[Cite as *Taylor v. Cleveland*, 2019-Ohio-541.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 107095

DIKISHA TAYLOR, ET AL.

PLAINTIFFS-APPELLEES

vs.

CITY OF CLEVELAND

DEFENDANT-APPELLANT

JUDGMENT:
AFFIRMED

Civil Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CV-17-880786

BEFORE: Kilbane, A.J., E.T. Gallagher, J., and S. Gallagher, J.

RELEASED AND JOURNALIZED: February 14, 2019

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MARY EILEEN KILBANE, A.J.:

{¶1} Defendant-appellant, the city of Cleveland ("City"), appeals from the trial court's decision denying its motion for summary judgment on political subdivision immunity grounds. For the reasons set forth below, we affirm.

{¶2} The facts of this case are not in dispute. In June 2015, plaintiffs-appellees, Dikisha Taylor, individually and as mother and next friend of her minor children Ashton Small and Bryennt Small II (collectively referred to as "plaintiffs"), were injured when the road gave way under Taylor's car. It was later determined that a water leak in front of the property located at 13614 Glenside Road had eroded the road's substrate causing a sinkhole to form under the weight of Taylor's vehicle. As a result, the plaintiffs brought a negligence action against the City. The City filed an answer, asserting political subdivision immunity under R.C. Chapter 2744.

{¶3} Following discovery, the City moved for summary judgment. The City argued

that it was entitled to immunity because it did not negligently perform, or create or have actual or constructive notice of the water main break at 13614 Glenside Road, causing the sinkhole. The City conceded that it had knowledge of a water main break the day before the accident at 13523 Glenside Road. The plaintiffs opposed, arguing that the City was aware of a defect in the water main the day before and took no actions to warn drivers of the potential hazard in the road. The trial court denied the City's motion.

{¶4} The City now appeals, raising the following single assignment of error for review.

Assignment of Error

The trial court erred when it denied the [City's] motion for summary judgment.

{¶5} The City argues that the trial court should have granted its motion for summary judgment because it is immune from liability under R.C. 2744.02(A)(1), which provides:

> 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, death, or loss to person or property 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.

{¶6} We review an appeal from summary judgment under a de novo standard of review. *Grafton v. Ohio Edison Co.*, 77 Ohio St.3d 102, 105, 1996-Ohio-336, 671 N.E.2d 241; *Zemcik v. LaPine Truck Sales & Equip. Co.*, 124 Ohio App.3d 581, 585, 706 N.E.2d 860 (8th Dist.1998). In *Zivich v. Mentor Soccer Club*, 82 Ohio St.3d 367, 369-370, 1998-Ohio-389, 696 N.E.2d 201, the Ohio Supreme Court set forth the appropriate test as follows:

> **{¶7}** Pursuant to Civ.R. 56, summary judgment is appropriate when
>
> (1) there is no genuine issue of 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 nonmoving party, said party being entitled to have the evidence construed most strongly in his favor. *Horton v.*

> *Harwick Chem. Corp.*, 73 Ohio St.3d 679, 1995-Ohio-286, 653 N.E.2d 1196, paragraph three of the syllabus. The party moving for summary judgment bears the burden of showing that there is no genuine issue of material fact and that it is entitled to judgment as a matter of law. *Dresher v. Burt*, 75 Ohio St.3d 280, 292-293, 1996-Ohio-107, 662 N.E.2d 264.

{¶8} Once the moving party satisfies its burden, the nonmoving party "may not rest upon the mere allegations or denials of the party's pleadings, but the party's response, by affidavit or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial." Civ.R. 56(E); *Mootispaw v. Eckstein*, 76 Ohio St.3d 383, 385, 1996-Ohio-389, 667 N.E.2d 1197. Doubts must be resolved in favor of the nonmoving party. *Murphy v. Reynoldsburg*, 65 Ohio St.3d 356, 358-359, 1992-Ohio-95, 604 N.E.2d 138.

{¶9} While R.C. 2744.02(A)(1), in general, grants a political subdivision immunity from negligence claims, R.C. 2744.02(B) also sets forth certain exceptions that reinstate liability. *Colbert v. Cleveland*, 99 Ohio St.3d 215, 2003-Ohio-3319, 790 N.E.2d 781, ¶ 7-8. If any of these exceptions apply and no defense in R.C. 2744.02(B) applies, then we must determine whether any of the defenses in R.C. 2744.03 apply, thereby providing the political subdivision a defense against liability. *Id.* at ¶ 9.

{¶10} Relevant to the instant case is R.C. 2744.02(B)(3), which provides in pertinent part: "political subdivisions are liable for injury, death, or loss to person or property caused by their negligent failure to keep public roads in repair and other negligent failure to remove obstructions from public roads[.]" Plaintiffs allege that, because of the City's negligence, they were injured when Taylor's car fell into a sinkhole on Glenside Road.

