[Cite as *Stovicek v. Parma*, 2015-Ohio-5147.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 102699

MARY LOU STOVICEK

PLAINTIFF-APPELLEE/
CROSS-APPELLANT

vs.

CITY OF PARMA, ET AL.

DEFENDANTS-APPELLANTS/
CROSS-APPELLEES

JUDGMENT:
AFFIRMED IN PART; REVERSED
IN PART AND REMANDED

Civil Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CV-13-815968

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

RELEASED AND JOURNALIZED: December 10, 2015

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PATRICIA ANN BLACKMON, J.:

{¶1} Appellants/cross-appellees, the city of Parma ("Parma") and Parma's Building Commissioner Paul Deichmann ("Deichmann"), appeal the trial court's judgment that denied Parma's motion for summary judgment based on sovereign immunity. Parma assigns five errors for our review. Appellee/cross-appellant Mary Lou Stovicek ("Stovicek") cross-appeals and assigns one error for our review.[1]

{¶2} Having reviewed the record and relevant law, we reverse the trial court's decision that denied Parma immunity and affirm the trial court's decision that granted summary judgment in favor of Deichmann. The apposite facts follow.

{¶3} In 1990, Stovicek purchased her home located at 1605 Fatima Drive in Parma, Ohio. The house was newly constructed. It is situated at the top of a hillside that abuts a ravine. Due to the grade of the property, the original plan of the house included a walk-out basement. Instead, the builder filled in the backyard, and a regular enclosed basement was built with no exposed wall. The fill began to slip within a year of construction.

{¶4} In 1992, the builder attempted to curb further erosion by constructing a culvert at the bottom of the hillside that drained storm water away from the property into the existing ravine. The drain pipes making up the culvert are cement sections of approximately 42 inches in diameter, running end to end for about 800 feet. Other than typical inspections and permits, Parma had no involvement in the design and installation of the home, backyard, or the culvert. Because the erosion continued in spite of the culvert, the builder further extended the culvert in 1997.

{¶5} In January 2012, a large section of Stovicek's backyard fell into the ravine. Due to the extensive erosion on her property, on October 23, 2013, Stovicek filed a complaint against Parma and the city's building commissioner, Paul Deichmann.[2] In her complaint, Stovicek alleged that large gaps between the pipe joints caused water to escape the pipes. According to Stovicek, the water leaking out of the pipes has caused erosion under her backyard. Thus, Stovicek claimed that Parma's negligent maintenance of the culvert caused the erosion. As to Deichmann, Stovicek alleged he improperly ordered her out of her house after concluding her home was unsafe to live in without first conducting a hearing.

{¶6} Parma filed a motion for summary judgment arguing it was immune from liability pursuant to R.C. Chapter 2744 because the culvert is not part of Parma's sewer system. Parma further argued that even if the culvert was part of Parma's sewer system, Parma was not negligent in its maintenance. Parma's expert stated that the cause of the erosion was not the gaps between the pipes, but the inadequate back fill and lack of compaction of the soil by the original builder in constructing the culvert.

{¶7} Stovicek filed a brief in opposition claiming that the property behind her backyard was dedicated to Parma in 1989; therefore, Parma had a duty to maintain the culvert. She also presented a memorandum, dated May 2, 1991, from the then assistant city engineer to the city engineer. The assistant engineer investigated the area in question with an employee from the Soil Conservation Service, Jim Storer. This was most likely in response to the builder's first request for permission to build the initial part of the culvert. In the memorandum, the assistant engineer listed comments made by Storer, and one of the comments was that if a culvert was

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[1] *See* appendix for list of assigned errors and cross-appeal error.

built, it would be Parma's duty to maintain it. Stovicek also attached to the motion excerpts from her expert's deposition and expert report, in which he opined that the gap between the pipe joints contributed to the erosion around the culvert.

