

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

Charles and Louise Claar

Court of Appeals No. S-11-004

Appellants

Trial Court No. 10-CV-192

v.

City of Fremont

**DECISION AND JUDGMENT**

Appellee

Decided: December 2, 2011

\* \* \* \* \*

Michael D. Portnoy, for appellants.

Larry P. Meyer, for appellee.

\* \* \* \* \*

OSOWIK, P.J.

{¶ 1} This is an appeal from a judgment of the Sandusky County Court of Common Pleas that granted summary judgment in favor of the city of Fremont in appellants' action for damages stemming from injuries Charles Claar suffered after he fell

in a hole along the edge of a sidewalk where workers for the city of Fremont had repaired a water line. For the reasons that follow, the judgment of the trial court is affirmed.

{¶ 2} Appellants Charles and Louise Claar set forth the following assignment of error:

{¶ 3} "The trial court committed prejudicial error to appellants when concluding that appellant Claar was injured by a defect in the sidewalk and not by a government function, that would prohibit the defense of governmental immunity."

{¶ 4} It is undisputed that Charles Claar ("Claar") was injured on February 26, 2008, when he fell into a hole while shoveling snow from a section of sidewalk in Fremont, Ohio. Part of the sidewalk where Claar fell had been removed to allow for a water line repair on December 4, 2007. Upon completion of the water line repair, the sidewalk area was back-filled with stone and the area between the sidewalk and curb was back-filled with dirt. Final completion of the new concrete section was postponed until the weather warmed and a cement contractor could be scheduled.

{¶ 5} On February 16, 2010, appellants brought a negligence action against the city of Fremont ("the city"), seeking to recover for Claar's injuries. Appellants argued that Claar was injured as a result of the underlying water line repair, which was a proprietary function covered by an exception to the governmental immunity provided by R.C. 2744.02(B)(2).

{¶ 6} On September 24, 2010, appellee filed a motion for summary judgment, arguing that the city of Fremont had sovereign immunity pursuant to R.C. 2744.01(B)(2)

because the maintenance and repair of sidewalks is a governmental function for which the city is immune pursuant to R.C. 2744.01(C)(2)(e).

{¶ 7} On January 6, 2011, the trial court granted summary judgment for the city, finding that Claar's injuries were not the result of a proprietary function -- the water line repair -- but the result of a sidewalk modification which was a governmental function, and that none of the exceptions to immunity set forth in R.C. 2744.02(B)(1-5) applied.

{¶ 8} Appellate review of summary judgment determinations is conducted on a de novo basis, applying the same standard utilized by the trial court. *Lorain Nat'l. Bank v. Saratoga Apts.* (1989), 61 Ohio App.3d 127; *Grafton v. Ohio Edison Co.* (1996), 77 Ohio St.3d 102, 105. Summary judgment shall be granted when there remains no genuine issue of material fact and, when considering the evidence most strongly in favor of the non-moving party, reasonable minds can only conclude that the moving party is entitled to judgment as a matter of law. Civ.R. 56(C).

{¶ 9} R.C. 2744.02(A)(1) confers sovereign immunity from civil liability upon political subdivisions "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." It is undisputed that the city of Fremont is a political subdivision pursuant to R.C. 2744.01(F). R.C. 2744.02(B) sets forth five exceptions to the immunity granted to political subdivisions.

{¶ 10} In their sole assignment of error, appellants assert that the trial court erred in granting summary judgment to appellee because the city negligently performed a

proprietary function by creating a hole in the sidewalk while repairing the water line. The city, they argue, can be held liable because Claar's injuries were "caused by the negligent performance of acts by their employees with respect to [a] proprietary function [.]" R.C. 2744.02(B)(2).

{¶ 11} Appellants correctly note that negligent performance of a proprietary function creates an exception to immunity pursuant to R.C. 2744.02(B)(2). The definition of a "proprietary function" under R.C. 2744.01(G)(2) includes "[t]he establishment, maintenance, and operation of a utility, including, but not limited to, a light, gas, power, or heat plant \* \* \*." R.C. 2744.01(G)(2)(c). The definition of "governmental function," however, under R.C. 2744.02(C)(2)(e), includes "[t]he regulation of the use of, and the maintenance and repair of \* \* \* sidewalks \* \* \* [.]"

{¶ 12} The issue before this court arises from the city's failure to maintain or repair the *sidewalk* after the water line was fixed. Claar was not injured during the course of the actual water line repair, nor was he injured by some defect resulting from that repair work. He was injured when he fell approximately three months later on a portion of the sidewalk that had not yet been fully repaired. Pursuant to R.C. 2744.01(A)(1), the city is immune from liability for injury resulting from that particular governmental function. We have carefully reviewed the record of evidence in this matter and find that appellants have not established that Claar's injury was "caused by the negligent performance of acts by [city] employees with respect to [a] proprietary function[.]" R.C. 2744.02(B)(2). Claar's injury was the result of a protected governmental function.

{¶ 13} Accordingly, the trial court did not err by granting summary judgment in appellee's favor and appellants' sole assignment of error is not well-taken.

{¶ 14} On consideration whereof, the judgment of the Sandusky County Court of Common Pleas is affirmed. Costs of this appeal are assessed to appellants 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.

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JUDGE

Thomas J. Osowik, P.J.

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JUDGE

Stephen A. Yarbrough, J.  
CONCUR.

\_\_\_\_\_  
JUDGE

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