IN THE COURT OF COMMON PLEAS OF CARBON COUNTY, PENNSYLVANIA
CIVIL DIVISION

JESSE R. HILES,	:	
	:	
Plaintiff	:	
	:	
v.	:	No. 16-2229
	:	
BOROUGH OF LANSFORD,	:	
	:	
Defendant	:	

Robert T. Yurchak, Esquire — Counsel for Plaintiff
Michael S. Greek, Esquire — Counsel for Defendant

MEMORANDUM OPINION

Serfass, J. – April 15, 2019

Jesse R. Hiles (hereinafter "Plaintiff") has taken this appeal from our decision and verdict of June 1, 2018, finding that Plaintiff had not demonstrated by a preponderance of the evidence that the Borough of Lansford (hereinafter "Defendant") diverted water from its natural channel or altered the quantity or quality of the water which naturally flows downhill on Cortright Street toward Plaintiff's property during rain storms. We file the following memorandum opinion pursuant to Pennsylvania Rule of Appellate Procedure 1925(a) and recommend that the aforesaid decision and verdict be affirmed for the reasons set forth hereinafter.

FACTUAL AND PROCEDURAL HISTORY

On September 14, 2016, Plaintiff filed a Complaint against Defendant asserting that water run-off caused by Defendant's

construction is damaging his triangularly shaped property located at the intersection of Cortright Street and West Ridge Street in Lansford. On February 3, 2017, Defendant filed an Answer and New Matter averring that storm water is a common enemy that enters Plaintiff's property as a natural effect of the elevation.

Following a non-jury trial held before this Court on July 25, 2017, and September 22, 2017, proposed Findings of Fact and Conclusions of Law were submitted by counsel for both parties on November 3, 2017. On June 1, 2018, upon review of counsels' submissions and careful consideration of the evidence presented at trial, this Court entered a decision and verdict finding that Plaintiff had failed to establish by a preponderance of the evidence that Defendant caused an increase in the amount of water that runs from West Ridge Street and Cortright Street onto Plaintiff's property during rain storms. Accordingly, this Court found in favor of Defendant on all claims set forth in Plaintiff's Complaint.

On June 11, 2018, Plaintiff filed a post-verdict motion. On July 25, 2018, Defendant filed a brief in opposition to that motion. The parties agreed to waive oral argument on Plaintiff's motion, which was scheduled for August 24, 2018, and rely upon their filings. On December 20, 2018, this Court entered an order denying Plaintiff's motion.

On January 18, 2019, Plaintiff filed a notice of appeal to the Superior Court. On January 28, 2019, this Court entered an order directing Plaintiff to file of record, within twenty-one (21) days, a concise statement of the matters complained of on appeal pursuant to Pennsylvania Rule of Appellate Procedure 1925(b). On February 14, 2019, as a final judgment had not been entered in this matter, the Superior Court entered an order directing Plaintiff to praecipe the Carbon County Prothonotary to enter judgment on our decision. On February 15, 2019, Plaintiff submitted a concise statement in compliance with our order. On February 19, 2019, Plaintiff filed a praecipe for judgment and, on February 21, 2019, judgment was entered in favor of Defendant and against Plaintiff.[1]

DISCUSSION

Plaintiff's concise statement raises the following issues for review: (1) whether this Court's verdict was supported by the evidence presented; (2) whether this Court properly applied the Pennsylvania Storm Water Management Act to the facts in this case; (3) whether this Court erred by not allowing David Hiles to testify as an expert in the field of mechanical engineering as it relates to storm water drainage; (4) whether this Court misapplied the Common Enemy Rule to the facts in this case; and (5) whether

[1] As provided in the Superior Court's order of February 14, 2019, Plaintiff's notice of appeal will be treated as having been filed on February 21, 2019, after the entry of judgment in this matter. *See* Pa. R.A.P. 905(a)(5).

Defendant assumed responsibility for the storm water run-off based upon previous attempts to address the water damage by installing curbing and handicapped-accessible ramps. We will address each issue seriatim.

I. This Court's verdict is supported by the evidence presented

Plaintiff argues that this Court's verdict was not supported by the evidence presented at trial.

