

IN THE SUPREME COURT OF OHIO

07-0873

DONALD D. HOWARD :
 :
 Plaintiff/Appellee : **On Appeal from the Montgomery**
 : **County Court of Appeals,**
 : **Second Appellate District**
 v. :
 :
 MIAMI TOWNSHIP FIRE DIVISION, : **Court of Appeals Case No. 21478**
 et al. :
 :
 Defendants/Appellants :

MERIT BRIEF
OF APPELLEE DONALD HOWARD

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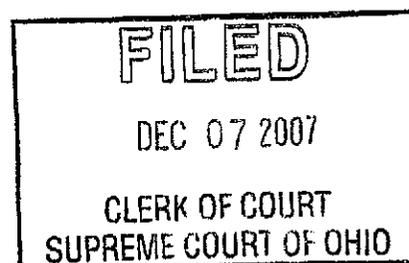


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STATEMENT OF FACTS

On January 24, 2004, Miami Township and the Miami Township Fire Department (“Defendants/Appellants”) intentionally burned down a building at 5460 Bear Creek Road in Miami Township, Montgomery County, Ohio as a practice drill for the fire department. (Appellant’s Supplement “Supp. I.” at 3-4; Appellee’s Supplement “Supp. II” at 4). In this “controlled burn,” Defendants/Appellants used up to 10,000 gallons of water to put out the fire. (Supp. I. at 12-14.) By 4:30 p.m., the majority of the structure was destroyed. (Supp. I. at 14, 21-22.) The building was situated on a hill above road level. (Supp. II. at 54-56). As a result, the water used to extinguish the fire ran down the hill and onto and across Bear Creek Road. *Id.* The temperature was below freezing all day. *Id.* at ¶ 3. Moreover, from about 4:50 p.m. to 9:50 p.m., the temperature dropped significantly from 19 degrees to about 12-13 degrees. *Id.* Additionally, the direction of the wind was from the north and northwest at about 10 to 11 mph, thereby making it colder than what the temperature suggested. *Id.*

Because of the thousands of gallons of water freely running across Bear Creek Road, combined with the below freezing temperatures on a typical January day, some of the water on the road turned into ice. (Supp. I. at 280-294.) The Deputy Fire Chief, Queen, was aware that the water would turn into ice across Bear Creek Road. (Supp. I. at 25, 27.) This was particularly concerning because there was an S curve in the road at this point. (Supp. II. at 56.) Immediately after the burn occurred, Queen informed Deputy Chief Huffman about the obvious problem. (Supp. I. at 27.) However, the warning had no effect, and no salt truck was called to the scene.

At about 5:00 p.m., water was noticed on Bear Creek Road, raising concerns about the

road becoming icy. (Supp. I. at 26-29, 325, 326.) Firefighters Pirk, Keyser, and Haney (“Firefighters”) were ordered to periodically check the roadway and the embers of the burned structure. (Supp. I. at 97-98). Keyser suggested calling for a salt truck to solve the problem of the water and ice on the roadway. (Supp. I. at 146.) Keyser’s suggestion was ignored. Instead, Deputy Chief Huffman advised Pirk, Keyser, and Haney to retrieve salt from Fire Station 49 and to apply it to the road near the burn site. (Supp. I. at 78.) Thereafter, the three firefighters tossed by hand the single five gallon bucket of salt on the wet roadway. (Supp. I. at 79, 143-144). This salt was used on Bear Creek Road that freezing day to melt all the ice that resulted from over seven hours of “controlled burning” and allowing thousands of gallons of water to run across the road. The five gallons was used to cover the entire width of the roadway for a stretch of 10-15 yards. (Supp. I. at 354.)

