
IN THE SUPREME COURT OF OHIO
CASE NO.:

10-0170

Appeal from the Court of Appeals
Eleventh Appellate District
Portage County, Ohio
Case No. 2008 PA 00017

HENRY MOORE, et al.

Plaintiffs-Appellees

v.

CITY OF STREETSBORO, et al.

Defendants-Appellants

**DEFENDANT/APPELLANT CITY OF STREETSBORO'S MEMORANDUM IN
SUPPORT OF JURISDICTION**

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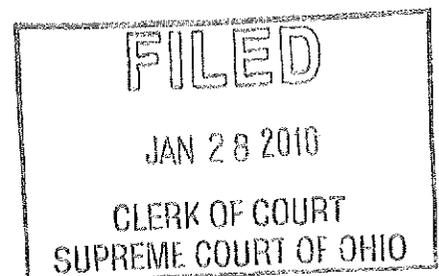


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I. **EXPLANATION OF WHY THIS CASE IS OF PUBLIC OR GREAT GENERAL INTEREST AND INVOLVES A SUBSTANTIAL CONSTITUTIONAL QUESTION**

This case presents two issues of great importance to political subdivisions in Ohio. The first issue is whether the plaintiff has the burden to demonstrate an exception to immunity under R.C. § 2744.02(B), when a political subdivision raises immunity under R.C. § 2744.02(A). The second issue is whether a public entity's failure to "upgrade" a sewer, which is allegedly inadequate to serve upstream property owners, is a failure to "maintain" the sewer under the proprietary function exception to immunity under R.C. § 2744.02(B)(2).

With regard to the first issue, the City asserts that once it demonstrates it is a "political subdivision" within the meaning of R.C. § 2744.02(A)(1), the City is entitled to a presumption of immunity and satisfies the movant's burden under Civil Rule 56. In turn, the nonmoving party has to affirmatively establish one of the five exceptions to immunity under R.C. § 2744.02(B) to rebut that presumption. Here, and despite the plaintiffs' failure to argue an exception applied – or even mention Chapter 2744 in their appellate brief – the majority panel erroneously concluded that the "city failed to meet its burden of identifying those portions of the record which demonstrate an absence of material fact as to the ownership and maintenance of the 18-inch pipe [from the condominium]" under Civil Rule 56. (App. Op. at ¶ 58; Apx. 16.) But, Moore did not put any evidence that the City negligently maintained the 18-inch line. And, the appellate court did not cite to any evidence of lack of maintenance.

The second issue deals with a political subdivision's alleged failure to "upgrade" a sewer. This issue turns on whether the "failure to upgrade sewers that are inadequate to service upstream property owners" is a governmental function that is immune, or a proprietary function that is not immune under R.C. § 2744.02(B)(2). A *governmental* function is: "(1) The provision or nonprovision, planning or **design, construction, or reconstruction** of a public improvement,

including, but not limited to, a **sewer system** [emphasis added].” R.C. § 2744.01(C)(2)(l). A *proprietary* function is: “(d) The maintenance, destruction, operation, and **upkeep of a sewer system** [emphasis added].” R.C. § 2744.01(G)(1)(d). The City’s position is that the failure to “upgrade a sewer” is a design, construction or reconstruction issue that is immune.

This case arises out of two property owners’ claims that they sustained flood damage after a severe rainstorm. Plaintiffs Henry and Maryann Moore (Moore) sued the City of Streetsboro¹ for damages to their property. The eleventh district determined that there was a genuine issue of material fact regarding the ownership of an 18-inch line that discharges into a junction box that may have caused reverse-flow flooding on Moore’s property. The majority panel further concluded that there “remains a question of whether the city was negligent in its maintenance and operation of the pipe, a proprietary function for which immunity does not apply.”

The eleventh district’s decision misconstrues the burdens under the Political Subdivision Tort Liability Act. The presumption of immunity is an important aspect of defending claims against public entities. It forces a plaintiff to articulate how a certain claim avoids immunity when challenged in a dispositive motion and prompts the early resolution of the immunity issue. In cases where plaintiffs make “shotgun” claims with little clarity and numerous allegations, the presumption is particularly helpful because it clarifies issues and eliminates untenable claims that clog court dockets and confuse other viable issues. The resolution of these claims is in accord with the recognized purpose of R.C. Chapter 2744, which is the “preservation of the fiscal integrity of political subdivisions.” Wilson v. Stark Cty. Dept. of Human Servs. (1994), 70 Ohio St.3d 450, 453. Further, the eleventh district’s decision is wrong and creates a conflict with

¹ Moore also sued adjoining landowners that are not part of this appeal.

numerous other appellate districts on the same issue. *See, e.g., Summerville v. City of Columbus* (10th Dist.), 2005-Ohio-5158 ¶ 17 (In order to overcome sovereign immunity, once the same is established, a plaintiff must demonstrate that an exception to immunity exists. This burden rests upon the plaintiff both at trial and during summary judgment proceedings.).

The eleventh district's decision on what constitutes non-immune sewer maintenance is troubling and presents an important issue of great general interest. The court improperly held that the City's failure to upgrade a sewer is a failure to maintain the sewer. Under the eleventh district's decision, the upgrade of a sewer is a proprietary function for which cities will be held liable under R.C. 2744.02(B)(2). While acknowledging that cities are immune from design and construction of their sewer systems, the majority nevertheless ruled that "the failure to upgrade sewers" is not a design or construction issue. The divided court reasoned, if "the city is responsible for that [condominium line], the failure to upgrade sewers that are inadequate to service upstream property owners despite sufficient notice of the inadequacy can best be described as a failure to maintain or upkeep the sewer." (App. Op. at ¶ 59; Apx. 16-17.)

"The failure to upgrade sewers" is not maintenance. The sewer could be perfectly maintained but simply not capable of handling drainage after severe rains. This is a design or construction issue. The Legislature expressly distinguished between immune governmental and non-immune proprietary functions. The eleventh district's decision directly challenges that legislative distinction. With Ohio's overtaxed and outdated sewer systems, the eleventh district's holding is significant because it turns otherwise non-liability claims for flood damage into very significant liability issues, despite perfect maintenance and diligent monitoring of sewers. In certain instances, where a 20-, 50- or 100-year storm hits an area resulting in flooding, public entities could be potentially liable to hundreds of residents. This liability would exist despite

have nothing to do with the maintenance of a line. The cost of upgrading sewers would be overwhelming. Public entities reconstruct sewers when resources are available to do so. While the Legislature does not immunize the lack of maintenance of a sewer, the Legislature has expressly shielded the decision of when to upgrade or reconstruct a sewer. This Court should protect that legislative determination.

This case presents issues of critical importance to Ohio's political subdivisions. The eleventh district's novel interpretation of the burden to demonstrate an exception to governmental immunity is wrong and creates an injustice to these and future litigants. The eleventh district's holding that the failure to "upgrade" a sewer to increase capacity constitutes a failure to maintain departs from the Tort Liability Act's express language and exposes political subdivisions potentially devastating liability. Review by this Honorable Court will provide guidance to all Ohio courts in which public entities are litigants. Therefore, this matter is of great general or public interest warranting this Court's review.

