Received 4/6/2021 10:17:22 AM Supreme Court Eastern District

Filed 4/6/2021 10:17:00 AM Supreme Court Eastern District
4 EAP 2021

IN THE SUPREME COURT OF PENNSYLVANIA

No. 4 EAP 2021

Wanda Brooks

Appellee

v.

Ewing Cole, Inc., D/B/A Ewing Cole, the City of Philadelphia and Family Court of the Court Of Common Pleas of the First Judicial District

Family Court of the
Court of Common Pleas of the
First Judicial District,
Appellant

Appeal from the July 9, 2020, Order of the Commonwealth Court at No. 912 CD 2018, which Quashed Appellant's Appeal from the July 3, 2018, Order of the Court of Common Pleas of Philadelphia at December Term 2016, No. 00680, denying Appellant's Motion for Summary Judgment

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Brief of Appellee Wanda Brooks

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I. Counter Statement of the Case

Wanda Brooks agrees she walked into an unmarked glass wall inside the Family Court Courthouse in Philadelphia and suffered injuries. The Family Court of the Court of Common Pleas of the First Judicial District ("Family Court") was the leasee and occupier of the building, having maintenance, janitorial and security duties. Family Court was also a decision maker in certain aspects of the design of the building. Wanda Brooks filed her negligence lawsuit under the real estate exception to sovereign immunity.

In its brief, Family Court omits some crucial, factual points:

- Family Court opted not to file preliminary objections asserting sovereign immunity, but to proceed with litigation;

- Family Court opted not to file a motion for judgment on the pleadings based upon sovereign immunity, but to proceed with litigation;

- Family Court did not expend any money for an attorney during litigation, but instead used co-defendant City of Philadelphia's Deputy City Solicitor [1] who doubled as Family Court's own defense counsel; and

- Family Court did not expend any legal time during litigation, but again rode the coattails of co-defendant City of Philadelphia's Deputy City Solicitor.

Wanda Brooks agrees that Family Court waited until the eve of trial to file its summary judgment motion, asserting sovereign immunity. Also on the eve of

[1] Joshua Feissner, Deputy City Solicitor entered his appearance on behalf of both Family Court and co-defendant City of Philadelphia. Attorney Feissner's own Verification even notes both Family Court and City of Philadelphia. (R. 013a; R. 014a).

trial, Wanda Brooks settled with co-Defendant Ewing Cole, Inc. As the case was then discontinued only as to co-Defendant Ewing Cole, Inc., the trial court ruled that the summary judgment order was "appropriate for intermediate appellate review." [2] But Family Court never subsequently requested, renewed or reinitiated its desire for interlocutory appellate review. It acquiesced to proceed with litigation.

[2] Brief of Appellant the Family Court; at 6; fn 2

II. Summary of Arguments

Family Court's actions, or inactions, speak louder that it words. If Family Court genuinely believed that "absolute immunity" was such a substantial issue, it would not have waited until after pleadings and discovery to raise the issue in the trial court. If Family Court honestly believed that "immunity from suit" was such an important policy issue, it would not have waited until the verge of trial to raise the issue by way of a summary judgment motion. It could have filed preliminary objections or a motion for judgment on the pleadings in order to raise the issue years before.

Our Commonwealth Court below correctly treated the trial court's denial of summary judgment as a non-final, interlocutory order. Our Commonwealth Court correctly analyzed the trial court's order denying summary judgment. Applying Pennsylvania Rule of Appellate Procedure 313 contravened neither statutory law nor case law. Our Commonwealth Court below reasoned: [3]

> "As to the third prong of the collateral order doctrine, the Family Court contends that denying immediate review of the trial court order would cause it to suffer "irreparable loss" by expending public funds in order to defend against Brooks' negligence claim. Family Court's Brief at 21. The Family Court asserts that "[t]he failure to grant summary judgment on the basis of immunity, where, as here, no facts are in dispute, results in the considerable expenditure of time and

[3] Brief of Appellant the Family Court; Appendix A; at 13 - 14.

> expense of public funds which cannot be recouped in proceedings through an erroneous trial and inevitable successful appeal." Id.
>
> With regard to the third element under the collateral order doctrine, "a claim will be `irreparably lost' if review is postponed only if it can be shown the issue involved will not be able to be raised on appeal, if appeal is delayed." Brophy v. Phila. Gas Works & Phila. Facilities Mgmt. Corp., 921 A.2d 80, 87 (Commw.Ct.2007); see also Kennedy, 876 A.2d at 943 (emphasis added) (holding that "[a]n appeal from a collateral order may be taken as of right where ... the claim will be irreparably lost") (emphasis added). Thus, "as to the third prong, we ask whether a right is `adequately vindicable' or `effectively reviewable. "' Twp. of Worcester, 129 A.3d at 55 (quoting Geniviva, 725 A.2d at 1213) (internal quotation marks omitted).
>
> We disagree with the Family Court that denying immediate review of the trial court's order would cause "irreparable loss" for purposes of the third requirement under Rule 313.

