

# Commonwealth Of Kentucky

## Court of Appeals

NO. 2002-CA-002144-MR

FREDERICK ALLISON DOWNING

APPELLANT

v. APPEAL FROM CAMPBELL CIRCUIT COURT  
HONORABLE WILLIAM J. WEHR, JUDGE  
ACTION NO. 01-CI-00418

CSX TRANSPORTATION, INC.

APPELLEE

### OPINION

### AFFIRMING

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BEFORE: EMBERTON, CHIEF JUDGE; JOHNSON AND KNOFF, JUDGES.

EMBERTON, CHIEF JUDGE. Frederick Allison Downing was struck by a train while lying on the CSX Transportation railroad tracks in Newport, Kentucky. The circuit court found that Downing was a trespasser and CSX owed no duty to Downing until the employee operating the train discovered his peril. It further found there was no evidence to support the claim that CSX violated any duty owed to Downing and entered summary judgment in favor of CSX.

On April 16, 2000, after having a "few" beers, Downing decided to walk to a friend's house and, after stopping by a local convenience store to purchase beer, began to cross the railroad tracks. While crossing the tracks, he claims he was assaulted and left on the tracks. He admitted in his deposition that he did not have CSX's direct permission to cross the tracks. He further testified that since he knew the tracks were active, and therefore could be dangerous to cross them, he was aware that pedestrians should stay away from the tracks.

The engineer on the night of the accident stated that the train was tested before leaving its departure point and was operating satisfactorily. As the train traveled along the tracks he saw what he believed to be debris and blew the horn. He began to slow down and continued to sound the horn. As he approached and realized a human was on the tracks, he slammed on the emergency brake in an attempt to stop. Unable to stop in time, the train ran over Downing.

Although Downing admits he did not have actual permission to be on the tracks, he argues that he is entitled to status as a licensee because he was trespassing in a known trespassing area. He argues that people regularly cross over the railroad tracks without objection from CSX. It is correct that a person or the public generally, may, through the regular use of a railroad track as a point of crossing, over time

acquire a license from the railroad to cross. However, the law is clear in this Commonwealth that a person or the public can never acquire a license to lie or sit on a railroad track. In Louisville & N. R. Co. v. Howard's Adm'r,<sup>1</sup> the court held that:

It is an established doctrine in this jurisdiction that, regardless of the location, one lying or sitting upon a railroad track will be treated as a trespasser to whom employees of the company in charge of the train owe no duty of lookout, warning, or control, or other care, except to use ordinary care to avoid injuring him after the discovery of his peril.

In Davis v. Crawford's Adm'x,<sup>2</sup> the court stated that "[n]o principle of law is better established in this jurisdiction than that one either sitting or lying upon a railroad track is held to be a trespasser. . . ."

The rule quoted applies regardless of what unfortunate circumstance brought the injured party to be in the hazardous position of lying on an active railroad track. In Chesapeake & O. Ry. Co. v. Butcher's Adm'r,<sup>3</sup> a young man was killed while lying on the tracks. There was evidence that he did not come to be on the tracks of his own volition but was assaulted and left there unconscious. Again citing the rule that the decedent was

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<sup>1</sup> Ky., 305 S.W.2d 305, 307 (1957) (quoting Louisville & N. R. Co. v. Byrge's Adm'x, 273 Ky. 570, 117 S.W.2d 585, 586 (1938)).

<sup>2</sup> 203 Ky. 71, 261 S.W. 835 (1924).

<sup>3</sup> 263 Ky. 45, 91 S.W.2d 551 (1936).

a trespasser, the court held that if he was lying down, there is no duty to anticipate his presence.<sup>4</sup>

The only duty owed by CSX to Downing was, after it discovered his peril, to use ordinary care to protect him from injury. The duty rests upon the trespasser to show that the train crew discovered his presence and the danger he faced in time to avoid injury by the exercise of ordinary care by the means they had at hand.<sup>5</sup> Downing was lying down on the tracks in the black of night wearing dark clothing. The only evidence satisfying the provisions contained in the record is that by the time the train crew realized Downing was on the track, although the train was thrown into full emergency operation, the accident could not be avoided.

The summary judgment is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

Charles H. Schaffner  
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BRIEF FOR APPELLEE:

James F. Brockman  
Barry F. Fagel  
LINDHORST & DREIDAME  
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<sup>4</sup> Id. at 552.

<sup>5</sup> Louisville & N. R. Company v. Mann's Adm'r, 227 Ky. 399, 13 S.W.2d 257 (1929).