[Cite as *Ohio Bell Tel. Co. v. Riley*, 2010-Ohio-5371.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 94771

OHIO BELL TELEPHONE COMPANY

PLAINTIFF-APPELLEE

vs.

LEON RILEY, INC., ET AL.

DEFENDANTS-APPELLEES

[Appeal by City of Westlake, Third-Party Defendant-Appellant]

JUDGMENT:
REVERSED AND REMANDED

Civil Appeal from the
Cuyahoga County Common Pleas Court
Case No. CV-690564

BEFORE: Boyle, J., Rocco, P.J., and Kilbane, J.

RELEASED AND JOURNALIZED: November 4, 2010

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MARY J. BOYLE, J.:

{¶ 1} Third-party defendant-appellant, city of Westlake ("Westlake"), appeals from a trial court judgment denying its motion to dismiss based on political subdivision immunity. It raises one assignment of error for our review, that is, it claims the trial court erred in denying its motion. Finding merit to the appeal, we reverse and remand.

Procedural History and Factual Background

{¶ 2} In April 2009, Ohio Bell Telephone Company ("Ohio Bell"), filed a complaint against defendant-appellee, Leon Riley, Inc., for negligently damaging its underground utility lines.

{¶ 3} Riley denied Ohio Bell's allegations and brought a third-party complaint against Westlake and third-party defendant-appellee, Schirmer

Construction Company ("Schirmer"). Riley claimed that Westlake caused Ohio Bell's damages because it acted in a wanton and/or reckless manner in "denying permission to verify the location of underground structures," and thereby prevented locating the underground utilities. Riley further claimed that it only acted at Schirmer's instruction to proceed with horizontal boring after Westlake denied the permit to excavate.

{¶ 4} Schirmer, in turn, brought cross-claims against Ohio Bell and Westlake. Westlake answered and asserted, inter alia, the affirmative defense of political subdivision immunity.

{¶ 5} Subsequently, Westlake moved to dismiss all claims against it based on immunity. The trial court summarily denied Westlake's motion, after which Westlake appealed.

Standard of Review

{¶ 6} A motion to dismiss for failure to state a claim upon which relief can be granted is procedural and tests the sufficiency of the complaint. *State ex rel. Hanson v. Guernsey Cty. Bd. of Commrs.* (1992), 65 Ohio St.3d 545, 605 N.E.2d 378. It is well settled that "when a party files a motion to dismiss for failure to state a claim, all factual allegations of the complaint must be taken as true and all reasonable inferences must be drawn in favor of the nonmoving party." *Byrd v. Faber* (1991), 57 Ohio St.3d 56, 60, 565 N.E.2d 584, citing *Mitchell v. Lawson Milk Co.* (1988), 40 Ohio St.3d 190, 192, 532 N.E.2d 753.

{¶ 7} While the factual allegations of the complaint are taken as true, "[u]nsupported conclusions of a complaint are not considered admitted *** and are not sufficient to withstand a motion to dismiss." *State ex rel. Hickman v. Capots* (1989), 45 Ohio St.3d 324, 324, 544 N.E.2d 639. In light of these guidelines, in order for a court to grant a motion to dismiss for failure to state a claim, it must appear "beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *O'Brien v. Univ. Community Tenants Union, Inc.* (1975), 42 Ohio St.2d 242, 245, 327 N.E.2d 753.

Three-Tiered Analysis for Determining Immunity

{¶ 8} To determine whether a political subdivision enjoys immunity under the Political Subdivision Tort Liability Act, as codified in R.C. Chapter 2744, we employ the three-tiered analysis set forth in *Colbert v. Cleveland*, 99 Ohio St.3d 215, 2003-Ohio-3319, 790 N.E.2d 781.

{¶ 9} "The first tier is the general rule that a political subdivision is immune from liability incurred in performing either a governmental function or proprietary function. [*Greene Cty. Agricultural Soc. v. Liming*, 89 Ohio St.3d 551, 556-557, 2000-Ohio-486, 733 N.E.2d 1141]; R.C. 2744.02(A)(1). However, that immunity is not absolute. R.C. 2744.02(B); *Cater v. Cleveland* (1998), 83 Ohio St.3d 24, 28, 697 N.E.2d 610." *Colbert* at ¶7.

