IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

JENNIE M. GRAHAM, Administratrix for the Estate of Leslie Millard,	:	
Plaintiff	:	CONSOLIDATED
vs.	:	DOCKET NO. 09-00611
	:	
TRUMBULL CORPORATION and COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF TRANSPORTATION,	:	CIVIL ACTION
Defendants	:	
vs.	:	
	:	
ISAAC P. MILLARD,	:	
Additional Defendant	:	

KELLY DOWNS, Administratrix for the Estate of Ryan Downs,	:	
Plaintiff	:	DOCKET NO. 10-00254
vs.	:	
	:	
TRUMBULL CORPORATION and COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF TRANSPORTATION,	:	CIVIL ACTION
Defendants	:	
vs.	:	
	:	
ISAAC P. MILLARD,	:	
Additional Defendant	:	

ISSAC P. MILLARD,	:	
Plaintiff	:	DOCKET NO. 10-00552
vs.	:	
	:	
TRUMBULL CORPORATION and THE DEPARTMENT OF TRANSPORTATION,	:	CIVIL ACTION
Defendants	:	

O P I N I O N AND O R D E R

These three (3) consolidated actions[1] arise out of a one-vehicle automobile accident that occurred on June 24th, 2008, at approximately 11:00 p.m., in a construction zone at the intersection of U.S. Highway 15 and State Route 184 in Cogan House Township in Lycoming County, Pennsylvania. Defendant Commonwealth of Pennsylvania Department of Transportation (PennDOT) contracted with Defendant Trumbull Corporation (Trumbull) to work on the Route 15 project. Isaac P. Millard, Plaintiff in the case filed at No. 10-00552 and an Additional Defendant in the cases filed at Nos. 09-00611 and 10-00254, was driving the vehicle at the time of the accident. Mr. Millard was travelling from Route 15 northbound onto the left exit for Route 184 when he failed to stop at the stop sign at the end of the ramp, crossed Route 184, and drove over an embankment and into a temporary sediment basin. The automobile landed on its roof. The two other occupants of the vehicle, Mr. Millard's father Leslie Millard and family friend Ryan Downs, were fatally injured. Isaac P. Millard judicially admitted responsibility and liability for this accident by pleading guilty to homicide by Driving Under the Influence (DUI) in the Court of Common Pleas of Lycoming County.

The representatives of the Estates of Leslie Millard and Ryan Downs have filed two of the consolidated actions, Nos. 09-00611 and 10-00254. In all three of the cases, Plaintiffs filed suit against PennDOT and Trumbull alleging negligence in the layout of the signage of the construction zone, the placement of the sediment basin

[1] By Order dated April 9th, 2010, this Court granted Plaintiff's Motion to Consolidate the actions at No. 09-00611 and No. 10-00254 to No. 09-00611. By Order dated June 28th, 2010, this Court granted Plaintiff's Motion to Consolidate the action at No. 10-00552 with the actions at Nos. 09-00611 and 10-00254 at the Consolidated No. 09-00611.

into which the Millard vehicle crashed, the absence of any guard rail or barrier in front of the basin, and the absence of lighting.

Through Orders dated June 28th, 2010, and August 6th, 2010, this Court granted Defendant HRI Inc.'s Preliminary Objections dismissing HRI as a Defendant in the consolidated action. Through a Scheduling Order dated November 29th, 2010, this Court established deadlines for completing discovery, producing expert reports, and filing dispositive motions. That Order set the cut-off date for filing dispositive motions at June 24th, 2011. Defendants PennDOT and Trumbull filed a Motion for Summary Judgment on June 24th, 2011. Plaintiffs did not file a response to the motion, but they did file an affidavit providing this Court with an expert report. Through a Scheduling Order dated August 19th, 2011, this Court extended the deadlines established in the November 29th Order. This Court held oral argument on Defendants' Motion for Summary Judgment on September 6th, 2011.

Defendants PennDOT and Trumbull assert that summary judgment should be granted in their favor because of the lack of evidence of negligence on the part of PennDOT and Trumbull, the failure of Plaintiffs to provide an exception to sovereign immunity, Isaac P. Millard's intoxicated operation of the vehicle as the sole proximate cause of the accident, and assumption of the risk. This Court believes that Plaintiffs have failed to establish an exception to sovereign immunity against Defendant PennDOT because Plaintiffs cannot prove causation as required in a common law action of negligence.

Pursuant to Pa.R.C.P. 1035.2, a party may move for summary judgment in whole or in part

> (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
> (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.

Id; *Farabaugh v. Pennsylvania Turnpike Comm'n*, 911 A.2d 1264, 1267 (Pa. 2006); *Stein v. Pennsylvania Turnpike Comm'n*, 989 A.2d 80, 84 n.2 (Pa. Commw. Ct. 2010). When granting summary judgment, this Court must view the evidence in the light most favorable to the non-moving party and all doubts as to the existence of a material fact should be resolved against the non-moving party. 989 A.2d at 84 n.2.

