STATE OF MICHIGAN

COURT OF APPEALS

KAREN DEBOER,

Plaintiff-Appellant,

v

CSX TRANSPORTATION, INC.,

Defendant-Appellee.

UNPUBLISHED
December 23, 2008

Nos. 280229; 282924
Ottawa Circuit Court
LC No. 05-051988-NO

Before: Hoekstra, P.J., and Bandstra and Donofrio, JJ.

PER CURIAM.

In Docket No. 280229, plaintiff appeals as of right the judgment of no cause of action, following a jury trial. In Docket No. 282924, plaintiff appeals as of right the trial court's order awarding defendant attorney fees of $92,278.50, and costs of $13,089.17, as case evaluation sanctions. We affirm.

This case arises from plaintiff's slip and fall injury during the course of her employment as a brakeman/switchman with defendant, CSX Transportation, Inc. Plaintiff fell when she slipped on some grain residue on a railroad tie near a switch where she was working. Plaintiff filed this action and asserted a claim for negligence under the Federal Employers' Liability Act ("FELA"), 45 USC 51 *et seq.* At issue on appeal are plaintiff's claims that defendant was negligent by (1) allowing grain residue to leak from the unsecured door of a grain hopper car, contrary to a federal regulation, (2) failing to provide plaintiff with a reasonably safe workplace, and (3) failing to warn plaintiff of the presence of a dangerous accumulation of grain residue in the area where she fell and failing to train her to deal with such a condition. The jury returned its verdict finding in favor of defendant, that defendant was not negligent.

I. Great Weight of the Evidence

Plaintiff first argues that the jury's verdict is against the great weight of the evidence and, therefore, the trial court erred in denying her motion for a new trial. We disagree.

A trial court's decision to grant or deny a motion for a new trial will not be reversed absent a palpable abuse of discretion. *Joerger v Gordon Food Service, Inc*, 224 Mich App 167, 172; 568 NW2d 365 (1997).

A new trial may be granted when "[a] verdict or decision [is] against the great weight of the evidence or contrary to law." MCR 2.611(A)(1)(e). However, such a motion should be granted only where "the evidence preponderates so heavily against the verdict that it would be a miscarriage of justice to allow the verdict to stand." *Shuler v Michigan Physicians Mut Liability Co*, 260 Mich App 492, 518; 679 NW2d 106 (2004).

Section 51 of the FELA, 45 USC 51, provides, in pertinent part:

> Every common carrier by railroad while engaging in commerce between any of the several States or Territories, . . . shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, . . . 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, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment.[1] [Emphasis added.]

An employee's contributory negligence may reduce, but not bar, recovery,[2] but "no such employee who may be injured or killed shall be held to have been guilty of contributory negligence in any case where the violation by such common carrier of any statute enacted for the safety of employees contributed to the injury or death of such employee." 45 USC 53.[3] "A regulation, standard, or requirement in force, or prescribed by the Secretary of Transportation under chapter 201 of Title 49, or by a State agency that is participating in investigative and surveillance activities under section 20105 of Title 49 is deemed to be a statute under sections 53 and 54 of this title." 45 USC 54a.

A. FRA Safety Regulations

Plaintiff argues that the evidence showed that defendant violated its duty to perform a pre-departure safety inspection and, therefore, was negligent per se.

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[1] As noted by plaintiff, FELA imposes liability when an injury is caused "in whole or in part" by the employer's negligence. This standard of proximate cause is to be distinguished from the usual common-law standard, which requires a plaintiff to prove that the defendant's negligence was a substantial factor in causing the injury, and that, more likely than not, but for the defendant's negligence, the plaintiff's injuries would not have occurred. *Weymers v Khera*, 454 Mich 639, 647-648; 563 NW2d 647 (1997); *Skinner v Square D Co*, 445 Mich 153, 164-165; 516 NW2d 475 (1994).

[2] In this case, the jury determined that defendant was not negligent and, therefore, did not reach the question whether plaintiff was contributorily negligent, or in what percentage.

[3] Similarly, the doctrine of assumption of risk does not apply where the employer violates a safety statute. 45 USC 54.

