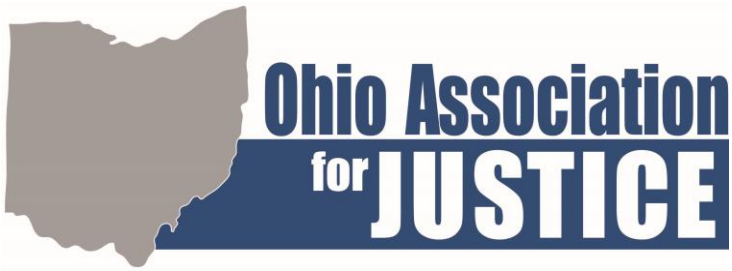

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October 15th | Columbus

Liability of Railroads: Beyond the Grade Crossing Case

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I. Railroad Grade Crossing

a. Highway crossings and sidewalks; maintenance and repair

> Companies operating a railroad in this state shall build and keep in repair good and sufficient crossings over or approaches to such railroad, its tracks, sidetracks, and switches, at all points where any public highway, street, lane, avenue, alley, road, or pike is intersected by such railroad, its tracks, sidetracks, or switches. Such companies shall build and keep in repair good and sufficient sidewalks on both sides of streets intersected by their railroads, the full width of the right of way owned, claimed, or occupied by them. The board of township trustees shall have power to fix and determine the kind and extent, and the time and manner of constructing, crossings and approaches outside of municipal corporations. ORC Ann. 4955.20

The above statute confers upon a railroad the duty to exercise ordinary care in building and keeping in repair good and sufficient crossings over public streets. A failure to perform such duty, resulting in injury to users of the public street, presents a question for the jury. *Grim Welding Company v. Norfolk & Western RR Co. et al.*, 1981 WL 4344.

The driver of a motor vehicle about to pass over a railroad grade crossing on a public highway is required both to look and listen for approaching trains, and the looking and listening must be at such time and place and in such manner as to be effective for that purpose. Where the incontrovertible physical facts demonstrate that plaintiff's decedent did not so do, then such failure on his part was a proximate cause of the collision as a matter of law. *North* v. *Pennsylvania Rd. Co*. (1967), 9 Ohio St. 2d 169 [38 O.O.2d 410]; *Boles* v.. *B. & O. Rd. Co*. (1959), 168 Ohio St. 551 [7 O.O.2d 427]; also see *State v. Corrigan*, 2012-Ohio-5970 (Ohio Ct.

App., Licking County Dec. 14, 2012); *Caudill v. Norfolk & W. Ry.*, 1995 Ohio App. LEXIS 401 (Ohio Ct. App., Butler County Feb. 6, 1995).

b. Signs and other warning Devices

R.C. 4955.33 provides, in part, that:

> "At all points where its railroad crosses a public road at a common grade, each company shall erect a sign in accordance with the department of transportation manual for uniform traffic control devices, adopted under section 4511.09 of the Revised Code, to give notice of the proximity of the railroad and warn persons to be on the lookout for the locomotive. Any such sign which has been or is erected in accordance with this section may lawfully be continued in use until it is replaced. A company which neglects or refuses to comply with this section is liable in damages for all injuries which occur to persons or property from such neglect or refusal."

In *McCallie* v. *New York Central Rd. Co.* (1969), 23 Ohio App. 2d 152, the court found that a violation of this statute imposed strict liability and contributory negligence is not a defense. However, in the instant case, the missing cross-buck sign was found not to be a proximate cause of the accident.

The violation by a railroad company of this section, in failing to maintain a warning sign at a railroad grade crossing is negligence per se: *Patterson v. Pennsylvania R. Co*., 26 Ohio Law Abs. 467, 1938 Ohio Misc. LEXIS 1250 (Ohio Ct. App. 1938).

