

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

Elizabeth Cunningham, et al.

Court of Appeals No. L-12-1272

Appellee

Trial Court No. CI0201005197

v.

The Star Academy of Toledo, et al.

DECISION AND JUDGMENT

Appellants

Decided: February 7, 2014

* * * * *

Rena Samole Leizerman and Michael J. Leizerman, for appellee.

Kristen E. Campbell and Craig G. Pelini, for appellants.

* * * * *

PIETRYKOWSKI, J.

{¶ 1} Appellants, Constellation, LLC (“Constellation”) and Patrick Flanagan, appeal an August 28, 2012 judgment of the Lucas County Court of Common Pleas that denied them immunity from liability for claims arising from personal injuries to Renard Cunningham, Jr., a minor. Renard was injured on June 7, 2010, while a student at The

Star Academy of Toledo (“Star Academy”), when a television and cart fell and severely injured him. Appellee is Elizabeth Cunningham, Renard’s mother. Ms. Cunningham filed this personal injury action, asserting claims, individually and on behalf of Renard, against appellants and others for damages arising from Renard’s injuries.

{¶ 2} Constellation and Patrick Flanagan contend they are immune from liability to appellee under immunities afforded political subdivisions and their employees under Ohio’s Political Subdivision Tort Liability Act, R.C. Chapter 2744. In the August 28, 2012 judgment, the trial court overruled appellants’ motion for summary judgment and ruled that Constellation was not a political subdivision and therefore not entitled to immunities granted political subdivisions under R.C. Chapter 2744. The trial court also ruled that since Patrick Flanagan, as an employee of Constellation, did not work for a political subdivision and, therefore, he did not qualify for immunity as an employee of a political subdivision.

{¶ 3} Appellants have filed a notice of appeal from the August 28, 2012 judgment. R.C. 2744.02(C) provides that “[a]n order that denies a political subdivision or an employee of a political subdivision the benefit of an alleged immunity” under R.C. Chapter 2744 is a final order that may be appealed immediately. *Riscatti v. Prime Properties Ltd. Partnership*, 137 Ohio St.3d 123, 2013-Ohio-4530, 998 N.E.2d 437, ¶ 18-19; R.C. 2744.02(C).

{¶ 4} Appellants assert three assignments of error on appeal:

1. The trial court erred in finding that Constellation does not qualify as a political subdivision and that Patrick Flanagan does not qualify as an employee of a political subdivision.

2. The trial court erred in not finding that political subdivision immunity barred the claims against Constellation and Flanagan.

3. The trial court erred in denying summary judgment to Constellation and Flanagan, even under general principles of negligence.

Standard of Review

{¶ 5} The standard of review of judgments ruling on motions for summary judgment is de novo; that is, an appellate court applies the same standard in determining whether summary judgment should be granted as the trial court. *Grafton v. Ohio Edison Co.*, 77 Ohio St.3d 102, 105, 671 N.E.2d 241 (1996). To prevail on a motion for summary judgment the moving party must demonstrate:

(1) that there is no genuine issue as to any material fact; (2) that the moving party is entitled to judgment as a matter of law; and (3) that reasonable minds can come to but one conclusion, and that conclusion is adverse to the party against whom the motion for summary judgment is made, who is entitled to have the evidence construed most strongly in his favor. *Harless v. Willis Day Warehousing Co.*, 54 Ohio St.2d 64, 66, 375 N.E.2d 46 (1978).

{¶ 6} The grant of summary judgment is limited to circumstances where there is no dispute of material fact. Civ.R. 56(C) provides:

Summary judgment shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, written admissions, affidavits, transcripts of evidence, and written stipulations of fact, if any, timely filed in the action, 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.

{¶ 7} Appellant's first assignment of error argues that the trial court erred in finding that Constellation does not qualify as a political subdivision for purposes of Chapter 2744 immunity and that Patrick Flanagan does not qualify as an employee of a political subdivision for such immunity.

{¶ 8} The pertinent facts are not in dispute. Star Academy is a community school located in Toledo that opened in the 2008-2009 school year. (Community schools are also known as charter schools. *State ex rel. Ohio Congress of Parents & Teachers v. State Bd. of Edn.*, 111 Ohio St.3d 568, 2006-Ohio-5512, 857 N.E.2d 1148, ¶ 1.) It is undisputed that Constellation is a private, for-profit corporation, created by individuals and not by the state. Star Academy hired Constellation during the summer of 2009 to manage Star Academy during the 2009-2010 school year. Under guidelines set forth in a written management agreement, Constellation contracted to provide management of the day to day activities of the school. Constellation hired Patrick Flanagan to serve as school's principal and Mr. Flanagan served as Star Academy's principal for the 2009-

2010 school year. The incident concerned in this litigation occurred at the school and on the final day of the 2009-2010 school year.

