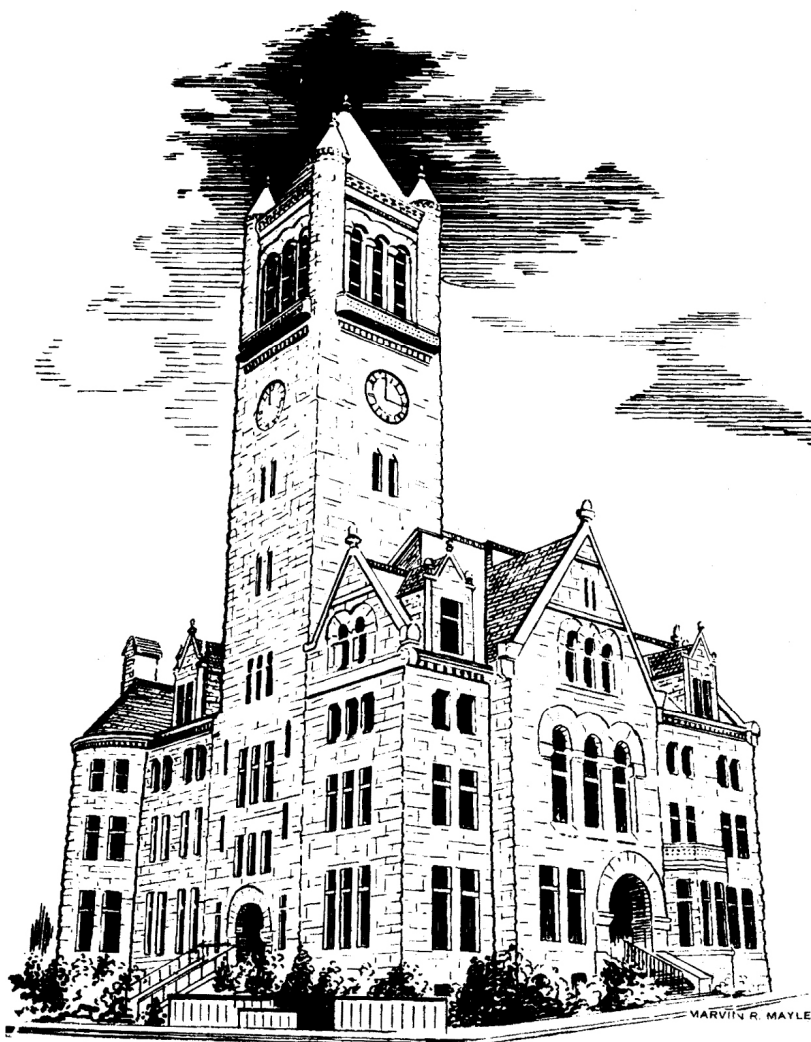


FAYETTE LEGAL JOURNAL

VOL. 84

APRIL 10, 2021

NO. 15



FAYETTE LEGAL JOURNAL

The FAYETTE LEGAL JOURNAL is published weekly by the Fayette County Bar Association, 45 East Main Street, Suite 100, Uniontown, Pennsylvania 15401, 724-437-7994. Legal advertisements should be submitted online at www.fcbar.org no later than 12:00 noon on Friday for publication the following Saturday. No date of publication is promised, however. Legal notices are published exactly as submitted by the advertiser. Copyright 2001 Fayette County Bar Association. All rights reserved.

Co-Editors: Garnet L. Gordon and Melinda Deal Dellarose

Cover Design by Marvin R. Mayle, 207 Lick Hollow Road, Hopwood, PA

FAYETTE COUNTY BAR ASSOCIATION Board of Directors

President: Charles O. Zebley, Jr.
President Elect: Gretchen A. Mundorff
Vice-President: Mark D. Brooks
Secretary: Anne N. John
Treasurer: Louise D. Monaghan
Past President: Louise D. Monaghan
Executive Director: Garnet L. Gordon

Directors
Jennifer M. Casini
Rachel A. Clark
Jeremy J. Davis
Robert A. Gordon
Sheryl R. Heid
James E. Higinbotham, Jr.
Margaret Zylka House
John A. Kopas, III
Wendy L. O'Brien
Douglas S. Sholtis

ETHICS HOTLINE

The Ethics Hotline provides free advisory opinions to PBA members based upon review of a member's prospective conduct by members of the PBA Committee on Legal Ethics and Professional Responsibility. The committee responds to requests regarding, the impact of the provisions of the Rules of Professional Conduct or the Code of Judicial Conduct upon the inquiring member's proposed activity. All inquiries are confidential.

Call (800) 932-0311, ext. 2214.

