FIFTH DIVISION

No. 1-22-1583

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

BILLY GUTHRIE, Plaintiff-Appellee, v. CSX TRANSPORTATION, INC., Defendant-Appellant.	))))))))))	Appeal from the Circuit Court of Cook County. No. 18 L 008451 Honorable Karen L. O'Malley, Judge Presiding.

ORDER

¶ 1 Defendant, CSX Transportation, Inc. (CSXT), requests leave to appeal pursuant to Illinois Supreme Court Rule 308(a) (eff. Jul. 1, 2017) based on the circuit court's certified question following the court's denial of defendant's motion for summary judgment in favor of plaintiff, Billy Guthrie. We deny defendant's application for leave to appeal pursuant to Rule 308(a).

¶ 2 Plaintiff, who was born in 1949, worked for defendant and its predecessor railroads from 1981 to 2007. Thereafter, he was diagnosed with squamous cell tongue cancer. In 2018, plaintiff filed a complaint under the Federal Employer's Liability Act (45 U.S.C. § 51 *et seq.*) (FELA) based on negligence. He alleged, among other things, that the exposure to environmental tobacco smoke (ETS), from his work at the railroad between 1981 to 2007 caused his cancer.

¶ 3 Plaintiff's supporting record contains a February 28, 2021, written report from his expert, R. Leonard Vance, PhD, which stated, among other things, as follows:

> "He was exposed to his co-workers' tobacco smoke from the time he began work in 1981 until his retirement in 2007. During his early years with the Railroad, most co-workers smoked in the workplace. Fellow employees smoked inside trucks transporting him to work sites. They smoked inside buildings and in lodging he shared with them. They smoked at lunch. Often they were right next to him, smoking. The Railroad allowed its employees to smoke at will, anywhere. Mr. Guthrie would move away from smokers when he could, but that was often impossible. There were no signs prohibiting smoking. At the end of his career, the amount of workplace smoking diminished somewhat."

The report further stated that starting in the 1960s, it was widely known that smoking tobacco was associated with a broad array of diseases for people who smoke. Following the 1964 Surgeon General's report regarding the negative effects of smoking tobacco, concern started to focus on the effects of tobacco smoke on non-smokers. The report stated that the hazards of ETS had long been known and concluded that defendant failed to, among other things, prohibit smoking in a timely manner and provide plaintiff with a reasonably safe place to work.

¶ 4 Defendant's expert, William Bullock, issued a report on June 23, 2022, which concluded, among other things, that defendant "implemented smoking policies and provided education and smoking cessation programs to employees more than a decade before most industries addressed the issue." He concluded that there was no basis to consider that defendant "could have known, contemplated or foreseen that persons working in the Engineering department could have been at an increased risk for developing tong [*sic*] cancer from potential exposure to ETS." The report further concluded:

> "CSXT took early and proactive approaches to reducing exposure to ETS at its workplaces, but, these efforts were blocked by the Unions. Not being able to move

forward with a smoking ban, CSXT focused their efforts on assisting those employees that wanted to quit smoking by offering smoking cessation programs. Ultimately, CSXT and the Unions reached agreements to ban smoking, and they issued policies and rules accordingly."

¶ 5 After Bullock's June 2022 report, plaintiff's expert issued a supplemental report, which stated:

"Railroads were on notice by at least 1972 of the carcinogenicity of ETS in the workplace. See the 1972 Surgeon General's Report, The Health Consequences of Smoking, cited in my initial February 28, 2021 report. Workplace smoking policies adopted by CSX in 1987, 1991, 1993, and 1999, and as described by Dr. Bullock, were not enforced with respect to Mr. Guthrie during his years of work, 1981-2007, except for the last two or three years he worked, and came too late. CSX could have engaged in collective bargaining to engage in ETS mitigation at any time after the issuance of the 1972 Surgeon General's Report. Dr. Bullock's testimony that CSX had to await dispute resolution involving other railroads is not supported by the decisions cited as exhibits or by collective industry knowledge since 1984 or earlier. It was well known by at least 1984 that ETS was an important employment health concern to be addressed by individual railroads."

