

COURT OF APPEALS  
STARK COUNTY, OHIO  
FIFTH APPELLATE DISTRICT

JEFFREY CUNNINGHAM

Plaintiff-Appellee

-vs-

SARAH ALLENDER, et al.

Defendant-Appellants

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JUDGES:

Hon. John F. Boggins, P.J.  
Hon. William B. Hoffman, J.  
Hon. Sheila G. Farmer, J.

Case No. 2004CA00337

OPINION

CHARACTER OF PROCEEDING:

Appeal from the Stark County Court of  
Common Pleas, Case No. 2004CV00739

JUDGMENT:

AFFIRMED

DATE OF JUDGMENT ENTRY:

APRIL 20, 2005

APPEARANCES:

**For Plaintiff-Appellee  
Jeffrey Cunningham:**

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**For Defendant-Appellant  
Stark County Board of Commissioners:**

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**For Defendant-Appellee  
Sarah Allender:**

MEL LUTE  
400 South Main Street  
North Canton, OH 44720

*Boggins, P.J.*

{¶1} This is an appeal from decisions of the Stark County Court of Common Pleas which denied Defendant-Appellant Stark County Board of Commissioner's Motion to Strike Evidence submitted by Appellee in response to Defendant-Appellant's Civ.R. 56 Motion and denial of such Motion.

### **STATEMENT OF THE FACTS AND CASE**

{¶2} The facts underlying this action are that on May 3, 2003, Sarah Allender violated a stop sign at the intersection of Route 172 and Alabama Avenue striking the vehicle of Amanda Cunningham.

{¶3} This Appellant was joined as a defendant based on the assertions that the vision of Sarah Allender as to the stop sign was obscured by bushes or trees which this Appellant was required to trim.

{¶4} Appellant, as stated, filed a motion for summary judgment and a motion to strike certain affidavits submitted by Plaintiff-Appellee which were denied.

{¶5} The Assignments of Error are:

### **ASSIGNMENTS OF ERROR**

{¶6} "I. THE TRIAL COURT ERRED IN FAILING TO STRIKE INADMISSIBLE AND IMPROPER EVIDENCE PRESENTED BY PLAINTIFF-APPELLEE IN OPPOSITION TO DEFENDANT-APPELLANT'S SUMMARY JUDGMENT MOTION.

{¶7} "II. THE TRIAL COURT ERRED IN DENYING SUMMARY JUDGMENT TO DEFENDANT-APPELLANT AS THE PLAINTIFF-APPELLEE FAILED TO DEMONSTRATE A FACTUAL CONTROVERSY TO SUSTAIN HIS NEGLIGENCE CLAIM."

## II.

{¶8} We shall first address the Second Assignment of Error.

{¶9} Normally, the denial of a motion for summary judgment does not constitute a final appealable order under R.C. 2505.02, and is thus not subject to immediate appeal. *Id. Celebrezze v. Netzley* (1990), 51 Ohio St.3d 89, 554 N.E.2d 1292. In accord with the general rule, the denial of a summary judgment motion is generally not final and appealable where, as here, the motion is premised upon the assertion of immunity from liability. See *Stevens*. Even if a trial court includes Civ.R. 54(B) language, its otherwise non-final order denying summary judgment does not become a final appealable order. *Jackson v. City of Columbus*, 156 Ohio App.3d 114, 804 N.E.2d 1016, 2004-Ohio-546, ¶ 9, citing *Noble v. Colwell* (1989), 44 Ohio St.3d 92, 95-97, 540 N.E.2d 1381.

{¶10} However, R.C. 2744.02(c) states:

{¶11} “An order that denies a political subdivision or an employee of a political subdivision the benefit of an alleged immunity from liability as provided in this chapter or any other provision of the law is a final order.”

{¶12} We therefore must review de novo those matters before the trial court to determine the applicability of sovereign immunity to the facts involved before the question as to the appropriateness of this appeal can be resolved.

{¶13} R.C. 2744 provides a three-tiered analysis for determining the availability of sovereign immunity to political subdivisions. R.C. 2744.02(A)(1) provides that a political subdivision is generally not liable for injury, death or loss to persons or property incurred in connection with the performance of a governmental or proprietary function of that political subdivision. This provision is generally referred to as the Ablanket immunity@ provision.

{¶14} R.C. 2744.02(B) then lists five exceptions to the blanket immunity provision described above.

{¶15} Subsection (B)(3) of such Section provides:

{¶16} 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 caused by their negligent failure to keep public roads in repair and other negligent failure to remove obstructions from public roads, except that it is a full defense to that liability, when a bridge within a municipal corporation is involved, that the municipal corporation does not have the responsibility for maintaining or inspecting the bridge.

{¶17} Thus after examining those matters specified by Civ.R. 56 de novo, we conclude that, if Appellee is able to establish the facts, proximate cause, liability and damages alleged, immunity would not be applicable under the exception stated in R.C. 2744.02(B)(3).

{¶18} Therefore, the second assignment of error is rejected.

{¶19} It is unnecessary by this ruling to address the First Assignment of Error.

{¶20} This appeal is affirmed at Appellant Stark County Board of Commissioner's costs.

By: Boggins, P.J.  
Hoffman, J., dissents without opinion  
Farmer, J. concurs separately

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JUDGES

*Hoffman, J., concurring in part and dissenting in part*

{¶25} I concur in the majority's decision to overrule appellant's second assignment of error for the reasons set forth in Judge Farmer's concurring opinion.

{¶26} I dissent from the majority's conclusion its decision to overrule appellant's first assignment of error renders it unnecessary to address appellant's first assignment of error.

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JUDGE WILLIAM B. HOFFMAN

*Farmer, J. concurring*

{¶21} Although I concur in the majority's decision, that sovereign immunity does not apply sub judice, I believe it is important to discuss the nature of the proffered defense by appellant.

{¶22} Under a summary judgment standard, all evidentiary facts are to be construed in favor of the non-moving party, appellee herein. The facts that must be so construed include the testimony of Sarah Allender which indicates she did not see the stop sign until it was too late to avoid the collision. Ms. Allender stated she did not see the stop sign because it was obscured by bushes. See, Exhibits C and D, attached to Appellee's September 9, 2004 Memorandum in Opposition to Motion for Summary Judgment.

{¶23} In addition, appellant admitted in its answers to interrogatories that it regularly inspected the shrubs in the vicinity of the intersection. See, Exhibit E, attached to Appellee's September 9, 2004 Memorandum in Opposition to Motion for Summary Judgment. Further, the county engineer could not say with certainty whether the foliage at the intersection had ever been trimmed. Rehfus depo. at 63.

{¶24} Therefore, I would conclude the defense of sovereign immunity does not apply because there are genuine issues of material fact. R.C. 2744.02(B)(3) places a duty upon appellant to keep the public roads and stop signs free from obstruction. In appellant's third tier of its motion for summary judgment, the issue of proximate cause is argued and this issue alone is argued to this court. The issue of sovereign immunity resolved against appellant was appealable to this court. The issue of proximate cause does not get

{¶25} bootstrapped into the mandates of automatic appeal and is not a final appealable order. See, R.C. 2744.02(C).

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JUDGE SHEILA G. FARMER

IN THE COURT OF APPEALS FOR STARK COUNTY, OHIO  
FIFTH APPELLATE DISTRICT

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JUDGMENT ENTRY

Case No. 2004CA00337

For the reasons stated in our accompanying Memorandum-Opinion, the Stark County Court of Common Pleas is affirmed. Costs assessed to Defendant-Appellant Stark County Board of Commissioners.

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JUDGES