

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
LUCAS COUNTY

Ricci W. Caputo, et al.

Court of Appeals No. L-11-1058

Appellants

Trial Court No. CI0201002517

v.

The City of Toledo

DECISION AND JUDGMENT

Appellee

Decided: November 4, 2011

* * * * *

Joan C. Szuberla and David G. Wise, for appellants.

Adam W. Loukx, City of Toledo Law Director, and
Joyce Anagnos, Senior Attorney, for appellee.

* * * * *

SINGER, J.

{¶ 1} Appellants appeal a summary judgment issued by the Lucas County Court of Common Pleas in a negligence suit against a municipality. For the reasons that follow, we affirm.

{¶ 2} Appellants, Ricci W. and Debra Ann Caputo, live on Edgebrook Drive in Toledo. According to the couple's complaint, they began to see water ponding in their yard shortly after employees of appellee, city of Toledo, replaced a storm sewer cover in their front yard. When they complained to the city, they were told that a portion of the storm sewer leading from their property to a nearby creek had collapsed. Appellants claimed that throughout 2008 appellee's employees promised to fix the allegedly defective storm sewer.

{¶ 3} Nevertheless, by March 11, 2009, when heavy rains fell on the city, no repair had been undertaken. The result, appellants complained, was that large quantities of water collected on their property, flooding their home with two inches of water on the ground floor. Damages resulted. On March 5, 2010, appellants sued appellee claiming that appellee's negligence in failing to maintain its storm and sanitary sewers caused the damages to appellants' home.

{¶ 4} Appellee answered, denying responsibility for appellants' damages and raising several affirmative defenses, including governmental immunity. Following discovery, the parties filed cross-motions for summary judgment. In its motion, appellee argued that flood control and storm water system construction and reconstruction are governmental functions, entitled to immunity from suit pursuant to R.C. 2744.01.

{¶ 5} Appellants responded that, pursuant to R.C. 2744.01(G)(2)(d) and 2744.02(B)(2), maintenance of a sewer system is a proprietary function, not a governmental function and, therefore, is not immune from suit. Appellants supported

their cross-motion with an affidavit from appellant Ricci Caputo who averred that appellants occupied the Edgebrook Drive home since 1990 and only began to notice ponding in 2007. According to Ricci Caputo, shortly after the March 11, 2009 flooding, appellee replaced a 15 to 20 foot length of the storm sewer after which no further flooding occurred.

{¶ 6} Appellee responded to appellants' cross-motion for summary judgment, reiterating its assertion of immunity and maintaining that appellants failed to submit evidence of evidentiary value showing that an act or omission by appellee was responsible for their damages. Appellee supported its position with affidavits of various city engineers and employees who testified to discovering that the last section of storm sewer pipe before it drained to a nearby ditch had separated, causing seepage to the ground above. The ditch itself had also become silted in. According to the employees, remedy of one or both of these conditions would not have prevented flooding in a very heavy rain. Moreover, the city considered replacement of a section of pipe to be construction, and dredging the ditch to be an expensive major project requiring discretionary budgeting, both governmental functions.

{¶ 7} The trial court concluded that for purposes of statutory governmental immunity the March 2009 repair was a construction project that is within the statutory definition of a governmental function subject to immunity from suit. Alternatively, the court ruled, even if the activity was not immune from suit, appellants had failed to meet their burden to show a causal link between appellee's delay in effecting the repair and

their damage. Accordingly, the court granted appellee's motion for summary judgment and denied appellants'. From this judgment, appellants now bring this appeal.

{¶ 8} Appellants set forth a single assignment of error:

{¶ 9} "The trial court erred in granting summary judgment to the City of Toledo on the claim of Ricci and Debra Caputo that they were damaged because the City, for one year, failed in its duty to maintain and see to the upkeep of the storm sewer near the Caputo home."

