THE FIRST JUDICIAL DISTRICT OF PENNSYLVANIA, PHILADELPHIA COUNTY
IN THE COURT OF COMMON PLEAS

VINCE E. OAKS, administrator of the estate of RHONDA BRONSON, decedent,	:	**TRIAL DIVISION- CIVIL**
Appellant	:	**March Term, 2010**
	:	**No. 1416**
v.	:	
	:	**Commonwealth Court No.**
THE COMMONWEALTH OF PENNSYLVANIA and THE PENNSYLVANIA: DEPARTMENT OF TRANSPORTATION,	:	**137 CD 2012**
Appellees	:	
	:	

OPINION

PROCEDURAL HISTORY

Plaintiff appeals this Court's Order dated August 17, 2011, granting the Motion for Summary Judgment submitted by Defendants, the Commonwealth of Pennsylvania and the Pennsylvania Department of Transportation.

FACTUAL BACKGROUND

On December 23, 1997, decedent, Rhonda Bronson was traveling south on the Roosevelt Expressway near Ridge Avenue when her car skidded across the southbound travel lanes and into the raised median barrier curb. (Plaintiff's First Amended Complaint, ¶¶ 14-17). Upon impact, the car became airborne, vaulted over the barrier into the northbound lanes, and struck a second vehicle occupied by Mark and Tyra Brooks. (Plaintiff's First Amended Complaint, ¶¶ 21-27). At 12:15 AM on December 24, 1997, Ms. Bronson and Mr. and Mrs. Brooks were pronounced dead at the scene of the accident. (Plaintiff's First Amended Complaint, ¶ 29).

Plaintiff, the alleged common law husband of Rhonda Bronson and the administrator of her estate, alleges that the barrier curb caused the Bronson vehicle to vault the median, and the Pennsylvania Department of Transportation (hereinafter "PennDOT") had a duty to correct the allegedly dangerous condition and failed to do so. (Plaintiff's First Amended Complaint, ¶¶ 37-47).

Plaintiff commenced this action by filing his Complaint on March 8, 2010 as the administrator of the estate of Rhonda Bronson and as the parent and natural guardian of and on behalf of his minor son, Vince, Jr., and Lavonda Oaks in her own right. (See Docket). Defendants (collectively the Commonwealth of Pennsylvania and PennDOT) filed Preliminary Objections to Plaintiff's Complaint on April 21, 2010. *Id.* Plaintiff filed an Answer in Opposition to Defendants' Preliminary Objections on May 11, 2010. *Id.* On May 24, 2010, Judge Fox sustained Defendants' Preliminary Objections and ordered Plaintiff to file an Amended Complaint to reflect proper identification of the parties. *Id.*[1] On June 2, 2010, Plaintiff filed an Amended Complaint as the administrator of the estate of Rhonda Bronson. *Id.*

Defendants filed an Answer with New Matter to Plaintiff's Amended Complaint on July 9, 2010. *Id.* Plaintiff filed a Motion to Strike the Answer on July 26, 2010, and Defendants filed an Answer in Opposition to Plaintiff's Motion to Strike on August 16, 2010. *Id.* Plaintiff then filed a Reply in Support of the Motion to Strike on August 19, 2010. *Id.* On August 23, 2010, this Court entered an Order denying the Motion to Strike the Answer with New Matter to Plaintiff's Amended Complaint. *Id.*

[1] Pursuant to Pa. R.C.P. 2202(a), "an action for wrongful death shall be brought only by the personal representative of the decedent for the benefit of those persons entitled by law to recover damages for such wrongful death."

Defendants filed a Motion for Summary Judgment on July 5, 2011. *Id.* Plaintiff filed a Response to the Motion for Summary Judgment on August 5, 2011. *Id.* Defendant filed a Sur-Reply to Plaintiff's Response to the Motion for Summary Judgment on August 16, 2011, and Plaintiff filed a Response to the Sur-Reply on August 17, 2011. *Id.*

On August 17, 2011, this Court granted Defendants' Motion for Summary Judgment. *Id.* On September 16, 2011, Plaintiff appealed to the Superior Court of Pennsylvania. *Id.* On October 7, 2011, this Court ordered Plaintiff to file a Concise Statement of Errors Complained of on Appeal. *Id.* Plaintiff complied with this Court's Order on October 27, 2011. *Id.* On November 30, 2011, the Superior Court transferred the appeal to Commonwealth Court. Plaintiff raises the following issues on appeal:

1) Whether Plaintiff's claims are barred by the expiration of the applicable statute of limitations; and
2) Whether Plaintiff's claims are barred under the doctrine of sovereign immunity.

