

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
LUCAS COUNTY

Amanda J. Gilbert, Administratrix of
the Estate of Daniel R. Clore

Plaintiff

Court of Appeals No. L-09-1062

Trial Court No. CI06-3774
CI07-5592

v.

Norfolk Southern Railway Co., et al.

Defendants

And

URS Midwest, Inc.

Appellant

v.

Norfolk Southern Railway Co., et al.

Appellees

DECISION AND JUDGMENT

Decided: June 11, 2010

* * * * *

Todd A. Harpst and Mitchell M. Pitchford, for appellant.

James R. Knepp, II, for appellees.

* * * * *

PIETRYKOWSKI, J.

{¶ 1} Appellant, URS Midwest, Inc. ("URS"), appeals the September 26, 2008 judgment entry of the Lucas County Court of Common Pleas which granted, in part, appellees Norfolk Southern Railway Company, et al.'s motion for summary judgment on the issue of federal preemption of state negligence claims stemming from a fatal semi-tractor/trailer and train collision. Appellant further appeals the trial court's rulings relative to trial and post-trial motions and argues that the jury verdict in favor of appellees was against the manifest weight of the evidence. For the reasons that follow, we affirm.

{¶ 2} This case stems from a tragic train/truck collision that occurred on April 11, 2006, at 1:10 a.m., in Ottawa County, Ohio. At the time of the collision, appellee Norfolk Southern Railway's railcars were blocking the crossing of a four-lane highway. The rail crossing was equipped with crossbucks, yellow advance warning signs, and pavement markings. Daniel Clore, driving a loaded semi-tractor/trailer automobile handler owned by appellant URS, was proceeding eastbound on S.R. 2. Clore was proceeding in the right-hand lane where two semi-tractors/trailers had stopped and were waiting for the train. Clore moved into the left lane in order to pass the trucks. Based on eyewitness testimony, Clore did see the train prior to impact, braked hard, but was unable to stop. Clore hit the train and the semi-tractor burst into flames destroying the cargo and killing Mr. Clore.

{¶ 3} Prior to the accident, Norfolk Southern employees were performing a switching operation at the BFI waste facility located just west of S.R. 2. There were 20 rail cars loaded with construction debris to deliver to the BFI facility and 20 empty rail cars were waiting at BFI to be returned to Sandusky, Ohio. Only 30 rail cars could fit between S.R. 2 and the BFI facility. The empty cars were coupled to the rear of the train and the train proceeded northbound, blocking the S.R. 2 crossing.

{¶ 4} On May 31, 2006, a wrongful death action was filed by Amanda Gilbert, Administrator of the Estate of Daniel Clore, against Norfolk Southern and its crew members. Appellees removed the case to federal court and, on July 19, 2007, finding that state duty-of-care claims as to the train crew defeated diversity jurisdiction, that court remanded the matter to common pleas court.

{¶ 5} On August 16, 2007, appellant filed its complaint against Norfolk Southern and the crew that was working at the time of the accident: Randy Zam (engineer); Jason Zielinski (conductor); and Matthew Hintz (brakeman.) Appellant alleged that appellees were negligent by failing to take preventative measures to prevent the accident. Such measures included limiting train traffic to daylight hours, flagging and flares, and providing sufficient lighting. Appellant further alleged that appellees were negligent by failing to sound the locomotive whistles, bells and or horns, failing to maintain a proper lookout, failing to develop proper rules and regulations for the dangerous location, failing to properly train and supervise the train crew, and failing to clear the right-of-way of

vegetative obstructions. Finally, appellant alleged that appellees were negligent by failing to properly instruct employees and agents as to train crossing safety, as to prior, similar circumstances leading to a collision, to observe and report local hazards, to identify specific local hazards, and to provide sufficiently trained and an adequate number of employees to perform all appropriate operating procedures in order to protect the motoring public. On September 4, 2007, appellant's case was consolidated with the Clore Estate's wrongful death action.

{¶ 6} In their answer to appellant's complaint appellees asserted that appellant's claims were, in part, barred by federal preemption. Appellees further asserted that Mr. Clore's negligence was the proximate cause of the damages.