{¶ 10} On review, appellate courts examine a grant summary judgment de novo, *Grafton v. Ohio Edison Co.* (1996), 77 Ohio St.3d 102, 105, applying the same standard as trial courts. *Lorain Natl. Bank v. Saratoga Apts.* (1989), 61 Ohio App.3d 127, 129. The motion may be granted only when it is demonstrated:

{¶ 11} "* * * (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 but one conclusion, and that conclusion is adverse to the party against whom the motion for summary judgment is made, who is entitled to have the evidence construed most strongly in his favor." *Harless v. Willis Day Warehousing Co.* (1978), 54 Ohio St.2d 64, 67, Civ.R. 56(C).

{¶ 12} When seeking summary judgment, a party must specifically delineate the basis upon which the motion is brought, *Mitseff v. Wheeler* (1988), 38 Ohio St.3d 112, syllabus, and identify those portions of the record that demonstrate the absence of a genuine issue of material fact. *Dresher v. Burt* (1996), 75 Ohio St.3d 280, 293. When a

properly supported motion for summary judgment is made, an adverse party may not rest on mere allegations or denials in the pleadings, but must respond with specific facts showing that there is a genuine issue of material fact. Civ.R. 56(E); *Riley v. Montgomery* (1984), 11 Ohio St.3d 75, 79. A "material" fact is one which would affect the outcome of the suit under the applicable substantive law. *Russell v. Interim Personnel, Inc.* (1999), 135 Ohio App.3d 301, 304; *Needham v. Provident Bank* (1996), 110 Ohio App.3d 817, 826, citing *Anderson v. Liberty Lobby, Inc.* (1986), 477 U.S. 242, 248.

I. Governmental Immunity

{¶ 13} Appellee claims, and the trial court found, that it is entitled to immunity from suit pursuant to R.C. Chapter 2744. R.C. 2744.01 et seq. is the codification of the Political Subdivision Tort Liability Act and sets forth a three tier analysis to determine whether a political subdivision is immune from liability. *Cater v. City of Cleveland* (1998), 83 Ohio St.3d 24, 27. R.C. 2744.02(A) provides for a general rule of immunity for political subdivisions:

{¶ 14} "For the purposes of this chapter, the functions of political subdivisions are hereby classified as governmental functions and proprietary functions. Except as provided in division (B) of this section, a political subdivision is not liable in damages in a civil action for injury, death, or loss to person or property allegedly caused by any act or omission of the political subdivision or an employee of the political subdivision in connection with a governmental or proprietary function."

{¶ 15} Exceptions to the general rule of immunity may be generally stated as (1) when a public employee is engaged in the operation of a motor vehicle, (2) damage resulting from public employees' negligence while engaged in a proprietary function, (3) damage due to negligence in the maintenance of roads or bridges, (4) negligence resulting in damage on the grounds of certain public buildings, and (5) when liability is specifically imposed in the Revised Code. R.C. 2744.02(B)(1)-(5). If, in the second tier of the analysis, one of these conditions is met, immunity is abrogated. *Cater*, supra.

{¶ 16} "Finally, under the third tier of analysis, immunity can be reinstated if the political subdivision can successfully argue that one of the defenses contained in R.C. 2744.03 applies." *Id.* Under R.C. 2744.03, if the act from which liability would arise (1) involves "the performance of a judicial, quasi-judicial, prosecutorial, legislative, or quasi-legislative function," R.C. 2744.03(A)(1), (2) is authorized by law or is necessary or essential, R.C. 2744.03(A)(2), (3) is discretionary with respect to policy-making or planning, R.C. 2744.03(A)(3), (4) occurred while the injured was performing community service, R.C. 2744.03(A)(4), (5) resulted from the exercise of judgment or discretion in the allocation of the use of equipment or personnel, unless done maliciously or recklessly, R.C. 2744.03(A)(5), (6) involves a legal officer immune at common law or by statute, R.C. 2744.03(A)(7), or (7) involving a public employee, unless manifestly acting outside the scope of the employee's duties or with malice or recklessness or there is express civil liability imposed by the Revised Code, R.C. 2744.03(A)(6), immunity is restored.

