2013 IL App (1st) 112751-U

FIRST DIVISION
FILED: May 20, 2013

No. 1-11-2751

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

JUAN RODRIGUEZ, Plaintiff-Appellant, v. NORTHEAST ILLINOIS COMMUTER RAILROAD CORPORATION d/b/a METRA, Defendant-Appellees.	)	Appeal from the Circuit Court of Cook County. No. 07 L 14438 The Honorable James P. Flannery, Jr., Judge Presiding.

PRESIDING JUSTICE HOFFMAN delivered the judgment of the court.
Justices Cunningham and Rochford concurred in the judgment.

ORDER

¶ 1 *Held*: Circuit court did not err in granting summary judgment to the defendant.

¶ 2 The plaintiff, Juan Rodriguez, appeals the circuit court's order granting summary judgment to the defendant, Northeast Illinois Commuter Railroad Corporation, on his claims seeking to recover from the defendant for a workplace injury he suffered. For the reasons that follow, we affirm the circuit court's judgment.

¶ 3 On January 20, 2011, the plaintiff filed his first amended complaint, which alleged that, on February 15, 2005, he injured his back while reaching to adjust a cut-out cock on a train he was

helping prepare for passenger service. The four-count complaint sought to hold the defendant liable for negligence under the Federal Employers Liability Act (FELA) (45 U.S.C. § 51 *et seq.* (2000)). The plaintiff alleged that the defendant's negligence was established by (1) its conduct; (2) its violation of the Locomotive Inspection Act (LIA) (49 U.S.C. § 20701 *et seq.* (2000)); (3) its violation of locomotive safety standards promulgated under the Federal Railroad Safety Act (FRSA) (49 U.S.C. § 20101 *et seq.* (2000)) (see 49 C.F.R. 229.45, 229.46); and (4) its violation of passenger equipment safety standards promulgated under the FRSA (see 49 C.F.R. 238.307(c)(10)(ii)). The premise of the plaintiff's first claim was that the angled and cut-out cocks were dangerously positioned and malfunctioned, that the defendant was aware of these problems, and that the problems led to the plaintiff's injury. The premise of the plaintiff's remaining claims is that defects in the train cock the plaintiff was working with constituted violations of safety rules and thus *per se* established the defendant's negligence.

¶ 4 The defendant filed a motion for summary judgment on all counts of the plaintiff's complaint, and the plaintiff filed his response. Each party attached to its filing several exhibits, which we now summarize in pertinent part.

¶ 5 The plaintiff, who is five feet, five inches tall, testified at his deposition that he injured his lumbar spine while working for the defendant on February 15, 2005. At the time of his injury, he was connecting hoses and cables from a locomotive car to a lead passenger car on a commuter train at Chicago Union Station. He said that, after he set blue flags on the track, he began his work. As he was trying to open one of the cocks under the train, he "unlocked it, pulled on it and it wouldn't go open." Thus, he testified, he "did it again, and that's when [he] felt the pinch on the backside of

[his] back." The plaintiff said that he did not know why the cock did not open on his first attempt, and he recalled no prior problems of that type with the equipment. According to the plaintiff, the handle had a lock on it, and "that's what [he] had a problem unlocking *** and twisting it open." When asked whether the handle itself was defective, the plaintiff responded that he could not say what the problem was. He testified that he was bent over and stretching to reach the cock to try to unlock it a second time at the time of his injury. The plaintiff agreed that the train was not moving at the time of his injury and that the blue flag he placed on the track indicated that he was working on the equipment and that the train was not to be moved.

¶ 6 In his supervisor's report of the plaintiff's injury, Ray Weatherspoon wrote that the main reservoir cock "was hard opening," apparently to relay the plaintiff's version of events. According to the report, after the incident, Weatherspooon and another supervisor, Arthur Olsen, inspected the equipment that the plaintiff was working with at the time of his injury. Weatherspoon "opened and closed [the cock] and found no defects." During his deposition, Weatherspoon stated that Metra had "from time to time" experienced problems with angle cocks, which would "fall off" or leak due to a mechanical defect. Weatherspoon also agreed that, at some point, Metra began a program of relocating the cocks in order to make them easier for carmen to access.

