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| MARSHA STONG, personal representative | : | IN THE COURT OF COMMON PLEAS OF |
| of the Estate of Robert Stong, Deceased, | : | LYCOMING COUNTY, PENNSYLVANIA |
| on behalf of the Estate of ROBERT STONG: | : | |
| and on behalf of MARSHA STONG and | : | |
| JOHN STONG, the intestate heirs of | : | |
| ROBERT STONG, | : | NO. 98-01514 |
| | : | |
| Plaintiffs | : | |
| | : | |
| vs. | : | CIVIL ACTION - LAW |
| | : | |
| COMMONWEALTH OF | : | |
| PENNSYLVANIA DEPARTMENT | : | |
| OF TRANSPORTATION | : | MOTION FOR SUMMARY JUDGMENT |
| and SABRINA C. DAY | : | |
| | : | |
| Defendants | : | |

Date: May 4, 2001

OPINION AND ORDER

Procedural and Factual Background

This is a wrongful death and survival action in which Plaintiffs seek to recover damages arising out of a traffic accident which caused the death of Robert Stong, then 11 years old. Robert Stong was standing on a bridge under PennDOT's jurisdiction when he was struck and fatally injured by an automobile operated by Defendant Sabrina C. Day. Presently before the Court for determination is the Motion for Summary Judgment filed February 27, 2001 by Defendant, Commonwealth of Pennsylvania, Department of Transportation ("PennDOT"). The motion seeks judgment on the cause of action in PennDOT's favor because ". . .the Complaint does not set forth a dangerous condition of Commonwealth Real Estate, which itself caused the injury." (Paragraph 16)

Under Count I of Plaintiff's Complaint (filed January 20, 2000) Plaintiffs assert the bridge where the accident occurred was dangerous, faulty and defective due to the extremely narrow lanes and an absence of adequate shoulders; i.e., PennDOT was negligent for failure to take action to correct these dangerous conditions. As a result of Defendant's negligence, Robert Stong was struck and killed by the vehicle operated by Defendant Day. Count II of the Complaint is a cause of action against Defendant Day alleging negligence in her operation of the vehicle, including that she failed to properly slow, swerve or take evasive actions to avoid striking Robert Stong.

In support of the Summary Judgment Motion the Commonwealth submitted Plaintiff's Complaint (Exhibit "A" thereto), the deposition of Defendant Day, pages 14-17 (Exhibit "B" thereto) and the deposition of Tammy Hamilton, a passenger in the Day automobile, pages 15 and 16 (Exhibit "C").

Plaintiffs' response to the summary judgment motion (March 14, 2001) acknowledges the essence of the nature of the testimony given in the two depositions and acknowledges the allegations of the Complaint but contends that the pleadings and testimony does not establish facts upon which it can be set as a matter of law that the condition of the bridge did not constitute a dangerous condition and/or that this dangerous condition was not a legal cause of Robert Stong's death. Plaintiff's brief (March 19th) also submitted for consideration, the Court in ruling on the summary judgment motion the State Police Accident Report, pages 17 and 18 of the Hamilton deposition and Plaintiffs' expert's report. PennDOT has not raised any objection to the Court considering those items attached to Plaintiff's brief in

disposition of this motion. Based upon the foregoing the Court has been able to establish the following uncontested facts.

Robert Stong, 11 years old, was on his way home from school and was standing on the bridge which spans Mill Creek on SR3029, known as Warrensville Road in Loyalsock Township, Lycoming County, Pennsylvania on September 8, 1998 at approximately 4:14 p.m. He was standing on the east side of the bridge, looking east, when the automobile operated by Defendant Day, which was northbound, started onto the bridge. At the same time an automobile proceeding in the opposite direction was approaching the bridge. As the Day automobile came alongside of Robert Stong he was struck by the Day automobile, near the right front window post and side rear-view mirror. He subsequently died as a result of the injuries sustained in that accident. The highway bridge is a two-lane bridge. There is no side to the bridge except guardrails along each side above an elevated curb. The concrete curbs are 1 foot high and 1 foot, 2 inches wide. The distance from the elevated curb to the eastern fog line is 15-1/2 inches. The distance between that fog line and the centerline for the northbound lane is 104 inches. The distance from the centerline for the southbound lane to the fog line on the west side of the bridge is 105 inches. The centerline consists of a solid double yellow line and the fog lines are solid white lines. The width between the edge lines of the highway is 20-22 feet on north and south approaches and there are 3-foot wide paved shoulders on both sides of the roadway, north and south of the bridge. The width between the edge lines of the bridge is 19 feet. Narrow bridge warning signs are erected at each approach.

