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2016 IL App (3d) 150028-U

Order filed March 15, 2016

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IN THE  
APPELLATE COURT OF ILLINOIS  
THIRD DISTRICT

A.D., 2016

MICHAEL CLaar, Independent	)	Appeal from the Circuit Court
Administrator of the Estate of Dorothy Price,	)	of the 14th Judicial Circuit,
	)	Rock Island County, Illinois.
Plaintiff-Appellant,	)	
	)	
v.	)	Appeal No. 3-15-0028
	)	Circuit No. 07-L-66
BNSF RAILWAY COMPANY, KERRY D.	)	
COX, and KEITH P. RYAN,	)	
	)	Honorable Jeffrey W. O'Connor,
Defendants-Appellees.	)	Judge, Presiding.

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JUSTICE SCHMIDT delivered the judgment of the court.  
Presiding Justice O'Brien and Justice Holdridge concurred in the judgment.

**ORDER**

¶ 1 *Held:* The jury verdict was not against the manifest weight of the evidence. BNSF presented sufficient evidence to show that Price was more than 50% negligent for the train collision that resulted in her death.

¶ 2 Plaintiff, Michael Claar, filed this wrongful death action against defendant, Burlington Northern Sante Fe Railway Company (BNSF), following a November 27, 2005, railroad crossing collision that resulted in the death of his mother, Dorothy Price. Following a trial, the jury returned a general verdict in favor of BNSF. Plaintiff appeals, arguing the trial court improperly

admitted a videotape depicting conditions that were not substantially similar to the conditions surrounding the accident. We affirm.

¶ 3

## BACKGROUND

¶ 4

On November 27, 2005, at approximately 9 p.m., a westbound BNSF train travelling along a route from Galesburg, Illinois to La Crosse, Wisconsin collided with Price's 1999 Toyota Camry at a railroad crossing near the entrance to the Tyson Foods (Tyson) plant in Joslin, Illinois. Price died as a result of her injuries. Price's son, Claar, filed a wrongful death action against BNSF and its employees, Kerry Cox and Keith Ryan. Plaintiff voluntarily dismissed Cox and Ryan before trial.

¶ 5

### I. Joint Stipulation of Uncontested Facts

¶ 6

The parties stipulated to the following uncontested facts: (1) Price had no family or friends who lived in the area of the accident or who worked at the Tyson plant; (2) the crossing was wide enough for two tractor-trailers traveling opposite directions to use simultaneously; (3) there had been no significant changes in the crossing, the roadway, or the tracks between the time of the accident and trial; (4) the headlamps and horn on the lead locomotive of the train were functioning and used appropriately prior to the accident; and (4) the train involved in the accident was a freight train consisting of 2 locomotives and 46 cars.

¶ 7

In addition, the stipulated stopping distance of the train was 2,089 to 2,166 feet. It was undisputed that Cox and Ryan (the crew) could have stopped the train in time to avoid the collision if they had applied the brakes at the bend in the tracks (7,366 feet), three-quarters of a mile from the crossing (3,960 feet), or one-half of a mile from the crossing (2,640 feet).

¶ 8

### II. Lyle Robinson's Testimony

¶ 9 Lyle Robinson, a truck driver for Anderson Trucking, testified he arrived at the Tyson plant to make a delivery at approximately 8:35 p.m. on the night of the accident. As he was leaving the plant, at approximately 8:55 p.m. (approximately 2½ minutes before the collision), Robinson observed Price’s vehicle sitting on the railroad tracks on the southwest side of the crossing. Price’s vehicle was off the paved crossing area and was oriented generally perpendicular to the railroad tracks. Robinson observed Price standing outside of her vehicle clutching her purse with an “eerie” expression on her face. Robinson testified there were no lights activated on the vehicle; the vehicle appeared undamaged. He observed nothing that would make opening or closing the driver-side door impossible. Robinson used his CB radio to notify the Tyson security officer, Frankie Perry, that there was a vehicle on the tracks and that it was an emergency situation. Robinson did not see the train approaching as he left the Tyson plant and did not see the collision.

