IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Albert Constanzo, a minor, by his parent and natural guardian, Milagros Jimenez and Milagros Jimenez, in her own right, Appellants	:	
v.	:	
Rosemarie Yetzer and John Yetzer and Reading School District and City of Reading	:	
v.	:	
Milagros Jimenez	:	No. 1173 C.D. 2007 Argued: March 10, 2008

BEFORE: HONORABLE BERNARD L. McGINLEY, Judge
HONORABLE ROCHELLE S. FRIEDMAN, Judge
HONORABLE JOSEPH F. McCLOSKEY, Senior Judge

OPINION NOT REPORTED

MEMORANDUM OPINION
BY JUDGE McGINLEY FILED: April 10, 2008

Alberto Constanzo (Constanzo), a minor, by his Parent and Natural Guardian, Milagros Jimenez, and Milagros Jimenez, in her own right (Jimenez) appeal the orders of the Court of Common Pleas of Berks County (common pleas court) which granted the Reading School District's (District) motion for judgment on the pleadings and sustained the preliminary objections of the City of Reading (City) and dismissed Jimenez's complaint against the City.

On April 7, 2000, Constanzo, a six year old student matriculating at the 13th and Greene Elementary School in Reading, Pennsylvania, was struck by a motor vehicle as he attempted to cross 13th Street at the corner of Oley Street. The

intersection was two blocks from the school. There was no crossing guard present because the District dismissed its students early. Jimenez alleged that Constanzo suffered serious injuries including:

> left open femur fracture, left closed tibia/fibula deformity, right closed femur fracture and right tibia/fibula fracture with degloving of skin over the tibia/fibia, intramedullary rod fixation of right and left femurs and such other injuries to her [sic] head, neck, back, arms, and legs, their bones, tissues, cells, members and organs, along with shock and injury to her nerves and nervous system all of which . . . are permanent in nature, irreparable and severe.

Complaint, July 22, 2002, (Complaint) Paragraph 17 at 3-4; Reproduced Record (R.R.) at R-4a-R-5a.

Jimenez commenced an action in the common pleas court against Rosemarie Yetzer and John Yetzer, the owners of the vehicle which struck Constanzo, the District, and the City. Jimenez settled with the Yetzers. In the complaint Jimenez alleged the City and District were negligent:

> 28. At all times prior to the date of the accident as aforementioned, defendants, Reading School District and City of Reading had in place a traffic control devise [sic] in the form of a school crossing guard at the aforementioned corner of North 13th Street and Oley Street for the purpose of the safe crossing of elementary school students at the intersection.
>
> 29. On the date and time of the accident as aforementioned, the aforesaid traffic control devise [sic] was not in place thereby directly contributing to the accident as aforementioned and resulting injuries to minor plaintiff.

> 30. The lack of a traffic control devise [sic] in the form of a school crossing guard created a reasonably foreseeable risk of injury to the minor plaintiff and at all times material hereto, defendants knew or should have known that such lack of a traffic control devise [sic] would cause injury to minor plaintiff.
>
> . . . .
>
> 32. The negligence, careless and liability producing conduct of the defendants, Reading School District and City of Reading consisted of the following:
>
> (a) Failure to properly supervise the aforesaid school crossing guard at the intersection of 13th & Oley Streets during all times pertinent to the minor plaintiff' [sic] accident;
>
> (b) Failure to promptly and properly replace and/or substitute the traffic control devise [sic] at the intersection as aforementioned;
>
> (c) Failure to warn plaintiffs of the lack of a school crossing guard or any other traffic control devise [sic] at the intersection as aforementioned;
>
> (d) Creating a dangerous condition at the intersection as aforesaid by failing to maintain a traffic control devise [sic] at the intersection as aforesaid;
>
> (e) Failure to insure that the traffic control devise [sic] in the form of a school crossing guard was present during the minor plaintiff's [Constanzo] dismissal from 13th & Greene Elementary School at the time and place as aforesaid;

Complaint, Paragraphs 28-30, and 32 at 6-7; R.R. at R-7a-R-8a.

In New Matter the District alleged that, as a matter of law, a school crossing guard is not a traffic control device within the meaning of 42 Pa.C.S.

§8542(b)(4)[1] and that the complaint failed to state a claim upon which relief could be granted because the allegations in the complaint did not fall within any exception to governmental immunity.

