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of fact in their second cause of action. We affirm the court's judgment in favor of the defendants in this suit to set aside the annexation of Redevelopment Area #3 by the City.

AFFIRMED.

VIVIKA A. DEVINEY, APPELLANT, V. UNION PACIFIC RAILROAD COMPANY, A DELAWARE CORPORATION, APPELLEE.

786 N.W.2d 902

Filed August 6, 2010. No. S-08-1259.

1. **Summary Judgment.** A court should grant summary judgment when the pleadings and evidence admitted show that no genuine issue exists regarding any material fact or the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law.
2. **Summary Judgment: Appeal and Error.** In reviewing a summary judgment, an appellate court views the evidence in a light most favorable to the party against whom the judgment is granted and gives such party the benefit of all reasonable inferences deducible from the evidence.
3. **Negligence.** Foreseeable risk is an element in the determination of negligence, not legal duty. In order to determine whether appropriate care was exercised, the fact finder must assess the foreseeable risk at the time of the defendant's alleged negligence. The extent of the foreseeable risk depends on the specific facts of the case and cannot be usefully assessed for a category of cases; small changes in the facts may make a dramatic change in how much risk is foreseeable.
4. **Federal Acts: Railroads: Liability: Negligence: Damages.** Under the Federal Employers' Liability Act, railroad companies are liable in damages to any employee who suffers injury during the course of employment when such injury results in whole or in part due to the railroad's negligence.
5. **Federal Acts: Railroads: Employer and Employee.** The Federal Employers' Liability Act requires that a railroad provide its employees with a reasonably safe workplace.
6. **Negligence: Damages: Proximate Cause.** In order to prevail in a negligence action, there must be a legal duty on the part of the defendant to protect the plaintiff from injury, a failure to discharge that duty, and damage proximately caused by the failure to discharge that duty.
7. **Negligence: Proximate Cause.** Foreseeability in the context of proximate cause relates to the question of whether the specific act or omission of the defendant was such that the ultimate injury to the plaintiff reasonably flowed from the defendant's breach of duty.
8. **Animals: Liability.** The doctrine of ferae naturae essentially provides that a landowner cannot be held liable for the actions of dangerous animals on his or

her property unless he or she has reduced the animals to his or her possession and control.

9. **Employer and Employee: Negligence.** An employer 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 and protect its employees.
10. **Federal Acts: Railroads: Negligence: Damages.** Under the Federal Employers' Liability Act, an employee who suffers an injury caused in whole or in part by a railroad's negligence may recover his or her full damages from the railroad, regardless of whether the injury was also caused in part by the actions of a third party.
11. **Federal Acts: Railroads: Proof: Notice.** The essential element of reasonable foreseeability in Federal Employers' Liability Act actions requires proof of actual or constructive notice to the employer of the defective condition that caused the injury.

Petition for further review from the Court of Appeals, SIEVERS, CARLSON, and CASSEL, Judges, on appeal thereto from the District Court for Douglas County, W. RUSSELL BOWIE III, Judge. Judgment of Court of Appeals affirmed.

Richard J. Dinsmore and Jayson D. Nelson, of Law Office of Richard J. Dinsmore, P.C., L.L.C., and Cortney S. LeNeave and Richard L. Carlson, of Hunegs, LeNeave & Kvas, P.A., for appellant.

William M. Lamson, Jr., Anne Marie O'Brien, and Angela J. Miller, of Lamson, Dugan & Murray, L.L.P., for appellee.

HEAVICAN, C.J., WRIGHT, CONNOLLY, GERRARD, STEPHAN, MCCORMACK, and MILLER-LERMAN, JJ.

HEAVICAN, C.J.

INTRODUCTION

Vivika A. Deviney (Deviney) brought this suit against her employer, Union Pacific Railroad Company (UP), under the Federal Employers' Liability Act (FELA),[1] for injuries she sustained after contracting "West Nile" virus (WNV). The Douglas County District Court granted UP's motion for summary judgment, and Deviney appealed the decision to the Nebraska Court of Appeals. In a split decision, the Court of Appeals reversed

[1] 45 U.S.C. §§ 51 through 60 (2006).

the decision of the district court,[2] and UP filed a petition for further review. We granted UP's petition for further review. We affirm the decision of the Court of Appeals.

