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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2006-CA-000724-MR

MICHAEL L. PERDUE — APPELLANT

v.

APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE STEVE MERSHON, JUDGE
ACTION NO. 04-CI-009934

CSX TRANSPORTATION, INC. — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: COMBS, CHIEF JUDGE; MOORE, JUDGE; AND HENRY,[1] SENIOR JUDGE.

HENRY, SENIOR JUDGE: The appellant, Michael L. Perdue, initiated this action against the appellee, CSX Transportation, Inc., alleging that CSX was liable for his injuries under the negligence provisions of the Federal Employers' Liability Act, and under the strict liability provisions of the Safety Appliance Act and the Locomotive Inspection Act. Mr. Perdue appeals from the judgment entered pursuant to the jury

[1] Senior Judge Michael L. Henry sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

verdict in favor of CSX. On appeal, he contends that the trial court erred in allowing CSX to introduce evidence of post-incident inspection records and in instructing the jury.

Perdue worked for CSX as an engineer and operated a wheel-style handbrake on locomotives during the course of his duties. The handbrake consists of a wheel, mounted approximately waist height, and a chain device. Turning the wheel clockwise tightens the chain and applies the brake shoe to the locomotive's wheel; turning the wheel counterclockwise loosens the chain and releases the brake shoe from the locomotive's wheel. Perdue claims that on September 26, 2002, he experienced pain after he twisted his back into an awkward position when the wheel suddenly stopped as he was releasing the handbrake on CSX Locomotive No. 256. He continued to work with the handbrake, released it, and continued with his shift. Other than Perdue, no other person witnessed the incident. He maintains that he sustained permanent injuries to his back as a result of the handbrake's functioning on September 26, 2002.

In his complaint, as amended, Perdue asserted that CSX was negligent under the Federal Employers' Locomotive Act (FELA), 45 U.S.C. § 51 et seq., for failing to provide him a safe place to work and for failing to properly inspect, test, and maintain the locomotive, specifically the handbrake. Perdue claimed that CSX was strictly liable under the Locomotive Inspection Act (LIA), 49 U.S.C. § 20701 et seq., for his injuries from a defective handbrake which was unsafe to operate without unnecessary danger of personal injury. Perdue also asserted a claim under the Safety Appliance Act (SAA), 49

U.S.C. § 20301 et seq., for CSX's failing to equip its locomotive with an efficient handbrake on the date of his injuries.

Perdue went to trial on the three claims, introducing evidence in support of his negligence claim and his strict liability claims. During the conference on the jury instructions after the close of evidence, the trial court dismissed the FELA negligence claim. Perdue does not appeal this decision. The jury found in favor of CSX, and this appeal followed the entry of the final judgment.

The FELA provides in pertinent part that a railroad carrier is liable in damages to its employees who sustain an injury "resulting in whole or in part . . . by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances . . . or other equipment." 45 U.S.C. § 51. A FELA claimant must prove the common law elements of negligence, including duty, breach, foreseeability, causation and injury. *Adams v. CSX Transp., Inc.*, 899 F.2d 536, 539 (6th Cir. 1990); *Booth v. CSX Transp., Inc.*, 211 S.W.3d 81 (Ky.App. 2006). The FELA is to be liberally construed to achieve its purpose of protecting railroad employees; however, it "does not make the employer the insurer of the safety of his employees while they are on duty. The basis of liability is [the employer's] negligence, not the fact that injuries occur." *Consolidated Rail Corp. v. Gottshall*, 512 U.S. 532, 543 (1994), *citing Ellis v. Union Pac. R. Co.*, 329 U.S. 649, 653 (1947). A plaintiff's burden of proving causation is relaxed from that required in a typical negligence claim. *Rogers v. Missouri Pac. R. Co.*, 352 U.S. 500, 506 (1957). A FELA plaintiff must demonstrate that his injuries were caused "in whole or in part" by the

employer's negligence, not that the employer's negligence was a substantial cause of the injuries.

