[Cite as *S.H.A.R.K. v. Metro Parks Serving Summit Cty.*, 2009-Ohio-3004.]

STATE OF OHIO	)	IN THE COURT OF APPEALS
	)ss:	NINTH JUDICIAL DISTRICT
COUNTY OF SUMMIT	)	

S.H.A.R.K., et al. Appellants v. METRO PARKS SERVING SUMMIT COUNTY, et al. Appellees	C. A. No. 24443 APPEAL FROM JUDGMENT ENTERED IN THE COURT OF COMMON PLEAS COUNTY OF SUMMIT, OHIO CASE No. CV 2007-06-4289

DECISION AND JOURNAL ENTRY

Dated: June 24, 2009

MOORE, Presiding Judge.

{¶1} Appellants, S.H.A.R.K. and Steven Hindi, appeal from the judgment of the Summit County Court of Common Pleas. This Court affirms.

I.

{¶2} Appellee, Metro Parks Serving Summit County, is the governmental entity responsible for the operation of the public park system in Summit County. In November 2003, it hired White Buffalo, Inc. to assist in controlling the deer population in the Metro Parks. White Buffalo is a wildlife research and management organization. Anthony DeNicola is the president of White Buffalo. Among other services, White Buffalo operates sharpshooter programs to help control deer populations. DeNicola instructed MetroParks' employees in the placement of bait sites within the parks so that the deer herd could be culled. The sharpshooters were positioned at various locations in the park at night with high-powered rifles. The culling was scheduled to take place over a ten-day period. MetroParks' Rangers David Rankin and Justin Simon were

trained and supervised by DeNicola. As the deer population control operation was controversial, MetroParks sought to protect the identities of the persons involved in the sharpshooting.

{¶3} Appellant, S.H.A.R.K. (Showing Animals Respect and Kindness), is a non-profit entity that strives to expose governmental entities and private organizations that use lethal methods to control wild animals. Appellant, Steven Hindi, is the President of S.H.A.R.K. In late February 2004, Hindi entered the MetroParks and secretly planted nine cameras in various areas of the park. S.H.A.R.K. intended to record the sharpshooters' activities over the ten-day period and share video footage with the news media. On February 29, 2004, the fourth night of the operation, Simon, who was working on the deer culling operation with Rankin and DeNicola, observed one of the cameras. Simon and Rankin contacted their supervisor, Eric Fitch, who removed the camera from the tree and transported it to the ranger office. The rangers were instructed to search the parks for other video cameras. In their subsequent search, the rangers recovered a total of six cameras. The cameras were transported to the ranger office where they were placed into evidence lockers.

{¶4} The next day, Rankin, Simon and DeNicola conducted an inventory of the equipment they had found. While examining the equipment, the three learned that one of the cameras contained footage of Rankin and his private vehicle in the area of a bait site. Rankin and Simon became concerned about the fact that Rankin could be identified in the recording through the vehicle license plate and that his home address could be obtained. DeNicola learned how to delete the images from the camera. Rankin and Simon agreed to allow DeNicola to delete the images from all six cameras. Rankin and Simon did not seek permission from their supervisor prior to allowing DeNicola to delete these images. MetroParks later disciplined the rangers for these actions.

{¶5} MetroParks continued the deer culling operations on subsequent nights. The video equipment was ultimately returned to Hindi. S.H.A.R.K. disseminated to the news media video footage obtained from the first three evenings of the operation. Hindi also posted some of these images on S.H.A.R.K.'s website.

{¶6} On November 23, 2004, S.H.A.R.K. and Hindi filed suit against MetroParks, Rankin and Simon, White Buffalo, Inc., and DeNicola in the U.S. District Court for the Northern District of Ohio. In their complaint, they alleged that the defendants violated their First Amendment rights and their rights under the First Amendment Privacy Protection Act. They also asserted state law claims for destruction of property, conversion and a statutory claim seeking recovery of damages for theft or willful damage.

{¶7} The District Court granted summary judgment in favor of all the defendants on the federal claims and declined to exercise supplemental jurisdiction over the state law claims. See *S.H.A.R.K. v. Metro Parks Serving Summit County* (N.D.Ohio 2006), 65 Fed.R.Serv.3d 212, at *6. The U.S. Sixth Circuit Court of Appeals affirmed the decision on appeal. See *S.H.A.R.K. v. Metro Parks Serving Summit County* (C.A.6, 2007), 499 F.3d 553, 567.

