

STATE OF MICHIGAN
COURT OF APPEALS

LARINA HALL,

Plaintiff-Appellant,

v

CONSOLIDATED RAIL CORPORATION,

Defendant-Appellee.

UNPUBLISHED

March 30, 1999

No. 201091

Wayne Circuit Court

LC No. 93-324945 NO

Before: Doctoroff, P.J., and Smolenski and Whitbeck, JJ.

PER CURIAM.

Plaintiff appeals as of right from the trial court's order granting defendant's motion for summary disposition. We reverse and remand.

Defendant moved for summary disposition under MCR 2.116(C)(8) and (10). A trial court's decision with respect to a motion for summary disposition is reviewed de novo. *West Bloomship Charter Twp v Karchon*, 209 Mich App 43, 48; 530 NW2d 99 (1995). A motion for summary disposition pursuant to MCR 2.116(C)(8) tests the legal sufficiency of a claim by the pleadings alone. *Smith v Kowalski*, 223 Mich App 610, 612; 567 NW2d 463 (1997). Summary disposition is warranted under MCR 2.116(C)(8) if the claim is so clearly unenforceable as a matter of law that no factual development could establish the claim and justify recovery. *Smith, supra* at 612-613. A motion for summary disposition under MCR 2.116(C)(10) tests the factual basis of a claim. *Larrow v Miller*, 216 Mich App 317, 319; 548 NW2d 704 (1996). Summary disposition is warranted under MCR 2.116(C)(10) if the documentary evidence submitted by the parties, when viewed in favor of the nonmoving party, fails to create a genuine issue of material fact. *Horn v Dep't of Corrections*, 216 Mich App 58, 66; 548 NW2d 660 (1996). A trial court is not permitted to make factual findings on disputed factual issues in resolving a motion for summary disposition under MCR 2.116(C)(10). *Skinner v Square D Co*, 445 Mich 153, 161; 516 NW2d 475 (1994).

In this case, the trial court correctly held that defendant was under no duty to install additional or different warning signals at the crossing where plaintiff was injured. MCL 257.668(2); MSA 9.2368(2); *Turner v CSX Transportation, Inc*, 198 Mich App 254, 256; 497 NW2d 571 (1993).

Nonetheless, the focus of plaintiff's complaint was that defendant breached its duty to maintain the required warning signals and devices in proper working order and that defendant had notice of the defect. In this regard, plaintiff's complaint alleges a cause of action upon which relief may be granted. See, e.g., *Wheeler v Grand Trunk W R Co*, 161 Mich App 759, 762; 411 NW2d 853 (1987); see also *Masters v Grand Trunk W R Co*, 13 Mich App 80, 83; 163 NW2d 661 (1968). Therefore, summary disposition under MCR 2.116(C)(8) was not warranted.

We also conclude that summary disposition was improper under MCR 2.116(C)(10). Although defendant presented evidence that the crossing was inspected both the day before and the day after the accident, at which time all warning devices were determined to be in proper working order, the testimony of Barbara Jones, an eyewitness to the accident, viewed most favorably to plaintiff, was sufficient to establish a genuine issue of material fact as to whether the crossing gates were working properly at the time of the accident. Moreover, Jones' testimony concerning a possible malfunction at the time of the subject accident, viewed in conjunction with her testimony of a history of malfunctions at the same location, was sufficient to establish a genuine issue of material fact with regard to whether defendant had notice of the allegedly dangerous condition. *Wheeler, supra*; see also *O'Loughlin v Detroit & Mackinac R Co*, 22 Mich App 146, 154, n 9; 177 NW2d 430 (1970). The weight and credibility of Jones' testimony was for the trier of fact to resolve. *Williams v Grand Trunk W R Co*, 344 Mich 84, 88-89; 73 NW2d 455 (1955).

Finally, any violation of MCL 257.667(1); MSA 9.2367(1), while potentially relevant to the issue of plaintiff's comparative negligence, would not operate as a complete bar to plaintiff's claim. See, e.g., *Klanseck v Anderson Sales & Service, Inc*, 426 Mich 78, 86-87; 393 NW2d 356 (1986); *Poch v Anderson*, 229 Mich App 40, 48; 580 NW2d 456 (1998).

Reversed and remanded. We do not retain jurisdiction.

/s/ Martin M. Doctoroff
/s/ Michael R. Smolenski
/s/ William C. Whitbeck