

IN THE SUPREME COURT OF OHIO

OHIO BELL TELEPHONE
COMPANY, *et al.*,

Appellees,

v.

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

Appellants.

08-1171

On Appeal from the Cuyahoga
County Court of Appeals,
Eighth Appellate District

Court of Appeals
Case Nos. 89708, 89907

MEMORANDUM IN SUPPORT OF JURISDICTION OF APPELLANT
THE OHIO BELL TELEPHONE COMPANY

William H. Hunt (0008847)

HUNT & COOK, L.L.C.
Gemini Tower II, Suite 400
2001 Crocker Road
Westlake, Ohio 44145
Telephone: (440) 892-0400
Facsimile: (440) 892-1966
whhunt@huntcooklaw.com

*Attorneys for The Ohio Bell Telephone
Company*

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

MCDONALD HOPKINS CO., LPA
600 Superior Avenue, East, Suite 2100
Cleveland, Ohio 44114

*Attorneys for 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

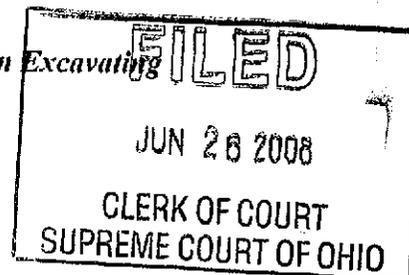
Gary S. Singletary (0037329)
Assistant Director of Law

CITY OF CLEVELAND DEPARTMENT OF LAW
601 Lakeside Avenue, Room 106
Cleveland, Ohio 44114-1077
Telephone: (216) 664-2800
Facsimile: (216) 664-2663

*Attorneys for
City of Cleveland*

James L. Glowacki (0001733)
Glowacki and Associates
526 Superior Avenue East, Suite 510
Cleveland, Ohio 44114

*Attorney for DiGioia-Suburban Excavating
LLC*



Shawn W. Maestle
WESTON HURD LLP

The Tower at Erievew
1301 East 9th Street, Suite 1900
Cleveland, Ohio 44115

*Attorney for
The Walgreen Company*

Michael S. Gordon (0070715)
Jocelyn N. Prewitt-Stanley
Vorys, Sater, Seymour and Pease LLP
2100 One Cleveland Center
1375 East Ninth Street
Cleveland, Ohio 44114

*Attorneys for Adelpia of the
Midwest, Inc.*

Michael E. Cicero, Esq. (0058610)
Vincent Feudo, Esq. (0019733)
Nicola, Gudbranson & Cooper, LLC
Landmark Office Towers
Republic Building, Suite 1400
25 West Prospect Avenue
Cleveland, Ohio 44115-1048

*Attorneys for Northern Ohio Risk
Management Association of Self Insurance
Pool Inc. and City of Maple Heights*

Daran P. Kiefer, Esq.
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*

WILLIAM D. MASON, Prosecuting Attorney
for Cuyahoga County, Ohio

BARBARA R. MARBURGER (0019152)
Assistant Prosecuting Attorney

The Justice Center, Courts Tower
1200 Ontario Street, 8th Floor
Cleveland, Ohio 44113
Telephone: (216) 443-7838
Facsimile: (216) 443-7602

*Attorneys for Cuyahoga County Department
of Development, Cuyahoga County Engineer
and Cuyahoga County Board of County
Commissioners*

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

*Attorney for Nationwide Mutual
Insurance Company*

David M. Matejczyk, Esq. (042325)
Roberts, Matejczyk & Ita Co. LPA
Thomas J. Vozar, Esq.
Vozar, Roberts & Matejczyk Co. LPA
5045 Park Avenue West, Ste 2B
Seville, Ohio 44273

*Attorneys for
Greystone Group-Libby,
Ltd., Visconsi Companies, Ltd. & Travelers
Property & Casualty Co.*

TABLE OF CONTENTS

	<u>Page</u>
I. THIS IS A CASE OF PUBLIC OR GREAT GENERAL INTEREST.....	4
II. STATEMENT OF THE CASE AND FACTS.....	5
III. ARGUMENT IN SUPPORT OF PROPOSITIONS OF LAW.....	6
<u>Proposition of Law No. I:</u> The political subdivision bears the burden of proof of successfully reinstating immunity under R.C. §2744.03.....	6
<u>Proposition of Law No. II:</u> 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).....	8
IV. CONCLUSION.....	8
CERTIFICATE OF SERVICE.....	10
APPENDIX	
Journal Entry and Opinion of the Cuyahoga County Court of Appeals (April 30, 2008).....	Ex. A

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

On April 30, 2008, the Cuyahoga County Court of Appeals, Eighth Appellate District (“Eighth District”) issued a decision which dramatically reverses the burden of proof in cases involving potentially negligent conduct of political subdivisions and their employees. A journalized copy of this decision is attached as Exhibit A.

