2018 IL App (4th) 170509-U

NO. 4-17-0509

FILED
April 2, 2018
Carla Bender
4th District Appellate
Court, IL

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

SAM HUNTINGTON,	)	Appeal from
Plaintiff-Appellant,	)	Circuit Court of
v.	)	Champaign County
CHAMPAIGN-URBANA MASS TRANSIT	)	No. 16L117
DISTRICT, a Local Public Entity,	)	
Defendant-Appellee.	)	Honorable
	)	Jeffrey B. Ford
	)	Judge Presiding.

JUSTICE TURNER delivered the judgment of the court.
Justices Knecht and DeArmond concurred in the judgment.

ORDER

¶ 1 *Held*: The trial court did not err in granting defendant's motion for summary judgment based on plaintiff's contributory negligence.

¶ 2 In July 2016, plaintiff Sam Huntington filed this lawsuit against defendant Champaign Urbana Mass Transit District (CUMTD) alleging he was injured after falling on defendant's bus. On June 29, 2017, the trial court granted defendant's motion for summary judgment. Plaintiff appeals the court's order. We affirm.

¶ 3 I. BACKGROUND

¶ 4 In July 2016, plaintiff filed the complaint at issue. According to the complaint, plaintiff was a passenger on a bus operated by defendant on August 10, 2015, which stopped for a red light at the intersection of Wright Street and Green Street along one of its routes at approximately 1 p.m. The complaint does not specify if this was in Champaign or Urbana. The

complaint also does not specify exactly what happened to plaintiff on the bus.

¶ 5 In his deposition, plaintiff testified he stood up and walked forward on the bus to throw an item away while the bus was stopped at an intersection. He did not hold onto anything to secure himself on the bus while standing and/or walking. Plaintiff did not see the traffic light turn from red to green. When the bus started moving, plaintiff fell.

¶ 6 Plaintiff alleged defendant was negligent and careless because it failed to (1) observe plaintiff was standing and moving through the bus without holding onto anything to secure himself, (2) warn plaintiff the bus was about to move, (3) remain in place until plaintiff could sit down, (4) warn plaintiff of the risks of standing, and (5) place enough waste containers on the bus to allow plaintiff to dispose of his trash without walking on the bus. Plaintiff alleged he was injured as a direct and proximate result of defendant's careless and negligent acts and/or omissions. According to his complaint, "since the sole instrumentality causing the injury was within the control of the Defendant, a presumption of negligence arises and the burden of proof is upon the Defendant to prove that the Plaintiff's injury which occurred while the bus in question was moving was not due to the negligence of the bus driver."

¶ 7 On March 2, 2017, defendant filed a motion for leave to file an affirmative defense against plaintiff, alleging plaintiff was contributorily negligent. The court granted defendant leave on March 7, 2017. Defendant's affirmative defense asserted plaintiff was negligent because he failed to remain seated while the bus was in the flow of traffic; failed to hold onto anything provided on the bus, including safety bars, railings, and/or handholds while he was standing and/or walking on the bus; stood up and moved around the bus while it was prepared to proceed at the stoplight; failed to observe the stoplight while standing and moving about the bus at the intersection; unnecessarily moved about the bus while stopped at an

intersection; and failed to inform the bus driver he was going to get up from his seat and move about the bus while it was stopped at the intersection. Defendant alleged one or more of plaintiff's negligent acts was a direct and proximate cause of his alleged injuries and damages.

¶ 8 In April 2017, defendant filed a motion for summary judgment, arguing plaintiff's own testimony established he could not prove defendant breached any duty owed to plaintiff or caused his injuries. According to defendant, plaintiff's deposition testimony established plaintiff was more than 50% contributorily negligent. Defendant pointed to plaintiff's testimony regarding the movement of the bus when he fell: "I don't know. I guess it just moved." (We note plaintiff also testified "the bus took off and I fell.") Defendant also pointed to plaintiff's testimony he got up from his seat on the bus while it was stopped at a traffic light, walked 10 feet forward without holding anything to steady himself, and failed to watch the traffic light while standing and moving about the bus. Further, defendant noted plaintiff had ridden its buses on a daily basis for 20 years.

