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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2010-CA-00516-MR

DANNY P. LOY — APPELLANT

v.

APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE FREDERIC COWAN, JUDGE
ACTION NO. 07-CI-008487

CSX TRANSPORTATION, INC. — APPELLEE

OPINION
REVERSING AND REMANDING

** ** ** ** **

BEFORE: TAYLOR, CHIEF JUDGE; MOORE AND WINE, JUDGES.

WINE, JUDGE: Danny Loy appeals from an order of the Jefferson Circuit Court granting summary judgment to CSX Transportation, Inc., and striking an affidavit sworn by Loy from an order directing Loy to pay CSX $2,363.76 in costs, and from an order vacating a previous order of the court allowing Loy to file an amended complaint.

Loy injured his shoulder after slipping on ballast while working as a railroad carman for CSX. The Jefferson Circuit Court held that Loy's claims for damages under the Federal Employers' Liability Act, 45 U.S.C.A. § 51, *et seq*. ("FELA") were preempted by the Federal Railroad Safety Act, 49 U.S.C. § 20101, *et seq*. ("FRSA"). Based upon our recent decision in *Booth v. CSX Transp., Inc.*, 334 S.W.3d 897 (Ky. App. 2011), we hold that "although a regulation promulgated under the FRSA may preclude a FELA claim, it did not do so in this case because the regulation at issue does not cover or substantially subsume the subject matter of the suit." *Id.* at 898.

History

On March 23, 2006, Loy was working as a lead carman for CSX. As Loy was performing a brake certification test prior to the departure of an outbound train, he attempted to climb up on the lead locomotive when a large piece of ballast rolled under his right foot, causing him to lose his balance. Loy grabbed onto the locomotive ladder handrails and hung momentarily, causing injury to his right shoulder in the form of a tear to his right rotator cuff.

Loy filed a suit for damages under FELA for the injury to his shoulder, claiming that CSX negligently maintained the section of ballast. CSX filed a motion for summary judgment on the grounds that Loy's FELA claim was preempted by FRSA, and summary judgment was granted by the Jefferson Circuit Court. Loy now appeals.

Analysis

On appeal, Loy argues (1) that the trial court erred in granting summary judgment to CSX and striking his post-deposition affidavit; (2) that the trial court erred in assessing costs against Loy without requiring the submission of itemized invoices; and (3) that the trial court erred in vacating a previously unopposed order granting Loy's motion to file an amended complaint,

We first address whether the trial court should have granted summary judgment on the grounds that Loy's FELA claim was precluded by FRSA. Upon review of the grant of a motion for summary judgment, we ask "whether the trial court correctly found that there were no genuine issues as to any material fact and that the moving party was entitled to judgment as a matter of law." *Scifres v. Kraft*, 916 S.W.2d 779, 781 (Ky. App. 1996). Because this inquiry poses a question of law, we conduct a *de novo* review. *Blevins v. Moran*, 12 S.W.3d 698, 700 (Ky. App. 2000).

FELA was enacted by Congress in 1908 to "provide a remedy to railroad employees injured as a result of their employers' negligence," and was intended to provide "a uniform method for compensating injured railroad workers and their survivors." *Booth v. CSX Transp., Inc.*, 334 S.W.3d at 898, quoting *Waymire v. Norfolk and Western Railway Co*., 218 F.3d 773, 775 (7th Cir. 2000); *CSX Transportation, Inc. v. Moody*, 313 S.W.3d 72, 79 (Ky. 2010). FELA makes railroad employers liable to employees for injuries suffered due to the railroad's negligence and is the exclusive remedy for railroad employees injured as a result of their employer's negligence. *Booth, supra*; 45 U.S.C.A. § 51.

