IN THE SUPREME COURT OF OHIO

JOSEPH ELIAS, et al.	)	CASE NO.: _____
Plaintiff - Appellees	)	
v.	)	On Appeal From The Summit County Court of Appeals,
CITY OF AKRON	)	Ninth District Court of Appeals Case No. CA 29107
Defendant - Appellant	)	

MEMORANDUM IN SUPPORT OF JURISDICTION OF APPELLANT CITY OF AKRON

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EXPLANATION OF WHY THIS IS A CASE OF PUBLIC OR GREAT GENERAL INTEREST

This case presents an issue of public and great general interest because it concerns the application of R.C. Chapter 2744, which grants sovereign immunity to political subdivisions within the State of Ohio. Specifically, it presents an opportunity for this Court to clarify the application of R.C. Chapter 2744 in the context of summary judgment proceedings in three respects: 1) What is a political subdivision's initial burden when moving for summary judgment; 2) Whether "negligent" as used in R.C. 2744.02(B)(3) embodies duty and breach of duty; and 3) What level of discretion is contemplated by R.C. 2744.03(A)(5).

1. A political subdivision's initial summary judgment burden is to demonstrate its entitlement to immunity pursuant to R.C. 2744.02(A).

Except for the Ninth Appellate District, appellate courts across the state uniformly hold that, once a political subdivision demonstrates its entitlement to immunity pursuant to R.C. 2744.02(A), the burden then shifts to the plaintiff to demonstrate that one of the exceptions to immunity contained in R.C. 2744.02(B) applies. *See, e.g., Koeppen v. Columbus*, 10th Dist. Franklin No. 15AP-56, 2015-Ohio-4463, ¶ 13; *Deitz v. Harshbarger*, 3d Dist. Shelby No. 17-16-21, 2017-Ohio-2917, ¶ 21; *Horen v. Bd. of Edn. of the Toledo Public Schools*, 6th Dist. Lucas No. L-09-1143, 2010-Ohio-3631, ¶ 33; *Tangler v.Carrollton*, 7th Dist. Carroll No. 17 CA 0920, 2018-Ohio-1343, ¶ 17; *Harris v. Cleveland*, 183 Ohio App.3d 616, 2009-Ohio-4033, 918 N.E.2d 181, ¶ 14 (8th Dist.); *Maggio v. Warren*, 11th Dist. Trumbull No. 2006-T-0028, 2006-Ohio-6880, ¶ 38. This is consistent with both the language of R.C. 2744.02 and the general premise that the starting point of an immunity analysis is that a political subdivision is immune. *See Colbert v. Cleveland*, 99 Ohio St.3d 215, 2003-Ohio-3319, 790 N.E.2d 781, ¶ 7. The

Ninth District, however, in conflict with the other appellate districts, has held that, not only must a political subdivision demonstrate its general entitlement to immunity under R.C. 2744.02(A), it also has the initial burden to demonstrate the inapplicability of the exceptions to immunity contained in R.C. 2744.02(B) in order to be entitled to summary judgment. The public has an interest in the sovereign-immunity statute being applied consistently across the State, and, therefore, this Court should accept jurisdiction and resolve the conflict that exists between the appellate districts.[1]

2. As used in R.C. 2744.02(B)(3), "negligent" embodies the concepts of duty and breach of duty.

A second issue of public and great general interest is the interpretation and application of R.C. 2744.02(B)(3), an exception to immunity where the plaintiff's injury was "caused by [the political subdivision's] *negligent* failure to keep public roads in repair and other *negligent* failure to remove obstructions from public roads * * *." (Emphasis added.). Thus, it is not enough that a plaintiff demonstrate that a political subdivision failed to keep the public roads in repair or that it failed to remove the obstructions from the public roads, the plaintiff must also demonstrate that in failing to do so, the political subdivision failed "to exercise the degree of care that someone of ordinary prudence would have exercised in the same circumstance." *Black's Law Dictionary*, Negligent (11th Ed.2019). In other words, in order to be liable, the political subdivision's failure to maintain the roads or to remove an obstruction must constitute a breach of a duty of care. The Ninth District, however, has repeatedly refused to consider whether the alleged failure by the political subdivision breached a duty owed to the plaintiff in the context of the interlocutory appeal provided by R.C. 2744.02(C), holding

[1] The City has filed a timely motion to certify a conflict in this matter, which remains pending before the Ninth District.

that whether the failure was negligent goes to the ultimate question of negligence and, therefore, is not within the scope of the interlocutory appeal of the denial of immunity. *See, e.g., Elias v. Akron*, 9th Dist. Summit No. 29107, 2020-Ohio-480, ¶ 15. *See also Calet v. East Ohio Gas Co.,* 9th Dist. Summit No. 28036, 2017-Ohio-348; *Davis v. City of Akron*, 9th Dist. Summit No. 27014, 2014-Ohio-2511; *McGuire v. City of Lorain*, 9th Dist. Lorain No. 10CA009893, 2011-Ohio-3887; *Devaux v. Albrecht Trucking Co.*, 9th Dist. Medina No. 09CA0069-M, 2010-Ohio-1249.[2]

Thus, the Ninth District has rewritten the exception in R.C. 2744.02(B)(3) contrary to its plain language and instead has interpreted the statute without regard to all of its language, in particular the word "negligent." However, "[i]n construing a statute, [a court] may not add or delete words." *State v. Hughes*, 86 Ohio St.3d 424, 427, 715 N.E.2d 540 (1999). Furthermore, the Ninth District's decisions have deprived political subdivisions of a right provided by the General Assembly and has undermined the purpose of the sovereign immunity statute, which is to " preserve political subdivisions' fiscal integrity." *Supportive Solutions, L.L.C. v. Electronic Classroom of Tomorrow*, 137 Ohio St.3d 23, 2013-Ohio-2410, 997 N.E.2d 490, ¶ 11. "Consistent with that purpose, early resolution of the immunity issue may save the parties the time, effort, and expense of a trial and appeal." *Id*. Thus, it is of great public and general interest that the Ninth District has deprived political subdivisions of the full review of an order denying

[2] Despite refusing to address any aspects of negligence within interlocutory appeals, the Ninth District has considered whether a political subdivision had notice of the issue. *See Calet*; *Davis*; and *McGuire*. Notably, whether a political subdivision had notice of an issue goes to whether a political subdivision had a duty to repair the road or remove an obstruction, which goes to whether the political subdivision had breached a duty owed—i.e., whether it was negligent. The Ninth District's decisions have not addressed this contradiction.

immunity to them, thereby creating unnecessary costs and expense to the taxpayers of those political subdivision in contravention of the explicit provisions of R.C. 2744.02. Therefore, this Court should accept jurisdiction over the City's second proposition of law and clarify that a court must and apply all of the plain language contained in R.C. 2744.02(B)(3). Accordingly, in applying all of the words in the statute, a court must consider whether a political subdivision's failure to keep the public roads in repair or to remove an obstruction was negligent—i.e., whether it constituted a breach of the duty of care.