Pennsylvania Rules already provide a procedure for immediate objections based upon sovereign immunity. Whether termed sovereign immunity, absolute immunity, immunity from suit or any other permutation of immunity, Family Court chose to file neither preliminary objections nor a motion for judgment on the pleadings in response to Wanda Brooks' negligence lawsuit.

Plus, Family Court finely focuses on money that "may" be spent to defend sovereign immunity cases. Money alone does not justify departing from the collateral order doctrine. This Supreme Court has employed a

balancing test to determine a "substantial legal and policy issue," as enunciated in Rae v. Pa. Funeral Dirs. Ass'n, 602 Pa. 65, 71, 977 A.2d 1121, 1125 (Pa.2009):

> "...in Cohen v. Beneficial Ind. Loan Corp., 337 U.S. 541, 69 S. Ct. 1221, 93 L. Ed. 1528 (1949), the United States Supreme Court crafted the collateral order doctrine, permitting the appeal of a narrow class of orders which address claims of right "separable from, and collateral to, rights asserted in the action, too important to be denied review and too independent of the cause [of action] itself to require that appellate consideration be deferred until the whole case is adjudicated." Id. at 546.
>
> This Court followed the United States Supreme Court in adopting a "practical rather than a technical construction" of what constitutes an appealable order, and so permitting immediate appellate review of certain collateral orders. See Pugar v. Greco, 483 Pa. 68, 73, 394 A.2d 542, 545 (Pa.1978) (quoting Cohen, supra).

Most importantly, nothing is lost. This Supreme Court has already decided that sovereign immunity is absolute; that is it cannot be waived. In re Upset Sale of Props. Etc., 560 A.2d 1388 (Pa.1989). The only real questions for this Supreme Court are:

- Why Family Court procrastinated so long in raising sovereign immunity; and

- How wide the floodgate of appeals will open if sovereign immunity challenges bypass the collateral order doctrine?

III. Arguments for Appellee

ISSUE: Should this Court review the Commonwealth Court's conclusion that an order denying summary judgment motion based on sovereign immunity does not satisfy the collateral order doctrine of Pennsylvania Rules of Appellate Procedure 313, which conflicts with statutory law and case law that this immunity is "immunity from suit" and presents a matter of first impression for this Court on a substantial legal and policy issue involving absolute immunities?

SUGGESTED ANSWER: No.

A. Family Court's belated sovereign immunity argument in the negligence lawsuit *sub judice* demonstrates this is not a "substantial legal and policy issue" justifying deviation from the collateral order doctrine.

1. Family Court's procrastination.

Pennsylvania Rules of Civil Procedure already provide a procedure for immediate objections based upon sovereign immunity. Whether termed sovereign immunity, absolute immunity, immunity from suit or any other permutation of immunity, Family Court chose not to file preliminary objections to Wanda Brooks' negligence lawsuit.

Preliminary objections based upon legal insufficiency, such as sovereign immunity, are available to a party such as Family Court. Renner v. Court of Common Pleas, 234 A.3d 411 (Pa. 2020); Sutton v. Bickell, 220 A.3d 1027 (Pa. 2019); Wurth v. Philadelphia, 584 A.2d 403 (Pa.Commw.1990); Adair v. First Judicial Dist. of Pa., 2012 Phila. Ct. Com. Pl. LEXIS 305. But Family Court opted

not to preliminarily object.

Our Commonwealth Court in Wurth reasoned:

> It is certainly possible -- and those cases which have sustained preliminary objections on the grounds of governmental immunity have borne this out -- that a complaint may be drawn against a governmental body setting forth a cause of action which does not fall within any of the exceptions to governmental immunity, and such is apparent on the face of the complaint. In such an instance, it is needless to prolong proceedings when the matter can be correctly and quickly decided on preliminary objections in the nature of a demurrer pursuant to Rule 1017(b)(4). This was the rationale and holding of Greenberg v. Aetna Ins. Co., 235 A.2d 576 (Pa.1967) which has never been overruled.

Likewise, a motion for judgment on the pleadings would have well-served Family Court's argument, just as the sovereign immunity defense was raised in Cagey v. Commonwealth, 179 A.3d 458 (Pa. 2018). Again, Family Court opted to proceed with litigation. Family Court fails to answer the most obvious question:

> If Family Court's sovereign immunity was so important a policy issue, why didn't it file appurtenant preliminary objections or a motion for judgment on the pleadings?

Now, despite having the opportunity over four years ago, Family Court claims its objection based upon sovereign immunity is too important a policy issue to wait until trial is concluded. Now, after over four years of litigation, Family Court claims its alleged sovereign immunity, based upon substantial policy grounds, warrants detouring from the well-entrenched collateral order and final judgment rules.

Keep in mind the appellate lawyers for Family Court have sat on the sidelines during pleadings, discovery and pretrial matters. The lawyer for co-defendant City of Philadelphia [4] has doubled as counsel for Family Court, that is until Family Court's summary judgment was denied.