As plaintiff correctly observes, the United States Supreme Court has held that when an employer violates a statutory duty, the FELA imposes liability without an additional showing of negligence, and without regard to whether the statute was designed to prevent the particular injury suffered by the employee. *Kernan v American Dredging Co*, 355 US 426, 436-439; 78 S Ct 394; 2 L Ed 2d 382 (1958).[4] Further, under 45 USC 53, a plaintiff's contributory negligence, if any, does not reduce a plaintiff's recovery where the employer violates a safety statute.

Part 215 of Title 49 of the Code of Federal Regulations is titled "Railroad Freight Car Safety Standards." In pertinent part, 49 CFR 215.13 provides:

> (a) At each location where a freight car is *placed in a train*, the freight car shall be inspected before the train departs. This inspection may be made before or after the car is placed in the train.
>
> * * *
>
> (c) At a location where a person designated under § 215.11[5] is not on duty for the purpose of inspecting freight cars, the inspection required by paragraph (a) shall, as a minimum, be made for those conditions set forth in Appendix D to this part.

49 CFR, part 215, Appendix D, provides:

> At each location where a freight car is placed in a train and a person designated under § 215.11 is not on duty for the purpose of inspecting freight cars, the freight car shall, as a minimum, be inspected for the imminently hazardous conditions listed below that are likely to cause an accident or casualty before the train arrives at its destination. These conditions are readily discoverable by a train crew member in the course of a customary inspection.
>
> 1. Car body:
>
> * * *
>
> (f) Door insecurely attached.

The parties agree that, in the railroad vernacular, a door that has not been properly closed is considered to be "insecurely attached."

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[4] In *Kernan*, *supra* at 429-436, the Court relied on FELA cases to decide an issue arising under the Jones Act, 46 USC 688, which provides for employer liability for injuries to seamen, and which is based on and interpreted in the same manner as the FELA.

[5] 49 CFR § 215.11 refers to a designated inspector. It is undisputed that there was no such person at the Bil-Mar location at the time of the accident.

As plaintiff argues, if she could show a violation of defendant's duty to inspect, she would not need to show any further negligence, and her contributory negligence, if any, could not be used to reduce her recovery.

The evidence indicated that plaintiff slipped on grain residue on a railroad tie just north of the siding switch. Most witnesses agreed that the pattern of residue depicted in photographs, and observed during a post-accident inspection, was consistent with the grain having leaked out of an open or partially open hopper door. However, the evidence also indicated that there were no reports of any hopper cars being rejected for train movement on that basis, and no reports of repairs having been made to any leaky hopper cars or defective hopper doors. There also were no reports that any hopper cars had been unlawfully moved by a train while the hopper doors were open or the car was leaking.

We note that 49 CFR 215.13 requires that the crew perform a safety inspection at any location where freight cars are "*placed in a train*," "before or after the car is *placed in the train*," but "*before the train departs*." Therefore, under the clear language of the regulation, the duty to inspect arises when a car is going to be placed in a train for movement on the main track. This is similar to defendant's equipment handling rule 4469, which states that, "[e]xcept for switching movements, do not accept a hopper car for movement that has its hopper doors or bottom discharge outlets open."

Plaintiff's theory is that defendant must have violated its duty to inspect because, if it had inspected the hopper cars, it would have noticed that a door was open. However, plaintiff presented no direct evidence that any hopper car was actually placed in a train and moved without being inspected, or while its hopper doors were open, or while the car itself was leaking. In fact, the evidence fails to exclude the possibility that the grain residue on which plaintiff slipped was deposited on the rails by a hopper car that was being lawfully moved on the siding track during a switching movement, which does not require an inspection.

Thus, the particulars of how the leak may have occurred are unclear. Contrary to plaintiff's argument, the evidence does not lead to the inescapable conclusion that a leak must have occurred while a car was being unlawfully moved by a train, without having been inspected. Rather, it is possible that defendant inspected the car and missed a leak, which would not constitute a violation of the federal regulation. It is also possible that defendant or the grain elevator plant, Bil-Mar Feeds, moved a leaky car during a switching movement, and then placed it back in the plant for some reason. If the hopper doors were closed after the leak, but before the car was picked up by the train for departure, there would be no hopper cars reported as being rejected for train movement, and no reports of any repairs.

In sum, plaintiff failed to show that the evidence preponderated heavily in favor of finding that defendant violated its statutory duty to inspect a hopper car before it departed as part of a train.

B. Reasonably Safe Place to Work

Plaintiff argues that, even if defendant did not violate its duty to inspect, it violated its duty to provide a reasonably safe place to work by allowing an accumulation of grain residue to remain on the tracks "for a long period of time prior to the date of [plaintiff's] injury."

