

[Cite as *Pelletier v. Campbell*, 2016-Ohio-8097.]

STATE OF OHIO, MAHONING COUNTY
IN THE COURT OF APPEALS
SEVENTH DISTRICT

JUDITH PELLETIER,)	
)	
PLAINTIFF-APPELLEE,)	
)	CASE NO. 15 MA 0220
V.)	
)	OPINION
CITY OF CAMPBELL, ET AL.,)	
)	
DEFENDANTS-APPELLANT.)	

CHARACTER OF PROCEEDINGS: Civil Appeal from Court of Common Pleas of Mahoning County, Ohio Case No. 14 CV 734

JUDGMENT: Affirmed

APPEARANCES:
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JUDGES:

Hon. Gene Donofrio
Hon. Cheryl L. Waite
Hon. Mary DeGenaro

Dated: December 7, 2016

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DONOFRIO, P.J.

{¶1} Defendant-Appellant, City of Campbell, appeals the judgment of the Mahoning County Common Pleas Court denying its motion for summary judgment.

{¶2} On August 22, 2013, Plaintiff-Appellee, Judith Pelletier, was traveling on Sanderson Avenue in the City of Campbell on her way to an orientation in connection with her employment. (Pelletier Dep. 14). At the intersection of Sanderson and 12th Street, there was a stop sign for those traveling on Sanderson. (Pelletier Dep. 14). Appellee claims she did not see the stop sign because her view of the stop sign was blocked by foliage. (Pelletier Dep. 14-15). Appellee says she also did not see a vehicle traveling on 12th Street approaching the intersection with Sanderson. (Pelletier Dep. 15). She did not slow down. *Id.* She entered the intersection and collided with the other vehicle. (Pelletier Dep. 15). Appellee testified that she previously had never traversed this intersection. (Pelletier Dep. 16-17). After she collided with the other vehicle, the other vehicle rolled over. (Pelletier Dep. 17). The speed limit on Sanderson is 25 miles per hour. (Pelletier Dep. 17). Appellee claims that as a result of the collision she was injured. Photos of the scene and the vehicles were taken and are part of the record. (Pelletier Dep. Exhibits A-E).

{¶3} On March 19, 2014, Appellee filed an action in tort against Appellant. Also named as defendants were Danny Saulsberry, Bank of New York Mellon, and Safeguard Properties, LLC. Allstate Insurance Company was later joined as a party defendant. Appellee's tort action against Appellant is based on her claim that the foliage impaired her ability to see the stop sign. Appellee claims that Appellant had a duty to remove the foliage and to maintain the stop sign so that it was visible to motorists approaching the stop sign.

{¶4} On April 30, 2015, Appellant filed a motion for summary judgment arguing that Appellee could not recover against it because Appellant is entitled to governmental immunity. The motion was thoroughly briefed by the parties. The trial court denied Appellant's motion for summary judgment on November 25, 2015. Appellant filed a timely appeal. The parties agree that this court has jurisdiction to hear this appeal pursuant to R.C. 2744.02(C).

{¶15} Appellant's sole assignment of error states:

THE TRIAL COURT ERRED WHEN IT OVERRULED THE APPELLANT'S MOTION FOR SUMMARY JUDGMENT AND DENIED THE APPELLANT THE BENEFIT OF GOVERNMENTAL IMMUNITY, TO APPELLANT'S PREJUDICE, (Judgment Entry, November 25, 2015).

{¶16} An appellate court reviews the granting of summary judgment de novo. *Comer v. Risko*, 106 Ohio St.3d 185, 2005-Ohio-4559, 833 N.E.2d 712, ¶ 8. Thus, we shall apply the same test as the trial court in determining whether summary judgment was proper.

{¶17} A court may grant summary judgment only when (1) no genuine issue of material fact exists; (2) the moving party is entitled to judgment as a matter of law; and (3) the evidence can only produce a finding that is contrary to the non-moving party. *Mercer v. Halmbacher*, 9th Dist. No. 27799, 2015-Ohio-4167, ¶ 8; Civ.R. 56(C). The initial burden is on the party moving for summary judgment to demonstrate the absence of a genuine issue of material fact as to the essential elements of the case with evidence of the type listed in Civ.R.56(C). *Dresher v. Burt*, 75 Ohio St.3d 280, 292, 662 N.E.2d 264 (1996). If the moving party meets its burden, the burden shifts to the non-moving party to set forth specific facts to show that there is a genuine issue of material fact. *Id.*; Civ.R.56(E). "Trial courts should award summary judgment with caution, being careful to resolve doubts and construe evidence in favor of the nonmoving party." *Welco Industries, Inc. v. Applied Cos.*, 67 Ohio St.3d 344, 346, 1993-Ohio-191, 617 N.E.2d 1129.