Despite compliance with statutory standards, a railroad may be required under Ohio law to take additional precautions beyond those imposed by statute, if conditions at the crossing are sufficiently dangerous. This "extra hazardous" rule in Ohio is consistent with traditional tort principles which hold a defendant liable for the reasonably foreseeable consequences of his actions. If the defendant knows or should know that a particular crossing is especially dangerous, then failure to take appropriate safety measures may constitute negligence. On the other hand, if a reasonably prudent man under the same circumstances would not, in the exercise of reasonable care, anticipate the danger to motorists and install other warning signals, the law will not hold

him liable for failure to take the added precautions: *Stoler v. Penn Cent. Transp. Co*., 583 F.2d 896, 11 Ohio Op. 3d 316, 1978 U.S. App. LEXIS 8970 (6th Cir. Ohio 1978); *Arrasmith v. Pennsylvania R. Co.*, 410 F.2d 1311, 23 Ohio Misc. 145, 50 Ohio Op. 2d 63, 1969 U.S. App. LEXIS 12362 (6th Cir. Ohio 1969) (holding that at a grade crossing where special circumstances make the crossing peculiarly hazardous, there may be a duty on the part of the railroad to take precautions beyond those imposed by this section); *Orsbon v. Baltimore & O. R. Co.*, 206 F. Supp. 356, 21 Ohio Op. 2d 277, 88 Ohio Law Abs. 423, 1962 U.S. Dist. LEXIS 3752 (S.D. Ohio 1962) (holding that the railroad company has no duty to provide more than the standard crossing sign required by this section, unless the crossing in question is especially dangerous or extra-hazardous).

Railroad crossing was "extra-hazardous" and railroad breached its duty of ordinary care in failing to install active warnings where photographs of the area showed trees, bushes and buildings that might obstruct a motorist's view, the approaching road was on a slight incline, and the crossing had a substantially higher accident rate than the national average. *Hostetler v. Conrail*, 123 F.3d 387, 1997 FED App. 0243P , 1997 U.S. App. LEXIS 21488 (6th Cir. Ohio 1997).

Where a motorist's view approaching a railroad crossing is obstructed, there is an even greater duty to use caution and look and listen. Unless a crossing is extra hazardous, a railroad has no duty to install additional safety devices. Negative testimony by witnesses that they did not hear a train's whistle or see its headlight has probative value if they were in a position to make the observation. *Cates v. Consolidated Rail Corp*., 100 Ohio App. 3d 288, 653 N.E.2d 1229, 1995 Ohio App. LEXIS 96 (Ohio Ct. App., Montgomery County 1995).

In the absence of evidence of an extraordinary hazard, the court must assume that the warning devices were appropriate for the crossing. The engineer and brakeman of a locomotive

may assume that a car approaching the tracks will yield to the oncoming train. A motorist is required to look and listen before crossing at a railroad grade crossing. *Osborn v. Norfolk & W. R. Co.*, 68 Ohio App. 3d 85, 587 N.E.2d 433, 1990 Ohio App. LEXIS 2422 (Ohio Ct. App., Paulding County), dismissed, 54 Ohio St. 3d 711, 561 N.E.2d 947, 1990 Ohio LEXIS 1210 (Ohio 1990).

Both a motorist and a train owe each other a duty of care to avoid collisions. A railroad is under no duty to provide extra statutory warnings at a grade crossing, where such warnings are not required by any order of the public utilities commission, if there is no substantial risk that a driver in the exercise of ordinary care may be unable to avoid colliding with a train that is being operated over the crossing in compliance with statutory requirements. *Glick v. Marler*, 82 Ohio App. 3d 752, 613 N.E.2d 254, 1992 Ohio App. LEXIS 4955 (Ohio Ct. App., Hamilton County 1992).

Railroad is not liable for failure to maintain statutory warning sign at crossing, where decedent knew of crossing (this section). *New York, Chicago, & St. Louis R.R. v. Bowles*, 35 Ohio App. 145, 171 N.E. 844 (1930).

