

No. 1-10-3033

NOTICE: This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

JIMMY HARVARD,)	Appeal from the
Plaintiff-Appellant,)	Circuit Court of
)	Cook County
)	
v.)	
)	08 L 4945
)	
NORTHEAST ILLINOIS REGIONAL)	
COMMUTER RAILROAD CORPORATION,)	Honorable
d/b/a Metra,)	Jennifer Duncan-Brice,
Defendant-Appellee.)	Judge Presiding.

PRESIDING JUSTICE STEELE delivered the judgment of the court.
Justices Murphy and Salone concurred in the judgment.

ORDER

HELD: Where plaintiff failed to establish common carrier had actual or constructive notice of allegedly defective door in negligence claim, circuit court properly granted summary judgment to defendant; where plaintiff failed to show that the door's condition violated pertinent regulations to render common carrier negligent *per se*, circuit court properly denied plaintiff's cross-motion for partial summary judgment; circuit court's judgment affirmed.

¶ 1 This case comes to us on appeal after the circuit court granted summary judgment in favor of defendant Northeast Illinois Regional Commuter Railroad Corporation, d/b/a Metra (Metra), in a negligence claim filed by plaintiff Jimmy Harvard under the Federal Employers'

1-10-3033

Liability Act (FELA) (45 U.S.C. §51 *et seq.* (2000)) for injuries he sustained while working on a moving train on May 9, 2007. The trial court also denied Harvard's cross-motion for partial summary judgment in which he asserted Metra was negligent *per se*, because the condition of the end door at issue violated certain regulations in the Passenger Equipment Safety Standards (PESS) (49 C.F.R. §238.1 *et seq.* (2008)). On appeal, Harvard contends the trial court erroneously interpreted FELA: (1) in not finding the door was defective; (2) in finding that he failed to show Metra had actual or constructive notice about the door's alleged condition; and (3) in determining that he failed to proffer sufficient expert testimony to support his claims. We affirm.

¶ 2

BACKGROUND

¶ 3 Harvard began working for Metra in 1993. He has worked as a conductor on Metra's Rock Island line from June 1995, to the present. From 2005 to the present, and including the date of the incident in question, Harvard worked assignment number 115, which consisted of a Monday through Friday schedule originating in Blue Island, Illinois. Harvard worked on the same trains daily, beginning with Rock Island district train number 608 in the morning and ending with train number 6062 in Blue Island in the evening. This schedule also required Harvard to work frequently on coach number 7322.

¶ 4 At 3:20 a.m. on May 9, 2007, Arthur Rix, a Metra employee for nearly 12 years and a qualified maintenance person (QMP)¹ certified to perform federally-mandated inspections,

¹ A QMP is a "person who has received, as a part of the training*** required under §238.109, instruction and training*** in one or more of the following

1-10-3033

conducted an inspection of the train, including coach number 7322, before the train left the station. In addition to a visual inspection of the doors, Rix also physically operated the doors (by opening them) to determine if there were any problems. At the end of his inspection, he completed a "Passenger Car Inspection Exception Report," also referred to as the "Daily." If he discovered any defects during his inspection, Rix would indicate the defects on a defect sheet. Also, he would post a sign (stating Doorway Inoperative) on the door if he was unable to repair any defect during his inspection. Neither Rix's report nor deposition testimony revealed he found any defects during his inspection.

¶ 5 On May 9, 2007, Harvard was working on train number 505, which had seven cars and included coach number 7322. The westbound/outbound train departed from LaSalle Street and was headed to Joliet. At approximately 9:50 a.m., the train was traveling 60 miles per hour, was rocking back and forth, and was going over a crossover at mile post 35.5, which was five miles from New Lenox. Harvard testified in his deposition that he tried to open the B-end door (where the hand brake is located) with his left hand, while carrying a mailbag in his right hand, as he stood near the right side of the isle. Harvard was trying to pass through coach number 7322 to enter car number 8555, which was the rear train that day. When Harvard pulled the door to the left, the door did not open. He pulled the door again, but it only opened halfway. He pulled the

functions:*** inspection, testing, maintenance, or repair of *** other components and systems for which the person is assigned responsibility. This person [possesses] a current understanding of what is required to properly repair and maintain*** mechanical components for which the person is assigned responsibility." 49 C.F.R. §238.5 (2008).

1-10-3033

door a third time and felt a “nudge in [his] shoulder.” The door bounced back onto him and opened on this third attempt. Harvard had no difficulty opening the door to car number 8555.

¶ 6 When Harvard was working on train number 510 later that morning, Harvard dropped his keys and bumped his left shoulder against a pole in coach number 7436 when he bent down to pick up the keys. At this point, the pain he felt in his shoulder from earlier worsened. The train was at Mokena at the time.

