[Cite as *Hess v. Austintown Twp.*, 2009-Ohio-4808.]

STATE OF OHIO, MAHONING COUNTY

IN THE COURT OF APPEALS

SEVENTH DISTRICT

SUSAN M. HESS, et al.,	)	
	)	CASE NO. 08 MA 254
PLAINTIFFS-APPELLANT,	)	
	)	
- VS -	)	OPINION
	)	
AUSTINTOWN TOWNSHIP, et al.,	)	
	)	
DEFENDANTS-APPELLEES.	)	

CHARACTER OF PROCEEDINGS: Civil Appeal from Common Pleas Court, Case No. 08 CV 1521.

JUDGMENT: Affirmed.

APPEARANCES:

For Plaintiffs-Appellant:

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For Defendants-Appellees:

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JUDGES:
Hon. Mary DeGenaro
Hon. Joseph J. Vukovich
Hon. Gene Donofrio

Dated: September 9, 2009

[Cite as *Hess v. Austintown Twp.*, 2009-Ohio-4808.]
DeGenaro, J.

{¶1} This timely appeal comes for consideration upon the record in the trial court, the parties' briefs, and their oral arguments before this court. Plaintiff-Appellant, Susan Hess, appeals the decision of the Mahoning County Court of Common Pleas granting summary judgment in favor of Defendant-Appellee, Austintown Township, in a trip-and-fall negligence action. On appeal, Hess argues the trial court erred by granting summary judgment in favor of Austintown, because genuine issues of material fact remain about whether the sidewalk defect was substantial and whether the open and obvious doctrine applies.

{¶2} Upon review, Hess's assignment of error is meritless. We hold that Austintown is immune from liability in this action pursuant to R.C. 2744 et seq. Therefore, the trial court correctly granted summary judgment in favor of Austintown. Accordingly, we affirm the judgment of the trial court.

Facts

{¶3} On April 1, 2006, while Hess was walking her dog, she tripped and fell on the sidewalk and was injured. The area of sidewalk where Hess fell was adjacent to a duplex owned by John Sandfrey in Austintown, Ohio. Hess and her husband Greg filed a complaint against Austintown and Sandfrey in the Mahoning County Court of Common Pleas, alleging negligence and loss of consortium. Austintown and Sandfrey answered separately thereto. Austintown listed sovereign immunity pursuant to R.C. 2744 et seq. as a defense in its answer. Hess was subsequently deposed.

{¶4} On October 14, 2008, Austintown filed a motion for summary judgment, with an affidavit attached in support thereof. In that motion, Austintown first argued there was no evidence demonstrating that any defect in the sidewalk proximately caused Hess's fall. In addition, Austintown argued it was not liable as a matter of law because the sidewalk defect was insubstantial and it had neither actual nor constructive notice of the defect. Alternatively, Austintown argued that any defect was open and obvious. Further, Austintown noted it had pled immunity as a defense in its answer. Hess then filed a brief in opposition to Austintown's motion for summary judgment, attaching her own affidavit in support.

{¶5} On November 24, 2008, the trial court granted summary judgment in favor of Austintown. The court did not give specific reasons for its decision, aside from stating: "The Court finds the [sic] there exist [sic] no genuine issue of material fact with regard to any of the claims and allegations contained in the Complaint and reasonable minds can come to one conclusion and that conclusion is adverse to Plaintiff. The Court further finds that Defendant, Austintown Township is entitled to judgment as a matter of law." Further, the court found no just cause for delay. On December 26, 2008, Hess voluntarily dismissed her claims against Sandfrey, the remaining defendant, without prejudice, pursuant to Civ.R. 41(A).

Summary Judgment

{¶6} Hess asserts the following assignment of error on appeal:

{¶7} "The trial court committed error prejudicial to Appellant when it sustained Appellee's motion for summary judgment."

{¶8} When reviewing a trial court's decision to grant summary judgment, an appellate court applies the same standard used by the trial court and, therefore, engages in de novo review. *Parenti v. Goodyear Tire & Rubber Co.* (1990), 66 Ohio App.3d 826, 829, 586 N.E.2d 1121. Under Civ.R. 56, summary judgment is only proper when the movant demonstrates that, viewing the evidence most strongly in favor of the nonmovant, reasonable minds must conclude no genuine issue as to any material fact remains to be litigated and the moving party is entitled to judgment as a matter of law. *Doe v. Shaffer* (2000), 90 Ohio St.3d 388, 390, 738 N.E.2d 1243. A fact is material when it affects the outcome of the suit under the applicable substantive law. *Russell v. Interim Personnel, Inc.* (1999), 135 Ohio App.3d 301, 304, 733 N.E.2d 1186.

