

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

CLAIR STROZYK and	:	
DENISE STROZYK, individually,	:	
as the parents of, and as	:	
co-administrators of THE	:	CIVIL ACTION
ESTATE OF CHRISTOPHER STROZYK,	:	
	:	NO. 01-2478
Plaintiffs,	:	
	:	
v.	:	
	:	
NORFOLK SOUTHERN CORPORATION,	:	
	:	
Defendant.	:	

MEMORANDUM

BUCKWALTER, J.

June 5, 2002

Presently before the Court is Norfolk Southern Corporation's ("Norfolk Southern" or "Defendant") Motion for Partial Summary Judgment. For the reasons stated below, Defendant's motion is GRANTED.

I. BACKGROUND

Clair Strozyk and Denise Strozyk ("Plaintiffs") bring this action pursuant to Pennsylvania's Wrongful Death and Survival Acts, 42 Pa. Cons. Stat. Ann. §§ 8301 and 8302, for the death of their son Christopher Strozyk ("Strozyk"). According to Plaintiffs' Complaint, on May 8, 2000, the decedent, Strozyk, was operating his vehicle in a northerly direction on Smith Lane in Alburtis, Lower Macungie Township, Pennsylvania. Strozyk

approached the Norfolk Southern railroad crossing at Smith Lane (referred to herein as the "Smith Lane Crossing"). As Strozyk drove across the railroad tracks, his vehicle was struck by a Norfolk Southern train traveling on the tracks in an easterly direction, resulting in his death.

Plaintiffs' Complaint sets forth multiple allegations of Norfolk Southern's negligence stemming from the accident, including (1) failing to have proper warning devices at the railroad crossing; (2) failing to give proper sound, signal or warning of the presence of its train; (3) failure to yield to Strozyk's right of way; (4) violations of local and federal laws concerning safety at railroad crossings; (5) operation of its train at excessive speed; (6) failing to provide proper sight lines for vehicles crossing the tracks; (6) failing to provide and maintain a safe crossing; (7) failing to adopt and install necessary protective measures to safeguard against fatal accidents; (8) creating a foreseeable risk of injury to individuals crossing the tracks; and (9) failing to hire, employ or retain personnel qualified to operate its trains.

Defendant now moves for partial summary judgment asserting that Plaintiffs' state tort claims are preempted under federal law.

II. STANDARD

A motion for summary judgment shall be granted if the Court determines "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." Fed. R. Civ. P. 56(c). In addition, "[i]nferences to be drawn from the underlying facts contained in the evidential sources . . . must be viewed in the light most favorable to the party opposing the motion. The non-movant's allegations must be taken as true and, when these assertions conflict with those of the movant, the former must receive the benefit of the doubt." Goodman v. Mead Johnson & Co., 534 F.2d 566, 573 (3d Cir. 1976). However, if the nonmovant's evidence is merely colorable, or is not significantly probative, or just raises some metaphysical doubt as to the material facts, summary judgment may be granted. Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 586, 106 S. Ct. 1348, 1355, 89 L. Ed. 2d 538 (1986), Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249-50, 106 S. Ct. 2505, 2511, 91 L. Ed. 2d 202 (1986).

III. DISCUSSION

The parties dispute concerns whether and to what extent the Federal Railway Safety Act (FRSA), by virtue of 23 C.F.R. §§

646.214(b)(3) and (4)¹, preempts Plaintiffs' state tort claims. Because of the United States Supreme Court's recent decision in Norfolk Southern Ry. v. Shanklin, 529 U.S. 344, 120 S. Ct. 1467, 146 L. Ed. 2d 374 (2000), it is now settled that the FRSA preempts state tort claims concerning a railroad's failure to maintain adequate warning devices at crossings where a state transportation department has used federal funds for the device's installation.

