

COURT OF APPEALS
STARK COUNTY, OHIO
FIFTH APPELLATE DISTRICT

LORI THORNTON, ADMINISTRATOR OF THE ESTATE OF ORVENE BERQUIST	:	JUDGES: Hon. W. Scott Gwin, P.J. Hon William B. Hoffman, J. Hon. Craig R. Baldwin, J.
	:	
Plaintiff-Appellant	:	Case No. 2017CA00237
	:	
-vs-	:	
	:	
TANNER S. LEMON, ET AL	:	<u>OPINION</u>
	:	
Defendant-Appellee	:	

CHARACTER OF PROCEEDING: Civil appeal from the Stark Couty Court of
Common Pleas, Case No. 2015CV02314

JUDGMENT: Affirmed

DATE OF JUDGMENT ENTRY: August 6, 2018

APPEARANCES:

For Plaintiff-Appellant

For Defendant-Appellee

GREGORY BECK
MELVIN LUTE, JR.
400 S. Main Street
North Canton, OH 44720

LARRY SLAGLE
2859 Aaronwood Ave. N.E.
Massillon, OH 44646

Gwin, P.J.

{¶1} Appellant, Michael Berquist in his capacity as Administrator of the Estate of Orvene Berquist¹, appeals the November 30, 2017 decision of the Stark County Court of Common Pleas granting Summary Judgment to Appellee City of Massillon.

Facts and Procedural History

{¶2} This case arises out of an unfortunate incident wherein Orvene Berquist, died because of injuries received in a pedestrian automobile accident, which occurred on November 11, 2013. Mrs. Berquist lived a short distance away from the intersection and had walked across Lincoln Way at 26th Street many times to go to Kmart, located on the north side of Lincoln Way. She was wearing a long brown coat and proceeding in the nighttime hours during a moderate rain with no umbrella at the time of the accident.

{¶3} There are five lanes of traffic at this crosswalk - a middle turning lane, two lanes of travel Eastbound and two more lanes of traffic Westbound on Lincoln Way. Mrs. Berquist was struck by vehicles operated by defendant Lemon and defendant Coulter while she was attempting to cross Lincoln Way at the intersection of Lincoln Way and 26th Street within the City of Massillon. The intersection is controlled by a traffic light and has a pedestrian Walk/Don't Walk signal as well. The pedestrian Walk/Don't Walk signal is activated automatically. The pedestrian crossing and signals were installed on October 11, 1977.

¹ The previous Administrator of the Estate, Lori Thornton, passed away Jan 19, 2017. On June 14, 2017, the trial court granted Plaintiff's Motion to Amended and amended the pleadings and caption to reflect the newly appointed "Executor," Michael E. Berquist, for the deceased Lori Thornton. Michael E. Berquist, as Administrator filed the Notice of Appeal in this Court. The courts dockets have not been updated to reflect this change.

{¶4} Lemon was westbound on Lincoln Way and observed a red light at 26th Street turn green for Lincoln Way west bound traffic. At that time, he also observed Mrs. Berquist within the crosswalk. She was approximately halfway across the highway. From the time he first saw Mrs. Berquist she had walked from the center of the road to the right side of his lane. He slammed on his brakes. Lemon believed he "brushed her." He then saw her be hit by the car coming from his right side. Defendant Coulter was in the curb lane going westbound at the time he came upon the intersection of 26th Street and Lincoln Way. The light was green, so Coulter proceeded through the intersection. Ms. Berquist walked into or otherwise made contact with the front driver's fender of the Coulter SUV as it came across the crosswalk.

{¶5} Appellant brought this wrongful death action against Defendants City of Massillon, Tanner Lemon and James Coulter in the Common Pleas Court of Stark County, Ohio, with all claims sounding exclusively in negligence. On September 12, 2017, the parties attended mediation and Defendants Lemon and Coulter were able to reach a settlement agreement with Appellant.

