

Linda L. Rhine, Administratrix Of The Estate Of Benjamin A. Rhine,
Plaintiff Vs. Department Of Transportation, Commonwealth Of
Pennsylvania, Defendant, Civil Action - Law, C.P. Franklin County
Branch, No. A.D. 1996-392

Rhine v. PennDOT

subsequent remedial measures - admissibility of suit brought in federal court - wrongful death action for loss of consortium of a son against the Commonwealth

Facts: Car left the road after entering a curve and hit a tree; driver died. Estate is suing PennDOT for failure to warn of loose aggregate on the road after maintenance operation and for failure to clean up the road.

1. Evidence of subsequent remedial measures taken by PennDOT (sweeping of the road after a "oil and chip" operation) is not admissible to show that PennDOT had control over the road or that precautionary measures were feasible because these issues were not controverted; the evidence may be introduced to impeach evidence by PennDOT regarding the condition of the roadway at the time of the accident.
2. Federal complaint filed against Chrysler Corporation not admissible in the suit against PennDOT. Federal complaint is based on theory of "crashworthiness" of decedent's car. The complaint merely alleges that the design defect of the car *enhanced* the decedent's injuries, not that it was the *sole* cause of the accident. The federal complaint is irrelevant, because if PennDOT is found negligent, it is liable for *all* injuries even if the design defect contributed to those injuries.
3. There is no wrongful death action against the Commonwealth for loss of consortium by parents of a son. The Sovereign Immunity Act limits a claim for loss of consortium against the Commonwealth to a spousal relationship.
4. The parties will not be permitted to inform the jury of the statutory cap on damages in an action against the Commonwealth; if the jury awards more than the statutory cap, the court will mold the verdict.

Leslie M. Fields, Esquire
Gerhard Schwaibold, Esquire

OPINION AND ORDER

WALKER, P.J., December 4, 1998:

Factual and Procedural Background

This case arises out of an accident which occurred on May 22, 1996, at approximately 11:18 p.m. Benjamin Rhine was driving east on Newburg Road, Franklin County, and after having rounded a lefthand curve, his vehicle left the road, went across the westbound lane and struck a tree. Benjamin incurred severe injuries which resulted in his death on May 24, 1996, at York Hospital, York County.

Plaintiff Linda Rhine, as the administratrix of Benjamin's estate, filed a complaint on September 18, 1996, alleging that the cause of the accident was the loose aggregate (consisting of stones and/or gravel) on the road on which Benjamin had skidded. Plaintiff alleges that shortly before the accident, Defendant PennDOT had engaged in an "oil and chip" pavement maintenance operation and that defendant had failed to remove the excess loose stones and/or gravel from the road. Plaintiff alleges that PennDOT was negligent because it created a dangerous and unsafe condition of the roadway. Plaintiff further alleges that PennDOT was negligent for failing to effectuate proper warnings of this dangerous condition of the roadway, such as posting a "loose gravel" sign. Plaintiff also alleges that the speed posted by PennDOT at the curve in question of 45 m.p.h. is not a safe speed for that curve. In her complaint, plaintiff brought both a wrongful death action against PennDOT for recovery of damages she and her husband, Robert Rhine, sustained personally for the loss of their son, and a survival action in her capacity as administratrix of Benjamin's estate.

On June 30, 1998, a pre-trial conference was held in this case. At that time, the attorneys for both parties raised several issues to be resolved before trial. This court directed them to file a motion in limine. Argument on the motions was held on August 20, 1998. At the time of argument, an additional issue regarding the statutory cap on damages in actions against the Commonwealth was raised. By letter dated September 18, 1998, counsel for plaintiff withdrew her motion in limine regarding the introduction of evidence of prior accidents at or near the scene in question. The following issues remain and must now be decided:

1. Whether evidence of post-accident measures taken by PennDOT at or near the site of the accident is admissible;
2. Whether the complaint filed by plaintiff in federal court suing Chrysler Corporation in the same accident is admissible at trial; and
3. Whether plaintiff, in her action for wrongful death, may introduce evidence of damages in the nature of medical bills paid or payable by insurance, funeral expenses, the costs of the administration of Benjamin's estate, loss of consortium, support, society, services and future contributions by Benjamin.

Discussion

1. Post-Accident Measures Taken by PennDOT

Plaintiff seeks to introduce into evidence that within hours after the accident, PennDOT employees spent two and a half hours sweeping the shoulders and roadway in the vicinity of the accident, using a mechanical tow broom to sweep up loose aggregate material. PennDOT objects to the introduction of this evidence arguing that evidence of subsequent remedial measures may not be introduced to prove PennDOT's negligence.

