

COURT OF APPEALS
PERRY COUNTY, OHIO
FIFTH APPELLATE DISTRICT

KAMRYN E. HAMILTON

Plaintiff-Appellant

-vs-

PIKE TOWNSHIP BOARD OF
TRUSTEES, et al.

Defendants-Appellees

JUDGES:

Hon. John W. Wise, P.J.

Hon. Patricia A. Delaney, J.

Hon. Craig R. Baldwin, J.

Case No. 23CA000002

O P I N I O N

CHARACTER OF PROCEEDING:

Civil Appeal from the Court of Common
Pleas, Case No. 21CV00155

JUDGMENT:

Affirmed

DATE OF JUDGMENT ENTRY:

August 23, 2023

APPEARANCES:

For Plaintiff-Appellant

For Defendants-Appellees

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Wise, P. J.

{¶1} Appellant Kamryn E. Hamilton appeals from the July 30, 2021, Judgment Entry by the Perry County Court of Common Pleas. Appellees are Pike Township Board of Trustees and Phillip Allen. The relevant facts leading to this appeal are as follows.

FACTS AND PROCEDURAL HISTORY

{¶2} On July 16, 2021, Appellant filed a Complaint alleging negligence on behalf of the Appellees during the dragging and grading of the T.R. 223. As Appellant transported mulch on T.R. 223, he encountered a tractor, taking up more than half the road, grading the gravel road. Appellant believed he did not have enough time to stop, so without applying breaks, he attempted to swerve around the tractor. In the process, Appellant wrecked his car.

{¶3} On August 10, 2021, Appellees filed an Answer to Appellant's Complaint.

{¶4} On December 6, 2022, Appellees filed a Motion for Summary Judgment.

{¶5} On December 30, 2022, Appellant filed a Memorandum Contra Appellees Motion for Summary Judgment.

ASSIGNMENT OF ERROR

{¶6} Appellant filed a timely notice of appeal raising the following Assignment of Error:

{¶7} "I. THE TRIAL COURT ERRED IN GRANTING THE MOTION FOR SUMMARY JUDGMENT OF DEFENDANTS-APPELLEES."

I.

{¶8} In Appellant's sole assignment of error, Appellant argues that the trial court erred by granting Appellees Motion for Summary Judgment. We disagree.

{¶9} With regard to summary judgment, this Court applies a de novo standard of review and reviews the evidence in the same manner as the trial court. *Smiddy v. The Wedding Party, Inc.*, 30 Ohio St.3d 35, 36, 506 N.E.2d 212 (1987). We will not give any deference to the trial court's decision. *Brown v. Scioto Cty. Bd. of Cmmrs.*, 87 Ohio App.3d 704, 711, 622 N.E.2d 1153 (4th Dist.1993). Under Civ.R. 56, a trial court may grant summary judgment if it determines (1) no genuine issues as to any material fact remain to be litigated; (2) the moving party is entitled to judgment as a matter of law; and (3) it appears from the evidence that reasonable minds can come to but one conclusion and viewing such evidence most strongly in favor of the party against whom the motion for summary judgment is made, that conclusion is adverse to that party. *Temple v. Wean United, Inc.*, 50 Ohio St.2d 317, 327, 364 N.E.2d 267, 274 (1977).

{¶10} The record on summary judgment must be viewed in the light most favorable to the party opposing the motion. *Williams v. First United Church of Christ*, 37 Ohio St.2d 150, 151, 309 N.E.2d 924 (1974).

{¶11} The moving party bears the initial responsibility of informing the trial court of the basis for the motion and identifying those portions of the record before the trial court which demonstrate the absence of a genuine issue of fact on a material element of the nonmoving party's claim. *Dresher v. Burt*, 75 Ohio St.3d 280, 292, 662 N.E.2d 264 (1996). Once the moving party has met the burden, the nonmoving party then has a reciprocal burden of specificity and cannot rest on the allegations or denials in the

pleadings, but must set forth “specific facts” by the means listed in Civ.R. 56(C) showing that a “triable issue of fact” exists. *Mitseff v. Wheeler*, 38 Ohio St.3d 112, 115, 526 N.E.2d 798, 801 (1988).

{¶12} A three-tiered analysis is required to determine whether a political subdivision is immune from tort liability pursuant to R.C. §2744. *Gattrell v. Utica*, 5th Dist. Licking No. 15-CA-26, 2016-Ohio-792, 63 N.E.3d 461, ¶36-37, citing *Greene Cty. Agricultural Soc. v. Liming*, 89 Ohio St.3d 551, 556-557, 733 N.E.2d 1141 (2000); *Smith v. McBride*, 130 Ohio St.3d 51, 2011-Ohio-4674, 955 N.E.2d 954, ¶13-15. The first tier is the general rule that a political subdivision is immune from liability incurred in performing either a governmental or a proprietary function. *Greene Cty. Agricultural Society* at 556-557, 733 N.E.2d 1141; R.C. §2744.02(A)(1). That immunity, however, is not absolute. R.C. §2744.02(B); *Carter v. Cleveland*, 83 Ohio St.3d 24, 697 N.E.2d 610 (1998). “The second tier of the analysis requires a court to determine whether any of the five listed exceptions to immunity listed in R.C. §2744.02(B) apply to expose the political subdivision to liability.” *Greene Cty. Agricultural Society* at 556-557, 733 N.E.2d 1141; R.C. §2744.02(A)(1). The third tier is to determine whether the political subdivision is entitled to a defense or qualified immunity under R.C. §2744.03(A). *Vasquez-Comer v. City of Toledo*, 6th Dist. Lucas No. L-18-1266, 2019-Ohio-5149, ¶9.

