

ORIGINAL

IN THE SUPREME COURT OF OHIO
CASE NO.: 2011-0199

Appeal from the Court of Appeals
Eleventh Appellate District
Portage County, Ohio
Case No. 2010-P-0016

ROBERT COLEMAN, et al.,

Plaintiffs-Appellees

v.

PORTAGE COUNTY ENGINEER,

Defendant-Appellant

MERITS BRIEF OF DEFENDANT/APPELLANT PORTAGE COUNTY ENGINEER

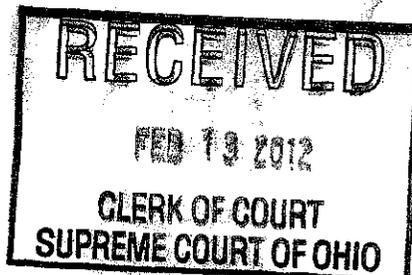
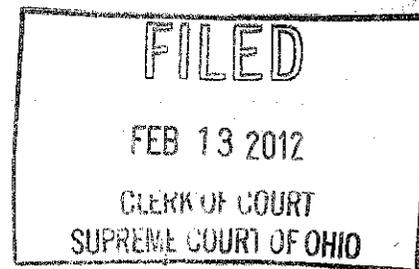
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I. INTRODUCTION

The legal issue in this case is whether a political subdivision's failure to upgrade the capacity of an allegedly inadequate sewer system exposes that political subdivision to liability under Ohio's Political Subdivision Tort Liability Act.

This case arises out of the Portage County Engineer's alleged improper design and maintenance of the drainage system that crosses Plaintiffs Robert and Barbara Coleman's property. Plaintiffs claim they had five floods in 27 years. (Comp. at ¶ 3-7.) Plaintiffs allege the flooding occurred because the piping system could not accommodate the drainage water. (*Id.* at ¶ 2.) Plaintiffs sued the Portage County Engineer (the County) for the improper design and maintenance of the storm sewer system that they allege caused flooding on their property. While it dismissed the design claim, the Eleventh District improperly found that Plaintiffs' claim that the failure to upgrade a sewer with inadequate capacity was a failure to maintain.

The Eleventh District improperly applied the Tort Liability Act by equating a failure to upgrade capacity with a failure to maintain. A failure to upgrade capacity of a sewer is *not* a failure to maintain. The Legislature did not impose liability for failing to upgrade a sewer and the term "upgrade" is not contained in the Tort Liability Act. Upgrade of capacity implicates design and construction, which are immune activities. Properly interpreted, a failure to upgrade the capacity an inadequate sewer cannot be judicially transformed into failure to "maintain." The Eleventh District's decision is inconsistent with the Legislature's intent, the majority of intermediate appellate courts, the separation of powers doctrine, and the policies behind the Act. This Court should reverse.

II. STATEMENT OF THE CASE AND FACTS

A. Factual Background

As this case comes before this Court on an order denying dismissal under Civ.R. 12(b)(6), Plaintiffs' factual allegations -- as opposed to legal conclusions -- constitute the record on appeal.

Plaintiffs Robert and Barbara Coleman live on 4087 Sabin Drive in Rootstown, Ohio, which experiences periodic flooding. (Comp. at ¶ 1.) They claim that the flooding is caused by the County's storm-water discharge system. They alleged that the County "collect[s] drainage water from drainage ditches along State Route 44 in Rootstown, and discharges [the water] through a piping system that runs across the adjacent" property owned by the Rootstown Local School District. "The piping system," the Plaintiffs claim, "is unable to accommodate all the drainage water, and ... the water overflows from the culverts in front of and behind [their] residence." (Comp. at ¶ 2.)

Plaintiffs alleged that over approximately 27 years their property flooded five times. They claimed that in June 1982, their property flooded when water overflowed from the culvert at the corner of their property. (Comp. at ¶ 3.) Seven years later, in June 1989, their property flooded again when the front and back culverts overflowed. (*Id.* at ¶ 4.) Fourteen years after that, in May 2003, the culvert in the back of Plaintiffs' property flooded, causing water to cross the backyard and flow into the back of their residence. (*Id.* at ¶ 5.) In August 2005, the culvert overflowed again, resulting in flooding in the schoolyard. (*Id.* at ¶ 6.) The culvert was unable to accommodate the water, causing Plaintiffs' property to flood. Most recently, in June 2009, Plaintiffs' property flooded again. (*Id.* at ¶ 7.) As a result of the flooding, Plaintiffs claimed they sustained damage.

Plaintiffs claimed that "the property will continue to flood due to the fact that the defendant has neglected or failed to construct a drainage plan or water drainage system to

properly discharge the water and prevent it from collecting on the plaintiff's [sic] property and causing significant damages. The defendant has failed to maintain the piping system that runs through the adjacent Rootstown Public School property to the storm sewer next to the Property." (Comp. at ¶ 8.)

Plaintiffs alleged that the County "has been notified numerous times" of the flooding on their property, but that the County has "refused and continues to refuse to abate the nuisance" or to "resolve the repetitive flooding" of their property. (Comp. at ¶ 9.)

Plaintiffs claimed that the County was negligent in "designing, constructing and maintaining the water piping system" and demands that the County be "require[d] to install adequate pipes and culverts." (Comp. at ¶¶ 2, 15.)

B. Procedural Background

1. The trial court dismisses Plaintiffs' complaint

Plaintiffs sued the Portage County Engineer¹ for the improper design and maintenance of an assessed ditch that they allege caused flooding on their property. (Comp.) After the Plaintiffs filed their two-count complaint, the parties fully briefed the issue of liability under Civ.R. 12(b)(6). The trial court held that the County was immune from claims for negligent planning, design and construction of the pipeline, dismissing those claims with prejudice. (Final J. Entry of Feb. 19, 2010, Apx. C- 47.) The trial court dismissed without prejudice Plaintiffs' negligent-maintenance claim based on Plaintiffs' failure to exhaust their administrative remedies. (*Id.*)

¹ The Portage County Engineer, who was sued in his official capacity, is referred to as the County in this Brief and is entitled to the immunities contained in R.C. 2744.02. *See Lambert v. Clancy*, 125 Ohio St.3d 231, 2010-Ohio-1483, 927 N.E.2d 585; *See* Opinion at ¶16; Apx. B - 31.

2. **The Eleventh District erroneously equates upgrade of capacity with "maintenance" and reverses the dismissal of the purported maintenance claim.**

The Plaintiffs appealed to the Eleventh District Court of Appeals. The Eleventh District exercised jurisdiction over the entire case and reversed, in part. Specifically and relevant to the critical issue in this appeal, the appellate court ruled that "the failure to upgrade sewers" is not a design or construction issue. (Opinion at ¶ 44, Apx. B-39.) The Eleventh District concluded that the failure to upgrade a sewer that lacks capacity is a failure to maintain. This holding contradicts the statutory language and the majority of intermediate appellate courts on this issue. The County timely appealed to this Court. (Notice of Appeal, Apx. A-1.)

III. LAW AND ARGUMENT

PROPOSITION OF LAW I: 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). (R.C. 2744.01(G)(2)(D) AND R.C. 2744.01(C)(2)(I) INTERPRETED AND APPLIED).

The fundamental error in the Eleventh District's decision is the judicial creation of an exception to the general rule that political subdivisions are immune for the "provision or nonprovision, planning or design, construction, or reconstruction" of a sewer system (i.e., immune governmental functions). The Eleventh District has eliminated the distinction between immune design/construction and non-immune maintenance/upkeep when it held that a failure to upgrade the capacity of an allegedly inadequate sewer is equivalent to non-immune maintenance. This judicially created exception swallows the rule of non-liability. This Court should reject this dramatic expansion of liability.

This Court reviews de novo a lower court's ruling on a Civ.R. 12(b)(6) motion to dismiss. *See Lambert v. Clancy*, 125 Ohio St.3d 231, 2010-Ohio-1483, 927 N.E.2d 585. This Court need not presume the truth of conclusions that are not supported by factual allegations. *Mitchell v. Lawson Milk Co.*, 40 Ohio St. 3d 190, 192, 532 N.E.2d 753 (1988); *see also Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 127 S.Ct. 1955, 167 L.Ed2d 929 (2007). Whether a political subdivision is entitled to immunity under Chapter 2744 is a question of law for this Court to decide. *Conley v. Shearer*, 64 Ohio St.3d 284, 292, 595 N.E.2d 862 (1992). This case comes before this Court on the Eleventh District's denial of immunity to the County in the context of a Civ.R. 12(b)(6) dismissal motion.

A. The failure to upgrade is not a failure to maintain.

1. The Legislature expressly distinguished between non-immune maintenance/upkeep and immune design/construction.

The Eleventh District erred when it improperly transformed an immune governmental function for the “design, construction, or reconstruction of ... a sewer system” into a non-immune proprietary function for the “maintenance, destruction, operation, and upkeep of a sewer system.” Despite the Eleventh District's holding, a failure to upgrade the capacity of an allegedly inadequate sewer is simply not a failure to maintain. This Court must reverse.

Ohio's Political Subdivision Tort Liability Act provides broad immunity to political subdivisions like the County. The Legislature enacted that Act because “the protections afforded to political subdivisions and employees of political subdivisions by this act are urgently needed in order to ensure the continued orderly operation of local governments and the continued ability of local governments to provide public peace, health, and safety services for their residents.” *Summerville v. Forest Park*, 128 Ohio St.3d 221, 2010-Ohio-6280, 943 N.E.2d 522 at ¶ 38, citing Am.Sub.H.B. No. 176, Section 8, 141 Ohio Laws, Part I, 1733. The “ ‘manifest statutory

purpose of R.C. Chapter 2744 is the preservation of the fiscal integrity of political subdivisions.’ ” *Id.*, citing *Wilson v. Stark Cty. Dept. of Human Servs.*, 70 Ohio St.3d 450, 453, 639 N.E.2d 105 (1994).

The County is a political subdivision within the definition of R.C. 2744.01(F) and is entitled to the immunities provided in R.C. 2744.02(A)(1). Section 2744.02(A)(1) provides broad immunity to political subdivisions from damages for injury or loss to persons or property for both proprietary and governmental functions. In other words, “if the defendant qualifies as a political subdivision, immunity is presumed under the statute.” *Sims v. City of Cleveland*, 8th Dist. No. 92680, 2009-Ohio-4722, 2009 WL 2894450 at ¶13. A political subdivision may lose its immunity only if one of the R.C. 2744.02(B)(1-5) exceptions applies. *Cater v. City of Cleveland*, 83 Ohio St.3d 24, 697 N.E.2d 610 (1998).

The only exception that is relevant to this case is the “proprietary function” exception. Under R.C. 2744.02(B)(2), the proprietary function exception provides, in relevant part:

[P]olitical 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 subdivisions.

R.C. 2744.02(B)(2).

A *proprietary* function is: “(d) The **maintenance**, destruction, operation, and upkeep of a **sewer system** [emphasis added].” R.C. 2744.01(G)(1)(d). A *governmental* function is: “(l) The provision or nonprovision, planning or **design, construction, or reconstruction** of a public improvement, including, but not limited to, a **sewer system** [emphasis added].” R.C. 2744.01(C)(2)(l).

The intermediate appellate court found that the failure to upgrade a sewer is a failure to maintain a sewer. The court reasoned, if “the [county] is responsible for that pipeline, the failure

to upgrade sewers that are inadequate to service upstream property owners despite sufficient notice of the inadequacy can best be described as a failure to maintain or upkeep the sewer.” (Opinion at ¶ 44, Apx. B- 39.) Under the Eleventh District’s decision, no matter how well maintained the sewer is, the fact that it had inadequate capacity or other design-related issues would make a political subdivision liable for failing to upgrade that sewer to meet the needs of property owners. The Eleventh District wrongly concluded that the failure to “maintain” the sewer by failing to upgrade the sewer capacity “expose[s] the [county] to liability under R.C. 2744.02(B)(2).” *Id.*

The legislative intent, as expressed by the clear language contained in the definitions of proprietary and governmental function, requires a finding in favor of the County. “[T]he failure to install a larger pipeline system,” in the words of the appellate court, firmly falls within the definition of an immune governmental function of “design, construction, or reconstruction ... of a sewer system,” not the definition of a non-immune proprietary function of “maintenance, destruction, operation, and upkeep of a sewer system.” The installation of a sewer line to increase capacity is an immune governmental function, not a proprietary function. R.C. 2744.01(C)(2)(I).

A court’s duty is to construe statutes in a manner to “ascertain and give effect to the legislative intent.” *Elston v. Howland Local Schools*, 113 Ohio St.3d 314, 2007-Ohio-2070, 865 N.E.2d 845. It is a court’s duty to apply the statute as the General Assembly has drafted it and not to rewrite it. *See, e.g., Bd. of Edn. of Pike-Delta-York Local School Dist. v. Fulton Cty. Budget Comm.*, 41 Ohio St.2d 147, 156, 324 N.E.2d 566 (1975)(“Courts do not have the authority to ignore, in the guise of statutory interpretation, the plain and unambiguous language

in a statute. ... The remedy desired by appellants from this court must be obtained from ... the General Assembly”).

The Eleventh District's conclusion that "upgrade" is tantamount to "maintenance" is not supported by the unambiguous terms contained in R.C. 2744.01. As an initial matter, "upgrade" is not a term defined in the Tort Liability Act and is not a term designated as a non-immune proprietary function. See R.C. 2744.01. Merriam-Webster defines "maintenance" as the "act of maintaining: the state of being maintained." Merriam-Webster Online Dictionary at <http://www.merriam-webster.com/dictionary/maintenance>, (accessed Jan. 24, 2012). "Maintain" is defined as "to keep in an existing state." Merriam-Webster Online Dictionary at <http://www.merriam-webster.com/dictionary/maintain> (accessed Jan. 24, 2012). "Maintenance" and "upkeep" are synonyms. Roget's 21st Century Thesaurus 765 (1994).

