[Cite as *Laries, Inc. v. Athens*, 2015-Ohio-2750.]

IN THE COURT OF APPEALS OF OHIO
FOURTH APPELLATE DISTRICT
ATHENS COUNTY

LARIES, INC., et al.,	:	
	:	Case No. 14CA10
Plaintiffs-Appellants,	:	
	:	
vs.	:	DECISION AND JUDGMENT
	:	ENTRY
CITY OF ATHENS,	:	
	:	
Defendant-Appellee.	:	**Released 06/26/15**

APPEARANCES:

Garry E. Hunter, Garry E. Hunter Law Offices, Inc., LPA, Athens, Ohio, for Appellants.

W. Charles Curley and Steven G. Carlino, Weston Hurd, LLP, Columbus, Ohio, for Appellee.

McFarland, A.J.

{¶1} Appellants, Laries, Inc., James L. Riestenberg, DDS, and Timothy C. Lavelle, DDS, appeal the February 7, 2014 decision and judgment on cross-motions for summary judgment of the Athens County Common Pleas Court, which found Appellants are not entitled to summary judgment as a matter of law. Appellants contend the trial court's dismissal pursuant to Civ.R. 56 was in error because: (1) there was a genuine issue of material fact whether or not sovereign immunity applied and (2) the application of R.C. 2744.03(A)(5) was an unconstitutional denial of

Appellants' right to a trial by jury. For the reasons which follow, we disagree with the judgment of the trial court. The doctrine of sovereign immunity does not apply to bar Appellants' claim that the City of Athens failed to properly maintain its storm water sewer system, and in particular, a 42" outfall pipe, a proprietary function pursuant to R.C. 2744.01(G)(2)(d). We also decline to consider Appellants' second assignment of error. Accordingly, we sustain Appellants' first assignment of error and reverse the judgment of the trial court.

FACTUAL AND PROCEDURAL BACKGROUND

{¶2} This lawsuit arises subsequent to flooding events which occurred on May 6, 2009, and June 2, 2009, at property owned by Laries, Inc., and located at 207 Columbus Road in Athens, Ohio. Laries Inc., was formed by Timothy C. LaVelle, DDS and Dr. James L. Riestenberg, DDS. The real property at 207 Columbus Road includes a building which houses their dental practice. The 207 Columbus Road property ("Laries property") was unimproved at the time it was purchased in 1990 or 1991. The dental practice building ("Laries building") was completed in 1992. Rain and surface water would fall on both the pavement and unpaved portions of the Laries property and would make its way to a ditch in the middle of the property.

{¶3} Later the Laries property was split and Glen Knudson purchased two parcels in 1996. Knudson's property was to the northwest side of the Laries' property. Knudson then constructed buildings on his property. The Knudson property is known as 211 Columbus Road. Dr. LaVelle testified between 1992 and the time the property was sold to Knudson, the Laries property did not experience flooding or water backup events into the Laries building. He further testified during that same time period, the Laries property did not experience storm or surface water buildup which would be considered abnormal. However, after Knudson completed development of his adjoining property, water began backing up and flooding the Laries property.

{¶4} Real property on the opposite side of Columbus Road, which is known as 210 Columbus Road, was developed by Mark Lee and Mike L'Heureaux ("L and L property"). Due to the proximity to the Hocking River, it was necessary to raise the L and L property above the regulatory 100-year flood plain. L and L retained professional architects and engineers to develop plans for construction and to modify sanitary and storm sewer and water lines on the property. L and L's engineer designed plans for a storm/surface water sewer system for the property. The design and construction included the connection of existing culverts transferring water

from the opposite side of Columbus Road and the addition of a 42" diameter lateral pipe running parallel with Columbus Road. One of the existing culverts under Columbus Road was fed by an 18" diameter storm sewer pipe which collected storm and surface water from the basement of the Laries building. The lateral lines collecting water from the opposite side of Columbus Road was to be drained by a 42" diameter outfall pipe which discharged near the Hocking River. The construction of L and L's storm sewer system was completed by Ralph Stover between 1997 and 1999.

