

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Nafeesah Al-Athariyyah, :  
Appellant :  
v. : No. 385 C.D. 2009  
Wilkes-Barre Housing Authority : Argued: November 5, 2009

BEFORE: HONORABLE ROCHELLE S. FRIEDMAN, Senior Judge  
HONORABLE JAMES R. KELLEY, Senior Judge  
HONORABLE JOSEPH F. McCLOSKEY, Senior Judge (P.)

OPINION NOT REPORTED

MEMORANDUM OPINION  
BY SENIOR JUDGE KELLEY

FILED: December 22, 2009

Nafeesah Al-Athariyyah (Appellant) appeals from the order of the Court of Common Pleas of Luzerne County (trial court), which granted Wilkes-Barre Housing Authority's (Authority) Motion for Summary Judgment. We affirm.

On January 30, 2008, Appellant filed a complaint against the Authority alleging that she sustained personal injuries as a result of a slip and fall on a sidewalk known as "Midland Court," which is part of a housing complex operated and maintained by the Authority where Appellant is a tenant. In the complaint, Appellant alleged that the Authority's employees did not remove all of the snow and ice from the sidewalk and that she slipped on the ice, fell, and sustained injuries.

In response, the Authority filed a Motion for Summary Judgment and alleged therein that the Authority is part of the Commonwealth government and therefore immune from tort liability pursuant to the statutory provisions relating to sovereign immunity, 1 Pa. C.S. §2310, 42 Pa. C.S. §8521-8528. The Authority further alleged that Appellant's suit did not fit within one of the exceptions to sovereign immunity because Appellant's fall was not the result of a defect of the property but due to ice on the property. Appellant filed an answer contending that the Authority is not a Commonwealth agency entitled to sovereign immunity protection, but a local authority.

The trial court determined that the Authority is a Commonwealth agency entitled to sovereign immunity and that Appellant's injury did not fit within any exceptions to immunity because she did not fall as the result of a condition that was "of" the walkway. By order dated February 27, 2009, the trial court granted the Authority's Motion for Summary Judgment. This appeal now follows.<sup>1</sup> Appellant raises the following issues for our review:

1. Whether the Authority is a local governmental unit rather than a Commonwealth agency and as such, entitled only to immunity consistent with matters affecting local governmental units.
2. Even if the Authority is a Commonwealth agency entitled to sovereign immunity, a material factual dispute exists regarding whether there was a defect "of" or "on" the sidewalk itself.

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<sup>1</sup> Our scope of review of a grant or denial of summary judgment is limited to determining whether the trial court committed an error of law or abused its discretion. Salerno v. LaBarr, 632 A.2d 1002 (Pa. Cmwlth. 1993), petition for allowance of appeal denied, 537 Pa. 655, 644 A.2d 740 (1994).

First, Appellant contends that the trial court erred in granting the Authority's Motion for Summary Judgment because the Authority is not a "Commonwealth Agency," entitled to sovereign immunity pursuant to Section 8521 of the Judicial Code, 42 Pa. C.S. §8521, but a "Local Agency," only entitled to governmental immunity pursuant to Section 8541 of the Judicial Code, 42 Pa. C.S. §8541. We disagree.

To begin, summary judgment may be granted only in those cases where the record clearly shows that there are no genuine issues of material fact and that the moving party is entitled to judgment as a matter of law. P.J.S. v. Pennsylvania State Ethics Commission, 555 Pa. 149, 723 A.2d 174 (1999); Salerno. On a motion for summary judgment, the record must be viewed in the light most favorable to the opposing party, and all doubts as to the existence of a genuine issue of material fact must be resolved in favor of the nonmoving party. Id.

Sovereign immunity operates as a bar to an action against the Commonwealth and its officials and employees acting within the scope of their duties. 1 Pa. C.S. §2310; Section 8521 of the Judicial Code, 42 Pa. C.S. §8521. This grant of immunity is subject to certain exceptions, which are enumerated in Section 8522 of the Judicial Code, 42 Pa. C.S. §8522. Of relevance to this discussion is Section 8522(b)(4) of the Judicial Code, which provides:

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). A “Commonwealth party” is defined as a “Commonwealth agency and any employee thereof, but only with respect to an act within the scope of his office or employment.” Section 8501 of the Judicial Code, 42 Pa. C.S. §8501.

