

**IN THE COURT OF APPEALS
ELEVENTH APPELLATE DISTRICT
TRUMBULL COUNTY, OHIO**

JOHN DOE,	:	OPINION
Plaintiff-Appellant,	:	
- vs -	:	CASE NO. 2011-T-0080
TRUMBULL COUNTY CHILDREN SERVICES BOARD, et al.,	:	
Defendant-Appellee.	:	

Civil Appeal from the Trumbull County Court of Common Pleas, Case No. 2010 CV 2367.

Judgment: Affirmed.

Michael A. Scala, 244 Seneca Avenue, N.E., P.O. Box 4306, Warren, OH 44482 (For Plaintiff-Appellant).

William L. Hawley, Harrington, Hoppe & Mitchell, Ltd., 108 Main Avenue, S.W., Suite 500, P.O. Box 1510, Warren, OH 44482-1510 (For Defendant-Appellee).

THOMAS R. WRIGHT, J.

{¶1} Appellant, John Doe, a pseudonym, appeals from a judgment of the Trumbull County Court of Common Pleas, granting appellee’s, Trumbull County Children Services Board’s (“CSB”), motion for summary judgment.

{¶2} During his teen years, appellant was under the custody of CSB and resided in a group home. Appellant alleges that he was approached by and had a sexual relationship with a CSB female employee, Jane Rowe, also a pseudonym, but

not a party to this appeal. Appellant claims that CSB failed to protect him and that CSB denied any wrongdoing. Appellant was released from CSB's custody when he turned 18.

{¶3} Thereafter, appellant filed a complaint against CSB and Jane Rowe alleging that their actions were wanton and reckless. CSB filed an answer and asserted the affirmative defense of sovereign immunity claiming it is a political subdivision and was performing a governmental function at all pertinent times.

{¶4} CSB subsequently filed a motion for summary judgment. Appellant filed a brief in opposition alleging that because CSB acted in a wanton and reckless manner, it is not shielded from liability. CSB filed a reply claiming that appellant does not fit within any of the exceptions to immunity.

{¶5} The trial court granted CSB's motion for summary judgment. The court found that CSB is entitled to immunity since appellant did not fit within any of the exceptions contained in R.C. 2744.02(B). Appellant filed a timely appeal asserting the following assignments of error:¹

{¶6} “[1.] The Trial Court erred to the detriment of Appellant by considering the custody of children to be a Governmental Function.

{¶7} “[2.] The Trial Court erred to the detriment of Appellant by ruling that the doctrine of sovereign immunity, as statutorily stated, bars any tort action by Appellant regardless of the nature of misconduct.

{¶8} “[3.] The Trial Court erred to the detriment of Appellant by accepting the Constitutional validity of ORC 2744 et seq.”

1. In his appellate brief, appellant references facts from his deposition. However, that deposition is not part of the trial court record or the record before this court. Thus, any references to that deposition will not be considered.

{¶9} Appellant’s three assignments of error stem from the trial court’s granting of CSB’s motion for summary judgment.

{¶10} An appellate court reviews a trial court’s decision to grant a motion for summary judgment under a de novo standard. *Grafton v. Ohio Edison Co.*, 77 Ohio St.3d 102, 105, 671 N.E.2d 241 (1996). Summary judgment is proper when: (1) no genuine issue as to any material fact remains to be litigated; (2) the moving party is entitled to judgment as a matter of law; and (3) it appears from the evidence that reasonable minds can come to but one conclusion, and viewing such evidence most strongly in favor of the party against whom the motion for summary judgment is made, that conclusion is adverse to that party. Civ.R. 56(C); *Welco Indus., Inc. v. Applied Cos.*, 67 Ohio St.3d 344, 346, 617 N.E.2d 1129 (1993).

{¶11} Once the moving party has met its burden of supporting its motion with sufficient admissible evidence, the nonmoving party has a reciprocal burden under Civ.R. 56(E) to set forth facts showing that there is a genuine issue for trial. *Dresher v. Burt*, 75 Ohio St.3d 280, 293, 662 N.E.2d 264 (1996). If the nonmoving party does not satisfy this reciprocal burden, summary judgment, if appropriate, shall be granted against the nonmoving party. Civ.R. 56(E).

{¶12} For the following reasons, we determine that the trial court properly granted CSB’s motion for summary judgment.

{¶13} In his first assignment of error, appellant argues the trial court erred in considering the custody of children to be a governmental function. He alleges that custody of children is not solely a governmental function and, therefore, sovereign immunity does not apply. Appellant maintains that the phrase “operation of children

service agencies or homes” applies to their operation, not to the care, custody, and control of children.

{¶14} Our analysis is directed by R.C. Chapter 2744. “[T]he Political Subdivision Tort Liability Act, codified in R.C. Chapter 2744, sets forth a three-tiered analysis for determining whether a political subdivision is immune from liability for injury or loss to property.” *Hortman v. Miamisburg*, 110 Ohio St.3d 194, 2006-Ohio-4251, 852 N.E.2d 716, ¶9, citing *Cater v. Cleveland*, 83 Ohio St.3d 24, 28, 697 N.E.2d 610 (1998). With respect to the first tier, “[b]efore determining whether a political subdivision is entitled to immunity from a civil action, a court must determine whether the political subdivision was engaged in a governmental or proprietary function when the alleged tort occurred.” *Rankin v. Cuyahoga Cty. Dept. of Children and Family Services*, 118 Ohio St.3d 392, 2008-Ohio-2567, 889 N.E.2d 521, ¶8.

