

An unpublished opinion of the North Carolina Court of Appeals does not constitute controlling legal authority. Citation is disfavored, but may be permitted in accordance with the provisions of Rule 30(e)(3) of the North Carolina Rules of Appellate Procedure.

NO. COA07-1571

NORTH CAROLINA COURT OF APPEALS

Filed: 18 November 2008

KAREN HOLMES, Administrator of
The Estate of ROBERT L. BURT, JR.
Plaintiff

v.

Wake County
No. 07 CVS 4798

CSX TRANSPORTATION, INC.,
NORFOLK SOUTHERN CORPORATION, and
NORFOLK SOUTHERN RAILWAY COMPANY
Defendants

Court of Appeals

Appeal by plaintiff from judgment entered 1 October 2007 by Judge Donald W. Stephens in Wake County Superior Court. Heard in the Court of Appeals 21 May 2008.

Slip Opinion

Mast, Schulz, Mast, Johnson & Wells, PA, by Charles D. Mast, George B. Mast & Ron L. Trimyer, Jr., for plaintiff-appellant.

Millberg Gordon & Stewart, P.L.L.C., by Frank J. Gordon, for defendant-appellee CSX Transportation, Inc.

Bode Call & Stroupe, L.L.P., by Odes L. Stroupe, Jr. & John S. Byrd, for defendant-appellees Norfolk Southern Corp., et al.

STEELMAN, Judge.

When the uncontroverted evidence showed that there was an unobstructed view to vehicles at a railroad crossing of between 1500 and 4026 feet, defendants had no duty to erect gates or mechanical warnings at the crossing. The trial court's granting of defendants' motion for summary judgment is affirmed.

I. Factual and Procedural Background

"This action arises out of a collision between an Amtrak train and a motor vehicle at a railroad grade crossing located off of Hillsborough Street between Raleigh and Cary. The crossing runs over two main line railroad tracks and provides access to two businesses located on the other side of the tracks." *Loredo v. CSX Transp., Inc.*, 169 N.C. App. 508, 509, 610 S.E.2d 225, 226 (2005), *affirmed* 360 N.C. 354, 625 S.E.2d 777 (2006).

At approximately 9:12 p.m. on 14 December 2000, plaintiff's decedent was the front-seat passenger in a 1996 Ford automobile, which was struck by an eastbound Amtrak train traveling on a track operated by the Norfolk Southern defendants.

On 28 March 2007, plaintiff re-filed a complaint in Wake County Superior Court, asserting that defendants' negligence in affording reasonable protection for motorists using the Bashford Road crossing was a proximate cause of the collision, which resulted in the death of plaintiff's intestate. In her prayer for relief, plaintiff sought compensatory and punitive damages, attorneys' fees, and requested a jury trial.

Defendant CSX Transportation filed an answer on 2 May 2007, denying plaintiff's negligence claim and pleading federal preemption, contributory negligence, and third party intervening negligence as affirmative defenses. The Norfolk Southern defendants filed an answer on 9 May 2007 in which they denied plaintiff's claims and pled similar affirmative defenses.

All parties filed motions for summary judgment. Defendants' motions for summary judgment, filed on 18 and 24 July 2007, were supported by affidavits related to this action and depositions taken in the *Loredo* action, which involved a collision at the identical railroad crossing where plaintiff's intestate was killed. Plaintiff's motion for summary judgment, filed 27 August 2007, was likewise supported by affidavits, as well as *Loredo* depositions and a transcript of testimony in *Dept. of Transportation v. Overton*, 111 N.C. App. 857, 433 S.E.2d 471 (1993), *disc. rev. improv. allowed*, 336 N.C. 598, 444 S.E.2d 448 (1994). In its motion, plaintiff sought summary judgment on the issue of duty against all defendants and summary judgment on all issues, except damages, against defendant Norfolk Southern Corporation.

On 1 October 2007, the trial court entered an order granting defendants' motions for summary judgment and dismissed plaintiff's action, with prejudice. Plaintiff appeals.

II. Standard of Review

Summary judgment is appropriate when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law." N.C. Gen. Stat. § 1A-1, Rule 56(c) (2003); *DiOrio v. Penny*, 331 N.C. 726, 728, 417 S.E.2d 457, 459 (1992). The record is reviewed in the light most favorable to the non-movant, and all inferences are drawn against the movant. *Caldwell v. Deese*, 288 N.C. 375, 378, 218 S.E.2d 379, 381 (1975). The trial court does not resolve issues of fact and must deny a motion for summary judgment if there is a genuine issue as to any material fact.

Ragland v. Moore, 299 N.C. 360, 363, 261 S.E.2d 666, 668 (1980).

Loredo, 169 N.C. App. at 510, 610 S.E.2d at 227.

III. Analysis

In her first two arguments, plaintiff contends that the trial court committed reversible error in granting defendants' motions for summary judgment and in denying her motion for summary judgment because the evidence established a genuine issue of material fact regarding sight distance at the Bashford Road crossing. We disagree.

This case is controlled by our decision in *Loredo v. CSX Transp., Inc.*, 169 N.C. App. 508, 509, 610 S.E.2d 225, 226 (2005), *affirmed* 360 N.C. 354, 625 S.E.2d 777 (2006), which dealt with another accident that occurred at the identical railroad crossing in Wake County.

The unobstructed view at the crossing permits a motorist to safely observe whether a train is approaching without using extraordinary protective means. Defendants' duty under our common law is to warn a motorist of an approaching railroad crossing and train, and that duty is met when a motorist stopped safely behind a stop sign at the crossing has an unobstructed view of an approaching train. *See Price*, 274 N.C. at 46, 161 S.E.2d at 600.

Id. at 513, 610 S.E.2d at 228-29.

Loredo held that, where there was an unobstructed view of more than 1500 feet down the tracks for a motorist stopped at the stop sign or stop bar, there was no duty to install gates or flashing lights at the intersection.

In this case, the deposition evidence from *Loredo* was before the trial court. In addition, there was expert testimony in the instant case from Dr. Charles Manning that the unobstructed sight distance to the east (the direction from which the train came on the fatal night) was 4026 feet.

Plaintiff makes an argument that, since the distance from the tracks to Hillsborough Street was only 57 feet, and trucks greater than that length used the crossing, defendants were thus required to install additional protective devices at the intersection. This is irrelevant to the instant case, where plaintiff's intestate was a passenger in an automobile, which was much less than 57 feet in length. The uncontroverted evidence in this case is that the automobile had an unobstructed view of the tracks to the east of the crossing for a great distance, and, given the speed of the train, had more than adequate time to safely cross the tracks ahead of the train.

There was no genuine issue of material fact in this case. Defendants did not have a duty to erect gates or other mechanical warnings at the intersection. The trial court properly granted summary judgment in favor of defendants.

Plaintiff's remaining argument is also without merit.

AFFIRMED.

Judges MCGEE and GEER concur.

Report per Rule 30(e).