SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-3646-21

CARMEN CORDERO,

Plaintiff-Appellant,

v.

NEW JERSEY TRANSIT
RAIL OPERATIONS, INC.,

Defendant-Respondent.

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Argued July 10, 2023 – Decided September 5, 2023

Before Judges Haas and Natali.

On appeal from the Superior Court of New Jersey, Law Division, Essex County, Docket No. L-1960-19.

P. Matthew Darby (Darby Law Group) of the Maryland and Pennsylvania bars, admitted pro hac vice, argued the cause for appellant (Zarwin Baum DeVito Kaplan Schaer Toddy, PC, and P. Matthew Darby, attorneys; Theodore M. Schaer and P. Matthew Darby, on the brief).

Thomas C. Hart argued the cause for respondent (Ruprecht Hart Ricciardulli & Sherman, LLP,

attorneys; Thomas C. Hart, Richard M. Forzani, and Andrew C. Smedberg, on the brief).

PER CURIAM

Plaintiff Carmen Cordero appeals from the Law Division's June 24, 2022 order granting summary judgment to defendant New Jersey Transit Rail Operations, Inc., and dismissing his complaint for damages under the Federal Employers' Liability Act, 45 U.S.C. §§ 51-60. We affirm.

I.

We briefly summarize the facts from the summary judgment record, viewing them in a light most favorable to plaintiff. Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 540 (1995). Plaintiff has worked for defendant since 2003. Initially hired as a repair person, he transferred to the Building and Bridges Department in 2019 where he worked as a mechanic. In August 2016, plaintiff was driving a mobile field work truck to transport an oxygen cylinder and miscellaneous parts from defendant's Woodbridge facility to its Raritan location. The truck was equipped with a sliding door, which opened from the driver to the passenger side, and that separated the cab from the rear section of the truck area.

Although the truck had designated compartments for the storage of oxygen cylinders, plaintiff did not place the oxygen container in those areas because 1)

he believed the compartments were filled with other tanks, and 2) the doors which secured the tanks were extremely difficult to open and close due to a purported defect in the locking mechanisms. As a result, plaintiff placed the oxygen cylinder and miscellaneous parts in the rear area of the truck and attempted to secure them with a large battery.

While driving to the Raritan location, plaintiff heard a noise in the rear compartment. Believing the oxygen cylinder might have become unsecured, he attempted to open the interior sliding door at a red light but found it difficult to close. While the truck was in drive, he attempted to close the door but it became "unjammed," and the momentum of the door wrenched his arm in a backward and upward motion resulting in a tear to the rotator cuff in his right shoulder.

Defendant moved for summary judgment and contended the record failed to create a genuine and material question of fact to establish: 1) any negligence on its part, 2) a defect in the sliding door, and 3) his injuries were reasonably foreseeable. In support, defendant relied on plaintiff's failure to provide expert proofs regarding any defect in the sliding door; the deposition of Herman Van DePutte, an assistant supervisor in defendant's department, who testified to the absence of any prior complaints with respect to the door; and monthly maintenance reports which similarly revealed no issues with the sliding door.

In opposing defendant's application, plaintiff submitted photographs of the door which revealed scuff, or friction, marks on a portion of the interior metal of the door. Plaintiff argued those photographs provided "legally sufficient circumstantial evidence . . . for the case to proceed to the jury." In addition, plaintiff relied upon his deposition testimony in which he described the circumstances of the incident and his resulting injury. In his deposition, he described the truck as having a "long history of being a big piece of junk," testified the external compartments and doors where the oxygen tanks are to be stored were inoperable, the rear door would open without notice, and "[e]very other door . . . never worked right . . . ."

After briefing and oral arguments, the court granted defendant's motion, dismissed plaintiff's complaint, and issued a conforming order. In its accompanying written statement of reasons, the court concluded no "genuine issue of material fact exists [as to] whether the door at issue was defective." Instead, as the court explained, plaintiff relied solely on "scratches or scuff marks on the wall behind the sliding door" and his testimony that the truck "has a long history of being a big piece of junk." The court, noted, however, no employee of defendant ever reported a problem with the sliding door, and none

of defendant's monthly reports detailing the maintenance of the truck reflected any issues or defects with the door.

