

NOTICE
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2013 IL App (4th) 121001-U
NO. 4-12-1001
IN THE APPELLATE COURT
OF ILLINOIS
FOURTH DISTRICT

FILED
July 29, 2013
Carla Bender
4th District Appellate
Court, IL

FREDERICK LEE REYNOLDS,)	Appeal from
Plaintiff-Appellant,)	Circuit Court of
v.)	McLean County
UNION PACIFIC RAILROAD COMPANY, a)	No. 10L208
Corporation.)	
Defendant-Appellee.)	Honorable
)	Paul G. Lawrence
)	Judge Presiding.

JUSTICE HOLDER WHITE delivered the judgment of the court.
Presiding Justice Steigmann and Justice Appleton concurred in the judgment.

ORDER

- ¶ 1 *Held:* The appellate court affirmed the trial court's judgment, concluding no genuine issue of material fact existed that plaintiff's injury was not foreseeable.
- ¶ 2 In November 2010, plaintiff, Frederick Lee Reynolds, filed a complaint under the Federal Employer's Liability Act (FELA) (45 U.S.C. § 51 (2006)) against defendant, Union Pacific Railroad Company (Union Pacific), plaintiff's employer. Plaintiff alleged he injured himself after stepping in a hole while working in defendant's Bloomington, Illinois, rail yard. Following an April 2012 hearing, the trial court granted defendant's motion for summary judgment pursuant to section 2-1005(c) of the Code of Civil Procedure (Civil Code) (735 ILCS 5/2-1005(c) (West 2010)), finding defendant did not have actual or constructive notice of the hole in which plaintiff stepped. Plaintiff filed a motion to reconsider, which the court denied in September 2012.

¶ 3 Plaintiff appeals, arguing the trial court erred by granting defendant's motion for summary judgment because a genuine issue of material fact exists as to whether his injury was foreseeable.

¶ 4 We affirm.

¶ 5 I. BACKGROUND

¶ 6 In January 2008, Bob Guy of the United Transportation Union Illinois Legislative Board sent a letter to Steven Rutledge, defendant's manager of train operations, in which Guy expressed concerns about walkway conditions and track problems in defendant's Bloomington rail yard. Guy told Rutledge that some walkway areas in the south end of the yard lacked "sufficient walking ballast." The lack of ballast made the areas hazardous after periods of precipitation because mud accumulated and because employees had to "routinely step in standing or frozen water to operate switches." With respect to the track conditions, Guy wrote that "an unusually high amount" of rails had recently broken and local maintenance-of-way employees were "overburdened and understaffed," lacking time to perform routine yard maintenance on top of their other duties. Guy requested he and Rutledge "jointly perform a very informal yard inspection" so Guy could point out the hazards that had been brought to Guy's attention.

¶ 7 In June 2008, before the requested inspection took place, a brakeman employed by defendant sustained a lower leg injury when he was "walking along the side of [a] tank car, pulled [a] pin," and felt a sharp pain in his leg. The following month, Guy and Rutledge jointly inspected the yard. Afterward, Guy sent Rutledge a letter outlining the "hazardous conditions" he and Rutledge identified, including the "need for ballast in and around" switches 12 and 13 to prevent employees from having to stand or step in excessive mud or frozen water.

¶ 8 On December 18, 2008, plaintiff reported to work at the Bloomington rail yard. Plaintiff's job that day was to direct the engineer to move a locomotive from one track to another. Because fresh ice and snow had accumulated on the ground, plaintiff wore galoshes and cleats issued to him by defendant.

¶ 9 That morning, plaintiff inspected a broken rail with Dave Schultz, the section foreman, near a switch used to access tracks 12 and 13. As plaintiff and Schultz finished conversing, plaintiff stepped with his left foot. Plaintiff's foot "went down" and he lost his balance, twisting his knee. Plaintiff recalled "stepping in a hole," although when he looked down before taking his step, all he could see was snow. After falling, he did not try to clear the snow to see the hole. Plaintiff did not know how long the alleged hole existed prior to his incident.

¶ 10 After twisting his knee, plaintiff tried to "walk it off" but eventually went to the hospital. Plaintiff later had three surgeries on his left knee. Before leaving the rail yard on the day of the accident, plaintiff asked the engineer, Ron Marusich, to take pictures of the spot where plaintiff fell before the conditions changed. Plaintiff testified Marusich's photographs did not show a hole, and plaintiff acknowledged he did not see the hole on the day of the incident or at any point after the incident.

¶ 11 According to Schultz, his duties as a section foreman included making sure the walkways around the switches were level, filling any holes in the walkways, and clearing snow and ice from the area around switches 12 and 13. Schultz testified defendant's general safety rules required employees to eliminate slips, trips, and falls by (1) performing work to avoid creating hazards, (2) maintaining good housekeeping, and (3) erecting barricades, signs, or cones when appropriate. The rules also instructed employees to use appropriate footwear, equipment,

and salt-sand mixtures to avoid slipping on slick surfaces during inclement weather. Schultz did not place ice melt or sand on the yard's walkway or accident location on the day of the incident. Employees were also supposed to take precautions to prevent injury to themselves, other employees, and the public.

