[Cite as *Shumaker v. Park Lane Manor of Akron*, 2011-Ohio-1052.]

STATE OF OHIO	)	IN THE COURT OF APPEALS
	)ss:	NINTH JUDICIAL DISTRICT
COUNTY OF SUMMIT	)	

DEBRA SHUMAKER Appellant v. PARK LANE MANOR OF AKRON, INC. et al. Appellees	C. A. No. 25212 APPEAL FROM JUDGMENT ENTERED IN THE COURT OF COMMON PLEAS COUNTY OF SUMMIT, OHIO CASE No. CV 2009-04-3060

DECISION AND JOURNAL ENTRY

Dated: March 9, 2011

Per Curiam.

INTRODUCTION

{¶1} As Debra Shumaker was walking through a half-inch of water that was flowing across a road at Park Lane Manor, she slipped and fell on ice that had formed beneath the water. She sued the apartment complex and the City of Akron, which had been hired to repair the broken private water main that was the source of the water. The trial court granted summary judgment to the City because it determined the City did not owe a duty to Ms. Shumaker and was entitled to political subdivision immunity. It granted summary judgment to Park Lane because it concluded that the condition was open and obvious. This Court affirms because Park Lane did not owe Ms. Shumaker the same duties as its tenants, the condition was open and obvious, and because the City has political subdivision immunity under Chapter 2744 of the Ohio Revised Code.

BACKGROUND

{¶2} According to Ms. Shumaker, her son lives in an apartment at Park Lane Manor with his wife and children. She visits them several times a week. On Friday, December 16, 2005, a water main broke near her son's building. The water rose to the surface, where it pooled on the lawn before overflowing onto the walkway to her son's unit and the road in front of the building. According to Park Lane's maintenance supervisor, the area of road that had water flowing across it was about 12 feet wide. He testified that the water flowed to a drain that was about 20 feet away.

{¶3} According to Ms. Shumaker, she first saw the water and learned about the water main break when she babysat for her grandchildren over the weekend. Although she could not remember which night she was at the apartment, she remembered staying overnight. During her weekend visit, she remembered walking through the water and learning that the City was going to repair the water main. She testified that, during her visit, there was yellow tape around the part of the lawn that had water on it as well as a couple of parking spaces that were a short distance from her son's building.

{¶4} The City's water distribution superintendent testified that the City had a history of repairing water main problems at Park Lane. He speculated that the relationship developed because of the number of low income and elderly residents who lived in the apartments. He said that the City would repair Park Lane's water lines at cost instead of making it hire a private contractor.

{¶5} According to the water distribution superintendent, Park Lane called his department about the water main break on Friday, December 16, 2005. He sent an employee to Park Lane that same day, who inspected the leak and agreed to do the repair. His department

originally scheduled the repair for Saturday. Because there were a number of public water mains that broke that weekend, however, it had to postpone the repair until Monday.

{¶6} On Monday, December 19, 2005, Ms. Shumaker returned to her son's apartment. She drove down the road in front of his building, passing through the flowing water. As she drove down the road, she noticed a big yellow machine sitting in the couple of parking spaces that had had yellow tape around them. She parked at the end of the road and started walking back toward her son's building, carrying her purse. She considered walking behind the building to her son's back door, but decided against it because there was snow and ice on the grass that looked dangerous. As she walked up the road, she noticed a couple of men standing near the big yellow machine. She recognized one of them as Park Lane's maintenance supervisor and assumed the other was a city worker there to repair the water main.

{¶7} Ms. Shumaker testified that, as she approached the part of the road with the flowing water, she looked for the shallowest spot. She chose a spot that she estimated was only about a half-inch deep. As she walked, she "holler[ed]" a question to the maintenance supervisor about whether the water was still on at her son's apartment because she wondered whether she would be able to prepare a bottle for her grandson. The supervisor answered "[y]eah. But you have got about five minutes, so hurry up." According to Ms. Shumaker, she walked past the walkway leading to her son's building and continued toward the supervisor. Just as she was beginning to ask him how long the water was going to be off, she slipped on a sheet of "black ice" that was "underneath the water" and fell, injuring her arm and shoulder.

