IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Vince E. Oaks, Administrator of the Estate of Rhonda Bronson, Decedent	:	
v.	:	No. 137 C.D. 2012
	:	Submitted: February 11, 2013
The Commonwealth of Pennsylvania and The Pennsylvania Department of Transportation, Individually, jointly, severally or in the alternative	:	
Appeal of: Vince E. Oaks	:	

BEFORE: **HONORABLE BERNARD L. McGINLEY,** Judge
HONORABLE BONNIE BRIGANCE LEADBETTER, Judge
HONORABLE JAMES GARDNER COLINS, Senior Judge

OPINION NOT REPORTED

MEMORANDUM OPINION BY
JUDGE LEADBETTER **FILED: September 6, 2013**

Vince E. Oaks (Appellant), Administrator of the Estate of Rhonda Bronson, Decedent, appeals from the order of the Court of Common Pleas of Philadelphia County granting the motion for summary judgment of the Commonwealth of Pennsylvania and the Pennsylvania Department of Transportation (Appellees). After review, we affirm.

The facts may be summarized as follows. Appellant Oaks was the common-law husband of Decedent Bronson, with whom he had two children, a daughter, Lavonda, and a son, Vince E. Oaks, Jr. On the evening of December 23,

1997, into the early morning hours of December 24, 1997, Decedent was traveling south on Route 1, Roosevelt Expressway, in the City of Philadelphia, returning home from Christmas shopping with toys and gifts for her children. Route 1 is a six-lane state highway that runs through Philadelphia. Although the posted speed limit is 50 mph, Decedent was traveling at an estimated 83 mph when she lost control of the vehicle, hit the median barrier separating the north and south bound lanes of the highway, vaulted over the barrier and landed on the hood and roof of a vehicle being driven by Mark Brooks and occupied by his wife, Tyra Brooks, in the front passenger seat. The Brooks were killed instantly, while Decedent was ejected from her vehicle and into a third vehicle and sustained fatal injuries. All three were pronounced dead at the scene.

On August 11, 1999, Appellant was appointed administrator for Decedent's estate. Shortly thereafter, the civil action filed by the administrator for the estate of Mark and Tyra Brooks against the same Appellees herein, was settled on or about September 13, 1999.[1] However, it was not until March 8, 2010, that Appellant filed a wrongful death and survival action against the Commonwealth and the Department of Transportation, captioned "Vince E. Oaks, Administrator of the Estate of Rhonda Bronson, Decedent, and as Parent and Natural Guardian Of and On Behalf Of Minor Son, Vince, Jr., and Lavonda Oaks, In Her Own Right." Appellees filed preliminary objections, which the trial court granted.[2] Appellant

[1] Although that action, captioned *Goldman v. Bronson*, (Philadelphia Court of Common Pleas No. 809, January Term 1998, Case ID. 980100809), is not part of the record, we may take judicial notice of the court docket. *See In re F.B.*, 555 Pa. 661, 670 n.8, 726 A.2d 361, 366 n.8 (1999).

[2] Appellees' asserted that the only proper plaintiff in a wrongful death and survival action is the administrator (or other personal representative) of the decedent's estate. In his responsive pleading, Appellant "agree[d] to amend the caption of the instant action as follows: to correct **(Footnote continued on next page…)**

then filed an amended complaint,[3] to which Appellees filed an answer with new matter and, thereafter, a motion for summary judgment. The trial court granted the motion for summary judgment on August 17, 2011, concluding that Appellant's action was barred by the statute of limitations because it was not brought within two years of Decedent's death; that the Minority Tolling Statute, 42 Pa. C.S. § 5533(b),[4] was not applicable to toll the statute of limitations; and that Appellant's claims were barred by the doctrine of sovereign immunity.[5] Appellant has now appealed to this court.[6]

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the name of the party to designate Vince E. Oaks, as the administrator of the estate of Rhonda Bronson, which suffices for the benefit of his children, who are entitled by law to recover damages for their mother's wrongful death, and to enforce the rights and liabilities of their mother to this survival action." Appellant's Response to Preliminary Objections, Certified Record (C.R.) Item 7 at 2-3. Appellees' preliminary objections were sustained, and Appellant was given 10 days to amend his complaint "to reflect proper identification of parties." Trial Court's May 24, 2010 Order, C.R. Item 8.

