[Cite as *Johnson v. Greene Cty. Sanit. Eng.*, 2015-Ohio-2967.]

IN THE COURT OF APPEALS OF OHIO
SECOND APPELLATE DISTRICT
GREENE COUNTY

WILLIAM S. JOHNSON	:	
Plaintiff-Appellee	:	C.A. CASE NO. 2014 CA 47
v.	:	T.C. NO. CVF1400349
GREENE COUNTY SANITARY ENGINEERING, et al.	:	(Civil Appeal from Municipal Court)
Defendants-Appellants	:	

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O P I N I O N

Rendered on the 24th day of July, 2015.

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WILLIAM S. JOHNSON, P. O. Box 62, Clifton, Ohio 45316
Plaintiff-Appellee

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FROELICH, P.J.

{¶ 1} The Greene County Sanitary Engineering Department, its Director, Ron Volkerding, and the Greene County Board of Commissioners, consisting of Tom Koogler, Alan Anderson, and Bob Glaser, appeal from a judgment of the Municipal Court of Fairborn, which denied their motion for summary judgment. William S. Johnson's complaint sought damages for the collection of fees for water and sewer service at 2454 Coldsprings Drive in Beavercreek, after he had requested that such services be stopped. The motion for summary judgment dealt with the municipality's immunity with respect to its operation of and billing for water and sewer systems.

{¶ 2} For the following reasons, the judgment of the municipal court will be reversed, and the matter will be remanded for the entry of summary judgment for the Sanitary Engineering Department, its Director, Ron Volkerding, and the Greene County Board of Commissioners, including Koogler, Anderson, and Glaser.

{¶ 3} Johnson has owned the property at 2454 Coldsprings Drive since 1982. His disputes with the Sanitary Engineering Department date back to 2006. On multiple occasions beginning in 2006, Johnson has instructed the Sanitary Engineering Department to temporarily stop water and sewer service to the house, which has been vacant since at least April 2006. However, county regulations specify that the water service charges and sanitary sewer service charges are "continuous charge[s] for all improved properties served by a connection, whether occupied or vacant."

{¶ 4} In various correspondence which is a part of the record in this case, the Sanitary Engineering Department informed Johnson that there was no procedure for placing water or sewer accounts in "an inactive, no cost status" (emphasis sic). (This

policy is also reflected in the county's water and sewer regulations.) The director of the department did offer to suspend all monthly water charges if Johnson had the water "turned off and locked down at the meter pit," and the charges for the water service were "temporarily discontinued" from March 2007 until October 2012. With respect to the sewer service, the director stated that monthly minimum sewer charges could not be waived unless Johnson had "the sewer service physically disconnected/abandoned at the property line (in the presence of a GCSED customer service representative)," at Johnson's expense, which Johnson never did. Johnson continued to send letters "disput[ing] the validity" of his unpaid balance and of the various tax liens attached to the property, to demand that water and sewer service be discontinued, and to deny that he had any outstanding balance(s) on his account.

{¶ 5} In April 2012, the Director of the Sanitary Engineering Department informed Johnson by letter that the "temporary" 5-year discontinuation of his water service at 2454 Coldsprings Drive would end, and the account would be returned to "active status," because "ample time ha[d] been provided" for Johnson to make the house "habitable." The department replaced the meter at the house in October 2012. In March 2013, Johnson alleged in an Application for Adjustment of Water/Sewer Bill that the meter at the house had been changed "without notice" and without an opportunity for him to check the "start reading." He disputed the water charges incurred since water service to the house had been reestablished.

{¶ 6} During the course of this lengthy dispute, the county auditor placed liens on the property for some of the prior unpaid bills, to be collected in the same manner as taxes, as provided in R.C. 6103.02(G)(1). Based on the billing statement contained in

the record, it appears that Johnson also paid some sums to the department. The current total liens and the balance that has not been reduced to a lien are unclear.