{¶ 7} On July 15, 2008, following extensive discovery, appellees filed a motion for summary judgment arguing that appellant's claims were preempted by federal law because the railroad crossing at issue was provided with crossing warning devices through the utilization of federal funds. On the same day, appellant filed a motion for partial summary judgment arguing that preemption did not apply to bar its claims where the railroad violates federal law or its own operating rules. Both parties relied on varying interpretations of federal law. Appellant further argued that preemption does not apply because the crossing is "extra-hazardous" under Ohio law and deemed a "local hazard." Plaintiff Amanda Gilbert also filed a memorandum in opposition to appellees' motion.

{¶ 8} On September 26, 2008, the trial court granted appellees' motion for summary judgment, in part, and denied appellant's motion. The court granted summary judgment as to appellant's and Amanda Gilbert's claims of negligence based upon appellees' failure to upgrade warning devices, failure to use flares or flagmen, failure to limit traffic to daylight hours, lack of reflectorization, and failure to maintain a lookout. The court concluded that questions of fact remained regarding appellees' duty to sound the whistle, punitive damages, and the issue of proximate cause.

{¶ 9} On November 3, 2008, the case proceeded to a jury trial. On November 10, 2008, the jury returned a defense verdict. Specifically, answering the jury interrogatories, the jury found that appellees were negligent in failing to sound the whistle and bell as required under R.C. 4999.04 and 4955.42. The jury further found that appellees were required to use the engine lights pursuant to the Northeast Operating Rules Advisory Committee ("NORAC") Rule 22, and use three short whistle blasts pursuant to NORAC Rule 19(e). The jury also agreed that appellees were required to consider the safety of the public under NORAC Rule S. Regarding proximate cause, the jury found that appellees' negligence did not proximately cause injury to Daniel Clore or appellant. The jury did not find that appellees acted with actual malice. The jury found that Mr. Clore was 51 per cent negligent and that appellees were 49 per cent negligent.

{¶ 10} Thereafter, appellant filed a motion for a new trial arguing that the jury's verdict was contrary to law and not sustained by the weight of the evidence.

Alternatively and contemporaneously, appellant filed a motion for judgment notwithstanding the verdict requesting that the trial court enter judgment that appellees' negligence was the proximate cause of Clore's death and appellant's damages. Appellant also requested that the court make a finding that appellees acted with actual malice. Finally, appellant requested that the court award its unrefuted damages of \$358,547.82 which included the loss of the semi-tractor, cargo, towing and lost income. Appellant opposed both motions.

{¶ 11} On February 10, 2009, the trial court denied appellant's motions. This appeal followed.

{¶ 12} Appellant now presents the following five assignments of error for our review:

{¶ 13} "First Assignment of Error: The trial court erred as a matter of law by denying Appellant URS Midwest, Inc.'s Motion for Partial Summary Judgment and granting in part Appellees' Motion for Summary Judgment when the court determined that several of Appellant URS Midwest, Inc.'s claims were preempted.

{¶ 14} "Second Assignment of Error: The trial court erred as a matter of law by denying Appellant URS Midwest, Inc.'s Motion for Directed Verdict and Post Trial Motions when the court determined the Appellant URS Midwest, Inc. had not proven causation as a matter of law and by failing to recognize the legal presumption that a trial's horn would have been heard, if blown.

{¶ 15} "Third Assignment of Error: The trial court erred as a matter of law by failing to instruct the jury as to the legal presumption that a train's horn would have been heard, if blown.

{¶ 16} "Fourth Assignment of Error: The trial court erred as a matter of law because it should have directed a verdict and/or granted Appellant URS Midwest, Inc.'s Post Trial Motions on the issue of Appellees' conscious disregard for the rights and safety of others.

{¶ 17} "Fifth Assignment of Error: The trial court erred as a matter of law by denying Appellant URS Midwest, Inc.'s Post Trial Motions because the judgment was against the manifest weight of the evidence."

