

IN THE SUPREME COURT OF OHIO

John Marich, et al., : Case No. 06-1827
: :
Appellees, : :
: :
vs. : :
: :
Bob Bennett Construction Co., et al., : Court of Appeals
: :
Appellants. : Case No. CA 23026
: :
:

REPLY BRIEF OF APPELLANTS
BOB BENNETT CONSTRUCTION COMPANY
AND JOHN S. GOSS

*Ralph F. Dublikar (0019235)
*COUNSEL OF RECORD
Baker, Dublikar, Beck,
Wiley & Mathews
400 South Main Street
North Canton, Ohio 44720
Phone: (330) 499-6000
Fax: (330) 499-6423
E-mail: dublikar@bakerfirm.com
COUNSEL FOR APPELLANTS
BOB BENNETT CONSTRUCTION
COMPANY AND JOHN S. GOSS

Marc Dann, Attorney General of Ohio
Elise Porter, Acting Solicitor General
*Stephen P. Carney, Deputy Solicitor
Michael L. Stokes, Assistant Solicitor
*COUNSEL OF RECORD
30 East Broad Street, 17th Floor
Columbus, Ohio 43215
Phone: (614) 466-8980
Fax: (614) 466-5087
E-mail: scarney@ag.state.oh.us
COUNSEL FOR *AMICUS CURIAE*
Ohio Attorney General Marc Dann

*Jack Morrison, Jr. (0014939)
Thomas R. Houlihan (0070067)
*COUNSEL OF RECORD
Amer Cunningham Co., L.P.A.
159 South Main Street
Eleventh Floor, Society Building
Akron, Ohio 44308-1322
Phone: (330) 762-2411
Fax: (330) 762-9918
E-mail: Morrison@Amer-law.com
E-mail: Houlihan@Amer-law.com
COUNSEL FOR APPELLEES
JOHN AND NADA MARICH

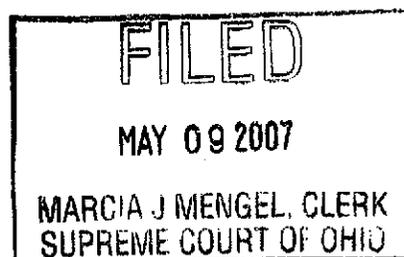


TABLE OF CONTENTS

	<u>Page</u>
TABLE OF AUTHORITIES	ii
STATEMENT OF FACTS	1
ARGUMENT	4
<u>Proposition of Law No. I:</u> A Municipality, Pursuant To Its Constitutional Right To Exercise All Powers Of Local Self-Government Under Section 3, Article XVIII, Of The Ohio Constitution, 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 City Of Norton Ordinance §440.02.	4
<u>Proposition of Law No. II:</u> 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 Jurisdiction Of The Municipality.	14
CONCLUSION	18
PROOF OF SERVICE	20

TABLE OF AUTHORITIES

<u>CASES</u>	<u>Page</u>
<i>Adrian v. St. Paris</i> (1983), 12 Ohio App.3d 71	5
<i>American Financial Services Assn. v. Cleveland</i> (2006), 112 Ohio St.3d 170	5, 6, 8
<i>Berge v. Columbus Comm. Cable Access</i> (1999), 136 Ohio App.3d 281	5
<i>Billings v. Railway Co.</i> (1915), 92 Ohio St. 478	5
<i>Cincinnati v. Baskin</i> (2006), 112 Ohio St.3d 279	6
<i>Cincinnati v. Shannon</i> (1979), 64 Ohio App.2d 58	5
<i>Cincinnati Motor Transport v. Lincoln Heights</i> (1971), 25 Ohio St.2d 203	5, 8
<i>City of Canton v. State of Ohio</i> (2002), 95 Ohio St.3d 149	7, 11, 12, 13
<i>Froelich v. Cleveland</i> (1919), 99 Ohio St. 376	5, 7
<i>Geauga County Bd. of Commissions v. Munn Road Sand & Gravel</i> (1993), 67 Ohio St.3d 579	5, 10
<i>Niles v. Dean</i> (1971), 25 Ohio St.2d 284	5
<i>Perrysburg v. Ridgeway</i> (1923), 108 Ohio St. 245	5, 7
<i>Reynolds v. Ohio Div. of Parole & Community Serv.</i> (1984), 14 Ohio St.3d 68	15
<i>Robinson v. Bates</i> (2006), 112 Ohio St.3d 17	15
<i>Shroades v. Rental Homes</i> (1981), 68 Ohio St.2d 20	2
<i>Sikora v. Wenzel</i> (2000), 88 Ohio St.3d 493	15
<i>Smiddy v. The Wedding Party, Inc.</i> (1987), 30 Ohio St.3d 35	15
<i>State v. Parker</i> (1994), 68 Ohio St.3d 283	5, 10
<i>Twinsburg v. State Employee Relations Bd.</i> (1988), 39 Ohio St.3d 226	5

