easement because there is no express reservation in the deed, there was no consideration paid for the right of way and there is no necessity for the right of way. None of these are required for an easement by implication.

Finally, defendants have named Harry Brant as an additional defendant to this action under the theory that he breached the warranty in the deed he executed to them. A purchaser takes subject to visible notorious easements that exist on the premises and which are not made subject to an exception. *Wood v. Evanitsky,* 369 Pa. 123 (1951). The right of way was visible and notorious to defendants; as such, they have no claim for damages. Even if this court were constrained to hold that Brant breached the warranty, defendant put on no credible evidence as to damages.

Defendants shall be enjoined from interfering with plaintiffs' use of the right of way. Since there is no indication that this suit was vexatious, defendants' request for attorney fees shall be denied.

DECREE NISI

April 24, 1987 defendants David E. Saylor and Sandra P. Saylor, their heirs, representatives and assigns are hereby enjoined from further interference in plaintiffs' right to use the roadbed running 25 feet along the entire length of the eastern boundary of defendants' property. Furthermore, defendants are ordered to remove the stakes that they placed in said roadbed within fifteen (15) days of this order.

BAKER, ET AL. V. WASHINGTON TOWNSHIP MUNICIPAL AUTHORITY, ET AL. C.P. Franklin County Branch, No. A.D. 1984-90

Wrongful Death - Motion for Summary Judgement - 3416 (2nd) and 427 Restatement of Torts - Government Immunity

1. An employer who hires an independent contractor to do particularly dangerous work cannot shield itself from liability.

2. Where a defendant has an inspector at a construction site who observes unsafe activity but takes no action, a duty is imposed on the defendant and liability arises.

3. Where an employee is killed constructing a sewer, he falls under the "utilities service facilities" exception of the Political Subdivision Tort Claims Act.

4. A municipality maintains control of real property where an inspector employed by the municipality stays at the work site and has the right to stop work.

John N. Keller, Esquire, counsel for the plaintiffs
Robert T. Shoop, Esquire, counsel for defendant Washington Township
John J. Sylvanus, Esquire, counsel for defendants D.L. George & Sons Construction Company

OPINION AND ORDER

WALKER, J., April 15, 1987:

On November 9, 1982, Jim Baker was working on a sewer construction project when a trench collapsed and killed him. At the time, Baker was working for D.L. George & Sons Construction Co. who had contracted with Washington Township Municipal Authority ("Township") to install a public sewer facility. The sewer project had been designed by Nassaux-Hemsley, Inc., and under the terms of its contract with the Township, the Township was to self-inspect the work, ensuring compliance with work and safety specifications. According to depositions taken, the Township had an inspector on the work site at all times during construction.

On the day of Baker's death, he was working in an unshored, unbraced seven foot deep trench that violated various state and federal regulations. Decedent's wife, plaintiff Brenda Baker, brought a wrongful death and a survival action against Nassaux-Hemsley, Inc. and the Township on behalf of her and her minor children. Defendants filed motions for summary judgments; briefs were filed with the court and argument was heard.

A motion for summary judgment may be granted if the pleadings, depositions, answers to interrogatories, admissions on file and affidavits show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. Pa. R.C.P. Rule 1035. Plaintiffs posit three seperate theories for imposing liability on the defendant Township; that is, by the defendant's contractual duty to self-inspect the project, by its position as employer of the independent contractor who decedent worked for, or by the failure of its inspector at the scene of the accident to take precautions against a dangerous condition.

If the evidence, when viewed in a light most favorable to the plaintiffs, supports a legally cognizable cause of action then defendant's motion for summary judgment must fail. *Husak v. Berkel, Inc.,* 234 Pa. Super. 452 (1975). In the present case, there

are two issues that must be decided under this standard, to wit: (1) did the defendant, as an employer of an independent contractor, owe a legal duty to decedent, an employee of the independent contractor, and (2) is the defendant immune from suit as a local agency? These issues, duty and governmental immunity, shall be dealt with in turn.

One Pennsylvania case that appears to be factually on point is *Heath v. Huth Engg., Inc.,* 279 Pa. Super. 90 (1980). In *Heath,* the defendant township hired a sewer construction contractor to install sewer lines. Heath, an employee of the contractor, was digging a trench when it collapsed and buried him. The trench, in violation of state and federal laws, had not been shored or braced against collapse. The Pennsylvania Superior Court upheld judgment for the plaintiff under Section 416 Second Restatement of Torts theory, "Work Dangerous in Absence of Special Precautions". An employer who hires an independent contractor to do a particularly dangerous work cannot shield or insulate itself from liability, according to the court.