The word "upgrade" means "improvement" or to "raise the quality of." Merriam-Webster Online Dictionary at <http://www.merriam-webster.com/dictionary/upgrade> (accessed Jan. 24, 2012). "Upgrade" is to make better and the following terms are synonymous with the word "upgrade": "ameliorate, amend, better, enhance ..." (*Id.* at <http://www.merriam-webster.com/thesaurus/upgrade>). The definitions of the terms "upgrade" or "upgrading" do not include "upkeep," "maintenance," or "maintain."

Similarly, analyzing the term "upgrade" in relation to the governmental function of the "construction, or reconstruction of ... a sewer system" further indicates that upgrade is the equivalent of design and re-construction. R.C. 2744.01(C)(2)(1). In cases like this, the plaintiff wants the political subdivision to "design" a better sewer system, to expand the capacity, and to make a sewer "adequate" by re-designing and re-constructing the existing sewer system. That is exactly the case here. Plaintiffs want the "defendant to install adequate pipes and culverts"

because the "piping system is unable to accommodate all the drainage water and ... the water overflows ..." (Comp. at ¶¶ 2, 15.) In the context of R.C. 2744.01(C)(2)(I), "design" is a noun, the relevant ordinary dictionary definition of which includes the following: "... n. 9. an outline, sketch, or plan, as of the form and structure of a work of art, an edifice, or a machine to be executed or constructed. 13. a plan or project: a design for a new process. ..." Webster's Encyclopedic Unabridged Dictionary (Portland House 1997). As relevant here, "construction" means: "1. the act or art of constructing. 2. the way in which a thing is constructed; structure ... 3. something that is constructed; a structure." *Id.* "Construct," in turn, is defined as "to form by putting together parts; build; frame; devise." *Id.* The Plaintiffs in this case, and cases like this, want to create a new design and construct a new (better) sewer in place of an old sewer, not merely replicate or maintain an old sewer.

"The failure to upgrade sewers" is not maintenance. The sewer could be perfectly maintained since construction, but simply not capable of handling flows based on changed events. This is an immune design or construction issue. The Legislature has distinguished between non-immune maintenance/operation/upkeep and immune design/construction. With overtaxed and outdated sewer systems across the state, the Eleventh District's holding is significant. The Eleventh District's decision turns otherwise immune claims for flood damage or growing flows into very significant liability issues, despite adequate maintenance and monitoring of sewers. Further, growing communities can increase runoff and also sanitary flows. Liability would exist despite having nothing to do with the maintenance or operation of a line. The cost of rebuilding sewers would be considerable. Events leading to flow changes can and do occur faster than sewers and treatment plants can be designed, built, and budgeted.

Public entities reconstruct sewers when resources are available to do so. These are discretionary decisions about allocating resources that are the hallmark of a governmental function (e.g., immune sewer design). While the Legislature does not immunize the lack of maintenance of a sewer, the Legislature has expressly shielded the decision of when to design and construct an upgrade or reconstruct a sewer.

2. The Legislature could have but did not create an exception to immunity for failure to "upgrade" a sewer.

The Legislature knew how to expand the Act's provisions if it chose to do so. It did not draft the Act to impose liability for failure to "upgrade" (or "improve") an inadequate sewer system. It did not indicate that "upgrade" was tantamount to "maintenance." The term "upgrade" does not appear in the definition of a non-immune proprietary function. The Legislature would surely be clear that it intended to create such widespread liability. In light of the dramatic impact of such interpretation, it is impossible to believe that the Legislature intended for "upgrade" to mean "maintenance." To equate "upgrade" with "maintenance" enlarges the scope of the Act beyond that which the General Assembly enacted. It erroneously equates immune construction/re-construction with non-immune maintenance. The judicial branch of government "cannot extend the statute beyond that which is written, for '[i]t is the duty of this court to give effect to the words used [in a statute], not to delete words used or to insert words not used.'" *Sarmiento v. Grange Mut. Cas. Co.*, 106 Ohio St.3d 403, 408-09, 2005-Ohio-5410, 835 N.E.2d 692 (citing *Bernardini v. Conneaut Area City School Dist. Bd. of Edn.*, 58 Ohio St.2d 1, 4, 387 N.E.2d 1222 (1979)) The Eleventh District misinterpreted the Act. This Court should protect that legislative determination and reject the Eleventh District's decision.

3. The Eleventh District's rationale for equating "upgrade" with "maintenance" is flawed.

The Eleventh District's rationale for holding that the failure to upgrade is equivalent to a failure to maintain is based primarily on the First District's decision in *H. Hafner & Sons Inc. v. Cincinnati Metropolitan Sewer Dist.*, 118 Ohio App.3d 792, 694 N.E.2d 111 (1st Dist. 1997). The Eleventh District also relies on its previous case *Moore v. Streetsboro*, 11th Dist. No. 2008-P-0017, 2009-Ohio-6511, 2009 WL 4756421 ¶ 59(citing *Hafner* without further analysis on this point). While citing *Hafner*, the Eleventh District provided no analysis of how or why the *Hafner* decision applies or any further analysis on the critical point of whether "the inadequacy of sewers [is] a failure to maintain them ..." *Hafner* at 797. In sum, the Eleventh District does not provide additional support to the underlying legal rationale of *Hafner*; it merely adopted *Hafner's* incorrect conclusion.

a. *Hafner* is not persuasive.

Hafner's conclusion is not well founded. *Hafner* does not -- and cannot -- provide a legitimate basis to abrogate the Legislature's distinction between immune construction/design (i.e., upgrade) and non-immune maintenance.

First, the *Hafner* court eschews analysis under the Tort Liability Act in favor of pre-Tort Liability Act case law. See *Hafner* at 796-97 citing *November Properties, Inc. v. Mayfield Hts.*, 8th Dist. No. 39626, 1979 WL 210535, citing *Masley v. Lorain*, 48 Ohio St.2d 334, 358 N.E.2d 596 (1976). This Court has explained that the Tort Liability Act "was the General Assembly's response to the judicial abrogation of common-law sovereign immunity." *Hubbell v. City of Xenia*, 115 Ohio St.3d 77, 2007-Ohio-4839, 873 N.E.2d 878 at ¶ 23. Ohio courts "clearly" recognize "with the Political Subdivision Tort Liability Act, the Ohio Legislature sought to codify the sovereign immunity doctrine and overrule all previous conflicting jurisprudence." See,

e.g., *Landwehr v. Batavia*, 173 Ohio App.3d 599, 2007-Ohio-6035, 879 N.E.2d 824 (12th Dist.) at ¶¶ 18-19.

Second, that pre-Tort Liability Act case law does not address immunity; rather, those cases deal with takings jurisprudence under Art. I, Section 19 of the Ohio Constitution. *Hafner* at 796-97. They have nothing to do with immunity. Nor do they inform an interpretation of the Legislature's language that is critical to this dispute.

Finally, *Hafner* does not meaningfully interpret the Legislature's language that is at the heart of this case. *See generally Hafner*. Courts that have rigorously analyzed the statutory language have concluded that "upgrade" is not maintenance.

The Eleventh District's decision in the present case -- and in *Moore* -- demonstrate the implications for liability in cases where political subdivisions have no immediate control of directing or re-directing storm-sewer water, but are subject to floods during severe weather events. These cases deal with the passive acceptance of uncontrollable amounts of water going through the sewer system that results in flooding. This water could come from other communities and through extreme weather events. The flooding has nothing to do with operating or maintaining the system. The system is the same. The only difference is the increase in water. Only the dramatic redesign and re-construction of sewers may alleviate flooding in such situations. This is *not* maintenance, upkeep or an operational issue. It is an immune design and construction issue.

b. The majority of Ohio courts reject the Eleventh District's rationale.

The Fourth, Seventh and Ninth Districts have recently interpreted the text of the Tort Liability Act and concluded that the decision whether to upgrade an existing sewer is a governmental function. These districts present a stark contrast to the Eleventh District's decisions

that do not meaningfully interpret the Tort Liability Act, and place unexamined reliance on *Hafner, supra*, which also did not interpret the Act.

The Fourth District has expressly held that the decision to upgrade an existing sewer involves the exercise of an immune governmental function. *Essman v. Portsmouth*, 4th Dist. No. 09CA3325, 2010-Ohio-4837, 2010 WL 3852247. The *Essman* court rigorously analyzed the definitions for governmental and proprietary functions with regard to sewer systems:

“An ‘upgrade’ is but another word for improvement. Thus, to ‘upgrade’ is to ‘improve.’ To improve means ‘to enhance in value or quality: make better.’ Because an upgrade to a sewer system would mean enhancing the system's value, upgrade is not synonymous with upkeep. ‘Upkeep’ means ‘the act of maintaining in good condition.’ Upgrading a sewer system would require more than retaining the system in good condition. Upgrading involves more than simple maintenance. Rather, upgrading involves a positive act of improvement. The Ohio General Assembly did not specify the upgrade of a sewer system as a proprietary function. * * * [W]e believe that a political subdivision's decision regarding an upgrade of its sewer system is a governmental function. A decision to upgrade requires a political subdivision to weigh various considerations, including the availability of fiscal resources, the use and acquisition of additional equipment, and the overall design of the system.” (Internal citations omitted.) *Id.* at ¶ 44.

Essman v. Portsmouth, 4th Dist. No. 09CA3325, 2010-Ohio-4837, 2010 WL 3852247. Similarly, the Seventh District has also reached the same conclusion. *Ivory v. Austintown Twp.*, 7th Dist. No. 10MA106, 2011-Ohio-3171, 2011 WL 2556283; see also *Guenther v. Springfield Twp.*, 2nd Dist. No. 2010-CA-114, 2012-Ohio-203, 2012 WL 175394 ¶ 21 (assuming a sewer system existed, reconstruction or redesign is a governmental function and the negligent-proprietary-function exception does not apply).

The Ninth District has also very recently held that the decision to upgrade an allegedly insufficient sewer system is a governmental function. *Bauer v. Brunswick*, 9th Dist. No. 11CA003-M, 2011-Ohio-4877, 2011 WL 4435205. In *Bauer*, the plaintiff sued the city, arguing that the city had a duty to upgrade the existing storm sewer when it proved to be inadequate to

service his neighborhood. Bauer experienced periodic flooding and argued that the city negligently engaged in a proprietary function when it failed to upgrade. The Ninth District observed that the initial construction and provision of a sewer system was an immune governmental function. Likewise, the court found, a political subdivision remains immune from liability when it exercises its judgment in determining ... how to allocate its limited financial resources, with regard to updating the sewer system.” *Id.* at ¶ 6. The Ninth District concluded that "when a sewer systems' design and construction later proves inadequate, the decision whether to upgrade or redesign the system involves 'the provision or nonprovision, planning or design, construction, or reconstruction' of the system and, therefore, the exercise of a governmental function. R.C. 2744.01(C)(2)(l)."

B. The judicial creation of a "failure-to-upgrade" exception to statutory immunity is an improper overlapping of judicial and legislative authority.

Intermediate district appellate courts, such as the First District in *H. Hafner & Sons, Inc. v. Cincinnati Metro Sewer Dist.*, 118 Ohio App.3d 792, 694 N.E.2d 111 (1st Dist. 1997) and the Eleventh District in this case, have judicially created an exception to statutory immunity. This is inimical to the separation of powers doctrine that goes the heart of Ohio's governmental system.

A "failure-to-upgrade" exception does not exist in the language of the statute. This judicial creation cannot be fairly inferred from the language of the statute. The Legislature's role in establishing public policy for the state is reinforced by the Ohio Constitution Art. II, § 1 (1912), which provides that "the Legislative power of the state shall be vested in a General Assembly ..." If allowed to stand, a court's creation of the exceptions to this immunity would override this constitutional mandate by authorizing overlapping authority. The Legislature's language creates a stark distinction between design/construction and upkeep/maintenance. To

judicially obviate this distinction violates the division between judicial power and legislative power.

This Court has long recognized the importance of the doctrine of separation of powers. *Drake v. Rogers*, 13 Ohio St. 21, 29-30 (1861). Although the Ohio Constitution does not contain a provision expressly creating the separation of powers doctrine, this Court has recognized the doctrine to be “implicitly embedded in the entire framework of those sections of the Ohio Constitution that define the substance and scope of powers granted to the three branches of state government.” *South Euclid v. Jemison*, 28 Ohio St.3d 157, 159, 503 N.E.2d 136 (1986). The doctrine of separation of powers is implied in the Ohio Constitution because “... each of the three grand divisions of the government, must be protected from encroachments by the others, so far that its integrity and independence may be preserved.” *Id.* citing *Fairview v. Giffie*, 73 Ohio St. 183, 76 N.E. 865 (1905).

The Eleventh District has chosen to disagree with the legislative balance struck in the immunity statute and have adopted their own view of the legislative priorities under a cloak of statutory interpretation of the Act. This improper judicial activism should not be allowed. Policy is for the legislature. Courts are not to legislate from the bench. The Eleventh District fatally blurred an immune design function with a non-immune maintenance function. This is destructive to the separation of powers doctrine that this Court has long held in the highest regard. This Court has asserted, “Probably our chief contribution to the science of government is the principle of the complete separation of the three departments of government, executive, legislative and judicial. No feature of the American system has excited greater admiration. *State ex. rel. Greenlund v. Fulton*, 99 Ohio St. 168, 187, 124 N.E. 172, 177 (1919). In accord with the

bedrock principles of separations of powers and constitutional mandates, this Court should protect these values and reverse the Eleventh District's decision.

