STATE OF MICHIGAN

COURT OF APPEALS

BARBARA THOMAS, Individually, and as Next Friend of JAMES EDWARD THOMAS, II, a Minor, Plaintiff-Appellant,	UNPUBLISHED November 2, 1999
v	No. 208311 Saginaw Circuit Court
CSX TRANSPORTATION, INC., Defendant-Appellee.	LC No. 96-013238 NO

Before: Murphy, P.J., and Gage and Wilder, JJ.

PER CURIAM.

Plaintiff appeals as of right from an order granting summary disposition in defendant's favor pursuant to MCR 2.116(C)(8) and (10). We reverse.

I

The facts in this case are relatively undisputed. Seven-year-old James Thomas, II, left some of his belongings at his mother's aunt's house, which was directly across defendant's railroad yard from his own aunt's house. When James' mother instructed him to retrieve his belongings, he took the most convenient route, a well-worn path crossing defendant's railroad yard. Defendant was aware that pedestrians, adults and children alike, commonly used this path and that children frequently, perhaps "constantly," played in the railroad yard. At the time James crossed the railroad yard, the footpath was blocked by a train more than a mile long, standing on the tracks, so he crossed the tracks between two railroad cars. He retrieved his belongings and returned along the same path, climbing under the same train, between the coupler holding two cars together, while his mother watched from her sister's yard. The train began moving without warning while James was climbing beneath it, severing his legs and two fingers.

II

Plaintiff contends that the trial court erred in granting summary disposition with respect to plaintiff's negligence and gross negligence claims. We agree. A motion for summary disposition filed pursuant to MCR 2.116(C)(8) may be granted only if the allegations fail to state a legal claim. *Radtke*

v Everett, 442 Mich 368, 373-374; 501 NW2d 155 (1993). The trial court may only grant the motion when "the claim is so clearly unenforceable as a matter of law that no factual development could possibly justify a right of recovery." *Feister v Bosack*, 198 Mich App 19, 22; 497 NW2d 522 (1993). A motion for summary disposition filed pursuant to MCR 2.116(C)(10) may be granted only when there is no genuine issue of material fact, and the moving party is therefore entitled to judgment as a matter of law. The court determines whether there is factual support for the underlying claim after considering all admissions, affidavits, depositions, pleadings, and other documentary evidence in the light most favorable to the nonmoving party. *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998). The court may not make findings of fact or weigh the credibility of sources in its determination. *Skinner v Square D Co*, 445 Mich 153, 161; 516 NW2d 475 (1994).

The threshold question in any negligence or premises liability action is whether the defendant owed a legal duty to the plaintiff, and a negligence analysis cannot proceed further unless such duty is owed. *Johnson v Bobbie's Party Store*, 189 Mich App 652, 659; 473 NW2d 796 (1991). In the present case, there was no dispute that plaintiff was a trespasser or that defendant knew trespassers commonly used the path across the tracks.

> A possessor of land who knows, or from facts within his knowledge should know, that trespassers constantly intrude upon a limited area thereof, is subject to liability for bodily harm there caused to them by his failure to carry on an activity involving a risk of death or serious bodily harm with reasonable care for their safety. [*Lyshak v Detroit*, 351 Mich 230, 249; 88 NW2d 596 (1958), quoting Restatement Torts, § 334.]

Stated another way, a possessor of land owes a known trespasser the duty to use ordinary care to prevent injury from active negligence. *Polston v S S Kresge Co*, 324 Mich 575, 580; 37 NW2d 638 (1949); *Schulke v Krawczak*, 62 Mich App 675, 677; 233 NW2d 694 (1975). Active negligence has been defined as the "carrying on of some operation or activity in a negligent manner." 62 Am Jur 2d, Premises Liability, § 166, p 536. Active negligence is distinguished from negligence in maintaining the premises in a defective or dangerous condition. *Polston, supra* at 579. Passive negligence includes the failure to warn of or remedy a hazardous condition on the premises. *Leep v McComber*, 118 Mich App 653, 660; 325 NW2d 531 (1982).

In this case, the trial court erred in granting summary disposition pursuant to MCR 2.116(C)(8) based on its conclusion that plaintiff had only pleaded passive negligence. While it is questionable whether plaintiff's complaint explicitly states a claim of active negligence, the documentation submitted in support of the complaint includes clear allegations that defendant moved the train without appropriate notice. Plaintiff contends that defendant was negligent in failing to sound a warning bell before the train began to move out of the yard. In support plaintiff submitted copies of relevant provisions of defendant's "Operating Rules Book," those rules providing:

> 13. The engine bell, must be rung when an engine is about to move, except after momentary stops in continuous switching movements.

* * *

> 14. The engine horn must be sounded at all places where required by rule or law to prevent accidents.

