IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Sonia Boniscavage and John Boniscavage, her husband,	:	
Appellants	:	
v.	:	No. 1318 C.D. 2009
	:	Submitted: September 13, 2010
Borough of Gilberton and Pennsylvania State Police,	:	

BEFORE: HONORABLE BONNIE BRIGANCE LEADBETTER, President Judge
HONORABLE P. KEVIN BROBSON, Judge
HONORABLE JIM FLAHERTY, Senior Judge

OPINION NOT REPORTED

MEMORANDUM OPINION
BY SENIOR JUDGE FLAHERTY FILED: November 19, 2010

Sonia Boniscavage (Mrs. Boniscavage) and John Boniscavage (Mr. Boniscavage)(Collectively, Appellants) appeal from orders of the Court of Common Pleas of Schuylkill County (trial court) dated May 13, 2008 and June 4, 2009, which granted the motions of the Pennsylvania State Police (PSP) and the Borough of Gilberton (Borough)(Collectively, Appellees) for judgment on the pleadings. We affirm.

Early in the morning on June 28, 2006, Mrs. Boniscavage left her home in Girardville, Schuylkill County for work in Frackville, Schuylkill County. Mrs. Boniscavage took the Gilberton on-ramp onto Southbound State Route 924 (S.R. 924). Within moments of entering S.R. 924, Mrs. Boniscavage drove her

vehicle into a 50 foot deep and 50 foot in diameter, sink hole which had developed in the southbound lane of travel of S.R. 924 in Schuylkill County. There were no warning signs or barricades to prevent Mrs. Boniscavage from entering and travelling southbound on S.R. 924.

At the time Mrs. Boniscavage's vehicle fell into the sink hole, S.R. 924 was closed to all southbound traffic coming from the north out of Shenandoah, Schuylkill County and all northbound traffic coming from the south out of Frackville. However, no steps were taken by the Borough or the PSP to make sure that the on-ramps to S.R. 924 were closed to traffic at the Gilberton on-ramp, which Mrs. Boniscavage took to get onto S.R. 924.

On May 2, 2007, Appellants filed a personal injury complaint alleging that the Borough was negligent for not having sufficient police presence to monitor and prevent traffic from using the on-ramp at the Gilberton exit to travel onto S.R. 924; was negligent in dispatching its on-duty police officer to go to Selinsgrove to pick up water pumps; and was negligent for failing to contact the PSP in Frackville to advise the PSP to prevent traffic from entering onto S.R. 924 from the Gilberton on-ramp.

Appellants further alleged that the PSP was negligent in failing to travel S.R. 924 after being requested by the Borough to monitor police calls and to cover for the Borough while its on-duty officer was traveling to Selinsgrove to pick up water pumps; was negligent in failing to take steps to block traffic from using the on-ramps to access S.R. 924 at a time when the PSP knew S.R. 924 was closed to traffic from the north and from the south; and was negligent in failing to patrol S.R. 924 which would have permitted the PSP to discover and take steps necessary

to protect the public, including Mrs. Bonsicavage, from the large sink hole which had developed.

Appellants alleged that as a result of the negligence of the Borough and the PSP, Mrs. Bonsicavage suffered personal injuries consisting of contusions, abrasions and a fractured sternum. Appellants also asserted claims for medical expenses, physical pain and suffering, mental distress and suffering, and loss of life's pleasures.

PSP and Borough each filed an answer and new matter. After the pleadings were closed, the PSP filed a motion for judgment on the pleadings. Appellants responded. On May 13, 2008, the trial court granted the PSP's motion for judgment on the pleadings.

The Borough later filed a motion for judgment on the pleadings. Again, Appellants filed a brief in opposition. On June 4, 2009, the trial court granted the Borough's motion for judgment on the pleadings. Appellants appealed to this court.[1]

Appellants contend that the trial court erred in granting Appellees' motions for judgment on the pleadings. Judgment on the pleadings should only be granted in cases where the moving party's right to succeed is certain and the case is so free from doubt that a trial would clearly be a fruitless exercise. City of Philadelphia v. Hennessey, 411 A.2d 567 (Pa. Cmwlth. 1980).

