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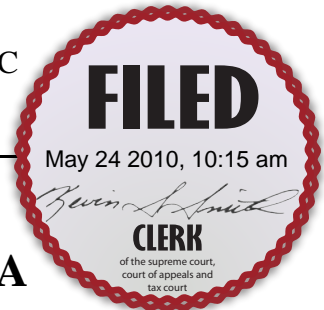
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**IN THE
COURT OF APPEALS OF INDIANA**

GARY PENNINGTON and CHARLENE
PENNINGTON, as Co-Administrators of the
ESTATE OF JEFFREY PENNINGTON,

Appellants-Defendants,

VS.

WHITE CONSTRUCTION, INC., and
CSX TRANSPORTATION, INC.,

Appellees-Plaintiffs.

No. 83A05-0910-CV-584

APPEAL FROM THE VERMILLION CIRCUIT COURT
The Honorable Bruce V. Stengel, Judge
Cause No. 83C01-0805-CT-4

May 24, 2010

MEMORANDUM DECISION – NOT FOR PUBLICATION

BARNES, Judge

Case Summary

Gary Pennington and Charlene Pennington, as the co-administrators of Jeffery Pennington’s Estate (“the Estate”), appeal the trial court’s grant of summary judgment in favor of White Construction, Inc., (“White”) and CSX Transportation, Inc., (“CSX”). We affirm.

Issue

The Estate raises three issues, which we consolidate and restate as whether the Comparative Fault Act bars the Estate’s action as a matter of law.

Facts

At approximately 10:25 a.m. on August 10, 2007, Pennington drove a tractor-trailer flatbed truck to pick up equipment at White’s facility in Vermillion County. Pennington entered the White facility via a drive that crossed CSX railroad tracks at a private railroad crossing. The crossing was marked with cross bucks and a stop sign. Below the cross bucks and stop sign, a white sign with red lettering indicated that “shipping and receiving” was ahead. App. p. 92. As Pennington neared the crossing, a CSX train approached the crossing with its headlight on and its whistle blowing. The

train was traveling just under the speed limit of sixty miles per hour. Pennington did not stop or slow down before he began crossing the tracks, and his truck was struck by the train, causing an explosion. Pennington died from injuries sustained in the accident, which was captured on video by the train's onboard camera.

On May 7, 2008, the Estate filed a complaint alleging that CSX and White were negligent. On April 29, 2009, White moved for summary judgment and, on June 1, 2009, the Estate responded. On June 15, 2009, CSX moved for summary judgment and, on July 13, 2009, the Estate responded. On July 23, 2009, White replied to the Estate's response. Following a hearing, the trial court granted White's and CSX's motions for summary judgment. The Estate now appeals.

Analysis

Our standard of review for summary judgment is the same as that used by the trial court: summary judgment is appropriate only where there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. Bushong v. Williamson, 790 N.E.2d 467, 473 (Ind. 2003) (citing Ind. Trial Rule 56(C)). We construe all facts and reasonable inferences drawn from those facts in favor of the non-moving party. Id. "Also, review of a summary judgment motion is limited to those materials designated to the trial court." Id.

Summary judgment serves to terminate litigation about which there can be no factual dispute and which may be determined as a matter of law. Id. at 474. "Once the moving party has sustained its initial burden of proving the absence of a genuine issue of material fact and the appropriateness of judgment as a matter of law, the party opposing

summary judgment must respond by designating specific facts establishing a genuine issue for trial.” Id. A factual issue is material for summary judgment purposes if it bears on the ultimate resolution of a relevant issue. Id. “A factual issue is genuine if it is not capable of being conclusively foreclosed by reference to undisputed facts.” Id. Thus, despite conflicting facts and inferences on some elements of a claim, summary judgment may be proper where there is no dispute or conflict regarding a fact that is dispositive of the claim. Id. If the opposing party fails to meet its responsive burden, the trial court shall render summary judgment. Id.

