2013 IL App (1st) 122496-U

SECOND DIVISION
August 27, 2013

No. 1-12-2496

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

ANTONIO BROWN,	)	
	)	Appeal from
Plaintiff-Appellant,	)	the Circuit Court
	)	of Cook County.
v.	)	
	)	No. 10 L 3805
UNION PACIFIC RAILROAD COMPANY,	)	
a Delaware Corporation,	)	Honorable
	)	Kathy M. Flanagan,
Defendant-Appellee.	)	Judge Presiding.

JUSTICE QUINN delivered the judgment of the court.
Justices Connors and Fitzgerald-Smith concurred in the judgment.

O R D E R

¶ 1 *HELD*: Where the plaintiff failed to establish that the defendant owed the plaintiff a duty in a negligence claim, the circuit court properly granted summary judgment to defendant.

¶ 2 I. INTRODUCTION

¶ 3 On August 20, 2000, plaintiff, Antonio Brown, who was 10 years old at the time, lost his leg above the knee as a result of climbing on, playing on and jumping from a moving freight train.

Almost 10 years later, on March 29, 2010, plaintiff filed an action against the defendant, Union Pacific Railroad Company, alleging that defendant's negligence and willful and wanton conduct was the proximate cause of plaintiff's injuries. After discovery concluded, defendant moved for summary judgment pursuant to section 2-1005(c) of the Illinois Code of Civil Procedure. 735 ILCS 5/2-1005(c) (West 2012). After the motion was fully briefed, the circuit court granted summary judgment in favor of the defendant and against plaintiff and issued its written ruling on June 13, 2012. Plaintiff filed a timely notice of appeal on July 6, 2012. Ill. S. Ct. R. 303(a)(1) (eff. June 4, 2008).

¶ 4 II. BACKGROUND

¶ 5 Before we outline the facts of this case, we address defendant's argument that statements made by plaintiff in his introduction, issues presented for review and statement of facts are argumentative and inappropriate for inclusion in an appellate brief. We do not see the same high level of deficiencies in plaintiff's brief that defendant does and conclude that any argument in those sections does not hinder our review of the case given the record on appeal and the defendant's supplemental statement of facts with citation to the record. See *Budzileni v. Department of Human Rights*, 392 Ill. App. 3d 422, 440-41 (2009).

¶ 6 Plaintiff filed a complaint against the defendant based on injuries he received while hopping on and then jumping from a moving freight train. In paragraph 7 of plaintiff's complaint, he alleged that the defendant was negligent and/or willful and wanton as follows:

> "a. Failed to install or maintain any gate at the footpath crossing that would block access of children and other pedestrians

from the railroad right-of-way;

b. Failed to install or maintain a fence at the location of the foot-path and near and adjacent to said school area which would block and deter persons from crossing the railroad right-of-way;

c. Failed to block off, close, or remove the existing well worn foot-path to prevent persons from using said foot-path to cross the railroad right-of-way;

d. Negligently failed to post any warning or sign to discourage persons from crossing the tracks at said foot-path in said location;

e. Carelessly and negligently operating a stopped freight train and started the operation of said train while failing to notice the open and obvious condition of numerous children climbing over said stopped freight train in the above-described location;

f. Started moving the above described freight train without checking to see if any persons were in the vicinity of said train or climbing over said train;

g. Negligently failed to become aware of or take note of the frequent use of said foot-path with the frequent conduct of

children in the vicinity climbing over stopped freight trains at the above described location;

h. Carelessly and negligently failed to sound a horn or warning devices on said train as well as a second train operating in the opposite direction at the same location;

i. Blocked the pathway by stopping the train across said pathway."

¶ 7 At the close of discovery, the defendant filed a motion for summary judgment arguing that the obvious condition of hopping and playing on and jumping from a moving freight car did not give rise to a duty of care by the defendant to the plaintiff. It argued that it was not reasonable to require the defendant to anticipate that anyone, in the exercise of ordinary care, would not have taken precautions necessary to not expose himself to the serious dangers of attempting to hop on and jump from a moving freight train. In other words, a reasonable 10 year old allowed to go out unsupervised, would have seen the moving freight train and appreciated the serious risk of trying to hop on it and jump from it. Plaintiff argued that the defendant should have known, due to the well-worn path over this area, that people, including children, used this path as an informal method to cross over the tracks and should have placed signs and/or barriers to prevent injury.

