MARCELLA K. REED AND TERRY L. REED, PLAINTIFFS V. COMMONWEALTH OF PENNSYLVANIA, PUBLIC UTILITIES COMMISSION; CONSOLIDATED RAIL CORPORATION; COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF TRANSPORTATION; FRANKLIN COUNTY; AND GUILFORD TOWNSHIP, DEFENDANTS, Franklin County Branch, CIVIL ACTION - LAW A.D. 1997 - 597

Reed v. Conrail

Preliminary Objections -- Railroad Crossing Accident -- Excessive Speed -- Federal Preemption -- Obstructing Vegetation -- Line-of-Sight Obstructions -- Duty to Report

1. Plaintiffs set forth a cause of action against a railroad for operating a train at excessive speed, even though they failed to allege the train was traveling at a speed in excess of the federally authorized speed limit, because the speed limit on the track and the speed at which the train was operating are within the knowledge of the railroad.

2. It is easier for plaintiffs to overcome an objection for lack of specificity where the information sought is in the hands of the objecting party.

3. Generally, federal law preempts state common law action s based on excessive speed. 49 U.S.C. § 20106.

4. The duty to remove vegetation which obstructs the vision of motorists on a roadway resides in the owner of the property on which the vegetation is located.

5. Although a railroad may be held liable for a dangerous condition at a railroad crossing even where the condition is unsafe because of events or circumstances beyond the railroad's control, it was not intended that railroad companies be held liable for any and all hazards at a crossing whether the railroad has control over the dangerous condition or not.

6. The duty of a railroad to abate a dangerous condition is not absolute, and to hold a railroad liable for every conceivable danger at a railroad crossing regardless of who is responsible for the hazard would stretch the law beyond all reason and practicality.

7. To the extent that there is a duty to maintain the vegetation which blocks visibility at a railroad crossing, it applies only to foliage on property owned by the railroad.

8. Regulations at 52 Pa. Code § 33.84 do not impose a duty on railroads to report line-of-sight obstructions at railroad crossings to the Pennsylvania Utilities Commission. Section 33.84 places a duty on railroads to inspect the tracks and report problems related to the tracks.

James R. Ronca, Esquire, Attorney for Plaintiffs
Joseph G. Muzic, Jr., Esquire, Attorney for Franklin County
Dennis E. Boyle, Esquire, Attorney for Conrail
Steven C. Gould, Dep. A.G., Attorney for PUC and Penn Dot
C. Kent Price, Esquire, Attorney for Guilford Township

OPINION AND ORDER

Walker, P.J., April 2, 1998:

This case is before the court on preliminary objections of Defendant Consolidated Rail Corporation (hereafter "Conrail"). The underlying action arises from a collision involving a motor vehicle driven by Plaintiff Marcella Reed and a Conrail train on December 16, 1995. Mrs. Reed was seriously injured in the accident, and subsequently brought a negligence action against Conrail and other defendants.

In a complaint filed on December 12, 1997, Mrs. Reed alleges that Conrail was negligent in (1) failing to inspect the crossing where the accident occurred and to report deficiencies to the Public Utilities Commission ("P.U.C."); (2) failing to report line-of-sight obstructions; (3) failing to make a reasonable effort to have obstructing vegetation removed; (4) failing to remove vegetation which obstructs the view of a crossbuck warning sign at the subject crossing; (5) failing to file a complaint with the P.U.C. to have the crossing altered, improved or suspended; (6) failing to erect adequate warning signs; (7) failing to operate its train at such a speed and in such a manner as to avoid collision with Mrs. Reed's car. Complaint ¶ 42.

In its preliminary objections, Conrail takes issue with the allegations regarding train speed, the maintenance of the crossing, the duty to deal with vegetation outside its property and the duty to report line-of-sight obstructions to the P.U.C. Conrail's preliminary objections are in the form of a demurrer, but it also argues that the complaint does not contain sufficient facts to permit it to present an adequate defense.

