[Cite as *Pesta v. Parma*, 2010-Ohio-4897.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 94395

RALPH A. PESTA

PLAINTIFF-APPELLANT

vs.

CITY OF PARMA, ET AL.

DEFENDANTS-APPELLEES

JUDGMENT:
AFFIRMED

Civil Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CV-566756

BEFORE: Rocco, P.J., Stewart, J., and Jones, J.

RELEASED AND JOURNALIZED: October 7, 2010

ATTORNEYS FOR APPELLANT

Robert D. Kehoe
Joseph J. Jerse
Kehoe & Associates, LLC
900 Baker Building
1940 East Sixth Street
Cleveland, Ohio 44114

ATTORNEYS FOR APPELLEE THE CITY OF PARMA

Timothy G. Dobeck
Law Director

BY: Michael P. Maloney
Richard D. Summers
Assistant Law Director
City of Parma
6611 Ridge Road
Parma, Ohio 44129

ATTORNEYS FOR APPELLEE AETNA CONSTRUCTION LTD.

Thomas S. Mazanec
John T. McLandrich
Frank H. Scialdone
Mazanec, Raskin, Ryder & Keller Co.
100 Franklin's Row
34305 Solon Road
Cleveland, Ohio 44139

KENNETH A. ROCCO, P.J.:

{¶ 1} Plaintiff-appellant, Ralph A. Pesta, appeals from common pleas court orders that (1) granted summary judgment to defendant-appellee, the city of Parma, on the ground that it is immune from liability, (2) granted summary judgment in favor of defendant-appellee, Aetna Construction Ltd., and (3) denied appellant's request for a declaratory judgment that R.C. Chapter 2744 is unconstitutional. We affirm the judgment in favor of Aetna Construction Ltd. We also affirm the trial court's denial of appellant's request for a declaratory judgment. We find genuine issues of material fact on the question whether the property at issue was "public grounds," the design, construction, repair, maintenance, and operation of which is a governmental function making the city immune from liability. Nevertheless, we affirm the summary judgment in favor of the city because the decedent was a trespasser and the city did not breach the limited duty of care owed to a trespasser.

Procedural History

{¶ 2} Appellant is the father and administrator of the estate of the decedent, Anthony J. Pesta. He filed this action on July 1, 2005, asserting that the decedent was walking on property owned by the city when he fell down a steep cliff and was killed. He claimed the city failed to maintain the property open, in repair, and free from nuisance; allowed a dangerous condition to exist on its property; and failed to warn pedestrians of that danger. He sought damages for wrongful death and loss of consortium. He also sought a declaratory

judgment that R.C. Chapter 2744 was unconstitutional to the extent that the city interposed sovereign immunity as a defense to liability or as a bar to punitive damages. Finally, he asserted an alternative claim against Aetna, the adjoining property owner, in the event that the decedent actually fell on the adjoining property.

{¶ 3} The city answered and asserted (among other affirmative defenses) that it was immune from liability under R.C. Chapter 2744. Aetna also answered and asserted a number of affirmative defenses to appellant's claims.[1]

{¶ 4} On January 30, 2006, Aetna filed a motion for summary judgment. It presented evidence that the city had admitted that it owned the property on which the decedent was killed. The city also admitted it owned and maintained the fence on that property. Aetna asserted that appellant could not show that Aetna was the owner of the property on which the decedent was killed. A responsive brief was filed by appellant,[2] and Aetna filed a reply. The court granted Aetna's motion, stating that "[t]he court, having considered all the evidence and having construed the evidence most strongly in favor of the non-moving party, determines that reasonable minds can come to but one conclusion, that there are no genuine issues of material fact, and that Aetna Construction Ltd[.] * * * is entitled to judgment as a matter of law. Partial."

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[1]Aetna also filed a cross-claim against the city, but it dismissed the cross-claim just three weeks later, without prejudice.

[2]This brief was inadvertently misfiled in another case, but was added to the

{¶ 5} The city of Parma moved for summary judgment on June 23, 2006. The city raised several arguments with respect to appellant's negligence claims. First, the city argued that the decedent was a trespasser on its property and that there was no evidence that the city breached its duty of care to him as a trespasser. The city also argued it had no duty to warn the decedent or guard against him falling into the ravine because the ravine was an open and obvious condition. Moreover, the fence at the top of the ravine served to warn or guard against a fall, and the decedent defeated that safety measure by going over the fence. The city further asserted that it was immune from liability as a political subdivision, and its maintenance of this property was a governmental function as to which there was no exception to immunity. Even if the maintenance of the property was a proprietary function as to which the city could be liable for negligence, the city argued that the decedent assumed the risk of injury and was contributorily negligent. Finally, the city claimed that the decedent was a recreational user of the property, so the city owed no duty to him. The city urged that the court lacked jurisdiction to hear appellant's claim for a declaratory judgment because the attorney general had not been served with the complaint. The city also asserted that the R.C. Chapter 2744 was constitutional.