{¶18} Appellant claims the trial court erred in not granting its motion for summary judgment because it is entitled to governmental immunity. The sovereign immunity statute is a deliberate attempt to limit the liability of political subdivisions for injuries and deaths occurring on their roadways. *Howard v. Miami Twp. Fire Div.*, 119 Ohio St.3d 1, 2008-Ohio-2792, 892 N.E.2d 311, ¶ 16. The availability of immunity is a

question of law properly determined by the court prior to trial. *Conley v. Shearer*, 64 Ohio St.3d 284, 292, 595 N.E.2d 862 (1992). Determining whether a political subdivision is immune from tort liability involves a three-tiered analysis. *Rastaedt v. Youngstown*, 7th Dist. No. 12 MA 0082, 2013-Ohio-750, ¶ 10; *Colbert v. Cleveland*, 99 Ohio St.3d 215, 2003-Ohio-3319, 790 N.E.2d 781, ¶ 7. Appellant's assignment of error addresses only the second tier of this analysis. The parties agree as to the first tier and Appellant does not claim any error by the trial court with regard to the third tier.

{¶9} The first tier involves a determination of whether or not the alleged wrongful conduct is a governmental or proprietary function. R.C. 2744.02(A); *Baker v. Wayne Cty.*, 147 Ohio St.3d 51, 2016-Ohio-1566, 60 N.E.3d 1214, ¶ 11. The parties do not dispute that the alleged wrongful conduct here constitutes a governmental function. Thus, Appellant enjoys the protection of sovereign immunity pursuant to R.C. 2644.02(A).

{¶10} The second tier requires that we consider if there is an exception to Appellant's sovereign immunity. There are five possible exceptions. The exceptions are set forth in R.C. 2744.02(B). Appellant argues that none of the exceptions apply. Appellee asserts that the exception set forth in R.C. 2744.03(B)(3) is applicable. That section provides, in part:

political subdivisions are liable for injury, death, or loss to person or property caused by their negligent failure to keep public roads in repair and other negligent failure to remove obstructions from public roads * *

*

{¶11} Appellee asserts that Appellant failed to keep its public road in repair and otherwise failed to remove an obstruction from its public road. "Public roads" are defined in R.C. 2744.01(H):

"Public roads" means public roads, highways, streets, avenues, alleys,

and bridges within a political subdivision. “Public roads” does not include berms, shoulders, rights-of-way, or traffic control devices unless the traffic control devices are mandated by the Ohio manual of uniform traffic control devices.

{¶12} We must accept the definition of “public roads” provided by the General Assembly. *Baker* at ¶ 13. If the stop sign here is mandated by the Ohio Manual of Uniform Traffic Control Devices (“OMUTCD”), it is, by definition, a “public road” and it must be kept in repair and free from obstructions. R.C. 2744.01(H); R.C. 2744.03(B)(3); *Yonkings v. Piwinski*, 10th Dist. Nos. 11AP-07, 11 AP-09, 2011-Ohio-6232, ¶ 22-24. If it is not, it does not fall under the definition of a public road. In this event, Appellant would be entitled to immunity and summary judgment should be granted in its favor.

{¶13} The 2012 version of the OMUTCD, like the prior versions, contains headings to classify the nature of the text that follows. OMUTCD Section 1A.13 provides the definitions for headings, words, and phrases used in the manual. There are four headings - Standard, Guidance, Option, and Support. Text classified as Standard includes a “required, mandatory, or specifically prohibited practice regarding a traffic control device.” OMUTCD, Section 1A.13(A). The definition notes that the verb “shall” is typically used and that the text appears in bold type. *Id.*

{¶14} OMUTCD, Section 2B.05, titled “STOP Sign (R1-1) and ALL WAY Plaque (R1-3P)”, appears under the Standard heading, is in bold type, and is thus considered mandatory. It provides, in part, that when it is determined that a full stop is always required on approach to an intersection a stop sign shall be used.