In a non-jury case such as this, appellate review is limited to a determination of whether the findings of the trial court are supported by competent evidence and whether the trial court committed error in the application of law. Showalter v. Pantaleo, 9 A.3d 233, 235 (Pa.Super. 2010) (quoting Shaffer v. O'Toole, 964 A.2d 420, 422 (Pa.Super. 2009)). "Findings of the trial judge in a non-jury case must be given the same weight and effect on appeal as a verdict of a jury and will not be disturbed on appeal absent error of law or abuse of discretion." *Id.* When reviewing the findings of the trial judge, the evidence is viewed in the light most favorable to the victorious party below and all evidence and proper inferences favorable to that party must be taken as true and all unfavorable inferences rejected. *Id.* The trial court's findings are especially binding on appeal when they are based upon the credibility of the witnesses, unless it appears that the court abused its discretion, that the court's findings lack evidentiary

support, or that the court capriciously disbelieved the evidence. *Id.*

"Conclusions of law, however, are not binding on an appellate court, whose duty it is to determine whether there was a proper application of law to fact by the lower court." *Id.* Regarding such matters, the appellate scope of review is plenary as it is with any review of questions of law. *Id.*

Our findings, which have been attached for the convenience of the Honorable Superior Court, are supported by the evidentiary record in this case, and there has been no abuse of discretion.

II. This Court properly applied the Pennsylvania Storm Water Management Act to the facts in this case

Plaintiff argues that this Court did not properly apply the Storm Water Management Act to the facts in this case.

> The Storm Water Management Act of 1978, 32 P.S. §680.1-15, *repealed in part by* Act of 1980, 71 P.S. §732-504, was enacted to encourage the planning and management of storm water runoff, 32 P.S. §680.3. The general assembly found that "a comprehensive program of storm water management, including reasonable regulation of development and activities causing accelerated runoff, is fundamental to the public health, safety, and welfare and the protection of the people of the Commonwealth, their resources, and the environment," 32 P.S. §680.2. The Act directed each county, in consultation with concerned municipalities, to prepare and adopt a storm water management plan . . . . Further, the Act required "landowners or any person engaged in the alteration or development of land which may affect storm water runoff characteristics to implement measures necessary to prevent injury to health, safety, or property," 32 P.S. § 680.13. Specifically, the Act enumerated two standards: "(1) To assure that the

> maximum rate of storm water runoff is no greater after development than prior to development activities; or (2) to manage the quantity, velocity, and direction of resulting storm water runoff in a manner which otherwise adequately protects health and property from possible injury."

Magee v. Marshman, 20 Pa. D. & C.4th 184, 187–88 (Pa. Com. Pl. 1993).

Here, as provided in our decision and verdict, this Court found that Plaintiff has failed to produce evidence showing that the quantity or quality of the storm water run-off changed as a result of the construction project on Cortright Street in 1996. Thus, as there has been no demonstrable change in storm water run-off, there has been no violation of the Storm Water Management Act.

III. This Court did not err in determining that David Hiles lacked the qualifications to testify as an expert

Plaintiff argues that this Court erred by not recognizing David Hiles as an expert in the field of mechanical engineering in general contracting and, thus, not allowing David Hiles to testify as to the cause of the alleged increase in storm water run-off onto Plaintiff's property.

> [T]he question whether a witness is qualified to testify as an "expert" is within the sound discretion of the trial court and will not be overturned except in clear cases of abuse. In Pennsylvania, a liberal standard for the qualification of an expert prevails. Generally, if a witness has any reasonable pretension to specialized knowledge on the subject matter under investigation he may testify and the weight to be given to his evidence

> is for the [fact finder]. It is also well established that an expert may render an opinion based on training and experience; formal education on the subject matter is not necessarily required.

Commonwealth v. Ramos, 920 A.2d 1253, 1255 (Pa.Super. 2007) (quoting Commonwealth v. Marinelli, 810 A.2d 1257, 1267 (Pa. 2002)).

