

IN THE SUPREME COURT OF OHIO

DONALD D. HOWARD, ETC., et al., : Supreme Court No. 07-873
: :
Appellee, : :
: : On Appeal from the Montgomery
v. : County Court of Appeals,
: Second District
MIAMI TOWNSHIP, DIVISION OF FIRE, :
et al. :
: Court of Appeals Case No. 21478
Appellants. :

**MERIT BRIEF OF APPELLANTS
MIAMI TOWNSHIP, DIVISION OF FIRE AND MIAMI TOWNSHIP**

Robert J. Surdyk (0006205)
Dawn M. Frick (0069068)
SURDYK, DOWD &
TURNER CO., L.P.A.
1610 Kettering Tower
40 North Main Street
Dayton, Ohio 45423
(937) 222-2333 (Tel.)
(937) 222-1970 (Fax)

*Attorneys for Appellants,
Miami Township Division of Fire
and Miami Township*

John A. Smalley (0029540)
DYER, GAROFALO, MANN
& SCHULTZ
131 North Ludlow Street
Suite 1400
Dayton, Ohio 45402
(937) 222-8888 (Tel.)
(937) 223-0127 (Fax)

*Attorney for Appellee,
Donald Howard*

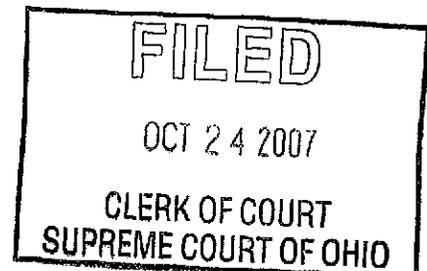


TABLE OF CONTENTS

TABLE OF AUTHORITIES iii

STATEMENT OF FACTS 1

ARGUMENT 5

Proposition of Law I: An “obstruction” in the context of R.C. § 2744.02(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.5

1. The blanket immunity provision set forth in R.C. § 2744.02(A) provides Appellants with immunity.5

2. The usual and ordinary meaning of “obstruction” should be applied.6

3. The legislative intent demonstrates the General Assembly’s objective that “obstruction” be construed with its plain and ordinary meaning.9

4. Prior judicial precedent interpreting the term “obstruction” supports a conclusion that obstruction should be given its usual and ordinary meaning.13

5. The General Assembly's use of the word “obstruction” in other contextually similar provisions of the Revised Code, are consistent with its ordinary and plain meaning.15

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.18

CONCLUSION..... 22

CERTIFICATE OF SERVICE 23

APPENDIX

Appx. Page

Notice of Appeal to the Ohio Supreme Court (May 16, 2007).....1

Judgment Entry from Second District Court of Appeals (March 30, 2007).....3

Howard v. Miami Township Fire Division, 171 Ohio App.3d 184, 2007-Ohio-1508 (Second District Court of Appeals opinion) (March 30, 2007)5

Decision, Order and Entry of the Montgomery County Court of Common Pleas (January 17, 2006)23

UNREPORTED CASES:

Huffman v. Bd. Of Cty. Commrs., Seventh Dis. App. No. 05 CO 71, 2006-Ohio-3479.....40

State ex rel. Montgomery Cty. Pub. Defender v. Rosencrans, Montgomery App. No. CA20416, 2005-Ohio-668149

Parker v. Upper Arlington, Franklin App. No. 05AP-695, 2006-Ohio-1649.....54

McQuaide v. Board of Commissioners of Hamilton County, First Dist. App. No. 030033, 2003-Ohio-4420.....61

STATUTES

R.C. § 2744.0165

R.C. § 2744.0271

R.C. § 1.4975

R.C. § 5547.0476

R.C. § 5589.0177

R.C. § 5589.2178

R.C. § 6115.2579

TABLE OF AUTHORITIES

Cases

<i>Brennaman v. R.M.I. Co.</i> , 70 Ohio St.3d 460, 639 N.E.2d 425, 1994-Ohio-322	13
<i>Carter v. Division of Water, City of Youngstown</i> (1946), 146 Ohio St. 203, 65 N.E.2d 63	7
<i>City of Dayton v. Taylor's Adm'r</i> (1900), 62 Ohio St. 11, 56 N.E. 480, 481	19
<i>Colbert v. City of Cleveland</i> , 99 Ohio St.3d 215, 790 N.E.2d 781, 2003-Ohio-3319	5
<i>Doe v. Dayton City School Dist. Brd. of Ed.</i> (1999), 137 Ohio App.3d 166, 738 N.E.2d 390.....	11
<i>Drake v. City of E. Cleveland</i> (1920), 101 Ohio St. 111, 127 N.E. 469	19
<i>Feitshans v. Darke Cty.</i> (1996), 116 Ohio App.3d 14, 686 N.E.2d 536.....	6
<i>Frank v. Warsaw</i> (1910), 198 N.Y. 463, 92 N.E. 17	15
<i>Harp v. Cleveland Heights</i> , 87 Ohio St.3d 506, 721 N.E.2d 1020, 2000-Ohio-467	13, 14
<i>Haynes v. Franklin</i> , 95 Ohio St.3d 344, 767 N.E.2d 1146, 2002-Ohio-2334	19
<i>Howard v. Miami Township Fire Division</i> , 171 Ohio App.3d 184, 2007-Ohio-1508.....	passim
<i>Hubbard v. Canton City Brd. Of Ed.</i> , 97 Ohio St.3d 451, 780 N.E.2d 543, 2002-Ohio-6718 .	7, 21
<i>Huffman v. Bd. Of Cty. Commrs.</i> , Seventh Dis. App. No. 05 CO 71, 2006-Ohio-3479.....	7, 8, 24
<i>Johnson v. U.S.</i> (2000), 529 U.S. 694, 120 S.Ct. 1795, 146 L.Ed.2d 727.....	13
<i>Manufacturer's Natl. Bank v. Erie Cty. Rd. Comm.</i> (1992), 63 Ohio St.3d 318, 587 N.E.2d 819	11, 14
<i>McQuaide v. Board of Commissioners of Hamilton County</i> , First Dist. App. No. 030033, 2003- Ohio-4420	19, 20, 24
<i>Mutual Bldg. & Inv. Co. v. Efros</i> (1947), 48 Ohio L. Abs. 633, 75 N.E.2d 75	14
<i>Parker v. Upper Arlington</i> , Franklin App. No. 05AP-695, 2006-Ohio-1649.....	8
<i>Ryll v. Columbus Fireworks Display Co., Inc.</i> , 95 Ohio St.3d 467, 769 N.E.2d 372, 2002-Ohio- 2584.....	5
<i>Shover v. Cordis Corp.</i> (1991), 61 Ohio St.3d 213, 574 N.E.2d 457	8

<i>State ex rel Herman v. Klopfleisch</i> (1995), 72 Ohio St.3d 581, 651 N.E.2d 995	9
<i>State ex rel. Montgomery Cty. Pub. Defender v. Rosencrans</i> , Montgomery App. No. CA20416, 2005-Ohio-6681	7, 24
<i>State v. Waddell</i> (1995), 71 Ohio St.3d 630, 646 N.E.2d 821	9
<i>Stewart v. Trumbell County Bd. Of Elections</i> , 34 Ohio St.2d 129, 276 N.E.2d 676 (1973).....	17
<i>Sudnik v. Crimi</i> (1997), 117 Ohio App.3d 394, 690 N.E.2d 925.....	11, 12
<i>Union Rural Elec. Coop., Inc. v. Pub. Util. Comm.</i> (1990), 52 Ohio St.3d 78, 555 N.E.2d 641 ...	9
<i>Volan v. Keller</i> (1969), 20 Ohio App.2d 204, 253 N.E.2d 309	14
<i>Williamson v. Pavlovich</i> (1989), 45 Ohio St.3d 179, 543 N.E.2d 1242	14, 15

Statutes

R.C. § 1.49	10, 24
R.C. § 2744.01(C)(2)(a).....	6
R.C. § 2744.02(A)(1)	6, 11, 22
R.C. § 2744.02(B)(3)	passim
R.C. § 2744.03	11
R.C. § 2744.03(B)(3)	6, 10
R.C. § 5589.01	17, 24
R.C. § 5589.21	17, 24
R.C. § 6115.25	18
R.C. § 5547.04	passim

Other Authorities

85 Ohio Jur.3d Statutes §174.....	13
85 Ohio Jur.3d Statutes §183	14
Am.Sub.H.B. No. 176, Section 8.....	12

<i>Black's Law Dictionary, Fifth Edition</i> . The Publisher's Editorial Staff, West Publishing Co., 1979.....	8
<i>Merriam Webster Collegiate Dictionary, Tenth Addition</i> . Merriam-Webster, 2003.....	9, 15, 18
Ohio Legislative Serv. Comm. Bill Analysis, Re-enactment of Am. Sub. H.B. 350 provisions..	10
Ohio Op. Atty. Gen. No. 80-043.....	17
<i>The American Heritage® Dictionary of the English Language, Fourth Edition</i> . Houghton Mifflin Company, 2004.....	8, 9
<i>Webster's II New College Dictionary</i> (1995) 755.....	8

I. STATEMENT OF FACTS

This case arises out of a single car accident that occurred on January 24, 2004. The car was driven by 16-year old Christopher Howard, son of the Appellee. The decedent, Christopher Howard lost control of his vehicle and crashed into a tree. (Supp. p. 367) Christopher Howard died as a result of the accident.

On January 24, 2004, the Miami Township Fire Department conducted a live fire training evolution at 5460 Bear Creek Road, Miamisburg, Ohio. The owner of the home located on that property gave the Fire Department authorization to burn the building. (Supp. p. 5) As part of the planning for the live fire training evolution, the Fire Department notified various environmental agencies and obtained documentation and inspections regarding asbestos in the building. (Supp. pp. 6, 7) Several of the Lieutenants and Deputy Chief Queen put together a training plan, which included the location of the apparatus, what apparatus was to be used, the amount of water at the scene, the location of the crews and the manner in which the structure would be ignited and consumed. (Supp. pp. 9, 14)

The training evolution began at approximately 9:00 a.m. on the morning of January 24, 2004. (Supp. p. 18) A series of training evolutions took place throughout the morning and afternoon, including several live fires. (Supp. p. 19). At approximately 2:30 p.m. the training evolutions were completed and the decision was made to begin final ignition of the structure for disposal purposes. (Supp. p. 19). The structure was burned in a systematic pattern so that the entire structure burned and dropped into the basement without the need to use additional water to knock down the fire. (Supp. pp. 20-21).

At approximately 4:30 p.m., the majority of the structure had been consumed; the equipment demobilized and placed back into service; and the Township dispatch center was

notified that the training evolutions were completed. (Supp. pp. 21-22) 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. (Supp. p. 22)

Deputy Chief Hoffman contacted Firefighter Joshua Pirk and advised him to pick up salt from Station 49 to be applied to the road by the fire training site. (Supp. p. 78) At approximately 6:00 p.m., three members of the Station 49 crew went to the fire training site to check on the fire embers and to spread salt on Bear Creek Road. (Supp. p. 62) It was still daylight when the firefighters returned to Bear Creek Road to apply additional salt to the road. (Supp. p. 151) The firefighters covered any wet areas on the road with salt. In front of the driveway, they spread salt for the entire width of Bear Creek Road. (Supp. pp. 148, 149, 150; Supp. p. 79) As Firefighter Keyser stated, “[i]f there was moisture, we salted it.” (Supp. p. 150) The firefighters, who walked the roadway in front of the home spreading salt, found no ice on the roadway at that time. (Supp. p. 83)

The firefighters returned to the site a second time at approximately 7:30 p.m. (Supp. p. 86) The firefighters checked Bear Creek Road around the fire training site again at that time. (Supp. p. 90) The firefighters evaluated the scene, and in their discretion, determined that no additional salt was needed. The firefighters noted that “[i]f there was ice, we would have called for a salt truck and notified our shift commander.” (Supp. p. 93)

At approximately 9:00 p.m., Officer Scott Aronoff was patrolling the area when a car passed him going around the curve in front of the fire training site, the same curve which the decedent later failed to negotiate. The vehicle passing Officer Aronoff was traveling northbound

in excess of the posted 55 miles per hour speed limit and Officer Aronoff, who was traveling southbound, turned around to pursue the speeding motorist. (Supp. pp. 186-188) According to Officer Aronoff, who recalled applying his vehicle's brakes as well as walking in the vicinity where the accident later took place, the roadway was not slippery. Although Officer Aronoff saw water, he was able to drive and walk safely on the roadway. (Supp. p. 192) Furthermore, both Officer Aronoff and the speeding motorist were able to negotiate the curve safely. (Supp. pp. 192-193)

Approximately fifty minutes after Officer Aronoff and the speeding motorist safely negotiated the roadway in front of the burn site, Christopher Howard and a friend, Robin Butler, were traveling northbound on Bear Creek Road. (Supp. p. 285) Before the curve on Bear Creek Road, there is a "Curve Ahead" sign, which warns drivers that the curve should be negotiated at no more than thirty miles per hour. Christopher Howard and his passenger safely negotiated the curve on Bear Creek Road in front of the burn site. Apparently, Christopher Howard wanted to see if he could negotiate the curve at a higher rate of speed so he retraced his path of travel and again proceeded northbound on Bear Creek Road. Five seconds prior to the crash, Christopher Howard was traveling sixty miles an hour around the curve – twice the speed recommended for safe negotiation of the curve. (Supp. p. 270) A young and inexperienced driver, Christopher Howard lost control of the vehicle, went off the road and crashed into a tree. (Supp. p. 386) Christopher Howard died as a result of the accident, although his passenger, Robin Butler, survived.

On August 9, 2004, Appellee 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. (Supp. pp. 367-368) On June 21, 2005, the Township filed a Motion for Summary Judgment as to the Howards' claims on the basis that the Township was immune pursuant to Chapter 2744 of the Revised Code which Appellees opposed.

On January 17, 2005, the Trial Court issued its "Decision, Entry, and Order Sustaining Defendants' Motion for Summary Judgment." (Appx. 23) 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). (Appx. 36) Revised Code Section 2744.02(B)(3) 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 Trial Court held that "obstruction" should be given its usual and ordinary definition-something that "blocks or closes up by obstacle." (Appx. 36) Since passage through Bear Creek Road or the ability to see Bear Creek Road had not been blocked by any obstacle, the Trial Court determined that the water and ice on the road did not amount to an "obstruction" by definition or by application. As such, the exception to immunity set forth in R.C. § 2744.02(B)(3) was not applicable and the Township was immune from liability.

On February 14, 2006, a Notice of Appeal to the Second District Court of Appeals was filed by Donald Howard, only. On appeal, Donald Howard raised one assignment of error: the Trial Court erred in finding that the Township was immune from suit as a matter of law pursuant to R.C. Chapter 2744. 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.

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

(Appx. 5) The Second District Court of Appeals held that 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.” (Appx. 11 *Howard v. Miami Township Fire Division*, 171 Ohio App.3d 184, 2007-Ohio-1508 at ¶16.) Thus, the Court of Appeals held further that pursuant to the statute, the 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.” *Id.*

On or about May 16, 2007, Miami Township filed a Notice of Appeal with the Court and a Memorandum in Support of Jurisdiction, positing two propositions of law. (Appx. 1) On August 29, 2007, this Court granted a discretionary appeal on Appellant's propositions of law.

II. ARGUMENT

A. **Proposition of Law I:** An “obstruction” in the context of R.C. § 2744.02(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.

1) The blanket immunity provision set forth in R.C. § 2744.02(A) provides Appellants with immunity.

In order to resolve immunity questions under the R.C. § 2744 provisions, a three tiered analysis is required. *Ryll v. Columbus Fireworks Display Co., Inc.*, 95 Ohio St.3d 467, 769 N.E.2d 372, 2002-Ohio-2584, at ¶ 19. Under this analysis, three questions must be addressed: 1) whether blanket immunity exists, 2) whether any exception to blanket immunity applies, and 3) whether a full defense to the exception exists. *Colbert v. City of Cleveland*, 99 Ohio St.3d 215, 790 N.E.2d 781, 2003-Ohio-3319 at ¶7.

In general, R.C. § 2744.02(A)(1) provides political subdivisions with blanket immunity for injury death or loss to persons or property resulting from the performance of a governmental or proprietary function. *Franks v. Lopez*, 69 Ohio St.3d 345, 347, 632 N.E.2d 502, 1994-Ohio-487. There is no dispute in this matter that pursuant to R.C. § 2744.01(C)(2)(a) a "governmental function" includes, "the provision or nonprovision of police, fire, emergency medical, ambulance, and rescue services or protection." Thus, the Township is immune from liability under R.C. § 2744.02(A)(1) unless an exception in R.C. § 2744.02(B) applies. *Feitshans v. Darke Cty.* (1996), 116 Ohio App.3d 14, 19-20, 686 N.E.2d 536.

In the present matter, there is no applicable exception to the blanket immunity provision. However, Appellee argues that R.C. § 2744.02(B)(3) provides an exception to the blanket immunity set forth in R.C. § 2744.02(A). Revised Code Section 2744.02(B)(3) provides, in relevant part:

(3) * * * 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, * * *.

The dispute in this case is over the definition of the term "obstruction" as used in R.C. § 2744.02(B)(3). The resolution of this issue depends on whether ice and slush constitute an "obstruction" pursuant to the 124th General Assembly's amendments in S.B. 106 to Ohio's Political Subdivision Immunity Statute—R.C. § 2744.03(B)(3).

- 2) The usual and ordinary meaning of "obstruction" should be applied.

Effective April 2003, the Ohio legislature amended R.C. § 2744.02(B)(3). Prior to amendment, the statute provided: "Political subdivisions are liable for injury, death, or loss to persons or property caused by their failure to keep public roads, highways, streets, avenues, alleys, sidewalks, bridges, aqueducts, viaducts, or public grounds within the political subdivision

open, in repair, and *free from nuisance* * * *.” As set forth above, the statute now limits the exception to blanket immunity to “negligent failure to keep public roads in repair and other negligent *failure to remove obstructions* from public roads * * *.” As can be seen by a comparison between the old version and the new version, the new version of the statute removed the word “nuisance” and instead stated a “negligent failure to remove obstructions.” *Huffman v. Bd. Of Cty. Commrs.*, Seventh Dis. App. No. 05 CO 71, 2006-Ohio-3479 at ¶¶50-53. Thus, since case law dealing with the old version of the statute does not address what an “obstruction” is and case law dealing with the current statute has not yet determined this, there is little guidance as to what constitutes an “obstruction.” *Id.*

Accordingly, because the legislature did not assign a specific meaning to the word “obstruction,” courts are required to give the word its plain and ordinary meaning.

In the construction of statutes the purpose in every instance is to ascertain and give effect to the legislative intent, and it is well settled that none of the language employed therein should be disregarded, and that all of the terms used should be given their usual and ordinary meaning and signification except where the lawmaking body has indicated that the language is not so used.

Carter v. Division of Water, City of Youngstown (1946), 146 Ohio St. 203,65 N.E.2d 63 at paragraph one of the syllabus; *Hubbard v. Canton City Brd. Of Ed.*, 97 Ohio St.3d 451, 780 N.E.2d 543, 2002-Ohio-6718 at ¶ 13.

As was noted by the Court of Appeals below, 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. *Howard v. Miami Township Fire Division*, 171 Ohio App.3d 184, 2007-Ohio-1508 at¶20 citing *State ex rel. Montgomery Cty. Pub. Defender v. Rosencrans*, Montgomery App. No. CA20416, 2005-Ohio-6681, at ¶ 18. The Court of Appeals below identified the plain and ordinary meaning of “obstruction” as “(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*

The Second District noted further that several other Courts of Appeal 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, 2006 WL 832523, 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. Commrs.*, Columbiana App. No. 05 CO 71, 2006-Ohio-3479 at ¶ 53 (interpreting “obstruction” to include a fallen bridge). However, rather than relying upon the cited ordinary meaning of obstruction, the Court of Appeals chose instead to examine the General Assembly's use of the word “obstruction” in other provisions of the Revised Code.

