[Cite as *Hummons v. Dayton*, 2009-Ohio-5398.]

IN THE COURT OF APPEALS OF OHIO
SECOND APPELLATE DISTRICT
MONTGOMERY COUNTY

MICHAEL A. HUMMONS	:	
	:	Appellate Case No. 23116
Plaintiff-Appellant	:	
	:	Trial Court Case No. 2006-CV-1707
v.	:	
	:	(Civil Appeal from
CITY OF DAYTON, OHIO, et al.	:	Common Pleas Court)
	:	
Defendant-Appellee	:	
	:	

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O P I N I O N

Rendered on the 9th day of October, 2009.

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FAIN, J.

{¶ 1} Defendant-appellant Michael Hummons appeals from a summary judgment rendered against him on his claim for personal injuries arising from a motor vehicle accident. He contends that the trial court erred in rendering summary judgment in favor of defendant-appellee Dayton Power & Light (DP&L), because it erred in concluding that his action against the company was time-barred. He further contends that the trial court should not have granted the motion for summary judgment filed by defendant-appellee, City of Dayton, because there is a genuine issue of material fact with regard to whether the City is liable for the subject accident.

{¶ 2} We conclude that the undisputed facts in this case support the trial court's finding that Hummons did not file the claim against DP&L within the applicable statute of limitations, and that the claim is therefore time-barred. We further conclude that the trial court did not err in rendering summary judgment against Hummons with regard to his claim against the City, because there is no evidence that the City had actual or constructive notice of any potential nuisance that could cause the accident, and because the evidence indicates that the City did not have a reasonable amount of time to remedy any such nuisance prior to the accident.

{¶ 3} The judgment of the trial court is Affirmed.

I

{¶ 4} On April 21, 2000, the City of Dayton received a call notifying it that the traffic lights at the intersection of Hillcrest Avenue and Salem Avenue were not operating. A City traffic crew responded to the intersection and found that the electrical power to the signal was out. The crew placed temporary stop signs at

each corner of the intersection. Later that same day, after being informed that DP&L had restored power to the area, the crew returned to the intersection. The crew discovered that there was insufficient power to operate the signal.

{¶ 5} On April 22, the City received notification at 6:45 a.m. that there was a cable fire at the intersection. Another traffic crew was dispatched and it was discovered that a traffic signal cable had burned and fallen to the ground. The crew secured the cable, verified that the traffic lights were not functioning and that the stop signs were in place directing traffic at the intersection. The crew left the scene at 7:15 a.m. and DP&L was notified of the electrical failure. A DP&L crew arrived on the scene at 7:45 a.m. At 9:45 a.m., the DP&L crew restored power to the traffic lights at the intersection. DP&L left the area without notifying the City that the power had been restored. At 10:10 a.m. the accident involving Hummons occurred at the intersection.

{¶ 6} At that time, Hummons was involved in a motor vehicle accident when his car collided with a vehicle operated by Doris Nixon. He filed a complaint for those injuries on April 22, 2002. In that complaint he named Nixon, the City and "all other Jane or John Does" as defendants. On December 12, 2002, Hummons filed an amended complaint in which he named the same defendants, without adding any additional defendants. Then, on May 8, 2004, Hummons filed a second amended complaint, in which he added DP&L as a defendant in place of the John Doe defendant. DP&L was served with process via certified mail.

{¶ 7} DP&L filed an answer in which it affirmatively asserted the defense of the expiration of the statute of limitations. DP&L also filed a motion for summary

judgment based, in part, upon its claim that the statute of limitations had expired. On March 4, 2005, prior to the resolution of the motion for summary judgment, Hummons voluntarily dismissed the action without prejudice, pursuant to Civ.R. 41(A). He subsequently re-filed the complaint on March 3, 2006.

{¶ 8} DP&L re-filed a motion for summary judgment, in which it again argued that Hummons's claim against it was time-barred. DP&L also claimed that Hummons had not served it properly in accordance with the personal service requirement of Civ.R. 15(D). The City also filed a motion for summary judgment, in which it argued that it was immune from liability for the accident and that it did not have actual or constructive notice that DP&L had effected a repair of the electrical service to the traffic lights, and thus, it did not have adequate time in which to restart the traffic lights prior to the accident.

