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FILED

IN THE COURT OF COMMON PLEAS
CUYAHOGA COUNTY, OHIO

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CUYAHOGA COUNTY

DAWN ELLIS, INDIVIDUALLY AND AS ADMINISTRATRIX,ETC
Plaintiff

Case No: CV-12-784493

Judge: CASSANDRA COLLIER-WILLIAMS

GREATER CLEVELAND REGIONAL TRANSIT AUTHORITY, ETAL
Defendant

JOURNAL ENTRY

96 DISP.OTHER - FINAL

DEFENDANT KATHERINE UNDERWOOD'S MOTION FOR SUMMARY JUDGMENT, FILED 11/14/2013, IS GRANTED.

DEFENDANT GREATER CLEVELAND REGIONAL TRANSIT AUTHORITY'S MOTION FOR SUMMARY JUDGMENT, FILED 11/14/2013, IS GRANTED.

OPINION AND ORDER IS SIGNED AND ORDERED RECORDED. ORDER ATTACHED. FINAL. OSJ.

COURT COST ASSESSED TO THE PLAINTIFF(S).

OSJ

Judge Signature Date

- 96
03/14/2014

IN THE COURT OF COMMON PLEAS
CUYAHOGA COUNTY, OHIO

DAWN ELLIS, Administratrix, etc.,	)	Case No. CV-12-784493
	)	
Plaintiff	)	JUDGE CASSANDRA COLLIER-WILLIAMS
	)	
vs.	)	
	)	
GREATER CLEVELAND REGIONAL TRANSIT AUTHORITY et al.,	)	**OPINION AND ORDER**
	)	
Defendants.	)	

This cause came on for consideration upon Defendants Greater Cleveland Regional Transit Authority (hereinafter "RTA") and Katherine Underwood's (hereinafter "Underwood") (hereinafter collectively referred to as "Defendants"), motions for summary judgment. Specifically, Defendants move this Court to grant summary judgment in their favor on Plaintiff Dawn Ellis' ("Plaintiff") wrongful death action. The Court, having undertaken an independent review of the record, grants Defendants' motions for summary judgment. While the parties disputed issues of law regarding immunity under R.C. 2744, et seq., negligence based on the facts in question, and the sudden emergency doctrine, this Court hereby refrains from deciding on these issues as Defendants' arguments regarding the defense of primary assumption of the risk and the open and obvious doctrine are well taken and sustained.

PROCEDURAL HISTORY AND STATEMENT OF THE FACTS

The relevant facts of this case are not in dispute. On July 22, 2011, at approximately 12:30 a.m., Charles Berry was struck and killed by a RTA rapid transit train operated by

Underwood on or near the train tracks at the East 120th Street station in Cleveland, Ohio. Approximately 6 p.m. earlier that evening, on July 21, 2011, Mark Ansboury drove himself and the decedent to Nighttown restaurant in Cleveland Heights. (Plaintiff's Memorandum in Opposition, p. 2, filed January 15, 2014.) Ansboury left Nighttown around 8 p.m., and Charles stated that he would walk or take a train to get home. Charles frequently used the rapid transit as a means of transportation, as the E. 120th station was less than a ten minute walk from his house. Plaintiff also testified that decedent rode the trains to work weekly. (Ellis Depo. Tr. pp. 34, 148-150, 152.) According to the bartender at Nighttown, Charles left the restaurant at approximately 11-11:30 p.m., presumably heading to the University Circle rapid station to proceed home. The University Circle Red Line Station is ½ mile from Nighttown. The Euclid/E. 120th Station is two stops east of University circle, and Berry's home on E. 108th Street was approximately one mile from the E. 120th station. It is undisputed that the westbound train being operated by Underwood struck and killed decedent near the red railing at the front of the platform as she pulled into the station.

Plaintiff is the widow of decedent and the administratrix of his estate. On June 7, 2012, Plaintiff brought claims against Underwood alleging negligence, recklessness, willful and wanton conduct in the operation of a train. Plaintiff also alleges that RTA is liable for Underwood's negligence pursuant to the exception to political subdivision tort immunity codified at R.C. 2744.02 and for the negligent design and maintenance of the rapid station where decedent was struck.

