2020 IL App (1st) 190279-U

Nos. 1-19-0279, 1-19-0283 & 1-19-0286 (Cons.)

March 31, 2020

First Division

IN THE

APPELLATE COURT OF ILLINOIS

FIRST DISTRICT

KENNETH TRIPP,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee/Appellant,	)	Cook County.
	)	
v.	)	No. 16 L 1767
	)	
UNION PACIFIC RAILROAD COMPANY,	)	Honorable
	)	John Ehrlich,
Defendant-Appellant/Appellee.	)	Judge Presiding.

JUSTICE WALKER delivered the judgment of the court.
Presiding Justice Griffin and Justice Hyman concurred in the judgment.

ORDER

¶ 1 *Held*: We vacate our order granting plaintiff's and defendant's Supreme Court Rule 304(a) and 308 applications for leave to appeal, dismiss the appeals, and remand to the circuit court.

¶ 2 In 2016 Kenneth Tripp filed a three-count complaint against Union Pacific Railroad Company (UP), seeking to recover damages for injuries he suffered working between two trains in 2015. The circuit court granted UP's motion for summary judgment on a count in which Tripp alleged that the couplers on a train did not function correctly. The circuit court found that one of

the trains involved in the accident was "in use," within the meaning of applicable federal statutes, but the other train was not. The circuit court certified for appellate review, under Supreme Court Rule 308 (Ill. S. Ct. R. 308(a) (eff. Jan. 1, 2015)), a question concerning whether locomotives in a designated maintenance area count as "in use." Tripp filed an appeal under Rule 308 and an appeal under Rule 304(a) (Ill. S. Ct. R. 304(a) (eff. Mar. 8, 2016)) from the judgment entered concerning the couplers. UP filed an appeal under Rule 308. Because the record does not unequivocally prove that both trains were in a designated maintenance area, we find that we would risk entry of an advisory opinion if we were to answer the certified question. The summary judgment involves only one of several negligent acts alleged in the complaint. Because Tripp still has a viable cause of action for negligence, the judgment on one count does not finally resolve Tripp's claim for negligence. Therefore, neither Rule 304(a) nor Rule 308 gives this court jurisdiction to consider the appeals. We dismiss all three appeals.

¶ 3 BACKGROUND

¶ 4 Tripp suffered an injury when he tried to couple together two locomotives while working as a conductor on a UP train. He alleged in count I of his complaint that UP violated the Federal Employers' Liability Act (FELA) (45 U.S.C. § 51 et seq. (2000)) by negligently failing to provide a reasonably safe place for Tripp's work. Count II, based on the Safety Appliance Act (SAA) (49 U.S.C. § 20302 et seq. (2000)), charged UP with leaving a train in use when its couplers did not function properly. Count III charged UP with violating the Locomotive Inspection Act (LIA) (49 U.S.C. § 20701 et seq. (2000)) by leaving a train with a defective gladhand in use. Tripp filed a motion for a summary determination that the two trains he tried to couple were "in use," within the meanings of the SAA and the LIA, when he sustained the injury. UP filed a motion for

summary judgment on counts II and III, arguing that the trains were not in use and that the evidence could not support a finding of a defect in either the couplers or the gladhands.

¶ 5 In an order dated January 18, 2019, the circuit court held that the locomotive on which Tripp rode at the time of the accident was in use, but the locomotive to which he tried to couple his locomotive was not in use. The court also held that the evidence could not support a finding of a defect in the couplers, but some evidence could support a finding that a defective gladhand contributed to causing Tripp's injury. Accordingly, the circuit court granted UP's motion for summary judgment on count II, concerning the couplers, but denied the motion for summary judgment on count III, concerning the gladhand. The circuit court added a finding of no just cause to delay appeal from the decision to grant UP summary judgment on count II.

¶ 6 The court certified for appellate review the following question: "Whether locomotives are 'in use' as that term is applied in the Locomotive Inspection Act, 49 U.S.C. § 20701 et seq., and the Federal Safety Appliance Act, 49 U.S.C. § 20302, if both locomotives have been removed from duty for maintenance, both are in the rail yard’s designated maintenance area, and one is moving the other within the designated maintenance area?"

¶ 7 Tripp filed a notice of appeal from the judgment entered on count II, and this court docketed the appeal as case no. 1-19-0283. Tripp separately appealed, under Supreme Court Rule 308 (Ill. S. Ct. R. 308(a) (eff. Jan. 1, 2015)), from the determination that one of the trains involved in the attempted coupling was not in use at the time of the injury. This court docketed the appeal as case no. 1-19-0286. UP also filed an appeal under Rule 308, docketed as case no. 1-19-0279. This court consolidated the three appeals.

¶ 8 ANALYSIS

¶ 9 Before reaching the merits of the appeal, we must determine whether we have jurisdiction. *Fligelman v. City of Chicago*, 264 Ill. App. 3d 1035, 1037 (1994). The parties contend that Rule 304(a) gives us jurisdiction over the appeal in docket no. 1-19-0283, and Rule 308 gives us jurisdiction over the appeals in docket nos. 1-19-0286 and 1-19-0279.

¶ 10 Rule 304

¶ 11 Tripp appeals from the judgment entered in favor of UP on count II, the claim for a violation of the SAA. Supreme Court Rule 304(a) provides:

> "If multiple parties or multiple claims for relief are involved in an action, an appeal may be taken from a final judgment as to one or more but fewer than all of the parties or claims only if the trial court has made an express written finding that there is no just reason for delaying enforcement or appeal." Ill. S. Ct. R. 304(a) (eff. Mar. 8, 2016).

