[Cite as *Hirt v. Crestline Paving & Excavating, Inc.*, 2013-Ohio-200.]

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

Reynold J. Hirt, et al.

Appellants

v.

Crestline Paving & Excavating, Inc., et al.

Appellees

Court of Appeals Nos. S-11-032
S-11-051

Trial Court No. 09-CV-24

DECISION AND JUDGMENT

Decided: January 25, 2013

* * * * *

John A. Coppeler, for appellants.

Shannon J. George, for appellee Crestline Paving & Excavating, Inc.

Larry P. Meyer, for appellee Sandusky Township Sewer District.

* * * * *

YARBROUGH, J.

I. Introduction

{¶ 1} This is a consolidated appeal from two separate judgments of the Sandusky County Court of Common Pleas, granting summary judgment in favor of defendants-appellees, Sandusky Township Sewer District ("Sandusky Township") and Crestline

Paving and Excavating, Inc. ("Crestline"). For the reasons that follow, we affirm, in part, and reverse, in part.

A. Facts and Procedural Background

{¶ 2} This matter stems from Sandusky Township's decision to undertake construction of a sanitary sewer in a neighborhood encompassing the homes of plaintiffs-appellants, Reynold and Sandra Hirt, David Fahrbach, and Marlene and Philip Daubel. Construction of the sewer was performed by Crestline, and was completed in 2001. It is undisputed that before construction began, none of the appellants had experienced any water or sewage problems in the basements of their homes.

{¶ 3} In January 2005, however, appellants began experiencing flooding in their basements during periods of heavy rain. The Hirts had up to two feet of water and sewage back up into their house from the basement toilet and drains. Following this, they installed test balls in the drains, which, when inflated, prevent sewage from backing up. However, they still experienced water flooding through the basement floor and walls.

{¶ 4} Fahrbach also had sewage back up into his house from the basement toilet and shower drain, covering 1,200 to 1,500 square feet of floor space. Subsequently, he installed a backflow preventer, which prevents sewage from entering his house. During periods of heavy rains, however, the backflow preventer causes him to be unable to use sinks, toilets, or showers until the pressure in the sanitary sewer line subsides.

{¶ 5} The Daubels, similarly, had four feet of water flood their basement. They have since experienced flooding of six feet of water in 2008, and four and one-half feet of water in May 2009.

{¶ 6} The appellants filed separate lawsuits against Sandusky Township, asserting claims for negligent operation and maintenance of the sewer system, and seeking writs of mandamus to compel Sandusky Township to initiate appropriation proceedings for the taking of their property by the continual flooding. The Daubels' lawsuit, which was filed originally on January 11, 2006, and then re-filed on December 28, 2008, additionally included a claim against Crestline. That claim alleged that, during construction of the sanitary sewer, Crestline severed an existing drain system that collected storm and subsurface water from the Daubels' house. Further, it alleged Crestline had a duty to repair the drain system, but failed to do so. The claim asserted that as a result of the severing of the system and the failure to repair it, the Daubels' house flooded in January 2005, and several times thereafter.

{¶ 7} The trial court consolidated the cases. Following discovery, Sandusky Township and Crestline moved for summary judgment. The trial court granted the motions for summary judgment in separate entries. As to Sandusky Township's motion, the trial court found that the cause of appellants' injuries was not due to any affirmative acts of Sandusky Township's employees in the performance of a proprietary function, and thus Sandusky Township was entitled to governmental immunity under R.C. 2744.01 et seq. As to Crestline's motion, the trial court found that the Daubels' claim was barred

by the statute of limitations because they knew, or reasonably should have known, that there was damage to their property by June 1, 2001, at the latest.

B. Assignments of Error

{¶ 8} Appellants have timely appealed the judgments, and those appeals have been consolidated for review. Appellants assert three assignments of error:

1. The Common Pleas Court erred in granting summary judgment in favor of appellee, Sandusky Township Sewer District, because there are genuine issues of material fact which preclude granting summary judgment.

2. The Common Pleas Court failed to address the mandamus claim of appellants relating to the taking of their property by the repeated flooding which has occurred.

