

STATE OF OHIO)
)ss:
COUNTY OF MEDINA)

IN THE COURT OF APPEALS
NINTH JUDICIAL DISTRICT

KIMBERLY DEVAUX, et al.

C.A. No. 09CA0069-M

Appellees

v.

ALBRECHT TRUCKING CO., INC., et al.

APPEAL FROM JUDGMENT
ENTERED IN THE
COURT OF COMMON PLEAS
COUNTY OF MEDINA, OHIO
CASE No. 08CIV0683

Appellants

DECISION AND JOURNAL ENTRY

Dated: March 29, 2010

MOORE, Judge.

{¶1} Appellants, Albrecht Trucking Company, Inc. and Medina County Agricultural Society, appeal the judgment of the Medina County Court of Common Pleas denying their motion for summary judgment. We affirm.

I.

{¶2} The Agricultural Society operates the Medina County Fair. Albrecht, owned by Mark Albrecht, has volunteered the use of its services and equipment in preparing for fair events since approximately 1948. In 2001, the Agricultural Society implemented a rough truck contest as part of the fair activities. The rough truck contest involves two classes of vehicles: 1) stock vehicles, including both cars and trucks that are street-legal with the possible exception of exhaust modifications; and, 2) modified vehicles, which include “[a]nything above and beyond street legal” [sic], subject to certain rules such as a prohibition against pressurized fuels or nitrous oxide. Drivers in each class of vehicles compete with each other to complete the course

in the fastest possible time. There is a \$2,000 prize purse and the standard practice is to award cash prizes to the ten competitors in each vehicle class with the fastest course completion times. The course includes bumps, a mud pit, moguls, also known as frame twisters, and ramps. These obstacles are constructed from dirt found on the fairgrounds. Jack Maxwell was the chairman of the Rough Truck Competition Committee from 2003 through 2006.

{¶3} Since its inception in 2001, Albrecht has been constructing the rough truck course at the direction of Agricultural Society members. In 2006, Maxwell directed Albrecht and its employees as to where to place each obstacle, how high to build each obstacle, how steep to make each obstacle and approximately how wide to make the base of each obstacle. Albrecht is involved in the construction of the course, but not in the planning.

{¶4} In 2005, Jared Myers participated in the stock class of the rough truck competition. He drove his father's 1990 Ford Ranger pickup truck, which had a blown head gasket. Myers had modified the exhaust to make the truck louder. As a result of the 2005 competition, the bumper on the truck had partially rolled under and the truck leaned to the left. Myers finished in eighth place and received a \$50 prize. Myers participated in the event again in 2006 with the same truck. He did not perform any work on the truck between the 2005 and 2006 competitions. In 2006, Myers went airborne over the first obstacle. Upon landing, he could no longer feel his legs and the truck soon idled to a stop. Myers sustained a burst fracture of his L-1 vertebrae, which caused bone fragments to infiltrate his spinal cord resulting in paralysis to both legs.

{¶5} Myers, his mother, Kimberly Devaux, and his father, Rick Myers, (collectively "Devaux plaintiffs") filed suit against the Agricultural Society and Albrecht. The Agricultural

Society and Albrecht moved for summary judgment on the basis of political subdivision immunity and assumption of the risk. The trial court denied the motion.

{¶6} Albrecht and the Agricultural Society timely filed a notice of appeal, raising two assignments of error for our review.

II.

ASSIGNMENT OF ERROR I

“THE TRIAL COURT ERRED IN ADOPTING SECONDARY ASSUMPTION OF RISK, AS OPPOSED TO PRIMARY ASSUMPTION OF RISK ANALYSIS.”

{¶7} In their first assignment of error, Albrecht and the Agricultural Society contend that the trial court erred in conducting a secondary assumption of risk analysis rather than a primary assumption of risk analysis. On November 5, 2009, this Court’s magistrate issued an order requiring Albrecht and the Agricultural Society to demonstrate why the order from which they appealed constituted a final, appealable order with regard to matters other than sovereign immunity. Albrecht and the Agricultural Society timely filed a response. On November 5, 2009, however, this Court filed a journal entry limiting this appeal to the issue of sovereign immunity because we are without jurisdiction to consider other issues. Accordingly, we decline to address Albrecht and the Agricultural Society’s first assignment of error.

ASSIGNMENT OF ERROR II

“THE TRIAL COURT’S FAILURE TO GRANT SUMMARY JUDGMENT BASED UPON CHAPTER 2744 OF THE REVISED CODE WAS ERROR[.]”

{¶8} In their second assignment of error, Albrecht and the Agricultural Society contend that the trial court erred in failing to grant summary judgment in their favor on the basis of sovereign immunity under Chapter 2744 of the Ohio Revised Code. We disagree.

{¶9} This Court reviews an award of summary judgment de novo. *Grafton v. Ohio Edison Co.* (1996), 77 Ohio St.3d 102, 105. We apply 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.

{¶10} Pursuant to Civil Rule 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.

