IN THE COMMONWEALTH COURT OF PENNSYLVANIA

John Jordan	:	
	:	
v.	:	No. 2450 C.D. 2010
	:	Submitted: June 10, 2011
Pennsylvania Department of	:	
Transportation and Allegheny County	:	
	:	
Appeal of: Allegheny County	:	

BEFORE: HONORABLE DAN PELLEGRINI, Judge
HONORABLE ROBERT SIMPSON, Judge
HONORABLE JOHNNY J. BUTLER, Judge

OPINION NOT REPORTED

MEMORANDUM OPINION
BY JUDGE PELLEGRINI FILED: July 1, 2011

Allegheny County (County) appeals from an order of the Court of Common Pleas of Allegheny County (trial court) denying its motion for post-trial relief and ordering it to pay $64,800 for damages it caused to property owned by John Jordan (Jordan). For the reasons that follow, we affirm the trial court's order.

Jordan purchased a house located at 6740 Smithfield Street in McKeesport, Pennsylvania in 2002 or 2003. In 2007, the County dug a french drain on Smithfield Street at the base of a hillside below Jordan's garage alongside the road. In May 2008, the hillside near Jordan's property gave out and a landslide

occurred. The County's Department of Public Works responded to the area where the landslide occurred to remove the fallen debris from the road.

As a result of the landslide, Jordan filed a four-count complaint against the County[1] alleging that due to the work improperly performed by the County when it installed the french drain, it caused his property to landslide, resulting in substantial property damage and unstable land beneath his garage. Specifically, the complaint alleged that his garage foundation was permanently damaged with large cracks visible in the cement floor and walls; various trees had fallen or had permanently been altered by the landslide; gravel around the garage and driveway had slid down the hillside; the driveway had crumbled and slid away; and Jordan was unable to use his driveway. In Count I, he alleged that the County had withdrawn lateral support from his land; in Count II, he alleged that the County was negligent for breaching its duty to excavate with due care; in Count III, Jordan alleged that the County was negligent when it removed earth from the base of the hillside during the installation of the french drain which caused the landslide; and in Count IV, he alleged that the County was jointly and severally liable for the damages he sustained. Jordan sought damages in excess of $25,000. The County filed an answer and new matter denying the allegations and alleging that the County was immune from suit. It also alleged that the accident situs was controlled by the Pennsylvania Department of Transportation. A non-jury trial was held.

[1] The complaint was also filed against the Pennsylvania Department of Transportation. A motion for summary judgment was granted as to the Department of Transportation so it is not a party to this appeal.

Before the trial court, Jordan testified that he lived in the Smithfield Street property with his fiancé, his fiancé's mother and three children. At the time of the purchase, he made various cosmetic improvements to the house, none of which concerned the structure of the house or the surrounding property. There were no soil erosion problems. In 2007, a french drain was being installed in the surrounding area of his property. He knew it was the County performing the work because his step-uncle, whose name he could not remember, was employed by the County and Jordan saw him working on the project. He saw the workers take a lot of dirt away from the area. Nothing happened until 2008 when the top of his driveway started cracking. Jordan stated that he referred to a pamphlet titled "A Homeowner's Guide to Landslide" that one of the workers had given him. He contacted Bud McCutcheon (McCutcheon) who came out to his home and evaluated the land and saw that the hillside had given out and trees were lying down in the street. Jordan stated that the whole side of his garage wall kicked out and that the foundation on the bottom and middle of his garage floor was cracked. He could no longer use his garage. Jordan testified that it was his belief that the landslide affected the value of his home and his property. He was nervous that there might be movement with his home. Jordan offered into evidence an appraisal of his home for $71,000. However, counsel for Jordan requested that the Court take judicial notice of the County assessment website which showed that the assessed valuation of the property was $64,800 - $62,600 as the fair market value of the actual residential structure and $2,200 as the fair market value for the detached garage. (June 24, 2010 hearing transcript at 154a.)

McCutcheon, an engineer employed by KU Resources in Duquesne, Pennsylvania, testified that he did visit Jordan's property to view the landslide at his request. While his property had been in a landslide-prone area at one time, it had reached the state of equilibrium where the property was being used as the parking area up on top and trees had grown. There was no indication of any disturbance or anything that would have triggered the landslide in the intervening years. McCutcheon opined that when the County came in and widened the berm of the road in June 2007 by putting in the french drain, the next spring when the normal rains were occurring, the hillside, which had previously been stable for every other year, could no longer withstand the wet mass and the slide occurred. McCutcheon stated that he looked at the County's maintenance logs and under the comments for June 6, 2007, it stated: "Dug out berm for asphalt. Hauled out eight ton." (June 24, 2010 hearing transcript at 142a.) He explained that eight tons was 16,000 pounds and it made perfect sense to him that with that much dirt dug out, the hill would collapse. McCutcheon offered into evidence his report indicating that the estimate for repair, including replacement of the garage structures, was $261,200.