Firefighters returned to the scene again at 7:24 p.m. (Supp. I. at 86). The Firefighters were admittedly tired at this late hour from the controlled burn. (Supp. I. at 93.) The Firefighters were mainly concerned with checking the embers of the burned structure. (Supp. I. at 86, 152.) Even at this late visit, the firefighters were aware of water on the road as they saw mud splash their Medic unit all the way up to their side windows. (Supp. I. at 100, 153.) Even though Keyser recalled the mud splashing their vehicle, Keyser did not recall checking the roadway. (Supp. I. at 152-153). The Firefighters added no additional salt or requested a salt truck. (Supp. I. at 93; Supp. II at 1). Pirk defensively stated in his deposition that there must not have been any ice on the roadway, because they would have salted the road if they had seen ice. (Supp. I. at 93). Notably, at this later visit, the scene was pitch dark. (Supp. II at 2, 4.)

At approximately 9:50 p.m., Christopher Howard was driving northbound on Bear Creek Road. Also, in Howard's vehicle was a passenger. The speed limit on Bear Creek Road in the northbound direction is 55 mph. (Supp. II at 54). Howard approached the initial left-hand turn of the S curve at 5460 Bear Creek Road. (Supp. I. at 211-212.) As Howard entered the turn, he began to lose traction due to the surface of the roadway. (Supp. II at 55.). Because of the water, rock salt, and ice on the road, Howard could not make the left hand turn. Id. Unable to maintain control, he crossed the center-line, struck a sign post, and collided with a tree. Id. By the time the police and paramedics arrived on the scene, Howard was dead. (Supp. I at 95-96, 109-110.) The passenger was able to free herself from the wreckage and was taken to the hospital. (Supp. I at 157-158.)

At the time of the accident, the Patrol Officer at the scene, Aronoff, and the Road Patrol Supervisor, Sergeant Fitzgerald noted the hazardous condition of the roadway, which was created by the fire department's "controlled burn." (Supp. I at 353-355.) The water was frozen in some places and slushy in other places. (Supp. I at 353.) This mixture of ice, running water, and slush covered an area from the steep drive to the burned structure and to the south for 10-15 yards.(Supp. I at 354.) Photographs were taken of the ice, slush, and water, which was identified later by Miami Township's accident reconstructionist, Rex Thompson. (Supp. I at 280-294). Fred Lickert, an independent accident reconstructionist, also performed an investigation. Lickert opined that the water and ice on the roadway was a hazardous condition. (Supp. II at 54.) Both accident reconstructionists agree that this hazard was a direct and proximate cause of the fatal collision. (Supp. II at 55.) The speed limit on Bear Creek Road is 55 mph and Howard was traveling at 60 mph, five seconds prior to the impact. (Supp. II at 54.) . As Howard negotiated

the curve, he lost traction because of this mixture of ice, slush, and water that had formed on the surface of the road.

Immediately after the accident, the Township dumped a truckload of salt on Bear Creek Road. (Supp. I at 274.) Unfortunately, this was too late for Christopher Howard. Donald Howard, the administrator of the estate of Christopher Howard, brought this action against Defendants/Appellants in August of 2004. The wrongful death action arose from Christopher Howard's death when his automobile collided with a tree on Bear Creek Road in Miami Township. The accident resulted from Defendants/Appellants creation of icy, slushy, watery conditions on a curvy portion of the roadway. Defendants/Appellants created these conditions by pouring 10,000 gallons of water onto an area near in the roadway as part of a practice drill for their firefighters. (Supp. I at 3-4, 12-14.) The water ran onto the road, covered a significant section of the road with an ice and water mixture, and essentially created a trap for an unsuspecting motorist, like Howard.

After several firefighters, paramedics, and police officers involved in the practice drill and accident scene had been deposed, Defendants/Appellants moved for summary judgment. The basis of their motion was the immunity for political subdivisions bestowed in R.C. 2744, et al. Howard's estate opposed the motion. *Id.* Yet, the Trial court granted summary judgment in favor of the Defendants/Appellants on January 17, 2006. *Id.* The trial court determined that the Defendants/Appellants were immune because their negligent actions did not create an obstruction in the road. *Id.* Howard's estate appealed this decision to Ohio's Second District Court of Appeals. On March 30, 2007, the Second District issued its decision reversing the trial court's grant of summary judgment and remanding the case to trial. Defendants/Appellants have now

appealed the appellate court's decision to this Court.