¶ 10 III. Frankie Perry’s Testimony

¶ 11 Perry, the security officer at the Tyson plant, testified that when she arrived at the crossing, Price was sitting in her vehicle with the doors locked. The right front tire of Price’s vehicle had dropped off the crossing. The driver-side window was rolled down about half of an inch, and the sunroof was open. Perry tried to stick her hand through the window to unlock the door, but she was unsuccessful. Perry told Price to put her vehicle in reverse so she could try to push it off the tracks. Price did not put the vehicle in reverse, nor did she acknowledge Perry. Rather, Price sat in her vehicle with her hands on the steering wheel, staring straight ahead. When Perry repeatedly pleaded with Price to get out of the vehicle because the train was coming, Price calmly stated, “I don’t think I can.” Perry could not recall whether the vehicle was running

or whether the vehicle's lights were on. Perry ran away from the tracks at the last second to avoid being struck by the train.

¶ 12 IV. Kerry Cox's Testimony

¶ 13 Cox, the locomotive engineer involved in the accident, testified he had been an engineer with BNSF for 28 years. The Galesburg, Illinois to La Crosse, Wisconsin route was his normal run, and the route was a "straight shot for over a mile" once the train came around the bend. Cox did not see anything on the crossing at the bend, three-fourths of a mile away, or one-half of a mile away. Cox did not see Price's vehicle until he was near the whistle post, which was approximately 1,300 feet from the crossing. Cox explained that proper protocol is to activate the emergency braking system when injury or property damage is imminent. Cox activated the emergency braking system just past the whistle post.

¶ 14 Cox testified he paid extra attention to the Tyson crossing on his runs following the accident. He explained that the ability to see the area after dark is considerably diminished; at three-quarters of a mile away, he could not see the crossing at all; at one-half of a mile away, he could sort of make out the crossing; and at one-quarter of a mile away, he could see the crossing pretty well.

¶ 15 V. Keith Ryan's Testimony

¶ 16 Ryan, the train's conductor, testified he did not see Price's vehicle from the bend, nor did he see it from three-fourths of a mile away. He acknowledged that the route was a "straight stretch" from the bend to the crossing and that there was nothing obstructing his view between those points. Ryan agreed with Cox that the proper protocol was to activate the emergency braking system when personal injury or property damage is imminent, and that they had done so just past the whistle post.

¶ 17

#### VI. Sergeant Darren Hart's Testimony

¶ 18

Sergeant Darren Hart, with the Rock Island County sheriff's department, investigated the accident. During the course of his investigation, Hart spoke with both Cox and Ryan. In his written report, Hart noted that Cox told him he first noticed there might be something on the railroad tracks one-half of a mile to three-quarters of a mile from the Tyson crossing. Hart also noted that Ryan told him, at approximately three-quarters of a mile from the Tyson crossing, he observed what appeared to be a vehicle parked across the railroad tracks. Hart's report indicated that Ryan made a comment to Cox asking, "Is that a car on the track?" to which Cox replied, "I don't know. Sure looks like it is." Hart also testified that Ryan told him "he could see what appeared to be a vehicle's hazard lights."

¶ 19

On cross-examination, both Cox and Ryan acknowledged speaking with Hart, but denied telling him any approximate distances.

¶ 20

#### VII. James Loumiet's Testimony

¶ 21

James Loumiet, a train accident reconstructionist, testified that based upon the event recorder taken from the train, the crew had ample time to stop the train from either the bend, three-quarters of a mile from the crossing, or one-half of a mile from the crossing. Loumiet's testimony regarding the stopping distance was not in dispute—both parties agreed that the collision would not have occurred had the crew applied the brakes at any of these locations.

