

IN THE SUPREME COURT OF OHIO

07-0873

DONALD D. HOWARD, ETC., et al.,

Appellee,

v.

MIAMI TOWNSHIP, DIVISION OF
FIRE, et al.

Appellants.

:
:
: On Appeal from the Montgomery
: County Court of Appeals,
: Second District
:
:
: Court of Appeals Case No. 21478
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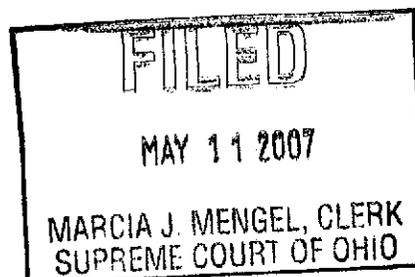
**MEMORANDUM IN SUPPORT OF JURISDICTION
OF APPELLANTS MIAMI TOWNSHIP, DIVISION OF FIRE
AND MIAMI TOWNSHIP**

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I. EXPLANATION OF WHY THIS CASE INVOLVES MATTERS OF PUBLIC AND GREAT GENERAL INTEREST

This case presents a new and undeveloped issue of law - the correct interpretation of current version of R.C. § 2744.02 (B)(3) and specifically what constitutes an “obstruction.” At issue is whether Appellant, a political subdivision, negligently failed to remove an obstruction from a public road. The resolution of this issue depends on whether ice and slush constitute an “obstruction” pursuant to the 124th General Assembly’s amendments in SB 106 to Ohio’s Political Subdivision Immunity Statute—R.C. § 2744.03(B)(3). Since the statute’s amendments became effective in April of 2003, this Court has not had an occasion to interpret the meaning of the word “obstruction.” In this instance, the Trial Court and the Appellate Court came to different conclusions about the meaning of “obstruction” by reference to different sources of statutory construction. The Court of Appeals construed “obstruction” broadly to include “any object placed or erected in a public roadway that has the potential of interfering with the public’s use of that roadway”, and abandoned the principle, first adopted over one hundred years ago, that a political subdivision is not an insurer of a travelers’ safety and is only subject to suit for injuries which arise from a traveler’s ordinary and usual use of the roadway. *See, City of Dayton v. Taylor’s Adm’r* (1900), 62 Ohio St. 11, 56 N.E. 480, 481; *see also, Haynes v. Franklin*, 95 Ohio St.3d 344, 2002-Ohio-2334, 767 N.E.2d 1146. The Court of Appeals’ construction is inappropriate both because it departs from Ohio’s well-settled and reasoned rules of statutory construction and because it leads to absurd results by subjecting political subdivisions to liability for the existence of road conditions beyond their control or ability to rectify.

The Second District Court of Appeals’ definition of “obstruction” is unreasonable and unworkable for political subdivisions. Its decision greatly enhances the exposure of all municipalities, counties and townships within the state to liability for all types of road conditions

such as the presence of ice, snow, gravel or foreign substances on road surfaces. For example, the Plaintiff herein sued the Defendant for failure to remove ice and slush from the roadway when Plaintiff crashed after speeding at 60 mph. through a curve in the road where the ice and slush is claimed to have been on the roadway although the posted speed limit was 30 mph. and the Plaintiff had passed through the curve minutes earlier at a more reasonable rate of speed without incident. The Court deemed the ice and slush an “obstacle” although ice and slush bears no resemblance to the meaning of obstruction as it is commonly understood, and subjected the Defendant to potential liability although the Plaintiff was not traveling in an ordinary and usual manner.

This decision has the unintended consequence of imposing a greater duty and responsibility on political subdivisions to remove material from a road surface than may be practical or warranted. The range of objects encompassed in the appellate court’s definition of obstruction is so broad as to encompass objects that do not literally obstruct a roadway, but also objects that only have the “potential” to interfere with traffic, and which may be so small or subtle as to pose a danger to persons using the road in an unusual and unexpected manner. Thus, rather than interpreting R.C. § 2744.0f(B)(3) in a manner which protects the fiscal integrity of political subdivisions, the Court of Appeals for the Second District has put the financial resources of all municipalities, counties and townships at substantial risk by now having to respond to claims for which they should be entitled to immunity as intended by the Legislature.

Therefore, an appropriate resolution of the true meaning of “obstruction”, as that term is used in R.C. § 2744.03(B)(3) is of public and great general interest.

II. STATEMENT OF THE CASE AND FACTS

A. Statement of the Case

This case arose out of a single vehicle automobile accident which resulted in the death of

the driver, Christopher Howard. On August 9, 2004 Donald Howard, individually and as the Administrator of the Estate of Christopher Howard, and Hallie Taylor filed a wrongful death and survivorship action against Miami Township- Fire Division¹ and Miami Township. The Complaint alleged that Miami Township's negligence proximately caused the death of Christopher Howard.

The Township filed a Motion for Summary Judgment as to the Howards' claims on June 21, 2005 on the basis that the Township was immune pursuant to Chapter 2744 of the Revised Code. Plaintiffs filed their Response Contra to Defendants' Motion for Summary Judgment on August 22, 2005. The Township filed its Reply in Support of Summary Judgment on September 13, 2005.

On January 17, 2005, the trial court issued its "Decision, Entry, and Order Sustaining Defendants' Motion for Summary Judgment." On February 14, 2006, a Notice of Appeal to the Second District Court of Appeals was filed by Donald Howard, only. On March 30, 2007, the Second District Court of Appeals rendered its opinion reversing the trial court's grant of summary judgment on the issue of immunity.

B. Statement of the Facts

On January 24, 2004, the Miami Township Fire Department conducted a live fire training evolution at 5460 Bear Creek Road, Miamisburg, Ohio. The training evolution began at approximately 9:00 a.m. on the morning of January 24, 2004. At approximately 2:30 p.m. the training evolutions were completed and the decision was made to begin final ignition of the structure. At approximately 4:30 p.m., the majority of the structure had been consumed, the equipment was demobilized and placed back into service and the Township dispatch center was

¹ Miami Township- Fire Division is sui juris and incapable of being sued. The Fire Division is not a separate entity from the Township.

notified that the training evolutions were completed. A request was made by the deputy chief on duty, Deputy Chief Hoffman, to have the police patrol check the site occasionally throughout the evening and a crew from Station 49 was assigned to periodically evaluate the site and apply road salt, as needed, to any areas where water came in contact with the road.

At approximately 6:00 p.m. three members of the Station 49 crew went to the house where the controlled burn had been completed approximately an hour earlier, in order to spread salt and check on the fire embers. The firefighters covered all areas with salt that were wet. At that time, there was no ice on the roadway. The firefighters returned to the site at approximately 7:30 p.m. until about 8:00 p.m. The firefighters checked the road again at that time. The firefighters noted that “[i]f there was ice, we would have called for a salt truck and notified our shift commander.” However, the firefighters evaluated the scene, and in their discretion, no additional salt was needed.

Approximately two hours later, Christopher Howard was traveling northbound on Bear Creek Road. Despite the presence of a “curve ahead” sign with a suggested speed of 30 mph. for northbound traffic to safely negotiate an upcoming curve, Christopher Howard entered the curve at a speed of approximately 60 mph. Christopher Howard lost control of his vehicle, went off of the road, crashed into a tree and was killed. Just minutes before the accident, Christopher had driven through the same area at a lower speed without incident. The accident occurred when he returned to the curve to try to negotiate it again at a higher speed. Therefore, the curve was safe for travel at a lower rate of speed.

III. ARGUMENT IN SUPPORT OF PROPOSITIONS OF LAW

Proposition of Law No. I: An “obstruction” in the context of R.C. § 2744.03(B) (3) should be given its plain and ordinary meaning of an “obstacle” or “something that blocks” or closes up [a roadway] by obstacle.” This definition comports with the plain and ordinary use of the word “obstruction,” such as would put a political subdivision on notice as to the types of conditions it is obligated to remove from its roadways.

At issue in the present matter is whether the alleged ice and slush on Bear Creek Road constituted an “obstruction” which the Township negligently failed to remove pursuant to the 124th General Assembly’s amendments to Ohio’s Political Subdivision Immunity Statute—R.C. § 2744.03(B)(3). The two courts below came to different conclusions about the legislative intent behind the changes to the statute as well as the definition of “obstruction.”

The trial court, relying on the plain and ordinary meaning of “obstruction” and pre-S.B. 106 judicial precedent defining “obstruction” in the context of R.C. § 2744.03(B)(3), defined “obstacle” as “something that ‘blocks or closes up by obstacle.’” In contrast, the appellate court took a different tact and relied on Attorney General’s Opinions defining the term “obstruction” in the context of R.C. § 5547, and the definition of “nuisance,” to arrive at the following hybrid definition of “obstruction”: “Any object placed or erected in a public roadway that has the potential of interfering with the public’s use of that roadway. An interference occurs when the public’s safe use of the roadway is jeopardized. Moreover, the severity of the interference will depend upon the nature of the object, the object’s size and the object’s location on the roadway.”

It is a “long-standing rule [of] statutory interpretation that ‘where the language of a statute is clear and unambiguous, it is the duty of the court to enforce the statute as written, making neither additions to the statute nor subtractions therefrom.’” *See, Sherwin-Williams v. Dayton Freight Lines, Inc.*, 112 Ohio St.3d 52, 2006-Ohio-6498, 858 N.E.2d 324, 326, ¶14 (citations omitted). However, when a word in a statute is susceptible to more than one reasonable interpretation, “[c]ourts give words in a statute their plain and ordinary meaning unless legislative intent indicates a different meaning.” *Hubbard v. Canton City School Bd. of Edn.*, 97 Ohio St.3d 451, 2002-Ohio-6718, 780 N.E.2d 543, 546, ¶13. Courts may determine a word’s plain and ordinary meaning by reference to a dictionary of common usage. *See, Nix v.*

Heddon, 149 U.S. 304 (1893). The Third Edition of Merriam Webster Dictionary, defines “obstruction” as something that “blocks or closes up by obstacle.” This definition comports with the plain and ordinary use of the word “obstruction”, such as would put a political subdivision on notice as to the types of conditions it is obligated to remove from its roadways.

