

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

John Howard,	:	
	:	
Appellant	:	
	:	
v.	:	
	:	
	:	
Southeastern Pennsylvania	:	No. 361 C.D. 2011
Transportation Authority	:	Submitted: July 22, 2011

BEFORE: HONORABLE DAN PELLEGRINI, Judge
HONORABLE MARY HANNAH LEAVITT, Judge
HONORABLE JOHNNY J. BUTLER, Judge

OPINION NOT REPORTED

MEMORANDUM OPINION BY
JUDGE BUTLER

FILED: August 15, 2011

John Howard (Howard) appeals the February 22, 2011 order of the Court of Common Pleas of Philadelphia County (trial court) granting the motion for summary judgment filed by Southeastern Pennsylvania Transportation Authority (SEPTA). The issues before this Court are: 1) whether the trial court erred in determining that Howard waived his issue pertaining to applicability of the real estate exception to sovereign immunity, and 2) whether the trial court erred in determining that Howard's claim does not fall within the vehicle exception to sovereign immunity. For the reasons that follow, we affirm the trial court's order.

On August 4, 2009, Howard filed a complaint seeking damages for personal injuries allegedly sustained on August 27, 2007 while exiting the R2 regional rail train at the Ridley Park SEPTA station. Howard claimed that he was caused to fall when SEPTA's driver failed to line up the train steps with the wooden platform. Specifically, Howard claimed:

The negligence and carelessness of Defendant SEPTA consisted of the following:

- (a) failing to have the Defendant's train under proper and adequate control;
- (b) positioning the train without due regard for the position and safety of the Plaintiff;
- (c) operating and positioning the train in a dangerous and unsafe manner;
- (d) failing to stop the train so that the steps of the train would line up with the station platform;
- (e) failing to align the train with the platform when [SEPTA] knew or should have known that in not doing so, the aforesaid accident would occur;
- (f) being negligent and careless as a matter of law by operating, moving and stopping the train in a careless manner; and
- (g) failing to see and have due regard for [Howard], while operating, moving and functioning the train and/or other parts thereof.

Reproduced Record (R.R.) at R-2 – R-3.

On September 16, 2009, SEPTA filed an answer with new matter asserting the sovereign immunity defense. The matter was submitted to arbitration on May 12, 2010,¹ following which the arbitration panel entered judgment in favor of SEPTA. Howard appealed the arbitration award. SEPTA filed a motion for summary judgment on August 31, 2010. The trial court issued an order and opinion on November 22, 2010 pursuant to Pa.R.A.P. 1925(a) and (b), granting SEPTA's motion for summary judgment, having found that Howard waived his argument under the real estate exception to sovereign immunity by failing to raise the issue prior to filing his 1925(b) Statement of Errors, and that Howard's claim does not fall within

¹ Howard was represented by counsel at arbitration.

the vehicle exception to sovereign immunity because Howard was not injured during the “operation” of a motor vehicle. Howard appealed to this Court, *pro se*.²

Howard argues that he did not waive the issue of the real estate exception to sovereign immunity because the purpose of his complaint was to present official record that SEPTA caused his injury, not to begin arguments of law. He further argues that the real estate exception was raised during arbitration and in SEPTA’s motion for summary judgment, thereby giving SEPTA plenty of time to defend such a claim. We disagree.

Pa.R.A.P. 302(a) provides: “Issues not raised in the lower court are waived and cannot be raised for the first time on appeal.” Howard’s complaint, filed with the assistance of counsel, only discussed SEPTA’s alleged negligence in regard to operating, moving and/or stopping the train. *See* R.R. at R-2 – R-3. The complaint does not mention the actual condition of the train platform at the time of his accident. Furthermore, Howard only mentions in his brief to this Court that the defects of real estate were raised at arbitration and in his response to SEPTA’s motion for summary judgment. He does not claim to have raised said defects in his complaint.

It is of no moment that SEPTA mentioned the real estate exception in its motion for summary judgment or at any other time during the proceedings. Pennsylvania is a specific fact-pleading state. *See* Pa.R.C.P. No. 1019. It is, therefore, the responsibility of a plaintiff to state all material facts in the complaint for any causes of action that he or she wants the court to consider. Moreover, Howard had the opportunity to seek leave of court to amend his pleading, pursuant to Pa.R.C.P. No. 1033, which he did not do. Because Howard did not set forth a claim

² “On appeal, in reviewing the trial court’s grant of summary judgment, we are limited to determining whether the trial court committed an error of law or abused its discretion.” *Davis v. Se. Pa. Transp. Auth.*, 980 A.2d 709, 711 n.3 (Pa. Cmwlth. 2009) *appeal granted*, __ Pa. __, 10 A.3d 898 (2010) (quotation marks omitted).

pursuant to the real estate exception to sovereign immunity at any point before his appeal to this Court, the trial court did not err in determining that he waived the issue.³

Howard also argues that the train driver's failure to stop in the correct place along the platform is considered part of the "operation" of the motor vehicle for purposes of the motor vehicle exception to sovereign immunity. We again disagree.

