# STATE OF MICHIGAN

# COURT OF APPEALS

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TONY MARTINEZ, Personal Representative of the ESTATE OF JEFFREY A. MARTINEZ, Deceased,

Plaintiff-Appellant,

v

CONSOLIDATED RAIL CORPORATION, CITY OF TRENTON, and DETROIT EDISON COMPANY,

Defendants-Appellees,

and

WAYNE COUNTY ROAD COMMISSION,

Defendant.

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UNPUBLISHED
December 21, 2001

No. 220289
Wayne Circuit Court
LC No. 96-634860-NO

Before: Zahra, P.J., and Smolenski and Talbot, JJ.

PER CURIAM.

In this wrongful death action, plaintiff appeals as of right, challenging a jury verdict of no cause of action in favor of defendant City of Trenton, an order in limine restricting the arguments and evidence with regard to defendant Consolidated Rail Corporation ("Conrail"), orders granting a directed verdict in favor of defendants Conrail and Detroit Edison, and an order denying plaintiff's motion for a new trial. We affirm.

## I. Conrail's Motion in Limine

Plaintiff first argues that the trial court erred in granting Conrail's motion in limine, which precluded plaintiff from arguing or presenting evidence concerning many of his claims. We review de novo the questions of law that are presented here. *Cardinal Mooney High School v Michigan High School Athletic Ass'n*, 437 Mich 75, 80; 467 NW2d 21 (1991).

## A. Federal Preemption

Under the Supremacy Clause, US Const, art VI, cl 2, federal law preempts state law in three circumstances: (1) where Congress has expressed an intent to preempt state law; (2) where state law regulates conduct in a field that Congress intended to occupy exclusively; and (3) where state law actually conflicts with federal law. *Grand Trunk Western Railroad Co v City of Fenton*, 439 Mich 240, 243-244; 482 NW2d 706 (1992). In 1970, Congress enacted the Federal Railroad Safety Act ("FRSA"), 49 USC 20101 *et seq.*, formerly 45 USC 421 *et seq*. The FRSA preempts duties imposed by state law (including common law duties) whenever federal regulations have been issued "covering" the subject, that is, "substantially subsum[ing] the subject matter of the relevant state law." *CSX Transp, Inc v Easterwood*, 507 US 658, 664, 668; 113 S Ct 1732; 123 L Ed 2d 387 (1993).

Under the FRSA, state laws are saved from preemption where: (1) no rule or standard has been issued on the subject; and (2) where additional or more stringent state laws are "necessary to eliminate or reduce an essentially local safety hazard," provided that such rules (a) are not incompatible with federal law, (b) nor impose an undue burden on interstate commerce. *Grand Trunk*, *supra* at 244, 249; see also 49 USC 20106. Because the FRSA refers to state laws, local ordinances relating to train safety are *not* saved from preemption, even if the federal government has not issued regulations covering their subject matter. See *Grand Trunk*, *supra* at 244, 249; see also *CSX Transp, Inc v City of Plymouth*, 86 F3d 626, 628-629 (CA 6, 1996) (*Plymouth I)*.

As argued by plaintiff, in *Emery v Chesapeake & Ohio Ry Co*, 372 Mich 663, 672-680; 127 NW2d 826 (1964), our Supreme Court held that, in addition to duties mandated by statute, railroads have a common law duty to use ordinary care, including a duty to warn, which does not depend on the existence of unusual conditions. However, *Emery* was decided before the enactment of the FRSA and, therefore, does not discuss federal preemption. Further, state courts are bound by United States Supreme Court decisions on federal questions, such as the scope of FRSA preemption. See *Betty v Brooks & Perkins*, 446 Mich 270, 276; 521 NW2d 518 (1994). Other federal cases are also binding concerning federal questions, at least when there is no conflict among the circuits. *Etefia v Credit Techs, Inc*, 245 Mich App 466, 470; 628 NW2d 557 (2001).

