IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Sean Claar, Appellant	:	
v.	:	No. 2598 C.D. 2009
	:	Argued: April 20, 2010
Erik Moore, and Commonwealth of Pennsylvania, Department of Transportation, and Duquesne Light Company	:	

BEFORE: **HONORABLE BONNIE BRIGANCE LEADBETTER,** President Judge
HONORABLE P. KEVIN BROBSON, Judge
HONORABLE ROCHELLE S. FRIEDMAN, Senior Judge

OPINION NOT REPORTED

MEMORANDUM OPINION BY
PRESIDENT JUDGE LEADBETTER **FILED:** June 7, 2010

Sean Claar (Claar) appeals from an order of the Court of Common Pleas of Allegheny County that entered summary judgment in favor of Duquesne Light Company (Duquesne) and against Claar in his civil action seeking to recover for injuries sustained when a vehicle, in which he was a passenger, struck a utility pole owned by Duquesne. Claar challenges the entry of summary judgment, arguing that the evidence in the record was sufficient to submit the questions of Duquesne's breach of duty and the causal connection between the location of the utility pole and his injuries to a jury.

I.

Claar does not dispute the material facts set forth in Duquesne's

motion for summary judgment. On September 26, 2000, Claar was a passenger in a 1994 Chevrolet sedan driven by Erik Moore (Moore). The vehicle was travelling eastbound on Freedom Crider Road, a two-lane state road running generally in an easterly and westerly direction, in New Sewickley Township, Beaver County. The paved lanes of Freedom Crider Road are 19 feet 6 inches wide, and the shoulder along the eastbound lane is 5 feet wide, gradually sloping away from the edge of the lane and forming an embankment. The outer half of the shoulder is covered with loose gravel.

At approximately 2:34 p.m. that afternoon, Moore drove the vehicle off the eastbound lane of Freedom Crider Road onto the shoulder and lost control of the vehicle when he took his eyes off the road and directed his attention to Claar in the passenger seat. The vehicle then slid on the gravel surface of the shoulder and over the embankment, continued to travel 109 feet and struck Duquesne's utility pole located 8.7 feet from the edge of the eastbound lane. Claar sustained serious injuries in the accident. At the location of the accident, Freedom Crider Road turns left through an ascending curve, and the speed limit was 40 miles an hour. Moore was driving 40 to 45 miles an hour before the accident. The weather was clear, and the road surface was dry.

In October 2001, Claar commenced a civil action against Moore, the Department of Transportation and Duquesne. Claar alleged, *inter alia*, that Duquesne created a foreseeable and unreasonable risk of harm to the traveling public by placing the utility pole 8.7 feet from the edge of the eastbound lane. In March 2009, Duquesne filed a motion for summary judgment, alleging that the material facts were not in dispute and that it was entitled to judgment as a matter of law. Duquesne averred that the location of the pole did not pose a foreseeable and

unreasonable risk of harm to users of the roadway and that it did not breach any legal duty. It further averred that Moore's admitted failure to keep his eyes on the road, not the location of the pole, was the proximate cause of Claar's injuries. Claar "admitted that for the purposes of the Motion for Summary Judgment, the material facts stated [in the motion for summary judgment] are not in dispute." Claar's Response to the Motion for Summary Judgment at ¶ 11; Reproduced Record (R.R.) at 58a. He denied, however, that Duquesne was entitled to summary judgment under those facts. On June 12, 2009, the trial court granted Duquesne's motion and entered summary judgment in favor of Duquesne and against Claar.

Claar filed a motion for reconsideration, arguing that whether the location of the pole posed an unreasonable danger to travelers on the roadway should be decided by a jury. Claar attached to the motion a "Preliminary Report of the Sean Claar Crash" prepared by Lance E. Robson, P.E. on July 11, 2001. In the report, Robson stated that Duquesne's pole reduced the clear zone and posed a foreseeable danger to an errant vehicle and that Duquesne's failure to relocate or eliminate the pole was not in accordance with long-standing safety concepts. Claar also attached Robson's affidavit dated June 16, 2009, in which he stated that he authored the 2001 report and that his statements in the report were true and correct. The trial court then vacated the June 12, 2009 order granting summary judgment, directed the parties to file briefs and scheduled oral argument on the motion for reconsideration.