¶ 7 At approximately 11:55 a.m., Harvard went to the trainmaster’s office at the LaSalle Street station to report he hurt his left shoulder and requested medical attention. Harvard spoke to Janet Carbonelli, a supervisor, who completed a “Supervisor’s Report of Incident” form. The form was later signed on May 14, 2007. Additionally, Harvard completed forms regarding his reported injury and the incident on coach number 7322.

¶ 8 Kurt Kroner, a Metra safety officer, came to the LaSalle Street station to ask Harvard what occurred. Kroner completed a "Preliminary Injury Investigation Report," which included a written statement of the events Harvard related to him. Kroner asked Harvard to review the statement for its accuracy. Harvard told him the statement was accurate.

¶ 9 Following Harvard's reported injury, the Rock Island mechanical department was notified to conduct an inspection of the end door. Michael Jennings, who was hired by Metra in February 1998, and is also a QMP, completed a post-incident inspection on coach number 7322. He was not informed what the purported problem was with the door or how Harvard’s injury occurred. He cycled, or opened, the B-end door several times, which opened with no difficulty. During his inspection, Jennings discovered a broken spring in the door handle assembly.

1-10-3033

Jennings discarded the spring, which he replaced, because he was not instructed to retain the part. Kenneth Hecimovich, a mechanical supervisor for over 13 years at the time of his deposition, testified that he completed a "Mechanical Department Post-Accident/Injury Inspection Report" on May 9, 2007, which included the information Jennings provided to him. The initials of James Derwinski, Metra's director of Rock Island district mechanical department since March 2007, appear on the mechanical department's post-accident/injury check off list.

¶ 10 Carbonelli transported Harvard to Advanced Occupational Medicine Specialists in Chicago, Illinois, where he had x-rays taken and was evaluated by the facility medical director and Metra's company doctor, Dr. Stephen Hartsock. The x-ray revealed a shoulder separation. Dr. Hartsock diagnosed Harvard with a left trapezius muscle strain and some muscle spasm. He prescribed over-the-counter medication (ibuprofen) for Harvard and recommended that he apply heat and ice to the area, as well as perform neck stretches. After he returned to the LaSalle station from the doctor's office, a relief was called to complete Harvard's shift. Harvard did not work his assignments for the following two days; he returned to work on May 14, 2007.²

¶ 11 On May 10, 2007, Harvard saw Dr. Hartsock again, but the findings were the same. On

²At his deposition, Harvard testified he returned to work on May 12, 2007, after a Metra employee advised him that he was off without authorization. He went on a layover and saw Dr. Robert Miller. After he took a doctor's note to Carbonelli, she pulled him from service. He eventually returned to work in late November 2007. However, the report Carbonelli completed refers to Harvard's initial return date after the incident as May 14, 2007.

1-10-3033

May 14, 2007, Harvard saw Dr. Robert Miller, who worked in the same medical group as Harvard's family physician, Neeru Jayanthi, M.D. Harvard complained to Dr. Miller about experiencing pain in his left shoulder over the past five days since the incident. Dr. Miller examined Harvard, which revealed cervical paraspinal tenderness, and placed him on a 15-pound lifting restriction and no work with his left arm. Dr. Miller diagnosed Harvard with cervical radiculopathy and started him on physical therapy. Dr. Miller turned over Harvard's care to Dr. Jayanthi.

¶ 12 On May 14, 2007, Harvard also returned to see Dr. Hartsock, at which time he examined Harvard to determine the source of the strain. Harvard was now complaining of some numbness and tingling in his left thumb. The following day, Alvin Clark, a claims agent for Metra, spoke with Harvard by telephone about the incident. As part of his job responsibilities in gathering information about incidents, Clark took Harvard's statement during their telephone conversation. Clark had previously taken 10 photos of the A and B-end doors on coach number 7322 on May 11, 2007.

¶ 13 In June 2007, Dr. Jayanthi also diagnosed Harvard with cervical radiculitis. He continued to follow up with Harvard following cervical epidural injections. Additionally, he continued Harvard's work restrictions until Harvard returned to work.

¶ 14 On August 10, 2007, Dr. Hartsock diagnosed Harvard as having "neck strain with spinal cord irritation and radicular symptoms" and referred Harvard to a neurosurgeon. In September 2007, Dr. Alexander John Ghanayem, a neurosurgeon, treated and examined Harvard pursuant to the referral. Dr. Ghanayem performed an EMG test, but opined there was no damage and no

1-10-3033

need for surgery at that time. A Dr. Zelby had previously recommended Harvard undergo surgery on his cervical spine. Dr. Hartsock continued to follow Harvard through the fall and issued a return to work slip on November 26, 2007.

