

STATE OF MICHIGAN  
COURT OF APPEALS

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DONALD E. TROUT,  
Plaintiff-Appellant,

UNPUBLISHED  
September 25, 2014

v

GRAND TRUNK WESTERN RAILROAD  
COMPANY and GRAND TRUNK WESTERN  
RAILROAD INCORPORATED,

No. 312727  
Wayne Circuit Court  
LC No. 11-001290-NO

Defendants-Appellees.

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Before: BECKERING, P.J., and HOEKSTRA and GLEICHER, JJ.

PER CURIAM.

Plaintiff appeals as of right from the trial court's order granting summary disposition in favor of defendants,<sup>1</sup> in this action brought under the Federal Employers' Liability Act (FELA), 45 USC 51 *et seq.* Because material questions of fact remain regarding whether plaintiff was injured by ballast forming part of the railroad support structure and whether defendant had notice of the hazard which caused plaintiff's injury, we reverse and remand for further proceedings.

This case arises from an injury plaintiff, a railroad brakeman/switchman, sustained on July 21, 2008, while employed by defendant. Plaintiff's job that day involved walking between the main track and the line one track to check the brake shoes on several rail cars. While performing this task, plaintiff tripped on a large rock and twisted his ankle, tearing a ligament in the process. The rock on which plaintiff tripped was approximately six inches in diameter and four inches tall. Plaintiff described the rock as large, roughly "twice the size of regular road ballast."<sup>2</sup>

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<sup>1</sup> Plaintiff's complaint alleges that, based on information and belief, as a result of a corporate reorganization, the corporate name of Grand Trunk Western Railroad Incorporated was recently changed to Grand Trunk Western Railroad Company. Thus, we use the singular "defendant" because both defendants listed are essentially the same entity.

<sup>2</sup> As basically defined, "ballast," in the present context, refers to "gravel or broken stone placed under the ties of a railroad." *Random House Webster's College Dictionary* (1992). Defendant's

Following his injury, plaintiff brought a claim against defendant under the FELA, claiming that defendant had been negligent in numerous ways, including its failure to provide a “walk area” suitable for walking, failure to comply with railroad industry standards and guidelines, and, more generally, failure to exercise ordinary care and provide plaintiff with a reasonably safe place to work. Plaintiff specified in his complaint that he sustained his injury when “he slipped on said large irregular non conforming rock,” which he described as “not part of the ballast track support structure.”

Defendant later moved for summary disposition pursuant to MCR 2.116(C)(10), asserting that (1) plaintiff’s claim was precluded by the Federal Railroad Safety Act (FRSA), 49 USC 20101 *et seq.*, and its accompanying Federal Railroad Administration (FRA) regulations, 49 CFR 200 *et seq.*, and (2) that plaintiff failed to provide any evidence that defendant had actual or constructive knowledge of the condition that allegedly caused plaintiff’s injury. Following a hearing, the trial court granted defendant’s motion under MCR 2.116(C)(10), concluding that plaintiff’s claim was precluded and that defendant lacked reasonable notice of the particular stone that caused plaintiff’s injury. Plaintiff now appeals as of right.

On appeal, plaintiff first argues that the trial court erred in concluding that the FRSA and FRA regulations precluded his claim under the FELA. This Court reviews *de novo* a trial court’s decision on a motion for summary disposition. *MEEMIC Ins Co v DTE Energy Co*, 292 Mich App 278, 280; 807 NW2d 407 (2011). “A summary disposition motion under MCR 2.116(C)(10) tests the factual support for a claim and should be granted if there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law.” *Id.* “When deciding a summary disposition motion, a court must consider the pleadings, affidavits, depositions, admissions, and other documentary evidence in the light most favorable to the opposing party.” *Id.* After viewing the evidence in this light, a genuine issue of material question of fact remains “when reasonable minds could differ on an issue.” *Allison v AEW Capital Mgt, LLP*, 481 Mich 419, 425; 751 NW2d 8 (2008). Whether a federal law precludes an action under another federal law is a question of law which we also review *de novo*. See *Nickels v Grand Trunk W R, Inc*, 560 F3d 426, 429 (CA 6, 2009).

In this case, plaintiff brought his claim under the FELA, which provides:

Every common carrier by railroad while engaging in commerce between any of the several States or Territories . . . 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, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment. [45 USC 51.]

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expert witness, William R. Paxton, more fully explained that ballast is used to transfer the loads imposed by trains from the rail/crosstie system to the subgrade and to support the track vertically, horizontally, and laterally. He further explained that ballast is purchased from rock quarries after testing to confirm compliance with railroad specifications and tested periodically thereafter to assure continued compliance.

