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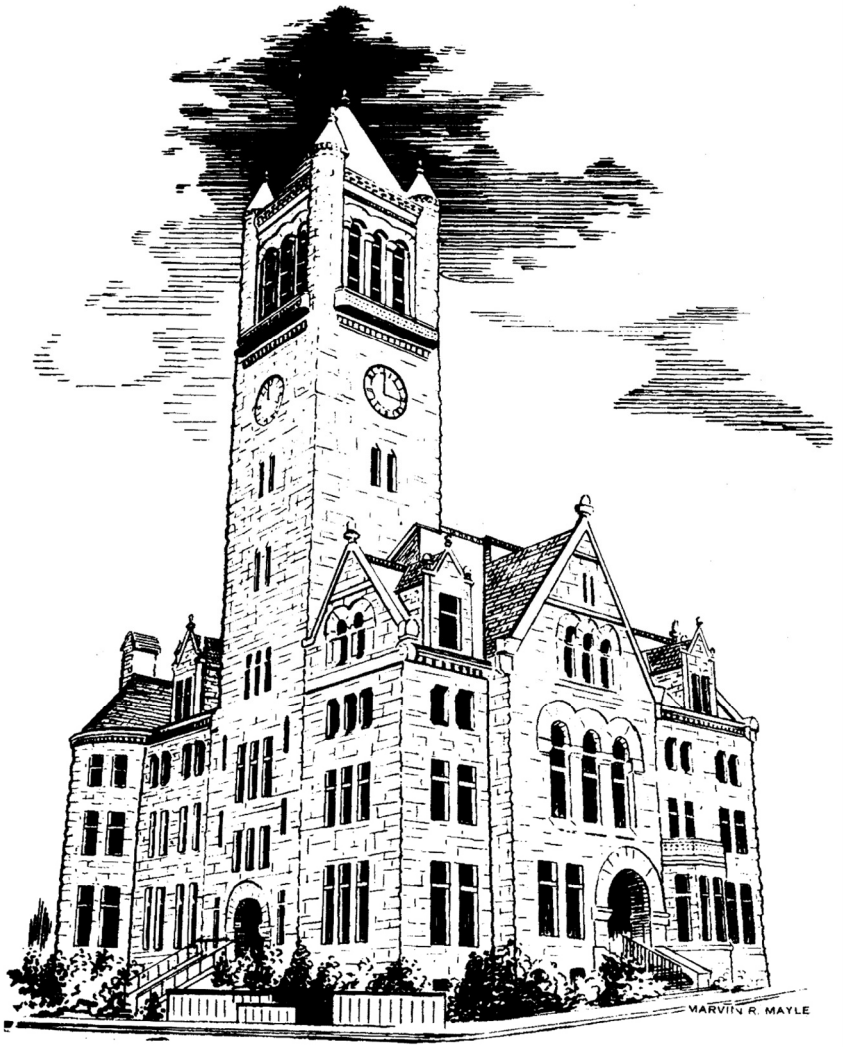

FAYETTE LEGAL JOURNAL

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.

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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

MARILYN L. BANKS, late of South Connellsville Borough, Fayette County, PA (3)
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Executor: Gary W. Snyder
c/o 51 East South Street
Uniontown, PA 15401
Attorney: Webster & Webster

LEGAL NOTICES

*** NO LEGAL NOTICES ***

JUDICIAL OPINION

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

JERRY HARROLD and	:
AMY HARROLD,	:
Plaintiffs,	:
v.	:
ALBERT GALLATIN NORTH	:
MIDDLE SCHOOL and ALBERT	:
GALLATIN SCHOOL DISTRICT,	: No. 206 of 2021, G.D.
Defendants.	: Honorable President Judge Steve P. Leskinen

OPINION AND ORDER

LESKINEN, P.J. December 19, 2023

Before the Court is the Defendants' Motion for Summary Judgment. After consideration of the record in this matter and the arguments and briefs of the parties in support of their positions, the Court hereby issues the following Opinion and Order granting the Motion:

