IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Tony Burgos, Appellant	:	
v.	:	
City of Philadelphia, Philadelphia Gas Works and PECO Energy Company	:	No. 2030 C.D. 2010 Submitted: May 9, 2011

BEFORE: HONORABLE BERNARD L. McGINLEY, Judge
HONORABLE DAN PELLEGRINI, Judge
HONORABLE PATRICIA A. McCULLOUGH, Judge

OPINION NOT REPORTED

MEMORANDUM OPINION
BY JUDGE McGINLEY FILED: August 10, 2011

Tony Burgos (Burgos) appeals from the order of the Court of Common Pleas of Philadelphia County (trial court) which denied his motion for post trial relief following entry of a directed verdict in favor of the City of Philadelphia (City).

On July 7, 2005, Burgos injured his ankle when he was thrown from his "mini bike" after it struck an unmarked sinkhole on the street in front of 630 Roosevelt Boulevard in the City.

On July 20, 2007, Burgos filed an Amended Complaint against the City, Philadelphia Gas Works and PECO Energy Company.[1] Burgos and the City entered into a Joint Stipulation of Facts. It was stipulated, *inter alia*, that: (1) Roosevelt Boulevard is a state-owned highway; (2) the sinkhole was caused by a

[1] PECO Energy and Philadelphia Gas Works were subsequently dismissed.

defective sewer lateral at 632[2] Roosevelt Boulevard which leaked dirt and water; (3) a sewer lateral is the pipe connection from an individual home to the main sewer line; (4) only the main sewer line is owned by the City, (5) a homeowner owns the sewer lateral, has responsibility to repair a defective lateral and to make repairs to a street from any resultant damage; (6) before the accident, the City's Sewer Maintenance Division served notice regarding the defective lateral on the homeowner at 632 Roosevelt Boulevard; (7) the notice instructed the homeowner to obtain a registered plumber to excavate and repair the lateral within 10 days, one week prior to Burgos' accident; (8) the City did not cordon off or barricade the sinkhole; (9) the City notified Pennsylvania Department of Transportation of the sinkhole; and (10) the City did not engage in any follow up communications with the homeowner at 632 Roosevelt Boulevard to determine if the sewer lateral, or sinkhole had been repaired. Joint Stipulation of Facts, ¶¶5, 12, 14-17, 20-21, 23, 25, April 9, 2010, at 1-3; Reproduced Record (R.R.) at 14a-16a.

The issue of whether the City was subject to liability pursuant to the "Utility Service Facilities" and/or "Streets" exceptions to governmental immunity set forth in Section 8542(b)(5)-(6) of the Judicial Code, *as amended,* 42 Pa.C.S. § 8542(b)(5)-(6), was submitted to the trial court.

In his Memorandum of Law in Lieu of Trial, Burgos argued that the City was subject to liability under the "Utility Service Facilities" exception because the City owned the "sewer line system" and a lateral portion of the City's "sewer line system" caused the dangerous sinkhole on a street located within the

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[2] Apparently, the defective lateral at **632** Roosevelt Boulevard leaked water and dirt which caused the sinkhole in front of **630** Roosevelt Boulevard.

City. Burgos also argued that the City was subject to liability for its failure to repair a known defect in a street which was located within the City limits, barricade or fill the sinkhole and/or follow up with the homeowner to ensure the sinkhole was repaired.

The City moved for directed verdict on the ground that it was immune from liability. First, it argued that the "Utility Service Facilities" exception states that the City may be liable for a dangerous condition of the facilities of steam, sewer, gas or electric systems *owned by the local agency*. Because the City did not own the sewer lateral at 632 Roosevelt Boulevard, the utility exception did not apply. The City argued that it was also immune from liability under the "Streets" exception because Roosevelt Boulevard is a state-owned highway, and as a matter of statutory law, the City had no responsibility for maintenance, inspection and repair of a state highway.

The trial court determined that the City was not liable under the "Utility Service Facilities" exception because, as stipulated, the sinkhole was caused by the sewer lateral, not the sewer main. The trial court further concluded that the City was not liable for repairs to a state highway, even if the highway was within the City limits.

On appeal[3], Burgos argues that the City was subject to liability under the "Utility Service Facilities" exception for failing to properly monitor, maintain

[3] Commonwealth Court's scope of review of an order of a trial court denying a motion for post-trial relief is limited to a determination of whether the trial court abused its discretion or committed an error of law. Wrazien v. Easton Area School District, 926 A.2d 585 (Pa. Cmwlth.), *petition for allowance of appeal denied,* 594 Pa. 718, 937 A.2d 448 (2007).

and repair the defective "sewer system" it owned, and which caused a known dangerous sinkhole on a street located within the City's limits. He also contends the City had a duty to properly barricade or warn citizens of the defective condition, or follow up with the homeowner to ensure repairs were made. Finally, Burgos argues that "the City is responsible for making repairs on streets located within City limits, even State highways, which are caused by underground utilities, including defective sewer lines." Burgos' Brief at 21. Burgos raised no issue on appeal pertaining to the "Streets" exception.

