[Cite as *Repasky v. Upper Arlington*, 2013-Ohio-2516.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

Sheryl Repasky,	:	
Plaintiff-Appellee,	:	
v.	:	Nos. 12AP-752 and 12AP-773
Thomas R. Gross, Jr.,	:	(C.P.C. No. 11CVC09-11321)
Defendant-Appellant,	:	(REGULAR CALENDAR)
v.	:	
City of Upper Arlington, Ohio,	:	
Third-Party Defendant-Appellee.	:	

D E C I S I O N

Rendered on June 18, 2013

Weston Hurd, LLP, David T. Patterson and *Steven G. Carlino*, for Thomas R. Gross, Jr.

Isaac, Brant, Ledman & Teetor, LLP, and *Craig R. Mayton* and *Mark Landis*, for City of Upper Arlington, Ohio.

APPEALS from the Franklin County Court of Common Pleas

KLATT, P.J.

{¶ 1} Defendant-appellant, Thomas R. Gross, Jr., appeals from a summary judgment entered by the Franklin County Court of Common Pleas in favor of third-party defendant-appellee, City of Upper Arlington, Ohio. This case addresses whether Upper Arlington is immune from liability for alleged negligence in connection with a bicycle

accident that occurred on a portion of roadway that was under construction. Because there are no material issues of fact and Upper Arlington is immune from liability as a matter of law, we affirm.

I. Factual and Procedural and History

{¶ 2} The relevant facts in this case are not in dispute. At approximately midnight on September 13, 2009, plaintiff, Sheryl Repasky, and Gross were riding on a tandem bicycle. Repasky was riding on the back seat and Gross was riding on the front seat. Repasky and Gross were returning from an OSU night football game. At the intersection of Coventry Road and Collingswood Road in Upper Arlington, Repasky and Gross rode across an area of road construction. This work was part of a construction project known as the "Collingswood Road Roadway and Water Main Replacement Project." The project consisted of water main and storm sewer repair and replacement, and roadway construction and paving work.

{¶ 3} There was a two-foot to four-foot wide cut in the pavement across Coventry Road. The cut resulted from a trench that was previously dug to install a replacement storm sewer line. That portion of the line was completed and the trench was backfilled with gravel and stone to grade level. The roadway had not yet been repaved.

{¶ 4} Gross saw the cut in the pavement when he was approximately ten feet away. As Gross and Repasky proceeded to ride across the cut, they lost control of the bicycle and fell. Repasky sued Gross alleging that he was negligent in steering the bicycle. Gross filed a third-party complaint against Upper Arlington alleging negligence due to the condition of the pavement.

{¶ 5} Upper Arlington filed a motion for summary judgment on the ground that it was entitled to political subdivision immunity from Gross' claim under R.C. Chapter 2744. The trial court granted Upper Arlington's motion.

{¶ 6} Gross appeals, assigning the following error:

> The trial court erred in granting Third Party Defendant-Appellant, City of Upper Arlington's Motion for Summary Judgment.

II. Summary Judgment Standard

{¶ 7} Summary judgment is appropriate when the moving party demonstrates that: (1) there is no genuine issue of material fact; (2) the moving party is entitled to judgment as a matter of law; and (3) reasonable minds can come to but one conclusion when viewing the evidence most strongly in favor of the nonmoving party, and that conclusion is adverse to the nonmoving party. *Hudson v. Petrosurance, Inc.*, 127 Ohio St.3d 54, 2010-Ohio-4505, ¶ 29; *Sinnott v. Aqua-Chem, Inc.*, 116 Ohio St.3d 158, 2007-Ohio-5584, ¶ 29. Appellate review of a trial court's ruling on a motion for summary judgment is de novo. *Hudson* at ¶ 29. This means that an appellate court conducts an independent review, without deference to the trial court's determination. *Zurz v. 770 W. Broad AGA, L.L.C.*, 192 Ohio App.3d 521, 2011-Ohio-832, ¶ 5 (10th Dist.); *White v. Westfall*, 183 Ohio App.3d 807, 2009-Ohio-4490, ¶ 6 (10th Dist.).

{¶ 8} When seeking summary judgment on the ground that the nonmoving party cannot prove its case, the moving party bears the initial burden of informing the trial court of the basis for the motion and identifying those portions of the record that demonstrate the absence of a genuine issue of material fact on an essential element of the nonmoving party's claims. *Dresher v. Burt*, 75 Ohio St.3d 280, 293 (1996). The moving party does not discharge this initial burden under Civ.R. 56 by simply making a conclusory allegation that the nonmoving party has no evidence to prove its case. *Id.* Rather, the moving party must affirmatively demonstrate by affidavit or other evidence allowed by Civ.R. 56(C) that the nonmoving party has no evidence to support its claims. *Id.* If the moving party meets its burden, then the nonmoving party has a reciprocal burden to set forth specific facts showing that there is a genuine issue for trial. Civ.R. 56(E); *Dresher* at 293. If the nonmoving party does not so respond, summary judgment, if appropriate, shall be entered against the nonmoving party. *Id.*

III. Political Subdivision Immunity under R.C. Chapter 2744

{¶ 9} The political subdivision tort liability act, codified in R.C. Chapter 2744, sets forth a three-tiered analysis for determining whether a political subdivision is immune from liability for injury or loss to property:

> The first tier is the general rule that a political subdivision is immune from liability incurred in performing either a

> governmental function or proprietary function. However, that immunity is not absolute.
>
> The second tier of the analysis requires a court to determine whether any of the five exceptions to immunity listed in R.C. 2744.02(B) apply to expose the political subdivision to liability. At this tier, the court may also need to determine whether specific defenses to liability for negligent operation of a motor vehicle listed in R.C. 2744.02(B)(1)(a) through (c) apply.
>
> If any of the exceptions to immunity in R.C. 2744.02(B) do apply and no defense in that section protects the political subdivision from liability, then the third tier of the analysis requires a court to determine whether any of the defenses in R.C. 2744.03 apply, thereby providing the political subdivision a defense against liability.

