

[Cite as *E. Ohio Gas Co. v. Cleveland*, 2019-Ohio-1248.]

# Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT  
COUNTY OF CUYAHOGA

---

JOURNAL ENTRY AND OPINION  
**No. 107563**

---

**THE EAST OHIO GAS COMPANY, D.B.A., DOMINION ENERGY OHIO**

PLAINTIFF-APPELLANT

vs.

**THE CITY OF CLEVELAND**

DEFENDANT-APPELLEE

---

**JUDGMENT:**  
AFFIRMED

---

Civil Appeal from the  
Berea Municipal Court  
Case No. 17 CVE 01279

**BEFORE:** Celebrezze, J., Kilbane, A.J., and Sheehan, J.

**RELEASED AND JOURNALIZED:** April 4, 2019

**ATTORNEY FOR APPELLANT**

Stephen J. Pruneski  
1500 One Cascade Plaza  
Akron, Ohio 44308

**ATTORNEYS FOR APPELLEE**

Barbara A. Langhenry  
City of Cleveland  
Director of Law  
BY: Elizabeth M. Crook  
Craig J. Morice  
Assistant Directors of Law  
601 Lakeside Avenue, Room 106  
Cleveland, Ohio 44114

FRANK D. CELEBREZZE, JR., J.:

{¶1} Plaintiff-appellant, the East Ohio Gas Company d.b.a. Dominion Energy Ohio (hereinafter “Dominion”), brings the instant appeal challenging the trial court’s judgment in favor of defendant-appellee, the city of Cleveland (hereinafter “city”), on Dominion’s negligence claim. Specifically, Dominion argues that the trial court erred by determining that the city was not negligent and immune from liability pursuant to R.C. Chapter 2744. After a thorough review of the record and law, this court affirms.

### **I. Factual and Procedural History**

{¶2} The instant appeal arose from a July 19, 2015 incident during which employees of the city’s water department conducted an excavation at the intersection of Gallatin Boulevard and Smith Road in Brook Park, Ohio, in order to repair a water line. During the excavation, Dominion’s gas line was struck and damaged, and Dominion incurred \$4,472.64 in damages in order to repair the gas line.

{¶3} On July 9, 2015, the city contacted the Ohio Utilities Protection Service (“OUPS”) and requested that the underground utilities at the intersection be located and marked. Pursuant to Dominion’s contract with the United States Infrastructure Corporation (“USIC”) and the city’s request, USIC located and marked the underground utilities at the intersection on July 9, 2015, at approximately 11:15 p.m.

{¶4} The city began the excavation and water-line-repair project on July 19, 2015. During the process of repairing the water line, and despite the fact that Dominion’s gas line had

been previously located and marked, a city employee struck and damaged a “dresser coupling”<sup>1</sup> that was protruding from Dominion’s gas line while operating a backhoe. The dresser coupling protruded approximately eight inches from Dominion’s gas line.

{¶5} The cost of repairing Dominion’s gas line was \$4,472.64. After paying the repair costs, Dominion issued an invoice to the city. Although the city acknowledged that it had, in fact, struck Dominion’s gas line during the excavation, the city did not tender a payment to Dominion for the cost of the repairs.

{¶6} As a result, on May 30, 2017, Dominion filed a complaint against the city in the Berea Municipal Court for “property damage,” alleging that the gas line was damaged due to the city’s negligence in operating the backhoe. Dominion’s complaint alleged, in relevant part:

2. On July 19, 2015, employees of the City of Cleveland Water Department negligently struck and damaged [Dominion’s] natural gas facilities at or near 5945 Smith Road, Brook Park, Ohio. In violation of Ohio law, the [city] failed to contact the [OUPS] to determine the location of underground utilities before excavating.

3. As a direct and proximate result of [the city’s] negligence and violation of Ohio law, [Dominion] incurred damages in the amount of [\$4,472.64] to repair its property[.]

Dominion’s complaint at ¶ 2-3.

{¶7} The city filed an answer on June 27, 2017. Therein, the city raised several affirmative defenses, including the affirmative defense of immunity under R.C. Chapter 2744.

