

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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## I. REBUTTAL TO PLAINTIFFS' INTRODUCTION

Plaintiffs' choice of emphasis is revealing. Rather than apply the plain language of the definitions of proprietary and governmental functions, Plaintiffs devote their time to irrelevant precedent and to avoiding a purely legal issue.

Plaintiffs' effort to characterize this case as one in need of facts is belied by the Eleventh District's legal holding. (Appellees' Br. at 1.) The Eleventh District expressly held 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.' '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). ...'[citations omitted]'" (Opinion at ¶ 44, Apx. 14.)

The issue expressly contained in that holding is precise and unequivocally legal: Whether "the upgrade of sewer system capacity is an immune governmental function under R.C. 2744.01(C)(2)(I)." (*See* Proposition of Law Accepted for Review.) Tellingly, Plaintiffs do not state what facts that are missing that would impair this Court's determination. Plaintiffs' facts, whatever they claim them to be, are irrelevant to the legal question facing this Court. What *is* relevant is the Eleventh District's legal holding that the failure to upgrade a sewer for lack of capacity *is* maintenance. The Eleventh District's erroneous holding is now the law of the case for these litigants<sup>1</sup> and the prevailing law in that District.

The Eleventh District's decision is inconsistent with the Legislature's statutory language, prevailing precedent, and the policies behind the Act. This Court must reverse.

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<sup>1</sup> *See Nolan v. Nolan*, 11 Ohio St.3d 1, 3, 462 N.E.2d 410 (1984) (The law-of-the-case doctrine holds that "the decision of a reviewing court in a case remains the law of that case on the legal questions involved for all subsequent proceedings in the case at both the trial and reviewing levels.")

## II. REBUTTAL TO PLAINTIFFS' 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).**

### A. Upgrading the capacity of a sewer is not maintenance.

This case has nothing to do with maintenance (e.g., fixing a deteriorating sewer, removing clogs, etc.) and it never has. This case is about whether the failure to increase the capacity of an allegedly inadequate sewer is maintenance or construction/reconstruction.

Plaintiffs erroneously state that sewer maintenance broadly imposes an absolute duty to "insure that the system is usable and does not cause damage to the users of the system."<sup>2</sup> (Appellees' Br. at 7.) This position, which would eviscerate the legislative distinctions between proprietary and governmental functions, has no basis in law. The Legislature has created a stark distinction between non-immune maintenance-related issues and immune design/construction/reconstruction issues. Plaintiffs' leap from design/construction (non-liability) to maintenance (liability) is not supported. The statute contemplates that certain claims or

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<sup>2</sup> To the extent, if at all, Plaintiffs suggest that alleging a bare legal conclusion avoids immunity, they are wrong. Simply alleging that the County failed to "maintain" because a sewer lacks capacity does not change the law or convert an immune governmental function into a non-immune proprietary function. Although Ohio only requires notice pleading, meaning that the complaint "... shall contain ... a short and plain statement of the claim showing that the party is entitled to relief[.]" the complaint "must be more than 'bare assertions of legal conclusions.'" *Copeland v. Summit Cty. Probate Court*, 9th Dist. No. 24648, 2009-Ohio-4860, 2009 WL 2952805, at ¶ 10. There is no question that legal conclusions do not avoid dismissal. *Mitchell v. Lawson Milk Co.*, 40 Ohio St.3d 190, 532 N.E.2d 753 (1988); see also *Ashcroft v. Iqbal*, 556 U.S. 662, 129 S.Ct. 1937, 1949 173 L.Ed.2d 868 (2009) ("While legal conclusions can provide the framework of a complaint, they must be supported by factual allegations" to survive a motion to dismiss.).

potential claims of damages to users are not actionable. Those caused by design, construction, or reconstruction are immune. To increase capacity requires a sewer be designed for increased capacity and constructed to carry that flow. These are immune issues as are the failures caused by existing design and construction.

Plaintiffs argue that *Doud v. City of Cincinnati* supports their position that the failure to upgrade the capacity of a sewer is "maintenance." *Doud v. City of Cincinnati*, 152 Ohio St. 132, 87 N.E.2d 243 (1949). (Appellees' Br. at 5.) This is wrong. *Doud* merely stands for the proposition that under pre-Tort Liability Act law, that a failure to maintain a deteriorating sewer may subject a public entity to liability. In *Doud*, unlike the present case, the sewer did not lack capacity, but was deteriorating. The plaintiffs in *Doud* asserted "that the damage to plaintiff's house was due to the gradual deterioration of the sewer in question" *Doud* at 138. *Doud* does not address the issue in this case.