LAWYERS CONCERNED FOR LAWYERS

Our assistance is confidential,
non-judgmental, safe, and effective

To talk to a lawyer today, call:
1-888-999-1941
717-541-4360

ESTATE NOTICES

Notice is hereby given that letters testamentary or of administration have been granted to the following estates. All persons indebted to said estates are required to make payment, and those having claims or demands to present the same without delay to the administrators or executors named.

Third Publication

MILDRED M. BARAK, a/k/a MILDRED BARAK, late of Luzerne Township, Fayette County, PA (3)

Executrix: Linda C. Ducar
c/o John & John
96 East Main Street
Uniontown, PA 15401
Attorney: Simon B. John

FRANK J. BARON, a/k/a FRANK BARON, late of German Township, Fayette County, PA (3)

Personal Representatives: Brett A. Baron and Breanne L. Paull
c/o George & George
92 East Main Street
Uniontown, PA 15401
Attorney: Joseph M. George

RICHARD J. DOLATA, late of Henry Clay Township, Fayette County, PA (3)

Executrix: Audrey M. Kaercher
265 Martin Road
P.O. Box 185
Markleysburg, PA 15459
c/o Carolann A. Young and Associates
530 North Center Avenue
P.O. Box 344
Somerset, PA 15501
Attorney: Carolann A. Young

WAYNE L. ETLING, late of Connellsville, Fayette County, PA (3)

Executrix: Mary Margaret Lynch
c/o Molinaro Law Offices
P.O. Box 799
Connellsville, PA 15425
Attorney: Carmine V. Molinaro, Jr.

SHARON B. FLETCHER, late of Saltlick Township, Fayette County, PA (3)

Administrator: John B. Fletcher, Jr.
c/o Casini & Geibig, LLC
815B Memorial Boulevard
Connellsville, PA 15425
Attorney: Jennifer M. Casini

WILLIAM JONES, a/k/a BILL JONES, late of Luzerne Township, Fayette County, PA (3)

Personal Representative:
John William Jones
c/o 902 First Street
P.O. Box 310
Hiller, PA 15444
Attorney: Herbert G. Mitchell, Jr.

CHARLOTTE A. KATKO, late of South Union Township, Fayette County, PA (3)

Administrator: Terry Katko
c/o P.O. Box 727
Uniontown, PA 15401
Attorney: Bernadette Tummons

THOMAS A. LONCE, a/k/a THOMAS ALVIN LONCE, late of Uniontown, Fayette County, PA (3)

Executor: John J. Lonce
c/o 4 North Beeson Boulevard
Uniontown, PA 15401
Attorney: Sheryl R. Heid

DARLENE C. PHILLIPS, late of Uniontown, Fayette County, PA (3)

Personal Representative: Chris A. Myers
c/o Davis & Davis
107 East Main Street
Uniontown, PA 15401
Attorney: James T. Davis

JOHN H. RICHTER, late of Franklin Township, Fayette County, PA (3)

Executor: Jerry D. Richter
c/o Molinaro Law Offices
P.O. Box 799
Connellsville, PA 15425
Attorney: Carmine V. Molinaro, Jr.

**PALMER FRANK SABATINE, a/k/a
PALMER F. SABATINE**, late of Uniontown,
Fayette County, PA (3)

Administratrix: Ruthanne S. Sabatine
c/o DeHaas Law, LLC
51 East South Street
Uniontown, PA 15401
Attorney: Ernest P. DeHaas, III

AGNES STRYCHALSKI, late of Washington,
Fayette County, PA (3)

Administrator: Constance A. Strychalski
316 Perry Avenue
Belle Vernon, PA 15012
c/o P.O. Box 1
401 Sixth Street at Washington Avenue
Charleroi, PA 15022
Attorney: Alan Benyak

**MILDRED SUTTON, a/k/a MILDRED
IMOGENE SUTTON, a/k/a MILDRED I
SUTTON, a/k/a MILDRED JEAN SUTTON**,
late of Georges Township, Fayette County, PA

Executrix: Carol Ann Hatfield (3)
c/o Kopas Law Offices
556 Morgantown Road
Uniontown, PA 15401
Attorney: John Kopas

LAURA E. WALTERS, late of Nicholson
Township, Fayette County, PA (3)

Administrator: Sabine Gaskill
c/o P.O. Box 622
Smithfield, PA 15478
Attorney: Charity Grimm Krupa

JOHN H. WENSING, late of New Salem,
Fayette County, PA (3)

Personal Representative: Sherri Hosfelt
c/o Watson Mundorff, LLP
720 Vanderbilt Road
Connellsville, PA 15425
Attorney: Timothy J. Witt

Second Publication

MINERVA ALBERT, late of Newell Borough,
Fayette County, PA (2)

Personal Representative: Walter A. Albert
c/o 902 First Street
P.O. Box 310
Hiller, PA 15444
Attorney: Herbert G. Mitchell, Jr.