Defendant asserts that Smith Lane Crossing was improved under Pennsylvania's Railroad Crossbuck Replacement Program with federal funds in or around June of 1987 by the addition of two sets of crossbucks and posts. Therefore, Defendant argues,

-
1. Sections 646.214(b)(3) and (4) provide in full:
 - (3)(i) "Adequate warning devices", under § 646.214(b)(2) or on any project where Federal-aid funds participate in the installation of the devices are to include automatic gates with flashing light signals when one or more of the following conditions exist:
 - (A) Multiple main line railroad tracks.
 - (B) Multiple tracks at or in the vicinity of the crossing which may be occupied by a train or locomotive so as to obscure the movement of another train approaching the crossing.
 - (C) High Speed train operation combined with limited sight distance at either single or multiple track crossings.
 - (D) A combination of high speeds and moderately high volumes of highway and railroad traffic.
 - (E) Either a high volume of vehicular traffic, high number of train movements, substantial numbers of schoolbuses or trucks carrying hazardous materials, unusually restricted sight distance, continuing accident occurrences, or any combination of these conditions.
 - (F) A diagnostic team recommends them.
 - (ii) In individual cases where a diagnostic team justifies that gates are not appropriate, FHWA may find that the above requirements are not applicable.
 - (4) For crossings where the requirements of § 646.214(b)(3) are not applicable, the type of warning device to be installed, whether the determination is made by a State regulatory agency, State highway agency, and/or the railroad, is subject to the approval of FHWA.

because federal funds were used for the installation of warning devices, under Shanklin, federal law preempts Plaintiffs' state tort claims relating to the adequacy and safety of the Smith Lane Crossing.

Plaintiffs agree that if the warning devices were erected with federal funds no state action against the railroad could be maintained that questions the adequacy of the warning devices. However, Plaintiffs dispute that the Smith Lane Crossing was erected with federal funds. First, Plaintiffs assert that Defendant has not presented sufficient evidence to establish that the original warning devices were erected with federal funds. Secondly, Plaintiffs assert that even if the original warning devices were erected with federal funds, the warning devices erected at the time of the accident were not the same, original crossbucks and posts and Defendant has not presented any evidence that the replacement warning devices were installed with federal funds.

Defendant's Exhibits to its Motion for Summary Judgment include Requests for Federal Highway Administration ("FHWA") authorization for the installation of reflectorized crossbuck signs at various rail-highway crossings throughout the Commonwealth. See Defendant's Exhibit A and B. These requests estimate the total project cost at \$1,080,000, \$972,000 of which is requested from federal sources. Also submitted by Defendant

are Federal Aid Project Agreements in which the FHWA signed off on \$972,000 in federal funds to be provided to the Pennsylvania Department of Transportation ("PennDOT") for improvements at various rail-highway crossings throughout the Commonwealth. See Defendant's Exhibit C and D. Defendant also attaches a description of the work to be completed at the Smith Lane Crossing pursuant to the Railroad Crossbuck Replacement Program. See Defendant's Exhibit F1. Finally, Defendant submits the affidavit of Harvey I. Cassell, the Central Office Grade Crossing Engineer for PennDOT. Mr. Cassell affirms that as part of the Federal Railroad Crossbucks Replacement Program, and with the use of federal funds authorized thereunder, reflectorized crossbucks and breakaway poles were placed at the Smith Lane Crossing in 1987. See Defendant's Exhibit 1. Defendant's Exhibits and Mr. Cassell's affidavit adequately establish that federal funds were used to install warning devices at the Smith Lane Crossing.

Plaintiffs also assert that the warning devices originally installed with federal funds at the Smith Lane Crossing were not the same crossbucks erected at the time of the accident. In support of their contention, Plaintiffs point out that the Smith Lane Crossing crossbucks lack the "3 TRACKS" signage that original work specifications called for as per Defendant's Exhibit F1. Thus, Plaintiffs argue, the warning

devices present at the time of the accident were not the same as the warning device erected in 1987 with federal funds.

Defendant responds to Plaintiffs' contention that the original warning devices installed with federal funds were subsequently replaced without the use of federal funds through the affidavit of K.D. Rothermel, Bridges and Building Foreman for Norfolk Southern, in charge of installing and maintaining crossing signs and signals. Mr. Rothermel confirms that the crossbuck signs installed at the Smith Lane Crossing on May 8, 2000, the date of Strozyk's accident, are the same signs that were originally installed through the Crossbucks Replacement Program in 1987, and paid for by the federal government. Mr. Rothermel further explains that the "3 TRACKS" signage was missing as a result of the May 8, 2000 accident, when the crossbuck was knocked down and the sign damaged. Plaintiffs question Mr. Rothermel's affidavit because the police report of the May 8, 2000 accident states that "a white railroad crossing sign is posted at the crossing and is clearly visible." Plaintiffs argue that this statement establishes that the crossbuck and post could not have been knocked over. Thus, Plaintiffs reason, the accident is not the reason the "3 TRACK" signage is missing, but rather the "3 TRACK" signage is missing because the crossbuck and post are replacements of the original warning device installed with federal funds.

