2016 IL App (4th) 150655-U

NO. 4-15-0655

FILED
November 18, 2016
Carla Bender
4th District Appellate
Court, IL

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

LARRY W. ARNOLD, Independent Executor of the Estate of LYNDAL W. ARNOLD, Deceased, Plaintiff-Appellant, v. NORFOLK SOUTHERN RAILWAY COMPANY, a Corporation; JAMES J. SOLDI; and MICHAEL SHULER, Defendants-Appellees.	))))))))	Appeal from Circuit Court of Vermilion County No. 10L11 Honorable Craig H. DeArmond, Judge Presiding.

JUSTICE TURNER delivered the judgment of the court.
Justices Harris and Appleton concurred in the judgment.

ORDER

¶ 1 *Held*: The appellate court affirmed the trial court's judgment, which granted summary judgment in favor of defendants.

¶ 2 In August 2010, plaintiff, Larry W. Arnold, as independent executor of the estate of Lyndal W. Arnold, filed an amended wrongful-death complaint against defendants, Norfolk Southern Railway Company (Norfolk Southern), James J. Soldi, and Michael Shuler. In May 2011, defendants filed a motion for summary judgment. In July 2015, the trial court granted summary judgment in favor of defendants.

¶ 3 On appeal, plaintiff argues the trial court erred in granting summary judgment in favor of defendants. We affirm.

¶ 4 I. BACKGROUND

¶ 5 On February 2, 2009, Lyndal Arnold drove his vehicle onto a railroad grade

crossing on County Road 250 East in Vance Township, Illinois, where he was hit by a Norfolk Southern train, which consisted of 3 locomotives and 16 train cars. Arnold sustained injuries resulting in his death. Soldi was the engineer operating the train at the time of the accident, and Shuler was also on board the train as an engineer.

¶ 6 In August 2010, plaintiff filed an amended complaint under the Wrongful Death Act (740 ILCS 180/0.01 to 2.2 (West 2010)) against defendants as well as Vance Township and Vermilion County. In count I, plaintiff alleged Norfolk Southern failed to provide (1) adequate crossing protection devices at the crossing, (2) a yield sign for motorists approaching the crossing, and (3) automatic crossing gates and/or flashing warning lights to alert motorists of approaching trains when it knew the crossing was dangerous and had sight obstructions. Count I also alleged, *inter alia*, Norfolk Southern was negligent in allowing trains to operate through the crossing at a time when there were no adequate warning devices in place; permitting trains to operate through the crossing when the motorist sight-line guidelines were not satisfied; failing to provide a flagman at the crossing to warn motorists of approaching trains; owning, maintaining, and permitting trains to operate through the crossing when it was ultrahazardous or extrahazardous; and failing to provide adequate and proper audible notice of the presence of the train at the crossing.

¶ 7 In count II, plaintiff alleged Soldi and Shuler were negligent because they (1) operated the train without keeping a proper and sufficient lookout; (2) proceeded at a speed greater than was reasonable and proper; (3) failed to decrease speed so as to avoid colliding with another vehicle; (4) failed to warn vehicles the train was approaching; (5) failed to sound the train's whistle in a sufficient time prior to the train's arrival at the crossing; (6) failed to place the train in "emergency" within a reasonable time period; (7) permitted and allowed trains to operate

through the crossing at a time when there were no adequate warning devices in place and when they knew that vegetation and fixed objects were present in the line of sight of oncoming motorists; (8) owned, maintained, and permitted trains to operate through the crossing when it was ultrahazardous or extrahazardous; and (9) failed to provide adequate and proper audible notice of the train's presence at the crossing. Counts III and IV set forth allegations against Vance Township and Vermilion County. The case against Vermilion County was ultimately dismissed. Vance Township is not a party to this appeal.

¶ 8 In May 2011, defendants filed a motion for summary judgment pursuant to section 2-1005 of the Code of Civil Procedure (735 ILCS 5/2-1005 (West 2010)). Therein, defendants argued plaintiff's claim that the train was traveling at an excessive rate of speed was preempted by federal law, as the train was traveling within the federal speed limit. Defendants also argued the absence of a yield sign was not a proximate cause of decedent violating his common law and statutory duties by driving into the path of a visible and audible oncoming train; the steepness of the grade did not obstruct decedent's view of the train; and decedent's negligence in entering the crossing after he could have seen the approaching train was the sole proximate cause of the accident, or at a minimum, exceeded 50% of the total fault.

