IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Errol Davis,	:	
Appellant	:	
	:	
v.	:	No. 583 C.D. 2007
	:	Argued: March 10, 2008
Southeastern Pennsylvania	:	
Transportation Authority	:	

BEFORE: HONORABLE BERNARD L. McGINLEY, Judge
HONORABLE ROCHELLE S. FRIEDMAN, Judge
HONORABLE JOSEPH F. McCLOSKEY, Senior Judge

OPINION NOT REPORTED

MEMORANDUM OPINION
BY SENIOR JUDGE McCLOSKEY FILED: April 21, 2008

Errol Davis (Appellant) appeals from an order of the Court of Common Pleas of Philadelphia County (trial court), granting the motion for a new trial filed on behalf of the Southeastern Pennsylvania Transportation Authority (SEPTA).[1] We now vacate and remand.

Appellant was employed by SEPTA as a railroad conductor and was injured in the course and scope of his employment when a seat on a railcar failed and he landed on the floor of the car. Appellant brought suit against SEPTA pursuant to the Federal Employers' Liability Act (FELA), 45 U.S.C. §§51-60,[2]

[1] This appeal was originally filed with our Superior Court. However, by order of the Superior Court dated February 20, 2007, the appeal was transferred to this Court.

[2] FELA provides a federal remedy for railroaders who suffer personal injuries as a result of negligence of their employer or fellow employees. See Atchison, Topeka & Santa Fe Railway Co. v. Buell, 480 U.S. 557 (1987).

alleging that the railroad had failed to provide him with a reasonably safe place to work.

SEPTA then filed a motion for summary judgment, asserting the defense of sovereign immunity. Appellant responded and Judge Gary DiVito denied the motion without opinion. Immediately prior to trial, SEPTA orally renewed its motion for summary judgment. The trial judge, Judge Sheldon Jelin, denied the same because SEPTA had failed to file a written motion with the court or to present any new facts warranting the reversal of Judge DiVito's prior decision. SEPTA then filed a motion for reconsideration, which was also denied.

The trial then proceeded and the jury entered a verdict in favor of Appellant. Post-trial motions were timely filed and answered. In its motion for judgment notwithstanding the verdict (jnov) or, in the alternative, a new trial, SEPTA asserted that the trial judge erred in failing to address its summary judgment motion on the immunity issue and by declining to hear witnesses proffered by the railroad who would testify concerning financial issues that it argued were relevant to the issue. In this motion, SEPTA raised additional issues concerning the allowance of expert testimony, a jury instruction regarding discounting loss of future wages to present value and Appellant's alleged failure to make out a prima facie case of negligence.

In his opinion granting the new trial, Judge Jelin only addressed the sovereign immunity issue. Judge Jelin stated that he did not address SEPTA's motion for reconsideration on the basis of "coordinate jurisdiction." Judge Jelin stated that this conclusion was in error in light of this Court's decision in Warnecki v. Southeastern Pennsylvania Transportation Authority, 689 A.2d 1023 (Pa. Cmwlth. 1997) and held that SEPTA was prejudiced by the court's failure to

address the motion.[3] In Warnecki, we held that the issue of sovereign immunity is non-waivable and can be raised at any time, even before different trial court judges. We further held that the grant of such a motion by the second trial court judge, following the denial by the first, would not be erroneous.[4] Appellant now appeals to this Court.

On appeal,[5] Appellant argues that the trial court erred in granting SEPTA a new trial as a result of the failure to address the merits of SEPTA's

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[3] Judge Jelin improperly referenced Warnecki as a decision from our Superior Court.

[4] However, this Court did previously indicate in Lyons v. City of Philadelphia, 632 A.2d 1006 (Pa. Cmwlth. 1993), that such reasoning would not apply where the summary judgment motions were identical and the first trial court judge considered the merits in denying the motion. In the present case, the trial court noted that Judge DiVito did not write an opinion as to the basis of his denial of SEPTA's original motion. In his opinion granting a new trial, Judge Jelin also raised the possibility that Judge DiVito denied said motion due to an issue of fact, which may necessitate the presentation of witnesses by SEPTA on this issue.

