[Cite as *Maddox v. E. Cleveland*, 2009-Ohio-6308.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 92673

SARAH J. MADDOX, ET AL.

PLAINTIFFS-APPELLANTS

vs.

CITY OF EAST CLEVELAND, ET AL.

DEFENDANTS-APPELLEES

JUDGMENT:
AFFIRMED IN PART; REVERSED IN PART, AND REMANDED

Civil Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CV-658625

BEFORE: Dyke, J., Kilbane, P.J., and Celebrezze, J.

RELEASED: December 3, 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 courts announcement of decision by the clerk per App.R. 22(C). See, also, S.Ct. Prac.R. II, Section 2(A)(1).

ANN DYKE, J.:

{¶ 1} Plaintiffs, Sarah Maddox, Jeffrey Sears, Jr., and Jasmine Sears, appeal from three orders entered in their action for wrongful death and other claims. Plaintiffs challenge the order granting summary judgment to Cuyahoga County, the Board of County Commissioners, and the Cuyahoga County Adult Probation Department. Plaintiffs also challenge the orders granting summary judgment to the city of East Cleveland, and the East Cleveland Police Department, and the order denying plaintiffs' motion for relief from that judgment entered in favor of the city of East Cleveland, and the East Cleveland Police Department. For the reasons set forth below, we affirm the order that granted summary judgment to the county defendants and we reverse and remand the order that denied the motion for relief from the judgment entered in favor of the East Cleveland defendants.

{¶ 2} The record indicates that Jeffrey Sears, Sr. ("Sears") and LaDora Yvette Anderson ("Anderson" or "decedent") resided together and had two children, Jeffrey, Jr., and Jasmine. Sears had an extensive criminal record that included both felony and misdemeanor convictions. In October 2001, he was convicted of felony possession of drugs and preparation of drugs for shipment, and was sentenced to 18 months of community control sanctions in the Cuyahoga County Court of Common Pleas.

{¶ 3} In October 2003, the decedent lodged a complaint with the city of East Cleveland, charging Sears with misdemeanor domestic violence. Sears

was subsequently incarcerated in connection with this matter. On March 3, 2004, Sears was released, subject to two years of probation through the East Cleveland Municipal Court. He returned to his home on Pontiac Avenue in East Cleveland. Thereafter, on March 6, 2004, Anderson alleged that Sears shot out the windows of her automobile. In the police report pertaining to this matter, Anderson indicated that she was in fear of her safety and that she and the children had moved out of the Pontiac Avenue home and had moved in with her mother, Maddox, on Shaw Avenue. In a separate police report, Anderson indicated that the landlord of the Pontiac Avenue home informed her that Sears had a gun and was threatening to kill her. In addition, Maddox averred that Sears made threatening phone calls to Anderson at the Shaw Avenue home.

{¶ 4} Sears was arrested in East Cleveland, but was later released. Thereafter, on March 14, 2004, Sears shot Anderson at the Pontiac Avenue home, then committed suicide. Anderson died from her injuries.

{¶ 5} On March 31, 2005, plaintiffs filed suit against the city of East Cleveland, the East Cleveland Police Department, Cuyahoga County, the Cuyahoga County Board of Commissioners, the Cuyahoga County Adult Probation Department, and various John Doe defendants. See *Maddox v. East Cleveland, et al.*, Common Pleas Case No. CV-557148. On May 7, 2007, plaintiffs voluntarily dismissed this action without prejudice. On May 13, 2008, plaintiffs refiled the action against the same defendants, setting forth claims for wrongful death, survivorship, and severe emotional distress. Plaintiffs were

granted leave to file an amended complaint in 2008 after Maddox was appointed personal representative of the decedent's estate.

{¶ 6} The county defendants moved for summary judgment and asserted that the amended complaint did not relate back, so the action was barred by the statute of limitations. They additionally argued that Sears was not subject to county supervision at the time the decedent was shot, and that they were statutorily immune from liability.

{¶ 7} The East Cleveland defendants moved for leave to file a motion for summary judgment, and within the attached summary judgment motion argued that they were entitled to statutory immunity.