The LIA, also known as the Locomotive Boiler Inspection Act, states, in relevant part, that a railroad carrier may "use or allow to be used a locomotive or tender on its railroad line only when the locomotive or tender and its parts and appurtenances . . . [a]re in proper condition and safe to operate without unnecessary danger of personal injury . . . ." 49 U.S.C. § 20701(1). A railroad is strictly liable under the LIA for injuries caused by a mechanical imperfection or any other condition of a locomotive which makes it unsafe to operate and involves "unnecessary danger of personal injury." *Lilly v. Grand Trunk Western R. Co.*, 317 U.S. 481 (1943); *Louisville & N. R. Co. v. Stephens*, 298 Ky. 328, 182 S.W.2d 447 (Ky. 1944).

The SAA imposes strict liability on railroad carriers for a violation of its requirements, stating, in relevant part, that a railroad carrier may "use or allow to be used on any of its railroad lines . . . a vehicle only if it is equipped with . . . efficient hand brakes . . . ." 49 U.S.C § 20302(a)(1)(B). An efficient handbrake is "adequate in performance; producing properly a desired effect. Inefficient means not producing or not capable of producing the desired effect; incapable; incompetent; inadequate." *Myers v. Reading Co.*, 331 U.S. 477, 483 (1947). Two methods exist for demonstrating that a handbrake is not efficient: "'Evidence may be adduced to establish some particular defect, or the same inefficiency may be established by showing a failure to function, when operated with due care, in the normal, natural, and usual manner.'" *Id., quoting*

Didinger v. Pennsylvania R.R. Co., 39 F.2d 798, 799 (6th Cir. 1930). A handbrake's inefficiency demonstrated by a failure to function does not require proof of a visible defect; rather, a plaintiff must establish that the handbrake "failed to work efficiently and properly even though it worked efficiently both before and after the occasion in question. The test in fact is the performance of the appliance." *Myers* at 483.

The LIA and the SAA are essentially amendments to the FELA and proof of a violation of the LIA or the SAA establishes negligence as a matter of law. *Urie v. Thompson*, 337 U.S. 163 (1949). Once a violation of the statute is established, a plaintiff must demonstrate causation by showing that he or she suffered injuries "resulting in whole or in part" from the violation. *Coray v. Southern Pac. Co.*, 335 U.S. 520, 524 (1949). While the FELA covers a wide variety of situations in which a railroad's negligence is alleged to have caused an employee's injuries, liability under the LIA and the SAA occurs only in the circumstances enumerated in the statutes.

Perdue first asserts that the trial court abused it discretion in allowing CSX to introduce into evidence a summary chart of its repair and inspections of the handbrake on Locomotive No. 256. The summary chart listed sixteen inspections spanning from February 8, 2002, through October 22, 2005. Three of the sixteen inspections occurred prior to the September 26, 2002, incident. Perdue claims that this evidence was irrelevant and highly prejudicial because the only issue for the jury was whether the handbrake on CSX Locomotive No. 256 failed to function efficiently on September 26, 2002, and caused his injuries.

We review rulings on the admissibility of evidence to determine whether a trial court abused its discretion. *Goodyear Tire and Rubber Co. v. Thompson*, 11 S.W.3d 575, 577 (Ky. 2000). Having reviewed the record and the relevant authorities, we cannot agree that Perdue was prejudiced by the court's allowing the disputed evidence.

Claims under the SAA and the LIA are not based on negligence. If it is clearly shown that a handbrake failed to efficiently function "when operated with due care, in the normal, natural and usual manner" on one occasion and thereby caused an employee's injuries, a railroad cannot avoid liability under the SAA by demonstrating its due care or diligence, or that the handbrake worked properly at other times. *Myers*, 331 U.S. at 483; *Urie*, 337 U.S. at 189.

Perdue cites numerous cases holding that a railroad cannot avoid liability by showing its diligent care, but these authorities do not address the precise issue before the court. Here, Perdue's description of the handbrake's functioning at the time of the incident was not substantiated and CSX disputed his account.