{¶ 7} In February 2014, Johnson filed a Complaint for Money Damages against the Sanitary Engineering Department, its Director, and the Greene County Board of Commissioners, including Koogler, Anderson, and Glaser (hereinafter all collectively referred to as "the Sanitary Engineering Department.")[1] Johnson alleged theft by the department by several means: 1) in its water billing since October 2012 (when the department resumed water service to the property) because Johnson had previously asked to terminate service; 2) in "tampering" with his water meter; and 3) in restarting his water service without his permission. He sought to recover $9,871.09, dating back to April 2006, in compensatory damages and "liquidation" damages under R.C. 2307.61 (damages for willful damage or theft), plus interest, and late fees.[2]

{¶ 8} In September 2014, the Sanitary Engineering Department filed a motion for summary judgment, asserting its immunity from liability, as a political subdivision, under R.C. Chapter 2744. In his response to the motion, Johnson stated that the department was not immune because 1) he had had a contract with the county (created by the county regulations related to water and sewer), and R.C. 2744.09(A) provides that political subdivision immunity does not apply to contractual liability, and 2) the exemption from

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[1] Although the complaint listed multiple defendants, neither the complaint nor the parties' other filings distinguished among the actions or capacities of the various defendants or their potential bases for immunity. The trial court's judgment also did not differentiate. For purposes of this appeal, we treat the Defendants-Appellants collectively, in keeping with the parties' filings.

[2] We note that the statute of limitations for an action against a political subdivision to recover damages is two years. R.C. 2744.04(A). Some of Johnson's claims fall outside of this time frame.

immunity set forth in R.C. 2744.02(B)(2) applies. In October 2014, the trial court denied the department's motion for summary judgment, simply stating that "the court is satisfied that genuine issues of material fact remain to be decided."

{¶ 9} The Sanitary Engineering Department appeals from the denial of its motion for summary judgment on the question of its immunity, as permitted by R.C. 2744.02(C). The department raises one assignment of error, which states:

> **The trial court abused its discretion in blanketly overruling the Defendants' motion for summary judgment.**

{¶ 10} The parties dispute whether there is a genuine issue of material fact as to whether the Sanitary Engineering Department is entitled to immunity for its activities in providing and billing for water and sewer service at Johnson's home.

{¶ 11} Pursuant to Civ.R. 56(C), summary judgment is proper when (1) there is no genuine issue as to any material fact, (2) the moving party is entitled to judgment as a matter of law, and (3) reasonable minds, after construing the evidence most strongly in favor of the nonmoving party, can only conclude adversely to that party. *Zivich v. Mentor Soccer Club, Inc.,* 82 Ohio St.3d 367, 369-370, 696 N.E.2d 201 (1998). The moving party carries the initial burden of affirmatively demonstrating that no genuine issue of material fact remains to be litigated. *Mitseff v. Wheeler,* 38 Ohio St.3d 112, 115, 526 N.E.2d 798 (1988). To this end, the movant must be able to point to evidentiary materials of the type listed in Civ.R. 56(C) that a court is to consider in rendering summary judgment. *Dresher v. Burt,* 75 Ohio St.3d 280, 292-293, 662 N.E.2d 264 (1996). Those materials include "the pleadings, depositions, answers to interrogatories, written admissions, affidavits, transcripts of evidence, and written stipulations of fact, if any, filed

in the action." *Id.* at 293; Civ.R. 56(C).

{¶ 12} Once the moving party satisfies its burden, the nonmoving party may not rest upon the mere allegations or denials of the party's pleadings. *Dresher* at 293; Civ.R. 56(E). Rather, the burden then shifts to the nonmoving party to respond, with affidavits or as otherwise permitted by Civ.R. 56, setting forth specific facts that show that there is a genuine issue of material fact for trial. *Id.* Throughout, the evidence must be construed in favor of the nonmoving party. *Id.*

{¶ 13} We review the trial court's ruling on a motion for summary judgment de novo. *Schroeder v. Henness,* 2d Dist. Miami No. 2012 CA 18, 2013-Ohio-2767, ¶ 42. De novo review means that this court uses the same standard that the trial court should have used, and we examine the evidence to determine whether, as a matter of law, no genuine issues exist for trial. *Brewer v. Cleveland City Schools Bd. of Edn.,* 122 Ohio App.3d 378, 383, 701 N.E.2d 1023 (8th Dist.1997), citing *Dupler v. Mansfield Journal Co.,* 64 Ohio St.2d 116, 119-20, 413 N.E.2d 1187 (1980). Therefore, the trial court's decision is not granted deference by the reviewing appellate court. *Powell v. Rion,* 2012-Ohio-2665, 972 N.E.2d 159, ¶ 6 (2d Dist.), citing *Brown v. Scioto Cty. Bd. Of Commrs.,* 87 Ohio App.3d 704, 711, 622 N.E.2d 1153 (4th Dist.1993).

