[Cite as *Gibbs v. Columbus Metro. Hous. Auth.*, 2012-Ohio-2271.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

Jack G. Gibbs, Jr., Administrator of the Estate of Blanks Treadway, Deceased,	:	
Plaintiff-Appellant,	:	No. 11AP-711
v.	:	(C.P.C. No. 09CVH8-11738)
Columbus Metropolitan Housing Authority, et al.,	:	(ACCELERATED CALENDAR)
Defendants-Appellees.	:	

D E C I S I O N

Rendered on May 22, 2012

Plymale & Dingus, LLC, *Ronald E. Plymale*, and *M. Shawn Dingus*, for appellant.

Kegler, Brown, Hill & Ritter, *Traci A. McGuire*, and *Timothy T. Tullis*, for appellee Columbus Metropolitan Housing Authority.

APPEAL from the Franklin County Court of Common Pleas.

SADLER, J.

{¶ 1} Plaintiff-appellant, Jack G. Gibbs, Jr., Administrator of the Estate of Blanks Treadway ("Treadway"), deceased, appeals from a judgment of the Franklin County Court of Common Pleas granting summary judgment in favor of defendant-appellee, Columbus Metropolitan Housing Authority ("CMHA"). For the reasons that follow, we affirm the judgment of the trial court.

{¶ 2} On Saturday, August 4, 2007, with the help of his daughter, Jacqueline Williams, 84-year-old Treadway moved into Jenkins Terrace, a CMHA facility offering senior independent living. Williams left her father just after midnight on Sunday, August 5, 2007. When she returned at approximately noon that day, Williams could not find her father, despite reporting to the police that he was missing and checking local hospitals. The following morning, Monday, August 6, a custodian of Jenkins Terrace discovered Treadway's body in a trash chute. Upon the discovery, emergency personnel were notified and Treadway was pronounced dead by medics. A subsequent investigation listed the death as "accidental" and the autopsy report listed "positional asphyxia" as the cause of death.

{¶ 3} Appellant filed a complaint against CMHA asserting wrongful death and survivorship claims. CMHA filed a motion for summary judgment asserting, inter alia, statutory immunity pursuant to R.C. Chapter 2744, the Political Subdivision Tort Liability Act. In opposition to CMHA's motion, appellant argued the asserted claims fell within an exception to immunity as set forth in R.C. 2744.02(B)(4). After briefing, the trial court agreed with CMHA's contention that R.C. 2744.02(B)(4) did not apply so as to take away CMHA's immunity and granted summary judgment in CMHA's favor.

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

> The trial court erred in granting Defendant's Motion for Summary Judgment because reasonable minds could differ as to whether the negligent maintenance of the Jenkins Terrace trash chute caused it to become physically defective.

{¶ 5} 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.*, 65 Ohio St.3d 621, 629 (1992), citing *Harless v. Willis Day Warehousing Co.*, 54 Ohio St.2d 64 (1978). Under summary judgment motion practice, the moving party bears an initial burden to inform the trial court of the basis for its motion and to point to portions of the record that indicate that

there are no genuine issues of material fact on a material element of the nonmoving party's claim. *Dresher v. Burt*, 75 Ohio St.3d 280 (1996). Once the moving party has met its initial burden, the nonmoving party must produce competent evidence establishing the existence of a genuine issue for trial. *Id*. 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. *Id*. 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*.

{¶ 6} An appellate court's review of summary judgment is de novo. *Koos v. Cent. Ohio Cellular, Inc.*, 94 Ohio App.3d 579 (8th Dist.1994); *Bard v. Soc. Natl. Bank, nka KeyBank*, 10th Dist. No. 97APE11-1497 (Sept. 10, 1998). Thus, we conduct an independent review of the record and stand in the shoes of the trial court. *Jones v. Shelly Co.*, 106 Ohio App.3d 440, 445 (5th Dist.1995). As such, we must affirm the trial court's judgment if any of the grounds raised by the moving party at the trial court are found to support it, even if the trial court failed to consider those grounds. *See Dresher*; *Coventry Twp. v. Ecker*, 101 Ohio App.3d 38, 41-42 (9th Dist.1995).

{¶ 7} In the sole assignment of error, appellant argues the trial court erred in granting summary judgment in favor of CMHA because a genuine issue of fact exists regarding CMHA's entitlement to immunity.

{¶ 8} R.C. Chapter 2744 addresses when political subdivisions, their departments and agencies, and their employees are immune from liability for their actions. *Lambert v. Clancy*, 125 Ohio St.3d 231, 2010-Ohio-1483, ¶ 8. Courts employ a three-tier analysis to determine whether a political subdivision is immune from liability under R.C. 2744.02. *Smith v. McBride*, 130 Ohio St.3d 51, 2011-Ohio-4674, ¶ 13; *Lambert* at ¶ 8. The analysis begins with a general grant of immunity that affords the political subdivision protection from liability "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. 2744.02(A)(1). This grant of immunity, however, is not absolute. The second tier of the analysis focuses on the five exceptions to immunity listed in R.C. 2744.02(B), which can expose a political subdivision to liability. *Smith* at ¶ 14; *Lambert* at ¶ 9. If any of the R.C.

