

Adams County **Legal Journal**

Vol. 53

January 6, 2012

No. 34, pp. 234-241

IN THIS ISSUE

CALVARY CHRISTIAN CENTER VS. SHULTZ ET AL

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IN THE COURT OF
COMMON PLEAS OF
ADAMS COUNTY, PENNSYLVANIA

CIVIL ACTION—LAW
Number 10-S-1848

BAC Home Loans Servicing, LP f/k/a
Countrywide Home Loans Servicing LP
v.

Harold L. Spicer

NOTICE OF SHERIFF'S SALE
OF REAL PROPERTY

To: Harold L. Spicer
990 Orphanage Road
Littletown, Pennsylvania 17340

Your house (real estate) at **990 Orphanage Road, Littletown, Pennsylvania 17340** is scheduled to be sold at Sheriff's Sale on **January 20, 2012 at 10:00 a.m.** at the Sheriff's Office of Adams County, Courthouse Room 4, 111-117 Baltimore Street, Gettysburg, PA 17325 to enforce the court judgment of \$51,490.22 obtained by BAC Home Loans Servicing, LP f/k/a Countrywide Home Loans Servicing LP against you.

NOTICE OF OWNER'S RIGHTS
YOU MAY BE ABLE TO PREVENT
THIS SHERIFF'S SALE

To prevent this Sheriff's Sale you must take immediate action:

1. The sale will be canceled if you pay to BAC Home Loans Servicing, LP f/k/a Countrywide Home Loans Servicing LP the back payments, late charges, costs, and reasonable attorney's fees due. To find out how much you must pay, you may call McCabe, Weisberg and Conway, P.C., Esq. at (215) 790-1010.
2. You may be able to stop the sale by filing a petition asking the Court to strike or open the judgment, if the judgment was improperly entered. You may also ask the Court to postpone the sale for good cause.
3. You may also be able to stop the sale through other legal proceedings.

You may need an attorney to assert your rights. The sooner you contact one, the more chance you will have of stopping the sale. (See the following notice on how to obtain an attorney.)

YOU MAY STILL BE ABLE TO SAVE
YOUR PROPERTY AND YOU HAVE
OTHER RIGHTS EVEN IF THE
SHERIFF'S SALE DOES TAKE PLACE

1. If the Sheriff's Sale is not stopped, your property will be sold to the highest bidder. You may find out the price bid by calling McCabe, Weisberg and Conway, P.C., Esq. at (215) 790-1010.
2. You may be able to petition the Court to set aside the sale if the bid price was grossly inadequate compared to the value of your property.
3. The sale will go through only if the buyer pays the Sheriff the full amount due on the sale. To find out if this has happened, you may call McCabe, Weisberg and Conway, P.C., Esq. at (215) 790-1010.
4. If the amount due from the buyer is not paid to the Sheriff, you will remain the owner of the property as if the sale never happened.
5. You have a right to remain in the property until the full amount due is paid to the Sheriff and the Sheriff gives a deed to the buyer. At that time, the buyer may bring legal proceedings to evict you.
6. You may be entitled to a share of the money which was paid for your real estate. A schedule of distribution of the money bid for your real estate will be filed by the Sheriff within thirty (30) days of the sale. This schedule will state who will be receiving that money. The money will be paid out in accordance with this schedule unless exceptions (reasons why the proposed schedule of distribution is wrong) are filed with the Sheriff within ten (10) days after the posting of the schedule of distribution.
7. You may also have other rights and defenses, or ways of getting your real estate back, if you act immediately after the sale.

YOU SHOULD TAKE THIS PAPER TO YOUR LAWYER AT ONCE. IF YOU DO NOT HAVE A LAWYER, GO TO OR TELEPHONE THE OFFICE SET FORTH ABOVE RIGHT. THIS OFFICE CAN PROVIDE YOU WITH INFORMATION ABOUT HIRING A LAWYER.

IF YOU CANNOT AFFORD TO HIRE A LAWYER, THIS OFFICE MAY BE ABLE TO PROVIDE YOU WITH INFORMATION ABOUT AGENCIES THAT MAY OFFER LEGAL SERVICES TO ELIGIBLE PERSONS AT A REDUCED FEE OR NO FEE.

