

IN THE SUPREME COURT OF OHIO

08-1171

OHIO BELL TELEPHONE COMPANY,)
et al.,)

Plaintiffs-Appellants,)

vs.)

DIGIOIA-SUBURBAN EXCAVATING,)
LLC, et al.,)

Defendants-Appellees.)

) On Appeal from the
) Cuyahoga County Court
) of Appeals, Eighth
) Appellate District
)
) Court of Appeals
) Case Nos. 89708 and 89907

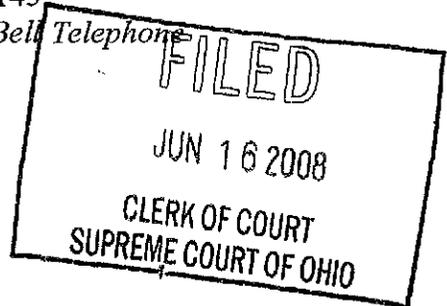
**MEMORANDUM IN SUPPORT OF JURISDICTION OF APPELLANT
THE EAST OHIO GAS COMPANY D/B/A DOMINION EAST OHIO**

Robert J. Triozzi (0016532)
Director of Law
Joseph F. Scott (0029780)
Chief Assistant Director of Law
Gary S. Singletary (0037329)
Assistant Director of Law
City of Cleveland
601 Lakeside Avenue, Room 106
Cleveland, Ohio 44114-1077
(216) 664-2800
(216) 664-2663
Attorneys for The City of Cleveland

Shawn W. Maestle
Weston Hurd LLP
The Tower at Erieview
1301 East 9th Street, Suite 1900
Cleveland, Ohio 44114
Attorney for The Walgreen Company

Michael L. Snyder (0040990)
Matthew R. Rechner (0074446)
McDonald Hopkins LLC
600 Superior Avenue, East, Suite 2100
Cleveland, Ohio 44114
(216) 348-5400
(216) 348-5474 (Facsimile)
*Attorneys for The East Ohio Gas
Company dba Dominion East Ohio*

William H. Hunt
Hunt & Cook, LLC
Gemini Tower II, Suite 250
2001 Crocker Road
Westlake, Ohio 44145
*Attorney for Ohio Bell Telephone
Company*



Michael S. Gordon
Joycelyn N. Prewitt-Stanley
Vorys, Sater, Seymour and Pease LLP
2100 One Cleveland Center
1375 East Ninth Street
Cleveland, Ohio 44114
*Attorneys for Adelphia of the Midwest,
Inc.*

Michael E. Cicero
Vincent Feudo
Nicola, Gudbranson & Cooper, LLC
Landmark Office Towers
Republic Building, Suite 1400
25 West Prospect Avenue
Cleveland, Ohio 44115
*Attorneys for Northern Ohio Risk
Management Association of Self
Insurance Pool Inc. and City of Maple
Heights*

Jeffrey E. Dubin
Javitch, Block & Rathbone LLP
1300 East Ninth Street, 14th Floor
Cleveland, Ohio 44114
*Attorney for Nationwide Mutual Insurance
Company*

Daniel R. Lutz, Esq.
Kropf, Wagner, Hohenberger & Lutz, LLP
100 North Vine Street
P.O. Box 67
Orrville, OH 44667
*Counsel for Plaintiff Christian Children's
Home of Ohio*

Barbara Marburger
The Justice Center, Courts Tower
1200 Ontario Street, 8th Floor
Cleveland, Ohio 44113
*Attorney for Cuyahoga County
Department of Development, Cuyahoga
County Engineer, and Cuyahoga County
Board of County Commissioners*

David M. Matejczyk
Thomas J. Vozar
Vozar, Roberts & Matejczyk Co., LPA
5045 Park Avenue West, Suite 2B
Seville, Ohio 44273
*Attorneys for Greystone Group-Libby,
Ltd., Visconsi Companies, Ltd., and
Travelers Property & Casualty Co.*

James L. Glowacki
Glowacki and Associates
526 Superior Avenue East, Suite 510
Cleveland, Ohio 44114
*Attorney for DiGioia Suburban Excavating,
LLC*

Daran P. Kiefer
Kreiner & Peters Co., LPA
P.O. Box 6599
Cleveland, Ohio 44101
*Attorney for Acuity f.n.a Heritage
Insurance Co. and United Petroleum
Marketing LLC*

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I. THIS IS A CASE OF PUBLIC OR GREAT GENERAL INTEREST

In its April 30, 2008 decision (a journalized copy of which is attached as Exhibit A), the Cuyahoga County Court of Appeals, Eighth Appellate District (“the Eighth District”) expanded political subdivision tort immunity beyond the scope permitted and established by R.C. Chapter 2744, Ohio’s Political Subdivision Tort Liability Act. The Eighth District’s decision (along with at least one sister court that has since followed the Eighth District’s decision, Monteith v. Delta Productions, Inc., 2008-Ohio-1997 (Ohio App. 3d. Dist. 2008)) completely changes the longstanding “three tier” analysis that governs political subdivision tort liability and immunity by erroneously shifting the parties’ respective obligations and burdens of proof under the statute.