¶ 7 In his deposition, Olsen confirmed that his and Weatherspoon's inspection revealed no problems with the equipment the plaintiff was using. He further testified that he was aware of no complaints of workers having difficulty turning cocks. Olsen also explained that Metra had undertaken a program to relocate the cocks eight to ten inches, but he did not know why Metra had started the program. He said that the modification program was "ongoing" and would be complete

after four years.

¶ 8 Francis Mascarenhas, a mechanical engineer for Metra, testified that, at some point before February 14, 2005, he was charged with studying the possibility of relocating the train cocks in over 600 train cars in order to facilitate easier access to them. Mascarenhas explained that he determined that the parts could be moved approximately 2 or 2.5 inches closer to the ends of their train cars. He said that the actual relocation work began in 2005 and was expected to take four years.

¶ 9 Richard Soukup, the defendant's chief mechanical officer, testified at his deposition that Metra began a modification program to relocate train cocks in response to an "incident *** where a female trainman of very small stature had difficulty reaching the valves." His understanding was that the cocks would be moved one to three inches. He said that he did not expect such a small move to make a difference and had recommended against the modification program, but that his supervisor overruled him.

¶ 10 Paul Byrnes, a consultant retained by the plaintiff, agreed that the cock worked properly the second time the plaintiff attempted to use it, and he said he could not explain why the part did not work initially. He added, "I don't know if a metal shaving got in there, I don't know if there was water in there that caused like a vacuum, I don't know." Conversely, Brian Heikkila, the defendant's consultant, testified that he believed that the plaintiff did not move the lever on the train cock "to a sufficient point to activate the release mechanism" or that "he did not depress it fully when he attempted" to open it initially. Heikkila added that the record indicates that inclement weather did not cause any problem with the train part and that "metal shaving would not be sufficient to inhibit handle movement." He also opined that the train was not in use at the time of the plaintiff's injury,

because it was blue-flagged and because it "was not yet prepared for service and had not been offered for service."

¶ 11 William Koran, a mechanical engineer for the defendant, testified that he assigned Mascarenhas the task of determining whether the train cocks could be relocated in order to improve access to them. He testified that the cocks were to be moved approximately 10 inches.

¶ 12 Kimberly Steel, a conductor for the defendant, testified that she was injured on February 3, 2005, while attempting to turn an angle cock on the underside of a passenger train car. Steel, who is five feet, six inches tall, attributed her injury to the difficulty and "awkwardness of the reach" required to open the part.

¶ 13 On August 19, 2011, the circuit court granted the defendant's motion for summary judgment on all four counts of the plaintiff's complaint. In granting summary judgment, the court concluded with respect to the first count that the defendant did not have notice of a dangerous condition and therefore was not negligent under FELA. For the remaining three counts, the circuit court found that the train was not "in use" at the time of the injury, and thus that LIA and FRSA do not apply. The plaintiff now timely appeals.

¶ 14 All of the plaintiff's appellate arguments are directed at the propriety of the trial court's decision to grant summary judgment in favor of defendant. "Summary judgment is proper where, when viewed in the light most favorable to the nonmoving party, the pleadings, depositions, admissions, and affidavits on file reveal 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." *Northern Illinois Emergency Physicians v. Landau, Omahana & Kopka, Ltd.*, 216 Ill.2d 294, 305, 837 N.E.2d 99 (2005). "The

function of a reviewing court on appeal from a grant of summary judgment is limited to determining whether the trial court correctly concluded that no genuine issue of material fact was raised and, if none was raised, whether judgment as a matter of law was correctly entered." *American Family Mutual Insurance Co. v. Page*, 366 Ill. App. 3d 1112, 1115, 852 N.E.2d 874 (2006). The propriety of a trial court's decision to grant summary judgment presents a question of law, which we review *de novo*. *Page*, 366 Ill. App. 3d at 1115.

¶ 15 The plaintiff first argues that the circuit court erred in granting summary judgment on the first count of his complaint. In his view, there remained a genuine issue of material fact regarding whether the defendant's negligence caused his injury, so that it should be liable under FELA.