FRSA, on the other hand, was enacted in 1970 "to promote safety in every area of railroad operations and reduce railroad-related accidents and incidents." *Norfolk Southern Railway Co. v. Shanklin*, 529 U.S. 344, 347, 120 S. Ct. 1467, 1471, 146 L. Ed. 2d 374 (2000), quoting 49 U.S.C.A. § 20101. FRSA authorizes the Secretary of Transportation to promulgate regulations and issue orders in all areas of railroad safety. *Id*. FRSA contains a preemption clause, however, in an effort to ensure that the laws and regulations related to railroad safety "be nationally uniform to the extent practicable." 49 U.S.C.A. § 20106(a)(1). The preemption clause provides that the states "may regulate railroad safety 'until the Secretary of Transportation . . . prescribes a regulation or issues an order covering the subject matter of the State requirement.'" *Booth* at 889, quoting 49 U.S.C.A. § 20106(a)(2). Therefore, a state law negligence action is preempted where a FRSA regulation "'substantially subsume[s]' the subject matter of the suit." *Nickels v. Grand Trunk Western R.R., Inc.,* 560 F.3d 426, 429 (6th Cir. 2009), citing *CSX Transportation, Inc. v. Easterwood*, 507 U.S. 658, 664, 113 S. Ct. 1732, 1738, 123 L. Ed. 2d 387 (1993). Whether a claim under FELA is precluded by FRSA poses a different question.

We recently decided the issue of whether a federal regulation under FRSA can preclude a FELA claim in the same manner that it may preempt a state law claim. We held that a railroad employee's claim under FELA is precluded if the same claim, when brought by a non-railroad employee under state law, would be preempted under FRSA. *Booth*, 334 S.W.3d at 900.

In *Booth*, just as in the present case, the injured employee brought suit against CSX claiming that CSX's negligent maintenance of ballast in its rail yards, specifically the use of large ballast which tends to roll under one's foot, caused his injury. In *Booth*, we held that while FRSA has regulations directed toward creating safe *railbeds* for trains, it is silent on the question of creating safe *walkways* for the employees who must inspect the trains. Thus, this Court held that we would not "preclude a negligence claim under FELA for [all] conduct by the railroad even remotely covered by a regulation enacted under FRSA." *Booth* at 901-02*,* quoting *Grimes v. Norfolk Southern Ry. Co.*, 116 F. Supp. 2d 995, 1000, 1002-3 (N.D. Ind. 2000). We found, instead, that the employee's claim against CSX could proceed because the FRSA regulations dealt primarily with the use of ballast to create a safe railbed for trains, rather than dealing with creating safe walkways for railroad employees. Despite CSX's arguments to the contrary, it is of no consequence to our decision that Booth was stepping from ballast onto a train, rather than walking along the ballast, at the time of his injury. The ballast used to support the track must still be used by employees for walking. In either event, the safety of ballast for railway workers, insofar as it is used as a surface for *walking* or *stepping*, is not subsumed by FRSA regulations.

Accordingly, in light of our recent holding in *Booth,* we reverse the summary judgment of the Jefferson Circuit Court and remand for further proceedings consistent with this opinion. We reach the other issues raised on appeal, however, since they are capable of repetition on remand.

Loy claims that the trial court erred in striking the affidavit submitted in support of his response to CSX's motion for summary judgment. In Loy's post-deposition affidavit, he described the portion of railbed where he slipped:

> [A]pproximately fifty percent (50%) bare ground and fifty percent (50%) large, mainline ballast [in an area] where water appeared to have been accumulating. The ballast that was present was loose and scattered rather than being compacted together.
> . . .
>
> The failure of the ballast to be compacted together coupled with the lack of ballast in the area where I was attempting to mount locomotive engine #487 was the reason that the piece of large, mainline sized ballast rolled under my right foot.

The trial court disregarded the affidavit in ruling on the motion for summary judgment, finding that Loy's deposition testimony contradicted the description in the affidavit. In so doing, the court noted:

> Loy had several opportunities in the deposition to describe the ground upon which he slipped, and always described it as subsisting of nothing but ballast rock. Similarly, Loy had several opportunities to describe what caused him to fall, and he always blamed the ballast rock's large size, never the rock's lack of compaction or the fact it rested on wet, bare ground.