3. The Common Pleas Court erred in granting summary judgment in favor of appellee, Crestline Paving & Excavating, Inc., because there are genuine issues of material fact which preclude granting such judgment.

II. Analysis

{¶ 9} We review appeals from an award of summary judgment de novo, applying the same standard as the trial court. *Lorain Natl. Bank v. Saratoga Apts.*, 61 Ohio App.3d 127, 129, 572 N.E.2d 198 (9th Dist.1989). Applying Civ.R. 56(C), summary judgment is appropriate where (1) there is no genuine issue as to any material fact, (2) the moving party is entitled to judgment as a matter of law, and (3) reasonable minds can come to but one conclusion, and viewing the evidence in the light most favorable to the non-moving

party, that conclusion is adverse to the non-moving party. *Harless v. Willis Day Warehousing Co.*, 54 Ohio St.2d 64, 66, 375 N.E.2d 46 (1978).

{¶ 10} We will address appellants' third assignment of error first.

A. The Daubels' Claim Against Crestline is Barred by the Statute of Limitations

{¶ 11} In the third assignment, the Daubels argue that the trial court erred in finding that their claim was barred by the statute of limitations. R.C. 2305.09(D) provides for a four-year statute of limitations for tort actions for damage to real property. *Harris v. Liston*, 86 Ohio St.3d 203, 207, 714 N.E.2d 377 (1999). The parties do not dispute that the discovery rule applies, such that the statute of limitations does not begin to run until the damage to the property "is first discovered, or through the exercise of reasonable diligence it should have been discovered." *Id.* In this case, the complaint was filed on January 11, 2006. Thus, the relevant date for when the damage was discovered, or reasonably should have been discovered, is January 11, 2002.

{¶ 12} Crestline argues that the Daubels knew of the flooding problem as of mid-2001. As support, it points to Marlene Daubel's deposition testimony that on June 9, 2000, Crestline severed an existing drain tile, and on June 10, 2000, water entered her basement for the first time. Further, Crestline points to Marlene's documentation of the "lifting of the basement floor" in January 2001, and instances of moisture on the cinder block foundation walls in February 2001. Additionally, Crestline relies on complaints that Marlene lodged with it. The first complaint, filed on May 14, 2001, states,

> While the front of the property was dug into I asked the foreman why they weren't installing field tile to dry up the water problem – he said they had reconnected the ground water pipe and something that should take the place of the dry well. This I hope works because this is not the system we originally had – we had a connected dry well system that led to the river. This is for the record just in case it doesn't solve our water problem. You are notified. (Emphasis sic.)

A second complaint, filed on May 22, 2001, states,

> Crestline did replace most of (not all) the ground water drainage on Riverbend Pkwy. Where is the drainage to drain the water that the trench brings down? Where are the dams? Dick Hoppenjans P.E. from Bowser Morner informed you how to fix the problem. You engineered a nightmare and if it causes anymore problems, you will be held responsible.

A third complaint, filed on June 1, 2001, states,

> Also Crestline foreman Steve and Bischoff's on sight engineer Edgil Williams both informed us that a straight pipe standing straight up in the center of the yard would work as our dry well. Now it is clearly marked CLEAN OUT. A simple straight pipe clean out will not work as our dry well. You may have reconnected the surface water system but you have not corrected the ground water problem that you engineered in this valley. Its (sic) too bad that our homes must crumble and our drinking water must be

> contaminated to prove what harm you have done to us. No matter when these things happen we will hold Crestline, Bischoff, Sandusky Township and Sandusky County responsible! Since no one will take responsibility for these problems – eventually a court of law will force an answer to this issue.

Finally, Crestline notes that Marlene again recorded flooding in their basement in July and August 2001.

{¶ 13} The Daubels, for their part, agree that they experienced water problems in June 2000 and January and February 2001 because of Crestline's work. However, they argue that the actionable cause of damage to their house in this case is not the original severing of the drain tile, but rather Crestline's negligent failure to correctly repair or reconnect the tile. They note that an agreement was reached on April 16, 2001, which in part required them to cooperate with the reconnection or restoration of drains for surface water. Thus, the Daubels logically infer from that agreement that the drains had not been reconnected or restored at that time. Marlene Daubel testified in an affidavit that it was not until after the January 2005 flooding that, "my husband and I concluded that the surface drainage had not been restored or repaired or reconnected as it was supposed to be at the time we signed the agreement on April 16, 2001, or that if that work had been done, it had either been done improperly or had now failed." Therefore, the Daubels contend that the cause of action did not accrue until January 2005. As a result, they conclude the claim was filed well within the four-year statute of limitations.

