[Cite as *Sullivan v. Anderson Twp.*, 2009-Ohio-6646.]

IN THE COURT OF APPEALS
FIRST APPELLATE DISTRICT OF OHIO
HAMILTON COUNTY, OHIO

GEORGE SULLIVAN,	:	APPEAL NO. C-070253 TRIAL NO. A-0607640
Plaintiff-Appellee,	:	
vs.	:	*D E C I S I O N.*
ANDERSON TOWNSHIP,	:	
Defendant-Appellant,	:	
and	:	
TREND CONSTRUCTION, INC.,	:	
Defendant.	:	

Civil Appeal From: Hamilton County Court of Common Pleas

Judgment Appealed From Is: Reversed and Cause Remanded

Date of Judgment Entry on Appeal: December 18, 2009

A. Brian McIntosh, for Plaintiff-Appellee,

Edward J. Dowd and *Kevin A. Lantz,* for Defendant-Appellant.

Note: We have removed this case from the accelerated calendar.

CUNNINGHAM, Judge.

{¶1} Defendant-appellant, Anderson Township, Ohio, appeals from the trial court's order granting in part and denying in part its motion for judgment on the pleadings. Plaintiff-appellee George Sullivan had filed a complaint against the township and defendant Trend Construction, Inc.,[1] alleging damage to his property located on Eight Mile Road as a result of the township's "road widening" project. The township had asserted that, as a political subdivision, it was immune under R.C. Chapter 2744 from liability.

{¶2} In March 2008, this court dismissed the township's appeal because the trial court's order "did not fully dispose of all the claims of all the parties, and because it lacked a certification pursuant to Civ.R. 54(B)."[2] The township appealed, and the Ohio Supreme Court held that "R.C. 2744.02(C) permits a political subdivision to appeal a trial court order that denies it the benefit of an alleged immunity from liability under R.C. Chapter 2744, even when the order makes no determination pursuant to Civ.R. 54(B)."[3] This court's judgment was reversed, and the case was remanded to us.[4]

{¶3} We now hold, on the merits of the appeal, that the township, as a political subdivision, was engaged in a governmental function. The trial court thus erred in denying the township immunity from liability on Sullivan's negligence claims. Since Sullivan can prove no set of facts that establish the existence of an oral contract with the township, we also hold that the trial court erred in denying the township judgment on the pleadings on Sullivan's breach-of-contract claim.

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[1] While the complaint and the trial court's order refer to "Trend Construction, Inc.," trial counsel for Trend maintained that The Ford Development Corporation, d.b.a. Trend Construction, was the proper party to this action.
[2] *Sullivan v. Anderson Twp.*, 1st Dist. No. C-070253, 2008-Ohio-1438, ¶1 ("*Sullivan I*").
[3] *Sullivan v. Anderson Twp.*, 122 Ohio St.3d 83, 2009-Ohio-1971, 909 N.E.2d 88, syllabus.
[4] See id. at ¶14.

{¶4} "In his amended complaint, Sullivan asserted the following causes of action against the township: (1) breach of contract for failing 'to honor its promises made to [Sullivan] in exchange for his permission to enter upon his property; (2) trespass on Sullivan's property to conduct unauthorized work; (3) negligence under the doctrine of respondeat superior for the negligent acts of 'its sub-contractor' Trend; and (4) negligence for improperly supervising 'its sub-contractor' Trend."[5]

{¶5} "The township raised its immunity defense in its answer. On November 29, 2006, the township moved for judgment on the pleadings pursuant to Civ.R. 12(C), asserting that Sullivan could prove no set of facts to support his claims for relief. The township maintained that it was immune under R.C. Chapter 2744 from Sullivan's promissory-estoppel, trespass, vicarious-liability, negligent-supervision, and punitive-damages claims. The township also asserted that Sullivan had failed to plead an express contract."[6] Sullivan did not respond to the township's motion.

{¶6} "On March 21, 2007, the trial court granted the township's motion for judgment on the pleadings in part and denied it in part. The trial court applied R.C. Chapter 2744 and found that the township was immune from Sullivan's trespass claim and from his request for punitive damages. But it concluded that the statute did not confer immunity from Sullivan's claim for breach of an oral contract, vicarious negligence, or negligent supervision of Trend."[7] This appeal followed.

