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IN THIS ISSUE

ADAMS COUNTY LEGAL JOURNAL (USPS 542-600)

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NOTICE BY THE ADAMS COUNTY CLERK OF COURTS

NOTICE IS HEREBY GIVEN to all heirs, legatees and other persons concerned that the following accounts with statements of proposed distribution filed therewith have been filed in the Office of the Adams County Clerk of Courts and will be presented to the Court of Common Pleas of Adams County Orphans' Court, Gettysburg, Pennsylvania, for confirmation of accounts entering decrees of distribution on Friday, August 18, 2017 at 8:30 am.

LOVELAND—Orphans' Court Action Number OC-123-2016. The First and Final Account of Christine A. Loveland, Successor Trustee of the Estate of Franklin O. Loveland III, Deceased, late of Adams County, Pennsylvania.

ADKINS—Orphans' Court Action Number OC-80-2017. The First and Final Account of ACNB Bank. Executor of the Estate of Lloyd E. Adkins, Deceased, late of McSherrystown, Adams County, Pennsylvania.

Kelly A. Lawver
Clerk of Courts

8/4 & 8/11

CHANGE OF NAME NOTICE

NOTICE IS HEREBY GIVEN June 8, 2017, a petition for name change was filed in the Court of Common Pleas of Adams County, Pennsylvania requesting a decree to change the name of Petitioner, Ryleigh Elycia Vedder to Ryleigh Elycia Lamont. The Court has affixed the 18th day of August, 2017 at 10:30 am in courtroom #4, third floor of the Adams County Courthouse as the time and place for the hearing of said petition, when and where all persons interested may appear and show cause, if any they have, why the Petitioner should not be granted.

8/4

CHANGE OF NAME NOTICE

NOTICE IS HEREBY GIVEN that, on June 27, 2017, a Petition for Change of Name was filed in the Court of Common Pleas of Adams County, PA, requesting a decree to change the name of Stacy E. Zaminski to Stacy Elizabeth Holly McCall Zaminski.

The Court has fixed August 18, 2017 at 10:30 a.m. in Courtroom #4, Third Floor, Adams County Courthouse, Gettysburg, PA, as the time and place for the hearing on said Petition, when and where all persons interested may appear and show cause, if any they have, why the prayer of the said petition should not be granted.

Samuel A. Gates, Esq.
Attorney for Petitioner
250 York Street
Hanover, PA 17331

8/4

RUTH CROUSE AND BRIAN CROUSE, SR. V. PATRICK FOLTZ AND MICHELLE FOLTZ V. LITTLESTOWN BOROUGH

1. Under Pennsylvania statutory law, a local agency is immune from liability for damages on account of an injury to a person or property caused by its own acts or the acts of its employees unless the injury falls into one of several enumerated exceptions to governmental immunity.

2. In order to qualify for an exception, a party must prove: (1) the damages would be recoverable under common law or statute against a person unprotected by the immunity; and (2) the negligent act of local agency or its employees that caused the injury falls within one of several limited exceptions to immunity.

3. Because of the express legislative intent to insulate political subdivisions from tort liability, exceptions to governmental immunity are strictly construed.

4. Pennsylvania jurisprudence teaches that while the issue of what constitutes a dangerous condition is a question of fact for the jury, whether an action is barred by immunity is purely a question of law. Determination of this question initially requires a strictly legal determination as to whether the alleged injury was caused by a condition of the property itself, which has its origin or source in the property.

5. The negligent maintenance of culverts for handling surface water which result in a dangerous condition caused by flooding has historically been held by Pennsylvania courts to fall within the sewer facilities exception as a dangerous condition arising from the property.

6. The history of Pennsylvania case law concerning whether negligent repair to a utility service facility falls within the exception is quite different. At the time of the filing of the current Motion for Summary Judgment, controlling precedent provided that the sewer facilities exception did not apply to dangerous conditions resulting from the conduct of government employees.

