

IN THE SUPREME COURT OF OHIO

TRI-VALLEY LOCAL SCHOOL DISTRICT  
BOARD OF EDUCATION,

Appellant,

v.

RANDY J. EPPLEY, ADMINISTRATOR OF  
THE ESTATE OF JOSHUA M. EPPLEY,  
DECEASED,

Appellee.

) SUPREME COURT CASE  
) NO. 2008-0366  
)

) ON APPEAL FROM THE  
) MUSKINGUM COUNTY COURT OF  
) APPEALS, FIFTH APPELLATE  
) DISTRICT  
)  
)  
)  
)

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**MERIT BRIEF OF APPELLANT TRI-VALLEY  
LOCAL SCHOOL DISTRICT BOARD OF EDUCATION**

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## BRIEF

### STATEMENT OF FACTS

On November 26, 2003, the motor vehicle driven by Corey W. Jenkins (“Jenkins”) was involved in a one car motor vehicle accident. Joshua M. Eppley (“Eppley”), a passenger in the automobile, was killed in the accident. Complaint, at ¶4. (Supp. 5.) Jenkins was not an employee of the Tri-Valley Local School District Board of Education (“Appellant”) at the time of the accident or at any time. Both he and Eppley were students within the School District. They were on their way home when the accident occurred.

Eppley’s Estate (“Appellee) filed a wrongful death claim against Appellant and several John Does on August 3, 2005. Appellee’s Complaint was given Muskingum County Court of Common Pleas Case No. CH 2005-0409. (Supp. 1.) Appellant filed an Answer and a Motion to Dismiss, or, in the Alternative, Motion for Judgment on the Pleadings pursuant to Rules 12(B)(6) and 12(C) of the Ohio Rules of Civil Procedure. Rather than respond to the Motion, Appellee voluntarily dismissed Case No. CH 2005-0409, pursuant to Rule 41 of the Ohio Rules of Civil Procedure, on September 15, 2005. Complaint, at ¶1. (Supp. 5.)

On September 7, 2006, Appellee refiled his Complaint against Appellant and the John Doe Defendants. Again, Appellant answered the Complaint and filed a Motion for Judgment on the Pleadings. The Motion for Judgment on the Pleadings was filed because (1) Appellee’s Complaint was not filed within the time period set forth in R.C. §2125.02 and was not saved by R.C. §2125.04, and (2) Appellant is immune from liability, pursuant to R.C. §2744.02(A)(1).

The trial court granted Appellant’s Motion on March 7, 2007 and Appellee appealed. (Appx. 22.)

The Muskingum County Court of Appeals, Fifth Appellate District reversed the trial court’s order granting Appellant’s Motion for Judgment on the Pleadings and remanded this

matter to the trial court for further proceedings against Appellant and the John Doe Defendants.  
(Appx. 4.)

Appellant filed an Application for Reconsideration on January 14, 2008. The Court of Appeals denied the Application for Reconsideration on February 1, 2008. (Appx. 20.)

## **ARGUMENT**

### **Proposition Of Law No. 1: R.C. §2125.04 Does Not Deny Wrongful Death Claimants The Equal Protection Of The Law.**

Eppley died on November 26, 2003. At the time of Eppley's death, a claim for wrongful death was required to be commenced within two years of the date of the decedent's death. "An action for wrongful death shall be commenced within two years after the decedent's death." R.C. §2125.02(D). (Appx. 27.)

An action for wrongful death was unknown at common law. Since Ohio's wrongful death statutes, R.C. §2125.01, et seq., are in derogation of the common law, they must be strictly construed and applied. *Keaton v. Ribbeck* (1979), 58 Ohio St.2d 443, 391 N.E.2d 307, 12 O.O.3d 375, *Rubeck v. Huffman* (1978), 54 Ohio St.32 20, 4, 374 N.E.2d 411; *Samonas v. St. Elizabeth Health Center*, 7<sup>th</sup> Dist. No. 05-MA-83, 2006-Ohio-671; *In re Estate of Traylor*, 7<sup>th</sup> Dist. No. 03MA253-259 and 262, 2004-Ohio-6504, at ¶23.

