RENDERED: APRIL 9, 2010; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2008-CA-000296-MR

TIMOTHY DALE WHALEN, INDIVIDUALLY;
TIMOTHY DALE WHALEN AS ADMINISTRATOR
OF THE ESTATE OF TIMOTHY ANDREW WHALEN;
AND TIMOTHY DALE WHALEN AS CUSTODIAN
FOR MINOR CHILD EMILEE PAIGE WHALEN APPELLANTS

v.

APPEAL FROM GRANT CIRCUIT COURT
HONORABLE STEPHEN L. BATES, JUDGE
ACTION NO. 04-CI-00471

NORFOLK SOUTHERN CORPORATION APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: CLAYTON, NICKELL, AND VANMETER, JUDGES.

NICKELL, JUDGE: Timothy Dale Whalen, individually, as administrator of the estate of Timothy Andrew Whalen, and as custodian for minor child, Emilee Whalen, (Estate) appeals from a summary judgment entered in favor of Norfolk Southern Corporation on his wrongful death claim. The Estate argues:

(1) entry of summary judgment in Norfolk's favor was barred by the law of the case doctrine; (2) material issues of fact existed as to whether Norfolk breached its duty; and (3) summary judgment was improper because of Norfolk's failure to comply with discovery. After reviewing the record and briefs, we affirm.

Andy Whalen was operating a motor vehicle with his fiancé, Amy Crabtree, and their two minor children as passengers. They left the property of Robert McDaniel where they had been conducting business. McDaniel's property consists of his residence, a barn, which he used as a shop, and the residence of his adult son, Tommy McDaniel. Whalen and Crabtree were killed instantly when their vehicle, while attempting to pass the railroad crossing from McDaniel's property driving onto U.S. Highway 25, collided with an oncoming train owned by Norfolk. The children survived the accident.

The Kentucky State Police investigated the accident. Other than the train crew, Tommy McDaniel was the only eyewitness. He stated that Whalen's car was traveling at a slow rate of speed and Whalen turned onto the crossing at the last instant without looking or slowing down. McDaniel stated that he heard the train blow its horn at the previous crossing and continued to blow its horn as it entered the McDaniel crossing. Detective Kevin Flick interviewed the conductor and engineer who both stated that the car pulled into the crossing at the last instant. The investigation revealed the visibility at the crossing to be 732.9 feet. The crossing is level and there are no bushes or trees to obscure a motorist's view.

The Estate filed a complaint in Grant Circuit Court. The court initially denied Norfolk's motion for summary judgment. However, the court ultimately granted a subsequent motion for summary judgment in favor of Norfolk. This appeal followed. Additional facts will be developed as necessary.

The Estate first argues the trial court erred by awarding summary judgment to Norfolk because it had previously denied a motion for summary judgment and therefore, the first denial became law of the case.

Citing *Davidson v. Castner-Knott Dry Goods, Inc.,* 202 S.W.3d 597, 602, (Ky. App. 2006), the Estate argues the law of the case doctrine precludes a trial court from reconsidering a previous denial of a motion for summary judgment. However, in *Davidson,* this Court specifically held "[i]t is well established that a trial court may reconsider and grant summary judgment to a party subsequent to an earlier denial." *Id.* (quoting *Hallahan v. The Courier Journal*, 138 S.W.3d 699, 705 n.4 (Ky. App. 2004)). Moreover, contrary to the Estate's assertion, the trial court considered substantial amounts of new evidence when it considered the second motion for summary judgment. There was no error.

The Estate next argues there was a genuine issue of material fact regarding whether the amount of traffic using the crossing placed additional duties of lookout and warning upon Norfolk. We disagree.

The trial court concluded the crossing at issue was private as a matter of law. This conclusion has not been challenged. In *Maggard v. Louisville & Nashville R. R.,* 568 S.W.2d 508, (Ky. App. 1977), this Court stated:

> [a]t 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.

