[Cite as *Harris Farms, L.L.C. v. Madison Twp. Trustees*, 2018-Ohio-4123.]

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

HARRIS FARMS, LLC,	:	
Plaintiff-Appellee,	:	Case No. 17CA3817
vs.	:	
MADISON TOWNSHIP TRUSTEES, et al.,	:	DECISION AND JUDGMENT ENTRY
Defendants-Appellants.	:	

APPEARANCES:

Jeffrey C. Turner, Dawn M. Frick, and Katherine L. Epling, Dayton, Ohio, and Margaret Miller, Portsmouth, Ohio for appellants.

Stephen C. Rodeheffer, Portsmouth, Ohio, for appellee.

CIVIL CASE FROM COMMON PLEAS COURT
DATE JOURNALIZED: 10-3-18
ABELE, J.

{¶ 1} This is an appeal from a Scioto County Common Pleas Court judgment that denied a Civ.R. 12(C) motion for judgment on the pleadings filed by the Madison Township Trustees, Trustee Donald Lambert, Trustee James Preston, and Trustee Christopher Rase, defendants below and appellants herein. Appellants assign the following errors for review:

FIRST ASSIGNMENT OF ERROR:

"THE TRIAL COURT ERRED WHEN IT DETERMINED THAT THE MAINTENANCE OF THE DRAINAGE DITCH IS A PROPRIETARY FUNCTION AND, THEREBY, THE MADISON

> TOWNSHIP TRUSTEES ARE NOT ENTITLED TO IMMUNITY UNDER R.C. 2744.01"
> SECOND ASSIGNMENT OF ERROR:
>
> "THE TRIAL COURT ERRED WHEN IT DID NOT FIND THAT THE DEFENSE SET FORTH IN R.C. 2744.03(A)(5) APPLIED TO REINSTATE IMMUNITY FROM LIABILITY TO THE MADISON TOWNSHIP TRUSTEES, DONALD LAMBERT, TRUSTEE, JAMES PRESTON, TRUSTEE, AND CHRISTOPHER RASE, TRUSTEE, BECAUSE THE ALLEGATIONS IN THE COMPLAINT ESTABLISHED THAT THE DEFENDANTS [SIC] ACTIONS RESULTED FROM THE EXERCISE OF JUDGMENT OR DISCRETION IN 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."

{¶ 2} On March 1, 2017, appellee filed a complaint and alleged that approximately ten years earlier, appellants excavated part of the roadway in front of appellee's property in order to perform maintenance on a drainage ditch that lies between the roadway and appellee's property. Appellee asserted that the excavation "diminished or removed the lateral support that the roadway was supplying to" appellee's property and, that as a result, appellee's "property began slipping towards" the roadway. Appellee complained about the slippage, and appellants attempted to alleviate the problem. However, the attempted correction did not work and appellee's property continues to slip.

{¶ 3} Appellee asserted that appellants "are charged with the responsibility of maintaining" the road and possess a "duty * * * to maintain lateral support for [appellee]'s contiguous land." Appellee claimed that appellants refused to remedy the problem and thus (1) requested damages, and (2) requested the court to issue a mandatory injunction to order

appellants to "renovate [the road] to eliminate any further slippage."

{¶ 4} Appellants answered and denied liability. Shortly thereafter, appellants filed a motion for judgment on the pleadings that claimed, in part, that appellants are entitled to statutory immunity under R.C. Chapter 2744.[1]

{¶ 5} Appellee, however, asserted that R.C. 2744.02(B)(2) removes the general grant of immunity to which appellants are entitled. Appellee contends that (1) the maintenance of a drainage ditch constitutes a propriety function, and (2) the R.C. 2744.03(A)(5) discretionary defense does not apply.

{¶ 6} Appellants responded that the maintenance of the drainage ditch is not a propriety function and, that even if it were, appellee's complaint does not allege that any of appellants' employees were negligent. Appellants further disputed appellee's assertion that the discretionary defense does not apply to appellants' decision regarding the drainage ditch.

{¶ 7} On November 14, 2017, the trial court denied appellants' motion. The court determined that "the negligent maintenance of the storm water drainage system that resulted in flooding is a proprietary function." This appeal followed.[2]

{¶ 8} Appellants' two assignments of error assert that the trial court erred by denying its motion for judgment on the pleadings. For ease of discussion, we consider them together.

