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IN THE
SUPREME COURT OF PENNSYLVANIA

No. 4 EAP 2021

Wanda Brooks
Appellee

v.

**Ewing Cole, Inc., d/b/a Ewing Cole,
and the City of Philadelphia, and the Family Court
of the Court of Common Pleas of the First Judicial District**

**Appeal of the Family Court
of the Court of Common Pleas of the First Judicial District**

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

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Statement of Jurisdiction

This Court has jurisdiction under 42 Pa.C.S.A. § 724(a). On January 11, 2021, the Court granted Appellant's Petition for Allowance of Appeal on the following issue:

> Should this Court review the Commonwealth Court's conclusion that an order denying a 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?

Brooks v. Ewing Cole, Inc., 243 A.3d 970, 971 (Pa. 2021).

Text of Order in Question

> AND NOW, this 9th day of July, 2020, the notice of appeal filed by the Family Court of the Court of Common Pleas of the First Judicial District Court (Family Court) from the June 4, 2018 order of the Court of Common Pleas of Philadelphia County (trial court), is hereby stricken. The Family Court's notice of appeal from the trial court's July 3, 2018 order denying the Family Court's motion for summary judgment is hereby quashed.

(Commonwealth Ct. Order, July 9, 2020.)[1]

[1] The Commonwealth Court's Order is published in table format at 238 A.3d 535. The Order is reported electronically at 2020 WL 3866647 (unpublished opinion).

Standard and Scope of Review

Whether an order is appealable under Pa.R.A.P. 313 is a question of law. *Rae v. Pennsylvania Funeral Directors Ass'n*, 977 A.2d 1121, 1126 (Pa. 2009). This Court's standard of review is *de novo*, and the scope of review is plenary. *Id.*

Question Presented for Review

Did the Commonwealth Court err in concluding that an order denying summary judgment based on sovereign immunity does not satisfy the collateral order doctrine of Pennsylvania Rule of Appellate Procedure 313, which conflicts with statutory law and case law that sovereign immunity is "immunity from suit" that is irreparably lost if review is delayed until after a final judgment?

Answer: Yes.

Statement of the Case

Facts and procedural history.

This negligence action arises from Appellee Wanda Brooks' injuries that she allegedly sustained when she walked into a glass wall at the Family Court Building in Philadelphia in January 2015. (Second Amended Complaint ¶ 7, R. 3a.)

Trial court proceedings.

In December 2016, Appellee sued the Family Court of the Court of Common Pleas of the First Judicial District Court ("Family Court"), Ewing Cole, Inc., and the City of Philadelphia in the Court of Common Pleas of Philadelphia. As it pertains to Family Court, Appellee claims that it was negligent for allowing a dangerous condition to exist in the Family Court Building. (Second Amended Complaint ¶ 8, R. 4a.)

After discovery, Family Court filed a Motion for Summary Judgment. Family Court argued that as an entity of the Unified Judicial System, it is entitled to sovereign immunity under 1 Pa.C.S.A. § 2310 from the negligence claim based on the Commonwealth Court's decision in *Russo v. Allegheny Co*, 125 A.3d 113 (Pa. Cmwlth. 2015)(holding that, as a matter of law, courts of the Unified Judicial

System retain sovereign immunity from tort claims and the limited exceptions to immunity in the Sovereign Immunity Act do not apply to the Judiciary), *aff'd*, 150 A.3d 16 (Pa. 2016).

By Order of June 4, 2018, the trial court denied Family Court's summary judgment motion. (R. 15a.) The court then granted Family Court's motion for reconsideration, but again denied summary judgment by Order of July 3, 2018. (R. 16a.) The trial court also denied Family Court's request to certify the Order for interlocutory appeal by permission due to the other two defendants' presence in the case. (R. 16a.)[2]

In its November 6, 2018, Rule 1925(a) Opinion supporting its July 3rd Order, the trial court (per Rau, J.) declined to follow the Commonwealth Court's binding decision in *Russo*. Instead, despite that *Russo* is binding precedent, it held that *Russo* was wrongly decided and that the exceptions in the Sovereign Immunity Act apply to the courts, contrary to the Commonwealth Court's holding. (Trial Ct. Op. at 4-8.)

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[2] Appellee eventually discontinued her claims against Defendant Ewing Cole, Inc., in August 2018. Thus, the trial court stated in its Opinion that its order denying summary judgment was now "appropriate for intermediate review." (Trial Ct. Op. at 2 n.2.) The trial court did not amend its order to allow for interlocutory appeal, however.

Thus, the court concluded that Appellee's claim comes within the real estate exception to immunity. (Trial Ct. Op. at 4.)

Commonwealth Court.

On July 5, 2018, Family Court filed a Notice of Appeal and an Emergency Application for Stay in the Commonwealth Court to stay the trial court proceedings while the appeal was pending. The Commonwealth Court granted the Emergency Application and directed the parties to address in their principal briefs whether the trial court's July 3 Order was appealable. (R. 17a.)

By Order and Memorandum dated July 9, 2020, a three-judge panel held that the trial court's July 3, 2018, Order denying Family Court's Motion for Summary Judgment is not an appealable order pursuant to Pa.R.A.P. 313, and thus quashed Family Court's appeal without reaching the merits of the sovereign immunity argument.

In its Memorandum, the Commonwealth Court examined the three elements of the collateral order doctrine under Rule 313. It held that the first element – whether the summary judge order is separable from and collateral to the main cause of action – is satisfied because the legal question of whether Family Court is a "Commonwealth party" and

retains sovereign immunity is independent of the negligence claim. (Commonwealth Ct. Memo. at 9-11.)[3]

Next, the Court held that the second element – is the right involved too important to be denied review – is also satisfied. The Court held that the immunity question "implicates public policy concerns that extend beyond the parties to the instant litigation, as its resolution will dictate whether a member of the general public may maintain a negligence action against the courts." (Commonwealth Ct. Memo. at 11-13.)

Finally, the Court examined the third element: whether the claim would be irreparably lost if appellate review were postponed until there is a final judgment. It rejected Family Court's argument that having to expend time and public money to defend the suit would cause an irreparable loss that could not be recouped. The Court held that because the immunity issue can be raised after final judgment, there is no "irreparable loss" under Rule 313. (Commonwealth Ct. Memo. at 14-16.)

Thus, the Court quashed the appeal without reaching the merits of Family Court's sovereign immunity argument.

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[3] Reported electronically at 2020 WL 3866647.

Summary of Argument

Sovereign immunity is immunity from suit. The General Assembly is clear: the Commonwealth and its officials and employees "enjoy sovereign immunity and official immunity and remain immune from suit[.]" 1 Pa.C.S.A. § 2310. This Court holds that absolute immunities, such as sovereign immunity, are designed to protect officials "from the suit itself" and to prevent the official from the "expense, publicity, and danger of defending" their good faith actions before a jury. Further, immunity from suit protects the public fisc by avoiding litigation's costs.

Under the Commonwealth Court's holding, however, an adverse decision on sovereign or other absolute immunities cannot be reviewed until after trial and judgment. Thus, contrary to the General Assembly's directive and this Court's holdings, "immunity from suit" would not exist: an official or entity has to defend their public actions and go through the expense and time of discovery and trial.

The Commonwealth Court's decision conflicts with decisions from this Court and the Superior Court that immunities from suit are irreparably lost if appellate review must wait until after final judgment.

Argument

The Commonwealth Court erred in holding that sovereign immunity is not irreparably lost because it can be raised after trial, which contradicts Section 2310's plain language and undermines sovereign immunity's purpose of protecting the Commonwealth and its officials from suit, not just damages.

The General Assembly declares that sovereign immunity is immunity "from suit," not only judgment or damages. Over 60 years ago, this Court recognized that absolute immunity's purpose is to bar not just damages, but suit:

> [A]bsolute immunity is designed to protect the official from the suit itself, from the expense, publicity, and danger of defending the good faith of his public actions before a jury.

Montgomery v. City of Philadelphia, 140 A.2d 100, 103 (Pa. 1958).[4] The importance in protecting public officials from having to defend their actions in a lawsuit has "a deeper purpose, the protection of society's interest in the unfettered discharge of public business and in full public knowledge of the facts and conduct of such business." *Id.*

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[4] Sovereign immunity under 1 Pa.C.S.A. § 2310 is absolute. *Stackhouse v. Pennsylvania State Police*, 892 A.2d 54, 62 (Pa. Cmwlth. 2006), *alloc. denied*, 903 A.2d 539 (Pa. 2006). The *Montgomery* court addressed high public official immunity, which is also absolute.

The General Assembly has also confirmed this purpose by the plain language in Section 2310: the Commonwealth and its officials and employees "enjoy sovereign immunity and official immunity and remain immune from suit[.]" 1 Pa.C.S.A. § 2310. The statute is unambiguous: the sovereign is immune from suit, not only damages.[5]

The Commonwealth Court's ruling in this case undermines these purposes and runs counter to both Section 2310 and case law, which makes clear that immunity from suit means just that – immunity from suit. This immunity is irreparably lost if public officials and entities have to engage in litigation, including discovery and trial. The public official – who is to be protected from the "expense, publicity, and danger" of defending their actions in good faith – will nonetheless have to do so. Moreover, the government will have to spend public resources and time to defend a lawsuit for which it is immune as a matter of law.