The presence of a train on a grade crossing does not necessarily constitute adequate notice to motorists. A railroad has an affirmative duty to warn of a train's presence on a crossing where the tracks are seldom used and motorists would thus not expect to encounter a train. *Matkovich v. Penn Central Trans. Co.*, 69 Ohio St. 2d 210, 23 Ohio Op. 3d 224, 431 N.E.2d 652 (1982).

A finding of actual malice attributable to the defendant negates a set-off of damages under comparative negligence law. The fact that an injured motorist drove around a lowered crossing gate does not preclude recovery where the circumstances suggested that there was a malfunction of the warning devices and that there was no danger. *Wightman v. Conrail*, 94 Ohio

App. 3d 389, 640 N.E.2d 1160, 1994 Ohio App. LEXIS 1573 (Ohio Ct. App., Erie County 1994).

> The syllabus of *Reed* v.*Erie Rd. Co.* (1938), 134 Ohio St. 31, states that:
>
> "A railroad company is not liable for the death of an automobile passenger occasioned when the automobile is driven against a moving freight train rightfully occupying its track at a highway crossing in the open country, where it appears that the company had erected a sign in literal compliance **[213]** with Section 8852, General Code, that there were other effective signs denoting the presence of the crossing and that the automobile struck the forty-second car back of the locomotive."

Citing *Reed,* the court in *Capelle* v. *Baltimore & Ohio Rd. Co.* (1940), 136 Ohio St. 203, concluded that the train itself was sufficient notice even though the accident occurred after midnight. Paragraph one of the syllabus states that:

> "Where a railroad train is rightfully occupying its track at a common grade crossing in the open country, the presence of the train is usually adequate notice to an approaching traveler on the highway that the crossing is preempted, and no additional signs, signals or warnings, other than those specified by law, are ordinarily required of the railroad company."

Similarly, in *Hood* v. *New York, Chicago & St. Louis Rd. Co.* (1957), 166 Ohio St. 529, and *Canterbury*v. *Pennsylvania Rd. Co.* (1952), 158 Ohio St. 68, railroad crossing accidents also occurred at night and the court exonerated the railroad's failure to use lights or other extra-statutory warnings.

However, in determining whether a train can act as notice in and of itself, the Ohio Supreme Court has stated that Courts must determine whether the train constituted actual notice of the hazard under the circumstances in this case, considering factors such as whether the train itself had reflective tape, the existence of warning devices, the darkness of the night and of the train, how frequent the tracks were used by trains, and the normal rate of speed of today's motor vehicles. *Matkovich v. Penn Cent. Transp. Co.*, 69 Ohio St. 2d 210, 213 (Ohio 1982).

c. <u>Federal Preemption</u>

In *CSX v. Easterwood*, 507 U.S. 658, 674, 113 S. Ct. 1732, 123 L. Ed. 2d 387 (1993), the Supreme Court of the United States held that the FRSA preempts state-law negligence claims if the train is traveling within speeds established by the Secretary of Transportation. Also see *Norfolk S. Ry. v. Shanklin*, 529 U.S. 344 (U.S. 2000).

When a state statute frustrates or conflicts with federal law, the federal law will prevail. U. S. Const., Art. VI, cl. 2; Maryland v. Louisiana, 451 U.S. 725, 746, 68 L. Ed. 2d 576, 101 S. Ct. 2114 (1981). However, preemption should be reluctantly applied in cases involving subjects that are "traditionally governed by state law." *Easterwood, supra*. Preemption will not lie unless it is "the clear and manifest purpose of Congress." *Rice v. Santa Fe Elevator Corp*., 331 U.S. 218, 230, 91 L. Ed. 1447, 67 S. Ct. 1146 (1947). According to 45 U.S.C.S. § 434, applicable federal regulations may preempt any state "law, rule, regulation, order, or standard relating to railroad safety." Legal duties imposed on railroads by the common law fall within the scope of these broad phrases. *Easterwood*, supra.

In analyzing and applying the preemptive affect of FRSA, the court in *Shanklin* reasoned that the Court in *Easterwood* held that FRSA pre-empts state tort claims concerning the adequacy of **all** warning devices installed with the participation of federal funds. *Shanklin*, supra.

