

IN THE SUPREME COURT OF OHIO

JOHN MARICH, et al.

Appellees

vs.

BOB BENNETT CONSTRUCTION CO.,
et al.

Appellants

CASE NO. 2006-1827

On Appeal from the
Summit County Court of Appeals,
Ninth Appellate District,
Case No. CA 23026

APPELLEES' MERIT BRIEF

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III. STATEMENT OF FACTS

On November 8, 2002, Appellant John Goss, an employee of Appellant Bob Bennett Construction Company, was operating a tractor-trailer unit upon which was loaded a bulldozer. The tractor-trailer was 8 ½ feet wide, and the bulldozer it was carrying was 10 feet, four inches wide. Bob Bennett Construction Company obtained a Special Hauling Permit from the Ohio Department of Transportation allowing the transport of the oversized bulldozer on the state highway system.

However, Goss left the state highway system and drove the oversized vehicle on Clark Mill Road in the City of Norton. Clark Mill Road has one lane in each direction, and is a curving, rural road with a 35 mile per hour speed limit. Goss stopped the tractor-trailer in the roadway, occupying the entire southbound lane. Goss did not put out any triangles, cones, fuses, or other warning devices behind or in front of his vehicle to warn approaching motorists. Bob Bennett Construction Company did not send a flagman crew to the scene. There were no orange or red flags marking the oversized load.

Goss then disconnected the tractor from the trailer, leaving the trailer in the roadway. This had the effect of disconnecting the power source for the trailer's lights. Goss then pulled the tractor up further in the roadway and parked it. He then returned to the trailer and climbed aboard to disconnect the chains and release the bulldozer.

While Goss was disconnecting and unloading the bulldozer, John Marich was approaching from the north. He rounded a gentle bend in the road and found serious sunglare affecting his view. Marich reached up and flipped down his visor, and immediately struck the back of the parked trailer. The collision caused serious injuries

to John Marich, including a large laceration on his forehead, multiple left-side rib fractures, right acetabular posterior wall fracture with hip dislocation.

John Marich, and his wife Nada, filed a negligence suit against Goss and Bob Bennett Construction Company on May 13, 2004. On April 14, 2005, the Marichs filed a Partial Motion for Summary Judgment, seeking a determination that Goss and Bob Bennett Construction Company were negligent as a matter of law for operating an oversized vehicle upon the public roads without an appropriate permit.

The bulldozer which Goss was hauling was 10 feet, 4 inches (124 Inches) wide. R.C. §5577.05 prohibits carrying a load with a width greater than 102 inches on the public roads. This prohibition is not limited to state routes or highways, but extends to all streets and roads in the State of Ohio, to wit:

5577.05 Maximum width, height, and length

(A) No vehicle shall be operated upon the public highways, streets, bridges, and culverts within the state, whose dimensions exceed those specified in this section.

(B) No such vehicle shall have a width in excess of:

* * *

(5) One hundred two inches, **including load**, for all other vehicles, except that the director may prohibit the operation of one hundred two-inch vehicles on such state highways or portions thereof as the director designates. (Emphasis added).

There is no dispute that the bulldozer which Goss was hauling was larger than permitted under R.C. §5577.05. However, Appellants defended the case by citing to R.C. §4513.34, which grants authority to the Ohio Department of Transportation to issue permits for state routes and highways under State jurisdiction, and to local authorities for the highways under municipal control. R.C. §4513.34 states in pertinent part that:

(A) The director of transportation with respect to all highways that are a part of the state highway system and local authorities with respect to highways under their jurisdiction, upon application in writing and for good cause shown, may issue a special permit in writing authorizing the applicant to operate or move a vehicle or combination of vehicles of a size or weight of vehicle or load exceeding the maximum specified in sections 5577.01 to 5577.09 of the Revised Code, or otherwise not in conformity with sections 4513.01 to 4513.37 of the Revised Code, upon any highway under the jurisdiction of the authority granting the permit.

* * *

(E) Every permit shall be carried in the vehicle or combination of vehicles to which it refers and shall be open to inspection by any police officer or authorized agent of any authority granting the permit. No person shall violate any of the terms of a permit.

Appellants further cited to Norton Ordinance 440.01 section (b), which states in pertinent part:

(b) Local Streets.

(1) No person shall operate a vehicle exceeding a size as specified in Section 440.02, or exceeding a gross weight of five tons, upon any street or highway in the Municipality other than the following streets and highways:

* * *

Clark Mill Road

* * *

Norton's police chief, Gregory Carris, testified that he does not issue oversized load permits for Clark Mill Road because he believes that the Norton ordinance acts as a blanket permitting exemption for that road.

In response to the Marich's Motion for Summary Judgment, the trial court, on July 28, 2005, appropriately held that Goss and Bob Bennett Construction Company were negligent as a matter of law for violating R.C. §5577.05, and reserved the issue of causation and damages for the jury. (July 28, 2005 Opinion, p.8, Appellants' Appendix at p.40).