{¶ 17} Appellants maintain that the work appellee performed on the Edgebrook Drive storm sewer was proprietary and the delay in repairing the collapse for more than a year after appellee became aware of the problem was negligence. Appellee insists that storm sewers are flood control devices and the replacement of a full length of pipe was a construction project: both activities are governmental functions.

{¶ 18} R.C. 2744.01(C)(1) defines a "governmental function" as:

{¶ 19} " * * * a function of a political subdivision that is specified in division (C)(2) of this section or that satisfies any of the following:

{¶ 20} "(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;

{¶ 21} "(b) A function that is for the common good of all citizens of the state;

{¶ 22} "(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) [which defines proprietary functions.]"

{¶ 23} R.C. 2744.01(C)(2) (l) and (r) specify that "[t]he provision or nonprovision, planning or design, construction, or reconstruction of a public improvement, including, but not limited to, a sewer system" and "[f]lood control measures" are governmental functions.

{¶ 24} "'Proprietary function' means a function of a political subdivision that is specified in division (G)(2) of this section or that satisfies both of the following:

{¶ 25} "(a) The function is not one described in division (C)(1)(a) or (b) of this section and is not one specified in division (C)(2) of this section;

{¶ 26} "(b) The function is one that promotes or preserves the public peace, health, safety, or welfare and that involves activities that are customarily engaged in by nongovernmental persons." R.C. 2744.01(G)(1).

{¶ 27} "A 'proprietary function' includes, but is not limited to, the following:

{¶ 28} "* * *

{¶ 29} "(d) The maintenance, destruction, operation, and upkeep of a sewer system * * *." R.C. 2744.01(G)(2)(d).

{¶ 30} Appellee maintains that this storm sewer was a flood control measure and that its repair constituted "construction" rather than "maintenance." As a result, appellee insists, the work on Edgebrook Drive was part of a governmental function and it is statutorily immune from suit. In support, appellee submits the affidavits of multiple city engineers who state that the replacement of a length of storm sewer is classified as construction by the city.

{¶ 31} Appellants insist that the repair at issue in this matter is clearly part of the maintenance and upkeep of the storm sewer and, consequently, a proprietary function statutorily exempt from governmental immunity. In support of this proposition, appellants cite several cases in which courts have held that a municipality's failure to

make timely repairs to a sewer constituted a proprietary maintenance function. *Malone v. City of Chillicothe*, 4th Dist. No. 05CA2869, 2006-Ohio-3268, ¶ 26 (City failed for ten years to repair deteriorated concrete in sewer, resulting in sewage backup.); *Nimishillen Twp. v. State ex rel. Groffre Investments*, 5th Dist. No. 2003-CA-04010, 2004-Ohio-3371, ¶ 38 (Township failed, after notice, to remedy improperly constructed sewer resulting in flooding.); *Martin v. City of Gahanna*, 10th Dist. No. 06AP-1175, 2007-Ohio-2651, ¶ 17 (City failed to replace missing storm sewer grate.); *Ezerski v. Mendenhall*, 188 Ohio App.3d 126, 2010-Ohio-1904, ¶ 8 (Basement flooded from sewer backup when a tree was placed through a manhole cover the city neglected to replace blocked the flow.)

{¶ 32} Appellee responds with multiple authorities that hold that flood control and planning, design, construction and reconstruction are governmental functions, subject to statutory immunity. Appellee has provided no legal authority, however, supporting its proposition that the repair of a sewer constitutes either flood control or construction. Appellee offers only affidavits from its employees to the effect that, as the duties of city's Division of Public Utilities are parceled out, replacing damaged sewer pipe is considered construction.

