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**In the Supreme Court of Ohio**

08-0569

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APPEAL FROM THE COURT OF APPEALS  
SECOND APPELLATE DISTRICT  
GREENE COUNTY, OHIO  
CASE NO. 2005 CA 0099

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DOTTIE HUBBELL,  
*Plaintiff-Appellee,*

v.

CITY OF XENIA, OHIO  
*Defendant-Appellant.*

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**MEMORANDUM IN SUPPORT OF JURISDICTION  
BY APPELLANT, CITY OF XENIA, OHIO**

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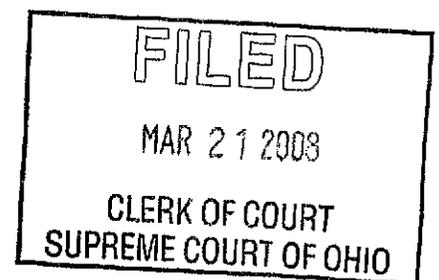


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**EXPLANATION AS TO WHY THIS IS A CASE OF PUBLIC OR  
GREAT GENERAL INTEREST**

There can be no reasonable dispute that the responsibilities of local municipalities, with respect to public sewer systems, are a matter of great public interest. Recently, Senator Brown challenged the federal government for assistance with Ohio's aging water and sewer infrastructure.<sup>1</sup> Ohio citizens everywhere are receiving notices with their water and sewer bills about rate increases due to infrastructure repair and rising costs of fuel for public vehicles. For these reasons and more, broad immunity protects Ohio's municipalities from liability from suits like this one.

Nonetheless, in an outcome-driven decision, the Second District created an entirely new duty for municipalities to immediately respond to emergency calls about water or sewage backing up into a resident's home. According to the Second District, municipalities are now potentially exposed to liability for their response to any call about rising water in a basement, a toilet backing up into the bathroom, or other sewer and water related call inside a citizen's home, regardless of whether the service call is causally connected to the maintenance of public sewers.

The court of appeal's decision further expands the potential liability for municipalities by concluding that decisions by municipal employees about whether to respond to calls about water and sewer backups inside an individual home are not discretionary. It states the duty to respond to calls about sewer backups inside a citizen's home are so compulsory and routine that municipal employees have no discretion to evaluate whether the call is related to a widespread public sewer problem before using public resources to respond. In effect, the Second District is holding that the municipality is no longer entitled to immunity under 2744.03(A)(5), a defense that has historically provided the city with immunity unless the decision about how to use public resources was reckless or wanton.

This is not a case where a municipality was negligent in cleaning, inspecting, or

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<sup>1</sup> [http://brown.senate.gov/newsroom/press\\_releases/release/?id=2dc78dd8-af87-4af2-bdbd-b7f97f937d7b](http://brown.senate.gov/newsroom/press_releases/release/?id=2dc78dd8-af87-4af2-bdbd-b7f97f937d7b).

otherwise maintaining its sewer systems. All agree, including the appellate court, that Xenia properly maintained its sewer systems. In twenty-plus years of living in Xenia, the plaintiff had not a single problem. The evidence forced the Court to re-direct its focus on a city employee who did not immediately respond to an emergency call for assistance about water backing up inside the plaintiff's home. To get the case to a jury, the court of appeals concluded Xenia had a legal duty to respond to such calls, that the duty is a part of the city's proprietary function as a matter of law, and that city employees have no discretion in responding to such calls under 2744.03(A)(5). Now, according to the Second District, Xenia and all other municipalities must respond to every single citizen call for assistance about sewer and water lines regardless of whether the call is possibly related to recent rainfall or a backup in the citizen's personal sewer and water lines. The ramifications of its decision in Ohio are obvious.

This case also presents an opportunity for the Court to clarify the summary judgment standard in Ohio courts. The court of appeals concluded there was a question of fact as to a number of different issues. In doing so, the court essentially required Xenia, the movant, to disprove the plaintiff's claims. Despite the movant's verified evidence and sworn testimony, the court imposed no genuine reciprocal burden on the non-movant to produce evidence under Rule 56(E). Instead, the court accepted the plaintiff's bare assertion of fact as true without any evidentiary support. For instance, Xenia presented a verified engineering map showing that the plaintiff's personal sewer line was not even connected to the very sewer main she alleged to have been blocked on the day of the incident. In response, the plaintiff relied solely upon her own assumption and personal feeling that her line was connected to one sewer main over another. Despite the lack of any genuine, admissible evidence from the plaintiff, the court of appeals nevertheless ruled a question of fact existed.

Amazingly, the court also concluded Xenia undertook a contractual duty to provide emergency sewer services to the plaintiff and, presumably, all citizens of Xenia. The court

assumed “municipal water and sewer service is typically provided to residents of the municipality pursuant to contract,” and extended such service to include responding to emergency calls about flooding inside a resident’s home. Plaintiff never alleged a contract, implied or otherwise. Nor was there any evidence of such a contract.

The summary judgment burden affects most civil cases, and is of grave importance to all of Ohio’s political subdivisions. Varying interpretations of the current summary judgment standard in Ohio has produced wildly varying outcomes for litigants. The ability of the lower courts to subjectively increase or decrease the summary judgment burden on litigants should be eliminated. The lower court’s creation of factual questions where the non-movant fails to offer such evidence needs to be addressed.

Because these matters involve questions of public or great general interest, the City of Xenia respectfully asks that the Court accept discretionary jurisdiction over this appeal. This Court should determine whether and to what extent municipalities have a duty to respond to calls for emergency sewer services based upon flooding inside a resident’s home. The Court should also determine whether the decision to respond to such calls is one that invokes discretion in whether and how to use public resources under 2744.03(A)(5). Finally, the Court should take the opportunity to clarify the burdens under Civil Rule 56. This request is supported by the following facts and law.

