



What the Courts Are Saying: A Review of Recent Construction Court Cases

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Ohio Supreme Court Affirms Governmental Immunity in Flooding Case

By: **Douglas L. Shevelow, P.E.**

Immunity is a powerful legal concept. A party that is immune from liability may be the unquestioned cause of devastating damages to another party, but is excused by law from having to pay anything to the injured party. The frustration can be doubled when the government is the cause of the damages. But some time ago, the Ohio General Assembly codified into Chapter 2744 of the Ohio Revised Code what had previously been the common law of "sovereign immunity," creating a complex law that gives a broad grant of immunity to state and local governments for negligence actions, creates exceptions for the grant of immunity, and even includes exceptions



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to the exceptions, reinstating immunity. Understandably, the legal doctrine is now called "statutory immunity."

The first step in an Ohio statutory immunity analysis is to determine whether the allegedly negligent act was performed in connection with a "governmental" or "proprietary" function. Generally speaking, state and local governments have immunity for governmental functions but not proprietary functions. Chapter 2744 defines and gives examples of governmental and proprietary functions.

One area that is frequently litigated is when a private property owner suffers damages from flooding — be it from an overflowing natural waterway or sewage backing up into a basement. Chapter 2744 and much case law makes it clear that the government is immune from damages caused by insufficient "design, construction, or reconstruction" of storm sewers, sanitary sewers, ditches and the like. The exception for immunity occurs when the government fails to adequately operate and maintain its sewers and ditches.

So the key to successfully prosecuting a negligence case against the government for flood damages is to convince the court that the cause of the flooding is not the original design, but failure to adequately operate and maintain the improvement.

In a recent Supreme Court case, a married couple tried to preserve their claim for flooding damages against their county government by relying on a 1997 Ohio Court of Appeals case that defined "operate and maintain" very broadly. But the Court rejected the plaintiffs' argument and impliedly overruled the 1997 case.

In [Coleman v. Portage County Engineer](#), 2012-Ohio-3881, the plaintiffs suffered repeated flooding of their property between 1982 and 2009, allegedly caused by runoff from road ditches along State Route 44 that could not be conveyed away quickly enough by downstream storm sewers. The plaintiffs alleged that the county engineer was negligent in designing, constructing and maintaining the storm sewer system. The trial court dismissed the complaint at the request of the engineer.

The Court of Appeals for the 11th District upheld most of the dismissal — the parts relating to negligent design and construction — holding that those were clearly governmental functions. But the court of appeals reversed the trial court, relying on a 1997 case from the Court of Appeals for the 1st District, *H. Hafner & Sons, Inc. v. Cincinnati Metropolitan Sewer District*, 118 Ohio App.3d 792, which equated "failure to upgrade" a sewer to failure to maintain or upkeep a sewer. The county engineer then appealed to the Supreme Court of Ohio.

The Supreme Court did not agree with either the plaintiffs or the court of appeals in *Hafner*, holding that the word "upgrade" does not appear in Chapter 2744 and that the "[c]ourts must abstain from inserting words into a statute that were not placed there by the General Assembly." The court reversed the court of appeals, agreeing with the analysis of similar cases from the Fourth and Ninth District Courts of

Appeals and the trial court.

The court was clearly sympathetic to the plaintiffs, stating that “we recognize that property owners have little control over the quality of storm and sewer systems to which their homes are attached,” and characterized their complaint as “creative.” But at the end of the day, the court still held that under Ohio Revised Code Chapter 2744, the government is immune from damages from its failure to upgrade a sewer system.

Contract Enforced Without Signature of All Parties

By: **Laura J. Bowman**

Generally, to be valid and enforceable, a contract must be signed by all parties. But recently, the Eighth Appellate District Court enforced the arbitration provision of a contract that was signed by only one party, demonstrating that a valid contract may form even if all parties have not signed the document.

In [Jatsek Constr. Co. v. Burton Scot Contrs., LLC](#), 2012 Ohio App. LEXIS 3489, a subcontractor on a public improvement project claimed that it had performed work pursuant to a subcontract agreement with the general contractor but had not been paid for the work. The general contractor admitted that the subcontractor had performed work and had not been paid, but argued that the subcontract agreement required arbitration of the dispute instead of a lawsuit in court. The subcontract agreement had handwritten changes made by the subcontractor, but none were made to the arbitration provision. The subcontract agreement had been signed and dated by the subcontractor but not by the general contractor. The trial court held that no contract existed and the defendant general contractor appealed.

On appeal, the subcontractor argued that no contract was formed since the general contractor did not sign the subcontract agreement and, therefore, arbitration was not required. The subcontractor also argued that even if a contract had formed, it was against public policy to enforce the arbitration provision because the lawsuit had already begun.

The appeals court, citing earlier case law, held that where all parties do not sign a proposed contract but one party still performs the work, an implied contract forms under the terms of that proposal. In addition, both parties are considered to have

agreed to the contract. Because both parties agreed that the subcontractor had performed the work, the court held that a contract existed between the subcontractor and the general contractor. Because the general contractor had raised the issue of the arbitration agreement early on in the lawsuit, the court stated that enforcing the arbitration provision was not against public policy, even though the lawsuit had already begun. The court also noted that resolving disputes using arbitration is generally favored by the law. Thus, the court held that the parties must arbitrate the dispute under the terms of the contract.