IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

ESTATE OF BRANDON BERRY,	:	
By and through Ken Berry and	:	
Lori Berry as Co-Administrators,	:	
Plaintiff	:	**No. 06-00258**
	:	
vs.	:	**CIVIL ACTION – LAW**
	:	
	:	
COMMONWEALTH OF PENNSYLVANIA	:	
DEPARTMENT OF TRANSPORTATION,	:	**Motion for Summary Judgment**
Defendant	:	

ORDER

AND NOW, this ___ day of August 2007, the court GRANTS the motion for summary judgment filed by the Department of Transportation (DOT). The court will attempt to give a brief explanation for the benefit of the parties.

During the morning of August 19, 2004, Brandon Berry (hereinafter Decedent) was operating a 1993 Ford Escort on State Route 220 in Woodward Township when, for no apparent reason, his vehicle crossed the passing lane and shoulder, entered the median, went airborne over Pine Run and collided with the concrete bridge support structure on the other side. Plaintiff contends DOT was negligent for failing to install a sufficient length of guardrail leading up to the bridge and its infrastructure, failing to install flared guardrail, and/or failing to place an earthen embankment between the eastbound bridge and the westbound bridge to prevent motorists from entering Pine Run or coming into contact with the bridge support structures on the opposite side of the creek.

To prevail against DOT in this case, Plaintiff must be able to prove that the negligent act falls within one of the categories for which sovereign immunity has been

waived. See 42 Pa.C.S. §8522. The only possible exception to sovereign immunity which could arguably apply is the "real estate" exception. See 42 Pa.C.S. §8522(b)(4). This exception waives the defense of sovereign immunity to claims for damages caused by a dangerous condition of Commonwealth agency real estate, sidewalks, and highways (other than conditions created by potholes or sinkholes).[1] It appears that Plaintiff is asserting three possible dangerous conditions: (1) the lack of adequate guardrail or an earthen embankment; (2) the concrete support structure of the bridge; and (3) the open "vertical hazard" between the westbound bridge and the eastbound bridge.

The court finds the real estate exception does not apply to this case. The lack of a guardrail is not a dangerous condition of a highway for purposes of the real estate exception because the failure to install a guardrail does not render the highway unsafe for its intended purpose of travel on the roadway. Dean v. Commonwealth, Department of Transportation., 561 Pa. 503, 511, 751 A.2d 1130, 1134 (Pa. 2000). Similarly, a claim that a barrier of a different size or greater dimension should have been installed also does not render the highway unsafe for travel on the roadway. See Svege v. Interstate Safety Service, Inc., 862 A.2d 752 (Pa.Cmwlth. 2004).

Plaintiff also contends the concrete bridge support structure was a dangerous condition of the real estate. Again, the court cannot agree. The concrete support structure is not regularly used or intended to be used for vehicular travel nor is it reasonably foreseeable that vehicles will come in contact with the concrete bridge support structure on the opposite side of Pine Run. Plaintiff also has not shown any condition originating from the concrete

1 Dangerous conditions of highways created by potholes, sinkhole or other similar conditions created by natural elements are governed by Section 8522(b)(5).

structure that would render it dangerous.

Lastly, Plaintiff claims the open vertical hazard between the two bridges was a dangerous condition of Commonwealth real estate. There is no evidence of record to show whether this vertical hazard is a natural or artificial condition. In order to reach this hazard, however, a motorist must travel through the median. Although the median is within the Commonwealth's right-of-way, the Commonwealth is not required to make its entire right-of-way safe for vehicle travel. Babcock v. Commonwealth, Department of Transportation, 156 Pa.Commw. 69, 74, 626 A.2d 672, 675 (Pa.Commw. 1993)("the right-of-way off the highway or cartway is clearly neither intended to be used nor is regularly used for vehicle travel").

Even if one or more of these alleged dangerous conditions would fall within the real estate exception, Plaintiff cannot establish causation under the facts and circumstances of this case. In Baer v. Department of Transportation, 713 A.2d 189 (Pa.Commw. 1998), the Commonwealth Court stated:

> Our supreme court has recognized that DOT owes a legal duty to those using its real estate to ensure 'that the condition of the property is safe for the activities for which it is regularly used, intended to be used, or reasonably foreseen to be used.'. . . Because of this general duty, in certain instances, the common law imposes an additional duty on a government party to reduce risks posed by steep cliffs and embankments in close proximity to the highway by erecting guiderails or other barriers. . . . However, there is a corresponding duty on all motorists to use the highways in the ordinary and usual manner and with reasonable care, …, and where an accident is the result of a motorist's failure to use the highway in such a manner, there can be no liability against DOT. . . .

713 A.2d at 190-91 (citations omitted). The Commonwealth Court has repeatedly upheld judgment on the pleadings and summary judgment on the ground that the plaintiff cannot prove causation when the plaintiff is unable to establish how or why they left the roadway.

Martinowski v. Commonwealth, Department of Transportation, 916 A.2d 717 (Pa.Commw. 2006)(summary judgment upheld); Fritz v. Glen Mills Schools, 894 A.2d 172 (Pa. Commw.), petition for allowance of appeal denied, 589 Pa. 741, 909 A.2d 1291 (Pa. 2006)(summary judgment upheld); Felli v. Commonwealth, Department of Transportation, 666 A.2d 775 (Pa.Commw. 1998)(judgment on the pleadings upheld); Baer, supra (summary judgment upheld). Plaintiff admits in its answer to DOT's motion for summary judgment and its brief that it does not know why Decedent left the roadway.[2] Plaintiff's Answer to Defendant's Motion for Summary Judgment, para. 20; Plaitniff's Brief in Opposition to Defendant's Motion for Summary Judgment, p. 13. Therefore, there can be no liability against DOT in this case.[3]

By The Court,

_____
Kenneth D. Brown,
President Judge

cc: Douglas Engelman, Esquire
Steven Gould, Esquire
Office Of Attorney General
Torts Litigation Section

2 The only eyewitness to this accident was Randall Dolby, who was traveling in the eastbound lanes of State Route 220. Mr. Dolby testified in his deposition that he could not see the driver of the vehicle from the point the vehicle left the right lane of westbound State Route 220 until it entered the median when the driver "popped up" and straightened the vehicle out so it would not enter the eastbound lanes. Plaintiff's Answer to Defendant's Motion for Summary Judgment, Exhibit B at pp. 11-17. It seemed to Mr. Dolby that Decedent was reaching down on the left hand side of his vehicle to get something. Id. at p. 13. Since Plaintiff's own witness establishes Decedent was not using the highway with reasonable care in an ordinary and usual manner, there can be no liability against DOT.

3 DOT's expert acknowledged the guide rail was about 200 feet too short, but he concluded that it had no effect on this accident because Decedent failed to apply his brakes and left the highway before he would have reached the additional 200 feet of guide rail. Given the above-quoted language in Baer and the admission that the guide rail is 200 feet too short, the court would encourage DOT take additional measures to prohibit motorists from going over the embankment between the bridges at Pine Run, if it has not already, as the court can easily envision circumstances where a motorist could be using the highway with reasonable care in an ordinary and usual manner and this deficiency would have an effect.

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