

[Cite as *Nimishillen Twp. Trustees v. State ex rel. Groffre Investments*, 2004-Ohio-3371.]

COURT OF APPEALS
STARK COUNTY, OHIO
FIFTH APPELLATE DISTRICT

TRUSTEES OF NIMISHILLEN TOWNSHIP, et al.

Plaintiffs-Appellants

-vs-

STATE ex rel. GROFFRE INVESTMENTS

Defendant-Appellee

JUDGES:

Hon. W. Scott Gwin, P. J.

Hon. John W. Wise, J.

Hon. John F. Boggins, J.

Case No. 2003 CA 00410

OPINION

CHARACTER OF PROCEEDING: Civil Appeal from the Court of Common Pleas, Case No. 2003CV02386

JUDGMENT: Affirmed

DATE OF JUDGMENT ENTRY: June 28, 2004

APPEARANCES:

For Plaintiffs-Appellants

JOHN D. LATCHNEY
TOMINO & LATCHNEY, LLC
803 E. Washington Street, Suite 200
Medina, Ohio 44256

For Defendant-Appellee

TIMOTHY J. JEFFRIES
437 Market Avenue North
Canton, Ohio 44702

Wise, J.

{¶1} Appellant Nimishillen Township (“township”) appeals the decision of the Stark County Court of Common Pleas that partially denied its motion for summary judgment filed against Appellee Groffre Investments (“Groffre”), on the basis that the storm water drainage system is a proprietary function and therefore, the township is not immune from liability. The following facts give rise to this appeal.

{¶2} This lawsuit is the result of a flooding problem that exists on property owned, by Groffre, in Nimishillen Township. The property is commonly referred to as the “Macomber Property.” At the time Groffre purchased the property, it was aware that a flooding problem existed on the property. Following a series of complaints by Groffre, it was discovered that the sanitary sewer line was installed so as to infringe upon the flow line of the storm water sewer in at least one location.

{¶3} On July 27, 2003, the area where the property is located received heavy rains that resulted in the flooding of Groffre’s offices and damages in the amount of \$29,000. Thereafter, on July 29, 2003, Groffre filed a combined petition for a writ of mandamus and a complaint for injunctive relief and damages as a result of the flooding. On November 19, 2003, the township filed a motion for summary judgment.

{¶4} On December 5, 2003, the trial court sustained, in part, and denied, in part, the township's motion for summary judgment. In denying the township's motion for summary judgment, the trial court concluded the maintenance of storm water ditches is a proprietary function and therefore, the township was not immune from liability. Judgment Entry, Dec. 5, 2003, at 3.

{¶5} The township timely filed a notice of appeal and sets forth the following sole assignment of error for our consideration:

{¶6} "1. THE TRIAL COURT ERRED IN DENYING APPELLANT NIMISHILLEN TOWNSHIP'S MOTION FOR SUMMARY JUDGMENT ON APPELLEE'S NEGLIGENCE CLAIM AGAINST THE TOWNSHIP WHERE THE TOWNSHIP IS ENTITLED TO R.C. CHAPTER IMMUNITY."

"Summary Judgment Standard"

{¶7} Summary judgment proceedings present the appellate court with the unique opportunity of reviewing the evidence in the same manner as the trial court. *Smiddy v. The Wedding Party, Inc.* (1987), 30 Ohio St.3d 35, 36. As such, we must refer to Civ.R. 56 which provides, in pertinent part:

{¶8} "* * * Summary judgment shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, written admissions, affidavits, transcripts of evidence in the pending case and written stipulations of fact, if any, timely filed in the action, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. * * * A summary judgment shall not be rendered unless it appears from such evidence or stipulation and only therefrom, that 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, such party being entitled to have the evidence or stipulation construed most strongly in the party's favor.

* * *

{¶9} Pursuant to the above rule, a trial court may not enter summary judgment if it appears a material fact is genuinely disputed. The party moving for summary judgment bears the initial burden of informing the trial court of the basis for its motion and identifying those portions of the record that demonstrate the absence of a genuine issue of material fact. The moving party may not make a conclusory assertion that the non-moving party has no evidence to prove its case. The moving party must specifically point to some evidence which demonstrates the non-moving party cannot support its claim. If the moving party satisfies this requirement, the burden shifts to the non-moving party to set forth specific facts demonstrating there is a genuine issue of material fact for trial. *Vahila v. Hall*, 77 Ohio St.3d 421, 429, 1997-Ohio-259, citing *Dresher v. Burt*, (1996), 75 Ohio St.3d 280.

{¶10} It is based upon this standard that we review the township's sole assignment of error.

I

{¶11} In its sole assignment of error, the township maintains the trial court erred when it denied its motion for summary judgment as it pertains to Groffre's negligence claim because the township is entitled to sovereign immunity under R.C. 2744. We disagree.

{¶12} The township moved for summary judgment on the basis that it is a political subdivision and qualifies for sovereign immunity under R.C. 2744.02(A)(1). This statute provides as follows:

{¶13} “(A)(1) For the purpose 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 persons 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.”

