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MARIA TOLENTINO, ANIBAL TOLENTINO, WINSTON FORDE, IAN FORDE, IVAN FORDE, LARUNDIA FORDE, FELICIA FORDE, and MARGARET COTTELL, Plaintiffs, v. UNITED PARCEL SERVICE, INC., Defendant and Third-Party Plaintiff, and CONSOLIDATED RAIL CORPORATION, Defendant, v. UNITED MODEL DISTRIBUTORS, INC. and CENTURI CORPORATION, Third-Party Defendants.

98-CV-10369-MEL

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS

2001 U.S. Dist. LEXIS 1395

January 11, 2001, Decided

DISPOSITION: [*1] UPS's motion for summary judgment denied. ConRail's motion for summary judgment granted as to all claims against it except the claim that it negligently maintained fire hydrants in the Beacon Park Rail Yard.

CASE SUMMARY:

PROCEDURAL POSTURE: Plaintiff toll collectors and their families sued defendants transporter and rail owner for negligence and loss of consortium in connection with a fire that consumed defendant transporter's trailer while in temporary storage in defendant rail owner's railroad yard. Defendants moved for summary judgment.

OVERVIEW: The negligence claims against defendant rail owner based on providing misinformation to firefighters and failing to inspect the trailer were preempted by the Federal Railroad Safety Act, *49 U.S.C.S. §§ 20101-20311*, because federal regulations set forth specific requirements for meeting safety standards when transporting hazardous wastes and specifically limited a carrier's responsibility when receiving a trailer for transport. However, those regulations did not apply to defendant transporter. Plaintiffs were not required to specifically identify the cause of the fire because if their expert were believed, both of the proffered causes were attributable to defendant transporting company. Moreover, plaintiffs had established res ipsa loquitur as the evidence showed a greater likelihood that plaintiffs' injuries came from defendant transporter's negligence. Plaintiffs' testimony regarding their injuries established a disputed material fact regarding the cause of their injuries. Summary judgment was inappropriate on the claims regarding dry fire hydrants since defendant rail

owner owed a duty of care and disputed facts remained regarding the hydrants' impact on plaintiffs' injuries.

OUTCOME: Defendant rail owner's motion for summary judgment was granted in part because plaintiffs' negligence claims were preempted by Federal Railroad Safety Act and was denied in part because it owed duty of care as a land owner and disputed facts remained regarding dry fire hydrants' impact on plaintiffs' injuries. Defendant transporter's motion for summary judgment was denied.

COUNSEL: For MARIA TOLENTINO, ANIBEL TOLENTINO, WINSTON FORDE, IAN FORDE, IVAN FORDE, LARUNDIA FORDE, FELICIA FORDE, MARGARET COTTELL, PAUL COTTELL, Plaintiffs: Robert V. Costello, Donald L. Liskov, Schneider, Reilly, Zabin & Costello, Boston, MA.

For MARGARET COTTELL, Plaintiff: John B. Rest, Leavis & Rest, P.C., Boston, MA.

For UNITED PARCEL SERVICE, Defendant: John A. Kiernan, Hugh R. Curran, Gilberg & Kiernan, Boston, MA.

For UNITED PARCEL SERVICE, CONSOLIDATED RAIL CORPORATION, Defendants: Michael B. Flynn, Flynn & Associates, P.C., Boston, MA.

For UNITED MODEL DISTRIBUTORS INC., Third-Party Defendant: Scott D. Burke, Edwin F. Landers, Jr., Morrison, Mahoney & Miller, Kathleen A. Kelley, Hare & Chaffin, Boston, MA.

For UNITED MODEL DISTRIBUTORS INC., ESTES INDUSTRIES, CENTURI CORPORATION, Third-Party Defendants: Robert T. Nagle, Hare & Chaffin, Boston, MA.

For UNITED PARCEL SERVICE, Third-Party Plaintiff: John A. Kiernan, Hugh R. Curran, Gilberg & Kiernan, [*2] Michael B. Flynn, Flynn & Associates, P.C., Boston, MA.

JUDGES: Morris E. Lasker, United States District Judge.

OPINION BY: Morris E. Lasker

OPINION

MEMORANDUM AND ORDER

LASKER, D.J.