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record during the pendency of a previous appeal in this matter.

{¶ 6} After an extension of time to complete discovery, appellant responded to the city's motion. The court granted the city's motion on June 27, 2007. The court concluded:

> "As applied here, immunity applies because the allegations relate to a proprietary governmental function. A function is proprietary if both of the following are met: (1) the function is not specified under (C)(1)(a) or (b) of this section [R.C. 2744.01] and is not one specified in division (C)(2) of this section; and (2) the function is one that promotes or preserves the public peace, health, safety, or welfare and that involves activities that are customarily engaged in by nongovernmental persons. O.R.C. 2744.01(G)(1). The regulation of the use, maintenance, and repair of public grounds falls within the definition of governmental function. R.C. 2744.02(C)(2)(e). Therefore, the city is immune from liability for its maintenance and construction of the fence at issue. As such, the Defendant City of Parma is entitled to judgment as a matter of law."

{¶ 7} Appellant appealed from this decision. On May 28, 2008, this court dismissed the appeal because the trial court had not disposed of appellant's declaratory judgment claim.

{¶ 8} Following the dismissal of the first appeal, the trial court entered a judgment finding that:

> "The complaint, filed 7/1/2005, sought a declaration that O.R.C. 2744 is unconstitutional. Count three of the complaint is not properly before the court because plaintiff failed to timely perfect service on that issue. A party has one year from the filing of the complaint to perfect service on the parties. O.R.C. 3205.17. In this case, plaintiff first sought service on the Ohio Attorney General's office on 12/15/2006. The certified mail request was returned on 12/19/2006. Since the plaintiff failed to perfect service on the Ohio Attorney General within one year of filing, the declaratory judgment action did not commence. Therefore, the question of the

> constitutionality of the statute was not properly before the court.
>
> "As such, this court's earlier ruling on defendant's motion for summary judgment is a final appealable order. Final. No just cause for delay."

{¶ 9} Appellants appealed from this order. This court also dismissed the second appeal. We held that our previous determination that the Ohio Attorney General had been properly served precluded the trial court from determining that service was improper. Because the trial court had still not disposed of appellant's declaratory judgment claim, we found that its order was still not final and appealable.

{¶ 10} Following the dismissal of the second appeal, the parties filed cross-motions for summary judgment on the constitutional issue. The trial court concluded that:

> "[T]he law is controlling from the Eighth District Court of Appeals, the City of Parma is afforded sovereign immunity pursuant to R.C. 2744. Plaintiff's request for declaratory judgment striking down R.C. 2744 is therefore denied. Final. No just cause for delay."

Law and Analysis

{¶ 11} Appellant presents five assignments of error for our review. First, appellant argues that the city is not immune from liability because the city's maintenance of the property was not a governmental function; it was a proprietary function and the city was grossly negligent. Second, appellant contends that R.C. Chapter 2744 unconstitutionally deprives a litigant of the right to a jury trial and violates his right to equal protection of the laws. Third, appellant asserts that the city was not entitled to judgment under Ohio laws governing premises liability. Fourth, appellant contends that genuine issues of material fact precluded judgment for the city on the grounds of assumption of the risk, open and obvious hazard, or impairment. Finally, appellant urges that genuine issues of material fact precluded judgment for Aetna.

A. Constitutionality of R.C. Chapter 2744.

{¶ 12} "We must address the constitutionality of R.C. Chapter 2744 before we can apply it." *Walker v. Jefferson Cty.*, Jefferson App. No. 02JE14, 2003-Ohio-3490, ¶13. We do not agree with the trial court's stated reason for denying appellant's request for a declaratory judgment. The court stated that it was denying the appellant's request for a declaratory judgment because the law in this district makes it clear that the city is immune from liability under R.C. Chapter 2744. That the city may be immune under the terms of the statute (a question we will address later in this opinion) has no bearing on the question whether the statute is constitutional.

