

of physicians' credentials and health care practices, generally by other physicians. *Sanderson v. Frank S. Bryan, M.D., Ltd*, 361 Pa. Super. 491, 494, 522 A.2d 1138, 1139 (1987). Without the assurance of confidentiality, it is likely that few physicians would participate in evaluations of their fellow physicians or, to the extent they did, would be less frank and open in their evaluations. One might even wonder if any formal peer review would be possible absent the assurance of the maintenance of confidentiality. The Commonwealth has adopted the cited statutory provisions which holds such "procedures and records" not to be "subject to discovery or introduction into evidence in any civil matter against a professional health care provider arising out of the matters which are the subject of evaluation and review of such committee..." 63 P.S. §425.4. This statute prohibits the discovery of the information being sought, and compels the ruling contained herein.

#### ORDER OF COURT

NOW, February 14, 1992, the subpoena served upon Norman Epstein on November 27, 1991 is quashed, the deposition of Norman Epstein as to the matter referred to in the opinion attached hereto is prohibited, and discovery of the documents requested in the Records Deposition Notice dated November 27, 1991 is prohibited.

MANFRE V. DEPARTMENT OF TRANSPORTATION,  
COMMONWEALTH OF PENNSYLVANIA, C.P. Franklin  
County Branch, No. A.D. 1989-263

#### *Traffic Accident - Debris on Road - Sovereign Immunity*

1. Pennsylvania Statute waives sovereign immunity where a defect is found in the structure of a state owned property or highway.
2. Where debris on a road causes an accident and not the road itself, sovereign immunity applies unless employees of the state placed the debris on the road.

*G. Clair Baker, Esquire*  
*Arthur Schneider, Esquire*  
*James J. Dodd-o, Esquire*

#### OPINION AND ORDER

WALKER, J., January 24, 1992:

#### FINDINGS OF FACT

On August 10, 1989, the plaintiff, Dominic P. Manfre, filed suit against the Department of Transportation of the Commonwealth of Pennsylvania (PennDOT). The complaint alleged that the plaintiff had been involved in a one vehicle accident on June 12, 1988. The complaint further alleged that the vehicle in question, the plaintiff's motorcycle, came into contact with debris on the road and that this caused the plaintiff to lose control of his motorcycle.<sup>1</sup>

After two continuances in this matter, an office conference was held on December 27, 1991. At that time, PennDOT raised the issue of sovereign immunity. Both parties and the court agreed that this issue was a question of law, not fact, and thus in the province of the court, not the jury. This court asked for memorandum of law on the applicability of sovereign immunity to this suit. These memos have been received and thus this matter is ripe for decision.

#### DISCUSSION

The basis for sovereign immunity in Pennsylvania is found in its constitution, specifically Article 1, section 11.

Sec. 11. Courts to be open; suits against the Commonwealth

All courts shall be open; and every man for an injury done him in his lands, goods, person or reputation shall have remedy by due course of law, and right and justice administered without sale, denial or delay. Suits may be brought against the Commonwealth

<sup>1</sup> An amended complaint was filed on September 28, 1989, which simply added some details to the original complaint.

in such manner, in such courts and in such cases as the Legislature may by law direct.

In 1 Pa.C.S.A §2310, Sovereign immunity reaffirmed; specific waiver., the General Assembly affirmed that sovereign immunity was still the law in this commonwealth except when specifically waived by statute.

The plaintiff claims that the General Assembly has done exactly that in this case. PennDOT disagrees. Both parties agree, however, that the relevant exception to sovereign immunity is 42 Pa.C.S.A. § 8522(b)(4). That section reads as follows:

(b) Acts which may impose liability. - The following acts by a Commonwealth party may result in the imposition of liability on the Commonwealth and the defense of sovereign immunity shall not be raised to claims for damages caused by:

(4) Commonwealth real estate, highways and sidewalks. - A dangerous condition of Commonwealth agency real estate and sidewalks, including Commonwealth-owned real property, leaseholds in the possession of a Commonwealth agency and Commonwealth-owned real property leased by a Commonwealth agency to private persons, and highways under the jurisdiction of a Commonwealth agency, except conditions described in paragraph (5) <sup>2</sup>

PennDOT argues that under §8522(b)(4), the plaintiff must show that the defect in the land itself caused the accident. The defect must be in the structure of the property, not merely on the

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<sup>2</sup> Section 5 waives sovereign immunity when natural elements create a dangerous condition on the highway, e.g., potholes and sinkholes. However, there are additional conditions for proceeding under section 5. The plaintiff must show that the dangerous condition created a reasonable foreseeable risk of the kind of injury that actually occurred. He must further show that the Commonwealth agency had actual written notice of the dangerous condition and that said notice occurred a sufficient time before the accident to have allowed the agency an opportunity to protect against the dangerous condition. Finally, property damages is not recoverable under section 5.

Since the plaintiff has not attempted to argue the applicability of section 5 to his cause of action at this time, the court will not entertain attempts to bring this case under section 5 at the time of trial.

property. Since the complaint alleges that the debris on the road and not the road itself caused the accident, PennDOT argues that this claim is barred by sovereign immunity.

