

- [Cite as *Walker v. Jefferson Cty. Bd. of Commrs.*, 2003-Ohio-3490.]

STATE OF OHIO, JEFFERSON COUNTY
IN THE COURT OF APPEALS
SEVENTH DISTRICT

LISA A. WALKER,)	
)	CASE NO. 02 JE 14
PLAINTIFF-APPELLANT,)	
)	
- VS -)	OPINION
)	
JEFFERSON COUNTY, OHIO, BOARD)	
OF COUNTY COMMISSIONERS, et al.,)	
)	
DEFENDANTS-APPELLEES,)	
)	
- VS -)	
)	
WILLIAM C. WALKER,)	
)	
THIRD-PARTY DEFENDANT.)	

CHARACTER OF PROCEEDINGS: Civil Appeal from Common Pleas Court, Case No. 00 CV 439.

JUDGMENT: Affirmed.

JUDGES:

Hon. Mary DeGenaro
Hon. Gene Donofrio
Hon. Joseph J. Vukovich

Dated: June 25, 2003

APPEARANCES:
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DeGenaro, J.

{¶1} This timely appeal comes for consideration upon the record in the trial court, the parties' briefs, and their oral arguments before this court. Plaintiff-Appellant, Lisa Walker, appeals the judgment of the Jefferson County Court of Common Pleas which denied her motion for partial summary judgment and granted summary judgment in favor of Defendants-Appellees, the Jefferson County Board of County Commissioners, Elizabeth Ferron, and Brenda Cybulski, based on R.C. Chapter 2744, the Political Subdivision Tort Liability Act. Lisa argues that the Act is unconstitutional and that even if it is constitutional, Appellees are not immune under the Act. She

further argues that the trial court erred by not granting her partial motion for summary judgment on the issue of Appellees' liability.

{¶12} Lisa has failed to demonstrate that the doctrine of political subdivision liability is unconstitutional and she failed to argue that any of the exceptions to immunity apply in this case. Accordingly, Appellees are immune from many of her claims. As for her contractual claims, Lisa has failed to provide any evidence that anyone at the CSEA made a promise of enforcement to her and she has failed to demonstrate that she can enforce contracts between the CSEA, the County, and the State as a third party beneficiary. Accordingly, the trial court's judgment is affirmed.

1. Facts

{¶13} Lisa and her husband, William Walker, were divorced on September 21, 1989. Their divorce decree ordered William to pay child support in the amount of \$267.00 and spousal support in the amount of \$106.15 every two weeks through the Jefferson County Child Support Enforcement Agency. William was only required to pay spousal support for the first five years following the divorce.

{¶14} Following the divorce, William began paying his support obligation. But his payments rarely met the amount due in any particular month. Furthermore, he did not make any support payments from May 1991 through May 1992. Accordingly, by the end of 1992, he had incurred an arrearage of \$22,112.96. This pattern of nonpayment and underpayment of his support obligation continued after 1993. Accordingly, on July 31, 2001, William's total arrearage was \$60,135.97. William was found in contempt of court for incurring that arrearage.

{¶15} Due to what she felt was a lack of enforcement of her child support order, Lisa filed a complaint against the Jefferson County Board of Commissioners, Elizabeth Ferron, and Brenda Cybulski. Ferron was the administrator of the Jefferson County CSEA. Cybulski was the CSEA's investigator which oversaw Lisa's file. That complaint alleged the defendants were in violation of the duties and obligations they were required to provide under the law, breach of contract, a third-party beneficiary claim of breach of contract, breach of fiduciary duties, and a violation of Ohio's Consumer Sales Practices Act. The defendants filed a third-party complaint against William.

{¶6} Subsequently, the Board and Ferron moved for summary judgment. That motion argued they were immune under R.C. Chapter 2744, they took reasonable steps to enforce Lisa's child support obligation, and there was no consumer transaction to violate the CSPA. They also requested summary judgment against William. Cybulski also moved for summary judgment, arguing she was immune and had breached no duty toward Lisa.