The Political Subdivision Tort Liability Act, R.C. §2744.01, *et seq.*, was originally enacted as the legislative response to the Supreme Court’s abolishment of common law sovereign immunity. *See e.g., Haverlack v. Portage Homes, Inc.* (1982), 2 Ohio St.3d 26, 30. Revised Code Chapter 2744 presents a labyrinth of statutory provisions to reach an ultimate determination of liability or immunity for political subdivisions of the state. However, this Court provided significant guidance in 1998 in *Cater v. City of Cleveland* (1988), 83 Ohio St. 3d 24. The divided Court prescribed a three-tier analysis. *See also, Greene Cty. Agricultural Soc. v. Liming* (2000), 89 Ohio St.3d 551, 556. First, R.C. §2744.02(A) sets forth the general rule that political subdivisions are immune from liability for an act or omission resulting in death, personal injury or property damage in connection with either a governmental or proprietary functions. However, the immunity granted in the general section is not absolute. It is subject to five exceptions set forth in R.C. §2744.02(B). The second tier of analysis is to determine whether any of the five exceptions apply. In the event that one of the five exceptions is found to be applicable, the third tier of the analysis is to determine if immunity is restored by the defenses set forth in R.C. §2744.03. *Cater v. City of Cleveland* (1988), 83 Ohio St. 3d 24, 28.

Applying the instant matter to the steps prescribed in the statute, R.C. §2744.02(A) grants *prima facie* immunity as a political subdivision of government. This immunity is then

eliminated for certain proprietary functions by R.C. §2744.02(B)(2) with reference to the definitions contained R.C. §2744.01(G)(2)(c). In combination these sections provide that the “establishment, maintenance and operation of a utility, including . . . a municipal corporation water supply system” is a proprietary function for which the political subdivision is not immune. Thus we reach the third tier analysis of R.C. §2744.03 and the basis for which the Eighth District overturned the trial court’s denial of sovereign immunity.

The City of Cleveland contended that it and its employees (and in particular, Mr. Perry) have immunity pursuant to R.C. §2744.03(A)(5):

(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.

(Emphasis added). The Eighth District accepted the City’s position believing that it was essential for a plaintiff to plead (and ultimately prove) that the City acted with recklessness and or malice in order to avoid the immunity protection provided by R.C. §2744.03(A)(5). This effectively shifts the burden of proof to the plaintiff and contrary to the language and intent of the statute.

II. STATEMENT OF THE CASE AND FACTS

This Appellant adopts the Statement of the Case and Facts in the Memorandum in Support of Jurisdiction of Appellant The East Ohio Gas Company d/b/a Dominion East Ohio (pages 5-8).

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.

The essential error of the Eighth District's analysis is that it renders the provisions of the third tier of the immunity statute broader than the second. This effectively restores immunity to the political subdivision in every case. That the immunity restoring defenses of Ohio Rev. Code §2744.03 must be more narrowly read than the immunity denying provisions of Ohio Rev. Code §2744.02(B) was the express conclusion of the Fourth District Court of Appeals in *Hall v. Ft. Frye Loc. School Dist. Bd. of Edn.* (1996), 111 Ohio App. 3d 690. In *Hall* a football player brought a claim against the school board for an injury he suffered on the practice field from an allegedly improperly maintained sprinkler system. The school board contended that its conduct regarding the sprinkler system was entitled to immunity as policy making and planning pursuant to Ohio Rev. Code §2744.03(A)(3) and discretionary under Ohio Rev. Code §2744.03(A)(5).

The court succinctly articulated the applicable legal principle to be followed:

Immunity operates to protect political subdivisions from liability based upon discretionary judgments concerning the allocation of scarce resources; it is not intended to protect conduct which requires very little discretion or independent judgment. The law of immunity is designed to foster freedom and discretion in the development of public policy while still ensuring that

implementation of political subdivision responsibilities is conducted in a reasonable manner. Marcum v. Adkins (Mar. 28, 1994), Gallia App. No. 93CA17, unreported, 1994 WL 116233.

Id. at 699 (emphasis added). Thus, the immunity statute is not intended to protect any conduct that might be characterized as discretionary judgment. The Fourth District appellate court further observed approvingly citing a 1993 decision of the Summit County Court of Appeals:

In *Hallett v. Stow Bd. of Edn.* (1993), 89 Ohio App.3d 309, 313, 624 N.E.2d 272, 274, the court recognized that the very structure of R.C. Chapter 2744 implies that *the General Assembly did not intend to relieve political subdivisions from liability for all negligent actions of their employees.* Since these immunity statutes generally provide that “ ‘you're not liable,’ then say ‘you are liable’ and finally say ‘you're not,’ ” *it is clear that the exceptions to liability in R.C. 2744.03 must be read more narrowly than the exceptions to nonliability in R.C. 2744.02(B) in order for the legislative structure to make any sense at all.*

Id., (emphasis added).

In other words, the defenses and immunities of R.C. 2744.03 cannot be read to swallow up the liability provisions of R.C. 2744.02(B) so as to render them nugatory.

The Eighth District has held in this case that the plaintiff's must plead and prove that the City Water Department's use of equipment no matter what the harm, was with malicious purpose, in bad faith, or in a wanton or reckless manner. This clearly not be what the legislature intended. Otherwise why eliminate immunity protection for proprietary functions at all?

