[Cite as *Smith v. CSX Transp., Inc.*, 2011-Ohio-1381.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

Julius P. Smith,	:	
Plaintiff-Appellant,	:	
		No. 10AP-588
v.	:	(C.P.C. No. 08CVC06-8056)
CSX Transportation, Inc.,	:	(REGULAR CALENDAR)
Defendant-Appellee.	:	

D E C I S I O N

Rendered on March 24, 2011

James A. Ebert, LLC, and *James A. Ebert*, pro hac vice; *Carroll, Ucker & Hemmer, LLC*, and *Paul K. Hemmer*, for appellant.

Porter, Wright, Morris & Arthur, LLP, Craig R. Carlson and *Megan E. Bailey*, for appellee.

APPEAL from the Franklin County Court of Common Pleas.

DORRIAN, J.

{¶1} Plaintiff-appellant, Julius P. Smith ("appellant"), appeals from a judgment of the Franklin County Court of Common Pleas, in which the trial court granted summary judgment in favor of defendant-appellee, CSX Transportation, Inc. ("appellee"). This action is brought under the Federal Employers' Liability Act ("FELA"), 45 U.S.C. 51-60. For the following reasons, we affirm.

{¶2} Appellant worked as a railroad employee for appellee since October 9, 1978. In 2005, appellant was a Class A machine operator for the 5G CAT gang. Each day, the railroad transported the gang to and from the designated job site in a 16-passenger van; however, the foremen rode separately in their own vehicles. On the morning of June 20, 2005, the gang moved their equipment along the tracks from Richmond, Virginia, toward Huntington, West Virginia. Appellant cautiously moved his equipment, weighing 67,000 pounds, directly in front of another gang member named John Castle ("Castle"). Castle, known to be an aggressive bully, followed appellant too closely, complaining that appellant moved very slowly along the tracks. Appellant became frightened that Castle would seriously injure him if they remained at such a close distance and radioed Castle to "get off [his] ass." (Smith depo. 25.)

{¶3} Mark Linkswiler ("Linkswiler"), a foreman, overheard the inappropriate radio communication and told Ray Cost ("Cost"), another foreman, that "we got a problem back there." (Linkswiler depo. 39.) Linkswiler and Cost first approached appellant to address the issue and then approached Castle regarding appellant's concerns. Castle stated that appellant was "stopping and going, stopping and going." (Linkswiler depo. 41.) Linkswiler replied, "I don't want to hear it. I want it to stop now." (Linkswiler depo. 47.) Subsequent to this conversation, Castle and Cost got into a heated argument regarding an unrelated matter, and Linkswiler approached the men to break up the altercation. Castle called Cost "a lying, no-good, son of a bitch," and threatened to "rip off his mother fucking head." (Linkswiler depo. 50.) Linkswiler separated the men and walked Castle back to his machine, claiming that Castle calmed down and apologized. Appellant also stated that, during the afternoon, Castle "got better" and that "[h]e kind of backed off a little bit and

didn't harass me anymore. It seemed like whatever Ray or Mark said to him it made him change his opinion about what he was doing." (Smith depo. 28.) At this time, the exchange between Castle and Cost was not reported to a supervisor.

{¶4} Prior to entering the van to go back to the hotel, Castle started harassing appellant once again about "going too slow and being incompetent." (Smith depo. 29.) The argument escalated on the van, and appellant cursed at Castle and gave him the middle finger. Castle became furious and threatened to knock appellant's "[f]'ing head off," if appellant gave him the middle finger again. (Bouvier depo. 32.) Both men continued arguing back and forth, and then appellant held up five fingers and stated, "[t]here, John. [t]here's five fuck yous." (Bouvier depo. 31-33.) Castle's face became "beat red," and he told appellant that "as soon as he got out he was getting his ass kicked." (Bouvier depo. 33.)

{¶5} The van reached the hotel, and as the men got out, Castle remained standing by the door. When appellant exited the van, Castle jabbed him under the rib cage, and appellant told Castle "just calm down." (Smith depo. 36.) Appellant attempted to walk away and Castle struck him from behind on the right side of the head, below his earlobe. Appellant turned around and staggered backward a few steps before falling to the ground.

{¶6} Shortly thereafter, Linkswiler received a telephone call notifying him about the incident and drove to the hotel to take appellant to the hospital. Linkswiler reported the incident to his supervisor, Kelly Piccirillo ("Piccirillo"), and advised the gang that Piccirillo planned to conduct an investigation the following day and that no one could leave the premises. That evening, each gang member wrote a statement regarding their

recollection of the incident between Castle and appellant. As a result of the investigation, appellee removed Castle from service.