{¶7} Lisa responded to those motions by arguing the defendants were not immune from liability but failed to argue any of the exceptions to immunity apply. At the same time, she moved for partial summary judgment. In support of this motion, she explained why she was entitled to summary judgment on the issue of liability for each of her claims.

{¶8} The trial court held a hearing on the pending motions for summary judgment. At that hearing, Lisa repeated her arguments, but also argued, for the first time, that R.C. Chapter 2744 was unconstitutional. In its judgment entry, the trial court found the defendants were immune from suit, did not breach any contract, did not violate the CSPA, and that R.C. Chapter 2744 was not unconstitutional. Lisa timely appeals that judgment and argues five assignments of error. In the event that we conclude the trial court erred, Appellees argue conditional assignments of error.

{¶9} Lisa appeals the trial court's decision granting summary judgment. When reviewing a trial court's decision to grant summary judgment, an appellate court applies the same standard used by the trial court and, therefore, engages in a de novo review. *Parenti v. Goodyear Tire & Rubber Co.* (1990), 66 Ohio App.3d 826, 829. Under Civ.R. 56, summary judgment is only proper when the movant demonstrates that, viewing the evidence most strongly in favor of the non-movant, reasonable minds must conclude no genuine issue as to any material fact remains to be litigated and the moving party is entitled to judgment as a matter of law. *Doe v. Shaffer* (2000), 90 Ohio St.3d 388, 390. "[T]he moving party bears the initial responsibility of informing the trial court of the basis for the motion, and identifying those portions of the record which demonstrate the absence of a genuine issue of fact on a material element of the nonmoving party's claim." *Dresher v. Burt* (1996), 75 Ohio St.3d 280, 296. The nonmoving party has the reciprocal burden of specificity and cannot rest on mere

allegations or denials in the pleadings. *Id.* at 293. A fact is material when it affects the outcome of the suit under the applicable substantive law. *Russell v. Interim Personnel, Inc.* (1999), 135 Ohio App.3d 301, 304.

2. Political Subdivision Immunity Statute

{¶10} In her first assignment of error, Lisa asserts:

{¶11} "The trial court erred in ruling that Appellees were immune under R.C. Chapter 2744."

{¶12} Lisa argues a reasonable trier of fact could have found Ferron and Cybulski were reckless in the execution of their duties and, therefore, they were not immune. She also argues R.C. Chapter 2744 is unconstitutional because it allows a right without a remedy. In response, the Board and Ferron note that Lisa does not challenge the trial court's decision that the Board was immune. In addition, they argue the constitutionality of R.C. Chapter 2744 was not properly raised and that the facts demonstrate there was insufficient evidence to establish Ferron acted recklessly. Cybulski adopted the arguments of her fellow Appellees, while adding reasons why there is no genuine issue of material fact that she acted recklessly. Lisa replies that she properly raised the issue of constitutionality and repeats her argument that a reasonable fact-finder could have found that Ferron and Cybulski acted recklessly.

A. Waiver of Constitutional Challenge

{¶13} We must address the constitutionality of R.C. Chapter 2744 before we can apply it. But before we may do so, we must decide whether Lisa has waived her constitutionality argument. Appellees argue Lisa did not properly raise the constitutionality of R.C. Chapter 2744 for two reasons.

{¶14} First, they argue that Lisa is raising the issue for the first time on appeal because "there can be no dispute that this issue was never raised in the underlying suit before the Trial Court." But this is incorrect. Lisa did not argue that R.C. Chapter 2744 was unconstitutional in her memorandum in opposition to summary judgment. But at the hearing she did make that argument, stating that holding political subdivisions immune violated the Ohio Constitution's provision stating that there should be no right without a remedy.