In *Hunt's Adm'r v. Chesapeake & O. Ry. Co.,* 254 S.W.2d 705, 707 (Ky. 1952), the former Court of Appeals stated:

> [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.

The Estate argues that there is an issue of fact as to whether a sufficient amount of traffic at the crossing imposed the additional duties of lookout and warning upon Norfolk. The only evidence regarding the amount of traffic at the McDaniel crossing was that several crossings, about eight to ten, occurred daily. The Court in *Hunt's Adm'r* noted that additional duties were not placed upon the railroad when as many as 125 persons utilized a crossing daily. *Id.*

We conclude the evidence demonstrating approximately eight to ten crossings daily is insufficient as a matter of law to impose additional duties upon Norfolk. Therefore, the issue of whether Norfolk sounded its train whistle at the McDaniel crossing is immaterial because there was no duty to sound the whistle. Moreover, the exception to the ordinary duties of railroads at private crossings requires the plaintiff to demonstrate the railroad knowingly consented to public use

of the private crossing. *Id.* No such evidence was presented in this case. Therefore, summary judgment was appropriate. *Steelvest, Inc. v. Scansteel Service Center, Inc.,* 807 S.W.2d 476, 483 (Ky. 1991).

The Estate next argues there was an issue of material fact as to whether the crossing was ultra-hazardous and whether Norfolk breached its duty of care by traveling at an excessive speed and failing to apply its brakes. We will examine these issues in turn.

The Estate failed to demonstrate whether the ultra-hazardous issue was brought to the attention of the trial court and where the issue was preserved in the record. Our review of the record indicates the issue was not raised in the Estate's response to Norfolk's motion for summary judgment. Before an issue may be raised on appeal, "a trial court must first be given the opportunity to rule on a question for which review is sought." *Taxpayer's Action Group v. Madison County Bd. of Elections*, 652 S.W.2d 666, 668 (Ky. App. 1983). Failure to do so renders an argument unpreserved for appeal. *Hoy v. Kentucky Indus. Revitalization Auth.*, 907 S.W.2d 766, 769 (Ky. 1995). We conclude the ultra-hazardous issue was not preserved for review and decline to address it.

Expert witness, James R. Loumiet, opined the train was traveling at an excessive rate of speed. However, Loumiet also stated the train was traveling within the limits established by federal regulations. *See* 49 C.F.R. § 234.213. Federal law preempts state law claims regarding the excessive speed of trains. *CSX Transp., Inc. v. Easterwood*, 507 U.S. 658, 675, 113 S.Ct. 1732, 1743-44, 123

L.Ed.2d 387 (1993). Further, any issue regarding Norfolk's violation of its own internal speed regulations is irrelevant under federal law. *Michael v. Norfolk S. Ry.*, 74 F.3d 271, 273 (11th Cir. 1996). Therefore, summary judgment on the excessive speed issue was appropriate.

Expert witness, August W. Westphal, stated the engineer should have applied the brakes upon seeing Whalen's vehicle approach the crossing. As stated above, Norfolk's duty was to exercise ordinary care after peril was discovered. The uncontroverted eyewitness testimony was Whalen approached the crossing at a slow rate of speed with enough time to stop and then pulled in front of the train at the last moment before impact. Both McDaniel and the train crew stated they assumed Whalen would stop and yield the right of way. Whalen was not in peril until he failed to abide by his own statutory duty to stop and yield the right of way. Instead he pulled into the crossing at the last moment without looking. Norfolk had no duty to take action until peril was discovered. The trial court properly granted summary judgment on this issue.

Finally, the Estate argues summary judgment was inappropriate because Norfolk failed to comply with discovery requests and motions to compel. We are cited to no legal authority in support of this argument. Neither are we cited to any violation by Norfolk of any discovery order entered by the trial court. Our review of the record indicates the Estate had ample opportunity to develop its case. There was no error.

Accordingly, the judgment of the Grant Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

Philip R. Combs
Florence, Kentucky

BRIEF FOR APPELLEE:

Robert B. Cetrulo
Edgewood, Kentucky