

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

STEVEN J. PAULSON and
ACUITY, a Mutual Insurance Company,

Plaintiffs,

v.

WISCONSIN CENTRAL LTD.

Defendant.

OPINION and ORDER

11-cv-303-bbc

Plaintiff Steven J. Paulson is suing defendant Wisconsin Central Ltd. for injuries he sustained when his vehicle collided with a freight train operated by defendant. (Plaintiff Acuity was named as a plaintiff simply because it paid plaintiff Paulson's medical expenses after the accident. Because that issue is not relevant to this opinion and Acuity did not file any summary judgment materials, I will refer to Paulson simply as "plaintiff.") Plaintiff alleges in his complaint that defendant was negligent by operating the train at an excessive speed, failing to use the train's horn properly and failing to provide functional warning devices at the railroad crossing. Diversity jurisdiction is present under 28 U.S.C. § 1332 because plaintiffs are citizens of Wisconsin, defendant is a citizen of Illinois and the amount

in controversy is greater than \$75,000.

Defendant has moved for summary judgment on several grounds: (1) plaintiff's state law claims are preempted by federal law; (2) defendant was not negligent as a matter of law; (3) the "occupied crossing rule" bars plaintiff's claim; and (4) plaintiff was more negligent than defendant as a matter of law. In addition, defendant has filed a motion to "strike" affidavits of Jane Paulson and James Scoptur that plaintiff filed with his summary judgment brief because Paulson's affidavit is inconsistent with her previous testimony and Scoptur's affidavit is not made on personal knowledge.

In response, plaintiff has withdrawn his argument that defendant's train was traveling at an excessive speed. With respect to his other claims, he says that they are not preempted because defendant "has not complied with federal law," that the occupied crossing rule does not apply and that questions of fact remain regarding the relative negligence of the parties. With respect to the motions to strike, he argues that both affidavits are admissible.

Even if I consider all of plaintiff's evidence, I conclude that defendant is entitled to summary judgment because no reasonable jury could find that any negligence of defendant's was equal to or greater than plaintiff's negligence under Wisconsin law. This conclusion moots defendant's motion to strike.

From the parties' proposed findings of fact and the record, I find that the following facts are undisputed.

UNDISPUTED FACTS

On July 12, 2009, in Taylor County, Wisconsin, plaintiff Steven Paulson was traveling east on State Highway 73 in a 1999 Ford F-250 truck that was pulling a trailer containing logs. Plaintiff was traveling 50 to 55 miles an hour as he approached a railroad crossing. It was a “nice, beautiful, sunny day” with full daylight. Plaintiff was not listening to the radio or talking on his cell phone as he drove.

A warning sign is posted approximately 750 feet from the crossing. Near the sign are pavement warning marks, which are 19 feet long. At the crossing are a crossbucks sign, a gate and lights.

Plaintiff knew about the railroad crossing because he had traveled over it several times in the past, including earlier that day. Before reaching the crossing, plaintiff drove around a curve in the road. After plaintiff came around the curve, the crossing was straight in front of him and he could see the crossing and gates. Plaintiff had an unobstructed view of the crossing from a distance of more than 2500 feet. Plaintiff was looking straight ahead as he drove.

A southbound train operated by defendant Wisconsin Central Ltd. was approaching the crossing at the same time as plaintiff. Todd Spande was the engineer and Joshua Edwards was the conductor. The train consisted of two locomotives, both of which were equipped with an event recorder that records electric data relating to train operations

including speed, operation of the train's emergency brake, operation of the train's horn and other data. The train was traveling at approximately 45 miles an hour.

Plaintiff saw the train just before he reached the crossing. He applied his brake, but still collided with the train's second locomotive and first railcar. At the time of impact, plaintiff's speed was no more than 10 miles an hour. Plaintiff was ejected from his truck. (Plaintiff survived the crash, but neither side discusses the extent of his injuries.)

Spande heard a loud bang and tires squealing and saw the trailer that plaintiff's vehicle had been towing. Once Spande saw the trailer, he immediately activated the train's emergency braking system.

After the accident, Spande told a deputy sheriff that "he took all necessary precautions before approaching the crossing, such as making 2 long blows, one short blow, and 2 more long blows on his train whistle." According to the data recording device, the final horn was sounded 7 seconds before the train's brake was applied. Plaintiff told another deputy sheriff that he did not hear any warning from the train.