{¶8} A trial commenced on January 31, 2018. At the close of trial, the parties submitted proposed findings of fact and conclusions of law.

---

<sup>1</sup> A “dresser coupling,” also known as a welded lug, is used to connect two separate pieces of pipe.

{¶9} On April 10, 2018, a magistrate issued its decision that contained several findings of fact, conclusions of law, and recommendations to the trial court. Therein, the magistrate ultimately concluded that the city “has immunity from liability pursuant to [R.C.] 2744.02 and 2744.03.” Accordingly, the magistrate entered judgment in favor of the city and recommended that the case be dismissed with prejudice.

{¶10} On April 26, 2018, Dominion filed objections to the magistrate’s decision. The city responded to Dominion’s objections on May 8, 2018. After obtaining trial transcripts, the parties filed supplemental briefs pertaining to the magistrate’s decision and Dominion’s objections thereto.

{¶11} On July 12, 2018, the trial court overruled Dominion’s objections and affirmed the magistrate’s decision in favor of the city. The trial court dismissed the case with prejudice.

{¶12} Dominion filed the instant appeal on August 17, 2018, challenging the trial court’s judgment. Dominion assigns three errors for our review:

- I. The trial court erred in concluding R.C. 3781.25 through R.C. 3781.38 does not impose civil liability on a political subdivision.
- II. The trial court erred in applying R.C. 2744.03(A)(6) to find the city of Cleveland immune for damaging Dominion’s property while performing a proprietary function.
- III. The trial court erred in determining that the city of Cleveland was immune and therefore not negligent because the city of Cleveland did not act “with malicious purpose, in bad faith or a wanton reckless manner.”

## **II. Law and Analysis**

{¶13} Dominion’s assignments of error challenge the trial court’s judgment that the city was not negligent and immune from liability under R.C. Chapter 2744.

### **A. Standard of Review**

{¶14} This court reviews a trial court’s decision adopting a magistrate’s decision for an abuse of discretion. *Vannucci v. Schneider*, 8th Dist. Cuyahoga No. 104598, 2017-Ohio-192, ¶ 13, citing *Abbey v. Peavy*, 8th Dist. Cuyahoga No. 100893, 2014-Ohio-3921, ¶ 13, and *Lindhorst v. Elkadi*, 8th Dist. Cuyahoga No. 80162, 2002-Ohio-2385. Under this standard of review, this court will only reverse the trial court’s decision if it is unreasonable, arbitrary, or unconscionable. *Blakemore v. Blakemore*, 5 Ohio St.3d 217, 219, 450 N.E.2d 1140 (1983).

{¶15} This court presumes that the trial court conducted a proper, independent analysis of the magistrate’s decision. *Snyder v. Snyder*, 8th Dist. Cuyahoga No. 95421, 2011-Ohio-1372, ¶ 41, citing *Bradach v. Bradach*, 8th Dist. Cuyahoga No. 88622, 2007-Ohio-3417, ¶ 19. “[A]n appellate court should not substitute its judgment for that of the trial court when there exists \* \* \* competent and credible evidence supporting the findings of fact and conclusions of law rendered by the trial judge.” *Ruiz v. Brecksville*, 8th Dist. Cuyahoga No. 105390, 2017-Ohio-9164, ¶ 12, quoting *Seasons Coal Co., Inc. v. Cleveland*, 10 Ohio St.3d 77, 80, 461 N.E.2d 1273 (1984).

{¶16} It is well-established that a reviewing court defers to the trial court’s findings of fact. “The rationale for giving deference to the trial court’s factual findings is based on the understanding that ‘the trial judge is best able to view the witnesses and observe their demeanor, gestures and voice inflections, and use these observations in weighing the credibility of the proffered testimony.’” *Ruiz* at ¶ 13, quoting *Seasons Coal Co.* at 80. Accordingly, this court will not disturb the trial court’s judgment when it is supported by competent, credible evidence in the record. *Ruiz* at *id.*

### **B. Immunity**

{¶17} In its first assignment of error, Dominion argues that the trial court erred by concluding that the city was immune from liability. Dominion contends that the city was liable for damaging Dominion’s gas line pursuant to Ohio’s One Call Utility Protection Service Act (hereinafter “OUPS Act”), R.C. 3781.25 et seq. It is undisputed, however, that the city is a political subdivision, and thus, R.C. Chapter 2744 applies in this case.