{¶8} Ms. Shumaker sued Park Lane and the City, alleging negligence. Park Lane moved for summary judgment, arguing that it did not have a duty to warn her because the condition was open and obvious. The City moved for summary judgment, arguing that it had not

created the condition that led to Ms. Shumaker's fall, that it had no duty to maintain the water main, that it is immune from liability, and that the condition was open and obvious. The trial court granted Park Lane's motion because it concluded that the condition was open and obvious. It granted the City's motion because it determined the City did not owe Ms. Shumaker a duty and was entitled to political subdivision immunity. Ms. Shumaker has appealed, assigning four errors.

LANDLORD-TENANT RELATIONSHIP

{¶9} Ms. Shumaker's first assignment of error regarding Park Lane is that the trial court incorrectly determined that Park Lane did not owe her the same duties as it owed its tenants under Section 5321.04(A) of the Ohio Revised Code. She has argued that, because Park Lane owed her a statutory duty under Section 5321.04, it can not use the open and obvious doctrine to avoid liability.

{¶10} Section 5321.04(A) provides the statutory obligations that a landlord owes to its tenants. Interpreting that section, the Ohio Supreme Court held in *Shroades v. Rental Homes, Inc.*, 68 Ohio St. 2d 20, 25 (1981), "that a landlord is liable for injuries, sustained on the demised residential premises, which are proximately caused by the landlord's failure to fulfill the duties imposed by R.C. 5321.04." In *Sikora v. Wenzel*, 88 Ohio St. 3d 493, syllabus (2000), it held that "[a] landlord's violation of the duties imposed by R.C. 5321.04(A)(1) or 5321.04(A)(2) constitutes negligence *per se*[.]" In *Robinson v. Bates*, 112 Ohio St. 3d 17, 2006-Ohio-6362, it concluded that "'[t]he open and obvious' doctrine does not dissolve the statutory duty to repair [under Section 5321.04]" because the doctrine is based on the landlord's common law duty to warn, while Section 5321.04 imposes on the landlord a duty to repair. *Id*. at ¶21, 25.

{¶11} Ms. Shumaker has argued that, even though she was not a tenant, Park Lane owed her the same duties as her son. She has noted that, in *Shump v. First Continental-Robinwood Assoc.*, 71 Ohio St. 3d 414 (1994), the Ohio Supreme Court held that "[a] landlord owes the same duties to persons lawfully upon the leased premises as the landlord owes to the tenant." *Id*. at syllabus. It also wrote that "the obligations imposed upon a landlord under R.C. 5321.04 . . . extend to tenants *and* to other persons lawfully upon the leased premises." *Id*. at 420.

{¶12} Ms. Shumaker's argument fails because *Shump* is limited to injuries occurring "upon the leased premises." *Id*. This Court has held that "a social guest, injured in an area not in the exclusive control of the tenant, is owed a duty of care by the landlord no higher than that owed to a licensee." *Rios v. Shauck*, 9th Dist. No. 97CA006753, 1998 WL 289692 at *1 (June 3, 1998); see also *Owens v. French Village Co.*, 9th Dist. No. 99CA0058, 2000 WL 1026690 at *5 (July 26, 2000). In *Sanders v. Bellevue Manor Apartments*, 9th Dist. No. 95CA006067, 1996 WL 1768 (Jan. 3, 1996), for example, this Court concluded that *Shump* had no effect on the duty that a landlord owed to the daughter of a tenant who fell in a parking lot that was under the landlord's control. *Id*. at *5. Similarly, in this case, there is no dispute that Ms. Shumaker fell on the one-lane road outside of her son's apartment building. Accordingly, because she did not slip and fall "upon the leased premises," Park Lane did not have a duty to her under Section 5321.04(A). Ms. Shumaker's first assignment of error as to Park Lane is overruled.

OPEN AND OBVIOUS

{¶13} Ms. Shumaker's second assignment of error regarding Park Lane is that the trial court incorrectly concluded that it did not owe her a duty of care because the condition was "open and obvious." She has not argued that questions of fact exist regarding whether the ice beneath the water was open and obvious. Her only argument is that the open and obvious

doctrine does not apply to her situation under *Robinson v. Bates*, 112 Ohio St. 3d 17, 2006-Ohio-6362.