Contrary to Family Court's arguments, it has expended no litigation time; spent no litigation costs. It has saved time and money by riding on the coattails of co-defendant City of Philadelphia's Deputy City Solicitor. Family Court and Amici Curiae reiterate irreparable harm governmental parties would suffer: expenditures of money and public resources[5] ; loss of monetary resources for "financially strapped" local governments and uncertain insurance coverage.[6]

Family Court's failures to file preliminary objections or a motion for judgment on the pleadings, or renew its request for interlocutory appellate review when the trial court ruled the summary judgment order was now "appropriate for intermediate appellate review" belie its argument of substantial legal and policy

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[4] see fn 1

[5] Brief of Appellant the Family Court; at 11.

[6] Brief of Amici Curiae County Commissioners Association of Pennsylvania, et al.; at 9, 15, 16. Oddly enough, one purpose of the exceptions to sovereign immunity was to **assist** the Commonwealth in determining the cost of insurance. The Legislative Journal of September 26, 1978 (pp. 994 - 996) (1a - 3a). The discussion centers on the types of categories of exceptions and how the Commonwealth would pay for claims against it.

import.

2. The exception to the collateral order doctrine is narrow.

As this Supreme Court ruled in Pridgen v. Parker Hannifin Corp., 905 A.2d 422 (Pa.2006):

> "In assessing importance for purposes of the collateral order doctrine, this Court looks for rights deeply rooted in public policy going beyond the litigation at hand, Geniviva v. Frisk, 725 A.2d 1209 (Pa.1999); Melvin v. Doe, 836 A.2d 42 (Pa. 2003), and measures any such interests against the public policy interests advanced by adherence to the final judgment rule."

And the interest of Wanda Brooks and every other litigant to have their case tried in whole, not piecemeal, not protracted, measures up to and surpasses Family Court's claimed interests. Family Court and Amici Curiae fail to view Family Court as it truly is in this case: an occupier / leasee of a public courthouse, with a contested defect, subject to the real estate exception of sovereign immunity.

Nothing is lost, or even at risk of loss, in this garden variety negligence case. Sovereign immunity, immunity from suit or absolute immunity can be revisited, reexamined and reevaluated after the jury returns its verdict; after there is a final judgment. And if a jury renders a defense verdict, this will all be moot.

Conversely, if sovereign immunity is deemed by this Supreme Court to be a substantial legal and policy issue, that is worthy of bypassing the collateral rule

doctrine, Pennsylvania appellate courts can expect the floodgate of sovereign immunity appeals to open wide. As a general rule, an appellate court's jurisdiction extends only to review of final orders. Pa.R.A.P. 341 states that an appeal may be taken as of right from any final order. Final orders are those which either (1) dispose of all claims and all parties, (2) are explicitly defined as final orders by statute, or (3) are certified as final orders by the trial court or other reviewing body.

Where an order satisfies Pa.R.A.P. 313's three-pronged test for collateral order status, a reviewing court may exercise appellate jurisdiction where the order is not final. If the test is not met, however, and in the absence of another exception to the final order rule, it has no jurisdiction to consider an appeal of such an order.

In Rae, supra., this Supreme Court ruled:

> "To buttress the final order rule, we, too, have concluded the collateral order doctrine is to be construed narrowly [7], and we require every one of its three prongs be "clearly present" before collateral appellate review is allowed. Melvin v. Doe, 836 A.2d 42 (Pa. 2003); Geniviva v. Frisk, 725 A.2d 1209 (Pa.1999). Parties may seek allowance of appeal from an interlocutory order by permission, and we have concluded that discretionary process would be undermined by an overly permissive interpretation of Rule 313's limited grant of collateral appeals as of right. Geniviva, 725 A.2d at 1214, n.5.

This Supreme Court continued in Rae, supra.:

> "We undertake our analysis cognizant that our precedent strongly cautions

[7] Contrary to this Supreme Court's own precedent, Family Court argues our Commonwealth Court went awry by looking at Rule 313 "too narrowly." Brief of Appellant the Family Court; at 14.

against permitting the collateral order doctrine to become an exception which swallows, in whole or in any substantial part, the final order rule."

3. Family Court remains protected.

In assessing importance for purposes of the collateral order doctrine, this Court looks for rights deeply rooted in public policy going beyond the litigation at hand, Geniviva v. Frisk, 725 A.2d 1209 (Pa.1999); Melvin v. Doe, 836 A.2d 42 (Pa. 2003), and measures any such interests against the public policy interests advanced by adherence to the final judgment rule. As this Supreme Court reasoned in Geniviva:

> "The United States Court of Appeals for the Third Circuit has recently explored the meaning of the "importance" factor of the collateral order doctrine in In re: Ford Motor Company, 110 F.3d 954, 958-62 (3d Cir. 1997). The court observed that in this context, importance "does not only refer to general jurisprudential importance. Rather . . . **an issue is important if the interests that would potentially go unprotected without immediate appellate review of that issue are significant relative to the efficiency interests sought to be advanced by the final judgment rule.**" Id. at 959. Surveying the various cases involving application of the collateral order doctrine, the court, invoking the "apples against oranges" simile, acknowledged that the balancing process involves a comparison of disparate interests. Essentially, however, the interests implicated in any given case must be considered against the costs of piecemeal litigation.