The governmental immunity afforded to local agencies under Section 8541 of the Judicial Code, 42 Pa. C.S. §8541, shields a local agency from liability for any damages on account of any injury to a person or property caused by any act of the local agency or an employee thereof or any other person. Governmental immunity is also subject to exceptions, but the exceptions are broader than those provided for sovereign immunity.<sup>2</sup> A “local agency” is defined as a

government unit other than the Commonwealth government. The term includes, but is not limited to, an intermediate unit; municipalities cooperating in the exercise or performance of governmental functions, powers or responsibilities under 53 Pa.C.S. Ch. 23 Subch. A (relating to intergovernmental cooperation);

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<sup>2</sup> The exceptions are enumerated in Section 8542 of the Judicial Code, 42 Pa. C.S. §8542. Of relevance, Section 8542(b)(7) of the Judicial Code, provides:

Sidewalks.--A dangerous condition of sidewalks within the rights-of-way 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. When a local agency is liable for damages under this paragraph by reason of its power and authority to require installation and repair of sidewalks under the care, custody and control of other persons, the local agency shall be secondarily liable only and such other persons shall be primarily liable.

42 Pa. C.S. §8542(b)(7).

and councils of government and other entities created by two or more municipalities under 53 Pa.C.S. Ch. 23 Subch. A.

Section 8501 of the Judicial Code, 42 Pa. C.S. §8501.

To determine whether a party is subject to sovereign immunity the courts must look to whether the particular enabling statute grants authority to exercise the public powers of the Commonwealth as an agent thereof, as well as to the source of the agency's creation, control, and funding. City Council of City of Philadelphia v. Greene, 856 A.2d 217 (Pa. Cmwlth. 2004), petition for allowance of appeal denied, 885 A.2d 43, 584 Pa. 710 (2005). The enabling provisions of the Housing Authorities Law<sup>3</sup> provide that a housing “Authority shall constitute a public body, corporate and politic, exercising public powers of the Commonwealth as an agency thereof.” Section 10 of the Housing Authorities Law, 35 P.S. §1550. “Each such Authority may be known as the housing authority of the city or the county, as the case may be, but shall in no way be deemed to be an instrumentality of such city or county, or engaged in the performance of a municipal function. Section 4(a) of the Housing Authorities Law, 35 P.S. §1544(a).

The courts of this Commonwealth have held that housing authorities are entitled to sovereign immunity. Byard v. Philadelphia Housing Authority, 629 A.2d 283 (Pa. Cmwlth.), petition for allowance of appeal denied, 536 Pa. 618, 637 A.2d 278 (1993);<sup>4</sup> Battle v. Philadelphia Housing Authority, 594 A.2d 769 (Pa. Super. 1991) (Philadelphia Housing Authority is a Commonwealth agency for

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<sup>3</sup> Act of May 28, 1937, P.L. 955, as amended, 35 P.S. §§ 1541 – 1568.1.

<sup>4</sup> Abrogation of this case was recognized in Wilson v. Philadelphia Housing Authority, 735 A.2d 172 (Pa. Cmwlth. 1999), but only to the extent that Byard held that the Commonwealth was immune from suit where plaintiff was injured as a result of third party's actions even though injury might not have occurred but for defect in Commonwealth's property.

purposes of sovereign immunity); Crosby v. Kotch, 580 A.2d 1191 (Pa. Cmwlth. 1990) (Luzerne County Housing Authority is a Commonwealth agency for purposes of sovereign immunity); see Irish v. Lehigh County Housing Authority, 751 A.2d 1201 (Pa. Cmwlth. 2000), petition for allowance of appeal denied, 567 Pa. 732, 786 A.2d 991 (2001) (Lehigh County Housing Authority protected by sovereign immunity).