Initially, Appellants allege that the trial court erred in granting the PSP's motion for judgment on the pleadings. Appellants point out that the trial

[1] Our review of the trial court's order granting judgment on the pleadings is limited to determining whether the trial court committed an error of law or abused its discretion. Baker v. Hawks, 560 A.2d 939 (Pa. Cmwlth. 1989).

court did not issue an opinion regarding the PSP's motion for judgment on the pleadings.

The trial court did not write an opinion regarding the PSP's motion, but did write one in support of its order granting the Borough's motion. In that opinion, the trial court reasoned that the police owed no special duty of care to Mrs. Boniscavage so as to trigger liability, and further that the Borough was statutorily immune from damages under what is commonly known as the Political Subdivision Tort Claims Act (Act), 42 Pa. C.S. §§8541-8542, as the exception for dangerous conditions of streets did not apply because the sinkhole was in a state highway, not a road controlled by the Borough.

It is not essential for a trial court to write an opinion regarding every order when multiple orders are appealed. It is up to the appellate court, if it feels that it needs more of an explanation, to remand for such explanation. Here, there is sufficient information in both the record and opinion regarding the Borough's motion for judgment on the pleadings. Thus, we do not need to remand for the trial court to issue another opinion regarding the PSP.

Initially, we observe that "[p]ursuant to … the Constitution of Pennsylvania, … the Commonwealth, and its officials and employees acting within the scope of their duties, shall continue to enjoy sovereign immunity … except as the General Assembly shall specifically waive the immunity." 1 Pa. C.S. §2310. Here, Appellants claim that they pled a sufficient cause of action that came under the exception to sovereign immunity for sinkholes under 42 Pa. C.S. §8522.[2]

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[2] 42 Pa. C.S. §8522(b) provides in pertinent part as follows:

> (b) Acts which may impose liability.- The following acts by a Commonwealth party may result in the imposition of liability on

Footnote continued on next page…

Appellants maintain they did aver that the PSP had actual written notice, that Appellants did establish a duty on the part of the PSP, and that the PSP did have jurisdiction over S.R. 924.

Additionally, 42 Pa. C.S. §8522(a) provides that sovereign immunity is waived with respect to "damages arising out of a negligent act where the damages would be recoverable under the common law or statute creating a cause of action if the injury were caused by a person not having available the defense of sovereign immunity." Sections 8522(b)(4) and (5) contain exceptions to sovereign immunity where there is a dangerous condition of a highway, a reasonably foreseeable risk of injury and the Commonwealth agency, whose jurisdiction its under, gets prior actual written notice in sufficient time to protect against the dangerous condition. *See* Note 1, page 4-5, *supra*.

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

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(4) Commonwealth real estate, highways and sidewalks.- A dangerous condition of Commonwealth agency real estate…and highways under the jurisdiction of a Commonwealth agency, except conditions described in paragraph (5).

(5) Potholes and other dangerous conditions.- A dangerous condition of highways under the jurisdiction of a Commonwealth agency created by potholes or sinkholes or other similar conditions created by natural elements, 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 Commonwealth agency had actual written notice of the dangerous condition of the highway a sufficient time prior to the event to have taken measures to protect against the dangerous condition. Property damages shall not be recoverable under this paragraph.

In the case of sovereign immunity, Appellants must first show a duty owed to them. Although the police "have a common law duty to protect the public when carrying out their duties, … the failure to act generally is not considered a harm to an individual." Daubenspeck v. Pennsylvania State Police, 894 A.2d 867, 871 (Pa. Cmwlth. 2006).

In Daubenspeck, this court stated that the police have a duty to an individual only if they enter into a "special relationship" with that person. In order to prove a "special relationship," a party must show that the police were aware of "the individual's situation or unique status," that they "had knowledge of the potential for the harm the individual suffered, and voluntarily assumed, because of this knowledge, to protect the individual from the harm which occurred." Id.

