A PRIMER FOR PENNSYLVANIA MUNICIPAL LIABILITY ISSUES

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The following is summary of some of the nuances of governmental immunity and municipal liability defenses available in the Commonwealth of Pennsylvania. This document is, essentially an overview of some of the fundamentals with which any risk management or claim professional should be familiar. Questions are welcome via e-mail or telephone.

SOVEREIGN AND GOVERNMENTAL IMMUNITY

I. Two Statutes

The first step is to determine if the entity/agency is a Commonwealth/state agency or a political subdivision/local agency.

A. Commonwealth Party

1. 42 Pa. C.S. § 8501 defines Commonwealth party as "a Commonwealth agency and any employee thereof, but only with respect to an act within the scope of his office or employment."

2. In order to determine whether an entity is a Commonwealth or local agency for immunity purposes, the Court looks to the entity's enabling legislation. *Sweeney v. Merrymead Farm, Inc.*, 799 A.2d 972 (Pa. Cmwlth. 2002).

3. Southeastern Pennsylvania Transit Authority (SEPTA) and the Port Authority of Allegheny County (PAT) are Commonwealth parties. The Pennsylvania Supreme Court has held that "while these may both appear to be local agencies because they operate on a local, not statewide, level and both have the names that sound local, both have been adjudged by the Courts to be Commonwealth agencies for the purpose of immunity, *Marshall v. Port Authority of Allegheny County*, 568 A.2d 931 (Pa. 1990), re-argument denied, *Feingold v. Southeastern Pennsylvania Transp. Authority*, 517 A.2d 1270 (Pa. 1968). Also, see *Blunt v. Philadelphia Parking Authority*, 600 Pa. 277 (Pa. 2008) (analyzing whether Philadelphia Parking Authority is a local rather than commonwealth agency for purposes of jurisdiction.

4. As to independent contractors, it has been held that in determining whether a person is independent contractor or employee of government body for purposes of immunity, the Court is required to consider "control of the manner work is done; responsibility for result only; terms of agreement between parties; nature of the work or occupation; skill required for performance; whether one is engaged in a distinct occupation or business; which party supplied the tools, [method of payment] by time or by job; whether work is part of regular business of employer, and... right to terminate the employment at any time". *Schuylkill County v. Maurer*, 536 A.2d 479 (Pa. Cmwlth. 1988).

Section 8501 defines "employees" as:

"Any person who is acting or who has acted on behalf of a government unit, whether on a permanent or temporary basis, whether compensated or not and whether within or without the territorial boundaries of the government unit, including any volunteer firemen or any elected or appointed officer, member of a governing body or other person designated to act for the government unit. Independent contractors under contract to the government unit and their employees and agents and persons performing tasks over which the government unit has no legal right of control are not employees of the government unit."

More recently, the Pennsylvania Commonwealth Court in *Oakes v. Richardson*, 2020 Pa. Commw. Unpub. LEXIS 350 (2019) discussed the determination of whether a person is an employee or independent contractor and the court's reliance on the guidance of the Pa. Supreme Court's opinion in *Hammermill Paper Company v. Rust Engineering Company*, 430 Pa. 365 (Pa. 1968). The court in *Oakes* noted that the Pa. Supreme Court quote opinion that while no hard and fast rule exists to determine whether particular relationship is that of an employer/employees or owner-independent contractor, certain guidelines have been established and certain factors are required to be taken into consideration, including:

> "[c] control of manner [of] work is to be done; responsibility for result only; terms of agreement between the parties; the nature of the work or occupation; skills required for performance; whether one employee is engaged in a distinct occupation or business; which party supplies the tools; whether payment is by the time or by the job; whether work is part of a regular business of the employer, and also the right to terminate the employment at any time."

Hammermill Paper Company v. Rust Engineering Company, Super. 243 A.2d at 392.

Oakes v. Richardson, Super. 2020 Pa. Cmwlth. Unpub. LEXIS at 350.

In *Oakes*, after fully discussing the elements to be analyzed and subsequent cases after *Hammermill*, the Commonwealth Court in *Oakes* found that the defendant acted on behalf of the Township as an "employee", and as such was entitled to governmental immunity under the Tort Claims Act. Therefore, the Commonwealth Court in *Oakes* affirmed the trial court's grant of summary judgment. *Id*.

