[Cite as *Matter v. Athens*, 2014-Ohio-4451.]

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

DAVE MATTER, et al.,	:	
	:	
Plaintiffs-Appellants,	:	Case No. 13CA20
	:	
vs.	:	
	:	DECISION AND JUDGMENT
CITY OF ATHENS, et al.,	:	ENTRY
	:	
Defendants-Appellees.	:	**Released: 10/02/14**

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 Appellees.

McFarland, J.

{¶1} Appellants, Dave and Chris Matter, appeal the trial court's summary judgment decision determining that Appellee, the City of Athens, was immune from liability pursuant to R.C. Chapter 2744, which governs political subdivision tort liability, for property damage caused to Appellants' residence as a result of a water line break in Appellants' yard.[1] On appeal, Appellants contend that the trial court erred in granting summary judgment

[1] The record reflects that although Appellants initially named the City of Athens as well as seven individuals employed by the city and the Service Safety Director and Mayor of Athens, Appellants voluntarily dismissed their claims against the individuals.

in favor of Appellee when there was a genuine issue of material fact concerning whether sovereign immunity applied. Because we have concluded that a genuine issue of material fact exists with respect to whether water maintenance employees were negligent in their operation of the water supply system and their performance of repairs to the water line break, and also in light of our conclusion that Appellee's actions and response during the emergency repair process did not involve the type of decisions covered by R.C. 2744.03(A)(5), Appellant's sole assignment of error is sustained. Accordingly, the decision of the trial court is reversed and this matter is remanded for further proceedings consistent with this opinion. On remand, the trial court is hereby instructed to determine the availability of immunity before trial, as a matter of law.

FACTS

{¶2} Appellants, Dave and Chris Matter, reside at 29 Canterbury Drive, which is located in Athens, Ohio. Appellants' house is located in a low elevation area and, as a result, experiences high pressure in its water lines. The record reflects that the water supply system in Athens consists of a water plant, water distribution lines, water towers, water reservoirs, water pumps and a telemetry system. Appellants' residence is served by water distribution lines that are gravity fed by the Longview Heights water tower,

which is supplied by the Curtis Street Reservoir. The record indicates that the reservoir has electric water pumps which push water to the 200-gallon tower, which in turn distributes the water by gravity into the distribution lines that service Appellants residence on Canterbury Drive.

{¶3} On July 29, 2008, the water pumps at the Curtis Street Reservoir were stopped due to an AEP power outage, or spike or flicker, a situation that had been a re-occurring problem. Appellee had installed soft starts and stops on the Curtis Street pumps, however, the power outages caused sudden stops and starts in the pumps, which created a water hammer effect. This water hammer situation caused increased water pressure on the day in question and resulted in several water line breaks/leaks. In particular, the water line servicing 29 Canterbury Drive suffered a break, which ultimately resulted in substantial water damage to Appellants' residence.

{¶4} Appellants were not home at the time, but their neighbors noticed the water break at approximately 4:00 p.m. The leak was reported to Steve Adams, the water plant operator. Because water department normal operating hours had ended at 4:00 p.m., Adams had to assemble a crew to respond to the leak. The record indicates that water employees were not required to live within the city, were not required to provide call-coverage, were not required to work mandatory overtime and were not permitted to

drive city water trucks home. As such, it took between one and a half to two hours to assemble a crew, which, due to the specified overtime call out procedures and union contract, resulted in several individuals who worked for the sewer and street departments responding to the breaks. There were also water department employees that responded, including Terry Gilkey, Steve Bails, and Larry Harris, all of which responded to the leak at Appellants' residence.

{¶5} The record further indicates that Terry Gilkey was the first person to respond to 29 Canterbury Drive, and he arrived in between his responses to three other breaks on the nearby streets of Coventry, Sussex and Lamar. Gilkey arrived between 5:15 p.m. and 5:30 p.m. and although he attempted to shut off the water valve, the valve did not close all the way and water continued to leak. By all reports, the water continued to flow, although it was diminished compared to before the valve was partially closed. Gilkey then left and went to do other repairs. When crews arrived later, at approximately 7:30 p.m., they brought a backhoe, a water truck with equipment and tools and two dump trucks. The crew contacted OUPS (Ohio Utility Protection Service) before digging but ultimately decided to go ahead and dig without waiting on OUPS to arrive. A baseball sized break was

eventually located in the water line and it was repaired with a clamp at approximately 9:30 p.m.

{¶6} It appears from the record that subsequent to this incident, Appellee received grant money from the Ohio EPA as well as federal stimulus funds in 2009, which allowed for improvements to the south side water system. Appellee used these funds, which amounted to approximately $800,000.00, to replace pumps and lines and install a pressure relief valve as well as other equipment to minimize the effect of power spikes. It appears from the record that these improvements and upgrades remedied the water pressure issues on Canterbury Drive.