Pa.R.E. 407 provides as follows:

When after an event, measures are taken which, if taken previously, would have made the event less likely to occur, evidence of the subsequent measures is not admissible to prove that the party who took the measures was negligent or engaged in culpable conduct in connection with the event. This rule does not require the exclusion of evidence of subsequent measures when offered for impeachment or to prove other controverted matters, such as ownership, control, or feasibility of precautionary measures.

It is clear that plaintiff may not introduce evidence of post-accident sweeping by PennDOT to prove that it was negligent. However, plaintiff argues that she seeks to introduce it for other purposes. First, plaintiff claims that she seeks to introduce the evidence to show that defendant alone had control over the roadway and thus that defendant alone had the duty and authority to properly maintain it. While Pa.R.E. 407 permits evidence to be introduced for this purpose, the rule also clearly provides that this may be done only when such issue is *controverted*. See Comment to Pa.R.E. 407. In the underlying case, PennDOT does not dispute that it had control over the road on which the accident happened. Therefore, evidence of post-accident sweeping by PennDOT cannot be introduced for this purpose.

Plaintiff next contends that the evidence may be admitted to show the feasibility of prevention. Plaintiff argues that there were precautionary measures PennDOT could have taken which would not

have been costly or burdensome and which would have prevented the accident. Similarly to the issue of control over the road, PennDOT does not argue that it was not feasible or affordable to sweep the road immediately after patching it. Rather, it is PennDOT's argument that it was customary to sweep the day following the patch work. The feasibility of the sweeping itself is not disputed by PennDOT and thus is not a controverted issue.

If, on the other hand, plaintiff intends to introduce the evidence to show that PennDOT should have swept immediately after the accident rather than the next day, this court finds that the evidence is not relevant for that purpose. The mere fact that PennDOT swept the roadway the following day, which it admits is customary procedure, does not tend to prove that it was not feasible to sweep immediately after the patch work. Rather, if plaintiff wants to show that PennDOT should have swept immediately after completing the patching, she must introduce such evidence through witnesses with knowledge of the facts or with expert opinions on this issue. Thus, this court finds that evidence of post-accident sweeping performed by PennDOT may not be introduced to show its feasibility.

Lastly, plaintiff argues that the evidence is admissible because it shows the condition of the roadway at the time of the accident. Plaintiff argues that the condition of the roadway, and specifically, the amount of loose aggregate on the road, will be a critical issue in this case. Plaintiff further asserts that it is PennDOT's contention that there was little aggregate on the road and that PennDOT presumably will call witnesses to testify to that effect. Plaintiff intends to use evidence regarding the post-accident sweeping to impeach such witnesses. Pa.R.E. 407 permits the introduction of evidence of subsequent remedial measures for impeachment purposes. *Also see Carney v. Otis Elevator Co.*, 370 Pa. Super. 394, 402, 536 A.2d 804 (1988)(evidence of subsequent repair of elevator admissible to impeach testimony of maintenance worker that elevator had been in good working order). Therefore, this court will permit plaintiff to introduce evidence of post-accident sweeping to the extent that it impeaches any evidence introduced by PennDOT regarding the amount of aggregate on the roadway.

2. Admissibility of Federal Complaint

Shortly before the complaint in the underlying case was filed, plaintiff commenced an action in federal court in the Middle District of Pennsylvania against Chrysler Corporation. In the federal complaint, plaintiff contends that Benjamin Rhine's car, a 1997 Jeep Wrangler, was defectively designed based on the theory of "crashworthiness." Under this theory, a manufacturer or seller of a motor vehicle may be liable in situations where "the defect did not cause the accident or initial impact, but rather increased the severity of the injury over that which would have occurred absent the defective design." *Mills v. Ford Motor Co.*, 142 F.R.D. 271, 272 (M.D. Pa. 1990). PennDOT seeks to introduce into evidence the federal complaint to show that plaintiff has asserted a different theory of causation, which also may have an effect on plaintiff's credibility. Plaintiff asserts that the federal complaint is irrelevant to the underlying case because the federal action does not claim that the defective design of the vehicle caused the accident, but rather only enhanced the injuries sustained by Benjamin.

