IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PA

JUDITH ROACH,	:	
Plaintiff	:	
	:	
v.	:	
	:	
DEPARTMENT OF TRANSPORTATION	:	No. 96-01,617
COMMONWEALTH OF	:	
PENNSYLVANIA,	:	
Defendant	:	
	:	
v.	:	
	:	
ROBERT S. ROACH,	:	
Additional Defendant	:	

O P I N I O N
Issued Pursuant to Pa.R.A.P. 1925(a)

This opinion is issued to set forth the reasons why this court entered a compulsory nonsuit against the plaintiff, Judith Roach. After this court precluded Mrs. Roach's expert from testifying, Mrs. Roach had no further witnesses to present and it was clear that she had not established a right to relief. Therefore, it was this court's duty to put a merciful end to this tortured, meritless case and dismiss the jurors.

Facts

On 1 October 1995 Robert Roach and his wife Judith took a trip on their Honda motorcycle, with Mr. Roach driving and Mrs. Roach seated behind him. They were traveling north on State Route 44, passageway to the sportsmen's paradise of the lovely Pine Creek recreation area. Mrs. Roach was thrown from the motorcycle and badly injured when the vehicle skidded after hitting gravel on the road.

Mrs. Roach sued the Pennsylvania Department of Transportation (PennDOT) and PennDOT joined Mr. Roach as an additional defendant. Mr. Roach was released from further liability after his carrier paid Mrs. Roach the policy limit of $100,000.

Discussion

A court may enter a compulsory nonsuit when, at the close of a plaintiff's case on liability, it is clear that he or she has failed to establish a right to relief. Pa.R.C.P. No. 230.1. Nonsuit was appropriate in this case because Mrs. Roach had not introduced sufficient evidence for a jury to find PennDOT liable.

The doctrine of sovereign immunity precludes PennDOT from liability for injuries sustained on its roads except in limited circumstances spelled out in 42 Pa.C.S. § 8522. The applicable exception in this case is the "dangerous condition of the highway" provision listed in § 8522(b), which states that the Commonwealth may be liable for "[a] dangerous condition of Commonwealth agency real estate and sidewalks, including . . . highways under the jurisdiction of a Commonwealth agency." Pennsylvania case law holds that a foreign substance cannot constitute a dangerous condition of a highway under this exception. Finn v. City of Philadelphia, 541 Pa. 596, 664 A.2d 1342 (1995). Both parties have therefore stipulated that PennDOT is not liable for the gravel on the roadway. Thus the issue for the jury to decide was whether PennDOT had negligently designed the highway in a manner that caused Mrs. Roach's injuries.

Mr. Roach, the only fact witness regarding the accident, testified that he was driving 30-35 mph when he approached an incline. Although the speed limit was 45 mph, an S-

curve sign and a speed advisory sign of 25 mph alerted him to an upcoming curve. He crested the hill at 30-35 mph, successfully negotiated the sharp right turn, and straightened his motorcycle. While on the straightway, he spotted pea-sized gravel on the road and downshifted but unfortunately his motorcycle hit the gravel and his vehicle slid toward the shoulder and eventually fell to the ground. Mr. Roach explicitly stated that the gravel was the reason the motorcycle went down.[1]

After Mr. Roach's testimony, counsel for PennDOT requested the court to preclude Mrs. Roach's expert from testifying because there was no factual basis upon which to support his testimony.[2] The court held extensive discussions with counsel for all parties in chambers, at which time counsel for Mrs. Roach made an offer of proof. Counsel stated that the expert would testify the accident was caused by a combination of the following factors: a substandard width of the roadway, the steep downgrade, the sharp curves, and an inadequate sight distance. The court precluded this expert from testifying because the Commonwealth cannot be found liable for any one of these purported factors.[3]

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[1] Mr. Roach, who was obviously well coached by his counsel, also added that the accident would not have occurred without the factors of the turn and the slope of the road.