Appellee timely filed his first Complaint on August 3, 2005. Appellee, however, voluntarily dismissed it on September 15, 2005, before the two year commencement set forth in R.C. §2125.02 expired.

The two year period set forth in R.C. §2125.02 is not a statute of limitations but an integral part of the cause of action:

[T]he time limitation on the wrongful death statute does not constitute a remedial limitation upon the right of action. Commencing the action within the prescribed time is a necessary

element of the right to bring it and if a petition shows upon its face that it is not filed within the two-year period, a demurrer to it must be sustained, not because of a statute of limitations is interposed as a defense but because an averment of an essential element of the action is absent.

*Sabol v. Pekoc* (1947), 148 Ohio St. 545, 554, 76 N.E.2d 84, 36 O.O. 182, construing former analogous General Code Section 10509-169. See, also, *Brookbank v. Gray* (1996), 74 Ohio St.3d 279, 291, 658 N.E.2d 274, 1996-Ohio-135.

On September 15, 2005, there were two savings statutes: one, R.C. §2125.04, applicable only to wrongful death claims, and the other, R.C. §2305.19, applicable to all other claims. If an action for wrongful death is voluntarily dismissed or fails otherwise than upon the merits, R.C. §2125.04 saves it but only if the two-year period of time set forth in R.C. §2125.02 has expired when the claim was voluntarily dismissed or fails otherwise upon the merits:

In every civil action for wrongful death commence or attempted to be commenced within the time specified by division (D)(1) ... of Section 2125.02 of the Revised Code, if a judgment for the plaintiff is reversed or if the plaintiff fails otherwise than upon the merits, and the time limited by any of those divisions for the commencement of the action has expired at the date of such reversal or failure, the plaintiff ... may commence a new action for wrongful death within one year after such date.

R.C. §2125.04. (Appx. 36.)

R.C. §2305.19, which became effective on March 2, 2004, gives non-wrongful death plaintiffs the right to refile their claims, if they are voluntarily dismissed or fail otherwise than upon the merits. R.C. §2305.19, however, gives non-wrongful death plaintiffs more time to refile their claims than R.C. §2125.04 gives to wrongful death plaintiffs. Non-wrongful death plaintiffs have one year from the date of the failure otherwise than upon the merits or the time remaining of the statute of limitations applicable to the claim, whichever is longer. In relevant part, R.C. §2305.19 provides:

In any action that is commenced or attempted to be commenced, if in due time ... the plaintiff fails otherwise than upon the merits, the plaintiff ... may commence a new action within one year after the date ... of the plaintiff's failure .. or with the original applicable statute of limitations, whichever occurs later.

R.C. §2305.19(A).

The first wrongful death savings statute was enacted because the original general savings statute did not apply to wrongful death claims:

The limitations of general code 10773, providing that every action based on a claim for wrongful death shall be brought within two years, is part of the right of action itself and not merely a limitation on the remedy; hence, the savings clause general code 11233, relating to causes commenced or attempted to be commenced in due time, but which have failed for some reason other than an on the merits, is without application.

*Collins v. Baltimore O.R. Co.* (1910), 22 Ohio Dec. 245, 1910 WL 1300, 11 Ohio N.P. (N.S.) 251.

Appellee was required to refile his Complaint on or before November 26, 2005. Instead, Appellee refiled his second Complaint on September 7, 2006, about ten months too late. (Supp. 5.) Appellee, in filing his second Complaint, relied on R.C. §2305.19. Appellee's reliance on R.C. §2305.19 was misplaced. It does not apply to wrongful death claims.

Further, R.C. §2305.19 is a general statute, while R.C. §2125.04 is a specific statute applicable only to wrongful death claims. It is well settled that a specific statute takes precedence over a general statute. See, *State v. Volpe* (1988), 38 Ohio St.3d 191, 527 N.E.2d 818. See, R.C. §1.51 of the Ohio Revised Code. Moreover, R.C. §2125.04, which was amended after the effective date of R.C. §2305.19, takes precedence over R.C. §2305.19 because it was enacted later:

If statutes enacted at the same or different sessions of the legislature are irreconcilable, the statute latest in date of enactment prevails.

R.C. §1.52.

