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Commonwealth of Kentucky

Court of Appeals

NO. 2007-CA-001651-MR

MARY JANE CALHOUN AND
JESSE DAYMOND CALHOUN — APPELLANTS

v.

APPEAL FROM BULLITT CIRCUIT COURT
HONORABLE RODNEY BURRESS, JUDGE
ACTION NO. 02-CI-01120

CSX TRANSPORTATION, INC.
AND PAUL MCCLINTOCK, JR. — APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: ACREE AND NICKELL, JUDGES; KNOPF,[1] SENIOR JUDGE.

KNOPF, SENIOR JUDGE: Mary Jane Calhoun and Jesse Daymond Calhoun (the Calhouns or the appellants) appeal from an order of the Bullitt Circuit Court awarding summary judgment to CSX Transportation, Inc., and Paul L.

[1] Senior Judge William L. Knopf sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statutes (KRS) 21.580.

McClintock, Jr., in a lawsuit arising out of a railroad crossing accident in which a CSX train engineered by McClintock struck a vehicle driven by Mary. The Calhouns contend that the trial court erred in awarding the appellees summary judgment. For the reasons stated below, we affirm.

FACTUAL AND PROCEDURAL BACKGROUND

In the light most favorable to the appellants, the facts are as follows. On December 12, 2001, at about 6:30 a.m., Mary dropped off two of her sons at the Bullitt County work site of their employer, Bullitt County Sanitation (BCS), a privately owned sanitation company. She had three sons who worked at the facility and regularly dropped them off at the site. She had made the trip most weekdays for about three months.

The work-site is located on the west side of Preston Highway in Shepherdsville across the CSX railroad tracks that run through the area. The tracks run north-south. Access to the BCS site is by an unnamed road running east-west toward the tracks.[2] The road is paved for a distance, but the paved portion ends short of the crossing and continues forward as a gravel road across the tracks. At the point of termination of the paved portion, the Bullitt County Highway Garage is on the right. The paved portion of the road is maintained by the county (for convenience in reaching the garage) but the gravel portion is not.

On the west side of the tracks are two tracts of property, one owned by Kerrin Hester and the other by Charles Burris. Hester's son operated the BCS

[2] The road is sometimes referred to in the record as the County Garage Road.

facility on the Hester tract.[3] As further discussed below, the record discloses that the unpaved portion of the road is not part of the public or county highway system and is not a part of the highway system of, nor maintained by, the state, Bullitt County, or any other local government. Because CSX believed the crossing to be a private crossing (as opposed to a public crossing), it did not maintain the crossing pursuant to the standards required for a public crossing. One of the consequences of this is that there is extensive vegetation growing along the west side of the crossing. The Calhouns allege that the vegetation unreasonably blocked the sitelines up and down the tracks.

Mary had dropped her sons off at the facility many times, had traversed the track regularly in both directions, and was familiar with the crossing. She had stopped for passing trains on several occasions. After dropping off her sons on this occasion, she was proceeding east back across the crossing toward Preston Highway. In the meantime, a CSX train operated by Paul McClintock was traveling northbound toward the crossing at fifty-two miles per hour, and accelerating to fifty-three miles per hour. It was foggy and dark.

McClintock and the train's conductor, Ed Harris, observed Mary's vehicle approaching the crossing through the treeline along the west side of the tracks. McClintock and Harris testified in their depositions that the train sounded its horn to warn Mary of its approach. However, according to the train's data recorder, the train's whistle was not sounded during the seven seconds prior to the

[3] The facility is now out of business.

train's reaching the crossing – a distance of 500 feet,[4] and thus there is a factual dispute concerning this issue. For whatever reason, Mary failed to realize the train was bearing down on the crossing and proceeded over the tracks.[5] She almost made it (and thus a second, or a fraction thereof, could have made the difference); however, the train clipped the back of her vehicle and spun it around. Mary was ejected from the vehicle and sustained severe injuries. She has no recollection of the incident.

As a result of the foregoing events, on December 10, 2002, the Calhouns filed a complaint against CSX and McClintock in Bullitt Circuit Court. The complaint alleged negligence by these defendants in causing the accident. More specifically, they alleged that CSX violated its duties by keeping and maintaining the railroad crossing in a highly dangerous and unsafe condition; operating the train at an excessive speed; failing to keep a proper lookout for crossing vehicles; and failing to adequately warn by horn or otherwise. BCS, Hester, and Burris were later added as defendants.

Following extensive discovery, both CSX and McClintock filed motions for summary judgment. On March 21, 2007, the trial court granted CSX and McClintock summary judgment.[6] The trial court reasoned that these defendants had not breached any duty owed to Mary principally because: (1) the

[4] There was testimony to the effect that the data recorder's recording of horn usage was subject to error. However, for purposes of our review we will presume the recorder data to be correct.

[5] One of Mary's sons, Paul, testified that he witnessed the accident and that it did not appear that Mary stopped at the crossing.

