[Cite as *Johnson v. Ashtabula Cty. Joint Vocational School*, 2010-Ohio-3054.]

THE COURT OF APPEALS

ELEVENTH APPELLATE DISTRICT

ASHTABULA COUNTY, OHIO

MARK JOHNSON, AS PARENT/ NATURAL GUARDIAN OF BENJAMIN JOHNSON, A MINOR, et al.,	:	**O P I N I O N**
	:	**CASE NO. 2010-A-0003**
Plaintiffs-Appellants,	:	
- vs -	:	
ASHTABULA COUNTY JOINT VOCATIONAL SCHOOL, et al.,	:	
Defendants-Appellees.	:	

Civil Appeal from the Court of Common Pleas, Case No. 2008 CV 1510.

Judgment: Reversed and remanded.

Thomas L. Brunn, Jr., and *Alison D. Ramsey*, The Brunn Law Firm Co., L.P.A., 208 Hoyt Block Building, 700 West St. Clair Avenue, Cleveland, OH 44113 (For Plaintiffs-Appellants).

Nick C. Tomino, Tomino & Latchney, L.L.C., L.P.A., 803 East Washington Street, #200, Medina, OH 44256 (For Defendants-Appellees).

COLLEEN MARY O'TOOLE, J.

{¶1} Mark Johnson, as parent and natural guardian of Benjamin Johnson, a minor, and on his own behalf, and Beth Johnson ("the Johnsons"), appeal from the grant of summary judgment by the Ashtabula County Court of Common Pleas to the Ashtabula County Joint Vocational School and the Ashtabula County Joint Vocational School District ("the School") in their action for damages arising from injuries incurred by Benjamin in the School's welding shop. We reverse and remand.

{¶2} January 15, 2008, Benjamin Johnson attended his welding class at the School. The School was built about 1968 or 1969. The welding shop includes several concrete block enclosures for the students' use. Benjamin entered his assigned enclosure, and attempted to turn on his welding machine, but failed. He had been told to check the electrical service panel should this occur. Doing so, he noticed the panel door was ajar, and the power switch in the "off" position. Benjamin closed the door, and flipped the switch to "on." The service panel exploded, causing Benjamin extensive second degree burns to his face, right arm, and hand.

{¶3} November 24, 2008, the Johnsons filed this action, alleging that the School had negligently "fused" the electrical service panel in the enclosure used by Benjamin, or had negligently maintained it. They further alleged that the concrete block enclosure was negligently designed, causing expanding gases from the electrical explosion to bounce back on Benjamin, significantly enhancing his injuries. January 23, 2009, the School answered, asserting, amongst other defenses, that of sovereign immunity.

{¶4} August 28, 2009, the School filed for summary judgment. It alleged that the Johnsons could not show any negligence on the part of the School excepting it from the protection of the immunity granted by R.C. 2744.02(A). The School further argued that, even if the Johnsons did raise an issue of material fact regarding negligence on the part of the School, the latter would still benefit from the defenses set forth at R.C. 2744.03(A)(3) and (5). Attached to the School's summary judgment motion was the affidavit of Dr. Jerome R. Brockway, Ph.D., the School's superintendent since 1989. Dr. Brockway testified that the construction of the School, including the welding shop and its

maintenance, were all done in accordance with the plans and specifications approved by the Board of Education of the Ashtabula County Joint Vocational School District and the Ohio Department of Education Vocational Education Division. He testified that the replacement of any fuses in the electrical service panels in the welding shop enclosures was done in accordance with such plans and specifications. He further testified that, prior to the time of Benjamin's injury, the school was unaware of any defect in the welding shop.

{¶5} October 27, 2009, the Johnsons filed their brief in opposition to the School's summary judgment motion. Attached to the brief were pages from Dr. Brockway's deposition. Therein, he stated that only the two maintenance men at the School, Dennis Ford and Virgil Cole, each employed for decades, would have conducted maintenance on the electrical service panels in the welding shop. Dr. Brockway further stated that no records were kept regarding maintenance of the panels. He stated that he had enquired of Mr. Ford and Mr. Cole whether either had ever replaced the fuses in the service panel which exploded, and that they responded, "to their knowledge they had not."

{¶6} Also attached to the Johnsons' brief in opposition were relevant pages from the deposition of Joseph Waite, Benjamin's welding instructor. Mr. Waite stated that he had no responsibility to maintain the electrical service panels; that he had never changed the fuses in them; and, that he had never even opened one of the panels. He admitted that, while instructing his students that the panels' doors should always be closed, he did not inspect them prior to the students entering their respective enclosures.

