[Cite as *Mentzer v. Ohio Dept. of Transp.*, 2017-Ohio-8958.]

MARK MENTZER, et al. Plaintiffs v. OHIO DEPARTMENT OF TRANSPORTATION Defendant AND MARK MENTZER, et al. Plaintiffs v. CITY OF CLEVELAND Defendant/Third-Party Plaintiff and OHIO DEPARTMENT OF TRANSPORTATION Third-Party Defendant	Case Nos. 2016-00082 and 2016-00320-PR Judge Patrick M. McGrath Magistrate Robert Van Schoyck DECISION

{¶1} In these consolidated cases, it is undisputed that on February 7, 2014, plaintiff, Mark Mentzer (Mentzer), was injured by a metal object that fell through the windshield of his vehicle as he drove along Interstate Route 90 (I-90) in the City of Rocky River. The parties agree that the accident occurred on a section of I-90 that passes below a bridge known as the Valley View Bridge, and that attached to the underside of the bridge was a water main spanning from end to end. There is no dispute that the water main belonged to the City of Cleveland and that the metal object

that injured Mentzer appears, at least possibly, to be a broken segment of a coupling device that joined together two water main pipes.

{¶2} The procedural history of the litigation began on February 3, 2016, when Mentzer and his wife, Jennifer Mentzer, filed a complaint against both the City of Cleveland and the City of Rocky River in Cuyahoga County Common Pleas Court Case No. CV-16-858423. One day later, on February 4, 2016, the Mentzers filed a complaint against the Ohio Department of Transportation (ODOT) in Court of Claims Case No. 2016-00082.

{¶3} In the Cuyahoga County proceedings, the City of Rocky River subsequently filed a third-party claim against ODOT for contribution and indemnity, thereby invoking the jurisdiction of the Court of Claims. The Cuyahoga County proceedings were thereafter removed to the Court of Claims pursuant to R.C. 2743.03(E)(1) and identified as Court of Claims Case No. 2016-00320-PR. On June 28, 2016, Court of Claims Case Nos. 2016-00082 and 2016-00320-PR were consolidated for purposes of trial.

{¶4} On October 18, 2016, the Mentzers voluntarily dismissed the claims against the City of Rocky River in Case No. 2016-00320-PR pursuant to Civ.R. 41(A)(1)(a), which rendered moot the third-party complaint that the City of Rocky River had filed against ODOT in that case. However, on January 24, 2017, the City of Cleveland filed its own third-party complaint against ODOT in Case No. 2016-00320-PR for contribution and indemnity.

{¶5} On August 15, 2017, ODOT filed a motion for summary judgment pursuant to Civ.R. 56(B) as to the claims asserted by the Mentzers in Case No. 2016-00082. The Mentzers did not file a response.

{¶6} On August 16, 2017, the City of Cleveland filed a motion for summary judgment pursuant to Civ.R. 56(B) as to the claims asserted by the Mentzers in Case No. 2016-00320-PR. On August 31, 2017, the Mentzers filed a memorandum in opposition. On September 7, 2017, the City of Cleveland filed a motion under L.C.C.R.

4(C) for leave to file a reply, instanter, to which the Mentzers filed a memorandum in opposition on September 11, 2017. Upon review, the motion for leave is DENIED.

{¶7} On August 15, 2017, ODOT filed a motion for summary judgment pursuant to Civ.R. 56(B) as to the third-party claim filed by the City of Cleveland in Case No. 2016-00320-PR. On August 29, 2017, the City of Cleveland filed a memorandum in opposition.

{¶8} Additionally, on August 22, 2017, the City of Cleveland filed a motion to take judicial notice, pursuant to Evid.R. 201, of the ODOT Manual of Bridge Inspection. The motion was not opposed and is hereby GRANTED.

{¶9} The motions for summary judgment are now before the court for a non-oral hearing pursuant to L.C.C.R. 4(D).

{¶10} Civ.R. 56(C) states, in part, as follows:

{¶11} "Summary judgment shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, written admissions, affidavits, transcripts of evidence, and written stipulations of fact, if any, timely filed in the action, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. No evidence or stipulation may be considered except as stated in this rule. A summary judgment shall not be rendered unless it appears from the evidence or stipulation, and only from the evidence or stipulation, that reasonable minds can come to but one conclusion and that conclusion is adverse to the party against whom the motion for summary judgment is made, that party being entitled to have the evidence or stipulation construed most strongly in the party's favor." *See also Gilbert v. Summit Cty.*, 104 Ohio St.3d 660, 2004-Ohio-7108, citing *Temple v. Wean United, Inc.*, 50 Ohio St.2d 317 (1977).