After Appellants sought reconsideration, the trial court incorrectly reversed itself and held that Goss and Bob Bennett Construction Company were not negligent for operating an oversized vehicle on the public roads. (October 31, 2005 Opinion, Appellants' Appendix at 18). On November 16, 2005, the Marichs filed Objections to the trial court's October 31, 2005 Opinion, pointing out the clear error of law contained therein. Notwithstanding the Marichs' objection, the matter proceeded to jury trial on other negligence theories the week of November 28, 2005. On December 1, 2005, the jury returned a verdict in favor of Goss and Bob Bennett Construction Company, finding no negligence. The Court journalized this verdict on December 1, 2005. (December 1, 2005 Judgment Entry, Appellants' Appendix at p.17).

The Marichs timely appealed from the Judgment Entry on December 21, 2005. By way of its decision dated August 16, 2006 (Appellants' Appendix at p.3), the Ninth District reversed and remanded the case so that summary judgment on the issue of negligence could be entered on behalf of the Marichs. Certification for discretionary appeal was granted by this Court on January 24, 2007.

IV. LAW AND ARGUMENT

Appellants' Proposition of Law I:

A municipality, pursuant to its constitutional right to self-government under Section 3, Article XVIII of the Ohio Constitution, and pursuant to its statutory right under Revised Code §§ 715.22, 723.01, 737.022, and 4511.07 to regulate and control streets under its jurisdiction, may by ordinance properly exempt certain roads within the municipality from the maximum width, height, and length provisions as set forth in Revised Code §5577.05, Revised Code §4513.34 and the City of Norton Ordinance Section 440.02

A. Appellants' Proposition of Law I is inappropriate.

As a threshold matter, Rule VI, Section 2(B)(4) of the Rules of Practice of the Supreme Court of Ohio compel an appellant to formulate a proposition of law which could be adopted as syllabus law if the appellant wins the appeal. Drake v. Bucher (1966), 5 Ohio St. 2d 37. Appellants' proposition of law makes specific reference to local ordinances of the City of Norton, and thus could not serve as syllabus law, to be applied to the entire state.

Further, Proposition of Law I does not advance any interest in clarifying or defining the law for the state. In 2002, this Honorable Court decided Canton v. State, 95 Ohio St.3d 149, 2002-Ohio-2005, which now serves as the touchstone decision in Home Rule analysis. Canton v. State has been recently comprehensively clarified and applied in Am. Financial Servs. Assn. v. Cleveland, 112 Ohio St.3d 170, 2006-Ohio-6043 and Cincinnati v. Baskin, 112 Ohio St.3d 279, 2006-Ohio-6422. This case does not present with the Court with an opportunity to further refine these standards. Therefore, Appellants' Proposition of Law I should not be adopted, and this Court should consider dismissing this action as improvidently allowed.

B. The power of a Municipality to regulate streets within its boundaries flows exclusively from the Ohio Constitution.

Within Proposition of Law I, and throughout Appellants' argument in support of the proposition, Appellants inappropriately claim that the City of Norton had statutory authority under Revised Code §§715.22, 723.01, 737.022, and 4511.07, for passing Norton Ordinance 440.01(b). (See Appellants' Brief at p. 4, 9-14). This argument is unsupported, and serves to confuse the entire argument presented by Appellants.

In Geauga Cty. Bd. of Commrs. v. Munn Rd. Sand & Gravel (1993), 67 Ohio St.3d 579, this Court clarified prior dicta and held that a municipality's authority to regulate traffic is derived from Section 3 of Article XVIII of the Ohio Constitution, not from any legislative grant of authority. Id. at 584. The Geauga Cty. Court specifically considered R.C. §4511.07, and held that while the statute "could be viewed as very much like a grant of authority to the municipality, the municipality does not need the grant of authority because it already possesses it pursuant to its home rule powers." Id. The Court referenced Justice Taft's concurring opinion in Shapiro v. Butts (1951), 155 Ohio St. 407, 418-419, and came to the conclusion that R.C. §4511.07 was included in the Revised Code merely as a recognition of municipalities' home rule powers, as opposed to consisting of an independent grant of authority. Id.

The same reasoning applies to Revised Code §§ 715.22, 723.01, and 737.022, which each purport to commit control of city streets to municipalities. Each of these statutes is surplusage, given the pre-existing constitutional power of municipalities. This Court recognized that principle in Linndale v. State (1999), 85 Ohio St.3d 52, where the Court held that municipalities "derive no authority from, and are subject to no limitations

of, the General Assembly, except that such ordinances shall not be in conflict with general laws.” *Id.* at 54, quoting Struthers v. Sokol (1923), 108 Ohio St. 263, syl.

It is therefore inappropriate for Appellants to claim that the City of Norton was enabled to pass its Ordinance 440.01(b) due to action of the Ohio General Assembly. On pages 9-10 of their Brief, Appellants rely on cases from the 1960s and 1970s interpreting Revised Code §§ 715.22, 723.01, and 737.022. E.g. Union Sand & Supply Corp. v. Village of Fairport (1961), 172 Ohio St. 387; Cincinnati Motor Transport v. Lincoln Heights (1971), 25 Ohio St.2d 203; Niles v. Dean (1971), 25 Ohio St.2d 284. Reliance upon these cases is misplaced, because these cases were decided before this Court clarified prior dicta in Geauga Cty., supra. There is simply no support, under existing law, for the contention that the City of Norton has the power to pass an ordinance under statutory authority which it would have no power to pass under its existing home rule authority. See Am. Financial Servs. Assn., supra, at ¶31 (“we reaffirm that the conflict analysis as mandated by the Constitution should be used in resolving home-rule cases”).