¶ 16 Under FELA, "[e]very common carrier by railroad *** shall be liable in damages to any person suffering injury while he is employed by such carrier *** for such injury *** resulting *** 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 [or] machinery." 45 U.S.C. § 51 (2000). FELA does not convert employers into insurers of employee safety or create a duty to make workplaces absolutely safe; it imposes liability only on those employers whose negligence causes a worker's injury. *Missouri Pacific Railroad Co. v. Aeby*, 275 U.S. 426 (1928). The plaintiff asserts that the defendant was negligent under FELA because it had notice that the train cocks were dangerously located and because it had notice that the cocks could malfunction.

¶ 17 On the first point, the plaintiff devotes her entire argument to the proposition that Steel's injury put the defendant on notice that the positioning of the cocks created a risk of injury for shorter workers. However, notice of a dangerous condition is not enough to create liability under FELA.

As the plaintiff notes himself in his brief, the test for liability under FELA "is not whether *** the place in which the work is to be performed [is] absolutely safe, nor whether the employer knew the same to be unsafe, but whether or not the employer has exercised reasonable care and diligence to make them safe." *Atlantic Coast Line Railroad Co. v. Dixon*, 189 F. 2d 525, 527 (5th Cir. 1951). Thus, even if we were to agree with the plaintiff that the placement of the train cocks constituted a dangerous condition, and even if we were to further agree that the defendant had notice of this danger, the plaintiff would have to establish more in order to succeed on his FELA claim: he would have to show that the defendant did not exercise reasonable care and diligence to make that condition safe. It is undisputed in this case that, after Steel's injury, the defendant began a program of relocating the train cocks in order to place them in a less dangerous position. The plaintiff makes no argument in her brief that the conception and implementation of this relocation program was anything but diligent and reasonable.

¶ 18 On the second point, the plaintiff may be correct that the defendant had notice that the cocks were prone to malfunction. However, the plaintiff produced no evidence to establish that a malfunction caused his injury in this case. In fact, the evidence, including testimony regarding the defendant's testing of the train equipment after the plaintiff's injury, indicates that the cock he dealt with was not defective. Thus, the plaintiff has not established a causal link between this purported negligence and his injury, as is required for him to succeed on his FELA claim. See *Williams v. National Railroad Passenger Corp.*, 161 F.3d 1059, 1062 (7th Cir. 1998) (noting that a FELA plaintiff must establish causation).

¶ 19 In his reply brief, the plaintiff argues that the defendant's liability under FELA does not

depend on his producing proof of a defect or a failure to cure a defect, because his complaint also alleged negligence in the defendant's failure to warn its employees of a potential danger. However, the argument on this point in the plaintiff's opening brief is devoted entirely to the notion that he established the defendant's knowledge that the parts were dangerously inaccessible and occasionally malfunctioned; he does not tie that argument into a "failure to warn" theory. He also does not mention any failure to warn in his statement of facts. Because the plaintiff did not raise this "failure to warn" line of argument until he filed his reply brief, we must consider it forfeited. See Ill. Sup. Ct. R. 341(h)(7) (eff. July 1, 2008) ("Points not argued are waived and shall not be raised in the reply brief"). In any event, we note that any duty to warn under FELA applies only to dangers that are known to the employer and unknown to the employee. *Eg.*, *Ward v. Maine Central Railroad Co.*, 132 Me. 88 (1933) (interpreting FELA). The plaintiff, who had experience with the tasks that led to his injury, makes no assertion that he was somehow unaware of any awkward reaching required to perform those functions. Accordingly, we agree with the circuit court that the plaintiff failed to establish the defendant's liability under FELA, and that summary judgment in favor of the defendant was proper on that claim.

¶ 20 The plaintiff's second argument on appeal is that the circuit court erred in entering summary judgment on the final three counts of his complaint, which alleged that the defendant's negligence under FELA was established by its violations of LIA, the locomotive safety standards promulgated under FRSA, and the passenger equipment safety standards promulgated under FRSA. See generally *Balough v. Northeast Illinois Regional Commuter Railroad Corp.*, 409 Ill. App. 3d 750, 757, 950 N.E.2d 680 (2011) (noting that LIA does not create a cause of action but that a violation of LIA can

constitute negligence *per se* under FELA); *Klem v. Consolidated Rail Corp.*, 191 Ohio App. 3d 690, 705, 947 N.E.2d 687 (2010) (noting that violation of FRSA regulations is a violation of LIA).