The only testimony countering plaintiff's assertion that defendant was actively negligent in failing to sound a warning, was the testimony of one of defendant's engineers. In his deposition this engineer denied any obligation, under the operating rules, to sound a warning when departing the yard. He stated that as a matter of course he did not sound a warning in that circumstance. We conclude that on these facts, reasonable minds could differ as to whether there was a duty to sound a warning. Thus, a genuine issue of material fact existed. We find, consequently, that plaintiff claimed a breach of the duty to use ordinary care to prevent injury from active negligence. *Polston, supra* at 580; *Schulke, supra* at 677. The alleged active negligence consisted of carrying on an activity in a negligent manner, that is, moving the train without any warning to possible trespassers.

In addition to a general duty to protect trespassers from active negligence, a possessor of land has a somewhat enhanced duty where children are concerned:

> Children, wherever they go, must be expected to act upon childish instincts and impulses; and others who are chargeable with a duty of care and caution towards them must calculate upon this, and take precautions accordingly. If they leave exposed to the observation of children anything which would be tempting to them, and which they in their immature judgment might naturally suppose they were at liberty to handle or play with, they should expect that liberty to be taken. [*Powers v Harlow*, 53 Mich 507, 515; 19 NW 257 (1884).]

The Court in *Lyshak*, *supra*, explained the public policy behind its decision to impose a duty of care with respect to child trespassers:

> The community has an interest in the life of a child. The preservation of that life is a proper factor to be weighed against a landowner's right to the exclusive possession of his land and the use he makes of it. Conduct which unreasonably jeopardizes that life is offensive to our society and the fact that the child is a trespasser is only one of the elements to be weighed by the jury in its historic scales. [*Lyshak, supra* at 244-245.]

The *Lyshak* Court went on to explain that "the right of a child to life, and life unmaimed, outweighs the landowner's right to the exclusive possession of his property" and that the scope of the liability "is to be measured by the magnitude of the danger to the child," noting that the probability of the trespasser's presence should be taken into account when considering the reasonableness of land possessor's conduct. *Id.* at 249, 250.

In the present case, defendant knew that adults and children crossed the railroad yard along the worn path on a regular basis, and that children commonly played in the railroad yard. The magnitude of the danger to a child was enormous, as illustrated by the instant case. Whether defendant breached the

duty of care was a question of fact properly left to a jury, and on these facts the court erred in alternatively granting summary disposition pursuant to MCR 2.116(C)(10).

The trial court also held that plaintiff had failed to present a valid gross negligence claim, dismissing that portion of the complaint pursuant to MCR 2.116(C)(8), or in the alternative, pursuant to MCR 2.116(C)(10). Gross negligence may be found where there is (1) knowledge of a situation requiring the exercise of ordinary care and diligence to avert injury to another; (2) an ability to avoid that injury through the exercise of ordinary care and diligence; and (3) the failure to use ordinary care and diligence to avoid the injury, when to the ordinary mind, the result will be disastrous to another person. *Taylor v Mathews*, 40 Mich App 74, 82-83; 198 NW2d 843 (1972). Stated another way, gross negligence has been defined as "conduct so reckless as to demonstrate a substantial lack of concern for whether an injury results." *Jennings v Southwood*, 446 Mich 125, 145; 521 NW2d 230 (1994).

Defendant here knew that people, including children, were regularly in the railroad yard, either crossing the tracks or playing. The inherent dangers of trains, particularly moving trains, is undisputed, and defendant had the ability to protect against some of those dangers. Defendant contends that gross negligence requires a finding of intent to harm; however, it is well established that gross negligence is something less than an intentional act. *Id.* at 135. Reasonable factfinders could disagree with respect to whether defendant knew with substantial certainty that its failure to take any measures to either eliminate trespassing or protect trespassers from known dangers would result in harm. Thus, this question should have been left to a jury.

III

Plaintiff next claims that the lower court erred in holding, as a matter of law, that defendant did not maintain an attractive nuisance. We agree. Attractive nuisance has been defined as follows:

> A possessor of land is subject to liability for physical harm to children trespassing thereon caused by an artificial condition upon the land, if
>
> (a) the place where the condition exists is one upon which the possessor knows or has reason to know that children are likely to trespass, and
>
> (b) the condition is one of which the possessor knows or has reason to know and which he realizes or should realize will involve an unreasonable risk of death or serious bodily harm to such children, and
>
> (c) the children because of their youth do not discover the condition or realize the risk involved in intermeddling with it or in coming within the area made dangerous by it, and
>
> (d) the utility to the possessor of maintaining the condition and the burden of eliminating the danger are slight as compared with the risk to children involved and

(e) the possessor fails to exercise reasonable care to eliminate the danger or otherwise to protect the children. [Restatement Torts, 2d, § 339; *Rand v Knapp Shoe Stores*, 178 Mich App 735, 740-741; 444 NW2d 156 (1989).]