Three toll collectors, Maria Tolentino, Winston Forde, and Margaret Cottell, and various members of their families, bring this negligence and loss of consortium suit against United Parcel Service, Inc. ("UPS") and Consolidated Rail Corporation ("ConRail") in connection with a fire that consumed a UPS trailer while in temporary storage in a ConRail railroad yard. The three toll collectors allege that UPS's and ConRail's negligence exposed them to fumes from the fire and that their contact with the fumes injured them. In particular, the plaintiffs allege that both defendants provided inaccurate information to firefighters; that UPS improperly packed the trailer; that ConRail failed to inspect the trailer properly; and, that ConRail did not properly maintain the fire hydrants on its property.

Both UPS and ConRail move for summary judgment. UPS's motion is denied. ConRail's motion is granted in part and denied in part.

I.

UPS is in the business of transporting packages. On June 27, 1997, in Palatine, Illinois, [*3] UPS consolidated into a single trailer, which it owned and maintained, a number of cartons and packages that its customers had hired it to transport. UPS packed and sealed the trailer so that it could be delivered to ConRail, which UPS had contracted to transport the trailer from Illinois to Massachusetts.

Among the varied contents of the trailer were cartons containing model rockets and model rocket engines manufactured by Centuri Corporation ("Centuri") and shipped by United Model Distributors, Inc. ("United Model"). The Centuri model rocket engines are classified by the Department of Transportation as a hazardous material subject to packaging and labeling regulations when transported. To comply with these regulations, Centuri applied for and received an Exemption from the Department of Transportation. This Exemption permitted Centuri, and distributors like United Model, to ship the model rocket engines as a flammable solid. United Model received instructions from UPS and Centuri on the

appropriate packaging and shipping procedures for transporting the model rocket engines, which it followed when sending these cartons to its customer in Fitchburg, Massachusetts.

At approximately [*4] 3:10 p.m. on June 29, 1997, the UPS trailer arrived on a ConRail flatbed train at ConRail's Beacon Park Rail Yard in Allston, Massachusetts. The Beacon Park Rail Yard is an intermodal facility used to transfer trailers from flatbed trains to road-bound trucks. ConRail has contracted with Pacific Rail Services ("PacRail") to deramp, or unload, trailers from flatbed trains so that they may be taken away by trucks. When the UPS trailer in this case arrived, PacRail deramped it for temporary storage in the Beacon Park Rail Yard.

On June 30, 1997, the trailer caught fire. The time at which it first began to show external signs of the fire is in dispute. Plaintiffs Forde and Tolentino both report smoke emanating as early as 3:30 that afternoon. ConRail became aware of the smoke at roughly 5:30 p.m., when ConRail Police Captain Stephen May observed the smoking trailer and contacted the Boston Fire Department ("BFD"). Minutes later, the BFD arrived.

The parties dispute the circumstances surrounding the BFD's firefighting. Taking the evidence most favorable to the non-moving party, the BFD did not vigorously apply water initially both because of concerns about an inadequate water supply and [*5] whether water might aggravate the combustion of the burning materials in the trailer. The record shows that the BFD hooked its hoses to a nearby public fire hydrant rather than to an inoperable fire hydrant in the Beacon Park Rail Yard. The plaintiffs contend this difficulty caused some delay. Further, although Captain May provided the BFD with the waybill for the trailer, which contained information about the contents of the trailer, the plaintiffs contend that some of the information was incorrect. Using the information on the waybill, the BFD called, but did not reach, the 24-hour emergency response telephone number in an attempt to gather information about the proper approach to put out the fire. The plaintiffs assert that this misinformation further delayed the BFD's firefighting efforts.

The BFD decided to break the UPS seal on the trailer in order to address the smoldering fire within the trailer. It had not been opened since UPS had sealed the trailer three days earlier. The smoldering continued until roughly 11:30 p.m., when the fire was finally extinguished.

At the time the fire began, Tolentino, Forde, and Cottell were collecting tolls from motorists using the nearby Massachusetts [*6] Turnpike. Smoke from the fire blew toward the toll plaza where they were working, roughly 500 feet from the burning trailer. The smoke made several of the toll collectors suffer shortness of breath, runny eyes, itchy skin, skin rash, headache, and wheezing. The Massachusetts State Police closed the toll plaza at 8 p.m. that evening because of its concerns over health hazards from the smoke. Tolentino, Forde, and Cottell all assert that they suffered from respiratory, pulmonary, and dermatologic problems as a result of their exposure to the fire's smoke and that they continue to suffer from these ailments.