CASE NO. 2016-00082

{¶12} The complaint in Case No. 2016-00082 essentially provides that the bridge and the attached water main presented a hazard to motorists traveling on the highway

below, that ODOT failed to warn or otherwise protect such motorists, and that ODOT is therefore liable for Mentzer's injuries under a theory of negligence. Jennifer Mentzer asserts a derivative claim for loss of consortium.

{¶13} "It is fundamental that in order to establish a cause of action for negligence, the plaintiff must show (1) the existence of a duty, (2) a breach of duty, and (3) an injury proximately resulting therefrom." *Armstrong v. Best Buy Co., Inc.*, 99 Ohio St.3d 79, 2003-Ohio-2573, ¶ 8. Pursuant to R.C. 5501.11, ODOT has a duty to maintain highways in a safe and reasonable manner. *Galay v. Dept. of Transp.*, 10th Dist. Franklin No. 05AP-383, 2006-Ohio-4113, ¶ 52.

{¶14} ODOT's primary argument is that Mentzer cannot establish that it breached its duty of care. As evidence, ODOT points to the deposition testimony of Youssef 'Joseph' Seif, who is employed with ODOT's District 12 office as a Bridge Maintenance Engineer. In his deposition, Seif explained that District 12 personnel are required to conduct regular inspections of every bridge in their three-county territory, which includes the Valley View Bridge, but that the inspections pertain primarily to the structural components of bridges and that ODOT does not have jurisdiction to maintain water mains or other utilities attached as accessories to bridges. As discussed in greater detail below, deposition testimony from City of Cleveland Department of Water employees establishes that the water main was owned and maintained by the City of Cleveland, not ODOT.

{¶15} Seif explained that ODOT personnel do assess the condition of water, electric, gas, or other utility lines attached to a bridge, and that if ODOT personnel observe any significant problem in this regard, their practice is to contact the owner of the utility as a courtesy. Seif testified that ODOT personnel performed a routine inspection of the Valley View Bridge on March 27, 2013, less than one year before the accident, and noted only some loose insulation in one area of the water main. Seif stated that when the City of Rocky River Police Department contacted ODOT after the

accident, he and another ODOT employee were shown the metal object in question and then they inspected the bridge, and upon finding no damaged or missing components they determined that the object did not come from the bridge. Kenneth Banaszak, the employee who accompanied Seif that day, testified in a deposition that the metal object was painted orange and was about 6 to 8 inches long and did not look like anything that would have come off a bridge. Banaszak stated that he and Seif carefully inspected the Valley View Bridge and two others nearby, using flashlights and binoculars, and saw no indication as to the origin of the object. Banaszak stated that the water main attached to the Valley View Bridge was covered with insulation over the pipes but that the couplings were visible and appeared to have no damage.

{¶16} As previously stated, the Mentzers did not file a response to ODOT's motion for summary judgment. In their response to the City of Cleveland's motion for summary judgment in Case No. 2016-00320-PR, the Mentzers state that they oppose only that motion, not ODOT's motion in Case No. 2016-00082. Upon review of the unopposed motion and the supporting evidence, the only reasonable conclusion that can be drawn is that ODOT is entitled to judgment as a matter of law. Accordingly, ODOT's motion for summary judgment in Case No. 2016-00082 shall be granted.

CASE NO. 2016-00320-PR

{¶17} The complaint in Case No. 2016-00320-PR raises a claim of negligence against the City of Cleveland essentially based on allegations that the water main was in a state of disrepair and presented a hazard to motorists traveling on the highway below, that the City of Cleveland failed to warn or otherwise protect such motorists, and that the City of Cleveland is therefore liable for Mentzer's injuries. There is also a derivative claim for Jennifer Mentzer's loss of consortium.

{¶18} In its motion for summary judgment, the City of Cleveland argues that it is entitled to immunity from the Mentzers' claims pursuant to R.C. 2744.02(A)(1).

