STATE OF MICHIGAN

COURT OF APPEALS

TIMOTHY P. PICKARD, Personal Representative of the Estate of PAMELA SUE FOX,

Plaintiff-Appellant,

v

LENAWEE COUNTY ROAD COMMISSIONERS,

Defendant-Appellee,

and

NORFOLK & WESTERN RAILWAY,

Defendant.

UNPUBLISHED
October 11. 1996

No. 177518
LC No. 93-005902-NI

Before: Jansen, P.J., and Hoekstra and D. Langford Morris,* JJ.

PER CURIAM.

Plaintiff appeals as of right from an order of the Lenawee Circuit Court granting defendant Road Commission's (defendant's) motion for summary disposition and an order denying plaintiff's motion to compel discovery and awarding defendant costs of $608.75. We affirm.

Plaintiff represents the estate of Pamela Sue Fox, who was killed when her car was struck by a train as she was crossing a railroad track in Lenawee County. Plaintiff filed suit against defendant claiming that the roadway where the accident occurred, which was under defendant's jurisdiction, was defective due to improper signage. Specifically, plaintiff alleges that a stop and a stop ahead sign located prior to the railroad tracks were negligently placed too far east of the edge of the roadway and were a proximate cause of Fox's death. The trial court granted defendant's motion for summary disposition, finding that the sign placement could not have been a proximate cause of Fox's death given her familiarity with the roadway and that the signs, which were placed in accordance with the Michigan Manual, had been properly placed.

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

We agree with the trial court that defendant is entitled to summary disposition, albeit for a different reason. Defendant is immune from tort liability for the death of Fox because MCL 257.668(2); MSA 9.2368(2) bars plaintiff's cause of action against defendant under MCL 691.1402; MSA 3.996(102). See *Taylor v Grand Trunk Western Railroad*, 216 Mich App 435; 549 NW2d 80 (1996).

Although MCL 691.1402; MSA 3.996(102) provides that a person sustaining bodily injury or property damage by reason of failure on the part of a governmental agency to keep the highway under its jurisdiction in a condition reasonably safe and fit for travel may recover the damages suffered by him, MCL 257.668(2); MSA 92368(2) limits a person's ability to recover against a governmental agency for improper signage relative to a railroad crossing. MCL 257.668(2); MSA 9.2368(2) provides, in pertinent part:

> . . .The 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.

Here, plaintiff is attempting to make the alleged negligent erection of the stop and stop ahead signs the basis for the instant action against defendant.[1] That basis is improper under MCL 257.668(2); MSA 9.2368(2). If defendant could not be liable for failing to erect the signs at issue in the first place, then clearly defendant cannot be liable for failing to erect them closer to the roadway.[2]

Turning now to plaintiff's claims regarding the trial court's refusal to compel discovery and its decision to award costs, we find no abuse of discretion. With regard to the trial court's denial of plaintiff's request to compel discovery, we agree with the trial court that plaintiff's request was overly broad and unduly burdensome. Although plaintiff's attorney represents on appeal that the trial court rejected his offer to look through the documents himself in order to spare defendant the burden, this offer was not made at the hearing on plaintiff's motion and there was no outright rejection of this offer by the trial court.

Likewise, we find that the trial court did not abuse its discretion in awarding sanctions to defendant upon the denial of plaintiff's motion to compel. MCR 2.313(A)(5)(b) provides for the imposition of sanctions when a motion to compel discovery is denied unless the trial court finds that the motion was substantially justified or that other circumstances make an award of expenses unjustified. Here, the trial court did not find that either of these exceptions to an award of sanctions was met, and we cannot conclude that the trial court abused its discretion in reaching that decision. Additionally, we find nothing improper in the trial court's calculation of the amount of sanctions owed.

Affirmed.

/s/ Kathleen Jansen
/s/ Joel P. Hoekstra
/s/ Denise Langford-Morris

[1] Although the placement of the phrase "unless ordered by public authority," appears to indicate that it modifies both "the erection of" and "failure to erect" signs, this cannot be so. This phrase only makes sense when applied to the failure of a governmental authority to erect signs after having been ordered to do so. If it also applied to the erection of signs, it would negate all immunity from liability for the erection of signs because presumably all signs which are erected are initially ordered by some type of public authority. See *Edington v Grand Trunk Western Railroad Co*, 165 Mich App 163; 418 NW2d 415 (1987). (This Court defines public authority to include county road commissions);. But see, *Taylor, supra*, n 2. (This Court recognizes the Michigan Public Utilities Commission or the Michigan Department of Transportation to be "the" proper public authority referenced in the statute at issue). Regardless, to hold that the ordering and erection of signs at railroad crossings by a road commission avoids immunity would subject the road commission to liability for negligence in all instances where it erects signs. However, the statute clearly exempts a road commission from liability for not erecting signs unless ordered to do so. Accordingly, any prudent road commission, seeking to avoid liability, would simply choose not to order the placement of any signs itself and wait for the requirement to be imposed upon it. This is clearly contrary to public policy and public safety and cannot reflect the correct interpretation of this statute. It is for these reasons that we believe the fact that the stop and stop ahead signs may have been ordered by the road commission is irrelevant. Furthermore, there is no evidence in the record that any other public authority was involved in the placement or erection of these signs. Accordingly, the immunity provided by MCL 257.668(2); MSA 9.2368(2) cannot be avoided on this basis.

[2]We are aware that our Supreme Court in *Pick v Szymczak*, 451 Mich 607; 548 NW2d 603 (1996) has recently recognized that a duty to provide adequate warning signs or traffic control devices at known points of hazard arises under MCL 691.1402; MSA 3.996(102), the highway exception to governmental immunity. Were the instant case not also subject to the application of MCL 257.668(2); MSA 9.2368(2), we might well have reached a different result.