2011 IL App (5th) 100392-U

NO. 5-10-0392

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

LARRY NIEDERHOFER,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellant,	)	Marion County.
	)	
v.	)	No. 07-L-8
	)	
ILLINOIS CENTRAL RAILROAD COMPANY,	)	Honorable
	)	George C. Lackey,
Defendant-Appellee.	)	Judge, presiding.

JUSTICE WELCH delivered the judgment of the court.
Justice Stewart concurred in the judgment.
Justice Goldenhersh dissented.

O R D E R

¶ 1 *Held*: Where no causal connection exists between the defendant's alleged negligence and the plaintiff's injury, summary judgment is proper.

¶ 2 The plaintiff, Larry Niederhofer (Niederhofer), appeals the decision of the circuit court of Marion County granting summary judgment in favor of the defendant, Illinois Central Railroad Company. On appeal, the plaintiff contends summary judgment was inappropriate because there are genuine issues of material fact regarding the defendant's negligence. For the following reasons, we affirm the circuit court.

¶ 3 Niederhofer was injured on February 10, 2004, while working for the defendant at its Champaign rail yard. On February 8, 2007, Niederhofer filed a complaint in the circuit court of Marion County under the Federal Employers' Liability Act (FELA) (45 U.S.C. § 51 *et seq.* (2000)). The complaint alleges that Niederhofer's work truck collided with a railroad car and "[w]hen the plaintiff attempted to exit the vehicle, he stepped onto unsafe terrain

consisting of approximately seven to eight inches of ice and snow causing injury to his left knee." The complaint alleges four bases for the defendant's negligence: (1) creating an unsafe work environment by failing to remove accumulated snow from common work area grounds, (2) failing to put down salt or other substances to aid in snow removal, (3) failing to equip company vehicles with snow tires or other mechanisms to aid travel in snow and ice, and (4) requiring the plaintiff to work in an unsafe environment with no attempt to remove the hazardous conditions.

¶ 4 The defendant filed an answer, discovery proceeded, evidence was gathered, and Niederhofer was deposed. On March 24, 2010, the defendant filed a motion for summary judgment pursuant to section 2-1005 of the Illinois Code of Civil Procedure (735 ILCS 5/2-1005 (West 2008)), alleging an absence of causation between its supposed negligence and the plaintiff's injuries. Niederhofer responded by filing a brief and affidavit in opposition to the motion for summary judgment. On August 9, 2010, after hearing oral argument, the court granted the motion for summary judgment.

¶ 5 The following facts are relevant to the disposition of this appeal. These facts are taken primarily from the pleadings or Niederhofer's deposition; information taken from Niederhofer's affidavit is specifically noted.

¶ 6 On February 10, 2004, Niederhofer was employed by the defendant as a car man and was operating a repair truck (RT truck) at the defendant's Champaign rail yard. There was substantial snow and ice accumulation (approximately seven to eight inches) on the ground. On this day, however, the temperature was above freezing and the accumulation was melting. The ground between the railroad tracks had not been plowed, salted, or otherwise cleared. Niederhofer testified that he was wearing ice cleats on his work boots.

¶ 7 The RT truck had two steps leading up to the cab, the first of which was approximately 20 inches off the ground and the second of which was approximately 12 to

14 inches from the cab. The truck also had a grab iron on the door frame by which a person could pull himself into the cab. Niederhofer stated that he normally used both steps and the grab iron in order to enter and exit the RT truck.

¶ 8 On February 10, 2004, Niederhofer was working in the RT truck with Brad Sanders. Sanders was driving the truck between two sets of railroad tracks on ground that was higher than the tracks, sloped toward the tracks, and covered with ice and snow. In order to allow another vehicle to pass, Sanders pulled his truck forward and, once the other vehicle had passed, slowly backed up to his original position. After bringing the truck to a stop, it slid down the embankment. The RT truck came to rest with its driver's side door against a railcar and the passenger's side considerably higher than the driver's side. No one was hurt in the accident and Niederhofer called it a "very minor fender bender." The only visible damage to the RT truck was to the driver's side mirror.

¶ 9 Once the truck came to rest, Niederhofer and Sanders talked about what to do. Concerned about causing more damage to the truck, they decided not to drive the RT truck out of its position. Instead, they attempted to contact another work truck in the area. When they received no response, they tried to contact their supervisor via hand-held radio. When contact via the hand-held radio did not work, Niederhofer tried to call his supervisor on a cell phone.

