

STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE COUNTY OF GRAND TRAVERSE

DAWN KORB,

Plaintiff,

v

File No. 98-17579-NI
HON. PHILIP E. RODGERS, JR.

ROBERT SNYDER, and GRAND TRAVERSE
DINNER TRAIN, AL JONES, and TUSCOLA AND
SAGINAW BAY RAILWAY COMPANY, INC., a
Michigan Corporation, jointly and severally,

Defendants.

Lee B. Steinberg (P20955)
Attorney for Plaintiff

Dennis K. Taylor (P32649)
Attorney for Defendant Snyder

James Wernstrom (P23071)
Attorney for Defendant GT Dinner Train

Phillip B. Maxwell (P24872)
D. Estelle Lopez (P55432)
Attorney for Tuscola and Saginaw Bay
and Jones

DECISION AND ORDER DENYING
DEFENDANT GRAND TRAVERSE DINNER TRAIN AND
DEFENDANTS TUSCOLA AND SAGINAW BAY RAILWAY COMPANY AND
AL JONES' MOTION FOR SUMMARY DISPOSITION

INTRODUCTION

Plaintiff Dawn Korb filed this action against Robert Snyder ("Snyder"), the Grand Traverse Dinner Train ("GTDT"), Engineer Al Jones ("Jones"), and the Tuscola Saginaw Bay Railway ("TSBR") for injuries she sustained when Defendant Robert Snyder drove off the road and hit an embankment in order to avoid striking the GTDT that was stopped across the Summit City Road crossing. On December 31, 1997, Plaintiff Korb was a passenger in the sport utility vehicle being

driven by Defendant Snyder northbound on Summit City Road. The GTDT was traveling east toward the Summit City Road crossing. The GTDT owned the train but contracted with Defendant TSBR to provide engineers to operate the train.

As the train pulled over the crossing, the engine lost power and coasted to a stop, blocking the crossing. The engineer, Jones, decided to reverse course and return to Traverse City. As he walked to the locomotive at the west end of the train, the Snyder vehicle approached the crossing. Defendant Snyder did not see the train until the last minute. He slammed on his brakes and pulled to the left to avoid hitting the train and ran off the road into an embankment.

Upon impact, the snowplow on the front of the Snyder vehicle snapped up and hit the hood of the vehicle. In addition, some open containers of sand which Snyder carried in the back of the vehicle for weight, as well as several tools which were in the back of the vehicle, flew forward. The tools ended up in the front seat and the sand slid forward into the back of the occupied seats.

Defendant Snyder testified that the speed limit on Summit City Road is 55 miles per hour. He further testified that he was traveling at approximately 45 to 50 miles per hour immediately before he noticed the train. He also testified that it was winter, but that it was not icy or snowing. Snyder was ticketed at the scene for violation of the basic speed law - traveling too fast for conditions - and failure to stop within the assured clear distance ahead. The tickets were eventually dismissed.

Defendant Snyder testified that he had been drinking earlier that evening. The mobile breathalyzer result was a .02 at the scene. He was not arrested for OUIL.

Defendant Snyder testified that the portion of the train that was blocking the crossing was the rear portion of the westbound engine and part of one dining car. He testified that this portion of the train was not illuminated. He testified that he first noticed the train because of a light that appeared on his right after he passed a privacy fence approximately 70-80 feet before the tracks. He also testified that after the accident, he noticed the front light on the westbound engine which was only illuminating the area off to his left, directly in front of the westbound engine.

Engineer Jones testified that the bell and whistle were sounded upon approaching the crossing and that the train engine headlights, strobe lights, and ditch lights, as well as the halogen flood lights on the sides of the cars, were illuminated.

A disinterested witness, Zundel, was traveling on Summit City Road in the same direction as the Snyder vehicle. He testified that the train was not illuminated and that he had trouble seeing it as he approached the crossing.

As a result of the accident, the Plaintiff suffered personal injuries. She filed this action alleging that the Defendants were negligent in that they (1) blocked the roadway; (2) failed to have proper safety lighting; (3) failed to use proper warning lights; and (4) failed to use a horn or other audible warning signal; and (5) failed to keep the train in proper maintenance and repair.

The Defendants filed motions for summary disposition. Defendant GTDT filed its motion pursuant to MCR 2.116(C)(10) claiming that the Plaintiff fails to state a viable cause of action for negligence against it because (1) the claims are preempted by federal law; (2) GTDT owed no duty to the Plaintiff; and/or (3) the Plaintiff failed to show a causation link between any action or inaction on the part of the GTDT and her injuries. Thus, GTDT contends that it is entitled to judgment as a matter of law.