[6] By agreement of the parties BCS, Hester, and Burris were dismissed from the lawsuit.

crossing was a private crossing and a railroad company's only duty under such circumstances is to warn a member of the public when he is observed in actual peril of being struck by the train; (2) because the crossing was a private crossing CSX had no duty to clear the vegetation which allegedly blocked the sitelines; and (3) that the crossing was not an ultrahazardous crossing, was not used pervasively by the public, and Mary did not rely upon the train signaling so as to alter CSX's duties from the general rule applicable to private crossings. The Calhouns' motion to alter, amend, or vacate was denied. This appeal followed.

STANDARD OF REVIEW – SUMMARY JUDGMENT

The standard of review on appeal when a trial court grants a motion for summary judgment is "whether the trial court correctly found that there were no genuine issues as to any material fact and that the moving party was entitled to judgment as a matter of law." *Scifres v. Kraft*, 916 S.W.2d 779, 781 (Ky. App. 1996); CR[7] 56.03. "The trial court must view the evidence in the light most favorable to the nonmoving party, and summary judgment should be granted only if it appears impossible that the nonmoving party will be able to produce evidence at trial warranting a judgment in his favor." *Lewis v. B & R Corp.*, 56 S.W.3d 432, 436 (Ky. App. 2001), *citing Steelvest v. Scansteel Serv. Ctr., Inc.*, 807 S.W.2d 476, 480-82 (Ky. 1991).

[7] Kentucky Rules of Civil Procedure.

"The moving party bears the initial burden of showing that no genuine issue of material fact exists, and then the burden shifts to the party opposing summary judgment to present 'at least some affirmative evidence showing that there is a genuine issue of material fact for trial.'" *Lewis*, 56 S.W.3d at 436, citing *Steelvest*, 807 S.W.2d at 482. The trial court "must examine the evidence, not to decide any issue of fact, but to discover if a real issue exists." *Steelvest*, 807 S.W.2d at 480. The Kentucky Supreme Court has held that the word "impossible," as set forth in the standard for summary judgment, is meant to be "used in a practical sense, not in an absolute sense." *Lewis*, 56 S.W.3d at 436. "Because summary judgment involves only legal questions and the existence of any disputed material issues of fact, an appellate court need not defer to the trial court's decision and will review the issue de novo." *Id.*

PRIVATE/PUBLIC CROSSING ISSUES

The duties a railroad owes to those traversing its tracks are considerably different depending upon whether the crossing is public or private. The appellees contend that the crossing is a private crossing and subject to the lesser duties applicable thereto. Accordingly, we must first consider whether the subject crossing is public or private. The trial court determined the crossing to be a private crossing. We believe its conclusion is correct.

KRS Chapter 177 addresses, among other things, state and federal highway matters. In turn, KRS 177.120 to KRS 177.210 address railroad crossings

in relation to the highway system. KRS 177.010(5) provides a definition for a public railroad crossing applicable to Chapter 177:

> (5) "Public grade crossing" means the at-grade intersection of a railroad track or tracks and a road or highway that has been dedicated to public use and incorporated into either the state primary road system or the highway or road system of a county or municipality[.]

The appellants argue that the foregoing definition is not applicable in a railroad negligence case because the definition is intended to be limited to its usage in Chapter 177. However, case authority mirroring KRS 177.010(5) confirms that this statutory definition is appropriate for application in determining whether a crossing is public or private in a railroad crossing negligence case such as the present one. *See Deitz' Adm'x v. Cincinnati, N.O. & T.P. Ry. Co.*, 296 Ky. 279, 176 S.W.2d 699, 701 (1943) ("For a crossing to be a public one the road or street on which it is situated must be a public road or street established either in the manner prescribed by statute or by dedication, and if in the latter manner there must be an acceptance.") As such, we disagree with the appellants that the statutory definition has no applicability in the present case.

In summary, to be classified as a public railroad crossing, the road traversing the crossing must: (1) have been dedicated to public use and (2) have been incorporated into either the state primary road system or the highway or road system of a county or municipality. It follows that a crossing that does not meet the foregoing criteria is a private crossing. The record is replete with evidence that the unnamed road at issue in this case does not meet the foregoing standards.

Carroll Samuels was employed at the time of his deposition as a supervisor for the Bullitt County Road Department. He had been employed there for 26 years. Samuels provided a deposition on behalf of the appellees addressing the status of the unnamed road leading to the crossing. He testified that the road was maintained by the county up to where the garage was located, but that the gravel portion that heads west from there across the tracks was not. Samuels testified that the road has not been dedicated to public use, and that it has not been incorporated into the state or county road system. He testified that the road would be more accurately described as a driveway leading to the Burris and Hester property on the west side of the track than a road.

There is no evidence contained in the record that any other governmental unit maintained the gravel portion of the road. Burris and Hester testified that they maintain the gravel portion of the road by replacing gravel as needed. Further the Kentucky Transportation Cabinet's listing of the public roads in Bullitt County does not include the road. Nor do the City of Shepherdsville or Bullitt County road listings include the road as part of their road systems. Finally, the U.S. Department of Transportation railroad crossing listing catalogs the crossing as a private crossing.

On the other hand, the appellants cite us to no evidence in the record which would indicate that that the road has been dedicated to public use and incorporated into either the federal, state, county, or municipality road system. It follows that there is a total failure of evidence in their favor upon this point.