“To prevail on a claim of negligence, a plaintiff is required to prove: (1) a duty owed by the defendant to the plaintiff; (2) a breach of that duty by the defendant; and (3) an injury to the plaintiff proximately caused by the breach.” Ford Motor Co. v. Rushford, 868 N.E.2d 806, 810 (Ind. 2007). “In negligence cases, summary judgment is rarely appropriate because they are particularly fact sensitive and are governed by a standard of the objective reasonable person-one best applied by a jury after hearing all of the evidence.” Schoop’s Rest. v. Hardy, 863 N.E.2d 451, 454 (Ind. Ct. App. 2007). “Nonetheless, summary judgment is appropriate when the undisputed material evidence negates one element of a negligence claim.” Id.

Both White and CSX argue that summary judgment was proper because Pennington was more than fifty percent at fault as a matter of law. The Comparative Fault Act provides:

(a) In an action based on fault that is brought against:

(1) one (1) defendant; or

(2) two (2) or more defendants who may be treated as a single party;

the claimant is barred from recovery if the claimant's contributory fault is greater than the fault of all persons whose fault proximately contributed to the claimant's damages.

(b) In an action based on fault that is brought against two (2) or more defendants, the claimant is barred from recovery if the claimant's contributory fault is greater than the fault of all persons whose fault proximately contributed to the claimant's damages.

Ind. Code § 34-51-2-6. For purposes of the Comparative Fault Act, the term "fault," "includes any act or omission that is negligent, willful, wanton, reckless, or intentional toward the person or property of others. The term also includes unreasonable assumption of risk not constituting an enforceable express consent, incurred risk, and unreasonable failure to avoid an injury or to mitigate damages." I.C. § 34-6-2-45(b) (emphasis added).

The Comparative Fault Act modified the common law rule of contributory negligence, which precluded a victim from recovering damages if the victim was even slightly negligent, and permits a jury to allocate fault among parties. Horine v. Homes by Dave Thompson, LLC, 834 N.E.2d 680, 685 (Ind. Ct. App. 2005). The Comparative Fault Act diminishes a claimant's recovery by the amount of the claimant's contributory fault, and bars recovery altogether in situations where the claimant's contributory fault is found to be greater than the fault of all other persons whose fault proximately contributed to the claimant's damages. Id. "Fault apportionment under the Comparative Fault Act is

uniquely a question of fact to be decided by a jury, unless there is no evidentiary dispute and the factfinder is able to come to only one logical conclusion.” Id.

Here, the facts are undisputed. The accident occurred during the morning on a clear day. An eyewitness stated that he saw Pennington turn from Highway 63 onto the main drive leading to the White facility. It was approximately 1/8 of a mile from Highway 63 to the crossing. Pennington was traveling approximately ten miles per hour as he approached the crossing. Cross bucks and a stop sign marked the crossing. The train had its headlight on and was blowing its whistle as it approached the intersection.

At the time of the accident, there were no visual obstructions, like trees or buildings that would have blocked one’s view of the tracks. At a deposition, one witness testified:

Q: If you approached the crossing and stopped at the stop sign and looked both directions, is there any way that you would not see an approaching train?

A: No, there is not.

* * * * *

Q: Had [Pennington] stopped and looked for the train, do you believe it would have been visible?

A: Yes, I do.

Q: From where he was at, there was nothing that would have obstructed his view of the oncoming train?

A: Correct.

App. pp. 89, 91. Another witness testified:

Q: Could you see a train approaching? If you're stopped at that stop sign and a train is coming toward you, can you see the train approaching?

A: Yes.

Q: If a train is approaching and blows its whistle, can you hear that whistle?

A: Yes.

Q: If you come to the crossing and stop at the stop sign and look, is there any way you would not see the oncoming train?

A: No.

Id. at 260. This evidence regarding the visibility of the signs and the view of the track is undisputed.