Prior judicial precedent interpreting the term in question may be used to shed light on the proper meaning of the term so long as the prior judicial precedent relied upon is relevant and related to the text at issue. “When a new legal regime develops out of an identifiable predecessor, it is reasonable to look to the precursor in fathoming the new law.” 85 Ohio Jur.3d Statutes §174 (citing *Johnson v. U.S.*, 529 U.S. 694, 120 S.Ct. 1795, 146 L.Ed.2d 727 (2000)). In addition, “[w]ords used in a statute that have acquired a settled meaning through judicial interpretation and that are used in a subsequent statute upon the same or an analogous subject are generally interpreted in the latter as in the former.” *Id.* (citing *Brenneman v. R.M.I. Co.*, 70 Ohio St.3d 460, 1994 Ohio 322, 639 N.E.2d 425). In *Harp v. Cleveland Heights* (2000), 87 Ohio St.3d 506, 512, 2000-Ohio-467, 721 N.E.2d 1020, this Court cautioned that the comparison of “essentially dissimilar statutes” to arrive at one common meaning results in a “flaw[ed]” analysis. This caution is repeated with reference to the “*in pari materia*” rule of statutory construction, as follows: “[s]tatutes that do not relate to the same subject and that have no common purpose and scope * * * are not *in pari materia* and should not be construed together.” 85 Ohio Jur.3d Statutes §183 (citing *Mutual Bldg. & Inv. Co. v. Efros* (1947), 48 Ohio L. Abs. 633, 75 N.E.2d 75; and *Volan v. Keller* (1969), 20 Ohio App.2d 204, 253 N.E.2d 309).

In addition, where, as here, the term in question relates to the application of liability for a government entity, a court’s interpretation may further be informed by the sovereign immunity canon of construction. This canon of construction provides that any statute waiving sovereign immunity is in derogation of the common law and must be construed narrowly to protect the

government from unintended obligations. *See, Floering v. Roller*, Wood App. No. WD-02-076, 2003-Ohio-5679, at ¶26; *see also, Wilson v. Stark Cty. Dept. of Human Serv.* (1994), 70 Ohio St.3d 450, 453, 639 N.E.2d 105, 108, stating “[t]he manifest statutory purpose of Revised Code Chapter 2744 is the preservation of the fiscal integrity of political subdivisions.”). A court’s interpretation may also be informed by the overall purpose or spirit of the statutory provision at issue. *See, Sherwin-Williams v. Dayton Freight Lines, Inc.*, 112 Ohio St.3d 52, 2006-Ohio-6498, 858 N.E.2d 324, ¶15.

The Appellate Court’s reliance on the Attorney General’s opinion regarding the meaning of the term “obstruction” in the context of R.C. § 5547 is inappropriate because the statutory provision from which the Attorney General drew that meaning is unrelated and inapposite to the code’s provisions regarding political subdivision immunity. Revised Code Section 5547.04, entitled “Removal of obstructions by landowners; consent and approval; signs and advertising”, provides, in relevant part, as follows:

The owner or occupant of lands situated along the highways shall remove all obstructions within the bounds of the highways, which have been placed there by them or their agents, or with their consent.* * * No person * * * shall erect, within the bounds of any highway or on the bridges or culverts thereon, any obstruction without first obtaining the approval of the board in case of highways other than roads and highways on the state highway system and the bridges and culverts thereon. All advertising or other signs and posters erected, displayed, or maintained on, along, or near any public highway, and in such a location as to obstruct, at curves or intersecting roads, the view of drivers using such highway, are obstructions, but this section has no application to crossing signs * * * .

R.C. § 5547.04 (emphasis added). The purpose and subject matter of R.C. § 2744.03(B)(3) and R.C. § 5547.04 are completely unrelated.

Revised Code Section 2744.03(B)(3) is concerned with the liability of political subdivisions for injuries caused by their failure to keep public roads in repair and their negligent failure to remove obstructions from the road, whereas R.C. § 5547.04 is concerned with

obtaining the approval of the board of township trustees to “erect” objects such as “advertising,” “signs,” and “posters” alongside highways. The “obstructions” described in R.C. § 5547, unlike the “obstructions” described in R.C. § 2744.03(B)(3), do not give rise to a duty, on the part of the board of trustees, to promptly remove the “obstructions” for public safety. Instead, the “obstructing” objects contemplated in R.C. § 5547 may remain within the bounds of the highway with the permission of the township’s board of trustees.

The difference between these two statutes is further illustrated by Attorney General William Brown’s comments regarding the proper interpretation of the meaning of “obstruction” in R.C. § 5547.04:

It is fundamental that the intent of the legislature in enacting a particular statute is primarily determined from the language of the statute itself. *Stewart v. Trumbell County Bd. Of Elections*, 34 Ohio St.2d 129, 276 N.E.2d 676 (1973) * * * Other portions of R.C. 5547.04 do * * * give some indication of what was meant by the word ‘obstruction’ in that section * * * The last part of R.C. 5547.04 * * * allows certain ‘obstructions’ to remain in the highways * * * it [is] clear that the General Assembly intended that the word ‘obstruction’ have a very broad meaning * * * In order to give effect to this intention of the General Assembly it appears that ‘obstruction’ is any object that has the potential of including virtually any object within the bounds of a highway that has been ‘placed’ or ‘erected’ there. In other words, an ‘obstruction’ is any object that has the potential of interfering with the highway easement * * * an object could interfere with the easement without hindering the flow of traffic * * * Whether an object interferes with the easement will depend upon the nature of the object, its size, and its precise location. Ohio Op. Atty. Gen. No. 80-043 (emphasis added).

Clearly the definition of “obstruction” applicable to R.C. § 5547.04, which is concerned with “virtually any object” erected alongside highways, cannot be transplanted into the body of R.C. § 2744.03(B)(3), which is concerned with carving out a narrow exception to political subdivision immunity under circumstances where the negligence of the political subdivision in failing to remove an obstruction posing a foreseeable risk of injury to travelers, from a public road (not a berm, shoulder, or right-of-way), actually causes injury to someone or something.

Therefore, the Court of Appeals' reliance on the Attorney General's Opinion regarding the meaning of "obstruction" in R.C. § 5547.04 was clearly inappropriate.

The appellate court's "very broad" interpretation of the term obstruction is also contrary to the rule of statutory construction that exceptions to common law sovereign immunity should be construed narrowly. It is also contrary to the 124th General Assembly's stated purpose of accomplishing tort reform, i.e., limiting the tort liability of political subdivisions, in amending R.C. § 2744.03(B)(3). As stated in the Legislative Service Commission Bill Analysis, the General Assembly's purpose in amending the statute was to:

make[] changes proposed by Am. Sub. H.B. 350 of the 121st General Assembly (the Tort Reform Act) * * * [by] * * * re-enact[ing] the substantive changes to the PSSI Law that were originally proposed by the Tort Reform Act and did not operate because of *Sheward*. Ohio Legislative Service Commission Bill Analysis, General Overall Operation of the Bill, at 2.

To accomplish its stated purpose, the General Assembly adopted the following changes to R.C. § 2744.03(B)(3):

The liability of a political subdivision for failing to keep public roads, highways, streets, avenues, alleys, sidewalks, public grounds, bridges, aqueducts, and viaducts within the political subdivision open, in repair, and free from nuisance is repealed and replaced with liability for injury, death, or loss to person or property caused by a negligent failure to keep "**public roads**" (defined to mean public roads, highways, streets, avenues, alleys, and bridges) within the political subdivision in repair and other negligent failure to remove obstructions from such "public roads * * *". See, Ohio Legislative Serv. Comm. Bill Analysis, Re-enactment of Am. Sub. H.B. 350 provisions, at 10 (emphasis added).

The Court of Appeals effectively ignored the substitution of the word "obstruction" for "nuisance" in its interpretation. More specifically, the Court of Appeals concluded that the purpose of the General Assembly in making the above changes was to limit political subdivision's duties to the "paved and traveled portion of the roadways themselves," but not to otherwise change the nuisance standard in any material way. In fact, the definition of nuisance under the prior version of R.C. § 2744.03(B)(3)—"conditions that directly jeopardize the safety

of traffic on the highway”—is not very different from the Court of Appeals’ definition of obstruction—an interference that jeopardizes the public’s safe use of the roadway. *Manufacturers National Bank v. Erie County* (1992), 63 Ohio St.3d 318, 587 N.E.2d 819.

Although the Court of Appeals cited a pre-amendment case, *Harp v. Cleveland Heights*, 87 Ohio St.3d 506, 2000-Ohio-467, 721 N.E.2d 1020, to support its conclusion that, because the duty to keep roads free from “nuisance” was broader than the duty to remove obstructions from public roads, the term “obstruction” should be limited to objects “placed” or “erected” on roadways—the court refused to consider pre-amendment caselaw defining “obstruction” according to its plain and ordinary meaning. Instead, the court reasoned that the pre-amendment cases cited by the trial court had no relevance to the interpretation of the statute as amended because pre-amendment cases’ definition of “obstruction” included objects overhanging or otherwise blocking the roadway, but not necessarily located on the roadway, whereas the amended statute, in the appellate court’s estimation, limited the application of the term “obstruction” to objects “placed” or “erected” on the roadway.