Factual and Procedural History

Plaintiffs filed the above-captioned negligence action against Defendants on February 5th, 2021. The matter concerns an incident that occurred on February 18th, 2019, when Mr. Harrold, acting as a delivery driver for US Foods, made a delivery to the Albert Gallatin North Middle School. Mr. Harrold alleges that a large dumpster was in the driveway leading to the loading dock. As a result of the placement of the dumpster, Mr. Harrold alleges he was unable to back his truck flush to the loading dock and instead used a ramp as a bridge from the truck to the dock. On his third trip into the building, either the hand truck Mr. Harrold was using or the cargo on the hand truck struck the building, the force of which knocked him to the ground below the dock, causing serious injuries.

Defendants filed a Motion for Summary Judgment on November 18th, 2022. The parties were referred to mediation which was unsuccessful. After a status conference on July 17th, 2023, this Court entered an Order setting forth a schedule for Plaintiffs to file their Response to the Motion and giving Defendants an opportunity to supplement the record, if they chose, after receiving the Response. Oral argument was held on November 13th, 2023, after which the parties had an opportunity to submit any additional case law or statutory authority in support of their positions. {1}

Standard of Review

Summary judgment is governed by Rule 1035.2 of the Pennsylvania Rules of Civil Procedure, which provides:

> After the relevant pleadings are closed, but within such time as not to unreasonably delay trial, any party may move for summary judgment in whole or in part as a matter of law

{1} The Court considered any supplemental materials and briefs submitted by the parties to the extent that such materials provided case law or statutory support for the respective party's oral argument. These materials included the Reply Brief Plaintiffs filed on September 11th, 2023, in response to Defendants' Reply to Plaintiffs Response, and the email submitted by Defendants on November 17th, 2023, after oral argument.

(1) whenever there is no genuine issue of any material fact as to a necessary element of the cause of action or defense which could be established by additional discovery or expert report, or

(2) if, after the completion of discovery relevant to the motion, including the production of expert reports, an adverse party who will bear the burden of proof at trial has failed to produce evidence of facts essential to the cause of action or defense which in a jury trial would require the issues to be submitted to a jury.

"Motions for summary judgment necessarily and directly implicate the plaintiffs proof of the elements of his cause of action." DeArmitt v. New York Life Ins. Co., 73 A.3d 578, 586 (Pa. Super. 2013). "Thus, a record that supports summary judgment will either (1) show the material facts are undisputed or (2) contain insufficient evidence of facts to make out a prima facie cause of action or defense and, therefore, there is no issue to be submitted to the fact finder." Id. Summary judgment may only be granted in cases that are clear and free from doubt. Weiss v. Keystone Mack Sales, Inc., 456 A.2d 1009, 1011 (Pa. Super. 1983).

Defendants argue that they are entitled to summary judgment as a matter of law because the Plaintiffs have not established a prima facie case for negligence in the "record" that satisfies the real property exception to governmental immunity. Plaintiffs contend that issues of material fact remain that are matters for a jury.

The Pennsylvania Political Subdivision Tort Claims Act

The Pennsylvania Political Subdivision Tort Claims Act ("PSTCA"), 42 Pa. C.S.A. §8541, et seq., provides, "Except as otherwise provided in this subchapter, no local agency shall be liable 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." Id. at §8541. The PSTCA then goes on to set forth certain exceptions to governmental immunity, beginning with §8542(a):

(a) Liability imposed.--A local agency shall be liable for damages on account of an injury to a person or property within the limits set forth in this subchapter if both of the following conditions are satisfied and the injury occurs as a result of one of the acts set forth in subsection (b): (emphasis added)

(1) The 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 a defense under section 8541 (relating to governmental immunity generally) or section 8546 (relating to defense of official immunity); and

(2) The injury was caused by the negligent acts of the local agency or an employee thereof acting within the scope of his office or duties with respect to one of the categories listed in subsection (b). As used in this paragraph, "negligent acts" shall not include acts or conduct which constitutes a crime, actual fraud, actual malice or willful misconduct.