¶ 15 After initially filing his complaint at law on May 8, 2008, Harvard subsequently filed a second amended complaint with two counts on January 8, 2010. Count I alleged, in pertinent part, that Metra was liable for his injuries under FELA, because Metra “carelessly and negligently” permitted a defective passenger car to be used by its employees when Metra had actual or constructive notice of a defect when “the door would not operate properly as intended and designed.” Count II alleged Metra was negligent *per se*, because Metra violated the PESS by not having the coach car’s end door, door latch, and door seal “in working order.” Metra filed its answer and affirmative defenses to the second amended complaint on February 5, 2010. Metra denied that it violated any safety regulations and Harvard’s injuries resulted from any negligence by Metra. During the course of the litigation, the parties engaged in discovery, including conducting depositions, propounding interrogatories, and exchanging production requests. The parties also videotaped an inspection of coach number 7322 on April 8, 2010.

¶ 16 Following discovery, both parties filed cross-motions for summary judgment on June 8, 2010, pursuant to section 2-1005(c) of the Illinois Code of Civil Procedure (Code) (735 ILCS 5/2-1005(c) (West 2008)), and an agreed order entered on May 18, 2010. Metra asserted it was entitled to judgment as a matter of law on both counts of Harvard’s second amended complaint. Harvard sought summary judgment in his favor on count II of his second amended complaint and for the issue of damages to be decided in a jury trial.

1-10-3033

¶ 17 In addition to written memoranda, Harvard and Metra submitted affidavits, deposition transcripts, and other materials in support of and in opposition to their respective motions. After taking the fully-briefed motions under advisement and without a hearing, the trial court issued a written ruling on September 24, 2010, granting Metra's motion in its entirety and denying Harvard's cross-motion.

¶ 18 On October 12, 2010, Harvard filed a timely notice of appeal with this court requesting reversal and remand to the trial court for a trial on either damages alone or on all issues.

¶ 19 DISCUSSION

¶ 20 On appeal, Harvard argues that he proffered sufficient evidence establishing genuine issues of material fact showing that the end door was defective and Metra had notice of its condition. He also contends that he was entitled to judgment as a matter of law, because he proffered sufficient evidence showing Metra violated certain safety regulations, and thus, was negligent *per se*. Furthermore, he asserts the trial court erroneously required him to provide expert testimony to support his claims.

¶ 21 I. Standard of Review

¶ 22 A party is entitled to summary judgment where "the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." 735 ILCS 5/2-1005(c) (West 2008). The documents are construed strictly against the movant and in the light most favorable to the nonmovant. *Espinoza v. Elgin, Joliet & Eastern Ry. Co.*, 165 Ill. 2d 107, 113 (1995). Summary judgment is a drastic means of disposing of litigation and should

1-10-3033

be granted only when the movant's right to relief is clear and free from doubt. *Bagent v. Blessing Care Corp.*, 224 Ill. 2d 154, 163 (2007); *Outboard Marine Corp. v. Liberty Mutual Insurance Co.*, 154 Ill. 2d 90, 102 (1992). We review a ruling on summary judgment *de novo*. *Outboard Marine*, 154 Ill. 2d at 102; *Judge-Zeit v. General Parking Corp.*, 376 Ill. App. 3d 573, 578 (2007).

¶ 23 The parties filed cross-motions for summary judgment, which invited the trial court to decide the issues presented as a matter of law. *Village of Oak Lawn v. Faber*, 378 Ill. App. 3d 458, 462 (2007); *SBC Holdings, Inc. v. Travelers Casualty & Surety Co.*, 374 Ill. App. 3d 1, 8 (2007). However, the filing of cross-motions does not compel a court to grant summary judgment in one party's favor over the other. *Faber*, 378 Ill. App. 3d at 462. The purpose of summary judgment motions is not for the trial court to try a question of fact, but to determine if a triable issue of fact exists. *Robidoux v. Oliphant*, 201 Ill. 2d 324, 335 (2002). In order to survive summary judgment, the nonmoving party does not have to prove his case, but the party must present some factual basis which arguably entitles the party to a judgment. *Id.*

¶ 24 Harvard seeks relief under FELA, which provides that “[e]very common carrier by railroad*** shall be liable in damages to any person suffering injury while he is employed*** for such injury or death resulting in whole or in part from the negligence of such [employer], or by reason of any defect or insufficiency, due to its negligence, in its cars,*** or other equipment.” 45 U.S.C. §51 (2000). A FELA action filed in the state court is governed by the state's procedural law and federal substantive law. *Schultz v. Northeast Illinois Regional Commuter R.R. Corp.*, 201 Ill. 2d 260, 274 (2002). Accordingly, federal substantive law governs

1-10-3033

our interpretation of the statute in determining whether the parties were entitled to judgment as a matter of law. *Brzinski v. Northeast Illinois Regional Commuter R.R. Corp.*, 384 Ill. App. 3d 202, 204 (2008) (citing *Larson v. CSX Transportation, Inc.*, 359 Ill. App. 3d 830, 834 (2005)).

