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RAYMOND D. WRIGHT, JR., RAYMOND, D. WRIGHT, SR., EVELYN WRIGHT, MICKALINA LAROCHE, and ISHEKA JACOBS, a minor, by her mother and next friend, MICKALINA LAROCHE, Plaintiffs v. JAMES CONWAY, ANTHONY POTHUL, and CONSOLIDATED RAIL CORPORATION, Defendants

CIVIL ACTION NO. 01-30076-MAP

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS

2003 U.S. Dist. LEXIS 18658

October 17, 2003, Decided

DISPOSITION: [*1] Court found no basis for liability against co-defendants Conway and Pothul, it vacates the default against them and, sua sponte, orders entry of judgment for them as well. This case closed.

CASE SUMMARY:

PROCEDURAL POSTURE: Defendant railroad filed a motion for summary judgment in connection with the action by plaintiffs, an individual and his family members, alleging claims for negligence by the railroad, an engineer, and a conductor.

OVERVIEW: The individual was struck by a train when he was using a well-traveled shortcut across the tracks. The shortcut was unauthorized, but the railroad was aware that people frequently used it. The individual crawled under a train and was struck when he attempted to jump in front of an oncoming train on the second track. It was unclear whether the oncoming train sounded its horn. The court held that the individual was a trespasser and thus was not owed a duty of reasonable care. *Mass. Gen. Laws ch. 160, § 218* made it a crime for any unauthorized person to enter property used by railroad corporations, and thus the public's open use of the shortcut did not create a prescriptive easement. As a trespasser, the railroad owed the individual nothing more than a duty to refrain from willful, wanton, or reckless conduct. Internally adopted safety regulations did not impart a duty of reasonable care, and there was no need to sound a warning where the individual was aware of the train's presence before jumping. There was no evidence that the railroad's conduct was willful, wanton, or reckless. There was no indication that the train was speeding or was being operated improperly.

OUTCOME: The court allowed the motion for summary judgment and vacated default judgments against the conductor and the engineer.

COUNSEL: For Raymond D Wright, Jr, Raymond D Wright, Sr, Evelyn Wright, Mickalina Laroche, Isheka Jacobs, PLAINTIFFS: Michael J Chieco, Pellegrini, Seeley, Ryan & Blakesley, PC, Springfield, MA USA.

James Conway, DEFENDANT, Pro se, Cape Coral, FL USA.

For James Conway, Anthony Pothul, Consolidated Rail Corporation, CSX Corporation, CSX Transportation, CSX Intermodal, Inc, DEFENDANTS: Michael B Flynn, Richard A Davidson, Jr, Flynn & Associates, PC, Boston, MA USA.

Anthony Pothul, DEFENDANT, Pro se.

For Anthony Pothul, DEFENDANT: Anthony Pothul, Niverville, NY USA.

For Department of Social Services, MOVANT: Andrew Todd Rome, Deputy Regional Counsel, Springfield, MA USA.

For James Conway, Anthony Pothul, Consolidated Rail Corporation Counter, CLAIMANTs: Michael B Flynn, Richard A Davidson, Jr, Flynn & Associates, PC, Boston, MA USA.

For Raymond D Wright, Jr, Raymond D Wright, Sr, Evelyn Wright, Mickalina Laroche, DEFENDANT: Michael J Chieco, Pellegrini, Seeley, Ryan & Blakesley, [*2] PC, Springfield, MA USA.

JUDGES: Michael A. Ponsor, U.S. District Judge.

OPINION BY: Michael A. Ponsor

OPINION

MEMORANDUM AND ORDER REGARDING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

(Docket No. 83)

PONSOR, D.J.

I. INTRODUCTION

Raymond D. Wright, Jr. ("Wright") was struck by a train operated by Consolidated Rail Corporation ("Conrail" or "defendant"). Wright and members of his family (collectively, "plaintiffs") have brought several tort claims based on alleged negligence by Conrail and two of its employees, James Conway and Anthony Pothul. [1]

1 Conway was an engineer riding in the lead locomotive of the train that struck Wright. Pothul was the conductor riding in the second locomotive of that train. Both Conway and Pothul were defaulted by the court on February 3, 2003, pursuant to *Fed. R. Civ. P. 55(a)*.

Conrail asserts that it was not negligent and has moved for summary judgment on all of plaintiffs' claims. For the reasons set forth below, this court will allow defendant's [*3] motion for summary judgment.

II. FACTS

In considering a motion for summary judgment, the court must view the facts in the light most favorable to the nonmovant, plaintiffs.