LAWYER REFERRAL SERVICE

Donald Fennimore
Court Administrator
Adams County Courthouse
117 Baltimore Street
Gettysburg, Pennsylvania 17325
(717) 337-9846

ASOCIACIÓN DE LICENCIADOS

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Gettysburg, Pennsylvania 17325
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1/6

CALVARY CHRISTIAN CENTER VS. SHULTZ ET AL

1. By its very language, once a municipality adopts a storm water management ordinance, the burden is on the landowner or developer, and not the municipality, to implement measures consistent with the applicable plan or ordinance to prevent injuries as a result of storm water runoff.

2. A local municipality cannot be held liable for allegedly failing to enforce its own ordinance or negligently enforcing its own ordinance.

3. Under the real property exception (to municipal immunity) the local agency must be in possession of the real property.

4. Under the utility exception to municipal immunity, the utility service facility must be owned and operated by the local agency.

In the Court of Common Pleas of Adams County, Pennsylvania, Civil, No. 09-S-948, CALVARY CHRISTIAN CENTER OF HANOVER, PA VS. DWAYNE R. SHULTZ AND PEGGY L. SHULTZ, DEFENDANTS, AND ALAN S. CAREY AND BERWICK TOWNSHIP, ADDITIONAL DEFENDANTS.

John J. Mooney, III, Esq., for Plaintiffs

Kevin D. Rauch, Esq., for Defendants

Kevin W. Lynch, Esq., for Additional Defendant Alan S. Carey

Robert L. McQuaide, Esq., for Additional Defendant, Berwick Township

Campbell, J., July 27, 2011

OPINION

Before this Court is Additional Defendant, Berwick Township's, Motion for Summary Judgment filed March 22, 2011. Berwick Township asserts that it is entitled to summary judgment because it has immunity under the Political Subdivision Tort Claims Act ("PSTCA"), 42 Pa. C.S.A. § 8541 et seq.

BACKGROUND

On June 18, 2009, Plaintiff commenced this cause of action by filing a Complaint against Defendants, Dwayne R. Shultz and Peggy L. Shultz ("the Shultzes"). Plaintiff is the current owner of a parcel of improved real estate located at 352 Abbottstown Pike in Berwick Township, Adams County, Pennsylvania. Plaintiff's parcel of land is adjacent to land owned by the Shultzes, located at 390 Abbottstown Pike, and the Shultzes' land is located at a higher elevation than Plaintiff's land. In its Complaint, Plaintiff alleges that changes have been made to the Shultzes' land resulting in a significant increase in

the flow of surface water across Plaintiff's land. Specifically, Plaintiff alleges that the Shultzes' land has been developed without regard to storm water management, and that development was performed without Berwick Township's approval or oversight. Plaintiff's Complaint asserts causes of action sounding in trespass, nuisance, and negligence. In its demand for relief, Plaintiff requests that this Court order the Shultzes to: 1) employ an engineer to do a thorough evaluation of the storm water runoff trends on the Shultzes' land; 2) follow the storm water management plan created by said engineer; and 3) take whatever other steps may be necessary to stop the damage being caused to Plaintiff's land by the storm water runoff from the Shultzes' land. Plaintiff does not seek any relief from Berwick Township itself.

On December 9, 2009, the Shultzes filed their Answer and New Matter. On February 12, 2010, the Shultzes filed a Motion for Leave to Join Additional Defendants, Alan S. Carey ("Carey"), and Berwick Township. By Order dated March 30, 2011, the Shultzes' Motion for Leave to Join Additional Defendants was granted, and the Shultzes filed an Amended Complaint to Join Additional Defendants on June 23, 2010.¹ On July 8, 2010, Additional Defendant Berwick Township filed its Answer to the Amended Complaint to Join Additional Defendants and New Matter. In its New Matter, Berwick Township asserted that the claims against it are barred by governmental immunity under the PSTCA, 42 Pa. C.S.A. § 8541 et seq.