Plaintiffs' argument is too speculative to create a material issue of fact. The Court notes that Plaintiffs declined to take discovery on this point. See Plaintiffs' Response in Opposition to Defendant's Motion for Summary Judgment at 4. As a result, Plaintiffs do not provide any credible documentation in support of their argument. Thus, the Court finds that the crossbucks and posts erected at the time of Strozyk's accident were the same warning devices installed in 1987 and such installation occurred with the participation of federal funds.

As it has been determined that the subject warning devices were installed with federal funds, the Court now turns to which claims asserted by Plaintiff are preempted under Shanklin. Plaintiffs argue that many of the claims identified by Defendant should not be preempted because under Shanklin, only the claims involving the safety of warning devices should be struck. Other claims, such as those involving allegations related to sight lines and general safety and adequacy of the crossing, should not be stricken.

The FRSA preemption provision applies to the subject matter of any state claim related to railway safety for which the Secretary of Transportation has prescribed or issued an order covering the same subject matter. See 49 U.S.C. § 20106. Transportation regulations found at 646.214(b)(3) and (4), pertaining to adequate warning devices at grade crossings, were

promulgated by the Secretary of Transportation pursuant to its authority to "prescribe regulations and issue orders for every area of railroad safety." 49 U.S.C. § 20103(a). Furthermore, this authority directs the Secretary of Transportation to "maintain a coordinated effort to develop and carry out solutions to the railroad grade problem." 49 U.S.C. § 20134(a).

Plaintiffs' allegations that Norfolk Southern failed to provide proper sight lines for vehicles such as Plaintiffs' decedent and that the sight line at the time of the accident was an improper distance must be stricken. Plaintiffs' theory appears to be that the view of the portion of the railroad tracks which crosses Smith Lane is in some way obstructed (by trees, shrubbery, embankments of earth or structures of any kind) and that Norfolk's failure to remove such obstruction, so as to afford an unobstructed view of its railroad tracks of a sufficient distance was negligent.

According to 23 C.F.R. § 646.214(b)(3), if the Smith Lane Crossing had a limited sight distance or an unusually restricted sight distance (conditions listed in section 646.214(b)(3)), installation of automatic gates with flashing light signals would be required. Through FHWA's authorization of the grade crossing improvement project involving the Smith Lane Crossing and the subsequent provision of federal funds for the project, it was determined that reflectorized crossbuck signs

were sufficient and automatic gates with flashing light signals were not required at the Smith Lane Crossing. This suggests that limited or unusually restricted sight distances did not exist at the Smith Lane Crossing. However, as explained by Justice O'Connor:

When the FHWA approves a crossing improvement project and the State installs the warning devices using federal funds, §§ 646.214(b)(3) and (4) establish a federal standard for the adequacy of those devices that displaces state tort law addressing the same subject. At that point, the regulation dictates the devices to be installed and the means by which railroads are to participate in their selection. It is this displacement of state law concerning the devices adequacy, and not the State's or the FHWA's adherence to the standard set out in §§ 646.214(b)(3) and (4) . . . that pre-empts state tort actions.

Shanklin, 529 U.S. at 357-59, 120 S. Ct. 1467 (citations omitted).

