BRADLEY V. FRANKLIN COUNTY PRISON, ET AL., C.P. Franklin County Branch, No. A.D. 1994-176

Civil Action-Judgment on the Pleadings- Local Governmental Immunity

1. The standard for reviewing a motion for judgment on the pleadings is whether, on the basis of the pleadings, a party is entitled to judgment as a matter of law.

2. Preliminary objections in the nature of a demurrer and motion for judgment on the pleadings have long been considered to be in effect identical, and ought to be judged by the same standard.

3. Exceptions to the rule of sovereign and local governmental immunity are limited in scope and must be strictly construed to effectuate the clear legislative intent to insulate the governmental entity's exposure to unlimited tort liability.

4. The real estate exception can be applied only to those cases where it is alleged that the artificial condition or defect of the land itself causes the injury, not merely when it facilitates the injury by the acts of others, whose acts are outside the statute's scope of liability.

5. Although different language is employed in 42 Pa.C.S.A. 8542(b)(3) and 8522(b)(4), the real estate exception has been interpreted consistently with respect to both types of immunity.

W.Scott Henning, Esquire, and with him, Handler & Wiener, for the Plaintiff

Timothy I. Mark, Esquire, and with him Caldwell & Kearns, for the Defendants

KAYE,J., November 17, 1994:

OPINION SUR DEFENDANTS' MOTION FOR JUDGMENT ON PLEADINGS

This is a civil action for personal injuries filed by Donald Bradley ("plaintiff") against Franklin County Prison and County of Franklin ("defendants"). Defendants filed a motion for judgment on the pleadings on August 25, 1994. The motion was argued before the Court on October 6, 1994, and is now in a posture for disposition.

Initially we will discuss the standard for reviewing a motion for judgment on the pleadings. The applicable standard for our review is whether, on the basis of the pleadings, a party is entitled to judgment as a matter of law. *Kerr v. Borough of Union City*, 150 Pa.Cmwlth. 21, 614 A.2d 338 (1992). The grant of a demurrer is appropriate when the facts set forth in a plaintiff's complaint do not state a claim upon which relief may be granted. *County of Allegheny v. Commonwealth*, 507 Pa. 360, 372, 490 A.2d 402, 208 (1985). A motion for judgment on the pleadings is merely a procedure for demurring after an answer has been filed. *Valley Forge Historical Society v. Washington Memorial Chapel*, 330 Pa.Super. 494, 479 A.2d 1011 (1984). Preliminary objections in the nature of a demurrer and motion for judgment on the pleadings have long been considered to be in effect identical, and ought to be judged by the same standard. *Engel v. Parkway Co.*, 439 Pa. 559, 266 A.2d 685 (1970).

In determining whether judgment on the pleadings is appropriate, only the complaint, answer and new matter may be considered. *Kroiz v. Blumenfeld, et al.*, 229 Pa.Super. 194, 323 A.2d 339 (1974). With this standard in mind we turn to the merits of defendant's objections.

Succinctly stated, the Complaint alleges that plaintiff was incarcerated at Franklin County Prison on January 1, 1993. On that date, he has alleged that he slipped and fell while showering in the maximum security block area of the prison, and sustained injuries as a consequence thereof. He claimed

that he was in the "drying off" area of the prison when the incident occurred. He further alleged there were no anti-slip pads or other non-slip devices in the drying off area to create a slip-resistant surface on the floor, and that the failure to provide a surface of that nature permitted the creation of a slippery condition when the defendants knew or should have known that such condition would be dangerous for those using the shower. The basis for the motion for judgment on the pleadings is that the action asserted is barred by doctrine of governmental immunity, 42 Pa.C.S.A.§8541 et seq., and that no exception therein is applicable to the matter *sub judice*.

The Pennsylvania Legislature created specific exceptions to the general principle of governmental immunity in the Political Subdivision Tort Claims Act. 42 Pa.C.S.A. 8541, et seq. In order to impose liability on a local agency, a plaintiff must establish three things: that 1/ "the damages would be recoverable under common law or a statute. . . " 42 Pa. C. S. 8542 (a) (1) ; 2 / " the injury was caused by the negligence of the local agency or an employee thereof . . ." 42 Pa. C. S. 8542 (a) (2) ; and 3/ the injury must result from one of a number of enumerated acts including the "care, custody and control of real property in the possession of the local agency..." 42 Pa.C.S. 8542(b)(3).

Exceptions to the rule of sovereign and local governmental immunity[1] are limited in scope and must be

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1 Although different language is employed in 42 Pa.C.S.A.§8542(b)(3) and 8522(b)(4), the real estate exception has been interpreted consistently with respect to both types of immunity. Thus, we will apply the doctrines as applied to the real estate exception interchangeably herein. Hicks v. SEPTA, 156 Pa.Cmwlth. 641, 624 A.2d 690 (1993); Chambers v. SEPTA, 128 Pa.Cmwlth. 368, 563 A.2d 603 (1989). See also *McCalla v. Mura et al.*, ___Pa.___, ____ A.2d ____ (No. 6 W.D. Appeal Docket 1993, decided November 3, 1994 slip op. 7).

strictly construed to effectuate the clear legislative intent to insulate the governmental entity's exposure to unlimited tort liability. *Snyder v. Harmon*, 522 Pa. 424, 562 A.2d 307 (1989).

