

IN THE SUPREME COURT OF OHIO

OHIO BELL TELEPHONE)	Case No. 2008 -1171
COMPANY, et al.,)	
)	
Plaintiffs-Appellants)	On Appeal from the Cuyahoga
)	County Court of Appeals,
vs.)	Eighth Appellate District
)	
)	
DIGIOIA-SUBURBAN)	Court of Appeals
EXCAVATING, LLC et al.)	Consolidated case Nos. 089708 and
)	089907
Defendants-Appellees)	

APPELLEE CITY OF CLEVELAND'S MEMORANDUM IN RESPONSE TO
APPELLANTS' MEMORANDA IN SUPPORT OF JURISDICTION

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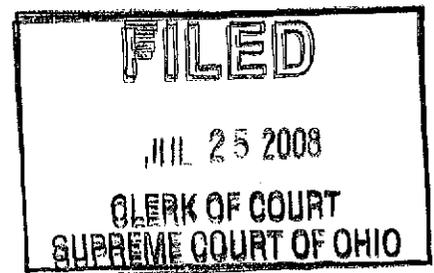
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I. THIS IS NOT A CASE OF PUBLIC OR GREAT GENERAL INTEREST AND APPELLANTS' ARGUMENTS CONTRAVENE *ELSTON V. HOWLAND LOCAL SCHOOLS* (2007), 113 OHIO ST.3D 314 AND THE LANGUAGE OF R.C. 2744.03(A)(5)

The Cuyahoga County Court of Appeals, Eighth Appellate District ("Eighth District") with its Order of April 30, 2008 correctly held that the City of Cleveland ("City") was immune from Plaintiff-Appellants' negligence allegations pursuant to application of R.C. 2744.03(A)(5). In so holding the Eighth District considered the facts that had been placed before the trial court, the negligence claims presented against the City in the various amended complaints, the statutory language, and the *Elston v. Howland Local Schools*, 113 Ohio St.3d 314, 2007-Ohio-2070 decision. Given the facts, allegations, and the statutory language at issue, *Elston* makes clear that the appellants misconstrue the application of this sovereign immunity defense and their appeal is not well taken.

With *Elston* the Court reversed an appellate court's denial of sovereign immunity under circumstances similar to the issues presented herein - where a subdivision's employee's exercise of judgment and discretion in determining how to use equipment and materials was at issue, where no claims were presented against the employee, and where the complaint against the political subdivision failed to allege malice, bad faith, or wanton or reckless conduct. *Elston* made clear under such circumstances where there are no allegations of malice, bad faith, or wanton or reckless conduct against the political subdivision that a court would err in straying beyond the pleadings in considering an award of sovereign immunity under R.C. 2744.03(A)(5).

In reversing the trial court and entering judgment on behalf of the City pursuant to R.C. 2744.03(A)(5) the Eighth District relied directly upon this Court's analysis and

holding in *Elston*. Appellants' basic premise that the City retains an ongoing burden under R.C. 2744.03(A)(5) to establish that its employee did not act with malice, in bad faith, or in a wanton or reckless manner, when all of the allegations against the City are predicated in negligence only is incorrect as a matter of law. The Eighth District ruled correctly and appellants' requests for jurisdiction should be denied.

II. STATEMENT OF THE CASE AND FACTS

This case involves negligence allegations brought by appellants for alleged property damages flowing from a sudden emergency that occurred at a construction site that was being excavated by co-defendant Digioia Suburban Excavating, LLC ("Digioia") pursuant to a contract Digioia had entered into with co-defendant Cuyahoga County to reconstruct a section of Lee Road in the City of Maple Heights.

An employee of the City's Division of Water happened to be visiting the Digioia work site at the time water suddenly erupted upwards from the area being excavated. The City had no prior notice of any water line problems or leaks before the sudden eruption. While the source of the leak would be linked to a 24 inch water main visual determination of the source of the water at the onset was obscured by gushing water and dirt. The City employee's review of his utility map showed 12 inch, 24 inch, and 36 inch water lines in the excavation area. The City's employee exercised his discretion and judgment at the scene in determining how to use materials, supplies, equipment, and personnel to deal with the unexpected situation. Whatever disagreement appellants may have with the employee's exercise of discretion and judgment at the scene, each of them brought separate complaints characterized in negligence only seeking to recover for property damages against the City only. The various cases were consolidated with each

of the appellants arguing that the City had failed to exercise ordinary and reasonable care in the performance of its duties.

