her to sell, in her capacity as Executrix of her late husband's estate, the real estate in question, without the joinder of the remaindermen, her daughters. Although not set forth in her petition, without objection from respondents, petitioner also seeks a ruling from the Court in effect, to permit her to consume the proceeds derived from the requested sale of the real estate.

After reviewing the evidence admitted in this case, we note that the will petitioner is asking us to interpret was not admitted into evidence, although a copy of the will was attached to the original petition. Therefore, the only evidence which we may properly consider is the testimony of petitioner, and the inventory and appraisement (Respondent's Exhibit 1). According to her testimony, petitioner is a life tenant in the real estate previously owned by Linn S. Steiger, with the remainder passing to their daughters upon petitioner's death.

"A life estate is a freehold interest in property, the duration of which is confined to the life...of some particular person...". P.L.E. Estates in Property §61."...[T]he life tenant of real property is entitled to its possession and enjoyment, to the exclusion of the remaindermen". P.L.E. Estates in Property §64.

A life tenant may ordinarily convey her interest in the life estate. *Dingee's Estate*, 109 Pa.Super. 455, 167A.2d 369(1933). However, a life tenant acting alone may not convey a property interest in fee simple unless the life tenant has a power of sale or a power of consumption. *Allen v. Hirlinger,* 219 Pa. 56, 87 A.2d 907 (1907). When the life tenant does not have a power to consume or sell, the life tenant may convey a fee simple interest if the remaindermen join in the deed. *Dorsey v. Fox,* 2 Dent. 591, 2 Sadler 207 3 A.2d 242 (1986).

In the case at bar, there is no evidence before us to indicate that petitioner was granted in the creating instrument the power to consume or sell the real estate in which she holds a life estate without the joinder of the remaindermen.

The limited evidence properly before the Court provides no basis for the Court to determine that the testator intended to grant to petitioner a power of consumption of the life estate granted to

petitioner. In construing a will, the scope of the inquiry for the Court to make is limited to the actual meaning of the words utilized by the testator, and the Court may not substitute its own judgment for what the testator ought to have said or even meant to say, but failed to say. *Re Ferren's Estate,* 365 Pa. 490, 76 A.2d 759 (1950). Testator herein granted to petitioner a life estate, and no more. The decedent made it quite clear that he intended for the remainder to pass to his daughters upon the death of petitioner, and this testamentary plan would be defeated if we were to grant the relief sought.

Accordingly, we are compelled to deny relief to petitioner.

DECREE NISI

NOW, June 22, 1990, the petition of Elizabeth H. Steiger is DENIED.

The Clerk of Courts shall notify the parties hereto of the entry of this decree nisi.

This decree nisi shall become a final decree upon motion of any party unless post-trial motions are filed within the time limits set forth in Pa.R.C.P. 227.1(c) (2).

Costs to be paid by petitioner.

KEGERREIS VS. LINCOLN INTERMEDIATE UNIT NO. 11, ET AL., C.P. Franklin County Branch, No. A.D. 93 of 1990

Demurrer - Governmental Immunity - Negligent Care of Real Property

1. Governmental immunity is an affirmative defense which is properly raised as new matter rather than by preliminary objection.
2. Where plaintiffs failed to file preliminary objections to defendants' preliminary objections raising the issue of governmental immunity, the defendants' objections will not be stricken.
3. The real estate exception to a claim of governmental immunity is unavailable where the claim of negligence consists of a failure to adequately supervise the conduct of students.

4. The real estate exception can only be applied where the artificial condition or defect of the land itself causes the injury.

James S. Palermo, Esq., Attorney for Plaintiffs
John J. Szaljna, Esq., Attorney for Plaintiffs
William A. Adams, Esq., Attorney for Defendants
David l. Schwalm, Esq., Attorney for Defendants

OPINION AND ORDER

KELLER, P.J., August 9, 1990:

Plaintiffs, Ronald D. Kegerreis and Julie R. Kegerreis, (hereafter "Kegerreis"), commenced this action on February 26, 1990 by filing a complaint for damages aginst the defendants, Lincoln Intermediate Unit #12, Chambersburg Area School District, (hereafter "School"), Roxanne M. Dennis, Marilyn Breier and Jane L. Cline for injuries suffered by the minor plaintiff, Ellen R. Kegerreis.