A court interpreting a statute *must* first look to the language of the statute to determine legislative intent, and if that inquiry reveals that the statute conveys meaning which is clear, unequivocal and definite, *interpretive effort is at an end*, and the statute must be applied accordingly. *Shover v. Cordis Corp.* (1991), 61 Ohio St.3d 213, 574 N.E.2d 457 (emphasis added). The plain and ordinary meaning of “obstruction” is consistently defined throughout various sources as an “obstacle” or the condition of being blocked. Black's Law Dictionary defines “obstruction” as a “hindrance, obstacle or barrier.” It further defines obstruct to include “to block up; to interpose obstacles; to render impassable; to fill with barriers or impediments, as to obstruct a road or way.” *Black's Law Dictionary, Fifth Edition*. The Publisher's Editorial Staff, West Publishing Co., 1979. See also *The American Heritage® Dictionary of the English*

Language, Fourth Edition. Houghton Mifflin Company, 2004, ([A]n “obstruction” is one that obstructs; an obstacle; “obstruct” is to block or fill (a passage) with obstacles or an obstacle.); *Merriam Webster Collegiate Dictionary, Tenth Addition*. Merriam-Webster, 2003, (“Obstruction” is the state of being obstructed; *especially*: a condition of being clogged or blocked; “obstruct” is to block or close up by an obstacle.). Additionally, the word obstruct comes from the Latin word *obstructiō* meaning barrier or *obstruere*, from *ob-* in the way plus *struere-* to build, heap up. *The American Heritage® Dictionary of the English Language, Fourth Edition*. Houghton Mifflin Company, 2004.

Pursuant to the principle of statutory construction, *verbis standum ubi nulla ambiguitas*, where there is no ambiguity, one must abide by the words. See, e.g., *State v. Waddell* (1995), 71 Ohio St.3d 630, 631, 646 N.E.2d 821, 821-822; *State ex rel Herman v. Klopfleisch* (1995), 72 Ohio St.3d 581, 584, 651 N.E.2d 995, 997-998. Thus, as in this case, words used in statutes must be given their plain and ordinary meaning, unless legislative intent indicates otherwise. *Union Rural Elec. Coop., Inc. v. Pub. Util. Comm.* (1990), 52 Ohio St.3d 78, 555 N.E.2d 641. Thus, applying the usual and ordinary meaning of “obstruction,” the exception to immunity would only encompass a political subdivision’s negligent failure to remove something that blocks, fills, clogs or closes up a public road.

- 3) The legislative intent demonstrates the General Assembly’s objective that “obstruction” be construed with its plain and ordinary meaning.

In addition to the above principals of statutory construction, an examination of the legislative intent behind Chapter 2744 and specifically R.C. § 2744.02(B)(3) also reveals that the word “obstruction” should be given its usual and ordinary meaning. In determining the intent of the legislature, a court may consider those factors listed in R.C. § 1.49, which include: the object

sought to be attained; the circumstances under which the statute was enacted; the legislative history; the common law or former statutory provisions, including laws upon the same or similar subjects; the consequences of a particular construction; or the administrative construction of the statute. R.C. § 1.49.

In the present matter, the Second District Court of Appeals held that “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.” *Howard, supra* at ¶16. However, this interpretation by the Second District was 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. § 2744.02(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).

By enacting Senate Bill 106, the General Assembly demonstrated its intent that political subdivisions should not be held civilly liable for failing to keep a public road free from nuisance.

However, 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 subdivisions’ 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. § 2744.02(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. *Manufacturer’s Natl. Bank v. Erie Cty. Rd. Comm.* (1992), 63 Ohio St.3d 318, 587 N.E.2d 819.

The General Assembly’s enactment of R.C. § 2744.02(A)(1) reflects a policy choice on the part of the State of Ohio to extend to its political subdivisions the full benefits of sovereign immunity from tort claims. *Doe v. Dayton City School Dist. Bd. of Ed.* (1999), 137 Ohio App.3d 166, 169, 738 N.E.2d 390. Likewise, the exceptions to immunity in R.C. § 2744.02(B) and the exceptions and defenses in R.C. § 2744.03 reflect policy choices on the state’s part to submit itself to judicial relief on tort claims only with respect to the particular circumstances identified therein. Because those exceptions and defenses are in derogation of a general grant of immunity, they must be construed narrowly if the balances which have been struck by the state’s policy choices are to be maintained. *Id.*

Moreover, as was noted by the Eighth District Court of Appeals in *Sudnik v. Crimi* (1997), 117 Ohio App.3d 394, 690 N.E.2d 925, the Political Subdivision Tort Liability Act, codified at R.C. Chapter 2744 *et seq.* was enacted in response to the judicial abrogation of common-law sovereign immunity. *Id.* at 397. In doing so, the General Assembly determined that

immediate legislative action was necessary in order to preserve the “public peace, health, and safety” and stated:

“The reason for such necessity is that the protections afforded to political subdivisions and employees of political subdivisions by this act are urgently needed in order to ensure the continued orderly operation of local governments and the continued ability of local governments to provide public peace, health, and safety services to their residents.” Am.Sub.H.B. No. 176, Section 8.

Id.

However, as a consequence of the application the definition of “obstruction” adopted by the Court of Appeals in this case, liability could be assessed against any political subdivisions for the 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 confusion regarding what constitutes “placed” or “erected,” the foregoing definition imposes liability on political subdivisions for something that has *even the potential of interfering* with the public’s use of the roadway—including hard to discover objects like ice and slush.

The Court of Appeals went so far as to specifically state that “ice and water residue constitutes an ‘obstruction’ for purposes of R.C. § 2744.02(B)(3).” *Howard, supra* at ¶34. Taking the Court of Appeals’ holding to its most extreme, but not unlikely interpretation, an immeasurable burden would be placed on all political subdivisions anytime there was ice or water residue on a roadway to ensure its immediate removal in order to avoid potential liability. Such an interpretation would open the floodgates to litigation any time an individual was in a car accident that occurred when a driver loses control on an icy or wet road. Clearly this was not the intent of the General Assembly in removing the word “nuisance” and replacing it with “obstruction.”

- 4) Prior judicial precedent interpreting the term “obstruction” supports a conclusion that obstruction should be given its usual and ordinary meaning.

Although the Court of Appeals below cited a pre-amendment case, *Harp v. Cleveland Heights*, 87 Ohio St.3d 506, 721 N.E.2d 1020, 2000-Ohio-467, 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 of Appeals 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 Court of Appeal’s estimation, limited the application of the term “obstruction” to objects “placed” or “erected” on the roadway.

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.* (2000), 529 U.S. 694, 120 S.Ct. 1795, 146 L.Ed.2d 727). 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 *Brennaman v. R.M.I. Co.*, 70 Ohio St.3d 460, 1994 Ohio 322, 639 N.E.2d 425. In *Harp v. Cleveland Heights*, 87 Ohio St.3d 506,

512, 721 N.E.2d 1020, 2000-Ohio-467, 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).

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 Collegiate Dictionary, Tenth Addition*. Merriam-Webster, 2003. 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 negligent 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.

- 5) The General Assembly's use of the word “obstruction” in other contextually similar provisions of the Revised Code, are consistent with its ordinary and plain meaning.

In this case, the Court of Appeals relied on an Attorney General’s Opinion defining the term “obstruction” in the context of R.C. § 5547.04, 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.” *Howard, supra* at ¶24.

The Court of Appeal’s reliance on the Attorney General’s opinion regarding the meaning of the term “obstruction” in the context of R.C. § 5547.04 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. § 2744.02(B)(3) and R.C. § 5547.04 are completely unrelated.

Revised Code Section 2744.02(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. § 5547.04, unlike the "obstructions" described in R.C. § 2744.02(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. § 5547.04 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. § 2744.02(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.

In contrast, the legislature uses the term “obstruction” in other statutes specifically relating to the blocking of roadways by a physical object. Specifically, R.C. § 5589.01, entitled “Obstructing public grounds, highway, street, or alley” provides that: “No person shall obstruct or encumber by fences, buildings, structures, or otherwise, a public ground, highway, street, or alley of a municipal corporation.” (emphasis added) Similarly, R.C. § 5589.21, entitled “Obstruction of public roads by railroad companies,” provides in relevant part:

(A) No railroad company shall obstruct, or permit or cause to be obstructed a public street, road, or highway, by permitting a railroad car, locomotive, or other

obstruction to remain upon or across it for longer than five minutes, to the hindrance or inconvenience of travelers or a person passing along or upon such street, road, or highway. (emphasis added)

Finally, R.C. § 6115.25, entitled “Removal of obstructions; procedure” provides, in part, that:

“[a]ll public corporations or persons having buildings, structures, works, conduits, mains, pipes, tracks, or other physical obstructions in, over, or upon the public streets, lanes, alleys, or highways which interfere with or impede the progress of construction, maintenance, or repair of the works of a sanitary district shall upon reasonable notice from the board of directors of the sanitary district promptly shift, adjust, accommodate, or remove such obstructions so as to fully meet the exigencies occasioning such action.” (emphasis added)

The above three examples of the General Assembly's use of the word “obstruction” in other contextually similar provisions of the Revised Code, are consistent with the ordinary and plain meaning of the word —“to block[] or close[] up.” *Merriam Webster Collegiate Dictionary, Tenth Addition*. Merriam-Webster, 2003.

Thus, in light of all of the foregoing, “obstruction,” as it is used in R.C. § 2744.02(B)(3), should be interpreted to mean “something that blocks” or closes up [a roadway] by obstacle.” As such, even if there were ice on Bear Creek Road, it would have not been a permanent, physical impediment that blocked the roadway. As such, the exception to immunity set forth in R.C. § 2744.02(B)(3) would not be applicable and the Township would be immune from liability.

B. 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.

Not only was the Court of Appeals definition of “obstruction” overly broad, it abandoned the requirement that a duty to remove an obstruction exists only when the condition that injured an individual created a danger for *ordinary traffic* on the regularly traveled portion of the road. This Court has previously 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.” *Drake v. City of E. Cleveland* (1920), 101 Ohio St. 111, 127 N.E. 469. However, the Court of Appeals essentially abandoned this Court’s prior holding in *Haynes v. Franklin*, 95 Ohio St.3d 344, 767 N.E.2d 1146, 2002-Ohio-2334, which stated political subdivisions were immune from liability pursuant to R.C. § 2744.02(B)(3) unless the condition that injured the individual created a danger for ordinary traffic on the regularly traveled portion of the road. *Id.* at ¶18.

The Court of Appeals below 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 requirement, 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, 767 N.E.2d 1146, 2002-Ohio-2334. 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 very broad liability.

In a case which is factually analogous to the one at hand, *McQuaide v. Board of Commissioners of Hamilton County*, First Dist. App. No. 030033, 2003-Ohio-4420, the First District Court of Appeals declined to overturn the trial court’s granting of summary judgment on the basis of immunity. In *McQuaide*, a young, inexperienced driver and her friends discussed driving over a hump in the road known to cause a vehicle traveling at high speed to become airborne, an activity known in the neighborhood as “hill-hopping.” *Id.* at ¶2. The vehicle traveled over the hump at approximately the posted speed limit of thirty-five miles per hour, and

although the occupants of the car could feel the contour of the road change, the driver did not lose control of the vehicle. *Id.* at ¶3. Later, the driver chose to go over the hump a second time at a speed significantly greater than the posted speed limit. After going over the hump, the driver lost control of the vehicle, and it struck a utility pole and flipped over. As a result of the accident, one of the passengers suffered fatal injuries and suit was filed. *Id.* at ¶5.

The Court of Appeals in *McQuaide* agreed with the trial court that the plaintiffs failed to establish that the "hump" in the road created a danger to *ordinary traffic*. *Id.* at ¶11 (emphasis added). The *McQuaide* court noted that plaintiffs' expert had not taken into account the speed of the driver. Moreover, the Court of Appeals agreed with the trial court that the driver, herself, had traveled over the hump earlier the same day, and when she had driven in conformity with the posted speed limit, she had been able to negotiate the hump without incident. Thus, even in light of the driver's inexperience as a driver, the hump was not demonstrated to pose a danger for ordinary traffic. *Id.* at ¶13.

In this instance, Christopher Howard, a young, inexperienced driver, was not traveling in the usual and ordinary course. Just minutes before, Christopher Howard had driven through this same area at a lower speed without incident. He returned to the curve to try it again at a faster speed. Five seconds prior to the crash, Christopher Howard was traveling sixty miles an hour around a curve in which the recommended speed is 30 miles per hour. (Supp. p. 270) Just as it was in *McQuaide, supra*, even in light of Christopher Howard's inexperience, when he traveled at a slower rate of speed, he had been able to negotiate the curb without incident. Thus, the alleged ice and slush at issue, not only did not block or close up the roadway, it did not impede Christopher Howard's ordinary and usual use of the roadway

Appellees have attempted to distinguish *McQuaide* from the case at hand by arguing that they have presented the testimony of an expert to the effect that it is possible for a vehicle to travel on the curve at issue at speeds in excess of 70 miles per hour. However, merely because an individual could travel the road in excess of the recommended speed limit, does not lead to a conclusion that such travel should be deemed “ordinary.” Rather “ordinary and usual modes” of travel are better evidenced by the recommended course of travel.

Without this requirement, the Court of Appeals’ definition of obstruction would apply to allow an individual to sue a political subdivision for failure to remove an obstruction regardless of whether the individual 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 miles per hour 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*. Thus, 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. Under these circumstances, immunity should apply to shield townships and counties from liability. Accordingly, 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.

III. CONCLUSION

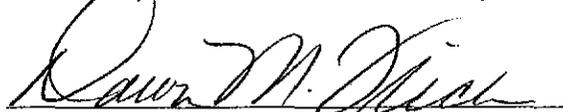
This Honorable Court should reverse the decision of the Second District Court of Appeals below, which overturned the Trial Court's Decision granting Appellants' Motion for Summary Judgment based upon the Township's claim that it is entitled to sovereign immunity pursuant to R.C. § 2744.02(A)(1). In the present matter, the Trial Court correctly granted summary judgment in favor of Miami Township and that decision must be upheld. As the trial court correctly found, if there was ice on the road at issue, that ice did not constitute an "obstruction" and thus no exception to immunity in R.C. § 2744.02(B) is applicable.

An "obstruction" in the context of R.C. § 2744.02(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. Moreover, the duty of a political subdivision to remove an obstruction from a public road must extend only to those objects which block or close off the roadway for those traveling in an ordinary and usual manner. The duty of a political subdivision to keep its street in a reasonably safe condition must only exist 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 his vehicle as a result of his own actions.

For the reasons herein, this Honorable Court should reverse the decision of the Second District Court of Appeals overturning the Trial Court's Decision granting Appellants Miami Township Division of Fire and Miami Township summary judgment.

Respectfully submitted,

SURDYK, DOWD & TURNER CO., L.P.A.



Robert J. Surdyk (0006205)

Dawn M. Frick (0069068)

SURDYK, DOWD & TURNER CO., L.P.A.

40 N. Main Street, Suite 1600

Dayton, Ohio 45423

Telephone: (937) 222-2333

Fax: (937) 222-1970

rsurdyk@sdtlawyers.com

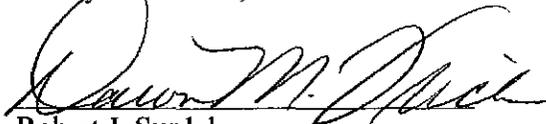
dfrick@sdtlawyers.com

ATTORNEYS FOR APPELLANT

*Miami Township, Division of Fire
and Miami Township*

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was mailed by ordinary U.S. Mail to John A. Smalley, Attorney for Plaintiff/Appellee, at Dyer, Garofalo, Mann & Schultz, 131 N. Ludlow Street, Ste. 1400, Dayton, Ohio 45402, this 23rd day of October, 2007.



Robert J. Surdyk

Dawn M. Frick

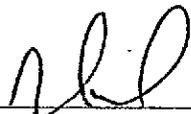
APPENDIX

	<u>Appx. Page</u>
1. Notice of Appeal to the Ohio Supreme Court (May 16, 2007).....	1
2. Judgment Entry from Second District Court of Appeals (March 30, 2007).....	3
3. <i>Howard v. Miami Township Fire Division</i> , 171 Ohio App.3d 184, 2007-Ohio-1508 (Second District Court of Appeals opinion) (March 30, 2007)	5
4. Decision, Order and Entry of the Montgomery County Court of Common Pleas (January 17, 2006)	23
5. <i>Huffman v. Bd. Of Cty. Commrs.</i> , Seventh Dis. App. No. 05 CO 71, 2006-Ohio-3479	40
6. <i>State ex rel. Montgomery Cty. Pub. Defender v. Rosencrans</i> , Montgomery App. No. CA20416, 2005-Ohio-6681	49
7. <i>Parker v. Upper Arlington</i> , Franklin App. No. 05AP-695, 2006-Ohio-1649.....	54
8. <i>McQuaide v. Board of Commissioners of Hamilton County</i> , First Dist. App. No. 030033, 2003-Ohio-4420	61
9. R.C. § 2744.01	65
10. R.C. § 2744.02	71
11. R.C. § 1.49	75
12. R.C. § 5547.04	76
13. R.C. § 5589.01	77
14. R.C. § 5589.21	78
15. R.C. § 6115.25	79

**NOTICE OF APPEAL OF APPELLANTS, MIAMI TOWNSHIP, FIRE DIVISION
AND MIAMI TOWNSHIP**

Appellants Miami Township, Fire Division and Miami Township, hereby give notice of appeal to the Supreme Court of Ohio from the judgment of the Montgomery County Court of Appeals, Second Appellate District, entered in Court of Appeals Case No. 21478 on March 30, 2007. This case is one of public or great general interest.

Respectfully submitted,

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

COUNSEL FOR APPELLANTS
MIAMI TOWNSHIP, DIVISION
OF FIRE AND MIAMI TOWNSHIP

CERTIFICATE OF SERVICE

The undersigned certifies that a copy of this Notice of Appeal was sent by ordinary U.S. mail to John A. Smalley, Dyer, Garofalo, Mann & Schultz, 131 North Ludlow Street, Suite 1400, Dayton, Ohio 45402, on this 10th day of May, 2007.


Robert J. Surdyk, Counsel of Record
Sup. Ct. No. 0006205

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

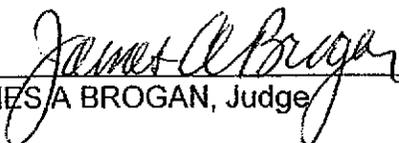
Trial Court Case No. 04-CV-5294

(Civil Appeal from
Common Pleas Court)

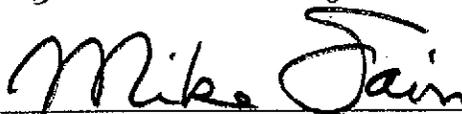
FINAL ENTRY

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.

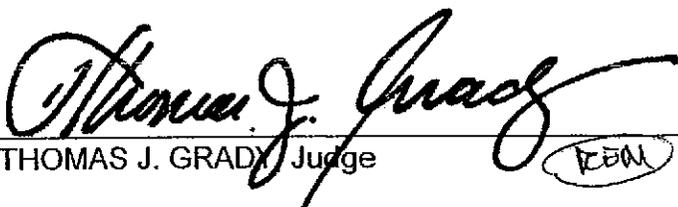
Costs to be paid as stated in App.R. 24.



JAMES A BROGAN, Judge



MIKE FAIN, Judge



THOMAS J. GRADY, Judge KEN

Copies mailed to:

John A. Smalley
DYER, GAROFALO, MANN & SHULTZ
131 N. Ludlow St., Suite 1400
Dayton, OH 45402

Robert J. Surdyk
SURDYK, DOWD & TURNER CO., LPA
Kettering Tower, Suite 1610
40 N. Main Street
Dayton, OH 45423

Hon. John W. Kessler
Montgomery County Common Pleas
41 N. Perry St., P.O. Box 972
Dayton, OH 45422

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. Commrs.*, 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. Commrs.*, 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



COURT OF COMMON PLEAS
MONTGOMERY COUNTY, OHIO
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 Hoffinan, the fire deputy chief on duty, requested that the police patrol the cite 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 of 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.

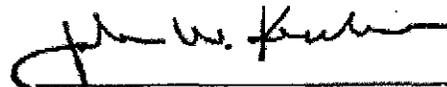
Finally, the Court finds that the decisions Township made with regard to treating the water and ice Bear Creek Road and any decision whether to post any notice of potential water and ice on the roadway were discretionary decisions which entitle Township to application of the defense of discretion and 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**.

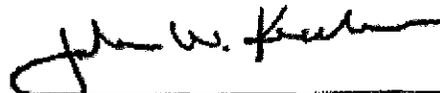
THIS IS A FINAL APPEALABLE ORDER, AND THERE IS NOT JUST CAUSE FOR DELAY FOR PURPOSES OF CIV. R. 54. PURSUANT TO APP. R. 4, THE PARTIES SHALL FILE A NOTICE OF APPEAL WITHIN THIRTY (30) DAYS.

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.