continued
TABLE OF AUTHORITIES

<u>CASES</u>	<u>Page</u>
<i>Union Sand & Supply Corp. v. Village of Fairport</i> (1961), 172 Ohio St. 387	5, 7
<i>Vaughn v. City of Parma</i> (1962), 30 Ohio Op.2d 617; 95 Ohio Law Abs. 6	5
<i>Village of Linndale v. State of Ohio</i> (1999), 85 Ohio St.3d 52	5
<i>Zehe v. Falkner</i> (1971), 26 Ohio St.2d 258	15
 <u>CONSTITUTIONAL PROVISIONS; STATUTES:</u>	
Ohio Constitution, Section 3, Article XVIII	4, 13
R.C. §715.22	5, 9, 10, 11
R.C. §715.22(B)	6
R.C. §723.01	5, 6, 9, 10, 11
R.C. §737.022	5, 10
R.C. §4511.01	6
R.C. §4511.07	5, 6, 10
R.C. §4511.78	6
R.C. §4511.99	6
R.C. §4513.01	6
R.C. §4513.34	4, 5, 9, 10, 11, 12, 13, 18
R.C. §4513.37	6
R.C. §5501.49	6
R.C. §5577.05	1, 2, 4, 9, 10, 11, 12, 13, 14, 18

continued
TABLE OF AUTHORITIES

OTHER

Norton City Ordinance §440.01	2
Norton City Ordinance §440.01(b)(1)	1, 9, 10, 11, 13, 14
Norton City Ordinance §440.02	4, 9, 18

STATEMENT OF FACTS

There is no dispute that on November 8, 2002, a vehicle driven by the plaintiff-appellee, John Marich, struck a tractor-trailer owned by defendant-appellant, Bob Bennett Construction Company, which was parked on Clark Mill Road in the city limits of Norton, Ohio. The appellant's tractor-trailer unit was carrying a bulldozer which was 124 inches wide. Defendant-Appellant, John Goss, was the operator of the tractor-trailer, working in the course and scope of his employment with Bob Bennett Construction Company. The bulldozer was admittedly in excess of the maximum width requirements as set forth in Revised Code §5577.05. Accordingly, defendants-appellants obtained a special hauling permit from the State of Ohio, permitting them to transport this oversize load on state highways. Appellants did not obtain a special hauling permit from the City of Norton because Norton City Ordinance §440.01(b)(1) provided that vehicles operated on Clark Mill Road in the City of Norton were exempt from the City of Norton's width requirements. The Norton City Police Chief testified on deposition that he would not issue a permit under these circumstances due to the exemption, even if a permit were requested.

Plaintiffs-Appellees filed a motion for partial summary judgment in the trial court, seeking an order that the defendants-appellants were negligent as a matter of law for operating a vehicle in excess of the width requirements of Revised Code §5577.05 without an appropriate permit. The trial court ultimately overruled this motion and held that the defendants-appellants were not negligent *per se*. The trial court relied upon the Norton City Ordinance which exempted Clark Mill Road from the width requirements.

However, the trial court allowed the case to proceed to trial by jury on all other issues of negligence, proximate cause and damages. The jury returned a general verdict in favor

of the defendants, finding no negligence on the part of the defendants-appellants, John Goss and Bob Bennett Construction Company. Plaintiffs-Appellees then appealed to the Ninth District Court of Appeals, raising as their “sole assignment of error” the following:

The trial court erred by failing to grant summary judgment on the issue of negligence to John and Nada Marich.