{¶ 13} "Statutes are presumed to be constitutional unless shown beyond a reasonable doubt to violate a constitutional provision." *Fabrey v. McDonald Village Police Dept.* (1994), 70 Ohio St.3d 351, 352, 639 N.E.2d 31. As appellant correctly notes, the current law of Ohio is that R.C. 2744 is not unconstitutional. To the extent that appellant claims that the statute deprives him of his right to a jury trial under Article I, Section 5 of the Ohio Constitution, the Ohio Constitution does not guarantee a trial by jury in a case in which the plaintiff has no cause of action. If the city is immune from liability, there is nothing to be tried. *Bundy v. Five Rivers MetroParks*, 152 Ohio App.3d 426, 2003-Ohio-1766, 787 N.E.2d 1279, ¶47. Therefore, R.C. Chapter 2744 does not deprive appellant of his right to a jury trial.

{¶ 14} Appellant also urges that sovereign immunity violates his rights to due process and equal protection of the laws because it is arbitrary, unreasonable, and unrelated to any legitimate state interest. However, appellant concedes that the state has a legitimate interest in preserving the financial integrity of political subdivisions. "Our equal protection review does not require us to conclude that the state has chosen the best means of serving a legitimate interest, only that it has chosen a rational one." *Fabrey*, 70 Ohio St.3d at 354. There is a rational relationship between the grant of sovereign immunity and preservation of the financial integrity of political subdivisions. The statute is not arbitrary or unreasonable simply because it

may deprive appellant of a remedy that he could have sought if the property owner were not a political subdivision. Therefore, we find appellant has failed to demonstrate that R.C. Chapter 2744 is unconstitutional on its face or as applied.

B. Sovereign Immunity/Negligence.

{¶ 15} Appellant's first assignment of error contends that the city was not entitled to sovereign immunity. The third and fourth assignments of error assert that the court could not have granted summary judgment on the merits of appellant's negligence claim or the city's affirmative defenses. All three assignments address the question whether there were any genuine issues of material fact and whether the city was entitled to judgment as a matter of law.

{¶ 16} Sovereign immunity should ordinarily be decided before addressing the merits of a claim. However, the parties have fully argued both immunity and the merits of appellant's claims in this appeal. Consequently, the interests of economy dictate that although we find genuine issues of fact on the question of sovereign immunity, we nevertheless affirm the judgment in favor of the city on the merits of appellant's claim.

1. Sovereign Immunity.

{¶ 17} Under R.C. 2744.02, a political subdivision is generally immune from liability for any "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." If the city's ownership and maintenance of this property is a proprietary function, there is a statutory exception to immunity for injuries caused by a municipal employee's negligence with respect to the proprietary function. R.C. 2744.02(B)(2). Concomitantly, if the city's ownership and maintenance of the property is a governmental function, there is no applicable exception to the city's immunity.[3]

{¶ 18} Initially, we must determine whether the maintenance of this property is a governmental or a proprietary function. Governmental functions include "the maintenance and repair of * * * public grounds" and "[t]he design, construction, reconstruction, renovation, repair, maintenance, and operation of * * *" a park or recreation area. R.C. 2744.01(C)(2)(u). Proprietary functions include, inter alia, any function not included within the

[3]None of the other four exceptions to sovereign immunity under 2744.02(B) applies here. These include injury caused by the negligent operation of a motor vehicle by an employee acting within the scope of his or her employment; injury caused by negligent failure to keep public roads in repair and negligent failure to remove obstructions from public roads; injury caused by the negligence of 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; and when civil liability is expressly imposed upon the political subdivision by a section of the Revised Code. R.C. 2744.02(B)(1), (3), (4), and (5).

Appellant notes that the decedent's death occurred approximately three months after an amendment to R.C. 2744.02(B)(3). The statute had previously provided an exception to sovereign immunity for injury caused by failure to keep public grounds open, in repair, and free from nuisance.

definition of a governmental function and that "promotes or preserves the public peace, health, safety or welfare and that involves activities customarily engaged in by non-governmental persons." R.C. 2744.01(G).

{¶ 19} The ravine where the decedent was killed was on the east side of South Park Boulevard, south of Snow Road. A public park, including a play area, was on the west side of the street. There was a gravel "turn-around" on the east side of South Park Boulevard that was used by the public and by municipal police, fire, and service department employees. Appellant argues that the property on the east side of the street was not a park or public ground, but was only property owned by the city. Therefore, he claims, the city's maintenance of the property should be considered a proprietary function.