Thus, even when viewing the motion record in a light most favorable to plaintiff and applying FELA's relaxed standard of proof, the court concluded "[c]ircumstantial evidence such as the scratches or scuff marks on the wall behind the sliding door would not help a jury, comprised of laypersons, with deciphering what defect, if any, with the sliding door." Stated differently, the court explained the "scuff mark does not prove a defect or issue, just that the door and wall apparently touched over time or that some other object scratched or scuffed that wall. That, with nothing else, does not prove a defect of the door or that the door was regularly not working properly."

Finally, the court reasoned even if "the sliding door was defective," plaintiff failed to establish defendant "knew or should have known about the alleged defect with the door." In light of the aforementioned findings and legal conclusions, the court deemed it unnecessary to determine if plaintiff's injury was foreseeable as there was "no evidence, apart from speculation, as to how the sliding door was defective."

Before us, the plaintiff largely reprises his arguments made before the court and specifically contends the court erred when it concluded

"[c]ircumstantial evidence such as the scratches or scuff marks on the wall behind the sliding door would not help a jury, comprised of lay persons, with deciphering what defect, if any, with the sliding door." He argues the court "discount[ed]" plaintiff's testimony that the door did not properly function, including his statement that he found the door difficult to open and even more challenging to close, and when it became "unjammed," its momentum caused plaintiff's injuries. Plaintiff maintains it is "within the realm of common knowledge that a simple sliding door [which] rubs against a partition with enough force to create marks could cause a problem such as that experienced by plaintiff."

Plaintiff also contends the court "incorrectly invad[ed] the function of the jury . . . with regard to the issues of notice" when it found "there was no evidence in the record before the court that [defendant] knew or should have known this to be true [that there was a defect] with a reasonable opportunity to repair the door." On this point, he again relies on photographs of the door "that clearly show scuff marks along the partition between the passenger cab and the mobile work truck's work area." Plaintiff contends these photographs are "easily understood [as an] indication of friction." Contrary to defendant's proofs, plaintiff maintains the motion record contained sufficient evidence to create a

factual question on the issue of notice, including plaintiff's testimony the truck was poorly maintained and in disrepair, including the external and internal compartments and doors, which he contends calls into question the sufficiency and accuracy of defendant's inspection reports.

In requesting we affirm, defendant first argues the motion record failed to create a genuine or material question of fact to establish a FELA claim because plaintiff's injuries resulted from an "unbroken chain of his own negligent conduct." On this point, defendant argues plaintiff's conduct violated numerous provisions of defendant's Rail Employee Safety Rules and On-Track Safety Procedures Manual, including those addressing the storage and transport of oxygen tanks, as well as his improper opening of the sliding door while the truck was in drive.

Defendant also argues the motion record failed to contain the necessary factual proofs to establish the door was defective. Defendant specifically notes the record is devoid of any complaints or reports regarding the door, and relies on DePutte's unrebutted deposition testimony that he did not recall having any issue, or complaints, with the sliding door prior to plaintiff's incident.

Defendant also stresses the motion record supported the finding the truck was "regularly inspected and . . . no defects were found with respect to the . . .

door." On a similar point, defendant contends the record fails to contain necessary expert proofs required to establish a defect. It explains the door is a complex instrument requiring expert testimony to support his claims of a defect. Finally, defendant argues its lack of either actual or constructive notice of any issue with the sliding door, thereby rendering the incident "wholly unforeseeable and attenuated."

We affirm substantially for the reasons expressed by the court in its written decision accompanying the order for summary judgment, as the motion record shows there is no genuine issue as to any material fact challenged and defendant is entitled to a judgment as a matter of law. We agree with the court that under the circumstances presented, plaintiff's proofs were deficient to establish a claim of negligence against defendant under FELA. We provide the following comments to amplify our decision.

II.

We apply the same standard as the trial court when reviewing a grant of summary judgment. Globe Motor Co. v. Igdalev, 225 N.J. 469, 479 (2016). Pursuant to Rule 4:46-2(c), a court is required to grant summary judgment "if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any

material fact challenged and that the moving party is entitled to a judgment or order as a matter of law." Further, the interpretation and construction of an insurance contract is a matter of law that we review de novo. Simonetti v. Selective Ins. Co., 372 N.J. Super. 421, 428 (App. Div. 2004).

