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

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# AMENDED MERIT BRIEF OF PLAINTIFFS/APPELLEES ROBERT COLEMAN, ET AL.

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## INTRODUCTION

The issue before the Court is whether appellant, Portage County Engineer, is immune from liability pursuant to Ohio Revised Code Section 2744.02.

Did appellant fail to meet its duty to carry out a propriety function in the upkeep of a storm sewer system? In other words, did the appellant fail to keep the storm sewer system operational after constructing the system over approximately thirty years ago? Given the complete paucity of facts developed in the trial court stage of the proceedings, are there sufficient facts before this high court to fairly and knowledgeably apply the facts to the statute under review?

The Appellees, Robert and Barbara Coleman, commenced an action against the Portage County Engineer (The County) after their property flooded five (5) separate times in a period of twenty seven (27) years. The Appellees action alleged that the piping system was inadequate and could not accommodate the drainage water. (Complaint paragraphs 3-7). Appellees sued the Portage County Engineer alleging improper design of the system and improper maintenance. The Eleventh District while dismissing the claim for improper design, properly concluded that the failure to upgrade a sewer with inadequate capacity was a failure to maintain the sewer and thus could expose the County to liability under R.C 2744.02(B)(2).

The Eleventh District Appeals Court, in interpreting the statutory language, properly concluded that the failure to upgrade an inadequate sewer system is indeed a failure to maintain the sewer system. It is the province of the Eleventh District to

interpret the language of the statute, and apply the law to the facts and circumstances of each case. It does not require a great leap of faith to understand – and it is clearly a reasonable interpretation of R.C. 2744.02(B)(2)- to conclude that the failure to upgrade an inadequate, inoperable, storm sewer system is a failure to maintain it. The Appellants have incorrectly suggested, that the Eleventh District in interpreting the statute, acted in an extra judicial capacity, essentially legislating from the bench in violation of the separation of powers doctrine. This Court should affirm the decision of the Eleventh District.

**STATEMENT OF THE FACTS**

Appellees, Robert and Barbara Coleman, are the owners of real estate and reside at 4087 Sabin Drive, Rootstown, Ohio. (Complaint, paragraph 1). Appellees have alleged that the County Engineer "collects drainage water from drainage ditches along state Route 44 in Rootstown and discharges same through a piping system that runs across the adjacent Rootstown Public School System. (Comp. paragraph 2).

Appellees have alleged that since June of 1982 their property has flooded on five (5) separate occasions. In June 1982 their property flooded when the water overflowed from the culvert at the corner of their property. (Comp paragraph 3). In June of 1989 their property flooded again when the front and back culverts were overflowing. (Comp. paragraph 4). In May 2003 their property flooded again and water flowed into their residence. (Comp. paragraph 5). In August 2005 the culvert overflowed again their property once again flooded. (Comp. paragraph 6). In June 2009 their property flooded again.

Appellees have alleged that their property will continue to flood because the Appellant has failed to perform any upkeep or maintenance of the storm sewer water drainage system. Such a failure is a breach of duty of the propriety function of the appellant to guard against the creation of a nuisance, and to prevent the collecting of flood water onto the Appellee's property causing significant damage. Appellants have failed to maintain the piping system that runs through the adjacent Rootstown Public School property to the storm sewer next to the property.(Comp. paragraph 8).

Appellees have alleged that the County "has been notified on numerous occasions" of the flooding, but that the County has "refused, continues to refuse to abate the nuisance" or to "resolve the repetitive flooding." (Comp. paragraph 9). Appellees have alleged that the County was negligent in designing, constructing and maintaining the water piping system." (Comp. paragraphs 12, 15).

**PROCEDURAL POSTURE**

Appellees commenced their action against the Appellant, Portage County Engineer, on November 9, 2009 in the Portage County Court of Common Pleas. Next, appellant filed a motion to dismiss pursuant to Civil Rule 12(B), alleging that the Appellant/County Engineer is immune under the auspices of Ohio Revised Code Chapter 2744. Appellees filed a brief in opposition arguing that the County is not immune from the Appellees claims for the improper design, planning and construction and negligent maintenance of the pipeline. On February 19, 2010 the Trial Court dismissed all claims. The claims for negligent planning, design and construction of the pipeline were dismissed with prejudice and the claims for negligent maintenance were dismissed without

prejudice based on the Appellees failure to exhaust their administrative remedies. On March 15, 2010 Appellees timely filed their notice of appeal.