¶ 9 Based on the parties' affidavits, depositions, and exhibits, the evidence indicated the crossing at issue in this case did not have automatic gates or flashing lights to warn motorists of approaching trains. A yellow and black advance warning sign for northbound vehicles was located approximately 800 feet south of the crossing. A reflective crossbuck sign was posted 15 feet before the crossing, but a required yield sign for northbound traffic was missing. The crossing was surrounded primarily by farmland, and, at the time of the collision, there was snow on the ground. The crossing had a humped profile, with an uphill grade of 5.6% to 6% on the

south side. According to Illinois law, the grade line of approaches to railroad crossings may not exceed 5%. 625 ILCS 5/18c-7401(3) (West 2008); 92 Ill. Adm. Code 1535.204(a) (2016). The county road in question was gravel and approximately 17 feet wide, with 5- to 6-foot ditches. On this single main-line track, the speed limit was 60 miles per hour.

¶ 10 At the time of the accident, which occurred at approximately 3:47 p.m., decedent was driving his Buick Regal north on the county road, while the train traveled west toward the crossing. Soldi sat on the right side of the lead locomotive and stated the weather was clear and dry. He had the train's headlight turned on the brightest setting and the ditch lights, which are additional lights below the headlight, were activated. Soldi sounded the train's horn at the whistle post, which was located approximately a quarter mile from the crossing. He also had the train's bell ringing. Heading toward the crossing at approximately 59 miles per hour, Soldi saw a vehicle approaching from his left. Soldi had no obstructions in his line of sight. Based on data downloaded from the train, Soldi sounded the horn for 2.5 seconds when he was 16.5 seconds from the crossing, 2.5 seconds when he was 10 seconds from the crossing, and continuously through the crossing when he was 6.5 seconds from the crossing. Based on Norfolk Southern's policy and federal regulations, the horn sequence upon approaching a crossing is two long blasts, followed by one short blast, and then another long blast.

¶ 11 Decedent was traveling approximately 21 miles per hour on the county road and decelerating. According to Matthew Brach, Norfolk Southern's expert, at a point beginning at least 500 feet from the crossing, a northbound motorist would have had an unobstructed view down the tracks for more than 1,500 feet. Soldi and Shuler stated they expected the vehicle to stop, but it did not and continued onto the tracks. Soldi applied the train's brakes just after the train impacted decedent's vehicle.

¶ 12 In his discovery deposition, Jared Stanfield, a track inspector for Norfolk Southern, testified that crossings without gates and lights required yield signs to be posted on the crossbuck post. Track inspection reports indicated the crossing was inspected on February 2, 2009—just hours before the collision. The report does not document any defects or findings at the crossing, and Stanfield did not remember whether yield signs were posted at the time of the collision. If a track inspector notices a yield sign is missing, he could call his dispatcher or the bridge department to report the missing sign; serve as a flagman at the crossing until the sign is replaced; or request a stop-and-flag order, a slow order, or a speed restriction be placed at the crossing until the sign is replaced.

¶ 13 In his discovery deposition, John Duez, a track inspector for Norfolk Southern, testified track inspectors are required to inspect all signs at crossings. He did not notice the missing yield sign at the crossing until after the collision.

¶ 14 Alan Blackwell, plaintiff's track-inspection expert, testified in his deposition a yield sign was required at the crossing and Norfolk Southern's inspectors should have inspected for the presence of one. He stated a missing yield sign is a dangerous condition and opined Norfolk Southern's inspectors should have identified the absence of the sign and taken corrective action.