Summary Judgment and Federal Preemption

{¶ 18} In appellant's first assignment of error, it argues that the trial court erred when it granted, in part, appellees' motion for summary judgment and denied appellant's motion for summary judgment on the issue of preemption. We first note that appellate review of a trial court's grant of summary judgment is de novo. *Grafton v. Ohio Edison Co.* (1996), 77 Ohio St.3d 102, 10. Accordingly, we review the trial court's grant of summary judgment independently and without deference to the trial court's determination. *Brown v. Scioto Cty. Bd. of Commrs.* (1993), 87 Ohio App.3d 704, 711. Summary judgment will be granted only when there remains no genuine issue of material fact and, when construing the evidence most strongly in favor of the nonmoving party,

reasonable minds can only conclude that the moving party is entitled to judgment as a matter of law. *Harless v. Willis Day Warehousing Co.* (1978), 54 Ohio St.2d 64, 66; Civ.R. 56(C). The burden of showing that no genuine issue of material fact exists falls upon the party who moves for summary judgment. *Dresher v. Burt* (1996), 75 Ohio St.3d 280, 294. However, once the movant supports his or her motion with appropriate evidentiary materials, the nonmoving party "may not rest upon the mere allegations or denials of his pleadings, but his response, by affidavit or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial." Civ.R. 56(E).

{¶ 19} In 1970, the Federal Railroad Safety Act ("FRSA") was enacted to promote safety in railroad operations and to reduce railroad-related accidents. Section 20101, Title 49, U.S.Code. To that end, the FRSA grants the Secretary of Transportation the authority to prescribe regulations and issue regulations in all areas of railroad safety. Section 20103(a), Title 49, U.S.Code. Through the Federal Highway Administration ("FHWA") the Secretary promulgated the Federal Railway-Highway Crossing Program, Section 401 et seq., Title 23, U.S.Code, which provided federal funding to states for the purpose of the elimination of hazards at railway-highway crossings. Section 130(a), Title 23, U.S.Code.

{¶ 20} At issue in the summary judgment motions was the issue of federal preemption of appellant's claims regarding the sufficiency of the warning devices at the

railroad crossing. Appellant argues that preemption does not apply where the claims are premised on violations of federal law or a railroad's violation of its own operating rules. In support, appellant cites Section 20106(B)(1)(A)-(B), Title 49, U.S.Code, for the proposition that these exceptions apply. The relevant portions of the statute provide:

{¶ 21} "(2) A State may adopt or continue in force a law, regulation, or order related to railroad safety or security until the Secretary of Transportation (with respect to railroad safety matters), or the Secretary of Homeland Security (with respect to railroad security matters), prescribes a regulation or issues an order covering the subject matter of the State requirement. A State may adopt or continue in force an additional or more stringent law, regulation, or order related to railroad safety or security when the law, regulation, or order--

{¶ 22} "(A) is necessary to eliminate or reduce an essentially local safety or security hazard;

{¶ 23} "(B) is not incompatible with a law, regulation, or order of the United States Government; and

{¶ 24} "(C) does not unreasonably burden interstate commerce.

{¶ 25} "(b) Clarification regarding State law causes of action.--(1) Nothing in this section shall be construed to preempt an action under State law seeking damages for personal injury, death, or property damage alleging that a party--

{¶ 26} "(A) has failed to comply with the Federal standard of care established by a regulation or order issued by the Secretary of Transportation (with respect to railroad safety matters), or the Secretary of Homeland Security (with respect to railroad security matters), covering the subject matter as provided in subsection (a) of this section;

{¶ 27} "(B) has failed to comply with its own plan, rule, or standard that it created pursuant to a regulation or order issued by either of the Secretaries; or

{¶ 28} "(C) has failed to comply with a State law, regulation, or order that is not incompatible with subsection (a)(2).

{¶ 29} "(2) This subsection shall apply to all pending State law causes of action arising from events or activities occurring on or after January 18, 2002."

{¶ 30} Appellant argues that there is a presumption against preemption. We disagree. In areas where historically there has been a significant federal presence, the presumption is not triggered. See *United States v. Locke* (2000), 529 U.S. 89.

{¶ 31} Appellant further argues that the clarifying amendment to Section 20106 has the effect of eliminating federal preemption in cases, such as the instant case, where a plaintiff's claims are premised on a railroad's violation of duties imposed by federal laws and regulations and its own operating rules adopted pursuant to those rules and regulations. Conversely, appellees assert that this amendment did not act to effect any substantive change to the statute; rather, it was simply intended to rectify a line of precedent which held the state tort claims were preempted even where the railroad was

found to violate a federal standard of care. Appellees reassert that where a crossing has been installed with warning devices using federal funds, the federal standard for adequacy of such devices usurps state tort law. The fact that the crossing's warning devices were installed in 1993, and federally funded under the Ohio Buckeye Crossbuck Program is uncontroverted.