{¶5} Dr. LaVelle testified the first water backup event occurred in 1997. During this time, the water was limited to flooding the parking lot in front of the Laries building. Dr. LaVelle notified the City about the flooding. Dr. LaVelle testified the property flooded 15-20 times. The City retained Jeff Maiden, P.E., of RJM Engineering Company, to investigate Dr. LaVelle's complaints to the city about the flooding. Maiden prepared plans to install a culvert under Columbus Road to drain water from the Laries property onto the flood plain on the other side of Columbus Road. J.B. Excavating Company installed the culvert under Columbus Road. In addition to a culvert, a catch basin was constructed to divert water into the

culvert.[1] Dr. LaVelle testified between 1997 and May 6, 2009, there was no flooding or water backup into the Laries building, however, there was flooding on the Laries property. Dr. LaVelle also testified in 2002, the culvert was modified to add a second manhole.

{¶6} Dr. LaVelle testified between 2002 and 2009, storm and surface water from the Laries property and the Knudson property were diverted in an open channel which was then directed into the catch basin and culvert under Columbus Road. When "significant" rain events would occur, large amounts of water collected in the open channel between the two properties. Andy Stone, engineer and director of public works for the City, testified in addition to the natural run off, additional drainage came from a large 36" metal corrugated pipe which handled storm water runoff from a hillside running down to the rear of the adjoining Laries and Knudson properties. The 36" pipe handled storm and surface water from approximately 25 acres of hillside. The pipe directed water into the open ditch between the Laries and Knudson properties.

{¶7} May 6, 2009 was the first date that flooding and water backed up into the Laries building. Dr. LaVelle received a phone call from a member of cleaning staff that the parking lot was flooded and water was

[1] The testimony indicates the City paid for the materials, but Knudson paid for the costs of installation of the culvert. The City also issued permits for construction and inspected during construction.

running in the building. When Dr. LaVelle arrived, he discovered water in the basement where dental records, office supplies, and dental equipment was stored. The crawlspace of the building was flooded to 16" above the floor slab. As a result of the flooding that took place on May 6, 2009, records, supplies, and equipment were damaged.

{¶8} Dr. LaVelle hired McVey Construction to assist in the cleanup of the flooding in the basement. McVey Construction specializes in housing, excavation, and utility work, and has been involved with the installation of sewer and water distribution systems. McVey Construction also investigated the source of the flooding problem. On June 1, 2009, McVey performed a dye test and learned that the 42" diameter outfall pipe, exiting into the Hocking River from the L and L property had collapsed.[2] Steven McVey opined that storm water was entering the Laries building through a sump pump and the backup was because of the collapsed 42" outfall pipe. The timing of the collapse, as well as the amount of time the outfall pipe was in a collapsed condition, was unknown according to the testimony of Andy Stone.

[2] The dye test revealed dye was coming from the outfall pipe that released water into the Hocking River. Once this discovery was made, according to Marco McVey's testimony, McVey used a light to look up and into the pipe and the collapse could be seen. Marco McVey also testified in his opinion the cause of the water backup into the Laries building was the collapsed pipe.

{¶9} A second flooding event occurred on June 2, 2009, which again caused backup into the Laries building basement and crawlspace area. On that date, Dr. LaVelle was on the premises, and he checked the basement because it was raining. The flooding was so deep he could only get to the bottom of the basement steps. According to Andy Stone, Athens County later worked with the City to remove the collapsed 42" outfall pipe and replace it with a 48" outfall. Dr. LaVelle testified since the outfall pipe had been replaced, there had been no flooding in the building.

{¶10} On December 8, 2010, Appellants Laries, Inc., Dr. Timothy C. LaVelle and Dr. James L. Riestenberg filed their complaint against the City of Athens claiming damages to the Laries building, parking lot, grounds, and contents of the dental office. Appellants alleged the City inadequately maintained a storm drainage system serving the property; the storm drainage system was undersized; incorrectly installed; incorrectly designed; and improperly inspected by the City. Appellants also alleged negligent maintenance of the storm drainage system.

{¶11} Discovery ensued and all parties filed motions for summary judgment. The trial court overruled Appellants' motion but granted the City's motion, by judgment entry dated February 7, 2014, finding that the

doctrine of sovereign immunity applied to bar Appellants' claims. This timely appeal followed.

ASSIGNMENT OF ERROR ONE

"I. THE TRIAL COURT'S DISMISSAL PURSUANT TO OHIO CIVIL PROCEDURE RULE 56 WAS IN ERROR WHEN THERE WAS A GENUINE ISSUE OF FACT CONCERNING WHETHER SOVEREIGN IMMUNITY APPLIED."