## B. Duty to Warn

As part of the FRSA, Congress enacted the Federal Railway-Highway Crossings Program ("Crossings Program") to provide funds for states to eliminate hazards at railroad crossings. *Norfolk Southern Ry Co v Shanklin*, 529 US 344, 347-348; 120 S Ct 1467; 146 L Ed 2d 374 (2000); *Easterwood*, *supra* at 663. As part of the program, federal regulations were issued requiring certain kinds of warning devices at crossings that were found to meet certain conditions. *Shanklin*, *supra* at 348-349; *Easterwood*, *supra* at 670-671. In *Easterwood*, the Supreme Court held that, where federal regulations concerning warning signs are shown to be "applicable, state tort law is pre-empted." *Easterwood*, *supra* at 670. Later, in *Shanklin*, where a crossing improvement project had been federally approved and warning signs had been installed using federal funds, the Court found that state regulation had been "displace[d]," and that state tort claims based on inadequate warning signs were preempted regardless of whether there had been strict compliance with federal regulations. *Shanklin*, *supra* at 350, 353-355, 357-359.

Similarly, this Court has held that any alleged duty to deploy a flagman is preempted by the FRSA speed regulations because, "if a train cannot be compelled to slow down as it approaches a crossing, it also cannot be compelled to stop altogether in order to deploy a flagman." *Paddock v Tuscola & Saginaw bay Ry Co*, 225 Mich App 526, 531; 571 NW2d 564 (1997).

### C. Crossing Blocking Laws

Regarding crossing blocking laws, the Sixth Circuit Court of Appeals held in *Plymouth I*, *supra* at 629-630, that a local ordinance limiting the length of time a train may block a crossing is a law "relating to railroad safety" and, therefore, is preempted by FRSA. Subsequently, *CSX Transp, Inc v City of Plymouth*, 92 F Supp 2d 643, 651-652, 654 (ED Mich, 2000) (*Plymouth II*), the court reached this conclusion with regard to Michigan's crossing blocking statute, MCL 462.391.

In a well-reasoned opinion, the district court in *Plymouth II* found that although federal regulations do not address how long a train may block a crossing, Michigan's crossing blocking statute had the effect of indirectly regulating train speed, length, and the performance of federally mandated air brake tests. *Plymouth II*, *supra* at 652, 653-657. Because federal regulations substantially subsume these three areas, Michigan's crossing blocking statute was not saved from preemption by the first savings clause. *Plymouth II*, *supra* at 657.

Similarly, because the statute was generally applicable throughout Michigan, it was not "necessary to eliminate or reduce an essentially local safety hazard," and it was not saved from preemption by the second exception. *Plymouth II*, *supra* at 657. By indirectly regulating train speed and length, Michigan's crossing blocking statute was also found to impose an undue burden on interstate commerce, thereby precluding application of the second preemption exception. *Plymouth II*, *supra* at 659-663.

Addressing the argument that a rail yard could be reconfigured to avoid blocking the crossing, the district court added that "[r]equiring substantial capital improvements as a form of compliance would directly burden interstate commerce, and impermissibly subject railroads to differing obligations from state to state." *Plymouth II*, *supra* at 661-662. The court further noted that a state's attempts to require substantial capital improvements are preempted by the Interstate Commerce Commission Termination Act ("ICCTA"), 49 USC 10101 *et seq*. *Plymouth II*, *supra* at 658-659. Among other things, the ICCTA grants exclusive jurisdiction to the Surface Transportation Board ("STB") over the "construction, acquisition, operation, abandonment, or discontinuance of spur, industrial, team, switching, or side tracks, or facilities, even if the tracks are located, or intended to be located, entirely in one State." *Plymouth II*, *supra* at 658-659; see also 49 USC 10501(b)(2). The STB also has exclusive jurisdiction over "transportation by rail carriers, and the remedies provided in this part with respect to rates, classifications, rules (including car service, interchange, and other operating rules), practices, routes, services, and facilities of such carriers." *Plymouth II*, *supra* at 658-659; see also 49 USC 10501(b)(1).

Further, in *Simpson v Pere Marquette Ry Co*, 276 Mich 653, 655-656; 268 NW 769 (1936), our Supreme Court held that, as a matter of law, a railroad's violation of Michigan's crossing blocking law "was not the proximate cause of [a] collision in the sense of want of duty of the defendant toward plaintiff." Citing cases from other jurisdictions, the Supreme Court

agreed that exceeding the time allowed was not a proximate cause of the accident; rather, it was the fact that the crossing was blocked (whether by a stopped or a moving train), and not how long it had been blocked, that created the conditions under which the accident occurred. *Simpson, supra* at 658-662. "The proximate cause of the accident was the negligence of the driver of the automobile who, with knowledge that she was approaching a railroad crossing, did not observe the obvious fact that a railroad car was across the highway." *Simpson, supra* at 656.