{¶ 32} Appellant argues that Norfolk Southern violated federal railroad law when it failed to erect automatic flashers prior to the subject collision. Specifically, appellant contends that Norfolk Southern violated the standard of care set forth in Section 646.214(b)(3)(i), Title 23, C.F.R. which provides:

{¶ 33} "(b) Grade crossing improvements.

{¶ 34} "* * *

{¶ 35} "(3)(i) Adequate warning devices, under § 646.214(b)(2) or on any project where Federal-aid funds participate in the installation of the devices are to include automatic gates with flashing light signals when one or more of the following conditions exist:

{¶ 36} "(A) Multiple main line railroad tracks.

{¶ 37} "(B) Multiple tracks at or in the vicinity of the crossing which may be occupied by a train or locomotive so as to obscure the movement of another train approaching the crossing.

{¶ 38} "(C) High Speed train operation combined with limited sight distance at either single or multiple track crossings.

{¶ 39} "(D) A combination of high speeds and moderately high volumes of highway and railroad traffic.

{¶ 40} "(E) Either a high volume of vehicular traffic, high number of train movements, substantial numbers of school buses or trucks carrying hazardous materials, unusually restricted sight distance, continuing accident occurrences, or any combination of these conditions.

{¶ 41} "(F) A diagnostic team recommends them."

{¶ 42} In support of its argument that Norfolk Southern's duty to erect automatic flashers was not preempted, appellant cites to *Karl v. Burlington N. RR. Co.* (C.A. 8 1989), 880 F.2d 68. Following its publication, this case was frequently criticized. See discussion in *Smith v. Norfolk & W. Ry. Co.* (N.D. Ind. 1991), 776 F.Supp. 1335, 1339-1340. Appellant also cites *Birmingham v. Union Pacific RR. Co.* (E.D.Ark. 1997), 971 F.Supp. 1282 for the proposition that negligence claims for failure to upgrade are not preempted.

{¶ 43} In *Norfolk S. Ry. Co. v. Shanklin* (2000), 529 U.S. 344, the Supreme Court of the United States squarely addressed the failure to upgrade preemption issue. In *Shanklin*, the decedent's wife sued the railroad for damages based on state claims for failure to maintain adequate warning devices at a grade crossing. The warning signs at

the crossing had been installed in 1987 using federal funds; the accident occurred in 1993. *Id.* at 347. The wife prevailed in the lower court.

{¶ 44} The *Shanklin* Court addressed the respondent's argument that preemption did not apply in the case because the crossing presented several of the factors listed in Section 646.214(b)(3), Title 23, C.F.R. The United States Supreme Court explained:

{¶ 45} "This misconceives how pre-emption operates under these circumstances. When the FHWA approves a crossing improvement project and the State installs the warning devices using federal funds, §§ 646.214(b)(3) and (4) establish a federal standard for the adequacy of those devices that displaces state tort law addressing the same subject. At that point, the regulation dictates 'the devices to be installed and the means by which railroads are to participate in their selection.' *Easterwood*, *supra*, at 671, 113 S.Ct. 1732. It is this displacement of state law concerning the devices' adequacy, and not the State's or the FHWA's adherence to the standard set out in §§ 646.214(b)(3) and (4) or to the requirements of the MUTCD, that pre-empts state tort actions. Whether the State should have originally installed different or additional devices, or whether conditions at the crossing have since changed such that automatic gates and flashing lights would be appropriate, is immaterial to the pre-emption question." *Id.* at 357-358.

{¶ 46} Thus, the court concluded that once the FHWA approved the devices and the signs were installed using federal funds, the federal standard for adequacy displaced

state statutory and common law claims addressing the same subject. *Id.* at 359. See *Nye v. CSX Transp., Inc.* (C.A.6 2006), 437 F.3d 556.