A. STANDARD OF REVIEW

{¶12} Appellate review of summary judgment decisions is de novo, governed by the standards of Civ.R. 56. *Today and Tomorrow Heating & Cooling*, 4th Dist. Highland No. 13CA14, 2014-Ohio-239, ¶ 10; *Vacha v. N. Ridgeville*, 136 Ohio St.3d 199, 2013-Ohio-3020, 992 N.E.2d 1126, ¶ 19. "Accordingly, we afford no deference to the trial court's decision and independently review the record to determine whether summary judgment is appropriate." *Matter v. Athens*, 4th Dist. Athens No. 13CA20, 2014-Ohio-4451, ¶ 11, quoting *Snyder v. Stevens*, 4th Dist. Scioto No. 12CA3465, 2012-Ohio-4120, ¶ 11.

{¶13} Summary judgment is proper if the party moving for summary judgment demonstrates that: (1) there is no genuine issue of material fact; (2) the moving party is entitled to judgment as a matter of law; and (3)

reasonable minds can come to but one conclusion, and that conclusion is adverse to the party against whom the motion is made. *Today, supra;* Civ.R. 56(C); *New Destiny Treatment Ctr., Inc. v. Wheeler,* 129 Ohio St.3d 39, 2011-Ohio-2266, 950 N.E.2d 157, ¶ 24; *Bender v. Portsmouth*, 4th Dist. Scioto No. 12CA3491, 2013-Ohio-2023, ¶ 8.

{¶14} "[A] party seeking summary judgment on the ground that the nonmoving party cannot prove its case, bears the initial burden of informing the trial court of the basis for the motion, and identifying those portions of the record that demonstrate the absence of a genuine issue of material fact on the essential element(s) of the nonmoving party's claims." *Dresher v. Burt,* 75 Ohio St.3d 280, 293, 662 N.E.2d 264 (1996). To meet this burden, the moving party must be able to specifically point to the pleadings, depositions, answers to interrogatories, written admissions, affidavits, transcripts of evidence, and written stipulations of fact, if any, timely filed in the action, which affirmatively demonstrate that the nonmoving party has no evidence to support the nonmoving party's claims. *Id.;* Civ.R. 56(C).

{¶15} "If the moving party fails to satisfy its initial burden, the motion for summary judgment must be denied. However, if the moving party has satisfied its initial burden, the nonmoving party then has a

reciprocal burden outlined in Civ.R. 56(E) to set forth specific facts showing that there is a genuine issue for trial * * *." *Dresher* at 293.

B. LEGAL ANALYSIS

{¶16} Whether a political subdivision is entitled to statutory immunity under Chapter 2744 presents a question of law that is properly determined by summary judgment. E.g., *Conley v. Shearer*, 64 Ohio St.3d 284, 292, 595 N.E.2d 862 (1992); *Williams v. Glouster*, 4th Dist. Athens No. 10CA58, 2012-Ohio-1283, ¶ 15.

{¶17} Appellants contend the City improperly constructed, inspected, investigated, and maintained the storm sewer system servicing their property at 207 Columbus Road, Athens, Ohio. Appellants characterize the issue as one of proper maintenance, operation, and upkeep of the storm sewer system, a proprietary function under R.C. 2744.01(G)(2)(d) and, therefore, the City is not immune from liability for its negligence. The complaint filed by Appellants alleges:

> "6. Defendant, City of Athens, retained RJM Engineering during 1997 to prepare plans to construct a culvert under Columbus Road, Athens, Ohio, and a storm water drainage system to the Hocking River, Athens, Ohio. The culvert was not constructed to ODOT standards, or in accordance with the engineering plans, was under-sized, and the rest of the drainage system was not installed correctly.
>
> 16. The storm water drainage system serving 207 Columbus Road, Athens, Ohio installed and/or inspected by Defendant,

> City of Athens, Ohio has been inadequately maintained, in that it is undersized, incorrectly installed, inspected by unqualified personnel of the City of Athens, Ohio, and incorrectly designed resulting in the continual rain water backup onto 207 Columbus Road, Athens, Ohio.
>
> 18. Extensive rain water backup damage was done to the property of Plaintiffs as a result of Defendant, City of Athens, Ohio, negligently maintaining the storm water drainage system by hiring contractor(s) who did not construct the storm drainage system according to engineering specifications or state standards, and inadequately supervising and training city personnel in how the storm water system at 207 Columbus Road, Athens, Ohio was to be constructed according to engineering plans and state standards."