¶ 15 In regard to plaintiff's claim that the crossing was ultrahazardous or extrahazardous, Archie Burnham, a consulting traffic engineer, testified as an expert in railroad/highway grade crossing safety. In his report, Burnham stated an ultrahazardous crossing is one that is "so dangerous that persons using ordinary care cannot pass over it safely without some warning other than the usual crossbuck sign." Burnham opined the crossing was ultrahazardous as motorists would be searching left and right at the same time "they were

encountering narrow road, steep hump, obscured opposite direction traffic, sun glare, rough crossing, and inadequate traffic controls." In his opinion, Burnham believed the crossing posed an unreasonable risk of harm to the public. He also opined the accident would not have occurred had the crossing had active warning devices, *i.e.*, automatic flashing lights, gates, and bells.

¶ 16 In his deposition, James Loumiet, an expert in accident reconstruction and highway safety, opined the crossing was extrahazardous. In his affidavit, he opined the crossing "was unusually sight restricted so that in some cases drivers did not have a safe and adequate view of approaching trains." He based that opinion on the presence of buildings, silos, parked vehicles and equipment in the southwest quadrant, trees, vegetation, and seasonal crops. He also opined decedent's "slowing in this case could have been due to the steep and humped nature of the crossing and concerns he had about traffic or road conditions on the other side of the tracks, which could have detracted in his ability to search for trains." He concluded that if the crossing had been equipped with flashing lights and automatic gates the collision would not have occurred.

¶ 17 In December 2014, the trial court held a hearing on the motion for summary judgment. In July 2015, the court issued its written ruling. The court found whether the crossing was extrahazardous at the time of the collision created a genuine issue of material fact. On the issue of the horn sequence, the court found that, even if defendants were not in compliance with federal regulations, no jury could reasonably conclude a different horn sequence would have changed the outcome. In considering defendants' claim that decedent was more than 50% negligent in failing to keep a proper lookout and his failure to do so was the sole proximate cause of the collision, the court found that after viewing the video from the train and considering the distance in which the train and vehicle were visible, along with the sounding of the horn, "it is

not evident until the very last moment that Plaintiff's decedent is not going to stop." Considering that it took 3,350 feet to stop the train after the brakes were applied, the court stated there were "no facts upon which a reasonable person could conclude the train crew could have done anything to stop the train or even slow it appreciably even if they had applied brakes once the decedent reached the crossbucks." The court found it undisputed that "decedent had 1500 feet of unobstructed view down the tracks from a point where he was at least 300 feet from the tracks" and "the train's lights, horn, and bell were operational on the day in question." The court concluded "there is no evidence upon which a finder of fact could conclude the decedent exercised any due care for his own safety. Mr. Arnold's negligence in entering the crossing long after he could have seen the approaching train was the sole proximate cause of the accident, or at the very least, exceeds 50% of the total fault." The court granted summary judgment in favor of defendants. The court also granted summary judgment in favor of Vance Township. This appeal followed.

¶ 18 Prior to beginning our analysis, we note the record in this case consists of over 9,000 pages and 39 volumes. The parties have also filed lengthy briefs setting forth their arguments. In those briefs, the parties have stated facts with reference to the pages of the record. We encourage the parties, especially in cases involving such a voluminous record, to also include the corresponding volume numbers where those pages can be found, thereby allowing this court quick access to the cited materials.

¶ 19 II. ANALYSIS

¶ 20 Plaintiff argues the trial court erred in granting summary judgment in favor of defendants on the issue of decedent's contributory negligence after finding several issues of material fact existed regarding defendants' conduct and the conditions at the crossing. We

disagree.

¶ 21 A. Standard of Review

¶ 22 "Summary judgment is appropriate where 'the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.' " *Ioerger v. Halverson Construction Co.*, 232 Ill. 2d 196, 201, 902 N.E.2d 645, 648 (2008) (quoting 735 ILCS 5/2-1005(c) (West 2000)). "Summary judgment is a drastic remedy and should be allowed only when the right of the moving party is clear and free from doubt." *Jones v. Chicago HMO Ltd. of Illinois*, 191 Ill. 2d 278, 291, 730 N.E.2d 1119, 1127 (2000). "Accordingly, where reasonable persons could draw divergent inferences from the undisputed material facts or where there is a dispute as to a material fact, summary judgment should be denied and the issue decided by the trier of fact." *Jackson v. TLC Associates, Inc.*, 185 Ill. 2d 418, 424, 706 N.E.2d 460, 463 (1998). "On appeal from a trial court's decision granting a motion for summary judgment, our review is *de novo*." *Bowles v. Owens-Illinois, Inc.*, 2013 IL App (4th) 121072, ¶ 19, 996 N.E.2d 1267.

