

IN THE SUPREME COURT OF OHIO

JOHN MARICH, et al.

Appellees

vs.

BOB BENNETT CONSTRUCTION CO.,
et al.

Appellants

CASE NO. 2006-1827

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

APPELLEES' MOTION FOR RECONSIDERATION

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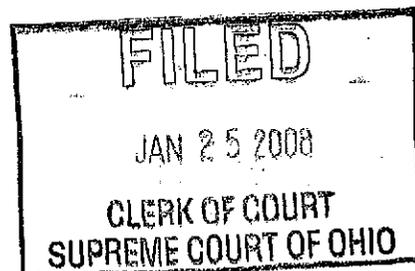


TABLE OF CONTENTS

I.	TABLE OF CONTENTS	i
II.	TABLE OF AUTHORITIES	ii
III.	MOTION TO RECONSIDER	1
IV.	SUPPORTING MEMORANDUM	2
V.	CONCLUSION	11
VI.	CERTIFICATE OF SERVICE	12

II. TABLE OF AUTHORITY

<u>Cases</u>	Page
<u>Baker v. West Carrollton</u> (1992), 64 Ohio St.3d 446	9
<u>Bush v. Harvey Transfer Co.</u> (1946), 146 Ohio St. 657	4-5
<u>Cascioli v. Central Mut. Ins. Co.</u> (1983), 4 Ohio St.3d 179	9
<u>Einhorn v. Ford Motor Co.</u> (1990), 48 Ohio St.3d 27	6
<u>Marich v. Bob Bennett Constr. Co.</u> , Slip Opinion No. 2008-Ohio-92.....	<i>passim</i>
<u>Robinson v. Bates</u>	10
(2006), 112 Ohio St.3d 17, 2006 -Ohio- 6362	
<u>State ex rel. Babcock v. Perkins</u> (1956), 165 Ohio St. 185	8,9
<u>State ex rel. Board of Education of North Canton Exempted Village School District v. Holt</u> (1962), 174 Ohio St. 55, 56	6
<u>State v. Parker</u> (1994), 68 Ohio St.3d 283	6-8
<u>Todd Dev. Co., Inc. v. Morgan</u> , Slip Opinion No. 2008-Ohio-87	3
<u>Toledo v. Kohlhofer</u> (1954), 96 Ohio App. 355	7
 <u>Other Authority</u>	
App.R. 3.....	9
R.C. §5577.05	<i>passim</i>
Restatement of the Law 2d, Torts (1965) 38, Section 288A, Comment g	4,7

III. MOTION FOR RECONSIDERATION

Come Now Appellees, John and Nada Marich, to hereby move this Honorable Court to reconsider its decision in the matter captioned Marich v. Bob Bennett Constr. Co., Slip Opinion No. 2008-Ohio-92, filed on January 17, 2008. The Marichs request that this Court reconsider paragraphs 39-42 of the decision, and enter a mandate to fully affirm the Ninth District's decision in this matter. The grounds for this motion are more fully set forth in the Supporting Memorandum, below, and incorporated herein by reference.

IV. SUPPORTING MEMORANDUM

A. The Supreme Court should not resolve facts which were not before the trial court and are not supported in the record.

There is no support in the record, as it existed at the time that the trial court granted summary judgment, for the proposition that Bob Bennett Construction Company “exercised reasonable diligence and care in attempting to comply with the law.” (Decision, ¶41). This Court goes so far as to find facts on this issue, finding that Bennett failed to seek a permit “only because Norton Codified Ordinance 440.01 stated that a permit was unnecessary.” (Decision, ¶40). This simply did not happen, and it is clear that Bennett did not exercise any diligence in attempting to comply with the law.

Bennett’s original position was that it was permitted to operate the oversized vehicle on Clark Mill Road pursuant to its state-issued Special Hauling Permit. (Bennett Depo. at p. 29). Clearly, Bennett did not do any investigation of the Norton Ordinances at all, because Bennett believed its permit allowed it to travel wherever it chose.

In response to Bennett’s position, the Marichs pointed out, in their Motion for Partial Summary Judgment, that even if Bennett’s state permit did extend to local roads, Bennett violated the state regulations which attached to the permit by parking in the roadway and failing to use safety equipment. Thereafter, Bennett changed its position, arguing that it did not need a permit at all. (Defendants’ Reply To Plaintiffs’ Partial Motion For Summary Judgment, filed April 29, 2005, at pp. 11-12). Bennett took the deposition of Norton Police Chief Gregory Carris as a later-day attempt to justify its conduct, and elicited from him the statement that he would not have granted a permit if one was applied for.