{¶ 14} Construing the evidence in the light most favorable to the Daubels, we hold that their claim is barred by the statute of limitations. Although Marlene's affidavit establishes they may not have subjectively known of the flooding problem until January 2005, the undisputed evidence shows that, as a matter of law, they reasonably should have known of the problem in August 2001.

{¶ 15} Accepting the proposition that the drain tile was not repaired as of April 16, 2001, the subsequent complaints filed by Marlene reveal that as of June 1, 2001, Crestline had completed the repairs it was going to make to the drainage system. Following those repairs, Marlene recorded flooding in the basement in July and August 2001. While that flooding may have been relatively minor, "Ohio courts have held that it is 'unnecessary that the full extent of damages be ascertainable' in determining the accrual date of a cause of action for statute of limitations purposes." *Jones v. Hughey*, 153 Ohio App.3d 314, 2003-Ohio-3184, 794 N.E.2d 79, ¶ 28 (10th Dist.), quoting *Beavercreek Local Schools v. Basic, Inc.*, 71 Ohio App.3d 669, 689, 595 N.E.2d 360 (2d Dist.1991). "Thus, 'an accrual of a cause of action is not delayed until the full extent of the resulting damage is known.'" *Id.* Therefore, because the cause of action accrued in August 2001, the initial filing of the complaint in January 2006 was outside of the four-year statute of limitations.

{¶ 16} The Daubels additionally argue that their complaint was filed within the statute of limitations based on the "continuing wrong" theory of tort law. Essentially,

they posit that the persistent flooding constitutes a continuing trespass, such that a new cause of action arises each day that the condition exists. We disagree.

{¶ 17} In a similar residential flooding case, the Ohio Supreme Court set forth the difference between a continuing trespass and a permanent trespass. *Sexton v. Mason*, 117 Ohio St.3d 275, 2008-Ohio-858, 883 N.E.2d 1013, ¶ 45. A continuing trespass "occurs when there is some continuing or ongoing allegedly tortious activity attributable to the defendant." *Id.* In contrast, "[a] permanent trespass occurs when the defendant's allegedly tortious act has been fully accomplished." *Id.* In *Sexton*, the Ohio Supreme Court held that the defendant's act of building a subdivision was fully complete, and thus constituted a permanent trespass, even though it resulted in the repeated flooding of the plaintiff's property. Further, because the defendant's act was completed more than four years before the complaint was filed, the claim was barred by the statute of limitations. *Id.* at ¶ 55.

{¶ 18} Here, similarly, Crestline completed its repairs to the drainage system in front of the Daubels' house by June 2001. Thus, its alleged negligent failure to correctly repair or reconnect the drainage system constituted a permanent trespass, not a continuing one. Therefore, the cause of action accrued by August 2001, when the Daubels continued to experience flooding even though the repairs were done. Consequently, their claim against Crestline is barred by the statute of limitations.

{¶ 19} Accordingly, appellants' third assignment of error is not well-taken.

B. Sandusky Township is Entitled to Immunity

{¶ 20} In their first assignment, appellants argue that the trial court erred by finding that Sandusky Township was entitled to immunity. At the outset, the parties agree that Sandusky Township is liable for the negligent acts of its employees with respect to proprietary functions, but not governmental functions. R.C. 2744.02(A)(1) and (B)(2). Proprietary functions include, "The maintenance, destruction, operation, and upkeep of a sewer system." R.C. 2744.01(G)(2)(d). Governmental functions, on the other hand, include, "The provision or nonprovision, planning or design, construction, or reconstruction of a public improvement, including, but not limited to, a sewer system." R.C. 2744.01(C)(2)(l). Thus, we must decide whether appellants' claims arise from Sandusky Township's failure to maintain, operate, or upkeep the sewer system, or whether they arise from the planning, design, and construction of the sewer system.