Because there was much confusion as to the preemptive affect of FRSA, congress attempted to clarify the issue on August 3, 2007. The Court in *Hunter v. Canadian Pac. Ry. Ltd.*, 2007 U.S. Dist. LEXIS 85110 (D. Minn. Nov. 16, 2007), discusses Congress's clarification as follows:

> On August 3, 2007, Congress acted to address this issue by clarifying the preemptive effect of the FRSA. First, Congress addressed the affirmative defense of preemption by providing that the FRSA no longer preempts actions filed under state law seeking damages for personal injury, death or property damages in cases where a plaintiff alleges that a railroad has failed to comply with federal standards

> of care, its own safety standards, or state laws that do not directly conflict with a federal regulation. 153 Cong. Rec. H8496-01, at *H8590 (daily ed. July 25, 2007). Congress also included a retroactivity provision, which clarifies that 49 U.S.C. § 20106 applies "to all pending State law causes of action arising from events or activities occurring on or after January 18, 2002, the date of the Minot, North Dakota derailment." Id. Notably, the legislative history shows that Congress specifically made reference to the jurisdictional issue of complete preemption and explained that "nothing in 49 U.S.C. § 20106 creates a federal cause of action on behalf of an injured party or confers Federal question jurisdiction for such State law causes of action." Id. Thus, Congress has clearly answered the jurisdictional question of complete preemption - it does not apply here. However, the railroad can still raise the affirmative defense of preemption to the trial court that has jurisdiction over the case.

After Congress' clarification, many Courts have applied the application of *Easterwood* and *Shanklin* by holding that the Court in *Easterwood* restricted its ruling to situations where a specific, individual hazard does not call for reducing train speeds below the Secretary of Transportation's regulations. Id. at 675 n.15. Thus, FRSA does not preempt excessive speed claims where a specific, individual hazard exists and calls for a slower speed. See Ludwig v. Norfolk S. Ry. Co., 50 Fed. App'x 743, 748 (6th Cir. 2002) (unpublished disposition); see also Bakhuyzen v. Nat'l Rail Passenger Corp, 20 F. Supp. 2d 1113, 1117 (W.D. Mich. 1996) (noting that "a number of district courts have held that excessive [8] speed claims were preempted by the FRSA" where plaintiffs had not identified a specific hazard unique to the "particular crossing where the accident occurred"). *Garza v. Norfolk Southern Ry. Co.*, 2012 U.S. Dist. LEXIS 123011 (N.D. Ohio July 23, 2012).

II. Third Party Liability

> No person or company owning or operating a railroad which crosses over and above a street less than seventy feet in width, in any city in this state, at an elevation above such street sufficient to permit persons to pass and repass along such street beneath the crossing, shall place, cause to be placed, or permit to be or remain in the street beneath such crossing or bridge, any pier or other stay or support for it, unless the placing or maintaining of such pier, stay, or support is authorized by the city in which the crossing is situated by ordinance, *or permit such crossing or bridge to be or remain in such condition that iron, coal, other hard substance, fluid, or noisome matter can fall or drop through such crossing or bridge upon persons traveling or passing beneath it.*

ORC Ann. 4955.23

In *Federal Steel & Wire Corp. v. Ruhlin Constr. Co.*, 45 Ohio St.3d 171, the Supreme Court of Ohio held that a company in control of a bridge could be held liable for damage done to property under the bridge caused by vandals. In this case the defendant [Ruhlin] undertook to fix a bridge and plaintiff was the owner of a business directly underneath the bridge. During the project vandalism and theft occurred. Instances of rebar and other construction materials being thrown from the bridge were reported to the defendant, which led to certain security measures being taken. During the winter months the project stopped but certain building materials were left on the bridge. While the project was stopped extensive damage was done to the plaintiff's property. The court held that where:

> A person exercises control over real or personal property and such person is aware that the property is subject to repeated third-party vandalism, causing injury to or affecting parties off the controller's premises, then a special duty may arise, to those parties whose injuries are reasonably foreseeable, to take adequate measures under the circumstances to prevent future vandalism. Id. at syllabus.