The Standard of Review

{¶7} Pursuant to Civ.R. 12(C), judgment on the pleadings is proper where the court construes all material allegations in the amended complaint, along with all

[5] *Sullivan I* at ¶2.
[6] Id. at ¶4
[7] Id. at ¶6.

reasonable inferences, as true and in favor of the plaintiff and concludes, beyond doubt, that the plaintiff can prove no set of facts to support the claims for relief.[8] We review the trial court's entry of judgment on the pleadings de novo.[9]

{¶8} In its sole assignment of error, the township now argues that it was entitled to judgment because it was engaged in a governmental function under R.C. 2744.01(C)(2)(e), because it was immune from liability on Sullivan's vicarious-liability claims, and because Sullivan had failed to plead the elements of an oral contract.

The Township Was Engaged in a Governmental Function

{¶9} In *Engleman v. Cincinnati Bd. of Edn.*, we noted that "[t]he Ohio Supreme Court has identified that '[t]he manifest statutory purpose of R.C. Chapter 2744 is the preservation of the fiscal integrity of political subdivisions.' "[10]

{¶10} "To limit the exposure of political subdivisions to money damages, R.C. Chapter 2744 provides a three-tiered scheme that grants nearly absolute immunity to political subdivisions. The first tier of the analysis * * * establishes the defense of sovereign immunity for political subdivisions. The next [found in R.C. 2744.02(B)] carves out certain exceptions to immunity where liability may still be imposed. Finally, if the claim satisfies one of the exceptions, the third tier delineates those defenses that may be asserted against liability."[11] These last defenses, listed in

[8] See *State ex rel. Midwest Pride IV, Inc. v. Pontious*, 75 Ohio St.3d 565, 570, 1996-Ohio-459, 664 N.E.2d 931; see, also, *Citicasters Co. v. Bricker & Eckler, LLP*, 149 Ohio App.3d 705, 2002-Ohio-5814, 778 N.E.2d 663, ¶5.
[9] *Lambert v. Hartmann*, 178 Ohio App.3d 403, 2008-Ohio-4905, 898 N.E.2d 67, ¶9; see, also, *Citicasters Co. v. Bricker & Eckler, LLP* at ¶5.
[10] (June 22, 2001), 1st Dist. No. C-000597, quoting *Wilson v. Stark Cty. Dept. of Human Serv.*, 70 Ohio St.3d 450, 453, 1994-Ohio-394, 639 N.E.2d 105.
[11] Id.; see, also, *Kenko Corp. v. Cincinnati*, 1st Dist. No. C-080246, 2009-Ohio-4189, ¶17.

R.C. 2744.03, only come into play if the plaintiff can demonstrate that one of the exceptions to immunity applies.

{¶11} Generally, a political subdivision is not liable in a civil action for injury to persons or property allegedly caused by "any act or omission of the political subdivision or any employee of the political subdivision in connection with a governmental or proprietary function."[12] Sullivan alleged that the township had been widening Eight Mile Road, and the township alleged in its answer that it had been installing a sidewalk on that roadway.[13] Since both the maintenance and the repair of roads and sidewalks are governmental functions as defined in R.C. 2744.01(C)(2)(e), under the first-tier analysis, the township was entitled to immunity from Sullivan's remaining negligence claims.[14]

The Township Was Immune from Trend's Alleged Negligence

{¶12} Under the second tier of immunity analysis, R.C. 2744.02(B) identifies five exceptions to the general grant of immunity. Despite the allegations in Sullivan's amended complaint that Trend was the township's "sub-contractor," in denying the township's motion for judgment on the pleadings, the trial court expressly determined that Sullivan had alleged sufficient facts to find that Trend had acted as the township's employee. And thus the court ruled that R.C. 2744.02(B)(2), which extinguishes a political subdivision's immunity for the negligent performance

[12] R.C. 2744.02(A)(1); see, also, *Haynes v. Franklin*, 95 Ohio St.3d 344, 2002-Ohio-2334, 767 N.E.2d 1146, ¶10, citing R.C. 2744.01(C)(2)(e); *Carter v. Complete Gen. Constr. Co.*, 10th Dist. No. 08AP-309, 2008-Ohio-6308, ¶11.
[13] See *Euvrard v. Christ Hosp. & Health Alliance* (2001), 141 Ohio App.3d 572, 575, 752 N.E.2d 326 (a Civ.R. 12[C] motion permits a court to consider the complaint and the answer in deciding whether the movant is entitled to judgment as a matter of law).
[14] See *Haynes v. Franklin* at ¶9; see, also, *Carter v. Complete Gen. Constr. Co.* at ¶11; *Hortman v. Miamisburg*, 161 Ohio App.3d 559, 2005-Ohio-2862, 831 N.E.2d 467, ¶16-20, reversed on other grounds, 110 Ohio St.3d 194, 2006-Ohio-4251, 852 N.E.2d 716.

of its employees when they are engaged in a *proprietary function*, applied to this case.