### D. State Preemption

As part of the Crossings Program, federal law requires that states receiving federal aid establish railway/highway safety programs. *Easterwood, supra* at 665-666. Where federal standards do not mandate the installation of specific warning devices, states and/or railroads can determine what warning signs are necessary at a particular crossing, subject to federal approval. *Easterwood, supra* at 666-667. States are also free to install or require additional warnings, but they cannot hold a railroad responsible for the adequacy of warnings installed with federal dollars. *Shanklin, supra* at 358. Thus, our Legislature has provided that

> [t]he erection of or failure to erect, replace, or maintain a stop or yield sign or other railroad warning device, unless such devices or signs were ordered by public authority, shall not be a basis for an action of negligence against the state transportation department, county road commissions, the railroads, or local authorities. [MCL 257.668(2).]

This statute has therefore eliminated any arguably remaining common law duty of the railroad to provide warning signs, unless ordered by a public authority. *Turner v CSX Transp Inc*, 198 Mich App 254, 256; 497 NW2d 571 (1993). Further, there is no common law duty to petition a public authority for such an order. *Hall v Consolidated Rail Corp*, 462 Mich 179, 185; 612 NW2d 112 (2000); *Paddock, supra* at 531-533; *Turner, supra* at 256-257.

### E. Analysis

In light of the foregoing, we conclude that plaintiff cannot maintain a state tort action against Conrail for failure to provide warning devices such as flares or fuses, a flagman, bells or whistles, or any other warnings. The duty to warn is preempted by federal law and, even if some duty survives the FRSA, it is preempted by state law. The trial court therefore did not err in limiting plaintiff's duty to warn claims.

Similarly, because both state and local crossing blocking laws are preempted, the trial court did not err in precluding plaintiff from arguing that Conrail had unreasonably blocked the crossing. Further, our Supreme Court has held that, as a matter of law, violations of blocking crossing laws are not a proximate cause of auto-train collisions. Although plaintiff argues that he wanted to use the violations of the crossing blocking laws as evidence of negligence, not to show negligence per se, he has failed to first establish that Conrail owed him a duty to refrain from blocking the crossing.

Conrail's alleged duty to find other ways to avoid blocking the crossing (such as picking up fewer cars or reconfiguring the Edison yard), is also preempted by ICCTA. Further, requiring

Conrail to pick up fewer cars or reconfigure the yard would impose an unreasonable burden on interstate commerce.

Lastly, although plaintiff argues that he should be able to present evidence that Conrail violated federal regulations, he has failed to cite to any federal standards that allegedly were violated, or cite any authority providing him a cause of action to enforce those standards. The regulations mentioned in *Stone v CSX Transp, Inc*, 37 F Supp 2d 789, 794-795 (SD W Va, 1999), 49 CFR §§ 234.1 - 234.6, the only case upon which plaintiff relies, concern the railroad's duties and liabilities with respect to inspection and maintenance of habitually-malfunctioning automatic warning signals, which are irrelevant to this case and explicitly provide for "civil and criminal penalties." The portion of the decision quoted by plaintiff merely states that, although plaintiff's claims of negligent inspection and maintenance are preempted, plaintiff might be able to show that frequent false activations create a local hazard requiring stricter regulations; if not, it would be necessary to proceed under the applicable federal regulations. See *Stone, supra* at 797-798.

The trial court did not err in granting Conrail's motion in limine.

## II. Conrail's Motion for Directed Verdict

Plaintiff next argues that although unusual conditions should not have been required, the trial court erred in granting Conrail's motion for a directed verdict on the basis that plaintiff failed to show the existence of unusual conditions at the time of the accident. Although we don't fully agree with the trial court's reasoning, we agree that a directed verdict was warranted. This Court will not reverse when the trial court reaches the right result for the wrong reason. See *In re People v Jory*, 443 Mich 403, 425; 505 NW2d 228 (1993).

In reviewing a trial court's decision on a motion for a directed verdict, this Court examines the testimony and all legitimate inferences that may be drawn in the light most favorable to the non-moving party. If reasonable jurors could honestly have reached different conclusions, the motion should have been denied. *Matras v Amoco Oil Co*, 424 Mich 675, 681-682; 385 NW2d 586 (1986). Questions of law are reviewed de novo. *Cardinal Mooney HS, supra* at 80.

