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**STATE OF MINNESOTA
IN COURT OF APPEALS
A17-0480**

Nathan Mead,
Appellant,

Amy Mead,
Plaintiff,

vs.

BNSF Railway Company,
Respondent,

Ture Lee,
Defendant,

and

BNSF Railway Company,
Defendant and Third Party Plaintiff,

vs.

Jerry Lee,
Third Party Defendant.

**Filed January 16, 2018
Reversed and remanded
Hooten, Judge**

Hennepin County District Court
File No. 27-CV-15-10789

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Considered and decided by Larkin, Presiding Judge; Hooten, Judge; and Smith, T., Judge.

U N P U B L I S H E D O P I N I O N

HOOTEN, Judge

Appellant claims that the district court erred in granting summary judgment for BNSF Railway Company on his Federal Employers' Liability Act (FELA) negligence claim. Because there is sufficient evidence of causation and foreseeability in the record for appellant's claim to survive summary judgment, we reverse and remand.

FACTS

Appellant Nathan Mead was working as a carman for respondent BNSF Railway Company on the night of August 3, 2012. Because of a storm, Mead's supervisor told Mead and the other carmen that they would not be leaving the shop until the storm had passed. The supervisor later received a call asking for repairs in Saint Paul. The supervisor, despite what he had said earlier about the storm, decided to send Mead. Mead was instructed to take a company truck, Unit 20, to perform the repair work. Prior to leaving, Mead inspected Unit 20, as required by BNSF safety rules, and found that the windshield had slag burns, the defroster was defective, and the inspection lights on the truck were not working properly. Mead informed his supervisor about the issues with his

truck and asked to take a different vehicle, but the supervisor told Mead to take Unit 20 because he was unable to give him a different vehicle.

On his way to the job site, Mead drove into a tunnel. Inside the tunnel, he was forced to slow down and change lanes because of an earlier accident that had occurred in the tunnel. As Mead was preparing to change lanes within the tunnel, he was rear-ended by another driver. In his deposition, Mead explained that the driver's seat in the truck reclined upon impact, which caused him to be "torpedoed" backward, causing his head to break through the back window of the truck. Mead suffered injuries to his head, neck, back, and shoulders in the accident. He did not claim that the rain or any of the defects that he had complained about on the truck contributed to the accident.

After the accident, Unit 20 was taken to Bona Brothers Auto and Truck Service to be inspected and repaired. Bona Brothers does repair work on BNSF's vehicles and has done so for decades. On Unit 20 alone, Bona Brothers has done over \$80,000 worth of repairs and maintenance. When Unit 20 was brought to Bona Brothers after the accident, the driver's seat was in a reclined position. After inspecting the driver's seat, Bona Brothers determined that the recliner and slider mechanisms were intact and functioning properly.

Mead hired William H. Muzzy III, a mechanical engineer who consults and provides expert evaluation and testimony on restraint system effectiveness in automobile accidents. In his report, Muzzy noted that Bona Brothers had previously performed repairs on the driver's seat of Unit 20, including reupholstering the seat and replacing the cushioning, but had not replaced the recliner and slider mechanisms on the seat. According to Muzzy, it

would have been prudent to rebuild the entire seat structure or replace it with a new seat given the seat's condition and the constant use of the truck. Muzzy concluded that the recliner mechanism failed on the seat, that Bona Brothers knew or should have known that the driver's seat recliner was worn and defective, and that Mead would not have received the injuries caused by hitting his head against the back window had the recliner mechanism not failed.

Mead brought a negligence claim with two theories of liability against BNSF under the Federal Employers' Liability Act, 45 U.S.C. § 51 (2012). Under the first theory of liability, Mead alleged that when his supervisor forced him to drive Unit 20 despite his request for a different vehicle, BNSF was negligent for failing to provide him with safe equipment and to follow its own safety rules and policies. Under the second theory of liability, Mead alleged that BNSF was negligent in its maintenance of the driver's seat. BNSF moved for summary judgment, which the district court granted. With respect to the theory of negligence for not providing a different vehicle, the district court held that it failed on the element of causation because Mead's injuries were not caused by the rain or the defects Mead had noted in his inspection of Unit 20. For the theory of negligence for failure to maintain the driver's seat, the district court held that it failed because notice and foreseeability of the malfunction could not be established. This appeal followed.

D E C I S I O N

We review summary judgment de novo. *Gallagher v. BNSF Ry. Co.*, 829 N.W.2d 85, 88 (Minn. App. 2013). This requires determining whether there are any genuine issues of material fact and whether the district court erred in its application of the law. *Id.* at 88–

89. We consider the evidence in the light most favorable to the non-moving party. *Id.* at 89. Summary judgment is proper when there is no genuine issue of material fact and a party is entitled to a judgment as a matter of law. *Id.*; Minn. R. Civ. P. 56.03.

