

[Cite as *Bowman v. Canfield*, 2015-Ohio-1323.]
STATE OF OHIO, MAHONING COUNTY

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STATE OF OHIO, MAHONING COUNTY

IN THE COURT OF APPEALS

SEVENTH DISTRICT

CHARLES V. BOWMAN)

PLAINTIFF-APPELLANT)

VS.)

CITY OF CANFIELD, et al.)

DEFENDANTS-APPELLEES)

CASE NO. 13 MA 144

OPINION

CHARACTER OF PROCEEDINGS:

Civil Appeal from the Court of Common
Pleas of Mahoning County, Ohio
Case No. 11 CV 2598

JUDGMENT:

Affirmed.

APPEARANCES:

For Plaintiff-Appellant:

Atty. Michael C. Lucas
Wiles & Richards
37265 Euclid Avenue
Willoughby, Ohio 44094

For Defendants-Appellees:

Atty. David C. Comstock, Jr.
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JUDGES:

Hon. Cheryl L. Waite
Hon. Mary DeGenaro
Hon. Carol Ann Robb

Dated: March 31, 2015

[Cite as *Bowman v. Canfield*, 2015-Ohio-1323.]
WAITE, J.

{¶1} Appellant Charles Bowman appeals an August 16, 2013 Mahoning County Common Pleas Court judgment entry which granted summary judgment in favor of the City of Canfield, et al. The complaint was filed against the City of Canfield, Mayor William Kay, Councilmembers Andrew W. Skrobola, Marlene Belfiore, Steve Rogers, and Daniel Frazzini, City Manager Charles H. Tieche, Police Chief Charles Colucci, Assistant Chief of Police Andrew Bodzak and Detective Brian McGivern (“referred to collectively as “Canfield”). Appellant asserts that Appellees’ continued investigation of him, even after his contract was rescinded, devolved from a governmental function into a proprietary function. Further, he claims that the investigation was negligently conducted, and in the alternative, was conducted with a malicious purpose, in bad faith, or in a wanton or reckless manner. As such, he asserts that the trial court erred in finding that Appellees were immune from liability on all tort related claims. Moreover, Appellant contends that the trial court erred in finding that a valid contract for employment did not exist. Even though the contract was unsigned, Appellant argues that Canfield’s charter allows the city to be bound to an employment agreement when the employee was appointed by city council.

{¶2} Canfield responds by arguing that Appellant has not shown that an exception to the general rule of political subdivision immunity applies to this case. Further, Canfield asserts that Appellant’s contract is unsigned and lacked necessary details; thus, it is not binding. Accordingly, Canfield urges that the trial court properly granted summary judgment as to both issues. For the following reasons, Appellant’s arguments are without merit and the judgment of the trial court is affirmed.

Factual and Procedural History

{¶3} Appellant interviewed for the position of Canfield's City Manager. After a series of interviews, he signed a confidentiality agreement which allowed Canfield to conduct a background investigation. On July 6, 2009, Canfield City Council voted to appoint him to the position by motion; a contract had been drafted, but not finalized or signed. At some point after the motion passed, Appellant resigned from his previous job as Greenville City Manager.

{¶4} Later that month, Canfield officials received anonymous letters alleging that the Ohio Bureau of Criminal Investigation ("BCI") had begun investigating Appellant for an alleged forgery of a Greenfield City Councilmember's signature. Once Canfield received confirmation of this investigation, city council unanimously rescinded Appellant's appointment. Despite this rescission, the investigation of Appellant continued for a period of time.

{¶5} Appellant brought an action against Canfield and several city officials raising the following causes of action: (1) breach of contract; (2) promissory and equitable estoppel; (3) intentional infliction of severe emotional distress; (4) invasion of privacy; (5) negligent hiring, training, and supervision; and, (6) respondeat superior. Canfield filed a motion for summary judgment on the grounds of governmental immunity and lack of a binding employment contract. The trial court granted Canfield's motion and Appellant filed this timely appeal.

FIRST ASSIGNMENT OF ERROR

THE TRIAL COURT COMMITTED PREJUDICIAL ERROR IN
GRANTING APPELLEES' MOTION FOR SUMMARY JUDGMENT

BASED UPON THE APPLICATION OF GOVERNMENTAL IMMUNITY
UNDER CHAPTER 2744 OF THE OHIO REVISED CODE.

{¶6} In determining whether a political subdivision is entitled to immunity from tort liability, a three-tiered analysis is employed. *Ziegler v. Mahoning County Sheriff's Department*, 137 Ohio App.3d 831, 835, 739 N.E.2d 1237 (7th Dist.2000), citing *Abdalla v. Olexia*, 7th Dist. No. 97-JE-43, 1999 WL 803592 (Oct. 6, 1999). At the outset, we begin with the presumption, pursuant to R.C. 2744.02(A)(1), that a political subdivision is generally immune from liability for its acts and the acts and actions of its employees unless one of the exceptions enumerated within R.C. 2744.02(B) apply.