### **1. R.C. Chapter 2744**

{¶18} R.C. Chapter 2744 governs sovereign immunity with respect to a political subdivision. *FirstEnergy Corp. v. Cleveland*, 182 Ohio App.3d 357, 2009-Ohio-2257, 912 N.E.2d 1156, ¶ 10 (8th Dist.). The Ohio Supreme Court has established a three-tiered analysis for courts to apply in determining whether a political subdivision is immune from liability. *Greene Cty. Agricultural Soc. v. Liming*, 89 Ohio St.3d 551, 556, 733 N.E.2d 1141 (2000).

“The first tier is the general rule that a political subdivision is immune from liability incurred in performing either a governmental function or proprietary function. R.C. 2744.02(A)(1). However, that immunity is not absolute. R.C. 2744.02(B). The second tier of the analysis requires a court to determine whether any of the five exceptions to immunity listed in R.C. 2744.02(B) apply to expose the political subdivision to liability. \* \* \* If any of the exceptions to immunity in R.C. 2744.02(B) do apply and no defense in that section protects the political subdivision from liability, then the third tier of the analysis requires a court to determine whether any of the defenses in R.C. 2744.03 apply, thereby providing the political subdivision a defense against liability.”

(Citations omitted.) *Williams v. Brewer*, 8th Dist. Cuyahoga No. 93829, 2010-Ohio-5349, ¶ 10, quoting *Colbert v. Cleveland*, 99 Ohio St.3d 215, 2003-Ohio-3319, 790 N.E.2d 781, ¶ 7-9.

{¶19} In the instant matter, regarding the first tier, it is undisputed that the city’s operation of a municipal water system constitutes a proprietary function under R.C. 2744.01(G)(2)(c). R.C. 2744.02(A)(1) provides, “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.”

{¶20} The trial court’s judgment and the instant appeal pertain to the second tier of the immunity analysis. As an initial matter, we note that it is undisputed that the city struck and damaged Dominion’s gas line while repairing the water line at the intersection of Gallatin Boulevard and Smith Road. The parties dispute, however, whether the exception set forth in R.C. 2744.02(B)(2) applies.

{¶21} R.C. 2744.02(B)(2) provides that a political subdivision is liable for loss to property allegedly “caused by the negligent performance of acts by their employees with respect to proprietary functions of the political subdivision[.]” In this case, the parties dispute whether the city was negligent in repairing the water line.

{¶22} The magistrate concluded that the city was not negligent in repairing the water line because the dresser coupling that was struck and damaged was not foreseeable. After reviewing the record, we find that the trial court did not abuse its discretion in adopting the magistrate’s decision because the magistrate’s determination that the city was not negligent is supported by competent and credible evidence.

{¶23} Dominion alleged in its complaint that the city’s employee negligently operated the backhoe during the excavation. “In order to establish a claim for negligence, a plaintiff must establish that (1) the defendant owed the plaintiff a duty of care, (2) the defendant breached that



duty, and (3) the plaintiff suffered an injury and damages as a direct and proximate result of that breach.” *Dabney v. Metro Appraisal Group, Inc.*, 8th Dist. Cuyahoga No. 106917, 2018-Ohio-4601, ¶ 24, citing *Texler v. D.O. Summers Cleaners & Shirt Laundry Co.*, 81 Ohio St.3d 677, 680, 693 N.E.2d 271 (1998). The duty a defendant owes to the plaintiff depends upon (1) the relationship between the parties, and (2) the foreseeability of injury. *Thayer v. B.L. Bldg. & Remodeling, L.L.C.*, 8th Dist. Cuyahoga No. 105950, 2018-Ohio-1197, ¶ 24, citing *Simmers v. Bentley Constr. Co.*, 64 Ohio St.3d 642, 645, 597 N.E.2d 504 (1992).

