[Cite as *Anderson v. Warren Local School Dist. Bd. of Edn.*, 2017-Ohio-436.]

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

TIMOTHY ANDERSON, ET AL.	:	
Plaintiffs-Appellants,	:	Case No. 16CA21
v.	:	DECISION AND JUDGMENT ENTRY
WARREN LOCAL SCHOOL DISTRICT BOARD OF EDUCATION,	:	
Defendants-Appellees.	:	RELEASED: 02/01/2017

APPEARANCES:

Brian W. Benbow, Benbow Law Offices, Zanesville, Ohio for appellants.

Michael J. Valentine and Melvin J. Davis, Reminger Co., L.P.A., Columbus, Ohio for appellee.

Hoover, J.

{¶ 1} Plaintiffs-appellants Timothy and Carol Anderson ("the Andersons") appeal a judgment of the Washington County Common Pleas Court awarding summary judgment in their negligence action in favor of defendant-appellee Warren Local School District Board of Education ("Warren"). In the instant action, the Andersons alleged that surface water runoff from a maintenance building owned and operated by Warren caused damage to their residence. The trial court granted summary judgment in favor of Warren because it found that Warren was entitled to governmental immunity under R.C. 2744.

{¶ 2} In the proceedings below, the time had elapsed to file amended pleadings with respect to the deadlines set forth by the trial court. However, the Andersons filed a motion to amend their complaint, which the trial court granted. After the Andersons filed their amended

complaint, Warren then failed to timely file an answer to the amended complaint. Thus, the Andersons filed a motion for default judgment. Warren filed a motion for leave to file an answer to the amended complaint. The trial court granted Warren's motion for leave, which implicitly overruled the Andersons' motion for default judgment.

{¶ 3} Here on appeal, the Andersons assert two assignments of error. In the first assignment of error, the Andersons argue that the trial court erred by failing to grant their motion for default judgment. Based on surrounding facts and circumstances below, we find that the trial court did not abuse its discretion by allowing Warren to file a late answer to the Andersons' amended complaint. In their second assignment of error, the Andersons argue that the trial court erroneously awarded summary judgment in favor of Warren. We find that the Andersons have failed to establish an exception to Warren's general grant of governmental immunity as a matter of law.

{¶ 4} Accordingly, for those reasons, and the reasons more fully discussed below, we overrule the Andersons' two assignments of error. The judgment of the trial court is affirmed.

I. Facts and Procedural Posture

{¶ 5} The Andersons reside at 426 Sweetapple Road, Vincent, Ohio, which is located in the Warren Local School District. Warren owns a maintenance building located to the southeast and uphill from the Andersons' property. The address of the maintenance building is 220 Sweetapple Road. Warren also uses the property as a school bus parking facility.

{¶ 6} The Andersons' residence was built in 1982. The maintenance building is approximately 5,200 square feet in size. According to Timothy Anderson ("Mr. Anderson"), the maintenance building was constructed in the 1990s. At some point, an addition was built onto the

building.[1] In 1995, water began to seep through the Andersons' basement wall. In response, Mr. Anderson installed a sump pump in his basement. Then, in 1996, Mr. Anderson dug a one and one-half feet deep ditch and lined it with rock. Mr. Anderson had hoped these measures would drain surface water out of the backyard. Mr. Anderson also laid pavers against the backside of his house.

{¶ 7} According to Mr. Anderson, all of the downspouts coming from Warren's maintenance building flowed to a drainage pipe that discharged the collected rainwater onto his property. Mr. Anderson stated that the discharging pipe was 6 inches, made of corrugated plastic. In 1996, Mr. Anderson discussed the rainwater issue with Ralph McKenna, who worked for Warren. In either 1998 or 1999, Warren placed a sump pump into its loading dock at the maintenance building; constructed a new line that discharged the maintenance building rainwater to a ditch along Sweetapple Road; and plugged the pipe that was discharging water onto the Andersons' property.

{¶ 8} In 2005 or 2006, Warren added a refrigeration unit to the maintenance building. A second refrigeration unit was added in 2008. In 2011, Mr. Anderson noticed cracks in his rear basement wall. In 2013, Mr. Anderson sought the assistance of the Environmental Protection Agency, the Ohio Basement Authority and the Washington Soil & Water Conservation District ("Washington SWCD"). Washington SWCD, represented by Bob Mulligan and Sandy Lahmers, inspected the water runoff issues of the maintenance building and the Andersons' property. Washington SWCD wrote a report and offered recommendations to both parties. The Washington SWCD recommended that the Andersons improve the capacity of the drainage

[1] The evidence differs on when the building and the addition were built. In his deposition, Mr. Anderson stated that the addition was built in either 1993 or 1994. In the Andersons' amended complaint, they stated that the maintenance building was built in 1991 and the addition was built in 1997.

system behind their residence to reduce the risk of surface waters reaching the rear of the house. The Washington SWCD also recommended that Warren seek engineering assistance to assess the maintenance building's gutters and underground pipe system to ensure that they are of adequate size to handle the runoff the roof produces. Upon the report's recommendation, Mr. Anderson installed a 14-inch pipe approximately 60 feet long in order to collect and drain rainwater from his backyard. In 2014, Warren also made changes to the maintenance building's drainage system. Warren installed new gutters and new downspouts on the maintenance building. Warren also constructed a new drainage pipe to route the runoff rainwater to a ditch alongside Sweetapple Road.

{¶ 9} The Andersons commenced this proceeding by filing a complaint in April 2015. Their complaint alleged two counts against Warren: (1) common law negligence and (2) violation of the reasonable use rule regarding surface water. The Andersons' claim of negligence alleged that (1) their real and personal property was damaged as a result of surface water runoff coming from the maintenance building owned by the Warren Local School District; and (2) as a direct and proximate result of the surface runoff, their basement was shifting; and the walls cracked and were in need of repair. The Andersons' second claim alleged that Warren failed to make reasonable use of its land and is therefore liable to them due to the harm to their property caused by the Warren's harmful interference with the flow of surface water. Andersons' original complaint alleged that even as a political subdivision, Warren was liable due to the negligence of its employees and the lack of proper disposal of the roof water from the maintenance building, which caused a physical defect in the building.

{¶ 10} In May 2015, Warren filed its answer to the Andersons' complaint. In November 2015, Warren filed a motion for summary judgment. In the motion, Warren argued that it was

entitled to governmental immunity under R.C. 2744. Warren contended that the "physical-defect" exception to governmental immunity, under R.C. 2744.02(B)(4), did not apply because the alleged damage did not occur on Warren's property. Warren attached two exhibits to its first motion for summary judgment: (1) the affidavit and report of C. K. Satyapriya ("Satyapriya"), a registered professional engineer and the President and CEO of CTL Engineering; and (2) the deposition of Mr. Anderson.

