

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Aron Braswell, :
 :
 Appellant :
 :
 v. : No. 2338 C.D. 2007
 :
 Commonwealth of Pennsylvania, : Argued: October 14, 2008
 Department Of Transportation :

BEFORE: HONORABLE BERNARD L. MCGINLEY, Judge
 HONORABLE RENÉE COHN JUBELIRER, Judge
 HONORABLE JAMES R. KELLEY, Senior Judge

OPINION NOT REPORTED

**MEMORANDUM OPINION
 BY JUDGE COHN JUBELIRER**

FILED: March 23, 2009

Aron Braswell (Braswell) appeals from the order of the Court of Common Pleas of Erie County (trial court) granting the Department of Transportation's (DOT) Motion for Summary Judgment and concluding that the real estate exception found at Section 8522(b)(4) of what is commonly referred to as "the Sovereign Immunity Act" (Act), 42 Pa. C.S. § 8522(b)(4), does not apply. The issue before this Court is whether the real estate exception to sovereign immunity applies when a driver swerves off the paved highway, presumably to avoid hitting a deer, and collides with a tree located in DOT's right-of-way.

This matter arises out of personal injuries sustained by Braswell stemming from a motor vehicle accident, which occurred during the early morning hours of July 28, 2003. Braswell was driving west on State Route 2018, also known as Lovell Road, when he swerved to avoid hitting “something shiny in the middle of the road” and hit a tree on the north side of the road. (Braswell Dep. at 24, July 13, 2006.) Braswell stated that there was “patchy fog that night,” that he saw a deer soon after the impact, and that the shiny object that he swerved to avoid hitting “was probably [the eyes of a] deer.” (Braswell Dep. at 24-25.)

Braswell filed a Complaint alleging that DOT was negligent “in causing, allowing and/or permitting a dangerous and hazardous condition of the Commonwealth Real Estate to exist,” which caused him to suffer “serious and severe injuries.” (Complaint ¶ 9.) Following preliminary objections, the trial court stated that all of Braswell’s claims of negligence are based solely upon the location of the tree and its proximity to the highway.¹

Subsequent investigations showed that the shoulder is gravel and varies in width, and the cartway has a double yellow line in the center and no white lines on

¹ In Babcok v. Department of Transportation, 626 A.2d 672 (Pa. Cmwlth. 1993), this Court clarified the distinctions between the terms “berm,” “cartway,” and “highway,” stating:

The “cartway” is generally accepted as the paved and travelled portion of the highway. The “berm” or “shoulder” is generally accepted as the paved portion to either side of actual [sic] travelled portion of the road. We use “highway” as a generic term encompassing both the cartway and the berm.

Babcok, 626 A.2d at 673 n.1 (citations omitted). In this opinion, as in Babcock, we use the term “highway” to encompass the berm and cartway; we do not use it as a term including the entire right of way.

the outer edges of the cartway. A witness to the accident scene also made a statement that there have been other accidents involving that particular tree, “probably four, maybe five times that tree has been hit,” within the last forty years. (Braswell Dep. Ex. C, Witness Statement of Robert Hall at 2.)

The acting County manager for DOT, Michael Depauli, established that the center of the tree that Braswell hit is “six and a half feet . . . from the edge of the roadway” and is within DOT’s right-of-way, which is twenty-five feet (25’) from the center of the roadway. (Depauli Dep. at 21, 23, July 13, 2006.)² Depauli also testified that according to DOT’s maintenance manual, “[w]e are supposed to remove any obstacle within the right of way to provide for a clear zone and for visibility also.” (Depauli Dep. at 22-23.) Depauli explained that, in order to create a clear zone in DOT’s right-of-way, DOT removes trees and other types of vegetation. (Depauli Dep. at 24-25.) In explaining why this tree had not been removed or listed for removal at the time of the accident, Depauli stated:

it wasn’t considered a hazard at that time. Other than the fact it was in the right of way, it was not a rotten tree, it wasn’t a tree that we’d had problems with before and it’s on a low-priority route. The size of our system, we can not possibly and economically remove every tree that’s on a right of way.

(Depauli Dep. at 26.) Depauli stated that, subsequent to the motor vehicle accident in this matter, the tree has been added to DOT’s removal list. (Depauli Dep. at 30.)

² The tree involved in this accident is located in the right-of-way because it is located 16.5 feet from the center of the roadway. (Depauli Dep. at 23.)

Before the trial court, DOT argued that summary judgment was proper under the Act because the testimony was insufficient as a matter of law to justify an inference of causation against DOT. Braswell argued that these issues are matters of fact to be determined by a jury.