{¶7} Appellants filed a complaint with a jury demand on March 1, 2010, alleging their residence suffered extensive water damage as a result of the negligence of Appellee and its employees. Appellants claims essentially alleged that Appellee was negligent in that it failed to timely respond to the break, to have supervisors and city personnel on duty or otherwise available that knew how to shut off the water break, to adequately train city personnel, and to adequately maintain its water lines on Canterbury Drive, when it knew or should have known that the lines were substandard and subject to frequent water line breaks. Appellants demanded judgment in the amount of $211,719.22 for damage to their property, as well as compensatory damages

and court costs in excess of $25,000.00. Appellee defended on the basis of sovereign immunity.

{¶8} The parties filed cross-motions for summary judgment on May 15, 2012. The trial court entered a decision and judgment entry on April 8, 2013, denying Appellants' motion for summary judgment and granting summary judgment in favor of Appellee. In denying Appellants' motion for summary judgment, the trial court stated that "reasonable minds could differ on whether the actions of the City and its employees in dealing with the water line break breached any duty owed to Plaintiffs." The trial court, however, granted summary judgment in favor of Appellees on the basis of sovereign immunity, reasoning that the Appellants' losses stemmed not from negligent maintenance/operation, but rather from design/construction, the latter being governmental functions for it was immune. With respect to the claims related to Appellee's proprietary functions, the trial court determined that while the R.C. 2744.02(B)(2) exception to immunity applied, immunity was reinstated under R.C. 2744.03(A)(5). It is from this decision and judgment entry that Appellants now bring their timely appeal, setting forth a single assignment of error for our review.

ASSIGNMENT OF ERROR

"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."

LEGAL ANALYSIS

{¶9} In their sole assignment of error, Appellants challenge the trial court's grant of summary judgment in favor of Appellee, the City of Athens, on the basis of sovereign immunity. More specifically, Appellants allege that the negligent maintenance and/or operation of a water system caused damage to their property for which the city should be liable. In their stated assignment of error, Appellants argue that there exists a genuine issue of material fact which precludes summary judgment regarding whether Appellee negligently breached a duty owed, and whether sovereign immunity applies. However, in the body of their brief, Appellants contend that the material facts at issue are not in dispute and that the trial court should have granted summary judgment in their favor, rather than in Appellee's favor.

{¶10} Appellee seems to implicitly concede negligence by virtue of their contention that the R.C. 2744.02(B)(2) exception to immunity applies and that immunity was reinstated, as a matter of law, under R.C. 2744.03(A)(5). The trial court denied Appellants' motion for summary judgment, stating that genuine issues of material fact were present, and that

"reasonable minds could differ on whether the actions of the City and its employees in dealing with the water line break breached any duty owed to the plaintiffs." However, the trial court went on to grant summary judgment in favor of Appellee on the basis of sovereign immunity, reasoning that any immunity lost under the R.C. 2744.02(B)(2) exception to immunity was reinstated under R.C.2744.03(A)(5).

SUMMARY JUDGMENT STANDARD

{¶11} We review the trial court's decision on a motion for summary judgment de novo. *Smith v. McBride*, 130 Ohio St.3d 51, 2011-Ohio-4674, 955 N.E.2d 954, ¶ 12. "Accordingly, we afford no deference to the trial court's decision and independently review the record to determine whether summary judgment is appropriate." *Snyder v. Stevens*, 4th Dist. Scioto No. 12CA3465, 2012-Ohio-4120, ¶ 11.

{¶12} Under Civ.R. 56(C), summary judgment is appropriate only if " '(1) no genuine issue of any material fact remains, (2) the moving party is entitled to judgment as a matter of law, and (3) it appears from the evidence that reasonable minds can come to but one conclusion, and construing the evidence most strongly in favor of the nonmoving party, that conclusion is adverse to the party against whom the motion for summary judgment is made.' " *DIRECTV, Inc. v. Levin*, 128 Ohio St.3d 68, 2010-Ohio-6279, 941

N.E.2d 1187, ¶ 15; quoting *State ex rel. Duncan v. Mentor City Council*, 105 Ohio St.3d 372, 2005-Ohio-2163, 826 N.E.2d 832, ¶ 9.

{¶13} "[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).

{¶14} "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.

R.C. 2744 POLITICAL SUBDIVISION TORT LIABILITY

{¶15} R.C. Chapter 2744 establishes a three-step analysis to determine whether a political subdivision is immune from liability. See, e.g., *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 or omissions connected with governmental or proprietary functions. See, e.g., *Cramer*; *Colbert v. Cleveland*, 99 Ohio St.3d 215, 2003-Ohio-3319, 790 N.E.2d 781, ¶ 7; *Harp v. Cleveland Hts.*, 87 Ohio St.3d 506, 509, 721 N.E.2d 1020 (2000). 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 the political subdivision in connection with a governmental or proprietary function."

{¶16} Second, R.C. 2744.02(B) lists five exceptions to the general immunity granted to political subdivisions under R.C. 2744.02(A)(1). See, e.g., *Cramer*; *Ryll v. Columbus Fireworks Display Co.*, 95 Ohio St.3d 467, 470, 2002-Ohio-2584, 769 N.E.2d 372, ¶ 25. Pertinent to the case sub judice, R.C. 2744.02(B)(2) 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."