Generally, Commonwealth agencies are granted immunity from tort liability. 989 A.2d at 84. Yet, the General Assembly waived immunity for certain tort claims by the Sovereign Immunity Act, 42 Pa.C.S.A. § 8501-28. One of these exceptions states that sovereign immunity cannot be raised as a defense for damages arising out of Commonwealth real estate and sidewalks (the real estate exception). 42 Pa.C.S.A. § 8522(b)(4)[2]. The Commonwealth Court has held that the real estate exception should be narrowly construed by the courts. *Brown v. Commonwealth of Pennsylvania, Dep't of Transportation*, 11 A.3d 1054, 1056 (Pa. Commw. Ct. 2010).

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[2] Section 8522(b)(4) provides:

> (b) **Acts which may impose liability. –** The following acts by a Commonwealth party may result in the imposition of liability on the Commonwealth and the defense of sovereign immunity shall not be raised to claims for damages caused by:
> * * *
> (4) **Commonwealth real estate, highways, and sidewalks. –** A *dangerous condition* of Commonwealth agency real estate and sidewalks, including Commonwealth-owned real property, leaseholds in the possession of a Commonwealth agency and Commonwealth-owned real property leased by a Commonwealth agency to private persons, and highways under the jurisdiction of a Commonwealth agency.

42 Pa.C.S.A § 8522(b)(4) (emphasis added).

In this case, the only exception to sovereign immunity that could apply is the real estate exception. 42 Pa.C.S.A. § 8522. Plaintiffs allege that a dangerous condition existed on and around the exit ramp of State Route 184. However, this Court finds that the real estate exception does not apply in this case because Plaintiff cannot establish a common law claim of negligence, in particular, causation.

To recover damages under the real estate exception, Plaintiffs must prove that: 1) a dangerous condition existed on Commonwealth real estate, and 2) the damages suffered are recoverable either under common law or statute. 42 Pa.C.S. § 8522(a); 11 A.3d at 1056; 989 A.2d at 84.

The existence of a dangerous condition is a question that arguably should be submitted to the jury. 11 A.3d at 1056. Therefore, this Court will not decide if a dangerous condition existed on and around the exit ramp of State Route 184.[3] This Court's analysis focuses on the second prong: whether the damages suffered by Plaintiffs are recoverable under the common law action of negligence.

To succeed on their negligence action, Plaintiffs must prove that: "(1) the defendant owed a duty of care to the plaintiff; (2) that the duty was breached; (3) the breach resulted in the plaintiff's injury; and (4) the plaintiff suffered an actual loss or

[3] In this case, Plaintiffs allege that the absence of a guardrail, lighting, and inappropriate sign placement caused a dangerous condition on the exit ramp of State Route 184. In similar cases, the Supreme Court has held that the absence of guardrails on Commonwealth real estate are not dangerous conditions because the missing guardrail "does render the highway unsafe for the purposes for which it was intended, i.e., travel on the roadway." *Dean v. Dep't of Transportation*, 751 A.2d 1130, 1134 (Pa. 2000); s*ee also Snyder v. Harmon*, 562 A.2d 307 (Pa. 1989) (Commonwealth was not found to be liable for failing to erect a guardrail to keep people from falling into a strip mine adjacent to the highway). This rationale was upheld by the Commonwealth Court in *Svege v. Interstate Safety Service, Inc.*, 862 A.2d 752 (Pa. Commw. Ct. 2004) (placement of 32-inch concrete barriers on a highway did not give rise to Commonwealth liability, even though a taller barrier would have been a more effective device).

damages." 11 A.3d at 1056. If Plaintiffs cannot prove one of these elements, such as causation, summary judgment should be granted in Defendant PennDOT's favor.

The Commonwealth Court has repeatedly upheld summary judgment for failure to prove causation in cases where plaintiffs are unable to establish how or why they left the roadway. *Martinowski v. Commonwealth, Dep't of Transportation*, 916 A.2d 717 (Pa. Commw. Ct. 2006), *appeal denied*, 932 A.2d 1290 (Pa. 2007) (summary judgment upheld); *Fritz v. Glen Mills Schools*, 894 A.2d 172 (Pa. Commw. Ct. 2006), *appeal denied*, 909 A.2d 1291 (Pa. 2006) (summary judgment upheld); 666 A.2d 775 (judgment on the pleadings upheld); *Baer v. Dep't of Transportation*, 713 A.2d 189 (Pa. Commw. Ct. 1998) (summary judgment upheld); *Fagan v. Commonwealth of Pennsylvania, Dep't of Transportation*, 946 A.2d 1123 (Pa. Commw. Ct. 2008) (summary judgment upheld). The Commonwealth Court has explained that

> [c]ourts faced with a 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 payment and not the owner of the land or objects nearby.