BACKGROUND

Deviney was a conductor for UP when she contracted WNV, a mosquitoborne illness. Deviney claimed she contracted WNV during the course of her employment as a conductor in Bill, Wyoming, on or about August 3, 2003. Deviney alleges that as a part of her employment, she conducted a roll-by inspection of a train near "East Cadaro Junction" in Wyoming, which inspection required her to examine the exterior of a passing train for defects or problems. Deviney alleges that during the inspection, she was bitten by mosquitoes more than once, but fewer than 25 times. She called the dispatcher to complain, but Deviney stated that the dispatcher's only response was to laugh.

Deviney also stated that she had taken precautions against mosquito bites by wearing long pants and a sweater, and by applying insect repellant containing 7 percent "DEET." Evidence in the record indicates there was a pond on mine property near East Cadaro Junction and that the water in the pond came from a silo owned by the mine. The record is unclear as to how close the pond was to UP's right-of-way. There is also evidence in the record that there were mosquitoes inside the Bill trainyard, that there was standing water in the trainyard as a result of the washing of equipment, and that there was a pond located on the trainyard property.

Within a week, Deviney developed headaches, diarrhea, vomiting, and nausea, and she was eventually diagnosed with WNV. Deviney was in a hospital and then a rehabilitation facility from August 13 to October 17, 2003. As a result of the virus, Deviney allegedly suffered 84-percent hearing loss in one ear and 20-percent hearing loss in the other ear and continues to suffer from fatigue, vertigo, impaired vision, and weakness in her left side. Deviney was unable to return to work, although

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[2] *Deviney v. Union Pacific RR. Co.*, 18 Neb. App. 134, 776 N.W.2d 21 (2009).

the record is unclear as to what contact, if any, Deviney had with UP after August 3.

Deviney brought suit under FELA in the Douglas County District Court against UP for her injuries. Deviney claims her injuries were caused through UP's negligence in not warning employees about the danger of mosquitoes and in not treating the standing water on or near UP's property. As noted, the Douglas County District Court granted summary judgment for UP and Deviney appealed. The Court of Appeals reversed the decision of the district court, and UP filed a petition for further review, which we granted.

ASSIGNMENTS OF ERROR

In its petition for further review, UP claims, restated, that the Court of Appeals erred in finding (1) that UP breached its duty to Deviney and (2) that Deviney's injuries were reasonably foreseeable.

STANDARD OF REVIEW

[1] A court should grant summary judgment when the pleadings and evidence admitted show that no genuine issue exists regarding any material fact or the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law.[3]

[2] In reviewing a summary judgment, we view the evidence in a light most favorable to the party against whom the judgment is granted and give such party the benefit of all reasonable inferences deducible from the evidence.[4]

ANALYSIS

[3] We first turn to the impact of our recent decision in *A.W. v. Lancaster Cty. Sch. Dist. 0001*[5] on this case. Although the circumstances in *A.W.* are very different from those in the present case, *A.W.* addresses the nexus of legal duty and the

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[3] *King v. Burlington Northern Santa Fe Ry. Co.*, 277 Neb. 203, 762 N.W.2d 24 (2009).

[4] *Id.*

[5] *A.W. v. Lancaster Cty. Sch. Dist. 0001, ante* p. 205, 784 N.W.2d 907 (2010).

foreseeability of harm. In the past, we have often treated the foreseeability of an injury as a question of law.[6] As we noted in *A.W.*, however, this places us in the position of deciding as a matter of law questions that are dependent upon the facts and circumstances of a particular case.[7] With *A.W.*, we have reframed the issue of foreseeability—the lack of foreseeable risk in a specific case may be a basis for a no-breach determination—but such a ruling is not a no-duty determination.[8] Therefore, we held:

> [F]oreseeable risk is an element in the determination of negligence, not legal duty. In order to determine whether appropriate care was exercised, the fact finder must assess the foreseeable risk at the time of the defendant's alleged negligence. The extent of foreseeable risk depends on the specific facts of the case and cannot be usefully assessed for a category of cases; small changes in the facts may make a dramatic change in how much risk is foreseeable.[9]

[4,5] With that understanding, and utilizing that framework, we address UP's assignments of error. UP argues that the Court of Appeals erred in finding that UP breached its duty to Deviney and in finding that Deviney's injuries were reasonably foreseeable. Under FELA, railroad companies are liable in damages to any employee who suffers injury during the course of employment when such injury results in whole or in part due to the railroad's negligence.[10] FELA law requires that a railroad provide its employees with a reasonably safe workplace.[11]

[6,7] In order to prevail in a negligence action, there must be a legal duty on the part of the defendant to protect the

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[6] See *Knoll v. Board of Regents*, 258 Neb. 1, 601 N.W.2d 757 (1999), *abrogated, A.W., supra* note 5.