II. STATEMENT OF THE CASE AND FACTS

A. Background to Plaintiffs' Property and Drainage Issues

Plaintiffs Henry and Maryann Moore ("Moore") owned 2.5 acres of commercial land, located on State Route 14 in the City of Streetsboro. Moore constructed a commercial building on that land. This case centers on the drainage situation of Moore's property.

Moore's property is on the southern side of State Route 14 and abuts a 24-inch culvert running under State Route 14. The original site plan for Moore's property indicates that on the northern side of State Route 14, 11.25 acres of undeveloped land drained into the culvert and onto Moore's property. Water coming from the northern side of State Route 14 accounts for between 50% and 75% of the run-off affecting Moore's property. There is no dispute that the

area has developed since Moore purchased the property in 1988. Further, Moore's property is located at a low point among properties that are on either side of it.

The 24-inch culvert primarily drains into a retention basin located along the northern border of Moore's property. Moore's property also drains into the retention basin, though Moore has long understood that at times his parking lot would also be holding water during rain. Moore's building, however, was "guaranteed" by Moore's architect, Mr. Manfrass, not to flood with less than a 20-year storm.

The retention basin drains through a single drainage pipe, which is known as the "Sperry line." The Sperry line is a 12-inch-clay-tile line. The Sperry line runs several dozen yards south to a large wetlands area, which serves as a large natural drainage basin for much of the area. The City does not have any responsibility for Sperry line, which is not part of the City of Streetsboro's sewer system.

At the lowest portion of the wetlands, the Sperry line ties into a "junction box." The junction box is an approximately three-foot tall cylindrical concrete structure that is hollow inside and has a grated opening at the top of the structure. Four other drainage lines, including an 18-inch line that runs from the Maplewood Condominiums, tie into the junction box. The junction box is not enclosed and allows overflow into the surrounding wetlands area through the grated opening at the top of the box. However, the junction box does have an internal 12-inch outlet pipe, which runs east and under a portion of State Route 14, south of Moore's property.

B. The Maple Wood Condominium Line

The eleventh district in deciding this case found significant the 18-inch pipe that runs from the Maple Wood Condominiums to the junction box. The eleventh district found that, in early 2000, the Moores granted the city an easement to construct, maintain, and operate an 18-

inch pipe, which runs from an upstream property, Maple Wood Condominiums. At that time, a detention basin was also created, and the detention basin that the Moores' neighbor built was expanded. The detention basin is the only outlet for the "Sperry pipeline," and was built three to four years after the Moores' built the plaza.

Mr. Moore testified that the city installed the drainage line for Maple Wood Condominiums, running a pipe through the property. The pipe does not actually drain onto the Moore property. Mr. Moore asserts that this additional drainage, which flows into the junction structure, along with the other upstream drainage pipes that were later added are the cause of the flooding problems his property experiences during periods of heavy rainfall. Mr. Moore opined the city should have been more comprehensive in incorporating the pipe to include all of the surrounding properties, instead of just the condominiums.

On July 21, 2003, a storm occurred that flooded Moore's business building. Moore's engineering expert, Jack McFadden, estimated that the storm that hit that day was a 50-year storm. Further, the Federal Emergency Management Agency declared Portage County, in addition to several other Ohio counties, federal disaster areas due to "tornadoes, flooding, severe storms, and high winds." Moore has acknowledged that, given the guarantee made by his architect, a storm of that severity would "probably" have flooded his building. Further, Moore testified that such a storm would have flooded his building back in 1988, when his architect advised him of the design of the building.

Moore retained an engineer, Jack McFadden, to evaluate the causes of his flooding problems. Mr. McFadden has opined on several different, potential contributors to the flooding of Moore's property including the fact that Moore's building was built too low – at the lowest point of the property. While finding that all but one of the expert's conclusions did not avoid

immunity in the present case, the eleventh district focused on McFadden's testimony that he believed that the junction box may have caused a "reverse flow" situation along the Sperry line during significant rain events. Essentially, Mr. McFadden stated that entering the concrete structure are several drainage lines, one of which was 18 inches, and the concrete structure only has a 12-inch outlet, therefore forcing water back up the Sperry line. In particular, Mr. McFadden stated that the flow velocity coming from the Maple Wood Condominiums' 18-inch pipe created reverse flow in the smaller pipes.

C. Two Judges Misconstrue Tort Immunity Law and Reverse the Trial Court

The trial court determined that Moore's claims had no merit and granted summary judgment in favor of the City of Streetsboro. The trial court found that the City was immune under Ohio's Political Subdivision Tort Liability Act. The trial court rejected Moore's argument that "Streetsboro is responsible for the storm water drains flowing to the junction box because Streetsboro allowed the drains to be installed." The trial court determined that this was a planning decision that was immune. (Tr. Ct. Op. at 7.)

Moore timely appealed that decision to the eleventh district court of appeals. In his appellate brief, Moore did not cite any provision of the Chapter 2744 and did not argue that any specific exception to the City's immunity existed. Yet, in a divided decision with one dissenting judge and one judge concurring in judgment only, the eleventh district reversed the trial court's decision.

The majority panel determined that the "city failed to meet its burden of identifying those portions of the record which demonstrate an absence of material fact as to the ownership and maintenance of the 18-inch pipe [from the condominium]" under Civil Rule 56. (App. Op. at ¶ 58; Apx. 16.) Even though not specifically argued by Moore, the eleventh district determined

that there was a factual conflict regarding whether the City owned the 18-inch line from the Condominium. Then, with no evidence of a lack of maintenance, the eleventh district held the failure to upgrade constitutes a failure to maintain:

If, indeed, the city is responsible for that pipeline, then “the failure to upgrade sewers that are inadequate to service upstream property owners despite sufficient notice of the inadequacy can best be described as a failure to maintain or upkeep the sewer.” “If proven, this failure would constitute the breach of a duty arising out of a proprietary function and would expose the city to liability under R.C. 2744.02(B)(2). Therefore, summary judgment is premature in this case.” [Citations omitted.]

(App. Op. at ¶ 59; Apx. 16-17.)

The dissenting judge correctly observed that the Moores did not present evidence regarding “the City of Streetsboro's responsibility for the pipe line in question, nor did the Moores present evidence that Streetsboro was negligent in maintaining the aforementioned pipe line.” (App. Op. at ¶ 79; Apx. 21.) The dissenting judge also correctly noted that “the Moores have failed to analyze or cite any case law pertaining to R.C. 2744, the chapter that refers to the maintenance, operation, and upkeep of a sewer system as a proprietary function.” (*Id.* at ¶ 80.)

III. ARGUMENT IN SUPPORT OF PROPOSITIONS OF LAW

Proposition of Law I: When a political subdivision raises immunity under R.C. § 2744.02(A), the plaintiff has the burden to demonstrate an exception to that immunity under R.C. § 2744.02(B) at trial and during summary judgment proceedings.

