J-A24013-12

NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

MARIAN W. OVIEDO, formerly known as MARIAN W. LAREAU, TRUSTEE OF THE LAREAU FAMILY REVOCABLE LIVING TRUST,	:	IN THE SUPERIOR COURT OF PENNSYLVANIA
Appellant	:	
v.	:	
CSX TRANSPORTATION, INC.,	:	
Appellee	:	No. 1830 WDA 2011

Appeal from the Order entered on October 19, 2011
in the Court of Common Pleas of Somerset County,
Civil Division, No. 472 Civil 2006

BEFORE: MUSMANNO, BOWES and WECHT, JJ.

MEMORANDUM BY MUSMANNO, J.: Filed: January 31, 2013

Marian W. Oviedo ("Oviedo"), formerly known as Marian W. Lareau, Trustee of the Lareau Family Revocable Trust ("the Trust"), appeals from the Order granting the Motion for summary judgment filed by CSX Transportation, Inc. ("CSX"), in this negligence action. We affirm.

The trial court set forth the facts underlying this case as follows:

> [Oviedo] is the [T]rustee of [the Trust], which contains 986 acres of [unimproved, mountainous] land located adjacent to Willis Creek in Fairhope, Somerset County, Pennsylvania ("the [P]roperty"). Originally, Oviedo's family owned the [P]roperty, but beginning in 1975[, Oviedo] purchased all of her relatives' shares in the [P]roperty and acquired sole ownership of it. In the past, the [P]roperty has been subject to wildfires [and it was commercially clear-cut of the mature timber on the Property between 1989 and 1996]. …
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> … After the clear-cut, neither [Oviedo] nor her family reseeded or regenerated the [P]roperty.

> The [P]roperty sits adjacent to a portion of the Baltimore-Keystone Subdivision of [CSX's] rail network. Along this railroad trail,[FN] there are five hot box detectors, which are equipped to detect the amount of heat emanating from trains and detect any dragging equipment.
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> [FN] This particular railroad stretch runs between Cumberland, Maryland and Connellsville, Pennsylvania.
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> On October 1, 2005[,] at approximately 4:00 p.m., a one-mile long CSX train ["the Train"] traveled westbound past Hyndman, Pennsylvania, a town located just east of Fairhope, Pennsylvania. After reaching Fairhope, the engineer [in] the rear [engine car] of the [T]rain looked in his side mirror and noticed smoke rising from the trees on the hillside above the tracks. In turn, he notified the head engineer[, William McAllister ("McAllister"), who was located in the Train's lead engine car along with the Train's conductor, Sandra Pennington ("Pennington")]. [McAllister] looked in his [rearview] mirrors, noticed the smoke and stopped the [T]rain. Amy Constantine, an eyewitness, indicated in her deposition that she saw flames and smoke coming from the [T]rain's wheels as it stopped. David Ritz, another eyewitness, saw the brush catch fire. After the [T]rain stopped, the engineers reported the fire to the [CSX] dispatcher. The crew went on to determine that the [T]rain was in good condition and continued along the railway.
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> Ultimately, a fire burned approximately 626 acres of the [P]roperty.

Trial Court Memorandum, 8/30/11, at 1-2 (footnote in original; some footnotes omitted).

In, July 2009, Oviedo filed a Complaint against CSX alleging that the fire in question was caused by CSX's negligence and that CSX was thus liable for the damage to the Property. Subsequently, Oviedo and CSX agreed upon a schedule regarding expert discovery, which was set to close in June 2011.

Following the close of factual and expert discovery per the agreed-upon schedule of the parties, on June 24, 2011, CSX filed a Motion for summary judgment. CSX argued, *inter alia*, that Oviedo could not prevail on her negligence claim because she had failed to present any evidence that CSX and/or the Train's operators owed a duty of care to Oviedo and had breached that duty.[1] According to CSX, since the standard of care owed by a railroad engineer/operator requires expert testimony, and Oviedo failed to produce any expert report in this regard, Oviedo failed to state a *prima facie* cause of action for negligence.

