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IN THE COURT OF COMMON PLEAS  
OF PHILADELPHIA COUNTY

REX ALLEN WINSTON and  
TINA L. WINSTON, h/w

JANUARY TERM, 1995

NO. 1037

v.

PENNSYLVANIA DEPARTMENT  
OF TRANSPORTATION, ET AL.

OPINION

Plaintiffs Rex Allen Winston and Tina L. Winston, husband and wife, filed this negligence action against Defendant Pennsylvania Department of Transportation. Plaintiffs sought damages for injuries that Plaintiff Rex Allen Winston sustained in an accident that occurred while he was driving a plow truck during a snow removal operation.

Before trial, Defendant filed a Motion in Limine to preclude the admission of bridge inspection reports prepared by Defendant pursuant to § 409 of the Federal-Aid Highway Act of 1987.<sup>1</sup> The Court denied Defendant's Motion and permitted the admission and use of the bridge inspection reports at trial. Trial began on May 23, 1997. On May 29, 1997, a jury returned a verdict for Plaintiffs and against Defendant.

Defendant filed a Motion for Post-Trial Relief on June 5, 1997, asking the Court to grant judgment n.o.v. and order a new trial. On July 2, 1997, the Court molded the verdict to reflect

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<sup>1</sup> 23 U.S.C. § 409.

\$250,000.00 as the statutory limit of recovery against Defendant.<sup>2</sup> On December 15, 1998, Defendant filed a Praecipe to Enter Judgment in favor of Plaintiffs pursuant to Pennsylvania Rule of Civil Procedure 227.4(1)(b). From the Entry of Judgment, Defendant timely appealed.

The issue on appeal is whether the Court erred in permitting the admission of Defendant's bridge inspection reports at trial. For the following reasons, the Court's ruling was proper and should be affirmed.

Defendant entered into a contract with the City of Philadelphia ("the City") under which the City agreed to provide snow removal services on certain Commonwealth roads. The City subsequently solicited a bid from Colanero Contracting Company ("Colanero") to perform winter traffic services along Henry Avenue. Plaintiff was employed by Colanero as an operation engineer. On March 13, 1993, Plaintiff was injured when the plow attached to the truck he was operating caught onto the top plate of a raised expansion joint on the Henry Avenue bridge northwest of Hunting Park Avenue. The truck came to an abrupt stop, throwing Plaintiff against the front windshield and steering column.

Before trial, Plaintiffs' liability expert, Alan Cohen, reviewed two bridge inspection reports prepared by Defendant. The first report, dated April 27, 1992, identifies heavy wear on the expansion joints. The second report, dated June 4, 1990, notes cracks in the concrete, rust in the expansion joints, and cracks in the bituminous wearing surface. The 1990 report also identifies a moderate bump at the near end of the bridge and heavy bumping near the far end. These reports were objected to at trial, as was the admission of a "Public Utility Commission Structure Status

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<sup>2</sup> See 42 Pa. C.S. § 8528(b).

Report” dated April 30, 1969, a “BMS Proposed Maintenance Activities” report dated May 7, 1990, an undated “Concrete or Masonry Bridge Record,” and an undated “Structure Inventory and Appraisal Sheet.”

To overcome the defense of sovereign immunity in this case, Plaintiffs were required to prove that Defendant had “actual written notice” of the dangerous condition on Henry Avenue.<sup>3</sup> Defendant, however, would not stipulate to notice in this case. Plaintiffs sought to introduce the bridge inspection reports, detailing the deteriorating condition of the road, to prove that Defendant had actual notice of the dangerous condition prior to the accident. Defendant sought to preclude the admission of these documents and any testimony related to them at trial. Following argument on this issue, the Court permitted the admission and use of the reports.

Defendant argues that permitting the admission and use of the bridge inspection reports was a violation of the Federal-Aid Highway Act of 1987 (“the Highway Act”).<sup>4</sup> The Highway Act provides:

... reports, surveys, schedules, lists or data compiled or collected for the purpose of identifying, evaluating, or planning the safety enhancement of potential accident sites, hazardous roadway conditions, or railway-highway crossings, pursuant to sections 130, 144, and 152 of this title or *for the purpose of developing any highway safety construction improvement project which may be implemented utilizing Federal-aid highway funds* shall not be subject to discovery or admitted into evidence in a Federal or State court proceeding or considered for other purposes in any action for damages arising from any occurrence at a location mentioned or addressed in such reports, surveys, schedules, lists, or data.<sup>5</sup>

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<sup>3</sup> 42 Pa. C.S. § 8522(b)(5).

<sup>4</sup> 23 U.S.C. § 409.

<sup>5</sup> 23 U.S.C. § 409 (emphasis added).

Consistent with the narrow wording of the statute, courts interpreting the Highway Act mandate strict construction of the Highway Act. In Kitts v. Norfolk and Western Railway Company, the District Court for the Southern District of West Virginia ruled that the statute was strictly limited to documents prepared solely for the purpose of developing highway construction improvement projects using federal-aid funds.<sup>6</sup> Specifically, the Court stated that the Highway Act:

clearly does not accord protection for documents or data prepared or compiled for some entirely separate and distinct purpose, even if the contents of the same eventually become ingredients thrown into a soup kettle with a distinct flavor of safety enhancement.<sup>7</sup>

Nevertheless, a state-prepared report regarding a road that is not part of the federal-aid highway system may be protected by the Highway Act in limited circumstances. Such reports are only protected when the party asserting the privilege produces evidence sufficient to establish that the state authorities prepared the documents for the purpose of complying with the federal safety enhancement program.<sup>8</sup>

In this case, Defendant argues that the bridge inspection reports relating to the accident site, which Defendant produced during discovery, should have been precluded from introduction at trial under the Highway Act. Defendant produced neither an affidavit nor any other evidence that these documents were created for any purpose even related to the federal-aid highway safety program. In fact, one of the reports was prepared on April 30, 1969, long before the Highway Act was enacted.

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<sup>6</sup> 152 F.R.D. 78, 81 (S.D.W. Va. 1993)(emphasis in original).

<sup>7</sup> Id.

<sup>8</sup> See Lusby v. Union Pac. R.R. Co., 4 F.3d 639, 641 (8th Cir. 1993), reh'g en banc denied, 1993 U.S. App. LEXIS 27117 (8th Cir. 1993); Harrison, 965 F.2d at 159.

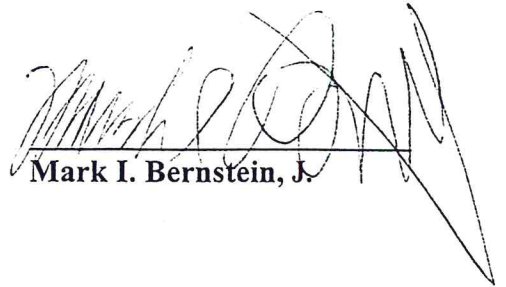
The bridge inspection reports at issue simply describe general maintenance activities and contain data relating to the physical condition of the Henry Avenue bridge. Thus, they do not fall within the ambit of the Highway Act's protection.

For the foregoing reasons, the Court properly admitted the bridge inspection reports at trial, and its ruling should be affirmed.

**BY THE COURT:**

**DATE:**

3/12/99



Handwritten signature of Mark I. Bernstein, J. The signature is written in dark ink and is somewhat stylized, with a large, sweeping flourish extending to the right.

**Mark I. Bernstein, J.**