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COMMONWEALTH OF MASSACHUSETTS

MIDDLESEX, ss.

**SUPERIOR COURT
CIVIL ACTION
NO. MICV2009-03201-C**
Young, P.C.

**LUCILIA MEDINA DeBARROS, Administrator
of the ESTATE OF HUGO M. GIUBERTI
Plaintiff**

vs.

**MASSACHUSETTS BAY TRANSPORTATION AUTHORITY,
MASSACHUSETTS BAY COMMUTER RAILROAD, LLC,
CSX TRANSPORTATION, INC. and PAUL TAYLOR
Defendants**

**MEMORANDUM AND ORDER ON DEFENDANTS'
MOTION FOR SUMMARY JUDGMENT**

On August 20, 2007, Hugo Giuberti was struck and killed by a commuter train traveling west through Natick, Massachusetts. The administrator of his estate commenced this action for wrongful death against the owner of the train (Massachusetts Bay Transportation Authority), the employer of the operator of the train (Massachusetts Bay Commuter Railroad, LLC), the operator Paul Taylor, and the owner of the railroad tracks (CSX Transportation, Inc.). All defendants move for summary judgment dismissing plaintiff's claims.

BACKGROUND

The following facts are taken from the parties' statements of fact, supplemented by judicial notice of the Google map of the area where the accident occurred.

The accident occurred at approximately 11:40 a.m. on a bright sunny day. Giuberti was struck while on the tracks in an area known as Horseshoe Curve in Natick. At that point, the tracks run parallel to West Central Street along a narrow strip of land (no more than a few

hundred feet wide) with Lake Cochituate on one side and Fisk Pond on the other side. Along the road and parallel to the tracks is a sidewalk for pedestrians. West Central Street, the sidewalk and the tracks are adjacent to each other. On the Lake Cochituate side of the tracks, there are trees along the shore. Near the place of the accident there is an opening in the line of trees where people could access the lake for fishing and boating. Taylor, the operator of the train, testified that in his experience operating the train at that location he saw people walking close to the tracks. He knew that they would cross the tracks at that location to access the lake.

On the day of the accident, Taylor testified that he never saw the victim before the train hit him. Taylor heard a “bang” and continued on. The tracks were allegedly “closed” to pedestrian traffic but the record does not disclose whether there was a fence or any other barrier erected to prevent walking over the tracks.¹ Giuberti’s body was found by authorities on the Lake Cochituate side of the tracks. He was not breathing or moving and had no pulse. He was declared dead at the scene.

At the time of the accident, the train was traveling below the maximum allowable speed (40 m.p.h) for the subject track. There is no evidence of any irregularity in the track conditions. There is no evidence that any of the defendants knew that Giuberti was on the tracks that day. An individual who was in the area at the time of the accident gave testimony that he did not hear any train whistle or bell at that time. Taylor testified that he was not required to sound a horn when he was traveling into the curve where the incident occurred.

¹ No fence or other barrier is visible from the Google map of the area. The date of the Google map is unknown.

DISCUSSION

The complaint is in twelve counts, all of which allege, essentially, that the defendants were negligent, grossly negligent, and/or reckless in the operation of the train or train system. Plaintiff alleges that the defendants recklessly disregarded the safety of the pedestrians in the area. The complaint seeks relief for the wrongful death of Guiberti as well as for his conscious pain and suffering.

“The Massachusetts wrongful death statute, G.L. c.229, §2, provides that a wrongful death claim may be brought against someone who, by wilful, wanton or reckless act, causes the death of another person. The statute includes a specific exemption to liability for railroads that states that ‘a person operating a railroad shall not be liable for *negligence* in causing the death of a person while walking or being upon such railroad contrary to law or to the reasonable rules and regulations of the carrier.’” *Boyd v. National Railroad Passenger Corporation*, 446 Mass. 540, 546 (2006) (emphasis added). Nevertheless, a railroad can be held liable for damages if the conduct of its agents that caused such death was wilful, wanton or reckless. This is true even if the decedent was a trespasser. *Id.* The Supreme Judicial Court specifically adopted the definition of reckless disregard of safety as set forth in the Restatement (Second) of Torts §500 (1965):

The actor’s conduct is in reckless disregard of the safety of another if he does an act or intentionally fails to do an act which it is his duty to the other to do, knowing or having reason to know of facts which would lead a reasonable man to realize, not only that his conduct creates an unreasonable risk of physical harm to another, but also that such risk is substantially greater than that which is necessary to make his conduct negligent.