{¶8} On June 15, 2007, S.H.A.R.K. and Hindi filed suit against MetroParks, Rankin and Simon, White Buffalo, Inc., and DeNicola in the Summit County Court of Common Pleas. Rankin and Simon were sued only in their official capacities. Accordingly, hereinafter we will refer to MetroParks, Rankin and Simon as "MetroParks." The complaint again alleged common law claims for destruction of property and conversion as well as a statutory claim seeking recovery of damages for theft or willful damage. On April 9, 2008, MetroParks filed a motion for summary judgment, asserting statutory immunity pursuant to Ohio Revised Code Chapter 2744. On May 12, 2008, S.H.A.R.K. filed a brief in response. On May 27, 2008, MetroParks

filed a reply brief. The trial court granted the motion for summary judgment on September 12, 2008. Because S.H.A.R.K.'s claims against White Buffalo and DeNicola remain unresolved, the trial court included Civ.R. 54(B) language in its September 12, 2008 judgment entry.

{¶9} On September 15, 2008, after the trial court had rendered its decision granting summary judgment in favor of MetroParks, S.H.A.R.K. requested leave to amend its complaint to assert claims against Rankin and Simon in their individual capacities. The trial court did not rule on the motion to amend. On October 10, 2008, S.H.A.R.K. timely appealed the trial court's decision. S.H.A.R.K. has raised one assignment of error for our review. On January 23, 2009, the trial court stayed the action pending appeal.

II.

ASSIGNMENT OF ERROR

"THE TRIAL COURT ERRED BY GRANTING [METROPARKS'] MOTION FOR SUMMARY JUDGMENT."

{¶10} In S.H.A.R.K.'s sole assignment of error, it contends that the trial court erred by granting MetroParks' motion for summary judgment. We disagree.

{¶11} S.H.A.R.K.'s assignment of error provides a roadmap for the court and directs our analysis of the trial court's judgment. See App.R. 16. However, S.H.A.R.K. has raised an additional ground for reversal under this assignment of error beyond its stated argument that the trial court erred in granting MetroParks' motion for summary judgment. Namely, S.H.A.R.K. argues that the trial court erred in implicitly denying[1] its motion to amend its complaint to pursue its claims against Rankin and Simon in their individual capacities. Pursuant to App.R. 12(A)(2)

[1] The trial court did not rule on S.H.A.R.K.'s motion to amend its complaint and therefore, we presume that this motion was denied.

and App.R. 16(A), we confine our review to S.H.A.R.K.'s arguments concerning whether the trial court erred in granting summary judgment in favor of MetroParks, as this is the argument set forth as S.H.A.R.K.'s assignment of error.

{¶12} This Court reviews an award of summary judgment de novo. *Grafton v. Ohio Edison Co.* (1996), 77 Ohio St.3d 102, 105. This Court applies the same standard as the trial court, viewing the facts of the case in the light most favorable to the non-moving party and resolving any doubt in favor of the non-moving party. *Viock v. Stowe-Woodward Co.* (1983), 13 Ohio App.3d 7, 12.

{¶13} Pursuant to Civ.R. 56(C), summary judgment is proper if:

> "(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." *Temple v. Wean United, Inc.* (1977), 50 Ohio St.2d 317, 327.

{¶14} To prevail on a motion for summary judgment, the party moving for summary judgment must be able to point to evidentiary materials that 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. *Dresher v. Burt* (1996), 75 Ohio St.3d 280, 293. Once a moving party satisfies its burden of supporting its motion for summary judgment with sufficient and acceptable evidence pursuant to Civ.R. 56(C), Civ.R. 56(E) provides that the non-moving party may not rest upon the mere allegations or denials of the moving party's pleadings. Id. Rather, the non-moving party has a reciprocal burden of responding by setting forth specific facts, demonstrating that a "genuine triable issue" exists to be litigated for trial. *State ex rel. Zimmerman v. Tompkins* (1996), 75 Ohio St.3d 447, 449.

{¶15} In determining whether a political subdivision is immune from liability, this Court must engage in a three-tier analysis. *Cater v. Cleveland* (1998), 83 Ohio St.3d 24, 28. The first tier is the premise under R.C. 2744.02(A)(1) that:

> "[e]xcept 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." (Emphasis omitted.) *Cater*, 83 Ohio St.3d at 28.

{¶16} The second tier involves the five exceptions set forth in R.C. 2744.02(B), any of which may abrogate the general immunity delineated in R.C. 2744.02(A)(1). Id. Lastly, under the third tier, "immunity can be reinstated if the political subdivision can successfully argue that one of the defenses contained in R.C. 2744.03 applies." Id.

{¶17} In their brief, S.H.A.R.K. concedes that "there is no dispute that [MetroParks] is a political subdivision under R.C. 2744.01(F) or that the injury occurred in connection with either a governmental or proprietary function." Rankin and Simon are entitled to the same immunity as MetroParks because the claims against them solely in their official capacities are synonymous with claims against the political subdivision - MetroParks. See *Smitek v. Peaco* (Jan. 27, 1993), 9th Dist. No. 92CA005359, at *2 (finding that "the suit against the defendants in their official capacities constituted a suit against the political subdivision, and it follows that they were entitled to the same immunity due the political subdivision"). Pursuant to R.C. 2744.02(A)(1), MetroParks is not liable unless an exception to immunity exists under R.C. 2744.02(B).