Moreover, the Commonwealth Court's decision extends beyond Section 2310 immunity to other absolute immunities, such as judicial

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[5] Section 2310 arises out of Article I, Section 11 of the Pennsylvania Constitution, which provides in part that "[s]uits may be brought against the Commonwealth in such manner, in such courts and in such cases as the Legislature may by law direct." Pa. Const. Art. I, § 11.

immunity. Thus, for example, an order denying judicial immunity would require judicial officers sued for their judicial actions to engage in discovery and litigate a case before they could obtain appellate review.

Rule of Appellate Procedure 313.

The Rules of Appellate Procedure allow a party to appeal an interlocutory order as of right when:

1) the right is separable from and collateral to the main cause of action;

2) the right is too important to be denied review; and

3) the question presented is such that if review is postponed until final judgment in the case, the claimed right will be irreparably lost.

Pa.R.A.P. 313(b).

The immunity issue is separable and collateral to the main cause of action.

The Commonwealth Court correctly held that the issue of whether Family Court is a "Commonwealth party" and has sovereign immunity is separable and collateral from the main cause of action. This Court employs a "practical analysis" for this issue – recognizing that "some potential interrelationship between merits issues and the question

sought to be raised in the interlocutory appeal is tolerable." *Pridgen v. Parker Hannifin Corp.*, 905 A.2d 422, 433 (Pa. 2006).

Here, the straightforward legal question about whether Family Court is a Commonwealth party for sovereign immunity purposes is not related to Appellee's personal injury cause of action, which involves separate factual determinations and issues. Instead, the immunity question addresses whether Family Court has an absolute defense, regardless of whether the elements of negligence alleged are proven. *See Yorty v. PJM Interconnection*, 79 A.3d 655, 662 (Pa. Super. 2013).

Sovereign immunity is too important to be denied review.

Next, the Commonwealth Court held correctly that the sovereign immunity issue is too important to be denied review. This prong addresses whether the issue involves "rights deeply rooted in public policy going beyond the particular litigation at hand." *Commonwealth v. Williams*, 86 A.3d 771, 782 (Pa. 2014). An issue is important if the "interests that would go unprotected without immediate appeal are significant relative to the efficiency interests served by the final order rule." *Id.*

Here, the Commonwealth Court properly held that the immunity question "implicates public policy concerns that extend beyond the parties to the instant litigation, as its resolution will dictate whether a member of the general public may maintain a negligence action against the courts." (Commonwealth Ct. Memo. at 11-13.)

Moreover, as this Court is aware, sovereign immunity applies to not only the Judiciary, but the Executive and Legislative branches, too.[6] The immunity issue involves questions related to whether government officials must defend their actions and when, as well as vital issues related to public funds and expenditures. Thus, this prong is met.

Immunity from suit will be irreparably lost if the immunity cannot be reviewed until after a trial is held and judgment entered.

Where the Commonwealth Court went awry is by looking at the irreparably lost prong of Rule 313 too narrowly. Instead of applying the plain language of Section 2310 and recognizing the purposes behind immunity, the court focused on whether the defense can still be raised

[6] Other absolute immunities and privileges are also impacted here, such as high public official, judicial, and quasi-judicial immunities, which provide "immunity from suit." *See Montgomery*, 140 A.2d at 103; *Guarrasi v. Scott*, 25 A.3d 394, 405 n.11 (Pa. Cmwlth. 2011).

on appeal after trial and judgment. (Commonwealth Ct. Memo. at 14-16.)

The proper question is not whether the defense can be raised after trial, however. It is whether absolute sovereign immunity's protections – the protection of immunity from suit – are irreparably lost if the Commonwealth and its officials are forced to go through discovery, trial, and judgment. The answer is yes.

In addition to the interests this Court laid out in *Montgomery*, sovereign immunity protects the public's fiscal interests: "the constitutionally-grounded, statutory doctrine of sovereign immunity" serves not only to protect "government policymaking prerogatives" but also "the public fisc." *Scientific Games Int'l, Inc. v. Commonwealth*, 66 A.3d 740, 755 (Pa. 2013); *see also Frazier v. W.C.A.B. (Bayada Nurses, Inc.)*, 52 A.3d 241, 249 (Pa. 2012)(stating that "a primary purpose of sovereign immunity [is] protection of the public fisc"). Under the Commonwealth Court's holding here, however, Commonwealth officials and entities would have to engage in discovery, prepare for trial, and

try a case – all of which require expenditures of taxpayer money, even though they may ultimately be immune.[7]

The irreparable loss of litigation costs is not a novel issue. Indeed, this Court held that litigation costs impose an irreparable loss in a case involving an immunity defense under the federal General Aviation Revitalization Act of 1994. In *Pridgen*, the Court held that a defendant suffers an irreparable loss under Rule 313(b) when it has to incur a "substantial cost" in defending a complex trial. 905 A.2d at 433. There, the defendant sought a collateral order appeal from a denial of summary judgment. The Court balanced the interest in avoiding piecemeal appellate review against Congress' interest in not exposing aviation manufacturers to both damages and the costs of litigation. *Id.* The Court concluded that defending the suit at trial "comprises a sufficient loss to support allowing interlocutory appellate review as of right." *Id.*

[7] As this Court is aware, defending even a straightforward personal injury case may involve tens of thousands of dollars in discovery and trial costs, including deposition fees, expert fees, and other litigation expenses.

In *Pridgen*, the irreparable injury was the cost to a private entity in defending at trial. Here, not only is there irreparable injury to the public fisc, but also present is the additional public policy concern in protecting public officials and entities from defending their actions in litigation, as well as "society's interest in the unfettered discharge of public business[.]" *Montgomery*, 140 A.2d at 103. This defense is vitiated once an official or entity has to defend their actions in a suit.

The Superior Court in *Yorty* relied upon *Pridgen* in holding that immunity under a Federal Energy Regulatory Commission tariff satisfied all three prongs of Rule 313. Notably, the court held that the immunity furthered Congress's objective in controlling electricity costs by limiting exposure to lawsuits, and that having to defend the negligence action would result in an irreparable loss. *Yorty*, 79 A.3d at 662.

The Superior Court in a statute of repose case also recognized that immunity from suit is irreparably lost if it can be raised only after judgment. It held that because a statute of repose is "immunity from suit, not just immunity from liability," the "substantial costs" in trying the case would be "irreparably lost if review were postponed until final

judgment." *Osborne v. Lewis*, 59 A.3d 1109, 1111 (Pa. Super. 2012), *alloc. denied*, 59 A.2d 1109 (Pa. 2013). Accordingly, an order denying a defendant's summary judgment motion based on the statute of repose satisfied all of Rule of Appellate Procedure 313(b)'s elements and was immediately appealable. *See also Richner v. McCance*, 13 A.3d 950, 957 (Pa. Super. 2011)(holding that an interlocutory order denying a *lis pendens* preliminary objection satisfied Rule 313(b) because immediate review would protect judicial efficiency, save the parties from duplicative litigation, and maintain consistency of results).

In this case, the Commonwealth Court correctly relied on *Pridgen* and *Yorty* in holding that the sovereign immunity issue is separable and distinct from the negligence issue. (Commonwealth Ct. Memo. at 9-11.) Inexplicably, however, the Court did not cite to these cases in its analysis of the irreparable loss element of Rule 313. Nor did it cite to this Court's and the Superior Court's cases holding that immunity from suit is irreparably lost if a defendant has to litigate a suit.

Instead, the Commonwealth Court relied on its own, distinguishable cases while skipping over the numerous cases in which it stated that absolute immunities are immunity from suit. In other

cases, the Commonwealth Court has consistently and accurately stated that the "purpose of absolute immunity is to foreclose the possibility of suit." *Osiris Enterprises v. Borough of Whitehall*, 877 A.2d 560, 566 (Pa. Cmwlth. 2005)(high public official immunity), *alloc. denied*, 877 A.2d 560 (Pa. 2006); s*ee Chasan v. Platt*, No. 47 C.D. 2020, 2020 WL 7329944, at *7 (Pa. Cmwlth. Dec. 14, 2020)(stating that absolute judicial immunity is "immunity from suit"), *petition for allowance of appeal pending*, 55 EAL 2021; *Guarrasi*, 25 A.3d at 405 (judicial immunity is "immunity from suit"); *Stackhouse*, 892 A.2d at 62 ("The purpose of absolute sovereign immunity [is] to insulate state agencies and employees not only from judgments but also from being required to expend the time and funds necessary to defend suits.")