7. However, on June 20, 2017, the Pennsylvania Supreme Court reversed the Commonwealth Court's decision in Metro. Edison Co. v. City of Reading, ___ A.3d ___, 2017 W.L. 2655101 (2017). In doing so, the Court opined: the originating cause of the dangerous condition, whether by the negligence of the local agency or otherwise, is irrelevant to a proper application of the Utility Exception. Instead, the negligent act necessary to trigger the Utility Exception is the failure of the local agency to remediate a dangerous condition of which it has notice.

IN THE COURT OF COMMON PLEAS OF ADAMS COUNTY, PENNSYLVANIA, CIVIL 14-S-762, RUTH CROUSE AND BRIAN CROUSE, SR. V. PATRICK FOLTZ AND MICHELLE FOLTZ V. LITTLESTOWN BOROUGH.

Evan J. Kline, Esq., Attorney for Plaintiffs
Curtis C. Johnston, Esq., Attorney for Defendants
Joshua J. Bovender, Esq., Attorney for Additional Defendant

George, J., July 6, 2017

OPINION

On July 24, 2012, Ruth Crouse ("Crouse") fell and broke her ankle while walking across property owned by Patrick and Michelle Foltz ("Foltz").[1] Apparently, due to construction on the street by which Crouse accessed her property, she had temporarily been parking in a parking lot behind her residence, which required her to cross the Foltz property in order to access her residence. As a result of the accident, Crouse initiated litigation against Foltz in an effort to recover damages for her injury. Foltz in turn has joined Littlestown Borough ("Borough") as an additional defendant alleging that a clogged storm water sewer located at the rear of the Foltz property caused ground erosion which resulted in the hole in which Crouse tripped. Additionally, Foltz claims that while performing maintenance on a storm water service line, which crossed the Foltz property, Borough negligently conducted the repairs by failing to restore the ground in a condition free of tripping hazards. In joining Borough, Foltz claims Borough is not entitled to governmental immunity as their claim falls within the utility services facilities exception to such immunity. Currently, Borough seeks summary judgment on the Joinder Complaint arguing the exception is inapplicable as the Borough did not own any of the underground sewage line crossing the Foltz property nor was provided sufficient notice of the existence of the alleged dangerous condition.

Undoubtedly, a motion for summary judgment may only be granted when the record clearly demonstrates the lack of any genuine issue of material fact and that the moving party is entitled to judgment as a matter of law. Pa. R.C.P. 1035.2; ***Abrams v. Pneumo Abex Corp.***, 981 A.2d 198, 203 (Pa. 2009). Because of the nature of the relief, a motion for summary judgment requires a strict scrutiny and should be granted only in the clearest of cases. ***Williams v. Pilgrim Life Ins. Co.***, 452 A.2d 269, 270 (Pa. Super. 1982). Applying this standard in the context of the record reveals that Borough's effort to obtain summary judgment on the lack of ownership is inappropriate.

The record reveals that Borough admits ownership of storm sewer inlets at both the front and the rear of the Foltz property. There is also

[1] This matter comes before the Court on a Motion for Summary Judgment. As such, the factual background is based upon the record in the light most favorable to the non-moving party. ***Potter v. Herman,*** 762 A.2d 1116, 1117-18 (Pa. Super. 2000).

evidence in the deposition testimony of Patrick Foltz that Borough entered his property and repaired an underground terra cotta pipe which connected the storm sewer inlet at the front of the property with the storm sewer inlet located at the rear of the property. While this evidence alone circumstantially supports a finding of ownership, the factual conclusion becomes more than circumstantial when considering the deposition testimony of Borough Manger Charles Keller wherein he claims Borough would not have utilized Borough employees to repair the terra cotta pipe unless it was a Borough facility.[2] While Borough fervently argues the lack of any documentation establishing a legal interest on the part of Borough to the terra cotta pipe crossing the Foltz property,[3] their argument fails to take into account the procedural posture in which this issue arises. More specifically, in considering the Motion for Summary Judgment to determine facts from competing evidence but rather to determine whether any competing evidence exists concerning a material factual conclusion necessary for the entry of judgment. Based on the current record, it is clear that a critical issue related to ownership requires resolution by a fact-finder.