The factual averments which set forth plaintiff's theory of recovery are contained in paragraph 12, of the Complaint:

> 12. The occurrence of the aforesaid accident and the injuries to the Plaintiff, Donald Bradley, resulting therefrom, were caused directly and proximately by the Defendants' negligence, generally and most specifically as set forth below:
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> a. In failing to provide the drying off area with non-slip pads or any other means of protection, thereby creating a dangerous condition;
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> b. By allowing the floor in the drying off area to remain unprotected when the Defendants knew or should have known that the bare floor was a dangerous condition;
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> c. In failing to warn the Plaintiff of the dangerous condition of the floor of the drying off area;
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> d. In installing and or allowing to exist a tile floor without non-slip properties;
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> e. In failing to properly inspect the drying off area to keep it in a safe condition;
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> f. In otherwise failing to use reasonable prudence in the design and maintenance of the drying off area.

The gravamen of plaintiffs' complaint is that defendants were negligent in failing to provide certain things to make the shower area safe. The stated averments in plaintiff's compliant, paragraph 12. a. through f., plead acts of omission or failure by individuals as the basis for a cause of action. It is well established that this type of averment does not fit within the exception to governmental immunity. Our courts have

consistently refused to apply the real estate exception to sovereign or governmental immunity in such circumstances.

In *Farber v. Pennsburry*, 131 Pa.Cmwlth. 642, 571 A.2d 546 (1990), a high school student alleged that while he was on school property participating in a school sponsored race he was caused to slip, trip and fall and suffer a knee injury.[2]

The Commonwealth Court then determined that the allegations of *Farber* as to the causation of his injuries were not allegations of a defect or artificial condition of the land itself and affirmed the granting of the motion for judgment on the pleadings. 131 Pa.Cmwlth. at 647, 571 A.2d at 549.

Plaintiff argues that his complaint meets the *Mascaro v. Youth Study Center*, 514 Pa. 351, 523 A.2d 1118 (1987) requirement by averring that a defective condition of the property itself caused plaintiff's injury.

In *Mascaro*, a juvenile escaped from the Philadelphia Youth Study Center, a secure juvenile facility. Authorities knew that he had a prior criminal record of rape, aggravated assault, robbery, burglary, involuntary deviate sexual intercourse, and auto theft. He had previously escaped from detention three times, and committed a number of crimes following one of those escapes. Following the escape that led to the lawsuit in question the juvenile, Claud Opher, and an accomplice, entered the residence of Kenneth and Michelle

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2 Averments (a), (b), (c), (d) and (f) of paragraph six of Farber's Complaint stated as follow: (a) acting in a reckless manner; (b) failing to respect the rights, safety, and position of the plaintiff in the place aforesaid; (c) failing to warn plaintiff; (d) failing to adequately supervise the race described; (f) failing to properly train plaintiff for the activity in which he was injured .... 131 Pa.Cmwlth. at 647, 571 A.2d at 548.

Mascaro, where they were discovered by the Mascaros. The accomplice raped Michelle Mascaro after tying up Kenneth Mascaro, and Opher beat and sodomized their daughter for several hours, as the rest of the family listened helplessly. Following his apprehension, Opher was convicted, and received a sentence of 50 to 150 years of incarceration. Kenneth Mascaro apparently was unable to deal with his memories of this terrible ordeal, and committed suicide.

The lawsuit ensued, which included the Youth Study Center, City of Philadelphia, and Wilson Goode, its then-director, among the defendants. The trial court granted judgment on the pleadings on the basis of governmental and official immunity under 42 Pa.C.S.A. §8541. On appeal, Commonwealth Court reversed that part of the order which dismissed the suit against the Youth Study Center and City of Philadelphia, finding that a cause of action had been stated under 42 Pa.C.S.A. §8542(b)(3), which covers the care, custody, and control of real estate by a local governmental agency.

In reversing the Commonwealth Court, the Supreme Court of Pennsylvania held that,

> ... the real estate exception can be applied only to those cases where it is alleged that the artificial condition or defect of the land itself causes the injury, not merely when it facilitates the injury by the acts of others, whose acts are outside the statute's scope of liability.
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> *Id.* 514 Pa. at 363, 523 A.2d at 1124.