{¶18} The City, however, characterizes the issue as one of design and construction of the city's sewer system. Pursuant to R.C.2744.02(C)(2)(l), the "provision or nonprovision, planning or design, construction or reconstruction of a public improvement, including, but not limited to, a sewer system" is a governmental function. The City argues, under this theory, it is immune from liability.

{¶19} In the case at bar, the trial court implicitly determined that the City's negligence, if any, involved the planning and design of the storm sewer system by the City of Athens, a governmental function pursuant to R.C. 2744.01(C)(2)(1). And, as such, the City is immune from liability for the governmental function involving the design and installation of the storm sewer system. For the reasons which follow, we disagree with the judgment

of the trial court. The trial court's decision granting summary judgment to the City is hereby reversed.

1. R.C. Chapter 2744 - Political Subdivision Tort Liability

{¶20} The General Assembly enacted R.C. Chapter 2744, Ohio's Political Subdivision Tort Liability Act, to reinstate the judicially abrogated common-law immunity of political subdivisions. *Today, supra*, at ¶ 12. See, *Riffle v. Physicians and Surgeons Ambulance Service, Inc.*, 135 Ohio St.3d 357, 2013-Ohio-989, 986 N.E.2d 983, ¶ 14-15. R.C. 2744 establishes a three-step analysis for determining whether a political subdivision is immune from liability. *Leasure v. Adena*, 973 N.E.2d 810, 2012-Ohio-3071, (4th Dist.), at ¶ 13; *Cramer v. Auglaize Acres*, 113 Ohio St.3d 266, 270, 2007-Ohio-1946, 865 N.E.2d 9, ¶ 14. First, R.C. 2744.02(A)(1) sets forth the general rule that a political subdivision is immune from tort liability for acts and omissions connected with governmental or proprietary functions. *Leasure*, *supra* at ¶ 13; *Cramer*, *supra; Colbert v. Cleveland*, 99 Ohio St.3d 215, 2003-Ohio-3319, 790 N.E.2d 781, ¶ 7. The statute states: "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 a political subdivision in connection with a governmental or proprietary function."

{¶21} Second, R.C. 2744.02(B) lists five exceptions to the general immunity granted to political subdivisions under R.C. 2744.02(A)(1). *Leasure, supra*; *Cramer, supra,; Ryll v. Columbus Fireworks Display Co.*, 95 Ohio St.3d 467, 470, 2002-Ohio-2584, 769 N.E.2d 372, ¶ 25. But that immunity is not absolute, and one exception to immunity is the political subdivision's "maintenance, destruction, operation, and upkeep of a sewer system, "which is identified as a proprietary function. R.C. 2744.01(G)(2)(d). R.C. 2744.02(B)(2) provides that political subdivisions are liable for injury, death, or property loss caused by the subdivision's employees' "negligent performance with respect to proprietary functions." *Coleman v. Portage,*133 Ohio St.3d 28, 2012-Ohio-3881, 975 N.E.2d 952, at ¶ 15.

{¶22} Finally, R.C. 2744.03(A) sets forth several defenses that a political subdivision may assert if R.C. 2744.02(B) imposes liability. However, a court does not need to engage in an analysis regarding available defenses provided in R.C. 2744.03 if no exception under R.C. 2744.02(B) can be found to remove the general grant of immunity. *Fink v. Twentieth Century Homes, Inc.*, 8th Dist. Cuyahoga No. 99550, 2013-Ohio-4916, ¶ 20;

Nelson v. Cleveland, 8th Dist. Cuyahoga No. 98548, 2013-Ohio-493, ¶ 14, citing *O'Toole v. Denihan,* 118 Ohio St.3d 374, 2008-Ohio-2574, 889 N.E.2d 505, ¶ 71.