R.C. §2305.19 and its precursors have applied to all non-wrongful death claims. R.C. §2125.04 and its precursors have applied only to wrongful death claims. If the legislature had intended that one statute apply to all claims, including wrongful death claims, it would have repealed R.C. §2125.04 when it adopted the amendment to R.C. §2305.19. The fact that the General Assembly did not repeal R.C. §2125.04, but amended it after enacting R.C. §2305.19, clearly indicates that the General Assembly intended R.C. §2125.04 to continue to apply to wrongful death claims, only, and intended R.C. §2305.19 to apply to all other claims.

The Court of Appeals acknowledged that R.C. §2305.19 is a general statute applicable to non-wrongful death claims and that R.C. §2125.04 is a specific statute applicable only to wrongful death claims. Opinion, at ¶¶16 and 17. (Appx. 4). The Court of Appeals, however, refused to construe and apply the wrongful death statutes as written. Instead, the Court of Appeals held that R.C. §2125.04, as applied to Appellee's cause of action, violated the Equal Protection Clause of Ohio's Constitution. Opinion, at ¶38. (Appx. 4).

The Court of Appeals erred in holding R.C. §2125.04 unconstitutional. First, R.C. §2125.04 does not apply to this case. The two-year period set forth in R.C. §2125.02 had not expired when Appellee voluntarily dismissed his first Complaint. As such, there was nothing to save. Appellee, pursuant to R.C. §2125.02, was required to refile his claim by November 26, 2005. Second, R.C. §2125.04 does not violate Equal Protection simply because it treats wrongful death claimants differently than non-wrongful death claimants. There is a rational basis for the legislative classifications.

Statutes are presumed to be constitutional. *Desenco, Inc. v. Akron* (1999), 84 Ohio St.3d 535, 538, 706 N.E.2d 323, 1999-Ohio-368. Before a court may declare a statute unconstitutional,

“it must appear beyond all reasonable doubt that the legislation and constitutional provisions are clearly incompatible.” *State ex rel. Dickman v. Defenbacher* (1955), 164 Ohio St. 142, 128 N.E.2d 59, 57 O.O. 134, ¶1 of the Syllabus.

A statute and a constitutional provision are clearly incompatible if the plain and ordinary meaning of the words of the statute in question cannot be reconciled with terms of the constitutional provision:

In reviewing a statute, a court, if possible, will uphold its constitutionality. *Winslow-Spacarb, Inc. v. Evatt* (1945), 144 Ohio St. 471, 475, 59 N.E.2d 924, 926, 30 O.O. 97, 99. All reasonable doubts as to the constitutionality of a statute must be resolved in its favor. *Dickman*. Courts have a duty to liberally construe statutes in order to save them from constitutional infirmities.

*Desenco, Inc.*, at 538.

A party claiming a statute is unconstitutional can do so in one of two ways: (1) present a facial challenge to the statute as a whole, or (2) challenge the statute as applied to a specific set of facts. *Harrold v. Collier* (2015), 107 Ohio St.3d 44, 836 N.E.2d 1165, 2005-Ohio-5334, ¶37.

A facial challenge requires the party challenging the statute to demonstrate that there are no set of facts under which the statute would be valid. *U.S. v. Salerno* (1987), 481 U.S. 739, 745, 107 S.Ct. 2095, 95 L.Ed. 2d 697. The fact that a statute might operate unconstitutionally under some set of circumstances is insufficient to render it wholly invalid. *Id.*

When a constitutional challenge is made on the ground that a statute is unconstitutional as applied to a set of facts, the challenger bears the burden of presenting clear and convincing evidence “of a presently existing state of facts which makes the act unconstitutional and void when applied thereto.” *Belden v. Union Life Ins. Co.* (1944), 143 Ohio St. 329, 55 N.E.2d 629, 28 O.O. 295, ¶16 of the Syllabus.

Article I, Section 2 of the Ohio Constitution provides, in part, that “[g]overnment is instituted for their equal protection.” The Equal Protection Clause prevents the state from treating people differently on an arbitrary basis. *State v. Williams* (2000), 88 Ohio St.3d 513, 530, 728 N.E.2d 342, citing *Harper v. Virginia State Bd. of Elections* (1966), 383 U.S. 663, 86 S.Ct. 1079, 16 L.Ed.2d 169 (Harlan, J., dissenting). The Equal Protection Clause does not prohibit classifications. It does, however, prevent the state from “treating differently persons who are in all relevant respects alike.” *Park Corp. v. Brook Park* (2004), 102 Ohio St.3d 166, 807 N.E.2d 913, 2004-Ohio-2237, ¶19, quoting *Nordlinger v. Hahn* (1992), 505 U.S. 1, 10, 112 S.Ct. 2326, 120 L.Ed.2d 1:.