However, “[a] plaintiff’s burden in a FELA action is . . . significantly lighter than it would be in an ordinary negligence case” and “because his burden at trial is so low, a FELA plaintiff can survive a motion for summary judgment when there is even slight evidence of negligence.” *Gallagher*, 829 N.W.2d at 92 (alteration omitted) (quotations omitted). The FELA only requires a “scintilla” of evidence to establish negligence to survive summary judgment. *Smith v. Soo Line R.R.*, 617 N.W.2d 437, 440 (Minn. App. 2000) (citing to *Hauser v. Chicago, Milwaukee, St. Paul & Pac. R.R.*, 346 N.W.2d 650, 653 (Minn. 1984)), review denied (Minn. Nov. 21, 2000). FELA actions are often submitted to juries based on evidence only “scarcely more substantial than pigeon bone broth.” *Harbin v. Burlington N. R.R.*, 921 F.2d 129, 132 (7th Cir. 1990). Because “[i]t is well established that the role of the jury is significantly greater in FELA cases than in common law negligence actions,” *Eggert v. Norfolk & W. R.R.*, 538 F.2d 509, 511 (2d Cir. 1976), quoted in *Gallagher*, 829 N.W.2d at 92, “[t]he issue of negligence should be submitted to a jury if there is a reasonable basis in the record for concluding that there was negligence which caused the injury.” *Gallagher*, 829 N.W.2d at 92 (quotation omitted); see also *Blair v. Baltimore & Ohio R.R.*, 323 U.S. 600, 602, 65 S. Ct. 545, 546 (1945) (“To deprive railroad workers of the benefit of a jury trial in close or doubtful cases is to take away a goodly portion of the relief which Congress has afforded them.” (quotation omitted)); *Tiller v. Atlantic Coast Line R.R.*, 318 U.S. 54, 68 n.30, 63 S. Ct. 444, 451 n.30 (1943) (“[T]o the maximum extent

proper, questions in actions arising under [FELA] should be left to the jury.”); *Ackley v. Chicago & N. W. Transp. Co.*, 820 F.2d 263, 267 (8th Cir. 1987) (“The Supreme Court has emphasized the jury’s role in determining whether an employer has breached its duties under the FELA.”).

I.

Mead first claims that BNSF was negligent in making him use Unit 20 despite his verbal complaints about the vehicle and his request to be provided with a different truck. The district court granted summary judgment on this theory of liability because it believed that Mead was unable to demonstrate causation. Specifically, the district court determined that the conditions that Mead complained about—the faulty defroster, the slag burns, and the inspection lights—did not in any way cause the accident or Mead’s injuries.

But the FELA has a unique causation standard. The Supreme Court explained that causation under the FELA “is as broad as could be framed” and that “a relaxed standard of causation applies.” *CSX Transp., Inc. v. McBride*, 564 U.S. 685, 691–92, 131 S. Ct. 2630, 2636 (2011) (quotations omitted). This standard can be traced back to *Rogers v. Missouri Pac. R.R.*, which explained that under the FELA “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.” 352 U.S. 500, 506, 77 S. Ct. 443, 448 (1957) (emphasis added). Importantly, *McBride* explicitly rejected the idea that FELA causation requires the injury to be a “natural and probable” consequence of the defendant’s negligence. 564 U.S. at 695, 705, 131 S. Ct. at 2638, 2644. We apply the *McBride* causation standard.

The issue, then, for this court in reviewing the district court's grant of summary judgment is whether there is any evidence that BNSF's negligence played any part, even the slightest, in Mead's injuries. BNSF argues that because the defects with Unit 20 did not cause the accident, its negligence played no part in Mead's injuries. Mead, however, does not claim that the defects caused the accident. And BNSF frames the issue too narrowly. BNSF had safety policies in place that required employees to not only inspect their equipment, but also to raise any concerns about defects in the vehicles. That was precisely what Mead did when he pointed out the obvious defects in Unit 20 and requested a different vehicle.¹ In his deposition, Mead said that the defects he pointed out "raise[d] the initial flags that the vehicle . . . was not well maintained." He even asked his supervisor to call a superior to see if he could be given a different vehicle. The supervisor did so and was still unable to obtain a different vehicle for Mead and instructed him to take Unit 20 and drive to the job site immediately. Mead argues that BNSF was negligent in making him take Unit 20 on that stormy night in spite of its safety policies. So the question is whether the negligence in making Mead use Unit 20 played any part in his injuries, not whether the defects that Mead complained about caused the injuries.