As Justice Mundy noted in dissent in Shearer v. Hafer, 177 A.3d 850 (Pa. 2018):

> The Majority Opinion goes on to emphasize that the right at issue in this case is not constitutionally derived, but the product of a rule. Id. at 14. This distinction should not be interpreted as being part of the above-quoted standard. Rule-based rights may well be significant relative to the final order rule and be deeply rooted in public policy. See Ben v. Schwartz, 556 Pa. 475, 729 A.2d 547, 552 (Pa. 1999) (recognizing issues pertaining to

> disclosure of privileged information as important for collateral order doctrine purposes); Spanier v. Freeh, 95 A.3d 342 (Pa. Super. 2014) (recognizing right to remove a case to federal court as important for collateral order doctrine purposes). **Contrastingly, constitutionally-derived rights, in certain contexts, may not meet the standard.** For example, suppression issues in criminal cases, often based on alleged violations of constitutional rights, are generally not deemed to extend beyond the particular facts of the case, or to overcome the policies underlying the final order doctrine. **It is not the source of the right but the effect an order denying that right may have on our system of justice and issues deeply rooted in public policy that matters.**

Similarly, in Ben v. Schwartz, 729 A.2d 547 (Pa.1999), this Supreme Court reasoned:

> "The overarching principle governing 'importance' is that, for the purposes of the Cohen [8] test, an issue is important if the interests that would potentially go unprotected without immediate appellate review of that issue are significant relative to the efficiency interests sought to be advanced by adherence to the final judgment rule."

Alas, in the appeal *sub judice*, the effect of the trial court's denial of summary judgment and the Commonwealth Court's finding that the third prong of the collateral order rule was not met, is neither fatal nor meaningful. Family Court remains protected by sovereign immunity. It complains only about *possibly* [9] spending money. Its sovereign immunity is already absolute.

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[8] In Cohen v. Beneficial Ind. Loan Corp., 337 U.S. 541, 69 S. Ct. 1221, 93 L. Ed. 1528 (1949), the United States Supreme Court crafted the collateral order doctrine, permitting the appeal of a narrow class of orders which address claims of right "separable from, and collateral to, rights asserted in the action, too important to be denied review and too independent of the cause [of action] itself to require that appellate consideration be deferred until the whole case is adjudicated."

[9] Brief of Appellant the Family Court; at 16; fn 7.

B. Family Court's (and Amici Curiae's) substantial legal and policy interest is all pecuniary, and speculation at best, while it forever retains its sovereign immunity.

1. It's all about money.

Family Court and Amici Curiae gripe about the cost of litigation and need to protect public officials. But in the case *sub judice,* Family Court expended nothing. Attorney Joshua Feissner acted in a dual role: counsel for both co-defendant City of Philadelphia and appellant Family Court. If anything, Family Court saved money during pleadings, discovery and pretrial motions.

As for public officials, no public official was sued in this case. Family Court and Amici Curiae aim to distract this Supreme Court with assertions that the Commonwealth Court undermines the sovereign immunity protections afforded to the Commonwealth and its officials. But that is not the case *sub judice.* No public or governmental official had to defend his/her actions. Even if a public official did have to defend his/her own actions, our Commonwealth Court in Hammond v. Thompson, 551 A.2d 667 (Commw.Ct.1988), made clear that a summary judgment denial premised on immunity does not qualify as an immediately appealable collateral order.

The case *sub judice* is a routine negligence action based upon defective real

estate: Family Court's own courthouse in Philadelphia. There is nothing so novel or of such great social import in this case. In fact, our legislature already provided an applicable exception to sovereign immunity; that is the real estate exception. 42 Pa.C.S. § 8522 (b)(4). Keep in mind that Family Court knew exactly what the claims were against it and what immunity exception applied. Family Court admitted it was a commonwealth entity. In her pleading, Wanda Brooks alleged:

> 4. Defendant, Family Court of the Court of Common Pleas the First Judicial District Court, is an entity of the Commonwealth of Pennsylvania organized and existing under the laws of the Commonwealth of Pennsylvania, with its principal place of business located at the above captioned address, and at all times material hereto, occupied, possessed, leased, maintained, controlled and operated the Family Court Building at 15th and Arch Streets, Philadelphia, and is subject to liability under the real estate exception to sovereign immunity, 85 Pa.C.S.A. §8522 (b).
> (R. 003a)

Family Court answered:

> 4. It is admitted that Answering Defendant is a Commonwealth entity. The remainder of the allegations contained in said paragraph of Plaintiff's Second Amended Complaint constitute conclusions of law to which no responsive pleading as required.
> (R. 009a)

Family Court outright exaggerates and prevaricates about the litigation costs and attorney time it seemingly incurred. Family Court claims "defending a straightforward personal injury case *may* involve tens of thousands of dollars in

discovery and trial costs."[10] In the case *sub judice*, Family Court saved money by riding the coattails of co-defendant City of Philadelphia's legal counsel.