The Ninth District Court of Appeals, in a 2-1 decision, reversed the trial court and held as follows at page 3 of its opinion:

In their sole assignment of error, Appellants have argued that the trial court erred by failing to grant them summary judgment on the issue of negligence. Specifically, Appellants have argued that by operating an oversized vehicle on the public roads without a permit, Appellees violated R.C. 5577.05 and thus, were negligent *per se*. We agree.

By way of rationale, the court of appeals went on to explain its decision as follows at page 12 of its opinion:

In conclusion, we find that R.C. 5577.05 is a general law and therefore preempts the conflicting local ordinance, Ordinance 440.01. As a result, Appellees were in violation of R.C. 5577.05 and were negligent *per se* as a matter of law. See *Shroades v. Rental Homes* (1981), 68 Ohio St.2d 20, 25. Negligence *per se* requires the violation of a statute which sets forth a specific course of conduct designed to protect the safety of others by one whose duty it is to obey the statute. See *Berge v. Columbus Comm. Cable Access* (1999), 136 Ohio App.3d 281, 312-313. We find all of these elements present in the matter sub judice. Accordingly, the trial court erred when it entered summary judgment in favor of Appellees on the issue of negligence *per se*.

To the contrary, Judge Slaby, in his dissent, stated as follows:

I respectfully dissent from my colleagues. I disagree with the conclusion that the local ordinance is in conflict with the state statute. However, I do not believe that is the central issue on summary judgment. The majority concludes that the conflict with the state statute creates negligence *per se*. I believe that is a different issue from what the majority relied on to reverse the

summary judgment decision. Although an action may or may not be brought against the township [sic, the city], the fact is that this action is against the company that relied on the ordinances. The issue then becomes one of whether that reliance was negligent. I would affirm . . .

The defendants-appellants have now appealed, seeking to obtain a reversal of the ruling of the court of appeals and requesting that this Court affirm the decision of the trial court and affirm the jury verdict which was rendered in favor of the defendants-appellants, John Goss and Bob Bennett Construction Company.

ARGUMENT

PROPOSITION OF LAW NO. I

A MUNICIPALITY, PURSUANT TO ITS CONSTITUTIONAL RIGHT TO EXERCISE ALL POWERS OF LOCAL SELF-GOVERNMENT UNDER SECTION 3, ARTICLE XVIII, OF THE OHIO CONSTITUTION, 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 CITY OF NORTON ORDINANCE §440.02.

As to this first proposition of law, there are essentially three issues to be determined.

They are as follows:

- (1) Are the regulation and control of city streets, including the setting of width and size requirements for vehicles, an exercise of local self-government or local police power?
- (2) If the regulation and control of streets is determined to be an exercise of local police power, does the ordinance conflict with state statutes?
- (3) If the regulation and control of streets is determined to be an exercise of local police power, and if the ordinance in question conflicts with state statutes, are the state statutes general laws?

A. The Regulation And Control Of Streets Within The Jurisdiction Of A Municipality Rests Solely With The Municipal Corporation Under Its Home Rule Powers Of Local Self-Government As Set Forth In Section 3, Article XVIII Of The Ohio Constitution.

It is the position of the defendants-appellants that the regulation and control of streets within a municipal corporation properly are included in the broad general powers of local self-government under Section 3, Article XVIII, of the Ohio Constitution. As Justice

O'Donnell stated in the majority opinion in *American Financial Services Assn. v. Cleveland* (2006), 112 Ohio St.3d 170 at p. 173:

The first step in a home rule analysis is to determine “whether the matter in question involves an exercise of local self-government or an exercise of local police power. *Twinsburg v. State Employee Relations Bd.* (1988), 39 Ohio St.3d 226 . . .

If an allegedly conflicting city ordinance relates solely to self-government, the analysis stops, because the constitution authorizes a municipality to exercise all powers of local self-government within its jurisdiction.