> The District moved for judgment on the pleadings:
>
> 8. Since the plaintiffs [Jimenez] have not sufficiently pled that a traffic control device under the care, custody or control of the defendant School District caused or in some manner contributed to the plaintiff's accident as required by 42 Pa. Cons. Stat. Ann. §8542(b)(4), and because their claims do not fall within any of the other enumerated exceptions to governmental immunity under 42 Pa. Cons. Stat. Ann. §8542, the plaintiffs' [Jimenez] claim against the School District is barred by the doctrine of local governmental immunity and Reading School District is entitled to the entry of judgment in its favor under Pa.R.Civ.P. 1034(b).

Motion for Judgment on the Pleadings, June 3, 2003, Paragraph 8 at 2-3; R.R. at R-18a-R-19a.

On January 26, 2004, the common pleas court entered judgment in favor of the District.

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[1] Section 8542(b)(4) of the Judicial Code, 42 Pa.C.S. §8542(b)(4), provides:

> (4) *Trees, traffic controls and street lighting*.--- A dangerous condition of trees, traffic signs, lights or other traffic controls, street lights or street lighting systems 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 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.

The City preliminarily objected in the nature of a demurrer and alleged that Jimenez's claims did not fall under any of the recognized exceptions to governmental immunity under 42 Pa.C.S. §8542(b):

> 5. Defendant, City of Reading, has governmental immunity under 42 Pa.C.S.A. section 8541 unless Plaintiffs' [Jimenez] cause of action falls under one of the exceptions listed under 42 Pa.C.S.A. section 8542.
>
> 6. Plaintiffs' [Jimenez] basis for their action centers around their interpretation that a school crossing guard is a traffic control device thereby falling under the exception set forth in 42 Pa.C.S.A. section 8542 (b)(4).
>
> 7. On January 26, 2004, the Court [common pleas court] granted a motion for judgment on the pleadings by Defendant, Reading School District. Said motion also set forth and argued that a school crossing guard is not a traffic control device falling under the governmental immunity exception set forth in 42 Pa.C.S.A. section 8542(b)(4).

Preliminary Objections, February 24, 2004, Paragraphs 5-8 at 1-2; R.R. at R-35a-R-36a.

On May 26, 2004, the common pleas court sustained the preliminary objection and dismissed Jimenez's complaint against the City with prejudice. In its opinion, the common pleas court reasoned that a crossing guard using devices to control traffic and the crossing guards themselves were not traffic control devices under 42 Pa.C.S. §8542(b)(4):

> Nowhere in that language is a human being, let alone a crossing guard mentioned. The very language used specifically and unmistakably describes inanimate devices and theoretical situations. A 'dangerous condition', for example, is a straightforward noun

> described by a qualifying adjective. A 'person' is not a 'condition'. This is a grammatical impossibility; the equivalent of saying a 'person' is 'foreseeability', or that a person with money in their [sic] pocket is 'currency'. It simply makes no logical sense, and is too great a leap for this Court to take. Similarly, it is far too great a departure to say that a 'person' is a 'tree', 'traffic sign', 'light' or 'other traffic control', 'street light' or a 'street lighting system.' The statute, as straightforwardly written as it is, must be strictly construed not to include people.
>
> Even assuming arguendo, that not having a crossing guard present is a dangerous condition, the Plaintiffs' [Jimenez] argument would still fail. Again, a person cannot be a condition, let alone a dangerous condition. For that matter, this Court is uncertain how a school's knowledge of the absence of a crossing guard could be actual notice of a dangerous condition. There are simply too many flaws in Plaintiff's [Jimenez] interpretation of the statute. The statutory language is clear and unambiguous, and further, it is neither overbroad nor insufficient, and this Court acted properly in its reading of the statute, and in its Orders based thereupon.

Common Pleas Court Opinion, August 22, 2007, at 3-4; R.R. at R-57a-R-58a. The common pleas court stated that relevant case law supported the determination that a traffic control device did not include human beings.

Jimenez contends that the common pleas court erred when it concluded that a sign held and manually operated by a school crossing guard and the crossing guard did not constitute "traffic controls" pursuant to 42 Pa.C.S. §8542(b)(4).[2]

[2] This Court's standard of review of an order of the trial court sustaining preliminary objections in the nature of a demurrer is limited to a determination of whether the trial court abused its discretion or committed an error of law. In ruling on preliminary **(Footnote continued on next page…)**

Jimenez asserts that the facts as pled in the complaint established that she possessed a common law or statutory cause of action against the City and the District pursuant to Sections 6122 and 6124 of the Vehicle Code (Code), 75 Pa.C.S. §§6122 and 6124.[3] Jimenez argues that once the City and the District exercised their discretion and placed a traffic control in the form of a "manually operated stop sign" at the intersection where Constanzo was injured, the City and