Discussion

A motion for summary judgment can only be granted if, when viewing the facts in the light most favorable to the non-moving party, there exists no genuine issue of material fact. *Hoffman v. Pellak*, 764 A.2d 64 (Pa.Super. 2000). “Summary judgment will only be granted in cases where it is clear and free from doubt that the moving party is entitled to judgment as a matter of law.” *Id.* at p. 65. In determining whether there is or is not a genuine issue concerning material facts in ruling on a summary judgment motion the Court cannot enter a judgment if the evidence advanced in support of the summary judgment motion depends upon oral testimony. This rule, which was first announced in *Nantyglo v. American Surety Company*, 163 A.523 (Pa. 1932), has been interpreted to mean that testimony by deposition or affidavits of the moving party or witnesses of the party (which are not documentary) even if uncontradicted are not a sufficient basis for entry of summary judgment, since the credibility is a matter for the trier of fact. *See Penn Center House, Inc. v. Huffman*, 553 A.2d 900 (Pa. 1989 citing *Goodrich Amram*, 2d §1035(b)). This Court finds there are many genuine issues of material fact in this case and accordingly, Defendant’s Motion for Summary Judgment must be denied.

Under the doctrine of governmental immunity, the Commonwealth can only be sued if it grants its consent. 42 Pa.C.S.A. §8522(b)(4) allows liability to be imposed against the Commonwealth if the claimant can establish that a dangerous condition of a Commonwealth highway is a legal cause of injury. *See, Snyder v. Harmon*, 562 A.2d 307 (Pa. 1989). The duty of the Commonwealth owed to those using the highway is such as to require that the condition of the highway be safe for the activities that it was regularly used, intended to be used or

reasonably foreseen to be used. *See Young v. PennDOT*, 714 A.2d 475 at 478 (Pa. Cmwlth. 1998).

Although the Commonwealth has agreed to allow parties to bring suit under the previously mentioned scenarios, the circumstances when the exception is actually applicable have been strictly construed. Not surprisingly, this has been a much-litigated issue with most of the relevant cases having been cited in the respective briefs of PennDOT and Plaintiff (filed respectively on March 8 and March 19, 2001).¹ From these cases it is clear that liability will only be incurred by the Commonwealth if the injury is the result of a defective dangerous condition of the highway itself, that is to say that under the Doctrine of Sovereign Immunity, the current law in Pennsylvania does not permit recovery if the highway merely facilitated the occurrence. PennDOT contends that in this case, regardless of the bridge's condition, it merely facilitated the accident but did not cause it.

There is no question the bridge was in its ordinary, everyday condition, Robert Stong was standing on it making a foreseeable and regularly intended use of the bridge. Plaintiff's Complaint clearly alleges that the narrow lanes of travel and lack of adequate shoulders on the bridge caused the accident to occur when Defendant Day's car drove past the 11-year old child.

To grant PennDOT's summary judgment motion would essentially require this Court to rule either that the accident was solely caused by the negligence of Defendant Day or

¹ Defendant has also submitted an unreported Commonwealth Court opinion, *Campbell v. Harshbarger*, No. 424 C.D. 2000 (Pa. Cmwlth. March 29, 2001). This submission, by letter faxed April 10, 2001, after argument, is improper. It is well known that unreported Commonwealth Court opinions are not to be cited. 210 Pa. Code §67.55, Pa. Rules of Court. I.O.P. Chapter 4, §414. *See, also*, www.courts.state.pa.us/OpPosting/Index/cwealthopindex.cfm. That opinion is not being considered by this Court.

that it was solely cause by the contributory negligence of the child Robert Stong. Both of these contentions depend upon oral testimony advanced by PennDOT or its witnesses. Granted that Defendant Day is a party nevertheless for the purposes of this motion PennDOT uses Day as a witness and depends upon her oral testimony to establish that it was she who was negligent and/or that it was the child, Stong, who was contributory negligent and the negligence of either or both of them was the sole cause of the accident. This is not permitted. See *Penn Center House, Inc. v. Huffman, supra*.

