[Cite as *Cool v. Brown-Clark*, 2020-Ohio-6968.]

IN THE COURT OF APPEALS OF OHIO

SEVENTH APPELLATE DISTRICT
MAHONING COUNTY

THOMAS COOL, et al.

Plaintiffs-Appellees,

v.

SARAH BROWN-CLARK, et al.,

Defendants-Appellants.

OPINION AND JUDGMENT ENTRY
Case No. 19 MA 0028

Civil Appeal from the
Court of Common Pleas of Mahoning County, Ohio
Case No. 16 CV 2532

BEFORE:
Cheryl L. Waite, Carol Ann Robb, Judges and Judge Timothy P. Cannon, Judge of the Eleventh District Court of Appeals, Sitting by Assignment.

JUDGMENT:
Reversed.
Judgment entered for Appellants.

Atty. Richard L. Goodman, Richard L. Goodman Co., L.P.A., 720 Youngstown-Warren Road, Suite E, Niles, Ohio 44446, for Plaintiffs-Appellees

Atty. Eugene J. Fehr, Youngstown City Law Department, 26 Phelps Street, 4th Floor, Youngstown, Ohio 44503, for Defendants-Appellants.

Dated: December 11, 2020

WAITE, P.J.

{¶1} Appellants Sarah Brown-Clark ("Brown-Clark") and the City of Youngstown ("the City") appeal the judgment of the Mahoning County Common Pleas Court denying their motion for summary judgment. This matter involves a claim filed by Appellees Thomas Cool ("Cool") and Thomas Cool Bail Bonding, LLC ("TCBB") alleging Appellants intentionally and maliciously refused to register him as a bail bondsman in the Youngstown Municipal Court. Appellants argue they are entitled to summary judgment based on governmental immunity. Based on the record, the trial court erred in denying Appellants' motion for summary judgment. No genuine issue of material fact exists as to whether Appellants have immunity pursuant to R.C. 2744.02 based on the evidence presented to the trial court. Appellants' assignment of error is sustained, the judgment of the trial court is reversed and judgment is entered for Appellants.

Factual and Procedural History

{¶2} In July of 2011, Cool became a licensed surety bail bonding agent pursuant to R.C. 3905.87. At that time, he formed TCCB. Pursuant to R.C. 3905.87(B), which governs bail bond agents, the agent must submit, along with the application, a copy of a surety bail bond license, the agent's driver's license or state identification card, and a certified copy of the agent's appointment by power of attorney from each insurer the agent represents. Cool filed the requisite documents and the application in the Youngstown Municipal Court on August 11, 2011. Cool's application was not accepted and he was not registered as an agent with the Youngstown Municipal Court for approximately 28 months. Cool alleges he made several inquiries into the status of his registration during

that time and was not given any explanation for the delay or failure to accept his registration.

{¶3} On October 23, 2013, Cool filed a petition seeking a writ of mandamus in this Court naming Brown-Clark only in her capacity as Clerk of the Youngstown Municipal Court as the Respondent. In the writ, Cool claimed that he attempted to register his agency as a bonding agent for Youngstown Municipal Court but Brown-Clark failed to accept that registration. He claimed that she was under a clear legal duty pursuant to R.C. 3905.87 " 'to register Relator as a Surety Bail Bonding Agent and Company and to accept Bail Bonds written by [Cool].' " *State ex rel. Cool v. Clark,* 7th Dist. Mahoning No. 13 MA 167, 2014-Ohio-284, ¶ 1.

{¶4} Brown-Clark filed an answer and affirmative defense on November 20, 2013. She requested the writ be dismissed as moot since Cool's registration had been accepted and he would be added to the list of bond agents for the court beginning in December of 2013. We issued an order requiring Brown-Clark to file a copy of the December, 2013 list. Brown-Clark complied and filed the list, which included Cool as a registered surety agent for the court. We subsequently dismissed the writ as moot. *Id.* at ¶ 6.