By ignoring pre-amendment judicial precedent, the Court of Appeals ignored a wealth of relevant information regarding the meaning of “obstruction,” including how “obstruction” differs from the broader category of “nuisance.” As a result, the Court of Appeals failed to consider that neither ice nor slush possess the characteristics of an “obstruction.” In *Manufacturer’s Natl. Bank v. Erie Cty. Rd. Comm.* (1992), 63 Ohio St.3d 318, 587 N.E.2d 819, this Court characterized a cornfield growing in a right-of-way, which rendered the regularly traveled portions of the highway unsafe for the usual and ordinary course of travel, both a permanent obstruction to visibility and a nuisance. *Id.* at paragraph one of the syllabus. The *Manufacturer’s* decision recognized an obstruction as something that “blocked” a driver’s line of sight on the

roadway. Similarly, in *Williamson v. Pavlovich* (1989), 45 Ohio St.3d 179, 182, 543 N.E.2d 1242, this Court listed the following examples of actionable “obstructions”:

In other jurisdictions, items such as boulders, building materials, dirt piles or ridges, lumber piles, paving materials, pipes, rubbish, stepping blocks, and tree limbs projecting into the street at a low angle were all determined to be actionable obstructions * * *.

The *Pavlovich* court also cited with approval the following description of actionable obstructions: “when the occupation [of a street or highway by an obstruction] is so protracted as to possess an element of permanency * * * its obstructive character makes it the duty of the municipal authorities to remove it.” *Id.* at 182. (quoting *Frank v. Warsaw* (1910), 198 N.Y. 463, 469, 92 N.E. 17). In sum, obstructions were defined in prior judicial precedent as objects that physically “blocked” or closed up the roadway, or objects that substantially “blocked” a driver’s view of the roadway.

The definition used by courts prior to the 2003 amendment is consistent with the plain and ordinary meaning of the word “obstruction”—“to block[] or close[] up.” *Merriam Webster Dictionary*, Third Edition, 2000. This definition is also consistent with the canon of statutory interpretation requiring courts to construe statutes in derogation of the common law narrowly, and with the 124th General Assembly’s “tort reform” purpose in substituting “obstruction” for “nuisance”. This definition limits political subdivision liability to their failure to remove obvious objects—i.e., objects that physically block or close up the roadway such as dirt piles, rubbish, tree limbs, and building materials.

The definition adopted by the Court of Appeals in this case, however, imposes liability on political subdivisions for their failure to remove any object placed or erected (by anyone) in a public roadway that has the potential of interfering with the public’s use of that roadway. Besides creating additional ambiguity regarding what constitutes “placed” or “erected,” the

foregoing definition imposes liability on political subdivisions for almost anything that has even the potential of interfering with the public's use of the roadway—including hard to discover objects like ice, slush, oil, water, gravel and road debris.

Proposition of Law II: The duty of a political subdivision to remove an obstruction from a public road extends only to objects which block or close off the roadway for usual and ordinary travel.

The overbreadth of the Court of Appeals' definition is further compounded by their decision to abandon *Haynes v. Franklin*, 95 Ohio St.3d 344, 2002-Ohio-2334, 767 N.E.2d 1146, which stated political subdivisions were immune from liability pursuant to R.C. § 2744.03(B)(3) unless the condition that injured the plaintiff created a danger for ordinary traffic on the regularly traveled portion of the road. *Id.* at ¶18. The Court of Appeals reasoned that *Haynes* was only applicable to claims for injuries arising out of a political subdivision's failure to remove a nuisance. However, some of the earliest cases adopting the "ordinary modes of travel" requirement did not predicate its application on the existence of a nuisance, but rather on the duty of a political subdivision. The reasoning underlying the requirement was that a political subdivision should not be held liable so long as its roads were "kept in a reasonably safe condition for the ordinary modes of travel," explaining:

[i]t is impossible to so conceive a plan of construction, and to so carefully maintain it, that injuries may not happen on the streets to heedless person * * * therefore cities and villages * * * are held only to the exercise of reasonable caution and foresight in providing for the use of the streets in the ordinary modes, and with ordinary care, by the traveler. *City of Dayton v. Taylor's Adm'r* (1900), 62 Ohio St. 11, 56 N.E. 480, 481.

This Court later had occasion to examine whether the City of Cleveland should be held liable from injuries a plaintiff sustained after he lost control of a team of horses and ran, at a high rate of speed, in an uncontrolled manner, into a defect in the street, in *Drake v. City of E. Cleveland* (1920), 101 Ohio St. 111, 127 N.E. 469. This Court stated that the duty of a political

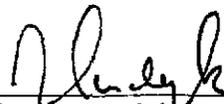
subdivision to keep its street in a reasonably safe condition only “exists with respect to such persons as travel the ways in the usual and ordinary modes” and not to a person injured in large part from his failure to control a team of runaway horses.

There is no reason for the courts to discontinue the application of this “ordinary and usual modes” requirement because it relates to a political subdivision’s duty and what constitutes adequate care, not to what constitutes a nuisance. Without this requirement, the Court of Appeals’ definition of obstruction would apply to allow a plaintiff to sue a municipality, township or county for failure to remove an obstruction regardless of whether the plaintiff was traveling in an ordinary and usual manner on the roadway when his or her injury occurred. The facts underlying this suit are a perfect example of the absurdity which results from such a rule. As noted by the trial court, Christopher Howard was “traveling 30 mph in excess of the posted cautionary speed while entering a curve at night,” he was not, in other words, traveling in a usual and ordinary manner. It is “a cardinal rule of statutory construction” that “courts must strive to avoid absurd or unreasonable results.” *Hubbard v. Canton City School Bd. of Edn.* at ¶24, *supra*. Under these circumstances, immunity should apply to shield townships and counties from liability. Thus, the *Haynes* analysis should not be discarded, but rather maintained to determine what duty may be owed in a negligence claim, such as the one here, against a political division.

IV. CONCLUSION

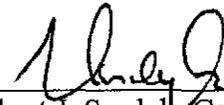
For the reasons discussed above, this case involves matters of public and great general interest. The Appellants request that this Court grant jurisdiction and allow this case so that the critical issues presented in this case will be reviewed on the merits.

Respectfully submitted,

By: 
Robert J. Surdyk, Counsel of Record
Sup. Ct. No. 0006205
COUNSEL FOR APPELLANTS

CERTIFICATE OF SERVICE

The undersigned certifies that a copy of this Memorandum in Support of Jurisdiction was sent by ordinary U.S. mail to Mr. John Smalley, 131 North Ludlow Street, Suite 1400, Dayton, Ohio 45402, Attorney for Appellee Donald Howard, on this 10th day of May, 2007.


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APPENDIX

Opinion of the Montgomery County Court of Appeals (March 30, 2007).....1
Judgment Entry of the Montgomery County Court of Appeals (March 30, 2007).....19
Opinion of Montgomery County Common Pleas Court (January 17, 2006) 21

The facts underlying this appeal are set out in the trial court's decision granting Township summary judgment in this matter. The facts are as follows:

"On 24 January 2004, Defendant, Miami Township Fire Department (hereinafter 'Township') conducted a live fire training evolution at 5460 Bear Creek Road, Miamisburg, Ohio. As part of the planning for this live fire training, the Fire Department notified various environmental agencies and obtained the requisite documents and inspections. Additionally, several of the Lieutenants and Deputy Chief Queen created a training plan that included the type and location of the fire engines and other equipment to be used; the amount of water to have on hand at the burn; the location of the crews; and the manner in which the building would be burned.

"The training evolution began at approximately 9:00 a.m. and continued until approximately 2:30 p.m. . [sic] The training consisted of a series of several live fires and involved different crews from the Fire Department. At the conclusion of the training the remaining portion of the structure was systematically burned such that as the structure burned it fell into the basement. At approximately 4:30 p.m. the structure had dropped into the basement and the majority of it was consumed. The equipment was removed from the burn site and placed back into service. The Township dispatch center was notified that the training evolutions were complete. Deputy Chief Hoffman, the fire deputy chief on duty, requested that the police patrol the cite [sic] occasionally throughout the night. Additionally, a crew from Fire Department 49 was assigned to periodically visit the site to ensure that the fire was out and to apply road salt as needed.

"At about 6:00 p.m. three members from Station 49 visited the burn site to check the embers from the fire and to spread salt on the road where water ran down from the

burnsite and onto the road. Two of the firefighters each testified in his deposition that they spread a five gallon bucket of salt on the affected area of the roadway. They further stated that there was no ice on the roadway at that time. The firefighters returned to the site at about 7:30 p.m. and remained there for about one half hour, again checking the embers from the fire and checking the road for water and ice. Firefighter Pirk testified that had there been ice on the road at that time 'we would have called for a salt truck and notified our shift commander.' No salt was added to the road at that time.

"In addition to the periodic visits to the burn site by the firefighters, Miami Township Police Officer Aronoff ('Aronoff') was patrolling, among other roads, Bear Creek Road. He traveled on Bear Creek Road at approximately 5:00 p.m. and again at about 9:00 p.m. During the 9:00 p.m. pass on Bear Creek Road, Aronoff conducted a traffic stop within a few hundred feet of the burn site.

"At approximately 9:50 p.m. Christopher Howard and a friend, Robin Butler (non-party; 'Butler'), were traveling in Howard's car, northbound on Bear Creek Road. Howard was the driver of the car. After entering the left hand curve just past the burn site, Howard lost control of the car, crashed into a tree and died as a result of the accident. Butler was able to free herself from the wreckage and was transported to the hospital.

"It is important to understand the layout of the burn site and its physical relationship to Bear Creek Road. Bear Creek Road is characterized by the police report attached to several of the depositions as a 'gently rolling rural road with several curves.' The un-posted speed limit on a rural road is 55 mph; however, there are several yellow caution signs posted on Bear Creek Road, indicating the type of curve that lies ahead and the recommended speed at which the curve should be negotiated. One such sign is located

just north of the burn site driveway and indicates a sharp curve ahead and recommends a speed of 30 mph. The burn site itself sits on a hill, accessed by a steep drive from Bear Creek Road. The driveway access to the burn site is just before Bear Creek Road [sic] curves to the left, if one is traveling north on Bear Creek Road.