¶ 12 Schultz testified that before 2008, three or more maintenance-of-way employees were regularly assigned to Bloomington; however, at some point, the company cut employees. Schultz could not recall how many other maintenance-of-way employees reported to work in Bloomington in December 2008. Schultz's department did not maintain a schedule for regular yard maintenance and repair in the Bloomington yard, nor did they have a manner of prioritizing needed maintenance tasks.

¶ 13 According to Schultz, standing water between rails could cause rails to break because standing water creates a "pumping action" and leaves "no support for the track." In addition, standing water "could possibly" cause defects, holes, or depressions to develop in the ground over time. Before December 2008, rails broke around tracks 12 and 13 once or twice a month. Schultz could not recall, prior to December 18, 2008, the last time maintenance-of-way employees performed work on the walkways, track, or ballast around the 12 and 13 switches. Schultz did not have records from 2008 showing work had been performed to repair the ground and walking conditions around those switches. On the day of plaintiff's accident, Guy authored a third letter to Rutledge, complaining that defendant failed to address his concerns about the ballast conditions near tracks 12 and 13.

¶ 14 In November 2010, plaintiff filed a complaint pursuant to FELA. 45 U.S.C. § 51 (2006). Specifically, plaintiff asserted on December 18, 2008, he was working as a conductor in

defendant's Bloomington rail yard when he stepped into a hole or defect in the ground and injured himself. (Plaintiff's complaint also alleged defendant violated section 18c-7401.1 of the Illinois Vehicle Code (625 ILCS 5/18c-7401.1 (West 2010)); however, plaintiff has not appealed the trial court's grant of summary judgment on that claim.)

¶ 15 In January 2012, defendant filed a motion for summary judgment pursuant to section 2-1005(c) of the Civil Code (735 ILCS 5/2-1005(c) (West 2010)), asserting plaintiff failed to produce evidence showing Union Pacific had actual or constructive notice of the hole in the yard. Following an April 2012 hearing, the trial court granted defendant's motion, finding "the hole alleged in Plaintiff's Complaint which allegedly caused his injury was not foreseeable and therefore the Defendant did not have actual or constructive notice of the hole." In May 2012, plaintiff filed a motion to reconsider, which the court denied in September 2012.

¶ 16 This appeal followed.

¶ 17 II. ANALYSIS

¶ 18 On appeal, plaintiff argues the trial court erred by granting defendant's motion for summary judgment because a genuine issue of material fact exists as to whether his injury was foreseeable.

¶ 19 Summary judgment is appropriate "if 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 2010). We review a grant of summary judgment *de novo*. *Millennium Park Joint Venture, LLC v. Houlihan*, 241 Ill. 2d 281, 309, 948 N.E.2d 1, 18 (2010).

¶ 20 The FELA 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 any of the officers, agents, or employees of such carrier." 45 U.S.C. § 51 (2006). To survive summary judgment, a FELA plaintiff must provide evidence creating a genuine issue of material fact on the common-law elements of negligence: duty, breach, foreseeability, and causation. *Green v. CSX Transportation, Inc.*, 414 F.3d 758, 766 (7th Cir. 2005)

¶ 21 A plaintiff's burden in a FELA action is said to be "significantly lighter than it would be in an ordinary negligence case." *Myers v. Illinois Central R.R. Co.*, 323 Ill. App. 3d 780, 784, 753 N.E.2d 560, 563 (2001). This relaxed burden, however, applies only to the causation element of a FELA claim. *Coffey v. Northeast Illinois Regional Commuter R.R. Corp. (Metra)*, 479 F.3d 472, 476 (7th Cir. 2007). As the Supreme Court recently explained, the trier of fact must initially determine whether a railroad carrier failed to observe the degree of care that a reasonably prudent person would have observed under the same or similar circumstances. *CSX Transportation, Inc. v. McBride*, ___ U.S. ___, ___, 131 S. Ct. 2630, 2643 (2011). If the carrier "has no reasonable ground to anticipate that a particular condition ... would or might result in a mishap and injury," the carrier "is not required to do anything to correct [the] condition." *CSX Transportation*, ___ U.S. at ___, 131 S. Ct. at 2643 (quoting *Gallick v. Baltimore & Ohio R.R. Co.*, 372 U.S. 108, 118 n. 7 (1963)). Indeed, "[r]easonable foreseeability of harm" is an "essential ingredient" of a FELA negligence claim. *CSX Transportation*, ___ U.S. at ___, 131 S. Ct. at 2643 (quoting *Gallick*, 372 U.S. at 117). If a plaintiff proves negligence, then the plaintiff may recover damages upon a showing that the railroad's negligence "played any part, even the slightest, in producing the injury," regardless of the extent of the injury or manner in

which it occurred. (Emphasis omitted.) *CSX Transportation*, ___ U.S. at ___, 131 S. Ct. at 2643 (quoting *Rogers v. Missouri Pacific R.R. Co.*, 352 U.S. 500, 506 (1957)).