C. The Eleventh District is at odds with the established reasons for the Tort Liability Act.

Ohio's Political Subdivision Tort Liability Act is designed to limit liability, not expand the liabilities and the duties of political subdivisions. This Court has long recognized that a "municipality is not obliged to construct ... sewers." *Doud v. Cincinnati*, 152 Ohio St. 132, 137, 87 N.E.2d 243 (1949). Similarly, a municipality is not obligated to construct a new sewer when dramatic weather events or increased development in a region overburden a sewer. While historically political subdivisions are not liable for failing to build a sewer, the Tort Liability Act also draws a clear legislative distinction between immune design/construction/reconstruction of sewers and non-immune maintenance functions. The Eleventh District rejected this distinction. In doing so, the Eleventh District not only misinterpreted the express language of the Act, but issued a decision that is inimical to the Legislative policy determinations underlying the Act.

The General Assembly enacted R.C. Chapter 2744, stating that "the protections afforded to political subdivisions and employees of political subdivisions by this act are urgently needed in order to ensure the continued orderly operation of local governments and the continued ability of local governments to provide public peace, health, and safety services for their residents." ... "[t]he manifest statutory purpose of R.C. Chapter 2744 is the preservation of the fiscal integrity of political subdivisions." [Citations omitted.]

Summerville v. Forest Park, 128 Ohio St.3d 221, 2010-Ohio-6280, 943 N.E.2d 522 at ¶ 38.

The Eleventh District's decision improperly imposed liability where none existed under the Tort Liability Act. With decreasing revenues and increased costs, political subdivisions are faced with a significant reduction of funding at the state level and forced to do more with less. The Eleventh District's decision, if allowed to stand, would convert legislatively immune functions of design and construction into a substantial -- and possibly financially crushing --

burden to "upgrade" countless sewers. The Eleventh District's decision is inconsistent with the policy behind Ohio's Political Subdivision Tort Liability Act.

IV. CONCLUSION

This Court should reverse the Eleventh District Court of Appeals and enter judgment as a matter of law in favor of Defendant-Appellant Portage County.

Respectfully submitted,

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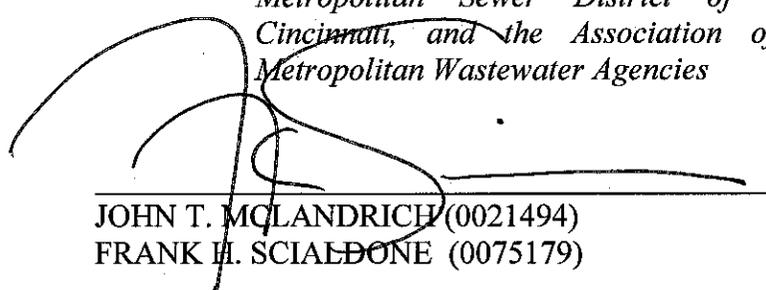
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APPENDIX

Notice of Appeal to the Ohio Supreme Court (February 3, 2011)..... Apx. A 1-25

Eleventh District Court of Appeals Opinion (December 20, 2010).....Apx. B 26-46

Final Judgment Entry of February 19, 2010Apx. C 47

R.C. 2744.01 Apx. D 48-53

R.C. 2744.02Apx. E 54-56

IN THE SUPREME COURT OF OHIO
CASE NO.

11-0199

Appeal from the Court of Appeals
Eleventh Appellate District
Portage County, Ohio
Case No. 2010-P-0016

ROBERT COLEMAN, et al

Plaintiffs-Appellees

v.

PORTAGE COUNTY ENGINEER,

Defendant-Appellant

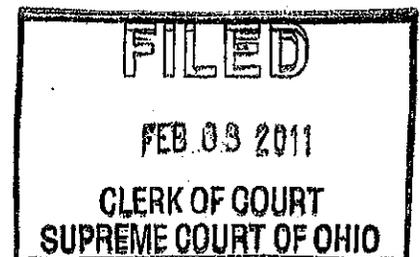
NOTICE OF APPEAL OF PORTAGE COUNTY ENGINEER

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Pursuant to Supreme Court Rule II § 2(A)(3), Appellant/Defendant Portage County Engineer, hereby gives notice of appeal to the Supreme Court of Ohio from the Eleventh District Court of Appeals' December 20, 2010 decision and judgment entry. A copy of the court of appeals decision is attached to this Notice. (See Ex. "A.")

This case raises a substantial constitutional question and is one of public or great general interest.

Respectfully submitted,

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A copy of the foregoing Notice of Appeal was served February 2, 2011 by depositing

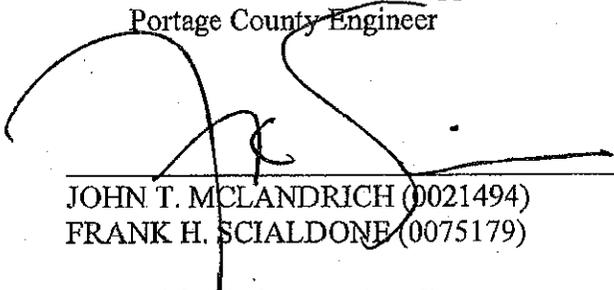
~~same in first-class United States mail, postage prepaid, to the following:~~

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A large, stylized handwritten signature in black ink, appearing to read 'J. McLandrigh', is written over a horizontal line. The signature is positioned above the typed name 'JOHN T. MCLANDRICH'.

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Counsel for Defendant/Appellant
Portage County Engineer

IN THE COURT OF APPEALS
ELEVENTH APPELLATE DISTRICT
PORTAGE COUNTY, OHIO

FILED
COURT OF APPEALS
DEC 20 2010

LINDA K. FANKHAUSER, CLERK
PORTAGE COUNTY, OHIO

MR. ROBERT COLEMAN,
et al.,

:

OPINION

Plaintiffs-Appellants,

:

CASE NO. 2010-P-0016

- vs -

:

PORTAGE COUNTY ENGINEER,

:

Defendant-Appellee.

:

Civil Appeal from the Court of Common Pleas, Case No. 2009 CV 01726.

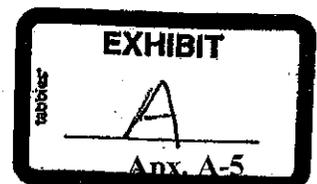
Judgment: Affirmed in part, reversed in part, and remanded.

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CYNTHIA WESTCOTT RICE, J.

{¶1} Appellants, Mr. Robert Coleman and Barbara Coleman, appeal the judgment of the Portage County Court of Common Pleas granting appellee Portage County Engineer's Civ.R. 12(B)(6) motion to dismiss their complaint for failure to state a claim on which relief can be granted. For the reasons that follow, we affirm in part, reverse in part, and remand.



{¶2} Appellants filed their complaint on November 9, 2009. They alleged they own and reside in the home located at 4087 Sabin Drive in Rootstown, Ohio. Their property has flooded numerous times beginning in 1982, resulting in damage to their home and its contents.

{¶3} Appellants alleged that the flooding is caused by appellee's storm water discharging system. They alleged appellee collects drainage water from drainage ditches along State Route 44 in Rootstown, and discharges the water through a piping system that runs across the property owned by the Rootstown Local School District, which is adjacent to appellants' property. The piping system is unable to accommodate the drainage water, causing it to overflow from culverts located in front of and behind appellants' residence.

{¶4} Appellants alleged that in June 1982, their property flooded when water overflowed from the culvert at the corner of their property. Water infiltrated their residence and damaged their furniture. In June 1989, appellants' property flooded again when the front and back culverts overflowed. Water came into the back of their residence, destroying their carpeting and furniture. In May 2003, the culvert in the back of appellants' property flooded, causing water to cross the backyard and flow into the back of their residence. In August 2005, the culvert overflowed again, resulting in flooding in the schoolyard. The culvert was unable to accommodate the water, causing appellants' property to flood. Most recently, in June 2009, appellants' property flooded again. Water infiltrated a bedroom wall, causing one foot of standing water along the back wall inside the residence. Appellants sustained significant property damage, including the destruction of the carpeting in four rooms.

{¶5} Appellants alleged that their property will continue to flood because appellee negligently constructed a water drainage system that does not properly discharge water or prevent it from flooding their property. They also alleged that appellee has negligently failed to maintain the water piping system, resulting in the repeated flooding of their property.

{¶6} Appellants alleged that they notified appellee of the flooding on their property on numerous occasions, but that appellee has refused and continues to refuse to abate the nuisance or to "resolve the repetitive flooding" of their property.

{¶7} Appellants' complaint asserts two claims. In Count I, they alleged that appellee was negligent in designing, constructing, and maintaining the water piping system that collects and discharges water onto their property, as a result of which they have sustained damages in an amount to be determined at trial.

{¶8} In Count II, appellants alleged they are entitled to an injunction prohibiting appellee from continuing to use the county's storm water discharging system in a manner that makes their property subject to flooding and requiring him to "abate the nuisance" by installing adequate pipes and culverts to prevent continued flooding and damage to their property.

{¶9} Prior to appellee filing an answer or the exchange of discovery between the parties, on December 30, 2009, appellee filed a motion to dismiss appellants' complaint pursuant to Civ.R. 12(B)(6), arguing that appellants' complaint failed to state a claim on which relief could be granted. Appellants filed their brief in opposition. On February 19, 2010, the trial court entered judgment granting appellee's motion. The court dismissed with prejudice appellants' claim for negligent planning, design and

construction of the pipeline in Count I based on political subdivision immunity. The court dismissed without prejudice appellants' claim for negligent maintenance of the pipeline in Count I and their claim for an injunction in Count II based on appellants' failure to exhaust their administrative remedies. Finally, the court dismissed with prejudice appellants' claims arising before June 17, 2009 on the ground that they were barred by the applicable statute of limitations.

{¶10} Appellants appeal the trial court's judgment, asserting three assignments of error. Appellee also raises one cross assignment of error for our consideration. For their first assigned error, appellants contend:

{¶11} "The trial court committed reversible error in dismissing plaintiffs-appellants [sic] claims [sic] for negligent planning, design and construction of the pipeline with prejudice asserting that the defendant-appellee is immune from these claims."

"A motion to dismiss for failure to state a claim upon which relief can be granted is governed by Civ.R. 12(B)(6). When considering a motion to dismiss pursuant to this rule, a court must accept the factual allegations set forth in the complaint as true." *Citibank, N.A. v. Siciliano*, 11th Dist. No. 2003-T-0026, 2004-Ohio-1528, at ¶6. Further, "the plaintiff shall be granted all reasonable inferences derived from the allegations of the complaint." *Id.* As such, the inquiry associated with a Civ.R. 12(B)(6) motion to dismiss focuses on the specific allegations contained in the complaint without reference to external documents or facts. *Id.*

{¶12} This court has held that an appellate court reviews a judgment granting or denying a Civ.R. 12(B)(6) motion to dismiss de novo. *Goss v. Kmart Corp.*, 11th Dist.

No. 2006-T-0117, 2007-Ohio-3200, at ¶17. Generally, “[a] motion to dismiss for failure to state a claim upon which relief can be granted is procedural and tests the sufficiency of the complaint.” *State ex rel. Hanson v. Guernsey Cty. Bd. of Commrs.*, 65 Ohio St.3d 545, 548, 1992-Ohio-73. (Citation omitted.) “[B]efore the court may dismiss the complaint, **** it must appear beyond doubt from the complaint that the plaintiff can prove no set of facts entitling him to recovery. *****” *Id.*, quoting *O'Brien v. University Community Tenants Union* (1975), 42 Ohio St.2d 242.

{¶13} In *Frazier v. Kent*, 11th Dist. Nos. 2004-P-0077 and 2004-P-0096, 2005-Ohio-5413, this court addressed the appropriate analysis upon the assertion of a defense based on political subdivision immunity, as follows:

{¶14} “R.C. Chapter 2744 sets forth a three tiered analysis for determining a political subdivision's immunity from liability. *Greene Cty. Agricultural Soc. v. Liming*, (2000), 89 Ohio St.3d 551, 556, 2000-Ohio-486. First, R.C. 2744.02(A)(1) codifies the general rule of sovereign immunity, viz., 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.’ However, this general rule is limited by R.C. 2744.02(B), which sets forth five instances in which a political subdivision is not immune. Hence, the second tier of the analysis requires a court to determine whether any of the exceptions under R.C. 2744.02(B) apply. Finally, if a political subdivision is exposed to liability through the application of R.C. 2744.02(B), a court must consider whether the political subdivision could legitimately assert any of

the defenses or immunities under R.C. 2744.03. See, e.g., *Greene Cty. Agricultural Soc.*, supra, at 557." *Frazier*, supra, at ¶20.

¶15 We begin our analysis by determining whether the Portage County Engineer is entitled to political subdivision immunity under R.C. Chapter 2744. In *Lambert v. Clancy, Hamilton County Clerk of Courts*, 125 Ohio St.3d 231, 2010-Ohio-1483, the Supreme Court of Ohio held that where "the allegations contained in the complaint are directed against the office of the political subdivision, the officeholder was sued in his official capacity rather than in his individual or personal capacity. [Further,] the three-tiered political-subdivision-immunity analysis set forth in R.C. 2744.02, and not the employee-immunity provision of R.C. 2744.03(A)(6), is to be applied in such a circumstance." *Lambert*, supra, at 231-232. Further, the immunity granted by statute to a political subdivision is also extended to the political subdivision's departments, agencies, and offices, which implement the duties of the political subdivision. *Id.* at 236. In the instant case, since the allegations in the complaint are directed against the office of the Portage County Engineer, he was sued in his official capacity, and we apply the three-tiered political subdivision-immunity analysis in R.C. 2744.02 in determining whether his office is immune from liability.

