

IN THE SUPREME COURT OF OHIO

OHIO BELL TELEPHONE
COMPANY, *et al.*,

Plaintiffs-Appellants,

vs.

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

Defendants-Appellees.

) Case No. 2008-1171
)
) 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

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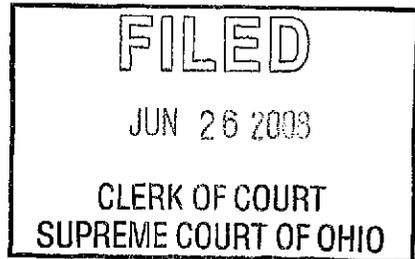


TABLE OF CONTENTS

	<u>Page</u>
TABLE OF CONTENTS.....	ii
EXPLANATION OF WHY THIS IS A CASE OF PUBLIC OR GREAT GENERAL INTEREST	1
STATEMENT OF THE CASE AND FACTS.....	4
LAW AND ARGUMENT	7
I. Proposition of Law: A Political Subdivision Bears The Burden Of Proof Pursuant To R.C. §2744.03 To Prove Entitlement To One Of The Defense Enumerated By The Ohio General Assembly Therein.....	6
CONCLUSION	11
APPENDIX.....	14

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

The Eighth District Court of Appeals decision in this case has refused to follow this Court's decade old sovereign immunity analysis set forth in *Cater v. City of Cleveland* (1998), 83 Ohio St. 3d 24. The Eighth District refused to follow this Court's requirement that the political subdivision prove entitlement to one of the defenses the Ohio General Assembly set forth in R.C. §2744.03(A). Instead, in contradiction to this Court's holding in *Cater*, the Eighth District has now imposed that the claimant through pleading and argument prove and carry the burden that the political subdivision is not entitled to any of the liability defenses set forth in R.C. §2744.03(A). If the Eighth District decision in this case shifting the third tier burden under *Cater* to the claimant, is a correct interpretation of that decision, then respectfully it is the obligation of this Court, the final arbiter of Ohio law, to so affirmatively state.

In *Cater*, this Court established a three-tier analysis to determine whether a political subdivision is entitled to sovereign immunity under Chapter 2744 of the Ohio Revised Code. The first-tier requires a political subdivision to establish entitlement to immunity under R.C. §2744.02(A)(i). *Id.* at 28; See also *Rankin v. Cuyahoga County Dept. of Children*, ___ Ohio St.3d ____; 2008 Ohio 2567. If the political subdivision successfully establishes entitlement, the next phase or second-tier pursuant to *Cater* requires a determination as to whether any of the statutory exceptions to immunity apply. In other words, it is the

claimant's burden to prove that the presumed immunity created it through the first-tier analysis is rebuttal by one of the statutory exceptions. *See*, R.C. §2744.02(B).

Where the claimant raises at least a genuine issue of material fact as to whether one of the statutory exceptions apply under the second-tier, the immunity analysis then shifts to the final or third tier and it is the political subdivision obligation under *Cater* to prove that one of the absolute defenses to liability set forth in R.C. §2744.03 applies to reinstate immunity that was removed under the second-tier analysis:

'Finally, under the third tier of analysis, immunity can be reinstated if the political subdivision can successfully argue that any of the defense contained in R.C. 2744.03 applies.' *Hortman*, 110 Ohio St.3d 194, 2006 Ohio 4251, p. 12, quoting *Cater*, 83 Ohio St.3d at 28.

Rankin, supra. at ¶27.

Requiring a political subdivision to prove and carry the burden of establishing reinstatement of the immunity under the third-tier is logical and consistent with the statutory language. Indeed, if a claimant is obligated to set forth in their complaint and prove that none of the defenses to liability under R.C. §2744.03 apply, then the *Cater* analysis has been set forth incorrectly and must be modified to advise all claimants as to their obligations when pursuing a claim against a political subdivision.

Troubling, if the Eighth District is correct, a political subdivision needs do nothing more than raise the presumption of immunity under tier one and then it would be the claimant's responsibility to prove not only an exception to immunity R.C. §2744.02(B) but also establish that none of the numerous defenses under R.C. §2744.03 apply. While

appellant asserts that such a procedure is in direct contradiction to this Court's decision in *Cater*, as well as the procedure set forth to remove immunity by the Ohio General Assembly, it is this Court's function to so state and not that of the junior appellate districts.

Appellant respectfully requests that this matter warrants this Court's extraordinary jurisdiction.

STATEMENT OF THE CASE AND FACTS

On or about July 24, 2001, Defendant Cuyahoga County entered into a construction contract with Appellee, DiGioia-Suburban Excavating, LLC ("DiGioia") for road improvements on Lee Road from Broadway Avenue to Interstate 480 in Maple Heights, Cuyahoga County, Ohio. On March 11, 2002, during the course of its excavation work, DiGioia exposed a bypass valve on a twenty-four (24) inch water main. At approximately 11:50 a.m., the twenty-four inch water main burst and water exploded from the excavation site.

