STATE OF MINNESOTA
IN COURT OF APPEALS
A17-0635

Ernest Wirtz,
Appellant,

vs.

Union Pacific Railroad Company,
Respondent.

Filed December 26, 2017
Affirmed in part, reversed in part, and remanded
Reyes, Judge

Hennepin County District Court
File No. 24-CV-16-702

Michael L. Weiner, Yaeger & Weiner, P.L.C., Minneapolis, Minnesota; and

James T. Farnan (pro hac vice), Daniel J. Downes, Ridge & Downes, Chicago, Illinois; and

Russell A. Ingebritson, Ingebritson & Associates, P.A., Edina, Minnesota (for appellant)

Dan J. Gendreau, Donna Law Firm, P.C., Minneapolis, Minnesota (for respondent)

Considered and decided by Peterson, Presiding Judge; Bjorkman, Judge; and Reyes, Judge.

U N P U B L I S H E D O P I N I O N

REYES, Judge

In this case brought under the Federal Employers' Liability Act (FELA), 45 U.S.C. §§ 51-60 (2012), and 49 C.F.R. § 213.37, appellant challenges the district court's grant of

summary judgment in favor of respondent, arguing that he met his burden under FELA and the regulation to show that respondent failed to provide him with a reasonably safe workspace. We affirm in part, reverse in part, and remand.

FACTS

On April 2, 2014, appellant Ernest Wirtz and his crew members, employees of respondent Union Pacific Railroad Company (Union Pacific), were assigned to work on a line of rail in Inver Grove Heights, Minnesota. Wirtz drove himself and his crew foreman to the job site in a company pick-up truck. He used an access road and parked the truck at the bottom of a hill adjacent to the job site. Both men walked up the hill to the job site upon arrival. That afternoon, Wirtz and his foreman finished work and returned to the truck following the same path they used that morning to ascend the hill. While following his foreman and descending the hill, Wirtz slipped and fell, injuring his ankle.

Wirtz filed suit, alleging that Union Pacific negligently failed to provide him with a reasonably safe work space, in violation of FELA. Wirtz amended his complaint, additionally arguing that Union Pacific's acts and omissions constituted negligence per se because Union Pacific failed to control the vegetation in the area where he fell in violation of 49 C.F.R. § 213.37.

Union Pacific filed a motion for summary judgment, alleging that Wirtz failed to produce evidence to support his FELA claim and arguing that 49 C.F.R. § 213.37 was not enacted for the safety of employees. The district court granted Union Pacific's summary judgment motion, determining that there were no genuine issues of material fact and that

appellant failed to offer evidence sufficient to show that Union Pacific negligently failed to provide him with a reasonably safe workplace.

This appeal follows.

D E C I S I O N

Summary judgment is properly granted if the "[p]leadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that either party is entitled to judgment as a matter of law." Minn. R. Civ. P. 56.03. "On appeal from summary judgment, we must review the record to determine whether there is any genuine issue of material fact and whether the district court erred in its application of the law." *Dahlin v. Kroening*, 796 N.W.2d 503, 504-05 (Minn. 2011). We may not weigh the evidence or make factual determinations, but must consider the evidence in the light most favorable to the nonmoving party. *McIntosh Cty. Bank v. Dorsey & Whitney, LLP*, 745 N.W.2d 538, 545 (Minn. 2008).

I. Wirtz produced sufficient evidence to overcome Union Pacific's summary-judgment motion on his FELA claim.

Wirtz argues that he presented sufficient evidence on his FELA claim of negligence to overcome Union Pacific's summary-judgment motion. We agree.

Section 1 of FELA provides that "[e]very common carrier by railroad . . . shall be liable in damages to any person suffering injury while he is employed by such carrier . . . for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier." 45 U.S.C. § 51 (2012). Congress passed

FELA with the intent of "provid[ing] liberal recovery for injured workers." *Kernan v. Am. Dredging Co.*, 355 U.S. 426, 432, 78 S. Ct. 394, 398 (1958).

To establish a claim of negligence under FELA, a plaintiff must offer evidence proving the common-law elements of negligence: duty, breach, foreseeability, and causation. *Smith v. Soo Line R.R. Co.*, 617 N.W.2d 437, 439 (Minn. App. 2000) (citation omitted), *review denied* (Minn. Nov. 21, 2000). However, a plaintiff's burden of proof to present a case to the jury is significantly lighter under FELA than at common-law. *Habrin v. Burlington N. Ry. Co.*, 921 F.2d 129, 132 (7th Cir. 1990) (providing examples of FELA cases submitted to the jury based on "evidence scarcely more substantial than pigeon bone broth"). Courts require a mere "scintilla" of evidence to establish negligence in FELA case. *Hauser v. Chi., Milwaukee, St. Paul & Pac. R. Co.*, 346 N.W.2d 650, 653 (Minn. 1984) (quotation omitted).

Under FELA, "a railroad has a duty to provide its employees with a reasonably safe workplace." *Smith*, 617 N.W.2d at 439 (citation omitted). "The catalyst which ignites this duty is knowledge, actual or constructive[,]" of the unsafe condition. *Gallose v. Long Island R. Co.*, 878 F.2d 80, 85 (2d Cir. 1989). A railroad's duty to provide a safe work place is nondelegable and exists even when its employees are required to go onto the premises of a third party over which the railroad has no control. *Shenker v. Balt. & Ohio R.R.*, 374 U.S. 1, 7, 83 S. Ct. 1667, 1671-72 (1963).