¶ 6 In July 2022, defendant filed a motion for summary judgment, arguing, as relevant here, that the circuit court did not have jurisdiction because plaintiff's claim that defendant was negligent for failing to issue a smoking ban was barred as being "preempted" as mandated by Public Law Boards under the Railway Labor Act (RLA). It argued it could not be held liable for failing to implement a smoking ban because controlling federal law expressly prevented such a

ban. Defendant asserted that at the time plaintiff claims that defendant should have banned smoking in the 1980's, railroads were expressly estopped from banning smoking by the Public Law Boards under the RLA.

¶ 7 Defendant attached to its motion for summary judgment, two decisions issued by the Public Law Boards in 1989 and 1990. Defendant attached Public Law Board No. 4762 from 1989, where the dispute was between Transportation Communications Union and Amtrak and the issue was whether Amtrak could unilaterally ban smoking on the facilities pursuant to the current collective bargaining agreement and past practice. The Arbitrator's award provided that Amtrak "may not unilaterally put into effect on January 1, 1990 its proposed policy for a total ban on smoking on its properties and vehicles, but must negotiate with the Organization regarding the implementation of such a smoking policy."

¶ 8 Defendant also attached to its motion Public Law Board No. 4755, where the parties were Norfolk Southern Corporation, Inc., the Transportation Communications International Union, Southern System Board of Adjustment #96, and Norfolk and Western System Board of Adjustment #218. The arbitrator's award concluded that "[s]moking at the workplace is a well-established condition of employment on this Carrier's policy; this again mandates negotiation before such condition may be changed."

¶ 9 At the hearing on defendant's motion for summary judgment, plaintiff's counsel argued in response that according to his expert's report, the workplace smoking policies adopted by defendant in 1987, 1991, 1993, and 1999, which defendant's expert had described in his June 23, 2022, report, were not enforced with respect to plaintiff during his time there from 1981 to 2007. Counsel argued that defendant had a duty under the FELA to provide a reasonably safe workplace.

Circuit Court's Ruling

¶ 10 The circuit court denied, in part, defendant's motion for summary judgment. At the hearing, the court orally concluded that the RLA and decisions made pursuant to the RLA did not preclude plaintiff's claim brought under the FELA. The court noted that in *Atchison Topeka and Santa Fe Railway Company v. Buell,* 480 U.S. 557 (1987), the United States Supreme Court held that the FELA "provided railroad workers with substantive protection against negligent conduct independent of the arbitration procedures under the RLA."

¶ 11 Following the court's oral ruling, defendant's counsel asked the court for Rule 308 language. The court stated it would consider Rule 308 language, noting that it didn't "see any authority out there that really squares with the facts here, as I mentioned in the ruling." Plaintiff's counsel objected to Rule 308 language, noting that *Buell* was analogous to this case. The court stated that it agreed that *Buell* was analogous but that "this is a very different set of facts here." It stated:

> "In all the cases that the Court is aware of, it was a situation where we had a current party who had a remedy under—that they could pursue now.***Here [plaintiff] is not diagnosed with cancer until years after the determination was made***by the board back in 1989. So it's a bit of a retrospective analysis versus the cases that are—that the Court has considered and that the court is aware of. It talks about what, you know, what current action a plaintiff could take and whether or not it's exclusive and whether or not that action is preempted because they can take that action."

The court allowed the parties to submit Rule 308 language to the court.

¶ 12 On September 23, 2022, the court issued a written ruling denying, in part, defendant's motion for summary judgment to the extent it was "based on absence of jurisdiction due to

federal preclusion under the Railway Labor Act and decisions of the Public Law Board." The court also stated that over plaintiff's objection, it granted defendant's request for a certified question under Rule 308(a), and it certified the following question:

> "Whether a plaintiff can assert a claim for negligence under the Federal Employer's Liability Act (45 U.S.C. § 51, *et seq.*) based on a railroad's alleged breach of duty for failure to implement a workplace smoking ban during a period in which railroads were prohibited from unilaterally banning smoking by controlling decisions of the Public Law Board applying the Railway Labor Act (45 U.S.C. § 153 First)."

The court concluded that its order denying defendant's motion for summary judgment involved a question of law as stated in the certified question as "to which there is a substantial ground for difference of opinion and an immediate appeal from that order may materially advance the ultimate termination of litigation." This petition for leave to appeal followed.

