IN THE COURT OF COMMON PLEAS OF
LYCOMING COUNTY, PA

MARIA N. WOOD, individually and as Administratrix of the Estate of CHRISTOPHER WOOD, SR., Plaintiff	:	NO: 07-02658 08-00547
vs.	:	
GLENN O. HAWBAKER, INC., Defendant	:	CIVIL ACTION
vs.	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF TRANSPORTATION, Additional Defendant	:	

O P I N I O N A N D O R D E R

This action arises out of a single-vehicle accident that occurred on July 28, 2006 along State Route 549 in Mansfield, Pennsylvania. Plaintiff's decedent, Christopher Wood, Sr., allegedly lost control of his 1988 Toyota pick-up truck during inclement weather conditions, crossed the centerline, and ultimately collided with a tree.

Plaintiff has filed three (3) Motions in Limine and a Motion to Compel Discovery. Plaintiff's first motion in limine seeks the preclusion of evidence at trial of the Decedent's failure to wear a seatbelt. Plaintiff's Motion in Limine # 2, seeks to admit into evidence a computer generated animation prepared by her expert witness, Steven Schorr. Plaintiff's Motion in Limine #3 seeks the admission of evidence of subsequent remedial measures against Defendant Glenn O. Hawbaker, Inc. Plaintiff's

Motion to Compel raises issues relating to the applicability and scope of privileges asserted by the Commonwealth Defendant under 23 U.S.C. § 409 and 75 Pa.C.S. § 3754, and the scope of expert witness discovery under Pa.R.C.P. 4003.5.

Plaintiff's Motion in Limine # 1

Plaintiff's first Motion in Limine seeks to preclude evidence of the Decedent Christopher Wood's failure to wear a seatbelt. This Motion is not opposed by either Defendant, and is GRANTED pursuant to the clear language of 75 Pa.C.S.A. 4581(e).

Plaintiff's Motion in Limine # 2

Plaintiff's second motion in limine seeks to admit into evidence a computer generated animation prepared by Plaintiff's expert witness, Steven Schorr. The Defendants object to the admissibility of the animation asserting that it does not fairly and accurately portray the accident events as alleged in Plaintiff's Complaint and as depicted by Plaintiff's experts. Following a review of the evidence presented, this Court agrees.

In Commonwealth v. Serge, 896 A.2d 1170 (Pa. 2006), the Supreme Court evaluated the admissibility of computer generated animation (hereinafter "CGA") evidence, and held that "As a preliminary matter, a CGA should be deemed admissible accurate representation of the evidence if it: (1) is properly authenticated pursuant to Pa.R.E. 901 as a fair and accurate representation of the evidence it purports to portray; (2) is relevant pursuant to Pa.R.E. 401 and 402; and (3) has a probative value that is not outweighed by the danger of unfair prejudice pursuant to Pa.R.E. 403." Id. at 1178-9. Following a review of the Plaintiff's pleadings, expert reports, and the proferred CGA, Plaintiff's request to admit CGA evidence is

DENIED. Plaintiff's version of the accident events as set forth in her Complaint is as follows:

> 5. On July 28, 2006, at approximately 5:30 a.m., Plaintiff's Decedent, Christopher Wood, Sr., while attempting to negotiate a sharp curve to the left, under inclement weather and lighting conditions, at or near Route 549 and Jenkins Road in Mansfield, PA, slid off the road and went into a drop-off in the road which caused him to lose control of his vehicle, slide sideways across the lane and collide with a tree. The road and aforesaid drop-off were constructed by Defendant, Commonwealth of Pennsylvania, Department of Transportation.

Plaintiff's liability exert, Joseph Muldoon, contends "the circumstances surrounding the Wood crash corroborate that it was triggered by a drop-off." (Joseph Muldoon Report, p. 6). Plaintiff's expert further opines to a reasonable degree of scientific and engineering certainty, that "The manner in which the Wood pick-up truck went out of control and its ensuing collision with the tree are consistent with a drop-off induced crash." (Id. at 9). Plaintiff's CGA fails to depict Decedent's vehicle encountering a drop-off condition off the paved shoulder of the roadway.