ARGUMENT

Proposition of Law No. 1:

An “obstruction” in the context of R.C. 2744.02(B)(3) should be defined as any object placed or erected in a public roadway that has the potential of interfering with the public’s safe use of the roadway. This definition complies with the plain and ordinary use of the word “obstruction,” is consistent with the legislative purpose, and the use of the term throughout the Revised Code.

- a. **The Exception to Immunity Contained Within R.C. 2744.02(B)(3) Applies to this Case to Remove Defendants/appellants Immunity.**

Immunity is bestowed on political subdivisions pursuant to R.C. 2744, et seq. Generally, political subdivision are immune. *Colbert v. Cleveland*, 99 Ohio St.3d 215, 2003-Ohio-3319. However, that immunity is not absolute. *Id.* R.C. 2744.02(B) provides several exceptions to the immunity. *Id.* If one of these exceptions applies to the case, then the trial court must determine whether any of the defenses in R.C. 2744.03 apply, giving the political subdivision a defense to liability. *Id.*

R.C. § 2744.02 states in part:

(A)(1) * * * 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.

*** * ***

(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:

* * *

(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**, * * *.
(Emphasis added).

b. The Plain, Ordinary Meaning of the Term “Obstruction” Includes That Which Hinders, Interferes, or Impedes, Not Only Blocking or Clogging Up.

Pursuant to R.C. 2744.02(B)(3), Defendants/Appellants are liable for the injury, death, or loss to person or property caused by its negligent failure to remove “obstructions” from public roads. Defendants/Appellants first proposition of law seeks to have the term “obstruction” in R.C. 2744.02(B)(3) defined as “something that blocks” or “closes up by obstacle.” In so doing, Defendants/Appellants are seeking for this Court to embrace a single meaning of the term “obstruction” to the exclusion of other plain, ordinary meanings of the term. The plain and ordinary meaning of the term obstacle encompasses more than a blocking or clogging up but also a hindrance, interference, or impediment.

The Merriam-Webster Online Dictionary defines “obstruction” as something that “obstructs.” Merriam Webster Online Dictionary (June 11, 2007). “Obstructs” is then defined as “(1) to block or close up by an obstacle; (2) to hinder from passage, action or operation : impede; [or] (3) to cut off from sight.” Id. Similarly, The American Heritage College Dictionary defines obstructs as (1) “to block or fill with obstacles,” (2) “to impede, retard, or interfere with; hinder,” and (3) “to get in the way of so as to hide from sight.” The American Heritage College Dictionary, Third Edition, (1993) 942. Therefore, the common, ordinary definition of “obstruction” is, not only to block or close up, but also to hinder or create an impediment to safe passage.

The use of the term “obstruction in Black’s Law Dictionary also supports Howard’s position. Although Defendants/Appellants cite the 1979 Fifth Edition of the Black’s Law Dictionary for definition of the term “obstruction.” The term “obstruction” has since been removed from the Black’s Law Dictionary. *Black’s Law Dictionary, Seventh Edition*, West Publishing Co. 1999. The word “obstruction” is now only included in the definition of the legal term “obstruction of justice.” *Id.* However, it is notable that in defining “obstruction of justice,” Black’s Law Dictionary does not define it merely as the blocking or clogging up of the judicial process but as “*interference* with the orderly administration of law and justice.” *Id.* (Emphasis added.) Likewise, according to Defendants/Appellants’ brief the definition of “obstruction” in the Fifth Edition of the Black’s Law Dictionary is a “*hindrance*, obstacle, or barrier”. (Emphasis Added). Thus, an obstruction is not only a barrier but a hindrance, impediment, or interference.