{¶15} Appellees' second argument is that the issue was not properly raised

under R.C. 2721.12. That statute provides:

{¶16} "In any action or proceeding that involves the validity of a municipal ordinance or franchise, the municipal corporation shall be made a party and shall be heard, and, if any statute or the ordinance or franchise is alleged to be unconstitutional, the attorney general also shall be served with a copy of the complaint in the action or proceeding and shall be heard." R.C. 2721.12(A).

{¶17} This statute is a provision of the Revised Code which deals with declaratory judgments. Although this court recently applied it in regular civil cases seeking monetary damages, relying on the Ohio Supreme Court's decision in *George Shima Buick, Inc. v. Ferencak* (2001), 91 Ohio St.3d 1211. *Mraz v. D & E Counseling Ctr.*, 7th Dist. No. 01 CA 176, 2002-Ohio-5213, the Ohio Supreme Court recently concluded it acted too "zealously" in *Ferencak* since it was not a declaratory judgment action filed pursuant to R.C. Chapter 2721. *Cleveland Bar Assn. v. Picklo*, 96 Ohio St.3d 195, 2002-Ohio-3995, ¶6-7. In *Picklo*, the Supreme Court limited the statute to controlling declaratory judgment actions only, and overruled *Ferencak* to that extent. As this case is also not a declaratory action filed pursuant to R.C. Chapter 2721, R.C. 2721.12(A) does not apply. *Id.* Thus, Appellees' contention that Lisa waived her constitutional argument is meritless.

B. Constitutionality of R.C. Chapter 2744

{¶18} Lisa argues R.C. Chapter 2744 violates Article I, Section 16 of the Ohio Constitution. R.C. Chapter 2744 codifies the concept of sovereign immunity for political subdivisions in the State of Ohio. *Ziegler v. Mahoning Cty. Sheriff's Dept.* (2000), 137 Ohio App.3d 831, 834. That chapter of the Revised Code provides that, with certain exceptions, political subdivisions are "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." R.C. 2744.02(A)(1). In contrast, Article I, Section 16 of the Ohio Constitution provides that "every person, for an injury done him in his land, goods, person, or reputation, shall have remedy by due course of law * * *. Suits may be brought against the state, in such courts and in such manner, as may be provided by law." *Id.*

{¶19} All legislative enactments enjoy a presumption of validity and constitutionality. *Adamsky v. Buckeye Local School Dist.* (1995), 73 Ohio St.3d 360, 361; *Sedar v. Knowlton Constr. Co.* (1990), 49 Ohio St.3d 193, 199; *Hardy v. VerMeulen* (1987), 32 Ohio St.3d 45, 48. Accordingly, a court should only hold that a statute is void when its unconstitutionality is shown beyond a reasonable doubt. *Fabrey v. McDonald Village Police Dept.* (1994), 70 Ohio St.3d 351, 35.

{¶20} When arguing the unconstitutionality of R.C. Chapter 2744, Lisa relies most heavily on *Butler v. Jordan* (2001), 92 Ohio St.3d 354. In *Butler*, a plurality of the court expressed their belief that R.C. Chapter 2744 may be unconstitutional. But a majority of the Ohio Supreme Court did not concur in that opinion. Instead, some of the justices expressed the opposite view in a vigorous dissent. Furthermore, no appellate court in this state has followed the *Butler* plurality's opinion and found R.C. Chapter 2744 unconstitutional. As the Fourth District pointed out in *Ratcliff v. Darby*, 4th Dist. No. 02CA2832, 2002-Ohio-6626, there are reasons to question the validity of the plurality's reasoning as the cases it relies on do not make the strongest of arguments in favor of the plurality's opinion. Accordingly, until the Ohio Supreme Court says otherwise, we will follow its decision in *Haverlack v. Portage Homes, Inc.* (1982), 2 Ohio St.3d 26, 30, where it provided that "the defense of sovereign immunity is not available, *in the absence of a statute providing immunity*, to a municipal corporation in an action for damages." (Emphasis added); see, also, *Fabrey* (Article I, Section 16 does not endow citizens with the fundamental right to sue political subdivisions); *Haas v. Hayslip* (1977), 51 Ohio St.2d 135 (Legislature's enactment of R.C. Chapter 2743 was not intended to waive sovereign immunity as a defense for political subdivisions). Lisa's argument that R.C. Chapter 2744 is unconstitutional is meritless.