{¶18} On appeal, S.H.A.R.K. contends that the exceptions provided under R.C. 2744.02(B)(2) and R.C. 2744.02(B)(4) apply to this matter. R.C. 2744.02(B) states, in pertinent part:

> "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:
>
> "(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.
>
> "***
>
> "(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."

{¶19} We will first examine S.H.A.R.K.'s argument that R.C. 2744.02(B)(2) applies to this matter. S.H.A.R.K. contends that the damage to its cameras, etc. resulted from the negligence of MetroParks' employees, Simon and Rankin, with respect to a proprietary function of MetroParks. More specifically, S.H.A.R.K. argues that "destroying a private citizen's property as part of the operation of a park" is not a governmental function under R.C. 2744.01(C)(1)(a)-(c).

{¶20} S.H.A.R.K. has ignored a significant portion of this statute. R.C. 2744.01(C)(1) specifically states that "'[g]overnmental function' means a function of a political subdivision that is specified in division (C)(2) of this section or that satisfies [2744.01(C)(1)(a)-(c)]." R.C. 2744.01(C)(2)(u)(i) provides that a "governmental function" includes, but is not limited to, "[t]he design, construction, reconstruction, renovation, repair, maintenance, and operation of any school athletic facility, school auditorium, or gymnasium or any recreational area or facility, including, but not limited to *** [a] park, playground, or playfield[.]" The incident in question involved acts by employees of a park with respect to the maintenance and operation of a park.

These acts constitute governmental functions, as set forth in R.C. 2744.01(C)(2)(u)(i), not proprietary functions. Conversely, R.C. 2744.01(G)(1)(a) defines "[p]roprietary function" to be a function that "is not one specified in division (C)(2) of this section[.]" As operation of a park is specifically set forth as a governmental function under R.C. 2744.01(C)(2)(u), it is specifically excluded from the definition of proprietary function. Accordingly, the exception to immunity set forth in R.C. 2744.02(B)(2) is inapplicable.

{¶21} Next, we turn to the exception to immunity set forth under R.C. 2744.02(B)(4). A review of S.H.A.R.K.'s brief reveals that although it purports to quote R.C. 2744.02(B)(4) in its entirety, it has omitted a significant phrase from the statute. Specifically, S.H.A.R.K. omitted the phrase that explains that the injury or damage at issue must have been "due to physical defects within or on the grounds of" governmental buildings. R.C. 2744.02(B)(4). As there is no allegation that the property damage was caused by a physical defect on the grounds of the park, this exception is clearly inapplicable. As we find no applicable exception to the general immunity afforded to political subdivisions, we need not examine the third tier of the analysis. *Cater*, 83 Ohio St.3d at 28.

{¶22} The trial court did not err in granting summary judgment in favor of MetroParks. Accordingly, S.H.A.R.K.'s sole assignment of error is overruled.

III.

{¶23} S.H.A.R.K.'s sole assignment of error is overruled. The judgment of the Summit County Court of Common Pleas is affirmed.

Judgment affirmed.

There were reasonable grounds for this appeal.

We order that a special mandate issue out of this Court, directing the Court of Common Pleas, County of Summit, State of Ohio, to carry this judgment into execution. A certified copy of this journal entry shall constitute the mandate, pursuant to App.R. 27.

Immediately upon the filing hereof, this document shall constitute the journal entry of judgment, and it shall be file stamped by the Clerk of the Court of Appeals at which time the period for review shall begin to run. App.R. 22(E). The Clerk of the Court of Appeals is instructed to mail a notice of entry of this judgment to the parties and to make a notation of the mailing in the docket, pursuant to App.R. 30.

Costs taxed to Appellants.

CARLA MOORE
FOR THE COURT

DICKINSON, J.
CONCURS

CARR, J.
CONCURS, BUT WRITES SEPARATELY, SAYING:

{¶24} Although I concur, I write separately to add that, in my opinion, the trial court did not abuse its discretion in not granting S.H.A.R.K.'s motion to amend its complaint. S.H.A.R.K. sought leave to amend its complaint nearly four years after the suit was filed and after summary judgment was rendered against it. Under these circumstances, I would hold that the trial court clearly did not abuse its discretion.

APPEARANCES:

KENNETH D. MYERS, Attorney at Law, for Appellants.

NICK C. TOMINO, Attorney at Law, for Appellee.

MARK J. SCARPITTI, and CARYN L. PETERSON, Attorneys at Law, for Appellees.