Preliminary objections in the nature of a demurrer will be sustained only where the complaint is clearly insufficient to establish a right to relief, and any doubt must be resolved in favor of overruling that demurrer. *Olon v. Com., Dept. Of Corrections*, 147 Pa. Cmwlth. 22, 606 A.2d 1241 (1992), *reversed on other grounds*, 534 Pa. 90, 626 A.2d 533, *reargument denied, certiorari denied* 510 U.S. 1044, 114 S.Ct. 691, 126 L.Ed. 2d 658. A demurrer will be sustained only in cases which are clear and free from doubt. *Ambrose v. Cross*

Creek Condominiums, 412 Pa. Super. 1, 602 A.2d 864 (1992). In the review of preliminary objections, facts that are well pleaded, material and relevant will be considered as true, together with such reasonable inferences as may be drawn from such facts. *Mellon Bank v. Fabinyi*, 437 Pa. Super. 559, 650 A.2d 895 (1994). Even where the trial court sustains preliminary objections on their merits, it is generally an abuse of discretion to dismiss the complaint without leave to amend. *Harley Davidson Motor Co., Inc., v. Hartman*, 296 Pa. Super. 37, 442 A.2d 284 (1982).

With the above-cited principles in mind, we will address Conrail's preliminary objections by providing responses to the questions presented by the railroad in its brief.

A. WHETHER THE PLAINTIFFS HAVE ALLEGED A CAUSE OF ACTION FOR OPERATING A TRAIN AT AN EXCESSIVE SPEED WHERE THEY FAILED TO ALLEGE THE TRAIN WAS OPERATING IN EXCESS OF THE FEDERALLY AUTHORIZED SPEED LIMIT.

In paragraph 42(g) of the compliant, the plaintiffs allege that Conrail was negligent in "[f]ailing to operate its train... at such a speed and in such a manner so as to avoid a collision with Marcella Reed's automobile." Although this is a very general averment, and not a specific allegation of excessive speed as Conrail claims, it is reasonable to assume that plaintiffs are asserting the train was going too fast for conditions as they existed at the time of the accident. Even when viewed in the most favorable light, this is a bold allegation which is unsupported by any facts in the complaint. For this reason, we will require plaintiffs to amend their complaint to include facts which will support the allegation of excessive speed.

In their brief, plaintiffs allude to evidence that leads them to believe that the train was speeding. The court will not require plaintiffs to plead evidence, but rather to offer factual support for their allegations. Additionally, we will not dismiss the plaintiffs' claim based on Conrail's objection to the excessive speed allegation because the speed of the train at the time of the accident is something which is within the knowledge of Conrail. It is easier for plaintiffs to overcome an objection for lack of

specificity where the information sought is in the hands of the objecting party. *Local No. 163 v. Watkins*, 417 Pa. 120, 207 A.2d 776 (1965).

Conrail contends that "Plaintiff's allegations of excessive track speed are preempted by Federal law." (Conrail's brief at p. 4). Although we cannot agree with this statement as set forth by Conrail, we recognize that the U.S. Supreme Court has decided that, generally, federal law preempts state common law actions based on excessive speed. *CSX Transp., Inc. v. Easterwood*, 507 U.S. 658, 113 S.Ct. 1732, 123 L.Ed.2d. 387 (1993); *See also*, *Consolidated Rail Corp. v. Pennsylvania Utility Commission*, 536 F. Supp. 653 (E.D. Pa. 1982). In order to state a viable cause of action for negligence based on excessive speed, the plaintiffs must plead facts which establish that Conrail had a duty to operate its trains at a certain speed and that the duty was breached. As it stands, the complaint fails to allege facts which establish that duty, and a general common law theory of negligence based on excessive speed is not sufficient in this kind of case. *See*, *Easterwood*, *supra*. The plaintiffs repeatedly refer to Pa. Code. § 33.84 to support the allegations contained in paragraph 42 of the complaint. It is clear from a plain reading of this regulation that it cannot support a claim for excessive speed as set forth in paragraph 42(g). Plaintiffs also argue that since the speed of the train is still a disputed issue of fact, the holding of *Easterwood* is inapplicable because, in that case, the plaintiff admitted the train was traveling below the speed limit. While the plaintiffs' position would have some merit if we were deciding whether to grant summary judgment, this argument does nothing to resolve the main problem with this complaint, namely, it does not allege sufficient facts to state a viable cause of action. Based on the foregoing, we will require the plaintiffs to amend their complaint to supply the statutory or regulatory basis for their claim of negligence against Conrail for excessive speed. In amending their complaint, plaintiffs should bear in mind that, under 49 U.S.C. § 20106 and the authority of *Easterwood*, this court is inclined to rule that any claims of excessive speed based on state law are preempted by federal law.

