2018 IL App (3d) 170553-U

Order filed July 30, 2018

IN THE

APPELLATE COURT OF ILLINOIS

THIRD DISTRICT

2018

TERESA KREPS, Special Representative of the Estate of MARTIN E. ARENZ, Deceased,	)	Appeal from the Circuit Court of the 9th Judicial Circuit, McDonough County, Illinois,
Plaintiff-Appellant,	)	Appeal No. 3-17-0553
v.	)	Circuit No. 16-L-3
BNSF RAILWAY COMPANY, a Delaware corporation,	)	Honorable Heidi A. Benson,
Defendant-Appellee.	)	Judge, Presiding.

JUSTICE WRIGHT delivered the judgment of the court.
Presiding Justice Carter and Justice Lytton concurred in the judgment.

ORDER

¶ 1 *Held*: The trial court did not err by granting summary judgment in favor of defendant because no genuine issue as to any material fact existed.

¶ 2 Martin E. Arenz (plaintiff)[1] filed a personal injury action against BNSF Railway Company (defendant) pursuant to the Federal Employers' Liability Act (FELA). 45 U.S.C.A.,

[1]Plaintiff passed away on October 6, 2016, during the pendency of this case due to a cause unrelated to the incident that is the subject of this lawsuit. Teresa Kreps was subsequently appointed as the special representative of plaintiff's estate.

§§ 51-60 (1939). Following routine discovery, defendant filed a motion for summary judgment which plaintiff opposed. The trial court issued a written order granting defendant's motion for summary judgment following a hearing. Plaintiff appeals the trial court's ruling.

¶ 3 FACTS

¶ 4 On March 21, 2014, plaintiff filed a two-count complaint against defendant, plaintiff's employer, in Morgan County case No. 14-L-7 pursuant to the FELA. 45 U.S.C.A., §§ 51-60. On August 18, 2014, plaintiff filed an amended complaint. Plaintiff's amended complaint generally alleged that due to defendant's negligent acts, plaintiff sustained severe and permanent injuries to his foot, shoulder, and body while attempting to get out of a railroad truck during work. Specifically, count I of plaintiff's amended complaint, the only count relevant to this appeal, alleged defendant was negligent because defendant failed to provide plaintiff with a safe place to work by having large rocks or debris in the yard or compound which prevented plaintiff from having a secure footing while exiting the truck, *inter alia*. On November 6, 2015, plaintiff voluntarily dismissed count II of his amended complaint. On February 8, 2016, plaintiff's amended complaint was transferred to McDonough County on *forum non conveniens* grounds.

¶ 5 It is undisputed that plaintiff sustained injuries to his ankle on January 31, 2013, while on his employer's premises during his customary work hours. Plaintiff discussed the incident with his supervisor, Tim Dearwester, on this date. Dearwester summarized his conversation with plaintiff in a written "Supervisor's Report of BNSF Employee Injury/Illness." Dearwester's report indicated that:

> "[PLAINTIFF] STATED HE STEPPED DOWN OFF A TRUCK AND EXPERIENCED RIGHT FOOT PAIN. [PLAINTIFF] SAYS HE DIDN'T STEP ON ANYTHING OR TWIST HIS ANKLE, ONLY HE HAD A SHARP PAIN WHICH

CAUSED HIS FOOT TO GIVE WAY, CATCHING HIMSELF WITH HIS LEFT ARM ON HANDRAIL."

¶ 6 On February 1, 2013, one day after the incident, plaintiff completed an "Employee Personal Injury/Occupational Illness Report" (personal injury report). According to the personal injury report, plaintiff's injury occurred while:

> "Getting out of Drives [*Sic*] Side door, three point contact, Right foot made contact with ground, Resulting in sharp pain foot gave out and left Arm was Supporting my body weight."

On that same date, plaintiff also completed a written statement which was requested by Dearwester. The written statement provides that plaintiff:

> "was getting out of Truck Drivers Side 3 pt. contact Right Foot made contact [and] then felt Sharp pain that Resulted in foot giving out Resulting in Left Arm supporting my body weight So Not As to fall. Resulting in Pain in Left Shoulder. This Happened on Jan 31 14:40 in compound Bushnell. After incident (illegible) was Able to walk good. Friday morning 2-1 pain Returned [and] has been with me all day. Contacted Rdm. Dearwester on 1-31 at 15:15."

¶ 7 Justin Wayne Lipes and Kecia Pugh worked with plaintiff and were at the scene with plaintiff when plaintiff exited the truck on January 31, 2013. The relevant portions of Lipes's affidavit stated:

> "5. As [plaintiff] exited the truck, he retained three-point contact by holding the inside door handle with his left hand, the truck's handrail with his right hand, and keeping his left foot on the truck step as he stepped to the ground with his right foot.