{¶ 10} "The second tier of the analysis requires a court to determine whether any of the five exceptions to immunity listed in R.C. 2744.02(B) apply to

expose the political subdivision to liability." Id. at ¶8, citing *Cater* at 28. The express exceptions under R.C. 2744.02(B) are: (1) the negligent operation of a motor vehicle by an employee, R.C. 2744.02(B)(1); (2) the negligent performance of proprietary functions, R.C. 2744.02(B)(2); (3) the negligent failure to keep public roads open and in repair, R.C. 2744.02(B)(3); (4) the negligence of employees occurring within or on the grounds of certain buildings used in connection with the performance of governmental functions, R.C. 2744.02(B)(4); (5) express imposition of liability by statute, R.C. 2744.02(B)(5).

{¶ 11} "If any of the exceptions to immunity in R.C. 2744.02(B) do apply and no defense to that section protects the political subdivision from liability, *** the third tier of the analysis requires a court to determine whether any of the defenses in R.C. 2744.03 apply, thereby providing the political subdivision a defense against liability." *Colbert* at ¶9.

Proprietary-Function Exception to Immunity

{¶ 12} Appellees agree that the general grant of immunity applies to Westlake, but contend that the exception for negligence committed by employees engaged in a proprietary function applies to revoke that immunity. R.C. 2744.02(B)(2), the proprietary-function exception, states that, with certain exceptions, "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." Appellees contend

that Westlake's action, denying an excavation permit, was a proprietary function, not a governmental function.

{¶ 13} The mutually exclusive definitions of "governmental function" and "proprietary function" are set out in R.C. 2744.01. R.C. 2744.01(C)(2) lists functions expressly designated as governmental functions and R.C. 2744.01(G)(2) lists specific functions that are expressly designated as proprietary functions. If an activity conducted by a political subdivision does not fall within either R.C. 2744.01(C)(2) or 2744.01(G)(2), then to classify the activity, courts must look to R.C. 2744.01(C)(1), which defines governmental function, and R.C. 2744.01(G)(1)(b), which defines proprietary function. Essentially, if the activity is one customarily engaged in by nongovernmental persons, then the activity is proprietary. *Greene Cty.*, 89 Ohio St.3d at 557.

{¶ 14} Westlake maintains none of the exceptions under R.C. 2744.02(B) apply to remove its immunity. Specifically, it contends that a city's granting or denying an excavation permit is a governmental function. Thus, it claims the proprietary-function exception does not apply. In support of its argument, Westlake relies on this court's decision in *Nagorski v. Valley View* (1993), 87 Ohio App.3d 605, 622 N.E.2d 1088.

{¶ 15} In *Nagorski*, a property owner filed suit against a political subdivision, its engineer, and a general contractor, alleging that his property had been damaged through excessive flooding, noise, and dust on account of the

negligent operation of road moving equipment. The trial court granted summary judgment in favor of the subdivision and its engineer based on R.C. Chapter 2744.

{¶ 16} This court upheld the trial court's decision, stating: "The village's decision to grant Target [the general contractor] an excavation permit and the village engineer's responsibility in setting forth the specifics of the permit and enforcing it are not functions which give rise to liability on the part of the political subdivision or its employee." *Nagorski* at 609.

{¶ 17} This court explained that the Valley View's act of granting the excavation permit fell within the explicit governmental function listed under R.C. 2744.01(C)(2)(p):

{¶ 18} "The provision or nonprovision of inspection services of all types, including, but not limited to, inspections in connection with building, zoning, sanitation, fire, plumbing, and electrical codes, and the taking of actions in connection with those types of codes, including, but not limited to, the approval of plans for the construction of buildings or structures and the issuance or revocation of building permits or stop work orders in connection with buildings or structures."

{¶ 19} We agree with Westlake that *Nagorski* applies to the instant case. Just as Valley View's act of granting the permit was a governmental function entitling the Valley View to immunity, Westlake's action here — denying the

excavation permit — was also a governmental function under R.C. 2744.01(C)(2)(p). Accordingly, Westlake is immune as a matter of law for any negligence committed on the part of its employees in denying the permit.