[5] Our review of a challenge to a new trial order begins with an analysis of the underlying conduct or omission by the trial court that formed the basis for the motion. Stong v. Department of Transportation, 817 A.2d 576 (Pa. Cmwlth.), petition for allowance of appeal denied, 574 Pa. 763, 831 A.2d 601 (2003). When responding to a request for a new trial, the trial court must follow a two-step process. First, it must decide whether one or more mistakes occurred at trial. Id. Second, if the court concludes a mistake occurred, it must determine whether the mistake was a sufficient basis for granting a new trial. Id. A new trial is not warranted merely because some irregularity occurred during the trial or another trial judge would have ruled differently; the moving party must demonstrate prejudice resulting from the mistake. Id.

As an appellate court reviewing the two-step process of the trial court for granting a new trial, we must also employ a two-prong analysis. As we stated in Stong:

> First, we examine the decision of the trial court that a mistake occurred. At this first stage, we must apply the correct scope of review based on the rationale given by the trial court. … There are two possible scopes of review to apply when the appellate courts are determining the propriety of an order granting or denying a new trial. … There is a narrow scope of review: 'where the trial court articulates a single mistake (or a finite set of

(Footnote continued on next page…)

repeated motions for summary judgment and the accompanying prejudice to SEPTA in this regard. We agree with Appellant insofar as the trial court granted SEPTA a new trial on this basis.

However, before we reach the merits of this argument, we must address the appropriate scope of review to be applied herein. Appellant suggests that, contrary to an assertion by SEPTA, this Court must apply a narrow scope of review of the trial court's decision and order. In the course of its argument that this Court must apply a broad scope of review and examine the record for any reason sufficient to grant a new trial, SEPTA notes that it raised numerous allegations of error in its motion for post-trial relief, all of which Appellant

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(continued…)

> mistakes), the appellate court's review is limited in scope to the stated reason, and the appellate court must review the reason under the appropriate standard.' …
>
> [Conversely,] If the trial court leaves open the possibility that reasons additional to those specifically mentioned might warrant a new trial, or orders a new trial 'in the interests of justice,' the appellate court applies a broad scope of review, examining the entire record for any reason sufficient to justify a new trial. …
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> Even under a narrow scope of review, the appellate court might still need to examine the entire record to determine if there is support for any of the reasons provided by the trial court.
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> The appropriate standard of review also controls this initial layer of analysis. If the mistake involved a discretionary act, the appellate court will review for an abuse of discretion. … If the mistake concerned an error of law, the court will scrutinize for legal error. If there were no mistakes at trial, the appellate court must reverse a decision by the trial court to grant a new trial because the trial court cannot order a new trial where no error of law or abuse of discretion occurred.

Stong, 817 A.2d at 581-82.

addressed in his statement of matters complained of on appeal.[6] SEPTA further notes that at the conclusion of oral argument with respect to its motion for a new trial, Judge Jelin twice stated that he was granting a new trial as to all issues.

Nevertheless, in his opinion, Judge Jelin only addressed the issue of sovereign immunity and his failure to address this issue by way of SEPTA's repeated motions for summary judgment. This opinion failed to identify any other basis for the grant of a new trial, nor did it remotely suggest or leave open the possibility that additional reasons might warrant a new trial.

Turning our attention to the merits, Appellant argues that the trial court erred in granting SEPTA a new trial as to this limited issue. We agree with Appellant that the grant of a new trial was not the appropriate remedy. A new trial is only warranted where it has been established that an error of law or an abuse of discretion occurred during the course of the trial. Harman v. Borah, 562 Pa. 455, 756 A.2d 1116 (2000). Here, the trial court was not in a position to conclude that an error of law or abuse of discretion occurred during trial, thereby justifying the grant of a new trial, without first making a determination as to whether or not the denial of SEPTA's motion for summary judgment on the basis of sovereign immunity was proper. Such a determination requires further findings and conclusions by the trial court, but does not warrant a new trial at this stage of the proceedings.