{¶24} As noted above, the city contacted OUPS on July 9, 2015, and requested that the underground utilities at the intersection of Gallatin Boulevard and Smith Road in Brook Park, Ohio be marked. The underground utilities were marked by USIC on July 9, 2015. USIC marked the city’s water line as well as Dominion’s natural gas pipeline.

{¶25} When the city conducted the excavation and repair work on July 19, 2015, the underground utilities at the intersection had already been marked. The employee operating the backhoe, Gary Pignatello, and the spotter assisting him with the excavation were able to see Dominion’s gas line during the excavation. However, the city’s employees were not aware that there was a dresser coupling protruding from Dominion’s gas line. Furthermore, the employees were not able to see the dresser coupling because it was covered with dirt. The employees only became aware that the dresser coupling was attached to Dominion’s gas line after the coupling had been struck by the backhoe.

{¶26} Accordingly, the magistrate’s determination that the city’s employees were not negligent in repairing the water line is supported by competent and credible evidence in the record. The employees were not aware that the dresser coupling was attached to and protruding from Dominion’s gas line, and the employees were unable to see the dresser coupling during the

excavation because it was covered in dirt. Pignatello, a 25-year veteran of the city's water department, testified that he had never encountered a dresser coupling protruding from a gas line during an excavation.

{¶27} Dominion argues that Pignatello's testimony in this respect is not credible because Jose Hernandez, an engineering manager with the city's water department, testified that the city uses dresser couplings to install gas lines. As noted above, the trial court was in the best position to determine the credibility of the witnesses. Furthermore, the deposition testimony of Dominion's own employee, Kenneth Young, that dresser couplings are "not commonly used" and only used for higher-pressure gas lines supports Pignatello's trial testimony and the magistrate's determination that the presence of the dresser coupling that was struck and damaged was not foreseeable.

{¶28} For all of the foregoing reasons, we find that the trial court did not abuse its discretion in concluding that the city was not negligent and immune from liability. The magistrate's determination that the city was immune from liability and that the exception to immunity under R.C. 2744.02(B)(2) for negligent acts during proprietary functions did not apply is supported by competent, credible evidence in the record. Dominion's first assignment of error is overruled in this respect.

## **2. OUPS Act**

{¶29} As noted above, in support of its argument that the city was liable for the damage to the gas line, Dominion directs this court to Ohio's OUPS Act, R.C. 3781.25 et seq.

{¶30} R.C. 3781.25 et seq. sets forth a statutory scheme to safeguard underground utility facilities. The statutes impose a nondelegable duty on excavators to determine whether "underground utility facilities," such as pipes and lines, exist in order to avoid damaging them

during excavation. *GTE N., Inc. v. Carr*, 84 Ohio App.3d 776, 779, 618 N.E.2d 249 (4th Dist.1993).

The statutes impose various duties on developers, designers and excavators with respect to excavation projects. R.C. 3781.28 places notification requirements on the excavator, and R.C. 3781.30 establishes a standard of care for excavators after excavation has begun. The nondelegable duties are imposed by these statutes to avoid damage to underground utilities.

*Opincar v. F.J. Spanulo Constr.*, 8th Dist. Cuyahoga No. 91255, 2008-Ohio-6286, ¶ 18, citing *Carr* at 779.

{¶31} Excavators are responsible for notifying OUPS of the location of an excavation site and the date of the excavation at least two days but not more than ten days before an excavation. R.C. 3781.28(A). Once a contractor notifies OUPS of the location of a proposed excavation, it fulfills its duty to inform itself of the location of the underground utility facilities. *Ohio Edison Co. v. Wartko Constr.*, 103 Ohio App.3d 177, 180, 658 N.E.2d 1118 (11th Dist.1995).

{¶32} In the instant matter, Dominion's challenge to the trial court's judgment is premised entirely on the proposition that a violation of an excavator's duties under R.C. 3781.30 constitutes negligence for purposes of the second tier of the immunity analysis and the exception set forth in R.C. 2744.02(B)(2). In other words, Dominion argues that because the city's employees violated its duties under R.C. 3781.30 to locate underground utilities and avoid damaging them, the employees were negligent in repairing the water line.

