

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

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| Ouris Foye, | : | |
| | : | |
| Appellant | : | |
| | : | |
| v. | : | No. 505 C.D. 2010 |
| | : | Submitted: January 7, 2011 |
| Southeastern Pennsylvania | : | |
| Transportation Authority and | : | |
| Richard McNeil | : | |

OPINION NOT REPORTED

MEMORANDUM OPINION
PER CURIAM

FILED: February 16, 2011

Ouris Foye (Foye), *pro se*, appeals from the February 22, 2010, order of the Court of Common Pleas of Philadelphia County, First Judicial District of Pennsylvania (trial court), which granted the motion for summary judgment filed by Southeastern Pennsylvania Transportation Authority (SEPTA) and Richard McNeil (McNeil) (collectively, Appellees) and entered judgment in Appellees' favor. We affirm.

On February 12, 2009, Foye filed a civil complaint against Appellees in Philadelphia County, alleging as follows. On September 27, 2007, he was a passenger on a SEPTA elevated train traveling westbound in Philadelphia. (Complaint, ¶ 6.) After the train arrived at the SEPTA underground station at 40th and Market Streets, he and the other passengers were required to exit the train due to construction occurring on one of the tracks. (*Id.*, ¶ 7.) Foye left the train and began walking up the stairs to street level. (*Id.*, ¶ 8.) Absent any provocation, McNeil, a SEPTA police officer, brutally assaulted and battered Foye. (*Id.*, ¶¶ 4, 9.) McNeil

filed a police report against Foye for engaging in criminal disorderly conduct, but, after McNeil failed to appear at Foye's preliminary hearing, the criminal charges were dropped. (*Id.*, ¶¶ 10-11.)

According to Foye, McNeil was acting within the scope of his employment when he assaulted and battered Foye and engaged in the outrageous conduct for which Foye seeks both compensatory and punitive damages. (*Id.*, ¶¶ 13-20.) Foye further alleged that SEPTA was negligent and breached its duty in directing, training, supervising and controlling McNeil properly and in hiring him despite its knowledge of his proclivity for the use of unnecessary force. (*Id.*, ¶¶ 21-25.)

In response, Appellees denied liability and raised the defense of sovereign immunity pursuant to sections 8521 and 8522 of the Judicial Code (Code), 42 Pa. C.S. §§8521-22. Appellees then filed a motion for summary judgment, alleging that the complained-of conduct does not fall within any of the exceptions to immunity. Foye responded that Appellees' conduct, as alleged in his complaint, comes within the real estate exception to immunity because "he was walking on a SEPTA platform when he was assaulted and arrested by Defendant McNeil, SEPTA's agent. That is, [Foye] was using SEPTA realty when the negligent act of a SEPTA agent caused him to suffer injuries. The Commonwealth realty was unsafe due to the Commonwealth's negligence." (Brief in Support of Response to Motion for

Summary Judgment at 2.) The trial court thereafter granted Appellees' summary judgment motion. Foye then appealed to this court.¹

On appeal,² Foye asserts that the trial court erred in granting summary judgment because Appellees did not meet the criteria required by Pa. R.C.P. No. 1035.2.³ We disagree.

Pa. R.C.P. No. 1035.2 provides:

After the relevant pleadings are closed, but within such time as not to unreasonably delay trial, any party may move for summary judgment in whole or in part as a matter of law

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

¹ Foye filed his notice of appeal on March 23, 2010. On May 24, 2010, the trial court ordered Foye to file a statement of errors complained of on appeal, in accordance with Pa. R.A.P. 1925(b). The trial court thereafter contended in its opinion, issued pursuant to Pa. R.A.P. 1925(a), that Foye filed his 1925(b) statement belatedly and, therefore, his appeal should be dismissed. Even so, the trial court also stated that, should we permit Foye's appeal to proceed, "immunity was not waived" in this case. (Tr. Ct. Op. at 3.) Because Appellees do not argue that Foye's appeal should be dismissed, we reach the merits of this matter.

² Our review of a grant of summary judgment is limited to a determination of whether the trial court abused its discretion or committed an error of law. *Davis v. City of Philadelphia*, 650 A.2d 1127, 1128 n.3 (Pa. Cmwlth. 1994).

³ To the extent that Foye attempts to raise other issues (*e.g.*, that SEPTA cannot claim sovereign immunity because SEPTA is not a federal agency and that Appellees' actions violated his constitutional rights, including his rights under the Americans with Disabilities Act, 42 U.S.C. §§12131-12165), we note that Foye failed to include these issues in his complaint or in his response to Appellees' motion for summary judgment, as well as in his "statement of issues" in his brief to this court. Hence, they are waived. *See* Pa. R.A.P. 302(a); Pa. R.A.P. 2116(a).

action or defense which could be established by additional discovery or expert report, or

(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.

For summary judgment purposes, an issue of fact is material if its resolution could affect the result of the case under the controlling law. *McCarthy v. City of Bethlehem*, 962 A.2d 1276, 1278 (Pa. Cmwlth. 2008), *appeal denied*, 603 Pa. 706, 983 A.2d 1250 (2009). Summary judgment may be granted when, viewing all of the facts in the light most favorable to the non-moving party and resolving all doubt regarding the existence of a material fact against the moving party, the moving party is entitled to judgment as a matter of law. *Id.* Summary judgment is proper only when the right of the moving party is clear and free from doubt. *Id.*

Moreover, the law is clear that SEPTA is a Commonwealth party that enjoys sovereign immunity except where that immunity has been specifically waived. *Clark v. Southeastern Pennsylvania Transportation Authority*, 691 A.2d 988, 991 (Pa. Cmwlth. 1997). Section 8522(a) of the Code, 42 Pa. C.S. §8522(a), provides that, in certain limited circumstances, the General Assembly has waived sovereign immunity “for damages arising out of a negligent act where the damages would be recoverable under the common law or a statute creating a cause of action if the injury were caused by a person not having available the defense of sovereign immunity.” Further, section 8522(b) of the Code, 42 Pa. C.S. §8522(b), enumerates the exceptions to immunity as follows: (1) vehicle liability; (2) medical-professional

liability; (3) care, custody or control of personal property; (4) Commonwealth real estate, highways and sidewalks; (5) potholes and other dangerous conditions; (6) care, custody or control of animals; (7) liquor store sales; (8) National Guard activities; and (9) toxoids and vaccines.

Here, Foye sued Appellees for conduct that does not come within any exception to sovereign immunity. First, Foye's complaint of assault and battery by McNeil alleges intentional acts, but the law is clear that SEPTA can only be held liable for damages arising out of negligent actions. *Clark*, 691 A.2d at 992. Second, Foye's complaint that SEPTA negligently directed, trained, supervised, controlled and hired McNeil also fails to come within any applicable exception to sovereign immunity. *Id.* Although Foye asserted that the real estate exception was applicable in this case, for that exception to apply, he must have alleged that "an artificial condition or defect of the real estate itself caused the injury." *Id.* This he did not do, nor could he successfully have done so, because "allegations of failure to supervise or train others are not allegations of a condition of the land itself." *Id.*

Therefore, even viewing all of the facts in the light most favorable to Foye, and resolving all doubt regarding the existence of a material fact in his favor, Appellees are nonetheless entitled to judgment as a matter of law. Accordingly, we affirm.

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| Transportation Authority and | : | |
| Richard McNeil | : | |

PER CURIAM

ORDER

AND NOW, this 16th day of February, 2011, the order of the Court of Common Pleas of Philadelphia County, First Judicial District of Pennsylvania, dated February 22, 2010, is hereby affirmed.