

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

FARM FAMILY INSURANCE)
COMPANY, AS SUBROGEE OF)
RUTKOSKE BROS., INC. AND)
RUTKOSKE BROS., INC.)
)
Plaintiffs,)
)
v.) C.A. No. 08C-12-146 WCC
)
VERIZON COMMUNICATIONS INC.,)
A DELAWARE CORPORATION, AND)
VERIZON DELAWARE LLC,)
A DELAWARE CORPORATION,)
)
Defendants.)

Submitted: October 8, 2010

Decided: January 31, 2011

Upon Plaintiffs' Motion for Summary Judgment - **DENIED**
Upon Defendant's Motion for Summary Judgment - **GRANTED**

OPINION

Michael R. Abbott, Esquire, Kent & McBride, P.C., 1105 N. Market Street, Suite 500, Wilmington, DE 19801. Attorney for Plaintiffs.

Anne Kai Seelaus, Esquire, Barnard, Mezzanotte, Pinnie and Seelaus, LLP, 300 Delaware Avenue, 11th Floor, P.O. Box 26304, Wilmington, DE 19899. Attorney for Defendant.

CARPENTER, J.

Before this Court are the Motions for Summary Judgment filed by Defendants Verizon Communications, Inc. and Verizon Delaware LLC (“Defendants” or “Verizon”) and by Plaintiffs Farm Family Insurance Company, as subrogee of Rutkoske Bros, Inc., and Rutkoske Bros., Inc. (“Plaintiffs”). At issue is whether Plaintiffs can maintain an action based on a theory of negligence per se for an alleged violation of safety regulations when that liability theory would conflict with an applicable state statute. The Court finds that they cannot. Accordingly, the Defendants’ Motion for Summary Judgment is granted, and the Plaintiffs’ Motion for Summary Judgment is denied.

FACTS

On May 24, 2007, Felix Rutkoske, III, an employee of Plaintiff Rutkoske Bros., Inc., was involved in a motor vehicle accident caused by the collision of farm equipment he was towing with an overhead communications cable owned and maintained by Defendants. Rutkoske was traveling down Marl Pit Road in Middletown, Delaware, operating a tractor that was pulling an air drill and a grain cart. The equipment was owned by Rutkoske Bros. and was insured by Farm Family Insurance Company. The parties agree that the farm equipment measured at least 14 feet 4 inches tall. The cable that was hit stretched across Marl Pit Road and was attached to a utility pole, and Verizon asserts that the cable was hung at a height of 17 feet above the road.

Near the intersection of Marl Pit Road and Jack’s Way, the air drill became hooked onto the Verizon cable, which snapped the utility pole. High-voltage Conectiv wires fell onto the farm equipment, sparking a fire that ultimately destroyed the tractor and caused significant damage to the other farm equipment Rutkoske was towing. During the fire, a substantial amount of tractor oil was spilled, requiring the

involvement of the Delaware Department of Natural Resources and Environmental Control (“DNREC”) in the subsequent environmental clean-up.

Plaintiffs filed a property subrogation action against Verizon in this Court on December 15, 2008, alleging that they suffered at least \$227,250.267 in damages as a result of the accident. Plaintiffs alleged that Verizon negligently failed to install and maintain its overhead communication lines at the minimum height mandated by regulations of the Delaware Department of Transportation (“DelDOT”), the Delaware Public Service Commission (“PSC”) and the National Electric Safety Commission (“NESC”). Plaintiffs and Defendants have each filed Motions for Summary Judgment. This is the Court’s decision after considering the parties’ briefs and oral arguments.

STANDARD OF REVIEW

Summary judgment is appropriate only where there are no genuine issues of material fact.¹ Where parties file cross-motions for summary judgment, they implicitly concede that there is no genuine issue of material fact.²

DISCUSSION

I. Plaintiffs’ Motion for Summary Judgment

Plaintiffs allege that Verizon’s failure to maintain its wires at an appropriate height violates several regulations and therefore constitutes negligence per se. Regulations promulgated by the Delaware Department of Transportation require a minimum 18-foot clearance above roadways for all existing utility lines and cables.³ Plaintiffs also cite to standards issued by the National Electric Safety Commission,

¹ Super. Ct. Civ. R. 56(c). *See also Moore v. Sizemore*, 405 A.2d 679, 680 (Del. 1979).

² *Browning-Ferris, Inc. v. Rockford Enter., Inc.*, 642 A.2d 820 (Del. Super. 1993).

