[Cite as *Estate of Enzweiler v. Clermont Cty. Bd. of Commrs.*, 2011-Ohio-896.]

IN THE COURT OF APPEALS

TWELFTH APPELLATE DISTRICT OF OHIO

CLERMONT COUNTY

ESTATE OF LAURA ENZWEILER, et al.,	:	
Plaintiffs-Appellants/Cross-Appellees,	:	CASE NOS. CA2010-11-085 CA2010-11-086
	:	
- vs -	:	O P I N I O N 2/28/2011
BOARD OF COMMISSIONERS, CLERMONT COUNTY, OHIO,	:	
	:	
Defendant-Appellee/Cross-Appellant.	:	

CIVIL APPEAL FROM CLERMONT COUNTY COURT OF COMMON PLEAS
Case No. 2007-CVC-2287

Kevin P. Roberts, 7373 Beechmont Avenue, Suite 3, Cincinnati, Ohio 45230 and James J. Condit, 9403 Kenwood Road, Suite D-20, Cincinnati, Ohio 45242, for appellants/cross-appellees, Kathleen Lester, Executrix, and Carmen L. & Christine L. Enzweiler

Donald W. White, Clermont County Prosecuting Attorney, Mary Lynn Birck, 101 East Main Street, 3rd Floor, Batavia, Ohio 45103, for appellee/cross-appellant

RINGLAND, J.

{¶1} Defendant-appellee and cross-appellant, Board of County Commissioners of Clermont County, Ohio (County), appeals from the Clermont County Court of Common Pleas decision denying its motion for summary judgment seeking governmental immunity pursuant to R.C. Chapter 2744 in a lawsuit initiated by plaintiff-

appellant and cross-appellee, Laura M. Enzweiler.[1] For the reasons outlined below, we reverse.[2]

{¶2} On October 1, 2003 at approximately 3:30 p.m., Enzweiler, a title examiner employed by Advance Land Title Agency, LLC, who was in the process of "check[ing] names on [her] title report," slipped and fell down a marble staircase leading to the Clermont County Clerk of Court's Office located in the basement of the Clermont County Courthouse. At the time of Enzweiler's fall, the Courthouse was under construction as part of an extensive remodeling project. It is undisputed that "dust" generated by the remodeling project caused Enzweiler to slip and fall, and that she sustained injuries as a result. It is also undisputed that on September 30, 2003, the day before Enzweiler's fall, an employee with the Clerk of Courts advised the "Facilities Management Department" to inspect the staircase and clean off the dust.

{¶3} On December 11, 2007, over four years after her fall, Enzweiler filed suit against County alleging it was negligent in its upkeep of the Courthouse staircase. Enzweiler's complaint, however, did not allege the County's upkeep of the Courthouse amounted to wanton or willful misconduct. On July 12, 2010, following a number of delays, and after filing its answer, County moved for summary judgment arguing, among other things, that it was entitled to governmental immunity.

{¶4} In its September 30, 2010 decision denying County's motion for summary judgment, the trial court found "the construction dust accumulated on the stairs causing [Enzweiler's] fall could be construed as a physical defect," and that "[b]ased on the

1. After initiating this lawsuit, Enzweiler passed away on October 22, 2009. Kathleen R. Lester, the representative of Enzweiler's estate, was subsequently substituted as plaintiff. For ease of discussion, we will refer to plaintiff-appellant and cross-appellee, Estate of Laura Enzweiler, as "Enzweiler" for purposes of issuing this opinion.

2. Pursuant to Loc.R. 6(A), we sua sponte remove this case from the accelerated calendar and place it on the regular calendar for purposes of issuing this opinion.

statutory obligation of the Clerk of Courts to keep its records available for public inspection it would appear that Enzweiler was a licensee and not an invitee." The trial court then determined that because there was evidence indicating the dust was "barely noticeable," there was "a question of fact as to whether [County's] conduct amounted to wanton misconduct." In concluding, the trial court granted Enzweiler leave to "file a motion to amend her pleadings within twenty days" that was "appropriately supported demonstrating * * * a question of fact regarding the failure of the County to comply with said standard of care." Enzweiler, however, did not file a motion to amend her pleading.

{¶5} On November 1, 2010, Enzweiler filed a notice of appeal with this court alleging that the trial court erred in its decision classifying her as a licensee. In response, County filed a cross-appeal arguing that the trial court erred by denying it governmental immunity pursuant to R.C. Chapter 2744. This court subsequently consolidated the appeals in an entry filed November 24, 2010.

{¶6} Now before this court is County's single assignment of error.

{¶7} "THE LOWER COURT ERRED IN NOT GRANTING IMMUNITY FOR TORT LIABILITY TO DEFENDANT-APPELLANT BOARD OF COMMISSIONERS, A POLITICAL SUBDIVISION."

{¶8} In its single assignment of error, County argues that the trial court erred in its decision overruling its motion for summary judgment by denying it governmental immunity. We agree.