In *Texas & P. Ry. Co. v. Griffith*, 265 F.2d 489 (5th Cir. 1959), the plaintiff established a prima facie case of a violation of the SAA on his own testimony. The court stated that "[t]he evidence as to the condition before and after the accident is material in enabling the jury to decide whether the plaintiff's testimony as to the brake slipping was credible. The evidence is immaterial under the Safety Appliance Act once the injured employee has shown non-compliance on the part of the railroad, that is,

failure to furnish an efficient, functioning brake." 265 F.2d at 493. The court in *Richardson v. Consolidated Rail Corp.*, 17 F.3d 213, 217 (7th Cir. 1994), *superseded on other grounds by Rule as stated in Musser v. Gentiva Health Services*, 356 F.3d 751 n.2 (7th Cir. 2004), held that evidence of inspection records was admissible to challenge the plaintiff's allegations of a brake's malfunctioning where no person other than the plaintiff witnessed the incident and the railroad disputed whether the brake malfunctioned.

Perdue's testimony, standing alone, was sufficient to create a jury question as to whether the brake malfunctioned during his September 26, 2002, shift. The disputed evidence of the brake's functioning outside September 26, 2002, was admissible for CSX to rebut Perdue's testimony. Perdue had the burden of proving that the handbrake failed to operate as intended at the time of his injuries, and it was for the jury to determine Perdue's credibility. *See Richardson*; *see also Spotts v. Baltimore & O.R. Co.*, 102 F. 2d 160, 162-63 (7th Cir. 1938), *cert. denied*, 307 U.S. 641 (1939).

Perdue also asserts that, even if the court did not abuse its discretion in permitting evidence of inspections contemporaneous to September 26, 2002, it erred in allowing evidence of three years' post-incident inspections. After considering the evidence introduced during Perdue's case-in-chief, this argument falls short. Perdue's expert, Mr. David Engle, testified that when he examined the handbrake on October 3, 2005, the handbrake "malfunctioned and did not operate as intended"; that it "bunched . . . and was defective and inoperable"; and that it "was not smooth [and] had a drag."

We find no reversible error in the trial court's allowing the summary chart of inspections through 2005, as it was relevant to the credibility of Perdue's account of the incident. Further, as will be more fully discussed in the following issue, the trial court properly instructed the jury that it was to determine whether the brake malfunctioned on September 26, 2002.

Perdue also contends that CSX made an improper closing argument when its counsel spoke to the brake's proper functioning on all other occasions and stated that the October 26, 2002, incident was a "phantom malfunction" because it has not malfunctioned at any other time. Perdue did not preserve this argument for appellate review because he did not object at the time of the alleged improper argument. *See Charash v. Johnson*, 43 S.W.3d 274 (Ky.App. 2000).

Next, Perdue asserts that the trial court erred in its instructions to the jury. He contends on appeal that the court erred in failing to give his tendered instructions and in including "thus causing an unnecessary danger of personal injury." We disagree.

In FELA litigation, federal law controls the substantive issues, and procedural matters are governed by state law. *St. Louis Southwestern Ry. Co. v. Dickerson*, 470 U.S. 409, 411 (1985). The instructions' form, that is, the way in which the FELA substantive law is presented to the jury, is a procedural matter. *See Pryor v. National R.R. Passenger Corp.*, 301 Ill.App.3d 628, 633, 703 N.E.2d 997, 1000-01 (Ill.App. 1998); *Duren v. Union Pacific R. Co.*, 980 S.W.2d 77, 79 (Mo.App. E.D. 1998); *see also,* Comment Note -- *Applicability of state practice and procedure in Federal*

Employers' Liability Act Actions Brought in State Courts, 79 A.L.R.2d 553 § 7 (1961 and Supplement).