{¶33} Dominion argues that the city violated R.C. 3781.30(1), (3), and (4), which provide:

(A) When making excavations using traditional or trenchless technologies, the excavator shall do all of the following:

(1) Maintain reasonable clearance between any underground facility and the cutting edge or point of powered equipment;

\* \* \*

(3) When approaching and excavating within the tolerance zone of underground utility facilities with powered equipment, require an individual other than the equipment operator, to visually monitor the excavation activity for any indication of the underground utility facility;

(4) Conduct the excavation within the tolerance zone of underground utility facilities in a careful, prudent, and nondestructive manner, when necessary, in order to prevent damage[.]

{¶34} After reviewing the record, we find that Dominion’s argument regarding the OUPS Act is misplaced. Dominion has failed to provide any authority in support of its proposition that a violation of an excavator’s OUPS duties constitutes negligence for purposes of the exception to immunity under R.C. 2744.02(B)(2). Accordingly, the trial court properly concluded that the city’s liability was governed by R.C. Chapter 2744, rather than the OUPS Act. *See Cincinnati Ins. Co. v. Cleveland*, 8th Dist. Cuyahoga No. 92305, 2009-Ohio-4043, ¶ 37 (“There is no question that the City was negligent in its duty to locate and mark the underground water main.

\* \* \* However, the state legislature has left certain avenues open to those injured by acts or omissions of the state and its municipalities. R.C. 2744.02(B)(2) would have allowed [the injured party] to recover from the City as one injured through the negligent operation of a proprietary function. \* \* \* This is the avenue left available to [the injured party] by statute.”).

{¶35} R.C. 2744.02(B)(5) provides,

In addition to the circumstances described in divisions (B)(1) to (4) of this section, a political subdivision is liable for injury, death, or loss to person or property

when civil liability is *expressly imposed* upon the political subdivision by a section of the Revised Code, including, but not limited to, sections 2743.02 and 5591.37 of the Revised Code. *Civil liability shall not be construed to exist under another section of the Revised Code merely because that section imposes a responsibility or mandatory duty upon a political subdivision, because that section provides for a criminal penalty, because of a general authorization in that section that a political subdivision may sue and be sued, or because that section uses the term “shall” in a provision pertaining to a political subdivision.*

(Emphasis added.)

{¶36} Neither R.C. 3781.30 nor the OUPS Act expressly impose civil liability upon a political subdivision. Pursuant to R.C. 2744.02(B)(5), civil liability shall not be construed to exist under R.C. 3781.30 merely because the statute imposes responsibilities and mandatory duties upon excavators and uses the term “shall.”

{¶37} Based on the foregoing analysis, the trial court properly determined that the OUPS Act did not impose civil liability upon the city. Accordingly, Dominion’s first assignment of error is overruled in this respect.

#### **C. R.C. 2744.03(A)(6)**

{¶38} In its second assignment of error, Dominion argues that the trial court erred in finding that the city was immune pursuant to R.C. 2744.03(A)(6). Specifically, Dominion argues that R.C. 2744.03(A)(6) is inapplicable because Dominion’s negligence claim pertained to the city, not any of the city’s individual employees.

{¶39} R.C. 2744.03(A)(6) provides,

In addition to any immunity or defense referred to in division (A)(7) of this section and in circumstances not covered by that division or sections 3314.07 and 3746.24 of the Revised Code, the employee is immune from liability unless one of the following applies:

(a) The employee's acts or omissions were manifestly outside the scope of the employee's employment or official responsibilities;

(b) The employee's acts or omissions were with malicious purpose, in bad faith, or in a wanton or reckless manner;

(c) Civil liability is expressly imposed upon the employee by a section of the Revised Code. Civil liability shall not be construed to exist under another section of the Revised Code merely because that section imposes a responsibility or mandatory duty upon an employee, because that section provides for a criminal penalty, because of a general authorization in that section that an employee may sue and be sued, or because the section uses the term "shall" in a provision pertaining to an employee.