{¶8} The trial court denied Parma's motion for summary judgment, stating in relevant part:

> Defendant's motion for summary judgment as to Count One of the plaintiff's complaint is denied. Genuine issues of fact exist whether the culvert in question is part of defendant's "sewer system" and as to the City's responsibility for maintaining it. A genuine issue of fact exists whether the City negligently failed to maintain the culvert. Under R.C. 2744.01(G)(2)(d), maintenance of a sewer system is a "proprietary function" for which the City would not be entitled to immunity based on negligence pursuant to R.C. 2744.02. Finally, genuine issues of fact also exist whether failure to maintain the culvert contributed to erosion and slippage on plaintiff's property and whether she has been damaged thereby.
>
> Defendant's motion for summary judgment as to Count Two of plaintiff's complaint is granted. Plaintiff alleged that the City's condemnation of her property (an action later rescinded based on her expert witness testimony) and that required her to leave her home for a period of approximately six weeks, amounted to a violation of her due process rights guaranteed under the 14th Amendment of the United States Constitution. This claim fails as a matter of law. *See Parrat v. Taylor*, 451 U.S. 527, 540-41, 101 S.Ct. 1908 (1981) (overruled on other grounds by *Daniels v. Williams*, 474 U.S. 327 (1986); and *Zakaib v. City of Cleveland*, 8th Dist. Cuyahoga No. 77402, 2001 Ohio APP. Lexis 1779 (Apr. 19, 2001), ¶ 18.

Journal Entry, February 13, 2015. The trial court included the language "no just reason for delay" in the journal entry.

Sovereign Immunity

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[2]The original builder of the home, Hyman Builders, is no longer in business.

{¶9} In its first assigned error, Parma argues that the trial court erred by denying summary judgment because sovereign immunity applied to protect it from Stovicek's lawsuit. Although a denial of a motion for summary judgment is not usually a final, appealable order, an order denying summary judgment based on a political subdivision's immunity defense is final and may be appealed. R.C. 2744.02(C); *Hubbell v. Xenia*, 115 Ohio St.3d 77, 2007-Ohio-4839, 873 N.E.2d 878.

{¶10} Under Civ.R. 56, summary judgment is appropriate when: (1) no genuine issue as to any 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 reach only one conclusion that is adverse to the nonmoving party. We conclude Parma was entitled to summary judgment as a matter of law.

{¶11} The General Assembly enacted R.C. Chapter 2744, Ohio's Political Subdivision Tort Liability Act, to reinstate the judicially abrogated common-law immunity of political subdivisions. *Riffle v. Physicians & Surgeons Ambulance Serv., Inc.*, 135 Ohio St.3d 357, 2013-Ohio-989, 986 N.E.2d 983, ¶ 14-15. R.C. Chapter 2744 establishes a three-step analysis for determining whether a political subdivision is immune from liability. *Cramer v. Auglaize Acres*, 113 Ohio St.3d 266, 2007-Ohio-1946, 865 N.E.2d 9, ¶ 14.

{¶12} First, R.C. 2744.02(A)(1) sets forth the general rule that a political subdivision is immune from tort liability for acts and omissions connected with governmental or proprietary functions. *Cramer*; *Colbert v. Cleveland*, 99 Ohio St.3d 215, 2003-Ohio-3319, 790 N.E.2d 781, ¶ 7. The statute states:

> Except as provided in division (B) of this section, 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 a political subdivision in connection with a governmental or proprietary function.

{¶13} Second, R.C. 2744.02(B) lists five exceptions to the general immunity granted to political subdivisions under R.C. 2744.02(A)(1). *Cramer*; *Ryll v. Columbus Fireworks Display Co.*, 95 Ohio St.3d 467, 470, 769 N.E.2d 372 (2002). One exception to immunity is the political subdivision's "maintenance, destruction, operation, and upkeep of a sewer system," which is identified as a proprietary function. R.C. 2744.01(G)(2)(d). R.C. 2744.02(B)(2) provides that political subdivisions are liable for injury, death, or property loss caused by the subdivision's employees' "negligent performance with respect to proprietary functions." *Coleman v. Portage*, 133 Ohio St.3d 28, 2012-Ohio-3881, 975 N.E.2d 952, ¶ 15.