#### **STATEMENT OF THE CASE AND FACTS**

As learned in *Hubbell v. City of Xenia*, 115 Ohio St.3d 77, 2007-Ohio-4839, sewage backed up into the first floor of Plaintiff, Dottie Hubbell’s house. Hubbell contacted the City of Xenia for assistance, but it was after business hours. When no one answered, she called Xenia’s emergency number and spoke to the dispatcher for the City of Xenia Police Department. The police dispatcher contacted William Buckwalter, an employee in the Public Services Department. Buckwalter had a pager that allowed him to be contacted in emergencies. Because

there had been several reports of flooded basements that week due to heavy rainfall, Buckwalter told the dispatcher to contact him if the resident called in again. He testified that, if the resident called a second time, it was more likely to mean her emergency was related to city services as opposed to excessive rainfall.

Once Buckwalter was contacted by the police dispatcher a second time, he responded to Hubbell's home. His supervisor also responded to the scene. When the city employees arrived at Hubbell's house, they evaluated the nearest sewer main on Home Avenue (the one Plaintiff's home connects with) and determined it was flowing freely. They also checked the sewer main on Monroe Street and found it to also be flowing, though not as far as Home Avenue. Hubbell testified that water stopped coming into her house after city employees lifted the manhole cover on Monroe Street, but she presented no evidence establishing a causal connection between the two events. Despite the fact that the sewage had already stopped flowing into the plaintiff's house, the city employees decided to clear the Monroe Street line just in case the slow flow was somehow related. City employees thereafter tried to assist Hubbell in cleaning her house. Hubbell subsequently sued the City of Xenia for the sewage backup. She specifically alleged a blockage in the Monroe Street line, resulting from a lack of proper maintenance, caused the backup into her home.

After the parties engaged in discovery of the claims and defenses, the City of Xenia filed a Rule 56(C) motion for summary judgment. Xenia offered a properly authenticated engineering map of the sewer lines in Hubbell's neighborhood to demonstrate that Hubbell's private sewer line was not connected to the Monroe Street line. Instead, her personal line is connected to Home Avenue. Xenia further presented direct testimony that the Home Avenue line was flowing freely on the day of the incident. Thus, the backup must have been in Hubbell's own lateral line for which she has sole legal responsibility. Xenia also offered undisputed evidence that it had an established inspection and maintenance program for the City sewer lines based upon need and

resources. As a matter of law, Hubbell could not and did not demonstrate any negligence on the city's part in the maintenance of the municipal sewer lines. Xenia further argued it owed no duty to the plaintiff to respond to citizen calls about flooding inside the residence under the prevailing legal precedent, including *Commerce & Industry Ins. Co. v. Toledo* (1989), 45 Ohio St.3d 96; and *Bingham v. The City of Fairborn* (Apr. 17, 1980), 2nd App. No. CA 1121, 1980 WL 352391. Moreover, the City was immune under R.C. § 2744.03(A)(5) for discretionary decisions in how and when to use public resources.

In response to summary judgment, Hubbell presented no evidence that her personal sewer line was connected to the slower moving main on Monroe Street. She instead improperly offered her own personal belief that her lines were connected to Monroe Street based solely upon the fact that Xenia employees had later cleared that line. Hubbell provided no evidence that the sewer backup into her home was caused by a backup in the City's lines rather than her own. She presented no evidence that the City's inspection or maintenance procedures were negligent. Instead, she argued that city employees were negligent in responding to her call for service only after her second or third call, which was three hours after the flooding had begun. However, Hubbell never alleged any negligence on the part of the city after its employees affirmatively responded to her house. She admitted that any flooding stopped soon thereafter.

The trial court found there was a question of fact as to whether Xenia was entitled to immunity under Chapter 2744. The Second District initially declined to hear the merits of that decision for lack of a final appealable order under 2744.02(C), but that decision was reversed by this Court after Xenia's first appeal. *Hubbell*, 2007-Ohio-4839. Upon remand, the court of appeals issued an opinion reversing the trial court's decision on immunity in part and affirming it in part. The Second District agreed there was no evidence that Xenia had negligently maintained its sewer lines and that the city was entitled to immunity. However, the court ignored Ohio law and held the city had a duty to respond to calls for emergency assistance about flooding inside a

resident's home. The court did not cite this Court's decision in *Commerce Industry* and it distinguished its own *Bingham* case by inferring that Xenia had supposedly assumed a contractual duty to respond to emergency calls. The court of appeals further concluded that the decision to respond to calls for assistance with sewer backups was not discretionary under R.C. § 2744.03(A)(5). Therefore, the Court wrongly concluded the City of Xenia is not entitled to immunity for alleged negligence in responding to such calls, contrary to *Commerce Industry*, *Bingham*, Chapter 2744, and *Elston, infra*.

### **PROPOSITIONS OF LAW**

**First Proposition of Law:** A municipality has no legal duty to respond to emergency sewer calls inside a citizen's home unless and until the municipality affirmatively elects to respond.

**Second Proposition of Law:** The decision whether to respond to emergency sewer calls inside a citizen's home necessarily entails discretion by the public employee under R.C. § 2744.03(A)(5), particularly where any response could impose an otherwise non-existent legal duty upon the municipality.

**Third Proposition of Law:** The summary judgment standard under Ohio Civil Rule 56(C) does not require the movant to affirmatively disprove the claims of the party that ultimately bears the burden of proof.

### **ARGUMENT IN SUPPORT OF PROPOSITIONS OF LAW**

**First Proposition of Law:** A municipality has no legal duty to respond to emergency sewer calls inside a citizen's home unless and until the municipality affirmatively elects to respond.

