

LEGAL NOTICES con't

Mower and Hoskinson
232 Lincoln Way East
Chambersburg, PA 17201
10/25,11/01,11/08/96

Estate of J. Rebecca Varner, deceased, late of
Greene Township, Franklin County,
Pennsylvania.
Personal Representative:
Valleybank, a division of Dauphin Deposit
Bank and Trust Company
P.O. Box 459
Chambersburg, PA 17201
Attorney:
Glen and Glen
306 Chambersburg Trust Building
Chambersburg, PA 17201
10/25,11/01,11/08/96

Estate of Alice Myers Watson, a/k/a Alice M.
Watson, deceased, late of Southampton
Township, Franklin County, Pennsylvania.
Personal Representative:
Randolph M. Watson
4386 Orrstown Road
Orrstown, PA 17244
and
Margaret Watson Burkholder
5814 Greenvillage Road
Chambersburg, PA 17201
and
George H. Watson
7768 Ebenezer Road
Orrstown, PA 17244
and
Dorothy Watson Ocker
991 Ridge Road
Shippensburg, PA 17257
Attorney:
Joel R. Zullinger, Esq.
200 Chbg. Trust Co. Bldg.
Chambersburg, PA 17201
10/25,11/01,11/08/96

Estate of H. Wayne Weagly, deceased, late of
Greene Township, Franklin County,
Pennsylvania.
Personal Representative:
Farmers and Merchants Trust Company of
Chambersburg
20 South Main Street
Chambersburg, PA 17201
Attorney:
Paul F. Mower, Esq.
Mower and Hoskinson
232 Lincoln Way East
Chambersburg, PA 17201

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10/25,11/01,11/08/96

FICTITIOUS NAME NOTICES

Notice is hereby given that application was
filed on October 24, 1996, with the Secretary
of the Commonwealth of Pennsylvania,
Harrisburg, Pennsylvania, for the conduct of a
business under the assumed or fictitious name
of ELRAY Associates of 4 Dorset Court,
Chambersburg, Pennsylvania, 17201, and that
the name and address of the person owning or
interested in said business is Raymond M.
Kane, 4 Dorset Court, Chambersburg,
Pennsylvania 17201.
Law Offices of Welton J. Fisher
550 Cleveland Avenue
Chambersburg, Pennsylvania 17201
11/08/96

BENJAMIN A. STEVENS and JUDITH E. STEVENS, his wife,
Plaintiffs vs. MUNICIPALITY OF WASHINGTON
TOWNSHIP, Defendant, Franklin County Branch, Civil Action -
Law No. A.D. 1994-420

*Benjamin A. Stevens and Judith E. Stevens, his wife, v. Municipality of Washington
Township.*

Suit to recover money damages arising from the pursuit of two statutory appeals from
administrative actions granting a variance and approving a conditional use application;
governmental immunity; Political Subdivision Tort Claims Act, 42 Pa.C.S.A. 8501 *et seq*;
Municipalities Planning Code, 53 P.S. section 11001 - A.

1. Plaintiffs who have filed two separate statutory appeals, one from the decision of the
Washington Township Zoning Hearing Board granting a variance, and the other from the
Washington Township Board of Supervisors approval of a conditional use application,
cannot recover money damages from the Township incurred as a result of pursuing the
appeals which allege Township negligence in conducting its administrative duties. The
Political Subdivision Tort Claims Act, 42 Pa.C.S.A. sections 8541 - 8542.

2. Attorney fees may not be awarded where the plaintiffs have not alleged the defendant was
dilatatory, obdurate or vexatious during the pendency of a matter, or that the defendant's
conduct was otherwise arbitrary, vexatious or in bad faith, but have merely alleged the
defendant was negligent in carrying out its regular and normal administrative duties. 42
Pa.C.S.A. section 2503.

3. Statutory appeals alleging violations of the Municipalities Planning Code are governed by
that Code's provisions, which specify the manner in which such appeals are to be pursued.
Recovery of money damages through an independent civil action for negligence is
specifically barred by Article X - A, section 11001 - A of the Code.

4. Where plaintiffs sue a local administrative agency and not its individual employees, and
do not allege that either committed acts of willful misconduct in granting the variance and
the conditional use application, governmental immunity remains a bar to recovery of money
damages. 42 Pa.C.S.A. section 8550.

5. The doctrine of governmental immunity may be raised in preliminary objections rather
than as an affirmative defense under new matter, where the defense is apparent on the face of
the pleadings, or where the opposing party did not file preliminary objections to the
preliminary objections.