{¶ 8} Plaintiffs opposed the motions and also moved for summary judgment, arguing that Maddox and the children were the real parties in interest and that Maddox was appointed representative of Anderson's estate in December 2008.[1] Plaintiffs also asserted that Sears was on probation with the county, that Anderson and Maddox notified his county probation officer, Angela Kittenoya,[2] and the city defendants, including victim advocate Deborah Black, of the threats Sears made against Anderson and that he had a weapon. The trial court granted the county's motion for summary judgment on December 17, 2008. Also on December 17, 2008, the trial court granted East Cleveland's motion for leave

[1]On December 16, 2008, plaintiffs were granted leave to file an amended complaint that indicated that Maddox had been appointed representative of Anderson's estate.

to file a motion for summary judgment and granted its motion for summary judgment. Plaintiffs moved for relief from judgment contending that by granting both the leave to file a motion for summary judgment and granting the motion for summary judgment on the same day, the trial court failed to provide plaintiffs 30 days within which to respond to East Cleveland's motion for summary judgment. The trial court denied plaintiffs' motion for relief from judgment and plaintiffs now appeal, assigning three errors for our review.

{¶ 9} For their first assignment of error, plaintiffs assert that the trial court erred in granting the county's motion for summary judgment.

{¶ 10} With regard to procedure, we note that we review an appeal from summary judgment under a de novo standard. *Baiko v. Mays* (2000), 140 Ohio App.3d 1, 746 N.E.2d 618.

{¶ 11} Civ.R. 56(C) provides that before summary judgment may be granted, a court must determine that "(1) no genuine issue as to any material fact remains to be litigated, (2) the moving party is entitled to judgment as a matter of law, and (3) it appears from the evidence that reasonable minds can come to but one conclusion, and viewing the evidence most strongly in favor of the nonmoving party, that conclusion is adverse to the nonmoving party."

{¶ 12} The moving party carries an initial burden of setting forth specific facts that demonstrate his or her entitlement to summary judgment. *Dresher v.*

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[2] This individual was not named as a party herein.

Burt, 75 Ohio St.3d 280, 1996-Ohio-107, 662 N.E.2d 264. If the movant fails to meet this burden, summary judgment is not appropriate, but if the movant does meet this burden, summary judgment will be appropriate only if the nonmovant fails to establish the existence of a genuine issue of material fact. Id.

{¶ 13} With regard to the substantive law,[3] we note that the Supreme Court has established a three-tiered analysis to determine whether a political subdivision is immune from tort liability: the first tier is to establish immunity under R.C. 2744.02(A)(1); the second tier is to analyze whether any of the exceptions to immunity under R.C. 2744.02(B) apply; if so, then under the third tier, the political subdivision has the burden of showing that one of the defenses of R.C. 2744.03 applies. *Cater v. Cleveland*, 83 Ohio St.3d 24, 1998-Ohio-421, 697 N.E.2d 610; *Hubbard v. Canton City School Bd. of Edn.,* 97 Ohio St.3d 451, 2002-Ohio-6718, 780 N.E.2d 543. If a defense applies, then immunity is reinstated. Id.

{¶ 14} R.C. 2744.02(A)(1) provides this general grant of immunity:

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[3] The county defendants argued that this action was not timely commenced because at the time this action was filed, Maddox was not the personal representative of the estate, had no authority to file a wrongful death action, and the December 2008 amended complaint brought by Maddox as representative of Anderson's estate did not "relate back." The county defendants cite to *Gottke v. Diebold* (Aug. 9, 1990), Licking App. No. CA-3484. We note that relation back has been permitted in certain circumstances, however. See *Stone v. Phillips* (Aug. 11, 1993), Summit App. No. 15908. However, because we are not called upon to address the issues of "relation back" or timeliness of the amended complaint, we simply assume for purposes of this appeal, but do not decide, that this action was timely and that the amended complaint relates back.

{¶ 15} "[A] political subdivision is not liable in damages in a civil action for injury, death, or loss to person 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."

{¶ 16} The immunity afforded a political subdivision in R.C. 2744.02(A)(1), however, is not absolute. *Cater v. Cleveland,* supra, citing *Hill v. Urbana,* 79 Ohio St.3d 130, 1997-Ohio-400, 679 N.E.2d 1109.

{¶ 17} Under the second tier of the analysis, courts must decide whether any exceptions to immunity apply under R.C. 2744.02(B). These exceptions include:

{¶ 18} "(2) Except as otherwise provided in sections 3314.07 and 3746.24 of the Revised Code, political subdivisions are liable for injury, death, or loss to person or property caused by the negligent performance of acts by their employees with respect to proprietary functions of the political subdivisions.

{¶ 19} "* * *

{¶ 20} "(5) In addition to the circumstances described in divisions (B)(1) to (4) of this section, a political subdivision is liable for injury, death, or loss to person or property 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 of the Revised Code. 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."

{¶ 21} Finally, "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." (Internal citations omitted.) *Cramer v. Auglaize Acres,* 113 Ohio St.3d 266, 2007-Ohio1946, 865 N.E.2d 9, quoting *Colbert v. Cleveland,* 99 Ohio St.3d 215, 2003-Ohio-3319, 790 N.E.2d 781.