¶16 The potential exceptions to immunity for a political subdivision involve: (1) the negligent operation of a motor vehicle by an employee; (2) *the negligent performance of a proprietary function*; (3) the negligent failure to keep public roads open and in repair; (4) injury caused by a defect on the grounds of a public building, and (5) instances in which civil liability is expressly imposed upon the subdivision by a section of the Revised Code. See R.C. 2744.02(B)(1)-(5).

{¶17} Appellants argue that the trial court erred in dismissing their claim in Count I alleging negligent design, planning, and construction of the pipeline based on political subdivision immunity because, they suggest, this claim alleged the negligent performance of a proprietary function, which is an exception to political subdivision immunity, pursuant to R.C. 2744.02(B)(2). However, appellants fail to cite any authority for the proposition that the design, planning, or construction of a sewer system is a proprietary function, in violation of App.R. 16(A)(7). Moreover, appellants present no argument that the same constitutes a proprietary function, in violation of the same appellate rule. For this reason alone, appellants' argument is not well taken. In fact, this court has reached the opposite conclusion.

{¶18} In *Moore v. Streetsboro*, 11th Dist. No. 2008-P-0017, 2009-Ohio-6511, discretionary appeal not allowed at 2010-Ohio-2212, 2010 Ohio LEXIS 1208, this court noted: "Pursuant to R.C. 2744.01(C)(2)(l), '[t]he provision or nonprovision, planning or design, construction, or reconstruction of a public improvement, including, but not limited to, a sewer system' constitutes a 'governmental function' from which the city is immune. See R.C. 2744.02(A)(1)." *Id.* at ¶42. Consequently, this court held: "It is clear that the city is immune from its failure to design and construct an adequate sewer system. Thus, the Moores' arguments that the city was negligent in issuing building permits to upstream properties without designing adequate storm water runoff controls are without merit." *Id.* at ¶45.

{¶19} Based upon the foregoing authority, the design, planning, and construction of Portage County's storm sewer system is a governmental function. Pursuant to R.C. 2744.01(C)(2)(l) and our holding in *Moore*, supra, the Portage County Engineer is

immune from liability for its alleged failure to design and construct an adequate storm sewer system.

{¶20} We therefore hold the trial court did not err in dismissing with prejudice appellants' claims premised on the negligent design, planning, and construction of the county's storm sewer system.

{¶21} Appellee's argument that appellants failed to allege their claim for negligent maintenance with sufficient specificity is irrelevant since appellants' first assignment of error does not address that claim.

{¶22} Appellants' first assignment of error is overruled.

{¶23} For their second assigned error, appellants contend:

{¶24} "The trial court committed reversible error in dismissing Plaintiffs' claims [sic] for the negligent maintenance of the pipeline without prejudice based upon Plaintiffs' failure to exhaust their administrative remedies."

{¶25} Before addressing appellants' assignment of error, we consider whether the negligent maintenance of the County's storm sewer system is an exception to political subdivision immunity. The Supreme Court of Ohio in *Doud v. Cincinnati* (1949), 152 Ohio St. 132 held:

{¶26} "*** A municipality is not obliged to construct or maintain sewers, but when it does construct or maintain them 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 *** proprietary function and not a governmental function within the rule of municipal immunity from 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. ***

{¶27} ***

{¶28} "The law on this subject is well stated in 38 American Jurisprudence, 341, Section 636, note 3, citing *City of Portsmouth v. Mitchell Mfg. Co.*, [113 Ohio St. 250], as follows:

{¶29} "The duty of a municipality to keep its sewers in repair involves the exercise of a reasonable degree of watchfulness in ascertaining their condition, from time to time, and preventing them from becoming dilapidated or obstructed. Where the obstruction or dilapidation is an ordinary result of the use of the sewer, which ought to be anticipated and could be guarded against by occasional examination and cleansing, the omission to make such examinations and to keep the sewers clear is a neglect of duty which renders the municipality liable." (Internal citations omitted.) *Doud*, supra, at 137-138.

{¶30} Further, in *Moore*, supra, this court stated: "Pursuant to R.C. 2744.02(B)(2), '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 subdivisions,' unless a defense to such liability is enumerated in R.C. 2744.03." *Id.* at ¶44. This court held: "In contrast to a governmental function, a 'proprietary function' includes '[t]he maintenance, *** operation, and upkeep of a sewer system.' R.C. 2744.01(G)(2)(d)." *Id.* at ¶43.

{¶31} Thus, appellants' claim that appellee was negligent in the maintenance of the county's storm sewer system is not barred by political subdivision immunity. In not

dismissing this claim with prejudice, the trial court tacitly agreed with such holding, but found that appellants had failed to exhaust their administrative remedies before filing such claim. We now consider appellants' argument that the trial court erred in dismissing without prejudice their negligent maintenance claim on the ground that they had failed to exhaust their administrative remedies.

{¶32} Appellee argues the trial court did not err in dismissing appellants' negligent maintenance claim because they failed to exhaust their administrative remedies pursuant to R.C. 6137.05, which provides:

{¶33} "The maintenance fund created under authority of section 6137.01 of the Revised Code [for the repair, upkeep, and maintenance of county ditches] shall be subject to use of the board of county commissioners *** for the necessary and proper repair or maintenance of any improvement constructed under sections 6131.01 to 6131.64, 6133.01 to 6133.15, and 6135.01 to 6135.27 of the Revised Code.

{¶34} "(A) Whenever the board, *** from its own observation or the recommendation of the county engineer, or on the written complaint of any of the owners of lands subject to the maintenance assessment, has reason to believe the improvement is in need of repair or maintenance, it shall as a board, or by the county engineer, make an inspection of its condition, and, if it finds the need to exist, it shall make an estimate of the cost of the necessary work and material required for the purpose. If the nature of the work is such as to be done most economically *** by force account, the board shall cause the proper work to be done by that method ***. If the finding is that necessary repair and maintenance on an improvement *** can be more

economically *** done by contract, the board *** shall *** let the contract for the required work and material to the lowest and best bidder ***.”

{¶35} On appeal, appellants argue they have sent three letters regarding their flooding issue to the Portage County Prosecutor in 1990, 1994, and 2009. They argue these letters satisfied any obligation they may have had to submit a written complaint to the board of commissioners before filing suit. However, as mentioned above, our review of a ruling on a motion to dismiss a complaint does not take into account materials outside the complaint, such as appellants’ letters. *Siciliano*, supra. While appellants alleged generally in their complaint that they had notified appellee of the flooding issue on their property, the complaint does not reference these letters and we therefore cannot consider them. In any event, our review of R.C. 6137.05 reveals that appellants were not required to comply with any of its provisions before filing suit.

{¶36} First, appellee fails to cite any authority for the proposition that a landowner must comply with R.C. 6137.05 before filing suit.

{¶37} Second, while a party seeking relief from an administrative decision must generally pursue available administrative remedies before pursuing action in court, *Dworning v. Euclid*, 119 Ohio St.3d 83, 2008-Ohio-3318, at ¶9, there are exceptions to the exhaustion doctrine. For example, a party is not required to pursue administrative relief first when the administrative body lacks the authority to grant the relief sought. *Gates Mills Invest. Co. v. Pepper Pike* (1978), 59 Ohio App.2d 155, 166-167. Ohio courts recognize that the pursuit of administrative relief under such circumstances would be a vain act and therefore do not impose the exhaustion requirement. *Id.*

{¶38} In their complaint, appellants sought an award of damages to compensate them for property damage they have sustained from the flooding caused by the county's water piping system. They also sought injunctive relief. However, R.C. 6137.05 merely provides for the use of the maintenance fund by the board of county commissioners for any needed repairs to a sewer constructed pursuant to R.C. Chapters 6131, 6133, and 6135. Under this statute the board does not have the authority to grant the relief sought by appellants in their complaint.

{¶39} Third, R.C. 6137.05 by its terms does not provide that a landowner must first submit a written complaint to the board regarding a necessary repair before filing suit based on the county's failure to maintain its water piping system. This statute merely sets forth circumstances in which a board of county commissioners, if it finds the need exists, is required to repair a ditch improvement constructed pursuant to the aforementioned statutes. In any event, the complaint does not allege that the subject piping system was constructed under any of these statutes. Because we are limited to a review of the allegations of the complaint, there is no basis for us to conclude that R.C. 6137.05 applies to the instant case.

{¶40} Fourth, appellee argues that because the subject storm sewer system is comprised of "assessed" pipelines, appellee's responsibilities are governed by R.C. 6137.05. However, as noted above, nowhere in their complaint do appellants allege the subject storm sewer system is comprised of assessed pipelines. We therefore reject appellee's argument that his responsibilities are limited by R.C. 6137.05. Appellee argues the county sent appellants a letter in 1990 explaining that the ditch was an assessed ditch. However, if appellee intended to rely on such alleged document to

obtain the dismissal he seeks, it was incumbent on him to include it in the record and to file a motion for summary judgment or a motion for judgment on the pleadings, rather than a Civ.R. 12(B)(6) motion to dismiss.

{¶41} Next, appellee makes several arguments that are irrelevant to this assignment of error. First, he argues, "Portage County does not appear to have any legal obligation to maintain the drainage pipes at issue." He argues that while R.C. 6137.05 provides that the county can authorize maintenance to be performed, it has no obligation to perform such maintenance. First, as noted above, there is no allegation in the complaint allowing us to conclude that RC. 6137.05 applies in this case. However, even if it did, appellee has failed to reference any authority in support of this argument, in violation of App.R. 16(A)(7). In any event, in light of R.C. 2744.01(G)(2)(d) and our holding in *Moore*, supra, appellant's argument is not well taken. Moreover, the following provision in R.C. 6137.05 defeats appellee's argument:

{¶42} "The repair and maintenance on any improvement may be done in part by contract and in part by force account, *it being the duty of the board of county commissioners *** and the county engineer to use the best and most economical methods under local conditions for the various phases of the maintenance program, such as excavating, clearing, cleaning, snagging, physical and chemical control of land and aquatic vegetation, and repair of banks and structures.*" (Emphasis added.)

{¶43} Second, appellee argues that appellants' negligent maintenance claim necessarily refers to a failure to install a larger pipeline system, which, he argues, is a governmental function. We do not agree. A failure to maintain would include a failure

to inspect, clean, repair, and otherwise ensure that the installed system is operating properly. *Doud*, supra. We also note that in *Moore*, supra, this court held:

{¶44} "If, indeed, the city is responsible for that pipeline, then 'the failure to upgrade sewers that are inadequate to service upstream property owners despite sufficient notice of the inadequacy can best be described as a failure to maintain or upkeep the sewer.' *H. Hafner & Sons Inc. v. Cincinnati Metropolitan Sewer Dist.* (1997), 118 Ohio App.3d 792, 797; see, also, *Hedrick v. Columbus* (Mar. 30, 1993), 10th Dist. Nos. 92AP-1030 and 92AP-1031, 1993 Ohio App. LEXIS 1874. 'If proven, this failure would constitute the breach of a duty arising out of a proprietary function and would expose the city to liability under R.C. 2744.02(B)(2). ***' Id." *Moore*, supra, at ¶59.

{¶45} In view of the foregoing, we hold that appellants were not required to comply with any claimed requirements in R.C. 6137.05 before filing the instant action. We therefore hold the trial court erred in dismissing their negligent maintenance claim without prejudice on the ground that appellants failed to exhaust their administrative remedies.

{¶46} We note that at oral argument for the first time, appellee argued that the trial court's dismissal of appellants' negligent maintenance claim without prejudice was not a final, appealable order.

{¶47} While an involuntary dismissal without prejudice is generally not a final, appealable order, *Arner v. Andover Bank*, 11th Dist. No. 2008-A-0056, 2008-Ohio-5857, at ¶2, "where a party's case is involuntarily dismissed by the trial court, and because of that dismissal any rights of the party are extinguished and will not be able to be reasserted in a refiled case, that party has the right to appeal the dismissal pursuant to

R.C. 2505.02(B)(1) because it is "[a]n order that affects a substantial right in an action that in effect determines the action and prevents a judgment." *Lippus v. Lippus*, 6th Dist. No. E-07-003, 2007-Ohio-6886, at ¶12.

{¶48} A dismissal without prejudice implies that the plaintiff has an *unconditional* right to re-file his action within one year from the date of the dismissal or within the period of the original applicable statute of limitations, whichever occurs later. R.C. 2305.19. However, the trial court's dismissal without prejudice conditioned appellants' right to re-file their negligent-maintenance claim on their exhaustion of administrative remedies. This means that before appellants can re-file their action in court, they must first litigate their claim with the board of commissioners. However, as discussed above, the board does not have jurisdiction over their claim. Thus, by requiring appellants to first litigate their claim with an administrative agency that does not have jurisdiction of the matter, the trial court has unreasonably interfered with appellants' right to re-file their claim in common pleas court, the only forum with jurisdiction. The court's order thus affected a substantial right in an action that in effect determines the action and prevents a judgment. R.C. 2505.02(B)(1). We therefore hold that in these circumstances, the trial court's dismissal without prejudice of appellants' negligent-maintenance claim is a final, appealable order.

{¶49} Appellants' second assignment of error is sustained.

{¶50} For their third and final assignment of error, appellants allege:

{¶51} "The trial court committed reversible error in dismissing Plaintiffs/Appellants [sic] claims arising prior to June 17, 2009 with prejudice."

