IN THE COMMONWEALTH COURT OF PENNSYLVANIA

David Megill and Michele Megill, Parents and Natural Guardians of Ethan D. Megill, a minor and David Megill and Michele Megill in their own right, Appellants	:	No. 1000 C.D. 2010
v.	:	Argued: October 12, 2010
Peter Niglio and Township of Tinicum	:	

BEFORE: HONORABLE RENÉE COHN JUBELIRER, Judge
HONORABLE PATRICIA A. McCULLOUGH, Judge
HONORABLE JAMES R. KELLEY, Senior Judge

OPINION NOT REPORTED

MEMORANDUM OPINION
BY JUDGE McCULLOUGH FILED: January 6, 2011

David and Michele Megill (Appellants) appeal from the May 13, 2010, order of the Court of Common Pleas of Delaware County (trial court) granting summary judgment to the Township of Tinicum (Township) and dismissing Appellants' complaint against the Township with prejudice. We affirm.

At the relevant time, Appellants lived at 655 Saude Avenue, a one-way street, at the corner of Delaware Avenue. An unnamed alley runs parallel to Saude Avenue, west of Appellants' property, and intersects with Delaware Avenue, which comes to a dead-end about 120 feet past the alley. Appellants' garage was situated at the intersection, facing Delaware Avenue. The Township painted a line on Delaware

Avenue in front of Appellants' garage extending approximately six feet from the corner and painted the word "NO" west of the line. (Reproduced Record (R.R.) at 211a-13a.) Appellants regularly parked their minivan and car on Delaware Avenue, west of the painted "NO."

On August 29, 2004, at approximately 6:45 p.m., thirteen year-old Ethan Megill was riding his bicycle on Delaware Avenue in a westerly direction. As he approached the unnamed alley he was struck by an automobile driven by Peter Niglio, a neighbor, whose car turned east from the alley, emerging from behind the three cars that were parked on the southern side of Delaware Avenue. The collision occurred on the north side of Delaware Avenue. The front left of the car hit Ethan, who fell and hit his head on a sewer grate. In addition to a broken leg, Ethan suffered serious brain injuries, resulting in permanent cognitive impairment.

Appellants instituted suit against Niglio and the Township by filing a writ of summons. Niglio had no insurance and had moved; mail was sent to him in care of a homeless shelter. Appellants subsequently filed a complaint against the Township, alleging that Ethan's injuries were caused by the Township's negligence in designating permitted parking on Delaware Avenue.[1] Specifically, Appellants asserted that the painted line on Delaware Avenue is a "traffic control"[2] that does not comply with regulations governing corner sight distances and that created a hazardous condition which was a substantial cause of the accident, in that the parked

[1] The complaint contains no allegations against Niglio. The Township joined Niglio as an additional defendant and, when he failed to answer, obtained a default judgment against him. Niglio is precluded from filing a brief in this appeal.

[2] Section 8542(b)(4) of the act commonly known as the Political Subdivision Tort Claims Act, 42 Pa. C.S. §8542(b)(4), sets forth an exception to governmental immunity related to trees, traffic controls and street lighting.

cars limited the sight distance for drivers exiting the alley. The Township filed an answer denying these allegations and, as new matter, asserted that Appellants' action is barred by governmental immunity.

In support of Appellants' claim, Mr. Megill testified[3] that, during the course of construction and road work near his house, he talked to Township employees about cars speeding in the area and about difficulty seeing from the alleyway. Mr. Megill said he told the employees that it was hard to see from the alley because people parked too close to the intersection. Mr. Megill also testified that he spoke to police officers about these concerns on a few occasions prior to the accident. Mr. Megill added that he complained to a Mr. Burnhower several times about parked cars blocking his garage and that he asked to have the lines that previously had been painted on Delaware Avenue repainted when the road work was completed. (R.R. at 68a-71a, 83a.)

Mr. Megill further testified that there had been two prior accidents involving vehicles parked at the same location. (R.R. at 69a-70a.) In one incident, a fifteen-year-old boy driving a van turned right from the alley onto Delaware Avenue and sideswiped Appellants' parked vehicle. The police report of that June 2, 2001, incident reflects that the driver was unlicensed and driving recklessly. (R.R. at 120a.) The second incident occurred on August 21, 2002, when a motorist drove past the alley, backed up on Delaware Avenue, and hit Appellants' van as he was backing up. (R.R. at 122a.)