6. After his right foot stepped to the ground, [plaintiff] indicated that he had done something to his right foot.

7. After stepping down from the truck, [plaintiff] walked around outside the truck and told me that he did not know what he did to his right foot.

8. At the time of the incident, [plaintiff] told me that he did not step on a rock and stepped down on a flat surface.

9. [Plaintiff] never indicated that he had any injury to his shoulder at the time of the incident or when I worked with him the next day, on February 1, 2013.

10. There were no defects or problems with the truck, the handrail, footing, or steps when [plaintiff] stepped down from the truck on January 31, 2013.

11. When [plaintiff] stepped down from the truck on January 31, 2013, there were no rocks, boulders, or stones approximately the size of a baseball or softball present in the parking lot at the BNSF Bushnell facility."

¶ 8 The relevant portions of Pugh's affidavit stated:

"5. As [plaintiff] exited the truck, I was gathering my personal protective equipment when I heard him indicate that he had hurt his foot.

6. [Plaintiff] reported to work on Friday, February 1, 2013, and indicated that his foot was still hurting, but he worked the full day. He also indicated that his shoulder was bothering him, but mostly his foot.

7. After [plaintiff] stepped down from the truck on January 31, 2013, I walked around to look at the driver's side of the truck and the ground surface where [plaintiff] stepped down.

8. There was nothing wrong with the truck, the handrail, the footing, or the steps when I looked at it immediately after [plaintiff] stepped down from the truck on January 31, 2013.

9. The ground surface did not have any large rocks or pieces of ballast. I noticed only a few loose rocks that were like gravel and some chip rock."

¶ 9 Plaintiff's foreman, Gary Calvin Greenlief Jr. also provided an affidavit. The relevant portions of Greenlief's affidavit stated:

"6. On January 31, 2013, the parking lot at the BNSF Bushnell facility was primarily composed of CA6 stone.

7. Occasionally, intermittent pieces of track ballast would be tracked into the parking lot from employees or BNSF Maintenance of Way vehicles during the ordinary course of operations.

8. All BNSF employees are free to remove any track ballast that is found in the Bushnell facility parking lot.

9. At no time, to my knowledge, were there any rocks, boulders, or stones approximately the size of a baseball or softball present in the parking lot at the BNSF Bushnell facility."

¶ 10 Plaintiff's treating physical therapist, Scott Higgins, recounted plaintiff's description of how plaintiff sustained the injuries in question. According to Higgins, plaintiff told him that plaintiff "Stepped down off a truck" and "My foot just gave out on me." Higgins did not recall plaintiff mentioning that he stepped on anything.

¶ 11 Another physical therapist who treated plaintiff's injuries, Karen Walter, indicated that plaintiff told her that plaintiff "stepped out of a vehicle and his foot collapsed, gave way." Walter did not recall plaintiff saying that he stepped on anything.

¶ 12 Dr. John Fleishli, plaintiff's podiatrist, summarized his medical notes. According to those notes, plaintiff did not mention stepping on something like a rock.

¶ 13 Dr. Osaretin Idusuyi, plaintiff's orthopedic surgeon, indicated plaintiff told him "that on January 31st of 2013 [plaintiff] stepped off a truck and his right ankle gave out. Then he twisted his right foot at that time." According to Dr. Idusuyi's notes, plaintiff did not mention stepping on anything when he exited the truck.

¶ 14 Dr. Idol Mitchell, another one of plaintiff's treating physicians, stated that plaintiff told him that "[plaintiff] didn't feel like he had stepped on something, although he states later somebody had photographed the area and there were some large rocks. He doesn't feel like that was the issue. He felt like his foot simply gave out on him as he was getting out of the truck."

¶ 15 With regard to plaintiff's purported shoulder injury, Dr. Michael Gernant treated plaintiff for shoulder pain. Dr. Gernant was unable to give any opinion regarding the specific cause of plaintiff's shoulder problems. Dr. Michael Hendricks, who performed an independent medical examination of plaintiff's shoulders, also opined that he could not pinpoint the cause of plaintiff's shoulder injuries.

¶ 16 On September 18, 2015, plaintiff described what happened on January 31, 2013. When asked to describe the incident in his own words, plaintiff stated:

> "Well, when I got out of the boom truck I had my -- my 3-point contact and I stepped down on the steps as you can see in Exhibit 1 and I put my foot down, my right

foot down on the ground, and I stepped on a rock and it rolled my foot and it tore my tendon."

