

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
LUCAS COUNTY

JoAnn Sams, etc.

Court of Appeals No. L-10-1320

Appellant

Trial Court No. CI0201003000

v.

Lucas County Board of Mental
Retardation and Developmental Disabilities

DECISION AND JUDGMENT

Appellee

Decided: May 6, 2011

* * * * *

Kevin M. Ferguson, for appellant.

Joan C. Szuberla, Anastasia K. Hanson, and Mary Anne Burns,
for appellee.

* * * * *

OSOWIK, P.J.

{¶ 1} This is an appeal from a judgment of the Lucas County Court of Common Pleas which granted appellee's motion for judgment on the pleadings pursuant to Civ.R. 12(C). For the reasons set forth below, this court affirms the judgment of the trial court.

{¶ 2} Appellant, JoAnn Sams, administrator of the estate of Merle Johnson ("Sams"), sets forth the following sole assignment of error:

{¶ 3} "The Trial Court erred in granting the Appellee's Motion for Judgment on the Pleadings and dismissing Plaintiff/Appellant's claims against Defendant holding that Defendant/Appellee was entitled to Governmental Immunity."

{¶ 4} The following undisputed facts are relevant to the issues raised on appeal. The decedent, Merle Johnson, was a developmentally challenged person residing in a private nursing home located in Lucas County, Ohio. Johnson's condition rendered her limited to a wheelchair.

{¶ 5} On February 6, 2008, Johnson was being transported by employees of the Lucas County Board of Mental Retardation and Developmental Disabilities ("MRDD") to Larc Lane, a developmental disability facility. The transportation was furnished on a bus owned by MRDD. Johnson was en route to Larc Lane in order to participate in programming offered by the facility. Prior to her arrival at the facility, Johnson fell from her wheelchair and sustained a left femur fracture and head injuries. Johnson was taken to Flower Hospital via ambulance for treatment. On February 11, 2008, approximately five days subsequent to this incident, Johnson passed away.

{¶ 6} On March 29, 2010, appellant filed suit on behalf of Johnson's estate. The suit asserted claims of negligence and wrongful death against appellee in connection to Johnson's fall from her wheelchair while onboard the MRDD bus. In response, appellee filed a Civ.R. 12(C) motion for judgment on the pleadings on the basis of R.C. 2744.02 sovereign immunity.

{¶ 7} On September 28, 2010, the trial court granted appellee's motion and issued judgment on the pleadings in favor of appellee. In support of this decision, the trial court determined that appellee was entitled to the protection of sovereign immunity pursuant to R.C. 2744.02(A)(1).

{¶ 8} The determinative portion of the judgment was the conclusion that Johnson's transportation by MRDD to the Larc Lane facility on an MRDD bus in order to participate in services operated by and at the facility constituted a governmental function. As a governmental function, it was encompassed by the sovereign immunity statute.

{¶ 9} The trial court rejected appellant's opposing contention that the incident stemmed from a non-governmental, proprietary function so as to exempt appellee from sovereign immunity pursuant to the relevant immunity exception set forth in R.C. 2744.02(B)(2).

{¶ 10} Accordingly, the trial court held as a matter of law that sovereign immunity applied to appellee in this case so as to warrant the requested judgment in favor of appellee on the pleadings pursuant to Civ.R. 12(C). This appeal ensued.

{¶ 11} In the sole assignment of error, appellant asserts that the trial court erred in granting judgment to appellee. Appellate court review of a disputed Civ.R. 12(C) judgment on the pleadings is conducted on a de novo basis, analogous to the standard utilized on Civ.R. 12(B)(6) motions. *Garofalo v. Chicago Title Ins. Co.* (1995), 104 Ohio App.3d 94, 104.

{¶ 12} In support of the assignment of error, appellant asserts that the trial court erred in determining that the incident occurred in the course of a governmental rather than a proprietary function, so as to be encompassed by the sovereign immunity established by R.C. 2744.02(A)(1).

{¶ 13} R.C. 2744.02(A)(1) directs that a "political subdivision is not liable in damages in a civil action for injury, death, or a 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." However, as pertinent to this case, R.C. 2744.02(B)(2) carves out as an exception from immunity protection, "negligent performance of acts by governmental employees with respect to proprietary functions of the governmental entity." These distinctions lie at the heart of this case. Appellant asserts that the incident occurred in the course of a non-immune proprietary function, while appellee successfully argued to the trial court that the incident arose during an immune governmental function.

{¶ 14} R.C. 2744.01(C)(2)(o) defines a requisite governmental function, as directly relevant to this case, as "the operation of mental health facilities, mental retardation or developmental disabilities facilities, alcohol treatment and control centers, and children's homes or agencies." In conjunction with this, and likewise directly applicable to the specific facts of this case, R.C. 5126.082(A)(5) expressly authorizes entities such as appellee to create and operate transportation systems within the county for disabled individuals.

{¶ 15} Lastly, R.C. 2744.01(G)(1)(b) defines a potentially non-immune proprietary function as, "one that promotes or preserves the public peace, health, safety, or welfare and that involves activities that are customarily engaged in by nongovernmental persons."

{¶ 16} Given that context of an incident occurring on an MRDD bus during the course of transportation to an MRDD facility to participate in MRDD services, adoption of appellant's position would necessitate concluding that an exempt proprietary function can somehow occur within and during the course of an immune governmental function. In *Wilson v. Stark Cty. Dept. of Human Serv.* (1994), 70 Ohio St.3d 450, 452, the Ohio Supreme Court rejected such a line of reasoning and held, "with respect to governmental functions, political subdivisions retain their cloak of immunity from lawsuits stemming from employees' negligent or reckless acts."

{¶ 17} We have carefully reviewed and considered the record of evidence in this matter. The record clearly reflects that the incident occurred in the course of a statutorily authorized and governmentally run and operated transportation service en route to a government developmental disability facility for the purpose of participating in a government operated program at the government facility.

{¶ 18} We find that the facts and evidence in this case do not support the notion that this scenario could conceivably be construed as a proprietary function that is, "customarily engaged in by nongovernmental persons."

{¶ 19} The record clearly demonstrates that this unfortunate incident wholly occurred in the course and factual context of a protected government function. As such, it is protected by R.C. 2744.02 sovereign immunity. As a matter of law, it cannot simultaneously constitute an exempt proprietary function pursuant to both the plain meaning of the relevant statutory provisions and the relevant precedent set forth in *Wilson*.

{¶ 20} Wherefore, based upon the foregoing, we find appellant's sole assignment of error not well-taken. The judgment of the Lucas County Court of Common Pleas is hereby affirmed. Appellant is ordered to pay the costs of this appeal pursuant to App.R. 24.

JUDGMENT AFFIRMED.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. See, also, 6th Dist.Loc.App.R. 4.

Mark L. Pietrykowski, J.

JUDGE

Thomas J. Osowik, P.J.

JUDGE

Stephen A. Yarbrough, J.
CONCUR.

JUDGE

This decision is subject to further editing by the Supreme Court of Ohio's Reporter of Decisions. Parties interested in viewing the final reported version are advised to visit the Ohio Supreme Court's web site at:
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