In his deposition, Loy described the walking conditions in the rail yard, the ground surface, and the cause of his fall as follows:

> Q. Do you think that the walking conditions in the Osborn yard, that those in any way related to the injuries that you have?
> A. I certainly do.
> . . .

Q. Okay. Go ahead.

A. Well, when I was climbing on the engine, on my report it was the 525 outbound engine. When I went to step up on the engine, you know, I have three-point contact, two point with my arms and foot on the step, and when I stepped up on the engine the particular day that I felt that it –I strained my arm, my footing slipped out. The ballast rolled on me.

. . .

Q. And did you –did your feet just slip? *(Question asked in reference to picture shown to witness)*

A. My – I feel that my foot rolled on the gravel. The ballast –this is obviously not where this took place (*comment in reference to picture*). I don't even believe this is in Osborn yard. The ballast were nowhere nothing like this.

Q. What do you mean "nothing like this?"

A. As far as the size of the ballast. There was different size ballast. . .

. . .

Q. In terms of the lawsuit that you filed, sir, is –is it your contention that the reason you feel that you are entitled to recovery against CSX is because of the size of the ballast rock that your right foot was standing on on March 23 of 2006?

A. That's correct.

Q. And is it your belief then that had that rock or those pieces of rock –what do you think, if you have an opinion—could have somehow made a difference in the outcome of this event?

A. Well, better walking conditions, for one thing, you know, ideal walking conditions. . .

Q. What do you mean when you say ideal –

A. Small ballast.

Q. You think the ballast should have been smaller?

A. I definitely do, yes.

. . .

Q. You have no reason to believe that there was anything other than ballast rock underneath your right foot in terms of debris, paper plate, as demonstrated in Exhibit 6, or anything else?

A. No debris. No. Just, again, large rock.

The rule for the use of a post-deposition affidavit to defeat a summary judgment motion is that the post-deposition affidavit cannot be used to create an issue of material fact by contradicting prior testimony, but can be used to *explain* prior testimony or *resolve inconsistencies* in prior testimony. *Lipsteuer v. CSX Transportation, Inc*., 37 S.W.3d 732, 736 (Ky. 2000). Loy originally testified at his deposition that his foot slipped on ballast, and that he felt smaller ballast would have prevented him from slipping. Loy's affidavit attributes the cause of his fall to lack of compaction of the ballast rock, or to wet, slippery ground in addition to the ballast rock. Thus, the affidavit does not expressly contradict the earlier testimony. Rather, it merely explains and expands upon the earlier testimony. We also tend to agree with the argument made in Loy's brief that "every competent lawyer instructs his witness in the cardinal rule of witness testimony – *answer the question you have been asked and nothing more.* It is incumbent upon the questioner to ask the proper question. The only responsibility of the witness is to answer that which he has been asked. *Appellant's brief,* pp. 4-5 (emphasis added). As such, we find Loy's post-deposition affidavit was properly used to explain or expand upon his prior deposition testimony. *Lipsteuer*, 37 S.W.3d at 736.

Loy's next argument on appeal is that the trial court erred in assessing costs to him without requiring CSX to submit itemized invoices to ensure the claimed costs were properly recoverable. We do not need to reach the merits of this argument, however. Because we are reversing the trial court's grant of

summary judgment, we necessarily reverse the court's award of costs to CSX as the prevailing party under Kentucky Rule(s) of Civil Procedure ("CR") 54.04.

Loy's last argument on appeal is that the trial court erred in vacating a previously unopposed order granting him leave to file an amended complaint.