Defendant/School filed preliminary objections on April 26, 1990 in the nature of a demurrer, and a motion to dismiss for failure to join necessary parties.

Briefs of Kegerreis and the School have been filed. Oral argument was heard June 7, 1990. The matter is now ripe for disposition.

We will first address defendant's demurrer. Defendant demurs to the complaint on the ground that the plaintiff has failed to state a cause of action against it under the real estate exception to governmental immunity.

When considering a preliminary objection in the nature of a demurrer, the demurrer "admits all relevant facts sufficiently pleaded in the complaint, and all inferences fairly deducible therefrom, but not conclusions of law or unjustified inferences." *DeSantes vs. Swigart,* 296 Pa. Super. 283, 286, 442 A.2d 770, 772 (1982). Only where it appears with certainty that upon the facts averred the law will not permit recovery, will a demurrer be sustained. If any doubt exists as to whether the demurrer should be sustained, the doubt should be resolved by refusing to sustain the demurrer.

Plaintiffs contend that defendant's preliminary objection concerning governmental immunity should be dismissed for being in violation of Pa. R.C.P. No. 1030.

Initially, we note that immunity is an affirmative defense which pursuant to Pa. R.C.P. 1030 is properly raised in new matter rather than by preliminary objection. The Supreme Court in *In Re Upset Sale of Properties,* Pa. , 560 A.2d 1388 (1989), concluded that the governmental immunity defense may be raised at any time in a proceeding. *See Cotter vs. School District of Philadelphia,* Commonwealth Ct. , 562 A.2d 1029 (1989). In numerous cases the courts have addressed the issue of whether the defense of immunity from suit raised by preliminary objection should be stricken. *See Swartz vs. Masloff,* 62 Pa. Commonwealth Ct. 522, 437 A.2d 472 (1981). Courts have held preliminary objections are a proper vehicle for raising immunity where the defense is apparent on the face of the pleadings under attack. *Ziccardi vs. School District of Philadelphia,* 91 Commonwealth Ct. 595, 498 A.2d 452 (1985). However, the Commonwealth Court and the Supreme Court have held that a party may object to an opponent's raising immunity from suit in an improper manner. The current procedure for raising such a challenge is to file preliminary objections to the preliminary objections raising the immunity defense. *McCreary vs. City of Philadelphia,* 95 Commonwealth Ct. 285, 505 A.2d 385 (1986). The plaintiffs failed to file preliminary objections to defendant's preliminary objections. Therefore, the defendant's preliminary objection will not be stricken.

> 42 Pa. C.S.A. §8542 provides inter alia:
>
> (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.
>
> (3) Real property - The care, custody or control of real property in the possession of the local agency, except that the local agency shall not be liable for damages on account of any injury sustained by a person intentionally trespassing on real property in the possession of the local agency.

The general assembly intended to exempt the Commonwealth from immunity only in specific clearly defined situations. Therefore, the real property exception must be strictly construed. Exceptions to the rule of governmental immunity are to be narrowly

interpreted. *Snyder vs. Harmon,* Pa. , 562 A.2d 307 (1989). We find the case law to be well established. Section 8542 (b) (3) must be construed as narrow exception to a general legislative grant of immunity.

For 42 Pa. C.S.A. §8542 (b)(3) to apply, thus waiving the political subdivisions immunity for negligent care of real property, there must be negligence which makes the real property itself unsafe for activities for which it is used. The government owned real estate must be able to afford safety not only for the activities for which the property is regularly used but also intended to be used or reasonably forseen to be used. The focus of the negligent act involving a dangerous condition of real estate is the actual defect of the real estate itself. *Snyder vs. Harmon, supra.* Acts of others, however, are specifically excluded in the general immunity section (42 Pa. C.S.A. §8541). We must conclude that any harm caused by others may not be imputed to the local agency.