Political subdivision tort liability and immunity under R.C. Chapter 2744 involves a three-tier analysis. See, Elston v. Howland Local Schools (2007), 113 Ohio St.3d 314, citing Green Cty. Agricultural Soc. v. Liming (2000), 89 Ohio St.3d 551, 556; see also, Cater v. City of Cleveland (1998), 83 Ohio St.3d 24. In this particular case, the trial court engaged in the following analysis as prescribed by the Ohio legislature:

(1) Tier I – general grant of immunity

“[A] political subdivision is not liable in damages in a civil action for injury, death, or loss to person or property allegedly caused by any act or omission of the political subdivision or an employee of the political subdivision in connection with a governmental or propriety function.” R.C. 2744.02(A)(1)

(2) Tier II – exceptions to immunity

“[P]olitical 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.” R.C. 2744.02(B)(2)

(3) Tier III – reinstatement of immunity

Immunity may be reinstated if a political subdivision can successfully assert that “the injury, death, or loss to persons 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)

The third tier remains at issue in this action. In its decision, the Eighth District overturned the trial court’s analysis of the record evidence and erroneously determined that immunity should have been reinstated by default under R.C. 2744.03(A)(5). The Eighth District reached this decision because the plaintiffs (including Appellant The East Ohio Gas Company d/b/a Dominion East Ohio (hereinafter the “Appellant”)) did not specifically allege malice, bad faith, or wanton or reckless conduct in their pleadings. In doing so, the Eighth District has shifted the burden of proof of the third tier away from the political subdivision and placed it upon the injured or damaged plaintiff. The Eighth District’s decision effectively adds language to R.C. 2744.03(A)(5) by creating a pleading requirement which does not exist (and has never existed) that requires plaintiffs to include certain “magic words” (e.g. recklessness or malice) in their initial pleadings or face dismissal of their claims. Because R.C. Chapter 2744 has been erroneously and impermissibly expanded beyond its scope as enacted by the Ohio legislature, this case involves matters of public and great general interest. Accordingly, Appellant respectfully requests that this Court accept jurisdiction in this case so that these important issues will be reviewed on their merits.

II. STATEMENT OF THE CASE AND FACTS

This case involves property damage that resulted from an Appellee City of Cleveland (the “City”) water main break that caused an ensuing natural gas explosion at a road construction project in Maple Heights, Ohio.

On March 11, 2002, DiGioia Suburban Excavating, L.L.C. (“DiGioia”) was performing a sewer-line improvement project (the “Project”) pursuant to a contract between DiGioia and the

Cuyahoga County Department of Development. Pernell Perry ("Mr. Perry"), a Water System Construction Inspector for the City's Division of Water ("CWD"), was assigned to the Project because excavation work was being conducted near CWD water lines. Mr. Perry was responsible for observing the work, being available for questions, and to "make sure that the water work that's going on is done per contract."

Mr. Perry arrived at the Project sometime after 11 a.m. on March 11, 2002. While excavating, DiGioia employees realized that they were working near a 24-inch transmission water main. During the course of the excavation, DiGioia exposed a bypass valve on the CWD water main. At approximately 11:50 a.m. on March 11, 2002, the 24-inch transmission water main burst and high-pressure water exploded from the burst line. Mr. Perry was at the construction site at the time the high-pressure water leak occurred. According to Mr. Perry's testimony, it was CWD's responsibility, through him, to determine "what was leaking and where it was leaking to be able to shut it down."

After the high-pressure water leak occurred, DiGioia employees repeatedly informed Mr. Perry that the water leak was on CWD's 24-inch transmission main. Despite being informed of this fact on more than one occasion, Mr. Perry ignored this information and insisted on shutting down CWD's 12-inch distribution mains. While Mr. Perry was busy trying to close the 12-inch distribution mains, DiGioia employee Tom Krall ("Mr. Krall") told Mr. Perry that he was misreading his maps and again informed Mr. Perry that the source of the high-pressure water leak was not from CWD's 12-inch distribution mains. Mr. Krall thereafter told Mr. Perry that Mr. Perry needed to call for a CWD hydraulic truck to close the correct 24-inch transmission main.

Instead of calling for a CWD hydraulic truck (i.e., the special equipment needed to close CWD's 24-inch transmission main), Mr. Perry obstinately continued to direct DiGioia employees to manually shut off valves on CWD's 12-inch distribution mains at the excavation site. Mr. Perry did not call for a CWD hydraulic crew to come to the excavation site for more than two and a half hours after the water leak occurred. Additionally, during this time, DiGioia's crew placed 6000-pound steel plates over the gushing water at the excavation site, which was flowing at a pressure of approximately 90 pounds per square inch. The diverted high-pressure water eroded the supporting soil under and around Appellant's 22-inch natural gas main that also ran through the excavation site. At approximately 2:56 p.m. on March 11, 2002 (three hours after the water lines burst), Appellant's natural gas main separated under its own weight because of the soil erosion caused by the diverted high-pressure water leak. Shortly thereafter, at approximately 3:34 p.m., the resulting natural gas leak ignited.

Despite being told repeatedly that the high-pressure water leak was on CWD's 24-inch transmission main (and not on CWD's 12-inch distribution mains), Mr. Perry chose to ignore that information and waited more than two and a half hours before acknowledging the true source of the water leak and calling for a CWD hydraulic crew to shut down CWD's leaking 24-inch transmission main. Once Mr. Perry finally made the call, the CWD hydraulic crew took another 30 minutes to arrive on the scene. CWD did not turn off the water leak until approximately 6:30 p.m. on March 11, 2006, more than six and a half hours after the high-pressure water lines initially burst.

Following fact and expert discovery, the City and Appellees Cuyahoga County Department of Development, Cuyahoga County Engineer, and Cuyahoga County Board of County Commissioners a/k/a Board of Commissioners Cuyahoga County (collectively,

“Cuyahoga County”) (the City and Cuyahoga County are jointly referred to herein as “Appellees”) filed motions for summary judgment arguing that they was immune from liability under R.C. Chapter 2744. The trial court denied Appellees’ motions for summary judgment.