Fagan, 946 A.2d at 1129; 989 A.2d at 88.

In *Fagan*, Plaintiffs' son was a passenger in an automobile that left the roadway, became airborne, and struck a utility pole and two trees. *Id*. at 1125. "For reasons that all parties agree are unknown, the northbound vehicle departed from the pavement in the area of a curve to the left" of State Route 3037. *Id*. In that case, Defendant PennDOT filed for motion for summary judgment, alleging that Plaintiffs failed to establish the causation necessary for a negligence action, because the

Plaintiffs' "expert report offered no opinion as to the cause of the vehicle leaving the pavement." *Id*. Relying on *Martinowski*,[4] the Commonwealth Court stated

> [t]he 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 provide 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 (emphasis added).

In this case, Plaintiffs have not established how or why Isaac P. Millard left the road. Isaac P. Millard cannot recall where he was or how he came to crash into the sediment basin on the night of the accident. Isaac P. Millard's deposition states

> A: …I mean, I don't know what happened during the event of the accident, but I really don't recall a lot of the evening.
> * * *
> A: It is easy for me to sit here and say this, that and the other, but the honest to God's truth is I don't know. I cannot recall how I got to where I was and what - - how it all went down. I can't.
> * * *
> Q: Now, do you recall reading any signs along the way on Route 15 prior to the accident?
> A: Do I recall them?
> Q: Yes.
> A: Nothing specific, no.
> * * *
> Q: So you don't recall any signs for towns or any sights along the way?
> A: No.
> * * *
> Q: Do you believe you were trying to exit Route 15 there to get on to 184 or to make a - - go the opposite way on 15?
> A: I'm not sure. I can't recall exactly what I was - - I mean, I don't know what happened, but I just can't remember.
> Q: So it is also true then that you don't remember if you were intending just to stay on Route 15 north when the accident happened?

[4] In *Martinowski*, the Commonwealth Court held that the motorist's inability to prove how or why she left the road prevented her from establishing causation. 916 A.2d at 725 n. 6; 946 A.2d at 1128. That Court granted summary judgment in PennDOT's favor and rejected the argument that the motorist did not need to explain how she came into contact with the guardrail because this contact was foreseeable. *Id.*

A: Right.
Q: Do you remember making any turns or breaking prior to the accident?
A: I remember one thing prior to the accident.
Q: What is that?
A: I remember before I went over the embankment I screamed out - - I said: Lord, save me.
* * *
Q: Do you recall any construction signs or cones or barrels or flashing lights prior to the accident?
A: To be honest, no, I don't recall. I don't recall very much from that evening.
* * *
Q: Do you recall a stop sign at the turn that you went through?
A: No.

Dep. of Isaac P. Millard, 28, 32, 33-34, 37.

As in *Fagan*, Plaintiffs failed to produce evidence to establish how the Millard vehicle came to be in the sediment basin. Plaintiffs' inability to prove why the Millard vehicle left its intended purpose creates precisely the same fatal gap in the chain of causation between the intended use of the highway and contact with a condition off the roadway that warranted summary judgment in *Fagan*. *Supra* at 1128. Summary judgment should be awarded in Defendant PennDOT's favor because of Plaintiffs' inability to prove causation and, therefore, its common law claim of negligence.

Plaintiffs argue that PennDOT's shortened left hand exit ramp deceleration lane with a stop terminal was the cause of this accident. Plaintiffs' expert report states that "the short left hand exit ramp deceleration lane with a Stop terminal was a dangerous condition, which was the cause of the accident." Plaintiff's Expert Report, 10. Plaintiffs' expert report states that the 230 foot long deceleration ramp from U.S. Highway 15 to State Route 184 was at least 150 feet short. *Id*. at 8. Plaintiffs' expert

based his opinion on the American Association of State Highway and Transportation Officials standards. *Id*.

In *Dean v. Commonwealth of Pennsylvania, Dep't of Transportation*, 751 A.2d 1130, 1134 n.8 (Pa. 2000), the Supreme Court of Pennsylvania opined that

> [t]he Commonwealth…is not a guarantor of the safety of the highway, but is only exposed to liability for dangerous conditions thereof. The fact that engineering standards may suggest that a highway would be "safer" if a guardrail were imposed does not render the highway "dangerous" without one.