In order to prevent the leaking water from spraying into the air, DiGioia covered the excavation with metal plates. DiGioia and, the City of Cleveland, likewise attempted to shut off water valves in and around the excavation site in an effort to control the water leak.

Notwithstanding these attempts, the force of the water, which was redirected by the metal plates, eroded the soil supporting a twenty-two (22) inch natural gas main that also ran through the excavation site. At approximately 2:56 p.m., the natural gas main, without surrounding soil support, separated under its own weight. At approximately 3:34 p.m., the natural gas was ignited by an electric transformer, and an explosion occurred. Tragically, the City of Cleveland did not turn off the water leak until approximately 6:30 p.m. that evening.

Appellant, Walgreen's operates a store located at 5264 Lee Road in Maple Heights, Ohio nearby where the Cuyahoga County/DiGioia construction project was occurring.

Walgreen's store is a retail drugstore, which is housed in a free-standing single story concrete block building, with approximately 10,000 square feet of sales area. The explosion caused by the leaking gas line caused extensive damage to Walgreen's' stock room and the front of the store. As a result of the explosion and/or fire, power to the store was interrupted for approximately 24-hours, resulting in the loss of perishable items, business operations and income. Further, as a result of the explosion and/or fire, Walgreen's had to make repairs to its premises.

Walgreen's expert, Paul Oleksa, has opined that the incident would not have occurred if the inspection plate on the Cleveland Water Department transmission valve had not corroded so severely. Further, Mr. Oleksa's report states that had the City's employee contacted the crew needed to operate the transmission valves in a timely manner, they would have seen that there was erosion of the supporting earth under the 24-inch natural gas pipeline. Likewise, had the City's employee contacted the crew needed to operate the transmission valves, steps could have been taken to notify Dominion East Ohio, or to redirect the flow of water away from the supporting earth underneath the natural gas pipeline. Finally, the transmission valve might have been turned off before the natural gas leak and subsequent explosion occurred.

As a result of this incident, Walgreen's filed suit against the City and alleges that it had a duty to maintain the integrity of its water utility facilities, including preventing, repairing, and/or replacing its water mains from aging and deterioration. Walgreen's alleges that the City and its employees were negligent by failing to timely, adequately and

properly respond to and control the water leak that occurred at the excavation. Further, Walgreen's alleges that it is the proximate result of the City's negligence, the natural gas line was damaged, thereby causing the natural gas leak and explosion.

On October 2, 2006, the City of Cleveland, filed a Motion for Summary Judgment asserting that it was entitled to immunity pursuant to Chapter 2744 of the Ohio Revised Code. Following opposition to the Appellant's motion, the Trial Court on April 2, 2007, granted the City's motion as to the subrogated insurance claim of Appellee, Traveler's Property & Casualty Company, however, the Court denied the City's request as to all other parties. On April 12, 2007, the City of Cleveland filed a timely appeal.

On April 30, 2008, the Eighth District Court of Appeals reversed the trial and held that The City was immune from the actions of its employees.

LAW AND ARGUMENT

I. Proposition of Law: A Political Subdivision Bears The Burden Of Proof Pursuant To R.C. §2744.03 To Prove Entitlement To One Of The Defense Enumerated By The Ohio General Assembly Therein.

Where a claim for immunity is asserted under Chapter 2744 of the Ohio Revised Code, this Court has set forth a three-tiered analysis to determine whether a political subdivision is immune from tort liability. *Cater v. Cleveland* (1998), 83 Ohio St. 3d 24. The first tier requires a political subdivision to establish entitlement to immunity under R.C. §2744.02(A)(1). *Id.* at 28. As to this first tier, Ohio Revised Code §2744.02(A)(1) provides immunity to political subdivisions and their employees as follows:

For the purposes of this chapter, the functions of political subdivisions are hereby classified as governmental functions and proprietary functions. Except as provided in division (B) of this section, 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 the governmental or proprietary function.

It is without dispute that the first tier is satisfied, and an initial presumption of immunity arises for the City of Cleveland.

The next phase or second tier requires a determination as to whether any of the statutory exceptions set forth in R.C. §2744.02(B) applies. These exceptions eliminate a political subdivisions immunity for any of the following conduct: the negligent operation of motor vehicles; negligence relating to any proprietary function; negligent conduct in

connection with public roads, buildings and property; and where civil liability is statutorily provided. See, R.C. §2744.02(B)(1), (2), (3), (4) and (5).

While, the claimant, Walgreens here, generally bears the burden of proving one of the exceptions, Appellant, the City of Cleveland, acknowledged below that the exception for negligent conduct related to a proprietary function applies.