This issue was thoroughly briefed and argued at pages 4 through 11 of appellants’ merit brief. No less than twelve cases were cited for the proposition that municipalities have control over the use of streets within their own jurisdiction as part of their constitutional power of local self-government: *Village of Linndale v. State of Ohio* (1999), 85 Ohio St.3d 52; *State v. Parker* (1994), 68 Ohio St.3d 283; *Geauga County Bd. of Commissioners v. Munn Road Sand & Gravel* (1993), 67 Ohio St.3d 579; *Niles v. Dean* (1971), 25 Ohio St.2d 284; *Cincinnati Motor Transport v. Lincoln Heights* (1971), 25 Ohio St.2d 203; *Union Sand & Supply Corp. v. Village of Fairport* (1961), 172 Ohio St. 387; *Perrysburg v. Ridgeway* (1923), 108 Ohio St. 245; *Froelich v. Cleveland* (1919), 99 Ohio St. 376; *Billings v. Railway Co.* (1915), 92 Ohio St. 478; *Adrian v. St. Paris* (1983), 12 Ohio App.3d 71; *Cincinnati v. Shannon* (1979), 64 Ohio App.2d 58; *Vaughn v. City of Parma* (1962), 30 Ohio Op.2d 617; 95 Ohio Law Abs. 6.

In addition to the long line of cases supporting this principle, there are several state statutes which have been cited in the appellants’ merit brief which reinforce this principle of “municipal control over municipal streets”. See, for example, Revised Code §715.22; §723.01; §737.022; §4511.07; §4513.34. Appellants acknowledge that the municipalities’

authority to regulate and control traffic on its streets emanates from the Ohio Constitution, but the above-cited statutes clearly reinforce this principle. In particular, the State Legislature, by enacting these statutes, has clearly recognized the constitutional authority of municipal corporations to regulate and control streets. Revised Code §715.22(B) provides that a municipal corporation may “license and regulate the use of the streets by persons who use vehicles . . .”. Revised Code §723.01 provides that “municipal corporations shall have special power to regulate the use of the streets”. (Emphasis added). Revised Code §723.01 goes on to state that “Except as provided in Section 5501.49 of the Revised Code, the legislative authority of a municipal corporation shall have the care, supervision and control of the public highways, streets, avenues, . . . within the municipal corporation”. Finally, Revised Code §4511.07 provides in relevant part that “Sections 4511.01 to 4511.78, 4511.99, and 4513.01 to 4513.37 of the Revised Code do not prevent local authorities from carrying out the following activities (regulating the use of certain streets by vehicles) with respect to streets and highways under their jurisdiction and within the reasonable exercise of the police power”.

In determining this first issue as to whether a city ordinance properly comes under the “powers of local self-government”, this Court has recently discussed the doctrines of “statewide concern” and “preemption”. *See, American Financial Services Assn. v. Cleveland*, supra, and *Cincinnati v. Baskin* (2006), 112 Ohio St.3d 279. This Court has stated in its opinion in *American Financial Services*, supra, as follows at p. 175:

. . . the doctrine [of statewide concern] is relevant only in “deciding, as a preliminary matter, whether a particular issue is ‘not a matter of merely local concern, but is of statewide concern, and therefore not included within the power of local self-government.’”

* * *

Thus, the statewide-concern doctrine falls within the existing framework of the Canton test, and courts should consider the doctrine when deciding whether “the ordinance is an exercise * * * of local self-government,” *Canton v. State*, 95 Ohio St.3d 149, . . . or whether a comprehensive statutory plan is, in certain circumstances, necessary to promote the safety and welfare of all the citizens of this state”.

As to this issue, the regulation and control of city streets entirely within a municipal corporation’s jurisdiction is clearly not a matter of statewide concern. The Legislature, as well as the courts of this state, have repeatedly deferred to municipal authorities with respect to the regulation and control of its own city streets. In *Froelich v. Cleveland*, supra, this Court stated as follows:

It is a necessary incident to the governmental power of the city to do the things above stated in the construction and control of its streets, to make such reasonable provisions for their proper and economic use as its close knowledge of the necessities of the situation and the structure of the streets themselves demonstrates to be proper.

* * *

The object of the home rule amendment was to permit municipalities to use this intimate knowledge and determine for themselves in the exercise of all the powers of local self-government how these and similar local affairs should be conducted.

In *Perrysburg v. Ridgeway*, supra, this Court held, in syllabus 2, as follows:

Syllabus 2. The power to establish, open, improve, maintain and repair public streets within the municipality, and fully control the use of them, is included within the term “powers of local self-government”. (Emphasis added).