John A. Smalley, Esquire
Dyer, Garofalo, Mann & Schultz
131 North Ludlow Street, Suite 1400
Dayton, Ohio 45402

Robert J. Surdyk Esquire
Dawn M. Frick, Esquire
Surdyk, Dowd & Turner
40 N. Main Street
1610 Kettering Tower
Dayton, Ohio 45423

Jessica Kimes, Staff Attorney (937) 496-6586

H

Huffman v. Bd. of Cty. Comnrs.
Ohio App. 7 Dist.,2006.

CHECK OHIO SUPREME COURT RULES FOR
REPORTING OF OPINIONS AND WEIGHT OF
LEGAL AUTHORITY.

Court of Appeals of Ohio,Seventh District,
Columbiana County.

William HUFFMAN, et al., Plaintiffs-Appellants,
v.
BOARD OF COUNTY COMMISSIONERS, et al.,
Defendants-Appellees.
No. 05 CO 71.

Decided June 28, 2006.

Civil Appeal from Common Pleas Court, Case No.
04CV1157. Affirmed in part; Reversed in part and
Remanded.

Attorney R. Jack Clapp, Attorney Timothy Ita,
Cleveland, for Plaintiffs-Appellants.

Attorney Mark Landes, Attorney Jeffery Sniderman,
Columbus, for Defendants-Appellees.

VUKOVICH, J.

*1 ¶ 1} Plaintiffs-appellants William and Virginia Huffman (the Huffmans) appeal the Columbiana County Common Pleas Court's grant of summary judgment for defendants-appellees Columbiana County Board of Commissioners, James Hoppel as Columbiana County Commissioner, Sean Logan as Columbiana County Commissioner, and Gary Williams as Columbiana County Commissioner (collectively referred to as "the county"). Two issues are raised in this appeal. The first issue is whether governmental immunity as defined under R.C. 2744.01, 2744.02 and 2744.03 is applicable as to the county for failing to place barricades in front of a bridge on Winona Road that had fallen during the horrific rainstorms on August 27 and 28 of 2004. The second issue is whether the county, specifically the Columbiana County Engineer's Department and Paul Parks, Superintendent of the County Engineer Department, acted recklessly, willfully and/or wantonly in failing to place barricades in front of the fallen Winona Road bridge. For the reasons stated below, the judgment of the trial court is affirmed in part, reversed in part, and remanded for further proceedings.

¶ 2} On August 28, 2004, at approximately 6:30 a.m. William Huffman was in a one-car accident. William was traversing Winona Road in his car and attempted to cross the bridge located on that road. He was unable to do so because the rainstorm that occurred during the late hours of August 27, 2004, and during the early hours of August 28, 2004, caused major flooding which led to the collapse of the Winona Road bridge. William ran his car into the void left by the fallen bridge and sustained serious injuries.

¶ 3} The Winona Road bridge is located in Columbiana County outside the Village of Lisbon. It is located 0.3 of a mile west of the intersection of Winona and Depot Roads. It is undisputed that it is Columbiana County's responsibility to maintain this bridge. Furthermore, it is undisputed that prior to the rainstorm the bridge was structurally sound.

¶ 4} The rainstorm that caused damage to the Winona Road bridge began during the late hours of August 27, 2004. The rain continued to fall until the early morning hours of August 28, 2004. It is undisputed that this rainstorm caused serious flooding and damage in and around the Village of Lisbon, Columbiana County, Ohio. Numerous deponents indicated that this was the worst rainstorm that they could remember in the history of Columbiana County. (Bret Dawson (County Engineer) Depo. 32 (worst magnitude disaster he has had to deal with); James Hoppel (County Commissioner) Depo. 44; Detective Sergeant Steven Walker Depo. 27 (never seen flooding like this); Deputy Manuel Milbauer Depo. 27 (lived in county all of his life and "never seen a rainstorm like this one"); Ronald Buchanan (works for highway department) Depo. 37, 56 ("never see nothing like I seen that night").

¶ 5} During this storm, at 2:27 a.m., a Winona Fire Department fireman discovered that the bridge had dropped approximately six inches and that the bridge was impassable. Willie Brantingham (Fire Chief for the Winona Volunteer Fire Department) Affidavit ¶ 6. This information was subsequently relayed to the Columbiana County Sherriff's Dispatcher Casey

Wilson. Brantingham Affidavit ¶ 6; Wilson Affidavit ¶ 5; Wilson Depo. 40-41, 43. Wilson then immediately notified Paul Parks, Superintendent for the Columbiana County Engineer's Department, who oversees the day-to-day operations of highway maintenance. Wilson Affidavit ¶ 5; Wilson Depo. 41; Parks Depo. 33-34. It is undisputed that Parks' department was in charge of placing barricades and closing the bridge at Winona Road.

*2 {¶ 6} At approximately 2:30 a.m. when Parks had received the notification that the Winona Road bridge was starting to fall, he was already attempting to deal with issues that were being caused from the torrential downpours of rain. At approximately 10:30 p.m. on August 27, Parks received a phone call at home. Parks Depo. 9. This call informed him that the rain was causing flooding on Teegarden Road. Id. Parks called Ronald Buchanan, one of his employees, to address the problem. Id. at 11; Buchanan Depo. 15. Buchanan proceeded to try to address the problem.

{¶ 7} Around 11:00 p.m., Parks received additional calls about flooding in different areas. Parks Depo. 13-14. Shortly thereafter at around 11:30 p.m., Parks decided that due to this rain and the calls concerning flooding, he should go to the county garage immediately. Id. at 15. Due to the flooding and the inability to navigate over many of the roads, Parks did not arrive at the county garage until 2:00 a.m. Id. Thus, it took him approximately 2 1/2 hours to travel from his house in East Palestine to the county garage in Lisbon. Id. During this time, he attempted to call additional employees into work. Id. He got a hold of Mike Zook and Tim Wood. Id. at 23.

{¶ 8} At 1:00 a.m., Parks received a phone call from Buchanan. Buchanan informed Parks that in attempting to address the problem at Teegarden Road he got stranded and would be unable to return to Lisbon until the waters receded. Buchanan Depo. 43. Buchanan was near Lincoln Storage and all of the roads near it leading in other directions were flooded. He (and some other motorists) was unable to go very far in any direction. Buchanan Depo. 38.

{¶ 9} When Parks arrived at the garage, Zook and Wood had already arrived. Parks Depo. 24. Parks also noticed that the garage had begun to flood. Parks, Zook and Wood then removed one of the trucks from the garage. Id. at 24. That was all that could be removed due to the flooding. Id. at 24. Ultimately, the lower level of the garage completely flooded and the upper portion had about 3 inches of water in it. Id. at 26.

{¶ 10} After seeing the garage and all the flooding that was occurring on the roads, Parks, Zook and Wood proceeded to the Emergency Management Agency (EMA) office. Id. at 29. At the EMA office, Parks met with Jay Carter, Director of Emergency Management. Parks wanted to see what was going on in the county and if it had been declared a state of emergency. Id. at 31.

{¶ 11} After Parks found out the county was in a state of emergency, he, Zook and Wood left the EMA office and proceeded back to the garage. This occurred around 2:30 a.m. Around this time, Parks received the call from Wilson about the Winona Road bridge starting to fall. Id. at 31-34. Parks, Zook and Wood arrived back at the garage around 3:00 a.m. Buchanan also arrived back at the garage at this time. Id. at 36. Buchanan's truck had some signs and barricades in it. Id. at 37. The water continued to rise at the garage. The men could not get into the garage because the electric was going off and on and the garage flooding created a safety hazard.

*3 {¶ 12} Parks, Zook, Wood, and Buchanan stayed at the garage in the parking lot. They did not physically attempt to go to the Winona Road bridge. Parks did not call anyone from the Sheriff's Department or from the Fire Department to inform them that he was unable to check on the status of the Winona Road bridge. Parks began to call additional workers to the garage at 5:30 a.m. He waited until this time because he was concerned about employee safety traveling on the roads. Id. at 38. At 5:30 a.m., the water had already receded and it was daylight.

{¶ 13} After additional employees arrived at the garage, trucks were loaded and sent out to address the problems caused by the flooding. The workers left the garage around 6:30 a.m. and did not arrive at the Winona Road bridge until approximately 7:30 a.m., which was approximately one hour after William's accident had occurred. Id. at 44. This was approximately 5 hours after Parks was notified that the Winona Road bridge was starting to fall.

{¶ 14} Due to the injuries and the length of time it took the county to respond to the notification that the bridge was starting to fall, the Huffmans filed suit against the county on December 10, 2004. The county answered and asserted immunity as specified under Chapter 2744 of the Revised Code as a defense.

{¶ 15} Numerous depositions were then taken and

each party filed a motion for summary judgment. The Huffmans asserted that immunity was not available to the county because a fallen bridge is an **obstruction** and the county is liable for failing to keep the road free from **obstructions** pursuant to R.C. 2744.02(B)(3). They argued that the county could have removed the **obstruction** by barricading the bridge. They also argued that Parks acted wantonly or recklessly by failing to attempt to barricade the bridge and/or by failing to notify anyone that his staff could not go out to the bridge. The county contended that the road itself cannot be considered an obstruction. Furthermore, it argued that even if it is an obstruction, it did not negligently fail to remove the obstruction. It additionally argued that the duty to erect signs and barricades are discretionary functions and, as such, immunity attaches to discretionary functions. It further argued that Parks did not act wantonly or recklessly.

{¶ 16} After considering these arguments, the trial court issued its decision. It stated that a fallen bridge is an obstruction which the county had a duty to remove. It explained:

{¶ 17} "While the county can protest this fallen bridge is not 'an obstruction' because it is not a big boulder sitting in the road there is no doubt that this fallen bridge 'created a danger for ordinary traffic on the regularly traveled portion of the road.' The Court can think of no bigger obstruction to travel than a fallen bridge." 11/25/05 J.E.

{¶ 18} Thus, the court found that while the county could not have feasibly repaired the road within that amount of time, the obstruction could have been removed by the use of barricades. The trial court then went on to discuss the erection of signs. It found that in accordance with Franks v. Lopez (1994), 69 Ohio St.3d 345, the erection of signs is a discretionary decision. Also, by citing Schaffer v. Board of Cty. Comms. of Carroll Cty., Ohio (Dec. 7, 1998), 7th Dist. No. 672, it explained that this court has found that there is no distinction between the discretionary nature of erecting permanent signs and erecting temporary signage. The trial court explained:

*4 {¶ 19} "If it is assumed that Parks was negligent in failing to place signs to remove this obstruction the failure to erect the temporary signs is subject to the defense of immunity under R.C. 2744.03(A)(5) and the county is not liable." 11/25/05 J.E.

{¶ 20} The court then went on to find that there was no showing that Parks acted wantonly or recklessly.

The Huffmans appeal from that decision raising two assignments of error.

{¶ 21} "THE TRIAL COURT ERRED IN GRANTING SUMMARY JUDGMENT IN FAVOR OF APPELLEE-DEFENDANT BY DETERMINING THAT THE DEFENSES SET FORTH IN R.C. 2744.03 ARE APPLICABLE HERE."

{¶ 22} "The determination as to whether a political subdivision is immune from suit is purely a question of law properly determined by a court prior to trial and preferably on a motion for summary judgment." Schaffer v. Board of Cty. Comms. of Carroll Cty., Ohio (Dec. 7, 1998), 7th Dist. No. 672, citing Conely v. Shearer, 64 Ohio St.3d 284, 292, 1992-Ohio-133. An appellate court reviews a trial court's decision on a motion for summary judgment de novo. Bonacorsi v. Wheeling & Lake Erie Ry. Co., 95 Ohio St.3d 314, 2002-Ohio-2220, ¶ 24. Summary judgment is properly granted when: (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. Harless v. Willis Day Warehousing Co. (1978), 54 Ohio St.2d 64, 66; Civ.R. 56(C).

{¶ 23} R.C. Chapter 2744 addresses governmental immunity. It provides a three-tiered analysis for determining the availability of sovereign immunity to political subdivisions. R.C. 2744.02(A)(1) states that political subdivisions are generally not liable for injury, death or loss to persons or property incurred in connection with the performance of a governmental or proprietary function of that political subdivision. However, subsection B lists five exceptions to this general immunity. These exceptions are as follows:

{¶ 24} "(B) Subject to sections 2744.03 and 2744.05 of the Revised Code, a political subdivision is liable in damages in a civil action for injury, death, or loss to person or property allegedly caused by an act or omission of the political subdivision or of any of its employees in connection with a governmental or proprietary function, as follows:

{¶ 25} "(1) Except as otherwise provided in this division, political subdivisions are liable for injury,

death, or loss to person or property caused by the negligent operation of any motor vehicle by their employees when the employees are engaged within the scope of their employment and authority. The following are full defenses to that liability:

{¶ 26} “(a) A member of a municipal corporation police department or any other police agency was operating a motor vehicle while responding to an emergency call and the operation of the vehicle did not constitute willful or wanton misconduct;

*5 {¶ 27} “(b) A member of a municipal corporation fire department or any other firefighting agency was operating a motor vehicle while engaged in duty at a fire, proceeding toward a place where a fire is in progress or is believed to be in progress, or answering any other emergency alarm and the operation of the vehicle did not constitute willful or wanton misconduct;

{¶ 28} “(c) A member of an emergency medical service owned or operated by a political subdivision was operating a motor vehicle while responding to or completing a call for emergency medical care or treatment, the member was holding a valid commercial driver's license issued pursuant to Chapter 4506. or a driver's license issued pursuant to Chapter 4507. of the Revised Code, the operation of the vehicle did not constitute willful or wanton misconduct, and the operation complies with the precautions of section 4511.03 of the Revised Code.

{¶ 29} “(2) Except as otherwise provided in sections 3314.07 and 3746.24 of the Revised Code, political subdivisions are liable for injury, death, or loss to person or property caused by the negligent performance of acts by their employees with respect to proprietary functions of the political subdivisions.

{¶ 30} “(3) 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, except that it is a full defense to that liability, when a bridge within a municipal corporation is involved, that the municipal corporation does not have the responsibility for maintaining or inspecting the bridge.

{¶ 31} “(4) 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 that is caused by the negligence of their employees and that occurs within or on the grounds of, and is due to physical defects within or on the grounds of, buildings that are used in connection with the performance of a governmental function, including, but not limited to, office buildings and courthouses, but not including jails, places of juvenile detention, workhouses, or any other detention facility, as defined in section 2921.01 of the Revised Code.

{¶ 32} “(5) In addition to the circumstances described in divisions (B)(1) to (4) of this section, a political subdivision is liable for injury, death, or loss to person or property when civil liability is expressly imposed upon the political subdivision by a section of the Revised Code, including, but not limited to, sections 2743.02 and 5591.37 of the Revised Code. Civil liability shall not be construed to exist under another section of the Revised Code merely because that section imposes a responsibility or mandatory duty upon a political subdivision, because that section provides for a criminal penalty, because of a general authorization in that section that a political subdivision may sue and be sued, or because that section uses the term “shall” in a provision pertaining to a political subdivision.”R.C. 2744.02(B).

*6 {¶ 33} That said, if any one of the exceptions listed above is found to exist, this does not necessarily mean that the political subdivision is necessarily liable. R.C. 2744.03 lists additional defenses and/or immunities that may be asserted to establish nonliability. This statute states:

{¶ 34} “(A) In a civil action brought against a political subdivision or an employee of a political subdivision to recover damages for injury, death, or loss to person or property allegedly caused by any act or omission in connection with a governmental or proprietary function, the following defenses or immunities may be asserted to establish nonliability:

{¶ 35} “(1) The political subdivision is immune from liability if the employee involved was engaged in the performance of a judicial, quasi-judicial, prosecutorial, legislative, or quasi-legislative function.

{¶ 36} “(2) The political subdivision is immune from liability if the conduct of the employee involved, other than negligent conduct, that gave rise to the claim of liability was required by law or authorized by law, or if the conduct of the employee involved that gave rise to the claim of liability was

necessary or essential to the exercise of powers of the political subdivision or employee.

{¶ 37} “(3) The 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.

{¶ 38} “(4) The political subdivision is immune from liability if the action or failure to act by the political subdivision or employee involved that gave rise to the claim of liability resulted in injury or death to a person who had been convicted of or pleaded guilty to a criminal offense and who, at the time of the injury or death, was serving any portion of the person's sentence by performing community service work for or in the political subdivision whether pursuant to section 2951.02 of the Revised Code or otherwise, or resulted in injury or death to a child who was found to be a delinquent child and who, at the time of the injury or death, was performing community service or community work for or in a political subdivision in accordance with the order of a juvenile court entered pursuant to section 2152.19 or 2152.20 of the Revised Code, and if, at the time of the person's or child's injury or death, the person or child was covered for purposes of Chapter 4123. of the Revised Code in connection with the community service or community work for or in the political subdivision.

{¶ 39} “(5) 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.

*7 {¶ 40} “(6) In addition to any immunity or defense referred to in division (A)(7) of this section and in circumstances not covered by that division or sections 3314.07 and 3746.24 of the Revised Code, the employee is immune from liability unless one of the following applies:

{¶ 41} “(a) The employee's acts or omissions were manifestly outside the scope of the employee's employment or official responsibilities;

{¶ 42} “(b) The employee's acts or omissions were with malicious purpose, in bad faith, or in a wanton or reckless manner;

{¶ 43} “(c) Civil liability is expressly imposed upon the employee by a section of the Revised Code. Civil liability shall not be construed to exist under another section of the Revised Code merely because that section imposes a responsibility or mandatory duty upon an employee, because that section provides for a criminal penalty, because of a general authorization in that section that an employee may sue and be sued, or because the section uses the term “shall” in a provision pertaining to an employee.

{¶ 44} “(7) The political subdivision, and an employee who is a county prosecuting attorney, city director of law, village solicitor, or similar chief legal officer of a political subdivision, an assistant of any such person, or a judge of a court of this state is entitled to any defense or immunity available at common law or established by the Revised Code.

{¶ 45} “(B) Any immunity or defense conferred upon, or referred to in connection with, an employee by division (A)(6) or (7) of this section does not affect or limit any liability of a political subdivision for an act or omission of the employee as provided in section 2744.02 of the Revised Code.” R.C. 2744.03.

{¶ 46} Given all the above, the first determination for sovereign immunity is whether repairing the bridge and/or removing the obstruction of the bridge is a governmental or propriety function. Clearly under R.C. 2744.01(C)(2)(e) the maintenance and repair of roads and bridges constitutes a governmental function. Therefore, the county is not liable unless one of the exceptions under R.C. 2744.02(B) applies (going to the second tier of the governmental immunity analysis).

{¶ 47} The trial court held that subsection (B)(3) was applicable in the matter at hand. As aforementioned, this subsection states:

{¶ 48} “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, except that it is a full defense to that liability, when a bridge within a municipal corporation is involved, that the municipal corporation does not have the responsibility for maintaining or inspecting the

bridge.”

{¶ 49} Under this subsection, the trial court determined that the fallen bridge was an obstruction and thus, the county was liable if it negligently failed to remove the obstruction. The trial court then determined that the only way the county could remove the obstruction was by placing barricades in front of the bridge, i.e. signage. Therefore, following this reasoning, the trial court determined that the county was not negligent under (B)(3) because under R.C. 2744.03(A)(5) and the Ohio Supreme Court case Franks v. Lopez (1994), 69 Ohio St.3d 345, the erection of signage is discretionary. As it is a discretionary function, the trial court concluded that the failure to erect a sign or barricade is not actionable under the statute.

*8 {¶ 50} We agree with the trial court that R.C. 2744.02(A)(3) is applicable to the case at hand. Clearly, a collapsed bridge falls under a failure to keep public roads in repair or a failure to remove obstructions. The word **obstruction** is not defined by statute. Furthermore, there is no case law on what constitutes an **obstruction**. The current version of subsection (B)(3) was part of Senate Bill 106, which became effective in 2003. The prior version of R.C. 2744.02(B)(3) did not contain the word **obstruction**. Instead it read:

{¶ 51} “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, except that it is a full defense to that liability, when a bridge within a municipal corporation is involved, that the municipal corporation does not have the responsibility for maintaining or inspecting the bridge.”

{¶ 52} As can be seen by a comparison between the old statute and the new statute, the new statute removed the word nuisance and instead stated a “negligent failure to remove obstructions.” Thus, since case law dealing with the old statute does not address what is an “obstruction” and case law dealing with the current statute has not yet determined this, there is little guidance as to what constitutes an “obstruction.”

{¶ 53} That said, the generic definition of **obstruction** is “something that obstructs.” Webster’s

Tenth Collegiate Dictionary (1998) 803. **Obstruct** is defined as “to hinder from passage, action, or operation: impede.” Id. As the trial court noted, there would be no bigger **obstruction** to travel than a fallen bridge. We agree. However, even if a collapsed bridge is not considered an **obstruction**, a bridge being collapsed would constitute a failure to keep a public road in repair.