3. R.C. 2744.03(A)(5) does not require a high degree of discretion in order to restore a political subdivision's immunity.

Employees of Ohio's political subdivisions are constantly called upon to necessarily make important decisions about how to perform governmental and proprietary functions that serve the citizens. Quite often, like this case, political subdivision employees at all levels necessarily exercise discretion in how to use equipment, supplies, materials, personnel, facilities and other resources to ensure that the function of the repair of public roads is performed. By enacting R.C. 2744.03(A)(5), the General Assembly intended to provide governmental immunity in the exercise of such discretion.

Whether a political subdivision is entitled to immunity for its exercise of discretion in how to use equipment, supplies, materials, personnel, facilities and other resources is not always a simple inquiry for the courts. Now, Ohio courts embark on a convoluted and unnecessary fact-specific examination into the degree of discretion being exercised by the political subdivision when determining how to use equipment, supplies, materials, personnel, facilities and other resources. However, this approach to political subdivision

immunity is inconsistent with a plain reading of R.C. 2744.03(A)(5), which broadly applies to:

> * * * the exercise of judgment or discretion in determining whether to acquire, or how to use, equipment, supplies, materials, personnel, facilities, and other resources unless the judgment or discretion was exercised with malicious purpose, in bad faith, or in a wanton or reckless manner.

Notably, there is nothing in R.C. 2744.03(A)(5) that requires a court to look to the degree of discretion being exercised by the political subdivision to determine whether immunity should attach. There is nothing in R.C. 2744.03(A)(5) that says that routine road repair decisions are not shielded by immunity.

Indeed, this Court has instructed that the requirement that a political subdivision must exercise a "high degree of judgment or discretion" is limited to the immunity provided in R.C. 2744.03(A)(3) and does not extend to R.C. 2744.03(A)(5). *Elston v. Howland Local Schools,* 113 Ohio St.3d 314, 318-319, 2007-Ohio-2070, ¶ 47-48; *Williams v. Brewer,* 8th Dist. Cuyahoga No. 93829, 2010-Ohio-5349, ¶ 14. The inquiry under R.C. 2744.03(A)(5) should be whether, in the exercise of discretion, the employee of a political subdivision acted with a malicious purpose, in bad faith, or in a wanton or reckless manner. *Elston.*

Notwithstanding this Court's holding in *Elston* and a plain reading of R.C. 2744.03(A)(5), Ohio's trial and appellate courts continue to improperly rely upon this Courts' decisions in *Enghauser Mfg. Co. v. Eriksson Engineering, Ltd.*, 6 Ohio St.3d 31 (1983), and *Perkins v. Norwood City Schools,* 845 Ohio St.3d 191 (1999), to hold that the R.C. 2744.03(A)(5) defense extends only to activities that involve weighing alternatives or making decisions involving a *high degree* of official judgment. *See, e.g., Smith v. Euclid,* 8th Dist. Cuyahoga No. 107771, 2019-Ohio-3099; *Abramezyk v.*

Willowick, 11th Dist. Lake No. 2017-L-060, 2017-Ohio-9336; *Calet*, 2017-Ohio-348; *Nelson v. Cleveland,* 8th Dist. Cuyahoga No. 98548, 2013-Ohio-493; *Cutlip v. Akron,* Summit Co. C. P. No. CV 2017-10-4233 (Order Jan. 25, 2019). *Enghauser* was decided well before Chapter 2744 was enacted and cannot be relied upon to set the standard for when discretionary immunity under R.C. 2744.03(A)(5) attaches. Similarly, *Perkins* was effectively overruled by *Elston*. It is improper and inconsistent with a plain reading of R.C. 2744.03(A)(5) and *Elston* for Ohio courts to continue to conduct examinations into the degree of discretion that a political subdivision exercised before concluding that R.C. 2744.03(A)(5) immunity attaches. Ohio courts' holdings that R.C. 2744.03(A)(5) only reinstates immunity when the exercise of judgment or discretion involves policymaking, planning or the exercise of a high degree of official judgment or discretion conflates the defenses under R.C. 2744.03(A)(3) and R.C. 2744.03(A)(5).

This case demonstrates why this Court should accept jurisdiction and provide Ohio courts with clear direction about how R.C. 2744.03(A)(5) applies. City employees exercised judgment and discretion with regard to the road depression condition at issue herein. Elias' injuries can be traced to the exercise of judgment and discretion in determining how to use equipment, supplies, materials, personnel and other resources in the repair of the road. The *Elias* court summarily found that the repair decisions were routine decisions requiring little judgment or discretion. That decision is inconsistent with a plain reading of R.C. 2744.03(A)(5) and *Elston.*

Accordingly, This Court should accept jurisdiction to provide clear and unambiguous instruction to Ohio courts about how R.C. 2744.03(A)(5) operates to

shield a political subdivision's exercise of discretion in using equipment, supplies, materials, personnel, facilities and other resources in maintenance of its public grounds.

STATEMENT OF THE CASE AND FACTS

John Green, a 27-year employee for the City of Akron Public Works Bureau employee, inspected a depression in a street in the City of Akron. Relying on his extensive experience with road maintenance conditions and road hazards, Green decided that the depression did not pose a hazard to motorists and decided not to mark the condition with a traffic control device. He reported the road depression condition to his supervisor, who in turn reported the condition to the Sewer Maintenance Division so that an inspection could occur to determine if the depression in the road was related to a leak in an underground sewer line. Green's exercise of discretion in determining whether the depression constituted a hazard to traffic was in accordance with Highway Maintenance Division protocol and reasonable.

The same day Green inspected and reported the depression, city employees drilled a hole in the area of the road depression in order for the Sewer Maintenance Division to perform a dye test to determine whether the condition was related to a break in an underground sewer line. City Highway Maintenance Division Emergency Worker Darius Haslam was also dispatched to the scene, and he placed a 48-inch navigator cone over the dye test hole to warn motorists to avoid travelling over the test hole. Just like Green earlier in the day, Haslam did not believe, based on his experience, that the depression in the road was itself a hazard to motorists at the time he placed the warning cone or that there was a great probability that harm to motorists would result.

Two days later, Appellee Clare Elias road over the depression on a motorcycle and lost control, resulting in her falling from the vehicle and sustaining injuries. City

Public Works Supervisor John Nutter inspected the road depression following the accident and, "nothing struck [him] as * * * [being] a severe problem * * *." Nutter testified that he has ridden a motorcycle for 40 years and "didn't see anything that made me think anything severe was in the road." Nutter summoned City Engineering Technician Anthony Puglia to the scene, who also did observe any openly dangerous condition in the road.