Accordingly, the sole question before the Court is whether, under the Home Rule provisions of the Ohio Constitution, the City of Norton had the power to enact Ordinance 440.01(b).

C. In Appellants’ analysis, Appellants employ an improper standard for determining whether a local ordinance supersedes a state statute.

Appellants do attempt a home rule analysis on page 5 of their Brief, but set forth a formulation of the three-part home rule test which is outdated. The test set forth in Auxter v. Toledo (1962), 173 Ohio St. 444, and Ohio Association of Private Detective Agencies v. City of North Olmsted (1992), 65 Ohio St.3d 242, as related by Appellants,

was specifically considered and re-stated by this Court in Canton v. State, *supra*. At paragraph 9 of the opinion, the Canton v. State Court cited to Auxter and Ohio Assn., and stated that a “state statute takes precedence over a local ordinance when (1) the ordinance is in conflict with the statute, (2) the ordinance is an exercise of the police power, rather than of local self-government, and (3) the statute is a general law.”

D. Under the appropriate formulation of the Home Rule Test, it is clear that City of Norton did not have the power to enact Ordinance 440.01(b).

1. “The ordinance is in conflict with the statute.”

The first item in the Canton v. State test is whether or not the ordinance at issue is in conflict with the state statute. Norton Ordinance 440.01(b) is in active conflict with R.C. §5577.05 because the ordinance permits oversized vehicles on public roads, which is forbidden by the statute. R.C. §5577.05(A) explicitly states that “[n]o vehicle shall be operated upon the public highways, streets, bridges, and culverts within the state, whose dimensions exceed those specified in this section.” The Norton Ordinance allows the movement of an oversized vehicle over municipal roads. These two items are in direct conflict.

A statute and an ordinance are in conflict when “the ordinance permits or licenses that which the statute forbids or prohibits, and vice versa.” Struthers v. Sokol, *supra*, syl. 2; Middleburg Hts. v. Ohio Bd. of Bldg. Standards (1992), 65 Ohio St.3d 510, 512-513, *citing* Fondessy Enterprises, Inc. v. Oregon (1986), 23 Ohio St.3d 213; Lorain v. Tomasic (1979), 59 Ohio St.2d 1. Under Norton Ordinance 440.01(b), a vehicle which would be over-dimension or over-weight everywhere else in the state would be

perfectly acceptable to operate upon certain enumerated roads within the City of Norton. Accordingly, the ordinance permits that which the statute does not allow.

This is not a situation where a municipality enacted more restrictive measures than the state, such that no conflict is created. If Norton City Ordinance 440.01 prohibited vehicles of lower weights or smaller dimensions than the state allows, no conflict would be implicated. See Cincinnati v. Baskin, *supra*, ¶¶23-25 (holding that Cincinnati ordinance banning semiautomatic firearms designed to hold more than 10 cartridges was not in conflict with state statute banning semiautomatic firearms designed to hold more than 31 cartridges); Middleburg Hts. v. Ohio Bd. of Bldg. Stds. *supra*, 512-513 (holding that ordinance establishing more restrictive building standards did not conflict with statute establishing minimum uniform building requirements). When the State issues a comprehensive general law concerning a topic, the field is preempted, and a local ordinance is only valid "if it is consistent with the related state statute." State v. Parker (1994), 68 Ohio St.3d 283, 284, *citing* Weir v. Rimmelin (1984), 15 Ohio St.3d 55, 57. Here, Norton Ordinance 440.01 is not consistent with the state statute, because it permits what the state statute disallows.

Appellants side-step the issue of conflict. Instead of directly articulating how Norton Ordinance 440.01(b) does not conflict with R.C. §5577.05, Appellants argue that Norton Ordinance 440.01(b) does not conflict with R.C. §5577.05 *as modified by* R.C. §§715.22, 723.01, and 737.022. (Appellants' Brief at pp. 12-13). Appellants argue that R.C. §§715.22, 723.01, and 737.022 give municipalities the power to draft exceptions to R.C. §5577.05, and Norton used that power to enact Ordinance 440.01(b), therefore,

Ordinance 440.01(b) must not be in conflict with R.C. §5577.05. (Appellants' Brief at pp. 12-13).

Boiled down to the above syllogism, Appellants' logic is clearly circular, with the conclusion serving as its own premise. Appellants essentially argue that there is no conflict between the ordinance and the statutes because the city has the power to enact ordinances. Further, the major premise of the argument is false. As detailed above, R.C. §§715.22, 723.01, and 737.022 do not give municipalities any more power than they already have with their home rule powers. Finally, Appellants' premise would lead to absurd results: If R.C. §§ 715.22, 723.01, and 737.022 truly give municipalities the power to supersede general state traffic laws without limitation, the state would descend into a mish-mash of cobbled-together vehicle speed and safety standards without any continuity between neighboring communities.

Accordingly, it cannot be credibly argued that Ordinance 440.01(b) is not in conflict with R.C. §5577.05.

2. "The ordinance is an exercise of the police power, rather than of local self-government"

The second criterion of the Canton v. State test focuses upon the distinction between a municipality's police power and power of local self-government. This is a distinction which Appellants have intentionally sought to blur throughout their Brief.

