IN THE COURT OF COMMON PLEAS
CUYAHOGA COUNTY, OHIO

KEVIN T. FINK, et al.,	)	**CASE NO. CV-09-685925**
	)	
Plaintiffs,	)	**JUDGE DICK AMBROSE**
	)	
-vs-	)	
	)	**JUDGMENT ENTRY**
TWENTIETH CENTURY HOMES, INC., et al.	)	**AND OPINION**
	)	
Defendants.	)	

{¶1} Before the Court is Defendant's, the City of Brecksville ("Brecksville"), Motion for Summary Judgment, filed July 1, 2011. For the reasons stated herein, Defendant's motion is granted and Brecksville is dismissed as a defendant in this case.

Facts

{¶2} This case involves a residential property known as 8651 Dunbar Lane, Brecksville, Ohio, which is owned by Kevin T. Fink and Carolin M. Fink ("Plaintiffs"). At all times relevant herein, before and after the construction of Plaintiffs' home, a "V" shaped ravine was observable behind Plaintiffs' property. In 1983, Plaintiffs built a home abutting this ravine. Central to this case is an 18" storm water pipe that drains water into this ravine from approximately 27 homes located in Bradford Village.[1] Plaintiffs' Amended Complaint asserts that Brecksville and the developer of Bradford Village, Defendant Broadview Service Corporation, constructed all or part of this pipe. Plaintiffs allege that Brecksville has an easement over this pipe, and is therefore responsible for its maintenance. Plaintiffs also allege, and Brecksville denies, that

[1] The sole purpose of this pipe is to discharge storm or surface water runoff into the ravine. The pipe does not supply water to homes.

Brecksville's inattentiveness to the maintenance of this pipe resulted in the erosion of the ravine, which then caused Plaintiffs' deck, patio, backyard, and home to gradually slide down the ravine.

{¶3} Plaintiffs' Amended Complaint states nine counts for relief. Brecksville addresses four (4) of these Counts in its Motion for Summary Judgment: Count 1 (Trespass by the City for Exceeding the Scope of the Easement); Count 2 (Trespass by the City); Count 3 (Nuisance by the City); and Count 5 (Negligence by the City for Failure to Maintain). In a ruling issued December 28, 2009, this Court granted Brecksville's Motion to Dismiss as to the intentional conduct and punitive damages component of Count 1. The Court also dismissed Count 4 (Waste by the City) and Count 9 (Unjust Enrichment), in their entirety. The Eighth District Court of Appeals affirmed these dismissals on November 10, 2010. *Fink, et al. v. Twentieth Century Homes, Inc., et al.*, 2010-Ohio-5486 (8th Dist.). Brecksville's Motion for Summary Judgment does not address the remaining Counts in Plaintiffs' Amended Complaint as these Counts do not apply to Brecksville.[2]

{¶4} In its Motion for Summary Judgment, Brecksville contends that: 1) it is not liable under Counts 1, 2, 3 or 5 of the Amended Complaint because it is entitled to immunity under R.C. 2744.02(A); 2) that the reasonable-use rule bars Plaintiffs' claims; 3) that Brecksville has committed no trespass because it has acquired a prescriptive easement over the ravine; and 4) that Brecksville owes no duty to maintain the ravine because the easement in question was not dedicated to Brecksville. The Court finds Brecksville's

[2] Count 6 (Negligence by the Developer's Engineer); Count 7 (Negligence by the City's Engineer); and Count 8 (Negligence by American Midwest and Fidelity).

immunity argument dispositive. Therefore, this opinion will not discuss Brecksville's subsequent arguments in favor of summary judgment.

APPLICABLE LAW

A. Political Subdivision Immunity – R.C. 2744.01 et seq.

{¶5} Plaintiffs' allegations against Brecksville are contingent upon the application of an exception to the general rule that political subdivisions are immune from tort liability. According to the Political Subdivision Tort Liability Act, codified in Chapter 2744, political subdivisions are not liable for damages in a civil action for injury, death, or loss to person or property caused by an act or omission of the political subdivision. *Hortman v. City of Miamisburg*, 110 Ohio St.3d 194, 2006-Ohio-4251, 852 N.E.2d 716, ¶10. The Ohio Supreme Court notes that a three-tiered analysis shall be employed to determine whether a political subdivision is immune from liability for injury or loss to property. *Rankin v. Cuyahoga Cnty. Dep't of Children & Family Servs, et al.*, 118 Ohio St.3d 392, 2008-Ohio-2567, 889 N.E.2d 521, ¶8, citing *Cater v. Cleveland*, 83 Ohio St.3d 24, 28 1998-Ohio-421, 697 N.E.2d 610 (1998), *vacated on other grounds*, *M.H. v. City of Cuyahoga Falls*, 2012-Ohio-5336, ¶ 10.