In addition to the dictionary definition of “obstruction” including hindrances, impediments, and interferences, several Ohio appellate courts have had the opportunity to discuss the meaning of the term “obstruction” in this exception. *Huffman v. Board of Cty Commrs.*, Seventh Dist. No. 05 CO 71, 2006-Ohio-3479, at ¶53 (finding that an obstruction is something that “hinder[s] from passage, action, or operations: impede”); *Floering v. Roller*, Sixth Dist. No. WD-02-076 at ¶27 (noting the change in R.C. 2744.02(B)(3)’s language but finding it still obligated political subdivisions to keep the public roads open for safe travel); *Parker v. City of Upper Arlington*, Tenth Dist. No. 05AP-695, 2006-Ohio-1649 (finding an obstruction is that which creates a impediment to passing on a roadway); *Henry v. Delaware Cty. Commrs.*, Fifth Dist. No. 06CAE 080054, 2007-Ohio-2323 (finding a detour sign in a roadway was an obstruction).

The Tenth District in *Parker* was one of the first court's to examine the term in the new version of the statute. *Parker*, supra. The *Parker* court determined that the term "obstruction" should be given its ordinary and natural meaning. *Id.* citing *Layman v. Woo*, 78 Ohio St.3d 485, 487, 1997-Ohio-195. The appellate court stated that "obstruct" is defined in Webster's Third International Dictionary as "to 'block up[,] stop up[,] or close up [, or to] place an obstacle in or fill with obstacles or *impediments to passing.*" *Id.* at ¶14 (emphasis added.). In *Parker*, the court determined that a poorly placed stop sign and crosswalk was not an obstruction under R.C. 2744.02(B)(3) because it did not create an impediment to passing on the roadway. *Id.*

In *Huffman*, the Seventh District Court of Appeals examined the term "obstruction" in R.C. 2744.02(B)(3) and like the *Parker* court, looked to the dictionary definition of the term.

The Huffman court stated:

[T]he 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.

Id. at ¶53. Likewise, the Fifth District Court of Appeals held that a Road Closed / Detour sign in a roadway would constitute an "obstruction" under R.C. 2744.02(B)(3). *Henry*, supra The Court found the sign was an obstruction even though it did not completely cover the roadway and local traffic could still pass on the roadway. *Id.*

Additionally, other states that have sought to define the term "obstruction" in their statutes pertaining to roadways have determined that an obstruction in the roadway is that which hinders, interferes with, or creates an impediment to passing. *Miranda v. State of Texas* (1979), 591 S.W.2d 568 (finding an obstruction is "a thing that obstructs or impedes, an obstacle,

impediment, or hindrance, as in a street, river or design”) citing *Harris v. Eaton* (1978), 573 S.W.2d 177; *Carder v. City of Clarksburg* (W.Va. 1926) 131 S.E. 349 (finding an obstruction is a hindrance, obstacle, or barrier); *State v. Malpass* (N.C. 1925), 127 S.E. 248 (noting that while the term obstruction may have long ago meant to “block up” or “stop up”, it had long since broadened its meaning “to include the idea of delay, impeding, or hindering”); *People v. Eckerson* (1909) 117 N.Y. S. 419 (finding an obstruction is an impediment in the roadway that prevents free passage on the roadway and renders it difficult for travel); *Davis v. Pickerell* (Iowa 1908), 117 N.W. 276 (an obstruction occurs when the object interferes with free passage on the road); *Jennings v. Johonott* (Wis. 1912), 135 N.W. 170 (stating, “Any object unlawfully placed within the limits of a highway is an obstruction if it impedes or seriously inconveniences public travel or renders it dangerous, and it is not at all necessary that such object should stop travel in order to be an obstruction”).

Thus, the plain and ordinary meaning of the term obstruction as it has been defined in the standard and law dictionaries includes not only objects that “block up” but also those which hinder, interfere, or impede. Additionally, several of Ohio’s appellate courts that have looked at the term “obstruction” in R.C 2744.02(B)(3) have found that it encompasses objects that hinder, interfere, or impede travel on the roadway. Finally, other jurisdictions that have examined the term “obstruction” in their statutes have also found that it means more than to block up a roadway but includes items in a roadway that impedes or hinders safe travel. Therefore, Defendants/Appellants proposition of law that “obstruction” be defined as block ups or closing up by obstacle should be denied.

c. The Legislative Intent of Senate Bill 106 Does Not Support a Requirement That “Obstruction” Means Only That Which Blocks or Closes Up by Obstacle.