MARY ANN BATOR, late of Redstone
Township, Fayette County, PA (2)

Executrix: Frances Yoders
P.O. Box 193
Republic, PA 15475
c/o 51 East South Street
Uniontown, PA 15401
Attorney: Anthony S. Dedola, Jr.

HARRY WILLIAM COPE, late of
Uniontown, Fayette County, PA (2)

Administratrix: Kathleen M. Heino
203 Dally Road
Coal Center, PA 15423
c/o Bassi, Vreeland & Associates, P.C.
P.O. Box 144
111 Fallowfield Avenue
Charleroi, PA 15022
Attorney: Bradley M. Bassi

SKYE FROST, late of Menallen Township,
Fayette County, PA (2)

Personal Representative:
Herbert G. Mitchell, Jr.
c/o 902 First Street
P.O. Box 310
Hiller, PA 15444
Attorney: Herbert G. Mitchell, Jr.

MARY JANE HAKY, late of South Union
Township, Fayette County, PA (2)

Executor: David G. Korelko
c/o John & John
96 East Main Street
Uniontown, PA 15401
Attorney: Anne N. John

DOROTHY HALBROOK, a/k/a DOROTHY J. HALBROOK, a/k/a DOROTHY JEAN HALBROOK, late of North Union Township, Fayette County, PA (2)

Executor: Charles David Halbrook
c/o Higinbotham Law Offices
45 East Main Street, Suite 500
Uniontown, PA 15401
Attorney: James Higinbotham

SHIRLEY KARPEL, a/k/a SHIRLEY ANN KARPEL, late of Luzerne Township, Fayette County, PA (2)

Executrix: Bernadine S. Hixon
94 Splash Drive
Falling Waters, WV 25419
c/o Law Office of Lorraine A. Smith
12 Fernwood Avenue
Pittsburgh, PA 15228
Attorney: Lorraine Smith

HELEN LOWDEN, a/k/a HELEN D. LOWDEN, late of Dunbar Township, Fayette County, PA (2)

Personal Representatives: Dale K. Lowden and Linda D. Sweitzer
c/o Higinbotham Law Offices
45 East Main Street, Suite 500p
Uniontown, PA 15401
Attorney: James Higinbotham

MARGARET E. MARGHELLA, a/k/a MARGARET ELIZABETH MARGHELLA, late of Uniontown, Fayette County, PA (2)

Administrator: Anthony N. Marghella, Jr.
c/o 51 East South Street
Uniontown, PA 15401
Attorney: Anthony S. Dedola, Jr.

HARRY E. NIEDZWECKI, a/k/a HARRY EDWARD NIEDZWECKI, late of Henry Clay Township, Fayette County, PA (2)

Personal Representative:
Justin Adam Niedzwecki
1738 Pickford Street
Irwin, PA 15642
c/o Hajduk Law Office
22 Bierer Avenue
Uniontown, PA 15401
Attorney: Mary Lenora Hajduk

GEORGE E. PAVLOVICH, late of German Township, Fayette County, PA (2)

Personal Representative:
Herbert G. Mitchell, Jr.
902 First Street
P.O. Box 310
Hiller, PA 15444
Attorney: Herbert G. Mitchell, Jr.

GEORGE ROBERT STRAWN, a/k/a GEORGE R. STRAWN, late of Connellsville, Fayette County, PA (2)

Executrix: Mary L. Reed
c/o P.O. Box 760
Connellsville, PA 15425
Attorney: Carolyn W. Marcondi

ELAINE E. TOMCHECK, late of Markleysburg, Fayette County, PA (2)

Executor: Anthony S. Dedola, Jr.
c/o 51 East South Street
Uniontown, PA 15401
Attorney: Anthony S. Dedola, Jr.