{¶7} On June 4, 2008, appellant filed a complaint for negligence, alleging that appellee violated the FELA by: (1) failing to provide appellant with a reasonably safe place to work; (2) failing to properly supervise its employees and keep them safe from harm; and (3) failing to train and/or supervise its employees to recognize employees who exhibit the propensity for violence. On August 3, 2009, appellee filed its motion for summary judgment; on May 12, 2010, appellant filed a memorandum contra; and on May 18, 2010, appellee filed a reply. On June 1, 2010, the trial court granted summary judgment in favor of appellee.

{¶8} Appellant timely filed a notice of appeal on June 23, 2010, and set forth the following assignment of error for our consideration:

> The trial court erred by granting the Appellee's motion for summary judgment because there exists genuine issues of material fact as to whether the Appellee was placed on notice of the assailant's violent propensities when the same made violent threats of physical harm to the Appellee's supervising foreman.

{¶9} Prior to addressing appellant's assignment of error, we note that, pursuant to 45 U.S.C. 56, "[t]he jurisdiction of the courts of the United States under this chapter shall be concurrent with that of the courts of the several States," thus allowing a FELA action to be brought in either federal or state court. It is well-settled law that "FELA cases adjudicated in state courts are subject to state procedural rules, but the substantive law governing them is federal." *St. Louis Southwestern Ry. Co. v. Dickerson* (1985), 470 U.S. 409, 411, 105 S.Ct. 1347, 1348. In *Vance v. Consol. Rail Corp.*, 73 Ohio St.3d 222,

1995-Ohio-134, the Supreme Court of Ohio stated "[w]hat constitutes negligence for purposes of the FELA is a federal question," and " '[f]ederal decisional law formulating and applying the concept governs.' " Id., quoting *Urie v. Thompson* (1949), 337 U.S. 163, 174, 69 S.Ct. 1018, 1027. Therefore, in FELA actions, we must apply Ohio's procedural standard for summary judgment, pursuant to Civ.R.56, along with federal substantive law regarding negligence. See *Henry v. Norfolk & W. Ry. Co.* (Feb. 2, 1994), 4th Dist. No. 2129.

{¶10} We review a summary judgment de novo. *Koos v. Cent. Ohio Cellular, Inc.* (1994), 94 Ohio App.3d 579, 588, citing *Brown v. Scioto Cty. Bd. of Commrs.* (1993), 87 Ohio App.3d 704, 711. When an appellate court reviews a trial court's disposition of a summary judgment motion, it applies the same standard as the trial court and conducts an independent review, without deference to the trial court's determination. *Maust v. Bank One Columbus, N.A.* (1992), 83 Ohio App.3d 103, 107; *Brown* at 711. We must affirm the trial court's judgment if any grounds the movant raised in the trial court support it. *Coventry Twp. v. Ecker* (1995), 101 Ohio App.3d 38, 41-42.

{¶11} Pursuant to Civ.R. 56(C), summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, written admissions, affidavits, transcripts of evidence, and written stipulations of fact, if any, timely filed in the action, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Accordingly, summary judgment is appropriate only under the following circumstances: (1) no genuine issue of material fact remains to be litigated; (2) the moving party is entitled to judgment as a matter of law; and (3) viewing the evidence most strongly in favor of the non-moving party, reasonable

minds can come to but one conclusion, that conclusion being adverse to the non-moving party. *Harless v. Willis Day Warehousing Co.* (1978), 54 Ohio St.2d 64, 66. Because summary judgment is a procedural device to terminate litigation, courts should award it cautiously after resolving all doubts in favor of the non-moving party. *Murphy v. Reynoldsburg*, 65 Ohio St.3d 356, 358-59, 1992-Ohio-95, citing *Norris v. Ohio Std. Oil Co.* (1982), 70 Ohio St.2d 1, 2.

{¶12} "When reviewing the grant of summary judgment in FELA actions, appellate courts have been mindful of the legislature's intent in promulgating the Act." *Gibbons v. CSX Transp., Inc.* (C.A.6, 1990), 12 F.3d 212. " 'In 1906, Congress enacted the FELA to provide a federal remedy for railroad workers who suffer personal injuries as a result of the negligence of their employer or their fellow employees.' " *Vance v. Consol. Rail Corp.* at 227, quoting *Atchison, Topeka & Santa Fe Ry. Co. v. Buell* (1987), 480 U.S. 557, 561-62, 107 S.Ct. 1410, 1413. Further, "[t]he FELA is to be liberally construed to further its remedial goal." Id. See *Consol. Rail Corp. v. Gottshall* (1994), 512 U.S. 532, 114 S.Ct. 2396.