In addition, Appellants offered the report of Steven M. Schorr, P.E., an engineer with DJS Associates, Inc., (R.R. at 47a-51a), stating that the "location of allowable parking, as established by the painted marks," created a hazardous

[3] All witnesses testified by way of deposition.

condition that limited the sight distance for both northbound and westbound drivers. According to the report, it "is consistent that this limitation was a substantial factor to the collision." (R.R. at 50a.) The Township submitted the report of Joseph M. Fiocco, P.E., an engineer with Mahon Associates, Inc., reflecting his contrary conclusion that there were no hazardous conditions in the vicinity of the intersection but, rather, there was ample sight distance available for vehicles to safely enter Delaware Avenue from the alley regardless of whether vehicles are parked along the south side of Delaware Avenue. (R.R. at 218a-19a, 229a.)

Mrs. Megill, who was outside when the accident occurred, testified that she did not recall whether Niglio had stopped before turning onto Delaware Avenue. However, according to a police report, Mrs. Megill witnessed the accident and told police that Niglio did not stop at the end of the alley before turning. (R.R. at 115a.) Mr. Megill also stated that, in the past he would see Niglio come around the corner without stopping.[4] (R.R. at 82a.)

Walter E. Lee, the Township's Superintendent of Highways, testified that his department relies on the Township's engineer, commissioners, and manager to determine where parking should be designated. Lee believed that the painted line and the word "No" were painted after Delaware Avenue was repaved and at Mr. Megill's request to prevent people from parking in front of his garage. Lee cited two other locations where similar lines had been painted on Delaware Avenue. (R.R. at 108a.)

[4] Ethan and his sister, who was ten at the time of the accident, also testified. Ethan had little recall of the accident. Both children stated that, in the past, they had seen Niglio driving too fast and exiting the alley without stopping.

On March 10, 2010, the Township filed a motion for summary judgment, asserting that Niglio's negligence was the cause of the accident, that there was no causal connection between the painted line and the accident, that no dangerous condition existed, and that the Township had no notice of a dangerous condition. (R.R. at 32a-34a.) The trial court determined that there was no genuine issue of material fact, no causal connection between the painted markings and the accident, and no evidence of complaints or notice to the Township that the lines created a problem with respect to visibility. Accordingly, the trial court granted the Township's motion, and Appellants appeal to this court.

Initially we note that summary judgment is properly granted where there is no genuine issue of material fact and the moving party has established entitlement to judgment as a matter of law. Wenger v. West Pensboro Township, 868 A.2d 638 (Pa. Cmwlth. 2005). As with all summary judgment cases, we must view the record in the light most favorable to the opposing party; all doubts as to the existence of a genuine issue of material fact must be resolved against the moving party. Id.

In order to withstand a motion for summary judgment, a non-moving party must produce sufficient evidence on an issue essential to its case and on which the non-moving party bears the burden of proof such that a jury could return a verdict in its favor.[5] Id. The failure to adduce this evidence establishes that there is no

[5] In pertinent part, Pa. R.C.P. No. 1035.2 provides that any party may move for summary judgment as a matter of law

> (2) if, after the completion of discovery relevant to the motion, including the production of expert reports, an adverse party who will bear the burden of proof at trial has failed to produce evidence of facts essential to the cause of action or defense which in a jury trial would require the issues to be submitted to a jury.

genuine issue of material fact and that the moving party is entitled to judgment as a matter of law. Id. Summary judgment is properly granted only in those cases which are free and clear from doubt. Id.

Generally, local agencies are immune from tort liability. Section 8541 of the Tort Claims Act, 42 Pa. C.S. §8541. However, a cause of action against a local agency may be maintained if the following conditions are satisfied: (1) the damages would otherwise be recoverable under common law or statute; (2) the injury was caused by the negligence of the local agency or an agency employee acting within the scope of his official duties; and (3) the negligent conduct falls within one of the exceptions to governmental immunity set forth in section 8542(b) of the Tort Claims Act, 42 Pa. C.S. §8542(b). Section 8542(a)(2) of the Tort Claims Act, 42 Pa. C.S. §8542(a)(2). In light of the expressed legislative intent to insulate political subdivisions from tort liability, the exceptions to governmental immunity are strictly construed. Metropolitan Edison Company v. Reading Area Water Authority, 937 A.2d 1173 (Pa. Cmwlth. 2007).

Appellants contend that the painted lines on the street are traffic controls and, therefore, the following exception to governmental immunity applies:

> *Trees, traffic controls and street lighting* – A dangerous condition of trees, traffic signs, lights or other traffic controls … under the care, custody or control of the local agency, *except that the claimant to recover must establish* that the dangerous condition created a reasonably foreseeable risk of the kind of injury which was incurred and *that the local agency had actual notice or could reasonably be charged with notice under the circumstances* of the dangerous condition at a sufficient time prior to the event to have taken measures to protect against the dangerous condition.