First Publication

MADGE APRIL ADAMS, a/k/a MADGE A. ADAMS, late of Perryopolis, Fayette County, PA (1)

Executrix: Amanda L. Vargo
c/o Zebley Mehalov & White, P.C.
18 Mill Street Square
P.O. Box 2123
Uniontown, PA 15401
Attorney: Mark M. Mehalov

ARNOLD S. BITTINGER, a/k/a ARNOLD BITTINGER, late of Georges Township, Fayette County, PA (1)

Executor: Clark Fitzpatrick, Jr.
c/o John & John
96 East Main Street
Uniontown, PA 15401
Attorney: Simon B. John

WILLIAM C. BREWER, a/k/a BILL BREWER, late of Washington County, Fayette County, PA (1)

Executrix: Theresa Jaworowski
316 South Fifth Street
West Newton, PA 15089
c/o P.O. Box 718
Belle Vernon, PA 15012
Attorney: Brian G. Pirilla

ANN L. CAROLLA, a/k/a ANN CAROLLA, late of North Union Township, Fayette County, PA (1)

Executor: Raymond G. Carolla
145 Windwoods Drive
Hopwood, PA 15445
c/o Newcomer Law Offices
4 North Beeson Boulevard
Uniontown, PA 15401
Attorney: Ewing D. Newcomer

DIANA M. EDENFIELD, late of South Union Township, Fayette County, PA (1)

Personal Representative: Jason Edenfield
c/o George & George
92 East Main Street
Uniontown, PA 15401
Attorney: Joseph M. George, Sr.

EARL HALL, a/k/a EARL D. HALL, SR., late of Bullskin Township, Fayette County, PA (1)

Executrix: Ruby A. Geyer
1309 West Crawford Avenue
Connellsville, PA 15425
c/o Snyder & Snyder
17 North Diamond Street
Mt. Pleasant, PA 15666
Attorney: Marvin Snyder

EDITH MARIE JENNEY, late of Brownsville, Fayette County, PA (1)

Personal Representative: Todd A. Jenney
c/o Davis & Davis
107 East Main Street
Uniontown, PA 15401
Attorney: Gary J. Frankhouser

EDITH NIXON, a/k/a EDITH GANS NIXON, late of Georges Township, Fayette County, PA (1)

Executor: David W. Nixon
c/o Radcliffe Law, L.L.C.
648 Morgantown Road, Suite B
Uniontown, PA 15401
Attorney: William M. Radcliffe

ELEANOR M. NYPAVER, late of Uniontown, Fayette County, PA (1)

Executrix: Stephanie M. Nypaver
c/o 9 Court Street
Uniontown, PA 15401
Attorney: Vincent J. Roskovensky, II

PASQUALE G. PASQUA, a/k/a PASQUALE PASQUA, a/k/a PATSY PASQUA, late of Menallen Township, Fayette County, PA (1)

Executor: Peter M. Pasqua
c/o George & George
92 East Main Street
Uniontown, PA 15401
Attorney: G.T. George

MARY L. PAULL, a/k/a MARY LOUISE PAULL, late of Jefferson Township, Fayette County, PA (1)

Executor: John A. Paull, Jr.
269 Chalfant Road
Perryopolis, PA 15473

PHILIP PLASKI, late of Masontown, Fayette County, PA (1)

Personal Representative: Bruce Plaski
582 Madison Drive
Smithfield, PA 15478
c/o 22 Bierer Avenue
Uniontown, PA 15417
Attorney: Mary Lenora Hajduk

JONATHAN STANLEY SOBEK, late of Jefferson Township, Fayette County, PA (1)

Personal Representative: Juliann Braddock
c/o Davis & Davis
107 East Main Street
Uniontown, PA 15401
Attorney: Jeremy J. Davis

PAUL F. STUCK, late of German Township,
Fayette County, PA (1)

Executrix: Diana Lou Forcier
c/o P.O. Box 622
Smithfield, PA 15478
Attorney: Charity Grimm Krupa

LENNIE VOYTOVICH, late of Jefferson
Township, Fayette County, PA (1)

Personal Representative: Melissa Berish
c/o Davis & Davis
107 East Main Street
Uniontown, PA 15401
Attorney: Jeremy J. Davis

LEGAL NOTICES

NOTICE IS HEREBY GIVEN that a Petition has been filed in the Court of Common Pleas of Fayette County, Pennsylvania, seeking to change the name of Luciano Ray Mackelprang to Luciano Ray Lewis. A hearing on the Petition will be held on Monday, May 10, 2021 at 11 :30 o'clock a.m. in Courtroom No. 4 at the Fayette County Courthouse, Uniontown, Pennsylvania, at which time any persons interested may attend and show cause, if any, why the Petition should not be granted.

