

[Cite as *Pavlik v. Cleveland*, 2009-Ohio-3073.]

# Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT  
COUNTY OF CUYAHOGA

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JOURNAL ENTRY AND OPINION  
**No. 92176**

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**MICHAEL PAVLIK, ET AL.**

PLAINTIFFS-APPELLEES

vs.

**CITY OF CLEVELAND**

DEFENDANT-APPELLANT

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**JUDGMENT:  
REVERSED AND REMANDED**

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Civil Appeal from the  
Cuyahoga County Court of Common Pleas  
Case No. CV-631750

**BEFORE:** Cooney, A.J., Boyle, J., and Celebrezze, J.

**RELEASED:** June 25, 2009

**JOURNALIZED:  
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N.B. This entry is an announcement of the court's decision. See App.R. 22(B) and 26(A); Loc.App.R. 22. This decision will be journalized and will become the judgment and order of the court pursuant to App.R. 22(C) unless a motion for reconsideration with supporting brief, per App.R. 26(A), is filed within ten (10) days of the announcement of the court's decision. The time period for review by the Supreme Court of Ohio shall begin to run upon the journalization of this court's announcement of decision by the clerk per App.R. 22(C). See, also, S.Ct. Prac.R. II, Section 2(A)(1).

COLLEEN CONWAY COONEY, A.J.:

{¶ 1} Defendant-appellant, the City of Cleveland (“City”), appeals the trial court’s denial of its motion for summary judgment. Finding merit to the appeal, we reverse and remand.

{¶ 2} This matter arises from a replevin action filed by the plaintiffs-appellees, Michael Pavlik (“Pavlik”) and Christina Young (“Young”) (collectively referred to as “plaintiffs”), against the City seeking damages for a 2003 Harley Davidson Deuce motorcycle (“2003 Harley”) seized by Cleveland police and disposed of by the City.

{¶ 3} In January 2006, officers from the Drug Enforcement Agency (“DEA”) and the Cleveland Police Department searched the plaintiffs’ home pursuant to a search warrant and based on their suspicion that Pavlik was selling drugs. During their search, the officers seized numerous personal items from the plaintiffs’ home. Pavlik informed the officers that he had two motorcycles (the 2003 Harley and a 2006 Harley Davidson Fatboy) stored at a Harley dealership in Cleveland. A few days later, the officers seized the two Harleys from the dealership because they believed the motorcycles were purchased with the proceeds from Pavlik’s drug sales.

{¶ 4} Pavlik was subsequently charged in Case No. 1:06-cr-00189 in the United States District Court, Northern District of Ohio, with attempted

possession with the intent to distribute cocaine. In April 2006, he pled guilty and was later sentenced to five months in prison, with an additional five months of home confinement and three years of supervised release. He was also ordered to forfeit \$65,000 and a 1998 Ford Explorer.

{¶ 5} During the pendency of Pavlik’s federal case, the 2003 and 2006 Harleys were in the possession of Cleveland police. The DEA declined to take possession of the 2003 Harley because it was not titled to Pavlik. The DEA eventually returned the 2006 Harley to Pavlik.

{¶ 6} The Cleveland police checked the Bureau of Motor Vehicles records and determined that James Lemay (“Lemay”) was the registered owner of the 2003 Harley. The City sent Lemay a certified letter in March 2006 advising him that the 2003 Harley was impounded and would be disposed of if he did not reclaim it within ten days. Lemay received the letter but never reclaimed the 2003 Harley. As a result, it was designated abandoned, and the City obtained a salvage title and sold the motorcycle at an auction in May 2006.

{¶ 7} In August 2007, the plaintiffs filed the instant replevin action against the “City of Cleveland (Division of Police)” seeking the return of the 2003 Harley or its fair market value.<sup>1</sup>

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<sup>1</sup>The parties reached a settlement regarding other items seized by police. The instant appeal involves only the 2003 Harley.

{¶ 8} The City moved for summary judgment on all claims asserted by the plaintiffs in August 2008. The City argued that it is immune under R.C. Chapter 2744 for its actions relating to the disposition of the 2003 Harley. The plaintiffs opposed the motion, arguing that they had provided the City with a signed and notarized title from Lemay granting ownership of the 2003 Harley to Pavlik. The City replied to the plaintiffs' brief in opposition, stating that the City did not receive a copy of the title from Pavlik purporting to transfer title from Lemay to Pavlik until August 10, 2006, which was nearly three months after the Harley had been sold at auction. The trial court then denied the City's motion for summary judgment, finding that genuine issues of material fact exist.