The warning system at the crossing is equipped with a gate event data recorder, which records electronic data relating to the operation of the lights, gates and bells. According to the recorder, the crossing lights began flashing approximately 30 seconds before the train reached the crossing, the gate descended approximately five seconds later, rose three seconds after the train reached the crossing and then returned to a horizontal position two seconds

later. (Plaintiff denies that the gate went down before he reached the crossing.) After the accident, the gate was broken.

Defendant used federal funds to install the warning devices at the crossing.

OPINION

Both sides drop the ball on the issue of preemption. Defendant says that any negligence claim relying on an inadequate horn or warning device at the crossing is preempted because these matters are addressed by federal regulations such as 49 C.F.R. Part 222 and 23 C.F.R. § 646.214. However, all the case law defendant cites predates the enactment of 49 U.S.C. § 20106(b), which limits the preemptive effect of federal law on state law claims against railroads in some circumstances. Defendant fails to address the potential effect of § 20106(b) on this issue.

For his part, plaintiff does not deny that federal regulations address the issues raised in his claims, but he says that defendant “has not complied with federal law, thus the defense of preemption does not apply.” Plt.’s Br., dkt. #43, at 3. Plaintiff does not explain further, but, in the discussion of his brief regarding the alleged failure to sound the horn, he makes similar statements that his claim is not preempted because defendant violated federal regulations related to this issue. Id. at 4-6.

Plaintiff may be attempting to take advantage of § 20106(b)(1)(A), which states that

federal law does not preempt state law if the railroad “has failed to comply with the Federal standard of care established by a regulation . . . covering the subject matter as provided in subsection (a) of this section.” However, plaintiff does not cite this provision, much less develop an argument as to why it should apply in this case. Further, plaintiff does not identify any federal regulations that defendant violated related to its alleged failure to keep the warning devices at the crossing functioning properly, so plaintiff has waived that issue.

It is not necessary to decide whether this is a case in which preemption applies, because even if I assume that plaintiff may bring a negligence claim under state law premised on defendant’s alleged failure to sound the horn or failure to keep the warning devices at the crossing functioning properly, he cannot prevail on his claim. Plaintiff argues first that defendant is “negligent per se” under *state* law for failing to comply with certain *federal* regulations regarding sounding the horn. However, plaintiff does not cite any authority or develop any argument in support of a proposition that any and all violations of these regulations make a railroad company liable as a matter of law, regardless of the plaintiff’s own negligence. In fact, plaintiff did not even include a claim for negligence per se in his complaint. Accordingly, I conclude that plaintiff has waived any claim relying on that theory.

With respect to the relative negligence of the parties, the parties devote much of their briefs to debating whether the court may rely on plaintiff’s testimony because it is “negative

evidence” and whether other evidence submitted by plaintiff is admissible. I need not resolve any of these disputes because, even I accept plaintiff’s view of the facts, plaintiff was more negligent than defendant as a matter of law. Under Wis. Stat. § 895.045, this means that defendant may not be held liable for plaintiff’s injuries.

Perhaps the most salient fact is that plaintiff hit the train; the train did not hit him. Although plaintiff tries to spin the facts to say that he and the train arrived at the crossing “at nearly the same time,” Plt. Br., dkt. #43, at 13, it is undisputed that plaintiff hit defendant’s second locomotive and first rail car, so plaintiff cannot deny that the train reached the crossing before he did.

For this reason, defendant relies on the “occupied crossing rule,” under which some courts have held that a railroad company cannot be found negligent for an accident that occurs at a crossing if the train was in the crossing when the accident occurred. E.g., King v. Illinois Central Railroad, 337 F.3d 550, 553 (5th Cir. 2003) (applying Mississippi law); Hurst v. Union Pacific Rail Co., 958 F.2d 1002, 1004 (10th Cir. 1992) (applying Oklahoma law). The theory behind this rule is that the train’s presence is adequate warning by itself. Although Wisconsin courts do not use the term “occupied crossing rule,” they have applied a similar concept.

