

ORIGINAL

IN THE SUPREME COURT OF OHIO

Deborah Evans,	:	
	:	
And	:	
	:	
Terry Evans	:	
Appellants,	:	On appeal from the Hamilton
	:	County Court of Appeals,
v.	:	First Appellate District
	:	
City of Cincinnati,	:	Court of Appeals
	:	Case No. C-120726
Appellee.	:	

MEMORANDUM IN SUPPORT OF JURISDICTION
OF APPELLANTS DEBORAH EVANS AND TERRY EVANS

Thomas J. Dall (0089016) (COUNSEL OF RECORD)
Randy A. Byrd (0041292)
Law Offices of Blake Maislin, L.L.C.
Maislin Professional Center
2260 Francis Lane
Cincinnati, Ohio 45206
(513) 721-5555
Fax No. (513) 721-5557

COUNSEL FOR APPELLANTS DEBORAH EVANS AND TERRY EVANS

Joseph C. Neff (COUNSEL OF RECORD)
Assistant City Solicitor
214 City Hall, 801 Plum St.
Cincinnati, Ohio 45202

COUNSEL FOR APPELLEE CITY OF CINCINNATI

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

This case involves a matter of public or great general interest, pursuant to Section 2(B)(2)(e), Article IV of the Ohio Constitution, because the issue presented is of importance to the public as distinguished from the parties. *Williamson v. Rubich* (1960), 171 Ohio St. 253. This case also involves a novel question of law or procedure which appeals to the Supreme Court's collective interest in jurisprudence. *Manigault v. Ford Motor Co.*, 96 Ohio St.3d 431, 2002-Ohio-5057, dissent at ¶17. Citing, *Noble v. Colwell* (1989), 44 Ohio St.3d 92.

The issues presented herein involve the liability of a city for the maintenance of a sign pole erected by the city and subsequently not maintained. Specifically, the present case revolves around the liability of the City of Cincinnati for the primary negligence of its agents, where the agents have failed to maintain and fully remove a sign pole erected by the City of Cincinnati.

As these issues have not yet been addressed by the Ohio Supreme Court, and for the foregoing reasons, this Court should accept jurisdiction of this case.

STATEMENT OF THE CASE AND FACTS

Plaintiff filed a Complaint on November 18, 2011 in the Court of Common Pleas in Hamilton County alleging negligence on the part of the City of Cincinnati for failure to maintain a broken sign pole on November 8, 2011. (See Original Complaint T.d. 1-9). The Evans' were season ticket holders for the Cincinnati Bengals at the time. T.p. 7. On the day in question, The Evans' parked near 3rd St. and Gest St. and walked to the Lot 1 of the Cincinnati Bengals Stadium to tailgate with friends. *Id.* At the time, Deborah had

just finished work for the day and had not consumed any alcoholic beverage of any kind. T.d. 16. While walking to Lot 1 of the Stadium, Ms. Evans passed a utility pole. *Id.* Behind the utility pole, hidden from the view of Ms. Evans and her husband, was a rusted out and jagged broken sign pole. *Id.* When Ms. Evans passed the utility pole, the rusted, jagged, broken sign pole snagged onto Ms. Evans' pants. *Id.* This caused Ms. Evans to fall straight down and as a result, broke both of her arms. *Id.*

ARGUMENTS IN SUPPORT OF PROPOSITIONS OF LAW

Proposition of Law No. I: The proximate cause of the accident was the City's failure to maintain a sign pole, not sidewalk maintenance

Ms. Evans' injuries resulted from a rusted, jagged sign pole, left behind after the majority of the pole had been removed. Ms. Evans did not trip on the sidewalk, or anything intended to be a part of the sidewalk. Both the Appeals Court of Hamilton County and the Appellee argue that Ms. Evans' case is similar to that of the *Burns v. City of Upper Arlington*, (2007, 10 Dist.), 2007 Ohio App. Lexis 724. In *Burns*, a pedestrian was injured after tripping and falling over an improperly aligned manhole cover. The Court held that the actual conduct complained of involved the maintenance of a sidewalk, and not the maintenance of a sewer.

The distinction between maintenance of a sewer and a sidewalk is an important one. Maintenance of a sewer can be held to be a proprietary function, while the maintenance of a sidewalk is unanimously held to be a government function. The difference being that immunity will apply to the maintenance of a sidewalk and not a sewer. In *Burns*, the City failed to place a manhole cover properly back in place. This caused an accident when a pedestrian attempted to walk over or on the manhole cover

and tripped. Manhole covers by their very nature are part of a sidewalk and are in fact designed to be walked upon. The *Burns* Court specifically stated that the manhole cover was “intended to form part of the walkway for pedestrian traffic to use, and was therefore part of the sidewalk.” *Burns* at 797.]