Oviedo responded that expert testimony was unnecessary to establish CSX's duty of care, since McAllister, the engineer in the Train's lead engine car, had testified that it was his "duty" to monitor the Train's rearview mirror to ensure that the Train was operating properly, and McAllister should have seen that the Train had started a fire on the Property. Regarding causation of the fire, Oviedo pointed out that (1) two eyewitnesses had testified that they observed sparks emanating from the Train and brush catching fire; and (2) during discovery, Oviedo produced a "Wildfire Investigation Report," prepared by an investigator with the Pennsylvania Bureau of Forestry,

[1] CSX attached to its Motion for summary judgment reports prepared by two purported railroad experts wherein the experts opined that CSX and the crew operating the Train did not act negligently or breach a duty of care to Oviedo.

Robert McJilton ("Investigator McJilton"), who concluded that the "Railroad" had caused the fire.[2, 3]

After conducting a hearing, on August 30, 2011, the trial court entered an Order granting CSX's Motion for summary judgment based upon the court's determination that Oviedo had failed to meet her burden to establish that CSX owed her a duty of care and had breached that duty. In the Memorandum accompanying the trial court's Order, the court explained the rationale for its ruling as follows:

> [W]e are convinced that the only way [Oviedo] could establish the existence of a breach of the standard of care is to first provide an expert to explain what comprises the standard of care for a railroad operator.[FN] A layperson would have little or no understanding of what a train engineer does or how he does it. We are left with only the testimony of [] McAllister, the [T]rain's [lead engine car] engineer, who indicated that an engineer should look back in the rearview mirror to make sure the train is operating properly. We have no information about what else a train operator should do, if anything, or even what a train operator should see in the mirror. Thus, with this void of information, a reasonable juror would be required to speculate on many relevant matters. For example, a juror would have to speculate about how far back an engineer should see when looking in the mirror, whether the sparking parts of a train are visible from the vantage point of the engineer, how often a train operator should look in the mirror, whether the mile-long [T]rain was entirely visible from the engineer's mirrors, and whether a train operator should have seen another warning signal that the [T]rain was a fire hazard. With these gaps in information, we

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[2] After performing an investigation of the scene, Investigator McJilton determined that there were six separate points of origin for the fire along approximately two miles of the CSX railroad tracks.

[3] Aside from Investigator McJilton's report, the only expert reports that Oviedo produced during discovery pertained to the monetary damage caused by the fire.

> conclude that there is no evidence of the relevant standard of care.
>
> > [FN] Here, we recognize that [Oviedo] has not alleged any type of strict liability. She does not allege that the [T]rain or [the] hotboxes were defective or that [CSX] was engaged in an abnormally dangerous activity. Therefore, the remaining theory of liability is negligence, which requires a showing that the standard of care was breached.

Trial Court Memorandum, 8/30/11, at 5 (footnote in original).

In September 2011, Oviedo timely filed a Motion for reconsideration challenging the trial court's entry of summary judgment. Oviedo attached to this Motion a copy of CSX's internal operating procedures ("CSX IOPs"), which CSX had disclosed to Oviedo during discovery. The CSX IOPs provided, in relevant part, that CSX employees must promptly report fires that are on or near the right of way to the proper authority. ***See*** Motion for Reconsideration, 9/9/11, at Ex. D. Additionally, Oviedo provided the trial court with additional deposition testimony excerpts from McAllister and the Train's conductor, Pennington.[4] Notably, Oviedo had failed to proffer the CSX IOPs or the additional deposition testimony prior to the trial court's ruling on CSX's Motion for summary judgment. According to Oviedo, the CSX IOPs and the additional deposition testimony presented

> sufficient evidence from which a jury could reasonably conclude that CSX's employees breached a duty of care to [] Oviedo by failing to discover the fire within a reasonable period of time

[4] Pennington testified, in relevant part, that, in her capacity as a locomotive conductor, "[y]ou're always on the look-out. You have big side mirrors, and you're always looking at your train to make sure there are no sparks coming out of the axles or things." N.T. (Pennington deposition), 6/9/10, at 17.

> after observing conditions that should have alerted them and by failing to stop the [T]rain and correct the problem causing the fire within a reasonable period of time.

