2011 IL App (1st) 102766

THIRD DIVISION
August 24, 2011

No. 1-10-2766

MARJORIE McDONALD, Executrix of the Estate of Thomas McDonald, Deceased, and MARJORIE McDONALD, Individually,	)	Appeal from the Circuit Court of Cook County
Plaintiffs-Appellees,	)	No. 07 L 2551
v.	)	
NORTHEAST ILLINOIS REGIONAL COMMUTER RAILROAD CORPORATION, d/b/a Metra/Metropolitan Rail,	)	Honorable Arnette R. Hubbard, Judge Presiding.
Defendant-Appellant.	)	

JUSTICE MURPHY delivered the judgment of the court, with opinion.
Presiding Justice Quinn and Justice Neville concurred in the judgment and opinion.

O P I N I O N

¶ 1 Defendant, Northeast Illinois Regional Commuter Railroad Corp., d/b/a Metra, appeals from orders of the circuit court of Cook County entering judgment on the jury's verdict in favor of plaintiff, Marjorie McDonald, individually and as the executrix of the estate of the decedent, Thomas McDonald, and denying its posttrial motion for judgment *n.o.v.* or a new trial. On appeal, defendant contends that it did not have a duty to warn the decedent of the oncoming train because he knew it was approaching and the danger presented by the train was open and obvious, that the decedent's negligence was the sole proximate cause of the accident, and that the circuit

court erred by allowing plaintiff to present evidence and argue to the jury that it was negligent for having failed to install and activate pedestrian signals prior to the accident. For the following reasons, we affirm.

¶ 2 BACKGROUND

¶ 3 On August 21, 2007, plaintiff filed an amended complaint, in which she asserted that defendant operated a train station at 3000 Willow Road in Glenview, Illinois (North Glenview station), and that she and the decedent went to that station on April 25, 2002, to board a southbound train to Chicago. Prior to boarding the train, the decedent crossed the tracks at the pedestrian crosswalk and was struck by one of defendant's trains that was running express through the North Glenview station toward Chicago. Defendant had installed pedestrian signals at the North Glenview station, but had not yet activated them at the time of the accident.

¶ 4 Plaintiff alleged that defendant owed the decedent the highest duty of care because it was a common carrier with respect to its operation of the North Glenview station and the passengers intending to board the trains therein and that it breached its duty of care by operating a train through the station without having activated the pedestrian signals it had previously installed; allowing the public to access the station when it knew it did not have adequate protections in place for the safety of pedestrians; failing to adequately warn the decedent that the pedestrian signals had not been activated; operating a train without keeping a proper and sufficient lookout; failing to adequately warn the decedent of the approach of the southbound express train; operating its train at an excessive rate of speed given the fact that the pedestrian signals had not been activated; failing to adequately slow the train and avoid hitting the decedent; and/or failing

to activate the pedestrian signals that had previously been installed. Plaintiff further alleged that as a result of one or more of defendant's breaches of its duty of care, the decedent sustained personal and pecuniary injuries, and she sustained a loss of consortium, society, and support.

¶ 5 Plaintiff also asserted that the decedent had since died of causes unrelated to the accident, that she voluntarily dismissed the cause of action on March 10, 2006, and that the complaint at issue was a refiling of that earlier action. Plaintiff requested the court enter judgment against defendant for a sum in excess of the jurisdictional limits of the law division of the circuit court of Cook County.

¶ 6 The record shows that defendant owned and operated the Milwaukee North Line, which consisted of two parallel tracks that ran north and south through the North Glenview station on its way to and from Chicago and Fox Lake, Illinois. Southbound trains ran on the west tracks and northbound trains ran on those to the east. At the time of the accident, a parking lot had been constructed to the east of the North Glenview station. Thus, a passenger who had parked in the parking lot and intended to board a southbound train would have to cross over both tracks at the crosswalk from the east platform to the west platform prior to the arrival of the train.

¶ 7 Plaintiff testified at trial that she and the decedent had not been to the North Glenview station prior to the accident, but had been to the other Glenview station about 30 times over the previous 3 years, and that the decedent had always obeyed the lights and bells that activated when a train was approaching a crossing. On the morning of the accident, they parked their car in the parking lot to the east of the train tracks at the North Glenview station, and the decedent realized he had forgotten his change in the car as they started walking toward the station.