¶ 8 The facts of this case are gleaned from the briefs with affidavits and deposition testimony in support. What is clear is that plaintiff was not using the well-worn path to cross the tracks. The freight car was already moving down the tracks slowly when plaintiff arrived at the tracks. Plaintiff began running between two moving freight cars and climbed one of the freight car end ladders. Two

end ladders are located on the end of freight cars, immediately adjacent to the freight car wheels. Running between two moving freight cars required plaintiff to run on an uneven surface with laid track and grab hold of the ladder while running and hoist himself up. Plaintiff continued his climbing journey on the moving freight train by making his way from the end ladder to the joined freight couplers that attached the two freight cars. To travel from the end ladder to the joined freight couplers, plaintiff had to go along an end platform that was only 8 inches wide and not equipped with any devices to hold on with your hands. Plaintiff successfully completed these maneuvers and reached the freight cars' joined couplers. From there, plaintiff decided to jump off the moving train from where he was positioned on the joined couplers. As plaintiff leaped off the train, his untied shoelace of his right shoe tangled in the couplers. As a result, his right leg was injured by the wheels of the freight train which resulted in amputation.

¶ 9 Defendant admitted to owning the railroad right-of-way where plaintiff was injured, however, other railroads operated freight trains over that track and, being that it was 10 years before suit was filed, no one has been able to conclusively establish the identity of the operator of the freight train that plaintiff was climbing on and jumping from. After all discovery was completed, plaintiff was unable to provide any evidence that defendant knew trespassers habitually used the path as an informal short-cut over the railroad tracks at the location of the accident. The circuit court granted defendant's motion for summary judgment.

¶ 10 For the reasons that follow, we affirm.

¶ 11 III. STANDARD OF REVIEW

¶ 12 Summary judgment should be granted only where the pleadings, depositions, admissions and

affidavits on file, when viewed in the light most favorable to the nonmoving party, show that there is no genuine issue as to any material fact and that the moving party is clearly entitled to judgment as a matter of law. 735 ILCS 5/2-1005(c) (West 2008); *Adams v. Northern Illinois Gas Co.*, 211 Ill. 2d 32, 43 (2004). Circuit court orders granting summary judgment pursuant to 735 ILCS 5/2-1005 (c) (West 2010) are given *de novo* review by reviewing courts. *General Casualty Insurance Co. v. Lacey*, 199 Ill.2d 281, 284 (2002). *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).

¶ 13 The purpose of summary judgment motions is not for the circuit court to determine a question of fact, but to determine if a triable issue of fact exists. *Robidoux v. Oliphant*, 201 Ill. 2d 324, 335 (1992). In order to survive summary judgment, the nonmoving party does not have to prove his case, but must present some factual basis which arguably entitles it to a judgment in its favor. *Id*. In other words, the nonmoving party must show there exists a genuine issue of material fact such that a reasonable jury could return a verdict in its favor. *Allegro Services, Ltd. v. Metropolitan Pier & Exposition Authority*, 172 Ill. 2d 243, 256 (1996). 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).

¶ 14 IV. ANALYSIS

¶ 15 Plaintiff's appellate arguments are directed at the propriety of the circuit court's decision to grant summary judgment in favor of defendant.

¶ 16 To survive a defendant's motion for summary judgment in a negligence action, a plaintiff

must present evidence in support of the common elements of negligence: (1) defendant owed a duty to plaintiff; (2) breach of duty; (3) forseeability of plaintiff's injury; and (4) proximate causation of plaintiff's injury. *Brzinski v. Northeast Illinois Regional Commuter R.R. Corp.*, 384 Ill. App. 3d 202, 205 (2008); *Pavlik v. Wal-Mart Stores, Inc.*, 323 Ill. App. 3d 1060, 1063 (2001). If the plaintiff fails to establish any element of the negligence cause of action, summary judgment for the defendant is proper. *Williams v. Manchester*, 228 Ill. 2d 404, 417 (2008). The issue before this court is whether there existed any negligence by the defendant that was the proximate cause of plaintiff's injury.

¶ 17 In any negligence action, the circuit court must determine, in the first instance, whether the defendant owed a duty to the plaintiff. *Choate v. Indiana Harbor Belt R.R. Co.*, 2012 IL 112948, ¶ 34. Whether or not a duty exists is a question of law for the court to decide. *Chandler v. Illinois Central Railroad Co.*, 207 Ill. 2d 331, 340 (2003) (citing *Thompson v. County of Cook*, 154 Ill. 2d 374, 382; *Wojdyla v. City of Park Ridge*, 148 Ill. 2d 417, 421 (1992)).

