[Cite as *Leslie v. Cleveland*, 2015-Ohio-1833.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 101771

PAUL LESLIE

PLAINTIFF-APPELLEE

vs.

CITY OF CLEVELAND, ET AL.

DEFENDANTS-APPELLANTS

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

Civil Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CV-13-810292

BEFORE: Celebrezze, A.J., Kilbane, J., and Laster Mays, J.

RELEASED AND JOURNALIZED: May 14, 2015

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FRANK D. CELEBREZZE, JR., A.J.:

{¶1} Defendant-appellant, city of Cleveland ("the City"), appeals the trial court's denial of its motion for summary judgment. After a careful review of the record and relevant case law, we affirm the trial court's ruling in part, reverse in part, and remand for further proceedings consistent with this opinion.

I. Procedural and Factual History

{¶2} On May 15, 2010, plaintiff-appellee Paul Leslie was driving down Wade Park Avenue between E. 82nd and E. 84th streets in the city of Cleveland when he hit a pothole, lost control of his car, and crashed into a wooden utility pole. Leslie filed suit against the City seeking damages for the significant injuries he sustained in the accident. Leslie's complaint contained two counts against the City: (1) negligent failure to maintain the road; and (2) malicious and intentional failure to repair the road.

{¶3} The City filed a motion for summary judgment on both counts and argued that it was immune from liability for Leslie's injuries pursuant to R.C. 2744.02(A)(1). Finding the existence of genuine issues of material fact, the trial court denied the City's motion. The City appealed contending, as its sole assignment of error, that the trial court erred by denying its motion for summary judgment. Specifically, the City argues that (1) the City is entitled to political subdivision immunity under R.C. 2744.02(A)(1); (2) that Leslie has not demonstrated that the City's immunity has been abrogated under R.C. 2744.02(B)(3) or 2744.02(B)(2); and (3) that the City is immune from liability for intentional torts.

{¶4} We affirm in part, reverse in part, and remand for further proceedings for the reasons listed below.

II. Standards of Review

A. Summary Judgment

{¶5} Pursuant to Civ.R 56©, summary judgment is appropriate when (1) no genuine issue of material fact exists; (2) the party moving for summary judgment is entitled to judgment as a matter of law; and (3) viewing the evidence most strongly in favor of the nonmoving party, reasonable minds can come to but one conclusion, and that conclusion is adverse to the nonmoving party.

{¶6} The burden of demonstrating that there is no genuine issue of material fact is on the moving party. *Dresher v. Burt*, 75 Ohio St.3d 280, 292-93, 662 N.E.2d 264 (1996). The movant must affirmatively establish that the nonmoving party's claims lack support by pointing to evidence in the form of pleadings, depositions, answers to interrogatories, written admissions, affidavits, etc. *Dresher* at 293; Civ.R 56©. Summary judgment will be granted unless the non-movant can set forth sufficient facts to establish a genuine issue of material fact for trial. *Dresher* at 293; Civ.R. 56(E).

{¶7} A trial court's grant of summary judgment is subject to de novo review by an appellate court. *Grafton v. Ohio Edison Co.*, 77 Ohio St.3d 102, 105, 1996-Ohio-336, 671 N.E.2d 241. Consequently, we must independently review the record to determine if summary judgment was appropriate, and need not defer to the trial court's decision.

B. Political Subdivision Immunity

{¶8} Chapter 2744 of the Ohio Revised Code, entitled Political Subdivision Tort Liability, provides a three-tiered scheme to determine whether a political entity is entitled to immunity from liability. First, R.C. 2744.01(A)(1) generally immunizes political subdivisions from civil liability for death or injuries that result from the exercise of governmental or proprietary functions. Thus, a court must determine whether the immunity-seeking entity is a political subdivision, and whether the alleged injuries followed from the exercise of a governmental or a proprietary function. Second, a court must determine whether the plaintiff has demonstrated that the political subdivision's immunity has been stripped pursuant to one of five statutorily enumerated exceptions under R.C. 2744.02(B). Finally, if an exception to immunity applies under R.C. 2744.02(B), a court must consider whether the political subdivision may claim a defense to liability under R.C. 2744.03.