{¶ 54} Thus, our analysis turns to whether the county was negligent in its failure either to repair the road or to remove the obstruction. As stated above, the trial court found that the county did not act negligently because the only way to remove the obstruction was through the erection of signage and since erection of signs is discretionary, the county was not liable for the failure to erect signs.

{¶ 55} We agree with the trial court that the only way the obstruction could be removed in this situation was through the erection of signage. That said, we do not agree with the final decision that there is no genuine issue of material fact as to whether the county negligently failed to remove the obstruction.

{¶ 56} In *Franks*, the Ohio Supreme Court stated:

{¶ 57} “Overhanging 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.” Franks, 69 Ohio St.3d at 349.

*9 {¶ 58} The above quoted portion of *Franks* indicates that once signage is posted, there is a mandatory duty to maintain. As such, a political subdivision will be held accountable for failing to replace signs that have lost their capacity to reflect or failing to remove foliage that obscure traffic signs. Id. Thus, *Franks* is clear that the erection of signage is discretionary, however, the duty to maintain signage is mandatory. Id., citing Winwood v. Dayton (1988), 37 Ohio St.3d 282.

{¶ 59} However, as seen above, *Franks* goes further to state that impediments such as potholes that are easily discoverable, the elimination of the hazards involve no discretion, policy-making, or engineering judgment. A collapsed bridge falls under an easily

discoverable hazard. As such, the decision of whether to barricade the bridge involves no discretion, policy-making or engineering judgment. The bridge must be barricaded. To hold otherwise would mean that a county would have no responsibility to ever barricade a fallen bridge.

{¶ 60} Thus, we cannot find that the decision to barricade the bridge called for a discretionary decision. Thus, the question then is did the county act negligently in failing to remove the obstruction?

{¶ 61} Negligence as defined legally is, "the omission to do something which a reasonable man, guided by those ordinary considerations which ordinarily regulate human affairs, would do." Black's Law Dictionary (5 Ed.1979) 930.

{¶ 62} The facts in this case show that clearly this was one of the worst rainstorms that Columbiana County experienced. It took Parks 2 1/2 hours to go to work because of the flooding. Trying to come to the garage that night, Parks learned that Route 517 was completely flooded and he could not take that road into Lisbon. So he went a different direction and tried to go on Franklin Square. Parks Depo. 19. Franklin Square and 558 were completely flooded. Parks Depo. 19. A fireman was sitting at 558 indicating that Parks could not take that route because it was flooded. Id. at 19. Parks, knowing he needed to get to the garage, drove his truck through there anyway. Id. at 20. The water was so high it was hitting his "door coming up past [the] passenger window." Id. at 21. He then proceeded to turn left onto Canfield-Lisbon Road. There is a big hill on this road and he saw that the rain had washed tremendous amounts of debris, large rocks, and trees onto the road. Id. at 21-22. However, he still proceeded onto this road. At various points on this road where either it intersected with crossroads or where it was low lying, there was "heavy flooding." Id. at 22. After all this, Parks finally arrived at the garage, which was flooding and continued to flood throughout the night. Entering the garage was risky at that point because the electric was coming on and off.

{¶ 63} Furthermore, from communicating with Buchanan, Parks was aware of other roads and areas which were experiencing severe flooding. In fact, as stated earlier, Buchanan became stranded at one point where he could not travel in any direction due to various roads being flooded in all directions. Buchanan's deposition testimony indicates how bad this storm was during the late hours of August 27 and the early hours of August 28. He explained:

*10 {¶ 64} "Just that. I just turned left on Teegarden, and I was awestruck at what I was seeing. The water, there was so much water coming off of the north side of the ski slope, the state has a big pipe, I am not sure of the precise size of the pipe, I would guess four foot plus in diameter, and it wasn't able to handle the water coming down out of that little wooded area off the north side of the ski slope, and it was hitting the area where the cross pipe is at under Teegarden, it was literally shooting up in the air and going over the guardrail splashing down onto the westbound lane at Teegarden and running down the road.

{¶ 65} "And I'm trying to picture is this actually what I'm seeing, and it was. I thought, well, the road still looks intact. So I thought I better proceed on.

{¶ 66} "That was pretty bad. I was kind of leery to drive through it because it looked pretty deep but I did, and I proceeded west and I got maybe two-tenths of a mile and there was another scenario pretty much of what I seen only worse."

{¶ 67} "Q. Is there another pipe, culvert?"

{¶ 68} "A. Yes. It was our cross pipe, county cross pipe, which is smaller, I'm going to say probably a 24-inch pipe, but to the right of that location, that cross pipe, there is a resident there, a man has a home built up in this hollow there. It is a ravine more or less, so to speak, and he had two ponds up there, and I am seeing just a massive amount of water coming down out of there, and I could see where it is starting to take the eastbound lane out, and there's just this gigantic hole, but there is so much water, I could see it coming off and running down the edge of our road.

{¶ 69} "At that time it probably had already taken two feet of our roadway, and I thought there is no way I can put a barricade right there because it's just going to get washed away. So I got turned around.

{¶ 70} " * * *

{¶ 71} "There is no way I could drive through it. The water was just, I mean, I'm afraid to guess how deep it was. It was two feet plus, probably so much water coming through.

{¶ 72} "Like I say, it was hitting our road, the road bank where our cross pipe was at and coming up, again, the same kind of scenario of what I had previously seen at the other intersection, coming up and coming down and hitting the road so hard it

pounded a hold in the road, the eastbound lane, washing it away.

{¶ 73} “So I thought I need to get through there. So I can't, so I opted to come back and the rain had picked up, again, even worse, if you can imagine from worse to even worse.”Buchanan Depo. 26-29.

{¶ 74} Also, deposition testimony from various Sherriff's Deputies indicates that many roads were impassable that night. Sergeant Thomas Smith indicated that Route 45 was shut down and he could not go any further than Logtown Road. Smith Depo. 17-19. It was dispatched to him that Route 45 washed away at Salem Grange Road and McCracken Road. Id. at 18-19. Other routes were also impassable throughout the night. Id. at 28. Route 9 was impassable, parts of Route 172 in the Guilford Lake area were impassable, and at one point Route 11 at Route 154 was shut down. Id. at 28. When asked about how far north he could travel, he indicated:

*11 {¶ 75} “We could not get any further north than Teegarden Road and Depot Road. We could not get any further than coming across the county roads that I know were shut down.

{¶ 76} “Depot, 172 was shut down just west of Guilford Lake. Lisbon, it was shut down at 45 just south of Logtown-Saint Jacobs, and then even further up where the bridge was washed out, 164 North, we were not able to get any further in that direction, and not speaking from personal knowledge, but patrol advised that State Route 11 was closed north of Lisbon.”Id. at 62.

{¶ 77} Deputy Manuel Milbauer conveyed similar information. He indicated that there was flooding on Depot Road. Milbauer Depo. 13. There were problems at McCracken Corner but he could not make it that far. Id. He indicated that in trying to get there he was stopped at Depot Road because just north of Teegarden Road there was water across Depot Road. Id. at 14. He explained that Teegarden Road to the east was under water. Id. At one point in his deposition he references a conversation he had with a Winona fireman at Winona Road west. Id. at 20. When asked about the conversation, he stated the following:

{¶ 78} “He told me that Winona was not passable to the west, that Depot was flooded to the north of him, the bridge was out at McCracken [a different bridge than the one at issue in this case], and I said is there any way out of here, and he said well, you can try to

go Winona east, but Teegarden is washed out down at McCracken Road.

{¶ 79} “So the whole area was basically flooded. Winona Road to the east was underwater where I could see from Depot. Winona to the west back behind the truck was under water.”Id. 20-21.

{¶ 80} This conversation occurred around midnight. Milbauer tried to continue north on Depot Road, but did not make it more than a quarter of a mile because the bridge on Depot Road was totally under water. Id. at 21. Milbauer indicated that he could not even see the bridge because the water had risen over the guardrails. Id. Thus, for awhile, Milbauer was stranded and unable to travel in any direction. At around 3:00 a.m. the rain had let up a little bit and the water had receded slightly at Winona Road east. Id. at 27. He took Winona Road east to Yates Road then to Campbell Road and then to 172. Id. at 27-28. He indicated that he was able to travel these roads but there was still several inches of water on the roads.

{¶ 81} The record indicates that between the time Parks found out about the bridge and the time that the accident occurred was a little over four hours. Parks did not notify the Sherriff's Department or anyone else that he would not be going out to the bridge until the morning. Deposition testimony revealed that several deputies were in the vicinity of the bridge that morning. Various deputies indicated that if they had been informed of the bridge, they would have attempted to blockade it. Whether or not they could have reached the bridge is debatable, but it is clear that no attempt was made to notify any of the deputies about the bridge's condition. Testimony also revealed that at around 3:00 a.m., the flood water was receding in certain areas of the county.

*12 {¶ 82} Considering all of the above, we find that it is a factual question for the jury as to whether the county was negligent. While this court and the trial court may believe that given the information Parks had that night he acted as a reasonable person would, the determination of what a reasonable person would do is typically a question for the jury. Accordingly, this assignment of error has merit.

{¶ 83} “THE TRIAL COURT ERRED IN DETERMINING THAT PAUL PARKS' CONDUCT WAS NOT WANTON OR RECKLESS AS A MATTER OF LAW.”

{¶ 84} The Huffmans contend that the County Engineer's Department, specifically Parks, acted wantonly or recklessly and did nothing to close the bridge or warn motorists of the hazard. After reviewing the depositions and summary judgment motions, the trial court found that Parks was not negligent, since negligence is a lower standard than recklessness and wantonness, summary judgment was granted for the county. In coming to this determination, the court stated:

{¶ 85} "This is where the Court believes that the question of whether the acts or omissions of Parks in not erecting barricades gives rise to liability at all under the immunity statutes such that the question of defense and immunities is not reached. His decision not to risk people on the road that night cannot be said to be in violation of any duty of care. While it is true that sheriff's deputies and firemen were responding throughout the county to emergency situations, these are trained emergency personnel whose general duties include facing some danger. Parks' experience in attempting to get to the garage from East Palestine, the fact that he had already had one employee trapped for over two hours because of the storm, the fact that he had other employees with difficulty getting to the garage and the fact that his equipment was flooded all indicate that his decision not to send anyone else in harms way for any reason was reasonable under the circumstances." 11/25/05 J.E.

{¶ 86} In order to survive summary judgment, the Huffmans were required to show that Parks' conduct fell within the definition of reckless, willful, and wanton.

{¶ 87} "'Willful and wanton misconduct' constitutes more than mere negligence. Brockman v. Bell (1992), 78 Ohio App.3d 508. It is behavior which demonstrates 'a deliberate or reckless disregard for the safety of others.' Reynolds v. City of Oakwood (1987), 38 Ohio App.3d 125, 127." Mitchell v. Norwalk Area Health Serv., 6th Dist. No. H-05-002, 2005-Ohio-5261, ¶ 57.

{¶ 88} "[M]ere negligence is not converted into wanton misconduct unless the evidence establishes a disposition to perversity on the part of the tortfeasor." Rozzman v. Sammett (1971), 26 Ohio St.2d 94, 96-97. Such perversity must be under such conditions that the actor must be conscious that his conduct will in all probability result in injury. Id. at 97. Such risk is substantially greater than that which is

necessary to make his conduct negligent. Fisher v. Harden, 5th Dist. No.2004AP0015, 2005-Ohio-4965, ¶ 26.

*13 {¶ 89} Despite the fact that this court has found that there is an issue as to whether or not the county acted negligently in this case, we cannot find, given the facts, that Parks acted recklessly, wantonly, or willfully.

{¶ 90} At most, Parks was negligent, but nothing in the record indicates his conduct rose to any higher level of culpability. In order for the finding of negligence to be converted into wanton misconduct, Parks must have known that his conduct would in all likelihood cause injury. Despite the Huffmans' characterization of Parks' actions as "doing nothing" and watching the water go by, the depositions reveal that this was not the case. Parks went to the garage, he called employees in, he went to the EMA office, and he continually took calls from the dispatcher. Considering the amount of time it took him and his employees to get to the garage, the condition the garage was in when they arrived, and the condition of the roads, Parks' actions do not rise to the level of wanton, willful or reckless conduct. The conditions of the roads that night and the information Parks had before him do not support a determination that Parks acted wantonly, willfully, or recklessly. Consequently, this assignment of error lacks merit.

{¶ 91} For the foregoing reasons, the judgment of the trial court is hereby affirmed in part, reversed in part and remanded to the trial court for further proceedings according to law and consistent with this Court's opinion.

DONOFRIO, P.J., concurs.

DEGENARO, J., concurs.

Ohio App. 7 Dist., 2006.

Huffman v. Bd. of Cty. Commrs.

Slip Copy, 2006 WL 1851715 (Ohio App. 7 Dist.),
2006 -Ohio- 3479

END OF DOCUMENT

H

State ex rel. Montgomery Cty. Pub. Defender v.
 Rosencrans
 Ohio App. 2 Dist., 2005.

**CHECK OHIO SUPREME COURT RULES FOR
 REPORTING OF OPINIONS AND WEIGHT OF
 LEGAL AUTHORITY.**

Court of Appeals of Ohio, Second District,
 Montgomery County.

STATE ex rel. Law Office of the Public Defender,
 Montgomery County, Ohio and Glen H. Dewar
 Relators

v.

Robert ROSENCRANS, Mayor of Moraine and the
 City of Moraine Respondents.
 No. CA20416.

Decided Dec. 14, 2005.

Background: Public Defender's Office filed petition for writ of mandamus, directing mayor and city to hold Moraine Mayor's Court in an open public forum, to turn on sound equipment and to record Mayor's Court proceedings.

Holding: The Court of Appeals held that mayor did not have a clear legal duty to turn on the sound system, and thus, Public Defender's Office was not entitled to writ of mandamus.

Petition denied.

[1] Mandamus 250 ↪23(2)

250 Mandamus

250I Nature and Grounds in General

250k21 Persons Entitled to Relief

250k23 Interest in Subject-Matter

250k23(2) k. Interest as Citizens or Taxpayers. Most Cited Cases
 To bring a mandamus action to enforce a "public right" it is only necessary that the relator is a state citizen.

[2] Criminal Law 110 ↪635

110 Criminal Law

110XX Trial

110XX(B) Course and Conduct of Trial in General

110k635 k. Publicity of Proceedings. Most Cited Cases

Public access to criminal proceedings is a public right based on the premise that criminal cases are prosecuted in the name of the people because crimes are public wrongs affecting all members of society.

[3] Mandamus 250 ↪22

250 Mandamus

250I Nature and Grounds in General

250k21 Persons Entitled to Relief

250k22 k. In General. Most Cited Cases

Since the Montgomery County Public Defender's Office was an agency which was statutorily mandated to defend indigent persons in criminal offenses, it had a clear legal right to bring a mandamus action to ensure public access to the Moraine Mayor's Court.

[4] Mandamus 250 ↪16(1)

250 Mandamus

250I Nature and Grounds in General

250k16 Mandamus Ineffectual or Not Beneficial

250k16(1) k. In General. Most Cited Cases

Since Public Defender's Office's petition for writ of mandamus sought order directing that all criminal defendants be brought into open court for their proceedings in Moraine Mayor's Court and since this act was already being performed by mayor, the issue was moot and mandamus would not lie.

[5] Courts 106 ↪72

106 Courts

106II Establishment, Organization, and Procedure

106II(B) Places and Times of Holding Court

106k72 k. Courthouses and Courtrooms.

Most Cited Cases

Because the Mayor's Court Rule distinguished between the "public" and "participants," the plain and ordinary meaning of "participant" did not include the public at large as that term was used in Mayor's Court Rule providing that all "participants" must be able to hear and be heard and, if the room acoustics are unsatisfactory, an efficient public address system shall be provided.

[6] Courts 106 ↪72

106 Courts

106II Establishment, Organization, and Procedure

106II(E) Places and Times of Holding Court

106k72 k. Courthouses and Courtrooms.

Most Cited Cases

Term "participant" referred to those who took an active role in the outcome of the trial, such as the parties, counsel, mayor, mayor's staff and any witnesses who actually took part in the proceedings, as that term was used in Mayor's Court Rule providing that all "participants" must be able to hear and be heard and, if the room acoustics are unsatisfactory, an efficient public address system shall be provided.

[7] Mandamus 250 ↪48

250 Mandamus

250II Subjects and Purposes of Relief

250II(A) Acts and Proceedings of Courts, Judges, and Judicial Officers

250k48 k. Trial or Hearing of Cause or

Issues. Most Cited Cases

Pursuant to Mayor's Court Rule providing that all "participants" must be able to hear and be heard and, if the room acoustics are unsatisfactory, an efficient public address system shall be provided, mayor did not have a clear legal duty to turn on the sound system since Public Defender's Office failed to show that any "participants" in Mayor's Court proceedings were unable to hear the proceedings, and thus, Public Defender's Office was not entitled to writ of mandamus directing mayor to turn on sound system.

[8] Courts 106 ↪49

106 Courts

106II Establishment, Organization, and Procedure

106II(A) Creation and Constitution

106k46 Organization and Incidents of Existence

106k49 k. Courts Not of Record. Most

Cited Cases

Courts 106 ↪189(16)

106 Courts

106IV Courts of Limited or Inferior Jurisdiction

106k186 Municipal Courts

106k189 Procedure

106k189(16) k. Records and Dockets.

Most Cited Cases

A Mayor's Court is not a court of record, and thus, a Mayor's Court is only required to keep a docket, but not a journal.

[9] Courts 106 ↪189(16)

106 Courts

106IV Courts of Limited or Inferior Jurisdiction

106k186 Municipal Courts

106k189 Procedure

106k189(16) k. Records and Dockets.

Most Cited Cases

Mayor's Court must list on its appearance docket any appearances, papers, orders, verdicts and judgments, but Court is not required to actually have signed journal entries of all these items.

[10] Courts 106 ↪72

106 Courts

106II Establishment, Organization, and Procedure

106II(E) Places and Times of Holding Court

106k72 k. Courthouses and Courtrooms.

Most Cited Cases

Courts 106 ↪111

106 Courts

106II Establishment, Organization, and Procedure

106II(M) Records

106k111 k. Necessity. Most Cited Cases

Language of Mayor's Court Rule providing that audio system to record Mayor's Court proceedings should be provided and tapes of proceedings should be maintained is discretionary, not mandatory, and thus, the Mayor is not required to have in place a recording system.

[11] Mandamus 250 ↪48

250 Mandamus

250II Subjects and Purposes of Relief

250II(A) Acts and Proceedings of Courts, Judges, and Judicial Officers

250k48 k. Trial or Hearing of Cause or Issues. Most Cited Cases

Since the Mayor's Court was not a court of record, and the Mayor's Court Rules did not require a recording system, the Mayor did not have a clear legal duty to turn on the recording system, and thus, Public Defender's Office was not entitled to writ of mandamus directing Mayor's Court to record all proceedings before it.

Janet R. Sorrell, Dayton, for Relators.

David C. Greer, Jennifer L. Stueve, Dayton, and Robert J. Surdyk, Dayton, for Respondents.

DECISION AND FINAL JUDGMENT ENTRY
PER CURIAM.

*1 ¶ 1} This matter comes for consideration by this Court on the petition for a writ of mandamus filed by Relators, Law Office of the Public Defender for Montgomery County. Relators filed their petition against Respondents, Robert Rosencrans, Mayor of Moraine and the City of Moraine, on March 16, 2004. Respondents filed a motion to dismiss the petition on April 13, 2004, which we overruled on May 5, 2005. In accordance with Local Appellate Rule 8, the parties have timely submitted their evidence and briefs, and the matter is ripe for resolution by this Court.

¶ 2} Relators request that this Court issue a writ of mandamus directing the Respondents to “hold Moraine Mayor’s Court in an open public forum, to turn on sound equipment and to record Mayor’s Court proceedings.” Respondents have answered that Moraine Mayor’s Court is held in an open public forum, thus the claim is moot, and that Mayor’s Court Rules make turning on the sound equipment and recording the proceedings discretionary and thus mandamus will not lie.

¶ 3} The following are our findings of fact relevant to the present action: Relators are the Law Office of the Public Defender for Montgomery County, Ohio and Glen H. Dewar, an Attorney-at-Law and the Public Defender of Montgomery County, Ohio. (Complaint ¶ 1).

¶ 4} Respondents are Robert Rosencrans, the duly elected Mayor of Moraine, Ohio and the City of Moraine. Robert Rosencrans, as Mayor, conducts the Moraine Mayor’s Court. (Id. at ¶ 2).

