[Cite as *Williams v. Brewer*, 2010-Ohio-5349.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 93829

JOHN WILLIAMS

PLAINTIFF-APPELLANT

vs.

ERIC BREWER, MAYOR CITY OF EAST CLEVELAND

DEFENDANT-APPELLEE

JUDGMENT:
AFFIRMED

Civil Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CV-644052

BEFORE: Gallager, A.J., McMonagle, J., and Cooney, J.

RELEASED AND JOURNALIZED: November 4, 2010

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SEAN C. GALLAGHER, A.J.:

{¶ 1} Plaintiff-appellant, John Williams ("Williams"), appeals the trial court's granting a directed verdict in favor of defendant-appellee, Eric Brewer, Mayor of East Cleveland,[1] on grounds of governmental immunity. For the reasons stated herein, we affirm.

{¶ 2} In December 2007, Williams filed a complaint alleging that employees of the East Cleveland Water Department ("Water Department" or "the City") negligently damaged the exterior shut-off valve and the water pipe leading to

Williams's property and caused extensive water damage to the foundation of his home, his basement, and yard. The case proceeded to a jury trial, at which the following evidence was presented.

{¶ 3} Williams testified that he needed to replace the main shut-off valve in his basement in order to repair his kitchen faucet. To do this, he contacted the Water Department to shut off the water leading from the main line in the street to his house. In attempting to find the exterior shut-off valve (also referred to as a "curb box"), Water Department employees poked the ground with an eight-foot "key." While poking, they punctured the shut-off valve, causing water to start "bubbling up" onto the tree lawn.

{¶ 4} The workers returned the next day and used a front-end loader to locate the shut-off valve. According to Williams, in the process of reaching the shut-off valve, the workers broke and pulled out some of the supply line leading to Williams's house. The workers left after they fixed the exterior shut-off valve.

{¶ 5} After several more trips to Williams's house, the Water Department eventually replaced a large part of the supply line leading to Williams's house with copper pipe, which they connected with a clamp to the existing galvanized line. The following day, Williams discovered water coming through his basement walls. He contacted the Water Department to fix the problem, but no one responded. As a result, Williams hired a plumber, Donald Edward Steplight, Jr. ("Steplight"),

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[1] We note that Eric Brewer is no longer the mayor of East Cleveland.

who made the necessary repair by replacing the entire line up to Williams's basement with copper pipe.

{¶ 6} Steplight testified that the old, corroded galvanized pipe was in bad shape and that the entire line originally should have been replaced with copper pipe. It was his opinion that the Water Department employees were negligent in connecting the new copper pipe to the existing corroded galvanized pipe, which did not form a good fitting.

{¶ 7} At the close of Williams's case, the City moved for a directed verdict, claiming the City was immune from liability under R.C. 2744.03(A)(5). The trial court granted the motion, and this appeal followed.

{¶ 8} In his sole assignment of error, Williams argues the trial court erroneously granted a directed verdict in favor of the City. We employ a de novo standard of review in evaluating the grant or denial of a motion for directed verdict. *Groob v. KeyBank*, 108 Ohio St.3d 348, 2006-Ohio-1189, 843 N.E.2d 1170, ¶ 14. A motion for directed verdict is properly granted if "the trial court, after construing the evidence most strongly in favor of the party against whom the motion is directed, finds that upon any determinative issue reasonable minds could come to but one conclusion upon the evidence submitted and that conclusion is adverse to such party." Civ.R. 50(A)(4).

{¶ 9} The trial court granted the City's motion for directed verdict on the grounds that it was immune from liability under R.C. 2744.03(A)(5). Williams

argues the trial court erred in granting the City a directed verdict because there was sufficient evidence to show that City employees negligently damaged his home while undertaking a proprietary function.

