

[Cite as *Hoskins v. Cleveland*, 2023-Ohio-3149.]

COURT OF APPEALS OF OHIO

**EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA**

CONTESSA HOSKINS, :
 :
 Plaintiff-Appellee, :
 : No. 112095
 v. :
 :
 CITY OF CLEVELAND, ET AL., :
 :
 Defendants-Appellants. :

JOURNAL ENTRY AND OPINION

JUDGMENT: AFFIRMED
RELEASED AND JOURNALIZED: September 7, 2023

Civil Appeal from the Cuyahoga County Common Pleas Court
Case No. CV-20-940635

Appearances:

Ciano & Goldwasser, LLP, and Andrew S. Goldwasser;
Flowers & Grube, Paul W. Flowers, and Melissa A. Ghrist,
for appellee.

Mark D. Griffin, City of Cleveland Director of Law, Craig J.
Morice, Amy K. Hough, Gilbert E. Blomgren, and
James R. Russell, Jr., Assistant Directors of Law, *for
appellant.*

ANITA LASTER MAYS, A.J.:

{¶ 1} Defendant-appellant city of Cleveland (“the city”) appeals the trial court’s decision denying their motion for summary judgment in favor of plaintiff-appellee Contessa Hoskins (“Hoskins”). We affirm the trial court’s decision.

I. Facts and Procedural History

{¶ 2} On December 23, 2019, William Johnson (“Johnson”) drowned in the indoor pool located at the Thurgood Marshall Recreation Center, a facility owned and operated by the city. Nieemah Hameed (“Hameed”) was the lifeguard on duty during the time of the drowning. During Hameed’s deposition, regarding the events surrounding Johnson’s drowning, Hameed stated that Johnson entered the deep end of the pool after exiting the locker room. She further stated that Johnson completed his normal routine, as he swam in the pool three times a week. While Johnson was swimming, Hameed recalled that she was seated in a folding chair instead of the elevated lifeguard chair, which was located between Hameed’s chair and the location where Johnson drowned. Hameed stated that she was larger than the lifeguard chair, so she sat in a folding chair that could accommodate her size.

{¶ 3} Hameed stated that she saw Johnson finish his normal routine while seated. She stood up and saw Johnson at the bottom of the pool and then surfacing again. Hameed stated that she did not see Johnson again, so she stood up, walked over to the deep end, and looked down in the water. Hameed stated that she

observed Johnson lying on his back. A second lifeguard, Rod-El Hill (“Hill”), who was reporting for duty, stated, during his deposition, that Hameed signaled him to the pool. As Hill walked towards Hameed, he observed a body at the bottom of the pool. Hill stated that when he walked over, Hameed jumped in the pool and pulled Johnson from the bottom.

{¶ 4} Hameed stated that Johnson had no pulse, and Hill stated that he detected no signs on life. Both lifeguards performed CPR until the EMS arrived. It was later determined that Johnson, who had epilepsy, had an epileptic seizure while swimming. It was known that earlier in the year, Johnson had a seizure while swimming. Hameed and Elandra Browne (“Browne”), the physical director of the recreation facility, both stated that they were present when Johnson had his previous seizure and assisted him during that time. Hameed also stated that she was trained on how to recognize and respond to emergencies involving epileptic swimmers in order to obtain her lifeguard certification.

{¶ 5} On November 27, 2020, Hoskins, the executor of Johnson’s estate, filed a complaint against the city, Hameed, Hill, Browne, and Terry Woods, Sr. (“Woods”) for the wrongful death of Johnson. Hoskins voluntarily dismissed all claims against Hill, Woods, and Browne without prejudice. However, the claims against the city and Hameed remained. Hoskins, in her complaint, alleged that Hameed, as an employee of the city, breached her duty as a lifeguard, by negligently and/or recklessly failing to appropriately monitor the pool and to provide

reasonably appropriate lifeguard-related services. Hoskins further argued that Johnson's death was a result of Hameed's breach.

{¶ 6} Hoskins argued that Hameed was unable to observe Johnson swimming in the deep end because the elevated lifeguard chair, which had various objects hanging from it, obstructed her low-level view. To support her claim, Hoskins requested that Dr. Francesco A. Pia ("Dr. Pia"), an aquatics safety expert, examine the events surrounding the drowning. Dr. Pia stated at his deposition that he reviewed all of the relevant information gathered during discovery and confirmed that Hameed's view was obstructed as she sat in the folding chair instead of the elevated lifeguard chair. Dr. Pia stated that this constituted a physical defect on the pool grounds.