The Eleventh District Court of Appeals exercised jurisdiction over the entire case and reversed in part. Although the Eleventh District ruled that "the failure to upgrade sewers" is not a design or construction issue, The Eleventh District found that "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". This holding is consistent with the holding in the First District Court of Appeals as well, *see H. Hafner & Sons, Inc. v. Cincinnati Metropolitan Sewer District,* 118 Oh App. 3d 792, 694 N.E.2d 111 (1st Dist 1997).

## LAW AND ARGUMENT

### I

**A political subdivisions failure to maintain a storm water drainage system would include a failure to inspect, clean, repair, and otherwise ensure that the installed system is operating properly. The failure to so maintain and ensure that the system is properly functioning is a proprietary function within the meaning of R.C. 2744.01(G)(2) so as to subject a political subdivision to liability under R.C. 2744.02(B)(2). The failure to keep the system in proper operating condition is not an immune governmental function under R.C. 2744.01(C)(2).**

The Eleventh District's decision in the case of *Coleman v. Portage County Engineer*, correctly decided that appellants, Portage County Engineer, failure to maintain (the storm water system) would include a failure to inspect, clean, repair, and otherwise ensure that the installed system is operating properly.

This Court has held in *Doud v. Cincinnati* (1949) 152 Ohio St. 132, 137, 87 N.E.2d 243 as follows:

"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 ministerial or 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."

Also *see Inland Products, Inc. v. City of Columbus*, 193 Ohio App3d 740, 954 N.E.2d 141 (2011) in which the court stated as follows:

"Although *Doud* predates the Public Subdivision Tort Liability Act, the rationale of *Doud* was codified in that act, and Ohio Courts have continued to follow the common-law rationale under the immunity statutes. *See Trustees of Nimishillen Twp. V. State ex. Rel. Groffre Invests.*, 5th Dist. No. 2003 CA 00410, 2004-Ohio-3371, 2004 WL 1445235, P. 38 citing *Best v. Findlay* (Dec 5, 1977), 3d Dist. No. 5-97-22, 1997 WL 746768 and *Nice v. Marysville* (1992), 82 Ohio App.3d 109, 611 N.E.2d 468.

Appellees submit that in order to ensure that the storm water system does not cause damage to its users; the County has a duty to insure that the system is usable and operates properly as it was intended to do. The Eleventh District correctly held that "a failure to maintain would include a failure to inspect, clean, repair and *otherwise ensure that the installed system is operating* properly." (11th Dist. Opinion in *Coleman*, at para. 43).

In support of the aforementioned proposition of law, the Eleventh District Court of Appeals cites its previous holding in *Moore v. Streetsboro*, 11th Dist. No. 2008-P-0017, 2009-Ohio-6511, wherein the 11th District Appeals Court stated: "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." The Eleventh District in *Moore* correctly adopted the rationale contained in *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).

In *Hafner*, the Cincinnati Metro Sewer District had been on notice for eleven (11) years that its combination sewer system had caused sewage overflow onto the Plaintiffs' properties yet took no action. The sewer system was antiquated and was unable to handle the storm water and sewage during heavy rain events and the gates of the system were closed which caused the Plaintiffs' property to flood.

In the case at bar, appellant, Portage County Engineer has known for close to thirty (30) years that the system was inadequate to accommodate large rainfalls, and that the Appellees property was episodically flooded as a result causing property damage. The evolution of the law concerning construction, operation, maintenance and repair of the system is that once the system is constructed, the duty to maintain the sewer system, repair the sewer system and upkeep the system is ministerial in nature and is not discretionary.

In this case the appellant knew that the system was insufficient to accommodate large amounts of rain, had constructive or actual notice, and should be liable to the Appellees for the damage sustained.

