IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Priscilla Rivera, a minor by her parent and natural guardian, Marilyn Burgos and Marilyn Burgos in her own right, Appellants	:	
v.	:	No. 1077 C.D. 2010
City of Philadelphia	:	Submitted: October 12, 2010

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

OPINION NOT REPORTED

MEMORANDUM OPINION
BY SENIOR JUDGE KELLEY FILED: November 9, 2010

Priscilla Rivera, a minor by her parent and natural guardian, Marilyn Burgos, and Marilyn Burgos in her own right (collectively "Burgos"), appeal the order of the Court of Common Pleas of Philadelphia County (trial court) granting the City of Philadelphia's (City) motion for summary judgment, entering judgment in favor of the City on all claims, and dismissing the City as a party to the action. We affirm.

On June 13, 2007, Rivera stopped to watch children playing soccer at the City's Tarken Recreation Center. Rivera stood by a wooden goal that had been erected on the field by soccer players from the neighborhood. The wooden goal was struck when one of the players kicked the soccer ball into one of its posts. The

wooden post, with an exposed nail, then fell down and struck Rivera on the right cheek. After the post struck Rivera, she pulled it away from her face exposing a large laceration and a hole in the side of her right cheek. Rivera was treated for the puncture wound and she now has a hyper-pigmented scar across her right cheek.

As a result, on May 6, 2009, Burgos filed a complaint against the City in the trial court seeking damages for Rivera's injury. On June 17, 2009, the City filed an answer and new matter in which it alleged, inter alia, that it was immune from liability pursuant to Section 8541 of the Judicial Code.[1] Discovery in the case proceeded and depositions were conducted.[2]

On January 7, 2010, following the close of discovery, the City filed a motion for summary judgment in which it again asserted, inter alia, that it was immune from liability under Section 8541. On February 5, 2010, Burgos filed a response to the City's motion in which she alleged, inter alia, that her claim fell

[1] 42 Pa.C.S. § 8541. Section 8541 of the Judicial Code states, "[e]xcept as otherwise provided in this subchapter, no local agency shall be liable for any damages on account of any injury to a person or property caused by any act of the local agency or an employee thereof or any other person."

[2] John Giargiari, the manager of the City's Tarken Recreation Center testified by deposition. See Reproduced Record (RR) at 85a-101a. Giargiari stated that the City owns metal goalposts that fit into sleeves in the ground for use at that park. Id. at 90a-91a. These goalposts are chained to the fence when not in use. Id. The wooden goalpost that injured Rivera was not owned by the City. Id. at 92a. That wooden goalpost was erected at the park by a group of local Brazilian soccer players who use their own goalposts in the park after closing. Id. at 91a-92a. Prior to the incident involving Rivera, Giargiari had confronted the players and told them that they could not use the park after hours, that they could not bring their own goalposts onto the property, and that he chased them off of the property. Id. at 92a-93a, 97a. Giargiari notified the Philadelphia Police Department and was told that they would stop by the park after closing. Id. at 95a. Giargiari had found the pieces of a wooden goalpost hidden in the bushes prior to the incident and destroyed them; however, the Brazilian soccer players must have constructed another goalpost which ultimately injured Rivera. Id. at 97a.

within the "real property" exception to governmental immunity contained in Section 8542(b)(3) of the Judicial Code.[3]

On February 25, 2010, the trial court issued an order granting the City's motion for summary judgment, entering judgment in favor of the City on all claims, and dismissing the City as a party to the action.[4] The trial court's order was

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[3] 42 Pa.C.S. § 8542(b)(3). Section 8542(b)(3) provides, in pertinent part:

> **(b) Acts which may impose liability.—**The following acts by a local agency or any of its employees may result in the imposition of liability on a local agency:
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> *** * ***
>
> (3) *Real property*.—The care, custody or control of real property in the possession of the local agency….

