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IN THE SUPREME COURT OF OHIO

HENRY MOORE, et al.	)	CASE NO. 10-0170
	)	
Plaintiffs-Appellees,	)	**ON APPEAL FROM COURT OF APPEALS, ELEVENTH APPELLATE DISTRICT, PORTAGE COUNTY, OHIO**
-vs-	)	
CITY OF STREETSBORO, et al.	)	
	)	Appellate Court Case No. 2008 PA 00017
Defendants-Appellants.	)	

PLAINTIFFS-APPELLEES HENRY MOORE AND MARYANN MOORE'S MEMORANDUM IN RESPONSE TO DEFENDANT-APPELLANT CITY OF STREETSBORO'S MEMORANDUM IN SUPPORT OF JURISDICTION

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I. STATEMENT OF WHY THIS CASE IS NOT OF PUBLIC OR GREAT GENERAL INTEREST AND DOES NOT INVOLVE A SUBSTANTIAL CONSTITUTIONAL QUESTION.

The instant case is not of public or great general interest and does not involve a substantial constitutional question as the legal precedent for the issues raised by Defendant-Appellant City of Streetsboro (hereinafter the "City") constitute established law. Application of the facts to established legal precedent does not elevate the instant action to one of public or great general interest and does not involve a substantial constitutional question.

Upon Plaintiffs-Appellees Henry Moore and Maryann Moore's (hereinafter the "Moores") appeal of the trial court's grant of summary judgment in favor of the City, the Eleventh District Court of Appeals (the "Court of Appeals") properly applied the facts of the instant case to established legal precedent and reversed the granting of summary judgment and remanded to the trial court for resolution of certain genuine issues of material fact. (App. Op. at ¶ 76). The Court of Appeals specifically determined that genuine issues of material fact remained unresolved as the Moores advanced unrebutted evidence as to the City's negligent maintenance, operation, and upkeep of the City's sewer system, for which governmental immunity does not apply. (App. Op. at ¶38). As such, the presumption of governmental immunity was rebutted with sufficient evidence creating a question of fact as to whether the City had control over the operation and upkeep of the 18-inch pipeline in question. (Journal Entry denying City's Motion to Certify a Conflict at page 5).

II. ARGUMENT IN SUPPORT OF PLAINTIFFS-APPELLEES' POSITION REGARDING PROPOSITIONS OF LAW RAISED IN DEFENDANT-APPELLANT'S MEMORANDUM IN SUPPORT OF JURISDICTION.

A. Proposition of Law 1: Plaintiffs-Appellees complied with the requirements of

R.C. §2744.02(B) by demonstrating an exception to immunity.

Ohio law requires that when a political subdivision, like the City of Streetsboro, pleads immunity under Ohio Revised Code Section 2744.02(A), the plaintiff has the burden to demonstrate an exception to the presumption of immunity under Ohio Revised Code Section 2744.02(B) at trial and summary judgment proceedings. (Journal Entry denying City's Motion to Certify a Conflict at page 2).

The Court of Appeals correctly determined that once the City established it was entitled to governmental immunity as a "political subdivision" under Ohio Revised Code Section 2744.02(A), the presumption of governmental immunity was rebutted by the Moores with sufficient evidence, i.e., the recorded easement granted to the City to install and maintain the 18-inch pipeline, to create a question of fact as to whether the City had control over the operation and upkeep of the 18-inch pipeline. (App. Op. at ¶54 and Journal Entry denying City's Motion to Certify a Conflict at page 5). Further, the Court of Appeals 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 stating "[q]uite simply, the City failed to provide any evidence that the pipeline is not under its control." (App. Op. at ¶ 58).

Ohio law relative to the presumed immunity of a political subdivision and the burden of a plaintiff to demonstrate an exception thereto is uncontroverted. However, as the Court of Appeals properly held, once the Moores met their burden of establishing such an exception, the City could not merely rely upon the presumed immunity in summary judgment proceedings when a genuine issue of material fact, i.e., the ownership and maintenance of the 18-inch pipeline, was not rebutted.

Further, as explained by the Court of Appeals in its February 8, 2010, Judgment Entry denying the City's Motion to Certify a Conflict, its decision is not in conflict with two (2) decisions of the Tenth Appellate District Court of Appeals. The Court of Appeals held that the Tenth Appellate District's decision in Summerville v. City of Columbus, 10th Dist. No. 04AP-1288, 2005-Ohio-5158, was entirely distinguishable from the instant action as the appellant in Summerville never filed a response to the city's motion for summary judgment and, therefore, never discharged her reciprocal burden of demonstrating that the governmental function involved fell under any specific exception to governmental immunity. (Judgment Entry denying City's Motion to Certify a Conflict at pages 3-4).