{¶7} The Johnsons also submitted the affidavit of Dr. George L. Kramerich, Ph.D. Dr. Kramerich is an electrical engineer. In his affidavit, Dr. Kramerich testified he inspected the electrical service panel in question January 29, 2008. Paragraph 7 of his affidavit reads:

{¶8} "It is my professional opinion that the electrical service panel's internal explosion was caused by improper fusing. A short circuit associated with the load side of the electrical service panel occurred. The short circuit current associated with the load exceeded the interrupting rating of the fuses in the electrical service panel. This caused a transition and expansion from solid to gas of the failing fuse elements, thus causing the explosion that injured Benjamin."

{¶9} November 5, 2009, the School filed its reply brief. Attached thereto were further pages from Dr. Brockway's deposition, in which he testified regarding the opinion of Mr. William L. Applebee, an electrical engineer hired by the School to investigate the incident. Mr. Applebee's letter to Dr. Brockway of January 23, 2008 was also attached. In that letter, Mr. Applebe opined that the electrical service panel's failure was due to tampering – i.e., a conductor being placed above the fuses, thus causing the short circuit.

{¶10} November 13, 2009, the Johnsons moved the trial court for leave to file a surreply brief instanter, which motion the trial court granted. In their surreply, the Johnsons noted that Dr. Brockway's testimony regarding Mr. Applebee's opinion was hearsay; and, that Mr. Applebee's letter was not proper evidence under Civ.R. 56(C). They moved the trial court to strike the letter.

{¶11} December 22, 2009, the trial court filed its judgment entry. It struck Mr. Applebee's letter, and refused to consider Dr. Brockway's deposition testimony regarding Mr. Applebee's opinion. Nevertheless, the trial court concluded that the Johnsons had failed to introduce any evidence showing that negligence by the School or its employees had led to the short circuit causing the explosion, and granted summary judgment to the school.

{¶12} January 8, 2010, the Johnsons timely noticed this appeal, assigning a single error:

{¶13} "The trial court erred in ruling that a statutory exception does not apply to deprive Appellee of immunity and in granting Appellee's Motion for Summary Judgment. ***"

{¶14} In support of this assignment of error, the Johnsons present a single issue for review:

{¶15} "In an action for damages predicated upon negligence, where the record includes evidence that genuine issues of material fact remain as to Appellee's negligence, summary judgment is an inappropriate resolution of the action."

{¶16} "'Pursuant to Civ.R. 56(C), summary judgment is appropriate when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law.' *Holik v. Richards*, 11th Dist. No. 2005-A-0006, 2006-Ohio-2644, ¶12, citing *Dresher v. Burt* (1996), 75 Ohio St.3d 280, 293, ***. 'In addition, it must appear from the evidence and stipulations that reasonable minds can come to only one conclusion, which is adverse to the nonmoving party.' Id. citing Civ.R. 56(C). Further,

the standard in which we review the granting of a motion for summary judgment is de novo. Id. citing *Grafton v. Ohio Edison Co.* (1996), 77 Ohio St.3d 102, 105, ***.

{¶17} "Accordingly, '(s)ummary judgment may not be granted until the moving party sufficiently demonstrates the absence of a genuine issue of material fact. 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 which demonstrate the absence of a genuine issue of fact on a material element of the nonmoving party's claim.' *Brunstetter v. Keating*, 11th Dist. No. 2002-T-0057, 2003-Ohio-3270, ¶12, citing *Dresher* at 292. 'Once the moving party meets the initial burden, the nonmoving party must then set forth specific facts demonstrating that a genuine issue of material fact does exist that must be preserved for trial, and if the nonmoving party does not so respond, summary judgment, if appropriate, shall be entered against the nonmoving party.' Id., citing *Dresher* at 293.

{¶18} "***

{¶19} "***

{¶20} "Since summary judgment denies the party his or her 'day in court' it is not to be viewed lightly as docket control or as a 'little trial.' The jurisprudence of summary judgment standards has placed burdens on both the moving and nonmoving party. In *Dresher v. Burt*, the Supreme Court of Ohio held that the moving party seeking summary judgment bears the initial burden of informing the trial court of the basis for the motion and identifying those portions of the record before the trial court that demonstrate the absence of a genuine issue of fact on a material element of the nonmoving party's claim. The evidence must be in the record or the motion cannot

succeed. The moving party cannot discharge its initial burden under Civ.R. 56 simply by making a conclusory assertion that the nonmoving party has no evidence to prove its case but must be able to specifically point to some evidence of the type listed in Civ.R. 56(C) that affirmatively demonstrates that the nonmoving party has no evidence to support the nonmoving party's claims. If the moving party fails to satisfy its initial burden, the motion for summary judgment must be denied. If the moving party has satisfied its initial burden, the nonmoving party has a reciprocal burden outlined in the last sentence of Civ.R. 56(E) to set forth specific facts showing there is a genuine issue for trial. If the nonmoving party fails to do so, summary judgment, if appropriate shall be entered against the nonmoving party based on the principles that have been firmly established in Ohio for quite some time in *Mitseff v. Wheeler* (1988), 38 Ohio St.3d 112, ***.