[4] In the opinion filed in support of its order, the trial court stated the following, in pertinent part:

> [The City] is entitled to Summary Judgment under sovereign immunity of [Section 8541 of the Judicial Code].[3] This act prohibits tort claims against local government agencies.[4] An exception to this immunity is provided for the negligent acts of a local agency when it relates to real property.[5] A chattel becomes part of real property when it is a fixture, if the chattel is not affixed to the ground it is not considered part of the real property.[6] In this case, it is undisputed that the makeshift goalposts were not affixed to the ground and put up by people from the neighborhood for soccer games.[7] Therefore, [Section 8541 of the Judicial Code] bars [Burgos's] claim because the goalpost was not a permanent fixture of real estate and summary judgment is appropriate based on sovereign immunity.
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> [3]42 Pa.C.S. §§ 8541-8542.
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> [4]Id.
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> [5]42 Pa.C.S. § 8542(b)(3).
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> [6]Blocker v. City of Philadelphia, 563 Pa. 559, 563[, 763 A.2d 373, 375] (2000) (holding bleachers that were unattached to the ground

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docketed on March 1, 2010. Burgos then filed the instant appeal of the trial court's order.[5,6]

In this appeal, Burgos claims that the trial court erred in granting summary judgment because the real property exception of Section 8542 of the Judicial Code applies in this case, and that there are genuine issues of material fact relating to the City's care, custody and control of its real property.[7] More

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> at the Robin Hood Dell East grounds were not real property and thus outside the exception to [Section 8541 of the Judicial Code]).
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> [7]*See* Depo. Giargiari [RR at 91a].

Trial Court Opinion at 2.

[5] Burgos initially appealed the trial court's order to the Pennsylvania Superior Court. However, by order dated April 19, 2010, the Superior Court transferred the appeal to this Court.

[6] This Court's scope of review of the grant of a motion for summary judgment is limited to determining whether the trial court abused its discretion or committed an error of law. Sonnenberg v. Erie Metropolitan Transit Authority, 586 A.2d 1026 (Pa. Cmwlth. 1991). Summary judgment is properly granted where there is no genuine issue of material fact as to a necessary element of the cause of action and the moving party has clearly established entitlement to judgment as a matter of law. Pa.R.C.P. No. 1035.2(1); Dunkle v. Middleburg Municipal Authority, 842 A.2d 477 (Pa. Cmwlth.), petition for allowance of appeal denied, 580 Pa. 708, 860 A.2d 491 (2004). The record must be viewed in a light most favorable to the opposing party, and all doubts as to the existence of a genuine issue of material fact must be resolved against the moving party. Id. The entry of summary judgment may only be granted in cases where the right is clear and free from doubt. Rieger v. Altoona Area School District, 768 A.2d 912 (Pa. Cmwlth. 2001).

[7] In this regard, Burgos relies upon the deposition testimony of Giargiari in asserting that the wooden goalpost that caused the harm to Rivera was made from the pieces of the wooden goalpost that had been found hidden in the bushes at the park. See Brief of Appellants at 14-15 citing to RR at 92a-93a, 97a. More specifically, Burgos argues that "[t]he City was negligent in its care, custody, and control of the field by allowing a wooden goalpost to continue to be stored on the property even after finding it hidden weeks before the incident, in failing to remove the goalpost and in failing to ensure that the dangerous and improper activities were not conducted at the park." Brief of Appellants at 16. However, it appears that Burgos is mistaken in this assertion. To the contrary, Giargiari specifically testified that the pieces of the wooden goalpost that were found hidden in the bushes were destroyed, and that the piece of the goalpost that ultimately injured Rivera must have been part of another wooden goalpost brought into the park.

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specifically, Burgos contends that the trial court erred in relying upon Blocker, and in determining that the goalpost was personalty and not part of the realty, because it was not "of" the realty. Burgos asserts that in Grieff v. Reisinger, 548 Pa. 1, 693 A.2d 195 (1997), the Supreme Court did away with the "on/of" distinction in determining whether the real property exception to immunity applied based upon the condition of government realty in its care, custody and control. As a result, Burgos claims that Grieff, and not Blocker, controls the disposition of this appeal.

However, in Repko v. Chichester School District, 904 A.2d 1036 (Pa. Cmwlth. 2006), petition for allowance of appeal denied, 592 Pa. 769, 923 A.2d 1175 (2007), this Court considered the interplay between Blocker and Grieff in determining the applicability of the real property exception to governmental immunity. In Repko, a student was injured when a folding table that had been improperly stored in a gym fell onto her right calf and ankle causing a deep cut which required several stitches. The trial court followed Grieff in rejecting the school district's assertion that the real property exception did not apply and that it was immune from liability.