{¶ 11} Warren retained Satyapriya to complete a visual assessment of the Andersons' property and the storm water flow from the Warren maintenance building. Satyapriya assessed the Andersons' property, in the presence of Mr. Anderson on August 20, 2015. In addition to his visual assessment, Satyapriya also reviewed the following: (1) photographs; (2) Mr. Anderson's deposition transcript; (3) the report prepared by Washington SWCD; (4) the report prepared by Donald Liszkay ("Liszkay"); and (5) the video of water overflow from the gutters on the Warren maintenance building. In his affidavit, Satyapriya concluded the following:

> Based upon my visual assessment and the review of the documents listed above, it is my opinion to a reasonable degree of engineering certainty that:
>
> a. Only a small portion of the storm water flows onto the Anderson Property due to the building addition of the Warren County School Maintenance Garage;
>
> b. The flow from within the Anderson Property is more than 3.5 times the amount of water that flows from the Warren County School Maintenance Garage;
>
> c. The water flow from the Warren County School Maintenance Garage has not caused damage to the Anderson Property.

{¶ 12} Satyapriya also completed a topographical survey to evaluate the storm water flow from both the Warren maintenance building and the Andersons' property. Based on the

topography, Satyapriya divided the site into five areas. Satyapriya used "The Rational Method" to evaluate the storm water flow and to determine the flow rate and volume of the "25 year storm events" across each of the areas. Satyapriya also calculated the impact of the maintenance building's contribution to the storm water flow. In his report, Satyapriya stated:

> Procedures was [sic] used to determine on what Storm Events that were commonly used in the evaluation or design of these watersheds.
>
> As you can see above, only a small portion of the storm water flows onto Mr. Anderson's property (0.122cfs), due to the building addition (assumption that the gutters are not channeling any of the storm water away form the property. In comparison the quantity of flow from within the Anderson property is more than 3.5 times the quantity.

{¶ 13} Satyapriya made the following conclusion:

> As discussed above the additional quantity of peak storm water flow from the building addition, even assuming that the gutters are not diverting any water, is very small. CTL agrees with Mr. Liszkay that basement wall distresses are due to soil pressure. As he states, wetter soil greater the density [sic] of the soil and thus greater the earth pressure. In addition, with increasing moisture content soil loses shear strength.
>
> During discussion Mr. Anderson indicated that backfill prior to the repair consisted of the surrounding soils, mainly silt clay soils. These materials are very moisture sensitive and absorb water and do not give up easily. Therefore, it is opined that the reasons for the inward movement of the basement wall was due to lack of drainage and the resulting increase in density of the soil and lateral earth

> pressure. As indicated by Mr. Anderson subsequent to the repair he placed sufficient drainage including granular backfill and a drain pipe, and he has not experienced any seepage. In fact he stated that there has not been a need for sump pumps (2 numbers) which he did say was present in the house prior to the repair.
>
> CTL also opines that the reason for the appearances of the distress after many years, is possibly due to the significant rainfall that Southern Ohio experienced in 2008 and 2011. In fact, CTL did investigate more than 80 slope failure cases along roadways in Southern Ohio in 2008/2009, which is more than double the average number slope failure investigations.

{¶ 14} In response to Warren's motion for summary judgment, the Andersons filed a Civ.R. 56(F) motion stating that they could not properly respond to the motion because substantial discovery had not been completed. Specifically, the Andersons stated that their deposition of witness Frank McKenna had not been completed as scheduled.

{¶ 15} On December 7, 2015, the trial court filed an entry modifying the time frame and deadlines of various motions. The entry stated that the Andersons' amended complaint was to be filed by December 11, 2015. On December 23, 2015, the Andersons filed a motion to amend their complaint along with the amended complaint. On the same day, the trial court granted the Andersons' motion. On December 29, 2015, the Andersons served their amended complaint on Warren.

{¶ 16} In the amended complaint, the Andersons asserted the following:

> 10. That the probable cause of Plaintiffs' damages was the malfunctioning of the gutter and downspout system located at Defendant's property as a result of

improper, routine, maintenance, the nature of which does not involve a high degree of discretion.

11. That the remedy to the problem Defendant created would not require Defendant to redesign or reconstruct the drainage system in [sic] issue. It would be a simple matter of timely inspections and regular, routine, maintenance.

12. Defendant, the Warren Local School District, inadequately maintained its gutter and underground pipe system gutters to ensure adequate size to handle the runoff water that the maintenance building's roof produced for the 5200 square foot building.

* * *

20. Plaintiffs submit that pursuant to R.C. 2744.02(B)(2), Defendants are liable in that Defendants negligently failed to maintain its gutter system, a proprietary function.

21. Moreover, Ohio courts have long recognized that a political subdivision can be liable for the negligent maintenance of its sewers. See *Portsmouth v. Mitchell Mtg. Co.*, 113 Ohio St. 250, 3 Ohio Law Abs. 389, 148 N.E. 846 (1925).

{¶ 17} On December 31, 2015, Warren filed a memorandum contra to the Andersons' motion to amend their complaint and a motion to strike the amended complaint. On January 20, 2016, the Andersons filed a motion for default judgment, alleging that Warren had failed to file a timely answer to their amended complaint. On February 9, 2016, Warren filed both a motion for leave to file an answer to the Andersons' amended complaint and a memorandum contra to the Andersons' motion for default judgment. On the same date, the trial court granted Warren's

motion for leave to file the answer. On February 11, 2016, Warren filed its answer to the Andersons' amended complaint.

{¶ 18} In February 2016, Warren filed a supplemental motion for summary judgment. Warren attached to this motion a report from Liszkay Engineers. In December 2015, Mr. Anderson contacted Donald Liszkay, a professional engineer, to inspect the surface water runoff issues. Liszkay prepared a report based upon his inspection. In the report, Liszkay stated, "The primary purpose of the observations and this report is to continue the evaluation of the storm runoff from the school building uphill from Mr. Anderson's residence." Liszkay's report contained sketches of the two properties in question, the maintenance building and the Andersons' property. Liszkay assumed in this report that the Andersons' residence is north of the school building. In the report, Liszkay made the following observations:

> * * *The [original school building] had a gutter on the south side and one on the north side. The southwest downspout discharged to the loading dock drain. The downspout at the northwest corner discharged to a loading dock drain. The downspout at the southeast corner discharged to grade. The loading dock drain was piped underground and discharged further to the northwest of the building and discharged down the slope directing it towards Mr. Anderson's property. Approximately 75 per cent of the buildings' [sic] roof water discharged at this point.
>
> Drawing #2 identifies the gutter downspout system with the rear addition on the original building prior to the installation of the refrigeration units. * * * The downspout at the southeast corner was now routed to the rear of the building and discharged into the gutter that went along the north edge of the building. The

downspout at the northwest corner discharged into the loading dock drain. * * *100 per cent of the roof flow now went to [the discharge point that flowed] onto Mr. Anderson's property.