{¶ 14} R.C. 2744.02(A) sets forth the general rule of immunity for political subdivisions, stating: "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 the political subdivision in connection with a governmental or proprietary function." Five exceptions are set forth in subsection (B). If an exception is found,

immunity can still exist if the political subdivision shows that one of the defenses contained in R.C. § 2744.03 applies.

{¶ 15} The parties do not dispute that the Sanitary Engineering Department, as a department of the Greene County government, is a political subdivision under R.C. 2744.01(F). In its motion for summary judgment, the Sanitary Engineering Department asserted its "blanket immunity" from damages in a civil action under R.C. 2744.02(A)(1) and that none of the exceptions to immunity under R.C. 2744.02(B) applied.

{¶ 16} With respect to exceptions to immunity, Johnson argued that R.C. 2744.09(A) provides that political subdivision immunity does not apply to civil actions involving contractual liability. He further asserted that "water and sewer charges are fees for service under an implicit or explicit contract which is the Regulations and Specifications of the Greene County Sanitary Engineering Department."

{¶ 17} As a general proposition, we reject Johnson's argument that regulations create a "contract" between a political entity and those to whom its regulations apply. *See Duncan v. Cuyahoga Community College*, 2015-Ohio-687, 29 N.E.3d 289, ¶ 29 (8th Dist.) ("The statutes and regulations do not create 'contracts' between the state and its citizens."); *Gamel v. Cincinnati*, 2012-Ohio-5152, 983 N.E.2d 375, ¶ 13 (1st Dist.) ("The presumption that a law does not contractually bind a legislature is 'grounded in the elementary proposition that the principal function of a legislature is not to make contracts, but to make laws that establish the policy of the [city].'" (Citations omitted.)). Moreover, Johnson's complaint did not allege a breach of contract. Under the circumstances presented in this case, there was no legal basis to conclude that the Sanitary Engineering Department's immunity was abrogated by its assumption of a contractual liability, as

contemplated by R.C. 2744.09(A).

{¶ 18} In response to the department's motion for summary judgment, Johnson also argued that the exception to political subdivision immunity set forth at R.C. 2744.02(B)(2) applied in this case. R.C. 2744.02(B)(2) states:

> Except as otherwise provided * * *, 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.

{¶ 19} The functions of a political subdivision are classified, for immunity purposes, as either governmental or proprietary. R.C. 2744.02(A)(1). "The statutory scheme specifically delineates functions relating to a 'sewer system.' Governmental functions related to sewer systems include '[t]he provision or nonprovision, planning or design, construction, or reconstruction of * * * a sewer system,' R.C. 2744.01(C)(2)(l), and related proprietary functions include '[t]he maintenance, destruction, operation, and upkeep of a sewer system,' R.C. 2744.01(G)(2)(d)." *Guenther v. Springfield Twp. Trustees*, 2012-Ohio-203, 970 N.E.2d 1058, ¶ 12 (2d Dist.). We have commented on "the overlapping nature" of the definitions of governmental and proprietary functions ("provision or non-provision, planning or design, construction, or reconstruction," governmental functions, versus "maintenance, destruction, operation, and upkeep," proprietary functions) with respect to sewer systems. *Guenther* at ¶ 17. The differentiation "is not always a simple inquiry." *Id.*, citing *Ivory v. Austintown*, 7th Dist. Mahoning No. 10 MA 106, 2011-Ohio-3171, ¶ 14.

{¶ 20} "[T]he powers of a municipality which are governmental are those

pertaining to the making and enforcing of regulations to check crime and apprehend criminals, to preserve public health, to prevent and extinguish fires, to care for the aged and indigent and to provide for the progressive and systematic education of the young, and in the carrying out of these functions all persons and facilities employed come under the rule of immunity from tort liability." *Eversole v. City of Columbus*, 169 Ohio St. 205, 207, 158 N.E.2d 515 (1959).

{¶ 21} To rebut the Sanitary Engineering Department's assertion of immunity, Johnson argued that his billing disputes with the department related to a proprietary function.