The regulation of traffic is clearly a police power and cannot be considered to be a "power of local self-government" as that term is used in the Home Rule Amendment. The powers of local self-government include the "exercise of the functions of government" related to the "municipal affairs" of the city. Fitzgerald v. Cleveland (1913), 88 Ohio St. 338, 344. The self-government powers "relates solely to the government

administration of the internal affairs of the municipality....” Beachwood v. Cuyahoga Cty. Bd. of Elections (1958), 167 Ohio St. 369, 370-371.

In contrast, the police power has been defined as the "power to guard the public morals, safety, and health, and to promote the public convenience and the common good." Automatic Refreshment Serv., Inc. v. Cincinnati (1993), 92 Ohio App.3d 284, 288, quoting Cincinnati & Suburban Bell Tel. Co. v. Cincinnati (P.C.1964), 7 Ohio Misc. 159, 167; see also Portage Cty. Bd. of Commrs. v. Akron, 109 Ohio St.3d 106, 2006-Ohio-954, ¶104. Among the matters that may be regulated pursuant to the police power of a city are the "protection of pedestrians and drivers" and "elimination of traffic congestion." Brown v. Cleveland (1981), 66 Ohio St.2d 93, 96.

On page 6 of Appellants' Brief, Appellants claim that this Court has recognized "that municipal corporations have the exclusive power to regulate, control and maintain vehicular traffic on streets within its jurisdiction under the constitutional powers of local self-government." (Appellants' Brief at p. 6). Appellants set forth a string-cite of cases which Appellants claim support this contention. However, a careful review of these cases demonstrates that the cases do not support Appellants' position. In fact, the cases all arose under circumstances when there was **no conflict** between the municipal ordinance and general state law.

In Billings v. Cleveland R. Co. (1915), 92 Ohio St. 478, the Court considered whether or not a municipality could pass an ordinance permitting a railroad operator to extend its line down a street. There was no state law in conflict with the local ordinance, the question was who owned the street, the city or the state.

In Froelich v. City of Cleveland (1919), 99 Ohio St. 376, the Court considered an appeal of a defendant who committed a violation of a Cleveland Ordinance which prohibited carrying a load greater than 10 tons on Cleveland streets. The defendant's load was greater than 10 tons but less than 12 tons. As noted on page 376, at the time, the state of Ohio had a statute which prohibited the movement of loads greater than 12 tons on public roads. Again, there was no conflict between the Cleveland Ordinance and state law: Cleveland was and is permitted to enact more restrictive limitations than the state chose to enact.

Appellants next cite to Village of Perrysburg v. Ridgway (1923), 108 Ohio St. 245, but again, as noted by this Court in State ex rel. Petit v. Wagner (1960) 170 Ohio St. 297, 300, Perrysburg is a case where the home rule powers were not in conflict with the general law. The Petit Court further went on to dispel the notion that Perrysburg stood for the notion that municipalities could ignore general law:

[F]ar from being authority for the proposition that a noncharter municipality can adopt regulations at variance with general law, it is actually a case in which five of the seven members of the court either adopted a diametrically opposite position or explicitly emphasized the fact that they were not passing upon it. Id. at 300.

Appellants next quote extensively from Union Sand & Supply Corp., and Cincinnati Motor Transport supra. These are cases where a municipality elected to enact vehicle weight limitations which were more restrictive than the State law. Union Sand & Supply Corp even notes, at page 391, that "[o]f course, the state law (Section 5577.04 et seq., Revised Code, relating to maximum loads) is operative generally...." Accordingly, in both cases, there was no conflict between the ordinance and the statute.

Accordingly, none of the cases which Appellants cite for support through pages 6-10 of Appellants Brief are actually supportive of Appellants' position that traffic ordinances are items of self-governance, as opposed to police power, which may conflict with general laws. In fact, one of the cases cited by Appellants states, in syllabus law, that a municipal ordinance regulating truck traffic "is a valid exercise of the police power." Niles v. Dean, *supra*, syl. 1; *see also* Tolliver v. Newark (1945), 145 Ohio St. 517, syl. 3, (regulation of traffic upon the streets "involves the exercise of the police power").

Accordingly, Norton Ordinance 440.01, which permits the operation of oversized vehicles on the streets of Norton, is an exercise of Norton's police power.

3. "The statute is a general law."

The third criterion for consideration under Canton v. State is the question of whether the statute is a general law. This Court announced, in the syllabus of Canton v. State, and reaffirmed recently in Am. Financial Servs. Assn., *supra*, at ¶32, a further four part test for determining whether or not a statute is a general law. In order to be considered a general law, the statute must:

- (1) be part of a statewide and comprehensive legislative enactment
- (2) apply to all parts of the state alike and operate uniformly throughout the state
- (3) set forth police, sanitary, or similar regulations, rather than purport only to grant or limit legislative power of a municipal corporation to set forth police, sanitary, or similar regulations, and
- (4) prescribe a rule of conduct upon citizens generally. Id.

It is clear that applying this test to R.C. §5577.05, that the statute is a general law.