* * *

At some point in time, the elbow under the gutter at the northwest corner rusted off or fell off. Now, most of the roof water was now discharging onto the ground at the northwest corner of this school building. The water will eventually flow to the north onto to [sic] Mr. Anderson's property.

* * *

The conclusion is that at all points of time of this school building's history, all the roof water discharged to the loading dock drain or spilled onto grade, but, eventually, flowed onto Mr. Anderson's property. Even the downspout at the south east corner that spilled onto grade (early in the life of the structure) flowed by gravity in the direction of Mr. Anderson's property.

In the current situation (as I understand it), all the downspout drains flow to the west and discharge on Sweetapple Road and do not discharge onto Mr. Anderson's property. However, much of the parking lot water still is routed towards Mr. Anderson's property. That was not the purpose of this investigation.

I understand that the gutters on the original building were standard four or five inch gutters. Currently, they are larger.

The current discharge north west of the school building is located about 25 feet from the fence line of this school property. The original discharge point was

> approximately 20 feet further to the north. Both points will still route water onto Mr. Anderson's property.
>
> * * *
>
> To a reasonable degree of scientific certainty, the probable cause of the water damage to the Anderson property, therefore the bowing of Mr. Anderson's basement wall, was lack of proper disposal of roof runoff from the school building located up hill from Mr. Anderson's house.

{¶ 19} In March 2016, the Andersons again filed a Civ.R. 56(F) motion stating that it could not respond to Warren's supplemental motion for summary judgment because they were waiting for an expert's affidavit. The trial court granted the Andersons' motion. On March 17, 2016, the Andersons filed their memorandum contra to Warren's motion for summary judgment. In their motion, the Andersons argued that Warren was liable because under R.C. 2744.02(B)(2), a political subdivision can be liable for the negligent maintenance of its sewer system.

{¶ 20} The Andersons attached the following evidence to their motion contra to summary judgment: (1) the affidavit of Mr. Anderson; (2) pictures depicting the school maintenance building, runoff points on the Andersons' property as well as Warren's property, and the ditch along Sweetapple Road where the runoff water from the maintenance building now discharges; (3) an invoice to Warren from the Continuous Gutter Pros LLC depicting the costs of the 2014 updates to the school maintenance building's drainage system; (4) the affidavit of Liszkay and his report that was also attached to Warren's supplemental motion for summary judgment; (5) the affidavit of Sandy Lahmers, a representative of the Washington SWCD; and (6) a "Technical Assistance Report" prepared by Washington SWCD.

{¶ 21} Mr. Anderson's affidavit essentially recited the facts as he asserted in his deposition. In the affidavit, Mr. Anderson referred to the maintenance building's drainage as a "sewer system." The invoice from The Continuous Gutter Pros LLC shows that Warren owed $9,234.47 for the 2014 changes made to the maintenance building's rainwater drainage system. The invoice is dated August 18, 2014. From the invoice, it appears that Warren had 6 inch gutters installed on the exterior of the maintenance building. The invoice also lists the costs of labor and material necessary to dig a ditch in order to discharge the runoff water towards Sweetapple Road.

{¶ 22} In his affidavit, Liszkay states similar conclusions as those found in his report. However, Liszkay's affidavit also asserts information not found in his report. For example, in his affidavit, Liszkay discusses the definition of a "sewer system." Liszkay states that gutters and downspouts are part of a larger sewer system, which conveys sewage, waste, and rainwater from a point of origin to a point of disposal. In his affidavit, Liszkay concludes:

> a) That Mr. Satyapriya's opinion is that there was a negligible amount of water that was redirected onto Plaintiff's property located at 426 Sweetapple Drive, Vincent, OH. This conclusion is invalid in that it did not take into account the entire amount of surface area directed by the entire 5200 square foot area.
>
> b) That the probable cause of Plaintiff's damages was the malfunctioning of the conduits used in Defendant's sewer system located at their property as a result of improper conduit maintenance and installation.
>
> c) That the remedy to the problem Defendant created would not require Defendant to redesign or reconstruct the sewer system in issue. It would be a simple matter of timely inspections and maintenance of conduits.

d) That the Warren Local School District inadequately maintained its conduits and sewer system to ensure adequate size to handle the redirected water from the roof produced by the 5200 square foot building.

e) That the conduits on the north side of the school bus garage was [sic] not adequate size (consisting of conventional household gutters), to handle peak runoff from a building of 5200 square feet, thereby causing excess water runoff onto Plaintiff's property, instead of being correctly, and naturally routed to a sewer, or storm sewer.

f) That the conduits Warren Local School District had installed were not properly attached to the building on the north side of the bus garage thereby causing water that was intentionally redirected to flow onto Plaintiff's property causing damage.

{¶ 23} Warren filed a reply in support of their supplemental motion for summary judgment. The Andersons then filed an additional supplemental memorandum regarding summary judgment.

{¶ 24} On May 23, 2016, the trial court awarded summary judgment in favor of Warren. In its entry granting Warren's supplemental motion for summary judgment, the trial court stated: "The Court finds that there are no genuine issues as to any material fact, that the Defendant is entitled to summary judgment as a matter of Law [sic] pursuant to the doctrine of governmental immunity and that the evidence is such that reasonable minds can come to but one conclusion and that conclusion is adverse to the Plaintiffs in this case."

{¶ 25} The Andersons then filed this timely appeal of the trial court's decision to award summary judgment in favor of Warren.

II. Assignments of Error

{¶ 26} The Andersons assert two assignments of error for our review:

Assignment of Error No. 1:

THE TRIAL COURT COMMITTED PREJUDICIAL ERROR BY DENYING APPELLANT'S MOTION FOR A DEFAULT JUDGMENT.

Assignment of Error No. 2:

THE TRIAL COURT COMMITTED PREJUDICIAL ERROR BY GRANTING APPELEE'S [SIC] MOTION FOR SUMMARY JUDGMENT BY NOT CONSIDERING APPELLANT'S PROPERLY FORMATTED AFFIDAVITS AND BY CONSTRUING THE EVIDENCE IN A LIGHT MOST FAVORABLE TO THE MOVING PARTY ---- NOT THE NON-MOVING PARTY.

III. Law and Analysis

A. The Trial Court Did Not Abuse Its Discretion By Allowing Warren to File a Late Answer to the Andersons' Amended Complaint.

