

No. SC84342

IN THE MISSOURI SUPREME COURT

**STATE OF MISSOURI ex rel. MISSOURI DIVISION OF MOTOR
CARRIER AND RAILROAD SAFETY,**

Relator,

v.

THE HONORABLE DAVID W. RUSSELL, CIRCUIT JUDGE

Respondent.

**Original Proceeding in Prohibition Against the Circuit Court of Clay
County, Missouri, the Honorable David W. Russell, Circuit Judge**

REPLY BRIEF OF RELATOR DIVISION OF RAILROAD SAFETY

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ARGUMENT

Respondent offers two reasons literally every railroad crossing in the state (Respondent's Br. at 16), including the McLeary Road crossing where the accident occurred in this case, should be deemed the state's property. First, the Division of Motor Carrier and Railroad Safety has exclusive regulatory jurisdiction and control over railroad crossings and, thus, can compel the actual owners and possessors of railroad crossings to remedy any dangerous condition.¹ And second, Railroad Safety has a duty to ensure the public from dangers at railroad crossings. Neither argument is persuasive.

Respondent compares Railroad Safety's undisputed statutory power to investigate, prosecute, adjudicate, and enforce railroad crossing safety matters to the power of the Missouri Highway and Transportation Commission over highways.

¹ Respondent splits this argument in two. (Respondent's Br. at 17–18.) But it is one argument. Railroad Safety's power to enforce its orders is part of its regulatory authority. Like administrative orders generally, Railroad Safety's orders are not self-enforcing. After two administrative proceedings and one judicial proceeding, Railroad Safety's orders can be enforced through a circuit court injunction or penalty. (Relator's Br. at 17–18, 23.)

(Respondent’s Br. at 12–15.) For this analogy, respondent relies on *Summit v. Roberts*, 903 S.W.2d 631 (Mo.App., W.D. 1995) and *Martin v. Missouri Highway & Transp. Dept.*, 981 S.W.2d 577 (Mo.App., W.D. 1998). But apart from the obvious fact that highways are state property and railroads and railroad crossings are not,² those cases only illustrate the difference between Railroad Safety’s and the Highway Commission’s statutory powers. Actual maintenance and repair of the highways is performed by Highway Commission officials. Railroad Safety only can order others to maintain and repair railroad crossings, and only can order others to warn of dangerous crossings. See §§ 622.240, 622.320, RSMo 2000.

² Respondent also makes this point for Railroad Safety by recognizing that privately–owned rental housing whose heating units are regulated by a city housing authority is not deemed to be public entity property. See *Tyler v. Housing Auth. of Kansas City*, 781 S.W.2d 110, 113 (Mo.App., W.D. 1989); Respondent’s Br. at 18. And that a dead tree on private property is not deemed to be property of the adjoining public entity. See *Tillison v. Boyer*, 939 S.W.2d 471, 473–74 (Mo.App., E.D. 1996); Respondent’s Br. at 19. Likewise, one public entity’s property over which another public entity has “some control” is not deemed to be the other entity’s property. See *Clapsill v. State Division of Econ. Dev.*, 809 S.W.2d 87, 89 (Mo.App., W.D. 1991).

Construction and maintenance of the highways, including all work incidental thereto, is under the “general supervision and control” of the Highway Commission. § 227.030.1, RSMo 2000; *see Summit*, 903 S.W.2d at 635; *Martin*, 981 S.W.2d at 580. And the highways “shall be maintained by the commission and kept in a good state of repair.” § 227.210.1, RSMo 2000; *see Martin*, 981 S.W.2d at 580–81. The Highway Commission’s duty to actually maintain and keep the highways in good repair includes a duty to remove any “obstruction” to their “lawful use.” § 210.220.1, RSMo 2000; *see Martin*, 981 S.W.2d at 581.

Accordingly, MHTC has control over the surface of the entire right-of-way to the extent necessary for highway purposes to the exclusion of any owner of the fee and is responsible for any cutting or mowing of vegetation growing in the right-of-way necessary for the safety of others.

Martin, 981 S.W.2d at 581, citing, *Mispagel v. Missouri Highway & Transp. Comm’n*, 785 S.W.2d. 279, 282 (Mo. banc 1990) (reinstating a claim against Highway Commission, but not fee owner, for failing to remove vegetation). The Highway Commission is responsible for actually maintaining and repairing the highways, not the owners of the fees through which the highways pass.

That is not the case with Railroad Safety. The General Assembly has not imposed a similar statutory duty on Railroad Safety to actually maintain railroads and railroad crossings. And the General Assembly and this Court have indicated that Railroad Safety's exclusive regulatory jurisdiction and control over railroad crossings does not preclude a cause of action against a railroad for a dangerous condition of its property. *See* §§ 389.610.2, 389.614, RSMo 2000; *Alcorn v. Union Pacific R.R. Co.*, 50 S.W.3d 226, 235, 237 (Mo. banc 2001).

While Railroad Safety's undisputed power to investigate, prosecute, adjudicate, and enforce railroad crossing safety matters may be duties that are owed to the public, rather than to a member of the public, *Heins Implement Co. v. Missouri Highway & Transp. Comm'n*, 859 S.W.2d 861, 694–95 (Mo. banc 1993), it goes too far to say that Railroad Safety's duty preempts any duty of care others may have. (Respondent's Br. at 16.) Respondent relies upon *Leathers v. Missouri Highway & Transp. Comm'n*, 961 S.W.2d 83 (Mo.App., W.D. 1995), which held that once the Public Service Commission issues an order relating to a railroad crossing, "the parties constructing or maintaining the crossing cannot be held negligent for failing to deviate from the PSC's directive." *Id.* at 86; *see also Coon v. Atchison, Topeka & Santa Fe*, 826 S.W.2d 66, 70 (Mo.App., W.D. 1992) (holding that once a PSC order issues, "the railroad has no further common law obligation"). These holdings, applying state

law preemption to negligence claims, now may be incorrect. *See Alcorn*, 50 S.W.3d at 235, 237. The legislative continuation of the railroads' common law duty to maintain safe crossings recognizes that regulation may be imperfect — “it accounts for changes in crossings that may not come to the attention of regulators.” *Alcorn*, 50 S.W.2d at 237.

Finally, apart from whether railroad crossings should be deemed the state's property, respondent attempts to distinguish the decisions describing the rule that a failure to perform an intangible act, such as a failure to regulate or to warn, cannot create a dangerous condition of property. *Necker v. City of Bridgeton*, 938 S.W.2d 651, 655 (Mo.App., E.D. 1997) and *O'Dell v. City of Bridgeton*, 21 S.W.3d 54, 58 (Mo.App., E.D. 2000) do not link, as respondent says they do, the existence or knowledge of a dangerous condition of property with a duty to warn of that condition. Even if the McLeary Road crossing were in a dangerous condition and Railroad Safety had notice of the condition before the accident occurred, Railroad Safety could not post a warning. Rather, Railroad Safety only could initiate its quasi-judicial administrative process to order others to warn of the crossing's condition. That administrative process, and any order to others to post a warning, is an intangible act that would not alter, or even warn of, the crossing's condition.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief contains the information required by Rule 55.03, complies with the limitations contained in Rule 84.06(b), and contains 1,269 words and that the diskettes provided this Court and counsel have been scanned for viruses and are virus-free.

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