TSBR and Jones filed a motion for summary disposition pursuant to MCR 2.116(C)(10) and 2.116(C)(8). TSBR and Jones contend that there is no genuine issue of material fact that "TSBR breached no duty owed to the Plaintiff and that this accident was caused exclusively by the negligence of Robert Snyder." Alternatively, these Defendants argue that the Plaintiff failed to state a claim upon which relief can be granted.

STANDARD OF REVIEW

MCR 2.116(C)(8)

A motion for summary disposition pursuant to MCR 2.116(C)(8), failure to state a claim upon which relief can be granted, is tested by the pleadings alone. Only the legal basis of the complaint is examined. The factual allegations of the complaint are accepted as true, along with any inferences which may fairly be drawn therefrom. Unless the claim is so clearly unenforceable as a matter of law that no factual development could possibly justify recovery, the motion should be denied. *Mills v White Castle System, Inc*, 167 Mich App 202, 205; 421 NW2d 631 (1988).

M CR 2.116(C)(10)

The applicable standard of review for a motion for summary disposition brought pursuant to MCR 2.116(C)(10) was most recently set forth in *Smith v Globe Life Ins Co*, 460 Mich. 446; 597 NW2d 28 (1999) as follows:

This Court in *Quinto v Cross & Peters Co*, 451 Mich 358, 362-363; 547 NW2d 314 (1996), set forth the following standards for reviewing motions for summary disposition brought under MCR 2.116(C)(10):

In reviewing a motion for summary disposition brought under MCR 2.116(C)(10), a trial court considers affidavits, pleadings, depositions, admissions, and documentary evidence filed in the action or submitted by the parties, MCR 2.116(G)(5), in the light most favorable to the party opposing the motion. A trial court may grant a motion for summary disposition under MCR 2.116(C)(10) if the affidavits or other documentary evidence show that there is no genuine issue in respect to any material fact, and the moving party is entitled to judgment as a matter of law. MCR 2.116(C)(10), (G)(4).

In presenting a motion for summary disposition, the moving party has the initial burden of supporting its position by affidavits, depositions, admissions, or other documentary evidence. *Neubacher v Globe Furniture Rentals*, 205 Mich App 418, 420; 522 NW2d 335 (1994). The burden then shifts to the opposing party to establish that a genuine issue of disputed fact exists. *Id.* Where the burden of proof at trial on a dispositive issue rests on a nonmoving party, the nonmoving party may not rely on mere allegations or denials in pleadings, but must go beyond the pleadings to set forth specific facts showing that a genuine issue of material fact exists. *McCart v J. Walter Thompson*, 437 Mich 109, 115; 469 NW2d 284 (1991). If the opposing party fails to present documentary evidence establishing the existence of a material factual dispute, the motion is properly granted. *McCormic v Auto Club Ins. Ass'n*, 202 Mich App 233, 237; 507 NW2d 741 (1993).

AUTHORITIES AND ANALYSIS

I.

Negligence Claims

The elements of an action for negligence are (1) duty, (2) general standard of care, (3) specific standard of care, (4) cause in fact, (5) legal or proximate cause, and (6) damage. *Moning v Alfonso*, 400 Mich 425, 437; 254 NW2d 759 (1977). Duty is essentially a question of whether the relationship between the actor and the injured person gives rise to any legal obligation on the actor's

part for the benefit of the injured person. *Id.* at 438-439. Where there is no legal duty, no actionable negligence exists. *Butrick v Snyder*, 236 Mich 300, 306; 210 NW 311 (1926).

The question of duty is one of law and for the court to decide. *Moning, supra* at 436-437; *Duvall v Goldin*, 139 Mich App 342, 347; 362 NW2d 275 (1984). The court must “determine, as a matter of law, what characteristics must be present for a relationship to give rise to a duty the breach of which may result in tort liability. It is for the jury to determine whether the facts in evidence establish the elements of that relationship.” *Smith v Allendale Mutual Ins Co*, 410 Mich 685, 714; 303 NW2d 702 (1981). The court must also determine “what evidence is minimally necessary to establish the elements of a relationship on which tort liability may be premised.” *Id.* at 715.

The Plaintiff alleges that the Defendants were negligent in (1) blocking the roadway; (2) failing to have proper safety/warning lights; and (3) failing to use the horn or other audible warning device.

The Defendants contend that (1) blocking the crossing “does not in and of itself constitute negligent conduct,” citing *Esterline v Kennicott*, 277 Mich 130; 268 NW 835 (1936); (2) they complied with all state and federal statutes and regulations regarding railway crossings; and (3) that they had no duty to install lights or use the horn, citing *Music v New York CR Co*, 2 Mich App 467; 140 NW2d 567 (1966).

