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TRACEY HAYNES ET AL. *v.* CITY OF MIDDLETOWN
(SC 18665)

Rogers, C. J., and Palmer, Zarella, McLachlan, Eveleigh and Harper, Js.*

Argued April 20—officially released September 25, 2012

Hugh D. Hughes, with whom, on the brief, were *William F. Gallagher*, *Michael Oh* and *Mark A. Balaban*, for the appellants (plaintiffs).

Matthew Dallas Gordon, with whom were *Nicholas N. Ouellette* and, on the brief, *Ruth Kurien* and *Deirdre D. Stokes*, for the appellee (defendant).

Opinion

PER CURIAM. The named plaintiff, Tracey Haynes, on her own behalf and on behalf of the plaintiff Jasmon Vereen, her minor son, brought this action against the defendant, the city of Middletown, claiming that Vereen had incurred injuries when a fellow student at Middletown High School pushed him into a broken locker. Responding to the plaintiffs' complaint, the defendant filed its answer and special defense claiming municipal immunity pursuant to General Statutes § 52-557n. Although the plaintiffs filed a reply denying the special defense, the plaintiffs failed to plead that any exception to the defendant's immunity applied to them. See Practice Book § 10-57. After the plaintiffs presented their case, the defendant filed a motion for a directed verdict on which the court heard argument and reserved decision. At the conclusion of the evidence, neither party requested an instruction pertaining to the special defense of municipal immunity or any exceptions thereto. See Practice Book § 16-21. The court instructed the jury on principles of negligence but made no reference to the special defense. After the jury rendered a verdict for Vereen, the defendant filed a motion to set aside the verdict. The trial court heard argument and granted both the motion for a directed verdict and the motion to set aside the verdict on the ground of governmental immunity and rendered judgment for the defendant. The plaintiffs then appealed to the Appellate Court, which affirmed the judgment of the trial court on the alternative ground that "the plaintiffs never made the applicability of the identifiable victim, imminent harm exception to discretionary act immunity a legal issue in the case because they failed to plead it in their complaint or in their reply to the defendant's special defense of governmental immunity." *Haynes v. Middletown*, 122 Conn. App. 72, 82, 997 A.2d 636 (2010). We then granted the plaintiffs' petition for certification to appeal, limited to the following issue: "Did the Appellate Court properly affirm the trial court's [order] setting aside the jury's verdict because the plaintiffs failed to plead the imminent harm exception to municipal immunity in their reply?" *Haynes v. Middletown*, 298 Conn. 907, 3 A.3d 70 (2010).

Because the issue of the plaintiffs' failure to plead the identifiable victim, imminent harm exception to discretionary act immunity in their complaint or in their reply to the defendant's special defense of governmental immunity had not been raised or briefed prior to oral argument before the Appellate Court, the plaintiffs argue that the Appellate Court therefore could not decide the case on this basis. "We have long held that, in the absence of a question relating to subject matter jurisdiction, the Appellate Court may not reach out and decide [an appeal] before it on a basis that the parties never have raised or briefed. . . . To do otherwise

would deprive the parties of an opportunity to present arguments regarding those issues.” (Citations omitted.) *Sabrowski v. Sabrowski*, 282 Conn. 556, 560, 923 A.2d 686 (2007). “If the Appellate Court decides to address an issue not previously raised or briefed, it may do so only after requesting supplemental briefs from the parties or allowing argument regarding that issue.” *State v. Dalzell*, 282 Conn. 709, 715, 924 A.2d 809 (2007).

At oral argument before the Appellate Court in the present case, the defendant tangentially raised the issue of the plaintiffs’ failure to plead the identifiable victim, imminent harm exception to discretionary act immunity. Two judges on the panel discussed this issue with the defendant. The plaintiffs had reserved three minutes for rebuttal. During these three minutes, the plaintiffs addressed two issues raised during the defendant’s argument, but they did not refer to the defendant’s claim that they had failed to plead the identifiable victim, imminent harm exception to discretionary act immunity. Nor did the plaintiffs request the opportunity during or after argument to file a supplemental brief.

Upon review of the record on appeal and the briefs and oral argument of the parties before this court, we conclude that the plaintiffs did not have adequate notice of this alternative basis or sufficient opportunity to address it. We therefore conclude that the Appellate Court improperly decided the case on the basis of the plaintiffs’ failure to plead the identifiable victim, imminent harm exception to discretionary act immunity and improperly affirmed the judgment of the trial court. Accordingly, the judgment of the Appellate Court is reversed and the case is remanded to that court for consideration of that issue only after affording the parties the opportunity to brief and argue that issue.

The judgment of the Appellate Court is reversed and the case is remanded to that court for further proceedings in accordance with this opinion.

* The listing of justices reflects their seniority status on this court as of the date of oral argument.
