[Cite as *Kerber v. Cuyahoga Hts.*, 2015-Ohio-2766.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 102419

ANTHONY W. KERBER, ADMINISTRATOR

PLAINTIFF-APPELLEE

vs.

VILLAGE OF CUYAHOGA HEIGHTS, ET AL.

DEFENDANTS-APPELLANTS

JUDGMENT:
AFFIRMED AND REMANDED

Civil Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CV-13-807588

BEFORE: Jones, P.J., E.T. Gallagher, J., and Blackmon, J.

RELEASED AND JOURNALIZED: July 9, 2015

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LARRY A. JONES, SR., P.J.:

{¶1} Defendants-appellants, the Cuyahoga Heights Board of Education, Cynthia Lusk, and Courtney Stock, appeal from the trial court's December 1, 2014 judgment denying their motion for summary judgment. We affirm and remand for further proceedings.

I. Procedural History

{¶2} On March 10, 2012, Daniel Papcke died as a result of injuries he sustained on March 7, 2012, in a "near-drowning" incident at the Cuyahoga Heights High School pool, which is operated by the board of education. In May 2013, Anthony W. Kerber, as administrator of the estate of Daniel Papcke, initiated this action against the board of education, Lusk, Stock, and the village of Cuyahoga Heights. In August 2013, appellee dismissed the Village without prejudice.

{¶3} After engaging in discovery, the appellants filed a motion for summary judgment based on political subdivision immunity, which appellee opposed. The trial court denied appellants' motion, finding that there was a genuine issue of material fact regarding whether Papcke's death was caused by the "negligence of the lifeguards and [was] due to physical defects within the pool grounds." The court further found that there was a genuine issue of material fact regarding whether "pool manager Cynthia Lusk was reckless."

II. Facts

{¶4} On March 7, 2012, Papcke was swimming laps in the indoor swimming pool at the high school. Two board employees, Lusk and Stock, were the lifeguards on duty. Lusk was also the pool manager. Stock was a high school student.

{¶5} The record demonstrates that the pool was unusually crowded that evening, because there was a boy scout troop of approximately 15 to 20 who were getting their "in-water badges." Generally, the pool would have one manager on duty and one lifeguard on duty, but because of the number of people that night, Lusk also guarded. Stock described the boys from the troop as "everywhere," "loud," and "kind of rowdy."

{¶6} Stock's guarding zone was from the shallow end of the pool up to the rope separating the medium depth from the deep end of the pool. Lusk's guarding zone was on the other side of the rope, which covered the medium depth to the deep end of the pool. There were two life guard chairs: a high one, which had not been used in years, and a short one, which Stock was using on the evening in question. The short chair was positioned in front of the shallow end of the pool.

{¶7} Lusk testified that the lifeguards did not use the higher lifeguard chair because it is easier to see the pool from the lower one. The higher chair had been used years ago when there was a high diving board. But since the high diving board had been removed, the high chair was no longer used.

{¶8} Lusk also testified that she attempted, unsuccessfully, to reach another lifeguard to come in so that she and Stock would be able to take a break. Lusk testified

that generally there would be three or more guards if there was a pool party or private rental.

{¶9} Lusk further testified that it is not safe for a lifeguard to talk to a patron more than five minutes, and even then, the guard should only be talking about swimming safety. Video surveillance from the pool showed Lusk engaged in an approximate 13-minute conversation with a patron. Lusk testified that she could not remember what the conversation was about.

{¶10} Lusk was life guarding from a bench located several feet away from the pool side; the bench was not an official lifeguard station. She had been at that location for nearly the half hour leading up to Papcke being noticed in distress. Lusk testified that she did not know where Papcke was at any time prior to the incident. Even when Stock got up to go into the water, Lusk did not know where Papcke was.

{¶11} The record establishes that, pursuant to established life-guarding protocol, a lifeguard must be able to see a swimmer, recognize that he is potentially in danger, and be able to act within seconds. Further, although a lifeguard may have a particular zone upon which her efforts are concentrated, she is also responsible for the entire pool.

{¶12} On the evening of the incident, Stock was alerted to Papcke by a father of one of the boy scouts. Stock testified that she had to get up out of her chair to see Papcke, who was face down in the water. She did not take the rescue mask with her when she left the deck chair, and had to go back across the pool to get it. She could not disagree that it took her "a couple of minutes" to extract Papcke from the pool. He was

already blue when she got to him. Lusk and Stock began administering CPR, but Lusk left to get the Automated External Defibrillator ("AED") equipment while Stock and a patron of the pool, who was a nurse, continued with CPR. The AED equipment was "no shock," so CPR was continued until the paramedics arrived. Papcke was transported to the hospital, where he passed away three days later.