Id. at 5; ***see also id.*** (arguing that "the questions which the [trial c]ourt believes require expert testimony are fully answered by the [deposition] testimony of CSX's employees and leave nothing for expert testimony or the speculation of the jury."). In the alternative, Oviedo requested the trial court to grant her an extension of time regarding the agreed-upon discovery schedule to enable Oviedo to file an expert report concerning the standard of care owed by a locomotive engineer.

Following a hearing, by an Order entered on October 19, 2011, the trial court dismissed Oviedo's Motion for reconsideration and affirmed its prior Order granting summary judgment in favor of CSX. In this Order, the trial court ruled that (1) it was precluded from considering the CSX IOPs and the additional deposition testimony because the court was bound to reconsider only those facts and evidence that were part of the record when the court ruled upon CSX's summary judgment Motion; (2) Oviedo's claim in her Motion for reconsideration that McAllister was negligent by his alleged failure to adhere to the CSX IOPs constituted a new theory of liability, and thus, the trial court was precluded from considering this new theory because it was not raised when the court decided the Motion for summary judgment; and (3) the court would not extend the deadline for the filing of expert reports.

Oviedo timely filed a Notice of appeal. On appeal, Oviedo raises the following issues for our review:

> I. Whether, in granting summary judgment in favor of [CSX] on the negligence and trespass claims of [Oviedo], in a railroad fire case, the Trial Court erred as a matter of law in concluding that:
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> a. a jury could not reasonably find that CSX breached the duty of care it owed to [Oviedo] without the benefit of an expert's opinion as to that duty, notwithstanding the undisputed testimony of the engineer in the lead locomotive involved in the fire as to his duties while operating the locomotive and his actions relating to those duties, the testimony of another CSX employee on the locomotive concerning what could be seen from the engine, the testimony of eyewitnesses concerning sparks emanating from the train, and the report of a state fire investigator as to the origin of the fire that destroyed the [P]roperty[?]
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> b. [the trial court] was not permitted, when reviewing [Oviedo's] Motion for Reconsideration, to consider the entire evidentiary record developed during discovery, [and,] particularly[,] a small but relevant portion of that record not presented to [the trial court] in the Motion for Summary Judgment and [Oviedo's] response thereto[?]
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> c. in finding, when reviewing [Oviedo's] Motion for Reconsideration, that [Oviedo's] argument that CSX was negligent for failing to promptly report the fire to appropriate authorities constituted a new theory of liability that [Oviedo had] waived by not expressly including it in [her] response to the Motion for Summary Judgment[?]

Brief for Appellant at 3.

> Our standard of review on an appeal from the grant of a motion for summary judgment is well-settled. A reviewing court may disturb the order of the trial court only where it is

> established that the court committed an error of law or abused its discretion. As with all questions of law, our review is plenary.
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> In evaluating the trial court's decision to enter summary judgment, we focus on the legal standard articulated in the summary judgment rule. Pa.R.C.P. 1035.2. The rule states that where there is no genuine issue of material fact and the moving party is entitled to relief as a matter of law, summary judgment may be entered. Where the non-moving party bears the burden of proof on an issue, he may not merely rely on his pleadings or answers in order to survive summary judgment. Failure of a non-moving party to adduce sufficient evidence on an issue essential to his case and on which he bears the burden of proof establishes the entitlement of the moving party to judgment as a matter of law. Lastly, we will review the record in the light most favorable to the non-moving party, and all doubts as to the existence of a genuine issue of material fact must be resolved against the moving party.

ADP, Inc. v. Morrow Motors, Inc., 969 A.2d 1244, 1246 (Pa. Super. 2009) (citation omitted).

Oviedo first argues that the trial court erred in ruling that summary judgment in favor of CSX was proper because Oviedo had failed to establish that CSX owed her a duty of care and had breached that duty, two of the necessary elements of a *prima facie* negligence claim.[5] ***See*** Brief for Appellant at 12, 18-20. Oviedo points out that, in her response in opposition to CSX's Motion for summary judgment, she argued that the evidence established that McAllister had a duty to monitor the Train's rearview mirror and breached that duty. According to Oviedo, the evidence

[5] Negligence is established by proving the following four elements: "(1) a duty or obligation recognized by law; (2) a breach of that duty; (3) a causal connection between the conduct and the resulting injury; and (4) actual damages." ***Brandon v. Ryder Truck Rental, Inc.***, 34 A.3d 104, 108 (Pa. Super. 2011) (citation omitted).