{¶ 20} We agree with appellant that not all land owned by a political subdivision should be considered "public grounds." "Public grounds" include property that is "established and maintained for and open to the general public and to which the general public are invited to come." *Cleveland v. Ferrando* (1926), 114 Ohio St. 207, 210, 150 N.E. 747, cited with approval in *Cater v. Cleveland* (1998), 83 Ohio St.3d 24, 30, 697 N.E.2d 610. "The term, 'public grounds,' contemplates areas to which the public may resort and within which it may walk, drive or ride, etc." *Standard Fire Ins. Co. v. Fremont* (1955), 164 Ohio 344, 347, 131 N.E.2d 221; see, also, *Tingler v.*

Elyria (1996), Lorain App. No. 96CA006345. The mere fact that property may be owned by a political subdivision does not mean the public is invited there.

{¶ 21} Nevertheless, we find there are genuine issues of material fact as to whether the property was public grounds. Evidence submitted by the city indicates that the property on the east side of South Park Boulevard was not developed with walking trails, sidewalks, play areas or the like. However, the existence of the turn-around and its location across the street from a public park area suggests that the public was invited there. See *Cottrell v. Washington Ct. House* (Dec. 8, 1982), Fayette App. No. 81-CA-1. Therefore, we sustain the first assignment of error. Nevertheless, we affirm the common pleas court's judgment on other grounds.

2. Negligence – Duty of Care to Trespasser.

{¶ 22} Although we find a genuine issue of fact exists on the question whether the maintenance of this property was a governmental or a proprietary function, this issue was not material because, as a matter of law, the city breached no duty to the decedent. When the decedent climbed over the fence, he became a trespasser on the city's property. "A trespasser is, 'one who, without express or implied authorization, invitation or inducement, enters private premises purely for his own purposes or convenience.' " *McKinney v. Hartz & Restle Realtors, Inc.* (1987), 31 Ohio St.3d 244, 246, 510

N.E.2d 386. The decedent was neither authorized nor invited to climb over the fence. Whatever his status may have been on the strip of land between the road and the fence, the decedent became a trespasser when he crossed over the fence.

{¶ 23} The only duty of care a property owner owes to a trespasser is to refrain from willful, wanton, or reckless conduct that is likely to injure the trespasser. *Gladon v. Greater Cleveland Regional Transit Auth.*, 75 Ohio St.3d 312, 317, 1996-Ohio-137, 662 N.E.2d 287. There is no evidence that any intentional or reckless conduct by the city caused the decedent to fall. Once the decedent crossed over the fence, he assumed the risk of the natural perils he encountered there.

{¶ 24} Appellant urges that there is a genuine issue whether the decedent was a "discovered trespasser" because there was evidence that others had fallen in the ravine in the past. A landowner's duty of care with respect to trespassers is elevated when (1) the landowner knows that a trespasser is on his or her property and is in a position of peril, or (2) the landowner "knows or has reason to know that trespassers 'constantly' intrude upon a limited area of the property where the owner either carries on a dangerous activity or has created or maintained an artificial condition that he has reason to know is dangerous and that the danger will not be discovered or appreciated by the intruders." *Drohn v. Cocca Dev., Inc.*, Mahoning App. No.

08MA43, 2008-Ohio-6079, ¶18. In such cases, the landowner owes a duty of ordinary care to avoid injuring the trespasser. *Drohn*, at ¶19.

{¶ 25} There is no evidence the city was aware that the decedent was on the property at the time he was injured. Assuming that "constant" intrusions onto the city's property may be found because two or three persons previously climbed the fence and fell into the ravine, the city did not create the danger that caused the decedent to fall, either by carrying on a dangerous activity or creating an artificial condition. Therefore, we find that as a matter of law, the decedent was not a discovered trespasser to whom the city owed an elevated duty of care.

{¶ 26} The trial court did not err by granting summary judgment for the city because the decedent was a trespasser when he climbed over the fence, and the city did not engage in any willful, wanton, or reckless conduct. Therefore, we affirm the order granting summary judgment in favor of the city.

C. Aetna.

{¶ 27} Finally, appellant asserts that the court erred by granting summary judgment in favor of Aetna. He contends that there are questions of fact whether Aetna owned the property where the decedent fell because, although the city admitted ownership of the real property at the top of the west side of the ravine and admitted that it owned and maintained the fence

there, the property line dividing the city's and Aetna's lands is at the bottom of the ravine and they do not know whether the decedent landed there after his fall. Even if this is true, appellant does not explain how Aetna could be held liable for the decedent's death based on its ownership of property at the bottom of the ravine. Aetna demonstrated that there were no genuine issues as to any material fact and that it was entitled to judgment as a matter of law. Therefore, we affirm the judgment in Aetna's favor.

Affirmed.

It is ordered that appellees recover of appellant 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.

KENNETH A. ROCCO, PRESIDING JUDGE

MELODY J. STEWART, J., and
LARRY A. JONES, J., CONCUR