¶ 18 In the instant negligence case and at the summary judgment stage of the proceedings, it has long been the law that the plaintiff must demonstrate sufficient evidentiary facts from which the court can impose a legal duty on the defendant for the benefit of the plaintiff, as well as evidence showing the defendant breached that duty and a resulting injury. *Miller v. S.S. Kresge Co.*, 306 Ill. 104, 106 (1922); *Illinois Steel Co. v. Ostrowski*, 194 Ill. 376, 385 (1902); *Gallagher Corp. v. Russ*, 309 Ill. App. 3d 192, 197 (1999). The existence of any legal duty imposed upon the defendant depends upon whether the plaintiff and the defendant stood in such a relationship to each other that the law imposed upon the defendant a legal obligation of reasonable conduct for the benefit of the plaintiff. *Happel v. Wal-Mart Stores*, *Inc.*, 199 Ill. 2d 179, 186 (2002) (also holding that whether a

duty exits is a question of law for the court to decide); see also *Ward v. K-mart Corp.*, 136 Ill. 2d 132, 140 (1990). Absent a legal duty of care owed to the plaintiff, the defendant cannot be found negligent. *Washington v. City of Chicago*, 188 Ill. 32d 235, 239 (1999) (unless a duty is owed, there is no negligence and a plaintiff cannot recover "as a matter of law").

¶ 19 The defendant maintains that the circuit court's grant of summary judgment in its favor was proper because the plaintiff failed to demonstrate any evidence that showed that the defendant owed a duty to the plaintiff.

¶ 20 We are dictated in our decision in this case by the recent supreme court case of *Choate v. Indiana Harbor Belt R.R. Co.*, 2012 IL 112948. *Choate* involved a 12 year-old who was injured severely when he fell while attempting to climb onto a moving freight train. The supreme court held that the defendant did not owe plaintiff a legal duty, in part, because plaintiff was a trespasser. It noted that although a landowner is generally under no duty to maintain its land for the safety of trespassers, an exception to the rule exists for child trespassers. *Id.* ¶ 24-27. However, the exception only applies if the dangerous condition is likely to injure children because they are incapable, based on age or maturity, of appreciating the risk. *Id.* ¶ 31. The court held that a defendant has no duty to remedy a dangerous condition if it is an obvious risk that a child of plaintiff's age would be expected to appreciate and avoid. ¶ 31. Specifically, the court held that "we now explicitly recognize as a matter of law that a moving train is an obvious danger [and] that any child allowed at large should realize the risk of coming within the area made dangerous by it." *Id.* ¶ 35.

¶ 21 Plaintiff appears to argue that the condition of a well-worn path leading to the railroad tracks is enough of a question of fact to go to a jury to determine if there was open and obvious danger

associated with this well-worn path or whether to impose a duty on defendant to protect trespassers from hopping on and playing on moving freight trains. There does not appear to be any dispute that the freight train was moving on the tracks. The defendant takes issue with the degree to which there was a "well-worn" path, but it appears the circuit court presumed the path was well-worn when issuing its decision. We likewise assume a well-worn path for purposes of this appeal. As our supreme court has recently dictated, only where there is a "dispute about the physical nature of the condition" is the issue of an open and obvious condition a question for the trier of fact. *Choate v. Indiana Harbor Belt R.R. Co.*, 2012 IL 112948, ¶¶ 33-35. The moving freight train was the condition that is central to the instant case, not the well-worn path. The *Choate* court overruled appellate court decisions that held that the question of whether children could appreciate "hopping a moving train was dangerous" was a factual issue and ruled, as a matter of law, that proximity to a moving train was an open and obvious dangerous condition that is reasonably known to children. *Id*. In fact, prior to *Choate*, the appellate court has held that where there is no dispute concerning the physical nature of the condition, the question of whether the condition is open and obvious is a legal one. *Belluomini v. Stratford Green Condominium Ass'n*. 346 Ill. App. 3d 1044, 1054 (2010).

¶ 22 We conclude, as the circuit court concluded, that defendant did not owe the plaintiff a legal duty regarding the danger posed by climbing on and playing on and jumping from a moving freight train even though there was a well-worn path leading to and from the railroad tracks that people, including children, used as a short-cut to cross the tracks. The argument, as posed by plaintiff would have the court focus on the well-worn path. However, plaintiff was not injured because he trespassed onto defendant's property and used a well-worn path to cross railroad tracks. Plaintiff

was injured because he hopped on and played on and jumped from a moving freight train. We find, consistent with *Choate*, that both the condition of the moving freight train and the risk of hopping, climbing and playing on it were apparent to and would have been recognized by a reasonable 10 year-old who was allowed out unsupervised exercising ordinary perception, intelligence and judgment. The dangerous condition of the moving freight train was open and obvious. In fact, this court held more than 40 years ago that a railroad owes no duty to a 9 year-old boy who fell from the side ladder of a nonmoving railroad car located in defendant's unfenced railroad yard. *Sydenstricker v. Chicago & Northwestern Railway Co.*, 107 Ill. App. 2d 427, 433-34 (1969).

