STATE OF MICHIGAN
IN THE SUPREME COURT

JACOB MARION, Individually and through his Guardian and Next Friend, MONICA MARION,

Plaintiff/Appellee,

v.

GRAND TRUNK WESTERN RAILROAD COMPANY, STEVEN GOLOMBESKI, and JESSIE WILSON,

Defendants/Appellants.

Supreme Court Case No. 164298
Court of Appeals Case No. 352355
Wayne County Circuit Court
Case No. 18-005516-NO

Nicholas A. Cirino (P37418)
LAW OFFICES OF NICHOLAS A. CIRINO
333 West Fort Street, Suite 1400
Detroit, MI 48226
(313) 628-4709
Nicholascirino@aol.com

Michael S. Cafferty (P36613)
CAFFERTY & ASSOCIATES, P.C.
333 West Fort Street, Suite 1400
Detroit, MI 48226
(313) 964-3070
mcaffe@aol.com

Attorneys for Plaintiff/Appellee

Mary C. O'Donnell (P33479)
FLETCHER & SIPPEL LLC
28 W. Adams Avenue
Grand Park Centre, Suite 1700
Detroit, MI 48226
(313) 552-3534
modonnell@fletcher-sippel.com

Attorneys for Defendants/Appellants

Dana Nessel
Attorney General of the State of Michigan
By Special Assistant Attorney General
FRALEIGH LAW FIRM, PLLC
6200 Pine Hollow Dr., Suite 200
East Lansing, MI 48823
(517) 575-0500

Attorney for Intervening Plaintiff Michigan Department of Health and Human Services

---

SUPPLEMENTAL BRIEF OF DEFENDANTS-APPELLANTS BY ORDER OF THE MICHIGAN SUPREME COURT

TABLE OF CONTENTS

INDEX OF AUTHORITIES ii

STATEMENT OF QUESTIONS PRESENTED BY ORDER OF THE SUPREME COURT 1

BACKGROUND OF CASE 2

ARGUMENT 6

I. The Railroad Defendants were entitled to presume that Plaintiff would leave the tracks before being struck by the train. 6

II. The Railroad Defendants did possess a duty to slow or stop the train to avoid a possible collision with Plaintiff, but only when it became apparent that Plaintiff could not or would not leave the tracks 11

III. The Railroad Defendants' entitlement to the presumption that a person will leave the tracks gave way to the duty to act to avoid a possible collision only when it became apparent that Plaintiff could not or would not leave the tracks. 11

RELIEF REQUESTED 16

PROOF OF SERVICE 17

INDEX OF AUTHORITIES

CASES:

Baumeister v. Grand Rapids & I.R. Co.,
63 Mich. 557, 30 N.W. 337 (1886).....12

Berlin v. Chicago & N.W. Ry. Co.,
261 Mich. 479, 246 N.W. 191 (1933).....10, 14

Bloch v. Detroit United Ry.,
211 Mich. 252, 178 N.W. 670 (1920).....7

Bonner v. Grand Trunk W. Ry. Co.,
191 Mich. 313, 158 N.W. 3 (1916) 8, 9

Brinks v. Chesapeake & O. Ry. Co.,
398 F.2d 889 (6th Cir. 1968) 13, 14, 15

DeCorte v. New York Cent. R. Co.,
377 Mich. 317, 140 N.W.2d 479 (1966).....13

Frye v. CSX Transp., Inc.,
933 F.3d 591 (6th Cir. 2019) 9, 14

Hotchkiss v. Nat'l R.R. Passenger Corp.,
904 F.2d 36 (6th Cir. 1990) 12

Lake Shore & Mich. S. R.R. Co. v. Miller,
25 Mich. 274 (1872) 7, 8, 11

Piskorowski v. Detroit, Grand Haven & Milwaukee Ry. Co.,
121 Mich. 498, 80 N.W. 241 (1899).....9

Tomes v. Detroit, T. & I.R. Co.,
240 Mich. 133, 215 N.W. 308 (1927).....10, 14

Trudell v. Grand Trunk Ry. Co.,
126 Mich. 73, 85 N.W. 250 (1901).....10, 13, 14

Wexel v. Grand Rapids & I. Ry. Co.,
190 Mich. 469, 157 N.W. 15 (1916).....8

Winchell v. Detroit & Mackinac Ry. Co.,
102 Mich. App. 433, 301 N.W.2d 884 (1980).....13

RULES:

MCR 7.305.....17

MCR 7.212.....17

MCR 7.213.....17

STATEMENT OF QUESTIONS PRESENTED BY ORDER OF THE SUPREME COURT

1. Whether the defendants were entitled to presume that the plaintiff would leave the tracks before being struck by the train?