{¶ 47} The effect of the 2007 clarification has been analyzed in only a handful of cases. In *Henning v. Union Pacific RR. Co.* (C.A.10 2008), 530 F.3d 1206, a wrongful death action, the plaintiff alleged that the railroad failed to timely install active warning devices. On appeal, the plaintiff argued that the 2007 clarification amendment to Section 20106, Title 49, U.S.Code, allowed for the inadequate signalization and negligent delay claims. *Id.* at 1214.

{¶ 48} The *Henning* court first set forth the historical underpinning for the clarifying amendment - a 2002 train derailment in North Dakota. The derailment was allegedly caused by track failure and the parties alleged that the railroad failed to inspect and maintain the rail. *Id.* The court concluded that the FRSA preempted any state law claim even where the claims alleged that the railroad violated federal standards of care. *Id.* at 1215. Thereafter, Congress added the clarification amendment to stress that "when a party alleges a railway *failed to comply* with a federal standard of care established by regulation or with its own plan, rule, or standard created pursuant to a federal regulation, preemption will not apply." (Emphasis in original.) *Id.*

{¶ 49} The *Henning* court then concluded that, unlike the train derailment case, Section 646.214(b)(3), Title 23, C.F.R., did not establish a federal standard of care; thus, the railroad "could not, as a matter of law, fail to comply with § 646.214.(b)(3)." *Id.*

Upon review, we agree with the *Henning* court that the 2007 clarification did not overrule *Shanklin*, supra. We further agree that Section 646.214(b)(3) did not establish a standard of care for which Norfolk Southern was required to comply. See *Kill v. CSX Transp., Inc.*, 3d Dist. No. 1-09-13, 2009-Ohio-6871.

{¶ 50} Appellant further argues that Norfolk Southern violated its own operating rules by not using flares. Norfolk Southern had adopted the NORAC as its operating rules pursuant to Sections 217.7 and 218.1, Title 49, C.F.R. These provisions provide, in part:

{¶ 51} "Through the requirements of this part, the Federal Railroad Administration learns the condition of operating rules and practices with respect to trains and other rolling equipment in the railroad industry, and each railroad is required to instruct its employees in operating practices.

{¶ 52} "This part prescribes minimum requirements for railroad operating rules and practices. Each railroad may prescribe additional or more stringent requirements in its operating rules, timetables, timetable special instructions, and other special instructions."

{¶ 53} Section 218.4, Title 49, C.F.R. further states:

{¶ 54} "Normal State negligence standards apply where there is no Federal action covering the subject matter. Under 49 U.S.C. 20106 (section 20106), issuance of the regulations in this part preempts any State law, regulation, or order covering the same

subject matter, except an additional or more stringent law, regulation, or order that is necessary to eliminate or reduce an essentially local railroad safety or railroad security hazard; that is not incompatible with a law, regulation, or order of the United States Government; and that does not unreasonably burden interstate commerce. Section 20106 permits State tort actions arising from events or activities occurring on or after January 18, 2002, for the following: Violation of the Federal standard of care established by regulation or order issued the Secretary of Transportation (with respect to railroad safety, such as these regulations) or the Secretary of Homeland Security (with respect to railroad security); a party's violation of, or failure to comply with, its own plan, rule, or standard that it created pursuant to a regulation or order issued by either of the two Secretaries; and a party's violation of a State standard that is necessary to eliminate or reduce an essentially local safety or security hazard, is not incompatible with a law, regulation, or order of the United States Government, and does not unreasonably burden interstate commerce. Nothing in section 20106 creates a Federal cause of action on behalf of an injured party or confers Federal question jurisdiction for such State law causes of action."

{¶ 55} The fact that federal law requires that a railroad file copies of its operating rules with the Federal Railroad Administration does not equate that the rules themselves were *created* pursuant to an order of the Secretary of Transportation. NORAC was created in 1985 with the purpose of harmonizing the operating rules of several railroads

mainly in the Northeast United States. See, e.g., Graetz, Martin, "NORAC: Northeast Operating Rules Advisory Committee," *Trains Magazine*, May 1, 2006. Accordingly, we find that the exception to federal preemption in Section 20106(b)(1)(B), Title 49, U.S.Code, is inapplicable.

{¶ 56} Based on the foregoing, we find that the trial court did not err when it granted, in part, appellees' motion for summary judgment. Appellant's first assignment of error is not well-taken.