{¶13} Pursuant to the FELA, 45 U.S.C. 51:

> Every common carrier by railroad while engaging in commerce between any of the several States or Territories, or between any of the States and Territories, or between the District of Columbia and any of the States or Territories and any foreign nation or nations, shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee; and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee, for such injury or death resulting in whole of 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.

"In order to recover pursuant to the FELA, a plaintiff must show (1) that he was injured while in the scope of his employment, (2) which employment is in furtherance of the railroad's interstate transportation business, (3) *that his employer was negligent*, and (4) that his employer's negligence played some part in causing the injury for which compensation is sought under FELA." (Emphasis added.) *Green v. River Terminal Ry. Co.* (C.A.6, 1985), 763 F.2d 805, 808. The FELA test for negligence, as conveyed in *Rogers v. Missouri Pacific R.R. Co.* (1957), 352 U.S. 500, 77 S.Ct. 443, "is quite broad and differs from Ohio's traditional proximate cause test in an ordinary negligence case." *Henry*, supra. "Under this statute the test of a jury case is simply whether the proofs justify with reason the conclusion that employer negligence played any part, even the slightest, in producing the injury or death for which damages are sought." *Rogers*, 352 U.S. at 506, 77 S.Ct. at 448. However, in order to prevail on a FELA negligence claim, a plaintiff must still " 'prove the traditional common law elements of negligence: duty, breach, foreseeability, and causation.' " *Gibbons*, quoting *Adams v. CSX Transp., Inc.* (C.A. 6, 1990), 899 F.2d 536, 539.

{¶14} In *Gallick v. Baltimore & Ohio R.R. Co.* (1963), 372 U.S. 108, 117, 83 S.Ct. 659, 661, the United States Supreme Court held that "reasonable foreseeability of harm is an essential ingredient of Federal Employers' Liability Act negligence." Further, "a railroad is guilty of negligence if it fails to prevent reasonably foreseeable danger to an employee from intentional or criminal misconduct." *Brooks v. Washington Terminal Co.*

(D.C. Cir.1978), 593 F.2d 1285, 1288. In situations involving fellow employees, "[a] railroad has no liability for an assault by one employee upon another in the absence of notice of the assaulter's 'vicious propensities' or where the working area is 'not conducive to any unusual risk of assault.' " *Green*, supra, at 808-09, quoting *Herold v. Burlington N., Inc.*, (D.Minn.1972), 342 F.Supp. 862, 864-65. "The defendant's duty is measured by what a reasonably prudent person should or could have reasonably anticipated as occurring under like circumstances." *Davis v. Burlington N., Inc.* (C.A.8, 1976), 541 F.2d 182, 185.

{¶15} In *Green*, the Sixth Circuit Court of Appeals affirmed a directed verdict in favor of the railroad because "the record was devoid of evidence from which a jury of fair-minded men could find foreseeability." Id. at 809. The appellant alleged that the railroad negligently failed to provide a safe work environment because a co-worker assaulted him while on the job. Id. at 806. The evidence, however, showed that the appellant did not report any problems to his supervisor regarding the employee that assaulted him prior to the attack, that arguments between the men were common on the job site, and that the appellant was "completely surprised" by the attack. Id. at 809. Therefore, based upon the record, the assault on the appellant was not reasonably foreseeable to the railroad.

{¶16} In *Lager v. Chicago Northwestern Transp. Co.* (C.A.8, 1997), 122 F.3d 523, the Eighth District Court of Appeals also addressed the issue of foreseeability in a negligence claim based upon a prior verbal threat to a supervisor employed by the railroad. Similar to the present matter, the appellant, assaulted by a fellow employee, claimed that the railroad should have known about the employee's violent tendencies due to a previous verbal altercation involving a supervisor, as well as the employee's

reputation as a "bully." Id. at 524-25. The appellant alleged that, prior to the assault, this particular employee threatened to "throw the yardmaster out of the windowed tower, which was five stories high." Id. at 524. The court affirmed the grant of summary judgment in favor of the railroad stating that the appellant's "evidence is insufficient as a matter of law." Id. at 525. In its holding, the court noted that the appellant based his claim of negligence upon only one incident involving the employee and the yardmaster, as well as the employee's reputation as a bully, and that "[a]bsent a reasonable inference that the railroad was aware of [the employee's] violent tendencies," a jury would have no evidence from which to conclude the attack was reasonably foreseeable to the railroad. Id.