Railroad Defendants' answer: Yes.

2. Whether the defendants possessed a duty to slow or stop the train to avoid a possible collision with the plaintiff?

Railroad Defendants' answer: Yes, but the duty arose only when it became apparent that the plaintiff could not or would not leave the tracks.

3. If both of the preceding questions are answered in the affirmative, at what point does the entitlement to a presumption that a person will leave the tracks give way to the duty to act to avoid a possible collision, if at all?

Railroad Defendants' answer: The entitlement to a presumption that a person will leave the tracks gives way to the duty to act to avoid a possible collision only when it becomes apparent that the person cannot or will not leave the tracks.

BACKGROUND OF CASE

On February 28, 2012, a train "of 88 cars loaded with 5480 ton of weight and 6410 feet in length," Exhibit 4 at 190,[1] was traveling north toward the Oak Street crossing in Wyandotte, Michigan. Exhibit 5 at 17; Exhibit 6 at 21. Defendant Jessie Wilson was the Engineer on the train, and Defendant Steven Golombeski was the Conductor. Exhibit 5 at 17; Exhibit 6 at 21.

Both Engineer Wilson and Conductor Golombeski saw a person approximately three-quarters of a mile to a mile ahead, walking between the rails with his back to them. Exhibit 7 at 60-61; Exhibit 8 at 72-73. It is not uncommon, in their 26 years of experience, to see pedestrians[2] walking on a railroad track; nor is it uncommon for the pedestrians to wait until "the last second" to step off the track. Exhibit 5 at 17-18; Exhibit 6 at 21-22; Exhibit 7 at 66.

As the train approached the Oak Street crossing, Engineer Wilson sounded the train's horn in the legally prescribed crossing pattern and then, after observing the pedestrian fail to move off the track, sounded it in several short blasts in an attempt to warn the pedestrian ahead. Exhibit 5 at 18; Exhibit 6 at 22; Exhibit 11 at 116. Tragically, and unbeknownst to the train crew, the pedestrian trespasser, fourteen-year-old Plaintiff Jacob Marion, was wearing earbuds and listening to music and apparently did not hear either the legally prescribed crossing signal nor the horn blasting. Exhibit 10 at 53; Exhibit 11 at 122-23.

---

[1] All exhibit references in this Supplemental Briefing are to the exhibits attached to Defendants' Application for Leave to Appeal (hereinafter "Defendants' Application), and the exhibit page numbers cited herein are to the page numbers at the bottom center of each page.

[2] Under Michigan law, pedestrians who walk on or along the right-of-way of railroad tracks—without permission from the owner railroad—are clearly trespassers. *See* MCL § 462.273 ("[A] person shall not walk, ride, drive, or be upon or along the right-of-way or yard of a railroad company operating its lines within this state, or go upon or cross the right-of-way or yard at a place other than a public or private crossing, unless having first obtained written permission from the owner or occupant railroad, its agent or servant."). As such, Plaintiff was a trespasser at the time of the incident alleged in his Complaint.

Both Engineer Wilson and Conductor Golombeski testified that it was not until after Plaintiff failed to respond to the sounding and blasting of the train's horn that they realized he was not going to step off the tracks and remove himself from harm's way, at which point the emergency brake was applied. Exhibit 5 at 18; Exhibit 6 at 22; Exhibit 7 at 62-63. Unfortunately, by that point, it was too late to avoid hitting Plaintiff, who suffered severe injuries. Exhibit 5 at 18; Exhibit 6 at 22. The train traveled over 700 feet before coming to a complete stop, 31 to 32 seconds after the emergency brake was applied. Exhibit 4 at 190; Exhibit 11 at 128-129; Exhibit 12 at 26-27.