Ohio Courts have repeatedly found that the issues of maintenance and upkeep do not qualify for discretionary immunity. *See, City of Salem v. Harding* (1929), 120 Ohio St. 250; *City of Portsmouth v. Mitchell Manufacturing* (1925), 113 Ohio St.2d 250; *City of Ironton v. Wiehly* (1908) 78 Ohio St. 41; *Masley v. Lorain* (1976) 48 Ohio St.2d 334; *Doud v. Cincinnati* (1949) 152 Ohio St. 132 and Hubbell v. *City of Xenia* (2008), 175

Ohio App.3d 99. Due to the fact that the duty to provide maintenance and upkeep requires that the system be made to be operational and usable, maintenance and upkeep includes the duty to upgrade to make usable and which is therefore mandatory as a ministerial act and not discretionary.

Appellants should not be able to stand behind a defense that it has inability to maintain and upkeep its sewer system which it has known for years that the system is inadequate. The logic used by the court in *Hafner* should be the law of the state of Ohio. The failure of a municipality to update its sewer system which the county has known for thirty (30) years causes flooding of the Appellees' property constitutes a failure to maintain the system for which the county may be liable. The political subdivision is bound to use reasonable diligence and care to keep the sewer system in good repair and should be liable to all property owners who are injured by the political subdivisions negligence in that respect.

II

**The First and Eleventh District Court of Appeals holdings in *Hafner*, *Coleman*, and *Moore*, correctly apply the Ohio Revised Code Section 2744.02 (B)(2) to the facts and circumstances in those cases. And, the decisions handed down in each of those appellate cases properly find that the government subdivisions in those cases were not immune from liability.**

Appellees submit that the duty to maintain and upkeep a sanitary sewer system includes the duty to insure that the system is usable and does not cause damage to the users of the system. The very definition of the term "upkeep" is maintenance in proper operation and repair (Webster's II, new revised dictionary revised edition). Appellant argues in this case that to "upgrade" a system involves the discretionary use of funds and money which triggers the immunity provisions of R.C. 2744 and that the duty to provide

upkeep does not carry the duty to "upgrade" an antiquated sewer system. Appellees submit that this position ignores the very purpose of the distinction between governmental and proprietary functions and further ignores the evolution of case law that has demonstrated that once a municipality assumes a duty, it must carry out that duty properly or otherwise risk liability for negligence.

The appellants attempt to reinstate immunity pursuant to R.C 2744.02 must fail in the instant case. A review of the history of 2744.02 reveals that this statutory section in effect codified the ministerial/discretionary test formulated by the Ohio supreme Court after the abrogation of severing immunity in the 1980's pursuant to its decision in *Howe v. Jackson Township Board of Trustees* (1990) 67 Ohio App.3d 159, 162. Pursuant to the *Howe v. Jackson* standard, it was held that, to constitute a basic policy making decision, an exercise of judgment should involve the weighing of fiscal priorities, safety and engineering considerations. *Williamson v. Pavlovich* (1998), 45 Ohio St.3d 179,185, However once a decision is made, the government entity may still be liable for the negligent implementation of its decision. *Enghauser Mfg Co. v. Erickson Engineering, Ltd.* (1983). (1983) 6 Ohio St.3d 31, see also *Winwood v. Dayton* (1988), 37 Ohio St.3d 282. Once the Appellant constructed a sewer system it had the duty to make appropriate decisions for upkeep and maintenance which, by definition, could include upgrading the system to insure that it operates properly and is usable. In the case at hand, there is no evidence of record to establish that appellant, Portage County Engineer, has performed any maintenance or repairs to the storm water system at issue.

The *Coleman* decision of the Eleventh District Court of Appeals is a correct application of the Ohio law. The evolution of law concerning construction, operation,

maintenance and repair of sewer system is that once the sewer system is constructed, the duty to maintain the sewer system, repair the sewer system and upkeep the sewer system is ministerial in nature and is not discretionary. The political subdivision is bound to use reasonable diligence and care to keep the sewer system in good repair and should be liable to all property owners who are injured by the negligence of the political subdivision. In this case the Appellant has known for approximately thirty (30) years that the sewer system did not operate properly and took no steps to remedy the defect.

The law of Ohio is clear that routine decisions requiring little judgment or discretion and which instead portray inadvertence or inattention do not grant immunity to political subdivisions from a loss resulting from the political subdivision's exercise of judgment or discretion. *Hubbell v. City of Xenia* (2008), 175 Ohio App. 3d 99.