A political subdivision, as a moving party, meets its burden under Civil Rule 56(C) when a public entity establishes that it is a “political subdivision” under R.C. § 2744.02(A). The eleventh district misinterpreted and confused the plaintiff’s burden. Despite the court’s decision, the plaintiff must demonstrate an exception to immunity under R.C. § 2744.02(B) in the context of summary judgment. A public entity like the City meets its burden on summary judgment when

it demonstrates that it is a “political subdivision” under R.C. § 2744.01(F) of the Political Subdivision Tort Liability Act.

That Section defines, “‘Political subdivision’ or ‘subdivision’ [as] a municipal corporation, township, county, school district, or other body corporate and politic responsible for governmental activities in a geographic area smaller than that of the state.” R.C. § 2744.01(F). Here, there is no dispute that the City established and admitted it was a political subdivision (*see* City’s answer and Pl.’s complaint) and raised it in its summary judgment and appellate briefing. Therefore, the City is broadly immune from liability under R.C. § 2744.02(A)(1), unless an exception under R.C. § 2744.02(B)(1-5) applies.

As a political subdivision, the City is statutorily immune from damage claims for property damage.

(A)(1) 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 a governmental or proprietary function.

R.C. § 2744.02(A)(1).

Under Ohio law, a political subdivision may lose its immunity under R.C. § 2744.02(A), only if one of the R.C. § 2744.02(B)(1-5) exceptions apply.² Cater v. City of Cleveland (1998), 83 Ohio St.3d 24. Consequently, a plaintiff must demonstrate an exception to immunity applies with competent evidence to avoid summary judgment. Here, the trial court properly concluded that Moore failed to meet this burden. The trial court correctly granted summary judgment in favor of the City and dismissed the case.

² Even then, a political subdivision can regain immunity under the well-established three-tiered statutory analysis. Cater v. City of Cleveland (1998), 83 Ohio St.3d 24; *see* R.C. § 2744.03.

Notwithstanding, the eleventh district sua sponte determined that the City did not meet its burden on summary judgment. The eleventh district determined that the “city failed to meet its burden of identifying those portions of the record which demonstrate an absence of material fact as to the ownership and maintenance of the 18-inch pipe.” (App. Op. at ¶ 58; Apx. 16.) The appellate court concluded that if ownership of the line and lack of maintenance were “proven, this failure would constitute the breach of a duty arising out of a proprietary function and would expose the city to liability under R.C. 2744.02(B)(2). Therefore, summary judgment is premature in this case.” [Citations omitted.]” (Id.)

The City does not have the burden to demonstrate an exception to immunity under R.C. § 2744.02(B). That is the plaintiff’s burden. And, there was no evidence that the City failed to maintain the 18-inch pipe, even assuming it owned the line.

The majority eleventh district’s decision is in direct conflict with the tenth district and other districts that hold that the plaintiff has that burden to demonstrate an exception under R.C. § 2744.02(B)(1-5). For instance, the tenth district has held that the plaintiff has the burden to demonstrate an exception under R.C. § 2744.02(B)(1-5):

... [A]ppellant argues that the initial burden rested upon the city to establish, within the dictates of Civ.R. 56, that appellant’s allegations did not fall within the “public grounds” exception found in former R.C. 2744.02(B)(3).
{¶ 17} On this point, appellant is mistaken. In order to overcome sovereign immunity, once the same is established, a plaintiff must demonstrate that an exception to immunity exists. This burden rests upon the plaintiff both at trial and during summary judgment proceedings. Thus, when sovereign immunity is established by one who has moved for summary judgment, the nonmovant’s responsive burden, pursuant to Civ.R. 56(E), includes the requirement that he or she demonstrate the existence of an applicable exception to sovereign immunity. In order to avoid summary judgment, then, the nonmovant must demonstrate the existence of a genuine issue of fact with respect to the applicability of one of the exceptions set forth in R.C. 2744.02(B).

Summerville v. City of Columbus (10th Dist.), 2005-Ohio-5158 ¶ 17.

Here, the Plaintiffs did not argue on appeal that a statutory exception existed and did not cite any provision of Chapter 2744 in its brief. The eleventh district's decision is wrong and conflicts with numerous other appellate districts on the same issue. *See e.g., Summerville*, supra; *see further e.g., M.B. v. Elyria City Bd. of Educ.* (9th Dist.), 2006-Ohio-4533 at ¶ 17 ("The party asserting an exception to immunity under R.C. 2744.02(B) has the burden of establishing that exception."). This Court should accept this appeal to clarify the burden that a political subdivision has when it raises immunity and moves for summary judgment.

Proposition of Law II: The upgrade of a sewer system is a governmental function under R.C. 2744.01(C)(2)(I).

The eleventh district improperly transformed an immune governmental function for the "design, construction, or reconstruction of ... a sewer system" into a non-immune proprietary function for the "maintenance, destruction, operation, and upkeep of a sewer system."

The majority found that the failure to upgrade a sewer is a failure to maintain a sewer. The majority reasoned, if "the city is responsible for that [condominium line], the failure to upgrade sewers that are inadequate to service upstream property owners despite sufficient notice of the inadequacy can best be described as a failure to maintain or upkeep the sewer." (App. Op. at ¶ 59; Apx. 16-17.)

So, under the eleventh district's decision, no matter how well maintained the sewer is, the fact that it had inadequate capacity or other design-related issues would make a political subdivision liable for failing to upgrade that sewer to meet the needs of property owners. Here, there was no evidence of the City's failure to maintain the sewer, even assuming that the City's easement constituted ownership of the line. There was no evidence the condominium line was crumbling, clogged, or dilapidated in any way.

The eleventh district wrongly concluded that the failure to “maintain” the sewer by failing to upgrade the sewer “expose[s] the city to liability under R.C. 2744.02(B)(2).” (App. Op. at ¶ 59; Apx. 17.) The majority panel sua sponte raised³ the “proprietary function” exception under R.C. § 2744.02(B)(2). That exception provides, in relevant part:

[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). This case does not involve a proprietary function. The (B)(2) exception does not apply.

A *governmental* function is: “(l) The provision or nonprovision, planning or **design, construction, or reconstruction** of a public improvement, including, but not limited to, a **sewer system** [emphasis added].” R.C. § 2744.01(C)(2)(l). A *proprietary* function is: “(d) The maintenance, destruction, operation, and **upkeep of a sewer system** [emphasis added].” R.C. § 2744.01(G)(1)(d).

A court’s duty is to construe statutes in a manner to “ascertain and give effect to the legislative intent.” Elston v. Howland Local Schools (2007), 113 Ohio St.3d 314. It is a court’s duty to apply the statute as the General Assembly has drafted it and not to rewrite it. *See, e.g., Bd. of Edn. of Pike-Delta-York Local School Dist. v. Fulton Cty. Budget Comm.* (1975), 41 Ohio St.2d 147, 156 (“Courts do not have the authority to ignore, in the guise of statutory interpretation, the plain and unambiguous language in a statute. ... The remedy desired by appellants from this court must be obtained from ... the General Assembly”).