C. Application of R.C. Chapter 2744

{¶21} In her other argument in support of her first assignment of error, Lisa argues the trial court erred when it concluded that no reasonable trier of fact could find that Ferron and Cybulski were reckless in the execution of their duties. She argues the trial court applied the wrong test to determine recklessness and that her evidence was sufficient under the proper definition of reckless. Ferron argues the trial court

properly defined reckless and that Lisa's evidence could not establish that Ferron acted recklessly. Cybulski makes a similar argument in her brief.

{¶22} In order to determine whether a political subdivision is immune from a particular suit, R.C. Chapter 2744 requires a three-tiered analysis. *Cater v. Cleveland* (1998), 83 Ohio St.3d 24. In the first tier, R.C. 2744.02(A) provides broad immunity to political subdivisions. *Allied Erecting & Dismantling Co. v. Youngstown*, 151 Ohio App.3d 16, 2002-Ohio-5179, ¶27, quoting *Summers v. Slivinsky* (2001), 141 Ohio App.3d 82, 86-87. In the second tier of the analysis, R.C. 2744.02(B) provides five exceptions to the general rule of immunity. *Id.* Finally, in the third tier, a political subdivision or its employee can then "revive" the defense of immunity by demonstrating the applicability of one of the defenses found in R.C. 2744.03. *Id.* For instance, an employee of a political subdivision may claim immunity unless the plaintiff can prove the employee actions or omissions were (1) manifestly outside the scope of the employee's employment or official responsibilities; (2) were committed with malicious purpose, bad faith, or in a wanton or reckless manner; or 3) liability is imposed on the employee by a section of the Revised Code. R.C. 2744.03(A)(6).

{¶23} Clearly, Lisa's tort claims against each of the defendants falls within the broad immunity granted to political subdivisions by R.C. 2744.02(A). Turning to the second tier of the analysis, she argues Ferron and Cybulski acted recklessly, thus preventing them from claiming immunity under R.C. 2744.03(A)(6)(b). But Lisa has never argued at any stage in these proceedings which of the five exceptions to political subdivision immunity found in R.C. 2744.02(B) apply in this case even though Appellees raised this issue in the trial court. Furthermore, even if Lisa can prove Ferron and Cybulski acted recklessly, such a finding would have no effect on the liability of the political subdivision. *Fabery* at 356.

{¶24} Although the trial court analyzed R.C. 2744.02(B) to see if any of the exceptions to immunity applied in this case, Lisa's failure to argue which of those exceptions applies appears to be similar to the situation this court faced in *Ziegler*. In *Ziegler*, the plaintiffs were attempting to argue that the political subdivision was not immune from suit. The defendant moved to dismiss the suit for failure to state a claim. In support of their argument against that motion to dismiss, the plaintiffs

maintained that their complaint alleges malice, bad faith and recklessness on the part of appellees as defined in R.C. 2744.03(A)(6)(b). *Id.* at 835. Therefore, they argued their complaint should be construed so as to allege an exception to the grant of immunity which precludes a dismissal under Civ.R. 12(B)(6). *Id.*

{¶25} On appeal, this court rejected that argument. "R.C. 2744.03 merely provides defenses to liability in the event that an exception to immunity under R.C. 2744.02(B) applies." *Id.* at 836.

{¶26} "The defenses and immunities found in R.C. 2744.03 * * * do not come into play until after it is proven that a specific exception to general immunity applies under R.C. 2744.02(B). Thus, Appellant is mistaken in those R.C. 2744.03 arguments that are used to try to impose liability in this manner. Appellant must first establish an exception to immunity under R.C. 2744.02(B)(2). This he has failed to do." *Id.*, quoting *Abdalla v. Olexia* (Oct. 6, 1999), 7th Dist. No. 97-JE-43.