{¶23} In *Williams v. Glouster,* 4th Dist. Athens No. 10CA58, 2012-Ohio-1283, we stated at ¶ 19:

> "[O]ur review of the pertinent case law in this area reveals that storm drainage systems, like the one at issue herein, are analyzed under the same framework as sanitary sewer systems for purposes of applying R.C. Chapter 2744's grant of sovereign immunity." See, generally, *Ivory v. Township of Austintown,* 7th Dist. Mahoning App. No. 10MA106, 2011-Ohio-3171.

2. Governmental or proprietary function?

{¶24} Here, it is undisputed that the City of Athens is a "political subdivision" pursuant to R.C. 2744.01(F). Appellee City is entitled to the broad grant of immunity under R.C. 2744.02(A)(1). " 'Functions which can be categorized as either governmental or proprietary * * * are clearly intended for use as a guide in determining whether, in a particular case, the activity attributed to a subdivision falls within the ambit of the statute.' " *Coleman v. Portage, supra,* at ¶ 17. (Internal citations omitted.) "A 'governmental function' includes '[t]he provision or nonprovision, planning or design, construction or reconstruction of * * * a sewer system.' *Essman v. Portsmouth*, 4th Dist. Scioto No. 09CA3325, 2010-Ohio-4837, ¶ 29; R.C.

2744.01(C)(2)(1). By contrast, a 'proprietary function' includes '[t]he maintenance, destruction, operation, and upkeep of a sewer system.' *Essman, supra*, at ¶ 28; R.C. 2744.01(G)(2)(d)."

{¶25} Our courts of appeals have developed a body of law holding that subdivisions are immune from claims that flow from the design and construction of a sewer system. *Coleman, supra,* at ¶ 19, citing *Spitzer v. Mid Continent Constr. Co., Inc.,* 8th Dist. Cuyahoga No. 89177, 2007-Ohio-6067, at ¶ 20. "[T]he design and construction of a storm water runoff system constitutes a 'governmental function' for which a political subdivision is statutorily immune from liability." *Ferguson v. Breeding,* 4th Dist. Lawrence No. 99CA22, 2000 WL 1234262. A distinction exists between damages sustained to property as a result of a sewer system's actual design and damages sustained due to a political subdivision's failure to perform routine maintenance on the system, as designed. *State ex rel. Nix v. Bath Twp.,* 9th Dist. Summit No. 25633, 2011-Ohio-5636, ¶ 14.

{¶26} Ohio courts have long recognized that a city can be liable for the negligent maintenance of its sewers. *Williams, supra,* at ¶ 23, citing *Portsmouth v. Mitchell Mfg. Co.*, 113 Ohio St. 250, 148 N.E.846 (1925). See, also, *Essman, supra,* at ¶ 31. "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." *Williams, supra,* at ¶ 25, quoting *Doud v. Cincinnati,* 152 Ohio St. 132, 137, 87 N.E.2d 243 (1949). Maintenance problems are classified as those that may be remedied through repairs, inspection, the removal of obstructions, and attention to general deterioration. *Id.* A political subdivision is immune from damages caused by the negligent installation of a faulty design (a governmental function), but not from damages caused by a failure to maintain (a proprietary function.) *Id.*

{¶27} Here, the City retained James E. Bir, P.E. of Lock One Inc., consulting engineers, to investigate and analyze the storm sewer system at 207 Columbus Road. Bir prepared a report dated December 24, 2009. Bir ultimately concluded the drainage system in operation prior to and throughout May and June 2009 had more than sufficient capacity to pass the water generated by a 10-year, 24-hour storm, the standard for determining adequate flow and volume, provided the 42" outfall was in working order. Bir testified the flooding of the Laries building was not associated with the

drainage system that conveyed the runoff from the hillside to the open drainage ditch between the Laries and Knudson properties.

{¶28} Bir noted the backup of water was into the basement and crawl space. Bir emphasized the basement and crawl space drainage was conveyed to a separate catch basin located on adjacent property on the other side of the Laries building. The basement area was drained by an 18" diameter pipe routed under Columbus Road from a separate manhole and culvert. This separate manhole and culvert is connected to the same 42" outfall on the opposite side of Columbus Road as the culvert which directed water under Columbus Road from the open drainage ditch between the Laries and Knudson properties. Bir opined the May and June 2009 water backup events were the result of the blockage of the 42" outfall on the opposite side of Columbus Road, causing the 18" drainage pipe which was partially fed by drainage from the Laries building basement to back up.

