

STATE OF MICHIGAN
COURT OF APPEALS

DIANE M. LANDSFELD, Personal Representative of
the Estate of FRANK JOSEPH LOCICCHIO,
deceased

Plaintiff–Appellant,

v

GRAND TRUNK WESTERN RAILROAD and
OAKLAND COUNTY ROAD COMMISSION,

Defendants-Appellees,

UNPUBLISHED
July 5, 1996

No. 179888
LC No. 93-461885

Before: Taylor, P.J., and Murphy and E. J. Grant,* JJ.

PER CURIAM.

Plaintiff, as the personal representative of decedent's estate, appeals as of right from circuit court orders granting defendants' motions for summary disposition in this wrongful-death case in which plaintiff's decedent was killed when his car was struck by a freight train. We affirm in part, reverse in part, and remand for further proceedings.

Initially, plaintiff argues that defendant, Grand Trunk Western Railroad (Grand Trunk), was not entitled to summary disposition because there was a genuine issue of material fact regarding whether the train was speeding at the time of the collision. We disagree.

Plaintiff contends that Grand Trunk was negligent because the train was traveling at a rate of forty-three miles per hour, which exceeded the speed limit of forty miles per hour. However, the Employees' Operating Timetable produced by Grand Trunk established that the train was traveling at a rate of forty miles per hour near and at the time of the collision. The engineer for the railroad also testified at his deposition that the train was traveling forty miles per hour when it entered the intersection. Because there was uncontroverted evidence that the train was not exceeding the speed limit, Grand Trunk was properly granted summary disposition on this ground. *Radtke v Miller, Canfield, Paddock & Stone*, 209 Mich App 606, 612; 532 NW2d 547 (1995).

*Circuit judge, sitting on the Court of Appeals by assignment.

Next, plaintiff claims that the trial court improperly granted defendants' summary disposition because defendant, Oakland County Road Commission, and Grand Trunk breached their duty of care to the decedent by failing to install additional or different warning devices at the crossing pursuant to the agreement between Grand Trunk and the Michigan Department of Transportation. We disagree.

Pursuant to MCL 257.668(2); MSA 9.2368(2), where there is no order by a public authority directing that additional warning devices or signals be installed, a railroad or road commission cannot, under the clear and unambiguous language of the statute, be held liable for the failure to erect additional warning devices or signals. *Taylor v Lenawee Road Commissioners*, 216 Mich App 435, 438-439; ___ NW2d ___ (1996); *Turner v CSX Transportation, Inc*, 198 Mich App 254, 256; 491 NW2d 571 (1993); *Edington v Grand Trunk Western Railroad Co*, 165 Mich App 163, 168; 418 NW2d 415 (1987). In this case, there was no order by a public authority ordering that additional or different warning devices be installed at the railroad crossing. Moreover, the agreement upon which plaintiff relies is not equivalent to an order. Even if the agreement constituted an order, it was not violated because it was signed in 1990, and Grand Trunk agreed to perform certain work within five years of the date of the execution of the agreement. However, the accident occurred in 1993, before the work was to be completed. Therefore, the trial court properly granted summary disposition to defendants on this basis.

Next, plaintiff argues that defendants were negligent in failing to petition the proper authorities for installation of different or additional warning devices at the crossing. However, a railroad or road commission has no common-law duty to petition the appropriate governmental entity for authority to install warning devices at railroad crossing. *Turner, supra* at 257, n 1; *Edington, supra*. Pursuant to MCL 257.615(a); MSA 9.2315(a) and MCL 257.668; MSA 9.2368, the duty to determine appropriate warning devices lies with the governmental entity that has jurisdiction over the roadway. Because defendants had no common-law duty to petition the appropriate governmental entity for authority to install warning devices at the railroad crossing, they were entitled to summary disposition on this basis.

Finally, plaintiff argues that the trial court erred in summarily dismissing her nuisance claim (Count II) against Grand Trunk because there was no discussion by the court of this issue and Grand Trunk did not seek dismissal of this claim. We agree.

In this case, plaintiff's amended complaint alleged that Grand Trunk maintained a nuisance-in-fact at the railroad crossing and that it was a proximate cause of the accident. Grand Trunk's motion for summary disposition sought dismissal of plaintiff's negligence claim and did not specifically address the nuisance claim. Plaintiff brought this to the trial court's attention in her response to Grand Trunk's motion for summary disposition and in her objections to the proposed order. Under these facts, the trial court improperly dismissed Count II. Grand Trunk is free to move for summary disposition of Count II of plaintiff's complaint on remand.

Affirmed in part, reversed in part, and remanded for further proceedings. We do not retain jurisdiction.

/s/ Clifford W. Taylor
/s/ William B. Murphy
/s/ Edward J. Grant