{¶27} This court concluded that the plaintiffs' failure to demonstrate the applicability of any exception under R.C. 2744.02(B) prevented them from recovering against the political subdivision. *Id.*

{¶28} Lisa does not argue, as the appellants in *Zeigler* did, that R.C. 2744.03 provides additional exceptions to the immunity granted to political subdivisions. Moreover, she failed to argue the applicability of any of the R.C. 2744.02(B) exceptions. Accordingly, it does not matter whether Cybulski or Ferron were reckless. Lisa has not demonstrated that one of the R.C. 2744.02(B) exceptions applies in this case.

{¶29} Lisa has failed to demonstrate to this court that R.C. Chapter 2744 is unconstitutional. Furthermore, when opposing Appellee's motions for summary judgment, she failed to argue that any of the R.C. 274.02(B) exceptions applied in this case, as required by the second tier of the *Cater* analysis. Accordingly, the trial court did not err when it determined that Appellees were entitled to summary judgment because they were immune from suit. Lisa's first assignment of error is meritless.

3. Contractual Claim

{¶30} In her second assignment of error, Lisa asserts:

{¶31} "The trial court erred in finding that there was no contract between

Appellee Jefferson County and Ms. Walker."

{¶32} Lisa argues that her cooperation with the CSEA created a unilateral binding contract since the CSEA was obligated to enforce the child support order. In the alternative, Lisa argues the CSEA should be held liable under the theory of promissory estoppel since it "held itself out as promising to provide child support enforcement, collection, and distribution services."

{¶33} In response, the Board argues Lisa is merely "cloth[ing] her tort claims in the garb of contract law in an attempt to circumvent Appellees immunity under R.C. Chapter 2744" and that the basic elements of a contractual relationship are lacking between the parties in this case as there was no promise and no consideration. Furthermore, it argues the doctrine of promissory estoppel cannot apply to political subdivisions.

{¶34} The parties dispute whether it is necessary to have consideration in a unilateral contract and whether that consideration existed in this case. A bilateral contract consists of mutual promises between two parties to the contract. *Gold Key Lease, Inc. v. Hood* (Sept. 20, 2001), 7th Dist. No. 00 C.A. 185, quoting *Bretz v. The Union Central Life Ins. Co.* (1938), 134 Ohio St. 171, 174. Unilateral contracts differ because no promisor receives a promise as consideration for his promise. *Id.* But both bilateral and unilateral contracts require mutual assent which is normally manifested by an offer and acceptance. *Nilavar v. Osborn* (2000), 137 Ohio App.3d 469, 484. A unilateral contract requires an offer; the acceptance is the performance of the offered terms and conditions. *Rudy v. Loral Defense Sys.* (1993), 85 Ohio App.3d 148, 153. Similarly, to recover under a theory of promissory estoppel the plaintiff must prove the existence of a clear and unambiguous promise. *Dietz-Britton v. Smythe, Cramer Co.* (2000), 139 Ohio App.3d 337, 351.

{¶35} In this case, Lisa has failed to demonstrate that the CSEA made an offer or promise to her. "An offer is the manifestation of willingness to enter into a bargain, so made as to justify another person in understanding that his assent to that bargain is invited and will conclude it." *McSweeney v. Jackson* (1996), 117 Ohio App.3d 623, 632; 1 Restatement of the Law 2d, Contracts (1981), Section 24. Lisa states that the CSEA promised to do things, but she has failed to introduce any evidence of such a

promise. Instead, she refers to the CSEA's statutorily imposed duties and a reference Ferron made in her deposition to news stories reporting the past successes of the CSEA. But this evidence does not show that anyone in the CSEA made any promises of enforcement to Lisa. It is impossible to conclude from the evidence before us that the CSEA ever bargained with Lisa for anything or that it ever promised her anything. Accordingly, the trial court properly granted summary judgment to the Board on Lisa's contract claims. Lisa's second assignment of error is meritless.

