[Cite as *Ohio Bell Tel. Co. v. Columbus*, 2009-Ohio-5126.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

Ohio Bell Telephone Co.,	:	
Plaintiff-Appellee,	:	
		No. 09AP-113
v.	:	(M.C. No. 2007 CVE 058293)
City of Columbus,	:	(ACCELERATED CALENDAR)
Defendant-Appellant.	:	

D E C I S I O N

Rendered on September 29, 2009

Hunt & Cook, L.L.C., *William H. Hunt* and *Gregory A. Cada*, for appellee.

Richard C. Pfeiffer, Jr., City Attorney, *Lara N. Baker*, Chief Prosecutor, and *Westley M. Phillips*, for appellant.

APPEAL from the Franklin County Municipal Court.

McGRATH, J.

{¶1} Defendant-appellant, City of Columbus ("appellant"), appeals from the judgment of the Franklin County Municipal Court denying appellant's motion for summary judgment.

{¶2} Plaintiff-appellee, Ohio Bell Telephone Company ("appellee"), is a public utility and telephone company that owns certain real property in Franklin County, Ohio. In its complaint, appellee alleges appellant negligently damaged appellee's property at two separate locations: 130 Brunson Avenue ("Brunson") and 84 Dakota Avenue ("Dakota"),

both of which are located in Columbus, Ohio. Specifically, appellee alleges that on May 8, 2007, one of appellant's trash trucks tore down an aerial telephone cable near the Brunson location. With respect to the Dakota location, appellee alleges its underground cable was damaged while appellant's water/sewer department was excavating in the area.

{¶3} On December 17, 2007, appellee filed its complaint seeking damages of $6,821.15, together with costs. On September 29, 2008, appellant filed a motion for summary judgment contending that not only is it immune from liability under the Political Subdivision Tort Liability Act but also that appellee failed to present evidence establishing appellant damaged any of appellee's real property fixtures. On January 23, 2009, the trial court denied appellant's motion for summary judgment stating only that appellant "has not met its legal burden." (Decision at 1.) No further reasoning was provided.

{¶4} This appeal followed and appellant brings the following two assignments of error for our review:

> 1. The Trial Court erred by misinterpreting and misapplying R.C. 2744 *et seq*, particularly R.C. 2744.02(B)(1), when it found that the City of Columbus is not entitled to statutory immunity from liability for the claims that comprise Count I of Ohio Bell Telephone Company's complaint.
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> 2. The Trial Court erred by misinterpreting and misapplying R.C. 2744 *et seq*, particularly R.C. 2744.02(B)(2), when it found that the City of Columbus is not entitled to statutory immunity from liability for the claims that comprise Count II of Ohio Bell Telephone Company's complaint.

{¶5} Though generally the denial of a motion for summary judgment is not a final appealable order, R.C. 2744.02(C) provides that "[a]n order that denies a political subdivision or an employee of a political subdivision the benefit of an alleged immunity

from liability as provided in this chapter or any other provision of the law is a final order." Appellant sought, and was denied, summary judgment on the basis of the Political Subdivision Tort Liability Act codified in R.C. Chapter 2744; therefore, the trial court's denial of summary judgment in this instance constitutes a final appealable order. See also *Hubbell v. City of Xenia*, 115 Ohio St.3d 77, 2007-Ohio-4839, syllabus (holding that when a trial court denies a motion in which a political subdivision or its employee seeks immunity under R.C. Chapter 2744, that order denies the benefit of an alleged immunity and is therefore a final, appealable order pursuant to R.C. 2744.02(C).)

{¶6} Because they are interrelated, we will address appellant's two assignments of error together. This matter was decided in the trial court by summary judgment, which under Civ.R. 56(C) may be granted only when there remains no genuine issue of material fact, the moving party is entitled to judgment as a matter of law, and reasonable minds can come to but one conclusion, that conclusion being adverse to the party opposing the motion. *Tokles & Son, Inc. v. Midwestern Indemn. Co.* (1992), 65 Ohio St.3d 621, 629, citing *Harless v. Willis Day Warehousing Co.* (1978), 54 Ohio St.2d 64. Additionally, a moving party cannot discharge its burden under Civ.R. 56 simply by making conclusory assertions that the nonmoving party has no evidence to prove its case. *Dresher v. Burt*, 75 Ohio St.3d 280, 293, 1996-Ohio-107. Rather, the moving party must point to some evidence that affirmatively demonstrates that the nonmoving party has no evidence to support his or her claims. Id.