{¶ 21} Appellants Hirt and Fahrbach assert claims for negligent maintenance and repair. Thus, if proven, Sandusky Township would not be immune from liability. Appellant Daubel asserts claims for both negligent failure to maintain, and negligent design and construction. Because the design and construction of a sewer system is a governmental function, Sandusky Township is immune from liability relative to that portion of the claim. Therefore, we will consider only appellants' claims for negligent maintenance and repair.

{¶ 22} The determinative issues we must address in this negligence action are breach of duty and proximate cause. Sandusky Township argues that appellants have

provided no evidence to show that it was negligent in maintaining, operating, or upkeeping the sewer system, nor have they shown that the flooding was caused by a negligent failure to maintain, operate, or upkeep the system. Instead, Sandusky Township points to expert testimony that the cause of the flooding is excess water entering the sanitary sewer system during periods of heavy rain. The source of the excess water is unknown, but it is believed that it can be attributed to the inadequacy of the existing storm sewer. The storm sewer was installed by private developers at the time the subdivision was created.

{¶ 23} Appellants, in response, do not identify any particular part of the sanitary sewer system that is broken and has not been repaired. Rather, they argue in their appellate brief that Sandusky Township's failure to remedy the problem constitutes a negligent failure to maintain or operate a properly working system in that,

> [S]anitary sewer systems can and are designed to operate properly in [areas with poor surface drainage] without basements being flooded, and the current sewer system can be changed or upgraded to take care of the problems that the appellants experience when heavy rainfalls result in excessive clean water entering the sanitary sewer system to the extent that the pressure forces sewage to back up into their homes.

The Ohio Supreme Court, however, recently rejected this argument. *Coleman v. Portage Cty. Engineer*, 133 Ohio St.3d 28, 2012-Ohio-3881, 975 N.E.2d 952.

{¶ 24} In *Coleman*, the plaintiffs averred that the existing storm drainage system was unable to accommodate all of the drainage water it collected, and thus it overflowed, damaging their property. *Id.* at ¶ 2. Like here, the cause of the storm-sewer backup was unclear. *Id.* The plaintiffs filed a complaint against the Portage County Engineer, in which they alleged the engineer negligently designed, constructed, and maintained the drainage system. *Id.* at ¶ 3. The trial court granted summary judgment in favor of the engineer on the basis of political-subdivision immunity. *Id.* at ¶ 5. The court of appeals affirmed summary judgment to the extent the claims were based on negligent design and construction, but reversed to the extent the claims were based on negligent maintenance of the sewer system. *Id.* at ¶ 7-8.

{¶ 25} Appeal was accepted by the Ohio Supreme Court on the proposition that, "A political subdivision's failure to upgrade the capacity of an inadequate sewer system is not a proprietary function within the meaning of R.C. 2744.01(G)(2)(d) so as to subject a political subdivision to liability under R.C. 2744.02(B)(2). The upgrade of sewer system capacity is an immune governmental function under R.C. 2744.01(C)(2)(i) [sic]." In agreeing with that proposition, the Ohio Supreme Court reasoned, "failure to upgrade is different from the failure to maintain or upkeep." *Id.* at ¶ 24. It adopted the approach that,

> A complaint is properly characterized as a maintenance, operation, or upkeep issue when "remedying the sewer problem would involve little discretion but, instead, would be a matter of routine maintenance,

> inspection, repair, removal of obstructions, or general repair of deterioration." *Essman* [*v. Portsmouth*, 4th Dist. No. 09CA3325, 2010-Ohio-4837, 2010 WL 3852247] at ¶ 32. But the complaint presents a design or construction issue if "remedying a problem would require a [political subdivision] to, in essence, redesign or reconstruct the sewer system." *Essman* at ¶ 32-33. (Brackets sic.) *Coleman*, 133 Ohio St.3d 28, 2012-Ohio-3881, 975 N.E.2d 952, at ¶ 30, quoting *Guenther v. Springfield Twp. Trustees*, 2012-Ohio-203, 970 N.E.2d 1058, ¶ 18 (2d Dist.).