Based on evidence provided by the train's event recorder, it is undisputed that Engineer Wilson began sounding the train's horn eighteen to nineteen seconds before impact, which would have provided Plaintiff plenty of time to step off the tracks had he heard, and responded to, the horn. Exhibit 11 at 117; Exhibit 12 at 26. But even if the brake had been applied at the same time as the first horn blast (which, of course, fails to account for any reaction time), the train could not have stopped in time, as it undisputedly took 31 to 32 seconds to stop once the brake was applied.

Plaintiff argued, and the Court of Appeals seems to have agreed, that the Railroad Defendants knew, or should have known, even before Engineer Wilson initially sounded the horn that Plaintiff was not going to get off the track. Plaintiff based this argument on deposition testimony in which Engineer Wilson stated that Conductor Golombeski had told him, "at the beginning, when we first saw him," that someone was "on the track and he's not responding" and that he did not think the person was going to move.[3] Exhibit 7 at 67. The Railroad Defendants included in their Appendix the page from Engineer Wilson's deposition in which **he clarified that**

[3] Conductor Golombeski did not recall making such a statement. Exhibit 9 at 74. However, in his own deposition, Conductor Golombeski testified that when "…we got about to the crossing and I might have said, 'He's not responding,' or something, at the crossing." *Id.*

this statement occurred after he began sounding the horn, which, as stated, was 18 to 19 seconds before impact, as the train approached Oak Street Crossing. Exhibit 8 at 50.

Defendants moved for summary disposition, arguing that, under Michigan law, there was no duty to slow or stop the train when someone is on the track "…unless or until it becomes apparent that the person is not going to ... get off the track ...." Exhibit 13 at 21. The circuit court granted the motion and discussed decisions of this Court addressing the right of a train crew to assume that persons on train tracks will remove themselves from the danger of an approaching train unless they suffer from some disability evident to the crew. Exhibit 2 at 8-10. The circuit court also denied Plaintiff's Motion for Reconsideration, finding that Plaintiff had "merely presented the same issues already ruled on by the Court, either expressly or by reasonable implication," and that Plaintiff had not demonstrated "a palpable error by which the Court and the parties have been misled," nor had he shown "that a different result would necessarily result from correction of the alleged mistake." Exhibit 3 at 12-13.

Plaintiff appealed, and the Court of Appeals reversed. *See generally* Exhibit 1. In reversing the trial court's decision, the Court of Appeals: **ignored this Court's precedents** establishing a train crew's right to presume people will step off the tracks; faulted the trial court for relying on cases before the adoption of comparative negligence, but then relied on cases from the same era—none of which involved circumstances to which the presumption would apply; discussed more recent cases addressing duty, none of which were railroad cases; failed to address undisputed evidence showing the accident could not have been avoided by the time it became apparent Plaintiff was not responding to the train horn (or erroneously determined that a duty arose before that point); and failed to recognize that even the standard of duty espoused at times in its Opinion was met by the Railroad Defendants based on the undisputed evidence in this case. On April 19,

2022, the Railroad Defendants filed an Application for Leave to Appeal to this Court, including a detailed analysis of these many shortcomings.

On September 28, 2022, this Court issued an Order directing the Clerk to schedule a "MOAA" (Mini-Oral Argument on the Application) and raised three specific questions. The instant Supplemental Brief addresses each of the three requested questions, answering each question and providing supporting caselaw and analyses. The Railroad Defendants' responses to these questions as set forth herein, in addition to the Defendants' Application, clearly document the bases for reversal of the Court of Appeal's Opinion and for reinstatement of summary disposition in favor of the Railroad Defendants.

ARGUMENT

As explained above, this Court has presented the parties with three specific questions via its September 28, 2022 Order. The first question is whether the Railroad Defendants were entitled to presume that Plaintiff would leave the tracks before being struck by the train. The second question is whether the Railroad Defendants possessed a duty to slow or stop the train to avoid a possible collision with Plaintiff. The third questions asks—if both of the preceding questions are answered in the affirmative—at what point does the entitlement to a presumption that a person will leave the tracks give way to the duty to act to avoid a possible collision, if at all.