{¶6} The first tier under R.C. 2744.02(A) sets forth the general rule that political subdivisions are entitled to immunity. *Hortman*, 110 Ohio St.3d 194 at ¶10. This Court finds no material facts that would dispute that Brecksville is a political subdivision under R.C. 2744.01(F). Brecksville is therefore entitled to a general grant of immunity pursuant to R.C. 2744.02(A).

B. Exceptions to Immunity of a Political Subdivision Must Sound in Negligence.

{¶7} Under the second-tier of the statutory analysis, once immunity is established, a determination must be made as to whether any of the five exceptions to immunity listed under R.C. 2744.02(B) apply. *Cater*, 83 Ohio St.3d at 28. As a preliminary matter, R.C. 2744.02(B)(2) only provides an exception to the general rule of immunity for negligence actions. *Cramer v. Auglaize Acres*, 113 Ohio St.3d 266, 2007-Ohio-1946, 865 N.E.2d 9, ¶19. Plaintiffs' claims for trespass (Counts 1 & 2) therefore cannot survive summary judgment because they deal with intentional conduct, not negligence. Additionally, Plaintiffs' claim for nuisance (Count 3) cannot withstand summary judgment because it also does not sound in negligence.[3] Therefore, Brecksville is entitled to judgment as a matter of law on Counts 1, 2, and 3 of the Amended Complaint and as a result, these counts are dismissed.

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[3] *Warren v. Testa*, 461 N.E.2d 1354 (11th Dist.) (finding that "[a] nuisance does not rest on the degree of care used, for that presents a question of negligence (sic), but on the degree of danger existing even with the best of care. Thus a person who creates or maintains a nuisance is liable for the resulting injury to others without regard to the degree of care of skill exercised by him."); *Selden v. City of Cuyahoga Falls*, 132 Ohio St. 223, 226, 6 N.E.2d 976, 978, citing 30 Ohio Jurisprudence, 310; 20 Ruling Case Law, 381; 46 Corpus Juris, 663 (stating that "negligence is a failure to use such care as persons of ordinary prudence are accustomed to exercise under the same or similar circumstances, while a nuisance is that which causes hurt, inconvenience, annoyance or damage to the rights of another or the public. The latter term is derived from the French word 'nuire,' meaning to (sic) hurt or annoy, and does not rest upon the degree of care used, but upon the injury done, irrespective of the care exercised.").
Furthermore, the General Assembly removed the only reference to nuisance in R.C. 2744.01 et seq. with the enactment of Senate Bill 106 ("S.B. 106"), effective April 9, 2003. Specifically, "nuisance" was removed from R.C. 2744.02(B)(3), the public roads immunity exception, and the General Assembly inserted "negligence" in its stead. Notably, S.B. 106 kept "negligence" in 2744.02(B)(2). The Supreme Court has found the legislature's action in amending R.C. 2744.02(B)(3) to not be "whimsy but a deliberate effort to limit political subdivisions' liability for injuries and deaths on their roadways." *Howard v. Miami Twp. Fire Division*, 119 Ohio St.3d 1, 2008 Ohio 2792, ¶ 26, 891 N.E.2d 311. Courts must give meaning to every word used by the legislature. *Hyle v. Porter*, 117 Ohio St.3d 165, 2008 Ohio 542, ¶33 882 N.E.2d 889. Therefore, the Court finds that the legislature only intended plaintiffs to have a cause of action sounding in negligence under R.C. 2744.01 et seq, as it was left in 2744.02(B)(2).

C. Proprietary vs. Governmental Functions.

{¶8} The only exception to the immunity doctrine relied upon by Plaintiffs is set forth under R.C. 2744.02(B)(2), which states in pertinent part that: "political subdivisions are liable for injury, death, or loss to person or property caused by the negligent performance of acts by their employees with respect to proprietary functions of the political subdivision." Proprietary functions are enumerated under R.C. 2744.01(G) and include, among others, the establishment, maintenance, and operation of a utility, including a water supply system, and the maintenance, destruction, and upkeep of a sewer system.