There are no relevant factual distinctions between *Heath* and the instant case. Defendant objects to *Heath* because it was decided after judicial abrogation of sovereigh immunity and before the enactment of the Political Subdivision Tort Claims Act. This exception is more properly addressed to the second issue before the court, i.e. governmental immunity, rather than the initial question of duty. Under Pennsylvania law, it appears that an employer in defendant's position had a duty to take special precautions for decedent's safety.

Plaintiff also proposes that defendant may be liable because it had an inspector on the site who observed a dangerous condition but failed to act. A similar basis for liability was advanced in *Philadelphia Elec. Co. v. Julian,* 425 Pa. 217 (1967). In *Julian,* the defendant contractor hired a subcontractor to erect guard rail fencing along the edge of a widened highway. The contractor and subcontractor were both aware of the underground gas distribution main but neither of them warned the subcontractor's employees who were observed digging in the area. The Pennsylvania Superior Court affirmed judgment for the plaintiff, holding that the township was negligent in failing to warn the workmen and, alternatively, that the contractor could have been held vicariously liable under Second Restatement of Torts Section 416 or 427 ("Negligent as to Danger Inherent in the Work").

In the present case, a duty was imposed on the defendant under Sections 416 and 427 of the Second Restatement of Torts, as adopted by *Julian,* or by undertaking the duty to self-inspect and placing an inspector on the work site who observed, but failed to

act on, a dangerous condition. The next question to be decided is whether the defendant is immune from suit as a local agency.

As a preliminary matter, defendant contends that plaintiffs' action, based on Second Restatement of Torts § §416 and 427, is one of vicarious liability and that such liability is not contemplated by the Political Subdivision Tort Claims Act. This is because § § 416 and 427 impose liability on the defendant for the contractor's negligence and a contractor is not a "local agency or employee thereof" for the purposes of the act, according to defendant. *See Gibson v. United States,* 567 F.2d 1237 (3d Cir. 1977), *cert denied,* 436 U.S. 925 (1978).

It is difficult to discern whether liability under § § 416 and 427 is predicated on the employer's own breach of a non-delegable duty or whether it is based vicariously on the independent contractor's negligence. *Julian,* supra; (§ § 416 and 427 as vicarious liability); *Heath,* supra (§ § 416 and 427 imposing non-delegable duty on employer); *Colloi v. Philadelphia Elec. Co,* 332 Pa. Super. 284 (1984) (§ § 416 and 427 imposing non-delegable vicarious liability). The distinctions and nuances of liabilities based on these restatement sections need not be dissected here, though, since the present case, like *Julian,* involves a question of direct negligence on the defendant's part, i.e., the Township inspector's failure to take special precautions against dangerous conditions at the site.

With regard to government immunity, the Political Subdivision Tort Claims Act, 42 Pa. C.S.A. § §8541 et seq., provides that "no local agency shall be liable for any damages on account of any injury to a person or property caused by an act of the local agency or an employee thereof or any other person." 42 Pa. C.S.A. §8541. The act waives immunity, however, if the damages sought are available under common law, or pursuant to a statute creating a cause of action, and if the action falls within eight enumerated exceptions to governmental immunity. *Id.,* §8542. It is evident, under *Heath,* that this action is one that is recognized by common law. The only remaining issue is as to whether this suit involves a controversy that is enumerated among the exceptions to governmental immunity, as found in 42 Pa. C.S.A. §8542 (b).

One of the statutory exceptions to governmental immunity is for "utility service facilities." That exception applies to any "dangerous conditions of the facilities of steam, sewer, water, gas or electric systems owned by the local agency within rights-of-way." 42 Pa. C.S.A. §8542 (b) (5).

