[Cite as *Zeidler v. Geauga Cty.*, 2010-Ohio-2524.]

IN THE COURT OF APPEALS

ELEVENTH APPELLATE DISTRICT

GEAUGA COUNTY, OHIO

ROBERT ZEIDLER,	:	**O P I N I O N**
Plaintiff-Appellant,	:	**CASE NO. 2009-G-2935**
- vs -	:	
GEAUGA COUNTY, OHIO, ROBERT L. PHILLIPS, GEAUGA COUNTY ENGINEER,	:	
Defendant-Appellee.	:	

Civil Appeal from the Chardon Municipal Court Case No. 2009 CVI 00870.

Judgment: Affirmed.

David M. Leneghan, The Law Offices Of David M. Leneghan, 200 Treeworth Boulevard, #200, Broadview Heights, OH 44147 (For Plaintiff-Appellant).

David P. Joyce, Geauga County Prosecutor, and *Bridey Matheney*, Assistant Prosecutor, Courthouse Annex, 231 Main Street, Chardon, OH 44024 (For Defendant-Appellee).

COLLEEN MARY O'TOOLE, J.

{¶1} Appellant, Robert Zeidler, appeals from the October 16, 2009 judgment entry of the Chardon Municipal Court, granting the motion for summary judgment of appellee, Geauga County, Ohio, Robert L. Phillips, Geauga County Engineer.

{¶2} In 2003, the Geauga County Board of Commissioners passed a resolution to improve Washington Street in Auburn Township. Bids were solicited for the project called "The Asphalt Resurfacing of Sections G-J of Washington Street, CH 606" and a

contract awarded to Ronyak Paving, Inc. ("Ronyak"), who performed the work in August of 2007, resulting in construction and replacement of the roadway in front of appellant's residence. According to appellant's affidavit, the newly constructed roadway is higher than what was previously existing, and is not in accordance with the plans and specifications of the construction project. Appellant indicated that debris from the roadway now comes on his driveway, thereby causing damage.

{¶3} According to the affidavit of appellee, the work performed by Ronyak was done pursuant to the project specifications. Appellee indicated that there is no requirement that the lip of appellant's driveway apron be higher in elevation than the surface of the street. Both appellant and appellee included photographs of appellant's driveway and the roadway. Appellee stated that nothing in any of the pictures shows any kind of abnormality or defect with the work performed.

{¶4} On June 25, 2009, appellant filed a small claims complaint against appellee for $3,000 plus interest and costs. According to his complaint, appellant alleged that appellee negligently and improperly adjusted the road in front of his residence, which led to flooding and damage, requiring him to adjust his driveway and incur costs.

{¶5} On August 4, 2009, appellee filed a motion for summary judgment pursuant to Civ.R. 56, which was granted by the trial court on August 28, 2009.

{¶6} On September 2, 2009, appellant filed a brief in opposition to appellee's motion for summary judgment, claiming that the trial court did not allow him 30 days to respond. The following day, appellant filed a motion to reconsider and/or vacate, indicating he did not realize that the Chardon Municipal Court's Local Rules provide only

a 14 day time period within which to respond and asserting that a genuine issue of material fact existed as to whether appellee acted negligently when resurfacing the road in front of his home.

{¶7} Pursuant to its September 25, 2009 judgment entry, the trial court granted appellant's motion to reconsider and/or vacate. The trial court vacated and set aside the August 28, 2009 judgment and reinstated the action.

{¶8} On October 6, 2009, appellee filed a reply brief in support of its motion for summary judgment.

{¶9} Pursuant to its October 16, 2009 judgment entry, the trial court granted appellee's motion for summary judgment. The trial court indicated that the activity of appellee about which appellant complained is a governmental function under R.C. 2744.01(C)(2)(e). The trial court further determined that the exception to immunity set forth in R.C. 2744.02(B)(2) is inapplicable and no other exception to immunity exists. It is from that judgment that appellant filed a timely appeal, raising the following assignment of error for our review:

{¶10} "The trial court committed error when it granted summary judgment in favor of [appellee]."

{¶11} In his sole assignment of error, appellant argues that the trial court erred by granting appellee's motion for summary judgment. Appellant maintains that appellee is not immune from liability under the theory of sovereign immunity. Appellant stresses that he is thus entitled to damages.