[3] In Counts I-III, Appellant asserted claims of negligence, corporate negligence, and vicarious liability (*respondeat superior*) on behalf of Decedent and against Appellees; while Count IV was for wrongful death and Count V was a survival action. Amended Complaint, C.R. Item 9.

[4] 42 Pa. C.S. § 5533(b) provides that:

> If an individual entitled to bring a civil action is an unemancipated minor at the time the cause of action accrues, the period of minority shall not be deemed a portion of the time period within which the action must be commenced. Such person shall have the same time for commencing an action after attaining majority as is allowed to others by the provisions of this subchapter.

[5] The trial court's order also dismissed the Commonwealth of Pennsylvania as a party to this action with prejudice, a matter not challenged on appeal. Trial Court's August 17, 2011 Order, C.R. Item 29. Accordingly, when referring to Appellees hereafter, we refer only to the Department of Transportation.

[6] This Court's review of a trial court's grant of summary judgment is limited to a determination of whether the trial court erred as a matter of law or abused its discretion. *Martinowski v. Dep't of Transp.,* 916 A.2d 717, 721 (Pa. Cmwlth. 2006). Summary judgment is appropriate when, after reviewing the evidence in the light most favorable to the non-moving

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On appeal, Appellant raises two issues: first, whether the minority tolling statute should have applied to toll the two year statute of limitations for the wrongful death action on behalf of his two children, and second, whether the doctrine of sovereign immunity bars his claim that an improperly placed barrier curb and a substandard height median barrier caused Decedent's car to vault the median and land in the opposite lane.

We turn first to the issue of sovereign immunity. The General Assembly has waived immunity for Commonwealth agencies for certain tort claims under what is commonly known as the Sovereign Immunity Act, 42 Pa. C.S. §§ 8501-8528. Where a plaintiff seeks to overcome the defense of sovereign immunity, the plaintiff must meet two distinct requirements: 1) the plaintiff must establish a common law or statutory cause of action against a Commonwealth party under Section 8522(a) of the Judicial Code, 42 Pa. C.S. § 8522(a); and 2) the plaintiff must demonstrate that the cause of action falls within one of the enumerated exceptions to immunity set forth in Section 8522(b) of the Code, 42 Pa. C.S. § 8522(b).

Here, the relevant exception asserted by Appellant is found in Section 8522(b)(4), which refers to Commonwealth real estate, highways and sidewalks, and provides that liability will be waived for "[a] dangerous condition of Commonwealth agency real estate and sidewalks . . . and highways under the jurisdiction of a Commonwealth agency, except conditions described in paragraph (5)." 42 Pa. C.S. § 8522(b)(4). It is the plaintiff's burden to establish the

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party, there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. *Quinones v. Dep't of Transp.,* 45 A.3d 467, 469 n.1 (Pa. Cmwlth. 2012), *appeal denied,* ___ Pa. ___, 64 A.3d 633 (2013).

dangerous condition of the real estate or highway. *Stein v. Pa. Turnpike Comm'n.*, 989 A.2d 80, 84 (Pa. Cmwlth. 2010), *appeal denied,* 610 Pa. 613, 20 A.3d 1214 (2011). Because the General Assembly has expressed a "clear intent to insulate the government from exposure to tort liability, the exceptions to immunity are to be strictly construed." *Fagan v. Dep't of Transp.,* 946 A.2d 1123, 1126 (Pa. Cmwlth. 2008) (citation omitted).

Appellant argues that the barrier curb, which was part of the Commonwealth realty, improperly placed in front of the substandard height median, caused Decedent's vehicle to "predictably vault" the median into the opposite lanes of traffic and ultimately land on the Brooks' vehicle. Appellant's Brief at 7. Appellant argues since at least 1967, or thirty years before the horrific crash, Appellee PennDOT recognized the need for specific measures to "correct unsafe conditions created by curbs in advance of median barriers," and that since 1977, Appellee "knew or should have known that the top of the median barrier was 6 inches lower than that specified." First Amended Complaint, C.R. Item 9 at 8.