The City firmly believes that the “upgrade,” in the words of the appellate court, of a sewer falls within the “design, construction, or reconstruction ... of a sewer system,” not

³ The Plaintiffs/Appellants did not mention any provision of Chapter 2744 in their appellate brief in the eleventh district.

“maintenance, destruction, operation, and upkeep of a sewer system.” The installation of a sewer line is an immune governmental function, not a proprietary function. R.C. § 2744.01(C)(2)(l).

Ohio case law has held that design and construction of a storm sewer is a “governmental function” and, thus, a city is statutorily immune from liability to property owners for damages caused by stormwater flooding for the alleged negligent design and construction of that sewer, under R.C. § 2744.02. *See e.g., Smith v. Cincinnati Stormwater Mgt. Div.* (1st Dist. 1996), 111 Ohio App.3d 502; *see Alden v. Summit County* (9th Dist. 1996), 112 Ohio App.3d 460. Ohio courts are in conflict on this issue and have also held to the contrary. *Compare, e.g., H. Hafner & Sons Inc. v. Cincinnati Metropolitan Sewer Dist.* (1997), 118 Ohio App.3d 792, 797(holding failure to upgrade sewers that are inadequate to service property owners is a failure to maintain). This Court should review this issue that continues to cause confusion among the intermediate appellate courts and creates unnecessary liability on public entities.

IV. CONCLUSION

This Honorable Court should accept jurisdiction.

Respectfully submitted,

MAZANEC, RASKIN, RYDER & KELLER CO., L.P.A.

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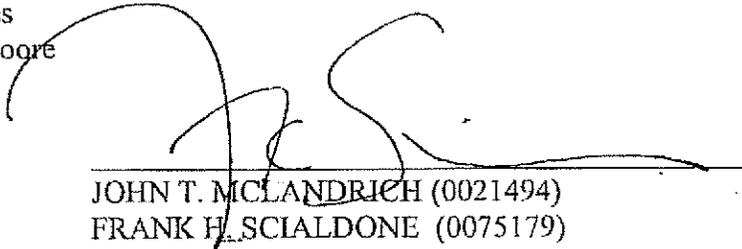
CERTIFICATE OF SERVICE

A copy of the foregoing Memorandum in Support of Jurisdiction has been sent by regular

U.S. Mail, postage prepaid, January 28, 2010 to the following:

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A large, stylized handwritten signature in black ink, appearing to read 'J.T. McLandrich', is written over a horizontal line.

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APPENDIX

Eleventh District Court of Appeals Opinion dated December 14, 2009

DEC 14 2009

LINDA K. FANKHAUSER, CLERK
PORTAGE COUNTY, OHIO

THE COURT OF APPEALS
ELEVENTH APPELLATE DISTRICT
PORTAGE COUNTY, OHIO

HENRY & MARYANN MOORE,	:	OPINION
Plaintiffs-Appellants,	:	CASE NO. 2008-P-0017
- VS -	:	
CITY OF STREETSBORO, et al.,	:	
Defendants-Appellees.	:	

Civil Appeal from the Court of Common Pleas, Case No. 2005 CV 1114.

Judgment: Reversed and remanded.

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MARY JANE TRAPP, P.J.

{¶1} Henry and Maryann Moore appeal from the trial court's award of summary judgment in favor of the city of Streetsboro ("the city"), which found the city was immune from liability for storm water drainage problems, which causes the Moores' property to flood during periods of heavy rainfall.

SCANNED

{¶12} The Moores contend on appeal that the court erred in finding the city was immune from liability because there are genuine issues of material fact that remain unresolved. Those issues are (1) whether the city owns a portion of the sewer system in question; (2) if so, whether the city was negligent in its maintenance and operation of that portion; and (3) whether any negligence on the part of the city contributed to the Moores' storm runoff flooding problem. The Moores also contend the trial court erred in applying the law applicable to a municipality's design and construction of storm sewer systems, rather than applying the law of riparian rights.

{¶13} While we find no error in the trial court's decision as to the questions addressed, we do find that one question was not addressed and upon a de novo review of the record, we agree with the Moores that genuine issues of material fact remain unresolved. Specifically, whether the 18-inch pipe installed pursuant to an easement the Moores granted to the city in early 2000 is a part of the city's sewer system. If so, there remains a question of whether the city was negligent in its maintenance and operation of the pipe, a proprietary function for which immunity from liability does not apply. We disagree, however, with the Moore's second contention that the law of riparian rights should apply, finding the court applied the appropriate analysis. Thus, we reverse and remand to resolve the genuine issues of material fact that remain.

{¶14} **Substantive and Procedural History**

{¶15} In 1988, the Moores purchased a commercially zoned property located on State Route 14, in Streetsboro, Ohio, from Mr. Lynn Sperry. The property as a whole sits at the lowest point of a commercially zoned area. Beyond the property is a wetland where a majority of the water from the upstream properties, as well as the Moores'

water drainage, flows. The point of confluence of drainage from the five pipes is the "junction structure," a concrete structure that has a small 12-inch pipe at the opposite end of the five pipes from which the water flows into the wetlands area, as well as a grated top to allow for overflow.

{¶6} At the time the Moores purchased the property, however, the upstream properties were not yet developed, or at most, mildly developed. Only a culvert, or ditch, existed that runs underneath State Route 14, which in turn runs into a natural creek or waterway to dispose of the runoff. Prior to purchasing the property, the Moores agreed with the city that the city would slope a certain amount of land into a retention area. The land was not specifically sloped, and was in fact, simply a dry ditch. A retention basin was ultimately never put on the property because one was constructed by the abutting property.

{¶7} The Moores built one commercial building on their property that housed their own business, Moore Electric, as well as several tenants; the Warehouse Gym, Streetsboro Visitors, and Mars Electric. The commercial building was opened sometime between the winter holidays in 1989. Although the site was initially approved for three buildings, it remains undeveloped due to the ensuing flooding and drainage problems the property has experienced since 2003. At the time the plaza was built, Mr. Moore's architect opined that part of the parking lot may become flooded at times, but that the building would not flood unless there was a "twenty year" storm. The original site plan also called for the building to be constructed a foot higher than it was eventually built as the property sits below street level.

{¶8} In the deed, the Moores expressly assumed responsibility for the portion of a pipeline known as the "Sperry pipeline" that runs across their property into the junction structure. Mr. Moore replaced the Sperry pipeline with PVC pipe when he purchased the property for the portion that ran through his and his neighbor's property.

{¶9} During the 1990s, the Moores had no problems with flooding or drainage, but as the upstream properties developed, so did issues with drainage. The junction structure and the pipes are questionable in their ability to maintain an adequate water flow to prevent flooding, causing over-retention and a reverse backup into the Moores' property, instead of flowing into the wetlands. The fact that some of the pipes have large cracks and are filled with debris actually helps the Moores in this instance by creating a certain negative pressure against a reverse flow.