{¶52} The Supreme Court of Ohio has held that "a Civ.R. 12(B)(6) motion will lie to raise the bar of the statute of limitations when the complaint shows on its face the bar of the statute." *Mills v. Whitehouse Trucking Co.* (1974), 40 Ohio St.2d 55, 58. However, "[a] Civ.R.12(B)(6) motion to dismiss based upon a statute of limitations should be granted only where the complaint conclusively shows on its face that the action is so barred." *Helman v. EPL Prolong, Inc.*, 139 Ohio App.3d 231, 241, 2000-Ohio-2593, citing *Velotta v. Petronzio Landscaping, Inc.* (1982), 69 Ohio St.2d 376, 379. To conclusively show that the action is time-barred, the complaint must demonstrate: "(1) the relevant statute of limitations, and (2) the absence of factors which would toll the statute ***." *Helman, supra*.

{¶53} R.C. 2744.04(A) provides: "An action against a political subdivision to recover damages for injury, death, or loss to person or property allegedly caused by any act or omission in connection with a governmental or proprietary function *** shall be brought within two years after the cause of action accrues ***."

{¶54} In the trial court's judgment entry, the court found that "Plaintiffs' claims arising prior to June 17, 2009 are dismissed with prejudice as they are barred by the applicable statute of limitations."

{¶55} While appellants' position is far from clear, they appear to argue that the statute of limitations was tolled pursuant to the continuing violation doctrine because appellee's repeated acts of negligence resulted in the continual flooding of their property. Appellee does not dispute the applicability of the continuing violation doctrine in this context; instead, he argues that it does not apply to the facts of this case. He argues that the only act that could be negligence was the installation of the piping

system sometime prior to the 1982 flood, and that the subsequent floods were merely continuing effects of that original alleged act of negligence. Appellee also argued in his motion to dismiss that appellants' potential damages are limited to the 2009 flood since that is the only flood that occurred within the statute of limitations. He argued that since appellants filed their complaint on November 9, 2009, they could only recover damages they sustained from November 9, 2007 until November 9, 2009.

{¶56} The Sixth Circuit in *Kuhnle Brothers, Inc. v. County of Geauga* (C.A. 6, 1997), 103 F.3d 516, held that the statute of limitations is tolled when an action arises out of continuing wrongful acts that inflict continuing and accumulating harm where those acts begin outside the statute of limitations but continue within the limitations period. *Id.* at 520. In that case Kuhnle Brothers, a trucking company, claimed the county had violated its substantive due process rights by passing a resolution that banned through-truck traffic on a certain road. The Sixth Circuit held:

{¶57} "**** A law that works an ongoing violation of constitutional rights does not become immunized from legal challenge for all time merely because no one challenges it within two years of its enactment. 'The continued enforcement of an unconstitutional statute cannot be insulated by the statute of limitations.' ****

{¶58} "****As a result, 'a new injury was inflicted on plaintiffs each day ***. Consequently, a new limitations period began to run each day as to that day's damage.' ***

{¶59} "****Kuhnle suffered a new deprivation of constitutional rights every day that Resolution 91-87 remained in effect, rather than merely suffering additional harm

from a prior unconstitutional act. Since the last alleged deprivation occurred less than two years before Kuhnle filed its complaint, Kuhnle's action is not time-barred.

{¶60} "Although the fact that no one brought a legal challenge to Resolution 91-87 within two years of its enactment does not insulate the resolution from legal challenge for all time, the statute of limitations is not entirely without effect. Statutes of limitations serve two purposes: requiring plaintiffs to bring claims before evidence is likely to have grown stale; and allowing potential defendants repose when they have not been put on notice to defend within a specified period of time. *** To allow damages for the entire period during which a law is in effect when a plaintiff challenges the law long after it was enacted would frustrate both of these purposes. Instead, just as a new injury was allegedly inflicted on Kuhnle each day that Resolution 91-87 was in effect, 'a new limitations period began to run each day as to that day's damage.' *** Therefore, Kuhnle is entitled to recover only those damages that were caused by Resolution 91-87 on or after the date two years immediately prior to the date on which Kuhnle filed this action. ***." (Internal citations omitted.) *Kuhnle*, supra, at 522-523.

{¶61} This court adopted the continuing violation doctrine as announced in *Kuhnle* in *Painesville Mini Storage, Inc. v. Painesville*, 11th Dist. No. 2008-L-092, 2009-Ohio-3656. In that case the city issued a building permit to a third party that allowed construction on a tract over which the landowner had an easement to gain access to its business property. The city argued the landowner's claim was time-barred. The landowner contended the statute of limitations did not bar its claim because the continuing violation doctrine applied. This court held the continuing violation doctrine did not apply because the complaint did not allege the issuance of a series of permits

over an extended period of time, nor did new construction occur periodically due to separate acts by the city. The landowner's claim showed its interests were damaged solely by one act: the issuance by the city of one building permit. *Id.* at ¶31. The landowner did not allege it was newly damaged each day after the permit was issued. This court held that since the landowner did not file an action within the applicable limitations period following the city's issuance of the permit, the landowner was now barred from seeking compensation. *Id.* at ¶34.

{¶62} Accepting the allegations of appellants' complaint as true and construing all inferences in their favor, as we are required to do, each flood was caused by appellee's repeated failure to maintain the sewer system. While several of these failures to act occurred outside the limitations period, at least one, that which resulted in the 2009 flood, occurred within the limitations period. As a result, appellants' negligence claim is not time-barred. However, their damages are limited to those occurring as a result of the 2009 flood.

{¶63} As a final note, we observe that, while the trial court and the parties state that the complaint pled multiple claims for negligence, our review of this pleading reveals that only one such claim was pled. Since we hold that appellants' sole claim for damages is not time-barred, but that the damages available to them are limited to those arising within two years of the filing of this action, we construe the trial court's dismissal to be a dismissal of appellant's claim for damages but only to the extent they occurred outside the limitations period. We therefore hold the trial court in its judgment entry, as construed, did not err in thus limiting appellants' claim for damages.

{¶64} Appellants' third assignment of error is overruled.

{¶65} For his sole cross assignment of error, appellee alleges:

{¶66} "The trial court erred by not expressly precluding any punitive damage claim in its order."

{¶67} While the trial court's judgment entry did not expressly dismiss appellants' prayer for punitive damages, by dismissing appellants' negligence claim, such dismissal necessarily included appellants' prayer for punitive damages. The cross assignment of error is therefore moot. We note that while R.C. 2744.05(A) provides that in an action against a political subdivision, punitive damages may not be awarded, the record reveals that appellee's counsel prepared the judgment entry, which omitted reference to punitive damages. Thus, any error of the trial court in not expressly dismissing appellants' prayer for punitive damages was either waived or invited by appellee.

{¶68} Appellee's cross assignment of error is overruled.

{¶69} For the reasons stated in the Opinion of this court, it is the judgment and order of this court that the judgment of the Portage County Court of Common Pleas is affirmed in part; reversed in part, and the matter is remanded to the trial court for further proceedings consistent with this opinion.

DIANE V. GRENDALL, J.,

TIMOTHY P. CANNON, J.,

concur.

STATE OF OHIO)
)SS.
COUNTY OF PORTAGE)

IN THE COURT OF APPEALS
ELEVENTH DISTRICT

FILED
COURT OF APPEALS

MR. ROBERT COLEMAN, et al.,

DEC 20 2010

Plaintiff-Appellants,

JUDGMENT ENTRY
LINDA K. FANKHAUSER, CLERK
PORTAGE COUNTY, OHIO

- vs -

CASE NO. 2010-P-0016

PORTAGE COUNTY ENGINEER,

Defendant-Appellee.

For the reasons stated in the opinion of this court, the assignments of error are not well taken. It is the judgment and the order of this court that the judgment of the Portage County Court of Common Pleas is affirmed in part; reversed in part, and the matter is remanded to the trial court for further proceedings consistent with this opinion.

Costs to be taxed against the parties equally.


JUDGE CYNTHIA WESTCOTT RICE

DIANE V. GRENDALL, J.,

TIMOTHY P. CANNON, J.,

concur.

IN THE COURT OF APPEALS
ELEVENTH APPELLATE DISTRICT
PORTAGE COUNTY, OHIO

FILED
COURT OF APPEALS
DEC 20 2010

LINDA K. FANKHAUSER, CLERK
PORTAGE COUNTY, OHIO

MR. ROBERT COLEMAN,
et al.,

:

OPINION

Plaintiffs-Appellants,

:

CASE NO. 2010-P-0016

- vs -

:

PORTAGE COUNTY ENGINEER,

:

Defendant-Appellee.

:

Civil Appeal from the Court of Common Pleas, Case No. 2009 CV 01726.

Judgment: Affirmed in part, reversed in part, and remanded.

Darrell D. Maddock, UAW GM Legal Services Plan, 1570 South Canfield-Niles Road, #B-101, Austintown, OH 44515 (For Plaintiffs-Appellants).

John T. McLandrich, Frank H. Scialdone, and Tami Z. Hannon, Mazanec, Raskin, Ryder & Keller Co., L.P.A., 100 Franklin's Row, 34305 Solon Road, Solon, OH 44139 (For Defendant-Appellee).

CYNTHIA WESTCOTT RICE, J.

{¶1} Appellants, Mr. Robert Coleman and Barbara Coleman, appeal the judgment of the Portage County Court of Common Pleas granting appellee Portage County Engineer's Civ.R. 12(B)(6) motion to dismiss their complaint for failure to state a claim on which relief can be granted. For the reasons that follow, we affirm in part, reverse in part, and remand.

{¶2} Appellants filed their complaint on November 9, 2009. They alleged they own and reside in the home located at 4087 Sabin Drive in Rootstown, Ohio. Their property has flooded numerous times beginning in 1982, resulting in damage to their home and its contents.

{¶3} Appellants alleged that the flooding is caused by appellee's storm water discharging system. They alleged appellee collects drainage water from drainage ditches along State Route 44 in Rootstown, and discharges the water through a piping system that runs across the property owned by the Rootstown Local School District, which is adjacent to appellants' property. The piping system is unable to accommodate the drainage water, causing it to overflow from culverts located in front of and behind appellants' residence.

{¶4} Appellants alleged that in June 1982, their property flooded when water overflowed from the culvert at the corner of their property. Water infiltrated their residence and damaged their furniture. In June 1989, appellants' property flooded again when the front and back culverts overflowed. Water came into the back of their residence, destroying their carpeting and furniture. In May 2003, the culvert in the back of appellants' property flooded, causing water to cross the backyard and flow into the back of their residence. In August 2005, the culvert overflowed again, resulting in flooding in the schoolyard. The culvert was unable to accommodate the water, causing appellants' property to flood. Most recently, in June 2009, appellants' property flooded again. Water infiltrated a bedroom wall, causing one foot of standing water along the back wall inside the residence. Appellants sustained significant property damage, including the destruction of the carpeting in four rooms.

{¶5} Appellants alleged that their property will continue to flood because appellee negligently constructed a water drainage system that does not properly discharge water or prevent it from flooding their property. They also alleged that appellee has negligently failed to maintain the water piping system, resulting in the repeated flooding of their property.

{¶6} Appellants alleged that they notified appellee of the flooding on their property on numerous occasions, but that appellee has refused and continues to refuse to abate the nuisance or to "resolve the repetitive flooding" of their property.

{¶7} Appellants' complaint asserts two claims. In Count I, they alleged that appellee was negligent in designing, constructing, and maintaining the water piping system that collects and discharges water onto their property, as a result of which they have sustained damages in an amount to be determined at trial.

{¶8} In Count II, appellants alleged they are entitled to an injunction prohibiting appellee from continuing to use the county's storm water discharging system in a manner that makes their property subject to flooding and requiring him to "abate the nuisance" by installing adequate pipes and culverts to prevent continued flooding and damage to their property.

{¶9} Prior to appellee filing an answer or the exchange of discovery between the parties, on December 30, 2009, appellee filed a motion to dismiss appellants' complaint pursuant to Civ.R. 12(B)(6), arguing that appellants' complaint failed to state a claim on which relief could be granted. Appellants filed their brief in opposition. On February 19, 2010, the trial court entered judgment granting appellee's motion. The court dismissed with prejudice appellants' claim for negligent planning, design and

construction of the pipeline in Count I based on political subdivision immunity. The court dismissed without prejudice appellants' claim for negligent maintenance of the pipeline in Count I and their claim for an injunction in Count II based on appellants' failure to exhaust their administrative remedies. Finally, the court dismissed with prejudice appellants' claims arising before June 17, 2009 on the ground that they were barred by the applicable statute of limitations.

{¶10} Appellants appeal the trial court's judgment, asserting three assignments of error. Appellee also raises one cross assignment of error for our consideration. For their first assigned error, appellants contend:

{¶11} "The trial court committed reversible error in dismissing plaintiffs-appellants [sic] claims [sic] for negligent planning, design and construction of the pipeline with prejudice asserting that the defendant-appellee is immune from these claims."

"A motion to dismiss for failure to state a claim upon which relief can be granted is governed by Civ.R. 12(B)(6). When considering a motion to dismiss pursuant to this rule, a court must accept the factual allegations set forth in the complaint as true." *Citibank, N.A. v. Siciliano*, 11th Dist. No. 2003-T-0026, 2004-Ohio-1528, at ¶6. Further, "the plaintiff shall be granted all reasonable inferences derived from the allegations of the complaint." *Id.* As such, the inquiry associated with a Civ.R. 12(B)(6) motion to dismiss focuses on the specific allegations contained in the complaint without reference to external documents or facts. *Id.*

{¶12} This court has held that an appellate court reviews a judgment granting or denying a Civ.R. 12(B)(6) motion to dismiss de novo. *Goss v. Kmart Corp.*, 11th Dist.

No. 2006-T-0117, 2007-Ohio-3200, at ¶17. Generally, “[a] motion to dismiss for failure to state a claim upon which relief can be granted is procedural and tests the sufficiency of the complaint.” *State ex rel. Hanson v. Guernsey Cty. Bd. of Commrs.*, 65 Ohio St.3d 545, 548, 1992-Ohio-73. (Citation omitted.) “[B]efore the court may dismiss the complaint, “*** it must appear beyond doubt from the complaint that the plaintiff can prove no set of facts entitling him to recovery. ****” *Id.*, quoting *O’Brien v. University Community Tenants Union* (1975), 42 Ohio St.2d 242.

