IN THE COURT of COMMON PLEAS of PHILADELPHIA COUNTY

FIRST JUDICIAL DISTRICT of PENNSYLVANIA

CIVIL TRIAL DIVISION

SUSAN BOYER, individually and as Parent and Natural Guardian of **EDWARD BOYER,** a minor	:	COURT of COMMON PLEAS PHILADELPHIA COUNTY, PA
v.	:	
	:	NOVEMBER TERM, 1997
THE CITY of PHILADELPHIA Defendant	:	No. 2647

September 28, 1999 GOODHEART, J

MEMORANDUM OPINION

On November 22, 1995, while on the premises of the Houseman Recreation Center, in the 5000 block of Summerdale Avenue -- a public playground owned and operated by the City of Philadelphia -- the minor Plaintiff (then a seven-year-old boy) was struck in the face and eye by debris thrown by other children, who were playing on and around a "pile of dirt approximately twelve feet high and thirty feet in diameter." As a result of his injuries, the minor Plaintiff suffered the permanent loss of vision in his right eye.

The pile of dirt had previously been dumped on the recreation center premises by City contractors, in preparation for a reconstruction of the playing fields located there.

The minor Plaintiff, through his mother, filed suit against the City in November of 1997, alleging that the City negligently allowed the pile of dirt to be deposited at the recreation center, negligently failed to barracade it or warn against it, negligently failed to supervise the other users of the recreation center, and negligently failed to have first aid equipment readily available at the scene.

On June 4, 1999, the City filed a Motion for Summary Judgment, based upon its general immunity from tort actions pursuant to the Political Subdivision Tort Claims Act, 42 P.S. §8542, et seq.

I granted the City's Motion, by Order dated July 22, 1999; this timely appeal followed.

Because the City of Philadelphia is a "local agency" of the Commonwealth, the City is absolutely immune from tort damages -- no matter how egregiously negligent its conduct might be -- unless that conduct falls within one or more of the eight specifically-enumerated categories of cases as to which sovereign immunity has been statutorily waived. 42 P.S. §8542. Of those eight categories, only one -- commonly called the "Real Property" exception[1] -- could possibly

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[1] The relevant portion of the statute, 42 P.S. §8542, reads as follows :

> "(A) LIABILITY IMPOSED.-- A local agency shall be liable for damages on account of an injury to a person or property within the limits set forth in this subchapter if both of the following conditions are satisfied and the injury occurs as a result of one of the acts set forth in subsection (b):
>
> (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 section 8541 (relating to governmental immunity generally) or section 8546 (relating to defense of official immunity); 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). As used in this paragraph, 'negligent acts' shall not include acts or conduct which constitutes a crime, actual fraud, actual malice or willful misconduct.
>
> (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:
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> * * *

apply to this case.

As a general proposition, the exceptions to Governmental Immunity have been construed rather narrowly, and most reported cases find the government[2] immune from suit.

For example, the appellate courts have permitted recovery under the "sidewalk" exception to governmental immunity only when the alleged defect appears in the sidewalk itself [such as a hole in the pavement], but not when the alleged defect appears on the pavement [for example, grease, as in Finn v. City of Philadelphia, 541 Pa. 596; 664 A.2d 1342 (1995); or snow and ice,

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> (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:
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> (i) trees, traffic signs, lights and other traffic controls, street lights and street lighting systems;
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> (ii) facilities of steam, sewer, water, gas and electric systems owned by the local agency and located within rights-of-way;
>
> (iii) streets; or
>
> (iv) sidewalks.
>
> * * *"

42 P.S. §8542.

[2] A separate statute, the Sovereign Immunity Act, 42 P.S. §8501, et seq. imposes similar restrictions on the ability to recover tort damages from the Commonwealth itself, and from Commonwealth Agencies (such as, for example, SEPTA). Because of this similarity, cases decided under one statute are often cited as "instructive" in decisions based upon the other. See, for example, Snyder v. Dombrowski, 522 Pa. 424; 562 A.2d 307 (1989); Downing v. PHA and Philadelphia Gas Works, 148 Pa. Commw. 225; 610 A.2d 535 (1992).

as in McRae v. School District of Philadelphia, -- Pa. Commw. --; 660 A.2d 209 (1995)][3].

This arbitrary distinction led Justice Cappy to issue a dissenting opinion in the Finn case, sharply criticizing the majority's 4-to-2 decision to affirm the Commonwealth Court's reversal of a trial court judgment against the City :

> "The impact of this absurd conclusion that the defect must emanate from the real estate itself is glaringly obvious when taken to an absurd extreme…. Do we really want to send a message to our school districts that they no longer need to carefully remove the snow and ice from their sidewalks?
>
> "I cannot comprehend how the Majority can justify its decision, in light of such absurd results, to afford immunity in situations of active negligence, such as where the City itself deposits the grease [on the sidewalk, as the City evidently had done], where the same would not be true in circumstances involving passive negligence, such as where the City simply permits a sidewalk to crumble." Id., at 609; 664 A.2d, at 1348.