{¶ 27} In their first assignment of error, the Andersons argue that the trial court erred by denying their motion for a default judgment. The Andersons contend that Warren failed to file an answer to their amended complaint within the time limit prescribed by Civ.R. 15(A), i.e., fourteen days after the amended complaint was served on Warren on December 29, 2015. Thus, it is the Andersons' position that the trial court should have granted default judgment in their favor because Warren filed its motion for leave to file an answer, *instanter* on February 9, 2016.

{¶ 28} Warren argues that it always intended to defend against the Andersons' claims. Warren also contends that it had no way of knowing that the trial court granted the Andersons' motion for leave to amend their complaint because they did not receive the judgment entry from the clerk's office until January 21, 2016. Further, Warren asserts that the trial court, fully aware

of the case's procedural history and the "mix up" at the clerk's office properly exercised its discretion and permitted it to file an answer to the Andersons' amended complaint.

1. Default Judgment Standard of Review

{¶ 29} Civ.R. 6(B)(2) explains when a court may grant leave for a late filing:

> When by these rules or by a notice given thereunder or by order of court an act is required or allowed to be done at or within a specified time, the court for cause shown may at any time in its discretion * * * upon motion made after the expiration of the specified period permit the act to be done where the failure to act was the result of excusable neglect; but it may not extend the time for taking any action under Civ.R. 50(B), Civ.R. 59(B), Civ.R. 59(D), and Civ.R. 60(B), except to the extent and under the conditions stated in them.

"Under Civ.R. 55, when a party defending a claim has 'failed to plead or otherwise defend,' the court may, upon motion, enter a default judgment on behalf of the party asserting the claim. If the defending party has failed to appear in the action, a default judgment may be entered without notice." (Citations omitted.) *Ohio Valley Radiology Assocs., Inc. v. Ohio Valley Hosp. Assn.*, 28 Ohio St.3d 118, 120, 502 N.E.2d 599 (1986); *see also* Civ.R. 55.

{¶ 30} The Ohio Supreme Court explained further that:

> Default, under both pre-Civil Rule decisions and under Civ.R. 55(A), is a clearly defined concept. A default judgment is a judgment entered against a defendant who has failed to timely plead in response to an affirmative pleading. As stated by the court in *Reese v. Proppe* (1981), 3 Ohio App.3d 103, 105, 443 N.E.2d 992 '[a] default by a defendant * * * arises only when the defendant has failed to contest the allegations raised in the complaint and it is thus proper to render default

> judgment against the defendant as liability has been admitted or "confessed" by the omission of statements refuting the plaintiff's claims. * * * ' It is only when the party against whom a claim is sought fails to contest the opposing party's allegations by either pleading or 'otherwise defend[ing]' that a default arises. This rule * * * is logically consistent with the general rule of pleading contained in Civ.R. 8(D), which reads in part that '[a]verments in a pleading to which a responsive pleading is required * * * are admitted when not denied in the responsive pleading.'

(Citation omitted.) *Id.* at 121.

{¶ 31} "Although Civ.R. 55(A) permits a default judgment when a defendant fails to answer or otherwise defend an action, a trial court has the discretion to permit an answer to be filed after the time for filing has run in the case of excusable neglect." *Kitson v. Gordon Food Serv.*, 9th Dist. Medina No. 15CA0078-M, 2016-Ohio-7079, ¶ 14, citing *Davis v. Immediate Med. Serv.*, Inc., 80 Ohio St.3d 10, 14, 684 N.E.2d 292 (1997). " 'Neglect under Civ.R. 6(B)(2) has been described as conduct that falls substantially below what is reasonable under the circumstances.' " *Id.*, quoting *Davis* at 14, citing *State ex rel. Weiss v. Indus. Comm.*, 65 Ohio St.3d 470, 473, 605 N.E.2d 37 (1992). "This determination is made with reference to all of the surrounding facts and circumstances and with due consideration for the principle that cases should be decided on their merits when possible." *Id*., citing *State ex rel. Lindenschmidt v. Butler Cty. Bd. of Commrs*., 72 Ohio St.3d 464, 466, 650 N.E.2d 1343 (1995). "A trial court's decision in this regard is reviewed for an abuse of discretion." *Id*., citing *Lindenschimidt* at 465.

2. Analysis

{¶ 32} After reviewing the surrounding facts and circumstances in this case, we do not find that the trial court abused its discretion in allowing Warren to file a late answer to the Andersons' amended complaint. First, the Andersons filed their amended complaint late according to the trial court's December 7, 2015 time frame order. The order stated that the Andersons were to file their amended complaint by December 11, 2015. The Andersons filed their motion to amend their complaint and their amended complaint on December 23, 2015. Nevertheless, the trial court allowed the Andersons to file their amended complaint late.

{¶ 33} After the Andersons filed their motion to amend their complaint, Warren filed a motion contra and a motion to strike the Andersons' amended complaint. On February 9, 2016, Warren filed a combined motion contra to the Andersons' motion for default judgment and motion for leave to file an answer to the Andersons' amended complaint *instanter*. In its motion, Warren claimed that it did not receive the judgment entry granting the Andersons' motion to file their amended complaint until January 21, 2016. The trial court granted Warren motion for leave to file its answer to the Andersons' amended complaint.

{¶ 34} Accordingly, it appears that, at all times, Warren was contesting the Andersons' claims. Even before the Andersons filed their motion for default judgment, Warren's first motion for summary judgment was still pending. Considering the surrounding facts and circumstances, along with the tenet of Ohio law that cases should be decided on their merits, we do not find that the trial court abused its discretion by permitting Warren to answer the amended complaint. The Andersons' first assignment of error is overruled.

B. The Trial Court's Grant of Summary Judgment in Favor of Warren Was Proper.

{¶ 35} In their second assignment of error, the Andersons contend that the trial court erred by granting summary judgment in favor of Warren. The Andersons argue that Warren is

not entitled to governmental immunity. The Andersons assert that under R.C. 2744.02(B)(2), Warren is liable for damage to their property because Warren negligently performed the proprietary function of maintenance, destruction, operation, and upkeep of a sewer system. The Andersons claim that the rainwater drainage system of Warren's maintenance building constitutes a "sewer system" and that the remedy for the runoff issues involved routine maintenance of the building's gutters and downspouts.

{¶ 36} Warren argues that it is entitled to governmental immunity because the exception under R.C. 2744.02(B)(2) does not apply. First, Warren contends that the maintenance building's rainwater drainage system does not constitute a "sewer system" as contemplated by the immunity statute. Second, Warren argues that even if it does constitute a sewer system, the remedy involves redesign and reconstruction of the building's gutters, downspouts, and underground disposal pipes. Warren claims that because the remedy involves redesign and reconstruction of a sewer system, it is a governmental function, for which governmental immunity would attach.