The removal of the phrase “free from nuisance” and the insertion of the phrase “other negligent failure to remove obstruction from public roads” was enacted by Senate Bill 106. Senate Bill 106 noted several reasons for the changes it was implementing. However, regarding the change to R.C. 2744.02(B)(3), the bill only states that it was making changes proposed by the 121st General Assembly in House Bill 350. Neither Senate Bill 106 or the Legislative Service Commission provides any further guidance as to the General Assembly’s reasons for changing the phraseology of R.C. 2744.02(B)(3).

Despite the lack of guidance in the legislative history as to the General Assembly’s legislative intent on this issue, Defendants/Appellants argue that the legislative intent in changing the phrases was to narrow the exception. Defendants/Appellants argue the Second District’s opinion defining “obstruction” does not effectuate that purpose because they argue “obstruction” is given a meaning similar to nuisance.

This Court has already held that an obstruction in a roadway may amount to a nuisance under the prior version of R.C. 2744.02(B)(3). Thus, it is reasonable that the terms will have similar meanings. A nuisance had been defined as a condition that directly jeopardizes the safety of traffic on the roadway. While the Second District Court of Appeals’ definition of the term obstruction is an object placed or erected in a public roadway that has the potential of interfering with the public’s safe use of that roadway. Thus, under the Second District’s definition, in order to have an obstruction (1) an object must be placed or erected in a roadway and (2) that object must interfere with safe public travel on the roadway. With such a limitation, the term

obstruction, rather than nuisance, does narrow the liability of political subdivisions under R.C. 2744.02(B)(3).

Despite Defendants/Appellants dire prediction, the Second District's definition of obstruction would not make political subdivisions liable whenever ice or snow appeared on the roadway. First of all, in order to be an obstruction, the object or objects must be placed or erected on the roadway. The natural accumulation of ice or snow is not placed or erected on a roadway. The phrase "placed or erected" inherently includes the concept of an artificial source putting the impediments in the roadway. Thus, a natural accumulation of ice or snow would not be an obstruction. Moreover, even if ice or snow was placed on a roadway, the political subdivision must still be negligent in failing to remove it. As is discussed later in this brief, this is an additional requirement Senate Bill 106 imposed on R.C. 2744.02(B)(3). Adding the negligent requirement was a significant limitation the General Assembly imposed, the importance of which is exemplified by the fact that they inserted the term "negligent" not once but twice in R.C. 2744.02(B)(3). In order to meet this requirement, the court would have to examine the political subdivision's action, including factors such as its knowledge of any impediments and reasonableness of its conduct in the situation. Thus, the Second District's decision would certainly not make political subdivisions liable whenever ice or snow appeared on a roadway. Rather, it furthers the legislative intent of limiting this immunity exception.

For example, an examination of the situation addressed in *Parker*, supra in which the plaintiff claims a street sign is poorly placed, shows the narrowing of potential liability by the statute language change. The placement of street signs or a poorly designed crosswalk could rise to the level of nuisance under the old statute. The poor design could create a condition that

directly jeopardized the safety of traffic on the roadway. Thus, it could amount to a nuisance and liability could be imposed on the political subdivision. However, under the new version of the statute with the obstruction language, this situation would not rise to an obstruction. First, in this example, nothing would have been placed or erected in the roadway, which would prevent it from being an obstruction. Further, the second requirement could not be met because the street sign would not be interfering with safe travel on the roadway. Thus, the obstruction language restores immunity to this situation.