In *Avila*, the Court specifically distinguished the *Burns* case. The Court wrote, “[B]urns is also distinguishable. In that case, the Court compared the function of maintaining a sidewalk with that of maintaining a sewer system. The Court concluded that because the actual conduct complained of involved the maintenance of a sidewalk, a governmental function, immunity applied. In this case, however, *Avila* and *Davis* specifically alleged in their complaint that the city’s negligent failure to maintain its water lines had caused the accident to occur.” *Avila v. City of Cincinnati* (2009), 182 Ohio App. 3d 647,914 N.E.2d 439 Ohio App. (1 dist). Likewise in the instant case, the complained of conduct has nothing to do with maintenance of the sidewalk, but the repair and maintenance of a sign pole.

Burns is in stark contrast to Ms. Evans’ situation. No sign pole is placed with the intention to be walked upon. To the contrary, they are to be noticed by any pedestrian passing. In the case of Ms. Evans, the sign pole had been partially removed, leaving behind a rusted, jagged, broken pole and destroying her ability to see and avoid the sign. T.d. 16. Therefore the proximate cause of Ms. Evans’ accident was the failure of the City of Cincinnati to maintain a sign pole, not the failure to maintain the sidewalk.

Proposition of Law No. II: The City’s failure to maintain the sign pole is not entitled to immunity under The Ohio Revised Code Chapter 2744

The Ohio Revised Code Chapter 2744 offers a three pronged analysis for determining whether a city is entitled to immunity. In part one of the analysis, R.C. 2744.02(A)(1) starts by conferring immunity to a political subdivision for any governmental or proprietary function. In part two, R.C. 2744.02(B) lists specific exceptions that can overcome the immunity in R.C. 2744.02(A)(1). Lastly, in part three, the City may attempt to reinstate immunity by applying one of the defenses listed in R.C. 2744.03(A). Avila at 646.

R.C. 2744.02(B)(2) provides that political subdivisions are liable for injuries caused by the negligent performance of “proprietary functions” by their employees. R.C. 2744.01(G)(1)(b) further defines a “proprietary function” as “one that promotes or preserves the public peace, health, safety, or welfare and that involves activities that are customarily engaged in by nongovernmental persons.” In the instant case, the design, repair, and maintenance of a sign post meets the definition of a proprietary function thus destroying the City of Cincinnati’s claim of immunity.

Designing, erecting, repairing, and maintaining a sign or sign pole is not a government function. Private companies design, erect, and maintain sign and sign poles on a regular basis in every city in the United States. Even the average person has likely at one time or the other, erected or done maintenance on a sign or sign pole. Further, signs are often placed for the safety of others, whether it is a road sign, warning a pedestrian of a curve, warning a pedestrian of a dangerous road condition, or a sign by a private company or person warning of a dog or not to trespass. Signs, be they from a political subdivision or a private entity are often used to warn individuals and satisfy the definition of “proprietary” as defined by 2744.01(G)(1)(b). Since the design, erection, and

maintenance of a sign meets the definition of “proprietary” the city is not entitled to immunity from their failure to maintain the sign that proximately caused the injury to Ms. Evans.

Proposition of Law No. III: The repair and proper maintenance of the sign is not “discretionary” under R.C. 2744.03(A)(3) or (5)

Since the repair and proper maintenance of the sign pole promotes or preserves the public peace, health, safety, or welfare and involves activities that are customarily engaged in by nongovernmental persons, the City of Cincinnati is left with the defenses in R.C. 2744.03(A)(1) through (5) that will reinstate sovereign immunity. Of those defenses, only R.C. 2744.03(A)(3) and (5) apply in the instant case. R.C. 2744.03(A)(3) provides immunity where a political subdivision’s employee’s acts or omissions were within that employee’s discretionary powers “by virtue of the duties and responsibilities of the office or position of the employee.” R.C. 2744.03(A)(5) provides that a political subdivision is immune from liability resulting from the exercise of judgment or discretion in determining whether to acquire, or how to use, equipment, supplies, materials, personal facilities, and other resources.