{¶19} "Determining whether a political subdivision is immune from tort liability pursuant to R.C. Chapter 2744 involves a three-tiered analysis." *Colbert v. Cleveland*, 99 Ohio St.3d 215, 2003-Ohio-3319, ¶ 7. "For purposes of R.C. Chapter 2744, the functions of political subdivisions are classified as either governmental functions or proprietary functions." *Inland Prods., Inc. v. Columbus*, 193 Ohio App.3d 740, 2011-Ohio-2046, ¶ 19 (10th Dist.), citing R.C. 2744.02(A)(1). The first tier of the analysis establishes "a general rule that a political subdivision is immune from liability incurred in performing either governmental or proprietary functions." *Smith v. Martin*, 176 Ohio App.3d 567, 2008-Ohio-2978, ¶ 11 (10th Dist.). Under the statutory definition of "proprietary function," the term includes, among other things, "[t]he establishment, maintenance, and operation of a utility, including, but not limited to, * * * a municipal corporation water supply system". R.C. 2744.01(G)(2)(c). Here, the parties agree that insofar as the City of Cleveland maintained and operated a water supply system which the water main was a part of, the City of Cleveland was engaged in a proprietary function for which immunity would generally apply under the first tier of the analysis.

{¶20} "However, the immunity provided by R.C. 2744.02(A)(1) is not absolute, but is subject to various exceptions set forth in R.C. 2744.02(B)." *Smith* at ¶ 11. "The second tier of the analysis focuses on the five exceptions to immunity listed in R.C. 2744.02(B), which can expose a political subdivision to liability." *Gibbs v. Columbus Metro. Hous. Auth.*, 10th Dist. Franklin No. 11AP-711, 2012-Ohio-2271, ¶ 8. "If any of the R.C. 2744.02(B) exceptions apply, then the third tier of the analysis requires an assessment of whether any defenses in R.C. 2744.03 apply to reinstate immunity." *Green v. Columbus*, 10th Dist. Franklin No. 15AP-602, 2016-Ohio-826, ¶ 17.

{¶21} Of the five exceptions to immunity set forth in R.C. 2744.02(B), the one that the parties contest is R.C. 2744.02(B)(2), which states: "Except as otherwise provided in sections 3314.07 and 3746.24 of the Revised Code, 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 proprietary functions of the political subdivisions." The applicability of this exception thus depends upon whether the elements of a negligence claim—duty, breach, proximate cause, and damages—can be proven. *Inland Prods.* at ¶ 39.

{¶22} The parties do not dispute that the City of Cleveland owed a duty of care relative to its maintenance and operation of the water main. In a case involving a sewer system, which, like a water supply system is considered a proprietary function of a political subdivision, the Supreme Court of Ohio stated the following:

> a. 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; 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 immunity from 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.

Doud v. Cincinnati, 152 Ohio St.132, 137 (1949); *see also Nice v. Marysville*, 82 Ohio App.3d 109, 117-118 (3rd Dist.1992), citing *Doud* at 137 and *Portsmouth v. Mitchell Mfg. Co.*, 113 Ohio St. 250, 255 (1925). "Although *Doud* predates the Public Subdivision Tort Liability Act, the rationale of *Doud* was codified in that act, and Ohio courts have continued to follow the common law rationale under the immunity statutes." *Inland Prods.* at ¶ 23.

{¶23} While there is no disagreement on the issue of the City of Cleveland owing a duty, the parties do dispute the issues of whether the City of Cleveland breached that duty, and, if so, whether any such breach proximately caused Mentzer's injuries.

{¶24} Among the deposition transcripts filed in relation to the motions for summary judgment are those of three employees of the City of Cleveland Department of Water: Consulting Engineer/Group Manager of Advance Planning and Hydraulics Pierre

Haddad, Manager of Engineering Jose Hernandez, and Manager of Distribution Systems Kim Thompson. These employees testified that the water main attached to the Valley View Bridge was installed in 1969, and that while it was owned by the City of Rocky River until a 2013 agreement transferring ownership of the water supply infrastructure to the City of Cleveland, the maintenance of the water main has always been the responsibility of the City of Cleveland.