{¶13} In *Frazier v. Kent*, 11th Dist. Nos. 2004-P-0077 and 2004-P-0096, 2005-Ohio-5413, this court addressed the appropriate analysis upon the assertion of a defense based on political subdivision immunity, as follows:

{¶14} “R.C. Chapter 2744 sets forth a three tiered analysis for determining a political subdivision’s immunity from liability. *Greene Cty. Agricultural Soc. v. Liming*, (2000), 89 Ohio St.3d 551, 556, 2000-Ohio-486. First, R.C. 2744.02(A)(1) codifies the general rule of sovereign immunity, viz., 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.’ However, this general rule is limited by R.C 2744.02(B), which sets forth five instances in which a political subdivision is not immune. Hence, the second tier of the analysis requires a court to determine whether any of the exceptions under R.C. 2744.02(B) apply. Finally, if a political subdivision is exposed to liability through the application of R.C. 2744.02(B), a court must consider whether the political subdivision could legitimately assert any of

the defenses or immunities under R.C. 2744.03. See, e.g., *Greene Cty. Agricultural Soc.*, supra, at 557." *Frazier*, supra, at ¶20.

¶15 We begin our analysis by determining whether the Portage County Engineer is entitled to political subdivision immunity under R.C. Chapter 2744. In *Lambert v. Clancy, Hamilton County Clerk of Courts*, 125 Ohio St.3d 231, 2010-Ohio-1483, the Supreme Court of Ohio held that where "the allegations contained in the complaint are directed against the office of the political subdivision, the officeholder was sued in his official capacity rather than in his individual or personal capacity. [Further,] the three-tiered political-subdivision-immunity analysis set forth in R.C. 2744.02, and not the employee-immunity provision of R.C. 2744.03(A)(6), is to be applied in such a circumstance." *Lambert*, supra, at 231-232. Further, the immunity granted by statute to a political subdivision is also extended to the political subdivision's departments, agencies, and offices, which implement the duties of the political subdivision. *Id.* at 236. In the instant case, since the allegations in the complaint are directed against the office of the Portage County Engineer, he was sued in his official capacity, and we apply the three-tiered political subdivision-immunity analysis in R.C. 2744.02 in determining whether his office is immune from liability.

¶16 The potential exceptions to immunity for a political subdivision involve: (1) the negligent operation of a motor vehicle by an employee; (2) *the negligent performance of a proprietary function*; (3) the negligent failure to keep public roads open and in repair; (4) injury caused by a defect on the grounds of a public building, and (5) instances in which civil liability is expressly imposed upon the subdivision by a section of the Revised Code. See R.C. 2744.02(B)(1)-(5).

{¶17} Appellants argue that the trial court erred in dismissing their claim in Count I alleging negligent design, planning, and construction of the pipeline based on political subdivision immunity because, they suggest, this claim alleged the negligent performance of a proprietary function, which is an exception to political subdivision immunity, pursuant to R.C. 2744.02(B)(2). However, appellants fail to cite any authority for the proposition that the design, planning, or construction of a sewer system is a proprietary function, in violation of App.R. 16(A)(7). Moreover, appellants present no argument that the same constitutes a proprietary function, in violation of the same appellate rule. For this reason alone, appellants' argument is not well taken. In fact, this court has reached the opposite conclusion.

{¶18} In *Moore v. Streetsboro*, 11th Dist. No. 2008-P-0017, 2009-Ohio-6511, discretionary appeal not allowed at 2010-Ohio-2212, 2010 Ohio LEXIS 1208, this court noted: "Pursuant to R.C. 2744.01(C)(2)(l), '[t]he provision or nonprovision, planning or design, construction, or reconstruction of a public improvement, including, but not limited to, a sewer system' constitutes a 'governmental function' from which the city is immune. See R.C. 2744.02(A)(1)." *Id.* at ¶42. Consequently, this court held: "It is clear that the city is immune from its failure to design and construct an adequate sewer system. Thus, the Moores' arguments that the city was negligent in issuing building permits to upstream properties without designing adequate storm water runoff controls are without merit." *Id.* at ¶45.

{¶19} Based upon the foregoing authority, the design, planning, and construction of Portage County's storm sewer system is a governmental function. Pursuant to R.C. 2744.01(C)(2)(l) and our holding in *Moore*, *supra*, the Portage County Engineer is

immune from liability for its alleged failure to design and construct an adequate storm sewer system.

{¶20} We therefore hold the trial court did not err in dismissing with prejudice appellants' claims premised on the negligent design, planning, and construction of the county's storm sewer system.

{¶21} Appellee's argument that appellants failed to allege their claim for negligent maintenance with sufficient specificity is irrelevant since appellants' first assignment of error does not address that claim.

{¶22} Appellants' first assignment of error is overruled.

{¶23} For their second assigned error, appellants contend:

{¶24} "The trial court committed reversible error in dismissing Plaintiffs' claims [sic] for the negligent maintenance of the pipeline without prejudice based upon Plaintiffs' failure to exhaust their administrative remedies."

{¶25} Before addressing appellants' assignment of error, we consider whether the negligent maintenance of the County's storm sewer system is an exception to political subdivision immunity. The Supreme Court of Ohio in *Doud v. Cincinnati* (1949), 152 Ohio St. 132 held:

{¶26} "*** A municipality is not obliged to construct or maintain sewers, but when it does construct or maintain them 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 *** proprietary function and not a governmental function within the rule of municipal immunity from 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. ***

{¶27} ***

{¶28} "The law on this subject is well stated in 38 American Jurisprudence, 341, Section 636, note 3, citing *City of Portsmouth v. Mitchell Mfg. Co.*, [113 Ohio St. 250], as follows:

{¶29} "The duty of a municipality to keep its sewers in repair involves the exercise of a reasonable degree of watchfulness in ascertaining their condition, from time to time, and preventing them from becoming dilapidated or obstructed. Where the obstruction or dilapidation is an ordinary result of the use of the sewer, which ought to be anticipated and could be guarded against by occasional examination and cleansing, the omission to make such examinations and to keep the sewers clear is a neglect of duty which renders the municipality liable." (Internal citations omitted.) *Doud*, supra, at 137-138.

{¶30} Further, in *Moore*, supra, this court stated: "Pursuant to R.C. 2744.02(B)(2), '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 subdivisions,' unless a defense to such liability is enumerated in R.C. 2744.03." *Id.* at ¶44. This court held: "In contrast to a governmental function, a 'proprietary function' includes '[t]he maintenance, *** operation, and upkeep of a sewer system.' R.C. 2744.01(G)(2)(d)." *Id.* at ¶43.

{¶31} Thus, appellants' claim that appellee was negligent in the maintenance of the county's storm sewer system is not barred by political subdivision immunity. In not

dismissing this claim with prejudice, the trial court tacitly agreed with such holding, but found that appellants had failed to exhaust their administrative remedies before filing such claim. We now consider appellants' argument that the trial court erred in dismissing without prejudice their negligent maintenance claim on the ground that they had failed to exhaust their administrative remedies.

{¶32} Appellee argues the trial court did not err in dismissing appellants' negligent maintenance claim because they failed to exhaust their administrative remedies pursuant to R.C. 6137.05, which provides:

{¶33} "The maintenance fund created under authority of section 6137.01 of the Revised Code [for the repair, upkeep, and maintenance of county ditches] shall be subject to use of the board of county commissioners *** for the necessary and proper repair or maintenance of any improvement constructed under sections 6131.01 to 6131.64, 6133.01 to 6133.15, and 6135.01 to 6135.27 of the Revised Code.

{¶34} "(A) Whenever the board, *** from its own observation or the recommendation of the county engineer, or on the written complaint of any of the owners of lands subject to the maintenance assessment, has reason to believe the improvement is in need of repair or maintenance, it shall as a board, or by the county engineer, make an inspection of its condition, and, if it finds the need to exist, it shall make an estimate of the cost of the necessary work and material required for the purpose. If the nature of the work is such as to be done most economically *** by force account, the board shall cause the proper work to be done by that method ***. If the finding is that necessary repair and maintenance on an improvement *** can be more

economically *** done by contract, the board *** shall *** let the contract for the required work and material to the lowest and best bidder ***.”

{¶35} On appeal, appellants argue they have sent three letters regarding their flooding issue to the Portage County Prosecutor in 1990, 1994, and 2009. They argue these letters satisfied any obligation they may have had to submit a written complaint to the board of commissioners before filing suit. However, as mentioned above, our review of a ruling on a motion to dismiss a complaint does not take into account materials outside the complaint, such as appellants’ letters. *Siciliano*, supra. While appellants alleged generally in their complaint that they had notified appellee of the flooding issue on their property, the complaint does not reference these letters and we therefore cannot consider them. In any event, our review of R.C. 6137.05 reveals that appellants were not required to comply with any of its provisions before filing suit.

{¶36} First, appellee fails to cite any authority for the proposition that a landowner must comply with R.C. 6137.05 before filing suit.

{¶37} Second, while a party seeking relief from an administrative decision must generally pursue available administrative remedies before pursuing action in court, *Dworning v. Euclid*, 119 Ohio St.3d 83, 2008-Ohio-3318, at ¶9, there are exceptions to the exhaustion doctrine. For example, a party is not required to pursue administrative relief first when the administrative body lacks the authority to grant the relief sought. *Gates Mills Invest. Co. v. Pepper Pike* (1978), 59 Ohio App.2d 155, 166-167. Ohio courts recognize that the pursuit of administrative relief under such circumstances would be a vain act and therefore do not impose the exhaustion requirement. *Id.*

{¶38} In their complaint, appellants sought an award of damages to compensate them for property damage they have sustained from the flooding caused by the county's water piping system. They also sought injunctive relief. However, R.C. 6137.05 merely provides for the use of the maintenance fund by the board of county commissioners for any needed repairs to a sewer constructed pursuant to R.C. Chapters 6131, 6133, and 6135. Under this statute the board does not have the authority to grant the relief sought by appellants in their complaint.

{¶39} Third, R.C. 6137.05 by its terms does not provide that a landowner must first submit a written complaint to the board regarding a necessary repair before filing suit based on the county's failure to maintain its water piping system. This statute merely sets forth circumstances in which a board of county commissioners, if it finds the need exists, is required to repair a ditch improvement constructed pursuant to the aforementioned statutes. In any event, the complaint does not allege that the subject piping system was constructed under any of these statutes. Because we are limited to a review of the allegations of the complaint, there is no basis for us to conclude that R.C. 6137.05 applies to the instant case.

{¶40} Fourth, appellee argues that because the subject storm sewer system is comprised of "assessed" pipelines, appellee's responsibilities are governed by R.C. 6137.05. However, as noted above, nowhere in their complaint do appellants allege the subject storm sewer system is comprised of assessed pipelines. We therefore reject appellee's argument that his responsibilities are limited by R.C. 6137.05. Appellee argues the county sent appellants a letter in 1990 explaining that the ditch was an assessed ditch. However, if appellee intended to rely on such alleged document to

obtain the dismissal he seeks, it was incumbent on him to include it in the record and to file a motion for summary judgment or a motion for judgment on the pleadings, rather than a Civ.R. 12(B)(6) motion to dismiss.

{¶41} Next, appellee makes several arguments that are irrelevant to this assignment of error. First, he argues, "Portage County does not appear to have any legal obligation to maintain the drainage pipes at issue." He argues that while R.C. 6137.05 provides that the county can authorize maintenance to be performed, it has no obligation to perform such maintenance. First, as noted above, there is no allegation in the complaint allowing us to conclude that RC. 6137.05 applies in this case. However, even if it did, appellee has failed to reference any authority in support of this argument, in violation of App.R. 16(A)(7). In any event, in light of R.C. 2744.01(G)(2)(d) and our holding in *Moore*, supra, appellant's argument is not well taken. Moreover, the following provision in R.C. 6137.05 defeats appellee's argument:

{¶42} "The repair and maintenance on any improvement may be done in part by contract and in part by force account, *it being the duty of the board of county commissioners *** and the county engineer to use the best and most economical methods under local conditions for the various phases of the maintenance program, such as excavating, clearing, cleaning, snagging, physical and chemical control of land and aquatic vegetation, and repair of banks and structures.*" (Emphasis added.)

{¶43} Second, appellee argues that appellants' negligent maintenance claim necessarily refers to a failure to install a larger pipeline system, which, he argues, is a governmental function. We do not agree. A failure to maintain would include a failure

to inspect, clean, repair, and otherwise ensure that the installed system is operating properly. *Doud*, supra. We also note that in *Moore*, supra, this court held:

{¶44} "If, indeed, the city is responsible for that pipeline, then 'the failure to upgrade sewers that are inadequate to service upstream property owners despite sufficient notice of the inadequacy can best be described as a failure to maintain or upkeep the sewer.' *H. Hafner & Sons Inc. v. Cincinnati Metropolitan Sewer Dist.* (1997), 118 Ohio App.3d 792, 797; see, also, *Hedrick v. Columbus* (Mar. 30, 1993), 10th Dist. Nos. 92AP-1030 and 92AP-1031, 1993 Ohio App. LEXIS 1874. 'If proven, this failure would constitute the breach of a duty arising out of a proprietary function and would expose the city to liability under R.C. 2744.02(B)(2). ***' Id." *Moore*, supra, at ¶59.

{¶45} In view of the foregoing, we hold that appellants were not required to comply with any claimed requirements in R.C. 6137.05 before filing the instant action. We therefore hold the trial court erred in dismissing their negligent maintenance claim without prejudice on the ground that appellants failed to exhaust their administrative remedies.