¶ 25 Before we address the merits of Harvard's appeal, we acknowledge Metra's request that we disregard statements contained in the introduction and statement of facts in Harvard's opening brief for failure to cite to supporting portions in the record on appeal and include other undisputed facts introduced by Metra, with the appropriate citations to the record, in accordance with Supreme Court Rules 341(h)(2) and 341(h)(6) (eff. July 1, 2008). Although we note the stated deficiencies in Harvard's brief, we conclude that the omissions do not hinder our review of the case given the record on appeal before us and Metra's supplemental facts with citations to the record. See *Budzileni v. Department of Human Rights*, 392 Ill. App. 3d 422, 440-41 (2009).

¶ 26 II. The Alleged Defect and Foreseeability Issue

¶ 27 We first address Harvard's argument that the trial court erroneously determined he failed to establish genuine issues of material fact showing the door's condition constituted a defect, which Metra had notice about. FELA provides broad remedial measures for railroad workers who are injured resulting from their employers' negligence. *Lisek v. Norfolk & Western Ry. Co.*, 30 F. 3d 823, 831 (7th Cir. 1994); *Martinez v. Burlington Northern & Santa Fe Ry. Co.*, 276 F. Supp. 2d 920, 923 (N.D. Ill. 2003). Yet, FELA is not considered a worker's compensation statute; the employee must still prove that the employer's " 'negligence played any part, even the slightest, in producing the injury.' " *Martinez*, 276 F. Supp. 2d at 923 (quoting *Rogers v. Missouri Pacific R.R. Co.*, 352 U.S. 500, 507 (1957)).

¶ 28 Notwithstanding the statute's liberal construction, FELA “does not make the employer the insurer of the safety of [its] employees while they are on duty. The basis of [the employer's] liability is [its] negligence, not the fact that injuries occur.” *Consolidated Rail Corp. v. Gottshall*, 512 U.S. 532, 543 (1994) (quoting *Ellis v. Union Pacific R.R. Co.*, 329 U.S. 649, 653 (1947)). “The FELA plaintiff who fails to produce even the slightest evidence of negligence will lose at summary judgment.” *Williams v. National Railroad Passenger Corp.*, 161 F.3d 1059, 1061-62 (7th Cir. 1998) (citing *McGinn v. Burlington Northern Railroad*, 102 F.3d 295, 298 (7th Cir. 1996)). To establish a cause of action under FELA, the plaintiff must proffer evidence satisfying these elements of negligence: duty; breach of duty; foreseeability; and causation. *Williams*, 161 F.3d at 1062. FELA holds common carriers like Metra to a prudent-person standard of care. *Id.*

¶ 29 Harvard claims the B-end door was defective, because the door did not "operate as intended" on the moving train. Essentially, Harvard argues the door was defective, because it did not slide open on his first attempt.³ Metra responds that the morning inspection, which QMP Rix conducted as required by federal regulations, showed no defects discovered during his inspection that included visually observing and physically opening all doors on the cars before the train departed. The record also reveals that no defects were noted in inspection reports for

³Metra disputes Harvard's recounting of how many times he attempted to slide the end door open based upon a different version recorded in statements Harvard gave to Metra employees when he reported the incident. For the purpose of our discussion, we refer to Harvard's account, which does not affect how we reached our conclusions.

1-10-3033

the coach car over the preceding three-year period or reported by Harvard after working on trains with coach number 7322 over 40 times between March 1, 2007, through the incident date.

Harvard argues the trial court ignored Metra's self-serving statement that it found no defect with the end door during the post-incident inspection, as well as Metra's failure to replicate the inspection under the same circumstances (while traveling 60 miles per hour) and inform Jennings about how Harvard was injured. Harvard's bald assertions that a defect existed, absent sufficient proof, fail to refute adequately Metra's factual statements.

¶ 30 Metra explains the incident involving the end door as "movement-induced resistance"⁴ versus "binding-movement resistance." In a detailed affidavit Metra submitted in reply to Harvard's response in opposition to Metra's summary judgment motion, Derwinski, who also worked in various maintenance and mechanical positions for Metra since 1996, and before assuming the director position, distinguished the two:

"Increased difficulty which is caused solely by * 'movement-induced resistance,'** whereby the natural and unavoidable forces of gravity and momentum generated by the lateral or side-to-side rocking, swaying, bouncing or leaning of the passenger car while the train is simultaneously in forward

⁴In describing movement-induced resistance, Derwinski also attested to a related situation, "leaning-induced resistance," as occurring when the passenger car is stationary, but is leaning toward either side, and the "natural and unavoidable force of gravity makes it more difficult to slide the door open or opposite to the direction which the passenger side is leaning.***"