III

**The Eleventh District Court of Appeals correctly interpreted maintenance and upkeep to include the upgrading of a sewer system.**

Ohio R.C 2744(B)(2) contains an exception to governmental immunity, and states, in pertinent part:

> "Political subdivisions are liable for injury, death or loss to person or property caused by the negligent performance of acts by their employees with respect to proprietary functions of the political subdivision."

Ohio Revised Code sets forth the difference between a proprietary function and a governmental function. A proprietary function is the *maintenance*, destruction, operation, and *upkeep* of a sewer system. A government function is the provision or nonprovision, planning or design, construction, or reconstruction of a public improvement, including, but not limited to, a sewer system, Ohio R.C 2744.01(C)(2)(1).

The Eleventh District Court of Appeals correctly interpreted maintenance and upkeep to include "upgrade". The failure to upgrade the sewer is a failure to maintain the sewer. Appellant relies substantially upon dictionary definitions to construe the intention of the Ohio Legislature as to what the duties to conduct maintenance and upkeep of a sewer system mean. In *Cabell v. Markham* (1945) 148 F.2d 737, 739 Judge Learned Hand Stated as follows:

"It is one of the surest indexes of a mature and developed jurisprudence not to make a fortress out of the dictionary; but to remember that statutes always have some purpose or object to accomplish, whose sympathetic and imaginative discovery is the surest guide to their meaning."

Likewise Justice Stevens stated in *Hibbs v. Winn* 542 U.S 88,113 (2004) as Follows:

"in a contest between the dictionary and the doctrine of stare decisis the latter clearly wins."

Appellees submit that the doctrine of common sense dictates that conducting maintenance and upkeep of a sewer system means that the system must be maintained in a condition that insures that it is usable and functional and meets the needs of the users of the system. A system that episodically floods the Appellees' property is not a system that has been maintained or has been provided upkeep in a manner to make it usable.

The Eleventh District Court of Appeals reasonably interpreted the statute under review and the *Coleman* decision should be affirmed.

IV

**The Eleventh District Court of Appeals did not judicially create a "a failure to upgrade" exception to statutory immunity and did not overlap judicial and legislative authority**

The Eleventh District Court did not engage in judicial activism and legislate from the bench. The Eleventh District Court faced with the task of interpreting the statute determined that the failure to upgrade the sewer system is tantamount to failing to maintain and/or upkeep the system which is proprietary in nature and for which liability may be found. The Court stated:

> "...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: ***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 ***propriety 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,*** *Coleman* at pp. 8-9, para's 25 and 26
>
> "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:
>
> "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.) *citing Doud*, supra at 137-138, *Coleman* at p. 9, para's 28, 29.
>
> Further, in *Moore,* (citing Moore v. Streetsboro, 11th Dist., 2009 WL 4756421) *supra,* this court stated: "Pursuant to R.C.2744.02(B)(2) 'political subdivisions are liable or injury, death, or loss to person or property caused by the negligent performance of acts by their em-

> ployees with respect to proprietary functions of the political divisions,' unless a defense to such liability is enumerated in R.C. 2744.03." Id at Para 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 Para 43.

The 11th District then held that the claim of Mr. and Mrs. Coleman's that the Portage County Engineer was negligent in the maintenance of the county's storm sewer system is not barred by political subdivision immunity, 11th DCA in *Coleman* at p.9.

Clearly the Eleventh District when interpreting the statute, and viewing the statutory language in its entirety, found that the failure to upgrade is consistent with failing to maintain and/or upkeep. It is tantamount to saying that Eleventh District Court of Appeals found the failure to upgrade within the penumbra of the language of the statute when reading same in its entirety.

V.

**Appellants contention that the "Majority of Ohio Courts reject the Eleventh District Court of Appeals rationale" is a misstatement of Ohio Appellate decisions and wholly without merit.**

Appellants cite three Ohio appellate decisions in the Fourth, Seventh and Ninth districts for the proposition that the government is statutorily immune from a negligence claim sued upon by an Ohio homeowner when the government entity engages in a governmental function concerning a storm sewer system vs. a propriety function, *citing Essman v. Portsmouth,* 2010 WL 3852247 (Fourth Dist Ct. App.) (2010), *Bauer v. Brunswick,* 2011 WL 4435205, (Ninth Dist Ct. App) (2011), and *Ivory v. Austintown Twp.,* (Seventh Dist. Ct. App) (2011).

