COURT OF APPEALS
DECISION
DATED AND FILED

February 22, 2017

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2016AP147 **Cir. Ct. No. 2014CV243**

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT II

JAMES J. MANOWSKE,

PLAINTIFF-APPELLANT,

V.

WISCONSIN CENTRAL LTD.,

DEFENDANT-RESPONDENT.

APPEAL from an order of the circuit court for Fond du Lac County: ROBERT J. WIRTZ, Judge. *Reversed and cause remanded.*

Before Reilly, P.J., Gundrum and Hagedorn, JJ.

¶1 PER CURIAM. James J. Manowske appeals an order dismissing his negligence claims against his employer, Wisconsin Central Ltd., under the Federal Employers' Liability Act (FELA). Manowske's suit was based on injuries suffered after he slipped and fell on ice while on the job. The circuit court granted summary judgment in favor of Wisconsin Central, determining that as a matter of

law, Manowske's injuries were not foreseeable. Manowske argues that the circuit court incorrectly applied the FELA's liability standard and that a genuine issue of material fact exists on the question of foreseeability. Wisconsin Central argues that summary judgment on the question of foreseeability was proper and asserts as an alternative ground supporting the propriety of summary judgment that Manowske was the sole cause of his injuries. We agree with Manowske and conclude that on the evidence before the circuit court and in light of the FELA's relaxed liability standard, summary judgment was improper. Accordingly, we reverse and remand for further proceedings.

¶2 Manowske has been employed at Wisconsin Central since 1988. On December 15, 2010, he left the "A Shop" in a utility vehicle to retrieve materials from another location. There was snow on the ground and along the A Shop building that had been there for more than one day. There was some precipitation several days before the incident; the temperature remained below freezing each day thereafter. Manowske returned with the materials and parked the utility vehicle outside, intending to bring the materials into the A Shop through a service door. The vehicle was parked about three feet away from the service door. There was a metal manhole cover "[r]ight in front of the service door." Manowske lifted the materials out of the utility vehicle and as he stepped toward the service door, his right foot slipped on the manhole cover. His right leg went out sideways and he fell on both knees. When he got up he saw "glare ice" on the manhole cover.

¶3 Wisconsin Central filed a summary judgment motion alleging that there was insufficient evidence creating a material issue of fact with respect to foreseeability and that as a matter of law, Manowske was the sole cause of his injuries. The circuit court granted summary judgment in Wisconsin Central's

favor, concluding there was insufficient evidence to establish the foreseeability of the dangerous condition alleged to have caused Manowske's injuries. Specifically, the circuit court determined there was no evidence that Wisconsin Central had actual notice of the condition, or that the ice had existed for a sufficient time to enable Wisconsin Central to learn about and take steps to remedy the condition. Manowske appeals.

¶4 This court reviews summary judgment decisions de novo, applying the same methodology and legal standard employed by the circuit court. ***Frost v. Whitbeck***, 2001 WI App 289, ¶6, 249 Wis. 2d 206, 638 N.W.2d 325. "[T]o be entitled to summary judgment, the moving party ... must prove that no genuine issue exists as to any material fact and that the moving party is entitled to a judgment as a matter of law." ***Lambrecht v. Estate of Kaczmarczyk***, 2001 WI 25, ¶24, 241 Wis. 2d 804, 623 N.W.2d 751. "The inferences to be drawn from the underlying facts contained in the moving party's material should be viewed in the light most favorable to the party opposing the motion, and doubts as to the existence of a genuine issue of material fact are resolved against the moving party." ***Lambrecht***, 241 Wis. 2d 804, ¶23.

¶5 The FELA provides that "[e]very common carrier by railroad while engaged in commerce between any of the several States … shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce … for such injury … 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. It is a broad remedial statute construed liberally to protect railroad employees. ***Vonderhaar v. Soo Line R.R. Co.***, 2001 WI App 77, ¶5, 242 Wis. 2d 746, 626 N.W.2d 314 (citing ***Consolidated Rail Corp. v. Gottshall***, 512 U.S. 532, 542-43 (1994)). "The standard for liability under FELA is low, and the plaintiff's

burden in a FELA action is significantly lighter than it would be in an ordinary negligence case." ***Vonderhaar***, 242 Wis. 2d 746, ¶5 (internal citations and sources omitted). Vonderhaar was a railroad engineer staying between runs at an employer-provided motel. ***Id.***, ¶2. He filed a FELA claim after slipping and falling on ice and snow in the motel's courtyard. ***Id***. The employer successfully moved for summary judgment on the issue of foreseeability, pointing out it had not received prior complaints about dangerous or slippery conditions at the motel, nor reports of similar accidents. ***Id***., ¶¶3, 18. On appeal, the ***Vonderhaar*** court disagreed that this was "enough to establish that Vonderhaar's claim was barred, as a matter of law, under FELA." ***Id***., ¶18. Reasoning that under the FELA, normal winter conditions may be sufficient notice to railroad employers about the potential for harm due to a slip and fall on ice or snow, the ***Vonderhaar*** court reversed the circuit court's summary judgment, concluding that the railroad failed to establish a prima facie case. ***Id***., ¶20.