The appellants argue to the effect that the crossing should be deemed a public crossing because there is signage there consistent with a public crossing; because CSX does not have a private crossing agreement with Hester and Burris though it generally is its policy to have such agreements with private crossing owners; and because Hester and Burris were not aware that it was not a public crossing. However, these factors do not supersede the rather straight-forward statutory and case law definitional requirements for classification as a public crossing, and we are thus unpersuaded that they are sufficient to transform the crossing into a public one.

In summary, the record discloses that the road leading to the crossing is a private road, and, it follows, that the crossing is, as a matter of law, a private crossing. We accordingly base the remainder of our review upon this premise.

DUTIES OWED AT PRIVATE CROSSING

In light of our conclusion that the crossing is a private crossing, we next consider the duty the appellees owed to Mary to maintain the crossing for safe passage and warn her of the approaching train.

A negligence action requires proof of: (1) a duty on the part of the defendant; (2) a breach of that duty; (3) a consequent injury, which consists of actual injury or harm; and (4) legal causation linking the defendant's breach with the plaintiff's injury. *Pathways, Inc. v. Hammons*, 113 S.W.3d 85, 88-89 (Ky. 2003). Thus to prevail in her lawsuit the appellants must show, first of all, that the

appellees owed a duty to Mary and, if so, that they breached that duty. Duty presents a question of law, and thus is reviewed *de novo*. *Id.* at 90.

The duties owed to a motorist or pedestrian crossing the tracks at a private crossing are minimal.

> . . . KRS 277.190 requires that each locomotive give a signal of its approach at each public crossing, while the general rule has been established that a railway company owes no duty of lookout or warning at private crossings. *Louisville & N. R. Co. v. Survant*, Ky., 19 Ky.L.Rptr. 1576, 44 S.W. 88 (1898); *Deitz' Adm'x v. Cincinnati, N. O. & T. P. Ry. Co.*, 296 Ky. 279, 176 S.W.2d 699 (1943). Operators of a train at or near a private crossing are not liable for injuries to a traveler at that crossing unless after discovery of his peril, they fail to use all means to avoid the accident. *Stull's Adm'x v. Kentucky Traction & Terminal Co.*, 172 Ky. 650, 189 S.W. 721 (1916); *Chesapeake and Ohio Railway Company v. Hunter's Adm'r*, 170 Ky. 4, 185 S.W. 140 (1916).

Hunt's Adm'r v. Chesapeake & O. Ry. Co., 254 S.W.2d 705, 706-07 (Ky. 1952) (citations modified).

> At a private crossing the only duty of a railroad is to exercise ordinary care to save a person from injury after his peril is discovered by those in charge of the train. The person crossing the track must exercise ordinary care for his own safety." *Chesapeake and Ohio Railroad Company v. Hunter's Adm'r.*, 170 Ky. 4, 185 S.W. 140 (1916).

Maggard v. Louisville & N. R. Co., 568 S.W.2d 508, 509 (Ky. App. 1977).

Nor does a railroad, contrary to the contentions of the appellants, have a duty to clear away vegetation at a private crossing which may obstruct the public's sitelines up and down the track. This issue was addressed in *Spalding v.*

Louisville & N.R. Co., 281 Ky. 357, 136 S.W.2d 1 (1940). In that case, Spalding was crossing the tracks by automobile at a private crossing located on a farm owned by John Barber which, like the crossing in the present case, had vegetation blocking the sitelines. *Spalding* addressed the issue as follows:

> . . . the precise question was before this Court in the case of *Gividen's Adm'r v. Louisville & Nashville Railroad Co.*, 17 Ky.Law Rep. 789, 32 S.W. 612, 613 (1895). The owner of a private passway (regardless of how it was acquired), crossing the railroad track from her residence to a portion of the home premises on the other side of the track, was killed by a train colliding with her, and to recover the damages sustained by her estate, her administrator filed the action against the defendant charging as negligence on its part "The failure of the defendant to cut the bushes and other undergrowth near its road, so as that one on the track might be seen, and such injuries in this way avoided," also that such permissible growth "obstructed the view of the decedent as she approached the crossing, and, in attempting to pass over the track, she was run over and killed."
>
> The Court held that the crossing was strictly a private one, and "therefore a signal was not necessary or required to be given of the approach of the train," which latter is thoroughly established in this jurisdiction and is conceded by counsel for plaintiffs. *It was furthermore held in that case that it was not the duty of the railroad company (the servient owner at that point) to keep its right of way clear of obstructing growths for the benefit of the dominant owner, and which is the precise point involved in this case. That opinion has never been overruled, and it appears to be in accord with the generally declared rule on the subject*[.]

Spalding, 136 S.W.2d at 3 (emphasis added; citation modified).

Thus, the general rule is that at a private crossing, the railroad has no duty to warn a person unless he is observed in immediate peril, nor does it have the

duty to clear away vegetation which may obstruct the traversing public's line of sight at the crossing. Accordingly, absent an exception, the foregoing defines the duties the appellees owed to Mary in the present case.

