

[Cite as *Weldon v. Prairie Twp.*, 2010-Ohio-5562.]

IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

Richard A. Weldon et al., :
 :
 Plaintiffs-Appellants, :
 :
 v. : No. 10AP-311
 : (C.P.C. No. 09CVH02-1676)
 :
 Prairie Township, Ohio et al., : (REGULAR CALENDAR)
 :
 Defendants-Appellees. :

D E C I S I O N

Rendered on November 16, 2010

Robert D. Holmes, for appellants.

Reminger Co., LPA, Michael J. Valentine, and Zachary B. Pyers, for appellees.

APPEAL from the Franklin County Court of Common Pleas.

SADLER, J.

{¶1} Appellants, Richard A. Weldon and Joy E. Weldon ("appellants"), filed this appeal seeking reversal of a judgment by the Franklin County Court of Common Pleas granting a directed verdict in favor of appellees, Prairie Township and the members of the township's Board of Trustees ("appellees"). For the reasons that follow, we affirm.

{¶2} Appellants are the owners of property located at 355 Buena Vista Avenue in Prairie Township. According to the complaint, during construction of a storm sewer in 1992, the sanitary sewer pipe connecting appellants' house to the sanitary sewer system broke in an area located within the township's right-of-way. A repair was attempted in which a sleeve was placed over the broken area of the pipe. Appellants asserted that over time, the sleeve twisted and sunk out of alignment due to the failure to secure the sleeve with proper or sufficient bedding. As a result, the sanitary sewer pipe became blocked in 2008, and appellants paid for the repairs. Appellants then filed suit, arguing that appellees should be responsible for the cost of the repairs.

{¶3} After exchanging discovery, appellees filed a motion for summary judgment. Appellees first argued that they were not responsible for the sewer line, as the township did not have any ownership interest in the sewer system, and had not undertaken any responsibility for repairs. In further support of the motion, appellees argued that they were entitled to immunity as a political subdivision pursuant to R.C. Chapter 2744. Specifically, appellees argued that the complaint alleged that the damage to appellants' sewer pipe occurred during the construction of a sewer system, and that construction of a sewer system is one of the activities identified as a governmental function under R.C. 2744.01(C)(2). Appellees argued that because the complaint alleged conduct that constituted a governmental function, none of the exceptions to the general rule of political subdivision immunity applied, and they were therefore entitled to summary judgment.

{¶4} The trial court initially granted the motion for summary judgment because appellants had not filed any response rebutting the evidence offered by appellees in

support of their motion. Appellants sought vacation of the trial court's decision on the grounds that counsel had agreed to extend the time for appellants to file a response to the motion for summary judgment due to medical issues being experienced by appellants' counsel. The trial court granted the motion to vacate, and ordered appellants to file a memorandum contra the motion for summary judgment, which appellants did.

{¶5} The trial court then issued a new decision and entry denying the motion for summary judgment. The trial court construed the nature of the conduct upon which appellants based their complaint as involving the maintenance, destruction, operation, and upkeep of a sewer system, which is a proprietary function rather than a governmental one. R.C. 2744.02(B) includes the negligent performance of acts with respect to the performance of proprietary functions as one of the exceptions to the general rule of political subdivision immunity. The trial court concluded that genuine issues of fact remained regarding whether appellees were negligent in their performance of a proprietary function, and denied the motion for summary judgment on that basis.

{¶6} The case then proceeded to a jury trial. During opening statements, appellants' counsel stated that the evidence would show that the 1992 storm sewer construction was performed by an independent contractor, that it was the independent contractor that broke appellants' sewer pipe, and that it was the independent contractor that performed the attempted repair of the pipe. Appellees then made a motion for directed verdict, arguing that the exceptions to political subdivision immunity do not

apply to impose liability for the negligent conduct of an independent contractor performing work for a political subdivision.

{¶7} The trial court sustained the motion for directed verdict, and entered judgment in favor of appellees. Appellants then filed this appeal, asserting eight assignments of error:

Plaintiffs' Assignment of Error No. 1

The trial court erred in taking from the jury the factual question as to whether the duty to repair damage to the sanitary sewer serving Plaintiffs' residence involved public safety, health and avoidance of public nuisance and was non-delegable by Prairie Township, and failing to address that question itself.

Plaintiffs' Assignment of Error No. 2

The trial court erred in failing to recognize that Prairie Township was a "Public Authority" under Ohio Revised Code 153.64 with a duty to determine and give notice, and monitor its contractor with respect to the location and depth of the sanitary sewer serving plaintiffs' property, and any breakage thereof.