After argument, the trial court denied the motion for reconsideration and reinstated the entry of summary judgment. At Claar's request, the court amended the order and certified it as an appealable final order pursuant to Pa. R.A.P. 341(c), stating that an immediate appeal would facilitate a resolution of the

entire case. Claar appealed the trial court's order to the Superior Court. On October 29, 2009, the trial judge ordered Claar to file a statement of matters complained of on appeal and serve it upon the trial judge and the parties within 21 days pursuant to Pa. R.A.P. 1925(b)(1). On November 18, 2009, Claar erroneously filed a Rule 1925(b) statement with the Superior Court instead of the court of common pleas. A copy of the Rule 1925(b) statement filed with the Superior Court, however, was delivered to the trial judge's chambers the same day and timely served upon the parties. In the Rule 1925(b) statement, Claar argued that whether the location of the pole created an unreasonable risk should be decided by a jury and that the trial court erred in refusing to consider Robson's report and affidavit. The Superior Court transferred the appeal to this Court, along with Duquesne's motion to quash challenging the trial court's certification of the order for appeal. This Court subsequently denied Duquesne's motion to quash.[1]

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[1] The trial judge stated that "[i]t is very possible that [Claar] has waived all issues on appeal" because he filed the Rule 1925(b) statement with the Superior Court, not with the trial court. Trial Court's Opinion at 1. Duquesne argues that Claar has waived all issues due to his failure to comply with the trial court's order directing him to file a Rule 1925(b) statement with the trial court. Rule 1925(b), as amended in 2007, provides in relevant part:

> If the judge entering the order giving rise to the notice of appeal ("judge") desires clarification of the errors complained of on appeal, the judge may enter an order directing the appellant to file of record in the trial court and serve on the judge a concise statement of the errors complained of on appeal ("Statement").
>
> (1) *Filing and service.*—Appellant shall file of record the Statement and concurrently shall serve the judge. Filing of record and service on the judge shall be in person or by mail ….
>
> (2) *Time for filing and service.*—The judge shall allow the appellant at least 21 days from the date of the order's entry on the docket for the filing and service of the Statement. Upon application of the appellant and for good cause shown, the judge may enlarge the time period initially specified or permit an

(Footnote continued on next page…)

II.

Claar argues that the trial court erred in entering summary judgment in favor of Duquesne when the evidence in the record was sufficient to submit to the jury the question of whether the location of the pole created a foreseeable and unreasonable risk. Claar submits that "[t]he slight deviation" of Moore's vehicle from the paved lane was not an unforeseeable or extraordinary event relieving Duquesne from liability. Claar's Brief at 12.

After the close of relevant pleadings, any party may move for summary judgment in whole or in part under the following circumstances:

> (1) whenever there is no genuine issue of any material fact as to a necessary element of the cause of

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(continued…)

> amended or supplemental Statement to be filed. In extraordinary circumstances, the judge may allow for the filing of a Statement or amended or supplemental Statement nunc pro tunc.

Duquesne maintains that the timely delivery of a copy of the Rule 1925(b) statement filed with the Superior Court to the trial judge does not preclude application of the bright-line, automatic waiver rule adopted in *Commonwealth v. Lord*, 553 Pa. 415, 719 A.2d 306 (1998), and *Commonwealth v. Butler*, 571 Pa. 441, 812 A.2d 631 (2002), and reaffirmed in *Commonwealth v. Castillo*, 585 Pa. 395, 888 A.2d 775 (2005). Claar counters that his inadvertent filing of the statement with the Superior Court did not result in prejudice to the trial judge because the trial judge was timely served a copy of the statement. Claar cites *Tucker v. R.M. Tours*, ___ Pa. ___, 977 A.2d 1170 (2009), holding that the trial court had the discretion to *sua sponte* direct the appellant to file a supplemental Rule 1925(b) statement to clarify non-concise statements of issues contained in the timely filed initial statement. The 2007 amendment to Rule 1925(b) grants the trial judge discretion to enlarge the time period within which to file a Rule 1925(b) statement and to allow an appellant to file a statement or an amended or supplemental statement nunc pro tunc in extraordinary circumstances. The Superior Court has noted that the current version of Rule 1925 "eliminated the automatic-waiver rule inherent in the previous version." *Commonwealth v. Hopfer*, 965 A.2d 270, 272 (Pa. Super. 2009). We find it unnecessary to address the effect of the 2007 amendment on the automatic waiver rule or Duquesne's waiver argument because Claar cannot prevail on the issues raised in the Rule 1925(b) statement, even if he has properly preserved the issues under Rule 1925(b).