There are three principal exceptions to the general private crossing duties as set forth above: (1) the assumed duty exception; (2) the ultrahazardous crossing exception; and (3) the habitual use exception. Mary contends that each applies in the present case. We consider these exceptions in the following sections.

ASSUMED DUTY EXCEPTION

The first exception concerns instances where the railroad has by custom adopted the practice of signaling at a private crossing and thus accustoming the public into depending upon signal to warn of an approaching train.

The rule is stated as follows:

> The rule of customary practice and the right to rely upon it in a case of this kind is like that relating to the approach of a train to a private crossing. Thus, a train may approach and run over a private crossing without signals unless it has been customary to give reasonable and timely signals and persons using the crossing were accustomed to rely upon them. Where it had been customary to do that *and the traveler relied upon receiving such warning,* the failure to give it is negligence.

Illinois Central R. Co. v. Maxwell, 292 Ky. 660, 167 S.W.2d 841, 843 (Ky. 1943) (citing *Chesapeake & O. Ry. Co. v. Young's Adm'r*, 146 Ky. 317, 142 S.W. 709 (1912); *Kentucky Traction & Terminal Co. v. Brawner*, 208 Ky. 310, 270 S.W. 825

(1925); *Illinois Cent. R. Co. v. Applegate's Adm'x*, 268 Ky. 458, 105 S.W.2d 153 (1937)) (emphasis added).

McClintock testified that he customarily gave a signal at this crossing, and CSX concedes that it had adopted this as its policy. As such, the first prong of the test is met – CSX had adopted the custom and practice of giving a signal at this private crossing.[8] However, a crucial element of this exception is that the plaintiff "*relied upon receiving such warning*." Mary Calhoun's deposition testimony indicates that although she had dropped off her sons many times at the BCS worksite and had had to stop for trains to pass on several occasions, she had never heard a train signal at the crossing:

> Q. When you had been to this sanitation place before and had encountered trains there, we talked about that earlier, had you – do you have a memory of hearing the horns being sounded?
>
> A. Never did hear a whistle. All the time I took 'em, I never did hear one.
>
> Q. How many times do you think you encountered - - I think you told me between one and ten?
>
> A. Uh-huh.
>
> Q. And I'm not gonna - -
>
> A. If you're talking about crossing the railroad?
>
> Q. Yes.

[8] While CSX concedes this point, Burris and Hester (those in the best position to know) testified that trains did not always signal at the crossing.

> A. Yeah. But like I say, I'd be setting there when I let my sons out and I'd see trains passing, and I never did hear a whistle. Never did hear a whistle.
>
> . . . .
>
> Q. And - - and your belief is that when those trains would go by, they would just go by silently?
>
> A. Never heard a whistle.

Because Mary had not come to rely upon the giving of a horn warning at the crossing, the exception does not apply. Accordingly, the appellants may not avail themselves of this exception to alter the general duties applicable to a private crossing.

ULTRAHAZARDOUS CROSSING EXCEPTION

An exception to the ordinary duties imposed upon a railroad at a public crossing arises in cases concerning an "ultrahazardous" crossing. An ultrahazardous crossing generally refers to a crossing where the terrain layout is such that someone crossing the tracks at that location is unable to readily observe an approaching train. The requisites for a crossing to qualify under this exception have been stated as follows:

> [T]he crossing must be so exceptionally dangerous on account of a natural or habitual artificial obstruction, or of other immediate surroundings, that a jury could say that one exercising ordinary care and prudence in traveling the highway can not see an oncoming train or become aware of its near approach until he is practically in immediate danger and unable by the exercise of ordinary care to avoid being struck by the train.

Cincinnati, N.O. & T.P. Ry. Co. v. Hare's Adm'x, 297 Ky. 5, 178 S.W.2d 835, 837 (Ky. 1944).[9]

The appellants contend that the ultrahazardous crossing doctrine is applicable based upon the vegetation and treeline in the area of the crossing that obscures the view of a person crossing over the tracks from the west and looking south. As previously noted, CSX had no duty to clear the vegetation. Moreover, the above requisites to qualify as an ultrahazardous crossing include natural obstructions, and thus obstructive vegetation could bring a crossing into the category.

We begin by noting Mary's deposition testimony concerning the problem of the obstructive vegetation:

> Q. . . . . Let me ask you another question. Do you agree that at this crossing, based upon your past experience there, it is possible to pull up to the tracks close enough that you can see up the tracks without anything blocking your view of the tracks?
>
> A. Best I can remember, yeah.
>
> Q. And that's what you would customarily do there, you would pull up to the tracks coming out?
>
> A. Yes.

[9] The appellants rely upon the following quote from *Louisville & N. R. Co. v. Quisenberry*, 338 S.W.2d 409, 411 (Ky. 1960): "However, there is a well recognized exception to the general rule where there exist peculiar or extraordinary circumstances surrounding a crossing and the facts are known to trainmen. In such cases reasonable care may require that an alarm or signal be given by the approaching train and the question of whether circumstances are such that require a signal is for the jury to determine" to argue that the rule as stated in *Hare's Adm'x* has been abrogated. However the rule as stated in *Hare's Adm'x* has not been specifically overruled and, accordingly, we are bound by its holding. SCR 1.030(8)(a); *City of Louisville v. Slack*, 39 S.W.3d 809, 811 (Ky. 2001).