Plaintiffs' Assignment of Error No. 3

The trial court erred in ignoring uncontroverted evidence in the record, by affidavit and expected testimony, that Prairie Township, in 1992, undertook construction of the storm sewer serving Plaintiffs' residence illegally, by not filing construction plans with the Franklin County Sanitary Engineer; by failing to pre-determine the depth of the sanitary sewer from public records, resulting in breakage of the sanitary sewer; by failure to report the breakage to the Franklin County Sanitary Engineer; failure to get a permit for repair and get inspection of the repair, and permitting an improper repair with no bedding to prevent eventual sinking and back-up of sewerage into Plaintiffs' residence, in 2007 and 2008.

Plaintiffs' Assignment of Error No. 4

The trial court erred in failing to recognize, as a matter of law, that under O.R.C. 2744.01(G)(2)(d) the duty of maintenance and repair of the sanitary sewer by Prairie Township was a proprietary function not immune from suit; that it was continuous and existed in 2008 irrespective of what Prairie Township, or its contractor, or contractor's employee did or didn't do in 1992.

Plaintiffs' Assignment of Error No. 5

The trial court erred in failing to apply the law as to circumstances affording Plaintiffs' right to recover damages, the measure of damages, and Plaintiffs' property rights.

Plaintiffs' Assignment of Error No. 6

The trial court erred in failing to recognize that Plaintiffs' forced expenditure of Plaintiffs' own funds in 2007 and 2008, for cleanouts, investigation, and to make sanitary sewer repairs in the public right-of-way, caused by Prairie Township's actions and omissions and by actions of its contractors in 1992, amounted to an unconstitutional taking under the Ohio Constitution Article I Section 19.

Plaintiffs' Assignment of Error No. 7

The trial court erred in relying on the case of *Howell vs. City of Canton*, (2007 CA 00035, Oct. 27, 2008), which involved a government activity immune from suit.

Plaintiffs' Assignment of Error No. 8

The trial court erred in relying on the case of *Joseph Amurri dba Columbus Billiard Supply, Plaintiff, Appellee v. City of Columbus*, (Court of Appeals, Tenth District, No. 84 AP 597, 598, 618, 681, and 682), which found municipal liability for work involving public safety, though denying recovery of prejudgment interest and attorney fees.

{¶8} In their brief, appellants do not separately argue each assignment, but instead mix the separate assignments into one single argument. Essentially, appellants'

argument can be distilled down to the single argument that the trial court erred when it granted a directed verdict in favor of appellees at the conclusion of appellants' opening statement. Consequently, we will address appellants' separate assignments collectively.

{¶9} Civ.R. 50(A)(1) provides that a motion for a directed verdict may be made "on the opening statement of the opponent, at the close of the opponent's evidence or at the close of all the evidence." A motion for directed verdict should be granted if, construing the evidence in favor of the party against whom the motion is directed, reasonable minds could come to but one conclusion on the evidence, and that conclusion is adverse to the party against whom the motion is directed. *Goodyear Tire & Rubber Co. v. Aetna Cas. & Sur. Co.*, 95 Ohio St.3d 512, 2002-Ohio-2842; Civ.R. 50(A)(4). As this question presents an issue of law, the standard of review on appeal is de novo. *Hale v. Spitzer Dodge, Inc.*, 10th Dist. No. 04AP-1379, 2006-Ohio-3309.

{¶10} The trial court granted a directed verdict in favor of appellees based on political subdivision immunity. In reviewing a claim of political subdivision immunity, R.C. Chapter 2744 sets forth a three-tiered analysis. *Cater v. Cleveland*, 83 Ohio St.3d 24, 1998-Ohio-421. First, R.C. 2744.02(A)(1) sets forth the general rule 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." Next, it is necessary to determine whether any of the exceptions to this general rule listed in R.C. 2744.02(B)(1) through (5) are applicable. Finally, if it is determined that one of the exceptions might apply, the political subdivision may assert

one of the affirmative defenses set forth in R.C. 2744.03(A). See *Colbert v. Cleveland*, 99 Ohio St.3d 215, 2003-Ohio-3319.

{¶11} In this case, in denying appellees' motion for summary judgment, the trial court concluded that appellants' complaint was based on conduct by the township that constituted a proprietary function rather than a governmental function. Specifically, the trial court concluded that appellants' claims were based not on construction of the storm sewer, which would have been considered a governmental function, but were instead based on the repairs made to appellants' sanitary sewer after it was broken during construction of the storm sewer, which the court concluded was a proprietary function.¹

{¶12} The distinction between governmental and proprietary functions was important in this case because one of the exceptions to the general rule that a political subdivision is not liable for damages caused by any act or omission in connection with a governmental or proprietary function provides that "[e]xcept as otherwise provided in sections 3314.07 and 3746.24 of the Revised Code, political subdivisions are liable for injury, death, or loss to person or property caused by the negligent performance of acts by their employees with respect to proprietary functions of the political subdivisions." R.C. 2744.02(B)(2).