Therefore, the court held that, for purposes of R.C. Chapter 2744, a claim of failure to upgrade is a claim based on negligent design and construction, not negligent maintenance. *Coleman* at ¶ 31. Consequently, it held that the engineer was entitled to political-subdivision immunity. *Id.*

{¶ 26} Applying *Coleman* to the present situation, we hold that Sandusky Township is entitled to political subdivision immunity concerning appellants' claim that is based on Sandusky Township's failure to upgrade the sewer system.

{¶ 27} Accordingly, appellants' first assignment of error is not well-taken.

C. Genuine Issues of Material Fact Still Exist Regarding Appellants' Mandamus Claims

{¶ 28} Finally, in their second assignment of error, appellants argue that the trial court failed to address their mandamus claims relating to Sandusky Township's alleged taking of their property. They contend those claims could not have been resolved by the

trial court's award of summary judgment on the basis of political subdivision immunity because their claims invoke the protections of the takings clause of the United States and Ohio Constitutions, which "are not subject to the limitations of the Political Subdivision Tort Liability Act." *Seiler v. Norwalk*, 192 Ohio App.3d 331, 2011-Ohio-548, 949 N.E.2d 63, ¶ 41 (6th Dist.). Sandusky Township agrees that the trial court did not expressly address the mandamus claims, but nonetheless argues that summary judgment was appropriate because appellants have not established an actual taking.

{¶ 29} A "taking" is "[a]ny direct encroachment upon land, which subjects it to a public use that excludes or restricts the dominion and control of the owner over it." *State ex rel. Doner v. Zody*, 130 Ohio St.3d 446, 2011-Ohio-6117, 958 N.E.2d 1235, ¶ 59, quoting *Norwood v. Sheen*, 126 Ohio St. 482, 186 N.E. 102 (1933), paragraph one of the syllabus. The Ohio Supreme Court has held,

> In eminent-domain cases involving claims of government-induced flooding, the claimant establishes a taking by proving that (1) the flooding is either intended by the government or is the direct, natural, or probable result of government-authorized activity and (2) the flooding is either a permanent invasion or creates a permanent liability because of intermittent, but inevitably recurring, overflows. *Doner* at ¶ 65.

Moreover, proof of these matters must be by clear and convincing evidence. *Id.* at ¶ 57.

{¶ 30} Addressing the second prong first, we find that appellants' affidavit testimony that the sanitary sewer backup occurs whenever there are periods of heavy rain

is sufficient to create a genuine issue of material fact as to whether the flooding creates "a permanent liability because of intermittent, but inevitably recurring, overflows."

{¶ 31} Turning to the first prong, appellants do not claim that Sandusky Township intended to flood their basements, thus they must prove that Sandusky Township's actions "caused the flooding and that the flooding was a foreseeable result of [its] actions." *Id.* at ¶ 67. Notably, the appellants' claims for mandamus raise different considerations, and therefore will be discussed separately.

{¶ 32} Regarding the Daubels' claim for mandamus based on storm water flooding their basement, Sandusky Township argues that the Daubels have failed to establish a taking because the only evidence the Daubels have is testimony from their expert witness, Milton Pommeranz, that he *believes* the tile severed by Crestline during the construction of the sanitary sewer ran from the home's foundation to the neighborhood storm sewer. Further, this *belief* is the basis of Pommeranz's conclusion that the severing of the tile is the cause of the flooding in the Daubels' basement. In contrast, the Sewer District points to the affidavit of its expert, Gary Dannemiller, in which he concludes that the severing of the drain tile is not the cause of the basement flooding. Given this conflict, and construing the evidence in the light most favorable to the non-moving parties, we find that a genuine issue of material fact exists as to whether the severing of the drain tile is the direct, natural, and probable cause of the flooding in the Daubels' basement. *See Seiler*, 192 Ohio App.3d 331, 2011-Ohio-548, 949 N.E.2d 63, at ¶ 85-86 (questions of fact that must be resolved by determining the credibility of

expert witnesses should be considered at trial, not through summary judgment). Therefore, summary judgment in favor of Sandusky Township is not appropriate on the Daubels' claim.