The real estate exception has consistently been held to be unavailable to those whose claim of negligence consists of a failure to adequately supervise the conduct of students or persons. *Mascaro vs. Youth Study Center,* 514 Pa. 351, 523 A.2d 1118 (1987). The language of the real property exception would be totally distorted if the supervisor of school children, or the lack thereof, was placed within its scope. *Frank vs. SEPTA,* 96 Pa. Commonwealth Ct. 221, 506 A.2d 1015 (1986). The real estate exception can be applied only to those cases where it is alleged that the artificial condition or defect of the land itself causes the injury, not merely when it facilitates the injury by the acts of others. *Mascaro, supra.*

The plaintiffs have not alleged that an artificial condition or a defect of the land caused the minor child's injuries.

The complaint instead alleges that the minor child, Ellen R. Kegerreis, received a forceful blow or was permitted to fall. There is no allegation of a defective toilet or table causing the injury; only that the child received a forceful blow or was permitted to fall. The complaint is replete with unexplained, conclusory statements rather than factual allegations. We find nothing alleged in the complaint that established or suggests a significant connection between an alleged dangerous condition and the plaintiff's complaint in the case at bar is that the minor child was negligently

Pennsylvania, on May 4, 1971, and recorded among the Deed Records of Franklin County, Pennsylvania, in Deed Book Volume 288-A, Page 219, Part 1.

BEING THE SAME REAL ESTATE which James S. Ferguson and JoAnne E. Ferguson, his wife, by deed dated March 7, 1974, and recorded among the Deed Records of Franklin County, Pennsylvania, in Deed Book Volume 698, Page 243, conveyed to Robert E. Collette and Victoria Collette, his wife.

SUBJECT, HOWEVER, to an easement for utilities along the strip of land ten feet in width adjoining Buckingham Drive and Warwick Drive as shown on the aforementioned plan of lots; to the restrictions adopted by Carl R. Flohr and Arlene S. Flohr, his wife, and recorded in Franklin County Deed Book Volume 664, Page 425; and to the covenant or agreement contained in abovementioned deed recorded in Franklin County Deed Book Volume 677, Page 1010.

BEING sold as the property of Robert E. Collette and Victoria Collette, his wife, Writ No. AD 1990-397.

TERMS

As soon as the property is knocked down to purchaser, 10% of the purchase price plus 2% Transfer Tax, or 10% of all costs, whichever may be the higher, shall be delivered to the Sheriff. If the 10% payment is not made as requested, the Sheriff will direct the auctioneer to resell the property.

The balance due shall be paid to the Sheriff by NOT LATER THAN Monday, February 18, 1991 at 4:00 P.M., prevailing time. Otherwise all money previously paid will be forfeited and the property will be resold on February 22, 1991 at 1:00 P.M., prevailing time in the Franklin County Courthouse, 3rd Floor, Jury Assembly Room, Chambersburg, Franklin County, Pennsylvania, at which time the full purchase price or all costs, whichever may be higher, shall be paid in full.

Raymond Z. Hussack
Sheriff
Franklin County, Chambersburg, PA

1/18, 1/25, 2/1/91

dropped, let fall, or swung onto the table or wheelchair. These claims are based upon alleged negligent supervision of the minor child and not a defect in the real property. The plaintiff's claim arises from the alleged conduct of the staff as distinguished from the condition of the property itself.

Based upon the foregoing, we are persuaded that the facts alleged do not bring the case at bar within the narrow scope of the exception to governmental immunity as set forth in the real estate exception. We therefore sustain defendant's preliminary objection in the nature of a demurrer.

Defendant's second motion, failure of plaintffs to join necessary parties, will not be acted upon because we have concluded the defendant's demurrer must be sustained. However, for the guidance of counsel, we feel compelled to observe that the legal posture of the Chambersburg Area School District appears to be identical with the other school districts.

ORDER OF COURT

NOW, this 9th day of August, 1990, the preliminary objections of the Chambersburg Area School District in the nature of a demurrer is sustained.

The plaintiffs are granted leave to file an amended complaint within twenty (20) days of date hereof.

LAYTON, ADMRX. ESTATE OF LAYTON, DECEASED VS. SHALLCROSS, M.D., ET AL., C.P. Franklin County Branch, No. A.D. 1987-398

Compulsory Nonsuit - Videotape Depositions - Expert Opinion - Medical Malpractice

1. An expert can render an opinion based on his personal knowledge assuming the truth of the trial testimony or based on a hypothetical question.

2. In a medical malpractice case the plaintiff must present expert testimony regarding the breach of the standard of care and causation.