RENDERED: NOVEMBER 5, 2010; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2009-CA-001470-MR

CSX TRANSPORTATION, INC. APPELLANT

v. APPEAL FROM PERRY CIRCUIT COURT
HONORABLE WILLIAM ENGLE III, JUDGE
ACTION NO. 03-CI-00522

JIMMY COLLINS APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: CLAYTON AND KELLER, JUDGES; BUCKINGHAM,[1] SENIOR JUDGE.

CLAYTON, JUDGE: This is an appeal of a circuit court jury verdict. The appellant, CSX Transportation, Inc. ("CSX"), argues that several rulings by the trial court were in error and that, consequently, it should have been granted either

[1] Senior Judge David C. Buckingham 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.

its motion for directed verdict or its motion for judgment notwithstanding the verdict ("JNOV"), or, in the alternative, should now be granted a new trial.

For the foregoing reasons, we affirm the decisions of the trial court.

BACKGROUND INFORMATION

Appellee Jimmy Collins ("Collins") brought an action against CSX under the Federal Employers Liability Act ("FELA") in Perry Circuit Court in September of 2003. Collins asserted in his complaint that he had developed bilateral osteoarthritis as a result of CSX's failure to provide a reasonably safe work place.

In June of 2009, the trial court entered a final judgment based upon the jury's finding that CSX was liable for Collins's injuries. CSX now appeals that decision alleging several errors in the rulings of the trial court.

DISCUSSION

CSX first asserts that the trial court erred when it denied CSX's motion for a directed verdict and JNOV, or, in the alternative, motion for a new trial. In reviewing a denial of a motion for a directed verdict or for JNOV, an appellate court must reverse if it is shown that the verdict was either flagrantly or palpably contradictory to the evidence since such would indicate the jury reached the verdict through passion or prejudice. *Lewis v. Bledsoe Surface Min. Co.*, 798 S.W.2d 459, 461 (Ky. 1990) (citing *NCAA v. Hornung*, 754 S.W.2d 855, 860 (Ky. 1988)). Evidence in support of the prevailing party must be considered to be true. The reviewing court may not make determinations regarding credibility nor the

weight of the evidence, as such is within the purview of the jury. *Kentucky & Indiana Terminal R. Co. v. Cantrell*, 298 Ky. 743, 184 S.W.2d 111 (Ky. 1944), and *Cochran v. Downing*, 247 S.W.2d 228 (Ky. 1952).

In support of its argument, CSX contends that Dr. John F. Gilbert, Jr.'s testimony regarding medical causation was insufficient to submit to the jury. It argues that, under FELA, a claimant must prove the common law elements of negligence, including causation. *Adams v. CSX Transp., Inc*., 899 F.2d 536, 539 (6th Cir. 1990).

In *Rogers v. Missouri Pac. R. Co*., 352 U.S. 500, 506, 77 S. Ct. 443, 448, 1 L. Ed. 2d 493 (1957), the Supreme Court held that, under FELA "the test of a jury case is simply whether the proofs justify with reason the conclusion that employer negligence played any part, even the slightest, in producing the injury or death for which damages are sought." CSX contends that expert testimony is necessary in cases such as this where the development of bilateral osteoarthritis may not be within the purview of a lay person.

Dr. Gilbert is Collins's primary care physician. He treated him for osteoarthritis in his knees, the ailment which was the issue at trial. At trial, Dr. Gilbert testified that he diagnosed Collins with the disease and that his job duties at CSX were a possible contributing factor in his ailment.

Collins was a brakeman for CSX in Hazard, Kentucky. As part of his job, he worked on coal runs. This job required him to mount and dismount a moving train in order to line the switches for the train and to apply and release

hand brakes on the rail cars. Collins testified that the train was usually moving from four to five miles per hour, but that it could be moving as fast as twenty-two miles per hour. Collins retired from CSX on February 19, 1999.

In *Wills v. Amerada Hess Corp.*, 379 F.3d 32, 46 (2nd Cir. 2004), the Court found that:

> [w]here . . . the nexus between the injury and the alleged cause would not be obvious to the lay juror, "[e]xpert evidence is often required to establish the causal connection between the accident and some item of physical or mental injury." *Moody v. Maine Cent. R.R. Co.*, 833 F. 2d 693, 695 (1st Cir. 1987).