Plaintiff brought this action under FELA, alleging that defendant negligently failed to provide a reasonably safe workplace and that such alleged negligence resulted in plaintiff's injury. FELA provides, in pertinent part, that "[e]very common carrier by railroad . . . shall be liable in damages to any person suffering injury while he is employed by such carrier . . . 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 . . . ." 45 U.S.C. § 51. Thus, in a FELA case, plaintiff must produce evidence, either direct or circumstantial, that justifies or supports an inference of employer negligence. Stevens v. N.J. Transit Rail Operations, 356 N.J. Super. 311, 318 (App. Div. 2003) (citing Rogers v. Mo. Pac. R.R. Co., 352 U.S. 500, 508 (1957)).

Plaintiff's burden is satisfied by showing that defendant's negligence "played any part, even the slightest[,] in producing the injury for which damages are sought." Stevens, 356 N.J. Super. at 318 (citations omitted). "[A] trial court is justified in withdrawing . . . issue[s] from the jury's consideration only in

those extremely rare instances where there is a zero probability either of employer negligence or that any such negligence contributed to the injury of an employee." Hines v. Consol. Rail Corp., 926 F.2d 262, 268 (3d Cir. 1991) (quoting Pehowic v. Erie Lackawanna R.R., 430 F.2d 697, 699-700 (3d Cir. 1970)). With that said, "FELA is not a strict liability or workers' compensation statute; it is a negligence statute with an explicitly-stated relaxed standard of causation." Monheim v. Union R.R. Co., 996 F. Supp. 2d 354, 361 (W.D. Pa. 2014); see also Consol. Rail Corp. v. Gottshall, 512 U.S. 532, 542-543 (1994).

Although the FELA standard is generally more liberal than the common law negligence standard, FELA plaintiffs remain obligated to establish the "traditional common law elements of negligence: duty, breach, foreseeability, and causation." Stevens, 356 N.J. Super. at 319 (citing Aparicio v. Norfolk and W. R.R. Co., 84 F.3d 803, 810 (6th Cir. 1996)). And while FELA requires every employer to exercise reasonable care to provide its employees with a safe work environment, reasonable foreseeability is a prerequisite to any claim. Hines, 926 F.2d at 268. The employer's responsibility is measured by "what a reasonably prudent person would anticipate as resulting from a particular condition." Gallick v. Balt. & Ohio R.R. Co., 372 U.S. 108, 118 (1963).

Applying these standards, we are satisfied plaintiff's evidence was insufficient to present a jury question. The gravamen of plaintiff's claim against defendant is it negligently permitted plaintiff to operate the truck with a defective door that injured his shoulder when it closed abruptly. In essence, plaintiff contends the door was either negligently maintained or defectively designed.

We agree with the court that the motion record, read in its most favorable light, failed to establish a genuine and material factual question as to defendant's negligence related to any defect or issue with the operation of the sliding door. Giving plaintiff all reasonable inferences, at best, he explained the circumstances of his injury, and the door abruptly closing while the truck was in drive and did not offer any fact supporting defendant's negligence or that defendant was aware of a problem with the door prior to plaintiff operating the truck. We agree with the court that the scuff marks in the photograph, without more, do not create a factual question on this issue. As the court noted, plaintiff did not testify the friction of the door caused those marks, nor does the record support the reasonable inference those marks suggest defendant negligently maintained the truck or permitted plaintiff to operate an unsafe vehicle.

Having failed to establish the existence of a dangerous or defective condition to which defendants had knowledge, any assertion the sliding door was defectively designed or installed clearly required expert testimony and we reject plaintiff's arguments to the contrary. In determining whether expert testimony is necessary, a court must consider "whether the matter to be dealt with is so esoteric that jurors of common judgment and experience cannot form a valid judgment as to whether the conduct of the [defendant] was reasonable." Davis v. Brickman Landscaping, Ltd., 219 N.J. 395, 407 (2014) (alteration in original) (quoting Butler v. Acme Mkts., Inc., 89 N.J. 270, 283 (1982)).