¶ 17 Plaintiff stated that he "stepped on a big rock," and "when [plaintiff] stepped on that big rock, [plaintiff] didn't step on it I guess square" and rolled his foot. Plaintiff testified that there were "big rocks" all throughout the compound before January 31, 2013. Plaintiff described the size of these "big rocks" as somewhere between a baseball and a softball, and speculated that this was "most likely" the size of the rock that he stepped down on. The following exchange took place regarding the rock:

Q: Did you see the big rock?

A: No, sir.

* * *

Q: Okay. But did you see it after you stepped down on it?

A: No.

Q: Did you ever see it?

A: No.

Q: How do you know you stepped on it?

A: Well, I -- it -- I had to have stepped on it because my foot didn't come down flat.

¶ 18 On September 15, 2016, defendant filed a motion for summary judgment and argued that there was no evidence to support plaintiff's claims that defendant was negligent. Importantly, defendant argued that there was no admissible evidence establishing that plaintiff stepped on a large rock.

¶ 19 Plaintiff's response to defendant's motion for summary judgment asserted that a relaxed standard of proof existed for cases involving allegations of negligence under the FELA. Based

on this relaxed standard, plaintiff argued summary judgment in favor of defendant was inappropriate because a genuine issue of material fact existed as to the presence of a rock in the "yard or compound" where the injury occurred. Plaintiff attached a transcript of his deposition testimony and several pictures of the "yard or compound" to plaintiff's response to defendant's motion for summary judgment.

¶ 20 On July 28, 2017, the trial court issued a written order granting defendant's motion for summary judgment. The court stated: "No one, not even [plaintiff], saw the rock, ever." The trial court reasoned that plaintiff was not an expert who could offer an opinion of the cause of his injury where his testimony clearly established plaintiff did not see a rock at the time of his injury. The court observed that plaintiff's testimony regarding the source of his injury had to have been a rock was "highly speculative" and was based solely on plaintiff's "guesses" about what happened. On August 25, 2017, defendant filed a timely notice of appeal.

¶ 21 ANALYSIS

¶ 22 On appeal, plaintiff argues the trial court erroneously granted defendant's motion for summary judgment because a genuine issue of material fact existed regarding whether defendant breached its duties under the FELA. This court reviews the trial court's decision granting a motion for summary judgment *de novo*. *Davis v. Burlington Northern Santa Fe Ry. Co*., 2016 IL App (3d) 150464, ¶ 15.

¶ 23 The FELA is the sole means by which a railroad employee may recover for injuries against their employer. *Wardwell v. Union Pacific R.R. Co*., 2017 IL 120438, ¶ 12. In relevant part, the FELA provides:

> "Every common carrier by railroad while engaging in commerce *** shall be liable in damages to any person suffering injury while he is employed by such carrier in

> such commerce *** 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, 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.A. § 51 (1939).

Thus, in order for a plaintiff to recover damages under the FELA, the plaintiff must show that the railroad was engaged in interstate commerce, that the plaintiff was an employee in interstate commerce acting in the scope of his employment, that the plaintiff's employer was negligent, and that the plaintiff's injury resulted "in whole or in part" from his employer's negligence. *Wardwell*, 2017 IL 120438, ¶ 12.

¶ 24 Generally, a FELA action brought in state court is governed by state procedural law and federal substantive law. *Schultz v. Northeast Illinois Regional Commuter R.R. Corp.*, 201 Ill. 2d 260, 274 (2002). Section 2-1005 of the Illinois Code of Civil Procedure provides that summary judgment shall be rendered "if the pleadings, depositions, and admission 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 2016).

¶ 25 An employee's burden of proof is relaxed under the FELA. *Ulfik v. Metro-North Commuter R.R.*, 77 F.3d 54, 58 (2d Cir. 1996). This relaxed burden has been interpreted to mean that a plaintiff must merely present "evidence scarcely more substantial than pigeon bone broth" to warrant a submission of the case to a jury. *Harbin v. Burlington Northern R.R. Co.*, 921 F.2d 129, 132 (7th Cir. 1990). "A railroad will thus be held liable if the employer's negligence played any part, even the slightest, in producing the injury." *Green v. CSX Transportation, Inc.*, 414 F.3d 758, 766 (7th Cir. 2005). However, even though plaintiff's burden is relaxed, plaintiff

"must still present some evidence of negligence in order to survive a motion for summary judgment." *Id.* "[T]he plaintiff must offer evidence creating a genuine issue of fact on the common law elements of negligence, including duty, breach, foreseeability, and causation." *Id.*

¶ 26 As the trial court observed, speculation and conjecture on behalf of the plaintiff is insufficient to defeat summary judgment. *Holbrook v. Norfolk Southern Ry. Co.*, 414 F.3d 739, 745 (7th Cir. 2005). If a plaintiff fails to present any evidence at all to support an inference of negligence then summary judgment is proper. *Lisek v. Norfolk & Western Ry. Co.*, 30 F.3d 823, 832 (7th Cir. 1994).