{¶13} There is no dispute that Appellees are political subdivisions performing either a proprietary or a governmental function.

{¶14} The second step of the analysis is to determine whether any of the exceptions to the general rule of immunity, contained in R.C. §2744.02(B) apply. *Greene Cty. Agricultural Society* at 556-557, 733 N.E.2d 1141; R.C. §2744.02(A)(1). Under R.C.

§2744.02(B)(2), a political subdivision loses its immunity and becomes liable for damages resulting from the harm caused by the negligence of its employees in their performance for proprietary functions *Brown v. Lincoln Hts.*, 1st Dist., Hamilton No. C-100699, 195 Ohio App.3d 149, 2011-Ohio-3551, 958 N.E.2d 1280, ¶22.

{¶15} Appellant argues either R.C. §2744.02(B)(2) or (B)(3) applies to abrogate Appellees entitlement to political subdivision immunity.

{¶16} R.C. §2744.02(B)(2) states, “[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.”

{¶17} R.C. §2744.01(G) defines a “proprietary function as:

(1) “Proprietary function” means a function of a political subdivision that is specified in division (G)(2) of this section or that satisfies both of the following:

(a) The function is not one described in division (C)(1)(a) or (b) of this section and is not one specified in division (C)(2) of this section;

(b) The function is one that promotes or preserves the public peace, health, safety, or welfare and that involves activities that are customarily engaged in by nongovernmental persons.

(2) A “proprietary function” included, but is not limited to, the following:

(a) The operation of a hospital by one or more political subdivisions;

(b) The design, construction, reconstruction, renovation, repair, maintenance, and operation of a public cemetery other than a township cemetery;

(c) The establishment, maintenance, and operation of a utility, including, but not limited to, a light, gas, power, or heat plant, a railroad, a busline or other transit company, an airport, and a municipal corporation water supply system;

(d) The maintenance, destruction, operation, and upkeep of a sewer system;

(e) The operation and control of a public stadium, auditorium, civic or social center, band or orchestra, or off-street parking facility.

{¶18} R.C. §2744.01(C)(1) defines “governmental function” as “(a) [a] function that is imposed upon the state as an obligation of sovereignty and that is performed by a political subdivision voluntarily or pursuant to legislative requirement; (b) [a] function that is for the common good of all citizens of the state; [or] (c) [a] function that promotes or preserves the public peace, health, safety, or welfare; that involves activities that are not engaged in or not customarily engaged in by nongovernmental persons.” R.C. §2744.01(C)(2)(e) includes “[t]he regulation of the use of, and the maintenance and repair of, roads, highways, streets, avenues, alleys, sidewalks, bridges, aqueducts, viaducts, and public grounds” as “governmental functions.”

{¶19} R.C. §5571.12 states, in pertinent part, “the board of trustees shall cause the graveled and unimproved public roads of the township to be dragged.” As such, Appellees were engaged in a governmental function as the dragging of T.R. 223 was

done pursuant to legislative requirement. Therefore, the exception to political subdivision immunity pursuant to R.C. §2744.02(B)(2) does not apply.

{¶20} Appellant also argues the exception to political subdivision immunity pursuant to R.C. §2744.02(B)(3) applies to abrogate Appellees immunity. Specifically, Appellant argues Appellees failed to remove an obstruction, the tractor, from the roadway.

{¶21} R.C. §2744.02(B)(3) states:

Except as otherwise provided in section 3746.24 of the Revised Code, political subdivisions are liable for injury, death, or loss to person or property caused by their negligent failure to keep public roads in repair and other negligent failure to remove obstructions from public roads, except that it is a full defense to that liability, when a bridge within a municipal corporation is involved, that the municipal corporation does not have the responsibility for maintaining or inspecting the bridge.

{¶22} An “obstruction” under the statute is “an obstacle that blocks or clogs the roadway and not merely a thing or condition that hinders or impedes the use of the roadway or that may have the potential to do so.” *Howard v. Miami Twp. Fire Div.*, 119 Ohio St.3d 1, 2008-Ohio-2792. In *McNamara v. Marion Popcorn Festival*, 3rd Dist. Marion No. 9-12-34, 2012-Ohio-5578, 983 N.E.2d 818, ¶26, the Third District found that an eight-foot wooden beam in the road did not constitute an obstruction as it merely impeded or hindered traffic as vehicles could navigate around the beam. Also, in *Hopkins v. Porter*, 3rd Dist. Mercer No. 10-13-17, 2014-Ohio-757, the Third District found that employees operating a chip spreader during a road improvement project operating across the entire

eastbound lane did not constitute an obstruction as contemplated under R.C. §2744.02(B)(3).

{¶23} Similarly, to *Hopkins* and *McNamara*, there is no evidence in the record the tractor blocked or clogged the roadway. The evidence did show the tractor was being operated and therefore did not do more than hinder or impede the use of the roadway. Therefore, the exception to political subdivision immunity pursuant to R.C. §2744.02(B)(3) does not apply.

{¶24} Appellant's sole Assignment of Error is overruled.

{¶25} For the foregoing reasons, the judgment of the Court of Common Pleas of Perry County, Ohio, is hereby affirmed.

By: Wise, P. J.

Delaney, J., and

Baldwin, J., concur.

JWW/br 0821