{¶14} The parties do not dispute that Nimishillen Township is a political subdivision under R.C. 2744.01(F). We must next determine whether the maintenance of the storm water drainage system is a governmental or proprietary function. In its judgment entry, the trial court concluded the maintenance of a storm water drainage system is a proprietary function and therefore, the township was not immune from liability. Judgment Entry, Dec. 5, 2003, at 3.

{¶15} A “proprietary function” is defined, in pertinent part, as follows, in R.C. 2744.01(G):

{¶16} “* * *

{¶17} “(2) A ‘proprietary function’ includes, but is not limited to, the following:

{¶18} “* * *

{¶19} “(d) The maintenance, destruction, operation, and upkeep of a sewer system;”

{¶20} “* * *”

{¶21} In its motion for summary judgment, the township maintained the maintenance of a storm water drainage system is a governmental function. A “governmental function” is defined, in pertinent part, as follows, in R.C. 2744.01(C)(2):

{¶22} “(2) A ‘governmental function’ includes, but is not limited to, the following:

{¶23} “* * *

{¶24} “(e) The regulation of the use of, and the maintenance and repair of, roads, highways, streets, avenues, alleys, sidewalks, bridges, aqueducts, viaducts, and public grounds;”

{¶25} “* * *

{¶26} “(l) The provision or nonprovision, planning or design, construction, or reconstruction of a public improvement, including, but not limited to, a sewer system;

{¶27} “* * *

{¶28} “(r) Flood control measures;

{¶29} “* * *”

{¶30} In support of its assignment of error, the township cites *Dowell v. City of North Canton* (June 1, 1999), Stark App. No. 1998CA00290. In *Dowell*, we determined the installation of a storm sewer system was a governmental function and therefore, the City of North Canton was entitled to immunity. We further concluded, in fn. 3, that even if “* * * North Canton’s activities could be considered a proprietary function, sovereign immunity would still apply. R.C. 2744.02(B)(2) would remove the blanket immunity, but the city would have a ‘defense’, which would statutorily reinstate the immunity. See R.C. 2744.03(A) and (A)(5).” *Id.* at 5.

{¶31} We conclude the *Dowell* decision is inapplicable to the case sub judice because *Dowell* dealt with the negligent installation of a storm sewer system. However, Groffre’s complaint alleges negligent maintenance of a storm water drainage system. See Count Three of Groffre’s complaint. R.C. 2744.01(G)(2)(d) clearly provides that the maintenance, destruction, operation and upkeep of a sewer system is a proprietary function. This distinction codified, in the sovereign immunity statute, is merely a recitation of the common law rule.

{¶32} In *Portsmouth v. Mitchell Mfg. Co.* (1925), 113 Ohio St. 250, 255, the Ohio Supreme Court held:

{¶33} “The weight of authority holds that the construction and institution of a sewer system is a governmental matter, and that there is no liability for mere failure to construct sewers. However, the weight of authority is equally decisive in holding that the operation and upkeep of sewers is not a governmental function, but is a ministerial or proprietary function of the city.”

{¶34} The Court, in *Portsmouth*, further explained:

{¶35} “The obligation to repair is purely ministerial. When, therefore, a municipal corporation assumes the control and management of the sewer or drain which has been constructed in a public street under its supervision, it is bound to use reasonable diligence and care to keep such sewer or drain in good repair, and is liable in damages to any property owner injured by its negligence in this respect.” *Id.*

{¶36} Finally, in *Doud v. Cincinnati* (1949), 152 Ohio St. 132, 137, the Ohio Supreme Court held:

{¶37} “A municipality is not obliged to construct or maintain sewers, but when it does construct or maintain them it becomes its duty to keep them in repair and free from conditions which will cause damage to private property * * *. The municipality becomes liable for damages caused by its negligence in this regard in the same manner and to the same extent as a private person under the same circumstances.” [Citations omitted.]

{¶38} Courts have maintained this view under the sovereign immunity statute. See *Best v. Findlay* (Dec. 5, 1997), Hancock App. No. 5-97-22 and *Nice v. Maryland* (1992), 82 Ohio App.3d 109. We also agree with the trial court’s conclusion that even if the township’s activities could be considered a propriety function, sovereign immunity would still not apply. The township would not be entitled to the defenses contained in R.C. 2744.03(A)(3) and (A)(5) because the township “produced no evidence of upkeep or reasonable diligence in the inspection and maintenance of the system.” Judgment Entry, Dec. 5, 2003, at 3. Thus, the defenses contained in R.C. 2744.03(A)(3) and (5) do not apply to reestablish the township’s immunity.

{¶39} Accordingly, we conclude the trial court did not err when it found the township was not entitled to immunity on Groffre’s negligence claim.

{¶40} Appellant’s sole assignment of error is overruled.

{¶41} For the foregoing reasons, the judgment of the Court of Common Pleas, Stark County, Ohio, is hereby affirmed.

By: Wise, J.

Gwin, P. J., and

JUDGES