Stephen D. Kulla, Esq., Counsel for Plaintiffs
Richard J. Walsh, Esq., Counsel for Defendant

OPINION AND ORDER

HERMAN, J., December 18, 1995:

Plaintiffs Benjamin and Judith Stevens filed a complaint on
October 27, 1994 against the Municipality of Washington
Township for money damages incurred in the filing and pursuit of
two statutory appeals from the administrative actions of the
Washington Township Zoning Hearing Board and the

Washington Township Board of Supervisors.¹ The administrative actions requested were the grant of a variance and conditional use application by the Washington Township Municipal Authority for the expansion of its waste water treatment plant.² In this civil complaint docketed to A.D. 1994-420 the plaintiffs allege the Municipality of Washington Township (specifically its governing body, the Township Supervisors) engaged in improper conduct and was negligent in carrying out its administrative duties in relation to the grant of the conditional use application. The plaintiffs contend the defendant's negligence required them to spend time and money filing the two statutory appeals to the Court of Common Pleas. The plaintiffs seek damages in an amount of less than \$20,000.00 plus interest and costs of suit. The defendant filed preliminary objections and argument was conducted on January 5, 1995. We subsequently requested counsel to submit additional briefs on the issue of sovereign immunity.³ These briefs were received by October 13, 1995 and this matter is ready for decision.

The Political Subdivision Tort Claims Act provides:

Except as otherwise provided in this subchapter, no local agency shall be liable for any damages on account of any injury to a person or property caused by any act of a local agency or an employee thereof or any other person.

42 Pa.C.S.A. Section 8541.⁴ Section 8542 sets forth the

¹ In this latter action the plaintiffs erroneously failed to name the Washington Township Board of Supervisors as a party and the Board filed preliminary objections which are currently pending before this Court.

² The two statutory appeals are docketed to Miscellaneous Docket BB-139 and BB-157 respectively.

³ The defendant raised the issue of sovereign immunity in its preliminary objections but did not discuss the issue in its brief. We requested additional briefing of this issue which we perceived as dispositive.

⁴ A "local agency" is defined as a government unit other than the Commonwealth Government including an intermediate unit. 42 Pa.C.S.A. Section 8501. There is no dispute that the defendant in this case is a local agency.

conditions which must be satisfied in order to overcome the general rule of governmental immunity:

- (a) (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.

Subsection (b) lists those actions which might cause a local agency to be held liable. Such acts must be connected with one of the following eight categories: 1) vehicle liability, 2) the care custody or control of personal property, 3) real property, 4) trees, traffic controls and street lighting, 5) utility service facilities, 6) streets, 7) sidewalks and 8) the care custody or control of animals. Therefore the first step in our analysis is to determine whether the plaintiffs have met the requirements of Section 8542(a)(1).

The relief requested in the plaintiffs' complaint is money damages, interest and costs of suit incurred as a result of their having to pursue the two statutory appeals. 42 Pa.C.S.A. Section 2503 governs the circumstances under which a litigant may receive counsel fees. This case does not fit into any of the ten categories listed in that section. The plaintiffs have not alleged that the defendants have engaged in "dilatatory, obdurate or vexatious conduct during the pendency of a matter", Section

2503(6) or that the defendant's conduct was "otherwise...arbitrary vexatious or in bad faith". Section 2503(9). The complaint merely states: "As a result of the defendant's breach of duty the plaintiffs have been caused to spend a significant amount of time and money in filing appeals to the Court of Common Pleas that would not have been necessary, but for the negligence of the defendant in not carrying out its regular and normal duties, more specifically set forth above." (Paragraph 27 of Plaintiffs' Complaint). This averment is an insufficient basis for an award of attorneys fees. *Wudkwyeh v. Borough of Canonsburg*, 111 Pa. Commw. 322, 533 A.2d 1104 (1987).

Article X-A of the Municipalities Planning Code, 53 P.S. Section 11001-A provides:

The procedures set forth in this article shall constitute the exclusive mode for securing review of any decision rendered pursuant to Article IX or deemed to have been made under this act.

The plaintiffs have instituted two statutory appeals for the review of the administrative acts of the Washington Township Zoning Hearing Board and the Washington Township Board of Supervisors. However, there is no basis under which the plaintiffs can recover their damages in this independent civil action since that remedy is specifically excluded by Section 11001-A. The issue of whether an appellant from an administrative action can obtain damages for the alleged negligence of a local agency has been addressed in *Bendas v. Upper Saucon Township*, 127 Pa. Commw. 378, 561 A.2d 1920 (1989). In *Bendas* the landowners sued the township which had issued a permit for on-site sewage disposal after it was determined that the disposal system set forth in the permit did not provide for adequate disposal of the sewage. A large portion of the landowner's lot was thereafter rendered unsuitable for use when the disposed sewage percolated upward. The township demurred on the ground that the Political Subdivision Tort Claim Act provided it with immunity from suit and there was no applicable exception under Section 8542. Our own Court of Common Pleas recently followed *Bendas* in *Hose v. Antrim Township*, - A.D. 1995082 (Order of Court May 12, 1995). We

conclude the plaintiffs have not shown that the damages requested in their complaint fit the exceptions under section 8542.