Plaintiff continued across the tracks to the station, and the decedent returned to the car. Plaintiff waited for the decedent on the platform on the west side of the tracks and saw him walking toward the platform, then looked to the north and saw a train in the distance. Plaintiff attempted to catch the decedent's attention and said "why don't you wait," but she did not know if he heard her. Plaintiff heard the train's horn blow when the decedent was halfway across the crosswalk and saw him try to hurry across in response. The decedent barely made it across the crosswalk before the train arrived, but was blown back into the train by the force of its accompanying wind, and then landed on the platform. The decedent's arm was bleeding, and an ambulance arrived at the station a few minutes later and transported him and plaintiff to Lutheran General Hospital.

¶ 8 On cross-examination, plaintiff stated that at the time of the accident, the decedent did not wear a hearing aid, had good hearing for someone who was 79 years old, and only wore glasses for reading. Plaintiff also stated that when she tried to get the decedent's attention and said "why don't you wait," he was just beginning to cross over from the platform to the east of the tracks to the crosswalk. While plaintiff could not remember whether the decedent looked both ways before crossing the tracks, she stated that he probably would have been able to see the approaching train had he looked north before traversing the crosswalk. Plaintiff further stated that the train's horn sounded several seconds before the accident and that the decedent would have been out of the train's way had he stopped and taken a step back after hearing the horn.

¶ 9 William Porter, the director of public works for the Village of Glenview at the time of the accident, testified that the North Glenview station opened on January 7, 2001, in an area of Glenview previously occupied by a naval base. Defendant had decided to open the station even

though the pedestrian signals, which had been installed at the other Glenview station in the 1980s and were to flash lights and ring bells as a train was approaching, had not been completed. Porter believed the station should have been equipped with pedestrian signals to protect the commuters' safety and had public works crews form Glenview install signs on the barricades at the pedestrian crossing which directed patrons to "stop, look, and listen." Porter did not regard those signs as a substitute for pedestrian signals because they were not a standard installation at a train crossing. At the time of the accident, the pedestrian signals were set to be in service by May 10, 2002.

¶ 10 On cross-examination, Porter stated that he believed the North Glenview station was safe for use when it opened even though the pedestrian signals had not been installed. He also stated that defendant put up signs at the crosswalk that said "CAUTION!," "HIGH SPEED TRAINS," and "LOOK BOTH WAYS BEFORE CROSSING" shortly after January 11, 2001, and that at the time of the accident, the signal heads for the pedestrian signals were in place and covered with black plastic bags.

¶ 11 Glenford Peters, defendant's project manager in charge of designing the North Glenview station, testified that the final set of drawings for the station provided for a location where pedestrian signals were to be installed. On cross-examination, Peters stated that he did not know why the signals had not been installed by the time the station was opened and that he helped in putting together a sign that was to be mounted on the inner track fence, which runs the length of the station between the two platforms, to warn commuters of approaching trains. Frank Baranski, an employee in defendant's signal department, testified that the signal design for the

North Glenview station was completed in November 2001 and that pedestrian signals were designed to provide commuters with a 20-second warning of approaching trains, which was the standard minimum warning time provided by the Federal Railroad Administration (FRA).

¶ 12 Eugene Holland, a consulting engineer and licensed structural engineer in the State of Illinois, testified that he was retained by plaintiff's counsel to formulate opinions regarding the security and safety of the North Glenview station and reviewed numerous documents including deposition testimony, photographs, and the manual on uniform traffic control devices prior to testifying. Holland explained that pedestrian warning signals provide a commuter with a warning that a train's arrival is imminent and opined within a reasonable degree of engineering certainty that defendant should not have opened the North Glenview station until after such signals had been completed because commuters were not provided with a prewarning that a train was approaching. On cross-examination, Holland stated that the decedent would have been able to see the approaching train had he looked both ways before attempting to cross the tracks.

¶ 13 Plaintiff presented evidence through the testimony of Dr. Miledones Eliades and the video evidence depositions of Dr. Andrea Kramer and Dr. Leon Benson showing that the decedent received treatment for his multiple injuries resulting from the accident at Lutheran General Hospital, where he remained from the date of the accident until June 3, 2002, and at Evanston Hospital, where he remained from June 3 to July 31, 2002.