{¶14} As noted in the previous section of this opinion, in *Robinson*, the Ohio Supreme Court held that "[t]he 'open and obvious' doctrine does not dissolve the statutory duty to repair." *Id*. at ¶25. Ms. Shumaker's argument fails because a landlord only owes a duty to repair under Section 5321.04 to tenants and "persons lawfully upon the leased premises." *Shump v. First Continental-Robinwood Assoc.*, 71 Ohio St. 3d 414, syllabus (1994). There is no genuine issue of material fact that Ms. Shumaker was on a road outside her son's apartment building at the time of her fall. Accordingly, the open and obvious doctrine still applies. Ms. Shumaker's second assignment of error as to Park Lane is overruled.

POLITICAL SUBDIVISION IMMUNITY

{¶15} Ms. Shumaker's second assignment of error regarding the City is that the trial court incorrectly determined that the City was entitled to immunity under Section 2744.03 of the Ohio Revised Code. "Determining whether a political subdivision is immune from liability . . . involves a three-tiered analysis." *Lambert v. Clancy*, 125 Ohio St. 3d 231, 2010-Ohio-1483, at ¶8. "The starting point is the general rule that political subdivisions are immune from tort liability[.]" *Shalkhauser v. Medina*, 148 Ohio App. 3d 41, 2002-Ohio-222, at ¶14. Section 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 . . . in connection with a governmental or proprietary function." "At the second tier, this comprehensive immunity can be abrogated pursuant to any of the five exceptions set forth at R.C. 2744.02(B)." *Shalkhauser*, 2002-Ohio-222, at ¶16. "Finally,

immunity lost to one of the R.C. 2744.02(B) exceptions may be reinstated if the political subdivision can establish one of the statutory defenses to liability." *Id.*; see R.C. 2744.03(A).

{¶16} The dissent argues that, because the City argued it was acting as a private contractor, Chapter 2744 of the Ohio Revised Code does not apply. It does not cite any authority in support of its contention. To the contrary, Section 2744.02(A)(1) specifically divides all functions of a political subdivision into two categories: governmental functions and proprietary function. There are no exceptions for occasions in which the City claims to be acting as a private contractor. In fact, the definition of proprietary function contains a catch-all provision, defining any function that is not a governmental function as a proprietary function if it "promotes or preserves the public peace, health, safety, or welfare and . . . involves activities that are customarily engaged in by nongovernmental persons." R.C. 2744.01(G)(1). The City can not recharacterize itself as anything other than a political subdivision, whose functions are either governmental or proprietary. Accordingly, Chapter 2744 applies to its decision to repair Park Lane's private water main.

{¶17} As previously noted, the starting point of the Chapter 2744 analysis is that the City is immune from liability. *Shalkhauser v. Medina*, 148 Ohio App. 3d 41, 2002-Ohio-222, at ¶14. Ms. Shumaker has argued that the City's immunity should be abrogated under Section 2744.02(B)(2) because it was engaged in a proprietary function when it agreed to repair the water main and her injuries were the result of its negligence. The City has argued that Section 2744.02(B)(2) does not apply because it was engaged in a governmental function and, even if it was engaged in a proprietary function, it was not negligent. The City has further argued that, even if it was negligent, it established one of the statutory defenses to liability under Section 2744.03(A).

{¶18} For purposes of this opinion, we will assume, without deciding, that the City was engaged in a proprietary function and that genuine issues of material fact exist with respect to whether the City was negligent. We, therefore, will proceed to the third step of the political subdivision immunity analysis. Under Section 2744.03(A)(3), a "political subdivision is immune from liability if the action or failure to act by the employee . . . 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." Under Section 2744.03(A)(5), a "political subdivision is immune from liability if the injury . . . resulted from the exercise of judgment or discretion in determining . . . 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." The trial court concluded that the City was immune under Section 2744.03(A) "because any decision made concerning the repair project involved discretion and allocation of the city's resources in the midst of sub-freezing weather and in light of a total of nine water main breaks occurring between Friday and Sunday."