The relevant part of §8542(b) is (b)(3), relates to real property:

(3) Real property.--The care, custody or control of real property in the possession of the local agency, except that the local agency shall not be liable for damages on account of any injury sustained by a person intentionally trespassing on real property in the possession of the local agency. As used in this paragraph, "real property" shall not include:

(i) trees, traffic signs, lights and other traffic controls, street lights and street lighting systems;
(ii) facilities of steam, sewer, water, gas and electric systems owned by the local agency and located within rights-of-way;
(iii) streets; or
(iv) sidewalks.

§8542(a)(1) Damages Recoverable Under Common Law or Statute

As directed by §8542(a)(1), a plaintiff must first meet their burden of proof to establish that damages would be recoverable if the injury was caused by a person who was not immune before a court determines whether the accident falls within the real estate exception to governmental immunity. Mason & Dixon Lines, Inc. v. Magnet, 645 A.2d 1370, 1373 (Pa. Cmwlth. 1994). The PSTCA does not impose a standard of liability in cases involving exceptions to immunity that is greater than that to which private landowners are held. Vann v. Bd. of Educ. Of School Dist. Of Philadelphia, 464 A.2d 684, fn. 5 (Pa. Cmwlth. 1983).

A prima facie negligence claim requires a plaintiff show that (1) the defendant had a duty to conform to a standard of conduct, (2) the defendant breached that duty, (3) the breach caused the injury in question; and (4) the plaintiff incurred actual loss or damage. Krentz v. Consolidated Rail Corp. 589 Pa. 576 (Pa. 2006) (distinguished on other grounds). The standard of care a possessor owes to one who enters upon the land depends on whether the person entering is a trespasser, licensee, or invitee. Carrender v. Fitterer, 503 Pa. 178, 184 (Pa. 1983). Under §332(1) and (3) of the Restatement (Second) of Torts, an invitee is either a public invitee or a business visitor. A business visitor is a person who is invited to enter or remain on land for a purpose directly or indirectly connected with business dealings with the possessor of the land. Mr. Harrold was clearly a business invitee of AGASD.

Possessors of land have a duty to protect invitees from foreseeable harm. Restatement, supra, §§341A, 343, and 343A. Under §343:

A possessor of land is subject to liability for physical harm caused to his invitees by a condition on the land, but only if, he
(a) knows or by the exercise of reasonable care would discover the condition, and should realize that it involves an unreasonable risk of harm to such invitees, and
(b) should expect that they will not discover or realize the danger, or will fail to protect themselves against it, and
(c) fails to exercise reasonable care to protect them against the danger.

Per comment (a) to §343, it should be read together with §343A:

(1) A possessor of land is not liable to his invitees for physical harm caused to - them by any activity or condition on the land whose danger is known or obvious to them, unless the possessor should anticipate the harm despite such knowledge or obviousness.

(2) In determining whether the possessor should anticipate harm from a known or obvious danger, the fact that the invitee is entitled to make use of public land, or of the facilities of a public utility, is a factor of importance indicating that the harm should be anticipated.

The Pennsylvania Supreme Court has cited §343 numerous times to support the proposition that "the law of Pennsylvania does not impose liability if it is reasonable for the possessor to believe that the dangerous condition would be obvious to and discovered by his invitee." Palenscar v. Michael J. Bobb, Inc., 439 Pa. 101, 105 (Pa. 1970). A possessor of land has no duty to warn an invitee of danger which is more obvious to and more likely to be discovered by the invitee than by the possessor. Id.

In Carrender, supra, the Pennsylvania Supreme Court addressed the relationship between the assumption of risk doctrine and the rule that a possessor of land is not liable to his invitees for obvious dangers. Carrender, at 187. The Plaintiff in Carrender argued her recognition of the dangerous condition of an icy parking lot before she proceeded voluntarily to traverse it should be considered by the jury in apportioning fault, but not operate as a total bar to recovery. The Carrender Court rejected that argument, holding:

