[Cite as *Smiley v. Cleveland*, 2018-Ohio-2847.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 106471

SHER SMILEY

PLAINTIFF-APPELLANT

vs.

CITY OF CLEVELAND

DEFENDANT-APPELLEE

JUDGMENT:
AFFIRMED

Civil Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CV-14-832319

BEFORE: Kilbane, P.J., S. Gallagher, J., and Blackmon, J.

RELEASED AND JOURNALIZED: July 19, 2018

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MARY EILEEN KILBANE, P.J.:

{¶1} Plaintiff-appellant, Sher Smiley ("Smiley"), appeals from the trial court's order granting summary judgment in favor of defendant-appellee, the city of Cleveland ("the City"). For the reasons set forth below, we affirm.

{¶2} In September 2014, Smiley filed a complaint alleging she slipped and fell on a metal strip in the floor while exiting the indoor swimming pool area into the outdoor water park area at Cudell Recreation Center ("the recreation center"). The recreation center is owned and operated by the City. Smiley further alleges that her fall caused injury to her head, neck, lower back, and left ankle and aggravated her preexisting back and neck injuries.

{¶3} In November 2014, the City filed an answer to the complaint, asserting numerous defenses. In December 2014, the City moved to dismiss Smiley's complaint for failure to state a claim, arguing it was immune from liability under R.C. 2744.02. Smiley missed the deadline for opposing the motion, and the trial court granted the City's motion to dismiss, noting it was unopposed. Smiley then filed a motion for relief from judgment along with a brief in support explaining why she missed the deadline. The trial court granted Smiley's motion for relief for judgment and gave her an opportunity to oppose the City's motion to dismiss.

{¶4} After Smiley filed her response, the trial court granted the City's motion to dismiss. Smiley appealed the trial court's order dismissing her complaint to this court. *Smiley v. Cleveland*, 8th Dist. Cuyahoga No. 103987, 2016-Ohio-7711 ("*Smiley I")*. On appeal, we determined that whether the wet metal strip constituted a physical defect was a question of fact that could not be resolved through a motion to dismiss. (The question as to whether the wet metal strip constituted a physical defect on the premises was determined on appeal to be a

question of fact that cannot be resolved through a motion to dismiss.) *Id*. at _ 12. Specifically, we determined that under the facts as alleged, it was not inconceivable that water could have interacted with the metal strip in some way resulting in a physical defect. *Id*. Accordingly, we reversed the trial court's dismissal and remanded this matter to the trial court for further proceedings. *Id*. at _ 15.

{¶5} Following our remand, the City filed its motion for summary judgment. The City supported its motion with portions of Smiley's deposition transcript as well as the affidavit of the recreation center manager, Ron Fields ("Fields"). Smiley filed a brief in opposition and attached the full transcript of her deposition.

{¶6} At her deposition, Smiley testified that she went to the recreation center with her boyfriend and her teenage son on July 6, 2013. The group planned to swim in the recreation center's indoor pool and use its outdoor water park area. This was Smiley's first visit to the recreation center.

{¶7} Upon arriving at the recreation center, Smiley went into the women's locker room to change. When she came out of the locker room, a young man, whom Smiley describes as an African-American male in his early twenties, told her that she needed to take off the water shoes she was wearing. Smiley testified that the young man was sitting at a desk located outside of the locker room in the indoor swimming area. The young man wore "a white wife beater [shirt] and some blue shorts." Smiley assumed this man was a recreation center employee.

{¶8} Smiley went back into the women's locker room to remove her water shoes. When Smiley reentered the pool area, her attention was drawn to her son in the pool "jumping up and down, showing [her] all his little tricks he was doing." Smiley and her boyfriend then began to walk toward the outdoor water park. The indoor and outdoor areas of the pool complex are

separated by a sliding glass door that runs on a metal strip in the floor. While exiting the indoor pool area through the open glass door, Smiley slipped and fell on the metal strip. Smiley did not observe the metal strip before she stepped on it, explaining she "was just * * * looking straight ahead" at the features of the water park and "wasn't paying attention to down." Smiley explained that the surrounding floor was wet, but acknowledged that had she looked down she would have seen the metal strip.