Luciano Ray Mackelprang
% Dellarose Law Office, PLLC
Melinda Deal Dellarose
99 East Main Street
Suite 101
Uniontown, PA 15401
(724)437-3200

JUDICIAL OPINION

IN THE COURT OF COMMON PLEAS OF FAYETTE COUNTY,
PENNSYLVANIA
CIVIL DIVISION

HEATHER BLACK, individually, as Administratrix :	
of the Estate of K.G.B., deceased, and as parent and :	
natural guardian of A.B., a minor and MELISSA :	
SHIPLEY, Administratrix, d.b.n. of the Estate of :	
JAMES E. BLACK, deceased, :	
Plaintiffs, :	
	:
vs. :	
	:
COMMONWEALTH OF PENNSYLVANIA, :	
DEPARTMENT OF TRANSPORTATION, :	
Defendant, :	
	:
vs. :	
	:
BRANDI M. MEYERS and :	No. 935 of 2018, G.D.
PENN LINE SERVICE, INC., :	
Additional Defendants. :	Honorable Nancy D. Vernon

OPINION AND ORDER

VERNON, J.	March 26, 2021
------------	----------------

Before the Court are two Motions for Summary Judgment. First is a Motion for Summary Judgment or, in the Alternative, Partial Summary Judgment filed by Defendant, Commonwealth of Pennsylvania, Department of Transportation (“PennDOT”) alleging sovereign immunity, lack of expert testimony to support Plaintiffs’ claims that the condition of the guiderail is the legal cause of the motor vehicle accident, that the testimony from the Coroner’s Inquest should be excluded from trial, and that the individual claims of Plaintiffs are capped at \$250,000 per claim and, in the aggregate \$1,000,000 pursuant to 42 Pa.C.S.A. §8528. Second, Additional Defendant Penn Line Service, Inc. (“Penn Line”) filed a Second Amended Motion for Summary Judgment requesting this Court to declare that Penn Line is not liable to PennDOT for breach of contract, contribution, or indemnification, that PennDOT cannot be indemnified for its own negligence, and/or to hold Penn Line’s liability is limited by the statutory damages cap.

FACTUAL BACKGROUND

This action arises out of a fatal motor vehicle accident which occurred on March 11, 2017, at 6:23 p.m., along State Route 982 in Bullskin Township, Fayette County, Pennsylvania. See, Complaint. Plaintiffs Heather Black and her minor children, A.B. and K.G.B., were as passengers in a 2006 Dodge Ram, which was owned and operated by James E. Black. Traveling in front of Black’s vehicle was a 2006 Chevrolet Cobalt owned and operated by Additional Defendant Brandi M. Meyers. Another vehicle was traveling in front of Meyers. James E. Black entered the southbound lane into a marked

passing zone in an attempt to pass the Meyers' vehicle. Meyers then also entered into the southbound passing lane and impacted the Black vehicle. The truck operated by Black veered off the western side of State Route 982 and struck a large tree, located outside of the guardrail. Minor child K.G.B. and James E. Black died as a result of the injuries suffered in this accident. Plaintiffs Heather Black and minor child A.B. survived and, at the instant action, allege injuries and damages as further set forth in the Complaint. Heather Black was appointed Administratrix of the Estate of K.G.B., deceased, and Melissa Shipley was appointed Administratrix d.b.n. of the Estate of James E. Black, deceased, herein named Plaintiffs pursuing claims on behalf of the estates.

Operative to this case is the state of the guardrail. Plaintiffs allege that the guardrail was "down" and "had been in a state of disrepair for a significant period prior to the date of the aforesaid accident." Plaintiffs allege the unrepaired guardrail was a dangerous condition of PennDOT, a Commonwealth agency's real estate.

PennDOT and Penn Line entered into a contract for Penn Line's highway construction and repair services. Pursuant to the contract, the description and location of the project was "[f]or the repair, replacement, and/or update of guide rail [...] throughout Fayette County." See, ECMS Highway Construction Contract 105778, page 6, ¶2. The contract incorporated PennDOT Publication 408/2016-IE. *Id.* at ¶1.

On or about January 29, 2017, PennDOT notified Penn Line that a portion of the guardrail "at approximately State Route 982, Segment 60, Offset 2250, was damaged and/or in need of repair, replacement, and/or update in accordance with the Contract between PennDOT and Penn Line Services, Inc." See, Complaint to Join Additional Defendant at ¶12. On the date of the accident, March 11, 2017, Penn Line had not repaired, replaced, or updated the guardrail.

STANDARD OF REVIEW

The standards for ruling on a motion for summary judgment are well-defined and clear. The court can grant summary judgment only in those cases where the record clearly demonstrates that there is no genuine issue of material fact, and that the moving party is entitled to judgment as a matter of law. When considering a motion for summary judgment, the trial court must take all facts of record, and reasonable inferences therefrom, in the light most favorable to the non-moving party. In doing so, the trial court must resolve all doubts as to the existence of a genuine issue of material fact against the moving party and, thus, may only grant summary judgment where the right to such judgment is clear and free from all doubt. See *Summers v. Certaineed Corporation*, 997 A.2d 1152 (Pa. 2010); *Toy v. Metropolitan Life Insurance Company*, 928 A.2d 186 (Pa. 2007).