The court noted that the defendant was in control of the bridge, was aware of prior numerous instances of vandalism by third persons, and employees of the defendant admitted that it was reasonably foreseeable for such activity to have continued. Id. at 177. Under these facts and circumstances it was reasonably foreseeable for vandalism to ultimately affect the plaintiff. Id. at 178.

Whether a duty exists depends upon the foreseeability of the injury. The test for foreseeability is whether a reasonably prudent person, under the same or similar circumstances as the defendant, should have anticipated that injury to the plaintiff is the probable result of the performance or nonperformance of an act. *Commerce & Industry* 45 Ohio St.3d at 98; also see

Brown v. Campbell, 2005-Ohio-3855 (Ohio Ct. App., Cuyahoga County July 28, 2005) citing *Federal Steel & Wire Corp. v. Ruhlin Constr. Co*. (1989), 45 Ohio St.3d 171, 174, 543 N.E.2d 769; *Menifee v. Ohio Welding Products, Inc*. (1984), 15 Ohio St.3d 75, 15 Ohio B. 179, 472 N.E.2d 707. It is not necessary that the injury to the particular Plaintiff is foreseeable; rather it is enough that the act in question may, in all human probability, produce harm to persons similarly situated. *Gedeon v. East Ohio Gas Co.* 128 Ohio St. 335.

"The foreseeability of harm generally depends on a defendant's knowledge." *Cole v. Pine Ridge Apts. Co. II*, Lake App. No. 2000-L-020, 2001 Ohio 8788, at *13. The knowledge of the defendant will be determined from the totality of the circumstances and only when the totality of the circumstances is "somewhat overwhelming" will a defendant be held liable for the criminal actions of a third party. *Feichtner v. Cleveland* (1994) 95 Ohio App.3d 388, 396 (wrongful death suit against ODOT for failing to provide protection over a bridge). The Ohio Supreme Court has explained the rationale for this rule as follows: "[i]n delimiting the scope of duty to exercise care, regard must be had for the probability that injury may result from the act complained of. No one is bound to take care to prevent consequences, which, in the light of human experience, are beyond the range of probability." *Gedeon* 128 Ohio St. at 338.

In *Feichtner v. Ohio Dept. of Transportation* 114 Ohio App.3d 346, the court had to determine whether such overwhelming circumstances existed so as to allow for the recovery of criminal acts. A wrongful death action was brought against the city and construction companies alleging that they were negligent by not keeping the construction site free from hazards and by failing to provide fencing along the entire length of the bridge. Vandals dropped a sandstone rock from the bridge and hit the passenger side of an automobile inflicting fatal injuries. The court held that no such overwhelming circumstances exist so as to allow liability for the criminal acts of third parties. Both Defendant's engineers testified that, although defendant may have

been apprised of scattered complaints of items being thrown from bridges onto highways in the state of Ohio, there were no complaints of objects ever being thrown from the bridge, either prior to or during the construction project. Furthermore, Defendant's engineer stated that he was unaware of any documented complaints of increased rock throwing in construction areas where the lanes of traffic had been temporarily shifted. A review of the evidence lead the court to the conclusion that plaintiff did not establish the elements necessary to maintain his negligence action and that defendant owed no special duty to plaintiff's wife to anticipate or foresee the criminal actions of the vandal. Not only may a duty arise as described above but a duty may also be imposed through statute. *Hadfield-Penfield Steel Co., v. Sheller*, 108 Ohio St. 106. A railroad has a statutory obligation to do the following:

> Negligence actions may be characterized as acts of commission or omission. Ohio adheres to this distinction and imposes a duty to refrain from active misconduct. Absent some special relationship between the parties, the law does not ordinarily require an affirmative duty to aid or protect another.

