[Cite as *Sisler v. Lancaster*, 2010-Ohio-3039.]

COURT OF APPEALS
FAIRFIELD COUNTY, OHIO
FIFTH APPELLATE DISTRICT

ROGER SISLER, et al.	:	JUDGES:
	:	
	:	Hon. W. Scott Gwin, P.J.
Plaintiffs-Appellees	:	Hon. Sheila G. Farmer, J.
	:	Hon. Patricia A. Delaney, J.
-vs-	:	
	:	Case No. 09-CA-47
CITY OF LANCASTER, et al	:	
	:	
	:	
Defendants-Appellants	:	O P I N I O N

CHARACTER OF PROCEEDING:	Appeal from the Fairfield County Court of Common Pleas, Case No. 2007 CV 01477
JUDGMENT:	REVERSED AND REMANDED IN PART; DISMISSED IN PART
DATE OF JUDGMENT ENTRY:	June 25, 2010

APPEARANCES:

For Defendants-Appellants:

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For Plaintiffs-Appellees:

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Delaney, J.

{¶1} Defendants-Appellants, the City of Lancaster, Lindel R. Jackson, and Michael B. Nixon, appeal the July 9, 2009 judgment entry of the Fairfield County Court of Common Pleas.

STATEMENT OF THE FACTS AND THE CASE

{¶2} In 2004, the City of Lancaster ("the City") began construction of a water tank on property adjacent to the property of Plaintiffs-Appellees, Roger and Sue Sisler. The property upon which the City constructed the water tank was at a higher elevation than the Appellees' property.

{¶3} The City bid the water tank construction project to Natgun Corporation. Natgun Corporation hired Loveland Excavating of Columbus, Inc. as the subcontractor for the job.

{¶4} The water construction project called for Loveland to excavate earthen material to create a space below ground level for the placement of the water tank. The earth removed during the excavation was piled around the rim of the excavation creating an earthen wall that rose above the original ground level. Throughout the excavation process, the excavation site would collect rainwater.

{¶5} On or about July 26, 2004, a steady rain fell in the area. For reasons unknown, a portion of the earthen rim holding back the rainwater opened, causing rainwater to rush downhill directly towards Appellees' property. The rush of rainwater swamped Appellees' property causing damage to the property including, but not limited to, washing out a bridge that crossed a stream on the property.

{¶6} The bridge was of great importance to Appellees for the use and development of Appellees' property. Appellees' property consisted of two parcels, divided by the stream. Appellees were constructing a new home on the back parcel of the property. The back parcel could only be reached by crossing the bridge.

{¶7} On July 29, 2004, Appellees met with Defendant-Appellant, Michael Nixon, the Superintendent of Water Pollution Control for the City and Defendant-Appellant, Lindel Jackson, Service-Safety Director for the City, at Appelles' property. The parties, along with the Loveland contractor, met to discuss the damage to the property. During the meeting, Nixon told Appellees that the City and Loveland would repair the bridge. It was Nixon's impression that as the Superintendent of Water Pollution Control, it was within his authority to make an agreement between the City and Loveland to make repairs to the bridge as part of the water tank construction project. Nixon was aware that pursuant to R.C. 735.05, he had no authority to enter into binding contract for the City for a contract over $25,000.00. A contract valued over $25,000.00 required city council approval.

{¶8} Appellees claim at that meeting, they entered into an oral agreement with the City. The terms of the agreement were that the City would remedy all damages to Appellees' property due to the water breach, in exchange for a settlement of liability. Appellees also delivered a document to Nixon's office outlining the repairs that were known to be necessary at that time.

{¶9} After that meeting, Loveland came onto Appellees' property to attempt to make repairs to the bridge. Appellees claimed that as part of the agreement, workers

were not allowed to come onto Appellees' property without Appellees' prior permission and only under Appellees' supervision.

{¶10} Loveland attempted to make repairs to the bridge utilizing the existing portions of the bridge. The remaining portions of the bridge proved to be unstable, requiring a complete reconstruction of the bridge. Loveland stopped repairs on the bridge and informed Nixon that it had ceased work on the bridge.