{¶5} Two years later, on March 25, 2015, Appellees filed a complaint in the Mahoning County Court of Common Pleas, Case No. 2015 CV 00811, naming as defendants Brown-Clark in her capacity as Clerk of Courts for the Youngstown Municipal Court, the City of Youngstown, Ohio, and John Does 1-10. The complaint alleged Brown-Clark refused to register Cool as a bail bonding agent from August of 2011 to November 20, 2013, and that her refusal was intentional, wanton, willful, and malicious. Cool alleged

that this conduct by Brown-Clark was ratified by the City and the remaining defendants. Cool alleged that Brown-Clark personally disliked him, and had represented to third parties that he was trading bonds for sexual favors and that this conduct deprived Cool of not only business revenue but interfered with due process of law and violated his civil rights. The complaint sought money damages from all defendants individually, jointly and severally. We note that, while Appellees did state Appellants' actions amounted to a violation of due process and civil rights, these were merely mentioned in the complaint. There was no actual civil rights action alleged in the complaint. The complaint was voluntarily dismissed pursuant to Civ.R. 41(A)(1) on August 19, 2016.

{¶6} On September 20, 2016, Appellees filed the instant action naming the same defendants and adding Robert Cregar and Jason Chappell, both competing bond agents. The complaint alleged Cregar and Chappell had interfered with Appellees' business interests and committed civil conspiracy. Appellees voluntarily dismissed their claims against Cregar and Chappell on May 24, 2017. The remaining defendants and claims were identical to the 2015 complaint with the addition of claims against Brown-Clark and the City alleging violations of the Ohio Public Records Act and seeking money damages.

{¶7} On November 17, 2016, Brown-Clark and the City filed an answer as well as a motion to dismiss the public records claims, asserting *res judicata,* collateral estoppel and mootness.

{¶8} While the motion to dismiss was pending, Appellants filed a motion for summary judgment on September 1, 2017. Both Appellants and Appellees cited the 2015 deposition testimony of both Brown-Clark and Cool, taken while the first complaint was still pending. However, neither deposition was properly filed on the record in this matter.

{¶9} In their summary judgment motion, Appellants argued that Brown-Clark and the City were cloaked with absolute immunity in performing judicial and/or quasi-judicial duties, and that since Appellees had failed to present evidence demonstrating Brown-Clark's conduct was malicious, wanton, or intentional, sovereign immunity applied. Appellants relied on Cool's deposition testimony, where he testified he was "suspicious that [Brown-Clark] was attempting to give business to agencies other than his but had no proof of same." (9/1/17 Defendants' Motion for Summary Judgment, p. 2.) Appellants also referred to Cool's deposition testimony in asserting that "Cool also believes that although he never met Defendant Brown-Clark, she has a personal dislike and that she harbors ill will and hatred towards him and wants to harm him because of this." (9/1/17 Defendants' Motion for Summary Judgment, p. 3.)

{¶10} Additionally, while Cool claimed that, based "on information and belief," Brown-Clark had told third parties that Cool traded bonds for sex, he offered no evidence in support of that claim. Appellants acknowledged that at her deposition, Brown-Clark admitted she had kept a file on Cool containing complaints of problems others had experienced with Cool. However, Brown-Clark testified that Cool had not been registered as a bonding agent with the court for two reasons: (1) because it was her opinion that his application was incomplete; and (2) she believed Cool was ineligible to be a bonding agent because he was already employed as a process server with the court. (9/1/17 Defendants' Motion for Summary Judgment, p. 4.) After Brown-Clark sought the advice of legal counsel regarding Cool's application and his ability to be listed as a bonding agent while at the same time being employed by the court as a process server, based on that advice from counsel she ultimately added Cool on the list as an agent with the court.

Because she added Cool as an agent while the mandamus action was pending with this Court, the writ was dismissed as moot.

{¶11} In Appellants' summary judgment motion they asserted that they were protected from suit pursuant to both R.C. 2744.02 and R.C. 2744.03(A)(6). Also, since Cool presented no evidence to support his claim that Brown-Clark harbored personal animosity toward him or that she spread malicious information about him to third parties, there was no evidence of any intentional behaviors and Appellants were acting within the scope of their employment and immune from liability pursuant to R.C. 2744.03(A)(6). Appellants argued that no exceptions to immunity applied to strip them of the presumption of blanket immunity they enjoyed pursuant to R.C. 2744.02. As Brown-Clark was at all times performing a judicial or quasi-judicial function, none of the exceptions to the presumption of immunity applied.