On appeal, the Eighth District reversed the trial court’s denial of the City’s motion for summary judgment on the grounds that “the City was entitled to an application of governmental immunity [pursuant to R.C. Chapter 2744] on appellees’ claims of negligence against it.” In rendering its decision, the Eighth District specifically stated:

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).

III. ARGUMENT IN SUPPORT OF PROPOSITIONS OF LAW

Proposition of Law No. I: The political subdivision bears the burden of proof of successfully reinstating immunity under R.C. 2744.03.

In the present action, the first two tiers of the political subdivision tort liability analysis are not in dispute. In fact, the City concedes that the immunity exception codified in R.C. 2744.02(B)(2) applies in this case. Nevertheless, the City argues that it is entitled to a reinstatement of immunity under R.C. 2744.03(A)(5). The City bears the ultimate burden of proof on this affirmative defense. Specifically, the City (not Appellant or the other plaintiffs) must successfully establish through record evidence: (i) that the City exercised judgment or discretion in determining whether to acquire, or how to use, its equipment, supplies, materials,

personnel, facilities, and other resources; and (2) that the City's judgment or discretion was not exercised with malicious purpose, in bad faith, or in a wanton or reckless manner. See, R.C. 2744.03(A)(5); see also, Ohio Civil Rule 56(C).

This Eighth District's decision, however, has erroneously shifted the above burden from the City to Appellant and the other plaintiffs by requiring them to plead and then disprove the City's affirmative defense under R.C. 2744.03(A)(5). In essence, the Eighth District has effectively re-written the statute to now include the following bolded language:

(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 persons 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 **[plaintiff pleads and proves that 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). As a result, the Eighth District has mistakenly created a pleading requirement that does not exist – and has never existed – in the text of R.C. 2744.03(A)(5).

By placing the burden of proof onto Appellant, the Eighth District has erroneously altered the three-tier structure of R.C. Chapter 2744. This Court has previously held that the immunity reinstatement provisions under R.C. 2744.03 – the third tier – must be read more narrowly than the exceptions to immunity under R.C. 2744.02(B), “[o]r the structure of R.C. chapter 2744 makes no sense at all.” Green Cty. Agricultural Soc. v. Liming (2000), 89 Ohio St.3d 551, 561. The Eighth District's decision purports to require a plaintiff – having already established an

exception to immunity under the second tier – to bear the burden of pleading and thereafter disproving the political subdivision’s affirmative defenses for reinstatement of immunity under the third tier. This burden shift elevates the third tier over the second tier and alters the three tier structure of R.C. Chapter 2744 codified by the Ohio legislature.

The Eighth District’s decision also conflicts with Ohio case law. By erroneously shifting the burden of proof from the City to the Appellant and the other plaintiffs to reinstate immunity under the third tier, the Eighth District’s decision conflicts with this Court’s decision in Cater v. City of Cleveland (1998), 83 Ohio St.3d 24, and the Eighth District’s own decision in Young v. Genie Industries United States, 2008-Ohio-929 (Ohio App. 8th Dist. 2008). In Cater, this Court clarified that R.C. 2744.03(A)(5) “is a defense to liability” and held that the conduct of the political subdivision presented a question of fact for the jury to consider. Cater, 83 Ohio St.3d at 32. Similarly, in Young, the Eighth District determined that:

[W]e find that R.C. 2744.03(A)(5) is not an exception to immunity because, under the third tier of analysis, R.C. 2744.03(A)(5) is a *defense* that a political subdivision may assert *after* a court finds an exception to immunity. For example, if we had found that one of the exceptions under R.C. 2744.02(B) applied, and immunity did not exist, the school district would have been able to assert a defense under R.C. 2744.03(A)(5) in order to restore immunity.

Id., ¶21 (emphasis in original).

By this language, the Cater and Young courts correctly affirmed the longstanding principle that the political subdivision -- and not the plaintiff -- bears the burden of proof of successfully reinstating immunity under R.C. 2744.03. See also, Elston, ¶12 (stating that “immunity may be reinstated if a political subdivision can successfully assert one of the defenses to liability listed in R.C. 2744.03”); Svette v. Caplinger, 2007-Ohio-664 (Ohio App. 7th Dist. 2007), ¶16 (quoting, Evans v. S. Ohio Med. Ctr., 103 Ohio App. 3d 250, 255 (Ohio App. 4th Dist.

1995) ("A party raising an immunity defense to support a motion for summary judgment 'must present evidence tending to prove the underlying facts upon which the defense is based.'"); Hall v. Ft. Frye Loc. School Dist. Bd. of Edn., 111 Ohio App. 3d 690, 694 (Ohio App. 4th Dist. 1996). The Eighth District did not adhere to this established jurisprudence. Rather, by shifting the burden for reinstating immunity under the third tier, the Eighth District's decision erroneously altered the three-tier analysis for political subdivision immunity under R.C. Chapter 2744.