When an invitee enters business premises, discovers dangerous conditions which are both obvious and avoidable, and nevertheless proceeds voluntarily to encounter them, the doctrine of assumption of the risk operates merely as a counterpoint to the possessor's lack of duty to protect the invitee from those risks. By voluntarily proceeding to encounter a known or obvious danger, the invitee is deemed to have agreed to accept the risk and to undertake to look out for himself. It is precisely because the invitee assumes the risk of injury from obvious and avoidable dangers that the possessor owes the invitee no duty to take measures to alleviate those dangers. Thus, to say that the invitee assumed the risk of injury from a known and avoidable danger is simply another way of expressing the lack of any duty on the part of the possessor to protect the invitee against such dangers. Id. at 188. (internal citations omitted)

Assuming for the purposes of summary judgment that the dumpster restricted access to the dock and that the loading dock was unreasonably narrow2 for its intended purpose, the placement of the dumpster and the size of the loading dock were not latent defects. As a delivery driver who had delivered to this site before and had already made other trips into the building for deliveries that day, Mr. Harrold would have had more knowledge and experience to determine whether the dock represented any unreasonable risk of harm for a driver than would any employee for AGASD who did not use the dock for that purpose. There is no evidence in the record showing that AGASD had any prior complaints about the alleged placement of the dumpster or the dimensions of the loading dock. Even if the exercise of reasonable care required AGASD to inspect the dock or the driveway, the record does not suggest any reason AGASD would be in a better position than Mr. Harrold to determine that the dumpster or the dimensions of the dock posed a dangerous condition.

By his own testimony, Mr. Harrold was aware that he would not be able to position his truck flush to the loading dock and that the dock was narrower than the dimensions of other docks where he made deliveries. He testified that he had delivered to Albert Gallatin North Middle School on at least three prior dates and had already made at least two trips with his hand truck into the school on that day before the accident occurred. Deposition of Jerry Harrold, page 76, line 7, and page 112, line 6.

{2} For the purposes of this case, "narrow" is referring to the depth of the dock- the distance from the door into the building to the opposite edge of the dock, and not to the width of the dock.

In fact, Mr. Harrold specifically testified that he did not perceive those conditions as requiring a higher level of caution or care in carrying out his deliveries:

Attorney Marquis: The question I have for you is: Do you believe the use of the ramp had anything to do with your accident?

Mr. Harrold: No.

Attorney Marquis: If you had backed your truck up flush to the loading dock, would you still have used the ramp or not used the ramp?

Mr. Harrold: Not used.

Attorney Marquis: Okay. Not used the ramp, is that correct?

Mr. Harrold: Correct.

Attorney Marquis: Okay. Do you believe that had the dumpster not been there at the time of your delivery, that you would have been able to back your truck up flush to the loading dock?

Mr. Harrold: Yes.

Attorney Marquis: Do you believe that it was at all possible, even with your indication that there was a dumpster there on the day of the accident, to back your truck up flush to the loading dock or was it impossible?

Mr. Harrold: Impossible.

Attorney Marquis: When you were making that delivery that day, did you ever think to possibly move your truck up farther away from the loading dock and then run the ramp to the ground to make the delivery?

Mr. Harrold: No.

Attorney Marquis: Why Not?

Mr. Harrold: Why make it harder on myself?

Attorney Marquis: Okay. So, in other words, you said it would have been harder for you to make the delivery if you would have what? Delivered the product to the ground and possibly what? Lift it on the loading dock and then take it in. Am I right?

Mr. Harrold: Correct.

Attorney Marquis: When you were making the delivery that day, did you have any concerns about any safety issues with using the ramp as a bridge to make your delivery?

Mr. Harrold: No.

Attorney Marquis: Did you have any concerns before you made your delivery that day about the loading dock, whether or not it was safe to use to make your delivery?

Mr. Harrold: No.

Attorney Marquis: Okay. When you were making your deliveries that day before the fall -okay- because you made some trips prior to the fall, did you have any thoughts in your mind, "Hey. This loading dock is too narrow. It's not wide enough. I better be careful?"

Mr. Harrold: No.

Attorney Marquis: So you had no concerns or worries or anything about the loading dock prior to the actual accident. Am I right?