{¶11} Appellees allege that they tried to contact Nixon about the repairs to the property, but they felt Nixon was avoiding them. They stated that they were finally able to contact Nixon, but Nixon told them to contact an attorney.

{¶12} Appellees filed their original complaint on July 8, 2005, against the City of Lancaster, Loveland Excavating, Inc., Loveland Excavating of Columbus, Inc., and Natgun Corporation. Appellees voluntarily dismissed their tort claims against the City on December 5, 2006. Appellees subsequently settled with Natgun and Loveland.

{¶13} Appellees re-filed their complaint on December 5, 2007, naming the City, Michael Nixon, and Lindel Jackson as Defendants. In Appellees' Second Amended Complaint, Appellees included claims for: (1) Trespass, as to all Appellants; (2) Breach of Written Contract, as to the City; (3) Breach of Oral Contract, as to the City; (4) Breach of Written Contract, as to Nixon and Jackson; (5) Breach of Oral Contract, as to Nixon and Jackson; (6) Negligence, as to Nixon and Jackson; (7) Fraud, as to all Appellants; and (8) Civil Conspiracy, as to all Appellants.

{¶14} Appellants filed their Motion for Summary Judgment on all Appellees' causes of action. Appellants argued in part that Appellees' tort claims were barred by

sovereign immunity. The trial court, on July 9, 2009, granted Appellants' Motion for Summary Judgment in part and denied it in part.

{¶15} It is from this decision that Appellants now appeal.

ASSIGNMENT OF ERROR

{¶16} Appellants raise one Assignment of Error:

{¶17} "I. THE TRIAL COURT ERRED IN FAILING TO GRANT DEFENDANTS, CITY OF LANCASTER, MICHAEL NIXON, AND LINDEL JACKSON'S, MOTION FOR SUMMARY JUDGMENT AS TO APPELLEES' CLAIMS OF TRESPASS, NEGLIGENCE AS TO NIXON AND JACKSON, FRAUD AND CIVIL CONSPIRACY, BASED UPON THE IMMUNITY PROVIDED TO THEM UNDER CHAPTER 2744 OF THE OHIO REVISED CODE."

I.

{¶18} We will first address the standard of review applicable to Appellants' Assignment of Error. Summary judgment motions are to be resolved in light of the dictates of Civ.R. 56. Said rule was reaffirmed by the Supreme Court of Ohio in *State ex rel. Zimmerman v. Tompkins,* 75 Ohio St.3d 447, 448, 1996-Ohio-211:

{¶19} "Civ.R. 56(C) provides that before summary judgment may be granted, it must be determined that (1) no genuine issue as to any material fact remains to be litigated, (2) the moving party is entitled to judgment as a matter of law, and (3) it appears from the evidence that reasonable minds can come to but one conclusion, and viewing such evidence most strongly in favor of the nonmoving party, that conclusion is adverse to the party against whom the motion for summary judgment is made. *State ex. rel. Parsons v. Fleming* (1994), 68 Ohio St.3d 509, 511, 628 N.E.2d 1377, 1379, citing

Temple v. Wean United, Inc. (1977), 50 Ohio St.2d 317, 327, 4 O.O3d 466, 472, 364 N.E.2d 267, 274."

{¶20} As an appellate court reviewing summary judgment motions, we must stand in the shoes of the trial court and review summary judgments on the same standard and evidence as the trial court. *Smiddy v. The Wedding Party, Inc.* (1987), 30 Ohio St.3d 35.

{¶21} This is a limited, statutorily authorized interlocutory appeal of a denial of summary judgment on sovereign immunity grounds.

A. STATUTORY IMMUNITY OF THE CITY OF LANCASTER

1. Intentional Torts of Trespass, Fraud, and Civil Conspiracy

{¶22} We will first address Appellants' arguments that the City is statutorily immune from Appellees' claims of trespass, fraud, and civil conspiracy. Trespass, fraud, and civil conspiracy are intentional torts.