2744.02(B) exceptions apply, then the third tier of the analysis requires an assessment of whether any defenses in R.C. 2744.03 apply to reinstate immunity. *Smith* at ¶ 15; *Lambert* at ¶ 9.

{¶ 9} It is not disputed that as a political subdivision performing a governmental function, CMHA qualifies for immunity under R.C. 2744.02(A)(1). *Moore v. Lorain Metro. Hous. Auth.*, 121 Ohio St.3d 455, 2009-Ohio-1250 (the operation of a public housing authority is a governmental function under R.C. 2744.01). Rather, appellant argues the trial court erred in not stripping away CMHA's immunity pursuant to R.C. 2744.02(B)(4), which states:

> Except as otherwise provided in section 3746.24 of the Revised Code, political subdivisions are liable for injury, death, or loss to person or property that is caused by the negligence of their employees and that occurs within or on the grounds of, and is due to physical defects within or on the grounds of, buildings that are used in connection with the performance of a governmental function, including, but not limited to, office buildings and courthouses, but not including jails, places of juvenile detention, workhouses, or any other detention facility, as defined in section 2921.01 of the Revised Code.

{¶ 10} As such, R.C. 2744.02(B)(4) abrogates the general immunity afforded political subdivisions performing a governmental function if an injury is: (1) caused by employee negligence; (2) on the grounds or buildings used in connection with the performance of that governmental function; and (3) due to a physical defect on or within those grounds or buildings. *Hamrick v. Bryan City School Dist.*, 6th Dist. No. WM-10-014, 2011-Ohio-2572; *Simmons v. Yingling*, 12th Dist. No. CA2010-11-117, 2011-Ohio-4041.

{¶ 11} According to the record in this case, Treadway lived on the second floor of Jenkins Terrace. Trash chutes were located at each end of the building, and each chute consisted of a 24-inch diameter circular tube that discharged into a dumpster on the first floor of the building. Marcus Jackson, custodian for Jenkins Terrace at the time of this incident, testified that he would empty the dumpster twice per day, Monday through Friday. Jackson testified his typical routine was to empty the dumpster when he arrived at work and then again just before leaving for the day. During the summer of 2007,

though Jenkins Terrace was his usual place of employment, Jackson was removed from his regular duties on July 31, 2007 because his help was needed at another CMHA facility, Sawyer Manor. Jackson returned to Jenkins Terrace on August 6, 2007, and when he went into the room containing the dumpster, he discovered Treadway's body partially suspended from the bottom of the trash chute. It is appellant's position that because CMHA did not remove the trash, but instead allowed the trash to build up, CMHA was negligent and the build up of trash constituted a physical defect on the property such that R.C. 2744.02(B)(4) removes the immunity given to CMHA by R.C. 2744.02(A).

{¶ 12} The Sixth District Court of Appeals recently reviewed R.C. 2744.02(B)(4) in *Hamrick*. In that case, school officials complained to the Bryan Municipal Utilities Department about low water pressure in the bus garage maintained by the Bryan City School District ("BCSD"). The plaintiff, a municipal utilities employee, went to the garage to investigate. Finding that a shutoff valve outside of the garage was partially closed, the plaintiff opened the valve all of the way and then proceeded into the garage to determine if this fix was successful. According to *Hamrick*, the plaintiff went to the garage door and knocked and after receiving no response, opened the unlocked door and called out "light and water." *Id*. at ¶ 5. The plaintiff took a couple of steps into the garage, but remembered nothing after that. A short time later, a bus driver found the plaintiff seriously injured in the bottom of a service pit.

{¶ 13} The plaintiff filed suit alleging that BCSD's negligence in allowing an unmarked service pit on its premises proximately caused his injuries. The trial court concluded the defendants were entitled to governmental immunity pursuant to R.C. Chapter 2744 and granted the defendants' motion for summary judgment. On appeal, the plaintiff argued the defendants' immunity should be removed pursuant to R.C. 2744.02(B)(4). According to the plaintiff, the service pit was defective because it should have been covered and the lip surrounding the pit should have been painted a different color. In contrast, the defendants argued there was no physical defect in the service pit because its purpose was to permit mechanics to get beneath school busses to perform maintenance, and the pit was operating as intended. The *Hamrick* court held:

> The word "physical" is defined as "having a material existence: perceptible esp[ecially] through senses and subject to the laws

> of nature." Merriam Webster's New Collegiate Dictionary (10 Ed. 1996) 877. A "defect" is "an imperfection that impairs worth or utility." Id. at 302. *It would seem then that a "physical defect" is a perceivable imperfection that diminishes the worth or utility of the object at issue.*

(Emphasis added.) *Id.* at ¶ 28.

