[Cite as *GMAC v. Cleveland*, 2010-Ohio-79.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 93253

GMAC

PLAINTIFF-APPELLEE

vs.

CITY OF CLEVELAND

DEFENDANT-APPELLANT

JUDGMENT:
REVERSED AND REMANDED
WITH INSTRUCTIONS

Civil Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CV-662771

BEFORE: Rocco, P.J., Celebrezze, J., and Sweeney, J.

RELEASED: January 14, 2010

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. 2.2(A)(1).

KENNETH A. ROCCO, P.J.:

{¶ 1} Defendant-appellant, the city of Cleveland, appeals from a common pleas court order denying its motion for summary judgment on the grounds of sovereign immunity. The City contends that it was performing a governmental function when it seized a 2007 Chevrolet Tahoe incident to the arrest of the driver and when it later sold the vehicle for scrap. The City further claims that the exceptions to sovereign immunity set forth in R.C. 2744.02(B) do not apply to any of the claims of the vehicle's owner, plaintiff-appellee, General Motors Acceptance Corporation ("GMAC").

{¶ 2} We agree that the evidence presented by the City in its motion for summary judgment demonstrated that the City was immune from liability here. Therefore, we reverse and remand with instructions to the trial court to enter judgment for the City.

{¶ 3} GMAC filed its complaint on June 19, 2008. The complaint asserted that GMAC leased a 2007 Chevrolet Tahoe to John Talley on July 10, 2006 for a period of four years. The City impounded the vehicle on November 8, 2007 and later moved it to a scrap yard where it was destroyed. GMAC claimed that it was not notified that the vehicle had been impounded or destroyed and therefore the City had converted the vehicle to its own use. Second, GMAC asserted that the City negligently destroyed the vehicle

without properly notifying GMAC. Third, GMAC claimed that Talley had breached his contract with GMAC by failing to make lease payments.

{¶ 4} The City answered the complaint, asserting, among other things, that it was immune from liability. Talley defaulted and the court entered judgment against him in the amount of $35,781 plus interest.

{¶ 5} The City moved for summary judgment on February 17, 2009. Attached to the City's motion was a copy of the complaint, the City's own answers to GMAC's interrogatories and requests for production of documents, and a copy of the Fifth District Court of Appeals decision in *Hunt v. Washington Twp.*, Tuscarawas App. No. 2001AP06 0059, 2001-Ohio-1734. The City claimed that the evidence showed that it seized the vehicle pursuant to the arrest of the driver on October 28, 2007, and it sent notice to Talley and to GMAC that the vehicle would be destroyed if it was not claimed by November 16, 2007. When neither Talley nor GMAC claimed the vehicle, the city obtained a salvage title and sold the vehicle as scrap on November 30, 2007. The City argued that it seized the vehicle while performing police services and police services are a governmental function, as to which it was immune from liability. The City further asserted that none of the exceptions to immunity set forth in R.C. 2744.02(B) applied. Therefore, it claimed, it was entitled to judgment as a matter of law.

{¶ 6} GMAC requested and was granted leave to file a brief in opposition to the City's motion for summary judgment on or before April 8, 2009, but it did not do so. It filed another motion for leave on April 28, 2009. However, the court denied the City's motion for summary judgment then denied the motion for leave as moot.

{¶ 7} The Ohio Supreme Court has held that an order denying a motion for summary judgment on sovereign immunity grounds is a final order under R.C. 2744.02(C), even if the denial is based on the existence of a genuine issue of material fact. *Hubbell v. Xenia*, 115 Ohio St.3d 77, 2007-Ohio-4839. The court in *Hubbell* determined that the appellate court should review the motion de novo and determine whether genuine issues of fact exist, or whether the case can be resolved solely on questions of law. Id., ¶ 21.

{¶ 8} R.C. Chapter 2744 establishes a three-tiered analysis for determining whether a political subdivision may be immune from liability. As a general rule, political subdivisions are immune from civil liability incurred in performing a governmental or proprietary function. R.C. 2744.02(A)(1). However, R.C. 2744.02(B) establishes five exceptions to this immunity. If any of these exceptions applies, then R.C. 2744.03 supplies additional defenses against liability.

{¶ 9} R.C. 2744.02(A)(1) provides that "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." The City is unquestionably a political subdivision entitled to immunity under R.C. 2744.02(A). See R.C. 2744.01(F) (defining political subdivision to include, e.g., municipal corporations).

{¶ 10} "Governmental functions" include, among other things, "[t]he provision or nonprovision of police * * * services or protection." R.C. 2744.01(C)(2)(a). Furthermore, police power to impound a vehicle constitutes a governmental function. *Pavlik v. Cleveland*, Cuyahoga App. No. 92176, 2009-Ohio-3073, ¶18; *Globe Am. Cas. Co. v. Cleveland* (1994), 99 Ohio App.3d 674, 678. The evidence attached to the City's motion here indicates that the vehicle was impounded by the police in conjunction with the arrest of the driver, and therefore was a governmental function.

{¶ 11} "This court has recognized that in limited circumstances police action that begins as a governmental function may transform into a proprietary function as the action progresses. *Bader v. Cleveland* (Feb. 18, 1982), Cuyahoga App. No. 44118." *Swanson v. Cleveland*, Cuyahoga App. No. 89490, 2008-Ohio-1254, ¶13. Thus, for example, in *Bader*, we held that the towing and impoundment of a vehicle was a governmental function of the police department, but the subsequent holding and storage of that vehicle at the police impound lot, after notice to the owners, could become a proprietary

function. We reasoned, "[a]t some time after each vehicle had been identified and its owner notified, police contact with that vehicle amount[s] to nothing more than storage."

{¶ 12} In this case, however, as in *Swanson*, the police disposed of the vehicle as unclaimed property pursuant to R.C. 4513.61. The police actions of seizing, impounding, and destroying the vehicle were strictly governmental functions. *Swanson*, at ¶15. Therefore, the City was immune from liability under R.C. 2744.02(A)(1).

{¶ 13} R.C. 2744.02(B) provides five exceptions to the general grant of immunity under subsection (A)(1). The first four of these exceptions[1] plainly have no application to the facts of this case. The fifth exception allows political subdivisions to be held liable where civil liability is expressly imposed by a section of the Revised Code. While R.C. 4513.61 imposes duties on the police to notify the owners of vehicles seized by the police and to give them the opportunity to reclaim the vehicles, this statutory duty is not the equivalent of statutory civil liability. See R.C. 2744.02(B)(5) ("[c]ivil 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

[1]Briefly, these are (1) negligent operation of a motor vehicle, (2) negligent performance with respect to a proprietary function, (3) negligent failure to keep public roads in repair, and (4) negligence within or on the grounds of, and due to physical defects within or on the grounds of, buildings used in connection with the performance of a governmental function.

a political subdivision"). Therefore, the exception to immunity under R.C. 2744.02(B)(5) does not apply.

{¶ 14} Because the City was immune under R.C. 2744.02(A)(1), and none of the exceptions to immunity under R.C. 2744.02(B) applies, we need not address the question whether any of the defenses set forth in R.C. 2744.03 applied. Construing the evidence presented by the City in the light most favorable to GMAC, there was no genuine issue of material fact and as a matter of law, the City was entitled to judgment. Therefore, the trial court erred by denying the City's motion for summary judgment. We reverse and remand with instructions to the trial court to enter judgment in the City's favor.

Reversed and remanded with instructions.

It is ordered that appellant recover from appellee 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.

KENNETH A. ROCCO, PRESIDING JUDGE

FRANK D. CELEBREZZE, JR., J., and
JAMES J. SWEENEY, J., CONCUR