DISCUSSION

PennDOT's Motion for Summary Judgment

PennDOT asserts sovereign immunity bars Plaintiffs' claims because the record is void of evidence that the injuries sustained in the accident were caused by the design, installation, or condition of the guiderail. PennDOT is protected from negligence actions by sovereign immunity, unless the cause of action falls within one of the exceptions set forth in 42 Pa.C.S.A. § 8522(b). The following exception exists under the Sovereign Immunity Act with regard to highways:

(b) Acts which may impose liability.--The following acts by a Commonwealth party may result in the imposition of liability on the Commonwealth and the defense of sovereign immunity shall not be raised to claims for damages caused by:

(4) Commonwealth real estate, highways and sidewalks.--A dangerous condition of Commonwealth agency real estate and sidewalks, [...] and highways under the jurisdiction of a Commonwealth agency.

42 Pa.C.S.A. § 8522(b)(4).

“A plaintiff seeking to prevail in a negligence action against the Commonwealth must demonstrate that [the] claim is one that, if proven, would satisfy the common law requirements for a negligence claim and that one of the exceptions to sovereign immunity applies.” *Lambert v. Katz*, 8 A.3d 409, 417 (Pa.Comm.w.Ct. 2010). Under common law, the plaintiff must establish that: “(1) the defendant owed a duty of care to the plaintiff; (2) the duty was breached; (3) the breach resulted in the plaintiff’s injury; and (4) the plaintiff suffered an actual loss or damages.” *Bubba v. Dep’t. of Transp.*, 61 A.3d 313, 316 (Pa.Comm.w.Ct. 2013).

The Pennsylvania Supreme Court has ruled that guardrails along state highways can meet the real estate exception to sovereign immunity. *Cagey v. Commonwealth*, 179 A.3d 458 (Pa. 2018). The Supreme Court held, “When PennDOT installs a guardrail, sovereign immunity is waived if the agency’s negligent installation and design creates a dangerous condition.” *Id.* at 467. Once a guardrail has been installed, it is a fixture, with the result that liability can be imposed under the real property exception to sovereign immunity.

Based on the record, PennDOT does not contest that the guardrail was installed at the location of the accident and that it was “down” at the time of the accident. Alleging that the guardrail was not in its proper upright position, Plaintiffs’ allegations relate to the negligent design or installation of the guardrail.

For the real estate exception to sovereign immunity to apply, the dangerous condition must cause the injury and “must derive, originate from, or have as its source the Commonwealth realty.” *Snyder v. Harmon*, 562 A.2d 307, 311 (Pa. 1989). Since the Commonwealth installed the guardrail, thus becoming a fixture, and the parties do not contest that the guardrail was not in its proper position, sovereign immunity cannot apply. Accordingly, summary judgment must be denied.

PennDOT next maintains that summary judgment should be entered since no expert testimony supports Plaintiffs’ claims that the condition of the guardrail is the legal cause of the accident and that the injuries and damages resulted from the accident. At the time set for oral argument, PennDOT withdrew its argument regarding the report of Sergeant John Weaver. By prior Order of Court dated September 28, 2020, Frye objections shall be raised prior to trial.

PennDOT moved to exclude from trial the testimony from the Coroner’s Inquest into the death of James E. Black. Plaintiffs do not oppose this motion.

Lastly, PennDOT requested summary judgment be entered that claims against PennDOT cannot exceed \$250,000 in favor of any Plaintiff or \$1,000,000 in the aggregate. For clarification, these damages limitations are statutory in nature and will be enforced by this Court, but any liability attributed to PennDOT will not be offset by Plaintiffs’ recovery from defendants other than PennDOT.

Penn Line's Motion for Summary Judgment

Penn Line first argues that it is not liable to PennDOT for breach of contract because Section 608 of the contract did not impose a contractual obligation on Penn Line to repair or replace the guiderail and cannot serve as a basis for a breach of contract claim. Penn Line contends Section 608 relates only to payments. PennDOT maintains that Section 608 of the contract with Penn Line did require Penn Line to respond within seven days for interstate or expressway work and fourteen days for all other roadways.

The contract provision at issue is Section 608.4(c) "Measurement and Payment" which provides in its entirety:

(c) Final Payment Adjustment. The contractor must respond to all call-outs within 7 calendar days for work on any interstate or expressway and 14 calendar days for all other roadway classifications. If the contractor fails to respond within the allotted time the final payment will be adjusted as follows.