B. Local Agency/Political Subdivision

1. 42 Pa. C.S. § 8501 defines local agency as:

> A government unit other than the Commonwealth government. The term includes an intermediate unit; municipalities cooperating in the exercise or performance of governmental functions, powers or responsibilities under 53 Pa. C.S. Ch. 23, subch. A (relating to intergovernmental cooperation);

and councils of government and other entities created by two or more municipalities under 53 Pa. C.S. Ch. 23 subch. A.

2. Examples of agencies found to be local agencies include city housing development corporations (See *Weinerman v. City of Philadelphia*, E.D. Pa. 1992, 785 F. Supp. 1174, reconsideration denied; Philadelphia Gas Works (PGW) (See *Brennon v. Philadelphia Gas Works*, 605 A.2d 475 (Pa. Cmwlth. 1992) appeal denied 621 A.2d 582, 533 Pa. 637; and Community College (See *Community College of Allegheny County v. Seibert*, 601 A.2d 1348 (Pa. Cmwlth. 1992) appeal granted 608 A.2d 32, 530 Pa. 658, aff'd 622 A.2d 285, 533 Pa. 314. However, on the other hand, see *Helsel vs. Complete Care Services, L.P., et. al.*, 797 A2d 1051 Pa. Cmwlth. 2002) where the court found that Administrators hired by county to manage county - owned nursing home were independent contractors, rather than employees of the county, who were not protected from suit by governmental immunity.

II. Pre-litigation Notice

42 Pa. C.S. § 5522 requires that notice of intention to make a claim against either Commonwealth party or political subdivision must be made within six months after the cause of action accrued.

Under 42 Pa. C.S. § 5522(b) (2) "If a statement is not filed, any civil action shall be dismissed and forever barred from proceeding further thereon. The court shall excuse failure to comply with this requirement upon a showing of reasonable excuse for failure to file such statement." However, the notice of claim statute must first be raised by the governmental defendant as an affirmative defense, after which a plaintiff may set forth the reasons for his delay, shifting the burden to the defendant to aver specific facts alleged to constitute prejudice, and the trial court balances reason for the delay against the prejudice to the defendant. See *Thomas v. The City of Philadelphia*, 861 A.2d 1023 (Pa. Cmwlth., 2004). Also see *Ramon v. PennDOT*, 556 A.2d 919 (Pa. Cmwlth. 1989) aff'd 573 A.2d 1025 (Pa. 1989) in which the Court held that if a plaintiff can establish a "reasonable" cause or excuse, the government must then prove it has suffered an undue hardship. See *Yuecheko v. County of Allegheny*, 243 A.2d 372 (Pa. 1968) for discussion of what constitutes undue hardship.

III. What You Need in Order to Proceed Against a Sovereign or Governmental Entity

A. Cause of Action

First, you need to have cause of action which would allow the recovery of damages, at common law, against a tortfeasor not otherwise shielded by governmental unity.

1. 42 Pa.C.S. § 8522(a) provides:

> **Liability imposed**. - The general assembly, ...does hereby waive, in the instances set forth in subsection (b) only and only to the extent set forth in this subchapter and within the limits set forth in subsection 8528 (relating to limitations on

damages), sovereign immunity as a bar to an action against Commonwealth parties, for damages arising out of a negligent act where the damages would be recoverable under the common law or a statute creating a cause of action if the injury were caused by a person not having available the defense of sovereign immunity. (Emphasis added). 42 Pa.C.S. Section 8522(a).

(An example of where the Court found no cause of action is the case of *Bufford v. PennDOT*, 670 A.2d 751 (Pa. Cmwlth. 1996) where plaintiff was stopped by a police officer and arrested because of a foul-up by PennDOT in erroneously/negligently reporting that the defendant was driving with a significant number of violations and/or an invalid license. The plaintiff was arrested falsely and imprisoned and brought suit against PennDOT for negligently maintaining his driving records. The trial court granted summary judgment which the Commonwealth Court affirmed and held that there was no cause of action stated here nor did it fit within any of the eight categories of sovereign immunity.)