“When a party files a FELA case in state court, we apply federal substantive law to adjudicate the claim while following state procedural rules.” *Hughes v Lake Superior & Ishpeming R Co*, 263 Mich App 417, 421; 688 NW2d 296 (2004) (citation omitted). The FELA was enacted in 1908 in response to the physical dangers faced by railroad workers in order to “shift[] part of the human overhead of doing business from employees to their employers.” *Consol Rail Corp v Gottshall*, 512 US 532, 542; 114 S Ct 2396; 129 L Ed 2d 427 (1994) (internal quotation marks omitted). To effectuate this purpose, “a relaxed standard of causation applies under FELA.” *Id.* The FELA is not, however, a workers’ compensation statute; rather, the basis of an employer’s liability “is his negligence, not the fact that injuries occur.” *Id.* at 543. What constitutes negligence under the FELA is a federal question that “generally turns on principles of common law.” *Id.* Under the common law, “[a] railroad has a duty to use reasonable care in furnishing its employees with a safe place to work.” *Atchison, Topeka & Santa Fe R Co v Buell*, 480 US 557, 558; 107 S Ct 1410; 94 L Ed 2d 563 (1987).

In comparison, the FRSA was enacted in 1970 “to promote safety in every area of railroad operations and reduce railroad-related accidents and incidents.” 49 USC 20101. See also *Norfolk Southern R Co v Shanklin*, 529 US 344, 347; 120 S Ct 1467; 146 L Ed 2d 374 (2000). The Act provides that the laws and regulations related to railroad safety “shall be nationally uniform to the extent practicable.” 49 USC 20106(a)(1). The FRSA gives the Department of Transportation the authority to “prescribe regulations and issue orders for every area of railroad safety supplementing laws and regulations in effect on October 16, 1970.” 49 USC 20103(a). The FRSA also includes an express preemption provision, 49 USC 20106(a), which has been held to preempt state law negligence claims provided that “the federal regulations substantially subsume the subject matter of the relevant state law.” *Shanklin*, 529 US at 352. See also 49 US 20106(b).

The FRSA and accompanying FRA regulations have also been held to have a preclusive effect on claims brought under the FELA. See *Nickels*, 560 F3d at 429-433; *Lane v RA Sims, Jr, Inc*, 241 F3d 439, 443 (CA 5, 2001); *Waymire v Norfolk & Western R Co*, 218 F3d 773, 776 (CA 7, 2000). The reasoning for this preclusive effect on FELA claims is that “the uniformity demanded by the FRSA can be achieved only if federal rail safety regulations are applied similarly to a FELA plaintiff’s negligence claim and a non-railroad-employee plaintiff’s state law negligence claim.” *Nickels*, 560 F3d at 430 (internal quotations and brackets omitted). Otherwise, the FRA’s safety regulations would be “virtually meaningless: The railroad could at one time be in compliance with federal railroad safety standards with respect to certain classes of plaintiffs yet be found negligent under the FELA with respect to other classes of plaintiffs for the very same conduct.” *Id.* (internal quotation marks omitted).

At issue in the present case is whether plaintiff’s claim of negligence under the FELA—involving his assertion that he tripped on a large rock on the walkway near the railroad—is precluded by FRSA and FRA. In arguing that plaintiff’s claim is precluded, defendant relies on FRA regulations regarding track support and emphasizes that, in *Nickels*, 560 F3d at 428-431, the Sixth Circuit determined the plaintiff’s claim that he had been injured by unnecessarily large ballast was precluded by the FRA regulations regarding track support because the regulation afforded railroads discretion in the size of ballast used for track support. Defendant asserts that plaintiff’s claims are similarly precluded because they involve injury sustained on ballast integral to the railroad’s support structure which falls within the FRA regulation’s purview.

Accordingly, we must consider whether the subject matter of plaintiff's claim is covered by the FRSA and the FRA regulations.

The FRA track support regulation at issue, 49 CFR 213.103, provides:

Unless it is otherwise structurally supported, all track shall be supported by material which will—

- (a) Transmit and distribute the load of the track and railroad rolling equipment to the subgrade;
- (b) Restrain the track laterally, longitudinally, and vertically under dynamic loads imposed by railroad rolling equipment and thermal stress exerted by the rails;
- (c) Provide adequate drainage for the track; and
- (d) Maintain proper track crosslevel, surface, and alinement.

Considering this regulation, the only claims precluded by its provisions are those within the same subject matter, that is, those claims relating to the railroad tracks' structural support measures, which could include ballast, provided that the ballast is used to perform a support function described in the regulation. See generally *Nickels*, 560 F3d at 431. Given the parameters of the regulation, if, as plaintiff contended in his complaint, his injury occurred on a rock that was not ballast and not part of the railroad support structure, the rock causing his injury was not within the subject matter governed by 49 CFR 213.103 and thus his claim was not precluded by the FRSA and accompanying FRA regulations. Consequently, the dispositive question becomes whether the rock was ballast that formed part of the railroad support structure.