For example, in Schmidt v. Chicago & N.W. Ry. Co., 191 Wis. 184, 210 N.W. 370 (1926), the plaintiff sued the railroad company for negligence after an accident. Although

the court “conceded that these various signal devices were not working properly,” it concluded that the railroad company could not be held liable because “the train was actually and physically upon and passing over the crossing at the time of the accident.” Contrary to plaintiff’s argument, the court did not hold that the train must be in the crossing for a particular amount of time in order to trigger this rule.

This is confirmed by Verrette v. Chicago & N. W. Railway Co., 40 Wis. 2d 20, 23, 161 N.W.2d 264, 265-66 (1968), in which the motorist hit the second parlor car of a train going through a railroad crossing. The motorist was aware of the crossing, but said that he did not hear a whistle and did not see the train until just before impact. Although the court assumed that the defendant had failed to blow the whistle, the court concluded that “the evidence is overwhelming that the plaintiff was causally negligent” because he failed to slow down or stop at the tracks.

Similarly, the Wisconsin Supreme Court has stated that “[t]he presence of a railroad track is always a signal of danger,” so that any motorist approaching a crossing “must use not only his sense of hearing but his sense of vision, and if necessary in order to properly exercise the latter, he must slow up his speed or stop his machine.” Roth v. Chicago, M. & St. P. R. Co., 185 Wis. 580, 201 N.W. 810 (1925). In this case, it is undisputed that plaintiff failed to stop or slow down when approaching the tracks. In addition, he testified that he was looking straight ahead rather than looking for a possible approaching train. Although

he says there was an “obstruction” in the direction of the train, he does not identify what the obstruction was or suggest that it would have stopped him from seeing the train if he had looked. In any event, the supreme court has held that if an obstruction blocks the motorist’s view while approaching the crossing, this heightens his duty to stop and look when he reaches the crossing. Ligman v. Bitker, 270 Wis. 556, 560, 72 N.W.2d 340, 342-43 (1955); see also Bembister v. Aero Auto Parts, 12 Wis. 2d 252, 107 N.W.2d 193 (1961) (railroad company not liable despite obstruction blocking plaintiff’s view while approaching track when motorist looked in only one direction before crossing tracks). In fact, the court has held, if a motorist testifies that he stopped, looked and listened, but still hit the train, it must be assumed that the motorist was negligent in performing his duty because otherwise he would have realized that the train was coming. White v. Minneapolis, St. Paul & S.S.M. Railway Co., 147 Wis. 141, 148, 133 N.W. 148, 149 (1911) (“[F]or a person to declare he performed such duty and yet failed to perceive an approaching train or car, in case of there being such in plain sight or hearing, does not raise a question of fact for decision by a jury. Such person must be presumed to either not have performed such duty or to have done so and yet heedlessly submitted himself to the danger.”).

In other cases with similar facts, the Wisconsin courts have held as a matter of law that the railroad company may not be held liable. Ligman, 270 Wis. at 560, 72 N.W.2d at 342-43 (railroad company could not be held liable when motorist “fail[ed] to . . . sto[p] at

the crossing despite the presence of a stop sign and a railroad crossing signal,” even though there was obstruction and even though train did not sound whistle properly); Keegan v. Chicago, M., St. P. Railroad, 251 Wis. 7, 27 N.W.2d 739 (1947) (driver’s negligence was “sole cause” of accident when he failed to stop, look and listen at crossing, even though railroad company did not sound whistle before crossing and even though engineer saw motorist approaching). It is telling that plaintiff fails to cite a single case from Wisconsin or any other jurisdiction in which the court concluded that a reasonable jury could find in favor of the plaintiff under similar facts.

In this case, I reach the same conclusion as the other courts. Because no reasonable jury could find in favor of plaintiff on his claim, I am granting defendant’s motion for summary judgment.

ORDER

IT IS ORDERED that

1. Defendant Wisconsin Central Ltd.’s motion for summary judgment, dkt. #35, is GRANTED.

2. Defendant Wisconsin Central Ltd.’s motion to strike affidavits, dkt #56, is DENIED as moot.

3. The clerk is directed to enter judgment in favor of defendant and close this case.

Entered this 14th day of May, 2012.

BY THE COURT:
/s/
BARBARA B. CRABB
District Judge