Instead of relying on these acknowledgements, however, the court cited to its decision in *Sylvan Heights Realty Partners, L.L.C. v. LaGrotta*, 940 A.2d 585 (Pa. Cmwlth. 2008). But in *Sylvan Heights*, Rule 313(b)'s first prong was not met: the court concluded that a factual dispute about whether a legislator's actions where within the legislative sphere meant that the issue was not severable and collateral. Here, the separable and collateral prong is not at issue: no factual disputes

underlying Family Court's claim to immunity are left to be resolved. The *Sylvan Heights* court addressed the irreparably lost requirement in dicta only, stating that the legislative immunity defense was not irreparably lost, even if the legislator had to go through a trial and appellate review. *Id.* at 588-89. Not only was this statement extraneous – it was also incorrect.[8]

Next, the court below cited to cases that either do not involve Section 2310 and "immunity from suit," or do not address the irreparably lost requirement. *See Aubrey v. Precision Airmotive LLC*, 7 A.3d 256, 262 (Pa. Super. 2010)(irreparable lost prong not addressed), *alloc. denied*, 7 A.3d 256 (Pa. 2012); *Gwiszcz v. City of Philadelphia*, 550 A.2d 880, 882 (Pa. Cmwlth. 1988)(holding that issue was not separable from the main cause of action; irreparably lost requirement not at issue); *Bollinger v. Obrecht*, 552 A.2d 359, 363 n.5 (Pa. Cmwlth. 1989)(stating that "we need not decide" whether postponement will

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[8] This Court holds that legislative immunity under the Speech and Debate Clause insulates against not only "the results of litigation," but also "the responsibility of defending against such claims." *Consumer Party of Pennsylvania v. Commonwealth*, 507 A.2d 323, 331 (Pa. 1986), *abrogated on other grounds*, *Pennsylvanians Against Gambling Expansion Fund, Inc. v. Commonwealth*, 877 A.2d 383 (Pa. 2005).

"cause an irreparable loss of rights"), *alloc. denied*, 552 A.2d 359 (Pa. 1990).

Federal courts and other states permit a decision on immunity from suit to be immediately appealed.

Not only have all of Pennsylvania's appellate courts recognized that absolute immunity is protection from suit, federal and other state courts do, too.

The Unites States Supreme Court holds that the "fear of consequences" that absolute immunity is designed to alleviate is "not limited to liability for money damages," but also includes "the general costs of subjecting officials to the risks of trial – distraction of officials from their governmental duties, inhibition of discretionary action, and deterrence of able people from public service." *Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985)(citing *Harlow v. Fitzgerald*, 457 U.S. 800, 816 (1982)).[9] Thus, the immunity defense "is effectively lost if a case is erroneously permitted to go to trial." *Pearson v. Callahan*, 555 U.S. 223, 231-32 (2009)(quoting *Mitchell*, 472 U.S. at 526).

[9] The *Mitchell* case involved both absolute and qualified immunities.

For that reason, a defendant in federal court may automatically appeal an adverse immunity ruling at any point: "the denial of a substantial claim of absolute immunity is an order appealable before final judgment, for the essence of absolute immunity is its possessor's entitlement not to have to answer for his conduct in a civil damages action." *Mitchell*, 472 U.S. at 525.

Indeed, the Court recognized that "even such pretrial matters as discovery are to be avoided if possible, as '[i]nquiries of this kind can be peculiarly disruptive of effective government.'" *Id.* (quoting *Harlow*, 457 U.S. at 817); *see also Plumhoff v. Rickard*, 572 U.S. 765, 772 (2014)(holding that qualified immunity "cannot be effectively reviewed on appeal from a final judgment because by that time the immunity from standing trial will have been irretrievably lost"); *Nixon v. Fitzgerald*, 457 U.S. 731, 751 (1982)(holding that a denial of the President's absolute immunity was immediately appealable under the collateral order doctrine). Thus, a party is entitled to present an

immunity defense at "the earliest possible stage of the litigation." *See Pearson*, 555 U.S. at 223.[10]

The federal court model is especially persuasive here because Rule 313 is a "codification of existing case law" regarding collateral orders. Pa.R.A.P. 313, Note. The Note to Rule 313 cites to *Pugar v. Greco*, in which this Court relied on federal case law in determining what constitutes an appealable interlocutory order. 394 A.2d 542, 544 (Pa. 1978)(citing *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541, 546

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[10] Under the Pennsylvania Rules of Civil Procedure, immunity technically can be raised only as an affirmative defense. *See* Pa.R.C.P. 1030. This has led to conflicting appellate decisions about whether immunity can properly be raised in preliminary objections. *Compare R.H.S. v. Allegheny Co. Dep't of Human Servs.*, 936 A.2d 1218, 1228 (Pa. Cmwlth. 2007)(recognizing that while the plaintiff was "technically correct" that immunity is an affirmative defense, immunity was apparent from the complaint's face and no prejudice existed in ruling on the defendant's preliminary objections), *alloc. denied*, 936 A.2d 1218 (Pa. 2008), *with Mitchell v. Fornelli*, 2018 WL 1150998, at *7 (Pa. Super. 2018)(plurality)(holding that immunity cannot be raised in preliminary objections when the plaintiff filed preliminary objections). Nonetheless, both intermediate appellate courts recognize that immunity may be raised at any time. *See Zanders v. Bigley*, 2018 WL 5316103, at *2 (Pa. Cmwlth. 2018); *Snead v. SPCA of Pa.*, 929 A.2d 1169, 1178 n.10 (Pa. Super. 2007), *aff'd,* 985 A.2d 909 (Pa. 2009). This Court has not yet "expressly stated whether sovereign immunity may be raised in a demurrer." *Sutton v. Bickell*, 220 A.3d 1027, 1035 n.4 (Pa. 2019).

(1949)). There is no reason here for this Court to now depart from the federal courts' model.

The federal courts are not alone in recognizing that immunity from suit is irreparably lost if it is not immediately appealable. A cursory review of states that have consider the question reveals that many reach the same conclusion.[11]

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[11] *See Henke v. Superior Court of State of Ariz.*, 775 P.2d 1160, 1164 (Ariz. Ct. App. 1989); *Virden v. Roper*, 788 S.W.2d 470, 472 (Ark. 1990); *Carothers v. Archuleta Co. Sheriff*, 159 P.3d 647, 650 (Colo. Ct. App. 2006), *cert. denied*, 2007 WL 1535734 (Colo. 2007); *Shay v. Rossi*, 749 A.2d 1147, 1163 (Conn. 2000), *overruled on other grounds, Miller v. Egan*, 828 A.2d 549 (Conn. 2003); *Tucker v. Resha*, 648 So.2d 1187, 1190 (Fla. 1994); *Greer v. Baker*, 369 P.3d 832, 839 (Haw. 2016); *Maggard v. Kinney*, 576 S.W.3d 559, 566 (Ky. 2019); *Irwin v. Commonwealth*, 992 N.E.2d 275, 281 (Mass. 2013); *Pepperman v. Barrett*, 661 A.2d 1124, 1126 n.1 (Me. 1995); *Sletten v. Ramsey County*, 675 N.W.2d 291, 299 (Minn. 2004); *Petroleum Traders Corp. v. State,* 660 S.E.2d 662, 664 (N.C. Ct. App. 2008); *Richardson v. Chevrefils*, 552 A.2d 89, 92 (N.H. 1988); *Handmaker v. Henney*, 992 P.2d 879, 884 (N.M. 1999); *Jones v. Lucas Co. Sheriff's Dep't*, 916 N.E.2d 1134, 1135 (Ohio Ct. App. 2009); *Manning v. Jones*, 2019 WL 6522183, at *5 n.11 (Tex. App. 2019); *Murray v. White*, 587 A.2d 975, 979 (Vt. 1991); *Hutchison v. City of Huntington*, 479 S.E.2d 649, 658-59 (W.V. 1996); *Arneson v. Jezwinski*, 556 N.W.2d 721, 727 (Wis. 1996); *Campbell Co. Memorial Hosp. v. Pfeifle*, 317 P.3d 573, 576 (Wyo. 2014). Conversely, some states do not allow collateral appeals of immunity issues, often due to legislative limitations on jurisdiction. For example, Georgia and Nebraska. *See Rivera v. Washington*, 784 S.E.2d 775, 780 (Ga. 2016); E.*D. v. Bellevue Pub. Sch. Dist.*, 909 N.W.2d 652, 658 (Neb. 2018). In Pennsylvania, in contrast, the collateral order rule is a court rule.

At bottom, the Commonwealth Court's conclusion here subverts not only the principles behind sovereign immunity and all absolute immunities, but also ignores Section 2310's plain language that the Commonwealth remain "immune from suit." Yet, "in absence of constitutional infirmity, courts are not free to circumvent the Legislature's statutory immunity directives pertaining to the sovereign." *Scientific Games Int'l, Inc.*, 66 A.3d at 755. To do so implicates separation of powers concerns. *Id.* And that is what the Commonwealth Court's ruling does.