{¶11} To establish negligence in which immunity is at issue, the plaintiffs must demonstrate that: (1) the defendant owed a duty of care; (2) the defendant breached the duty of care; and (3) as a direct and proximate result of the defendant's breach, the plaintiff suffered

injury. *Menifee v. Ohio Welding Prods., Inc.*, 15 Ohio St.3d 75, 77, 472 N.E.2d 707 (1984), citing *Di Gildo v. Caponi*, 18 Ohio St.2d 125, 247 N.E.2d 732 (1969); *Feldman v. Howard*, 10 Ohio St.2d 189, 226 N.E.2d 564 (1967).

{¶12} Construing the evidence in a light most strongly in favor of plaintiffs, genuine issues of material fact exist concerning their allegation that the City was negligent by failing to maintain Glenside Road. The evidence demonstrates that 24 hours before the plaintiffs' sinkhole incident, the City was aware of a water main break at 13523 Glenside Road, which is less than 200 feet from where the plaintiffs were injured by the sinkhole at 13614 Glenside Road. The water main break at 13523 Glenside Road created the unsafe condition, which the City had a duty to repair.

{¶13} Because we find that R.C. 2744.02(B)(3) applies in this case, we must now look at the possible R.C. 2744.03 defenses presented by the City, thereby providing it with a defense against liability. *Colbert*, 99 Ohio St.3d 215, 2003-Ohio-3319, 790 N.E.2d 781, at ¶ 9. The City, however, failed to argue in its summary judgment motion that any of the defenses in R.C. 2744.03 apply. It is well settled that issues that could have been raised at the trial court level cannot be raised for the first time on appeal. *Miller v. Romanauski*, 8th Dist. Cuyahoga No. 100120, 2014-Ohio-1517, ¶ 35, citing *Thompson v. Preferred Risk Mut. Ins. Co.*, 32 Ohio St.3d 340, 513 N.E.2d 733 (1987); *Hous. Advocates, Inc. v. Am. Fire & Cas. Co.*, 8th Dist. Cuyahoga Nos. 86444 and 87305, 2006-Ohio-4880; *State v. Payne*, 114 Ohio St.3d 502, 2007-Ohio-4642, 873 N.E.2d 306. The R.C. 2744.03 defenses were not raised by the City in its motion for summary judgment below. Thus, we decline to address them here.

{¶14} Accordingly, the City's single assignment of error is overruled.

{¶15} Judgment affirmed.

It is ordered that appellees recover from 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.

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MARY EILEEN KILBANE, ADMINISTRATIVE JUDGE

EILEEN T. GALLAGHER, J., CONCURS;
SEAN C. GALLAGHER, J., DISSENTS (SEE SEPARATE DISSENTING OPINION)

SEAN C. GALLAGHER, J., DISSENTING:

{¶16} I respectfully dissent. The majority concludes that a water leak in one location on a city street serves as constructive notice to the City that a sinkhole could occur in any other location on that street. Thus, according to the majority's position, whenever a subterranean water leak is discovered on any given street, the City is on notice that a sinkhole could form anywhere else on that street or potentially on other neighboring streets. Although I empathize with the plaintiffs' plight, the result of this decision will undoubtedly leave the City with little choice but to close entire streets when a water leak is detected to avoid potential liability. The law does not require this course of action, and therefore, I dissent.

{¶17} The plaintiffs, collectively referred to as the "Taylors" for the ease of reference, were driving on Glenside Road when the surface gave way underneath the Taylors' vehicle. It was later determined that a separate water leak in front of the property located at 13614 Glenside

Road caused the sinkhole to form under the weight of the vehicle. In its motion for summary judgment, the City filed several affidavits attesting to the lack of knowledge of any latent defects at that address that would have put the City on notice of the danger the Taylors encountered. However, the City conceded it was aware of a second water leak, which had been discovered the day before the Taylors' accident, that occurred in front of the property located at 13523 Glenside Road — less than 200 feet up the street. An employee of the City inspected the area around the 13523 Glenside Road address and determined that a repair crew could be dispatched the following day. Cones were set out to cordon off the area.

{¶18} There is no evidence, or even an argument, supporting the notion that the water leak occurring at 13523 Glenside Road caused or was in any way related to the sinkhole that developed in front of 13614 Glenside Road. In fact, the Taylors failed to submit any evidence in opposition to the City's undisputed evidence and nothing in the record indicates that a sinkhole formed as a result of the water leak in front of 13523 Glenside Road. The Taylors' conclusion that the latent defect discovered at 13523 Glenside Road caused the sinkhole at 13614 Glenside Road is not based on the record.