Equal protection of the law means the protection of equal laws. It does not preclude class legislation or class action provided there is a reasonable basis for such classification. The prohibition against the denial of equal protection of the laws requires that the law shall have an equality of operation on persons according to their relation. So long as the laws are applicable to all persons under like circumstances and do not subject individuals to arbitrary exercise of power and operate alike upon all persons similarly situated, it suffices the constitutional prohibition against the denial of equal protection of the laws.

*Conley v. Shearer* (1992), 64 Ohio St.3d 284, 288-289, 595 N.E.2d 862.

The test to be used in determining whether a statute is constitutional under the Equal Protection Clause depends upon whether a fundamental interest or suspect class is involved. If a fundamental right or suspect class is involved, strict scrutiny applies. *Arbino v. Johnson and Johnson* (2007), 116 Ohio St.3d 468, 880 N.E.2d 420, 2007-Ohio-6948, ¶68. Fundamental rights have been defined as “those fundamental liberties that are implicit in the concept of ordered liberty such that neither liberty nor justice would exist if they were sacrificed.” *Palko v. State of Connecticut*, 302 U.S. 319, 58 S.Ct. 149, 52 L.Ed. 288 (reversed on other grounds). A fundamental right is also found in “those liberties that are deeply rooted in the nation’s history

and traditions.” *Moore v. City of Cleveland* (1977), 431 U.S. 494, 98 S.Ct. 1932, 52 L.Ed. 2d 531.

A statutory classification which involves neither a fundamental right nor a suspect class does not violate the Equal Protection Clause of the Ohio Constitution if the classification is rationally related to a legitimate governmental interest. *Menefee v. Queen City Metro* (1990), 49 Ohio St.3d 27, 29, 550 N.E.2d 181, 182:.

Rational basis scrutiny is intended to be a paradigm of judicial restraint, and where there are plausible reasons for the general assembly’s action a court’s inquiry must end.

*Am. Assn. of Univ. Professors, Cent. State Univ. Chapter v. Central State University* (1998), 83 Ohio St.3d 229, 239, 699 N.E.2d 463, 1998-Ohio-282 (Cook, J., dissenting) (majority decision summarily reversed by the United States Supreme Court (1999), 526 U.S. 124, 119 S.Ct. 1162, 143 L.Ed. 2d 222).

Wrongful death claimants are not a suspect class, and the right to file a claim for wrongful death is not a fundamental right. Indeed, Appellee in the Court of Appeals conceded in its Brief, see pages 14 and 15, that wrongful death claimants are not a suspect class and that there is no authority supporting any claim that the ability to file a wrongful death claim is a fundamental right. Therefore, if there is a rational basis for R.C. §2125.04, the statute is constitutional.

The legislature may treat wrongful death claims differently than other claims. First, a wrongful death claim is a statutory claim, only. Wrongful death claims did not exist under the common law. Claims for personal injury or damage to property are common law claims. Second, wrongful death claims are derivative in nature. They are brought by the decedent’s estate’s representative on behalf of decedent’s next of kin, as defined by statute. Wrongful death proceeds are recovered for exclusive distribution of those beneficiaries designated under the Wrongful

Death Statute, which class of people may include people not entitled to inherit from a decedent under R.C. §2105.06. *Brookbank v. Gray* (1996), 74 Ohio St.3d 279, 284-285, 658 N.E.2d 724, 728-729, 1999-Ohio-135. Personal injury and property damage claims are direct claims. They are brought by the injured or damaged party and against the party allegedly responsible for the injury or damage. The damages recovered are paid directly to the injured party. Third, damages recoverable in wrongful death claims cannot be limited by law. Ohio Constitution Article I, Section 19a. Damages for personal injury can and have been limited. R.C. §2323.24. *Arbino, supra*. Finally, the time period set forth in R.C. §2125.02 is an integral part of the cause of action. It is not a statute of limitations period. R.C. §2305.19 refers to statutes of limitation, which are remedial limitations on non-wrongful death claims. The wrongful death statutes serve a legitimate need to provide a cause of action and to accord potential defendants with some finality. *Brookbank*, at 291.