{¶29} The question is whether the three problems identified by Bir in his report and testimony, and addressed in the trial court's decision as the cause of flooding and backup on Appellants' property at 207 Columbus Road, involve the City's performance of governmental or proprietary functions. The trial court's entry granting Appellee's motion for summary

judgment emphasized these three problems as the causes of the flooding and backup:

> "1. The initially undersized catch basin between plaintiffs' property and the property directly northwest (labeled Catch Basin "B" on Bir. Depo. Exhibit 5);
>
> 2. Partially collapsed, improperly laid (e.g., "bell down") sewer pipe in a lateral line between two manholes across the street from plaintiffs' property; and
>
> 3. Collapsed, improperly laid (e.g. "bell down") sewer pipe in an outfall line for the subject system located across the street from a separate catch basin between plaintiffs' property and adjoining Ohio University property."

{¶30} Based up our de novo review of the record, we disagree with the trial court's decision that sovereign immunity applied in this instance. The flooding in Appellants' property was, by all accounts, caused by a collapsed, improperly maintained 42" outfall pipe. Maintenance and upkeep of a sewer system is identified as a proprietary function, R.C. 2744.01(G)(2)(d). Political subdivisions are liable for property loss caused by negligent performance with respect to proprietary functions. R.C. 2744.02(B)(2). As such, the trial court should have found that sovereign immunity did not apply to bar Appellants' claims herein.

{¶31} Bir's testimony and the references to his report indicate that the original drainage plan prepared in 1997 did not address the future development of the Knudson property, and further indicates the undersized

catch basin/inlet, Catch Basin B, was not designed to accommodate the flow from Knudson's development of his adjoining property. It is obvious, based on Bir's testimony, that the original plans in 1997 would have required redesign and reconstruction to meet "current demands" after the Knudson property was further developed. The trial court's decision noted Bir's findings and opinion.

{¶32} However, the trial court's decision next emphasized the "partially collapsed, improperly laid 'bell down' sewer pipe in a lateral line between two manholes across the street from the plaintiffs' property" as an undisputed cause of flooding set forth in Bir's deposition testimony. Bir testified in his opinion, the storm water system was engineered adequately, however, the installation of the system was improper. He testified the storm water drainage lines flowing from the catch basins and manholes were collapsed. In particular, he testified Manholes C and D had collapsed sections. Bir testified that Manholes C and D, along with the use of corrugated pipe instead of smooth bore pipe, and the improper bedding of the pipe contributed to the flooding at the Laries building.

{¶33} Finally, the trial court's decision observed Bir's opinon, that the "improperly laid (e.g. "bell down") sewer pipe in an outfall line for the subject system located across the street from a separate catch basin between

plaintiffs' property and adjoining Ohio University property" was an undisputed cause of the flooding. After the backup flooding into the Laries building in May and June 2009, McVey Construction, on behalf of Dr. LaVelle, investigated the source of the flooding. McVey opined that the flooding and backup was caused by the collapsed 42" outfall pipe, which exited into the Hocking River from the L and L property across the road. McVey testified the collapse was due to improper installation. Bir also testified the collapse was due to improper installation, because it was installed "bell down" or backwards.

{¶34} Appellants' complaint alleged the above-referenced design and construction issues, but it also alleged at paragraph 16 that the storm water drainage system had been "inadequately maintained, in that it is undersized, incorrectly installed, inspected by unqualified personnel….and incorrectly designed." In *Coleman, supra*, the Supreme Court of Ohio noted Webster's New College Dictionary definition of "maintain" as "[t]o preserve or keep in a given existing condition, as of efficiency or good repair." Maintenance problems are classified as those that may be remedied through repairs, inspection, the removal of obstructions, and attention to general deterioration. *Bath, supra*, at *3. Although Bir's testimony demonstrates the

system was improperly installed, the record also reveals credible evidence suggesting a lack of maintenance.

{¶35} Scott Lambert, the Sewer Supervisor for the City of Athens, also gave deposition testimony. Lambert had been the Supervisor since 2003. Lambert testified the City received calls about the water backup on the parking lot at 207 Columbus Road between 2003 and 2009. He testified he kept cleaning "the catch basin" to fix the problem. Lambert admitted he never checked to see if any of the lines were collapsed on the river side of Columbus Road. Lambert further admitted that after the second flooding event in June 2009, he checked the line going to the river and found a problem.