The County called Nathaniel Hayes (Hayes), an engineer for Zell Engineers, who testified that he was working for the County in 2008 when the landslide occurred. He went out to the property and based on what he observed, he stated that it did not look like there had been any recent construction activity. He knew that it was the season for landsliding and rock-fall issues happening in different parts of the county roads. "So I just chalked it up as just another one of those to where, oftentimes, the occurrences are driven by the seasonal rain and

different issues relating to erosion concerns or groundwater conditions or site disturbances or just the overall deterioration and the characteristics of the soils situated around county roadway." (June 24, 2010 hearing transcript at 178a-179a.) Hayes submitted a report indicating that he believed the cause of the landslide was due to groundwater and external forces relating to the large trees which had deposited on Smithfield Street. On cross-examination, Hayes admitted that he had not been told that eight tons of material had been removed from the area and if such large amounts of material had been removed from the base of the hill of Jordan's residence, that could have been a factor in causing the landslide. He also admitted that he had never reviewed the maintenance log of June 6, 2007.

Anthony Mangretta (Mangretta), a district supervisor from the County's Department of Public Works, testified that the County did perform the work installing drains on Smithfield Street in February of 2010, and that there was work done in front of Jordan's residence to the left of the property, but there was no documentation that indicated any kind of drainage work was done in front of the area where the landslide took place. The work order which indicated that "eight ton" was dug out could have been eight ton of anything, including asphalt, dirt, trees or debris. It could have comprised different areas as opposed to one particular area. On cross-examination, Mangretta admitted that the County owned Smithfield Street.

Steven Smallhoover (Smallhoover), a geotechnical federal highway project manager for the County, testified that he did not believe that it was the County's road that caused the landslide. He explained that a water line permit for

an under drain was taken out four years prior by Penn American Water Company and he believed that was the cause of the problem. He stated that there was a difference in the pavement between the roadway surface and the shoulder; there was a distinct pavement break. That meant the contractor for Penn American Water Company or one of its contractors cut a joint along the road to work in the shoulder and then restored the shoulder with asphalt at a later date. On cross-examination, Smallhoover admitted that the County owned and maintained the road so if Penn American Water Company came onto the road to perform maintenance, it would have to be with the permission of the County.

The trial court found that the County was not immune from liability and awarded Jordan $64,800 because the cost of repairs exceeded the full market value of the property and the Court felt that the County's assessed value was more accurate than Jordan's value. After post-trial motions were denied, the County filed this appeal.[2]

The County contends that the trial court erred in awarding damages to Jordan because the action against the County should have been dismissed on the basis that it was immune from liability under the Political Subdivision Tort Claims Act (Act) as its purported negligent conduct does not fit within either the "streets"

[2] "In a bench trial, it is the duty of the trial judge to judge credibility of the witnesses and to weigh their testimony…His findings will not be reversed unless it appears that he has clearly abused his discretion or committed an error of law..; for it is not the duty of an appellate court to find the facts but to determine whether there was evidence in the record to justify the trial court's finding of fact." *Weir by Gasper v. Estate of Ciao*, 491 Pa. 503, 556 A.2d 819, 824 (1989).

or "real property" exceptions to governmental immunity under 42 Pa. C.S. §8542(b)(3) or (6).[3]

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[3] 42 Pa. C.S. §§8542(b)(3) and (6) provide:

> (b) Acts which may impose liability. The following acts by a local agency or any of its employees may result in the imposition of liability on a local agency:
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> (3) *Real property.* – The care, custody or control of real property in the possession of the local agency, except that the local agency shall not be liable for damages on account of any injury sustained by a person intentionally trespassing on real property in the possession of the local agency. As used in this paragraph, "real property" shall not include:
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> (i) trees, traffic signs, lights and other traffic controls, street lights and street lighting systems;
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> (ii) facilities of stream, sewer, water, gas and electric systems owned by the local agency and located within rights-of-way;
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> (iii) streets; or
>
> (iv) sidewalks.
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> * * *
>
> (6) *Streets.*-
>
> (i) a dangerous condition of streets owned by the local agency, 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.