{¶ 9} The City now appeals, raising one assignment of error for our review, in which it argues that the trial court erred in denying summary judgment for the City.<sup>2</sup>

#### Standard of Review

{¶ 10} Appellate review of summary judgment is de novo. *Grafton v. Ohio Edison Co.* (1996), 77 Ohio St.3d 102, 105, 671 N.E.2d 241; *Zemcik v. LaPine Truck Sales & Equip. Co.* (1998), 124 Ohio App.3d 581, 585, 706 N.E.2d 860. The Ohio

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<sup>2</sup>Generally, the denial of summary judgment is not a final appealable order subject to review by this court. However, the Ohio Supreme Court in *Hubbell v. Xenia*, 115 Ohio St.3d 77, 2007-Ohio-4839, 873 N.E.2d 878, held that an order that denies a political subdivision immunity under R.C. Chapter 2744 is a final appealable order. Therefore, the City's appeal is properly before this court.

Supreme Court set forth the appropriate test in *Zivich v. Mentor Soccer Club* (1998), 82 Ohio St.3d 367, 369-370, 696 N.E.2d 201, as follows:

“Pursuant to Civ.R. 56, summary judgment is appropriate when (1) there is no genuine issue of material fact, (2) the moving party is entitled to judgment as a matter of law, and (3) reasonable minds can come to but one conclusion and that conclusion is adverse to the nonmoving party, said party being entitled to have the evidence construed most strongly in his favor. *Horton v. Harwick Chem. Corp.* (1995), 73 Ohio St.3d 679, 653 N.E.2d 1196, paragraph three of the syllabus. The party moving for summary judgment bears the burden of showing that there is no genuine issue of material fact and that it is entitled to judgment as a matter of law. *Dresher v. Burt* (1996), 75 Ohio St.3d 280, 292-293, 662 N.E.2d 264, 273-274.”

{¶ 11} Once the moving party satisfies its burden, the nonmoving party “may not rest upon the mere allegations or denials of the party’s pleadings, but the party’s 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); *Mootispaw v. Eckstein* (1996), 76 Ohio St.3d 383, 385, 667 N.E.2d 1197. Doubts must be resolved in favor of the nonmoving party. *Murphy v. Reynoldsburg* (1992), 65 Ohio St.3d 356, 358-359, 604 N.E.2d 138.

#### Political Subdivision Immunity

{¶ 12} The Political Subdivision Tort Liability Act, as codified in R.C. Chapter 2744, sets forth a three-tiered analysis for determining whether a political subdivision is immune from liability. First, R.C. 2744.02(A) sets forth the general rule of immunity that a political subdivision is immune from liability incurred in performing

either a governmental function or proprietary function.<sup>3</sup> See, also, *Colbert v. Cleveland*, 99 Ohio St.3d 215, 2003-Ohio-3319, 790 N.E.2d 781. But, the immunity afforded in R.C. 2744.02(A)(1) is not absolute. See R.C. 2744.02(B).

{¶ 13} “The second tier of the analysis requires a court to determine whether any of the five exceptions to immunity listed in R.C. 2744.02(B) apply to expose the political subdivision to liability.” *Colbert*.

{¶ 14} “If any of the exceptions to immunity in R.C. 2744.02(B) do apply and no defense in that section protects the political subdivision from liability, then the third tier of the analysis requires a court to determine whether any of the defenses in R.C. 2744.03 apply, thereby providing the political subdivision a defense against liability.” *Id.* See, also, *Cater v. Cleveland*, 83 Ohio St.3d 24, 1998-Ohio-421, 697 N.E.2d 610.

{¶ 15} Because the City is a political subdivision as defined by R.C. 2744.01(F), the general grant of immunity in R.C. 2744.02(A)(1) applies in the instant case.

#### Exceptions to Political Subdivision Immunity

{¶ 16} Under the second tier of the analysis, the City may be liable if one of the exceptions under R.C. 2744.02(B) applies. Of the five exceptions, only two apply in this case – R.C. 2744.02(B)(2) and (5).

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<sup>3</sup>For purposes of immunity under R.C. Chapter 2744, “governmental function” is defined by R.C. 2744.01(C) and “proprietary function” is defined by R.C. 2744.01(G).

R.C. 2744.02(B)(2)

{¶ 17} R.C. 2744.02(B)(2) exposes a political subdivision to liability when the alleged damages are caused by the negligent performance of acts by its employees with respect to proprietary functions of the political subdivision.

{¶ 18} In the instant case, the police disposed of an impounded motorcycle. This court has held that the police power to impound a motor vehicle constitutes a governmental function. See *Globe Am. Cas. Co. v. Cleveland* (1994), 99 Ohio App.3d 674, 651 N.E.2d 1015; *Swanson v. Cleveland*, Cuyahoga App. No. 89490, 2008-Ohio-1254. Moreover, the provision of police services is defined as a governmental function in R.C. 2744.01(C)(2)(a).

