STATE OF MICHIGAN

COURT OF APPEALS

JENNIFER JOHNSON,

Plaintiff-Appellant,

v

CITY OF BAY CITY and CENTRAL MICHIGAN RAILWAY COMPANY,

Defendants-Appellees.

UNPUBLISHED
July 19, 1996

No. 175961
LC No. 93-003434-NO

Before: Jansen, P.J., and Taylor and J.P. Noecker,* JJ.

PER CURIAM.

Plaintiff appeals as of right from a May 17, 1994, order of the Bay Circuit Court granting summary disposition in defendants' favor pursuant to MCR 2.116(C)(10). We affirm in part and reverse in part.

I

Plaintiff Jennifer Johnson was injured on August 24, 1991, when she fell off her moped while crossing railroad tracks intersecting Water Street in Bay City. Plaintiff alleges that the accident was caused by the railroad tracks being uneven and of a different level with the street surface. She also alleges that the pavement of the street surface was uneven with holes, cracks, and other irregularities, and that the space between the tracks and surrounding pavement surface was irregular and wide. Plaintiff contends that because of these problems, the surface was not safe for two-wheeled vehicles such as her moped.

In count I of her first amended complaint, plaintiff alleged that Bay City owed and breached the following duties: the duty to inspect and observe hazards and defects in the railway surface and railroad crossing; the duty to warn traffic of the hazards and defects; the duty to close the street or detour traffic

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

until the hazardous conditions had been repaired; the duty to maintain the roadway and railroad crossing in reasonable repair; the duty to repair the railroad tracks; and the duty to notify the entity controlling the railroad crossing of the hazardous condition and demand immediate repair of the crossing. In count II of the first amended complaint, plaintiff alleged that Central Michigan Railway Company (Central Railway) owed and breached the following duties: the duty to inspect and observe hazards and defects in the roadway surface and railroad crossing; the duty to warn traffic of the existence of all hazards and defects in the roadway and railroad crossing; the duty to close or detour traffic until the hazardous conditions were repaired; and the duty to maintain the roadway and railroad crossing in reasonable repair.

Defendants moved for summary disposition under MCR 2.116(C)(10). The trial court ruled, with regard to defendant city, that it was not under a duty to maintain the railroad because the pertinent statute placed the duty to maintain the railroad tracks on the railroad. With respect to defendant railroad, the trial court ruled that plaintiff had failed to set forth sufficient facts tending to establish that there was a breach of a duty to use reasonable care in maintaining the railroad. Regarding the nuisance claim raised in the original complaint, the trial court also dismissed that claim ruling that a nuisance claim and negligence claim could not arise out of the same set of facts.

We review the trial court's decision on a motion for summary disposition de novo. *Babula v Robertson*, 212 Mich App 45, 48; 536 NW2d 834 (1995). A motion under MCR 2.116(C)(10) tests the factual basis of the plaintiff's claim. *Radtke v Everett*, 442 Mich 368, 374; 501 NW2d 155 (1993). MCR 2.116(C)(10) permits summary disposition when, except with regard to the amount of damages, there is no genuine issue regarding any material fact and the moving party is entitled to judgment as a matter of law. *Radtke*, *supra*, p 374. The court must consider pleadings, affidavits, depositions, admissions, any other documentary evidence submitted to it, and all reasonable inferences drawn therefrom, and decide whether a genuine issue of any material fact exists to warrant a trial. *Skinner v Square D Co*, 445 Mich 153, 161; 516 NW2d 475 (1994).

II

Plaintiff first argues that the trial court erred in dismissing her claim of failure to maintain against both defendants.

A

We first address plaintiff's claim of failure to maintain against the city. We find that the trial court properly granted summary disposition on this claim to the city because it is under no duty to maintain the railroad tracks.

MCL 469.1; MSA 22.761[1] was in effect at the time that plaintiff filed her complaint and it states in relevant part:

> The parties owning railroad tracks crossing any public highway at grade shall improve, if necessary, and thereafter maintain, renew and repair all railroad roadbed, track and railroad culverts within the confines of the highway, and the surfacing lying between the

> rails and for a distance outside the rails of 1 foot beyond the end of the ties, and the public authorities having jurisdiction over such highway shall improve, if necessary, and thereafter maintain, renew and repair all the rest and remainder of said highway.

We agree with the trial court that this statutory provision places sole responsibility on the entity owning the railroad (here, Central Railway) to maintain and repair the railroad tracks, including one foot of surface beyond the end of the ties. Therefore, the city was under no duty to maintain and repair the railroad tracks. Because it is undisputed that plaintiff fell from her moped when she hit the railroad tracks (by her own deposition testimony), and the city is under no duty in this case to maintain the railroad tracks, plaintiff cannot sustain her failure to maintain claim against the city.

