[Cite as *Schlegel v. Summit Cty.*, 2023-Ohio-2866.]

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

ROBERTA SCHLEGEL	C.A. No. 30377
Appellant	
v.	APPEAL FROM JUDGMENT ENTERED IN THE
SUMMIT COUNTY	COURT OF COMMON PLEAS COUNTY OF SUMMIT, OHIO
Appellee	CASE No. CV 2018-10-4138

DECISION AND JOURNAL ENTRY

Dated: August 16, 2023

CARR, Presiding Judge.

{¶1} Plaintiff-Appellant Roberta Schlegel appeals the judgment of the Summit County Court of Common Pleas. This Court affirms.

I.

{¶2} In the prior appeal, this Court set forth the following summary:

> Since 1992, Ms. Schlegel has resided at 472 Meadowview Drive in Sagamore Hills, which is located at the southeast corner of the intersection of Boyden Road and Meadowview Drive. This is a T-intersection, with Boyden Road running north/south and Meadowview Drive running east/west. A drainage ditch runs along the east side of Boyden Road. At the intersection of Boyden Road and Meadowview Drive there are two metal culverts: one culvert runs perpendicular underneath each road. The Boyden Road culvert is on the north side of the intersection and has catch basins on both sides of the culvert. These culverts provide drainage runoff from Meadowview Drive and houses on the east side of Boyden Road, including Ms. Schlegel's home.
>
> On April 1, 2016, [Defendant-Appellee] Summit County ("the County") inspected the culverts at the intersection of Boyden Road and Meadowview Drive and found that they were both rusted with large holes. Based upon the deteriorating condition of the culverts, the catch basins, and a manhole cover, and the results of a drainage analysis for the surrounding area, the County determined that the culverts were deficient and needed to be replaced with larger pipes. In December 2016, the

County prepared preliminary plans for the reconstruction of the culverts, and the plans were finalized in the first quarter of 2017. The County received approval for the contract to replace the culverts on May 16, 2017.

In April 2017, there were heavy rains in the area. Sometime prior to May 21, 2017, a sinkhole formed in Boyden Road near the northwest corner of Mr. Schlegel's property and close to the southeast corner of the intersection with Meadowview Drive. The County placed an orange construction barrel on the collapsed portion of Boyden Road.

On May 21 and 25, 2017, Ms. Schlegel's basement flooded. Ms. Schlegel called the County on May 26, 2017 to report that the culvert under Boyden Road was obstructed due to the sinkhole in Boyden Road. [The parties identify the collapsed and blocked culvert differently. Ms. Schlegel refers to it as the culvert under Boyden Road while the County refers to it as the culvert under Meadowview Drive. Despite the difference in the parties' identification of the culvert, they appear to agree it is the same culvert. To avoid confusion we will not use either designation, and instead will refer to it as "the culvert."] That same day the County cleaned the debris from the culvert and water flowed through the culvert. Also, the County placed a steel plate over the sinkhole along with a caution cone. On May 28, 2017, Ms. Schlegel's basement flooded again. During June 2017, the County did some repairs to the culvert and Boyden Road and both culverts were replaced in July 2017.

Ms. Schlegel filed a complaint against the County alleging that it was negligent in two ways: in the upkeep of the roadway and in the performance of a proprietary function. First, Ms. Schlegel alleged that the sinkhole and culvert collapse occurred due to the County's failure to maintain the roadway. Additionally, Ms. Schlegel alleged that the County was negligent in its attempt to temporarily repair and block the sinkhole and collapsed culvert by placing a metal plate and caution cone over the sinkhole. Ms. Schlegel asserted that both of these failures by the County in maintaining the roadway "made it so that water upon and along Boyden Road could not properly flow or filtrate," and caused her basement to flood.

Ms. Schlegel also claimed that the County was negligent in providing a proprietary service, namely the maintenance of a sewer system. Ms. Schlegel alleged that the ditches and culverts were a sanitary sewer system. She asserted that the flooding in her basement was caused by the water in the Boyden Road ditch not being able to "flow or filtrate through the collapsed culvert[.]"

