

GLEONARD E. BYERS, JR. and	:	IN THE COURT OF COMMON PLEAS OF
SUSAN M. BYERS, Co-Administrators	:	LYCOMING COUNTY, PENNSYLVANIA
of the Estate of KIRK ANTHONY	:	JURY TRIAL DEMANDED
BYERS, Deceased,	:	
Plaintiffs	:	
vs.	:	NO. 00-01,951
	:	
COMMONWEALTH OF	:	CIVIL ACTION - LAW
PENNSYLVANIA, PENNSYLVANIA	:	MOTION TO COMPEL ANSWERS
DEPARTMENT OF TRANSPORTATION,	:	REQUEST FOR PRODUCTION
Defendant	:	OF DOCUMENTS

Date: May 4, 2001

OPINION AND ORDER

BEFORE THE COURT is Plaintiff's Motion to Compel Answers to Interrogatories, filed February 13, 2001. For the reasons to be discussed in this Opinion, Plaintiff's motion will be GRANTED in part and DENIED in part.

Facts

The case arises out of a fatal one-car crash, which occurred on August 20, 2000 on State Route 15, Lycoming County. Plaintiffs' (hereafter collectively "Byers") decedent, Kirk Anthony Byers, was the operator of the vehicle. Both he and a passenger were killed when the vehicle struck a bridge parapet at approximately 6:00 a.m. that morning on S.R. 15. The road, S.R. 15, including the bridge, is under the control of Defendant Commonwealth of Pennsylvania, Pennsylvania Department of Transportation (hereafter "PennDOT"). Byers' Complaint (filed January 16, 2001) alleges in relevant part: 1) the bridge, parapet and guide rail cable system were negligently maintained and installed, were outdated, and constituted a hazard which PennDOT failed to replace, modify or correct. (Paragraphs 9-12); 2) PennDOT made repairs and modifications to the guide rail system at the bridge prior to the crash but

failed to make it reasonably safe (paragraph 12); 3) PennDOT knew of the hazardous condition prior to the accident but did not correct it by installing a right berm guide rail system which would have made the system reasonably safe and would have deflected Byers' vehicle away from the parapet (Paragraphs 13-15). Byers alleges PennDOT is subject to suit and liability for its negligence under the Exceptions to Sovereign Immunity, 42 Pa. C.S. §8522.

PennDOT's Answer and New Matter (filed February 12, 2001) generally denies the allegations of negligence and proximate causation (including the allegations PennDOT had made repairs to the guide rail system). PennDOT also denies any exception to governmental immunity under 42 Pa. C.S. §8522 applies. In its New Matter PennDOT further asserts as a defense it did not have “. . . notice, written or otherwise, of the allegedly dangerous condition, or in the alternative, if said notice was received, it was not received in sufficient time prior to the alleged accident. . .” to permit PennDOT to correct or warn the public of the dangerous condition. (Paragraph 32).

Byers has served PennDOT with interrogatories and a request for document production on the same day. PennDOT objected to the following interrogatories at issue as follows: (numbering after Plaintiff):¹

5. Please identify all crash data and statistics for SR 15 in the vicinity of the accident, including but not limited to, a summary of all accidents, the identification of all documents referring to or relating to any such accidents, the identification of any studies, findings or reports regarding any such accidents.

Objection. The information is privileged and confidential pursuant to 75 Pa.C.S. §3754(b) and 23 U.S.C. §409.

¹ See, Exhibits “A” and “C” attached to PennDOT's Response to Plaintiff's Motion to Compel, filed March 21, 2001.

8. Identify all inspections of the bridge, performed by or at the direction of PennDOT over the last five years.

Objection. Bridge inspection reports are privileged and confidential pursuant to 23 U.S.C. §409.

13. Identify and describe PennDOT programs and policies regarding training of personnel in:

- a. the identification of roadway and roadside defects and dangerous conditions;
- b. the correction of roadway or roadside defects and dangerous conditions.