{¶17} Finally, if liability exists under R.C. 2744.02(B), R.C. 2744.03(A) sets forth several defenses that re-instate a political subdivision's immunity. See *Cramer* at ¶ 16; *Colbert* at ¶ 9. In the case at bar, Appellee suggests and the trial court determined that R.C. 2744.03(A)(5) applies, which states:

> "The political subdivision is immune from liability if the injury, death, or loss to person or property resulted from the exercise of judgment or discretion in determining whether to acquire, or how to use, equipment, supplies, materials, personnel, facilities, and other resources unless the judgment or discretion was exercised with malicious purpose, in bad faith, or in a wanton or reckless manner."

{¶18} Whether a political subdivision is entitled to statutory immunity under R.C. Chapter 2744 presents a question of law. See, e.g., *Conley v. Shearer*, 64 Ohio St.3d 284, 292, 595 N.E.2d 862 (1992); *Murray v. Chillicothe*, 164 Ohio App.3d 294, 2005-Ohio-5864, 842 N.E.2d 95, ¶ 11. In the case sub judice, the parties do not dispute that Appellant is entitled to

the general grant of immunity under R.C. 2744.02(A)(1). Instead, the dispute focuses on whether the R.C. 2744.02(B)(2) exception to immunity applies, and, if so, whether R.C. 2744.03(A)(5) re-instates immunity.

R.C. 2744.02(B)(2)

{¶19} R.C. 2744.02(B)(2) subjects a political subdivision to liability for "the negligent performance of acts by their employees with respect to proprietary functions of the political subdivisions." Thus, before this provision removes a political subdivision's immunity, a plaintiff must demonstrate that the political subdivision's employees negligently performed a proprietary function. Accordingly, before R.C. 2744.02(B)(2) will remove a political subdivision's immunity, the plaintiff must establish: (1) the elements required to sustain a negligence action-duty, breach, proximate cause, and damages; and (2) that the negligence arose out of a "proprietary function." See, generally, *Gabel v. Miami E. School Bd.,* 169 Ohio App.3d 609, 2006-Ohio-5963, 864 N.E.2d 102, ¶ 39-40. A "proprietary function" includes "[t]he establishment, maintenance, and operation of a utility, including, but not limited to, a light, gas, power, or heat plant, a railroad, a busline or other transit company, and airport, *and a municipal water supply system*." R.C. 2744.01(G)(2)(c) (Emphasis added). The proprietary

function at issue here is the maintenance and operation of a municipal water supply system.

{¶20} Appellants have raised several issues which purportedly deal with Appellee's maintenance and repair of its municipal water supply system. For instance, Appellants argue that Appellee failed to replace or upgrade sections of the water distribution system and shut-off valves servicing Appellants' residence which Appellee knew had been in need of replacement for some time. Appellants have raised additional issues, however, contending that the damage sustained to their residence was not only a result of an aging water system that should have been replaced, but was also the result of Appellee's employees delayed response time to the water leak, a lack of training of Appellee's employees, and the employees' failure to shut off pumps servicing the tower supplying water to Appellants' residence.

{¶21} We begin by considering Appellants' argument that Appellee was negligent in failing to replace or upgrade the portions of the water supply distribution system servicing Appellants' residence, which the record reflects and Appellee does not dispute had suffered multiple breaks and leaks, and had been repaired multiple times. Appellants argue that the water distribution system, including the water lines and telemetry on Canterbury

Drive "is old and has been in need of being replaced for some time." Appellants further point out that the water line serving Canterbury Drive had, at the time of the leak on July 29, 2008, at least 13 repairs by clamps. Appellants add that the water hammer situation that occurred on the day of the leak had occurred several times previously and had been causing water breaks. Finally, Appellants argue that although these problems were eventually remedied by a water system upgrade, "upgrading after the damage has occurred cannot be a justification for conversion of the issue from a proprietary function into a governmental function."

{¶22} Appellee responds by arguing that the claim that it negligently failed to replace and/or upgrade the water lines is not actually a claim of negligent maintenance, but rather is actually a claim that it negligently failed to improve and upgrade water lines, a governmental decision for which it is entitled to immunity. We agree. We conclude that although many of Appellants' claims are couched in terms of negligent maintenance and repair, the claims alleging Appellee failed to upgrade parts of the aging water system are actually claims of negligent design and construction. Municipal decisions regarding updating or upgrading, rather than simple maintenance and repair of existing systems have been held to be a governmental function to which immunity applies. See *Essman v. City of*

Portsmouth, 4th Dist. Scioto No. 09CA3325, 2010-Ohio-4837, ¶ 46 ("a city's decision regarding an upgrade to its sewer system is a governmental function for which it is entitled to immunity"); *Smith, et al. v. Stormwater Management Division, City of Cincinnati, et al.*, 111 Ohio App.3d 502, 507, 676 N.E.2d 609 (1996) (adopting the reasoning set forth in *Duvall v. Akron*, 9th Dist. Summit No. 15110, 1991 WL 231433 (Nov. 6, 1991) (holding that a city's decision not to update a fifty-one-year-old sewer system that failed to meet current demands was a discretionary governmental function even in light of a history of flooding).