Neither Appellant's nor the other plaintiffs' pleadings were improper in this case. The burden lies with the City -- and with the City alone -- to establish through record evidence that R.C. 2744.03(A)(5) immunizes it from liability in this case. Appellant, along with the other plaintiffs, satisfied their burden of proof in the second tier by establishing that the negligence exception to immunity, R.C. 2744.02(B)(2), applies in this case. Indeed, the City conceded that the R.C. 2744.02(B)(2) exception is applicable. Thus, the burden shifted back to the City to assert and prove that immunity should be reinstated in accordance with the affirmative defenses contained in R.C. 2744.03. See, Cater, 83 Ohio St.3d at 32; see also, Young, ¶121, Elston, ¶12; Evans, 103 Ohio App. 3d at 255; Hall, 111 Ohio App.3d at 694-95. The City did not do this. Because the City did not establish, through record evidence, that no genuine issues of material fact existed surrounding its R.C. 2744.03(A)(5) affirmative defense, immunity was not reinstated by the trial court. The trial court therefore properly denied the City's motion for summary judgment, and the Eighth District should have affirmed the trial court's decision.

Proposition of Law No. II: 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 Eighth District misinterpreted R.C. Chapter 2744 and this Court's holding in Elston by concluding that a plaintiff's failure to plead malice, bad faith, or wanton or reckless conduct in its complaint entitles a political subdivision to immunity under R.C. 2744.03(A)(5). Neither R.C. 2744.03(A)(5) nor Elston stand for this proposition. To the contrary, the Elston case centered upon a certified conflict between appellate jurisdictions concerning "[w]hether 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." Elston, 113 Ohio St.3d 314, 2007-Ohio-2070, ¶1. After analyzing the record evidence in that case, this Court ruled that:

[W]e conclude that pursuant to R.C. 2744.03(A)(5), a political subdivision is immune from liability if the injury complained of results from an individual employee's exercise of judgment or discretion in determining whether to acquire or how to use equipment or facilities unless the 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.

Id., ¶32.

This was the Court's holding in Elston, which did not hold (explicitly or implicitly) that, in the absence of allegations of malice, bad faith, or wanton or reckless conduct in a plaintiff's complaint, political subdivisions are, by default, entitled to immunity under R.C. 2744.03(A)(5). The Elston decision did not center upon the specificity of the parties' complaint, nor did this Court render its decision based upon a technical analysis of the four corners of the plaintiff's

complaint. To the contrary, this Court in Elston specifically ruled that a political subdivision is immune under R.C. 2744.03(A)(5) for injuries or damages resulting from an employee's exercise of judgment or discretion in determining whether to acquire or how to use equipment or facilities unless "the judgment or discretion was exercised with malicious purpose, in bad faith, or in a wanton or reckless manner." Id., ¶32.

Against this backdrop, this Court analyzed the record evidence in Elston and thereafter concluded that "Elston's injury resulted from the judgment or discretion of the [employee] in determining how to use equipment or facilities." Id., ¶¶21, 26. Because there was no suggestion of reckless conduct in the record evidence, this Court in Elston ruled that the school district successfully asserted and established that immunity should be reinstated under R.C. 2744.03(A)(5). See id., ¶26. This Court in Elston did not hold that immunity under R.C. 2744.03(A)(5) automatically applies if a plaintiff fails to specifically include certain "magic words" like malice, bad faith or wanton or reckless behavior in its initial complaint.

The Eighth District's decision is inconsistent with longstanding case law in Ohio and with this Court's Elston decision. Courts have uniformly decided that the issue of whether or not the actions (or inactions) of a political subdivision rise to a level of recklessness is a question of fact -- not law -- for a jury to determine. See, Hunter v. City of Columbus, 139 Ohio App.3d 962, 970 (Ohio App. 10th Dist. 2000) (citing, Brockman v. Bell, 78 Ohio App.3d 508, 517 (Ohio App. 1st Dist. 1992)); see also, Edinger v. Allen Cty. Bd. of Commrs., 1995 WL 243438 (Ohio App. 3rd Dist. 1995) (citing, Matkovich v. Penn Cent. Transp. Co. (1982), 69 Ohio St.2d 210, 214) ("[T]he issue of wanton misconduct is normally a jury question."). When record evidence may lead a jury to find recklessness, a political subdivision is not entitled to immunity under R.C. 2744.03(A)(5) as a matter of law. See, Thompson v. Bagley, 2005-Ohio-1921 (Ohio App.

3rd Dist. 2005), ¶51; see also, Fitzpatrick v. Spencer, 2004-Ohio-1940 (Ohio App. 2nd Dist. 2004), ¶21; Edinger, 1995 WL 243438 at *3-4. This Court's decision in Elston did not change or overturn these legal propositions.

Reinstatement of immunity pursuant to R.C. 2744.03(A)(5) is an affirmative defense to be asserted and proven by the political subdivision, not the plaintiff. A plaintiff is not required to specifically plead (and eventually disprove) the political subdivision's defenses in the plaintiff's complaint. A plaintiff's initial pleadings are not dispositive to a court's determination of whether or not immunity should be reinstated under R.C. 2744.03(A)(5). Instead, all of the record evidence must be considered. Therefore, the trial court in this case properly denied the City's motion for summary judgment, and the Eighth District should have affirmed that decision.

IV. CONCLUSION

For the reasons discussed above, this case involves matters of public and great general interest. The doctrine of political subdivision tort immunity has been improperly expanded beyond the scope codified by the Ohio legislature in R.C. Chapter 2744. Accordingly, Appellant respectfully requests that this Court accept jurisdiction in this case so that the important issues presented will be reviewed on the merits.