The PSP, in Daubenspeck, were sued for damages because they failed to direct traffic around an icy patch of interstate highway. The state troopers, while investigating one ice-related crash, observed two others. They called for the Pennsylvania Department of Transportation (PennDOT) to correct the icy conditions, but left the scene before PennDOT arrived. Shortly after the troopers left, the accident occurred, with two fatalities. The trial court sustained preliminary objections in the nature of a demurrer and this court affirmed, holding, in part, that the plaintiffs had not pled that a special relationship existed between the PSP and the two decedents.

In the present controversy, Appellants allege that the PSP knew or should have known that S.R. 924 was being closed to traffic from the north and the south. Appellants further allege that the Borough had requested the PSP to monitor police calls and to cover for the Borough's on-duty officer. These well pled allegations of fact are to be taken as true. Thus, the Appellants contend that

they sufficiently stated a cause of action against the PSP, as the PSP had actual knowledge of the dangerous condition of S.R. 924.

The pleadings, however, do not establish that there was a "special relationship" between Mrs. Boniscavage and the PSP. There is no allegation that the PSP was aware of Mrs. Boniscavage's specific and unique situation or that the PSP voluntarily assumed the duty to protect her. Mrs. Boniscavage does not allege that the PSP had actual knowledge of the sink hole, only that they "knew or should have known" that the highway was closed. Mrs. Boniscavage alleged that the PSP failed to "travel and patrol" the highway in such a way as to "discover" the sinkhole, and otherwise "take steps to protect the public at large, including…[Mrs.] Boniscavage." Complaint at ¶ 22(b) and (c).

In Mindala v. American Motors Corp., 518 Pa. 350, 363, 543 A.2d 520, 527 (1988), the police chief went to a dangerous intersection where a stop sign was missing but failed to notify PennDOT and failed to use the warning devices which were on his vehicle, at the intersection. The Supreme Court found that, "since the township police possessed statutory authority to regulate traffic, had knowledge of the dangerous situation, and the capability to rectify the problem, a duty was created to reasonably exercise that authority and the failure to do so violated that duty." Id.

However, Mindala is distinguishable from the present controversy. In Mindala, although the Supreme Court ultimately concluded that the police department was immune from damages, it also concluded that a special relationship existed where a local police officer was notified of a missing stop sign and failed to contact PennDOT and failed to use his patrol car's warning devices to

warn motorist of the hazard, contrary to specific statutory authority to do so. Here, there is no factual allegation or references to specific statutory authority.

Appellants further cite to Socarras v. City of Philadelphia, 552 A.2d 1171, 1173 (Pa. Cmwlth.), appeal deined, 522 Pa. 608, 562 A.2d 829 (1989). In Socarras, the driver of a vehicle stalled in the middle lane of an interstate highway and tried to flag down a passing Philadelphia police officer. The officer saw the vehicle, did not stop, and shortly thereafter, the plaintiff's car ran into the stalled vehicle. Because of a departmental directive to render assistance in this situation and because of statutory authority to regulate traffic on the interstate highway, this court found that the police officer had a "duty owed not only to the occupants of the disabled vehicle, but also to approaching motorists who would foreseeably come into contact with the disabled vehicle." Id.

In the present controversy, the PSP had knowledge that S.R. 924 was closed to traffic and was also asked by the Borough to monitor police calls. Given the well-pled facts, the statutory basis for asserting a claim under 42 Pa. C.S. §8522, and the duty established pursuant to Mindala and Socarras, Appellants urge this court to find that the trial court erred and reverse the grant of judgment on the pleadings with regards to the PSP.

However, even if Appellants had established a duty by the PSP, Appellants' claim must fail because it is not within the enumerated exceptions to sovereign immunity. The exception under 42 Pa. C.S. §8522(b)(5), requires the Commonwealth agency to have actual written notice of a sinkhole in a sufficient time prior to the accident to have taken corrective measures. The complaint alleges that the "PSP knew or should have known that State Route 924 was being closed to traffic from the North at Shenandoah and to the South at Frackville," and

that the PSP "failed to travel and patrol State Route 924 in a manner which would have permitted Defendant PSP to discover and take steps to protect the public at large, including …[Mrs.] Boniscavage" from the large sinkhole. Complaint at ¶ 22(b) and (c).