¶ 14 After plaintiff rested her case-in-chief, defendant called Daniel Orseno, who worked for defendant as the superintendent of the Milwaukee District and had investigated the accident at the request of defense counsel to determine whether Brian Voss, the engineer of the train

involved in the accident, had properly operated the train. Orseno testified that during the investigation, he collected and analyzed data from the train's data recorder, which is analogous to an airplane's black box; read the depositions of plaintiff, Voss, David Chidlow, and Arlene Landsman; and reviewed documents and measurements prepared by defendant and the Glenview police force.

¶ 15 Orseno explained that an engineer was required to activate the train's bell at least a quarter-mile before reaching a station at which the train was not going to stop, keep a lookout to make sure the track was clear, sound the train's horn as a warning if someone was in harm's way, and put on the emergency brakes if a person did not get off the tracks following the warning horn. Once the emergency brakes had been applied, there was nothing else an engineer could do to slow down or stop the train.

¶ 16 Based on his investigation, Orseno believed that on the morning of the accident, Voss was operating a southbound train and that the decedent attempted to cross the tracks from east to west at the crosswalk at the North Glenview station. Orseno determined that Voss activated the train's bell about 40 seconds and more than a half-mile before reaching the station, sounded the horn 7 to 8 seconds before the train reached the crosswalk, and applied the emergency brakes 6 to 7 seconds before reaching the crosswalk. Orseno opined that Voss fulfilled his responsibilities as an engineer to keep a lookout, activate the train's bell, sound its horn, and apply the emergency brakes on the morning of the accident.

¶ 17 On cross-examination, Orseno stated that pedestrian signals were to be activated 20 seconds before an approaching train reached the station, that Voss would not have been doing his

job properly if he had waited until the decedent was halfway across the crosswalk to sound the train's horn, and that based on additional observations made by a Glenview police officer, it was possible that Voss did not sound the train's horn until six seconds before it reached the crosswalk. On redirect, Orseno testified that he believed Voss blew the train's horn when the decedent was on the tactile strip on the edge of the east platform before he stepped foot on the crosswalk.

¶ 18 Arlene Landsman testified that she was on the east platform at the North Glenview station a few minutes after 8:20 a.m. on April 25, 2002, when she saw a man walking from the platform to the crosswalk as a train approached from the north. Landsman heard the train's bells and horn and saw that it was approaching quickly, and the man stepped onto the crosswalk and quickened his pace as he walked across while the bells and horn continued to sound.

¶ 19 David Chidlow testified that at the time of the accident, he was a student at Northridge Academy in Niles and took the northbound train to Morton Grove to go to school. On the morning of the accident, he had slept through his stop and got off the train at North Glenview to take a train south to Morton Grove. Chidlow called his father when he got off the train and saw plaintiff and the decedent standing on opposite sides of the crosswalk as a train approached from the north. The decedent was on the east side of the tracks and plaintiff was on the west, and they were talking to each other. Plaintiff was telling the decedent to stay on his side of the tracks and wait for the next train. The decedent responded that he could make it across before the oncoming train arrived and tried to run across the tracks. Chidlow did not remember hearing a bell or horn before the train arrived at the station. After the train passed, Chidlow went across the tracks, saw

the decedent lying on the ground, and called 911.

¶ 20 Brian Voss testified that he was an engineer and that he operated one of defendant's trains on the morning of April 25, 2002, which departed from Fox Lake at 7:34 a.m., and was scheduled to arrive at Union Station in Chicago at 8:53 a.m. The train consisted of an engine, five coaches, and a cab car, and Voss operated the train from the cab car at the front of the train while the engine pushed the cars from behind. The train was scheduled to run express through North Glenview on the way from Northbrook to the old Glenview station. The speed limit for that section of track was set by the FRA at 79 miles per hour (mph), and Voss did not exceed the speed limit on the morning of the accident.

¶ 21 Voss further testified that he activated the train's bell well before he was within a quarter-mile of the North Glenview station and that the train's oscillating headlights were on as he approached the station, as were the ditch lights, which began to flash when he activated the bell. As he approached the station, Voss saw the decedent, who was on the east platform, walk toward the tracks. When the decedent reached the yellow tactile strip on the edge of the platform by the crosswalk, Voss began to blow the train's horn because it looked as though he was going to go across the crosswalk. At that time, the train was traveling at close to 70 mph. After he sounded the horn, the decedent stepped onto the crosswalk and began to hurry across. Voss applied the emergency brakes as soon as he saw the decedent step onto the crosswalk and heard a thud from the right edge of the cab car when it passed the crosswalk. On cross-examination, Voss stated that the decedent paused for a split second when he sounded the train's horn.