The City moved for summary judgment, arguing that it was entitled to immunity pursuant to R.C. 2744.02, which the trial court denied. On appeal, the Ninth District affirmed, holding that the City bore the initial burden of disproving the applicability of the exceptions to immunity contained in R.C. 2744.02(B) and that the City had failed to meet that initial burden. The court also declined to consider whether there was a genuine issue of material fact as to whether the City was negligent in failing to repair the road, asserting that the question of negligence was outside the scope of the interlocutory appeal. Finally, the court held the City had failed to demonstrate immunity had been restored pursuant to R.C. 2744.03(A)(5) because it had failed to demonstrate that the decisions made by Green and Haslam were the result of high-level discretion.

ARGUMENT IN SUPPORT OF PROPOSITIONS OF LAW

PROPOSITION OF LAW NO. 1: A POLITICAL SUBDIVISION MEETS ITS INITIAL SUMMARY JUDGMENT BURDEN BY DEMONSTRATING IT IS ENTITLED TO IMMUNITY PURSUANT TO R.C. 2744.02(A), THEREBY SHIFTING THE BURDEN TO NON-MOVING PARTY TO DEMONSTRATE A GENUINE ISSUE OF MATERIAL FACT AS TO ONE OF THE EXCEPTIONS IN R.C. 2744.02(B).

"Determining whether a political subdivision is immune from tort liability pursuant to R.C. Chapter 2744 involves a three-tiered analysis." *Colbert*, 99 Ohio St.3d 215, 2003-Ohio-3319, 790 N.E.2d 781, at ¶ 7. R.C. 2744.02(A)(1) provides, "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." This sets forth "the general rule that a political subdivision is immune from liability incurred in performing either a governmental function or proprietary function." *Colbert* at ¶ 7. Thus, unless an exception set forth in R.C. 2744.02(B) applies, the political subdivision is immune. In other words, absent evidence demonstrating the applicability of one of the R.C. 2744.02(B) exceptions, the political subdivision is entitled to immunity as a matter of law.

Within the context of summary judgment, demonstrating entitlement to immunity pursuant to R.C. 2744.02(A) satisfies the political subdivision's burden to demonstrate that no genuine issue of material fact exists as to its entitlement to summary judgment.[3] *See Dresher v. Burt*, 75 Ohio St.3d 280, 292 (1996). The burden then shifts to the non-moving party to demonstrate that a genuine issue does exist, which would typically take the form of attempting to demonstrate the applicability of one of the exceptions contained in R.C. 2744.02(B). *See Id*. at 293. If the non-moving party is unable to demonstrate the applicability of one of the exceptions, a court properly awards summary judgment to the political subdivision. *Accord*. *Koeppen*, 2015-Ohio-4463, at ¶ 13.

[3] Given the limitations on the submission of evidence and argumentation, it is unlikely that any political subdivision would simply move for summary judgment solely on its entitlement to immunity pursuant to R.C. 2744.02(A). There would usually be additional argumentation regarding the applicability of R.C. 2744.02(B) exceptions and arguments about the restoration of immunity pursuant to R.C. 2744.03. This practical reality, however, does not alter the fact that, absent additional evidence, the political subdivision is presumptively immune under R.C. 2744.02(A) if it was engaged in governmental or proprietary function.

In addition to being consistent with the language of R.C. 2744.02, the burden-shifting approach set forth above is more equitable to the parties. It would be impracticable to require political subdivisions to move for summary judgment by attempting to demonstrate no dispute of fact as to each and every possible exception in R.C. 2744.02(B). R.C. 2744.02(B)(5) alone would require a political subdivision would to demonstrate to the court in each and every case that there is no express imposition of liability by the Revised Code, which would involve not only scouring the entire Revised Code but creating an argument about each section that imposes liability. This would be in addition to disproving the exceptions in R.C. 2744.02(B)(1)-(4). Even the most imaginative political subdivision would be hard-pressed to locate and disprove all possible exceptions in a summary judgment motion. Moreover, the summary judgment filings in every case would become a voluminous and unwieldy mass of documents.[4] This would be contrary both to the purposes of summary judgment and to the intent and purpose of R.C. Chapter 2744.

Accordingly, this Court should hold that a political subdivision meets its summary judgment burden by demonstrating an absence of dispute of material fact that it is a political subdivision and that the alleged damage resulted from a governmental or proprietary function.

[4] This would be in addition to any attempt to demonstrate there is no dispute of fact as to the underlying cause of action.

PROPOSITION OF LAW NO. 2: THE PLAIN LANGUAGE OF R.C. 2744.02(B)(3) REQUIRES A PLAINTIFF DEMONSTRATE THAT THE POLITICAL SUBDIVISION'S "FAILURE TO KEEP PUBLIC ROADS IN REPAIR" WAS NEGLIGENT, WHICH REQUIRES DEMONSTRATING THE POLITICAL SUBDIVISION BREACHED A DUTY OF CARE.

R.C. 2744.02(B)(3) contains the word "negligent." It provides, in part, that "political subdivisions are liable for injury * * * caused by their *negligent* failure to keep public roads in repair and other *negligent* failure to remove obstructions from public roads." (Emphasis added.). Thus, it is not enough for a plaintiff to show that their alleged injury was caused by the political subdivision's failure to keep public roads in repair or failure to remove obstructions from public roads. Instead, the plaintiff must also demonstrate that the failure was *negligent*, which means "Characterized by a person's failure to exercise the degree of care that someone of ordinary prudence would have exercised in the same circumstance." *Black's Law Dictionary*, Negligent (11th Ed.2019). Accordingly, the language of the statute requires consideration of whether there was a breach of a standard of care.

Notably, "[i]n order to establish an actionable claim of negligence, a plaintiff must show the existence of a duty, a breach of that duty, and an injury that was proximately caused by the breach." *Rieger v. Giant Eagle, Inc.*, 156 Ohio St.3d 512, 2019-Ohio-3745, 138 N.E.3d 1121, ¶ 10. " 'The amount of care required of a person to establish whether he has discharged his duty to another is variously referred to as the "amount of caution," the "degree of care" or the "standard of conduct" which an ordinarily careful and prudent person would exercise or observe under the same or similar circumstances.' " *Strother v. Hutchinson*, 67 Ohio St.2d 282, 285, 423 N.E.2d 467 (1981), quoting *Di Gildo v. Caponi*, 18 Ohio St.2d 125, 127, 247 N.E.2d 732 (1969). Thus, a party that fails to exercise the degree of care of a person of ordinary prudence

is negligent and also breached a duty for purposes of a negligence analysis. In other words, in order to determine whether an act was negligent, a court must examine whether a duty existed and whether the act breached that duty. Therefore, the negligence concepts of duty and breach are embodied in R.C. 2744.02(B)(3) and are necessarily part of an appellate court's review of an interlocutory appeal of the denial of immunity to a political subdivision.