Under the Commonwealth Court's holding, neither the Commonwealth's public fisc nor its interest in the unfettered discharge of public business is protected. The Commonwealth Court's decision forces Family Court and its officials to expend time to prepare for trial and burdens the public fisc, as well as taking time away from their official duties, which is what sovereign immunity is intended to prevent. If Family Court is required to defend itself at trial, then it does not have "immunity from suit" as the Legislature has directed.

Conclusion

In sum, the Commonwealth Court's holding conflicts with the plain meaning of "immunity from suit" in both 1 Pa.C.S.A. § 2310 and Pennsylvania's appellate case law, as well as undermines immunity's purpose. Thus, Family Court respectfully requests this Honorable Court to reverse the Commonwealth Court's decision and remand this case to that Court for further proceedings, including consideration of Family Court's claim of sovereign immunity from Appellee's suit for damages.

Respectfully Submitted,

s/Michael Daley, Esquire
Michael Daley, Esquire
Megan L. Davis, Esquire

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

Word Count Certification

The Brief contains 4,605 words, not including the Title Page, Table of Contents, Table of Authorities, and Certificates. Certification is based on the word count tool of the word processor used to prepare this Brief.

Appendix A

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Wanda Brooks	:	
	:	
v.	:	
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Ewing Cole, Inc., d/b/a Ewing Cole and City of Philadelphia and Family Court of the Court of Common Pleas of the First Judicial District Court	:	
	:	
Appeal of: Family Court of the Court of Common Pleas of the First Judicial District	:	Nos. 911 & 912 C.D. 2018
	:	Submitted: June 12, 2020

BEFORE: HONORABLE ANNE E. COVEY, Judge
HONORABLE CHRISTINE FIZZANO CANNON, Judge
HONORABLE J. ANDREW CROMPTON, Judge

OPINION NOT REPORTED

MEMORANDUM OPINION
BY JUDGE FIZZANO CANNON FILED: July 9, 2020

The Family Court of the Court of Common Pleas of the First Judicial District Court (Family Court) appeals from the June 4, 2018 order of the Court of Common Pleas of Philadelphia County (trial court) denying the Family Court's motion for summary judgment, and also from the July 3, 2018 reconsideration order of the trial court again denying summary judgment.[1] Upon review, we strike the

[1] While the Family Court consistently references the trial court's June 4, 2018 order, we note that on July 2, 2018, the trial court vacated its June 4, 2018 order pending reconsideration thereof. *See* Trial Court Docket at 11, Original Record (O.R.) at 11. The Family Court's notice of appeal from the trial court's June 4, 2018 order (docketed at No. 911 C.D. 2018) is, therefore, rendered inoperative and must be stricken. *See* Pa.R.A.P. 1701(b)(3) (providing that "[a]fter an

notice of appeal of the trial court's June 4, 2018 order and quash the notice of appeal of the trial court's July 3, 2018 order.[2]

The instant dispute arises from an action filed by Wanda Brooks (Brooks) against the Family Court for injuries allegedly sustained when she walked into an unmarked glass wall at the Family Court Building in Philadelphia, Pennsylvania, on January 8, 2015. Trial Court Opinion, 11/6/18 at 1. The Family Court filed a motion for summary judgment on the basis that sovereign immunity barred Brooks' negligence claim, contending that the exceptions to immunity set forth in Section 8522 of the Sovereign Immunity Act, 42 Pa.C.S. § 8522, do not apply to the courts. *See* Family Court's Motion for Summary Judgment at 2-3, ¶¶ 9-18, Reproduced Record (R.R.) at 3a-4a; Trial Court Docket at 8, Original Record (O.R.) at 8.[3] Brooks filed a response, asserting that as a state governmental entity, the Family Court was not immune to her negligence claim, citing the waiver of immunity contained in Section 8522(b)(4) of the Sovereign Immunity Act, 42

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appeal is taken . . . , the trial court . . . may . . . [g]rant reconsideration of the order which is the subject of the appeal or petition," and that "[a] timely order granting reconsideration under this paragraph shall render inoperative any such notice of appeal . . . theretofore or thereafter filed or docketed with respect to the prior order"); *Barron v. City of Philadelphia*, 754 A.2d 738, 740 (Pa. Cmwlth. 2000) (noting, "we have held that when a trial court has, within the permitted time period, vacated a prior order to consider the motion for reconsideration, the trial court's action constituted the functional equivalent of an express grant of reconsideration") (internal citation and quotation marks omitted). Nevertheless, the Family Court additionally filed a timely notice of appeal from the trial court's July 3, 2018 order (docketed at No. 912 C.D. 2018) denying summary judgment upon reconsideration, and also indicated that it is appealing from this order in its appellate brief. *See* Family Court Brief at 1-4. However, as the trial court's July 3, 2018 order does not constitute a final order, the threshold question *sub judice* is whether the July 3, 2018 trial court order constitutes an appealable collateral order.

[2] By order dated September 11, 2018, this Court consolidated these two appeals.

[3] Our citations to the O.R. reference the page numbers of the PDF document, as the O.R. is not paginated.

Pa.C.S. § 8522(b)(4), for claims arising from a dangerous condition of real estate owned or leased by the Commonwealth. Brooks' Response at 4-5, ¶¶ 19-23, R.R. at 13a-14a.

On June 4, 2018, the trial court denied the Family Court's motion for summary judgment. On June 28, 2018, the Family Court filed a motion for reconsideration of the trial court's June 4, 2018 order. Trial Court Docket at 10, O.R. at 10. On the same date, the Family Court also filed with this Court a notice of appeal from the trial court's June 4, 2018 order.[4] Trial Court Docket at 11, O.R. at 11. On July 2, 2018, the trial court vacated its June 4, 2018 order pending reconsideration of that order. Trial Court Docket at 11, O.R. at 11.

On July 3, 2018, upon reconsideration of the Family Court's motion for summary judgment, the trial court again denied summary judgment and further denied the Family Court's request to certify the matter for interlocutory appeal. Trial Court Docket at 11, O.R. at 11. On July 5, 2018, the Family Court filed with this Court a notice of appeal from the trial court's July 3, 2018 order. Trial Court Docket at 12, O.R. at 12. Also on this date, the Family Court filed an emergency application to stay the trial court proceedings pending resolution of its appeal to this Court. Emergency Application for Stay, 7/5/18. On July 9, 2018, we granted the Family

[4] We note that the Family Court incorrectly states in the statement of jurisdiction portion of its appellate brief that it appeals "from the trial [c]ourt's July 3, 2018 [o]rder *denying the motion for reconsideration of the June 4, 2019 [o]rder[.]*" Family Court's Brief at 1 (emphasis added). The Family Court also erroneously identified as one of the questions presented in its appellate brief "[w]hether the trial [c]ourt committed an error of law or abused its discretion *when on July 3, 2018, it denied [the] Family Court's motion for reconsideration of the June 4, 2018 [o]rder denying summary judgment.*" *Id.* at 4 (emphasis added). The trial court effectively granted the Family Court's motion for reconsideration on July 2, 2018 and, upon reconsideration, denied the Family Court's motion for summary judgment in its July 3, 2018 order. *See* Trial Court Docket at 11, O.R. at 11.

Court's emergency application and directed the parties to address the appealability of this July 3, 2018 order in their principal briefs on the merits. Cmwlth. Ct. Order, 7/9/18. On August 28, 2018, the trial court entered an order discontinuing Brooks' claim as to Ewing Cole, Inc. without prejudice. Trial Court Docket at 12, O.R. at 12.[5]

On November 7, 2018, the trial court issued an opinion expounding upon its reasons for denying the Family Court's motion for summary judgment. Trial Court Docket at 13, O.R. at 13; Trial Court Opinion at 1-9, Supplemental Reproduced Record (S.R.R.) at 1-9.[6] The trial court noted that "[t]he central issue

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[5] Brooks initially named two other defendants—Ewing Cole, Inc., and the City of Philadelphia. Trial Court Opinion at 2 n.2. On July 3, 2018, the trial court denied the Family Court's request to certify the matter for interlocutory appeal, because other defendants remained involved in the matter, thereby rendering a collateral appeal premature. *Id.* However, on August 18, 2018, after the July 3, 2018 order was appealed to this Court, Brooks discontinued her claims against Ewing Cole, Inc. *Id.* Noting "that Ewing Cole, Inc. [was] no longer a party and that the remaining party [was] the City [of Philadelphia], which claim[ed] immunity as a landlord out of possession, [the trial court] agree[d] that its [o]rder denying summary judgment is appropriate for intermediate review." *Id.* The trial court stated that, "as [its] opinion will delineate, the issue of whether the [Family Court] is completely immune from suit and courts were not meant to be included in exceptions to immunity for state parties under the Sovereign Immunity Act 'involves a controlling question of law as to which there is a substantial ground for difference of opinion and that an immediate appeal from the [o]rder may materially advance the ultimate termination of the matter.'" *Id.* (quoting Pa.R.A.P. 1312(a)(2)). The trial court reasoned that "since [it] has concluded that review now is legally appropriate, it is no longer necessary at this stage to address the appealability of [its] [o]rder denying summary judgment." Trial Court Opinion at 2 n.2. However, the trial court failed to amend its order to permit interlocutory appeal in accordance with Pennsylvania Rule of Appellate Procedure 1311 and Section 702(b) of the Judicial Code, such as would have allowed the Family Court to file a petition for permission to appeal with this Court in accordance with Rule 1311. *See* Pa.R.A.P. 1311; 42 Pa.C.S. § 702(b). Thus, as noted by this Court in its order granting the Family Court's emergency application for a stay, the appealability of the trial court's order denying summary judgment remains an outstanding issue. *See* Cmwlth. Ct. Order, 7/9/18.