On March 22, 2011, Berwick Township filed its Motion for Summary Judgment. Plaintiff filed its Answer to Berwick Township's Motion for Summary Judgment on April 20, 2011. In its Answer, Plaintiff alleges that it is not seeking damages under the PSTCA; rather Plaintiff demands that an engineer perform an evaluation of the storm water runoff, that the Shultzes and Additional Defendants Carey and Berwick Township follow the engineer's plan, and that any other necessary steps are taken to stop damage to Plaintiff's land

¹ On April 6, 2010, the Shultzes filed their Complaint to Join Additional Defendants. On June 3, 2010, Additional Defendant Carey filed Preliminary Objections to the Shultzes' Complaint to Join Additional Defendants. On June 17, 2010, Berwick Township filed its Answer to the Shultzes' Complaint to Join Additional Defendants. In response to Additional Defendant Carey's Preliminary Objections, the Shultzes filed an Amended Complaint to Join Additional Defendants on June 23, 2010.

as a result of storm water runoff from the Shultzes land. Berwick Township filed its Brief in Support of Summary Judgment on May 9, 2011. To date, no party other than Plaintiff has responded to Berwick Township's Motion for Summary Judgment. Oral argument occurred on June 28, 2011, and the only parties appearing for oral argument were counsel for Plaintiff and Additional Defendant, Berwick Township.

DISCUSSION

Under the Pennsylvania Rules of Civil Procedure a court may enter summary judgment when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. **Pa. R. Civ. P. 1035.2**; *Strine v. Commonwealth*, 894 A.2d 733, 737 (Pa. 2006). Summary judgment is only appropriate where the pleadings, depositions, answers to interrogatories, omissions and affidavits, and other materials demonstrate that there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. *Roche v. Ugly Duckling Car Sales, Inc.*, 879 A.2d 785, 789 (Pa. Super. 2005) (quotations and citations omitted). The burden of demonstrating the lack of any genuine issue of material fact falls upon the moving party, and, in ruling on the motion, the court must consider the record in the light most favorable to the non-moving party. *Id.* However, where a motion for summary judgment has been supported with depositions, answers to interrogatories, or affidavits, the non-moving party may not rest on the mere allegations or denials in its pleadings. *Accu-Weather, Inc. v. Prospect Commc'ns Inc.*, 644 A.2d 1251, 1254 (Pa. Super. 1994). Rather, the non-moving party must by affidavit or in some other way provided for within the Rules of Civil Procedure, set forth specific facts showing that a genuine issue of material fact exists. *Id.* Summary judgment is only appropriate in those cases which are free and clear from doubt. *McCannaughey v. Bldg. Components, Inc.*, 637 A.2d 1331, 1333 (Pa. 1994).

Berwick Township argues that it is entitled to summary judgment because it has immunity under the PSTCA, and there is no applicable exception to immunity. Under the PSTCA, "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.” **42 Pa. C.S.A. § 8541.**² However, the PSTCA also provides for certain exceptions to the immunity that local agencies generally enjoy. **See 42 Pa. C.S.A. § 8542.** A local agency may be liable for damages if:

- (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 8541...; 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)....

42 Pa. C.S.A. § 8542(a)(1)-(2).³

Under subsection (b), the following exceptions may impose liability upon a local agency:

- (1) Vehicle liability;
- (2) Care, custody or control of personal property;
- (3) Real property;
- (4) Trees, traffic controls and street lighting;
- (5) Utility service fees;
- (6) Streets;
- (7) Sidewalks;
- (8) Care, custody or control of animals.

42 Pa. C.S.A § 8542(b)(1)-(8).

² There is no dispute that Berwick Township constitutes a local agency for purposes of the PSTCA. *See Deluca v. Whitmarsh Twp.*, 526 A.2d 456, 457 n.3 (Pa. Cmwlth. 1986) (finding that a township was a local agency, and, therefore subject to the PSTCA).

³ Plaintiff argues that the immunity provided under the PSTCA is inapplicable instantly because it is not seeking the type of damages contemplated by the PSTCA. It is important to note that Plaintiff has no direct claims against Additional Defendant Berwick Township. In their Amended Complaint to Join Additional Defendant, the Shultzes joined Berwick Township and alleged that Berwick Township is “liable to the Plaintiff or liable over to Defendants, Dwayne R. Shultz and Peggy L. Shultz, for full contribution and/or indemnification on any and all sums and other forms of relief recoverable under the causes of action asserted in the Plaintiff’s Complaint.” *See Def.’s Am. Compl. to Join Add’l Defs. Alan S. Carey and Berwick Twp.* Based on this allegation against Berwick Township by the Shultzes, Berwick Township is facing liability for damages via contribution or indemnity. Therefore, Berwick Township could be facing liability for damages, and the PSTCA applies.