R.C. §§2125.02 and 2125.04 apply equally to all wrongful death claimants. The language used in these statutes is clear and unambiguous. If a representative of a decedent's estate wishes to pursue a wrongful death claim, the representative has two years from the date of decedent's death to do so. If a wrongful death claim is filed and dismissed before the two-year period expires, the claim must be refiled within two years of the date of death. If the claim is filed before the two year period expires but fails otherwise than upon the merits after the two year period expires, then the estate representative has one year from the date of the failure to refile the claim.

R.C. §2125.04 is constitutional and should be construed and applied as written. R.C. §2125.04 does not affect any fundamental right. R.C. §2125.04 is rationally related to a legitimate state interest, and it and R.C. §2125.02 are clear and unambiguous:

[I]t is conceivable that the General Assembly may have concluded that the savings provision of R.C. 2125.04 served a different, legitimate governmental purpose than the purposes served by the general savings statute, R.C. 2305.19. It is not irrational to conclude that amending R.C. 2125.04 to extend the time to file a wrongful death action would not further those legitimate government purposes identified in *Brookbank*. Moreover, because the Wrongful Death Act serves purposes that are different from an action for personal injury or other tortious conduct, the General Assembly was within its right to differentiate between the causes of action.

*Presley Admx., et al. v. Janette Fraley, et al.*, Franklin County Common Pleas Court Case No. 06 CV-05-6963. (Decision rendered Jun. 13, 2008.) (Appx. 48.)

Neither R.C. §2125.04 nor R.C. §2305.19 are applicable to the facts of this case. The two year period of time set forth in R.C. §2125.02 had not expired when Appellee voluntarily dismissed his first Complaint. Therefore, Appellee was required to refile his claim before the expiration of the two-year period of time set forth in R.C. §2125.02. The Court of Appeals should have affirmed the trial court's order granting Appellant's Motion for Judgment on the Pleadings. Its holding that R.C. §2125.04 is unconstitutional should be reversed.

**Proposition Of Law No. 2: A Political Subdivision Is Immune From Liability If There Are No Facts Which Support Any Of The Exceptions Found In R.C. §§2744.02(B)(1) Through (5).**

A "political subdivision" is 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." R.C. §2744.01(F).

A board of education of each school district is a body politic and corporate.

The board of education of each school district shall be a body politic and corporate, and, as such, capable of suing and being sued

...

R.C. §3313.17.

Therefore, pursuant to R.C. §§3313.17 and 2744.01(F), Appellant is a political subdivision.

Political subdivisions are generally immune from liability for injury, death, or loss to persons or property. R.C. §2744.02(A)(1). A political subdivision may be held liable for injury, death, or loss to person or property if one of the exceptions set forth in R.C. §§2744.02(B)(1) through (5) applies and R.C. §2744.03 does not operate to restore immunity and provide the political subdivision with a complete defense to the claim. *Cater v. City of Cleveland* (1998), 83 Ohio St.3d 24, 28, 697 N.E.2d 610, 614-615.

R.C. §2744.02(B) provides five exceptions to the general grant of immunity. A political subdivision can be held liable for injury, death or loss to persons or property:

- 1) caused by the negligent operation, by one of its employees, of a motor vehicle;
- 2) caused by the negligent performance of a proprietary function;
- 3) caused by the negligent failure to keep public roads in repair or other negligent failure to remove obstructions from public roads;
- 4) caused by a physical defect due to the negligence of an employee on the grounds of or buildings used by the political subdivision; or
- 5) if civil liability is expressly imposed upon the political subdivision by a section of the Revised Code.

R.C. §§2744.02(B)(1) through (5).

Eppley, while a passenger, was involved in a motor vehicle accident on November 26, 2003. Jenkins “crashed his vehicle,” Complaint at ¶4 (Supp. 5), but he was not one of Appellant’s employees. If Jenkins negligently operated the vehicle in which Eppley was a passenger, his

negligence does make Appellant liable. R.C. §2744.02(B)(1) provides no exception to the immunity afforded Appellant.