1-10-3033

(longitudinal) motion causes a person to encounter greater difficulty when trying to slide an end door open; *****Because 'movement-induced resistance' and 'leaning-induced resistance' are both caused solely by the natural and unavoidable forces of gravity and/or momentum, both of these conditions are considered by mechanical forces as non-defective conditions[.]**

'**[B]inding-induced resistance'** [occurs where] increased difficulty in sliding or pulling the end door open which is independent from movement-induced and/or leaning-induced resistance, and which is instead caused by either:

- a) **a physical object or debris***; or**
- b) the end door itself coming into physical contact with some other defective, broken or misaligned mechanical component of the passenger car.***" (Emphases in original.)

In stating his opinion, Derwinski characterized Harvard's incident as a "classic example" of movement-induced resistance. During his deposition, QMP Jennings also testified the rocking of a train increases the resistance or difficulty one may experience when trying to open an end door; however, he also opined any such difficulty does not indicate that the door is defective.

¶31 Harvard contends the incident stemmed from the door "binding" or "jamming," apparently trying to fit the incident into the defective category according to Metra's own definition. Indeed, Harvard contends the door should have been designed or manufactured to operate and open despite gravity and while the train was rocking and traveling at high speed. We find Harvard's reliance on *Myers v. Reading Co.*, 331 U.S. 477 (1947), as support of how he has established a

1-10-3033

defect is misplaced. The *Myers* Court involved the propriety of reversing judgment for the plaintiff following a jury trial in which the inefficiency of a freight car's hand brake was deemed to violate the Safety Appliance Act of 1910. *Id.* at 478. The plaintiff testified that he did not normally encounter difficulty with the hand brake at issue. *Id.* at 480. In this case, however, we are at the summary judgment stage where Harvard failed to establish that his injury was caused by Metra's negligence or that the door's condition violated any safety statute. Additionally, Harvard admitted at his deposition that he normally encountered resistance on occasion while opening end doors on a moving train.

¶32 Furthermore, Harvard argues the pneumatic motor assembly contributed to the door's malfunction. Yet, Harvard emphasizes the door's alleged faulty design in his opening brief. Metra argues Harvard forfeited his argument about the broken spring as the alleged defect, which he expressly refers to as circumstantial evidence of a defect in his reply brief only. While Metra's technical argument has merit, we will nonetheless address Harvard's argument regarding the spring given the record before us, including pleadings filed in the trial court raising Harvard's same argument, for a complete disposition of the case's merits.

¶33 Derwinski and Jennings explained how the door handle assembly operated independently of the door's operation, and thus, did not render the end door defective as Harvard contends. Jennings, who would be responsible for repairing an end door, testified at his deposition that in order to unlatch the door, one would have to slide the handle from the 12 o'clock position to the 10 o'clock position. When the handle is moved to the 10 o'clock position, a cylinder inside of the door assembly unit lifts the latch, which he referred to as the keeper. The keeper then unlatches

1-10-3033

the door from the side wall of the equipment, which he referred to as the hasp. He further explained that the spring in the unit reduces the tension to keep the keeper in the hasp. When he was asked whether the broken spring affected the inability to slide the B-end door open, Jennings testified about his ability to open the door during his inspection and before he discovered the broken spring.

¶34 In one of his detailed affidavits, Derwinski attested to the door handle return spring's sole mechanical function as allowing the door handle "to snap up from the 10:00 position to the 12:00 position." He concluded that any difficulty sliding an end door open was not indicative, in and of itself, that the motor assembly was defective. Rix also testified that the broken spring operated independently of the end door's opening and functioned solely to return the handle to its "correct" (upright, at 12 o'clock) position. Similarly, Hecimovich testified that the spring's function is to return the handle to the upright position and that he had operated an end door like the one on coach number 7322 with a broken spring. Harvard failed to proffer any sufficient evidence to rebut Derwinski, Jennings, Rix, and Hecimovich's testimony about the door handle's independent operation.

¶35 Nonetheless, Harvard maintains he was not required to proffer technical scientific evidence to support his claims against Metra, citing *Harbin v. Burlington Northern R.R. Co.*, 921 F.2d 129, 132 (1990). Unlike *Harbin*, where the court noted the plaintiff did not have to proffer evidence given the insufficient ventilation in the work area at issue (*Id.*), the origin of the alleged defect in the end door here is not obvious. See *Myers v. Illinois Central R.R. Co.*, 629 F.3d 639, 643 (7th Cir. 2010) (expert testimony unnecessary where layperson can understand

1-10-3033

what caused injury). Thus, Harvard cannot rest upon generalized comments and unsubstantiated complaints to establish the end door was defective.