{¶23} The Ohio Supreme Court reiterated the three-tiered analysis to determine a political subdivision's immunity under R.C. Chapter 2744 in *O'Toole v. Denihan*, 118 Ohio St.3d 374, 2008-Ohio-2574, 889 N.E.2d 505. The Court stated that, "subject to a few exceptions, R.C. 2744.02(A)(1) provides that political subdivisions are '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.'"

{¶24} The exceptions to immunity listed in R.C. 2744.02(B) are: (1) the negligent operation of a motor vehicle by an employee of the political subdivision, (2) negligent performance of acts by employees of the political subdivision with respect to

"proprietary functions" of the political subdivision, (3) negligent failure of the political subdivision to keep public roads in good repair, (4) negligent creation or failure to remove physical defects in buildings and grounds; and (5) where civil liability is expressly imposed upon a political subdivision by another section of the Revised Code. If any of the exceptions apply, the court must further analyze whether any of the defenses in R.C. 2744.03 apply, providing the political subdivision with a defense against liability.

{¶25} Appellants state this case involves issues that arose from the construction and operation of the water tank adjacent to Appellees' property; therefore, this case involves a "proprietary function" pursuant to R.C. 2744.01(G)(2)(c) ("The establishment, maintenance, and operation of a utility, including, but not limited to, a light, gas, power, or heat plant, a railroad, a busline or other transit company, an airport, and a municipal corporation water supply system"). Appellees do not dispute Appellants' characterization of its acts in this case as a proprietary function, but Appellees argue that they are not requesting damages arising out of the construction or operation of the water tank, nor are they seeking damages for the act of dewatering the construction site. Appellees state in their brief that, "This case is grounded on what took place between the Appellees and the Appellants in the aftermath of the damage cause[d] by the water tank project. * * * [T]he Appellants * * * made promises regarding repairs they would complete to address those damages. The damages at issue in this case arose out of the Appellants' decision to undertake faulty repairs of the bridge and then, before the repairs were complete, to abandon the project." (Appellees' Brief, p. 7).

{¶26} Regardless of the categorization of the alleged act or omission of the City as a governmental or proprietary function, we find the City is immune under R.C. 2744.02 from Appellees' intentional tort claims of trespass, fraud, and civil conspiracy. R.C. 2744.02(B)(2) refers to proprietary functions and the exception applies only where injury results from negligence.

{¶27} In fact, because R.C. 2744.02(B) includes no specific exceptions for intentional torts, Ohio courts have consistently held that political subdivisions are immune under R.C. 2744.02 from intentional tort claims. *Williams v. McFarland Properties, LLC*, 177 Ohio App.3d 490, 2008-Ohio-3594, 895 N.E.2d 208, ¶11 citing *Thayer v. W. Carrollton Bd. of Edn.,* Montgomery App. No. 20063, 2004-Ohio-3921, 2004 WL 1662198; *Terry v. Ottawa Cty. Bd. of Mental Retardation & Developmental Disabilities,* 151 Ohio App.3d 234, 783 N.E.2d 959, 2002-Ohio-7299; *Fabian v. Steubenville* (Sept. 28, 2001), Jefferson App. No. 00 JE 33, 2001 WL 1199061; *Ellithorp v. Barberton City School Dist. Bd. of Edn.* (July 9, 1997), Summit App. No. 18029, 1997 WL 416333; *Coats v. Columbus,* Franklin App. No. 06AP-681, 2007-Ohio-761, 2007 WL 549462; and *Sabulsky v. Trumbull Cty.,* Trumbull App. No. 2001-T-0084, 2002-Ohio-7275, 2002 WL 31886686. See also *Wilson v. Stark Cty. Dept. of Human Servs.* (1994), 70 Ohio St.3d 450, 639 N.E.2d 105 ("Consequently, except as specifically provided in R.C. 2744.02(B)(1), (3), (4) and (5), with respect to governmental functions, political subdivisions retain their cloak of immunity from lawsuits stemming from employees' negligent or reckless acts. * * * There are no exceptions to immunity for the intentional torts of fraud and intentional infliction of emotional distress"); *Hubbard v. Canton City School Bd. of Edn.,* 97 Ohio St.3d 451, 2002-Ohio-6718, 780 N.E.2d 543,

¶ 8, quoting *Wilson v. Stark Cty. Dept. of Human Servs.* (1994), 70 Ohio St.3d 450, 452, 639 N.E.2d 105 ("This court has reviewed R.C. 2744.02(B)(5) in the context of intentional torts and concluded that 'there are no exceptions to immunity for the intentional torts of fraud and intentional infliction of emotional distress' ").