¶6 Manowske argues that under ***Vonderhaar*** and given the winter weather conditions, the evidence supports an inference "that a reasonable person in [Wisconsin Central's] position would foresee the potential for harm, … or that the unsafe condition was one [Wisconsin Central] could have discovered upon inspection." ***Vonderhaar***, 242 Wis. 2d 746, ¶13 (internal sources and citations omitted). Wisconsin Central maintains that summary judgment was appropriate because there was no evidence Wisconsin Central was aware of prior similar incidents, and Manowske was required to establish that the ice had existed on the manhole for a significant period prior to his accident.

¶7 We conclude that Manowske has established a genuine issue of material fact as to whether the harm was foreseeable pursuant to FELA's "relaxed foreseeable-harm standard." *See* ***Dalka v. Wisconsin Cent., Ltd.***, 2012 WI App

22, ¶23, 339 Wis. 2d 361, 811 N.W.2d 834 (citing with approval principle that under the FELA, "the common-law negligence standards of foreseeability and causation normally applied in summary judgment are substantially diluted." (citation omitted)). There was existing snow on the ground and around the building. Temperatures remained freezing following the precipitation several days before. The metal manhole cover was immediately in front of the A Shop service door. Right above the service door was a sloping roof where melting snow would drip down and freeze. At the time of the incident, there was also an awning immediately above the service door that prevented employees from getting wet when they stepped outside. The awning stuck out about three feet and appeared to funnel dripping water from the roof onto the metal manhole cover. Manowske had previously seen ice on the manhole cover and would throw salt on the cover if available in the yard's salt buckets. There were times he had to retrieve a bag of salt and other times when the salt buckets were not near the door. There was sufficient evidence to preserve Manowske's opportunity to present his case to a jury.

¶8 Wisconsin Central attempts to distinguish ***Vonderhaar***, arguing that while normal winter conditions might provide sufficient notice to an employer about potential slip and fall injuries, the small amount of precipitation in the days preceding Manowske's fall combined with the freezing temperatures constituted unusual and extreme transient weather conditions. Wisconsin Central argues that the FELA is not a worker's compensation statute and does not assign liability based solely on the existence of transient weather conditions unless the condition has continued for an extended time so as to give notice and an opportunity to respond. *See* ***Turner v. Clinchfield R.R. Co.***, 489 S.W.2d 257, 261 (Tenn. Ct.

App. 1972). Wisconsin Central asserts that Manowske was required to and did not sufficiently establish the continuous existence of the ice.

¶9 We agree that the FELA is not a strict liability statute and "a FELA plaintiff is not impervious to summary judgment." ***Vonderhaar***, 242 Wis. 2d 746, ¶7 (citation omitted). However,

> The lightened burden of proof means a correspondingly easier task for a plaintiff defending a summary judgment motion; because [the] burden at trial is so low, a FELA plaintiff can survive a motion for summary judgment "when there is even slight evidence of negligence."

Id. at ¶8 (citing ***Lisek v. Norfolk & W. Ry. Co.***, 30 F.3d 823, 832 (7th Cir. 1994)). We are not persuaded by Wisconsin Central's attempt to distinguish ***Vonderhaar*** based on the weather conditions in the instant case, which it characterizes as extreme, unusual and transient.[1] Further, we disagree with Wisconsin Central's assertion that Manowske did not sufficiently allege or establish facts that would support an inference of foreseeability. To the extent Wisconsin Central argues that the lack of certain record facts undercuts the element of foreseeability, these are arguments to make to a jury, especially given the FELA's relaxed standard.

¶10 Finally, Wisconsin Central asks this court to conclude it was entitled to summary judgment because:

[1] The transient weather cases cited by Wisconsin Central arise from warmer jurisdictions. As stated in ***Whelan v. Penn. Central Co***., 503 F.2d 886, 890 (2nd Cir. 1974):

> Perhaps a railroad in Tennessee cannot be expected to guard against icicles falling onto engines en route. But a New Jersey railroad may well be held to a higher standard with respect to gradual ice formation in its own railyard. The icy condition dispute in this case was foreseeable.

We remain satisfied that in the instant case, foreseeability is a question for the jury.

> The evidence demonstrates that a reasonable juror could only conclude that if Manowske did injure his knee as alleged, it was the result of his sole negligence as he completely ignored his own safety by failing to even look where he was walking and carrying items in a manner that prevented him from seeing.

Citing Manowske's testimony that he could not see his feet when he was carrying materials from the utility vehicle into the shop, Wisconsin Central provides a list of alternative actions that Manowske might have taken to avoid injury.[2]

¶11 Wisconsin Central has not established its entitlement to summary judgment on the issue of causation. Under the FELA's relaxed causation standard, "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" at issue. ***Rogers v. Mo. Pac. R.R. Co.***, 352 U.S. 500, 506 (1957). If a jury could determine that Wisconsin Central's negligence played any part at all in producing Manowske's injury, summary judgment on the question of causation is inappropriate regardless of Manowske's actions.

¶12 In sum, given the FELA's relaxed standards, we conclude that Wisconsin Central was not entitled to summary judgment. Thus, the circuit court erred in dismissing Manowske's FELA claims.

By the Court.—Order reversed and cause remanded.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5.

[2] Wisconsin Central asserts this as an alternative basis on which to affirm summary judgment. Manowske asks that we determine this issue to clarify further proceedings.