{¶ 7} In the city's answer to Hoskin's complaint, it argued political subdivision immunity under R.C. 2744.01 and that Johnson assumed the risk of drowning by swimming at their facility. The city also contended that Johnson signed a recreation waiver that absolves them of any liability for injury suffered while at the pool.

{¶ 8} On March 1, 2022, the city filed a motion for summary judgment. In the city's motion, they provided an identical argument as in their answer: they were immune from liability under R.C. 2744.01 and Johnson signed a waiver of liability. They also stated that Johnson stopped taking his seizure medication and his doctor advised him to start taking it again to control his seizures. The city further argued

that according to the autopsy report, Johnson died of accidental drowning due to a seizure.

{¶ 9} On March 28, 2022, Hoskins filed an opposition to the city’s motion for summary judgment, arguing that the city is not immune from liability because Hameed’s negligence caused Johnson’s death. Further, Hoskins argued that Hameed, during her deposition, agreed that a failure to follow the policies and procedures of the city would be reckless and irresponsible. Hoskins also argued that failing to sit in the elevated lifeguard chair is a violation of policy and procedure that the city has instituted for its lifeguards on duty. Hoskins also contends that Hameed was on notice that Johnson suffered from epilepsy and could have a seizure because Hameed was present for the previous seizure Johnson suffered at the pool a few months prior to his death.

{¶ 10} On September 28, 2022, the trial court held an oral hearing on the city’s motion for summary judgment. On October 3, 2022, the trial court denied the city’s motion for summary judgment, stating: “After careful review and consideration of both the briefings and the oral arguments the court finds that there is a genuine issue of material fact. Defendant’s motion for summary judgment is denied.” Journal entry No. 130252467 (Oct. 3, 2022).

{¶ 11} The city filed this appeal, assigning three errors for our review:

1. The trial court erred as a matter of law when it determined that there were genuine issues of material fact for an exception to the city’s immunity;

2. The trial court erred as a matter of law by failing to reinstate immunity; and
3. The trial court erred as a matter of law by determining there was a genuine issue of material fact for employee immunity.

II. Summary Judgment

A. Standard of Review

{¶ 12} “We review a trial court’s summary judgment decision de novo, applying the same standard that the trial court applies under Civ.R. 56(C).” *Heba El Attar v. Marine Towers E. Condominium Owners’ Assn.*, 8th Dist. Cuyahoga No. 111695, 2023-Ohio-2581, ¶ 10, citing *Grafton v. Ohio Edison Co.*, 77 Ohio St.3d 102, 105, 671 N.E.2d 241 (1996). Under 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) after construing the evidence most favorably for the party against whom the motion is made, reasonable minds can reach only a conclusion that is adverse to the nonmoving party. Civ.R. 56(C).

{¶ 13} “On a motion for summary judgment, the moving party carries an initial burden of identifying specific facts in the record that demonstrate the absence of a genuine issue of material fact and entitlement to summary judgment as a matter of law.” *El Attar* at ¶ 11, citing *Dresher v. Burt*, 75 Ohio St.3d 280, 292-293, 662 N.E.2d 264 (1996). “If the moving party fails to meet this burden, summary judgment is not appropriate; if the moving party meets this burden, the nonmoving party must then point to evidence of specific facts in the record demonstrating the

existence of a genuine issue of material fact for trial.” *Id.* at 293. “If the nonmoving party fails to meet this burden, summary judgment is appropriate.” *Id.*

B. Political Subdivision Immunity

{¶ 14} In the city’s first assignment of error, it argues that the trial court erred by determining there were genuine issues of fact for an exception to its immunity. “R.C. 2744.02(A)(1) divides the functions of a political subdivision into two types, governmental functions and proprietary functions.” *Garmback v. Cleveland*, 8th Dist. Cuyahoga No. 110295, 2022-Ohio-1490, ¶ 20. “Under the first tier, if a defendant is determined to be a political subdivision, it is immune from liability for its governmental and proprietary functions ‘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 * * *.’” *Id.*, quoting R.C. 2744.02(A)(1).