The County moved for summary judgment, arguing that it was immune from Ms. Schlegel's negligence claims because the ditch and the culverts are not a sewer system and, thus did not constitute a proprietary function. Even if the culverts were a sewer system, the County argued, Ms. Schlegel's claims related to a governmental function as opposed to a proprietary function. Specifically, the County argued that Ms. Schlegel's allegations related to the design and reconstruction of the culverts as opposed to the maintenance and operation of a sewer system. The County also

> argued that the roadway maintenance exception did not apply as Ms. Schlegel's damages did not occur while traveling on the roadway. The County further argued that even if an exception to immunity existed, immunity was restored pursuant to R.C. 2744.03(A)(5) because the County's handling of the culvert involved discretionary decisions. Finally, the County argued that Ms. Schlegel's negligence in using a substandard drainage system was the cause of the flooding in her basement.
>
> Ms. Schlegel filed a brief in opposition, which was followed by a reply from the County and a sur-reply from Ms. Schlegel. The trial court denied in part the County's motion for summary judgment, finding that there were genuine issues of material fact regarding: 1) whether an exception to immunity does not apply because the ditch, the culverts and the catch basins are not a sewer system; 2) whether the County was negligent in clearing the clogged culvert; 3) whether the sewer backup was due to the County's design and could not be resolved with maintenance; 4) whether the sewer backup was a result of the County's discretion and exercise of judgment in its use of personnel and resources to update the culverts; and 5) whether the design of Ms. Schlegel's drainage system was the cause of her basement flooding. The trial court also granted in part the County's motion for summary judgment on the basis that the negligent roadway maintenance exception to immunity did not apply in this matter.

Schlegel v. Summit Cty., 9th Dist. Summit No. 29804, 2021-Ohio-3451, ¶ 2-9.

{¶3} The County appealed, and this Court reversed the decision of the trial court. *Id.* at ¶ 1; *but see id.* at ¶ 45-46 (Carr, J., dissenting). In so doing, the Court concluded "that the trial court erred by denying the County's motion for summary judgment as to the immunity exception in R.C. 2744.02(B)(2)." *Id.* at ¶ 39. We remanded the matter to the trial court for further proceedings. *Id.* at ¶ 44.

{¶4} Upon remand, the trial court reanalyzed the issue as to whether the R.C. 2744.02(B)(3) exception to immunity applied. The trial court concluded that it did not and that Ms. Schlegel was "not in the class of persons to benefit from [the County's] duty to maintain public roads because she was not a motorist or user of the roadway injured by a roadway condition." The trial court thus granted the County's summary judgment motion.

{¶5} Ms. Schlegel has appealed, raising two assignments of error for our review.

II.

ASSIGNMENT OF ERROR I

> IT WAS REVERSIBLE ERROR FOR THE TRIAL COURT TO RULE THAT THE STATUTORY EXCEPTION TO GOVERNMENTAL IMMUNITY SET FORTH UNDER R.C. []2744.02(B)(3) DOES NOT APPLY TO THIS CASE.

{¶6} Ms. Schlegel argues in her first assignment of error that the trial court erred in granting summary judgment to the County. Ms. Schlegel maintains that the exception set forth in R.C. 2744.02(B)(3) applies to the facts of this case.

{¶7} This Court reviews an award of summary judgment de novo. *Grafton v. Ohio Edison Co.*, 77 Ohio St.3d 102, 105 (1996). This Court applies the same standard as the trial court, viewing the facts in the case in the light most favorable to the non-moving party and resolving any doubt in favor of the non-moving party. *Viock v. Stowe-Woodward Co.*, 13 Ohio App.3d 7, 12 (6th Dist.1983).

{¶8} Pursuant to Civ.R. 56(C), summary judgment is proper if:

> (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).

{¶9} The party moving for summary judgment bears the initial burden of informing the trial court of the basis for the motion and pointing to parts of the record that show the absence of a genuine issue of material fact. *Dresher v. Burt*, 75 Ohio St.3d 280, 292-293 (1996). Specifically, the moving party must support the motion by pointing to some evidence in the record of the type listed in Civ.R. 56(C). *Id.* Once a moving party satisfies its burden of supporting its motion for summary judgment with acceptable evidence pursuant to Civ.R. 56(C), Civ.R. 56(E) provides that

the non-moving party may not rest upon the mere allegations or denials of the moving party's pleadings. *Id*. at 293. Rather, the non-moving party has a reciprocal burden of responding by setting forth specific facts, demonstrating that a "genuine triable issue" exists to be litigated at trial. *State ex rel. Zimmerman v. Tompkins*, 75 Ohio St.3d 447, 449 (1996).