{¶25} Haddad, who testified that he has been employed with the Department of Water for nearly 30 years, stated that his office performs assessments of the water supply infrastructure based upon analytical data that includes several factors, including the age of the pipe, the size of the pipe, hydraulic conditions, and a performance rating that measures any water main failures against the overall failure rate throughout the system. Haddad testified about a 2012 report that his office prepared concerning the water supply infrastructure within the City of Rocky River, and he explained that the water main attached to the Valley View Bridge was assessed to be in "excellent condition." According to Haddad, at approximately 45 years of age the water main was relatively young, as the methodology awards points for the age of a pipe until it reaches 100 years old. Haddad also testified that there had been no breaks or other problems with the water main prior to the accident, dating back to the time of its installation. Hernandez and Thompson further testified that they understood it was the practice of ODOT to notify a utility owner when ODOT staff noticed a problem with a utility attached to a bridge, but to their knowledge ODOT never notified their office of any issue with this water main.

{¶26} Haddad stated that the Department of Water did not learn of a problem until two weeks after Mentzer's accident, when the water main began leaking water onto I-90 due to a break. Haddad stated that he had not known about Mentzer's accident until subsequent media reports and communications with the City of Rocky River identified it as potentially being related to the water main break. According to Haddad, a

review by his office determined that the water main break resulted from a combination of severely cold weather and a lack of flow, or hydraulic rate, which he described as a combination of water pressure and elevation. Haddad explained that even though the water main was wrapped in insulation, a lack of flow due to limited demand on the water supply kept the water column from moving at an adequate rate to prevent it from freezing in the severely cold temperatures, and as the water column thus froze it expanded and placed great pressure on the water main. Regarding the weather conditions, Thompson recounted that there was a polar vortex in February 2014 that led to an anomalously high volume of broken water mains in the area, resulting in 20,000 service calls that month, twice as many as the month before. Haddad testified that rather than deterioration or corrosion, it was apparent upon examining the pipe that the force of the expanding frozen water column simply was more than the pipe was designed to withstand and caused a sudden failure in multiple sections.

{¶27} The uncontroverted evidence demonstrates that the water main was within its useful lifespan, that there was some diligence exercised in performing regular analytical assessments of the water main, that the water main was rated excellent and never had any problems in the past, and that the water main was not deteriorated or otherwise in disrepair.

{¶28} Although the Mentzers have not presented evidence establishing that the City of Cleveland should have repaired or replaced any component of the water main or taken any additional measures to fulfill its duty of care, they do argue that the City of Cleveland was obligated to conduct periodic inspections of the water main, at least where it was situated above a busy highway. However, there is no evidence from which a factfinder may conclude that failing to inspect the water main proximately caused Mentzer's injuries. As Haddad explained, the failure of the water main appeared to result from a frozen water column exerting more pressure than the water main was designed to withstand, not from any deteriorative process or other state of disrepair.

When questioned about the condition of the broken section of the coupling device that struck plaintiff, Haddad stated that it "looks like a failed part" and that even though it appeared to have some surface corrosion, which he said all parts typically have unless they are newly installed, it lacked the deep penetrative rust or pitting that is associated with corrosive deterioration. Haddad's testimony about the coupling device and pipe demonstrates that even if the components of the water main were inspected, they did not appear to be in disrepair.

{¶29} The City of Cleveland has come forward with uncontroverted evidence demonstrating that the water main was not in disrepair, that an inspection of the water main would not have revealed any defective condition, and that the failure of the water main, including the piece of the coupling device that allegedly fell from the water main, was caused by factors unrelated to any negligence attributable to the City of Cleveland. There can be no liability on the claim of negligence where the water main was not in disrepair and an inspection of the water main would not have revealed any defective condition. *See Doud* at 137; *Kendle v. Summit Cty.*, 9th Dist. Summit No. 15268, 1992 Ohio App. LEXIS 2005 (Apr. 15, 1992). Even if it could be inferred that the City of Cleveland was somehow deficient in its upkeep of the water main, there is no evidence whatsoever to demonstratively show that other methods of maintaining the water main—whether it be inspecting, repairing or replacing something, removing an obstruction, or remedying general deterioration—would have prevented the accident. *See Muranyi v. Oregon*, 6th Dist. Lucas No. L-05-1415, 2006-Ohio-4303, ¶ 19.