Each subsection will be considered in turn, below.

a. **Is the statute part of a statewide and comprehensive legislative enactment?**

As noted by the Ninth District, at paragraph 22 of their opinion in this matter, R.C. §5577.05 "is part of Chapter 5577 which is a comprehensive scheme prescribing weight, size and load requirements to ensure safety on Ohio's public roads." Chapter 5577 prescribes the dimensions and weight of all axled vehicles on Ohio roads, from farm equipment to tractor-trailers. The only argument that Appellants could muster against the comprehensiveness of the chapter is that the chapter contains two exceptions: (1) firetrucks and other enumerated vehicles are excluded, and (2) R.C. §4513.34 allows permits to be issued for the movement of oversize vehicles in derogation of R.C. §5577.05. (Appellants' Brief at pp. 16-17).

The fact that a statute contains particular exceptions does not mean that it is not a comprehensive enactment. In Am. Financial Servs. Assn., supra, this Court recently considered whether the predatory lending statutes set forth in R.C. §1349.25 through §1349.37 were "comprehensive" under the above standard. Ohio's predatory lending laws contain exceptions for pre-payment penalties and "bridge loans" lasting less than a year. R.C. §1349.27(A)(1); R.C. §1349.27(C). Despite the fact that the predatory lending statute contained exceptions, the Court held that it was a comprehensive enactment. Id. at ¶33. Accordingly, the fact that R.C. Chapter 5577 contains a few enumerated exceptions does not mean that it is not a comprehensive law.

To determine whether the predatory lending laws were general laws, this Court in Am. Financial Servs. Assn. looked to the legislative history of the enabling legislation. Id. at ¶31. Because Chapter 5577 was carried over from the General Code, there is no similar legislative history available. However, Appellees submit that the extensive

regulation of vehicle dimensions set forth in Chapter 5577, with further rulemaking authority delegated to the Director of Transportation under R.C. §5577.05(D), evidence the General Assembly's intention to pre-empt the field in this area. The State of Ohio has a substantial interest in uniformity of vehicle height and weight restrictions, in order to assure the motoring public is not subject to inconsistent local standards when traveling through the state. As noted by this Court, "[o]nce a matter has become of such general interest that it is necessary to make it subject to statewide control so as to require uniform statewide regulation, the municipality can no longer legislate in the field so as to conflict with the state." Ohio Assn. of Private Detective Agencies, Inc., supra at 244, quoting State ex rel. McElroy v. Akron (1962), 173 Ohio St. 189, 194.

Accordingly, Chapter 5577 is a comprehensive enactment.

b. Does the statute apply to all parts of the state alike and operate uniformly throughout the state?

R.C. §5577.05 applies uniformly throughout the state. No matter what area of the state a citizen is in, he or she is prohibited from operating an oversized or overweight vehicle. The fact that the Director of Transportation or a local official can issue a permit, which acts as a defense to a claim that the movement of the vehicle is unlawful, does not affect the uniformity of the statute. State v. Parker, supra, at 285-286. R.C. §5577.05 is similar in operation to Chapter 45 of the Revised Code, concerning traffic safety, which this Court has held to be a uniform enactment. City of Cleveland Heights v. Woodle (1964), 176 Ohio St. 113, 116, (noting that "Title 45 of the Ohio Revised Code was enacted to provide uniformity in traffic rules throughout the state. Such uniformity is essential both for traffic safety and for efficient traffic regulation.")

- c. **Does the statute set forth police, sanitary, or similar regulations, rather than purport only to grant or limit legislative power of a municipal corporation to set forth police, sanitary, or similar regulations?**

R.C. § 5577.05 is a police regulation, in that it promotes safety and limits damage to bridges and roadway. Regulation of traffic involves the exercise of police power. Tolliver, supra at syl. 3. R.C. §5577.05 does not purport to grant or limit municipal authority. It is R.C. §4513.34 which purports to grant power to municipal corporations to issue permits. However, despite Appellants' best efforts to combine the two statutes, the question before the Court is whether Norton Ordinance 440.01 conflicts with R.C. §5577.05, **not** whether the Ordinance conflicts with R.C. §4513.34. R.C. §5577.05, the relevant statute, is on its face an exercise of the State's police power.

- d. **Does the statute prescribe a rule of conduct upon citizens generally?**

All citizens must abide by the constrictions of R.C. §5577.05 if they choose to operate any of the vehicles to which it applies. Appellants argue against this point by claiming that the statute allows different widths for different types of vehicles, and the statute therefore does not apply to all citizens equally. (Appellant's Brief at p. 18). Appellants mistakenly argue that motor vehicles are citizens. Obviously, only human beings may be citizens. This law applies to all human beings the same, and prohibits all citizens from operating a variety of vehicles on the public roads. Accordingly, R.C. §5577.05 prescribes a rule of conduct upon citizens generally.

E. Conclusion as to Proposition of Law I.

It is clear that R.C. §5577.05 is a general law, and Norton Ordinance 440.01 is in conflict with it, as it allows what R.C. §5577.05 disallows. The only legislation which

Norton could pass concerning the size and weight of vehicles are those ordinances which are not in conflict with state law. As an example, Norton could pass more restrictive ordinances, calling for smaller or less weighty vehicles, which would be effective upon posting signs in compliance with R.C. §4511.07. See State v. Parker, supra, at 285 (noting that "while the municipality may legislate in this area, it must post signs to give warning of a variant local regulation to drivers....") But Norton is not free to simply supersede state law, and allow that which the state law prohibits.