In support of her position that the Authority is a local agency and not part of the Commonwealth government, Appellant primarily relies upon Sphere Drake Insurance Company v. Philadelphia Gas Works, 566 Pa. 541, 782 A.2d 510 (2001), and Ford ex rel. Pringle v. Philadelphia Housing Authority, 848 A.2d 1038 (Pa. Cmwlth.), petition for allowance of appeal granted, 581 Pa. 273, 864 A.2d 1201(2004), appeal dismissed as improvidently granted, 583 Pa. 439, 879 A.2d 162 (2005). In Sphere, a liability insurer filed a subrogation suit against Philadelphia Gas Works (PGW) and Philadelphia Facilities Management Corporation (PFMC), a non-profit corporation incorporated by city officials to provide management services for the city-owned PGW. The trial court entered summary judgment in favor of the insurer; this Court affirmed. On appeal, the Pennsylvania Supreme Court reversed. In a case of first impression, the Court, held that PFMC was a “local agency” entitled to governmental immunity. Sphere. The Supreme Court noted that the stipulated facts showed that the City's control over the corporation is pervasive and the corporation's authority is limited to that granted by the City.<sup>5</sup>

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<sup>5</sup> The Court elaborated:

The City created PFMC, appoints its Board of Directors, and exercises substantial control over it. The assets of PFMC would vest in the City upon the dissolution of PFMC. PFMC employees

*(Continued....)*

In Ford, a minor resident of public housing filed suit against the Philadelphia Housing Authority, alleging personal injury from lead paint exposure. Following a judgment entered in favor of the resident, the housing authority appealed to this Court. We determined that the housing authority was not a Commonwealth agency, but a local “government unit” for purposes of establishing notice pursuant to Section 5522 of the Judicial Code, 42 Pa. C.S. §5522.<sup>6</sup> Ford, 848 A.2d at 1049-1050.<sup>7</sup> While the Supreme Court initially granted the petition for allowance of appeal limited to the specific issue of whether a housing authority is a Commonwealth agency for the purpose of sovereign immunity, the appeal was subsequently dismissed as improvidently granted. Ford ex rel. Pringle v. Philadelphia Housing Authority, 583 Pa. 439, 879 A.2d 162 (2005). Justice Newman, joined by Justices Castille and Eakin, dissented to the dismissal and opined that the housing authority is a Commonwealth agency for the purposes of sovereign immunity. Id. (Newman, J. dissenting).

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participate in deferred compensation and defined benefit plans that are exclusively for City employees. ... PFMC's sole source of income is the management fee paid it by the City. ... That fact, combined with the fact that the City is obliged to indemnify PFMC's directors, officers and employees and hold them harmless from all claims and liability arising in connection with PFMC's management and operation of PGW, makes clear that any award of damages against PFMC is, in effect, an award against the City.

Sphere, 566 Pa. at 551, 782 A.2d at 516.

<sup>6</sup> This section provides a six-month limitation for giving notice to government unit.

<sup>7</sup> In support thereof, we cited Allegheny County Housing Authority v. Cooley, 439 A.2d 1315 (Pa. Cmwlth. 1982). Therein, we held that the Allegheny County Housing Authority was a municipal authority rather than an agency of the Commonwealth. Cooley, 439 A.2d at 1317. This determination was for the purposes of establishing jurisdiction, not sovereign immunity. Id.

What we garner from these cases is that an entity's status can vary depending on the issue for which the determination is made. See, e.g., SEPTA v. Union Switch & Signal, Inc., 637 A.2d 662 (Pa. Cmwlth.) (recognizing that SEPTA is considered a "Commonwealth party" under the provisions of the Sovereign Immunity Act, but is not the Commonwealth for the purpose of jurisdiction under the Board of Claims Act), petition for allowance of appeal denied, 538 Pa. 662, 648 A.2d 792 (1994). While authorities may be considered an "instrumentality of the Commonwealth", that does not mean that they are automatically considered to be "the Commonwealth" for all purposes. Id.

Sphere and Ford are distinguishable from the case at hand. This Court's determination in Ford is neither controlling nor persuasive in the context of sovereign immunity. The Supreme Court's determination in Sphere that PFMC is a local agency for the purposes of governmental immunity does not alter prior determinations that local housing authorities are considered Commonwealth agencies for the purposes of sovereign immunity. See Downing By and Through Downing v. Philadelphia Housing Authority, 610 A.2d 535, n.1 (Pa. Cmwlth.), petition for allowance of appeal denied, 532 Pa. 658, 615 A.2d 1314 (1992). In light of the enabling statute and review of caselaw, we conclude that the trial court did not err in determining that the Authority is an agency of the Commonwealth entitled to sovereign immunity.