In furtherance of their motion, Borough also raises the issue of lack of notice as to the existence of the dangerous condition. In doing so, Borough correctly notes the existence of the statutory protection of governmental immunity which generally shields a government municipality from liability for damages caused by a municipality, or employee thereof, unless specifically identified exceptions apply. 42 Pa. C.S.A. § 8541. Although Borough concedes that an exception known as the utilities services facilities exception exists, they argue the elements necessary to trigger the exception, including the requirement of notice, do not exist.

Foltz, on the other hand, argues that the question of whether Borough had actual or constructive notice of the dangerous condition of the storm water system is a question of fact for the jury. Foltz points to evidence in the record that Borough employees were alleg-

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[2] Deposition Transcript of Charles Keller, November 9, 2016, pg. 30-31.

[3] Borough has produced a title search on the property which reveals the lack of any recorded documents establishing ownership or right-of-way interest to the terra cotta pipe traversing the Foltz property. Indeed, although Foltz argues that such a document may exist but was not recorded, despite extensive discovery in this matter, they also have been unable to produce any such documentation.

edly aware of repeated flooding events on the Foltz property caused by the clogged sewage pipes. They further suggest that due to this knowledge, Borough could reasonably be imputed with notice that the flooding would create a foreseeable risk of a safety hazard. Thus, they conclude that actual knowledge of flooding coupled with the reasonable foreseeability of a dangerous condition being created by the flooding satisfies the notice requirement under the governmental immunity exception.

Under Pennsylvania statutory law, a local agency is immune from liability for damages on account of an injury to a person or property caused by its own acts or the acts of its employees unless the injury falls into one of several enumerated exceptions to governmental immunity. 42 Pa. C.S.A. § 8541-8542; ***Dunkle v. Middleburg Mun. Auth.***, 842 A.2d 477, 479 (Pa. Commw. Ct. 2004). In order to qualify for an exception, a party must prove: (1) the damages would be recoverable under common law or statute against a person unprotected by the immunity; and (2) the negligent act of local agency or its employees that caused the injury falls within one of several limited exceptions to immunity. 42 Pa. C.S.A. § 8542(a); ***Sobat v. Borough of Midland***, 141 A.3d 618 (Pa. Commw. Ct. 2016). Because of the express legislative intent to insulate political subdivisions from tort liability, exceptions to governmental immunity are strictly construed. ***Metro. Edison Co. v. Reading Area Water Auth.***, 937 A.2d 1173, 1175 (Pa. Commw. Ct. 2007).

> In resolving this issue, an understanding of the specific language of the exception to government immunity which Foltz relies upon is necessary. That section reads as follows:
>
> > (b) **Acts which may impose liability.** --The following acts by a local agency or any of its employees may result in the imposition of liability on a local agency: …
> >
> > > (5) **Utility service facilities.** --A dangerous condition of the facilities of steam, sewer, water, gas or electric systems owned by the local agency and located within rights-of-way, 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.

42 Pa. C.S.A. § 8542(b)(5).

Pennsylvania jurisprudence teaches that while the issue of what constitutes a dangerous condition is a question of fact for the jury, whether an action is barred by immunity is purely a question of law. ***Sobat***, 141 A.3d at 624. Determination of this question initially requires a strictly legal determination as to whether the alleged injury was "caused by a condition of the property itself, which has its origin or source in the property." ***Id***. This initial determination is particularly relevant in considering the various allegations in the Joinder Complaint.