¶ 21 The circuit court concluded that these statutes do not apply, because the train car at issue was not "in use," as is required to trigger the statutes. See generally *Balough*, 409 Ill. App. 3d 750 (discussing the "in use" requirement for application of the LIA). However, we do not reach that issue, because we conclude that, even if the train car was "in use," the plaintiff has provided no evidence of a defect that violated LIA or the FRSA regulations.

¶ 22 In arguing that the final three counts of his complaint should have survived the defendant's motion for summary judgment, the plaintiff relies solely on the notion that a defect in the train cock he was trying to open at the time of his injury violates LIA and the FRSA regulations. However, as we have noted above, there is no evidence that the equipment the plaintiff was working with was defective, and the evidence in fact indicates that there was no defect.

¶ 23 To argue that he needed no evidence of a defect, the plaintiff directs us to *Virgil v. New York, Chicago & St. Louis Railroad Co.*, 347 Ill. App. 281, 106 N.E.2d 749 (1952). In *Virgil*, the plaintiff, a railroad switchman, was injured when he attempted to open a stubborn angle cock, which opened abruptly and thereby caused air to rush through an air hose that struck the plaintiff's arm. *Virgil*, 347 Ill. App. at 283. The plaintiff testified at trial that, when he initially tried to open the angle cock, "[h]e jerked real hard and the angle cock did not come open, and of a sudden the air hose came up and spun around and hit him on the wrist." *Virgil*, 347 Ill. App. at 285-86. He further testified that he had opened or closed that angle cock 10 prior times; "that when he started pulling on the handle it might have opened a little; [and] that he gave it a second jerk and it came completely open."

Virgil, 347 Ill. App. at 286. "He testified further on direct examination that when he opened the angle cock prior to the accident it worked hard and he had to jerk it to get it to start; that on the second day he looked at the angle cock, *** the valve stem was down about a quarter of an inch in the handle and had marks like it had been hammered; that the handle was bent slightly to the right about a quarter inch out of line." *Virgil*, 347 Ill. App. 3d at 286. In determining whether there was sufficient evidence of a defect to submit the question to a jury, this court explained its reading of precedent as follows:

> "The court held there were two recognized methods of showing the efficiency of hand brake equipment[:] adducing evidence to establish some particular defect[,] or showing a failure to function[] when operated with due care[] in the normal, natural, and usual manner, even though it worked efficiently both before and after the occasion in question. [Citation.] It is therefore immaterial, on defendant's motion for a directed verdict, whether there is any evidence of probative value tending to prove the specific defects in the angle cock claimed by plaintiff if there is testimony tending to prove that the angle cock failed to function when opened in the usual manner on the occasion in question." *Virgil*, 347 Ill. App. at 286-87.

¶ 24 In the plaintiff's view, the rule from *Virgil* should apply here to relieve him of the burden of proving a particular defect even though the part he was working with displayed no defects before or after his injury. However, we see distinctions between this case and *Virgil* sufficient to remove this case from the above-quoted rule. Most significantly, the rule from *Virgil* is premised on the plaintiff's producing evidence that he attempted to use the allegedly defective part in the usual manner and that it malfunctioned. Here, by contrast, the plaintiff described his positioning at the

time of his injury, but he neither described the specific manner in which he attempted to open the train cock nor offered an assurance that he did so properly. Further, of the parties' two competing railroad consultants, only one offered an unqualified conclusion as to why the part did not work on the plaintiff's first attempt: the defendant's consultant opined that the plaintiff had failed to depress the handle on the part sufficiently.

¶ 25 In addition, in *Virgil* there was evidence that the angle cock malfunctioned and was damaged. Here, there was affirmative evidence to establish that the part in question had no defect--the defendant's employees tested it immediately after the plaintiff's incident and discovered no problems–and there was no evidence indicating that the plaintiff's inability to open the cock initially was due to the part's failure to function. For these reasons, we disagree with the plaintiff's position that *Virgil* controls our case. Instead, we conclude that the plaintiff failed to provide any evidence that the train cock he was attempting to operate at the time of his injury was defective. Because the plaintiff failed to establish such a defect, he cannot recover for an injury caused by that defect. On that basis, we agree with the circuit court's decision to grant summary judgment to the defendant on the final three counts of the plaintiff's complaint.

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

¶ 27 Affirmed.