Plaintiffs also argue that the *Hafner* decision was persuasive support for the Eleventh District's decision. (Appellees' Br. at 5-6.) As discussed in the County's Merits Brief, the Eleventh District provided no analysis of how or why the *Hafner* decision applied 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 merely adopted *Hafner's* incorrect conclusion. The *Hafner* decision is not persuasive because 1) the *Hafner* court eschews analysis under the Tort Liability Act in favor of pre-Tort Liability Act case law; 2) the 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; and 3) *Hafner* does not meaningfully interpret the Legislature's language that is at the heart of this case. *See generally Hafner*; *see also* the County's Merits Brief at 10-12. Fundamentally, the *Hafner* court makes a policy decision

reserved to the Legislature: When an adequate design becomes inadequate and when that ongoing inadequacy triggers a maintenance duty or is a matter of sewer redesign and reconstruction. *Hafner* and the Eleventh District disagree with the Act and therefore construed an exception that does not exist.

Plaintiffs string cite various cases for the proposition that "maintenance and upkeep" are non-immune functions. (Appellees' Br. at 6.) There is no dispute the Legislature has provided that a *proprietary* function is: "(d) The maintenance ... and upkeep of a sewer system." R.C. 2744.01(G)(1)(d). But, again, this does not address the issue in this case: whether the upgrade of capacity for a sewer constitutes maintenance or upkeep. Courts that have rigorously analyzed the statutory language have concluded that "upgrade" is not maintenance. *Essman v. Portsmouth*, 4th Dist. No. 09CA3325, 2010-Ohio-4837, 2010 WL 3852247, ¶ 39; *Bauer v. Brunswick*, 9th Dist. No. 11CA0003-M, 2011-Ohio-4877, 2011 WL 4435205, ¶ 9; *Ivory v. Austintown*, 7th Dist. No. 10 MA 106, 2011-Ohio-3171, 2011 WL 2556283, ¶¶ 2, 19; *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).

**B. Flooding damages do not automatically mean absolute liability when a political subdivision provides a sewer.**

Plaintiffs inexplicably conclude that once a political subdivision constructs a system and flooding occurs, then a political subdivision is per se engaged in a proprietary function because the system is not, in the Plaintiffs' words, "usable." (Appellees' Br. at 7.) The Tort Liability Act provides no support for this premise. Presumably to explain this argument, Plaintiffs cryptically state that the "evolution of law concerning construction, operation, maintenance and repair of a sewer system" leads to the conclusion that a political subdivision "should be liable to all property

owners who are injured by the negligence of the political subdivision." (Appellees' Br. at 9.) This argument is inconsistent with the Tort Liability Act.

**1. Plaintiffs failed to interpret the Tort Liability Act, the critical source of law in this case.**

"Upgrade" of a sewer that lacks capacity is a governmental function. The Legislature's use of the terms "construction, or reconstruction of ... a sewer system" demonstrates 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. 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)(1), "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 want to create a new design and construct a new (better) sewer in place of an old sewer, not merely 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, including changing weather patterns. This is an immune design or construction issue.

Plaintiffs argue that the Eleventh District correctly held that the failure to upgrade a sewer that lacks capacity is non-immune maintenance under R.C. 2744.02(B)(2). But, like the Eleventh District, Plaintiffs fail to apply the text of the Tort Liability Act. (*See* Appellees' Br. at 9-10.)

Rather than provide a rigorous or even appropriate interpretation of the statutory language, Plaintiffs merely argue that the dictionary is not the law. (Appellees' Br. at 9-10.) Of course, that is true. But to determine the Legislature's intent, the careful review of the terms of the statute is necessary. In the present case, the plain, ordinary language of the Act is clear. Upgrade of a sewer for lack of capacity is the same as construction or reconstruction, which is an immune governmental function under the express terms of the Act. The ordinary meaning of statutory terms is guided by the dictionary. *Howard v. Miami Twp. Fire Div.*, 119 Ohio St.3d 1, 891 N.E.2d 311 (2008). The Legislature did not intend for the upgrading of a sewer for lack of capacity to be considered the non-immune function of "maintenance."