In R.C. §4513.34, the State of Ohio, having pre-empted the regulation of the size and weight of motor vehicles, then gave back to the municipalities the power to grant exceptions to the state law by way of granting written permits. R.C. §4513.34 clearly requires written permits upon written application, and Norton is not free to ignore the formalities of the grant of power afforded by the statute. Snider v. Dayton Power & Light Co. (1938), 27 Ohio Law Abs. 389, at *8, ("the statute contemplates . . . (a) permit in writing"). Accordingly, not only does Norton not have constitutional authority to enact Ordinance 440.01, the Ordinance is not supportable as an exercise of the statutory authority granted to Norton under R.C. §4513.34.

Therefore, Norton had no power to issue a blanket exemption to R.C. §5577.05, and Appellants' Proposition of Law I is not supportable.

Appellants' Proposition of Law II:

A court decision holding that a municipal ordinance is unconstitutional as being in conflict with a state statute may not be applied retroactively in such a way as to hold a defendant in a personal injury case negligent as a matter of law for purportedly being in violation of a state statute where the conduct of such defendant at the time of the incident was in full compliance with the municipal ordinance and the accident occurred within the municipality

A. Appellants' Proposition of Law II is inappropriate.

As with Appellants' Proposition of Law I, Appellants' Proposition of Law II is cluttered with references to specific facts of this case, and thus it could not serve as syllabus law. Accordingly, under Rule VI, Section 2(B)(4) of the Rules of Practice of the Supreme Court of Ohio, Appellants' Proposition of Law II is inappropriate.

B. Appellants have not properly preserved their Proposition of Law II for review.

Appellants argue for the first time in this forum that they had the right to rely upon the Norton Ordinance and it would not be fair to hold them liable for violating the state statute. This is the first time that Appellants have raised this argument.

In State ex rel. Babcock v. Perkins (1956), 165 Ohio St. 185, the court held, in paragraph three of the syllabus:

Where an appeal on questions of law is taken to the Supreme Court from the Court of Appeals, which latter court had jurisdiction of the subject matter of and the parties to the action, the Supreme Court will not consider or determine claimed errors which were not raised and preserved in the Court of Appeals.

The Supreme Court does not consider arguments that were not presented to the trial court or Court of Appeals. Baker v. West Carrollton (1992), 64 Ohio St.3d 446, 448; State v. Phillips (1971), 27 Ohio St.2d 294, 302. As a result, this Court should not consider Proposition of Law II.

C. There is no retroactive application of law at issue in this matter.

In the event that the Court considers Proposition of Law II, it is ill-conceived. Appellants argue that the validity of an ordinance should only be challenged in a declaratory judgment action, not a negligence claim, and that until such a declaratory judgment is entered, the ordinance should be considered valid as to them. (Appellants' Brief at pp. 19-20). Appellants are not able to summon even one citation in support of this proposed rule, and with good reason: It is an unworkable proposition. If a municipality passed an ordinance legalizing murder, would the existence of such an ordinance act as a valid defense to a murder charge? Absolutely not. Nor would a prosecutor be required to bring a declaratory judgment action in order to challenge such an ordinance prior to prosecuting the crime.

The question of what law applies is regularly litigated within the context of civil damages litigation. In torts which cross state lines, the question of which state's law applies is regularly litigated. The determination of which state's substantive law applies can establish or relieve a party from liability. The same is true of contract litigation; in the absence of a contractual choice-of-law provision, the parties must fight it out and the court must decide. It should be no different when a defendant in an injury case seeks to immunize his conduct by relying upon a local ordinance. If the ordinance is unconstitutional, the defense is not available.

Furthermore, there is no retroactive application of law at issue in this case. The Ninth District was charged with review of Norton Ordinance 440.01, a legislative enactment of the City of Norton. When a court reviews a legislative enactment, the court merely determines what the statute has meant since the time of its enactment.

Agee v. Russell (2001), 92 Ohio St.3d 540, 543. In this case, Norton Ordinance 440.01 has meant nothing since its enactment, because it was unconstitutional. Therefore, there is no issue of retroactivity. See Fiore v. White (2001), 531 U.S. 225, 227-229, 121 S.Ct. 712, 714, 148 L.Ed.2d 629, 633 (state supreme court's interpretation of state statute clarified the meaning of the statute and was thus not new law so that case presented no issue of retroactivity).

Appellants go on to argue, within the framework of a due process challenge, that they could not have complied with the law because the City of Norton did not offer permits. (Appellants' Brief at pp. 20-21). This argument is meritless. R.C. §5577.05 prohibits oversized vehicles on public roads. Appellants could have complied with the law simply by not operating an oversized vehicle on public roads. Appellants' desire to unload a huge bulldozer on a two lane road did not mean that Appellants were entitled to an exception to R.C. §5577.05. As an analog, if a city government withholds a building permit, rightly or wrongfully, a landowner may not build on his or her lot then claim that compliance with the law was impossible.