Mr. Harrold: Correct.

Deposition of Jerry Harrold, page 209, line 25, through page 211, line 25.

Attorney Marquis: Okay. And on the day of the accident, you agree that if you wanted to, you could have backed your truck up short of the loading dock, let the ramp go to the ground and you could have unloaded product that way? Am I correct?

Mr. Harrold: Correct.

Attorney Marquis: Okay. And it's because you didn't see a problem with using the loading dock that day. Am I right?

Mr. Harrold: I wouldn't have done that because it would have been harder, not smarter.

Attorney Marquis: Okay. Well if you believe that the loading dock was dangerous prior to your fall, wouldn't you agree that you would have done that? You would have put the ramp on the ground. You would have delivered the product off onto the ground and then maybe lifted it onto the loading dock and then taken it in. Would you agree with that?

Mr. Harrold: No.

Attorney Marquis: You wouldn't have done it that way?

Mr. Harrold: No.

Attorney Marquis: Then what would you have done? Just not delivered to the school at all?

Mr. Harrold: I would have done exactly what I did.

Attorney Marquis: Regardless? Even if you believed the loading dock was dangerous or somehow defective, you still would have delivered it that same way. Is that what you're saying?

Mr. Harrold: If I thought the dock was deliberately dangerous, I wouldn't have delivered the stuff.

Attorney Marquis: You wouldn't have delivered it?

Mr. Harrold. Uh-huh.

Attorney Marquis: So you agree then before your accident, you didn't believe there was any problem with the dock until you had your accident. Am I right on that?

Mr. Harrold: Correct.

Deposition of Jerry Harrold, page 314, line 16, through page 316, line 3.

Even when the record is considered in the light most favorable to Plaintiffs, there is no genuine issue of fact as to at least one of the essential elements of §343(b) of the Restatement. By Mr. Harrold's own admission, he was aware of the conditions of which he now complains prior to his accident and he did not perceive them as posing any unreasonable danger prior to his accident. As an experienced delivery driver, Mr. Harrold was in the best position to perceive whether conditions were dangerous or not. Because he was able to perceive possible dangers better than anyone at the school, he was in the best position to take appropriate precautions for his own safety. To the extent that the size of the dock or the position of the dumpster represented a dangerous condition, the Defendants had no reason to anticipate that Mr. Harrold would fail to take any necessary precautions to unload and deliver safely. As a result, pursuant to the above cited case law, the Defendants had no duty to warn or otherwise act to protect the Plaintiff. {3}

The absence of a duty to the Plaintiff does not depend on the status of the Defendants as Political Subdivisions, there is an absence of duty even if they were private parties not subject to the PSTCA.

§8542(b)(3) does not waive immunity as to any unfortunate incident solely because it occurs on government property. Vann, supra, at 686. Plaintiffs have failed to produce evidence of facts essential to establish that Defendants owed him a duty of care under the circumstances, which is one of the required elements for a cause of action under §8542(a)(1), and therefore Defendants are entitled to summary judgment as a matter of law.

WHEREFORE, the Court issues the following Order:

ORDER

AND NOW, this 19th day of December, 2023, upon consideration of the "record" submitted and the oral arguments and briefs presented by the parties in support of their positions, and for the reasons set forth above, Defendant's Motion for Summary Judgment is hereby GRANTED. All Plaintiffs' claims are DISMISSED.

As this is a Final Order resolving all claims, it is immediately appealable.

BY THE COURT:
STEVE. P. LESKINEN, PRESIDENT JUDGE

ATTEST:
PROTHONOTARY

{3} Ski slopes have a statutory defense for "assumption of the risk," meaning that anyone voluntarily using a ski slope has given up any claim for harm resulting from that use. That means that even though the ski slope owner could have installed more safeguards, even when it would be reasonable and prudent to do so, and even when it would be obvious to the ski slope owner, there is no duty because of the statute. Here, there could have been a duty to install safeguards or to provide a warning, but the delivery driver himself was in a better position to evaluate the possible danger in using the dock than anyone employed by the Defendants, so the Defendants had no duty.