"Aronoff was dispatched to the accident and was the first police officer to arrive at the scene. He remembers that the road was wet; that water was pooling on the side of the road at the bottom of the burn site; and that he pointed the water out to another police officer, Sgt. Fitzgerald ('Fitzgerald') because he was concerned that the water could freeze.

"Sergeant Scott C. Fitzgerald ('Fitzgerald') knew that the Fire Department was going to conduct a controlled burn on 24 January 2004. He was on duty that day, but did not visit the burn site until he was dispatched to the accident scene. Upon arriving at the scene Fitzgerald questioned Aronoff about the accident. Aronoff pointed out the water runoff from the burn site, down the driveway, onto the roadway. Fitzgerald testified that he observed, water, some ice, and some slush on the roadway, as well as fresh water flowing onto the roadway.

"Sergeant Rex A. Thompson ('Thompson'), was called at home to report to the crash site. He arrived at 10:19 p.m. He was responsible for collecting evidence to reconstruct the accident. Included in the data he collected was information from the sensing diagnostic module, air bag sensor ('SDM'). Thompson testified at his deposition that the information collected from SDM indicated that Howard's vehicle was traveling at 60 mph five seconds prior to the crash. Thompson further testified, that, from viewing pictures taken of the roadway the night of the accident, the road was wet and possibly slushy, but he could not tell from the pictures whether the road was icy.

"Howard's Response contains an affidavit from his expert witness, accident reconstructions Fred Lickert ('Lickert'). Lickert states that '[i]t was not merely the speed of the plaintiff's vehicle that made this condition unsafe. Although the speed at which Mr. Howard attempted to take this turn was careless, it did not change the fact that this roadway presented a hazardous condition to ordinary users of the roadway.' Lickert further states that it is possible for a vehicle, under optimal conditions, to negotiate the curve at speeds up to 70.9 mph. Lickert states that [sic] is his 'professional opinion, with a reasonable certainty, that the actions and inactions of the Miami Township Fire Department in failing to address the hazardous condition of the roadway were a proximate and contributing cause of this fatal accident.' Lickert bases this opinion on his review of the depositions filed in this case and his personal observations of the scene of the accident on 29 January 2004; 10 February 2004 and 2 June 2004.

"Howard's parents filed the instant action against Miami Township Fire Division and Miami Township claiming that the Township, through the actions of its employees was negligent and, as such, is liable for Howard's death. Township filed its Motion for Summary Judgment arguing that it is immune from liability pursuant to O.R.C. 2744, *et seq.*"

The trial court granted summary judgment in favor of Township. According to the court, the water and ice on Bear Creek Road did not amount to an "obstruction" as contemplated by R.C. 2744.02(B)(3). This statute imposes liability upon political subdivisions "for injury, death, or loss to person or property caused by their negligent failure to keep public roads in repair and other negligent failure to remove obstructions from public roads, * * * ." The court found that "obstruction" should be given its ordinary definition – something that "blocks or closes up by obstacle." In reaching this conclusion, the court

relied on the word's application in cases decided under former R.C. 2744.02(B)(3), which held political subdivisions "liable for injury, death or loss to person or property caused by their failure to keep public roads * * * free from nuisance * * * ." (Emphasis added.) In those cases, "certain obstructions to a driver's ability to see the road could constitute a nuisance." (Decision and Entry at 14, citing *Manufacturer's Natl. Bank of Detroit v. Erie Cty. Road Comm.* (1992), 63 Ohio St.3d 318, 587 N.E.2d 819. Since passage through or ability to see Bear Creek Road had not been blocked by any obstacle, the court determined that the water and ice on the road did not amount to an "obstruction" by definition or by application. Therefore, the trial court held that Township was not liable for Christopher Howard's death.

On appeal, Howard raises one assignment of error: the trial court erred in finding that Township was immune from suit as a matter of law pursuant to R.C. 2744, et seq. As an appellate court, our review of trial court decisions on summary judgment is de novo, which means that "[w]e apply the same standard as the trial court, viewing the facts in the case in a light most favorable to the non-moving party and resolving any doubt in favor of the non-moving party." *Brown v. Dayton*, Montgomery App. No. 21542, 2006-Ohio-6816, at ¶5 (citations omitted). Trial courts will appropriately grant summary judgment where they find "(1) that there is no genuine issue as to any material fact; (2) that the moving party is entitled to judgment as a matter of law; and (3) that reasonable minds can come to but one conclusion, and that conclusion is adverse to the party against whom the motion for summary judgment is made, who is entitled to have the evidence construed most strongly in his favor." *Harless v. Willis Day Warehousing Co.* (1978), 54 Ohio St.2d 64, 66, 375 N.E.2d 46.

Upon review of the record, we find that the trial court erred in granting Township's Motion for Summary Judgment. Under R.C. 2744.02(B)(3), "obstruction" should be construed to include any object that has the potential of interfering with the safe passage of motorists on public roads. Therefore, pursuant to the statute, Township is not entitled to judgment as a matter of law where the ice and water mixture that formed on Bear Creek Road on the night of Christopher Howard's accident constituted an obstruction. This obstruction was caused by water flowing from the site of the live fire training evolution conducted earlier that day by Township. Furthermore, we find that a genuine issue of material fact exists as to whether Township acted negligently in failing to remove the icy mixture from the road. Finally, Township will not have a defense to liability under R.C. 2744.03(A)(3) or (5). It is not an exercise of a political subdivision's discretion to eliminate an obvious potential hazard from public roads. Accordingly, the judgment of the trial court will be reversed and the cause remanded for further proceedings.

I.

Under his sole assignment of error, Howard contends that the trial court erred by finding Township immune from liability pursuant to R.C. 2744.02(B)(3). R.C. Chapter 2744, also known as the Political Subdivision Tort Liability Act, requires a three-tiered analysis to determine whether a political subdivision should be immune from liability. *Sherwin Williams Co. v. Dayton Freight Lines*, 161 Ohio App.3d 444, 2005-Ohio-2773, 830 N.E.2d 1208, at ¶9. First, under R.C. 2744.02(A)(1), political subdivisions are generally not liable in damages when performing a governmental or proprietary function. *Id.* (citation omitted). After establishing immunity, the next tier of the analysis turns to whether one of the

exceptions to immunity set forth in R.C. 2744.02(B)(1) through (5) applies. *Id.* Finally, political subdivisions may overcome the exceptions and have immunity reinstated if they demonstrate that one of the defenses contained in R.C. 2744.03 applies. *Id.*

The first issue that we must address is whether one of the exceptions to immunity, specifically R.C. 2744.02(B)(3), imposes liability upon Township for Christopher Howard's death. R.C. 2744.02(B)(3) states that "[e]xcept as otherwise provided in section 3746.24 of the Revised Code, political subdivisions are liable for injury, death, or loss to person or property caused by their negligent failure to keep public roads in repair and other negligent failure to remove obstructions from public roads * * *." This current version of subsection (B)(3) was part of Senate Bill 106, which became effective in April 2003. Prior to that date, R.C. 2744.02(B)(3) read, "Except as otherwise provided in section 3746.24 of the Revised Code, political subdivisions are liable for injury, death, or loss to person or property caused by their failure to keep public roads, highways, streets, avenues, alleys, sidewalks, bridges, aqueducts, viaducts, or public grounds within the political subdivisions open, in repair, and free from nuisance, * * *." In amending the statute, the General Assembly limited the scope of political subdivisions' responsibility to public roads only, which it defined as "public roads, highways, streets, avenues, alleys, and bridges within a political subdivision. 'Public roads' does not include berms, shoulders, rights-of-way, or traffic control devices * * *." R.C. 2744.01(H).

Furthermore, the General Assembly replaced "free from nuisance" with "other negligent failure to remove obstructions." Under former 2744.02(B)(3), courts broadly interpreted "nuisance" to be "conditions that directly jeopardize the safety of traffic on the highway." *Manufacturer's Natl. Bank of Detroit*, 63 Ohio St.3d at 322. This included

conditions outside of the paved surface of roadways, as well as conditions on roads themselves. For example, a nuisance could be a permanent obstruction to visibility not on a public road, such as growing crops, that made it unsafe for the usual and ordinary course of travel within a highway right-of-way. *Id.* at 323. See, also, *Harp v. Cleveland Heights* (2000), 87 Ohio St.3d 506, 721 N.E.2d 1020 (holding that a defective tree limb threatening to fall on a public roadway, but not obstructing the roadway, constitutes a nuisance under R.C. 2744.02(B)(3)); *Sherwin Williams Co. v. Dayton Freight Lines*, 161 Ohio App.3d 444, 2005-Ohio-2773, 830 N.E.2d 1208 (finding that smoke emanating from a burn site and obstructing the vision of drivers on a nearby interstate constituted a nuisance pursuant to R.C. 2744.02(B)(3); *McQuaide v. Bd. of Commrs. of Hamilton Cty.*, Hamilton App. No. C-030033, 2003-Ohio-4420, at ¶¶12-13 (finding that a four-degree incline in a right-of-way did not constitute a nuisance where prior accidents cited by the appellant occurring in the general area of the incline did not establish that the incline caused the accidents or that the incline could not be traversed safely in the course of ordinary travel). By amending R.C. 2744.02(B)(3), it is reasonable to conclude that the General Assembly was responding to these cases in which the duty of political subdivisions to care for their public roadways extended beyond the paved and traveled portion of the roadways themselves. While a nuisance may come from outside of the boundaries of the roadway, an "obstruction" implies an object located on the roadway, over which the political subdivision has direct control for taking action to correct. See *Harp*, 87 Ohio St.3d at 512 (interpreting the language "free from nuisance" in former R.C. 2744.02(B)(3) to mean that a political subdivision has a greater duty of care beyond merely removing obstructions from public roads). However, neither R.C. 2744 et seq. nor case law dealing with this statute has

defined the term "obstruction."