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[1] Appellants also claimed that appellee failed to bring its claim within the applicable statute of limitations.

[2] We note that "when a trial court denies a motion in which a political subdivision or its employee seeks immunity under R.C. Chapter 2744, that order denies the benefit of an alleged immunity and thus is a final, appealable order pursuant to R.C. 2744.02(C)." *Hubbell v. Xenia*, 115 Ohio St.3d 77, 2007-Ohio-4839, 873 N.E.2d 878, ¶ 27. Accordingly, "[a]n order denying a motion for judgment on the pleadings filed by a political subdivision or its employees is a final, appealable order." *Moss v. Lorain Cty. Bd. Of Mental Retardation*, 9th Dist. Lorain No. 09CA009550, 2009-Ohio-6931, ¶ 7, citing *Sullivan v. Anderson Twp.*, 122 Ohio St.3d 83, 2009–Ohio–1971, 909 N.E.2d 88, ¶ 3–4.

{¶ 9} In its first assignment of error, appellants argue that the trial court erred by concluding that the maintenance of the drainage ditch is a propriety function. Appellants contend that according to R.C. 2744.01(C)(2)(e) and (r), the maintenance of a drainage ditch constitutes a governmental function for which liability cannot attach. Appellants claim that the maintenance of a drainage ditch relates to road maintenance and flood control measures and that the drainage ditch is not part of a sewer system. Appellants additionally argue that appellee failed to plead that any employee of the political subdivision was negligent. Appellants observe that appellee's complaint alleges that appellants "contracted with an individual to alleviate the slippage."

{¶ 10} In its second assignment of error, appellants contend that the trial court erred by determining that the discretionary defense set forth in R.C. 2744.03(A)(5) does not reinstate its immunity. Appellants argue that the decision to hire an independent contractor to alleviate the slippage required the exercise of judgment as to how to use resources.

{¶ 11} Appellee counters, however, that appellants failed to establish that appellee cannot prove a set of facts that would entitle it to relief. Appellee points out that its complaint does not conclusively reveal the nature of the drainage ditch at issue. Appellee thus contends that the pleadings fail to show, beyond doubt, that appellee cannot prove a set of facts that would remove appellants' general grant of immunity.

A

STANDARD OF REVIEW

{¶ 12} Appellate courts conduct a de novo review of trial court decisions concerning a Civ.R. 12(C) motion for judgment on the pleadings. *E.g., State ex rel. Mancino v. Tuscarawas*

Cty. Court of Common Pleas, 151 Ohio St.3d 35, 2017-Ohio-7528, 85 N.E.3d 713, ¶ 8. Thus, appellate courts independently review trial court decisions regarding a Civ.R. 12(C) motion for judgment on the pleadings. *Rayess v. Educational Comm. for Foreign Med. Graduates*, 134 Ohio St.3d 509, 2012-Ohio-5676, 983 N.E.2d 1267, ¶ 18 ("Because the review of a decision to dismiss a complaint pursuant to Civ.R. 12(C) presents only questions of law, * * * our review is de novo.").

B

CIV.R. 12(C)

{¶ 13} Civ.R. 12(C) provides: "After the pleadings are closed but within such time as not to delay the trial, any party may move for judgment on the pleadings." A court that is considering a Civ.R. 12(C) motion for judgment on the pleadings "must construe the material allegations in the complaint, along with all reasonable inferences to be drawn therefrom, in favor of the nonmoving party as true." *Ohio Manufacturers' Assn. v. Ohioans for Drug Price Relief Act*, 147 Ohio St.3d 42, 2016-Ohio-3038, 59 N.E.3d 1274, ¶ 10 (citation omitted); *accord State ex rel. Leneghan v. Husted*, — Ohio St.3d —, 2018-Ohio-3361, — N.E.3d ---, ¶ 13. A court may enter judgment on the pleadings "only if it appears beyond doubt that the nonmoving party can prove no set of facts entitling it to relief." *Ohio Manufacturers' Assn.* at ¶ 10; *accord Maynard v. Norfolk S. Ry.*, 4th Dist. Scioto No. 08CA3267, 2009-Ohio-3143, ¶ 12; *Dolan v. Glouster*, 173 Ohio App.3d 617, 2007-Ohio-6275, 879 N.E.2d 838, ¶ 7 (4th Dist.). "'Thus, Civ.R. 12(C) requires a determination that no material factual issues exist and that the movant is entitled to judgment as a matter of law.'" *Rayess* at ¶ 18, quoting *State ex rel. Midwest Pride IV, Inc. v. Pontious*, 75 Ohio St.3d 565, 570, 664 N.E.2d 931 (1996). "Consequently, 'as long as