{¶6} The City of Massillon maintains that, after the light turns red stopping east/west traffic on Lincoln Way, the "Walk" sign is illuminated for eight seconds, (Mitchell Affidavit) The "Don't Walk" light comes on for an additional 12.4 seconds allowing any pedestrians within the crosswalk to clear the intersection. (Mitchell Affidavit) Consequently, a pedestrian who moves onto Lincoln Way upon the activation of the "Walk" sign has 20.4 seconds to clear the intersection.(Mitchell Affidavit) The timing of the device as it exists now was the same as the timing of the device on the evening of the accident. (Mitchell Affidavit).

{¶7} Appellant, on the other hand, has provided the affidavit of an expert that the amount of time the "Walk" sign is illuminated is actually six seconds. (Schweickart Affidavit). This is because the traffic signal has a two-second delay during which it remains red for all directions while the pedestrian signal continues to display the "Don't Walk" message. Schweickart further opined,

B. His affirmation [Mitchell's] regarding the don't walk sign being illuminated an additional 12.4 seconds appears to refer to the fact that, following the walk interval, there 6 seconds of steady don't walk plus green for 26th street, 4.5 seconds of steady don't walk plus yellow clearance for 26th street and 2 seconds of steady don't walk plus all red which equates to 12.5 seconds.

Schweickart Affidavit at 7(B).

{¶8} Appellee City of Massillon moved for summary judgment, which was granted on November 30, 2017. In granting summary judgment the trial court found that Appellee City of Massillon enjoyed complete immunity pursuant to R.C. 2744.02(B) after applying the decision in *Ervin v. Willison*, 5th Dist. Muskingum No. CT2013-0022, 2014-Ohio-482 stating, "maintenance of a pedestrian signal at an intersection did not qualify as keeping 'public roads in repair' for purposes of an exception to government immunity." *Judgment Entry*, Nov 30, 2017, at 4-6. The trial court further found that Appellee City of Massillon was entitled to immunity under R.C. 2744.03(A)(3) and (5) as the timing of the walk interval constituted a discretionary decision. *Judgment Entry*, Nov 30, 2017 at 4-6.

Assignments of Error

{¶9} Appellant raises three Assignments of Error,

{¶10} “I. THE TRIAL COURT ERRED IN GRANTING SUMMARY JUDGMENT IN FAVOR OF THE APPELLEE CITY OF MASSILLON ON THE BASIS OF IMMUNITY.

{¶11} “II. THE TRIAL COURT ERRED IN FINDING AS A MATTER OF LAW THAT DEFENDANT-APPELLEE, CITY OF MASSILLON, WAS IMMUNE FROM LIABILITY PURSUANT TO O.R.C. §2744.03(A)(5), WHERE THE CITY OF MASSILLON WAS INVOLVED IN A "PROPRIETARY FUNCTION" UNDER TIER TWO OF THE IMMUNITY ANALYSIS AND WHERE NONE OF THE O.R.C. §2744.03(A) DEFENSES ARE APPLICABLE TO REINSTATE IMMUNITY.

{¶12} “III. THE TRIAL COURT ERRED IN FINDING THAT NO ISSUES OF MATERIAL FACT EXISTED PRIOR TO THE RULING ON THE CITY'S MOTION FOR SUMMARY JUDGMENT.”

I., II., & III.

{¶13} All three of Appellants' Assignments of Error concern the trial court's grant of summary judgment to Appellee City of Massillon based on statutory immunity.

STANDARD OF APPELLATE REVIEW.

{¶14} 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.* 30 Ohio St.3d 35, 36, 506 N.E.2d 212(1987). Accordingly, summary judgment is appropriate only where: (1) no genuine issue of material fact remains to be litigated; (2) the moving party is entitled to judgment as a matter of law; and (3) viewing the evidence most strongly in favor of the nonmoving party, reasonable minds can come to but one conclusion and that conclusion is adverse to the nonmoving party. *Tokles & Son, Inc. v. Midwestern Indemn. Co.* 65 Ohio St.3d 621,

629, 605 N.E.2d 936 (1992), *citing Harless v. Willis Day Warehousing Co.*, 54 Ohio St.2d 64, 65-66, 375 N.E.2d 46 (1978).