Witnesses testified that the presence of grain residue around the Bil-Mar grain elevator was a chronic condition, and plaintiff conceded that the conductor warned her about it. However, there was no evidence that the presence of grain residue in the area of the siding switch was a chronic problem, or any evidence concerning how long this particular accumulation had been on the tracks. While the post-accident report states that the tracks were "contaminated" with grain residue, there is no indication that the use of this word was intended to imply that the tracks were saturated, or had been coated with grain residue for a long period of time. Moreover, while witnesses claimed that the issue of dangerous grain residue at Bil-Mar was brought up at safety meetings, plaintiff concedes that there is no mention of any such discussion in the safety committee minutes.

Again, we conclude that plaintiff failed to show that the evidence preponderated heavily in favor of finding that defendant negligently allowed a dangerous accumulation of grain residue to remain on the siding switch area, and thereby violated its duty to provide a reasonably safe place to work.

C. Failure to Warn and Train

Plaintiff also argues that defendant was negligent by failing to warn her that there was a dangerous accumulation of grain residue near the switch, and by failing to train her to deal with such conditions.

As previously indicated, plaintiff failed to show that defendant was aware of the slippery grain residue conditions that existed in the siding switch area. Defendant could not have warned plaintiff of a danger of which it was not aware. Further, the evidence showed that plaintiff was extensively trained, and had been warned to be aware of her surroundings, and of hazardous walking conditions. Thus, plaintiff failed to show that the evidence preponderated heavily in favor of finding that defendant violated its duty to warn her of this danger, or its duty to properly train her.

In sum, plaintiff has failed to show that the evidence preponderated so heavily against the jury's verdict that it would be a miscarriage of justice to allow the verdict to stand. *Shuler*, *supra* at 518. Accordingly, the trial court did not abuse its discretion by denying her motion for a new trial. *Joerger*, *supra* at 172.

II. Safety Committee Minutes

Plaintiff next argues that the trial court erred in admitting the safety committee minutes into evidence, and in ruling that the jury would be allowed to take the minutes into the jury room, which enabled defense counsel to use the minutes inappropriately during closing argument to misrepresent defendant's duty to provide plaintiff with a reasonably safe workplace. We disagree.

A trial court's decision to admit or exclude evidence is reviewed for an abuse of discretion. *Waknin v Chamberlain*, 467 Mich 329, 332; 653 NW2d 176 (2002). Whether to allow trial exhibits to be taken into the jury room is also a matter within the trial court's discretion. *Socha v Passino*, 405 Mich 458, 471; 275 NW2d 243 (1979). An abuse of discretion occurs only when the trial court's decision falls outside the range of "reasonable and principled outcome[s]." *Maldonado v Ford Motor Co*, 476 Mich 372, 388; 719 NW2d 809 (2006).

The safety committee minutes were relevant to rebut plaintiff's claim that the presence of dangerous grain residue at Bil-Mar was brought up during safety committee meetings. The minutes were also relevant to rebut the implication that, although defendant was placed on notice of the problem, nothing was done to remedy the situation. Plaintiff's proffered stipulation satisfied only the first ground of relevance and, therefore, did not obviate defendant's justification for introducing the minutes into evidence.

Plaintiff also argues that the minutes should not have been admitted into evidence or submitted to the jury because their probative value was substantially outweighed by the danger of unfair prejudice, contrary to MRE 403. We disagree.

At trial, MRE 403 was not specifically addressed. However, the concern over potential prejudice is apparent from plaintiff's argument that the minutes contained irrelevant information. The trial court evidently agreed that there was some danger of prejudice, and offered to give the jury a limiting instruction. The trial court specifically asked plaintiff's counsel to remind it to do so. However, no such instruction was later requested or given. Further, the record makes clear that plaintiff's counsel was aware that the minutes were going to be submitted to the jury, but did not object on that basis.

On appeal, reversal may not be premised on an "error to which the aggrieved party contributed by plan or negligence." *Phinney v Perlmutter*, 222 Mich App 513, 537; 564 NW2d 532 (1997). Plaintiff's counsel could have objected to the exhibits being provided to the jury, but did not. Counsel also could have lessened any potential for prejudice by requesting a limiting instruction, but he apparently did not submit one to the court, and did not remind the court to give one. Therefore, plaintiff is not entitled to reversal on this basis.