{¶ 9} The trial court rendered summary judgment in favor of DP&L upon a finding that Hummons had not timely commenced an action against the company. The trial court also rendered summary judgment in favor of the City upon a finding that the City did not have sufficient time in which to remedy any problem with the traffic lights.

{¶ 10} Hummons appeals.[1]

II

{¶ 11} Hummons' First Assignment of Error is as follows:

{¶ 12} "THE TRIAL COURT COMMITTED PREJUDICIAL ERROR WHEN IT

[1] The trial court also rendered summary judgment in favor of Nixon prior to the institution of this appeal. Hummons has not appealed from the judgment in favor of

GRANTED APPELLEE DP&L'S MOTION FOR SUMMARY JUDGMENT."

{¶ 13} Hummons contends that the trial court should not have rendered summary judgment against him with regard to his claims against DP&L. In support, he claims that DP&L waived any issue regarding service of process by failing to raise this issue in the trial court. He further claims that his action against DP&L was timely filed, because he served the company with process within one year from the date he filed the amended complaint identifying the company as one of the John Doe defendants.

{¶ 14} We review an appeal from summary judgment under a de novo standard. *Baiko v. Mays* (2000), 140 Ohio App. 3d 1, 10. Therefore, we must independently review the record to determine whether summary judgment is appropriate. *Northeast Ohio Apartment Assn. v. Cuyahoga Cty. Bd. Of Commrs.* (1997), 121 Ohio App. 3d 188, 192. 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 because it appears from the evidence, when viewed in favor of the nonmoving party, that reasonable minds can come to but one conclusion, which is adverse to the nonmoving party. *State ex. rel. Duganitz v. Ohio Adult Parole Auth.* (1996), 77 Ohio St. 3d 190, 191.

{¶ 15} In this case, the facts with regard to the pleadings are undisputed. Therefore, this argument presents a purely legal issue of whether Hummons's second amended complaint relates back to the original complaint, so as to render his claim against DP&L timely filed.

Nixon.

{¶ 16} An action for personal injury must be initiated within two years after the cause of action arises. R.C. 2305.10. Pursuant to Civ.R. 3(A), "a civil action is commenced by filing a complaint with the court, if service is obtained within one year from such filing *** upon a defendant identified by a fictitious name whose name is later corrected pursuant to Civ. R. 15(D)."

{¶ 17} Civ.R. 15(D), which governs the relation back of amended complaints for previously unknown defendants, provides that "when the plaintiff does not know the name of a defendant, that defendant may be designated in a pleading or proceeding by any name and description. When the name is discovered, the pleading or proceeding must be amended accordingly, The plaintiff, in such case, must aver in the complaint the fact that he could not discover the name. The summons must contain the words 'name unknown,' and a copy thereof must be served personally upon the defendant."

{¶ 18} Civ.R. 15(D) operates "to relate a complaint amended pursuant to [that] rule back to the filing of the original complaint for statute of limitations purposes when the particular circumstances [that section involves are] satisfied." *Knotts v. Solid Rock Enterprises, Inc.*, Montgomery App. No. 21622, 2007-Ohio-1059, ¶ 30, citing *Amerine v. Haughton Elevator Co.* (1989), 42 Ohio St. 3d 57. Previously, service upon such amended complaints "was required within the statute of limitations period." Id. ¶23. However, Civ.R. 3(A) was amended in 1986 to extend the period for service of amended complaints for one year after the original complaint was filed. Id. Thus, in order for the amended complaint naming DP&L as a defendant to relate back to the filing of the original claim Hummons was required to obtain service

within one year of the filing of the original complaint. *Knotts*, supra; *Amerine*, supra at 59.

{¶ 19} Hummons appears to be arguing that the one-year extension for service provided for in Civ.R. 3(A) commences to run, not from the date of filing of the original complaint, but from the date of filing of the complaint in which he named DP&L. This is contrary to the language in Civ.R. 3(A): "A civil action is commenced by filing a complaint with the court, if service is obtained within one year from *such* filing * * * upon a defendant identified by a fictitious name whose name is later corrected pursuant to Civ.R. 15(D)." (Emphasis added.) The construction of Civ.R. 3(A) that Hummons advocates would effectively abrogate the applicable statute of limitations by allowing a plaintiff to file a timely complaint against "John Doe," without even describing generally who or what "John Doe" is or did, and then, at the plaintiff's later convenience, irrespective of the statute of limitations, the plaintiff could amend his complaint to name a specific defendant, and have another full year in which to serve that defendant. We reject that construction.

