IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

WALTER G. PERSING, II, and KAREN PERSING, his wife,	**:**	**No. 97-00515**
Plaintiffs	**:**	
	:	
vs.	**:**	**CIVIL ACTION - LAW**
	:	
CONSOLIDATED RAIL CORPORATION, ROBERT EARL BROWN, DONALD E. ENGEL, THEODORE PERRY, and DELAWARE TOWNSHIP,	**:**	
Defendants	**:**	

O R D E R

AND NOW, this day of December 2001, upon consideration of the plaintiffs' post trial motions, it is ORDERED AND DIRECTED as follows:

1. The plaintiffs' contend the Court erred in failing to charge the jury on the presumption of due care for a plaintiff who cannot recall the events in question. This Court cannot agree. In Marks v. Swayne, 549 Pa. 336, 701 A.2d 224 (1997), the Pennsylvania Supreme Court stated: "We conclude, therefore, that in the interest of clarity, juries should no longer be instructed as to a presumption of due care in favor of a deceased or incapacitated plaintiff." Id. at 342, 701 A.2d at 226.

2. The plaintiffs' also contend the Court erred in admitting testimony, allowing closing argument and instructing the jury regarding stop, look and listen. Again, the Court cannot agree. The Court believes the charge given adequately stated the law of Pennsylvania. The Court did not charge stop, look and listen as an absolute. Rather, the charge as a whole reflected that if the circumstances warranted, i.e., if the injured plaintiff

could see or hear the approaching train, he had a duty to stop his vehicle. If, on the other hand, the jury found the crossing was obscured by foliage and overgrowth as contended by plaintiffs and, as a result, the injured plaintiff had to place his vehicle on or precariously close to the tracks to obtain an appropriate view, the plaintiff would not be negligent. See N.T., June 21, 2001, at pp. 55-57. Assuming arguendo that the charge was misleading or erroneous, any such error was harmless in this case as the jury did not reach the question of the Mr. Persing's contributory negligence.

3. Finally, the plaintiffs contend there was juror misconduct which tainted the verdict in this case. On Wednesday, June 20, 2001, after Court recessed for the day, one of the jurors went to the site of the accident in Watsontown. The next day, the juror mentioned this to one of the tipstaves. The juror was brought into chambers and, ultimately, removed from the jury with the agreement of both parties. The parties agreed that the Court would ask the other jurors as a panel if the excused juror mentioned his visit to the accident site to them. If any of the jurors responded in the affirmative and the parties wished to question him or her further, the Court would bring the juror to sidebar. Only one of the remaining jurors indicated the excused juror mentioned he went to the scene. The juror explained that he changed the subject and the excused juror did not discuss the accident site any further. All the jurors indicated they could be fair and impartial and they would only consider the evidence presented in the courtroom. None of the parties requested a mistrial or even a sidebar for further questioning of the jurors. Based on these facts, the Court finds the plaintiffs have waived this issue.

By The Court,

Kenneth D. Brown, J.

cc: Mark Wade, Esquire
Lester Greevy, Esquire
J. David Smith, Esquire
Sean Roman, Esquire
Work file
Gary Weber, Esquire (Lycoming Reporter)