[Cite as *Messer v. Butler Cty. Bd. of Commrs.*, 2009-Ohio-4462.]

IN THE COURT OF APPEALS

TWELFTH APPELLATE DISTRICT OF OHIO

BUTLER COUNTY

TOM MESSER, Administrator of the Estate of Eva Waddle Huesman, Deceased,	:	
Plaintiff-Appellant,	:	CASE NOS. CA2008-12-290 CA2009-01-004
- vs -	:	O P I N I O N
	:	8/31/2009
BUTLER COUNTY BOARD OF COMMISSIONERS, et al.,	:	
Defendants-Appellees.	:	

CIVIL APPEAL FROM BUTLER COUNTY COURT OF COMMON PLEAS
Case No. CV2007-11-4652

Weisser & Wolf, Mark B. Weisser, 1014 Vine Street, Suite 2510, Cincinnati, Ohio 45202, for plaintiff-appellant

Isaac, Brant, Ledman & Teetor LLP, Daniel T. Downey, Mark H. Troutman, 250 E. Broad Street, Suite 900, Columbus, Ohio 43215, for defendants-appellees

HENDRICKSON, J.

{¶1} Plaintiff-appellant, Tom Messer, the administrator of the estate of Eva Waddle Huesman (the decedent), appeals the judgment of the Butler County Court of Common Pleas granting summary judgment in favor of defendants-appellees, Butler County Board of Commissioners, Deputy Brian Oswald, Sergeant Kent Hall, Misty Addis, and the Butler

County Sheriff's Office. [1]

{¶2} This case involves a wrongful death action filed on behalf of the decedent, who died in a motor vehicle collision on the evening of January 24, 2006. As a result of high winds, the stoplight at the intersection of S.R. 4 and S.R. 747 lost electric power. The decedent was a passenger in a vehicle driven by Devin Cox, who was traveling north on S.R. 4 when he reached the intersection. Cox stopped before making a left hand turn into the Countryside Trailer Park, which is located just off of S.R. 4 on the west side of the intersection. Mary Johnson was proceeding south on S.R. 4 in an SUV when Cox's vehicle turned in front of her. Johnson failed to treat the intersection as a four-way stop, as required by law in the event of a power outage. Consequently, Johnson's vehicle struck the passenger side of Cox's vehicle, where the decedent was seated. The decedent died shortly thereafter.

{¶3} Initially, appellant filed suit against the two drivers involved in the collision, Johnson and Cox. Appellant later named appellees to the suit. Appellant reached a settlement with Johnson and Cox, leaving only appellees as defendants. In the action against appellees, appellant alleged that Butler County and its employees had a duty to provide safe traffic flow until power was restored at the intersection of S.R. 4 and S.R. 747 and failed to do so, and their actions resulted in the death of the decedent.

{¶4} On January 28, 2008, appellant moved for a change of venue; the trial court denied the motion. Subsequently, appellees moved for summary judgment. The trial court granted judgment in favor of appellees in an entry dated October 29, 2008. From that entry

1. It appears from the record that appellant sued the individual appellees, Addis, Deputy Oswald and Sergeant Hall, in their official capacities only. Therefore, the claims against the individual appellees constitute claims against Butler County. See *Smitek v. Peaco* (Jan. 27, 1993), Lorain App. No. 92CA005359; *Duff v. Coshocton County*, Coshocton App. No. 03-CA-019, 2004-Ohio-3713, at ¶18, citing *Hafer v. Melo* (1991), 502 U.S. 21, 112 S.Ct. 358.

and the entry denying the change of venue, appellant appeals, asserting two assignments of error.

{¶5} Assignment of Error No. 1:

{¶6} "THE TRIAL COURT ERRED WHEN IT GRANTED DEFENDANTS' MOTION FOR SUMMARY JUDGMENT."

{¶7} Appellant first argues the trial court erred in finding appellees had no common law or statutory duty to maintain and perform traffic control at the intersection of S.R. 4 and S.R. 747 pursuant to R.C. 2744.02(B)(3) and the internal policies of the Butler County Sheriff's Department. Within this assignment of error, appellant also argues that Butler County and its employees failed to operate the 9-1-1 communications system "free from willful or wanton misconduct."

{¶8} This court conducts a de novo review of a trial court's decision on summary judgment. *Burgess v. Tackas* (1998), 125 Ohio App.3d 294, 296. In applying the de novo standard, we review the trial court's decision independently and without deference to the trial court's determination. *White v. DePuy* (1998), 129 Ohio App.3d 472, 478. A court may grant summary judgment only when: (1) there is no genuine issue as to any material fact; (2) the moving party is entitled to judgment as a matter of law; and (3) it appears from the evidence submitted that reasonable minds can come to but one conclusion and that conclusion is adverse to the nonmoving party, who is entitled to have the evidence construed most strongly in his favor. Civ.R. 56(C); *Welco Indus., Inc. v. Applied Cos.,* 67 Ohio St.3d 344, 346, 1993-Ohio-191.