Q. You would stop your vehicle at a position where you could see up the tracks to our right?

A. Both ways, yes.

Q. Without anything blocking your view, correct?

A. Best of my ability, yes.

Q. And although you do not remember, obviously from what you've told me, what happened on this day, you believe, based upon your habit there, that is exactly what you would have done on this day?

A. Yes.

Q. You would have - -

A. Stopped.

Q. - - pulled up and stopped –

A. Yes.

Q. - - at a position where you would have no obstructions to your view looking up the tracks?

A. The best I can remember, yes.

. . . .

Q. You were aware, obviously, that there were obstructions to your view, namely those trees?

A. Yes.

Q. And that you had to get past those trees in order to have that unblocked view of the tracks?

A. Yes.

> Q. And you were aware that because of that you had to pull past the trees and stop in order to have that unobstructed view of the tracks.
>
> A. Yes.

Thus Mary testified that it was possible to pull up past the treeline and have an unobstructed view up and down the tracks. Nevertheless, the appellants cite us to the testimony and "forensic mapping" of Dr. Jerry Cusick and his opinions as to the minimal sight distances available to a motorist in close proximity to the crossing. They note that it is his opinion that at a distance of 22 feet from the crossing heading east, the sight distance to the north is only 263 feet, at which point a train would be only 3.38 seconds from the crossing.[10]

As previously noted, under our summary judgment standards, in the usual case we are required to view the evidence in the light most favorable to the appellant. *Steelvest*, *supra.* The testimony and forensic modeling of Dr. Cusick would, therefore, despite Mary's testimony, normally be sufficient to create a genuine issue of material fact concerning whether this was an ultrahazardous crossing. *See Louisville & N. R. Co. v. Quisenberry*, 338 S.W.2d 409 (Ky. 1960) (siteline of 300 feet created extrahazardous crossing).[11] However, "the mere

[10] Dr. Cusick's calculations are based upon the positioning of a tree (since cut down) nearest the crossing in a location strongly contested by the appellees.

[11] The ultrahazardous crossing in *Quisenberry* is described in the opinion as follows: "The railroad tracks which bisect this road, run, as we have indicated, from north to south. The southbound track is on the west side of the road's right-of-way and the northbound track is on the east side. About 300 feet north of the crossing is a sharp curve in the track and on the west, or concave side of the curve, is a bluff or cut which obscures the vision of an operator proceeding south. There is some testimony to the effect that a person approaching within 34 feet of the crossing would be able to see the track for about 500 feet north of the crossing, but when getting closer, he could see only 300 feet in that direction. It is not explained why this is so and we

existence of some alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no genuine issue of material fact." *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 247-48, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986). "When opposing parties tell two different stories, one of which is blatantly contradicted by the record, so that no reasonable jury could believe it, a court should not adopt that version of the facts for purposes of ruling on a motion for summary judgment." *Scott v. Harris*, 550 U.S. 372, 127 S.Ct. 1769, 1776, 167 L.Ed.2d 686 (2007) (Video tape of police chase discrediting 42 U.S.C. § 1983 plaintiff's depiction of the chase).

In this case, Dr. Cusick's testimony and forensic mapping is blatantly contradicted by the record by way of the photographic evidence made near the time of the accident. This contradiction is well illustrated by the photographs included at tab 4[12] and tab 5[13] of the appellees' brief.

The photographs depict the view heading east across the tracks looking to the south – the route Mary was traveling when she was hit. Clearly visible in the pictures is a railroad crossing sign, which is described in the appellants' own exhibits as being 18 feet from the center of the track (*see*, e.g.,

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surmise that at the former point one might be able to see behind the bluff and further up the track. To the south of the crossing in the direction the automobile was carried is a stretch of relatively straight track. This too ends in a curve." 338 S.W.2d at 410.

[12] Contained in the record as Exhibit 1 (top photograph) of Mary Calhoun's deposition.

[13] Contained in the record as Exhibit D1 of Kerrin Hester's deposition.

appellants' brief, appendix 15). There is a wide gravel shoulder west of the tracks that extends well beyond the crossing sign. The pictures are taken from behind the crossing sign, and it is obvious that a vehicle could have safely pulled to that position, or forward of it, and stopped prior to crossing the tracks. From this position a vehicle is beyond the treeline and vegetation, and has a clear view down the tracks to the south. The tracks are unwaveringly straight at this point, and the view is virtually to the horizon. In summary, these photographs contradict the allegation that this crossing is ultrahazardous.

As a matter of law the circumstances are not such "that a jury could say that one exercising ordinary care and prudence in traveling the highway can not see an oncoming train or become aware of its near approach until he is practically in immediate danger and unable by the exercise of ordinary care to avoid being struck by the train." *Hare's Adm'x*, 178 S.W.2d at 837. Accordingly, the ultrahazardous crossing doctrine is inapplicable to the present case.