42 Pa. C.S. §8542(b)(4) (emphasis added).

Appellants argue that in Glenn v. Horan, 765 A.2d 426 (Pa. Cmwlth. 2001), our court recognized that lines painted on the street are traffic controls. In Glenn, the administratrix of a pedestrian's estate filed an action against the township asserting, among other things, that the township negligently maintained a cross-walk. The trial court sustained the township's preliminary objections, but this court reversed, concluding that the cross-walk was a traffic control and that the complaint established a prima facie case that was sufficient to overcome the township's demurrer. We conclude that the factual and procedural distinctions between Glenn and the present case render the former inapplicable here.

Appellants' argument is essentially that the Township failed to adequately prohibit parking along Delaware Avenue. The Township observes that this court previously has held that there is no cause of action against a city for failure to provide traffic controls. See Garrett by Garrett v. Moyston, 562 A.2d 386 (Pa. Cmwlth. 1989) (citing Farber v. Engle, 525 A.2d 864 (Pa. Cmwlth. 1987) and Bryson v. Solomon, 510 A.2d 377 (Pa. Cmwlth. 1986)). However, we need not decide whether or not the painted lines on Delaware Avenue are traffic controls or whether a failure to provide traffic controls was a contributing factor to the accident because Appellants did not establish that the Township had notice of a dangerous condition at the intersection.

Notice is an essential element of the plaintiff's burden in every case related to establishing a local agency's duty concerning a dangerous condition of traffic controls, 42 Pa. C.S. §8542(b)(4), even in situations where the local agency itself is responsible for creating the dangerous condition. Kennedy v. City of Philadelphia, 635 A.2d 1105 (Pa. Cmwlth. 1993); Fenton v. Philadelphia, 561 A.2d

1334 (Pa. Cmwlth. 1989).[6] A plaintiff may show that a party had notice of a dangerous condition by presenting evidence of similar accidents occurring at substantially the same place and under the same or similar circumstances, Ringelheim v. Fidelity Trust Company of Pittsburgh, 330 Pa. 69, 198 A. 628 (1938), and here, Appellants presented evidence reflecting that the Township had knowledge of two prior accidents at or near the same location. However, there is no indication that the painted lines or inadequate sight distance contributed to either of those accidents; in one instance, the driver was backing up on Delaware Avenue, not exiting from the alley, and in the other instance, the record reflects that the accident was caused by reckless driving. In addition, although Appellants testified about conversations with Township employees concerning sight problems at the intersection, there was no evidence of complaints related to the location of the painted lines. Thus, the Township's information concerning these prior accidents did not constitute actual or constructive notice of a dangerous condition related to the effect of painted markings on Delaware Avenue on sight distance at the intersection. Because Appellants did

[6] In Fenton, the plaintiff was injured in an accident that occurred when the car in which he was a passenger was passing a tractor trailer at an intersection. The driver of the tractor trailer proceeded to make a left turn, forcing the car into a concrete abutment. The plaintiff argued that the accident was caused by the city's inadequate and confusing line painting on a state highway, i.e, that the city should have painted a left-turn lane in addition to the existing lane markings. We observed in Fenton that while the plaintiff presented sufficient evidence to establish a dangerous condition, the plaintiff failed to prove that the city had actual or constructive notice of a dangerous condition caused by the lack of a left-turn lane. Thus, we concluded that the plaintiff failed to establish an exception to governmental immunity.

Kennedy involved a collision between an automobile and two pedestrians. The plaintiffs asserted that the city's placement of a single white dotted line on the highway misled the pedestrians into believing that they could safely walk where they were struck. Relying on our decision in Fenton, we concluded that the plaintiffs failed to establish an exception to governmental immunity because they did not demonstrate that the city had notice of the specific dangerous condition alleged.

not establish that the Township had actual notice of the alleged dangerous condition or could be reasonably charged with such notice under the circumstances, Appellants did not establish an exception to governmental immunity, and, therefore, the trial court properly granted the Township's motion for summary judgment.

Accordingly, we affirm.

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PATRICIA A. McCULLOUGH, Judge

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v.	:	
Peter Niglio and Township of Tinicum	:	

ORDER

AND NOW, this 6th day of January, 2011, the order of the Court of Common Pleas of Delaware County, dated May 13, 2010, is hereby affirmed.

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PATRICIA A. McCULLOUGH, Judge