{¶ 33} Regarding the Hirts' claim for mandamus based on storm water flooding their basement, Sandusky Township argues that summary judgment is appropriate because the basement water is not attributable to the sanitary sewer construction. Sandusky Township notes that there are no alleged construction errors associated with the Hirts' home. Further, it relies on Dannemiller's conclusion in his affidavit that "the sanitary sewer is not causing the flooding of the basement." Instead, Dannemiller concludes that storm water enters the Hirts' basement because of the area's naturally high groundwater elevation, the fact that no subsurface drainage pipes or footer drains discharge into the Hirts' sump crock thereby limiting the effectiveness of the sump pump in lowering the water table around the entire foundation, and the fact that the sump pump is not connected to the storm sewer system, but rather discharges to the ground surface around the house. Appellants have provided no evidence to counter the conclusions of Dannemiller. Therefore, we find that no genuine issue of material fact exists that the flooding was not the direct, natural, or probable result of Sandusky Township's activity. Accordingly, summary judgment in favor of Sandusky Township as to this portion of the claim is appropriate.

{¶ 34} Finally, concerning the claims for mandamus regarding the sewage backup into the basements of the Hirts and Fahrbach,[1] Sandusky Township argues that summary judgment is appropriate because there is no evidence of ongoing design, construction, or maintenance issues relating to the sanitary sewer.

{¶ 35} This case is similar to *State ex rel. Livingston Court Apts. v. Columbus*, 130 Ohio App.3d 730, 721 N.E.2d 135 (10th Dist.1998). In *Livingston Court*, the owner of an apartment complex filed a complaint for a writ of mandamus to compel the city to commence appropriation proceedings for the alleged taking of property caused by the city's sanitary sewer system flooding the basements of the apartments. The flooding occurred during periods of heavy rain, and it was determined that the cause of the flooding was a series of illegal storm water hookups into the sanitary sewer line that overloaded the system, thereby resulting in sanitary water backing up into the basements. The Tenth District found that, under the circumstances of the city failing to correct the problem, "the sewer system at issue, maintained and controlled by the city, was used by the city in a manner causing damage to relator from flooding by raw sewage, and that this interference with the landowner's use and enjoyment of the property constituted a taking." *Id.* at 739.

[1] Although Sandusky Township asserts that the mandamus claims are unique to the Daubels and Hirts, Fahrbach's amended complaint filed on January 5, 2009, also includes a claim for a writ of mandamus.

{¶ 36} We note that while the city in *Livingston Court* failed to take any steps to enforce its ordinance prohibiting illegal hookups despite its knowledge of the illegal connections, Sandusky Township in this case is actively trying to identify the source of the excess water, and prevent it from entering the sanitary sewer system. Nevertheless, the relevant issue is whether the flooding is "the direct, natural, or probable result of the government-authorized activity." Here, Sandusky Township has failed to present any evidence that the sewer lines, maintained and controlled by Sandusky Township, are not causing the flooding of appellants' basements. Therefore, summary judgment in its favor is inappropriate as to these claims.

{¶ 37} Accordingly, appellants' second assignment of error is well-taken to the extent it relates to the Daubels' mandamus claim, and to the mandamus claims raised by the Hirts and Fahrbach based on sewage flooding their basements. To the extent it relates to the Hirts' mandamus claim based on storm water flooding their basement, appellants' second assignment of error is not well-taken.

III. Conclusion

{¶ 38} For the foregoing reasons, the judgments of the Sandusky County Court of Common Pleas are affirmed, in part, and reversed, in part. The trial court's award of summary judgment to Sandusky Township on the Daubels' mandamus claim and on the Hirts' and Fahrbach's mandamus claims based on sewage entering their basements is reversed, and the cause is remanded to the trial court for further proceedings on those

claims. All other aspects of the trial court's judgments are affirmed. Costs are to be split evenly between appellants and Sandusky Township pursuant to App.R. 24.

Judgments affirmed, in part,
and reversed, in part.

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

Arlene Singer, P.J. _____
JUDGE

Thomas J. Osowik, J. _____
JUDGE

Stephen A. Yarbrough, J. _____
CONCUR.
JUDGE