{¶13} The only facts alleged in the pleadings were that Trend was the township's "sub-contractor." And even if Trend had been the township's employee, since we have already determined that the township was engaged only in a governmental and not a proprietary function, the trial court's reliance upon R.C. 2744.02(B)(2) to reimpose potential liability on the township was erroneous. Thus, under the political-immunity statutory scheme, Sullivan could prove no set of facts in support of his claim that would have entitled him to overcome the township's general grant of immunity for his vicarious-liability claims.

No Oral Contract With The Township

{¶14} The township next argues that the trial court erred in ruling that Sullivan's amended complaint contained factual allegations sufficient to entitle him to relief on his claim for breach of an oral contract. As the trial court correctly noted, political subdivisions are not immune from actions seeking damages for breach of contract.[15]

{¶15} Sullivan did not allege that the parties had a written contract. Rather he stated that the parties had met concerning the widening of Eight Mile Road and that a township employee had authored "a letter memorializing that meeting and the initial requirements to the agreement * * *." Sullivan also alleged that the township had made "additional promises" and had "failed to honor promises" made in exchange for entrance upon his property.

{¶16} We note that Sullivan did not attach the township's letter to his complaint or amended complaint. Civ.R. 10(D)(1) provides that any claim that is based on a written

[15] See R.C. 2744.09(A); see, also, *Hortman v. Miamisburg*, 2006-Ohio-4251, at ¶27.

instrument must have a copy of the instrument attached to the pleading. If the document is not attached, "the reason for the omission must be stated in the pleading." Sullivan offered no explanation for the absence of the letter. Nonetheless, the trial court concluded, based upon these facts, that Sullivan had alleged facts sufficient to support a claim that an oral contract existed with the township and that the township had breached that agreement. We disagree.

{¶17} Contracts may be written or oral. And while it is preferable that a contract be memorialized in writing, an oral agreement "may be enforceable if there is sufficient particularity to form a binding contract."[16] "Generally, a breach of contract action is pleaded by stating (1) the terms of the contract, (2) the performance by the plaintiff of his obligations, (3) the breach by the defendant, (4) damages, and (5) consideration."[17] Sullivan's amended complaint did not contain any statements as to the terms of the contract, consideration, or damages. The only performance mentioned was Sullivan's permission to the township to enter his property.

{¶18} Upon these allegations, we conclude that Sullivan can prove no set of facts that establish the existence of an oral contract with the township. Therefore, the trial court erred in denying the township judgment on the pleadings as to Sullivan's claim of a breach of contract.[18]

{¶19} Sullivan's amended complaint also alleged that the township had made "additional promises" and had "failed to honor promises" made in exchange for entrance upon Sullivan's property. With these allegations viewed as true, it would appear that Sullivan asserted a cause of action for promissory estoppel: that he had relied to his

[16] *Kostelnik v. Helper*, 96 Ohio St.3d 1, 2002-Ohio-2985, 770 N.E.2d 58, ¶16.
[17] See *American Sales v. Boffo* (1991), 71 Ohio App.3d 168, 175, 593 N.E.2d 316; see, also, *Kostelnik v. Helper* at ¶16 .
[18] See Civ.R. 12(C).

detriment upon the township's promises and that injustice could be avoided only by enforcing the terms of those promises.[19]

{¶20} The Ohio Supreme Court has recently held, however, that the doctrine of promissory estoppel is "inapplicable against a political subdivision when [it] is engaged in a governmental function."[20] Since we have already determined that the township was engaged in a governmental function, Sullivan did not have an actionable claim for promissory estoppel against the township.

{¶21} The assignment of error is overruled.

Conclusion

{¶22} Therefore, that portion of the trial court's entry denying the township immunity from liability under R.C. Chapter 2744 on Sullivan's vicarious-negligence claims is reversed. That portion of the entry denying the township judgment on the pleadings on Sullivan's breach-of-contract claim is also reversed. And the case is remanded to the trial court with instructions for it to dismiss the township from this case, and for further proceedings consistent with law and this decision.

Judgment accordingly.

SUNDERMANN, P.J., and **DINKELACKER, J.,** concur.

Please Note:

The court has recorded its own entry on the date of the release of this opinion.

[19] See *Hortman v. Miamisburg*, 2006-Ohio-4251, at ¶22; see, also, *Uebelacker v. Cincom Systems, Inc.* (1988), 48 Ohio App.3d 268, 273, 549 N.E.2d 1210.
[20] *Hortman v. Miamisburg*, 2006-Ohio-4251, syllabus.