{¶10} The Moores' expert, Mr. Jack McFadden, was unable to ascertain who owned the junction structure that led into the wetland's drainage area. Mr. Moore testified that it was originally a wooden structure constructed in the 1950s, and that at some point, the city built the concrete structure that stands today.

{¶11} In early 2000, the Moores granted the city an easement to construct, maintain, and operate an 18-inch pipe, which runs from an upstream property, Maple Wood Condominiums. At that time, a detention basin was also created, and the detention basin that the Moores' neighbor built was expanded. The detention basin is the only outlet for the "Sperry pipeline," and was built three to four years after the Moores' built the plaza.

{¶12} In regard to the easement, the city engineer sent a letter to the Moores on January 11, 2000, requesting an easement across the back of the Moores' property in

order to install a drainage line from the Maple Wood Condominiums. The city sent the Moores a letter on April 29, 2000, enclosing a copy of the easement.

{¶13} Mr. Moore testified that the city installed the drainage line for Maple Wood Condominiums, running a pipe through the property. The pipe does not actually drain onto the Moore property. Mr. Moore asserts that this additional drainage, which flows into the junction structure, along with the other upstream drainage pipes that were later added are the cause of the flooding problems his property experiences during periods of heavy rainfall. Mr. Moore opined the city should have been more comprehensive in incorporating the pipe to include all of the surrounding properties, instead of just the condominiums.

{¶14} Sometime in 2002, an adjacent property owner also installed a pipeline to alleviate drainage problems and prevent flooding. By the end of 2002, despite several conversations and disagreements regarding the addition of this new pipeline, the line was installed by the property owner. The property owner, however, did not complete the seeding and sloping that was necessary because a disagreement ensued with the Moores over who was financially responsible.

{¶15} Several years later, in 2003, a heavy rainfall occurred in early July, flooding the Moores' property up to the sidewalk of the plaza and completely covering the parking lot. At that time, there was some type of stoppage of flow, presumably from a reverse flow of the junction structure. The city assisted Mr. Moore in pumping the excess water, which took approximately five days to pump several million gallons. The city pumped the water from the catch basin area to the easement pipe. The Moores'

property incurred concrete damage and lost several layers of subsoil. The junction structure leading into the wetlands was under water for 28 days.

{¶16} A second storm, much more severe, occurred on July 21, 2003.. At that time Mr. Moore called the city, the mayor, the service director, as well as the city engineer department, to no avail. The city eventually responded that there was only one pump and it was in use. Around midnight, the building flooded, incurring an inflow of six inches of water within a rapid period of time, ten minutes.

{¶17} The city did eventually bring the pump the following morning, but left the Moores to pump the retained flow due to the severe flooding in the entire city area. The city was declared a disaster area following these July storms. Mr. Moore pumped for a full day to remove the water from the building, and it took him approximately a week to pump all the water from the land. As he pumped the water, the flooding on the neighboring properties also receded; however, they were not as severely flooded as the Moore property.

{¶18} The plaza was severely damaged, requiring the Moores to remove all the carpeting, cut 14 inches off the lower portions of the walls throughout the entire building to remove and replace all the insulation, as well as replace all of the bathrooms. The debris filled five or six dumpster loads, and all the equipment that was plugged into electrical sockets was ruined. To this day, the concrete foundation has not been repaired.

{¶19} After the 2003 flood, Mr. Moore purchased his own water pump, and now pumps excess water about two to three times a year depending on need. Once the

water reaches a predetermined spot, a neighbor or the police will call Mr. Moore, who will then begin manually pumping to avoid flooding.

{¶20} Moores' Expert's Opinion as to Cause

{¶21} Mr. McFadden determined there were six causes contributing to the flooding on the Moores' property during periods of heavy rainfall. First, the plaza should have been built approximately 12 inches higher according to the original site plan. Second, after the property northwest of the plaza was constructed, the owners installed a 15-inch pipe that flows into the existing shared detention basin. The basin was extended but not excavated to a sufficient depth to protect the Moore property. As a result, the rainfall bypasses the detention basin and the Moores' parking lot floods before the basin is full. Third and fourth, two of the buildings on the northeast property adjacent to the Moores were constructed without adequate drainage systems. One of the buildings has two storm water pipes, one of which flows into the roadside ditch, and the other into what appears to be some sort of a storm water basin. The basin is not properly constructed and resembles a "small depression in the ground where the water flows out as fast as it flows in." The other property does not have any sort of a detention basin. Fifth, Mr. McFadden observed no detention basins on the southwest abutting property, "All Seasons RV." Mr. McFadden could not find any evidence after looking through its records that drainage was addressed prior to the building of that site. Lastly, Mr. McFadden found that the pipeline that was installed per the city's easement, combined with the other four pipes, have a greater capacity than the out-flowing pipe that drains from the junction structure into the wetlands. The city engineer told Mr.

McFadden at the time of his investigation that he has no knowledge of when the junction structure was constructed or by whom.

{¶22} Mr. McFadden summarized his findings, concluding that the flooding experienced by the city was caused by its lack of an overall storm water plan, and that every new construction, "be it a building, a road or even a park, impacts areas far removed from the actual site."

{¶23} All of the defendants filed for summary judgment, three were denied, as well as the city's motion to dismiss. Summary judgment was granted for defendant Maplewood Senior Citizens, as well as the city. The remaining defendants were dismissed with prejudice.

{¶24} As to the city's motion for summary judgment, which is at issue on appeal, the trial court found that pursuant to Chapter 2744, political subdivisions are generally immune from liability for many of their activities, including "governmental functions." Governmental functions specifically include "planning or design, construction, or reconstruction of a public improvement, including a sewer system" pursuant to R.C. 2744.01(C)(2)(l). The court further found that R.C. 2744.02 allows claims to be brought against political subdivisions for property damage when the damage is caused by negligent performance of "proprietary functions," which includes "maintenance, destruction, operation, and upkeep of a sewer system," pursuant to R.C. 2744.01(G)(2)(d).

{¶25} After reviewing the applicable law, the court held that approval of commercial development site plans with inadequate surface water detention facilities is a statutorily governmental function, and thus, immunity applies to shield the city from

liability, even if the city negligently conducted this function, pursuant to R.C. 2744.03(A)(3). As to the maintenance and operation of roadside ditches or culverts, the court found the Moores failed to evidence the city's neglect. The court further found that the city has no ownership or maintenance responsibility for the multiple storm water pipes that flow to the junction structure. Lastly, the court concluded that at least one of the pipes is the shared responsibility of the surrounding property owners, including the plaintiffs. Finding that the Moores failed to introduce any evidence of the city's ownership or responsibility for any portion of the sewer system at issue, the court awarded summary judgment in favor of the city.

{¶26} The Moores now timely appeal, raising the following two assignments of error for our review:

{¶27} "[1.] The trial court committed error prejudicial to appellants by granting appellee summary judgment even though facts material to the resolution of appellants' claims remain in dispute.