³ 2 Del. Admin. Code §2401-3.3.3.2.1 (DelDOT Utilities Manual).

which require a 15.5-foot minimum clearance for overhead utility wires.⁴ Finally, Plaintiffs rely upon regulations of the Delaware Public Service Commission, which require a minimum twenty-foot ground clearance for the attachment of all wires, cables, and associated equipment.⁵ In a claim for negligence per se, a plaintiff must establish four elements: (1) that the statute in question was enacted for the safety of others; (2) that the statutory violation proximately caused the plaintiff's injury; (3) that plaintiff was a member of the class of persons the statute was intended to protect; and (4) that the statute established a standard of conduct designed to avoid the harm suffered by plaintiff.⁶

Here, Plaintiffs allege that the regulations in question were enacted for the purpose of ensuring the public safety. Furthermore, they allege that the damage to the farm equipment would not have occurred but for Verizon's failure to adhere to the minimum clearance heights required by the regulations. Plaintiffs contend that Mr. Rutkoske, as a person lawfully operating a vehicle on Delaware's roads, was a member of the class of persons intended to be protected by the regulations. Finally, Plaintiffs argue that these regulations, which are designed to prevent hazardous conditions, were intended to prevent precisely this sort of harm. Therefore they assert they are entitled to judgment as these claims cannot be factually disputed by the Defendant.

II. Defendants' Motion for Summary Judgment

In their Motion for Summary Judgment, Defendants argue that they cannot be held liable for Plaintiffs' injuries as a matter of law. Defendants rely upon 21 Del. C. §§4501-4502, which establish maximum height restrictions for vehicles traveling

⁴ National Electric Safety Code, 2002 Table 232-1 Vertical Clearance of Wires, Conductors, and Cables Above Ground, Roadway, Rail or Water.

⁵ CDR 10 800 016 §7.2.2.(a).

⁶ *NVF Co. v. Garrett Snuff Mills, Inc.*, 2002 WL 130536, at *2 (Jan. 30, 2002).

on Delaware roads and the minimum height requirement for structures across highways. 21 Del. C. §4502(b)(2) provides that no vehicle traveling on Delaware roads may exceed a height of 13 feet 6 inches, and in spite of this limitation, Section 4501(g)(5) requires wires and other structures to be at least 12 feet 6 inches, an interesting inconsistency but not critical to this decision. The Defendants also recognize there is an exception that permits farm equipment being temporarily moved or transported on a public highway to exceed the height restriction,⁷ but they assert that the terms of the exception expressly provide, “[T]he liability for damages caused by any vehicle operated under this provision shall be borne by the owner of said vehicle.”⁸

Verizon contends that the statutory language here is clear and unambiguous in assigning the risk of loss to the owner and operator of vehicles that operate in excess of the maximum height restriction. Accordingly, Verizon argues, liability cannot be imposed on Verizon for Plaintiffs’ damages suffered in this accident and summary judgment should be granted in its favor.

III. Analysis

The question before this Court, therefore, is whether Plaintiffs’ negligence per se claims on the basis of a regulatory violation can go forward where an applicable state statute prevents assigning liability in this manner.

Plaintiffs are correct that a claim for negligence per se can be based on administrative regulations. Delaware has long recognized that administrative regulations with the force and effect of law can provide the basis for a claim of negligence per se.⁹ In *Sammons*, the Delaware Supreme Court held that the violation

⁷ 21 Del. C. §4501(h)(2).

⁸ 21 Del. C. §4502(h).

⁹ See *Sammons v. Ridgeway*, 293 A.2d 547, 549 (Del. 1972).

of a State School Board of Education ordinance regulating safety conditions for children disembarking from a school bus could serve as the basis for a claim of negligence per se where the plaintiff was a child who was injured when the safety ordinances were not followed.¹⁰ However, the extension of negligence per se to administrative regulations is limited. The *Sammons* Court cautioned that its holding was “expressly limited to regulations having the statutory basis and the purpose of the regulations here involved” and noted that its ruling was not intended “to extend the negligence per se rule to regulations of administrative agencies generally.”¹¹

As such, Delaware courts have subsequently held that regulations and local ordinances without a statutory foundation cannot serve as the basis for negligence per se claims. For example, the Delaware Supreme Court has held that failure to adhere to NESC standards is evidence of negligence but not negligence per se where the duty to follow NESC standards arose from a contract rather than from administrative regulations promulgated pursuant to a legislative directive.¹² More recently, in a case involving a claim of negligence per se based on alleged violations of New Castle County building ordinances, this Court granted summary judgment for the defendants, concluding that the County did not have legislative authority under the enabling statute to create a cause of action for violations of its ordinances.¹³

Generally, when there is a conflict between an administrative regulation and a statute, the statute prevails, at least to the extent of the conflict.¹⁴ Although the Delaware Supreme Court does not appear to have directly addressed the conflict between a state administrative regulation and a state statute, it has ruled that a statute

¹⁰ *See id.*

¹¹ *Sammons*, 293 A.2d at 550.