¶36 Moreover, Harvard also fails to show that Metra had actual or constructive notice of the door's allegedly defective condition. A FELA plaintiff must show that the employer breached its duty by establishing circumstances that " 'a reasonable person would foresee as creating a potential for harm.' " *Williams*, 161 F.3d at 1062 (quoting *McGinn*, 102 F.3d at 300)). Such foreseeability is established only where the employer had actual or constructive notice of the condition. *Brzinski*, 384 Ill. App. 3d at 205 (citing *Holbrook v. Norfolk Southern Ry. Co.*, 414 F.3d 739, 742 (2005), and *Williams*, 161 F.3d at 1063)). An employer will not be held liable "if it has no reasonable way of knowing that a potential hazard exists." *Williams*, 161 F.3d at 1062-63 (and cases discussed therein). Harvard urges us to find Metra had "reasonable foreseeability of potential harm" and failed to warn its employees of risks involving the end doors based upon the door's "design limits," Derwinski's affidavits, the conductors' deposition testimony, and the passenger affidavits.

¶37 In opposition to Metra's motion for summary judgment, Harvard attached transcripts from discovery depositions conducted of other Metra conductors and 11 affidavits from individuals identifying themselves as Metra passengers on the Rock Island line. Affidavits submitted in support of or opposition to summary judgment must conform to Illinois Supreme Court Rule 191 (eff. July 1, 2002). *Robidoux*, 201 Ill. 2d at 339. Affidavits must contain sufficient evidentiary facts upon which to base a decision (*Robidoux*, 201 Ill. 2d at 336), and are subject to the same requirements for competent trial testimony (*Judge-Zeit*, 376 Ill. App. 3d at

1-10-3033

586). See also *Geary v. Telular Corp.*, 341 Ill. App. 3d 694, 699 (2003) (unsupported and self-serving assertions and opinions fail to comply with Supreme Court Rule 191).

¶38 The 11 affidavits are templates containing the same verbiage in four paragraphs, namely stating: (1) the individual was a “longtime Metra passenger,” with “(RID)” or “(Rock Island)” handwritten at the end of the sentence; (2) “[b]oth before and after the incident, I experience [sic] difficulties opening passenger car end doors”; (3) “[w]hen trying to open the difficult doors, I have personally experienced end doors that are hard to open or stuck closed”; and (4) “[a]t other times, the end doors open freely and easily, as they should.” However, we find these general statements fail to establish a genuine issue of material fact that Metra had notice of any condition in the end doors indicating a defect or warranting some action by Metra.

¶39 Similarly, the deposition testimony of other conductors fails to substantiate genuine issues of material fact for Harvard to survive summary judgment. For example, Gary Mister, who worked as a conductor for Metra on the Rock Island line since 1991, and was a carman for Metra from 1989 to 1991, testified to the following at his deposition:

“Q. [PLAINTIFF’S COUNSEL:] [W]hat is your experience, if any, of any difficulties you [illegible word] with the passenger car end doors on the Metra Rock Island District?

A. Well, it’s been noted several times during our safety meetings***. These doors have been brought up numerous times about how hard they are to open, you know.

Q. [D]o you remember what the concerns were, with the end doors, that were

1-10-3033

raised in these safety meetings?

A. It was just—You know, we just told them, you know, the doors are difficult, you know, to open. You know, even passengers have, you know, complained to us concerning, you know, about the doors.”

¶40 Subsequently, Harvard's counsel requested Mister to identify a document marked as an exhibit. Counsel then asked and Mister answered as follows:

“Q. [A]re there any difficulties that you have had or a passenger has reported a problem to you, that they have had, and filled out one of these forms regarding a passenger car end door?

A. I can't actually say that I have filled out one pertaining to an end door***.”

¶41 Another deponent, Ken Malloy, who was a Metra conductor on the Rock Island District for 19 years, testified:

“Q. [PLAINTIFF'S COUNSEL:] [H]ave you ever reported an end door?

A. Yes. I am sure that I have.

* * *

Q. [A]nd so you filled out forms like this for bad [opening] passenger car end doors?

A. Yes.

1-10-3033

Q. Specifically the problems opening the passenger car end doors?

A. I couldn't recall if I filled one out for that or not."

After testifying that he experienced difficulty on more than one occasion, he stated that he did not know what caused the supposed problem with the end doors.

¶42 Further, Harvard attached the deposition transcript of Gary Pattenaude, who was a Metra conductor on the Rock Island district line for 13 years at the time he was deposed. Pattenaude described an instance, which occurred about five or six years prior to Harvard's incident (although he was unsure), where he pulled an end door several times and he stopped trying to open the door when his arm began hurting. He stated that he contacted the mechanical department, but the mechanic was also unable to open the door. He noted that he did not fill out any documents and "turned it over to mechanical." Yet, he testified that there may not have been any write-up and if they had to, the mechanical department would take the car out if it could not be repaired during the day. He stated that was his only experience like that with any door, although he later testified that sometimes the doors "stick a little on you," but "never that tough to get one where I couldn't get it open***." Moreover, he testified that female passengers had difficulty opening the end doors, "so usually guys are a little stouter and we can get it open."