{¶40} R.C. 2744.03(A)(6)(b) states that "an employee" is immune from liability unless "[t]he employee's acts or omissions were with malicious purpose, in bad faith, or in a wanton or reckless manner[.]" See *Minaya v. NVR, Inc.*, 2017-Ohio-9019, 103 N.E.3d 160, ¶ 24 (8th Dist.). By its very terms, R.C. 2744.03(A)(6)(b) "applies only to individual employees and not to political subdivisions." *Fabrey v. McDonald Village Police Dept.*, 70 Ohio St.3d 351, 356, 639 N.E.2d 31 (1994); *Sudnik v. Crimi*, 117 Ohio App.3d 394, 398, 690 N.E.2d 925 (8th Dist.1996) (R.C. 2744.03(A)(6) "applies only to individual employees and not to political subdivisions and, therefore, has no effect on the alleged liability of the city.").

{¶41} In the instant matter, Dominion filed its complaint against the city. Dominion did not file its complaint against any city employees, or name any individual employees therein.

Accordingly, R.C. 2744.03(A)(6) is inapplicable. *See Minaya* at ¶ 24.

{¶42} The record reflects that the magistrate did, in fact, cite to R.C. 2744.03(A)(6) in its findings of fact. *See* magistrate's findings of fact 12-15. The magistrate did not, however, cite R.C. 2744.03(A)(6) in its conclusions of law. Furthermore, the record reflects that the magistrate's determination that the city was not negligent and immune from liability was not based on an application of R.C. 2744.03(A)(6). Rather, as noted above, the magistrate concluded that the city was immune because the city's employees were not negligent in repairing the water line, and thus, the exception to immunity set forth in R.C. 2744.02(B)(2) did not apply.

{¶43} Accordingly, Dominion's argument regarding R.C. 2744.03(A)(6) is misplaced. Dominion's second assignment of error is overruled.

#### **D. R.C. 2744.03(A)(5)**

{¶44} In its third assignment of error, Dominion argues that the trial court erred in finding that the defense to immunity set forth in R.C. 2744.03(A)(5) applied.

{¶45} R.C. 2744.03(A)(5) provides that the following defense or immunity may be asserted to establish nonliability in a civil action:

[t]he 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.

{¶46} In this case, Dominion argues that the defense to immunity under R.C. 2744.03(A)(5) does not apply because the maintenance of the city's water system is a proprietary function, and the act of maintaining and repairing the water system is ministerial in nature, rather than an exercise of judgment or discretion. Dominion's argument is misplaced and unsupported by the record.

{¶47} Dominion’s third assignment of error pertains to the third tier of the immunity analysis. As noted above, courts only proceed to the third tier of the analysis if one of the exceptions to immunity under R.C. 2744.02(B) applies.

{¶48} Although the magistrate concluded that the city was immune from liability pursuant to R.C. 2744.02 and 2744.03, the record reflects that the magistrate’s decision was based on its determination that the exception set forth in R.C. 2744.02(B)(2) did not apply because the city’s employees were not negligent in repairing the water line. Based on its determination that none of the exceptions under R.C. 2744.02(B) applied, the magistrate did not address the third tier of the immunity analysis. In fact, the magistrate’s conclusions of law specifically provide that “there is no exception available under ORC 2744.02(B) to the Conclusion that the [city] is not liable in damages to [Dominion] in the instant lawsuit and the [immunity analysis] does NOT need to proceed to the third tier.” Magistrate’s conclusions of law 30. Finally, Dominion alleged in its complaint that the city was negligent in repairing the water line — not that the conduct of the city’s employees was wanton and/or reckless.

{¶49} For all of these reasons, Dominion’s third assignment of error is overruled.

### **III. Conclusion**

{¶50} After thoroughly reviewing the record, we affirm the trial court’s judgment. The trial court did not abuse its discretion in finding that the city was not negligent and immune from liability, and the trial court’s judgment is supported by competent and credible evidence in the record.

{¶51} Judgment affirmed.

It is ordered that appellee recover of appellant costs herein taxed.

The court finds there were reasonable grounds for this appeal.



It is ordered that a special mandate issue out of this court directing the Berea Municipal Court to carry this judgment into execution.

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

FRANK D. CELEBREZZE, JR., JUDGE

MARY EILEEN KILBANE, A.J., and  
MICHELLE J. SHEEHAN, J., CONCUR