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
vs.	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF TRANSPORTATION Defendant	:	

MARIA N. WOOD, individually and as Administratrix of the Estate of CHRISTOPHER WOOD, SR., Plaintiff	:	NO: 08-00547
vs.	:	
GLENN O. HAWBAKER, INC., Defendant	:	
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 asserts that the Defendant, Commonwealth of Pennsylvania,

Department of Transportation (hereinafter "Defendant PennDOT"), was negligent for failing to maintain the unpaved area of the roadway adjacent to the paved shoulder of State Route 549 which resulted in a "drop off" condition. Plaintiff's claims against Defendant, Glenn O. Hawbaker, Inc. (hereinafter "Defendant Hawbaker"), relate to its alleged failure to place back up material in the area of the drop off.[1]

Through a Scheduling Order dated July 8, 2008, this Court established deadlines for completion of discovery, the production of expert reports, and the filing of dispositive motions. The pleadings between the parties are closed, and discovery is complete.[2] The Defendants have filed Motions for Summary Judgment. Oral argument was held on November 17, 2009.

Pursuant to Pa.R.C.P. 1035.2(1), summary judgment is appropriate:

> (1) whenever there is no genuine issue of any material fact as to a necessary element of the cause of action or defense which could be established by additional discovery or expert report, or
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> (2) if, after completion of discovery relevant to the motion, including the production of expert reports, an adverse party who will bear the burden of proof at trial has failed to produce evidence of facts essential to the cause of action or defense which in a jury trial would require the issues to be submitted to a jury.

Defendant PennDOT, asserts that summary judgment should be granted because the Plaintiff has failed to establish a common law cause of action against the Defendants. This Court agrees.

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[1] Although additional theories were advanced by the Plaintiff in her complaints, Defendant Hawbaker contends that the Plaintiff has abandoned such claims, and this Court finds that Plaintiff has failed to produce any evidence supportive of such claims as required by Pa.R.C.P. 1035.3(a)(2).

[2] Plaintiff filed a Complaint against the Commonwealth Defendant on November 30, 2007. Plaintiff commenced a second action against Defendant Hawbaker on March 20, 2008. On June 27, 2008 Defendant Hawbaker filed a complaint to join Defendant Commonwealth as an Additional Defendant seeking indemnification and/or contribution to the extent that Defendant Hawbaker is found negligent in the performance of their construction activities. The cases were consolidated pursuant to an Order of this Court on June 10, 2008.

> A plaintiff seeking to overcome the defense of sovereign immunity under 42 Pa.C.S.A. § 8422 must meet two distinct requirements. First, the plaintiff must show that he possesses a common law or statutory cause of action against a Commonwealth party under Section 8522(a)…Second, the plaintiff must demonstrate that the cause of action falls within one of the exceptions to sovereign immunity set forth in Section 8522(b)." Felli v. Commonwealth of Pennsylvania, Department of Transportation, 666 A.2d 775, 776-7 (Pa.Commw. 1995).

The only possible exception to sovereign immunity which could arguably apply is the "real estate" exception. See 42 Pa.C.S.A. §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. This Court finds that the real estate exception does not apply to this case, as even if an alleged dangerous condition could be shown, the Plaintiff cannot establish causation under the facts and circumstances of this case.

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), *appeal denied*, 932 A.2d 1290 (Pa. 2007)(summary judgment upheld); Fritz v. Glen Mills Schools, 894 A.2d 172 (Pa.Commw.), *appeal denied*, 909 A.2d 1291 (Pa. 2006)(summary judgment upheld); Felli v. Commonwealth, Department of Transportation, *supra,* (judgment on the pleadings upheld); Baer v. Department of Transportation, 713 A.2d 189 (Pa.Commw. 1998)(summary judgment upheld).

In Fagan v. Commonwealth of Pennsylvania, Department of Transportation, 946 A.2d 1123 (Pa.Commw. 2008) the plaintiff's son was a passenger in a vehicle

that left the roadway, became airborne and struck a utility pole and two trees. Factual averments relating to the accident events were as follows:

> For reasons that all parties agree are unknown, **the northbound vehicle departed from the pavement** in the area of a curve to the left. The vehicle strayed to the right, over the fog line, crossing over a gravel shoulder….Immediately thereafter, he vehicle ramped a turned-down guardrail terminal, causing it to become airborne. It struck a utility pole, two trees, and rolled over. Report of Joseph B. Muldoon…Both occupants were fatally injured. Id. at 1124. (Emphasis added).

The passenger's parents, as Administrators of his estate, brought suit against PennDot alleging negligence. In its summary judgment motion, PennDot argued that the plaintiffs failed to establish the causation necessary for a negligence action.

The evidence presented by the plaintiffs as to causation was as follows:

> Factually, the plaintiffs submitted the expert's report…through this report they offered expert opinion that guardrails abutting the shoulders must be designed and maintained so as to be acceptably crashworthy, and that the turned-down guardrail terminal should have been supplanted with a crashworthy end treatment before the accident in question…Plaintiffs also offered to prove by expert opinion that PennDot has a responsibility to design and maintain roadway shoulders for safe passage of motor vehicles, and that the difference between the slope of the roadway and the slope of the shoulder, in combination with the gravel surface of the shoulder, was a dangerous condition which triggered loss of control over the vehicle…**The expert offered no opinion as to the cause of the vehicle leaving the pavement.** Id. at 1125. (Emphasis added).