{¶ 22} Greene County Regulations and Specifications Part A, Section 3, pertains to the water system; Section 4 pertains to the sanitary sewer system. Section 3.01(D) provides that a consumer may have water service temporarily discontinued by request to the Sanitary Engineering Department. There is no definition of "temporary." There is no provision for a temporary termination of sewer service.

{¶ 23} A permanent termination of water service requires that water be shut off at the main by the department and that the customer pay the cost of doing so. Section 3.01(K). Section 3.07(A), Billing Methods and Procedures, states that water service will be billed for any property "provided an active water service connection or withdrawing water from a County water system." It continues: "The water service charge is a continuous charge for all improved properties served by a connection whether occupied or vacant." A similar provision exists for sanitary sewer service. Part A, Section 4.06(A). A customer may request "permanent sanitary service line abatement," which involves the disconnection and plugging the sanitary lateral at the sewer main by the

department, at the customer's expense. Section 4.06(G).

{¶ 24} Although Johnson repeatedly requested that his water and sewer service be "disconnected" or placed on "inactive status," he did not request permanent disconnection, nor did he offer to pay for it as required by the regulations. The water service was "temporarily discontinued" for a period of more than five years, after which time the Sanitary Engineering Department notified Johnson that "ample time ha[d] been provided * * * to make this house habitable," and that it intended to return the water service to active status. The sewer service was never discontinued, as there was no provision in the regulations for doing so. Thus, Johnson did not allege that the department assessed water and sewer fees in contravention of the regulations. His objection seemed to be with the regulations themselves, in that they required him to pay for a base level of service even when the residence on the property was vacant, and did not permit the type of indefinite cancellation of service (without charge) that he sought.

{¶ 25} Water and sewer regulations and, in particular, a requirement that such service be maintained, preserve public health and relate to the prevention and extinguishment of fires. In our view, the county's decision to set a policy, in its regulations, that property owners may not opt-out of the provision of sewer services, even if a property is vacant, in the absence of extraordinary circumstances in which an owner would be willing to pay for a permanent disconnection of the sewer line, amounted to setting a public policy, and thus is properly characterized as a governmental function. Similarly, the determination that water service may be temporarily, but not permanently, interrupted, can reasonably be viewed as a public policy determination.

{¶ 26} Johnson objects not to an error in the administrative act of billing for water

and sewer, but to the policy that limits the voluntary disruption of such services. Because the enactment of such a policy is a legislative function and relates to a "provision or non-provision" of services, it is a governmental, rather than a proprietary, function, and the exception from liability set forth in R.C. 2744.02(B)(2) does not apply. As such, the trial court erred in denying the Sanitary Engineering Department's motion for summary judgment, based on political subdivision immunity, for its refusal to terminate Johnson's water and sewer service in the manner he requested.

{¶ 27} Johnson's complaint also described the department's collection efforts and imposition of liens based on unpaid bills as "theft," citing R.C. 2913 (presumably R.C. 2913.02, the criminal offense of theft), and R.C. 2307.61, which provides for the recovery of compensatory and liquidated damages for willful damage or theft. In our view, however, acts taken in accordance with the regulations of a political subdivision cannot constitute theft, because they do not violate the law as it is written.

{¶ 28} Johnson made additional claims that the department had "tampered" with the meter at 2454 Coldsprings Drive when it replaced the meter without allowing him to inspect the old meter or to verify that the new meter's reading began at zero. Because this claim relates to the maintenance and operation of the water system, rather than any public policy issue, it is more aptly classified as a proprietary function than a governmental function. Thus, we will consider separately whether summary judgment was appropriate on this claim. Pursuant to R.C. 2744.02(B)(2), an exception to immunity may be appropriate with respect to a political subdivision's proprietary functions if its employees acted negligently.

{¶ 29} Johnson relied on R.C. 6103.29, which applies to connecting or tampering

with water supply facilities without the permission of the County Board of Commissioners. This statute does not apply to the replacement of a water meter in a residence. Moreover, meters are provided by the county (Part A, Section 3.02) and are owned by the county (Part A, Section 2.02). The county cannot tamper, in a criminal sense, with its own property.