{¶21} "The court in *Dresher* went on to say that paragraph three of the syllabus in *Wing v. Anchor Media, Ltd. of Texas* (1991), 59 Ohio St.3d 108, ***, is too broad and fails to account for the burden Civ.R. 56 places upon a *moving* party. The court, therefore, limited paragraph three of the syllabus in *Wing* to bring it into conformity with *Mitseff*. (Emphasis added.)

{¶22} "The Supreme Court in *Dresher* went on to hold that when *neither* the moving nor nonmoving party provides evidentiary materials demonstrating that there are no material facts in dispute, the moving party is not entitled to a judgment as a matter of law as the moving party bears the initial responsibility of informing the trial court of the basis for the motion, 'and identifying those portions of the record which demonstrate the absence of a genuine issue of fact on a material element of the nonmoving party's

claim.' Id. at 276. (Emphasis added.)" *Welch v. Ziccarelli*, 11th Dist. No. 2006-L-229, 2007-Ohio-4374, at ¶36-37, 40-42. (Parallel citations omitted.)

{¶23} It is undisputed between the parties that the School is a political subdivision, entitled to the immunity provided in Chapter 2744 of the Revised Code. In *Frazier v. Kent*, 11th Dist. No. 2006-P-0082, 2007-Ohio-5782, at ¶50-53, we recounted the analysis required when determining if a political subdivision benefits from the immunity provided in Chapter 2744:

{¶24} "The Supreme Court of Ohio in *Elston v. Howland Local Schools*, 113 Ohio St.3d 314, 2007-Ohio-2070, ***, stated at ¶10-12:

{¶25} "'(t)he process of determining whether a political subdivision is immune from liability involves a three-tiered analysis. See *Greene Cty. Agricultural Soc. v. Liming* (2000), 89 Ohio St.3d 551, 556, *** (***). The first tier provides a general grant of immunity, stating that "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. 2744.02(A)(1). (***)

{¶26} "'The second tier in an immunity analysis focuses on the exceptions to immunity located in R.C. 2744.02(B). (***)

{¶27} "'Finally, in the third tier of the analysis, immunity may be reinstated if a political subdivision can successfully assert one of the defenses to liability listed in R.C. 2744.03. See *Cater v. Cleveland* (1998), 83 Ohio St.3d 24, 28, *** (***). (***)' (Parallel citations omitted.)"

{¶28} As the parties do not dispute the School's status as a political subdivision, it is entitled to the immunity provided by R.C. 2744.02(A)(1), unless one of the five exceptions to that immunity set forth at R.C. 2744.02(B) applies. Pertinent herein is R.C. 2744.02(B)(4), which provides:

{¶29} "(4) 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."

{¶30} The Johnsons argue that the affidavit testimony of Dr. Kramerich, that the electrical service panel was improperly fused, combined with the evidence that the School's maintenance men, Mr. Ford and Mr. Cole did not recall ever re-fusing that panel, is sufficient to create a genuine issue of material fact as to whether the School was negligent in its maintenance of the panel. The School counters that there is no evidence that any School personnel ever performed any service regarding the panel and its fusing, which should negate any possibility of a finding of negligence against it. This, essentially, was the finding of the trial court.

{¶31} In these summary judgment proceedings, we find the Johnsons' position has merit. The evidence they introduced does not prove negligence by School personnel in reference to a defect in the School's building, but is sufficient to raise a

genuine issue of material fact that requires resolution by a jury. "***[U]nless school personnel assume a more specific obligation, they are bound only under the common-law duty to exercise that care necessary to avoid reasonably foreseeable injuries." *Redd v. Springfield Twp. School Dist.* (1993), 91 Ohio App.3d 88, 91-92. An omission to act can be negligence, and Dr. Kramerich's affidavit testimony that the panel was improperly fused, combined with a total lack of any record of maintenance to the panel in the School's thirty year history, puts such an omission at issue. A jury might find it reasonably foreseeable that failure to maintain an electrical service panel for an extended period of time in an area regularly used by students for hazardous work like welding could result in injury. That the School recognized the panels could be dangerous is indicated by the fact students were instructed to keep the panel doors shut.