there is a set of facts, consistent with the plaintiff's complaint, which would allow the plaintiff to recover, the court may not grant a defendant's motion * * * [for judgment on the pleadings].'" *Kerr v. Logan Elm School Dist.*, 4th Dist. Pickaway No. 14CA6, 2014-Ohio-5838, 2014 WL 7477955, ¶ 12, quoting *York v. Ohio State Hwy. Patrol*, 60 Ohio St.3d 143, 145, 573 N.E.2d 1063 (1991).

{¶ 14} We further note that under the Ohio Rules of Civil Procedure, a complaint need only contain "a short and plain statement of the claim showing that the party is entitled to relief." Civ.R. 8(A)(1). Civ.R. 8(E) further directs that averments contained in a pleading be simple, concise, and direct. Accordingly, "Ohio law does not ordinarily require a plaintiff to plead operative facts with particularity." *Cincinnati v. Beretta U.S.A. Corp.*, 95 Ohio St.3d 416, 2002-Ohio-2480, 768 N.E.2d 1136, ¶ 29. We observe, however, that "'[i]n a few carefully circumscribed cases,'" a plaintiff must "'plead operative facts with particularity.'" *State ex rel. Edwards v. Toledo City School Dist. Bd. of Edn.*, 72 Ohio St.3d 106, 109, 647 N.E.2d 799 (1995), quoting *York*, 60 Ohio St.3d at 145, citing *Mitchell v. Lawson Milk Co.*, 40 Ohio St.3d 190, 532 N.E.2d 753 (1988) (employee's intentional tort claim against employer) and *Byrd v. Faber*, 57 Ohio St.3d 56, 565 N.E.2d 584 (1991) (negligent hiring claim against religious institution); *see also* S.Ct.Prac.R. 12.02(B)(1) (complaints in original actions filed in the Supreme Court); Civ.R. 9(B) (claims of fraud or mistake).

{¶ 15} Moreover, a plaintiff is not required to plead the legal theory of the case at the pleading stage and need only give reasonable notice of the claim. *State ex rel. Harris v. Toledo*, 74 Ohio St.3d 36, 656 N.E.2d 334 (1995); *see York*, 60 Ohio St.3d at 145 (stating that complaint need not contain more than "brief and sketchy allegations of fact to survive a motion to dismiss

under the notice pleading rule"). Thus, "a plaintiff is not required to prove his or her case at the pleading stage." *York*, 60 Ohio St.3d at 145; *accord Leneghan* at ¶ 16 (citing *York* and noting that party "not required to prove her case at the pleading stage").

{¶ 16} The foregoing "simplified notice-pleading standard relies on liberal discovery rules and summary-judgment motions to define disputed facts and to dispose of nonmeritorious claims." *Ogle v. Ohio Power Co.*, 180 Ohio App.3d 44, 2008-Ohio-7042, 903 N.E.2d 1284 (4th Dist.), ¶ 5. In fact, "'[b]ecause it is so easy for the pleader to satisfy the standard of Civ.R. 8(A), few complaints are subject to dismissal.'" *Id.*, quoting *Leichtman v. WLW Jacor Communications, Inc.*, 92 Ohio App.3d 232, 234, 634 N.E.2d 697 (1994).

{¶ 17} We further note that a plaintiff's complaint need not "specifically allege facts to disprove [an] affirmative defense." *Kerr* at ¶ 13. Doing so would contravene the concept of notice-pleading. *Id.* Consequently, "'the assertion of an affirmative defense does not place a burden on the non-moving party to affirmatively demonstrate or plead the absence of, or any exception to, immunity.'" *Parmertor v. Chardon Local Schools*, 2016-Ohio-761, 47 N.E.3d 942, (11th Dist.), ¶ 7, appeal not allowed, 146 Ohio St.3d 1470, 2016-Ohio-5108, 54 N.E.3d 1269, quoting *Ganzhorn v. R & T Fence Co.*, 11th Dist. Portage No. 2010–P–0059, 2011-Ohio-6851, 2011 WL 6938590, ¶ 13; *Mangelluzzi v. Morley*,, 2015-Ohio-3143, 40 N.E.3d 588 (8th Dist.), ¶ 13 (stating that when "reviewing a motion for judgment on the pleadings, a complainant's failure to allege specific facts to disprove possible affirmative defenses of the defendant should not be fatal to the complaint"). Indeed, "'complaints need not anticipate and attempt to plead around defenses.'" *Savoy v. Univ. of Akron*, 10th Dist. Franklin No. 11AP–183, 2012–Ohio–1962, ¶ 8, quoting *United States v. N. Trust Co.*, 372 F.3d 886, 888 (7th