Additionally, it is undisputed that at the time of the accident a 3 foot paved shoulder existed adjacent to the southbound travel lane of State Route 549. As the CGA clearly depicts all wheels of the Decedent's vehicle on the shoulder of the roadway prior to the accident, Mr. Schorr's CGA does not accurately depict the shoulder width. As the CGA does not fairly and accurately portray the Plaintiff's version of the accident events, or the roadway as it existed at the time of the accident, the probative value of such evidence is greatly outweighed by the danger of confusion and resulting prejudice to the Defendants.

Plaintiff's Motion in Limine # 3

Plaintiff's final Motion in Limine relates to the introduction of subsequent remedial measures at trial. The Plaintiff seeks to introduce evidence that the stretch of roadway where the accident took place was repaired by Defendant, Commonwealth of Pennsylvania, Department of Transportation (hereinafter "PennDot"), following the accident.

Pa.R.E. 407 provides:

> When, after an injury or harm allegedly caused by an event, measures are taken which, if taken previously, would have made the injury or harm less likely to occur, evidence of the subsequent measures is not admissible to prove **that the party who took the measures was negligent or engaged in culpable conduct**, or produced, sold, designed, or manufactured a product with a defect or a need for a warning or instruction. This rule does not require the exclusion of evidence of subsequent matters when offered for impeachment, or to prove other matters, if controverted, such as ownership, control, or feasibility of precautionary measures. (Emphasis added).

Plaintiff argues that although such evidence is inadmissible against Defendant PennDot, it is admissible as to Defendant Hawbaker because Hawbaker did not implement the remedial measures.

Defendant Hawbaker asserts that such evidence is irrelevant, as their duties related only to the performance of their contract with PennDot. As the planning and design of the roadway was the responsibility of PennDot, evidence of subsequent design changes by PennDot would be irrelevant as to Defendant Hawbaker. In Svege v. Interstate Safety Service, 862 A.2d 752 (Pa.Commw. 2004), members of the appellants' family died in an accident on the Pennsylvania Turnpike. The accident occurred when a tractor trailer crashed through a 32-inch concrete barrier that separated eastbound and westbound traffic. The appellants argued that the Turnpike

Commission was negligent in their design, construction and maintenance of the turnpike. Appellants further argued that the contractor, Stabler Construction Co.-JV-Eastern Industries, Inc., Eastern Industries (hereinafter "Stabler") and the manufacturer, Interstate Safety Services, Inc. (hereinafter "Interstate") were negligent in the production and installation of the concrete barriers. Motions in limine were filed with respect to the appellants' expert as well as motions for summary judgment. In affirming the lower court's grant of summary judgment (thereby rendering motions in limine moot) the Commonwealth Court held,

> With respect to Stabler and Interstate, the trial court found that there was no dispute that the concrete median barrier in question was manufactured and installed according to Commission contract specifications, not the specifications of Stabler or Interstate. Further, Appellants did not allege that Stabler or Interstate were negligent in performing their duties under the contract or that they had violated the contract specifications. The trial court therefore granted summary judgment to Stabler and Interstate under the "general contractor defense." This defense was enunciated in Ference as follows:
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> > It is hornbook law that the immunity from suit of the sovereign state does not extend to independent contractors doing work for the state. But it is equally true that where a contractor performs his work in accordance with the plans and specifications and is guilty of neither a negligent nor a willful tort, he is not liable for any damage that might result. 370 Pa. at 403, 88 A.2d at 414 (citation omitted).
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> After a review of the record, the trial court's findings and conclusions of law, we conclude that the trial court thoroughly, ably and correctly disposed of the issues raised by Appellants before this Court. Id. at 755.

As the Plaintiff similarly does not assert that Defendant Hawbaker was negligent in performing its duties under their contract with PennDot or violated contract specifications, this Court does not believe remedial measures undertaken by

PennDot and relating to design element changes are relevant to Defendant Hawbaker nor permissible under the reasoning in Svege, *supra*.

Moreover, although Plaintiff argues that any potential prejudice suffered by Defendant PennDot could be cured with a limiting instruction, this Court believes that the introduction of such evidence would be highly prejudicial to Defendant PennDot. Accordingly Plaintiff's Motion in Limine to Admit Evidence of Subsequent Remedial Measures is DENIED.