{¶12} "This court reviews de novo a trial court's order granting summary judgment." *Hudspath v. Cafaro Co.*, 11th Dist. No. 2004-A-0073, 2005-Ohio-6911, at

¶8, citing *Hapgood v. Conrad*, 11th Dist. No. 2000-T-0058, 2002-Ohio-3363, at ¶13. "'A reviewing court will apply the same standard a trial court is required to apply, which is to determine whether any genuine issues of material fact exist and whether the moving party is entitled to judgment as a matter of law.'" Id.

{¶13} "Since summary judgment denies the party his or her 'day in court' it is not to be viewed lightly as docket control or as a 'little trial.' The jurisprudence of summary judgment standards has placed burdens on both the moving and the nonmoving party. In *Dresher v. Burt* [(1996), 75 Ohio St.3d 280, 296,] the Supreme Court of Ohio held that the moving party seeking summary judgment bears the initial burden of informing the trial court of the basis for the motion and identifying those portions of the record before the trial court that demonstrate the absence of a genuine issue of fact on a material element of the nonmoving party's claim. The evidence must be in the record or the motion cannot succeed. The moving party cannot discharge its initial burden under Civ.R. 56 simply by making a conclusory assertion that the nonmoving party has no evidence to prove its case but must be able to specifically point to some evidence of the type listed in Civ.R. 56(C) that affirmatively demonstrates that the nonmoving party has no evidence to support the nonmoving party's claims. If the moving party fails to satisfy its initial burden, the motion for summary judgment must be denied. If the moving party has satisfied its initial burden, the nonmoving party has a reciprocal burden outlined in the last sentence of Civ.R. 56(E) to set forth specific facts showing there is a genuine issue for trial. If the nonmoving party fails to do so, summary judgment, if appropriate shall be entered against the nonmoving party based on the principles that have been firmly established in Ohio for quite some time in *Mitseff v. Wheeler* (1988), 38 Ohio

St.3d 112 ***." *Welch v. Ziccarelli*, 11th Dist. No. 2006-L-229, 2007-Ohio-4374, at ¶40. (Parallel citation omitted.)

{¶14} "The court in *Dresher* went on to say that paragraph three of the syllabus in *Wing v. Anchor Media, Ltd. of Texas* (1991), 59 Ohio St.3d 108 ***, is too broad and fails to account for the burden Civ.R. 56 places upon a *moving* party. The court, therefore, limited paragraph three of the syllabus in *Wing* to bring it into conformity with *Mitseff.* (Emphasis added.)" Id. at ¶41.

{¶15} "The Supreme Court in *Dresher* went on to hold that when *neither* the moving nor nonmoving party provides evidentiary materials demonstrating that there are no material facts in dispute, the moving party is not entitled a judgment as a matter of law as the 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.' Id. at 276. (Emphasis added.)" Id. at ¶42.

{¶16} This court stated in *Frazier v. Kent*, 11th Dist. Nos. 2004-P-0077 and 2004-P-0096, 2005-Ohio-5413, at ¶20:

{¶17} "R.C. Chapter 2744 sets forth a three tiered analysis for determining a political subdivision's immunity from liability. *Greene Cty. Agricultural Soc. v. Liming*, (2000), 89 Ohio St.3d 551, 556, ***. First, R.C. 2744.02(A)(1) codifies the general rule of sovereign immunity, viz., that 'a political subdivision is not liable in damages in a civil action for 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.' However, this general rule is

limited by R.C. 2744.02(B), which sets forth five instances in which a political subdivision is not immune. Hence, the second tier of the analysis requires a court to determine whether any of the exceptions under R.C. 2744.02(B) apply. Finally, if a political subdivision is exposed to liability through the application of R.C. 2744.02(B), a court must consider whether the political subdivision could legitimately assert any of the defenses or immunities under R.C. 2744.03. See, e.g., *Greene Cty. Agricultural Soc.,* supra, at 557." (Parallel citation omitted.)

{¶18} R.C. 2744.02(B) provides:

{¶19} "Subject to sections 2744.03 and 2744.05 of the Revised Code, a political subdivision is 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 of any of its employees in connection with a governmental or proprietary function, as follows:

{¶20} "(1) Except as otherwise provided in this division, political subdivisions are liable for injury, death, or loss to person or property caused by the negligent operation of any motor vehicle by their employees when the employees are engaged within the scope of their employment and authority. The following are full defenses to that liability:

{¶21} "(a) A member of a municipal corporation police department or any other police agency was operating a motor vehicle while responding to an emergency call and the operation of the vehicle did not constitute willful or wanton misconduct;