{¶14} Finally, R.C. 2744.03(A) sets forth several defenses that a political subdivision may assert if R.C. 2744.02(B) imposes liability. However, a court does not need to engage in an analysis regarding available defenses provided in R.C. 2744.03 if no exception under R.C. 2744.02(B) can be found to remove the general grant of immunity. *Nelson v. Cleveland*, 8th Dist. Cuyahoga No. 98548, 2013-Ohio-493, ¶ 14, citing *O'Toole v. Denihan*, 118 Ohio St.3d 374, 2008-Ohio-2574, 889 N.E.2d 505, ¶ 71.

{¶15} In the instant case, it is undisputed that Parma qualifies as a "political subdivision" under R.C. 2744.01(F). It is also undisputed that pursuant to R.C. 2744.01(G)(2)(d) because the upkeep of a sewer is a proprietary function, Parma would be liable for negligent maintenance of its sewer system.

{¶16} Parma argues that the culvert is not part of its "sewer system"; therefore, Parma is immune and cannot be held liable for the negligent maintenance of the culvert. It is undisputed that Parma did not install the pipes nor did Parma instruct that the pipes be installed. The decision to install the pipes and the actual installation was done by the builder of the home in

order to prevent further erosion. It is also undisputed that the culvert is not connected to the storm lines of Parma. The culvert was constructed by the builder to address the erosion problems of several property owners on Fatima Drive. The culvert drains the storm water from those properties into the existing ravine.

{¶17} This court in *Fink v. Twentieth Century Homes, Inc.*, 8th Dist. Cuyahoga No. 99550, 2013-Ohio-4916, addressed a similar situation. In *Fink*, like in the instant case, the parties had a draining system to drain excess water from their property. This court concluded that because no evidence was presented that the area was part of Brecksville's sewer system, its maintenance and operation did "not amount to a propriety function under R.C. 2744.01(G)(2)(c) or (d)." *Id.* at ¶ 27. *See also Guenther v. Springfield Twp.*, 2d Dist. Clark No. 2010-CA-114, 2012-Ohio-203 (because drain tiles and ditch were not part of the sewer system, the city was immune from negligent maintenance.)

{¶18} Stovicek argues that the instant case is distinguishable from the *Fink* decision because in the instant case, the property behind her home was publicly dedicated to Parma in 1989 prior to the construction of her home.[3] However, in *Fink*, the plaintiffs did argue that because the property was dedicated, Brecksville was obligated to maintain the property. This court held as follows:

> Finally, with regard to the Finks' claims of public dedication of the storm-water drainage system and storm-water easement that traverses the ravine, a city or county has no duty to maintain a drainage system on private property if there is no indication that the system was ever used for public purposes. *Guenther*,

[3]Attached to Stovicek's brief in opposition to Parma's motion for summary judgment is a copy of the plat showing that Hyman Builders dedicated the property to Parma. Stovicek alleged that Parma accepted the dedication by passing ordinance number 324-89 on October 16, 1989. The ordinance does not appear in the record, but Parma does not dispute that it accepted the dedication in its motion for summary judgment.

2012-Ohio-203, 970 N.E.2d 1058 (2d Dist.), citing *Beauchamp v. Hamilton Twp. Trustees*, 10th Dist. Franklin No. 93APE09-1331, 1994 Ohio App. LEXIS 1877 (May 5, 1994).

{¶19} *Fink* explained that because the storm sewer and drainage ditch only benefitted a small number of residents and was only for the purpose of draining excess water from the adjoining properties and not part of a larger sewer disposal system, the dedication did not obligate Brecksville to maintain the drainage system. Also, there was no evidence that Brecksville ever undertook the maintenance or repair of the area in question.

{¶20} Likewise, in the instant case, in spite of the dedication, the culvert only benefits a few property owners in the vicinity of Stovicek's property and was not part of a larger sewer system. Both Deichmann and Parma's retained expert submitted affidavits stating that the culvert was installed by the development builder to benefit a few homes that were experiencing severe erosion. There was also no evidence that Parma ever undertook the maintenance or repair of the culvert.