¶ 9 On June 29, 2017, the trial court granted defendant's motion for summary judgment. In the court's written order, it struck plaintiff's affidavits filed after his deposition because they contradicted his deposition testimony. The court also found the allegations in paragraphs 3(a) to 3(g) of plaintiff's complaint were not sufficient to establish a duty under normal circumstances. However, the court did find:

> "Given the standard for a *prima facie* case of negligence under the common carrier standard, the Court concludes that Plaintiff has satisfied his evidentiary burden and there would be a presumption of negligence that Defendant would need to rebut. Defendant argues that this presumption is equivalent to imposing strict liability on Defendant. It does not. [Citation.] The presumption may be

rebutted. [Citations.] Here the Defendant has not offered any rebuttal evidence. The Defendant is just stating that there should not be a presumption and complaining that the presumption makes this a strict liability case. There is not a genuine issue of material fact presented, but under the law Defendant has not rebutted Plaintiff's *prima facie* case."

The court then addressed defendant's affirmative defense with regard to plaintiff's contributory negligence.

¶ 10 According to the court, whether a plaintiff was contributorily negligent is normally a question for the trier of fact. However, summary judgment is appropriate based on contributory negligence if all reasonable minds would agree that no contrary verdict could ever stand viewing the evidence in a light most favorable to the nonmoving party. The court granted defendant's motion for summary judgment based on plaintiff's contributory negligence. The court found:

> "All the evidence presented to the Court shows Plaintiff has an understanding of how and why buses operate. He knew whether seated or standing, that the bus he was riding on would eventually move. Plaintiff's testimony on January 16, 2017, that the 'bus took off and I fell' (Huntington Dep. January 16, 2017, 16:3) does not speak to speed or abruptness. It is ambiguous as to those things. We know the bus 'just moved' (Huntington Dep. January 16, 2017, 5:12) which could be synonymous with 'took off[.']
>
> Since he knew he was standing on a bus that would move, Plaintiff had to exercise due care for his own safety. A novice bus rider would understand these things and a veteran[,] such as Plaintiff, would have knowledge that a bus not

> only moves, [but] starts and stops, and also caution must be taken at all times, since a bus is moving in traffic and even bus drivers have to drive defensively, as noted in the cases cited above. There is no evidence that Plaintiff exercised any due care for his own safety. Plaintiff did not hold onto anything as he was walking on the bus (Huntington Dep. January 16, 2017, 16:20-22) even though he knew the bus could start and stop. He did not exercise due care for his own safety for the situation he put himself in. Plaintiff did not testify that it was urgent that he stand up and walk to the trash container to throw away an empty Pepsi container. Viewed in the light most favorable to Plaintiff, he completely ignored his safety in a situation where he knew that his safety could be put in jeopardy. He was over 50% negligent."

¶ 11 This appeal followed.

¶ 12 II. ANALYSIS

¶ 13 Plaintiff argues the trial court erred by granting defendant's motion for summary judgment. Our supreme court has made clear summary judgment is a drastic means of disposing of litigation. *Bagent v. Blessing Care Corp.*, 224 Ill. 2d 154, 163, 862 N.E.2d 985, 991 (2007). A movant's right must be clear and free from doubt before summary judgment is appropriate. *Bagent*, 224 Ill. 2d at 163, 862 N.E.2d at 991. "The purpose of summary judgment is not to try a question of fact, but rather to determine whether a genuine issue of material fact exists." *Williams v. Manchester*, 228 Ill. 2d 404, 417, 888 N.E.2d 1, 8 (2008).

> "In determining whether a genuine issue as to any material fact exists, a court must construe the pleadings, depositions, admissions, and affidavits strictly against the movant and liberally in favor of the opponent. A triable issue

> precluding summary judgment exists where the material facts are disputed or where, the material facts being undisputed, reasonable persons might draw different inferences from the undisputed facts." *Bagent*, 224 Ill. 2d at 162–63, 862 N.E.2d at 991.