Wright lived on Lincoln Street in Pittsfield, in the vicinity of railroad tracks owned by Conrail. He routinely used a well-traveled shortcut across the tracks at the end of Oak Street. The shortcut was unauthorized, but Conrail was aware that people frequently used it to cross the tracks. The area was not marked with a "No Trespassing" sign.

The railroad tracks themselves included two main lines, known as track number 1 and track number 2, an active spur track, and an abandoned spur track. Track number 1 was the main line nearest to Wright's home.

At approximately 2:30 PM on February 27, 1998, Wright, then sixteen years old, was walking with his sister, Mickalina LaRoche, to her chiropractic appointment in Pittsfield. They decided to cross the tracks using the shortcut.

When Wright and LaRoche got to the tracks, they found a west-bound train standing still, essentially parked, across the shortcut. This train, NESE7, was standing on track number 1 and consisted of four locomotives and 83 freight cars.

[*4] Undaunted, Wright and LaRoche continued across the shortcut by crawling under the standing train. LaRoche led the way, with Wright following close

behind. As LaRoche emerged from under the standing train, she saw an east-bound train, SENE7, approaching on track number 2. LaRoche leapt across track number 2 ahead of the oncoming train and escaped injury.

Wright emerged from under the standing train a few seconds after LaRoche. He, too, noticed the oncoming train and attempted to jump across track number 2 ahead of it. Wright was not as lucky as his sister. He was struck by the oncoming train's lead locomotive, suffering many serious injuries.

The record is unclear as to whether the oncoming train sounded its horn in warning before striking Wright. Wright and LaRoche aver that they did not hear any train horn as they were crossing the tracks. Conrail contends that the train's horn was blown four times as it approached the standing train and that its bell was ringing continuously as it passed the standing train.

III. STANDARD OF REVIEW

A motion for summary judgment should be granted when "the pleadings, depositions, answers to interrogatories, and admissions on file, together [*5] with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." *Fed. R. Civ. P. 56(c)*. A "genuine" issue is one that could be resolved in favor of either party, and a "material fact" is one that has the potential to affect the outcome of the case. See *Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248-50, 91 L. Ed. 2d 202, 106 S. Ct. 2505 (1986)*. All reasonable inferences that may be drawn from the record are to be construed in the light most favorable to the party opposing summary judgment, *Motorsport Eng'g, Inc. v. Maserati S.p.A., 316 F.3d 26, 28 (1st Cir. 2002)*, and the moving party bears the initial burden of proving that no genuine issue of material fact exists. *Sands v. Ridefilm Corp., 212 F.3d 657, 661 (1st Cir. 2000)*.

Not every genuine factual conflict, of course, necessitates a trial. "It is only when a disputed fact has the potential to change the outcome of the suit under the governing law if found favorably to the nonmovant that the materiality hurdle is cleared." *Parrilla-Burgos v. Hernandez-Rivera, 108 F.3d 445, 448 (1st Cir. 1997)* [*6] (citation omitted). Moreover, "the plain language of *Rule 56(c)* mandates the entry of summary judgment ... against a party who fails to make a showing sufficient to establish the existence of an element essential to the party's case, and on which the party will bear the burden of proof at trial." *Celotex Corp. v. Catrett, 477 U.S. 317, 322, 91 L. Ed. 2d 265, 106 S. Ct. 2548 (1986)*. In order to survive a motion for summary judgment, then, plaintiffs in this case must present a prima facie case of negligence. See *Nat'l Amusements, Inc. v. Town of Dedham, 43 F.3d 731, 735 (1st Cir. 1995)*, cert. denied, *515 U.S. 1103, 132 L. Ed. 2d 255, 115 S. Ct. 2247 (1995)*.

IV. DISCUSSION

Plaintiffs offer several claims for damages, but each is predicated upon defendant's alleged negligence in causing Wright's injuries. A finding of negligence is appropriate where Conrail owed Wright a duty of care and then violated that duty of care.

A railroad generally owes foreseeable trespassers on its tracks only the limited duty to refrain from willful, wanton, or reckless conduct. See *McConville v. Mass. Bay Transp. Auth., 852 F. Supp. 1, 2 (D. Mass. 1994)*. [*7] See also *Schofield v. Merrill, 386 Mass. 244, 245-46, 435 N.E.2d 339 (1982)*; *Owen v. Meserve, 381 Mass. 273, 276-77, 408 N.E.2d 867 (1980)*. [2]

2 The so-called Child Trespasser Statute, Mass. Gen. L. c. 231, § 85Q, provides that a landowner owes a duty of reasonable care to certain foreseeable child trespassers, but this statute has never been applied to a railroad. Plaintiffs do not argue that the Child Trespasser Statute applies in this case.