"A railroad breaches its duty to provide a safe workplace when it knows or should know of a potential hazard in the workplace, yet fails to exercise reasonable care to inform or protect its employees." *Smith*, 617 N.W.2d at 439.

"Reasonable foreseeability of harm is an essential ingredient of [FELA] negligence[.]" *Gallick v. Balt. & Ohio R.R.*, 372 U.S. 108, 117, 83 S. Ct. 659, 665 (1963). This requirement is met if the railroad carrier "was or should have been aware of conditions which created a likelihood that [the employee], in performing the duties required of him, would suffer just such an injury as he did." *Rogers v. Mo. Pac. R.R.*, 352 U.S. 500, 503, 77 S. Ct. 443, 447 (1957).

The plaintiff's proximate-cause burden under FELA is lighter than for common-law negligence. *Id.* at 503. The railroad carrier is liable if "the proofs justify with reasons the conclusion that employer negligence played any part, even the slightest, in producing the injury or death for which the damages are sought." *Gallagher v. BNSF Ry. Co.*, 829 N.W.2d 85, 95 (Minn. App. 2013) (quoting *Consol. Rail Corp. v. Gottshall*, 512 U.S. 532, 543, 114 S. Ct. 2396, 2404 (1994)).

Here, the district court found that Union Pacific did not breach its duty to provide Wirtz a reasonably safe workplace because there was no evidence of unreasonably unsafe conditions, deeming Wirtz's testimony regarding these conditions as "mere speculation." Although Wirtz admitted that he did not know precisely what caused him to slip and fall, he did testify that he had concerns that the embankment, although minimal in its slope-angle, may have been slippery. He also testified that the embankment's grass was matted-down, the ground was wet, and his clothes were soaked in water after he fell. The determination of whether Wirtz's testimony about the condition of the embankment was "mere speculation" is a question of fact for the jury. *See Blair v. Balt. & Ohio R. Co.*, 323 U.S. 600, 601, 65 S. Ct. 545, 546-47 (1945) ("to deprive railroad workers of the benefit of

a jury trial in close or doubtful cases is to take away a goodly portion of the relief which Congress has afforded them"); *Tiller v. Atl. Coast Line R. Co.*, 318 U.S. 54, 68 n.30, 63 S. Ct. 444, 451 (1943) ("to the maximum extent proper questions in actions arising under the [FELA] should be left to the jury"); *Gallagher*, 829 N.W.2d at 95 ("Whether appellant's injuries were caused by any alleged breach is a question of fact.").

Considering the evidence in the light most favorable to the party against whom summary judgment was granted, *McIntosh Cnty. Bank*, 745 N.W.2d at 545, we conclude that Wirtz produced the necessary "scintilla" of evidence sufficient to withstand summary judgment. Wirtz produced evidence from which a jury could reasonably conclude that Union Pacific breached its duty of care and that such breach caused Wirtz's injuries. The district court erred in granting Union Pacific's summary judgment motion on Wirtz's FELA claim.

II. The district court did not err in granting summary judgment in favor of Union Pacific on Wirtz's 49 C.F.R. § 213.37 claim.

Wirtz argues that the district court erred in finding that he could not meet his burden under 49 C.F.R. § 213.37 to show Union Pacific's negligence per se. We disagree.

Under 49 C.F.R. § 213.37(c), "[v]egetation on railroad property which is on or immediately adjacent to roadbed shall be controlled so that it does not . . . interfere with railroad employees performing normal trackside duties." Wirtz's co-worker testified that the distance between the job site and the service road where Wirtz parked his truck was approximately 250 feet. Wirtz testified that he was three-quarters of the way down the

embankment when he fell, meaning he was at least 100 feet away from the tracks when he fell.

49 C.F.R. § 213.37 uses the words "on" and "adjacent to" to describe the vegetation's location in relation to the roadbed. The word "on" is "used to indicate position above and supported by or in contact with." *American Heritage Dictionary* 1228 (4th ed. 2006). "Adjacent to" is defined as "close to; lying near." *Id.* at 21. The Fifth Circuit has defined roadbed as "the area of soil that supports the ballast which is the permeable granular materials such as sand, gravel, crushed rock or slag, chat, cinders and so on placed around and under the ties to promote track stability." *Mo. Pac. R.R. Co. v. R.R. Comm'n of Tex.*, 948 F.2d 179, 182 n.2 (5th Cir. 1991) (quotation omitted).

Although the regulation does not define its geographic scope in feet or yards, other courts have declined to apply the regulation to distances nearer to the track than in the present case. The Fifth Circuit rejected the proposition that a railroad's entire right-of-way is an "area immediately adjacent to the roadbed" and held that the federal regulation does not "cover the subject matter" of vegetation that is on the right-of-way but not immediately next to the roadbed. *Id.* at 185 (quotation omitted). In addition, the Eastern District of Louisiana concluded that ten to fifteen feet away from the roadbed was not vegetation "on or immediately adjacent to the roadbed." *Hadley v. Union Pac. R. Co.*, No. Civ. A. 02-1901, 2003 WL 21406183, at *2 (E.D. La. 2003). Based on the regulation's plain meaning and the caselaw, 49 C.F.R. § 213.37(c) is inapplicable here because Wirtz was more than 100 feet away from the roadbed.

Affirmed in part, reversed in part, and remanded.