STATE OF MINNESOTA
IN COURT OF APPEALS
A11-41

Brian Richard Buganski,
Appellant,

vs.

Soo Line Railroad Company, Inc.,
d/b/a Canadian Pacific Railway,
Respondent.

Filed August 22, 2011
Affirmed
Collins, Judge[*]

Hennepin County District Court
File No. 27-CV-10-6703

Thomas F. Handorff, Handorff Law Offices, P.C., St. Louis Park, Minnesota (for appellant)

Timothy K. Masterson, Jeffrey A. Abrahamson, Ricke & Sweeney, PA, St. Paul, Minnesota (for respondent)

Considered and decided by Connolly, Presiding Judge; Hudson, Judge; and Collins, Judge.

[*] Retired judge of the district court, serving as judge of the Minnesota Court of Appeals by appointment pursuant to Minn. Const. art. VI, § 10.

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

COLLINS, Judge

In this appeal from summary judgment, appellant argues that the district court erred by dismissing his negligence claims under the Federal Employers' Liability Act (FELA) and the Locomotive Inspection Act (LIA). Because we conclude that appellant failed to make a showing of evidence sufficient to withstand summary judgment and there are no material facts in dispute, we affirm.

FACTS

Appellant Brian Buganski was injured on March 1, 2007, while working overtime as a machinist for his employer, respondent Soo Line Railroad Company Inc., and had surgery to repair a herniated disc in his back. After an extended period of recuperation, Buganski allegedly sustained an injury to his left knee in the course of a physical examination for clearance to return to work. Buganski sued Soo Line, asserting causes of action under the FELA and the LIA.[1]

Buganski has worked for Soo Line since 1978 in various positions, first as a laborer, then as a machinist or a mechanic in charge. According to his deposition, Buganski received on-the-job training in safety techniques to avoid physical injuries caused by improper body positioning or lifting. In his deposition, Buganski stated that he was well aware of proper ergonomic positioning when performing his duties and that he had the proper tools for his job.

[1] Buganski also alleged a cause of action under the Federal Safety Appliances Act, which was later dropped.

On March 1, 2007, Buganski agreed to do overtime work on locomotive 777, which was in the locomotive repair shop. He was instructed to remove a defective power assembly on the locomotive. In order to do this, he and a coworker had to remove crankcase covers from 16 cylinders. Each crankcase cover is about 12 inches in diameter and can be removed by loosening a center hand-sprocket. By design, crankcase covers can be removed without a tool, although Buganski usually needed to use a wrench on the bolt in the center of the sprocket to loosen it. In between the crankcase cover and the engine block is a rubber gasket that creates a seal to prevent unspent oil from leaking out of the cylinder. On the day in question, when Buganski attempted to turn the sprocket on crankcase cover #1, he found it was tight, although he'd "had tighter." He testified that he was in a proper ergonomic position. As he pulled on his wrench, the sprocket loosened and then he felt a pop and immediate pain in his back. It was determined that Buganski herniated a disc in his lower back, an injury that required surgery.

After months of recuperation and physical therapy, Buganski underwent a two-day functional capacity evaluation (FCE) in November 2007 to determine whether he could return to work. During the examination, Buganski performed a series of increasingly difficult tasks that simulated a workday. After the FCE, Buganski complained of pain in his left knee (not his right knee, which had been a point of discomfort since the back injury). Buganski had a meniscus repair on his left knee in January 2008. Although he correlated the onset of his left-knee pain with the FCE, Buganski could not firmly attribute it to any specific activity or incident occurring during the FCE. He returned to

work with some lifting restrictions. A subsequent independent medical examination revealed degenerative meniscal changes in Buganski's left knee.

On appeal, Buganski asserts that Soo Line is liable under the FELA because it was negligent in failing to hold to a maintenance schedule for crankcase inspection and replacement of the gaskets.[2] The locomotive manufacturer, General Motors Electro-Motive Division, had issued Maintenance Instruction Guides in 1978 and 1980 that recommended that the crankcase covers be removed and inspected, and the gaskets be replaced every twelve months. These guidelines provided "average recommendations which should ensure satisfactory locomotive operation and economical maintenance cost where average load factors and average climatic conditions are encountered. [They are] intended to serve as a guide when establishing maintenance schedules that will meet the particular requirements of individual operations, and planned economic life of the locomotive." The maintenance guidelines do not address safety or workplace concerns.