{¶12} Appellees filed a response to the summary judgment motion on February 26, 2018. Attached were affidavits from attorney Gary Van Brocklin who had represented Cool in the mandamus action, reporter Janet Rogers who conducted a telephone interview with Brown-Clark, and an affidavit from Cool. Van Brocklin averred that an Assistant Law Director had told him "Mr. [sic] Brown-Clark did not like Mr. Cool and questioned his character." (2/8/18 Van Brocklin Depo., p. 2.) Rogers testified that Brown-Clark would not register Cool because "he was not a nice man, she focused on his character and told me that he tried to trade bonds in exchange for sex with women, so she was not going to allow him to write bonds in her court." (2/23/18 Rogers Depo., p. 2.) Cool complained that he was never provided any explanation why his application was considered incomplete despite numerous requests from others and that Cool had never

met Brown-Clark or spoken to her directly. Appellees' position was that a genuine issue of material fact existed regarding whether Brown-Clark's actions were manifestly outside the scope of her official responsibilities and were malicious, in bad faith, wanton or reckless in nature and thus she would not be entitled to immunity under R.C. 2744.03.(A)(6).

{¶13} On February 5, 2019, the trial court issued a judgment entry. The court granted Appellees' motion to compel discovery and denied Appellants' motion for summary judgment, concluding, "the affidavits of Janet Rogers and Thomas Cool which are part of the Plaintiff's Reply, are sufficient to create an issue of material fact." The court also overruled Appellants' motion to dismiss. (2/5/19 J.E.)

{¶14} Appellants filed this timely appeal.

Summary Judgment

{¶15} An appellate court conducts a *de novo* review of a trial court's decision to grant summary judgment, using the same standards as the trial court set forth in Civ.R. 56(C). *Grafton v. Ohio Edison Co.,* 77 Ohio St.3d 102, 105, 671 N.E.2d 241 (1996). Before summary judgment can be granted, the trial court must determine that: (1) no genuine issue as to any material fact remains to be litigated, (2) the moving party is entitled to judgment as a matter of law, (3) it appears from the evidence that reasonable minds can come to but one conclusion, and viewing the evidence most favorably in favor of the party against whom the motion for summary judgment is made, the conclusion is adverse to that party. *Temple v. Wean United, Inc.,* 50 Ohio St.2d 317, 327, 364 N.E.2d 267 (1977). Whether a fact is "material" depends on the substantive law of the claim

being litigated. *Hoyt, Inc. v. Gordon & Assoc., Inc*., 104 Ohio App.3d 598, 603, 662 N.E.2d 1088 (8th Dist.1995).

{¶16} "[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." (Emphasis deleted.) *Dresher v. Burt*, 75 Ohio St.3d 280, 296, 662 N.E.2d 264 (1996). If the moving party carries its burden, the nonmoving party has a reciprocal burden of setting forth specific facts showing that there is a genuine issue for trial. *Id.* at 293. In other words, when presented with a properly supported motion for summary judgment, the nonmoving party must produce some evidence to suggest that a reasonable factfinder could rule in that party's favor. *Brewer v. Cleveland Bd. of Edn.,* 122 Ohio App.3d 378, 386, 701 N.E.2d 1023 (8th Dist.1997).

{¶17} The evidentiary materials to support a motion for summary judgment are listed in Civ.R. 56(C) and include the pleadings, depositions, answers to interrogatories, written admissions, affidavits, transcripts of evidence, and written stipulations of fact that have been filed in the case. In resolving the motion, the court views the evidence in a light most favorable to the nonmoving party. *Temple*, 50 Ohio St.2d at 327.

ASSIGNMENT OF ERROR

> As to Count One of the Amended Complaint, the Trial Court erred by not granting political-subdivision-immunity to Defendant Sarah Brown-Clark, Clerk of Courts, Youngstown Municipal Court, and Defendant City of Youngstown, where Plaintiff[s] Thomas Cool and Thomas Cool Bail

Bonding, LLC, alleged damages caused by an act or omission in connection with a governmental function.

{¶18} The crux of this matter is whether the two defendants, Brown-Clark and the City of Youngstown, are immune from liability under Ohio's sovereign immunity statute. The availability of immunity is a question of law properly determined by the court prior to trial. *Conley v. Shearer*, 64 Ohio St.3d 284, 292,595 N.E.2d 862 (1992); *Hall v. Ft. Frye Local School Dist. Bd. of Edn*., 111 Ohio App.3d 690, 694,676 N.E.2d 124 (4th Dist.1996). R.C. Chapter 2744, which is referred to as the sovereign immunity statute, provides not only the political subdivision's immunity, but describes the circumstances under which an employee of a political subdivision is also entitled to immunity from tort liability. *Zeigler v. Mahoning County Sheriff's Department,* 137 Ohio App.3d 831, 835, 739 N.E.2d 1237 (7th Dist.2000).