Besides the notice problem, neither the specific exception which applies to sinkholes and potholes, nor the more general one which refers to "Commonwealth real estate, highways and sidewalks", 42 Pa. C.S. §8522(b)(4), is applicable here because the PSP is not the agency which has jurisdiction over the highway.

In Daubenspeck this court stated in pertinent part as follows:

> When using the phrase in the real estate exception 'and highways under the jurisdiction of a Commonwealth agency', the General Assembly meant jurisdiction by the Turnpike Commission, PennDot or another Commonwealth agency exercising control over the right-of-way of the highway of the type expressed in [the Pennsylvania Turnpike Northeast Extension act, Act of September 27, 1951, P.L. 1430,] *36 P.S. §§ 660.6(e) and (f)*, not merely a state agency undertaking some activity on the highway.
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> …By accepting responsibility for removing abandoned vehicles from the Turnpike, the State Police was only exercising its already assigned police function found at [Section 710(g) of the Administrative Code of 1929, Act of April 9, 1929, P.L. 177, as amended,] *71 P.S. § 250(g)*, which gives it the power to enforce the laws regulating the use of the highways of this Commonwealth.
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> Similarly, DOT has "exclusive authority and jurisdiction over all State designated highways" under Section 2002(a)(10) of the [Administrative] Code [of 1929], *71 P.S. [§] 512(a)(10)*. (Citation omitted, emphasis in original).

Daubenspeck, 894 A.2d at 873-74. This court concluded that even though the PSP responded to accidents and enforced the laws on an interstate highway, it did not have jurisdiction over it. Id. Thus, the PSP did not have jurisdiction and the trial court in this case did not err in granting the PSP's request for judgment on the pleadings.

Next, Appellants argue that the trial court erred in granting the Borough's motion for judgment on the pleadings. Appellants allege that the Borough knew or should have known that S.R. 924 had been closed to traffic, should have prevented motorists from using the on-ramp to S.R. 924, and failed to advise the PSP to keep motorists from driving onto S.R. 924.

The trial court concluded that S.R. 924 was not a highway owned by the Borough and, therefore, the Borough could not be liable under the streets exception to governmental immunity. However, pursuant to Mindala and Socarras, municipalities can be charged with a duty when their police officials have knowledge of dangerous conditions based on their duty and ability to regulate traffic but fail to act. Here, Appellants argue that its well-pled allegations regarding knowledge and duty required the trial court to deny the Borough's motion for judgment on the pleadings.

The Borough, however, had no duty or special relationship with Mrs. Boniscavage. The Borough police only have a common law duty to protect the public when carrying out their duties, and their failure to act generally cannot be considered to harm an individual. Peak v. Petrovich, 636 A.2d 1248 (Pa. Cmwlth. 1994). In Peak, this court determined in pertinent part as follows:

> [t]he no-duty rule provides that a police officer's obligation to protect the citizenry is a general duty owing

> to the public at large, and not a specific duty owing to particular persons.... If the police enter into a special relationship with an individual, however, the general duty owing to the public is narrowed into a specific duty owing to that person, the breach of which can give rise to a cause of action for damages.

Id. at 1252, citing, Morris v. Musser, 478 A.2d 937, 939-940 (Pa. Cmwlth. 1984).

In Peak, we stated that in proving a special relationship, a party must establish that the government entity was:

> 1. Aware of the individual's situation or unique status;
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> 2. Had knowledge of the potential for the particular harm the individual suffered; and
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> 3. Voluntarily assumed, in light of that knowledge, to protect the individual from the precise harm which was occasioned.

Peak, 636 A.2d at 1252-1253, citing, Rankin v. Southeastern Pennsylvania Transportation Authority, 606 A.2d 536 (Pa. Cmwlth. 1992). The focus is on the individual and any danger unique to the individual from which the police specifically promised protection. Yates v. City of Philadelphia, 578 A.2d 609 (Pa. Cmwlth. 1990).