We give no deference to a trial court's summary judgment order and apply a *de novo* standard of review. *Williams*, 228 Ill. 2d at 417, 888 N.E.2d at 9.

¶ 14 "In order to establish a claim of negligence against a common carrier, plaintiffs must present sufficient factual evidence to establish the existence of a duty of care owed by defendants to plaintiffs, a breach of that duty, and an injury proximately caused by the breach." *Carlson v. Chicago Transit Authority*, 2014 IL App (1st) 122463, ¶ 24, 10 N.E.3d 426. Citing *Phelps v. Chicago Transit Authority*, 224 Ill. App. 3d 229, 233, 586 N.E.2d 352, 355 (1991), plaintiff points to the fact a common carrier owes its passengers a duty to operate with the "highest degree of care consistent with the mode of conveyance used and the practical operation of its business as a common carrier by bus." Plaintiff is correct on this point. However, a common carrier is not "an absolute insurer of the safety of its passengers [citation], and it is not responsible for personal injuries sustained by them in the absence of some unjustifiable act of commission or omission." *Smith v. Chicago Limousine Service, Inc.*, 109 Ill. App. 3d 755, 759, 441 N.E.2d 81, 84 (1982).

¶ 15 "A rebuttable presumption of negligence is raised against a common carrier when a plaintiff shows that she was a passenger, an accident happened with an apparatus wholly under the control of the carrier, and that an injury was inflicted." *New v. Pace Suburban Bus Service*, 398 Ill. App. 3d 371, 379, 923 N.E.2d 310, 317 (2010). The presumption can be rebutted by the common carrier "explaining or accounting for the accident and proving that it resulted from a

cause for which the carrier should not be held responsible." *Carlson*, 2014 IL App (1st) 122463, ¶ 25, 10 N.E.3d 426. The trial court did find plaintiff's deposition established a rebuttable presumption of negligence against defendant. The trial court also found defendant presented no evidence to rebut this presumption.

¶ 16 Nonetheless, the trial court granted defendant's motion for summary judgment because of plaintiff's contributory negligence. According to the court's order, even when the evidence in this case is viewed in the light most favorable to plaintiff, plaintiff "completely ignored his safety in a situation where he knew that his safety could be put in jeopardy."

¶ 17 Citing *Pedrick v. Peoria & Eastern R.R. Co.*, 63 Ill. App. 2d 117, 125, 211 N.E.2d 134, 138 (1965), the trial court noted "[a] passenger riding in an automobile must exercise due care for his own safety." The court held the evidence showed plaintiff was over 50% negligent in causing his alleged injuries. Section 2-1116(c) of the Code of Civil Procedure (735 ILCS 5/2-1116(c) (West 2016)) states a "plaintiff shall be barred from recovering damages if the trier of fact finds that the contributory fault on the part of the plaintiff is more than 50% of the proximate cause of the injury or damage for which recovery is sought."

¶ 18 Without citing any authority or providing any reasoning to this court, plaintiff argues defendant's duty of exercising the highest degree of care for its passengers obligated it to do the following specific acts before moving the bus after the traffic light turned from red to green: (1) observe whether plaintiff was standing and moving through the bus without holding on to anything; (2) warn plaintiff the bus was about to move; (3) remain stopped until plaintiff was seated; (4) warn plaintiff of the risks of standing; and (5) and not begin moving faster than was safe for a passenger standing in the aisle. We find plaintiff forfeited any argument defendant breached its high duty of care to plaintiff for these alleged omissions as he provided no authority

or reasoning for his argument. See Ill. Sup. Ct. R. 341(h)(7) (eff. Nov. 1, 2017). This court is not a depository for an appellant to dump the burden of argument and research. *Elder v. Bryant*, 324 Ill. App. 3d 526, 533, 755 N.E.2d 515, 522 (2001).

