[Cite as *Camp v. Sandusky*, 2013-Ohio-3053.]

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

Terry F. Camp, Sr., et al.	Court of Appeals No. E-12-032
Appellants/Cross-Appellees	Trial Court No. 2010-CV-0447
v.	
City of Sandusky	**DECISION AND JUDGMENT**
Appellee/Cross-Appellant	Decided: July 12, 2013

* * * * *

D. Jeffery Rengel and Thomas R. Lucas, for appellants/cross-appellees.

William P. Lang, for appellee/cross-appellant.

* * * * *

PIETRYKOWSKI, J.

{¶ 1} Appellants, Terry F. Camp, Sr. and Susan Camp, appeal the May 2, 2012 grant of summary judgment in favor of appellee, the city of Sandusky, based upon the doctrine of sovereign immunity. The city has filed a cross-appeal arguing that the court should have also granted summary judgment in its favor on appellants' negligence claim.

For the reasons that follow, we find that no genuine issues of fact remain and affirm the trial court's grant of summary judgment to the city.

{¶ 2} The relevant facts of this case are as follows. Terry F. Camp Sr. alleges he was injured while riding a bicycle in the vicinity of the Keller building where he ran in to a cable surrounding the building. The building is located in downtown Sandusky, Ohio, and is owned by the city of Sandusky. The building is part of the city's Paper District Redevelopment Area which had a goal of revitalization of the city's downtown and waterfront areas. At the time of Camp's fall, the building was being marketed for sale.

{¶ 3} Because the building was dilapidated and the city feared that passers-by might be struck by falling bricks or other debris, sometime from 2000 to 2001, the city installed a one-quarter inch in diameter wire around the north, south, and west sides of the Keller building to prevent pedestrians from using the sidewalk surrounding the building. The cable extended out to the sidewalk on the north and west sides of the Keller building and ran parallel with Shoreline Drive and Decatur Streets on those respective sides. The wire was placed approximately four feet high and secured with posts in the ground around the building. Reflectors, flag tape and yellow caution tape were also strung along the wire to ensure passing pedestrians and vehicles could see the wire.

{¶ 4} On July 10, 2009, Camp was riding his bicycle in the street near the Keller building and attempted to enter the sidewalk to avoid vehicular traffic. Camp then allegedly struck the wire surrounding the building and sustained injuries. There is

significant dispute as to whether Camp struck the cable. On June 8, 2010, Camp and his wife filed a complaint against the city alleging negligence, two counts of negligence per se under R.C. 2744.02(B)(3) and (B)(4), and loss of consortium.

{¶ 5} The city filed a motion for summary judgment on December 16, 2010, on all claims advanced by appellants arguing sovereign immunity, that the city owed no duty to Camp because the cable was an "open and obvious" danger, that Camp could not prove the cable actually caused his alleged injuries, and that the loss of consortium claim was not viable. The trial court granted the city's motion for summary judgment finding that the city was immune from liability for the causes of action advanced by appellants. They filed a timely appeal of that decision.

{¶ 6} Appellants now raise the following two assignments of error for our consideration:

> I. The trial court erred when it held that R.C. § 2744.02(B)(4) did not remove the grant of sovereign immunity to appellee under the political subdivision tort liability act, R.C. § 2744.01 et. seq.
>
> II. The trial court erred when it granted summary judgment finding that R.C. 2744.02(B)(3) does not apply as an exception to the grant of sovereign immunity to appellee under Ohio's political subdivision tort liability act, R.C. § 2744.01 et. seq.

{¶ 7} The city's cross-appeal raises the following assignment of error:

The trial court committed reversible error when it found that there were justiciable issues of material fact regarding how the alleged incident occurred.

