District Court City and County of Denver, Colorado 1437 Bannock Street Denver, CO 80202	DATE FILED: April 13, 2016 1:10 PM CASE NUMBER: 2014CV31144
Plaintiff: RICHARD BLAKESLEY, v. **Defendant:** BNSF RAILWAY COMPANY.	Case No. 14CV31144 Courtroom 376

ORDER Re: BNSF Railway Company's Motion for Summary Judgment

This matter comes before the Court on "BNSF Railway Company's Motion for Summary Judgment," filed on February 15, 2016. The Plaintiff filed a Response on March 7, 2016 and BNSF, a Reply on March 15, 2016. The Court, having reviewed the Motion, Response and Reply, along with exhibits attached thereto and referenced therein, the case file, applicable law, and being otherwise fully advised, does hereby find and order as follows:

Brief Factual and Procedural History

The Court incorporates by reference the statement of facts and litigation background contained in its Orders dated September 8, 2015 and September 18, 2015. Additional facts and procedural history relevant to this analysis are that:

- More than two years before the incident, RTD and BNSF entered into the "Relocation and Construction Agreement" ("Construction Agreement")[1]
- The Construction Agreement states that:

> BNSF has no duty to observe or inspect, or to halt work by any Non-BNSF Contractor on either Corridor, it being solely RTD's responsibility to ensure that work performed by any Non-BNSF Contractor is conducted

[1] Plaintiff Richard Blakesley's Third Amended Complaint ("Third Amended Complaint") ¶16.

in compliance with the terms of this Construction Agreement, the Joint Corridor Use Agreement, all Law and the applicable Approved Plans.[2]

- The operative complaint is Plaintiff's Third Amended Complaint, and as to BNSF, asserts two claims for relief: violation of § 13-21-115, C.R.S. (Fourth Claim for Relief) and negligence (Fifth Claim for Relief).
- On September 18, 2015, judgment as a matter of law was entered in favor of the Plaintiff and against Defendant BNSF on BNSF's affirmative defense of "statutory employer."

Standard of Review and Applicable Law

Summary Judgment

Under C.R.C.P. 56(c), summary judgment is proper only if the pleadings and supporting documents establish that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. *Civil Serv. Comm'n v. Pinder*, 812 P.2d 645, 649 (Colo. 1991). The moving party bears the burden of establishing the non-existence of a genuine issue of material fact. *Id.*

When a party moves for summary judgment, its initial burden is satisfied by demonstrating to the court that there is an absence of evidence in the record to support the nonmoving party's case. If the moving party meets this initial burden, the burden then shifts to the nonmoving party to establish that there is a triable issue of fact. *Continental Air Lines, Inc. v. Keenan*, 731 P.2d 708, 712-13 (Colo. 1987). If the nonmoving party fails to do so, a trial court is left with no alternative but to conclude that no genuine issue of material fact exists. *Pinder*, 812 P.2d at 649.

A genuine issue of material fact cannot be raised "simply by means of argument." *Sullivan v. Davis*, 172 Colo. 490, 495, 474 P. 2d 218, 221(1970). Instead, a party opposing summary judgment must set forth specific facts demonstrating the existence of genuine issues for trial. *Pueblo W. Metro. Dist. v. Se.*

[2] Motion, Ex. A, Art. II, § 2.4 ¶B at p.10.

Colo. Water Conservancy Dist., 689 P.2d 594, 600 (Colo. 1984); *Knittle v. Miller*, 709 P.2d 32, 35 (Colo. App. 1985). Although all doubts as to the presence of disputed facts must be resolved in favor of the nonmoving party, *Southard v. Miles*, 714 P.2d 891, 895 (Colo. 1986), "[t]hat is not to say [] the non-moving party can use 'pretense or apparent formal controversy' to avoid summary judgment." *In re: The Interest of S.N. v. S.N.*, 329 P.3d 276, 282 (Colo. 2014) (citing *Sullivan*, 474 P.2d at 221).

Summary judgment is a useful procedural tool because it enables the court to test whether there is an actual basis for relief. *S.N.*, 329 P.3d at 281. Summary judgment is not a procedural shortcut but rather an integral part of the rules of civil procedure. *See Celotex v. Catrett*, 477 U.S. 317, 327 (1986) (discussing Federal Rule of Civil Procedure 56); *see generally*, *Keenan*, 731 P.2d at 712 (summary judgment is proper in the absence of material fact, citing *Celotex* with approval).

Premises Liability Act

Section 13-21-115 of the Colorado Revised Statutes is also known as the Colorado Premises Liability Act ("PLA"). "Landowner" is defined to include "an authorized agent or a person in possession of real property and a person legally responsible for the condition of real property or for the activities conducted or circumstances existing on real property." § 13-21-115(1).