> action or defense which could be established by additional discovery or expert report, or
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> (2) if, after the 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.

Pa. R.C.P. No. 1035.2. The nonmoving party may not rest upon the mere allegations or denials of the pleadings but must file a response within thirty days after service of the motion, identifying:

> (1) one or more issues of fact arising from evidence in the record controverting the evidence cited in support of the motion or from a challenge to the credibility of one or more witnesses testifying in support of the motion, or
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> (2) evidence in the record establishing the facts essential to the cause of action or defense which the motion cites as not having been produced.

Pa. R.C.P. No. 1035.3(a).

The party moving for summary judgment has the initial burden of proving that no genuine issue of material fact exists. *Case v. Lower Saucon Twp.*, 654 A.2d 57 (Pa. Cmwlth. 1995). Factual issues are "material" for the purpose of summary judgment, if their resolution could affect the outcome of the case under the governing law. *Strine v. Med. Care Availability & Reduction of Error Fund*, 586 Pa. 395, 894 A.2d 733 (2006). A properly supported motion for summary judgment "may 'pierce the pleadings' and require the non-moving party to disclose the facts on which [h]is or her claim is based." *Case*, 654 A.2d at 59 [quoting *Elder v. Nationwide Ins. Co.*, 599 A.2d 996, 1000 (Pa. Super. 1991)]. Summary judgment may be granted when, viewing all the facts in the light most favorable to the nonmoving party and resolving all doubt as to the existence of any material fact

against the moving party, the moving party is entitled to judgment as a matter of law. *McCarthy v. City of Bethlehem*, 962 A.2d 1276 (Pa. Cmwlth. 2008), *appeal denied*, ___ Pa. ___, 983 A.2d 1250 (2009). Summary judgment may be granted only when the moving party's right is clear and free from doubt. *Id.*

In order to support a cause of action for negligence, a plaintiff must prove: (1) a defendant's duty or obligation recognized by law; (2) a breach of that duty or obligation; (3) a causal connection between the defendant's conduct and the resulting injury; and (4) an actual loss or damage. *R.W. v. Manzek*, 585 Pa. 335, 888 A.2d 740 (2005). The actor's negligent conduct constitutes a proximate cause of harm to others if the conduct is a substantial factor in bringing about the harm. *Taylor v. Jackson*, 643 A.2d 771 (Pa. Cmwlth. 1994).[2]

It has long been the law of this Commonwealth that utility companies are liable for harm caused by the negligent placement and maintenance of utility poles. *Nelson v. Duquesne Light Co.*, 338 Pa. 37, 12 A.2d 299 (1940); *Scalet v. Bell Tel. Co. of Pa.*, 291 Pa. 451, 140 A. 141 (1928). In *Nelson*, the Court set forth the standard for imposing liability upon utility companies:

The poles, if placed and maintained with due regard for

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[2] In determining whether the actor's negligent act was a substantial factor in bringing about the harm, the following considerations are important: (1) the number of other factors which contributed in producing the harm and the extent of the effect which they have in producing it; (2) whether the actor's conduct created a force or series of forces which were in continuous and active operation up to the time of the harm, or created a situation harmless unless acted upon by other forces for which the actor was not responsible; and (3) lapse of time. *Vattimo v. Lower Bucks Hosp., Inc.*, 502 Pa. 241, 465 A.2d 1231 (1983); Restatement (Second) of Torts § 433 (1965). An intervening negligent act will not be a superseding cause relieving the original negligent actor from liability "*if* that actor at the time of his negligent act *should have realized* that another person's negligence might cause harm; or, if a *reasonable man* would not regard the occurrence of the intervening negligence as *highly extraordinary*; or, if the intervening act is not *extraordinarily negligent*." *Flickinger Estate v. Ritsky*, 452 Pa. 69, 75, 305 A.2d 40, 43 (1973) (emphasis in original).

> the public safety, are not unlawful obstructions. They are obstructions incidental to the exercise of a statutory right. The statute has not said, however, where the poles shall be located. *The implied condition is therefore attached that they must be so located as to avoid unreasonable and unnecessary danger to travelers upon the highway. … The question is whether the place chosen is so dangerous and the danger so needless that the choice becomes unreasonable.* … The question, therefore, is whether there is any evidence that … when the accident occurred, the location of these poles was dangerous, and that the danger was unreasonable.

Nelson, 338 Pa. at 45-46, 12 A.2d at 303 [quoting *Stern v. Int'l Ry. Co.*, 220 N.Y. 284, 291-93, 115 N.E. 759, 761 (1917)] (emphasis added in *Nelson*).