Cir.2004). *Cf. Todd Dev. Co. v. Morgan*, 116 Ohio St.3d 461, 2008-Ohio-87, 880 N.E.2d 88, ¶ 24 (noting that "[a] plaintiff or counterclaimant moving for summary judgment does not bear the initial burden of addressing the nonmoving party's affirmative defenses"). "Effectively, adoption of such a standard would require a plaintiff to anticipate affirmative defenses and exceptions at the inception of the litigation." *Kravetz v. Streetsboro Bd. of Edn.*, 11th Dist. Portage No. 2011-P-0025, 2012-Ohio-1455, 2012 WL 1106731, ¶ 42.

{¶ 18} Accordingly, "a plaintiff need not affirmatively dispose of the immunity question altogether at the pleading stage." *Scott v. Columbus Dept. of Pub. Utils.*, 192 Ohio App.3d 465, 2011-Ohio-677, 949 N.E.2d 552 (10th Dist.), ¶ 8, citing *Fink v. Twentieth Century Homes, Inc.*, 8th Dist. Cuyahoga No. 94519, 2010-Ohio-5486, 2010 WL 4520482, ¶ 29. Instead, a plaintiff "must merely allege a set of facts that would plausibly allow [the plaintiff] to recover." *Fink* at ¶ 29, citing *Gallo v. Westfield Natl. Ins. Co.*, 8th Dist. Cuyahoga No. 91893, 2009-Ohio-1094, 2009 WL 625522; *see also Stevenson v. ABM, Inc.*, 9th Dist. No. 07CA0009–M, 2008-Ohio-3214, 2008 WL 2582990 (affirming trial court's denial of motion to dismiss when reviewing court could not ascertain from the complaint whether activity involved governmental or proprietary function); *Carr v. Armstrong*, 5th Dist. No. 98CA0032, 1998 WL 549369 (Aug. 24, 1998) (affirming denial of a Civ.R. 12(B)(6) motion to dismiss when the political subdivision's activity was not "clearly governmental on the face of the complaint"). Therefore, unless the pleadings "obviously or conclusively establish[] the affirmative defense," a court may not grant a motion for judgment on the pleadings. *Cristino v. Bur. of Workers' Comp.*, 10th Dist. No. 12AP-60, 2012-Ohio-4420, 977 N.E.2d 742, 2012 WL 4470634, ¶ 21; *see Rich v. Erie Cty. Dept. Of Human Resources*, 106 Ohio App.3d 88, 91, 665 N.E.2d 278 (6th Dist. 1995)

(stating that court may dismiss complaint based upon affirmative defense of statutory immunity when "complaint itself bears conclusive evidence that" political subdivision immune from liability for cause of action).

{¶ 19} In the case sub judice, appellants assert that the pleadings conclusively demonstrate that appellants are entitled to the general grant of immunity and that the pleadings fail to show that any of the exceptions to immunity apply. Appellee, on the other hand, contends that the pleadings do not conclusively demonstrate that appellants are entitled to immunity. Instead, appellee argues that the pleadings indicate that appellee may be able to prove a set of facts that might subject appellants to liability under R.C. Chapter 2744.

C

R.C. CHAPTER 2744

{¶ 20} R.C. Chapter 2744 establishes a three-step analysis for determining whether a political subdivision is immune from liability. *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 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 * * * in connection with a governmental or proprietary function." *Accord 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). Accordingly, "[t]he starting point is the general rule that political subdivisions are immune from tort liability." *Shalkhauser v. Medina*, 148 Ohio App.3d 41, 772 N.E.2d 129, ¶ 14 (9th Dist. 2002).