HABITUAL USE EXCEPTION

The final exception involves a private crossing that is heavily used by the public such that it takes on the character of a public crossing. The rule is described as follows:

> [W]hen a private crossing is used by the public generally with the consent of the railroad company, a duty devolves to give warning of the approach of trains; in other words, if a crossing is a public one, there is no doubt about the duty to give warning or signal; if the crossing is a private one and sufficient evidence is introduced to show habitual use of the crossing by the

> public, then this use may impose the duty of lookout and warning. *Louisville & N. R. Co. v. Arrowood's Adm'r*, 280 Ky. 658, 134 S.W.2d 224 (1939); *Louisville & N. R. Co. v. Foust*, 274 Ky. 435, 118 S.W.2d 771 (1938). However, this court has never, so far as we have been able to find, established a definite rule as to the number of people who must use a crossing each day before it may be said that it is a public crossing. In *Louisville & N. R. Co. v. Arrowood's Adm'r*, 280 Ky. 658, 134 S.W.2d 224, 226 (1939), we said:
>
> > 'In the *Stidham case [Louisville & N. R. Co. v. Stidham's, Adm'x*, 194 Ky. 220, 238 S.W. 756 (1922)], the precedents were reviewed and it was held that the duty of trainmen to anticipate the presence of persons upon the track, and to exercise ordinary care to discover and avoid injuring them, does not arise where the greatest number of persons using the track, according to the largest estimate of many of the witnesses, was 150 persons each 24 hours, and the place of the accident was in the country, although the track connected two incorporated towns located about 3 miles apart. We have held insufficient to establish those duties estimates of the use of the track in such places by as many as 60, 75, or 100, or 125 persons every day.'
>
> It seems that in such cases the effect of the use in the particular case is a matter of law for the court to determine.

Hunt's Adm'r v. Chesapeake & O. Ry. Co., 254 S.W.2d at 707 (citations modified).

Thus it would appear that at least 150 crossings per day would be required for this exception to apply. There is no evidence of record which would indicate that the number of crossings at the subject site is anywhere near this level. While it appears that BCS had a total of 12 trucks, according to Paul Calhoun the company normally ran only 4 to 6 at a time, and that each truck made 3 to 4 trips in

and out daily. Based upon 6 trucks and 4 trips, this would be 48 crossings in and out daily by the trucks. Assuming two men to each truck, these 12 employees made 24 crossings daily coming to and leaving work (or 36 crossings assuming 3 men per truck). In addition, a few occasional customers crossed the tracks to pay their bills, and of course Hester and Burris used the crossing daily. This number of crossings, however, is well under the level required for the exception to apply. Accordingly, the exception is not applicable.

COMMON LAW DUTY TO WARN

The appellants argue that failing all else, the common law duties owed to travelers by a railroad imposed a duty upon CSX and McClintock to have provided a warning to Mary as she approached the crossing. "The common law embraces the duty of giving adequate warning of the approach of a train, of keeping a lookout ahead, and of operating the train at a speed commensurate with the care required under the circumstances." *Illinois Cent. R. Co. v. Arms*, 361 S.W.2d 506 , 509 (Ky. 1962) (citing *Piersall's Adm'r v. Chesapeake & O. Ry. Co.*, 180 Ky. 659, 203 S.W. 551 (1918)).

However, the case law we have cited herein *is* the common law applicable to a railroad's duty as it has developed in Kentucky in the area of private railroad crossings. The appellants may not avoid the general rules concerning private crossings discussed herein simply by invoking a cause of action based upon common law principles. As such, the cases cited in the preceding

sections are the controlling authorities in this action, and this argument is without merit.

BREACH OF DUTY

Having determined that the duty owed by the appellees are those applicable to a private crossing as set forth above, we next consider whether there is a genuine issue of material fact concerning whether that duty was breached.

First, because this was a private crossing, CSX breached no duty owed to Mary by failing to clear the vegetation in the area so as to provide her with a better siteline down the tracks to the south. Moreover, as previously noted, when the tracks are properly approached and crossed, an unobstructed view down the tracks is available. The vegetation issue does not defeat summary judgment.

Second, while the engineer and conductor both observed Mary's vehicle heading toward the crossing while she was still on the west side of the treeline, she was not yet in immediate peril. She was still a considerable distance from the crossing and the general rule that the train had no duty to give warning was at that point operative. We believe that application of the private crossing rule as stated above did not require the train to sound its horn merely because Mary was observed heading toward the crossing, but not at the time in peril.

Third, we note that Mary's car would have appeared into view as it came from behind the treeline, approached the crossing, and started over the tracks. It stands to reason that she would have at this time have been in immediate peril and the private crossing rules would have required the train to sound a warning.

However, the appellants do not make the argument that had the train sounded a warning at that point the accident could have been avoided. While the appellants received leave to file a 40-page brief, they do not have an argument section addressing whether the appellees breached their duty under the standards applicable to a private crossing; that is, by failing to warn as Mary came into immediate peril when she began to traverse the tracks as the train sped toward her.

