may be a latent component to the injury does not postpone the commencement of the statute of limitations," and holding that a plaintiff who released a claim based on a known injury could not later bring an action based on the subsequent discovery of a latent injury).

In toxic exposure litigation, however, many courts have developed a different rule in recognition of the long latency period that applies to many toxic tort injuries, whereby a plaintiff suffering from one exposure-related disease may later develop a separate disease. In such cases, a plaintiff who has already sued for a toxic tort-related injury is not automatically precluded from bringing a separate action should the plaintiff later develop a different disease resulting from the same exposure. *See John Crane, Inc. v. Puller*, 169 Md. App. 1, 33 (2006) (stating that Maryland is a "two-disease" state, in which "each of . . . two diseases" arising from the same toxic exposure "gives rise to a different claim"); *see also, e.g., Kiser v. A.W. Chestertown Co.*, 770 F. Supp. 2d 745, 750-51 & n.6 (E.D. Pa. 2011) (identifying the "modern trend . . . to recognize the separate disease rule" in toxic exposure cases); *Sopha v. Owens-Corning Fiberglas Corp.*, 601 N.W.2d 627, 630, 642 (Wis. 1999) (holding that "a person who brings an action based on a diagnosis of a non-malignant asbestos-related condition may bring a subsequent action upon a later diagnosis of a distinct malignant asbestos-related condition").

The purpose of the separate disease rule is to protect plaintiffs from a "catch 22" situation in which a claim based on a later-developing disease would be barred regardless of whether the plaintiff filed suit based on the earlier disease; that is, res judicata would bar the later claim if suit had been brought based on the first disease, and the statute of limitations would bar the later claim if not. *See Devlin v. Johns-Manville Corp.*, 495 A.2d 495, 502 (N.J. Super. Ct. Law Div. 1985); *see also Pustejovsky v. Rapid-Am. Corp.*, 35 S.W.3d 643, 648 (Tex. 2000) (citing Note, *Claim Preclusion in Modern Latent Disease Cases: A Proposal for Allowing Second Suits*, 103 Harv. L. Rev. 1989, 1989-97 (1990)).

Maryland follows the separate disease rule in toxic exposure cases. *See Exxon Mobil Corp. v. Ford*, 204 Md. App. 1, 268 (2012) (Eyler, D., J., concurring in part and dissenting in part) ("Maryland, like the vast majority of jurisdictions, has done away with the single-action rule in toxic tort actions . . ., for any [plaintiff] who in fact contracts cancer in the future[.]"), *aff'd in part & rev'd in part*, 433 Md. 426 (2013). In *Pierce v. Johnson-Manville Sales Corp.*, the Court of Appeals applied the rule in holding that a plaintiff's claim for damages resulting from lung cancer was not barred by the statute of limitations notwithstanding his earlier contraction of asbestosis resulting from the same exposure. 296 Md. 656, 668 (1983). And in *Smith v. Bethlehem Steel Corp.*, the Court held that a plaintiff's prior claim for damages related to asbestosis did not preclude his assertion of a later claim for asbestos-related colon cancer. 303 Md. 213, 234 (1985).

West Virginia has adopted the separate disease rule by statute for asbestos- and silica-related claims in its Asbestos and Silica Claims Priorities Act, W. Va. Code Ann.,

§§ 55-7G-1 – 55-7G-10. Under the Act, "[a]n asbestos or silica action arising out of a nonmalignant condition shall be a distinct cause of action from an action for an asbestos-related or silica-related cancer." *Id.* § 55-7G-9.