Defendant argues that the above provision does not apply in the present case because the damage was not caused by an existing

conveyed; thence by lands of Idella B. Benchoff and through and across Twp. Road #378 locally known as Swamp Road North 69½ degrees West 22.45 perches to an iron pin; thence by other lands of the grantees herein North 78 degrees West 5.92 perches to a point in said public road; thence by the same North 26½ degrees West 9.44 perches to an iron pin, said iron pin being the most Westerly point of the tract herein conveyed; thence by the East side of a lane or private road opposite the grantees' land North 16½ degrees East 25.12 perches to an iron; thence by lands of Roy Cline South 87¾ degrees East 6.54 perches to an iron; thence with same North 11 degrees West 2.4 perches to an iron in said Old Baltimore Turnpike; thence in said Turnpike North 83 degrees East 26.3 perches to a point in said Turnpike; thence continuing in said Turnpike South 83 degrees East 1.9 perches to an iron, the point of beginning, Containing 8 acres 42 perches neat measure, as per survey and plot of John H. Atherton, C.S., dated June 26, 1945.

BEING the same real estate conveyed to Paul C. Dillon and Velda C. Dillon, his wife, by deed of Mamie S. Kauffman, widow, dated July 13, 1945, and recorded in Franklin County Deed Book Volume 337, Page 432. Velda C. Dillon died September ___, 1956, and Paul C. Dillon thereby became sole owner, as surviving tenant by the entirety. Paul C. Dillon, sometimes known as Paul K. Dillon, subsequently married Hilda K. Dillon. On September 22, 1962, Paul C. Dillon died testate, and by his last will and testament dated June 18, 1962, recorded in Franklin County Will Book Volume 61, Page 428, he devised the above described real estate to his daughter by his first marriage, June Shoemaker, who is one of the within Grantors.

INCLUDED in the within description, but not intended to be conveyed hereby is a tract conveyed by Paul K. Dillon and wife to Charles Roy Cline and wife by deed dated July 23, 1945, and recorded in Franklin County Deed Book Volume 338, Page 90, and a tract conveyed by the Estate of Paul K. Dillon to T.V. Cable, Co., by deed dated May 23, 1963, and recorded in Franklin County Deed Book Volume 571, Page 908, also a tract of real estate conveyed by Paul K. Dillon, widower, to Omar E. Benchoff and wife, dated November 21, 1956, and recorded in Franklin County Deed Book Volume 486, Page 382.

NOTICE

If you wish to defend, you must enter a written appearance personally or by attorney and file your defenses or objections in writing, with the court. You are warned that if you fail to do so the case may proceed without you and a judgment may be entered against you without further notice for the relief requested by the Plaintiffs. You may lose money or property or other rights important to you.

YOU SHOULD TAKE THIS NOTICE TO YOUR LAWYER AT ONCE. IF YOU DO NOT HAVE A LAWYER OR CANNOT AFFORD ONE, GO TO OR TELEPHONE THE OFFICE SET FORTH BELOW TO FIND OUT WHERE YOU CAN GET LEGAL HELP.

Legal Reference Service of Franklin-Fulton Counties
Franklin County Courthouse
Chambersburg, PA 17201
Telephone No: (717) 264-4125, Ext. 213

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6-12, 6-19, 6-26

sewer system, rather, that it was caused by the construction of a new system. For this proposition, defendant urges the court to construe the act strictly. *See, Casey v. Geiger,* 346 Pa. Super. 279 (1985).

In the case of *Medicus v. Merion Twp.,* 82 Pa. Commw. 303 (1984), however, the Commonwealth Court held that a culvert handling the flow of surface water was a "sewer" for the purposes of the "utility service facilities" exception to the act. If a culvert is to be considered a "sewer", then the installation of a sewer system must also be classified as such. Furthermore, this court sees no reason to distinguish between damage caused by an existing sewer and damage caused by the installation of a new sewer, expecially since the act itself makes no such distinction.

If this case did not fall within the "utility service facility" exception to governmental immunity, then it would certainly fall within the "real property" exception. Under that provision, a local agency may be liable for damages caused by a local agency's negligent acts that make real property under its "care, custody or control" unsafe. 42 Pa. C.S.A. §8542 (b) (2). *Vince by Vince v. Ringgold School Dist.,* ____ Pa. Commw. ____, 499 A.2d. 1148 (1985).

Defendant argues, then, that the property in question was not within the Township's "care custody and control". An independent contractor is in possession of a work area while the work is being done, so his responsibility replaces that of the owner who is out of possession and without control over the work or the premises. *Hader v. Coplay Cement Mfg. Co.,* 410 Pa. 139 (1963). In the present case, the township retained possession and control of the property because a township inspector stayed at the work site during the entire time the work was being performed. The inspector not only had the right to stop work, but he also supervised various aspects of the project, according to depositions taken. Additionally, defendant specifically contracted for these duties in its agreement with Nassaux-Hemsley.