{¶9} Conversely, governmental functions, which provide a political subdivision with immunity and are effectively the inverse of proprietary functions, are set forth under R.C. 2744.01(C). Governmental functions include such things as, the planning, design, construction, or reconstruction of a sewer system.

{¶10} With respect to Plaintiffs' remaining claim for negligence (Count 5), the key issue is whether the alleged negligent performance by Brecksville is connected to a proprietary function. This determination is a question of law, and Plaintiffs have the burden of establishing that such a connection exists. *Conley v. Shearer*, 64 Ohio St.3d 284, 292, 595 N.E.2d 862 (1992); *Seikel v. City of Akron*, 191 Ohio App.3d 362, 2010-Ohio-5983, 946 N.E.2d 250, ¶ 19 (9th Dist.).

{¶11} In the case at bar, Plaintiffs rely on R.C. 2744.01(G)(2)(c) and (d) to establish an exception to the general grant of immunity. R.C. 2744.01(G)(2)(c) includes in the definition of a proprietary function: "[t]he establishment, maintenance, and operation of a utility, including, but not limited to . . . a municipal corporation water supply system." A

municipal corporation water supply system encompasses, "the installing of water lines, equipment, and other materials which are a necessary part of the system." *Hill v. City of Urbana*, 79 Ohio St.3d 130, 679 N.E.2d 1109 (1997).

1. The Storm Water Drain is Not a Part of a Water Supply System.

{¶12} Plaintiffs assert that the pipe discharging storm water into the ravine below Plaintiffs' home is a part of Brecksville's municipal corporation water supply system. In support of this argument, Plaintiffs cite *Seiler v. City of Norwalk*, 192 Ohio App.3d 331, 2011 Ohio, 548, 949 N.E.2d 63 (6th Dist.). However, *Seiler* is inapposite to this case. *Seiler* concerned the overflow of a reservoir that contained drinking water as well as cooling water for the City's power plant into a spillway, which also overflowed, resulting in the flooding of plaintiffs' homes. Understandably, the *Seiler* Court found R.C. 2744.01(G)(2)(c) applicable because the damage stemmed from an overflow of the city's reservoir, which was considered part of the city's water supply system.

{¶13} The instant case, however, involves the drainage of storm water into a ravine. Thus, this case concerns a system involved in the capture and release of storm water, not a system involved in delivering water to citizens. *See Wilson v. City of Cleveland*, 2012 Ohio 4289, ¶15 (8th Dist.) (referring to the use of the term "water supply system" in R.C. 2744.01(G)(2)(c) as describing a "water delivery system.") Accordingly, the Court finds that the storm drain at issue does not fit the definition of proprietary function under R.C. 2744.01(G)(2)(c), and thus that code section does not apply to the facts of this case as a matter of law.

2. Design and/or Construction of a Sewer System is a Governmental Function.

{¶14} R.C. 2744.01(G)(2)(d) includes in the definition of a proprietary function: "the maintenance, destruction, operation, and upkeep of a sewer system." However, under R.C. 2744.01(C)(2)(l), "the provision or nonprovision, planning or design, construction, or reconstruction of a public improvement, including, but not limited to, a sewer system" is considered a government function, not a proprietary function.

{¶15} Plaintiffs' expert, Joseph A. Recktenwald ("Recktenwald"), asserts in his expert report that the slope instability caused by erosion at the toe of the ravine "could have been avoided if the outlet pipe had not been located where it is; rip-rap or other forms of energy dissipation and erosion protection had been installed; or the surrounding area had been maintained."

{¶16} The Court finds that Recktenwald's conclusions concerning the location of the pipe and the installation of certain preventative measures to stop or limit the erosion refer to problems associated with planning, design, construction, or reconstruction, not maintenance, operation, or upkeep. As such, Recktenwald's conclusions as to the location of the pipe and the installation of rip-rap energy dissipation are solutions that must be classified as governmental functions.