{¶23} Granted, the cited cases above deal with the failure of a municipality to update sewer systems, not water supply systems. Appellants argue that the issue of whether the failure to upgrade an inadequate water system constitutes a proprietary function or governmental function and is at issue in Ohio. However, we find that the cases dealing with the failure to upgrade sewer systems apply by analogy to the case sub judice. *Williams v. Glouster*, 4th Dist. Athens No. 10CA58, 2012-Ohio-1283, ¶ 19 (analyzing a storm drainage system under the same framework as a sanitary sewer system for purposes of applying R.C. 2744's grant of sovereign immunity). For instance, R.C. 2744.01(C)(1)(l) defines as a governmental function "[t]he provision or nonprovision, planning or design, construction, or

reconstruction of a public improvement, including, but not limited to, a sewer system[.]" Thus, although the planning and design of sewer systems is expressly defined as a governmental function, the statute does not limit such "public improvements" to sewer systems. Although, R.C. 2744.01(G)(2)(c) provides that the establishment, maintenance and operation of a utility, including a municipal corporation water supply system is a proprietary function, we believe the planning and design of such a system is a governmental function, much like the planning and design of a sewer system is a governmental function under R.C. 2744.01(C)(1)(l).

{¶24} "Under R.C. 2744.02(B)(2), a political subdivision cannot be held liable for the negligent performance of acts by their employees with respect to a governmental function." *Williams v. Glouster* at ¶ 18. As such, we conclude that Appellee's failure to upgrade its water supply system, despite its knowledge that it was an aging system with multiple breaks and in need of updating, was a discretionary governmental function. Thus, Appellee is entitled to immunity from liability for any damages that occurred in connection with the performance of this governmental function. Accordingly, we reject this portion of Appellant's sole assignment of error.

{¶25} We next consider Appellants' arguments that Appellee's failure to have residency requirements for its city service workers, failure to have

water supervisors and personnel familiar with the water distribution system present, failure to require mandatory overtime, failure to respond to the leak in a timely manner, and failure to train its employees on emergency response for water leaks, constituted negligence. As set forth above, R.C. 2744.01(G) defines proprietary functions and provides in section (2)(c) that "[t]he establishment, maintenance, and operation of a utility, including, but not limited to * * * a municipal corporation water supply system[]" is a proprietary function.

{¶26} Both parties and the trial court seem to agree that Appellee was negligent in the performance of its proprietary functions with respect to the maintenance and operation of the water supply system. However, as we will discuss more fully below, we have determined that a genuine issue of material of fact exists with respect to whether Appellee was, in fact, negligent in performing repairs at the site of the leak and operating its water system on the date in question. Nonetheless, on the other hand, if Appellee was negligent in its response time, training of its employees, etc. and as such, that the R.C. 2744.02(B)(2) exception to immunity applies, we find that immunity was reinstated pursuant to R.C. 2744.03(A)(5).

{¶27} Appellants' argument essentially claims that Appellee failed to adequately staff and train its employees. More specifically, Appellants

argue that had water department personnel been required to live within city limits, had been required to carry pagers or cell phones, had been required to accept overtime, and had been permitted to drive city trucks home, that the response to the water break would have been quicker. Appellants argue that delays in this regard constituted negligence and contributed to the damage sustained to their property. Appellants further argue that the failure to have maps of the water system, including valve locations, made known and available to all employees and failure to train its employees on its emergency response policy constituted negligence and also contributed to the damages they sustained. If these deficiencies constitute negligence, as stated, we nevertheless find that these decisions made by Appellee are the types of decisions contemplated by R.C. 2744.03(A)(5) and as such, Appellee is immune from liability for any damage occurring from their negligence in this regard.

R.C. 2744.03(A)(5) provides as follows:

> "(A) In a civil action brought against a political subdivision or an employee of a political subdivision to recover damages for injury, death, or loss to person or property allegedly caused by any act or omission in connection with a governmental or

> proprietary function, the following defenses or immunities may be asserted to establish nonliability:
>
> * * *
>
> (5) The political subdivision is immune from liability if the injury, death, or loss to person or property resulted from the exercise of judgment or discretion in determining whether to acquire, or how to use, equipment, supplies, materials, personnel, facilities, and other resources unless the judgment or discretion was exercised with malicious purpose, in bad faith, or in a wanton or reckless manner."

We believe the decisions made by Appellee related to the level of staffing of the water department after hours, whether or not to require employees to live within city limits and provide on-call coverage, whether to allow employees to drive city trucks home, as well as the extent to which and the subject matter upon which the employees were trained, were all discretionary decisions regarding how to use equipment, personnel and resources.