{¶11} The party moving for summary judgment bears the initial burden of informing the trial court of the basis for the motion and pointing to parts of the record that show the absence of a genuine issue of material fact. *Dresher v. Burt* (1996), 75 Ohio St.3d 280, 292-93. Specifically, the moving party must support the motion by pointing to some evidence in the record of the type listed in Civ.R. 56(C). *Id.* Once this burden is satisfied, the non-moving party bears the burden of offering specific facts to show a genuine issue for trial. *Id.* at 293. The non-moving party may not rest upon the mere allegations and denials in the pleadings but instead must point to or submit some evidentiary material that demonstrates a genuine dispute over a material fact. *Henkle v. Henkle* (1991), 75 Ohio App.3d 732, 735.

{¶12} The issues before this Court are: 1) whether the Agricultural Society is entitled to political subdivision immunity under Chapter 2744; and 2) whether Albrecht is entitled to political subdivision immunity under Chapter 2744 as an employee of the Agricultural Society.

{¶13} According to R.C. 2744.02(A)(1), a political subdivision is not liable in damages in a civil action for loss to persons or property by any act or omission in connection with

governmental and proprietary functions of the political subdivision or its employees. The determination of whether governmental immunity under R.C. 2744.02 applies is a question of law to be decided by the court. *Conley v. Shearer* (1992), 64 Ohio St.3d 284, 292.

{¶14} 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.

{¶15} 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). *Cater*, 83 Ohio St.3d at 28. 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.*

Agricultural Society

{¶16} The Devaux plaintiffs contend that the Agricultural Society is a political subdivision for the purposes of R.C. 2744. They further contend that ownership and operation of a county fair is a proprietary, rather than governmental, function subjecting the Agricultural Society to liability for the negligent acts of its employees under R.C. 2744.02(B)(2). On these points, the Agricultural Society agrees. In its motion for summary judgment and on appeal, the Agricultural Society argues that because Myers executed a waiver and voluntarily assumed the risk, he would have to establish that the Agricultural Society and Albrecht acted recklessly, wantonly or intentionally in order for the Devaux plaintiffs to recover damages. The issues of

liability and recovery of damages, however, are not before us. At this time, we address only whether Albrecht and the Agricultural Society are entitled to political subdivision immunity.

{¶17} As the parties do not dispute that the Agricultural Society is a political subdivision for the purposes of Chapter 2744 and that it performed a proprietary function when it conducted the rough truck contest, we need only consider the second and third tiers of the *Cater*-analysis. The Agricultural Society is immune from liability under R.C. 2744.02(A)(1) unless the alleged acts or omissions fall within one of the five general immunity exceptions under R.C. 2744.02(B).

{¶18} R.C. 2744.02(B) provides, in pertinent part, that:

“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.”

{¶19} Because the parties agree that conducting the rough truck contest was a proprietary function, the exception to political subdivision immunity found in R.C. 2744.02(B)(2) applies and the Agricultural Society is liable in damages for injuries caused by the negligent acts of its employees unless, under the third tier of the *Cater*-analysis, a defense found in R.C. 2744.03 applies to reinstate immunity. *Cater*, 83 Ohio St.3d at 28.

{¶20} The Agricultural Society does not contend that any of the defenses found in R.C. 2744.03 apply to reinstate immunity.

{¶21} Conducting a rough truck contest constitutes a proprietary, rather than governmental, function and because no defenses under R.C. 2744.03 apply, the Agricultural Society is not immune from suit for injuries caused by the negligent acts of its employees. *Cater*, 83 Ohio St.3d at 28. Accordingly, the trial court properly denied the motion for summary judgment in favor of the Agricultural Society on the basis of political subdivision immunity.

ALBRECHT

{¶22} Albrecht moved for summary judgment on the basis that R.C. 2744.03(A)(6) provides statutory immunity to employees of political subdivisions. Specifically, Albrecht contends that the Devaux plaintiffs cannot establish a question of fact as to whether Albrecht or its employees acted with malicious purpose, bad faith or in a wanton or reckless manner. In the appellate brief and the motion for summary judgment below, this contention appears in a section of the argument that does not address Albrecht, yet it addresses a statutory subsection related only to the immunity of employees of political subdivisions. Whether this contention relating to employees of a political subdivision is intended to relate to the Agricultural Society or Albrecht, we decline to address it, as the brief does not cite to any portion of the record setting forth relevant facts, nor is any analysis provided as is required by App.R. 16(A)(7). App.R. 12(A)(2).

{¶23} Albrecht further argues that it acted solely at the direction of the Agricultural Society and, as a contractor, is not liable because it followed the Agricultural Society's design specifications. Those specifications, it argues, were not obviously defective or dangerous such that no reasonable person would have followed them. We also decline to address Albrecht's second contention, which does not involve a question of political subdivision immunity. As noted in our discussion of Albrecht and the Agricultural Society's first assignment of error, this appeal is limited to questions of political subdivision immunity.

{¶24} Accordingly, the trial court properly denied the motion for summary judgment in favor of Albrecht.

III.

{¶25} Albrecht and the Agricultural Society's second assignment of error is overruled. We decline to address Albrecht and the Agricultural Society's first assignment of error. We affirm the decision of the Medina County Court of Common Pleas.

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 Medina, 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

WHITMORE, J.
BELFANCE, P. J.
CONCUR

APPEARANCES:

MEL L. LUTE, JR., Attorney at Law, for Appellant.

DAVID G. UTLEY, Attorney at Law, for Appellant.

CHARLES H. BENDIG, Attorney at Law, for Appellees.