2. 42 Pa. C.S. § 8542 (a) provides:

Liability imposed – A local agency shall be liable for damages on account of injury to a person within the limits set forth in this subchapter if both of the following conditions are satisfied and the injury occurs as a result of one of the acts set forth in subsection (b):

(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 § 8541 (relating to governmental immunity general) or § 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 the subparagraph "negligent acts" shall not include acts or conduct which constitutes a crime, actual fraud, actual malice or wilful misconduct. (Emphasis added). 42 C.S. Section 8542 (a) (1) & (2)

3. **Burden of Proof** - Plaintiff seeking to impose liability on a local agency has the burden of showing that the common law or a statutory cause of action for negligence exists and the negligent act falls into one of the exceptions to governmental immunity enumerated in the code. *Tyree v. City of Pittsburgh*, 669 A.2d 487, (Pa. Cmwlth. 1995). Also, see *Naji Mohammed vs. Pennsylvania State Police Supervisors, et. al.* 2013 WL 5741788.

4. Examples of where the courts found no cause of action. The Courts have held that certain actions do not represent a cause of action and, therefore, their claim fails. In *Clark v. SEPTA*, 691 A.2d 988 (Pa. Cmwlth.1997), the Commonwealth

Court held that the plaintiff's allegations of negligence for injuries sustained during the course of his arrest by SEPTA police officers did not fall within the exceptions of sovereign immunity. The Court in *Clark* cited *Martz v. SEPTA*, 598 A.2d 580 (Pa. Cmwlth. 1991) for the proposition that allegations such as these do not constitute a cognizable cause of action in Pennsylvania nor would other allegations in the complaint indicating that SEPTA failed to adequately supervise and control their employees or failed to train and instruct them. Also see *Thomas v. City of Philadelphia*, 668 A.2d 292 (Pa. Cmwlth. 1995) where the plaintiff decedent was killed while working for a construction company employed by the City. He was electrocuted while working. The trial court granted the City's Motion for Summary Judgment finding that there is no cause of action in the Commonwealth because of the special risk doctrine whereby the employee or an independent contractor (as here) can only impose liability on the entity that hired its employer if there was special risk at issue it did not disclose. The Court indicated that there was no vicarious liability for negligent acts of independent contractor within the framework of governmental immunity.

B. Exceptions to the Absolute Bar

Secondly, the cause of injury must fit into one of the categories set forth in:

1. 42 P.S. § 8522(b) provides:

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:

(1) vehicle liability...;
(2) medical-professional liability...;
(3) care, custody or control of personal property...;
(4) commonwealth real estate, highways and sidewalks...;
(5) potholes and other dangerous conditions...;
(6) care, custody or control of animals...;
(7) liquor store sales...;
(8) national guard activities...;
(9) toxoids and vaccines....

2. 42 Pa. C.S. § 8542 (b) provides:

The following acts by a local agency or any of its employees may result in the imposition of liability on the local agency:

(1) vehicle liability...;
(2) care, custody or control of personal property...;
(3) real property...;
(4) tress, traffic controls and street lighting...;

(5) utility service facilities...;
(6) streets...;
(7) sidewalks...;
(8) care, custody or control of animals....

C. Strict Construction:

"Because the legislature's intent in both the Sovereign Immunity and Tort Claims Act is to shield government from liability, except as provided for in the statute themselves, we apply a rule of strict construction in interpreting these exceptions." *Jones v. SEPTA*, 772 A.2d 435, 440 (Pa. 2001) also see *Kiley by Kiley v. City of Philadelphia*, 537 Pa. 402, 506, 645 A.2d 184, 185-188 (Pa. 1994); and *Snyder v. Harmon*, 562 A.2d 307, 311 (Pa. 1989). *Nardella vs. SEPTA*, 34 A2d 300 (Pa. Cmwlth 2011) reconsideration denied (2012)). However, see *Young vs. United States of America, et. al.*, Wl31340706 (U.S. District Court E.D. 2002).

IV. Differences Between the Statutes

Each act is independent of the other. Although the language of the exceptions is similar, there are differences. An exception to one act does not apply to the other.

A. Damages

1. Sovereign - $250.000.00

2. Local/Municipal - $500,000.00

B. Recovery of Intangibles

1. Sovereign Entities/Agencies.

No limit except the amount of damages.