Therefore, this Court is in error in determining that Bennett employed reasonable diligence in attempting to comply with the law. There are simply no facts to support this determination, and it was incumbent upon Bennett to develop the facts that support such an affirmative defense during the summary judgment process. As noted by this Court very recently in Todd Dev. Co., Inc. v. Morgan, Slip Opinion No. 2008-Ohio-87, ¶14, the defendant has the burden in summary judgment practice to support its affirmative defenses with evidence, and if a defendant fails to, summary judgment is appropriately granted against the defendant. As a result, the summary judgment granted to Bennett was appropriately reversed by the Ninth District, and should be upheld by this Court.

B. Bennett was able to comply with the law.

At ¶41 of the decision, this Court held that "Bennett was unable to comply with the statutes through no fault of its own." Bennett certainly could have complied with R.C. §5577.05. All Bennett had to do to comply with the statute was to refrain from driving an oversized vehicle down Clark Mill Road.

Bennett had a desire to drive an oversized vehicle down Clark Mill Road. Bennett did not have a right to do so. It may have been impractical or inconvenient, but it was not impossible for Bennett to comply with the law. Through the first 38 paragraphs of its opinion, this Court clearly sets forth that R.C. §5577.05 prohibits the operation of oversized vehicles on all of the roads of Ohio, regardless of conflicting local ordinances. Either through ignorance or willful behavior, Bennett violated R.C. §5577.05, by driving down that road, and that decision caused a collision that resulted in serious and debilitating injuries to Mr. Marich.

If a landowner wants to build a one hundred foot pink granite tower on a city lot, and is denied a permit to do so by a local municipality, the landowner cannot go ahead and build the tower, then claim that compliance with the law was impossible because the city would not issue a permit. The same principal is at issue here – if Norton refused to issue Bennett a permit, it was incumbent upon Bennett not to drive an oversized vehicle on Clark Mill Road. Therefore, this Court's finding that "Bennett was unable to comply with the statutes through no fault of its own" is in error.

C. This Court should not broaden the doctrine of legal excuse in the motor vehicle context.

This Court should reconsider its decision to expand the doctrine of legal excuse, because its decision radically changes the doctrine in such a way as to significantly undermine existing law.

Legal excuse, in the context of motor vehicle law, has been historically an exceedingly narrow doctrine. In Bush v. Harvey Transfer Co. (1946), 146 Ohio St. 657, at syllabus 2, this Court held that

A legal excuse, precluding liability for injuries resulting from negligence per se in the failure to comply with a safety legislative enactment directing the manner of the operation of a motor vehicle on the public highways, must be something which makes it impossible to comply with the safety legislative enactment, something over which the driver has no control, an emergency not of the driver's making causing failure to obey the statute, or an excuse or exception specifically provided in the enactment itself.

This syllabus law sets forth three types of legal excuses in connection with motor vehicle law: (1) impossibility, (2) sudden emergency / matter outside of control of the driver, and (3) a statutory excuse. This narrow construction of legal excuse is necessary in order to give statutory traffic law any meaning whatsoever.

Here, none of the legal excuses recognized by the Bush court are at issue. First, compliance with R.C. §5577.05 was not impossible – all that Bennett had to do was refrain from driving down a road it was not permitted to drive upon. Second, there was no sudden emergency which required operation of the oversized vehicle on Clark Mill Road. Finally, there is no statutory excuse for Bennett's failure to comply with the law.

This Court is adding a new excuse – that of “reasonable diligence” – to rebut the violation of a traffic law. This Court cites to Restatement of the Law 2d, Torts (1965) 38, Section 288A, Comment g for support of this new defense. The illustration to Comment g makes clear that this defense is reserved for those who make every diligent effort to protect the public from harm, but fail despite their best efforts, to wit:

A statute provides that railroad companies shall keep their fences free from snow and ice. A heavy blizzard covers the fences of the A Railroad Company with snow. Although A Company has exercised all reasonable care to provide snow removal equipment, and acts as promptly as possible, it is unable to remove the snow from one of its fences for three days. During the second day B's cow, in an adjoining field, crosses the fence on a mound of snow, and is struck by a train. A is not liable to B on the basis of a violation of the statute.