In *Union Sand & Supply Co.*, supra, this Court held that a municipal ordinance regarding maximum weights of vehicles using its highways and streets was proper, even though such ordinance fixed lesser weights than those permitted by state statute. This Court

again reiterated the “broad powers and duties with respect to streets and highways within their limits” which are enjoyed by municipal corporations.

In *Cincinnati Motor Transport v. Lincoln Heights*, supra, this Court stated as follows at pp. 208-209:

Moreover, upon the theory that city council is in a better position to understand and note the needs of the community than a reviewing court, courts should strive to respect the acts of municipal legislative bodies determining what legislation is reasonably necessary for the good and welfare of its community.

Therefore, the regulation and control of city streets is a local concern, as opposed to a matter of “statewide concern”.

In addition, the state has clearly not preempted the field of legislation in this area. Again, numerous state statutes, as cited above, recognize the “special power of municipalities to regulate and control the use of its streets”. Neither counsel for the appellees, nor counsel for the *amicus curiae*, have cited any case where a municipal ordinance having to do with the regulation and control of city streets was declared invalid as being in conflict with state law. To the contrary, every case that has been cited by any of the counsel in this case, having to do with the right of a municipality to control and regulate its streets, has come down on the side of municipal control of municipal streets.

Therefore, as to this first issue, this Court should hold that a city may properly exempt certain roads from the width requirements as part of its constitutional power of local self-government involving the control and regulation of traffic on local streets within its jurisdiction. If such is the case, and if this Court finds the control and regulation of city streets to be within the powers of local self-government, then “the analysis stops”. See, *American Financial Services Assn. v. Cleveland*, supra, at p. 173.

B. If It Is Determined That Norton City Ordinance §440.01(b)(1) Is An Exercise Of Police Power By The City, Such Ordinance Is Not In Conflict With General Laws.

Even if this Court were to hold that the regulation of width requirements on city streets is part of the local police power, then Norton City Ordinance §440.01(b)(1) does not conflict with Revised Code §5577.05 or Revised Code §4513.34.

Revised Code §5577.05 prescribes certain size limits for certain vehicles operating on the streets and highways of this state. Revised Code §4513.34 provides for the issuance of permits by either state officials for travel on state highways or local authorities for travel within the local jurisdiction. The City of Norton exempted certain streets within the municipal city limits from the size and width requirements set forth in Revised Code §5577.05 and further set forth in Norton City Ordinance §440.02. If the Court determines that this ordinance involves local police regulations, as opposed to powers of local self-government, then the next issue to be determined is whether Norton City Ordinance §440.01(b)(1) conflicts with the state statutes. For the reasons which follow, it is respectfully submitted that there is no conflict.

In analyzing this issue, several of the state statutes must be read together and interpreted to determine whether the local ordinance conflicts with the state statutes. As stated above, Revised Code §715.22 provides that municipal corporations may “license and regulate the use of the streets by persons who use vehicles, or solicit or transact business thereon”. Revised Code §723.01 provides that “municipal corporations shall have special power to regulate the use of the streets, . . . and shall have the care, supervision and control of the public highways, streets, avenues, alleys, sidewalks, . . . within the municipal corporation”.

Revised Code §4511.07 provides that certain traffic statutes, including Revised Code §4513.34, “do not prevent” local authorities from regulating the streets and highways under their jurisdiction. Although Revised Code §4513.34 does provide for the issuance of permits, as argued by counsel for the *amicus curiae*, Revised Code §4511.07 clearly provides that certain statutes, including Revised Code §4513.34, **do not prevent** local authorities from regulating the use of streets “under their jurisdiction and within the reasonable exercise of the police power”. This Court has held on at least two occasions that the “do not prevent” language of Revised Code §4511.07 “is effectively the same as specifically providing that no conflict exists with general laws of the state when a municipality regulates in the enumerated areas”. *Geauga County Bd. of Commissions v. Munn Road Sand & Gravel*, supra, and *State v. Parker*, supra. As this Court stated in *Geauga County*, supra:

Revised Code Section 4511.07, by stating that certain statutes “do not prevent” local authorities from regulating, effectively provides on its face that those statutes do not stand in the way of regulation in these areas.