Evidence that is not relevant is not admissible. Pa.R.E. 402. "Relevant evidence is evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would without the evidence." Pa.R.E. 401. The federal action is based on the theory of crashworthiness, in which plaintiff is seeking damages only for the enhancement of Benjamin's injuries and his death, which allegedly would not have occurred if the vehicle had been "crashworthy." The courts have already held that in such a situation, the manufacturer cannot be a joint tortfeasor with the driver of the vehicle who caused the accident. *Mills*, 142 F.R.D. at 272-273. This is because the initial impact is distinguishable from any impact resulting from the lack of crashworthiness of the vehicle, and therefore the actors did not unite together to cause a single injury. In such a case, the person who caused the accident may be held liable for *all* injuries, while the manufacturer may be held liable only for *enhanced* injuries. *Mills*, at 273. Similarly, in the underlying case, if the jury finds PennDOT was negligent in failing to sweep the road or post adequate warnings, it will be liable for *all* Benjamin's injuries (reduced, of course, by any findings of contributory negligence of 50% or less), while in the federal suit, Chrysler may be liable only for the enhancement of his injuries. Plaintiff does not argue that Chrysler's defective design *caused* the accident. Thus, it does not appear that the federal

complaint will be relevant to show that plaintiff has asserted an alternate theory of causation.

The Pennsylvania Superior Court recently addressed a similar issue. *Madonna v. Harley Davidson, Inc.*, 708 A.2d 507 (Pa. Super. 1998). There, plaintiffs filed a suit against Harley Davidson, alleging that a defective bolt broke during the operation of the motorcycle and caused the accident which injured plaintiffs, who were riding on the motorcycle. Defendant argued at trial that it was not a defective bolt but rather operator error which caused the accident. In support of this argument, defendant introduced evidence that the plaintiff-driver had been intoxicated at the time of the accident. *Madonna*, 708 A.2d at 508. On appeal, plaintiff argued that defendant had improperly interjected negligence principles into a strict liability case. The court first noted that generally, evidence of a user's negligence cannot be introduced to excuse a defective product. *Id.*, at 508. Where a product defect merely *contributed* in any way to the harm, evidence of a user's negligence is not relevant. However, where the defense offers evidence to establish that the accident was *solely* the result of the user's conduct and not related in any way to the product defect, such evidence is relevant and admissible. *Id.*, at 509. In other words, where defendant seeks to show that there is another theory which establishes that it is the *sole* cause of the accident, such evidence is relevant and admissible. If, on the other hand, the alleged alternate causation merely contributed to the cause of the accident, it is not relevant.

While *Madonna* dealt with the specific situation of strict products liability where negligence is generally not a factor, this court nevertheless finds the case to be instructive on the issue at hand. The federal complaint filed by plaintiff against Chrysler would be relevant and admissible if it would tend to show that the design defect of the vehicle was the sole cause of the accident. But if such defect is not the sole cause of the accident, it is not relevant. The reason for this is that PennDOT will nevertheless be liable to plaintiff for *all* Benjamin's injuries even if the design defect contributed to the injuries. Since the federal complaint merely alleges that the design defect enhanced Benjamin's injuries and not that it was the cause of the accident, the federal complaint does not tend to show that there is an alternate theory of causation which would affect PennDOT's liability to plaintiff. The admission of the federal complaint does not

have any tendency to make a material issue in the case against PennDOT more or less probable, and thus it is not relevant. Therefore, PennDOT will not be permitted to introduce the federal complaint into evidence.

3. Wrongful Death Action

Defendant in its motion in limine argues that the Rhines may not be permitted, as part of their wrongful death action, to introduce evidence of damages in the nature of medical bills, funeral expenses, the costs of the administration of Benjamin's estate, loss of Benjamin's consortium, support, society, and future contributions because they cannot recover for such damages in an action against the Commonwealth. Plaintiff, in her answer to the motion in limine, has asserted that she will not introduce evidence regarding the medical bills paid or payable by insurance, funeral expenses, the costs of the administration of Benjamin's estate, and therefore that this part of defendant's motion may be granted. This leaves the issue of whether or not plaintiffs, as the parents of the deceased, can recover for loss of their son's consortium, support, society, companionship, aid or services, as well as for future contributions which would have been made to them by their son.

a. Loss of Consortium, Services, Companionship and Support

The courts have permitted parents to recover damages for the wrongful death of their minor child. *See Berry v. Titus*, 346 Pa. Super. 376, 499 A.2d 661 (1985); 42 Pa.C.S.A. § 8301(b). However, the legislature has limited the damages a plaintiff can recover in an action against the Commonwealth. The relevant part of the sovereign immunity statute provides as follows:

(a) **General rule.** -- Actions for which damages are limited by reference to this subchapter [titled "actions against Commonwealth parties"] shall be limited as set forth in this section.

(c) **Types of damages recoverable.** -- Damages shall be recoverable only for:

- (1) Past and future loss of earnings and earning capacity.

(2) Pain and suffering.