Plaintiffs, however, assert that Conrail owed Wright a duty of reasonable care for several reasons.

First, plaintiffs claim Wright was not a trespasser and so was owed a duty of reasonable care. Plaintiffs' theory is that the general public's continuous and notorious use of the shortcut created a prescriptive easement such that Wright actually had a legal right to cross the tracks. However, Mass. Gen. Laws ch. 160, § 218 ("section 218"), fatally undermines any claim of a prescriptive [*8] easement across the tracks. See *Gage v. City of Westfield, 26 Mass. App. Ct. 681, 532 N.E.2d 62, 70 n.8 (Mass. App. Ct. 1988)*, rev. denied, *404 Mass. 1103, 536 N.E.2d 1093 (Mass. 1989)*.

Section 218 makes it a crime for any unauthorized person to enter property used or controlled by railroad corporations. No authority recognizes a prescriptive

easement in the face of such a statute. There is no question that Wright was not authorized to be on the tracks on February 27, 1998, and so was engaged in illegal behavior in violation of section 218. Under these circumstances, Wright was a trespasser to whom Conrail owed nothing more than a duty to refrain from willful, wanton, or reckless conduct.

Second, plaintiffs allege that, even if Wright was a trespasser, Conrail owed him a duty of reasonable care pursuant to its own safety regulation, which requires that train operators sound the whistle four times when approaching and passing a standing train. Since there is a factual dispute as to whether the whistle sounded prior to the accident, plaintiffs contend that summary judgment is inappropriate. Again, however, plaintiffs point to no authority suggesting [*9] that internally adopted safety regulations necessarily impart a duty of reasonable care. Moreover, on the facts of this case, no whistle was needed to warn Wright of the oncoming train. Undisputedly, Wright was aware of its presence before making the tragic misjudgment to try to jump ahead of it.

Third, plaintiffs contend that Conrail owed Wright a reasonable duty of care once the operators of the oncoming train, SENE7, became aware of his presence on the tracks. See *Pridgen v. Boston Housing Auth., 364 Mass. 696, 707, 308 N.E.2d 467 (1974)*. Again, this argument collapses in the face of undisputed facts. The record is clear that Wright became visible only moments before the lead locomotive struck him. This momentary awareness, nearly instantaneous with the accident, gave the engineer insufficient time to bring the train to a stop. Thus, no violation of the duty of care occurred as a matter of law.

Given that Conrail may be charged only with the limited duty to refrain from willful, wanton, or reckless conduct, the other undisputed facts in the record make clear that Conrail is entitled to summary judgment.

Willful, wanton, or reckless conduct means "intentionally [*10] persisting in conduct involving a high degree of probability that substantial harm would result to another." *Gage v. City of Westfield, 532 N.E.2d at 68* (citation omitted). It requires conduct that is "criminal or quasi-criminal" as opposed to merely careless. *Cotter v. Boston, R.B. & L.R. Co., 237 Mass. 68, 72, 129 N.E. 426 (1921)*, quoting *Aiken v. Holyoke Street Railway Co., 184 Mass. 269, 271, 68 N.E. 238 (1903)*.

The record in this case, even viewed in the light most favorable to plaintiffs, is grossly inadequate to demonstrate that Conrail's conduct was willful, wanton, or reckless. All Conrail did was conduct a train along a track in its normal course of business. There is no indication that the train was speeding or was being operated improperly in any way. Sadly, Wright's decision to cross the tracks by crawling under a standing train and then leaping in front of an oncoming train caused his injuries. Nothing in the record suggests any conduct on Conrail's part amounting to willfulness, wantonness, or recklessness. Lacking evidence that Conrail intentionally and substantially imperilled Wright, its conduct cannot be found to [*11] be willful, wanton, or reckless.

V. CONCLUSION

It is never a pleasant responsibility to dispose of a case without a trial where a plaintiff's injuries are so severe. It would merely compound the tragedy, however, to give plaintiffs false hope, and permit this case to continue in the face of its glaring lack of a factual and legal foundation.

Conrail's Motion for Summary Judgment is hereby ALLOWED, and the clerk is ordered to enter judgment in its favor. Since the court has found no basis for liability against co-defendants Conway and Pothul, it vacates the default against them and, sua sponte, orders entry of judgment for them as well. This case may now be closed.

It is So Ordered.

/s/ Michael A. Ponsor

U.S. District Judge

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