{¶9} Summary judgment is a procedural device used to terminate litigation when there are no issues in a case requiring a formal trial. *Forste v. Oakview Const., Inc.,* Warren App. No. CA2009-05-054, 2009-Ohio-5516, ¶7. A trial court may grant summary judgment only when: (1) there is no genuine issue of any material fact; (2) the moving party is entitled to judgment as a matter of law; and (3) the evidence submitted

can only lead reasonable minds to a conclusion which is adverse to the nonmoving party. See Civ.R. 56(C); *Harless v. Willis Day Warehousing Co.* (1978), 54 Ohio St.2d 64, 66. The party moving for summary judgment bears the initial burden of demonstrating no genuine issue of material fact exists. *Dresher v. Burt,* 75 Ohio St.3d 280, 292-293, 1996-Ohio-107. Once this burden is met, the nonmoving party must then present evidence to show that there is some issue of material fact yet remaining for the trial court to resolve. *Smedley v. Discount Drug Mart, Inc.*, Fayette App. No. CA2010-05-010, 2010-Ohio-5665, ¶11. In determining whether a genuine issue of material fact exists, the evidence must be construed in the nonmoving party's favor. *Walters v. Middletown Properties Co.,* Butler App. No. CA2001-10-249, 2002-Ohio-3730, ¶10.

{¶10} The determination of whether governmental immunity is available is a question of law that is properly decided by the court before trial. *Frazier v. Clinton Cty. Sheriff's Office*, Clinton App. No. CA2008-04-015, 2008-Ohio-6064, ¶27, citing *Carpenter v. Scherer-Mountain Ins. Agency* (1999), 135 Ohio App.3d 316, 330. This court reviews de novo the trial court's summary judgment decision on immunity grounds. *Winkle v. Zettler Funeral Homes, Inc.*, 182 Ohio App.3d 195, 2009-Ohio-1724, ¶15. In applying the de novo standard, we are required to "us[e] the same standard that the trial court should have used, and * * * examine the evidence to determine whether as a matter of law no genuine issues exist for trial." *Bravard v. Curran,* 155 Ohio App.3d 713, 2004-Ohio-181, ¶9, quoting *Brewer v. Cleveland Bd. of Edn.* (1997), 122 Ohio App.3d 378, 383.

{¶11} In analyzing whether a political subdivision is immune from liability, courts conduct a three-tiered analysis. *Fields v. Talawanda Bd. of Edn.,* Butler App. No. CA2008-02-035, 2009-Ohio-431, ¶10, citing *Elston v. Howland Local Schools,* 113 Ohio St.3d 314, 2007-Ohio-2070, ¶10. Initially, R.C. 2744.02(A)(1) sets forth the general rule

that a political subdivision is "not liable for damages in a civil action for injury, death, or loss to persons 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." *Messer v. Butler Cty. Bd. of Commrs.*, Butler App. Nos. CA2008-12-290, CA2009-01-004, 2009-Ohio-4462, ¶9. Next, R.C. 2744.02(B) lists five exceptions to the general immunity granted to political subdivisions under R.C. 2744.02(A)(1). *Syle v. London Police Dept.*, Madison App. No. CA2009-12-027, 2010-Ohio-2824, 29. Finally, in the event the political subdivision is subject to liability pursuant to R.C. 2744.02(B), immunity may be reinstated if the political subdivision can successfully assert one of the defenses to liability provided for in R.C. 2744.03(A). *Golden v. Milford Exempted Village School Bd. of Edn.*, Clermont App. No. CA2008-10-097, 2009-Ohio-3418, ¶10.

{¶12} In this case, it is undisputed, and County concedes, that it is a political subdivision pursuant to R.C. 2744.01(F), and that Enzweiler sustained injuries due to a physical defect within the Courthouse, a building used in connection with its performance of a governmental function. However, we must first decipher the County's requisite duty of care owed to Enzweiler under these circumstances to determine whether County was negligent and subject to liability pursuant to R.C. 2744.02(B)(4).[3]

{¶13} In order to establish a negligence claim, Enzweiler must show the existence of a duty, a breach of that duty, and an injury proximately resulting from the breach. *Texler v. D.O. Summers Cleaners & Shirt Laundry Co.,* 81 Ohio St.3d 677, 680, 1998-Ohio-602. The failure to prove any element is fatal to her negligence claim.

3. R.C. 2744.02(B)(4) provides that "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[.]"

Whiting v. Ohio Dept. of Mental Health (2001), 141 Ohio App.3d 198, 202.

{¶14} In cases of premises liability negligence, such as the case here, the scope of the duty owed to a visitor depends upon her status. *Shump v. First Continental-Robinwood Assoc.,* 71 Ohio St.3d 414, 417, 1994-Ohio-427. In determining the duty of a property owner or occupier, Ohio adheres to the common law classifications of invitee, licensee, and trespasser. *Gladon v. Greater Cleveland Regional Transit Auth.,* 75 Ohio St.3d 312, 315, 1996-Ohio-137.