{¶9} In the present case, both parties agree that the City possesses immunity pursuant to R.C. 2744.01(A)(1) because it is a political subdivision exercising governmental and proprietary functions. However, the City and Leslie disagree over whether the City's immunity has been abrogated by an exception under R.C. 2744.02(B).

III. Analysis

{¶10} In its sole assignment of error, the City contends that the trial court erred in denying its motion for summary judgment. First, the City argues that it cannot be held liable for negligent failure to repair the road because its immunity under R.C. 2744.01(A)(1) has not been abrogated by a statutory exception, specifically R.C.

2744.02(B)(3). Second, the City contends it is completely immune from civil liability for intentional torts. We consider each of these arguments in turn.

A. Applicability of R.C. 2744.02(B)(3)

{¶11} The City primarily contends that the trial court erred in denying summary judgment because the City's immunity has not been abrogated under R.C. 2744.02(B)(3), which provides that a political subdivision may be liable for "negligent failure to keep public roads in repair and other negligent failure to remove obstructions from public roads * * * ." We have interpreted R.C. 2744.02(B)(3) to contain two exceptions to sovereign immunity. *Todd v. Cleveland*, 8th Dist. Cuyahoga No. 98333, 2013-Ohio-101, ¶ 13-14. Upon giving effect to all of the words in the statute, the terms "in repair" and "obstruction" exist separately and provide two independent bases for abrogating immunity. *Todd* at ¶ 14, citing *Bonance v. Springfield Twp.*, 179 Ohio App.3d 736, 2008-Ohio-6364, 903 N.E.2d 683, ¶ 29 (7th Dist.), *Crabtree v. Cook*, 196 Ohio App.3d 546, 2011-Ohio-5612, ¶ 27 (10th Dist.).

{¶12} First, the City argues that the pothole in this case is not an obstruction under the meaning of R.C. 2744.02(B)(3). Specifically, the City directs our attention to *Howard v. Miami Twp. Fire Div.*, 119 Ohio St.3d 1, 2008-Ohio-2792, 891 N.E.2d 311. In that case, the Ohio Supreme Court held that an "obstruction" is an impediment that "blocks or clogs the roadway and not merely a thing or condition that hinders or impeded the use of the roadway or that may have the potential to do so." *Id.* at ¶ 30.

{¶13} The City contends that this pothole is not an "obstruction" under *Howard* because the record is devoid of evidence that the pothole completely blocked or clogged traffic on Wade Park Avenue. However, we need not decide whether this pothole was an obstruction because R.C. 2744.02(B)(3) contains another exception to immunity for negligent failure to keep public roads in repair.

{¶14} We note initially that R.C. 2744 fails to define "in repair." In *Todd*, when addressing the interpretation of "in repair" pursuant to R.C. 2744.02(B)(3), this court looked to the Ohio Supreme Court's interpretation of a similar provision in R.C. 305.12, a statute that authorizes suit against county boards for failure to keep roads "in proper repair." *Todd*, 2013-Ohio-101 at ¶ 15, citing *Heckert v. Patrick*, 15 Ohio St.3d 402, 406, 473 N.E.2d 1204 (1984). In *Heckert*, the Ohio Supreme Court held that the General Assembly intended to confer a duty on the county commissioners "only in matters concerning either the deterioration or disassembly of county roads and bridges." *Heckert* at 406. In light of *Heckert*, we found that "in repair" has been interpreted to include "fixing holes or crumbling pavement." *Todd* at ¶ 15, citing *Crabtree*, 196 Ohio App.3d 546, 2011-Ohio-5612, 964 N.E.2d 473, ¶ 27, citing *Bonace*, 179 Ohio App.3d 736, 2008-Ohio-6364, 903 N.E.2d 683, ¶ 29. Thus, cities have a duty to repair roads that have deteriorated into a potentially hazardous condition. If the City's "negligent failure to keep public roads in repair" resulted in the hazardous pothole that allegedly caused Leslie's injuries, the City could be liable under R.C. 2744.02(B)(3).

{¶15} Because we find that the City's immunity could be abrogated under R.C. 2744.02(B)(3), we must next address whether Leslie has set forth sufficient facts to create a genuine issue as to the City's negligence. Leslie contends that there was sufficient evidence to avoid summary judgment because he established that a large pothole formed on the road, that the pothole caused his accident, and that the City knew or should have known of the road's hazardous condition.