See generally Artman v. Commonwealth of Pennsylvania, Pennsylvania Turnpike Cmm'n, No. 1122 C.D. 2008, 2009 Pa. Commw. Unpub. LEXIS 78 (Pa. Commw. Ct. Jan. 12, 2009). Furthermore, this Court notes that Plaintiffs' argument about the shortened exit ramp goes to the dangerous condition prong of the sovereign immunity exception test. This Court believes that Plaintiffs claims against Defendant PennDOT fail because Plaintiffs are unable to prove the common law action prong of the sovereign immunity test. In short, this Court concludes that *Fagan*, *supra*, mandates summary judgment for the Commonwealth.[5]

Defendant Trumbull Corporation also requested an order granting summary judgment pursuant to Plaintiffs' inability to prove a common law action of negligence against Trumbull. This Court declines to grant Defendant Trumbull's Motion for Summary Judgment because a question of fact for the jury exists as to whether Defendant Trumbull performed its contract with Defendant PennDOT in a non-negligent matter causing harm.

[5] The Superior Court recently affirmed a similar decision rendered by this Court in *Wood v. Commonwealth of Pennsylvania, Dep't of Transportation*, 07-02658, 08-00547 (C.C.P. Lycoming County 2009).

The general contractor defense provides that "immunity from suit of the sovereign state does not extend to independent contractors doing work for the state." *Svege v. Interstate Safety Service, Inc.*, 862 A.2d 752, 755 (Pa. Commw. Ct. 2004) (citing *Ference v. Booth and Flinn Co.*, 88 A.2d 413, 414 (Pa. 1952)). The Commonwealth Court has held that "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." *Id*. A public work contractor may be insulated from liability by its compliance with a contract "only if the record does not support a question of negligence arising from the contractor's performance of the contracted work. *Coolbaugh v. Commonwealth of Pennsylvania, Dep't of Transportation*, 816 A.2d 307, 313 (Pa. Super. Ct. 2002) (Plaintiffs' two expert reports raised a question of material fact as to whether the contractor performed under the contract in a non-negligent manner).

Here, Plaintiffs' expert report provides a factual issue as to whether Defendant Trumbull is negligent and a cause of Plaintiffs' harm. In this case, Plaintiffs' expert report states that PennDOT mitigated the dangerous condition created by its short left hand exit ramp by placing a Large Double Arrow warning sign at the ramp's intersection with State Route 184. Plaintiffs' Expert Report, 10. The report also provides that Trumbull removed this warning sign during construction and did not install it as required by Trumbull's contract with PennDOT. Plaintiff's expert report states that the "removal of the Two-Direction Large Arrow sign took away critical warning to Millard that he was coming to a tee intersection." *Id*. The report also

provides that and that "Trumbull's improper removal and failure to reinstall the PaDOT installed Large Double Arrow warning sign was not proper and was a cause of the collision." *Id.*

In this case, the record provides a question of negligence arising from Trumbull's performance at the construction sight around the exit ramp and intersection of U.S. Highway 15 and State Route 184. Therefore, this Court believes that the award of summary judgment to Defendant Trumbull would be inappropriate in this case.

Despite both PennDOT and Trumbull's arguments, Isaac P. Millard's criminal negligence does not relieve Trumbull of liability. *See Powell v. Drumheller*, 653 A.2d 916, 922 (Pa. 1995). Concurrent causation is normally an issue to be decided upon by a jury. *Id*. at 623-24. Additionally, the Supreme Court has held that "criminal conduct does not act as a per se superseding force." *Id*. In this case, the negligence of Defendant Trumbull and Isaac P. Millard could both be causes of the accident. Therefore, the question of concurrent liability should be left for a jury.

Furthermore, Plaintiffs Graham and Downs did not assume the risk of driving with Isaac P. Millard. Except when preserved by statute, assumption of the risk is no longer a defense in Pennsylvania. The Supreme Court held in *Hughes v. Seven Springs Farm, Inc.*, 563 Pa. 501, 504, 762 A.2d 339, 341 (2000) that "[a]s a general rule, the doctrine of assumption of the risk, with its attendant 'complexities' and 'difficulties,' has been supplanted by the Pennsylvania General Assembly's adoption of a system of recovery based on comparative fault in the Comparative Negligence Act, 42 Pa.C.S.A. § 7102(a)-(b)." (citations omitted). In this case, whether Plaintiffs'

negligence exceeded Defendants' "is a question for the finder of fact at trial and not one properly considered at the summary judgment stage." *Thornton v. Phila. Hous. Auth.*, 4 A.3d 1143, 1154 (Pa. Super. Ct. 2010).

O R D E R

AND NOW, this 13th day of September 2011, it is hereby ORDERED and DIRECTED that Defendant Commonwealth of Pennsylvania Department of Transportation's Motion for Summary Judgment is GRANTED and Defendant Trumbull Corporation's Motion for Summary Judgment is DENIED. The Commonwealth of Pennsylvania is dismissed as a party in the consolidated action.

BY THE COURT,

_____
Richard A. Gray, J.

RAG/abn

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