2. Local Entities/Agencies

Pain and suffering is only permitted for permanent loss of bodily function, permanent disfigurement or permanent dismemberment where medical expenses exceed the sum of $1,500. See *Walsh v. City of Philadelphia*, 585 A.2d 445 (Pa. 1991). In this case, the Court found that the inability to do or perform a bodily act or bodily acts which the claimant was able to do or perform before sustaining the injury is permanent. Medical testimony is needed to establish this loss. Claimant's own testimony of self-limiting actions does not meet the standard. The Commonwealth Court in *Boyer v. City of Philadelphia*, 692 A.2d 259 (Pa. Cmwlth. 1997) found that the trial court erred in failing to remove a non-suit where the plaintiff's medical expert testified that as a result of being struck by a city leased vehicle, the plaintiff developed a permanent arthritic condition in her lower back that was likely to worsen with age. Also, see *Smith vs. Endless*

Mountain Transportation Authority., 878 A.2d 177 (Pa. Cmwlth 2005) in which the court held that whether a pedestrian sustained permanent loss of bodily function as result of accident, such that exception to governmental immunity would apply, was question for jury.

C. Status of Claimant

The status of claimant is more important under the Tort Claims Act as a municipal defendant will remain immune if the claimant is found to be a trespasser. Sovereign immunity does not offer this protection for a Commonwealth defendant.

D. Notice Requirements

1. Sovereign

The Sovereign Immunity Act does not require notice where liability is premised on "a dangerous condition" of its real estate, highways and sidewalks. See 42 Pa. C.S. § 8522(b)(4). However, for "potholes and other conditions" 42 Pa.C.S. § 8522(b)(5) provides that ... "the Commonwealth agency" had actual written notice of the dangerous condition of the highway a sufficient time prior to the event to have taken measures to protect against the dangerous condition."

2. Local/Municipal

Under the Tort Claims Act, a municipal defendant does not require notice for a liability claim arising from the "care, custody or control" of its real property. See 42 Pa. C.S. § 8542(b)(3). However, under this Act sections (b)(4), (5), (6) and (7) provide that a dangerous condition of trees, utility service facilities, streets and sidewalks... "that the local agency had actual notice or could reasonably be charged with notice under the circumstances of the dangerous condition at a sufficient time prior to the event to have taken measures to protect against the dangerous condition." See, 42 Pa. C.S. 8542 (b)(4), (5), (6) and (7).

E. Conditions of the Property

Under 8522(b)(4), the issue is "a dangerous condition" of Commonwealth agency real estate and sidewalks....whereas, under 8542 the issue is "the care, custody or control" of real property in the possession of the local agency. An example of the differences between the two statutes and the Court holdings relating thereto, are reflected in the cases of *Hanna v. West Shore School District*, 717 A.2d 626 (Pa. Cmwlth. 1998) and *Tallada v. East Stroudsburg University of Pennsylvania*, 724 A.2d 427 (Pa. Cmwlth. 1999). In *Hanna v. West Shore School District, supra*, 717 A.2d 626 the court found that a wet floor on the corridor of the school was a condition which met the exception under 8542(b)(3). See, *Sanchez - Guardiola vs. City of Philadelphia*, 87 3d. 934 (Pa. Cmwlth 2014) for additional discussion of the holdings in *Hanna*. However, in *Tallada v. East Strousburg University of Pennsylvania, supra*, 724 A.2d 427, the court found that grease on the floor of a kitchen was not found to be an exception under 8522 (b).

V. Exceptions

The following discussion highlights some of the exceptions under 42 Pa. C.S. Section 8522 (b) and 8542(b) and case law relating thereto.

A. "Real Property" and sidewalk exceptions under both Acts

The real property exception of sovereign immunity (42 Pa. C.S. § 8522(b)(4)) as well as the real property and sidewalk exceptions of governmental immunity (42 Pa. C.S. §8542(b)(3) and (7)) have been the subject of much case law. There has been much debate regarding "of" versus "on" distinction.

In *Jones v. SEPTA*, 772 A.2d 435 (Pa. 2001), the Pennsylvania Supreme Court took the opportunity to eliminate any confusion regarding the debate of "of v. on".