¶ 22 Following closing arguments, the jury returned a verdict in favor of plaintiff and assessed

$700,143.70 in damages. In doing so, the jury found that plaintiff suffered $1,166,906.18 in damages as a proximate result of the accident and that 40% of the negligence that proximately contributed to plaintiff's injuries was attributable solely to the decedent. The jury also provided answers to five special interrogatories, in which it related that it found that: (1) defendant did not provide the decedent with adequate warning that its train was approaching the North Glenview station; (2) the decedent walked in front of defendant's train when he knew or reasonably should have known that it was unsafe to do so; (3) Voss kept a proper lookout for the decedent; (4) Voss did not sound the horn in a timely manner; and (5) Voss applied the brakes in a timely manner. Defendant filed a posttrial motion asking the circuit court to grant it judgment *n.o.v.* or, in the alternative, a new trial, and the court denied the motion.

¶ 23 ANALYSIS

¶ 24 I. Duty to Warn

¶ 25 Defendant first contends that it was entitled to judgment *n.o.v.* because it did not have a duty to warn the decedent of the oncoming train where he knew of its approach and the danger it presented was open and obvious. A trial court may only enter judgment *n.o.v.* where all the evidence, viewed in the light most favorable to the nonmovant, so overwhelmingly favors the movant that no contrary verdict could stand. *Pedrick v. Peoria & Eastern R.R. Co.*, 37 Ill. 2d 494, 510 (1967). A motion for judgment *n.o.v.* presents a question of law as to whether there was a total failure to present evidence to prove a necessary element of the plaintiff's case, and we therefore review the circuit court's ruling on such a motion *de novo*. *York v. Rush-Presbyterian-St. Luke's Medical Center*, 222 Ill. 2d 147, 178 (2006).

¶ 26 To recover damages based on defendant's alleged negligence, plaintiff was required to allege and prove that defendant owed a duty to the decedent, that defendant breached that duty, and that the breach was the proximate cause of the alleged injuries to her and the decedent. *Thompson v. County of Cook*, 154 Ill. 2d 374, 382 (1993). The issue of whether a duty exists presents a question of law for this court to decide by determining whether there is a relationship between the parties requiring the imposition of a legal obligation upon one party for the benefit of the other. *Washington v. City of Chicago*, 188 Ill. 2d 235, 239 (1999). If defendant did not owe a duty to the decedent, then judgment *n.o.v.* is required. *Id.* at 238-39.

¶ 27 Defendant, citing *Sheahan v. Northeast Illinois Regional Commuter R.R. Corp.*, 212 Ill. App. 3d 732 (1991), asserts that it did not have a duty to warn the decedent of the train at issue because he knew it was approaching when he decided to cross the tracks. However, in that case this court did not hold that the defendant did not have a duty to warn the plaintiff of approaching trains, but instead reaffirmed that "a railroad's duty with respect to crossings is to provide adequate warning *** that a train is approaching" and held that the defendant met its duty to warn the plaintiff by providing working warning signals at the crossing. *Id.* at 735-36. Thus, this court's holding in *Sheahan* does not support defendant's assertion that it did not have a duty to warn the decedent of oncoming trains, and we therefore decline to depart from the longstanding rule that a railroad has a duty to provide adequate warning of approaching trains at its crossings (*Espinoza v. Elgin, Joliet & Eastern Ry. Co.*, 165 Ill. 2d 107, 120 (1995); *Sheahan*, 212 Ill. App. 3d at 735) on the basis of that holding.

¶ 28 Defendant also asserts that it was not required to warn the decedent of the oncoming train

because it was an open and obvious danger. However, it is well-settled in Illinois that a railroad has a common law duty to provide travelers adequate warning at a crossing of approaching trains. *Magna Bank of McLean County v. Ogilvie*, 235 Ill. App. 3d 318, 323 (1992). Although defendant maintains that the evidence showed that the danger of the approaching train was open and obvious where its lights were flashing and its horn was blowing, that evidence is relevant as to whether it provided the decedent with adequate warning of the train, and not whether it owed him a duty to warn as a matter of law. As such, we conclude that defendant had a duty to warn the decedent of the approaching train at issue.