In this case, Dottie Hubbell contacted the City of Xenia to report that she had sewer backing up into her house after business hours. When she discovered that the Public Services Department was closed, she dialed the police dispatch number. The police dispatcher called William Buckwalter, and Buckwalter asked to be contacted if Hubbell called again about the backup. He testified that there had been substantial rainfall in Xenia that week, and he had received a number of calls about water coming into local basements. Upon receipt of a second call, Buckwalter elected to respond to Hubbell's home.

In responding to summary judgment, the plaintiff relied exclusively upon the argument

that the three-hour delay in responding to house caused damage to her property. The City, however, argued that it did not have a legal duty to respond to the plaintiff's call for service under *Commerce & Industry Ins. Co., supra*, 45 Ohio St.3d 96 and *Bingham, supra*, 1980 WL 352391. Under this precedent, the only duty that could have existed in this particular case was under the city's general duty to protect persons and property in a governmental capacity and for which Xenia was clearly entitled to immunity under Chapter 2744 of the Ohio Revised Code. The appellate court's incorrect legal holding that Buckwalter's response to an emergency call for help amounts to a proprietary function is wrong and strips R.C. § 2744.01(C)(2)(b) of all meaning.

In *Bingham*, the plaintiff's home was flooded with raw sewage from the sewer system operated by the City of Fairborn. *Bingham*, 1980 WL 352391 at \*1. Just as in this case, Fairborn's lines were regularly inspected and maintained. *Id.* Upon discovering the flooding, the Bingham's immediately contacted the sanitation department. *Id.* However, no one answered the phones because everyone was at lunch. *Id.* Just as in this case, the Bingham's next called the police department and, later, the fire department. *Id.* The fire department and a utility superintendent responded nearly two hours after the Bingham's initial call. *Id.* Upon arrival, the utility superintendent opened a manhole, which, unlike this case, was filled and blocked. *Id.* Then, he called in a utility truck with a "rodder" to remove the blockage. *Id.*

The Bingham's alleged the City utility department was negligent in not answering its phone when it was on lunch and in sending only an investigator to respond to the scene, which created a longer delay. *Id.* at \*2. The Second District, however, rejected the Bingham's argument. The court explained that the imposition of liability for delayed response would require municipalities to maintain the same type of crews that are maintained by fire departments. *Id.* at \*6. In this case, Hubbell argued Buckwalter's decision not to immediately respond to the first call for service was negligent, but she failed to establish that Buckwalter had

any affirmative, legal duty to immediately respond. In distinguishing the current case from *Bingham*, however, the Second District inferred a contractual duty that it had never inferred in *Bingham*. The court's inference of a contractual duty in this case was not supported by any evidence in the record and not even supported by any argument raised by Plaintiff herself. The alleged existence of a contract and contractual duty appears to have been created by the appellate court solely to avoid the binding effect of its own precedent, the *Bingham* case.

This case must be accepted to address the legal pitfalls it created for several reasons. First, it should be noted that the Second District Court of Appeals has previously recognized that there cannot be an "implied contract" with a political subdivision as a result of "procedural safeguards [that] have been adopted which govern the creation of public obligations and liabilities." *Wright v. Dayton* (2004), 158 Ohio App.3d 152, 159, 814 N.E.2d 514. Moreover, contrary to the court's holding, there is no evidence that the manner in which Xenia provides services was any different than the manner in which the municipality in *Bingham v. City of Fairborn* provided services. There was no evidence of a contract for emergency in-home services. There was no evidence of a special phone number other than the one for the public services department, just as there had been in *Bingham*. There was absolutely no evidence to support a proposition that the City of Xenia undertook a contractual legal obligation to respond to calls to the service department about backups in the homes of local residents.

Further supporting the lack of a duty to respond to emergencies inside a resident's home was this Court's decision in *Commerce & Industry Ins. Co.*, 45 Ohio St.3d 96. Under R.C. § 2744.01(G)(2)(d) and 2744.02(B)(2), political subdivisions that operate proprietary sewer lines are responsible in the same manner and to the same extent as a private person under the same circumstances. See *Doud v. City of Cincinnati* (1949), 152 Ohio St. 132, 87 N.E.2d 243. Because private entities do not typically operate sewer systems, Xenia analogized this case to those cases involving private entities that operate city-wide public utilities such as gas and

electricity. It was not a perfect analogy because of the great potential of harm in the context of gas and electricity, but it was the best available.

In *Commerce*, the Supreme Court explained that public utilities providing gas to residential homes do not generally have a duty to respond to emergencies inside a customer's home. That is because the utility cannot be expected to know what gas appliances its customers have installed or maintained. *Id.* The same should also hold true for a municipal sewer department. Xenia cannot be expected to know what facilities Hubbell had in her home, the use of those facilities, the maintenance of her lateral lines, and other potential causes of flooding inside the home. Therefore, a call from only one customer along a sewer main concerning water coming into a home cannot be sufficient to give rise to an absolute duty to respond. Otherwise, sanitation departments will be required to respond each time a citizen has an overflowing toilet.