Similarly, the situation addressed by this Court in *Sherwin-Williams Co. v. Dayton Freight Lines, Inc.*, 112 Ohio St.3d 52, 2006-Ohio-6498 demonstrates a situation where a nuisance removed immunity under the old version of the statute but immunity would not be removed under the obstruction version of the statute with the Second District's definition. In *Sherwin-Williams*, smoke from a fire set by a political subdivision was alleged to have drifted onto an interstate where it mixed with fog and created visibility problems resulting in a multiple car collision. *Id.* While this Court stated this situation could amount to a nuisance, it did not amount to an obstruction under the Second District's definition. Under the Second District's obstruction definition, there would be no obstruction in this example because nothing was placed or erected on the roadway. Thus, the obstruction language prevents an exception immunity to this situation. Therefore, if the legislative intent was indeed to narrow political subdivisions liability by removing the nuisance phrase and inserting the obstruction phrase, it is accomplished by the Second District Court of Appeals definition of obstruction.

- d. The Term “Obstruction” in R.C. 2744.02(b)(3) Should Be Given the Same Meaning as in Other Portions of the Ohio Revised Code, Which Is That Which Has the Potential to Hinder, Impede, or Interfere.

Additionally, the term “obstruction” is used in another contextually similar provision of the Ohio Revised Code with a meaning consistent with the Second District Court of Appeals opinion. R.C. 5547.04 states:

[t]he owner or occupier 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.

The term obstruction in R.C. 5547.04 has been interpreted by the Ohio Attorney General on several occasions, when referencing whether this section authorizes a county to remove foreign materials blocking a side ditch within the county’s right of way if it interferes with the free flow of water and impair the function of the county road. The Ohio Attorney General has stated:

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. 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.

In this case, the mixture on the roadway of ice, slush, and water was an obstruction under Merriam-Webster’s definition and the definition used by the *Parker* and *Huffman* courts. The

Merriam-Webster definition of obstruction is something that “obstructs,” specifically something that “hinder[s] from passage, action, or operation, [or] impedes.” Also, the definition applied by the Tenth District in *Parker*, states that an “obstruction” is that which creates an impediment to passing or traveling through the roadway.” The icy, slushy, and watery mixture on the roadway was a hazard that hindered or impeded safe passage on the roadway. In this case, Defendants/Appellants created an icy, slushy, and watery mixture over the entire width of the roadway for 10 to 15 yards on the roadway even though the roadway possessed a S shaped curve at this point. (Supp. I. at 353-355; Supp. II at 54-56.) Howard was only traveling at 60 mph in an area zoned for 55 mph when he began the left turn on this roadway. (Supp. I. at 271; Supp. II. at 54.). Without the hazardous mixture on the road, the road could be safely traversed up to speeds of 70.9 mph. (Supp. II. at 55.). But, on January 24, 2004, the layer of the ice, slush, and water mixture prevented vehicles, such as Howard’s, from traversing the roadway at approximately the speed limit.

Unfortunately at the time of issuing its decision, the trial court did not have the benefit of the *Parker* or the *Huffman* decisions. Instead, the trial court looked to the Ohio Supreme Court’s decision in *Manufacturer’s National Bank v. Erie County Road Commission* (1992), 63 Ohio St.3d 318. In *Manufacturer’s* the Court addressed a situation in which a driver’s visibility was limited by an object to the side of the roadway. *Id.* The Court found that the term “nuisance” included such “obstructions.” *Id.* In this case, the trial court pointed to *Manufacturer’s* and narrowly interpreted “obstructions” as things which impair a driver’s ability to see the road. While this is one of the dictionary definitions of an “obstruction,” the trial court completely ignored the other definitions of “obstruction.” Under this interpretation, a four foot high

plexiglass cube in a roadway would not be an obstruction because it would not impair the view of the roadway. Clearly, such a barrier would be an obstruction. Thus, the trial court's interpretation could not have been accurate. Thus, the appellate court looked at all of the definitions provided in the dictionary. Under the definition describing an obstruction as that which impedes, interferes with, or hinders passage or operation on a roadway, the hazardous mixtures placed on the roadway by the Township and the Township Fire Department was an obstruction.