{¶ 20} In this case, it is undisputed that Hummons was injured on April 22, 2000; that he filed his original complaint on April 22, 2002, the last day possible prior to the expiration of the R.C. 2305.10 statute of limitations; and that he did not amend the complaint to identify DP&L as one of the John Doe defendants until May 28, 2004 – more than two years after the filing of the original complaint. Consequently, Hummons failed to obtain service upon DP&L within one year of filing the original complaint, and he therefore failed to comply with the requirements of Civ.R. 3(A) so

as to avoid the statute of limitations bar set forth at R.C. 2305.10.[2] Therefore, the trial court properly determined that Hummons's claim against DP&L is time-barred.

{¶ 21} Hummons claims that DP&L waived any claims regarding the service of process by failing to assert the issue in the trial court, pursuant to Civ.R. 12(B). Specifically, Civ.R. 15(D) requires personal service upon a previously unknown defendant. See, *Knotts* supra at ¶39. Hummons did not effect personal service, but rather used certified mail. Hummons claims that counsel for DP&L agreed to service via certified mail.

{¶ 22} Although we agree that DP&L failed to assert the lack of personal service as a defense as required by Civ.R. 12(B), this is not dispositive of the case. The issue of whether Hummons should have effected personal service is directed at the method of service, not the timing of that service. Even if had Hummons effected personal service upon DP&L, he would have missed the statute of limitations, since he did not attempt any service until two years after the filing of the original complaint. Further, DP&L expressly asserted the statute of limitations as an affirmative defense thereby preserving the issue for appeal.

{¶ 23} The First Assignment of Error is overruled.

III

{¶ 24} Hummons' Second Assignment of Error states as follows:

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[2] April 22, 2000 - date of the accident.
April 22, 2002 - original complaint filed.
April 22, 2003 - last day to obtain service of original or amended complaint.
May 8, 2004 - second amended complaint, naming DP&L as a defendant filed.

{¶ 25} "THE TRIAL COURT COMMITTED PREJUDICIAL ERROR WHEN FINDING THAT NOTICE TO THE CITY WAS INSUFFICIENT AND GRANTING ITS MOTION FOR SUMMARY JUDGMENT."

{¶ 26} Hummons contends that the trial court erred by rendering summary judgment in favor of the City because he demonstrated that the City was responsible for failing to repair the traffic lights at the intersection where the accident occurred. He contends that the City's failure to do so created a nuisance.

{¶ 27} As a general rule, municipalities are immune from liability for "damages in a civil action for injury, death, or loss to person or property allegedly caused by any act or omission of the [municipality] in connection with a government or proprietary function." R.C. 2744.02(A)(1). This immunity is subject to five exceptions listed in R.C. 2744.02(B). Of relevance herein, R.C. 2744.02(B)(3) provides that "[e]xcept as otherwise provided in section 3746.24 of the Revised Code, political 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 ***."

{¶ 28} Pursuant to R.C. 723.01, "[m]unicipal corporations shall have special power to regulate the use of the streets. Except as provided in section 5501.49 of the Revised Code, the legislative authority of a municipal corporation shall have the care, supervision, and control of the public highways, streets, avenues, alleys, sidewalks, public grounds, bridges, aqueducts, and viaducts within the municipal corporation, and the municipal corporation shall cause them to be kept open, in repair, and free from nuisance."

{¶ 29} "A petition, alleging that a municipality failed to repair an electric traffic signal after receiving reasonable notice that the signal was not functioning properly and that the malfunction caused a dangerous condition which caused the automobile accident resulting in plaintiff's injuries, states a cause of action against the municipality for maintaining a nuisance in violation of Section 723.01, Revised Code." *Fankhauser v. City of Mansfield* (1969), 19 Ohio St.2d 102.