Prior to 1996, Soo Line generally followed these recommendations; after 1996, Soo Line instructed employees to replace gaskets upon "failure." Buganski's expert witness, Thomas Johnson, opined that the gaskets have a limited useful life; if not timely replaced, the gaskets lose sealing effectiveness and to prevent oil leaks the mechanics must inordinately tighten the sprockets, thus increasing the chances of injury when removing the crankcase covers. Johnson had not physically inspected locomotive 777, but had reviewed maintenance records. He discovered that the oil had been changed in

[2] Buganski alleged other negligent acts in his complaint, but his appeal rests solely on the issue of crankcase-cover maintenance.

July 2006 but that it appeared that no gaskets had been replaced since 2003, and he found several reports of oil leakage.

Soo Line offered the affidavit of Al Borth, a process manager who supervises the care and maintenance of its locomotives. He described the reports of "oil leakage" on locomotive 777 as "throwing oil" and characterized locomotive 777 as a "repeater," that is, a locomotive that continually throws oil. "Throwing oil" occurs when oil is not fully consumed in the engine cylinder and is emitted through the exhaust stack of the locomotive. According to Borth, this has nothing to do with the crankcase covers. Borth stated that a reported reference to "leaking test cocks" also did not implicate oil leakage around the crankcase covers. Finally, Borth reviewed all of the maintenance records for locomotive 777 and found no reported reference to oil leakage related to crankcase cover #1. Soo Line is mandated to report any such problem.

Johnson filed a supplementary affidavit stating that records showed that crankcase covers #1, #3 and #11 were "blowing oil" and that on February 5, 2007, employees were instructed to "[p]ull packing and verify. [c]hange the worst ones." Johnson did not explain the meaning of "blowing oil".

In addition to his FELA claim, Buganski alleged his injuries stemmed from violations of the LIA. The LIA holds a railroad strictly liable for injuries to an employee if a locomotive is operated when its parts or appurtenances are not in proper condition. The LIA applies only when a locomotive is in use, not when it is out of operation for maintenance; but Buganski alleged that he had a cumulative injury from all of his years of working on locomotives that were in operation. Buganski did not identify other

incidents of trauma in his deposition, although his medical records do reflect other injuries.

Soo Line moved for summary judgment on all claims, which the district court granted. This appeal followed.

D E C I S I O N

The district court may grant summary judgment if, based on all the evidence before it, there is no genuine issue of material fact and either party is entitled to judgment as a matter of law. Minn. R. Civ. P. 56.03. We review the district court's summary judgment to determine whether there are genuine issues of material fact and whether the district court erred in its interpretation of the law. *STAR Ctrs., Inc. v. Faegre & Benson, L.L.P.*, 644 N.W.2d 72, 76 (Minn. 2002). When considering a motion for summary judgment, the district court may not weigh evidence or determine credibility or decide disputed facts. *Geist-Miller v. Mitchell*, 783 N.W.2d 197, 201 (Minn. App. 2010). Thus the moving party is not entitled to summary judgment if the nonmoving party's evidence, "if fully believed, would support a claim for relief." *Id.* But if the nonmoving party bears the burden of proving an essential element, the nonmoving party must make a showing of sufficient evidence to withstand summary judgment. *DLH, Inc. v. Russ*, 566 N.W.2d 60, 71 (Minn. 1997).

I.

We first address Buganski's primary claim under the FELA. In its memorandum supporting the summary-judgment order, the district court noted that a FELA claim must be submitted to a jury if "the proofs justify within reason that the employer's negligence

played even the slightest part in producing the injury" and that "[a] FELA plaintiff's burden is . . . significantly lighter than it would be in an ordinary negligence case." (Quotation omitted.) But the district court concluded that Buganski had not demonstrated a genuine issue of fact for trial because his "claims of negligence rest upon multiple levels of speculation and conjecture." The district court discounted Buganski's expert's testimony as "speculative and lack[ing in] foundation." Specifically, the district court determined that Johnson's affidavit

> lacks foundation, fails to provide a causal link between Soo Line's maintenance policy, the tightness of crank case cover #1, and [Buganski's] injury, and fails to establish what the standard of care is with respect to the tightness of crank case covers and how Soo Line deviated from that standard in this instance.