Defendants/Appellants are unable to point to a single case that has addressed the term "obstruction" in R.C. 2744.02(B)(3) and found it to mean only something which "blocks or closes up" a roadway. Such a definition would pose an unnaturally strict meaning of the term. Under this definition, a municipality would have carte blanche to cover a fifty foot stretch of roadway where the speed limit is 55 mph, with a one inch layer of motor oil and this would not amount to an obstruction. Because the motor oil could technically be driven through and not "block up" the road, it would not be an "obstruction" under Defendants/Appellants proposition of law. In reality, the motor oil would make the roadway exceptionally slick and hazardous, likely causing several accidents. Under a common meaning of the term, this roadway would have an obstruction in it.

Based on the plain meaning of the term "obstruction" as supported by the dictionary definition and the definition of the term in R.C. 5547.04, the Second District Court of Appeals definition of the term was correct. Defendants/Appellants proposition of law would run contrary to the plain meaning of the term "obstruction" as set forth in dictionaries, Ohio appellate opinions, and other sections of the revised code.

Proposition of Law No. II:

A political subdivision has a duty not to negligently fail to remove obstructions placed or erected by them in the public roadway.

- a. The Definition of “Obstruction” in R.C. 2744.02(b)(3) Should Not Include a Requirement That the Roadway Was Being Used for Usual and Ordinary Travel Because That Is Encompassed in the Statute’s Requirement That the Political Subdivision Be “Negligent” in Failing to Remove the Obstruction.

Defendants/Appellants’s second Proposition of Law argues that an obstruction must be defined as only that which is a danger for ordinary traffic on the roadway. First, it must be noted that the Second District Court of Appeals never stated that a political subdivision may be liable for obstructions to unusual or other than ordinary traffic. Rather, the trial court’s analysis under the new version of R.C. 2744.02(B)(3) only first determined whether an obstruction existed in the roadway and then, whether the obstruction was a danger to ordinary traffic. The appellate court stated that this was the incorrect analysis.¹ Instead, the appellate court stated that under the new version of R.C. 2744.02(B)(3), the court must first determine whether an obstruction existed in the roadway and then determine whether the political subdivision was negligent in failing to remove the obstruction. In this case, the court found that Defendants/Appellants were negligent for failing to remove the icy, slushy, watery mixture it created in the roadway.

In truth, the Second District’s standard is a higher burden for a plaintiff to have to reach. The plaintiff will have to show that the political subdivision was negligent in not removing the obstruction - rather than just that the plaintiff was a part of ordinary traffic. Thus, the plaintiff will

¹Neither Defendants/Appellants in its briefs nor the trial court in its opinion analyzed, R.C. 2744.02(B)(3)’s new requirement that its exception to a political subdivision’s immunity only applies where the political subdivision **negligently** fails to remove the obstruction.

have to demonstrate that the political subdivision was on notice of the obstruction, the political subdivision was unreasonable in failing to alleviate the obstruction, and, of course, that it was foreseeable that the obstruction would interfere with the public's use of the roadway. Just as foreseeability is a natural part of finding negligence, it is natural that a political subdivision will only be able to foresee obstructions which interfere with the ordinary use of the roadway. Thus, the Second District's opinion did not remove the requirement that the political subdivision only owes a duty to ordinary traffic on the roadway, but enforced the statute's harsher standard of negligence which encompasses that requirement. Thus, Defendants/Appellants second proposition of law misconstrues the new version of R.C. 2744.02(B)(3), seeking to impose an "ordinary traffic" requirement on the term "obstruction," when the concept is already encompassed by the statute's requirement of **negligence** in failing to remove the obstruction.

b. The Evidence Indicates Christopher Howard Was Using the Roadway as One Would for Ordinary Travel.