Plaintiff's Motion to Compel

Plaintiff's Motion to Compel raises issues relating to the scope and privilege asserted by the Commonwealth Defendant under 23 U.S.C. § 409 and 75 Pa.C.S.§ 3754, and the scope of expert witness discovery under Pa.R.C.P. 4003.5. Specifically, Plaintiff seeks to compel Defendant PennDot to produce documents described in a privilege log produced on May 15, 2009, direct Defendant PennDot to provide answers to two questions directed to Paul Mitchell during a deposition on May 22, 2009, and provide answers to expert interrogatories served on April 16, 2009.

23 U.S.C. § 409 provides:

> Notwithstanding any other provisions of law, reports, surveys, schedules, lists or data compiled 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 148 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.

75 Pa.C.S.A. § 3754(b) provides:

> 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 proceeding.

Plaintiff contends that she is entitled to internal memorandums and e-mails in which safety improvement work is discussed and/or planned pursuant to a traffic engineering and safety study. This Court finds that such evidence is not discoverable by the Plaintiff. As a general rule, courts do not have the power to ignore clear and unambiguous statutory language. Commonwealth v. Taylor, 841 A.2d 108, 111 (Pa.2004). "The Statutory Construction Act directs that, in construing statutory language, 'words and phrases shall be construed according to the rules of grammar and according to their common and approved usage.' 1 Pa.C.S. § 1903." Id. at 112. Section 3745(b) mandates, in explicit and unambiguous terms, that "evidence pertaining to anything contained in …in-depth accident investigations or safety study records or reports" is not discoverable, nor admissible as evidence. In upholding the broad protection afforded under Section 3745(b), the Superior Court in Taylor, stated:

> Privileges of the sort at issue here are not at all uncommon…The General Assembly has apparently determined that, as in other instances of privilege, there is some value in ensuring the confidentiality of Penn DOT's work product in this area. Absent a valid constitutional objection….it is not our role to second-guess that legislative judgment." Id. at 113.

Based upon the clear language of 75 Pa.C.S.A. § 3754 and the Superior Court's interpretation of this provision in Taylor, *supra*, this Court finds that to permit the discovery requested by the Plaintiff would circumvent the privilege.[1]

Plaintiff's next issue relates to objections made by Defense counsel during the deposition of Paul Mitchell. Although the Plaintiff asserts that counsel for PennDot objected to and instructed Paul Mitchell, the Assistant Construction Manager for PennDot, not to answer questions on eighteen (18) separate occasions based upon 75 Pa.C.S.A. § 3754, the Plaintiff only identifies two times in which the privilege allegedly does not apply. The first instance related to the "tie in" of a photograph, the second related to bringing contractors back in to finish additional highway work. Defendant PennDot argues that the photograph "tie in" question was asked and answered. Following a review of the relevant portions of Mr. Mitchell's deposition transcript, this Court agrees. Moreover, when specifically asked during argument what specific information the Plaintiff was seeking that she did not have adequately answered, Plaintiff's counsel was unable to clearly articulate what, if any, questions remained.

As to the second question posed by Plaintiff's counsel and objected to during the deposition, this Court finds that the question as presented is privileged pursuant to 75 Pa.C.S.A. § 3754(b).

Plaintiff's counsel asked Mr. Mitchell, "[i]s it normal for PennDot, when a contractor has finished their work and you see additional work that needs to be done for you [to] not bring them back in?" (Mitchell Dep. 5/22/09, p. 44). PennDot

[1] This Court notes that the federal statute has been applied to similar facts, and the federal statute has been interpreted in a consistent manner by Chief Judge Sylvia Rambo in Sala v. Frock, No. 93-1002 (M.D. Pa. filed April 11, 1994).

contends that this line of questioning elicits privileged information as the additional work was being performed as the result of a safety study. As Section 3754(b) mandates that employees of agencies, such as PennDot, which are charged with the development and procurement of safety studies or reports, shall not be required to give depositions or evidence pertaining to safety records or reports, and this Court finds that the information sought pertains to evidence generated in a safety study, Plaintiff's Motion to Compel as to Plaintiff's question regarding additional work performed, is DENIED.