While the above referenced sections of R.C. 2744.03(A) may reinstate sovereign immunity for the City of Cincinnati, they will not do so in the instant case. While there may be some discretion in placing a sign pole, there is no discretion involved in maintaining, repairing, or fully removing the sign pole. Even if a particular decision to act or refrain from acting is discretionary, the implementation of that decision involves very little discretion or independent judgment and is not immune from liability. *Winwood v. City of Dayton* (1988), 37 Ohio St.3d 382, 285, 525 N.E.2d 808, 811; see also *Franks v.*

Lopez (1994), 69 Ohio St.3d 345, 349, 632 N.E.2d 502, 505-506 (holding that while the installation of traffic control devices may be discretionary, the implementation of that decision is not immune from liability); *Perkins v. Norwood City Schools* (1999), 85 Ohio St.3d 191, 193, 707 N.E.2d 868, 869 (holding that the decision on how to repair a leaking water fountain is not discretionary); *Husband v. Board of County Commissioners of Licking County* (1994, 5 Dist.), 1994 WL 140688 (holding that the implementation of the decision to place a warning sign at a curve was not protected by immunity); *Avila v. City of Cincinnati* (2009), 182 Ohio App. 3d 646, 647, 648 (holding that maintenance of a water line maintenance involves no discretion); and *Stuckey v. Board of Trustees of Lawrence Township, Stark County* (1992, 5 Dist), 1992 WL 214485 (holding that once the decision was made to stripe a road, the decision to restripe was not discretionary).

In *Avila*, a water line broke causing water to run across the street. An icy patch began to form in the middle of the two westbound lanes of Westwood and Northern Boulevard. An accident resulted from the icy conditions. The Court went on to hold that the City was not entitled to sovereign immunity and that R.C. 2744.03(A)(3) and (A)(5) involves policy-making and the exercise of independent judgment and not routine maintenance decisions. The Court further held that the City's prioritization of water-system repairs did not involve a matter of discretion or policy-making as contemplated by the law, but instead a matter of customer service. *Avila* at 648.

In *Stuckey*, Plaintiff's were injured in a head-on collision when one of their vehicles traveled left of center because the stripes on the road had faded. A claim was brought by Plaintiffs against Lawrence Township Board of Trustees, alleging that the trustees were negligent in failing to restripe the road. The Fifth District Court of Appeals

held that whole the initial decision to stripe the road was discretionary, once that decision had been made, the Township's decisions regarding if, when, and how the road was maintained were not discretionary. *Stuckey* at *3. Accordingly, while a political subdivision's initial decision to install infrastructure maybe discretionary, the decision to maintain and repair it is not.

Furthermore, immunity under R.C. §§2744.03(A)(3) and (5) “attaches only to the broad type of discretion involving public policy made with ‘the creative exercise of political judgment.’” *McVey v. City of Cincinnati* (1995, 1 Dist.), 109 Ohio App.3d 159, 163, 671 N.E.2d 1288, 1290 (citing *Bolding v. Dublin Local School Dist.* (1995, 10 Dist.), 1995 WL 360227 (holding that the decision to forgo placing employees near escalators to assist with crowd control was not discretionary); *James v. City of Cincinnati* (2008, 1 Dist.), 2008 WL 2312637 (holding that while it was within the City of Cincinnati's discretion to determine whether to use wooden or steel light poles at a park, it did not have the discretion not to maintain those light poles once they were in place); and *Hacker v. City of Cincinnati* (1998, 1 Dist.), 130 Ohio App.3d 764, 771, 721 N.E.2d 311 (holding that when a public entity is performing a proprietary function, the decision about whether to erect warning signs is not discretionary).

In *McVey v. City of Cincinnati*, supra, McVey was injured while riding down an escalator at Riverfront Stadium. A crowd had formed at the bottom of the escalator and there was nowhere for riders to go, causing McVey to fall backwards and hit her head. McVey brought an action against the City of Cincinnati, alleging that the City was negligent for not stationing personnel near the escalators to direct the crowd. The City claimed that it was entitled to immunity pursuant to R.C. §§2744.03(A)(3) and (5)

because the decision to post personnel at the escalators was “discretionary.” Judge Painter, writing for the First District Court of Appeals responded:

Horsefeathers....Without question, the city made a decision, at some unspecified time, to install escalators in its stadium parking facility. That decision itself may have involved discretion. The operation of the escalators is a different issue, however, and the discretion involved in “making choices” hardly rises to the “creative exercise of political judgment.” *McVey*, 109 Ohio App.3d at 162163.

This is analogous to the instant case. Repair or maintenance of a sign pole does not rise to the level of “creative exercise of political judgment.” While there may have been discretion in initially placing a sign, there is none involved in the repair or maintenance of that sign once it has been placed.

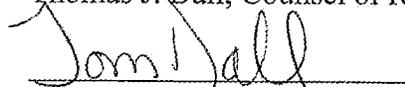
Based on the foregoing, it is clear that the City’s decisions regarding the repair and maintenance of the sign cannot be characterized as “discretionary” and the City is accordingly not entitled to reinstated immunity under R.C. 2744.03(A)(3) and (5).