{¶28} Thus, Appellee is entitled to immunity from any damages stemming from its negligence in these areas. See *Spencer v. Lakeview School Dist.*, 11th Dist. Trumbull No. 2002-T-0175, 2004-Ohio-5303, ¶ 32 ("R.C. 2744.03(A)(5) provides immunity for the school board as to its level

of medical staff and training."). Further, this Court noted as follows with respect to the *Hall v. Fort Frye* decision[2] in *Malone, et al. v. City of Chillicothe*, 4th Dist. Ross No. 05CA2869, 2006-Ohio-3268, ¶ 18:

> "In *Hall*, we approved of then Judge Cook's dissenting opinion in *Vallish v. Copley Bd. Of Edn.* (Feb. 3, 1993), Summit App. No. 15664: ' "[T]he 'A(5)' exception contemplates affording immunity for decisions such as how many firetrucks respond to an alarm, how many officers with how much training are assigned to a neighborhood, challenges to snowplowing equipment and personnel on the job during a snowstorm, etc." '."

Similarly, we conclude that Appellee's decisions with respect to how many employees and with how much training respond to an emergency break are the type of decisions contemplated by the (A)(5) exception, as are the decisions with respect to how city trucks will be used and whether or not employees with be provided with pagers and/or cell phones to facilitate call coverage. Finally, as Appellants do not allege Appellee exercised its discretion in this respect with malicious purpose, in bad faith, or in a wanton or reckless manner, we find immunity was reinstated under R.C.

---

[2] *Hall v. Fort Frye Local School District Bd. of Edn*., 111 Ohio App.3d 690, 676 N.E.2d 1241 (4th Dist. 1996)

2744.03(A)(5). Accordingly, we also reject this portion of Appellants' sole assignment of error.

{¶29} Our inquiry, however, does not end here. As set forth above, we have determined that Appellee's failure to replace the aging municipal water system, despite its knowledge that it had suffered multiple leaks and had undergone repeated repairs, is properly categorized as a failure to upgrade claim, a governmental decision for which Appellee is immune from liability. We have further determined that even if Appellee was negligent in its response time to the leak or in failing to have adequately trained water department personnel available at the time, immunity for such staffing-related decisions was reinstated under R.C. 2744.03(A)(5), which provides immunity for decisions involving a high degree of judgment or discretion, including how to use personnel and equipment. Finally, we next consider Appellants' argument that Appellee was negligent in its operation of the water supply system and its actual emergency repair to the water leak that flooded their residence.

{¶30} Appellants contend that Appellee's employees negligently repaired the leak at issue during the emergency response. Appellants argue that because the shut-off valves located the closest to their residence did not completely shut-off the flow of water to their residence, that Appellee's

employees were negligent in failing to close shut-off valves located farther down the water line, and also in failing to call the water plant operator to manually shut down the water pumps at the Curtis Street Station, which supplies water to the Longview Heights Water Tower, which in turn gravity feeds water through the distribution lines to supply Appellants' residence on Canterbury Drive. Appellants contend that in failing to do these things, Appellee allowed water to continue flowing into Appellants' residence from approximately 5:30 p.m. when crews initially attempted to shut the closest valve, until 9:30 p.m. when crews finally repaired the leak. It is in this argument raised by Appellants that we find some merit.

{¶31} As this Court noted in *Hall v. Fort Frye Local School District Board of Education* at 694, "[t]he Supreme Court of Ohio has recognized that the availability of statutory immunity raises a purely legal issue that is properly determined by a court prior to trial." Citing *Nease v. Med. College Hosp.*, 64 Ohio St.3d 396, 400, 596 N.E.2d 432 (1992). However, we also noted in *Fort Frye* that "once an immunity defense is deemed available as a matter of law, its applicability to the actions of the parties becomes fact-specific, e.g., the negligence issues * * *." *Hall* at 694. Nonetheless, it is the court, not the jury, which must determine the availability of immunity prior to trial. *Conley v. Shearer*, 64 Ohio St.3d 284, 292, 595 N.E.2d 862

(1992); *MacCABEE v. Mollica*, 4th Dist. No. 09CA32, 2010-Ohio-4310 (Harsha, J., dissenting).

{¶32} Once again, R.C. 2744.02(A)(1)'s general grant of immunity is not absolute. R.C. 2744.02(B)(1)-(5) contains five exceptions to the general grant of immunity and provides in (B)(2) that "* * * 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 subdivision." Additionally, we have explained that per R.C. 2744.01(G)(2)(c) "[t]he establishment, maintenance, and operation of a utility, including, * * * a municipal corporation water supply system[]" is a proprietary function, the performance of which Appellees can be held liable for loss to property. Thus, Appellee can be held liable for its negligent maintenance and operation of its water supply system. *Willams v. Brewer*, 8th Dist. Cuyahoga No. 93829, 2010-Ohio-5349, ¶ 11; *East Ohio Gas Company v. City of Akron*, 9th Dist. Summit No. 25830, 2012-Ohio-3780; *Hill v. City of Urbana*, 79 Ohio St.3d 130, 133, 679 N.E.2d 1109 (1997).