> shows [that] CSX and [] McAllister … recognized the duty to use reasonable care to not harm the [] Property and that the first step in discharging [this duty] was to observe the Train, its operation and the area through which it passed. The [CSX IOPs] make the observation, controlling, and reporting of fires a priority.[FN] [] McAllister testified that it was his "duty" to "look in [the] rearview mirror [of the locomotive] to check the [T]rain as [it is] proceeding along" to "make sure everything is okay." [N.T. (McAllister deposition), 6/9/10, at 90 (bracketed language added)]. [] McAllister's position in the [Train's] engine[, on October 1, 2005,] was on the side closest to the [] Property. [Oviedo] submits that this evidence, simple as it is, establishes the relevant standard of care.
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> [FN] Of course, this reference assumes that the Trial Court should have considered the [CSX IOPs, which issue this panel addresses ***infra***.]
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> As for the breach of that standard, the Report of [] Investigator McJilton and the testimony of [eyewitnesses] David Ritz and Amy Constantine … establishes that sparking and fire conditions existed for the [T]rain crew to observe. The testimony of [] McAllister and [] Pennington shows that [] McAllister was in a position to observe these conditions. … [] Pennington's testimony … describes the use of the rear view mirrors to discharge the duty of observation and explains that[,] by using [the mirrors,] it is possible to see the entire Train ….

Brief for Appellant at 18-19 (footnote in original).

Furthermore, Oviedo contends that expert testimony was unnecessary to establish CSX's duty of care because

(1) "[a] juror does not require more than [the above-detailed evidence] to conclude that [] McAllister should have seen the sparks the eyewitnesses testified they saw or those that caused the numerous 'points of origin' along the railroad tracks identified in [] Investigator McJilton's report[;]"

(2) "[t]he common experience of jurors in operating motor vehicles is more than sufficient for them to comprehend the testimony of [] McAllister and [] Pennington as to an engineer's duty to observe, to check the rear view mirrors

> while operating a locomotive, and if a dangerous condition is observed, to report it[;]" and
>
> (3) "the obligation to report fires to the proper authorities is not beyond the knowledge of jurors."

Id. at 11, 19; ***see also*** Reply Brief for Appellant at 4-5 (footnote omitted).

The Pennsylvania Supreme Court has stated that

> [e]xpert testimony is often employed to help jurors understand issues and evidence which is outside of the average juror's normal realm of experience. We have stated that, the employment of testimony of an expert rises from necessity, a necessity born of the fact that the subject matter of the inquiry is one involving special skill and training beyond the ken of the ordinary layman. Conversely, [i]f all the primary facts can be accurately described to a jury and if the jury is as capable of comprehending and understanding such facts and drawing correct conclusions from them as are witnesses possessed of special training, experience or observation, then there is no need for the testimony of an expert.

Young v. Dep't of Transp., 744 A.2d 1276, 1278 (Pa. 2000) (citations and paragraph breaks omitted).

Here, in the trial court's Pa.R.A.P. 1925(a) Opinion, the court addressed Oviedo's issue as follows:

> The parties had agreed to a deadline for the presentation of expert reports in advance of trial, and despite the presentation of [two] expert report[s by CSX] establishing the lack of a breach of duty of care in the operation of its [T]rain, [Oviedo] failed to similarly present an expert report which detailed what the duty of care is and how it was breached. Neither the [trial] court nor its citizen-jurors have a clear understanding of the standards by which train personnel go about operating the complex machinery which passes through Somerset County on its rail systems. Engineers and conductors go through extensive training and testing[, and] are subject to countless federal rules and regulations which focus on the safe operation of [locomotive] equipment. …