In *Jones*, the plaintiff slipped on rock salt that had covered a train platform at a SEPTA station. SEPTA moved for summary judgment on the basis that the rock salt was not a condition "of" the train platform and, therefore, the real estate exception to sovereign immunity did not apply. The plaintiff then filed an appeal to the Pennsylvania Superior Court. Pennsylvania Superior Court affirmed the trial court. Thereafter, an appeal was taken to the Pennsylvania Supreme Court. The Pennsylvania Supreme Court, in affirming the summary judgment, analyzed the previous case law concerning governmental immunity.

The Supreme Court acknowledged the confusion in the law and traced its development. The Court, after its review of the case law, concluded that the "of/on" distinction created over the years is "problematic and of little use or no use. Not only is it strange and confusing, it is also incorrect because it works to exclude claims that fall within the parameters of the Act's real estate exemption. Therefore, we reject it. " *Jones v. SEPTA, supra*, 772 A2d at 443.

The Pennsylvania Supreme Court replaced the "on/of " test and concluded that:

> ...[a] claim for damages for injuries caused by a substance or an object on Commonwealth real estate must allege that the dangerous condition "derived, originated or had as its source the Commonwealth realty" itself, if it is to fall within the Sovereign Immunity Act's real estate exception. In other words, assuming all other requirements of 42 Pa. C.S. § 8522(b)(4) are met, the Commonwealth may not raise the defense of sovereign immunity when a plaintiff alleges, for example, that a substance or object on Commonwealth reality was the result of a defect in the property or in its construction, maintenance, repair or design. (Emphasis added) *Id.* at 443-444.

Additionally, the Pennsylvania Supreme Court indicated that the decision in *Jones* is consistent with both *Snyder v. Harmon*, 562 A.2d 307 (Pa. 1989) and *Finn v. City of Philadelphia*, 664 A.2d 1342 (Pa. 1995). The Pennsylvania Supreme Court in

Jones found that *Finn's* essential holding that the application of 42 Pa. C.S. § 8542(b)(7) depends on the "legal determination that an injury was caused by a condition of the government realty itself, deriving, originating from or having realty as its source" is identical to the court's holding in *Jones*. Moreover, the Pennsylvania Supreme Court also clarified that the court's interpretation [in *Jones*] of 42 Pa. C.S. Section 8522 (b)(4) does not conflict with the interpretation of the Tort Claims Act's real estate exception, 42 Pa. C.S. Section 8542 (b)(3). That is, the court in Jones found the cases of *Grieff v. Reisinger*, 693 A.2d 195 (Pa. 1997) and *Kilgore v. City of Philadelphia*, 717 A.2d 514 (Pa. 1998) are still controlling on cases involving injury occurring on local agency-owned real property, noting that the statutory language of the real estate exception of the sovereign immunity was different than that of the Tort Claims Act. The Court in Jones noted:

> As aptly noted in those cases, the language of the legislature chose for subjecting the Commonwealth to liability under 42 C.S. § 8522(b)(4)-- "a dangerous condition of Commonwealth agency real estate"- varies markedly from the language it chose for subjecting a local agency to liability under 42 Pa. C.S. § 8542(b)(3) – "the care, custody or control of real property...." *Id*. at 444.
>
> (For further discussions, see *Erb vs. Greenmount Community Fire Co.*, 2003 WL 23173648 (Pa. Com. Pl. 2003); and *Irish vs. Lehigh County Housing Authority, et. al.*, 751 A.2d 1201 (Pa. Cmwlth. 2000)).
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> The Supreme Court in *Jones* also noted that the material words used in the Sovereign Immunity Act's real estate exemption mirror the material words used in the Tort Claims Act's sidewalk exception. 42 Pa. C.S. § 8522(b)(4); 8542(b)(7).
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> It should be noted that there is a distinction between 8542(b)(3) and 8522(b)(4).