In short, the Railroad Defendants were, indeed, entitled—under longstanding precedent developed by this Court—to a presumption that Plaintiff would leave the tracks before being struck by the train. No exception to this presumption applied where Plaintiff did not appear to be under any type of disability preventing him from stepping to safety at the time the crew saw first him (prior to their sounding of the horn at the crossing). And, although the Railroad Defendants undeniably also possessed the duty to stop and/or slow the train to avoid a collision with Plaintiff, such duty was **not triggered until it became apparent** that Plaintiff could not or would not heed the train's warnings and leave the tracks. Here, this did not become apparent until ***after*** the crew sounded the horn and saw that Plaintiff did not react nor leave the tracks. At that point, the Railroad Defendants' entitlement to presume that Plaintiff would leave the tracks gave way to the duty to slow or stop the train—which **Defendants did immediately**. Unfortunately, given the speed and weight of the train, impact with Plaintiff could not be avoided at that point.

I. The Railroad Defendants were entitled to presume that Plaintiff would leave the tracks before being struck by the train.

Under Michigan law established by this Court, a train crew is entitled to presume that a pedestrian will leave the track before being struck by a train. Indeed, train crews seeing a person

on the track ahead have a legal right to proceed on the presumption that such person is in possession of his or her faculties, will hear and heed the signals given (such as the horn), and will act with instinctive self-preservation by stepping off the track. The rationale behind this legal presumption is that, while it is expeditious for a pedestrian to avoid danger by stepping off the track, trains cannot reasonably stop or slow every single time a pedestrian is seen in a position on or near the track (a pedestrian who will likely see or hear the train and act in their own interest by simply stepping out of the way). *See Bloch v. Detroit United Ry.*, 211 Mich. 252, 259, 178 N.W. 670, 672 (1920) (noting that a pedestrian on the tracks "…by a step or two can place himself in a position of safety" and explaining that "Were motormen required to prepare to stop every time a man appeared on the track, cars would make little progress, and there would be no such thing as rapid transit. They are not bound to anticipate that a pedestrian will not step off or to be prepared for a contingency so unlikely to happen."). However, the clearly-established exception to this presumption takes effect if the crew has knowledge (from the person's actions or appearance) sufficient to show that such person labors under some disability or condition preventing him or her from appreciating the impending danger or from physically removing themselves from the track.

The foundational case on this issue was decided by this Court in 1872, and has since been cited with approval by additional decisions from this Court, the Michigan Court of Appeals, as well as the Sixth Circuit Court of Appeals. *See, e.g.*, *Lake Shore & Mich. S. R.R. Co. v. Miller*, 25 Mich. 274 (1872), *overruled in part on other grounds by Bricker v. Green*, 313 Mich. 218, 21 N.W.2d 105 (1946). As quoted in Defendants' Application (*see* at 8-9), this Court explained both the presumption and the reasoning behind it, stating in *Lake Shore*:

> ... [I]f [the train engineer] sees a man walking along upon the track at a considerable distance ahead, and is not aware that he is *deaf* or *insane*, or from some other cause insensible of the danger, ... ***he has a right*** to rely upon the laws of nature and the ordinary course of things, and ***to presume that the man ... walking upon the track***,

> ***has the use of his senses***, ***and will*** act upon the principles of common sense and the motive of self-preservation common to mankind in general, and that they will, therefore, ***get out of the way***; ***that those on the track will get off***, and those approaching it will stop, ***in time to avoid the danger***; and ***he therefore has the right to go on, without checking his speed, until he sees that ... the man is not likely to get out of the way, when it would become his duty to give extra alarm by bell or whistle, and if that is not heeded, then, as a last resort, to check his speed or stop his train, if possible, in time to avoid disaster***.[4]
>
> If, however, he sees a child of tender years upon the track, or any person known to him to be, or from his appearance giving him good reason to believe that he is, insane, or badly intoxicated, or otherwise insensible of danger, or unable to avoid it, he has no right to presume that he will get out of the way, but should act upon the belief that he might not, or would not, and he should therefore take means to stop his train in time. A more stringent rule than this—a rule *that would require the engineer to check his speed or stop his train, whenever he sees a team crossing the track or a man walking on it, far enough ahead to get out of the way in time,* until he can send ahead to inquire why they do not; *or which would require the engineer to know the deafness or blindness, or acuteness of hearing or sight, or habits of prudence or recklessness, or other personal peculiarities of all those persons he may see approaching*, or upon the track, and more especially of all those who may be approaching a crossing upon the highway, though not seen—any such rule, if enforced, must effectually put an end to all railroads, as a means of speedy travel or transportation, and reduce the speed of trains below that of canal-boats forty years ago; and *would effectually defeat the object of the legislature in authorizing this mode of conveyance.*