{¶28} Accordingly, we find the trial court erred as a matter of law in finding that statutory immunity did not bar Appellees' claims against the City for trespass, fraud, and civil conspiracy.

2. Negligence

{¶29} As stated above, a political subdivision is generally not liable in a civil action for loss to property incurred while performing a governmental or proprietary function. An exception to that immunity is the negligent performance of acts by an employee with respect to a proprietary function. R.C. 2744.02(B)(2). Appellees allege negligent behavior by Nixon and Jackson in their decision to have Loveland repair Appellees' bridge and the decision to terminate repairs on the bridge.

{¶30} The trial court found that the acts alleged in the present case involve a proprietary function, rather than a governmental function. "The establishment, maintenance, and operation of a utility, including, but not limited to, a light, gas, power, or heat plant, a railroad, a busline or other transit company, an airport, and a municipal corporation water supply system" is a proprietary function under R.C. 2744.01(G)(2)(c). Nevertheless, Appellees state that their claims do not have to do with the construction of the water supply tank and the dewatering of the construction site. There is a question, therefore, as to what type of function (proprietary or governmental) the alleged

negligent act (decision to use Loveland to make the repairs and the decision to terminate the repairs) is.

{¶31} Considering the evidence in a light most favorable to the non-moving party, we will find that the acts involve a proprietary function.

{¶32} However, because Appellees' state their claim of negligence is based on the decisions made by Nixon and Jackson in regards to the repairs of the bridge, we find the City can reestablish its immunity through R.C. 2744.03(A)(5). This defense specifically grants political subdivisions immunity from liability in damages when the injury "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." "In order to demonstrate an exercise of discretion for which R.C. 2744.03(A)(5) confers immunity from liability," the defendant must show "[s]ome positive exercise of judgment that portrays a considered adoption of a particular course of conduct in relation to an object to be achieved * * *." *Ezerski v. Mendenhall*, Montgomery App. No. 23528, 2010-Ohio-1904, ¶10 citing *Doe v. Dayton City School Dist. Bd. of Educ.* (1999), 137 Ohio App.3d 166, 169.

{¶33} In this case, the Civ.R. 56 evidence shows that Nixon and Jackson surveyed the damage caused by the breach of water from the excavation site. In order to maintain community relations and to try to remedy Appellees' damage in an economical and practical manner, Nixon and Loveland agreed that Loveland would immediately undertake repairs of the bridge. Nixon considered the repairs to be part of

the overall water tank construction process and therefore within his authority to make such a decision to allocate resources to make such repairs.

{¶34} Loveland proceeded to make the repairs based on the information Appellees gave regarding the construction material of the bridge. Loveland determined during its repairs that the bridge was not made of the material as represented by Appellees, making the previously agreed-to repairs unworkable. Loveland stopped the repairs on the bridge and informed Nixon that it had stopped making the repairs.

{¶35} We find that the alleged injuries claimed by Appellees resulted through the exercise of Nixon and Jackson's judgment on how to remedy the damage through the allocation of resources and personnel on the already existing construction project under Nixon and Jackson's authority. The next question then is whether that exercise of judgment or discretion was with malicious purpose, in bad faith, or in a wanton or reckless manner.