¶ 5} The Moraine Mayor’s Court is held at the council chambers within the Municipal Building located at 4200 Dryden Road, Moraine, Ohio. (Id. at ¶ 3). The proceedings of the Moraine Mayor’s Court are governed by Ohio Revised Code § 1905.01 et. seq. and the Mayor’s Court Education and Procedure Rules, as promulgated by the Ohio Supreme Court. (Id. at ¶ 4).

¶ 6} During Robert Rosencrans’s tenure as Mayor the practice of bringing prisoners into open court

ceased. (Rosencrans Depo. 88, lines 15-19). However, the Mayor has now resumed bringing prisoners into open court for legal proceedings. (Id. at 99, lines 10-24). Further, the Mayor and the City of Moraine have admitted in their Answer to Relator’s petition that they have a duty to conduct all proceedings in an open, public forum. (Answer ¶ 3).

¶ 7} The Moraine Mayor’s Court is held in the city council chambers which contains a sound system that is always turned on during a city council meeting. (Hicks Depo. 12, line 3). That sound system is routinely not turned on for proceedings in the Moraine Mayor’s Court. (Rosencrans Depo. 78-79). The Mayor chooses not to turn on the existing system because he does not “want [] everyone in the courtroom to know what they are being charged with.” (Id. at 79, lines 8-9). Additionally, the Mayor believes that he is not required to turn on the sound system. (Id., lines 16-25).

¶ 8} The council chambers does contain recording equipment that is used for city council meetings. (Hicks Depo. 77). The sound and recording systems are apparently linked, thus when the sound system is not turned on the recording system is also not turned on.

*2 ¶ 9} Based on the aforementioned facts the Relators seek a writ of mandamus ordering the Moraine Mayor’s Court to bring all prisoners into open court, and to turn on the sound and recording system for all proceedings in Mayor’s Court.

¶ 10} To be entitled to a writ of mandamus, the petitioner must demonstrate: (1) that he has a clear legal right to the relief requested; (2) that the respondent is under a clear legal duty to perform the requested act; and (3) that the petitioner has no plain and adequate remedy in the ordinary course of law. *State ex rel. Luna v. Huffman* (1996), 74 Ohio St.3d 486, 487, 659 N.E.2d 1279.

¶ 11} Initially, we must address whether the Public Defender’s Office may bring an original action when it does not have a “beneficial interest” in the litigation. It is not required that the Public Defender’s Office have a “beneficial interest” if it is attempting to enforce a “public right.” See *State ex rel. Ohio Academy of Trial Lawyers v. Sheward* (1999), 86 Ohio St.3d 451, 475, 715 N.E.2d 1062. To bring a mandamus action to enforce a “public right” it is only necessary that the relator is an Ohio citizen. *Id.* Public access to criminal proceedings is a public right based on the premise that “[c]riminal cases are prosecuted

in the name of the people because crimes are public wrongs affecting all members of society." *In re T.R., a Juvenile, State ex rel. Dispatch Printing Company v. Solove, Judge* (1990), 52 Ohio St.3d 6, 13, 556 N.E.2d 439.

[3]{¶ 12} As the Montgomery County Public Defender's Office is an agency which is statutorily mandated to defend indigent persons in criminal offenses, we hold that it has a clear legal right to bring a mandamus action to ensure public access to the Moraine Mayor's Court.

{¶ 13} In addition to the Public Defender's Office having a legal right to bring this action, it must also be shown that the Moraine Mayor's Court has a clear legal duty to perform the requested acts, in order for the extraordinary relief of mandamus to lie. In essence, the Public Defender's Office seeks three separate actions from the Moraine Mayor's Court: (1) that all criminal defendants are brought into court for their proceedings; (2) that the sound amplification system is turned on so that the public may hear the court proceedings; and (3) that the proceedings which occur in Moraine's Mayor's Court are recorded.

[4]{¶ 14} The Public Defender's Office's first request is that all criminal defendants be brought into open court. Mandamus will not lie to compel an act which has already been performed. *State ex rel. Hamilton v. Brunner* (2005), 105 Ohio St.3d 304, 305, 825 N.E.2d 607, 2004-Ohio-1735. In other words, mandamus is inappropriate to secure resolution of issues which have become moot while pending before a court of appeals. *State ex rel. Gantt v. Coleman* (1983), 6 Ohio St.3d 5, 450 N.E.2d 1163.

{¶ 15} It is undisputed that the Mayor is currently bringing all criminal defendants into open court. Further, the Mayor and the City of Moraine have admitted in their answer to Relators' complaint, and we agree with their admission, that they have a duty to conduct all court proceedings in open and bring all criminal defendants into open court. Therefore, as the requested act is being performed by the Mayor, the issue is moot and mandamus will not lie.

*3 {¶ 16} The Public Defender's Office also seeks an order from this Court requiring Moraine Mayor's Court to turn on its sound system for all court proceedings. The Public Defender's Office relies on Mayor's Court Rule 11(B)(2) which states, in part, that "[a]ll participants must be able to hear and be heard. If the room acoustics are unsatisfactory, an efficient public address system shall be provided."

{¶ 17} At issue is whether the term "participants" is limited to the Mayor, the Prosecutor, the Defendants and their attorneys; or whether the term "participants" includes the public at large which may observe the court proceedings. Unfortunately, the Mayor's Court Rules fail to provide a definition of the term "participant."

{¶ 18} The words in statutes or rules of procedure must be given their "plain and ordinary meaning, unless legislative intent indicates otherwise." *Union Rural Elec. Coop., Inc. v. Pub. Util. Comm.* (1990), 52 Ohio St.3d 78, 555 N.E.2d 641. If the rule conveys a meaning which is clear and unequivocal, then the interpretation is at an end. *Provident Bank v. Wood* (1973), 36 Ohio St.2d 101, 105-106, 304 N.E.2d 378. However, if the term is ambiguous, a court should look at all words used in the rule and ensure that all words have effect and no part of the rule is disregarded. *D.A.B.E., Inc. v. Toledo-Lucas Cty. Bd. of Health* (2002), 96 Ohio St.3d 250, 254, 773 N.E.2d 536, 2002-Ohio-4172.

{¶ 19} It is important to note that a writ of mandamus is an extraordinary remedy which should be granted with caution. *State ex rel. Brown v. City of Canton* (1980), 64 Ohio St.2d 182, 185, 414 N.E.2d 412 (C.J.Celebreeze, dissenting). The respondent must have a clear legal duty to perform the requested act for the relator to be entitled to the extraordinary remedy of mandamus. *State ex rel. Luna*, 74 Ohio St.3d at 487, 659 N.E.2d 1279 (emphasis added).

[5][6]{¶ 20} The word "participant" is defined as "one that participates, shares, or takes part in something." *American Heritage Dictionary* (4th ed.2000). The terms "participants," "public" and "parties and counsel" are used throughout Mayor's Rule 11. We conclude that because the Rule distinguishes between the "public" and "participants," the plain and ordinary meaning of "participant" does not include the public at large. We believe it is more logical to read the term "participant" as a reference to those who take an active role in the outcome of the trial such as the parties, counsel, Mayor, Mayor's staff and any witnesses who actually "take part" in the proceedings.

[7]{¶ 21} Thus, we conclude that based on our reading of Mayor's Rule 11(B)(2), the Mayor does not have a "clear legal duty" to turn on the sound system. The Relators have failed to show that any "participants," as we understand the word, are unable

to hear the proceedings.

{¶ 22} We do note, however, that as a functioning sound system is in place, and it only requires the flip of a switch to activate the sound system, it would seem to be good practice to turn on the sound system for Mayor's Court proceedings. But, based on our interpretation of the Rule, we can not say that there is a clear legal duty for the Mayor to turn on the sound, thus the extraordinary remedy of mandamus will not lie.

*4 {¶ 23} Finally, the Public Defender's Office asserts that the Moraine Mayor's Court is required by law to record all proceedings before it. The Public Defender's Office states that Mayor's Courts are governed by the Ohio Rules of Criminal Procedure and that the Rules of Criminal Procedure "require a court to record certain matters, and by implication, all matters."

{8}[9]{¶ 24} However, we agree with Respondents that a Mayor's Court is not a court of record. Portage v. Belcher (1996), 117 Ohio App.3d 90, 91-92, 689 N.E.2d 1032. A Mayor's court is only required to keep a docket, but not a journal. City of Blue Ash v. Madden (1982), 8 Ohio App.3d 312, 313, 456 N.E.2d 1277. This distinction requires the Mayor's court to list on its appearance docket any appearances, papers, orders, verdicts and judgments; it does not require the court to actually have signed journal entries of all these items. See e.g., City of North Ridgeville v. Smith (Feb. 21, 2001), Lorain App. No. 00CA7579 (examining the difference between a court journal and an appearance docket).

[10]{¶ 25} In addition to the fact that a Mayor's Court is not a court of record, the Mayor's Court Rules do not require that a recording system be provided. Mayor's Court Rule 11(B)(2) states in part that "[a]n audio system to record mayor's court proceedings *should* be provided and tapes of proceedings *should* be maintained" (emphasis added). Thus, the language of the Rule is clearly discretionary, not mandatory, and the Mayor is not required to have in place a recording system.

[11]{¶ 26} Accordingly, as the Mayor's Court is not a court of record, and the Mayor's Court Rules do not require a recording system, the Mayor does not have a "clear legal duty" to turn on the recording system.

{¶ 27} As we have previously noted, the sound system in place at the Moraine city council chambers, where Mayor's Court is conducted, is apparently also

a functioning recording system. Additionally, although we hold that there is no clear legal duty to turn on the sound system, we believe it would be good practice to do so, and accordingly this practice would also include using the recording system which is part of the sound system already in place. However, as there is no clear legal duty to turn on the recording system, the extraordinary remedy of mandamus will not lie.

{¶ 28} In sum we conclude that the Public Defender's first request that all defendants be brought into open court is moot as the Mayor is currently doing so, and has admitted that he has a duty to continue bringing defendants into open court. Further, as there is no clear legal duty to perform the other requested acts, to turn on the sound system and record proceedings before the Moraine Mayor's Court, mandamus will not lie.

{¶ 29} As a result of our determination that there is no clear legal duty to perform the requested acts, it is unnecessary for us to address whether the Public Defender's Office has an adequate remedy at law available to it.

*5 {¶ 30} Wherefore, the requirements for the extraordinary relief of mandamus having not been satisfied, a writ of mandamus shall not issue. Accordingly, Relator's petition for a writ of mandamus is DENIED and this matter is DISMISSED.

{¶ 31} IT IS SO ORDERED.

To the Clerk: Pursuant to Civil Rule 58(B), please serve on all parties not in default for failure to appear notice of judgment and its date of entry upon the journal.

Ohio App. 2 Dist., 2005.
State ex rel. Montgomery Cty. Pub. Defender v. Rosencrans
Not Reported in N.E.2d, 2005 WL 3454738 (Ohio App. 2 Dist.), 2005 -Ohio- 6681

END OF DOCUMENT

H

Parker v. City of Upper Arlington
Ohio App. 10 Dist., 2006.

CHECK OHIO SUPREME COURT RULES FOR
REPORTING OF OPINIONS AND WEIGHT OF
LEGAL AUTHORITY.

Court of Appeals of Ohio, Tenth District, Franklin
County.

Charles PARKER et al., Plaintiffs-Appellants,
v.

CITY OF UPPER ARLINGTON, Defendant-
Appellee.

No. 05AP-695.

Decided March 31, 2006.

Background: City residents brought action against city seeking declaration that city traffic ordinance was unconstitutional, and seeking actual and compensatory damages. The Court of Common Pleas, Franklin County, No. 04CVH09-9609, dismissed residents' action. Residents appealed.

Holdings: The Court of Appeals, Klatt, P.J., held that:

- (1) to extent that residents' complaint sought declaration that city's actions were unconstitutional, residents' complaint asserted true declaratory judgment claim from which city was not immune under Political Subdivision Tort Liability Act;
- (2) to extent that residents' complaint sought monetary damages against city, complaint asserted tort claim that could be barred by provisions of Political Subdivision Tort Liability Act;
- (3) city was immune from residents' complaint alleging that city's actions had resulted in nuisance;
- (4) city's exercise of governmental function of regulating traffic did not fall within exception to governmental immunity for injury, death, or loss to person or property caused by negligent failure to remove obstructions from public roadways;
- (5) residents stated claim for declaratory judgment against city; and

(6) residents pled sufficient basis to have stated claim for writ of mandamus.

Affirmed in part, reversed in part, and remanded.
West Headnotes

[1] Municipal Corporations 268 ↪723

268 Municipal Corporations

268XII Torts

**268XII(A) Exercise of Governmental and
Corporate Powers in General**

**268k723 k. Nature and Grounds of
Liability. Most Cited Cases**

To extent that city residents' complaint sought declaration that city's actions in enacting traffic ordinance and constructing allegedly dangerous traffic pattern were unconstitutional, residents' complaint asserted true declaratory judgment claim from which city was not immune under Political Subdivision Tort Liability Act. R.C. § 2744.01 et seq.

[2] Municipal Corporations 268 ↪723

268 Municipal Corporations

268XII Torts

**268XII(A) Exercise of Governmental and
Corporate Powers in General**

**268k723 k. Nature and Grounds of
Liability. Most Cited Cases**

To extent that city residents' complaint sought monetary damages against city for city's actions in enacting traffic ordinance and creating allegedly dangerous traffic pattern, complaint asserted tort claim that could be barred by provisions of Political Subdivision Tort Liability Act. R.C. § 2744.01 et seq.

[3] Municipal Corporations 268 ↪724

268 Municipal Corporations

268XII Torts

**268XII(A) Exercise of Governmental and
Corporate Powers in General**

**268k724 k. Governmental Powers in
General. Most Cited Cases**

City was performing governmental function of regulating traffic when it constructed allegedly dangerous and unnecessary traffic pattern, and thus

city was immune from city residents' complaint alleging that city's actions had resulted in nuisance. R.C. § 2744.02(A)(1).

[4] Automobiles 48A  **266**

48A Automobiles

48AVI Injuries from Defects or Obstructions in Highways and Other Public Places

48AVI(A) Nature and Grounds of Liability

48Ak266 k. Failure to Prevent or Remove Defects or Obstructions. Most Cited Cases

Municipal Corporations 268  **776**

268 Municipal Corporations

268XII Torts

268XII(C) Defects or Obstructions in Streets and Other Public Ways

268k774 Obstructions

268k776 k. Roadway. Most Cited Cases

City's placement of stop signs, painted crosswalks, and sidewalk ramps at intersection did not block intersection, or present obstacle or impediment to passing through on either road, and thus city's exercise of governmental function of regulating traffic did not fall within exception to governmental immunity under Political Subdivision Tort Liability Act for injury, death, or loss to person or property caused by negligent failure to remove obstructions from public roadways. R.C. § 2744.02(B)(3).

[5] Declaratory Judgment 118A  **315**

118A Declaratory Judgment

118AIII Proceedings

118AIII(D) Pleading

118Ak312 Complaint, Petition or Bill

118Ak315 k. Statutes and Ordinances.

Most Cited Cases

Declaratory Judgment 118A  **319**

118A Declaratory Judgment

118AIII Proceedings

118AIII(D) Pleading

118Ak312 Complaint, Petition or Bill

118Ak319 k. Public Officers and Agencies. Most Cited Cases

City residents pled actual controversy between residents and city that related to constitutionality, under due process provision of federal constitution and home rule provision of state constitution, of city's conduct in establishing intersection, and thus

residents stated claim for declaratory judgment against city; residents alleged that city's traffic ordinance and city's actions in installing cross-walks, ramps, and stop signs were unreasonably dangerous, arbitrary, and capricious, with no relation to health, safety, morals, or general welfare of public, that configuration of intersection resulted in limited sight distance for drivers, and that traffic engineers had determined that intersection's configuration was unwarranted and dangerous. U.S.C.A. Const.Amend. 14; Const. Art. 18, § 3.

[6] Mandamus 250  **98(5)**

250 Mandamus

250II Subjects and Purposes of Relief

250II(B) Acts and Proceedings of Public Officers and Boards and Municipalities

250k98 Establishment, Vacation,

Regulation, and Use of Highways and Streets

250k98(5) k. In General. Most Cited

Cases

If city's actions in passing traffic ordinance and creating intersection configuration were found to be unconstitutional, under due process provisions of federal constitution and home rule provisions of state constitution, in declaratory judgment action by city residents against city, city would have clear legal duty to rectify its unconstitutional actions, and thus city residents pled sufficient basis to have stated claim for writ of mandamus. U.S.C.A. Const.Amend. 14; Const. Art. 18, § 3.

Appeal from the Franklin County Court of Common Pleas.

Mowery & Youell, Ltd., Samuel N. Lillard and Elizabeth J. Birch, for appellants.

Isaac, Brant, Ledman & Teetor, LLP, Mark Landes and Scyld D. Anderson, for appellee.

(REGULAR CALENDAR)

KLATT, P.J.

*1 {¶ 1} Plaintiffs-appellants, Charles and Carol Parker and Charles and Louise Curtis, appeal from a judgment of the Franklin County Court of Common Pleas dismissing their action against defendant-appellee, the City of Upper Arlington (the "City"). For the following reasons, we affirm in part, reverse in part, and remand.

{¶ 2} On September 15, 2004, appellants filed a complaint against the City seeking a declaratory judgment and a writ of mandamus. Appellants' action

stems from the City's decision to install stop signs, painted crosswalks, and sidewalk ramps at the intersection of Castleton Road and Winterset Road. Appellants, who live near this intersection, believe that the stop signs, painted crosswalks, and sidewalk ramps create a dangerous condition and want them removed.

{¶ 3} Castleton Road curves immediately before intersecting with Winterset Road. In their complaint, appellants alleged that due to this curvature, a driver traveling westbound on Castleton Road only has a sight distance of 140 feet, which provides inadequate time to stop for a pedestrian crossing at the Castleton and Winterset intersection. Given this safety hazard, the City identified three alternatives: (1) to declare the intersection unsafe; (2) to install stop signs at the intersection; or (3) to install a series of signs warning drivers about the crosswalk ahead. The City chose the second alternative and proposed an ordinance that mandated the installation of stop signs, painted crosswalks, and sidewalk ramps. Residents living near the Castleton and Winterset intersection objected to the proposed ordinance on the grounds that it "would not remedy the hazardous condition and would result in the injury and possible deaths of pedestrians invited to use the implied safety of the * * * crosswalks." (Complaint, at ¶ 8.) Despite the residents' protests, the City passed the proposed ordinance—Ordinance No. 106-2004—and installed the stop signs, painted crosswalks, and sidewalk ramps.

{¶ 4} After the City rejected the residents' concerns, appellants filed suit against the City, maintaining that the City's "actions in passing Ordinance No. 106-2004 and in constructing an unnecessary traffic pattern that is dangerous" constituted a violation of their due process rights under the federal Constitution and an impermissible exercise of police power in violation of Section 3, Article XVIII of the Ohio Constitution. (Complaint, at ¶ 14-16, 19-21.) Furthermore, appellants asserted that the installation of the stop signs, painted crosswalks, and sidewalk ramps created a public nuisance. Based upon these averments, appellants requested that the trial court issue a declaratory judgment: (1) "determin[ing] that the Defendant City of Upper Arlington's Ordinance No. 106-2004 is invalid, illegal, and in violation of the U.S. and Ohio Constitution[s] because [it] is an unreasonable and impermissible exercise of Defendant's police power"; and (2) awarding appellants "all costs associated with the City's actions including, but not limited to, actual damages, compensatory damages and attorney fees of not less than Fifty Thousand Dollars (\$50,000)."

Additionally, appellants sought a writ of mandamus "compelling Defendant City of Upper Arlington to remove the crosswalks, signs and ramps, and otherwise abate the public nuisance recently created."

*2 {¶ 5} After answering appellants' complaint, the City filed a motion for judgment on the pleadings pursuant to Civ.R. 12(C). In this motion, the City argued that appellants' claim for monetary damages failed because R.C. Chapter 2744 entitled it to immunity from liability for such a claim and that appellants' action for mandamus failed because appellants did not allege that the City had a clear legal duty to provide the relief appellants requested.