The final issue before this Court relates to Expert Interrogatories served by Plaintiff on Defendant, PennDot on June 1, 2009. Defendant PennDot served Objections to the Expert Interrogatories on June 19, 2009 asserting that Pa.R.C.P. 4003.5 limits the scope of discovery to production of expert reports to be used at trial. Pa.R.C.P. 4003.5(a)(1)(b) provides:

> Discovery of facts known and opinions held by an expert, otherwise discoverable under the provisions of Rule 4003.1 and acquired or developed in anticipation of litigation for trial, may be obtained as follows:
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> (1) A party may through interrogatories require
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> (b) the other party to have each expert so identified state the substance of the facts and the opinions to which the expert is expected to testify and a summary of the grounds for each opinion. The party answering the interrogatories may file as his or her answer a report of the expert or have the interrogatories answered by the expert. The answer or separate report shall be signed by the expert.

Defendant PennDot asserts that as the rules permit a party to respond to expert interrogatories by production of an expert report, no further discovery of the expert is permissible. Pa.R.C.P. 4003.5(a)(2) clearly permits the Court to allow additional discovery as the Court deems appropriate. Moreover, in J.S. v. Whetzel, 860 A.2d

1112 (Pa.Super. 2004), the Superior Court held that Rule 4003.5 "does not limit discovery to the facts and opinions upon which an expert is expected to testify." Id. at 1119. In reviewing additional discoverable information of an expert, the Superior Court noted, "Impeachment of an expert witness by demonstrating partiality is permissible….It is proper to ask an expert witness his fee for testifying, as well as whether he has a personal friendship with the party or counsel calling him." Id. at 1120.

The Court in J.S. further noted:

> In summary, this Court has consistently permitted a party to examine an expert witness' relationship with counsel calling the expert, including the history and amount of compensation received by the expert from counsel. This Court has also upheld inquiries about the amount of income an expert has received from testifying in a particular type of case (for example, asbestos cases or personal injury cases), and whether the expert consistently represents one side or the other; *i.e.*, plaintiff or defendant. Nevertheless, at all times, this Court has made clear the information sought must be relevant to the inquiry presently before the court. We have cut short those line of inquiry that either impugn an expert's character or are otherwise unrelated to the issue or issues on which the expert is offering his or her opinion. Id. at 1121.

Plaintiff's Expert Interrogatories one (1) through eight (8) seek information regarding the facts and opinions held by expert witnesses. Accordingly, these interrogatories are appropriately answered by production of expert reports. As Plaintiff's expert witness interrogatories nine (9) through eleven (11) relate to inquiries regarding compensation paid in this case, and information regarding Plaintiff's experts' previous representations, such evidence is discoverable by the Plaintiff.

Accordingly, Plaintiff's Motion to Compel Answers to Expert Interrogatories is GRANTED as to Expert Interrogatories 9, 10 and 11 served June 1, 2009. In all other

respects, Plaintiff's Motion to Compel Answers to Expert Interrogatories is DENIED.

O R D E R

AND NOW, this 29th day of October, 2009, the Plaintiff's Motion in Limine #1 seeking to preclude evidence of the Decedent, Christopher Wood's failure to wear a seatbelt is GRANTED. The Plaintiff's Motion in Limine # 2 seeking to admit into evidence a computer generated animation prepared by Plaintiff's expert witness, Steven Schorr, is DENIED. Plaintiff's Motion in Limine # 3 seeking to introduce evidence of subsequent remedial measures is DENIED. Plaintiff's Motion to Compel Discovery is GRANTED in part and DENIED in part. Plaintiff's request for documentation from Defendant, Commonwealth of Pennsylvania Department of Transportation's privilege log, and request for answers to questions directed to Paul Mitchell are DENIED pursuant to 23 U.S.C. § 409 and 75 Pa.C.S. § 3754. Plaintiff's Motion to Compel Defendant, Commonwealth of Pennsylvania Department of Transportation to provide answers to Plaintiff's Expert Interrogatories is GRANTED and Defendant is directed to provide Answers to Interrogatories 9 - 11 within twenty (20) days.

BY THE COURT,

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Richard A. Gray, J.

cc: Jules Zacher, Esquire
Medical Arts Building
1601 Walnut Street, Suite 707
Philadelphia, PA 19102

Steven Gould, Esquire
Office of Attorney General, Torts Litigation
15th Floor, Strawberry Square
Harrisburg, PA 17120

David A. Strassburger, Esquire
Strassburger, McKenna, Gutnick & Gefsky
Four Gateway Center, Suite 2200
444 Liberty Avenue
Pittsburgh, PA 15222

Douglas Engelman, Esquire

Gary Weber, Esquire