The City affirmatively moved for summary judgment against each of the appellants' negligence allegations pursuant to the sovereign immunity protections of R.C. 2744.03(A)(5). The trial court denied the City's motion for summary judgment and the City appealed the immunity ruling to the Eighth District. The Eighth District conducted a *de novo* review and announced its decision reversing the trial court and ruling in favor of the City on March 27, 2008. Appellants Ohio Bell and East Ohio Gas dba Dominion filed motions for reconsideration. The Eighth District denied the motions for reconsideration and entered judgment in favor of the City on April 30, 2008.

III. LAW AND ARGUMENT

The East Ohio Gas Company DBA Dominion East Ohio's Proposition of Law No. 1:

The political subdivision bears the burden of proof of successfully reinstating immunity under R.C. 2744.03.

The Ohio Bell telephone Company's Proposition of Law No 1:

The political subdivision bears the burden of proof of successfully reinstating immunity under R.C. 2744.03.

The Walgreen Company's Proposition of Law:

A political subdivision bears the burden of proof pursuant to R.C. 2744.03 to prove entitlement to one of the defenses enumerated by the Ohio General Assembly therein.

The East Ohio Gas Company DBA Dominion East Ohio's Proposition of Law No. 2:

A Plaintiff's failure to plead malice, bad faith, or wanton or reckless conduct in its initial pleadings does not automatically entitle a political subdivision to immunity under R.C. 2744.03(A)(5).

The Ohio Bell telephone Company's Proposition of Law No 2:

A Plaintiff's failure to plead malice, bad faith, or wanton or reckless conduct in its initial pleadings does not automatically entitle a political subdivision to immunity under R.C. 2744.03(A)(5).

The judgment and discretion exercised by a City employee in responding to the sudden eruption of water at the Digioia excavation site forms the basis for the appellants' allegations against the City. Considerable discovery was undertaken during the pendency of the case and the various plaintiffs were allowed by the trial court to file amended complaints as requested. At all times the appellants' allegations against the City remained predicated in simple negligence only.

It is recognized that whether a political subdivision is immune from liability is purely a question of law, properly determined prior to trial, and preferably on a motion for summary judgment. *Conley v. Shearer* (1992), 64 Ohio St.3d 284, 292. The City filed a properly supported motion for summary judgment establishing that the City as a political subdivision was immune from appellants' negligence claims as a matter of law pursuant to R.C. 2744.03(A)(5).¹ R.C. 2744.03 states in pertinent part:

(A) In a civil action brought against a political subdivision or an employee of a political subdivision to recover damages for injury, death, or loss to person or property allegedly caused by any act or omission in connection with a governmental or proprietary function, the following defenses or immunities may be asserted to establish nonliability:

* * *

(5) The political subdivision is immune from liability if the injury, death, or loss to person or property resulted from the exercise of judgment or discretion in determining whether to acquire, or how to use, equipment, supplies, materials, personnel, facilities, and other resources unless the judgment or discretion was exercised with malicious purpose, in bad faith, or in a wanton or reckless manner.

¹ The fact that a proprietary exception under R.C. § 2744.02(B)(2) may have been involved does not have any effect on application of the defenses allowed by R.C. 2744.03 as "[b]y their very terms, ..., the exceptions set forth in R.C 2744.02(B)(2) through (4) are *subject to* R.C 2744.03." *Bilfield v. Orange Board of Education* (Dec. 11, 1997) 8th Dist. No. 72070 (at * 4), 1997 WL 767462.

The Eighth District had previously recognized in matters involving the application of R.C. § 2744.03(A)(5) that a plaintiff's "failure to plead that the judgment or discretion of the appellees' employees was exercised with malicious purpose, in bad faith, or in a wanton or reckless manner" permitted application of immunity to the appellants' claim of injury. *Mackulin v. Lakewood Board of Education* (March 11, 1993), 8th Dist. No. 61808, 1993 WL 69555.