¶ 22

#### VIII. James White's Testimony

¶ 23

James White, a retired locomotive engineer, agreed with Loumiet's testimony regarding the stopping distances. He also opined that the train crew violated Rule 1.47 of the General Code of Operating Rules, which provides that conductors and engineers must take precautions to

provide protection if conditions are not covered by the rules. In his opinion, the crew waited too long to apply the brakes.

¶ 24 IX. Defendant’s Exhibit 33: “Train Night Video”

¶ 25 Counsel for BNSF sought to introduce an “exemplar video” during its expert, Brian Heikkila’s, testimony. The video, marked “Defendant’s Exhibit 33 Train Night Video,” was captured in January 2014 and depicts the view from a BNSF locomotive as it approaches the Tyson crossing. Prior to Heikkila’s testimony, the trial judge viewed the video outside the presence of the jury. BNSF’s counsel stated the video would serve two purposes; it would show the “visibility of the approach to the crossing,” and it would show what Heikkila saw on his ride, including the track, the curvature, and other landmarks. The trial judge allowed the video to be played during Heikkila’s testimony, stating, “I think for the first time in all of the evidence that’s been produced in this case, you get a sense of the bend and—and what it is at nighttime out there. Is it an exact portrayal? No. But it is—it’s very—it’s close, and it does show not only the visual, but it shows the time lapse and where you are at certain times at these different posts.”

¶ 26 X. Brian Heikkila’s Testimony

¶ 27 Heikkila, a railroad accident investigator and consultant for BNSF, testified he investigated the accident site in August 2012. During his investigation, Heikkila made several measurements along the relevant portion of the rail line. Later that evening, he rode a BNSF locomotive through the crossing. Heikkila noted the similarities and differences between his ride and the crew’s ride during his testimony. Specifically, his train reached the crossing at 9:02 p.m. rather than 8:57 p.m., his train was travelling at 48 miles per hour rather than 52 miles per hour, and no vehicle was positioned on the crossing during his ride. Defendant’s exhibit No. 33 was played for the jury over plaintiff’s objection. Heikkila testified that he had seen the video and

that it was “a good depiction” of the layout. Heikkila stated playing the video would help the jury understand what he saw on his ride, including the track, the curvature, and other landmarks.

¶ 28 Counsel for BNSF emphasized that the video was “not a replica,” but that the video was taken at night, and “would give the jury some idea of what one sees when he’s on a locomotive in that area.” During his testimony, Heikkila pointed out the relevant landmarks and stopping points as they appeared on the video. He testified that had there been a car on the crossing during his ride, he could not have seen it from three-fourths of a mile away. He explained that the crossing was not even visible from three-fourths of a mile away, and that even from one-half of a mile away, the crossing was still “very obscure.”

¶ 29 On cross-examination and during his closing argument, plaintiff’s counsel reiterated and emphasized the various differences between the crew’s ride at the time of the accident, Heikkila’s ride, and the ride portrayed on BNSF’s exemplar video.

¶ 30 XI. Jury Instructions and Verdict

¶ 31 The trial court submitted the case to the jury on the following theories. Plaintiff alleged BNSF was negligent in one or more of the following respects: (1) BNSF’s crew failed to slow the train in time to avoid a collision with Price’s vehicle; or (2) BNSF’s crew failed to stop in time to avoid a collision with Price’s vehicle. In response, BNSF denied it was negligent and alleged Price was contributorily negligent in one or more of the following respects: (1) Price drove her vehicle in such a manner that it went off of the traveled portion of the private road onto BNSF’s railroad bed; (2) after being outside of her vehicle, which was stuck on the railroad track bed, Price reentered the vehicle placing herself in danger; or (3) Price refused to get out of her vehicle when requested to do so by a Tyson security officer, when she knew or should have known a train was approaching.