The question of whether a utility pole is placed so closely to the road as to pose a danger to the traveling public "is generally a question of fact to be determined by the jury after considering a variety of circumstances, including the narrowness and general contours of the road, the presence or absence of reflective mark, the proximity of the pole to the road, the availability of less dangerous locations." *Talarico v. Bonham,* 650 A.2d 1192, 1194 (Pa. Cmwlth. 1994). However, "the question of the sufficiency of the evidence before presenting a question to the jury is clearly within the discretion of the trial judge." *Farnese v. Se. Pa. Transp. Auth.,* 487 A.2d 887, 890 (Pa. Super. 1985).

The material facts in this case, which are admitted by Claar and supported by his own allegations and deposition testimony and Moore's deposition testimony, establish that neither the location of the pole nor the contours of the road contributed to Moore's losing control of the vehicle. As admitted by Claar, "the contours of Freedom Crider Road are plain and essentially flat, curving to the left." Claar's Response to the Motion for Summary Judgment at ¶ 15; R.R. at 59a. The accident occurred in the mid-afternoon, and the road surface was dry. The

weather did not affect Moore's driving. Moore's Deposition at 20. Moore drove off the paved lane and lost control of his vehicle because he was distracted. He was cited for careless driving after the accident. Police Chief Dale Kryder's Deposition at 26. In addition, the record is devoid of any prior incidences of vehicles going off the road in the same area.

In *Novak v. Kilby*, 647 A.2d 687 (Pa. Cmwlth. 1994), the Court considered whether the telephone company should be held liable under similar facts. In that case, Novak sustained severe injuries when he lost control of his car, crossed the opposing lane of traffic and struck the guardrail and the pole located five and one-half feet from the paved lane. In affirming the grant of summary judgment in favor of the telephone company, the Court stated:

> Nothing in the record indicates that Novak needed to swerve to avoid the pole or that the natural layout of the road funnelled cars toward the pole. Where, as here, the pole has existed without incident for nearly 50 years and the pole's location did not contribute to Novak's losing control of the car and leaving the roadway, it cannot be said that the placement of the pole breached the telephone company's duty to Novak as a traveler on the road. Furthermore, we believe that the causal connection between the location of the pole and Novak's injuries is too remote for liability to attach and that the telephone company's actions cannot, therefore, be considered the proximate cause of Novak's injuries.

Id. at 691.

The Court was also presented with similar facts in *Caldwell v. Department of Transportation*, 548 A.2d 1284 (Pa. Cmwlth. 1988). In that case, the passenger was injured when the vehicle strayed from the paved portion of the highway after the driver steered the vehicle to the right to avoid a deer, struck a drainage culvert and then sideswiped a telephone pole located 8 feet from the

paved portion of the highway. The Court affirmed the grant of summary judgment in favor of the telephone company, holding:

> The extraordinariness of the series of events was sufficient to constitute a risk unforeseeable to Bell and thus relieve Bell from liability. … Bell's duty not to incommode or unreasonably interfere with public use of highways and roads does not extend to vehicles which … completely leave the highway out of control due to extraordinary occurrences which are unforeseeable to Bell.

Id. at 1286. *See also Beck v. Zabrowski*, 650 A.2d 1152 (Pa. Cmwlth. 1994) (the entry of summary judgment against the decedent was affirmed where the decedent, before striking a pole, drove under the influence of alcohol at an excessive speed and without turning headlights on while attempting to flee from the police).

As in the above cases, the evidence in this case is not sufficient to submit the questions of Duquesne's breach of duty and the causal relationship between the location of the pole and Claar's injuries to the jury. Duquesne's duty to locate a utility pole to avoid an unreasonable and unnecessary danger to travelers on the roadway did not extend to Claar who was injured because the vehicle left the lane of travel out of control due to Moore's negligent driving and continued to travel more than 100 feet before striking the pole. Such events cannot be considered risks of harm that were reasonably foreseeable to Duquesne. Further, the causal connection between the location of the pole and Claar's injuries sustained under such events is too remote to impose liability upon Duquesne. Hence, the trial court did not abuse its discretion in granting summary judgment in favor of Duquesne and against Claar.[3]

[3] Contrary to Claar's assertion, this case does not present a factual situation where the vehicle deviated slightly from the lane of travel and struck a utility pole located in close **(Footnote continued on next page…)**

III.