Does the *possibility* of excessive litigation costs in one sovereign immunity case warrant breach of the collateral order doctrine for all sovereign immunity cases? Does the chance that a commonwealth[11] party *may* have to spend money to defend a negligence suit justify bypassing the final judgment rule?

2. Sovereign Immunity is already absolute.

Remember that a sovereign immunity defense cannot be waived. The defense of governmental immunity is an absolute defense and is not waive-able, nor is it subject to any procedural device that could render a governmental agency liable beyond the exceptions granted by the legislature. In re Upset Sale of Props. Etc., supra.

There is no appeal as of right in the case of a denial of a motion for summary judgment. Pa. Tpk. Comm 'n v. Jellig, 563 A.2d 202 (Pa.Cmwlth.

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[10] Brief of Appellant the Family Court; at 16; fn 7.

[11] Contrary to Amici Curiae's interests of financially strapped "local governments," (Brief of Amici Curiae; at 15) the case *sub judice* focuses squarely on governmental immunity afforded to the Commonwealth, not immunity for local political subdivisions.

1989), *affd sub nom.* Jellig v. Kiernan, 620 A.2d 481 (Pa. 1993). Where a defendant's summary judgment motion premised upon sovereign immunity was denied, the defendant's appeal was procedurally improper because: the appeal was interlocutory; it was not an appeal from a final order; and it did not constitute a collateral issue. Gwiszcz v. City of Philadelphia, 550 A.2d 880 (Commw.Ct.1988). An immunity defense does not, in and of itself, entitle a litigant to appellate review of an interlocutory order. Id.; Hammond v. Thompson, 551 A.2d 667 (Commw.Ct.1988).

Our legislature provided for exceptions to sovereign immunity by enacting 42 Pa.C.S. §§ 8521, 8522. Our legislature then specifically provided defenses for officials, the judiciary, and others. 42 Pa.C.S. § 8524. Not only is sovereign immunity preserved, so are the defenses to the Commonwealth's individuals acting in their official capacity.

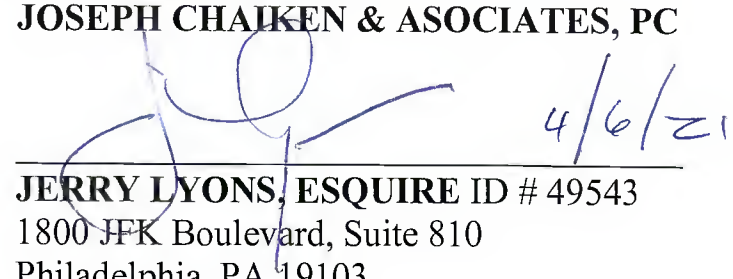
IV. Conclusion

Throughout the litigation of the underlying case, Family Court has not acted like it involved any substantial legal or policy issue. Family Court missed its first bite of the apple when it opted not to file preliminary objections to Wanda Brooks' pleading. It missed the second bite of the apple when it neglected to file a motion for judgment on the pleadings. Family Court finally took the third bite by filing, albeit at the last possible moment before trial, its summary judgment motion. As Family Court itself did not treat this sovereign immunity issue as significantly critical, there is no reason why this Honorable Supreme Court should do so now.

We all spend money to go to court: individuals; corporations; and municipal and commonwealth entities. Spending money is not unique to Family Court. Our legislature created exceptions to sovereign immunity, and afforded defenses to those people acting in their official capacity. Family Court relinquishes nothing by waiting for a final judgment. It retains its sovereign immunity and defenses.

WHEREFORE, Wanda Brooks respectfully requests this Honorable Supreme Court affirm the July 9, 2020, Order of Commonwealth Court.

Respectfully submitted,
JOSEPH CHAIKEN & ASOCIATES, PC



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the City of Philadelphia and Family Court	:	
of the Court Of Common Pleas	:	
of the First Judicial District	:	

CERTIFICATE OF COMPLIANCE

I certify that this filing complies with the provisions of the Case Records Public Access Policy of the Unified Judicial System of Pennsylvania that require filing confidential information and documents differently than non-confidential information and documents.

Respectfully submitted,
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4/6/21

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the City of Philadelphia and Family Court	:	
of the Court Of Common Pleas	:	
of the First Judicial District	:	

CERTIFICATE OF SERVICE

I, Jerry Lyons, Esquire, counsel for Wanda Brooks, certify that on 4/6/21 I served a copy of Brief for Appellee Wanda Brooks, on counsel of record and the court listed below, *via* e-mail or US Mail, first class, as follows:

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APPENDIX

BILL ON THIRD CONSIDERATION REVERTED TO PRIOR PRINTER'S NUMBER AND FINAL PASSAGE

HB 2437 (Pr. No. 3791) — Considered the third time,

On the question,
Will the Senate agree to the bill on third consideration?