As mentioned, Foltz seeks to hold Borough liable under several theories. First, they argue that Borough failed to properly maintain the storm water utility service facility thereby resulting in flooding, ground erosion, and ground settlement which allegedly resulted in Crouse's injury. Additionally, they seek to hold the Borough responsible under a theory that Borough employees negligently performed repairs in an unworkmanlike manner while repairing the excavated ground on the Foltz property during repair of the terra cotta pipe. Foltz claims both theories fall within the utility services facilities exception to the shield of government immunity.

The negligent maintenance of culverts for handling surface water which result in a dangerous condition caused by flooding has historically been held by Pennsylvania courts to fall within the sewer facilities exception as a dangerous condition arising from the property. ***Medicus v. Upper Marion Tp.***, 475 A.2d 918, 920 (Pa. Commw. Ct. 1984). The history of Pennsylvania case law concerning whether negligent repair to a utility service facility falls within the exception is quite different. At the time of the filing of the current Motion for Summary Judgment, controlling precedent provided that the sewer facilities exception did not apply to dangerous conditions resulting from the conduct of government employees. ***Metro. Edison Co. v.***

City of Reading, 125 A.3d 499 (Pa. Commw. Ct. 2015); *see also* ***Metro. Edison Co. v. Reading Area Water Auth.***, 937 A.2d 1173 (Pa. Commw. Ct. 2007) (utility service facilities exception inapplicable to damage caused by municipal employee while repairing a utility facility). However, on June 20, 2017, the Pennsylvania Supreme Court reversed the Commonwealth Court's decision in ***Metro. Edison Co. v. City of Reading,*** ___ A.3d ___, 2017 W.L. 2655101 (2017). In doing so, the Court opined:

> … the originating cause of the dangerous condition, whether by the negligence of the local agency or otherwise, is irrelevant to a proper application of the Utility Exception. Instead, the negligent act necessary to trigger the Utility Exception is the failure of the local agency to remediate a dangerous condition of which it has notice.

Id. - A.3d – 2017. In light of this very recent decision, both of Foltz's theories, if otherwise supported by the record, are sufficient to trigger the exception. In that regard, the Borough argues proof of sufficient notice of the alleged dangerous condition necessary to trigger the exception is lacking.

As discussed above, the cornerstone of Foltz's first theory is the alleged blockage in the storm water sewer system which allegedly caused flooding on the Foltz property. Foltz alleges the existence of prior occasions where he personally complained to Borough about the flooding on his property. He further claims the Borough actually conducted repairs on his property in an effort to address the flooding. At first glance, Foltz's argument is persuasive as prior notice under the utility services facilities exception can be established "by evidence of past incidents of flooding or breaks within the area." ***Gibellino v. Manchester Twp.***, 109 A.3d 336, 343 (Pa. Commw. Ct. 2015) (citations omitted)). *See also* ***Medicus v. Upper Marion Twp.,*** 475 A.2d 918 (Pa. Commw. Ct. 1984) (notice of separate flooding instance has been found to be sufficient to place a municipality on notice of a dangerous condition)); ***City of Washington v. Johns***, 474 A.2d 1199, 1203 (Pa. Commw. Ct. 1984). Nevertheless, the nature of Foltz's allegations requires further discussion of this issue.

Instantly, the Joinder Complaint does not allege an injury directly caused by flooding. Rather, the claim is one of a dangerous condition being caused by a dangerous condition, i.e. the hole in which Crouse

fell being caused by the dangerous condition of the flooding. Recognizing this nuance, Borough argues the dangerous condition of the hole on the Foltz property was not known by the Borough and thus precludes Foltz's attempt to pierce the protection of immunity. Foltz, on the other hand, argues that a factual question on this issue exists as a jury can conclude it was reasonably foreseeable by Borough officials that the repeated flooding at the property would result in uneven ground due to erosion. In support of their argument, Foltz cites to the deposition testimony of several Borough employees who conceded erosion to be a natural consequence of flooding.[4]