¶ 23 B. Negligence and Summary Judgment

¶ 24 "To state a cause of action for negligence, a plaintiff must establish that the defendant owed a duty to the plaintiff, that the defendant breached that duty, and that the plaintiff incurred injuries proximately caused by the breach." *Chandler v. Illinois Central R.R. Co.*, 207 Ill. 2d 331, 340, 798 N.E.2d 724, 728 (2003). Whether defendant owes a duty to plaintiff is a question of law for the court to decide. *Espinoza v. Elgin, Joliet & Eastern Ry. Co.*, 165 Ill. 2d 107, 114, 649 N.E.2d 1323, 1326 (1995). However, "[t]he issues of breach and proximate cause are factual matters for a jury to decide, provided there is a genuine issue of material fact

regarding those issues." *Espinoza*, 165 Ill. 2d at 114, 649 N.E.2d at 1326.

¶ 25 "Although the issue of proximate cause is generally a question of fact, at the summary judgment stage the plaintiff must present some affirmative evidence that it is 'more probably true than not true' that the defendant's negligence was a proximate cause of the plaintiff's injuries." *Johnson v. Ingalls Memorial Hospital*, 402 Ill. App. 3d 830, 843, 931 N.E.2d 835, 847 (2010); see also *Raleigh v. Alcon Laboratories, Inc.*, 403 Ill. App. 3d 863, 871, 934 N.E.2d 530, 537 (2010) (stating "summary judgment is proper as a matter of law when the plaintiff fails to present affirmative evidence that the defendant's negligence was arguably a proximate cause of the plaintiff's injuries").

¶ 26 Proximate cause consists of both "cause in fact" and "legal cause." *Lee v. Chicago Transit Authority*, 152 Ill. 2d 432, 455, 605 N.E.2d 493, 502 (1992).

> "Cause in fact exists where there is a reasonable certainty that a defendant's acts caused the injury or damage. [Citation.] A defendant's conduct is a cause in fact of the plaintiff's injury only if that conduct is a material element and a substantial factor in bringing about the injury. [Citation.] A defendant's conduct is a material element and a substantial factor in bringing about an injury if, absent that conduct, the injury would not have occurred. [Citation.] 'Legal cause,' by contrast, is essentially a question of foreseeability. [Citation.] The relevant inquiry here is whether the injury is of a type that a reasonable person would see as a likely result of his or her conduct." *First Springfield Bank & Trust v. Galman*, 188 Ill. 2d 252, 258, 720 N.E.2d 1068, 1072 (1999).

If the plaintiff fails to establish an element of the negligence action, summary judgment in favor of the defendant is appropriate. *Espinoza*, 165 Ill. 2d at 114, 649 N.E.2d at 1326.

¶ 27 C. The Duties of the Railroad and Motorists at Crossings

¶ 28 "A railroad has a common [law] duty to provide adequate warning devices at its crossings." *Bassett v. Burlington Northern R.R. Co.*, 131 Ill. App. 3d 807, 811, 476 N.E.2d 31, 34 (1985). However, "[r]ailroad crossings are, of course, inherently dangerous, and not every circumstance which might be said to increase the degree of danger will impose a duty upon the railroad to provide extraordinary means to protect the crossing beyond signs warning of its presence." *Merchants National Bank of Aurora v. Elgin, Joliet & Eastern Ry. Co.*, 121 Ill. App. 2d 445, 455, 257 N.E.2d 216, 222 (1970).