{¶ 9} Whether Constellation is a political subdivision is central to appellants' immunity claims:

R.C. Chapter 2744, Ohio's Political Subdivision Tort Liability Act, was enacted in response to the judicial abrogation of the common-law immunity of political subdivisions. *Greene Cty. Agricultural Soc. v. Liming*, 89 Ohio St.3d 551, 558, 733 N.E.2d 1141 (2000). R.C. Chapter 2744 generally shields political subdivisions from tort liability in order to preserve their fiscal integrity. *See, e.g., Hubbell v. Xenia*, 115 Ohio St.3d 77, 2007-Ohio-4839, 873 N.E.2d 878, ¶ 23; R.C. 2744.02(A)(1). *Riscatti*, 137 Ohio St.3d 123, 2013-Ohio-4530, 998 N.E.2d 437 at ¶ 15.

{¶ 10} R.C. 2744.01(F) defines the term "political subdivision" for purposes of the immunity statute:

(F) Political subdivision" or "subdivision" means a municipal corporation, township, county, school district, or other body corporate and politic responsible for governmental activities in a geographic area smaller than that of the state. "Political subdivision" includes, but is not limited to *

* * community school established under Chapter 3314. of the Revised Code

* * * .

{¶ 11} It is undisputed that Star Academy is a community school established under R.C. Chapter 3314. The parties also do not dispute that Constellation is a community school management company. Although community schools are specifically listed in R.C. 2744.01(F) as political subdivisions, community school management companies are not. Accordingly, in order to establish that it is a political subdivision of Ohio for purposes of immunity in tort, Constellation must prove that it qualifies under R.C. 2744.01(F) as some “other body corporate and politic responsible for governmental activities in a geographic area smaller than that of the state.” R.C. 2744.01(F); *see Greene* at 554-555.

{¶ 12} Appellants argue that the trial court incorrectly relied on the Ohio Supreme Court’s decision in *Hamilton Cty Bd. of Mental Retardation & Dev. Disabilities v. Professional Guild of Ohio*, 46 Ohio St.3d 147, 545 N.E.2d 1260 (1989) in its judgment and too narrowly construed the term “body corporate and politic” to refer to public corporations. Appellants contend that the Ohio Supreme Court rejected the *Hamilton* analysis as to what constitutes a body corporate and politic in its decision in *Greene Cty. Agricultural Soc. v. Liming*.

{¶ 13} In *Greene*, the Ohio Supreme Court considered whether a county agricultural society was a political subdivision under R.C. 2744.01(F) and entitled to immunity from claims arising from the conduct of a livestock competition at a county fair. *Greene* at 551-552, 554. In *Greene*, the Ohio Supreme Court stated that it was in agreement with the court of appeals that certain arguments by appellants in the case,

based upon the *Hamilton*, were “not on point.” The court distinguished *Hamilton* in that it concerned whether the county board was a “person” under R.C. 119.01(F) (dealing with whether the board was entitled to appeal a decision of the State Employment Relations Board) and not whether the county board was a political subdivision under R.C. 2744.01(F) and entitled to immunity. *Id.* at 556.

{¶ 14} The appellate decision in *Greene* identified the specific argument on which the *Hamilton* decision was found “not on point.” It was an argument asserting “interpretation of *Hamilton Cty. MRDD, supra*, as requiring a body corporate and politic to act as an ‘agent’ in the administration of civil government in some technical way.” *Greene Cty. Agricultural Soc. v. Liming*, 2d. Dist. Greene No. 98 CA 119, 1999 WL 958498, *3 (Aug. 13, 1999).

{¶ 15} Appellee argues first that the Ohio Supreme Court in *Greene* did not overrule existing case law interpreting the term “body corporate and politic,” to be limited to governmental bodies and public corporations. Second, appellee also argues that the Ohio legislature has treated community schools and private management companies for community schools differently.

{¶ 16} In construing the definition in R.C. 2744.01(F) of political subdivisions to include “other body corporate and politic responsible for governmental activities in a geographic area smaller than that of the state,” the Ohio Supreme Court, in *Greene*, looked to the definition of the term “body politic.”

Black's Law Dictionary (7 Ed.1999) 167, defines "body politic" as "[a] group of people regarded in a political (rather than private) sense and organized under a single governmental authority." *Greene*, 89 Ohio St.3d at 555, 733 N.E.2d 1141.

{¶ 17} In our view, this definition underscores the public as opposed to private nature of an entity that is a "body corporate and politic." Constellation is a private, for-profit corporation, rather than political organization or public corporation. We conclude that Constellation is not a body corporate and politic within the meaning of R.C. 2744.01(F) and, therefore, appellants are not immune to appellee's claims under R.C. Chapter 2744.

{¶ 18} Such an understanding is consistent with prior case law interpreting the term "body politic." In *Uricich v. Kolesar*, 132 Ohio St. 115,118, 5 N.E.2d 335 (1936) the Ohio, Supreme Court considered the meaning of the term "body politic" as used in Gen.Code, § 11760, relating to garnishment. The court looked to the commonly accepted meaning of the term and concluded: "'Politic' is a derivative from a root signifying 'citizen.' It would seem, therefore, that the phrase connotes simply a group or body of citizens organized for the purpose of exercising governmental functions." *Id.*

{¶ 19} Appellants have not cited this court to any legal authority that supports their contention that private for-profit corporations performing services under a contract with a political subdivision come within the definition of a political subdivision under R.C. 2744.01(F). The decision of the Eighth District Court of Appeals in *Lyons v.*

Teamhealth Midwest Cleveland, 8th Dist. Cuyahoga No. 96336, 2011-Ohio-5501, cited by appellants, concerned the distinction between governmental functions and proprietary functions under R.C. 2744.02(C), not whether the defendant county was a political subdivision. *Id.* at ¶ 45-48. It was undisputed in the case that the defendant, Columbia County, was a political subdivision for purposes of R.C. Chapter 2744 immunity.