1. Summary Judgment Standard of Review

{¶ 37} 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 and the inferences that can be drawn from it to determine whether summary judgment is appropriate. *Harter v. Chillicothe Long-Term Care, Inc.*, 4th Dist. Ross No. 11CA3277, 2012-Ohio-2464, ¶ 12; *Grimes v. Grimes*, 4th Dist. Washington No. 08CA35, 2009-Ohio-3126, ¶ 16.

{¶ 38} Summary judgment is appropriate only when the following have been established: (1) that there is no genuine issue as to any material fact; (2) that the moving party is entitled to

judgment as a matter of law; and (3) that reasonable minds can come to only one conclusion, and that conclusion is adverse to the nonmoving party. Civ.R. 56(C); *DIRECTV, Inc. v. Levin,* 128 Ohio St.3d 68, 2010-Ohio-6279, 941 N.E.2d 1187, ¶ 15. In ruling on a motion for summary judgment, the court must construe the record and all inferences therefrom in the nonmoving party's favor. Civ.R. 56(C). The party moving for summary judgment bears the initial burden to demonstrate that no genuine issues of material fact exist and that they are entitled to judgment in their favor as a matter of law. *Dresher v. Burt*, 75 Ohio St.3d 280, 292-293, 662 N.E.2d 264 (1996). To meet its burden, the moving party must specifically refer 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," that affirmatively demonstrate that the nonmoving party has no evidence to support the nonmoving party's claims. Civ.R. 56(C); *Dresher* at 293. Moreover, the trial court may consider evidence not expressly mentioned in Civ.R. 56(C) if such evidence is incorporated by reference in a properly framed affidavit pursuant to Civ.R. 56(E). *Discover Bank v. Combs*, 4th Dist. Pickaway No. 11CA25, 2012-Ohio-3150, ¶ 17; *Wagner v. Young*, 4th Dist. Athens No. CA1435, 1990 WL 119247, *4 (Aug. 8, 1990). Once that burden is met, the nonmoving party then has a reciprocal burden to set forth specific facts to show that there is a genuine issue for trial. *Dresher* at 293; Civ.R. 56(E).

2. Governmental Immunity

{¶ 39} "The Political Subdivision Tort Liability Act, as codified in R.C. Chapter 2744, sets forth a three-tiered analysis for determining whether a political subdivision is immune from liability." *Cater v. Cleveland,* 83 Ohio St.3d 24, 28, 697 N.E.2d 610 (1998); *see also Elston v. Howland Local Schools,* 113 Ohio St.3d 314, 2007–Ohio–2070, 865 N.E.2d 845, ¶ 10. The first tier involves determining whether the political subdivision is generally immune from liability

under R.C. 2744.02(A)(1). *Elston* at ¶ 10; *see also Hortman v. Miamisburg*, 110 Ohio St.3d 194, 2006–Ohio–4251, 852 N.E.2d 716, ¶ 12.

{¶ 40} Once immunity is generally established, "the second tier of analysis is whether any of the five exceptions to immunity in subsection (B) apply." *Id.* at ¶ 12. Only when one of the exceptions listed in R.C. 2744.02(B) applies do courts move to the third tier. *Terry v. Ottawa Cty. Bd. of Mental Retardation & Dev. Disabilities*, 151 Ohio App.3d 234, 2002–Ohio–7299, 783 N.E.2d 959, ¶ 13 (6th Dist.); *Dolan v. Glouster*, 173 Ohio App.3d 617, 2007–Ohio–6275, 879 N.E.2d 838, ¶ 17 (4th Dist.); *see also* Gotherman & Babbit, Ohio Municipal Law (2d Ed.1992), Section 32.4 ("The defenses and immunities provided to a political subdivision by R.C. 2744.03(A) only become relevant if one of the five exceptions to immunity in R.C. 2744.02(B) applies to render the subdivision vulnerable to liability"). If an exception to the general immunity provision does apply, "under the third tier of analysis, immunity can be reinstated if the political subdivision can successfully argue that any of the defenses contained in R.C. 2744.03 applies." *Hortman* at ¶ 12.

{¶ 41} "Whether a political subdivision is entitled to statutory immunity under R.C. Chapter 2744 presents a question of law." *Williams v. Glouster*, 4th Dist. Athens No. 10CA58, 2012-Ohio-1283, ¶ 15, citing *Conley v. Shearer*, 64 Ohio St.3d 284, 292, 1992–Ohio–133, 595 N.E.2d 862 (1992) and *Murray v. Chillicothe*, 164 Ohio App.3d 294, 2005–Ohio–5864, 842 N.E.2d 95, ¶ 11 (4th Dist.). The parties do not dispute that Warren is a political subdivision subject to immunity under R.C. Chapter 2744. Instead, the dispute here focuses on whether or not the exception in R.C. 2744.02(B)(2) applies.

3. R.C. 2744.02(B)(2)

{¶ 42} "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." *Williams* at ¶ 17. "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.' " *Id*. According to R.C. 2744.01(G)(2)(d), a "proprietary function" includes "[t]he maintenance, destruction, operation, and upkeep of a sewer system."

{¶ 43} "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." *Id*. at ¶ 18. "A 'governmental function' includes '[t]he provision or nonprovision, planning or design, construction or reconstruction of * * * a sewer system.' R.C. 2744.01(C)(2)(l).

4. The Maintenance Building's Gutters, Downspouts and Discharge Pipes Do Not Constitute a "Sewer System" as Contemplated by the Governmental Immunity Statute.

{¶ 44} In *Williams*, 2012-Ohio-1283, we stated at ¶ 19:

> Additionally, our review of the pertinent case law in this area reveals that storm drainage systems, like the one at issue herein, are analyzed under the same framework as sanitary sewer systems for purposes of applying R.C. Chapter 2744's grant of sovereign immunity. See, generally, *Ivory v. Township of Austintown*, Mahoning App. No. 10MA106, 2011–Ohio–3171 (equating duty to maintain sewer with duty to maintain storm water catch basin); *Martin v. Gahanna*, Franklin App. No. 06AP1175, 2007–Ohio–2651 (determining maintenance of a storm water system to be a proprietary function).

{¶ 45} The first issue here is whether the maintenance building's rainwater drainage system constitutes a "sewer system" in regards to the governmental immunity statute. The Andersons contend that it does because the gutters, downspouts, and underground pipes collect rainwater and carry it to a public storm sewer. The Andersons cite to the affidavits of Liszkay and Mr. Anderson. Liszkay's affidavit plainly states that the gutters and downspouts on the maintenance building are part of a sewer system. Mr. Anderson's affidavit specifically refers to the maintenance building's drainage as a "sewer system."