Respectfully submitted,



Michael L. Snyder (0040990)

Matthew R. Rechner (0074446)

McDonald Hopkins LLC

600 Superior Avenue, East, Suite 2100

Cleveland, Ohio 44114

Telephone: (216) 348-5400

Facsimile: (216) 348-5474

Email: msnyder@mcdonalddhopkins.com

mrechner@mcdonalddhopkins.com

Attorneys for Appellant The East Ohio
Gas Company d/b/a Dominion East Ohio

CERTIFICATE OF SERVICE

A copy of the foregoing **Memorandum of Appellant The East Ohio Gas Company d/b/a Dominion East Ohio in Support of Jurisdiction** was served by regular U.S. mail this 16th day of June, 2008 to the following:

Robert J. Triozzi (0016532)
Director of Law
Joseph F. Scott (0029780)
Chief Assistant Director of Law
Gary S. Singletary (0037329)
Assistant Director of Law
City of Cleveland
601 Lakeside Avenue, Room 106
Cleveland, Ohio 44114-1077
(216) 664-2800
(216) 664-2663
Attorneys for The City of Cleveland

Shawn W. Maestle
Weston Hurd LLP
The Tower at Erieview
1301 East 9th Street, Suite 1900
Cleveland, Ohio 44114
Attorney for The Walgreen Company

Michael S. Gordon
Joycelyn N. Prewitt-Stanley
Vorys, Sater, Seymour and Pease LLP
2100 One Cleveland Center
1375 East Ninth Street
Cleveland, Ohio 44114
Attorneys for Adelphia of the Midwest, Inc.

William H. Hunt
Hunt & Cook, LLC
Gemini Tower II, Suite 250
2001 Crocker Road
Westlake, Ohio 44145
Attorney for Ohio Bell Telephone Company

Barbara Marburger
The Justice Center, Courts Tower
1200 Ontario Street, 8th Floor
Cleveland, Ohio 44113
Attorney for Cuyahoga County Department of Development, Cuyahoga County Engineer, and Cuyahoga County Board of County Commissioners

David M. Matejczyk
Thomas J. Vozar
Vozar, Roberts & Matejczyk Co., LPA
5045 Park Avenue West, Suite 2B
Seville, Ohio 44273
Attorneys for Greystone Group-Libby, Ltd., Visconsi Companies, Ltd., and Travelers Property & Casualty Co.

James L. Glowacki
Glowacki and Associates
526 Superior Avenue East, Suite 510
Cleveland, Ohio 44114
Attorney for DiGioia Suburban Excavating, LLC

Michael E. Cicero
Vincent Feudo
Nicola, Gudbranson & Cooper, LLC
Landmark Office Towers
Republic Building, Suite 1400
25 West Prospect Avenue
Cleveland, Ohio 44115
*Attorneys for Northern Ohio Risk
Management Association of Self
Insurance Pool Inc. and City of Maple
Heights*

Jeffrey E. Dubin
Javitch, Block & Rathbone LLP
1300 East Ninth Street, 14th Floor
Cleveland, Ohio 44114
*Attorney for Nationwide Mutual Insurance
Company*

Daran P. Kiefer
Kreiner & Peters Co., LPA
P.O. Box 6599
Cleveland, Ohio 44101
*Attorney for Acuity f.n.a Heritage
Insurance Co. and United Petroleum
Marketing LLC*

Daniel R. Lutz, Esq.
Kropf, Wagner, Hohenberger & Lutz, LLP
100 North Vine Street
P.O. Box 67
Orrville, OH 44667
*Counsel for Plaintiff Christian Children's
Home of Ohio*



Michael L. Snyder (0040990)
Matthew R. Rechner (0074446)

Attorneys for Appellant
The East Ohio Gas Company d/b/a
Dominion East Ohio

Court of Appeals of Ohio

APR 30 2008

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
Nos. 89708 and 89907

**OHIO BELL TELEPHONE
COMPANY, ET AL.**

PLAINTIFFS-APPELLEES

vs.

**DIGIOIA-SUBURBAN
EXCAVATING, LLC, ET AL.**

DEFENDANTS

[APPEAL BY: CITY OF CLEVELAND, CUYAHOGA
COUNTY DEPARTMENT OF DEVELOPMENT,
CUYAHOGA COUNTY ENGINEER, AND CUYAHOGA COUNTY
BOARD OF COUNTY COMMISSIONERS

DEFENDANTS-APPELLANTS]

**JUDGMENT:
REVERSED AND REMANDED**

Civil Appeals from the Cuyahoga
County Common Pleas Court Case Nos.
CV-481681, CV-512412, CV-518023, CV-524324,
CV-524505, CV-536352, CV-538843

BEFORE: Sweeney, A.J., Cooney, J., and Celebrezze, J.

RELEASED: March 27, 2008

CA07089708

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JOURNALIZED: APR 30 2008

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EXHIBIT A

**ATTORNEYS FOR APPELLANT
CITY OF CLEVELAND**

Robert J. Triozzi, Director of Law
Joseph F. Scott, Chief Asst. Director of Law
Gary S. Singletary, Asst. Director of Law
601 Lakeside Avenue
Room 106
Cleveland, Ohio 44114-1077

**ATTORNEYS FOR APPELLANTS
CUYAHOGA COUNTY DEPARTMENT OF
DEVELOPMENT, CUYAHOGA COUNTY
ENGINEER, AND CUYAHOGA COUNTY
BOARD OF COUNTY COMMISSIONERS**

William D. Mason
Cuyahoga County Prosecutor
Barbara R. Marburger
Assistant Prosecuting Attorney
1200 Ontario Street, 8th Floor
Cleveland, Ohio 44113

**ATTORNEYS FOR APPELLEE
THE WALGREEN COMPANY**

Shawn W. Maestle
David Arnold
Weston Hurd LLP
The Tower at Erieview
1301 East 9th Street, Suite 1900
Cleveland, Ohio 44114-1862