{¶13} The deputy medical examiner who examined Papcke's body and reviewed the hospital records concluded that Papcke had died because of "multisystem organ failure due to near drowning." According to the medical examiner's review of the records, Papcke had been underwater for three to five minutes.

III. Law and Analysis

{¶14} Appellants' sole assignment of error reads: "The trial court erred in denying Defendants/Appellants' Motion for Summary Judgment on the grounds that Defendants/Appellants were not entitled to immunity pursuant to R.C. 2744."

Standard of Review

{¶15} We review an appeal from summary judgment under a de novo standard of review. *Grafton v. Ohio Edison Co.*, 77 Ohio St.3d 102, 105, 671 N.E.2d 241 (1996); *Zemcik v. LaPine Truck Sales & Equip. Co.*, 124 Ohio App.3d 581, 585, 706 N.E.2d 860 (8th Dist.1998).

{¶16} Pursuant to Civ.R. 56, summary judgment is appropriate when (1) there is no genuine issue of material fact, (2) the moving party is entitled to judgment as a matter of law, and (3) reasonable minds can come to but one conclusion and that conclusion is

adverse to the nonmoving party, said party being entitled to have the evidence construed most strongly in his favor. *Horton v. Harwick Chem. Corp.*, 73 Ohio St.3d 679, 653 N.E.2d 1196 (1995), paragraph three of the syllabus. The party moving for summary judgment bears the burden of showing that there is no genuine issue of material fact and that it is entitled to judgment as a matter of law. *Dresher v. Burt*, 75 Ohio St.3d 280, 292-293, 662 N.E.2d 264 (1996).

{¶17} Once the moving party satisfies its burden, the nonmoving party

> may not rest upon the mere allegations or denials of the party's pleadings, but the party's response, by affidavit or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial.

Civ.R. 56(E); *Mootispaw v. Eckstein*, 76 Ohio St.3d 383, 385, 667 N.E.2d 1197 (1996). Doubts must be resolved in favor of the nonmoving party. *Murphy v. Reynoldsburg*, 65 Ohio St.3d 356, 358-359, 604 N.E.2d 138 (1992).

Political Subdivision Immunity

{¶18} The process to determine whether a political subdivision entity is entitled to immunity involves a three-tiered analysis as set forth in *Colbert v. Cleveland*, 99 Ohio St.3d 215, 2003-Ohio-3319, 790 N.E.2d 781.

> The first tier is the general rule that a political subdivision is immune from liability incurred in performing either a governmental function or proprietary function. [*Greene Cty. Agricultural Soc. v. Liming*, 89 Ohio St.3d 551, 556-557, 2000-Ohio-486, 733 N.E.2d 1141]; R.C. 2744.02(A)(1). However, that immunity is not absolute. R.C. 2744.02(B); *Cater v. Cleveland*, 83 Ohio St.3d 24, 28, 1998-Ohio-421, 697 N.E.2d 610.
>
> The second tier of the analysis requires a court to determine whether any of the five exceptions to immunity listed in R.C. 2744.02(B) apply to expose

the political subdivision to liability. *Id.* at 28, 697 N.E.2d 610. * * *

> If any of the exceptions to immunity in R.C. 2744.02(B) do apply and no defense to 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.

Id. at ¶ 7-9.

{¶19} The main issue in this appeal as it relates to the board of education is whether, under the second tier, any exceptions to immunity apply. Those exceptions are found in R.C. 2744.02(B) and the relevant one to this appeal is contained as follows in subsection (4):

> (4) * * * political subdivisions are liable for injury, death, or loss to person or property that is caused by the negligence of their employees and that occurs within or on the grounds of, and is due to physical defects within or on the grounds of, buildings that are used in connection with the performance of a governmental function, including, but not limited to, office buildings and courthouses, but not including jails, places of juvenile detention, workhouses, or any other detention facility, as defined in section 2921.01 of the Revised Code.

{¶20} Thus, in order for the "physical defect" exception to the Board's general immunity to apply, appellee must demonstrate that (1) Papcke's death was caused by the negligence of one or more of the Board's employees; (2) the negligence occurred within a building used in connection with a governmental function; and (3) the death was due, in part, to a physical defect within the building. We find that appellee has, at least, created a genuine issue of fact, as to each of these elements, as discussed below.

Negligence of Stock and/or Lusk

{¶21} In regard to Stock, the following creates a genuine issue of material fact upon which a jury could find negligence. She did not know how long Papcke had been in the

water, how long he had been swimming, or how many laps he had swam. Further, she never saw him in distress and was only alerted to him by a bystander. She therefore did not know how long he had been facedown in the water or how long he had been unconscious.