{¶9} When moving for summary judgment, a party must produce some facts that suggest a reasonable fact-finder could rule in her favor. *Brewer v. Cleveland Bd. of Edn*. (1997), 122 Ohio App.3d 378, 386, 701 N.E.2d 1023. "[T]he moving party bears the initial responsibility of informing the trial court of the basis for the motion, and identifying those portions of the record which demonstrate the absence of a genuine issue of fact on a material element of the nonmoving party's claim." *Dresher v. Burt* (1996), 75 Ohio St.3d

280, 296, 662 N.E.2d 264. The trial court's decision must be based upon "the pleadings, depositions, answers to interrogatories, written admissions, affidavits, transcripts of evidence, and written stipulations of fact, if any, timely filed in the action." Civ.R. 56(C). Id. The nonmoving party has the reciprocal burden of specificity and cannot rest on the mere allegations or denials in the pleadings. Id. at 293, 662 N.E.2d 264.

{¶10} On appeal, Hess contends summary judgment was inappropriate because she claims genuine issues of material fact remain about whether the sidewalk defect was substantial and whether the open and obvious doctrine applies. To the contrary, Austintown argues that summary judgment was proper because the defect was insubstantial and Austintown had no notice of it. In addition, Austintown argues that Hess failed to prove proximate cause, and that the open and obvious doctrine obviates its duty.

{¶11} As a threshold matter, however, we hold that Austintown is immune from liability in this suit. Therefore we decline to specifically address the arguments advanced by the parties in their briefs. Although sovereign immunity was not raised on appeal, it was raised in the trial court. Since this court must undertake a de novo assessment of this cause, it is within the proper scope of our review to consider sovereign immunity. See, e.g., *Homan, Inc. v. A1 AG Services L.L.C.*, 175 Ohio App.3d 51, 2008-Ohio-277, 885 N.E.2d 253, at ¶20.

Sovereign Immunity

{¶12} "The Political Subdivision Tort Liability Act is codified in R.C. Chapter 2744 and was enacted in response to the judicial abolishment of the common-law doctrine of sovereign immunity for municipal corporations in *Haverlack v. Portage Homes, Inc*. (1982), 2 Ohio St.3d 26, 2 OBR 572, 442 N.E.2d 749, and *Enghauser Mfg. Co. v. Eriksson Eng. Ltd*. (1983), 6 Ohio St.3d 31, 6 OBR 53, 451 N.E.2d 228. See *Franks v. Lopez* (1994), 69 Ohio St.3d 345, 347, 632 N.E.2d 502. The Act established statutory tort immunity in some cases in which political subdivisions, including cities [and townships], may otherwise be sued in negligence. See id." *Haynes v. Franklin*, 95 Ohio St.3d 344, 2002-Ohio-2334, 767 N.E.2d 1146, at ¶9.

{¶13} As the Ohio Supreme Court has explained in *Colbert v. Cleveland*, 99 Ohio

St.3d 215, 2003-Ohio-3319, 790 N.E.2d 781: "determining whether a political subdivision is immune from tort liability pursuant to R.C. Chapter 2744 involves a three-tiered analysis.

{¶14} "The first tier [under R.C. 2744.02(A)(1)] is the general rule that a political subdivision is immune from liability incurred in performing either a governmental function or proprietary function. * * * However, that immunity is not absolute. * * *

{¶15} "The second tier of the analysis requires a court to determine whether any of the five exceptions to immunity listed in R.C. 2744.02(B) apply to expose the political subdivision to liability. * * *

{¶16} "If any of the exceptions to immunity in R.C. 2744.02(B) do apply and no defense in that section protects the political subdivision from liability, then the third tier of the analysis requires a court to determine whether any of the defenses in R.C. 2744.03 apply, thereby providing the political subdivision a defense against liability." *Colbert* at ¶7-9 (internal citations omitted.)

{¶17} With regard to the first tier of the analysis, Austintown, a township, is a political subdivision pursuant to R.C. 2744.01(F), and the maintenance and repair of sidewalks constitutes a governmental function pursuant to R.C. 2744.01(C)(2)(e). Thus, it is immune from suit. We next consider the second tier of the analysis and determine whether one of the exceptions contained in R.C. 2744.02(B)(1)-(5) apply, and expose the township to liability.

{¶18} The exceptions are as follows:

{¶19} "(1) Except as otherwise provided in this division, political subdivisions are liable for injury, death, or loss to person or property caused by the negligent operation of any motor vehicle by their employees when the employees are engaged within the scope of their employment and authority. * * *

{¶20} "(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.

{¶21} "(3) Except as otherwise provided in section 3746.24 of the Revised Code, 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, except that it is a full defense to that liability, when a bridge within a municipal corporation is involved, that the municipal corporation does not have the responsibility for maintaining or inspecting the bridge.

{¶22} "(4) Except as otherwise provided in section 3746.24 of the Revised Code, political subdivisions are liable for injury, death, or loss to person or property that is caused by the negligence of their employees and that occurs within or on the grounds of, and is due to physical defects within or on the grounds of, buildings that are used in connection with the performance of a governmental function, including, but not limited to, office buildings and courthouses, but not including jails, places of juvenile detention, workhouses, or any other detention facility, as defined in section 2921.01 of the Revised Code.