{¶ 46} Warren argues to the contrary. Warren contends that the Andersons' entire theory of their case rests on the allegation that their property was damaged by surface water, not an underground sewer system. Warren claims that before the Andersons filed their amended complaint, Mr. Anderson, in his deposition, testified that his property was damaged by Warren's usage of undersized gutters on the maintenance building. Warren likewise contends that Liszkay's initial report, created before his affidavit, blamed the Andersons' property damage on the lack of proper disposal of water runoff from the maintenance building's roof. Warren argues that the Andersons' interpretation of the term "sewer system" is broader than the legislature intended.

{¶ 47} According to Mr. Anderson's deposition, the Warren maintenance building's rainwater runoff system included gutters and downspouts that would route runoff water to a drain, which in turn would discharge the water onto Anderson's property. Mr. Anderson stated that in "'98, [or] '99" Warren installed a sump pump in the loading dock of the maintenance building and plugged the pipe that discharged water onto his property. Mr. Anderson also stated that Warren installed a "three-inch line" that discharged water into a ditch alongside of Sweetapple Road. In their original complaint, the Andersons did not reference a "sewer system."

Instead, they alleged that Warren was liable for its negligence and "lack of proper disposal of the roof water from the Warren property building* * *[.]" In their amended complaint, the Andersons stated that the "malfunctioning" of the gutter and downspout system was the result of improper routine maintenance. The amended complaint also stated that the remedy to the problem Warren created would not require Warren to redesign or reconstruct the drainage system, but would only be a matter of timely inspections and routine maintenance.

{¶ 48} Throughout the proceedings, the Andersons have asserted that the maintenance building's drainage of rainwater was inadequate. The evidence provides that, at least initially, the gutters and downspouts on the maintenance building collected runoff rainwater and disposed of it through a pipe located above and towards the Andersons' property. After Mr. Anderson talked to Warren officials about the drainage issues on his property, Warren constructed a new pipe to dispose the water in a ditch along Sweetapple Road. Warren also installed larger gutters on the maintenance building. There is no indication that the building's drainage system was a part of some larger sewer system beyond the gutters, downspouts, and the underground disposal pipe.

{¶ 49} The question is not what the parties might call the drainage system utilized by the Warren maintenance building. Instead it is whether the gutter and downspout system qualifies as a "sewer system" contemplated by R.C. 2744.01(C)(2)(l). There is no definition of "sewer system" in R.C. 2744. The interpretation of a statute involves a question of law, which we review de novo. *Hayslip v. Hanshaw*, 4th Dist. Highland No. 15CA20, 2016-Ohio-3339, ¶ 12.

{¶ 50} In construing a statute, a court's paramount concern is the legislature's intent in enacting it. *See, e.g., State ex rel. Cincinnati Enquirer v. Jones–Kelley*, 118 Ohio St.3d 81, 2008-Ohio-1770, 886 N.E.2d 206, ¶ 17; *State ex rel. Russell v. Thornton*, 111 Ohio St.3d 409, 2006-Ohio-5858, 856 N.E.2d 966, ¶ 11. " 'The court must look to the statute itself to determine

legislative intent, and if such intent is clearly expressed therein, the statute may not be restricted, constricted, qualified, narrowed, enlarged or abridged; significance and effect should, if possible, be accorded to every word, phrase, sentence and part of an act * * *.' " *State ex rel. McGraw v. Gorman*, 17 Ohio St.3d 147, 149, 478 N.E.2d 770 (1985), quoting *Wachendorf v. Shaver*, 149 Ohio St. 231, 78 N.E.2d 370 (1948), paragraph five of the syllabus. To determine legislative intent, a court must " 'read words and phrases in context and construe them in accordance with rules of grammar and common usage.' " *Jones-Kelley* at ¶ 17, quoting *Thornton* at ¶ 11. "In construing the terms of a particular statute, words must be given their usual, normal, and/or customary meanings." *Proctor v. Kardassilaris*, 115 Ohio St.3d 71, 2007-Ohio-4838, 873 N.E.2d 872, ¶ 12.

{¶ 51} When the language of a statute is plain and unambiguous and conveys a clear and definite meaning, there is no need to apply rules of statutory construction. *Id.*; *see also Cline v. Ohio Bur. of Motor Vehicles*, 61 Ohio St.3d 93, 96, 573 N.E.2d 77 (1991); *Sears v. Weimer*, 143 Ohio St. 312, 55 N.E.2d 413 (1944), paragraph five of the syllabus. However, when a statute is subject to various interpretations, a court may invoke rules of statutory construction to arrive at legislative intent. R.C. 1.49; *Cline*, supra; *Carter v. Youngstown*, 146 Ohio St. 203, 65 N.E.2d 63 (1946), paragraph one of the syllabus.

{¶ 52} Notably, most cases involving political subdivision immunity and a sewer system or a storm water system are brought against a municipality or county government. *See e.g. Pierce v. Gallipolis*, 4th Dist. Gallia No. 14CA3, 2015-Ohio-2995; *Engel v. Williams Cty*., 6th Dist. Fulton No. F-07-027, 2008-Ohio-3852; *Laries, Inc. v. City of Athens*, 2015-Ohio-2750, 39 N.E.3d 788 (4th Dist.). It is clear that Warren does not operate or maintain a sewer system in the same regard that a county or city government might. However, the Andersons assert that the

maintenance building's gutters, downspouts, and drainage pipes collect rainwater and carry it via a conduit to a public storm sewer, thus constituting a "sewer system."

{¶ 53} Using a customary definition of the words "sewer system," we find that the Andersons' assertion is too broad of an interpretation. A sewer system consisting of only gutters and downspouts attached to a building and underground disposal pipes would characterize normal household rainwater disposal systems as their own "sewer systems." The discharging pipes do not connect into a system; instead they dispose of the collected runoff into a ditch alongside Sweetapple Road. There was no specific evidence introduced by the Andersons demonstrating the flow of the runoff beyond this point. Even assuming that the rainwater runoff may be disposed in a public sewer, no evidence was provided that the public sewer is operated by Warren. Accordingly, it is our conclusion that the maintenance building's runoff drainage does not qualify as a "storm water system" or "sewer system" contemplated by the immunity statute.

{¶ 54} In *Guenther v. Springfield Twp. Trustees*, 2012-Ohio-203, 970 N.E.2d 1058 (2d Dist.), the township authorized the installation of two drainage culverts that were installed underneath the road and drained water through the appellant Guenther's property into an open ditch behind the property. *Id.* at ¶ 3. Guenther brought a claim against the township for negligently failing to maintain the drainage ditch, which caused water overflow when it rained. *Id.* at ¶ 5. The Second District Court of Appeals decided that there was no evidence that the pipes and ditch were part of a larger "system." *Id.* at ¶ 15. The court concluded that the two pipes and ditch were not a "sewer system" that exposes the township to liability for negligent maintenance. *Id.*

{¶ 55} Here, we similarly conclude that Warren's maintenance building's gutters, downspouts, and underground disposal pipes do not constitute a sewer system contemplated by R.C. 2744. Therefore, Warren cannot be exposed to liability for negligent performance of the proprietary function of maintaining a sewer system.

