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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2010-CA-001139-MR

JOHN L. ADKINS — APPELLANT

v.

APPEAL FROM PERRY CIRCUIT COURT
HONORABLE WILLIAM ENGLE III, JUDGE
ACTION NO. 07-CI-00774

CSX TRANSPORTATION, INC. — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: NICKELL AND THOMPSON, JUDGES; ISAAC,[1] SENIOR JUDGE.

NICKELL, JUDGE: John L. Adkins has appealed from the Perry Circuit Court's entry of summary judgment in favor of CSX Transportation, Inc. (CSXT) in his action for personal injuries arising from his employment. After a careful review of the law, the record and the briefs, we affirm.

[1] Senior Judge Sheila R. Isaac sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statutes (KRS) 21.580.

Adkins began his railroad career in 1970 working for a predecessor of CSXT. He worked mainly as a carman[2] and a car inspector until February 27, 2005, with the exception of the period between 1987 and 1995 when he was laid off. During his tenure with CSXT, Adkins was employed at the Hazard, Crawford, Ravenna, and Corbin, Kentucky railyards.

In 1976, Adkins sustained a work-related injury to his left knee requiring surgical intervention in 1976 and 1977. He entered into a compensation and settlement agreement with CSXT concerning that injury in 1978. Adkins sought treatment in 2001 for pain in his left knee which he related "back to an injury many years ago for which he had surgical reconstruction of ligaments." He underwent an additional surgery on his left knee on January 22, 2001. In 2007, Adkins again sought treatment for his left knee, citing his work-related injury from 1976 as the cause. His physicians, however, believed the knee problems may not have related to the prior injury, but rather resulted from degenerative changes stemming from his work conditions.

On December 18, 2007, Adkins filed a two-count complaint against CSXT for personal injuries arising under the Federal Employers' Liability Act (FELA), 45 U.S.C. §§ 51-60. He alleged he sustained injuries to his back, legs and knees as a result of being required to work on large, uneven ballast[3] and lifting

[2] A carman inspects and repairs freight cars on tracks in yards and in dedicated car repair facilities.

[3] As used in the railroad context, "ballast" means the crushed stone which is placed around and under railroad tracks and ties for structural support, drainage and erosion protection.

heavy objects without sufficient mechanical or manual assistance over the course of his career with CSXT. In addition to other claims, Adkins contended CSXT used improperly sized ballast in its railyards, thus creating an unsafe working environment. He alleged CSXT's negligence was the precipitating cause of his injuries. In the second count, Adkins alleged that on February 25, 2005, he injured his back and legs while "working in an awkward position on large and uneven ballast providing an unstable surface to inspect a train." He again argued that CXST's negligence was the proximate cause of his injuries.

During the course of discovery, Adkins identified numerous witnesses who were to testify on his behalf. One of those witnesses, Dr. Tyler Kress, was identified as an expert ergonomist who was to opine regarding Adkins' "work environment, including risk factors consistent with Plaintiff's injuries, job design to minimize hazard exposure, and walking on uneven ballast." After missing numerous court-imposed deadlines and show cause hearings, and still unable to produce a written opinion from Dr. Kress, Adkins formally withdrew Dr. Kress as an expert witness. On October 26, 2009, the trial court entered an order precluding Dr. Kress from testifying as an expert witness in this matter. Adkins produced no other expert witnesses regarding the standard of care or industry standards regarding Adkins' work environment.

CSXT filed three separate motions for summary judgment. The first sought partial summary judgment on Adkins' ballast related claims based on the preclusion provision contained in the Federal Railroad Safety Act (FRSA), 49

U.S.C. §§20101, *et seq.* Relying on the language contained in *Nickels v. Grand Trunk W. R.R., Inc.*, 560 F.3d 426 (6th Cir. 2009), the trial court granted the partial summary judgment on October 26, 2009.

