

[Cite as *Ayers v. Prevision Environmental Co.*, 2010-Ohio-4479.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 93559

MICHAEL J. AYERS

PLAINTIFF-APPELLANT

vs.

PRECISION ENVIRONMENTAL CO., ET AL.

DEFENDANTS-APPELLEES

**JUDGMENT:
DISMISSED IN PART; AFFIRMED IN PART**

Civil Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CV-670032

BEFORE: Jones, J., Stewart, P.J., and Sweeney, J.

RELEASED AND JOURNALIZED: September 23, 2010

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LARRY A. JONES, J.:

{¶ 1} Plaintiff-appellant, Michael Ayers (“Ayers”), appeals the trial court’s decision to grant defendant-appellee’s, city of Cleveland’s (“City”) motion to dismiss and the granting of summary judgment in favor of defendant-appellee, Precision Environmental Co., Inc. (“Precision”). For the reasons that follow, we dismiss the appeal against the City and affirm summary judgment in favor of Precision.

{¶ 2} In 2004, the City condemned real property owned by Ayers on East 40th Street. The City subsequently ordered the property demolished and contracted with Precision to perform asbestos abatement on the property prior to demolishing the buildings.

{¶ 3} In 2008, Ayers filed suit against the City and Precision, alleging that Precision’s employees removed personal property belonging to Ayers, including eight vehicles, tools, and other equipment.

{¶ 4} The City moved to dismiss, arguing both that the statute of limitations had expired and that it was immune from suit pursuant to R.C. 2744. Precision moved for summary judgment, arguing that since it was working for the City, a political subdivision, the company was also immune from liability. The trial court granted the City’s motion and dismissed the case against the City on May 5, 2009.

{¶ 5} On May 21, 2009, the trial court held a settlement conference, at which attorneys for both Ayers and Precision attended. No settlement was reached and the trial court later granted summary judgment in favor of Precision. The trial court found that R.C. 2744.01 provided Precision immunity in its

governmental function of abating a nuisance by assisting the City in the demolition of Ayers's property.

{¶ 6} Ayers filed his pro se notice of appeal against the judgments in favor of both the City and Precision. Ayers later retained counsel, and presents the following assignments of error for our review.

"I. "The trial court erred in granting summary judgment on behalf of Precision Environmental and finding that sovereign immunity extended to their actions on the property located at 1407 East 40th [Street,] Cleveland[, Ohio]."

"II. "The trial court erred in failing to allow plaintiff[-]appellant to participate in the settlement conference on May 21, 2009 or in acceptance of the materials offered in support of his claims as a pro se litigant."

Claims Against the City

{¶ 7} As an initial matter, we address whether Ayers has perfected an appeal against the City. Although neither assignment of error nor Ayers's prayer for relief mentions the City, Ayers listed the City as a party on the notice of appeal and included the trial court's order granting the City's motion to dismiss in his praecipe.

{¶ 8} App.R. 4(A) requires that an appeal be filed within thirty days of the date of the entry of the judgment being appealed. It is well-settled that an appellate court lacks jurisdiction over any appeal that is not timely filed. See, e.g., *State ex rel. Pendell v. Adams Cty Bd. of Elections* (1988), 40 Ohio St.3d 58, 60, 531 N.E.2d 713. Ayers did not file his appeal until July 1, 2009, more than thirty days after the time to file an appeal had expired.

{¶ 9} Therefore, we are without jurisdiction to consider an appeal against the City, and the appeal is dismissed as to the City.

Summary Judgment

{¶ 10} Next we consider the trial court's granting of summary judgment in favor of Precision. Appellate review of summary judgment is de novo, governed by the standard set forth in Civ.R. 56. *Comer v. Risko*, 106 Ohio St.3d 185, 2005-Ohio-4559, 833 N.E.2d 712, ¶8. Accordingly, we afford no deference to the trial court's decision and independently review the record to determine whether summary judgment is appropriate. *Hollins v. Shaffer*, 182 Ohio App.3d 282, 2009-Ohio-2136, 912 N.E.2d 637, ¶12. Under Civ.R. 56(C), summary judgment is proper when all relevant materials to be considered under the rule reveal that "there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." The evidence must be construed most strongly in the nonmoving party's favor and "summary judgment shall not be rendered" unless those materials establish that "reasonable minds can come to but one conclusion and that conclusion is adverse to the party against whom the motion for summary judgment is made * * *." *Id.*

{¶ 11} The Political Subdivision Tort Liability Act, as codified in R.C. 2744, sets forth a three-tiered analysis for determining whether a political subdivision is immune from liability. *Cater v. Cleveland*, 83 Ohio St.3d 24, 1998-Ohio-421, 697 N.E.2d 610. 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 in the third tier the political subdivision has the burden of showing that one of the defenses of R.C. 2744.02 applies. Id.