Mr. Manfre does not disagree with PennDOT's characterization of the law. He does, however, disagree with PennDOT's characterization of the facts. Mr. Manfre claims that the debris on the road was left over gravel from PennDOT's repair work in April 1988. Since PennDOT itself caused the gravel to be on the road, the accident was caused by the dangerous condition of Commonwealth-owned property.

The court feels that the plaintiff's characterization of his case, if proven, would state a cause of action which would not be subject to sovereign immunity. The court wants to make very clear, however, that in order for this case to go to the jury, there must be evidence that the debris in question was placed there by PennDOT. If the testimony at trial reveals that the repair work in question did not occur at the scene of the accident, this court would grant a nonsuit against the plaintiff. Mere debris is not a defect in the land itself and is subject to sovereign immunity. If, however, the plaintiff can prove the debris was on the road because of some affirmative action on the part of PennDOT, the court will send this case to the jury for their determination.<sup>3</sup>

## CONCLUSION

The plaintiff has stated a cause of action which is not subject to sovereign immunity. Specifically, this court feels that 42 Pa.C.S.A § 8522(b)(4) would allow a lawsuit to proceed against

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The court emphasizes this point because after its review of the complaint and the amended complaint it appeared to the court that the plaintiff was asserting that PennDOT breached its duty to maintain the road. See *Complaint*, Paragraph 7, *Amended Complaint*, Paragraph 10. The complaint did not assert that PennDOT itself was responsible for the debris' presence in the first place. However, since that is the theory now being advanced by the plaintiff and since it is not inconsistent with what is in the complaint, the court will allow the plaintiff to proceed. The plaintiff is on notice, however, that he has locked himself into his theory of recovery and the court will take a dim view of any further attempts to modify the complaint.

PennDOT if PennDOT negligently left gravel or debris on the roadway and such gravel or debris was the proximate cause of plaintiff's injuries. The court will therefore allow the plaintiff the opportunity to proceed under that theory.

### ORDER OF COURT

January 24, 1992, the court will not dismiss the case because of the sovereign immunity statute. The plaintiff must prove that this case falls within 42 Pa.C.S.A. §8522(b)(4).

IN RE: DETER, C.P. Franklin County Branch, Orphans Court Division, No. 48 of 1991

#### *Incompetency - Prior Power of Attorney*

1. A finding of incompetency does not compel the appointment of a guardian where a durable power of attorney is previously in place.
2. In determining whether to appoint a guardian where a power of attorney is previously appointed, the Court may consider the attorney-in-fact's education, background and experience.

*George W. Wenger, Jr., Esquire, Attorney for Petitioner*  
*David C. Wertime, Esquire, Attorney for Respondent*

### ADJUDICATION AND DECREE NISI

KAYE, J., February 10, 1992:

#### ADJUDICATION

On June 18, 1991, Charles Deter and Mary Deter filed a petition pursuant to Section 5511 of the Probate, Estate and fiduciaries Code ("PEF Code"), 20 Pa.C.S.A. §5511 et seq., seeking an adjudication of incompetency of their mother, Catherine B. Deter, (referred to in some pleadings as "Catherine W. Deter"), and the appointment of Charles Deter as guardian of her person, and Chambersburg Trust Company, as guardian of her estate. A citation was issued upon the alleged incompetent, and a hearing thereon was scheduled for July 29, 1991.

On July 22, 1991, the alleged incompetent, by Ruth B. Wingert, her attorney-in-fact, filed an answer praying that the petition for incompetency be dismissed or, in the alternative, that Ruth B. Wingert be appointed as guardian of the person and estate of the alleged incompetent. By agreement of the parties, the hearing was continued to August 22, 1991. On the latter date, evidence was taken, and further evidence taken and was marked closed on September 19, 1991. The matter was put down for argument at the October, 1991 argument court. The matter having been fully briefed and argued is now before the Court for decision.

#### I. ISSUES.

A. Whether the evidence warrants a finding of incompetency.

B. Assuming a finding of incompetency whether a guardian of the person and/or the estate will be granted in this case where a valid durable power of attorney is existent.

#### II. FINDINGS OF FACT.

A. Cathreine W. Deter (sometimes referred to as "Mrs. Deter" or "the alleged incompetent"), a woman born February 15, 1915, currently is a resident of Menno Haven, Inc., ("Menno Haven") a nursing home facility located in Chambersburg, Franklin County, Pennsylvania.

B. Mary Deter, a resident of 567 Mt. Pleasant Road, Fayetteville, Franklin County, Pennsylvania, is the only daughter of Catherine W. Deter.

C. Charles E. Deter, a resident of 640 Mickey Inn Road, Chambersburg, Franklin County, Pennsylvania, is the only son of Catherine E. Deter.

D. Catherine W. Deter is a widow.

E. George W. Baker, Jr., is a medical doctor licensed in Pennsylvania, and who was physician to the alleged incompetent from about 1970, and had last seen her, prior to his testimony, on April 4, 1991.