Secondly, Howard was traveling in a usual and ordinary manner when he was driving on Bear Creek Road, particularly when the facts are viewed in a light most favorable to Howard. Defendants/Appellees rely on *McQuaide v. Bd. Of Commrs. of Hamilton Cty.*, First Dist. No. C-030033, 2003-Ohio-4420. In *McQuaide*, a teenager drove her teenage friends and several younger children over a "hump" on a road, at thirty miles per hour ("mph") over the speed-limit. *Id.* This "hump" on the road was known to cause vehicles traveling at high speeds to become airborne - an activity known as "hill-hopping." *Id.* The driver lost control of the vehicle, killing one of the younger passengers. *Id.* The estate of the deceased child brought a wrongful death action against the county, among others, arguing the "hump" was a nuisance. The estate relied on the report of its

expert witness, who stated the “hump” was a dangerous condition. *Id.* However, the expert had not performed any analysis concerning the speed at which the “hump” could be “traversed safely.” *Id.* Therefore, the court found there was no evidence on whether the “hump” created a danger for “ordinary traffic” and thus, whether it was a nuisance.

Unlike *McQuaide*, Howard in this case was not on a joy-ride. Howard was not like the driver in *McQuaide* who drove over the “hump” at a significantly higher speed than the posted speed-limit. First, Defendants/Appellants incorrectly claim that Howard was traveling at 60 mph when the speed limit for the roadway was 30 mph. The speed limit for the roadway was actually 55 mph. There was present a yellow advisory sign advising the curve on Bear Creek Road be taken at 30 mph. However, a yellow speed limit sign is “an advisory speed plate” only and merely indicates the recommended speed. *City of Cuyahoga Heights v. Howard*, Eighth Dist. No. 81025, 2003-Ohio-2862, at ¶15. Thus, a speeding violation does not occur when a vehicle travels at a speed higher than that posted on an yellow “advisory speed plate.” *Id.* Thus, Howard was only traveling five miles above the speed limit of 55 mph, which is reasonable. Additionally, Howard’s expert performed tests that prove that under normal conditions a vehicle could make the left-hand curve at 540 Bear Creek Road in speeds in excess of 70.9 mph. (Supp. II. at 55.) Also, Defendants/Appellants boldly accuse Howard of having traveled through the Bear Creek Road curve shortly before the accident at a slower speed without citing to any evidence. Defendants made this allegation to the trial court and to the appellate court and never once provided a citation to admissible evidence to support the claim. Thus, there is no basis for this argument and the Court should disregard the allegation.

As a result, the evidence before the trial and appellate court only indicated that Howard was driving down Bear Creek Road within five mph of the posted speed limit. Howard was operating his

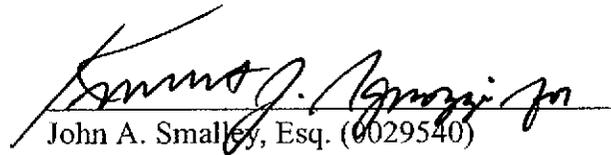
vehicle within the confines of Ohio law, committing no violations. As this is the case, Defendants/Appellants argument that Christopher Howard was not driving his vehicle in a usual and ordinary manner is simply false. Therefore, even if this Court concludes that the R.C. 2744.02(B)(3) exception only applies where the road is being traveled in the usual and customary manner, Howard was driving on the roadway in the usual and customary manner. Thus, R.C. 2744.02(B)(3) applies to this case to create an exception to immunity.

CONCLUSION

For the above states reasons, this Court should affirm the judgment of the Second District Court of Appeals, finding that R.C. 2744.02(B)(3) creates an exception to immunity in this case.

Respectfully submitted,

DYER, GAROFALO, MANN & SCHULTZ

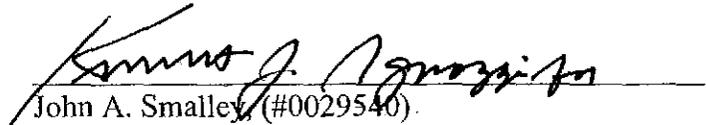


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CERTIFICATE OF SERVICE

The undersigned does hereby certify that a copy of the foregoing was sent to the following this 7th day of December, 2007 via U.S. Ordinary Mail:

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