{¶ 6} On June 23, 2005, the trial court issued a judgment granting the City's motion and stating that: The Court finds, as a matter of law, that there is no public nuisance and the Plaintiffs failed to establish any constitutional violation. The fact that the Plaintiffs disagree with the decision of the Defendant as to the placement of stop signs and/or cross walks [sic] does not amount to a constitutional violation. Further, the Plaintiffs' [sic] are barred from asserting claims based on the tort theory of public nuisance and money damages are precluded by R.C. Chapter 2744. Accordingly, this Court finds the Defendant's motion for judgment on the pleadings to be well taken and said motion is GRANTED. The Court finds that, as a matter of law, the Plaintiffs are not entitled to money damages as the Defendant was engaged in a governmental function, and the Plaintiffs are not entitled to injunctive relief as the Defendant's decision whether or not to prohibit pedestrian crossing is purely discretionary. * * *

{¶ 7} Appellants now appeal from the trial court's June 23, 2005 judgment and assign the following errors:

1. THE TRIAL COURT ERRONEOUSLY HELD THAT APPELLANTS' COMPLAINT FAILED TO STATE A CAUSE OF ACTION FOR RELIEF.
2. THE TRIAL COURT ERRONEOUSLY HELD THAT APPELLEE IS IMMUNE TO LIABILITY PURSUANT TO R.C. § 2744.02(A)(1) BECAUSE THERE EXISTS AN EXCEPTION TO THIS IMMUNITY PURSUANT TO R.C. § 2744.02(B)(3) AND FURTHER, § 2722.02 GOES TO MONETARY DAMAGES AND NOT TO DECLARATORY RELIEF.

{¶ 8} By both of appellants' assignments of error, they challenge the trial court's grant of judgment on

the pleadings pursuant to Civ.R. 12(C). A Civ.R. 12(C) motion can be characterized as a belated Civ.R. 12(B)(6) motion for failure to state a claim upon which relief may be granted. Whaley v. Franklin Cty. Bd. of Comms., 92 Ohio St.3d 574, 581, 752 N.E.2d 267, 2001-Ohio-1287. However, unlike Civ.R. 12(B)(6) motions, "Civ.R. 12(C) motions are specifically for resolving questions of law." State ex rel. Midwest Pride IV, Inc. v. Pontious (1996), 75 Ohio St.3d 565, 569-570, 664 N.E.2d 931. Dismissal of a complaint is appropriate under a Civ.R. 12(C) motion where, after construing all material allegations in the complaint in favor of the nonmoving party, a court "finds beyond doubt that the plaintiff could prove no set of facts in support of his claim that would entitle him to relief." Id. Appellate courts review the grant of a Civ.R. 12(C) motion under the de novo standard. Cuyahoga Cty. Veterans Services Comm. v. State, 159 Ohio App.3d 276, 823 N.E.2d 888, 2004-Ohio-6124, at ¶ 6.

*3 [1][2]{¶ 9} We will first address appellants' second assignment of error, by which they argue that R.C. Chapter 2744 does not entitle the City to immunity from liability. Appellants assert that R.C. Chapter 2744 applies only to tort claims for damages, and thus, it does not provide the City with immunity from appellants' claim for declaratory judgment. Appellants are correct that R.C. Chapter 2744 immunity is only a defense to tort claims seeking monetary damages, and not to claims seeking declaratory relief. Portage Cty. Bd. of Comms. v. Akron, 156 Ohio App.3d 657, 808 N.E.2d 444, 2004-Ohio-1665, at ¶ 186, affirmed in part, reversed in part on other grounds 109 Ohio St.3d 106, 2006-Ohio-954. However, appellants' argument ignores that their claim for declaratory judgment is, in part, a disguised tort claim for monetary damages. As we stated above, appellants want the trial court to issue a "declaratory judgment" that both declares the City's actions unconstitutional and awards them actual and compensatory damages.^{FN1} If a plaintiff prevails upon a claim for declaratory judgment, a court "may declare rights, status, and other legal relations," not award monetary damages. R.C. 2721.02(A) (emphasis added). Accordingly, to the extent that appellants' complaint seeks a declaration regarding the unconstitutionality of the City's actions, it asserts a true declaratory judgment claim for which the City cannot escape liability through R.C. Chapter 2744. However, to the extent that appellants' complaint seeks monetary damages, it asserts a tort claim that may be barred by R.C. Chapter 2744 immunity.

^{FN1} Appellants seek monetary damages to compensate them for the alleged "loss in value of [their] property interests and [the] destruction of the previously quiet enjoyment of the residential character of the community." (Complaint, at ¶ 23.)

[3]{¶ 10} Our review of appellants' complaint reveals that the only tort claim appellants pled that could entitle them to monetary damages is a claim for public nuisance. Therefore, we must determine whether the City is entitled to R.C. Chapter 2744 immunity from liability for public nuisance.

{¶ 11} The Political Subdivision Tort Liability Act, as codified in R.C. Chapter 2744, requires courts to employ a three-tiered analysis to determine whether a political subdivision is immune from liability for tort claims. Colbert v. Cleveland, 99 Ohio St.3d 215, 790 N.E.2d 781, 2003-Ohio-3319, at ¶ 7; Cater v. Cleveland (1998), 83 Ohio St.3d 24, 28, 697 N.E.2d 610. First, pursuant to R.C. 2744.02(A)(1), a court must initially find political subdivisions immune from liability incurred in performing either a governmental or proprietary function. Id. However, the immunity afforded by R.C. 2744.02(A)(1) is not absolute, but rather, it is subject to the five exceptions contained in R.C. 2744.02(B). Id. Accordingly, the second tier of the analysis requires a court to determine whether any of these exceptions apply. Colbert, at ¶ 8; Cater, at 28, 697 N.E.2d 610. If the court answers affirmatively, then it must move to the third tier: determining whether any of the R.C. 2744.03 defenses against liability require the court to reinstate immunity. Colbert, at ¶ 9; Cater, at 28, 697 N.E.2d 610.

*4 {¶ 12} In the case at bar, appellants do not dispute that the facts pled in their complaint, even when construed in their favor, require an initial finding of immunity under the first tier of the analysis. Appellants alleged that they were damaged when the City passed Ordinance No. 106-2004 and constructed a dangerous and unnecessary traffic pattern. Thus, when the City allegedly incurred liability, it was performing a governmental function—the regulation of traffic. See R.C. 2744.01(C)(2)(j) ("A 'governmental function' includes, but is not limited to * * * [t]he regulation of traffic, and the erection or nonerection of traffic signs, signals, or control devices."). As the City was performing a governmental function, it is immune under R.C. 2744.02(A)(1).

[4]{¶ 13} Appellants maintain, however, that the

exception contained in R.C. 2744.02(B)(3) strips this immunity from the City. Pursuant to R.C. 2744.02(B)(3), "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 * * *."^{FN2} Appellants argue that the stop signs, painted crosswalks, and sidewalk ramps constitute "obstructions," and the City is liable for its negligent failure to remove these "obstructions." We disagree.

FN2.R.C. 2744.02(B)(3), as amended by Am.Sub.S.B. No. 106, applies to appellants' action because their action accrued after April 9, 2003, the effective date of the amendment.

{¶ 14} In the absence of any definition of the intended meaning of the words used in an ordinance, a court must give the words used their ordinary and natural meaning. Layman v. Woo, 78 Ohio St.3d 485, 487, 678 N.E.2d 1217, 1997-Ohio-195; Thompson Elec. Inc. v. Bank One, Akron, N.A. (1988), 37 Ohio St.3d 259, 264, 525 N.E.2d 761. To "obstruct" is to "block up[,] stop up[,] or close up [, or to] place an obstacle in or fill with obstacles or impediments to passing," as in "traffic [obstruct]ing the street." Webster's Third International Dictionary (1961) 1559. Here, the placement of stop signs, painted crosswalks, and sidewalk ramps do not serve to "block up" the Castleton and Winterset intersection or present an "obstacle or impediment to passing" through on either road. Therefore, the R.C. 2744.02(B)(3) exception does not apply, and the City is entitled to immunity from liability for appellants' public nuisance claim.

{¶ 15} As the City is immune from tort liability, the trial court did not err in granting judgment on the pleadings with regard to that portion of appellants' declaratory judgment claim that, in reality, is a public nuisance claim. Accordingly, we overrule appellants' second assignment of error.

[5]{¶ 16} We now turn to appellants' first assignment of error, by which they argue that because they alleged sufficient facts to state a claim for declaratory judgment and a writ of mandamus, the trial court erred in dismissing both. Appellants assert that rather than review whether they had sufficiently pled their action, the trial court impermissibly decided their action upon its merits. We agree.

*5 {¶ 17} A court may dismiss a declaratory judgment claim upon a Civ.R. 12(C) motion if a plaintiff fails to plead a justiciable issue or actual controversy between the parties, or if declaratory relief will not terminate the uncertainty or controversy. Woodson v. Ohio Adult Parole Auth., Franklin App. No. 02AP-393, 2002-Ohio-6630, at ¶ 7. See, also, Home Builders Assn. v. Lebanon, Warren App. No. CA2003-12-115, 2004-Ohio-4526, at ¶ 13 (concluding the trial court erred in dismissing a complaint that sufficiently pled all the necessary elements for a declaratory judgment action). "For purposes of a declaratory judgment action, a 'justiciable issue' requires the existence of a legal interest or a right, and a 'controversy' exists where there is a genuine dispute between parties who have adverse legal interests." Woodson, at ¶ 7.

{¶ 18} In the case at bar, appellants averred in their complaint that the City's actions violated Section 3, Article XVIII of the Ohio Constitution—the Home Rule Amendment—and the Due Process Clause of the Fourteenth Amendment of the federal Constitution. The Home Rule Amendment confers a high degree of sovereignty upon municipalities, granting municipalities broad powers and duties with respect to roads within their jurisdictions. Cleveland v. Shaker Heights (1987), 30 Ohio St.3d 49, 51, 507 N.E.2d 323. However, in order to be a valid exercise of a municipality's police power, an ordinance: " * * * must directly promote the general health, safety, welfare or morals and must be reasonable, the means adopted to accomplish the legislative purpose must be suitable to the end in view, must be impartial in operation, must have a real and substantial relation to such purpose and must not interfere with private rights beyond the necessities of the situation."

Hausman v. Dayton, 73 Ohio St.3d 671, 678, 653 N.E.2d 1190, 1995-Ohio-277, quoting Teegardin v. Foley (1957), 166 Ohio St. 449, 143 N.E.2d 824, paragraph one of the syllabus. See, also, Portsmouth v. McGraw (1986), 21 Ohio St.3d 117, 119, 488 N.E.2d 472, quoting DeMoise v. Dowel (1984), 10 Ohio St.3d 92, 96, 461 N.E.2d 1286 (courts must uphold local self-government and police regulations "if they bear 'a real and substantial relation to the public health, safety, morals, or general welfare of the public' and if they are 'not unreasonable or arbitrary' "). Similarly, in order to comport with due process, an ordinance must bear a rational relationship to a legislative purpose. Desenco, Inc. v. Akron, 84 Ohio St.3d 535, 545, 706 N.E.2d 323, 1999-Ohio-368, citing Martinez v. California (1980), 444 U.S. 277, 283, 100 S.Ct. 553, 62 L.Ed.2d 481.

{¶ 19} Here, appellants alleged in their complaint that “[t]he City’s Ordinance No. 106-2004 and actions in the installation of cross-walks, ramps and stop signs * * * is unreasonably dangerous, arbitrary, capricious, and bears no relation to the health, safety, morals or general welfare of the public.”(Complaint, at ¶ 12.) To support this general allegation, appellants additionally alleged that the configuration of the intersection results in a limited sight distance for drivers, and, on at least one occasion, a driver only narrowly missed striking children using the crosswalk. Further, appellants alleged that two traffic engineers have reviewed the intersection and determined that its current configuration is unwarranted and dangerous. Given these allegations, we conclude that appellants have presented sufficient facts to state a claim alleging a violation of the federal and Ohio Constitutions.^{FN3} Accordingly, appellants sufficiently pled an actual controversy between the parties, and thus, they have stated a claim for declaratory judgment.

FN3. In their brief, the City suggests that appellants failed to state a due process violation because the challenged governmental action did not effect a fundamental right. However, this court has previously determined that substantive due process protects non-fundamental rights, although governmental actions that infringe upon such rights receive only a rational-basis, and not strict-scrutiny, review. State v. Small, 162 Ohio App.3d 375, 833 N.E.2d 774, 2005-Ohio-3813, at ¶ 14-16.

*6 [6]{¶ 20} Likewise, appellants have pled a sufficient basis for a writ of mandamus. A court will only grant a writ of mandamus if a relator establishes a clear legal right to the requested relief, a corresponding clear legal duty on the part of a respondent to provide it, and the lack of an adequate remedy in the ordinary course of law. State ex rel. Steele v. Morrissey, 103 Ohio St.3d 355, 815 N.E.2d 1107, 2004-Ohio-4960, at ¶ 16. A mandamus action may test the constitutionality of an ordinance. State ex rel. Bd. of Commrs. v. Tablack, 86 Ohio St.3d 293, 297, 714 N.E.2d 917, 1999-Ohio-103. When a court finds an ordinance unconstitutional in a mandamus action, it may direct public bodies or officials to follow a constitutional course in completing their duties. State ex rel. Zupancic v. Limbach (1991), 58 Ohio St.3d 130, 133, 568 N.E.2d 1206. In other words, if a court determines that a challenged

ordinance is unconstitutional, it may order a municipality to satisfy its clear legal duty, i.e., to rectify any action taken pursuant to the unconstitutional ordinance.

{¶ 21} In the case at bar, the City argues, and the trial court found, that appellants failed to state an action for mandamus because the Ohio Manual of Uniform Traffic Control Devices (“OMUTCD”) makes the installation of a “No Pedestrian Crossing” sign discretionary and, thus, does not create a clear legal duty to install such a sign. This argument is unavailing. Appellants seek a writ of mandamus ordering the City to remove the stop signs, painted crosswalks, and sidewalk ramps. The existence of a clear legal duty to this requested relief is based upon the alleged unconstitutionality of the City’s configuration of the intersection, not any OMUTCD provision. If a court were to find the ordinance and installation of the current intersection configuration unconstitutional, the City would have a clear legal duty to rectify its unconstitutional actions. Whether the City is required to take additional steps, like the installation of “No Pedestrian Crossing” signs, is irrelevant because such relief was not requested in appellants’ complaint.

{¶ 22} Finally, we stress that our analysis is unconcerned with whether appellants can actually prove the alleged constitutional violations underlying their action. A court may not use a motion for judgment on the pleadings, which is specifically intended to resolve questions of law, to summarily review the merits of a cause of action. Cf. Home Builders Assn., supra, at 12 (“[A] motion to dismiss is not an opportunity for a trial judge to address the matter on its merits.”); Robinson v. Office of Disciplinary Counsel (Aug. 26, 1999), Franklin App. No. 98AP-1431 (“A trial court may not use [a Civ.R. 12(B)(6)] motion to summarily review the merits of the cause of action.”).

{¶ 23} Accordingly, because appellants pled sufficient facts to state a claim for declaratory judgment and a writ of mandamus, we sustain appellants’ first assignment of error.

*7 {¶ 24} For the foregoing reasons, we sustain appellants’ first assignment of error and overrule appellants’ second assignment of error. Consequently, we affirm in part and reverse in part the judgment of the Franklin County Court of Common Pleas, and we remand for further proceedings in accordance with law and this opinion.

Judgment affirmed in part, reversed in part, and

Not Reported in N.E.2d

Page 7

Not Reported in N.E.2d, 2006 WL 832523 (Ohio App. 10 Dist.), 2006 -Ohio- 1649
(Cite as: Not Reported in N.E.2d)

cause remanded.

PETREE and MCGRATH, JJ., concur.

Ohio App. 10 Dist., 2006.

Parker v. City of Upper Arlington

Not Reported in N.E.2d, 2006 WL 832523 (Ohio
App. 10 Dist.), 2006 -Ohio- 1649

END OF DOCUMENT

McQuaide v. Hamilton Cty. Bd. of Commrs.
Ohio App. 1 Dist., 2003.

CHECK OHIO SUPREME COURT RULES FOR
REPORTING OF OPINIONS AND WEIGHT OF
LEGAL AUTHORITY.

Court of Appeals of Ohio, First District, Hamilton
County.

Mary Patricia McQUAIDE, Executor of the Estate of
Anna Marie De Stefano, Plaintiff-Appellant,
v.

BOARD OF COMMISSIONERS OF HAMILTON
COUNTY, Ohio, Heather Hensley, and Jared Ballew,
Defendants-Appellees.
No. C-030033.

Decided Aug. 22, 2003.

Executor of estate of minor passenger who was killed in single-vehicle accident brought wrongful death action against county and other passengers who allegedly encouraged, aided, and abetted driver in negligent operation of vehicle. The Court of Common Pleas, Hamilton County, J., granted summary judgments in favor of county and defendant passengers. Executor appealed. The Court of Appeals, Hildebrandt, P.J., held that: (1) engineer's report did not support executor's claims that hump in county road constituted a nuisance; (2) prior accidents in vicinity of hump in road did not establish that hump was a nuisance; and (3) defendant passengers were not engaged in joint enterprise with driver, and therefore were not jointly and severally liable for deceased passenger's injuries.

Affirmed.
West Headnotes

[1] Judgment 228 ↪ 185.3(21)

228 Judgment

228V On Motion or Summary Proceeding

228k182 Motion or Other Application

228k185.3 Evidence and Affidavits in
Particular Cases

228k185.3(21) k. Torts. Most Cited

Cases

Engineer's report, submitted in support of motion for summary judgment, did not support claims of executor of estate of minor passenger, who was killed in single-vehicle accident, that hump in county road

constituted a nuisance, within meaning of Political Subdivision Tort Liability Act making political subdivisions liable for failure to keep public roads, highways, and streets free from nuisance; although engineer stated that hump was "dangerous condition that was a cause of the crash," he conceded that his report had not taken into account speed that vehicle was traveling, and that he had not performed any analysis concerning speed at which hump could be traversed safely. R.C. § 2744.03(B)(3).

[2] Automobiles 48A ↪ 264

48A Automobiles

48AVI Injuries from Defects or Obstructions in
Highways and Other Public Places

48AVI(A) Nature and Grounds of Liability

48Ak263 Obstructions

48Ak264 k. In General. Most Cited

Cases

Prior accidents in vicinity of hump in county road where single-vehicle accident occurred did not establish that the hump was a nuisance, within meaning of Political Subdivision Tort Liability Act making political subdivisions liable for failure to keep public roads, highways, and streets free from nuisance; traffic citations and police reports indicating that accidents were in same general area did not establish that prior accidents had occurred at site of hump, and did not indicate that hump was cause of accidents or that hump could not have been traversed safely in course of ordinary traffic. R.C. § 2744.03(B)(3).

[3] Automobiles 48A ↪ 198(4)

48A Automobiles

48AV Injuries from Operation, or Use of Highway

48AV(A) Nature and Grounds of Liability

48Ak183 Persons Liable

48Ak198 Occupants of Vehicles Driven
by Another

48Ak198(4) k. Joint Enterprise. Most

Cited Cases

Absent evidence showing that minor passengers and driver together had such control and direction over the automobile as to be practically in the joint or common possession of it, passengers who allegedly encouraged driver to drive over hump in road to show other minor passengers what they had done earlier as part of "hill-hopping" activity were not engaged in a

joint enterprise, and therefore were not jointly and severally liable for injuries sustained by another passenger who died in single-vehicle accident that occurred after driver sped over hump and lost control of vehicle.

Civil Appeal from Hamilton County Court of Common Pleas.

Timothy M. Burke, Rhonda S. Frey and Manley Burke, for plaintiff-appellant.

Thomas E. Deye and David T. Stevenson, Assistant Prosecuting Attorneys, for defendant-appellee Board Of Commissioners of Hamilton County, Ohio.

Jerome F. Rolfes and Smith, Rolfes & Skavdahl, for defendant-appellee Heather Hensley.

Stephen J. Patsfall, for defendant-appellee Jared Ballew.

HILDEBRANDT, Presiding Judge.

*1 ¶ 1} Plaintiff-appellant, Mary Patricia McQuaide, appeals the summary judgment granted by the Hamilton County Court of Common Pleas in favor of defendants-appellees, the Board of Commissioners of Hamilton County, Ohio ("county"), Heather Hensley, and Jared Ballew, in a wrongful-death action. For the following reasons, we affirm the trial court's judgment.

¶ 2} In early June 2000, sixteen-year-old Michelle Luhn received her driver's license. On June 9, 2000, Luhn drove two of her friends, Hensley and Ballew, to Hillside Avenue, a two-lane road in western Hamilton County. They were riding in the Jeep Cherokee owned by Luhn's parents. As they traveled down the road, they discussed a "hump"^{FN1} in the road that was known to cause a vehicle traveling at high speed to become airborne, an activity known in the neighborhood as "hill-hopping."