In the second motion, CSXT sought summary judgment on Adkins' left knee claim alleging Adkins had previously been compensated for that injury and was not entitled to double recovery for the same injury. The third motion sought summary judgment on all of Adkins' remaining claims on the ground that Adkins could not prove CSXT was negligent as he had not produced any expert testimony regarding the standard of care, nor would he be able to do so. On April 14, 2010, in a combined order, the trial court granted both of CSXT's motions and dismissed the action. The trial court found Adkins had failed to identify the standard of care that CSXT had allegedly breached and was therefore unable to establish a *prima facia* case of negligence. It found that expert testimony was required to establish the standard of care and whether such standard was breached but Adkins had not produced such testimony. The trial court then found CSXT's motion for summary judgment on Adkins' knee injury claims was subsumed by its ruling on the negligence issue and the ballast issue, but stated its belief that Adkins had previously been compensated for the injury and could not recover again for the same injury. To the extent Adkins was claiming a new injury or aggravation of his previous injury, the trial court additionally found such claims were time-barred as the FELA contains a three-year statute of limitations provision applicable to Adkins' claims, he knew or should have known in 2001 he had been injured and

the potential cause of such injury, and the instant action was not filed until 2007. The trial court dismissed all of Adkins' claims with prejudice. Adkins' subsequent motion to alter, amend or vacate the April 14, 2010, judgment was denied. This appeal followed.

Adkins argues the trial court erred in finding his FELA ballast claims were precluded by operation of the FRSA, thus rendering its grant of partial summary judgment on the issue infirm. He also contends the trial court erroneously granted CSXT's motions for summary judgment on his negligence and knee injury claims as material issues of fact existed on those issues. We shall address each of these rulings in turn.

The standard of review governing appeals from the grant of summary judgment is well settled. We must determine whether the trial court erred in concluding there was no genuine issue as to any material fact and the moving party was entitled to judgment as a matter of law. *Scifres v. Kraft*, 916 S.W.2d 779, 781 (Ky. App. 1996). Summary judgment is only appropriate "if the pleadings, depositions, answers to interrogatories, stipulations, and admissions 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." CR 56.03. In *Paintsville Hospital Co. v. Rose,* 683 S.W.2d 255 (Ky. 1985), the Supreme Court of Kentucky held that for summary judgment to be proper it must be shown that the adverse party cannot prevail under any circumstances. The Supreme Court has also stated, "the proper function of summary judgment is to

terminate litigation when, as a matter of law, it appears that it would be impossible for the respondent to produce evidence at the trial warranting a judgment in his favor." *Steelvest, Inc. v. Scansteel Service Center, Inc.,* 807 S.W.2d 476, 480 (Ky. 1991).

Appellate courts are not required to defer to the trial court when factual findings are not at issue. *Goldsmith v. Allied Building Components, Inc.,* 833 S.W.2d 378 (Ky. 1992). "The record must be viewed in a light most favorable to the party opposing the motion for summary judgment and all doubts are to be resolved in his favor [citation omitted]." *Steelvest,* 807 S.W.2d at 480. However, "a party opposing a properly supported summary judgment motion cannot defeat it without presenting at least some affirmative evidence showing that there is a genuine issue of material fact for trial." *Id.* at 482. *See also* Philipps, *Kentucky Practice,* CR 56.03, p. 418 (6th ed. 2005).

Adkins first argues the trial court erred in precluding him from presenting evidence or testimony on his ballast-related claims. CSXT sought partial summary judgment on Adkins' ballast claims contending that such claims were precluded by operation of the preemption clause contained in the FRSA, which precludes claims if the Federal Railroad Administration (FRA) has issued a regulation or order covering the subject matter underlying the claim. CSXT argued 49 C.F.R. § 213.103, a safety regulation governing track structure promulgated by the FRA, covered the subject matter of Adkins' FELA ballast claims, thus requiring the trial court to grant summary judgment on the issue. In granting the

motion, the trial court found "the cases of *Nickels v. Grand Truck* (sic) *Western Railroad, Inc.* and *Cooper v. CSXT*, 560 F.3d 426 (6th Cir. (Mich.) March 28, 2009) to be instructive on the issue" and refused to rule inconsistently with those opinions.

In *Nickels*, the plaintiffs alleged they had suffered leg and back injuries as a result of walking on railroad ballast. Similar to the instant case, the *Nickels* plaintiffs alleged the railroad was negligent in failing to provide a safe work environment by using improperly sized ballast in its railyards. The Sixth Circuit found that although 49 C.F.R. § 213.103 did not specifically address ballast size, the regulation subsumed the issue, and that the preemption clause of the FRSA precluded the plaintiff's FELA claims. Based on this reasoning, the trial court ruled that Adkins was precluded from presenting testimony or evidence that the size of ballast "caused, contributed to or aggravated any of Plaintiff's alleged injuries." We disagree.