{¶ 15} “Under the second tier, the immunity conferred under R.C. 2744.02(A)(1) “is not absolute, but is * * * subject to the five exceptions to immunity listed in * * * R.C. 2744.02(B).”” *Id.* at ¶ 21, quoting *Hortman v. Miamisburg*, 110 Ohio St.3d 194, 2006-Ohio-4251, 852 N.E.2d 716, ¶ 12. “The third tier of political subdivision immunity analysis comes into operation if it is determined that one of the exceptions to immunity under R.C. 2744.02(B)(1) through (5) applies.” *Id.* at ¶ 22. “Under the third-tier, immunity can be reinstated

if the political subdivision can demonstrate that one of the defenses under R.C. 2744.03 applies.” *Id.*, citing *Hortman* at ¶ 12.

{¶ 16} First, the city qualifies as a political subdivision under R.C. 2744.01(F) (“Political subdivision * * * means a municipal corporation, township, county, school district, or other body corporate and politic responsible for governmental activities in a geographic area smaller than that of the state.”). The next question is whether the city was engaged in a governmental or proprietary function during the incident that caused the claimed loss.

{¶ 17} Second, the city was engaged in a governmental function during the drowning incident. R.C. 2744.01(C)(2)(u)(iv) defines the operation of a swimming pool as a governmental function. As a political subdivision engaged in a governmental function, the city is entitled to immunity under R.C. 2744.02(A)(1) unless one of the exceptions in R.C. 2744.02(B) applies.

{¶ 18} According to R.C. 2744.02(B)(4),

political subdivisions are liable for injury, death, or loss to person or property that is caused by the negligence of their employees and that occurs within or on the grounds of, and is due to physical defects within or on the grounds of, buildings that are used in connection with the performance of a governmental function.

{¶ 19} Hoskins claims that Hameed’s negligent performance as a lifeguard employed by the city caused the death to Johnson. Specifically, Hoskins argues that Hameed’s failure to sit in the elevated lifeguard chair and instead sitting in a low-level folding chair at the shallow end of the pool, created a physical defect at the pool.

In order to demonstrate that R.C. 2744.02(B)(4) applies to remove immunity from the city, Hoskins ““must establish * * * the elements required to sustain a negligence action.”” *Garmback*, 8th Dist. Cuyahoga No. 110295, 2022-Ohio-1490, at ¶ 26, quoting *Riveredge Dentistry Partnership v. Cleveland*, 8th Dist. Cuyahoga No. 110275, 2021-Ohio-3817, ¶ 32.

{¶ 20} “Thus, in order for the ‘physical defect’ exception to the city’s general immunity to apply, Hoskins must demonstrate that (1) Johnson’s death was caused by the negligence of Hameed; (2) the negligence occurred within a building used in connection with a governmental function; and (3) the death was due, in part, to a physical defect within the building.” *Kerber v. Cuyahoga Hts.*, 8th Dist. Cuyahoga No. 102419, 2015-Ohio-2766, ¶ 20.

The Ohio Supreme Court has held that “[i]t is clear that the operation of a pool is a government function[,]” and in the case of an injury at a city’s indoor swimming pool, that “it is equally clear that the injury ‘occur[ed] within or on the grounds of a building that was used in connection with the performance of a governmental function.’”

Id. at ¶ 23, quoting *M.H. v. Cuyahoga Falls*, 134 Ohio St.3d 65, 2012-Ohio-5336, 979 N.E.2d 1261, ¶ 11, quoting R.C. 2744.01(B)(4).

{¶ 21} At the time of Johnson’s drowning, Hameed was seated in a folding chair, lower to the ground than the elevated lifeguard chair. The lifeguard chair was covered with hanging objects and was located in between Hameed’s folding chair and the location where Johnson drowned. Hameed stated at her deposition that she

had to stand up to see Johnson, demonstrating that her view of Johnson was obstructed from where she was seated.

{¶ 22} Additionally, Dr. Pia, the aquatics safety consultant, confirmed that Hameed’s view was obstructed as she sat in the folding chair instead of the lifeguard chair. Dr. Pia stated that this constituted a physical defect on the pool grounds. These facts are analogous with the facts in *Kerber*, where a lifeguard was sitting in a low chair, which obstructed the lifeguard’s view of a near drowning incident. In *Kerber*, the aquatics safety consultant stated that “the low profile chair was ineffective and reduced the line of sight and observation ability of the on duty lifeguards.” *Id.* at ¶ 25. We held in *Kerber*, “[o]n this record, we find that there is a genuine issue of material fact as to whether the use of the low deck lifeguard chair created a physical defect at the pool grounds.” *Id.* at ¶ 26. In light of the Dr. Pia’s testimony, Hameed’s testimony that she had to get out of the folding chair to observe Johnson, and our decision in *Kerber*, we find that there is a genuine issue of material fact as to whether the use of the low folding chair created a physical defect at the pool grounds.