¶ 10 Niederhofer was on the phone with the supervisor when he exited the truck. He exited the truck by holding onto the grab iron with his left hand, holding onto the phone with his right hand, and backing out of the cab. He was not in a rush. Because of the truck's angle, the passenger door kept closing on him as he attempted to exit. There was no snow or ice on either of the truck's two exterior steps. While still on the phone with his supervisor, Niederhofer stepped off the second step and onto the ground. He did not remember looking at the ground as he was exiting, but he knew that he was stepping onto snow and ice. The

distance between the RT truck's lower step and the ground was normally approximately 20 inches but was about 8 inches after the accident because of the truck's position on the terrain.

¶ 11 Niederhofer testified that as soon as his left foot hit the ground, he felt immediate pain in his left leg and knee. Niederhofer did not slip or otherwise lose his footing on the ice and snow. In his deposition, he stated: "I'm sure [my leg] hit [the ground] on an angle, you know, due to the angle of the contour of the ground. *** But as far as remembering the slipping, I don't remember that." He continued by saying: "Other than just jamming it or something due to the shorter distance *** I don't remember hitting it. I don't remember bumping it." He stated that he did not know what caused his leg injury but admitted to having misjudged the distance of the step.

¶ 12 In his deposition, Niederhofer stated that company policy required that a supervisor be contacted after an accident. Niederhofer wanted to contact his supervisor to inform him of the accident and to get his opinion about how to move the truck away from the railcars. In his affidavit, Niederhofer added that he felt it was necessary to exit the truck to assess whether any other part of the RT truck was damaged and posed "an immediate hazard to Mr. Sanders and [himself] or to the railroad car(s) which the RT truck was resting against." He specifically noted concern for the contents of the railcars and the integrity of the truck's fuel tank.

¶ 13 The circuit court granted the defendant's motion for summary judgment on August 9, 2010, noting, "I can't [*sic*] see anything at all in the facts in the deposition that the slipping of the truck had anything to do with causing him specifically to hurt his leg or to hurt his knee." The court continued: "[T]he slipping and sliding of the vehicle did not in and of itself cause any harm at all. It may have given occasion for this to have happened, but there is nothing about the fact that the vehicle slipped that caused this injury." It is from this grant of summary judgment that Niederhofer appeals. We affirm the circuit court.

¶ 14 Summary judgment is proper where, when viewed in the light most favorable to the nonmoving party, the pleadings, depositions, admissions, and affidavits on file reveal 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. *Home Insurance Co. v. Cincinnati Insurance Co.*, 213 Ill. 2d 307, 315 (2004) (citing 735 ILCS 5/2-1005(c) (West 2002)). The purpose of summary judgment is not to try a question of fact, but to determine whether one exists. *Allegro Services, Ltd. v. Metropolitan Pier & Exposition Authority*, 172 Ill. 2d 243, 256 (1996). A genuine issue of material fact exists only if the evidence is such that a reasonable jury could return a verdict for the nonmoving party. *McDonald v. Northeast Illinois Regional*, 249 F. Supp. 2d 1051, 1053 (N.D. Ill. 2003). To survive a motion for summary judgment, the nonmoving party must present a factual basis that would arguably entitle him to a judgment. *Allegro Services, Ltd.*, 172 Ill. 2d at 256. A party opposing summary judgment must present more than a mere scintilla of evidence to support its position; it must present " 'definite, competent evidence to rebut the motion.' " *McDonald*, 249 F. Supp. 2d at 1053 (quoting *Equal Employment Opportunity Comm'n v. Sears, Roebuck & Co.*, 233 F.3d 432, 437 (7th Cir. 2000)).

¶ 15 A grant of summary judgment is reviewed *de novo*. *Home Insurance Co.*, 213 Ill. 2d at 315. *De novo* review requires that we consider the facts and law anew to determine whether the circuit court was correct. *Bank One, Springfield v. Roscetti*, 309 Ill. App. 3d 1048, 1054 (1999). On review, we construe the evidence liberally in favor of the nonmoving party. *Espinoza v. Elgin, Joliet & Eastern Ry. Co.*, 165 Ill. 2d 107, 113 (1995). Because summary judgment is a drastic means of disposing of litigation, where reasonable persons could draw divergent inferences from the undisputed material facts, summary judgment should be denied and the issue decided by the trier of fact. *Espinoza*, 165 Ill. 2d at 113-14.