The trial court granted DOT's Motion for Summary Judgment, concluding that the real estate exception to sovereign immunity, found at Section 8522(b)(4) of the Act, did not apply to this case. The trial court determined that the deer Braswell swerved to avoid, and not the tree that he struck, caused the accident. The trial court held that a deer in the cartway is not a dangerous condition of the highway for which DOT can be held liable. The trial court held that because the tree merely facilitated, but did not cause the accident, the real estate exception to sovereign immunity did not apply. (Trial Ct. Op. at 8.) Braswell now appeals the trial court's order to this Court.

When a trial court grants summary judgment in favor of DOT, this Court's scope of review is "whether the trial court committed an error of law or abused its discretion." Department of Transportation v. Koons, 661 A.2d 490, 492 (Pa. Cmwlth. 1995). In reviewing an order granting summary judgment, we are cognizant that "[a] motion for summary judgment may be granted only when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law." Bronson v. Horn, 830 A.2d 1092, 1094 (Pa. Cmwlth. 2003) (citing Pa. R.A.P. No. 1035.2). "The right to judgment must be clear and free from doubt." Id. In reviewing the granting of a motion for summary judgment, this Court must "view the record in the light most favorable to the non-moving party,

and all doubts as to the existence of a genuine issue of material fact must be resolved against the moving party.” Pappas v. Asbel, 564 Pa. 407, 418, 768 A.2d 1089, 1095 (2001).

Braswell argues that he can show his claim falls within the real estate exception to sovereign immunity by adducing evidence that DOT was negligent in allowing the tree that he struck to remain within the berm of the highway, and that the tree was a dangerous condition of the highway. Thus, he argues that the trial court erred in granting DOT’s Motion for Summary Judgment. For the following reasons, we must disagree.

Commonwealth agencies are generally immune from civil suit for tort liabilities unless the General Assembly waives sovereign immunity. See 1 Pa. C.S. § 2310; Section 8521 of the Act, 42 Pa. C.S. § 8521. Section 8522 waives immunity for Commonwealth agencies “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,” 42 Pa. C.S. § 8522(a), where the damages are caused by acts or conditions set forth in the nine exceptions enumerated in Section 8522(b). Because the General Assembly has clearly evinced its intention “to insulate government from exposure to tort liability, the exceptions to immunity are to be strictly construed.” Dean v. Department of Transportation, 561 Pa. 503, 508, 751 A.2d 1130, 1132 (2000). One of these exceptions, the real estate exception, allows recovery of damages caused by “[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)³.” 42 Pa. C.S. § 8522(b)(4) (emphasis added).

In order to meet the requirement of Section 8522(a), that a plaintiff show that his damages would be recoverable under common law if sovereign immunity did not apply, the plaintiff must prove the requisite elements of negligence: “(1) a defendant’s duty or obligation recognized by law; (2) a breach of that duty; (3) a causal connection between the defendant’s conduct and the resulting injury; and (4) actual damages.” Talarico v. Bonham, 650 A.2d 1192, 1194 (Pa. Cmwlth. 1994). DOT has “a duty to make its highways reasonably safe for their intended purpose.” Bendas v. White, 531 Pa. 180, 185, 611 A.2d 1184, 1187 (1992).

Here, Braswell argues that the highway includes the berm, and that the intended use of the berm is for vehicular travel by motorists attempting to evade

³ This paragraph deals mainly with potholes:

(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.

42 Pa.C.S. § 8522(b)(5). Neither party argues that this exception applies here.

obstructions in the cartway. (Braswell’s Br. at 13.) DOT was negligent, Braswell argues, by allowing “the tree to remain in close proximity to the roadway, in an area where the size of the berm decreases significantly with no warning.” (Braswell Br. at 13.) While this portion of Braswell’s argument appears to assert that the berm was too narrow, Braswell also appears to argue that the tree was actually in the berm, stating “[t]he area where this tree was allowed to exist is within the berm area of the road, and is part of the highway for sovereign immunity purposes.” (Braswell Br. at 13.) While the highway, which DOT has a duty to maintain, does include the berm of the road, we have defined “berm” as “the paved portion to either side of actual [sic] travelled portion of the road.” Babcock v. Department of Transportation, 626 A.2d 672, 673 n.1 (Pa. Cmwlth. 1993). While Braswell asserts in his brief that the tree was within the berm, his brief also acknowledges that the berm encompasses only the paved portion outside the cartway. (Braswell’s Br. at 13.) There is no evidence or testimony in the record to show that the tree was in the paved portion of the highway, and the photographs included in the record clearly establish that it was not. As for Braswell’s argument that the berm was too narrow, or narrowed too suddenly, Braswell does not cite, nor has this Court found, authority for the principle that DOT has a duty to provide a berm. Because Braswell has failed to prove the elements of duty and breach, we must hold that Braswell has failed to satisfy the requirement of Section 8522(a), which requires a showing that his damages would be recoverable in a common law negligence action.