Appellant further contends that the trial court erred in granting the Authority's Motion for Summary Judgment because, even if the Authority is a Commonwealth agency entitled to sovereign immunity, there exists a material factual dispute as to whether there was a defect "of" or "on" the sidewalk itself. We disagree.



The real estate exception to sovereign immunity provides that liability may only result from a “dangerous condition of Commonwealth agency real estate and sidewalks... .” Section 8522(b)(4) of the Judicial Code, 42 Pa. C.S. §8522(b)(4). For the sidewalk exception to apply, the defect has to be “of” the sidewalk; meaning, the condition must derive from, originate from, or have the sidewalk as its source. Jones v. Southeastern Pennsylvania Transportation Authority, 565 Pa. 211, 772 A.2d 435 (2001).<sup>8</sup> “In other words, assuming all other requirements of the statutory exception at 42 Pa. C.S. §8522(b)(4) are met, the Commonwealth may not raise the defense of sovereign immunity when a plaintiff alleges, for example, that a substance or an object on Commonwealth realty was the result of a defect in the property or in its construction, maintenance, repair or design.” Jones, 565 Pa. at 225, 772 A.2d at 443-444.

Here, Appellant alleged in her complaint that “she slipped on ice” which was located on Midland Court, thereby causing her to fall to the ground and sustain injuries. Reproduced Record (R.R.) at 5a. Appellant alleged that the

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<sup>8</sup> We recognize the trial court applied the “on/of” distinction in its analysis. See Trial Ct. Slip. Op., 2/27/09, at 4. In Jones, the Supreme Court rejected the “on/off” distinction, concluding that it was problematic and of little or no use. The Court relayed the following illustration:

Applying the ‘[on/of]’ analysis as a rule to determine whether or not immunity is waived will produce absurd, inconsistent and illogical results. If an individual is walking on [C]ommonwealth property and steps in a hole in the walkway (defect of the property), then immunity is waived. However, if that same individual is walking on the same property and trips and falls over a chunk of the walkway that formerly had been filling the hole and now is sitting on top of the walkway (defect on the property), immunity applies.

Jones, 565 Pa. at 225, 772 A.2d at 444.

Authority was responsible for the maintenance and care of Midland Court, including, but not limited to, snow and ice removal. Id. Appellant further alleged her damages were caused solely by the negligence and carelessness of the Authority in that the Authority maintained Midland Court in a dangerous and unsafe condition; permitted ice to accumulate on Midland Court and remain thereon for an unreasonable period of time; failed to remove ice in a reasonable period of time; failed to keep and maintain Midland Court in an ice-free condition; failed to keep and maintain Midland Court in a safe condition; and failed to properly remove the ice which had accumulated on Midland Court. R.R. at 4a-9a. Appellant did not allege that the icy conditions derived or originated from Midland Court or had Midland Court as its source. While Appellant presented photos of Midland Court at the hearing that attempt to show that the concrete was uneven, Appellant failed to allege that the uneven pavement caused her injury. At her deposition, Appellant repeatedly testified that she “fell on ice,” “patches of ice,” “lumpy ice.” R.R. at 68a, 73a, 89a, 92a. While the Authority’s witness admitted that the ice was lumpy in spots, he explained it was “white ice” meaning that it had been there for a while. R.R. at 166a. The icy condition which caused Appellant to fall did not derive from, originate from, or have the sidewalk as its source and therefore does not fall within the real property exception to sovereign immunity. We, therefore, conclude that the trial court properly granted the Authority’s motion for summary judgment.

Accordingly, the order of the trial court is affirmed.

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JAMES R. KELLEY, Senior Judge

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Nafeesah Al-Athariyyah, :  
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Wilkes-Barre Housing Authority :

**ORDER**

AND NOW, this 22nd day of December, 2009, the order of the Court of Common Pleas of Luzerne County, at No. 1189 of 2008, dated February 27, 2009, is AFFIRMED.

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JAMES R. KELLEY, Senior Judge