In the example, a potential tortfeasor was overwhelmed by a natural disaster, but made its best efforts to protect the public. Bennett did not make **any** effort to protect the public in this case. Bennett had an oversize vehicle which it wanted to move down a road in violation of state law. Bennett did not investigate local permitting requirements only to find a confusing interplay between local ordinances and state law, Bennett just drove down the road. Bennett did not make any effort to protect the public - there were no flagmen, escort vehicles, or public protection devices of any type used by Bennett.

If Bennett had simply inquired at the police station, the police would have closed the road, to protect the public, **just as the police did when Bennett filmed its**

accident reconstruction video. As set forth in detail in the deposition testimony of Richard Stevens, pp. 29-31, Bennett had the Norton police shut down Clark Mill Road so that Bennett could drive the truck down the road again, and produce a video for use at trial. If Bennett was capable of securing police cooperation to extricate itself from liability, it certainly could have secured police cooperation to prevent the harm in the first place.

There is no evidence that Bennett exercised reasonable diligence in this matter, and Bennett does not deserve to have this Court change 60 years of precedent to immunize its conduct. The effect of abandoning the prior narrow construction of legal excuse in the motor vehicle context will be widespread – and will essentially replace the traffic laws of the State of Ohio with a “rule of reason.” Every driver who violates a traffic law and causes a motor vehicle accident from this day forward will raise the legal excuse of “reasonable diligence.” It will then become a jury issue as to whether or not the defendant driver acted with “reasonable diligence.” This will make automobile accident cases even more difficult to resolve short of a full-blown trial. This is a bad policy for the Courts and the people of the State of Ohio.

D. The Court's decision is in conflict with State v. Parker (1994), 68 Ohio St.3d 283.

The Court's decision also disturbs another well-settled principal of law – that ignorance of the law is no excuse for its violation. Einhorn v. Ford Motor Co. (1990), 48 Ohio St.3d 27, 30; State ex rel. Board of Education of North Canton Exempted Village School District v. Holt (1962), 174 Ohio St. 55, 56. As set forth in detail in this Court's analysis, through the first 38 paragraphs of its decision in this matter, the law of Ohio is that, pursuant to R.C. §5577.05, oversized vehicles are not permitted upon local roads,

and a local ordinance which says otherwise is void. Yet this Court excused Bennett's failure to comply with the law because Bennett "only failed to seek [a permit] for Clark Mill Road because Norton Codified Ordinance 440.01 specifically exempted that road."

¶41. Even if this statement was true, which it is not, that would only support the notion that Bennett was ignorant of the law.

Ignorance of the law is different than ignorance of a fact. Excusing conduct for ignorance of a fact is contemplated in the "reasonable diligence" excuse, ignorance of the law is not. In the Restatement's illustration to Comment G, it was appropriate to excuse the railroad company when the railroad company made every effort to comply with the law, but did not know that a snow mound covered its fence in one area. It would not have been appropriate to excuse the railroad company if it did not know it had a duty to clear its fence.

It is impossible to reconcile the Court's decision in this matter with the Court's decision in State v. Parker (1994), 68 Ohio St.3d 283. In Parker, a truck driver had a state-issued permit to operate a truck with an overweight load on state routes. In order to change state routes, he had to travel over a small portion of a Toledo city street which was not designated as a state route. Toledo had an ordinance which set the same weight limit as the state weight limit – 80,000 pounds – and required a permit to travel on city streets for any vehicles in excess of that limit. The truck driver did not have a permit from Toledo, and he was stopped and cited while moving from the off-ramp of one state route to the on-ramp of another state route.

The truck driver challenged the citation, and argued that he was unfairly trapped by Toledo's ordinance because there were no signs announcing the need for a local

permit. The Supreme Court rejected that argument, noting that "it is well settled that one is presumed to know the law, and that includes traffic regulations as well." Id. at 286, citing Toledo v. Kohlhofer (1954), 96 Ohio App. 355. The Court went on to find that the truck driver was "chargeable with knowledge that, regardless of the absence of a sign articulating that a city permit is required if one is operating an overweight vehicle on the city streets, failure to obtain a city permit is a violation of the law." Id. The fact that the truck driver had a state permit had no bearing in the analysis, because "he had no greater right to operate an overweight vehicle than an operator who had no permit at all." Id. As a result, this Court upheld the citation.

If the truck driver in Parker was properly charged with a violation of the Toledo ordinance despite his ignorance of the ordinance, Bennett is properly chargeable with the violation of state law, despite the existence of a conflicting, but invalid, local ordinance. The Parker case illustrates the danger of departing from the presumption that all persons know the law. If this Court does not reconsider its decision, it can expect to see many more cases, in both the negligence context and in the criminal context, citing Marich as precedent for the proposition that one can be excused from following the law when the law is confusing or conflicting. This is a bad precedent to set.