{¶ 22} R.C. 2744.03 provides in relevant part as follows:

{¶ 23} "(A) In a civil action brought against a political subdivision or an employee of a political subdivision to recover damages for injury, death, or loss to person or property allegedly caused by any act or omission in connection with a governmental or proprietary function, the following defenses or immunities may be asserted to establish nonliability:

{¶ 24} "(1) The political subdivision is immune from liability if the employee involved was engaged in the performance of a judicial, quasi-judicial, prosecutorial, legislative, or quasi-legislative function.

{¶ 25} "(2) The political subdivision is immune from liability if the conduct of the employee involved, other than negligent conduct, that gave rise to the claim

of liability was required by law or authorized by law, or if the conduct of the employee involved that gave rise to the claim of liability was necessary or essential to the exercise of powers of the political subdivision or employee.

{¶ 26} "(3) The political subdivision is immune from liability if the action or failure to act by the employee involved that gave rise to the claim of liability was within the discretion of the employee with respect to policy-making, planning, or enforcement powers by virtue of the duties and responsibilities of the office or position of the employee.

{¶ 27} "* * *

{¶ 28} "(5) The political subdivision is immune from liability if the injury, death, or loss to person or property 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 unless the judgment or discretion was exercised with malicious purpose, in bad faith, or in a wanton or reckless manner.

{¶ 29} "(6) In addition to any immunity or defense referred to in division (A)(7) of this section and in circumstances not covered by that division or sections 3314.07 and 3746.24 of the Revised Code, the employee is immune from liability unless one of the following applies:

{¶ 30} "(a) The employee's acts or omissions were manifestly outside the scope of the employee's employment or official responsibilities;

{¶ 31} "(b) The employee's acts or omissions were with malicious purpose, in bad faith, or in a wanton or reckless manner;

{¶ 32} "(c) Civil liability is expressly imposed upon the employee by a section of the Revised Code. 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 an employee, because that section provides for a criminal penalty, because of a general authorization in that section that an employee may sue and be sued, or because the section uses the term 'shall' in a provision pertaining to an employee."

{¶ 33} In this matter, there is no evidence that Sears was subject to county probation at the time that the decedent was shot and killed. The evidence demonstrates that the court of common pleas imposed an 18 month term of community control sanctions in October 2001, or over two years before the decedent was killed. The county also presented evidence that Sears was not subject to the county's probation supervision after he completed the term of incarceration imposed by the East Cleveland Municipal Court. Plaintiffs insist that they justifiably relied upon Kittenoya's representation, shortly before the homicide, that she was assigned to supervise Sears on probation. We note, however, that the doctrines of equitable estoppel and promissory estoppel are inapplicable against a political subdivision when the political subdivision is engaged in a governmental function. *Hortman v. Miamisburg,* 110 Ohio St.3d 194, 2006-Ohio-4251, 852 N.E.2d 716. That is, "it is well-settled that, as a

general rule, the principle of estoppel does not apply against a state or its agencies in the exercise of a governmental function." *Ohio State Bd. of Pharmacy v. Frantz* (1990), 51 Ohio St.3d 143, 555 N.E.2d 630.

{¶ 34} Moreover, it is beyond dispute that the county's operation of the Department of Adult Probation is a "governmental function." See R.C. 2744.01(C). Accordingly, there is immunity pursuant to R.C. 2744.02(A)(1). In addition, the operation of a probation department is quasi-judicial. R.C. 2301.32; R.C. 2301.27. Therefore under R.C. 2744.02(B)(2), there is no exception to immunity. As to the exception set forth in R.C. 2744.02(B)(5), plaintiffs assert that there is liability pursuant to R.C. 2743.02. This statute applies to state actors in actions in the court of claims, however. In any event, even if an exception to immunity were established under R.C. 2744.02(B), immunity is re-established pursuant to R.C. 2744.03(A)(1), as the supervision of a probationer is a quasi-judicial function. R.C. 2301.27; R.C. 2301.32. Further, no specific county employee was named in this action, so R.C. 2744.03(A)(6) is inapplicable, and there is no evidence that any county actor acted with malicious purpose, in bad faith, or in a wanton or reckless manner. Finally, insofar as plaintiffs rely upon the "special duty rule" to establish liability, "the special-relationship exception is not codified in R.C. 2744.02(B), and it is therefore not an independent exception to a political subdivision's general immunity from liability." *Rankin v. Cuyahoga Cty. Dept. of Children & Family Servs.,* 118 Ohio St.3d 392, 2008-Ohio-2567, 889 N.E.2d 521.