As the trial court noted in its opinion, SEPTA's original motion for summary judgment was denied by Judge DiVito without opinion. SEPTA's

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[6] Following the trial court's order granting SEPTA a new trial and his subsequent notice of appeal, Appellant submitted this statement to the trial court in accordance with Pa. R.A.P. 1925(b).

repeated motions for summary judgment at trial were denied by Judge Jelin on the basis of coordinate jurisdiction.[7] Upon further consideration of this Court's previous decisions in Warnecki and Lyons, Judge Jelin concluded that he had erred in denying said motions on this basis.

In Warnecki, we stated the general rule that "it is improper for a trial judge to overrule the decision of another judge of the same court in the same case." Warnecki, 689 A.2d at 1024 n.1 (citation omitted). Nevertheless, as the issue of sovereign immunity is non-waivable, we held that a party may raise the defense of sovereign immunity at any time in order to prevent unnecessary litigation against that party. As to the consideration of this issue by different judges, we specifically indicated as follows:

> Moreover, where the issue of governmental immunity raised in a motion for summary judgment was denied by one trial court judge, that same issue could again be properly raised in a second motion for summary judgment before a different trial court judge, and the grant of the motion on such grounds by the second judge is not error.

Id. (citations omitted).[8] In the present case, Judge DiVito never provided a written opinion or reason for his denial of SEPTA's original summary judgment motion.

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[7] At least one of these motions was denied because it was presented orally, and not in writing.

[8] As noted above, in Lyons we indicated that such reasoning would not apply where the first trial court judge, after considering the merits, denied a motion for summary judgment on the basis of governmental immunity. In such a case, we stressed that a second trial court judge should be precluded from overruling an earlier denial. We noted an example in Lyons where the first trial court judge denied the motion for summary judgment on the basis of governmental immunity because the plaintiff's claim may fall within an exception to this immunity.

Hence, under Warnecki, the trial court correctly indicated that it was not in fact precluded from addressing SEPTA's subsequent motions for summary judgment.

Moreover, we recognized in Warnecki that SEPTA is indeed a "Commonwealth party" which generally enjoys immunity from suit under Section 8521 of the Judicial Code, 42 Pa. C.S. §8521. See also Ross v. Southeastern Pennsylvania Transportation Authority, 714 A.2d 1131 (Pa. Cmwlth. 1998), petition for allowance of appeal denied, 558 Pa. 613, 736 A.2d 606 (1999). However, in Warnecki, Ross and Lyons, we cautioned that, regardless of this claimed immunity, a plaintiff may maintain a cause of action if he/she could show that damages would be recoverable under 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. We further indicated in these cases that should a plaintiff meet one of these initial tests, the plaintiff must next establish that a cause of action falls within one of the enumerated exceptions to sovereign immunity found in Section 8522(b) of the Judicial Code, 42 Pa. C.S. §8522(b). These determinations were never reached by the trial court in this case. Hence, a remand to the trial court is warranted.

Accordingly, the order of the trial court is vacated. The matter is remanded to the trial court for further findings and conclusions, and a hearing, if necessary, with respect to SEPTA's motion for summary judgment on the basis of sovereign immunity. Further, we note that should the trial court ultimately conclude that SEPTA is not entitled to such immunity, the jury verdict remains.

Nevertheless, the trial court will be required to address the remaining issues raised by SEPTA in its original post-trial motions.

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JOSEPH F. McCLOSKEY, Senior Judge

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O R D E R

AND NOW, this 21st day of April, 2008, the order of the Court of Common Pleas of Philadelphia County (trial court) is hereby vacated. The case is remanded to the trial court for further findings and conclusions, and a hearing, if necessary, with respect to the motion of the Southeastern Pennsylvania Transportation Authority (SEPTA) for summary judgment on the basis of sovereign immunity. Additionally, should the trial court conclude that SEPTA is not entitled to such immunity, it will be required to address the remaining issues raised by SEPTA in its original post-trial motions.

Jurisdiction relinquished.

JOSEPH F. McCLOSKEY, Senior Judge