{¶16} A plaintiff alleging negligence must demonstrate the existence of a duty, a breach of that duty, proximate cause, and damages. *See, e.g., Menifee v. Ohio Welding Prods., Inc.*, 15 Ohio St.3d 75, 77, 472 N.E.2d 707 (1984). The burden of proof is on the plaintiff to establish by a preponderance of the evidence that the defendant failed to exercise the level of care that a reasonably prudent person would exercise under similar circumstances. *Republic Light & Furniture Co. v. Cincinnati*, 97 Ohio App. 532, 536-537, 127 N.E.2d 767 (1st Dist.1954). Where the standard of care is not common knowledge to the jury, the plaintiff also bears the burden of introducing evidence from which the jury may reasonably infer the appropriate standard of care in the situation. *Id.* at 532-533.

{¶17} "Where negligence revolves around the existence of a hazard or defect, a duty of reasonable care does not arise unless the defendant has notice, either actual or constructive, of such hazard or defect." *Davis v. Akron*, 9th Dist. Summit No. 19553, 2000 Ohio App. LEXIS 843, *4 (Mar. 8, 2000), citing *Heckert* at 405. *See also Gomez v. Cleveland*, 8th Dist. Cuyahoga No. 97179, 2012-Ohio-1642, ¶ 7 ("A municipality's

liability for damages for failing to perform the duty of alleviating faulty road conditions 'arises only upon proof that its agents or officers actively created the faulty condition, or that it was otherwise caused and the municipality has actual or constructive notice of its existence.'"), quoting *Cleveland v. Amato*, 123 Ohio St. 575, 176 N.E. 227 (1931).

{¶18} A party has constructive notice of a defect when it existed for such a period of time that it would have been discovered in the exercise of reasonable care. *Bello v. Cleveland*, 106 Ohio St. 94, 100, 139 N.E. 526 (1922). Moreover, to defeat summary judgment and show constructive notice, a party must point to evidence in the record

> indicating that (1) the unsafe condition existed in such a manner that it could or should have been discovered by the city, (2) the condition for such a length of time to have been discovered by the city, and (3) if it had been discovered, it would have created a reasonable apprehension of potential danger or an invasion of private rights.

Todd, 2013-Ohio-101 at ¶ 26, citing *Gomez*, 2012-Ohio-1642 at ¶ 7, quoting *Nanak v. Columbus*, 121 Ohio App.3d 83, 86, 698 N.E.2d 1061 (10th Dist. 1997), citing *Beebe v. Toledo*, 168 Ohio St. 203, 151 N.E.2d 738 (1958), paragraph two of the syllabus.

{¶19} Finally, Civ.R. 56© does not require the nonmoving party to prove his case; he need only point to evidence in the record demonstrating the existence of a genuine issue of material fact. *Todd*, 2013-Ohio-101 at ¶ 24.

{¶20} In *Todd*, the plaintiff hit a pothole, lost control of her automobile, and struck a utility pole. *Id.* at ¶ 1. She sued the city arguing that it had negligently failed to maintain the road. *Id.* This court found that a genuine issue of material fact existed as to whether the city had been placed on constructive notice about the potholes. *Id.* at

¶ 25. In holding that a factfinder would reasonably infer that someone from the city should have noticed the hazard, this court relied on photographs of the scene, the plaintiff's deposition testimony regarding the road conditions, the proximity of the hole to a city impound lot, and public records supplied by the city. *Id.* at ¶ 27-28.

{¶21} When viewing the evidence in the light most favorable to Leslie, we find that a genuine issue of material fact exists regarding whether the City had constructive notice of the hazardous condition posed by the pothole on Wade Park Avenue. Both parties submitted materials to support their respective positions. The City submitted affidavits on behalf of the City's divisions of streets, water, and water pollution control, which indicated that a search of their records revealed no complaints, maintenance, or repairs regarding potholes on Wade Park Avenue for approximately two years prior to Leslie's accident. The City also provided Leslie's deposition testimony, in which Leslie stated that he never personally complained to the City about potholes. However, although Leslie testified that he never observed a hole, he acknowledged the presence of a "wave" in the road and felt it as he traveled down the street.