Thus the district court concluded that Buganski had failed to produce sufficient evidence of negligence to withstand summary judgment.

The FELA, 45 U.S.C. §§ 51-60 (2006), "imposes liability upon the employer to pay damages for injury or death due in whole or in part to its negligence." *Rogers v. Missouri Pacific R.R.*, 352 U.S. 500, 507, 77 S. Ct. 443, 449 (1957) (emphasis and quotation omitted). The Supreme Court concluded that if the evidence showed that employer negligence played even "the slightest" role in the injury, it should be submitted to a jury. *Id.* at 506, 77 S. Ct. at 448. The Supreme Court recently reaffirmed the reasoning of *Rogers* in *CSX Transp., Inc. v. McBride*, ___ S. Ct. ___, 2011 WL 2472795 (2011).

The FELA was enacted for humanitarian purposes following the death or injury to thousands of railroad workers; as such, its purpose is remedial and the courts liberally interpret its provisions to meet this goal. *Consol. Rail Corp. v. Gottshall*, 512 U.S. 532, 542-43, 114 S. Ct. 2396, 2404 (1994); *Smith v. Soo Line R.R.*, 617 N.W.2d 437, 439 (Minn. App. 2000) (stating that "FELA requires only a scintilla of evidence to establish negligence" (quotation omitted)), *review denied* (Minn. Nov. 21, 2000). The FELA abrogated such common-law employer defenses as assumption of risk and contributory negligence.[3] *Gottshall*, 512 U.S. at 544, 114 S. Ct. at 2404.

But although a plaintiff's proximate-cause burden may be lighter, the essential elements of a negligence claim brought under the FELA are the same as at common law. *Norfolk S. Ry. v. Sorrell*, 549 U.S. 158, 166, 171, 127 S. Ct. 799, 805, 808 (2007); *see Holbrook v. Norfolk S. Ry.*, 414 F.3d 739, 742 (7th Cir. 2005) ("The FELA does not, however, render a railroad an insurer of its employees. . . . Thus, a plaintiff must proffer some evidence of the defendant's negligence in order to survive summary judgment."). Therefore, a plaintiff claiming under the FELA must provide proof of the common-law elements of negligence: duty, breach, foreseeability, and causation. *Green v. CSX Transp., Inc.*, 414 F.3d 758, 766 (7th Cir. 2005); *see also Gottshall*, 512 U.S. at 543, 114 S. Ct. at 2404 (stating that the FELA is based on common-law concepts of negligence);

[3] That is, the employee's claim cannot be wholly defeated by showing that the employee was more than 50% negligent; the employer is responsible for its negligence on a comparative basis, no matter how slight. *See Janke v. Duluth & Ne. R.R.*, 489 N.W.2d 545, 547 (Minn. App. 1992) (stating that "although an employee's contributory negligence does not bar recovery, the employee's damages are to be diminished by the amount of contributory negligence"), *review denied* (Minn. Oct. 28, 1992).

Van Gorder v. Grand Trunk W. R.R., 509 F.3d 265, 269 (6th Cir. 2007) ("FELA does not lessen a plaintiff's burden to prove the elements of negligence.").

The FELA imposes a duty on an employer to provide a safe workplace. *Holbrook*, 414 F3d at 741. Although Buganski alleged other bases of negligence in his complaint, the issue presented to the district court was whether Soo Line's failure to adhere to the 12-month schedule for replacement of crankcase gaskets as provided in the maintenance guidelines was a breach of its duty to provide a safe workplace. Buganski's theory, as explained by his expert, was that (1) gaskets generally have a useful life of 12 months; (2) they become cracked and adhere to the hot engine body after a period of time; (3) this permits oil leaks; (4) Soo Line directed its employees to tighten the crankcase covers to prevent leakage; and (5) this led to over-tightened crankcase covers, which created a foreseeable risk of injury. Buganski testified in his deposition that he had been told to tighten crankcase covers that were leaking if a replacement gasket was not available; he also testified that in that situation, the need for a new gasket would be recorded in the daily log. The records contain no such notations about crankcase cover #1.