When the scope of a municipality’s powers is at issue, a provision that certain statutes “do not prevent” regulation is effectively the same as specifically providing that no conflict exists with the general laws of the state when the municipality regulates in the enumerated areas.

67 Ohio St.3d at pp. 583-584.

Accordingly, with respect to the permit requirements of Revised Code §4513.34, Norton City Ordinance §440.01(b)(1) does not conflict with §4513.34 because Revised Code §4511.07 specifically provides that Revised Code §4513.34 does not prevent local authorities from regulating streets within its jurisdiction. In addition, there is no conflict between Norton City Ordinance §440.01(b)(1) and Revised Code §5577.05 because Revised Code §715.22, Revised Code §723.01, Revised Code §737.022 and Revised Code §4511.07 all

clearly recognize the inherent and “special power” of a municipal corporation to regulate and control its own streets within its own jurisdiction.

Finally, Revised Code §4513.34(B) provides as follows, in pertinent part:

Notwithstanding Sections 715.22 and 723.01 of the Revised Code, the holder of a special permit issued by the director under this section may move the vehicle . . . described in the special permit on any highway that is part of the state highway system when the movement is partly within and partly without the corporate limits of a municipal corporation.

This portion of the statute likewise explicitly references Revised Code §§715.22 and 723.01, which clearly articulate the power of municipal corporations to control and regulate traffic on municipal streets. Revised Code §4513.34(B) provides for an exception where the state route goes through a municipality. Likewise, the State Legislature could have easily said that “notwithstanding §§715.22 and 723.01 of the Revised Code, a municipality shall have no authority to exempt certain roads within its jurisdiction from the permit requirement”. Obviously, the Legislature chose not to include such language in the statute.

For all of the foregoing reasons, it is respectfully submitted that there is no conflict between Norton City Ordinance §440.01(b)(1) and Revised Code §5577.05 and Revised Code §4513.34. See also, dissenting opinion of Judge Slaby, finding no conflict between the ordinance and the state statutes.

C. Revised Code §5577.05 And Revised Code §4513.34 Are Not General Laws.

In *Canton v. State* (2002), 95 Ohio St.3d 149, this Court announced a four-part test to determine whether state statutes constitute general laws. In order to be considered a general law, a statute must (1) be part of a statewide and comprehensive legislative enactment; (2) be applied 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. When reading Revised Code §5577.05 and Revised Code §4513.34 together, as is necessary in this case, it is clear that they are not general laws as defined in *Canton v. State*, supra.

Revised Code §§5577.05 and 4513.34 are not part of a statewide, comprehensive legislative enactment, do not apply to all parts of the state alike, limit legislative power of a municipal corporation, and do not apply a rule of conduct to citizens generally. Revised Code §5577.05, while purporting to apply to all vehicles on all streets and highways within the state, truly does not. First, there are at least four different requirements involving the width of certain vehicles, depending on whether they are buses, traction engines, recreational vehicles, or other vehicles. There are no less than eight different provisions in Revised Code §5577.05 regarding the length of vehicles. Revised Code §5577.05(G) totally exempts fire engines, fire trucks, other vehicles belonging to a municipal corporation, vehicles and trailers used to transport poles, pipes or well-drilling equipment. Further, the statute does not apply to farm machinery and equipment.

Revised Code §4513.34 then clearly permits state or local authorities to circumvent the width and length requirements by use of a permit system. Under these circumstances, it cannot be said that these statutes represent a part of a statewide and comprehensive legislative enactment, nor can it be said that these statutes prescribe a rule of conduct on citizens generally. Due to the permit system, each and every local authority has the power to apply these statutes differently. Whereas one local authority may grant a permit for a particular size vehicle, another local authority may refuse such a permit. Accordingly, it

cannot be said that these statutes “apply to all parts of the state alike and operate uniformly throughout the state”. It is clear on the face of the statutes that they do not apply to all parts of the state or operate uniformly throughout the state.

In *Canton v. State*, supra, this Court held that certain statutes regarding manufactured homes were not general laws because there was an exception allowing for restrictive covenants in deeds which “wholly defeats the stated purpose of fostering more affordable housing”. Likewise, Revised Code §4513.34, providing for the issuance of permits for oversized vehicles, totally defeats the purpose of Revised Code §5577.05, which purports to regulate the size of vehicles on all streets and highways within the state.

