UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

No. 93-3442

(Summary Calendar)

SHIRLEY WATKINS and
ERIC BELL,

Plaintiffs-Appellants,

versus

ILLINOIS CENTRAL RAILROAD, ET AL.,

Defendants-Appellees.

Appeal from the United States District Court
for the Middle District of Louisiana
(CA-91-847-A-M1)

(November 24, 1993)

Before JOLLY, WIENER, and EMILIO M. GARZA, Circuit Judges.

EMILIO M. GARZA, Circuit Judge:*

Shirley Watkins appeals summary judgment of her attractive nuisance claim against Illinois Central Railroad Company ("the Railroad"). Finding no genuine issue of material fact regarding whether the victim appreciated the danger of playing near a moving train, we affirm.

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* Local Rule 47.5.1 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the Court has determined that this opinion should not be published.

Watkins's minor sons, Eric Bell (age 12) and Alexander Watkins (age 6), were playing near the railroad tracks at West Grant Street in Baton Rouge, Louisiana, when a freight train owned by the Railroad passed through the area. The train was 184 cars long, or approximately two miles in length. Apparently, Eric and children on the other side of the tracks began throwing candy under the wheels of the moving train. At some point, Eric walked to within three feet of the moving train to retrieve a piece of candy thrown by one of the other children. As Eric was rising from his kneeling position, he was struck in the head by a ladder which was attached to the train. The resulting blow caused serious injuries to Eric's head.

Watkins filed suit against the Railroad in state court, claiming *inter alia* that the train amounted to an attractive nuisance which caused her son's injuries. The action was removed to federal district court on the basis of diversity jurisdiction.[1] The railroad then filed a motion for summary judgment, arguing that based on his deposition, Eric knew of the dangers of playing near a moving train. The district court entered an order granting the Railroad's motion for summary judgment, from which Watkins filed a timely notice of appeal.[2]

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[1] The district court properly applied Louisiana substantive law to this diversity action as Louisiana was the forum state. *See Ideal Mut. Ins. Co. v. Last Days Evangelical Ass'n, Inc.,* 783 F.2d 1234, 1238 (5th Cir. 1986) (applying substantive law of forum state to diversity action).

[2] Because Watkins only appeals the district court's summary judgment of her attractive nuisance claim against Railroad, *see* Brief for Watkins at 4, our discussion is limited to that issue.

We review the district court's grant of a summary judgment motion de novo. *Davis v. Illinois Cent. R.R.*, 921 F.2d 616, 617-18 (5th Cir. 1991). Summary judgment is appropriate if the record discloses "that there is no genuine issue of material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). A party seeking summary judgment bears the initial burden of identifying those portions of the pleadings and discovery on file, together with any affidavits, which it believes demonstrate the absence of a genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 325, 106 S. Ct. 2548, 2554, 91 L. Ed. 2d 265 (1986). Once the movant carries its burden, the burden shifts to the non-movant to show that summary judgment should not be granted. *Id.* at 324-25, 106 S. Ct. at 2553-54. While we must "review the facts drawing all inferences most favorable to the party opposing the motion," *Reid v. State Farm Mut. Auto. Ins. Co.*, 784 F.2d 577, 578 (5th Cir. 1986), that party may not rest upon mere allegations or denials in its pleadings, but must set forth specific facts showing the existence of a genuine issue for trial. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 256-57, 106 S. Ct. 2505, 2514, 91 L. Ed. 2d 202 (1986).

"[T]he fundamental concept of the attractive nuisance doctrine is that the offending condition . . . although apparently dangerous to adults of discretion, is nevertheless so enticing and alluring

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See Hobbs v. Blackburn, 752 F.2d 1079, 1082 (5th Cir.), *cert. denied*, 474 U.S. 838, 106 S. Ct. 117, 88 L. Ed. 2d 95 (1985) (stating that matters neither cited as error nor briefed on appeal are considered abandoned).

as to be calculated to excite the curiosity of children of tender years to the extent of inducing them to utilize the instrumentality in some childish endeavor, the inherent danger of which the child is incapable of comprehending." *Smith v. Crown-Zellerbach, Inc.,* 638 F.2d 883, 885 (5th Cir. 1981) (quoting *Patterson v. Recreation and Park Comm'n,* 226 So. 2d 211, 214 (La. App. 1969, writ ref'd). Therefore, one of the conditions which Louisiana courts require for the attractive nuisance doctrine to apply is that "[t]he injured child must have been too young to appreciate the danger." *Id.* (quoting *Butler v. City of Bogalusa,* 258 So. 2d 599, 602 (La. App. 1972, writ denied)).

Watkins's sole argument on appeal is that a genuine issue of material fact exists regarding whether Eric "truly appreciated the risk of playing near a slow moving train." We disagree. Eric's own deposition indicates that he knew of the dangers of playing near a moving train.[3] He also stated that while playing near the

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[3] Eric's deposition provides:

Q. You knew it was kind of dangerous to be around that moving train, didn't you?

A. Yes.

Q. Had your mother ever told you about not playing around those trains?

A. No.

Q. She didn't have to tell you that, you kind of knew that it was dangerous?

A. Yes.

Record on Appeal at 138.

moving train, he made sure that his younger bother stayed behind him to "[m]ake sure he was safe."[4] Because a reasonable finder of fact could not have found that Eric did not appreciate the dangers of playing near a moving train, we hold that summary judgment of Watkins's attractive nuisance claim was proper.

Accordingly, the district court's judgment is AFFIRMED.

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[4] *Id.* at 137.