{¶15} Appellate review of summary judgments is de novo. *Grafton v. Ohio Edison Co.*, 77 Ohio St.3d 102, 105, 671 N.E.2d 241 (1996); *Smiddy v. The Wedding Party, Inc.*, 30 Ohio St .3d 35,506 N.E.2d 212(1987). We stand in the shoes of the trial court and conduct an independent review of the record. As such, we must affirm the trial court's judgment if any of the grounds raised by the movant at the trial court is found to support it, even if the trial court failed to consider those grounds. *See Dresher, supra; Coventry Twp. v. Ecker*, 101 Ohio App.3d 38, 41-42, 654 N.E.2d 1327 (9th Dist. 1995).

ISSUE FOR APPEAL.

1). Whether after independent review of the record the trial court erred in determining appellee's actions were covered by immunity under R.C. Chapter 2744, and were not covered under the exceptions of R.C. 2744.02(B).

{¶16} In *Greene County Agricultural Society v. Liming*, the Supreme Court of Ohio explained the three-tier analysis required for determining if sovereign immunity applies:

R.C. Chapter 2744 sets out the method of analysis, which can be viewed as involving three tiers, for determining a political subdivision's immunity from liability. First, R.C. 2744.02(A)(1) sets out a general rule that political subdivisions are not liable in damages. In setting out this rule, R.C. 2744.02(A)(1) classifies the functions of political subdivisions into governmental and proprietary functions and states that the general rule of immunity is not absolute, but is limited by the provisions of R.C. 2744.02(B),

which details when a political subdivision is not immune. Thus, the relevant point of analysis (the second tier) then becomes whether any of the exceptions in R.C. 2744.02(B) apply. Furthermore, if any of R.C. 2744.02(B)'s exceptions are found to apply, a consideration of the application of R.C. 2744.03 becomes relevant, as the third tier of analysis.

89 Ohio St.3d 551, 556–557, 733 N.E.2d 1141, 2000–Ohio–486.

a. Tier One.

{¶17} R.C. 2744.02 governs immunity for political subdivisions. Subsection (A)(1) states,

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 any act or omission of the political subdivision or an employee of the political subdivision in connection with a governmental or proprietary function.

{¶18} Governmental functions include “[t]he regulation of the use of, and the maintenance and repair of, roads, highways, streets, avenues, alleys, sidewalks, bridges, aqueducts, viaducts, and public grounds.” R.C. 2944.01(C)(2)(e). They also include “[t]he regulation of traffic, and the erection or non-erection of traffic signs, signals or control devices.” R.C. 2944.01(C)(2)(j). The regulation of traffic is a governmental function, and the city is entitled to blanket immunity under the first tier of the analysis unless an exception to immunity applies. *Darby v. Cincinnati*, 1st Dist. Hamilton No. C-

130430, 2014-Ohio-2426, ¶7, citing *Parker v. Upper Arlington*, 10th Dist. Franklin No. 05AP-695, 2006-Ohio-1649, ¶12-13.

b. Tier Two.

{¶19} R.C. 2744.03(A)(3) provides immunity to a political subdivision where the act or failure to act by an employee was within the discretion of the employee as to “policy-making, planning, or enforcement powers by virtue of the duties and responsibilities of the office or position of the employee.”

{¶20} Appellant does not argue that R.C. 2744.02(B)(3) applies to this case. (Appellant’s Brief at 14). Rather, Appellant contends that the exception to immunity contained in R.C. 2744.02(B)(2) applies to the timing of the pedestrian signal. R.C. 2744.02(B)(2) provides,

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.

{¶21} R.C. 2744.01 defines “proprietary function,” to include,

(G)(1) “Proprietary function” means a function of a political subdivision that is specified in division (G)(2) of this section or that satisfies both of the following:

(a) The function is not one described in division (C)(1)(a) or (b) of this section and is not one specified in division (C)(2) of this section;

(b) The function is one that promotes or preserves the public peace, health, safety, or welfare and that involves activities that are customarily engaged in by nongovernmental persons.