{¶17} Additionally, Recktenwald's conclusion that maintenance of the pipe's surrounding area[4] was responsible for erosion of the ravine does not meet the definition of a proprietary function. To constitute a proprietary function under R.C. 2744.01(G)(2)(d), the surrounding area, i.e., the toe of the ravine and not the pipe itself,

[4] Importantly, Recktenwald refers only to maintenance of the pipe's "surrounding area," but not to the maintenance of the pipe itself.

would have to be considered a part of the sewer system. Brecksville rebuts this inference with the affidavit of Brecksville's city engineer, Gerald Wise, who specifically states that the ravine is not a part of Brecksville's sewer system. In response, Plaintiffs argue that three Brecksville city ordinances (Brecksville Code of Ordinances 1177.03, 1117.10, and 1113.21)[5] establish that the ravine at issue is a part of the sewer system. When reviewing these ordinances, the court finds the language plain and unambiguous as to what does or does not constitute a storm sewer system. The Court finds that the ordinances provide no reasonable basis to conclude that the ravine at issue is a part of Brecksville's sewer system. Moreover, Plaintiffs have failed to demonstrate how the Brecksville ordinances establish the ravine as part of the sewer system and how the ordinances create a duty on the part of Brecksville to maintain the ravine, as part of the sewer system. Thus, in light of Wise's affidavit and the plain reading of the Brecksville City Ordinances, the Court finds that Plaintiffs' have failed to establish that the ravine is a part of the Brecksville's sewer system. Accordingly, Recktenwald's assertion that the area surrounding the outlet pipe should have been maintained does not trigger liability

[5] Copies of the foregoing ordinances were not made available to the Court by Plaintiffs. The following language is what was made available:

> 1177.03 provides that a "municipal separate storm sewer system means a conveyance or system of conveyances (including roads with drainage systems, municipal streets, catch basins, curbs, gutters, ditches, man-made channels, or storm drains): (1) Owned or operated by a state, city . . . [or] municipality."
> 1117.10 provides with respect to "drainage ways," "[w]here a subdivision is traversed by a drainage way, channel, or stream, a storm water easement or drainage right-of-way conforming [sic] substantially with the lines of such water course shall be established. Such easements shall be not less than 20 feet wide . . . ."
> 1113.21(a)(7)(B) defines a drainage way as, "[t]he land required for construction or maintenance of storm sewers, or required along a drainage ditch, natural stream or water course"
> 1113.21(a)(7)(C) provides an easement is "[a] grant by a property owner of the use of land for a specific purpose, by the general public, a corporation or another person."

on the part of Brecksville because the ravine itself has not been established as part of the Brecksville's sewer system. Therefore, its maintenance cannot be a proprietary function.

{¶18} Assuming arguendo that the ravine in this case is a part of the sewer system, the court would still find that Plaintiffs have not established the applicability of 2744.01(G)(2)(d) as Plaintiffs failed to offer any evidence of proximate cause between Brecksville's failure to maintain the "sewer" and the erosion of the ravine. As referenced above, Plaintiffs' expert offers a bald assertion that the pipe's surrounding area needed maintenance, but did not state how that caused the damage complained of by Plaintiffs. Additionally, when deposed, defense counsel asked Recktenwald, "[d]o you know what all is entailed in the maintenance of [this] storm water easement?" Recktenwald replied "No." Therefore, assuming the ravine is a part of the sewer system, the Court finds that Plaintiffs have not satisfied their burden to set forth facts establishing Brecksville's duty to maintain the ravine, its breach of that duty, and how such breach proximately caused the ravine to erode and Plaintiffs' house to slide.

Conclusion

{¶19} Based on the foregoing analysis, the Court finds that Brecksville is immune under R.C. 2744.02(A), and that none of the exceptions to immunity under R.C. 2744.02(B) apply. Therefore, the Court need not address the third-tier of the analysis under R.C. 2744.02 (i.e., whether immunity can be reinstated if any of the defenses under R.C. 2744.03 apply). *GMAC v. City of Cleveland*, 2010-Ohio-79, ¶14 (8th Dist.). Accordingly, Brecksville's Motion for Summary Judgment is granted as to Plaintiffs'

claims of trespass (Counts 1 & 2); Nuisance (Count 3); and Negligence (Count 5), and these claims are dismissed.

{¶20} In accordance with the Court's rulings above, Plaintiffs have no remaining claims against Brecksville, and the City of Brecksville is therefore dismissed as a party Defendant in this litigation. There is no just reason for delay.

IT IS SO ORDERED.

DATE: _____

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JUDGE DICK AMBROSE