Next, defendant contends that this action does not fall within the real property exception because plaintiff's claim is essentially one for negligent supervision, rather than for injuries caused by a dangerous condition of the property. Defendant goes on to cite numerous cases where courts have held that the real property exception does not apply to injuries caused by a third party's activities on the property. *See, e.g., Fizzano v. Borough of Ridley Park,* ____ Pa. Commw. ____, 503 A.2d 57 (1986) (plaintiff struck by hockey puck while skating in a public rink). Having reviewed case law on the matter, the court has no trouble finding that the seven-and-a-half foot trench that collapsed and killed decedent

was a dangerous condition of real property within the meaning of the Political Subdivision Tort Claims Act.

As stated earlier, though, plaintiff's claim falls wihtin the "utility service facilities" rather than the "real property" exception since the latter specifically exludes sewers. The court includes the above discussion to illustrate that if defendant's initial position were adopted, i.e., that the trench was not part of a sewer, then governmental immunity would still be waived under the real property exception, found in 42 Pa. C.S.A. §8542 (b) (3).

Defendant has failed to show that plaintiffs' inability to recover is clear and free from doubt. As such, defendant's motion for summary judgment must be denied.

ORDER OF COURT

April 15, 1987, the defendant Washington Township's motion for summary judgment is denied.

COMMONWEALTH V. CRIDER, C.P. Franklin County Branch, C.D. No. 244 of 1986

Driving under the Influence - Quota System for Police - 71 P.S. §2002

1. 71 P.S. § 2002 forbids a quota system and voids any tickets or citations issued pursuant to such a system.

2. Where defendant is arrested and a complaint filed against him, despite the existance of a quota, such a procedure is not within the meaninf of § 2002.

David W. Rahauser, Esquire, Assistant District Attorney, Attorney for the Commonwealth
E. Franklin Martin, Esquire, Attorney for the Defendant

OPINION AND ORDER

WALKER, J., February 9, 1987:

At 2:00 o'clock a.m. on March 22, 1986, Washington Township Police Officer Warren was driving east on East Main Street in Waynesboro, Pennsylvania when he noticed a car approaching him from behind. Though he was in a 35 mile per hour zone, the car appeared to be traveling at the rate of approximately 55 miles per hour. Officer Warren pulled over to the side of the road and

observed that the car continued in an easterly direction, straddling the traffic lanes.

After stopping the vehicle, Warren spoke with the driver, defendant Timothy Crider. Defendant smelled of alcohol, slurred his speech, and stumbled when he got out of his car. After failing a field sobriety test, defendant was taken to the Washington Township police station where two breathalyzer tests were administered. His blood-alcohol content registered .157 and .161. A complaint was subsequently filed, charging him with driving under the influence of alcohol.

A non-jury trial was held on December 12, 1986, and testimony was taken. Defendant raised the affirmative defense that he was arrested pursuant to an illegal quota system. At the trial, defendant produced a memorandum that the chief of police of Washington Township had circulated among his officers. In that memo, title "Performance Objectives for the Month of March, 1986", a list of "minimum performance goals" was outlined. At the end of March, each officer's performance was to be evaluated in terms of whether the "goals" had been met or exceeded. These goals included such quotas as: one traffic citation for each hour of patrol duty, sixteen criminal arrests for the month, and other similarly enumerated objectives. After the trial, both sides submitted to the court.

The court finds that defendant has sustained his burden of proving that a quota system existed in Washington Township in March of 1986. The question this court is left with is whether the prohibition against quota systems applies to a charge of driving under the influence. For the reasons discussed below, the court answers this question in the negative.

Defendant's position is that his arrest must be held null and void because it was the result of an impermissible quota system that was in force in Washington Township at the time of his arrest. Specifically, he relies on 71 P.S. §2002 which states that any tickets or citations issued pursuant to a quota system are unenforceable, null and void. The obvious flaw in defendant's argument is that he was not issued a ticket or citation; he was arested and a complaint was filed against him.

In spite of this, defendant urges the court to include "complaints" within the definition of "citations", as used in §2002. His expansive interpretation is unwarranted; penal statutes are to be strictly construed. 1 Appendix, Pennsylvania Consolidated Statutes Annotated §1928 (b) (1). Simply put, a complaint for a driving under the influence violation is not a "citation". This conclusion is easily reached by comparing the rules of criminal