{¶28} "[2.] The Trial Court erred in applying the law applicable to municipal design and construction of storm sewer systems rather than applying the law of riparian rights."

{¶29} The city cross-appeals as well, raising the following assignment of error:

{¶30} "[1.] The trial court erred when it failed to apply the public duty doctrine to bar plaintiff/appellant Moore's claim as a matter of law."

{¶31} **Summary Judgment Standard of Review**

{¶32} "Pursuant to Civ.R. 56(C), summary judgment is appropriate when there is no genuine issue of material fact and the moving party is entitled to judgment as a

matter of law.' *Holik v. Richards*, 11th Dist. No. 2005-A-0006, 2006-Ohio-2644, ¶12, citing *Dresher v. Burt* (1996), 75 Ohio St.3d 280, 293. 'In addition, it must appear from the evidence and stipulations that reasonable minds can come to only one conclusion, which is adverse to the nonmoving party.' *Id.*, citing Civ.R. 56(C). 'Further, the standard in which we review the granting of a motion for summary judgment is de novo.' *Id.*, citing *Grafton v. Ohio Edison Co.* (1996), 77 Ohio St.3d 102, 105.

{¶33} "Accordingly, '[s]ummary judgment may not be granted until the moving party sufficiently demonstrates the absence of a genuine issue of material fact. The moving party bears the initial burden of informing the trial court of the basis for the motion and identifying those portions of the record which demonstrate the absence of a genuine issue of fact on a material element of the nonmoving party's claim.' *Brunstetter v. Keating*, 11th Dist. No. 2002-T-0057, 2003-Ohio-3270, ¶12, citing *Dresher* at 292. 'Once the moving party meets the initial burden, the nonmoving party must then set forth specific facts demonstrating that a genuine issue of material fact does exist that must be preserved for trial, and if the nonmoving party does not so respond, summary judgment, if appropriate, shall be entered against the nonmoving party.' *Id.*, citing *Dresher* at 293." *Welch v. Zicarelli*, 11th Dist. No. 2006-L-229, 2007-Ohio-4374, ¶36-37.

{¶34} "Since summary judgment denies the party his or her 'day in court' it is not to be viewed lightly as docket control or as a 'little trial.' The jurisprudence of summary judgment standards has placed burdens on both the moving and nonmoving party. In *Dresher v. Burt*, the Supreme Court of Ohio held that the moving party seeking summary judgment bears the initial burden of informing the trial court of the basis for the

motion and identifying those portions of the record before the trial court that demonstrate the absence of a genuine issue of fact on a material element of the nonmoving party's claim. The evidence must be in the record or the motion cannot succeed. The moving party cannot discharge its initial burden under Civ.R. 56 simply by making a conclusory assertion that the nonmoving party has no evidence to prove its case but must be able to specifically point to some evidence of the type listed in Civ.R. 56(C) that affirmatively demonstrates that the nonmoving party has no evidence to support the nonmoving party's claims. If the moving party fails to satisfy its initial burden, the motion for summary judgment must be denied. If the moving party has satisfied its initial burden, the nonmoving party has a reciprocal duty outlined in the last sentence of Civ.R. 56(E) to set forth specific facts showing there is a genuine issue for trial. If the nonmoving party fails to do so, summary judgment, if appropriate shall be entered against the nonmoving party based on the principles that have been firmly established in Ohio for quite some time in *Mitseff v. Wheeler* (1988), 38 Ohio St.3d 112.

{¶35} "The court in *Dresher* went on to say that paragraph three of the syllabus in *Wing v. Anchor Media Ltd. of Texas* (1991), 59 Ohio St.3d 108, *** is too broad and fails to account for the burden Civ.R. 56 places upon a moving party. The court, therefore, limited paragraph three of the syllabus in *Wing* to bring it into conformity with *Mitseff*.

{¶36} "The Supreme Court in *Dresher* went on to hold that when neither the moving nor nonmoving party provides evidentiary materials demonstrating that there are no material facts in dispute, the moving party is not entitled to judgment as a matter of law as the moving party bears the initial responsibility of informing the trial court of the

basis for the motion, 'and identifying those portions of the record which demonstrates the absence of a genuine issue of fact on a material element of the nonmoving party's claim.' Id. at 276." Id. at ¶¶40-42.

¶37 Genuine Issues of Material Fact Remain Unresolved

¶38 In their first assignment of error, the Moores contend that the trial court erred in awarding summary judgment to the city because material facts remain as to the negligent maintenance, operation, and upkeep of the city's sewer system for which governmental immunity does not apply. We agree with this contention and determine this assignment of error has merit.

¶39 Specifically, the Moores contend the commercial development that has occurred north of their property increased the storm water runoff that is collected in a ditch that runs alongside State Route 14. The water is piped under the road to the retention basin located on another property, which is then piped through the Moores' "Sperry pipeline" to the junction structure that drains into the wetlands. Since the upstream properties have been developed, the Moores' property now floods on a yearly basis, requiring them to manually pump the water during periods of heavy rainfall because the retention basin, the "Sperry pipeline," and the junction structure cannot accommodate all of the runoff.

¶40 Political Subdivision Tort Liability

¶41 "R.C. Chapter 2744, the Political Subdivision Tort Liability Act, absolves political subdivisions of tort liability, subject to certain exceptions. See *Franks v. Lopez* (1994), 69 Ohio St.3d 345, 347; see, also, *Helton v. Scioto Bd. Cty. Commrs.* (1997), 123 Ohio App.3d 158, 162. Whether a political subdivision is entitled to statutory

immunity under Chapter 2744 presents a question of law for the court's determination. *Conley v. Shearer* (1992), 64 Ohio St.2d 3d 284, 292; see, also, *Feitshans v. Darke Cty.* (1996), 116 Ohio App.3d 14, 19." *Ferguson v. Breeding* (Aug. 25, 2000), 4th Dist. No. 99 CA 22, 2000 Ohio App. LEXIS 4093, 14.

{¶42} Pursuant to R.C. 2744.01(C)(2)(l), "[t]he provision or nonprovision, planning or design, construction, or reconstruction of a public improvement, including, but not limited to, a sewer system" constitutes a "governmental function" from which the city is immune. See R.C. 2744.02(A)(1).

{¶43} In contrast to a governmental function, a "proprietary function" includes "[t]he maintenance, destruction, operation, and upkeep of a sewer system." R.C. 2744.01(G)(2)(d).

{¶44} Pursuant to R.C. 2744.02(B)(2), "political 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 propriety functions of the political subdivisions," unless a defense to such liability is enumerated in R.C. 2744.03.

{¶45} It is clear that the city is immune from its failure to design and construct an adequate sewer system. Thus, the Moores' arguments that the city was negligent in issuing building permits to upstream properties without designing adequate storm water runoff controls are without merit.

{¶46} The 18" Easement Pipeline

{¶47} Questions remain in this case as to whether the city was responsible for a pipeline that was installed pursuant to its easement in 2000, and if so, whether the city was negligent in its maintenance of the pipeline.