In viewing the evidence in the light most favorable to Mead, the non-moving party, we conclude that there is support for Mead's theory of liability that BNSF was negligent in making him drive a vehicle in need of repair in violation of its own policy, and that the

¹ Mead also testified at his deposition that the trucks used by the carmen at BNSF were often in disrepair at any given time, and that he often had to verbally communicate his concerns in order to get a vehicle repaired.

poorly maintained vehicle at least played a role in causing his injuries. Had BNSF listened to Mead's concerns and provided him with a different truck—per company policy—then Mead would not have found himself in a truck with a faulty seat and he would not have “torpedoed” into the back window of the truck after the seat defectively reclined. And the parties do not dispute that the seat in Unit 20 reclined during the accident and that Mead suffered his injuries as a result of striking the window of the truck. We conclude that a reasonable jury could find that BNSF was negligent in making Mead drive Unit 20 despite his request for a different vehicle, and could find that this negligence played a part in Mead's injuries.

The district court and BNSF compare this case to *Alex v. BNSF Ry. Co.*, 103 So.3d 1180 (La. Ct. App. 2012). In *Alex*, the plaintiff was rear-ended while driving a company car and brought a FELA claim because there were some defects with the vehicle. *Id.* at 1184. The court found that these defects had no effect on the vehicle's crashworthiness and did not contribute to Alex's injuries, so it affirmed summary judgment. *Id.* BNSF argues that we should affirm for similar reasons.

Mead's case is different in two significant ways. First, Mead is alleging that BNSF's negligence in not listening to his request for a different vehicle was what led to his injuries, not that BNSF's negligence with respect to the defroster, slag burns, and inspection lights caused his injuries. In contrast, Alex alleged that BNSF was negligent for providing him a vehicle with defects. *Id.* Second, Mead claims that it was a poorly maintained condition in Unit 20—the faulty recliner mechanism—that directly caused his injuries. Alex, on the other hand, admitted that his vehicle was “pretty crashworthy” and did not attribute his

injuries to any of the conditions in the vehicle. *Id.* In other words, even if BNSF had provided Alex with a different vehicle with no defects, he still would have suffered the same injuries. Unlike the factual situation in *Alex*, there is no dispute that Mead's injuries were caused or aggravated by a defective condition in Unit 20.

BNSF also argues that Mead's first theory of liability should fail because the risk to Mead was not foreseeable. This argument was not presented in BNSF's arguments on summary judgment to the district court. Indeed, for this theory, the district court granted summary judgment on the issue of causation, not on foreseeability. This is the first time that the argument has been presented. Nonetheless, we point out that in *McBride* the Supreme Court explained that "[i]f negligence is proved . . . then the carrier is answerable in damages even if . . . the manner in which [the injury] occurred was not probable or foreseeable." 564 U.S. at 703–04, 131 S. Ct. at 2643 (quotation omitted). As we explained above, a reasonable jury could find that BNSF was negligent in forcing Mead to drive Unit 20 despite his objections and contrary to BNSF's policy. Mead complained about the safety of Unit 20, so it does not matter that it was more foreseeable that the defroster, slag burns, or inspection lights would cause the injuries than a faulty seat. We conclude that Mead's first theory of liability survives summary judgment on the issue of foreseeability.

II.

Mead's second theory of liability was that BNSF was negligent in its maintenance of the seat in Unit 20. The district court granted summary judgment on this theory because it believed that Mead could not establish that it was foreseeable that the seat would fail.

Specifically, the district court said that BNSF had no notice of any issue with the seat, so it was not foreseeable that it was defective.

In a FELA case, a railroad's conduct is measured by "the degree of care that persons of ordinary, reasonable prudence would use under similar circumstances and by what [they] would anticipate as resulting from a particular condition." *Ackley*, 820 F.2d at 267 (citing *Gallick*, 372 U.S. 108, 118, 83 S. Ct. 659, 665 (1963)). Thus, "[a] railroad breaches its duty to provide a safe workplace when it knows or should know of a potential hazard in the workplace, yet fails to exercise reasonable care to inform or protect its employees." *Smith*, 617 N.W.2d at 439. However, if there is no "reasonable ground to anticipate that a particular condition . . . would or might result in a mishap and injury, then the party is not required to do anything to correct [the] condition." *McBride*, 564 U.S. at 703, 131 S. Ct. at 2643 (alterations in original) (quoting *Gallick*, 372 U.S. at 118 n.7, 83 S. Ct. at 666 n.7) (quotation marks omitted).