[6] We note that the Family Court failed to paginate the Supplemental Reproduced Record (S.R.R.) in accordance with Pennsylvania Rule of Appellate Procedure 2173 by adding a small letter "b" following page numbers, instead adding small letter "a." We have therefore omitted the letter "a" from our citations to the S.R.R.

presented in [the] appeal [was] whether the General Assembly, in promulgating the Sovereign Immunity Act which waived state . . . governmental immunity in nine specific areas, intended the Courts to be included in the definition of a 'Commonwealth party.'" Trial Court Opinion at 2-3, S.R.R. at 2-3. The trial court disagreed with *Russo v. Allegheny County*, 125 A.3d 113, 115 (Pa. Cmwlth. 2015), *aff'd*, 150 A.3d 16 (Pa. 2016), in which this Court held that sovereign immunity has not been waived with respect to tort claims against the courts of the Unified Judicial System, because the courts are not "Commonwealth parties" within the meaning of the Sovereign Immunity Act. *See* Trial Court Opinion at 4, S.R.R. at 4. In *Russo*, we reasoned as follows:

> The General Assembly has waived sovereign immunity with respect to tort claims in the portion of the Judicial Code commonly known as the Sovereign Immunity Act. 42 Pa.C.S. §§ 8521–8528. However, this waiver applies only to actions for damages arising out of certain negligent acts committed by "Commonwealth parties." 42 Pa.C.S. § 8522(a), (b). A "Commonwealth party" is defined in the Sovereign Immunity Act as a "Commonwealth agency and any employee thereof, but only with respect to an act within the scope of his office or employment." 42 Pa.C.S. § 8501. To determine what is or is not a Commonwealth agency, we must look to Section 102 of the Judicial Code, which provides general definitions for the entirety of the Judicial Code, including the Sovereign Immunity Act, and defines a Commonwealth agency as "[a]ny executive agency or independent agency." 42 Pa.C.S. § 102. The definitions of "executive agency" and "independent agency" in turn specifically exclude "any court or other officer or agency of the unified judicial system." *Id.*
>
> Accordingly, it is clear that the courts of the unified judicial system are not "Commonwealth parties" within the meaning of the Sovereign Immunity Act. Because

> sovereign immunity has not been waived with respect to the courts of the unified judicial system, we must conclude that the courts of the unified judicial system retain their sovereign immunity as related to tort claims.

Russo, 125 A.3d at 118.

The trial court criticized our analysis in *Russo* for "exporting the definition for 'Commonwealth agency' from the Judicial Code[.]" Trial Court Opinion at 5, S.R.R. at 5. The trial court reasoned that "[n]one of the definitions in the Sovereign Immunity Act make a distinction among the branches within the Commonwealth government, excluding or including the judicial branch," noting that "[t]he primary distinction the General Assembly made in waiving governmental immunity in the two sections was whether the entity was at the state level or at a level 'other than' the state level." Trial Court Opinion at 3, S.R.R. at 3. The trial court further noted that, in *Russo*, this "Court did not use the Judicial Code's definition of 'Commonwealth government' which includes all of 'the courts . . . of the unified judicial system,'" despite having done so in the unpublished opinion *Abrams v. Juvenile Justice Dep't* (Pa. Cmwlth., No. 2167 C.D. 2014, filed September 3, 2015), slip op. at 7-8. Trial Court Opinion at 6-7, S.R.R. at 6-7. The trial court opined that "[i]t would be surprising for the General Assembly to create a special exemption allowing for the judicial branch of government to enjoy a higher level of immunity than the General Assembly provided to itself and the executive branch without any explicit language or legislative history of such an intention." Trial Court Opinion at 9, S.R.R. at 9. The trial court further determined that "[i]n this case, there is no dispute that the claims set forth by . . . Brooks fall within the real estate exception of the Sovereign Immunity Act." *Id.* at 8. Thus, the trial court concluded that "[t]he only dispute is a question of law as to whether the General

Assembly's definition in the Sovereign Immunity Act of 'Commonwealth party' encompasses the courts." Trial Court Opinion at 9, S.R.R. at 9.

The Family Court presently seeks to appeal the trial court's denial of summary judgment.[7] However, "we have . . . held that 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, 204 (Pa. Cmwlth. 1989), *aff'd sub nom. Jellig v. Kiernan*, 620 A.2d 481 (Pa. 1993) (citing Pa.R.A.P. 311). Nevertheless, the Family Court argues that the order in question constitutes an appealable collateral order under Pennsylvania Rule of Appellate Procedure 313.[8] Family Court's Brief at 15 & 18 (citing Pa.R.A.P. 313; *Pridgen v. Parker Hannifin Corp.*, 905 A.2d 422 (Pa. 2006)).

"In determining appealability of orders, Pennsylvania courts adhere to the 'final judgment rule,' which holds that an appeal will lie only from a final order unless otherwise permitted by statute or rule." *Bollinger by Carraghan v. Obrecht*, 552 A.2d 359, 361 (Pa. Cmwlth. 1989) (citing *Fried v. Fried,* 501 A.2d 211 (Pa. 1985); Pa.R.A.P. 341(a)). "The collateral order doctrine is an exception to the general rule that all appeals must await final judgment." *Id.* at 362 (emphasis omitted). "[W]hether an order is appealable as a collateral order under Rule 313 is [therefore] an issue of [the] Court's jurisdiction to entertain an appeal of such an order." *Commonwealth v. Kennedy*, 876 A.2d 939, 943 (Pa. 2005); *see also Shearer*

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[7] The Family Court contends that "[a]lthough the trial [c]ourt has now certified this matter for [] immediate appeal, the appealability of the . . . [t]rial [c]ourt's denial of summary judgment pursuant to the collateral order doctrine is an outstanding issue . . . ." Family Court's Brief at 15. While the Family Court correctly identifies the threshold issue *sub judice*, we again note that the trial court failed to certify its order denying summary judgment for interlocutory appeal. *See supra* note 5.

[8] Whether an order constitutes an appealable collateral order under Pennsylvania Rule of Appellate Procedure 313 is a question of law. As such, our standard of review is *de novo* and our scope of review is plenary. *Commonwealth v. Kennedy*, 876 A.2d 939, 943 n.3 (Pa. 2005).

v. Hafer, 177 A.3d 850, 857 (Pa. 2018) (stating, "[i]f the [collateral order] test is not met . . . and in the absence of another exception to the final order rule, there is no jurisdiction to consider an appeal of such an order").

Pursuant to Rule 313, "[a]n appeal may be taken as of right from a collateral order of a[] . . . lower court," defining "collateral order" as "an order separable from and collateral to the main cause of action where the right involved is too important to be denied review and the question presented is such that if review is postponed until final judgment in the case, the claim will be irreparably lost." Pa.R.A.P. 313. The Family Court asserts that "all [three] criteria are satisfied here." Family Court's Brief at 8.

Regarding the first requirement of separability, the Family Court contends that the question of whether it qualifies as a "Commonwealth party" within the meaning of the Sovereign Immunity Act and, therefore, retains sovereign immunity from Brooks' claim "is clearly both conceptually and factually distinct from the merits of [the] underlying negligence cause of action." Family Court's Brief at 18; *see also id.* at 16 (citing *Pridgen*, 905 A.2d at 433), *id.* at 26-27 (citing *Yorty v. PJM Interconnection, L.L.C.*, 79 A.3d 655 (Pa. Super. 2013)).

"In determining whether an order is separable from and collateral to the main cause of action, we must first decide whether review of the order implicates the merits of the main cause of action." *Twp. of Worcester v. Office of Open Records*, 129 A.3d 44, 55 (Pa. Cmwlth. 2016) (citing *Commonwealth v. Wright*, 78 A.3d 1070 (Pa. 2013)). "[I]f the resolution of an issue concerning a challenged trial court order can be achieved independent from an analysis of the merits of the underlying dispute, then the order is separable for purposes of determining whether the order is a collateral order pursuant to Rule 313." *Kennedy*, 876 A.2d at 943. Our

Supreme Court "has adopted a practical analysis recognizing that some potential interrelationship between merits issues and the question sought to be raised in the interlocutory appeal is tolerable" for purposes of assessing separability. *Pridgen* 905 A.2d at 433.