In *Commerce & Industry Ins. Co.*, the Court said that a duty could arise to act with reasonable care on behalf of that customer once the utility is aware or should have been aware that its failure to act could result in an unreasonable risk of harm to the customer. *Id.* at 98. Thus, the Court found a duty arose only when the utility company affirmatively responded to the gas emergency, whether or not that response was as a "volunteer." *Id.* See also, *Smith v. Cincinnati Gas & Elec. Co.* (1991), 75 Ohio App.3d 567, 569, 600 N.E.2d 325. Again, the same should hold true in this case. Until Buckwalter affirmatively responded to the problem inside Hubbell's house, Xenia owed no duty of care to Hubbell under either *Commerce & Industry Ins. Co.* or *Bingham*. Unlike *Commerce*, there was no evidence of negligence in this case after the city employee affirmatively elected to respond. The court of appeals did not even address the defendant's argument that it should not be held to a greater duty than private utilities under *Commerce & Industry Ins. Co.*

Any imposition of a duty on the municipality to respond under the circumstances would eviscerate the individual's responsibility for their own sewer lines. Every citizen could allege

the length of time it took the city to respond under the circumstances was negligent and enhanced the damage to their property. The imposition of a legal duty to respond to every such call would subject the municipality to liability even when the backup was not attributable to any negligence on the part of the city in maintaining its sewer lines, as in this case. Therefore, the City of Xenia requests that the Court accept jurisdiction over this appeal to decide the extent to which municipalities have a legal duty to respond to calls for emergency assistance related to sewer backups inside a resident's house. The Court should conclude that municipalities have no legal duty to respond to emergency sewer calls inside a citizen's home unless and until the municipality affirmatively elects to respond.

**Second Proposition of Law: The decision whether to respond to emergency sewer calls inside a citizen's home necessarily entails discretion by the public employee under R.C. § 2744.03(A)(5), particularly where any response could impose an otherwise non-existent legal duty upon the municipality.**

Not only did the Second District conclude that municipalities have a legal duty to respond to calls about backups inside residential homes, it also concluded that the decision to respond was not a discretionary use of personnel and resources under R.C. 2744.03(A)(5). The court concluded that Buckwalter's decision whether to respond to Hubbell's house was a routine decision requiring little judgment or discretion.

First, Section 2744.03(A)(5) does not specifically require the exercise of high level policy-making discretion. *See Elston v. Howland Local Schools*, 113 Ohio St.3d 314, 2007-Ohio-2070. Rather, Section 2744.03(A)(5) provides:

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.

R.C. § 2744.03(A)(5)(emphasis added). The use of "judgment or discretion" in the disjunctive demonstrates an intent by the General Assembly to provide immunity for either the exercise of

judgment or discretion in using public resources as long as that judgment or discretion was not exercised recklessly. In this case, there can be no dispute that Buckwalter exercised his own judgment as to whether to respond to each and every backup call in the City of Xenia. And, there is certainly no allegation or evidence that he exercised his judgment with malicious purpose, in bad faith, or in a wanton or reckless manner.

Secondly, the Court must conclude that the decision at-issue in this case was a discretionary decision for purposes of 2744 immunity under prior precedent. The Second District set forth a reasonable standard for determining whether an act was discretionary and then ignored it in rendering this result-driven decision. Specifically, the court explained that, “Some positive exercise of judgment that portrays a considered adoption of a particular course of conduct in relation to an object to be achieved is required in order to demonstrate an exercise of discretion for which R.C. 2744.03(A)(5) confers immunity from liability on a political subdivision.” As discussed above, the decision by an employee to respond to an emergency inside a citizen’s home could impose a duty upon the municipality that otherwise would not exist.

Buckwalter specifically testified that he had received several calls concerning water coming into homes resulting from recent heavy rainfall. His decisions as to how to respond to those calls were not ministerial day-to-day functions. Rather, he had an obligation to make responsible choices about the use of time and public resources. For instance, if Xenia employees were required to respond to every one of those calls, as the Second District would have them do, there is a high likelihood that no one would be available to respond to true public emergencies. Additionally, municipalities would be forced to raise water and sewer rates exponentially in order to cover the costs associated with responding to calls that ultimately could be completely unrelated to the actual upkeep and maintenance of the public sewer system.

Accordingly, Xenia asks that the Court accept discretionary jurisdiction over this appeal to determine whether the acts alleged in this case constitute the exercise of judgment or

discretion in determining how to use personnel and resources under R.C. § 2744.03(A)(5).

**Third Proposition of Law: The summary judgment standard under Ohio Civil Rule 56(C) does not require the movant to affirmatively disprove the claims of the party that ultimately bears the burden of proof.**

Federal courts have already recognized the importance of summary judgment in disposing of claims that lack merit and evidentiary support.<sup>2</sup> The United States Supreme Court has consistently decided that summary judgment is a valuable tool for eliminating unsupported issues before trial and, therefore, securing a just, speedy and inexpensive resolution of all cases. *Id.* Under the current summary judgment standard in Ohio, however, the trial and appellate courts have found ample authority to support either an impossible summary judgment standard or one very similar to the federal standard, depending upon the case. Generally, this is accomplished by either setting the initial evidentiary burden for summary judgment movants under Civil Rule 56(C) very high or setting it relatively low. For example, relying upon this Court's decision in *Dresher v. Burt* (1996), 75 Ohio St.3d 280, 295, 662 N.E.2d 264, the Second District once concluded that a defendant had failed to satisfy its initial burden under Civil Rule 56 to affirmatively demonstrate that the plaintiffs had no abuse of process claim. *Busch v. Premier Integrated Med. Assoc., Ltd.* (Sept. 5, 2003) 2nd App. No. 19364, 2003 WL 22060392.

In the course of discovery and in response to summary judgment motions, the plaintiffs in *Busch* did not present a single shred of evidence in support of their abuse of process claim. In fact, the court of appeals even said, "It may be that [the] abuse of process claim is frivolous and subject to Civ.R. 11 sanctions." Even though the burden of proof in the abuse of process claim was clearly on the plaintiffs, the lower courts placed an impossible burden on the defendants to present sufficient evidence to disprove the plaintiffs' frivolous abuse of process claim. In other words, the defendants had to prove a negative.