While Appellees may have a duty to ensure that the condition of its property, the highway, is safe for the activities for which it is regularly used, intended to be used or reasonably foreseen to be used, *i.e.*, travel on the roadway, there is, as well, a corresponding duty on every motorist to use the highway in the ordinary and usual manner and with reasonable care. *Snyder v. Harmon*, 522 Pa. 424, 435, 562 A.2d 307, 312 (1989); *Lambert v. Katz,* 8 A.3d 409, 413 (Pa. Cmwlth. 2010); *Glover v. Dep't of Transp.,* 647 A.2d 630, 632 (Pa. Cmwlth. 1994). In a line of cases beginning with our Supreme Court's decision in *Dean v. Department of Transportation,* 561 Pa. 503, 751 A.2d 1130 (2000), we have attempted to resolve the issue of sovereign immunity as it relates to guardrails,

concrete barriers, and rumble strips, and whether the absence of these types of safety features constituted a dangerous condition of the highway. *See Dean,* 561 Pa. at 511, 751 A.2d at 1134 (absence of a guardrail cannot be said to be a dangerous condition of the real estate); *Quinones v. Dep't of Transp.*, 45 A.3d 467, 472-73 (Pa. Cmwlth. 2012) (DOT owed no duty to design, construct, and maintain the grassy median to deter crossovers and lack of guardrail did not render the roadway unsafe for travel); *Brown v. Dep't of Transp.*, 11 A.3d 1054, 1057 (Pa. Cmwlth. 2011) (the absence of rumble strips did not make the highway unsafe for its intended use).

Appellant asserts that such cases are distinguishable because they dealt with the "absence" of guardrails or barriers, whereas his theory of negligence rests on the existence of a barrier curb that was improperly placed in front of the substandard height median guardrail. However, we have also concluded that sovereign immunity was not waived in those cases where the parties similarly argued that an allegedly defective or improperly designed/installed/maintained guardrail or other safety barrier constituted a dangerous condition of the highway. *See Stein*, 989 A.2d at 88 (sovereign immunity not waived where plaintiff alleged that negligently designed guardrail caused bodily injury); *Fagan*, 946 A.2d at 1127 (court rejected plaintiff's claim that DOT was liable for its negligent design and maintenance of a turned-down guardrail); *Svege v. Interstate Safety Serv., Inc.*, 862 A.2d 752, 755 (Pa. Cmwlth. 2004) (claim that concrete barrier alleged to be too short to serve its protective function did not meet real estate exception to sovereign immunity because barrier did not render the highway unsafe for its intended purpose). More recently in *Quinones*, we were presented with a motorist who, while driving on the roadway, lost control of his vehicle which then crossed

the grassy median and struck an oncoming vehicle driven by the victim, Quinones, who was severely injured. Ms. Quinones alleged that Appellees owed a duty of care to the public to ensure that its property, the grassy median, was safe for the purposes for which it was regularly used, intended to be used or reasonably foreseen to have been used, *i.e.*, to control, impede, and separate the flow of traffic. In affirming the trial court's order granting Appellees' motion for summary judgment, we found that the grassy median was not intended for vehicular traffic and therefore Appellees owed no duty to design, construct, and maintain the median to prevent crossovers; and further, that the lack of guardrail did not render the roadway unsafe for the purpose for which it was intended. *Id.* at 472-73. We concluded that the real estate exception under 42 Pa. C.S. § 8522 (b)(4) did not apply.

These cases are clearly controlling. Accordingly, the trial court's order is affirmed.[7]

BONNIE BRIGANCE LEADBETTER,
Judge

[7] Because of our disposition of this issue, we need not address appellant's statute of limitations argument.

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O R D E R

AND NOW, this 6th day of September, 2013, the order of the Court of Common Pleas of Philadelphia County in the above-captioned matter is hereby AFFIRMED.

BONNIE BRIGANCE LEADBETTER,
Judge