

IN THE CIRCUIT COURT OF COUNTY, MISSISSIPPI

VS.

CIVIL ACTION NO.

PLAINTIFF'S RESPONSE TO MOTION FOR SUMMARY JUDGMENT

Comes now , Plaintiff, by and through his/her attorneys, and responds to Defendant's Motion for Summary Judgment, as follows, to wit:

1. Plaintiff admits the summary as set forth in paragraph one.
2. Paragraph two of Defendant's Motion is admitted.
3. Paragraph three of Defendant's Motion is denied.
4. Paragraph four of Defendant's Motion is denied.
5. Paragraph five of Defendant's Motion is denied.
6. Paragraph six does not require an answer from Plaintiff.

AFFIRMATIVE MATTER IN SUPPORT OF PLAINTIFF'S RESPONSE

A. INSUFFICIENT ILLUMINATION AT CROSSING AND OF TRAIN ITSELF

Plaintiff contends that the defendant railroad was negligent in failing to provide adequate lighting so as to warn motorists of its presence. Plaintiff contends that the crossing was not sufficiently illuminated, and that the subject crossing itself did not have an overhead streetlight (, affidavits), and in addition, the train itself was not lighted. (deposition, pages) The engineer, , testified that the caboose was equipped with a large red light, however it was not turned on and that it could have been turned on by simply turning a switch inside the caboose. (deposition pages) testified that the railroad cars were all black. (deposition pages) In addition, the road surface was black asphalt, (deposition, page) which made the lighting conditions more severe.

In Robert J. Newman, Jr. vs Missouri Pacific Railroad Company 421 F.Supp. 488, affirmed in 545 F.2d 439, the Court held that a crossing not sufficiently illuminated, or the train itself not being sufficiently illuminated of itself, presented the motorist with an unusual and dangerous condition, which was known or should have been known to the railroad, requiring greater degree of care on its part in the form of additional warning or illumination over crossing.

The Plaintiff contends that the crossing itself was not illuminated, and that the only illumination came from an adjacent crossing, and was therefore insufficiently illuminated. In addition, the train itself was not illuminated whatsoever, and that the matter of negligence of the Defendant, if any, is a question of fact and should therefore be left for the jury to determine.

B. UNUSUAL ENVIRONMENTAL LANDSCAPING

Under most circumstances when a train is occupying a public crossing, there is no additional warning required by the railroad, due to the tremendous size of the railroad engine and it's cars, however when environmental landscaping or other circumstances which should cause the railroad to foresee that motorists may not see the train, then this circumstance puts the issue of the railroad's negligence a jury question. Clark v. Columbus and Grenville Rv. Co. 473 So2d 947.

In the instant case, the railroad tracks had a levy on either side of the crossing, and at night, with the presence of the train on the crossing, it gave the appearance of being a part of the levy system. (affidavit of _____, photograph Exhibit "A")

Also, as previously shown, the crossing was not lighted over the subject crossing, and in addition the crossing did not possess operating warning lights. (_____ deposition pages 15,16)

In addition, the engineer alleged that he/she undertook to place a lighted "fuse" on the side of the crossing away from plaintiff, and admits that he/she did not bother to place a "fuse" on plaintiff's side of the tracks, saying that he/she did not see any traffic coming from the east. (_____ deposition page _____) Further, the engineer on defendant's train testified that he/she looked both ways and did not see traffic approaching from the east/west/north/south (the direction of plaintiff), (_____ deposition page _____) however, he/she estimated that it was approximately one minute after he/she looked to see if anything was coming. and the moment of impact. (_____ deposition page _____) It is apparent from this admission that the engineer did not keep a proper lookout for traffic. If true, this constitutes negligence, and would be a jury issue. Mississippi Exnort Railroad Company v. Emery S. Clark 223 So. 542, where the Court said that the jury was justified in finding that the engineer failed to keep a proper lookout while the crossing was approached.

MATTER OF JURY ISSUE

In determining whether a genuine issue of fact exists, the non-movant must be giving the benefit of every reasonable doubt. If reasonable minds could differ on the existence of a genuine issue of fact, then the summary judgment motion should be denied. BROWN v. CREDIT CENTER, INC. 444 So2d 358. The mere possibility that an issue of material fact exists is sufficient to defeat a motion for summary judgment. DONALD v. REEVES TRANSPORT CO., 538 So2d 1191.

The Plaintiff respectfully requests that Defendant's Motion for Summary Judgment be dismissed.

Respectfully submitted,

By: _____

CERTIFICATE OF SERVICE

I, _____, Attorney for Plaintiff, certify that I have this day mailed a copy of these Interrogatories by United States mail with postage prepaid to _____, at his/her usual address of

This the _____ day of _____, _____.