{¶ 23} Therefore, the city’s first assignment of error is overruled.

{¶ 24} In the city’s second and third assignments of error, they argue that the trial court erred as a matter of law by failing to reinstate their immunity and by determining there was a genuine issue of fact for employee immunity. “Under the third-tier, immunity can be reinstated if the political subdivision can demonstrate

that one of the defenses under R.C. 2744.03 applies.” *Garmback*, 8th Dist. Cuyahoga No. 110295, 2022-Ohio-1490, at ¶ 21, citing *Hortman*, 110 Ohio St.3d 194, 2006-Ohio-4251, 852 N.E.2d 716, at ¶ 12.

{¶ 25} Regarding the third tier of the political subdivision immunity test, we do not find that any of the defenses of R.C. 2744.03(A) apply. The city contends that the exception under subsection (5) is applicable, which states:

The political subdivision is immune from liability if the injury, death, or loss to person or property resulted from the exercise of judgment or discretion in determining whether to acquire, or 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.

R.C. 2744.03(A)(5).

{¶ 26} “In regard to subsection (5), it is not applicable if the judgment or discretion was exercised in a wanton or reckless manner.” *Kerber*, 8th Dist. Cuyahoga No. 102419, 2015-Ohio-2766, at ¶ 29. Hoskins’s amended complaint specifically alleges “to the extent that * * * Hameed * * * use[d] [her] judgment or discretion in the exercise of determining whether to acquire, or to how use, equipment, supplies, materials, personnel, facilities and other resources, [she] did so with malicious purpose, in bad faith, or in a wanton or reckless manner.” Hoskins also filed her complaint against Hameed individually. We find that a genuine issue of material fact exists as to whether Hameed was reckless by sitting in the folding chair instead of the elevated lifeguard chair.

Generally, immunity is extended to claims against individual employees of political subdivisions. Under R.C. 2744.03(A)(6), an employee of a political subdivision is immune from liability unless: (1) the employee's acts or omissions are manifestly outside the scope of the employee's employment or official responsibilities; (2) the employee's acts or omissions were malicious, in bad faith, or wanton or reckless; or (3) liability is expressly imposed on the employee by a section of the Revised Code.

Id. at ¶ 30.

{¶ 27} “Generally, whether an employee acted with malicious purpose, in bad faith, or in a wanton or reckless manner are questions of fact.” *Id.* at ¶ 31, citing *Long v. Hanging Rock*, 4th Dist. Lawrence No. 09CA30, 2011-Ohio 5137, ¶ 17. “Upon review, we find that a genuine issue of material fact exists as to whether [defendant] was reckless in regard to this incident. There is evidence in this case upon which a jury could determine that [defendant] was more than merely negligent.” *Id.* First, Hameed was not sitting in the elevated lifeguard chair. Second, Hameed's view was arguably obstructed by the objects hanging from the lifeguard chair that was in between her and where Johnson was swimming. Third, Hameed had to stand up from her chair to view Johnson at the bottom of the pool. Fourth, Hameed stood once, sat down, stood again, and appears to realize she could not see Johnson. She walked over to where Johnson was swimming and observed Johnson in the bottom of the pool. She motioned for Hill to come to the pool, and only when Hill arrived did Hameed get Johnson out of the pool. Fifth, Dr. Pia, an

aquatics safety consultant, stated Hameed's folding chair and hanging objects from the lifeguard chair constituted a physical defect on the pool grounds.

{¶ 28} Therefore, we determine that the trial court did not err by failing to reinstate the city's immunity or by determining that there is a genuine issue of material fact as to Hameed's immunity. The city's second and third assignments of error are overruled.

{¶ 29} Judgment affirmed.

It is ordered that appellee recover from appellant 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.

ANITA LASTER MAYS, ADMINISTRATIVE JUDGE

FRANK DANIEL CELEBREZZE, III, J., and
MICHELLE J. SHEEHAN, J., CONCUR

KEYWORDS

#112095

Summary judgment; genuine issues of material fact. The trial court properly denied the appellant's summary judgment motion because there are genuine issues of material fact for trial.