Although the United States Supreme Court has not decided whether the separate disease rule applies in FELA cases, separate opinions signed by all nine justices in *Norfolk & W. Ry. Co. v. Ayers*, 538 U.S. 135 (2003), seemed to assume that it does. The issue in *Ayers* concerned whether FELA plaintiffs who had asbestosis, but who had not developed cancer, could recover damages for "fear of cancer," which the Court ultimately held they could. *Id.* at 159. In arguing for a contrary result, the United States, as an amicus, contended that permitting damages for "fear of cancer" was unwarranted because, pursuant to the separate disease rule, the plaintiffs could later recover damages for cancer itself if they subsequently developed it. *Id.* at 152-53. In a footnote that discussed the separate disease rule with apparent favor, the Court's majority stated that there was no "inevitable conflict" between the rule "and recovery of cancer *fear* damages by asbestosis claimants" because any duplicative damages could be excluded in any subsequent lawsuit based on the development of cancer. *Id.* at 152 n.12. Justice Kennedy, writing for four members of the Court in partial dissent, also assumed that the separate disease rule would apply, observing that it "has been adopted by a majority of jurisdictions, and the Court does not suggest that it would not apply in cases brought under FELA." *Id.* at 174 (Kennedy, J., concurring in part and dissenting in part) (internal citation omitted).

Against that backdrop, Ohio's intermediate appellate court concluded that the separate disease rule applies to FELA claims in *Arpin v. Consol. Rail Corp.*, 75 N.E.3d 948, 954 (Ohio Ct. App. 2016). There, the court stated it was joining "a growing trend among states to apply the separate disease rule, also known as the 'two-disease rule,'" which "state and federal court decisions have applied . . . to federal causes of action in the asbestos context." *Id.* We agree that the separate disease rule applies to toxic tort claims arising under FELA.

2. Ms. Staubs's Cause of Action Is Not Identical to that Presented in the West Virginia Action nor Could It Have Been Resolved in that Action.

In *John Crane, Inc. v. Puller*, this Court summarized the relationship between the separate disease rule and claim preclusion principles. 169 Md. App. 1, 28-33 (2006). There, a plaintiff who had previously brought and then voluntarily dismissed with prejudice a claim for damages based on asbestosis brought a second action after he developed mesothelioma. *Id.* at 29-30. We held that the second action was not barred by res judicata because it was based on a separate and distinct claim than the first action. We acknowledged that the two claims were "between the same parties or those in privity with them" and that "[t]he trials of the two cases, had they both come about, would have involved, moreover, a heavy overlap of factual issues." *Id.* at 29. Nonetheless, "the two claims were not the same." *Id.* We explained:

> The claim based on asbestosis which the [plaintiff] voluntarily dismissed . . . is not the same claim as that on which the [plaintiffs] recovered a judgment [based on mesothelioma]. The fact that two separate claims share a significant number of common factual issues did not fuse them into a single

> claim. [The defendant], in effect, concedes as much when, in its brief, it refers to Maryland as a "two-disease" state. The consequence of being a "two-disease" state is that each of the two diseases gives rise to a different claim. By definition, then, *res judicata* does not apply. Claim preclusion only operates to preclude subsequent attempts to relitigate the same claim. It does not preclude the subsequent litigation of a different claim. Collateral estoppel or issue preclusion may cross the line from one claim to another claim sharing a common factual issue, but *res judicata* may not.

Id. at 33 (emphasis removed). Seeing no reason that the principles would apply differently under West Virginia law, res judicata will bar Ms. Staubs's present claims only if the West Virginia action encompassed or could have encompassed a claim for damages for Mr. Staubs's development of kidney cancer.

CSXT's sole support for its argument that Ms. Staubs's claim for damages resulting from Mr. Staubs's development of kidney cancer was raised and resolved in the West Virginia action is contained in court records from that action, particularly the complaint that initiated that action. CSXT interprets that complaint as alleging that Mr. Staubs suffered from "cancer"—necessarily including kidney cancer—resulting from exposure to toxic substances while employed by CSXT. We do not read the complaint that way.

As discussed above, the West Virginia complaint was filed on behalf of 100 plaintiffs and the allegations in it were not specific to any one plaintiff but were made generally on behalf of all of them. In that context, the complaint listed the diseases from which the plaintiffs allegedly suffered in two places. First, the complaint alleged that

> the plaintiffs learned that he [sic] suffered from an occupationally related lung disease, including, without limitation, asbestosis, asbestos related pleural disease; silicosis, mixed dust pneumoconiosis, chronic obstructive pulmonary disease, occupational asthma, occupational bronchitis, cancer, an increased risk of cancer, and other serious and severe pulmonary diseases.