Where a defendant is neither in possession of the exact area where the injury occurred nor legally responsible for the condition of the property or the activities conducted there, the defendant is not a "landowner" pursuant to the statute. *See Jordan v. Panorama Orthopedics & Spine Ctr., P.C.*, 346 P.3d 1035, 1042-44 (Colo. 2015). Where a party has no obligation to either maintain property or exercise control over the activities performed on it, the PLA will not apply. *Id.* at 1042-43.

Moreover, the PLA classifies persons who allege "injury occurring while on the real property of another and as a result of a condition on the property or activities conducted or circumstances on such property" into three categories: invitee, licensee and trespasser. § 13-21-115(3) (emphasis added). It is also evident

by statute and common law, a plaintiff in the context of a PLA case must prove causation. § 13-21-115(3), C.R.S.; *see Jordan*, 346 P.3d at 1043.

Negligence

To establish a negligence claim, a plaintiff must prove four things:

1. the defendant owed a legal duty of care; and
2. the defendant breached that duty; and
3. the plaintiff was injured; and
4. the defendant's breach caused that injury.

Vigil v. Franklin, 103 P.3d 322, 325 (Colo. 2004); *Ryder v. Mitchell*, 54 P.3d 885, 889 (Colo. 2002); *Greenberg v. Perkins*, 845 P.2d 530, 533 (Colo. 1993).

Whether a defendant owed a duty to a plaintiff is a question of law to be determined by the court. *Vigil v. Franklin*, 103 P.3d at 325; *Greenberg v. Perkins*, 845 P.2d at 536; *Lewis v. Emil Clayton Plumbing*, 25 P.3d 1254, 1256 (Colo. App. 2000).

Discussion

Regardless of whether the Plaintiff was an invitee, a licensee or a trespasser and regardless of whether BNSF is a landowner as defined in the statute, the Plaintiff has to establish causation. The statute specifically requires a plaintiff to prove causation but Plaintiff has provided absolutely no evidence that anything BNSF did caused the Plaintiff injury. For this reason alone, the Court enters summary judgment in favor of BNSF and against the Plaintiff.

Additionally, however, the undisputed facts demonstrate that BNSF was not a landowner within the meaning of the PLA and assumed no duty to the Plaintiff. Whether a person or entity actually occupies and controls, or intended to control, the real property can be determined by contract. *See Jordan*, 346 P.3d at 1042-1043. In this case, the Construction Agreement makes it clear that BNSF had no obligation, and no intent, to control the work conducted at Plaintiff's worksite, which was also the location of his injury.

Likewise, there is no evidence that BNSF occupied BT Construction's fenced-in area where work was being performed and the Plaintiff was injured. BNSF may have been legally entitled to be on the property, but it was not legally responsible for either creating the condition or conducting an activity that injured the Plaintiff. *See Pierson v. Black Canyon Aggregates, Inc.,* 48 P.3d 1215, 1221 (Colo. 2002).

Turning next to Plaintiff's negligence claim against BNSF, this Court must first find that there existed a legal duty of care by BNSF towards the Plaintiff. The Court finds there is no duty and enters summary judgment in favor of BNSF on the Plaintiff's negligence claim.

In his Response, the Plaintiff points this Court to statements made or directions given by a BNSF employee to the Plaintiff. Resp. at 15. However, there is no evidence to back up this argument and the Court cannot find a disputed issue of fact exists based on argument alone. Plaintiff testified in his deposition that it was a BT Construction employee who actually gave him the instructions which the Plaintiff now attributes to a BNSF employee. The Plaintiff cannot create an issue of fact to avoid summary judgment without evidence to support it, especially where, as here, the Plaintiff himself said something diametrically opposed under oath at his deposition.

Plaintiff also argues that public policy requires this Court to impose a duty of care upon BNSF. The Court disagrees. Under the complex circumstances here it would be unfair to BNSF to hold it responsible in tort for injury to the Plaintiff, especially when BNSF by contract had no obligation to supervise or in any way be responsible for operations within the work zone.

Furthermore, the factors discussed in *Lewis* and in *Taco Bell, Inc. v. Lannon*, 744 P.2d 43, 46 (Colo. 1987), do not compel a different result. In considering the risk involved, the foreseeability and likelihood of injury as weighed against the social utility of the conduct involved, the magnitude of the burden of guarding against injury, the consequences and the fairness of placing such a duty on BNSF, the Court finds that imposing such a duty on BNSF in this case is unwarranted.

Conclusion

Based on the foregoing, the Court GRANTS BNSF Railway Company's Motion for Summary Judgment and enters summary judgment in BNSF's favor.

Dated this 13th day of April 2016.

SO ORDERED.

ELIZABETH A. STARRS
Denver District Court Judge