{¶ 19} In the instant case, just as in *Swanson*, the vehicle was seized and impounded as part of a criminal investigation of suspected drug activity. Therefore, the City had a duty under R.C. 2933.41(B) to “make a reasonable effort to locate the persons entitled to possession of the property in its custody, to notify them of when and where it may be claimed, and to return the property to them at the earliest possible time.”<sup>4</sup>

{¶ 20} A review of the record reveals that the City notified Lemay as the registered owner of the 2003 Harley to retrieve the motorcycle. When he failed to do

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<sup>4</sup>R.C. 2933.41 was repealed in July 2007, but was in effect at the time of this incident.



so, the motorcycle was designated abandoned, and the City obtained salvage title for the 2003 Harley. The City sold the motorcycle at an auction in May 2006.

{¶ 21} In his summary judgment affidavit, Pavlik stated that he provided the City with a copy of the title for the 2003 Harley indicating that Lemay sold it to him. However, “a nonmoving party may not avoid summary judgment by merely submitting a self-serving affidavit contradicting the evidence offered by the moving party. \*\*\* This rule is based upon judicial economy: Permitting a nonmoving party to avoid summary judgment by asserting nothing more than “bald contradictions of the evidence offered by the moving party” would necessarily abrogate the utility of the summary judgment exercise. \*\*\* Courts would be unable to use Civ.R. 56 as a means of assessing the merits of a claim at an early state of the litigation and unnecessary dilate the civil process.” (Internal citations omitted.) *Lennon v. Cuyahoga Cty. Juvenile Court*, Cuyahoga App. No. 86651, 2006-Ohio-2587, quoting *Greaney v. Ohio Turnpike Comm.*, Portage App. No. 2005-P-0012, 2005-Ohio-5284.

{¶ 22} Here, Pavlik never stated in his affidavit when he provided the City with a copy of the title endorsed by Lemay. Rather, he stated that “he furnished the Cleveland Police Department with a title to the motorcycle with his name on it.” The City did not receive a copy of the title until August 2006, when Pavlik’s attorney requested the release of the Harley and included a copy of the title for the 2003 Harley indicating that Lemay had assigned ownership, but no buyer’s name or signature appears on the title. Furthermore, Pavlik failed to transfer the title into his

name pursuant to R.C. 4505.06(A)(5)(b), which would indicate that he had purchased the 2003 Harley. Thus, Pavlik’s affidavit is self-serving and insufficient to meet his “reciprocal burden \*\*\* to set forth specific facts showing that there is a genuine issue for trial \*\*\*.” *Dresher*.

{¶ 23} Accordingly, under the facts and circumstances of the instant case, we find that police actions of seizing, impounding, and auctioning the motorcycle were governmental functions, and as such, R.C. 2744.02(B)(2) does not provide an exception to the City’s general immunity.

R.C. 2744.02(B)(5)

{¶ 24} R.C. 2744.02(B)(5) exposes a political subdivision to liability “when civil liability is expressly imposed upon the political subdivision by a section of the Revised Code, including, but not limited to, sections 2743.02 and 5591.37 \*\*\*. Civil liability shall not be construed to exist under another section of the Revised Code merely because that section imposes a responsibility or mandatory duty upon a political subdivision, because that section provides for a criminal penalty, because of a general authorization in that section that a political subdivision may sue and be sued, or because that section uses the term ‘shall’ in a provision pertaining to a political subdivision.”

{¶ 25} R.C. 2933.41(A)(1) states in part that: “any property \*\*\* lawfully seized or forfeited, and that is in the custody of a law enforcement agency shall be kept

safely pending the time it no longer is needed as evidence and shall be disposed of pursuant to this section.”

{¶ 26} Although R.C. 2933.41 imposed an express duty on the City to keep the 2003 Harley safe until it was no longer needed and to return it at the earliest possible time thereafter, “there is no language in the statute that imposes an express liability on the City for its failure to carry out that duty. Without direct or unmistakable terms imposing civil liability upon the city, R.C. 2744.02(B)(5) does not apply.” *Swanson* at ¶23.

{¶ 27} Therefore, we find that the City is immune from liability under R.C. 2744.02(A)(1), and the trial court erred by denying the City’s motion for summary judgment.

{¶ 28} Accordingly, the sole assignment of error is sustained.<sup>5</sup>

{¶ 29} Judgment is reversed, and the matter is remanded for the court to enter summary judgment for the City.

**It is ordered that appellant recover of said appellees costs herein taxed.**

**The Court finds there were reasonable grounds for this appeal.**

**It is ordered that a special mandate issue out of this court directing the common pleas court to carry this judgment into execution.**

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<sup>5</sup>The City also seeks our review of the other defenses it raised in its motion for summary judgment (standing, lawful seizure of the 2003 Harley, and conversion). Because we find the immunity issue dispositive, we decline to address these arguments. See App.R. 12(A)(1)(c).

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

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COLLEEN CONWAY COONEY, ADMINISTRATIVE JUDGE

MARY J. BOYLE, J., CONCURS;

FRANK D. CELEBREZZE, JR., J., CONCURS IN JUDGMENT ONLY