[2] Mrs. Roach also contends that this court erred in considering PennDOT's motion in limine during trial because the motion was not properly placed before the court. This court knows of no rule of law requiring it to disregard a motion in limine merely because it is not in writing or because it was not presented to oppoing counsel prior to trial. Indeed, in this case the court could not have decided the motion until after Mr. Roach had completed his testimony. Furthermore, the court provided plaintiff's counsel with an adequate opportunity to argue against the motion and also offered to grant plaintiff's counsel time to gather additional fact witnesses. Counsel declined that offer.

[3] For this reason, the case offered by the plaintiff, Dean v. Com., Dept. of Transp., 718 A.2d 374 (Pa. Cmwlth.1998), is not relevant. That case held that PennDOT can be liable for injuries when the dangerous condition of a highway is a contributing cause that adds to a plaintiff's injury, as well as the initial cause of the injury. Here, however, the

The court prevented the expert from testifying as to the first three factors because there was no factual basis upon which to base such an opinion. As explained by the Superior Court, "To endow opinion evidence with probative value it must be based on facts proven or assumed, sufficient to enable the expert to form an intelligent opinion." Vernon v. Stash, 367 Pa. Super. 36, 532 A.2d 441, 449 (1987) (citing cases). The facts assumed by an expert need not be conclusively proven; it is sufficient if the evidence of record tends to establish these assumptions. Id. Mr. Roach, the only witness testifying to the facts of the accident, clearly stated that he crested the hill and negotiated the turn without any problem. Therefore, the court had no choice but to preclude the expert from testifying that the roadway, the steep downgrade, or the sharp curve caused the accident.

The court excluded expert testimony on the fourth purported cause, inadequate stopping sight distance, because the court found as a matter of law that PennDot could not be liable for failing to set a speed limit low enough to allow motorists to stop in time to avoid hitting pea-size gravel. This conclusion was based on the following analysis.

Stopping sight distance, as defined in 67 Pa. Code § 441.1, is the distance required by a driver traveling at a given speed to stop the vehicle after an object on the roadway becomes visible to the driver. PennDOT's 1990 *Highway Design Manual* states that for the safe operation of vehicles, drivers must be able to see ahead for a sufficient distance to avoid striking an unexpected object. Therefore, roads should provide a proper sight distance to enable a vehicle traveling at or near the speed limit to stop before reaching a stationary object in its path. The method for calculating the minimum stopping sight

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Commonwealth is not liable for *any* condition that was a substantial factor in bringing about Mrs. Roach's injuries.

distance, set forth in Pa. Code 67 § 201.6(v)(A), involves the interrelation of a vehicle's speed, the coefficient of friction with the road, and the roadway grade.

Mrs. Roach argues that according to PennDOT regulations this particular stretch of Route 44, with a speed limit of 45 mph and a 14% downgrade, should have a stopping site distance of 562 feet, and that the actual stopping site distance is 355 feet less than the minimum safe standard.

The court rejects this argument for the following reasons. First, the PennDOT regulations provide the following statement on stopping site distance: "For the purpose of measuring the available stopping sight distance at a particular location, the driver's eye height is assumed to be 3.50 feet above the roadway surface and the object height is assumed to be 6 inches above the roadway surface." 67 Pa. Code § 201.6(v)(A). This passage demonstrates that stopping sight distance has no applicability to objects less than six inches high, for the regulations do not even address stopping sight distance for objects that small. The reason for this is obvious: the purpose of calculating a stopping sight distance is to prevent accidents due to collision with objects, and an adequate stopping sight distance allows a driver to stop before hitting an object. However, objects less than six inches high cannot generally be seen at *any* distance by a driver in a vehicle traveling at any appreciable speed. Therefore, PennDOT apparently feels that it is not even worth considering those smaller objects when calculating stopping sight distance, because it will have no real impact on preventing accidents. Moreover, smaller objects generally pose less of a danger to vehicles. In fact, the court believes that the most pervasive application of stopping sight distance is in regard to permitting a motorists to stop in time to avoid *other*

vehicles, as the few cases addressing the issue show. See Commonwealth, Department of Transportation v. Longo, 510 A.2d 832 (Pa. Cmwlth. 1986).