Foreseeability can be established with proof of notice. *Williams v. Nat'l R.R. Passenger*, 161 F.3d 1059, 1062–63 (7th Cir. 1998). This can be done in two ways. First, by proof of actual notice. *Smith*, 617 N.W.2d at 439; *see also Brown v. Cedar Rapids & Iowa City Ry. Co.*, 650 F.2d 159, 161 (8th Cir. 1981) (stating that a railroad can be found liable if an officer, employee, or agent of the railroad has actual knowledge of the presence of an unsafe condition prior to the accident). Second, by proof of constructive notice. *Smith*, 617 N.W.2d at 439; *see also Brown*, 650 F.2d at 161 (stating that liability can attach if an unsafe condition has existed for long enough to infer "that failure to know about it and remove it was due to want of proper care").

There was evidence that Unit 20 has received over \$80,000 worth of repairs from 2008 through 2013. The sheer amount of wear and tear on the vehicle, as evidenced by the amount of money spent on repairing it in such a short period of time, makes it foreseeable that the truck was potentially dangerous to drive. Bona Brothers had also performed work on the seat prior to the accident, including reupholstering the seat cushions and replacing the seatbelt. Muzzy, Mead's expert, explained in his report that it would have been prudent for Bona Brothers to just replace the entire seat structure, and that they either knew or should have known that the driver's seat recliner was worn and defective. This report on its own raises a fact issue for the jury on whether it was foreseeable that the recliner mechanism was defective.

Muzzy's report also references the deposition of Michael Lawler, another BNSF employee, in which he stated that three or four months prior to Mead's accident he had trouble getting the reclining mechanism into the locked position. This is significant because while Lawler's statement in Muzzy's report is inadmissible as proof that there was in fact a defect in the recliner mechanism, it is admissible as proof of notice. *See Webb v. Fuller Brush Co.*, 378 F.2d 500, 502 (3rd Cir. 1967). Lawler's statement is relevant in two ways.

First, Lawler's statement is relevant to the issue of actual notice. BNSF argues that for there to be actual notice the employee must report the condition that caused the accident. BNSF relies heavily on *Brown* for how notice can be established, but BNSF misreads that case. In *Brown*, an employee had in fact reported the unsafe condition to a supervisor, 650 F.2d at 163, but the court was just stating what had happened, not instituting a requirement

of reporting the unsafe condition to a supervisor.² We instead rely on *Brown*'s earlier language that says:

In a FELA action, the employee must show . . . that (1) an officer, employee or agent of the railroad was responsible, through negligence, for the presence of the unsafe condition; or (2) at least one of *such persons* had actual knowledge of its presence before the accident; or (3) the unsafe condition had continued for a sufficient length of time to justify the inference that failure to know about it and remove it was due to want of proper care.

650 F.2d at 161 (emphasis added). The phrase “such persons” refers to “officer[s], employee[s] or agent[s]” of the railroad, so Mead has produced evidence that BNSF had actual knowledge regardless of whether Lawler reported the problem with the recliner to a supervisor. *See id.* We conclude that Mead produced sufficient evidence to create a material dispute of fact as to whether BNSF had actual notice of the defect in the recliner mechanism.

Second, Lawler's statement is relevant to the issue of constructive notice. Constructive notice is established if the unsafe condition has existed for long enough to infer “that failure to know about it and remove it was due to want of proper care.” *Brown*, 650 F.2d at 161.³ Lawler's statement is evidence that the defect existed at least three or four months prior to Mead's accident. When we consider that, along with the fact that Unit 20 was frequently undergoing repairs, we hold that even if Bona Brothers was not actually

² While *Smith* similarly discusses a supervisor being aware of the condition that caused the injury, it does not require that awareness of an unsafe condition by a supervisor is necessary for actual notice to exist. 617 N.W.2d at 439.

³ *Brown* does not specifically use the word notice, but it is discussing the knowledge necessary for a railroad to be liable for an unsafe condition, which we equate to notice.

aware of the defect with the recliner mechanism, there is evidence to suggest it should have been aware of it. Accordingly, we hold that a reasonable jury could find that constructive notice existed.

Constructive notice is significant because the FELA imposes liability on railroads for negligence on the part of its agents. 45 U.S.C. § 51. Mead asserts that Bona Brothers is an agent of BNSF and BNSF does not dispute this claim. Because the record indicates that Bona Brothers has been performing repairs for BNSF for decades, it appears to be an agent of BNSF. *See, e.g., Smith*, 617 N.W.2d at 439 (holding, on appeal from summary judgment, that a railroad could be liable for the negligent act of the company that delivered water to its workplace). Thus, BNSF can be liable under the FELA for negligence on the part of Bona Brothers.

Because we hold that there was evidence that it was foreseeable that there would be an issue with the recliner mechanism, and that there was evidence that BNSF had both actual and constructive notice of the defect, we conclude that the district court erred in concluding there was no genuine dispute of material fact and in granting BNSF's motion for summary judgment on the issue of foreseeability on Mead's second theory of liability.

Reversed and remanded.