Thus, presuming that the negligence exception, R.C. §2744.02(B)(2), applies as the City has stated, the burden then shifts to the City of Cleveland, to assert and prove, under the third tier, one of the defenses set forth in of R.C. §2744.03. If one of the defenses applies, as a matter of law, then immunity may be reinstated. *Cater, supra.*; *See also, Rankin v. Cuyahoga County Department of Children*, ____ Ohio St.3d ____; 2008 Ohio 2567.

As to this third tier analysis, the City states that the R.C. §2744.03(A)(5) applies to reinstate immunity. R.C. §2744.03(A)(5) permits immunity to be reinstated where the political subdivision proves that its employees actions were within its business judgment or discretion and not actions which were exercised recklessly, wantonly, in bad faith or with malice:

(5) The political subdivision is immune from liability if the injury, death, or loss to 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); *See also, Elston v. Howland Local Schools*, 113 Ohio St. 3d 314, 2007-Ohio-2070.

The City of Cleveland fails to support its reliance on this asserted defense. Indeed, aside from citing the defense and recent *Elston* decision, the City has not advanced any *evidence* or legal argument justifying its position. Frankly, the City has the burden under this (A)(5) defense as well as applicable summary judgment law to set forth factual evidence proving that its employee did not act recklessly, willfully, wantonly, in bad faith or with malice. See, *Svette v. Caplinger*, 2007-Ohio-664 (7th Dist.) at ¶ 16; *Evans v. S. Ohio Med. Ctr.*, 103 Ohio App. 3d 250, 255 (4th Dist. 1995); *Hall v. Fort Frye Local School*, 111 Ohio App. 3d 690, 694 (4th Dist. 1996).

Entitlement to this immunity defense is not the Appellant's burden. Appellant needs only establish and prove their various claims at trial against the City. If the City believes it is entitled to this immunity defense, it is obligated to prove to the trial court, in accordance with Civ. R 56, that the immunity defense applies as a matter of law, and that no justifiable question of fact exists on any of the pertinent issues. *Svette v. Caplinger*, 2007-Ohio-664 (7th Dist.) at ¶ 16.

Rule 56(C) of the Ohio Rules of Civil Procedure specifically provides that before summary judgment may be granted, the court must determine (1) that no genuine issue of material fact remains to be litigated; (2) the moving party is entitled to judgment as a matter of law; and (3) it appears from the evidence that reasonable minds can come to but one conclusion and, viewing such evidence most strongly in favor of the party against whom the motion for summary judgment is made, that conclusion is adverse to the non-moving party. *Osborne v. Lyles* (1992), 63 Ohio St. 3d 326.

This Court further stated in *Drescher v. Burt* (1996), 75 Ohio St. 3d 280, 293, that the movant (City of Cleveland) bears the initial burden of identifying those portions of the record which demonstrate the absence of a genuine issue of material fact. Only if the movant satisfies this initial burden does the opposing party have a reciprocal obligation and burden to set forth specific facts which create genuine issue of material fact for trial. *Id.* Neither *Elston* nor *Xenia* change the burden an immunity claimant must meet to be entitled to summary judgment on its claimed defense.

In the case *sub judice*, the City was required to establish the absence of a genuine issue for trial on all *prima facie* elements their immunity defense. A fair reading of the (A)(5) sub part for that defense calls into question multiple factual issues, including whether the City's employee was exercising his judgment or discretion in an appropriate manner. Additionally, the City must prove that its employee was neither acting recklessly, willfully, wantonly, in bad faith nor with malice at the time. In short, the City has not set forth any argument or cited to any evidence in the trial court record proving that there is a lack of a genuine issue of material fact on any of these *prima facie* issues. Rather, the City attempts to prove its defense by asserting that the various complaints and causes of action sound only in simple negligence and therefore they are entitled to the defense. With all due respect, it is the City's burden to prove the defense. Appellant need only prove negligence to recover for their damages. See, *Hill v. City of Urbana* (1997), 79 Ohio St. 3d 130, 134.

CONCLUSION

It is solely within the providence of this Court to interpret and modify, if appropriate, a prior decision of this Court. The Eighth District's decision herein ignores this Court's analysis set forth in *Cater, supra*. If the Eighth District decision is permitted to stand without comment, the Ohio General Assembly's promulgation of the immunity standard will be drastically affected and forever altered. Because it is this Court's function to make such far reaching changes to Ohio law, this case is one of great general interest as well as important to every citizen in the State of Ohio.

Respectfully submitted,

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APPENDIX

Tab

Eighth District Court of Appeals Opinion & Judgment Entry.....A

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

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JOURNALIZED: APR 30 2008

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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).

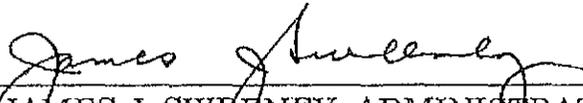
Judgment reversed and case remanded.

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