MOTION TO REVERT TO PRIOR PRINTER'S NUMBER

Senator SCANLON. Mr. President, I move that House Bill No. 2437 revert to the form it was in under Printer's No. 3664.

On the question,
Will the Senate agree to the motion?

Senator HAGER. Mr. President, I would urge that the Senate revert to the prior printer's number.

And the question recurring,
Will the Senate agree to the motion?
The motion was agreed to.

The PRESIDENT. The Senate now has before it House Bill No. 2437, Printer's No. 3664.

On the question,
Will the Senate agree to the bill on third consideration?
It was agreed to.

On the question,
Shall the bill pass finally?

Senator HAGER. Mr. President, I recognize the urgency which moves us to pass this bill in its present form. I think we are making some serious errors in doing so, however. I realize there is unsubstantial support for the amendments which we were to offer which were taken from a bill prepared with a lot of effort by the staff of the Minority. Just so everyone understands the kind of problems we foresee because the passage of this bill will, I feel, create some serious problems, I believe the Members of the Senate should know that New York State presently has $6.5 billion in their budget to take care of lawsuits against the State. This one item is larger than our entire State budget for one year. This money is there for claims of the nature which will be available against this Commonwealth when this bill, which we are considering, becomes law. There are already, in two months, between $30 million and $50 million in lawsuits which have been filed against the Commonwealth of Pennsylvania and they continue apace.

There have been eight categories of suits in this bill which will be allowed. Boy, have we got some dumb ones. For instance, under this bill an habitual drunkard, intoxicated as a result of liquor sold him by a State store employee, could recover for injuries incurred while stumbling out of the State store, but a person suffering serious injury in the store, from exploding bottles or other products liability in the store, could have no right of recovery against the State.

A person could recover for a broken shock absorber resulting from hitting a shovel carelessly left out by a repair crew, but the next motorist who swerves to avoid the first motorist and hits a pothole and suffers permanent disfigurement from a fiery wreck which ensues, could only recover if he had the foresight to notify the Department of Transportation that the pothole existed and allowed them time to fill the pothole before he hit it. They go on. There are all kinds of strange examples created by the law which we are passing tonight in a hurried fashion. As a matter of fact, Bill Nast himself, who, for the Joint State Government Commission, put this thing together says that he cannot justify the eight categories and cannot justify leaving others out.

We offered the possibility to this Senate to pass legislation which says immediately there is no way you could execute against the Commonwealth for past suits which have already been filed in the interim. We think that is the way to handle it. The second thing we did was say that until the people of this State have some idea about the cost, this change of getting rid of sovereign immunity or allowing eight randomly-selected categories while not taking others, which will be created for this State is to block the execution of any judgments against this State.

The bill before us does not do that. The bill attempts to retrospectively pass a law outlawing some of those claims except for those which fall into those eight categories. It is pretty obvious from court decisions already before us that the Supreme Court of Pennsylvania is going to throw that out too and we will end up with all of those lawsuits, not just the eight categories, but the others.

The reason I mention that is that there already is a court decision where the court has explicitly stated that a cause of action is a vested right and cannot be extinguished by action of the General Assembly. Therefore, all of those actions—if I can get the attention of the gentleman from Philadelphia, Senator McKinney—which have already been filed, even though we attempt to extinguish them by this bill, it will just not work. The court has already told us that. It is already there in much decisional law.

What we tried to do but could not get any consideration of because of the magic words "Joint State Government Commission" was: Let us hold everything in abeyance—and we could have done it legally, we have the authority for it—and offer the people of this Commonwealth a referendum to say, shall the taxes of this State be increased to cover any or all categories of suits which may be brought by the taxpayers of this State against the Commonwealth.

Now, for some reason or other, the judgment is, no, we should not do that. We should just plunge merrily ahead having absolutely no idea how much money we should budget for this. Mr. President, may I suggest that there is no way we can produce a budget for next year which comes anywhere close to reality except by guess and by God. But, so be it.

I intend to vote for this bill because it is all I have. I have no other opportunities. I think we make very bad law and we make it in haste no matter how wonderful the name Joint State Government Commission.

Senator O'PAKE. Mr. President, the hour is late and I do not want to respond point by point to the observations of the gentleman from Lycoming, Senator Hager. I would like to point out a few things.

Number one, I am not sure I understood him correctly but if I

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did, I am astounded to hear the Minority Leader suggest that we should let the citizens of the Commonwealth file suit against the Commonwealth, proceed to judgment and then make that judgment a worthless piece of paper and tell them that we are not going to pay the judgment. That, to me, is incredible. I wonder whether that would hold up in a court of law.

