

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

NATALIE RODRIGUEZ,

Plaintiff and Appellant,

v.

MODESTO AND EMPIRE TRACTION
COMPANY, INC.,

Defendant and Respondent.

F062301

(Super. Ct. No. 634544)

OPINION

APPEAL from a judgment of the Superior Court of Stanislaus County. Hurl W. Johnson III, Judge.

Law Office of Brent L. Bixby and Brent L. Bixby; Law Office of David M. Jamieson and David M. Jamieson for Plaintiff and Appellant.

Curtis Legal Group, Ralph S. Curtis and Youlet Ovrachim for Defendant and Respondent.

-ooOoo-

Plaintiff Natalie Rodriguez appeals from the judgment entered on a defense verdict in her negligence action against defendant Modesto and Empire Traction Company, Inc. She contends defendant's operation of a railroad was subject to the "extreme" or heightened duty of care traditionally applied to ultrahazardous activities or materials, such as electricity, firearms, explosives and gasoline. She contends the trial court erred in refusing her requested jury instruction applying the elevated standard of care. We disagree and affirm the judgment.

FACTS AND PROCEDURAL HISTORY

Defendant operates a short-haul railroad in the City of Modesto. Defendant has tracks that connect various industrial sites in Modesto with rail lines owned by the Union Pacific and Burlington Northern Santa Fe railroads. Defendant operates trains traveling to businesses located in those industrial sites.

The portion of defendant's tracks involved in this case begins at a Union Pacific siding, then curves to the east, where it runs down the middle of "B" Street from Beard Street, across 9th Street, to 12th Street, where "B" Street ends. In the blocks between Beard and 12th Streets, the space between the rails is filled with concrete and the rails themselves are at grade level, creating a driving surface similar to trolley tracks still familiar in a few California cities. "B" Street has two lanes for automobile traffic in each direction, and the inner lanes overlap with, and run parallel to, defendant's tracks. When one of defendant's trains comes onto "B" Street traveling eastward, automatic switches activate warning bells at the intersections and change the traffic signals to blinking red lights in all four directions, that is, changing the intersections into four-way stops.

Just before 8 o'clock in the morning on January 31, 2007, one of defendant's trains entered "B" Street. The train consisted of three locomotives and 33 loaded freight cars. It was traveling at approximately five or six miles per hour. Automobile traffic was "hectic" on "B" Street. Before the lead engine entered "B" Street, the engineer activated the warning bell on the engine and began blowing the horn with two long blasts, a short

blast, and then a concluding long blast, as specified in defendant's standard operating procedures. Plaintiff was traveling east on "B" Street. She pulled up alongside the train and, when she was approximately 180 to 240 feet ahead of it, pulled in front of the train. The traffic signals changed to flashing red. Plaintiff stopped her car behind other cars at the intersection. As cars went through the intersection, plaintiff moved her car up. Once at the intersection, however, plaintiff did not take the opportunity to go through it even though it was clear for her. When plaintiff did not move, the engineer employed emergency braking maneuvers. The train collided with the rear of plaintiff's car at about three to five miles per hour. Plaintiff's car was pushed into the intersection but did not collide with other automobiles. Plaintiff suffered injuries, the extent of which were disputed at trial. Plaintiff testified at trial that she saw the flashing traffic signals at the intersection, but did not hear the train bell or horn and did not see the train until it hit her.

Plaintiff sued defendant and the engineer for negligence. The engineer was dismissed from the case and the matter went to trial against defendant. Plaintiff requested the jury be instructed with CACI No. 414, modified to state the following: "People must be extremely careful when they deal with dangerous items or participate in dangerous activities. Operating a train on a public street is dangerous in and of itself. The risk of harm is so great that the failure to use extreme caution is negligence." The court denied the request, instructing the jury instead with the basic standard of care instruction, CACI No. 401, and with the instruction stating the basic standard of care for railroads, CACI No. 800. As modified by the trial court, CACI No. 800 states the following: "Railroad companies must use reasonable care to avoid causing injury to anyone crossing railroad tracks from a street or roadway. Train operators must use reasonable care in operating their trains at railroad crossings. The failure to use reasonable care is negligence."

The jury returned a verdict for defendant. Judgment was entered and plaintiff's posttrial motions were denied. Plaintiff's sole contention on appeal is that the court erred in refusing to instruct the jury with CACI No. 414.

DISCUSSION

Plaintiff contends the operation of a fully loaded freight train down the middle of a city street at rush hour constitutes a "dangerous activity" as contemplated by CACI No. 414.¹ There are at least two problems with this contention. First, the Supreme Court has expressly held that the "reasonable care" standard is applicable to operators of railroads. (*Peri v. L. A. Junction Ry.* (1943) 22 Cal.2d 111, 120 (*Peri*)). *Peri* thoroughly discussed the policy considerations and precedents applicable to railroads; this court is without the power to revisit the Supreme Court's conclusion, even if we believed a different rule was called for. (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455.) Second, the standard of reasonable care seems, in fact, to be the appropriate standard under the circumstances and no reconsideration of the rule in *Peri*, which is embodied in CACI No. 800, is necessary. While plaintiff contends that freight trains do not normally travel down the middle of city streets, it is common knowledge that trains do share the roadway with cars at rail crossings in most California cities. Further, even though a freight train is massive, while traveling on the city street here the train was

¹ Plaintiff acknowledges that the category of dangerous items or activities is limited, under current and long-established case law, to "highly explosive or inflammable materials, firearms, or other inherently hazardous instrumentalities with which the slightest misjudgment may constitute negligence." (*Menchaca v. Helms Bakeries, Inc.* (1968) 68 Cal.2d 535, 544.) In all other circumstances, the exercise of ordinary care must take into account the dangers in particular circumstances (*ibid.*), and negligence consists of doing or failing to do "something that a reasonably careful person would do in the same situation." (CACI No. 401.) Unquestionably, the known presence of a car on the railroad tracks would be a relevant circumstance in determining the required level of care for a train operator, whether the train is speeding down a rural track or moving slowly down a city street. The jury here was permitted to consider that circumstance under the instructions given in the present case.

traveling at no more than six miles per hour with a commensurate stopping distance. There is nothing in the record here that establishes the operation of the train was “so inherently dangerous or complex ... that the hazard persists despite the exercise of ordinary care.” (*Benwell v. Dean* (1964) 227 Cal.App.2d 226, 233.)

DISPOSITION

The judgment is affirmed. Defendant is awarded costs on appeal.

DETJEN, J.

WE CONCUR:

LEVY, Acting P.J.

GOMES, J.