For all of the foregoing reasons, the court of appeals erred in holding that the City of Norton Ordinance §440.01(b)(1) was invalid. Said ordinance was properly enacted for the following reasons:

- (1) The City of Norton had the authority to enact such ordinance under its constitutional home rule power of local self-government under Section 3, Article XVIII, of the Ohio Constitution;
- (2) The ordinance did not conflict with state statutes; and
- (3) The state statutes in question were not general laws.

PROPOSITION OF LAW NO. 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 JURISDICTION OF THE MUNICIPALITY.

The second issue presented by this appeal is whether the trial court was correct in holding that the defendants-appellants were not negligent per se for failing to have a permit to operate on Clark Mill Road in the City of Norton. Stated in another way, the issue presented by this appeal is whether the court of appeals erred in holding that the defendants-appellants were “negligent per se” for being in violation of Revised Code §5577.05, after finding that Norton City Ordinance §440.01(b)(1) was invalid. For the reasons which follow, it is respectfully submitted that the trial court was correct in holding that the defendants-appellants were not negligent per se. The court of appeals decision should be reversed.

First, the defendants-appellants restate all of their arguments as set forth in support of Proposition of Law No. I to the effect that Norton City Ordinance §440.01(b)(1) was a valid exercise of home rule powers on the part of the City of Norton, did not conflict with general laws, and, therefore, such ordinance was valid. However, even if this Court were to find that the Norton City Ordinance was invalid as being in conflict with state statutes, that is still not sufficient grounds to hold the defendants-appellants negligent per se. The fact that the Norton City Ordinance was a valid enactment at the time of the accident, and, more importantly, the fact that the defendants-appellants could not obtain a permit under any

circumstances due to the exemption, rendered it impossible to comply with the statute. Under these circumstances, such would constitute a legal excuse and, therefore, the defendants-appellants could not be found negligent per se.

This Court has addressed the issue of negligence per se and legal excuse recently in the cases of *Sikora v. Wenzel* (2000), 88 Ohio St.3d 493, and again in *Robinson v. Bates* (2006), 112 Ohio St.3d 17. In *Sikora*, supra, it was stated as follows at p. 497:

Furthermore, negligence *per se* and strict liability differ in that a negligence *per se* statutory violation may be “excused”. As set forth in the Restatement of Torts 2d, *supra*, at 37, Section 288B(1): the *unexcused* violation of a legislative enactment * * * which is adopted by the Court as defining the standard of conduct of a reasonable man, is negligence in itself”. (Emphasis added). But “[a]n *excused* violation of a legislative enactment * * * is not negligence”. (Emphasis added). Restatement of Torts 2d, *supra*, at 32, Section 288(A)(1). See also, *Reynolds v. Ohio Div. of Parole & Community Serv.* (1984), 14 Ohio St.3d 68, 71, . . . quoting Prosser, Law of Torts (4 Ed. 1971) 200-201, Section 36; *Smiddy v. The Wedding Party, Inc.* (1987), 30 Ohio St.3d 35 . . . (applying the concept of a legal excuse in the context of motor vehicle operation); *Zehe v. Falkner* (1971), 26 Ohio St.2d 258.

The court in *Sikora*, as well as in *Robinson v. Bates*, supra, held that “lack of notice” is among the legal excuses to negligence *per se*. This Court further stated at page 497 of the *Sikora* opinion as follows:

Lack of notice is among the legal excuses recognized by other jurisdictions and set forth in the Restatement of Torts 2d. This excuse applies where “the actor neither knows nor should know of any occasion or necessity for action in compliance with the legislation or regulation”. Restatement of Torts 2d, *supra*, at 35, Section 288(A)(2)(b), Comment *f*.

There is no dispute that, at the time of this accident, the City of Norton did not require a permit to operate an oversized vehicle on Clark Mill Road. There is further no dispute, based upon the testimony of the police chief, that the City of Norton would not have issued

a permit even if one had been requested due to the exemption contained in the ordinance. Therefore, the defendants-appellants could not have been on notice of any requirement for getting a permit while operating on Clark Mill Road at the time of the accident. This lack of notice would clearly constitute a legal excuse, avoiding any liability for negligence *per se*.

