[Cite as *Dawson v. Cleveland*, 2010-Ohio-5142.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 94510

JAMES DAWSON, ET AL.

PLAINTIFFS-APPELLEES

vs.

CITY OF CLEVELAND, ET AL.

DEFENDANTS-APPELLANTS

JUDGMENT:
DISMISSED

Civil Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CV-668479

BEFORE: McMonagle, J., Gallagher, A.J., and Sweeney, J.

RELEASED AND JOURNALIZED: October 21, 2010

ATTORNEYS FOR APPELLANT

City of Cleveland

Robert J. Triozzi
Director of Law
Jerome A. Payne, Jr.
Assistant Director of Law
City of Cleveland
601 Lakeside Ave., Room 106
Cleveland, OH 44114-1077

ATTORNEYS FOR APPELLEES

For James Dawson

David R. Grant
Friedman, Domiano & Smith Co., L.P.A.
55 Public Square
Suite 1055
Cleveland, OH 44113

For Heidi Dawson

Harvey Kugelman
450 Standard Building
1370 Ontario Street
Cleveland, OH 44113

For Vandra Brothers Construction, Inc.

Molly Steiber Harbaugh
55 Public Square
Suite 930
Cleveland, OH 44113-1901

CHRISTINE T. McMONAGLE, J.:

{¶ 1} Defendant-appellant, the city of Cleveland (the "City"), appeals from the trial court's judgment denying its motion for summary judgment. We dismiss for lack of a final, appealable order.

I

{¶ 2} This action arises out of an incident that occurred on March 11, 2004 on Western Avenue in the city of Cleveland. At approximately 7:15 a.m., as he was driving to work, plaintiff-appellee, James Dawson, lost control of his car and struck a telephone pole, sustaining severe head injuries. In his complaint, Dawson alleged that he lost control of his car because he encountered large potholes in the road. He asserted negligence claims against the City, Vandra Brothers Construction, Inc., with whom the City had contracted to perform reconstruction work on Western Avenue, and various subcontractors of Vandra Brothers.

{¶ 3} The City answered Dawson's complaint and asserted various affirmative defenses to the complaint, including immunity from liability under R.C. 2744 et seq. The City also asserted a cross-claim against Vandra Brothers. Vandra Brothers likewise answered the complaint and asserted a cross-claim against the City.

{¶ 4} Vandra Brothers subsequently filed a motion for summary judgment, in which it argued that Dawson, who testified at his deposition

that he did not know why he lost control of his vehicle and struck a telephone pole, had not identified the cause of his accident, thereby precluding a finding that Vandra Brothers had failed to exercise due care and that such failure was a proximate cause of Dawson's injury.[1] Vandra Brothers also argued that summary judgment was appropriate because the only way for Dawson, who could not recall the accident and therefore could not identify or explain the cause of the accident, to overcome his burden of proof regarding causation was to produce liability expert testimony, which he had not done.

{¶ 5} The City subsequently filed its motion for summary judgment, in which it stated that "[f]or the purposes of this motion, the City incorporates and adopts the argument set forth by Vandra Brothers Construction in its motion for summary judgment with some minor modifications." With only a few exceptions, the City's motion matched Vandra Brothers' motion nearly word for word. The City's motion did not raise the issue of political subdivision immunity.

{¶ 6} Dawson filed a brief in opposition to the City's motion, in which he argued that there were genuine issues of material fact regarding the cause

---

[1]The essential elements of any negligence action are a duty of care, a breach of that duty, and an injury directly and proximately resulting therefrom. *Texler v. D.O. Summers Cleaners & Shirt Laundry Co.*, 81 Ohio St.3d 677, 680, 1998-Ohio-602, 693 N.E.2d 271. "It is incumbent on the plaintiff to show how and why an injury occurred — to develop facts from which it can be determined by the jury that the defendant failed to exercise due care and that such failure was a proximate cause of the injury." *Boles v. Montgomery Ward & Co.* (1950), 153 Ohio St. 381, 389, 92 N.E.2d 9.

of his accident. Specifically, Dawson pointed to the deposition testimony of Roger Derosett, who witnessed the accident. Dawson argued that Derosett's testimony created an issue of fact regarding whether the accident was caused by potholes in the road. Dawson also noted in his brief that the City's motion had raised only the issues of duty of care and proximate cause and, therefore, he addressed only those issues in his brief in opposition.