We agree that the instant case is not a situation where the injury was a result of "third party" action. We observe that the rationale behind the *Mascaro*, decision is that the government is immune from suit when an injury is caused by "third parties" and not entirely by the governmental unit. However,

the absence of a third party causing the injury alone does not create an exception to governmental immunity. Plaintiff must allege a cause of action that will fit within the narrow exceptions to governmental immunity. Plaintiff maintains that the complaint alleges that it was the condition of the prison floor that caused the injuries and this meets the narrow interpretation of 42 Pa.C.S. 8542(b)(3). Specifically, plaintiff directs our attention to sub-paragraphs 12 d. and f. of the complaint which read:

> The occurrence of the aforesaid accident and the injuries to the plaintiff, Donald Bradley, resulting therefrom, were caused directly and proximately by the Defendants' negligence, generally and more specifically as set forth below:
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> d. In installing and or allowing to exist a tile floor without non-slip properties;
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> f. In otherwise failing to use reasonable prudence in the design and maintenance of the drying off area.

In *King v. City of Philadelphia*, 107 Cmwlth. 126, 527 A.2d 1102 (1987) a prisoner, while being moved, was injured after falling on some steps. The complaint alleged that the fall occurred while plaintiff was handcuffed to a crutch and forced to walk on the steps. *Id.* at 128, 527 A.2d at 1103. The court, in sustaining the demurrer, stated the following:

> We are of the view in this respect, that appellant, in averring the City's "failure to provide a safe means for a person on crutches to go from one building level to another without stairs", did not allege any defective condition of real property, but instead only alleged negligent or otherwise unsatisfactory procedures in the transportation of prisoners within the involved building.

> The very presence of stairs no doubt presents a potential hazard to any individual whose ambulatory capabilities have been in some manner restricted, as is the case, rather clearly, with a person handcuffed to a crutch. That reality, however, does not compel the conclusion that stairs are "defective" real property either in common parlance or for purposes of the Judicial Code.
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> 107 Comwlth. at 130, 527 A.2d at 1104.

In *Taylor v. Department of Corrections*, 10 D&C 4th 194 (C.P. Montgomery Co., 1991), aff'd. 145 Pa.Cmwlth. 690, 604 A.2d 770 (1992), the court addressed a slip and fall accident by a prisoner on the prison gymnasium floor at the State Correctional Institution at Graterford. The plaintiff's complaint alleged negligence on the part of the Commonwealth and sought damages for the fall which occurred as a result of the presence of a liquid substance on the gymnasium floor. The court stated:

> Applying the law to the facts of the present case, it is clear that plaintiff's case, which is based on an alleged slip and fall on an unspecified fluid of unknown origin, cannot legally be construed to be a type of dangerous defect of Commonwealth real estate which would fall within the purview of any of the exceptions to sovereign immunity under section 8522(b)(4). To reach a contrary conclusion would require this court to ignore the clear legislative mandate of section 8522(b)(4) and disregard a long line of appellate decisions which have narrowly construed exceptions to sovereign immunity.The effect of such a conclusion would be to place the Commonwealth in the same position as any other landowner in the defenses of premises liability cases.
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> 10 D&C 4th at 197.

In the instant case the alleged slippery floor in the prison shower area is not a defect in government real estate under the

exception. This conclusion is supported through the discussion by the Commonwealth Court in the recent case *West v. Kuneck,* No. 1516 C.D., 1993 Pa.Cmwlth. Lexis 508, (September 1, 1994). In that case Grace Siford was walking across a parking lot of a fire company when she was struck by a vehicle that entered the parking lot from a state highway. Siford was hit while she was nineteen (19') feet into the fire company's parking lot. She received serious injuries and died eleven months after the accident. The administratrix of Siford's estate filed suit against the driver of the vehicle that struck Siford, the fire company, the township, the school district and Pennsylvania Department of Transportation. Among the allegations was that the fire company owned or controlled the parking lot on which Siford was walking when she was struck. The complaint contained allegations that the fire company was negligent when it failed to provide proper and adequate markings "upon its parking lot and or driveways premises" and failed to provide "properly designed driveways" and failed to provide "adequate warnings ... to protect ... pedestrians from the dangerous and hazardous condition of its parking lot". *Id.*, Lexis 508 at 2. The fire company's answer included new matter which asserted the affirmative defense of governmental immunity under 42 Pa.C.S. 8541-8542. The fire company's motion for summary judgment was granted by the trial court on the basis of governmental immunity. The Commonwealth Court, in affirming the decision, stated:

> Clearly, the alleged failure to provide markings on the surface of the parking lot is not an actual defect of the parking lot itself.
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> *Id.* Lexis 508 at 7.

Similarly, plaintiff's averments in paragraph 12., sections d. and f. do not set forth actual defects of prison realty. The plaintiff's fall herein allegedly arose as a consequence of either the tile on the floor surface becoming slippery, or from failure to some sort of surface that would increase the traction

between the defendant's foot and the floor surface. These allegations do not assert that a defect existed in the floor on which the fall allegedly occurred, however, and thus the Complaint does not set forth a cause of action cognizable under the "real estate exception" to governmental immunity. For this reason, we will grant defendants' motion.