The contents of the trailer and the trailer itself were substantially destroyed by the fire and the firefighting efforts. The Massachusetts Department of Environmental Protection ("DEP") directed UPS to retain React Environmental, a company specializing in hazardous waste clean-up, to clean-up, the remains of the trailer and dispose of the waste materials. UPS complied with the DEP's request.

II. Preemption

Both UPS and ConRail move for summary judgment on the ground that the Federal Railroad Safety Act of 1970, *49 U.S.C. §§ 20101-311 (1994)*(as amended [*7] and recodified)("FRSA"), preempts the plaintiffs' state law claims.

A. Preemption of the Field

UPS argues that the FRSA preempts the field of state negligence actions with regard to any railroad-based negligence. UPS further contends that no state tort claim is available to enforce the FRSA because the FRSA contains a specific mechanism for enforcement that does not include a private right of action. *Talbott v. C.R. Bard, 63 F.3d 25, 28-30 (1st Cir. 1995)* (Medical Devices Act preemption); *Ouellette v. Union Tank Car Co., 902 F. Supp. 5, 10-11 (D.Mass. 1995)* (applying Talbot to the FRSA).

The plaintiffs respond that particularly in areas of traditional state regulation, such as the claims here, there is a strong presumption against preemption. *New York St.*

Conf. of Blue Cross & Blue Shield Plans v. Travelers Ins. Co., 514 U.S. 645, 654-55, 131 L. Ed. 2d 695, 115 S. Ct. 1671 (1994). Moreover, the plaintiffs contend that the FRSA does not preempt the present state claims because of the limitations of the statute's express preemption clause, which provides, in relevant part:

> [a] State may adopt or continue in force [*8] a law, regulation, or order related to railroad safety until the Secretary of Transportation prescribes a regulation or issues an order covering the subject matter of the State requirement. A State may adopt or continue in force an additional or more stringent law, regulation, or order related to railroad safety when the law, regulation or order--(1) is necessary to eliminate or reduce an essentially local safety hazard; (2) is not incompatible with a law, regulation, or order of the United States Government; and (3) does not unreasonably burden interstate commerce.

49 U.S.C. § 20106. Because the Department of Transportation has promulgated no such regulations, the plaintiffs maintain that state action is not preempted.

It is clear from the statutory language that the FRSA does not preempt the field. *CSX Transp., Inc. v. Easterwood, 507 U.S. 658, 123 L. Ed. 2d 387, 113 S. Ct. 1732 (1993)*. At most, the FRSA has preemptive effect only when either: (1) a more stringent state rule addresses a matter beyond local safety or conflicts with federal law or unreasonably burdens interstate commerce; or (2) the Department of Transportation has [*9] issued a regulation or order that "covers" the specific area where negligence is being alleged. *49 U.S.C. § 20106*.

> To prevail on the claim that the regulations have pre-emptive effect, petitioner must establish more than that they "touch upon" or "relate to" that subject matter ... for "covering" is a more restrictive term which indicates that pre-emption will lie only if the federal regulations *substantially subsume* the subject matter of the relevant state law.

CSX Transp., 507 U.S. at 664 (citations omitted)(emphasis added). Accordingly, the plaintiffs' negligence claims against UPS are not preempted unless specific Department of Transportation regulations exist that "substantially subsume" the subject matter.

B. Preemption by Specific Regulations

ConRail asserts that certain regulations issued by the Department of Transportation that govern the transportation of hazardous materials, issued under the Hazardous Materials Transportation Act ("HMTA"), [1] preempt the negligence claims the plaintiffs bring against it. Relying on *CSX Transp., Inc. v. Public Utilities Comm. Of Ohio, 901 F.2d 497, 501 (6th Cir. 1990)* [*10] (holding that the FRSA preemption provision applies to the HMTA "as it relates to the transportation of hazardous material by rail"), ConRail contends that two regulations preempt the state negligence claims.