(3) Medical and dental expenses including the reasonable value of reasonable and necessary medical and dental services,

(4) *Loss of consortium.*

(5) Property losses, . . .

42 Pa.C.S.A. §8528 (emphasis added).

The Pennsylvania Commonwealth Court has held that a limited action for wrongful death can be maintained against the Commonwealth. *Huda v. Kirk*, 122 Pa. Cmwlth. 129, 134, 551 A.2d 637 (1988), *allocatur denied*, 569 A.2d 1371. The wrongful death action is limited to the damages set forth by the statute. For example, funeral expenses and the costs of the administration of the decedent's estate which are recoverable against a non-Commonwealth defendant pursuant to the Wrongful Death Act, are not recoverable against the Commonwealth because it has not been provided for in § 8528. *Huda*, 122 Pa. Cmwlth. at 134.

In *Huda*, a husband and his minor children sought to recover for the wrongful death of their wife and mother. In determining whether plaintiffs could recover for the loss of comfort and society, and the loss of the value of her services, the Commonwealth Court interpreted the subsection providing for damages for "loss of consortium." It defined "consortium" as the "[c]onjugal fellowship of husband and wife, and the right of each to the companionship, society, cooperation [sic], affection, and the aid of the other in every conjugal relation." *Huda*, at 131, *citing* Black's Law Dictionary. Thus, a wrongful death action against the Commonwealth appears to be specifically limited to an action by a plaintiff for the loss of companionship and services of a spouse, not by parents for the loss of services or companionship of their children. However, the Commonwealth Court then permitted the plaintiffs, which apparently included both the spouse and the children of the deceased, to recover for the loss of the decedent's services. This appears to create an ambiguity in the Commonwealth Court's opinion.

The Court of Common Pleas of Delaware County also noted this ambiguity in *Huda*, and pointed out that the Commonwealth Court appears to say one thing but to do another. *Quinn v. PennDOT*, 7 D. & C. 4th 43, 45 (1990). The Delaware County Court analyzed *Huda* to determine whether to follow the definition of "consortium" given by the Commonwealth Court (permitting recovery only by spouses), or the apparent outcome of the case, which allowed both husband and the minor children to recover. *Id.* The court compared the Sovereign Immunity Act at issue to the Political Subdivision Tort Claims Act, which was enacted at the same time. *Quinn*, at 46. The court noted that the Political Subdivision Tort Claims Act specifically provides for the recovery of damages for "loss of support" against a political subdivision. *Quinn*, at 46; 42 Pa.C.S.A. § 8553(c)(5). The court then noted that since the statutes were enacted at the same time, but the legislature used different language in the Sovereign Immunity Act, it is reasonable to assume that the legislature did not intend to allow recovery for loss of support in actions against the Commonwealth. *Quinn*, at 47. The Delaware County Court concluded that "in suits against this state, a parent is not entitled to recover for loss of consortium resulting from the death of a child and vice versa." *Quinn*, at 47-48. The court further reconciled its decision to adhere to the definition of "consortium" provided in *Huda* with the outcome in that case by noting that the primary focus of that case was on the question of whether a limited wrongful death action could be brought against the state in addition to a survival action. It was the Delaware County Court's opinion that the Commonwealth Court in *Huda* merely neglected to specify that only the husband, and not the children, could recover this type of damage. *Quinn*, at 48.

This court agrees with the analysis set forth by the Delaware County Court and hereby adopts it. This court feels bound to follow the definition set forth by the Commonwealth Court on the consortium claim and believes that the difference between the definition provided in *Huda* and the outcome of the case allowing the husband and the children to recover was a mere oversight by the Commonwealth Court. Thus, it is this court's opinion that plaintiffs cannot seek to recover from the Commonwealth for the loss of their son's services, companionship, society and support. Plaintiffs will be precluded from introducing any evidence with respect to this claim. However, because *Huda* is somewhat ambiguous and because this court's decision will preclude any recovery in the wrongful death

action, this court will entertain a petition by plaintiff to file an interlocutory appeal on this issue.