¶ 16 The FELA provides that "[e]very common carrier by railroad *** shall be liable in

damages to any person suffering injury while he is employed by such carrier *** for such injury *** resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment." 45 U.S.C. § 51 (2000). In a negligence case, a plaintiff suing under the FELA has a lighter burden than under the common law; a railroad will be liable where "the proofs justify with reason the conclusion that employer negligence played any part, even the slightest, in producing the injury." *Rogers v. Missouri Pacific R.R. Co.*, 352 U.S. 500, 506 (1957). The employer, however, is not " ' "the insurer of the safety of his employees while they are on duty. The basis of his liability is his negligence, not the fact that injuries occur." ' " *Brzinski v. Northeast Illinois Regional Commuter R.R. Corp.*, 384 Ill. App. 3d 202, 205 (2008) (quoting *Consolidated R. Corp. v. Gottshall*, 512 U.S. 532, 543 (1994) (quoting *Ellis v. Union Pacific R.R.*, 329 U.S. 649, 653 (1947))). To survive a motion for summary judgment, a plaintiff must present evidence proving the common law elements of negligence: duty, breach, foreseeability, and causation. *Brzinski*, 384 Ill. App. 3d at 205.

¶ 17 The issue before this court is whether the defendant's alleged negligence caused Niederhofer's injury. The United States Supreme Court recently addressed the issue of causation in FELA cases in *CSX Transportation, Inc. v. McBride*, 564 U.S. ____, 131 S. Ct. 2630 (2011). Noting that traditional notions of proximate cause do not apply in FELA cases, the Court reiterated the applicability of the *Rogers* standard, calling it the "comprehensive statement of the FELA causation standard." *McBride*, 564 U.S. at ___, 131 S. Ct. at 2638. *McBride*, however, makes clear that more than mere "but for" causation is required under the FELA. The Court went on to note that when juries are properly instructed on negligence and causation and told to use their "common sense" in reviewing the evidence, "juries would have no warrant to award damages in far out 'but for' scenarios." 564 U.S. at ___, 131 S. Ct. at

2643. "Indeed, judges would have no warrant to submit such cases to the jury." 564 U.S. at ___, 131 S. Ct. at 2643. The Court went on to cite two cases for this common sense limitation on *Rogers*. First, *Nicholson v. Erie R.R. Co.*, 253 F.2d 939 (2d Cir. 1958), held that a railroad was not liable for negligence in failing to provide a restroom for a female employee when she tripped over a suitcase while looking for a lavatory in a passenger car. Second, *Moody v. Boston & Maine Corp.*, 921 F.2d 1, 2-5 (1st Cir. 1990), held a railroad not to be negligent when an employee suffered a stress-related heart attack after the railroad forced him to work for 12 hours with inadequate breaks.

¶ 18 We find the case of *McDonald v. Northeast Illinois Regional*, 249 F. Supp. 2d 1051 (N.D. Ill. 2003), to be instructive to the causation issue before us. In *McDonald*, the plaintiff alleged that the defendant railroad was negligent because one of its employees improperly operated a forklift, causing it to become stuck in snow. 249 F. Supp. 2d at 1056. The plaintiff helped push the forklift out of the snow and immediately thereafter twisted his ankle when he stepped on the edge of a snow-covered apron. 249 F. Supp. 2d at 1056. The reviewing court upheld the grant of summary judgment for the railroad because of a lack of "causal connection" between the defendant's alleged negligence in improperly operating a forklift and the plaintiff's injury. 249 F. Supp. 2d at 1056-57. The "only link to the injury and the improper use of the forklift is that the operation of the forklift preceded his injury. This is not a legally recognized concept of causation. Instead, it is a fallacy called *post hoc ergo propter hoc* (following this, therefore because of this)." 249 F. Supp. 2d at 1056.