{¶32} We find the opinion of the court in *Nice v. Marysville* (1992), 82 Ohio App.3d 109, instructive on the burden the Johnsons were required to carry in order to defeat summary judgment herein. In *Nice*, appellant homeowners brought an action against the city of Marysville, after a city-owned storm sewer running beneath their house began flooding their basement. Id. at 112. The trial court granted the city summary judgment, evidently on the basis it owed no duty to the homeowners. Id. at 112, 116-117. The court of appeals noted that the common law rule regarding a city's responsibility for a sewer system paralleled that codified at R.C. Chapter 2744. Id. at 117. Relevant to this case, the *Nice* court held:

{¶33} "Based upon the Nices' complaint and William Burris' affidavit, a genuine issue of fact remains as to who or what caused the flooding to the Nices' basement in

1990, thereby leaving in doubt the elements of breach and proximate causation. Evidence has been presented that there was damage to the city's storm sewer, that the damage may have been the result of the city's failure to inspect and maintain the sewers, and that excessive flooding occurred in appellants' basement whereunder the city's storm sewer is buried. This is sufficient evidence to maintain a claim of negligence. Therefore, we disagree with the trial court that appellants 'failed to show negligence.' Further, we disagree with the trial court's reasoning that because the excavating contractor could not conclusively state who or what damaged the city's storm sewer causing the basement to flood, this evidenced that reasonable minds could only conclude that summary judgment was proper for the city. Rather, the fact that it has not been conclusively determined who or what damaged the city's storm sewer is a genuine issue of material fact, as the city could be found negligent based on inferences viewed most favorably to appellants." *Nice* at 118.

{¶34} Similarly, the Johnsons have presented sufficient evidence in this case to maintain their action for negligence against a motion for summary judgment. The fact that they cannot, at this juncture, conclusively establish negligence by the School and its personnel at this juncture is irrelevant, since all facts must be construed in their favor.

{¶35} Having determined that the School may be liable pursuant to R.C. 2744.02(B)(4), we must consider whether that potential liability is eliminated by one of the defenses set forth at R.C. 2744.03(A). The School maintains that it benefits from the defenses set forth at R.C. 2744.03(A)(3) and (5), which provide:

{¶36} "***

{¶37} "(3) The political subdivision is immune from liability if the action or failure to act by the employee involved that gave rise to the claim of liability was within the discretion of the employee with respect to policy-making, planning, or enforcement powers by virtue of the duties and responsibilities of the office or position of the employee.

{¶38} "***

{¶39} "(5) The political subdivision is immune from liability if the injury, death, or loss to person or property resulted from the exercise of judgment or discretion in determining whether to acquire, or how to use, equipment, supplies, materials, personnel, facilities, and other resources unless the judgment or discretion was exercised with malicious purpose, in bad faith, or in a wanton or reckless manner."

{¶40} In a nutshell, the School argues that since any maintenance of the electrical service panels was done in compliance with the plans and specifications for the construction and maintenance of the School adopted and approved by the Board of Education of the Ashtabula County Joint Vocational School District and the Ohio Department of Education Vocational Education Division, that maintenance is cloaked with the immunity those bodies would receive for exercising their discretion in such matters.

{¶41} We respectfully disagree. The Supreme Court of Ohio has specifically held that the R.C. 2744.03(A)(3) immunity only extends to "policy-making, planning, or enforcement powers." *Elston*, supra, at ¶27. Maintaining electrical service panels does not involve "policy-making, planning, or enforcement." Further:

{¶42} "The Supreme Court of Ohio has held that the repair of equipment within a building falls within the routine maintenance, and is not a discretionary act as contemplated under R.C. 2744.03(A)(5). See *Perkins v. Norwood City Schools* (1999), 85 Ohio St.3d 191, 193, *** (repair of leaking drinking fountain does not involve R.C. 2744.03(A)(5) judgment or discretion)." *Fleming v. Vanguard Sentinel Joint Vocational School*, 6th Dist. No. S-02-030, 2003-Ohio-2134, at ¶18. (Parallel citations omitted.) The maintenance of the electrical service panel at issue herein is, therefore, simply maintenance, and not discretionary action.

{¶43} Consequently, the School cannot receive the benefit of either the R.C. 2744.03(A)(3) or (5) defense.

{¶44} The assignment of error has merit.

{¶45} The judgment of the Ashtabula County Court of Common Pleas is reversed, and this matter is remanded for further proceedings consistent with this opinion.

{¶46} It is the further order of this court that appellees are assessed costs herein taxed.

{¶47} The court finds there were reasonable grounds for this appeal.

MARY JANE TRAPP, P.J., concurs,

DIANE V. GRENDELL, J., concurs in judgment only.