Morgan v. Fairfield Family Counseling Ctr. 77 Ohio St.3d 284, 293, *Homan v. George*, 127 Ohio App.3d 472, *Jackson v. Forest City Enterprises Inc.* 111 Ohio App.3d 283.

Whether intervening causation breaks the casual connection between negligence and injury depends upon whether that intervening cause was reasonably foreseeable by the one guilty of the original negligence. *Hall v. Watson* 2002 WL 1396763 citing *Pavlides v. Niles Gun Show* 93 Ohio App. 3d 46. A defendant could reasonably foresee that an intervening act was likely to happen where the original negligence of the defendant is followed by an independent act of a third person which directly results in injurious consequences if, according to human experience and in the natural and ordinary course of events. *Taylor v. Webster* 12 Ohio St.2d 53 see also *Bleh v. Biro Manufacturing Co.* 142 Ohio App.3d 434

A defendant's negligence is not deemed the proximate cause of the injury when the connection is actually broken by a responsible intervening cause. But the connection is not actually broken if the intervening event is one that might, in the natural and ordinary course of things, be anticipated *as not entirely improbable*, and *the defendant's negligence is an essential link in the chain of causation*. *Neff Lumber Co. v. First Nat. Bank* 122 Ohio St. 302

The issue of intervening causation generally presents a factual issues to be decided by the trier of fact. *Merchants Mut. Ins. Co. v. Baker* 15 Ohio St.3d 316, 318, *Cascone v. Herb Kay Co*. 6 Ohio St.3d 155, 160; Murdrich, supra, 153 Ohio St. at 40. The determination of intervening causation "involves a weighing of the evidence, and an application of the appropriate law to such facts, a function normally to be carried out by the trier of the facts." *Cascone*, supra, 6 Ohio St.3d at 160. In *Cascone* the court established the test to be used to determine whether the intervening act was foreseeable and therefore a consequence of the original negligent act or whether the intervening act operates to absolve the original actor. "The test * * * is whether the original and successive acts may be joined together as a whole, linking each of the actors as to the liability, or whether there is a new and independent act or cause which intervenes and thereby absolves the original negligent actor." Id. at 160, citing *Mudrich, supra,* and *Mouse v. Cent. Sav. & Trust Co.*, 120 Ohio St. 599). *Leibreich v. A.J. Refrigeration, Inc.* 67 Ohio St.3d 266, 269

A duty is going to depend upon whether or not the act is foreseeable. The more deliberate and criminal the act becomes the less likely it was foreseeable.

Zebrasky v. Ohio Dept. of Transp. 16 Ohio App.3d 481 (wrongful death suit against ODOT for failing to provide protection over a bridge) *Semadeni v. Ohio Dept. of Transp.* 75 Ohio St.3d 128 (wrongful death suit against ODOT for failing to provide protection over a bridge) *State v. Cooey* 46 Ohio St.3d 20 (on September 1, 1986, two young women were raped and murdered in Akron after the murderers forced their car off the road by throwing concrete

from an interstate bridge) *Feichtner v. Cleveland* (1994) 95 Ohio App.3d 388, 396 (*Feichtner v. Ohio Dept. of Transp.* 114 Ohio App.3d 346 (wrongful death suit against ODOT for failing to provide protection over a bridge)).

III. Injuries on Railroad Property

a. Status of Plaintiff

"A licensee is a person who is privileged to enter or remain on land only by virtue of the possessor's consent." Restatement of the Law 2d, Torts (1967), Section 330. See, also, Prosser & Keeton, The Law of Torts (5 Ed.1984) 412, Section 60. Consent to enter does not need to be actual consent. It can be implied from acquiescence to continued use of the property by the public. See *Wills v. Frank Hoover Supply* (1986), 26 Ohio St.3d 186, 190, 26 OBR 160, 163-164, 497 N.E.2d 1118, 1121, fn. 1; *Hannan v. Ehrlich* (1921), 102 Ohio St. 176, 131 N.E. 504, paragraph one of the syllabus. See, also, *Harriman v. Pittsburgh, Cincinnati & St. Louis Ry. Co.* (1887), 45 Ohio St. 11, 12 N.E. 451, paragraph one of the syllabus.