¶ 19 Niederhofer argues that because the forklift in *McDonald* was extracted *before* that plaintiff was injured, that court was correct in finding causation did not exist. In the instant case, however, because the RT truck was still in its postaccident location when he was injured, Niederhofer argues that causation exists. This argument is unpersuasive. In both *McDonald* and the instant case, the plaintiffs were in locations and doing activities that they

would not have been doing if it were not for the defendants' alleged negligence. In both cases, the defendants' alleged negligence merely created the preceding situation–it did not cause the plaintiffs' injuries; intervening actions and forces separate the defendants' negligent acts from the plaintiffs' injuries. Other than the initial truck accident, the snow and ice played no role in Niederhofer's injury–he did not slip on the ground or RT truck's step. Instead, he admits that he did not look where he was stepping and misjudged the distance between the step and the ground. Without a more direct causal connection between the railroad's alleged negligence in failing to remove the snow and ice and Niederhofer's injury when he misjudged the distance between the last step on the truck and the ground while on his cell phone, his case cannot survive summary judgment.

¶ 20 We note that in Niederhofer's affidavit he states that he was exiting the RT truck in order to determine whether he, the truck, or railcars were in imminent peril. In his deposition, however, he states that he exited the truck in order to assess the situation and provide a better report to his supervisor; he did not mention having a concern for the contents of the railcar or the integrity of the truck's fuel tank. Further, in the deposition Niederhofer described the accident as a "very minor fender bender" and stated that he was not in a rush to exit the vehicle. Taking the time to converse with Sanders and attempting two radio calls before exiting the vehicle gives credence to his claim of not being rushed. While a court reviewing a summary judgment views the evidence on file in the light most favorable to the nonmoving party, we note that the plaintiff's affidavit does not outweigh his clear deposition testimony or create a genuine issue of material fact.

¶ 21 While the negligence standard is lower under the FELA than the common law, there remains a requirement that the defendant's negligence caused, at least in some part, the plaintiff's injury. It is the plaintiff's burden to plead facts sufficient to support its cause of action. Niederhofer fails to meet this burden. Any negligence on the part of the defendant

railroad in failing to remove accumulated ice and snow is sufficiently disconnected from Niederhofer's injury to relieve the railroad from liability, even under the slight causation standard under the FELA set forth in *Rogers*. 352 U.S. at 506-08. This case, like *Nicholson* and *Moody*, is an example of the common sense limitation on causation in FELA cases. Thus, we find that the judge had no warrant to submit the case to the jury and summary judgment was proper as a matter of law.

¶ 22 The decision of the circuit court of Marion County is hereby affirmed.

¶ 23 Affirmed.

¶ 24 JUSTICE GOLDENHERSH, dissenting.

¶ 25 I respectfully dissent. As the majority clearly indicates, the termination of litigation by summary judgment is a drastic remedy and the records and pleadings in litigation with a summary judgment motion are to be construed liberally in favor of the party opposing that motion. The majority's recitation of the evidence existent so far in this litigation, as well as the record in its entirety, do not indicate that there is no genuine issue of material fact left open for a trier of fact. As appellant succinctly noted in his initial brief, the following issues, at a minimum, remain:

> "The record before the court shows the following:
>
> 1. The snow-packed condition of Defendant's Champaign yards was present for at least several days before February 10, 2004;
>
> 2. Defendant did not take the steps to improve the surface conditions as it did in its Centralia, Illinois yards;
>
> 3. The area where Mr. Sanders was operating the RT truck between two sets of railroad tracks was sloped and not level;

4. It was foreseeable that a vehicle operating between the two sets of tracks might have difficulty with its traction because of the surface conditions and topography;

5. The radios supplied to [Niederhofer] and Mr. Sanders and the radio in the RT truck did not work and [Niederhofer]'s foreman, Mr. Smith, knew they would not work because he gave [Niederhofer] a cellular telephone to use;

6. It was foreseeable that a collision involving the RT truck would occur because of the winter conditions; and

7. If an incident involving the RT truck and the wintry conditions occurred, the workers occupying the RT truck would need to get out of the truck either to insure their safety or to comply with Defendant's rule that all incidents were to be reported 'immediately.'

There was sufficient evidence of causation because [Niederhofer] presented evidence that he was injured reacting to the collision of the RT truck with the line of railroad cars."

Neither the recitation of the factual basis for the majority's opinion nor the authorities cited by the majority negate the existence of these genuine issues of material fact which should more appropriately be decided by the trier of fact than by a circuit judge ruling on a dispositive pretrial motion, as in this instance. This litigation should proceed to jury trial or settlement.

¶ 26 Accordingly, I respectfully dissent from the majority's disposition in this case.