Lake Shore & Mich. S. R.R. Co. v. Miller, supra, at 279-80 (emphasis added but for italics in second line, which is original). *See also: Wexel v. Grand Rapids & I. Ry. Co.*, 190 Mich. 469, 477, 157 N.W. 15, 17 (1916) ("It has been repeatedly held by this court that those running trains are not required to stop or check simply because they see ahead of them upon or approaching the track persons who are apparently without disability and of sufficient age to understand the hazards of a railroad track, always to be recognized as 'a perpetual menace of danger.'"); and *Bonner v. Grand Trunk W. Ry. Co.*, 191 Mich. 313, 319, 158 N.W. 3, 5 (1916) ("The engineer had a right to assume

[4] This is the sequence of events in this case. The Railroad Defendants saw Plaintiff walking on the track three-quarters of a mile ahead, had the right to continue on, assuming he would step off the tracks, realized after the horn sounded for the crossing that he did not respond, so gave an "extra alarm" of short blasts, and then applied the emergency brake. Exhibit 5 at 18; Exhibit 6 at 22; Exhibit 7 at 60-64; Exhibit 8 at 47-48; Exhibit 9 at 72-73.

plaintiff had exercised reasonable precautions to observe if a train was approaching along the track on which he stood and would seasonably step aside. Until it became apparent that he would not do so, there could be no discovered negligence."). Additionally, the Sixth Circuit Court of Appeals very recently expressed this principle of Michigan law with clarity: "Until it becomes apparent otherwise, train crew members can reasonably assume a person on the tracks—adult or child—will move off the tracks in time to avoid a collision." *Frye v. CSX Transportation, Inc.*, 933 F.3d 591, 600–01 (6th Cir. 2019).

The evidence in this case shows that, at the time the crew saw Plaintiff on the track (about three-quarters of a mile ahead), he did not appear be under any sort of disability preventing him from heeding the warnings of the train and removing himself from his dangerous location. First, although Plaintiff had earbuds playing music in his ears at the time of the incident—which apparently prevented him from hearing the train's blaring horn and appreciating his position of danger—this is not something that the crew could have possibly seen or understood from that distance. Not only are earbuds small pieces of electronics, but they are inserted primarily inside of one's ear. As such, there is no evidence that the crew had any knowledge whatsoever that Plaintiff allegedly could not hear the warnings of the oncoming train (including the whistle and horn at the crossing, and the extra blasts). As such, the crew's entitlement to the presumption that Plaintiff would step off the track before being hit by the train remained in force. *See Piskorowski v. Detroit, G.H. & M.R. Co.*, 121 Mich. 498, 500, 80 N.W. 241, 242 (1899) ("We think negligence cannot be imputed to defendant's servants in not knowing of plaintiff's deafness, and in not assuming that he would ignore the warning given him.").[5]

[5] As discussed in detail in the Defendants' Application, the Court of Appeals, in its misguided Opinion reversing summary disposition, rejected the application of this factually-similar case based simply on the fact that contributory negligence was applicable at the time that

