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Commonwealth of Kentucky

Court of Appeals

NO. 2011-CA-000178-MR

JEFFREY T. CANIFF — APPELLANT

v.

APPEAL FROM PERRY CIRCUIT COURT
HONORABLE WILLIAM ENGLE, III, JUDGE
ACTION NO. 07-CI-00741

CSX TRANSPORTATION, INC. — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: COMBS, NICKELL AND TAYLOR, JUDGES.

NICKELL, JUDGE: Jeffrey T. Caniff 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.

Caniff began his railroad career in 1979 working for the Chessie System at their yards located in Raceland, Kentucky, as a blacksmith helper. After

spending several years away from railroad work, he later became an employee of CSXT at their yard in Russell, Kentucky, where he worked as a carman.[1] He spent the majority of his on-the-job time working in the yard rather than in a car shop.

Sometime in 1999 or 2000, in an unrelated incident, Caniff sustained an injury to his neck which required surgical intervention. He was released to return to work, but his injury caused him to request assistance performing tasks more frequently than he had prior to this unrelated accident.

On December 10, 2004, Caniff was dispatched to determine the trouble with a stopped train blocking a crossing and was told to fix it if he was able. Upon arriving at the disabled train, Caniff determined that a knuckle—an approximately seventy-five pound device used to link two train cars together—was broken and needed to be replaced. Because he did not have a replacement on his service truck, Caniff returned to the shop to retrieve a replacement part. Prior to departing the shop, Caniff inquired of his supervisor, Kevin Frasure, whether another railroad employee, L.A. Smith, was available to assist him on this task. Frasure informed Caniff that Smith was busy with other work and to "do what [he could] do" to repair the train. Caniff did not seek assistance from any other railroad employees.

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

Caniff returned to the stopped train. Although the condition of the yard[2] and the location of the train on the tracks kept him from getting his truck closer than 200 feet from the train, he did not anticipate any difficulty in carrying the knuckle by himself and began to traverse the distance to the train. Approximately seventy to eighty feet into the walk, and as he was stepping over a rail, Caniff slipped on a wet piece of ballast.[3] To avoid dropping the knuckle on his feet, Caniff twisted to one side and fell, thereby injuring his back.

An unknown and unnamed conductor, who was standing nearby and witnessed the entire course of events, came to Caniff's aid and carried the knuckle the remainder of the way to the train. The conductor helped complete the repair of the broken knuckle. Caniff stated he had seen the conductor standing nearby and intended to request his assistance in installing the knuckle but never intended to ask for help carrying the new part to the train. Caniff finished his shift believing he had pulled a muscle or possibly aggravated his pre-existing neck injury. He reported the incident to Frasure sometime during the shift and to another supervisor sometime prior to January 3, 2005, his last day of work for CSXT.

As a result of the accident, Caniff experienced numbness, weakness and tremors, was unsteady on his feet, had an irregular gait, and was instructed not

[2] Caniff stated in his deposition that there had been a substantial amount of rainfall in the days prior to his injury, resulting in soggy conditions and areas of standing water and mud throughout the yard. He also stated the vehicle he was driving was large and heavy, thus limiting the terrain over which it could safely travel.

[3] As used in the railroad context, "ballast" refers to the crushed stone placed around and under railroad tracks and ties for structural support, drainage and erosion control.

to lift over twenty pounds. He was also advised not to sit, stand or walk for extended periods of time.

On November 30, 2007, Caniff filed the instant complaint in the Perry Circuit Court seeking damages for his injuries under the Federal Employer's Liability Act (FELA).[4] He alleged he sustained injuries to his back, shoulder and neck, or an aggravation of a previously existing condition, resulting from being required to work on large, uneven, and negligently maintained ballast and lifting a heavy knuckle without sufficient mechanical or manual assistance. He argued CSXT's negligence was the proximate cause of his injuries.