Normally, the question of whether a local agency has either actual or constructive notice of a dangerous condition of its utility services facilities is a question of fact for the jury. ***Angell v. Dereno***, 134 A.3d 1173, 1181 (Pa. Commw. Ct. 2016). Had the current issue before the Court simply been one of whether the Borough could reasonably foresee the possibility that flooding would create the uneven ground ***which caused*** the accident, this jurist would defer to the fact-finder for that determination. The issue is not so simple however. Instantly, the record is devoid of any proof that the flooding ***was the cause*** of the hole or uneven ground upon which Crouse fell. Absent some evidence on this issue, denial of the Motion for Summary Judgment would result in the fact-finder being asked to determine the existence of constructive notice of a dangerous condition caused by a dangerous condition without any proof that the latter caused the earlier. Obviously, such a finding could only occur as a result of improper speculation by the fact-finder. ***Commonwealth v. Ortho-McNeil-Janssen Pharmaceuticals, Inc***., 52 A.3d 498, 504 (Pa. Commw. Ct. 2012) (a jury cannot be permitted to reach its verdict on the basis of speculation or conjecture)).

The paucity of evidence on this issue is aggravated by the deposition testimony of Foltz who opined that the flooding did not affect

[4] While it is true that three Borough officials indicated that ground erosion could result from flooding, two of the three witnesses qualified their statement with a requirement of increased water velocity. The third witness answered the general question put to him without qualification. The record is not clear as to whether the flooding at issue was moving under velocity or, in the alternative, simply ponding.

the unevenness of that area of the yard where Crouse fell.[5] The speculative nature of the existence of a dangerous condition resulting from the Borough's maintenance of the sewage treatment facility is further highlighted by the existence of numerous other causes for the alleged "hole." For instance, in his Joinder Complaint, Foltz attributes the negligent excavation discussed above as a potential cause of the hole. Similarly, as discussed in the Foltz deposition, the "hole" might be nothing more than the natural shifts of land present in all yards or the decomposition of the structural integrity of the terra cotta piping line beneath the surface. The bottom line is the record is devoid of any evidence of causation for a hole in the Foltz's yard or evidence of the elimination of causes other than the alleged flooding. In essence, there are multiple reasons for the genesis of the dangerous condition which caused the alleged injury.

Similarly, Foltz's theory that the "hole" resulted from negligent excavation work performed by Borough employees lacks any factual support in the record. Indeed, the only evidence of record is Mr. Foltz's deposition testimony that some ground settlement occurred after the excavation which he addressed by throwing "some more top soil on it." Foltz Deposition, pg. 42. As with the other claim, there is simply no credible evidence as to the origination of the "hole" in which Crouse allegedly fell.

While the Court certainly understands a party's motivation in deflecting responsibility, if any, to others, the law requires that a burden of proof accompany that effort. Instantly, the record is absolutely devoid of any indication that the dangerous condition related to the Borough's operation of a utility services facility was the factual cause of injury to Crouse. Absent some proof the Borough's utility services facility had a role in the accident, this suit cannot be maintained.

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[5] The deposition testimony of Foltz on this issue is as follows:

Q. What I'm trying to find out; did any of this flooding affect the unevenness of your backyard?

A. I would say not to my knowledge. I mean, again, I refer back to the fact that the yard was uneven all over the place.

Foltz Deposition, pg. 42. Earlier in his deposition, Foltz testified he was unaware of what actually caused Crouse's fall, Tr. pg. 27; that he was unaware of any indentations in the yard more than an inch, Tr. pg. 24; and that his whole back yard is uneven, Tr. pg. 24.

For the foregoing reasons, the attached Order is entered.

ORDER

AND NOW, this 6th day of July, 2017, Littlestown Borough's Motion for Summary Judgment to the Joinder Complaint is granted. Judgment is entered in favor of Littlestown Borough on the Joinder Complaint filed by Defendants, Patrick Foltz and Michelle Foltz.