{¶ 10} The Ohio Supreme Court has outlined a three-tier analysis for determining whether a political subdivision is entitled to immunity under R.C. Chapter 2744. "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. R.C. 2744.02(A)(1). However, that immunity is not absolute. R.C. 2744.02(B). 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. * * * If any of the exceptions to immunity in R.C. 2744.02(B) do apply and no defense in that section protects the political subdivision from liability, then 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." (Citations omitted.) *Colbert v. Cleveland*, 99 Ohio St.3d 215, 2003-Ohio-3319, 790 N.E.2d 781, ¶ 7-9.

{¶ 11} The City concedes that R.C. 2744.01(G)(2)(c) includes the Water Department's operation as a proprietary function and that it could be adjudged liable for the negligent acts of its employees in the performance of duties for the Water Department. Pursuant to R.C. 2744.02(B)(2), a political subdivision is

liable for loss to property allegedly caused by the negligent performance of acts by its employees with respect to proprietary functions of the political subdivisions.

{¶ 12} As to the final tier, the City argues that the defense found in R.C. 2744.03(A)(5) shields it from liability. R.C. 2744.03(A)(5) provides, in pertinent part:

> **"(5) The political subdivision is immune from liability if the injury, death, or loss to person or property resulted from the exercise of judgment or discretion in determining whether to acquire, or how to use, equipment, supplies, materials, personnel, facilities, and other resources unless the judgment or discretion was exercised with malicious purpose, in bad faith, or in a wanton or reckless manner."**

The above defense extends to the exercise of judgment or discretion by employees of a political subdivision. *Elston v. Howland Local Schools*, 113 Ohio St.3d 314, 2007-Ohio-2070, 865 N.E.2d 845, ¶ 32.[2]

{¶ 13} The *Elston* case involved allegations of negligent decisions made by a high-school baseball coach during a batting practice in the high-school gymnasium at which a student was struck and injured. Id. The court distinguished the defenses found in R.C. 2744.03(A)(3) and (A)(5). The court recognized that unlike subsection (A)(5), the focus of subsection (A)(3) is that the employee be engaged in policy-making, planning, or enforcement. Id. at ¶

[2] We are not persuaded by Williams's reliance on *Hill v. Urbana*, 79 Ohio St.3d 130, 1997-Ohio-400, 679 N.E.2d 1109. In that case, the court determined that the city of Urbana was engaged in a "proprietary function" pursuant to R.C. 2744.02(B)(2) in connection with the installation of a water valve during which negligence was asserted. The court did not address any issues pertaining to available defenses under R.C. 2744.03.

27. [3] Under R.C. 2744.03(A)(3) "a political subdivision may assert the immunity defense when an employee who has the duty and responsibility for policy-making, planning, or enforcement by virtue of office or position actually exercises discretion with respect to that power. This immunity exists even if the discretionary actions were done recklessly or with bad faith or malice." Id. Because the baseball coach's position did not involve "the exercise of a high degree of official judgment or discretion" associated with policy-making, planning, or enforcement powers, the court found the defense under R.C. 2744.03(A)(3) did not apply. Id. at ¶ 30. Nevertheless, the court determined that R.C. 2744.03(A)(5) did afford a defense to liability. Id. at ¶ 26.

{¶ 14} Unlike subsection (A)(3), R.C. 2744.03(A)(5) is not focused on policy-making, planning, or enforcement powers or the exercise of a "high degree of official judgement or discretion." This provision applies "if the injury complained of resulted from an individual employee's exercise of judgment or discretion in determining whether to acquire or how to use equipment or facilities unless the judgment or discretion was exercised with

[3] R.C. 2744.03(A)(3) provides as follows: "The political subdivision is immune from liability if the action or failure to act by the employee involved that gave rise to the claim of liability was within the discretion of the employee with respect to policy-making, planning, or enforcement powers by virtue of the duties and responsibilities of the office or position of the employee."

malicious purpose, in bad faith, or in a wanton or reckless manner, because a political subdivision can act only through its employees." *Elston*, 113 Ohio St.3d 314, 2007-Ohio-2070, 865 N.E.2d 845, ¶ 32.