A civil jury trial order was issued by the trial court in this case on April 22, 2009, setting the matter for trial on October 20, 2009, and requiring that any proposed amendment of pleadings be filed fifteen days before trial. In compliance with that order, Loy filed a motion for leave to file an amended complaint on October 5, 2009, which was addressed at a pretrial conference on October 8, 2009, at which CSX stated it had no objection to the filing of the amended complaint. The court orally granted the motion at the pretrial conference but failed to sign the tendered order.

Thereafter, on October 13, 2009, the trial court granted summary judgment in favor of CSX. In response, Loy filed a motion to alter, amend or vacate the summary judgment along with a motion for the court to sign a written order confirming its previous oral grant of leave for Loy to file his amended complaint. The court entered a written order on November 2, 2009, stating that CSX had no objection to Loy's motion to amend, and stating that it would sign the previously tendered order granting Loy leave to file the amended complaint.

On the following day, CSX filed a CR 59.05 motion to vacate the court's entry of this order on the grounds that Loy had materially "changed his entire theory of the case" mere "days before the scheduled trial." CSX claims that

Loy's affidavit contradicted his prior deposition testimony and that Loy was attempting to use this materially changed testimony to introduce a new theory of liability. The trial court granted CSX's CR 59.05 motion and vacated its previous order granting Loy leave to file an amended complaint, stating "the entire original claim is dismissed as a matter of law consistent with this Court's Opinion and Order Granting Summary Judgment."

A trial court is authorized to alter, amend, or vacate a judgment or order under CR 59.05 upon a properly filed motion by any party within ten days of the final judgment. Recognizing the scope of this power, our Supreme Court has noted that "a trial court has 'unlimited power to amend and alter its own judgments.'" *Bowling v. Kentucky Dept. of Corrections*, 301 S.W.3d 478, 483 (Ky. 2010), quoting *Gullion v. Gullion*, 163 S.W.3d 888, 891-92 (Ky. 2005). A trial judge's ruling pursuant to a CR 59.05 motion is reviewed on appeal for abuse of discretion. *Gullion*, 163 S.W.3d at 892.

Likewise, whether a party may amend a complaint is a matter within the discretion of the trial court. *Kenney v. Hanger Prosthetics & Orthotics, Inc.*, 269 S.W.3d 866, 869 (Ky. App. 2007). Under CR 15.01, "a party may amend his pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires." *See also Shah v. American Synthetic Rubber Corp*., 655 S.W.2d 489 (Ky. 1983).

In the present case, the trial court determined in its summary judgment that the statements in Loy's affidavit contradicted his earlier deposition testimony.

However, on appeal, we reverse the summary judgment and, as previously stated, hold that Loy's affidavit was not contradictory under *Lipsteuer*. In light of the fact that CSX agreed, twice, in open court to the filing of the amended complaint, and in light of the rule that amendments of pleadings are to be liberally granted, we reverse the trial court's grant of CSX's CR 59.05 motion vacating the court's previous order granting Loy leave to file an amended complaint.

Accordingly, in consideration of the foregoing, we reverse the summary judgment and the orders of the trial court and remand to the circuit court for further proceedings consistent with this opinion.

TAYLOR, CHIEF JUDGE, CONCURS.

MOORE, JUDGE, CONCURS IN RESULT ONLY AND FILES SEPARATE OPINION.

MOORE, JUDGE, CONCURRING IN RESULT ONLY.

Respectfully I concur in result only. The majority relies on *Booth v. CSX Transportation,* 334 S.W.3d 897 (Ky. App. 2011). As a prior published decision recently rendered by this Court, I understand we are bound by its holding absent intervening changes in the statutes or binding caselaw or unless it is overturned by the Court *en banc*. However, I disagree with the *Booth* Court's reliance on the dissent in *Nickels v. Grand Trunk Western R.R., Inc.,* 560 F.3d 426 (6th Cir. 2009). The *Nickels* majority, under a factually similar situation, held that FRSA precluded the employee's FELA claim. I believe the *Nickels* majority opinion is the correct interpretation of the law under the facts of this case.

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