{¶10} "A court engages in a three-tiered analysis to determine whether a political subdivision is immune from liability for damages in a civil action." *Molnar v. Green*, 9th Dist. Summit No. 29072, 2019-Ohio-3083, ¶ 11. "R.C. 2744.02(A) provides 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 or an employee of the political subdivision in connection with a governmental or proprietary function.'" *Thomas v. Lorain Metro. Hous. Auth.*, 9th Dist. Lorain No. 17CA011177, 2018-Ohio-2997, ¶ 13. "When it has been determined that a party generally qualifies for immunity due to its status as a political subdivision, the second tier of the analysis is to determine whether one of the exceptions to immunity set forth in R.C. 2744.02(B) is applicable." *Id*. "Under circumstances where an exception to immunity applies, the third tier of the analysis involves a determination of whether immunity may be restored under R.C. 2744.03(A)." *Id*.

{¶11} Here, the issue before this Court is whether the exception to immunity contained in R.C. 2744.02(B)(3) applies to the facts of this case. R.C. 2744.02(B)(3) states that, "[e]xcept as otherwise provided in section 3746.24 of the Revised Code, 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."

R.C. 2744.01(H) defines "[p]ublic roads" as "public roads, highways, streets, avenues, alleys, and bridges within a political subdivision. 'Public roads' does not include berms, shoulders, rights-of-way, or traffic control devices unless the traffic control devices are mandated by the Ohio manual of uniform traffic control devices."

{¶12} Ms. Schlegel's contention is that a sinkhole collapsed a portion of the County maintained road and debris from the road collapse clogged the culvert/pipe and that led to the flooding and ultimately the damage to Ms. Schlegel's property. The County argued below that the exception does not apply because the claim did not arise out of Ms. Schlegel's use of the road as a motorist. Ms. Schlegel in response pointed out there is nothing in the plain language of R.C. 2744.02(B)(3) that limits the liability for injury or loss to those that occur on the roadway itself.

{¶13} While we do not disagree with Ms. Schlegel's contention that the statute itself does not limit liability to losses occurring on the roadway, we nonetheless conclude that the trial court did not err in granting the County summary judgment on the issue.

{¶14} The precise language found in R.C. 2744.02(B)(3) has changed over the years. Early on, it provided in part that "[p]olitical subdivisions are liable for injury, death, or loss to persons or property caused by their failure to keep public roads, highways, streets, avenues, alleys, sidewalks, bridges, aqueducts, viaducts, or public grounds within the political subdivision open, in repair, and free from nuisance * * *." *See Manufacturer's Natl. Bank of Detroit v. Erie Cty. Road Comm.*, 63 Ohio St.3d 318, 321 (1992). In analyzing this early version of R.C. 2744.02(B)(3) with respect to what was meant by the phrase "free from nuisance[,]" the Supreme Court looked to a former R.C. 723.01, which also included language indicating the duty of municipal corporations to keep, inter alia, public highways and streets "open, in repair, and free from nuisance." *See Manufacturer's Natl. Bank of Detroit* at 321, fn.1. The Supreme Court noted that,

"[l]ike [former] R.C. 723.01, [former] R.C. 2744.02(B)(3) imposes on political subdivisions a duty of care to keep highways open and safe for public travel." *Id.* at 321. The Supreme Court concluded that, in determining duty under either statute, "the focus should be on whether a condition exists within the political subdivision's control that creates a danger for ordinary traffic on the regularly travelled portion of the road." *Id.* at 322; *see also Haynes v. Franklin*, 95 Ohio St.3d 344, 2002-Ohio-2334, ¶ 12, 14 (noting the continuing validity of the inquiry set forth in *Manufacturer's Natl. Bank of Detroit)*; *Harris v. Strongsville*, 8th Dist. Cuyahoga No. 70271, 1996 WL 695619, *5 (Dec. 5, 1996).

