

IN THE COURT OF APPEALS
TWELFTH APPELLATE DISTRICT OF OHIO
CLERMONT COUNTY

STATE OF OHIO ex rel.	:	
RIVER CITY CAPITAL, L.P.,	:	
	:	CASE NO. CA2008-12-110
Plaintiff-Appellee,	:	
	:	
- vs -	:	<u>OPINION</u>
	:	9/8/2009
	:	
BOARD OF CLERMONT COUNTY	:	
COMMISSIONERS, et al.,	:	
	:	
Defendants-Appellants.	:	

CIVIL APPEAL FROM CLERMONT COUNTY COURT OF COMMON PLEAS
Case No. 2007-CVH-01114

James F. McCarthy, III, 2400 Chemed Center, 255 East Fifth Street, Cincinnati, OH 45202, for plaintiff-appellee

Mary Lynne Birck, 101 East Main Street, Batavia, OH 45103, for defendants-appellants

POWELL, J.

{¶1} Defendant-appellant, Board of County Commissioners of Clermont County, Ohio (the County), appeals the decision of the Clermont County Court of Common Pleas denying its motion for summary judgment, in which the County sought immunity from suit pursuant to R.C. Chapter 2744. For the reasons set forth herein, we affirm the trial

court's decision.

{¶2} This matter concerns the collapse of a 72-inch stormwater pipe on a parcel of property owned by plaintiff-appellee, River City Capital, L.P. (River City). The property at issue is located at 770 Eastgate South Drive, in a commercial district of Clermont County known as the Eastgate Square Development. Twins Group, LLC leases the property and operates a Pizza Hut restaurant at the location. The property is situated between a McDonald's restaurant and an Oak Express furniture store. The three contiguous properties are bordered by State Route 32 to the north, and Eastgate South Drive to the south.

{¶3} The property at issue is located in a 280-acre watershed. With the progression of commercial development in the area, the County promulgated policies and procedures requiring property owners to construct stormwater facilities as a condition for approval of design plans and the issuance of building permits. A stormwater management system was thus created, consisting of open channels, underground pipes, inlets, curbs and gutters, manholes, and catch basins.

{¶4} The majority of stormwater in the watershed collects in a large retention pond south of Eastgate South Drive. The water from the retention pond is released through a pipe under Eastgate South Drive that connects to a 72-inch pipe on the Oak Express property. This pipe, in turn, connects and drains into a 72-inch pipe on River City's property. The remaining stormwater in the watershed flows through a 36-inch pipe on the McDonald's property, which also connects and drains into the 72-inch pipe on River City's property. The collection of stormwater then flows through this pipe, drains into a pipe beneath State Route 32, and eventually drains into a lake north of

State Route 32.

{¶15} According to River City, the roads surrounding the property at issue were dedicated to the County in 1995, at which time the County became responsible for the maintenance and control of the stormwater facilities in and beneath the roads. Like the surrounding commercial properties, the County discharges runoff from its roads into the existing stormwater facilities that ultimately drain into the pipes located on River City's property.

{¶16} On July 17, 2001, a portion of the 72-inch pipe on River City's property and a portion of the 72-inch pipe on the Oak Express property collapsed. Thereafter, representatives of River City, Oak Express and the Twins Group met with Clermont County Engineer Carl Hartman to discuss repairing the pipes in question. On November 2, 2001, the County's prosecuting attorney issued a letter to the Twins Group instructing that "immediate action" be taken "to repair the storm water system," due to "the possible damage to the road and its underlying structure," as well as concerns regarding "public safety and welfare."

{¶17} Shortly thereafter, River City hired several contractors to repair the damaged pipes. River City retained FOPPE Technical Group to provide construction inspection and material testing services in connection with the backfill placement operations for the installation of the new stormwater pipe sections. River City retained Nixco Plumbing to repair the damaged sections of the pipes, along with the underground gas and sanitary sewer lines on the Oak Express property. Sub-contractors were subsequently retained to install new power lines and a light pole that were damaged as a result of the pipe collapse. River City incurred expenses totaling \$271,952 for the

repairs.

{¶18} In April 2003, River City commenced an action against the County in the United States District Court for the Southern District of Ohio, alleging a takings claim pursuant to the Fifth and Fourteenth Amendments of the United States Constitution, a due process claim pursuant to the Fourteenth Amendment of the United States Constitution, a common law nuisance claim, and a claim for a writ of mandamus. The district court issued a decision on September 9, 2005, following a full hearing on the merits of River City's claims. *River City Capital, L.P. v. Bd. of Cty. Commrs.* (S.D. Ohio 2005), Case No. C-1-03-289, 2005 WL 2211303. The United States Court of Appeals for the Sixth Circuit, however, subsequently dismissed the case for lack of subject matter jurisdiction, finding the alleged claims were not ripe where River City had not fully exhausted state law remedies. *River City Capital, L.P. v. Bd. of Cty. Commrs.* (C.A.6, 2007), 491 F.3d 301.