{¶15} Appellant does not assert that the stop sign here is anything but a public road as defined in R.C. 2744.03(B)(3) and R.C. 2744.01(H). Thus, Appellant can be held liable and is not entitled to immunity if it failed to keep its stop sign in repair and/or failed to remove obstructions. Appellant argues that, by definition, the foliage which allegedly interfered with Appellee’s view of the stop sign here is not an obstruction and/or the stop sign was not in disrepair as required by R.C.

2744.02(B)(3).

{¶16} Appellant refers to a number of cases which have addressed the meaning of the phrase “obstructions from public roads.” Appellant initially draws our attention to *Howard*, 119 Ohio St.3d 1. Unlike here, *Howard* did not involve a mandated traffic control device. Rather, the issue presented was a narrow one – did the accumulation of ice on a roadway constitute an “obstruction” within the meaning of R.C. 2744.02(B)(3). *Id.* at ¶ 1. In *Howard*, the Supreme Court noted that the legislature did not define “obstruction” in the statute and that the Supreme Court, prior to *Howard*, also had not defined the term. *Id.* at ¶ 19. The Court discussed a number of dictionary definitions for the term. *Id.* at ¶ 21. However, the Supreme Court rejected the appellate court’s interpretation of the meaning of the term obstruction as anything that has the potential of interfering with the public’s safe use of the roadway. *Id.* at ¶ 22. The Supreme Court came to its conclusion after analyzing the history of the statute and the fact that the legislature removed from the statute the term “nuisance.” *Id.* at ¶ 23-30. The Court concluded that the intent of the change in the statute was to limit the liability of political subdivisions for what might otherwise be tortious conduct. *Id.* The Supreme Court, reversing the appellate court, stated:

We conclude that for purposes of R.C. 2744.02(B)(3), an “obstruction” must be an obstacle that blocks or clogs the roadway and not merely a thing or condition that hinders or impedes the use of the roadway or that may have the potential to do so.

Id. at ¶ 30. (Chief Justice Moyer was joined by Justice Pfeifer in dissent arguing that making a political subdivision liable for negligence that makes travel impossible while excusing liability that merely makes travel treacherous “makes little sense.” *Id.* at ¶ 36). The Supreme Court did not discuss the meaning of the word “obstruction” as it might apply to a mandatory traffic control device.

{¶17} Appellant next draws our attention to a number of appellate court decisions of similar import. None of the cases to which Appellant draws our attention

involve a mandatory traffic control device. *Rastaedt*, 7th Dist. No. 12-MA-0082, considered whether a down slope in a street that led toward a sewer catch basin was an obstruction. Reversing the trial court's denial of the City of Youngstown's motion for summary judgment, we held that this was not an obstacle that blocked or clogged the road. *Id.* at ¶ 25. *Laurie v. City of Cleveland*, 8th Dist. No. 91665, 2009-Ohio-869, involved a claim that city trees lining the street visually blocked a driver's view of a van exiting a driveway. *Repasky v. Upper Arlington*, 10th Dist. Nos. 12AP-752, 12AP-773, 2013-Ohio-2516, involved a construction project where a two-foot to four-foot wide cut was made in the pavement resulting from a trench previously dug to install a replacement storm sewer line. *Id.* at ¶ 3. The Tenth District held that an exception did not exist under R.C. 2744.02(B)(3) because "nothing in the record suggests that the gravel and stone blocked a person from riding a bicycle on this portion of" the road. *Id.* at ¶ 16. *McNamara v. Marion Popcorn Festival, Inc.*, 3d Dist. No. 9-12-34, 2012-Ohio-5578, involved another rider of a bicycle. Approximately one-third of the roadway was covered by a crossbeam. *Id.* at ¶ 2. The bicycle rider was catapulted off of his bicycle after striking the beam. *Id.* at ¶ 3. The argument again centered on whether the beam hindered or impeded the roadway as opposed to actually blocking or clogging it.

{¶18} Based on *Howard*, *Laurie*, *Repasky*, and *McNamara*, Appellant argues that the exception to immunity for its alleged tortious conduct, under R.C. 2744.02(B)(3), exists "only if the plaintiff demonstrates that the public roadway was literally obstructed or clogged." Appellant's interpretation of these cases is too narrow. None of these cases involve mandatory traffic control devices and are thus distinguishable. We are reminded that we must be careful to resolve doubts and construe the evidence in favor of Appellee. Whether or not the failure to remove the foliage here was an obstruction which Appellant was obligated to remove presents a question of material fact for the trier of fact to resolve. We cannot conclude that, as a matter of law, Appellant is entitled to judgment.