Moreover, neither can Plaintiff's age alone be considered a disability precluding the presumption that he would step off the track in preservation of his own safety. Indeed, this Court has previously found it was reasonable for an engineer to assume that a seven-year-old would step off the track in time to avoid a collision. *See Trudell v. Grand Trunk R. Co.*, 126 Mich. 73, 81, 85 N.W. 250, 253 (1901) (explaining that "…if any one was seen of the size of this boy, he would be justified in believing he would step off in time to avoid injury."). This Court has found the same for a nine-year-old. *See Berlin v. Chicago & N.W. Ry. Co.*, 261 Mich. 479, 482, 246 N.W. 191, 191 (1933) ("Even if the engineer saw [the nine-year-old], he would be justified in believing he would not run into the side of defendant's train or stay upon its track where he would likely be injured, and that in the exercise of intelligence plaintiff would step off the track."). This Court has also held that the appearance and conduct of an early teenager—like Plaintiff in this case—was sufficient to support the presumption that she would remove herself from a position of danger given the oncoming train. *See Tomes v. Detroit, T. & I.R. Co.*, 240 Mich. 133, 138-39, 215 N.W. 308, 309 (1927) ("Deceased was not a little child, but a high school student nearly 14 years old, intelligent, normal, and familiar with this crossing, its surroundings, conditions, and dangers. There is no proof of anything in her appearance or conduct suggesting anything abnormal in her appearance or actions as she walked towards the crossing."). The same was and is the case here.

Accordingly, the Railroad Defendants in this case were entitled to presume that Plaintiff would leave the tracks before being struck by the train. Although Plaintiff was a minor, he was mature enough in appearance that the crew could reasonably believe that he could appreciate the

---

it was decided. This distinction, however, does not affect the viability of the longstanding precedent of a train crew's entitlement to presume that a pedestrian will step off the track in time to avoid a collision. *See* Defendants' Application, Section I(B). Nor can a lower court unilaterally and impliedly overrule prior precedent of this Court.

danger of an approaching train and act in the interest of his own safety by stepping off the track. Further, the crew was provided with no indication—upon simply seeing him on the track from three-quarters of a mile away[6] and up until the time of impact—that, at the time the crew provided the legally-required warning, Plaintiff was under any kind of condition preventing him from hearing the train and moving out of the way. In sum, the Railroad Defendants—upon seeing an individual of such stature sufficient to preserve his own safety by stepping off the track and without the appearance of any disability preventing such departure—was **legally entitled to presume** that Plaintiff would heed the warnings of the oncoming train and step off the track to safety.

II. The Railroad Defendants did possess a duty to slow or stop the train to avoid a possible collision with Plaintiff, but only when it became apparent that Plaintiff could not or would not leave the tracks.

As clearly set out in the *Lake Shore & Mich. S. R.R. Co. v. Miller* decision quoted at length above, railroads do indeed possess a duty under Michigan law to slow or stop a train to avoid a possible collision with a pedestrian (or a vehicle). Defendants do not in any way contest this point, nor do they seek a lower duty. However, for purposes of the liability analysis in this case, the key consideration here is *when* that duty was actually triggered. Because this issue is covered by the Railroad Defendants' answer to this Court's third question in its September 28, 2022 Order, it will be addressed in the next section.

III. The Railroad Defendants' entitlement to the presumption that a person will leave the tracks gave way to the duty to act to avoid a possible collision only when it became apparent that Plaintiff could not or would not leave the tracks.

As discussed above, the Railroad Defendants possessed a duty to slow or stop the train to avoid a possible collision with Plaintiff—but **only at such time as when it became apparent** that

[6] Not only was it difficult (if not impossible) for the crew to see details such as earbuds in Plaintiff's ears at this distance, but there was also *nothing* for Plaintiff to actually respond to at this time—as there was no warning yet given or required. *See* Section III analysis, *infra*.

he could not or would not leave the tracks. In essence, when the train crew sounded the horn for the crossing and observed that Plaintiff did not react, the duty to stop or slow the train was then triggered. It was *not*, however, triggered by the crew simply seeing Plaintiff on the track three-quarters of a mile away.[7] The presumption applied until *after* the crew sounded the horn, observed Plaintiff's response (or in this case, non-response), and determined he could not or would not step off the track. But at that point, given the speed and weight of the train, impact with Plaintiff could not be avoided.