{¶7} The second tier of the analysis requires us to evaluate whether any of the five R.C. 2744 exceptions to blanket immunity applies. The exceptions include: (1) the negligent operation of a motor vehicle by an employee who is acting within the subdivision's scope of employment and authority; (2) an employee's negligent performance of acts with respect to the subdivision's proprietary functions; (3) the negligent failure to repair public roads and negligent failure to remove obstructions from public roads; (4) negligence of employees 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; and, (5) when a section of the Revised Code expressly imposes civil liability on the subdivision. If one of the five exceptions applies, the political subdivision is stripped of its immunity.

{¶8} The analysis does not end at this point, however. The third and final tier sets out seven defenses that revive a political subdivision's immunity in the event

that one of the above exceptions applies. The defenses that restore immunity are, first, when the political subdivision or an employee of the subdivision is engaged in the performance of a judicial, quasi-judicial, prosecutorial, legislative, or quasi-legislative function at the time of the alleged injury. The second defense is triggered only when the injury is caused by non-negligent conduct that was required or authorized by law, or by conduct that was necessary or essential to the exercise of the subdivision's powers. The third defense arises when the action that caused the alleged injury was within the employee's discretion by virtue of the office or position held within the political subdivision.

{¶9} The fourth defense is relevant when the person, including a juvenile, whose action caused the injury was serving any portion of a sentence stemming from a criminal conviction by performing community service work within the subdivision. The fifth defense applies 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." 2744.03(A)5). However, this defense does not apply if the judgment or discretion was made with a malicious purpose, in bad faith, or in a wanton or reckless manner.

{¶10} Turning to the merits, Appellant agrees that although a political subdivision is generally immune from liability, R.C. 2744.02(B) provides exceptions to this general immunity. Appellant contends, however, that a municipality that acts in a proprietary manner can be held liable when such acts are performed negligently, which Appellant argues occurred in this case. Appellant recognizes that an investigation into his background was a governmental action. He argues, however,

that Canfield's continued investigation of him even after rescinding his appointment contract went beyond the scope of government action, as no interest of the city was advanced by this continued investigation. Appellant urges that the investigation ceased to be a governmental action and somehow become a proprietary function, instead. Further, although Appellant signed a confidentiality waiver which allowed for a background check, he argues that the waiver expired when Canfield rescinded his appointment. Even so, Appellant urges that the entire investigation was unnecessary, as he informed the city of BCI's investigation before council voted to hire him. Moreover, even if we do not believe that the exception for proprietary actions applies, Appellant argues that the city is liable and immunity should be stripped because it acted with a malicious purpose, in bad faith, or in a wanton or reckless manner.

{¶11} Canfield argues that all of its actions involving the investigation of Appellant were governmental, especially as the police were the sole investigators. As such, Appellant cannot show that an exception to the blanket immunity pursuant to R.C. 2744.02(B) applies. Canfield argues that the immunity analysis must end at this point and urges that once a political subdivision has immunity, they are protected against all claims. As the city is protected by immunity, Canfield asserts that Appellant's "malicious purpose argument" cannot serve to overcome immunity standing alone, and Appellant also fails in this argument.

{¶12} As Canfield is a political subdivision, the parties agree that Chapter 2744 applies. The parties further agree that as a political subdivision, Canfield is afforded governmental immunity under the first part of the analysis. Under the

second tier of the analysis, Appellant appears to concede that four out of the five exceptions do not apply. Thus we must only determine whether the remaining exception, R.C. 2744.02(B)(2), applies in any fashion.

{¶13} Under R.C. 2744.02(B)(2), a political subdivision is stripped of its immunity if it causes injury through “negligent performance of acts by their employees with respect to proprietary functions.” As Appellant claims that his background investigation changed from a governmental function into a proprietary function, we must review the definitions of both terms. Under R.C. 2744.01(C)(1)(a), (b) and (c), a governmental function is a function that is “imposed upon the state as an obligation of sovereignty”; a function “for the common good of all citizens of the state”; or a function that involves activities not customarily engaged in by non-governmental persons that “promotes or preserves the public peace, health, safety, or welfare.” On the other hand, a proprietary function is an activity that is customarily engaged in by non-governmental persons.

{¶14} Appellant does not appear to contest that the investigation itself began as a governmental function. Rather, Appellant believes that the investigation magically changed into a proprietary function when it continued despite the rescission of Appellant’s appointment. Appellant cites to two Eighth District cases as examples of government functions that he alleges later become proprietary functions. Appellant appears misguided in his interpretation of these cases. Regardless, these cases both involve the impoundment of cars and are wholly inapplicable to the facts in the present case. Accordingly, it appears that Appellant is making a novel argument when he asks us to determine whether, under the facts of this case, a

governmental function may become proprietary and, under R.C. 2744.02(B)(2), then strips Canfield of its immunity.