{¶ 35} The first assignment of error is without merit.

{¶ 36} For their third assignment of error, plaintiffs assert that the trial court erred in denying their motion for relief from the judgment granting East Cleveland's motion for summary judgment. Plaintiffs assert that because the trial court granted the motion for leave to file the motion for summary judgment on the same day as the trial court granted East Cleveland's motion for summary judgment, the court failed to provide them 30 days within which to respond to the motion for summary judgment, in contravention of Loc.R. 11(I) of the Cuyahoga County Court of Common Pleas, General Division.

{¶ 37} This court addressed this argument in *Bohannon v. Pipino, Inc.,* Cuyahoga App. No. 92325, 2009-Ohio-3469, and determined that the plaintiff was entitled to relief from judgment where the trial court failed to follow the provisions of Loc.R. 11 in ruling on the defendant's motion for summary judgment. This court stated:

{¶ 38} "Plaintiff argues that the court should have ruled on Gallagher Pipino's motion for leave before it ruled on its summary judgment motion, so she would have notice of the proper time within which to oppose summary judgment. See *Capital One Bank v. Toney,* Jefferson App. No. 06 JE 28, 2007-Ohio-1571 (holding that 'appellant had no obligation to respond to the merits of the summary judgment motion until the trial court granted Capital One leave to file such motion'); *Hooten v. Safe Auto Ins. Co.,* 100 Ohio St.3d 8, 12, 2003-Ohio-4829 (holding that Civ.R. 56 and the notion of due process require that the nonmoving

party to a summary judgment motion 'receive notice of the deadline date for [responding] to the summary judgment motion or of the date on which the motion is deemed submitted for decision'); *Donovan v. Mushkat* (Dec. 6, 1995), Summit App. No. 17262 (opining that '[i]t would be unreasonable to require the nonmoving party to bear the expense of fully responding to an untimely motion for summary judgment when the court has not determined that it will even allow the motion'); Cuyahoga County Common Pleas Loc.R. 11(I)(1) (stating that 'a party opposing a motion for summary judgment * * * may file a brief in opposition * * * within thirty (30) days of service of the motion').

{¶ 39} "* * *

{¶ 40} "* * * In reviewing the record, we find that plaintiff was made aware that the court granted Gallagher Pipino's request for leave to file summary judgment, thus triggering the 30 days within which plaintiff had a right to oppose the motion, on the same day the court granted the summary judgment motion. As stated earlier, whether the court erred in granting summary judgment is properly decided on appeal and we do not reach a conclusion on that issue. Rather, we address the court's denial of plaintiff's motion for relief from judgment and analyze whether the court abused its discretion because plaintiff's neglect in failing to oppose summary judgment was excusable.

{¶ 41} "* * *

{¶ 42} "* * * [W]e find that the court abused its discretion in denying plaintiff's motion for relief from judgment."

{¶ 43} Accord *Capital One Bank v. Toney,* Jefferson App. No. 06 JE 28, 2007- Ohio-1571 ("[A] non-movant is not expected to respond to a request to file for summary judgment * * * [;] the non-movant's duty does not arise until the movant is given leave to file and the non-movant is provided with notice of a response cut-off date that is at least fourteen days after such leave is granted."); *Green v. Lewis* (Sept. 3, 1998), Cuyahoga App. No. 74045.

{¶ 44} Likewise in this matter, we conclude that plaintiffs were entitled to relief from the award of summary judgment entered at the same time as the trial court's grant of defendants' motion for leave to file a motion for summary judgment. Applying *Bohannon v. Pipino, Inc.,* supra, the trial court's granting of East Cleveland's request for leave to file summary judgment triggered the 30-day period within which to file a response pursuant to Loc.R. 11(I). Further, we do not reach the issue of whether the trial court properly decided the merits of the award of summary judgment to the East Cleveland defendants.

{¶ 45} The third assignment of error is well-taken.

{¶ 46} In their second assignment of error, plaintiffs challenge the merits of the trial court's decision awarding the East Cleveland defendants' motion for summary judgment. In light of our disposition of the third assignment of error, plaintiffs' second assignment of error is moot. App.R. 12(A)(1)(c).

{¶ 47} The order of the trial court that awarded summary judgment to the county defendants is affirmed, the order of the trial court denying plaintiffs' motion

for relief from judgment is reversed, and the matter is remanded for further proceedings consistent with this opinion.

It is ordered that appellees and appellants split the costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate be sent to said court to carry this judgment into execution.

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

ANN DYKE, JUDGE

MARY EILEEN KILBANE, P.J., and
FRANK D. CELEBREZZE, JR., J., CONCUR