In short, FHWA authorization of a crossing improving project and the installation of warning devices using federal funds displaces state tort law addressing the same subject. See Shanklin, 529 U.S. at 357, 120 S. Ct. at 1476. Both conditions, FHWA authorization and utilization of federal funds, are present in the instant case. Therefore, Norfolk Southern cannot be liable for failing to install different or additional devices or failing to alter the particular conditions at the crossing. These elective considerations are immaterial to the preemption question. Once federal funds are provided and used in the

improvement of a railway crossing, federal requirements with respect to such improvements and adequate warning devices set the appropriate standard. See Shanklin, 529 U.S. at 353, 120 S. Ct. 1467. (citing CSX Transp., Inc. v. Easterwood, 507 U.S. 658, 666, 113 S. Ct. 1732, 123 L. Ed. 2d 387 (1993)). This standard encompasses all the considerations set forth in section 646.214(b)(3)(A) through (F), including the appropriate response to limited sight distance or unusually restricted sight distance. Thus, because the federal regulation includes within its subject matter the subject of Plaintiffs' state tort claims, according to Shanklin, Plaintiffs' claims regarding inadequate sight lines are preempted.

Furthermore, there is no separate evaluation of danger that states or railroads must undertake and they are essentially divested of the responsibility to provide additional or different warning and safety devices and divested of the responsibility to adopt additional or different protective measures, standards and safeguards.

Again, Justice O'Connor advises

"that nothing prevents a State from revisiting the adequacy of devices installed using federal funds. States are free to install more protective devices at such crossings with their own funds or with additional funding from the FHWA. What States cannot do - once they have installed federally funded devices at a particular crossing - is hold the railroad responsible for the adequacy of those devices.

Shanklin, 529 U.S. at 358, 120 S. Ct. at 1476.

With respect to Plaintiffs' argument that Shanklin does not require preemption in the case of general allegations related to safety and adequacy of the crossing, it would defy logic to allow preemption in the case of the specific allegation that a railroad failed to maintain adequate warning devices, rendering a grade crossing unsafe, but not the general allegation that a railroad failed to maintain a safe grade crossing. The Court believes that these allegations are one in the same and will strike those portions of Plaintiffs' complaint pertaining specifically to inadequate warning devices as well as their general allegations of inadequate safety at the Smith Lane Crossing.

Only two of the paragraphs of Plaintiffs' Complaint that Defendant has requested stricken will remain. Paragraph 19b alleges that Norfolk Southern was negligent by "failing to give proper sound, signal or warning of the presence of its train prior to its collision with Plaintiffs' decedent's vehicle under the circumstances[.]" Paragraph 19c alleges Norfolk Southern violated "the Plaintiffs' decedent, Christopher Strozyk's right of way under the circumstances[.]" These allegations do not pertain to the safety conditions of the Smith Lane Crossing but rather implicate the actions of the operator of the train at the time of the accident.

IV. CONCLUSION

Because the Court finds that the improvements at the Smith Lane Crossing utilized federal funds, Plaintiffs' claims pertaining to the Defendant's failure to maintain adequate warning devices and safe conditions at the Smith Lane Crossing will be stricken. The stricken paragraphs of Plaintiffs' Complaint are 15, 16, 19a, 19f, 19j, 19m, 19o, 19p, 19q, 19r, 19s, 19w, 19z, 19aa, 19bb and 35m. Paragraphs 19b and 19c of Plaintiffs' Complaint will remain.

An appropriate Order follows.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

CLAIR STROZYK and	:	
DENISE STROZYK, individually,	:	
as the parents of, and as	:	
co-administrators of THE	:	CIVIL ACTION
ESTATE OF CHRISTOPHER STROZYK,	:	
	:	NO. 01-2478
Plaintiffs,	:	
	:	
v.	:	
	:	
NORFOLK SOUTHERN CORPORATION,	:	
	:	
Defendant.	:	

ORDER

AND NOW, this 5th day of June, 2002, upon consideration of Defendant's Motion for Summary Judgment (Docket No. 14) and Plaintiffs' response in opposition thereto (Docket No. 15), along with other matters of record, it is hereby **ORDERED** that Defendant's motion is **GRANTED**.

More specifically, it is ORDERED that paragraphs 15, 16, 19a, 19f, 19j, 19m, 19o, 19p, 19q, 19r, 19s, 19w, 19z, 19aa, 19bb and 35m are stricken from Plaintiffs' Complaint. Paragraphs 19b and 19c of Plaintiffs' Complaint will remain.

Trial is set for Monday, September 9, 2002 at 10:00 a.m. in Courtroom 14A.

BY THE COURT:

RONALD L. BUCKWALTER, J.