{¶48} The city provided the trial court an affidavit from the city's director of engineering, Mr. Bruce J. Terrell, who averred that the "Sperry pipeline" is not part of the city's sewer system, the city never installed the "Sperry pipeline," and further, the city does not own, maintain or have any responsibilities with respect to the "Sperry pipeline." Also attached to its motion are pictures of various retention and detention basins, as well as the junction structure, a FEMA declaration that Streetsboro was declared a disaster area after the summer floods of 2003, and the depositions of Mr. Moore and Mr. McFadden.¹

{¶49} In their brief in opposition, the Moores attached Mr. McFadden's expert report, a chart of the amount of rainfall from the July 21, 2003 storm, the deed from the Sperrys to the Moores in which the Moores explicitly assumed responsibility over the "Sperry pipeline" for the portions located on their property, pictures of the junction structure, the easement conveyed to the city, Mr. McFadden's supplemental report, as well as Mr. McFadden's affidavit.

{¶50} Mr. McFadden averred in his affidavit that, but for the development and changes surrounding the Moores' property, much of the surface water would evaporate or pass in another direction, away from the Moores' property. As a direct result of the accumulated and increased flow, however, the Moores' property has been damaged by flooding-related problems, including cracked pavement and loss of support of the parking deck.

1. We note that the city incorrectly cross examined Mr. McFadden on his expert opinion as to a "reasonable certainty" as to the causes of the water drainage problems on the Moores' property. The correct standard to be applied is that "expert opinion regarding a causative event, including alternative causes, must be expressed in terms of *probability*," which Mr. McFadden did indeed opine. (Emphasis added.) *McWreath v. Ross*, 179 Ohio App. 3d 227, 2008-Ohio-5855, ¶84.

{¶51} The city filed a supplemental reply in support of its motion for summary judgment, attached to which was evidence that the area was declared a flood disaster area in 2003. The city did not address any of the flooding problems the Moores have experienced since that time.

{¶52} While there is no doubt that the city, however imperfect in its sewer design and planning, is immune from liability for such imperfections, the Moores raised genuine issues of material fact regarding the ownership and maintenance of the 18-inch line installed after the Moores granted an easement to the city for the line and whether this pipeline contributed to the Moores' flooding problems.

{¶53} The Moores do not contend that the "Sperry pipeline" is the city's responsibility. They admit their responsibility, as is clearly detailed in their deed. The Moores argue, rather, that the city contributed to the faulty storm water drainage problem because of its faulty maintenance of the pipeline it assumed responsibility for in the 2000 easement.

{¶54} Specifically, the easement states that the Moores grant to the city, "a perpetual easement for storm sewer purposes, which easement shall include, but only on a temporary basis, the right to use so much additional land of the Grantors as is reasonably necessary to excavate and install the storm sewer pipeline, *maintain the same after installation and replace the same when necessary.*"

{¶55} The city denies that any portion of the pipeline installed per the easement is its responsibility although seemingly the easement conveyed the responsibility for the installation and maintenance of the pipeline to the city. This pipeline covered by the easement was not addressed by the trial court.

{¶56} There is no question the city is immune from the design and construction of its sewer system, but the question remains as to whether it is responsible for the maintenance of this pipeline, and whether negligent maintenance contributed to the backflow of the junction structure and flooding problems the Moores have continued to experience since the 2003 storms.

{¶57} "A municipality is not obliged to construct or maintain sewers, but when it does construct or maintain them it becomes its duty to keep them in repair and free from conditions which will cause damage to private property ***. The municipality becomes liable for damages caused by its negligence in this regard in the same manner and to the same extent as a private person under the same circumstances." *Trustees of Nimishillen Township v. State ex rel. Groffre Investments*, 5th Dist. No. 2003 CA 00410, 2004-Ohio-3371, ¶37, quoting *Doud v. Cincinnati* (1949), 152 Ohio St. 123, 137, (citations omitted). Further, "[c]ourts have maintained this view under the sovereign immunity statute." *Id.* at ¶38, citing *Nice v. Maryland* (1992), 82 Ohio App.3d 109 (citation omitted). See, also, *Martin v. City of Gahanna*, 10th Dist. No. 06AP-1175, 2007-Ohio-2651, ¶17.

{¶58} The city failed to meet its burden of identifying those portions of the record which demonstrate an absence of material fact as to the ownership and maintenance of the 18-inch pipe. Quite simply, the city failed to provide any evidence that the pipeline is not under its control.

{¶59} If, indeed, the city is responsible for that pipeline, then "the failure to upgrade sewers that are inadequate to service upstream property owners despite sufficient notice of the inadequacy can best be described as a failure to maintain or

upkeep the sewer." *H. Hafner & Sons Inc. v. Cincinnati Metropolitan Sewer Dist.* (1997), 118 Ohio App.3d 792, 797; see, also, *Hedrick v. Columbus* (Mar. 30, 1993), 10th Dist. Nos. 92AP-1030 and 92AP-1031, 1993 Ohio App. LEXIS 1874. "If proven, this failure would constitute the breach of a duty arising out of a proprietary function and would expose the city to liability under R.C. 2744.02(B)(2). Therefore, summary judgment is premature in this case." *Id.*

{¶60} Thus, we reverse and remand because we find genuine issues of material fact remain as to whether the pipeline associated with this easement are a part of the city's sewer system, and if so, whether the city was negligent in its maintenance of the pipeline, contributing to the Moores' storm water runoff problems.

{¶61} Finding the Moores' first assignment of error has merit, we reverse and remand in accordance with this opinion.

{¶62} The Law of Riparian Rights

{¶63} In the Moores' second assignment of error, they contend the trial court incorrectly applied the law of political subdivision immunity, instead of the law of riparian rights. We find this argument to be without merit, as the trial court correctly applied the law in this case.

{¶64} The trial court correctly applied the analysis of the Political Subdivision Tort Liability Act, which is codified in Chapter 2744. The city is correct in stating that the Moores incorrectly rely on cases dealing with common-law sovereign immunity decided before the enactment of the Act in 1985.

{¶65} Thus, the Supreme Court of Ohio explained in *Rankin v. Cuyahoga Cty. Dept. of Children and Family Services*, 118 Ohio St.3d 392, 2008-Ohio-2567, that

"[b]efore determining whether a political subdivision is entitled to immunity from a civil action, a court must determine whether the political subdivision was engaged in a governmental or proprietary function when the alleged tort occurred. See R.C. 2744.02(A)(1)." *Id.* at ¶8.

{¶66} Further, as we addressed in the Moores' first assignment of error, "[t]he immunity afforded a political subdivision in R.C. 2744.02(A)(1) is not absolute, but is, by its express terms, subject to the five exceptions to immunity listed in *** R.C. 2744.02(B). *** Thus, once immunity is established under R.C. 2744.02(A)(1), the second tier of analysis is whether any of the five exceptions to immunity in subsection (B) apply." *Id.* at ¶18, quoting *Hortman v. Miamisburg*, 110 Ohio St.3d 194, 2006-Ohio-4251, ¶12, quoting *Carter v. Cleveland* (1998), 83 Ohio St.3d 24, 28.