Trial and Post-Trial Issues

{¶ 57} In appellant's second assignment of error, appellant argues that the trial court erred by denying its motion for a directed verdict and motion for judgment notwithstanding the verdict where appellant demonstrated causation as a matter of law. Appellant contends that the jury's findings that appellees violated NORAC rules 19 and 20 and R.C. 4955.32 and 4999.04, regarding sounding the horn or whistle, and NORAC rule 22, regarding the activating the headlamp and ditch lights, constitutes negligence per se. Appellant further argues that the evidence presented at trial proved that had the horn been sounded, the accident would not have occurred.

{¶ 58} Appellant cites to the trial testimony of brakeman Matthew Hintz. Hintz testified that when the engineer initially took the locomotive across S.R. 2, the engineer sounded the horn and that Hintz, approximately one-quarter mile away, heard it. Appellant argues that had the horn again been sounded when the locomotive began

moving over the crossing, Mr. Clore would have heard it and heeded its warning.

Appellant asserts that because appellees failed to present evidence that Clore would not have heard the horn, the only evidence before the jury was that he would have heard the horn had it been sounded.

{¶ 59} In support of this argument, appellant relies on the case *Badger v. Louisville & Nashville RR. Co.* (C.A.5 1969), 414 F.2d 880. In *Badger*, the court reversed the lower court's judgment for the railroad notwithstanding the verdict in favor of plaintiffs. The court noted that the question of whether the statutorily required train signals were given, and whether they were a proximate cause of the accident, were in conflict and were questions that had been properly left to the jury to decide. *Id.* at 883.

{¶ 60} Appellant also relies on *Taylor v. Silva* (Nev.1980), 615 P.2d 970. In *Taylor*, the reviewing court held that the appellants' motion for a new trial or for judgment notwithstanding the verdict should have been granted where the jury found that the respondents were negligent but that their negligence did not proximately cause the injury.

{¶ 61} Ohio law provides that in order to prove negligence, a plaintiff must establish duty, a breach of that duty, and damage or injury proximately caused by the breach. *Simmers v. Bentley Constr. Co.* (1992), 64 Ohio St.3d 642. Further, "[t]he concept of negligence per se allows the plaintiff to prove the first two prongs of the negligence test, duty and breach of duty, by merely showing that the defendant

committed or omitted a specific act prohibited or required by statute; no other facts are relevant." *Lang v. Holly Hill Motel, Inc.*, 122 Ohio St.3d 120, 2009-Ohio-2495, ¶ 15, citing *Chambers v. St. Mary's School* (1998), 82 Ohio St.3d 563, 565-566. Accordingly, a finding of negligence per se does not establish causation.

{¶ 62} Appellant further contends that causation was presumptively demonstrated by appellees' failure to follow safety rules or sound warnings. In support of its argument appellant relies on *Petre v. Norfolk S. Ry. Co.* (N.D. Ohio 2006), 458 F.Supp.2d 518. In *Petre* the court stated that if the locomotive sounds its whistle as required by statute, it is presumed to have been heard. *Id.* at 534. The *Petre* court's statement was made in response to arguments regarding the *audibility* of the train whistle and whether the late whistle or infrequency of the whistle's use was the proximate cause of the collision. *Id.* at 535.

{¶ 63} Appellant advances that appellees' failure to sound the horn and operate the lights, is analogous to the "read and heed" failure-to-warn product liability cases which raise a rebuttable presumption as to proximate cause. A manufacturer's duty to warn is premised on consumer safety and an inadequate warning claim is statutory. See R.C. Chapter 2307. We find that this analogy does not bear out.

{¶ 64} Appellant further argues that the jury's responses to special interrogatories D, E, and F, demonstrates that they were confused about proximate cause. The jury concluded that the negligence of appellees did not proximately cause the death of Daniel

Clore (Interrogatories A and B.) At that point, the instructions stated that if the answer to Interrogatory B was "no," that the jurors were to sign the defense verdict form. However, the jury continued on to Interrogatory C and found that the conduct of the defendants did not rise to the level of actual malice.