{¶36} In *Riggs v. Richard*, Stark App. No. 2007CA00328, 2008-Ohio-4697, ¶ 36-38, this Court addressed the issues of malice, bad faith, and wanton or reckless conduct in the sovereign immunity context:

{¶37} "'Malicious purpose' has been defined as the 'willful and intentional design to do injury, or the intention or desire to harm another, usually seriously, through ... unlawful or unjustified' conduct. *Cook v. Hubbard Exempted Village Bd. of Edn.* (1996), 116 Ohio App.3d 564, 569, 688 N.E.2d 1058. 'Bad faith' imports more than mere bad judgment or negligence. Id. It connotes a 'dishonest purpose, moral obliquity, conscious wrongdoing, breach of a known duty through some ulterior motive or ill will

partaking of the nature of fraud.' *Jackson v. McDonald* (2001), 144 Ohio App.3d 301, 309, 760 N.E.2d 24.

{¶38} "'Wanton' conduct is the complete failure to exercise any care whatsoever. *Fabrey v. McDonald Village Police Dept.* (1994), 70 Ohio St.3d 351, 356, 639 N.E.2d 31. However, mere negligence will not be construed as wanton misconduct in the absence of evidence establishing 'a disposition of perversity on the part of the tortfeasor', the actor must be aware that his conduct will probably result in injury. Id. (quoting *Roszman v. Sammett* (1971), 26 Ohio St.2d 94, 97, 269 N.E.2d 420). One acts recklessly 'if he does an act or intentionally fails to do an act which it is his duty to the other to do, knowing or having reason to know of facts which would lead a reasonable man to realize, not only that his conduct creates an unreasonable risk of physical harm to another, but also that such risk is substantially greater than that which is necessary to make his conduct negligent.' *Jackson v. Butler Cty. Bd. of Cty. Commrs.* (1991), 76 Ohio App.3d 448 454, 602 N.E.2d 363, (quoting *Thompson v. McNeill* (1990), 53 Ohio St.3d 102, 104-105, 559 N.E.2d 705).

{¶39} "Generally, issues regarding malice, bad faith, and wanton or reckless behavior are questions presented to the jury. *Fabrey,* * * *. However, summary judgment is appropriate in instances where the alleged tortfeasor's actions show 'that he did not intend to cause any harm ..., did not breach a known duty through an ulterior motive or ill will, [and] did not have a dishonest purpose....' *Fox v. Daly* (Sept. 26, 1997), Trumbull App. No. 96-T-5453 [1997 WL 663670], (quoting *Hackathorn v. Preisse* (1995), 104 Ohio App.3d 768, 772, 663 N.E.2d 384). *Henney* at paragraphs 48-50."

Doe v. Jackson Local School Dist., Stark App. No.2006CA00212, 2007-Ohio-3258 at ¶ 38."

{¶40} Upon review of the Civ.R. 56 evidence presented, we find that reasonable minds could only conclude that Nixon and Jackson did not act with malicious purpose, in bad faith, or in a wanton or reckless manner in deciding to proceed with the repairs through the allocation of personnel and resources under their control and then terminating the repair process when it became unworkable.

{¶41} Accordingly, we find that the City is immune from Appellees' claim of negligence.

B. STATUTORY IMMUNITY OF EMPLOYEES NIXON AND JACKSON

{¶42} The next issue to be determined is whether Nixon and Jackson, as employees, are entitled to statutory immunity. The trial court denied Appellants' Motion for Summary Judgment as to Nixon and Jackson's immunity on Appellees' claim of negligence.

{¶43} Statutory immunity is extended, with three exceptions, to employees of political subdivisions under R.C. 2744.03(A)(6). The second prong of the three-tiered analysis, whether any of the exceptions to immunity apply, is the focus of our inquiry in this case. Under R.C. 2744.03(A)(6)(b), employees can lose their immunity for acting "with malicious purpose, in bad faith, or in a wanton or reckless manner."

{¶44} The trial court first determined there was a genuine issue of material fact as to Appellees' claim that Nixon and Jackson were negligent in halting the bridge repair work. The trial court found that reasonable minds could differ on whether Nixon and Jackson acted recklessly in their decision to halt the bridge repair.