{¶19} River City thereafter commenced the present action against the County in the Clermont County Court of Common Pleas. River City alleges it is entitled to a writ of mandamus compelling the County to institute an eminent domain proceeding to compensate River City for the alleged taking of its property. In addition, River City alleges a takings claim pursuant to the Fifth and Fourteenth Amendments of the United States Constitution, a due process claim pursuant to the Fourteenth Amendment of the United States Constitution, and a common law nuisance claim. The County filed a summary judgment motion on September 30, 2008, alleging it is immune from liability

with respect to River City's nuisance claim.¹ The trial court denied the motion on November 14, 2008, finding the County is "not statutorily immune from suit for maintenance and repair issues" with respect to the stormwater system.

{¶10} The County now appeals the trial court's decision concerning the issue of immunity, advancing a single assignment of error for review.

{¶11} Assignment of Error:

{¶12} "THE TRIAL COURT ERRED IN CONSTRUING [RIVER CITY'S] NUISANCE CLAIM AS A 'MAINTENANCE AND REPAIR ISSUE.'"

{¶13} The County argues the trial court erred in denying its motion for summary judgment because it is entitled to immunity as a matter of law with respect to River City's nuisance claim. Specifically, the County argues that River City's nuisance claim is premised upon the County's alleged failure to provide a stormwater system, which is a governmental function for which it is immune from liability. We find the County's argument without merit.

{¶14} As an initial matter, River City argues that the trial court's decision denying the County's summary judgment motion is not a final appealable order. Contrary to River City's assertion, the Ohio Supreme Court has held that a trial court's denial of "a motion in which a political subdivision * * * seeks immunity under R.C. Chapter 2744" is a final appealable order. *Hubbell v. City of Xenia*, 115 Ohio St.3d 77, 2007-Ohio-4839, syllabus. See, also, *Sullivan v. Anderson Twp.*, 122 Ohio St.3d 83, 2009-Ohio-1971, syllabus. River City's argument as to this matter is therefore without merit.

{¶15} Summary judgment is proper when there are no genuine issues of material

1. The County also sought summary judgment on River City's claim for a writ of mandamus, as well as on River City's due process claim. The trial court denied the County's motion as to both claims, which denial

fact, the moving party is entitled to judgment as a matter of law, and reasonable minds can only come to a conclusion adverse to the nonmoving party, construing the evidence most strongly in that party's favor. Civ.R. 56(C). See, also, *Harless v. Willis Day Warehousing Co.* (1978), 54 Ohio St.2d 64, 66. The moving party bears the initial burden of informing the court of the basis for the motion and demonstrating the absence of a genuine issue of material fact. *Dresher v. Burt*, 75 Ohio St.3d 280, 293, 1996-Ohio-107. If the moving party meets its burden, the nonmoving party has a reciprocal burden to set forth specific facts demonstrating a genuine issue for trial. *Id.* This court reviews a trial court's summary judgment decision de novo, meaning we apply the same standard utilized by the trial court. *Howard v. Kirkpatrick*, Fayette App. No. CA2008-11-040, 2009-Ohio-3686, ¶9.

{¶16} Sovereign immunity claims are governed by a three-tiered analysis pursuant to R.C. 2744.01, et seq. *Holbrook v. Brandenburg*, Clark App. No. 2007 CA 106, 2009-Ohio-2320, ¶16; *Golden v. Milford Exempted Village School Bd. of Edn.*, Clermont App. No. CA2008-10-097, 2009-Ohio-3418, ¶10, citing *Cater v. Cleveland*, 83 Ohio St.3d 24, 28, 1998-Ohio-421. Under the first tier, a political subdivision is afforded a broad grant of immunity for any injury, death or loss that occurs in connection with the performance of a governmental or proprietary function. R.C. 2744.02(A)(1). Immunity, however, is not absolute, but rather, is subject to five exceptions set forth in R.C. 2744.02(B). The second tier focuses on these exceptions. Under the third tier of the analysis, if an exception exists, immunity can be reinstated if the political subdivision demonstrates that one of the defenses set forth in R.C. 2744.03(A) applies. *Cater*.

{¶17} In its complaint, River City alleges the County created a nuisance by

has not been challenged on appeal.