Notwithstanding the express language of R.C. 2744.02(B)(3), however, the Ninth District incorrectly held that "those issues fall outside the scope of the instant appeal which pertains solely to whether the trial court erred in denying the City the benefit of the immunity pursuant to R.C. 2744.02(A)." *Elias v. City of Akron,* 9th Dist. Summit No. 29107, 2019-Ohio-4657, ¶ 15. To reach this conclusion, however, the Ninth District gave no meaning to "negligent" within the context of R.C. 2744.02(B)(3) because "negligent" inherently embodies the existence of a duty and a breach of that duty. Essentially, the Ninth District's holding rewrites the law to omit "negligent," and undercuts the intents and purposes of the sovereign immunity law, which is impermissible.[5] *Accord. Hughes*, 86 Ohio St.3d at 427 ("In construing a statute, [a court] may not add or delete words.").

[5] In 2003, the General Assembly amended R.C. 2744.02(B)(3) to add the term "negligent" as a modifier to the term "failure." Thus, in order to show that the (B)(3) exception applies to remove a political subdivisions general grant of immunity under R.C. 2744.02(A), the amendment requires a plaintiff to show a "negligent failure to keep roads in repair." The addition of the word negligent demonstrates that the legislature intended negligence to be embodied within the (B)(3) exception.

Accordingly, for the foregoing reasons, this Court should accept the City's second proposition of law and clarify the proper analysis of whether the exception R.C. 2744.02(B)(3) applies.

> **PROPOSITION OF LAW NO. 3**: A POLITICAL SUBDIVISION NEED NOT EXERCISE A HIGH DEGREE OF JUDGMENT OR DISCRETION IN DETERMINING WHETHER TO ACQUIRE, OR HOW TO USE, EQUIPMENT, SUPPLIES, MATERIALS, PERSONNEL, FACILITIES OR OTHER RESOURCES IN ORDER TO BE IMMUNE FROM LIABILITY PURSUANT TO R.C. 2744.03(A)(5).

This case also presents a question of public interest and concern regarding the third tier of the tort immunity analysis under Chapter 2744 as applied to a municipality's maintenance of public roadways. Under the third tier, a political subdivision's immunity from liability can be restored by R.C. 2744.03(A)(5) which provides immunity from liability,

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

There is nothing in R.C. 2744.03(A)(5) that requires courts to look to the degree of discretion being exercised to determine whether immunity should attach. Nor is there any language in the provision that states that "[r]outine decisions are not shielded by immunity" as stated by the *Elias* court. The only inquiry is whether the employee exercised judgment or discretion with malicious purpose, in bad faith or in a wanton or reckless manner.

In *Elston v. Howland Local Schools,* 113 Ohio St.3d 314, 2007-Ohio-2070, this Court affirmed this straightforward reading of R.C. 2744.03(A)(5) and specifically stated that the immunity does not hinge upon planning, policy-making, or high degree of official

judgment or discretion. Despite this Court's instruction in *Elston,* Ohio appellate courts have improperly relied upon *Enghauser* and *Perkins* and conducted a fact-specific examination of the degree of discretion exercised by the political subdivision employee into whether the decision was routine or involved the exercise heightened degree of discretion. By doing so, they have created conflicting and contradictory decisions that are difficult to reconcile with one another.

The *Enghauser* Court abolished the judicially created doctrine of municipal immunity but retained immunity for the exercise of "an executive or planning function involving the making of a basic policy decision which is characterized by the exercise of a high degree of official judgment or discretion." 6 Ohio St.3d at 36. While providing historical insight into sovereign immunity, *Enghauser* (1983) predates the General Assembly's enactment of R.C. 2744.03(A) (1985) and does not interpret or apply the defenses in that section. *Perkins* requires an examination into the degree of discretion exercised by the employee, but it is plainly inconsistent with a candid reading of R.C. 2744.03(A)(5) which simply requires an exercise of discretion made without malicious purpose, bad faith, or wantonness or recklessness.

This case presents a prime example of why this issue needs direction from this Court. At least two highly experienced City Highway Maintenance Emergency employees and a supervisor exercised judgment and discretion about an emergent need to devote limited equipment, materials, personnel or other resources (e.g., outside contractor) to the road depression condition. While these employees ordinarily and regularly make these maintenance and repair decisions everyday, making them "routine," they are nonetheless exercising discretion when they make them. The *Elias*

court inappropriately applied a blanket rule that abrogates immunity for any exercise of discretion by workers with “boots on the ground” related to repair of public roads. That is inconsistent with the intent of the General Assembly expressed in R.C. 2744.03(A)(5).

This Court should accept jurisdiction and hold that is improper to examine the degree of discretion exercised by an employee under R.C. 2744.03(A)(5), and that any degree of discretion exercised by a political subdivision employee, absent malicious purpose, bad faith, or wantonness or recklessness, is sufficient to invoke tort liability immunity.

CONCLUSION

For all of the above reasons, the City of Akron respectfully requests this Court accept jurisdiction in this case and review the erroneous decisions of the trial court and court of appeals.

Respectfully submitted,

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CERTIFICATE OF SERVICE

A copy of the foregoing Memorandum in Support of Jurisdiction was served by electronic mail to russ@russsmithlaw.com on March 30, 2020.

/S/ John Christopher Reece
John Christopher Reece

APPENDIX:

Joseph J. Elias, et al. v. City of Akron , 9th Dist. Summit No. 29107, 2020-Ohio-480

Joseph J. Elias v. City of Akron, Summit Co. C.P. No. CV 2017-01-0342 (Order, June 18,

[Cite as *Elias v. Akron*, 2020-Ohio-480.]

STATE OF OHIO	)	IN THE COURT OF APPEALS
	)ss:	NINTH JUDICIAL DISTRICT
COUNTY OF SUMMIT	)	

JOSEPH J. ELIAS, et al. Appellees v. CITY OF AKRON Appellant	C.A. No. 29107 APPEAL FROM JUDGMENT ENTERED IN THE COURT OF COMMON PLEAS COUNTY OF SUMMIT, OHIO CASE No. CV-2017-01-0342

DECISION AND JOURNAL ENTRY

Dated: February 12, 2020

SCHAFER, Judge.

{¶1} Defendant-Appellant, the City of Akron (the "City"), appeals the decision of the Summit County Court of Common Pleas denying the City's motion for summary judgment claiming immunity on the basis of political subdivision immunity pursuant to R.C. Chapter 2744. This Court affirms.