{¶30} Mentzer argues that "[w]ater lines that have been properly inspected and maintained do not fall apart," but no evidence has been presented to support that conclusion. Instead, the unrebutted evidence shows that the water main was not in disrepair and that it failed due to conditions that an inspection would not have revealed. Such evidence allows an inference to be drawn that the failure of the water main occurred in the absence of any negligence attributable to the City of Cleveland. *See*

Jennings Buick, Inc. v. Cincinnati, 63 Ohio St.2d 167, 173-174 (1980). While the court sympathizes with Mentzer's unfortunate accident and resulting injuries, from the evidence presented reasonable minds can only conclude that those injuries were not proximately caused by a negligent act or omission on the part of the City of Cleveland. Thus, the elements necessary to sustain a claim of negligence cannot be established and the City of Cleveland's motion for summary judgment in Case No. 2016-00320-PR shall be granted.

CONCLUSION

{¶31} In Case No. 2016-00082, the court concludes that there are no genuine issues of material fact and that ODOT is entitled to judgment as a matter of law. As a result, ODOT's motion for summary judgment shall be granted and judgment shall be rendered in favor of ODOT.

{¶32} In Case No. 2016-00320-PR, the court concludes that there are no genuine issues of material fact on the claims against the City of Cleveland and that the City of Cleveland is entitled to judgment as a matter of law. As a result, the City of Cleveland's motion for summary judgment shall be granted and judgment shall be rendered in favor of the City of Cleveland. The third-party complaint that the City of Cleveland filed against ODOT, which was conditioned upon a finding of liability on the part of the City of Cleveland, is effectively rendered moot. Therefore, the third-party complaint shall be dismissed and ODOT's motion for summary judgment on the third-party complaint shall be denied as moot. *See Wise v. Gursky*, 66 Ohio St.2d 241, 243 (1981); *Zenfa Labs, Inc. v. Big Lots Stores, Inc.*, 10th Dist. Franklin No. 05AP-343, 2006-Ohio-2069, ¶ 5, fn. 1.

PATRICK M. MCGRATH
Judge

[Cite as *Mentzer v. Ohio Dept. of Transp.*, 2017-Ohio-8958.]

MARK MENTZER, et al. Plaintiffs v. OHIO DEPARTMENT OF TRANSPORTATION Defendant AND MARK MENTZER, et al. Plaintiffs v. CITY OF CLEVELAND Defendant/Third-Party Plaintiff and OHIO DEPARTMENT OF TRANSPORTATION Third-Party Defendant	Case Nos. 2016-00082 and 2016-00320-PR Judge Patrick M. McGrath Magistrate Robert Van Schoyck JUDGMENT ENTRY

{¶33} A non-oral hearing was conducted in this case upon defendants' motions for summary judgment. For the reasons set forth in the decision filed concurrently herewith, in Case No. 2016-00082, the court concludes that there are no genuine issues of material fact and that ODOT is entitled to judgment as a matter of law. As a result, ODOT's motion for summary judgment is GRANTED and judgment is hereby rendered in favor of ODOT.

{¶34} In Case No. 2016-00320-PR, the court concludes that there are no genuine issues of material fact on the claims against the City of Cleveland and that the City of

Cleveland is entitled to judgment as a matter of law. As a result, the City of Cleveland's motion for summary judgment is GRANTED and judgment is hereby rendered in favor of the City of Cleveland. The third-party complaint that the City of Cleveland filed against ODOT, which was conditioned upon a finding of liability on the part of the City of Cleveland, is effectively rendered moot. Therefore, the third-party complaint is DISMISSED and ODOT's motion for summary judgment on the third-party complaint is DENIED as moot.

{¶35} The clerk is directed to return the original papers in Case No. 2016-00320-PR to the Cuyahoga County Common Pleas Court.

{¶36} All previously scheduled events are VACATED. Court costs are assessed against plaintiffs. The clerk shall serve upon all parties notice of this judgment and its date of entry upon the journal.

PATRICK M. MCGRATH
Judge

cc:

Elizabeth M. Crook
L. Stewart Hastings, Jr.
City of Cleveland Department of Law
601 Lakeside Avenue, Suite 106
Cleveland, Ohio 44114-1077

Eric A. Walker
Timothy M. Miller
Assistant Attorneys General
150 East Gay Street, 18th Floor
Columbus, Ohio 43215-3130

Thomas J. Sheehan
W. Craig Bashein
Terminal Tower, 35th Floor
50 Public Square
Cleveland, Ohio 44113-2216

Filed November 8, 2017
Sent to S.C. Reporter 12/12/17