{¶21} Stovicek presented a memorandum from May 1991 from the assistant city engineer to the city engineer regarding comments made by an employee from the Soil Conservation Service, Jim Storer. One of the comments was that if a culvert was built, it would be Parma's duty to maintain it. However, a misstatement of the law by a person who is not within Parma's employ does not create a duty by Parma to maintain the culvert. According to *Fink*, the city has no duty to maintain the culvert even if it is on dedicated property.

{¶22} Stovicek also contends that there were plans by Parma to connect the culvert to Parma's sewer system. However, as of the date the suit was filed, it was not connected. Therefore, the fact there were future plans to connect the culvert, does not create a present duty to maintain the culvert, which currently only benefits a few of the property owners. Moreover,

although Stovicek contends that according to the Northeast Ohio Regional Sewer District, the culvert was part of Parma's regional sewer system, evidence in the record demonstrates otherwise. A review of the affidavit by Kellie C. Rotunno, the Director of Engineering and Construction of the Northeast Ohio Regional Sewer District shows she did not state this. Instead, Rotunno stated that the sewer district does not hold any agreements with Parma that would give the sewer district access to the culvert. Although she called the culvert a "storm sewer," she gave no opinion as to whether Parma was obligated to maintain the culvert or whether it was connected to the sewer system.

{¶23} Accordingly, we conclude the trial court erred. Parma was entitled to summary judgment as a matter of law. Parma's first assigned error is sustained. Given our disposition of Parma's first assigned error, its remaining assigned errors are moot and need not be addressed. App.R. 16(A)(1)(c).

Cross-Appeal

{¶24} In her cross-appeal, Stovicek argues the trial court erred by granting summary judgment in favor of Building Commissioner Deichmann, regarding Stovicek's 42 U.S.C. 1983 action.

{¶25} At the outset, we address Parma's argument that Stovicek's cross-appeal should be dismissed. Parma contends that Stovicek's cross-appeal is unrelated to the sovereign immunity argument that Parma raised in its direct appeal. The cross-appeal is related to the trial court's granting of summary judgment in favor of Deichmann. However, there is no requirement that the cross-appeal be related to the argument asserted by the appellant on direct appeal. The cross-appeal must only be related to the "judgment or order" appealed by the appellant. *See* App.R. 3(C)(1). In the instant case, the trial court in its order, denied summary judgment as to

sovereign immunity and granted summary judgment as to Stovicek's claim against Deichmann. *See Short v. Res. Title Agency, Inc.*, 8th Dist. Cuyahoga No. 10006, 2014-Ohio-830 ("appellee's cross- assignments actually constitute arguments that are raised in a cross-appeal because they assert errors at trial beyond those raised in the direct appeal.") Therefore, Parma's motion to dismiss the cross-appeal is denied.

{¶26} Stovicek argues that the trial court erred by granting summary judgment in favor of Deichmann. She argues that his ordering her to vacate her home, without first conducting a hearing, violated her right to due process. Six weeks after she vacated the home, Parma conducted a hearing where an expert retained by Stovicek testified that the home was safe to inhabit. Parma, thereafter, permitted Stovicek to return to her home.

{¶27} The trial court granted summary judgment in Deichmann's favor, relying on *Parrat v. Taylor*, 451 U.S. 527, 101 S.Ct. 1908, 68 L.Ed.2d 420 (1981) (reversed on other grounds) and *Zakaib v. Cleveland*, 8th Dist. Cuyahoga No. 77402, 201 Ohio App. LEXIS 1779 (Apr. 19, 2001). In these cases, the courts rejected a procedural due process challenge based on the failure to hold a hearing prior to the deprivation of property.

{¶28} Deichmann, as a government official, possesses qualified immunity. Public officials who perform discretionary functions are entitled to be shielded from liability for civil damages in a 1983 action as long as their conduct does not violate clearly established federal rights of which a reasonable person would have known. *Harlow v. Fitzgerald*, 457 U.S. 800, 818, 102 S.Ct. 2727, 73 L.Ed.2d 396 (1982).