Colbert v. Cleveland, 99 Ohio St.3d 215, 2003-Ohio-3319, ¶ 7-9. (Citations omitted.)

A. Application of the Proprietary Function Exception to Immunity

{¶ 10} Here, the parties do not dispute that Upper Arlington is a political subdivision within the meaning of the statute. However, Gross first argues that the proprietary-function exception set forth in R.C. 2744.02(B)(2) precludes Upper Arlington from raising immunity as a defense in this case. We disagree.

{¶ 11} R.C. 2744.02(B)(2) provides, in relevant part:

> [P]olitical 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.

Therefore, a political subdivision can be liable for injury or damage to property caused by the negligent performance of a proprietary function. R.C. 2744.01(G)(2) defines a proprietary function to include:

> (c) The establishment, maintenance, and operation of a utility, including, but not limited to, a light, gas, power, or heat plant, a railroad, a busline or other transit company, an airport, and a municipal corporation water supply system;
>
> (d) The maintenance, destruction, operation, and upkeep of a sewer system[.]

{¶ 12} Gross argues that the construction project at issue reflected a proprietary function because it involved the maintenance and upkeep of a sewer system, and/or the establishment, maintenance and operation of a municipal corporation water supply system. Therefore, Gross argues that Upper Arlington can be liable for negligence under R.C. 2744.02(B)(2). Upper Arlington contends the construction project was a governmental function, and the exception to immunity contained in R.C. 2744.02(B)(2) does not apply. R.C. 2744.01(C)(2)(l) defines "governmental function" to include "[t]he provision or nonprovision, planning or design, construction, or reconstruction of a public improvement, including, but not limited to, a sewer system."

{¶ 13} It is undisputed that the construction at the site of the accident involved the installation of a replacement storm sewer line. The replacement of a storm sewer line constitutes the construction or reconstruction of a sewer system, not the maintenance and upkeep of a sewer system nor the maintenance of a water supply system. Therefore, this work constituted a governmental function. Because Upper Arlington was engaged in a governmental function, not a proprietary function, the R.C. 2744.02(B)(2) exception to immunity relied upon by Gross is inapplicable, and Upper Arlington is immune from liability. R.C. 2744.02(A)(1).

{¶ 14} To the extent that the storm sewer replacement work could be considered completed, leaving the road repair work, Upper Arlington would still be immune from liability. R.C. 2744.01(C)(2)(e) defines "governmental function" to include "the maintenance and repair of, roads, highways, streets, avenues[.]" Therefore, the repair of the roadway is also a governmental function and the R.C. 2744.02(B)(2) exception would not apply. R.C. 2744.02(A)(1); *Sullivan v. Anderson Twp.*, 1st Dist. No. C-070253, 2009-Ohio-6646, ¶ 11 (maintenance and repair of roads are governmental functions).

B. Road Obstruction Exception to Immunity

{¶ 15} Gross also argues that the gravel and rock-filled trench constituted a road obstruction for which Upper Arlington is not immune from liability. Gross relies upon R.C. 2744.02(B)(3) which provides:

> [P]olitical subdivisions are liable for injury, death, or loss to person or property caused by their negligent failure to keep public roads in repair and other negligent failure to remove obstructions from public roads.

{¶ 16} We reject appellant's argument that the cut in the road constituted an obstruction of the public road under the statute. In *Howard v. Miami Twp. Fire Div.*, 119 Ohio St.3d 1, 2008-Ohio-2792, the Supreme Court of Ohio concluded that for purposes of R.C. 2744.02(B)(3), "an 'obstruction' must be an obstacle that blocks or clogs the roadway and not merely a thing or condition that hinders or impedes the use of the roadway or that may have the potential to do so." *Id.* at ¶ 30. There is nothing in the record indicating that the cut in pavement filled to grade level with stone and gravel, and/or loose gravel on the roadway, constituted an obstruction as that term is used in R.C. 2744.02(B)(3). *Mosler v. St. Joseph Twp. Bd. of Trustees*, 6th Dist. No. WM-07-016, 2008-Ohio-1963, ¶ 17 (loose gravel and stone did not constitute an obstruction under R.C. 2744.02(B)(3)). Although these conditions might constitute a hazard, nothing in the record suggests that the gravel and stone blocked a person from riding a bicycle on this portion of Coventry Road. Therefore, the exception contained in R.C. 2744.02(B)(3) does not apply.

{¶ 17} Gross relies heavily on *Crabtree v. Cook*, 196 Ohio App.3d 546, 2011-Ohio-5612 (10th Dist.), in arguing that the exception to sovereign immunity contained in R.C. 2744.02(B)(3) saves his claims from summary judgment. However, in *Crabtree*, there was an issue of fact regarding whether "potholes, overhanging vegetation, or a strip of mud along the curb" might constitute obstructions for purposes of a bicyclist. *Id.* at ¶ 26. Here, no such issue of fact exists. Again, nothing in the record suggests that the cut in Coventry Road filled to grade level with gravel/stone "blocked or clogged the road" for a bicyclist, even if this condition constituted a potential hazard. *Howard* at ¶ 30. Therefore, *Crabtree* is distinguishable.

{¶ 18} For the foregoing reasons, we overrule Gross' assignment of error, and we affirm the judgment of the Franklin County Court of Common Pleas.

Judgment affirmed.

SADLER and VUKOVICH, JJ., concur.

VUKOVICH, J., of the Seventh Appellate District, sitting by assignment in the Tenth Appellate District.