In upholding the lower court's entry of summary judgment, the Commonwealth Court, relying on Martinowski, *supra*, stated:

> The PennDOT conditions of which Plaintiffs complain begin with the shoulder. Plaintiffs do not offer to prove, however, how the vehicle came to be on the shoulder. The failure to prove why the vehicle left its intended place on the paved portion of the highway results in a gap in the chain of causation between the intended use of the highway and contact with PennDot instrumentality." Id. at 1128.
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> In the case at bar, the Plaintiff's Complaint states:

> 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 the aforesaid drop-off were constructed by Defendant, Commonwealth of Pennsylvania, Department of Transportation.
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> (Plaintiff's Complaint, ¶ 5)(Emphasis added).
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> Plaintiff's expert report states:
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> This is an accident that occurred when a pick-up truck while rounding a curve to the left under wet surface conditions, went out of control and crossed the opposing lane. The pick-up truck continued out of control along the grassy roadway until it struck a large tree, thereby killing its driver.
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> * * * * * * * * * * *
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> The manner where the Wood vehicle translated and rotated in a southeasterly direction is consistent with its right tires **having left the paved portion along the westerly side** as Mr. Wood attempted to bring them back onto the pavement.
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> (Report of Joseph B. Muldoon p. 3-4, 7)(Emphasis added).

As in Fagan, the Plaintiff has failed to produce evidence to establish how Decedent's vehicle came to be on the shoulder. Plaintiff's failure to prove why the Decedent's vehicle left its intended place creates precisely the same fatal gap in the chain of causation between intended use of the highway and contact with a condition off the roadway that required summary judgment in Fagan.

Although the Plaintiff relies upon Fidanza v. Commonwealth of Pennsylvania, Department of Transportation, 655 A.2d 1076 (Pa.Commw. 1995), for the proposition that it is for the jury to ultimately decide the issue of causation, the facts in Fidanza are easily distinguished from those presented in the case at bar. In Fidanza, the plaintiff was driving her car in a southwesterly direction in Pennsylvania Route 841

when she was forced off the roadway by an on-coming car that was traveling in a northerly direction on Pennsylvania Route 841 and had crossed over into her lane of traffic. After the Fidanzas' car left the roadway, it encountered used highway materials that caused the car to slide out of control and strike a tree. Because the trial court found that the accident was caused by the on-coming car rather than Commonwealth real estate, which merely facilitated the accident, it granted PennDot's motion for summary judgment. In reversing the lower court's grant of summary judgment, the Commonwealth Court held as follows:

> Because the fact finder is to determine whether the conditions alleged by the Fidanzas are dangerous, as well as whether the action by the other driver of swerving into their lane was unforeseeable, the decision of the trial court granting PennDot's motion for summary judgment is reversed, and the case is remanded for further proceedings consistent with this opinion. Id. at 1080.

Here, we do not have to determine whether actions taken by other drivers were foreseeable. Moreover, although the court in Fidanza allowed the issue of causation to be decided by the jury, the Commonwealth Court in Fagan made reference to the emerging trend on this issue in the years following Fidenza. Following its review of Fritz, *supra*; Baer, *supra*, Felli, *supra*, Saylor v. Green, 645 A.2d 318 (Pa.Commw. 1994), and Babcock v. Commonwealth, Department of Transportation, 626 A.2d 672 (Pa.Commw. 1993), the Court noted:

> Courts faced with the causation question in leaving-the-pavement cases may resolve the issue with different language, but recent results are consistent: the loss tends to fall on the party with some responsibility for the vehicle leaving the pavement and not on an owner of land or objects nearby. Fagan, *supra*, at 1129.

Most recently, in Pritts v. Commonwealth of Pennsylvania, Department of Transportation, 969 A.2d 1 (Pa.Commw. 2009), *allocator denied*, 2009 WL 3850440

(Pa.)(Nov. 18, 2009), the Commonwealth Court held that no cause of action falls within the real estate exception to sovereign immunity when the reason a vehicle leaves the roadway is driver error. In Pritts, *supra*, the plaintiff lost control of her vehicle, the vehicle left the paved portion off the highway, went off the edge of the shoulder and struck a tree. Plaintiff's estate brought suit against PennDOT for various acts of negligence, including a failure to maintain the unpaved berm/shoulder area of the road. The plaintiff contended that the reason the vehicle drifted from the highway was due to the plaintiff's inattentiveness and that "the final time she allowed the vehicle to drift from the highway caused her to lose control and hit the tree." Id. at 3. In affirming the lower court's grant of summary judgment, the Commonwealth Court held:

> While we agree that Appellants have established evidence as to why Ms. Caldwell's vehicle left the highway, we do not find that this factual distinction provides them with a basis for establishing liability on the part of DOT." Id.

Defendant Hawbaker similarly requests an order granting summary judgment pursuant to Plaintiff's failure to prove causation. For the reasons set forth above, this Court agrees. Additionally, this Court believes that summary judgment is appropriate pursuant to Svege v. Interstate Safety Service, 862 A.2d 752 (Pa.Commw. 2004). In Svege, *supra*, 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. In affirming the lower court's grant of summary judgment, 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 believes that summary judgment is appropriate.

O R D E R

AND NOW, this 24th day of November, 2009, it is hereby ORDERED that the Defendant Commonwealth of Pennsylvania, Department of Transportation's Motion for Summary Judgment and Defendant Glenn O. Hawbaker, Inc.'s Motion for Summary Judgment are hereby GRANTED and all claims against and between such Defendants are DISMISSED with prejudice.

BY THE COURT,

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Richard A. Gray, J.

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