{¶ 65} Thereafter, the jury also concluded that Mr. Clore was negligent (Interrogatory D) and that his negligence proximately caused injury to himself. (Interrogatory E.) The jury then proceeded to answer Interrogatory F attributing 51 per cent of the negligence to Clore and 49 per cent of the negligence to appellees.

{¶ 66} Appellant argues that the finding that appellees did not proximately cause the injury to Clore or appellant is irreconcilable with the jury's assessment of contributory fault. Civ.R. 61 provides:

{¶ 67} "No error in either the admission or the exclusion of evidence and no error or defect in any ruling or order or in anything done or omitted by the court or by any of the parties is ground for granting a new trial or for setting aside a verdict or for vacating, modifying or otherwise disturbing a judgment or order, unless refusal to take such action appears to the court inconsistent with substantial justice."

{¶ 68} We agree that according to the jury interrogatories, the jury, after finding that the negligence of appellees did not cause the injuries to Clore or appellant, should have stopped deliberating and entered a defense verdict. However, in either event, the

jury clearly intended to enter a defense verdict. Accordingly, the error is harmless in that it did not prejudice or affect appellant's substantial rights.

{¶ 69} Based on the foregoing, we find that the trial court did not err when it failed to enter a directed verdict as to causation. Appellant's second assignment of error is not well-taken.

{¶ 70} In its third assignment of error, appellant contends that the trial court erred by failing to instruct the jury as to the legal presumption that a train's horn would have been heard, if blown. Generally, requested jury instructions should be given if they are a correct statement of the law as applied to the facts in a given case. *Murphy v. Carrollton Mfg. Co.* (1991), 61 Ohio St.3d 585. A court's instructions to a jury "should be addressed to the actual issues in the case as posited by the evidence and the pleadings." *State v. Guster* (1981), 66 Ohio St.2d 266, 271. We review the trial court's decision to refuse the requested jury instructions for an abuse of discretion. *State v. Wolons* (1989), 44 Ohio St.3d 64.

{¶ 71} Appellant states that it requested the instruction pursuant to *Petre*, 458 F.Supp.2d 518, discussed *infra*. As stated in our discussion of appellant's second assignment of error, the *Petre* presumption was based on the audibility or effectiveness of the train whistle. *Petre's* holding did not include the presumption that had the train whistle been *sounded*, it would have been heard. Accordingly, we find that the trial court

did not err when it failed to instruct the jury as to appellant's proposed instruction.

Appellant's third assignment of error is not well-taken.

{¶ 72} Appellant's fourth assignment of error asserts that the trial court erred when it denied its motion for a directed verdict or motion for judgment notwithstanding the verdict based upon appellees' "conscious disregard for the rights and safety of others." Appellant further asserts that because appellees acted with conscious disregard, or actual malice, the jury's finding of comparative negligence does not act to reduce appellant's damages. In support of this argument, appellant relies on the testimony of appellees Randy Zam and Jason Zielinski.

{¶ 73} Randy Zam agreed that he had not been trained that the "safe and proper way to conduct a switching operation" was to avoid blocking S.R. 2 at night. Zam clarified that they were permitted to block grade crossings only for a reasonable amount of time. Zam stated that he did not sound the horn as the locomotive began to proceed back across the tracks and that he had not activated the locomotive headlights.

{¶ 74} Appellees counter that conscious decisions regarding the switching procedure and use of the horn or headlights, do not equate with a conscious disregard. Appellees assert that there was testimony presented that the Norfolk Southern employees believed that they were working in a safe manner the night of the accident and that when shoving off backwards from an already occupied crossing the sounding of the horn and illuminating the headlights did not act as a warning to oncoming motorists. Appellees

rely on the testimony presented by Blair Bradigan, trainmaster for the Toledo east territory. Bradigan stated that NORAC Rule 19(e), which required that the horn be sounded when a standing train is preparing to back up, was an old and "unnecessary" rule that was intended as a signal to other railroad workers prior to the advent of portable radios. Bradigan further stated that NORAC rule 22, regarding headlight use, applies only to the leading end of a moving train. Bradigan also testified that the train crew on duty at the time of the accident was operating in a safe and efficient manner.