{¶ 20} Appellees disagree that *Nagorski* applies. They claim that denying the permit in question here falls under the express proprietary function listed in R.C. 2744.02(G)(2)(c):

{¶ 21} "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[.]"

{¶ 22} We disagree. When deciding whether a political subdivision is engaged in a governmental or proprietary function pursuant to R.C. 2744.01, a court should look to the particular activity the subdivision is engaged in and decide whether that particular activity is of the type customarily engaged in by nongovernmental persons. *Allied Erecting & Dismantling Co. v. Youngstown*, 151 Ohio App.3d 16, 2002-Ohio-5179, 783 N.E.2d 523, ¶52.

{¶ 23} Westlake's purpose in denying the excavation permit to locate the utility was not to establish, maintain, or operate utility lines. If anything, it was to regulate the use of or maintain the road, which was located over Ohio Bell's utility lines. When a city acts to maintain or regulate the use of roads, it is an express governmental function. R.C. 2744.01(C)(2)(e) ("regulation of the use of, and the

maintenance and repair of, roads, highways, streets ***"). See *CAC Bldg. Properties, L.L.C. v. Cleveland*, 8th Dist. No. 91991, 2009-Ohio-1786 (city would be liable for damage to utility if the city had undertaken a "utility venture," and not "acted with a purpose to repair the sidewalk," then city would have been liable for damage to utility).

{¶ 24} As an alternative argument, appellees further argue that in denying the permit, Westlake engaged in a proprietary function customarily engaged in by nongovernmental persons, namely, protecting its property. We also disagree with this argument.

{¶ 25} Appellees cite *Allied Erecting*, 151 Ohio App.3d 16, in support of its argument. They assert that "[b]ecause most persons customarily protect their own property, the court in *Allied* found it was illogical for the City to suggest that it was acting any differently than any other property owner ***."

{¶ 26} In *Allied*, the city had purchased property from a railroad company. Allied (who did not know the city had purchased the land) purchased all of the track, rails, and "salvageable ballast and ties" located on the land. The two parties got into a dispute over who owned the old railroad materials. When Allied attempted to remove the materials from the land, the city threatened it with criminal charges.

{¶ 27} In finding that the city was not entitled to immunity, the *Allied* court reasoned:

{¶ 28} "[W]e find that the trial court misapplied R.C. Chapter 2744 by incorrectly framing the issue before it. The issue is not whether nongovernmental persons would customarily protect government property; rather, it is whether nongovernmental persons would customarily try to protect their own property. The answer to this, of course, is an emphatic yes. It is illogical to suggest that the city, when threatening to press criminal charges against Allied, was acting any differently than any other property owner threatening an alleged trespasser with criminal charges. Therefore, when the city prevented Allied from removing the ballast, it was engaged in a proprietary function. Thus, if the jury found it did so negligently, then the city's actions fall within R.C. 2744.02(B)(2)'s exception to the rule of general immunity found in R.C. 2744.02(A)." Id. at ¶53.

{¶ 29} While we agree with the *Allied* court's reasoning in that case, we find the facts in the present case to be wholly distinguishable. In *Allied*, the city's actions — threatening Allied for removing railroad materials that Allied had a legitimate right to — were not specifically covered under any of the express governmental or proprietary functions. Thus, the court engaged in the analysis used when an activity is not expressly designated as either a proprietary or governmental function, i.e., it determined whether the city's actions were ones customarily performed by governmental or nongovernmental persons. *Greene Cty.*, 89 Ohio St.3d at 557, citing R.C. 2744.01(C)(1) and 2744.01(G)(1)(b)

(defining what a governmental and proprietary function is when it is not expressly designated as such). We agree that the city's action here — protecting its property — was a proprietary function.

{¶ 30} But in the present case, the city was not acting to protect its property because someone was attempting to appropriate it — an act that is not customarily conducted by governmental persons. Rather, the city's action in denying the permit to excavate the road falls within two express governmental functions listed in R.C. 2744.01(G)(2)(e) and (p) (i.e., regulating the use of and maintaining roads and the issuance or revocation of building permits). The issuance or revocation of building permits and the regulation and maintenance of roads are functions typically performed by governmental persons.