Appellants' final argument is that the Ninth District's decision invalidating the Norton Ordinance violates Section 28, Article II of the Ohio Constitution. (Appellants' Brief at pp. 21-22). Appellants' argument fails, because judicial decisions do not invoke the state constitution's ban on *ex post facto* laws. Gooding v. National Union Fire Ins. Co. of Pittsburgh Stark App. No. 2003CA00209, 2004-Ohio-694, appeal not allowed 102 Ohio St.3d 1484, 2004-Ohio-3069; King v. Safeco Ins. Co. (1990), 66 Ohio App.3d 157, 161.

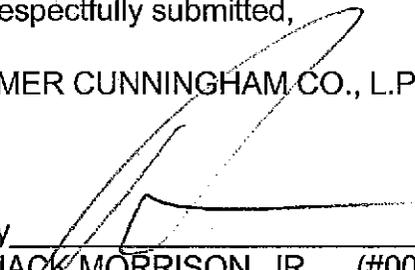
V. CONCLUSION

Both Appellants and the Ninth District (August 16, 2006 Decision at ¶30) have raised issues concerning whether or not it is fair to hold Appellants liable under this set of facts. It bears noting that Appellants' original position in this action was that their state-issued oversized load permit allowed Appellants to operate on the local roads of Norton. When it was pointed out that Appellants' behavior violated several provisions of the regulations that attach to a state-issued permit, Appellants began arguing that no permit was required. Under Ohio Administrative Code §5501:2-1-09(D), no vehicle operating under an oversized load permit is permitted to park on the roadway at any time, and under subsection (G), the oversized load must be marked with high visibility flags. It is clear that the City of Norton was not issuing permits in the manner authorized by R.C. §4513.34. Appellees submit that it would not be fair for Appellants to take advantage of Norton's laxity by performing, with impunity, acts on the streets of Norton which are prohibited on the roads under State control. Accordingly, upon balance of the equities, it is appropriate to hold Appellants liable in this case.

Based upon the foregoing law and argument, the decision of the Ninth District Court of Appeals should be AFFIRMED.

Respectfully submitted,

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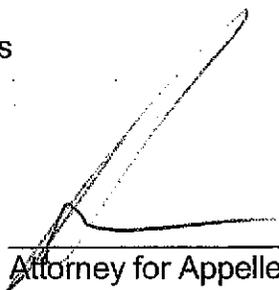
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VI. CERTIFICATE OF SERVICE

THIS CERTIFIES THAT a copy of the foregoing was served on April 19, 2007, upon the following by regular, U.S. Mail:

Ralph F. Dublikar, Esq.
Baker, Dublikar, Beck, Wiley & Matthews
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Attorney for Appellees

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Appendix

R.C. § 1349.27

Baldwin's Ohio Revised Code Annotated Currentness

Title XIII. Commercial Transactions

↳ Chapter 1349. Consumer Protection (Refs & Annos)

↳ Consumer Credit Mortgage Loans

➔ **1349.27 Prohibitions**

A creditor shall not do any of the following:

(A) Make a covered loan that includes any of the following:

(1) Terms under which a consumer must pay a prepayment penalty for paying all or part of the principal before the date on which the principal is due. For purposes of division (A)(1) of this section, any method of computing a refund of unearned scheduled interest is a prepayment penalty if it is less favorable to the consumer than the actuarial method.

Division (A)(1) of this section does not apply to a prepayment penalty imposed in accordance with section 129(c)(2) of the "Home Ownership and Equity Protection Act of 1994," 108 Stat. 2190, 15 U.S.C.A. 1639(c)(2), as amended, and the regulations adopted thereunder by the federal reserve board, as amended.

(2) Terms under which the outstanding principal balance will increase at any time over the course of the loan because the regular periodic payments do not cover the full amount of interest due;

(3) Terms under which more than two periodic payments required under the loan are consolidated and paid in advance from the loan proceeds provided to the consumer;

(4) Terms under which a rebate of interest arising from a loan acceleration due to default is calculated by a method less favorable than the actuarial method.

(B) Make a covered loan that provides for an interest rate applicable after default that is higher than the interest rate that applies before default;

(C) Make a covered loan having a term of less than five years that includes terms under which the aggregate amount of the regular periodic payments would not fully amortize the outstanding principal balance. This division does not apply to any covered loan with a maturity of less than one year, if the purpose of the loan is a "bridge" loan connected with the acquisition or construction of a dwelling intended to become the consumer's principal dwelling.

(D) Engage in a pattern or practice of extending credit to consumers under covered loans based on the consumers' collateral without regard to the consumers' repayment ability, including the consumers' current and expected income, current obligations, and employment;

(E) Make a payment to a contractor under a home improvement contract from amounts extended as credit under a covered loan, except in either of the following ways:

(1) By an instrument that is payable to the consumer or jointly to the consumer and the contractor;

(2) At the election of the consumer, by a third party escrow agent in accordance with terms established in a written agreement signed by the consumer, the creditor, and the contractor before the date of payment.

(F) On or after October 1, 2002, make a covered loan that includes a demand feature that permits the creditor to terminate the loan in advance of the original maturity date and to demand repayment of the entire outstanding balance, except in any of the following circumstances:

(1) There is fraud or material misrepresentation by the consumer in connection with the loan.

(2) The consumer fails to meet the repayment terms of the agreement for any outstanding balance.