[7] *A.W., supra* note 5.

[8] *Id.*

[9] *Id.* at 216, 784 N.W.2d at 917.

[10] *McNeel v. Union Pacific RR. Co.*, 276 Neb. 143, 753 N.W.2d 321 (2008).

[11] *Pehowic v. Erie Lackawanna Railroad Company*, 430 F.2d 697 (3d Cir. 1970).

plaintiff from injury, a failure to discharge that duty, and damage proximately caused by the failure to discharge that duty.[12] Foreseeability in the context of proximate cause relates to the question of whether the specific act or omission of the defendant was such that the ultimate injury to the plaintiff reasonably flowed from the defendant's breach of duty.[13]

UP's legal duty is a question of law and is well established under FELA. But whether UP breached that duty and whether Deviney's injuries were reasonably foreseeable are questions of fact. And because this case comes before us on a grant of summary judgment, the question is whether Deviney produced sufficient evidence to present a genuine issue of material fact on those two points.

[8] UP argues that it did not have a duty to protect Deviney from mosquitoes and asks us to apply the doctrine of ferae naturae. The doctrine of ferae naturae essentially provides that a landowner cannot be held liable for the actions of dangerous animals on his or her property unless he or she has reduced the animals to his or her possession and control.[14] This doctrine has been applied to insects.[15]

As already noted, however, under FELA, an employer has a duty to provide a reasonably safe place to work. Under *A.W.*, foreseeability is an issue of fact that relates to a breach of that duty, to be determined by the fact finder.[16] We look for guidance in other FELA cases in which railroads have been found liable for damages stemming from insect bites.[17] Those same FELA cases, along with the set of facts in this case, inform our

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[12] *Wilke v. Woodhouse Ford*, 278 Neb. 800, 774 N.W.2d 370 (2009); *Desel v. City of Wood River*, 259 Neb. 1040, 614 N.W.2d 313 (2000); *Bargmann v. Soll Oil Co.*, 253 Neb. 1018, 574 N.W.2d 478 (1998).

[13] *Fu v. State*, 263 Neb. 848, 643 N.W.2d 659 (2002).

[14] *Nicholson v. Smith*, 986 S.W.2d 54 (Tex. App. 1999).

[15] *Id.*

[16] *A.W., supra* note 5.

[17] See, *Gallick v. Baltimore & Ohio R. Co.*, 372 U.S. 108, 83 S. Ct. 659, 9 L. Ed. 2d 618 (1963); *Pehowic, supra* note 11; *Grano v. Long Island R. Co.*, 818 F. Supp. 613 (S.D.N.Y. 1993).

decision as to whether Deviney presented sufficient evidence to overcome a motion for summary judgment.

Though we could find no FELA cases that specifically address mosquitoborne illnesses, there are cases dealing with injuries arising from other insect bites and stings. In *Pehowic*, the employee had reported that an area owned by the railroad was overgrown by vegetation and brush and had a large concentration of bees.[18] The employee notified the dispatcher of the presence of the brush and bees and stated that it was unsafe. After the employee was stung by a bee and treated for his reaction to the sting, he filed a suit under FELA, claiming that the railroad had been negligent in not trimming the brush.[19] The railroad argued that it could not be chargeable with the acts of wild bees.[20] The court found that failure to trim the brush could be found by a jury to be a breach of duty.

[9] *Grano* involved several railroad employees who contracted Lyme disease, a tickborne illness, during the course of their employment.[21] In that case, the court determined that the employer was negligent for failing to provide its employees with a reasonably safe place to work because it failed to maintain and inspect worksites or to spray for ticks. The court stated that "'[a]n employer 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 and protect its employees.'"[22]

Finally, in *Gallick*, the railroad had knowledge of a stagnant pool of water on its property that contained dead rats and pigeons.[23] After being bitten by an insect similar to those flying around the stagnant pool, the employee developed an infection that resulted in the amputation of both his legs. The U.S. Supreme Court held that the railroad could be found liable for

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[18] *Pehowic, supra* note 11.