{¶29} Once the government official has presented facts that suggest he was performing a discretionary function during the alleged incident, the plaintiff bears the burden of presenting evidence to meet a two-part test. The plaintiff must show: (1) the violation of a constitutional

right, and (2) that the right at issue was "clearly established" at the time of the official's misconduct, such that a reasonable official acting with the same knowledge would understand that his actions violate that right. *Cook v. Cincinnati*, 103 Ohio App.3d 80, 85, 658 N.E.2d 814 (1st Dist.1995).

{¶30} It is undisputed that Deichmann was acting within the scope of his discretionary authority as the building commissioner when he ordered Stovicek to vacate her home. However, according to case law, Deichmann did not violate Stovicek's due process rights by doing so without first conducting a hearing.

{¶31} In *Parrat*, 451 U.S. 527, 101 S.Ct. 1908, 68 L.Ed.2d 420, the United States Supreme Court held that postdeprivation remedies can satisfy the Due Process Clause. The court explained:

> These cases [cases where quick action is necessary because of a public interest] recognize that either the necessity of quick action by the State or the impracticality of providing any meaningful predeprivation process, when coupled with the availability of some meaningful means by which to assess the propriety of the State's action at some time after the initial taking, can satisfy the requirements of procedural due process.

Id. at 539.

{¶32} In *Zakaib*, 8th Dist. Cuyahoga No. 77402, 201 Ohio App. LEXIS 1779, this court addressed a situation where a person's property was condemned prior to a hearing being conducted. The city found the home to be in unsafe condition because of housing code violations. This court concluded that the immediate condemnation of the property did not violate Zakaib's right to due process because the unsafe premises warranted the immediate evacuation and closure of the home.

{¶33} In the instant case, according to the record, exigent circumstances existed. In Deichmann's letter to Stovicek, he advised her that he inspected the property with the assistant

building commissioner, assistant engineer, and two building inspectors. He listed the following concerns: (1) a significant portion of her yard had fallen away and cracks had developed in the remaining yard and under the deck; (2) some of the deck posts were cracking and one of the posts was displaced with its footing leaning toward the top of the slope; (3) a vertical crack in the rear foundation wall indicates a structural failure due to the foundation; and (4) a vertical crack up to 3/4 inches in width on the rear corner of the house is horizontally displaced towards the top of the slope. Photos of the back of her home show it is only a couple of feet from the top of the slope.

{¶34} Under these circumstances, we cannot conclude that Deichmann violated Stovicek's due process rights by ordering her to temporarily vacate the premises for her own safety. Although Deichmann ended up being wrong regarding the safety of the property, it was not unreasonable for him to require Stovicek to vacate the premises until its safety could be determined. Accordingly, because exigent circumstances supported Deichmann's order for Stovicek to temporarily vacate the premises, the trial court did not err by granting summary judgment in Deichmann's favor. Stovicek's assigned error is overruled.

{¶35} Judgment affirmed in part; reversed in part and remanded for the trial court to enter judgment in Parma's favor.

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 the Cuyahoga County 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.

PATRICIA ANN BLACKMON, JUDGE

LARRY A. JONES, SR., P.J., and
MELODY J. STEWART, J., CONCUR

APPENDIX

Assignments of Error

I. The trial court erred in denying appellant's motion for summary judgment pursuant to statutory immunity afforded it by Ohio Revised Code Chapter 2744.

II. The trial court erred in denying appellant's motion for summary judgment in that plaintiff cannot determine that the culvert caused erosion of plaintiff's yard.

III. The trial court erred in denying appellant's motion for summary judgment in that appellee's complaint fails because it has been filed outside the applicable statute of limitations.

IV. The trial court erred by denying appellant's motion to strike appellee's exhibits 1, 3, 5, 7, and 8 from plaintiff's brief in opposition to defendant's motion for summary judgment and from the record of this case in accordance to Ohio Civil Rule 56(C).

V. The trial court erred by denying appellant's motion to exclude expert testimony and/or statements of Mark Recktenwald in that said statements and opinions are not reliable under Evidence Rule 702(C).

Cross-appeal

I. The trial court erred in granting Paul Deichmann's motion for summary judgment.