But back to the bill itself, Mr. President, I am not the author of this bill and, frankly, I have some problems with some sections which have been written into the law. However, I am under the impression that the Governor is prepared, when he signs this, to clarify the section which really bothers me. That is the section which governs retroactivity and prospective and what causes of action are barred, namely Section 5. I would like to point out that the Joint State Government Commission, as most of these commissions do, discussed this, considered it very thoroughly, compromised and arrived at eight areas of the law which cover, I would say, ninety-five to ninety-seven per cent of the kinds of causes of action that you could bring against the Commonwealth for negligence of its employees. The Commission decided that those eight categories would be the categories where the Commonwealth would waive its sovereign immunity and permit the citizens of Pennsylvania, who were wronged by the negligence of a Commonwealth employee, to sue and recover. This proposes to require those kinds of suits to be filed but to suspend any action on those until the next fiscal year, namely, July 1, 1979. The reason for that is fairly obvious. We want to give our Department of Justice time to gear up for the onslaught of suits. Parenthetically, I believe it is unfair to compare the financial impact on New York State with Pennsylvania because we have isolated eight categories and we should not compare this law with New York's law, which is entirely different.

Hopefully, by next July the various actuarial and insurance experts will be able to determine what the cost of insurance is to the Commonwealth to those agencies which are not insured and then tell us the fiscal impact of the bill. We need this now, however, because the Department of Justice needs some guidelines to govern them for the next eight months and give them the opportunity to phase into this rather than have it thrust upon them immediately.

This bill, as all bills, is not perfect but it is very badly needed. I was not on the Joint State Government Commission Task Force and I do not know the policy pros and cons that caused that task force to reach these eight categories. Three Members of the Minority were on that task force and three of the Majority and I am sure they can speak to that issue better than I.

Mr. President, I urge this Senate, here and now, to pass this bill, as the House did, with all the compromises, with possible defects which, if they are found to be real, can be corrected and get it to the Governor now.

Senator HAGER. Mr. President, just a few comments on the remarks of the gentleman from Berks, Senator O'Pake.

The gentleman says it is unfair to compare Pennsylvania to New York but in the breath before that, he said that the eight categories which we are opening cover ninety-five to ninety-seven per cent of all the possible ways in which the State could be sued, so I guess it is unfair to compare it. If you think about ninety-five to ninety-seven per cent of $6.5 billion in claims I believe the comparison becomes fairly real.

It is true that we already do allow some suits in this State and there is insurance for it. The State pays quite a bit of money in insurance premiums.

Mr. President, we are talking about opening—Pandora's Box is not the word, gentlemen and lady, not the word at all.

I would also like to comment on his suggestion that what I have said is unconscionable that we would say these claims cannot be paid. People would get the idea pretty soon and stop filing suits? How is that unconscionable compared to what the gentleman wants us to do? He wants us to go ahead and let them get the claims and then, retroactively, wipe them out. I do not see how there is a whole lot of difference between those two positions.

There is one example I forgot which I really should mention. For example, if a woman is raped by a mental patient who escaped through the negligence of a Commonwealth employee, she could not recover. However, that same person if bitten by a laboratory animal of the State, could.

Senator JUBELIRER. Mr. President, contrary to what the gentleman from Lycoming, Senator Hager, said, I do not believe this bill was acted upon in haste. I served on that task force, Mr. President, the task force on sovereign immunity for two years. A great deal of testimony was taken from experts all over Pennsylvania and from without the State; from judges and from those who are knowledgeable on the subject of sovereign immunity.

Mr. President, I do believe we have come up with a piece of legislation that may not be perfect, indeed, but it is a beginning. I believe when the Pennsylvania Supreme Court abolished the doctrine of sovereign immunity certainly, the timing of this task force could not have been better, perhaps only a few months earlier.

I do believe this is a piece of legislation that is urgent for us to pass or, as the gentleman from Lycoming, Senator Hager, said, it leaves us with nothing.

I would also like to point out, Mr. President, that in the past, when we had the doctrine of sovereign immunity, the Commonwealth of Pennsylvania did indeed purchase insurance for its employees because of the fact that, when you could not sue the State, you sued the employees and in order to protect the employees, insurance was purchased. I realize that the protection the employees enjoyed was not, perhaps, the same thing that the Commonwealth will have. But this bill does place a cap on the amount any one individual can recover, as we reverted to the prior printer's number, in the amount of $250,000 per person or maximum of $1 million per accident.

I do not believe we can really rate how we will compare with the State of New York at this time and I do not believe it will be quite the chaotic situation the Minority Leader refers to. I think the bill is the best we can do, thought out over two years' time and, if we need to make changes in the future we can do it at that time.

Mr. President, I believe it is essential that we pass this bill tonight.

And the question recurring,

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Shall the bill pass finally?