{¶ 8} We review the trial court's grant of summary judgment de novo. *Grafton v. Ohio Edison Co.*, 77 Ohio St.3d 102, 105, 671 N.E.2d 241(1996). A motion for summary judgment should only be granted when 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. *Harless v. Willis Day Warehousing Co.*, 54 Ohio St.2d 64, 66, 375 N.E.2d 46 (1978); Civ.R. 56(C). The burden of showing that no genuine issue of material fact exists falls upon the party who moves for summary judgment. *Dresher v. Burt*, 75 Ohio St.3d 280, 294, 662 N.E.2d 264 (1996). However, once the movant supports his or her motion with appropriate evidentiary materials, the nonmoving party "may not rest upon the mere allegations or denials of his pleadings, but his response, by affidavit or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial." Civ.R. 56(E).

{¶ 9} We will jointly address appellants' assignments of error and the city's cross-appeal as they are interrelated. In appellants' first assignment of error they dispute the trial court's finding that because the Keller building was vacant, the exception to immunity under R.C. 2744.02(B)(4) did not apply. In their second assignment of error,

appellants contend that the court also erred in finding that the exception to immunity under R.C. 2744.02(B)(3), dealing with the maintenance of public roads, does not apply to impose liability.

{¶ 10} Ohio uses a "three-tiered analysis" to determine whether a political subdivision is immune from liability. *Elston v. Howland Local Schools*, 113 Ohio St.3d 314, 317, 2007-Ohio-2070, 865 N.E.2d 845, ¶ 10; *see also Moore v. Lorain Metro. Hous. Auth.*, 121 Ohio St.3d 455, 2009-Ohio-1250, 905 N.E.2d 606, ¶ 9. Under the first tier, we examine whether the general grant of immunity provided by R.C. 2744.02(A) applies. *Id*. If so, the second tier requires us to determine whether immunity has been abrogated by the exceptions set forth in R.C. 2744.02(B). *Id.* at ¶ 11. If an exception applies, the third tier involves a determination of whether the political subdivision is able to successfully assert one of the defenses listed in R.C. 2744.03, thereby reinstating its immunity. *Id*. at ¶ 12.

{¶ 11} Appellants contend that the city owned the property for purposes of the governmental function of urban renewal, R.C. 2744.01(C)(2)(q). Appellants first argue that the trial court erroneously determined that the exception in R.C. 2744.02(B)(4) did not apply to the Keller building because it was vacant. The section provides:

> (B) Subject to sections 2744.03 and 2744.05 of the Revised Code, a political subdivision is liable in damages in a civil action for injury, death, or loss to person or property allegedly caused by an act or omission of the

political subdivision or of any of its employees in connection with a governmental or proprietary function, as follows:

* * *

(4) 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 that is caused by the negligence of their employees and that occurs within or on the grounds of, and is due to physical defects within or on the grounds of, buildings that are used in connection with the performance of a governmental function, including, but not limited to, office buildings and courthouses, but not including jails, places of juvenile detention, workhouses, or any other detention facility, as defined in section 2921.01 of the Revised Code.

{¶ 12} Appellants also argue that the exception under R.C. 2744.02(B)(3), regarding the maintenance of public roads may apply to the case. This section states:

(3) 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.

{¶ 13} Appellants focus their claim on the argument that the defect at issue was the debris falling from the building and that but for this defect, the sidewalk would not have been blocked off by the cable. Appellants further contend that the cable could have been considered a road obstruction based upon the fact that it extended to block diagonal parking spaces along the sides of the building. Conversely, the city first disputes that the city was using the building. The city further argues that there was no evidence that the cable did not perform as intended; thus, there was no defect.

{¶ 14} While the parties spend a majority of their arguments on whether the vacant Keller building was "used" as required under R.C. 2744.02(B)(4), we conclude that the correct analysis is more straightforward. Camp does not allege that he was injured by debris falling from the building; rather, he contends that he ran into the cable surrounding the sidewalk. The ownership of the building was immaterial. The maintenance and use of a public sidewalk is a governmental function. R.C. 2744.01(C)(2)(e) specifically includes "[t]he regulation of the use of, and the maintenance and repair of, roads, highways, streets, avenues, alleys, sidewalks, bridges, aqueducts, viaducts, and public grounds[.]"