¶ 29 That said, a railroad does have a duty to provide additional warnings "when 'special circumstances,' also defined as 'extrahazardous conditions,' are present." *Brennan v. Wisconsin Central Ltd.*, 227 Ill. App. 3d 1070, 1079, 591 N.E.2d 494, 501 (1992); see also *Reiser v. Illinois Central R.R.Co.*, 132 Ill. App. 2d 941, 945, 270 N.E.2d 856, 859 (1971) (noting the "common law duty on railroads, independent of the statute or regulation, to protect crossings with adequate safety devices other than the usual cross-arm sign, when special or unusual conditions cause such crossing to be 'extra hazardous' and warrant additional protection"). Whether a crossing is extrahazardous and in need of additional warnings is a factual question for the jury to decide based on the circumstances present at the time of the collision. *Bassett*, 131 Ill. App. 3d at 812, 476 N.E.2d at 35; see also *Merchants National Bank*, 121 Ill. App. 2d at 458, 257 N.E.2d at 224 (stating whether the crossing was extrahazardous was a question of fact for the jury). When deciding whether a crossing is extrahazardous, courts have enumerated several factors for the jury to consider, including: "physical obstructions to vision, volume and speed of

vehicular and train traffic, track arrangement, intersecting driveways and roadways, angles at which roadways intersect the tracks, character of the highway, width of the crossing, track elevation, character of the surrounding neighborhood, and sight distance." *Bassett*, 131 Ill. App. 3d at 812, 476 N.E.2d at 34.

¶ 30 Courts have also pointed out that "the rights and duties of railroads and travelers upon the highway crossings are mutual and reciprocal." *Shaw v. Chicago & Eastern Illinois R.R. Co.*, 332 Ill. App. 285, 291, 75 N.E.2d 51, 54 (1947).

> "A railroad has a duty to exercise due care to avoid a collision. [Citation.] Although a train engineer is not required to anticipate and guard against the possibility that a motorist may disregard a warning and enter a crossing [citations], the engineer is required to stop the train when it becomes apparent that the motorist has not heard or will not heed the signal given by the train." *Espinoza*, 165 Ill. 2d at 115, 649 N.E.2d at 1326-27.

¶ 31 At the same time, our supreme court has consistently recognized "railroad crossings are dangerous, and that in approaching them a person is required to diligently use the senses of sight and hearing and to exercise a degree of care commensurate with the known danger." *National Bank of Bloomington v. Norfolk & Western Ry. Co.*, 73 Ill. 2d 160, 169, 383 N.E.2d 919, 922 (1978); see also *Coleman v. Illinois Central R.R. Co.*, 59 Ill. 2d 13, 17, 319 N.E.2d 228, 230 (1974); *Tucker v. New York, Chicago & St. Louis R.R. Co.*, 12 Ill. 2d 532, 535, 147 N.E.2d 376, 378 (1957); *Greenwald v. Baltimore & Ohio R.R. Co.*, 332 Ill. 627, 631, 164 N.E. 142, 144 (1928) (noting "it is the duty of persons about to cross a railroad track to look about them and see if there is danger, and not to go recklessly upon the track but to take proper

precaution to avoid accident").

> "Where a train and a person travelling on a highway approach a railroad crossing at the same time, it is not the duty of the railroad to stop its train, but is, instead, the duty of the traveler, in obedience to the known custom of the country, to stop, if the circumstances require, and not attempt to pass in front of the advancing train." *Overman v. Illinois Central R.R. Co.*, 34 Ill. App. 2d 30, 42, 180 N.E.2d 213, 218-19 (1962).

See also *Frankenthal v. Grand Trunk Western R.R. Co.*, 120 Ill. App. 3d 409, 415, 458 N.E.2d 530, 536 (1983) (stating a train engineer has "the right to assume that motorists approaching the tracks [will] exercise due care for their own safety"). "The failure of warning signals alone *** is insufficient to relieve one of the duty to look and listen for an approaching train[.]" *Reiss v. Chicago, Milwaukee, St. Paul & Pacific R.R. Co.*, 77 Ill. App. 3d 124, 132, 395 N.E.2d 981, 987 (1979). Moreover, "greater care should be exercised where the view is obscured and the location known to the driver." *Swenson v. Chicago, Milwaukee, St. Paul & Pacific R.R. Co.*, 336 Ill. App. 287, 294, 83 N.E.2d 375, 294 (1949).

¶ 32 D. Plaintiff's Arguments

¶ 33 In the case *sub judice*, the trial court found that whether the crossing was extrahazardous at the time of the collision created a genuine issue of material fact and was a matter best determined by the fact finder. However, the court ultimately entered summary judgment in favor of defendants, finding no genuine issue of material fact as to the proximate cause of the collision. The court found decedent's failure to observe and stop for the train showed a lack of "due care for his own safety" and his "negligence in entering the crossing long

after he could have seen the approaching train was the sole proximate cause of the accident, or the very least, exceeds 50% of the total fault."