{¶22} The following creates a genuine issue of material fact in regard to Lusk. She did not know where Papcke had been for at least 15 minutes leading up to him being distressed, she only learned of his distress when she saw Stock enter the pool, and in the time leading up to Papcke's distress, she was engaged in a prolonged conversation on a bench away from the edge of the pool.

Negligence Occurred within Building Used in Connection with Governmental Function

{¶23} The Ohio Supreme Court has held that "[i]t is clear that the operation of a pool is a government function[,]" and in the case of an injury at a city's indoor swimming pool, that "it is equally clear that the injury 'occur[ed] within or on the grounds of a building that was used in connection with the performance of a governmental function.'" *M.H. v. Cuyahoga Falls*, 134 Ohio St.3d 65, 2012-Ohio-5336, 979 N.E.2d 1261, ¶ 11, quoting R.C. 2744.02(B)(4).

The Physical Defect of the Deck Chair

{¶24} At the time of the incident, Stock had been life guarding while sitting in a short, low deck chair, which was positioned at the pool's edge. When questioned at deposition about how Papcke looked when she first became aware that there potentially was a problem, Short testified that "[f]rom that position I didn't — I couldn't really tell."

In other words, Short could not see Papcke until she got out of the chair.

{¶25} In opposition to the board's summary judgment motion, appellee submitted the affidavit and expert report of Kim W. Tyson, an aquatic safety consultant. Tyson opined, among other things, that the

> placement and usage of the low profile chair to provide patron surveillance of the entire pool and bottom was ineffective and reduced the line of sight and observation ability of the on duty lifeguards and directly contribute[d] [to] the delay in the recognition and detection of the lifeguards while Daniel Papcke was progressing through a drowning event and also delayed them from rapidly initiating a[n] effective and rapid water rescue response and lifesaving care and management of his life threatening emergency.

{¶26} On this record, we find that there is a genuine issue of material fact as to whether the use of the low deck lifeguard chair created a physical defect at the pool grounds.

{¶27} Further, under the third tier of the political subdivision immunity test, we do not find that any of the defense of R.C. 2744.03(A) apply. The board contends that the exceptions under subsections (3) and (5) are applicable. Those subsections provide as follows:

> (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:
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> * * *
>
> (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.

* * *

> (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.

{¶28} Subsection (3) requires the employees to have engaged in policy-level judgments. The record here, however, establishes that Lusk and Stock were executing policies that were already in place. The Third Appellate District has addressed R.C. 2744.03(A)(3) in the life-guarding context, and has held that it is inapplicable. *Thompson v. Bagley*, 3d Dist. Palding No. 11-04-12, 2005-Ohio-1921, ¶ 47 (The lifeguard's "supervision of [the victim] did not involve any 'policy-making, planning, or enforcement powers by virtue of the duties and responsibilities' of his position.") We agree with the Third District.

{¶29} In regard to subsection (5), it is not applicable if the judgment or discretion was exercised in a wanton or reckless manner. As will be discussed below, we find that a genuine issue of material fact exists as to whether Lusk was reckless.

Defendant Lusk: Recklessness[1]

{¶30} Appellee brought this action against Lusk and Stock individually. Generally,

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[1]The trial court's judgment entry is silent as to the individual liability of Stock. Although our review is de novo, the issue should first be considered by the trial court. Therefore, on remand, we instruct the trial court to consider Stock's individual liability.

immunity is extended to claims against individual employees of political subdivisions. Under R.C. 2744.03(A)(6), an employee of a political subdivision is immune from liability unless: (1) the employee's acts or omissions are manifestly outside the scope of the employee's employment or official responsibilities; (2) the employee's acts or omissions were malicious, in bad faith, or wanton or reckless; or (3) liability is expressly imposed on the employee by a section of the Revised Code.

{¶31} Generally, whether an employee acted with malicious purpose, in bad faith, or in a wanton or reckless manner are questions of fact. *Long v. Hanging Rock*, 4th Dist. Lawrence No. 09CA30, 2011-Ohio 5137, ¶17. Upon review, we find that a genuine issue of material fact exists as to whether Lusk was reckless in regard to this incident. There is evidence in this case upon which a jury could determine that Lusk was more than merely negligent. The trial court, therefore, properly denied the motion for summary judgment as it related to Lusk individually.

IV. Conclusion

{¶32} Judgment affirmed; case remanded. On remand, the trial court shall address the claim against Stock in her individual capacity and conduct further proceedings consistent with this opinion.

It is ordered that appellee recover of appellants 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 Cuyahoga County Court of Common Pleas 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, SR., PRESIDING JUDGE

EILEEN T. GALLAGHER, J., and
PATRICIA ANN BLACKMON, J., CONCUR