Objection. This interrogatory is overly broad and would cause undue burden and expense to Defendant to identify the programs defined in (a) and (b) of this interrogatory.

PennDOT also objected to the following request for document production as follows:

27. All traffic count, pavement friction coefficient testing, pavement condition surveys, speed surveys, bridge inspection reports, guide rail condition inspections/surveys, traffic control device inventories, and traffic and engineering studies performed for the accident site.

Objection. Pavement friction testing, bridge inspection reports, speed studies and traffic and engineering studies, and inspection reports are privileged and confidential pursuant to 75 Pa.C.S. §3754(b) and 23 U.S.C. §409. Without waiver of objection, the Defendant will produce all other documents that are not deemed privileged. This response was later supplemented to identify sign surveys and traffic counts attached to Defendant's Answer to Interrogatories as a response.

Byers then filed this Motion to Compel responses to the foregoing interrogatories and document request.

Discussion

PennDOT's objections to interrogatories 5, 8 and document production request 27 are based on two statutes that PennDOT argues qualify the requested discovery as privileged. Byers acknowledges the privilege does indeed exist, however asserts the

information to be discovered falls outside of the scope of the privilege. Byers alternatively argues that even if the privileges do apply, PennDOT waived those privileges in its Answer and New Matter. PennDOT asserts such waiver cannot arise since it was required to respond to Buyers' notice allegation and cannot be forced to either admit the allegation or waive the privilege.

The statutes at issue provide:

75 Pa.C.S.A. § 3754

§ 3754. Accident prevention investigations.

- (a) General rule.—The department, in association with the Pennsylvania State Police, may conduct in-depth accident investigations and safety studies of the human, vehicle and environmental aspects of traffic accidents for the purpose of determining the causes of traffic accidents or increase the overall safety of roadways and bridges.
- (b) Confidentiality of reports.—In-depth accident investigations and safety studies and information, records and reports used in their preparation shall not be discoverable nor admissible as evidence in any legal action or other proceeding, nor shall officers or employees or the agencies charged with the development, procurement or custody of in-depth accident investigations and safety study records and reports be required to give depositions or evidence pertaining to anything contained in such in-depth accident investigations or safety study records or reports in any legal action or other proceeding.

23 U.S.C. § 409

§409. Discovery and admission as evidence of certain reports and surveys

Notwithstanding any other provision of law, reports, surveys, schedules, lists, or data compiled or collected for the purpose of identifying, evaluating, or planning the safety enhancement of potential accident sites, hazardous roadway conditions, or railway-highway crossings, pursuant to sections 130, 144, and 152 of this title or for the purpose of developing any highway safety

construction improvement project which may be implemented utilizing Federal-aid highway funds shall not be subject to discovery or admitted into evidence in a Federal or State court proceeding or considered for other purposes in any action for damages arising from any occurrence at a location mentioned or addressed in such reports, surveys, schedules, lists, or data.

Section 3754 of the Vehicle Code is part of a comprehensive statute directing PennDOT to compile information concerning highways and other conditions that lead to accidents and to conduct appropriate studies to eliminate roadway hazards and conditions, which contribute to accidents. *See generally* 75 Pa. C.S. §3751 through §3754 inclusive. Since the overall codification of the Vehicle Code in 1976, these sections have been specifically amended by the legislature in response to various court decisions that have held certain information, such as raw data or reports of accidents, compiled by PennDOT in carrying out this duty, to be discoverable. As now written the statute is sufficiently broad to prohibit discovery of all the information gathered by PennDOT and used in in-depth accident investigation or to prepare safety studies or reports. This conclusion is reached by the Court in accepting the reasoning set forth in PennDOT's original Brief filed March 21, 2001 and Supplemental Brief filed April 4, 2001 and particularly relying upon the reasoning set forth in cases attached as Exhibits A, B and C to the supplemental brief of April 4, 2001 as follows: ***Dalton v. Mulligan***, slip opinion 9 November 1992, Court of Common Pleas, Chester Cty. No. 91-00754; ***Shaw v. PennDOT***, slip opinion of September 22, 1992, Court of Common Pleas, Butler Cty. No. 91-697, Book 138, page 480; ***Reed v. PennDOT***, slip opinion/memorandum November 20, 1990, Court of Common Pleas, Bedford Cty., No. 715 for the year 1989.