{¶ 20} The Fifth District Court of Appeals decision in *Helfrich v. City of Pataskala*, 5th Dist. Licking No. 02CA38, 2003-Ohio-847, did not concern liability of any private entity. The defendant-appellees in the case were the city of Pataskala and its zoning commission. The court of appeals held that the city and the commission were political subdivisions engaged in a governmental function and immune from liability for the plaintiff's claims. *Id.* at ¶ 27. Similarly, *Brewer v. Butler Cty. Bldg. & Zoning Dept.*, 142 Ohio App.3d 567, 756 N.E.2d 222 (12th Dist.2001), concerned the status of public entities as political subdivisions: Butler County and the Butler County Building and Zoning Department. *Id.* at 573. In the Second District Court of Appeals decision in *Gabel v. Miami E. School Bd.*, 169 Ohio App.3d 609, 2006-Ohio-5963, 864 N.E.2d 102 (2d Dist.), the parties did not dispute that the Miami East School District was a political subdivision under R.C. 2744.01(F). *Id.* at ¶ 36, fn. 6. The dispute concerned whether the tort claims in the case concerned a proprietary or governmental function. *Id.* at ¶ 37-38.

{¶ 21} We also agree with appellee that if the general assembly wished to provide private management companies who provide services to community schools with immunity as a political subdivision, it could have included management companies for

community schools in the listing of specific entities identified as political subdivision in R.C. 2944.01(F). Community schools are included in the list. Management companies are not.

{¶ 22} We hold that the trial court did not err in ruling that Constellation is not a political subdivision within the meaning of R.C. 2744.01(F) and that both Constellation and Patrick Flanagan lack immunity under R.C. Chapter 2744 from appellee’s claims.

{¶ 23} We find appellant’s first assignment of error not well-taken.

{¶ 24} Appellant’s second assignment of error argues that the trial court erred in not finding that political subdivision immunity barred the claims against Constellation and Flanagan. The court’s ruling under Assignment of Error No. 1 is dispositive of the issues raised under Assignment of Error No. 2.

{¶ 25} We find Assignment of Error No. 2, not well-taken.

{¶ 26} Under Assignment of Error No. 3, appellants contend that the trial court erred in failing to grant them summary judgment on the merits of the underlying claims. We conclude that the court lacks jurisdiction to consider this assignment of error due to lack of a final appealable order.

{¶ 27} “An appellate court can review only final orders, and without a final order, an appellate court has no jurisdiction.” *Supportive Solutions L.L.C. v. Electronic Classroom of Tomorrow*, 137 Ohio St.3d 23, 2013-Ohio-2410, 997 N.E.2d 490, ¶ 10. R.C. 2744.02(C) provides that an order denying a political subdivision or employee of a

political subdivision “the benefit of an alleged immunity from liability as provided in this chapter or any other provision of the law is a final order.” R.C. 2744.02(C).

{¶ 28} In *Riscatti*, 137 Ohio St.3d 123, 2013-Ohio-4530, 998 N.E.2d 437, the Ohio Supreme Court considered the scope of R.C. 2744.02(C) interlocutory appeals. The court ruled in *Riscatti* that an order denying a political subdivision’s dispositive motion asserting a statute of limitations defense “does not deny the benefit of immunity and is not a final, appealable order even though it arose along with a political subdivision’s immunity claim.” *Id.* at ¶ 19. The court reasoned: “Although our prior decisions have interpreted R.C. 2744.02(C) broadly in favor of early appeal, they have always been tethered directly to the defense of immunity, not other defenses. E.g., *Supportive Solutions, L.L.C.*, at ¶ 13.” *Id.* at ¶ 20.

{¶ 29} As with the issue of the statute of limitations considered in *Riscatti*, the issue of whether appellants are entitled to summary judgment on the merits of appellee’s negligence claims presented here, is an issue independent of and not involved in the determination of whether appellants are immune from those claims. Applying *Riscatti*, we conclude that R.C. 2744.02(C) does not apply to make the order denying summary judgment in this case a final appealable order on the merits of the negligence claims. Accordingly, we conclude that the court lacks jurisdiction to consider the issues raised in Assignment of Error No. 3.

{¶ 30} Justice having been afforded the parties complaining, we affirm the judgment of the Lucas County Court of Common Pleas and remand this case for further proceedings. We order appellants to pay the costs of this appeal pursuant to App.R. 24.

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

Arlene Singer, J.

JUDGE

Thomas J. Osowik, J.
CONCUR.

JUDGE

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