{¶46} We note that at oral argument for the first time, appellee argued that the trial court's dismissal of appellants' negligent maintenance claim without prejudice was not a final, appealable order.

{¶47} While an involuntary dismissal without prejudice is generally not a final, appealable order, *Amer v. Andover Bank*, 11th Dist. No. 2008-A-0056, 2008-Ohio-5857, at ¶2, "where a party's case is involuntarily dismissed by the trial court, and because of that dismissal any rights of the party are extinguished and will not be able to be reasserted in a refiled case, that party has the right to appeal the dismissal pursuant to

R.C. 2505.02(B)(1) because it is '[a]n order that affects a substantial right in an action that in effect determines the action and prevents a judgment.'" *Lippus v. Lippus*, 6th Dist. No. E-07-003, 2007-Ohio-6886, at ¶12.

{¶48} A dismissal without prejudice implies that the plaintiff has an *unconditional* right to re-file his action within one year from the date of the dismissal or within the period of the original applicable statute of limitations, whichever occurs later. R.C. 2305.19. However, the trial court's dismissal without prejudice conditioned appellants' right to re-file their negligent-maintenance claim on their exhaustion of administrative remedies. This means that before appellants can re-file their action in court, they must first litigate their claim with the board of commissioners. However, as discussed above, the board does not have jurisdiction over their claim. Thus, by requiring appellants to first litigate their claim with an administrative agency that does not have jurisdiction of the matter, the trial court has unreasonably interfered with appellants' right to re-file their claim in common pleas court, the only forum with jurisdiction. The court's order thus affected a substantial right in an action that in effect determines the action and prevents a judgment. R.C. 2505.02(B)(1). We therefore hold that in these circumstances, the trial court's dismissal without prejudice of appellants' negligent-maintenance claim is a final, appealable order.

{¶49} Appellants' second assignment of error is sustained.

{¶50} For their third and final assignment of error, appellants allege:

{¶51} "The trial court committed reversible error in dismissing Plaintiffs/Appellants [sic] claims arising prior to June 17, 2009 with prejudice."

{¶52} The Supreme Court of Ohio has held that “a Civ.R. 12(B)(6) motion will lie to raise the bar of the statute of limitations when the complaint shows on its face the bar of the statute.” *Mills v. Whitehouse Trucking Co.* (1974), 40 Ohio St.2d 55, 58. However, “[a] Civ.R.12(B)(6) motion to dismiss based upon a statute of limitations should be granted only where the complaint conclusively shows on its face that the action is so barred.” *Helman v. EPL Prolong, Inc.*, 139 Ohio App.3d 231, 241, 2000-Ohio-2593, citing *Velotta v. Petronzio Landscaping, Inc.* (1982), 69 Ohio St.2d 376, 379. To conclusively show that the action is time-barred, the complaint must demonstrate: “(1) the relevant statute of limitations, and (2) the absence of factors which would toll the statute ***.” *Helman, supra.*

{¶53} R.C. 2744.04(A) provides: “An action against a political subdivision to recover damages for injury, death, or loss to person or property allegedly caused by any act or omission in connection with a governmental or proprietary function *** shall be brought within two years after the cause of action accrues ***.”

{¶54} In the trial court’s judgment entry, the court found that “Plaintiffs’ claims arising prior to June 17, 2009 are dismissed with prejudice as they are barred by the applicable statute of limitations.”

{¶55} While appellants’ position is far from clear, they appear to argue that the statute of limitations was tolled pursuant to the continuing violation doctrine because appellee’s repeated acts of negligence resulted in the continual flooding of their property. Appellee does not dispute the applicability of the continuing violation doctrine in this context; instead, he argues that it does not apply to the facts of this case. He argues that the only act that could be negligence was the installation of the piping

system sometime prior to the 1982 flood, and that the subsequent floods were merely continuing effects of that original alleged act of negligence. Appellee also argued in his motion to dismiss that appellants' potential damages are limited to the 2009 flood since that is the only flood that occurred within the statute of limitations. He argued that since appellants filed their complaint on November 9, 2009, they could only recover damages they sustained from November 9, 2007 until November 9, 2009.

{¶56} The Sixth Circuit in *Kuhnle Brothers, Inc. v. County of Geauga* (C.A. 6, 1997), 103 F.3d 516, held that the statute of limitations is tolled when an action arises out of continuing wrongful acts that inflict continuing and accumulating harm where those acts begin outside the statute of limitations but continue within the limitations period. *Id.* at 520. In that case Kuhnle Brothers, a trucking company, claimed the county had violated its substantive due process rights by passing a resolution that banned through-truck traffic on a certain road. The Sixth Circuit held:

{¶57} "**** A law that works an ongoing violation of constitutional rights does not become immunized from legal challenge for all time merely because no one challenges it within two years of its enactment. 'The continued enforcement of an unconstitutional statute cannot be insulated by the statute of limitations.' ***

{¶58} "****As a result, 'a new injury was inflicted on plaintiffs each day ***. Consequently, a new limitations period began to run each day as to that day's damage.' ***

{¶59} "****Kuhnle suffered a new deprivation of constitutional rights every day that Resolution 91-87 remained in effect, rather than merely suffering additional harm

from a prior unconstitutional act. Since the last alleged deprivation occurred less than two years before Kuhnle filed its complaint, Kuhnle's action is not time-barred.

{¶60} "Although the fact that no one brought a legal challenge to Resolution 91-87 within two years of its enactment does not insulate the resolution from legal challenge for all time, the statute of limitations is not entirely without effect. Statutes of limitations serve two purposes: requiring plaintiffs to bring claims before evidence is likely to have grown stale; and allowing potential defendants repose when they have not been put on notice to defend within a specified period of time. *** To allow damages for the entire period during which a law is in effect when a plaintiff challenges the law long after it was enacted would frustrate both of these purposes. Instead, just as a new injury was allegedly inflicted on Kuhnle each day that Resolution 91-87 was in effect, 'a new limitations period began to run each day as to that day's damage.' *** Therefore, Kuhnle is entitled to recover only those damages that were caused by Resolution 91-87 on or after the date two years immediately prior to the date on which Kuhnle filed this action. ***." (Internal citations omitted.) *Kuhnle*, supra, at 522-523.

{¶61} This court adopted the continuing violation doctrine as announced in *Kuhnle in Painesville Mini Storage, Inc. v. Painesville*, 11th Dist. No. 2008-L-092, 2009-Ohio-3656. In that case the city issued a building permit to a third party that allowed construction on a tract over which the landowner had an easement to gain access to its business property. The city argued the landowner's claim was time-barred. The landowner contended the statute of limitations did not bar its claim because the continuing violation doctrine applied. This court held the continuing violation doctrine did not apply because the complaint did not allege the issuance of a series of permits

over an extended period of time, nor did new construction occur periodically due to separate acts by the city. The landowner's claim showed its interests were damaged solely by one act: the issuance by the city of one building permit. *Id.* at ¶31. The landowner did not allege it was newly damaged each day after the permit was issued. This court held that since the landowner did not file an action within the applicable limitations period following the city's issuance of the permit, the landowner was now barred from seeking compensation. *Id.* at ¶34.

{¶62} Accepting the allegations of appellants' complaint as true and construing all inferences in their favor, as we are required to do, each flood was caused by appellee's repeated failure to maintain the sewer system. While several of these failures to act occurred outside the limitations period, at least one, that which resulted in the 2009 flood, occurred within the limitations period. As a result, appellants' negligence claim is not time-barred. However, their damages are limited to those occurring as a result of the 2009 flood.

{¶63} As a final note, we observe that, while the trial court and the parties state that the complaint pled multiple claims for negligence, our review of this pleading reveals that only one such claim was pled. Since we hold that appellants' sole claim for damages is not time-barred, but that the damages available to them are limited to those arising within two years of the filing of this action, we construe the trial court's dismissal to be a dismissal of appellant's claim for damages but only to the extent they occurred outside the limitations period. We therefore hold the trial court in its judgment entry, as construed, did not err in thus limiting appellants' claim for damages.

{¶64} Appellants' third assignment of error is overruled.

{¶65} For his sole cross assignment of error, appellee alleges:

{¶66} "The trial court erred by not expressly precluding any punitive damage claim in its order."

{¶67} While the trial court's judgment entry did not expressly dismiss appellants' prayer for punitive damages, by dismissing appellants' negligence claim, such dismissal necessarily included appellants' prayer for punitive damages. The cross assignment of error is therefore moot. We note that while R.C. 2744.05(A) provides that in an action against a political subdivision, punitive damages may not be awarded, the record reveals that appellee's counsel prepared the judgment entry, which omitted reference to punitive damages. Thus, any error of the trial court in not expressly dismissing appellants' prayer for punitive damages was either waived or invited by appellee.

{¶68} Appellee's cross assignment of error is overruled.

{¶69} For the reasons stated in the Opinion of this court, it is the judgment and order of this court that the judgment of the Portage County Court of Common Pleas is affirmed in part; reversed in part, and the matter is remanded to the trial court for further proceedings consistent with this opinion.

DIANE V. GRENDALL, J.,

TIMOTHY P. CANNON, J.,

concur.

STATE OF OHIO)
)SS.
COUNTY OF PORTAGE)

IN THE COURT OF APPEALS
ELEVENTH DISTRICT

FILED
COURT OF APPEALS

MR. ROBERT COLEMAN, et al.,

DEC 20 2010

Plaintiff-Appellants,

LINDA K. FANKHAUSER, CLERK,
PORTAGE COUNTY, OHIO
JUDGMENT ENTRY

- vs -

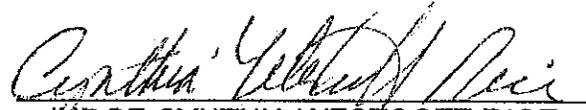
CASE NO. 2010-P-0016

PORTAGE COUNTY ENGINEER,

Defendant-Appellee.

For the reasons stated in the opinion of this court, the assignments of error are not well taken. It is the judgment and the order of this court that the judgment of the Portage County Court of Common Pleas is affirmed in part; reversed in part, and the matter is remanded to the trial court for further proceedings consistent with this opinion.

Costs to be taxed against the parties equally.


JUDGE CYNTHIA WESTCOTT RICE

DIANE V. GRENDALL, J.,

TIMOTHY P. CANNON, J.,

concur.

FILED
COURT OF COMMON PLEAS

FEB 19 2010

LINDA K. FANKHAUSER, CLERK,
PORTAGE COUNTY, OHIO

IN THE COURT OF COMMON PLEAS
PORTAGE COUNTY, OHIO

MR. ROBERT COLEMAN, et al.,)	CASE NO.: 2009CV01726
)	
Plaintiffs,)	JUDGE LAURIE J. PITTMAN
)	
vs.)	
)	<u>FINAL JUDGMENT ENTRY</u>
PORTAGE COUNTY ENGINEER,)	
)	
Defendant.)	
)	

This cause came on for consideration upon the Motion to Dismiss filed by Defendant, Portage County Engineer, seeking to dismiss Plaintiff's Complaint in its entirety.

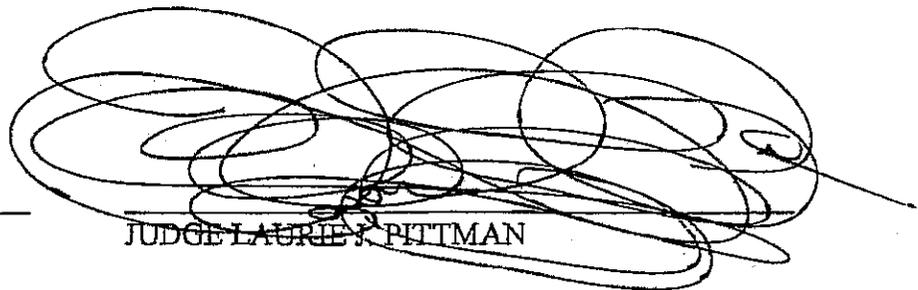
Based upon the Motion, and for good cause shown, Count I of Plaintiffs' Complaint asserting claims for negligent planning, design and construction of the pipeline is dismissed with prejudice. Defendant is immune from these claims.

Counts I and II of Plaintiffs' Complaint asserting claims for the negligent maintenance of the pipeline and requesting an Order requiring Defendant, Portage County Engineer, to perform maintenance on the pipeline are hereby dismissed without prejudice based upon Plaintiffs' failure to exhaust their administrative remedies.

Additionally, Plaintiffs' claims arising prior to June 17, 2009 are dismissed with prejudice as they are barred by the applicable statute of limitations.

IT IS SO ORDERED.

DATED 2.19.2010



JUDGE LAURIE J. PITTMAN

Baldwin's Ohio Revised Code Annotated Currentness
 Title XXVII. Courts--General Provisions--Special Remedies
 Chapter 2744. Political Subdivision Tort Liability (Refs & Annos)
 →→ 2744.01 Definitions

As used in this chapter:

(A) "Emergency call" means a call to duty, including, but not limited to, communications from citizens, police dispatches, and personal observations by peace officers of inherently dangerous situations that demand an immediate response on the part of a peace officer.

(B) "Employee" means an officer, agent, employee, or servant, whether or not compensated or full-time or part-time, who is authorized to act and is acting within the scope of the officer's, agent's, employee's, or servant's employment for a political subdivision. "Employee" does not include an independent contractor and does not include any individual engaged by a school district pursuant to section 3319.301 of the Revised Code. "Employee" includes any elected or appointed official of a political subdivision. "Employee" also includes a person who has been convicted of or pleaded guilty to a criminal offense and who has been sentenced to perform community service work in a political subdivision whether pursuant to section 2951.02 of the Revised Code or otherwise, and a child who is found to be a delinquent child and who is ordered by a juvenile court pursuant to section 2152.19 or 2152.20 of the Revised Code to perform community service or community work in a political subdivision.