{¶ 15} Thus, in *Elston*, the court determined that the school district was entitled to immunity under R.C. 2744.03(A)(5), for the actions of its employee because "[the] injury resulted from the judgment or discretion of the coach in determining how to use equipment or facilities [and no] claim is presented suggesting reckless conduct." Id. at ¶ 26.

{¶ 16} In *FirstEnergy Corp. v. Cleveland,* 182 Ohio App.3d 357, 2009-Ohio-2257, 912 N.E.2d 1156, this court found that the city water department's work with regard to repairing water main breaks and a water leak, which resulted in damage to underground facilities, involved the exercise of judgment or discretion. In the absence of evidence showing the city acted with a malicious purpose, in bad faith, or in a wanton or reckless manner, we found the city was entitled to immunity under R.C. 2744.03(A)(5). Id. at ¶ 23. This court made similar rulings in *FirstEnergy Corp. v. Cleveland*, 179 Ohio App.3d 280, 2008-Ohio-5468, 901 N.E.2d 822 (finding how the city used its equipment to make repairs to broken water lines required the exercise of judgment in stopping the water leaks); and *Ohio Bell Tel. Co. v. Digioia-Suburban Excavating*, Cuyahoga App. Nos. 89708

and 89907, 2008-Ohio-1409 (finding city was entitled to immunity for employee's alleged negligence in turning off the wrong water main when a leak occurred).

{¶ 17} Likewise, in this case, employees of the Water Department exercised their discretion in deciding how to perform the repair and connection of the water line and in their selection of the equipment and materials used, including the decision to connect copper pipe to galvanized pipe. Because the employees exercised discretionary judgment in determining how to use equipment and materials, and there is a lack of malicious purpose, bad faith, or wanton or reckless conduct, the City is entitled to immunity under R.C. 2744.03(A)(5). Thus, construing the evidence most strongly in favor of Williams, we find that the City was entitled to a directed verdict in this matter.

{¶ 18} Accordingly, Williams's sole assignment of error is overruled.

Judgment affirmed.

It is ordered that appellee recover of appellant costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this court directing the common pleas court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

SEAN C. GALLAGHER, ADMINISTRATIVE JUDGE

CHRISTINE T. McMONAGLE, J., CONCURS;
COLLEEN CONWAY COONEY, J., DISSENTS WITH SEPARATE OPINION

COLLEEN CONWAY COONEY, J., DISSENTING:

{¶ 19} I respectfully dissent. I would reverse the trial court's granting the directed verdict because Williams's complaint involves a routine maintenance decision by the Water Department. Williams contacted the Water Department to shut off the water at the street leading to his house. That is the crux of this case. Therefore, I find it analogous to *Perkins v. Norwood City Schools* (1990), 85 Ohio St.3d 191, 707 N.E.2d 868, in which the Ohio Supreme Court held:

> "We conclude from the record and the standard created by earlier decisions of this court that the decision of whom to employ to repair a leaking drinking fountain is not the type of decision involving the exercise of judgment or discretion contemplated in R.C. 2744.03(A)(5). Such a decision, under the facts of this case, is a routine maintenance decision requiring little judgment or discretion. We therefore hold that appellee is not entitled to immunity from liability pursuant to R.C. 2744.03(A)(5)."

Perkins at 193.

{¶ 20} In determining what constitutes the "exercise of judgment or discretion," the Second Appellate District's decision in *Addis v. Howell* (2000), 137 Ohio App.3d 54, 60, 738 N.E.2d 37, is persuasive to me:

> "If an act of discretion is merely a choice between alternate courses of conduct, then almost every volitional act or omission involves an exercise of discretion. R.C. 2744.03(A)(5) cannot be interpreted that broadly, for to do so would comprehend anything and everything a political subdivision might do. Routine decisions requiring little judgment or discretion are not covered by the section. *Perkins v. Norwood City Schools* (1999), 85 Ohio St.3d 191, 707 N.E.2d 868."