The only references we can find alluding to this are in the appellants' Statement of the Case where they state "[a]ny warning before arrival could have prevented the crash because Ms. Calhoun almost made it through the crossing. This collision almost did not happen," Appellants' Brief, pg. 1, and in their argument heading "McClintock Failed to Act as a Reasonably Prudent Railroad Engineer" where they state "[a]lternatively, he [McClintock] knew or should have known that if she were in the zone of danger and he sounded the horn she may have been able to take emergency evasive action to get through the crossing faster." Appellants' Brief, pg. 37.

While as Mary began to traverse the tracks and came into immediate peril under the private crossing rules the railroad had a duty to sound a warning, they cite us to no testimony or other evidence of record alleging that if the train sounded its horn the accident could have been avoided. Moreover, the record discloses that application of the train's brakes by the time Mary began her approach over the tracks would have had no impact on its speed prior to making contact with Mary's vehicle.

While it seems superficially plausible that if the train had sounded a warning as Mary started over the tracks then she could have avoided the accident by, for example, "flooring it", in the absence of the appellants' development of the issue in the proceedings below, and proper briefing before us, we are constrained to conclude that our speculation that the accident may have been avoided is insufficient for us to determine that there is a jury issue. We could just as well speculate that by the time Mary started across the tracks it was too late for a warning to have done any good. Simply put, the appellants failed to develop the issue – either below or before us - as a ground for avoiding summary judgment.

As such, we are constrained to agree with the trial court that the appellees are entitled to summary judgment.

TIMELINESS OF MCCLINTOCK'S MOTION

In filing the original motion for summary judgment, counsel for the appellees neglected to include McClintock as a party to the motion. Upon realizing the error, at the hearing on the motion counsel moved to include McClintock as a party to the motion. Counsel for the appellees represented that the same arguments contained in the original motion were likewise applicable to McClintock. Counsel for the appellants objected.

Because of the scheduled trial date, it was too late to file a new motion for McClintock and still provide the appellants with the 10 days' notice provided in CR 56.03. This was discussed and it was agreed (though still over the

appellants' objection) that counsel for the appellees would file a motion applicable to McClintock that day, and the appellants would be given a week to respond.

CR 56.03 provides as follows:

> *The motion [for summary judgment] shall be served at least 10 days before the time fixed for the hearing.* The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, stipulations, and admissions on file, together 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 a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages. (Emphasis added).

In *Perkins v. Hausladen*, 828 S.W.2d 652 (1992), Justice Leibson addressed the CR 56.03 10-day notice requirement, and its importance, as follows:

> The only Kentucky case squarely addressing this issue [of compliance with CR 56.03's 10-day notice requirement] is *Rexing v. Doug Evans Auto Sales, Inc.*, Ky.App., 703 S.W.2d 491 (1986). In *Rexing* the court viewed it as error to force a hearing on summary judgment short of the ten days notice requirement, stating:
>
> "We see no reason to permit appellee to circumvent the notice requirements of our Civil Rules by ambushing appellants with last minute motions and early morning hearings. The trial court erred in refusing to grant appellants a continuance.["] *Id*. at 494.
>
> The treatise on *Kentucky Practice* by Bertelsman and Philipps, 4th ed. Civil Rule 56.03, Comment 3, states:
>
> "As the annotations following the sub-rule demonstrate, the 10-day lead time provided before hearing the motion

> is extremely important and, although not jurisdictional, may not be lightly disregarded. . . . [R]equests for extension of time to respond to such motions are usually freely granted, and it may be an abuse of discretion for the trial court to refuse to grant reasonable extensions."
>
> We need not decide whether there is an inflexible rule that violation of the ten day notice requirement requires automatic reversal. There may be unusual situations where no possible prejudice could have resulted from a premature hearing. But this case is not one of them. As pointed out in their Brief, the [nonmovants] were put at a "disadvantage by not being able to put on any affidavits, additional legal research, nor other evidence to contradict the motion."

Perkins, 828 S.W.2d at 656-57.

The above discussion suggests that a violation of the CR 56.03 notice provisions requires "automatic reversal" except in "unusual situations where no possible prejudice could have resulted from a premature hearing." We believe that this is a situation where no reversal is required. The arguments applicable to McClintock were identical to those applicable to CSX, so the appellants had timely notice of the applicable arguments. Moreover, since trial was scheduled to begin in less than 10 days, there was no way the notice requirement could have been met and the motion ruled upon without rescheduling the trial. Further, if McClintock was indeed entitled to summary judgment (which is how it turned out), it would have made no sense to proceed with the trial simply because his motion could not be timely addressed for procedural reasons. Under these circumstances we find no prejudice to the appellants in preparing for the late-filed motion, and accordingly find no abuse of discretion in the trial court's permitting of the late-filed motion.

MCCLINTOCK'S PRESCRIPTION DRUG USE

The record discloses that McClintock suffers from migraine headaches and recurrences of sickness related to malaria he contracted while serving in the military. As a result he takes a variety of prescription drugs, including valium, oxycontin, and hydrocodone. The appellants' argument is stated in their brief, in total, as follows:

> Dr. William Smock is an expert in emergency medicine. He reviewed Mr. McClintock's pharmacy and medical records and concluded Mr. McClintock would have been impaired in his operation of the train by the type, amount and combination of narcotics shown in those records. CSX has in place a drug screening program that can – at best – be likened to a voluntary "honor" system whereby the employees are expected to fill out an "MD3" form if they miss over seven days of work. The employee is expected to list in the form any medical problems they have. According to Dr. Thomas Nielson, CSX Chief Medical Officer, this along with a drug screening program that tests only 25% of employees, is the extent of CSX's policies to ensure train crew are not impaired while operating trains in Kentucky.
>
> Appellants respectfully submit that reasonable care and railway safety in Kentucky require much more than such minimal effort to ensure safe train operations.