In the event that statutes fail to define the intended meanings of words therein, the words must be given their " 'plain and ordinary meaning, unless legislative intent indicates otherwise.' " *State ex rel. Montgomery Cty. Pub. Defender v. Rosencrans*, Montgomery App. No. CA20416, 2005-Ohio-6681, at ¶18 (citation omitted). The plain and ordinary meaning of "obstruction" is "(1) One that obstructs: OBSTACLE; (2) An act or instance of obstructing; (3) The act of impeding or an attempt to impede the conduct of esp. legislative business." Webster's II New College Dictionary (1995) 755. "Obstruct" is defined as "(1) To clog or block (a passage) with obstacles; (2) To impede, retard, or interfere with <obstruct legislation>; (3) To cut off from sight." *Id.* Several courts have recently relied on this definition of "obstruction" in determining the extent of political subdivisions' liability pursuant to R.C. 2744.02(B)(3). See *Parker v. Upper Arlington*, Franklin App. No. 05AP-695, 2006-Ohio-1649, at ¶14 (finding that stop signs, painted crosswalks and sidewalk ramps do not "block up" or present "an obstacle or impediment to passing" through the public roadways); *Huffman v. Bd. of Cty. Comms.*, Columbiana App. No. 05 CO 71, 2006-Ohio-3479, at ¶53 (interpreting "obstruction" to include a fallen bridge).

We also find it instructive to examine the General Assembly's use of the word "obstruction" in other contextually similar provisions of the Revised Code. R.C. 5547.04 provides in pertinent part that "[t]he owner or occupant of lands situated along the highways shall remove all obstructions within the bounds of the highways, which have been placed there by them or their agents, or with their consent. * * * No person, partnership, or corporation shall erect, within the bounds of any highway or on the bridges or culverts thereon, any obstruction without first obtaining the approval of the board [of county

commissioners] in case of highways other than roads and highways on the state highway system and the bridges and culverts thereon.”

On several occasions, the Ohio Attorney General has interpreted the meaning of “obstruction” within R.C. 5547.04. Specifically, in response to whether this section authorizes a county to remove foreign materials blocking a side ditch within the county’s right-of-way that interfere with the free flow of water and impair the function of the county road, the Ohio Attorney General provided:

“In putting these parts of R.C. 5547.04 together, it becomes clear that the General Assembly intended that the word ‘obstruction’ have a very broad meaning. In order to give effect to this intention of the General Assembly, it appears that ‘obstruction’ must be defined so as to include virtually any object within the bounds of a highway that has been ‘placed’ or ‘erected’ there. In other words, an obstruction is any object that has the potential of interfering with the highway easement. An object could interfere with the easement without hindering the flow or traffic or the construction or maintenance of the highway. Whether an object interferes with the easement will depend upon the nature of the object, its size, and its precise location.” 1980 Ohio Atty.Gen.Ops. No. 80-071, at 2-282. See, also, 1980 Ohio Atty.Gen.Ops. No. 80-043, at 2-181 (finding that pipes and conduits in a township road constitute an “obstruction,” whereby a company seeking to install such pipes and conduits must first receive approval from the board of county commissioners).

In light of the foregoing definitions, we find that “obstruction,” as it is used in R.C. 2744.02(B)(3), should be interpreted to mean any object placed or erected in a public roadway that has the potential of interfering with the public’s use of that roadway. An

interference occurs when the public's safe use of the roadway is jeopardized. Moreover, the severity of the interference will depend upon the nature of the object, the object's size, and the object's location on the roadway.

In the present action, Howard contends that an icy, slushy, and watery mixture at the "S" curve on Bear Creek Road created by Township's live fire exercise obstructed the safe passage of the road by his son on the night of his death. In contrast, Township argues that the uncontroverted evidence established that the ice (if it was present) did not constitute an "obstruction" on the roadway. Township argues that "obstruction" instead clearly contemplates something which physically blocks the road preventing cars from passing.

We agree with Howard based on our interpretation of the meaning of "obstruction." "R.C. 2744.02(B)(3) imposes on political subdivisions a duty of care to keep highways open and safe for public travel." *Manufacturer's Natl. Bank of Detroit*, 63 Ohio St.3d at 321. See, also, *Floering v. Roller*, Wood App. No. WD-02-076, 2003-Ohio-5679, at ¶27 (interpreting the current version of R.C. 2744.02(B)(3) as imposing the same duty of care on political subdivisions as it did when the statute's language included "free from nuisance.") The icy mixture was the direct result of the run-off of water from Township's live-burn exercise. Clearly, an icy mixture on a public roadway has the potential of interfering with the public's safe use of the roadway by creating an opportunity for loss of traction and/or loss of control of a vehicle. In this instance, the severity of the interference was substantial, as the ice and water obstruction covered the entire width of the roadway for approximately 10 to 15 yards, at a point where the road makes a sharp curve to the left when traveling north. Thus, we find that Township was not entitled to judgment as matter

of law under R.C. 2744.02(B)(3), where the political subdivision had a duty of care to remove this obstruction from the road.

II.

The remaining issue at this point is whether Township *negligently* failed to remove the obstruction from Bear Creek Road. The trial court did not address this issue except to state that Howard could not demonstrate that the water and ice was a nuisance or an obstruction under the analysis set forth in *Haynes v. Franklin*, 95 Ohio St.3d 344, 2002-Ohio-2334, 767 N.E.2d 1146, at ¶18. To withstand a motion for summary judgment under *Haynes*, the plaintiff must establish that “the condition alleged to constitute a nuisance creates a danger for ordinary traffic on the regularly traveled portion of the road” and that the cause of the condition was not “a decision regarding design and construction.” *Id.* According to the trial court, because Christopher Howard was traveling 30 mph in excess of the posted cautionary speed at the time of the accident, he was not traveling in the “usual and ordinary manner.” Therefore, the court determined that Howard could not satisfy the first prong of the *Haynes* analysis.

We find the trial court’s application of *Haynes* to be erroneous. In this case, the parties are not attempting to demonstrate that the ice and water on the road constituted a nuisance under former R.C. 2744.02(B)(3). Instead, they are arguing that the condition constituted an “obstruction.” Under the amended version of R.C. 2744.02(B)(3), Township will be liable for the death of Christopher Howard if found to have negligently failed to remove the obstruction from Bear Creek Road. Therefore, the correct question to ask is whether Township acted negligently in failing to remove the ice and water from the road.

See *Huffman v. Bd. of Cty. Commrs.*, Columbiana App. No. 05 CO 71, 2006-Ohio-3479, at ¶60. As to this question, we find that there is a genuine issue of material fact.

The record indicates that once Township noticed water was flowing from the burn site onto Bear Creek Road, Deputy Chief Hoffman ordered firefighters Keyser, Pirk and Lieutenant Haney to monitor the roadway's condition. Hoffman also directed these firefighters to pick up salt from Station 49 and apply it to the road. Following these directions, the firefighters spread a five-gallon bucket of salt mainly in front of the driveway on Bear Creek Road leading to the burn site. They applied the salt to a 20-foot portion of the road that was wet. According to Pirk, he did not notice any ice on the road at that time. However, knowing that the temperature would drop throughout the night, Keyser suggested calling a salt truck. No salt truck was called to the scene that night.

The firefighters checked the burn site again approximately one hour later. At this time, they checked the burning embers left over from the training exercise, but they did not check the condition of the roadway. Firefighter Pirk stated that had there been ice on the road, they would have called for a salt truck and notified their shift commander, Hoffman.

The accident happened at approximately 9:50 p.m. The police report written by Officer P.M. McCoy provides that Christopher Howard and Robyn Butler were traveling northbound on Bear Creek Road at a speed of 60 mph. The section of the road at which the accident took place curves to the left, and a sign indicating "curve ahead" and a suggested speed of 30 mph is posted there. The report indicates that Howard lost control of his vehicle and slid up a grass covered berm before vaulting into the air. The roof of the vehicle impacted a tree, causing it to collapse and crush Howard. The passenger side was not crushed by the impact, which allowed Butler to free herself from the car. At the end of

the report, McCoy stated that he could not "determine, with any certainty, that the condition of the roadway surface, i.e. ice and/or water, caused [Howard] to lose control." (Fitzgerald Dep., Ex. 1, p. 8.)

Officer Aronoff, who was called to the scene of the accident, reported that he noticed icy conditions on the roadway. Likewise, Sergeant Fitzgerald testified that he saw ice and water on approximately 10 to 15 yards of the road: "It was some areas were wet, some areas frozen, some areas you could walk through, kind of splashed a little bit like it was slushy. It's almost like it wasn't conforming to each other. It was just like – it was just kind of strange. You'd have maybe a slushy patch here, free flowing water over here, and icy over here (indicating)." (Id. at 14.)

Miami Township Police Department's accident reconstructionist, Sergeant R.A. Thompson, stated in his report that Howard failed to negotiate the curve as a result of the road being "[s]tricken with water, rock salt, and some ice." (Id., Ex. 1, p. 22.) Furthermore, Howard's reconstructionist, Fred Lickert, testified that "[t]he running water, slush, and ice on [Bear Creek Road] created an unsafe condition for ordinary users of the roadway, * * * ." (Lickert Aff. at ¶8.)

Based on the foregoing deposition and affidavit evidence before the trial court, we find that a genuine issue of material fact exists as to whether Township negligently failed to remove the icy mixture from Bear Creek Road. Insofar as we have determined that the ice and water residue constitutes an "obstruction" for purposes of R.C. 2744.02(B)(3), and that a genuine issue of material fact exists as to whether Township acted negligently in failing to remove that obstruction, we remand this matter to the trial court for further proceedings.