In some cases, the "jury is not competent to supply the standard by which to measure the defendant's conduct," and thus the plaintiff must establish the defendant's standard of care and breach of that standard by presenting expert testimony. Ibid. (quoting Sanzari v. Rosenfeld, 34 N.J. 128, 134-35 (1961)); see, e.g., id. at 408 (expert required to explain fire code provisions and standards); D'Alessandro v. Hartzel, 422 N.J. Super. 575, 581-83 (App. Div. 2011) (stating an expert is required to explain dangerous condition of a step down into a sunken living room near the entrance because allegations of a design flaw or construction defect are "so esoteric or specialized that jurors of common judgment and experiences cannot form a valid conclusion" (quoting Hopkins v.

Fox & Lazo Realtors, 132 N.J. 426, 450 (1993)); Vander Groef v. Great Atl. & Pac. Tea Co., 32 N.J. Super. 365, 370 (App. Div. 1954) (concluding plaintiff "failed to introduce any evidence that the construction of a platform [forty-four] inches high without steps or a ladder was in any way a deviation from standard construction, or that it was unsafe").

In contrast, where "a layperson's common knowledge is sufficient to permit a jury to find that the duty of care has been breached," an expert is not required. Davis, 219 N.J. at 407 (quoting Giantonnio v. Taccard, 291 N.J. Super. 31, 43 (App. Div. 1996)). That is because "some hazards are relatively commonplace and ordinary and do not require the explanation of experts in order for their danger to be understood by average persons." Hopkins, 132 N.J. at 450 (stating an expert is not required to establish a dangerous condition of camouflaged step); see also Scully v. Fitzgerald, 179 N.J. 114, 127-28 (2004) (expert not required to explain danger of throwing a lit cigarette onto a pile of papers or other flammable material); Berger v. Shapiro, 30 N.J. 89, 101-02 (1959) (expert not required to explain dangerous condition caused by a missing brick in top step of a porch); Campbell v. Hastings, 348 N.J. Super. 264, 270-71 (App. Div. 2002) (expert not required to establish danger of unlit sunken foyer). These principles apply equally in FELA cases. Stevens, 356 N.J. Super. at 321

(expert not required to demonstrate machine unsafe when plaintiff presented ample evidence that physical "contortions" required for use were clear to any lay observer); Schulenberg v. BNSF Ry. Co., 911 F.3d 1276, 1289-90 (10th Cir. 2018) (expert required to establish that railroad track did not meet federal standards for deviation under load); Tufariello v. Long Island R.R., 485 F.3d 80, 87-88 (2d Cir. 2006) (expert not required to show repeated exposure to train horns without proper sound protection can cause hearing loss). In Stevens, the plaintiff presented unrebutted evidence regarding the machine alleged to have caused his injury, including repeated employee complaints, the defendant's purchase of a newer machine, and the defendant's instructions to use the older machine only when necessary. 356 N.J. Super. at 320-21.

Here, plaintiff failed to provide any expert evidence to support his claim the sliding door was in any way defective, hazardous, or dangerous. In light of plaintiff's inability to identify any specific problem with the sliding door suggestive of defendant's negligence, expert testimony was necessary to establish operating the door was in some way dangerous or negligently maintained. As noted, rather than providing competent expert or other testimony, plaintiff solely relied on the presence of "scuff marks" on the panel of the door and his generalized complaints about the doors on the truck without

detailing any specific complaints regarding the operation of the sliding door other than the circumstances leading to his injuries. We agree with the court those proofs were insufficient to establish a defect in the door, that it was improperly maintained, or defendant was in any way negligent.

Finally, the case relied upon by plaintiff for the proposition expert testimony was not required, Lynch v. Ne. Reg'l Commuter R.R. Corp., 700 F.3d 906 (7th Cir. 2012) is clearly distinguishable. There, plaintiff was injured when the top portion of a fence he was installing came loose and hit him. Id. at 908. The court held under those facts, there "was no reason for expert testimony on the easily understood causal connection between improper installation of a top rail [of a fence] and its subsequent drop to the ground." Id. at 915. Here, the cause of plaintiff's injuries is not so clear. Instead of a fence falling on plaintiff, he was allegedly injured by the improper functioning of a sliding pocket door. As noted, the cause of the sliding door's purported improper functioning is hardly known by an average juror, and expert testimony was required to address any defect or issue, if for no other reason than to avoid improper speculation by the jury.

In sum, we are satisfied plaintiff failed to provide sufficient proof of negligence on the part of defendant, notwithstanding the minimal proof required under FELA. The order dismissing plaintiff's complaint is affirmed.