"failing to develop, design, construct or maintain a coordinated public stormwater management system for the watershed * * *." River City also alleges the County caused the failure of the pipe in question by "requiring development in the watershed to construct stormwater facilities discharging into the stormwater pipes on the River City Property * * *."

{¶18} R.C. 2744.01(C)(2)(l) provides that the "provision or nonprovision, planning or design, construction, or reconstruction of a public improvement, including but not limited to, a sewer system" is a governmental function. Pursuant to R.C. 2744.01(G)(2)(d), however, the "maintenance, destruction, operation, and upkeep of a sewer system" is a proprietary function. The Ohio Supreme Court addressed this distinction in *Doud v. City of Cincinnati* (1949), 152 Ohio St. 132, 137:

{¶19} "A municipality is not obliged to construct or maintain sewers, but when it does * * * it becomes its duty to keep them in repair and free from conditions which will cause damage to private property; and in the performance of such duty the municipality is in the exercise of a ministerial or proprietary function and not a governmental function within the rule of municipal liability for tort. The municipality becomes liable for damages caused by its negligence in this regard in the same manner and to the same extent as a private person under the same circumstances." "Where a municipal corporation uses and assumes the management and control of a sewer within the municipality, it is required to exercise reasonable care to keep the same in repair and free from conditions which will cause damage to private property * * *." *Id.* at paragraph two of the syllabus.

{¶20} Moreover, in *City of Mansfield v. Balliett* (1902), 65 Ohio St. 451, paragraph three of the syllabus, the Ohio Supreme Court held that a municipality is

liable in damages to a property owner where, "without a legal appropriation in which the * * * owner is afforded an opportunity to obtain compensation, [it] causes its sewage to be emptied [onto the owner's property], thereby creating a nuisance inflicting special and substantial damages on such proprietor * * *." "The immunity which extends to the consequences, following the exercise of judicial or discretionary power, by a municipal body or other functionary, presupposes that such consequences are lawful in their character, and that the act performed might in some manner be lawfully authorized. * * * Where * * * the acts done are of such a nature as to constitute a positive invasion of the individual rights guaranteed by the constitution, legislative sanction is ineffectual as a protection to the persons or corporation performing such acts from responsibility for their consequences." Id. at 469, quoting *Seifert v. City of Brooklyn* (1886), 101 N.Y. 136, 143, 144.

{¶21} The County argues it is immune from liability as a matter of law, pursuant to R.C. 2744.01(C)(2)(I), because River City's nuisance claim is premised upon the County's alleged failure to "develop, design, construct or maintain a coordinated public stormwater management system." The County argues it does not have a duty to construct a stormwater management system, and therefore, River City's claim must fail. River City's claim for nuisance, however, also alleges that the County caused the failure of the pipe in question by "requiring development in the watershed to construct stormwater facilities discharging into the stormwater pipes on the River City Property * * *." Moreover, River City's nuisance claim specifically incorporates by reference all other allegations set forth in the complaint, including that the County's actions effectuated a taking of River City's property without just compensation. Accordingly, after reviewing the complaint, we decline the County's invitation to construe River City's nuisance claim

so narrowly as to find only an allegation that the County failed to construct a stormwater management system. See Civ.R. 8.

{¶22} The trial court found that the County is liable under a nuisance theory only if it took River City's property, "thereby assuming the responsibility of repairing and maintaining the sewer system." The court concluded, and the County does not challenge on appeal, that genuine issues of material fact remain with respect to River City's takings claim.

{¶23} The court then determined that the County is not immune from liability with respect to "maintenance and repair issues," pursuant to the exception to immunity set forth in R.C. 2744.02(B)(2) and defined in R.C. 2744.01(G)(2)(d). As discussed above, a municipality may be held liable in tort where it "uses and assumes the management and control of a sewer within the municipality." *Doud*, 152 Ohio St. 132 at paragraph two of the syllabus. See, also, *Balliett*, 65 Ohio St. 451 at paragraph three of the syllabus.

{¶24} Significantly, the County does not challenge the trial court's finding as to this matter. Rather, the County's sole argument on appeal is that the trial court misconstrued River City's nuisance claim to find an allegation that the County failed to repair and maintain the pipes in question. As previously discussed, we find the trial court did not err in this regard.

{¶25} As issues of fact remain with respect to River City's takings claim, we find the issue of immunity has not yet been determined. Accordingly, we find the trial court appropriately denied the County's motion for summary judgment.

{¶26} Judgment affirmed.

BRESSLER, P.J., and HENDRICKSON, J., concur.