This jurisdiction "uses the 'bare bones' method. This method does not include explaining evidentiary matters or evidentiary presumptions with the instructions. 'They should not contain an abundance of detail, but should provide only the 'bare bones' of the question for jury determination. This skeleton may then be fleshed out by counsel on closing argument.'" *Meyers v. Chapman Printing Co., Inc.*, 840 S.W.2d 814, 824 (Ky. 1992) (Citation omitted.). Instructions must advise the jury "what it must believe from the evidence in order to return a verdict in favor of the party who bears the burden of proof." *Meyers*, *id*. Our question on review is not whether Perdue's tendered instructions stated the substantive law more specifically, but to determine whether the delivered instruction misstated the law. *Olfice, Inc. v. Wilkey*, 173 S.W.3d 226 (Ky. 2005).

The court's instructions included the following:

> Mr. Perdue may establish CSX's liability under this Act either by demonstrating that on September 26, 2002, there was some particular mechanical defect with the brake or that on September 26, 2002, the brake failed to function, when operated with due care, in the normal, natural and usual manner, thus causing an unnecessary danger of personal injury.

The jury was then requested to answer the following question: "Do you believe from the evidence that on September 26th, 2002, the brake in question either had some particular mechanical defect or that the brake failed to perform, when operated with

due care, in the normal, natural and usual manner, thus causing an unnecessary danger of personal injury?" The jury answered "No" to the question, resulting in a verdict for CSX.

Perdue asserts that the instruction "allowed the jury to make assumptions as to the condition of the handbrake on the date of the incident based on the condition of the handbrake on numerous other unrelated occasions." Referencing his argument on the admissibility of CSX's summary inspection chart, Perdue claims that "when a plaintiff has alleged a violation of the FSAA due to an injury incurred by an inefficient operation of a handbrake, courts throughout the country have instructed the jury that operation before or after the accident was irrelevant." Perdue further asserts that Kentucky's bare bones approach is inapplicable in this FELA litigations and that the trial court was obligated to deliver his tendered instructions from the Modern Federal Jury Instructions.

As discussed previously, evidence of the handbrake's functioning on dates other than September 26, 2002, was relevant to the jury's determining Perdue's credibility as to the brake's malfunctioning on that date. Perdue's tendered instruction not only exceeded Kentucky's "bare bones" approach, but improperly limited the jury's using the disputed evidence to determine Perdue's credibility. More important, the trial court's instruction properly addressed the dispositive issue of whether the handbrake was unsafe, defective, or failed to function on September 26, 2002. The following excerpt from *Olfice*, 173 S.W.3d at 230, speaks to the issue at hand:

> "Bare bones" jury instructions must be given with the understanding that they are merely a framework for the applicable legal principles. It becomes the role of counsel, then, to flesh out during closing argument the legal nuances

> that are not included within the language of the instruction. *See Rogers* [*v. Kasdan*], 612 S.W.2d [133,] 136 [(Ky. 1981)]. This principle was aptly stated by Justice Palmore in the *Cox* decision, wherein he explained what a lawyer should do if he or she is not satisfied with the trial court's instructions: "[I]f counsel felt that the jury was too thick to get the point all he had to do was to explain it in his summation." *Cox* [*v. Cooper*], 510 S.W.2d [530,] 535 [(Ky. 1974)].

Perdue's counsel took full advantage of his opportunity during closing argument to explain to the jury that CSX violated the statute when the handbrake failed on September 26, 2002, regardless of the handbrake's functioning all other times. Perdue's closing argument followed CSX's closing argument, where its counsel argued that Perdue's testimony of the handbrake's malfunctioning was simply incredible. The trial court's instruction correctly stated the law, and the court did not abuse its discretion in refusing to give Perdue's tendered instruction that exceeded Kentucky's "bare bones" approach and "gave undue prominence to facts and issues." *See Rogers v. Kasdan*, 612 S.W.2d at 136.