¶ 19 Before we determine whether the trial court erred in granting defendant's motion for summary judgment, we will address defendant's motion to strike portions of plaintiff's reply brief. Defendant first argues statements in plaintiff's reply brief should be stricken because the statements characterizing the bus's movement are either outside of or contradicted by the record.

¶ 20 As we are dealing with a motion for summary judgment, we must construe the record and evidence in a light most favorable to the non-moving party, which in this case is plaintiff. In his deposition, plaintiff testified the bus "took off and I fell." We see no reason why plaintiff cannot offer a reasonable construction of this statement favorable to his claim. As a result, we deny this portion of defendant's motion to strike.

¶ 21 Defendant also argues we should strike the portion of plaintiff's reply brief in which he argues the trial court erred in striking his affidavits because plaintiff did not make this argument in his initial appellate brief. Although we deny defendant's motion to strike, we hold plaintiff forfeited this issue by not raising it in his initial brief to this court. See Ill. S. Ct. R. 341(h)(7) (eff. Nov. 1, 2017).

¶ 22 As for plaintiff's argument the trial court erred in granting defendant's motion for summary judgment, we hold the trial court did not err in granting this motion based on the record in this case which clearly shows defendant's contributory negligence was the primary cause of his injuries. We note a question whether a party is contributorily negligent is normally left for the trier of fact. However, this court has stated:

"While ordinarily the question of contributory negligence is a question of fact for

> the jury, 'it becomes a question of law when all reasonable minds would agree that the evidence and reasonable inferences ***, viewed in a light most favorable to the nonmoving party, so overwhelmingly favors the movant that no contrary verdict based on that evidence could ever stand.' " *Buerkett v. Illinois Power Co.*, 384 Ill. App. 3d 418, 425, 893 N.E.2d 702, 711 (2008) (quoting *West v. Kirkham*, 207 Ill. App. 3d 954, 958, 566 N.E.2d 523, 525 (1991)).

¶ 23 In this case, plaintiff does not allege the bus was involved in any kind of collision or the driver abruptly applied the brakes or swerved without notice. In addition, plaintiff failed to offer any argument why defendant's bus driver had any duty to determine plaintiff was either seated or holding onto something on the bus before the driver could drive forward when the traffic light changed from red to green. Plaintiff can only point to the way defendant drove away from the intersection when the traffic light turned green as the proximate cause of his injuries.

¶ 24 Viewing the evidence in a light most favorable to plaintiff, all that can be said about defendant is that its bus "took off" from its stopped position. Plaintiff states in his reply brief, "the term 'took off' implies a movement that is other than gentle, but speedy and abrupt." Even assuming, for the sake of argument, defendant somehow breached its duty of care toward plaintiff by making a "speedy and abrupt" start at the intersection, the record does not show this was the primary cause of plaintiff's injuries.

¶ 25 As the trial court correctly noted, defendant was not an insurer of plaintiff's safety on the bus (*Smith*, 109 Ill. App. 3d at 759, 441 N.E.2d at 84) and plaintiff was obligated to look out for his own safety (*Pedrick*, 63 Ill. App. 2d at 125, 211 N.E.2d at 138). Plaintiff's failure to do so was the primary cause of his injuries. Plaintiff left his seat on the bus when it was stopped for a red light at an intersection, walked forward on the bus to throw away a bottle, and

failed to secure himself by holding onto anything on the bus. Plaintiff had been a passenger on defendant's buses on a consistent basis for 20 years. Plaintiff knew the bus could resume moving forward at any time and any movement of the bus could affect his balance. Based on the evidence in this case, any reasonable juror would find plaintiff's failure to look out for his own safety was more than 50% of the cause of his injuries, and we conclude no contrary verdict could ever stand. As a result, the trial court did not err in granting defendant's motion for summary judgment based on plaintiff's contributory negligence.

¶ 26 III. CONCLUSION

¶ 27 For the reasons stated, we affirm the trial court's summary judgment ruling.

¶ 28 Affirmed.