Appellant provides a system of public education. The provision of a system of public education is a governmental function. R.C. §2744.01(C)(2)(c). Since the provision of a system of public education is a governmental function not a proprietary function, R.C. §2744.02(B)(2) provides no exception to the immunity afforded Appellant.

The motor vehicle accident occurred on a public road. Appellant has no obligation to maintain or repair the public roads or to keep them free from obstructions. Municipal corporations generally have the power to regulate and maintain the streets within their jurisdiction R.C. §723.01. School property is not dedicated for use by the general public, nor is the general public invited to use it. *Miller v. Wadsworth City Schools* (1994), 93 Ohio App.3d 278, 281, 638 N.E.2d 166, 168, 93 Ed. Law. Rep. 286. Therefore, R.C. §2744.02(B)(3) provides no exception to the immunity afforded to Appellant.

Eppley's death was not caused by the negligence of one of Appellant's employees, was not due to a physical defect on the grounds of or within any of Appellant's buildings, and did not occur on its property. Therefore, R.C. §2744.03(B)(4) has no application to this matter.

Finally, there is no section of the Revised Code that specifically imposes liability upon Appellant for Eppley's death. R.C. §2744.02(B)(5), therefore, does not provide an exception to the immunity afforded Appellant.

In fact, the Court of Appeals found no exception to the immunity afforded Appellant.

Appellees argue Joshua's death was caused by the negligent operation of a motor vehicle, but the operator of the motor vehicle was not one of the Board's employees. The Board did not own the road on which the accident occurred, and the accident did not occur on school grounds. Decedent's death was not caused by a defect on or within the grounds or buildings used by the Board.

Opinion, at ¶48 (Appx. 4). Nevertheless, the Court of Appeals held that the Board could, if the allegations in the Complaint are proved to be true, be held liable because one or more of its employees allegedly acted wantonly, recklessly or willfully in allowing Jenkins to give Eppley a ride from school:

Pursuant to R. C. 2744.03(A)(6), an employee of a political subdivision is immune from liability unless (1) the employee's acts or omissions were manifestly outside the scope of the employment or official responsibilities, (2) the employee's acts or omissions were with a malicious purpose, in bad faith, or in a wanton or reckless manner; or (3) when the Revised Code expressly imposes civil liability.

...

Appellant's Complaint alleges the employees of Tri-County Local School District acted recklessly, wantonly or willfully when they allowed an unauthorized person to remove decedent from school premises. We find construing the allegations of the Complaint to be true. Appellant could prove a set of facts entitling him to recover, but only as to the Board and the John Does.

Opinion, ¶¶47 and 48.

The Court of Appeals failed to follow the *Cater v. City of Cleveland* analysis or the statutory scheme in reaching its decision. The Court of Appeals, once it determined that none of the exceptions set forth in R.C. §2744.02(B) applies, should have ended its analysis and affirmed the trial court's ruling as to the Appellant. If R.C. §2125.04 is unconstitutional and R.C. §2305.19 saves Appellee's cause of action, a cause of action remains only against the John Doe Defendants. If this matter is remanded for future proceedings, it should be remanded only against the John Doe Defendants.

**Proposition Of Law No. 3: R.C. §§2744.03(A)(1) Through (5) Are Defenses That Restore Immunity And Do Not Provide Claimants With A Basis Of Recovery.**

R.C. §2744.03 sets forth five defenses applicable to political subdivisions. These defenses restore the immunity afforded a political subdivision, if one of the exceptions set forth in R.C. §2744.02(B) applies. R.C. §2744.03(A)(6) applies, if at all, only to employees of political subdivisions. *Fabrey v. McDonald Village Police Dept.* (1994), 70 Ohio St.3d 351, 355-356, 639 N.E.2d 31 . See, also, *Reyes v. Lochotzki*, 6<sup>th</sup> Dist. No. 07-05-034, 2006-Ohio-1404, at ¶15.