The plaintiffs do not contest the defendant's immunity under Sections 8541 and 8542, but instead cite Section 8550 as a basis for their claim. That section provides:

In any action against a local agency or employee thereof for damages on account of an injury caused by the act of the employee in which it is judicially determined that the act of the employee caused the injury and that such act constitutes a crime, actual fraud, actual malice or willful misconduct the provisions of sections 8545, 8546, 84548 and 8549 shall not apply.⁵

(emphasis supplied).

The plaintiffs assert that the Washington township Zoning Hearing Board and the Washington Township Supervisors did not proceed in merely a negligent fashion but also committed acts of willful misconduct in connection with the permit approval process. The plaintiffs cite to the fact that on December 22, 1994, Benjamin Stevens wrote a letter to one of the Washington Township Supervisors concerned about the manner in which the Washington Township Municipal Authority's permit was granted. Specifically, Mr. Stevens advised that the Board of Supervisors employed illegal procedures which should be rescinded. Plaintiffs contend that "To blantly [sic] ignore the Stevens' correct advice without researching the issue thoroughly is nothing but willful misconduct and meets within the exception set forth in 42 Pa.C.S.A. 8550". (The plaintiffs' brief, page 7). We note this letter was sent after the statutory appeals had been filed in the two miscellaneous docketed cases and appears in plaintiffs' brief for the first time. It is therefore not part of the record before us. The complaint makes no reference to willful misconduct on the part of the Washington Township Board of Supervisors or any of its employees but instead avers negligence only.

⁵ these sections address claims founded upon the conduct of an employee of a local agency rather than the agency itself. The plaintiffs' complaint names the municipality of Washington Township as the defendant, not individual members of the Board of Supervisors, and contains no allegations against particular employees of the Municipality.

A local agency cannot be held liable for acts or conduct of its employees constituting a crime, actual fraud, actual malice or willful misconduct under Section 8542(a)(2). The only situation in which the issue of willful misconduct may apply is where employees of the local agency have claimed the defense of official immunity under Section 8550. In that situation, if the plaintiff is able to establish that the employees have committed acts of willful misconduct, plaintiff may be able to recover damages directly from those employees. *City of Philadelphia v. Glom*, 149 Pa. Comma. 491, 613 A.2d 613 (1992); *Petal v. Melody*, 158 Pa. Comma. 212, 631 A.2d 762 (1993). However, as noted above, the instant case was not brought against the individual members of the governing body of Washington Township but rather the body itself.

The plaintiffs also argue that their complaint in law should not be dismissed on the ground of sovereign immunity under 42 U.S.C.S. Section 1983 which imposes civil liability on any person who deprives another of its federally protected constitutional rights. There has been no allegation up to this point that the defendant has deprived the plaintiffs of their federally protected constitutional rights. This issue was not pled in the complaint nor briefed prior to the January 1995 oral argument. Furthermore, the plaintiffs cite no case law in support of the applicability of this statute to the instant case and we must conclude that this issue has not been timely raised.

The plaintiffs also argue that the township improperly raised the issue of governmental immunity in preliminary objections, since Pa.R.C.P. 1030 requires that any affirmative defenses including the issue of immunity from suit should be pled under the heading of New Matter. Plaintiffs argue that we are required to dismiss the preliminary objection regarding sovereign immunity.

It has been held that a plaintiff may waive its right to challenge the appropriateness of pleading the defense of immunity in preliminary objections by failing to file preliminary objections to a defendant's preliminary objections. *CSX Transportation Inc. v. Franty Construction*, 157 Pa. Commw. 620, 630 A.2d 932 (1993). It has also been held that a preliminary objection may raise immunity when that defense is apparent on the face of the

pleadings. *State Workmen's Insurance Fund v. Caparo Real Estate, Inc.*, 160 Pa. Commw. 581, 635 A.2d 705 (1993).⁶ In this case, the defendant's sixth preliminary objection is that the defendant is immune from liability (Paragraph 30). In their response to preliminary objections, the plaintiffs did not object to defendant's raising of this defense in this manner, nor was this objection voiced at oral argument. In light of the foregoing, we see no error in the defense of governmental immunity being raised and considered at this procedural stage and conclude that consideration of the defendant's preliminary objections on their merits is appropriate.

ORDER OF COURT

NOW this 18th day of December, 1995, the defendant's demurrer to the plaintiffs' complaint on the ground of sovereign immunity from suit is GRANTED and the complaint dismissed.

⁶ See also *Pleading the Defense of Local Agency Immunity in Pennsylvania: The Requirements of Rule 1030 New Matter and the Preliminary Objection*. Forsythe, 27 Duquesne L. Rev. 661. (1989).