Indeed, under Michigan law, the entitlement to presume that a person (or vehicle) will leave the tracks gives way to the duty stop or slow the train to avoid a possible collision **only when it is apparent** that he either cannot or will not heed the warnings given and step off the tracks in the interest of his own safety. Again, the Sixth Circuit synthesized this Court's precedents on this issue succinctly. It explained:

> The duty of the engineer to take evasive action, however, is qualified by certain presumptions. An engineer is entitled to presume that a vehicle on the tracks will get off, or that a vehicle approaching the tracks will stop in time to avoid the danger, until it becomes apparent that the vehicle cannot or will not stop. *Until it becomes apparent the assumption is incorrect*, an engineer may assume that a person or vehicle on or near the tracks will exercise ordinary care. When a person or vehicle is on the tracks, as opposed to approaching them, an engineer is bound to slow or stop the train *for those who are apparently unaware of the danger and do not hear or notice warning signals*, or for a vehicle obviously disabled or unable to extricate itself from the tracks because of surrounding traffic.

Hotchkiss v. Nat'l R.R. Passenger Corp., 904 F.2d 36 at *4 (6th Cir. 1990) (internal citations omitted and italics added). *See also: Baumeister v. Grand Rapids & I.R. Co.*, 63 Mich. 557, 561, 30 N.W. 337, 339 (1886) (holding that "…where a person is discovered upon the track, and it is

[7] Defendants suggest that **there can be no dispute** that the crew would see very little three-quarters of a mile from Plaintiff, let alone any non-response. Further, **there is no dispute** that there was nothing for Plaintiff to respond to at three-quarters of a mile out, especially with his back to the train.

seen that he fails to recognize the peril of his situation, or the warnings thereof, it is the duty of the engineer, and humanity requires it, that he should slow down his train; and, if necessary to preserve life or limb, come to a full stop."); *Trudell*, 126 Mich. at 79 ("…the engineer would be justified in believing that he would step off the track in time to avoid being struck, and the engineer would not be required to check the speed of his engine until he saw the boy did not appreciate the danger."); *DeCorte v. New York Cent. R. Co.*, 377 Mich. 317, 328, 140 N.W.2d 479, 482 (1966) ("The railroad has the right-of-way and the engineer might assume that the truck would stop until it became apparent that the truck could not or would not stop."); *Winchell v. Detroit & M. Ry. Co.*, 102 Mich. App. 433, 437, 301 N.W.2d 884, 886 (1980) (affirming the use of jury instruction that explained that "…(u)nder the Michigan law, there's no duty for a railroad to reduce its speed until it realizes that a car won't stop."); and *Brinks v. Chesapeake & O. Ry. Co.*, 398 F.2d 889, 891 (6th Cir. 1968) ("The Michigan Supreme Court has held that there is no duty for a railroad train to reduce its speed until it realizes that an approaching vehicle will not stop.").

Here, as explained above, the duty to stop or slow the train was triggered **only when it became apparent** that Plaintiff either could not or would not get off the track (i.e., when it became apparent that Plaintiff was not responding to the train horn). Stated differently, the crew had the right to trust that Plaintiff was in possession of his normal faculties and that, with all the warnings given as the train approached the crossing, he would step off the tracks to avoid being hit. However, when the crew realized that Plaintiff was not going to heed the warnings given (or could not)—after the horn was sounded (i.e., the warning was actually *given*) and they observed that he did not respond—the presumption was overcome and the duty to slow or stop the train was triggered, with which duty the crew immediately complied. To be clear, the crew could not possibly have known

that Plaintiff was not going to heed the warnings of the train **until after such warnings were provided** because there was nothing for Plaintiff to "respond to" before then.

As explained in Defendants' Application, all parties agree that the train's horn was sounded 18-19 seconds before impact. Exhibit 11 at 116-117; Exhibit 12 at 26. All parties agree that it took the train 31 to 32 seconds to come to a complete stop. Exhibit 11 at 128-29; Exhibit 12 at 26-27. It was not until Plaintiff failed to respond to the train's horn that the train crew could have had any idea that he did not hear it and was unaware of the oncoming train. Only *then* did any duty to slow or stop the train arise. Plaintiff's attempt to confuse the timeline of pertinent facts and to conflate **seeing** Plaintiff (at a distance) with the realization that he was not responding to the train horn (sounded 18-19 seconds before impact)—as though these things happened at the same time—is disingenuous and precludes an applicable analysis. The Court of Appeals's seeming acceptance of such timeline further highlights this concern. Again, as stated in the Defendants' Application, "[H]aving the Plaintiff 'in plain sight' has no bearing on knowing whether he was going to step off the track unless mere sight of him revealed something that would indicate a physical inability or mental incapacity to comprehend the danger, for which there is no evidence." Defendants' Application, at 22.