While each of the appellants take a different tack in addressing the propositions of law grouped above, appellants incorrectly argue that the City has the affirmative burden of proving it did not exercise judgment or discretion with malicious purpose, in bad faith, or in a wanton or reckless manner - even though their complaints and amended complaints against the City were at all times brought in simple negligence only. The City has no such burden where only negligence has been alleged and appellants' arguments conflict with recognized precedent in the Eighth District and the Ohio Supreme Court's recent holding and application of sovereign immunity under R.C. 2744.03(A)(5) in the 2007 *Elston* decision.

The Syllabus of the Court in *Elston* holds that:

1. Pursuant to R.C. 2744.03(A)(5), a political subdivision is immune from liability if the injury complained of resulted from an individual employee's exercise of judgment or discretion in determining how to use equipment or facilities unless that judgment or discretion was exercised with malicious purpose, in bad faith, or in a wanton or reckless manner, because a political subdivision can act only through its employees.

In reaching such holding the Court was presented with circumstances that mirror the pleading and immunity issues presented in the instant matter. The *Elston* Court considered a certified conflict between appellate jurisdictions, with the issue framed as: "Whether a political subdivision's immunity from liability under

R.C. 2744.03(A)(5) applies only to the acts of the political subdivision, and not to the acts of the employees of the political subdivision.” *Id.* at ¶ 1.

The Court began its analysis recognizing that the Eleventh District Court of Appeals had overruled the trial court’s entry of summary judgment in favor of the subdivision, Howland Local Schools, having “determined that a genuine issue of material fact existed regarding whether ...[the subdivision’s employee] acted with a malicious purpose, in bad faith, or in a wanton and reckless manner *despite the fact that no such allegations had been presented in the pleadings.*” *Id.* at ¶ 2 (emphasis added).

Elston makes clear in reaching its holding that “the appellate court concluded that genuine issues of material fact also existed regarding whether ... [the subdivision’s employee] acted with a malicious purpose, in bad faith, or in a wanton and reckless manner despite the fact that *Elston* had not included any such allegations of malice, bad faith, or reckless conduct in the amended complaint.” *Id.* at ¶6.² Notwithstanding the 11th District’s recognition of questions of genuine issues of material fact concerning malice, bad faith, wantonness, and recklessness, *Elston* specifically upholds successful assertion of the R.C. 2744.03(A)(5) defense where no claim of recklessness had been presented:

² *Elston*’s recognition that the appellate court had concluded that genuine issues of material fact existed in overturning the award of summary judgment clearly evidences that appellants misread *Elston*. East Ohio Gas dba Dominion goes as far as to argue that in deciding *Elston* the Ohio Supreme Court was deciding a matter where “there was no suggestion of reckless conduct in the record evidence”. (See East Ohio Gas’ Memo at p. 13). Such reading of *Elston* is incorrect and ignores the obvious import of the Court’s recognition of the *Elston* appellate court’s belief of what the record below showed. As herein, the Supreme Court in deciding *Elston* and upholding summary judgment under R.C. 2744.03(A)(5) keyed in on the most basic fact that no allegations of malice, bad faith, or reckless conduct had been brought in the amended complaint.

The appellate court here has added its own phrases to this statute and unnecessarily manipulated and confused it. Because a school district can act only through its employees, R.C. 2744.03(A)(5) affords a defense to liability. In this instance, Elston's injury resulted from the judgment or discretion of the coach in determining how to use equipment or facilities. *No claim is presented suggesting reckless conduct.* Thus, the school district successfully asserted this defense in this instance. *Id.* at ¶ 26.

Contrary to appellants' arguments in the instant matter, *Elston* makes clear that there is no burden on the defendant plaintiff to establish its lack of malice, bad faith, or wanton or reckless conduct where only negligence is pleaded:

Finally, we recognize that because the amended complaint filed here presented no claims against ... [the individual subdivision employee], we need not consider any defense he may have been able to assert pursuant to R.C. 2744.03(A)(6). *Furthermore, because the amended complaint failed to allege malice, bad faith, or wanton or reckless conduct, the appellate court strayed well beyond the pleadings and erred in reversing the judgment of the trial court in that regard, and we need not further address that issue. Id.* at ¶ 31. (emphasis added).