Buganski's expert offered affidavits in support of his theory, but the district court rejected his testimony. The district court may not weigh evidence when considering a summary judgment motion, and did not do so here. Rather, the district court observed that (1) there was no evidence that the gasket of the particular crankcase cover #1 was cracked; (2) there was no evidence of leaking around crankcase cover #1, or that it had been tightened to prevent leaks; (3) Buganski did not testify that he had to strain unusually to loosen the sprocket on crankcase cover #1; rather, he found that it was tight

but not extraordinarily so and not much different than the thousands of sprockets that he had loosened on crankcase covers; and (4) he had already loosened the sprocket when he felt the injury in his back. Buganski further testified that he had the proper tools and he was in an ergonomically correct position as he had been trained by Soo Line.

We conclude that the district court correctly determined that Buganski failed to produce sufficient, non-speculative evidence that Soo Line's decision not to replace crankcase cover gaskets on a 12-month schedule was a breach of its duty to provide a safe workplace. A plaintiff in a negligence action, even under the FELA, must establish a breach of duty; here, Buganski asserted that Soo Line was negligent for failing to adhere to the maintenance guidelines but there was no evidence of the gasket on crankcase #1 being defective, or that the crankcase had been leaking oil, or that the crankcase sprocket had been over-tightened. Thus there was no proof that Soo Line's failure to hold to the maintenance guidelines in this instance resulted in an unsafe workplace. We agree with the district court that Buganski failed to make a showing of evidence that Soo Line was negligent sufficient to withstand summary judgment. *See DLH*, 566 N.W.2d at 71.[4]

II.

Buganski's second claim was brought under the LIA, 49 U.S.C. §§ 20701-03 (2006), which prohibits a railroad from using a locomotive on a railroad line unless the locomotive and all its "parts and appurtenances" are in proper condition and can be safely operated. 49 U.S.C. at § 20701. Buganski contends that he suffered cumulative injuries

[4] Because we affirm the district court's summary judgment dismissing his FELA claim, we need not address Buganski's argument that his left-knee injury, allegedly sustained during his FCE, derived from a violation of the FELA.

because Soo Line permitted its locomotives to be operated in unsafe conditions. The district court concluded that Buganski's LIA claim failed because locomotive 777 was not "in use," as defined by the statute, at the time of the injury and because he failed to provide evidence that his injury was the result of cumulative trauma.

An employer is strictly liable under the LIA for injuries to an employee. *Wright v. Arkansas & Missouri R.R.*, 574 F.3d 612, 620 (8th Cir. 2009). The LIA is applicable only when a locomotive is "in use," which "gives the railroad an opportunity to remedy hazardous conditions before strict liability attaches to claims made by injured workers." *Id.* "[D]etermination of whether a train is 'in use' is to be made based upon the totality of the circumstances at the time of the injury." *Id.* at 621. Whether a locomotive is in use is a question of law for determination by the court. *Id.* at 620.

The inquiry as to the circumstances is "very fact-specific." *Paul v. Genesee & Wy. Indus., Inc.*, 93 F. Supp. 2d 310, 316 (W.D.N.Y. 2000). Generally, a locomotive is not "in use" when it is "being serviced in a place of repair." *Steer v. Burlington N., Inc.*, 720 F.2d 975, 976 (8th Cir. 1983). But a locomotive that is briefly uncoupled for service and that is moving back into service could be held to be "in use." *Angell v. Chesapeake & Ohio Ry.*, 618 F.2d 260, 262 (4th Cir. 1980).

The situation here does not create the sort of ambiguity seen in *Angell.* Locomotive 777 was in the repair yard and its power assembly was being removed. Buganski's claim was not based on locomotive 777 being "in use"; rather, Buganski asserted that his injury was the result of cumulative trauma from working on locomotives that were in use. However, there is no evidence supporting this; when Buganski was

questioned about cumulative trauma, he responded that he was only talking about the March 1, 2007 incident. The district court did not err by granting summary judgment on Buganski's LIA claim.

Affirmed.