¶ 29 In addition, defendant has asserted in its reply brief that the jury's finding, as set forth in its answers to the special interrogatories, that the decedent knew it was unsafe to walk in front of the train is inconsistent with the general verdict and therefore requires the judgment for plaintiff be reversed. However, defendant has waived that argument by failing to raise it in its appellant's brief. Ill. S. Ct. R. 341(h)(7) (eff. July 1, 2008) ("[p]oints not argued [in the appellant's brief] are waived and shall not be raised in the reply brief, in oral argument, or on petition for rehearing"); *Burlington Northern & Santa Fe Ry. Co. v. ABC-NACO*, 389 Ill. App. 3d 691, 717 (2009). Moreover, the jury's finding that the decedent walked in front of defendant's train when he knew or reasonably should have known that it was unsafe to do so is consistent with its finding that the accident was partially attributable to his own negligence, and is not inconsistent with its verdict for plaintiff or its finding that defendant failed to adequately warn him of the approaching train before he decided to cross the tracks.

¶ 30 II. Proximate Cause

¶ 31 Defendant next contends that it was entitled to judgment *n.o.v.* or, in the alternative, a new trial because the decedent's negligence was the sole proximate cause of the accident. The term "proximate cause" encompasses two requirements: cause in fact and legal cause. *Abrams v. City of Chicago*, 211 Ill. 2d 251, 258 (2004). A defendant's conduct is a cause in fact of the relevant injury "if, absent that conduct, the injury would not have occurred" (*id.*), and is a legal cause where it is so closely tied to the injury that it should be held responsible for it (*Young v. Bryco Arms*, 213 Ill. 2d 433, 446 (2004)). "The proper inquiry regarding legal cause involves an assessment of foreseeability, in which [this court asks] whether the injury is of a type that a reasonable person would see as a likely result of [the defendant's] conduct." *Id.* at 446-47.

¶ 32 A. Legal cause

¶ 33 Defendant first asserts that plaintiff failed to prove that its claimed negligence was a legal cause of the accident. A defendant's negligence is not the legal cause of an injury if it merely created a condition which made the relevant injury possible by the subsequent, independent acts of a third person. *First Springfield Bank & Trust v. Galman*, 188 Ill. 2d 252, 257 (1999). "The test that should be applied in all proximate cause cases is whether the first wrongdoer reasonably might have anticipated the intervening efficient cause as a natural and probable result of the first party's own negligence." *Id.* Thus, a defendant's negligence is only a legal cause of an injury if the injury is of a type that a reasonable person would see as the likely or probable result of the defendant's negligence. *Abrams*, 211 Ill. 2d at 262.

¶ 34 Defendant maintains that the evidence presented at trial, when viewed in the light most favorable to plaintiff, shows that the decedent heard the train's horn before he began to cross the

southbound tracks and that he then attempted to hurry across the tracks and beat the train even though he was in a position of safety when the horn was sounded. Defendant reasons that its negligence was not a legal cause of the accident because it was not reasonably foreseeable that the decedent would choose to run in front of a train he knew was coming as a result of its failure to provide him with adequate warning of the train's approach.

¶ 35 It is improper for a court to enter judgment *n.o.v.* "where reasonable minds might differ as to inferences or conclusions to be drawn from the facts presented." *Pasquale v. Speed Products Engineering*, 166 Ill. 2d 337, 351 (1995). Viewed in the light most favorable to plaintiff, the record shows that the decedent was halfway across the crosswalk when the train's horn was first sounded, six or seven seconds before it reached the crosswalk. Thus, the decedent, who had intended to cross the tracks and meet plaintiff on the west platform, was required to make an immediate decision as to whether he could safely cross the tracks, and decided to hurry across and try to beat the train. We determine that it was not unreasonable for the jury to conclude that defendant may have anticipated that its failure to provide adequate warning would cause a pedestrian to make a snap decision as to whether to cross the tracks in advance of an approaching train and that, in doing so, he would misjudge his ability to cross the tracks safely. As such, we conclude that defendant was not entitled to judgment *n.o.v.* due to plaintiff's alleged failure to prove that its negligence was a legal cause of the accident.

¶ 36 In reaching this conclusion, we have considered *Galman*, 188 Ill. 2d 252, *Sheahan*, 212 Ill. App. 3d 732, *Hamilton v. Atchison, Topeka & Santa Fe Ry. Co.*, 175 Ill. App. 3d 758 (1988), and *Garcia v. National R.R. Passenger Corp.*, No. 05 C 4413, 2006 WL 2990437 (N.D. Ill. Oct.

