

TABLE OF CONTENTS

	<u>Page</u>
TABLE OF AUTHORITIES	ii
STATEMENT OF THE CASE	1
ARGUMENT OF LAW	3
CONCLUSION	6
CERTIFICATE OF SERVICE	7

TABLE OF AUTHORITIES

CASES

Page

Robinson v. Bates, 112 Ohio St.3d 17 3, 5

Sikora v. Wenzel (2000), 88 Ohio St.3d 493 3, 5

STATUTES

R.C. §4513.34 1, 2, 5

R.C. §5577.05 1, 2, 3, 5

OTHER

Norton City Ordinance Section 440.01 1, 2, 3, 4, 5

Norton City Ordinance Section 440.02 1

Restatement of Torts 2d, Section 288(A)(2)(b) 4

I. STATEMENT OF THE CASE

This case arises out of a motor vehicle collision which occurred on November 8, 2002, on Clark Mill Road in the City of Norton, Summit County, Ohio. A vehicle operated by plaintiff-appellee, John Marich, struck a tractor-trailer which had been parked by defendant-appellant, John Goss, who was acting in the course and scope of his employment with defendant-appellant, Bob Bennett Construction Company. The trailer being operated by appellant Goss was carrying a bulldozer which was 124 inches wide, and which admittedly exceeded the allowable width of 102 inches pursuant to R.C. §5577.05(A)(4) and Norton City Ordinance §440.02. Pursuant to R.C. §4513.34, Goss and Bob Bennett Construction Company had obtained a special hauling permit from the Ohio Department of Transportation allowing the oversize bulldozer to be transported on the state highway system. Defendants-appellants did not obtain a special hauling permit from the City of Norton for the reason that no hauling permit was required under Norton City Ordinance 440.01(b)(1), which exempted Clark Mill Road from the above width requirements. The police chief from the City of Norton testified that it would have been impossible for the defendants-appellants to obtain a permit since none would have been issued and none was required under the local Norton city ordinance.

At the trial court level, the plaintiffs-appellees filed a motion for partial summary judgment, seeking a ruling from the trial court that the defendants-appellants were negligent per se for being in violation of R.C. §5577.05. Defendants-Appellants also moved for partial summary judgment, seeking a ruling from the court that the defendants-appellants were not negligent as a matter of law based upon the applicability of City of Norton Ordinance 440.01. Ultimately, the trial court granted defendants-appellants' motion for summary judgment,

holding that the defendants were not negligent as a matter of law since no special hauling permit was required under the terms of the Norton city ordinance. It is important to note that the case then proceeded to a jury trial based upon all other issues of negligence, proximate cause and damages. The jury then returned a verdict in favor of the defendants, finding that there was no liability on the part of the defendants for negligence.

The court of appeals then held that R.C. §5577.05 preempted the conflicting local ordinance. In addition, the court of appeals held that since the state statute preempted the local ordinance, then the defendants-appellants were negligent per se, and remanded the case back to the trial court.

This Court, in a unanimous opinion, held that R.C. §5577.05 and R.C. §4513.34 did, in fact, supersede and take precedence over Norton Codified Ordinance 440.01, and therefore invalidated the Norton city ordinance. However, this Court then went on to unanimously hold that the defendants-appellants were legally excused from complying with the state statute due to the fact that the Norton city ordinance exempted Clark Mill Road from the width requirements at the time of the accident, and further that there was evidence by way of deposition testimony from the Norton police chief that it would have been impossible to obtain a permit from the City of Norton due to the statutory exemption. Accordingly, this Court unanimously held that defendants-appellants' "conduct does not meet the test for negligence per se". This Court then reversed the holding of the court of appeals and reinstated the jury's verdict in favor of defendants-appellants.

Plaintiffs-Appellees have now filed a motion for reconsideration.

II. ARGUMENT OF LAW

This case presented two completely separate and distinct issues. The first issue was whether R.C. §5577.05 and R.C. §4513.34 conflicted with and took precedence over Norton Codified Ordinance 440.01. The second issue, which was totally separate and distinct, was whether, assuming that the Norton Codified Ordinance was invalid as being in conflict with state law, the defendants could then subsequently be held negligent per se for being in violation of the state statutory requirements. The court of appeals held that the local Norton ordinance was invalid as being in conflict with state law, and then went on to hold that, as a result, defendants were negligent per se. This Court reversed and held that even though the Norton city ordinance was invalid, that did not necessarily or automatically mean that the defendants were negligent per se because the issue then became whether the violation of the state statute was “excused”.