LEGAL ANALYSIS

Summary Judgment is governed by Pennsylvania Rule of Civil Procedure 1035.2, which states,

> 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) 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. Pa. R.C.P. 1035.2

In determining whether summary judgment is proper, the record is viewed in the light most favorable to the non-moving party, and all doubts as to whether a genuine issue of material fact exists are resolved against the moving party. *Pennsylvania State Univ. v. County of Centre*, 532 Pa. 142, 615 A.2d 303, 304 (Pa. 1992). The appellate court's scope of review is plenary. *O'Donoghue v. Laurel Savings Ass'n*, 556 Pa. 349, 728 A.2d 914, 916 (Pa. 1999). A trial court's decision to grant or deny a motion for summary judgment will only be reversed where the lower court committed an error of law or abused its discretion. *Cochran v. GAF Corp.*, 542 Pa. 210, 666 A.2d 245, 248 (Pa. 1995).

Courts may enter summary judgment in those cases where the facts establish that a dangerous condition does not exist. *Lambert v. Katz*, 8 A.3d 409, 414, 2010 Pa. Commw. LEXIS 612, P11 (2010), *citing Bendas v. Twp. of White Deer*, 531 Pa. 180, 185, 611 A.2d 1184, 1187 (1992).

1) Plaintiff's claim is barred because it was not commenced within the two year statute of limitations applicable to wrongful death and survival actions.

"An action to recover damages for injuries to the person or for the death of an individual caused by the wrongful act or neglect or unlawful violence or negligence of another" must be commenced within two years. 42 Pa. C.S.A. 5524(2). In an action for wrongful death, the statute of limitations begins to run at the date of death. *Pastierik v. Duquesne Light Company*, 526 A.2d 323, 326 514 Pa. 517, 521-22 (1987). In contrast, in a survival action, the statute of limitations begins to run on the date the injuries are received. *Id.* at 326, 522-23.

In the instant matter, Rhonda Bronson sustained fatal injuries on December 24, 1997 and was pronounced dead at the scene of the accident. (Plaintiff's First Amended Complaint, ¶ 24). Therefore, the statute of limitations commenced on December 24, 1997 and expired on December 24, 1999. Plaintiff did not file this action until March 8, 2010. Therefore, Plaintiff's claims are barred by the statute of limitations.

Plaintiff argues that his claims may proceed by virtue of the Minority Tolling Statute. Pennsylvania's Minority Tolling Statute provides,

> If an individual entitled to bring a civil action is an unemancipated minor at the time the cause of action accrues, the period of minority shall not be deemed a portion of the time period within which the action must be commenced. Such person shall have the same time for commencing an action after attaining majority as is allowed to others by the provisions of this subchapter. 42 Pa. C.S. 5533(b).

The Court in *Holt v. Lenko* clarified the application of the Minority Tolling Statute, writing,

> Construing the Minority Tolling Statute in accordance with the plain meaning of its language, and the intent of the legislature, we conclude that the statute contemplates a minor Plaintiff who is alive, but whose parent or guardian fails, for some reason, to bring suit on the minor's behalf prior to the minor's eighteenth birthday. *Holt v. Lenko*, 2002 Pa. Super. 29, P10, 791 A.2d 1212, 1214 (2002).

The Minority Tolling Statute is not applicable in the instant matter because the action was brought by Plaintiff as the administrator of the estate of Rhonda Bronson. The original Complaint was filed by Plaintiff as the administrator of the estate and as the parent and natural guardian of and on behalf of his minor son, Vince, Jr., and Lavonda Oaks in her own right. However, on May 24, 2010, Plaintiff was ordered to file an Amended Complaint to reflect proper identification of the parties because actions for wrongful death and survival actions must be commenced by the personal

representative of the estate. Therefore, because the action was brought by Plaintiff as the personal representative of the estate, the statute of limitations was not tolled, and Plaintiff's claims are barred.