{¶9} Appellees contend that they are immune from liability for all claims set forth by appellant. R.C. 2744.02 establishes a three-tier analysis for determining whether a political subdivision is immune from liability. *Grooms v. Crawford*, Brown App. Nos. CA2005-05-008,

CA2005-05-009, 2005-Ohio-7028, ¶11, citing *Cater v. Cleveland*, 83 Ohio St.3d 24, 27-28, 1998-Ohio-421. First, R.C. 2744.02(A)(1) sets forth the general rule 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 an act or omission of the political subdivision or an employee of the political subdivision in connection with a governmental or proprietary function." Second, R.C. 2744.02(B) lists five exceptions to the general immunity granted to political subdivisions under R.C. 2744.02(A). A political subdivision is subject to liability if its acts or omissions fall under one of these exceptions. Finally, if liability attaches under one of the exceptions in R.C. 2744.02(B), then a political subdivision may assert an available defense provided in R.C. 2744.03(A). See *Grooms* at ¶14, citing *Cater* at 28.

{¶10} In this case, it is undisputed that appellees are political subdivisions and were engaged in governmental functions at the time of the accident and are therefore entitled to general immunity. Appellant argues, however, that appellees are subject to an exception to immunity pursuant to R.C. 2744.02(B)(3).

{¶11} R.C. 2744.02(B)(3) provides in pertinent part that political subdivisions are liable for the injury, death or loss to a person caused by the negligent failure to keep public roads in repair. Appellees assert, however, that they could not have been negligent in keeping the intersection in repair because they had no duty to do so.

{¶12} Public highways are divided into three classes: state roads, county roads, and township roads. R.C. 5535.01. State roads include roads and highways on the state highway system. R.C. 5535.01(A). County roads include all roads which are or may be established as part of the county system of roads. County roads are maintained by the board of county commissioners. R.C. 5535.01(B). Pursuant to R.C. 5535.08(A), the state, county, and township shall each maintain its roads as designated in R.C. 5535.01. Further, R.C.

5501.11(A)(1) requires the Ohio Department of Transportation (ODOT) to "[e]stablish state highways on existing roads, streets and new locations and construct, reconstruct, widen, resurface, maintain, and repair the state system of highways and the bridges and culverts thereon."

{¶13} In this case, the accident occurred at the intersection of two state highways: S.R. 4 and S.R. 747. As such, the highways were within the specific jurisdiction of ODOT, not Butler County. See *Steach v. Bacon* (July 8, 1986), Allen App. No. 1-85-17; *Weiher v. Phillips* (1921), 103 Ohio St. 249, 259.

{¶14} To prove negligence, a plaintiff must demonstrate the existence of a duty, a breach of that duty, and damages proximately caused by that breach. See *White* at 486. Because the intersection in this case involves two state routes which the county has no duty to maintain, appellant cannot prove negligence and therefore no exception to immunity under R.C. 2744.02(B)(3). Therefore, statutory immunity precludes a claim against appellees for a failure to maintain the intersection pursuant to R.C. 2744.02.

{¶15} Appellant also asserts that R.C. 2744.02(B)(5) provides for an exception to appellees' immunity. Appellant argues appellees failed to operate the 9-1-1 communications system properly pursuant to R.C. 4931.49(B).

{¶16} R.C. 2744.02(B)(5) provides in pertinent part that a political subdivision is liable for injury, death, or loss to a person when civil liability is expressly imposed upon the political subdivision by another section of the Revised Code. Appellant argues that R.C. 4931.49(B) imposes such liability.

{¶17} R.C. 4931.49(B) provides that an individual who gives or follows emergency through a 9-1-1 system established under R.C. 4931.40 to 4931.51 and the principals for whom the person acts, including both employers and independent contractors, public and

private, are not liable in damages in a civil action for injuries, death, or loss to persons or property arising from the issuance or following of emergency instructions, except where the issuance or following of the instructions constitutes willful or wanton conduct.

{¶18} A statute imposing a duty does not equate with a statute imposing liability. *Butler v. Jordan*, 92 Ohio St.3d 354, 357, 2001-Ohio-204. Ohio courts have likewise rejected broad readings of the Revised Code finding that a particular section imposes liability. *Svette v. Caplinger*, Ross App. No. 06CA2910, 2007-Ohio-664, at ¶32; *Farra v. Dayton* (1989), 62 Ohio App.3d 487, 496.

{¶19} R.C. 4931.49(B) applies to actions taken by a person who gives or follows emergency instructions. In this case, the express language of R.C. 4931.49(B) does not apply to the facts, as the record demonstrates the applicable 9-1-1 communications involved reports of the power outage at the intersection and the dispatcher's request for signage from the state. Because this section does not apply to this case and because R.C. 4931.49 functions as an immunity provision, rather than a section imposing civil liability, appellant's claim pertaining to R.C. 4931.49 is not well-taken. *Svette*, at ¶33.

{¶20} Accordingly, the trial court did not err in granting summary judgment in favor of appellees, and appellant's first assignment of error is overruled.

{¶21} Assignment of Error No. 2:

{¶22} "THE TRIAL COURT ERRED WHEN IT OVERRULED PLAINTIFF'S MOTION REQUESTING A CHANGE OF VENUE PURSUANT TO CIV.R. 3(C)4."

{¶23} Appellant argues the trial court erred in overruling the motion for change of venue. We need not address the merits of this issue as our ruling in appellant's first assignment of error renders this matter moot. See App. R. 12(A)(1)(c).

{¶24} Judgment affirmed.

POWELL, P.J., and RINGLAND, J., concur.

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