{¶ 21} Second, R.C. 2744.02(B) lists five exceptions to the general immunity granted to

political subdivisions under R.C. 2744.02(A)(1). *Cramer*; *Ryll v. Columbus Fireworks Display Co.*, 95 Ohio St.3d 467, 470, 2002-Ohio-2584, 769 N.E.2d 372, ¶ 25. Finally, R.C. 2744.03(A) sets forth several defenses that a political subdivision may assert if R.C. 2744.02(B) imposes liability. *Cramer*; *Colbert* at ¶ 9. The R.C. 2744.03(A) defenses then re-instate immunity. Whether a political subdivision is entitled to statutory immunity under Chapter 2744 presents a question of law. *E.g., Conley v. Shearer*, 64 Ohio St.3d 284, 292, 595 N.E.2d 862 (1992); *Williams v. Glouster*, 4th Dist. No. 10CA58, 2012-Ohio-1283, 2012 WL 1029470, ¶ 15.

{¶ 22} In the case sub judice, appellee contends that even if appellants are entitled to the general grant of immunity, appellee can prove a set of facts that might support holding appellants liable under R.C. 2744.02(B)(2).

{¶ 23} R.C. 2744.02(B)(2) states:

> Subject to sections 2744.03 and 2744.05 of the Revised Code, a political subdivision is liable in damages in a civil action for injury, death, or loss to person or property allegedly caused by an act or omission of the political subdivision or of any of its employees in connection with a governmental or proprietary function, as follows:
>
> * * * *
>
> (2) 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.

{¶ 24} Appellants, however, contend that appellee cannot prove any set of facts to remove appellants' general grant of immunity under R.C. Chapter 2744. Appellants assert that appellee cannot prove a set of facts to show that appellee's damages were caused by appellants' negligent performance of a proprietary function. Appellants contends that the maintenance of the drainage ditch does not constitute a proprietary function, but instead, is a governmental

function.[3]

{¶ 25} Appellants further assert that even if appellee could prove a set of facts to show that an immunity exception applies, appellee cannot prove a set of facts to illustrate that appellee's injury did not result from appellants' exercise of discretion.

{¶ 26} Appellee asserts, however, that it might be able to prove a set of facts to establish that the maintenance of the drainage ditch constitutes a proprietary function for which appellants may be held liable under R.C. 2744.02(B)(2). Appellee contends that the proper maintenance of a sewer or a storm drainage system is a proprietary act, is mandatory, and is not discretionary. Appellee contends that the pleadings fail to reveal the nature of the drainage ditch, or the actions and functions involved, so as to allow for any determination–at this stage–whether appellants are entitled to immunity. Appellee asserts that the pleadings do not conclusively demonstrate that it will be unable to produce a set of facts to show that appellants negligently performed a proprietary function.

{¶ 27} As we explain below, we agree with appellee. Even if the pleadings conclusively demonstrate that appellants are entitled to the general grant of immunity, the pleadings fail to conclusively illustrate that the maintenance of the drainage ditch involved a governmental function and that appellee cannot prove a set of facts consistent with its theory of liability.

{¶ 28} R.C. 2744.01(C) defines "governmental function" as follows:

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[3] We observe that appellants additionally argue that appellee cannot prove a set of facts to show that appellants' negligent failure to keep public roads in repair caused appellee's alleged damages. Appellants claim that the drainage ditch does not constitute a "public road." Appellee concedes in its appellate brief, however, that the ditch is not part of the roadway as defined in R.C. 2744.01(H). Moreover, appellee does not assert that the R.C. 2744.02(B)(3) "public road" exception to immunity applies in the case sub judice. We therefore do not address this issue.

> (C)(1) "Governmental function" means a function of a political subdivision that is specified in division (C)(2) of this section or that satisfies any of the following:
>
> (a) A function that is imposed upon the state as an obligation of sovereignty and that is performed by a political subdivision voluntarily or pursuant to legislative requirement;
>
> (b) A function that is for the common good of all citizens of the state;
>
> (c) A function that promotes or preserves the public peace, health, safety, or welfare; that involves activities that are not engaged in or not customarily engaged in by nongovernmental persons; and that is not specified in division (G)(2) of this section as a proprietary function.
>
> (2) A "governmental function" includes, but is not limited to, the following:
>
> * * * *
>
> (l) The provision or nonprovision, planning or design, construction, or reconstruction of a public improvement, including, but not limited to, a sewer system;
>
> * * * *
>
> (r) Flood control measures;

{¶ 29} Under R.C. 2744.01(G)(2)(d) a "proprietary function" includes "[t]he maintenance, destruction, operation, and upkeep of a sewer system."