19, 2006), cited by defendant, and find them distinguishable from this case. In *Galman*, 188 Ill. 2d at 261-62, our supreme court held that the defendant's negligence was not a legal cause of the decedent's injuries where the defendant could not have reasonably anticipated that his violation of a "no parking" sign would result in the decedent ignoring a marked crosswalk, walking to mid-block, and attempting to cross a designated truck route blindly and in clear violation of the law. In *Garcia*, 2006 WL 2990437, at *1, the decedent saw the approaching train, then jogged down the platform parallel to the tracks toward the crosswalk and was struck by the train as he attempted to run across the tracks. The court held that no reasonable jury could conclude that the defendant should have foreseen that the decedent "would attempt to outrun and then cross in front of a train that he knew was bearing down upon him." *Id.* at *3. Unlike in those cases, where the decedents had time to consider their decisions as to whether to place themselves in danger and undertook multiple steps in doing so, the decedent in this case was forced to make an immediate decision as to whether to cross the remainder of the crosswalk as a direct result of defendant's failure to adequately warn him of the approaching train.

¶ 37 In *Sheahan*, 212 Ill. App. 3d at 737-38, this court held that the defendants fulfilled their duty to warn the decedent of the approaching train and that it was not reasonably foreseeable that the decedent would disregard the signals and attempt to cross the tracks. In *Hamilton*, 175 Ill. App. 3d at 760-61, this court held that the decedent's action in circumventing the crossing gate was the sole proximate cause of the accident where the evidence showed that the crossing gates were lowered and the crossing lights were flashing when the decedent drove his vehicle around the gates and onto the tracks. In this case, however, the jury found that defendant did not provide

the decedent with adequate warning of the oncoming train. Thus, unlike in *Sheahan* and *Hamilton*, where the decedents consciously disregarded adequate warnings of an oncoming train provided by the defendants, here the decedent's decision to attempt to cross the tracks was made in response to defendant's inadequate and tardy warning, and that decision and his inability to accurately judge his ability to safely cross the remainder of the crosswalk were not unforeseeable given the brief warning he was provided of the approaching train. Moreover, in this case the decedent was already on the crosswalk when defendant first warned him that a train was approaching, unlike in *Sheahan*, *Hamilton*, and *Garcia*, where the decedents received warning of the oncoming trains prior to entering the crossing area.

¶ 38 B. Cause in fact

¶ 39 Defendant next asserts that plaintiff failed to prove that its negligence was a cause in fact of the accident. To establish cause in fact, a plaintiff must show that the defendant's conduct was a material element and a substantial factor in bringing about the injury at issue. *Lee v. Chicago Transit Authority*, 152 Ill. 2d 432, 455 (1992). The plaintiff is not required to produce unequivocal evidence of causation and may meet its burden by presenting circumstantial evidence from which a jury may reasonably infer causation. *Kleiss v. Bozdech*, 349 Ill. App. 3d 336, 351 (2004).

¶ 40 Defendant maintains that the evidence, viewed in the light most favorable to plaintiff, shows that the decedent would have attempted to cross the southbound tracks even if he had received adequate warning of the train's arrival. However, viewed in the light most favorable to plaintiff, the evidence shows that the decedent was halfway across the crosswalk when the train's

horn was first sounded and that the train reached the crosswalk six to seven seconds thereafter. In addition, the record also shows that the pedestrian warning signals were designed to provide commuters with a 20-second warning of approaching trains and that Voss was supposed to have sounded the horn before the decedent was halfway across the crosswalk. Thus, the jury may have reasonably inferred that the decedent would not have attempted to beat the train across the tracks had he been warned of its arrival prior to having already made it halfway across the crosswalk.

¶ 41 In addition, the record shows that the decedent made it across the tracks before the train reached the crosswalk, but was blown back into the train by the force of its accompanying wind. Thus, the jury may have reasonably inferred that had the decedent been warned of the approaching train even a little bit earlier, he could have hurried his approach across the crosswalk sooner, and would have most likely made it across uninjured. As such, we determine that defendant was not entitled to judgment *n.o.v.* or a new trial as a result of plaintiff's alleged failure to prove that its negligence was a cause in fact of the accident.