{¶36} After the second flooding, Lambert testified the City replaced the straight line discharge pipe on the river side of Columbus Road to the Hocking River. Lambert testified during this construction it was discovered the original pipe had been installed incorrectly. He testified the original pipe was installed with the bell end backwards. He further testified there were gaps in the pipe and it was partially collapsed with a lot of debris inside.

{¶37} We disagree with the trial court's conclusion that the allegations implicated matters of design and construction. Although Appellants alleged the culvert was not constructed according to ODOT

standards, was under-sized, and was not installed correctly, the evidence also demonstrates that the City failed to properly maintain the storm water sewer system and in particular, the 42" outfall pipe. Both Appellants' and Appellee's experts concluded that the backup flooding was primarily caused by the collapsed 42" outfall pipe. Scott Lambert also observed the collapsed pipe with debris in it after the two flooding events in May and June 2009. As we have stated above, maintenance problems are those which may be remedied through repairs, inspection, the removal of obstructions, and attention to general deterioration. The evidence in the record demonstrates that apparently no one had inspected, repaired, or maintained the collapsed 42" outfall since its improper installation in 1997.

{¶38} Our de novo review has revealed that the City failed to properly inspect and maintain its sewer system, and in particular, the collapsed 42" outfall pipe. Maintenance of the sewer system and pipe is a proprietary function, which the City performed negligently. As such, Appellants' claims are not barred by the application of the sovereign immunity doctrine. For these reasons, we sustain Appellants' first assignment of error and reverse the judgment of the trial court which granted immunity to the City of Athens.

ASSIGNMENT OF ERROR TWO

> "II. THE TRIAL COURT'S DISMISSAL PURSUANT TO OHIO CIVIL PROCEDURE RULE 56 WAS IN ERROR BECAUSE THE APPLICATION OF OHIO REVISED CODE SECTION 2744.03(A)(5) IS AN UNCONSTITUTIONAL DENIAL OF THE RIGHT TO A TRIAL BY JURY."

{¶39} A reviewing court will not consider an issue or claim not presented, considered, or decided by a lower court. *Dayton Walther Corporation, v. Specialized Carriers, Inc.*, 4th Dist. Scioto No. 1702, 1988 WL 106670, *7, citing *Skinner v. Turner*, 30 Ohio App.3d 232, 507 N.E.2d 392 (8th Dist. 1986); *Kalish v. Trans World Airlines*, 50 Ohio St.2d 73, 362 N.E.2d 994, (1977). Such general rule also applies to appeals from the entry of summary judgment. *Dayton Walther, supra,* citing *Edgar v. Hines*, 35 Ohio App.3d 23, 519 N.E.2d 670, (12 Dist. 1987). Here, Appellants did not challenge the constitutionality of the sovereign immunity statute or make any argument that it was an unconstitutional denial of the right to jury trial at the trial court level. As such, it is not "absolutely necessary to address the merits of the constitutional issue in light of Appellants' failure to timely raise it. See *Smith v. Landfair,* 135 Ohio St.3d 89, 2012-Ohio- 5692, 984 N.E.2d 1016. Accordingly, we decline to consider the second assignment of error.

JUDGMENT REVERSED.

Harsha, J., concurring.

{¶40} I concur in the judgment sustaining appellants' first assignment of error and write separately to point out the conflicting signals given by the Supreme Court of Ohio on the issue of whether immunity is a question of law or fact.

{¶41} In *Conley v. Shearer*, 64 Ohio St.3d 284, 595 N.E.2d 862, the Supreme Court of Ohio rejected a claim that the procedure for filing claims against the state, its officers, and employees violated a plaintiff's right to a trial by jury. The court held that "[t]he question of whether [the defendant] is entitled to immunity as a governmental employee is a question of law for which there is no right to trial," *Id* at 292. In rejecting the claimed right to a jury trial the court decided that immunity presented purely legal questions. The court did so in pronouncing that " '[w]hether immunity may be invoked is a purely legal issue, properly determined by the court prior to trial * * *, and preferably on a motion for summary judgment.' " *Id.*, quoting *Roe v. Hamilton Cty. Dept. of Human Serv.*, 53 Ohio App.3d 120, 126, 560 N.E.2d 238 (1st Dist.1988).