CONCLUSION

For the reasons discussed above, this case involves matters of public and great general interest. The appellant requests that this court accept jurisdiction in this case so that the important issues presented will be reviewed on the merits.

Respectfully submitted,

Thomas J. Dall, Counsel of Record



Thomas J. Dall (0089016)

Randy A. Byrd (0041292)

COUNSEL FOR APPELLANTS,
DEBORAH EVANS AND
TERRY EVANS

CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of the foregoing has been served by ordinary U.S. mail this 28th day of June, 2013 upon the following:



Thomas J. Dall (0089016)
Randy A. Byrd (0041292)
COUNSEL FOR APPELLANTS,
DEBORAH EVANS AND
TERRY EVANS

CAPTION: EVANS V. CINCINNATI

05-22-13

APPEAL NO.(S): C-120726

TRIAL NO.(S): A-1109253

KEY WORDS: CIVIL MISCELLANEOUS – GOVERNMENTAL IMMUNITY

SUMMARY:

Where plaintiff claimed that she was injured when she tripped and fell on a broken-off signpost located on a city sidewalk, the trial court erred in denying the city's motion for summary judgment on plaintiff's claims for negligence in failing to maintain the sidewalk and for failure to warn about the dangerous condition of the sidewalk: the city was immune under R.C. Chapter 2744 because the failure to keep the sidewalk free of obstructions and the failure to properly regulate the use of the sidewalk by allowing the dangerous condition to exist fell within the ambit of the maintenance, repair and regulation of the sidewalk, which is, by definition, a governmental function.

JUDGMENT: REVERSED AND CAUSE REMANDED

JUDGES: OPINION by DEWINE, J.; DINKELACKER, P.J., and FISCHER, J., CONCUR.

**IN THE COURT OF APPEALS
FIRST APPELLATE DISTRICT OF OHIO
HAMILTON COUNTY, OHIO**

DEBORAH EVANS,	:	APPEAL NO. C-120726
	:	TRIAL NO. A-1109253
and	:	
	:	<i>OPINION.</i>
TERRY EVANS,	:	
Plaintiffs-Appellees,	:	
vs.	:	
CITY OF CINCINNATI,	:	
Defendant-Appellant,	:	
and	:	
JOHN DOE,	:	
and	:	
ANTHEM,	:	
Defendants.	:	

Civil Appeal From: Hamilton County Court of Common Pleas

Judgment Appealed From Is: Reversed and Cause Remanded

Date of Judgment Entry on Appeal: May 22, 2013

Law Offices of Blake Maislin, LLC, and T. Tod Mollaun, for Plaintiffs-Appellees,

*John P. Curp, City Solicitor, and Joseph C. Neff, Assistant City Solicitor, for
Defendant-Appellant.*

Please note: this case has been removed from the accelerated calendar.

DEWINE, Judge.

{¶1} This is an appeal from a summary judgment in which the trial court concluded that sovereign immunity did not apply to bar a claim against the city of Cincinnati for an injury that occurred when plaintiff-appellee Deborah Evans tripped on a broken-off signpost located on a city sidewalk. By statute, the maintenance, repair and regulation of a sidewalk is a “governmental function” for which immunity is conferred upon the city; the question presented by this case, however, is whether this immunity extends to a broken signpost within a sidewalk. We conclude upon the facts before us that it does, and, therefore, reverse the trial court’s denial of summary judgment.

I.

{¶2} Ms. Evans tripped and fell while walking to a tailgate party before a Cincinnati Bengals’ Monday Night Football game. She broke both of her elbows in the fall. She blames the injury on her pants leg having gotten caught on a part of a broken metal pole that was jutting out of the sidewalk.

{¶3} Ms. Evans and her husband filed a lawsuit against the city. In her complaint, Ms. Evans alleged that the city was negligent in failing to maintain its premises in a safe condition and in failing to warn her about the defects in or dangerous condition of the sidewalk. The city filed a motion for summary judgment, arguing that it was immune under R.C. Chapter 2744. The trial court denied the summary judgment motion, noting only that it found there existed a genuine issue of material fact. The city now appeals.

{¶4} In its sole assignment of error, the city asserts that the trial court erred when it failed to conclude that the city was entitled to immunity as a matter of law.

II.