Appellants mistakenly contend that these cited appellate decisions reject the rationale of the Eleventh District Court of Appeals decision in *Coleman v. Portage County Engineer*, 191 Ohio App3d 32. Appellants incorrectly applies the facts, and misconstrues the law in two of the three cited appellate decisions, and at page 12 of its brief, Appellants next improperly and incorrectly contend that the "majority of Ohio Courts reject the Eleventh District's rational."

Even a cursory reading of the *Ivory v. Austintown Township* decision of the Seventh Appellate District decision in *Ivory* reveals that the facts in *Ivory* are distinguishable from *Coleman and Essman.* Appellants argument and conclusion that the *Ivory* decision rejects the Eleventh Appellate Court decision in *Coleman v. Portage County Engineer* is unsupportable and without merit.

In *Ivory*, plaintiff Joseph Ivory, a homeowner of a single-story house with a basement and level garage and living space, filed suit against the Township alleging Austintown Township negligently maintained its sewers when it covered the drainage ditch and installed the pipe and catch basin. The gravaman of plaintiff Ivory's complaint was that the political subdivision, Austintown Township, had negligently performed a propriety function, among other things. The *Ivory* appellate Court stated, in analyzing the Ohio law, R.C. 2744.02 (B)(2) : "This exception to immunity necessitates first determining whether a political subdivision was engaged in a propriety or governmental function."

The Seventh District Court of Appeals next proceeded to find, on the facts in the case before it, that "prior to the storm of June 2006 Austintown covered a sewer drainage ditch abutting Ivory's property and installed a pipe and catch basin. But neither party has

presented any testimony indicating why the pipe and catch basin were installed or whether it operated correctly during the storm. Instead, *Ivory* merely asserts its construction constituted maintenance while Austintown asserts that the pipe and catch basin was a new sewer design and construction."

In the *Ivory* case, unlike the circumstances and facts in *Coleman*, the township attempted to resolve the flooding problem with a recent design, construction and installation of a new pipe and catch drain.

Based on the facts before it, the *Ivory* appellate court stated: "The legal question is whether the installation of the pipe and catch basin constituted maintenance of a sewer, a proprietary function, or the provision, design or construction of a sewer, a governmental function." The *Ivory* court went on to hold:

> " Viewing the evidence in a light most favorable to Ivory, when Austintown covered the drainage ditch and installed the pipe and catch basin, it had provided/redesigned/constructed a new sewer, not maintained it. Because sewer design and construction is a governmental, not propriety, function, R.C. 2744.02(B)(2) does not apply and Austintown's immunity remains intact, *Ivory* at pg. 4

Thus, unlike the *Ivory* case decided by the Ohio Seventh District Court of Appeals, the *Coleman* facts before the Eleventh District Appellate Court are clearly distinguishable. In *Ivory,* the Township attempted to fix the flooding problem through construction and installation of the catch basin and new pipe. Such action by the Township to correct problem through installation of a new storm sewer system and construction is immune under Ohio Revised Code as governmental function. On the other hand, in *Coleman*, the facts are undisputed. Appellant, Portage County engineer, did nothing in the past thirty years to alleviate the flooding problem. Therefore, while the

Township in *Ivory* is immune from suit based on its redesign and installation of a faulty storm sewer, no such remedy was tried by appellant Portage County Engineer in the instant case. Thus, *Ivory* is wholly inapplicable to *Coleman*, the case at hand.

Moreover, the court's decision of the Seventh District in *Ivory* distinguished the circumstances and facts in *Ivory* from the Fourth District decision in *Essman* Court. ("The determination of whether Austintown's actions were proprietary or governmental is more difficult because the record does not contain any information concerning the construction, design, or maintenance of the sewer in question," *see Ivory v. Township of Austintown*, 2011 WL 2556283 at p. 4. (Ohio App. 7 Dist, June 15, 2011).