In Peak, Peak was traveling in a car which crossed a bridge where a river had overflowed causing her car to become partially submerged. Peak was pulled by the force of the water into an off shoot of the river where she cried for help for thirty minutes. She eventually drowned. Her parents sued various defendants, including the state police, alleging that they were aware of the flooding conditions of the bridge and took no action to warn drivers. They also alleged that the police failed to rescue the decedent and failed to alert other emergency

agencies. The state police filed preliminary objections stating that they enjoyed sovereign immunity and were immune from suit because there was no cause of action at common law to effectuate the rescue and no special relationship existed between the state police and Peak. The trial court denied the preliminary objections and this court reversed, holding that Peak's cause of action did not fall within any of the exceptions to immunity, that there was no special relationship established, thus, no common law duty to rescue Peak.

Similarly, in Daubenspeck, the state police were sued for allegedly not properly directing and controlling traffic in an area where several traffic accidents had occurred due to icy road conditions. The police had contacted PennDOT to correct the icy conditions, but left the area before PennDOT arrived and another accident occurred, with fatalities. The police filed preliminary objections stating that they did not have a special relationship and immunity applied. The trial court granted the preliminary objections and this court affirmed. This court reasoned that the plaintiff did not establish or allege that the police were aware of the decedents or their particular situation. Further, that even if a special relationship existed, the plaintiff failed to show that his or the decedents' claims were not barred by immunity, as the state police did not have jurisdiction over the roadway in question for purposes of the real estate exception to immunity.

In the present controversy, Appellants' allegations do not support any theory that the Borough's police department had a special relationship with Mrs. Boniscavage. They do not allege that the Borough even knew Mrs. Boniscavage or that she would be traveling on S.R. 924. Further, Appellants do not allege that the Borough was aware of the sink hole prior to the accident.

Additionally, neither the allegations of negligent conduct against the Borough nor the alleged duty, created by a special relationship, fall within any of the exceptions to immunity under the Act. Appellants rely upon Mindala, which is distinguishable, as the police had been specifically informed by the communications center that the stop sign was missing for over 12 hours and that efforts to reach PennDOT were unsuccessful. The officer, in Mindala, personally visited the intersection and observed the missing stop sign and the dangerous highway condition, but did nothing to rectify the situation. Based upon these facts, it was determined that the township owed a duty to the plaintiff and breached such duty.

In the present controversy, there are no allegations that the Borough police visited the scene of the sink hole to observe the condition. There is, however, an allegation that the Borough police officer had other pressing matters to attend to, in that he was traveling to Selinsgrove to pick up water pumps.

In Mindala, even though a duty was found, it was still determined that the acts complained of did not come within any of the exceptions to immunity. Similarly, in the present controversy, the acts complained of by the Borough police do not fall within any of the exceptions to immunity.

The Borough is entitled to governmental immunity under the Act, which provides that "[e]xcept as otherwise provided in this subchapter, no local agency shall be liable for any damages on account of any injury to a person or property caused by an act of the local agency or an employee thereof or any other person." 42 Pa. C.S. §8541. Under the Act, local agencies and municipalities are entitled to immunity unless the case falls within one of the eight enumerated exceptions to immunity. The exceptions, in pertinent part, are as follows:

> (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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> (6) Streets –
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> (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.

42 Pa. C.S. §8542(b)(6)(i). In order for this section to apply, Appellants must prove that the Borough actually owned the street. Verna v. Commonwealth, 613 A.2d 174 (Pa. Cmwlth. 1992), petition for allowance of appeal denied, 533 Pa. 647, 622 A.2d 1378 (1993). The Borough does not own, control, or maintain S.R. 924. Appellants admit that S.R. 924 is a state road. As such, the streets exception to immunity does not apply. The trial court did not err in granting the motion of the Borough for judgment on the pleadings.

Accordingly, we must affirm both orders.

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JIM FLAHERTY, Senior Judge

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

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v.	:	No. 1318 C.D. 2009
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<u>O R D E R</u>

AND NOW, this 19th day of November, 2010, the orders of the Court of Common Pleas of Schuylkill County dated May 13, 2008 and June 4, 2009, in the above-captioned matter, are affirmed.

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JIM FLAHERTY, Senior Judge