[Cite as *Canidate v. Cuyahoga Metro. Hous. Auth.*, 2015-Ohio-880.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 101753

JOE CANIDATE

PLAINTIFF-APPELLEE

vs.

CUYAHOGA METROPOLITAN HOUSING AUTHORITY

DEFENDANT-APPELLANT

JUDGMENT:
REVERSED

Civil Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CV-13-815484

BEFORE: E.A. Gallagher, P.J., Kilbane, J., and Blackmon, J.

RELEASED AND JOURNALIZED: March 12, 2015

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EILEEN A. GALLAGHER, P.J.:

{¶1} Cuyahoga Metropolitan Housing Authority ("CMHA") appeals the trial court's order denying summary judgment pursuant to political subdivision immunity on Joe Canidate's claims for negligence and violation of Ohio's landlord tenant act arising from a slip and fall incident. For the following reasons, we reverse the decision of the trial court.

{¶2} Canidate's complaint against CMHA alleges that he was a tenant at the Cedar Extension High Rise operated by CMHA in Cleveland. On May 21, 2012, he entered the apartment complex's television room to watch a basketball game. During the game, a water leak began on the third floor of the building, and water began to drain down to the first floor where it fell in the hallway outside the television room.

{¶3} Darryl Curry, another Cedar Extension resident in the television room, heard the water leaking to the floor outside, retrieved a rolling garbage can from the television room and positioned it below the leak to collect the draining water. Curry testified that, despite his efforts, there was a "whole lot of water" already on the floor of the hallway. There was no color to the water, and a picture of the hallway reveals the floor possessed a glossy and reflective appearance.

{¶4} Willie Hammond, a CMHA police protection officer on duty at the Cedar Extension, heard someone from the television room yell that there was a leak. Hammond observed the water draining to the hallway floor through a missing ceiling tile and saw Curry position the garbage can to mitigate the accumulation of water on the floor. Hammond traced the leaking water to an overflowing sink in an apartment on the third floor and wrote a violation ticket for the responsible resident. Hammond reported the issuance of the ticket but did not clean up the water already on the floor because he felt it was the maintenance personnel's job to do so. He

did not, however, notify maintenance of the water that had accumulated around the garbage can because he did not believe it was enough water to cause any damage.

{¶5} Canidate exited the television room 15 to 20 minutes after Curry set the garbage can to catch the leaking water and after Hammond failed to notify maintenance of the water on the floor of the hallway. Canidate slipped and fell as he passed the garbage can, injuring his neck.

{¶6} Canidate filed this action against CMHA in the Cuyahoga County Common Pleas Court, alleging that CMHA was negligent and violated Ohio's landlord tenant act. CMHA moved for summary judgment, arguing that it was entitled to political subdivision immunity in regards to Candidate's claims. CMHA argued that the accumulated water was an open and obvious hazard, that no physical defect existed on the property, and that Canidate was barred from pursuing a violation of Ohio's landlord tenant act against a political subdivision. The trial court denied summary judgment, and CMHA appeals offering the following sole assignment of error:

> The motion for summary judgment was improperly denied as it relates to sovereign immunity.

{¶7} Ordinarily, an order denying a motion for summary judgment is not a final and appealable order within the scope of Civ.R. 60(B); rather, it is an interlocutory order. However, an order denying a political subdivision the benefit of an alleged immunity from liability is expressly deemed a "final order" under R.C. 2744.02(C) and is thus immediately appealable. *See Sullivan v. Anderson Twp.*, 122 Ohio St.3d 83, 2009-Ohio-1971, 909 N.E.2d 88, ¶ 12-13.

{¶8} Our review of a trial court's grant of summary judgment is de novo. *Grafton v. Ohio Edison Co.*, 77 Ohio St.3d 102, 105, 1996-Ohio-336, 671 N.E.2d 241. Pursuant to Civ.R. 56(C), 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, 1995-Ohio-286, 653 N.E.2d 1196, paragraph three of the syllabus; *Zivich v. Mentor Soccer Club*, 82 Ohio St.3d 367, 1998-Ohio-389, 696 N.E.2d 201. 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, 1996-Ohio-107, 662 N.E.2d 264.