{¶5} The starting point for our discussion is R.C. Chapter 2744, which establishes a three-tiered analysis for determining whether the city is entitled to immunity. R.C. 2744.02(A)(1) confers immunity upon political subdivisions for “injury * * * 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” unless one of the exceptions listed in R.C. 2744.02(B) applies. If one of those exceptions applies, the city may assert one of the defenses listed in R.C. 2744.03(A).

{¶6} The city argues that no exception removes the immunity conferred in R.C. 2744.02(A)(1). The Evanses counter that R.C. 2744.02(B)(2) presents an applicable exception because it provides that political subdivisions are liable for injuries caused by the negligent performance of “proprietary functions” by their employees.

{¶7} R.C. 2744.01(C)(2) provides a nonexhaustive list of functions that are governmental. Included on the list is “[t]he regulation of the use of, and the maintenance and repair of, roads, highways, streets, * * * [and] sidewalks[.]” R.C. 2744.01(C)(2)(e).

{¶8} To be considered “proprietary,” a function must be one not described or listed in R.C. 2744.01(C) as governmental, and must both (1) “promote[] or preserve[] the public peace, health, safety, or welfare[,] and (2) “involve[] activities that are customarily engaged in by nongovernmental persons.” R.C. 2744.01(G)(1).

R.C. 2744.01(G)(2) provides a nonexhaustive list of proprietary functions including the operation of a hospital, cemetery, public utility, railroad, busline, sewer system, public auditorium and parking facility.

{¶9} Here, the city asserts that it is entitled to immunity because the gist of the Evanses' complaint is that the city was negligent in the maintenance of sidewalks, which is delineated as a governmental function. The city analogizes this case to *Burns v. Upper Arlington*, 10th Dist. No. 06AP-680, 2007-Ohio-797, which involved an injury caused when the plaintiff tripped over a manhole cover located on a sidewalk. There, the court concluded that the city of Upper Arlington was entitled to immunity because the manhole was part of the sidewalk and "the conduct about which [plaintiff] complain[ed] was the maintenance of a sidewalk, * * * not the maintenance of a sewer." *Id.* at ¶ 15.

{¶10} In contrast, the Evanses rely heavily on our conclusion in *Avila v. Cincinnati*, 182 Ohio App.3d 642, 2009-Ohio-2734, 914 N.E.2d 439 (1st Dist.), that the city was not entitled to immunity for claims involving a car accident that occurred due to the formation of ice on a road arising from a broken water line. In reaching our decision, we relied on the fact that the plaintiffs' allegations "did not concern the city's regulation, use, or repair of roadways [a governmental function], but instead implicated the city's maintenance of water lines [a proprietary function]." *Id.* at ¶ 12.

{¶11} The Evanses argue that this case is not about the maintenance of the sidewalk, but about the maintenance of the signpost, which they assert would fall within the definition of proprietary functions. According to the Evanses, sign maintenance is a proprietary function because public signs are placed for the safety

of others and because signs “on streets, buildings, and billboards” are customarily maintained by private persons.

{¶12} The problem with this argument, however, is that the statute in question explicitly provides that to be proprietary, an activity must not be listed as governmental. R.C. 2744.01(G)(1)(a). Sidewalk maintenance and regulation is specifically listed as governmental. R.C. 2744.01(C)(1)(e). Here, the Evanses’ complaint is that the city failed in its duty to keep the sidewalk clear of a dangerous obstruction. As in *Burns*, the conduct about which the Evanses complain—the failure to keep the sidewalk free of obstructions like jagged signposts or manhole covers—falls within the ambit of the city’s responsibilities in connection with sidewalks.

{¶13} Even accepting the Evanses’ argument that private entities may sometimes erect public signs—and there is no indication that this is what occurred in the present case—the immunity in R.C. 2744.01(C)(2)(e) extends not only to sidewalk “maintenance and repair” but also to the “regulation of the use” of a sidewalk.¹ Here the Evanses’ grievance is either that the city was negligent in the “maintenance and repair” of the sidewalk by failing to keep it free from the jagged, cut-off signpost, or that it was negligent in the “regulation of the use” of the sidewalk by allowing the existence of the dangerous signpost. In either case, what is at issue is a “governmental function,” and the city is entitled to immunity.

¹ It is worth noting that the city maintains extensive regulations concerning the use of sidewalks, including the placement of signs and other obstructions on sidewalks. See generally Cincinnati Municipal Code Chapters 721, 722, and 723.

III.

{¶14} We sustain the sole assignment of error, reverse the judgment of the trial court, and remand the cause for entry of judgment for the city.

Judgment reversed and cause remanded.

DINKELACKER, P.J., and FISCHER, J., concur.

Please note:

The court has recorded its own entry on the date of the release of this opinion.