{¶23} "(5) In addition to the circumstances described in divisions (B)(1) to (4) of this section, a political subdivision is liable for injury, death, or loss to person or property when civil liability is expressly imposed upon the political subdivision by a section of the Revised Code, including, but not limited to, sections 2743.02 and 5591.37 of the Revised Code. Civil liability shall not be construed to exist under another section of the Revised Code merely because that section imposes a responsibility or mandatory duty upon a political subdivision, because that section provides for a criminal penalty, because of a general authorization in that section that a political subdivision may sue and be sued, or because that section uses the term "shall" in a provision pertaining to a political subdivision." R.C. 2744.02(B)(1)-(5).

{¶24} The only exception that could arguably apply is R.C. 2744.02(B)(3), which deals with the negligent failure to keep public roads in repair. However, several of our sister districts have held that the R.C. 2744.02(B)(3) exception no longer applies in cases involving an allegation of a negligent failure to maintain a public *sidewalk.* See *Burns v. City of Upper Arlington,* 10th Dist. No. 06AP-680, 2007-Ohio-797, at ¶14-16; *Gordon v.*

Dziak, 8th Dist. No. 88882, 2008-Ohio-570, at ¶38. These courts reached this conclusion because R.C. 2744.02(B)(3) was amended to, inter alia, no longer include the word "sidewalk." This amendment was effective April 6, 2003, three years prior to Hess's fall.

{¶25} The prior version of R.C. 2744.02(B)(3) read: "[P]olitical subdivisions are liable for injury, death, or loss to person or property caused by their failure to keep public roads, highways, streets, avenues, alleys, *sidewalks*, bridges, aqueducts, viaducts, or public grounds within the political subdivisions open, in repair, and free from nuisance * * *." See 149 Ohio Laws, Part II, 3500, 3508 (emphasis added.)

{¶26} However, as quoted above, the current version of R.C. 2744.02(B)(3) only mentions "public roads," not sidewalks. Further, R.C. 2744.01(H) defines "public roads" as: "public roads, highways, streets, avenues, alleys, and bridges within a political subdivision. * * *." R.C. 2744.01(H). Therefore, sidewalks are not considered public roads.

{¶27} In light of this change in the law, the Tenth District in *Burns,* supra*,* held that the R.C. 2744.02(B)(3) exception did not apply in a case where a pedestrian tripped and fell over a manhole cover that was part of the city's sidewalk, since R.C. 2744.02(B)(3) had been amended to remove reference to sidewalks. *Burns* at ¶14-16. The Eighth District reached the same conclusion in *Gordon,* supra*,* another case where a pedestrian tripped and fell on a city sidewalk. *Gordon* at ¶48.

{¶28} We have not specifically ruled on this issue. The only case in our district involving municipal liability for a sidewalk defect after R.C. 2744.02(B)(3) was amended in 2003 is *Dobranchin v. City of Canfield*, 7th Dist. No. 07MA119, 2008-Ohio-4968. In that case, one of the plaintiffs tripped over a water shut-off valve located on the edge of a sidewalk. Sovereign immunity was not argued on appeal, and we presume from the opinion that it was not raised as a defense in the trial court and therefore waived. See *Turner v. Central Local School Dist*. (1999), 85 Ohio St.3d 95, 98-99, 706 N.E.2d 1261. Accordingly, we did not address the issue of sovereign immunity with regard to the municipal defendant in *Dobranchin*, instead affirming the trial court's grant of summary judgment in favor of both the private and municipal defendants based on the open and

obvious doctrine. Id. at ¶26.

{¶29} Given the opportunity to squarely address this issue, we hold that R.C. 2744.02(B)(3) no longer provides an immunity exception for the negligent failure to maintain sidewalks. After the legislature amended R.C. 2744.02(B)(3) in 2003, that provision, on its face, no longer provides such an exception. In *Howard v. Miami Twp. Fire Div*., 119 Ohio St.3d 1, 2008-Ohio-2792, 891 N.E.2d 311, the Ohio Supreme Court discussed other changes made to R.C. 2744.02(B)(3) by the 2003 amendments, namely the replacement of the phrase "free from nuisance" with "other negligent failure to remove obstructions." The Court found: "[w]e are persuaded that the legislature's action in amending R.C. 2744.02(B)(3) was not whimsy but a deliberate effort to limit political subdivisions' liability for injuries and deaths on their roadways." Id. at ¶26. It seems this logic must also apply to the legislature's decision to delete "sidewalks" from R.C. 2744.02(B)(3).

{¶30} Thus, based on the foregoing, we hold that Austintown was immune from liability in this suit pursuant to R.C. 2744 and the trial court correctly granted summary judgment in favor of Austintown. Accordingly, Hess's sole assignment of error is meritless and the judgment of the trial court is affirmed.

Vukovich, P.J., concurs.

Donofrio, J., concurs.