Next, Appellants rely on the unsupported conclusion that the Ninth District court of Appeals holding in *Bauer v. Brunswick*, 2011 WL 443205 (9/26/2011) rejects the rationale in the *Coleman* case at hand.

However, appellants fail to cite in its brief the well reasoned 9th Appellate District subsequent decision in the case of *State of Ohio, ex rel. David M. Nix, et. al. vs. Bath Township*, 2011 WL 5188079 (11/2/2011). Contrary to appellants contention that Ohio law as set forth by the Ninth District Court of Appeals "present a stark contrast to the Eleventh District's decisions...," the analysis and conclusion reached by the Ninth Appellate decision in *Nix v. Bath Township* agrees with and is consistent with the 11th DCA holding in *Coleman*.

In a well reasoned decision, the Ninth District Court of Appeals in *Nix* rejected the arguments of Bath Township that the "testimony supported the conclusion that this was an issue of negligent design, not maintenance," *Nix* at p. 9. In *Nix*, a drainage pipe

broke due to fatigue causing water discharge onto the Nix property. The *Nix* Appellate Court essentially found the following facts:

"That one of the two water collection systems drains water form the road and other properties through a pipe, which discharges water at the boundary point of the Nixes' and Ellers property. As a result of the water discharging, the property sustained erosion damage. In 1989, Bath Township added to the existing water collection system, which had been installed by the County in 1960's. Specifically, Bath Township installed additional drainage facilities, adding a catch basin, grating, extended underground drainage piping, and top soil to help repair the erosion. Bath Township did not take any further action on the properties after the 1989 installation occurred... During the 1990's, David Nix made several repairs and changes to the drainage facilities that Bath Township installed...In 2009, the Nixes...discovered that a portion of the drainage pipe that Bath Township had installed in 1989 had torn apart... As a result of the break in the pipe, water flowed from that portion of the pie rather than being carried to its intended termination point. The Nixes and the Ellers contacted Bath Township after the pipe tore and asked it to remedy the tear, but Bath Township declined to take any action to remedy the tear," *Nix* at pp. 1,.2.

The homeowners, Nixes and Ellers brought suit against Bath Township, alleging negligence, trespass, and nuisance. Bath Township sought summary judgment arguing government immunity, among other things. In an in depth analysis of the facts in a 16 page decision, the *Nix* Appellate Court determined that Bath Township was not entitled to a general grant of immunity, *see Nix,* at p.11. The *Nix* Court found that Bath Township failed to properly exercise its propriety function and that it was the fatigue of the pipe that

caused the pipe to fail and damage the property, not the design itself, *Nix* at p. 10. The Court went on to state: "It (Bath Township) did not point to any evidence demonstrating that a genuine issue of material fact existed with regard to the drainage problem being one of design, rather than maintenance. That is, Bath did not set forth a genuine dispute that the damage here was caused by the design of its drainage facilities and not its failure to maintain them over a twenty-year period. *See Zimmerman v. County of Summit, Ohio (Jan. 15, 1997), 9th Dist. No. 17610* at 2-3 (including as maintenance problems those that are redressable by way of attention to "general deterioration"), *Nix* at p. 11.

In the case at hand, similar to *Nix*, there is no evidence of record to demonstrate that appellant, Portage County Engineer, performed any upkeep or reasonable diligence in the inspection and maintenance of the storm sewer drainage system.

As stated in the *Nix* appellate court decision: " Bath Township did not point to any evidence that its failure to inspect or maintain the facilities over a twenty year period was the result of any discretionary decision. *See Sturgis* at Para 17-19, Nimishillen Twp. Trustees at para 38 (concluding that township was not entitled to either defenses under R.C. 2744.03 (A)(3) or (A)(5) because it produced no evidence of upkeep or reasonable diligence in the inspection and maintenance of the system."), Compare *Shumaker v. Park Lane Manor of Akron*, citation omitted (concluding that city had defense to liability where it exercised discretion to address more pressing matters before attending to the repair at issue.)

*Essman v. City of Portsmouth* is distinguishable from *Coleman v. Portage County Engineer*. Unlike *Coleman v. Portage County Engineer*, *Essman v. City of Portsmouth* was a fully developed case. In *Essman* various experts were engaged in the

case, discovery was conducted and extensive fact finding was undertaken and the case proceeded accordingly.