**ATTORNEYS FOR APPELLEES
NORTHERN OHIO RISK MANAGEMENT
ASSOCIATION OF SELF INSURANCE POOL, INC.
AND CITY OF MAPLE HEIGHTS**

Vincent A. Feudo
Michael E. Cicero
Nicola, Gudbranson & Cooper
Republic Building, Suite 1400
25 West Prospect Avenue
Cleveland, Ohio 44115-1048

**ATTORNEYS FOR APPELLEE
THE OHIO BELL TELEPHONE COMPANY**

William H. Hunt
Brian J. Darling
Hunt & Cook LLC
Gemini Tower II, Suite 400
2001 Crocker Road
Westlake, Ohio 44145

**ATTORNEYS FOR APPELLEE
EAST OHIO GAS COMPANY, d.b.a.
DOMINION EAST OHIO**

Michael L. Snyder
Matthew R. Rechner
McDonald Hopkins LLC
2100 Bank One Center
600 Superior Avenue, East
Cleveland, Ohio 44114

**ATTORNEYS FOR ADELPHIA
OF THE MIDWEST, INC.**

Michael S. Gordon
Jocelyn N. Prewitt-Stanley
Vorys, Sater, Seymour & Pease LLP
2100 One Cleveland Center
1375 East Ninth Street
Cleveland, Ohio 44114-1724

**ATTORNEY FOR DIGIOIA SUBURBAN
EXCAVATING LLC**

James L. Glowacki
Glowacki and Associates
510 Leader Building
526 Superior Avenue, East
Cleveland, Ohio 44114

**ATTORNEY FOR ACUITY, f.n.a.
HERITAGE INSURANCE COMPANY
AND UNITED PETROLEUM MARKETING LLC**

Daran P. Kiefer
Kreiner & Peters Co., L.P.A.
P.O. Box 6599
2570 Superior Ave., Suite 401
Cleveland, Ohio 44101

**ATTORNEY FOR NATIONWIDE
MUTUAL INSURANCE COMPANY**

Jeffrey E. Dubin
Javitch, Block & Rathbone LLP
1300 East Ninth Street, 14th Floor
Cleveland, Ohio 44114-1503

**ATTORNEYS FOR GREYSTONE GROUP-LIBBY,
LTD., VISCONSI COMPANIES, LTD., &
TRAVELERS PROPERTY & CASUALTY CO.**

David M. Matejczyk
Vozar, Roberts & Matejczyk Co., L.P.A.
5045 Park Avenue West
Suite 2B
Seville, Ohio 44273

Thomas J. Vozar
Lasko & Associates Co., L.P.A.
1406 West Sixth Street
Suite 200
Cleveland, Ohio 44113-1300

**ATTORNEY FOR CHRISTIAN CHILDREN'S
HOME OF OHIO**

Daniel R. Lutz
Kropf, Wagner, Hohenberger & Lutz LLP
100 North Vine Street
Orrville, Ohio 44667

FILED AND JOURNALIZED
PER APP. R. 22(E)

APR 30 2008

GERALD E. FUERST
CLERK OF THE COURT OF APPEALS
BY deu DEP

ANNOUNCEMENT OF DECISION
PER APP. R. 22(B), 22(D) AND 26(A)
RECEIVED

MAR 27 2008

GERALD E. FUERST
CLERK OF THE COURT OF APPEALS
BY deu DEP

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N.B. This entry is an announcement of the court's decision. See App.R. 22(B), 22(D) and 26(A); Loc.App.R. 22. This decision will be journalized and will become the judgment and order of the court pursuant to App.R. 22(E) unless a motion for reconsideration with supporting brief, per App.R. 26(A), is filed within ten (10) days of the announcement of the court's decision. The time period for review by the Supreme Court of Ohio shall begin to run upon the journalization of this Court's announcement of decision by the clerk per App.R. 22(E). See, also, S.Ct. Prac.R. II, Section 2(A)(1).

NOTICE MAILED TO COUNSEL
FOR ALL PARTIES-COSTS TAXED

JAMES J. SWEENEY, A.J.:

Defendants-appellants, the City of Cleveland (“City”), Cuyahoga County Department of Development, Cuyahoga County Engineer, and the Cuyahoga County Board of County Commissioners (“County”) (collectively referred to as “appellants”), appeal the trial court’s denial of their individual motions for summary judgment seeking dismissal of plaintiffs-appellees’ claims pursuant to the immunity under R.C. Chapter 2744. An order that denies a political subdivision immunity under R.C. Chapter 2744 is a final, appealable order. R.C. 2744.02(C); *Hubbell v. Xenia*, 115 Ohio St.3d 77, 2007-Ohio-4839, syllabus. Accordingly, appellants have properly limited their arguments on appeal to this topic.¹

This appeal stems from property damage that resulted from a City water main break and an ensuing gas explosion on the site of a construction project commissioned by the County with defendant DiGioia-Suburban Excavating, LLC (“DiGioia”). The project involved improvements, including road and sewer replacements, on Lee Road in Maple Heights, Ohio.

¹The denial of a motion for summary judgment is ordinarily not a final, appealable order and, therefore, any issues or arguments beyond that of political subdivision immunity, which appellants’ may have raised in their respective motions for summary judgment that the trial court denied, are not ripe for appeal at this time.

The City assigned Pernell Perry, a City employee, to the project site in order to protect the City's interests in its water supply equipment and utilities that are located there.