{¶ 15} Because Camp's injury was not directly caused by the condition of the building, we find that the exception to immunity in R.C. 2744.02(B)(4) is not applicable.

{¶ 16} Regarding the exception to immunity under R.C. 2744.02(B)(3), appellants argue that fact issues remain as to whether the cable could be considered an obstruction based on its location and whether it prevented travel on the roadway. The city counters

that the cable was strung along to block diagonal parking spots but was not over travelled parts of the roadway; thus, there could be no "obstruction" as required by the statute.

{¶ 17} The exception in R.C. 2744.02(B)(3) specifically refers to "public roads" which are defined as "public roads, highways, streets, avenues, alleys, and bridges within a political subdivision. 'Public roads' does not include berms, shoulders, rights-of-way, or traffic control devices unless the traffic control devices are mandated by the Ohio manual of uniform traffic control devices." R.C. 2744.01(H).

{¶ 18} Despite some evidence that on a few occasions a vehicle clipped the cable, based upon the record before us we cannot find that an issue of facts remains as to whether the cable was a road obstruction. Moreover, in 2002, sidewalks were removed from the R.C. 2744.02(B)(3) exception to immunity. Thus, the legislature intended to remove the immunity exception for a political subdivision's maintenance and regulation of the use of its public sidewalks. *See Wilson v. Cleveland*, 2012-Ohio-4289, 979 N.E.2d 356 (8th Dist.).

{¶ 19} In addition, we agree with the city that the cable's purpose was to keep pedestrians off of the sidewalk and that it was effective in doing so. Similarly, as cited by the city, in *Hamrick v. Bryan City School Dist.*, 6th Dist. Williams No. WM-10-104, 2011-Ohio-2572, this court found that there was no defect on school property where an unmarked service pit in the bus garage operated as it was intended. *Id.* at ¶ 29.

{¶ 20} In addition to operating as intended, we find that the condition of the cable was open and obvious. Under Ohio's "open and obvious" doctrine, an occupier or owner

of a premises is under no duty to protect or warn against dangers where the "'nature of the hazard itself serves as a warning.'" The underlying theory of the doctrine is that persons entering the premises may reasonably be expected to "'discover those dangers and take appropriate measures to protect themselves.'" *Armstrong v. Best Buy Co., Inc.*, 99 Ohio St.3d 79, 2003-Ohio-2573, 788 N.E.2d 1088, ¶ 5, quoting *Simmers v. Bentley Constr. Co.*, 64 Ohio St.3d 642, 644, 597 N.E.2d 504 (1992). *See also Armstrong v. Meade*, 6th Dist. Lucas No. L-06-1322, 2007-Ohio-2820, ¶ 7.

{¶ 21} Deposition testimony was presented demonstrating that the cable was equipped with reflectors and flags, and that it was checked one to two times per week to ensure that the flags were in place and that the cable was not hanging low. Some of the flags were replaced after becoming faded. Testimony was presented that there were three flag tapes placed then a two-inch by two-inch reflector. The pattern repeated along the length of the cable.

{¶ 22} Camp testified in his deposition that he had ridden his bike past the Keller building on prior occasions and that he had been a Sandusky resident for his entire life (62 years.) On the day of the accident it was warm and sunny. Camp stated that he does not remember falling; he only remembers lying on the sidewalk and hearing sirens.

{¶ 23} Based on the foregoing, we find that appellants' first and second assignments of error are not well-taken and that the city's assignment of error is well-taken. Albeit on different grounds, we find that no genuine issues of fact remain for trial.

{¶ 24} On consideration whereof, we find that the Erie County Court of Common Pleas' judgment in favor of appellee, city of Sandusky, is affirmed. Pursuant to App.R. 24, appellants are ordered to pay the costs of this appeal.

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.

Mark L. Pietrykowski, J. _____
JUDGE

Arlene Singer, P.J. _____
JUDGE

Thomas J. Osowik, J. _____
CONCUR.
JUDGE