The Pennsylvania Supreme Court granted allocatur in *Cagey v. Commonwealth*, 645 Pa. 268, 179 A.3d 458 (2018) "to determine whether the Pennsylvania Department of Transportation (PennDOT) is liable for injuries caused by negligently and dangerously designed guardrails erected on Commonwealth real estate." *Id*. The court explained that the case of *Cagey* allowed the court "to clarify the contours of the real estate exception to sovereign immunity, CPA, C.S. Section 8522(b)(4) especially in light of the Commonwealth Court's expansive treatment of [Pa. Supreme Court's] prior decision in *Dean v. Dept. of Transp.*, 561 Pa. 503, 571 A.2d 1130 (2000). *Cagey*, 645 Pa. At 268. In *Dean* the Pa. Supreme Court held that "PennDOT has no duty to erect guardrails alongside Commonwealth roadways." *Cagey*, 645 Pa. At 268 citing *Dean*. (Citations omitted). However, the court in *Cagey* noted that the question before was "whether the Commonwealth owes a duty of care when PennDOT has in fact installed a guardrail alleged to be dangerous." *Cagey*, 645 Pa. At 268. After thoroughly discussing the case law and the Sovereign Immunity Act, 42 Pa. C.S. Sections 8521-8522, the Pa. Supreme Court concluded that "[p]ursuant to the plain language of the Sovereign Immunity Act (citation omitted) that the General Assembly have waived PennDOT's immunity as a bar to damages caused by dangerous guardrails affixed to Commonwealth real estate." *Id*. Pa. Supreme Court

found that "*Dean* is inapposite and does not control under the facts presented [in *Cagey*]. Therefore, the Pa. Supreme Court reversed the decision of Commonwealth Court and remanded the case back to said court. *Id.*

More recently, the Pa. Supreme Court in *Wise v. Huntingdon Cty. Hous. Dev. Corp.*, 249 A.3d 506, 2021 LEXIS 1799 (2021) reversed the decision of the Commonwealth Court upholding summary judgment in favor of the Commonwealth. In *Wise*, the trial court granted summary judgment in favor of the Commonwealth on the basis that the *Wise*'s claim was barred by sovereign immunity. The Pa. Supreme Court found that the Commonwealth Court erred and reversed the order and remanded the case back for further proceedings. *Id.* At 508. The Pa. Supreme Court found that "insufficient outdoor lighting of Commonwealth property, occurring because of the location on the property of a pole light and a tree blocking the light emitting from the pole light, constitutes a 'dangerous condition of' the property for purposes of the real estate exception to sovereign immunity." *Id*. At 508. The court set forth a lengthy discussion of the statutes and case law relating to the real estate exception including discussion of the *Cagey*.

B. The property must be real property for the exception of real property to apply under both Acts

In *Blocker v. City of Philadelphia*, 763 A.2d 373 (Pa. 2000), plaintiff was injured when a bleacher upon which she was sitting to watch a concert collapsed. The plaintiff sued the City of Philadelphia under the real property exception of the Tort Claims Act. The Pennsylvania Supreme Court found that the moveable bleachers which had collapsed were not attached to the property and, therefore, was personalty, not real property. Therefore, the Court held that the real estate exception did not apply as there must be some fixture or permanent attachment for an object to be considered "realty". *Id*. In *Blocker*, there was an issue that the City intended to make the bleachers permanent. The Court held that such a consideration was not relevant as the bleachers had to have been permanently affixed to the ground at the time of the plaintiff's accident. Also, see *Rivera vs. Pleasant School District*, 2013 WL1054390 (2013).

In *Rieger v. Altoona School District*, 768 A.2d 912 (Pa. Cmwlth. 2001), a student during cheerleading practice sustained injuries as a result of a failed cheerleading move. Plaintiff filed suit against the school district claiming the real estate exception to the Tort Claims Act. The school district filed a motion for summary judgment which was granted. The Commonwealth Court affirmed the summary judgment. The plaintiff on appeal had argued that gymnastic mats are an integral part of a gymnasium hardwood floor when used to practice the gymnastic-type stunts that are routinely performed in moderating cheerleading. The plaintiff relied on the decision in *Singer v. School District of Philadelphia*, 513 A.2d 1108 (1986). However, the Commonwealth Court in *Rieger* found that the *Singer* decision had been overruled by the Pennsylvania Supreme Court, sub silentio, by reason of the Court's decision in *Blocker v. City of Philadelphia*. The Commonwealth Court in *Rieger* found that in light of the findings in *Blocker*, the *Singer* holding is no longer viable. The evidence in *Rieger* showed that the gymnasium mats in question were in no way affixed to the real property and, as such, merely constituted personalty. Therefore, the Court found that even assuming that failure to provide mats in a cheerleading practice area amounted to a negligent act causing plaintiff's injury, such negligent conduct would not fall within the real property exception to the Act.