{¶67} Because we determined that the city's maintenance and operation of its sewer system is a proprietary function under which a claim of negligence may be pursued if the city is responsible for the pipeline in question, one of the exceptions to immunity may apply. This is to be determined by a trier of fact.

{¶68} The Supreme Court of Ohio was clear in *Rankin* that "an unambiguous statute must be applied in a manner consistent with the plain meaning of the statutory language." *Id.* at ¶30, quoting *Hubbell v. Xenia*, 115 Ohio St.3d 77, 2007-Ohio-4839, ¶11, citing *State ex. rel. Burrows v. Indus. Comm.* (1997), 78 Ohio St.3d 78, 81. Thus, "R.C. 2744.02 begins with an express general denial of liability, limited only by the exceptions provided in division (B) of the statute: '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 ****.'" *Id.*

{¶69} Thus, the common law of riparian rights may have determined the Moores' rights vis-a-vis the owners of the adjacent properties that were parties to the suit, but that body of law does not control the determination of a claim against a political subdivision. "R.C. Chapter 2744 was the General Assembly's response to the judicial abrogation of common law sovereign immunity and that '[t]he manifest statutory purpose of R.C. 2744 is the preservation of the fiscal integrity of political subdivisions.'" *Id.* at ¶34, citing *Hubbell* at ¶23, quoting *Wilson v. Stark Cty. Dept. of Human Servs.* (1994), 70 Ohio St.3d 450.

{¶70} The Moores' second assignment of error is without merit.

{¶71} The Public-Duty Rule

{¶72} In its cross-assignment of error, the city contends that even if the trial court erred in awarding summary judgment to the city, the "public duty" rule applies. This argument is wholly without merit because as we previously explained, the city may or may not be immune from liability under the circumstances of this case.

{¶73} Because the maintenance, destruction, operation, and upkeep of a sewer system is a proprietary function pursuant to R.C. 2744.01(G)(2)(d), the public duty rule does not apply. The Second District Court of Appeals recently explained this rationale in *Holbrook v. Brandenburg*, 2d Dist. No. 2007 CA 106, 2009-Ohio-2320: "[t]he Supreme Court addressed this distinction when it held, '[a] municipality is not obliged to construct or maintain sewers, but when it does *** it becomes its duty to keep them in repair and free from conditions which will cause damage to private property; and in the performance of such duty the municipality is in the exercise of a ministerial or proprietary function and not a governmental function within the rule of municipal liability

for tort. The municipality becomes liable for damages caused by its negligence in this regard *in the same manner and to the same extent as a private person under the same circumstances.*" (Emphasis added.) Id. at ¶17, quoting *Doud* at 137. See, also, *Portsmouth v. Mitchell Mfg. Co.* (1925), 113 Ohio St. 250, 255; *Nice* at 117; *State ex rel. River City Capital L.P. v. Bd. of Clermont Cty. Commrs.*, 12th Dist. No. CA2008-12-110, 2009-Ohio-4675.

{¶74} Thus, the determination of the city's claim of sovereign immunity requires first the determination of material facts that remain in genuine dispute. If the city took responsibility for the maintenance and operation of the pipeline, then the public duty rule does not apply.

{¶75} The city's cross-assignment of error is without merit.

{¶76} We reverse and remand the judgment of the Portage County Court of Common Pleas in accordance with this opinion.

COLLEEN MARY O'TOOLE, J., concurs in judgment only,
DIANE V. GRENDELL, J., dissents with Dissenting Opinion.

DIANE V. GRENDELL, J., dissents with a Dissenting Opinion.

{¶77} The majority concluded that there remains a question of whether the City of Streetsboro "was negligent in its maintenance and operation of the pipe, a proprietary function for which immunity does not apply."—] disagree.....

{¶78} As the majority asserted, a municipality is not obliged to construct or maintain sewers, but when it does, it incurs the duty to keep them in repair and free

from conditions which will cause damage to private property; and in the performance of such duty the municipality is in the exercise of a ministerial or proprietary function and not a governmental function within the rule of municipal liability for tort. See *Doud v. City of Cincinnati* (1949), 152 Ohio St. 132, 137. The municipality becomes liable for damages caused by its negligence in this regard in the same manner and to the same extent as a private person under the same circumstances. See *Trustees of Nimishillen Twp. v. State ex rel. Groffre Invest.*, 5th Dist. No. 2003 CA 00410, 2004-Ohio-3371, at 35 (citation omitted).

{¶79} However, the nonmoving party must "set forth specific facts demonstrating that a genuine issue of material fact does exist that must be preserved for trial, and if the nonmoving party does not so respond, summary judgment *** shall be entered against the nonmoving party." The Moores have failed to present evidence to establish a genuine issue of fact regarding the City of Streetsboro's responsibility for the pipe line in question, nor did the Moores present evidence that Streetsboro was negligent in maintaining the aforementioned pipe line. See Civ.R. 56(E) ("the party's response, by affidavit or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial").

{¶80} Furthermore, the Moores have failed to analyze or cite any case law pertaining to R.C. 2744, the chapter that refers to the maintenance, operation, and upkeep of a sewer system as a proprietary function. This court has held that "[o]nce general immunity has been established by the political subdivision, the burden lies with the plaintiff to show that one of the recognized exceptions apply." *Maggio v. Warren*, 11th Dist. No. 2006-T-0028, 2006-Ohio-6880, at ¶38. In *Maggio*, this court found that

since the appellant cited to "no relevant statutory authority expressly imposing liability with respect to any of his alleged claims *** the trial court did not err, as a matter of law, by granting summary judgment in favor of the City on the grounds of sovereign immunity." Id. at ¶40.

{¶81} Therefore, since the Moores have failed to meet their burden, the trial court did not err in granting summary judgment in favor of the City of Streetsboro. Accordingly, I would affirm the decision of the trial court.

STATE OF OHIO

COUNTY OF PORTAGE

HENRY & MARYANN MOORE,

Plaintiffs-Appellants,

- vs -

CITY OF STREETSBORO, et al.,

Defendants-Appellees.

FILED
COURT OF APPEALS

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LINDA K. FANKHAUSER, CLERK
PORTAGE COUNTY, OHIO

IN THE COURT OF APPEALS

ELEVENTH DISTRICT

JUDGMENT ENTRY

CASE NO. 2008-P-0017

For the reasons stated in the opinion of this court, it is the judgment and order of this court that the judgment of the Portage County Court of Common Pleas is reversed and this case remanded for further proceedings.

Costs to be taxed against appellee, City of Streetsboro.

Mary Jane Trapp

PRESIDING JUDGE MARY JANE TRAPP

COLLEEN MARY O'TOOLE, J., concurs in judgment only,

DIANE V. GRENDALL, J., dissents with Dissenting Opinion.

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