ESTATE NOTICES

NOTICE IS HEREBY GIVEN that in the estates of the decedents set forth below, the Register of Wills has granted letters, testamentary of or administration to the persons named. All persons having claims or demands against said estates are requested to make known the same, and all persons indebted to said estates are requested to make payment without delay to the executors or administrators or their attorneys named below.

FIRST PUBLICATION

ESTATE OF MILDRED G. GUISE a/k/a MILDRED GERALDINE GUISE, DEC'D

Late of Butler Township, Adams County, Pennsylvania

Administrators: Miriam M. Crouse, 121 Centre Mills Road, Aspers, PA 17304; Lance D. Crouse, 269 Chestnut Hill Road, Aspers, PA 17304

Attorney: Puhl, Eastman & Thrasher, 220 Baltimore Street, Gettysburg, PA 17325

ESTATE OF LINDA S. MYERS, DEC'D

Late of the Borough of Gettysburg, Adams County, Pennsylvania

Executor: Steven B. Myers, 300 Fulton Street, Hanover, PA 17331

Attorney: Keith R. Nonemaker, Esq., Guthrie, Nonemaker, Yingst & Hart, LLP, 40 York Street, Hanover, PA 17331

SECOND PUBLICATION

ESTATE OF JEFFREY LYNN FRONHEISER, DEC'D

Late of the Borough of Bendersville, Adams County, Pennsylvania

Executor: Monica Fronheiser

Attorney: William J. Luttrell, III, Esq., 11 S. Olive Street, 4th Fl., Media, PA 19063

ESTATE OF MILDRED J. HAHN, DEC'D

Late of Conewago Township, Adams County, Pennsylvania

Executors: James F. Hahn, 27 Ocelot Drive, Hanover, PA 17331; Jeffrey A. Hahn, 5342 Pigeon Hill Road, Spring Grove, PA 17362

Attorney: Elinor Albright Rebert, Esq., 515 Carlisle Street, Hanover, Pennsylvania 17331

ESTATE OF JOAN E. MINSINGER, DEC'D

Late of Conewago Township, Adams County, Pennsylvania

Executor: John J. Minsinger, c/o Stonesifer and Kelley a division of Barley Snyder, 14 Center Square, Hanover, Pennsylvania 17331

Attorney: Stonesifer and Kelley a division of Barley Snyder, 14 Center Square, Hanover, Pennsylvania 17331

ESTATE OF REBECCA H. SIMPSON, DEC'D

Late of Straban Township, Adams County, Pennsylvania

Co-Executors: David E. Simpson; Christina M. Simpson, c/o Hartman & Yannetti, 126 Baltimore Street, Gettysburg, PA 17325

Attorney: Bernard A. Yannetti, Jr., Esq. Hartman & Yannetti, 126 Baltimore Street, Gettysburg, PA 17325

ESTATE OF WILLIAM B. WILSON, DEC'D

Late of Biglerville, Menallen Township, Adams County, Pennsylvania

Executrix: Lucinda Wilson, P.O. Box 1113, Lily Dale, NY 14752

Attorney: John A. Wolfe, Esq., Wolfe, Rice & Quinn, Llc, 47 West High Street, Gettysburg, PA 17325

THIRD PUBLICATION

ESTATE OF MARY JANE ROBINHOLD DUNKIN, DEC'D

Late of Oxford Township, Adams County, Pennsylvania

Executor: Terry R. Dunkin, 801 Bacon Hall Road, Sparks, MD 21152

ESTATE OF ROSA LEE C. MULLINIX, a/k/a ROSA LEE CRAVER MULLINIX, DEC'D

Late of Straban Township, Adams County, Pennsylvania

Personal Representative: Patricia Ann Petry, c/o Heather Entwistle Roberts, Esq., Entwistle & Roberts, 37 West Middle Street, Gettysburg, PA 17325

Attorney: Heather Entwistle Roberts, Esq., Entwistle & Roberts, 37 West Middle Street, Gettysburg, PA 17325