¶ 34 Plaintiff, however, argues the existence of genuine issues of material fact precluded summary judgment in favor of defendants. Plaintiff contends that had the jury decided these issues of fact in his favor, "the collision in this case unequivocally would not have happened, because the crossing would have had automatic gates and flashing lights or there would have been a slow order, a stop order, speed restriction, or a flagman at the crossing."

¶ 35 We find plaintiff's argument misplaced. The issue is not whether the accident would have occurred had Norfolk Southern installed gates or flashing lights or had a flagman present at the crossing at the time of the collision. Instead, when considering proximate cause, and specifically legal cause, "[t]he relevant inquiry *** is whether the injury is of a type that a reasonable person would see *as a likely result* of his or her conduct." (Emphasis in original.) *Galman*, 188 Ill. 2d at 260, 720 N.E.2d at 1073. Thus, the question is whether it was reasonably foreseeable that the absence of gates, lights, or a flagman would likely result in a motorist ignoring the crossbuck and the approaching train and fail to yield the right-of-way. We find it would not.

¶ 36 "All railroad crossings present a danger to motorists[.]" *Bassett*, 131 Ill. App. 3d at 812, 476 N.E.2d at 34. Our General Assembly has declared "the existence of a railroad track across a highway is a warning of danger." 625 ILCS 5/11-1201(a-5) (West 2008).

> "At any railroad grade crossing provided with railroad crossbuck signs, without automatic, electric, or mechanical signal devices, crossing gates, or a human flagman giving a signal of the approach or passage of a train, the driver of a vehicle shall in obedience to

> the railroad crossbuck sign, yield the right-of-way and slow down to a speed reasonable for the existing conditions and shall stop, if required for safety, at a clearly marked stopped line, or if no stop line, within 50 feet but not less than 15 feet from the nearest rail of the railroad and shall not proceed until he or she can do so safely. If a driver is involved in a collision at a railroad crossing or interferes with the movement of a train after driving past the railroad crossbuck sign, the collision or interference is prima facie evidence of the driver's failure to yield right-of-way." 625 ILCS 5/11-1201(d) (West 2008).

"When a traveler on a highway fails to use ordinary precaution while traveling over a crossing, it is generally condemned as negligence." *Shaw*, 332 Ill. App. at 291, 75 N.E.2d at 54.

¶ 37 The evidence indicated the weather was clear shortly before 4 p.m., when the collision occurred. The crossing had an advance warning sign and a crossbuck, and the surrounding area was flat and free of obstructions. The tracks and the county road ran nearly perpendicular to each other. Decedent was familiar with the crossing, and he had 1,500 feet of unobstructed view down the tracks from a point where he was at least 300 feet from the crossing. See *Overman*, 34 Ill. App. 2d at 42, 180 N.E.2d at 219 (stating a traveler "who has an unobstructed view of an approaching train is not justified in closing his eyes or failing to look"). The train had its lights on, bell ringing, and horn blowing. Soldi and Shuler stated it was not evident until the very last moment that decedent was not going to stop, and they could not have stopped the train once decedent traveled beyond the crossbuck and continued onto the tracks.

¶ 38 Even assuming, *arguendo*, defendants' acts or omissions were a cause in fact of

the collision, the evidence establishes defendants could not have reasonably anticipated the independent acts of decedent which caused the accident. "If a defendant's negligence does nothing more than furnish a condition by which injury is made possible, that negligence is not the proximate cause of injury." *Thompson v. County of Cook*, 154 Ill. 2d 374, 383, 609 N.E.2d 290, 294 (1993). Here, the proximate cause was not the absence of gates, flashing lights, or a flagman. Instead, the sole proximate cause was decedent's failure to look and yield to the approaching train. Accordingly, we find the trial court did not err in granting summary judgment in favor of defendants.

¶ 39 III. CONCLUSION

¶ 40 For the reasons stated, we affirm the trial court's judgment.

¶ 41 Affirmed.