b. Future Contributions

The Rhines may also not recover for the future contributions they expected to receive from their son in a wrongful death suit against the Commonwealth. Following the analysis set forth above, the legislature intended such damages in wrongful death actions to apply to the spousal relationship only. The Delaware County Court, also following this analysis, struck from the complaint any claims for the loss of the child's financial support and maintenance. *Quinn*, at 48. It does appear, however, that a claim for future loss of earnings may be made by the representative of the estate as part of the survival claim. The statute specifically provides for recovery of damages for "past and future loss of earnings and earning capacity." 42 Pa.C.S.A. § 8528 (c)(1). The Commonwealth Court in *Huda* specifically noted that the first two items enumerated in § 8528 (loss of earnings and pain and suffering) are recoverable in a survival action. *Huda*, 122 Pa. Cmwlth. at 133. The Commonwealth Court has further stated that "[a] claim for loss of earnings, pain and suffering, and medical expenses is made by one plaintiff, the *injured* spouse, while a claim for loss of consortium is made by another plaintiff, the *uninjured* spouse." *Kowal v. PennDOT*, 100 Pa. Cmwlth. 593, 596, 515 A.2d 116 (1986) (emphasis added). Thus, it appears that plaintiff, in her capacity as administratrix of Benjamin's estate, may seek recovery for the loss of Benjamin's future income, but not for the contributions Benjamin would have made to her and her husband personally in their capacity as his parents. Plaintiff will therefore be precluded from introducing any evidence with respect to future contributions by Benjamin to his parents.

c. Statutory Cap

At the time of argument, the question arose whether the jury can be told about the statutory cap provided for in § 8528 of the Sovereign Immunity Act. The cap for damages arising out of the same transaction or occurrence is \$250,000 per plaintiff, or \$1,000,000 in the aggregate. 42 Pa.C.S.A. § 8528(b). Separate damages caps apply to an action brought for wrongful death and for survival, even if the same person, the administrator of the estate, brings both actions. *Tulewicz v. Southeastern Pennsylvania*

Transportation Authority, 529 Pa. 588, 596, 606 A.2d 427 (1992). This is so because there are two different categories of claimants: the family for the loss of the decedent, and the estate for the injuries the decedent himself sustained. *Tulewicz*, 529 Pa. at 597.

In the underlying case, because of this court's decision above, the Rhines cannot recover damages for the wrongful death of their son. Thus, it appears that the statutory cap on the recovery in this case will be \$250,000 for the survival action. Plaintiff wishes to be able to inform the jury of this cap. Plaintiff refers this court to *Fernandez v. City of Pittsburgh*, 164 Pa. Cmwlth. 662, 643 A.2d 1176 (1994). In that case, counsel for plaintiff told the jury that the statutory cap on damages in the case against the city was \$500,000 but that the jury should ignore the cap and "return a full and adequate and complete verdict ignoring that cap." *Fernandez*, at 676. The Commonwealth Court noted that "[i]n closing argument, counsel may discuss the applicable law but may not misstate the law or discuss it in a way so as to confuse the jury." *Id.* The court furthermore noted that counsel may not request specific sums of money from the jury during closing argument. The court concluded that since the statute clearly provided for a \$500,000 cap, counsel's reference to it was a correct statement of the law. It further noted that counsel did not request a specific amount of money and that the City was not prejudiced by counsel's reference to the statutory limit. Thus, the court did not find counsel's statement to be improper.

This court finds *Fernandez* to be somewhat peculiar. The Commonwealth Court found the reference to the statutory limit to be a correct statement of the law. However, the amount of the cap was not used to inform the jury that there was a maximum amount of money it could award, but rather, plaintiffs' counsel requested the jury to ignore that cap and return a "full and adequate" verdict.

It is this court's opinion that a reference to the statutory cap is virtually tantamount to requesting a specific sum of money, since it gives the jury a specific indication of the sum of money that may be awarded. This court furthermore does not find it proper for counsel to bypass the prohibition on requesting a specific sum of money by asking the jury to ignore the cap and award a "full and adequate verdict." This court finds it better practice not to inform the jury of the cap so that no indications are given regarding specific sums of

money to award to the plaintiff. Rather, if the jury returns an award that is higher than the statutory limit, this court will mold it. Thus, neither party will be permitted to make reference to the statutory limit.

ORDER OF COURT

December 4, 1998, after consideration of the motions in limine filed by both parties, the court enters the following order.

1. Plaintiff may introduce evidence of post-accident sweeping to the extent that it impeaches any evidence introduced by PennDOT regarding the amount of aggregate on the roadway at the scene of the accident;
2. The federal complaint filed against Chrysler Corporation based on the same accident is not relevant to any material issue of this case, and therefore PennDOT will not be permitted to introduce the federal complaint into evidence.
3. Plaintiff, in the wrongful death action, may not introduce evidence of medical bills paid or payable by insurance, funeral costs, and the costs of the administration of the estate.
4. Plaintiff, in the wrongful death action, cannot recover for loss of her son's services, companionship, society, support and future contributions and will be precluded from introducing any evidence with respect to this claim.
5. Plaintiff is not permitted to inform the jury of the statutory cap on the damages. If the jury awards plaintiff an amount higher than the statutory cap, this court will mold the verdict.