{¶42} Based on *Conley* we have often held that [i]mmunity issues ordinarily present questions of law that an appellate court reviews independently and without deference to the trial court. *See Pauley v.*

Circleville, 2012-Ohio-2378, 971 N.E.2d 410, ¶ 16 (4th Dist.), citing *Conley* at 292. Consistent with the Supreme Court's holding in *Conley* and other precedent, we have further held that questions of law are for a court to decide, even if resolving the question requires the court to consider the facts or evidence. *See, e.g., Martin v. Lambert*, 2014-Ohio-715, 8 N.E.3d 1024 (4th Dist.), ¶ 17, quoting *Ruta v. Breckenridge-Remy Co.*, 69 Ohio St.2d 66, 68, 430 N.E.2d 935 (1982) (" 'Simply because resolution of a question of law involves a consideration of the evidence does not mean that the question of law is converted into a question of fact or that a factual issue is raised' ").

{¶43} Nevertheless, in *Hubbell v. Xenia*, 115 Ohio St.3d 77, 2007-Ohio-4839, 873 N.E.2d 878, at ¶ 21, the Supreme Court observed in dicta, that the issue of whether a political subdivision or its employee was entitled to immunity could potentially raise a genuine issue of material fact precluding summary judgment:

> A court of appeals must exercise jurisdiction over an appeal of a trial court's decision overruling a Civ.R. 56(C) motion for summary judgment in which a political subdivision or its employee seeks immunity. Absent some other procedural obstacle, a court of appeals must conduct a de novo review of the law and facts. If, after that review, only questions of law remain, the court of appeals may resolve the appeal. If a genuine issue of material fact remains, the court of appeals can remand the case to the trial court for further development of the facts necessary to resolve the immunity issue.

{¶44} Similarly in cases held by the Supreme Court for its decision in *Hubbell*, the court stated that "[i]f genuine issues of material fact remain, the courts of appeals may remand the causes to the trial courts for further development of the facts necessary to resolve the immunity issue." *See In re Ohio Political Subdivision Immunity Cases*, 115 Ohio St.3d 448, 2007-Ohio-5252, 875 N.E.2d 912, ¶ 2; *Fogle v. Bentleyville*, 116 Ohio St.3d 301, 2007-Ohio-6454, 878 N.E.2d 638, ¶ 2.

{¶45} However, in these cases the issue was whether there was a final appealable order and the court's actual holdings were restricted to: "When a trial court denies a motion in which a political subdivision or its employee seeks immunity under R.C. Chapter 2744, that order denies the benefit of an alleged immunity and is therefore a final, appealable order pursuant to R.C. 2744.02(C)." *Hubbell* at syllabus. The remaining language in the opinion appears to be dicta that does not specifically overrule the Supreme Court's holding in *Conley,* i.e. that immunity decisions remain questions of law that should be resolved prior to trial notwithstanding existing issues of fact.

{¶46} If the Supreme Court intended to overrule *Conley,* and to avoid any confusion on the part of trial and appellate courts, the dicta in *Hubbell* was not the way to do it. In the absence of more explicit guidance on this matter, I continue to believe *Conley* is applicable to questions of political-

subdivision immunity in a motion for summary judgment. This is so because, like duty, immunity presents a question about the rules of procedure and public policy. Courts' decide the rules under which cases are decided, not juries, regardless of whether such a decision requires consideration of facts. *Ruta, supra*.

{¶47} Therefore, I concur that the city is not entitled to immunity because the failure to properly repair or replace a collapsed sewer pipe represents a maintenance issue, for which there is no immunity.

JUDGMENT ENTRY

It is ordered that the JUDGMENT BE REVERSED and that the Appellants recover of Appellee any costs herein.

The Court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this Court directing the Athens County Common Pleas Court to carry this judgment into execution.

Any stay previously granted by this Court is hereby terminated as of the date of this entry.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

Harsha, J.: Concurs in Judgment and Opinion with Opinion.
Hoover, P.J.: Dissents.

For the Court,

BY: _____
Matthew W. McFarland,
Administrative Judge

NOTICE TO COUNSEL

Pursuant to Local Rule No. 14, this document constitutes a final judgment entry and the time period for further appeal commences from the date of filing with the clerk.