¶ 23 Plaintiff relies heavily upon *Nelson v. Northeast Illinois Regional Commuter Railroad Corp., d/b/a Metra*, 364 Ill. App. 3d 181 (2006) in arguing that the frequent trespasser doctrine imposes a duty on the defendant railroad separate and apart from the holding in *Choate*. The issue in *Nelson* was whether Metra owed a duty of care under the frequent trespasser doctrine to a 15 year-old girl who was injured by a train as she crossed a railroad track. The *Nelson* decision invoked the frequent trespasser doctrine because the burden of looking out for frequent, known trespassers by a train operator is not great. *Id*. at 186-87. Plaintiff's argument appears to suggest that the defendant has a duty to remove all dangers from a railroad track in order to avoid liability. First, there was no evidence presented by plaintiff that defendant was aware of this well-worn path or that it was utilized by children. Secondly, the plaintiff, again, focuses on the well-worn path. Plaintiff was not injured while crossing the tracks utilizing the well-worn path and, as importantly, there was no evidence the railroad was aware of the well-worn path. *Vega v. Northeast Illinois Regional Commuter Railroad*

Corp., d/b/a Metra, 371 Ill. App. 3d 572 , 581 (2007). Plaintiff was injured because he hopped on, climbed on and jumped from a moving freight train. It would be impossible for any railroad company to render a moving freight train "injury-proof" under these conditions. See *Sandoval v. City of Chicago*, 357 Ill. App. 3d 1023, 1029 (2005) (summary judgment appropriate when danger is open and obvious); see also *Ward v. K-mart Corp*. 136 Ill. 2d 132, 142 (1990) (defendant has no duty to "remove all dangers" to avoid liability). In other words, "if people who are likely to encounter a condition may be expected to take perfectly good care of themselves without further precautions, then the condition is not unreasonably dangerous."(Internal quotation marks omitted.) *Ward v. K-mart Corp*. 136 Ill. 2d 132, 148 (1990).

As the *Choate* decision held:

> "Courts have essentially explained that if a duty were imposed on a railroad to erect a fence where one accident occurred, the railroad 'would likewise be subject to the duty of fencing innumerable places along many miles of tracks frequented by trespassing children.' [Citation]. We hold that Illinois law does not impose any such requirement." *Choate v. Indiana Harbor Belt R.R. Co.*, 2012 IL 112948, ¶ 43.

¶ 24 *Choate* did not specifically address the frequent trespasser doctrine. However, we need not reach what impact *Choate* has on the frequent trespasser doctrine because that doctrine clearly does not apply to the facts of this case. The frequent trespasser doctrine fails for plaintiff because it

requires proof that the defendant knew that trespassers habitually frequented its premises to cross its tracks. Simply, plaintiff has no such evidence. Additionally, in order to establish liability under the frequent trespasser doctrine, a plaintiff must establish that he was injured after being struck by a careless train operator who knew or should have known that trespassers could be present. *Vega v. Northeast Illinois Regional Commuter Railroad Corp., d/b/a Metra*, *371 Ill. App. 3d 572 (2007); McKinnon v. Northeast Illinois Regional Commuter Railroad Corp., d/b/a Metra*, 263 Ill. App. 3d 774, 777-79 (1994); *Nelson v. Northeast Illinois Regional Commuter Railroad Corp., d/b/a Metra*, 364 Ill. App. 3d 181, 184-85 (2006). The instant case does not involve a train hitting a pedestrian walking across railroad tracks.

¶ 25 We cannot say that the record before us presents triable issues because, as a matter of law, the defendant did not owe plaintiff any duty. Reversing the circuit court without sufficient proof of the defendant's duty is tantamount to reversing the circuit court simply because the plaintiff was injured, which contradicts well-established law. Although it is unfortunate that plaintiff was injured, we cannot omit or even relax an essential ingredient of plaintiff's negligence cause of action based on sympathy, no matter how heartfelt.

¶ 26 V. CONCLUSION

¶ 27 For all the foregoing reasons, we affirm the judgment of the circuit court.

¶ 28 Affirmed.