STATE OF MICHIGAN

COURT OF APPEALS

DALE H. HANEY,

Plaintiff-Appellee,

v

GRAND TRUNK WESTERN RAILWAY COMPANY,

Defendant-Appellant.

UNPUBLISHED
May 16, 1997

No. 181278
Wayne Circuit Court
LC No. 92-212744-NO

Before: Holbrook, Jr., P.J., and White and S.J. Latreille*, JJ.

PER CURIAM.

Plaintiff brought this negligence action under the Federal Employers' Liability Act (FELA), 45 USC 51, for injuries sustained in the course of his employment as a brakeman for defendant railway company. A judgment was entered on a jury verdict that found defendant to be negligent and awarded plaintiff $795,000 in damages. Defendant's post-judgment motions for a new trial or remittitur were denied by the trial court. Defendant appeals as of right and we affirm.

Defendant first argues that the jury's finding of liability was against the great weight of the evidence. A claim that a verdict is against the great weight of the evidence must be raised by a motion for a new trial. MCR 2.611(A)(1)(e). Because defendant's motion for new trial in the lower court did not challenge the jury's finding of negligence as being against the great weight of evidence, we deem this issue waived on appeal.[1] *Roberts v Auto Owners Ins Co*, 135 Mich App 595, 600; 354 NW2d 271 (1983), rev'd on other grounds 422 Mich 594 (1985).

Defendant also argues that the trial court erred in denying its motion for a directed verdict on the basis of *Inman v Baltimore & O R Co*, 361 US 138; 80 S Ct 242; 4 L Ed 2d 198 (1959). Actions brought in a state court under FELA are governed by state law with respect to procedural matters and federal law with respect to substantive matters. See *St Louis SW R Co v Dickerson*, 470 US 409, 411; 105 S Ct 1347; 84 L Ed 2d 303 (1985); *Brady v Southern R Co*, 320 US 476; 64 S Ct 232; 88 L Ed 239 (1943); *Gortney v Norfolk & Western Ry Co*, 216 Mich App 535; 549 NW2d 612

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* Circuit judge, sitting on the Court of Appeals by assignment.

(1996). Accordingly, we apply the standard of review under Michigan law in determining whether the trial court's denial of defendant's motions for a new trial or remittitur was proper. *Id.* at 538.

In reviewing a motion for a directed verdict, both trial and appellate courts must view the facts in a light most favorable to the nonmoving party and determine whether reasonable minds could differ as to whether the plaintiff presented a prima facie case. *DiFranco v Pickard*, 427 Mich 32, 58-59; 398 NW2d 896 (1986). If a material factual dispute existed, or reasonable minds could have differed, the issue should have been submitted to the factfinder. *Tuttle v Dep't of State Highways*, 397 Mich 44, 46-47; 243 NW2d 244 (1976); MCR 2.613(C). In this case, we find that reasonable minds could have differed on whether plaintiff had presented a prima facie case of negligence.

FELA was intended to increase drastically a railroad employer's duty to pay damages for negligence that causes injury to its employees. *Inman, supra* at 140; *Rogers v Missouri P R Co*, 352 US 500, 507-508; 77 S Ct 443; 1 L Ed 2d 493 (1957); *Blake v Consolidated Rail Corp*, 176 Mich App 506; 439 NW2d 914 (1989). To state a claim under FELA, a plaintiff need only show that the railroad employer's negligence "played any part at all" in the resulting injury. *Rogers, supra.* Under FELA, a railroad employer has a duty to protect its employees against foreseeable criminal misconduct. *Lillie v Thompson*, 332 US 459, 462; 68 S Ct 140; 92 L Ed 73 (1947).

In *Inman*, the plaintiff was a railroad crossing watchman who was struck by a drunk driver while flagging traffic for a passing train. The drunk motorist drove around the line of cars waiting for the train and hit the plaintiff. The plaintiff sued the defendant railroad under FELA for failing to provide him with a safe workplace. *Inman, supra* at 138-139. The United States Supreme Court agreed with the Ohio Court of Appeals that "it was 'not reasonably foreseeable' that petitioner 'would be injured by the actions of a drunk driver, violating five traffic statutes.'" The Court noted that the plaintiff had been working at the particular crossing for seven years without incident and that there was no evidence of similar occurrences or complaints to the railroad. The Court concluded that, "in light of this background, we believe that the evidence here was so thin that, on a judicial appraisal, the conclusion must be drawn that negligence on the part of the railroad could have played no part in petitioner's injury." *Id.* at 140-141.

While *Inman* is factually similar to our case, there are important distinctions. In this case, ample evidence was presented that defendant knew or should have known that the Sibley Road railroad crossing posed a danger to railroad employees engaged in nighttime switching operations nearby. Several of defendant's employees who had worked at the Sibley Road switch testified that it was dangerous due to motorists' disregard for the crossing signals, and it was well known that drunk drivers were likely to ignore the signals. Deposition testimony read into evidence showed that the highest rate of drunk driving and resulting accidents occurred on Friday and Saturday nights and that defendant did not take relatively simple steps to protect its workers by increasing their visibility, enabling them to turn off the flashers without placing them near the roadway, or simply using available alternate switches at night. Expert testimony also established that defendant did not follow the Michigan Manual of Uniform Traffic Devices, which provided for several simple precautions to ensure that motorists were aware of the upcoming crossing and were able to see workers directing traffic through the crossing.