The Real Property exception has also been found inapplicable when an act of someone other than the governmental party is the direct cause of the actual harm, notwithstanding any defect in the government-owned real property [such as the actions of a third party in slamming a defective door that severed the Plaintiff's finger, as in Byard v. PHA, 157 Pa. Commw. 269; 629 A.2d 283 (1993); the actions of a detainee who attacked a family after escaping from a negligently-maintained juvenile facility, as in Mascaro v. Youth Study Center of the City of Philadelphia, et al, 514 Pa. 351; 523 A.2d 1118 (1987)], and when defective real property caused an injury on adjacent property [as in Snyder v. Harmon, 522 Pa. 424; 562 A.2d 307 (1989), where the Plaintiff, a motorist, fell into a mineshaft on property immediately adjacent to a Commonwealth

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[3] For the purposes of this opinion, the "sidewalk" exception is essentially similar to the "real property" exception.

highway which had neither barriers nor markings to prevent such an occurrence].

In McCloskey v. Abington School District, 115 Pa. Commw. 289; 539 A.2d 946 (1988; hereinafter, McCloskey III), the Commonwealth Court further extended the principle set forth in Byard and Mascaro. Originally, at 101 Pa. Commw. 110; 515 A.2d 642 (1986; McCloskey I), the Commonwealth Court had reversed a summary judgment granted in favor of the defendant school district and remanded the case for trial. McCloskey -- a student -- had fallen from a set of hanging rings in the defendant's gymnasium during his regularly-scheduled class there, which rendered him a quadriplegic. The trial court found that the rings were, as a matter of law, fixtures on the gymnasium property, and not an integral part of the real property itself, taking the case out of the real property exception. The Commonwealth Court, in McCloskey I, held that such a finding was factual rather than legal, and should therefore have been made by the jury, not the court. On that basis, the Commonwealth Court reversed and remanded for trial.

Shortly thereafter, the Mascaro decision was released. The Supreme Court then issued an Order granting allocatur in McCloskey I, summarily vacating the Commonwealth Court's decision, and remanding the matter to that court [517 Pa. 347; 537 A.2d 329 (1988; McCloskey II)] for further proceedings in light of the Mascaro holding.

On remand, Commonwealth Court sidestepped the fixture/real property question entirely, and focused its attention on the "other actor" discussion contained in Byard and Mascaro.

According to its opinion on remand (McCloskey III), since the Plaintiff was using the gym rings when he was injured, his use of the rings was the direct "cause" of the accident -- effectively treating the Plaintiff as an "other actor" -- and taking the case out of the Real Property exception irrespective of whether or not the rings were actually defective, without deciding whether the rings were or were not fixtures, and apparently without benefit of any evidence that the Plaintiff had

acted negligently. McCloskey III.

Under the McCloskey analysis, then, the injuries to the instant minor Plaintiff – because they were directly caused by the actions of others (the children who threw the debris) and not by the City's mere act of creating (or causing the creation of) the dirt pile – would fall outside the "real estate" exception to tort immunity.

Interestingly, just four days after I granted summary judgment in this case, the Commonwealth Court – sitting *en banc* – decided Rosalind Wilson v. Philadelphia Housing Authority, No. 3126 C.D. 1999 (July 26, 1999), a case I decided as trial court.

In Wilson, the Plaintiff was injured while attempting to break up a fistfight in front of her residence; she was pushed by one of the participants and struck her ankle on the stump of a metal post previously left in the ground by PHA maintenance workers.

I granted PHA's Motion for Summary Judgment in Wilson and dismissed the Plaintiff's Complaint, on the basis that the legal cause of the Plaintiff's injuries was the push that she received, and not any negligence on the part of PHA.

Tthe Commonwealth Court reversed, and remanded the case for trial, holding that only a factfinder -- and not the court -- can determine whether or not a negligent act by a third party is a "superseding cause" of "Commonwealth party" negligence. Powell v. Drumheller, 539 Pa. 484; 653 A.2d 619 (1995).

The court further held that since there can be more than one proximate cause of an injury, Dean v. PennDOT, 719 A.2d 374 (Pa. Commw., 1998), only a factfinder can determine whether or not "Commonwealth party" negligence is a proximate cause of a particular Plaintiff's injuries; summary judgment, the court concluded, was therefore inappropriate.

Here, I found -- as a matter of law -- that the "direct" cause of this Plaintiff's injuries was

the throwing of debris by other children present at the recreation center, and not the mere existence of the dirt pile itself, a finding that -- according to Wilson -- may not have been mine to make.

If I was entitled to rule as I did, then -- because the City is immune from liability -- my Order granting Summary Judgment should be affirmed.

If, on the other hand, this case presents unresolved issues of fact that can only be resolved by a factfinder, my decision was improper, and should be reversed[4].

BY THE COURT:

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Goodheart, J.

[4] The Wilson court also opined that the question of whether the pole stump was a defect in, or a defect on, the real property should have been submitted to a factfinder as well. This portion of the opinion appears to be *dicta*; some such determinations are sufficiently obvious that a court should properly make them as a matter of law.