{¶19} An exception to immunity also exists where a subdivision fails to keep

its public roads in repair. R.C. 2744.02(B)(3). According to Appellee, foliage grew in front of the stop sign, blocked her view of the stop sign, and protruded to some extent into the road. In light of this, we must consider if the stop sign (by definition a public road) was in need of repair. Appellant argues, relying on *Heckert v. Patrick*, 15 Ohio St.3d 402, 406 (1984), *Sanderbeck v. County of Medina*, 130 Ohio St.3d 175, 2011-Ohio-4676, ¶ 14, and *Bonace v. Springfield*, 7th Dist. No. 07 MA 0226, 2008-Ohio-6364, ¶ 29, that in order for a road to be in need of repair it must be shown that the road is damaged, deteriorated, or disassembled. As with our discussion of the cases involving obstructions, none of the cases relied upon by Appellant involve a traffic control device.

{¶20} *Heckert* involves a large tree branch that fell, without warning, in front of plaintiff's motorcycle while he was traveling. *Heckert* at 402. The language Appellant uses from *Sanderbeck* comes from a dissenting opinion to the dismissal of that case as having been improvidently accepted. (The political subdivision was the appellant and the dissent was concerned that a subdivision could be held liable based on nothing more than an expert's claim that the road was out of repair because its coefficient of friction fell below an abstract threshold). *Sanderbeck* at ¶ 3. Our decision in *Bonace* concerned an excessive slide slope of a road and involved a claimed design or construction flaw. *Bonace* at ¶ 26 - 27. In *Bonace*, we did state that, "in its ordinary sense", the words "in repair" refers to maintaining a road's condition after construction or reconstruction, "for instance by fixing holes and crumbling pavement." *Id.* at ¶ 29.

{¶21} Appellant quotes the foregoing as well as our statement that these words deal "with repairs after deterioration of a road or disassembly of a bridge, for instance." *Id.* From this, Appellant urges us to conclude that there is no demonstration here that the stop sign was out of repair and thus "there is no question of fact as to whether the City of Cambridge's [sic] immunity is removed under this portion of the exception."

{¶22} The interpretation of our language by Appellant is too narrow. Where,

as here, a mandated traffic control device (which is considered to be, by definition, a public road) no longer serves its purpose because of some extraneous factor, it may be in need of repair as contemplated by R.C. 2744.02(B)(3). These are issues to be resolved by the trial court.

{¶23} Appellant also claims it is entitled to judgment because it had no notice of the foliage allegedly blocking the view of the stop sign. The exception to immunity is inoperative if Appellant did not have actual or constructive notice of the condition of the stop sign. *Thompson v. City of Campbell*, 7th Dist. No. 07 MA 0054, 2008-Ohio-1545, ¶ 31. (Although our decision in *Thompson* concerned a nuisance, the same principle applies). Appellant points to the uncontradicted Bednarik Affidavit, attached as Exhibit 1 to its motion for summary judgment, which states that Appellant had no notice of the condition. Appellee does not claim or point to any evidence that Appellant had actual notice of the alleged condition of the stop sign. Instead, Appellee asserts that even if Appellant had no actual notice of the condition, it had constructive notice. In *Thompson*, as Appellant points out, we stated that in order for there to be constructive notice, it must appear that the condition existed in such a manner that it could or should have been discovered, that it existed for a sufficient length of time to have been discovered, and, if discovered, it would have created a reasonable apprehension of a potential danger. *Id.* See also *Rastaedt* at ¶ 27. Appellee notes that the accident here occurred in August, i.e., late summer, and that the foliage allegedly grew high enough to block a motorist's view of the stop sign and protruded partially onto the roadway. This, Appellee asserts, at minimum establishes a genuine issue of material fact as to whether it is a condition that should have been discovered, existed for a sufficient length of time to be discovered, and, if discovered, would have created a reasonable apprehension of danger. We agree. This constitutes a genuine issue of material fact to be resolved in the trial court.

{¶24} Resolving all doubts and construing the evidence in favor of Appellee, as we must, we cannot conclude that there are no genuine issues of material fact, that the Appellant is entitled to judgment as a matter of law, and that the evidence

can only produce a finding that is contrary to the Appellee. *Mercer* at ¶ 8.

{¶25} Accordingly, Appellant's assignment of error is without merit and is overruled.

{¶26} The decision of the trial court denying Appellant's motion for summary judgment is hereby affirmed.

Waite, J., concurs.

DeGenaro, J., concurs.