III.

Although it held that Township was entitled to judgment as a matter of law because the ice and water mixture did not constitute an "obstruction" per R.C. 2744.02(B)(3), the trial court nonetheless found that the discretionary defenses set forth in R.C. 2744.03 would reinstate Township's immunity should an exception apply. As stated above, political subdivisions found to be liable under one of the exceptions in R.C. 2744.02 may be granted immunity if they can successfully demonstrate that one of the defenses contained in R.C. 2744.03 applies. Township argues that even if an exception to immunity applied to this case, the live fire exercise and "clean up" involved a planning function embodying the making of basic policy decisions that required a high degree of discretion to which immunity would attach. This defense is embodied in R.C. 2744.03(A)(3) and (5). Subsection (A)(3) provides that "[t]he political subdivision is immune from liability if the action or failure to act by the employee involved that gave rise to the claim of liability was within the discretion of the employee with respect to policy-making, planning, or enforcement powers by virtue of the duties and responsibilities of the office or position of the employee." Subsection (A)(5) states that "[t]he political subdivision is immune from liability if the injury, death, or loss to person or property resulted from the exercise of judgment or discretion in determining whether to acquire, or how to use, equipment, supplies, materials, personnel, facilities, and other resources unless the judgment or discretion was exercised with malicious purpose, in bad faith, or in wanton or reckless manner."

In *Franks v. Lopez* (1994), 69 Ohio St.3d 345, 632 N.E.2d 502, the Ohio Supreme Court stated that “[o]verhanging branches and foliage which obscure traffic signs, malfunctioning traffic signals, signs which have lost their capacity to reflect, or even physical impediments such as potholes, are easily discoverable, and the elimination of such hazards involves no discretion, policy-making or engineering judgment. The political subdivision has the responsibility to abate them and it will not be immune from liability for its failure to do so.” (Emphasis added.) *Id.* at 349. See, also, *Huffman v. Bd. of Cty. Comms.*, Columbiana App. No. 05 CO 71, 2006-Ohio-3479, at ¶¶57-60 (refusing to find that a decision to barricade a fallen bridge called for a discretionary decision). Furthermore, the First District has found that when an exception to liability exists under R.C. 2744.02(B)(3), a city’s exercise of some discretion will still not abrogate its duty to keep its streets free from a nuisance. *Dillard v. Cincinnati*, Hamilton App. No. C-050045, 2005-Ohio-6819, at ¶17. Although the court reached its decision under the parameters of former R.C. 2744.02(B)(3), the general contention is that political subdivisions may not thwart liability where they have a duty to keep public roadways safe for travel. This would certainly apply pursuant to the amended version of the statute, which calls for political subdivisions “to remove obstructions from public roads.”

Here, Township asserts that planning and implementing the live fire training evolution on Bear Creek Road involved its personnel exercising their discretion in “the preparation and in how they used their people and equipment.” (Appellee’s Mot. for Summ. J. at 5.) Specifically, Township contends that it exercised its discretion in assigning fire and police personnel and equipment to monitor the burn site and spread salt on the road when necessary. Based on *Franks*, however, we find the decision to spread salt

across the road not to be one which calls for discretion, policy-making or engineering judgment, but to be a reaction to an obvious physical impediment, i.e., ice forming on a paved surface. Township had a duty to remove this obstruction from Bear Creek Road, and spreading salt on the potentially hazardous icy mixture was simply the manner in which Township attempted to fulfill its duty. Therefore, we find that the trial court incorrectly concluded that the discretionary defenses set forth in R.C. 2744.03(A)(3) and (5) would reinstate Township's immunity should the trier of fact determine that Township negligently failed to remove an obstruction from a public road per R.C. 2744.02(B)(3).

Accordingly, Howard's single assignment of error is sustained. The judgment of the trial court is reversed, and the cause is remanded for further proceedings consistent with this opinion and the law.

Judgment reversed and cause remanded.

.....

FAIN and GRADY, JJ., concur.

Copies mailed to:

John A. Smalley
Robert J. Surdyk
Hon. John W. Kessler

IN THE COURT OF APPEALS OF OHIO
SECOND APPELLATE DISTRICT
MONTGOMERY COUNTY

DONALD D. HOWARD

Plaintiff-Appellant

v.

MIAMI TOWNSHIP FIRE DIVISION

Defendant-Appellee

Appellate Case No. 21478

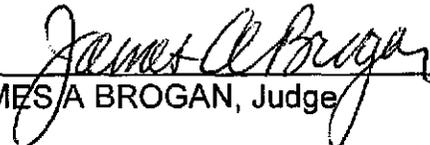
Trial Court Case No. 04-CV-5294

(Civil Appeal from
Common Pleas Court)

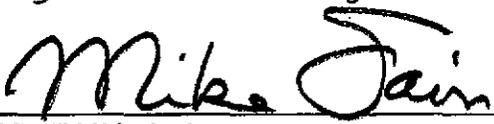
FINAL ENTRY

Pursuant to the opinion of this court rendered on the 30th day
of March, 2007, the judgment of the trial court is **Reversed** and this cause
Remanded for proceedings consistent with this opinion.

Costs to be paid as stated in App.R. 24.

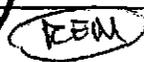


JAMES A. BROGAN, Judge



MIKE FAIN, Judge



THOMAS J. GRADY, Judge 

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COURT OF COMMON PLEAS

2005 JUN 17 10:28:03

JAMES E. WEAVER
CLERK OF COURTS
MONTGOMERY CO., OHIO

**IN THE COMMON PLEAS COURT OF MONTGOMERY COUNTY, OHIO
CIVIL DIVISION**

DONALD HOWARD, ETC et. al,	:	Case No. 2004 CV 05294
Plaintiffs,	:	(Judge John W. Kessler)
v.	:	
MIAMI TOWNSHIP, DIVISION OF FIRE, et. al.,	:	DECISION, ORDER AND ENTRY SUSTAINING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT
Defendant.	:	

This matter is before the Court on "Defendants' Motion for Summary Judgment" (hereinafter "Township's Motion") filed on 21 June 2005; "Plaintiffs' Response Contra to Defendants' Motion for Summary Judgment" (hereinafter "Howard's Response") filed on 22 August 2005; and "Defendants' Reply in Support of its Motion for Summary Judgment" (hereinafter "Township's Reply") filed on 13 September 2005. For the reasons set forth below, Township's Motion for Summary Judgment is **SUSTAINED**.

I. FACTS

On 24 January 2004, Defendant, Miami Township Fire Department (hereinafter "Township") conducted a live fire training evolution at 5460 Bear Creek Road, Miamisburg, Ohio. As part of the planning for this live fire training, the Fire Department notified various environmental agencies and obtained the requisite documents and inspections. Additionally, several of the Lieutenants and Deputy Chief Queen created a training plan that included the

type and location of the fire engines and other equipment to be used; the amount of water to have on hand at the burn; the location of the crews; and the manner in which the building would be burned.

The training evolution began at approximately 9:00 a.m. and continued until approximately 2:30 p.m. . The training consisted of a series of several live fires and involved different crews from the Fire Department. At the conclusion of the training the remaining portion of the structure was systematically burned such that as the structure burned it fell into the basement. At approximately 4:30 p.m. the structure had dropped into the basement and the majority of it was consumed. The equipment was removed from the burn site and placed back into service. The Township dispatch center was notified that the training evolutions were complete. Deputy Chief Hoffman, the fire deputy chief on duty, requested that the police patrol the site occasionally throughout the night. Additionally, a crew from Fire Department 49 was assigned to periodically visit the site to ensure that the fire was out and to apply road salt as needed.

At about 6:00 p.m. three members from Station 49 visited the burn site to check the embers from the fire and to spread salt on the road where water ran down from the burnsite and onto the road. Two of the firefighters each testified in his deposition that they spread a five gallon bucket of salt on the affected area of the roadway. They further stated that there was no ice on the roadway at that time. The firefighters returned to the site at about 7:30 p.m. and remained there for about one half hour, again checking the embers from the fire and checking the road for water and ice. Firefighter Pirk testified that had there been ice on the road at that

time "we would have called for a salt truck and notified our shift commander." No salt was added to the road at that time.

In addition to the periodic visits to the burn site by the firefighters, Miami Township Police Officer Aronoff ("Aronoff") was patrolling, among other roads, Bear Creek Road. He traveled on Bear Creek Road at approximately 5:00 p.m. and again at about 9:00 p.m. During the 9:00 p.m. pass on Bear Creek Road, Aronoff conducted a traffic stop within a few hundred feet of the burn site.

At approximately 9:50 p.m. Christopher Howard and a friend, Robin Butler (non-party; "Butler"), were traveling in Howard's car, northbound on Bear Creek Road. Howard was the driver of the car. After entering the left hand curve just past the burn site, Howard lost control of the car, crashed into a tree and died as a result of the accident. Butler was able to free herself from the wreckage and was transported to the hospital.

It is important to understand the layout of the burn site and its physical relationship to Bear Creek Road. Bear Creek Road is characterized by the police report attached to several of the depositions as a "gently rolling rural road with several curves." The un-posted speed limit on a rural road is 55 mph; however, there are several yellow caution signs posted on Bear Creek Road, indicating the type of curve that lies ahead and the recommended speed at which the curve should be negotiated. One such sign is located just north of the burn site driveway and indicates a sharp curve ahead and recommends a speed of 30 mph. The burn site itself sits on a hill, accessed by a steep drive from Bear Creek Road. The driveway access to the burn site is just before Bear Creek Road curves to the left, if one is traveling north on Bear Creek Road.