Appellants' arguments that the Eighth District's decision is inconsistent with the *Elston* decision are mistaken. The Eighth District understood and correctly applied *Elston* in finding on behalf of the City:

The Ohio Supreme Court has held that where a party's complaint against a political subdivision does not allege malice, bad faith, or wanton or reckless conduct, a court errs by denying immunity pursuant to R.C. 2744.03(A)(5) where the alleged injury, death, or loss to person or property resulted from the political subdivision's exercise of judgment or discretion in determining whether to acquire, or how to use, equipment, supplies, materials, personnel, facilities, and other resources. *Elston v. Howland Local Schools*, supra at ¶ 31; accord *Knotts v. McElroy*, Cuyahoga No. 82682, 2003-Ohio-5937 (upholding dismissal of plaintiff's complaint on basis of qualified immunity where plaintiff had not alleged acts against the governmental entity beyond that of mere negligence).

Ohio Bell Tel. Co. v. Digioia-Suburban Excavating, L.L.C., 8th Dist. Nos. Nos. 89708, 89907, 2008 -Ohio- 1409, at ¶ 39.

Additionally, the Eighth District's holding and understanding of *Elston* is in accord with the very recent 10th District Court of Appeals decision in *Smith v. Marti*, --- N.E.2d ----, 2008-Ohio-2978 wherein the court addressing the exercise of judgment and discretion under R.C. 2744.03(A)(5) recognized that:

In *Elston* at ¶ 31, the Supreme Court of Ohio found that, in the absence of allegations in the complaint that the defendant acted with malice, bad faith or wanton or reckless conduct, the appellate court erred by straying beyond the pleadings and reversing the trial court's entry of summary judgment based on political subdivision immunity. *Smith* at ¶ 32.

See also *Monteith v. Delta Productions, Inc.*, 3rd Dist. Nos. 3-07-35, 3-07-36, 2008 -Ohio- 1997, at ¶ 28 (Citing *Elston*, the Third District upheld summary judgment in favor of the city relating to its exercise of discretion and judgment in the use of equipment, personnel, and other resources under authority of R.C. 2744.03(A)(5) where appellants had only alleged negligence).

The decisions relied upon by appellants³ in arguing the City's burden are distinguished from *Elston* and the complaints against the City as they involve matters where actual allegations of reckless, malicious, bad faith, wanton or willful behavior have been alleged against a subdivision or directly against an employee. As addressed above no such claims were pleaded in *Elston* and no such claims were presented against the

³ Appellant Ohio Bell's argument that the Eighth District's analysis improperly renders the third tier [the defenses allowed under R.C. 2744.03] of the immunity statute broader than the second tier analysis [is there a R.C. 2744.02(B) exception] is simply not supportable. Ohio Bell relies upon the 1996 *Hall v. Fort Fry* decision, to argue: "Thus, the immunity statute is not intended to protect any conduct that may be characterized as discretionary". (Ohio Bell's memorandum at p. 7) Ohio Bell fails to reference or even acknowledge *Elston's* analysis of R.C. 2744.03(A)(5) and the circumstance that it only alleged negligence claims against the City.

City or its employee herein.⁴ See *Hall v. Fort Frye Local School Bd. Of Educ.*, 111 Ohio App.3d 690, 693 (“[t]he second count alleged that the school's failure to correct, remedy, or repair the latent dangerous condition of the sprinkler-head attachments constituted wanton or willful misconduct.”); *Thompson v. Bagley* 3rd Dist. No. 11-04-12, 2005-Ohio-1921 (matter involved actual allegations of malice, bad faith, and recklessness) Id. at ¶ 6; *Edinger v. Allen Cty. Bd. Of Commrs.*, (April 26, 1995) 3rd Dist. No. 1-94-84 (addresses issue of whether subdivision employee defendant actions were wanton or reckless);⁵ *Fitzpatrick v. Spencer* 2nd Dist. No. 20067, 2004-Ohio-1940, (the complaint directly asserted reckless conduct by the police officer involved) Id. at ¶ 6; *Hunter v. City of Columbus* (10th Dist. 2000), 139 Ohio App.3d 962 (plaintiff had alleged that the employee driver was guilty of willful and wanton misconduct); *Svette v. Caplinger*, 7th Dist No. , 2007-Ohio-664 (plaintiffs had alleged reckless or wanton misconduct), at ¶¶ 29-30.