5. Governmental Function, Not Proprietary Function

{¶ 56} Even if we were to assume that the Warren maintenance building's drainage constituted a sewer system, we would still find that immunity would apply. "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." *Essman v. City of Portsmouth*, 4th Dist. Scioto No. 09CA3325, 2010-Ohio-4837, ¶ 29. "A 'governmental function' includes '[t]he provision or nonprovision, planning or design, construction or reconstruction of * * * a sewer system.' " *Id*; R.C. 2744.01(C)(2)(l). By contrast, a 'proprietary function' includes '[t]he maintenance, destruction, operation, and upkeep of a sewer system.'

{¶ 57} In *Laries, Inc. v. City of Athens*, 2015-Ohio-2750, 39 N.E.3d 788 (4th Dist.), this Court has previously stated:

> Our courts of appeals have developed a body of law holding that subdivisions are immune from claims that flow from the design and construction of a sewer system. *Coleman*, supra, at ¶ 19, citing *Spitzer v. Mid Continent Constr. Co.*, Inc., 8th Dist. Cuyahoga No. 89177, 2007-Ohio-6067, 2007 WL 3377212, at ¶ 20. "[T]he design and construction of a storm water runoff system constitutes a 'governmental function' for which a political subdivision is statutorily immune from liability." *Ferguson v. Breeding*, 4th Dist. Lawrence No. 99CA22, 2000 WL 1234262. A distinction exists between damages sustained to

> property as a result of a sewer system's actual design and damages sustained due to a political subdivision's failure to perform routine maintenance on the system, as designed. *State ex rel. Nix v. Bath Twp.*, 9th Dist. Summit No. 25633, 2011-Ohio-5636, 2011 WL 5188079, ¶ 14.

Id. at ¶ 25.

{¶ 58} "Determining whether an allegation of negligence relates to the maintenance, operation, or upkeep of a sewer system or, instead, the design, construction, or reconstruction of a sewer system is not always a simple inquiry." *Essman*, 2010-Ohio-4837 at ¶ 32. However, some guidance does exist. For example, "when remedying the sewer problem would involve little discretion, but, instead, would be a matter of routine maintenance, inspection, repair, removal of obstructions, or general repair of deterioration, then the complaint is properly characterized as a maintenance, operation, or upkeep issue." *Id*., citing *Martin v. Gahanna*, 10th Dist. Franklin No. 06AP–1175, 2007-Ohio-2651, 2007 WL 1560283, ¶ 17, and *Zimmerman v. Summit Cty*., 9th Dist. Summit No. 17610, 1997 WL 22588 (Jan. 15, 1997). In constrast, "[w]hen remedying a problem would require a city to, in essence, redesign or reconstruct the sewer system, then the complaint presents a design or construction issue." *Id*., citing *Zimmerman* at *9.

{¶ 59} In the case at bar, the Andersons contend that a reconstruction or redesign of the maintenance building's gutters, downspouts, and pipes was not necessary to remedy the issues Warren created. Instead, the Andersons contend that the remedies needed, as represented by the Continuous Gutter Pros LLC invoice, consisted of routine maintenance. Warren, on the other hand, argues that the Andersons' claims relate to the design of the gutters, rather than their maintenance.

{¶ 60} In his report, Liszkay stated and concluded the following:

In the current situation (as I understand it), all the downspout drains flow to the west and discharge on Sweetapple Road and do not discharge onto Mr. Anderson's property. However, much of the parking lot water still is routed towards Mr. Anderson's property. That was not the purpose of this investigation.

I understand that the gutters on the original building were standard four or five inch gutters. Currently, they are larger.

* * *

To a reasonable degree of scientific certainty, the probable cause of the water damage to the Anderson property, therefore the bowing of Mr. Anderson's basement wall, was lack of proper disposal of roof runoff from the school building located up hill from Mr. Anderson's house.

{¶ 61} In his affidavit, Liszkay stated:

c) That the remedy to the problem Defendant created would not require Defendant to redesign or reconstruct the sewer system in issue. It would be a simple matter of timely inspections and maintenance of conduits.

d) That the Warren Local School District inadequately maintained its conduits and sewer system to ensure adequate size to handle the redirected water from the roof produced by the 5200 square foot building.

e) That the conduits on the north side of the school bus garage was [sic] not adequate size (consisting of conventional household gutters), to handle peak runoff from a building of 5200 square feet, thereby causing excess water runoff onto Plaintiff's property, instead of being correctly, and naturally routed to a sewer, or storm sewer.

> f) That the conduits Warren Local School District had installed were not properly attached to the building on the north side of the bus garage thereby causing water that was intentionally redirected to flow onto Plaintiff's property causing damage.

{¶ 62} The Washington SWCD's inspection noted that at the time of their visit, the gutter on the north side of the building, closest to the Andersons' property was not in working order because (1) the gutters were conventional household gutters and appeared to be inadequate to handle peak runoff from a building of the maintenance building's size; and (2) the downspouts were also not properly attached to the gutter. The Washington SWCD recommended to Warren that it should seek engineering assistance to assess their gutter and underground pipe system to ensure that they are of adequate size to handle the runoff that the roof produces.

{¶ 63} A consistent analysis both by the Washington SWCD and the Andersons' own expert, Liszkay, is that the gutters and downspouts on Warren's maintenance building were inadequate to handle rainwater runoff from the roof of the building. The Andersons and Liszkay attempt to characterize the issue as a failure on Warren's behalf to routinely inspect the gutters and downspout to ensure their adequate size. This is not persuasive. Changing the size of the gutters, and redirecting the water initially discharged towards the Andersons' property would require, essentially, a redesign of the maintenance building's drainage system. Conversely, the Andersons have failed to set forth remedial measures that constitute routine maintenance, such as removal of obstructions or a simple repair of a deterioration.