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 has misapplied R.C. Chapter 2744 by holding that a plaintiff must affirmatively plead malice, bad faith or wanton or reckless conduct in order to avoid the application of immunity to a public subdivision's negligent undertaking of a proprietary function. Protection of sovereign immunity is an affirmative defense which the political subdivision must plead and prove. The evidence presented by the City in support of its motion for summary judgment did not approach this burden. In defending the motion the plaintiff's were not obligated to prove the opposite.

IV. CONCLUSION

For the reasons set forth above and the arguments presented by Appellant The East Ohio Gas Company d/b/a Dominion East Ohio (pages 8-14) in its Memorandum in Support of Jurisdiction, Appellant The Ohio Bell Telephone Company respectfully urges that this case presents a case of public and great general interest appropriate for the review of this Court upon the merits.

Respectfully submitted,

William H. Hunt

WILLIAM H. HUNT (0008847)

HUNT & COOK, L.L.C.
Gemini Tower II, Suite 400
2001 Crocker Road
Westlake, Ohio 44145

*city
John F. Kelly
per fd.
auth.*

Telephone: (440) 892-0400
Facsimile: (440) 892-1966
whhunt@huntcooklaw.com

*Attorneys for Appellant
The Ohio Bell Telephone Company*

CERTIFICATE OF SERVICE

A copy of the foregoing Memorandum in Support of Jurisdiction of Appellant
The Ohio Bell Telephone Company was served upon counsel:

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

ROBERT J. TRIOZZI (0016532)
Director of Law

MCDONALD HOPKINS CO., LPA
600 Superior Avenue, East, Suite 2100
Cleveland, Ohio 44114

Joseph F. Scott (0029780)
Chief Assistant Director of Law

*Attorneys for East Ohio Gas Company
d/b/a
Dominion East Ohio*

Gary S. Singletary (0037329)
Assistant Director of Law

Shawn W. Maestle
WESTON HURD LLP

CITY OF CLEVELAND DEPARTMENT OF LAW
601 Lakeside Avenue, Room 106
Cleveland, Ohio 44114-1077
Telephone: (216) 664-2800
Facsimile: (216) 664-2663

The Tower at Erievew
1301 East 9th Street, Suite 1900
Cleveland, Ohio 44115

*Attorneys for
City of Cleveland*

*Attorney for
The Walgreen Company*

James L. Glowacki (0001733)
Glowacki and Associates
526 Superior Avenue East, Suite 510
Cleveland, Ohio 44114

Michael S. Gordon (0070715)
Jocelyn N. Prewitt-Stanley
Vorys, Sater, Seymour and Pease LLP
2100 One Cleveland Center
1375 East Ninth Street
Cleveland, Ohio 44114

*Attorney for DiGloia-Suburban
Excavating LLC*

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

*Attorneys for Adelpia of the
Midwest, Inc.*

*Attorney for Nationwide Mutual
Insurance Company*

Michael E. Cicero, Esq. (0058610)
Vincent Feudo, Esq. (0019733)
Nicola, Gudbranson & Cooper, LLC
Landmark Office Towers
Republic Building, Suite 1400
25 West Prospect Avenue
Cleveland, Ohio 44115-1048

*Attorneys for Northern Ohio Risk
Management Association of Self
Insurance
Pool Inc. and City of Maple Heights*

Daran P. Kiefer, Esq.
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*

WILLIAM D. MASON, Prosecuting
Attorney for Cuyahoga County, Ohio

BARBARA R. MARBURGER (0019152)
Assistant Prosecuting Attorney

The Justice Center, Courts Tower
1200 Ontario Street, 8th Floor
Cleveland, Ohio 44113
Telephone: (216) 443-7838
Facsimile: (216) 443-7602

*Attorneys for Cuyahoga County
Department of Development, Cuyahoga
County Engineer and Cuyahoga County
Board of County Commissioners*

David M. Matejczyk, Esq. (042325)
Roberts, Matejczyk & Ita Co. LPA
Thomas J. Vozar, Esq.
Vozar, Roberts & Matejczyk Co. LPA
5045 Park Avenue West, Ste 2B
Seville, Ohio 44273

*Attorneys for
Greystone Group-Libby,
Ltd., Visconsi Companies, Ltd. &
Travelers
Property & Casualty Co.*

by regular U.S. mail, postage prepaid, this 20th day of June, 2008.

William H. Hunt / by *JMF.*
WILLIAM H. HUNT (0008847)
*Kelly per
fel. auth.*

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

51343968



JOURNALIZED: APR 30 2008

VOL 0656 PG 0584

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 2003

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

CA07089907 50718465


CA07089708 50718464


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).

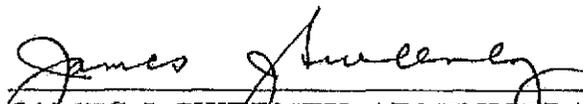
Judgment reversed and case remanded.

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. SWEENEY, ADMINISTRATIVE JUDGE

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