Further, the Court of Appeals held the case of Martin v. City of Gahanna, 10th Dist. No. 06AP-1175, 2007-Ohio-2651, was quite similar to the instant action as the Tenth Appellate District affirmed the trial court's dismissal of the city's motion for summary judgment, finding that genuine issues of material fact remained unresolved as to the operation and upkeep of the city's sewer system.

Established legal precedent is uncontroverted and correctly applied by the Court of Appeals in its Opinion reversing and remanding the judgment of the trial court. As such, the City's Proposition of Law 1 is not of public or great general interest and does not involve a substantial constitutional question.

B. Proposition of Law 2: The Appellate Court properly applied legal precedent when holding that the failure to upgrade stormwater 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 stormwater system.

The Court of Appeals held that, in the event the City is responsible for the 18-inch

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. (App. Op. at ¶ 59). "If proven, this failure would constitute a 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." Hafner, supra.

The First Appellate District stated in Hafner, supra, that "[p]articularly instructive in defining [Cincinnati Metropolitan Sewer District's] omission as either proprietary or governmental are cases decided prior to the 1985 passage of the Ohio Political Subdivision Tort Liability Act, which abrogated the public-duty/special-duty theory of municipal liability. The Eighth District Court of Appeals, for example held that 'where a municipality fails to *maintain* a public improvement such as a sewer system and thereby effectively takes private property in that municipality for its own use by casting surface waters upon that property, it must pay compensation for the property taken under Art. I, Sec. 19 of the Ohio Constitution.' (Emphasis added.) November Properties, Inc. v. Mayfield Hts., (Dec. 6, 1979, Cuyahoga App. No. 39626, unreported (citing Masley v. Lorain, (1976), 48 Ohio St.2d 334, 358 N.E.2d 596)."

The First Appellate District further stated in Hafner, supra, that "[t]he courts have clearly considered the inadequacy of sewers to be a failure to maintain them in a manner to adequately accept upstream flow, rather than to reflect a defective design."

In early 2000, the Moores granted the City an easement to construct, maintain, and

operate an 18-inch pipeline, which runs from upstream property. Beginning in 2003, the Moores began experiencing severe flooding on their property, believed to have been caused by a reverse flow resultant from the flow velocity from the 18-inch pipeline that is the subject of the 2000 easement granted to the City by the Moores. As the City makes no claim that it did not have sufficient notice of the inadequacy of the stormwater system, the City's failure to upgrade the stormwater sewers to adequately service upstream property owners is a failure to maintain or upkeep the sewer. Accordingly, breach of such a duty is a proprietary function exposing the City to potential liability.

The City relies upon two (2) cases in its Memorandum in Support of Jurisdiction in requesting that this Court accept jurisdiction to resolve an alleged conflict on the instant Proposition of Law. Smith v. Cincinnati Stormwater Mgt. Div., (1996), 111 Ohio App.3d 502, was decided by the First Appellate District in 1996, one (1) year before its decision in Hafner, supra, which was relied upon by the Court of Appeals in the instant case. Any arguable inconsistency between the First Appellate District's decisions in Smith and Hafner, supra, was resolved as Smith was effectively overruled upon the First Appellate District's subsequent issuance of its decision in Hafner. Further, the City's reliance on Alden v. Summit County, (9th Dist. 1996), 112 Ohio App.3d 460, 679 N.E.2d 36, is mistaken as Alden makes no reference to the issue presented, i.e., whether failure to upgrade sewers that are inadequate to service upstream properties is a proprietary or governmental function.

Contrary to the City's assertion in its Memorandum in Support of Jurisdiction, the Court of Appeals did not improperly transform an immune governmental function into a non-immune proprietary function. The Court of Appeals merely applied established legal precedent. As such,

the City's Proposition of Law 2 is not of public or great general interest, does not involve a substantial constitutional question and surely does not involve a conflict between Ohio Appellate Districts.

III. CONCLUSION.

WHEREFORE, Plaintiffs-Appellees Henry Moore and Maryann Moore respectfully request that this Honorable Court deny jurisdiction as the issues presented herein are not of public or great general interest and do not involve a substantial constitutional question.

Respectfully submitted,

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CERTIFICATE OF SERVICE

A copy of the foregoing Plaintiffs-Appellees Henry Moore and Maryann Moore's Memorandum in Response to Defendant-Appellant City of Streetsboro's Memorandum in Support of Jurisdiction has been served this 24th day of February, 2010, by regular U.S. Mail, postage prepaid, upon the following:

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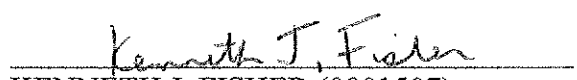

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