{¶9} In his affidavit, Fields, the recreation center manager, identified the five life guards by name that were working at the recreation center on July 23, 2016. Fields explained that none of these five lifeguards are African-American. Fields stated that lifeguards are required to wear white short sleeve t-shirts with the City logo printed on the front and "lifeguard" printed on the back. Fields explained that the lifeguards are not permitted to wear tank tops.

{¶10} In October 2017, the trial court granted the City's motion for summary judgment based upon three separate findings. First, the trial court agreed with the City that it was immune from liability under R.C. 2744.02. Secondly, it determined that any negligence claim against the City was barred because the metal strip on which Smiley slipped and fell was open and obvious. Finally, the trial court found that Smiley assumed a foreseeable risk of using a pool and splash park.

{¶11} It is from this order that Smiley appeals, raising the following three assignments of error for our review:

Assignment of Error One

> The lower court erred in granting [the City's motion for summary judgment] as there [were] disputed issues of law and facts as to [the City's negligence].

Assignment of Error Two

> The [c]ourt erred in granting [summary judgment] on the basis of the defect upon which [Smiley] slipped on was "open and obvious."

Assignment of Error Three

> The trial court erred in granting summary judgment on the basis [that Smiley] assumed a known risk.

Summary Judgment Standard

{¶12} We review a trial court's decision to grant summary judgment de novo. *Grafton v. Ohio Edison Co.*, 77 Ohio St.3d 102, 105, 1996-Ohio-336, 671 N.E.2d 241. Accordingly, we afford no deference to the trial court's decision and independently review the record to determine whether summary judgment is appropriate. *Kestranek v. Crosby*, 8th Dist. Cuyahoga No. 93163, 2010-Ohio-1208, ¶ 14.

{¶13} Under Civ.R. 56(C), summary judgment is properly granted when (1) there is no genuine issue as to any material fact; (2) the moving party is entitled to judgment as a matter of law; and (3) reasonable minds can come to but one conclusion, and that conclusion is adverse to the party against whom the motion for summary judgment is made, who is entitled to have the evidence construed most strongly in his or her favor. *Harless v. Willis Day Warehousing Co.*, 54 Ohio St.2d 64, 66, 375 N.E.2d 46 (1976).

{¶14} The party moving for summary judgment bears the initial burden of demonstrating the absence of a genuine issue of material fact on the essential elements of the nonmoving party's claims. *Dresher v. Burt*, 75 Ohio St.3d 280, 293, 1996-Ohio-107, 662 N.E.2d 264. If the moving party satisfies this initial burden, the nonmoving party has a reciprocal burden as outlined in Civ.R. 56(E). *Id.*

> When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his

> pleadings, but his response, by affidavit or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him.

Civ.R. 56(E).

Political Subdivision Immunity

{¶15} In the first assignment of error, Smiley argues the trial court erred by finding that the City is immune from liability under R.C. 2744.02.

{¶16} A determination of whether a political subdivision is immune from tort liability pursuant to R.C. Chapter 2744 involves a three-tiered analysis. *Dynowski v. Solon*, 183 Ohio App.3d 364, 2009-Ohio-3297, 917 N.E.2d 286, ¶ 12 (8th Dist.). The first tier, found in R.C. 2744.02(A), sets forth the general rule that political subdivisions are not liable in damages for personal injury. *Smiley I* at ¶ 7, citing *Rankin v. Cuyahoga Cty. Dept. of Children & Family Servs*., 118 Ohio St.3d 392, 2008-Ohio-2567, 889 N.E.2d 521, ¶ 8. R.C. 2744.02(A)(1) explains:

> For the purposes of this chapter, the functions of political subdivisions are hereby classified as governmental functions and proprietary functions. Except as provided in division (B) of this section, a political subdivision is not liable in damages in a civil action for injury * * * to person * * * allegedly caused by an act or omission of the political subdivision or an employee of the political subdivision in connection with a governmental or proprietary function.

{¶17} The second tier of the analysis considers whether any of the exceptions to immunity outlined in R.C. 2744.02(B) apply. *Id*. at _ 7, citing *Rankin* at _ 18. If a plaintiff establishes the presence of one of these exceptions, the political subdivision can restore

immunity by demonstrating the applicability of one of the defenses set forth in R.C. 2744.03. *Id.*, citing *Rankin* at _ 27.