On appeal, this Court reversed the trial court, stating the following, in pertinent part:

> Contrary to the trial court's interpretation of *Grieff* that the government entity was not immune because "the care of the personalty caused a dangerous condition to occur on the real property", the actual holding in *Grieff* clearly stated that there was no immunity due to *the negligent care of the real property—i.e., the floor*—when paint thinner was poured on the floor, which ignited and caused severe injuries. Similarly, the holding in *Hanna* [*v. West Shore School District*, 717 A.2d 626 (Pa.

See RR at 93a, 97a.

> Cmwlth. 1998)] was based on the injuries suffered from improperly caring for the real property, i.e., the floor. Here, although Repko frames the issue in terms of the negligent care of the gymnasium, which is real property, in fact, Repko was ***injured by a table*** that fell on her in the gymnasium. Thus, the facts in this case are very similar to the facts in *Blocker* and its progeny, which have held that the real property exception to immunity does not apply where a person is injured by the negligent maintenance of *personalty*.
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> Like the plaintiffs in *Canon-McMillan* [*School District v. Bioni*, 561 A.2d 853 (Pa. Cmwlth. 1989)], *Rieger* and *Blocker*, Repko was injured by an item of *personalty*, and not real property. Therefore, consistent with those opinions, we will apply the *Blocker* approach, and find that the School was immune under [Section 8541 of the Judicial Code]. To hold, as the trial court did, that an item of personalty which injures someone on real property is within the care, custody and control exception to immunity, would bring almost any injury on school district property within the real property exception to immunity. Such a holding would defeat the purpose of immunity under the [Judicial Code], which must be strictly construed to further the legislature's intent to provide immunity. *Finn* [*v. City of Philadelphia*, 541 Pa. 596, 601, 664 A.2d 1342, 1344 (1995)].

Repko, 904 A.2d at 1042-1043 (emphasis in original and footnote omitted).[8,9]

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[8] In support of this allegation of error, Burgos also relies upon the opinion of the Supreme Court in Kilgore v. City of Philadelphia, 553 Pa. 22, 717 A.2d 514 (1998), in which a genuine issue of material fact precluded summary judgment where it was alleged that the driver of a motorized luggage tug lost control because of the accumulated ice and snow on the City's airport roadway. Thus, like the claim in Grieff, the claim in Kilgore related to the negligent care of the real property, i.e., the roadway, where the accident was caused by the accumulated ice and snow. Again, in the instant case, it is undisputed that Rivera's injuries were caused by personalty, i.e., the wooden goalpost, that had been placed on the City's real property.

[9] Finally, Burgos also relies upon the opinion of this Court in Martin v. City of Philadelphia, 696 A.2d 909 (Pa. Cmwlth. 1997), in which a genuine issued of material fact precluded summary judgment where a child was injured in a City park when he fell onto a

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Likewise, in the instant case, it is undisputed that Rivera's injuries were caused by personalty, i.e., the wooden goalpost, that had been placed on the City's real property. As a result, Blocker and Repko control the disposition of the instant motion for summary judgment. Accordingly, the trial court did not err in granting the City's motion for summary judgment, in entering judgment in the City's favor, and in dismissing the City as a party in this case.

Accordingly, the order of the trial court is affirmed.

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JAMES R. KELLEY, Senior Judge

discarded piece of metal pipe that was lying in a field. However, in that case, "[t]he Martins assert[ed] that the goalpost had been attached to the ground, and it remained on the premises and 'of' the City's land after it was removed from the ground." Martin, 696 A.2d at 912. Thus, unlike the instant case, the claim in Martin was based upon a fixture as defined in Blocker.

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O R D E R

AND NOW, this 9th day of November, 2010, the order of the Court of Common Pleas of Philadelphia County, dated February 25, 2010 at May Term, 2009, No. 425, is AFFIRMED.

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JAMES R. KELLEY, Senior Judge