Appellants’ arguments are contrary to the holding and analysis undertaken in *Elston*. As noted above, the affirmative defense provided by R.C. 2744.03(A)(5) is applied in circumstances where an employee of a political subdivision has exercised judgment or discretion “in determining whether to acquire, or how to use, equipment,

⁴ Walgreen’s separate reliance (memo at p. 9) on *Evans v. S. Ohio Med Ctr* (4th Dist. 1995), 103 Ohio App.3d 250, 255 is misplaced as that matter did not involve sovereign immunity burden of proof considerations, but addressed defendant’s burden of proof in establishing a statute of limitations defense.

⁵ East Ohio Gas also cites (Memo at p. 13) to *Matkovich v. Penn Cent. Transp. Co.* (1982), 69 Ohio St.2d 210, 214 as relied upon by *Edinger* for the proposition “The issue of wanton misconduct is normally a jury question”. The Plaintiff in *Matkovich* had brought an action actually alleging injuries resulting from wanton misconduct by the railroad. Again, East Ohio Gas and the other appellants only alleged negligence in their original and amended complaints and their argument under the particular circumstances where only negligence is at issue is without merit as *Elston* makes abundantly clear.

supplies, materials, personnel, facilities, and other resources unless the judgment or discretion was exercised with malicious purpose, in bad faith, or in a wanton or reckless manner.” This matter involved the exercise of judgment and discretion protected by R.C. 2744.03(A)(5), with no allegations presented involving malicious purpose, bad faith, wantonness, or recklessness.

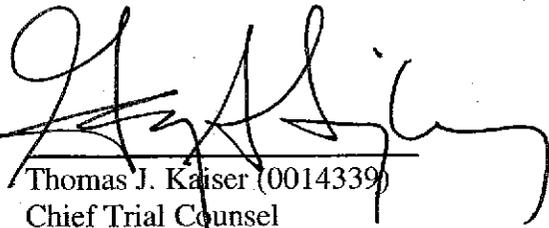
IV. CONCLUSION

Appellants do not present a case of public and great general interest for review by this Court nor are their arguments supported by the law governing application of the R.C. 2744.03(A)(5) sovereign immunity defense. Judgment in favor of the City of Cleveland does not improperly expand the scope of sovereign immunity as argued by appellants. Rather, the Eighth District’s judgment properly follows its own precedent and is in accord with the language of R.C. 2744.03(A)(5) and *Elston v. Howland Local Schools*, 113 Ohio St.3d 314, 2007-Ohio-2070, this Court’s recent decision construing application of the statute where only negligence has been alleged. As in *Elston*, appellants’ amended complaints failed to allege malice, bad faith, or wanton or reckless conduct and the City is not liable as a matter of law for the alleged negligent exercise of judgment and discretion in determining how to use materials, supplies, personnel, equipment and other resources.

For the reasons addressed above appellants’ requests for review by this Court of the Eighth District’s judgment in favor of the City should be denied

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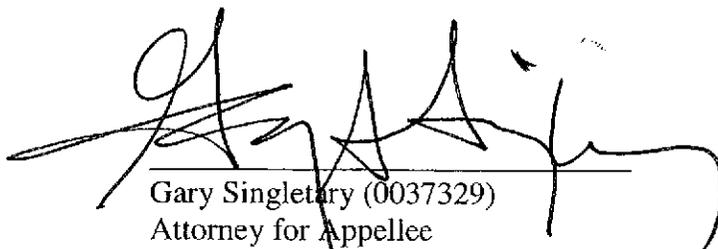
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