I.

{¶2} Clare Elias, and husband Joseph Elias, Plaintiffs-Appellees in this matter, were riding their motorcycles in Akron, Ohio, on March 21, 2012. As the pair traveled on North Howard Street, Clare was abruptly thrown from her motorcycle to the ground. She was transported to the hospital by ambulance for the treatment of injuries she sustained in the accident.

{¶3} It was subsequently determined there was a depression or sinkhole in the road at the area of North Howard Street where the accident occurred. The Eliases filed a complaint against the City alleging that the City knew of the sinkhole and the "unreasonably dangerous hazard and

condition" it presented, but that the City "recklessly, wantonly, willfully, and negligently failed to repair it, barricade or protect against it, or warn of it." In the complaint the Eliases claimed that the sinkhole was the direct and proximate cause of the injuries Clare sustained in the accident, and also asserted a claim for loss of consortium.

{¶4} The City filed a motion for summary judgment on the basis of political subdivision immunity pursuant to R.C. Chapter 2744. In ruling on the motion, the trial court found that issues of material fact remained as to whether the City is entitled to immunity, and declined to grant summary judgment.

{¶5} The City appealed raising two assignments of error for our review. For ease of analysis, we combine those assignments of error.

II.

Assignment of Error I

The trial court erred by declining to consider the City of Akron's arguments addressing proof of negligence - duty, breach of duty, and proximate cause[.]

Assignment of Error II

The trial court erred by denying the City of Akron's motion for summary judgment.

{¶6} The City argues that the trial court erred when it declined to consider all of the arguments in the City's motion for summary judgment, and that the trial court ultimately erred by denying the motion.

{¶7} Under Civ.R. 56(C), summary judgment is appropriate when:

> (1) [no] genuine issue as to any material fact remains to be litigated; (2) the moving party is entitled to judgment as a matter of law; and (3) it appears from the evidence that reasonable minds can come to but one conclusion, and viewing such evidence most strongly in favor of the party against whom the motion for summary judgment is made, that conclusion is adverse to that party.

Temple v. Wean United, Inc., 50 Ohio St.2d 317, 327 (1977). To succeed on a motion for summary judgment, the moving party bears the initial burden of demonstrating the absence of genuine issues of material fact. *Dresher v. Burt*, 75 Ohio St.3d 280, 292 (1996). If the moving party satisfies this burden, the non-moving party "must set forth specific facts showing that there is a genuine issue for trial." *Id.* at 293.

A. Political Subdivision Immunity

{¶8} "The denial of a motion for summary judgment is not ordinarily a final, appealable order." *Buck v. Reminderville*, 9th Dist. Summit No. 27002, 2014-Ohio-1389, ¶ 5. However, R.C. 2744.02(C) provides that "[a]n order that denies a political subdivision * * * the benefit of an alleged immunity from liability as provided in this chapter or any other provision of the law is a final order." There is no dispute the City is a political subdivision of the state of Ohio and entitled to a general grant of immunity. Accordingly, because the trial court's denial of the motion effectively denied the City the benefit of the political subdivision immunity, it is a final order. *Hubbell v. City of Xenia*, 115 Ohio St.3d 77, 2007-Ohio-4839, ¶ 2. Our review is limited to the alleged errors in the portion of the trial court's decision which denied the political subdivision the benefit of immunity; and this Court lacks jurisdiction to address any other interlocutory rulings the trial court made. *Owens v. Haynes*, 9th Dist. Summit No. 27027, 2014-Ohio-1503, ¶ 8, quoting *Makowski v. Kohler*, 9th Dist. Summit No. 25219, 2011-Ohio-2382, ¶ 7-8.

{¶9} Ohio's Political Subdivision Tort Liability Act, which governs political subdivision liability and immunity, is codified in Chapter 2744 of the Revised Code. A court engages in a three-tiered analysis to determine whether a political subdivision is immune from liability for damages in a civil action. *Moss v. Lorain Cty. Bd. of Mental Retardation*, 9th Dist. Lorain No. 13CA010335, 2014-Ohio-969, ¶ 10. The first tier establishes generally 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." R.C. 2744.02(A)(1); *Moss* at ¶ 10. In the second tier, we consider the applicability of any of the five exceptions to immunity listed in R.C. 2744.02(B)(1)-(5). If any of those exceptions apply, we move to the third tier to consider whether immunity can be restored based on the defenses enumerated in R.C. 2744.03. *Id*.

B. General Immunity and the R.C. 2744.02(B) Exceptions

{¶10} There is no dispute that the City qualified, at the first tier of the analysis, for a general grant of immunity under R.C. 2744.02(A). Regarding the second tier of the analysis, the City presented several arguments in its motion for summary judgment claiming that none of the R.C. 2744.02(B) exceptions applied in this case. In particular, the City argued the inapplicability of R.C.2744.02(B)(3), which states:

> Except as otherwise provided in [R.C. 3746.24], political subdivisions are liable for injury, death, or loss to person or property caused by their negligent failure to keep public roads in repair and other negligent failure to remove obstructions from public roads, except that it is a full defense to that liability, when a bridge within a municipal corporation is involved, that the municipal corporation does not have the responsibility for maintaining or inspecting the bridge.

Thus, pursuant to R.C. 2744.02(B)(3), the City may be held liable for injuries caused by its negligent failure to keep public roads in repair. *Pelletier v. Campbell*, 153 Ohio St.3d 611, 2018-Ohio-2121, ¶ 19.

{¶11} First, the City argued that R.C. 2744.02(B)(3) was inapplicable because the City was not required to place a traffic control device at the site of the sinkhole. The City then asserted seven arguments contending that "the City is immune from liability and the R.C. 2744.02(B)(3) exception does not apply because[:]"

1. "Elias cannot prove the duty element in a negligence analysis; the city owed no duty to Elias under the public duty rule"

2. "Elias cannot prove the duty element in a negligence analysis; the condition was open and obvious"

3. "Elias cannot prove the duty element in a negligence analysis; the city owed no duty of care to Elias because she assumed the risk of her action"

4. "Elias cannot prove the city breached a duty of care owed to Elias as a licensee"

5. "Elias cannot prove the city breached a duty of ordinary care"

6. "Elias cannot prove the proximate cause element in a negligence analysis; Elias' own act or omission in failing to discover the condition and avoid the risk of harm was the last act or omission that preceded the accident and was the proximate cause of Elias' injuries and damages"

7. "Elias cannot prove the proximate ca[u]se element in a negligence analysis; Elias' comparative negligence was greater than any negligence of the city as a matter of law"

1. The City's Arguments the Trial Court Declined to Consider

{¶12} The City faults the trial court for declining to consider the seven arguments asserted in the motion that, according to the City, "address[] the negligence component embodied in the exception[.]" In its judgment entry, the trial court noted

> that the City of Akron argued multiple other legal theories under the heading of political subdivision immunity in its brief such as the public duty rule, the open and obvious doctrine, etc. However, these defenses represent defenses independent of sovereign immunity. * * * Because the City only presented these arguments within the structure of political subdivision immunity, the [c]ourt finds its determination on political subdivision immunity resolves the entirety of the [m]otion for [s]ummary [j]udgment. The [c]ourt therefore finds good cause to deny the [m]otion for [s]ummary [j]udgment based upon political subdivision immunity.