{¶ 75} In order to prove actual malice a plaintiff must demonstrate: "(1) that state of mind under which a person's conduct is characterized by hatred, ill will or a spirit of revenge, *or* (2) a conscious disregard for the rights and safety of other persons that has a great probability of causing substantial harm." (Emphasis in original.) *Preston v. Murty* (1987), 32 Ohio St.3d 334, syllabus.

{¶ 76} The Supreme Court of Ohio later explained that "[m]ere foreseeability cannot be equated with great probability. In the law of negligence, foreseeability is the threshold level of probability at which conduct becomes negligent. Great probability, then, can be likened to high foreseeability." *Calmes v. Goodyear Tire & Rubber Co.* (1991), 61 Ohio St.3d 470, paragraph two of the syllabus. Further, that the defendant acted maliciously must be proven by clear and convincing evidence. See R.C. 2315.21(D)(4).

{¶ 77} Upon review, we find that there was sufficient evidence presented to demonstrate that appellees did not act maliciously. Accordingly, the trial court did not err when it failed to grant a directed verdict finding that, as a matter of law, appellees acted with actual malice. Thus, the issue of comparative negligence was properly before the jury. Appellant's fourth assignment of error is not well-taken.

{¶ 78} In appellant's fifth and final assignment of error, it contends that the jury's verdict was against the manifest weight of the evidence. It is well settled in Ohio that "[j]udgments supported by some competent, credible evidence going to all the essential elements of the case will not be reversed by a reviewing court as being against the manifest weight of the evidence." *C.E. Morris v. Foley Constr. Co.* (1978), 54 Ohio St.2d 279, syllabus. Matters relating to the credibility of a witness at trial and/or the weight accorded to the evidence offered at trial are primarily for the trier of fact. *State v. DeHass* (1967), 10 Ohio St.2d 230, paragraph one of the syllabus. A reviewing court gives these determinations of fact great deference, as the trier of fact is best able to evaluate the credibility of the proffered testimony. *Seasons Coal Co. v. Cleveland* (1984), 10 Ohio St.3d 77, 80.

{¶ 79} Appellant contends that the jury's verdict was against the manifest weight of the evidence because the evidence demonstrated that the trial crew was negligent by unnecessarily blocking S.R. 2 and failing to sound the horn as the engine approached the crossing. In the same vein, appellant asserts that causation was clearly established; to

wit, had the horn been sounded, the accident would not have occurred. Finally, appellant disputes the jury's failure to find that appellees acted with actual malice.

{¶ 80} As correctly noted by appellees, many of the issues raised have been previously rejected in our analysis of appellant's second and fourth assignments of error. Further, we have carefully examined the transcripts of these proceedings. There was evidence submitted which, if believed, supported the jury's finding that appellees' action or inaction did not proximately cause Mr. Clore's death.

{¶ 81} Appellees presented evidence showing that they believed that the switching operation used was safe and efficient, that they were permitted to occupy the crossing in order to perform the "shove" maneuver, that because the crossing was occupied they did not have to sound the horn when backing up, and that because the locomotive was not the "leading end of the movement," they did not have to use the headlight. There was also testimony presented that Mr. Clore proceeded around two stopped semi-trucks, failed to reduce his speed, and was unable to avoid colliding with the train. Given this testimony, we cannot say that the jury's verdict was against the weight of the evidence. Accordingly, appellant's fifth assignment of error is not well-taken.

{¶ 82} On consideration whereof, we find that substantial justice was done the party complaining and the judgment of the Lucas County Court of Common Pleas is affirmed. Pursuant to App.R. 24, appellant is ordered to pay the costs of this appeal.

JUDGMENT AFFIRMED.

Amanda J. Gilbert, Administratrix of
the Estate of Daniel R. Clore, et al.
v. Norfolk Southern Railway Co., et al.
[URS Midwest, Inc.-appellant]
L-09-1062

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27.
See, also, 6th Dist.Loc.App.R. 4.

Peter M. Handwork, J.

JUDGE

Mark L. Pietrykowski, J.

JUDGE

Thomas J. Osowik, P.J.
CONCUR.

JUDGE

<p>This decision is subject to further editing by the Supreme Court of Ohio's Reporter of Decisions. Parties interested in viewing the final reported version are advised to visit the Ohio Supreme Court's web site at: http://www.sconet.state.oh.us/rod/newpdf/?source=6.</p>