(2) A “proprietary function” includes, but is not limited to, the following:

(a) The operation of a hospital by one or more political subdivisions;

(b) The design, construction, reconstruction, renovation, repair, maintenance, and operation of a public cemetery other than a township cemetery;

(c) The establishment, maintenance, and operation of a utility, including, but not limited to, a light, gas, power, or heat plant, a railroad, a busline or other transit company, an airport, and a municipal corporation water supply system;

(d) The maintenance, destruction, operation, and upkeep of a sewer system;

(e) The operation and control of a public stadium, auditorium, civic or social center, exhibition hall, arts and crafts center, band or orchestra, or off-street parking facility.

{¶22} R.C. 2744.01 defines a “governmental function” to include,

(C)(1) “Governmental function” means a function of a political subdivision that is specified in division (C)(2) of this section or that satisfies any of the following:

(a) A function that is imposed upon the state as an obligation of sovereignty and that is performed by a political subdivision voluntarily or pursuant to legislative requirement;

(b) A function that is for the common good of all citizens of the state;

(c) A function that promotes or preserves the public peace, health, safety, or welfare; that involves activities that are not engaged in or not customarily engaged in by nongovernmental persons; and that is not specified in division (G)(2) of this section as a proprietary function.

(2) A “governmental function” includes, but is not limited to, the following:

(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;

* * *

(j) The regulation of traffic, and the erection or nonerection of traffic signs, signals, or control devices;

* * *

{¶23} Timing of pedestrian signals and traffic control devices are not a service customarily engaged in by nongovernmental persons. R.C. 2744.01(G)(1)(b). However, timing of pedestrian signals and traffic control devices does involve the regulation of traffic, and the erection or non-erection of traffic signs, signals, or control devices. R.C. 2744.01(C) (2)(j). It is a function that is not customarily engaged in by nongovernmental

persons. R.C. 2744.01(C)(1)(c). Accordingly, the timing of pedestrian signals would fall within the purview of a “governmental function.” As a governmental function, the R.C. 2744.02(B)(2) exception does not apply. *Wilson v. Cleveland*, 8th Dist. Cuyahoga No. 98035, 2012-Ohio-4289, ¶15; *Burns v. Upper Arlington*, 10th Dist. Franklin No. 06AP-680, 2007-Ohio-797, ¶16. Therefore, Appellee is entitled to immunity set forth in R.C. 2744.02(A)(1) unless one of the exceptions set forth in R.C. 2744.02(B)(1) through (5) applies.

c. The Ohio Manual of Uniform Traffic Control Devices (“OMUTCD”).

{¶24} Appellant argues that the timing of pedestrian crossing signals is mandatory under the Ohio Manual of Uniform Traffic Control Devices (“OMUTCD”) and the Appellee has no authority to deviate from the requirements imposed by the OMUCTCD. Appellant cites R.C. 4511.09, which provides,

The department of transportation shall adopt a manual for a uniform system of traffic control devices, including signs denoting names of streets and highways, for use upon any street, highway, bikeway, or private road open to public travel within this state. Such uniform system shall correlate with, and so far as possible conform to, the system approved by the federal highway administration.

{¶25} Appellant further cites R.C. 4511.11, which provides,

(A) Local authorities in their respective jurisdictions shall place and maintain traffic control devices in accordance with the department of transportation manual for a uniform system of traffic control devices, adopted under section 4511.09 of the Revised Code, upon highways under

their jurisdiction as are necessary to indicate and to carry out sections 4511.01 to 4511.76 and 4511.99 of the Revised Code, local traffic ordinances, or to regulate, warn, or guide traffic.

* * *

(D) All traffic control devices erected on any street, highway, alley, bikeway, or private road open to public travel shall conform to the state manual.

{¶26} OMUTCD has been adopted as the state's official specifications for highway signs and markings under the mandate of R.C. 4511.09. *White v. Ohio Dept. of Transp.*, 56 Ohio St.3d 39, 41, 564 N.E.2d 462 (1990). Local authorities must place and maintain traffic control devices according to the manual under R.C. 4511.11. *Winwood v. Dayton*, 37 Ohio St.3d 282, 284, 525 N.E.2d 808 (1988); *Maple Hts. v. Smith*, 131 Ohio App.3d 406, 408, 722 N.E.2d 607 (8th Dist.1999). Compliance with the OMUTCD is an issue of law that this court can determine. *Hopkins v. Porter*, 3d Dist. Mercer No. 10–13–17, 2014–Ohio–757, ¶ 61.