¹² *See Delaware Elec. Co-op., Inc. v. Duphily*, 703 A.2d 1202, 1209 (Del. 1997) (“*Duphily II*”) (approving jury instructions to this effect by the Delaware Superior Court).

¹³ *NVF Co.*, 2002 WL 130536, at *4.

¹⁴ 2 Am. Jur. 2d Administrative Law § 225

will prevail over a conflicting local ordinance or regulation where the statute is found to be exclusive.¹⁵ The Delaware Supreme Court has also explained that exclusivity can be found either by demonstrating through statutory text or legislative history that the statute was intended to prevail over ordinances [regulations] or can be implied when the ordinance [regulation] hinders the objectives of the state statute.¹⁶ Here, both are present. The text of the statute directly addresses the issue before the Court and reflects a clear intent by the legislature as to who would be the responsible party. Further allowing the height requirements developed by administrative agencies to act as a basis for litigation and in effect shifting that responsibility to another party would clearly frustrate and hinder the state statute.

There is no dispute that the General Assembly has granted DeIDOT broad authority to establish a safe and efficient transportation network that includes the effective management and design of utilities within their rights-of-way.¹⁷ DeIDOT requires utilities to install and maintain overhead wires at a minimum clearance of 18 feet above roadways. Such a requirement is within the general regulatory authority given to the department and the failure of a utility to comply could lead to an administrative enforcement action to insure compliance. And if 21 *Del. C.* §4501 and §4502 had not been enacted, the regulations would perhaps provide a basis for the Plaintiff to assert a negligence per se claim for the utilities' non-compliance.¹⁸ However, this broad regulatory authority is not without limits and does not permit the department to create regulations and procedures that are in direct conflict with the clear intent of the legislature as reflected in the statutes they enact.

¹⁵ *Cantina v. Fontana*, 884 A.2d 468, 473 (Del. 2005)

¹⁶ *Id.* at 473-74.

¹⁷ See 2 Del. Admin. Code §2401. There is no authority to suggest that NESC standards have been adopted as law in Delaware pursuant to a legislative directive. Therefore, consistent with the Delaware Supreme Court's holding in *Duphily II*, this Court will not consider the NESC standards in its analysis.

¹⁸ The same argument would be applicable to the regulations established by the Public Service Commission.

The General Assembly appears to have anticipated situations like the one involved in this case and to have made a policy judgment that utilities would not serve as the insurer of individuals who operate vehicles exceeding the maximum height restriction under Delaware law, even if doing so lawfully. They have also specifically set forth the obligations of entities such as the Defendant when phone or cable lines are placed across a highway. Section 4501(g)(5) of Title 21 specifically states that:

(5) Neither the State, any agency or subdivision thereof, nor any person, firm or corporation shall be required to raise, alter, construct or reconstruct any underpass, wire, pole, trestle or other structure to permit passage of any vehicle having a height, including any load thereon, in excess of 12 feet 6 inches. *The liability for damage to any person, vehicle, structure or other property caused by any vehicle having a height, including any load thereon, in excess of 12 feet 6 inches shall be borne by the owner and/or the operator of the vehicle.*¹⁹

While farm equipment is exempt from the height limitation when it is temporarily operated on a highway,²⁰ the General Assembly has also clearly stated their intention that when such a circumstance occurs, the “liability for damages caused by the operation” of a vehicle over the allowable height will be “borne by the owner of said vehicle.”²¹ Put another way, the provisions of 21 *Del. C.* §4501 and §4502 taken together would allow the operation of farm equipment in excess of 12' 6" on Delaware roads, but the owner of that equipment assumes the risk of injury and liability for property damage when doing so. Allowing the negligence case to proceed under the theory that the utility violated an administrative regulation would be directly contrary to these statutory provisions and would violate the clear intent of

¹⁹ 21 *Del. C.* §4501(g)(5)(emphasis added).

²⁰ Section 4501(h)(2)

²¹ *Id.*

the legislature. Therefore, to the extent the regulations conflict with 21 *Del. C.* §4501 and §4502, they cannot be used as a basis to impose tort liability. Accordingly as the statute would impose liability on the owner/operator of the farm equipment and expressly bars imposing liability on Verizon in such circumstances, Defendants' Motion for Summary Judgment must be granted.

CONCLUSION

For the reasons stated above, Plaintiffs' Motion for Summary Judgment is DENIED, and Defendants' Motion for Summary Judgment is hereby GRANTED.

IT IS SO ORDERED.

/s/ William C. Carpenter, Jr. _____
Judge William C. Carpenter, Jr.