LAW AND ANALYSIS

I. Summary Judgment Standard

Pursuant to Civ. R. 56, summary judgment is only appropriate when (1) no genuine issue as to any material fact exists, (2) the party moving for summary judgment is entitled to judgment as a matter of law, and (3) after viewing the evidence most strongly in favor of the nonmoving party, reasonable minds can reach only one conclusion that is adverse to the nonmoving party. *Hollins v. Shaffer*, 182 Ohio App.3d 282, 2009-Ohio-2136 (8th Dist.). The Court analyzes factual evidence in the light most favorable to the non-moving party and draws all reasonable inferences in the non-moving party's favor. *See Henderson v. Walled Lake Consol. Sch.*, 469 F.3d 479, 487 (6th Cir. Mich. 2006). Summary judgment is inappropriate if the evidence would permit a reasonable jury to return a verdict in favor of the non-moving party. *Barrett v. Whirlpool Corp.*, 556 F.3d 502, 511 (6th Cir. Tenn. 2009) citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 251-2, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986).

A. Primary Assumption of the Risk

Defendants rely primarily on *Miljkovic v. Greater Cleveland Regional Transit Auth.*, 8th Dist. No. 77214, (Oct. 12, 2000) in arguing the defense of primary assumption of risk is a complete bar to all of Plaintiff's claims. The facts are similar in that the plaintiff in *Miljkovic* was struck by a train owned and operated by RTA. This Court finds merit to Defendants' argument. The elements of a primary assumption of risk defense were outlined by the Supreme Court of Ohio as "(1) consent or acquiescence in (2) an appreciated or known (3) risk * * *. The practicalities of proof require that the defense of assumption of the risk also be applicable where the risk is so obvious that plaintiff must have known and appreciated it." *Miljkovic*, citing *Anderson v. Ceccardi*, 6 Ohio St. 3d 110, 112, 451 N.E.2d 780 (1983). Like the open and obvious doctrine, primary assumption of risk was not merged with contributory or comparative negligence and functions as a complete bar as a matter of law to a negligence claim. *Gallagher v.*

Cleveland Browns Football Co., 74 Ohio St.3d 427, 431, 659 N.E.2d 1232 (1996). When the defense applies, "the duty element of negligence is not established as a matter of law [and] the defense prevents the plaintiff from even making a prima facie case." *Id.*

Based on the evidence in the record, this Court finds that the decedent in this case consented to a risk of which he knew or reasonably should have known. Decedent was a forty-two (42) year old individual who had a long history of riding RTA's rapid transit trains as a mode of transportation. Also, there were signs posted at the E. 120th Station warning to "Stay away from the edge of the platform...No horseplay or running on the platform or on the train. Always look both ways before crossing the tracks." (See Exhibits D and E attached to Underwood's motion for summary judgment.) Therefore, pursuant to *Miljkovic,* RTA owed no duty to the decedent, and it is not necessary to analyze any alleged breach of the standard of care, pursuant to *Miljkovic.*

B. <u>The Open and Obvious Doctrine</u>

Defendants also argue that the open and obvious doctrine acts as a complete bar to Plaintiff's negligence action. "Where a danger is open and obvious, a landowner owes no duty of care to individuals lawfully on the premises." *Armstrong v. Best Buy*, 99 Ohio St.3d 79, 788 N.E.2d 1088, 2003-Ohio-2573, ¶14. The doctrine is separate and distinct from a comparative or contributory negligence analysis, due to "the simple truism that where there is no duty there is no liability, and therefore no fault to the compared." *Id.* at ¶11. A train is an open and obvious danger. *McKinney v. Hartz & Restle Realtors, Inc.*, 31 Ohio St.3d 244, at 247, 510 N.E.2d 386 (1987). "A moving train is not a subtle or hidden danger and its potential for causing bodily injury or death to anyone in its path is readily apparent, even to young children. 'Nothing could be more pregnant with warning of danger than the noise and appearance of a huge, rumbling,

string of railroad cars.'" *Jones v. Norfolk S. Ry. Co.*, 8th Dist. No. 84394, 2005-Ohio-879, ¶14, (citations omitted). This Court finds that this oncoming RTA train was an open and obvious danger. Therefore, RTA owed no duty to the decedent, and Plaintiff's claims fail as a matter of law.

CONCLUSION AND ORDER

Based on the preceding findings, Defendants' motions for summary judgment are granted.

IT IS HEREBY ORDERED THAT:

The Court, having considered all of the evidence and having construed the evidence in a light most favorable to the non-moving party, determines that reasonable minds can come but to one conclusion, that there are no genuine issues of material fact and that Defendants Greater Cleveland Regional Transit Authority and Katherine Underwood are entitled to judgment as a matter of law on the issues of negligence and wrongful death. Therefore, this Court grants Defendants' Motions for Summary Judgment against Plaintiff on all counts.

IT IS SO ORDERED.

3-14-2014
DATE

JUDGE CASSANDRA COLLIER-WILLIAMS