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<sup>2</sup> See, e.g., *Anderson v. Liberty Lobby, Inc.* (1986), 477 U.S. 242; *Celotex Corp. v. Catrett* (1986), 477 U.S. 317; and *Street v. J.C. Bradford & Co.* (6th Cir. 1989), 886 F.2d 1472, 1476 (recognizing that *Anderson* and *Celotex* reflected a clear shift in summary judgment proceedings in which the mere suggestion of a question of fact was no longer sufficient to overcome dismissal).

The *Busch* case is just one of many, many examples wherein the trial and appellate courts, interpreting the plurality decision in *Dresher*, have imposed an impossible burden on summary judgment movants to prove a negative. The current case presents another such example. Yet, this notion that movants have a burden to prove a negative or to disprove the claims of the party ultimately bearing the burden of proof was expressly rejected by the United States Supreme Court in *Celotex Corp. v. Catrett* (1986), 477 U.S. 317.<sup>3</sup> According to the Supreme Court, the initial burden under Civil Rule 56(C) is one of production and articulation of a reason supporting summary judgment, not a burden to disprove the plaintiff's claims.

The plurality in *Dresher v. Burt* specifically discussed the *Celotex* holding at length. *Dresher v. Burt*, 75 Ohio St.3d at 286-292. The Court noted that, "Virtually all of the Justices agreed that the court of appeals had erred in concluding that Fed.R.Civ.P. 56 requires a defendant seeking summary judgment to produce affirmative evidence disproving ("negating") the plaintiff's case." *Id.* at 286-287. The plurality in *Dresher* also explained that their holding was to be taken as consistent with *Celotex*. Yet, many trial and appellate courts that have interpreted the *Dresher* decision since 1996 have interpreted it in a manner that could not be farther from the position advocated by the Supreme Court in *Celotex*. That is one of the key reasons the summary judgment process in Ohio state courts versus Ohio federal courts has diverged so markedly.

In this case, after discovery was complete, the City of Xenia specifically moved for summary judgment, arguing the plaintiff had no evidence to prove the backup into her home was caused by any act or omission of the City of Xenia. The City further argued that the plaintiff could not even demonstrate the city sewer main to which her home was connected was in any way clogged or backed up on June 21, 2003. Pursuant to its burden under Civil Rule 56, the City

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<sup>3</sup> The Supreme Court explained that, "[W]e do not think the *Adickes* language quoted above should be construed to mean that the burden is on the party moving for summary judgment to *produce evidence* showing the absence of a genuine issue of material fact, even with respect to an issue on which the nonmoving party bears the burden of proof. Instead, as we have explained, the burden on the moving party may be discharged by 'showing'-that is, pointing out to the district court-that there is an absence of evidence to support the nonmoving party's case."

of Xenia set forth affirmative, authenticated evidence that Hubbell's personal sewer line was not even connected to Monroe Street, the sewer main that she alleged was clogged on the day of the incident. Instead, Hubbell's house was connected to Home Avenue, which was flowing freely at the time of the incident. Thus, any backup into Hubbell's house had to have been caused by a backup in her personal line.

Under Rule 56, the burden should have shifted to Dottie Hubbell to present some evidence showing that her line was connected to Monroe Street. She should have presented some evidence that the backup into her home was causally related to some defect in the city's lines. However, Hubbell presented no evidence other than her own speculative personal belief that her home sewer lines were connected to Monroe Street. She presented no maps, surveys, or photographs, or other evidence. She presented no testimony from a plumber, contractor, or even cross-examination testimony from Xenia employees to support her position. The court of appeals acknowledged in this case that, "The particular cause of the back-up of sewage into Hubbell's home remains undetermined," yet proceeded to place the burden on the city to eliminate all possible causes of the backup.

Once discovery requests were made and summary judgment was sought as to all claims in the case, Hubbell should have had, and did in fact have, an obligation to turn over any evidence that she intended to present at trial. And, Hubbell would have been barred from presenting any evidence at trial that had not already been disclosed to the defendant. In response to summary judgment, Hubbell was unable to present any genuine evidence as to duty or causation in this case. A jury will never hear any direct evidence that her line was connected to Monroe Street. A jury will never hear any direct evidence or expert testimony that the backup was proximately caused by a problem in the City's sewer lines. Instead, Hubbell asked the lower courts to accept inferences built upon other inferences, which the courts agreed to do.

The Ohio Supreme Court should accept jurisdiction of this appeal to clarify that summary

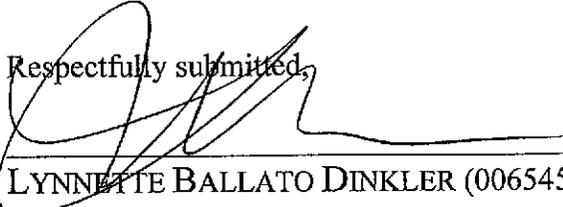
judgment is an important aspect of civil litigation. It narrows the issues and ensures that only viable causes of action are sent to the jury. It further eliminates the burdens and expense of trial on all parties where it is clear the non-movant lacks sufficient evidence to meet her burden of proof. As the federal courts have already recognized, nothing in Civil Rule 56 requires the movant to completely disprove the non-movant's claims. Litigants should not be permitted to survive summary judgment without presenting sufficient Rule 56(E) evidence to demonstrate that there is a **genuine** issue of material fact with respect to all the elements of their claims. Moreover, the requirement of viewing all reasonable inferences and facts in a light most favorable to the non-movant does not mean the trial and appellate courts should create, infer, or imply facts that simply do not exist or that are not supported by Rule 56(E) evidence.

Accordingly, the City of Xenia respectfully requests that the court accept this case for review to clarify once and for all whether the plurality decision in *Dresher v. Burt* actually does impose a burden on a Rule 56(C) movant to affirmatively disprove the claims of the party who ultimately bears the burden of proof.