In the recent and factually similar case of *Booth v. CSX Transportation, Inc.*, 334 S.W.3d 897 (Ky. App. 2011), a panel of this Court addressed the very issue presented in this appeal. The *Booth* Court refused to adopt the *Nickels* holding and declined "'to preclude a negligence claim under FELA for any conduct by the railroad even remotely covered by a regulation enacted under FRSA.'" *Id.* at 901-02 (quoting *Grimes v. Norfolk Southern Ry. Co.*, 116 F.Supp.2d 995, 1002-03 (N.D. Ind. 2000)). In reversing the lower court's ruling to the contrary, it found 49 C.F.R. § 213.103 did not cover the subject matter

at issue and thus held the FRSA did not operate to preclude Booth's negligence action. Likewise, we hold the trial court here erred in granting partial summary judgment to CSXT on Adkins' ballast-related claims.

Were this the sole issue presented in this appeal, we would be required to reverse and remand for reconsideration. However, because we believe other issues presented herein are dispositive, remand is unnecessary for the proper resolution of the matter.

Adkins next contends the trial court erred in granting summary judgment on his negligence claim. He believes the trial court incorrectly found that because this was a cumulative injury claim he was required to present expert testimony to establish the standard of care and breach of that standard. Adkins alleges his testimony regarding his request for assistance in performing his work duties and CSXT's refusal to provide such assistance was sufficient to withstand a motion for summary judgment as it tended to establish a causal connection between CSXT's alleged negligence and his alleged injuries, or at least created a genuine issue of material fact to be decided by a jury. We disagree.

To succeed on a FELA negligence claim, a plaintiff is required to plead and prove the common law elements of duty, breach, foreseeablity and causation. *Van Gorder v. Grand Trunk W. R.R., Inc.*, 509 F.3d 265 (6th Cir. 2007). Although we agree with Adkins that FELA relaxes the standard of proof regarding causation, it does not lessen the burden to prove the elements of negligence. "[A] plaintiff cannot benefit from FELA's relaxed causation standard unless he can

prove that the employer was negligent in the first place . . . ." *Id.* at 271. "FELA claims, like common law negligence claims, must be supported by expert testimony where they involve issues . . . beyond the common experience and understanding of the average jury." *In re Amtrak Sunset Ltd. Train Crash in Bayou Canot, Ala. on Sept. 22, 1993*, 188 F.Supp.2d 1341, 1349 (S.D. Ala. 1999).

Whether expert testimony is required in a given case is squarely within the trial court's discretion. *Keene v. Commonwealth,* 516 S.W.2d 852, 855 (Ky. 1974). Absent an abuse of discretion, we will not disturb the trial court's ruling. *Baptist Healthcare Systems, Inc. v. Miller,* 177 S.W.3d 676, 680-81 (Ky. 2005). Because the "business of operating a railroad entails technical and logistical problems with which the ordinary layman has had little or no experience[,]" *Bridger v. Union Ry. Co.*, 355 F.2d 382, 389 (6th Cir. 1966), the failure to provide expert testimony regarding the applicable standard of care is fatal to Adkins' claims. We do not believe that a lay juror would possess sufficient knowledge of the working conditions of a railyard to independently determine whether CSXT put Adkins at an unreasonable risk of cumulative trauma injury. Likewise, and contrary to Adkins' contention, the record does not contain sufficient facts to permit an inference that CSXT knew or should have known that the risk of injury posed by the conditions of its railyard was unreasonable. Therefore, we hold the trial court did not abuse its discretion in holding Adkins was required to present expert testimony regarding the applicable standard of care and that CSXT breached that duty, and his inability to do so precluded his ability

to establish a *prima facie* case of negligence. There was no abuse of discretion and the trial court correctly dismissed Adkins' claims.

Finally, because of our holding on the negligence issue, we believe Adkins' arguments regarding the impropriety of the trial court's grant of summary judgment as to his knee injury are moot. We also believe the trial court's reliance on CSXT's allegations of a prior recovery for the same injury and violations of the applicable statute of limitations were mere surplusage, without which the grant of summary judgment would still be proper. Therefore, no further discussion of Adkins' arguments is warranted.

For the foregoing reasons, the judgment of the Perry Circuit Court is affirmed.

ISAAC, SENIOR JUDGE, CONCURS.

THOMPSON, JUDGE, CONCURS IN RESULT ONLY.

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