Instantly, Berwick Township asserts that there is no viable common law or statutory cause of action against it. Additionally, Berwick Township asserts that even if Plaintiff had a viable cause of action under common law or statute, the Township's actions do not fall within any of the categories of exceptions in subsection (b).

First, it must be determined whether there is a common law or statutory cause of action applicable in the instant case. Plaintiff asserts that Berwick Township has duties under the Storm Water Management Act ("SWMA"), 32 Pa. C.S.A. § 680.1 et seq. The SWMA provides the applicable guidelines for adopting storm water management plans that are reviewed and approved by Pennsylvania's Department of Environmental Protection. **See 32 Pa. C.S.A. § 680.1-680.17.** Under Section 680.11, municipalities are required to adopt and implement ordinances to regulate development within the municipality in accordance with the applicable storm water management plan. **32 Pa. C.S.A. § 680.11.** Additionally, Section 680.13 of the SWMA provides:

Any landowner and any person engaged in the alteration or development of land which may affect storm water runoff characteristics shall implement such measures consistent with the provisions of the applicable watershed storm water plan as are reasonably necessary to prevent injury to health, safety or other property. Such measures shall include:

1. to assure that the maximum rate of storm water runoff is no greater after development than prior to development activities; or
2. to manage the quantity, velocity and direction of resulting storm water in a manner which otherwise adequately protects health and property from possible injury.

32 Pa. C.S.A. § 680.13.

By its very language, once a municipality adopts a storm water management ordinance, the burden is on the landowner or developer, and not the municipality, to implement measures consistent with the applicable plan or ordinance to prevent injuries as a result of storm water runoff. *Id.*

Instantly, it is undisputed that Berwick Township complied with the SWMA and adopted its Storm Water Ordinance (Ordinance No. 42) on September 28, 1998. The property located at 390 Abbottstown Pike is owned by the Shultzes, and the property located at 352 Abbottstown Pike is owned by Plaintiff. Berwick Township does not own or have a property interest in any of the properties at issue. Based on the mandates of the SWMA, the Shultzes, as landowners, have a duty to maintain and develop their property located at 390 Abbottstown Pike in a manner consistent with Berwick Township's Storm Water Ordinance so as to prevent injury to other property. Berwick Township has no such duty under the SWMA.

Additionally, a local municipality cannot be held liable for allegedly failing to enforce its own ordinance or negligently enforcing its own ordinance. *See Buffalini by Buffalini v. Shrader*, 535 A.2d 684, 687-88 (Pa. Cmwlth. 1987).⁴ Therefore, Plaintiff has failed to show that the damages it is seeking would be recoverable under common law or statute.

Even if damages were recoverable against Berwick Township under common law or statute, Plaintiff's claim that immunity is inapplicable still fails because Berwick Township's alleged action and/or inaction does not fall within any of the categories of exceptions in subsection (b). The only two potentially applicable exceptions under subsection (b) are the real property and utility service facility exceptions.

Section 8542(b)(3) provides that the following act by a local agency may impose liability:

- (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 or other traffic controls, street lights and any street lighting systems;

⁴ It is worth noting that enforcement actions generally arise in the context of mandamus or equity actions. *Buffalini*, 535 A.2d at 687. No such action has been filed here.

- (ii) facilities of steam, sewer, water, gas, electric systems owned by the local agency and located within rights-of-way;
- (iii) streets; or
- (iv) sidewalks.

42 Pa. C.S.A. § 8542(b)(3).

Under the real property exception, the local agency must be in possession of the real property. *Id.* Possession must be something more than control exercised by a local agency by adoption of an ordinance. *Buffalini*, 535 A.2d at 688.

Instantly, there is no evidence that Berwick Township was in possession of the land at issue for purposes of the real property exception. Specifically, the offending property is owned by the Shultzes and was previously owned by Additional Defendant, Carey. There is no evidence that Berwick Township has any property interest in the allegedly offending property. The allegedly offending property is in the exclusive control of the Shultzes. Therefore, the real property exception is inapplicable.