{¶15} As Appellant concedes, the only possible exception applicable to this case is R.C. 2744.02(B)(2). A review of the record reveals that there is no evidence suggesting that the R.C. 2744.02(B)(2) applies, here. Appellant has not presented any authority to suggest that the continuation of the investigation beyond rescission of his appointment somehow changes the nature of the investigation from a governmental to proprietary function. Again, a proprietary function, by definition, involves an act customarily engaged in or by non-governmental agencies. Appellant has advanced no caselaw or other authority or evidence tending to show that a police department background check is such an act. Although it is acknowledged that Canfield could have had better inter-department communication and perhaps should have informed its police department to stop investigating Appellant's background once the appointment was rescinded, the record is devoid of any evidence suggesting that investigation then became a proprietary function, i.e., a function that non-governmental entities routinely undertake. As no evidence or authority exists on which to base an exception to the general blanket of governmental immunity, it is irrelevant that Appellant alleges that this government action continued maliciously. Under the three tier analysis required under R.C. 2744, only after it is definitely determined that an exception to liability exists that we look towards the motivation of the actor. If no exception applies, allegations of malice, recklessness or wanton behavior alone cannot serve to strip a political subdivision of its immunity. Hence, Appellant's arguments are without merit, here.

SECOND ASSIGNMENT OF ERROR

THE TRIAL COURT COMMITTED PREJUDICIAL ERROR IN GRANTING APPELLEES' MOTION FOR SUMMARY JUDGMENT BASED UPON THE ABSENCE OF ANY SIGNED AGREEMENT.

{¶16} While governments have immunity from negligence actions, they can still be sued in contract. To recover on a breach of contract claim in general, the plaintiff must prove “(1) the existence of a contract, (2) performance by the plaintiff, (3) breach by the defendant, and (4) damage or loss to the plaintiff.” *Ballard v. Nationwide Ins. Co.*, 7th Dist. No. 11 MA 122, 2013-Ohio-2316, ¶14, citing *Price v. Dillon*, 7th Dist. Nos. 07-MA-75, 07-MA-76, 2008-Ohio-1178, ¶44. Under Ohio law, a political subdivision cannot be bound by a contract “unless the agreement is in writing and formally ratified through proper channels.” *Schmitt v. Educational Serv. Ctr. Of Cuyahoga Cty.*, 8th Dist. No. 97605, 2012-Ohio-2208, ¶18. Consequently, a political subdivision cannot be liable based on theories of implied or quasi contract. *Id.*

{¶17} In his second assignment of error, Appellant claims that even though he did not sign a contract, the trial court erred in finding that a contract did not exist. Although Appellant concedes that a municipality generally does not act without a signed agreement, he argues that Canfield’s charter counters this principle. He contends that, according to the charter, his hiring was complete once his appointment was voted on by council. He asserts that his arguments present an issue of genuine material fact as to whether he had a valid employment contract and the trial court erred when it granted Canfield’s motion for summary judgment.

{¶18} Canfield responds by arguing that contracts involving political subdivisions are invalid until signed or otherwise appropriately ratified. Canfield asserts that the written contract proffered to Appellant had unfilled blanks after the words “effective date of said appointment.” (Appellee’s Brf., p. 20.) Without an appointment date, Canfield argues that the agreement was incomplete. Moreover, the contract was not signed by any of the parties. Accordingly, as all necessary formalities were not in place and Canfield argues that the contract could not have been effective as a matter of law.

{¶19} As a political subdivision is not bound to act in the absence of a signed agreement and it is undisputed that the contract in this case was unsigned, the trial court did not err in granting Canfield’s motion for summary judgment. See *Schmitt, supra*.

{¶20} Further, the contract is not complete, as several lines are blank. For instance, the subsection titled “Term” states: “[t]he term of this Agreement shall begin _____, 2009 and shall continue for a [sic] two (2) years until _____, 2011. * * *.” (Agreement, p. 1.) Thus, necessary details of the contract had not been completed and a full agreement between the parties had not been reached.

{¶21} Accordingly, Appellant’s second assignment of error is also without merit and is overruled.

Conclusion

{¶22} As Appellant has not shown that an exception to the general rule of immunity exists in this case, the trial court did not err in finding that Canfield was entitled to immunity regarding Appellant’s tort claims. As for the breach of contract

claim, the employment agreement is incomplete and reveals that the parties had not finalized all terms and conditions of the contract. Even so, the agreement is not signed by either party. As a political subdivision is not bound by an unsigned contract, the trial court did not err in granting summary judgment in favor of Canfield regarding the breach of contract claim. For the reasons provided, Appellant's first and second assignments of error are without merit and the judgment of the trial court is affirmed.

DeGenaro, J., concurs.

Robb, J., concurs.