{¶15} As relevant to this matter, an invitee is one who enters property by invitation and for the benefit of the property owner or occupier. *Light v. Ohio Univ.* (1986), 28 Ohio St.3d 66, 68. An owner or occupier of property is obliged to exercise ordinary care in ensuring the safety of invitees. *Salmon v. Rising Phoenix Theatre*, Butler App. No. CA2005-11-491, 2006-Ohio-4328, ¶14. By contrast, a licensee is one who enters property with the permission or acquiescence of the owner or occupier and for the benefit of the individual instead of the owner or occupier. *Provencher v. Ohio Dept. of Transp.* (1990), 49 Ohio St.3d 265, 266; *Combs ex rel. Estate of Combs v. Baker*, Butler App. No. CA2001-01-020, 2001-Ohio-8650. The duty of care owed to a licensee is a duty to avoid wanton or willful misconduct. *Rosell v. Wolf*, Butler App. No. CA2003-09-250, 2004-Ohio-5090, ¶11, citing *Gladon* at 317. To constitute willful and wanton misconduct, an act must demonstrate heedless indifference to or disregard for others in circumstances where the probability of harm is great and is known to the actor. *Salmon* at ¶14; *Rinehart v. Fed. Natl. Mtge. Assn.* (1993), 91 Ohio App.3d 222, 229.

{¶16} Visitors on state or local government property are generally classified as licensees. *Souther v. Preble Cty. Dist. Library, West Elkton Branch*, Preble App. No. CA2005-04-006, 2006-Ohio-1893, ¶14, citing, e.g., *Provencher* at syllabus; *Hood v. Bethel-Tate School Dist.* (Oct. 24, 1994), Clermont App. No. CA94-05-036, 4-5.

{¶17} In this case, Enzweiler readily admits that her sole purpose for traversing down the Courthouse staircase towards the Clerk of Court's office was not to file any documents or to pay any filing fees, but instead, to "check names on [her] title report." By simply "check[ing] names on [her] title report," we find it clear that Enzweiler was acting for her own benefit, and ostensibly for that of her employer, and not for the benefit of County.[4] See, e.g., *Souther* at ¶17; *Shotts v. Jackson Cty.*, Jackson App. No. 00CA016, 2000-Ohio-1961, 2000 WL 33226299, * 3.

{¶18} Enzweiler, however, claims that she was an invitee at the time of her fall because "County did in fact receive a financial benefit from [her] visit in the form of the recording fees her title searching activity generated for [County]." However, contrary to her claim otherwise, the record is devoid of any evidence that County actually received any funds resulting from filing fees generated by Enzweiler's title examination. The mere possibility that County could have received funds resulting from a filing fee generated by Enzweiler's title examination is based on nothing more than pure speculation and insufficient to establish her status as an invitee. See, generally, *Simpson v. Harris Cty.* (Tex.1997), 951 S.W.2d 251, 253-254 (holding plaintiff who paid court filing fee was not entitled to invitee status by virtue of such payment).

{¶19} In light of the foregoing, we find Enzweiler was a licensee at the time she sustained her fall. Accordingly, because Enzweiler was a licensee, County merely owed her a duty to refrain from wanton or willful misconduct.

{¶20} That being said, Enzweiler has not alleged that County acted in a wanton

4. It should be noted that the record is devoid of any evidence indicating the existence of a contractual relationship between the parties, nor any evidence as to whether Enzweiler was charged a fee to enter the Courthouse, whether she went to the Courthouse to engage in a "civic duty," or whether the County somehow "enticed [her] to use the facilities." See, e.g. *Provencher*, 49 Ohio St.3d 265 at syllabus; *Souther*, 2006-Ohio-1893, ¶13-18; *Trutza v. Cleveland* (1995), 102 Ohio App.3d 371, 375-376; *Mocarski v. Akron* (July 14, 1999), Summit App. No. 19138, 1999 WL 492678; *McClorey v. Hamilton Cty. Bd. of Elections* (Nov. 7, 1994), Hamilton App. No. C-930946, 1994 WL 680143.

or willful manner.[5] In turn, because she failed to allege the requisite degree of conduct required to establish a breach of County's duty of care under these circumstances, Enzweiler's negligence claim fails. See *Souther* at ¶18; *Koffi v. Cleveland Mun. School Dist.*, Cuyahoga App. No. 80045, 2002-Ohio-12, 2002 WL 22046, *2; see, also, *Light*, 28 Ohio St.3d at 68-69. As a result, we find the trial court erred in its decision denying County's motion for summary judgment seeking governmental immunity pursuant to R.C. Chapter 2744. Therefore, County's single assignment of error is sustained and the trial court's decision overruling County's motion for summary judgment is reversed and judgment s hereby entered on behalf of the County.

{¶21} Judgment reversed.

POWELL, P.J., and BRESSLER, J., concur.

5. It should also be noted that during oral argument before this court, Enzweiler's counsel conceded that there was "no factual support for an allegation of wanton or reckless conduct in this case."