[19] *Id.*

[20] *Id.*

[21] *Grano, supra* note 17.

[22] *Id.*, 818 F. Supp. at 618.

[23] *Gallick, supra* note 17.

the injuries because it knew of the existence of the pool and could also be charged with knowledge of the increased risk to its employees.[24]

In the present case, Deviney testified that there were a lot of mosquitoes in the Bill trainyard. UP's treatment plant and operations manager in Bill testified that there was an evaporation pond, on UP property one-quarter to one-half mile from the office, that often contained standing water. He testified that he had noticed more mosquitoes coming from a creek on the property and that he had treated both the pond and the creek for mosquitoes in the past. He also testified that he did not remember whether he had treated the pool in 2003 and that he used larvicide to treat for mosquitoes only when he noticed a problem after the mosquitoes hatched. According to the record, however, larvicide is effective only if used before mosquitoes hatch.

Deviney testified that she also had not been made aware of UP's accident prevention bulletin, which had been issued in 2002. The bulletin recommended using an insect repellant containing 20 to 30 percent DEET, but the repellant Deviney used contained only 7 percent DEET. Deviney also stated that she was required to get out of the train to perform her roll-by inspection, that she was bitten a number of times, and that her age placed her in a high-risk group for WNV.

In order to overcome UP's motion for summary judgment, Deviney had to produce enough evidence to present a genuine issue of material fact that UP breached its duty to provide a reasonably safe place to work. In light of the FELA cases discussed above, Deviney has presented enough evidence for her action to survive the motion for summary judgment. Deviney presented evidence that UP knew or should have known of the potential hazard posed by the presence of mosquitoes in the Bill trainyard and that UP failed to exercise reasonable care to inform and protect her from that hazard.

[10] Deviney also presented evidence that there was a pond on mine property near East Cadaro Junction where she

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[24] *Id.*

conducted a roll-by inspection. Deviney stated that she received more than 1 bite but fewer than 25 mosquito bites at that location. UP argues that it cannot be held liable for mosquitoes breeding on a third party's property. The Court of Appeals, citing *Carter v. Union Railroad Company*,[25] stated that Deviney had presented enough evidence for her action to survive summary judgment. "Under the FELA, an employee who suffers an 'injury' caused 'in whole or in part' by a railroad's negligence may recover his or her full damages from the railroad, regardless of whether the injury was also caused 'in part' by the actions of a third party."[26] We agree with the assessment of the Court of Appeals that Deviney has presented enough evidence of a potential breach of duty to overcome a motion for summary judgment on this issue.

[11] As previously noted, foreseeability is an issue of fact, relating to breach of duty, to be determined by the fact finder. We recognize that "[t]he essential element of reasonable foreseeability in FELA actions requires proof of actual or constructive notice to the employer of the defective condition that caused the injury."[27] UP's own accident prevention bulletin demonstrates that UP at least knew of the risks posed by WNV, and Deviney presented evidence that UP knew or should have known of the presence of mosquitoes where she was required to work. We therefore agree with the Court of Appeals that Deviney presented sufficient evidence for her action to survive a motion for summary judgment.

CONCLUSION

We conclude that under FELA, UP owed Deviney a duty to provide a reasonably safe workplace, and that Deviney presented sufficient evidence to give rise to a genuine issue of material fact as to whether UP breached that duty. We also hold

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[25] *Carter v. Union Railroad Company*, 438 F.2d 208 (3d Cir. 1971).

[26] *Norfolk & Western R. Co. v. Ayers*, 538 U.S. 135, 165-66, 123 S. Ct. 1210, 155 L. Ed. 2d 261 (2003). See, also, *Holsapple v. Union Pacific RR. Co.*, 279 Neb. 18, 776 N.W.2d 11 (2009).

[27] *Grano, supra* note 17, 818 F. Supp. at 618.

that Deviney presented sufficient evidence of a genuine issue of material fact as to the foreseeability of contracting WNV. We therefore affirm the decision of the Court of Appeals.

AFFIRMED.