Dr. Gilbert referred Collins to Dr. Mukut Sharma, an orthopedic surgeon. Dr. Sharma diagnosed severe osteoarthritis in both knees and recommended knee replacement surgery. CSX asserts that the causation of bilateral osteoarthritis can only be shown through expert testimony. We believe the testimony of Dr. Gilbert is such expert testimony. In addition to Dr. Gilbert's testimony, Dr. Sharma's and Collins's testimony as to the normal working conditions of his job was sufficient to establish FELA's causation requirement. CSX cites the following in support of its argument that the medical testimony supplied by Drs. Gilbert and Sharma was not sufficient to establish causation:

> Perhaps nothing is absolutely certain in the field of medicine, but the intent of the law is that if a physician cannot form an opinion with sufficient certainty so as to make a medical judgment, neither can a jury use that information to reach a decision.

Combs v. Stortz, 276 S.W.3d 282, 296 (Ky. App. 2009) (citing *McMahon v Young*, 442 Pa. 484, 276 A.2d 534, 535 (Pa. 1971)). We believe, however, that Dr. Gilbert's testimony was sufficient to support the jury's finding of causation. As set forth above, there was also testimony from Dr. Sharma and Collins regarding Collins's job and his osteoarthritic condition. This was clearly enough to establish causation under the FELA standard. Thus, we find the trial court did not err in denying CSX's motions for direct verdict and JNOV or, in the alternative, a new trial.

Next, CSX contends that the trial court erred when it failed to instruct the jury on proximate cause. Specifically, CSX argues that FELA was drafted to be consistent with the common law concept of negligence. See *Urie v. Thompson,* 337 U.S. 163, 182, 69 S.Ct 1018, 1030, 93 L.Ed.1282 (1949). In *Southern Ry. Co. v. Gray*, 241 U.S. 333, 339, 36 S. Ct. 558, 560, 60 L. Ed.1030 (1916), the Court held that the rights and obligations under FELA required negligence on the part of a railroad for recovery.

CSX asserts that the omission of a proximate cause instruction is inconsistent with the traditional common law negligence and causation analysis required by FELA. The trial court in this case instructed the jury as follows:

> Did CSX Transportation's failure to provide a reasonably safe place to work, as identified in your response above, cause, in whole or in part, the injuries of which plaintiff complains?

Verdict Form 1(b).

In *Rogers v. Missouri Pacific R. Co*., 352 U.S. 500, 506-07, 77 S.Ct. 443, 449, 1 L.Ed. 2d 493 (1957), the U.S. Supreme Court held the following regarding proximate cause and FELA cases:

> Under [FELA] the test of a jury case is simply whether the proofs justify with reason the conclusion that employer negligence played any part, even the slightest, in producing the injury or death for which damages are sought. It does not matter that, from the evidence, the jury may also with reason, on grounds of probability, attribute the result to other causes, including the employee's contributory negligence. Judicial appraisal of the proofs to determine whether a jury question is presented is narrowly limited to the single inquiry whether, with reason, the conclusion may be drawn that negligence of the employer played any part at all in the injury or death. Judges are to fix their sights primarily to make that appraisal and, if that test is met, are bound to find that a case for the jury is made out whether or not the evidence allows the jury a choice of other probabilities. The statute expressly imposes liability upon the employer to pay damages for injury or death due "in whole or in part" to its negligence. (Footnote citations omitted).

Later, in *Page v. St. Louis Southwestern Ry. Co.,* 349 F.2d 820, 827 (5th Cir. 1965), the Fifth Circuit Court of Appeals held that:

> We ought to avoid those practices which "distract the jury's attention from the simple issues of whether the carrier was negligent and whether that negligence was the cause, in whole or in part, of the plaintiff's injury." (citation omitted). . . . When done in this fashion, with suitable accompanying general instruction which F.R. Civ. P. 49(a) calls for, there is no need any longer for putting this in the labored terms of "proximate cause" or "sole proximate cause" or "contributory negligence."

Congress has "deliberately adopted a negligence standard different from that of the common law." *Hausrath v. NewYork Cent. R. Co*., 401 F.2d 634 (6th Cir. 1968); *accord*, *Hamilton v. CSX Transp., Inc*., 208 S.W.3d 272, 278 (Ky. App. 2006). Based upon the relaxed standard of FELA, we find that Instruction No. 2 was adequate. Thus, we find the trial court did not err in failing to submit a "proximate cause" instruction.

Based upon the above, we affirm the decision of the trial court.

ALL CONCUR.

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