{¶18} Here, the parties do not dispute that the City is a political subdivision as defined in R.C. 2744.01(F), and thus, qualifies for general immunity under R.C. 2744.02(A). It is also undisputed that the City's maintenance and operation of a pool and water park constitutes a governmental function. *See* R.C. 2744.01(C)(2)(u)(iv).

{¶19} Smiley argues the City loses immunity under the exception created by R.C. 2744.02(B)(4), which states, in relevant part:

> [P]olitical subdivisions are liable for injury * * * to person * * * that is caused by the negligence of their 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[.]

{¶20} This particular immunity exception only applies if the personal injury is: "'1) caused by employee negligence, 2) on the grounds or in buildings used in connection [with the performance of a] governmental activity, and 3) due to physical defects on or within those grounds or buildings.'" *Duncan v. Cuyahoga Community College*, 2012-Ohio-1949, 970 N.E.2d 1092, ¶ 26 (8th Dist.), quoting *Hamrick v. Bryan City School Dist.*, 6th Dist. Williams No. WM-10-014, 2011-Ohio-2572. Indeed, "'[a]ll these characteristics must be present'" for the exception to apply. (Emphasis deleted.) *Id.*, quoting *Hamrick.*

{¶21} Smiley explains that her "theory of negligence is based on [t]he City's employee's insistence that she remove her water shoes before proceeding on the wet pool deck and into the splash park." She argues there is no evidence in the record contradicting her testimony that a male African-American employee insisted she remove her water shoes. The City, on the other hand, disputes whether the unidentified young man was a City employee. The trial court

determined that Smiley failed to present sufficient evidence demonstrating any negligence of a City employee and the presence of a physical defect.

{¶22} Regardless of the employment status of the unidentified young man, Smiley's argument that her injury was caused by employee negligence fails because she presents no evidence that her inability to wear her water shoes caused her fall. She provides no support for her contention that her water shoes were designed to prevent slipping on wet surfaces or that their wear would have made traversing over the metal strip safer. A number of Ohio appellate districts, including this court, have determined that premises are not considered physically defective based solely upon an allegation that modifications or improvements may render them safer. *See Parmertor v. Chardon Local Schools*, 2016-Ohio-761, 47 N.E.3d 942, ¶ 23 (11th Dist.); *Duncan* at _ 27 (holding that a community college's failure to use floor mats when conducting a self-defense class did not constitute a "physical defect" withing the meaning of R.C. 2744.02(B)(4)).

{¶23} Additionally, Smiley presents no evidence that the wet metal strip by itself constitutes a physical defect — she merely alleges it was "wet all over" the pool complex and that she slipped while walking barefoot on the metal strip.

{¶24} This court has defined a physical defect as "a perceivable imperfection that diminishes the worth or utility of the object at issue." (Emphasis deleted.) *Duncan*, 2012-Ohio-1949, 970 N.E.2d 1092, at ¶ 26, quoting *Hamrick*, 6th Dist. Williams No. WM-10-014, 2011-Ohio-2572, at _ 28. We have also held that the physical defect exception may apply if the injury-causing instrumentality "did not operate as intended due to a perceivable condition or if the instrumentality contained a perceivable imperfection that impaired its worth or

utility." *Jacobs v. Oakwood*, 8th Dist. Cuyahoga No. 103830, 2016-Ohio-5327, ¶ 16, quoting *Jones v. Del. City School Dist. Bd. of Edn.*, 2013-Ohio-3907, 995 N.E.2d 1252, ¶ 22 (5th Dist.).

{¶25} Here, the record does not demonstrate that the metal strip failed to operate properly as a track for the sliding glass door or that the strip's worth or utility was somehow diminished or impaired.

{¶26} Based on the foregoing, we find the trial court did not err in granting summary judgment to the City on the basis that it is immune from liability in this case. Smiley failed to present evidence creating a genuine issue of material fact on the physical defect exception to immunity.

{¶27} Accordingly, the first assignment of error is overruled.

{¶28} In the second and third assignments of error, Smiley challenges the trial court's alternative bases for granting summary judgment in favor of the City. These remaining assignments of error are moot in light of our resolution of the first assignment of error. *See* App.R. 12(A)(1)(c).

{¶29} 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.

MARY EILEEN KILBANE, PRESIDING JUDGE

SEAN C. GALLAGHER, J., and
PATRICIA ANN BLACKMON, J., CONCUR