We agree with plaintiff that *Emery*, *supra*, impliedly overruled the cases relied on by the trial court, which required the existence of special conditions before a railroad could be charged with a duty of care beyond that imposed by statute. See *Emery*, *supra* at 673-674, 680 (criticizing *McParlan v Grand Trunk W R Co*, 273 Mich 527, 533-534; 263 NW 734 (1935), and its progeny). As discussed previously, however, common law duties of care have been largely preempted by the FRSA.

In *Easterwood*, the railroad "concede[d] that the pre-emption of respondent's excessive speed claim does not bar suit for breach of related tort law duties, such as the duty to slow or stop a train to avoid a specific, individual hazard." *Easterwood, supra* at 675 n 15. However, the Court noted, "[a]s respondent's complaint alleges only that petitioner's train was traveling too quickly given the 'time and place,' . . . this case does not present, and we do not address, the question of FRSA's pre-emptive effect on such related claims." *Easterwood, supra* at 675 n 15 (citation omitted).

More significantly, this Court has agreed "that an allegedly dangerous railroad crossing itself does not constitute 'a specific, individual hazard'" by reason of its "vegetation, grade and angle" or "inadequate warnings" because such a construction would swallow the rule. *Paddock, supra* at 529-531. The decision in *Paddock* endorsed the proposition that "a specific, individual hazard" "relates to the avoidance of a specific collision," not to the physical conditions characteristic of a particular crossing. *Paddock, supra* at 531, quoting *Armstrong v Atchison, Topeka, & S F R Co*, 844 F Supp 1152, 1153 (WD Tex, 1994). "A 'specific, individual hazard' is, for example, a child standing on the roadway." *Stone, supra* at 796; see also *Bakhuyzen v Nat'l Rail Passenger Corp*, 20 F Supp 2d 1113, 1117-1118 (WD Mich, 1996) (weather conditions may create a specific individual hazard).

In the present case, there was no proof that anything unique or unusual was happening at the crossing on the night of the accident that might have given rise to additional common law duties. Although it was dark and cloudy, there was no evidence that the night of the accident was unusually dark or foggy, or that normal nighttime visibility was compromised in any way. Further, none of the conditions identified by plaintiff -- "'poorly illuminated' crossing, angled tracks, the absence of flashing signals, or audible warnings, cloudy weather, dark backdrop, and a rural setting" -- are specific, individual hazards as defined by caselaw. The trial court did not err in granting Conrail's motion for a directed verdict. *Jory, supra* at 425.

## III. Edison's Motion for Directed Verdict

Plaintiff also argues that the trial court erred in granting Edison's motion for a directed verdict. We disagree.

Although Edison is not protected by statutes governing railroads, we find that plaintiff failed to show that Edison breached a duty of care owed to plaintiff. There was no evidence that Edison owned the crossing. In fact, Conrail stipulated that it owned the tracks, but there was no evidence concerning ownership or control of the land where the accident occurred. Further, although Edison admitted that it owned the light poles and maintained the lights, there was no evidence that they were working improperly. The City of Trenton, not Edison, selected the location, fixtures and wattage of the lights; and maintained the pavement markings. There was also no evidence concerning who actually made the decision concerning how many railroad cars would be picked up on any given occasion. There is no basis for finding that Edison had a duty to illuminate the crossing or install warning signals. See MCL 257.615; MCL 462.303; MCL 462.311; MCL 462.315. In fact, Edison is prohibited from installing lights or signals without proper authorization. See MCL 257.615(a). Lastly, even if Edison was directly or indirectly responsible for the crossing being blocked, the fact that it was blocked was not a proximate cause of the accident. *Simpson, supra* at 655-656, 658-662.

In sum, plaintiff failed to introduce any evidence from which a reasonable person could find that Edison breached any duty of care towards the decedent that proximately caused the accident. The trial court did not err in granting Edison's motion for a directed verdict.

## IV. Plaintiff's Motion for New Trial

Lastly, plaintiff argues that the trial court erred in denying his motion for a new trial against the City of Trenton. A trial court's decision granting or denying a motion for a new trial will not be reversed absent a palpable abuse of discretion. *Joerger v Gordon Food Service, Inc*, 224 Mich App 167, 172; 568 NW2d 365 (1997).

Plaintiff has failed to cite any legal authority or factual support for his argument. "A party may not merely announce a position and leave it to the Court of Appeals to discover and rationalize the basis for the claim." *Joerger*, *supra* at 178. We therefore find that this issue has been abandoned.

Affirmed.

/s/ Brian K. Zahra
/s/ Michael R. Smolenski
/s/ Michael J. Talbot