{¶19} Appellants' argument on appeal is that both Brown-Clark (sued only in her official capacity) and the City are immune from liability under R.C. 2744.02 of the sovereign immunity statute.

{¶20} Appellees did not present any direct argument on a theory of liability as to the City of Youngstown in their response to the motion for summary judgment nor do they present any theory of direct liability here. Rather, Appellees focus on Brown-Clark and argue that a determination of sovereign immunity must be analyzed under R.C. 2744.03(A)(6) because Brown-Clark, as an employee of the City, acted with malicious purpose, in bad faith or in a wanton or reckless manner outside the scope of her employment so as to be stripped of governmental immunity. Despite their allegations of Brown-Clark's malicious conduct, they also argue that, as her employer, the City is liable

for the "bad acts" of Brown-Clark. However, if we would apply R.C. 2744.03(A)(6) and conclude that evidence exists demonstrating Brown-Clark's conduct was done with malicious purpose, in bad faith, wanton or reckless, there could be no liability for the City, as Brown-Clark would then be acting outside the scope of her duties as Clerk. Therefore, the threshold question on appeal is whether R.C. 2744.02 or R.C. 2744.03(A)(6) applies.

{¶21} In order to determine whether to apply the three-tiered analysis in R.C. 2744.02 or the R.C. 2744.03(A)(6) employee immunity statute, we must first determine whether Brown-Clark was sued individually or in her official capacity as an elected officeholder in the political subdivision. *Bennett v. Columbiana Cty. Coroner,* 2016-Ohio-7182, 72 N.E.3d 242, ¶ 60 (7th Dist.), citing *Lambert v. Clancy,* 125 Ohio St.3d 231, 2010-Ohio-1483, 927 N.E.2d 585.

{¶22} In *Lambert,* the Hamilton County Clerk of Courts was sued for putting Ms. Lambert's traffic ticket information on the county website. Lambert's complaint named Greg Hartmann, Hamilton County, Ohio, Clerk of Courts as the only defendant. The Ohio Supreme Court noted that without utilizing "individually" or any other signifier indicating that the clerk was being sued personally, he was being sued in his official capacity as clerk of courts. *Lambert,* ¶ 15. The Court held that when allegations in a complaint are directed against an office of a political subdivision, the officeholder named in his or her official capacity is sued only in the official capacity, and not in an individual or personal capacity. *Lambert,* ¶ 22. Moreover, when a named defendant sued in his or her official capacity is an elected officeholder, the political subdivision immunity analysis in R.C. 2744.02 applies. *Id.* "It is well settled law that an action against a government official in his or her official capacity is not an action against the official, but, instead, is one against

the official's office and, thus, is treated as an action against the entity itself." *State ex rel. Estate of Miles v. Piketon,* 121 Ohio St.3d 231, 2009-Ohio-786, 903 N.E.2d 311, ¶ 23, quoting *Kelly v. New Haven,* 275 Conn. 580, 595, 881 A.2d 978 (2005). Thus, if Appellees sued Brown-Clark only in her official capacity as elected clerk of courts, we are to conduct an analysis of sovereign immunity pursuant to R.C. 2744.02.

{¶23} We first turn to the language of the complaint filed by Appellees and the effect it has on the immunity analysis. Appellees argue they sued Brown-Clark in her capacity as an employee of the City. Appellants assert that Brown-Clark was sued in her official capacity. It is not clear from the judgment entry whether the trial court considered the status of Brown-Clark as an officeholder of the City in conducting an immunity analysis. The trial court simply denied Appellees' motion for summary judgment citing the affidavits of Janet Rogers and Appellee Cool, apparently presuming the affidavits created a genuine issue of material fact when applying the employee sovereign immunity analysis of R.C. 2744.03(A)(6).