B. WHETHER CONRAIL HAS A DUTY TO MAINTAIN VEGETATION AT RAILROAD CROSSINGS

ON PROPERTY WHICH DOES NOT BELONG TO CONRAIL.

Conrail next contends that it does not have a duty to remove vegetation which obstructs the view of motorists at a train crossing when said vegetation is on property not owned by Conrail. According to Conrail, absent this duty, the plaintiffs' claim of negligence on the part of Conrail for failure to remove obstructing vegetation cannot survive.

Plaintiffs, on the other hand, claim that Conrail has a duty to inspect the railroad tracks, report unsafe conditions to the P.U.C. and take immediate appropriate action to insure the safety of the traveling public. In the plaintiffs' view, Conrail should be responsible to report and correct conditions even if they are outside of the railroad's control. If Conrail fails to take action to correct an unsafe condition and someone is hurt, the company should be held liable.

This presents an interesting question which is worthy of a brief discussion. Plaintiffs rely on the case of *Marinelli v. Mountour R. Co.*, 278 Pa. Super. 403, 420 A.2d 603 (1980) in support of its position that a railroad company may be held liable for a dangerous condition at a railroad crossing even where the condition is unsafe because of events or circumstances beyond the railroad's control. The Marinelli court expressed its position by writing the following:

> we find no reason in principle to distinguish between the duty of municipal authorities to abate dangerous conditions on land not owned by the municipality, and the duty of a railroad to abate dangerous conditions on land not owned by the railroad where the site in question is a public railroad crossing.

Marinelli v. Mountour R. Co., 278 Pa. Super. 403, 414, 420 A.2d 603, 608-9 (1980).

This pronouncement by the Superior Court seems to be in conflict with the general rule that the duty to remove vegetation which obstructs the vision of motorists on a roadway resides in the owner of the property on which the vegetation is located. *Okkerse v. Howe*, 405 Pa. Super. 608, 593 A.2d 431 (1991). It

is unclear whether there is an exception to this general rule where a railroad crossing is involved as opposed to a typical motor vehicle intersection. In any case, we are convinced that the Superior Court did not intend to hold railroad companies liable for any and all hazards at a crossing whether the railroad has control over the dangerous condition or not. In fact, Superior Court stated, "[w]e do not say that a railroad's duty to abate dangerous conditions is absolute." *Marinelli* at 420 A.2d 609. To hold a railroad liable for every conceivable danger at a grade crossing regardless of who is responsible for the hazard would stretch the holding of *Marinelli* beyond all reason and practicality.

It is important to note that there are provisions which appear to address this type of problem in the Code of Federal Regulations and the Public Utility Code. In particular, 49 C.F.R. § 213.37 provides that,

> Vegetation **on railroad property** which is on or immediately adjacent to roadbed must be controlled so that it does not
>
> (a) Become a fire hazard to track-carrying structures;
> (b) Obstruct visibility of railroad signs and signals;
> (c) Interfere with railroad employees performing normal trackside duties;
> (d) Prevent proper functioning of signal and communication lines; or
> (e) Prevent railroad employees from visually inspecting moving equipment from their normal duty stations.

49 C.F.R. § 213.37 (emphasis added).

> In addition, Section 2702(b) of the Public Utility Code sets forth the following: The commission shall require every railroad the right-of-way of which crosses a public highway at grade to cut or otherwise control the growth of brush and weeds **upon property owned by the railroad** within 200 feet of such crossing on both sides and in both directions so as to insure proper visibility by motorists.

66 Pa. C.S.A. § 2702(b) (emphasis added).

These statutory and regulatory provisions offer a clear answer in the negative to the question of whether a railroad has a duty to control obstructing vegetation on property not its own. To the extent there is a duty to maintain the vegetation which blocks visibility at a crossing, it applies only to foliage on property owned by the railroad. These reasons lead us to the conclusion that the complaint does not set forth a viable cause of action, and an amended complaint will be necessary to address these deficiencies. Again, we decline to dismiss the complaint, but we will order plaintiffs to amend their pleadings to include more facts which would establish their right to relief.