(continued…)

objections, the court must accept as true all well pled allegations of material fact. A demurrer should be sustained only in cases that are free from doubt and only when it appears with certainty that the law permits no recovery under the allegations set forth. Smith v. Pennsylvania Employees Benefit Trust Fund, 894 A.2d 874 (Pa. Cmwlth. 2006). This Court's review of an order granting a motion for judgment on the pleadings is limited to a determination of whether the common pleas court committed an error of law or abused its discretion. Ithier v. City of Philadelphia, 585 A.2d 564 (Pa. Cmwlth. 1991).

[3] Section 6122(a) of the Code, 75 Pa.C.S. §6122(a), provides in pertinent part:

> The department on State-designated highways and local authorities on any highway within their boundaries may erect official traffic-control devices, which shall be installed and maintained in conformance with the manual and regulations published by the department upon all highways as required to carry out the provisions of this title or to regulate, restrict, direct, warn, prohibit or guide traffic.

Section 6124 of the Code, 75 Pa.C.S. §6124, provides:

> The department on State-designated highways, including intersections with local highways, and local authorities on intersections of highways under their jurisdiction may erect and maintain stop signs, yield signs or other official traffic-control devices to designate through highways or to designate intersections at which vehicular traffic on one or more of the roadways should yield or stop and yield before entering the intersection.

the District demonstrated their awareness of its necessity, and each had a duty to either take corrective action or warn minor school children and/or their parents. Further, the City and the District knew or should have reasonably anticipated that a walking route had been established through the supervised intersection and the missing "manually operated stop sign" created a hazardous condition.

This Court does not agree. First, with respect to the District, this Court held in Majestic v. Commonwealth of Pennsylvania, Department of Transportation, 601 A.2d 386, 391 (Pa. Cmwlth. 1991) that a school district does not have authority to erect traffic control devices:

> Although Section 6122(a) of the Vehicle Code confers discretionary authority upon municipalities to erect traffic control devices on state highways within their boundaries, no comparable section gives such authority to the School District nor would there be any obligation to request the Department itself to erect any traffic control devices.

Based on Majestic, Jimenez's argument fails with respect to the District.

Second, before this Court in her brief, Jimenez argues that the "sign manually operated by" the crossing guard constituted a traffic control for purposes of the Code and Section 8542(b)(4) of the Judicial Code, 42 Pa.C.S. §8542(b)(4). However, a review of Jimenez's complaint indicates that Jimenez claimed the City and the District were negligent because they did not have the traffic control in place and the traffic control in question was the crossing guard him or herself. Jimenez did not allege that the City and District were negligent because there was

no stop sign or whistle present. This argument was not raised before the common pleas court and, consequently, is not before this Court. Therefore, this Court need not address it. See Pa.R.A.P. 302(a).

The common pleas court determined that a crossing guard was not a traffic control device under the exception to the immunity of a political subdivision under 42 Pa.C.S. §8542(b)(4). Jimenez does not challenge this determination in the argument section of her brief. Assuming arguendo, that Jimenez challenged this holding, this Court agrees with the common pleas court's cogent analysis of that issue. This Court previously held that a police officer directing traffic did not constitute a traffic control device because the exception contained in 42 Pa.C.S. §8542(b)(4) "applies to inanimate objects, such as traffic lights, etc. . . .This Statute was never intended to apply to a police officer directing traffic." Robinson v. City of Philadelphia, 666 A.2d 1141, 1143 (Pa. Cmwlth. 1995). Similarly, though not binding upon this Court, the United States District Court for the Eastern District of Pennsylvania determined in Smith v. City of Chester, 842 F. Supp. 147 (E.D. Pa. 1994) that a school crossing guard did not constitute a traffic control device. The District Court relied in part on Erney v. Wunsch, 35 D & C 3d 440 (York 1983) where the Common Pleas Court of York County held that a crossing guard did not qualify as a traffic control under 42 Pa.C.S. §8542(b)(4) because the exception only referred to nonhuman devices. While Smith and Erney are not binding upon this Court, this Court agrees with the reasoning contained therein.

Accordingly, this Court affirms.

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BERNARD L. McGINLEY, Judge

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O R D E R

AND NOW, this 10th day of April, 2008, the orders of the Court of Common Pleas of Berks County in the above-captioned matter is affirmed.

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BERNARD L. McGINLEY, Judge