{¶9} We note that the trial court's journal entry denying summary judgment is ambiguous with regard to Canidate's claim that CMHA violated the Landlord Tenant Act as set forth in R.C. Chapter 5321. Although the trial court acknowledged that CMHA could not be held liable for violations of the Act, the court's order did not expressly grant summary judgment as to that count in the complaint. It is well established that R.C. Chapter 5321 does not abrogate the sovereign immunity expressly provided to political subdivisions performing governmental functions. *Moncrief v. Bohn*, 8th Dist. Cuyahoga No. 100339, 2014-Ohio-837, ¶ 17, citing *Moore v. Lorain Metro. Hous. Auth.*, 121 Ohio St.3d 455, 2009-Ohio-1250, 905 N.E.2d 606, at ¶ 21. CMHA is a political subdivision, and the operation of a public housing authority is a governmental function. *See Moore* at ¶ 19. As such, summary judgment was proper as to Canidate's claim under the Landlord Tenant Act.

{¶10} We turn now to Canidate's negligence claim. The legislature has generally shielded political subdivisions from tort liability. *Greene Cty. Agricultural Soc. v. Liming*, 89 Ohio St.3d 551, 2000-Ohio-486, 733 N.E.2d 1141. Chapter 2744 of the Revised Code sets forth a three-tier analysis for determining whether a political subdivision is immune from liability. The

first step sets forth the general rule that political subdivisions are entitled to broad immunity. R.C. 2744.02(A)(1) provides:

> 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 an act or omission of the political subdivision or an employee of the political subdivision in connection with a governmental or proprietary function.

{¶11} Under the second tier of the statutory analysis, once immunity is established, a determination must be made as to whether any of the five exceptions to immunity listed under R.C. 2744.02(B) apply. If one or more exceptions apply, the third tier of analysis requires a determination of whether immunity may be reinstated because a defense applies.

{¶12} R.C. 2744.02(B)(4) removes the general immunity conferred on political subdivisions performing a governmental function if an injury is: "(1) caused by employee negligence, (2) on the grounds or in buildings used in connection with that governmental function, and (3) due to a physical defect on or within those grounds or buildings. *All of these characteristics must be present.*" (Emphasis sic.) *Duncan v. Cuyahoga Community College*, 8th Dist. Cuyahoga No. 97222, 2012-Ohio-1949, 970 N.E.2d 1092, ¶ 26, quoting *Hamrick v. Bryan City School Dist.*, 6th Dist. Williams No. WM-10-014, 2011-Ohio-2572, ¶ 25.

{¶13} CMHA argues that Canidate's negligence claim fails to satisfy the first and third prongs of the above standard. As to the first prong, Canidate argues that his injury was caused by the negligence of CMHA's employee, Willie Hammond, because of his failure to notify emergency maintenance of the existence of the accumulated water or otherwise ameliorate the hazard himself. CMHA argues that the water spill was an open and obvious hazard because of

Canidate's acknowledgment that he overheard other tenants discussing a leak outside the television room.

{¶14} The Supreme Court of Ohio recognized in *Armstrong v. Best Buy Co., Inc.*, 99 Ohio St.3d 79, 2003-Ohio-2573, 788 N.E.2d 1088, ¶ 11-15, that the open-and-obvious doctrine relates to the threshold issue of duty in a negligence action. By focusing on duty, "the rule properly considers the nature of the dangerous condition itself, as opposed to the nature of the plaintiff's conduct in encountering it." *Id*. Where a condition is open and obvious, the premises owner is absolved from taking any further action to protect the plaintiff. *Id*. The open-and-obvious nature of the hazard serves as a warning, and the owner or occupier may reasonably expect that persons entering the premises will discover those dangers and take appropriate measures to protect themselves. *Id*. at ¶ 4-8, citing *Simmers v. Bentley Constr. Co.*, 64 Ohio St.3d 642, 644, 1992-Ohio-42, 597 N.E.2d 504. When the open-and-obvious doctrine is applicable, it obviates the duty to warn and acts as a complete bar to recovery. *Armstrong* at ¶ 4-8.

{¶15} The question of whether a danger is open and obvious is an objective one. *Goode v. Mount Gillion Baptist Church*, 8th Dist. Cuyahoga No. 87876, 2006-Ohio-6936, ¶ 25. The fact that a plaintiff was unaware of the danger is not dispositive of the issue. *Id*. Hence, a court must consider whether, in light of the specific facts and circumstances of the case, an objective, reasonable person would deem the danger open and obvious. *See Stanfield v. Amvets Post No. 88*, 2d Dist. Miami No. 06CA35, 2007-Ohio-1896, ¶ 12.