{¶ 30} Nonetheless, a dispute arose from the replacement of the water meter in October 2012. Johnson claimed that his water bill rose significantly in the following billing period (using 34 units of water during that period, as compared with zero during the previous several years); he inferred that the new meter "had a start reading of 34." When Johnson raised this issue by letter with the Sanitary Engineering Department, the department informed him of its policy for consideration of a bill adjustment, which required him to demonstrate a leak and that the leak had been repaired. (Part A, Section 3.15). Johnson informed the Sanitary Engineering Department a few weeks later that a "county Customer Service worker" had found no leak. The department then denied the request for a bill adjustment because no leak was found.

{¶ 31} To the extent that Johnson has an unresolved dispute with the Sanitary Engineering Department over the replacement of his water meter and the charges incurred around that time, Johnson may have recourse through R.C. 2723.01. R.C. 2723.01 provides that "[c]ourts of common pleas may enjoin the illegal levy or collection of taxes and assessments and entertain actions to recover them when collected, without regard to the amount thereof, but no recovery shall be had unless the action is brought within one year after the taxes or assessments are collected." This court has held that unpaid water and sewer bills that are placed on the tax duplicate for collection in the same

manner as other taxes constitute an "assessment" under R.C. 2723.01 et seq. *Johnson v. Clark Cty. Util. Dept.*, 2d Dist. Clark No. 2014 CA 31, 2014-Ohio-3356, ¶ 9. *See also Englewood Hills, Inc. v. Englewood,* 14 Ohio App.2d 195, 198, 237 N.E.2d 621 (2d Dist.1967) (holding that a tap-in fee for water and sewer services qualified as an "assessment" under R.C. 2723.03); *Shanahan v. Toledo,* 6th Dist. Lucas No. L-09-1077, 2009-Ohio-5991 (holding that a trash-collection fee fit within the ambit of "taxes and assessments" under R.C. 2723.03).

{¶ 32} However, even if such recourse were appropriate, R.C. 2723.01 confers jurisdiction over such disputes to the court of common pleas. To the extent that Johnson's action related to a dispute over his assessments, the municipal court in which his action was filed lacked jurisdiction to hear it. We express no opinion as to the merit of any billing dispute; however, our disposition of this action filed in the municipal court does not, on the basis of res judicata, preclude the filing of an action for return of money or release of lien.

{¶ 33} Johnson also asserted in his complaint that the Sanitary Engineering Department acted "wantonly" and "in bad faith" in failing to establish a procedure "providing a fair and reasonable opportunity for resolution of billing disputes," as required by R.C. 6103.02(G)(4).

{¶ 34} R.C. 6103.02(G) states, in pertinent part:

> Each board [of county commissioners] that fixes water rates or charges [for water supply systems or sewer districts] may render estimated bills periodically, provided that at least quarterly it shall schedule an actual reading of each customer's meter so as to render a bill for the actual amount

> shown by the meter reading to be due, with credit for prior payments of any estimated bills submitted for any part of the billing period, except that estimated bills may be rendered if a customer's meter is not accessible for a timely reading or if the circumstances preclude a scheduled reading. Each board also shall establish procedures providing a fair and reasonable opportunity for the resolution of billing disputes.

{¶ 35} Arguably, since the language upon which Johnson relies is contained in a paragraph that relates specifically to estimated billing procedures, the dispute resolution procedures set forth relate only to such estimated billings. Regardless, this provision is directory and provides no remedy for non-compliance. Moreover, Johnson's complaint on its face is not a billing dispute, but seeks compensatory damages for theft and tampering.

{¶ 36} The Sanitary Engineering Department asserted its immunity for the provision of water and sewer services, and Johnson did not establish that any exception to that immunity applied under the facts of this case. Johnson also created no genuine issues of material fact that the Sanitary Engineering Department had committed "theft" or "tampering" in its provision of water and sewer services to his property, or that he had been denied an established right to dispute his bills.

{¶ 37} The department's assignment of error is sustained.

{¶ 38} The judgment of the trial court will be reversed. This matter will be remanded for the trial court to enter summary judgment in favor of the Greene County Sanitary Engineering Department, its Director, Ron Volkerding, and the Greene County Board of Commissioners, including Tom Koogler, Alan Anderson, and Bob Glaser.

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FAIN, J. and WELBAUM, J., concur.

Copies mailed to:

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Hon. John L. Ross,
Assigned Judge