Section 409 of the Federal Highway law has a similar purpose as §3754 of the Vehicle Code. Simple stated §409 protects any information gathered under §§130, 144, 152 for

identifying, evaluating or planning safety enhancements from discovery. All three of these sections are found in Title 23 U.S.C. Section 130 deals with railway crossings. Section 144 seeks to identify bridges that are unsafe because of structural deficiencies physical deterioration or functional obsolescence. This law charges the U.S. Secretary of Transportation in consultation with PennDOT to inventory all those highway bridges on public roads, that are part of the Federal-aid system, classify them according to serviceability, and safety, assign a priority for replacement or rehabilitation, and determine the cost of replacement or rehabilitation. Section 152 is concerned with the elimination of roadway hazards. It requires PennDOT to maintain an “engineering survey” of public roads to identify hazardous locations, including roadside obstacles. It also permits identification of hazards through “surveys” and the undertaking of projects to “address” the hazards. PennDOT is also required to analyze and assess and report to the U.S. Secretary of Transportation the results achieved by safety improvement projects and the progress made in eliminating safety hazards. Section 152 authorizes the U.S. Secretary of Transportation to fund safety improvement projects (not necessarily limited to the funding to those hazards identified under §152 procedures).

PennDOT asserts through affidavits attached and its supplemental response to Plaintiff’s Motion to Compel filed March 21, 2001, that S.R. 15 in the location of the accident is part of the federal highway system and under PennDOT’s jurisdiction. (Exhibit “D”) This Byers does not contest. It also asserts that the bridge has been inspected for structural safety at least once every two years under a bridge inspection program implemented for purpose of identifying evaluating planning the safety enhancement of potential accident sites and has its roadway conditions pursuant to 23 U.S.C. §144. Byers does not contest that such inspections

were made but does not concede they are the only inspections made by PennDOT of the bridge in question. In asserting that the purpose of the bridge inspections for the purpose of evaluating planning and safety enhancement of potential accident sites for hazardous roadway conditions the affidavit speaks to the purposes and function of conducting surveys under §152 rather than assessing the serviceability and structural deficiencies, deterioration or obsolescence under §144. PennDOT's affidavits also identify that it conducts a STAAMP (Systematic Technique to Analyze And Manage Pennsylvania pavements) program to assess the quality of pavement on State highways and adjacent areas. The affidavit contends that the STAAMP surveys are conducted to evaluate and plan the safety enhancement of potential accident sites or hazardous roadway conditions and to develop safety construction improvement projects to be implemented using Federal-aid highway funds. Byers does not assert he has any knowledge as to specifics that the STAAMP surveys are conducted.

Our Superior Court has recently recognized that evidentiary privileges “are held in disfavor and may be applied only for limited purposes under closely circumscribed conditions.” *Com., Dept. of Transp. v. Taylor*, 746 A.2d 626, 629 (Pa. Super. 2000). *Taylor* holds §3754 of the Motor Vehicle Code is not to be interpreted to prohibit a defendant in a criminal prosecution appropriate and limited access to in-depth accident investigations necessary for preparation and presentation of a defense to driving under the influence charges because such disclosure does not violate the purpose of §3754. The exercise of the privilege must be limited to that it is, “. . .given effect only to the extent necessary to promote the purpose enunciated in . . .” the statute which proclaims the privilege. *Id.*

As recognized by Superior Court in *Taylor* the object of the privilege statutes, especially §3754, is to provide PennDOT complete, unbiased, honest and accurate information in order to construct a safe and efficient system of highways. Also, as noted in *Taylor* there is no question that the legislature as well as Congress has expressed a clear intent to enhance the quality of PennDOT's information and encourage candor by PennDOT in the development in procuring compiling and collecting information that it will allow it to identify, evaluate and plan for safety enhancements being free of the fear that such information may be used as a sword against them should they determine that a cause of a traffic accident or lack of a safety enhancement could be attributed to any act or non-action on the part of PennDOT or its employees. *See also, Simon v. Allegheny County*, 23 D.&C.3d, 360 (1982).