{¶13} The trial court directed a verdict in favor of appellees after appellants' counsel stated that the evidence would show that an independent contractor had performed the work upon which appellants' claims were based. R.C. 2744.01(B) provides that, for purposes of the political subdivision immunity provisions in R.C.

¹ Neither party has appealed from the trial court's conclusion that the conduct here involved a proprietary function rather than a governmental function.

Chapter 2744, " '[e]mployee' does not include an independent contractor." Thus, the exception to immunity set forth in R.C. 2744.02(B)(2) does not apply where the conduct for which liability is sought to be imposed was performed by an independent contractor of the political subdivision, and where there is no evidence that the political subdivision exercised control over the independent contractor's actions. *Howell v. Canton*, 5th Dist. No. 2007CA00035, 2008-Ohio-5558; *Monteith v. Delta Prods., Inc.* 3d Dist. No. 3-07-35, 2008-Ohio-1997.

{¶14} In opening statement, appellants' counsel stated that the independent contractor hired by Prairie Township performed the repairs to appellants' sanitary sewer line after it was broken during construction of the storm sewer. Counsel did not say that the evidence would show that Prairie Township exercised any control over the independent contractor's attempted repair, nor does it appear from the record that the township may have exercised some control over the independent contractor in completion of the repairs.

{¶15} In several of their assignments of error, appellants seek to avoid application of the statutes governing political subdivision immunity by setting forth a number of arguments. First, appellants argue that repair of the damage to appellants' sanitary sewer was a duty that Prairie Township owed to appellants because it was a matter of public safety, and the township could not avoid liability by delegating that duty to an independent contractor. In some cases, Ohio courts have recognized that a political subdivision may not avoid liability for negligence by delegating performance of an action to an independent contractor, where the action involves serious hazards to public safety. *Amurri v. Columbus* (Feb. 28, 1985), 10th Dist. No. 84AP-597 (case

involving demolition of a building).² We cannot say that the repair of the sewer line in this case, even assuming that the township was under a duty to complete the repairs, was such an inherently dangerous activity that the township could not avoid liability by delegating that duty to an independent contractor.

{¶16} Appellants also argue that the township undertook construction of the storm sewer without filing construction plans with the Franklin County Sanitary Engineer, by failing to pre-determine the depth of the sanitary sewer, by failing to report the break in the sanitary sewer to the Sanitary Engineer, by failing to obtain a permit before repairing the break, and by permitting the repair to be performed without proper bedding. Appellants point to R.C. 153.64, which imposes a duty on public authorities (including townships) to notify private utility owners and locate underground utilities prior to digging, arguing that the statute provides an exception to the general rule of political subdivision immunity.

{¶17} However, we have held that R.C. 153.64 "does not expressly impose civil liability upon a political subdivision for damages to private property owners caused by the political subdivision's failure to comply with the statutory provisions." *Carter v. Complete Gen. Constr. Co.*, 10th Dist. No. 08AP-309, 2008-Ohio-6308, ¶12. We have also held that R.C. 153.64 does not create an exception to the general rule of political subdivision immunity. *Id.*

² In one of their assignments of error, appellants argue that the trial court erred in "relying" on *Amurri*. To the extent that the trial court cited *Amurri*, it appears that it did so in recognition of appellants' argument that some duties may be non-delegable, but the trial court concluded the township's duty here was not among those duties that are non-delegable.

{¶18} Furthermore, to the extent that appellants argue that the construction of the storm sewer without obtaining proper permits constituted negligence per se, we first note that appellants have cited to no authority for the proposition that failure to obtain the permits would constitute negligence per se. In addition, focusing on the necessity for obtaining permits prior to beginning construction of the storm sewer ignores the trial court's express conclusion that the conduct appellants complained of involved repair of a sewer system, a proprietary function to which the exception set forth in R.C. 2744.02(B)(2) can be applied, rather than construction of a sewer system, a governmental function to which the exception cannot be applied.

{¶19} Finally, appellants argue that the actions taken by appellees, resulting in their being required to expend money to investigate and make repairs to the sanitary sewer, constitute an unconstitutional taking under Section 19, Article I of the Ohio Constitution. Appellants did not assert a claim for an unconstitutional taking in their complaint, nor does it appear that appellants raised the issue at any other time before the trial court. Because appellants failed to raise this argument before the trial court, we need not consider it for the first time on appeal. *State ex rel. O'Brien v. Messina*, 10th Dist. No. 10AP-37, 2010-Ohio-4741.

{¶20} Appellants' assignments of error are overruled. Having overruled the assignments of error, we affirm the judgment of the Franklin County Court of Common Pleas.

Judgment affirmed.

KLATT and McGRATH, JJ., concur.