4. Third-Party Beneficiary

{¶36} In her third assignment of error, Lisa asserts:

{¶37} "Trial court erred in finding that there was no breach of third-party beneficiary contract."

{¶38} Here, Lisa argues she is a third-party beneficiary of contracts between the Board, the CSEA, and other governmental bodies. According to Lisa, the Board was required by law to enter into a written plan of cooperation with the CSEA to specify how the entities were to establish and enforce child support orders. Similarly, she argues the Board and the ODJFS were required by law to enter into a partnership agreement. Finally, she argues that the CSEA was required by law to enter into written agreements with the courts, prosecutors, and local law enforcement officials. She argues each of these contracts was intended to benefit children in need of child support and that the CSEA's failure to ensure enforcement of her child support order violated the terms of those contracts.

{¶39} The Board argues Lisa's claim must fail because private citizens do not have the right to enforce governmental contracts unless a different intention is clearly manifested on the contract. In addition, it argues the statutes under which these agreements were made do not give rise to individual rights as the purpose of the CSEA is to preserve the fiscal resources of the state by preventing women and children from becoming dependent on government-provided support.

{¶40} Private citizens generally do not have the right to enforce government contracts as a third-party beneficiary on their own behalf, unless a different intention is clearly manifested in the contract. *Doe v. Adkins* (1996), 110 Ohio App.3d 427, 436; 2 Restatement of the Law 2d, Contracts (1981) 472, Section 313, Comment a. In order

to determine whether the contracts manifested an intent that a private citizen could enforce them as a third-party beneficiary, we must be able to view and interpret those contracts. Lisa has presented no evidence that these contracts existed, let alone the terms of those contracts. Accordingly, it is impossible to determine whether Lisa is entitled to enforce them as a third-party beneficiary. Accordingly, the trial court properly granted summary judgment to the Board on Lisa's third-party contract claims.

5. Remaining Tort Claims

{¶41} In her fourth and fifth assignments of error, which we will address together, Lisa asserts:

{¶42} "The trial court erred in overruling Ms. Walker's motion for summary judgment on the issue of liability for breach of fiduciary duty."

{¶43} "The trial court erred in overruling Ms. Walker's claim of Appellees [sic] violations of the Consumer Sales Practice Act R.C. 1345.01 et seq."

{¶44} Lisa argues she was entitled to summary judgment on the issue of liability on two of her claims, one for fiduciary duty and the other under the CSPA. But her arguments are meritless because Appellees are immune from these claims pursuant to R.C. Chapter 2744.

{¶45} R.C. 2744.02(A)(1) provides that political subdivisions are "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." An action for breach of fiduciary duties is a civil action for damages caused by an act or omission of the political subdivision. A fiduciary duty is, after all, a common law duty. *Cruz v. South Dayton Urological Associates, Inc.* (1997), 121 Ohio App.3d 655, 663. Likewise, an action for damages under the CSPA is a civil action. See *Opial v. City of Rossford* (1996), 116 Ohio App.3d 588.

{¶46} There are certain types of civil actions to which R.C. Chapter 2744 does not apply, such an action for breach of contract. See R.C. 2744.09. But neither an action for breach of fiduciary duties nor an action under the CSPA is one of them. *Id.* Thus, these claims fall within the immunity provided to political subdivisions. Because Appellees are immune under R.C. Chapter 2744, Lisa's fourth and fifth assignments of

error are meritless.

{¶47} In the event that we found the trial court erred, Appellees argued conditional assignments of error. But since we have found each of Lisa's assignments of error are meritless, we do not need to reach those conditional assignments of error. See *Allied* at ¶68.

{¶48} Accordingly, the judgment of the trial court is affirmed.

Judgment affirmed.

Donofrio and Vukovich, JJ., concur.