¶ 12 "Although Rule 304(a) permits appeals from orders which do not dispose of an entire proceeding, the fact that an order contains the requisite 304(a) language does not make a non-final order appealable." *Rice v. Burnley*, 230 Ill. App. 3d 987, 991 (1992). "[W]here an order disposes only of certain issues relating to the same basic claim, such a ruling is not subject to review under Rule 304(a)." *Blumenthal v. Brewer*, 2016 IL 118781, ¶ 27.

¶ 13 "The Safety Appliance Act [SAA] does not create a cause of action for *** railroad employees *** who are injured as a result of a railroad's violation of the act. [Citation.] But Congress did provide a federal cause of action for railroad employees in the Federal Employers' Liability Act [Citation.] The FELA embraces claims of an employee based on violations of the

Safety Appliance Act." (Internal quotation marks omitted.) *Magna Trust Co. v. Illinois Central R.R. Co.*, 313 Ill. App. 3d 375, 380 (2000). "While [FELA] requires a finding of negligence on the part of the railroad, a violation of the [SAA] is considered to be negligence per se, or conclusive proof of negligence, on the part of the railroad in an action brought under the FELA." *Miller v. Alton & Southern Ry. Co.*, 233 Ill. App. 3d 896, 898 (1992).

¶ 14 Thus, by granting UP summary judgment on count II, the circuit court barred proof of one form of alleged negligence, but permitted Tripp to proceed to trial on the allegations of negligence in counts I and III. See *Coffey v. Northeast Illinois Regional Commuter R.R. Corp.*, 479 F.3d 472, 477 (7th Cir. 2007).

¶ 15 In *Hull v. City of Chicago*, 165 Ill. App. 3d 732 (1987), the plaintiff alleged negligent acts in 12 separate subparagraphs of each of two counts. The circuit court entered an order dismissing 11 of the 12 subparagraphs from each count and added Rule 304(a) language to the order. The appellate court held that dismissal of the 11 subparagraphs "did not determine the merits of a separate cause of action or terminate any litigation between the parties. The order of dismissal merely determined which allegations of negligence would be allowed to remain." *Hull*, 165 Ill. App. 3d at 733. The court dismissed the appeal for lack of jurisdiction.

¶ 16 The appellate court applied *Hull* in *Rice*, where the plaintiff, like Tripp, pleaded separate allegations of negligence in separate counts. The appellate court in Rice held, "It is of no consequence that plaintiff here has split her claim of negligence into separate counts rather than as subparagraphs as in Hull. *** Here, [the] Counts *** which are still viable allege negligence for these defendants' failure to have smoke detectors ***. [The] Counts *** which were dismissed also alleged negligence, albeit based on different acts or omissions ***. As in Hull, the plaintiff

here has advanced only one theory of recovery— negligence." *Rice*, 230 Ill. App. 3d at 992. The court dismissed the appeal for lack of jurisdiction.

¶ 17 Under the reasoning of *Hull* and *Rice*, this court lacks jurisdiction to consider the appeal under Rule 304(a), in case no. 1-19-0283.

¶ 18 Rule 308

¶ 19 Supreme Court Rule 308 provides: "When the trial court, in making an interlocutory order not otherwise appealable, finds that the order involves a question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, the court shall so state in writing, identifying the question of law involved." Ill. S. Ct. R. 308(a) (eff. Jan. 1, 2016).

¶ 20 Our supreme court interpreted Rule 308 in *Rozsavolgyi v. City of Aurora*, 2017 IL 121048, ¶ 21, where the court held, "If addressing a certified question will result in an answer that is advisory or provisional, the certified question should not be reached.[Citations.] Similarly, if an answer is dependent upon the underlying facts of a case, the certified question is improper."

¶ 21 Thus, the certified question must address the underlying disputed question of law so as to avoid a situation where we are asked to render an advisory opinion on matters unrelated to the case before us. Where the certified question assumes facts not fully determined by the record, the question is not in proper form.

¶ 22 The certified question here assumes both trains Tripp tried to couple were "in the rail yard’s designated maintenance area" at the time of the accident. Tripp in his brief cites evidence that the trains involved in the coupling were at least partially outside the maintenance area, in "transportation manager's territory," at the time of the accident.

¶ 23 If we answer the certified question, and the trier of fact later finds that the trains were not entirely "in the rail yard's designated maintenance area," this court will have issued an advisory opinion not applicable to the facts of the case.

¶ 24 Accordingly, the certified question asks us to assume a fact that has not been adequately admitted or otherwise established. This court should not have granted the applications for leave to appeal under Supreme Court Rule 308.

¶ 25 CONCLUSION

¶ 26 Because the judgment entered on count II did not determine the merits of a separate cause of action, we lack jurisdiction over the appeal in docket no. 1-19-0283. Because an answer to the certified question might lead to an advisory opinion not applicable to the facts of the case, we should not have granted the applications for leave to appeal under Supreme Court Rule 308. We vacate our order granting all applications for leave to appeal pursuant to Rule 304(a) and Rule 308, dismiss the appeals, and remand this cause to the circuit court for further proceedings.

¶ 27 Appeals dismissed; cause remanded.