### CONCLUSION

For these reasons, Appellant, the City of Xenia, respectfully requests the Ohio Supreme Court accept discretionary jurisdiction of this appeal as it involves questions of public or great general interest.

Respectfully submitted,



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Counsel of Record

TABITHA JUSTICE (0075440)

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**Proof of Service**

I certify that a copy of this Memorandum in Support of Jurisdiction was sent by ordinary U.S. mail to the following counsel on March 20, 2008:

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**APPENDIX**

	<u>App. Page</u>
Judgment Entry of the Greene County Court of Appeals (February 8, 2008)	App-1
Opinion of the Greene County Court of Appeals (February 8, 2008)	App-3

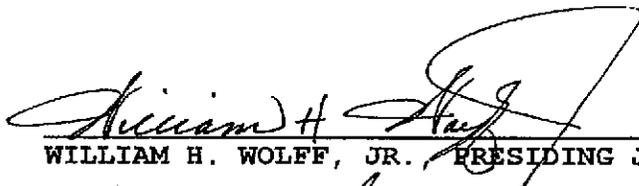
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IN THE COURT OF APPEALS OF GREENE COUNTY, OHIO

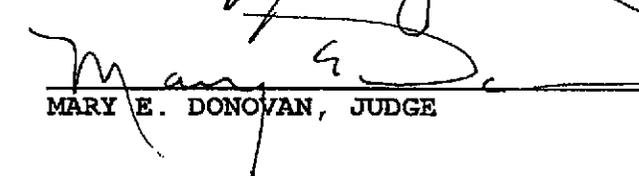
DOTTIE HUBBELL :  
 Plaintiff-Appellee : C.A. CASE NO. 2005CA0099  
 vs. : T.C. CASE NO. 2004CV0507  
 CITY OF XENIA, OHIO : FINAL ENTRY  
 Defendant-Appellant :

.....

Pursuant to the opinion of this court rendered on the  
9th day of February, 2008, the judgment of the trial  
 court is Reversed, in part, and the matter is Remanded to the  
 trial court for further proceedings consistent with the  
 opinion. Costs are to be paid as follows: 50% by Appellant  
 and 50% by Appellee.

  
 WILLIAM H. WOLF, JR. PRESIDING JUDGE

  
 THOMAS J. GRADY, JUDGE

  
 MARY E. DONOVAN, JUDGE

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Hon. Stephen Wolaver  
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IN THE COURT OF APPEALS OF GREENE COUNTY, OHIO

DOTTIE HUBBELL :  
 Plaintiff-Appellee : C.A. CASE NO. 2005CA0099  
 vs. : T.C. CASE NO. 2004CV0507  
 CITY OF XENIA, OHIO : (Civil Appeal from  
 Defendant-Appellant : Common Pleas Court)

O P I N I O N

Rendered on the 9th day of February, 2008.

Michael P. McNamee, Atty. Reg. No.0043861; Gregory B.  
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Lynette Pisone Ballato, Atty. Reg. No.0065455; Tabitha  
 Justice, Atty. Reg. No. 0075440, The Greene Town Center, 50  
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 Attorneys for Defendant-Appellant

GRADY, J.:

This is an appeal from an order of the court of common  
 pleas that denied a Civ.R. 56 motion for summary judgment  
 filed by Defendant-Appellant, the City of Xenia, Ohio  
 ("Xenia"), on its defense of governmental immunity to a claim  
 for relief for negligence in an action filed by Plaintiff-

Appellee, Dottie Hubbell.

Previously, we dismissed Xenia's appeal on a finding that an order denying a motion for summary judgment is not a final, appealable order. *Hubbell v. City of Xenia, Ohio*, Greene App. No. 2005-CA-99, 2006-Ohio-3369. We subsequently granted Xenia's App.R. 25 motion to certify a conflict between our judgment and the judgments of the courts of appeals for other districts. The Supreme Court of Ohio reversed our judgment, holding that an order that denies the benefit of an alleged governmental immunity is a final, appealable order pursuant to R.C. 2744.02(C). *Hubbell v. City of Xenia*, 115 Ohio St.3d 77, 2007-Ohio-4839. That matter is again before us for decision on remand from the Supreme Court.

On June 12, 2003, water and sewage began flowing into Hubbell's home in Xenia through drains in a shower, a toilet, and a bathroom sink. The sewage included human waste, tampons, and cigarette butts.

Believing that the problem was likely caused by a malfunction in the public sewer system maintained by Xenia, to which her house was connected, Hubbell placed a telephone call to an Emergency Services number provided by the City of Xenia Public Services Department. That office had then closed for the day, and the call automatically transferred to the Xenia

Police Department, which paged an on-call sewer and waste maintenance worker, William Buckwalter. Buckwalter declined to act, suspecting that the problem was likely the result of heavy rainfall that day.

The sewage and dirty water continued to flow into Hubbell's home, damaging the house and its contents. Hubbell placed a second call for help several hours after her first call was placed. This time, Buckwalter decided to respond and investigate the problem, and a service crew was brought in.

Hubbell's home is situated at the intersection of Monroe and Home Avenues in Xenia. Hubbell's home is connected through her private line to the public sewer main on Home Avenue, which is connected to a public sewer main on Monroe Avenue. The service crew examined the Home Avenue main line and found it was flowing freely. When a manhole cover on the Monroe Avenue line was removed, the back-up into Hubbell's house promptly subsided. Further investigation revealed a partial blockage in the Monroe Avenue main, which was removed. Several days later, tree roots that had invaded the main were cut away. There is evidence that the roots may have contributed to the blockage.

Xenia offered to clean Hubbell's home, and Hubbell accepted the offer. However, she concluded that the results

were unsatisfactory and terminated Xenia's efforts. Hubbell thereafter commenced the underlying action against Xenia for damages to her property that proximately resulted from the back-up.