As to the first tier, R.C. 2744.02(A)(1) states that “[a] political subdivision is not liable for 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.” While R.C. 2744.02(A)(1) provides broad immunity to acts in connection with governmental and proprietary function, R.C. 2744.02(B) provides that:

“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 any of its employees in connection with a governmental or proprietary function * * * [.]”

{¶ 12} A governmental function, as defined by R.C. 2744.01(C)(2), includes “the enforcement or non-performance of any law; * * * [t]he provision or nonprovision of inspection services of all types, including, but not limited to, inspections in connection with building, zoning, sanitation, fire, plumbing, and electrical codes, * * * including, but not limited to, the approval of plans for construction of buildings or structures and the issuance or revocation of building permits or stop work orders in connection with building or structures; [and] [u]rban renewal projects and the elimination of slum conditions * * *.” R.C. 2744.01(C)(2)(i), (p), and (q).

{¶ 13} There is no doubt that the City is a political subdivision. Although at the trial court level the City argued that Precision was an independent contractor, Ayers argued in his reply brief on the motion for summary judgment that Precision was an employee of the City. Thus, we find, that with no evidence or argument

presented to the contrary, that Precision may be considered an employee of the City providing a governmental function in abating the asbestos found on Ayers's property.

{¶ 14} Once immunity is established under R.C. 2744.02(A)(1), the second tier of analysis is whether any of the five exceptions to immunity in subsection (B) apply. *Cater.* R.C. 2744.02(B) removes the general statutory presumption of immunity for political subdivisions only under the following express conditions: (1) the negligent operation of a motor vehicle by an employee, R.C. 2744.02(B)(1); (2) the negligent performance of proprietary functions, R.C. 2744.02(B)(2); (3) the negligent failure to keep public roads open and in repair, R.C. 2744.02(B)(3); (4) the negligence of employees occurring within or on the grounds of certain buildings used in connection with the performance of governmental functions, R.C. 2744.02(B)(4); (5) express imposition of liability by statute, R.C. 2744.02(B)(5).

{¶ 15} Ayers argues that Precision's actions in taking his personal property arose out of actions independent of the company's contractual duties. In fact, Ayers concedes that the allegations in the complaint do not allege that Precision negligently performed its abatement duties. Rather, Ayers claims Precision illegally seized his property and that seizure exceeded the scope of its duties and, therefore, Precision acted outside "the scope and course of its responsibilities as an agent of the [City]." Ayers, however, fails to argue or otherwise provide any evidence that any of the five exceptions to immunity apply pursuant to R.C.

2744.02(B). Therefore, we cannot find that any of the exceptions to immunity apply to Precision.

{¶ 16} Finally, under the third tier of analysis, immunity can be reinstated if the political subdivision can successfully argue that one of the defenses contained in R.C. 2744.03 applies. *Cater*. Since we found that none of the exceptions apply, we need not reach the third tier.

{¶ 17} Even if Ayers alleged in his amended complaint allegations of tortious conduct that could withstand scrutiny under an analysis of immunity, allegations contained in a complaint alone are not sufficient to withstand summary judgment. The nonmoving party, which in this case was Ayers, “may not rest on the mere allegations of his pleading, but his response, by affidavit or as otherwise provided in Civ.R. 56, must set forth specific facts showing the existence of a genuine triable issue.” *Mootispaw v. Eckstein* (1996), 76 Ohio St.3d 383, 385, 667 N.E.2d 1197. A dispute of fact can be considered “genuine” if it is supported by substantial evidence that exceeds the allegations in the complaint. *Myers v. Jamar Ents.* (Dec. 10, 2001), Clermont App. No. CA2001-06-056.

{¶ 18} Thus, in order to avoid summary judgment in Precision’s favor, Ayers was required to set forth specific facts to demonstrate a triable issue. Again, Ayers failed to do so.

{¶ 19} In *City of Cleveland v. Wescon Constr. Corp.* (Aug. 23, 1990), Cuyahoga App. No. 57405, we found the City immune from liability for enforcement of building codes. We stated,

{¶ 20} “R.C. 2744 creates immunity for [the City] from liability for injury or losses incurred by the exercise of its governmental function. [The] * * * stated cause of action arose out of the City’s performance of its governmental functions: to wit: enforcement of the City Building Codes regarding the abatement of an alleged nuisance caused by a building or structure which was injurious to or menace to the public health, safety or welfare.” Likewise, in this case, Precision, as an agent of the City, is immune from liability for losses incurred by the exercise of the City’s governmental function in demolishing Ayers’s condemned property.