{¶ 21} In *Hall v. Ft. Frye Loc. School Dist. Bd. of Edn.* (1996), 111 Ohio App.3d 690, 699, 676 N.E.2d 1241, the Fourth District further explained:

> "Immunity operates to protect political subdivisions from liability based upon discretionary judgments concerning the allocation of scarce resources; it is not intended to protect conduct which requires very little discretion or independent judgment. The law of immunity is designed to foster freedom and discretion in the development of public policy while still ensuring that implementation of political subdivision responsibilities is conducted in a reasonable manner. * * *"

{¶ 22} The Supreme Court in *Perkins* noted that the routine maintenance of property does not involve the exercise of judgment or discretion. *Perkins* at 193. The court distinguished *Franks v. Lopez* (1994), 69 Ohio St.3d 345, 347-348, 632 N.E.2d 502, in which it held that "decisions regarding road construction and the placement of signage are the types of discretionary decisions within the scope of R.C. 2744.03(A)(5)." Id. Thus, courts have construed the R.C. 2744.03(A)(5) discretionary defense narrowly. See, e.g., *Hallett v. Stow Bd. of Edn.* (1993), 89 Ohio App.3d 309, 624 N.E.2d 272. "[T]he exceptions to liability found in R.C.

2744.03 must be read more narrowly than the exceptions to nonliability found in R.C. 2744.02(B) in order for the structure chosen by the legislature to make sense." Id. at 313.

{¶ 23} In the instant case, Williams asked the Water Department to perform the routine function of shutting off the water line leading to his house so that his plumber could replace the main shut-off valve in his house. In attempting to complete this routine task, the Water Department employees broke the main water line shut-off leading to Williams's house. To repair the broken pipe, city personnel replaced a portion of the main water line with copper pipe and connected it to the existing galvanized pipe, which was corroded. When they turned the water back on, Williams's basement and yard flooded, and the foundation to his home was damaged. Williams's unrebutted expert testimony demonstrated that connecting the new copper pipe to the existing galvanized pipe, which was corroded, constituted negligence.

{¶ 24} I find the following cases from this court that upheld the grant of immunity to be distinguishable. In *First Energy Corp. v. Cleveland*, 179 Ohio App.3d 280, 2008-Ohio-5468, 901 N.E.2d 822, *First Energy Corp. v. Cleveland,* 182 Ohio App.3d 357, 2009-Ohio-2257, 912 N.E.2d 1156, and *Ohio Bell Tel. Co. v. Digioia-Suburban Excavating*, Cuyahoga App. Nos. 89708 and 89907, 2008-Ohio-1409, governmental entities used equipment to excavate and perform an emergency sewer repair or complete a road or sewer construction project, not

the simple routine call Williams made to the City to shut off the water to his home. We noted in the 2009 *First Energy* case that the decisions by Cleveland were not routine decisions requiring little judgment. "Rather, the city's work involved '[s]ome positive exercise of judgment that portray[ed] a considered adoption of a particular course of conduct.'" 182 Ohio App.3d 357, 2009-Ohio-2257, 912 N.E.2d 1156, at ¶28.

{¶ 25} Although I concede that deciding how to shut off the water line to a resident's home or repair the pipe the City workers broke involves some discretion on the part of the City workers, "almost every volitional act or omission involves an exercise of discretion." *Perkins* at 193. Shutting off the water to Williams's house and installing a new pipe, however, are acts of routine maintenance that water department workers commonly perform. These are not decisions involving discretionary judgments concerning the use of scarce resources nor are they decisions characterized by the exercise of a high degree of judgment or discretion, such as the design, implementation, or construction of a sewer system or excavations performed to repair a water main break in the street. I would find that the city's actions under the facts of this case involved routine maintenance decisions that do not fall within the scope of R.C. 2744.03(A)(5) and are therefore not entitled to immunity.