Here, the appeal from the trial court order denying summary judgment involves the issue of whether the Family Court qualifies as a "Commonwealth party" within the meaning of the Sovereign Immunity Act. We agree with the Family Court that this question may be resolved independent of an analysis of the underlying negligence claim. *See Kennedy*, 876 A.2d at 943. The Family Court relies in part on *Yorty*, a case involving a negligence claim levied against a federally-created regional transmission organization (RTO) by an electrician employed by PPL Electric Utilities Corporation after sustaining injury while performing repairs on a transmission line. *Yorty*, 79 A.3d at 658. The RTO filed a motion for summary judgment, claiming immunity from suit pursuant to a tariff[9] granted by the Federal Energy Regulatory Commission (FERC). *Id.* at 659. The trial court denied the motion for summary judgment, ruling "that there was no affirmative act of Congress authorizing the FERC to grant immunity to RTOs from tort claims." *Id.* The RTO filed a notice of appeal with the Superior Court and the electrician filed a motion to quash the appeal, contending that the trial court's order denying summary judgment constituted an unappealable interlocutory order. *Id.* at 660. In denying the motion to quash, the Superior Court determined that the issue challenged in the trial court order satisfied the separability requirement under Rule 313, reasoning as follows:

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[9] The term "tariff" is defined by the Federal Energy Regulatory Commission as "[a] compilation of all effective rate schedules of a particular company or utility," including "General Terms and Conditions along with a copy of each form of service agreement." *Tariff*, FERC: FEDERAL ENERGY REGULATORY COMMISSION, available at https://www.ferc.gov/about/what-ferc/about/glossary (last visited July 8, 2020).

> [T]he immunity granted [the RTO] under the [t]ariff is [] factually distinct from the underlying negligence action . . . . To prove negligence appellees must show four elements: 1) a legal duty or obligation; 2) a breach of that duty; 3) a causal link between that breach and the injury alleged; and 4) actual damage or loss suffered by the claimant as a consequence. *Wright v. Eastman,* 63 A.3d 281, 284 (Pa. Super. 2013). Immunity is factually distinct from the proof of any of these elements. Immunity simply functions as an absolute defense to this cause of action regardless of the elements alleged or proven. Thus, immunity is wholly separable from the underlying negligence action . . . .

Yorty, 79 A.3d at 662 (citing *Pridgen*). Further, the Superior Court noted that "where the issue presented is a question of law as opposed to a question of fact, an appellant is entitled to review under the collateral order doctrine[.]" *Id.* at 660 (stating, "if a question of fact is presented, appellate jurisdiction does not exist").

Similarly, here, the question of whether the Family Court is potentially subject to a waiver of immunity as a "Commonwealth party" under the Sovereign Immunity Act entails an analysis that is separable and distinct from the underlying negligence action. *See Yorty*, 79 A.3d at 662. Further, consideration of this issue centers on the terms of the Sovereign Immunity Act and does not necessitate a factual inquiry into the extent of the Family Court's liability. *See Pridgen*, 905 A.2d at 424, 433 (holding that trial court's denial of summary judgment satisfied the separability requirement under Rule 313 where the issue of the applicability of a statute of repose under the federal General Aviation Revitalization Act of 1994

(GARA)[10] was "both conceptually and factually distinct from the merits of [the] underlying product liability causes of action," and "to resolve the legal claim presented, [the] appellate court's frame of reference [would] be centered on the terms of GARA," and "not on determinations of fact or the scope of [a]ppellants' liability in the first instance"). We, therefore, find that issue presented on appeal from the trial court's order denying summary judgment is separable from the underlying negligence action for purposes of Rule 313.[11]

In regards to the second requirement under Rule 313, the Family Court contends that the question of immunity in the instant case is too important to be denied review, because it implicates two constitutional issues—sovereign immunity and separation of powers. Family Court's Brief at 20 (citing *Shearer*, 177 A.3d at 858-59; *Russo*, 125 A.3d at 116). The Family Court thus asserts that "the instant case presents a serious and unsettled question of law deeply rooted in the infrastructure of government, and an issue that implicates a right deeply rooted in

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[10] Pub. L. No. 103-298, 108 Stat. 1552 (1994), amended by Act of Pub. L. No. 105-102, § 3(e), 111 Stat. 2204, 2216 (1997).

[11] We acknowledge precedent from this Court indicating that a denial of summary judgment on the basis of immunity is not appealable under the collateral order doctrine. *See, e.g.*, *Bollinger*, 552 A.2d at 360 (holding that a trial court's order denying a public school's motion for summary judgment on the basis of statutory immunity was not separable from and collateral to the underlying negligence action, where factual issues remained regarding the applicability of the real property exception to immunity); *Gwiszcz v. City of Philadelphia*, 550 A.2d 880, 881-82 (Pa. Cmwlth. 1988) (concluding that a trial court's order denying a motion for summary judgment filed by the Department of Transportation, which contended that the plaintiff failed to state a claim within one of the exceptions to sovereign immunity contained in the Sovereign Immunity Act, did not constitute an appealable collateral order, where the question of whether the Department negligently failed to maintain the roadway was essential to the determination of liability). We note, however, that these cases are distinguishable, as the present matter does not turn on the applicability of a particular exception to immunity based on the particular facts of the case, but, rather, whether the exceptions to sovereign immunity enumerated in the Sovereign Immunity Act apply to the courts of the Unified Judicial System.

public policy beyond the present litigants, which outweighs any efficiency interest in discouraging piecemeal litigation." *Id.* at 19-20. Further, the Family Court maintains that courts should resolve questions regarding governmental immunity at the earliest possible stage of the proceedings to prevent the government from incurring unnecessary expense at the cost of taxpayers. *Id.* at 19.

"[T]he overarching principle governing 'importance' is that . . . 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." *Ben v. Schwartz*, 729 A.2d 547, 552 (Pa. 1999). Thus, "[i]n analyzing the importance prong, we weigh the interests implicated in the case against the costs of piecemeal litigation." *Id.* Further, "it is not sufficient that the issue be important to the particular parties. Rather it must involve rights deeply rooted in public policy going beyond the particular litigation at hand." *Geniviva v. Frisk*, 725 A.2d 1209, 1213-14 (Pa. 1999).

We agree with the Family Court that the issue of immunity challenged on appeal from the trial court order denying summary judgment is of sufficient import to satisfy the second requirement under Rule 313. The question of whether the courts of the unified judicial system qualify as "Commonwealth parties" within the meaning of the Sovereign Immunity Act implicates public policy concerns that extend beyond the parties to the instant litigation, as its resolution will dictate whether a member of the general public may maintain a negligence action against the courts. *See Schwartz*, 729 A.2d at 552 (holding "that resolution of the issue of whether the investigative files of the Bureau [of Professional and Occupational Affairs] [were] subject to any executive or statutory privilege implicate[d] rights rooted in public policy, and impact[ed] individuals other than those involved in [the]

particular litigation"); *cf. Geniviva*, 725 A.2d at 1213-14 (concluding that a trial court order denying a motion to approve a settlement only implicated rights important to the parties to the settlement and did not involve broader public policy concerns). Further, this Court has held previously that interests involving immunity may be of sufficient import to satisfy the second aspect of a collateral order. *See Sylvan Heights Realty Partners, L.L.C. v. LaGrotta*, 940 A.2d 585, 588 (Pa. Cmwlth. 2008) (holding, in case involving an attempted interlocutory appeal from a motion for judgment on the pleadings filed by a member of the Pennsylvania House of Representatives on the basis of immunity under the Speech and Debate Clause of the Pennsylvania Constitution and the doctrine of official immunity, that the "right to assert immunity to suit [was] of sufficient importance to satisfy the second element of the collateral order doctrine"). Thus, we find that the rights implicated by the issue of immunity involved in the trial court's denial of summary judgment are sufficiently important to satisfy the second requirement under Rule 313.

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 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 (Pa. Cmwlth. 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. Here, the Family Court has asserted the affirmative defense of sovereign immunity. Although the trial court rejected the Family Court's assertion of immunity in denying its motion for summary judgment, the Family Court may nevertheless seek appellate review following final judgment. *See Sylvan Heights Realty Partners, L.L.C.*, 940 A.2d at 588-89 (holding that a trial court's denial of a motion for judgment on the pleadings did not constitute an appealable collateral order where, "[i]f the matter were to proceed to trial, the issues of [s]peech or [d]ebate immunity, and/or legislative immunity, affirmative defenses that were properly pled, would be subject to appellate review should [the defendant] not prevail" such that "[u]nder either scenario, the claim of immunity [would] not be 'irreparably lost'"); *cf. Schwartz*, 729 A.2d at 547 (holding that an order compelling the Bureau of Professional and Occupational Affairs to produce investigative files satisfied the third prong of the collateral order doctrine, where, "[i]n essence, the disclosure of documents cannot be undone," such that "there is no effective means of reviewing after a final judgment an order requiring the production of putatively protected material").