Additionally, Section 8542(b) provides that the following act by a local agency may impose liability:

- (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 the local agency had actual notice or could be reasonably charged with notice under the circumstances of the dangerous condition at a sufficient time prior to the event to have taken place to protect against the dangerous condition.

42 Pa. C.S.A. § 8542(b)(5).

Under this exception, the utility service facility must be owned and operated by the local agency. *Id.*; see also *Pastore v. Com. State System of Higher Educ.*, 618 A.2d 1118, 1125 (Pa. Cmwlth. 1992) (finding that the Additional Defendant in that case had been joined in

a narrowly drawn claim of liability only on the basis of inadequacy of the storm water system which was *owned and operated* by the Township) (emphasis added).

Instantly, there is no storm water management facility owned and operated by Berwick Township. No such facility exists on Plaintiff's land or on the Shultzes' land. Therefore, the utility service facility exception under subsection (b) is inapplicable. Accordingly, Plaintiff has failed to prove the exception to immunity under Section 8542(b).

There are no factual disputes in the instant case. Berwick Township is statutorily immune from the claims against it. Accordingly, Berwick Township is entitled to judgment as a matter of law. Finally, it is important to note that Plaintiff is the only party that responded to Additional Defendant Berwick Township's Motion for Summary Judgment. Under Pennsylvania Rule of Civil Procedure 1035.3(d) "[s]ummary judgment may be entered against a party who does not respond." **Pa. R. Civ. P. 1035.3(d)**. The Shultzes, and Additional Defendant, Carey, did not respond to Berwick Township's Motion for Summary Judgment or appear at oral argument. Therefore, summary judgment may be granted in favor of Berwick Township and against the Shultzes and Additional Defendant, Carey due to their failure to respond to Berwick Township's Motion for Summary Judgment.

Therefore, for all the reasons stated herein, Additional Defendant Berwick Township's, there are no genuine issues of material fact and Berwick Township is entitled to judgment as a matter of law. Accordingly, Berwick Township's Motion for Summary Judgment is granted, and the attached Order is entered.

OPINION

AND NOW, this 27th day of July 2011, Additional Defendant, Berwick Township's, Motion for Summary Judgment is granted. The Adams County Prothonotary is directed to enter judgment in favor of Additional Defendant, Berwick Township, and against all other parties of record in the above-captioned matter.

ESTATE NOTICES

NOTICE IS HEREBY GIVEN that in the estates of the decedents set forth below the Register of Wills has granted letters, testamentary or of 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 LUCILLE G. KNOX, DEC'D**

Late of Cumberland Township, Adams County, Pennsylvania

Executrix: Sally Raymond, 5819 Hanna Road, Eldersburg, MD 21784

ESTATE OF LORETTA A. LIVELSBERGER, DEC'D

Late of Conewago Township, Adams County, Pennsylvania

Co-Executors: Loretta Ann Livelsberger, John H. Livelsberger, and Eugene W. Livelsberger, c/o Keith R. Nonemaker, Esq., Guthrie, Nonemaker, Yingst & Hart, LLP, 40 York Street, Hanover, PA 17331

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

ESTATE OF ARTHUR WEANER, DEC'D

Late of Straban Township, Adams County, Pennsylvania

Richard Weaner, 1480 Old Harrisburg Road, Gettysburg, PA 17325

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

SECOND PUBLICATION**ESTATE OF PATRICK J. CANAVAN, DEC'D**

Late of Oxford Township, Adams County, Pennsylvania

Executrix: Kandie J. Canavan, c/o James T. Yingst, Esq., Guthrie, Nonemaker, Yingst & Hart, LLP, 40 York Street, Hanover, PA 17331

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

THIRD PUBLICATION**ESTATE OF PEARL E. MOREHEAD a/k/a PEARL ETHEL MOREHEAD, DEC'D**

Late of Oxford Township, Adams County, Pennsylvania

Executrix: Peggy Ann Morehead Weems, 34215 Woodcrest Road, Millsboro, DE 19966

Attorney: Stonesifer and Kelley, P.C., 209 Broadway, Hanover, PA 17331