(Footnote continued on next page…)

The applicability of what exception applies is somewhat problematic because we do not know whether the land which was removed was in the Smithfield Street right-of-way or was land owned in fee by the County; but in either case, the County would still be liable. If it is under the "street" exception, the County created the dangerous condition when it widened the berm and removed eight tons of materials from the toe directly under Jordan's garage. It created a reasonably foreseeable risk of the kind of injury which was incurred, and

(continued…)

> (ii) a dangerous condition of streets owned or under the jurisdiction of Commonwealth agencies, if all of the following conditions are met:
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> (A) The local agency has entered into a written contract with a Commonwealth agency for the maintenance and repair by the local agency of such streets and the contract either:
>
> (i) had not expired or been otherwise terminated prior to the occurrence of the injury; or
>
> (ii) if expired, contained a provision that expressly established local agency responsibility beyond the term of the contract for injuries arising out of the local agency's work.
>
> (B) The injury and dangerous condition were directly caused by the negligent performance of its duties under such contract.
>
> (C) The claimant 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.

it could have taken measures to protect against the dangerous condition by removing the material correctly in the first place so that it would not collapse.

If it is not within the street exception, the "real property" exception would apply. That exception waives immunity for the negligent "care, custody or control" of real property in the possession of the local agency. Ownership of the real property is not required for possession to be found. *Sweeney v. Merrymead Farm, Inc.*, 799 A.2d 972 (Pa. Cmwlth. 2002). The meaning of possession within the real property exception is total control over the premises, evidencing a conscious, free choice that the property is necessary to carry out a governmental activity. *Gramlich v. Lower Southampton Twp.*, 838 A.2d 843 (Pa. Cmwlth. 2003). In this case, Mangretta testified that the County owned the areas where it removed the eight tons of dirt, and the trial court additionally found that it installed a french drain. Because by removing eight tons of material and installing a french drain the County assumed total care, custody and control of the property, the County's purported negligent conduct fell within that exception, even if the berm was not within the right-of-way. Consequently, the trial court did not err by refusing to dismiss Jordan's complaint on the basis that the County was immune.

The County argues next that Jordan failed to meet his burden of proving negligence because while it admits that it owns Smithfield Street and its environs, it denies that it caused the landslide. First, it contends that the trial court erred in finding that it installed a french drain based on Jordan's testimony. It argues that "[w]hile Appellee Jordan seemed certain that Allegheny County installed French drains at the bottom of the hillside, he could not think of the name

of the person who he spoke to while the work was being performed, despite the fact that the individual in question was supposedly a relative." (County's brief at 12.) Here, the trial court judge listened to all of the testimony, reviewed all of the evidence and even went to view the property. Simply because Jordan could not remember his step-uncle's name is not cause for us to disagree with the trial court's credibility determination. In any event, it seems that the removal of eight tons of material was the cause of the landslide, and the County admits that it removed that material from below Jordan's garage.

Finally, the County alleges that the trial court did not give sufficient weight to all of the County's witnesses. Specifically, the County alleges that the trial court failed to sufficiently weigh Mangretta's testimony when he stated that he could not recall that the County even performed the french drain work at or near Jordan's home because the pipe would have had to come out of his inventory. Also, Hayes testified that the landslide was caused by groundwater conditions. Finally, Smallhoover testified that the County did not do the work and that a water line permit had been taken out by Penn American Water Company. Also, there had been a break in the pavement indicating that the work was done by someone other than the County.

Contrary to the County's allegation, the trial court heard and considered all of the testimony. While Mangretta stated that he could not recall performing the french drain work, he did not dispute the maintenance logs that indicated that the County removed 16,000 pounds of dirt and debris from Jordan's hillside. Hayes also admitted at trial that the removal of the 16,000 pounds of dirt

and debris from the hillside could have triggered the landslide. Also, Smallhoover admitted that any work done at or near Jordan's property was done with the County's permission. Because it was within the discretion of the trial court to consider and weigh all of the testimony and evidence and it found the County liable for damages, we will not disturb that determination.

Accordingly, the order of the trial court is affirmed.

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DAN PELLEGRINI, JUDGE

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O R D E R

AND NOW, this 1st day of July, 2011, the order of the Court of Common Pleas of Allegheny County dated October 18, 2010, is affirmed.

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DAN PELLEGRINI, JUDGE