Accordingly, the trial court did not err in granting summary disposition to the city on plaintiff's claim of failure to maintain because the city is under no duty to maintain and repair the railroad tracks.

B

With respect to plaintiff's claim of negligence against the railroad, we find that the trial court erred in granting summary disposition to Central Railway because plaintiff has presented a material factual dispute on this claim.

In her first amended complaint, plaintiff alleges that defendant railroad had a duty to maintain the railroad crossing in reasonable repair. We agree with plaintiff, based on MCL 469.1; MSA 22.761, that the duty to repair and maintain the railroad tracks was with Central Railway. The trial court, however, ruled that Central Railway was entitled to summary disposition on this claim because plaintiff had failed to set forth sufficient evidence tending to show that Central Railway breached its duty to maintain the railroad tracks in reasonable repair. Defendant Central Railway argues on appeal that plaintiff has presented no evidence that the railroad tracks constituted a defect.

Plaintiff claims that because the rails are raised higher than the street level, the rails constitute a defect. According to plaintiff's deposition testimony, she hit the railroad tracks, and she then fell over. City engineer Donald Heffelbower testified at his deposition that the rail was not inset into the street. He stated that because of this raised level or "bump," it would be a hazard for a moped to cross the railroad tracks. Plaintiff had submitted pictures of the railroad tracks to the trial court. The pictures show that there is a gap or rut between the rails and that the rails are not even with the street level. The pictures also show that the rut between the rails is two to three inches deep. Further, plaintiff has submitted an affidavit of her expert, Donald Cleveland, Ph.D., who stated that the railroad failed to maintain the surface of the street in a reasonably safe condition by permitting abrupt surface discontinuities to develop in the tracks. Therefore, according to Dr. Cleveland, the moped would not have been upset had the road and track surface been even and maintained.

Plaintiff contends that because of the gap between the railroad tracks and because the tracks are so elevated from the street level, they constituted a defect, especially for a two-wheeled vehicle such as a moped. Contrary to the trial court's ruling, we find that plaintiff has presented sufficient evidence to

create a material factual dispute regarding whether the railroad breached its duty to maintain the railroad tracks in reasonable repair.

We reject defendant's contention that plaintiff's claim is defeated because of the open and obvious rule. Here, there is a specific statute that places the duty to maintain the railroad tracks on the railroad owning the tracks. Because there is a statutory obligation on the railroad to repair and maintain the railroad tracks, the open and obvious rule does not absolve the railroad of this obligation. See *Walker v City of Flint*, 213 Mich App 18; 539 NW2d 535 (1995); *Haas v City of Ionia*, 214 Mich App 361; 543 NW2d 19 (1995).

Accordingly, plaintiff has submitted sufficient evidence to create a material factual dispute as to whether the railroad breached its duty to maintain the railroad tracks in reasonable repair. The trial court's grant of summary disposition in favor of defendant Central Railway regarding the failure to maintain claim is reversed, and we remand for further proceedings on this claim.

III

Plaintiff next argues that the trial court erred in dismissing her claim of failure to warn against both defendants.

We find that neither the city nor the railroad had a duty to warn in this case, and affirm the grant of summary disposition in favor of both defendants regarding plaintiff's duty to warn claim.

MCL 257.668(2); MSA 9.2368(2) provides in relevant 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.

In this case, plaintiff has presented no evidence that there was an order by a public authority directing that warning devices or signs be installed. Under this statutory provision, Bay City, as the local authority, cannot, as a matter of law, be held liable for the failure to erect warning devices or signals at the railroad crossing. *Taylor v Lenawee Co Bd of Road Comm'rs*, 216 Mich App 435, 439; ___ NW2d ___ (1996). Further, Central Railway, the railroad, is also under no duty to warn as a matter of law because there is no evidence that a public authority directed that a warning sign be installed at the railroad crossing. *Turner v CSX Transportation, Inc*, 198 Mich App 254, 256; 497 NW2d 571 (1993); *Baughman v Consolidated Rail Corp*, 185 Mich App 78, 80; 460 NW2d 895 (1990); *Edington v Grand Trunk W R Co*, 165 Mich App 163, 168-169; 418 NW2d 415 (1987).

Therefore, the trial court did not err in granting summary disposition in favor of both defendants regarding plaintiff's duty to warn claim. Plaintiff has presented no proof that a public authority directed any entity that a warning sign be installed at the railroad crossing.

IV

Plaintiff next argues that the trial court erred in ruling that she could not state a cause of action for nuisance in the same complaint with a cause of action for negligence. Although the trial court's reasoning was incorrect, it reached the right decision and we affirm the decision to dismiss the claim of nuisance.