The plaintiff apparently believes that the above-quoted passage means the stopping sight distance measurement for objects six inches high is a minimum calculation that should apply to all objects lower than six inches. This interpretation is illogical because stopping sight distance guarantees that a vehicle traveling at the speed limit will be able to stop in time to avoid colliding with the object. There are apparently no guarantees for objects less than six inches high. Therefore, when a driver collides with objects smaller than six inches, as happened in this case, he or she would not be able to prove that a substandard stopping sight distance was the cause of the accident, for even if the stopping sight distance had been exactly as calculated in the regulations, the driver still might not have seen the object. Therefore, the court finds that the PennDOT regulations for stopping sight distance have no application to the case before the court, where the gravel on the road was less than six inches high.

Furthermore, the court finds that PennDOT cannot be liable for inadequate stopping sight distance in this case *as a matter of law*. Normally, negligence is an issue for the jury to decide. However, when the plaintiff fails to prove the defendant engaged in wrongful conduct that caused the plaintiff's injuries, nonsuit is appropriate because reasonable persons could not find the defendant negligent. Engle v. Spino, 425 Pa. 254, 228 A.2d 745 (1967). That is the case here.

The Sovereign Immunity Act, 42 Pa.C.S.A. § 8522(a), states that PennDOT may be held liable only for damages arising out of certain *negligent acts*, which are then

enumerated. Negligence law is founded upon the principle that one must use reasonable care to avoid unreasonable risk of harm to others. Mazzagatti v. Everingham by Everingham, 512 Pa. 266, 516 A.2d 672 (1986). Defendants are not liable for every possible risk created by their activities–only for unreasonable risks. The determination of negligence essentially amounts to a risk/utility analysis. As the Pennsylvania Supreme Court has explained, the standard of care can be expressed as the "highest degree of care practicable." Stewart v. Motts, 539 Pa. 596, 654 A.2d 535 (1995). Similarly, the "dangerous condition" exception to sovereign immunity has been interpreted as imposing on the Commonwealth a duty to maintain its roadways in a *reasonable manner*, to make them *reasonably safe* for their intended purpose. McCalla v. Mura, 538 Pa. 527, 649 A.2d 646 (1994); Starr v. Veneziano, 705 A.2d 950, 952 (Pa. Cmwlth. 1998).

It is not always easy to determine exactly where the line should be drawn, but surely pea-sized gravel falls below that line. To hold the Commonwealth liable in this case would be to conclude that the Commonwealth should have set the speed limit low enough to permit a driver to stop in time to avoid hitting pea-sized gravel. That would be highly impractical, to say the least. This court sincerely hopes that the Commonwealth does *not* set speed limits according to such a standard, for that would slow traffic to a virtual crawl.

The court notes that PennDOT had posted a speed advisory of 25 mph, which Mr. Roach had ignored. Speed advisories notify a driver of the maximum safe speed to travel on a particular section of a road. That is the most PennDOT should reasonably be required to do in this instance. State Route 44 is a rural road leading to the Pennsylvania Grand Canyon and other pristine wilderness areas. This highly scenic and enjoyable trip would

turn into a tedious, agonizing journey if the speed limit were lowered to 25 mph.

Driving, like life itself is risky–even on a reasonably safe highway. That is the chance drivers take, and the price they sometimes pay, for getting behind the wheel of a vehicle. Motorcycle drivers risk an even greater chance of injury. Yet almost everyone in our society assumes the risk of motorized travel in order to take advantage of the most convenient form of transportation available. Those who are willing to take this risk must also be willing to bear the consequences of an accident without automatically blaming PennDOT. For those who are not willing to take the risk, the horse and buggy remains available.

BY THE COURT,

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