Plaintiffs quote Judge Learned Hand who cautioned against the rigid interpretation of statutory language that would "frustrate [] the patent purpose" of the statute itself. (Appellees' Br. at 10, *citing Cabell v. Markham*, 148 F.2d 737, 739 (2nd Cir. 1945).) First, interpreting upgrading the capacity of a sewer as the immune function of reconstruction/design is hardly rigid. This interpretation is in accord with the Legislature's express language and common sense. Second, the purpose of Ohio's Political Subdivision Tort Liability Act is to limit liability, not expand the liabilities and the duties of political subdivisions.

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; emphasis added.]**

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

Plaintiffs do not carefully review the text of the Act or appreciate the intent of the Act.

**C. Despite Plaintiffs' argument, most courts reject *Coleman*.**

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 that allegedly has inadequate capacity is a governmental function.

- 1. The Fourth District expressly held that it is "improper" to interpret R.C. 2744.01(G)(2)(d) so as to equate "upgrade" with "maintenance, operation, or upkeep."**

Yet, Plaintiffs argue that the Fourth District's decision in *Essman v. Portsmouth* should be disregarded because it is factually distinguishable. *Essman v. Portsmouth*, 4th Dist. No. 09CA3325, 2010-Ohio-4837, 2010 WL 3852247. But, as a matter of law, the Fourth District rejected the Eleventh District's *legal* holding.

The Fourth District in *Essman* specifically held that "the city is entitled to immunity regarding appellees' claim that the city negligently failed to maintain, operate, or upkeep the sewer by failing to upgrade the system." *Id* at ¶46. If there could be any dispute on its position, the Fourth District held that "In particular, we believe that *Hafner* [which *Coleman* relied] improperly interpreted R.C. 2744.01(G)(2)(d) so as to equate "upgrade" with "maintenance, operation, or upkeep." *Id.* at 39.

- 2. The Ninth District expressly held that "the determination whether to upgrade the existing storm sewer system involved the exercise of a governmental function."**

Nevertheless, Plaintiffs argue that the County relies on "unsupported conclusions" about the Ninth District's *Bauer v. Brunswick* case. (Appellee's Br. at 15.) This is wrong.

The Ninth District, after explaining the districts that reject *Coleman*, expressly held that "we agree that the determination whether to upgrade the existing storm sewer system involved the exercise of a governmental function." *Bauer* at ¶ 10. The Ninth District, mentioning the Eleventh District by name, deliberately rejected the Eleventh District's approach seeing "no reason to depart from our precedent" that "when a sewer system's design and construction later proves inadequate, the decision whether to upgrade or redesign the system involves ... the exercise of a governmental function. R.C. 2744.01(C)(2)(1)." *Id.* at ¶9.

Plaintiffs argue that a mere 37 days after the Ninth District's unanimous decision in *Bauer*, that the court decided to reverse itself on the critical point in *State ex rel. Nix v. Bath Twp.*, 9th Dist. No. 25633, 2011 WL 5188079, 2011-Ohio-5636. There is no support for this. The *State ex rel Nix* case re-affirmed that issues of maintenance (removal of obstructions and general deterioration) are not immune, but expressly acknowledged that design issues (redesigning and reconstructing sewers to meet current demands) are immune. *Id.* at ¶ 14. *State ex rel. Nix* did not reverse established Ninth District's precedent.

3. **The Seventh District expressly held when a "flooding problem can only be remedied by the ... redesign of the pipe and catch basin," this is an immune sewer design/construction issue, not a maintenance issue.**

Yet, Plaintiffs claim that the Seventh District did not reject the Eleventh District's holding. The Seventh District in *Ivory* asserted as a legal matter that a political subdivision engages in an immune governmental function when it installs a sewer, even if it provides inadequate drainage after a heavy rain. *Ivory v. Austintown*, 7th Dist. No. 10 MA 106, 2011-Ohio-3171, 2011 WL 2556283, ¶¶ 2, 19; *see also Bauer v. Brunswick*, 9th Dist. No. 11CA0003-M, 2011-Ohio-4877, 2011 WL 4435205, ¶ 6-7 (observing that the Seventh District in *Ivory* has

"reached the same conclusion [as the Ninth District]" that "the decision to upgrade an existing sewer system involves the exercise of a governmental function.").