¶ 32 In addition to instructions on negligence and causation, the trial court provided the jury with plaintiff's jury instruction No. 21, which stated, in relevant part, "If you find for Defendant BNSF Railway Company and against Plaintiff Michael Claar, or if you find that Dorothy Price's contributory negligence was more than 50% of the total proximate cause of the injury or damage for which recovery is sought, then you should use Verdict Form C."

¶ 33 On July 11, 2014, the jury returned a general verdict in favor of BNSF using verdict form C. Plaintiff did not request any special interrogatories, nor were any submitted. Plaintiff filed a motion for judgment notwithstanding the verdict and/or a motion for new trial, which the trial court denied. Plaintiff appeals.

¶ 34 ANALYSIS

¶ 35 BNSF presented two theories of the case at trial. Essentially, those theories were either (1) BNSF's crew was not negligent; or (2) even if the crew was negligent, Price was *more* negligent. On appeal, plaintiff argues only that the admission of BNSF's exemplar video, showing various landmarks along the train's route to the Tyson crossing, was improper.

¶ 36 It is well established that "[w]hen there is a general verdict and more than one theory is presented, the verdict will be upheld if there was sufficient evidence to sustain either theory, and the [moving party], having failed to request special interrogatories, cannot complain." *Witherell v. Weimer*, 118 Ill. 2d 321, 329 (1987). Under these circumstances, a general verdict creates a presumption that the jury found in favor of the winning party on every theory or defense presented. *Lazenby v. Mark's Construction, Inc.*, 236 Ill. 2d 83, 102 (2010); see also *Strino v. Premier Healthcare Associates, P.C.*, 365 Ill. App. 3d 895, 904 (2006) (where a defendant raises two or more defenses, a general verdict creates a presumption that the jury found in favor of the defendant on every defense).



¶ 37 Here, the trial court instructed the jury to fill out verdict form C if it found *either*: (1) for BNSF and against plaintiff; *or* (2) that Price’s contributory negligence was more than 50% of the total proximate cause of the injury or damage for which recovery is sought. The jury in this case returned a general verdict on verdict form C for BNSF and against plaintiff. This general verdict created a presumption that the jury found in favor of BNSF on both theories.

¶ 38 In only briefing issues surrounding the BNSF exemplar video on appeal, plaintiff has effectively conceded that the evidence was sufficient to support the jury’s verdict with regard to Price’s comparative fault. However, even if he had provided any argument to the contrary, we find there was clearly sufficient evidence to sustain the verdict on the theory of Price’s contributory negligence.

¶ 39 BNSF presented the jury with evidence that 2½ minutes before the collision, Price was standing outside of her vehicle clutching her purse with an eerie expression on her face. For whatever reason, Price decided to get back into her vehicle and lock the doors. When Perry arrived on the scene and attempted to help Price to safety, Price refused to unlock her doors or put her vehicle in gear. When Perry pleaded with Price to exit her vehicle, Price sat in her car with both hands on the steering wheel, stared straight ahead, and calmly stated, “I don’t think I can.” This evidence was more than sufficient for the jury to have concluded Price was more than 50% negligent, thereby barring any recovery.

¶ 40 Even if we assume, for the sake of argument, that the jury would have found BNSF negligent had the exemplar video not been played, plaintiff’s counsel conceded at oral argument that: (1) the exemplar video would not have influenced the jury’s findings regarding Price’s ability to walk away from the tracks before the train arrived; and (2) it is at least as easy to see a railroad locomotive as it is to see a car. Nothing about BNSF’s negligence changes the fact that

Price would not have been injured in the accident had she not gotten back into her vehicle and locked the doors. If the BNSF crew could see the car, then, undoubtedly, Price could see the train.

¶ 41 Accordingly, the jury's verdict was not against the manifest weight of the evidence, and any alleged error in the playing of the exemplar video, which went only to the issue of BNSF's negligence, was harmless.

¶ 42 CONCLUSION

¶ 43 For the foregoing reasons, we affirm the judgment of the circuit court of Rock Island County.

¶ 44 Affirmed.