Claar next argues that the trial court erred in failing to consider Robson's report and affidavit attached to the motion for reconsideration. Claar claims that the trial court effectively permitted him to obtain Robson's affidavit by vacating its prior order granting the motion for summary judgment. In support, he cites Pa. R.C.P. No. 1035.3(c), which provides that "[t]he court may rule upon the motion for judgment or permit affidavits to be obtained, depositions to be taken or other discovery to be had or make such other order as is just."

A party opposing a motion for summary judgment must file a response within 30 days after service of the motion, identifying evidence in the record controverting the evidence cited in the motion or evidence establishing facts supporting a cause of action. Pa. R.C.P. No. 1035.3(a). A party opposing the motion may also "supplement the record or set forth the reasons why the party

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proximity to the lane, as in *Scheel v. Tremblay*, 312 A.2d 45 (Pa. Super. 1973), relied on by Claar. In *Scheel*, passengers were injured when the vehicle, traveling in an easterly direction on a narrow road with sharp "corkscrew" curves, steered slightly to the right and struck a utility pole located only 10 inches from the paved portion of the road. The evidence showed that a rock protruded from the adjacent land and overhung the road at a curve about 50 to 75 feet west of the utility pole. To avoid the rock, drivers on the westbound lane had a natural tendency to veer slightly into the middle and eastbound lane, and drivers in the eastbound lane tended to steer to the shoulder to allow westbound traffic to pass. The evidence also showed that there had been a large number of accidents at that location in the past. The Court reversed the grant of summary judgment in favor of the utility company, concluding that "a slight deviation" of the vehicle from the paved portion of the road should not be such an extraordinary event as to bring the case within the narrow class of cases which should be taken from a jury. *Id.* at 48. Unlike in *Scheel*, Moore's vehicle left the paved lane out of control due to his negligence, not due to the contours of Freedom Crider Road. The vehicle traveled 109 feet after leaving the lane before striking the pole, which was 8.7 feet away from the road. Thus, this case is more similar to *Novack* and *Caldwell*, and they are controlling on this issue.

cannot present evidence essential to justify opposition to the motion and any action proposed to be taken by the party to present such evidence." Pa. R.C.P. No. 1035.3(b). Claar does not dispute that Robson's report had been available since 2001. In his response to the motion for summary judgment, Claar admitted all the material facts stated in the motion and failed to identify or submit Robson's report or any other evidence supporting his cause of action. Nor did he seek to supplement the record or provide an explanation as to why he was unable to do so. Further, the trial court vacated the order granting summary judgment to permit the parties to file briefs and to "hear additional argument," not to permit Claar to present additional evidence. Trial Court's January 10, 2010 Opinion at 2. *See also* Trial Court's June 23, 2009 Order; R.R. at 195a.

In *Henninger v. State Farm Insurance, Co.*, 719 A.2d 1074 (Pa. Super. 1998), the trial court granted State Farm's motion for summary judgment because Henninger failed to identify evidence in the record supporting her claims. Henninger filed a motion for reconsideration, arguing that the transcripts of her treating physician's depositions submitted to the trial court with the motion for reconsideration supported her claims. In rejecting her argument, the Superior Court stated:

> There is no record evidence indicating that the transcripts of these depositions were unavailable to Henninger when State Farm filed its summary judgment motion …. Because Henninger filed the deposition transcripts after the thirty-day window that Rule 1035.3 provides had closed, they were filed in an untimely manner. Consequently, the deposition transcripts cannot be considered with reference to whether Henninger adequately supported her opposition brief.

Id. at 1076-77. Likewise, the trial court did not abuse its discretion in refusing to consider the untimely filed Robson's report and affidavit in reinstating the entry of

summary judgment.

Accordingly, the order of the trial court reinstating the entry of summary judgment in favor of Duquesne and against Claar is affirmed, and this matter is remanded for further proceedings.

BONNIE BRIGANCE LEADBETTER,
President Judge

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Sean Claar, Appellant	:	
v.	:	No. 2598 C.D. 2009
Erik Moore, and Commonwealth of Pennsylvania, Department of Transportation, and Duquesne Light Company	:	

O R D E R

AND NOW, this 7th day of June, 2010, the order of the Court of Common Pleas of Allegheny County in the above-captioned matter is hereby AFFIRMED, and this matter is REMANDED for further proceedings.

Jurisdiction relinquished.

BONNIE BRIGANCE LEADBETTER,
President Judge