{¶ 33} "[F]lood control occurs when authorities call in political subdivision employees to contain and control impending flood damage." *Hedrick v. Franklin Cty.* (Mar. 30, 1993), 10th Dist. Nos. 92AP-1030, 92AP-1031. While the initial construction of the storm sewer at issue was likely to control flooding, to continue to classify the

upkeep and maintenance of the system as such would allow the exception to subsume the rule. *Id.*, *Keytack v. City of Warren*, 11th Dist. No. 2005-T-0152, 2006-Ohio-5179, ¶ 23, appeal not allowed, 112 Ohio St.3d 1492, 2007-Ohio-724. Consequently, we conclude that R.C. 2744.01(C)(1)(r) is inapplicable on the facts presented.

{¶ 34} With respect to whether repair of a damaged storm sewer is an act of construction or maintenance, the authority provided by appellants is persuasive. Repair of a storm sewer is a maintenance activity and, therefore a proprietary function pursuant to R.C. 2744.01(G)(2)(d). Accordingly, the trial court erred in determining in its second tier analysis that appellee was entitled to statutory immunity pursuant to R.C. Chapter 2744.

II. Evidence of Negligence

{¶ 35} Although appellants have prevailed on the issue of immunity, the trial court alternatively concluded that appellants failed in their burden to come forth with evidence that appellee's acts or omissions caused the flooding in their house. "To establish actionable negligence, one must show in addition to the existence of a duty, a breach of that duty and injury resulting proximately therefrom." *Mussivand v. David* (1989), 45 Ohio St.3d 314, 318.

{¶ 36} Appellee supported its motion for summary judgment with numerous affidavits stating that the 12 inch storm sewer, which was not designed to Toledo specifications, was already in place when the city annexed appellants' property. As the trial court noted, appellee's employees averred that they responded to every service

request made for appellants' address following heavy rain. In each instance, these employees found no blockage and that water was running as it should in the storm sewer. What appellants characterize as a collapsed pipe was a separation between lengths of pipe that during rain would permit water to escape upwards into a neighbor's yard. Appellee's employees stated that this did not inhibit the flow of water and, in likelihood, relieved some pressure from the pipe in heavy rain.

{¶ 37} Appellee's employees insist that the flooding appellants experienced was the result of an unusually heavy local rainfall, coupled with ground saturation or partially frozen ground that channeled extra water into the storm sewer. Appellants' home is in a low lying area. In these conditions, nothing appellee could have done would have prevented the flooding. Indeed, appellee's employees maintain, even after replacing the damaged length of pipe, flooding is still possible if the conditions of March 11, 2009, are duplicated.

{¶ 38} Appellants do not contest that appellee responded to their complaints every time. Neither do they offer evidence that the break in the storm sewer was the proximate cause of their flood. They merely observe that there was no flooding for years before and that since the sewer repair there has been no further flooding.

{¶ 39} As the trial court concluded, appellants "have not rebutted [appellee's] evidence that it properly maintained the sewer and that the sewer simply suffered an overload from a heavy rain event that was not manageable in a proactive manner.

Likewise, they have not rebutted [appellee's] testimony that a failure to maintain, if any, was not the proximate cause of [appellants'] damages."

{¶ 40} After appellee's motion for summary judgment, appellants had the burden to come forward with evidence of appellee's negligence and the causal link between that negligence and their damages. We concur with the trial court that they failed in both respects. As a result the trial court did not err in granting summary judgment to appellee. Accordingly, appellants' single assignment of error is not well-taken.

{¶ 41} On consideration whereof, the judgment of the Lucas County Court of Common Pleas is affirmed. It is ordered that appellants pay the court costs of this appeal pursuant to App.R. 24.

JUDGMENT AFFIRMED.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. See, also, 6th Dist.Loc.App.R. 4.

Peter M. Handwork, J.

JUDGE

Arlene Singer, J.

JUDGE

Thomas J. Osowik, P.J.
CONCUR.

JUDGE

This decision is subject to further editing by the Supreme Court of Ohio's Reporter of Decisions. Parties interested in viewing the final reported version are advised to visit the Ohio Supreme Court's web site at: http://www.sconet.state.oh.us/rod/newpdf/?source=6.