R.C. §2744.03 does not provide an independent basis for imposing liability upon a political subdivision. Rather, it “is a defense to liability, it cannot be used to establish liability.” *Cater, supra*, at 32, citing *Hill v. Urbana* (1997), 79 Ohio St.3d 130, 135, 679 N.E.2d 1109, 1113, 1997-Ohio-400 (Lindberg Stratton, J., concurring in part and dissenting in part), *id.*, at 138-139, 679 N.E.2d 1116 (Mayer C.J., dissenting). See, also, *Coats v. Columbus*, 10<sup>th</sup> Dist. No. 06AP-681, 2007-Ohio-761, ¶19.

Moreover, if none of the exceptions set forth in R.C. §2744.02(B) applies, a court need not address whether any of the defenses contained in R.C. §2744.03 apply. *Doe v. Marlinton*, 5<sup>th</sup> Dist. No. 2006CA00102, 2007-Ohio-2815, at ¶26. See, also, *Piispanen v. Carter*, 11<sup>th</sup> Dist. No. 2005-L-133, 2006-Ohio-2382, at ¶22. See, also, *Jones v. Franklin County Sheriff’s Dept.* (Jun. 21, 1999), 12<sup>th</sup> Dist. No. CA-99-01-004, at page 6. See, also, *Davis v. City of Akron* (July 20, 2005), 9<sup>th</sup> Dist. No. 22428, 2005-Ohio-3629, at ¶12.

The Court of Appeals did not have to engage in the third tier of the *Cater* analysis. But in so doing, it applied the wrong law to Appellant. In essence, the Court of Appeals determined that Appellant could be held liable solely on a theory of *respondent superior* – an outcome that R.C. §§2744.02(A) and (B) are specifically designed to prohibit.

If the Court of Appeals' decision is permitted to stand, there will be confusion in the law and conflict within the districts as to what law applies to political subdivisions and what law applies to the employees of political subdivisions. R.C. §2744.03(A)(6) cannot be used to impose liability on political subdivisions:

The city properly points out that the statute upon which the trial court relied in denying the city's motion – R.C. 2744.03(A)(6)(b) – creates an exception to the statutory *immunity* afforded to employees of political subdivisions, not an exception to the immunity afforded to political subdivisions themselves. This is apparent from the plain language of the statute.

*Lowery v. City of Cleveland*, 8<sup>th</sup> Dist. No. 90246, 2008-Ohio-132, ¶15.

The Court of Appeals erred in remanding this case to the trial court for further proceedings against the Board assuming Appellee's second Complaint was saved in some fashion. R.C. §2744.03(A)(6) applies only to employees of political subdivisions.

## **CONCLUSION**

Appellee failed to file his claim within the time period set in R.C. §2125.02. Therefore, Appellee cannot maintain and pursue any wrongful death claim against any party.

The Court of Appeals, though acknowledging the fact that wrongful death claims are in derogation of the common law, failed to construe and apply the statutes applicable to this claim. Instead, the Court of Appeals declared R.C. §2125.04 unconstitutional. The Court of Appeals erred in so doing. Its decision should be reversed.

Moreover, even if R.C. §2125.04 is unconstitutional, the Court of Appeals erred in remanding this matter to the trial court for further proceedings against Appellant. The Appellant is immune from liability, as there is no exception to the immunity afforded to it pursuant to R.C. §2744.02(A)(1). The Court of Appeals wrongfully engaged in the third-tier of the *Cater* analysis

and, in so doing, applied the wrong law to Appellant. The Court of Appeals' ruling, as to Appellant, even if R.C. §2125.04 is unconstitutional, should be reversed.

Respectfully submitted,



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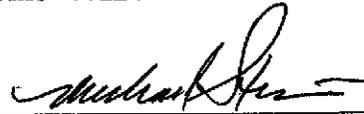
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**CERTIFICATE OF SERVICE**

A true and correct copy of the foregoing *Merit Brief of Appellant Tri-Valley Local School District Board of Education* was sent this 7<sup>th</sup> day of August, 2008, via UPS Overnight Delivery, postage-prepaid upon the following:

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Michael E. Stinn (0011495)