In the instant case, *Coleman v. Portage County Engineer*, however, the Plaintiffs complaint was dismissed pursuant to Ohio Civil Rule 12(B)(6) motion to dismiss for failing to state a claim upon which relief can be granted. Accordingly, Plaintiffs were never afforded an opportunity to engage in fact finding, complete discovery or utilize the services of an expert to determine the cause(s) of the flooding.

It remains unknown in *Coleman* as to whether or not the flooding was caused by a planning, design or construction issue, or whether it was caused by a failure to properly maintain, operate or provide for the proper upkeep of the storm sewer system. Hence, Appellants contention that the *Essman* decision is a correct interpretation and application of the relevant statute and the *Coleman* decision is without merit, is an inappropriate and grossly inaccurate comparison of the two cases.

The decision in *Essman* is myopic in holding that the failure to upgrade is a design, planning or construction issue, thus removing a failure to upgrade as a proprietary function. The holding in *Essman*, if applied to the facts in *Coleman*, loses sight of the fact that the system is not properly operational and does not operate as intended.

When considering the statute in its entirety, common sense would dictate that the failure to upgrade the sewer system is tantamount to failing to maintain the system.

Furthermore, The Fourth District Court of Appeals in *Essman* construed the statute very narrowly in failing to find that the failure to upgrade the sewer system is a failure to *maintain* the sewer system.

The question in *Coleman* is "did the County provide the means to make the sewer system operational?" This question remains unanswered because the case was not fully developed through fact finding to determine whether or not the failure to maintain the sewer system contributed to or indeed caused the flooding.

The correct analysis in *Essman* is contained within the dissent of Judge Kline. In his accurate dissent Judge Kline stated as follows, to wit:

"As such, I find the following definition of "maintenance" to be more appropriate: "the labor of keeping something (as buildings or equipment) in a state of repair or efficiency [.]" Webster's Third New International Dictionary, Unabridged (2002). Furthermore, "efficiency" may be defined as "suitability for a task or purpose [.] Id. Thus, in the present case, I believe "maintenance" means "the labor of keeping the sewer system suitable to (1) to perform the tasks of a sewer system and/or (2) to fulfill the purpose of a sewer system." Based on these definitions, I believe that the appellees' claim implicates a proprietary function not a government function. Because the city has allowed further development without upgrading the sewer system, the appellees' essentially claim that the city *has failed to keep the sewer system suitable.*"

The correct analysis in *Essman* is contained within the dissent. If the system is not suitable and operational for its intended purpose, then the system has not been properly maintained. The majority in *Essman* rejects the holdings in *Hafner* and *Moore*. Such rejection by the majority opinion is misguided.

Furthermore, the record in *Coleman* is completely devoid of any meaningful facts upon which this court can make a determination as to why the system episodically floods during heavy rains. *Essman* was a fully developed case involving expert testimony, discovery and substantial fact finding. This provided a full and complete record upon which a reviewing court could make a full analysis. *Coleman* is completely distinguishable from *Essman* in this regard as the record contains absolutely no fact finding whatsoever.

## CONCLUSION

The decision of the Eleventh District Court of Appeals should be upheld or alternatively the case should be remanded to the trial court. This would provide the opportunity for the case to become more fully developed, discovery conducted, experts retained in order to fully determine the cause(s) of the flooding. Only in this fashion can it be determined as to whether or not the cause(s) are attributable to design, planning or construction, or maintenance issues.

Respectfully Submitted

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## CERTIFICATE OF SERVICE

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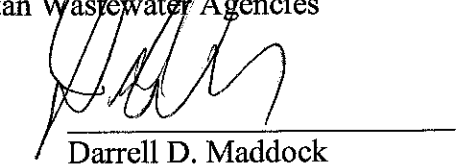

Darrell D. Maddock

## APPENDIX

### Attached to Appellants Merit Brief

Notice of Appeal to the Ohio Supreme Court (February 3, 2011)

Eleventh District Court of Appeals Opinion (December 20, 2010)

Final Judgment Entry of February 19, 2010

O.RC. 2744.01

O.R.C. 2744.02

### Attached hereto Appellees Merit Brief

O.R.C. 2744.03.....Apx. 1-2

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(6 screens)

R.C. § 2744.03

Baldwin's Ohio Revised Code Annotated Currentness
Title XXVII. Courts--General Provisions--Special Remedies
Chapter 2744. Political Subdivision Tort Liability (Refs & Annos)
**2744.03 Defenses and immunities**

(A) In a civil action brought against a political subdivision or an employee of 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, the following defenses or immunities may be asserted to establish nonliability:

(1) The political subdivision is immune from liability if the employee involved was engaged in the performance of a judicial, quasi-judicial, prosecutorial, legislative, or quasi-legislative function.