In *LoFurno, a Minor v. Garnet Valley School District*, 904 A.2d 980 (Pa. Cmwlth. 2006), plaintiff alleged injury as a result of operating a vertical belt sander in a class. The parties in this case agreed that in order for the plaintiff to prevail plaintiff had to show that the sander was a fixture in order to come under the real property exception. The evidence revealed that the sander had originally been bolted to the floor, connected to a dust collection system and plugged into a 220 volt electric outlet. The evidence further showed that the sander was unhooked from the dust collection system and moved or slid across the floor for cleaning from time to time. It was also moved to accommodate other equipment in the classroom. Originally, the trial court found, after an evidentiary hearing, that the sander was, as a matter of law, a fixture and "permanently affixed" to the floor. However, the Commonwealth Court held that the trial court's findings and conclusions were not supported by the record. The Commonwealth Court noted that although the sander was bolted to the floor, there was no evidence of hardwiring, dedicated electric lines or permanent attachment to a dust collection system. The Commonwealth Court noted that the evidence showed that the equipment was moved for cleaning and there was no evidence that the room had been physically altered to accommodate the electrical requirements of the sander. Therefore, the Court held that evidence of bolting alone was insufficient to support a conclusion that the school district intended the sander to be permanently affixed to the real estate and reversed the trial Court.

C. Vehicle liability

The "motor vehicle liability exception" to local agency immunity is one of eight exceptions set forth in the Act. Under the Act, the following acts by a local agency or any of its employees may result in the imposition of liability on a local agency . . . (1) Vehicle Liability - the operation of any motor vehicle in the possession or control of the local agency. As used in this paragraph, "motor vehicle" means any vehicle which is self-propelled and any attachment thereto, including vehicles operated by a rail, through water or in the air. 42 Pa.C.S. §8542(b)(1).

The Pa. Supreme Court overturned the holding of the Commonwealth Court in *Balentine v. Chester Water Auth.*, 648 Pa. 105 (2018). The Pa. Supreme Court provided a lengthy discussion of the lower court's opinion and reasoning as well as the case law relied upon by the local courts in this matter. The Pa. Court granted allowance in this matter "to consider whether the Commonwealth Court erred in holding that the involuntary movement of a vehicle does not constitute operation of a motor vehicle for purposes of the vehicle liability exception to governmental immunity under 42 Pa. C.S. Section 8542 (b)(1)." *Id.* At 1009. The court determined that "movement of a vehicle whether voluntary or involuntary is not required by the statutory language of the vehicle exception." *Id.*

Also, see *Podejko v. PennDOT of Pa.*, 236 A.3d 1216 (Cmwlth. Ct. 2020) in which the Commonwealth Court held: "based upon *Balentine*, the courts cannot ignore the purpose for which the vehicle is operated." Citing the dissenting opinion of Judge Newman in *Warrick v. Pro Cor Ambulance, Inc.*, 709 A.2d 422 (Pa. Cmwlth. 1997), aff'd, 559 Pa. 44, 739 A.2d 127 (Pa. 1999). *Podejko*, 236 A.3d at 1225. The *Podejko* court found that: "here, the purpose of the fire department's pumper truck was not only to transport firefighters to where they were needed,

but its parts were also expressly designed to disperse water onto the fire or, in this case, the removed flood waters. Because the fire department controlled the parts of the pumper truck that removed the water from Route 6 and redirected it from the pumper truck's rear, the fire department operated the vehicle. Thus, the vehicle liability exception to governmental immunity applies..." *Id.*

D. Utility service facilities 42 Pa. C.S. § 8542(b)(5)

In *Pietrak v. Certain Underwriter at Lloyds*, 2006 Philadelphia Court of Common Pleas, LEXIS 219 (May 26, 2006), the owner of a property brought suit against the City claiming that the City had been negligent in failing to properly inspect and repair a fire hydrant which malfunctioned and allegedly allowed flames to destroy the property. Under 42 Pa. C.S. § 8542(b) an exception to governmental immunity is "a dangerous condition of the facilities of steam, sewer, water, gas or electric systems owned by the local agency and located within the rights of way except that the claimant to recover must establish that the dangerous condition created a reasonably foreseeable risk of the kind of injury which was incurred and that the local agency had actual notice or could reasonably be charged with notice....".