Plaintiff argues that the trial court's alleged error in admitting the minutes enabled defense counsel to use the slogans contained in the minutes and argue that plaintiff was responsible for her own safety, contrary to the applicable standard of care. We disagree.

An attorney's misconduct can be grounds for reversal if it deprived the other party of a fair trial. *Reetz v Kinsman Marine Transit Co*, 416 Mich 97, 102-103; 330 NW2d 638 (1982). Here, however, plaintiff did not object to defense counsel's allegedly improper closing argument. Thus, the issue is unpreserved and plaintiff must show a plain error affecting her substantial rights. *Kern v Blethen-Coluni*, 240 Mich App 333, 336; 612 NW2d 838 (2000). The slogan mentioned during closing argument had already been used during defendant's cross-examination of plaintiff's expert, without objection. Therefore, its use in closing argument was cumulative. Further, contrary to plaintiff's argument, defense counsel did not use the slogan to avoid defendant's duty to provide a reasonably safe working environment. Rather, counsel used

it in the context of arguing plaintiff's contributory negligence, which was an issue at trial with respect to plaintiff's non-statutory negligence claims. Thus, defense counsel's argument was not improper and did not deprive plaintiff of a fair trial.[6]

III. Case Evaluation Sanctions

For her last claim of error, plaintiff argues that the imposition of attorney fees as case evaluation sanctions was improper, because it impermissibly burdens the exercise of her rights under the FELA. We disagree.

The parties agree that state courts are required to apply federal substantive law to FELA claims and that the imposition of damages in a FELA case is governed by federal substantive law. They argue, however, about whether the imposition of sanctions under Michigan's case evaluation rules is a matter of procedure, governed by state law, or substance, governed by federal law. Similarly, they argue about whether case evaluation sanctions are properly to be considered "damages," not to be awarded in a FELA case, even though those sanctions are not imposed to make a party whole or otherwise compensate for injury.

We need not decide these issues. Plaintiff's argument overlooks the fact that her complaint against defendant was not based solely on FELA and its associated federal regulations; she also alleged violations of a Michigan statute pertaining to railroads, and she pursued theories of common law negligence against defendant as well. When the case evaluators reviewed the matter and entered an award of $95,000 in plaintiff's favor, they did not specify which of plaintiff's claims formed the basis of that award. To the extent that the award was premised on plaintiff's state law theories of liability, the FELA and its prohibition against the imposition of attorneys fees as damages would not apply to case evaluation sanctions that were imposed against plaintiff as a result of her rejection of the award.

We further note that the confusion in this regard is the result of plaintiff's failure to timely bring her FELA-based argument against the case evaluation process to the attention of the trial court. Under the court rules, plaintiff had the right to object to case evaluation but had to do so within 14 days after the matter was assigned to evaluation. MCR 2.403(C)(1). Had she done so, the merits of her argument as to her FELA claims could have been determined and the evaluation could have been tailored in a fashion to prevent the confusion that currently exists with respect to this issue. Plaintiff did not take this opportunity but, instead, objected to the case evaluation procedure on the eve of trial, after an award had been rendered with respect to the

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[6] Moreover, plaintiff does not dispute that the trial court properly instructed the jury concerning the standard of care, i.e., that defendant has a nondelegable continuing duty to use reasonable care to provide plaintiff a reasonably safe place to work, and to maintain it in a reasonably safe condition. Jurors are presumed to follow the court's instructions unless the contrary is clearly shown. *Bordeaux v Celotex Corp*, 203 Mich App 158, 164; 571 NW2d 899 (1993).

totality of plaintiff's claims and, most notably, after she had rejected that award and thus placed herself at risk for case evaluation sanctions.

In sum, the murky record with which we are presented does not warrant granting relief to plaintiff on this issue, even if her arguments regarding FELA have merit. Further, plaintiff is to blame for the state of that record, having failed to follow the rules that would have allowed her to claim the protection she now asserts. In light of these circumstances, it would be fundamentally unfair to deny defendant the benefit of the case evaluation sanction it rightfully deserved under MCR 2.403(O).

We affirm. Defendant, being the prevailing party, may tax costs pursuant to MCR 7.219.

/s/ Joel P. Hoekstra
/s/ Richard A. Bandstra
/s/ Pat M. Donofrio