Given the evidence presented to the trial court in relation to defendant's motion for summary disposition, we conclude that the trial court erred in concluding the FRA regulations precluded plaintiff's action under FELA because a material question of fact remains as to whether the rock in question was ballast or debris, and whether it formed part of the railroad's support structure or a walkway for the workers. Specifically, on the evidence presented, reasonable minds could conclude that the rock that caused plaintiff's injury was not actually ballast used to support the track structure, but debris. Plaintiff testified that the rock he tripped on was especially large—about six inches in diameter and four inches tall, and plaintiff's expert, a member of the American Railway Engineering and Maintenance of Way Association (AREMA), opined, based on the size of the rock, that it “was simply debris and not part of the track support structure.”<sup>3</sup> Plaintiff's expert further explained that the injury occurred, not on part

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<sup>3</sup> On appeal, defendant discusses at length the fact that plaintiff thought the rock that caused his injury was ballast. However, viewing the evidence in a light most favorable to plaintiff, his own uncertain identification of the rock is not fatal to his claim where he has offered other evidence, including expert testimony, to establish the rock was not ballast used to support the track structure.

of the railroad support structure, but on a walkway running “along side and between tracks,” which is commonly traversed by trainmen performing their track side duties. In his opinion, “safe walkway material should have been placed” in this walkway area rather than large rocks. In short, there was evidence that the rock in question was not part of the railroad support structure because it was not ballast and it was located on a walkway where it did not serve a support function. Although defendant presented evidence to counter plaintiff’s proofs, when deciding a motion for summary disposition, a court must consider the evidence in the light most favorable to the nonmoving party, *MEEMIC*, 292 Mich App at 280, and given the conflicting evidence presented in this case it is clear that a material question of fact remains. Consequently, plaintiff’s claim was not precluded by 49 CFR 213.103, and the trial court erred in granting defendant’s motion for summary disposition under MCR 2.116(C)(10) on this basis.

Next, plaintiff contends that the trial court erred in finding that there was no evidence defendant had notice of the condition that caused his injury. As noted, the FELA imposes a duty on railroad employers to exercise reasonable care in providing their employees with a safe place to work. *Atchison, Topeka & Santa Fe R Co*, 480 US at 558. To prevail under the FELA, a plaintiff need not show that the employer had actual notice of a dangerous condition in the workplace. See *Szekeres v CSX Transp, Inc*, 617 F3d 424, 430-431 (CA 6, 2010). “The law is clear that notice under the FELA may be shown from facts permitting a jury to infer that the defect could have been discovered by the exercise of reasonable care or inspection.” *Id.* at 430. Conversely, “if a person has 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*, \_\_ US \_\_, \_\_; 131 S Ct 2630, 2643; 180 L Ed 2d 637 (2011) (internal alternations omitted). “If negligence is proved, however, and is shown to have played any part, even the slightest, in producing the injury, then the employer is answerable in damages even if the extent of the injury or the manner in which it occurred was not probable or foreseeable.” *Id.* (internal citations, quotation marks, and alterations omitted).

In this case, there was evidence that defendant knew or should have known about the condition that caused plaintiff’s injury. Plaintiff testified, “[b]ig rocks ha[d] been reported out there hundreds of times and they don’t do anything about it so why waste your breath.” Plaintiff testified that, in fact, he had complained several times over the years about the area between the tracks, but that despite his complaints, defendant took no action. Plaintiff specifically remembered telling the yardmaster about one month before his injury that the ballast between the tracks was too big, but nothing was done. Plaintiff said that other employees have complained to the yardmasters as well about the size of the ballast in that area. This evidence was sufficient to create a material question of fact as to whether defendant had been alerted to the dangers posed by large rocks in the area in question. In addition, plaintiff testified that the particular rock he tripped on was especially large, meaning it would be possible for a jury to conclude that this particularly large rock would have been discovered “by the exercise of reasonable care or inspection.” See *Szekeres*, 617 F3d at 430. Indeed, given defendant’s insistence that the rock formed part of the ballast support structure for the railroad, it would be reasonable to conclude that defendant was responsible for placing that rock, and others, in the area. If a party has created a dangerous condition, then one can conclude that it had notice of the condition. See *Clark v Kmart Corp*, 465 Mich 416, 419; 634 NW2d 347 (2001). On the whole, there is evidence to create a material question of fact regarding whether defendant was on notice of the

defect which caused plaintiff's injury, and, consequently, the trial court erred in granting summary disposition on this basis.

Reversed and remanded for further proceedings. We do not retain jurisdiction.

/s/ Jane M. Beckering

/s/ Joel P. Hoekstra