In this case, the plaintiff was only able to demonstrate that the fire hydrant malfunctioned at the time of the accident but was unable to provide any evidence that the City had notice of the inoperative fire hydrant before the fire. Therefore, the trial court granted summary judgment in favor of the City of Philadelphia.

Also, see the Commonwealth Court in *Geier v. Board of Public Education of the School District of Pittsburgh*, 2017 Pa. Cmwlth. LEXIS 13, addressed the exception of utility services facilities as well as the real property exception. *Id*. The court in *Geier* concluded that Plaintiffs sufficiently alleged a dangerous condition of the PBE's [Pittsburgh School District's Board of Education] utility services facilities and real property substantially contributing to decedent's mesothelioma and ultimate death. *Id*. 2017 Pa. Cmwlth. LEXIS 13. Therefore, the Commonwealth Court upheld the denial of the motion for summary judgment by the Allegheny trial court. However, the Commonwealth Court noted that the notice issue was not properly developed before the trial court although it was raised in the brief and argument at the appellate level. Therefore, the Commonwealth Court refused to address the notice issue as it found that the notice issue was not before them on this limited interlocutory appeal by permission. *Id.*, 2017 Pa. Cmwlth. LEXIS 13. However, I believe that the court's holding in the *Geier* decision leaves on the issue of notice. The utility service facility's exception does require "that the local agency had actual notice or could reasonably be charged with notice..."

VI. Investigation to Be Done in Commonwealth and Local Agency Cases

The following is a list of items, not inclusive, of investigation to be considered in these cases:

1. Look at the site.

2. Secure police report.

3. Is an expert needed early.

4. Has the notice requirement been met and, if not, is there any undue prejudice.

5. As to damages, know the statutory damage caps $250,000 (Commonwealth) versus $500,000 (political subdivision/local agencies); and if political subdivision/local/municipal, then plaintiff must establish, for a pain and suffering recovery, permanent loss of bodily function, permanent disfigurement or permanent dismemberment or medical expenses exceed the sum of $1,500. Does the plaintiff have the medical expert to establish the alleged permanent condition.

6. Does the plaintiff have the right defendants, correct name; do you, the defendant, need to join anyone, including a person or entity that may have an easement or right of way, etc.

7. Any prior losses or incidents at the location in question.

8. Any work that was done by the specific agency, including any inspections.

9. Any applicable codes, ordinances, regulation or statutes.

10. Any records concerning construction, design or maintenance, including any contracts between any governmental agency and/or others.

11. In addition to the 8522 and 8552, are there any other statutes that bar the case such as the Recreational Use of Land and Water Act (RULWA).

12. Secure as many facts as possible concerning the incident, including location, entities, control, possession, ownership, contracts, work performed, inspections.

13. Is notice required under 8522 or 8542 (such as potholes) and if so did the entity have notice of the alleged condition.

14. Is the property real property or is it affixed to the property. If this is an issue, you need to determine if the property in question is permanently affixed, moveable, temporary.

15. Status of the claimant regarding the political Subdivision/Tort Claims Act, that is, is the claimant a trespasser.

If you have any questions, need additional information or need copies of any cases, please feel free to contact Carol Ann Murphy at cmurphy@margolisedelstein.com; direct dial (215) 931-5881 or cell phone (215) 803-0356.

Carol Ann Murphy represents contractors, business owners, product manufacturers, restaurant and bar establishments, municipalities and other governmental authorities and their officials. Also, included within Ms. Murphy's client base are insurers, homeowners, industrial plants, apartment complexes, homeowners associations, animal owners and rescuers, and vehicle operators. She has experience in all trial, appellate and mediation forums including arbitration hearings (UM/UIM, state court and binding high/low), jury and bench trials and appellate courts. Ms. Murphy serves as an arbitrator for the Court of Common Pleas of Philadelphia County and as a Judge Pro Tem for the Court of Common Pleas of Philadelphia County.

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