{¶ 14} The *Hamrick* court held because the plaintiff presented "no evidence that there was any discernable imperfection that diminished the utility of either the bus garage or the service pit," there was nothing of record to suggest that either did not perform as intended or was less useful than designed. *Id.* at ¶ 29. Consequently, the court upheld the trial court's application of governmental immunity to the defendants.

{¶ 15} Recently, the Eighth District Court of Appeals adopted *Hamrick*'s definition of "physical defect" in *Duncan v. Cuyahoga Community College*, 8th Dist. No. 97222, 2012-Ohio-1949, wherein the alleged defect was a failure to use mats on the floor while conducting a self-defense class. Finding there was no imperfection that diminished the worth or utility of the object at issue, the court concluded the lack of mats on a classroom floor did not constitute a "defect" as the word is used in R.C. 2744.02(B)(4).

{¶ 16} Similarly, the record herein does not contain evidence of a "physical defect" on or within CMHA's grounds or buildings as that term is used in R.C. 2744.02(B)(4). During his deposition, appellant's expert witness, Hal Dunham, testified he is a forensic engineer who has been deposed approximately 130 times. However, prior to this deposition, Dunham had never rendered an expert opinion on trash chutes, nor had he ever installed, designed, inspected or received any education regarding trash chutes. Dunham testified that he was not aware of any evidence in this case indicating that the trash chute in question was not installed properly or not installed according to code. Nor was Dunham aware of any evidence that the chute was "defective." (Depo. 62.) According to Dunham, the defect was "the trash back-up into the trash chute." (Depo. 80.) In other words, in Dunham's view, the fact that trash was within the trash chute constituted a physical defect. The following exchange occurred at the deposition:

> Q: Again, just so we're clear, it's nothing wrong with the trash chute. It's just the fact that the trash wasn't removed.
>
> A: Correct.

Q: So the defect was the accumulation of trash.

A: Yes.

(Depo. 80.)

{¶ 17} Though identifying the physical defect as the "accumulation of trash," Dunham does not explain, and appellant does not provide any evidence of whether this alleged physical defect "diminishes the worth or utility" of the trash chute as required under *Hamrick*, nor whether such alleged defect existed at the time of Treadway's death. At his deposition, Dunham agreed it is unknown how much trash was inside of the trash chute at the time of Treadway's death. Though stating he "believed" garbage was lodged within the chute prior to Treadway's entrance, when asked if he had "any idea of how far up into the chute it may have been," Dunham responded, "No, [he] did not determine that." (Depo. 68.) Thus, though it can be speculated that Treadway would have entered the chute on one of the building's floors sometime between 1:00 a.m. and 11:00 a.m. on Sunday, August 5, 2007, there is no evidence of how much trash was disposed of either before or after that occurrence.

{¶ 18} Likewise, it is unknown how Treadway got into the chute. Dunham explained that the second story trash chute door is at a "25 degree angle above horizontal sloping toward the chute when fully opened," and that "[e]ven if it was your goal, it would take – it would take some physical exertion to get into the chute." (Depo. 70, 74.) Additionally, Dunham agreed that it is not known "if he fell, if someone pushed him, if someone tipped" Treadway into the chute. (Depo. 64-65.) Though concluding in his report that "if the trash had been removed as needed and not allowed to back-up to the second floor, Mr. Treadway would be able to drop his trash in the trash door opening and not be exposed to the hazard of entering the chute to push the trash down," Dunham admitted at the deposition that there is no evidence the trash was backed-up to the second floor, and "the hazard of entering the chute to push the trash down" was based solely on speculation. (Depo. 81.)

{¶ 19} In other words, appellant's version of events, that the entire length of the trash chute was full of trash and Treadway fell into the trash chute while trying to push his trash into the chute, is based upon pure speculation. Speculation and conjecture,

however, are not sufficient to overcome appellant's burden of offering specific facts showing that there is a genuine issue for trial. *Dresher*. After a proper motion for summary judgment is made, "the nonmoving party must do more than supply evidence of a possible inference that a material issue of fact exists; it must produce evidence of specific facts which establish the existence of an issue of material fact." *Carrier v. Weisheimer Cos., Inc.*, 10th Dist. No. 95APE04-488 (Feb. 22, 1996); *Wing v. Anchor Media, Ltd. of Texas*, 59 Ohio St.3d 108 (1991). Though a truly tragic and unfortunate occurrence, based on the record presented, it is not one to which any of the exceptions to immunity apply.

{¶ 20} For the foregoing reasons, we overrule appellant's assignment of error.

{¶ 21} In conclusion, appellant's single assignment of error is overruled, and the judgment of the Franklin County Court of Common Pleas is hereby affirmed.

Judgment affirmed.

KLATT and TYACK, JJ., concur.