{¶ 30} We agree with appellee that the pleadings do not conclusively indicate that the maintenance of the drainage ditch constitutes a governmental function. The limited facts that one can discern from the pleadings, when construed most strongly in appellee's favor, do not show that the maintenance of the drainage ditch involved "[t]he provision or nonprovision, planning or design, construction, or reconstruction of a public improvement, including, but not limited to, a sewer system," or "flood control measures." The pleadings do not conclusively indicate whether the drainage ditch is part of a sewer system. Of course, later and more developed facts might reveal that it is. Furthermore, nothing in the pleadings conclusively shows that the drainage ditch constitutes a "flood control measure." Even if either of the foregoing is a reasonable inference, the Civ.R. 12(C) standard requires us to construe the factual

allegations and all reasonable inferences in appellee's favor, not appellants'. Employing this liberal standard, we believe that appellee could prove a set of facts to illustrate that the maintenance of the drainage ditch involved "[t]he maintenance, destruction, operation, and upkeep of a sewer system."

{¶ 31} Furthermore, even though appellee's complaint does not explicitly allege that appellants or its employees were negligent, we believe that a liberal construction of appellee's complaint permits that inference. The tenor of appellee's complaint suggests that appellants negligently failed to alleviate the slippage.

{¶ 32} Moreover, we do not agree with appellants that appellee's complaint must contain facts that specifically dispute appellants' affirmative defense of statutory immunity. *E.g., Kerr, supra*. Furthermore, appellee's complaint does not involve one of those "carefully circumscribed cases" that requires a plaintiff to "plead operative facts with particularity." *E.g., York, supra*. Additionally, to our knowledge, the Ohio Supreme Court has not imposed any heightened pleading standard in cases involving R.C. Chapter 2744.

{¶ 33} In light of the early stage of the proceedings, we also are unable to determine from the face of the pleadings that appellants' conduct with respect to the drainage ditch involved the type of discretion that would reinstate its immunity under R.C. 2744.03(A)(5). As we explained in *Leasure v. Adena Local School Dist.*, 2012-Ohio-3071, 973 N.E.2d 810, (4th Dist.), ¶ 31:

> The R.C. 2744.03(A)(5) discretionary defense extends only to activities that involve weighing alternatives or making decisions that involve a "high degree of official judgment or discretion." *Enghauser Mfg. Co. v. Eriksson Engineering Ltd.*, 6 Ohio St.3d 31, 451 N.E.2d 228 (1983), paragraph two of the syllabus. Thus, 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) (Cook, J., concurring), quoting *Enghauser Mfg. Co.*, 6 Ohio St.3d at 35, 451 N.E.2d 228. 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 Loc. Sch. Dist.*, 10th Dist. No. 94APE09–1307, 1995 WL 360227 (June 15, 1995). The "exercise of judgment and discretion" contemplated by R.C. 2744.03(A)(5) thus does not apply to every decision that a political subdivision makes. *Mathews v. Waverly*, 4th Dist. No. 08CA787, 2010-Ohio-347, 2010 WL 364455, ¶ 45. As we explained in *Hall v. Fort Frye Loc. Sch. Dist. Bd. Of Educ.*, 111 Ohio App.3d 690, 699, 676 N.E.2d 1241 (1996):
>
> "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."

{¶ 34} Ohio courts have consistently held that the decision to provide maintenance and repair to a sewer system does not involve the exercise of discretion that would reinstate immunity under R.C. 2744.03(A)(5). *Abramezyk v. Willowick*, 11th Dist. No. 2017-L-060, 2017-Ohio-9336, 103 N.E.3d 139, 2017 WL 6729682, ¶ 45. In *Williams v. Glouster*, 4th Dist. Athens No. 10CA58, 2012-Ohio-1283, 2012 WL 1029470, this court "rejected [the political subdivision's] contention that its duty to maintain the [sewer] system constituted the type of discretionary decision * * * contemplated under R.C. 2744.03(A)(5) which would re-establish its immunity." *Id.* at ¶ 35.