¶ 27 Here, it is undisputed that defendant has a duty to exercise reasonable care in providing plaintiff with a reasonable, safe place to work. *Atchison, Topeka & Santa Fe Ry. Co. v. Buell*, 480 U.S. 557, 558 (1987). Yet, plaintiff's account of the events that led to his injury varied. Plaintiff's first written account of the incident, prepared one day after his injury, admitted plaintiff:

> "was getting out of Truck Drivers Side 3 pt. contact Right Foot made contact [and] then felt Sharp pain that Resulted in foot giving out Resulting in Left Arm supporting my body weight So Not As to fall. Resulting in Pain in Left Shoulder. This Happened on Jan 31 14:40 in compound Bushnell. After incident (illegible) was Able to walk good. Friday morning 2-1 pain Returned [and] has been with me all day. Contacted Rdm. Dearwester on 1-31 at 15:15."

¶ 28 On September 18, 2015, the following exchange took place during plaintiff's deposition:

> Q: Did you see the big rock?
>
> A: No, sir.

* * *

Q: Okay. But did you see it after you stepped down on it?

A: No.

Q: Did you ever see it?

A: No.

Q: How do you know you stepped on it?

A: Well, I -- it -- I had to have stepped on it because my foot didn't come down flat.

¶ 29 In 2013, plaintiff did not mention a rock when telling coworkers about his injury just moments after the injury occurred. Similarly, plaintiff's coworker's did not see a large rock at the precise point where plaintiff injured his ankle. Furthermore, according to plaintiff's surgeon, treating physicians, and physical therapists, plaintiff did not mention a rock as a contributing cause of his injury that required treatment.

¶ 30 We recognize that during his 2015 deposition, plaintiff stated that "I put my foot down, my right foot down on the ground, and I stepped on a rock and it rolled my foot and it tore my tendon." However, plaintiff's conclusion that he must have stepped on a rock is simply a new theory based on the same undisputed facts, namely that neither plaintiff nor his coworkers saw a rock or saw plaintiff step on a rock when he sustained the injury in 2013.

¶ 31 The court received photographs showing rocks in the area where the incident took place. Regardless of the potential inadmissibility of such photographs at trial, plaintiff did not offer any eyewitness account, including his own, that one of those rocks depicted in the photo was underneath plaintiff's foot at the time of his injury.

¶ 32 Although we review the trial court's judgment, and not the reasons cited by the court, we agree with the trial court that this case is factually similar to the Seventh Circuit case in

Holbrook. *Holbrook*, 414 F.3d 739. In *Holbrook*, the plaintiff slipped on a ladder and suffered an injury to his knee. *Id*. at 741. While on the ground, the plaintiff noticed an oily substance on the rung of the ladder but did not know "whether the substance was on the ladder" before the plaintiff stepped onto the ladder or whether the plaintiff had an oily substance on his boot before the plaintiff first stepped up on the ladder. Either way, the plaintiff claimed the substance could only have come from the work yard because he only wore his work boots on his employer's work premises. *Id*. The plaintiff brought a cause of action against his employer pursuant to the FELA and alleged that "he was caused to slip due to a hazardous accumulation of oil and thereby injured." *Id*. The Seventh Circuit Court of Appeals affirmed the trial court's grant of summary judgment in favor of the defendant because the plaintiff was uncertain about whether he stepped in oil at the worksite that day and did not know whether there was any oil on the ground at his workplace for him to step into. *Id*. at 744. The court found that the plaintiff offered "no evidence that he was in the vicinity of an accumulated oil pool on the day of the accident, or that any such accumulation even then existed." *Id*.

¶ 33 Here, plaintiff's theory that his injury "had to have been" caused by a rock is nothing more than a guess. This injury does not speak for itself such as a cut from accumulated glass on a worksite. There are many reasons for a person to roll his or her own foot that are equally plausible but unrelated to scattered rocks on the surface of the lot. Perhaps plaintiff's own clumsiness or carelessness caused him to roll his foot without a rock present underneath. As stated above, the case law provides that speculation and conjecture is not sufficient to create the necessary question of fact needed to avoid summary judgment. See *Holbrook*, 414 F.3d at 745. Thus, we hold that plaintiff failed to establish a question of material fact concerning defendant's negligence in not using reasonable care to ensure plaintiff a safe work environment.

¶ 34 CONCLUSION

¶ 35 The judgment of the circuit court of McDonough County is affirmed.

¶ 36 Affirmed.