Moreover, under our precedent, we can not agree with Braswell’s assertion that a tree in close proximity to the highway, but which does not encroach on the

highway, can constitute a “dangerous condition” within the ambit of Section 8522(b)(4). In Bendas, the Pennsylvania Supreme Court held that “what constitutes a dangerous condition is one of fact.” Bendas, 531 Pa. at 185, 611 A.2d at 1187. However, that Court also stated that “[n]othing in this Opinion is intended to preclude a court from entering judgment in those cases where the facts establish as a matter of law that a dangerous condition did not exist.” Id. at 185 n.6; 611 A.2d at 1187 n.6. In order to constitute a dangerous condition of the highway, there must exist “either an artificial condition or a defect of the land itself.” Dean, 561 Pa. at 511, 751 Pa. at 1134. The presence of a tree near the side of a highway is neither an artificial condition nor a defect of the land. Such a tree “does not render the highway unsafe for the purposes for which it was intended, i.e., travel on the roadway.” Id. (explaining that absence of a guardrail does not constitute a dangerous condition of Commonwealth realty). Therefore, the trial court was correct that DOT is immune from Braswell’s claim.⁴

⁴ Braswell also argues that the trial court erred by applying the “facilitation of the injury” standard in a sovereign immunity case because the distinction between facilitating the injury and causing the injury is no longer the applicable legal principle. As Braswell points out, the “facilitation of the injury” language as originally found in Mascaro v. Youth Study Center, 523 A.2d 1118 (1987), later was cited by this Court in Babcock v. Department of Transportation, 626 A.2d 672 (Pa. Cmwlth. 1993), and was clarified by the Supreme Court in Dean v. Department of Transportation, 561 Pa. 503, 751 A.2d 1130 (2000). In Dean, the Supreme Court stated that the “facilitation” language in Mascaro applies in a claim based upon a theory of vicarious liability, and not one of concurrent causation. Id. at 509, 751 A.2d at 1133. DOT concedes that the trial court erred in its analysis. However, as discussed above, Braswell’s claim fails even if we accept that the tree was the cause of his injury and we must, therefore, affirm the trial court’s order. See Commonwealth v. Pittman, 466 A.2d 1370, 1375 n.4 (Pa. Super. 1983) (“a correct decision [of] a trial court will be sustained on appeal for any reason presented on the record.”)

Additionally, in making his argument on this point, Braswell argues that this case is factually similar to Koons. In Koons, this Court held that a stone wall culvert located in DOT’s right-of-way could be the direct cause of an accident that occurred when the driver attempted to use the shoulder of the road to avoid an oncoming vehicle and struck the stone wall culvert. Id. at 493. Braswell argues that, just as the accident in Koons would not have occurred but for the

For these reasons, we must affirm the order of the trial court.

RENÉE COHN JUBELIRER, Judge

stone wall culvert, so too Braswell’s accident would not have occurred but for the tree located on the shoulder. Braswell contends that his choice to leave the roadway to avoid a deer is similar to the driver’s choice in Koons to leave the roadway to avoid an oncoming vehicle. We believe Koons is distinguishable from the current case in that, in Koons, the question of whether the stone wall culvert could be a dangerous condition of the highway was a question of fact that should go to the jury. Koons, 661 A.2d at 494. As discussed above, we do not believe that the tree in this case, as a matter of law, can be considered a dangerous condition of the highway. The stone wall culvert in Koons was an artificial structure, thus satisfying the requirement that a dangerous condition be “either an artificial condition or a defect of the land itself.” Dean, 561 Pa. at 511, 751 A.2d at 1134. A tree, on the other hand, is neither an artificial condition nor a defect of the land itself. Therefore, we find Koons to be factually distinguishable from the case at bar.

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Aron Braswell,	:	
	:	
Appellant	:	
	:	
v.	:	No. 2338 C.D. 2007
	:	
Commonwealth of Pennsylvania,	:	
Department Of Transportation	:	

ORDER

NOW, March 23, 2009, the order of the Court of Common Pleas of Erie County granting Department of Transportation summary judgment in the above-captioned matter is hereby **affirmed**.

RENÉE COHN JUBELIRER, Judge