Pennington did not stop at the stop sign. Instead, he stopped the truck in the middle of the tracks. Pennington's truck was struck a "split second" after he stopped. Id. at 89. The train's engineer testified that, even if he had applied the brakes as soon as he saw the truck, the train could not have stopped before hitting the truck. The train's conductor testified that, even if they applied the brakes when the truck was two full lengths from the crossing, the train could not have stopped before it reached the crossing. The descriptions of the accident are confirmed by video taken by the train's onboard camera.

In an attempt to establish an issue of fact for trial, the Estate points to the report of Colon Fulk, who had thirty-three years of onboard experience in train operations. Since 1994, Fulk has been employed by Railex, Inc., a consulting firm specializing in all aspects of train operations. In his report, Fulk concluded:

A. It is my opinion the manner in which the signs were displayed, at the crossing, confused and distracted Mr. Pennington's attention away from the rail/highway grade crossing. He was a truck driver, and it is reasonable to believe he would have been looking for directions to the loading docks in the industry. It is my opinion Mr. Pennington saw the sign directing him towards the shipping docks. It is my opinion he did just what the sign indicated for him to do, follow the arrows, keep going straight ahead. Mixing the three signs together was completely negligent and wrong. The signs displayed were misleading. One sign gives warning of a railroad crossing, one gives an indication to stop, another gives instructions with arrows indicating to continue across the track. All three of the aforementioned signs were attached to the same posts. It is important to note the sign stating, "Shipping, Receiving", was the smallest sign and had the smallest print of the three, thus causing the sign to require more attention to see and read.

B. It is my opinion the CSXT train crew failed to apply the emergency braking in a timely manner. As documented by the video data downloaded from the lead locomotive, it was obvious Mr. Pennington was not aware of the presence of the train. He continued to operate the truck at a speed that appeared to be constant from the time it came into view of the camera until the point of impact. Therefore, the conductor and engineer on-board the train should have recognized the truck was not planning to stop prior to fouling the crossing. During my review of the video it was obvious from the time the truck first came into view and was not going to stop short of the crossing. The train crew should have applied emergency braking as soon as the truck came into sight. A reduction in train speed prior to the crossing may have greatly decreased the severity of this incident.

C. The CSXT train crew was negligent by not sounding the proper whistle signal from the locomotive while approaching the crossing. The most widely recognized whistle signal, used in the railroad industry, is a succession of sounds, blasted from the locomotive horn, when trying to attract the attention of people approaching the train. A succession of locomotive horn blasts is an effective method of attracting the attention of people on or near the railroad track.

It works. I have used this method and seen it used successfully on many occasions. Additionally, it is part of the CSXT Operating Rules. . . .

Id. at 44. In an amended report,¹ Fulk also opined that the train’s crew was not taught “to use the succession of sounds to warn people on and/or near the track.” Id. at 218.

Fulk’s expertise relates to what the train crew should have or could have done to prevent an accident. There is no evidence Fulk has any expertise with respect to signage and how it might have confused Pennington. Further, although Fulk calculated the rate at which the train would have slowed had it applied the brakes sooner, there is no scientific support for his conclusion that a reduction in train speed before the crossing would have “greatly decreased the severity of this incident.” Id. at 44. Finally, even if short successive whistle blasts may be effective at preventing accidents, Fulk’s report does not address the effectiveness of a constant whistle blast, which was used here.²

For these reasons, the opinions in Fulk’s report are largely speculation, which cannot create questions of fact. See Beatty v. LaFontaine, 896 N.E.2d 16, 20 (Ind. Ct. App. 2008), trans. denied. “Opinions expressing a mere possibility with regard to a hypothetical situation are insufficient to establish a genuine issue of material fact. Put another way, guesses, supposition and conjecture are not sufficient to create a genuine issue of material fact to defeat summary judgment.” Id. (quotations and citations

¹ Based on the Estate’s designations of evidence, it is not clear which report was designated. For the purposes of our decision on appeal, however, we assume they were both properly designated.