As this Court correctly pointed out, “negligence per se is different from strict liability”. Also, it has long been the law of Ohio that negligence per se does not necessarily equal liability per se. As this Court held in *Robinson v. Bates*, 112 Ohio St.3d 17:

Negligence per se is . . . different from strict liability, in that a negligence per se violation will not preclude defenses and excuses, unless the statute clearly contemplates such a result.

One of the “excuses” which has clearly been recognized by this Court in past cases is the concept of “notice”. In *Sikora v. Wenzel* (2000), 88 Ohio St.3d 493, this Court held at p. 497 as follows:

. . . Negligence per se and strict liability differ in that a negligence per se statutory violation may be “excused”.

* * *

But, “an excused violation of a legislative enactment . . . is not negligence”.

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

This Court correctly held in its decision that the defendants-appellants failed to obtain a permit “only because Norton Codified Ordinance 440.01 stated that a permit was unnecessary”. This Court also pointed out that the police chief testified by way of deposition that “the city did not even issue local permits, because the ordinance made them irrelevant for Clark Mill Road.” Therefore, this is clearly a situation where it would have been impossible for the defendants-appellants to comply with the ordinance and obtain a permit. Also, the defendants-appellants were not on notice that a permit was required due to the exemption set forth in the local ordinance.

Plaintiffs-Appellees, in their motion for reconsideration, argue that there is no evidence that the defendants-appellants exercised reasonable diligence and care in attempting to comply with the law. However, this argument is clearly misplaced on its face. This Court did not act as a fact finder, but instead simply held that the failure to obtain a permit from the City of Norton was “excused” based upon the presence of the Norton city ordinance exempting this particular road from the width requirements, and further based upon the testimony of the police chief to the effect that such a permit would not have been issued even if requested. The fact that Bennett obtained a permit for operating on state routes clearly showed reasonable diligence in attempting to comply with the law.

Plaintiffs-Appellees further make the ludicrous argument that the defendants-appellees could have complied with the law simply by not driving an oversize vehicle on Clark Mill Road. At the time of this accident, defendants-appellees had every right to operate this vehicle on Clark Mill Road without a permit based upon the Norton city ordinance. The fact that the ordinance was subsequently found invalid cannot form the basis for a finding of negligence per se, after the fact.

This Court did not radically change the law of Ohio in any way, shape or form. In fact, this Court's decision was simply a reaffirmance of prior Ohio law. The narrow decision unanimously issued by this Court was simply this:

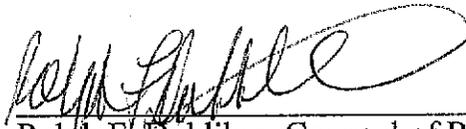
- (1) Revised Code §5577.05 and §4513.34 take precedence over Norton Codified Ordinance 440.01, invalidating it as a matter of law.
- (2) Bennett's conduct does not meet the test for negligence per se because the conduct was "excused". Bennett's failure to seek or obtain a permit was excused because under the local ordinance a permit was not necessary and could not even be obtained at the time.

The above conclusions by this Court do not place this Court in the position of a "fact finder". Rather, the Court has taken undisputed facts from the record and held, as a matter of law, that the defendants-appellants were not negligent per se due to the presence of a legal excuse. This is the same conclusion that was reached in *Robinson v. Bates, supra*, and *Sikora v. Wenzel, supra*.

CONCLUSION

For all of the reasons set forth herein, the plaintiffs-appellees' motion for reconsideration should be denied. This Court's decision, issued January 17, 2008, should be affirmed, and the jury's verdict in favor of the defendants-appellants should be reinstated.

Respectfully submitted,



Ralph F. Dublikar, Counsel of Record
BAKER, DUBLIKAR, BECK,
WILEY & MATHEWS
400 South Main Street
North Canton, OH 44720
Phone: (330) 499-6000
Fax: (330) 499-6423
E-mail: dublikar@bakerfirm.com
Counsel for Appellants

CERTIFICATE OF SERVICE

I certify that a copy of this Brief was sent by ordinary U.S. mail to counsel for plaintiffs-appellees, Jack Morrison, Jr., and Thomas R. Houlihan, Amer Cunningham Co., L.P.A., 159 South Main Street, Eleventh Floor, Society Building, Akron, Ohio 44308-1322; on January 31st, 2008.



Ralph F. Dublikar

BAKER, DUBLIKAR, BECK,
WILEY & MATHEWS