{¶33} Further, this Court has observed that "the General Assembly did not intend to relieve political subdivisions from liability for all negligent actions of their employees." *Hall* at 699; citing *Hallett v. Stow Bd. of Edn.*, 89 Ohio App.3d 309, 313, 624 N.E.2d 272 (9th Dist. 1993). We further

noted that due to the way in which the immunity statutes are structured, "it is clear that the exceptions to liability in R.C. 2744.03 must be read more narrowly than the exceptions to nonliability in R.C. 2744.02(B) in order for the legislative structure to make sense at all." Id.; citing *Stuckey v. Lawrence Twp. Bd. of Trustees*, 5th Dist. Stark No. 8806, 1992 WL 214485 (Aug. 24, 1992). Finally, in *Hall,* we reasoned that "the defenses and immunities of R.C. 2744.03 cannot be read to swallow up the liability provisions of R.C. 2744.02(B) so as to render them nugatory." *Hall* at 699.

{¶34} A review of the record indicates that although Appellants were not home at the time, neighbors noticed a water line break in their front yard at approximately 4:00 p.m. on July 29, 2008, and called in a report which was routed to the water plant operator on duty at the time, Steve Adams. The normal water department operating hours end at 4:00 p.m. As such, Adams began making calls to assemble a crew. Water maintenance technician, Terry Gilkey, was the first to respond and went to several different locations, including Coventry Lane, Sussex Avenue, Canterbury Drive and Lamar Avenue, in that order.

{¶35} After shutting off the valve at Coventry, Gilkey proceeded to the water shop to get a water truck with tools and then returned, only to be told by someone that there was a major leak shooting over the top of a house

on Sussex. As a result, Gilkey went to Sussex to shut that valve off when someone drove by and informed him of the leak on Canterbury. Gilkey then left and went to Canterbury where he attempted to shut that valve off. Gilkey testified that the valves are old, that it is not possible to completely shut them down sometimes, and that the water did not immediately stop. He then proceeded to Lamar, where he had been informed another leak was occurring. Gilkey estimated he arrived at Canterbury at 5:15 p.m., which is very close to Dave Matter's estimation of 5:30 p.m. During this time, Adams continued to call out a water crew pursuant to the City's call-out procedure, and in accordance with the collective bargaining agreement. No one returned to Appellants' residence until approximately 7:15 or 7:30 p.m. by Appellants' estimation. The water leak was finally stopped and repaired at approximately 9:30 p.m. Thus, water continued to flow, although diminished, from 5:30 until 9:30 p.m. because the valve was unable to be completely closed.

{¶36} Contrary to both Appellants' and Appellee's assertions on appeal that no genuine issue of material facts exists, we find the failure of the city employees to attempt to locate a valve "farther up" or to identify whether or not there were altitude valves at Curtis Street and/or Longview and shut them off, or to contact the water plant operator to shut off the Curtis

Street pumps, in order to stop the flow of water to Appellants' residence constitutes a genuine issue of material fact which precludes summary judgment. Based upon the following deposition testimony, we believe that reasonable minds could differ as to whether Appellee negligently operated and repaired its water system on the date in question.

{¶37} For example, Andrew Stone, City Engineer and Director of Public Works testified in his deposition that if a valve malfunctions, it is possible to consult a map and locate a valve "farther back and turn it off." He further testified that in an emergency, which this was, the plant operator can help by closing altitude valves and pumps at the Curtis Street Reservoir "from afar." The Curtis Street Reservoir supplied the Longview Heights Tower, which was essentially emptying into Appellants' yard. This was not done and seemingly was not even considered.

{¶38} For instance, contrast Stone's deposition testimony with that of Steve Adams, the water plant operator on duty the evening of the leak at issue. When questioned regarding the options available when a valve will not close completely, Adams testified in his deposition that he could do nothing and has no control over anything. In fact, contrary to Stone's testimony, Adams testified that, as the water plant operator, once he notifies the supervisor on call of the leak, he is out of the loop. Thus, it appears that

although the water plant operator had the ability to effect the situation in certain ways, he did not seem to know he had that ability and therefore did nothing.

{¶39} Andrew Stone's deposition testimony also makes reference to certain “altitude valves,” which appear to be different from shut-off valves. For instance, Stone referenced in his deposition testimony the ability of the water plant operator to close the altitude valve located at the Curtis Street Reservoir “from afar,” but indicated that the Longview Heights tower did not have an altitude valve. Again, contrast this testimony with the testimony of Nick Carr, Director of Water and Sewer Services. Carr testified that the Longview Heights tower actually did have an altitude valve, which could have been closed. Carr testified that the individuals who would have known about the existence of the new valve in 2008 were not there that evening.

{¶40} Carr testified that the altitude valve at Longview, when operated as it was designed would actually open up when there was a break, in order to let more water out. Carr testified that the valve was set up this way in case of fire, because when hydrants are opened up, it essentially simulates a water line break. He testified that it was not usually a concern because the Longview tower would typically empty pretty quickly and would go dry once the Curtis Street pumps were shut off. This is unless, as

Carr explained, the Curtis Street pumps continue to run and supply the tower, which is what happened on the evening of the leak. Carr further testified, once again in contrast to Stone's and Adams' deposition testimony, that the water plant operator could have overridden the system and closed the altitude valve at Longview.