On March 11, 2002, DiGioia was working around City water mains. A DiGioia employee was in a hole removing dirt around a valve box when water suddenly shot into a 50-foot stream in the air. Perry, still on the scene, saw the water burst and went over to inquire as to what they "hit." According to Perry, no one knew what caused the water leak. Perry ascertained that it was either a 12" main or a 24" main. The 12" water main could be shut down by Perry and the laborers at the scene. However, shutdown of the 24" main would require a hydraulic crew.

Perry called his supervisor, who instructed him to shut down the 12" main and then call him back. Perry proceeded to shut down the 12" main with the assistance of DiGioia employees. This took over two hours.

DiGioia employees claim they told Perry from the beginning that the water was coming from the 24" main. Perry denies this and claims they did not mention the 24" main until he had already discovered that it was the source of the leak.

Meanwhile, DiGioia employees decided to place metal plates over the water stream, in order to protect nearby electrical lines. This, however, caused

the water to divert and erode the soil, which was supporting a gas line. The gas line then broke, which ultimately lead to a massive fire that burned for about one-half hour until the gas company turned off the gas. The fire caused extensive damage to area properties. The water leak was eventually shut off by a City hydraulic crew but not until many hours later.

An expert witness employed by appellee Walgreen Company ("Walgreens") has opined that "the incident would not have occurred if the transmission water valve had been turned off in a timely manner." The expert additionally opined that Perry wasted about two and a half hours turning off the 12" valves that were not applicable to the incident. The expert concluded Perry's delay in shutting down the 24" main was unreasonable and lead to the erosion of the soil under the 20" gas line.

Because the City and the County advance the same assignment of error, namely that the trial court erred by denying them immunity against the plaintiffs' claims, we address them together to the extent of setting forth the substantive law. Thereafter, we shall apply the law and facts to the plaintiffs' claims against them individually.

"City's Assignment of Error I. The trial court erred in not granting summary judgment in favor of the City of Cleveland on all claims against it on

the basis of the sovereign immunity provided to the City as a political subdivision by Chapter 2744 of the Ohio Revised Code.

“County’s Assignment of Error I. The trial court erred by not granting summary judgment to the Cuyahoga County defendants/appellants on all claims against them on the basis of their immunity from liability for ‘government functions’ such as road construction projects that is established in R.C. 2744.02(A).”

“A court of appeals must exercise jurisdiction over an appeal of a trial court’s decision overruling a Civ.R. 56(C) motion for summary judgment in which a political subdivision or its employee seeks immunity.” *Hubbell*, 2007-Ohio-4839, ¶21.

In general, immunity is an affirmative defense, which must be raised and proven, i.e., it usually does not affect the jurisdiction of the court. *State ex rel. Koren v. Grogan* (1994), 68 Ohio St.3d 590, 594, citing *Goad v. Cuyahoga Cty. Bd. of Commrs.* (1992), 79 Ohio App.3d 521, 523-524.

The three-tier analysis that governs the application of sovereign immunity to a political subdivision pursuant to Chapter 2744 of the Ohio Revised Code, is set forth in *Cramer v. Auglaize Acres*, 113 Ohio St.3d 266, 2007-Ohio-1946, ¶14-16, quoting *Colbert v. Cleveland*, 99 Ohio St.3d 215, 2003-Ohio-3319, ¶7-9:

“Determining whether a political subdivision is immune from tort liability pursuant to R.C. Chapter 2744 involves a three-tiered analysis. The first tier is the general rule that a political subdivision is immune from liability incurred in performing either a governmental function or proprietary function. R.C. 2744.02(A)(1). However, that immunity is not absolute. R.C. 2744.02(B) ***.

“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. ***

“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.” (Internal citations omitted).

For purposes of immunity under R.C. Chapter 2744, “governmental function” is defined by R.C. 2744.01(C) and “proprietary function” is defined by R.C. 2744.01(G).

Here, the parties agree that the City’s involvement in this case constituted establishing, maintaining, and operating a water supply, which is a proprietary function under R.C. 2744.01(G)(2)(c). The parties also agree that the County’s involvement in this case constituted the maintenance or repair of a road or street

and the planning or design, construction or reconstruction of a public improvement to a sewer system, which are both designated as governmental functions pursuant to R.C. 2744.01(C)(2)(e) and (l).

There is no dispute that the first tier of the immunity analysis is satisfied by both the City and the County. We proceed then to examine separately whether the City or County are entitled to immunity in this case.

A. Sovereign Immunity as to the County

Except as specifically provided in R.C. 2744.02(B)(1), (3), (4), and (5), with respect to governmental functions, political subdivisions retain their cloak of immunity from lawsuits stemming from employees' negligent or reckless acts. *Wilson v. Stark Cty. Dept. of Human Serv.* (1994), 70 Ohio St.3d 450.

The County asserts immunity for performing governmental functions pursuant to R.C. 2744.02. Walgreens is the only party-appellee to contend otherwise in this appeal. Walgreens maintains that the exception to immunity in R.C. 2744.02(B)(3) applies, which provides:

“(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.”

In analyzing the above statute, the Ohio Supreme Court has explained that the focus is upon whether the political subdivision has failed in its duty to “keep highways and streets open for the purposes for which they were designed and built -- to afford the public a safe means of travel.” *Manufacturer’s Nat’l Bank v. Erie Cty. Road Comm.* (1992), 63 Ohio St.3d 318, 321. Stated differently, did “a condition exist within the political subdivision’s control that creat[ed] a danger for ordinary traffic on the regularly traveled portion of the road[?]” *Id.*

In this case, the roadway was under construction and was not open for travel. Walgreens, a fixed building structure, sustained property damage from a gas explosion that occurred during the construction project. Walgreens was not damaged in the course of traversing an allegedly unsafe roadway.