The City contends that this was "an incomplete determination on the issue of proof of the R.C. 2744.02(B)(3) exception[.]" The City argues that, "[u]nless [Clare] can establish negligence[—]which is essential to R.C. 2744.02(B)(3)[—]then her claim fails." In order to address this argument, this Court must address a threshold issue regarding the scope of our review.

{¶13} To establish liability on a claim of negligence, a plaintiff must show "the existence of a duty, a breach of that duty, and an injury proximately resulting from the breach of duty." *Mondi v. Stan Hywet Hall & Gardens, Inc.*, 9th Dist. Summit No. 25059, 2010-Ohio-2740, ¶ 11. However, "[s]tatutory immunity, including political-subdivision immunity, is an affirmative defense[.]" *Supportive Solutions, L.L.C. v. Electronic Classroom of Tomorrow*, 137 Ohio St.3d 23, 2013-Ohio-2410, ¶ 17, citing *Turner v. Cent. Local School Dist.*, 85 Ohio St.3d 95, 98 (1999). An affirmative defense is a new matter which, assuming the complaint to be true, constitutes a defense to it. *Davis v. Cincinnati, Inc.*, 81 Ohio App.3d 116, 119 (9th Dist.1991). Specifically, "[a]n affirmative defense is any defensive matter in the nature of a confession and avoidance. It admits that the plaintiff has a claim (the 'confession') but asserts some legal reason why the plaintiff cannot have any recovery on that claim (the 'avoidance')." *State ex rel. The Plain Dealer Publishing Co. v. Cleveland*, 75 Ohio St.3d 31, 33 (1996). The burden of proving an affirmative defense rests with the party asserting the defense. *Nationstar Mtge., L.L.C. v. Mielcarek*, 9th Dist. Lorain No. 15CA010748, 2016-Ohio-60, ¶ 11.

{¶14} The trial court declined to consider these arguments because, despite the City's attempt to raise them within the context of political subdivision immunity, the court determined that the arguments presented defenses independent of the defense of statutory immunity. The issue at this stage of the analysis is whether the City can meet its summary judgment burden to demonstrate the absence of a factual dispute as to the inapplicability of the R.C. 2744.02(B)(3) exception. If the City were to meet its burden, and if the Eliases were unable to meet the reciprocal burden to show some genuine issue of material fact in dispute regarding the applicability of the R.C. 2744.02(B)(3) exception to immunity, the affirmative defense of statutory immunity would allow the City to avoid liability regardless of whether the Eliases could prove the elements of the

underlying claims. However, the arguments asserted by the City consist of defenses that aim to negate elements of the underlying cause of action or present alternative affirmative defenses. The City has failed to demonstrate how these arguments have any bearing on, or relevance to, the second tier of the political subdivision immunity analysis.

{¶15} Certainly, such defenses may be available to the City *independent* of the affirmative defense of political subdivision immunity. However, "[t]o the extent that the City asks this Court to address the substance of [the arguments seeking to negate an element of Clare's underlying negligence claim or present alternative affirmative defenses], those issues fall outside the scope of the instant appeal which pertains solely to whether the trial court erred in denying the City the benefit of immunity pursuant to R.C. 2744.02(A)." *Davis v. Akron*, 9th Dist. Summit No. 27014, 2014-Ohio-2511, ¶ 14; *see Shepard v. Akron*, 9th Dist. Summit No. 26266, 2012-Ohio-4695, ¶ 32 ("Because the City's appeal is limited to the court's denial of immunity and the public duty rule is independent of immunity, the issue is outside the scope of this appeal."); *Baab v. Medina City Schools Bd. of Edn.*, 9th Dist. Summit No. 28969, 2019-Ohio-510, ¶ 15 (Questions about the source of a duty are beyond the scope of a limited immunity appeal.).

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

{¶16} As discussed above, the pertinent question at this second tier of the analysis is whether R.C. 2744.02(B)(3) provides an exception to the general grant of immunity. Because the only issue pertaining to immunity that the City raised below and on appeal is the City's contention that R.C. 2744.02(B)(3) is rendered inapplicable by R.C. 2744.01(H), we confine our analysis accordingly. *See Ponyicky v. Brunswick*, 9th Dist. Medina No. 15CA0097-M, 2017-Ohio-37, fn.1. R.C. 2744.01(H) defines "public roads" as "public roads, highways, streets, avenues, alleys, and bridges within a political subdivision." The City emphasizes that the definition of public roads

"does not include * * * traffic control devices unless the traffic control devices are mandated by the Ohio manual of uniform traffic control devices."

{¶17} In its merit brief, the City argues that, based on the timing of the incident, the placement of traffic control devices was not mandated by the Ohio manual of uniform traffic control devices. The City fails to support its argument by explaining the relevance of "traffic control devices" in the context of this case. While traffic control devices may be excluded from the definition of public roads where they are not mandated, the City has not supported its claim that this distinction removes any issues of fact regarding its alleged failure to keep a public road—rather than a traffic device—in repair. Because there are no allegations that the City failed to maintain a traffic control device, we conclude that this argument lacks merit.

{¶18} The trial court found that issues of material fact remain as to whether the city was negligent in failing to repair or properly protect a portion of a public road with a known and potentially hazardous sinkhole. The City has not raised any argument, cited to any authority, or pointed to any portion of the record to demonstrate error in the trial court's decision. Our review of the record leads this Court to determine that the City failed to demonstrate the absence of material factual issues as to the City's assessment of the sinkhole as well as any decisions regarding the repair and the safeguarding of the road. Therefore, we conclude that the City failed to meet its burden to establish the absence of a genuine issue of material fact as to the inapplicability of R.C. 2744.02(B)(3), and the trial court properly concluded that the City was not entitled to a summary judgment determination of immunity in the second tier of the analysis.

C. R.C. 2744.03 Defenses to Restore Immunity

{¶19} Regarding the third tier of analysis, the City argues that even assuming Clare "could demonstrate that the R.C. 2744.02(B)(3) exception applies, the City retains immunity pursuant to R.C. 2744.03(A)."