It is undisputed that the crew applied the emergency brake as soon as it became apparent that Plaintiff was not responding to the warnings and was not going to step off the track. However, it must be recognized that, because a train crew is permitted to presume that a pedestrian on the tracks will step off in time to avoid a collision, it may be at times that the danger is not discovered until an accident is ultimately unavoidable. *See, e.g., Frye*, 933 F.3d at 601 (citing *Trudell*, *Berlin*, and *Tomes* discussed *supra*, and stating that "…the train crew ... was under no duty to stop the train until it was clear [thirteen-year-old plaintiff] would not step away from the track," but "…by

that time, the collision was unavoidable, given the great difficulty in stopping a train."); *see also Brinks*, 398 F.2d at 891, 892 (pointing out that "…there is no evidence that the railroad could have realized the peril of Mrs. Brinks in sufficient time to avoid the accident."). Such was the case here, unfortunately. By the time the Railroad Defendants determined that Plaintiff was not responding to the train's horn and was not going to step off the tracks, the collision was unavoidable as it took the train a full 32 seconds to stop after the emergency brake was activated.

CONCLUSION

The Court of Appeals' decision ignored numerous precedents of this Court and leaves the law as to a train crew's duty upon seeing trespassing pedestrians walking down railroad tracks in a state of utter confusion. Although this Court has previously (and repeatedly) held that train crews can assume that a person will step off the tracks unless or until it becomes apparent that the person does not recognize the danger or does not have the physical ability to act in self-preservation, the Court of Appeals' decision ignoring this Court's precedents would seem, incongruously, to place upon a train crew the duty to act merely upon the sight of someone on the tracks. This is untenable and cannot be permitted.

RELIEF REQUESTED

WHEREFORE, because the Court of Appeal's decision is inconsistent with prior decisions of this Court, leaves a train crew's duty as to trespassing pedestrians walking on railroad tracks in a state of uncertainty, and ignores undisputed evidence showing that the Railroad Defendants should not be held liable in this case, the Railroad Defendants respectfully request that this Court, pursuant to MCR 7.305(H), peremptorily reverse and vacate the opinion of the Court of Appeals, and reinstate the circuit court's judgment in favor of the Railroad Defendants. In the alternative, the Railroad Defendants request this Court grant full leave to resolve these issues.

This brief complies with MCR 7.212 and 7.213 and consists of 5,685 words.

Respectfully submitted,

GRAND TRUNK WESTERN RAILROAD COMPANY,
STEVEN GOLOMBESKI, and JESSIE WILSON

By: */s/ Mary C. O'Donnell*

Mary C. O'Donnell (P33479)
Fletcher & Sippel LLC
28 W. Adams Avenue
Grand Park Centre, Suite 1700
Detroit, MI 48226
(313) 552-3534
MODonnell@fletcher-sippel.com

Attorney for Defendants-Appellees

Dated: January 10, 2023

PROOF OF SERVICE

I, Robin Goodman, hereby certify that on the date shown below, I served a copy of ***Supplemental Brief of Defendants-Appellants by Order of the Michigan Supreme Court,*** by electronically filing same with the Clerk of the Court via the MiFile system which will then send notification to all counsel of record.

I, Robin Goodman, also hereby certify that on the date shown below I served a copy of ***Notice of Filing of Supplemental Brief of Defendants-Appellants by Order of the Michigan Supreme Court*** with the Clerks for the Michigan Court of Appeals and the Wayne County Circuit Court via the MiFile electronic system which will then send notification of such filing upon all counsel of record.

The statement above is true to the best of my knowledge and information.

Dated: January 10, 2023 /s/ *Robin Goodman*