The nuisance claim was raised in plaintiff's original complaint. In her original complaint, plaintiff alleged that defendants improperly maintained the irregular and uneven railroad crossing and created an unreasonable risk and hazard. Plaintiff alleged that such a hazard constituted a nuisance. Although a nuisance could arise out of the same set of facts alleging negligent conduct, plaintiff failed to set forth any identifiable nuisance in her original complaint. For that reason, the trial court did not err in granting summary disposition in defendants' favor on the nuisance claim.

With respect to defendant city, in order to establish a claim falling within the nuisance exception to governmental immunity, plaintiff had to prove the existence of a trespass nuisance or a nuisance per se. *Fox v Ogemaw Co*, 208 Mich App 697, 698; 528 NW2d 210 (1995). Plaintiff did not plead facts sufficient to prove a trespass nuisance. A trespass nuisance is a direct trespass upon, or the interference with, the use or enjoyment of land that results from a physical intrusion caused by, or under the control of, a governmental entity. *Peterman v Dep't of Natural Resources*, 446 Mich 177, 205; 521 NW2d 499 (1994). Plaintiff likewise did not plead sufficient facts to prove a nuisance per se. A nuisance per se is an activity or condition which constitutes a nuisance at all times and under all circumstances, without regard to the care with which it is conducted or maintained. Fox, supra, p 700. Plaintiff did not plead or show that the railroad tracks constituted a condition that was dangerous at all times and under all circumstances.

Accordingly, the trial court did not err in granting summary disposition in favor of defendant city on plaintiff's nuisance claim.

With respect to any nuisance claim against defendant railroad, plaintiff also did not plead sufficient facts to prove any recognized nuisance. Plaintiff did not specify whether her claim was one for a public or private nuisance. A public nuisance is an unreasonable interference with a common right enjoyed by the general public. *Cloverleaf Car Co v Phillips Petroleum Co*, 213 Mich App 186, 190; 540 NW2d 297 (1995). A private nuisance is a nontrespassory invasion of another's interest in the private use and enjoyment of land. *Adkins v Thomas Solvent Co*, 440 Mich 293, 302; 487 NW2d 715 (1992). It is clear that plaintiff did not plead facts sufficient to meet either definition of a public or private nuisance.

Accordingly, the trial court did not err in granting summary disposition in defendant railroad's favor on plaintiff's claim of nuisance.

V

Last, plaintiff argues that the trial court abused its discretion in not allowing her to amend her complaint to allege that she suffered a closed head injury. We agree.

Leave to amend a complaint should be freely given when justice so requires. MCR 2.118(A)(2). This Court reviews a trial court's decision on a motion to amend a complaint for an abuse of discretion. *Froede v Holland Ladder & Mfg Co*, 207 Mich App 127, 136; 523 NW2d 849 (1994).

Under MCR 2.112(I), when items of special damage are claimed, they must be specifically stated. It is only required, however, that the injury sought to be proved must be the natural result of the injury complained of in the pleadings. *Van Pembrook v Zero Mfg Co*, 146 Mich App 87, 107; 380 NW2d 60 (1985). If such injury can be traced to the act complained of and is such as would naturally flow from the alleged injury, it need not be specifically averred. Id.

In her first amended complaint, plaintiff alleged that she suffered a fractured jaw; lacerations, bruises, and abrasions to her face, head, and dentation; and injuries to her neck, shoulders, back, and arms. In this case, plaintiff's alleged closed head injury can be traced to falling off her moped while crossing over the uneven railroad tracks. Because plaintiff alleged other injuries to her face and head, her allegation of a closed head injury would naturally flow from her fall and other injuries. Accordingly, the trial court abused its discretion in denying plaintiff's motion to amend her complaint to allege a closed head injury. On remand, plaintiff shall be allowed to allege a closed head injury.

In conclusion, we reverse the grant of summary disposition in favor of defendant Central Railway regarding the failure to maintain claim only. On remand, plaintiff shall also be allowed to allege a closed head injury. The grant of summary disposition regarding the claims of failure to warn and nuisance in favor of defendant Central Railway is affirmed. The grant of summary disposition regarding all claims in favor of defendant Bay City is also affirmed.

Affirmed in part, reversed in part, and remanded for further proceedings. Jurisdiction is not retained.

/s/ Kathleen Jansen
/s/ Clifford W. Taylor
/s/ James P. Noecker

[1] This statutory provision was amended effective January 14, 1994, by MCL 462.309; MSA 22.1263(309) which even more clearly places the duty to maintain the railroad tracks on the railroad. It now provides:

> A railroad owning tracks across a public street or highway at grade shall at its sole cost and expense construct and thereafter maintain, renew, and repair all railroad roadbed,

track, and railroad culverts within the confines of the street or highway, and the streets or sidewalks lying between the rails and for a distance outside the rails of 1 foot beyond the end of the ties. The road authority at its sole cost and expense shall construct or improve if necessary and thereafter maintain, renew, and repair the remainder of the street or highway.