Here, David Hiles testified that while he has earned a degree in mechanical engineering, he has not worked as a mechanical engineer and he is not licensed as a civil or mechanical engineer. David Hiles works as a general contractor. He has not worked on the design or construction of roadways that require compliance with state regulations, nor has he worked for a municipality in the construction of a storm water plan for a roadway. Given that David Hiles has no experience in the field of engineering as it relates to storm water drainage beyond his education, this Court found that David Hiles was not qualified to testify as an expert in the fields of mechanical or civil engineering. There has been no abuse of discretion relative to our determination concerning David Hiles' qualifications and that determination should not be overturned.

IV. This Court properly applied the Common Enemy Rule to the facts in this case

Plaintiff argues that this Court misapplied the Common Enemy Rule to the facts in this case.

Pennsylvania courts follow the "Common Enemy Rule" under which an owner of higher land is not liable for damages to an owner of lower land caused by water naturally flowing from one level to another. Chamberlin v. Ciaffoni, 95 A.2d 140, 142 (Pa. 1953). However, the upper landowner will be liable for the effects of surface water run off where he has diverted the water from its natural channel by artificial means or where he has unreasonably or unnecessarily increased the quantity or quality of water discharged upon his neighbor. LaForm v. Bethlehem Township, 499 A.2d 1373, 1378 (Pa.Super. 1985).

It has long been recognized in this Commonwealth that municipalities are authorized to open, grade, and improve streets, that some disturbance of the surface drainage is inevitable in such development and that, without negligence, the municipality is not liable for the results. *See* Carr v. Northern Liberties, 35 Pa. 324 (1860). Pursuant to the holding of our Supreme Court in Kunkle v. Ford City Borough, 175 A. 412 (Pa. 1934), a municipality is not liable for damage resulting from a municipal improvement causing a flow of water onto a plaintiff's land.

In the case at bar, both Plaintiff and his brother, David Hiles, testified that the natural flow of storm water onto the subject property from West Ridge Street and Cortright Street increased after Defendant repaired the sewer line in approximately 1996. Both brothers claim that the road changed from a swale, where

the water flows down the middle, to a crown, where the water flows down each side of the road. However, Plaintiff has produced neither expert testimony to that effect nor any concrete evidence that the contour of the road changed following that construction project. Moreover, Plaintiff and his brother testified that during normal rainfalls, water does not necessarily enter onto or cause erosion on the triangular parcel but does so during heavy rain storms. Absent evidence that Defendant diverted the natural flow of storm water toward Plaintiff's property, Defendant cannot be held liable for damages resulting from storm water runoff.

V. Defendant did not assume responsibility for the storm water run-off onto Plaintiff's property

Finally, Plaintiff argues that Defendant assumed responsibility for the rain water run-off onto Plaintiff's property by making attempts to address the damage caused by the run-off.

"Under the law of Pennsylvania, a person who makes an engagement, even though gratuitous, and actually enters upon its performance, will incur tort liability if his negligence thereafter causes another to suffer damages." Pirocchi v. Liberty Mut. Ins. Co., 365 F. Supp. 277, 281 (E.D. Pa. 1973) (citing Pascarella v. Kelley, 105 A.2d 70 (Pa. 1954). "The existence of a voluntarily assumed duty through affirmative conduct is a matter for determination in light of all the facts and circumstances."

Id. In Pascarella v. Kelley, an independent contractor's bulldozer damaged a hotel foundation while working to deepen a nearby creek. 105 A.2d at 72. Kelley, the foreman of the project, but not the owner of the bulldozer, told the hotel owner that he would have the damage repaired. *Id.* Rather than properly repair the damage, Kelley had gravel pushed up against the building, and the foundation eventually gave way. *Id.* The Pennsylvania Supreme Court held that Kelley, while not responsible for the original damage to the building, could be held liable for a gratuitous attempt to repair that damage if he was negligent in that attempt. *Id.* at 73.

Here, by gratuitously repairing the sidewalk and curbing on Plaintiff's property, Defendant did assume responsibility for any damage caused by negligence in its attempts to repair damage to the sidewalk and curbing. However, Defendant did not assume liability for the original damage caused by the storm water. Plaintiff makes no claim of damages as a result of Defendant's repairs to the curbing, for which Defendant would be liable.

CONCLUSION

For the reasons set forth hereinabove, we respectfully recommend that the instant appeal be denied and that our decision and verdict of June 1, 2018, be affirmed accordingly.

BY THE COURT:

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Steven R. Serfass, J.