STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF GRAND TRAVERSE

PEOPLE OF THE STATE OF MICHIGAN,

Appellee,

v

File No. 99-7977-AR
HON. PHILIP E. RODGERS, JR.

GRAND TRAVERSE DINNER TRAIN, INC.,

Appellant.
/

Noelle R. Moeggenberg (P55973)
Attorney for Appellee

Stephen C. Chambers (P22908)
Attorney for Appellant

DECISION AND ORDER

Following a bench trial held in the District Court on August 17, 1999, the Appellant was convicted of multiple violations of MCLA 324.51504(a) and (f); MSA 13A.51504(a) and (f). The convictions related to fires caused by the Appellant on April 10 and April 24, 1999. The Court reviewed the parties' briefs and entertained the oral arguments of counsel on January 7, 2000. The Court then took the matter under advisement. For reasons that will now be described, the determination of the District Court is affirmed.

The Appellant first argues that it was denied procedural due process when the Appellee was allowed to amend the complaint on the eve of trial. The Appellant does not dispute that it was aware of the original charge brought under MCLA 324.51504(f); MSA 13A.51504(f) and acknowledges that it was timely provided with copies of incident reports relating to the two sets of fires. The Appellee and the Appellant dispute the extent to which the proposed amended complaint was discussed during several prior pre-trial conferences.

Be that as it may, a due process violation requires a showing of actual prejudice. The Appellant did articulate prejudice with regard to counts in the amended complaint brought under

MCLA 324.51504(e); MSA 13A.51504(e), and the trial court dismissed them. As to the remaining new allegations, no articulable prejudice was provided to the trial court or described on appeal. The additional charges arose out of the same statutory section and had as their operative factual bases allegations long known to the Appellant. Further, the trial court offered "some additional time today or some sort of special treatment, I suppose, during the course of the day" if needed. No further request was made during the trial for additional time or special treatment, e.g., an opportunity to file additional briefs or produce additional witnesses.

This Court concludes that the trial court properly found the additional counts to be materially indistinguishable from those long known to the Appellant, dismissed those where actual prejudice was shown and proceeded with the trial. No error occurred as a result.

Appellant next argues that the trial court erred in interpreting MCLA 324.51504(f); MSA 13A.51504(f) as requiring "effective" spark arresters. The precise language of subsection (f) is as follows:

> A person shall not do any of the following:
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> . . . (f) operate or cause to be operated any engine, other machinery, or powered vehicle not equipped with spark arresters or other suitable devices to prevent the escape of fire or sparks.

Fundamental rules of statutory construction require that the words of a statute be given their ordinary construction according to their common and approved usage and that a court can refer to legislative intent in passing the statute to find an appropriate interpretation. *Girard v Wagenmaker*, 437 Mich 231, 238; 470 NW2d 372 (1991); and *Erb Lumber Inc v Gidley*, 234 Mich App 387, 392; 594 NW2d 81 (1999). Legislative intent, of course, may be ascertained from an examination of the act's language, the subject matter under consideration, the scope and purpose of the act and other preceding statutes. *Girard, supra,* at pp 238 and 239.

A plain reading of this statutory section makes it clear that the disjunctive "or" links spark arresters with other suitable devices and requires that both "prevent the escape of fire or sparks." It would make little sense for the legislature to require that an engine be equipped with either a "suitable device to prevent the escape of fire or sparks" or an ineffective spark arrester. The purpose

of the statute is to prevent precisely what occurred here, fires along a railroad right of way caused by sparks escaping from the engine's smokestack.

While there is no dispute that the Appellant train was equipped with spark arresters, it is also beyond the pale of reasonable disagreement that they did not work. Twenty-four fires covering eight miles of track were lit on April 10, 1999 from sparks thrown from the stack of the Appellant's diesel engine. An additional nine fires were similarly caused by the train on April 24, 1999. The trial court's interpretation of the statute was sound and does not support a claim of error.

Finally, the Appellant argues that the trial court erred in its application of MCLA 324.51504(a); MSA 13A.51504(a). This statutory provision reads as follows:

> A person shall not do any of the following:
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> (a) Dispose of a lighted match, cigarette, cigar, ashes or other flaming or glowing substances, or any other substance or thing that is likely to ignite a forest, brush, grass, or woods fire; or throw or drop from a moving vehicle any such object or substance.

The Appellee correctly notes that the Appellant did not object to this charge at trial other than the claim of timely notice. Absent a showing of manifest injustice, the issue has not been preserved for appeal. *Appellee v Handley,* 415 Mich 356; 329 NW2d 710 (1982).

The essence of Appellant's argument is that it may not properly be charged and convicted for violations of both subsection (a) and subsection (f). The Court must disagree. While the overall purpose underlying section 51504 is to prevent fire, it is evident that its various subsections accomplish different purposes. Section (f) can be violated simply by having an ineffective spark arrester regardless of whether a fire occurs. Subsection (a) is intended to prevent the discharge of flaming or glowing substances that are likely to ignite forest, brush, grass or woods fires. Conceivably, one can violate subsection (a) even if the engine is equipped with a spark arrester that meets industry standards.[1]

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[1]The testimony suggested that available technology makes such arresters only 90 percent effective in the elimination of escaping sparks.

Appellant complains that is manifestly unfair to be found criminally responsible for starting fires when an engine is equipped with a spark arrester.[2] The Court assumes from the evidentiary record that an effective spark arrester may only eliminate 90 percent of the sparks which would otherwise escape an engine. Ignoring the fact that Appellant had no such arrester, the complaint merits an answer.

The application of criminal responsibility in the context of strict liability is well recognized. Generally described as the Public Welfare Offense Doctrine, it has been recognized since the middle of the 19th century when the demands of an increasingly complex social order required additional regulation of an administrative character unrelated to questions of personal guilt. *Francis Bowes Sayre, Public Welfare Offenses,* 33 Columbia Law Review, 55, 67 (1933); *Morissette v United States*, 342 US 246, 253-60, 96 L Ed 2d 288, 72 S Ct 240 (1952). *Sayre* suggested two principles which identify the outer limits of the Public Welfare Offense Doctrine. First, if punishment of the wrongdoer far outweighs regulation of the social order as a purpose of the law in question, then *mens rea* is probably required. *Sayre, Public Welfare, supra,* p 72. Second, if the penalty is light, involving a relative small fine and not including imprisonment, then *mens rea* is not required. *Id.* This opinion was later echoed by Justice Jackson in *Morissette,* where he described the policy which underlies the exception:

> The accused, if he does not will the violation, usually is in a position to prevent it with no more care than society might reasonably expect and no more exertion than it might reasonably exact from one who has assumed his responsibilities. Also, penalties commonly are relatively small, and conviction does no grave damage to an offender's reputation.

Morissette, supra, p 256.

Here, with the use of effective spark arresters, fires are essentially eliminated. Without them, the Appellant unintentionally but negligently caused 33 separate grass fires. Violation of section 51504 is a misdemeanor; the penalty for which is relative small and conviction for which "does no grave damage to an offender's reputation." Strict liability in a criminal prosecution may be properly

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[2]This begs the question of the spark arresters efficacy.

predicated on the violation of a Public Welfare Offense. See, *People v Lardie,* 452 Mich 231, 239 and 252; 551 NW2d 656 (1996).

The convictions entered by the trial court here do not offend notions of due process or fundamental fairness and properly interpret the legislature's intent in promulgating this statute. For all the foregoing reasons, the decision of the trial court is affirmed. No costs are ordered.

IT IS SO ORDERED.

HONORABLE PHILIP E. RODGERS, JR.
Circuit Court Judge

Dated: 2/02/2000