{¶41} After reviewing all of the deposition testimony in the record, it appears that although the Curtis Street pumps initially failed due to either a power outage or a power flicker they re-started and then remained running automatically, as designed. It also appears from the testimony in the record, that although the pumps were designed to run automatically, they were also designed with the option of a manual shut-off in case of emergency. There is a question as to whether these pumps could have been turned off "from afar" by the plant operator or whether they had to be manually turned off, but it is clear that they could have been turned off. Further, it appears that an altitude valve existed at Curtis Street Reservoir that also could have been shut off "from afar" by the water plant operator, and that there had been a new altitude valve recently installed at the Longview tower that could have been at least manually shut off, if not shut off “from afar” by the water plant operator. It further appears that the altitude valve at Longview operated as it was designed in that it allowed water to flow out in the event of a break,

which would essentially simulate the opening of a fire hydrant, but that it was also designed with the ability to be manually shut off.

{¶42} An overall review of the deposition testimony reveals that each crew member that arrived at the Canterbury leak realized that the water continued to flow, albeit in a diminished capacity, and that the valve had not been completely shut off. The testimony further reveals that none of these crew members weighed the option of attempting to locate a valve "farther up" to try to shut-off the water, nor did they consider contacting the water plant operator to request that the Longview or Curtis Street altitude valves be closed or that the Curtis Street pumps be turned off, as an alternative. As a result, water continued to flow for four hours after the initial response by a water department employee.

{¶43} Construing this evidence in a light most strongly in favor of Appellants, we believe that a genuine issue of material fact exists as to whether Appellant negligently operated and repaired its water distribution system. The record indicates that although the system was designed and constructed with manual shut-off options in case of emergencies, none of those options were even considered by the crew that responded on the evening of the leak. As such, we conclude that reasonable minds could differ on whether the actions of Appellee and its employees in dealing with

the water line break breached any duty owed to Appellants. We note in reaching this decision that Appellants contend that the material facts are not in dispute and that not only should Appellee's' motion for summary judgment not have been granted, that Appellants' own motion for summary judgment should have been granted. However, because we find the existence of genuine issues of material fact, as detailed above, we reject Appellant's argument and find that summary judgment should not have been granted in either party's favor.

{¶44} However, once again our inquiry into this matter does not end here, but rather must continue in order to determine whether the maintenance and repair decisions at issue herein involve the type of judgment or discretion as contemplated by R.C. 2744.03(A)(5), as argued by Appellee and as found by the trial court. We again look to the language of R.C. 2744.03(A)(5), which provides as follows:

> " (A) In a civil action brought against a political subdivision or an employee of a political subdivision to recover damages for injury, death, or loss to person or property allegedly caused by any act or omission in connection with a governmental or proprietary function, the following defenses or immunities may be asserted to establish nonliability:

> * * *
>
> (5) The political subdivision is immune from liability if the injury, death, or loss to person or property resulted from the exercise of judgment or discretion in determining whether to acquire, or how to use, equipment, supplies, materials, personnel, facilities, and other resources unless the judgment or discretion was exercised with malicious purpose, in bad faith, or in a wanton or reckless manner."

Thus, "[a]lthough R.C. 2744.02(B)(2) may remove the city's general grant of immunity with respect to [Appellants'] negligent operation claims, R.C. 2744.03(A)(5) may re-instate the city's immunity." *Essman v. City of Portsmouth* at ¶ 52.

{¶45} The R.C. 2744.03(A)(5) defense extends to activities that involve weighing alternatives or making decisions involving a high degree of official judgment or discretion. See *Enghauser Mfg. Co. v. Eriksson Engineering Ltd.*, 6 Ohio St.3d 31, 451 N.E.2d 228, paragraph two of the syllabus (1983). Political subdivisions are immune from liability for " 'certain acts which go to the essence of governing,' i.e., conduct characterized by a high degree of discretion and judgment in making public policy choices." *Butler v. Jordan*, 92 Ohio St.3d 354, 375, 750 N.E.2d 554

(2001); quoting *Enghauser Mfg. Co.* at 35. In other words, " 'immunity attaches only to the broad type of discretion involving public policy made with the creative exercise of political judgment.' " *McVey v. Cincinnati*, 109 Ohio App.3d 159, 163, 671 N.E.2d 1288 (1995); quoting *Bolding v. Dublin Local Sch. Dist.*, 10th Dist. Franklin No. 94APE09-1307, 1995 WL 360227 (June 15, 1995); see, also, *Perkins v. Norwood City Schools*, 85 Ohio St.3d 191, 707 N.E.2d 868 (1999) (Cook, J., concurring).