> 1 Pub. L. No. 93-633, 88 Stat. 2156 (1975), now known, after being amended and recodified in 1990, as the Hazardous Materials Transportation Uniform Safety Act, *49 U.S.C. §§ 5101-27 (1994)* ("HMTUSA").

1. Provision of Incorrect Information

ConRail argues that the plaintiffs' claim that its provision of allegedly incorrect information to the BFD delayed the firefighting is preempted by *49 C.F.R. § 172.602(c)(2)*, which provides that:

> each operator of a facility where a hazardous material is received, stored or handled during transportation, shall maintain the information required by paragraph (a) of this section [emergency response information] whenever the hazardous material is present. This information must be in a location that is immediately [*11] accessible to facility personnel in the event of an incident involving the hazardous material.

ConRail asserts that it followed this provision, but that even if it had not, a state law negligence claim based on a violation of this regulation is preempted. *Talbott, 63 F.3d at 28-30* (Medical Devices Act preemption); *Ouellette, 902 F. Supp. at 10-11* (applying Talbot to the FRSA).

ConRail is correct that *49 C.F.R. § 172.602(c)(2)* "substantially subsumes" the labeling and information-providing duties of a operator of a facility like the Beacon Park Rail Yard. When coupled with *49 C.F.R. § 172.602(a)*, it provides specific requirements to meet safety standards. Accordingly, the negligence claims advanced by the plaintiffs against ConRail on the basis of the provision of misinformation are preempted by the FRSA.

UPS, however, does not operate the Beacon Park Rail Yard, and therefore *49 C.F.R. § 172.602(c)(2)* does not apply to it, nor does it preempt the plaintiff's negligence claim against UPS based on the alleged provision of misinformation.

2. Inspection of [*12] the Trailer

ConRail next addresses the plaintiffs' contention that ConRail was negligent in the inspection of the trailer. ConRail asserts that because it had no authority to open the container, its only duties are those specified by *49 C.F.R. § 174.9*:

> at each location where a hazardous material is accepted for transportation or placed in a train, the carrier shall inspect each rail car containing the hazardous material, at ground level, for required markings, labels, placards, securement of closures and leakage.

Conrail argues that this regulation preempts the negligence claims. Moreover, it contends that it performed the specified inspection, and that at any rate, the plaintiffs cannot sue to enforce the federal regulation even if ConRail did violate the regulation. *Talbott, 63 F.3d at 28-30* (Medical Devices Act preemption); *Ouellette, 902 F. Supp. at 10-11* (applying Talbot to the FRSA).

ConRail again is correct that *49 C.F.R. § 174.9* "substantially subsumes" the subject matter of its duty to inspect the UPS trailer. The regulation specifically limits the inspection responsibilities [*13] of a carrier such as ConRail when receiving a trailer for transport. Accordingly, any negligence claims advanced by the plaintiffs against ConRail on the basis of inspection of the trailer are preempted by the FRSA.

However, in contrast to ConRail, UPS was not a "carrier" as to the material aboard the ConRail train, and is therefore not covered by *49 C.F.R. § 174.9*.

III. UPS's Motion for Summary Judgment Based on the Sufficiency of the Evidence

UPS argues that the evidence fails to establish that: (1) UPS's actions were the proximate cause of the fire itself; or (2) that the fumes from the fire were the proximate cause of the plaintiffs' injuries.

A. Cause of the Fire

UPS claims that, at best, the plaintiffs have merely shown many possible causes, but no probable cause, of the fire. The plaintiffs' expert on causation, Thomas Klem, concludes in his report that the fire was caused either by a smoldering cigarette or by a rag with linseed oil left in the trailer. Since neither of these possible causes is more likely than the other, UPS asserts, the plaintiffs have failed to meet their burden of establishing the cause of the fire. See, e.g., *Bigwood v. Boston & N. St. Ry. Co., 209 Mass. 345, 348, 95 N.E. 751, 752 (1911)*. [*14]

The plaintiffs respond that Klem's testimony is sufficient because both the oily rag and the cigarette are fairly attributable to UPS. The plaintiffs also contend that the present case is one of *res ipsa loquitur* and that, since there was no external cause and a fire did start, it should be presumed that UPS was negligent, particularly because during the cleanup UPS destroyed the physical evidence of the source of the fire.