{¶22} "(b) A member of a municipal corporation fire department or any other firefighting agency was operating a motor vehicle while engaged in duty at a fire, proceeding toward a place where a fire is in progress or is believed to be in progress, or

answering any other emergency alarm and the operation of the vehicle did not constitute willful or wanton misconduct;

{¶23} "(c) A member of an emergency medical service owned or operated by a political subdivision was operating a motor vehicle while responding to or completing a call for emergency medical care or treatment, the member was holding a valid commercial driver's license issued pursuant to Chapter 4506. or a driver's license issued pursuant to Chapter 4507. of the Revised Code, the operation of the vehicle did not constitute willful or wanton misconduct, and the operation complies with the precautions of section 4511.03 of the Revised Code.

{¶24} "(2) Except as otherwise provided in sections 3314.07 and 3746.24 of the Revised Code, political subdivisions are liable for injury, death, or loss to person or property caused by the negligent performance of acts by their employees with respect to proprietary functions of the political subdivisions.

{¶25} "(3) Except as otherwise provided in section 3746.24 of the Revised Code, 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, except that it is a full defense to that liability, when a bridge within a municipal corporation is involved, that the municipal corporation does not have the responsibility for maintaining or inspecting the bridge.

{¶26} "(4) Except as otherwise provided in section 3746.24 of the Revised Code, political subdivisions are liable for injury, death, or loss to person or property 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, including, but not limited to, office buildings and courthouses, but not including jails, places of juvenile detention, workhouses, or any other detention facility, as defined in section 2921.01 of the Revised Code.

{¶27} "(5) In addition to the circumstances described in divisions (B)(1) to (4) of this section, a political subdivision is liable for injury, death, or loss to person or property when civil liability is expressly imposed upon the political subdivision by a section of the Revised Code, including, but not limited to, sections 2743.02 and 5591.37 of the Revised Code. Civil liability shall not be construed to exist under another section of the Revised Code merely because that section imposes a responsibility or mandatory duty upon a political subdivision, because that section provides for a criminal penalty, because of a general authorization in that section that a political subdivision may sue and be sued, or because that section uses the term 'shall' in a provision pertaining to a political subdivision."

{¶28} In the case at bar, the activity of appellee about which appellant complains is a "governmental function." R.C. 2744.01(C)(2)(e). Also, appellee's status is that of a "political subdivision." R.C. 2744.01(F). Accordingly, appellee enjoys a general immunity from civil liability as defined in R.C. 2744.02(A). However, as previously stated, this general rule is limited by R.C. 2744.02(B), which sets forth five instances in which a political subdivision is not immune. We determine that none of the exceptions under R.C. 2744.02(B) apply.

{¶29} Specifically, the first exception, R.C. 2744.02(B)(1), does not apply here since that section relates to the operation of motor vehicles.

{¶30} The second exception, R.C. 2744.02(B)(2), has no application to the instant matter due to the fact that it deals with "proprietary functions."

{¶31} The third exception, R.C. 2744.02(B)(3), also does not apply to the case sub judice since that section specifically states, in part, that "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[.]" Here, appellant maintains that the actual reconstruction of the street was done in a negligent and improper manner. Contrary to appellant's assertions, there is no conclusive evidence in the record establishing that he "cautioned" appellee prior to commencing work on the road regarding the fact that his driveway needed to be higher than the road. Also, there is no conclusive evidence demonstrating appellee's alleged negligence through the before and after pictures. We agree with appellee that there is no law or rule requiring the lip of appellant's driveway apron to be higher in elevation than the surface of the road. In addition, appellant did not allege below that appellee failed to keep the public road in repair or that an obstruction existed on the road. All of the work performed by appellee was done in accordance with the plans and specifications compiled within his professional judgment.

{¶32} The fourth exception, R.C. 2744.02(B)(4), likewise is inapplicable to this case since that section addresses a political subdivision's liability for defects in public buildings.

{¶33} Lastly, the fifth exception, R.C. 2744.02(B)(5), does not apply here since there is no statute which imposes civil liability upon appellee.

{¶34} Accordingly, the trial court properly granted appellee's motion for summary judgment.

{¶35} For the foregoing reasons, appellant's sole assignment of error is not well-taken. The judgment of the Chardon Municipal Court is affirmed. It is ordered that appellant is assessed costs herein taxed. The court finds there were reasonable grounds for this appeal.

DIANE V. GRENDELL, J.,

CYNTHIA WESTCOTT RICE, J.,

concur.