

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
ERIE COUNTY

Julie Butler, et al.

Court of Appeals No. E-10-026

Appellees

Trial Court No. 2007-CV-0681

v.

City Commission, City of Sandusky, et al.

DECISION AND JUDGMENT

Appellants

Decided: March 11, 2011

* * * * *

Kevin J. Zeiher, for appellees.

William P. Lang, for appellants.

* * * * *

OSOWIK, P.J.

{¶1} This is an appeal from a judgment of the Erie County Court of Common Pleas which denied appellants' motion for summary judgment pursuant to Civ.R. 56(C). For the reasons set forth below, this court affirms the judgment of the trial court.

{¶2} Appellants, City Commission, City of Sandusky and Sandusky Director of Engineering Services Kathryn McKillips (hereafter "appellants") set forth the following sole assignment of error:

{¶3} "The trial court erred as a matter of law when it found that the defendants were not immune, pursuant to Ohio Revised Code Chapter 2744."

{¶4} The following undisputed facts are relevant to the issues raised on appeal. On the night of August 23, 2005, appellees, Joseph and Julie Butler, were traveling southbound on Sanford Street in the city of Sandusky on their 2001 Harley motorcycle en route home to Catawba Island. Joseph was driving and Julie was a passenger. They were traveling as a small group with some friends, all riding motorcycles.

{¶5} While traveling through a construction zone in which the pavement had been ground down approximately several inches from the surface in connection with a road resurfacing project, Joe lost control of his motorcycle. This event culminated in a single vehicle accident in which Julie was injured.

{¶6} In the course of her duties and responsibilities as the Director of Engineering Services for Sandusky, McKillips had opted to direct that a "bump" traffic warning sign be attached to a telephone pole in the vicinity of the construction zone. This was the only traffic sign posted in connection to the road resurfacing project.

{¶7} In the wake of this accident, appellees filed a negligence suit against appellants alleging failure to furnish adequate warning signage to oncoming motorists traveling through this road construction zone and failure to adequately supervise a city traffic engineer. Appellants filed for summary judgment asserting that adequate signage and warnings were in place and further asserting the protection of R.C. 2744 political subdivision immunity.

{¶8} On June 11, 2010, the trial court denied appellants' motion for summary judgment. In its denial, the trial court emphasized that upon Sandusky's discretionary determination to install the "bump" traffic warning sign, sovereign immunity longer applied. Timely notice of appeal was filed.

{¶9} In their single assignment of error, appellants assert that the trial court erred in its summary judgment determination that they are not encompassed by R.C. 2744 political subdivision immunity.

{¶10} An appellate court reviews a trial court's summary judgment determination on a de novo basis, applying the same standard as utilized by the trial court. *Lorain Natl. Bank v. Saratoga Apts.* (1989), 61 Ohio App.3d 127, 129; *Grafton v. Ohio Edison Co.* (1996), 77 Ohio St.3d 102, 105. Summary judgment is granted where there remains no genuine issue of material fact and, when construing the evidence most strongly in favor of the nonmoving party, reasonable minds can only conclude that the moving party is entitled to judgment as a matter of law. Civ.R. 56(C).

{¶11} In support of summary judgment, appellants place substantial reliance upon the notion that because the adverse summary judgment immunity ruling referenced an inapplicable Ohio Manual of Uniform Traffic Control Devices ("OMUTCD") advisory speed warning requirement for such construction zones, the summary judgment ruling was substantively compromised so as to negate the propriety of the entire immunity ruling. Appellants argued in relevant part, "The imposition of a standard not required by

the Manual of Uniform Traffic Control Devices was in error. The City is immune for the reason that the Engineer exercised her discretion in the use of the signage."

{¶12} In opposition to summary judgment, appellees furnished expert testimony challenging the legal adequacy of the placement of the "bump" warning sign on a multitude of bases. In addition, the expert witness disputed appellants' compliance with ODOT specifications and with OMUTCD guidelines.

{¶13} It is well-established by controlling precedent that although an initial determination as to whether or not to install a traffic control sign or device by a political subdivision is discretionary, and thus protected by R.C. 2744 political subdivision immunity, once the election is made to install a traffic control sign or device, the implementation of the decision is not immune from potential liability. *Franks v. Lopez* (1994), 69 Ohio St.3d 345.

{¶14} In applying the above legal framework to the facts and circumstances of this case, we note that although appellants accurately argue, and appellees concede, that the relevant version of OMUTCD did not mandate an advisory speed warning sign as suggested in the summary judgment ruling, that does not negate the balance of genuine issues of material fact pertaining to the implementation of the decision to install the warning sign which removed them from sovereign immunity protection pursuant to *Franks*.

{¶15} Based upon our independent review and consideration of the record of evidence in this matter, we find that despite the trial court's inclusion of one inapplicable

OMUTCD requirement in its summary judgment determination, the decision itself remains proper. Despite the above scenario, the trial court accurately applied *Franks* and properly determined that, pursuant to *Franks*, appellants are not protected by R.C. 2744 sovereign immunity. In conjunction with this, the trial court likewise accurately found that genuine issues of material fact with respect to the adequacy of the specific signage installed in this case remained to be resolved by the trial court.

{¶16} We have carefully reviewed the record in this matter to make a de novo determination as to whether appellants were entitled to summary judgment. We find that genuine issues of material fact remain in dispute to be resolved by the trial court.

{¶17} Accordingly, we find appellants' sole assignment of error not well-taken. The judgment of the Erie County Court of Common Pleas is affirmed. Appellants are ordered to pay the cost of this appeal pursuant to App.R. 24.

JUDGMENT AFFIRMED.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. See, also, 6th Dist.Loc.App.R. 4.

Peter M. Handwork, J.

JUDGE

Mark L. Pietrykowski, J.

JUDGE

Thomas J. Osowik, P.J.
CONCUR.

JUDGE

<p>This decision is subject to further editing by the Supreme Court of Ohio's Reporter of Decisions. Parties interested in viewing the final reported version are advised to visit the Ohio Supreme Court's web site at: http://www.sconet.state.oh.us/rod/newpdf/?source=6.</p>