{¶7} An appellate court's review of summary judgment is de novo. *Koos v. Cent. Ohio Cellular, Inc.* (1994), 94 Ohio App.3d 579, 588; *Bard v. Society Natl. Bank, nka KeyBank* (Sept. 10, 1998), 10th Dist. No. 97APE11-1497. Thus, we conduct an

independent review of the record and stand in the shoes of the trial court. *Jones v. Shelly Co.* (1995), 106 Ohio App.3d 440, 445. As such, we must affirm the trial court's judgment if any of the grounds raised by the movant at the trial court are found to support it, even if the trial court failed to consider those grounds. See *Dresher*, supra; *Coventry Twp. v. Ecker* (1995), 101 Ohio App.3d 38, 41-42.

{¶8} Under the Political Subdivision Tort Liability Act, as codified in R.C. Chapter 2744, we utilize the familiar three-step analysis to determine immunity of a political subdivision. First, we begin with the understanding that political subdivisions, such as appellant, are not liable generally for injury or death to persons in connection with a political subdivision's performance of a governmental or proprietary function. R.C. 2744.02(A)(1); *Howard v. Miami Twp. Fire Div.*, 119 Ohio St.3d 1, 2008-Ohio-2792, ¶18. Next, we are to consider whether an exception to that general rule of immunity applies. R.C. 2744.02(B); *Howard*. If there is an applicable exception, we then proceed to a third inquiry of whether the political subdivision can still establish immunity by demonstrating another statutory defense. R.C. 2744.03; *Howard*.

{¶9} As is provided in R.C. 2744.02(A)(1), "[e]xcept as provided in division (B) of this section, a political subdivision is not liable in damages in a civil action for injury, death, or loss to person or property allegedly caused by any act or omission of the political subdivision or an employee of the political subdivision in connection with a governmental or proprietary function." R.C. 2744.01(C)(2)(k) includes trash collection within the definition of governmental function, and R.C. 2744.01(C)(2)(l) includes the construction or reconstruction of a sewer system within the definition of governmental

function. Additionally, R.C. 2744.01(G)(2)(d) includes within the definition of proprietary function the "maintenance, destruction, operation, and upkeep of a sewer system."

{¶10} In support of its motion for summary judgment, appellant relied on the complaint and appellee's interrogatory responses in which appellee asserts a trash truck of appellant's tore down an aerial telephone cable at the Brunson location, and a backhoe operator of appellant's damaged a telephone pole at the Dakota location. Therefore, appellant met its initial burden to show that blanket immunity had been triggered, and the burden shifted to appellee to establish one of the exceptions to this immunity applied.

{¶11} As is relevant here, R.C. 2744.02(B) provides in part:

> (1) Except as otherwise provided in this division, political subdivisions are liable for injury, death, or loss to person or property caused by the negligent operation of any motor vehicle by their employees when the employees are engaged within the scope of their employment and authority. * * *
>
> (2) Except as otherwise provided in sections 3314.07 and 3746.24 of the Revised Code, political subdivisions are liable for injury, death, or loss to person or property caused by the negligent performance of acts by their employees with respect to proprietary functions of the political subdivisions.

{¶12} With its motion for summary judgment, appellant filed the affidavit of Scott Minnehan, a 13-year refuse collection vehicle operator employed by appellant. The Brunson location is included in Mr. Minnehan's assigned refuse collection area. According to his affidavit, on May 8, 2007, Mr. Minnehan observed a downed cable line at the Brunson location for the second week in a row and reported his observations to the Refuse Collection Division Dispatcher. Mr. Minnehan further testified that he did not damage the cable, no part of his vehicle ever came into contact with the cable, and that

had he caused such damage, he would have been required as part of his job duties to report the same.