> [Oviedo] argue[s] that the focus of duty and breach of care in this case is on what the engineer [McAllister] saw and when he saw it. Seeing is a simple exercise which all common people do. The problem with [Oviedo's] theory, however, is that the jurors need expert information [to allow them to] understand what the engineers can see and when they can see it -- how much time do they have to devote to looking out the windows and mirrors -- from what distance can they see sparks from the perspective of their cabins -- does it make a difference as to whether the train is on a left curve or a right curve -- what does the impact of the time of day and the level of sunlight make -- how frequently do the spark arrestors fail -- how frequently should an engineer stop the train to inspect it -- the list goes on and on. … If the reasonable conduct of the [T]rain's operators is the focus of this action, an expert must place the context of the operator's actions in some frame of professional conduct. If the reasonable conduct of the [T]rain's designers and maintainers is the focus of this action, an expert must place the context of train design and maintenance in some frame of professional conduct. Without supplying an expert report, [Oviedo] expects the [trial] court to find [CSX] strictly liable solely on the basis of [Oviedo's] expert report o[n] causation[, *i.e.*, Investigator McJilton's report, which concluded that the "Railroad" was the cause of the fire].

Trial Court Opinion, 1/19/12, at 1-2.

The trial court's sound reasoning is supported by the record and the law, and thus, we adopt it for the purpose of this appeal. ***See id.***

The testimony of an expert was indispensable for Oviedo to prove her negligence claim against CSX. Oviedo's only theory of liability was that McAllister was negligent in exercising his duty to monitor the Train's rearview mirror, which resulted in the failure of the Train's crew and CSX to promptly notice and report the fire. However, absent the testimony of a qualified expert as to the proper standard of care under which McAllister should have conducted himself and in what way McAllister's actions deviated

from that standard, a jury's verdict would be nothing more than conjecture. ***See Schmoyer v. Mexico Forge, Inc.***, 649 A.2d 705, 707 (Pa. Super. 1994) (stating that "the trial court has a duty to prevent questions from going to the jury which would require it to reach a verdict based on conjecture, surmise, guess or speculation.") (citation omitted). Moreover, we are unpersuaded by Oviedo's claim that the common experience of jurors in operating motor vehicles, and utilizing rearview mirrors, was sufficient to enable them to properly determine whether McAllister was negligent in discharging his duties. A locomotive engine is a specialized piece of machinery, the operation of which is unfamiliar to the average person. ***Contra Vrabel v. Dep't of Transp.***, 844 A.2d 595, 598 (Pa. Cmwlth. 2004) (observing that "because the use of motor vehicles is so common, courts do not restrict testimony about the operation of motor vehicles to expert witnesses.")

In her second and third issues, Oviedo contends that the trial court erred in ruling that (1) it was precluded from considering the additional evidence that she had presented in her Motion for reconsideration, particularly, the CSX IOPs and the additional deposition testimony excerpts from Pennington and McAllister; and (2) Oviedo's reliance upon the CSX IOPs in the Motion for reconsideration constituted a new theory of liability. Brief for Appellant at 21-22. According to Oviedo, "the reference to the [CSX IOPs] is not a new theory of liability but[,] rather[,] supplemental evidence of the duty CSX owed" to Oviedo, *i.e.*, McAllister's purported duty

to observe and promptly report the fire to the proper authorities. ***Id.*** at 21; ***see also id.*** at 22 (asserting that "the reference to the CSX [IOPs] provides the background to and supports [] McAllister's testimony as to his duty to observe, [and] shows specifically what he should be looking for and what to do if he saw it.").

It is well established that arguments not raised initially before the trial court in opposition to summary judgment may not be considered by this Court on appeal. ***Krentz v. CONRAIL***, 910 A.2d 20, 37 (Pa. 2006); ***Devine v. Hutt***, 863 A.2d 1160, 1169 (Pa. Super. 2004); ***see also Rabatin v. Allied Glove Corp.***, 24 A.3d 388, 391 (Pa. Super. 2011) (holding that issues raised for the first time in a motion for reconsideration after the entry of summary judgment may not be considered by this Court). However, even if the trial court should have considered the CSX IOPs and the additional deposition testimony excerpts in reassessing whether the entry of summary judgment was proper, this evidence would not have altered the result. Since Oviedo never presented an expert report pertaining to the applicable standard of care, the trial court correctly refused to reopen the summary judgment entered in favor of CSX.

Since we conclude that Oviedo failed to produce evidence of facts essential to the cause of action which would require this case to be presented to a jury, we affirm the trial court's Order granting CSX's Motion for summary judgment.

Order affirmed.