Hubbell's complaint alleged that Xenia was negligent in maintaining and operating its sewer line because it failed to inspect the Monroe Street main, allowing the line to become obstructed and clogged by tree roots and collected refuse, causing the back-up into her home. Hubbell further alleged that the condition constituted a nuisance for which Xenia is liable.

Xenia filed an answer and jury demand. Xenia denied most of the factual allegations of Hubbell's complaint. Xenia also pleaded a number of affirmative defenses, including immunity from Hubbell's claims for relief pursuant to the Political Subdivision and Tort Liability Act, R.C. 2744.01, et. seq. Subsequently, Xenia filed a Civ.R. 56 motion for summary judgment on that immunity defense. The trial court denied the motion. Xenia filed a timely notice of appeal.

ASSIGNMENT OF ERROR

"THE TRIAL COURT'S DECISION TO DENY CHAPTER 2744 IMMUNITY TO THE CITY OF XENIA WAS IN ERROR."

In *Doud v. City of Cincinnati* (1949), 152 Ohio St. 132, the Supreme Court held:

"Where a municipal corporation uses and assumes the management and control of a sewer within the municipality, it is required to exercise reasonable diligence and care to keep the same in repair and free from conditions which will cause damage to private property; and the municipality's failure in this respect makes it liable for damages caused by its negligence, in the same manner and to the same extent as a private person under the same circumstances." *Id.*, Syllabus by the Court, paragraph two.

A municipal corporation's alleged liability is nevertheless subject to the defense of governmental immunity provided by R.C. 2744.01, et. seq. Upon an invocation of that defense, the court must apply a three-tier analysis. The first step is to determine whether the claimant is a political subdivision within the coverage of R.C. 2744.01, et. seq. The second is to determine whether any of the five exceptions to immunity in R.C. 2744.02(A)(1) apply. If one or more does, the third step is to determine whether one of the defenses in R.C. 2744.03 applies. *Cater v. Cleveland* (1998), 83 Ohio St.3d 24.

It is undisputed that Xenia is a political subdivision. The questions Xenia's motion presents implicate the second and third prongs of the *Cater* inquiry. Further, those questions must be resolved in the context of the Civ.R. 56 motion for summary judgment that Xenia filed.

Summary judgment may not be granted unless the entire record demonstrates that there is no genuine issue of material fact and that the moving party is, on that record, entitled to judgment as a matter of law. Civ.R. 56. The burden of showing that no genuine issue of material fact exists is on the moving party. *Harless v. Willis Day Warehousing Co.* (1978), 54 Ohio St.2d 64. All evidence submitted in connection with a motion for summary judgment must be construed most strongly in favor of the party against whom the motion is made. *Morris v. First National Bank & Trust Co.* (1970), 21 Ohio St.2d 25. In reviewing a trial court's grant of summary judgment, an appellate court must view the facts in a light most favorable to the party who opposed the motion. *Osborne v. Lyles* (1992), 63 Ohio St.3d 326. Further, the issues of law involved are reviewed de novo. *Nilavar v. Osborn* (1998), 127 Ohio App.3d 1.

Among the "proprietary functions" of a political subdivision are "[t]he maintenance, destruction, operation,

and upkeep of a sewer system." R.C. 2744.01(G)(2)(d). "[P]olitical subdivisions are liable for injury, death, or loss to persons or property caused by the negligent acts of their employees with respect to proprietary functions of the political subdivision." R.C. 2744.02(B)(2). Political subdivisions are nevertheless immune from such liability when the injury or loss concerned "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." R.C. 2744.02(A)(5).

In *Addis v. Howell* (2000), 137 Ohio App.3d 54, 60, we wrote:

"If an act of discretion is merely a choice between alternate courses of conduct, then almost every volitional act or omission involves an exercise of discretion. R.C. 2744.03(A)(5) cannot be interpreted that broadly, for to do so would comprehend anything and everything a political subdivision might do. Routine decisions requiring little judgment or discretion are not covered by the section. *Perkins v. Norwood City Schools* (1999), 85 Ohio St.3d 191, 707 N.E.2d 868. In our view, nor are those decisions which involve

inadvertence, inattention, or unobservance. Some positive exercise of judgment that portrays a considered adoption of a particular course of conduct in relation to an object to be achieved is required in order to demonstrate an exercise of discretion for which R.C. 2744.03(A)(5) confers immunity from liability on a political subdivision."

The particular cause of the back-up of sewage into Hubbell's home remains undetermined. Hubbell contends that the back-up and resulting damage to her property proximately resulted from the negligent acts of Xenia's employees. R.C. 2744.02(B)(2). Hubbell complains that Xenia's employees were negligent in permitting the blockage of its sewer lines to occur. She further complains that additional damage occurred because Xenia's employee, Buckwalter, was negligent in responding to her call for emergency service.

To show that it exercised reasonable diligence and care to keep its sewer lines open and free from the conditions that Hubbell alleges caused damage to her property, Doud, Xenia offered evidence showing that it performs an ongoing inspection and cleaning of its sewer lines. Hubbell did not offer evidence showing how Xenia's employees were negligent in inspecting and cleaning the Monroe Avenue sewer line. By implication, her contention is that Xenia's inspection and

cleaning program was insufficient to avoid or prevent the loss she suffered.

On this record, reasonable minds could only find that Xenia's inspection and cleaning program, because its design and performance involved "[s]ome positive exercise of judgment that portrays a considered adoption of a particular course of conduct in relation to an object to be achieved," *Addis v. Howell*, constitutes an exercise of judgment or discretion which, per R.C. 2744.03(A)(5), renders Xenia immune from liability for any injuries to persons or property proximately resulting therefrom. The trial court erred when it denied the motion for summary judgment that Xenia sought on that defense.

