IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Tyler D. Esh,	:	
	:	No. 221 C.D. 2013
Appellant	:	Submitted: September 12, 2013
	:	
v.	:	
	:	
Solanco School District and Matthew Bruns	:	

BEFORE: HONORABLE DAN PELLEGRINI, President Judge
HONORABLE ANNE E. COVEY, Judge
HONORABLE ROCHELLE S. FRIEDMAN, Senior Judge

OPINION NOT REPORTED

MEMORANDUM OPINION
BY SENIOR JUDGE FRIEDMAN FILED: October 7, 2013

Tyler D. Esh appeals from the January 31, 2013, order of the Court of Common Pleas of Lancaster County (trial court) granting summary judgment in favor of Solanco School District and one of its teachers, Matthew Bruns (together, Defendants). We affirm.

Esh was a tenth-grade student in Bruns' shop class. On April 28, 2008, Esh was using a pedestal grinder to shorten a piece of steel that was thirteen and one-half inches long and one-quarter inch in diameter. While Esh was operating the grinder, the fifth finger on Esh's left hand came into contact with the grinding wheel, severing a portion of that finger and eventually requiring its amputation.

The grinder was attached by a flexible cord to a safety connection box, which was hardwired to the classroom's power source. The grinder was not bolted to

the floor, although the bottom of the grinder's pedestal had four bolt holes that permitted it to be attached to the floor. The grinder was surrounded by a three-sided, sheet-metal safety screen to contain waste and protect students from injury. The safety screen also was not attached to the floor.

On October 8, 2010, Esh filed a negligence suit against Defendants. Defendants filed an answer and new matter, alleging that they are immune from liability under the governmental immunity provision of section 8541 of the Judicial Code, 42 Pa. C.S. §8541, commonly known as the Political Subdivision Tort Claims Act (Act). Esh filed an answer to Defendants' new matter, asserting that the real property exception to governmental immunity in section 8542(b)(3) of the Act applies.[1] The parties filed a joint stipulation of facts on April 16, 2012.

On July 30, 2012, Defendants filed a motion for summary judgment. After oral argument, the trial court granted Defendants' motion. The trial court concluded that the pedestal grinder was not part of the realty of the school and, therefore, the real property exception to governmental immunity did not apply. Esh now appeals to this court.[2]

Esh asserts that Defendants are not immune from suit under the real property exception to governmental immunity. Specifically, he claims that the

[1] Section 8542(b)(3) of the Act provides that a local agency or any of its employees may be liable for "[t]he care, custody or control of real property in the possession of the local agency." 42 Pa. C.S. §8542(b)(3).

[2] Our scope of review of an order granting summary judgment is plenary. We will reverse only if we determine that the trial court committed an error of law or abused its discretion. *Wilson v. Ridgway Area School District*, 596 A.2d 1161, 1163 n.13 (Pa. Cmwlth. 1991).

pedestal grinder could be bolted to the floor and, thus, was intended to be part of the realty and not personalty. We disagree.

To maintain a negligence claim under the real property exception, the plaintiff must prove that his or her injury resulted from a dangerous condition arising from the local agency's care, custody, or control of real property. *Tackett v. Pine Richland School District*, 793 A.2d 1022, 1023 (Pa. Cmwlth. 2002). Our courts have recognized three categories of chattels used in connection with real estate. The third category, which the parties agree applies here, includes "chattels 'which, although physically connected with the real estate, are so affixed as to be removable without destroying or materially injuring the chattels themselves, or the property to which they are annexed.'" *Cureton v. Philadelphia School District*, 798 A.2d 279, 283 (Pa. Cmwlth. 2002) (citation omitted). Such chattels "'become part of the realty or remain personalty, depending upon the intention of the parties at the time of the annexation.'" *Id.* (citation omitted). Whether a chattel is realty or personalty is a question of law to be determined by the property owner's manifest conduct. *LoFurno v. Garnet Valley School District*, 904 A.2d 980, 983 (Pa. Cmwlth. 2006).