The "Utility Service Facilities" exception to immunity under Section 8542(b)(5) of the Judicial Code, 42 Pa.S.C. §8542(b)(5), provides:

> Utility services facilities – A dangerous condition of the facilities of steam, sewer, water, gas or electric systems *owned by the local agency* and located within rights-of-way, except that the claimant to recover must establish that the dangerous condition created a reasonably foreseeable risk of the kind of injury which was incurred and that the local agency had actual notice or could reasonably be charged with notice under the circumstances of the dangerous condition at a sufficient time prior to the event to have taken measures to protect against the dangerous condition. (emphasis added).

This Court has held that the City will not be held liable under the "Utility Service Facilities" exception for a defect of a privately owned utility facility. In Jackson v. City of Philadelphia, 782 A.2d 1115 (Pa. Cmwlth. 2001), a pedestrian was injured when her foot caught in an uncovered stop box located on the sidewalk in the City of Philadelphia. The pedestrian argued, as does Burgos:

> that the curb stop box is a part of or a facility of the water supply system and that application of the exception does not require the local agency to own the actual component

> causing the injury; rather the exception only requires that the utility *system* be owned by the local agency. (emphasis in original).

Jackson, 782 A.2d at 1118.

By contrast, the City argued, that the "Utility Service Facilities" exception requires that the local agency own the specific component or facility which is in a dangerous condition. The City owned the water and sewer mains, not the connecting lines for service between the mains and houses serviced. The City argued that the water valve stop box was owned by, and was the responsibility of, the property owner.

This Court agreed with the City that an uncovered water valve stop box in the sidewalk abutting private property was not actionable under this exception:

> We believe it to be clear that the legislature intended to impose liability upon municipalities only for injuries arising from a defective condition of its own equipment and facilities….to impose within the sweep of the immunity exception injuries caused by equipment owned by private parties and providing their access to the utility service would be an expansive reading of the statue quite at odds with our strict construction mandate…. Accordingly, we hold that for purposes of the utility service facilities exception to governmental immunity, the instrumentality which causes the harm must be owned by the local agency.

Jackson, 782 A.2d at 1118-19.

Here, the parties stipulated that "a homeowner owns the sewer lateral and has responsibility to repair a defective lateral line, and to make repairs to a

street from any resultant damage." Stipulation of Facts, ¶16 at 2; R.R. at 15a. The stipulated facts demonstrate that a dangerous condition of the sewer lateral owned by the owner of 632 Roosevelt Boulevard caused the sinkhole on a state-owned highway. The City did not own the defective lateral. Therefore, Burgos' claim does not fall within the "Utility Service Facilities" exception to immunity, which requires that the local agency own the instrumentality which caused the injury.

In Leone v. City of Philadelphia, 780 A.2d 754 (Pa. Cmwlth. 2001), allocator denied, 568 Pa. 702, 796 A.2d 984 (2002), the City of Philadelphia received notice of a water leak on Torresdale Avenue, a state highway within City limits. Following inspection of the leak, the City determined that the source of the leak was a pipe on private property. The homeowners hired a contractor to repair the leak. The contractor left a plumber's ditch that originated on the private property and extended onto Torresdale Avenue. PennDOT notified the City that the plumber's ditch was unsafe, and a City employee attempted repairs. A partial repair was made because the ground was frozen and a car was parked over the area.

Subsequently, a pedestrian tripped over the unrepaired ditch and injured his knee. A negligence action was commenced against the City. The City moved for a partial non-suit because the "Utility Service Facilities" exception did not apply. The trial court agreed because the leak was on private property, not City-owned property. This Court affirmed.

Burgos argues that Leone is distinguishable because here, the homeowner took no action to repair the defective sewer lateral or resultant sinkhole on the street. Burgos contends, under these circumstances, it was the City's duty to protect the public. This Court must disagree. The present case is

essentially indistinguishable from Leone. As the City points out, Leone involved a water line lateral, while the present controversy involved a sewer lateral. In Leone, the City left a roadway defect following a failed repair and failed to follow up with another repair in a timely manner. In this controversy, the City left a roadway defect with no repair and failed to ensure that the property owner repaired it in a timely manner. In both instances, the neighboring property owner, not the City, owned the instrumentality which caused the roadway defect. The City was not liable in Leone, and is not liable in the present case.

Lastly, to the extent that Burgos argues that the City was liable for the defect because it was on a roadway within City limits, the location of the defect makes no difference under the "Utility Service Facilities" exception. Whether the defective privately-owned utility causes a defect on a sidewalk, as in Jackson, or on a highway, as in Leone, the claim does not fall within the utilities exception unless the local agency owns the instrumentality.[4]

Because the City did not own the defective sewer lateral, it was not responsible for its repair or maintenance. Moreover, Burgos points to no exception to immunity that would subject the City to liability for failing to barricade or warn the public of the sinkhole's potential danger of a state-owned highway.

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[4] Burgos asserts that the dangerous instrumentality that caused his injuries was not the defective sewer lateral, but the dangerous sinkhole at 630 Roosevelt Boulevard, which directly caused Burgos' "mini bike" to flip. However, this argument seems to be counterintuitive to Burgos' cause as it was undisputed that the City did not own Roosevelt Boulevard. In any event, as pointed out, Burgos did not preserve his claims under the "Streets" exception on appeal.

The trial court is affirmed.

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BERNARD L. McGINLEY, Judge

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O R D E R

AND NOW, this 10th day of August, 2011, the order of the Court of Common Pleas of Philadelphia County in the above-captioned case is hereby affirmed.

BERNARD L. McGINLEY, Judge