In *Deutsch v. Shein*, 597 S.W.2d 141, 143-44 (Ky. 1980), the Supreme Court adopted the substantial factor test for causation as set forth in § 431 of the Restatement (Second) of Torts, which is entitled "What Constitutes Legal Cause." This section states in pertinent part that the "actor's negligent conduct is a legal cause of harm to another if his conduct is a substantial factor in bringing about the harm." Comment (a) to § 431 explains what is meant by "substantial factor":

> In order to be a legal cause of another's harm, it is not enough that the harm would not have occurred had the actor not been negligent. . . . [T]his is necessary, but it is not of itself sufficient. The negligence must also be a substantial factor in bringing about the plaintiff's harm. The word "substantial" is used to denote the fact that the defendant's conduct has such an effect in producing the harm as to lead reasonable men to regard it as a cause, using that word in the popular sense, in which there always lurks the idea of responsibility, rather than in the so-called "philosophic sense," which includes every one of the great number of events without which any happening would not have occurred. Each of these events is a cause in the so-called "philosophic sense," yet the effect of many of them is so insignificant that no ordinary mind would think of them as causes.

Section 434 of the Restatement (Second) of Torts addresses the issues of when legal causation is a question of law for the court and when it is a question of fact for the jury. The court has the duty to determine "whether the evidence as to the facts makes an issue upon which the jury may reasonably differ as to whether the conduct of the defendant has been a substantial factor in causing the harm to the plaintiff." § 431(1)(a). This standard is consistent with Kentucky law. *See, e.g., McCoy v. Carter*, 323 S.W.2d 210, 215 (Ky. 1959) (Legal causation presents a question of law when "there is no dispute about the essential facts and [only] one conclusion may reasonably be drawn from the evidence.") *See also* 57A Am.Jur.2d, Negligence § 446 (1989); *Pathways, Inc. v. Hammons*, 113 S.W.3d 85, 92 (Ky. 2003).

Here, upon viewing the evidence of McClintock's prescription drug use in the light most favorably to the appellants, we do not believe there is a

genuine issue of material fact upon the issue of whether his prescription drug use was a substantial factor in causing the present accident.

We first note that McClintock had taken his prescription narcotics for a long period of time, had developed a tolerance for them, and thus took them in greater quantities than someone not accustomed to the substances. All of his prescriptions were authorized by his physician. At the time of the accident, McClintock was at the concluding stage of his return run from Nashville, which had been traversed without incident. There was no testimony that subsequent to the accident he appeared over-medicated.

Further, owing to the circumstances of the accident, the only plausible theory that the drugs could have had an impact would be that they caused him to quit signaling the train horn in the seven seconds (500 feet) prior to the crash.[14] However, immediately south of the subject crossing were two public crossings and the recorder box indicates that the train did signal at those crossings and continued to do so until 500 feet from the private crossing where the accident occurred. McClintock and the conductor testified that they saw Mary approaching from the west side of the tree line. It defies reason to suppose that his medications would have been the explanation for McClintock having stopped signaling (if he did) those seven seconds prior to the crash.

Moreover, the appellants' expert on the drug issue merely extrapolates from the quantity of prescriptions McClintock had filled to speculate the levels he

[14] Again, McClintock testified that he did signal, but the recorder box indicates he did not.

had ingested the day of the accident. There is no direct evidence supporting the appellants' theory that McClintock was impaired by his medications at the time of the accident.

In summary, we do not believe the evidence adduced during discovery linking McClintock's prescription drug use to the accident is sufficient to defeat summary judgment.

EVIDENTIARY RULINGS

Finally, the appellants argue that two evidentiary rulings made by the trial court should be reversed in the event we reverse the trial court's summary judgment issue and remand the cause for trial. They contend that the trial court erroneously excluded evidence concerning a February 2005 accident at the crossing which resulted in a fatality and two injuries. They allege that evidence concerning this accident is admissible as relevant to punitive damages as the second accident reflects upon CSX's failure to remedy the unsafe condition of the crossing following the present accident.

The appellants also contend that the trial court erroneously denied its motion to exclude the testimony of the appellees' accident reconstructionist insofar as he intended to testify regarding the injuries that would have been prevented if Mary had been wearing her seatbelt.[15]

Based upon our disposition herein, these evidentiary issues are moot, and we will accordingly not discuss them on the merits.

[15] The appellants contend that Mary was wearing her seat belt; the appellees contend that she was not and, accordingly, suffered additional injuries by her failure to do so.

CONCLUSION

For the foregoing reasons the judgment of the Bullitt Circuit Court is affirmed.

ALL CONCUR.

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