IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Lourdes Pollas	:	
	:	
v.	:	
	:	
Pennsylvania Financial Responsibility Assigned Claims Plan	:	
	:	
v.	:	No. 1525 C.D. 2009
	:	
Southeastern Pennsylvania Transportation Authority, Appellant	:	
	:	
Lourdes Pollas, Appellant	:	
	:	
v.	:	
	:	
Pennsylvania Financial Responsibility Assigned Claims Plan	:	
	:	
v.	:	No. 1572 C.D. 2009
	:	Argued: February 9, 2011
Southeastern Pennsylvania Transportation Authority	:	

BEFORE: **HONORABLE BONNIE BRIGANCE LEADBETTER,** President Judge
HONORABLE DAN PELLEGRINI, Judge
HONORABLE RENÉE COHN JUBELIRER, Judge
HONORABLE MARY HANNAH LEAVITT, Judge
HONORABLE P. KEVIN BROBSON, Judge
HONORABLE PATRICIA A. McCULLOUGH, Judge
HONORABLE JOHNNY J. BUTLER, Judge

OPINION NOT REPORTED

MEMORANDUM OPINION BY
PRESIDENT JUDGE LEADBETTER **FILED: August 4, 2011**

The Southeastern Pennsylvania Transportation Authority (SEPTA) appeals from the order of the Court of Common Pleas of Philadelphia County, which ordered SEPTA to pay first party medical benefits and uninsured motorist benefits to Lourdes Pollas, and found that the Pennsylvania Financial Responsibility Assigned Claims Plan (Plan) had no liability to Pollas. We reverse.

The facts of this case are not in dispute. On July 29, 2005, Pollas rode the Route 47 SEPTA bus to the corner of Fifth Street and Olney Avenue in Philadelphia. There she disembarked, intending to transfer to the Route 18 bus. She took a few steps to the corner, and waited for the light to change. When the light was in her favor, she entered the intersection, and was struck by an unidentified vehicle.

Pollas brought an action in common pleas against the Plan, seeking first party and uninsured motorist benefits. The Plan joined SEPTA as an additional defendant and, at trial, asserted that, while transferring, Pollas remained a legal "occupant" of a SEPTA vehicle, and that SEPTA was therefore liable to Pollas under the terms of its self-insurance. Furthermore, the Plan argued that because it is the insurer of last resort, SEPTA was primarily and solely liable for Pollas' injuries. SEPTA argued that Pollas was not an occupant of its vehicle at the time she was struck, and that it had sovereign immunity from suits of this sort. Common pleas ruled against SEPTA on both the occupancy and sovereign immunity issues, finding SEPTA, and not the Plan, liable to Pollas.

SEPTA appealed to this court. The Plan, as an appellee, supports common pleas' decision. Pollas, also an appellee, agrees that the judgment against SEPTA should be affirmed, but she also argues that, if we do reverse common pleas, the Plan should be held liable. Pollas also filed a "protective appeal"

challenging the judgment in favor of the Plan. Pollas' counsel neglected, however, to file a statement of errors complained of on appeal as required by Pa. R.A.P 1925(b) for this "protective appeal." We conclude that, as Pollas prevailed below and was consequently not aggrieved, she was not required to file an appeal to protect her interests in this matter.[1] Therefore, we strike Pollas' "protective appeal" and, in SEPTA's appeal, consider both issues presented.

For the reasons given in *Jones-Molina v Southeastern Pennsylvania Transportation Authority*, 1363 C.D. 2009 (filed July 22, 2011), a strikingly similar case argued the same day as the case before us, we hold that Pollas was not the occupant of a SEPTA bus at the time she was struck and, therefore, SEPTA has no liability to Pollas.[2]

In *Jones-Molina*, it was clear that once it was determined that SEPTA was not liable to the plaintiff, the Plan was. However, in this case the Plan disputes that conclusion. It is undisputed that Pollas meets most of the requirements to recover from the Plan, as she is a Pennsylvania resident injured in a motor vehicle accident and is not herself the owner of a motor vehicle or otherwise entitled to benefits from any other source. *See* 75 Pa. C.S. § 1752. In addition, we have determined that because she was not the occupant of a SEPTA vehicle at the time she was injured, she is not ineligible under subsection (a)(5) of

[1] Had it been possible for Pollas to recover from both the Plan and SEPTA, or for them to be jointly and severally liable, our view would be different. However, since recovery from one entity precluded recovery from the other and she received all the damages to which she could have been entitled from SEPTA, we find she was not aggrieved by the judgment.