Unlike *Taylor*, specifically at issue in this case is the claim of Byers that the decedent sustained fatal injuries in an automobile accident due to the negligence of PennDOT in maintaining a specific bridge structure along the State Highway in a defective and dangerous condition having actual or constructive knowledge of that condition. It is clear, therefore, that to the extent the information sought by Byers exists from PennDOT is protected by 75 Pa.C.S. §3754 or 23 U.S.C. §409, it may not be the subject of discovery nor admitted into evidence in this proceeding. Otherwise, the clear purpose and intent of the legislature and Congress in establishing the privileges would be vitiated.

In interrogatory number 5, Byers requests all crash data and statistics for SR 15 in the vicinity of the accident, including accident summaries, studies, findings or reports. PennDOT replied. PennDOT has equated Plaintiff's request as a request for information shielded by §3754 of the Vehicle Code and §409 after Federal Highway Laws Halo asserts

Defendants are seeking accident reports, which are also shielded by 75 Pa.C.S. §3751(b)². The Court agrees that Byers is not entitled to accident reports because he is not within the class of persons entitled to receive this information under. The Court also finds the accident reports are otherwise privileged under §3754 and §409.

In interrogatory number 8, Plaintiff asked Defendant to identify all inspections of the bridge, performed by, or under the direction of PennDOT, for the last five years. Because 23 U.S.C. §409 incorporates 23 U.S.C. §144, which is written very broadly, the Court agrees with Defendant that the inspections are privileged under this statute. The Court notes, however, that Plaintiff asked Defendant to identify all inspections of the bridge. Though this may be irrelevant for Plaintiff's purposes, the Court reads nothing in the statute that would prevent the disclosure of the number and dates, if any, of inspections that were conducted in the span of time in question.

It is apparent that PennDOT might easily contend that any information sought in Interrogatory 5 has been gathered to be used for the purpose of doing a safety study or to prepare for a project which increases safety on the highway or eliminates hazards. It is not clear, however, that all such data and information is subject to the privilege of being protected from discovery under the applicable statutes.

² This statute reads:

(b) Furnishing copies of report.

Police departments shall, upon request, furnish at cost not to exceed \$15 a certified copy of the full report of the police investigation of any vehicle accident to any person involved in the accident, his attorney or insurer, and to the Federal Government, branches of the military service, Commonwealth agencies, and to officials of political subdivisions and to agencies of other states and nations and their political subdivisions.

The Rules of Pennsylvania regarding discovery are clear. They are designed to promote the pre-sharing of information and narrow issues and limit unfair surprise and thus discovery of any matter is permitted with the notable exception that the matter sought to be discovered is “not privileged.” *See*, Pa. R.C.P. 4003.1.

Even if it is assumed that the foregoing statutes apply to all material identified in Byers’ interrogatories, PennDOT’s objections are not proper. That is because PennDOT has not made a proper response to interrogatories. This Court believes that PennDOT cannot make a simple objection in asserting the privilege but in asserting the objection must identify information that it is withholding to which it asserts the privilege applies. *See*, Pa. R.C.P. Rule 4009.12(b)(2); *Wein v. Williamsport Hospital and Medical Center, et al.*, 20 Lyc. 418, (Lycoming Co. C.P. 1998). Rule 4009.12 therefore as would relate to Plaintiff’s Request for Production of Documents requires Defendant to reasonably identify the documents for things not produced so that this Court will be able to verify the privilege under §3754 of the Vehicle Code or 42 U.S.C. §409 applies to the items withheld.