{¶24} In their complaint, Appellees brought suit against two defendants: "Sarah Brown-Clark, Clerk of Youngstown Municipal Court" and "The City of Youngstown." As in *Lambert,* nowhere in the caption did Appellees name Brown-Clark with the designation "individually" or "personally," or use any signifier to indicate that Brown-Clark was being sued in any other capacity than in her official capacity as the elected clerk. In addition, the allegations in the complaint contain allegations of negligent, wanton and malicious conduct against Brown-Clark, but also that her conduct was "ratified" by the City and that she was acting under the authorization, direction and control of the City. The prayer for relief seeks damages from both Brown-Clark and the City. Based on the language of the

complaint, we conclude that Appellees asserted claims against Brown-Clark only in her official capacity as an officeholder in the political subdivision as well as against the City as a political subdivision. Therefore, as an elected officeholder sued in her official capacity, the immunity analysis under R.C. 2744.02 must be applied.

{¶25} The determination of whether a political subdivision is immune from liability involves a three-tiered analysis. *Id.* The first tier requires a determination of whether the political subdivision is immune from liability because the alleged negligent acts occur in connection with a governmental or proprietary function pursuant to R.C. 2744.02(A). A presumption exists that the political subdivision is generally immune from liability for its acts and the acts of its employees. *Bowman v. Canfield,* 7th Dist. Mahoning No. 13 MA 144, 2015-Ohio-1323, ¶ 6.

{¶26} If immunity exists, the second tier provides five exceptions to immunity, listed in R.C. 2744.02(B). *Doe v. Skaggs,* 2018-Ohio-5402, 127 N.E.3d 493, ¶ 18 (7th Dist.).

{¶27} The R.C. 2744.02(B) exceptions include:

> (1) the negligent operation of a motor vehicle by an employee who is acting within the subdivision's scope of employment and authority; (2) an employee's negligent performance of acts with respect to the subdivision's proprietary functions; (3) the negligent failure to repair public roads and negligent failure to remove obstructions from public roads; (4) negligence of employees 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; and, (5) when a section of the Revised Code expressly imposes civil liability on the subdivision.

Bowman at ¶ 7.

{¶28} If one of these exceptions is found to apply, the political subdivision loses its immunity. *Id.* However, immunity may still be restored after an analysis of the third tier, set forth in R.C. 2744.03(A). This section lists seven defenses that restore immunity should one of them apply. These defenses are as follows: (1) when the political subdivision or an employee of the subdivision is engaged in the performance of a judicial, quasi-judicial, prosecutorial, legislative, or quasi-legislative function at the time of the alleged injury; (2) the injury is caused by non-negligent conduct that was required or authorized by law, or by conduct that was necessary or essential to the exercise of the subdivision's powers; (3) the action that caused the alleged injury was within the employee's discretion by virtue of the office or position held within the political subdivision; (4) the person whose action caused the injury was serving any portion of a sentence stemming from a criminal conviction by performing community service work within the subdivision; and (5) the injury 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." R.C. 2744.03(A).

{¶29} It is not disputed that the City of Youngstown is a political subdivision pursuant to R.C. 2744.01(F). Appellees presented no evidence of the existence of one of the five exceptions to immunity to the trial court. In their amended complaint Appellees alleged only that the City of Youngstown was "responsible for the tortious conduct of its Clerk of Courts." (Plaintiffs' Amended Complaint, ¶ 4.) The alleged misconduct by

Brown-Clark was her refusal to register Appellees as surety bond agents with the court for a 28-month period. Appellees presented evidence to the trial court that Brown-Clark had some animus toward Cool, by means of affidavits from a reporter that Brown-Clark stated in an interview that she had heard that Cool was "not a nice man" and affidavits from both an attorney and Appellee Cool, himself, that Brown-Clark did not like Cool.

{¶30} Appellants presented evidence that Brown-Clark was under the impression that Cool could not be registered as an agent when he was already employed by the court as a process server. They also presented evidence that Brown-Clark believed Cool's application was incomplete.

{¶31} Appellees responded that both of these stated reasons for the delay were pretextual and that Brown-Clark harbored personal animosity toward Cool. However, these are not relevant under our R.C. 2744.02 analysis. Appellees' speculative assertions of alleged malicious conduct by Brown-Clark are considered only pursuant to the R.C. 2744.03(A)(6) employee immunity analysis, which would apply only if Brown-Clark was sued in her individual capacity. She was not.