Aronoff was dispatched to the accident and was the first police officer to arrive at the scene. He remembers that the road was wet; that water was pooling on the side of the road at the bottom of the burn site; and that he pointed the water out to another police officer, Sgt. Fitzgerald ("Fitzgerald") because he was concerned that the water could freeze.

Sergeant Scott C. Fitzgerald ("Fitzgerald") knew that the Fire Department was going to conduct a controlled burn on 24 January 2004. He was on duty that day, but did not visit the burn site until he was dispatched to the accident scene. Upon arriving at the scene Fitzgerald questioned Aronoff about the accident. Aronoff pointed out the water runoff from the burn site, down the driveway, onto the roadway. Fitzgerald testified that he observed, water, some ice, and some slush on the roadway, as well as fresh water flowing onto the roadway.

Sergeant Rex A. Thompson ("Thompson"), was called at home to report to the crash site. He arrived at 10:19 p.m. He was responsible for collecting evidence to reconstruct the accident. Included in the data he collected was information from the sensing diagnostic module, air bag sensor ("SDM"). Thompson testified at his deposition that the information collected from SDM indicated that Howard's vehicle was traveling at 60 mph five seconds prior to the crash. Thompson further testified, that, from viewing pictures taken of the roadway the night of the accident, the road was wet and possibly slushy, but he could not tell from the pictures whether the road was icy.

Howard's Response contains an affidavit from his expert witness, accident reconstructions Fred Lickert ("Lickert"). Lickert states that "[i]t was not merely the speed of the plaintiff's vehicle that made this condition unsafe. Although the speed at which Mr. Howard attempted to take this turn was careless, it did not change the fact that this roadway

presented a hazardous condition to ordinary users of the roadway.” Lickert further states that it is possible for a vehicle, under optimal conditions, to negotiate the curve at speeds up to 70.9 mph. Lickert states that is his “professional opinion, with a reasonable certainty, that the actions and inactions of the Miami Township Fire Department in failing to address the hazardous condition of the roadway were a proximate and contributing cause of this fatal accident.” Lickert bases this opinion on his review of the depositions filed in this case and his personal observations of the scene of the accident on 29 January 2004; 10 February 2004 and 2 June 2004.

Howard’s parents filed the instant action against Miami Township Fire Division and Miami Township claiming that the Township, through the actions of its employees was negligent and, as such, is liable for Howard’s death. Township filed its Motion for Summary Judgment arguing that it is immune from liability pursuant to O.R.C. 2744, *et seq.*

II. LAW AND ANALYSIS

A. Summary Judgment Standard

“Trial courts should award summary judgement with caution.” *Leibreich v. A.J. Refrigeration, Inc.* (1993), 67 Ohio St.3d 266, 269. In *Harless v. Willis Day Warehousing Inc.* (1978), the Ohio Supreme Court stated in order for summary judgment to be appropriate, it must appear that:

- (1) There is no genuine issue as to any material fact;
- (2) The moving party is entitled to judgment as a matter of law; and
- (3) Reasonable minds can come to but one conclusion and that conclusion is adverse to the party against whom the motion for summary judgment is made, who is entitled to have the evidence construed most strongly in his favor.

54 Ohio St.2d 64, 66.

The moving party bears the burden of informing the court of the basis of the motion and identifying those portions of the pleadings, depositions and other such material which it believes demonstrates the absence of a genuine issue of material fact. *Misteff v. Wheeler* (1988), 38 Ohio St.3d 112, 114; *Harless*, 54 Ohio St.2d at 66. The burden on the moving party may be satisfied by "showing" that there is an absence of evidence to support the non-moving party's case. *Celotex Corp. v. Catrett* (1986), 477 U.S. 317, 323-325. Furthermore, any inferences to be drawn from the underlying facts must be viewed in the light most favorable to the party opposing the motion. *Leibreich*, 67 Ohio St.3d 266, 269; *Williams v. First United Church of Christ* (1974), 37 Ohio St.2d 150, 152.

Thereafter, the non-moving party bears the burden of coming forward with specific facts and evidence showing that there is a genuine issue of material fact for trial. *VanFossen v. Babcock & Wilson Co.* (1988), 36 Ohio St.3d 100, 117. The non-moving party has the burden "to produce evidence on any issue for which that party bears the burden of production at trial." *Leibreich*, 67 Ohio St.3d at 269; *Wing v. Anchor Media, Ltd.* (1991) 59 Ohio St.3d 108, 111 (citing *Celotex Corp.*, 477 U.S. 317, 322-323). Therefore, the non-moving party may not rest upon unsworn or unsupported allegations in the pleadings. *Benjamin v. Deffet Rentals* (1981), 66 Ohio St.2d 86; *Harless*, 54 Ohio St.2d at 66. The non-moving party must respond with affidavits or other appropriate evidence to controvert the facts established by the moving party. *Id.* Further, the non-moving party must do more than show there is some metaphysical doubt as to the material facts of the case. *Matsushita Electric Ind. Co. v. Zenith Radio* (1980), 475 U.S. 574.

B. Political Subdivision Liability, Immunity and Defenses

“The Political Subdivision Tort Liability Act, codified at R.C. Chapter 2744, requires a three-tiered analysis to determine whether a political subdivision should be immune from liability. Pursuant to R.C. 2744.02(A)(1), the general rule is that political subdivisions are not liable in damages when performing either a governmental or a proprietary function. Once immunity is established, the second tier of the analysis is whether one of the exceptions to immunity set forth at R.C. 2744.02(B)(1)-(5) applies. Third, immunity can be reinstated if the political subdivision can successfully show that one of the defenses contained in R.C. 2744.03 applies.” *The Sherwin Williams Company v. Dayton Freight Lines* (2005), 161 Ohio App. 3d 444 (citations omitted).

“Except as otherwise provided in section 3746.24 of the Revised Code, political subdivisions are liable for injury, death, or loss to person or property caused by their negligent failure to keep public roads in repair and other negligent failure to remove obstructions from public roads” O.R.C. 2744.02(B)(3).¹

“In *Haynes v. Franklin*, the Supreme Court of Ohio established a two-prong test to determine whether a condition in the right-of-way constitutes a nuisance under R.C. 2744(B)(3). To withstand a motion for summary judgment, the plaintiff must establish that ‘the condition alleged to constitute a nuisance creates a danger for ordinary traffic on the regularly traveled portion of the road’ and that the cause of the condition in the right-of-way ‘was other than a decision regarding design and construction.’” *McQuaide v. Board of Commissioners of Hamilton County*, 2003 WL 21991337.

¹ The Court notes that O.R.C. 2744.02(B)(3) effective 9 March 2003, deleting the language “free from nuisance” and adding the language “remove obstructions”.

“The congruous factor in the line of cases cited therein is that only conditions which directly jeopardize the safety of ordinary traffic on the regularly traveled portion of a highway may be considered by a jury.” *Gonzalez v. City of Cuyahoga Falls*, 1993 Ohio App. LEXIS 5388.

“The political subdivision is immune from liability if the injury, death, or loss to person or property resulted from the exercise of judgment or discretion in determining whether to acquire, or how to use equipment, supplies, materials, personnel, facilities, and other resources unless the judgment or discretion was exercised with malicious purpose, in bad faith, or in a wanton or reckless manner.” O.R.C. 2744.03(A)(5).

“Malice is the intention or design to harm another by inflicting serious injury, without excuse or justification, by an act which in and of itself may not be unlawful.

Bad faith, although not susceptible of concrete definition, embraces more than bad judgment or negligence. It imports dishonest purpose, moral obliquity, conscious wrongdoing, breach of a known duty through some ulterior motive or ill will partaking of the nature of fraud. It also embraces actual intent to mislead or deceive another.

Wanton misconduct charged against a defendant implies a disposition to perversity and a failure to exercise any care toward those to whom a duty of care was owing when the probability that harm would result from such failure was great and such probability was known, or in the circumstances ought to have been known, to the defendant.

The actor’s conduct is in reckless disregard of the safety of another if he does an act or intentionally fails to do an act which it is his duty to another to do, knowing or having reasons to know of facts which would lead a reasonable man to realize, not only that his conduct

creates an unreasonable risk of physical harm to another, but also that such risk is substantially greater than that which is necessary to make his conduct negligent.” *Parker v. Dayton Metropolitan Housing Authority*, 1996 WL 339935 (citations omitted).

“[E]xercise of some care precludes a finding of wanton misconduct, as a matter of law.” *Neely v. Mifflin Township*, 1996 WL 550170.

C. Analysis

The parties agree that the Political Subdivision Tort Liability Act applies to this case. Township maintains that it is entitled to summary judgment arguing that it is entitled to political subdivision immunity because the alleged water and ice on Bear Creek Road does not constitute an obstruction; the decision whether and how much salt to put onto Bear Creek Road was a discretionary function; and Howard is unable to prove that the exercise of that discretion was exercised with malicious purpose, in bad faith, or in a wanton and reckless manner.

Township begins with the correct assertion that is it immune from liability unless an exception to that immunity applies. Township maintains that no exceptions to immunity apply and focuses on the exception that provides that “political subdivisions are liable for injury . . . caused by their negligent failure to . . . remove obstructions from public roads . . .” asserting that no evidence exists that there was any obstruction on Bear Creek Road. Township acknowledges that Ohio Courts have not clearly defined obstruction as it is used in O.R.C. 2744.02(B)(3). However, Township urges the Court to apply the ordinary meaning of obstruction, as it is defined by Merriam Webster dictionary, as something that “blocks or closes up by obstacle”. Township argues that construing obstruction as defined by the dictionary

comports with cases construing the former version of O.R.C. 2744.02(B)(3) in which a nuisance was defined as “[a] permanent obstruction to visibility, with the highway right of way, which renders the regularly traveled portions of the highway unsafe for the usual and ordinary course of travel.” *Manufacturer’s Nat’l. Bank v. Erie Cty. Rd. Comm.* (1992), 63 Ohio St. 3d 318. Township argues that under the above definitions of obstruction, any water or ice that may have been on Bear Creek Road the night of Howard’s accident was not an obstruction because it did not permanently impair visibility or block the roadway. Township contends that the definition of obstacle is more narrow and more specific than the vague meaning of nuisance. Township further contends that the Legislature’s purpose in changing the statute from nuisance to obstacle was clearly to narrow the application of exceptions to political subdivision immunity.