That the issue of immunity is framed as a question of law regarding whether the Family Court qualifies as a "Commonwealth party" within the meaning of the Sovereign Immunity Act, as opposed to whether a particular exception to immunity applies, does not preclude the Family Court's ability to obtain review of the trial court's resolution of this question in conjunction with an appeal from a final order. *See Aubrey v. Precision Airmotive LLC*, 7 A.3d 256, 263 (Pa. Super. 2010) (stating that "[a] question of law is necessary but not always sufficient to trigger collateral review"). This Court has noted previously that "an immunity defense does not, in and of itself, entitle a litigant to appellate review of an interlocutory order." *Gwiszcz*, 550 A.2d at 881; *see also Bollinger*, 552 A.2d at 363 n.5 (noting that even if a governmental entity is immune from suit under the Sovereign Immunity Act, "the mere possibility of an irreparable loss of [the] right [to avoid suit] does not in itself satisfy the collateral order doctrine"). Further, our conclusion that the rights implicated by the trial court's order are of sufficient import for purposes of the second prong of the collateral order doctrine does not frustrate our finding that the Family Court nevertheless fails to satisfy the third requirement. *See Sylvan Heights Realty Partners, L.L.C.*, 940 A.2d at 588 (concluding that, "[w]hile we believe that [the defendant's] right to assert immunity to suit is of sufficient importance to satisfy the second element of the collateral order doctrine, we do not believe . . . that [the defendant's] right to appellate review will be irreparably lost if review is denied at this juncture").

Moreover, our conclusion is consistent with precedent recognizing "that the collateral order doctrine is to be narrowly construed in order to buttress the final order doctrine, and by the recognition that a party may seek an interlocutory appeal by permission pursuant to [Pennsylvania Rule of Appellate Procedure] 312."

Shearer, 177 A.3d at 858 (noting that "as parties may seek allowance of appeal from an interlocutory order by permission, we have concluded that that discretionary process would be undermined by an overly permissive interpretation of Rule 313"). We, therefore, "construe the collateral order doctrine narrowly so as to avoid 'undue corrosion of the final order rule,' . . . and to prevent delay resulting from 'piecemeal review of trial court decisions.'" *Id.* (brackets omitted). "[I]t is more important to prevent the chaos inherent in bifurcated, trifurcated, and multifurcated appeals than it is to correct each mistake of a trial court the moment it occurs." *Id.* We therefore find that the Family Court fails to establish that the trial court's order satisfies the third requirement under Rule 313, because the Family Court's claim regarding immunity will not be irreparably lost if postponed until final judgment. *See* Pa.R.A.P. 313(b). Thus, we conclude that the trial court's July 3, 2018 order denying summary judgment does not constitute an appealable collateral order. *See Shearer*, 177 A.3d at 858 (noting that courts "require[] the appealing party to establish each of the three prongs of the collateral order test to ensure that Rule 313 has been satisfied").

Accordingly, because the Court lacks jurisdiction to entertain the Family Court's appeal, we quash the Family Court's notice of appeal from the July 3, 2018 order of the trial court.

CHRISTINE FIZZANO CANNON, Judge

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Wanda Brooks	:	
	:	
v.	:	
	:	
Ewing Cole, Inc., d/b/a Ewing Cole and City of Philadelphia and Family Court of the Court of Common Pleas of the First Judicial District Court	:	
	:	
Appeal of: Family Court of the Court of Common Pleas of the First Judicial District	:	Nos. 911 & 912 C.D. 2018

O R D E R

AND NOW, this 9th day of July, 2020, the notice of appeal filed by the Family Court of the Court of Common Pleas of the First Judicial District Court (Family Court) from the June 4, 2018 order of the Court of Common Pleas of Philadelphia County (trial court), is hereby stricken. The Family Court's notice of appeal from the trial court's July 3, 2018 order denying the Family Court's motion for summary judgment is hereby quashed.

CHRISTINE FIZZANO CANNON, Judge

Appendix B

IN THE COURT OF COMMON PLEAS OF PHILADELPHIA COUNTY
FIRST JUDICIAL DISTRICT OF PENNSYLVANIA
CIVIL TRIAL DIVISION

WANDA BROOKS,	:	DECEMBER TERM 2016
Appellee,	:	NO. 00680
v.	:	
EWING COLE, INC., d/b/a EWING COLE and CITY OF PHILADELPHIA and FAMILY COURT OF THE COURT OF COMMON PLEAS OF THE FIRST JUDICIAL DISTRICT COURT,	:	976 EDA 2018
Appellants.	:	

Rau, J.

OPINION

I. Introduction

Appellee Wanda Brooks brought claims against the Family Court of the Court of Common Pleas of the First Judicial District ("Family Court") for injuries she allegedly sustained when she walked into an unmarked glass wall on January 8, 2015 at the Family Court Building, located at 1501 Arch Street, Philadelphia, Pennsylvania. Appellant Family Court filed a Motion for Summary Judgment arguing that the courts, unlike other Commonwealth governmental entities, were immune from suit and did not even fall within the limited exceptions to immunity set forth in the Sovereign Immunity Act. 42 Pa.C.S. § 8522; Mot. for Summ. J. of Def. Family Ct. of First Judicial District ¶¶ 9-18. Appellee Brooks opposed summary judgment arguing that Family Court, like all other state governmental entities, had waived sovereign immunity through the Sovereign Immunity Act's real estate exception that holds state entities responsible for

dangerous conditions on their properties that cause injury. Br. in Supp. of Pl. Brook's Resp. to Def. Family Ct. of the First Judicial District Ct.'s Mot. for Summ. J. 3-7. In addition, Appellee Brooks argued that Family Court admitted in its answer that it was a "Commonwealth entity" and never claimed any special immunity that was unavailable to other state governmental bodies. Br. in Supp. of Pl. Brook's Resp. to Def. Family Ct. of the First Judicial District Ct.'s Mot. for Summ. J. 5. This Court denied summary judgment[1] and a subsequent motion for reconsideration. Family Court appealed.[2]

The Pennsylvania Constitution provides that the Commonwealth may only be sued where the General Assembly has authorized suit. Pa. Const. art. 1 § 11. The General Assembly has similarly specified that, "the Commonwealth . . . shall continue to enjoy sovereign immunity and official immunity and remain immune from suit except as the General Assembly shall specifically waive the immunity." 1 Pa.C.S. § 2310. The central issue presented in this appeal is whether the General Assembly, in promulgating

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[1] Parties may move for summary judgment "whenever there is no genuine issue of any material fact as to a necessary element of the cause of action or defense which could be established by additional discovery or expert report[.]" Pa. R.C.P. 1035.2(1). Summary judgment "is appropriate only in those cases where the record clearly demonstrates that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law." Wells Fargo Bank, N.A. v. Joseph, 183 A.3d 1009, 1012 (Pa. Super. 2018) (quoting Summers v. Certainteed Corp., 997 A.2d 1152, 1159 (Pa. 2010)). In reviewing a motion for summary judgment, this Court must view all evidence in the light most favorable to the non-moving party. Id.

[2] Initially, Appellee Brooks brought claims against two other parties, Ewing Cole, Inc. and the City of Philadelphia. On July 3, 2018, this Court denied Appellant Family Court's request to certify the matter for interlocutory appeal because there remained other defendants involved in the matter making a collateral appeal premature. However, on August 18, 2018, after this appeal was taken, Appellee Brooks discontinued her claims against Ewing Cole. Given that Ewing Cole, Inc. is no longer a party and that the remaining party is the City, which claims immunity as a landlord out of possession, this Court agrees that its Order denying summary judgment is appropriate for intermediate review. As this opinion will delineate, the issue of whether the First Judicial District is completely immune from suit and courts were not meant to be included in exceptions to immunity for state parties under the Sovereign Immunity Act "involves a controlling question of law as to which there is a substantial ground for difference of opinion and that an immediate appeal from the Order may materially advance the ultimate termination of the matter." Pa.R.A.P. 1312(a)(2). Consequently, since this Court has concluded that review now is legally appropriate, it is no longer necessary at this stage to address the appealability of this Court's Order denying summary judgment.

the Sovereign Immunity Act which waived state and local governmental immunity in nine specific areas, intended the Courts to be included in the definition of a "Commonwealth party."

II. Sovereign Immunity Act

In the Sovereign Immunity Act, the General Assembly set forth specific exceptions to the Constitutional and statutory presumptive immunity from suit for "matters affecting government units." 42 Pa.C.S. § 8501 et. seq. The Sovereign Immunity Act divided the sections waiving immunity depending upon the level of government an entity was, with the first addressing "Actions Against Commonwealth Parties," §§ 8521-8528, and the second addressing "Actions Against Local Parties," §§ 8541-8564. The two sections generally break down what immunity is waived against the state government as opposed to local governments and provide for different damage limitations depending upon whether the government unit is at the state or local level. For purposes of the Sovereign Immunity Act, the General Assembly defined a "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."

42 Pa.C.S. § 8501. The General Assembly defined a "Local Agency" as:

> "A government unit *other than the Commonwealth government*. . . ."

Id. (emphasis provided). None of the definitions in the Sovereign Immunity Act make a distinction among the branches within the Commonwealth government, excluding or including the judicial branch. The primary distinction the General Assembly made in waiving governmental immunity in the two sections was whether the entity was at the state level or at a level "other than" the state level.