Percentage of Call-Outs Within the Allotted Time	Proportional Part of Contract Price Allowed
100	100%
95 to 99	90%
90 to 94	80%
85 to 89	70%
80 to 84	60%
75 to 79	50%
Less than 75	25%

See, ECMS Highway Construction Contract 105778, page 74.

Penn Line asserts that it was the parties' intent to create a device for payment reduction in the event of delayed or incomplete performance and highlights the heading of this provisions named "Final Payment Adjustment." According to Penn Line, this provision does not say that Penn Line's failure to respond within the allotted time constitutes a breach of contract, but rather, that Penn Line's compensation is subject to adjustment if the work is not completed within a particular timeframe.

PennDOT responds that Section 608 is a material term of the contract that primarily governs the time within which Penn Line must perform its obligations. According to PennDOT, Section 608 imposes a duty on Penn Line to perform construction and repair services within seven or fourteen days. PennDOT maintains that the contract does not allow Penn Line to discretionally determine when it will perform such services.

It is well-established that three elements are necessary to plead a cause of action for breach of contract: (1) the existence of a contract, including its essential terms; (2) a breach of the contract; and, (3) resultant damages. Meyer, Darragh, Buckler, Bebenek & Eck, P.L.L.C. v. Law Firm of Malone Middleman, P.C., 137 A.3d 1247, 1258 (Pa. 2016)

The determinative question pending before this Court is whether Section 608.4(c), as an essential term of the contract, articulates the time period within which Penn Line is obligated to respond to call-outs or whether the section is merely a clause for payment reduction in the event of delayed or incomplete performance.

In interpreting the terms of a contract, the cardinal rule followed by courts is to

ascertain the intent of the contracting parties. *Lesko v. Frankford Hosp.—Bucks Cnty.*, 15 A.3d 337, 342 (Pa. 2011). If the contractual terms are clear and unambiguous on their face, then such terms are deemed to be the best reflection of the intent of the parties. *Kripp v. Kripp*, 849 A.2d 1159, 1162 (Pa. 2004). “A contract is ambiguous if it is reasonably susceptible of different constructions and capable of being understood in more than one sense.” *Insurance Adjustment Bureau, Inc. v. Allstate Ins. Co.*, 588 Pa. 470, 905 A.2d 462, 468 (2006). While unambiguous contracts are interpreted by the court as a matter of law, ambiguous writings are interpreted by the finder of fact. *Kripp* at 1163.

Here, the Court finds that the time frame for responding to call-outs provided in Section 608.4(c) is not ambiguous with the parties agreeing to the mandatory language: “[t]he contractor must respond [...]” The conjunction “if” applies only to the payment provisions: “If the contractor fails to respond within the allotted time the final payment will be adjusted [...]”

A contract is to be considered as a whole, and if possible, all its provisions should be given effect. *Meeting House Lane, Ltd. v. Melso*, 628 A.2d 854 (Pa. Super. 1993). Although placement of this time frame provision under the heading “Mobilization, Final Payment Adjustment” could be misleading, the headings are used for convenience or reference. The language of the text of Section 608.4(c) requires Penn Line to respond within seven or fourteen days.

Even if the Court were to hold differently, whether finding that Section 608.4(c) was ambiguous or that it applied only to payment reductions, contracts without a stated duration will still be “construed as providing for a reasonable time or some particular period inferred from the nature and circumstances of the undertaking.” *Price v. Confair*, 79 A.2d 224, 226 (Pa. 1951). Where a written instrument does not specify a time for performance, the law implies that performance will be done within a reasonable time, depending upon the nature of the business. *Field v. Golden Triangle Broad., Inc.*, 305 A.2d 689, 691 (Pa. 1973). Here, PennDOT reported the guardrail to Penn Line on or about January 29, 2017. Penn Line had not fixed the guardrail when the accident occurred 42 days later on March 11, 2017.

Penn Line next moves for summary judgment arguing that PennDOT cannot be indemnified for its own negligence as the contract’s indemnification language is insufficient under the Perry-Ruzzi rule. PennDOT responds that Penn Line’s attempted application of this rule is misguided. Specifically, PennDOT contends that Penn Line cannot use the Perry-Ruzzi rule to escape potential liability even before negligence has been established or disproved.

Under well-settled Pennsylvania law, known as the Perry-Ruzzi rule, a party can only obtain contractual indemnification for its own negligent conduct if the contract contains clear and unequivocal language to that effect. *Perry v. Payne*, 66 Pa. 553 (Pa. 1907); *Ruzzi v. Butler Petroleum Co.*, 588 A.2d 1 (Pa. 1991).