[2] In its brief, the Plan suggests that we could find SEPTA liable because one of its buses was involved in the accident. As it is undisputed that the SEPTA vehicle was stationary and at the curb at the time Pollas was struck by the unidentified vehicle, this argument is without merit.

the statute, which states that an eligible claimant must not be "the operator or occupant of a motor vehicle owned by a self-insurer." 75 Pa. C.S. § 1752(a)(5).

However, the Plan argues that Pollas did not prove that she filed a police report within the time period required by the Motor Vehicle Financial Responsibility Law. *See* 75 Pa. C.S. § 1702.[3] As the Plan notes in its brief to this court, Pollas did not introduce the report at trial. However, although the Plan raised the issue in New Matter in its answer to Plaintiff's Complaint, by the time of trial the parties were focused on the issue of whether Pollas was an "occupant" of the SEPTA bus when she was injured crossing the street. Indeed, counsel for the Plan addressed the court at the beginning of trial, stating:

> Actually, Your Honor, if I may speak, most of the facts in this case are actually stipulated, including the amount of damages…But what is really in dispute, and what the Court is being asked to address is, what the plaintiff's legal status was at the time of her accident….The Plan submits there are two issues before the Court…whether or not the plaintiff was an occupant of the bus [and] whether or not the first SEPTA bus was involved in the accident…

Reproduced Record (R.R.) at 420a-421a.

At the conclusion of brief testimony from Pollas, the Plan did not move for a compulsory nonsuit, nor did it make any argument on the police report issue at the conclusion of trial. None of the post-trial briefs nor the post verdict motions deal with the issue, which appears to have first resurfaced *sua sponte* in common pleas' opinion filed in accordance with Rule 1925. Significantly, the

[3] Section 1702 makes clear that an unidentified motor vehicle can only be considered "uninsured" if "the accident is reported to the police or proper government authority and the claimant notifies his insurance within 30 days, or as soon as practicable thereafter, that the claimant or his legal representative has a legal action arising out of the accident."

Plan's brief on appeal does not state, as required by Rules 2117(c) and 2119(e) of the Pennsylvania Rules of Appellate Procedure, the place and manner in which the issue was preserved. Other than the opinion filed by the trial court after the matter was on appeal, and the Plan's New Matter, the only reference to a police report we have found in the entire record, including the parties' briefs and arguments, is a passing comment during the plaintiff's deposition in which counsel for the Plan appears to acknowledge his awareness of such a report. *See* R.R. at 133a-134a. Under all these circumstances, we hold that the Plan has waived the issue.[4]

Accordingly, we reverse the judgment against SEPTA and remand for the entry of judgment against the Plan.

BONNIE BRIGANCE LEADBETTER,
President Judge

[4] Ordinarily, even though it had not preserved the issue in the trial court, the Plan could argue as an appellee that the judgment should be affirmed on alternate grounds. However, since counsel for the Plan advised the court that the essential facts were stipulated and the only issues presented for the trial court's determination related to the SEPTA bus, we believe that it was error for that court to base its decision—even in part—on failure to present evidence on a factual issue not presented by the parties and that Pollas had no reason to believe was contested.

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O R D E R

AND NOW, this 4th day of August, 2011, the appeal docketed at 1572 C.D. 2009 is hereby STRICKEN and the order of the Court of Common Pleas of Philadelphia County in the above-captioned matter is hereby REVERSED, and the matter is hereby REMANDED for entry of judgment against the Pennsylvania Financial Responsibility Assigned Claims Plan and in favor of the Southeastern Pennsylvania Transportation Authority.

Jurisdiction relinquished.

BONNIE BRIGANCE LEADBETTER
President Judge

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HONORABLE PATRICIA A. McCULLOUGH, Judge
HONORABLE JOHNNY J. BUTLER, Judge

OPINION NOT REPORTED

DISSENTING OPINION
BY JUDGE PELLEGRINI FILED: August 4, 2011

For the same reasons set forth in *N. Morning Cloud Jones-Molina and Pennsylvania Financial Responsibility Assigned Claims Plan v. Southeastern Pennsylvania Transportation Authority* (No. 1363 C.D. 2009, filed July 22, 2011), I respectfully dissent.

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DAN PELLEGRINI, JUDGE