{¶ 64} As this Court explained in *Essman*, 2010-Ohio-4837:

> We begin our analysis of the statute by examining the plain meanings of the terms "maintenance, operation, and upkeep" and "upgrade" to determine whether the *Hafner* court properly found the terms to be synonymous. Webster's

Encyclopedic Dictionary (1989) defines "maintenance" as "a maintaining or being maintained." *Id.* at 601, 896 N.E.2d 1011. "Maintain" is defined as "to cause to remain unaltered or unimpaired." *Id.* Webster's does not define "unaltered or unimpaired," but it does define "alter" and "impair." "Alter" means "to make different, modify, change." *Id.* at 27, 896 N.E.2d 1011. "Impair" means "to lessen in quality or strength, damage." *Id.* at 485, 896 N.E.2d 1011. Merriam-Webster's online dictionary defines "maintenance" as "the act of maintaining: the state of being maintained. http://www.merriam-webster.com/dictionary/maintenance. To "maintain" means "to keep in an existing state (as of repair, efficiency, of validity): to preserve from failure or decline." http://www.merriam-webster.com/dictionary/maintain. We find this latter definition most appropriate to define the term "maintenance" as used in R.C. 2744.01(g)(2)(d). Thus, as used in the statute, "maintenance" means the act of keeping the sewer in its existing state of repair and to preserve it from failure or decline.

Webster's defines "operation" as "the act of operating, or an instance of this" or "the way in which a thing works." Webster's, supra, at 703. To "operate" means "to be in action, function" or "to put into action, cause to work." *Id.* Merriam-Webster's online dictionary defines "operation" as "performance of a practical work or of something involving the practical application of principles or processes" or "the quality or state of being functional or operative" or "a method or manner of functioning." http:// www.merriam-webster.com/dictionary/ operation.

> Merriam-Webster's defines "upkeep" as "the act of maintaining in good condition: the state of being maintained in good condition." http:// www.merriam-webster.com/dictionary/ upkeep. Webster's defines "upkeep" as "the maintenance of buildings, roads, equipment, etc." Webster's, supra, at 1081.
>
> An "upgrade" is but another word for improvement. http:// www.merriam-webster.com/dictionary/upgrade. Thus, to "upgrade" is to "improve." To improve means "to enhance in value or quality: make better." http:// www.merriam-webster.com/ dictionary/improve. Because an upgrade to a sewer system would mean enhancing the system's value, upgrade is not synonymous with upkeep. "Upkeep" means "the act of maintaining in good condition." Upgrading a sewer system would require more than retaining the system in good condition. Upgrading involves more than simple maintenance. Rather, upgrading involves a positive act of improvement. The Ohio General Assembly did not specify the upgrade of a sewer system as a proprietary function. Thus, we believe that *Hafner* and *Moore,* which hold that a failure to upgrade or update an inadequate sewer system is the equivalent of a failure to maintain or upkeep, are misguided and do not apply a proper statutory interpretation analysis. Rather, we believe that a political subdivision's decision regarding an upgrade of its sewer system is a governmental function. A decision to upgrade requires a political subdivision to weigh various considerations, including the availability of fiscal resources, the use and acquisition of additional equipment, and the overall design of the system. See *Duvall; Alden.*

Id. at ¶¶ 41-44.

{¶ 65} Applying the foregoing principles, it is our conclusion that even examining the facts in favor of the nonmoving party on the issue of summary judgment, the Andersons' allegation of negligence against Warren relates to the planning, design, construction or reconstruction of the Warren maintenance building's drainage system. The problems of the drainage system asserted by the Andersons related to the inadequacy of the gutters and downspouts on the main building and the discharge of water towards their property. The remedy to that situation would require Warren to install new, larger gutters and downspouts and also construct an alternative discharge route of the runoff rainwater from the building's roof. Because the redesign of the assumed sewer system is a governmental function, under R.C. 2744.01(C)(2)(l), the proprietary function exception does not apply here. Accordingly, even assuming that the maintenance building's drainage constitutes a "sewer system," Warren would still be entitled to governmental immunity.

6. Another Exception To Governmental Immunity Does Not Apply.

{¶ 66} Both in their amended complaint below and their appellate brief before this Court, the Andersons assert that Warren may be liable for damages stemming from the negligent maintenance of its buildings or grounds. In its decision awarding summary judgment in favor of Warren, the trial court addressed the Andersons' assertion. The trial court stated, "Plaintiffs' assertion of the 'physical-defect' exemption fails entirely as the damage to Plaintiff's [sic] property is on adjacent property, not on the grounds of [sic] buildings used in connection with a government function."

{¶ 67} R.C. 2744.02(B)(4) provides another exception to the general grant of political subdivision immunity. R.C. 2744.02(B)(4) provides:

> Except as otherwise provided in section 3746.24 of the Revised Code, political subdivisions are liable for injury, death, or loss to person or property that is caused by the negligence of their employees and that occurs within or on the grounds of, and is due to physical defects within or on the grounds of, buildings that are used in connection with the performance of a governmental function, including, but not limited to, office buildings and courthouses, but not including jails, places of juvenile detention, workhouses, or any other detention facility, as defined in section 2921.01 of the Revised Code.

"* * *[T]o establish that the R.C. 2744.02(B)(4) exception applies, a plaintiff must demonstrate that the injury (1) resulted from a political subdivision employee's negligence, (2) occurred within or on the grounds of buildings used in connection with a governmental function, and (3) resulted from a physical defect within or on those grounds." *Leasure v. Adena Local School District*, 2012-Ohio-3071, 973 N.E.2d 810, ¶ 15 (4th Dist.), citing *Moss v. Lorain Cty. Bd. Of Mental Retardation,* 185 Ohio App.3d 395, 2009-Ohio-6931, 924 N.E.2d 401, ¶ 13 (9th Dist.).

{¶ 68} In the case sub judice, the alleged damage occurred to and on the Andersons' property and not on or within the grounds of the Warren maintenance building. Accordingly, the Andersons cannot establish the exception to governmental immunity found in R.C. 2744.02(B)(4).

IV. Conclusion

{¶ 69} We find that the trial court did not abuse its discretion in allowing Warren to file a late answer to the Andersons' amended complaint. Also, reasonable minds could only conclude that Warren is entitled to governmental immunity as a matter of law. We find that even when construing the facts in favor of the Andersons, we conclude (1) that the Warren maintenance

building's gutters, downspouts, and drainage pipes do not constitute a "sewer system;" and (2) that even assuming arguendo that they did constitute a sewer system, the Andersons' claims relate to the design of the sewer system and not to Warren's negligence in failing to maintain a sewer system. Accordingly, the Andersons cannot establish that an exception to the general grant of immunity exists relating to Warren's maintenance, destruction, operation, and upkeep of a sewer system, which the immunity statute identifies as a proprietary function. Therefore, the trial court did not erroneously grant summary judgment in favor of Warren.

{¶ 70} We overrule both of the Andersons' assignments of error. The judgment of the trial court is affirmed.

JUDGMENT AFFIRMED.

JUDGMENT ENTRY

It is ordered that the JUDGMENT IS AFFIRMED. Appellant shall pay the costs herein taxed.

The Court finds there were reasonable grounds for this appeal.

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

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

Harsha, J. & Abele, J.: Concur in Judgment and Opinion.

For the Court

By:_____
Marie Hoover, 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.