In *Canon-McMillan School District v. Bioni*, 561 A.2d 853 (Pa. Cmwlth. 1989), this court determined that an 800-pound cast iron lathe in a high school wood shop was intended to be personalty. Although the lathe was hardwired to the classroom and had holes for attachment, the lathe was not bolted to the floor. Moreover, the lathe had been moved to a different room at least once and had been moved short distances within the classroom for cleaning, coursework, and classroom redesign. This court held, as a matter of law, that the lathe was an item of personalty

and, thus, the plaintiff's cause of action did not fall within the real property exception to governmental immunity. *Id.* at 855.

Here, as in *Canon-McMillan*, the evidence established that the pedestal grinder: (1) was not bolted to the floor; (2) was not connected to a centralized vacuum system; (3) was attached by a flexible electrical cord to a safety connection box; (4) had been moved on several occasions for the installation of a new floor, during an expansion of the shop, and for general maintenance; and (5) had been moved short distances within the classroom for cleaning and coursework. Therefore, the trial court correctly determined that Defendants intended that the pedestal grinder be an item of personalty.[3] *See also Wilson v. Ridgway Area School District*, 596 A.2d 1161, 1164 (Pa. Cmwlth. 1991) (concluding that a table saw in a school wood shop was personalty where the saw was not attached to the floor, was connected to the real estate only by an electrical cord, and was occasionally moved for cleaning purposes); *LoFurno*, 904 A.2d at 985 (concluding that a belt sander in a school wood shop was personalty where, despite being bolted to the floor, "there [was] no evidence of hardwiring, dedicated electrical lines or permanent attachment to a dust collection system"; rather, the sander was plugged into a receptacle and was "simply attached to a dust collection system from which it was easily removed for cleaning").[4]

[3] In reaching its decision, the trial court properly rejected Esh's claim that the pedestal grinder should be considered realty because it was hardwired to the classroom's power source. (Trial Ct. Op. at 4.) The lathe in *Canon-McMillan* was likewise hardwired to the classroom but was determined to be personalty. Furthermore, the trial court found that the pedestal grinder in this case could be easily disconnected from the power source with a screwdriver or wrench.

[4] *But see Cureton*, 798 A.2d at 283-84 (concluding that a scroll saw in a school wood shop was part of the realty where it was bolted down, had not been moved since 1987, was never removed from the classroom, and was permanently hardwired to the building's main power supply).

Esh also argues that because the grinder could be bolted to the floor, it was intended to be part of the realty. Esh appears to advocate a bright-line rule, arguing that "[i]n nearly every case where the machine was bolted to the floor, this Court had held that the machine was realty, and where it was not, this Court has held that the machine was personalty." (Esh's Br. at 14-15.) In *LoFurno*, however, we explained:

> [E]vidence of bolting alone is insufficient to support a conclusion that the School District intended the sander to be permanently affixed to the real estate; this is especially so where it is beyond dispute that such equipment is understandably safer if secured to the floor.

904 A.2d at 986. In any event, the evidence here established that the grinder was not, and had never been, bolted to the floor.

Finally, Esh argues that Defendants should not be shielded from liability where their conduct violated the law. Esh's expert, Ronald D. Schaible, concluded that the pedestal grinder in question was designed to be bolted to the floor and that Defendants' failure to attach the grinder to the floor violated the safety regulations of the Occupational Safety and Health Administration (OSHA). *See* 29 C.F.R. §1910.212(b).[5] However, Esh failed to allege that his injury resulted from Defendants' failure to attach the grinder to the floor, nor did he allege any OSHA violation. (*See* Compl. ¶¶ 39(A)-(Q).) As the trial court correctly noted, based on Esh's allegations, "[t]he only relevance of the grinder not being bolted to the floor

[5] The regulation provides that "[m]achines designed for a fixed location shall be securely anchored to prevent walking or moving." 29 C.F.R. §1910.212(b).

[was] whether the grinder should be considered part of the realty of the School." (Trial Ct. Op. at 5.)

Accordingly, we affirm the trial court's order granting summary judgment in Defendants' favor.

ROCHELLE S. FRIEDMAN, Senior Judge

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O R D E R

AND NOW, this 7th day of October, 2013, we hereby affirm the January 31, 2013, order of the Court of Common Pleas of Lancaster County.

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ROCHELLE S. FRIEDMAN, Senior Judge