Plaintiff's case is more similar to *Bridger v Union R. Co,* 355 F2d 382 (CA 6, 1966), where the plaintiff was struck by a truck while switching train cars at night at a crossing that was neither well lit nor visible. The Sixth Circuit Court of Appeals found "ample and cogent evidence of the foreseeability here in the notice from its [the railroad's] many employees that this was the most dangerous crossing in Memphis, as they had so often reported to their employer railroad." *Id.* at 386. Accordingly, because reasonable minds could differ as to whether the plaintiff presented a prima facie case of negligence, the trial court did not err in denying defendant's directed verdict motion.

Defendant next argues that the trial court abused its discretion in denying its motion for a new trial or remittitur on grounds that the damages award was excessive because it was the result of juror passion, sympathy, or prejudice. Defendant further argues that the jury failed to reduce the award to present value and failed to take into consideration that the award would be exempt from federal income taxes. We find defendant's assertions to be unsupported by the record.

A new trial may be granted based on an excessive verdict if it was obtained by improper methods, or was the result of sympathy or prejudice. If the verdict was within the range of the evidence, a new trial is not merited. *Blake,* supra at 523. The burden is on the moving party to show that the verdict was excessive. *Belin v Jax Kar Wash, Inc*, 95 Mich App 415, 423; 291 NW2d 61 (1980). Here, based on evidence presented regarding plaintiff's pain and suffering, medical expenses, and lost income, plaintiff's counsel had asked the jury to award plaintiff a total of $1,650,000, and the jury awarded $795,000. Defendant's reliance on certain cases where courts have overturned similar verdicts as excessive is misplaced given the fact that plaintiff's injuries and resulting permanent disability were clearly more severe. Considering the evidence in a light most favorable to plaintiff, we conclude that the verdict was within the range of the evidence and should be upheld.

After-tax income is the proper amount to use in determining wage loss damages in a FELA case. *Norfolk & Western R Co v Liepelt*, 444 US 490, 494-495; 100 S Ct 755; 62 L Ed 2d 689 (1980). Defendant has presented no evidence aside from the size of the award to suggest that the jury failed to deduct federal income taxes from the award for lost wages. Given that defendant concedes that the jury was properly instructed regarding this issue, we decline to address it further. Moreover, nothing in the record supports defendant's assertion that the jury failed to reduce any award for future damages to present value, as required under federal law. See *Monessen SW Ry Co v Morgan,* 486 US 330; 108 S Ct 1837; 100 L Ed 2d 349 (1988). The trial court properly instructed the jury regarding this issue and defendant did not object to the instructions as given. The amount of the award does not suggest to this Court that the jury failed to follow the trial court's instructions.

Defendant next argues that it was denied a fair trial because the trial court failed to instruct the jury that defendant was under no duty to install other railroad signal devices at the Sibley Road crossing unless ordered to do so by the Michigan Department of Transportation. Because defendant never requested such an instruction, and did not object to the instructions as

given, we find that this issue has not been properly preserved for appellate review. MCR 2.516(C). See also *Napier v Jacobs*, 429 Mich 222, 228; 414 NW2d 862 (1987), citing *Kinney v Folkerts*, 84 Mich 616, 625; 48 NW 283 (1891) ("[p]arties cannot remain silent, and thereby lie in wait to ground error, after the trial is over, upon a neglect of the court to instruct the jury as to something which was not called to its attention on the trial, especially in civil cases"). Accordingly, defendant has not shown entitlement to appellate relief on this basis.

Finally, defendant argues that the trial court abused its discretion in excluding certain collateral source evidence. We find no abuse of discretion. Under the collateral source rule, a tortfeasor may not disclaim liability on the basis that the plaintiff may have received compensation for his injuries from another source aside from payment from that tortfeasor or joint tortfeasor. *Citizens Ins Co v Buck*, 216 Mich App 217, 227; 548 NW2d 680 (1996). This rule generally prevents tort defendants from presenting evidence that the plaintiff received insurance benefits covering his injuries, because the victim is deemed to have paid for the benefits received by way of premium payments. *Id.* at 227, n 3. The collateral source rule applies to FELA cases. *Eichel v New York Central R Co*, 375 US 253, 255; 84 S Ct 316; 11 L Ed 2d 307 (1963) ("the likelihood of misuse by the jury clearly outweighs the value of this [collateral source] evidence").

Defendant argues that plaintiff's testimony regarding lost wages and future medical expenses misled the jury to believe that he would suffer financial hardship because of lack of income and health coverage, and so "opened the door" to the admission of collateral source evidence. Review of the challenged testimony does not support defendant's argument. Plaintiff did testify regarding the date he stopped working and the amount of his wages; however, this was appropriate testimony to support his claim for lost wages, rather than a maudlin claim of poverty. Plaintiff never testified that he had absolutely no source of income or support. Plaintiff's testimony clearly established that he did have health insurance that covered past medical treatments. Although plaintiff testified that his employer-provided health insurance would expire at the end of 1994, his testimony also indicated that he planned to continue his coverage. In closing argument, plaintiff's counsel did not claim all future medical expenses, but only those which would not be covered by medical insurance. Under these facts, the trial court did not abuse its discretion in excluding collateral source evidence regarding plaintiff's no-fault insurance benefits.

Affirmed.

/s/ Donald E. Holbrook, Jr.
/s/ Helene N. White
/s/ Stanley J. Latreille

[1] While defendant asserted the issue generally in its motion, its argument, presented in issue III of its brief, was based on *Inman v Baltimore & Ohio Railroad*, 361 US 138; 80 S Ct 242; 4 Led 2d 198 (1959).