{¶ 35} We explained:

> [I]f it is proven that [a]ppellant negligently maintained its * * * sewer system, the maintenance of which is a proprietary function, because that function is mandatory and did not involve the exercise of judgment or discretion, [a]ppellant's immunity from liability would not be re-instated under R.C. 2744.03(A)(5).

Id. at ¶ 36; *accord Nelson v. Cleveland*, 8th Dist. Cuyahoga No. 98548, 2013-Ohio-493, 2013 WL 588718 ("Decisions involving the proper maintenance of the sewer * * * system is a proprietary act, which is mandatory and not discretionary. These decisions do not involve a high degree of discretion. Rather, they involve routine inspection and maintenance.").

{¶ 36} In the case at bar, the pleadings do not conclusively illustrate that the maintenance of the drainage ditch involved a high degree of discretion such that R.C. 2744.03(A)(5) reinstates immunity. At this stage of the proceedings, we are unable to state that appellee cannot prove a set of facts to demonstrate that appellants may be held liable for its claim, despite the immunity granted under R.C. Chapter 2744.

{¶ 37} We agree with appellants, however, to the limited extent that the trial court fully determined that "the negligent maintenance of the storm water drainage system that resulted in flooding is a proprietary function." As we have explained in this opinion, the pleadings do not conclusively demonstrate whether appellee's complaint concerns a governmental or proprietary function. Instead, that is a matter that remains to be determined once the parties develop the facts.

{¶ 38} Moreover, we do not disagree with appellants that, as a general proposition, the question of a political subdivision's immunity is a question of law. *E.g., Pelletier v. Campbell*, — Ohio St.3d —, 2018-Ohio-2121, — N.E.2d —, ¶ 12. We also do not disagree that early resolution of the immunity question is an important consideration. *Id.*, citing *Riscatti v. Prime*

Properties Ltd. Partnership, 137 Ohio St.3d 123, 2013-Ohio-4530, 998 N.E.2d 437, ¶ 17 (noting importance of determining R.C. Chapter 2744 immunity before trial). This does not mean, however, that the immunity question always can be determined at the earliest stage of litigation. Instead, as the Ohio Supreme Court has recognized, questions of law may require courts to evaluate "both facts and evidence in reaching its legal determination." *Pangle v. Joyce*, 76 Ohio St.3d 389, 667 N.E.2d 1202 (1996), citing *O'Day v. Webb*, 29 Ohio St.2d 215, 219, 280 N.E.2d 896 (1972); *see State v. Williams*, 134 Ohio St.3d 482, 2012-Ohio-5699, 983 N.E.2d 1245, ¶ 25 (stating that "[a]ppellate courts apply the law to the facts of individual cases to make a legal determination"). Logically, then, the record must contain "both facts and evidence" in order to allow a court to determine the legal question. When the record fails to contain sufficient facts and evidence to resolve the question of law, an appellate court cannot evaluate the legal question. *See generally Bostic v. Connor*, 37 Ohio St.3d 144, 146–47, 524 N.E.2d 881 (1988) (stating that court decides question of law when "the evidence is not in conflict or the facts are admitted").

{¶ 39} In the case sub judice, we have already pointed out that the facts, at this stage of the proceeding, are not adequately developed to allow any determination regarding the legal question of whether appellants are entitled to immunity. Although we recognize that the question of a political subdivision's statutory immunity generally presents a question of law, we do not believe that simply examining the pleadings allow us to resolve the immunity question.

E

CONCLUSION

{¶ 40} Accordingly, based upon the foregoing reasons, we overrule appellants' second assignment of error. We partially overrule and partially sustain appellant's first assignment of

error. We sustain appellant's first assignment of error to the extent that the trial court conclusively determined that appellee's cause of action involves a proprietary function. We therefore affirm the trial court's judgment that denied appellant's motion for judgment on the pleadings. We reverse its decision to the extent the court ruled that appellee's cause of action concerns a proprietary function.

JUDGMENT AFFIRMED IN PART AND REVERSED IN PART AND REMANDED FOR FURTHER PROCEEDINGS CONSISTENT WITH THIS OPINION.

JUDGMENT ENTRY

It is ordered that the judgment be affirmed in part and reversed in part and remanded for further proceedings consistent with this opinion. Appellee shall recover of appellant 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 Scioto County Common Pleas Court to carry this judgment into execution.

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

Hoover, P.J. & Harsha, J.: Concur in Judgment & Opinion

For the Court

BY:_____
Peter B. Abele, 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.