This is precisely the argument that was made by Judge Slaby of the Ninth District Court of Appeals in his dissenting opinion. Judge Slaby pointed out that the defendants-appellants relied on the ordinances. The sole assignment of error in the court of appeals, as brought by the plaintiffs-appellees, is whether the trial court erred in finding that the defendants-appellants were not negligent *per se*. Based upon the doctrine of “legal excuse”, the trial court was entirely correct in holding that the defendants-appellants were not negligent *per se*. The court then allowed the trial to go forward based upon all other elements of negligence, proximate cause and damages, after which the jury found in favor of the defendants, finding no negligence. This was the entirely appropriate result. The court of appeals, in finding that the Norton City Ordinance was invalid, and in further finding that the defendants were negligent *per se*, totally missed the concept of “legal excuse” which was clearly applicable to the facts of this case. It was literally impossible for the defendants to obtain a permit to be in compliance with the statutes.

In closing, and as stated in Proposition of Law No. II, even if a court holds that a municipal ordinance is invalid or unconstitutional as being in conflict with a state statute, this may not be applied in such a way as to hold a defendant in a personal injury case negligent as a matter of law, where the conduct of the defendant was in full compliance with the municipal ordinance and the accident occurred within the jurisdiction of the municipality. In other words, the compliance with the City Ordinance and the impossibility of obtaining

a permit negates any liability for negligence *per se* even if the statute is subsequently determined to be invalid.

CONCLUSION

For all of the foregoing reasons, it is respectfully submitted that the decision of the Ninth District Court of Appeals should be reversed and the decision of the Summit County Common Pleas Court should be affirmed. Further, this Court should hold as follows:

- (1) The City of Norton, under its constitutional home rule power of local self-government, had the authority to validly enact an ordinance exempting certain roads from the permit requirements of Revised Code §§5577.05 and 4513.34 and Norton City Ordinance §440.02.
- (2) If it is determined that the enactment of the City of Norton Ordinance was part of its “local police regulations”, said ordinance was not in conflict with any general laws of the State of Ohio.
- (3) If it is determined that the statute was invalid as being in conflict with state statute, the defendants-appellants could not be found guilty of negligence *per se*, where they were admittedly in full compliance with the Norton City Ordinance, and where it was impossible to obtain a permit prior to the time of the accident from the City of Norton due to the exemption for Clark Mill Road, thereby constituting a legal excuse.

The court of appeals recognized the inherent unfairness and injustice in their decision, at p. 12 of the opinion, where the court of appeals majority stated as follows:

While we understand the seemingly inequitable nature of this decision, appellate courts are not courts of equity and we are thereby constrained to apply the law regardless of the impact upon either party.

The simple answer to this “inequity” is that the defendants-appellants had a “legal excuse” for not complying with the statute. They were not on notice that a permit was required, but, to the contrary, the statute that was in effect at the time clearly stated that no permit was required. Under these circumstances, the decision of the court of appeals should be reversed; the decision of the trial court should be affirmed; and final judgment should be rendered in favor of the defendants-appellants based upon the jury verdict in their favor.

Respectfully submitted,



Ralph F. Dublikar, Counsel of Record

BAKER, DUBLIKAR, BECK,

WILEY & MATHEWS

400 South Main Street

North Canton, OH 44720

Phone: (330) 499-6000

Fax: (330) 499-6423

E-mail: dublikar@bakerfirm.com

Counsel for Appellants

PROOF OF SERVICE

I certify that a copy of this Brief was sent by ordinary U.S. mail this 8th day of May, 2007, to:

Jack Morrison, Jr., Esq.
Thomas R. Houlihan, Esq.
Amer Cunningham Co., L.P.A.
159 South Main Street
Eleventh Floor, Society Building
Akron, Ohio 44308-1322
Counsel for Plaintiffs-Appellees

Marc Dann, Attorney General of Ohio
Elise Porter, Acting Solicitor General
Stephen P. Carney, Deputy Solicitor
Michael L. Stokes, Assistant Solicitor
30 East Broad Street, 17th Floor
Columbus, Ohio 43215
Counsel for *Amicus Curiae*



Ralph F. Dublikar
BAKER, DUBLIKAR, BECK,
WILEY & MATHEWS