

*Clevetrust Realty Investors, supra* at 433, the courts held that a lender/property owner satisfied his obligations to the subcontractor by making advances to the general contractor for the work performed by the subcontractors. Furthermore, the court held in *Meyers Plumbing & Heating Supply Company v. West End Federal Savings and Loan Ass'n supra* at 565 that property owners are not liable for the cost of materials supplied by a subcontractor for the renovation of their property.

In the current dispute, the defendants, Thomas and Marybeth Maloskey, paid compensation for all the benefits received as a result of their newly constructed residence. The defendants paid the general contractor the amount due under the contract. The amount paid included the costs of the services rendered for construction and installation as well as the cost of the building materials. Therefore, the defendants paid the general contractor for the materials received from the plaintiff. If the court were to require the defendants to pay the plaintiff, J and D Kitchen Distributors, for the kitchen and bathroom materials, the defendants would pay twice for the same items.

Moreover, in the interest of fairness, the defendants should not be held liable for the general contractor's failure to pay the plaintiff for these materials. The business agreement between the plaintiff and the general contractor involved a certain amount of risk to be born by the plaintiff. To have the court restructure this agreement and place all the risk on the defendants would be unfair. *D.A. Hill Company v. Clevetrust Realty, supra* at 434. The plaintiff should bear the responsibility for its own business decisions and seek recourse from the general contractor, not the defendants.

#### CONCLUSION

The plaintiff, J and D Kitchen Distributors, Inc., has not set forth any cause of action against the defendants, Thomas and Marybeth Maloskey, in its complaint. First, under contract law, the defendants were only incidental beneficiaries to the contract between the plaintiff and the general contractor, Larry Thatcher. Incidental beneficiaries will not be held liable under the third party beneficiary theory. Second, under the theory of unjust enrichment, the defendants did not receive an uncompensated benefit from the plaintiff.

#### ORDER OF COURT

August 5, 1991, the preliminary objection filed by defendants, Thomas and Marybeth Maloskey, in the form of a demurrer is granted and the case is dismissed.

PEIPER VS. PENNSYLVANIA DEPARTMENT OF TRANSPORTATION, C.P. Franklin County Branch, Misc. Vol. AA, Page 143

*Bus Drivers License - Revocation - Established Medical History - Federal Rehabilitation Act of 1973*

1. A Pennsylvania Department of Transportation regulation disqualifying a school bus driver on the basis of medical history of heart disease is a reasonable exercise of the Department's rule-making powers.
2. Under the current regulation a school bus driver's license can be revoked based on her medical history and not her current condition.
3. The Federal Rehabilitation Act of 1973 creates an affirmative defense of handicap discrimination in license revocation cases.
4. Where appellant does not raise an affirmative defense to avoid the regulation of the Department of Transportation, medical history alone is a basis for license suspension.

*Donald J. Smith, Esquire, Attorney for Appellant*  
*Patrick J. Redding, Esquire, Attorney for Appellee*

KAYE, J, July 30, 1991:

#### OPINION

Carol Ann Peiper (hereinafter "appellant") has appealed from the February 8, 1991 recall by the Department of Transportation of her license to operate a school bus. The Department's action was based on a physical examination report filed by appellant's family physician in January, 1991, which indicated that she had a medical

history of heart disease. The recall was effected pursuant to Department regulations which disqualifies an individual from driving a school bus who has "an established medical history or clinical diagnosis of myocardial infarction, angina pectoris, coronary insufficiency, or pacemaker insertion." 67 Pa. Code §71.3(b). Appellant filed a timely appeal from the Department's recall action, as is authorized by Section 1550 of the Vehicle Code, 75 Pa. C.S. §1550. A *de novo* hearing was held before the undersigned on June 6, 1991.

### FINDINGS OF FACT

At the time of hearing, appellant has been employed as a school bus driver for approximately twenty-two (22) years. She has worked for the Chambersburg Area School District for twelve (12) years and was employed prior to that by Valley Bus Lines. Appellant works three hours per day during the school year.

In October, 1990, appellant reported to her doctor that she was experiencing discomfort in her left arm and chest, which was diagnosed as angina pectoris. Following a heart catheterization which revealed multiple arterial blockages, appellant underwent coronary artery bypass surgery in November, 1990. Appellant recovered well post-operatively and had a normal stress test in January, 1991. Appellant's physician testified that at the present time she is experiencing no coronary insufficiency and can operate a school bus with no undue risk to her passengers.