¶ 22 Here, the trial court found the hole into which plaintiff allegedly stepped was not foreseeable and therefore defendant did not have actual or constructive notice of the hole. Plaintiff contends the trial court construed the issue of foreseeability too narrowly by limiting the question to whether defendant possessed notice of the specific hole in which plaintiff allegedly stepped. According to plaintiff, pursuant to *Gallick*, 372 U.S. at 120, foreseeability is established where a defendant knows of a condition giving rise to the potential for harm. Plaintiff argues the "conditions" of which defendant was aware and which made his injury foreseeable were the yard's standing water, inadequate drainage, and overall poor condition.

¶ 23 Plaintiff accurately sets out the required showing. However, plaintiff has failed to make this showing. We acknowledge that in both Guy's January 2008 and July 2008 letters to Rutledge, Guy expressed concern over certain "hazardous conditions"—namely, the need for ballast in and around switches to prevent employees from having to walk through excessive mud and standing frozen water. Guy also informed defendant "an unusually high amount" of rails had recently broken and maintenance employees were overburdened and understaffed. Thus, Guy's letters establish defendant was aware of standing water in the yard and the need for additional ballast. In addition, as plaintiff points out, Schultz testified standing water "could possibly" cause defects, holes, or depressions to develop in the ground over time.

¶ 24 The impediment to plaintiff's claim is he cannot show the existence of the complained-of defect in the rail yard. Plaintiff testified although he felt the "sensation" of stepping into a hole, he did not see the hole before stepping in it, nor did he see the hole at any

point after the accident. Indeed, Marusich's photographs, taken shortly after the incident, did not show a hole. The fact no one saw the hole either before, during, or after the accident leads us to conclude it was not foreseeable the conditions of the of the rail yard might result in the formation of a hole.

¶ 25 Plaintiff also points out defendant possessed actual knowledge that another one of its employees was injured while walking in the same general area. However, the record does not indicate the employee's injury was caused by a hole or defect; rather, the record reflects the employee was injured when he "pulled [a] pin" and felt a sharp pain in his leg.

¶ 26 Likewise, plaintiff's citations to *Geraty v. Northeast Illinois Regional*, 2009 WL 691280 (N.D. Ill. Mar. 16, 2009), and *Scott v. BNSF Ry. Co.*, 2012 WL 1378666 (N.D. Ill. Apr. 20, 2012), are unpersuasive. In *Geraty*, an employee tripped over plastic sheeting that the employer had hung from a ceiling and that subsequently fell onto the floor. *Geraty*, 2009 WL 691280, at *2. The district court denied the employer's motion for summary judgment on the employee's FELA claim, reasoning "the draped plastic, funneled into a garbage can, and left in plain view for roughly one week, was no hidden defect; that is, a trier of fact could reasonably conclude that [the railroad carrier] had notice of the dangerous condition that caused Plaintiff's injury." *Id.* at *8. By contrast, here, plaintiff testified the hole, which allegedly developed as a result of the conditions in the rail yard, was not seen before or after his injury; accordingly, *Geraty* is inapposite. For this reason, *Syverson v. Consolidated R. Corp.*, 19 F.3d 824, 825 (2d Cir. 1994), in which an employee was attacked by another person in a part of a rail yard that was "a known encampment for tramps, alcoholics, drug addicts and suspicious persons" is also distinguishable.

¶ 27 In *Scott*, an employee asserted a FELA claim after injuring his shoulder when the plate of a derail he was closing popped up and three spikes came out of the tie. *Scott*, 2012 WL 1378666, at *2. The employee claimed the spikes' holes had become enlarged, and although he admitted the enlarged spike holes were not visible, he testified track inspectors could have checked to see if the derail was properly attached to the ties using a "track bar." *Id.* at *3. The district court denied the employer's motion for summary judgment, finding that although the employee acknowledged the derail did not look unusual, the employee also testified he believed (1) the holes for the spikes "had wore out" and had become too large and (2) the derail had not been regularly inspected as required. *Id.* at *5. Therefore, the court concluded the evidence suggested the railroad carrier "had at least constructive notice of a defective condition in the ties." *Id.* at *6.

¶ 28 Thus, in *Scott*, a factual dispute existed as to whether the employee's injury stemmed from a condition that the employer could have discovered upon inspection. Here, plaintiff has presented no evidence suggesting that an earlier inspection of the yard would have revealed the hole, which nobody saw before, during, or after plaintiff's incident.

¶ 29 Based on the foregoing, we conclude the trial court properly granted summary judgment on plaintiff's FELA claim, as plaintiff failed to establish a genuine issue of material fact that his injury was foreseeable.

¶ 30 III. CONCLUSION

¶ 31 For the reasons stated, we affirm the trial court's judgment.

¶ 32 Affirmed.