{¶27} Appellant contends that the interval as set by Appellee in the case at bar does not meet the minimum OMUTCD requirements. However, the mandates of the OMUTCD and R.C. 4511.09, 4511.11 do not expressly impose liability on a political subdivision for failing to follow their requirements. *Petre v. Norfolk Southern Railway Co.*, 458 F.Supp.2d 518, 541(N.D. Ohio 2006); *Scalan v. Consolidated Rail Corp.*, 6th Dist. Fulton No. 89FU000008, 1990 WL 42652(Apr. 13, 1990) at *4. The issue of whether an act constitutes a mandatory duty or a discretionary act determines the scope of the Appellee's liability because Appellee is immune from liability for damages resulting from

not performing a discretionary act. *Winwood v. Dayton*, 37 Ohio St.3d 282, 525 N.E.2d 808(1988).

{¶28} OMUTCD Section 1A.09 provides in relevant part,

Section 1A.09 Engineering Study and Engineering Judgment

Support:

Definitions of an engineering study and engineering judgment are contained in Section 1.13.

Standard:

02 This Manual describes the application of traffic control devices, but shall not be a legal requirement for their installation.

Guidance:

03 The decision to use a particular device at a particular location should be made on the basis of either an engineering study or the application of engineering judgment. Thus, while this Manual provides Standards, Guidance, and Options for design and application of traffic control devices, this Manual should not be considered a substitute for engineering judgment.

Emphasis in original.

{¶29} OMUTCD Section 1A.13 **Definitions of headings, Words and Phrases in this Manual** provides in relevant part,

Standard:

When used in this Manual, the text headings of Standard, Guidance, Option, and Support shall be defined as follows:

A. Standard—a statement of required, mandatory, or specifically prohibitive practice regarding a traffic control device. All Standard statements are labeled, and the text appears in bold type. The verb "shall" is typically used. The verbs "should" and "may" are not used in Standard statements. Standard statements are sometimes modified by Options. Standard statements shall not be modified or compromised based on engineering judgment or engineering study.

B. Guidance—a statement of recommended, but not mandatory, practice in typical situations, with deviations allowed if engineering judgment or engineering study indicates the deviation to be appropriate. All Guidance statements are labeled, and the text appears in unbold type. The verb "should" is typically used. The verbs "shall" and "may" are not used in Guidance statements. Guidance statements are sometimes modified by Options.

C. Option—a statement of practice that is a permissive condition and carries no requirement or recommendation. Option statements contain allowable modifications to a Standard or Guidance statement. All Option statements are labeled, and the text appears in unbold type. The verb "may" is typically used. The verbs "shall" and "should" are not used in Option statements.

D. Support—an informational statement that does not convey any degree of mandate, recommendation, authorization, prohibition, or enforceable condition. Support statements are labeled, and the text

appears in unbold type. The verbs "shall," "should," and "may" are not used in Support statements.

Emphasis in original.

{¶30} It is Appellants' contention that the timing of the walk signal was not in conformance with the Ohio Manual of Uniform Traffic Control Devices. ("OMUTCD"). Specifically, Appellant argues that the Appellee had a mandatory duty to comply with OMUTCD Section 4E.06, Pedestrian Intervals and Signal Phases, which provides,

Guidance:

07 Except as provided in Paragraph 8, the pedestrian clearance time should be sufficient to allow a pedestrian crossing in the crosswalk who left the curb or shoulder at the end of the WALKING PERSON (symbolizing WALK) signal indication to travel at a walking speed of 3.5 feet per second to at least the far side of the traveled way or to a median of sufficient width for pedestrians to wait.

* * *

Guidance:

14 The total of the walk interval and pedestrian clearance time should be sufficient to allow a pedestrian crossing in the crosswalk who left the pedestrian detector (or, if no pedestrian detector is present, a location 6 feet from the face of the curb or from the edge of the pavement) at the beginning of the WALKING PERSON (symbolizing WALK) signal indication to travel at a walking speed of 3 feet per second to the far side of the

traveled way being crossed or to the median if a two-stage pedestrian crossing sequence is used.