(3) There is any action or inaction by the consumer that adversely affects the creditor's security for the loan or any right of the creditor in that security.

(G)(1) Within one year after having made a covered loan, refinance a covered loan to the same borrower into another covered loan, unless the refinancing is in the consumer's interest. An assignee holding or servicing a covered loan shall not, for the remainder of the one-year period following the date of origination of the covered loan, refinance any covered loan to the same consumer into another covered loan, unless the refinancing is in the consumer's interest.

A creditor or assignee shall not engage in acts or practices to evade division (G)(1) of this section, including a pattern or practice of arranging for the refinancing of its own loans by affiliated or unaffiliated creditors, or modifying a loan agreement, whether or not the existing loan is satisfied and replaced by the new loan, and charging a fee.

(2) Division (G)(1) of this section shall apply on and after October 1, 2002.

(H) Make a covered loan without first obtaining a copy of the mortgage loan origination disclosure statement that was delivered to the buyer in accordance with division (A)(1) of section 1322.062 of the Revised Code;

(I) Finance, directly or indirectly, into a covered loan or finance to the same borrower within thirty days of a covered loan any credit life or credit disability insurance premiums sold in connection with the covered loan, provided that any credit life or credit disability insurance premiums calculated and paid on a monthly or other periodic basis shall not be considered financed by the person originating the loan. For purposes of this division, credit life or credit disability insurance does not include a contract issued by a government agency or private mortgage insurance company to insure the lender against loss caused by a mortgagor's default.

(J) Replace or consolidate a zero interest rate or other low-rate loan made by a governmental or nonprofit lender with a covered loan within the first ten years of the low-rate loan unless the current holder of the loan consents in writing to the refinancing. For purposes of this division, a "low-rate loan" means a loan that carries a current interest rate two percentage points or more below the current yield on United States treasury securities with a comparable maturity. If the loan's current interest rate is either a discounted introductory rate or a rate that automatically steps up over time, the fully indexed rate or the fully stepped-up rate, as applicable, shall be used, in lieu of the current rate, to determine whether a loan is a low-rate loan.

(K) Make a covered loan if, at the time the loan was consummated, the consumer's total monthly debt, including amounts owed under the loan, exceed fifty per cent of the consumer's monthly gross income, as verified by the credit application, the consumer's financial statement, a credit report, financial information provided to the person originating the loan by or on behalf of the consumer, or any other reasonable means, unless the consumer submits both of the following:

(1) Verification that the consumer received prepurchase counseling from a counseling service that meets the criteria established by the superintendent of financial institutions

under section 1349.271 of the Revised Code;

(2) A disclosure, signed by the consumer, that acknowledges the risk of entering into such a loan.

(2006 S 185, eff. 1-1-07; 2002 H 386, eff. 5-24-02)

HISTORICAL AND STATUTORY NOTES

Amendment Note: 2006 S 185 added division (K).

RULE VI. BRIEFS ON THE MERITS IN APPEALS

* * *

Section 2. Appellant's Brief.

(A) In every appeal involving termination of parental rights or adoption of a minor child, or both, the appellant shall file a merit brief with the Supreme Court within 20 days from the date the Clerk of the Supreme Court receives and files the record from the court of appeals. In every other appeal, the appellant shall file a merit brief within 40 days from the date the Clerk receives and files the record from the court of appeals or the administrative agency. In any case, the appellant shall not file a merit brief prior to the receipt and filing of the record by the Clerk. [See Appendix H following these rules for a sample brief.]

(B) The appellant's brief shall contain all of the following:

(1) A table of contents listing the table of authorities cited, the statement of facts, the argument with proposition or propositions of law, and the appendix, with references to the pages of the brief where each appears.

(2) A table of the authorities cited, listing the citations for all cases or other authorities, arranged alphabetically; constitutional provisions; statutes; ordinances; and administrative rules or regulations upon which appellant relies, with references to the pages of the brief where each citation appears.

(3) A statement of the facts with page references, in parentheses, to supporting portions of both the original transcript of testimony and any supplement filed in the case pursuant to S. Ct. Prac. R. VII.

(4) An argument, headed by the proposition of law that appellant contends is applicable to the facts of the case and that could serve as a syllabus for the case if appellant prevails. See *Drake v. Bucher* (1966), 5 Ohio St. 2d 37, at 39. If several propositions of law are presented, the argument shall be divided with each proposition set forth as a subheading.

(5) An appendix containing copies of all of the following:

(a) The date-stamped notice of appeal to the Supreme Court;

(b) The judgment or order from which the appeal is taken;

(c) The opinion, if any, relating to the judgment or order being appealed;

(d) All judgments, orders, and opinions rendered by any court or agency in the case, if relevant to the issues on appeal;

(e) Any relevant rules or regulations of any department, board, commission, or any other agency, upon which appellant relies;

(f) Any constitutional provision, statute, or ordinance upon which appellant relies, to be construed, or otherwise involved in the case;

(g) In appeals from the Public Utilities Commission, the appellant's application for rehearing.

The pages of the appendix shall be numbered separately from the body of the brief.

(C) Except in appeals of right involving the death penalty, the appellant's brief shall not exceed 50 numbered pages, exclusive of the table of contents, the table of authorities cited, and the appendix.