{¶17} In the present matter, the issue of foreseeability is paramount in determining whether appellant's negligence claim, pursuant to the FELA, should withstand summary judgment. In his assignment of error, appellant asserts that genuine issues of material fact exist as to whether appellee was placed on notice of Castle's violent propensities when Castle "made violent threats of physical harm" to foreman Cost on the day of the assault. Based upon the evidence set forth in the record, we find that no genuine issues of material fact existed as to the reasonable foreseeability of a physical assault on appellant.

{¶18} In their depositions, several gang members, including appellant, testified that, although Castle bullied fellow railroad workers, they were surprised that he physically assaulted appellant on June 20, 2005. Chadwick Wayne Horsley testified:

> Q: Given Castle's aggressive nature, I think somebody else referred to him as a schoolyard bully, are you surprised that he hit somebody?

> A: Actually, yeah.
>
> Q: Why?
>
> A: I never dreamed that anybody would hit anybody. I mean, those circumstances, it was more like bullying around. I didn't see it getting physical, no.
>
> * * *
>
> Q. All right. Did anyone on your gang ever tell you that they were surprised that Castle hit him?
>
> A. Everybody was surprised that he actually hit him.
>
> Q. Everybody was?
>
> A. Yes.

(Horsely depo. 24, 28.)

Louis Bouvier, another gang member, also testified that, although Castle bullied other workers and was a loud mouth, it surprised him that Castle physically assaulted appellant. Bouvier testified:

> Q. Were you surprised that he ended up hitting someone that day?
>
> A. Yes, I was.
>
> Q. Why were you surprised?
>
> A. Because John was a loud mouth. He would do a lot of talk; and he would try to bully you around, if he could, until he bullied you to the point where you drew the line and he would back off and pick on somebody else.

(Bouvier depo. 25.)

Further, appellant testified that, prior to the day of the incident, Castle never physically assaulted another railroad worker and that Castle's actions on June 20, 2005, surprised him as well. Appellant testified:

> Q: Had you had any problems with Mr. Castle before the day he hit you?
>
> A: No, not really.
>
> * * *
>
> Q: Before the day of the accident had you ever asked not to work with Mr. Castle?
>
> A: No, sir.
>
> Q: Had you ever heard anybody ask a foreman that they did not want to work with Mr. Castle?
>
> A: No, I can't recall anything like that was ever said.
>
> * * *
>
> Q: Okay. Had he ever struck anybody to your knowledge before that day?
>
> A: No sir, I didn't know anything about that.
>
> * * *
>
> Q: When he had the argument with Mr. Cost?
>
> A: Yes.
>
> Q: Did you tell anyone that you thought he should be taken out of service?
>
> A: No, we didn't discuss that.
>
> * * *
>
> Q: Before you got out of the van did you think Mr. Castle was going to strike you?

> A: I didn't think so, no, sir. I knew he had a look in his eye that he may want to speak some more to me *but I never thought that he would strike me.*

(Emphasis added.) (Smith depo. 13-16, 24, 125-26.)

{¶19} Based upon the testimonies of Chadwick Wayne Horsely, Louis Bouvier, and appellant, we believe that it was not reasonably foreseeable to appellee that Castle would physically assault appellant on June 20, 2005. Castle, known throughout the gang as a loud-mouth bully, never physically assaulted a co-worker prior to the incident with appellant. We consider as well that Linkswiler also stated that, subsequent to the verbal altercation between Castle and Cost, Castle apologized and calmed down prior to returning to his machine, which appellant further corroborated as being true, stating that Castle "got better" and that "[h]e kind of backed off a little bit and didn't harass me anymore." (Smith depo. 28.)

{¶20} Finally, appellant testified that, prior to June 20, 2005, he had no issue with Castle. In light of Castle's known reputation as a bully, appellant never thought Castle would assault him. Therefore, it is counter-intuitive to argue that it was reasonably foreseeable for appellee to have known about Castle's alleged "violent propensities," given the fact that even appellant remained unconcerned regarding the possibility of a physical assault on June 20, 2005. Similar to the decisions in *Green* and *Lager*, we find that the record is devoid of any evidence from which to conclude that the unfortunate assault on appellant was reasonably foreseeable to appellee. Therefore, appellant has not established that appellee was negligent under FELA.

{¶21} Appellant's sole assignment of error is overruled.

{¶22} Having overruled appellant's assignment of error, we affirm the judgment of the Franklin County Court of Common Pleas.

Judgment affirmed.

BRYANT, P.J., and FRENCH, J., concur.

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