[Cite as *Peshek v. Springfield*, 2009-Ohio-3951.]

IN THE COURT OF APPEALS FOR CLARK COUNTY, OHIO

TY PESHEK, et al.	:	
Plaintiffs-Appellees	:	C.A. CASE NO. 2008 CA 72
v.	:	T.C. NO. 07 CV 1152
THE CITY OF SPRINGFIELD, OHIO, et al.	:	(Civil appeal from Common Pleas Court)
Defendants-Appellants	:	
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O P I N I O N

Rendered on the 7th day of August, 2009.

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FRENCH, J. (by assignment)

{¶ 1} Defendants-appellants, City of Springfield ("City"), Springfield Mayor Warren R. Copeland, Assistant Mayor Orphus R.S. Taylor, Commissioner Karen B. Duncan, Commissioner Daniel J. Martin, Commissioner Kevin O'Neill, and Springfield City Manager Matt Kridler (collectively, "appellants"), appeal the

judgment of the Clark County Court of Common Pleas, which denied their motion for summary judgment. Having concluded that appellants are immune from liability in this matter, we reverse that judgment.

{¶ 2} On September 7, 2007, plaintiffs-appellees, Ty and Lori Peshek ("appellees"), filed a complaint for declaratory judgment and damages against appellants. In the complaint, they alleged that they had purchased property at a sheriff's auction in April 2002. At that time, the property was connected to city water and sanitary sewer lines, the sewer connection having occurred pursuant to an agreement with prior owners of the property. The property was "to be sold free of all liens and encumbrances." The property is located on St. Paris Pike outside city corporate limits.

{¶ 3} The complaint also alleged that, by letter dated April 11, 2003, a city employee notified appellees that "payment of the 'outstanding sewer connection fee' of $4,476.84 was required before the 'connection/establishment of sewer services to this property.' " In April 2004, the City disconnected the sanitary sewer lines to the property. As a result, appellees sought (1) a declaration that they are not obligated to pay a connection fee to the City, (2) damages in the amount of $7,637.69 for the installation of a septic system, and (3) damages in the amount of $21,960 for the projected costs of reconnecting the sanitary sewer system.

{¶ 4} In December 2007, appellants moved for summary judgment in their favor. Through that motion, appellants contended, first, that appellees had not made allegations against, or sought relief from, the Commissioners or City Manager. These individuals, appellants argued, should be dismissed from the

complaint.

{¶ 5} Second, appellants contended that appellees had no contractual right to the municipal sewer service because (1) appellees were not parties to any agreement for service, and (2) the terms of an agreement between the City and the prior property owners had not been fulfilled. In support, appellants attached a May 1997 Development Incentive Agreement between the City and the previous owners of the St. Paris Pike property, James and Kathy Howell. The agreement provided that the Howells (identified as "Developer") wished to obtain city sewer services for the property. The City agreed to furnish those services after the Howells tapped an available sewer line and paid a connection fee of $4,446.94. The City agreed to provide service within five days after the Howells made the connection, requested an inspection, and received city approval. The Howells agreed to annex the property to the City and to pay all sewer charges.

{¶ 6} The Howells also agreed that the sewer services were for their sole benefit. They could not assign their interest or rights to any other entity without the City's consent. And, in the event the Howells did convey their interest in the property "without providing for such assumption," and did not cure that failure after notice from the City, the City could, "at its option, terminate the sewer services provided pursuant to this agreement."

{¶ 7} Once sewer services became available, the Howells were to pay the City $250 per year until the property was annexed. The agreement was binding upon and inured to the benefit of the parties, "their respective legal representatives, successors and assigns."

{¶ 8} The City Commission also passed Ordinance No. 97-210, which appellants attached to their motion. That ordinance authorized the City Manager to enter into the Development Incentive Agreement and approved it.

{¶ 9} With their motion, appellants submitted evidence that the terms of the agreement had not been fulfilled, that is, (1) the connection fee of $4,446.94 had not been paid, (2) the annual fee of $250 had not been paid, and (3) annexation had not occurred. Because the agreement had not been fulfilled, appellants argued, appellees, the new owners of the property, were not entitled to its benefits.

{¶ 10} Third, appellants contended that appellees had no other right to city sewer service because the City has no obligation to provide its services outside its boundaries. Without annexation, the property remained outside city limits.

{¶ 11} Finally, appellants argued that appellees' acquisition of the property through a sheriff's sale was of no consequence. The City had no lien or encumbrance on the property, nor was it a party to the foreclosure proceedings.

{¶ 12} The trial court held a hearing on the motion on February 29, 2008. Thereafter, the trial court denied the motion by entry.