C. WHETHER CONRAIL HAS A DUTY TO NOTIFY THE P.U.C. OF LINE-OF-SIGHT OBSTRUCTIONS AT A PUBLIC RAILROAD CROSSING

Conrail maintains that neither 52 Pa. Code § 33.84 nor *Marinelli* establish a duty on a railroad to notify the P.U.C. of line-of-sight obstructions or petition the Commission to rectify the problem. In response, plaintiffs argue that Conrail should report to the P.U.C. any unsafe condition at the railroad crossing. We do not find such a duty to report in the applicable statutes and regulations. This court is unwilling to read these provisions so broadly as to make the railroad responsible for any and all "unsafe conditions" at its crossings. Laws which are intended to protect the traveling public should afford railroad companies an opportunity to correct problems that may exist at a crossing or on the tracks themselves. Implicit in that statement is the ability of the railroads to ascertain exactly what it is that they are protecting the public against. The term "unsafe condition" encompasses too many possibilities and it would be impossible for a railroad company to guard against every conceivable condition which may be found to be unsafe.

Section 33.84 places a duty on the railroad to inspect the tracks for problems related to the tracks. This section further requires the railroad's inspector to prepare a report of the inspection which should include a list of defects in need of correction "with respect to track stability and alignment, track

surface, gauge, ties and rail fastenings, welding, insulated joints, track anchors and bolts, frogs and switches, guardrails, drainage and such other conditions as may be deemed appropriate by the carrier concerned." 52 Pa. Code § 33.84(2). This report is then retained by the carrier and is made available to the P.U.C. for inspection. *Id.* This regulation goes on to provide that,

> If the track inspection reveals improper alignment, improper cross level, faulty gauge, loose ties, defective switch points, or any other condition which, in the judgment of the individual inspecting the track, creates an unsafe condition, such employee shall take immediate appropriate action for the safety of operations. If the condition presents an immediate hazard, a Slow Order should be issued or, if necessary, the track taken out of service. The inspector should continue to report the condition until it is corrected.

52 Pa. Code § 33.84(12).

The types of conditions which the railroad is charged with reporting and correcting are conditions which relate specifically to the tracks and not to line-of-sight obstructions at railroad crossings. Section 33.84 lists a number of problems to which the inspector should pay particular attention, and all these items are related to the condition of the tracks and not things such as line-of-sight obstructions at grade crossings. It would be a stretch for this court to find that Section 33.84 establishes a duty on railroads to report and correct line-of-sight obstruction problems at crossings. For this reason, it is imperative for the plaintiffs to allege further facts to help the court determine whether there is a viable cause of action for failure to report and correct line-of-sight obstructions. We are particularly interested in learning whether these alleged obstructions are in Conrail's right-of-way. It is clear that if the unsafe condition exists on Conrail's property, they should be responsible for accidents that occur as a result of their failure to correct the condition. Conversely, if the unsafe condition exists outside the railroad's property, perhaps liability

should attach to another party.[1]

D. WHETHER THE PLAINTIFFS HAVE ALLEGED SUFFICIENT FACTS TO PREVENT CONRAIL TO RESPOND TO ALLEGATIONS CONCERNING VEGETATION AND MAINTENANCE.

We agree with Conrail when they argue that the complaint should be more specific regarding allegations of obstructing vegetation and maintenance. More facts are necessary to allow this court to decide whether plaintiffs have a viable claim which entitles them to relief. An appropriate Order will follow instructing plaintiffs to amend their complaint.

ORDER OF COURT

April 2 , 1998, in consideration of the preliminary objections of Consolidated Rail Corporation, the plaintiffs' response thereto and oral argument on the issues,

IT IS ORDERED that plaintiffs shall amend the complaint in accordance with the court's instructions at oral argument and in a manner consistent with the opinion filed herewith.

IT IS FURTHER ORDERED that the plaintiffs shall file an amended complaint within 45 days from the date of filing of this order of court.

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[1] It should be noted that claims of obstructed view at a railroad crossing are generally used by plaintiffs to respond to allegations of contributory negligence. *See*, *Johnson v. Pennsylvania Railroad Company*, 160 A.2d 694 (Pa. 1960). It is not clear whether a claim based on line-of-sight obstructions should be dismissed at the preliminary objections stage, before the defendants have had an opportunity to allege contributory negligence.

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