{¶ 31} And appellees' reliance on *Greene Cty.*, 89 Ohio St.3d 551, is also misplaced. If anything, *Green Cty.* supports our decision here. In *Greene Cty.*, the Ohio Supreme Court determined that a county agricultural society was a political subdivision, although it was not specifically designated as one in R.C. 2744.01(F) (defines "political subdivision" as "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."). It then went on to conclude that the county's agriculture activities when conducting the county fair were proprietary functions. Id. at 560-561. It reasoned that "even though conducting a county fair may be an activity not customarily

engaged in by nongovernmental persons, conducting a livestock competition is an activity customarily engaged in by nongovernmental persons. Any organization, whether private or public, can hold a competition of this type." Id. at 560. But applying that same analysis here, "any organization" cannot issue building permits or maintain and regulate the use of roads.

{¶ 32} Thus, we conclude Westlake is entitled to immunity and thus, the trial court erred by not granting Westlake's motion to dismiss. Westlake's sole assignment of error is sustained.

Judgment reversed and remanded to the lower court for further proceedings consistent with this opinion.

It is ordered that appellant recovers from appellees costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate be sent to said 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.

MARY J. BOYLE, JUDGE

KENNETH A. ROCCO, P.J., CONCURS;
MARY EILEEN KILBANE, J., DISSENTS WITH SEPARATE OPINION

MARY EILEEN KILBANE, J., DISSENTING:

{¶ 33} Respectfully, I dissent. I would affirm the trial court's decision to deny immunity to Westlake at this stage of the proceedings. I agree with the majority that there is no question Westlake is a political subdivision for purposes of R.C. 2744; it is thus entitled to immunity under the first tier of the immunity analysis. However, based upon the procedural posture of the case, granting blanket immunity to Westlake is premature.

{¶ 34} In Ohio's statutory immunity scheme, governmental and proprietary functions are mutually exclusive. See *Greene Cty. Agricultural Soc. v. Liming*, 89 Ohio St.3d 551, 2000-Ohio-486, 733 N.E.2d 1141. Here, as in *Greene Cty.*, the issue is not so much whether Westlake was engaging in a governmental or proprietary function; the issue is whether Westlake's denial of a permit to Riley to verify the location of underground structures is a governmental function that constitutes negligence so as to divest it of blanket immunity. With the facts so far in the record, answering that question now would be premature.

{¶ 35} In order to survive a motion to dismiss under Civ.R. 12(B)(6), Riley, as a third-party complainant, must merely allege a set of facts that would plausibly allow it to recover. See, e.g., *Gallo v. Westfield Natl. Ins. Co.*, 8th Dist. No. 91893, 2009-Ohio-1094. This language applies to political subdivisions in the same manner as other defendants. It need not affirmatively dispose of the

immunity question altogether at the Civ.R. 12(B)(6) stage. Requiring Riley to affirmatively demonstrate an exception to immunity at this stage of the proceedings would be tantamount to overcoming a motion for summary judgment at the pleadings stage.

{¶ 36} "Ohio is a notice-pleading state, Ohio law does not ordinarily require a plaintiff to plead operative facts with particularity." *Cincinnati v. Beretta U.S.A. Corp*., 95 Ohio St.3d 416, 2002-Ohio-2480, 768 N.E.2d 1136. Civ.R. 8(A)(1) only requires a complaint to include a "short and plain statement of the claim showing that the party is entitled to relief." As recognized by the Ohio Supreme Court: "Under [the Ohio Rules of Civil Procedure], a plaintiff is not required to prove his or her case at the pleading stage. Very often, the evidence necessary for a plaintiff to prevail is not obtained until the plaintiff is able to discover materials in the defendant's possession. If the plaintiff were required to prove his or her case in the complaint, many valid claims would be dismissed because of the plaintiff's lack of access to relevant evidence. Consequently, as long as there is a set of facts consistent with the plaintiff' s complaint that would allow the plaintiff to recover, the court may not grant a defendant's motion to dismiss." *York v. Ohio State Hwy. Patrol* (1991), 60 Ohio St.3d 143, 145, 573 N.E.2d 1063.

{¶ 37} Taking all allegations as true in Riley's third-party complaint as the law requires, I would affirm the trial court's denial of immunity to Westlake.