{¶20} If an R.C. 2744.02(B) exception to immunity applies, the political subdivision may still establish nonliability through a defense or immunity listed in R.C. 2744.03(A). The City asserts two defenses stated in R.C. 2744.03(A):

> (3) The political subdivision is immune from liability if the action or failure to act by the employee involved that gave rise to the claim of liability was within the discretion of the employee with respect to policy-making, planning, or enforcement powers by virtue of the duties and responsibilities of the office or position of the employee.
>
> * * *
>
> (5) The political subdivision is immune from liability if the injury, death, or loss to person or property resulted from the exercise of judgment or discretion in determining whether to acquire, or how to use, equipment, supplies, materials, personnel, facilities, and other resources unless the judgment or discretion was exercised with malicious purpose, in bad faith, or in a wanton or reckless manner.

{¶21} This Court has held that "the exceptions to immunity set forth in R.C. 2744.03 must be narrowly construed.'" *Shumaker v. Park Lane Manor of Akron*, 9th Dist. Summit No. 25212, 2011-Ohio-1052, ¶ 19, quoting *Sturgis v. E. Union Twp.*, 9th Dist. Wayne No. 05CA0077, 2006-Ohio-4309, ¶ 18. "'Routine decisions are not shielded by immunity under R.C. 2744.03(A)(3) or 2744.03(A)(5).'" *Id.* quoting *Sturgis* at ¶ 18. "'A "discretionary" act necessarily involves "[s]ome positive exercise of judgment that portrays a considered adoption of a particular course of conduct in relation to an object to be achieved[.]"'" *Id.* quoting *Sturgis* at ¶ 18, quoting *Addis v. Howell*, 137 Ohio App.3d 54, 60 (2d Dist.2000).

{¶22} The City contends that its employees exercised judgment and discretion regarding the sinkhole and the condition of the road. The City argues that it "is immune from liability unless

[Clare] proves that the City employees exercised their discretion with malicious purpose, in bad faith, or in a wanton or reckless manner." This contention reflects the City's misunderstanding of its dual burdens: (1) to establish its affirmative defense of statutory immunity, and (2) to demonstrate the absence of a genuine issue of material fact to show that it is entitled to summary judgment. *Mielcarek*, 2016-Ohio-60 at ¶ 11; *Dresher*, 75 Ohio St.3d at 292-293. Rather than demonstrating that immunity is restored by a R.C. 2744.03 defense, the City attempts to prematurely shift the burden to the Eliases.

{¶23} As both the party asserting the affirmative defense and the party moving for summary judgment, the burden was upon the City to show that it was entitled to summary judgment on the issue of the applicability of a defense stated in R.C. 2744.03(A). In its brief, the City fails to cite to any relevant authority or present any meaningful argument to support the contention that the City's actions were a proper exercise of discretion. The City did not reference in its motion to the trial court, and does not reference on appeal, any part of the record to support its claim, but instead asserts that unspecified "evidence filed by the City defeats any such notion" that the City's actions were not based on the proper exercise of discretion. *See* Civ.R. 56; App.R. 12(A)(2). We conclude that the City failed to meet its burden to show that immunity would be reinstated under R.C. 2744.03(A)(3) or (5). Therefore, we conclude that the trial court did not err by denying the City's motion for summary judgment on the issue of the City's claim of immunity under R.C. Chapter 2744.

III.

{¶24} The City's assignments of error are overruled. The judgment of the Summit County Court of Common Pleas is affirmed.

Judgment affirmed.

There were reasonable grounds for this appeal.

We order that a special mandate issue out of this Court, directing the Court of Common Pleas, County of Summit, State of Ohio, to carry this judgment into execution. A certified copy of this journal entry shall constitute the mandate, pursuant to App.R. 27.

Immediately upon the filing hereof, this document shall constitute the journal entry of judgment, and it shall be file stamped by the Clerk of the Court of Appeals at which time the period for review shall begin to run. App.R. 22(C). The Clerk of the Court of Appeals is instructed to mail a notice of entry of this judgment to the parties and to make a notation of the mailing in the docket, pursuant to App.R. 30.

Costs taxed to Appellant.

JULIE A. SCHAFER
FOR THE COURT

TEODOSIO, P. J.
CALLAHAN, J.
CONCUR.

APPEARANCES:

EVE V. BELFANCE, Director of Law, and MICHAEL J. DEFIBAUGH and JOHN CHRISTOPHER REECE, Assistant Directors of Law, for Appellant.

A. RUSSELL SMITH, Attorney at Law, for Appellee.

IN THE COURT OF COMMON PLEAS
COUNTY OF SUMMIT

JOSEPH J. ELIAS	)	CASE NO.: CV-2017-01-0342
	)	
Plaintiff	)	JUDGE TAMMY O'BRIEN
-vs-	)	
	)	
THE CITY OF AKRON	)	**ORDER**
	)	
Defendant	)	

- - -

This matter comes before the Court upon the Motion for Summary Judgment filed by Defendant, City of Akron; the Response in Opposition filed by Plaintiff; and the Reply in Support filed by Defendant. This matter also comes before the Court upon Plaintiff's Supplemental Brief in Opposition filed on June 1, 2018 and an Objection to the Untimely Supplemental Brief filed by Defendant on June 7, 2018.

Upon review, the Court finds the supplemental brief was filed outside the time for a response and that leave is not proper. The Court therefore finds the Motion for Leave to File Supplemental Response was not well-taken. The Court further finds that the Defendant's Motion for Summary Judgment is not well-taken.

The Court therefore ORDERS the Motion for Leave to File Supplemental Response shall be DENIED. The supplemental response was not considered in rendering the decision herein.

The Court therefore ORDERS the Motion for Summary Judgment shall be DENIED.

The trial scheduled for **June 18, 2018** shall hereby be VACATED. The City of Akron stated at the final pretrial that if summary judgment was denied, it would file an appeal in accordance with R.C. 2744.02(C).

This is a final appealable order. There is no just reason for delay.

ANALYSIS

A. Statement of The Facts and Arguments Presented.

Plaintiff, Claire Elias, was injured in a motorcycle accident which occurred on or about March 21, 2012 in Akron, Ohio. Elias was riding her motorcycle when she suddenly was thrown off of it. Upon inspection, it was revealed that Elias struck a large depression in the road or a sink hole (hereinafter referred to as "sink hole"). Originally, Elias filed an action against the City of Akron in 2014. On January 23, 2016, the original action was voluntarily dismissed by Plaintiff. On January 23, 2017, Plaintiff refiled her action against the City of Akron. Plaintiff's complaint

alleges that the City of Akron and its employees "recklessly, wantonly, willfully, wrongfully, and negligently directly and proximately injured and caused injury to the Plaintiff…" However, Plaintiff did not sue any specific employees of the political subdivision in this matter.