The yeas and nays were taken agreeably to the provisions of the Constitution and were as follows, viz:

YEAS—49

Andrews,	Hankins,	McCormack,	Ross,
Arlene,	Hess,	McKinney,	Scanlon,
Bell,	Holl,	Mellow,	Schaefer,
Coppersmith,	Hopper,	Messinger,	Smith,
Corman,	Howard,	Moore,	Snyder,
Dougherty,	Jubelirer,	Murray,	Stapleton,
Duffield,	Kelley,	Nolan,	Stauffer,
Dwyer,	Kury,	Noszka,	Stout,
Early,	Kusse,	O'Pake,	Sweeney,
Fumo,	Lewis,	Orlando,	Tilghman,
Gekas,	Lynch,	Reibman,	Wood,
Gurzenda,	Manbeck,	Romanelli,	Zemprelli,
Hager,			

NAYS—0

A constitutional majority of all the Senators having voted "aye," the question was determined in the affirmative.

Ordered, That the Clerk return said bill to the House of Representatives with information that the Senate has passed the same without amendments.

BILL ON THIRD CONSIDERATION AND FINAL PASSAGE

HB 2586 (Pr. No. 3827) — Considered the third time and agreed to,

And the amendments made thereto having been printed as required by the Constitution,

On the question,

Shall the bill pass finally?

The yeas and nays were taken agreeably to the provisions of the Constitution and were as follows, viz:

YEAS—49

Andrews,	Hankins,	McCormack,	Ross,
Arlene,	Hess,	McKinney,	Scanlon,
Bell,	Holl,	Mellow,	Schaefer,
Coppersmith,	Hopper,	Messinger,	Smith,
Corman,	Howard,	Moore,	Snyder,
Dougherty,	Jubelirer,	Murray,	Stapleton,
Duffield,	Kelley,	Nolan,	Stauffer,
Dwyer,	Kury,	Noszka,	Stout,
Early,	Kusse,	O'Pake,	Sweeney,
Fumo,	Lewis,	Orlando,	Tilghman,
Gekas,	Lynch,	Reibman,	Wood,
Gurzenda,	Manbeck,	Romanelli,	Zemprelli,
Hager,			

NAYS—0

A constitutional majority of all the Senators having voted "aye," the question was determined in the affirmative.

Ordered, That the Clerk return said bill to the House of Representatives with information that the Senate has passed the same with amendments in which concurrence of the House is requested.

REPORT FROM COMMITTEE ON RULES AND EXECUTIVE NOMINATIONS

Senator ROSS, by unanimous consent, from the Committee on Rules and Executive Nominations, reported the following nominations, made by His Excellency, the Governor, which were read by the Clerk as follows:

JUDGE, MUNICIPAL COURT OF PHILADELPHIA

September 6, 1978.

To the Honorable, the Senate of the Commonwealth of Pennsylvania:

In conformity with law, I have the honor hereby to nominate for the advice and consent of the Senate Stanley W. Bluestine, Esquire, 110 Beth Drive, Philadelphia 19115, Philadelphia County, Sixth Senatorial District, for appointment as Judge, Municipal Court in and for the City of Philadelphia, First Judicial District of Pennsylvania, to serve until the first Monday of January, 1980, vice Honorable Maxwell L. Ominsky, Mandatory retirement.

MILTON J. SHAPP.

MEMBER OF THE COMMONWEALTH OF PENNSYLVANIA COUNCIL ON THE ARTS

September 7, 1978.

To the Honorable, the Senate of the Commonwealth of Pennsylvania:

In conformity with law, I have the honor hereby to nominate for the advice and consent of the Senate the following for appointment as a member of the Commonwealth of Pennsylvania Council on the Arts:

Ms. Sandra Featherman, 2100 Spruce Street, Philadelphia 19103, Philadelphia County, Second Senatorial District, to serve until July 1, 1981, and until her successor has been appointed and qualified, vice Mrs. Stella Moore, Philadelphia, whose term expired.

MILTON J. SHAPP.

MEMBER OF THE BOARD OF TRUSTEES OF CALIFORNIA STATE COLLEGE

June 13, 1978.

To the Honorable, the Senate of the Commonwealth of Pennsylvania:

In conformity with law, I have the honor hereby to nominate for the advice and consent of the Senate Miss Kimberly Jean Lama, R. D. 1, Box 264, Fayette City 15438, Fayette County, Thirty-second Senatorial District, for appointment as a student member of the Board of Trustees of California State College, to serve for a term of three years, or for so long as she is a full-time undergraduate student in attendance at the college, whichever period is shorter, vice Ronald D. Galloway, Pittsburgh, whose term expired.

MILTON J. SHAPP.

MEMBER OF THE BOARD OF TRUSTEES OF CLARION STATE COLLEGE

August 24, 1978.

To the Honorable, the Senate of the Commonwealth of Pennsylvania:

In conformity with law, I have the honor hereby to nominate for the advice and consent of the Senate Steven Craig Moore, 222 North Penn Street, Palmyra 17078, Lebanon County, Forty-eighth Senatorial District, for appointment as a student member of the Board of Trustees of Clarion State College, to serve for three years or for so long as he is a full-time undergraduate student in attendance at the college, whichever period is shorter, vice Leonard K. Bashline, Clarion, whose term expired.

MILTON J. SHAPP.

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