¶ 42 III. Tort Immunity Act

¶ 43 Defendant further contends that it is entitled to a new trial because the circuit court erroneously allowed plaintiff to present evidence and argue to the jury that it was negligent for having failed to install and activate pedestrian signals prior to the accident where it was precluded from doing so by sections 3-104 (745 ILCS 10/3-104 (West 2002)) and 2-109 (745 ILCS 10/2-109 (West 2002)) of the Local Governmental and Governmental Employees Tort Immunity Act. Plaintiff responds that defendant was not prejudiced by any alleged error committed by the circuit court in allowing her to do so because the jury also found it negligent on

the alternate theory that Voss failed to sound the train's horn in a timely manner and that finding was supported by the evidence.

¶ 44 A reviewing court may not reverse a jury verdict unless it is against the manifest weight of the evidence, and a verdict is not against the manifest weight of the evidence unless the opposite conclusion is clearly evident or the jury's findings "are unreasonable, arbitrary, and not based upon any of the evidence." *Snelson v. Kamm*, 204 Ill. 2d 1, 35 (2003). "[I]t is the province of the jury to resolve conflicts in the evidence, to pass upon the credibility of the witnesses, and to decide what weight should be given to the witnesses' testimony." *Maple v. Gustafson*, 151 Ill. 2d 445, 452 (1992).

¶ 45 The record shows that in addition to finding that defendant did not provide the decedent with adequate warning of the approaching train, the jury also found that Voss failed to sound the train's horn in a timely manner. Although Landsman and Voss testified at trial that the train's horn sounded while the decedent was on the yellow tactile strip on the edge of the east platform, plaintiff testified that the decedent was halfway across the crosswalk when the horn was sounded, and Orseno testified that Voss would not have been doing his job properly if he had waited until the decedent was halfway across the crosswalk to sound the horn. As such, we cannot conclude that the jury's finding that Voss failed to sound the train's horn in a timely manner is against the manifest weight of the evidence where that finding is supported by the testimony of plaintiff and Orseno.

¶ 46 Defendant asserts that it is nonetheless entitled to a new trial because the circuit court's alleged error tainted the entire verdict where it was impossible for the jury to separate plaintiff's

claim that it was negligent for failing to install and activate pedestrian warning signals from her claim that it was negligent due to Voss's failure to sound the train's horn in a timely manner. We initially note that defendant has waived this argument by failing to cite any supporting authority. Ill. S. Ct. R. 341(h)(7) (eff. July 1, 2008); *Hirsch v. Optima, Inc.*, 397 Ill. App. 3d 102, 109 (2009). Moreover, although plaintiff spent a considerable portion of the trial presenting evidence regarding defendant's failure to install pedestrian signals and emphasized that claim during closing arguments, the evidence showing that Voss failed to timely sound the train's horn was distinct from that showing that defendant had failed to activate working pedestrian crossing signals. We therefore determine that the jury could have separated plaintiff's claims and that it demonstrated its ability to do so by specifically finding that Voss had failed to sound the horn in a timely manner in addition to finding more generally that defendant did not provide adequate warning of the train's approach. As such, we conclude that defendant is not entitled to a new trial based on the circuit court's alleged error in allowing plaintiff to present evidence and argue to the jury that it was negligent for having failed to install and activate pedestrian signals prior to the accident.

¶ 47 CONCLUSION

¶ 48 Accordingly, we affirm the judgment of the circuit court of Cook County.

¶ 49 Affirmed.

REPORTER OF DECISIONS – ILLINOIS APPELLATE COURT
(Front Sheet to be Attached to Each Case)

Please Use Following Form:

Complete TITLE of Case

MARJORIE McDONALD, Individually and as Executor of the Estate of THOMAS McDONALD, Deceased,

Plaintiff-Appellee,

v.

NORTHEAST ILLINOIS REGIONAL COMMUTER RAILROAD CORPORATION d/b/a METRA/METROPOLITAN RAIL,

Defendant-Appellant.

Docket No.

COURT

Nos. 1-10-2766
Appellate Court of Illinois
First District, THIRD Division

Opinion Filed

August 24, 2011
(Give month, day and year)

JUSTICES

JUSTICE MURPHY delivered the opinion of the court:

Quinn, P.J., and Neville, J., concur [s]

APPEAL from the Circuit Ct. of Cook County, Criminal Div.

Lower Court and Trial Judge(s) in form indicated in the margin:

The Honorable Arnette Hubbard, Judge Presiding.

Indicate if attorney represents APPELLANTS or APPELLEES and include attorneys of counsel. Indicate the word NONE if not represented.

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