For actions against "Commonwealth parties," the General Assembly set forth nine specific areas where the general presumption of immunity would be waived and the state could be liable for certain torts, including the "real estate exception:"

> "Commonwealth real estate, highways and sidewalks.—A dangerous condition of Commonwealth agency real estate and sidewalks, including Commonwealth-owned real property, leaseholds in the possession of a Commonwealth agency and Commonwealth-owned real property leased by a Commonwealth agency to private persons, and highways under the jurisdiction of a Commonwealth agency, except conditions described in paragraph (5)."

42 Pa.C.S. § 8522(b)(4).

III. Caselaw Interpreting the Sovereign Immunity Act

Appellant Family Court relies on the Commonwealth Court's recent interpretation of the Sovereign Immunity Act in Russo v. Allegheny County for the proposition that courts enjoy complete immunity from any tort claims, even those where other branches of the Commonwealth are subject to suit under the Sovereign Immunity Act. 125 A.3d 113, 117 (Pa. Commw. Ct. 2015). In Russo, a discharged employee brought Whistleblower, contract, and wrongful discharge tort claims against the Court of Common Pleas. Id. The Russo Court stated that, "[w]hile the precise issue of whether courts of common pleas retain sovereign immunity has not been addressed," based on its analysis, it held that, "the CCP, as a court of the unified judicial system, is entitled to the sovereign immunity of the Commonwealth." Id. The Russo Court grappled with whether the Sovereign Immunity Act's "Commonwealth parties" being defined as a "Commonwealth agency" was meant to encompass the Courts of Common Pleas (CCP) and thereby subject the CCP to suit like other Commonwealth government units. Id. at

118. The Russo Court resolved the issue by exporting the definition for "Commonwealth agency" from the Judicial Code to conclude:

> "To determine what is or is not a Commonwealth agency, we must look to Section 102 of the Judicial Code, which provides general definitions for the entirety of the Judicial Code, including the Sovereign Immunity Act, and defines a Commonwealth agency as '[a]ny executive agency or independent agency.' 42 Pa.C.S. § 102. The definitions of 'executive agency' and 'independent agency' in turn specifically exclude 'any court or other officer or agency of the unified judicial system.' Id. Accordingly, it is clear that the courts of the unified judicial system are not 'Commonwealth parties' within the meaning of the Sovereign Immunity Act. Because sovereign immunity has not been waived with respect to the courts of the unified judicial system, we must conclude that the courts of the unified judicial system retain their sovereign immunity as related to tort claims. . . . Furthermore, even if we were to conclude that the General Assembly intended to waive sovereign immunity for the courts of the unified judicial system for tort claims, the Sovereign Immunity Act provides for only nine categories of claims as to which immunity is waived. 42 Pa.C.S. § 8522(b). The wrongful discharge claim asserted by Russo does not implicate any of the specifically enumerated exceptions to sovereign immunity and therefore the claim would be barred on that basis as well."

Id. at 118-119. The Russo Court reviewed definitions from the Judicial Code to try to determine what the General Assembly meant the Sovereign Immunity Act to encompass within its definition of "Commonwealth Party."

The Judicial Code never defines "Commonwealth Party." The Judicial Code has an extensive definition section that begins with an explanation of how its definitions should be used and not used based on the context of other statutory sections:

> "Subject to additional definitions contained in subsequent provisions of this title which are applicable to specific provisions of this title, the following words and phrases when used in this title shall have, *unless the context clearly indicates otherwise*, the meaning given to them in this section."

42 Pa.C.S. § 102 (emphasis provided). The Judicial Code's many definitions distinguish among different branches within the Commonwealth government, different

levels of the courts, and various judges. The Judicial Code defines "Commonwealth government" as:

> "The government of the Commonwealth, including the courts and other officers or agencies of the unified judicial system, the General Assembly and its officers and agencies, the Governor, and the departments, boards, commissions, authorities and officers and agencies of the Commonwealth, but the term does not include any political subdivision, municipal or other local authority, or any officer or agency of any such political subdivision or local authority."

Id. The Russo Court did not use the Judicial Code's definition of "Commonwealth government" which includes all of "the courts . . . of the unified judicial system." Instead, the Russo Court extrapolated from the Judicial Code's definition of "Commonwealth agency" which is defined as "[a]ny executive agency or independent agency." Id. The Judicial Code's respective definitions of "executive agency" and "independent agency" explicitly excludes "any court . . . of the unified judicial system."[3] Id. Thus, the Russo Court concluded that when the General Assembly defined "Commonwealth Party" in the Sovereign Immunity Act, it must have meant the same thing as the Judicial Code's "Commonwealth Agency," which excluded the courts and, therefore, carved out a special immunity for the courts, unlike any other Commonwealth governmental entities. See 42 Pa.C.S. § 102; Russo, 125 A.3d at 118-119.

However, the Russo Court held in the alternative that even if the General Assembly meant for courts to be subject to liability for some tort claims, just like other Commonwealth governmental units, a wrongful discharge claim was not one of the nine exceptions that would permit liability under the Sovereign Immunity Act. Consequently, Russo's claims would not be permitted under either interpretation of the Sovereign

[3] Another interpretation is that the General Assembly typically delineates when it intends to exclude the courts from being encompassed within a definition involving the Commonwealth as it did in its definition of "Commonwealth agency," "executive agency", and "independent agency." See 42 Pa.C.S. § 102.

Immunity Act and the outcome of the case would have been the same whether or not the General Assembly meant for the Court of Common Pleas to be subject to suit under the exceptions to immunity for "Commonwealth Parties" set forth the Sovereign Immunity Act. Russo, 125 A.3d at 119.

Prior to the Commonwealth Court's decision in Russo, the courts had *presumed* in their analysis that the Courts of Common Pleas were included within the definition of "Commonwealth Party" within the Sovereign Immunity Act. For instance, just one month prior to Russo, the Commonwealth Court determined that the Juvenile Court was encompassed within the Sovereign Immunity Act and subject to the waivers of immunity. See Abrams v. Juvenile Justice Dept., No. 2167 C.D. 2014, 2015 WL 5671465 (Pa. Commw. Ct. Sept. 3, 2015) (unpublished memorandum); 42 Pa.C.S. § 8522. The Abrams Court looked to the Judicial Code's definitions and used the definition of "Commonwealth government" as "including the courts and other officers or agencies of the unified judicial system," as opposed to using the definition of "Commonwealth agency" as the Russo court did. Abrams, 2015 WL 5671465 at *3; 42 Pa.C.S. § 102. The Abrams Court concluded that the Juvenile Court was subject to liability if its conduct fell within one of the exceptions in the Sovereign Immunity Act, but ultimately determined that the plaintiff's claims did not fall within any exception to immunity and thus they were rightly dismissed. See Abrams, 2015 WL 5671465 at *4.

Similarly, in Heicklen v. Hoffman, the Commonwealth Court held that a district justice was an officer of the Commonwealth and subject to suit if his conduct fell within one of the nine areas where the Commonwealth had waived immunity in the Sovereign Immunity Act. 761 A.2d 207, 209 (Pa. Commw. Ct. 2000). However, just as in Russo

and Abrams, the Commonwealth Court found the claims did not fall within one of the exceptions and the claims were properly dismissed. Id.

This Court found no case where claims were brought against a court within the Commonwealth government or one of its officers where that claim actually fit within one of the exceptions to immunity set forth in the Sovereign Immunity Act. In this case, there is no dispute that the claims set forth by Appellee Brooks fall within the real estate exception of the Sovereign Immunity Act.

IV. Conclusion

The only dispute is a question of law as to whether the General Assembly's definition in the Sovereign Immunity Act of "Commonwealth party" encompasses the courts. It would be surprising for the General Assembly to create a special exemption allowing for the judicial branch of government to enjoy a higher level of immunity than the General Assembly provided to itself and the executive branch without any explicit language or legislative history of such an intention. If the General Assembly had meant to carve out such a unique exemption for the courts, this would mean that courts alone are not responsible to keep their property safe from dangerous conditions while all other state and local governments are required to do so, and are subject to liability when they do not and someone is injured.

If the General Assembly, when it promulgated the Sovereign Immunity Act, intended to give the courts immunity that is unavailable to other branches of the Commonwealth government, then summary judgment should have been granted and the Family Court would be completely immune from any injuries caused to Appellee Brooks from a dangerous condition on its property. On the other hand, if the General

Assembly intended to include the courts within the definition of "Commonwealth party" within the Sovereign Immunity Act and subject to liability in specific areas, as it did for all other state and local governments, then summary judgment should have been denied and a trial should be held to determine if the glass wall in the Family Court lobby was a dangerous condition under the real estate exception that caused Appellee Brooks' injury.

BY THE COURT:

Lisa M. Rau, J.

DATE: November 6, 2018

Certificate of Service

The undersigned certifies that on March 8, 2021, the foregoing *Brief* was served by PACFile on counsel of record:

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