{¶45} In addition to the above-stated definition of recklessness, the Ohio Supreme Court further defined recklessness as follows:

{¶46} "Distilled to its essence, and in the context of R.C. 2744.03(A)(6)(b), recklessness is a perverse disregard of a known risk. Cf. *Fabrey v. McDonald Village Police Dept.* (1994), 70 Ohio St.3d 351, 356, 639 N.E.2d 31; see also *McGuire v. Lovell* (1999), 85 Ohio St.3d 1216, 1219, 709 N.E.2d 841 (Moyer, C.J., dissenting); *Jackson v. Butler Cty. Bd. of Cty. Commrs.* (1991), 76 Ohio App.3d 448, 454, 602 N.E.2d 363 ("we recently held that the term 'reckless' as used in R.C. 2744.03(A)(6)(b) means a perverse disregard of a known risk").

{¶47} "Recklessness, therefore, necessarily requires something more than mere negligence. *Fabrey,* 70 Ohio St.3d at 356, 639 N.E.2d 31. In fact, 'the actor must be conscious that his conduct will in all probability result in injury.' Id." *O'Toole*, supra, ¶ 73-74.

{¶48} The Civ.R. 56 evidence in this case, reviewed in a light most favorable to the non-moving party, fails to demonstrate that Nixon and Jackson held a perverse disregard of a known risk in not continuing the bridge repair work when it became too complex for Loveland to complete. Perhaps it was negligent of Nixon to fail to follow up with Appellees, but we do not find this omission to rise to the level of recklessness. Our de novo review shows that Nixon and Jackson are entitled to judgment as a matter of law as to immunity on the claim of negligence.

{¶49} Appellees also brought claims against Nixon and Jackson for trespass, fraud, and civil conspiracy. We reviewed Appellants' Motion for Summary Judgment and find that Appellants did not raise statutory immunity as a bar to those causes of

action. The trial court denied Appellants' Motion for Summary Judgment as to trespass, fraud, and civil conspiracy on the merits of those claims and did not engage in any statutory immunity analysis.

{¶50} In *Hubbell v. City of Xenia*, 115 Ohio St.3d 77, 2007-Ohio-4839, 873 N.E2d 878, ¶27, the Ohio Supreme Court held that, "when a trial court denies a motion in which a political subdivision or its employee seeks immunity under R.C. Chapter 2744, that order denies the benefit of an alleged immunity and thus is a final, appealable order pursuant to R.C. 2744.02(C)." Because the trial court's denial of summary judgment on the claims of trespass, fraud, and civil conspiracy did not deny the benefit of statutory immunity to Nixon and Jackson as employees of the City, this Court is without jurisdiction to review those claims.

{¶51} Accordingly, we find the trial court erred in denying summary judgment as to statutory immunity for the City of Lancaster on Appellees' claims of trespass, fraud, civil conspiracy, and negligence. We also find that Michael Nixon and Lindel Jackson, as employees of the City of Lancaster, are entitled to statutory immunity on Appellees' claim of negligence.

{¶52} The judgment of the Fairfield County Court of Common Pleas as to only the issues of statutory immunity is reversed and remanded. Furthermore, we lack jurisdiction to review the denial of Appellants' Motion for Summary Judgment as to trespass, fraud and civil conspiracy and therefore the appeal is dismissed as to those claims.

By: Delaney, J.

Gwin, P.J. and

Farmer, J. concur.

HON. PATRICIA A. DELANEY

HON. W. SCOTT GWIN

HON. SHEILA G. FARMER

PAD:kgb

[Cite as *Sisler v. Lancaster*, 2010-Ohio-3039.]

IN THE COURT OF APPEALS FOR FAIRFIELD COUNTY, OHIO

FIFTH APPELLATE DISTRICT

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Plaintiffs-Appellees	:	
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-vs-	:	JUDGMENT ENTRY
	:	
CITY OF LANCASTER, et al	:	
	:	
	:	Case No. 09-CA-47
Defendants-Appellants	:	

For the reasons stated in our accompanying Opinion on file, the judgment of the Fairfield County Court of Common Pleas is reversed and remanded in part, and dismissed in part. Costs assessed equally to the parties.

HON. PATRICIA A. DELANEY

HON. W. SCOTT GWIN

HON. SHEILA G. FARMER