UPS disputes the plaintiffs' attempted use of the doctrine of *res ipsa loquitur*. It argues that the doctrine is applicable only when a defendant has exclusive control of the instrumentality, *Wilson v. Colonial Air Transp., 278 Mass. 420, 425, 180 N.E. 212 (1932)*, and that it did not have such exclusive control of the trailer.

The plaintiffs are correct that if Klem's testimony is believed, they need not prove which of the two circumstances (smoldering cigarette or oily rag) caused the fire because either cause would be attributable to UPS.

Moreover, the doctrine of *res ipsa loquitur* is applicable in this case. The *Restatement (Second) of Torts § 328D* specifics the criteria for the application of the doctrine:

> It may [*15] be inferred that harm suffered by the plaintiff is caused by negligence of the defendant when (a) the event is of a kind which ordinarily does not occur in the absence of negligence; (b) other responsible causes, including the conduct of the plaintiff and third persons, are sufficiently eliminated by the evidence; and (c) the indicated negligence is within the scope of the defendant's duty to the plaintiff.

Each of these elements exists here.

First, a trailer does not ordinarily catch fire, without external causes, absent negligence. See *Wilson v. Honeywell, Inc., 409 Mass. 803, 807, 569 N.E.2d 1011, 1014 (1991)* (holding that "Unattended garage doors ordinarily do not fall or roll down from an open position, absent negligence."); *Evangelio v. Metropolitan Bottling Co., 339 Mass. 177, 180 158 N.E.2d 342, 345 (1959)* (holding "the explosion of a bottle containing a carbonated beverage is the kind of occurrence which usually does not happen in the absence of negligence."). Second, both third-party negligence and negligence by the plaintiffs has been sufficiently eliminated by the evidence. There is no evidence that the plaintiffs had anything [*16] to do with the fire. As to third-party negligence, no party has made a claim that the fire was started by an external cause. None of the many experts on both sides allege that anything other than the materials inside the trailer caused the fire. PacRail or ConRail did not cause the fire, nor did a lightning strike or an arsonist. This distinguishes the case from *McBride v. Proctor & Gamble Mfg. Co., 300 F. Supp. 1150, 1152 (E.D. Tenn. 1969)*, in which it was ruled the doctrine of *res ipsa loquitur* could not apply under a factual setting that had not ruled out external causes.

UPS contends that it is entirely possible that any of the packages within the trailer, which UPS had no duty to open and inspect, may have caused the fire. In this case, UPS has sued Century and United Model for indemnity and contribution on that theory. However, to merit the application of *res ipsa loquitur* treatment, "the plaintiff is not bound to exclude every other possibility of cause for his injury except that of the negligence of the defendant;" instead, "he is required to show by evidence a greater likelihood that it came from an act of negligence for which defendant is responsible [*17] than from a cause for which the defendant is not liable." *Bigwood, 209 Mass. at 348, 95 N.E. at 752*. The record reflects that the plaintiffs have done so here.

While exclusive control is an important element that supports the applicability of the doctrine of *res ipsa loquitur*:

> exclusive control is merely one fact which establishes the responsibility of the defendant; and if it can be established otherwise, exclusive control is not essential to a res ipsa loquitur case. The essential question becomes one of whether the probable cause is one which the defendant was under a duty to the plaintiff to anticipate or guard against.

Restatement (Second) of Torts § 328D, comment g.

Finally, UPS was under a duty to pack its trailer so as to avoid exposing the public to fumes from the combustion of its trailers. Accordingly, *res ipsa loquitur* is appropriate.

UPS attacks the validity of Klem's opinions and testimony, but their admissibility must be decided in a Daubert hearing, not on a motion for summary judgment.

UPS's motion for summary judgment on the grounds that the plaintiffs have failed to establish the cause of the fire is denied.

[*18] B. Cause of the Injuries

UPS argues that none of the plaintiffs' expert witnesses, various doctors, has any information about the identity of the substances and chemicals to which the plaintiffs were exposed nor about the concentration or amount of exposure the plaintiffs had to those unidentified substances or chemicals. Even if the doctors' credentials are impeccable, UPS asserts, without sufficiently reliable data on which to base an opinion, no opinion rendered by the doctors as expert witnesses is admissible under *Fed. R. Evid. 702*. Without the doctors' testimony, UPS contends that injury cannot be established in a toxic tort case.