A trespasser is one "who, without express or implied authorization, invitation or inducement, enter private premises purely for [their] own purposes or convenience." *McKinney, infra*, 31 Ohio St.3d at 246, 31 OBR at 450, 510 N.E.2d at 388.

In cases involving railroads, "the mere toleration of continued intrusion where objection or interference would be burdensome or likely to be futile * * * is not in itself and without more a manifestation of consent." Prosser & Keeton, The Law of Torts, *supra*, at 414, Section 60. The Restatement of the Law 2d, Torts, *supra*, at Comment *c*, sets forth the following reasons for this approach:

> "A failure to take burdensome and expensive precautions against intrusion manifests only an unwillingness to go to the trouble and expense of preventing others from trespassing on the land, and indicates only toleration of the practically unavoidable, rather than consent to the entry as licensee. Even a failure to post a notice warning the public not to trespass cannot reasonably be construed as an

> expression of consent to the intrusion of persons who habitually and notoriously disregard such notices."

In *Brooks v. Norfolk & W. Ry. Co.* (1976), 45 Ohio St.2d 34, 74 O.O.2d 53, 340 N.E.2d 392, the court was faced with a case wherein a ten-year-old boy was injured by a train. The railroad track bisected a park where children played. The court concluded that the boy was a trespasser as a matter of law. Clearly, there are going to be numerous trespasses on railroad property by children playing in the park. However, the Court still determined that the injured boy was a trespasser.

In *Boydston v. Norfolk Southern Corp*., 73 Ohio App. 3d 727, 731-732 (Ohio Ct. App., Ross County 1991, the Court concluded that evidence that the public used the trestle bridge to cross a creek was not sufficient evidence to prove that the railroad company acquiesced to the use of the bridge and therefore, the men who were injured were trespassers.

The duty owed to a trespasser is to refrain from willful and wanton misconduct. The Ohio Supreme Court established a two-part test for wanton misconduct in *Hawkins* v. *Ivy* (1977), 50 Ohio St. 2d 114. First, there is a failure to exercise any care whatsoever by those who owe a duty of care to the appellant. Secondly, this failure occurs under circumstances in which there is great probability that harm will result from the lack of care. The first prong of the test requires that we determine the duty appellees owed appellant, and also the extent of care exercised by appellees. Then, we must consider the nature of the hazard created by the circumstances. *Matkovich v. Penn Cent. Transp*. Co., 69 Ohio St. 2d 210, 212 (Ohio 1982).

The second prong of the *Hawkins* test is that the failure to exercise care occurs under circumstances in which there is a great probability that harm will result. The Ohio Supreme Court has recognized that "almost every railroad grade crossing involves a substantial risk of danger to those using the highway over such crossing, * * *." *Hood, supra,* at page 534.

b. When children are involved

"The use of dangerous agencies and instrumentalities either in the street, or so near thereto as to be easily reached by pedestrians passing that way, places upon those responsible for the presence there of the dangerous instrumentalities the duty of giving warnings to and of safeguarding the public by using such mechanical contrivances as will effectually prevent injury to persons or property. The care must be commensurate with the danger." *Coy v. Columbus, Delaware & Marion Electric Co.*, 125 Ohio St. 283, 284 (Ohio 1932).

However, the Ohio Supreme Court has expressly rejected the attractive nuisance argument and dangerous instrumentality exception in cases involving railroads and trains. *McKinney v. Hartz & Restle Realtors, Inc.*, 31 Ohio St. 3d 244 (Ohio 1987).

In *McKinney v. Hartz & Restle Realtors, Inc.* (1987), 31 Ohio St.3d 244, 31 OBR 449, 510 N.E.2d 386, a four-year-old child was injured by a train running on tracks which abutted the apartment complex where the child resided. The court in *McKinney*, as it did in *Brooks, supra*, concluded that the child was a trespasser.