{¶32} The only potentially relevant R.C. 2744.02(B) exceptions in this matter are R.C. 2744.02(B)(2) and (B)(5). A political subdivision is stripped of its immunity under R.C. 2744.02(B)(2) when an injury is caused by "the negligent performance of acts by their employees with respect to proprietary functions of the political subdivisions." However, there is no exemption for the performance of governmental functions. R.C. 2744.01(C) defines governmental function:

(1) "Governmental function" means a function of a political subdivision that is specified in division (C)(2) of this section or that satisfies any of the following:

(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;

* * *

(2) A "governmental function" includes, but is not limited to, the following:

* * *

(i) The enforcement or nonperformance of any law;

* * *

(x) A function that the general assembly mandates a political subdivision to perform.

{¶33} It is clear that Brown-Clark was performing a governmental function in registering surety bond agents for the Youngstown Municipal Court. Therefore, as she was performing a governmental and not a proprietary function, R.C. 2744.02(B)(2) does not exempt her from the presumption of immunity.

{¶34} Appellees also contend that Brown-Clark lacked discretion in registering proposed bond agents such as Cool, because R.C. 3905.87 operates to impose a

"mandatory duty" on Brown-Clark, requiring registration as a surety bond agent when the requisite documents and application are submitted. Appellants' argument in this regard leads to an examination of this statute, as R.C. 2744.02(B)(5) strips a political subdivision of immunity if the revised code imposes civil liability. R.C. 3905.87 governs the registration of a surety bond agent with the clerk of courts. It reads, in pertinent part:

> (C) The clerk of the court shall make available a list of court-registered surety bail bond agents to the appropriate holding facility, jail, correction facility, or other similar entity within the court's jurisdiction annually not later than the first day of September. If an agent registers with a court after the last day of August, the court shall add that agent to the list and make the updated list available to the appropriate holding facility, jail, correction facility, or other similar entity within the court's jurisdiction within twenty-four hours of the court's approval of that registration.

{¶35} Although the statute uses the word "shall" regarding the clerk's duty to make a list of bond agents available to the appropriate facilities, the statute does not impose any civil liability on the clerk for failing to register an agent, as Appellees contend. Appellees argue R.C. 3905.87 imposes a mandatory duty on the clerk to register a surety bond agent provided the proper documentation is presented, but this is a misrepresentation of the statutory language. The statute does not impose a duty to register. Instead, this section requires the clerk to make a list of all available agents to the appropriate facilities. Consequently, there is no statutorily imposed civil liability and R.C. 2744.02(B)(5) does not apply to strip Appellants of immunity. Because Appellees

failed to assert one of the five exceptions to immunity applies in this matter, we do not need to consider the third tier of the governmental immunity analysis. Based on the pleadings and evidence presented in this matter, Appellants are entitled to the presumption of immunity imposed in Chapter 2744 of the Revised Code.

{¶36} Because she was not sued in her individual capacity, Appellant Brown-Clark enjoys immunity from suit in this matter. Appellees raise no allegations in their complaint to overcome this immunity. Despite the allegations that her conduct was malicious, reckless and wanton, because she was sued only in her official capacity Appellees have not raised allegations against an employee of a political subdivision, but have raised allegations only against the political subdivision or office over which the official presides. *Lambert* at ¶ 22. Because none of the R.C. 2744.02 exemptions apply and Brown-Clark was sued for a governmental function, she retains immunity. Likewise, as no allegations against the City of Youngstown were directly raised, but only derivatively from Appellees' assumptions that it was responsible for Brown-Clark's actions, the City was entitled to judgment in this matter. The trial court erred in applying R.C. 2744.03 to this matter, based on the pleadings. Accordingly, Appellants' assignment of error has merit and is sustained.

{¶37} Based on the foregoing, the trial court erred in denying Appellants' motion for summary judgment. Appellants' assignment of error is sustained. The judgment of the trial court is reversed and judgment is entered for Appellants.

Robb, J., concurs.

Cannon, J., concurs.

For the reasons stated in the Opinion rendered herein, the assignment of error is sustained and it is the final judgment and order of this Court that the judgment of the Court of Common Pleas of Mahoning County, Ohio, is reversed and we hereby enter judgment in favor of Appellants. Costs to be taxed against the Appellees.

A certified copy of this opinion and judgment entry shall constitute the mandate in this case pursuant to Rule 27 of the Rules of Appellate Procedure. It is ordered that a certified copy be sent by the clerk to the trial court to carry this judgment into execution.

NOTICE TO COUNSEL

This document constitutes a final judgment entry.