(2) The political subdivision is immune from liability if the conduct of the employee involved, other than negligent conduct, that gave rise to the claim of liability was required by law or authorized by law, or if the conduct of the employee involved that gave rise to the claim of liability was necessary or essential to the exercise of powers of the political subdivision or employee.

(3) The political subdivision is immune from liability if the action or failure to act by the employee involved that gave rise to the claim of liability was within the discretion of the employee with respect to policy-making, planning, or enforcement powers by virtue of the duties and responsibilities of the office or position of the employee.

(4) The political subdivision is immune from liability if the action or failure to act by the political subdivision or employee involved that gave rise to the claim of liability resulted in injury or death to a person who had been convicted of or pleaded guilty to a criminal offense and who, at the time of the injury or death, was serving any portion of the person's sentence by performing community service work for or in the political subdivision whether pursuant to section 2951.02 of the Revised Code or otherwise, or resulted in injury or death to a child who was found to be a delinquent child and who, at the time of the injury or death, was performing community service or community work for or in a political subdivision in accordance with the order of a juvenile court entered pursuant to section 2152.19 or 2152.20 of the Revised Code, and if, at the time of the person's or child's injury or death, the person or child was covered for purposes of Chapter 4123. of the Revised Code in connection with the community service or community work for or in the political subdivision.

(5) The political subdivision is immune from liability if the injury, death, or loss to person or property resulted from the exercise of judgment or discretion in determining whether to acquire, or how to use, equipment, supplies, materials, personnel, facilities, and other resources unless the judgment or discretion was exercised with malicious purpose, in bad faith, or in a wanton or reckless manner.

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

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

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

(c) Civil liability is expressly imposed upon the employee by a section of the Revised Code. Civil

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

(7) The political subdivision, and an employee who is a county prosecuting attorney, city director of law, village solicitor, or similar chief legal officer of a political subdivision, an assistant of any such person, or a judge of a court of this state is entitled to any defense or immunity available at common law or established by the Revised Code.

(B) Any immunity or defense conferred upon, or referred to in connection with, an employee by division (A)(6) or (7) of this section does not affect or limit any liability of a political subdivision for an act or omission of the employee as provided in section 2744.02 of the Revised Code.

CREDIT(S)

(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; 2000 S 179, § 3, eff. 1-1-02; 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; 1986 S 297, eff. 4-30-86; 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.

UNCODIFIED LAW

2002 S 106, § 3: See Uncodified Law under 2744.01.

2001 S 108, § 1 and 3: See Uncodified Law under 2744.01.

1986 S 297, § 3: See Uncodified Law under 2744.02.

HISTORICAL AND STATUTORY NOTES

**Ed. Note:** 1996 H 350, eff. 1-27-97. See Notes of Decisions, *State ex rel. Ohio Academy of Trial Lawyers v. Sheward* (Ohio 1999), 86 Ohio St.3d 451, 715 N.E.2d 1062.

**Amendment Note:** 2002 S 106 substituted "Civil liability" for "liability" and added the second sentence to division (A)(6)(c); and made other nonsubstantive changes.

**Amendment Note:** 2000 S 179, § 3, eff. 1-1-02, substituted "2152.19 or 2152.20" for "2151.355" in division (A)(4).

**Amendment Note:** 1997 H 215 added the reference to section 3314.07 in division (A)(6).

**Amendment Note:** 1996 H 350 added the second sentence in division (A)(6)(c); and made changes to reflect gender neutral language.

**Amendment Note:** 1994 S 221 inserted "or section 3746.24 of the Revised Code" in division (A)(6).

CROSS REFERENCES