{¶46} "To qualify for immunity, the subdivision's function must require it to weigh multiple considerations, 'not merely to "rubber stamp" [a proposal] found to be in compliance with all requisite technical requirements.' "*Drew v. Laferty*, 4th Dist. Vinton No. 98CA522, 1999 WL 366532 (June 1, 1999); quoting *Winwood v. Dayton*, 37 Ohio St.3d 282, 284, 525 N.E.2d 808 (1988). As we explained in *Hall v. Ft. Frye Loc. School Dist. Bd. of Edn.* at 699:

> "Immunity operates to protect political subdivisions from liability based upon discretionary judgments concerning the allocation of scarce resources; it is not intended to protect conduct which requires very little discretion or independent judgment. The law of immunity is designed to foster freedom and discretion in the development of public policy while still

ensuring that implementation of political subdivision responsibilities is conducted in a reasonable manner." See, also, *Hubbell v. Xenia,* 175 Ohio App.3d 99, 2008-Ohio-490, 885 N.E.2d 290, ¶ 18; quoting *Addis v. Howell*, 137 Ohio App.3d 54, 60, 738 N.E.2d 37 (2000) (" 'Some positive exercise of judgment that portrays a considered adoption of a particular course of conduct in relation to an object to be achieved is required in order to demonstrate an exercise of discretion for which R.C. 2744.03(A)(5) confers immunity from liability on a political subdivision.' "); *East Ohio Gas Company v. City of Akron*, 2012-Ohio-3780, 976 N.E.2d 276, ¶ 8 (also noting "that R.C. 2744.03(A)(5) does not shield routine decisions from liability" but that "it does provide immunity * * * for ' "positive exercise[s] of judgment that portray [] a considered adoption of a particular course of conduct in relation to an object to be achieved." ' ").

{¶47} In the case presently before us, as we alluded to above, it does not appear that the crew responding to the water line break that flooded Appellants' residence considered or weighed the different options available to them in trying to stop the flow of water from the break and or then

rejected them for whatever reasons. Although Appellee asserted in its summary judgment motion that the pumps weren't shut off due to a concern of depressurizing the system which would result in a boil order, it doesn't appear that the crew members making the actual repairs were trying to balance that concern or even considered that issue. There is simply no evidence in the record presently before us which indicates that the crew engaged in any sort of decision-making process or weighing of alternatives with respect their failure to avail themselves of the built-in manual overrides to the water supply system.

{¶48} As such, it cannot be said, in this instance, that there was any "positive exercise of judgment" in affirmatively rejecting the options of closing off additional shut-off valves, altitude valves and water pumps. Rather, it appears from the record that these options were either not considered, or were not fully understood by the crew or the water plant operator. Thus, we cannot conclude that Appellee's actions were ones that involved or employed the exercise of judgment or discretion, but rather they consisted of the emergency operation, maintenance and repair work that should have been performed in a reasonable manner.

{¶49} Appellee cites several cases in support of its contention that immunity was reinstated under R.C. 2744.03(A)(5), claiming that the

decisions made in connection with the repair of the water line break were ones which involved weighing alternatives. We believe this is true with respect to the staffing, on-call, and training issues; however, we find the cases cited by Appellee to be distinguishable from the case sub judice with respect to the actual repairs that were performed on the evening of the Canterbury water line break. For instance, *East Ohio Gas Company v. City of Akron*, supra, is one of the cases relied upon by Appellee in support of its assertions. *East Ohio Gas* involved the decision of a city water department supervisor to wait until 7:30 a.m. to respond to a water main break that occurred at 2:30 a.m. Id. at ¶ 2.

{¶50} The supervisor reasoned that by the time an after-hours crew was called out and assembled that the break "would receive no earlier attention than if the inspector on duty at 7:30 a.m. went to the scene immediately." Id. at ¶ 10. It was determined that the city was immune from liability in that case based upon the reasoning that the supervisor made a "positive exercise of judgment that portray[ed] a considered adoption of a particular course of conduct." Here, as discussed above, there was no such weighing of alternatives or positive exercise of judgment made in failing to locate additional shut-off valves and/or altitude valves or failing to turn off the water pumps that were supplying the leak. As such, the situation

presently before us is distinguishable from the cases generally relied upon by Appellee in this regard.

{¶51} Because evidence in the record, construed most strongly in favor of Appellants, raises a genuine issue of fact as to whether Appellee negligently operated, maintained and repaired its municipal water supply system on the day of the leak at issue, and since the actions of the crew members responding to the water break on the date in question did not involve the exercise of judgment or discretion as intended by R.C. 2744.03(A)(5), as a matter of law, the trial court erred in granting summary judgment in favor of Appellee on the basis of sovereign immunity. As such, Appellants' sole assignment of error is sustained. Accordingly, the decision of the trial court is reversed and this matter is remanded for further proceedings consistent with this opinion. As indicated above, on remand the trial court is hereby instructed to determine the availability of immunity before trial, as a matter of law.

JUDGMENT REVERSED AND REMANDED.

JUDGMENT ENTRY

It is ordered that the JUDGMENT BE REVERSED AND CAUSE REMANDED. Appellants shall recover of Appellees 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. and Hoover, J.: Concur in Judgment and Opinion.

For the Court,

BY: ____________________________________
Matthew W. McFarland, 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.