In *Ivory*, a plaintiff claimed that Austintown replaced a drainage ditch with a pipe and catch basin two weeks before a storm that allegedly flooded his home. *Ivory* at ¶ 4. The plaintiff sued Austintown for negligent maintenance of a sewer for installing a pipe and catch basin that was inadequate to drain water after a heavy rain. *Id.* at ¶ 19. Similar to the case here, Plaintiffs sued the County for "negligent maintenance" of a sewer allegedly resulting in flooding because "the piping system is unable to accommodate all the drainage water" (Comp. at ¶2) and the County "failed to construct a drainage plan or water drainage system to properly discharge the water." (Comp. at ¶8.)

Affirming the trial court, the Seventh District held the city was immune, noting "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." *Ivory* at ¶ 19. The Seventh District in *Ivory* asserted as a legal matter that a political subdivision engages in an immune governmental function when it installs a sewer, even if it is allegedly inadequate to properly drain after a heavy rain. *Ivory v. Austintown*, 7th Dist. No. 10 MA 106, 2011-Ohio-3171, 2011 WL 2556283, ¶¶ 2, 19. This holding is in direct conflict with the Eleventh District's holding in the present case. (Opinion at ¶ 44, Apx. 14.)

Plaintiffs argue that "if the system is not suitable and operational for its intended purpose, then the system has not been properly maintained." (Appellees' Br. at 19.) First, Plaintiffs seem to think if flooding occurs that causes damage, then a sewer is not being "operated" correctly. But, operation refers to the manner and method of how a political subdivision uses a sewer, for

instance, opening and closing weir gates<sup>3</sup> (*See e.g., Essman, supra*, at ¶ 48); it has nothing to do with maintenance. Second, if this is what constitutes non-immune maintenance under R.C. 2744.01(G)(1)(d), then such interpretation would swallow the rule of non-liability for the governmental function of "the provision or nonprovision, planning or design, construction, or reconstruction of a public improvement, including, but not limited to, a sewer system" under R.C. 2744.01(C)(2)(1). For instance, a new sewer could be designed incorrectly and cause occasional flooding. Under Plaintiffs' interpretation, this would be a failure of maintenance, despite having nothing to do with maintenance and everything to do with design. Similarly, a perfectly maintained older sewer could function well under almost all conditions but flooding occurs after a catastrophic storm. Despite a perfect record of cleaning and maintenance (repair of cracks, cleaning, etc.), this too would be non-immune maintenance.

The Legislature has distinguished between non-immune maintenance/operation/upkeep and immune design/construction. The Plaintiffs have little regard for the Legislature's stark distinction between non-immune sewer maintenance and immune sewer reconstruction/design. The repercussions of this misconstruction are radical and expose political subdivisions and, ultimately, the taxpayers to extraordinary liability. It is impossible to believe that the Legislature intended for sewer maintenance to impose an absolute duty to "insure that the system is usable and does not cause damage to the users of the system" regardless of cause, as Plaintiffs suggest. In accord with the purpose of the Act to limit the liability of political subdivisions, the Legislature carefully balanced the immunities and liabilities by distinguishing between non-immune functions of maintenance, and immune functions of reconstruction/design. Upgrade of a

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<sup>3</sup> A weir gate is a gate that can be raised or lowered to control the amount of water that flows into a sewer system. *See Essman* at ¶ 1.

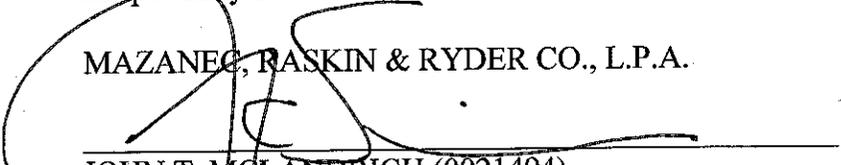
sewer that allegedly lacks capacity is merely another way of saying that the County failed to design and construct a new sewer, an immune governmental function.

### III. 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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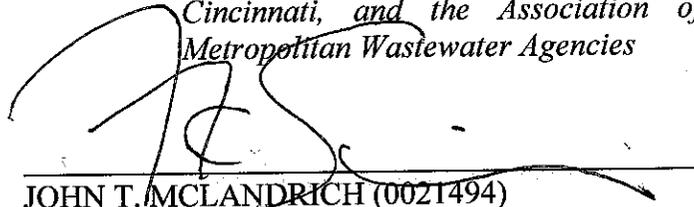
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