E. The legal excuse of "reasonable diligence" was waived by Bennett.

This Court has held, time and time again, that arguments which are not raised and preserved in the trial court and Court of Appeals are waived, and should not be considered by this Court. State ex rel. Babcock v. Perkins (1956), 165 Ohio St. 185,

189-190; Cascioli v. Central Mut. Ins. Co. (1983), 4 Ohio St.3d 179, 180, fn. 2; Baker v. West Carrollton (1992), 64 Ohio St.3d 446, 448.

Bennett did not raise the legal excuse of “reasonable diligence” in the trial court. There were no facts tendered or developed in support or opposition to the defense. Bennett did not raise any legal excuse in response to the appeal in the Ninth District, despite the ability to do so through App.R. 3(C)(2), as an alternate ground to affirm the judgment. Bennett did not even raise legal excuse in its Merit Brief, but instead waited to make such an argument until its Reply Brief.

Because Bennett did not advance this argument in the trial court, the Marichs were deprived from developing any evidence in contravention to it. Because Bennett did not raise the argument in the Ninth District or in its Merit Brief, the Marichs were precluded from responding and citing the Court to cases such as Parker, above, which clearly contraindicate the application of a legal excuse in this context. The Marichs relied upon Bennett’s waiver of this issue, and did not address it their Merit Brief. It is simply unjust to decide the case on an issue that was not addressed in the trial court, appellate court, or Appellant’s Merit Brief. As a result, the Court should reconsider its decision to reverse the Ninth District on this basis.

F. Even if the legal excuse of “reasonable diligence” is applicable despite Bennett’s waiver, the matter should be remanded for fact-finding concerning the application of the defense.

The trial court granted Summary Judgment to Bennett on the claim that Bennett violated R.C. §5577.05 by operating an oversized vehicle on the public roads. The Ninth District reversed that determination, finding that the grant of Summary Judgment was in error, and determined that the Marichs’ cross-motion for summary judgment

should have been granted. This Court decided to “reinstate the jury’s verdict finding Bennett not liable for the Mariches’ injuries.” ¶42. However, there is nothing to reinstate: the Marichs’ claim that Bob Bennett violated R.C. §5577.05 was never tried – summary judgment was inappropriately granted against the Marichs’ claim, and the Marichs never got to try it.

If, despite Bennett’s waiver, the legal excuse of reasonable diligence applies to this case, then the only aspect of the Ninth District’s decision that should be reversed is its decision to grant the Marich’s cross-motion for summary judgment. The matter should be remanded with both parties’ summary judgment motions overruled. The matter should go to the jury with an instruction that Bennett was negligent per se, but that the jury could excuse the conduct if the jury finds that Bennett was “reasonably diligent.” See Robinson v. Bates (2006), 112 Ohio St.3d 17, 2006 -Ohio- 6362, ¶24 (finding that “a jury should have been allowed to consider whether Bates exercised reasonable diligence and care in repairing the wall or instead breached her statutory duty to repair.”) In no event should this Court engage in fact-finding at this level of review to enter judgment on a legal excuse which was never raised in the trial court.

V. CONCLUSION

This Court should not embrace the legal excuse of "reasonable diligence" as a new defense to the negligent violation of traffic laws. To do so would be to disturb many years of precedent which has construed legal excuses in a narrow manner, and instead essentially replace the traffic laws of Ohio with a rule of reason. This would create chaos in the streets as well as the courtroom. The decision also disturbs the presumption that all persons are presumed to know the law. The Marich decision, as it currently stands, will invite legions of civil and criminal defendants to claim that their reasonableness or diligence supersedes the letter of the law, or to claim confusion or ignorance as a defense. It is a bad precedent, and should be reconsidered.

Respectfully submitted,

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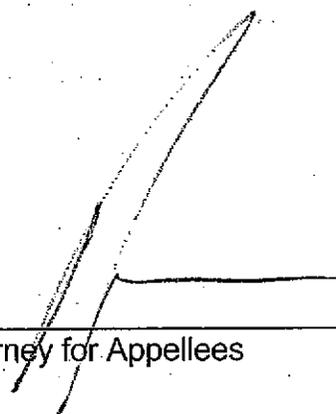
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VI. CERTIFICATE OF SERVICE

THIS CERTIFIES THAT a copy of the foregoing was served on January 24, 2008 upon the following by regular, U.S. Mail:

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