{¶16} Notwithstanding the objective nature of the inquiry, the question of whether a danger is open and obvious is not always a question that can be decided as a matter of law simply because it may be visible. *Furano v. Sunrise Inn of Warren,* Inc., 11th Dist. Trumbull No.

2008-T-0132, 2009-Ohio-3150, ¶ 23; *Hudspath v. Cafaro Co.*, 11th Dist. Ashtabula No. 2004-A-0073, 2005-Ohio-6911. When only one conclusion can be drawn from the established facts, the issue of whether a risk was open and obvious may be decided by the court as a matter of law. *Klauss v. Marc Glassman, Inc.*, 8th Dist. No. 84799, 2005-Ohio-1306, ¶ 18. When reasonable minds could differ with respect to whether a danger is open and obvious, the obviousness of the risk is an issue for the jury to determine. *Id*. citing *Carpenter v. Marc Glassman*, Inc., 124 Ohio App.3d 236, 240, 705 N.E.2d 1281 (8th Dist.1997).

{¶17} Furthermore, the "attendant circumstances" of a slip and fall may create a material issue of fact regarding whether the danger was open and obvious. *Id*. Attendant circumstances involve all facts relating to the slip and fall. *Armstrong v. Meade*, 6th Dist. Lucas No. L-06-1322, 2007-Ohio-2820, ¶ 14. In effect, attendant circumstances include any distraction that might divert an ordinary person's attention in the same circumstances and consequently reduce the amount of care a reasonable person would exercise. *Hudspath* at ¶ 19.

{¶18} Construing the evidence in a light most favorable to Canidate, we agree with the trial court's assessment that reasonable minds could differ with respect to whether the water hazard in this instance was open and obvious. However, this does not end our inquiry. In order to avoid summary judgment, Canidate's injury must have been "due to a physical defect" on the property. We find no evidence in the record to establish this prong of R.C. 2744.02(B)(4).

{¶19} The term "physical defect" is defined as a perceivable imperfection that diminishes the worth or utility of the object at issue. *Moncrief*, 8th Dist. Cuyahoga No. 100339, 2014-Ohio-837, at ¶ 15, citing *Duncan*, 8th Dist. Cuyahoga No. 97222, 2012-Ohio-1949.

> [I]n general, courts have held the R.C. 2744.02(B)(4) physical defect exception may apply if the instrumentality that caused appellee's injury did not operate as

> intended due to a perceivable condition or if the instrumentality contained a perceivable imperfection that impaired its worth or utility.

Jones v. Del. City School Dist. Bd. of Edn., 5th Dist. Delaware No. 2013 CAE 01 0009, 2013-Ohio-3907, ¶ 22, citing *Leasure v. Adena Local School Dist.*, 4th Dist. Ross No. 11CA3249, 2012-Ohio-3071, 973 N.E.2d 810.

{¶20} Canidate argues that the missing ceiling tile noted by Hammond constitutes a physical defect in the property that caused his injury. CMHA argues that the missing ceiling tile did not constitute a defect because it was merely aesthetic in nature.

{¶21} We find no evidence in the record from which a reasonable jury could conclude that the missing ceiling tile was a physical defect that caused Canidate's injury. In Hammond's deposition, he described the missing ceiling tile as akin to a conference room ceiling panel. There is no evidence in the record to suggest that the missing tile's purpose or utility was to absorb, collect or prevent leaking water from draining from the third floor to the first or that it was capable of such function. In fact, plaintiff has failed to offer any evidence from which a reasonable person could conclude that the ceiling tile's function was anything other than purely aesthetic or that its absence caused the other ceiling tiles to not operate as intended and absorb the leak. The record lacks any evidence from which one could conclude that if the tile had been in place the leaking water would not have continued to drain to the floor.

{¶22} We find that the trial court erred in concluding that a genuine issue of fact existed in regards to the ceiling tile constituting a physical defect that caused Canidate's injury. Because of the lack of evidence establishing a physical defect, we find that CMHA is entitled to judgment as a matter of law on the basis of immunity afforded by R.C. Chapter 2744.

{¶23} CMHA's assignment of error is sustained.

{¶24} The judgment of the trial court is reversed.

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 issue out of this court directing the 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.

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EILEEN A. GALLAGHER, PRESIDING JUDGE

PATRICIA A. BLACKMON, J., CONCURS;
MARY EILEEN KILBANE, J., DISSENTS (WITH SEPARATE OPINION).