### DISCUSSION

The issue presented by this case is whether an individual who has a history of angina pectoris and coronary insufficiency, but who currently has been determined by medical examination to be in good physical condition, can nevertheless have her bus operator's privileges recalled by the Department based solely on her history of heart disease. As noted previously, Department regulations currently provide for the disqualification of bus drivers on the basis of a medical history alone. 67 Pa. Code §71.3(b). The issue of the validity of that regulation has been thoroughly analyzed by the Commonwealth Court and upheld as a reasonable exercise of the Department's legislative rule-making power. In the case of *Bureau of*

*Traffic Safety v. Johnson*, 88 Pa.Cmwlth. 248, 256, 489 A.2d 960, 963 (1985), the Court upheld the validity of the Department's regulation under substantive due process standards and sustained the validity "of the regulatory basis for recall of a school bus driver's license solely upon the basis of medical history of heart attack." In *Pennsylvania Department of Transportation v. Miller*, 89 Pa. Cmwlth. 232, 492 A.2d 121 (1985), the Court clarified that the holding in *Johnson* also applies to a medical history of coronary insufficiency. The Court further summarized the *Johnson* holding as follows:

Recognizing that 67 Pa. Code §71.3 was promulgated by DOT Under an express grant of legislative power, we concluded in *Johnson* that the regulation is reasonable and valid under substantive due process when read and applied to disqualify a school bus operator solely on the basis of a medical history of myocardial infarction and without regard for whether such person is presently asymptomatic.

*Id.* at 234, 492 A.2d at 122. Application of this holding to the case at bar would require our affirmance of the Department's recall action given appellant's clear history of coronary insufficiency and angina pectoris.

We note our awareness of a more recent line of cases which would permit a further challenge to the Department's action on the basis of the affirmative defense of Section 504 of the Federal Rehabilitation Act of 1973, 29 U.S.C. §794. The case of *In re Stober*, Pa. Cmwlth. , 524 A.2d 535 (1987) first addressed the applicability of Section 504, which deals with the subject of handicap discrimination, to a case factually similar to the one at bar. The Court determined that Mr. Stober had established a prima facie case of handicap discrimination in that he had experienced a heart attack and was, therefore, regarded by the Department as a handicapped individual. Moreover, Mr. Stober established that he was excluded from his work due solely to that handicap. Having established a prima facie case under the Rehabilitation Act, the Court determined that the burden of proof then shifted to the Department to establish that Mr. Stober was not "otherwise qualified" to perform his work duties. The Court, accordingly, remanded the case for a determination of "(1) whether

there is an appreciable risk that Mr. Stober would not be able to secure the safety of his passengers; and (2) whether the accommodation of Mr. Stober, and individuals like him, by treadmill stress testing or other medical screening procedures would present an undue burden on DOT." *Id.* t , 524 A.2d at 539. A similar analysis was applied by the Court in *Department of Transportation v. Brown*, 125 Pa. Cmwlth. 372, 558 A.2d 121 (1989), *allocatur granted*, 525 Pa. 605, 575 A.2d 570 (1990).

Critical to our analysis here is the fact that in each of the Commonwealth Court cases which has permitted a challenge to the Department's recall action, such challenge has been grounded on the assertion by the driver of an affirmative defense under the Rehabilitation Act. It is only by virtue of such an affirmative defense that strict application of the Department's regulation may potentially be avoided. The dilemma presented by the instant case is that, while evidence has been presented by appellant which could support an affirmative defense of handicap discrimination, appellant has at no time specifically asserted her status as a handicapped individual under the rehabilitation Act. The Department contends that her failure to assert such a defense constitutes a waiver thereof and requires that we apply the terms of the regulation on the basis of appellant's medical history alone.

Appellant cites the case of *Commonwealth v. Lehman*, 5 Pa. D&C 4th 297 (C.P. Beaver 1990) in support of her contention that the Department may not rely on a past history of heart disease, where the appellant introduces evidence that she is presently qualified to drive a school bus. Our review of Pennsylvania appellate court decisions, however, convinces us that, absent specific assertion of an affirmative defense under the rehabilitation Act, the burden does not shift to the Department simply by the presentation of evidence regarding the current medical condition of the appellant. Instead, we believe that the Department may continue to act on the basis of a medical history alone where no allegation of handicap discrimination is asserted. *See, Department of Transportation v. Chalfant*, 129 Pa. Cmwlth. 430, 565 A.2d 1252 (1989). We believe such a result is clearly required by those cases, previously discussed, which uphold the validity of Section 71.3 (b) of the Department's regulations.

Given the status of the record presently before us, we conclude that the Department's recall of appellant's school bus driving privilege must be reinstated on the basis of appellant's clear medical history of coronary insufficiency and angina pectoris. In view of the medical evidence presented by appellant regarding her presently asymptomatic physical condition, however, we will also grant leave to appellant to amend her petition to assert an affirmative defense under the Rehabilitation Act. Our ruling in this regard in no way condones counsel's failure to assert an affirmative defense on behalf of his client prior to this stage of the proceedings. Instead, this action is taken in recognition of the fact that appellant's livelihood will be directly affected by the ultimate resolution of this matter. In order to avoid any prejudice to the Department, we will allow the record to remain open for the presentation of additional evidence in the event that a properly amended petition is filed in a timely manner by appellant. We will, accordingly, enter the attached order.

#### ORDER OF COURT

NOW, this 30th day of July, 1991, it is hereby ordered that the recall of the school bus driving privilege of Carol Ann Peiper in the above-captioned matter be reinstated and the appeal therefrom be dismissed.

It is further ordered that Carol Ann Peiper is granted leave to file an amended appeal petition within twenty (20) days of the date of this order. In the event such amended petition is timely filed and conforms to the dictates of the foregoing opinion, the record will remain open for the presentation of additional relevant evidence.