¶43 Harvard cites *Balough v. Northeast Illinois Regional Commuter R.R. Corp.*, 409 Ill. App. 3d 750 (2011), as support that other purported occurrences of the door's condition are evidence of Metra's breach of duty and foreseeability of potential harm. We find the occurrences described in *Balough* distinguishable from the general comments in the record before us. In *Balough*, the trial court admitted testimony about prior incidents involving injuries from contact

1-10-3033

with trapdoors on other cars at the jury trial. *Balough*, 409 Ill. App. 3d at 778. Metra argued that the trial court erred in admitting the four incidents, because the incidents occurred on other cars other than the one at issue. *Id.* However, this court found the trial court did not abuse its discretion in admitting evidence about the prior incidents, which were deemed substantially similar to the plaintiff's incident. *Id.* at 779. Here, however, the sole instance of an alleged injury involving a door Harvard submits is inapposite, because Harvard was able to open the end door as was Jennings during his post-incident inspection.

¶44 Contrary to Harvard's contention, we find the facts in *Williams v. National Railroad Passenger Corp.*, 161 F.3d 1059 (7th Cir. 1998), similar to the instant facts. In *Williams*, the plaintiff sued under FELA for an injury he sustained while operating an end door. The plaintiff propped the vestibule door open by setting a switch above the door to lock it open while he prepared to help passengers move their belongings as he routinely did. *Williams*, 161 F.3d at 1060-61. While straddling the doorway, he bent down to pick up a bag. The door suddenly closed, striking him on top of his head. *Id.* at 1061. The court noted the parties agreed that the carrier had no actual notice of the alleged defective door and concluded Williams failed to meet his burden in showing the carrier had constructive knowledge, in that he presented no evidence suggesting the door was defective or in need of repair, or that the carrier had any prior notice of problems with the door such that it could have discovered the defect and remedied the situation. *Id.* at 1063. The court specifically noted that an affidavit submitted by a conductor stating that Williams had passed out in a car failed to provide sufficient information about the incident, the carrier's role in the incident, or linking Williams's injury to any negligence by the carrier. *Id.*

1-10-3033

Here, neither the conductors' testimony nor the affidavits provide sufficient information about Harvard's incident or Metra's role in the incident, or linking Harvard's injuries to negligent conduct by Metra.

¶45 We note that Harvard relies heavily upon cases noting the relaxed standard of causation in FELA cases to bolster his claims, including the United States Supreme Court's recent decision in *CSX Transportation, Inc. v. McBride*, ___ U.S. ___, 131 S. Ct. 2630 (2011), in which the Court discussed the proper jury instructions addressing causation in FELA cases.

Notwithstanding the relaxed standard, which Metra does not dispute, Harvard must still establish that Metra's conduct was negligent, *i.e.*, failed to provide a safe workplace or had notice of a condition, and such negligence caused Harvard's injuries. As Harvard quotes in his supplemental brief, the *McBride* Court also reiterated that " 'reasonable foreseeability of harm' *** is indeed 'an essential ingredient of [FELA] negligence.' " (Emphasis in original.) *McBride*, ___ U.S. at ___, 131 S. Ct. at 2643 (quoting *Gallick v. Baltimore & Ohio R.R. Co.*, 372 U.S. 108, 117 (1963)); see also *Gallick*, 372 U.S. at 118 n. 7 (a party is not required to correct a particular condition if no reasonable ground exists to anticipate the condition would result in injury). We cannot say that the record before us presents triable issues that the door was defective and that Metra had notice about the alleged defective condition. Granting relief to Harvard without sufficient proof to support his claims is tantamount to granting relief to Harvard simply because he was injured while working, which contradicts well-established law. Accordingly, the circuit court properly granted summary judgment to Metra on count I of the second amended complaint.

¶46

III. Harvard's Negligence *Per Se* Claim

1-10-3033

¶47 We next address Harvard's claim that he was entitled to judgment as a matter of law, because the door's alleged condition violated certain federal regulations. *Kernan v. American Dredging Co.*, 355 U.S. 426, 431 (1958); *Coffey v. Northeast Illinois Regional Commuter R.R. Corp.*, 479 F.3d 472, 477 (7th Cir. 2007). However, the record before us fails to show Harvard's right to relief is clear and free from doubt.