{¶ 13} In May 2008, appellants filed a second motion for summary judgment. By this motion, appellants contended that they are immune from liability pursuant to R.C. Chapter 2744. Appellants argued that (1) its disconnection of sewer service was not a proprietary function that could preclude immunity, and (2) even if a proprietary function, the disconnection was pursuant to a legislative act, which would restore immunity. Appellants also argued that the individual defendants were immune.

{¶ 14} In response, appellees contended that the disconnection was a proprietary function, for which appellants did not have immunity. Appellees also contended that no legislative act authorized appellants' disconnection of an existing sewer connection.

{¶ 15} The trial court denied appellants' second motion for summary judgment. Without detailed analysis, the court found that there existed a genuine issue of material fact as to whether an exception to immunity applied.

{¶ 16} Appellants filed a timely appeal, and they raise the following assignment of error:

{¶ 17} “The trial court erred when it overruled [appellants'] second motion for summary judgment.”

{¶ 18} We review a summary judgment de novo. *Grafton v. Ohio Edison Co.* (1996), 77 Ohio St.3d 102, 105. We apply the same standard as the trial court, viewing the facts in a light most favorable to the non-moving party and resolving any doubt in favor of the non-moving party. *Viock v. Stowe-Woodward Co.* (1983), 13 Ohio App.3d 7, 12.

{¶ 19} Pursuant to Civ.R. 56(C), 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." Accordingly, summary judgment is appropriate only under the following circumstances: (1) no genuine issue of material fact remains to be litigated; (2) the

moving party is entitled to judgment as a matter of law; and (3) viewing the evidence most strongly in favor of the non-moving party, reasonable minds can come to but one conclusion, that conclusion being adverse to the non-moving party. *Harless v. Willis Day Warehousing Co.* (1978), 54 Ohio St.2d 64, 66.

{¶ 20} Here, the legal question before us is whether appellants are immune from liability pursuant to R.C. Chapter 2744. The Political Subdivision Tort Liability Act, contained in that chapter, prescribes a three-tier analysis to determine whether a political subdivision is immune from liability. The beginning point of the analysis is the general rule that a political subdivision is not liable in damages for loss to property allegedly caused by an act of the subdivision or one of its employees in connection with a governmental or proprietary function. *Mega Outdoor, L.L.C. v. Dayton*, 173 Ohio App.3d 359, 2007-Ohio-5666, ¶49, citing *Hubbard v. Canton City School Bd. of Edn.*, 97 Ohio St.3d 451, 2002-Ohio-6718. The second tier of the analysis asks whether an exception to that general rule should apply, i.e., whether one of the exceptions contained in R.C. 2744.02(B)(1)-(5) applies. *Mega Outdoor* at ¶49. And, if a political subdivision loses immunity under the second tier, the third tier of the analysis asks whether a political subdivision can restore immunity by showing that one of the defenses contained in R.C. 2744.03 applies. Id.

{¶ 21} Here, under the first-tier general rule, the City is not liable to appellees for damages caused by the City or its employees for the disconnection of the sewer line, an action the parties agree is either a governmental or proprietary function. As to the second tier, appellants argue that the disconnection is a governmental function, and no exception to liability applies. Appellees, in response, contend that

disconnection of a city sewer line is a proprietary function and that questions of fact remain as to whether appellants performed that function negligently. Under this second tier, if appellants were negligent, then they are not immune. But, even if we were to assume disconnection of a sewer line is a proprietary function (tier I) that appellants performed negligently (tier II), the City could restore immunity if it can show that one of the defenses contained in R.C. 2744.03 applies (tier III). Because it is potentially dispositive, we begin our analysis with the third tier of the analysis.

{¶ 22} Appellants contend that R.C. 2744.03(A)(2) applies here and restores any immunity that might be lost. That section grants immunity to a political subdivision "if the conduct of the employee involved, other than negligent conduct, that gave rise to the claim of liability was required by law or authorized by law, or if the conduct of the employee involved that gave rise to the claim of liability was necessary or essential to the exercise of powers of the political subdivision or employee." We focus on the latter portion of that section, which restores immunity if the conduct was "necessary or essential to the exercise of powers" of the subdivision or its employee.

{¶ 23} Section 4, Article XVIII of the Ohio Constitution authorizes any municipality to acquire, construct, own, lease, and operate a public utility within or outside its corporate limits. Section 6, Article XVIII also authorizes a municipality owning or operating a public utility to sell and deliver a surplus utility product outside its boundaries. The Supreme Court of Ohio has held that, in general, the council of the municipality has the power to determine the terms on which a surplus

utility product will be sold to extraterritorial customers. *Bakies v. Perrysburg*, 108 Ohio St.3d 361, 2006-Ohio-1190, ¶35, reaffirming the holding in *State ex rel. Indian Hill Acres, Inc. v. Kellogg* (1948), 149 Ohio St. 461. See also *Clark v. Greene Cty. Combined Health Dist*., 108 Ohio St.3d 427, 2006-Ohio-1326, ¶20 ("a municipality can require annexation agreements in exchange for providing water and sewer services").