Interrogatories 5 and 8 ask PennDOT to “identify” the actual interrogatories proposed by Byers to PennDOT at page 3 thereof contained a definition of “identify” as would relate to a document indicating that the responding party should state the following:

- (a) its description (e.g., letter memorandum, report, etc.), title, and date;
- (b) its subject matter;
- (c) its author’s identify;
- (d) its addressees;
- (e) its present location; and

(f) its custodian's identity;

See Plaintiffs' Motion to Compel, filed February 13, 2001, Exhibit 2. The statutes enunciating the privilege relied upon by PennDOT do not prohibit identification of the documents PennDOT knows of or that are in PennDOT's custody but rather prohibit, if anything, the disclosure of their contents. The Court recognizes that 23 U.S.C. §409 contains reference to the fact that the items enumerated therein ". . .shall not be subject to discovery. . . ." Nevertheless, we do not find that phrase prohibits identifying whether or not the items requested by Byers exist.

The reasons such identification of documents in response to the interrogatories is to be required becomes more apparent when these interrogatories are coupled with the document production request Number 27, which requests the documents be produced. With regard to Byers' document production request number 27, PennDOT's answer is somewhat contradictory. Initially, PennDOT suggested that there are other documents available, but they are privileged. PennDOT did then supply sign surveys and traffic control. PennDOT also asserts that the only document it possesses fitting Byers' description is a STAMPP (Systematic Technique to Analyze and Manage Pennsylvania Pavements) survey. PennDOT however must identify with greater sufficient precision which documents are being withheld as privileged.

In its supplemental response to the Motion to Compel PennDOT has identified the STAAMP studies. The Court finds that under the reasoning and analysis of STAAMP data as discussed in *Reed v. PennDOT*, *supra*, such information is protected by §3754, as well as §409.

In interrogatory number 13, Plaintiff asks for an identification and description of various PennDOT training programs. Defendant has objected to this interrogatory on the basis that the request is overly broad and would cause undue expense and burden. Unfortunately PennDOT does not give this Court sufficient information to determine that this objection is valid. The Court finds it difficult to believe that Defendant's agency does not have some listing or identification outlining available training programs. At the very least it would seem that PennDOT could identify some courses or training manuals or instructions given to employees concerning the training of its personnel to identify or correct dangerous or hazardous conditions. Such material may too voluminous to require PennDOT to supply all of it as opposed to giving Byers the opportunity to go to an appropriate location to inspect it. It appears that Byers' request is appropriately limited to aspects of training concerning identification of, or correction of, hazardous and dangerous highway conditions. The Court flatly rejects the notion that the agency does not have written policies regarding training. The Court does not see a valid reason for Defendant not to comply in an appropriate manner.

Waiver

Byers' allegations that PennDOT had actual or constructive notice of the dangerous condition of the roadway where the accident occurred prior to the accident date and PennDOT's assertion that it had no such notice or at the least did not have any timely notice thereof are certain germane to the issue of whether or not PennDOT ultimately can be held liable in this proceeding. Our Pennsylvania Supreme Court has ruled definitively that PennDOT cannot be held liable as the possessor of the bridge guide rail and highway in question unless it has either had actual or constructive notice of the risk of unreasonable harm

and further that before PennDOT can be charged with constructive notice of a dangerous condition, that condition must have been apparent upon a reasonable inspection. *See Commonwealth of Pennsylvania, Department of Transportation*, 546 Pa. 562, 6A.2d 1302 at 1304 (1997). It is obvious that Byers' requested discovery is designed to determine what notice PennDOT may have had in relation to the condition of the bridge as well as to whether or not that condition was a dangerous one that would be apparent upon reasonable inspection. In addition, the requested discovery may lead to other discoverable and admissible information that would benefit Byers at trial. PennDOT, therefore, has not attempted to assert any objection as to relevancy of the requested discovery.

This discovery issue becomes significant to the ultimate disposition of the case. Without the requested discovery information Byers may have an impossible burden of showing what PennDOT knew and when it knew it. On the other hand, requiring PennDOT to review the information they frustrate the purpose of the State and Federal Statutes which protect PennDOT from exposing itself to liability as it attempts to fulfill its role and responsibility of seeking out and eliminating dangerous roadway hazards.

