

**IN THE COURT OF APPEALS
FIRST APPELLATE DISTRICT OF OHIO
HAMILTON COUNTY, OHIO**

CITY OF NORTH COLLEGE HILL EX REL. SHAWNA O'SHEA,	:	APPEAL NOS. C-160215 C-160233
Plaintiff-Appellee,	:	TRIAL NO. A-1403791
vs.	:	<i>JUDGMENT ENTRY.</i>
NORTH COLLEGE HILL,	:	
and	:	
MARK FITZGERALD,	:	
Defendants-Appellants.	:	

We consider these appeals on the accelerated calendar, and this judgment entry is not an opinion of the court. *See* Rep.Op.R. 3.1; App.R. 11.1(E); 1st Dist. Loc.R. 11.1.1.

Defendants-appellants North College Hill (“NCH”) and Mark Fitzgerald appeal from the entry of the Hamilton County Common Pleas court, which denied their motions for summary judgment.

In a single assignment of error, North College Hill argues the trial court erred by denying it summary judgment on the basis that it was immune from suit under R.C. Chapter 2744. Fitzgerald argues in a single assignment of error that the trial court committed reversible error by denying him the benefit of statutory governmental immunity pursuant to R.C. Chapter 2744.

When reviewing a trial court’s decision denying summary judgment on the basis of immunity, this court employs a de novo standard of review. *See Munday v. Village of Lincoln Hts.*, 1st Dist. Hamilton No. C-120431, 2013-Ohio-3095, ¶ 15.

O’Shea filed a taxpayer action against NCH and Fitzgerald pursuant to R.C. 733.56, which provides that a taxpayer may institute suit against a municipal corporation “to restrain the misapplication of funds of the municipal corporation, the abuse of its corporate powers, or the execution or performance of any contract made on behalf of the municipal corporation in contravention of the laws of or ordinance governing it.”

“R.C. Chapter 2744 generally shields political subdivisions from tort liability in order to preserve their fiscal integrity.” *Riscotti v. Prime Properties. Ltd. Partnership.*, 137 Ohio St.3d 123, 2013-Ohio-4530, 998 N.E.2d 437, ¶ 15. Thus, political subdivision tort immunity is not available as a defense where a party’s claims against a political subdivision or its employees do not sound in tort and do not seek money damages. *See Big Springs Golf Club v. Donofrio*, 74 Ohio App.3d 1, 2, 598 N.E.2d 14 (9th Dist.1991); *LaBorde v. Gahanna*, 2015-Ohio-2047, 35 N.E.3d 55, ¶ 18 (10th Dist.).

NCH and Fitzgerald agree that they are not entitled to immunity under R.C. Chapter 2744 to the extent that O’Shea seeks only injunctive and declaratory relief against them. They argue, however that O’Shea has also requested money damages and attorney fees. As a result, they contend that they are entitled to immunity with respect to her requests for money damages associated with those claims. We disagree that O’Shea has sought monetary damages because she sought a constructive trust and rescission. Not every claim involving monetary relief is a request for money damages. *See LaBorde*, at ¶ 19. Here, where O’Shea brought suit

on behalf of North College Hill and is seeking the return of monies to North College Hill, she is seeking equitable relief and not monetary damages. *See* R.C. 733.61 (permitting the court to make an order that the equity of the case demands); *see also LaBorde* at ¶ 19; *State ex rel. Fatur v. Eastlake*, 11th Dist. Lake No. 2009-L-037, 2010-Ohio-1448 (holding that R.C. Chapter 2744 does not apply to claims for equitable relief); *Estate of Cowling v. Estate of Cowling*, 109 Ohio St.3d 276, 2006-Ohio-2418, 847 N.E.2d 405 (holding a constructive trust to be an equitable remedy). Thus, we find NCH and Fitzgerald's first argument meritless.

NCH and Fitzgerald next argue that O'Shea's request for attorney fees is tantamount to seeking an award of money damages. But the plain language of R.C. 733.61 provides the trial court with discretion to award attorney fees as part of the costs in a taxpayer action if judgment is awarded in the taxpayer's favor. *See City of Cincinnati v. City of Harrison*, 1st Dist. Hamilton No. C-130195, 2014-Ohio-2844, ¶ 40-44. As a result, we cannot conclude that R.C. Chapter 2744 provides NCH or Fitzgerald immunity from any attorney-fee award the court may impose should O'Shea successfully prosecute her taxpayer claims.

Thus, the trial court did not err by denying NCH's motion for summary judgment. We, therefore, overrule NCH's sole assignment of error.

With respect to Fitzgerald, the trial court concluded that O'Shea had presented evidence creating a genuine issue of material fact as to whether Fitzgerald had acted outside the scope of his employment. Based on our review of the record, we agree that O'Shea presented evidence to sustain her burden on summary judgment. Fitzgerald additionally argues that the trial court erred by denying him summary judgment because the taxpayer claims are barred by the one-year statute of limitations set forth in R.C. 733.60, and O'Shea lacks standing to bring such claims.

But we lack jurisdiction to address any claimed errors relating to the denial of summary judgment on these issues because their resolution does not directly deny Fitzgerald the benefit of any alleged immunity under R.C. Chapter 2744. *See, e.g., Riscotti*, 137 Ohio St.3d 123, 2013-Ohio-4530, 998 N.E.2d 437, at ¶ 20-21 (holding that the denial of a judgment on statute-of-limitations grounds under R.C. 2744.04(A) does not deny a political subdivision the benefit of immunity and is not, therefore, immediately appealable under R.C. 2744.02(C)); *see City of Harrison*, 1st Dist. Hamilton No. C-130195, 2014-Ohio-2844, at ¶ 47-49; *Leasure v. Adena Local School Dist.*, 2012-Ohio-3071, 973 N.E.2d 810 (4th Dist.).

We, therefore, overrule Fitzgerald’s sole assignment of error. Having found the assignments of error raised by NCH and Fitzgerald to be meritless, we affirm the judgment of the trial court.

Further, a certified copy of this judgment entry shall constitute the mandate, which shall be sent to the trial court under App.R. 27. Costs shall be taxed under App.R. 24.

FISCHER, P.J., DEWINE and MOCK, JJ.

To the clerk:

Enter upon the journal of the court on November 9, 2016
per order of the court _____.
Presiding Judge