{¶13} Appellant also filed the affidavit of Robert Ellinger, a 15-year sewer maintenance manager employed by appellant. Mr. Ellinger testified in his affidavit that if the Division of Sewerage and Drainage was involved in an excavation/construction project in the vicinity of the Dakota location on or about July 21, 2007, said activity would be reflected in the division's records. According to Mr. Ellinger's affidavit, "[t]here is no entry in the Division's records that indicates that the Division of Sewerage and Drainage was involved" in such activity. (Ellinger affidavit at 2.)

{¶14} To meet its reciprocal burden and demonstrate that one of the exceptions to immunity applies, appellee filed two affidavits, both by Scott Johnson, I&R Manager for AT&T in the Columbus South area. According to Mr. Johnson's first affidavit, he supervised the cable repair at the Brunson location on May 8, 2007. Mr. Johnson avers, "[w]hile on site Affiant spoke with two witnesses, who declined to identify themselves, who said that the cable had been torn down by a 'yellow' City of Columbus trash truck." (Johnson affidavit at 1.)

{¶15} However, affidavits filed in support of or in opposition to summary judgment must be made on personal knowledge. Civ.R. 56(E); *Meadows v. Freedom Banc, Inc.*, 10th Dist. No. 03AP-1145, 2005-Ohio-1446, ¶21, citing *State ex rel. Cassels v. Dayton City School Dist. Bd. of Edn*. (1994), 69 Ohio St.3d 217, 223. "Personal knowledge" is defined as " 'knowledge of the truth in regard to a particular fact or allegation, which is original, and does not depend on information or hearsay.' " Id. quoting *Brannon v. Rinzler* (1991), 77 Ohio App.3d 749, 756. Thus, paragraph three of Mr. Johnson's affidavit

attesting to the statements of unknown declarants is inadmissible hearsay. *Streets v. Chesrown Ent. Inc.*, 10th Dist. No. 03AP-577, 2004-Ohio-554. In this same affidavit, Mr. Johnson goes on to aver that based on the scene, appellee's facilities were pulled down by a trash truck. Essentially, because the cable was torn down "in the vicinity" of dumpsters, and the cables were thirteen feet three inches high, Mr. Johnson states a trash truck with its hooks elevated pulled down the cable. Unfortunately, this presents not evidence, but mere speculation.

{¶16} Similarly, the second affidavit of Mr. Johnson fares no better for appellee. The affidavit states only that "[w]hile on site at 84 Dakota Avenue in Columbus, Ohio on July 21, 2007, Affiant observed workers repairing the sewer at or near the base of Plaintiff's telephone pole[.]" (Johnson affidavit at 1.) This affidavit does not even allege appellant was in *any* way involved with the activities at the Dakota location.

{¶17} It is apparent appellee relies on speculation rather than evidence in reaching its conclusion that appellant was negligent and caused damage to appellee's property. Supposition, however, does not create a genuine issue of material fact. It is well-settled that a jury verdict may not be based upon mere speculation or conjecture. *Westinghouse Elec. Corp. v. Dolly Madison Leasing & Furniture Corp.* (1975), 42 Ohio St.2d 122. If the plaintiff's evidence on proximate cause requires speculation and conjecture to determine the cause of the event, the defendant is entitled to summary judgment as a matter of law. *Mills Best Western v. Springdale*, 10th Dist. No. 08AP-1022, 2009-Ohio-2901, ¶20, citing *Shooter v. Perella*, 6th Dist. No. L-07-1066, 2007-Ohio-6122, ¶25.

{¶18} Here, appellee failed to meet its reciprocal burden by pointing to evidentiary materials in the record that would establish the existence of a genuine issue of material fact pertaining to the applicability of the exceptions to appellant's immunity from tort liability. Therefore, appellant was entitled to the immunity set forth in R.C. 2744.02(A)(1) because none of the exceptions to the general rule of immunity set forth in R.C. 2744.02(B)(1) through (5) apply. Consequently, the trial court erred when it denied appellant's motion for summary judgment.

{¶19} For the foregoing reasons, we sustain appellant's two assignments of error, reverse the judgment of the Franklin County Municipal Court denying appellant's motion for summary judgment, and remand this matter to that court for entry of summary judgment in favor of appellant.

Judgment reversed and cause remanded with instructions.

FRENCH, P.J., and SADLER, J., concur.

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