¶48 The PESS are promulgated in 49 C.F.R. §238.1 *et seq.* (2008). The purpose of this part is to "prevent collisions, derailments, and other occurrences involving railroad passenger equipment that cause injury or death to railroad employees *** and to mitigate the consequences of such occurrences to the extent they cannot be prevented." 49 C.F.R. §238.1 (2008). Harvard refers to sections about daily mechanical inspections, "all end doors and side doors [operating] safely and as intended," and safe mechanical components on cars. See 49 C.F.R. §§238.305(c)(10), 238.307(f) (2008); but see 49 C.F.R. §§238.305(c)(10), 238.305(d) (discussing when passenger car can continue in service where end door does not operate as intended).

¶49 Harvard primarily argues the end door should have been redesigned to operate as intended to satisfy the regulations. Harvard contends Derwinski's affidavits support his claims, including that Metra had notice of a need to alter the door's design. In an affidavit, Derwinski asserts the manufacturer (the Budd Company) was not required to design the door to counter movement-induced resistance. We find Derwinski's testimony on this point lacking sufficient authority. Yet, he later sufficiently attests in his affidavit that he was unfamiliar with any regulations requiring the door to be designed or altered to operate under movement or binding

1-10-3033

resistance. Simultaneously, Harvard, who bears the burden in establishing a violation occurred in his negligence *per se* claim, cannot rely upon his bald, self-serving assertion to substantiate his claim the door should be redesigned.

¶50 In support of his negligence *per se* claim, Harvard relies on *Schmitz v. Canadian Pacific Ry. Co.*, 454 F.3d 678 (7th Cir. 2006). We find *Schmitz* distinguishable from the case here. In *Schmitz*, 454 F.3d at 680, the court dealt with erroneous jury instructions where a federal regulation imposed a duty on the railroad to control trackside vegetation where the conductor stepped into a hole along the tracks in performing his job responsibilities. Unlike the recognized duty in *Schmitz*, Harvard's recitation of regulations does not, by itself, indicate the regulations imposed a duty on Metra to redesign the end door.

¶51 Harvard then argues about the end door itself, namely the motor assembly and the broken spring Jennings found during his post-incident inspection, was unsafe and improperly functioning equipment. We note, as did Metra, that Harvard's argument about the pneumatic motor assembly is grounded solely in referring to Derwinski's testimony that the door's motor assembly is affected by the amount of resistance encountered. As previously mentioned, Harvard then briefly points to the broken spring in the door assembly as the defective equipment constituting a violation. Again, Harvard attempts to support his claims by regurgitating regulations and simply stating the door was improperly functioning as proof. Harvard not only fails to proffer any expert testimony to substantiate his claims, but he also fails to show that Metra's inspections of the end door imposed a duty on the carrier to alter its design. See *Borger v. CSX Transportation, Inc.*, 571 F.3d 559, 566 (6th Cir. 2009) (carrier's compliance with

1-10-3033

regulations demonstrated carrier exercised due care).

¶52 We disagree with Metra's interpretation that the general principles of reliability-based maintenance programs (stated as appendix E to Part 238) is inapplicable to Tier I equipment like Metra's. In interpreting statutes *de novo*, we ascertain and give effect to the statute's legislative intent by viewing the statute's plain language. *E.g.*, *Abruzzo v. City of Park Ridge*, 231 Ill. 2d 324, 332 (2008). The appendix's plain language does not state that it applies only to Tier II equipment. As Harvard correctly notes, other subparts specifically reference whether the section applies to Tier I or Tier II equipment. Absent that specificity, we decline to follow Metra's narrow interpretation of appendix E in the stated regulations. Nonetheless, we have already concluded that Harvard failed to proffer sufficient evidence establishing Metra violated any safety regulations. Accordingly, the circuit court properly denied Harvard's cross-motion on count II of his second amended complaint and granted judgment in Metra's favor on the count.

¶53 Lastly, Harvard refers to a circuit court's summary judgment ruling in another case against Metra to support his argument that the door's condition here violated pertinent safety regulations. However, a circuit court's decision is not binding precedent for this court. See *Norton v. City of Chicago*, 293 Ill. App. 3d 620, 625 (1997) (unpublished order by trial court lacks precedential value); see also *In re A.A.*, 181 Ill. 2d 32, 36 (1998) (circuit courts have "absolute duty" to follow appellate courts' decisions).

¶54 CONCLUSION

¶55 In sum, we conclude Harvard failed to establish, even construing the evidence in the light most favorable to him, either the jury was entitled to hear issues about the end door's

1-10-3033

alleged defective condition and Metra's notice about the door's alleged condition, or that he was entitled to judgment as a matter of law because the end door's condition on the moving train violated pertinent regulations. Additionally, Harvard's failure to proffer sufficient expert testimony to support his claims and refute undisputed facts and opinions in the record contributed to his inability to prevail on summary judgment. For all of the aforementioned reasons, we affirm the judgment of the circuit court.

¶56 Affirmed.