Second, the complaint alleged generally that

> the plaintiffs have developed asbestosis, asbestos related pleural disease, silicosis, mixed dust pneumoconiosis, chronic obstructive pulmonary disease, occupational asthma, occupational bronchitis, cancer, an increased risk of cancer, and/or other serious and severe respiratory diseases, and have suffered other bodily injuries, including a greatly increased risk of developing mesothelioma, bronchogenic carcinoma, or other cancerous conditions, and suffer difficulty breathing, as well as other serious and severe injuries which may be permanent. Further, some of these plaintiffs have died as a result of the above conditions[.]

Although CSXT reads these passages as alleging that all the plaintiffs suffered from all of those ailments, we think a more reasonable interpretation is that each plaintiff allegedly suffered from one or more of them. That flows from common sense and context, the use of "and/or" in the second passage, *see* Antonin Scalia & Bryan A. Garner, Reading Law: The Interpretation of Legal Texts 125 (2012) (emphasis omitted) (explaining that "and/or" can mean "any one or more of the following"), and the statement in the second passage that the plaintiffs had "a greatly increased risk of developing . . . other cancerous conditions[.]" The complaint does not allege that Mr. Staubs suffered from any particular condition.

Furthermore, Ms. Staubs is correct that the allegations of the West Virginia complaint, though generic, appear to be limited to pulmonary diseases. In both passages quoted above, the complaint's references to "cancer, [and] an increased risk of cancer" are followed by "*other* serious and severe respiratory diseases" (emphasis added), suggesting that the type of cancer referenced was also pulmonary in nature. And the first passage introduces the entire list as "occupationally related lung disease" and ends with a catch-all

of "other serious and severe pulmonary diseases." Kidney cancer is not a pulmonary disease.[8]

Even more definitive, although the complaint itself is not enlightening concerning whether Mr. Staubs was then allegedly suffering any type of cancer (pulmonary or otherwise), other documents in the record make clear that he was not. As noted, after the West Virginia action was transferred to the Kanawha County court, the only claims that were dismissed were those of the plaintiffs who were *not* alleging malignant injuries. In other words, the record appears to reflect that the only reason Mr. Staubs's claim was dismissed, along with the claims of 96 other plaintiffs named in the same lawsuit, was because he was *not* alleging that he had cancer.

The documents in the record from the West Virginia action thus establish that Mr. Staubs did not bring a claim in that action based on his development of kidney cancer resulting from exposure to toxic substances while employed by CSXT. Applying the two disease rule, Ms. Staubs's claim based on Mr. Staubs's kidney cancer would therefore not be precluded by res judicata. CSXT nonetheless contends that res judicata would still bar Ms. Staubs's current claim if Mr. Staubs could have raised such a claim in that lawsuit. Although that is true, the materials before the circuit court on CSXT's motion to dismiss

[8] Medical dictionaries define "pulmonary" as "[r]elating to the lungs." *See* "pulmonary," Black's Medical Dictionary 553 (43rd ed. 2017); *see also* "pulmonary," Taber's Cyclopedic Medical Dictionary 1986 (24th ed. 2021) (defined as "[p]ert. to or involving the lungs"); "pulmonary," Stedman's Medical Dictionary 1601 (28th ed. 2006) (defined as "[r]elating to the lungs, to the pulmonary artery, or to the aperture leading from the right ventricle into the pulmonary artery").

do not establish that Mr. Staubs could have raised a claim in the West Virginia action based on his development of kidney cancer. If discovery reveals that Mr. Staubs was diagnosed with kidney cancer before the West Virginia action was dismissed and had reason to believe it was caused by CSXT's negligence, CSXT will not be precluded from raising res judicata at a later stage of the litigation.

The circuit court therefore erred in dismissing the complaint based on res judicata. Accordingly, we must reverse.

JUDGMENT OF THE CIRCUIT COURT FOR BALTIMORE CITY REVERSED. CASE REMANDED FOR FURTHER PROCEEDINGS CONSISTENT WITH THIS OPINION. COSTS TO BE PAID BY THE APPELLEE.