2) Summary Judgment was proper because Plaintiff's claims against the Pennsylvania Department of Transportation and the Commonwealth of Pennsylvania are barred by the doctrine of sovereign immunity.

"Commonwealth agencies are generally immune from civil suit for tort liabilities unless the General Assembly waives sovereign immunity." *See* 1 Pa. C.S. § 2310. The Commonwealth has waived sovereign immunity where a claim arises from an alleged dangerous condition of Commonwealth real estate. 42 Pa. C.S. § 8522(b)(4). The exceptions to sovereign immunity are to be strictly construed. *Dean v. Department of Transportation*, 561 Pa. 503, 508, 751 A.2d 1130, 1132 (2000).

> In order for the real estate exception to apply, 'a claim … must allege that the dangerous condition' derived, originated from or had as its source the Commonwealth realty itself. *Lambert v. Katz*, 8 A.3d 409, 414, 2010 Pa. Commw. LEXIS 612, P9 (2010), *quoting Jones v. SEPTA*, 565 Pa. 211, 225, 772 A.2d 435, 443 (2001).
>
> A government entity waives sovereign immunity when an artificial condition or defect of the land *itself* causes injury, rather than merely facilitates the injury. *Lambert*, 8 A.3d at 415, P13, *citing Snyder v. Harmon*, 522 Pa. 424, 434, 562 A.2d 307, 312 (1989)(emphasis in original).

The facts in *Svege v. Interstate Safety Service, Inc.*, 862 A.2d 752, 2004 Pa. Commw. LEXIS 881 (2004), are substantially the same as those presented here. The claims in *Svege* arose out of a motor vehicle accident in which a tractor trailer crashed through the 32-inch concrete "safety shape" barrier separating eastbound and westbound traffic on the Pennsylvania Turnpike, caught fire, and crushed the vehicle

carrying the Svege family. Three members of the Svege family were killed and three sustained severe injuries in the accident.

In their Complaint, Plaintiffs alleged that Interstate Safety Service, Inc. and Stabler Construction Co. were negligent in the construction and design of the barriers because they knew that a 46-inch high reinforced barrier would substantially decrease the risk of cross-over crashes compared to the 32-inch concrete safety median barrier[2] utilized at the crash site. *Svege*, 862 A.2d 752, 753, 2004 Pa. Commw. LEXIS 881, P3 (2004).

Relying on *Dean v. Department of Transportation*, 561 Pa. 503, 751 A.2d 1130 (2000), the trial court in *Svege* granted summary judgment to Defendants. The Commonwealth Court upheld the trial court's reasoning, stating:

> [T]he trial court held that the placement of 32-inch concrete barriers could not give rise to liability even if a taller barrier would have been a more effective device. In *Dean*, the absence of any barrier was held not to render a highway unsafe for its intended purpose of travel. Accordingly, Appellants' claim that a hypothetical barrier of greater dimensions and stability could have minimized or eliminated their injuries was inadequate as a matter of law to hold the sovereign liable under the real estate exception. *Svege*, 862 A.2d 752, 754-55, 2004 Pa. Commw. LEXIS 881, P7 (2004).

Similarly, in *Lambert v. Katz*, 8 A.3d 409, 2010 Pa. Commw. LEXIS 612, Mr. Wilsbach's car broke through the guard cables located on the right side of the westbound lane, struck a tree and slid down an embankment, killing all three occupants of the vehicle.

[2] At the time the 32- inch barriers were installed, they were the most widely used barriers in the United States and were in use in the vast majority of States at the time of the accident. Plaintiff's expert concluded that the 32-inch barriers were defective based upon the standards promulgated in 1998 by the American Association of State Highways and Transportation Officials, 9 years after the allegedly defective barriers were installed.