FN1. The hump was described in police reports and in the report of McQuaide's expert as a four-degree incline in the right-of-way.

¶ 3} The hump in the road was in the opposite lane of traffic. Luhn turned the car around after they had passed the hump and proceeded in its direction. They traveled over the hump at approximately the posted speed limit of thirty-five miles per hour, and although the occupants of the car could feel the contour of the road change, Luhn did not lose control of the vehicle.

¶ 4} Luhn, Hensley, and Ballew then went to a park

where they picked up Luhn's sister and a number of other children. At that point, the total number of occupants in the vehicle, including Luhn, was eleven. After Luhn accidentally struck a curb, the topic of hill-hopping arose, and Luhn again drove down Hillside Avenue, traveling the same path that she had taken earlier that day.

¶ 5} As she approached the hump the second time, though, Luhn drove the car at a speed significantly greater than the posted speed limit. After going over the hump, Luhn lost control of the vehicle, and it struck a utility pole and flipped over. As a result of the accident, thirteen-year-old Anna Marie De Stefano suffered fatal injuries.

¶ 6} McQuaide, De Stefano's mother and the executor of her estate, filed suit against Luhn and the appellees. The claims against Luhn were ultimately settled, and she was dismissed from the action. In the remaining claims, McQuaide alleged that Hensley and Ballew had encouraged, aided, and abetted Luhn in the negligent operation of the vehicle and that the county had failed to keep Hillside Avenue free from nuisance.

¶ 7} The appellees filed motions for summary judgment, and the trial court granted each of the motions. McQuaide now appeals, setting forth two assignments of error. In her first assignment, she argues that the trial court erred in granting summary judgment in favor of the county.

¶ 8} Pursuant to Civ.R. 56(C), a motion for summary judgment is to be granted only when no genuine issue of material fact remains to be litigated, the moving party is entitled to judgment as a matter of law, and it appears from the evidence that reasonable minds can come to but one conclusion, and, with the evidence construed most strongly in favor of the nonmoving party, that conclusion is adverse to that party.^{FN2} The party moving for summary judgment bears the initial burden of demonstrating that no genuine issue of material fact exists, and once it has satisfied its burden, the nonmoving party has a reciprocal burden to set forth specific facts showing that there is a genuine issue for trial.^{FN3} This court reviews the granting of summary judgment de novo.^{FN4}

FN2. See State ex rel. Howard v. Ferreri, 70 Ohio St.3d 587, 589, 1994-Ohio-130, 639 N.E.2d 1189.

FN3. See *Dresher v. Burt*, 75 Ohio St.3d 280, 293, 1996-Ohio-107, 662 N.E.2d 264.

FN4. *Jorg v. Cincinnati Black United Front*, 1st Dist No. C-030032, 2003-Ohio-3668, at ¶ 6, 153 Ohio App.3d 258, 792 N.E.2d 781.

*2 {¶ 9} Political subdivisions are generally immune from liability under R.C. 2744.02(A)(1) for damages incurred in the performance of a "governmental function," and the "maintenance and repair" of roads is included in the statutory definition of "governmental function." ^{FN5}But R.C. 2744.02(B) lists several exceptions to the general grant of immunity. One of the exceptions is listed in R.C. 2744.02(B)(3), which provides that political subdivisions are liable for injury caused "by their negligent failure to keep public roads in repair and other negligent failure to remove obstructions from public roads." The parties agree that this exception embodies the concept that the former version of the statute referred to as "nuisance."

FN5. See R.C. 2744.01(C)(2)(e).

{¶ 10} In *Haynes v. Franklin*, ^{FN6} 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. 2744.03(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." ^{FN7}

FN6. 95 Ohio St.3d 344, 2002-Ohio-2334, 767 N.E.2d 1146, at ¶ 18, motion for reconsideration denied, 96 Ohio St.3d 1455, 2002-Ohio-3819, 772 N.E.2d 126.

FN7. *Id.*

[1]{¶ 11} In the case at bar, we agree with the trial court that McQuaide failed to establish that the "hump" in the road created a danger to ordinary traffic. In attempting to prove a nuisance, McQuaide relied heavily on the report of her expert witness, engineer H. Richard Hicks. Hicks stated in his report that the hump was a "dangerous condition that was a cause of the crash." But Hicks conceded in his deposition testimony that his report had not taken

into account the speed that Luhn's vehicle was traveling, and that in fact he had not performed any analysis concerning the speed at which the hump could be traversed safely. Hicks's opinion thus did not address the necessary element of whether the hump created a danger for "ordinary traffic" as formulated by the court in *Haynes*. Given this circumstance, Hicks's report did not support McQuaide's claims that the hump constituted a nuisance.

[2]{¶ 12} In arguing that the hump was a nuisance, McQuaide also cited other accidents that had occurred in the vicinity of the hump before the accident in the case at bar. We are not persuaded that these prior accidents established that the hump was a nuisance. First, there was no indication that the prior accidents occurred at the location of the Luhn accident. Although the traffic citations and police reports indicated that the accidents were in the same general area as the Luhn accident, they did not establish that the prior accidents had occurred at the site of the hump. Moreover, even if the reports had established that the prior accidents had occurred in the same location, they did not indicate that the hump was the cause of the accidents or, more importantly, that the hump could not be traversed safely in the course of ordinary traffic.

*3 {¶ 13} Also, as the trial court noted, Luhn herself had traveled over the hump earlier the same day, and when she had driven in conformity with the posted speed limit, she had been able to negotiate the hump without incident. Thus, even in light of Luhn's inexperience as a driver, the hump was not demonstrated to pose a danger for ordinary traffic. We therefore hold that the trial court correctly granted summary judgment in favor of the county, and we need not address the issue of whether the hump was the result of the design and construction of the road or whether Luhn's negligence was an intervening, superseding cause of the accident. The first assignment of error is overruled.

[3]{¶ 14} In her second assignment of error, McQuaide argues that the trial court erred in granting summary judgment in favor of Hensley and Ballew. Construing the evidence in a light most favorable to McQuaide, as we must, we take it to show that Hensley and Ballew had suggested that Luhn return to Hillside Avenue to show the more recent occupants of the vehicle the hump and to demonstrate hill-hopping. McQuaide argues that this encouragement rendered Hensley and Ballew jointly and severally liable for her injuries. We disagree.

{¶ 15} Our starting point is the general rule “that the negligence of the driver of a motor vehicle cannot be imputed to his passenger(s).”^{FN8} An exception to this rule is where the parties are engaged in a joint enterprise in which the passenger and driver are jointly operating or controlling the vehicle.^{FN9} To demonstrate the existence of a joint enterprise, “it is not sufficient merely that the passenger or occupant of the machine indicate to the driver or chauffeur the route he may wish to travel, or the places he wishes to go * * *. The circumstances must be such as to show that the occupant and the driver together had such control and direction over the automobile as to be practically in the joint or common possession of it.”^{FN10}

FN8. *Case v. Norfolk and Western Ry. Co.* (1988), 59 Ohio App.3d 11, 16, 570 N.E.2d 1132.

FN9. *Bloom v. Leech* (1930), 120 Ohio St. 239, 242-243, 166 N.E. 137; *Allen v. Benefiel* (Sept. 30, 1999), 10th Dist. No. 99AP-90 (the passenger’s actions in encouraging the driver to drink, in giving her directions, and in asking her to stop at a bar were insufficient to establish a joint enterprise).

FN10. *Bloom, supra*, at 245-246, 166 N.E. 137, quoting *Bryant v. Pac. Elec. Ry. Co.* (1917), 174 Cal. 737, 164 P. 385.

{¶ 16} In the case at bar, there was no evidence that either Hensley or Ballew had any control or direction over the vehicle that Luhn was driving and certainly no evidence that they were in joint or common possession of the vehicle. At most, the evidence indicated that Hensley and Ballew suggested that Luhn drive over the hump to show the other children what they had done earlier. As the *Bloom* court specifically stated, the mere indication by the passenger of the route he wishes to travel is not sufficient to show a joint enterprise.

{¶ 17} McQuaide cites this court’s decision in *Johnson v. Thyer*^{FN11} for the proposition that all who actively participate in the commission of a tort or who command, direct, advise, encourage, aid, or abet its commission are equally liable. In *Johnson*, though, we emphasized that each of the tortfeasors had exerted control over the actions that had done harm to the plaintiffs’ property.^{FN12} Thus, we merely

applied the general rule that the element of common control is necessary to establish joint and several liability; we did not expand it. Because the element of control was not proved in the case at bar, we find *Johnson* to be distinguishable.

FN11. (Oct. 11, 1978), 1st Dist. No. CA77-07-0089.

FN12. *Id.*

*4 {¶ 18} McQuaide also cites a number of criminal cases in arguing that Hensley and Ballew, in encouraging the tortious activity, must be held equally liable.^{FN13} We agree with Hensley and Ballew that these cases do not abrogate the rule stated above, that proof of control is a necessary prerequisite to liability in cases involving the passenger of an automobile. Because there was no evidence of such control here, the trial court properly granted summary judgment in favor of Hensley and Ballew. Accordingly, the second assignment of error is overruled, and the judgment of the trial court is affirmed.

FN13. See, e.g., *State v. Carter* (Aug. 15, 1989), 2nd Dist. No. 2530 (one of numerous participants in criminal-damaging offense could be held liable for entire amount of restitution); *State v. Schrickel* (Sept. 19, 1997), 6th Dist. No. WD-96-060 (person convicted of receiving stolen property was properly held liable in restitution for damage to automobiles even though he did not personally damage the vehicles from which items were stolen).

Judgment affirmed.

PAINTER and WINKLER, JJ., concur.

Please Note:

The court has placed of record its own entry in this case on the date of the release of this Decision.

Ohio App. I Dist., 2003.

McQuaide v. Hamilton Cty. Bd. of Commrs.

Not Reported in N.E.2d, 2003 WL 21991337 (Ohio App. I Dist.), 2003 -Ohio- 4420 .

END OF DOCUMENT

R.C. § 2744.01



Baldwin's Ohio Revised Code Annotated Currentness

Title XXVII. Courts--General Provisions--Special Remedies

▣ Chapter 2744. Political Subdivision Tort Liability (Refs & Annos)

→ 2744.01 Definitions

As used in this chapter:

(A) "Emergency call" means a call to duty, including, but not limited to, communications from citizens, police dispatches, and personal observations by peace officers of inherently dangerous situations that demand an immediate response on the part of a peace officer.

(B) "Employee" means an officer, agent, employee, or servant, whether or not compensated or full-time or part-time, who is authorized to act and is acting within the scope of the officer's, agent's, employee's, or servant's employment for a political subdivision. "Employee" does not include an independent contractor and does not include any individual engaged by a school district pursuant to section 3319.301 of the Revised Code. "Employee" includes any elected or appointed official of a political subdivision. "Employee" also includes a person who has been convicted of or pleaded guilty to a criminal offense and who has been sentenced to perform community service work in a political subdivision whether pursuant to section 2951.02 of the Revised Code or otherwise, and a child who is found to be a delinquent child and who is ordered by a juvenile court pursuant to section 2152.19 or 2152.20 of the Revised Code to perform community service or community work in a political subdivision.

(C)(1) "Governmental function" means a function of a political subdivision that is specified in division (C)(2) of this section or that satisfies any of the following:

(a) A function that is imposed upon the state as an obligation of sovereignty and that is performed by a political subdivision voluntarily or pursuant to legislative requirement;

(b) A function that is for the common good of all citizens of the state;

(c) A function that promotes or preserves the public peace, health, safety, or welfare; that involves activities that are not engaged in or not customarily engaged in by nongovernmental persons; and that is not specified in division (G)(2) of this section as a proprietary function.

(2) A "governmental function" includes, but is not limited to, the following:

(a) The provision or nonprovision of police, fire, emergency medical, ambulance, and rescue services or protection;

(b) The power to preserve the peace; to prevent and suppress riots, disturbances, and disorderly assemblages; to prevent, mitigate, and clean up releases of oil and hazardous and extremely hazardous substances as defined in section 3750.01 of the Revised Code; and to protect persons and property;

(c) The provision of a system of public education;

(d) The provision of a free public library system;

(e) The regulation of the use of, and the maintenance and repair of, roads, highways, streets, avenues, alleys, sidewalks, bridges, aqueducts, viaducts, and public grounds;

(f) Judicial, quasi-judicial, prosecutorial, legislative, and quasi-legislative functions;

R.C. § 2744.01

- (g) The construction, reconstruction, repair, renovation, maintenance, and operation of buildings that are used in connection with the performance of a governmental function, including, but not limited to, office buildings and courthouses;
- (h) The design, construction, reconstruction, renovation, repair, maintenance, and operation of jails, places of juvenile detention, workhouses, or any other detention facility, as defined in section 2921.01 of the Revised Code;
- (i) The enforcement or nonperformance of any law;
- (j) The regulation of traffic, and the erection or nonerection of traffic signs, signals, or control devices;
- (k) The collection and disposal of solid wastes, as defined in section 3734.01 of the Revised Code, including, but not limited to, the operation of solid waste disposal facilities, as "facilities" is defined in that section, and the collection and management of hazardous waste generated by households. As used in division (C)(2)(k) of this section, "hazardous waste generated by households" means solid waste originally generated by individual households that is listed specifically as hazardous waste in or exhibits one or more characteristics of hazardous waste as defined by rules adopted under section 3734.12 of the Revised Code, but that is excluded from regulation as a hazardous waste by those rules.
- (l) The provision or nonprovision, planning or design, construction, or reconstruction of a public improvement, including, but not limited to, a sewer system;
- (m) The operation of a job and family services department or agency, including, but not limited to, the provision of assistance to aged and infirm persons and to persons who are indigent;
- (n) The operation of a health board, department, or agency, including, but not limited to, any statutorily required or permissive program for the provision of immunizations or other inoculations to all or some members of the public, provided that a "governmental function" does not include the supply, manufacture, distribution, or development of any drug or vaccine employed in any such immunization or inoculation program by any supplier, manufacturer, distributor, or developer of the drug or vaccine;
- (o) The operation of mental health facilities, mental retardation or developmental disabilities facilities, alcohol treatment and control centers, and children's homes or agencies;
- (p) The provision or nonprovision of inspection services of all types, including, but not limited to, inspections in connection with building, zoning, sanitation, fire, plumbing, and electrical codes, and the taking of actions in connection with those types of codes, including, but not limited to, the approval of plans for the construction of buildings or structures and the issuance or revocation of building permits or stop work orders in connection with buildings or structures;
- (q) Urban renewal projects and the elimination of slum conditions;
- (r) Flood control measures;
- (s) The design, construction, reconstruction, renovation, operation, care, repair, and maintenance of a township cemetery;
- (t) The issuance of revenue obligations under section 140.06 of the Revised Code;
- (u) The design, construction, reconstruction, renovation, repair, maintenance, and operation of any school athletic facility, school auditorium, or gymnasium or any recreational area or facility, including, but not limited to, any of the following:
- (i) A park, playground, or playfield;

R.C. § 2744.01

- (ii) An indoor recreational facility;
 - (iii) A zoo or zoological park;
 - (iv) A bath, swimming pool, pond, water park, wading pool, wave pool, water slide, or other type of aquatic facility;
 - (v) A golf course;
 - (vi) A bicycle motocross facility or other type of recreational area or facility in which bicycling, skating, skate boarding, or scooter riding is engaged;
 - (vii) A rope course or climbing walls;
 - (viii) An all-purpose vehicle facility in which all-purpose vehicles, as defined in section 4519.01 of the Revised Code, are contained, maintained, or operated for recreational activities.
- (v) The provision of public defender services by a county or joint county public defender's office pursuant to Chapter 120. of the Revised Code;
- (w)(i) At any time before regulations prescribed pursuant to 49 U.S.C.A 20153 become effective, the designation, establishment, design, construction, implementation, operation, repair, or maintenance of a public road rail crossing in a zone within a municipal corporation in which, by ordinance, the legislative authority of the municipal corporation regulates the sounding of locomotive horns, whistles, or bells;
- (ii) On and after the effective date of regulations prescribed pursuant to 49 U.S.C.A. 20153, the designation, establishment, design, construction, implementation, operation, repair, or maintenance of a public road rail crossing in such a zone or of a supplementary safety measure, as defined in 49 U.S.C.A 20153, at or for a public road rail crossing, if and to the extent that the public road rail crossing is excepted, pursuant to subsection (c) of that section, from the requirement of the regulations prescribed under subsection (b) of that section.
- (x) A function that the general assembly mandates a political subdivision to perform.
- (D) "Law" means any provision of the constitution, statutes, or rules of the United States or of this state; provisions of charters, ordinances, resolutions, and rules of political subdivisions; and written policies adopted by boards of education. When used in connection with the "common law," this definition does not apply.
- (E) "Motor vehicle" has the same meaning as in section 4511.01 of the Revised Code.
- (F) "Political subdivision" or "subdivision" means a municipal corporation, township, county, school district, or other body corporate and politic responsible for governmental activities in a geographic area smaller than that of the state. "Political subdivision" includes, but is not limited to, a county hospital commission appointed under section 339.14 of the Revised Code, board of hospital commissioners appointed for a municipal hospital under section 749.04 of the Revised Code, board of hospital trustees appointed for a municipal hospital under section 749.22 of the Revised Code, regional planning commission created pursuant to section 713.21 of the Revised Code, county planning commission created pursuant to section 713.22 of the Revised Code, joint planning council created pursuant to section 713.231 of the Revised Code, interstate regional planning commission created pursuant to section 713.30 of the Revised Code, port authority created pursuant to section 4582.02 or 4582.26 of the Revised Code or in existence on December 16, 1964, regional council established by political subdivisions pursuant to Chapter 167. of the Revised Code, emergency planning district and joint emergency planning district designated under section 3750.03 of the Revised Code, joint emergency medical services district created pursuant to section 307.052 of the Revised Code, fire and ambulance district created pursuant to section 505.375 of the Revised Code, joint interstate emergency planning district established by an agreement entered into under that section, county solid waste management district and joint solid waste management district established under section 343.01 or 343.012 of the Revised Code, community school established under Chapter 3314. of the Revised Code, the county or counties

R.C. § 2744.01

served by a community-based correctional facility and program or district community-based correctional facility and program established and operated under sections 2301.51 to 2301.58 of the Revised Code, a community-based correctional facility and program or district community-based correctional facility and program that is so established and operated, and the facility governing board of a community-based correctional facility and program or district community-based correctional facility and program that is so established and operated.

(G)(1) "Proprietary function" means a function of a political subdivision that is specified in division (G)(2) of this section or that satisfies both of the following:

(a) The function is not one described in division (C)(1)(a) or (b) of this section and is not one specified in division (C)(2) of this section;

(b) The function is one that promotes or preserves the public peace, health, safety, or welfare and that involves activities that are customarily engaged in by nongovernmental persons.

(2) A "proprietary function" includes, but is not limited to, the following:

(a) The operation of a hospital by one or more political subdivisions;

(b) The design, construction, reconstruction, renovation, repair, maintenance, and operation of a public cemetery other than a township cemetery;

(c) The establishment, maintenance, and operation of a utility, including, but not limited to, a light, gas, power, or heat plant, a railroad, a busline or other transit company, an airport, and a municipal corporation water supply system;

(d) The maintenance, destruction, operation, and upkeep of a sewer system;

(e) The operation and control of a public stadium, auditorium, civic or social center, exhibition hall, arts and crafts center, band or orchestra, or off-street parking facility.

(H) "Public roads" means 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 unless the traffic control devices are mandated by the Ohio manual of uniform traffic control devices.

(I) "State" means the state of Ohio, including, but not limited to, the general assembly, the supreme court, the offices of all elected state officers, and all departments, boards, offices, commissions, agencies, colleges and universities, institutions, and other instrumentalities of the state of Ohio. "State" does not include political subdivisions.

(2006 H 162, eff. 10-12-06; 2004 S 222, eff. 4-27-05; 2002 S 106, eff. 4-9-03; 2001 S 108, § 2.03, eff. 1-1-02; 2001 S 108, § 2.01, eff. 7-6-01; 2001 S 24, § 3, eff. 1-1-02; 2001 S 24, § 1, eff. 10-26-01; 2000 S 179, § 3, eff. 1-1-02; 1999 H 205, eff. 9-24-99; 1997 H 215, eff. 6-30-97; 1996 H 350, eff. 1-27-97 [FN1]; 1995 H 192, eff. 11-21-95; 1994 H 384, eff. 11-11-94; 1993 H 152, eff. 7-1-93; 1992 H 723, H 210; 1990 H 656; 1988 S 367, H 815; 1987 H 295; 1986 H 205, § 1, 3; 1985 H 176)

[FN1] See Notes of Decisions, *State ex rel. Ohio Academy of Trial Lawyers v. Sheward* (Ohio 1999), 86 Ohio St.3d 451, 715 N.E.2d 1062.

