IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

WALTER G. PERSING, II, and KAREN PERSING, his wife,	:	**No. 97-00515**
Plaintiffs	:	
vs.	:	**CRIMINAL DIVISION**
	:	
	:	
CONSOLIDATED RAIL CORPORATION, ROBERT EARL BROWN, DONALD E. ENGEL, THEODORE PERRY, and DELAWARE TOWNSHIP,	:	
Defendants	:	**1925(a) Opinion**

OPINION IN SUPPORT OF ORDER IN COMPLIANCE WITH RULE 1925(a) OF THE RULES OF APPELLATE PROCEDURE

This opinion is written in support of this Court's Order dated November 30, 2001 and docketed December 3, 2001, which denied the plaintiffs' post verdict motions. The relevant facts are as follows: The plaintiffs live on John Road approximately 1/8th of a mile from a railroad crossing. On or about May 8, 1996, Plaintiff Walter Persing was driving home from work in his manual transmission pick-up truck. Mr. Persing approached the John Road railroad crossing. This crossing did not have a gate or lights; it only had a crossbuck. A train was approaching at approximately forty-two (42) miles per hour. Mr. Persing's vehicle stopped on the railroad tracks. The train could not stop in time and it struck Mr. Persing's truck. The truck was demolished and Mr. Persing was severely injured.

The plaintiffs filed suit against the defendants on or about April 8, 1997.

The plaintiffs asserted that shrubbery and foliage along the train tracks was overgrown such that one could not see an oncoming train until one was on the tracks or in such close proximity to be in danger of being hit by a train. Plaintiffs also contended the portion of the roadway between the rails was so deteriorated that it caused Mr. Persing's vehicle to stall on the tracks.

A jury trial was held June 18-22, 2001. Mr. Persing had no recollection of the accident, but presented expert testimony regarding the accident and its cause. Consolidated rail presented the testimony of employees, who were on the train, neighbors who had a view of the tracks and their own experts.

During trial, one of the tipstaves notified the Court that one of the jurors, Mr. Michael, visited the scene of the accident. The Court interviewed Mr. Michael in chambers and he was excused. The Court discussed with the attorneys the manner in which to proceed to determine if Mr. Michael mentioned his observations or his opinions with any other members of the jury. The Court suggested asking the jury as a group whether any of them talked to Mr. Michael and, if anyone raised their hand, they would be brought to sidebar. One individual indicated Mr. Michael mentioned he had been to the scene, but this individual changed the subject so Mr. Michael did not have the opportunity to express any opinions or other information to him. All the other jurors shook their head to indicate Mr. Michael had not mentioned his visit to the scene or his opinions to them. Counsel did not ask any follow up questions. Moreover, counsel did not object to the procedure utilized by the Court nor did anyone request that each juror be questioned in chambers.

After the close of the evidence, the Court charged the jury. The plaintiffs

requested a Presumption of Due Care charge. The Court denied this requested and the plaintiffs objected. The defendant requested a charge that Plaintiff Walter Persing had a duty to stop, look and listen. The Court granted this request and gave such a charge over the plaintiffs' objection.

The jury deliberated and returned a verdict that Defendant Consolidated Rail was not negligent on or about June 22, 2001.

On or about July 2, 2001, the plaintiffs filed post trial motions asserting the following: (1) the Court erred in failing to give a Presumption of Due Care charge; (2) the Court erred in giving a stop, look and listen charge; and (3) the misconduct of the excused juror tainted the verdict. In an Order of November 30, 2001, which was docketed December 3, 2001, the Court denied the plaintiffs' post trial motions.

The plaintiffs filed a timely notice of appeal. In their first issue, the plaintiffs contend the Court erred in failing to give a Presumption of Due Care charge. This Court cannot agree. In Marks v. Swayne, 549 Pa. 336, 342, 701 A.2d 224, 226 (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." Furthermore, any such alleged error would be harmless in this case, as the jury did not even reach the question of Mr. Persing's contributory negligence.

The plaintiffs next contend the Court erred in charging the jury that Mr. Persing had a duty to stop, look and listen. Again, the Court cannot agree. The Court believes the charge given adequately stated the law of Pennsylvania. See Fallon v. Penn Central Transp. Co., 444 Pa. 148, 279 A.2d 164 (1971); Tomasek v.

Monongahela Railway Co., 427 Pa. 371, 374-375, 235 A.2d 359, 362 (1967); Johnson v. Pa. RR Co., 399 Pa. 436, 160 A.2d 694 (1960); Buchecker v. Reading Co., 271 Pa.Super. 35, 44-48, 412 A.2d 147, 151-153 (1979); Evans v. Reading Co., 242 Pa.Super. 209, 213-215, 363 A.2d 1234, 1236-1237 (1976); National Freight v. Southeastern Pa. Transp. Auth., 698 F.Supp. 74, 79 (E.D.Pa. 1988). 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. N.T., June 21, 2001, at pp. 55-57. Moreover, 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 Mr. Persing's contributory negligence.

Finally, the plaintiffs contend there was juror misconduct, which tainted the verdict in this case. On Wednesday, June 20, 2001, after the Court recessed for the day, one of the jurors went to the site of the accident in Watsontown. N.T. at p.4. 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. N.T. at p. 4-9. 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. N.T. at pp. 11-13. Only one of the remaining

jurors indicated the excused juror mentioned he went to the scene. N.T. at p. 14. The juror explained that he changed the subject and the excused juror did not discuss the accident site any further. N.T. at p. 14. All the jurors indicated they could be fair and impartial and they would only consider the evidence presented in the courtroom. N.T. at pp. 14-15. None of the parties requested a mistrial or even a sidebar for further questioning of the jurors. N.T. at pp. 14-15. Based on these facts, the Court finds the plaintiffs have waived this issue. See Harman ex rel. Harman v. Borah, 562 Pa. 455, 473-475, 756 A.2d 1126-1127 (2000); Danville Area School Dist. V. Danville Area Educ. Ass'n, 562 Pa. 238, 246, 754 A.2d 1255, 1259 (2000); Knarr v. Erie Insurance Exchange, 555 Pa. 211, 213, 723 A.2d 664, 666 (1999); Hall v. Jackson, 788 A.2d 390, 402 (Pa.Super. 2001).

DATE: _____ By The Court,

_____
Kenneth D. Brown, J.

cc: Mark Wade, Esquire
Lester Greevy, Esquire
J. David Smith, Esquire
Sean Roman, Esquire
Law Clerk
Work file
Superior Court (original & 1)
Gary Weber, Esquire (Lycoming Reporter)