The plaintiffs respond that the case is not a toxic tort; they are not alleging exposure to any hazardous materials

in particular; instead, they are alleging illness caused by simple exposure to "smoke." Accordingly, while the plaintiffs dispute UPS's characterization of the doctor's testimony, they contend that the only evidence they need is the testimony of Tolentino, Forde, and Cottell themselves, who have said that they were injured by the smoke. Their testimony, according to the plaintiffs, has established a dispute of material fact that [*19] precludes summary judgment.

In times when expert witnesses are increasingly relied on to establish many critical parts of a negligence claim, it is easy to overlook the proposition that a jury may reasonably rely on evidence offered by a lay witness to establish injury. The testimony of Tolentino, Forde, and Cottell is that they were injured by the "smoke" emanating from the trailer fire. This evidence is enough to establish a dispute of material fact, even without reference to the testimony of the treating doctors. It is for a jury to decide the witnesses' credibility and the weight to give their testimony. Accordingly, UPS's motion for summary judgment is denied.

IV. ConRail's Motion for Summary Judgment

ConRail argues that it owed the plaintiffs no duty of care and, like UPS, that the plaintiffs have not established the proximate cause of either the fire or their injuries.

A. Duty of Care

ConRail contends that it owed the plaintiffs no duty of care. Whether such a duty exists is a question of law and determined by looking to social values, customs, and policy. *Yakubowicz v. Paramount Pictures Corp., 404 Mass. 624, 629, 536 N.E.2d 1067, 1070 (1989).* [*20] ConRail asserts that it owes no duty to individuals who are not actually on its property, which includes the public on an adjacent highway. *Davis v. Westwood Group, 420 Mass. 739, 743-44, 652 N.E.2d 567, 570 (1995).* The plaintiffs disagree, asserting that ConRail may be found liable for failing to provide adequate means for extinguishing the fire on its property. See, e.g., *Little v. Lynn & Marblehead Real Estate Co., 301 Mass. 156, 159, 16 N.E.2d 688, 691 (1938)*; *Foreign Car Center, Inc. v. Salem Suede, Inc., 40 Mass. App. Ct. 15, 660 N.E.2d 687,* review denied, *422 Mass. 1106, 663 N.E.2d 576 (1996).*

ConRail had a duty to take reasonable care to maintain its property so that, in the event of a fire, it may be extinguished without injuring the nearby public. *Pritchard v. Mabrey, 358 Mass. 137, 140, 260 N.E.2d 712, 714-15 (1970).* The negligence occurred and the injury originated on ConRail's property. The injury was reasonably foreseeable and therefore a duty of care to the plaintiffs existed.

Because ConRail owed the plaintiffs a duty of care, and because ConRail does not assert that the FRSA preempts [*21] this claim, summary judgment is denied. The parties present clear alternative theories of whether ConRail had reasonably maintained it premises to combat any potential fire. ConRail contends it had no notice of any inoperable fire hydrants; the plaintiffs maintain that nonetheless the fire hydrant was "dry" at the critical time. Likewise, the parties present clear alternative theories of whether any such deficiency contributed to the injuries that the plaintiffs claim to have suffered. ConRail argues that any delay caused by the "dry" fire hydrant was negligible; the plaintiffs maintain that there was a significant delay. When such material facts are in dispute, there is no room for summary judgment.

B. Cause of the Fire and of the Injuries

Like UPS, ConRail argues that the plaintiffs have failed to establish, by a preponderance of the evidence, either the proximate cause of the fire or the proximate of their injuries. As with UPS, ConRail's motion for summary judgment based on these subjects is denied. The cause of the fire is immaterial to the plaintiffs' remaining claim against ConRail, which is based on whether ConRail adequately maintained adequate fire hydrants on its property. [*22] As with UPS, the plaintiffs' injuries may be based on their testimony alone, without experts.

V.

UPS's motion for summary judgment is denied. ConRail's motion for summary judgment is granted as to all claims against it except the claim that it negligently maintained fire hydrants in the Beacon Park Rail Yard.

It is so ordered.

Dated: January 11, 2001

Boston, Massachusetts

Morris E. Lasker

United States District Judge

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