On the other hand, routine decisions requiring little judgment or discretion and which, instead, portray inadvertence, inattention, or unobservance, are not covered by the defense provided by R.C. 2744.03(A)(5). *Id.* Buckwalter's decision to not respond to Hubbell's first call for emergency service is of that character. His belief that the problem resulted from excess rainfall is an individual determination. Also, Buckwalter testified that he failed to respond to the call as he was required to do, because he decided to instead wait for another call from Hubbell in order to show that the problem was serious before responding. (Deposition, p. 13).

Reasonable minds could find that Buckwalter's conduct was merely a routine decision portraying inadvertence, inattention, or unobservance, and therefore the defense provided by R.C. 2744.03(A) (5) does not bar Xenia's liability for any damage to Hubbell's property that proximately resulted from Buckwalter's alleged negligence.

Xenia argues that, nevertheless, it is not liable for any damage that resulted from Buckwalter's alleged negligence. Xenia relies on our holding in *Bingham v. City of Fairborn* (April 17, 1980), Greene App. No. 1121, in which we wrote: "[w]e do not believe there is a duty upon the city to maintain a complete stand-by emergency service every time a householder phones that he has an overflow in the sewer system on his premises." *Id.*, at p. 2. On that finding, we held that the city's failure to respond did not constitute actionable negligence.

A duty of care may be imposed by operation of law or by contract. *Pittsburgh, F.W. & C.R. Co. v. Bingham* (1876), 29 Ohio St.364; *Stark County Agricultural Society v. Brenner* (1930), 122 Ohio St. 560. A contractual duty to act may be express or implied. *Hannan v. Erlich* (1921), 102 Ohio St. 176.

When one undertakes a duty to perform an act, and another

reasonably relies on that undertaking, the act must generally be performed with ordinary care. *Northwest Airlines, Inc. v. Glenn L. Martin Co.* (1955, CA 6), 224 F.2d 120. While a breach of contract is ordinarily not a tort, a common-law duty to perform with care, skill, reasonable expedience, and faithfulness is incidental to every contract, and the negligent failure to observe those conditions may constitute a tort. *Hunsicker v. Buckeye Union Casualty Co.* (1953), 95 Ohio App. 241. For a breach of that duty, a person injured as a proximate result has a right of action based on the contractor's failure to exercise due care in the performance of his assumed obligation. *Durham v. Warner Elevator Mfg. Co.* (1956), 166 Ohio St. 31.

Municipal water and sewer service is typically provided to residents of the municipality pursuant to contract, and there is no basis to find that Xenia provided its service to Hubbell otherwise. Unlike in *Bingham v. City of Fairborn*, where the city provided no emergency repair service or access to it, Xenia undertook to provide emergency services to persons to whom it provides sewer service, as well as access to that service by telephone. Implicit in that undertaking is a duty to perform the service with ordinary care. On this record, reasonable minds could find that, through the acts or

omissions of its employee, Buckwalter, Xenia was negligent in the service it provided Hubbell, and that as a proximate result, Hubbell suffered a loss to her property. Therefore, the trial court erred when it granted summary judgment for Xenia on that aspect of Hubbell's claim for relief.

Xenia also argues that summary judgment was proper because the averments in Hubbell's complaint fail to allege that Bookwalter was negligent. We do not agree. Hubbell alleged that when the back-up began she dialed Xenia's emergency service number, and "[a]fter several hours had elapsed, an employee of the City finally showed up." (Paragraph 10 and 11). Hubbell further alleged that, due to the contamination that resulted from the back-up, she was "left with an uninhabitable, wet and contaminated residence without much of any personal property or furnishings." (Paragraph 54). After incorporating those allegations (Paragraph 61), Hubbell alleged that the injuries to her property were proximately caused by the City's negligence. (Paragraphs 70 and 71). We believe those allegations satisfy the requirements of Civ.R. 8(A) for purposes of pleading Buckwalter's alleged negligence.

Finally, Xenia argues that it is entitled to summary judgment on Hubbell's claim because, irrespective of

Buckwalter's delay in responding, Hubbell failed to show that the back-up of sewage into her home was not caused by a blockage in the sewer line connecting her property to Xenia's sewer system, for which Hubbell is responsible. Xenia points to evidence that, upon examination, the public main on Home Avenue to which Hubbell's private line connects was open and free-flowing, which supports an inference that the cause of the back-up was instead in Hubbell's private line.

Xenia's contention involves a question of fact. On a motion for summary judgment, evidentiary facts and inferences reasonably drawn therefrom must be construed most strongly in favor of the party against whom the motion is made. Civ.R. 56(C).

In opposition to Xenia's contention that the proximate cause of the back-up was a blockage or other problem in her private line, Hubbell points to evidence that the Home Avenue main connects with Xenia's sewer main on Monroe Avenue, and that when the manhole cover on the Monroe Avenue main was removed, the back-up of sewage into Hubbell's home promptly subsided. That fact, construed most strongly in Hubbell's favor, reasonably supports an inference that the condition of the Monroe Avenue main, which was at least partially blocked, in combination with the heavy rainfall to which Buckwalter

testified, proximately caused the back-up into Hubbell's home. That showing satisfied Hubbell's reciprocal burden under *Dresher v. Burt* (1996), 75 Ohio St.3d 280, 293, "to set forth specific facts showing that there is a genuine issue for trial," concerning whether the back-up was instead proximately caused by the condition of the private sewer line on Hubbell's property.

The assignment of error is sustained in part and overruled in part. The judgment of the trial court will be reversed, in part, and the cause remanded to the trial court for further proceedings consistent with this opinion.

WOLFF, P.J. And DONOVAN, J., concur.

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