The relevant contractual indemnification provision within PennDOT Publication 408/2016-IE provides:

107.14 RESPONSIBILITY FOR DAMAGE CLAIMS— [...] to indemnify and save harmless the State, the Department, and all of its officers and employees from all suits, actions, or claims of any character, name, and description, brought for or on account of any injuries or damages received or sustained by any person, per-

sons, or property during the performance of work by the Contractor, whether the same is due to the use of defective material, defective workmanship, neglect in safeguarding the work or public interests, or by or on account of any act, omission, neglect, or misconduct of the Contractor, or any Subcontractors, Fabricators, Manufacturers, or Vendors.

PennLine argues that this language does not contemplate that Penn Line, as the contractor, will indemnify PennDOT for its own negligence and, also, that this provision lacks any language to that effect.

At this stage of the proceedings, the negligence of any party has not been determined. It is undisputed that the Perry-Ruzzi rule applies when a party seeks indemnification for its own negligence. Yet, unless or until PennDOT is determined by a fact finder to have been negligent, application of the Perry-Ruzzi rule is premature.

Lastly, Penn Line requests the Court to rule, as a matter of law, that Penn Line cannot be liable to PennDOT for contribution or indemnification in excess of \$1 million, given the damages cap contained in the Sovereign Immunity Act, 42 Pa.C.S.A. §8521, et seq. PennDOT admitted these averments to the extent that PennDOT also should not be liable in excess of \$1 million as the maximum statutory liability. Upon PennDOT's response, the Court holds that Penn Line cannot be liable for contribution or indemnification to PennDOT for sums greater than \$1 million.

WHEREFORE, we will enter the following Order.

ORDER

AND NOW, this 26th day of March, 2021, upon consideration of the Motion for Summary Judgment or, in the Alternative, Partial Summary Judgment filed by Defendant, Commonwealth of Pennsylvania, Department of Transportation, and the Record, it is hereby ORDERED and DECREED that the motion for sovereign immunity is denied, the lack of expert testimony to support Plaintiffs' claims that the condition of the guidrail is the legal cause of the motor vehicle accident is withdrawn, that the testimony from the Coroner's Inquest should be excluded from trial is granted, and that the individual claims of Plaintiffs are capped at \$250,000 per claim and, in the aggregate \$1,000,000 pursuant to 42 Pa.C.S.A. §8528 is granted.

It is further ORDERED and DECREED that the Second Amended Motion for Summary Judgment filed by Additional Defendant Penn Line Service, Inc. ("Penn Line") to declare that Penn Line is not liable to PennDOT for breach of contract, contribution, or indemnification is denied, that PennDOT cannot be indemnified for its own negligence is denied as premature, and to hold Penn Line's liability is limited by the statutory damages cap is granted.

BY THE COURT,
NANCY D. VERNON, JUDGE

ATTEST:
Prothonotary

LUNCH & LEARN SERIES

The Fayette County Bar Association's next presentation in its Lunch & Learn Series will be:

- Date: **Wednesday, April 21st** from 12:00 p.m. to 1:30 p.m.
- Location: Courtroom No. 1 of the Fayette County Courthouse
- Discussion topics: **Sheriff's Sales**
- Presenters: Anne N. John, Esquire, and Charles O. Zebley, Esquire

CLE Credit

1.5 hours of Substantive CLE credit for the program. The fees are as follows:

Members of the FCBA

- No charge for attendance without CLE Credit
- \$10 fee for attendance with CLE Credit

Attorneys admitted to practice in Pennsylvania after January 1, 2016

- No charge for attendance with CLE Credit

Non-members of the FCBA

- \$10 fee for attendance without CLE Credit
- \$40 fee for attendance with CLE Credit

**** All fees to be paid at the door ****

A light lunch will be provided.

RSVP

If interested in attending, please call Cindy at the Bar office at 724-437-7994 or by email to cindy@fcbar.org on or before Monday, April 19th.

WARMAN ABSTRACT & RESEARCH LLC

JOHN F. WARMAN

518 Madison Drive

Smithfield, PA 15478

724-322-6529

johnfranciswarman@gmail.com

COMMERCIAL/RESIDENTIAL/CURRENT OWNER/MINERAL TITLE

A DECADE OF EXPERIENCE

E&O INSURED

WILL TRAVEL

ACCEPTING NEW CLIENTS

*Quality... Experience... Results...
It's what your clients deserve.*

Medical Malpractice • Auto Accidents • Personal Injury



GISMONDI
& ASSOCIATES

412-281-2200

www.gislaw.com

700 Grant Bldg., 310 Grant St., Pgh., PA 15219