(C)(1) "Governmental function" means a function of a political subdivision that is specified in division (C)(2) of this section or that satisfies any of the following:

(a) A function that is imposed upon the state as an obligation of sovereignty and that is performed by a political subdivision voluntarily or pursuant to legislative requirement;

(b) A function that is for the common good of all citizens of the state;

(c) A function that promotes or preserves the public peace, health, safety, or welfare; that involves activities that are not engaged in or not customarily engaged in by nongovernmental persons; and that is not specified in division (G)(2) of this section as a proprietary function.

(2) A "governmental function" includes, but is not limited to, the following:

- (a) The provision or nonprovision of police, fire, emergency medical, ambulance, and rescue services or protection;
-
- (b) The power to preserve the peace; to prevent and suppress riots, disturbances, and disorderly assemblages; to prevent, mitigate, and clean up releases of oil and hazardous and extremely hazardous substances as defined in section 3750.01 of the Revised Code; and to protect persons and property;
- (c) The provision of a system of public education;
- (d) The provision of a free public library system;
- (e) The regulation of the use of, and the maintenance and repair of, roads, highways, streets, avenues, alleys, sidewalks, bridges, aqueducts, viaducts, and public grounds;
-
- (f) Judicial, quasi-judicial, prosecutorial, legislative, and quasi-legislative functions;
-
- (g) The construction, reconstruction, repair, renovation, maintenance, and operation of buildings that are used in connection with the performance of a governmental function, including, but not limited to, office buildings and courthouses;
- (h) The design, construction, reconstruction, renovation, repair, maintenance, and operation of jails, places of juvenile detention, workhouses, or any other detention facility, as defined in section 2921.01 of the Revised Code;
- (i) The enforcement or nonperformance of any law;
- (j) The regulation of traffic, and the erection or nonerection of traffic signs, signals, or control devices;
- (k) The collection and disposal of solid wastes, as defined in section 3734.01 of the Revised Code, including, but not limited to, the operation of solid waste disposal facilities, as "facilities" is defined in that section, and the collection and management of hazardous waste generated by households. As used in division (C)(2)(k) of this section, "hazardous waste generated by households" means solid waste originally generated by individual households that is listed specifically as hazardous waste in or exhibits one or more characteristics of hazardous waste as defined by rules adopted under section 3734.12 of the Revised Code, but that is excluded from regulation as a hazardous waste by those rules.
- (l) The provision or nonprovision, planning or design, construction, or reconstruction of a public improvement, including, but not limited to, a sewer system;
- (m) The operation of a job and family services department or agency, including, but not limited to, the provision

of assistance to aged and infirm persons and to persons who are indigent;

(n) The operation of a health board, department, or agency, including, but not limited to, any statutorily required or permissive program for the provision of immunizations or other inoculations to all or some members of the public, provided that a "governmental function" does not include the supply, manufacture, distribution, or development of any drug or vaccine employed in any such immunization or inoculation program by any supplier, manufacturer, distributor, or developer of the drug or vaccine;

(o) The operation of mental health facilities, mental retardation or developmental disabilities facilities, alcohol treatment and control centers, and children's homes or agencies;

(p) The provision or nonprovision of inspection services of all types, including, but not limited to, inspections in connection with building, zoning, sanitation, fire, plumbing, and electrical codes, and the taking of actions in connection with those types of codes, including, but not limited to, the approval of plans for the construction of buildings or structures and the issuance or revocation of building permits or stop work orders in connection with buildings or structures;

(q) Urban renewal projects and the elimination of slum conditions;

(r) Flood control measures;

(s) The design, construction, reconstruction, renovation, operation, care, repair, and maintenance of a township cemetery;

(t) The issuance of revenue obligations under section 140.06 of the Revised Code;

(u) The design, construction, reconstruction, renovation, repair, maintenance, and operation of any school athletic facility, school auditorium, or gymnasium or any recreational area or facility, including, but not limited to, any of the following:

(i) A park, playground, or playfield;

(ii) An indoor recreational facility;

(iii) A zoo or zoological park;

(iv) A bath, swimming pool, pond, water park, wading pool, wave pool, water slide, or other type of aquatic facility;

(v) A golf course;

(vi) A bicycle motocross facility or other type of recreational area or facility in which bicycling, skating, skate boarding, or scooter riding is engaged;

(vii) A rope course or climbing walls;

(viii) An all-purpose vehicle facility in which all-purpose vehicles, as defined in section 4519.01 of the Revised Code, are contained, maintained, or operated for recreational activities.

(v) The provision of public defender services by a county or joint county public defender's office pursuant to Chapter 120. of the Revised Code;

(w)(i) At any time before regulations prescribed pursuant to 49 U.S.C.A 20153 become effective, the designation, establishment, design, construction, implementation, operation, repair, or maintenance of a public road rail crossing-in-a-zone within a municipal corporation in which, by ordinance, the legislative authority of the municipal corporation regulates the sounding of locomotive horns, whistles, or bells;

(ii) On and after the effective date of regulations prescribed pursuant to 49 U.S.C.A. 20153, the designation, establishment, design, construction, implementation, operation, repair, or maintenance of a public road rail crossing in such a zone or of a supplementary safety measure, as defined in 49 U.S.C.A 20153, at or for a public road rail crossing, if and to the extent that the public road rail crossing is excepted, pursuant to subsection (c) of that section, from the requirement of the regulations prescribed under subsection (b) of that section.

(x) A function that the general assembly mandates a political subdivision to perform.

(D) "Law" means any provision of the constitution, statutes, or rules of the United States or of this state; provisions of charters, ordinances, resolutions, and rules of political subdivisions; and written policies adopted by boards of education. When used in connection with the "common law," this definition does not apply.

(E) "Motor vehicle" has the same meaning as in section 4511.01 of the Revised Code.

(F) "Political subdivision" or "subdivision" means a municipal corporation, township, county, school district, or other body corporate and politic responsible for governmental activities in a geographic area smaller than that of the state. "Political subdivision" includes, but is not limited to, a county hospital commission appointed under section 339.14 of the Revised Code, board of hospital commissioners appointed for a municipal hospital under section 749.04 of the Revised Code, board of hospital trustees appointed for a municipal hospital under section 749.22 of the Revised Code, regional planning commission created pursuant to section 713.21 of the Revised Code, county planning commission created pursuant to section 713.22 of the Revised Code, joint planning council created pursuant to section 713.231 of the Revised Code, interstate regional planning commission created

pursuant to section 713.30 of the Revised Code, port authority created pursuant to section 4582.02 or 4582.26 of the Revised Code or in existence on December 16, 1964, regional council established by political subdivisions pursuant to Chapter 167. of the Revised Code, emergency planning district and joint emergency planning district designated under section 3750.03 of the Revised Code, joint emergency medical services district created pursuant to section 307.052 of the Revised Code, fire and ambulance district created pursuant to section 505.375 of the Revised Code, joint interstate emergency planning district established by an agreement entered into under that section, county solid waste management district and joint solid waste management district established under section 343.01 or 343.012 of the Revised Code, community school established under Chapter 3314. of the Revised Code, the county or counties served by a community-based correctional facility and program or district community-based correctional facility and program established and operated under sections 2301.51 to 2301.58 of the Revised Code, a community-based correctional facility and program or district community-based correctional facility and program that is so established and operated, and the facility governing board of a community-based correctional facility and program or district community-based correctional facility and program that is so established and operated.

(G)(1) "Proprietary function" means a function of a political subdivision that is specified in division (G)(2) of this section or that satisfies both of the following:

~~(a) The function is not one described in division (C)(1)(a) or (b) of this section and is not one specified in division (C)(2) of this section;~~

(b) The function is one that promotes or preserves the public peace, health, safety, or welfare and that involves activities that are customarily engaged in by nongovernmental persons.

(2) A "proprietary function" includes, but is not limited to, the following:

(a) The operation of a hospital by one or more political subdivisions;

(b) The design, construction, reconstruction, renovation, repair, maintenance, and operation of a public cemetery other than a township cemetery;

(c) The establishment, maintenance, and operation of a utility, including, but not limited to, a light, gas, power, or heat plant, a railroad, a busline or other transit company, an airport, and a municipal corporation water supply system;

(d) The maintenance, destruction, operation, and upkeep of a sewer system;

(e) The operation and control of a public stadium, auditorium, civic or social center, exhibition hall, arts and crafts center, band or orchestra, or off-street parking facility.

(H) "Public roads" means 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.

(I) "State" means the state of Ohio, including, but not limited to, the general assembly, the supreme court, the offices of all elected state officers, and all departments, boards, offices, commissions, agencies, colleges and universities, institutions, and other instrumentalities of the state of Ohio. "State" does not include political subdivisions.

CREDIT(S)

(2006 H 162, eff. 10-12-06; 2004 S 222, eff. 4-27-05; 2002 S 106, eff. 4-9-03; 2001 S 108, § 2.03, eff. 1-1-02; 2001 S 108, § 2.01, eff. 7-6-01; 2001 S 24, § 3, eff. 1-1-02; 2001 S 24, § 1, eff. 10-26-01; 2000 S 179, § 3, eff. 1-1-02; 1999 H 205, eff. 9-24-99; 1997 H 215, eff. 6-30-97; 1996 H 350, eff. 1-27-97 (*State, ex rel. Ohio Academy of Trial Lawyers, v. Sheward* (1999)); 1995 H 192, eff. 11-21-95; 1994 H 384, eff. 11-11-94; 1993 H 152, eff. 7-1-93; 1992 H 723, H 210; 1990 H 656; 1988 S 367, H.815; 1987 H 295; 1986 H 205, § 1, 3; 1985 H 176)

CONSTITUTIONALITY

"Ohio Revised Code § 2744" was held on 12-16-2003 to violate the right to trial by jury, under Ohio Constitution Article 1, § 5, and the right to a remedy, under Ohio Constitution Article 1, § 16. The ruling was by the U.S. District Court for the Southern District of Ohio, deciding as it believes the Supreme Court of Ohio would have, in the case of *Kammeyer v City of Sharonville*, 311 F.Supp.2d 653 (SD Ohio 2003). The Court also observed that the state is sovereign but political subdivisions are not.

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▶ Baldwin's Ohio Revised Code Annotated Currentness

Title XXVII. Courts--General Provisions--Special Remedies

▣ Chapter 2744. Political Subdivision Tort Liability (Refs & Annos)

→→ 2744.02 Political subdivision not liable for injury, death, or loss; exceptions

(A)(1) For the purposes of this chapter, the functions of political subdivisions are hereby classified as governmental functions and proprietary functions. Except as provided in division (B) of this section, 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.

(2) The defenses and immunities conferred under this chapter apply in connection with all governmental and proprietary functions performed by a political subdivision and its employees, whether performed on behalf of that political subdivision or on behalf of another political subdivision.

(3) Subject to statutory limitations upon their monetary jurisdiction, the courts of common pleas, the municipal courts, and the county courts have jurisdiction to hear and determine civil actions governed by or brought pursuant to this chapter.

(B) Subject to sections 2744.03 and 2744.05 of the Revised Code, a political subdivision is liable in damages in a civil action for injury, death, or loss to person or property allegedly caused by an act or omission of the political subdivision or of any of its employees in connection with a governmental or proprietary function, as follows:

(1) Except as otherwise provided in this division, political subdivisions are liable for injury, death, or loss to person or property caused by the negligent operation of any motor vehicle by their employees when the employees are engaged within the scope of their employment and authority. The following are full defenses to that liability:

(a) A member of a municipal corporation police department or any other police agency was operating a motor vehicle while responding to an emergency call and the operation of the vehicle did not constitute willful or wanton misconduct;

(b) A member of a municipal corporation fire department or any other firefighting agency was operating a motor vehicle while engaged in duty at a fire, proceeding toward a place where a fire is in progress or is believed to be in progress, or answering any other emergency alarm and the operation of the vehicle did not constitute willful or wanton misconduct;

(c) A member of an emergency medical service owned or operated by a political subdivision was operating a motor vehicle while responding to or completing a call for emergency medical care or treatment, the member was holding a valid commercial driver's license issued pursuant to Chapter 4506. or a driver's license issued pursuant to Chapter 4507. of the Revised Code, the operation of the vehicle did not constitute willful or wanton misconduct, and the operation complies with the precautions of section 4511.03 of the Revised Code.

(2) Except as otherwise provided in sections 3314.07 and 3746.24 of the Revised Code, 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 subdivisions.

(3) Except 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.

(4) Except as otherwise provided in section 3746.24 of the Revised Code, political subdivisions are liable for injury, death, or loss to person or property that is caused by the negligence of their employees and that occurs within or on the grounds of, and is due to physical defects within or on the grounds of, buildings that are used in connection with the performance of a governmental function, including, but not limited to, office buildings and courthouses, but not including jails, places of juvenile detention, workhouses, or any other detention facility, as defined in section 2921.01 of the Revised Code.

(5) 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.

(C) An order that denies a political subdivision or an employee of a political subdivision the benefit of an alleged immunity from liability as provided in this chapter or any other provision of the law is a final order.

CREDIT(S)

(2007 H 119, eff. 9-29-07; 2002 S 106, eff. 4-9-03; 2001 S 108, § 2.01, eff. 7-6-01; 1997 H 215, eff. 6-30-97; 1996 H 350, eff. 1-27-97 (*State, ex rel. Ohio Academy of Trial Lawyers, v. Sheward* (1999)); 1994 S 221, eff. 9-28-94; 1989 H 381, eff. 7-1-89; 1985 H 176)

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