{¶15} Former R.C. 2744.02(B)(3) was subsequently amended and its scope narrowed. *See Howard v. Miami Twp. Fire Div.*, 119 Ohio St.3d 1, 2008-Ohio-2792, ¶ 24-26. As stated above, it now provides that a political subdivision is liable, inter alia, for loss caused by the negligent failure to keep public roads in repair and the negligent failure to remove obstructions from public roads. R.C. 2744.02(B)(3). The Supreme Court has determined that the amendment evidenced a "legislative intent to limit political-subdivision liability for roadway injuries and deaths." *Howard* at ¶ 29. Accordingly, while the scope of the *Manufacturer's Natl. Bank of Detroit* inquiry has likewise narrowed and shifted, nothing suggests that the overarching principal of R.C. 2744.02(B)(3) has changed, i.e. that a political subdivision still has a duty to keep public roads safe for public travel. *See Manufacturer's Natl. Bank of Detroit* at 321; *see also Ohio Bell Tel. Co. v. Digioia-Suburban Excavating, L.L.C.*, 8th Dist. Cuyahoga Nos. 89708, 89907, 2008-Ohio-1409, ¶ 25 (concluding R.C. 2744.02(B)(3) did not apply to property damage sustained by business from a gas explosion while a road was under construction because the business was not damaged in the course of traversing an unsafe roadway).

{¶16} While the current version of the statute, like the former version, does not explicitly indicate that loss must occur on the road itself, the Supreme Court's history of interpreting the statute must be taken into account. *See Howard* at ¶ 27. It is presumed that when the legislature amended R.C. 2744.02(B)(3), it was aware of the Supreme Court of Ohio's statements about the political subdivision's duty under R.C. 2744.02(B)(3). *See Howard at ¶ 27.* The failure of the legislature to include language indicating that the political subdivision must also take into account possible dangers to those off the roadway when determining the necessity of repairing or removing obstructions from the public road evidences that it did not intend to expand R.C. 2744.02(B)(3) to the scope envisioned by Ms. Schlegel. Instead, the political subdivision's duty under R.C. 2744.02(B)(3) is concerned with maintaining the safety of the public road, not the neighboring property. *See Manufacturer's Natl. Bank of Detroit*, 63 Ohio St.3d at 321.

{¶17} We note that the case relied upon by Ms. Schlegel, *Sherwin-Williams Co. v. Dayton Freight Lines, Inc.*, 112 Ohio St.3d 52, 2006-Ohio-6498, wherein the Supreme Court concluded that the exception in former R.C. 2744.02(B)(3) applied, involved a multi-vehicle accident on a highway. *Id.* at ¶ 1, 5, 24. Thus, *Sherwin-Williams Co.* did not directly address the issue before us. While the case does include language concerning statutory interpretation that would aid Ms. Schlegel's argument, *see id.* at ¶ 15-17, we cannot say that it is dispositive in light of the previous analysis.

{¶18} Ms. Schlegel's first assignment of error is overruled.

ASSIGNMENT OF ERROR II

THE COUNTY IS NOT OTHERWISE ABSOLVED FROM LIABILITY AS A MATTER OF LAW DUE TO ANY OF THE STATUTORY DEFENSES SET FORTH UNDER R.C. []2744.03(A).

{¶19} Ms. Schlegel argues in her second assignment of error that immunity is not reinstated for the County under R.C. 2744.03(A). However, as we concluded above that the trial court correctly concluded that the exception to immunity in R.C. 2744.02(B)(3) does not apply to the facts of this case, there was no need for the trial court, or this Court, to address whether R.C. 2744.03 applies. *See Thomas*, 2018-Ohio-2997, at ¶ 13.

{¶20} Ms. Schlegel's second assignment of error is overruled.

III.

{¶21} Ms. Schlegel'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.

DONNA J. CARR
FOR THE COURT

STEVENSON, J.
FLAGG LANZINGER, J.
CONCUR.

APPEARANCES:

MATTHEW S. ROMANO, Attorney at Law, for Appellant.

SHERRI BEVAN WALSH, Prosecuting Attorney, and MARVIN D. EVANS, Assistant Prosecuting Attorney, for Appellee.