For the reasons noted in Plaintiff's brief of March 19, 2001 this Court also finds the facilitation argument, set forth in cases that were relied upon by PennDOT, as to be not applicable to this action under the facts and to which there is no genuine dispute. The controlling facts as to whether the bridge condition strongly facilitates rather than caused the accident are in dispute.

The operator of the vehicle, Sabrina Day, testified that as she approached the bridge, Decedent was on her right. She further testified that she slowed down and moved over to the centerline as far as she could. As she pulled up alongside Decedent, "he turned and walked into the side of my car." *Dep. of Sabrina Day*, p.11, l. 6-7. Day further testified that it appeared to her that Decedent "did not know that I was beside him" and that when he turned, "he turned away from me." *Id.* at p.17, l. 21-25.

Tammy Hamilton, a passenger in Sabrina Day's automobile, offered the following testimony:

Question: Did it appear to you that he did not know you were there, your car was there?

Answer: Yes

Question: Why do you say that?

Answer: Because I don't think he would have gone into the street into the road.

Question: Did he actually step or just turn and start to take a step.

Answer: He turned and started to take a step.

Ms. Hamilton further testified:

Question: Okay, you say in your question to the police you say, 'Stong was just about to step into the side of the car.' Maybe you can't answer this. Did he appear like he stood up and turned all in one motion and impact or did he actually take steps out into the highway?

Answer: It looked like he was just getting ready. He didn't move his left foot off the ground. He just turned his body and lifted up his right foot like he was getting ready to walk out.

Dep. of Tammy Hamilton, p.15-18. Ms. Hamilton also testified that the right front window post and side mirror struck the Decedent. *Id.* at p.16. This point of impact is also originally sustained by physical evidence.

There is a difference of material facts in this case arising out of the discrepancies between the testimony of Defendant Day, the driver, and Tammy Hamilton, her passenger. Day's testimony is that the decedent "turned and walked into the side of my car." *Dep. of Sabrina Day*, p. 16, l. 6-7. Whereas Tammy Hamilton testified, "It looked like he was just getting ready. He didn't move his left foot off the ground. He just turned his body and lifted up his right foot like he was getting ready to walk out." *Dep. of Tammy Hamilton*, p. 15. At first blush, this issue would seem to have more bearing on Sabrina Day's liability than PennDot's. However, since PennDot is contending that the realty merely facilitated the

accident, the actions of the decedent become significant to PennDot's liability issues as well. If Sabrina Day's testimony is accurate, then the decedent was at least partially negligent, and the bridge facilitated the accident. However, if as in Tammy Hamilton's account, the decedent was still in the shoulder area just getting ready to step and was still struck by a vehicle, then the narrowness of the bridge is the source of the injury. It may be that the jury will find neither correct, but that Robert Stong never moved before the collision, or was struck because of the necessity of Day driving too close to him in order to avoid a collision with the on-coming vehicle. The jury may also find the bridge did not allow her to pass by the child without striking him. This Court believes there are sufficient facts in this case, depending upon which facts the jury finds to be credible, which would permit a finding that PennDOT was negligent and that its negligence was the legal cause, or a concurrent legal cause, of Robert Stong being struck and killed by Defendant Day's automobile. See *Fidanza v. PennDOT*, 655 A.2d (1076) (Pa. Cmwlth. 1995); *Young v. PennDOT*, *supra*; *Dean v. PennDOT*, 718 A.2d 374 (Pa. Cmwlth. 1998) and *Dean v. PennDOT*, 751 A.2d 1130 (Pa. 2000).

It is up to the trier of fact to decide whose testimony is to be given greater weight. This important factual difference also renders granting a motion for summary judgment inappropriate.

ORDER

For the reasons mentioned in the previous opinion, Defendant PennDOT's Motion for Summary Judgment, filed February 27, 2001, is DENIED.

BY THE COURT,

William S. Kieser, Judge

cc: Court Administrator
Daniel R. Goodemote, Esquire
Gary T. Harris, Esquire
Jeffrey J. Shipman, Esquire
Judges
Jeff Wallitsch, Esquire
Gary Weber, Esquire (Lycoming Reporter)