{¶22} To counter the City's assertions, Leslie submitted crash site photographs and police measurements of the pothole, which was calculated to be four feet by seven feet. The photographs depict a large hole of varying depths occupying the majority of one lane of a deteriorating roadway. Leslie also provided a comprehensive investigation report completed by Henry Lipian, a certified accident reconstructionist. Lipian used the police measurements and other factors, such as Leslie's speed and the type of car, to conclude

that Leslie's impact with the pothole caused him to spin out and collide with the utility pole.

{¶23} Furthermore, Leslie submitted the deposition of an asphalt foreman, Keith Davis, who has been employed in the City's division of streets since 1984. Upon viewing the photographs, Davis testified that, in his experience, he believed an underground sewer or water line ruptured and caused the pavement to erode and sink.

{¶24} Finally, Leslie tendered an affidavit and an email from Tammy Pitsenbarger, a resident on Wade Park Avenue who lives near the pothole. Pitsenbarger complained about the pothole to the City via an email to the Mayor's Action Center on May 14, 2010, approximately one day before Leslie's accident. She expressed concern that the pothole could damage a motorist's car. In her affidavit, Pitsenbarger stated that she personally observed the pothole form in January 2010. Moreover, by March and April 2010, Pitsenbarger observed cars crossing into the opposing lane of traffic to avoid colliding with the large pothole. By May 2010, Pitsenbarger witnessed the pothole become so large and hazardous that the foundation of her home rattled when trucks and cars drove over the pothole.

{¶25} Based on the photographs, Leslie's testimony regarding the accident, the asphalt foreman's affidavit, the accident reconstruction report, police measurements, and the affidavit and email from a resident on Wade Park Avenue, we conclude that a factfinder could reasonably infer that the road was in such an unsafe condition that it should or could have been discovered by the City. A factfinder could reasonably

conclude that the hole was present for a sufficiently long time that it should have been discovered by the City because Leslie supplied evidence, in the form of the personal observations of Pitsenbarger, indicating that the pothole had developed and worsened for at least five months prior to Leslie's accident. Furthermore, Leslie demonstrates through Pitsenbarger's affidavit that both residents and motorists appreciated the hazardous road condition because they had to cross into the opposing lane to avoid colliding with the hole.

{¶26} Moreover, we are persuaded that there is a genuine issue of fact with regard to constructive notice in this case because of the City's stance with regard to the Pitsenbarger evidence. In the City's initial and reply briefs, the City infers that Pitsenbarger's account is unreliable by employing the phrases "purportedly" and "presumably" in connection with her email and affidavit. For example, the City argued in its reply brief, "Pitsenbarger's email was *presumably* sent at 2:40 on Friday, May 1, 2010 to the Mayor's Action Center * * *." (Emphasis sic.) That the City questions the validity of Pitsenbarger's account suggests the existence of a genuine factual dispute regarding whether the City possessed constructive notice of the pothole. Therefore, we hold that Leslie has demonstrated the existence of a genuine issue of material fact about whether the City possessed constructive notice of the hazardous road conditions on Wade Park Avenue prior to Leslie's accident. The trial court properly denied the City's motion for summary judgment with regard to Count 1 of the complaint, negligent failure to repair the road.

{¶27} Because we find that a genuine issue of fact exists with regard to notice under R.C. 2744.02(B)(3), we need not address the City's arguments regarding the exception to political subdivision immunity under R.C. 2744.02(B)(2). Furthermore, we need not address the applicability of any defenses to the City's liability under R.C. 2744.03 at this juncture because the City has offered no basis for the reinstatement of its immunity.

B. Immunity from Liability for Intentional Torts

{¶28} Leslie did not oppose the City's motion for summary judgment with regard to Count 2 of Leslie's complaint, wherein he alleged the City intentionally, maliciously, and recklessly caused his injury. Moreover, in the brief submitted for our consideration, Leslie conceded that the City had complete immunity from his intentional tort claim. Thus, the City's assignment of error with regard to Count 2 is sustained, and the trial court should have granted the City's motion for summary judgment with regard to Count 2.

{¶29} This cause is affirmed in part, reversed in part, and remanded to the lower court for further proceedings consistent with this opinion.

It is ordered that appellant and appellee share the 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.

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

FRANK D. CELEBREZZE, JR., ADMINISTRATIVE JUDGE

MARY EILEEN KILBANE, J., and
ANITA LASTER MAYS, J., CONCUR