As noted in *Boyd*, “[t]he almost certain outcome of being struck by a high-speed train is either death or great physical injury.” *Id.* at 550.

This motion presents the issue of whether plaintiff has presented sufficient evidence to create a triable issue of what could constitute reckless conduct. While it is a “high evidentiary standard” to prove reckless conduct, all evidentiary inferences must be resolved in favor of plaintiff upon a motion for summary judgment. “Summary judgement is seldom granted in a cause of action alleging reckless conduct.” *Id.* at 544-545. See also, *Gage v. City of Westfield*, 26 Mass. App. Ct. 681, 691 (1988) (summary judgment in favor of railroad reversed where there was evidence that could warrant a finding of recklessness in the operation of a train that struck and killed trespassers).

Here, there is sufficient evidence to create a triable issue of fact with respect to the recklessness of Taylor, his employer, MBCR, and the MBTA, the owner of the train. Taylor’s admission that he knew from experience that people walked across the track in that area to go fishing gave him reason to know of an unreasonable risk. His conduct -- traveling 40 miles per hour and not sounding a horn or a bell -- could be determined by a jury to be reckless. Plaintiff also included in the summary judgment record the affidavit of an alleged expert in railroad operations who opined that Taylor, if he had been operating the train properly, should have seen Giuberti. His failure to see the victim on a bright sunny day contributes to the “totality of the circumstances” that a jury could use to find recklessness. See *Beausoleil v. National Railroad Passenger Corp.*, 145 F. Supp. 2nd 119, 124 (2001) (summary judgment denied allowing claim for recklessness against train operator to proceed). Taylor’s knowledge of the high level of risk in the area may fairly be imputed to his employer and the owner of the train.

As a result, plaintiff's claim of wrongful death against Taylor, MBCR and MBTA on the basis of recklessness survives summary judgment. To the extent plaintiff alleges negligence and gross negligence by defendants, such claims must be dismissed as required by the statute.

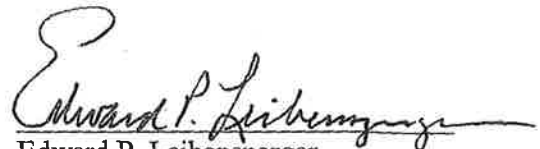
I also deny summary judgment for Taylor, MBCR and MBTA with respect to plaintiff's claim for conscious pain and suffering. To the extent plaintiff can prove recklessness on the part of defendants, recovery may be available. See *Gage, supra* at 694. Whether plaintiff can recover for fright before impact, or is limited to proof of conscious pain and suffering after impact, is an open question that should await further factual development. See *McIntyre v. United States*, 447 F. Supp. 2d 54, 178, n. 102 (2006).

With respect to CSX, the outcome is different. In response to the summary judgment motion, plaintiff offered no evidence to suggest that CSX, as the owner of the tracks, was aware that people regularly walked across the tracks to access the lake. There's no evidence of failure to maintain the tracks or the area surrounding the tracks. In short, plaintiff's evidence fails to create a triable issue even as to negligence of CSX, let alone the required proof of recklessness. Summary judgment must be allowed in favor of CSX on all counts.

CONCLUSION

For the reasons stated above, the motions for summary judgment by defendants Taylor, MBCR, and MBTA are allowed in part and denied in part. The motions are **ALLOWED** with respect to plaintiff's claims of negligence and gross negligence. The motions are **DENIED** with respect plaintiff's claims based on recklessness. The motion for summary judgment of CSX is **ALLOWED**.

By the Court,


Edward P. Leibensperger
Justice of the Superior Court

Dated: January 29, 2013