Through the course of a lengthy discovery period, Caniff produced only two fact witnesses: himself and another CSXT employee, John Quillen. Caniff's deposition testimony generally mirrored the facts recited herein. He stated CSXT was generally "not good" about resolving issues in the yards and excess ballast was allowed to accumulate in some areas while others would have none, resulting in puddles, standing water and mud, especially during periods of substantial rainfall like that which occurred in December of 2004. Although he claimed the general area around where his injury occurred had many muddy areas, he conceded there was no mud on the tracks themselves where he actually fell. He could not pinpoint any condition that caused him to fall, attributing it simply to "gravity." Caniff stated that in addition to the muddy and wet condition of the

[4] 45 U.S.C. §51, et seq. *See CSX Transp., Inc. v. Begley*, 313 S.W.3d 52, 57-60 (Ky. 2010), for an excellent discussion of the history and purpose of the FELA.

yard, the distance he was required to carry the knuckle most likely played a factor in his injury, although he did not elaborate on this issue. He admitted he did not request further assistance once he was told L.A. Smith was unavailable, while acknowledging the first rule of railroad workers to be "if it ain't safe, don't do it." He further admitted to having a pipe on his truck which could be threaded through the knuckle to enable two people to carry the load and to knowing a conductor was standing nearby at the time of his fall. Caniff stated he did not request assistance from the conductor because "you don't do that. . . . That's not his job."

Quillen did not witness Caniff's fall and was unaware of the precise location where it occurred. Quillen was able to confirm that CSXT's Russell Yard suffered from drainage and mud issues in years past, but was unable to say specifically what the condition was in December 2004 at the time of Caniff's injury. Further, as he did not know where Caniff fell, he testified he would "have no clue" whether ballast conditions contributed to Caniff's injury. Upon questioning, Quillen stated he had previously carried knuckles by himself on multiple occasions, specifically recalling one instance of carrying one in excess of 3,000 feet. He stated that at the time of the deposition a new, two-person carrying tool had been introduced which was unavailable in 2004. Thus, Quillen averred that although he did the job alone in 2004, he would no longer do so based on the advent of the new tool. No other testimony was offered regarding standard practices for carrying knuckles.

CSXT moved for summary judgment on Caniff's ballast claim on October 6, 2009. Following a hearing, the trial court concluded that genuine issues of material fact existed on the issue and denied the motion on December 21, 2009. On May 18, 2010, CSXT again moved the trial court for summary judgment, this time on all of Caniff's claims. The trial court granted the motion and found that Caniff had failed to identify any act or omission from CSXT with respect to the condition of the yard ballast which contributed to his fall. The trial court further found the issue of whether Caniff was required to carry too much weight for too far of a distance necessitated a showing that CSXT's standards were outside the generally accepted railroad standards at the time. The trial court, believing this was a matter beyond the common knowledge of a jury, held that expert testimony was required and Caniff's failure to procure such an expert was fatal to his claim. This appeal followed.

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). With these standards in mind, we turn to the allegations presented in this appeal.

First, it appears Caniff has abandoned his claim about improperly maintained ballast as no argument is made on appeal regarding the trial court's entry of summary judgment on the issue. "An appellant's failure to discuss particular errors in his brief is the same as if no brief at all had been filed on those issues." *Hugenberg v. W. Am. Ins. Co.*, 249 S.W.3d 174, 187-88 (Ky. App. 2006)

(quoting *Milby v. Mears*, 580 S.W.2d 724, 727 (Ky. App. 1979)). Therefore, no further discussion of the ballast maintenance issue is warranted.

Next, 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 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 Caniff's claims. We agree with the trial court that a lay juror not would possess

sufficient knowledge of the working conditions of a railyard to independently determine whether CSXT put Caniff at an unreasonable risk of traumatic injury.

Therefore, we hold the trial court did not abuse its discretion in holding Caniff 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 granted summary judgment and dismissed Caniff's claims.

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

ALL CONCUR.

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