

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Robert C. Zimmerman, :
Administrator of the Estate of :
Andrew R. Zimmerman, deceased, :
Appellant :

v. :

Commonwealth of Pennsylvania, :
Department of Transportation :

v. :

No. 340 C.D. 2012
Submitted: September 10, 2012

Mary Rynier, Administratrix of the :
Estate of Scott J. Shoffstall, :
Deceased, and Carol Rodriguez, :
Administratrix of the Estate of :
Aurelio Rodriguez , Deceased :

BEFORE: HONORABLE BERNARD L. McGINLEY, Judge
HONORABLE MARY HANNAH LEAVITT, Judge
HONORABLE P. KEVIN BROBSON, Judge

OPINION NOT REPORTED

MEMORANDUM OPINION
BY JUDGE LEAVITT

FILED: January 9, 2013

Robert C. Zimmerman, on behalf of the Estate of Andrew R. Zimmerman (Decedent), appeals an order of the Court of Common Pleas of York County (trial court) granting the motion for summary judgment filed by the Pennsylvania Department of Transportation (PennDOT), defendant in Zimmerman’s negligence and wrongful death actions. The trial court concluded that PennDOT could not be held liable for fatal injuries sustained by Decedent

when the car in which he was a passenger was hit by an oncoming car that had left its lane of travel and traveled through the grass median strip. In this case, we consider whether sovereign immunity has been waived for a claim where it is alleged that PennDOT's failure to erect a median barrier has caused bodily injury. We affirm the trial court's holding that an exception from sovereign immunity has not been established for such a claim.

The facts surrounding the automobile accident are as follows. The accident occurred on U.S. Route 30, in Hellam Township, York County, near the bridge over the Susquehanna River which separates Lancaster and York Counties. At that location, Route 30 has two lanes for eastbound travel and two lanes for westbound travel. The highway is straight and the lanes are separated by a flat grass median strip approximately 30 feet wide at the accident site.

On August 12, 2001, at approximately 1:50 a.m., Aurelio Rodriguez was driving westbound on Route 30 in an Eagle Talon. Rodriguez had two passengers, one of whom was Decedent. At the same time, Scott Shoffstall was driving a Hyundai Accent eastbound on Route 30, with one passenger. As Shoffstall approached the bridge, he lost control of his vehicle for unknown reasons, left the roadway, traveled through the grass median and struck Rodriguez's vehicle head-on in the right-hand westbound lane. Decedent, Rodriguez, Shoffstall and his passenger were all pronounced dead at the scene. The other passenger in Rodriguez's vehicle was seriously injured but survived.

Robert Zimmerman, Decedent's father and estate administrator, filed a negligence and wrongful death action against PennDOT. The complaint alleged that PennDOT had notice that vehicles at the accident site might lose control and cross the grass median strip, posing a severe danger to vehicles travelling on the

other side of the highway. The complaint further alleged that PennDOT was negligent in failing to prevent foreseeable cross-over accidents by failing to install a median barrier between opposing lanes of traffic. Complaint ¶10(b); Reproduced Record at 45a.¹

PennDOT filed an answer and new matter admitting that it was responsible for maintaining Route 30, but denying that it was negligent in any way. PennDOT asserted the defense of sovereign immunity.

The parties engaged in lengthy discovery. Zimmerman secured an expert report from forensic engineering consultant Kevin E. O'Connor, P.E., dated December 2, 2009. O'Connor studied PennDOT's manuals and noted that by PennDOT's own standards, which take into account the size of the median strip and the daily volume of traffic in the area, a median barrier was warranted at the accident site by 1993. Based on accident reconstruction data, O'Connor estimated that the Shoffstall vehicle was traveling 80 miles per hour at the time of the accident. O'Connor opined that had a median barrier been in place at the accident site, the collision with Rodriguez's vehicle would not have occurred because the barrier would have prevented the Shoffstall vehicle from entering the westbound lanes.

PennDOT moved for summary judgment, asserting that it is immune from a claim based on a failure to install a median barrier. The trial court granted summary judgment in PennDOT's favor. Relying on *Dean v. Department of Transportation*, 561 Pa. 503, 751 A.2d 1130 (2000) and its progeny, the trial court

¹ Zimmerman also alleged that PennDOT was negligent in failing to warn motorists of the danger presented by the lack of a median barrier. However, on appeal Zimmerman limits the issue to the lack of a median barrier.

concluded that PennDOT is immune from suit because the real estate exception to sovereign immunity does not apply and PennDOT had no duty to build a median barrier. The present appeal followed.²

Zimmerman raises one issue for our review. Zimmerman argues that the trial court erred in granting summary judgment in PennDOT's favor when Zimmerman's claim that PennDOT was negligent in failing to install a median barrier does, in fact, fall within the real estate exception to sovereign immunity. Zimmerman concedes that under current law, PennDOT is immune from liability for lack of a guardrail or a negligently designed guardrail. However, Zimmerman argues that PennDOT is not immune from liability because median barriers are part of a single highway and their absence renders the highway unsafe for its intended use, *i.e.*, travel on the highway.

This Court addressed this very issue in the companion case of *Rodriguez v. Department of Transportation*, __ A.3d __ (Pa. Cmwlth., No. 339 C.D. 2012, filed January 9, 2013), which involved the same automobile accident. There, we held that lack of a median barrier does not fall within the real estate exception to sovereign immunity because lack of a median barrier does not render the highway unsafe for its intended purpose, which is travel on the roadway. PennDOT has no duty to prevent cross-over accidents because the median is not

² This Court's standard of review of a grant of summary judgment is limited to determining whether the trial court committed an error of law or abused its discretion. *Cochrane v. Kopko*, 975 A.2d 1203, 1205 (Pa. Cmwlth. 2009). Our scope of review is plenary and we apply the same standard for summary judgment as the trial court. *Id.* A grant of summary judgment is only appropriate where the record clearly shows that there are no genuine issues of material fact and that the moving party is entitled to judgment as a matter of law. *Farabaugh v. Pennsylvania Turnpike Commission*, 590 Pa. 46, 52 n.3, 911 A.2d 1264, 1267 n.3 (2006).

meant for vehicular travel. That holding is dispositive in this case. Accordingly, we affirm the trial court's grant of summary judgment in favor of PennDOT.

MARY HANNAH LEAVITT, Judge

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ORDER

AND NOW, this 9th day of January, 2013, the order of the Court of Common Pleas of York County in the above-captioned case, filed January 30, 2012, is hereby AFFIRMED.

MARY HANNAH LEAVITT, Judge