SEPTA's enabling statute provides that it is immune from suit unless a cause of action is encompassed by one of the sovereign immunity exceptions. 74 Pa.C.S. § 1711(c)(3). In relevant part, Section 8522(b)(1) of the Judicial Code provides that:

The following acts by a Commonwealth party may result in the imposition of liability on the Commonwealth and the

³ Even assuming *arguendo* that Howard did not waive the issue of the real estate exception, he would not prevail on the issue. Section 8522(b)(4) of the Judicial Code provides:

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, except conditions described in paragraph (5).

42 Pa.C.S. § 8522(b)(4) (emphasis added). Howard specifically stated in his deposition testimony that nothing about the blacktop he stepped onto caused his fall. R.R. at R-15. He alleged no dangerous condition of Commonwealth agency real estate. Therefore, Howard's admission concerning the condition of the blacktop onto which he stepped removes his claim from any potential eligibility under the real estate exception to sovereign immunity.

defense of sovereign immunity shall not be raised to claims for damages caused by:

(1) Vehicle liability. -- The operation of any motor vehicle in the possession or control of a Commonwealth party. As used in this paragraph, ‘motor vehicle’ means any vehicle which is self-propelled and any attachment thereto, including vehicles operated by rail, through water or in the air. . . .

42 Pa.C.S. § 8522(b)(1). “[E]xceptions to immunity are to be narrowly construed.” *Simko v. Cnty. of Allegheny*, 869 A.2d 571, 574 (Pa. Cmwlth. 2005). The Supreme Court of Pennsylvania has defined “operation,” for purposes of the motor vehicle exception with the following language:

[T]o operate something means to actually put it in motion. Merely preparing to operate a vehicle, or acts taken at the cessation of operating a vehicle are *not* the same as actually operating that vehicle. . . . Getting into or alighting from a vehicle are merely acts ancillary to the actual operation of that vehicle.

Love v. City of Phila., 518 Pa. 370, 375, 543 A.2d 531, 533 (1988); *see also Bottoms v. Se. Pa. Transp. Auth.*, 805 A.2d 47, 49 (Pa. Cmwlth. 2002). This Court has extended the definition of operation to include “[t]he movement of parts of a vehicle, or an attachment to a vehicle” *Sonnenberg v. Erie Metro. Transit Auth.*, 586 A.2d 1026, 1028 (Pa. Cmwlth. 1991). Further, although Pennsylvania courts have held that the temporary stoppage of motor vehicles due to traffic does fall within the exception, as in *Vogel v. Langer*, 569 A.2d 1047 (Pa. Cmwlth. 1990), “a temporary stop connected to the discharge of passengers is not part and parcel of the operation of a vehicle.” *Warrick v. Pro Cor Ambulance, Inc.*, 709 A.2d 422, 427 (Pa. Cmwlth. 1997), *aff’d*, 559 Pa. 44, 739 A.2d 127 (1999). Finally, in *Royal v. Se. Pa. Transp. Auth.*, 10 A.3d 927 (Pa. Cmwlth. 2010), this Court clearly summarized the law relating to the operation of a motor vehicle for purposes of the motor vehicle

exception by holding that “[n]o movement of the bus, part of the bus, or attachment to the bus caused [the appellant’s] injury. Therefore, as a matter of law, the bus was not in operation at the time of [the appellant’s] fall and the vehicle liability exception to sovereign immunity was inapplicable.” *Royal*, 10 A.3d at 931.

Howard testified that the train was at a complete stop and the doors were open when he stepped down onto the blacktop. Clearly, the train was not in operation as defined by this Court for purposes of the motor vehicle exception.

Howard also contends that case law provides that SEPTA had a duty of care when enabling passengers to alight safely from its vehicles, citing *Brown v. Beaver Valley Motor Coach Co.*, 365 Pa. 578, 76 A.2d 403 (1950) and *O’Malley v. Laurel Line Bus Co.*, 311 Pa. 251, 166 A. 868 (1933). The distinguishing factor between those cases and the case at bar is that, in those cases, the common carrier was not an instrumentality of the Commonwealth immune from suit. The duty of care requirement is not a determining factor in deciding whether a claim falls within one of the exceptions to sovereign immunity. In the cases Howard relies upon, the common carriers were not protected by sovereign immunity. Thus, the trial court did not err in determining that Howard’s claim did not fall within the motor vehicle exception to sovereign immunity.

For the reasons stated above, the order of the trial court is affirmed.

JOHNNY J. BUTLER, Judge

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ORDER

AND NOW, this 15th day of August, 2011, the February 22, 2011 order of the Court of Common Pleas of Philadelphia County is affirmed.

JOHNNY J. BUTLER, Judge