The trial court should have granted the County’s motion for summary judgment on the grounds of state sovereign immunity contained in R.C. Chapter 2744. The County’s assignment of error is sustained.

B. Sovereign Immunity as to the City

As set forth above, the City was engaged in a proprietary function for purposes of the immunity analysis. Where a proprietary function is involved,

the second tier of the immunity analysis focuses on whether any exception to immunity would apply under the provisions of R.C. 2744.02(B). In this instance, the City concedes that the exception to R.C. 2744.02(B)(2) would apply.

R.C. 2744.02(B)(2) establishes liability of political subdivisions for injuries caused by negligent acts performed by employees with respect to proprietary functions.

The City, however, contends that its immunity status should be reinstated pursuant to R.C. 2744.03(A)(5), which provides:

“(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.”

The City relies on *Elston v. Howland Local Schools*, 113 Ohio St.3d 314, 2007-Ohio-2070, which held:

“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.” *Id.* at syllabus.

The City maintains that Perry’s actions on March 11, 2002 qualified as an exercise of discretion over the use of equipment, supplies, and materials, thereby entitling it to immunity under R.C. 2744.03(A)(5).

In response to this argument, the various appellees respond that questions of material fact exist over whether Perry’s actions or judgment was exercised in a wanton or reckless manner. This same response was contained in briefs in opposition to the City’s motion for summary judgment below. See, e.g., R. 165, p. 14 (“this Court must still deny the City’s motion as a genuine issue of material fact exists as to whether the City exercised its judgment or discretion with malicious purpose, and bad faith, or in a wanton or reckless manner.”)

The appellees point to evidence in the record which, if believed, would establish that numerous individuals repeatedly told Perry that the leak was

coming from the 24" water main and not the 12" water main. They also claim Perry was told he was misreading his maps. Nonetheless, Perry focused his efforts on shutting down the 12" main for several hours. Perry, by his own admission, made no effort to shut down the 24" water main until after the 12" main was ruled out as the source. This, the appellees contend is sufficient evidence to overcome the City's effort to reinstate immunity under R.C. 2744.03(A)(5) at the summary judgment stage. The trial court obviously agreed, since it denied the City's motion that raised this same argument.

The City contends that the appellees' pleadings only alleged a claim of negligence, thus barring any evidence on the issue of discretion being exercised by the City or its employees in a wanton or reckless manner. The City asserted this argument in its reply brief in support of its motion for summary judgment.

All of the complaints in this consolidated appeal alleged negligence claims against the City but did not allege that the City acted with "malicious purpose, in bad faith, or in a wanton or reckless manner." Although Ohio Bell Telephone Company, Walgreens, and Dominion East Ohio did allege that the City acted in a "careless" manner, this is not the equivalent of malicious purpose, bad faith, wantonness, or recklessness. In answering each of the appellees' complaints, the City asserted the defense of governmental immunity. Nonetheless, when the appellees subsequently filed amended complaints, they still did not add any

allegations that the City acted with “malicious purpose, in bad faith, or in a wanton or reckless manner.”

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).

The only basis that the trial court had to deny immunity to the City in this case was the factual dispute as to whether the City, through its employees, exercised their judgment or discretion in their efforts to stop the water leak in a wanton or reckless manner. Although courts have not required a party to supplement their pleadings where an issue has been tried by the implicit or express consent of the other party, that is not the case here. See, e.g., *Zaychek v. Nationwide Mutual Ins. Co.*, Ninth App. No. 23441, 2007-Ohio-3297. The City did object to the trial court’s consideration of any alleged recklessness or

wantonness on its part through its reply brief in support of its motion for summary judgment. Therein, the City maintained that the appellees' complaints failed to contain allegations sufficient to overcome the application of governmental immunity; specifically, the City asserted that none of the appellees had alleged that the City acted maliciously, in bad faith, recklessly, or wantonly. Although the appellees could have moved to amend their complaints or moved under Civ.R. 15(B) to have the pleadings conform to the evidence, they did not do so. Accordingly, based on the above precedent, the trial court erred by denying the City the protections of qualified immunity under R.C. Chapter 2744.

Applying the controlling law to this record, the City was entitled to an application of governmental immunity on appellees' claims of negligence against it.

Appellants' assignments of error are sustained because both the City and the County were entitled to governmental immunity pursuant to R.C. Chapter 2744. The trial court's judgments that denied summary judgment as to the application of governmental immunity to these appellants are reversed and the matter is remanded for further proceedings consistent with this opinion.

"County's Assignment of Error II. The trial court erred by not granting summary judgment to the Cuyahoga County defendants/appellants on all claims

against them because Cuyahoga County cannot be vicariously liable for the allegedly negligent act of the independent contractor, defendant Digioia-Suburban Excavating Co., LLC.”

Given our disposition of the City’s and County’s first assignments of error, we do not find it necessary to address the County’s Assignment of Error II, which is moot. App.R. 12(A)(1)(c).

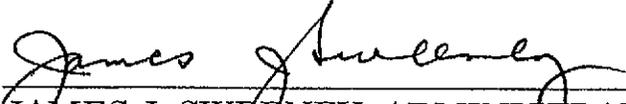
Judgment reversed and case remanded.

It is ordered that appellants recover from appellees their costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this Court directing the Court of Common Pleas to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.



JAMES J. SWIRENEY, ADMINISTRATIVE JUDGE

COLLEEN CONWAY COONEY, J., and
FRANK D. CELEBREZZE, JR., J., CONCUR