OMUTCD, Section 4E.06 (2012 Ed.), available at http://www.dot.state.oh.us/Divisions/Engineering/Roadway/DesignStandards/traffic/OhioMUTCD/Pages/OMUTCD2012_current_default.aspx.

{¶31} Both of the provisions cited by Appellant are titled, “Guidance” and contain the verb “should.” As noted above, a provision titled “Guidance” is a “statement of recommended, but not mandatory, practice in typical situations, with deviations allowed if engineering judgment or engineering study indicates the deviation to be appropriate.” Thus, contrary to Appellants’ claims the provisions are not mandatory. Appellee has discretion in the timing of the pedestrian walk signal. Thus, as this Court has noted,

Assuming arguendo that the timing of the pedestrian signal falls within the exception under R.C. 2744.02(B)(3), we find immunity exists under R.C. 2744.03(A)(3) and (5) which state the following:

(A) In a civil action brought against a political subdivision or an employee of a political subdivision to recover damages for injury, death, or loss to person or property allegedly caused by any act or omission in connection with a governmental or proprietary function, the following defenses or immunities may be asserted to establish non-liability:

(3) The political subdivision is immune from liability if the action or failure to act by the employee involved that gave rise to the claim of liability was within the discretion of the employee with respect to policy-making,

planning, or enforcement powers by virtue of the duties and responsibilities of the office or position of the employee.

(5) The political subdivision is immune from liability if the injury, death, or loss to person or property resulted from the exercise of judgment or discretion in determining whether to acquire, or how to use, equipment, supplies, materials, personnel, facilities, and other resources unless the judgment or discretion was exercised with malicious purpose, in bad faith, or in a wanton or reckless manner.

* * *

Absent a specific requirement in the OMUTCD manual, the decision in this case to set the walk interval at nine seconds was a discretionary decision which makes appellees' immune, unless the judgment was exercised with malicious purpose, in bad faith or in a wanton or reckless manner. There is nothing to suggest that appellees' judgment or discretion was exercised with malicious purpose or in bad faith or in a wanton or reckless manner.

Ervin v. Williams, 5th Dist. Muskingum No. CT2013-022, 2014-Ohio-482, ¶¶31-33.

{¶32} In the case at bar, there is no evidence that the traffic control devices or the pedestrian signal malfunctioned on the date of the accident. The devices have been in use for many years operating in the same sequence. No evidence of any prior complaints from pedestrians or motorists during the 30-year history of the devices' use has been presented. No evidence of previous accidents involving pedestrians is

contained in the record. No evidence was presented to establish the status of the pedestrian signal at the moment Mrs. Berquist entered the crosswalk.

{¶33} Appellant's allegations against Appellee sound exclusively in negligence. Absent allegations and evidence that Appellee acted with malicious purpose, bad faith or in a wanton or reckless manner, a slight difference in the timing sequence and length of the roadway does not constitute an issue of material fact sufficient to overcome immunity, and therefore the grant of summary judgment in Appellee's favor.

Conclusion.

{¶34} The timing of pedestrian signals would fall within the purview of a "governmental function," accordingly; R.C. 2744.02(B)(2) does not apply to except immunity. The provisions of the OMUTCD expressly state the timing decisions are discretionary. Appellant has not alleged nor presented evidence that Appellee's action in determining the timing of the pedestrian signal at issue was done with a malicious purpose, in bad faith or in a wanton or reckless manner.

{¶35} The trial court correctly granted summary judgment in favor of Appellee because there are no issue of material fact, Appellee is entitled to judgment as a matter of law, and viewing the evidence most strongly in favor of Appellant, reasonable minds can come to but one conclusion and that conclusion is adverse to Appellant.

{¶36} Appellants First, Second and Third Assignments of Error are overruled.

{¶37} The judgment of the Stark County Court of Common Pleas is affirmed.

By Gwin, P.J.,

Hoffman, J., and

Baldwin, J., concur