MARY EILEEN KILBANE, J., DISSENTING:

{¶25} I respectfully dissent. I would affirm the trial court's decision denying immunity to CMHA at this stage of the proceedings in plaintiff's action for injuries sustained at the Cedar Extension High Rise senior living facility.

{¶26} Prior to rendering its decision in this matter, the trial court held an oral hearing on the motion for summary judgment on July 11, 2014, at which the parties appeared in court and argued their respective positions. The court considered the arguments and evidence presented, and on July 24, 2014, the court concluded as follows:

> The court has reviewed the parties' Civ.R 56(E) evidence, the applicable law and considered the oral arguments of the attorneys at the 7/11/14 hearing on this motion pursuant to the standard of Civ.R 56(C), considering the evidence in a light most favorable to plaintiff, the non-moving party, there are genuine issues of material fact in dispute and reasonable minds can differ as to whether the exception to sovereign immunity provided by R.C. 2744.02(B)(4) applies in this case. Specifically, pursuant to the requirements of this exception, CMHA is undoubtedly a political subdivision and plaintiff's injuries occurred within a building used in connection with a governmental function, the provision of public housing. Further, there are genuine disputes of material fact that remain to be

> litigated with respect to (1) whether a ceiling constitutes a physical defect and whether the absence of a ceiling tile in this case also constitutes a physical defect that causally contributed to plaintiff's fall, and (2) whether the water on the floor was an open and obvious hazard.
>
> * * * CMHA may argue the open and obvious defense, pursuant to common law and as part of their argument that the aforementioned exception to immunity is not applicable in this case. * * * These factual disputes must be resolved by a jury.

{¶27} Likewise, applying the de novo standard of review, I would also conclude that there are genuine issues of material fact as to whether the plaintiff was injured as the result of negligence and due to a physical defect on the premises.

{¶28} As is relevant herein, pursuant to R.C. 2744.02(B)(4), CMHA's general immunity conferred in connection with governmental functions is overcome if the injury is: "'(1) caused by employee negligence, (2) on the grounds or in buildings used in connection with that governmental function, and (3) due to a physical defect on or within those grounds or buildings. All of these characteristics must be present.'" *Duncan v. Cuyahoga Community College*, 8th Dist. Cuyahoga No. 97222, 2012-Ohio-1949, ¶ 26, quoting *Hamrick v. Bryan City School Dist*., 6th Dist. Williams No. WM-10-014, 2011-Ohio-2572, ¶ 25. If this exception is established, then the third tier of the statutory analysis requires a court to determine whether any of the defenses in R.C. 2744.03 provide CMHA with a defense against liability.

{¶29} The phrase "physical defect" is not defined in R.C. Chapter 2744, so courts have looked to common usage of the words in the context of the statute as a whole and concluded that a "physical defect" is a perceivable imperfection that diminishes the worth or utility of the object at issue. *Duncan*. The R.C. 2744.02(B)(4) physical defect exception may apply if the instrumentality that caused the injury did not operate as intended because of a perceivable condition or if the instrumentality contained a perceivable imperfection that impaired its worth or

utility. *Leasure v. Adena Local School Dist.*, 4th. Dist. Ross No. 11CA3249, 2012-Ohio-3071, 973 N.E.2d 810.

{¶30} In this matter, there was a leak from the ceiling at the senior living facility on the first floor in the hallway leading to the tenants' television room. A ceiling tile was missing from the ceiling above the area. I believe that reasonable minds could differ as to whether the ceiling had a perceivable imperfection that diminishes the worth or utility, and that the ceiling did not operate as intended because of this imperfection. I would conclude, as the trial court concluded following its oral hearing in the matter, that there are

> genuine disputes of material fact that remain to be litigated with respect to * * * [whether the ceiling] constitutes a physical defect and whether the absence of a ceiling tile in this case also constitutes a physical defect that causally contributed to plaintiff's fall.

I believe that the record presents genuine issues of material fact as to whether CMHA employees were negligent in connection with their handling of the water leaking into the hallway, whether that negligence caused a physical defect, and whether plaintiff was injured as a result of that physical defect. In my view, a jury should resolve these issues.

{¶31} I would further conclude that reasonable minds could differ as to whether the water presented an open and obvious hazardous condition, and that the evidence presented raises a triable issue of fact on this issue. *Johnson v. Metrohealth Med. Ctr.*, 8th Dist. Cuyahoga No. 87976, 2007-Ohio-392, ¶ 21.

{¶32} I would therefore affirm the judgment of the trial court.