{¶19} This Court has held that "the exceptions to immunity set forth in R.C. 2744.03 must be narrowly construed." *Sturgis v. E. Union Twp.*, 9th Dist. No. 05CA0077, 2006-Ohio-4309, at ¶18. "Routine decisions are not shielded by immunity under R.C. 2744.03(A)(3) or 2744.03(A)(5)." *Id.* "A 'discretionary' act necessarily involves '[s]ome positive exercise of judgment that portrays a considered adoption of a particular course of conduct in relation to an object to be achieved[.]'" *Id.* (quoting *Addis v. Howell*, 137 Ohio App. 3d 54, 60 (2000)).

{¶20} The City has argued that its decision to postpone the Park Lane repair until Monday was a discretionary allocation of its limited resources. It has noted that there were nine

other water main breaks from December 16-18, 2005, and has explained that the reason others were given priority is because "they involved leaks to major City water mains and involved potential significant damage to City property, roadways, and sidewalks if left unattended for any length of time."

{¶21} Ms. Shumaker has argued that the City was making a routine decision requiring little judgment or discretion, noting that the water distribution superintendent testified that it was a minor leak that was not an urgent matter. We disagree. It is evident from the superintendent's testimony that, although the City initially thought it could repair the leak on Saturday, there ended up being a number of other water main breaks that presented a more significant risk to City property. The water department, therefore, decided to allocate its limited resources to the more significant water main breaks first, postponing the Park Lane repair until Monday morning. The City's decision reflects a "positive exercise of judgment" in light of the dangers presented. Ms. Shumaker has not argued, let alone pointed to any evidence, that its decision was made in bad faith. Accordingly, the trial court correctly concluded that, even if the City was negligent, there is no genuine issue of material fact that its immunity was restored under Section 2744.03(A)(3) or (5). Ms. Shumaker's second assignment of error as to the City is overruled. Because the City has political subdivision immunity, Ms. Shumaker's first assignment of error regarding whether the City owed her a duty is moot, and is overruled on that basis. See App. R. 12(A)(1)(c).

CONCLUSION

{¶22} The trial court correctly granted summary judgment to Park Lane and the City. The judgment of the Summit County Common Pleas Court is affirmed.

Judgment affirmed.

There were reasonable grounds for this appeal.

We order that a special mandate issue out of this Court, directing the Court of Common Pleas, County of Summit, State of Ohio, to carry this judgment into execution. A certified copy of this journal entry shall constitute the mandate, pursuant to App.R. 27.

Immediately upon the filing hereof, this document shall constitute the journal entry of judgment, and it shall be file stamped by the Clerk of the Court of Appeals at which time the period for review shall begin to run. App.R. 22(E). The Clerk of the Court of Appeals is instructed to mail a notice of entry of this judgment to the parties and to make a notation of the mailing in the docket, pursuant to App.R. 30.

Costs taxed to Appellant.

DONNA J. CARR
FOR THE COURT

CARR, P. J.
WHITMORE, J.
CONCUR

BAIRD, J.
CONCURS IN PART, AND DISSENTS IN PART, SAYING:

{¶23} I agree with the majority's conclusions regarding Park Lane Manor. I dissent with respect to the City, however, because I believe that it does not have political subdivision immunity. Throughout this case, including the arguments made to this Court, the City has maintained that it was acting as a private contractor. Having characterized its activity as that of a private contractor, the City must accept whatever rights and responsibilities a private contractor

would have in such circumstances. Chapter 2744 of the Ohio Revised Code applies to actions of cities, not private contractors. Since the activities herein were acts of a private contractor, the statutory provisions regarding political subdivision immunity are not applicable. Accordingly, I would reverse the trial court's grant of summary judgment to the City.

(Baird, J., retired, of the Ninth District Court of Appeals, sitting by assignment pursuant to §6(C), Article IV, Constitution.)

APPEARANCES:

ROBERT W. HIGHAM, Attorney at Law, for Appellant.

JOYCE KIMBLER, Attorney at Law, for Appellee.

CHERI CUNNINGHAM, Director of Law, JOHN C. REECE, and JANET M. CIOTOLA, Assistant Directors of Law, for Appellee.