{¶ 21} Therefore, we find that the trial court properly granted summary judgment to Precision. The first assignment of error is overruled.

Settlement Conference

{¶ 22} In the second assignment of error, Ayers argues that the trial court erred in holding a settlement conference without his being present. He claims that at the time the court held the conference he was a pro se litigant and any conference the trial court held without him should constitute impermissible ex parte conversations. Ayers further argues that the supplementary material he submitted to the trial court in his motion for reconsideration and to this court as part of his appeal should be considered by our court. We disagree.

{¶ 23} First, the record shows that Ayers was represented by counsel from the inception of the lawsuit until the court issued its final order. His attorney was present at the settlement conference. After the trial court issued its order granting summary judgment in favor of Precision, Ayers filed a pro se motion for

reconsideration and attached numerous “exhibits” in support of his motion. However, a motion for reconsideration of a final order is a nullity. *Pitts v. Dept. of Transp.* (1981), 67 Ohio St.2d 378, 381, 423 N.E.2d 1105. Therefore, those exhibits were not properly before the trial court and are thus not properly before this court as part of his appeal.

{¶ 24} The second assignment of error is overruled.

{¶ 25} Accordingly, this cause is dismissed in part and affirmed in part.

It is ordered that appellees recover of appellant 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.

LARRY A. JONES, JUDGE

JAMES J. SWEENEY, J., CONCURS;

MELODY J. STEWART, P.J., CONCURS
IN PART AND DISSENTS IN PART WITH
SEPARATE OPINION

MELODY J. STEWART, P.J., CONCURRING IN PART AND DISSENTING
IN PART:

{¶ 26} I agree that the appeal filed against the city of Cleveland should be dismissed. However, I respectfully dissent from the remainder of the decision. R.C. 2744.01(B) states, “‘Employee’ means an officer, *agent*, employee, or servant, whether or not compensated on full-time or part-time, who is authorized to act and is acting within the scope of the officer’s, agent’s, employee’s, or servant’s employment for a political subdivision. ‘*Employee*’ does not include an independent contractor * * *.” (Emphasis added.) Independent-contractor status is determined by the right to control. *Bostic v. Connor* (1988), 37 Ohio St.3d 144, 524 N.E.2d 881, paragraph one of the syllabus. The key issue is whether the City retained control of, or the right to control, the mode and manner of doing the work contracted for, the asbestos removal.

{¶ 27} Conversely, an agency relationship requires a fiduciary relationship between the agent and the principal. *Berge v. Columbus Community Cable Access* (1999), 136 Ohio App.3d 281, 736 N.E.2d 517. In this case, the purported principal in the alleged agency relationship specifically denied that Precision was its agent. The City argued that Precision was an independent contractor the City contracted with to remove asbestos from the building prior to its demolition. Simply because both appellant and appellee claim that Precision is an “employee” of the City, does not make it fact upon which the court may grant statutory immunity.

{¶ 28} However, even if appellant waived the right to challenge Precision's status as an employee for Chapter 2744 purposes, there remains a factual question of whether Precision's employees were acting outside of the scope of their employment when they sold appellant's trucks. One of the stated exceptions to statutory immunity for employees of political subdivisions is that an employee of a political subdivision is not immune from liability when the employee's acts or omissions are "manifestly outside the scope of the employee's employment or official responsibilities," or are taken "with malicious purpose, in bad faith, or in a wanton or reckless manner." R.C. 2744.03(A)(6)(a) and (b). *Estate of Graves v. Circleville*, 124 Ohio St.3d 339, 2010-Ohio-168, 922 N.E.2d 201.

{¶ 29} Appellant claims that Precision's employees acted outside of the scope of asbestos removal and acted wantonly and recklessly when they removed and sold his trucks. Appellant opposed Precision's motion for summary judgment with copies of answers to interrogatories in which Precision admitted its employees removed trucks from the property and sold them for scrap. Precision did not allege that the removal of the trucks was necessary for asbestos removal. Instead, it denied the trucks were appellant's personal property and claimed that the trucks were "abandoned property" that its employees sold for scrap. This evidence, construed most strongly in

appellant's favor, raises a triable issue of fact as to whether one of the exceptions to statutory immunity applies.

{¶ 30} Accordingly, I would reverse the judgment of the trial court granting summary judgment and find that there are triable issues of fact remaining relating to whether Precision was acting as an agent of the City and, if so, whether its employees acted outside of the scope of their employment or with malice when they removed and sold property alleged to belong to appellant.