However, Township next argues that if this Court chooses to apply the broader analysis of a nuisance under the former version of R.C. 2744.02(B)(3), as set forth by the Ohio Supreme Court in *Haynes*, supra, the exception to immunity still will not apply. In *Haynes*, the Court created a two prong test to determine whether a nuisance existed such that liability would attach. To satisfy the first prong a plaintiff must establish that the condition alleged to constitute a nuisance creates a danger for usual and ordinary modes of travel. To satisfy the second prong, a plaintiff must show that the cause of the condition in the right-of-way was other than a decision regarding design and construction. Township states that the second prong is not at issue, and therefore, focuses its analysis on the first prong.

Township argues that the key to the analysis of the first prong is to focus on the phrase “usual and ordinary modes of travel”. Township urges the Court to consider what it contends

is a factually analogous case, *McQuaide*, *supra*. In *McQuaide* the Court found that the plaintiff failed to demonstrate that a “hump” in the road was a nuisance under R.C. 2744.02(B)(3) where the plaintiff, an inexperienced driver, had driven over the “hump” earlier in the day at the posted speed limit without incident, but when driving over the “hump” a second time, at a rate of speed in excess of the posted speed limit she lost control of the vehicle and crashed her car. Township submits that Howard, also an inexperienced driver, was not traveling in the usual and ordinary mode of travel when he entered the curve at 60 mph, 30 mph over the posted recommended speed of 30 mph. Township contends that because Howard was not traveling in the usual and ordinary mode of travel, any water or ice on the road cannot constitute a nuisance or an obstruction, and thus Howard cannot establish that an exception to Township’s immunity applies.

Township’s final argument turns on the defenses set forth in R.C. 2744.03(A)(3) and (5). Specifically, Township argues that the entire process of planning and executing the controlled burn required Township to exercise judgment and discretion in making decisions regarding how to use equipment, supplies, materials, personnel, and other resources. Additionally, Township argues that Howard did not allege, nor can he provide, evidence that any such discretion was made with malicious purpose, in bad faith or in a wanton and reckless manner. Thus, Township argues that if the Court finds that an exception to its immunity does apply, Township is protected by the defense that it was exercising its judgment and discretion in all aspects of conducting the controlled burn and its aftermath.

Howard’s Response argues that Township is not immune from liability because an exception to that immunity applies for which Township has no defense. Howard’s Response

argues that the Court should apply the two prong test set forth in *Haynes, supra*, but argues that Howard's driving did not create the nuisance. Howard concedes that his driving may have been negligent and may have been a contributing cause to the accident, but that the Township created the nuisance. Howard seeks to distinguish the instant case from the *McQuaide* case relied upon by Township. Howard argues that unlike the "hump" in *McQuaide*, "the risk for ordinary travel caused by ice is not diminished even though vehicles have traveled safely over ice." Howard contends that ice is commonly known to create risk for drivers during ordinary travel and is a dangerous condition by itself. Howard further argues that permanency is not required for a condition to be a nuisance; however, Howard then cites a passage from a case that states that permanency is a factor in determining whether a condition constitutes a nuisance. *See, Feitshans v. Dark Cty. Ohio* (1996), 116 Ohio App. 3d 14 ("Normally, for purposes of sovereign immunity, 'nuisances are obstructions or dangerous developments that are either subject to the control of local authorities or of a more permanent nature than accumulated rainwater.'").

Howard then argues that the holding in *Manufacturer's, supra*, stated that a permanent obstruction to a driver's visibility can be a nuisance, but did not confine nuisance to that definition. Additionally, Howard argues that the Township created the nuisance without providing any notice of the condition to motorists.

Howard's final argument is that Township is not entitled to the defense of discretion because it did not consider the potential of water run off when it planned the controlled burn. Howard maintains that Township did not consider the water run off and potential for ice problem until the conclusion of the burn. Howard argues that the decision to apply salt by hand

to the affected part of the road was not discretionary and, therefore, that the defense of discretion is not available to Township.

Township's Reply again urges the Court to note the change in the language of the political subdivision immunity statute, substituting obstruction for nuisance. Township argues this is significant and clearly evinces the intent of the Legislature to narrow the applicability of exceptions to a political subdivision's immunity. Township then argues that any water or ice that may have been on Bear Creek Road clearly does not rise to the level of an obstruction as that word is normally defined in the dictionary and as it has been characterized by Ohio Courts.

Township further argues that if the Court does find that the water or ice on Bear Creek Road did constitute an obstruction, Township's immunity is reinstated by virtue of the defense of discretion. Township again argues that all the decisions it took from planning and executing the controlled burn to cleaning up and dealing with any water runoff were discretionary decisions that were made based upon the judgement and experience of those in charge. Additionally, Township notes that in Howard's Response, his argument is focused solely on the issue of whether Township's actions were discretionary. Howard argues that the actions were not discretionary and Howard offered no facts or argument that if the actions were discretionary, they were exercised with malicious purpose, in bad faith, or in a wanton or reckless manner.

Township concludes that it is entitled to immunity because any alleged water and ice that may have been present on Bear Creek Road was not an obstruction as set forth in O.R.C. 2744.02(B)(3) and Township is entitled to summary judgment on all of Howard's claims. In the alternative, Township argues that if the water and ice are deemed to be an obstruction, the

defense of discretion reinstates Township's immunity and Township is entitled to summary judgement on all of Howard's claims.

The Court finds that the water and ice on Bear Creek Road was not an obstruction as contemplated by O.R.C. 2744.02(B)(3). The Court finds that it is significant that the Legislature deleted the word "nuisance" and added the word "obstruction" to the above-referenced statute. Although there is no case law directly defining the parameters of what condition constitutes an obstruction, the Court notes that cases decided when the statute contained the word nuisance held that certain obstructions to a driver's ability to see the road could constitute a nuisance. See, e.g., *Manufacturer's, supra*. This is significant because under the old version of O.R.C. 2744.02(B)(3) courts, in defining nuisance, ascribed the ordinary meaning to the word obstruction. The Court can find no reason why obstruction as it is used in the current version of O.R.C. 2744.02(B)(3) would not be given that same, ordinary definition. Accordingly, the Court FINDS that the water and ice that was on Bear Creek Road as a result of the fire evolution training conducted by Township was not an obstruction and, therefore, no exception applies to impose liability on Township. The Court further FINDS that Township's Motion for Summary Judgment is well-taken, and the same is hereby, SUSTAINED.

Although the above finding by the Court resolves the case, the Court believes it is prudent to comment on the additional arguments made by Township. The Court is persuaded by Township's and Howard's argument that the Court can apply the analysis set forth by the Ohio Supreme Court in *Haynes, supra*. Focusing on the first prong of that analysis, the Court finds that Howard was not traveling in the "usual and ordinary manner" because he was

speeding, traveling 30 mph in excess of the posted cautionary speed while entering a curve at night. As such, Howard cannot establish that the water and ice was a nuisance or an obstruction.

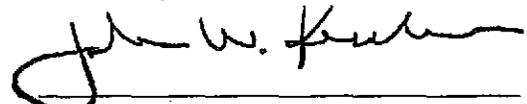
Finally, the Court finds that the decisions Township made with regard to treating the water and ice Bear Creek Road and any decision whether to post any notice of potential water and ice on the roadway were discretionary decisions which entitle Township to application of the defense of discretion and reinstatement of its immunity. Township firefighters visited the burn site at least twice after the conclusion of the controlled burn exercise. The purpose of the visits was to ensure that the fire was extinguished and to monitor any water flow onto the road. On one visit the decision was made to spread a five gallon bucket of salt on the roadway. With regard to the subsequent visit, Firefighter Pirk testified that had there been ice on the road at that time "we would have called for a salt truck and notified our shift commander." No salt was added to the road at that time. The Court finds that these actions are evidence of the type of exercise of discretion and judgment contemplated by the statute. Additionally, Howard presented no evidence that such decisions were made with malicious purpose, in bad faith, or in a wanton or reckless manner. Further, "exercise of some care precludes a finding of wanton misconduct, as a matter of law." *Neely v. Mifflin Township*, 1996 WL 550170. Accordingly, these discretionary decisions would have the effect of reinstating Township's immunity should the Court have made the initial finding that an exception to that liability applied.

III. CONCLUSION

After careful consideration of the arguments and authorities proffered by the parties, the Court finds that the Defendants' Motion for Summary Judgment is well-taken, and the same is hereby **SUSTAINED**.

THIS IS A FINAL APPEALABLE ORDER, AND THERE IS NOT JUST CAUSE FOR DELAY FOR PURPOSES OF CIV. R. 54. PURSUANT TO APP. R. 4, THE PARTIES SHALL FILE A NOTICE OF APPEAL WITHIN THIRTY (30) DAYS.

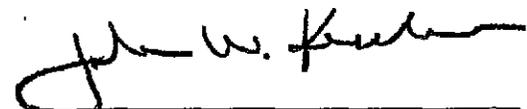
SO ORDERED:



JOHN W. KESSLER, JUDGE

To the Clerk of Courts:

Please serve the attorney for each party and each party not represented by counsel with Notice of Judgment and its date of entry upon the journal.



JOHN W. KESSLER, JUDGE

Copies of this Decision, Order and Entry were forwarded to all parties listed below by ordinary mail this filing date.

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