The court based its decision, in part, on plaintiff's mother's duty to keep her child out of the railroad yard. To the extent that the trial court may have imputed her comparative negligence to plaintiff, this was error. Evidence of a parent's comparative negligence is inadmissible against a child. *Byrne v Schneider's Iron & Metal, Inc*, 190 Mich App 176, 185-187, 189; 475 NW2d 854 (1991). The court also erred with respect to its reliance on *Lyshak, supra*, for its conclusion that the legal duty was on plaintiff's mother, rather than on defendant, to keep him out of the railroad yard. The Court in *Lyshak* was merely commenting on the state of negligence law by pointing out that, at the time *Lyshak* was decided, there appeared to be a higher duty imposed on a possessor of land when a trespassing *dog* was injured than when a trespassing *child* was injured:

> We would be the last to deny, however, that there are real differences in the two cases. Thus the child has responsible parents. They have, as we pointed out in denying recovery to a trespassing child in *Ryan v Towar*, 128 Mich 463, 479; [87 NW 644 (1901)], both a natural and a legal "duty of care and watchfulness," and it is often because of a parental lack of care that the trespassing child is injured. In other words, the parents must keep the children in. It is not up to the adjoining landowner to keep them out. [*Lyshak, supra* at 234.]

The court went on to point out that the same distinction had previously existed between dogs and cattle, but had since changed:

> But again the reported cases disturb our complacency, the logic of our reasoning. For this was also the common law with respect to trespassing cattle. Yet in 1848, the Supreme Court of Illinois (*Seeley v Peters*, 5 Gilman 130, 10 Ill 130) reversed the common law precedent. It thus became a landowner's responsibility to keep trespassing cattle out. Why the change? The Court recognized that the environment for cattle had changed, hence the rule as to their trespasses should also change. "Cows on treeless and sparsely-settled prairies required," it was reasoned, "different treatment from that given to cows in suburban . . . communities." . . . . Do children, likewise, in the densely populated and industrialized areas of today, utilizing as their "playgrounds," city streets, piles of lumber, steel I-beams, vacant lots, even golf courses, require different treatment (meaning that as to them a landowner must exercise reasonable care) from the children of our frontier communities, even from the children of feudal times? This, simply stated, is our problem. [*Id*. at 234-235.]

The Court ultimately imposed an affirmative duty on landowners to carry on activities involving a risk of death or serious bodily harm with reasonable care for the safety of known trespassing children. *Id*. at 249; see also *Ellsworth v Highland Lakes Development Associates*, 198 Mich App 55, 63; 498 NW2d 5 (1993); *Byrne, supra* at 182. Thus, in the present case the lower court's interpretation of and reliance on *Lyshak* was misplaced.

The lower court granted summary disposition with respect to plaintiff's attractive nuisance claim based, in part, on a distinction between "playing" and merely crossing the tracks. In *Lyshak*, *supra*, the Court suggested that liability should be found where a possessor of land leaves exposed anything "which they [children] in their immature judgment might naturally suppose they were at liberty to *handle or play with*." *Id.* at 242 (emphasis added). The Restatement advises that attractive nuisance may be found where "children because of their youth do not discover the condition or realize the risk involved in intermeddling with it or in coming within the area made dangerous by it." Restatement 2d Torts, § 339(c); *Rand*, *supra* at 740-741. Thus, the cases on point do not require proof that a child was playing, but rather require proof that the child "intermeddled" with the dangerous condition because of childish impulses and lack of understanding of the dangers involved.

The court also concluded that because James had been told that trains were dangerous, this knowledge made him "aware of the inherent danger a train might pose, for instance, that a standing train could move at anytime." The law recognizes that a child *under* the age of seven is incapable of negligence as a matter of law, but this does not mean that a child is presumptively negligent as soon as he reaches the age of seven. See *Burhans v Witbeck*, 375 Mich 253, 255; 134 NW2d 225 (1965). Rather, recovery may be barred where evidence shows that the child appreciated the danger or risk involved, typically a question of fact left to the jury. See *Cox v Hayes*, 34 Mich App 527, 533-534; 192 NW2d 68 (1971). The capacity of a child of seven or older is a question of fact for the jury, and the child's age is only one factor for a jury to consider when determining whether the child did or should have realized the risk. *Burhans*, *supra* at 255; *Taylor*, *supra* at 91-92. There was insufficient evidence from which the court could have determined, as a matter of law, that plaintiff realized the danger involved in climbing under the train.

The court concluded that because James' mother warned her son not to climb on moving trains he was therefore aware of the inherent dangers a train might impose, including the danger that it might start moving at any time, and that because he was merely doing what he was told, that he was not acting on childish impulses. As any person who has ever observed a child realizes, many children play and act on childish impulses even while they are walking or carrying out some other task. Although plaintiff's mother did direct him to cross the railroad yard to retrieve his belongings, there was no evidence that she instructed him to climb through a train to do so. These were all questions of material fact on which reasonable minds could differ. The trial court's dismissal of plaintiff's attractive nuisance claim pursuant to MCR 2.116(C)(10) was erroneous.

Reversed and remanded for further proceedings. We do not retain jurisdiction.

/s/ William B. Murphy
/s/ Kurtis T. Wilder

I concur in result only.

/s/ Hilda R. Gage