{¶19} R.C. 2744.02(A)(1), generally speaking, grants the City immunity from claims of negligence. As is pertinent in this case, R.C. 2744.02(B)(3) reinstates political subdivision liability if the alleged damages result from a "negligent failure to keep public roads in repair and other negligent failure to remove obstructions from public roads." In order to avoid summary judgment in a negligence action in which immunity is an issue, the plaintiff must show "'(1) the defendant owed her a duty of care; (2) the defendant breached the duty of care; and (3) as a direct and proximate result of the defendant's breach, the plaintiff suffered injury.'" *Gomez v. Cleveland*, 8th Dist. Cuyahoga No. 97179, 2012-Ohio-1642, ¶ 6, quoting *Walters v. Eaton*, 12th

Dist. Preble No. CA2001-06-012, 2002-Ohio-1338, 2; and *Menifee*, 15 Ohio St.3d at 77, 472 N.E.2d 707. Whether the political subdivision owed a duty of care depends on whether it had notice of, or actually created, the alleged defect. *Davis v. Akron*, 9th Dist. Summit No. 19553, 2000 Ohio App. LEXIS 843, 4 (Mar. 8, 2000).

{¶20} Thus, the political subdivision's liability, for summary judgment purposes, depends on demonstrating the lack of a genuine issue of material fact on whether "'its agents or officers actively created the faulty condition, or that it was otherwise caused and the municipality has actual or constructive notice of its existence.'" *Gomez* at ¶ 7, quoting *Cleveland v. Amato*, 123 Ohio St. 575, 176 N.E. 227 (1931). A genuine issue of material fact concerning constructive notice exists if the plaintiff sets forth evidence indicating that the unsafe condition existed in such a manner that it could or should have been timely discovered; the condition existed for such a length of time that it should have been discovered; and if it had been discovered, it would have created a reasonable apprehension of potential danger or an invasion of private rights. *Id.* at ¶ 7, quoting *Nanak v. Columbus*, 121 Ohio App.3d 83, 86, 698 N.E.2d 1061 (10th Dist.1997), and citing *Beebe v. Toledo*, 168 Ohio St. 203, 151 N.E.2d 738 (1958), paragraph two of the syllabus.

{¶21} In this case, the City presented undisputed evidence that it was not aware of the latent defect, the subterranean water leak in front of 13614 Glenside Road, nor did the defect exist for such a length of time that it should have been discovered. In response, the Taylors claim that the City had actual notice of the defect because the City was aware of the water leak that had occurred the day before less than 200 feet up the street, in front of the 13523 Glenside Road address. According to the Taylors, the City took no action to warn drivers of the potential danger from that hazard.

{¶22} Contrary to the Taylors' sole argument, the City warned drivers of the danger posed by the water leak at 13523 Glenside Road — the area was cordoned off with traffic cones. Nothing in the record indicates that a sinkhole formed at that address, but the City produced evidence that the leak was repaired without incident the day following its discovery. Nevertheless, that is not the issue in this case. The Taylors were not injured by the latent defect discovered at the 13523 address.

{¶23} The Taylors were injured by the undiscovered, latent defect at the 13614 address. Thus, the issue in this case is whether the City had actual or constructive notice of the second water leak that caused the damages sought in the Taylors' complaint. The failure to notify the Taylors of the second danger is the negligent act on which the complaint is based. On this point, the Taylors are silent.

{¶24} Notice of a water leak almost 200 feet from the site of the accident that has not been causally connected to the alleged defect in this case is not sufficient to demonstrate actual notice that would give rise to a duty to act. *Leibreich v. A.J. Refrig., Inc.*, 67 Ohio St.3d 266, 270, 1993-Ohio-12, 617 N.E.2d 1068 (the causal connection between a second act of negligence and the injury does not survive if the second act could not be reasonably foreseen at the time of the initial negligent act); *see Montgomery v. Vargo*, 2016-Ohio-809, 60 N.E.3d 709, ¶ 15 (8th Dist.), citing *Tankersley v. Lohrey*, 12th Dist. Butler No. CA98-10-206, 1999 Ohio App. LEXIS 2116, 8 (May 10, 1999) (under tort law, there must be a connection between the breach and the resulting damages). In this case, the City presented undisputed evidence that it had no notice of the latent water leak at 13614 Glenside Road that actually caused the sinkhole. The water leak discovered at 13523 Glenside Road posed no ongoing danger, and there is no evidence or argument offered supporting a claim of constructive notice of the danger the Taylors

encountered. *Hollowell v. Aplis*, 8th Dist. Cuyahoga No. 100275, 2014-Ohio-1084, ¶ 11 (summary judgment is appropriate in a negligence action when the undisputed evidence demonstrates the defendant lacked actual or constructive notice of the alleged defect); *Person-Thomas v. Quilliams-Noble Apts., L.L.C.*, 2015-Ohio-4277, 45 N.E.3d 654, ¶ 20 (8th Dist.).

{¶25} Upon the evidence submitted under Civ.R. 56(C), it is undisputed that the City lacked notice, constructive or otherwise, of the water leak that caused the Taylors' accident. Without notice, the City had no duty to act, and therefore, the City could not be deemed to be negligent in keeping the road repaired under the immunity statute. Because of the undisputed facts presented in this case, the City's immunity from the negligence action remains intact despite R.C. 2744.02(B)(3). I would hold that the trial court erred in denying the City the benefit of the alleged immunity.