{¶ 24} Before the trial court, appellants submitted evidence of the legislative act by which the City set the terms for providing sewer service to customers outside its corporate limits. Specifically, Resolution No. 3724, adopted by the City Commission on December 12, 1972, provides: "That it shall be the policy of the City to extend water and sewer facilities to areas contiguous to the City upon annexation." Other evidence established that Resolution No. 3724 has not been repealed, appellees' property lies outside the city limits, and the property has not been annexed to the city. Therefore, the provision of sewer service to appellees' property is contrary to the City's terms of providing service.

{¶ 25} Nevertheless, appellees argue that the City has no power to disconnect sewer service already being provided to customers outside its limits. To the contrary, however, the Supreme Court of Ohio has repeatedly held that, in the absence of a contract, a municipality does not have a continuing obligation to provide water or sewer service to extraterritorial customers. See *Bakies* at ¶20-21, citing *Indian Hill*; *Fairway Manor, Inc. v. Bd. of Commrs. of Summit Cty.* (1988), 36 Ohio St.3d 85, 89; and *Grandview Hts. v. Columbus* (1963), 174 Ohio St. 473.

{¶ 26} Appellees submitted a March 19, 1956 agreement between the City

and John Howell, one of the prior owners. Through that agreement, the City agreed to provide water to the property. A 1970 agreement grants easements and allows the Howells to tap into the water lines. Neither of these agreements, however, requires the City to provide sewer service to the property.

{¶ 27} Only the 1997 Development Incentive Agreement, which appellees submitted in opposition to appellants' second motion for summary judgment, provides for sewer service. As appellants argue, however, the City has no agreement with appellees. Furthermore, the benefits of the 1997 agreement cannot accrue to appellees because the City never approved their assumption of the agreement. And, even if the benefits of the agreement could accrue to appellees, the agreement would not require the City to continue to provide sewer service because the terms of the agreement—payment of a connection fee, payment of annual fees, and annexation—have not been fulfilled. Therefore, with or without the 1997 agreement, the City has no continuing obligation to provide sewer service to appellees' property and has the power to discontinue it. The actions taken by the City and its employees—notifying appellees of the terms of continuing service and ultimately disconnecting the line itself—were all necessary to the exercise of the City's power to prescribe the terms for sewer service and to discontinue service if those terms are not met. Therefore, R.C. 2744.03(A)(2) grants immunity to the City against liability in damages for any alleged loss to property as a result of that discontinuation.

{¶ 28} R.C. 2744.03(A)(6) also grants immunity to city employees unless (1) "[t]he employee's acts or omissions were manifestly outside the scope of the

employee's employment or official responsibilities;" (2) the employee acted "with malicious purpose, in bad faith, or in a wanton or reckless manner;" or (3) another section of the Revised Code expressly imposes liability on the employee. In their complaint, appellees did not allege that (1) the individual defendants acted outside the scope of their employment or official responsibilities, (2) they acted with malice, bad faith or in a wanton or reckless manner, or (3) another section of the Code imposed liability upon them. Instead, the complaint referred only to the City "or its agents or contractors," and alleged that damages occurred as a "result of Defendant's [sic] intentional or negligent action."

{¶ 29} Although appellants moved for summary judgment in favor of the individual defendants, appellees did not address the individual defendants in their memorandum in opposition, nor did the trial court address them. Instead, appellees opposed summary judgment, and the trial court denied summary judgment, only on the basis of R.C. 2744.02(B)(2), which imposes liability on political subdivisions under certain circumstances, but does not impose similar liability on city officials or employees. And, although appellants raised the issue of individual immunity before this court, appellees did not address it.

{¶ 30} In short, appellees submitted no evidence that would support liability against the individual appellants. Their pleading, evidence, and arguments supported a question of fact only as to R.C. 2744.03(B)(2), which does not impose liability on individuals. On the record before us, we may only conclude that the trial court erred by denying summary judgment to the individual appellants.

{¶ 31} For all these reasons, we conclude that appellants are immune from

liability in damages under R.C. Chapter 2744, and we sustain appellants' sole assignment of error. Accordingly, we reverse the judgment of the Clark County Court of Common Pleas.

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BROGAN and FAIN, JJ., concur.

(Hon. Judith L. French, from the Tenth District Court of Appeals, sitting by assignment of the Chief Justice of the Supreme Court of Ohio.)

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