¶ 13 Rule 308(a) Application for Leave to Appeal

¶ 14 Generally, as an appellate court, absent a statutory exception or rule of the supreme court, we have jurisdiction to review only final judgments entered in the trial court. *In re Estate of Luccio*, 2012 IL App (1st) 121153, ¶ 17. Rule 308(a) provides an exception to this general rule and allows for a permissive appeal "of an interlocutory order certified by the trial court as involving a question of law as to which there is substantial ground for difference of opinion and where an immediate appeal may materially advance the ultimate termination of the litigation." *Id.* (citing Ill. S. Ct. R. 308(a) (eff. Jul. 1, 2017).

¶ 15 Rule 308 "was not intended to open the floodgates to a vast number of appeals from interlocutory orders in ordinary litigation." *Morrissey v. City of Chicago,* 334 Ill. App. 3d 251, 257 (2002). Our supreme court has explained that appeals under Rule 308 "should be reserved

for exceptional circumstances, and the rule should be sparingly used." *Rozsavolgyi v. City of Aurora*, 2017 IL 121048, ¶ 21. Further, our supreme court has stated that, "an appellate court serves as a gatekeeper and must carefully question whether the case before it warrants consideration outside the usual process of appeal." *Id.* ¶ 23. "Certified questions must not seek an application of the law to the facts of a specific case" and a certified question should not be reached if addressing it will result in an answer that is advisory or provisional. *Id.* ¶ 21. Additionally, "if an answer is dependent upon the underlying facts of a case, the certified question is improper." *Id.* Certified questions are questions of law that we review *de novo*. *Moore v. Chicago Park District*, 2012 IL 112788, ¶ 9.

¶ 16 Applying these principles here, we decline to answer the certified question. As previously stated, where the resolution of a certified question depends on resolving a host of factual predicates, a reviewing court should generally decline to answer the question. *Combs v. Schmidt*, 2015 IL App (2d) 131053, ¶ 6. Here, the certified question involves and is dependent on a number of factual questions related to defendant's smoking policies and efforts in collective bargaining with the union regarding a smoking ban and ETS mitigation during the time plaintiff worked there from 1981 to 2007. These include such questions as whether defendant attempted a unliteral smoking ban, whether it made reasonable and timely efforts to engage in collective bargaining to eliminate or reduce smoking in the workplace, or whether it failed to enforce any smoking policies that it did implement during the relevant time period. Accordingly, the certified question is dependent on several underlying factual questions and a factfinder will have to resolve a number of factual disputes before determining whether defendant breached its duty to provide plaintiff a reasonably safe workplace. See *Dowd & Dowd, Ltd. v. Gleason*, 181 Ill. 2d 460, 477 (1998) (the supreme court declined to answer the certified question, finding it was a

"fact-intensive inquiry," and that, "on remand the finder of fact will have to resolve a number of factual disputes before determining whether the defendants breached their fiduciary duty").

¶ 17 Moreover, we note that the question asks whether a plaintiff can assert a negligence claim under the FELA "based on a railroad's alleged breach of duty for failure to implement a workplace smoking ban during a period in which railroads were prohibited from unilaterally banning smoking by controlling decisions of the Public Law Board applying the [RLA]". However, the two Public Law Board awards that defendant cites to support its argument that it was prohibited from unilaterally banning smoking under the RLA were from 1989 and 1990, and the parties involved in the arbitration dispute were other railroads, Amtrak and Norfolk Southern. These decisions concluded that the railroads in the cases had to engage in negotiation with the union before making the respective changes to the smoking policies. Defendant was not a party in those disputes, and the Public Law Board awards were issued in 1989 and 1990. Defendant has not cited any authority to support that these Public Law Board awards, where defendant was not a party, prohibited defendant from unliterally banning smoking during the time plaintiff worked there from 1981-2007.

¶ 18 Accordingly, after having reviewed defendant's application for leave to appeal and plaintiff's answer in opposition, it is HEREBY ORDERED:

Defendant's application for leave to appeal pursuant to Rule 308(a) is denied.

ORDER ENTERED
DEC - 5 2022
APPELLATE COURT FIRST DISTRICT

Justice

Justice

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