² One witness testified that the train whistle was blowing “multiple blasts.” App. p. 378. However, because we construe the facts most favorable to the non-moving party, we will assume that the train was sounding one continuous whistle blast.

omitted); see also Messer v. Cerestar USA, Inc., 803 N.E.2d 1240, 1248 (Ind. Ct. App. 2004) (“Before admitting expert testimony, trial courts must assess whether the reasoning or methodology underlying the testimony is scientifically valid and whether the reasoning or methodology properly can be applied to the facts in issue.”), trans. denied.

Moreover, regardless of the admissibility of Fulk’s conclusions, Pennington’s obligation to yield to the train was clear. “When a stop sign is erected at a railroad crossing, the driver of a vehicle shall stop within fifty (50) feet but not less than ten (10) feet from the nearest track of the grade crossing and shall proceed only upon exercising due care.” I.C. § 9-21-4-16. Further:

Every commercial motor vehicle other than those listed in § 392.10 shall, upon approaching a railroad grade crossing, be driven at a rate of speed which will permit said commercial motor vehicle to be stopped before reaching the nearest rail of such crossing and shall not be driven upon or over such crossing until due caution has been taken to ascertain that the course is clear.

49 C.F.R. § 392.11. Finally, “[i]t is well settled that, because a railroad crossing is a known place of danger, drivers entering a crossing must exercise reasonable care for their own safety.” Consolidated Rail Corp. v. Thomas, 463 N.E.2d 315, 320 (Ind. Ct. App. 1984).

Even if, as Fulk concluded, the signage was misleading, a reduction in speed may have reduced the severity of the accident, and successive horn blasts are an effective method of attracting attention and CSX failed to teach its employees how to use properly

use the whistle, Pennington disregarded the stop sign.³ Had he stopped, Pennington undisputedly would have seen the train and avoided the accident. Although the accident is tragic, this a case in which a fact finder could have only reached one conclusion—Pennington’s fault is undisputedly greater than any combined fault of White and CSX. Thus, regardless of whether the Estate can establish that White and/or CSX were negligent, Pennington’s comparative fault bars his recovery.⁴ See Ind. Code § 34-51-2-6(b). Under these unique circumstances, summary judgment was proper. See Barnard v. Saturn Corp., a Div. of General Motors Corp., 790 N.E.2d 1023, 1031 (Ind. Ct. App. 2003) (holding no reasonable trier of fact could find that injured person was less than fifty percent at fault for his injuries and that defendants were entitled to judgment as a matter of law), trans. denied; Thiele v. Norfolk & W. Ry Co., 68 F.3d 179 (7th Cir. 1995) (applying Indiana law and affirming grant of summary judgment where driver truck by train violated his duty to exercise reasonable care for his own safety and his statutory duty to stop and was more than fifty percent responsible for his injuries).

³ The Estate also appears to argue that Pennington was not negligent because an asphalt plant operator, who was in an office of the asphalt plant while the plant was running at the time of the accident, did not hear the train’s whistle. However, this same witness testified that the whistle might have blown but he did not hear it. He stated that, at the time of the accident, he was “inside a building with closed doors and windows. [He] couldn’t hear anything on the outside.” App. p. 265. This evidence does not create a genuine issue of material fact for trial.

⁴ On appeal, the Estate relies on the last clear chance doctrine to establish that CSX owed Pennington a duty of reasonable care. In another context, however, we have observed, “Under comparative fault, the need for an ameliorative doctrine such as last clear chance is eliminated. Last clear chance in reality permits a comparison of fault.” Hull v. Taylor, 644 N.E.2d 622, 624 (Ind. Ct. App. 1994). Based on this reasoning, the last clear chance doctrine is not relevant to the issue of duty under a comparative fault scheme.

Conclusion

The trial court properly granted White's and CSX's motions for summary judgment because Pennington was more than fifty percent at fault for the accident, barring the Estate from recovery under the Comparative Fault Act. We affirm.

Affirmed.

May, J., and ROBB, J., concur.