{¶15} R.C. 2744.01(C)(2) defines a “governmental function” as including, but not limited to, the following:

{¶16} “(m) The operation of a job and family services department or agency * * *;
[and]

{¶17} “* * *

{¶18} “(o) The operation of * * * children’s homes or agencies[.]”

{¶19} Appellant contends that matters dealing with child custody are outside the scope of the operation of a children’s agency. Appellant admits in his appellate brief, however, that he was unable to find any Ohio case law to support his contention. Nevertheless, appellant suggests that the facts of this case support such a distinction. We disagree.

{¶20} Like our case, *Rankin* involved allegations of sexual abuse of a minor while in agency custody. *Rankin, supra*, at ¶2. The Ohio Supreme Court held that under either R.C. 2744.01(C)(2)(m) or (o), the county department of children and family services was a political subdivision performing a governmental function. *Rankin, supra*, at ¶16. Thus, pursuant to the precedent in *Rankin*, the trial court did not err in concluding that under either R.C. 2744.01(C)(2)(m) or (o), CSB is a political subdivision performing a governmental function.

{¶21} Appellant's first assignment of error is without merit.

{¶22} In his second assignment of error, appellant alleges the trial court erred in ruling that the doctrine of sovereign immunity bars any tort action regardless of the nature of misconduct. He maintains that since the custody of children is not a governmental function, CSB should not be shielded by sovereign immunity since the actions involve more than mere negligence.

{¶23} As stated, the first tier in the three-tiered analysis is the general rule that a political subdivision is immune from liability incurred in performing either a governmental or proprietary function. R.C. 2744.02(A)(1); *Rankin, supra*, at ¶8; *Greene Cty. Agricultural Soc. v. Liming*, 89 Ohio St.3d 551, 556-557, 733 N.E.2d 1141 (2000). The second tier requires a court to determine whether any of the five exceptions to immunity under R.C. 2744.02(B) apply to expose the political subdivision to liability. *Id.* at 557. The third tier requires that if any of the R.C. 2744.02(B) exceptions are applicable, then a court must determine whether any of the defenses in R.C. 2744.03 are relevant. *Id.*

{¶24} With respect to the foregoing three-tiered analysis, this court recently stated in *Howard v. Girard*, 11th Dist. No. 2010-T-0096, 2011-Ohio-2331, at ¶45:

{¶25} “[T]he end of inquiry is reached when the acts or omissions of a political subdivision do not fit under any of the five exceptions enumerated in R.C. 2744.02(B). In other words, the courts do not engage in the third-tier analysis regarding available defenses provided in R.C. 2744.03, if no exception under R.C. 2744.02(B) can be found to remove the general grant of immunity.”

{¶26} As previously addressed, CSB is a political subdivision performing a governmental function. *Rankin, supra*, at ¶16. Thus, under the first tier, CSB is immune from liability. R.C. 2744.02(A)(1); *Greene, supra*, at 556-557. With respect to the second tier, the trial court correctly determined that the alleged act or omission by CSB does not fit under any of the five exceptions enumerated in R.C. 2744.02(B): (1) negligent operation of a motor vehicle by an employee; (2) negligent performance of a proprietary function; (3) negligent failure to keep public roads in repair; (4) negligent conduct by an employee occurring on the grounds of public buildings relating to physical defects; and (5) express statutory imposition of liability. Thus, as appellant is unable to state an exception to the immunity granted to CSB as a political subdivision under R.C. 2744.02, our inquiry regarding CSB’s liability does not proceed to the third tier, but rather ends here. *Howard, supra*, at ¶45, 48. Therefore, the trial court did not err in concluding that CSB is immune from liability.

{¶27} Appellant’s second assignment of error is without merit.

{¶28} In his third assignment of error, appellant contends the trial court erred in accepting the constitutional validity of R.C. Chapter 2744. He now stresses that the entire sovereign immunity statute is unconstitutional as it provides for the taking of property and liberty of a person without due process of law. However, the constitutionality of the statute was not raised to the trial court.

{¶29} “Failure to raise at the trial court level the issue of the constitutionality of a statute or its application, which issue is apparent at [that] time * * *, constitutes a waiver of such issue and a deviation from this state’s orderly procedure, and therefore need not be heard for the first time on appeal.” *Molnar v. Klammer*, 11th Dist. No. 2004-L-072, 2005-Ohio-6905, at ¶83, quoting *State v. Awan*, 22 Ohio St.3d 120, 489 N.E.2d 277 (1986).

{¶30} Thus, because appellant failed to raise this issue at the trial court level, his argument is waived. Even if appellant had raised this issue to the trial court, his argument would still fail as the law remains that R.C. Chapter 2744 is constitutional. *Fahnbulleh v. Strahan*, 73 Ohio St.3d 666, 670, 653 N.E.2d 1186 (1995); *O’Toole v. Denihan*, 118 Ohio St.3d 374, 2008-Ohio-2574, 889 N.E.2d 505, ¶95; *Cornelison v. Colosimo*, 11th Dist. No. 2009-T-0099, 2010-Ohio-2527, at ¶29.

{¶31} Appellant’s third assignment of error is without merit.

{¶32} For the foregoing reasons, appellant’s assignments of error are not well-taken. The judgment of the Trumbull County Court of Common Pleas is affirmed.

DIANE V. GRENDELL, J.,

MARY JANE TRAPP, J.,

concur.