{¶ 30} "However, if the municipality did not create the faulty condition, no liability can arise except upon proof that it had actual or constructive notice of such condition." *Schmidt v. Mansfield* (April 9, 1998), Tuscarawas App. No. 97 CA 99, citing *City of Cleveland v. Amato* (1931), 123 Ohio St. 575, paragraph one of the syllabus. "Thus, before liability can attach, a municipality must have had actual or constructive notice of a nuisance condition and must have failed to correct the condition within a reasonable time after having received such notice." Id., citing *Taylor v. City of Cincinnati* (1944), 143 Ohio St. 426, paragraph five of the syllabus.

{¶ 31} The trial court determined that the City did not cause the malfunction with the subject traffic light. We agree. From the record, it appears that the traffic light malfunction was due to problems with the electrical service to the light.

{¶ 32} The trial court further determined that "regardless of [whether the City had notice], the uncontroverted record in the instant case establishes there was insufficient time for the City to correct any problem that may have resulted after DP&L employees serviced the traffic light. The record shows that electrical service was restored to the area at 9:45 A.M. on the day of the accident. The record also shows that there was a call reporting [the accident] at approximately 10:10 A.M.

These facts show a time lapse of approximately twenty-five minutes between the time DP&L restored electrical service to the intersection and the accident."

{¶ 33} In finding that the City did not have sufficient time to remedy the problem, the trial court relied upon the holding of the Tenth District Court of Appeals in *Coleman v. Village of Groveport* (Oct. 6, 1992), Franklin App. No. 92AP-375. In *Coleman*, a traffic accident occurred following a power outage that shut down the entire traffic signal system in the Village of Groveport. Id. Seventeen minutes later, a motor vehicle accident occurred as a result of the lack of a traffic signal at an intersection. Id. The Court of Appeals found that "as a matter of law seventeen minutes is an insufficient time to require the [Village] to repair the traffic signal." Id.

{¶ 34} We find *Coleman* distinguishable upon its facts. First, *Coleman* involved a single power outage resulting in the shut-down of the traffic system; in this case, there is evidence that the subject traffic light had experienced an outage the day prior to the accident with ongoing problems until the morning of the accident. Second, in *Coleman*, the traffic light at issue was completely shut down. In this case, the evidence is conflicting with regard to the status of the signal. A city worker testified that when a power outage occurs, traffic lights affected thereby will go completely dark or into "all flash mode" – meaning the light will flash red in all directions until reset by a City electrician. The worker also testified that the lights will go into flash mode if the microprocessor in the light senses a problem such as a potential for green lights in both directions. The flash mode goes into effect within seconds of sensing such problems. Hummons corroborated this testimony in his own deposition wherein he indicated that the traffic light was flashing red in his

direction. However, according to Nixon's deposition testimony, the traffic light in her direction of travel was green at the time she entered the intersection, and changed to yellow as she passed through the intersection.

{¶ 35} The City of Dayton had constructive notice of the existence of a problem with the traffic lights for a period of approximately twenty-four hours, due to issues with the electrical service. But there is no evidence that the City had any notice that the light was not operating properly following the restoration of the electrical service. The City was not made aware that the light was possibly operating normally in one direction and in flash mode in the other direction. In other words, once DP&L restored power to the intersection, the City expected the light either to go into flash mode or to go completely dark. The City had no notice that the light did not function as expected following a restoration of power. Furthermore, the City had placed stop signs at all four corners of the intersection to control traffic during the time period wherein the light was supposed to be either dark or flashing.

{¶ 36} Absent any evidence that the City was informed that the power had been restored or that the light subsequently malfunctioned by failing to go dark or into flash mode, we conclude that the City did not have actual or constructive notice of any potential nuisance. Even it the City did have notice, there was, at most, twenty-five minutes between the restoration of power to the lights and the occurrence of the accident. We agree with the trial court's conclusion, as a matter of law, finding that there was not a reasonable amount of time between those two occurrences for the City to correct the problem. Therefore, we conclude that summary judgment was appropriate.

{¶ 37} The Second Assignment of Error is overruled.

IV

{¶ 38} Both of Hummons's assignments of error having been overruled, the judgment of the trial court is Affirmed.

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BROGAN and FROELICH, JJ., concur.

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