Perdue also contends that the instruction improperly included the phrase from the LIA, "unnecessary danger of personal injury." He asserts that the LIA claim was dismissed, and that including the phrase from the LIA in the court's instructions increased his burden of proof in that he had to prove that the handbrake malfunctioned and that the malfunctioning "created an unnecessary danger of personal injury."

Perdue asserts on appeal that "the trial court and parties determined that the LIA was a non-issue to the case." This contention is not supported by the record. At the

trial court level Perdue had no objection to "unnecessary danger or personal injury" in the instruction on the statutory duties, but he objected to repeating that phrase in the question determining whether CSX violated its duties.

Perdue litigated this action under the FELA, the SAA, and the LIA. The negligence claim under the FELA was dismissed after the close of the evidence and before the trial court instructed the jury. During the bench conference on instructions, both parties agreed with the trial court's suggestion to not include the phrase “Locomotive Inspection Act” in the instructions. Agreeing to the deletion of the phrase "Locomotive Boiler Inspection Act," Perdue continued to advocate for his tendered instruction that quoted both the SAA and the LIA and included "safe to operate without unnecessary danger of personal injury." He strenuously asserted that his tendered instruction informing the jury that the handbrake’s functioning "before or after the specific occurrence is not relevant," be given with the tendered instruction quoting portions of the SAA and the LIA.

The trial court noted that "unnecessary danger of personal injury" appeared throughout the case law cited by Perdue, and specifically questioned Perdue's attorney, "Are you telling me that the federal Safety Appliance Act, the law itself, doesn't include the clause, 'thus causing unnecessary danger of personal injury?'" Perdue's attorney answered, "No, no, excuse me your honor, that's not the charge, I meant to say that's not in the charge." Perdue requested that the trial court to "read the statute. What the Safety Appliance Act states, and it talks about '[a] railroad carrier may use or allow to be used a

locomotive or tender on its railroad line only when the locomotive or tender and its parts and appurtenances are in proper condition and safe to operate without unnecessary danger of personal injury.'" *See* 49 U.S.C. § 20701 (Locomotive Inspection Act). In short, Perdue's argument to the trial court was that the phrase, "unnecessary danger of personal injury," appeared in the statute, but not in the federal charge, and that it was error to include it both in the instruction defining CSX's duties and in the question relating to whether CSX violated its duties.

Along with his tendered instruction quoting portions of the SAA and the LIA, Perdue insisted that the court deliver his tendered instruction, based on the Modern Federal Jury Instructions, that the jury's "inquiry should focus on the particular occasion in which a malfunction of the handbrake caused an injury to plaintiff. Whether the handbrake was defective or functioned properly before or after the specific occurrence is not relevant. The question is, did the handbrake function properly on this occasion." Since Perdue agreed in the trial court that the instructions should include the statutory duty of providing a locomotive with parts "safe to operate without unnecessary danger of personal injury," he cannot assert on appeal that the trial court erred in including the phrase in the instructions. *See Kennedy v. Commonwealth*, 544 S.W.2d 219 (Ky. 1976).

Perdue's argument that the jury might attribute his injuries from the September 26 incident to his pre-existing back condition, even if it believed that the handbrake malfunctioned, lacks merit. The court specifically instructed the jury that it could compensate Perdue for losses related to his pre-existing condition, to the extent that

the pre-existing condition was aroused or aggravated by the September 26, 2002, incident.

The SAA's stated purpose is "to promote safety in every area of railroad operations and reduce railroad-related accidents and incidents." 49 U.S.C. § 20101. While it is true that the SAA and the LIA target safety concerns in different ways, we find no reversible error in including "unnecessary danger of personal injury" in the instruction on the CSX's duties and in the question relating to whether CSX violated its duties. The instructions were not misleading and properly guided the jury in its determination of whether the brake malfunctioned on September 26 and caused Perdue's injuries. Perdue was free to argue during his closing argument about any of the particulars omitted from the instructions. The trial court did not abuse its discretion in failing to deliver Perdue's tendered instructions.

The judgment of the Jefferson Circuit Court is affirmed.

ALL CONCUR.

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