{¶ 7} In reply to Dawson's brief in opposition, the City argued for the first time that it was immune from liability under R.C. 2744 et seq. The City noted that under R.C. 2744.02(A)(1), a political subdivision is immune from liability unless one of the exceptions to immunity set forth in R.C. 2744.02(B) applies. The City conceded that the exception set forth in R.C. 2744.02(B)(3) arguably applies to this case. It states that "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." But the City argued that this exception requires actual or constructive notice of a problem with the road and because it had no notice of any potholes, "reasonable minds can only come to the conclusion that the City is immune from plaintiff's claim under R.C. 2744.01(A)(1)."

{¶ 8} Dawson filed a motion to strike the city's reply brief because the City had not raised the immunity defense in its motion for summary

judgment.[2] The trial court subsequently granted the motion to strike "to the extent that the reply brief raises a new defense not previously included in defendant City of Cleveland's motion for summary judgment." It also denied the City's motion for summary judgment.

II

{¶ 9} The City's notice of appeal states that it is appealing from the trial court's order denying it summary judgment under R.C. 2744.02(C), which states: "An order that denies a political subdivision or an employee of a political subdivision the benefit of an alleged immunity from liability as provided in this chapter or any other provision of the law is a final order." The Ohio Supreme Court has determined that a political subdivision may immediately appeal an order denying it immunity pursuant to this section. *Hubbell v. Xenia*, 115 Ohio St.3d 77, 2007-Ohio-4839, 873 N.E.2d 878, ¶23-27; see, also, *Parsons v. Greater Cleveland Regional Trans. Auth.*, 8th Dist. No. 93523, 2010-Ohio-266.

{¶ 10} But Dawson argues that because the City never raised the issue of immunity in its motion for summary judgment, the trial court's order denying the City's motion for summary judgment was not a denial of an

[2]"A party seeking summary judgment must specifically delineate the basis upon which summary judgment is sought in order to allow the opposing party a meaningful opportunity to respond." *Mitseff v. Wheeler* (1988), 38 Ohio St.3d 112, 526 N.E.2d 798, syllabus. The City's assertion of immunity did not come until after Dawson had responded to the City's motion.

alleged immunity and, therefore, the City is not entitled to an interlocutory appeal of the trial court's judgment. We agree.

{¶ 11} In its motion for summary judgment, the City raised only two issues: duty of care and proximate cause. In fact, its motion practically mirrored, almost word for word, Vandra Brothers' motion for summary judgment, which likewise raised only the issues of duty of care and proximate cause (Vandra Brothers obviously could not have raised immunity as a defense against the suit). The City did not raise the issue of immunity under R.C. 2744.02 until its reply brief, which the trial court struck because it raised a new issue not raised in the City's motion for summary judgment. Hence, the immunity argument was neither before, nor decided by, the trial court. Accordingly, the trial court's denial of the City's motion for summary judgment did not deny the City the benefit of an alleged immunity.

{¶ 12} "It is well-established that an order must be final before it can be reviewed by an appellate court. If an order is not final, then an appellate court has no jurisdiction." *Gen. Acc. Ins. Co. v. Ins. Co. of N. Am.* (1989), 44 Ohio St.3d 17, 20, 540 N.E.2d 266. An order denying a motion for summary judgment is not a final, appealable order. See, e.g., *State ex rel. Overmeyer v. Walinski* (1966), 8 Ohio St.2d 23, 23, 222 N.E.2d 312. Therefore, we must dismiss for lack of a final appealable order.

Dismissed.

It is ordered that appellee Dawson recover from appellant city of Cleveland 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.

CHRISTINE T. McMONAGLE, JUDGE

SEAN C. GALLAGHER, A.J., and
JAMES J. SWEENEY, J., CONCUR