On March 23, 2018, the City of Akron filed its Motion for Summary Judgment claiming that political subdivision immunity applies. Defendant's brief raises multiple arguments detailing that no exception to R.C. 2744.02(A), including R.C. 2744.02(B)(3), applies. Defendant's brief further argues that, even if an exception to political subdivision immunity applies, that R.C. 2744.03(A) restores immunity. The Defendant filed a response claiming that political subdivision immunity does not apply in this case.

B. Standard of Review

The party seeking summary judgment bears the burden of showing no genuine issue of material fact exists for trial. Civ. R. 56(C). Doubts must be resolved in favor of the non-moving party. *Id.* Once the moving party has satisfied his burden, the non-moving party has a reciprocal burden to set forth specific facts showing that there is a genuine issue for trial. *Dresher v. Burt* (1996), *75* Ohio St.3d 280, 291. A moving party is entitled to judgment as a matter of law when the non-moving party fails to present evidence of specific facts on an essential element of the case with respect to which they have the burden of proof. *Donnelly v. Taylor,* 9th Dist. No. 02CA0033-M, 2003 Ohio App. LEXIS 686.

C. Law and Analysis

The Ohio Revised Code establishes a three-tier analysis for determining whether a political subdivision is immune from liability. *Winkle v. Zettler Funeral Homes, Inc.,* 12th Dist. App. No. CA2008-06-144, ¶17, 2009-Ohio-1724. R.C. 2744.02(A)(1) first provides a general grant of immunity to a political subdivision in connection with governmental and proprietary functions. *Id.* Second, R.C. 2744.02(B) lists five exceptions to the general grant of immunity to political subdivisions. Finally, R.C. 2744.03 sets forth defenses which, if successfully asserted by the political subdivision, reinstates immunity.

It is undisputed that the City of Akron is entitled to a general grant of immunity as a political subdivision. It is also undisputed that the City of Akron was engaging in a governmental or proprietary function in this matter. Accordingly, the first prong of the political subdivision immunity analysis has been satisfied and a general grant of immunity applies to the City of Akron.

Next, the Court must consider whether an exception to this general grant of immunity exists. R.C. 2744.02(B)(3) provides that

> Except as otherwise provided in section 3746.24 of the Revised Code, political subdivisions are liable for the injury, death, or loss to person or property caused by their negligent failure to keep public roads in repair and other negligent failure to remove obstructions from public roads, except that it is a full defense to liability, when a bridge within a municipal corporation is involved, that the municipal corporation does not have the responsibility for maintaining or inspecting the bridge.

The City of Akron may be liable for injuries caused by their negligent failure to keep public roads in repair. To establish negligence, a duty, a breach of that duty, proximate cause, and damages must be shown. Todd v. City of Cleveland, 8th Dist. Cuyahoga No. 98333, 2013-Ohio-101, ¶ 15 *citing* ***Menifee v. Ohio Welding Prods., Inc.,*** 15 Ohio St. 3d 75, 77, 15 Ohio B. 179, 472 N.E.2d 707 (1984). A city has a duty to repair potholes that deteriorate into a potentially hazardous condition. *Id. citing Gomez v. Cleveland,* 8th Dist. No. 97179, 2012 Ohio 1642, ¶ 9. When viewing the evidence in the light most favorable to Plaintiff, the Court finds that issues of material fact remain as to whether the City of Akron breached its duty to repair the potentially hazardous sink hole. Issues remain as to whether the City was negligent in waiting at least two days from the date of discovery to repair the sink hole and whether the City properly protected the area until the hazard could be remedied.

Finally, the Court considers whether R.C. 2744.03(A) restores immunity even if R.C. 2744.02(B)(3) applies. The City of Akron claims that its employees engaged in discretionary decisions inherent to the maintenance and repair of roads in determining how to proceed with repairing the road and in determining whether the area needed to be protected until the hazard could be remedied. In *Lester Pointer v. City of Akron,* 9th Dist. No. , 1995 Ohio App. LEXIS 3137, the Ninth District referred to the Ohio Supreme Court's decision in *Franks v. Lopez,* 69 Ohio St.3d 345, which stated:

> Overhanging branches and foliage which obscure traffic signs, malfunctioning traffic signals, signs which have lost their capacity to reflect, or even physical impediments such as potholes, are easily discoverable and the elimination of such hazards involves no discretion, policy making or engineering judgment. The political subdivision has the responsibility to abate them, and it will not be immune from liability for its failure to do so.

In light of this language, the Ninth District explained that "if a jury were to find 1) the City had notice of the pothole, 2) the potholes rendered unsafe the regularly travelled portion of the road, and 3) the resulting dangerous condition caused [the Plaintiff's] injuries and death" the City could not rely on R.C. 2744.03(A)…to shield it from liability." While *Franks* and *Pointer* rely

upon a previous version of R.C. 2744.02(B)(3) which referred to "nuisances" in the roadway as opposed to "negligent failure to repair the roadway", this Court finds the rationale remains applicable under the current language of R.C. 2744.02(B)(3). Further, R.C. 2744.03(A) exceptions must be narrowly construed. *Shepard v. City of Akron*, 9th Dist. No. 26266, ¶28, 2012-Ohio-4695. Under the circumstances, the Court finds the R.C. 2744.03(A) does not restore the City's immunity as a matter of law.

The Court notes that the City of Akron argued multiple other legal theories under the heading of political subdivision immunity in its brief such as the public duty rule, the open and obvious doctrine, etc. However, these defenses represent defenses independent of sovereign immunity. *See Shepard v. City of Akron,* 9th Dist. No. 26266, ¶31, 2012-Ohio-4695. Because the City only presented these arguments within the structure of political subdivision immunity, the Court finds its determination on political subdivision immunity resolves the entirety of the Motion for Summary Judgment. The Court therefore finds good cause to deny the Motion for Summary Judgment based upon political subdivision immunity.

COURT ORDERS

The Court therefore ORDERS the Motion for Leave to File Supplemental Response shall be DENIED. The supplemental response was not considered in rendering this decision herein.

The Court therefore ORDERS the Motion for Summary Judgment shall be DENIED.

The trial scheduled for **June 18, 2018** shall hereby be VACATED. The City of Akron stated at the final pretrial that if summary judgment was denied, it would file an appeal in accordance with R.C. 2744.02(C).

This is a final appealable order. There is no just reason for delay.

IT IS SO ORDERED.

JUDGE TAMMY O'BRIEN

CC: ATTORNEY A. RUSSELL SMITH
ATTORNEY A. RUSSELL SMITH
ATTORNEY JOHN CHRISTOPHER REECE
ATTORNEY MICHAEL J. DEFIBAUGH

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