Byers essentially claims waiver of the sovereign immunity statute should be given precedence in this case and that they have an entitlement to the documents under a theory of waiver. Byers' Complaint in paragraphs 13 and 17 specifically alleges PennDOT knew of the hazards and dangerous condition of the bridge and guide rail system prior to the accident. PennDOT responded by a statement of general denial pursuant to Pa. R.C.P. 1029(e). Thus, Byers must produce evidence at trial to satisfy its burden of proof on the issue. PennDOT further asserted in its Answer and New Matter, in paragraph 32, that "The Commonwealth

Defendant did not have notice, written or otherwise, of the allegedly dangerous condition, or in the alternative, if said notice was received, it was not received in sufficient time prior to the alleged accident for the Commonwealth Defendant to have corrected or to have warned the traveling public of the allegedly dangerous condition.” Byers contends that by denying it had notice of possible bridge problems when it did possess various reports, PennDOT has put the notice question at issue and thereby waived the right to object based on the asserted statutory privileges. Defendant argues that this position is illogical because the only way Defendant could avoid waiving its privilege would have been to admit to the existence of the defect or dangerous condition in responding to Plaintiff’s Complaint, thus making the privilege illusory. This is not quite correct. PennDOT could have avoided an affirmative statement and new matter inasmuch as assertions under new matter are not necessary to contravene an essential element of Byers’ case. *See generally, Auson v. Green*, 331 A.2d 790 (Pa. Super. 1974) and Standard 5 Pa. Practice 2nd §26:46. The general denial made in the answer to Byers’ initial allegations is sufficient. What is significant, however, is that it is not PennDOT that has put this matter at issue as in the cases where waiver has been established, it is Byers, Plaintiff. Byers is required to put the matter at issue in order to recover. It concerns this Court that PennDOT would make an absolute statement as set forth in the New Matter that it did not ever have notice if in fact it did rather than relying upon a general denial. However, the responsive pleading is not sufficient to constitute a waiver. It is only where the litigant takes the affirmative step to raise an issue concerning privileged information as a defense that it is deemed to be waived. *See, e.g., Rhoune-Poulenc Rorer Inc. v. Home Indem. Co.*, 32 F.3d 851 (3d Cir.1994). This is consistent with the view that privileges can only be waived upon a

showing of “an intentional relinquishment or abandonment of a known right or privilege.” *Johnson v. Zerbst*, 304 U.S. 458, 58 S.Ct. 1019, 82 L.Ed. 1461 (1938). In this case Defendant has not intentionally relinquished or abandoned the privilege. Given the significant purpose to be served by shielding PennDOT from disclosing the information it gathers in seeking to improve highway safety the waiver must be clearly undertaken. Furthermore, the Court is not convinced that Plaintiffs, such as Byers, can only meet their notice burden through disclosure of the protected information.

This having been said, the Court acknowledges that it knows of no case that directly addressed the waiver of privilege issue with regard to discovery under circumstances similar to the ones in this case. All of the materials that the Court has uncovered focus on the effect of the privilege on the admissibility of evidence usually at trial or in limine.

It also concerns the Court that Defendant states they had no notice of any defects and yet maintains that even if they did, the materials that provided notice are privileged. While this Court can support the rationale of a privilege that encourages candor among employees to improve road safety without fear of litigation, the Court’s support ceases when a privilege is utilized as a sword rather than as a shield. Nevertheless, the Court must conclude that no waiver occurred in this case even given the unnecessary assertion of this statement in New Matter.

ORDER

Defendant is DIRECTED to furnish the information Plaintiff seeks in interrogatory number 13 a. and 13 b. Defendant is ordered to identify with sufficient precision, the documents, if any that exist under interrogatories 5 and 8 and to identify which documents

are being withheld under the claim of privilege in response to document production request #27. Plaintiff's request for pavement friction testing as it relates to the STAMPP surveys is DENIED.

BY THE COURT,

William S. Kieser, Judge

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