CONSTITUTIONALITY

"Ohio Revised Code § 2744" was held on 12-16-2003 to violate the right to trial by jury, under Ohio Constitution Article 1, § 5, and the right to a remedy, under Ohio Constitution Article 1, § 16. The ruling was by the U.S. District Court for the Southern District of Ohio, deciding as it believes the Supreme Court of Ohio would have, in the case of Kammeyer v City of Sharonville, 311 F.Supp.2d 653 (SD Ohio 2003). The Court also observed that the state is sovereign but political subdivisions are not.

R.C. § 2744.01

UNCODIFIED LAW

2002 S 106, § 3, eff. 4-9-03, reads:

Sections 723.01, 1533.18, 2744.01, 2744.02, 2744.03, 2744.04, 2744.05, 2744.06, 2744.07, 4582.27, 5511.01, 5591.36, and 5591.37 of the Revised Code, as amended by this act, apply only to causes of action that accrue on or after the effective date of this act. Any cause of action that accrues prior to the effective date of this act is governed by the law in effect when the cause of action accrued.

2001 S 24, § 6, eff. 10-26-01, reads:

Section 2744.01 of the Revised Code was amended by Am. Sub. H.B. 350 of the 121st General Assembly and was amended by acts subsequent to its amendment by Am. Sub. H.B. 350. This act amends section 2744.01 of the Revised Code to remove substantive matter inserted by, and to revive substantive matter removed by, Am. Sub. H.B. 350 of the 121st General Assembly. This act retains in section 2744.01 of the Revised Code amendments that were made subsequent to Am. Sub. H.B. 350 of the 121st General Assembly and that are independent of the purposes of Am. Sub. H.B. 350. The removal, revival, or retention of that language is not intended to have any substantive effect and is intended to present in Sections 1 and 3 of this act the version of section 2744.01 of the Revised Code that is currently effective.

2001 S 108, § 1, eff. 7-6-01, reads:

It is the intent of this act (1) to repeal the Tort Reform Act, Am. Sub. H.B. 350 of the 121st General Assembly, 146 Ohio Laws 3867, in conformity with the Supreme Court of Ohio's decision in *State, ex rel. Ohio Academy of Trial Lawyers, v. Sheward* (1999), 86 Ohio St.3d 451; (2) to clarify the status of the law; and (3) to revive the law as it existed prior to the Tort Reform Act.

2001 S 108, § 3, eff. 7-6-01, reads, in part:

(A) In Section 2.01 of this act:

(1) Sections 1701.95, 1707.01, 2305.25, 2305.251, 2305.37, 2307.60, 2307.61, 2743.18, 2743.19, 2744.01, 2744.02, 2744.03, 2744.05, 3123.17, 4112.02, 4507.07, 4513.263, 4582.27, and 5111.81 of the Revised Code, which have been amended by acts subsequent to their amendment by Am. Sub. H.B. 350 of the 121st General Assembly, are amended to remove matter inserted by, or to revive matter removed by, Am. Sub. H.B. 350. Amendments made by Am. Sub. H.B. 350 or the subsequent acts that are independent of the purposes of Am. Sub. H.B. 350 are retained.

(C) In Section 2.03 of this act sections 2744.01 and 2744.03 of the Revised Code are amended effective January 1, 2002, to continue the amendments made to those sections by Section 2.01 of this act as explained in division (A)(1) of this section. Sections 2744.01 and 2744.03 were amended subsequently to Am. Sub. H.B. 350 by Am. Sub. S.B. 179 of the 123rd General Assembly, effective January 1, 2002.

1999 H 205, § 3, eff. 9-24-99, reads:

It is the intent of the General Assembly in amending division (C)(2)(u) of section 2744.01 of the Revised Code in this act, in part, to supersede the effect of the holding of *Garrett v. Sandusky*, (1994) 68 Ohio St. 3d 139, that a wave pool is not a "swimming pool" within governmental functions for which a city enjoys tort immunity.

HISTORICAL AND STATUTORY NOTES

Amendment Note: 2006 H 162 inserted the last part of the last sentence of division (F), beginning with the text ", the county or counties served by a community-based correctional facility"; and made other nonsubstantive changes.

R.C. § 2744.01

Amendment Note: 2004 S 222 inserted "board of hospital commissioner appointed for a municipal hospital under section 749.04 of the Revised Code, board of hospital trustees appointed for a municipal hospital under section 749.22 of the Revised Code," in division (F).

Amendment Note: 2002 S 106 inserted "school athletic facility, school auditorium, or gymnasium or any" in division (C)(2)(u); added new division (C)(2)(w); redesignated former division (C)(2)(w) as new division (C)(2)(x); added new division (H); and redesignated former division (H) as new division (I).

Amendment Note: 2001 S 24, § 1 and 3 substituted "job and family" for "human" in division (C)(1)(m), rewrote division (C)(1)(u); deleted division (H); and redesignated former division (I) as new division (H). Prior to amendment and deletion, division (C)(1)(u) and division (H) read:

"(u) The design, construction, reconstruction, renovation, repair, maintenance, and operation of any park, playground, playfield, indoor recreational facility, zoo, zoological park, bath, swimming pool, pond, water park, wading pool, wave pool, water slide, and other type of aquatic facility, or golf course;

"(H) "Public roads" means 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, unless the traffic control devices are mandated by the Ohio manual of uniform traffic control devices."

Amendment Note: 2000 S 179, § 3, eff. 1-1-02, substituted "2152.19 or 2152.20" for "2151.355" in division (B).

Amendment Note: 1999 H 205 deleted "and the operation and control of any" after "pond," and inserted "water park, wading pool, wave pool, water slide, and other type of aquatic facility, or" in division (C)(2)(u); and made other nonsubstantive changes.

Amendment Note: 1997 H 215 inserted ", and a community school established under Chapter 3314. of the Revised Code" in division (F).

Amendment Note: 1996 H 350 added division (H); redesignated former division (H) as division (I); and made changes to reflect gender neutral language.

Amendment Note: 1995 H 192 inserted "a fire and ambulance district created pursuant to section 505.375 of the Revised Code," in division (F).

Amendment Note: 1994 H 384 inserted "joint emergency medical services district created pursuant to section 307.052 of the Revised Code," in division (F).

Amendment Note: 1993 H 152 added ", does not include any individual engaged by a school district pursuant to section 3319.301 of the Revised Code" in division (B).

R.C. § 2744.02

► Baldwin's Ohio Revised Code Annotated Currentness
Title XXVII. Courts--General Provisions--Special Remedies
◄ Chapter 2744. Political Subdivision Tort Liability (Refs & Annos)

→ 2744.02 Political subdivision not liable for injury, death, or loss; exceptions (later effective date)

<Note: See also preceding version of this section with earlier effective date.>

(A)(1) For the purposes of this chapter, the functions of political subdivisions are hereby classified as governmental functions and proprietary functions. Except as provided in division (B) of this section, a political subdivision is not liable in damages in a civil action for injury, death, or loss to person or property allegedly caused by any act or omission of the political subdivision or an employee of the political subdivision in connection with a governmental or proprietary function.

(2) The defenses and immunities conferred under this chapter apply in connection with all governmental and proprietary functions performed by a political subdivision and its employees, whether performed on behalf of that political subdivision or on behalf of another political subdivision.

(3) Subject to statutory limitations upon their monetary jurisdiction, the courts of common pleas, the municipal courts, and the county courts have jurisdiction to hear and determine civil actions governed by or brought pursuant to this chapter.

(B) Subject to sections 2744.03 and 2744.05 of the Revised Code, a political subdivision is liable in damages in a civil action for injury, death, or loss to person or property allegedly caused by an act or omission of the political subdivision or of any of its employees in connection with a governmental or proprietary function, as follows:

(1) Except as otherwise provided in this division, political subdivisions are liable for injury, death, or loss to person or property caused by the negligent operation of any motor vehicle by their employees when the employees are engaged within the scope of their employment and authority. The following are full defenses to that liability:

(a) A member of a municipal corporation police department or any other police agency was operating a motor vehicle while responding to an emergency call and the operation of the vehicle did not constitute willful or wanton misconduct;

(b) A member of a municipal corporation fire department or any other firefighting agency was operating a motor vehicle while engaged in duty at a fire, proceeding toward a place where a fire is in progress or is believed to be in progress, or answering any other emergency alarm and the operation of the vehicle did not constitute willful or wanton misconduct;

(c) A member of an emergency medical service owned or operated by a political subdivision was operating a motor vehicle while responding to or completing a call for emergency medical care or treatment, the member was holding a valid commercial driver's license issued pursuant to Chapter 4506. or a driver's license issued pursuant to Chapter 4507. of the Revised Code, the operation of the vehicle did not constitute willful or wanton misconduct, and the operation complies with the precautions of section 4511.03 of the Revised Code.

(2) Except as otherwise provided in sections 3314.07 and 3746.24 of the Revised Code, political subdivisions are liable for injury, death, or loss to person or property caused by the negligent performance of acts by their employees with respect to proprietary functions of the political subdivisions.

(3) Except as otherwise provided in section 3746.24 of the Revised Code, political subdivisions are liable for injury,

R.C. § 2744.02

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, except that it is a full defense to that liability, when a bridge within a municipal corporation is involved, that the municipal corporation does not have the responsibility for maintaining or inspecting the bridge.

(4) 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 that is caused by the negligence of their employees and that occurs within or on the grounds of, and is due to physical defects within or on the grounds of, buildings that are used in connection with the performance of a governmental function, including, but not limited to, office buildings and courthouses, but not including jails, places of juvenile detention, workhouses, or any other detention facility, as defined in section 2921.01 of the Revised Code.

(5) In addition to the circumstances described in divisions (B)(1) to (4) of this section, a political subdivision is liable for injury, death, or loss to person or property when civil liability is expressly imposed upon the political subdivision by a section of the Revised Code, including, but not limited to, sections 2743.02 and 5591.37 of the Revised Code. Civil liability shall not be construed to exist under another section of the Revised Code merely because that section imposes a responsibility or mandatory duty upon a political subdivision, because that section provides for a criminal penalty, because of a general authorization in that section that a political subdivision may sue and be sued, or because that section uses the term "shall" in a provision pertaining to a political subdivision.

(C) An order that denies a political subdivision or an employee of a political subdivision the benefit of an alleged immunity from liability as provided in this chapter or any other provision of the law is a final order.

(2007 H 119, eff. 9-29-07; 2002 S 106, eff. 4-9-03; 2001 S 108, § 2.01, eff. 7-6-01; 1997 H 215, eff. 6-30-97; 1996 H 350, eff. 1-27-97 [FN1]; 1994 S 221, eff. 9-28-94; 1989 H 381, eff. 7-1-89; 1985 H 176)

[FN1] See Notes of Decisions, State ex rel. Ohio Academy of Trial Lawyers v. Sheward (Ohio 1999), 86 Ohio St.3d 451, 715 N.E.2d 1062.

<Note: See also preceding version of this section with earlier effective date.>

CONSTITUTIONALITY

"Ohio Revised Code § 2744" was held on 12-16-2003 to violate the right to trial by jury, under Ohio Constitution Article I, § 5, and the right to a remedy, under Ohio Constitution Article I, § 16. The ruling was by the U.S. District Court for the Southern District of Ohio, deciding as it believes the Supreme Court of Ohio would have, in the case of Kammeyer v City of Sharonville, 311 F.Supp.2d 653 (SD Ohio 2003). The Court also observed that the state is sovereign but political subdivisions are not.

UNCODIFIED LAW

2002 S 106, § 3: See Uncodified Law under 2744.01.

2001 S 108, § 1 and 3: See Uncodified Law under 2744.01.

1986 S 297, § 3, eff. 4-30-86, amended 1985 H 176, § 5, to read, in part:

(C) The provisions of sections 2744.02 and 2744.03 of the Revised Code, as amended as of the effective date of this amendment, shall apply only to causes of action against political subdivisions for injury, death, or loss to persons or property that arise on or after November 20, 1985. The provisions of division (A)(6) of section 2744.03 of the Revised Code, as amended as of the effective date of this amendment, shall apply only to causes of action against employees of political subdivisions for injury, death, or loss to persons or property that arise on or after November 20, 1985, and the provisions of division (A)(7) of that section insofar as they relate to a county prosecuting attorney, city director of law, village solicitor, or similar chief legal officer of a political subdivision, to

R.C. § 2744.02

the assistants of any such person, and to the judges of the courts of this state, as amended as of the effective date of this amendment, shall apply only to causes of action against a county prosecuting attorney, city director of law, village solicitor, or similar chief legal officer of a political subdivision, to the assistants of any such person, and to the judges of the courts of this state for injury, death, or loss to persons or property that arise on or after the effective date of this amendment.

(D) If any provision of this section or the application of any provision of this section to any person is declared invalid by a court of this state, the invalidity does not affect other provisions of this section or of this act, or applications of other provisions of this section or of this act, that can be given effect without the invalid provision or application, and to this end the provisions are severable.

HISTORICAL AND STATUTORY NOTES

Amendment Note: 2007 H 119 added new subsection (A)(2); and redesignated former subsection (A)(2) as subsection (A)(3).

Amendment Note: 2002 S 106 deleted "upon the public roads, highways, or streets" after "by their employees" in division (B)(1); rewrote divisions (B)(3) to (B)(5); and added new division (C). Prior to amendment divisions (B)(3) to (B)(5) read:

"(3) 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, except that it is a full defense to that liability, when a bridge within a municipal corporation is involved, that the municipal corporation does not have the responsibility for maintaining or inspecting the bridge.

"(4) 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 that is caused by the negligence of their employees and that occurs within or on the grounds of buildings that are used in connection with the performance of a governmental function, including, but not limited to, office buildings and courthouses, but not including jails, places of juvenile detention, workhouses, or any other detention facility, as defined in section 2921.01 of the Revised Code.

"(5) In addition to the circumstances described in divisions (B)(1) to (4) of this section, a political subdivision is liable for injury, death, or loss to person or property when liability is expressly imposed upon the political subdivision by a section of the Revised Code, including, but not limited to, sections 2743.02 and 5591.37 of the Revised Code. Liability shall not be construed to exist under another section of the Revised Code merely because a responsibility is imposed upon a political subdivision or because of a general authorization that a political subdivision may sue and be sued."

Amendment Note: 1997 H 215 added the reference to section 3314.07 in division (B)(2).

Amendment Note: 1996 H 350 deleted ", highways, or streets" after "public roads" in the first paragraph in division (B)(1); rewrote division (B)(3); inserted ", and is due to physical defects within or on the grounds of," in division (B)(4); rewrote the second sentence in division (B)(5); added division (C); and made other nonsubstantive changes. Prior to amendment, division (B)(3) and the second sentence in division (B)(5) read, respectively:

"(3) Except as otherwise provided in section 3746.24 of the Revised Code, political subdivisions are liable for injury, death, or loss to persons 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, except that it is a full defense to such liability, when a bridge within a municipal corporation is involved, that the municipal corporation does not have the responsibility for maintaining or inspecting the bridge."

"Liability shall not be construed to exist under another section of the Revised Code merely because a responsibility

R.C. § 2744.02

is imposed upon a political subdivision or because of a general authorization that a political subdivision may sue and be sued."

Amendment Note: 1994 S 221 added "Except as otherwise provided in section 3746.24 of the Revised Code," at the beginning of divisions (B)(2), (B)(3), and (B)(4).

R.C. § 1.49

C

Baldwin's Ohio Revised Code Annotated Currentness

General Provisions

▣ Chapter 1, Definitions; Rules of Construction (Refs & Annos)

▣ Statutory Provisions (Refs & Annos)

→ 1.49 Aids in construction of ambiguous statutes

If a statute is ambiguous, the court, in determining the intention of the legislature, may consider among other matters:

- (A) The object sought to be attained;
- (B) The circumstances under which the statute was enacted;
- (C) The legislative history;
- (D) The common law or former statutory provisions, including laws upon the same or similar subjects;
- (E) The consequences of a particular construction;
- (F) The administrative construction of the statute.

(1971 H 607, eff. 1-3-72)

R.C. § 5547.04

C

Baldwin's Ohio Revised Code Annotated Currentness

Title LV. Roads--Highways--Bridges (Refs & Annos)

Chapter 5547. County Highways--Use; Obstruction

→ **5547.04 Removal of obstructions by landowners; consent and approval; signs and advertising**

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.

By first obtaining the consent and approval of the board of county commissioners, obstructions erected prior to July 16, 1925 in highways other than roads and highways on the state highway system or bridges or culverts thereon, may be permitted to remain, upon such conditions as the officials may impose, provided such obstructions do not interfere with traffic or with the construction or repair of such highways.

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 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 erected in compliance with section 4955.33 of the Revised Code, at the crossings of highways and railroads.

The board shall enforce this section and, in so doing, may avail itself of section 5547.03 of the Revised Code.

(1953 H 1, eff. 10-1-53; GC 7204-1a)

HISTORICAL AND STATUTORY NOTES

Pre-1953 H 1 Amendments: 112 v 495; 111 v 278

R.C. § 5589.01

C

Baldwin's Ohio Revised Code Annotated Currentness
Title LV. Roads--Highways--Bridges (Refs & Annos)
Chapter 5589. Offenses Relating to Highways
General Offenses

→ 5589.01 Obstructing public grounds, highway, street, or alley

No person shall obstruct or encumber by fences, buildings, structures, or otherwise, a public ground, highway, street, or alley of a municipal corporation.

(1953 H 1, eff. 10-1-53; GC 13421)

HISTORICAL AND STATUTORY NOTES

Pre-1953 H 1 Amendments: RS 6921

R.C. § 5589.21

C

Baldwin's Ohio Revised Code Annotated Currentness
Title LV. Roads--Highways--Bridges (Refs & Annos)
 Chapter 5589. Offenses Relating to Highways
 Offenses by Railroads

→ **5589.21 Obstruction of public roads by railroad companies**

(A) No railroad company shall obstruct, or permit or cause to be obstructed a public street, road, or highway, by permitting a railroad car, locomotive, or other obstruction to remain upon or across it for longer than five minutes, to the hindrance or inconvenience of travelers or a person passing along or upon such street, road, or highway.

(B) At the end of each five minute period of obstruction of a public street, road, or highway, each railroad company shall cause such railroad car, locomotive, or other obstruction to be removed for sufficient time, not less than three minutes, to allow the passage of persons and vehicles waiting to cross.

(C) This section does not apply to obstruction of a public street, road, or highway by a continuously moving through train or caused by circumstances wholly beyond the control of the railroad company, but does apply to other obstructions, including without limitation those caused by stopped trains and trains engaged in switching, loading, or unloading operations.

(D) If a railroad car, locomotive, or other obstruction is obstructing a public street, road, or highway in violation of division (A) of this section and the violation occurs in the unincorporated area of one or more counties, or in one or more municipal corporations, the officers and employees of each affected county or municipal corporation may charge the railroad company with only one violation of the law arising from the same facts and circumstances and the same act.

(E) Upon the filing of an affidavit or complaint for violation of division (A) of this section, summons shall be issued to the railroad company pursuant to division (B) of section 2935.10 of the Revised Code, which summons shall be served on the regular ticket or freight agent of the company in the county where the offense occurred.

(2000 S 207, eff. 10-27-00; 1969 S 5, eff. 9-4-69; 1953 H 1; GC 7472)

HISTORICAL AND STATUTORY NOTES

Pre-1953 H 1 Amendments: RS 4748

R.C. § 6115.25

C

Baldwin's Ohio Revised Code Annotated Currentness

Title LXI. Water Supply--Sanitation--Ditches

Chapter 6115. Sanitary Districts (Refs & Annos)

Board of Directors

→ 6115.25 Removal of obstructions; procedure

All public corporations or persons having buildings, structures, works, conduits, mains, pipes, tracks, or other physical obstructions in, over, or upon the public streets, lanes, alleys, or highways which interfere with or impede the progress of construction, maintenance, or repair of the works of a sanitary district shall upon reasonable notice from the board of directors of the sanitary district promptly shift, adjust, accommodate, or remove such obstructions so as to fully meet the exigencies occasioning such action. Upon failure of any public corporation or person to make such changes the board may do so. Unless otherwise mutually agreed to, the cost and expense of such changes shall be met by the district.

(1953 H 1, eff. 10-1-53; GC 6602-54)

HISTORICAL AND STATUTORY NOTES

Pre-1953 H 1 Amendments: 108 v Pt 1, 647, § 21