The common law rule is that railroads have a duty to maintain such grade crossing protection to highway travelers, in addition to safeguards required by statute, as ordinary care and prudence demand. *Emery v Chesapeake & Ohio Railway Co*, 372 Mich 663; 127 NW2d 826 (1964) citing *McParlan v Grand Trunk W R Co*, 273 Mich 527; 263 NW 734 (1935).

In *Baldinger's Estate v Ann Arbor Railroad Co*, 372 Mich 685, 690; 127 NW2d 837 (1964), our Supreme Court reviewed the application of this rule and said:

The underlying principle in all cases of this kind which requires a railroad company not only to comply with all statutory requirements in the matter of signals, flagmen, and other warnings of danger at public crossings, but many times to do much more than is required by positive enactment, is that neither the legislature nor railroad commissioners can arbitrarily determine in advance what shall constitute ordinary care or reasonable prudence in a railroad company, at a crossing, in every particular case which may afterwards arise.

In *Baldinger's Estate, Id.* at 673, the Court recognized that the common law rule had often been misconstrued and misapplied such that "railroads have been excused from compliance with the otherwise universally applicable common law duty of due care,--of ordinary prudence,--the trial judge first having determined as a matter of law that there was no 'special duty.'" The Court expressly disapproved of *Esterline, supra*, and other cases that required "special" or "usual" conditions before requiring railroads to warn of danger.

Therefore, whether the Defendants GTDT, TSBR and Jones were negligent or, stated another way, whether the circumstances in the instant case were of such a nature as to call for 'some efficient local warning,' over and above statutory requirements and the requirements of safety regulations promulgated by the Public Service Commission is a question for the jury to decide. *Baldinger's Estate, supra* at 673

The Plaintiff also contends that the Defendants were negligent in that they failed to keep the train in proper maintenance and repair. The Defendants assert in their motion that "Korb, however, has failed to set forth *any* evidence that GTDT *did* fail to properly maintain the train as required by the federal regulations *or* that if GTDT in any way failed to maintain or inspect, that GTDT's failure to do so caused the train's engine to lose power."

Again, compliance with federal regulations is a minimum required by the railroad. The Plaintiff has presented the Court with, among other things, copies of inspection reports which, when viewed in the light most favorable to the Plaintiff, would allow the trier of fact to reasonably conclude that the train was not properly maintained and repaired.

II.

Negligence of Defendant Snyder

The Defendants GTDT, TSBR, and Jones contend that the Plaintiff cannot prove that her injuries were actually and proximally caused by their negligence. They claim that her injuries resulted entirely from Defendant Snyder's negligence. They claim that Defendant Snyder was negligent and that his negligence was the sole proximate cause of the Plaintiff's injuries because he was familiar with the Summit City Road crossing, but he failed to see the train in time to stop

because he was going too fast for conditions, he had been drinking, his attention was diverted from the road, and he never slows down when he approaches railroad crossings.

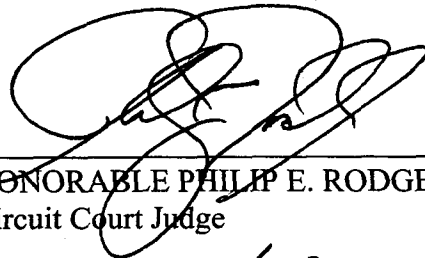
According to the exhibits and deposition excerpts that were submitted to the Court, the Defendants' rendition of Snyder's conduct seems exaggerated. Snyder was traveling at a speed less than the posted speed and the citations were eventually dismissed. In addition, Snyder admitted he had been drinking, yet the breathalyzer result was only .02. Snyder also admitted that he would occasionally glance away from the road to look at a friend's nearby house or talk with the Plaintiff, but that this attention was not unduly diverted from the road.

The Court having reviewed all of these exhibits and deposition excerpts, cannot agree that Snyder was negligent as a matter of law and that his negligence was the sole, proximate cause of the Plaintiff's injuries. Viewed in the light most favorable to the Plaintiff, the Court finds that this documentary evidence raises genuine issues of material fact regarding whether the Defendant Snyder was negligent and, if so, whether his negligence was the sole, proximate cause of the Plaintiff's injuries.

CONCLUSION

For the reasons set forth herein, the Court denies both the Defendant GTDT's motion for summary disposition and the Defendants TSBR and Jones' motion for summary disposition.

IT IS SO ORDERED.



HONORABLE PHILIP E. RODGERS, JR.
Circuit Court Judge

Dated: 12/16/99