The Court in *Lambert* discounted the opinion of the Plaintiffs' expert that decedent Wilsbach would have been able to correct the out of control vehicle if the shoulder had been widened, finding that the facts did not establish that a dangerous condition was permitted to exist. *Lambert*, 8 A.3d at 419, P26. In affirming the trial court's grant of summary judgment to PennDOT, the Pennsylvania Commonwealth Court concluded,

> The legislature did not intend to impose liability upon the government whenever a plaintiff alleged that his or her injuries could have been avoided or minimized, had the government installed a guardrail alongside the roadway. *Lambert*, 8 A.3d at 416, P15, *quoting Dean v. Department of Transportation*, 561 Pa. 503, 511-12, 751 A.2d 1130, 1134 (2000).

Moreover, the Court in *Brown v. Commonwealth* held that, consistent with *Svege* and *Lambert*, the absence of rumble strips does not make the highway unsafe for its intended use or cause accidents to occur. *Brown v. Commonwealth of Pennsylvania*, 11 A.3d 1054, 1057, 2011 Pa. Commw. LEXIS 11, P7 (2011).

In differentiating a condition of the real estate causing versus facilitating an accident, the Court in *Brown* explained,

> In *Dean*, the reason the vehicle left the road was that it slid on the snow, not that there was no guardrail. Similarly, here, the reason Hughes's car left the road was that Hughes was asleep while he was driving it, not that there were no rumble strips to wake him up. *Brown*, 11 A.3d 1054, 1057, 2011 Pa. Commw. LEXIS 11, P7 (2011).

In the instant matter, Plaintiff alleges that the presence of a barrier curb caused the Bronson vehicle to vault the median, which, as Plaintiff further alleges, was 6 inches shorter than the standard utilized beginning in approximately 1977. (Plaintiff's Response to Defendants' Motion for Summary Judgment, pg. 3). Plaintiff's

Engineering Experts conclude that, "[t]he 5 foot offset from the curb to the face of the median barrier and the substandard barrier height are dangerous conditions and were causes of the crash." (Expert Report attached as Exhibit "B" to Plaintiff's Response to Defendants' Motion for Summary Judgment, pg. 4).

Plaintiff's expert report also states that the speed limit at the scene of the accident is 50 mph. Plaintiff was traveling at a speed no less than 83 mph when she lost control of the vehicle. (Expert Report attached as Exhibit "B" to Plaintiff's Response to Defendants' Motion for Summary Judgment).

In the instant matter, Plaintiff cannot abrogate sovereign immunity under the real estate exception. Like the lack of rumble strips in *Brown* or the absence of a guardrail in *Dean* or a narrow shoulder in *Lambert*, the barrier curb and median may have contributed to the severity of the accident, but did not cause the accident, as required for a waiver of sovereign immunity. As in *Svege*, Plaintiff's contention that a hypothetical taller median with a barrier curb positioned closer to the median would have minimized or eliminated the severity of the injuries is insufficient to abrogate sovereign immunity.[3]

Additionally, as our courts have held, there can be no liability premised on the negligent installation of a safety fixture the government had no duty to provide. Therefore, Plaintiff's contentions that the accident could have been avoided if the median was six inches higher or the barrier curb was placed closer to the median are insufficient to establish liability of the Defendants.

[3] Plaintiff's experts state in their Supplemental Report that "impact with correctly installed barrier would likely have prevented Bronson's vehicle from penetrating the barrier and entering opposing traffic." (Supplemental Expert Report attached as Exhibit "B" to Plaintiff's Response to Defendants' Motion for Summary Judgment).

The Defendants did not waive sovereign immunity in this case because Plaintiff's claim does not arise from a dangerous condition of Commonwealth real estate.

CONCLUSION

For the foregoing reasons, this Court respectfully requests that its decision to grant Defendants the Commonwealth of Pennsylvania and the Pennsylvania Department of Transportation's Motion for Summary Judgment be **AFFIRMED**.

BY THE COURT:

_____ _____

DATE **ALLAN L. TERESHKO, J.**

cc:
All Counsel
Sarah B. Dragotta, Esq., for Appellant
Richard Charles Geer, Esq., for Appellee