IN THE SUPREME COURT OF OHIO

RANDY J. EPPLEY, ETC., ) SUPREME COURT CASE NO.  
 )  
 Appellee, ) 08-0366  
 ) ON APPEAL FROM THE JUDGMENT  
 v. ) ENTERED IN THE MUSKINGUM  
 ) COUNTY COURT OF APPEALS,  
 TRI-VALLEY LOCAL SCHOOL DISTRICT, et ) FIFTH APPELLATE DISTRICT  
 al., )  
 ) COURT OF APPEALS  
 Appellant. ) CASE NO. CT 2007-0022

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NOTICE OF APPEAL OF APPELLANT  
TRI-VALLEY LOCAL SCHOOL DISTRICT BOARD OF EDUCATION

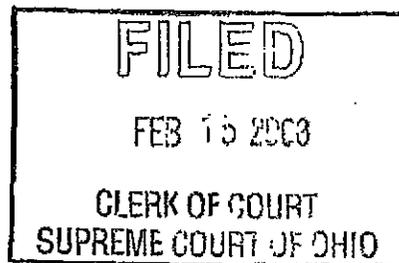
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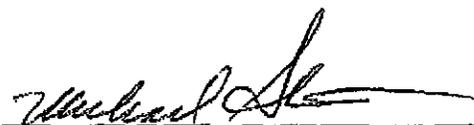


**NOTICE OF APPEAL**

Appellant Tri-Valley Local School District Board of Education hereby gives notice of appeal to the Supreme Court of Ohio from the judgment of the Muskingum County Court of Appeals, Fifth Appellate District, entered in Court of Appeals Case No. CT 2007-0022 on or about January 3, 2008 and its decision to deny the Application for Reconsideration dated February 1, 2008. Copies of the Court of Appeals' Opinion and Orders are attached hereto and incorporated by reference herein.

This case is one of public or great general interest and involves a substantial constitutional question.

Respectfully submitted,



---

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School District Board of Education

**CERTIFICATE OF SERVICE**

A true and correct copy of the foregoing *Notice of Appeal of Appellant Tri-Valley Local School District Board of Education* was sent this 14 day of February, 2008, via regular U.S. mail, postage-prepaid upon the following:

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COURT OF APPEALS  
MUSKINGUM COUNTY, OHIO  
FIFTH APPELLATE DISTRICT

FILED  
FIFTH DISTRICT  
COURT OF APPEALS  
JAN - 3 2008  
MUSKINGUM COUNTY, OHIO  
TODD A. BICKLE, CLERK

RANDY J. EPPLEY, ET AL  
Plaintiffs-Appellants

-vs-

TRI-VALLEY LOCAL SCHOOL  
DISTRICT, ET AL  
Defendants-Appellees

JUDGES:  
Hon: W. Scott Gwin, P.J.  
Hon: William B. Hoffman, J.  
Hon: Patricia A. Delaney, J.

Case No. CT2007-0022

OPINION

CHARACTER OF PROCEEDING:

Civil appeal from the Muskingum County  
Court of Common Pleas, Case No.  
CH2006-0529

JUDGMENT:

Reversed and Remanded

DATE OF JUDGMENT ENTRY:

APPEARANCES:

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For Defendant-Appellee

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*Gwin, P.J.*

{¶1} Plaintiff Randy J. Eppley, individually and as the Administrator for the Estate of Joshua M. Eppley, deceased, appeals a judgment of the Court of Common Pleas of Muskingum County, Ohio, which dismissed his complaint pursuant to Civ. R. 12. Appellees are the Tri-Valley Local School District, Tri-Valley Local School Board, and John Does one through five. Appellant assigns four errors to the trial court:

{¶2} "I. THE TRIAL COURT ERRED WHEN IT GRANTED JUDGMENT ON THE PLEADINGS BECAUSE THE SAVINGS PROVISIONS OF OHIO REVISED CODE SECTION 2305.19 APPLY TO ALL CAUSES OF ACTION FILED IN OHIO COURTS.

{¶3} "II. THE TRIAL COURT ERRED WHEN IT GRANTED JUDGMENT ON THE PLEADINGS BECAUSE IT FAILED TO LIMIT THE EFFECT OF OHIO REVISED CODE SECTION 2125.04 TO THE SUBSTANTIVE REVISIONS CONTAINED IN THE 2004 AMENDMENT SO AS TO AVOID A CONSTITUTIONAL ISSUE.

{¶4} "III. THE TRIAL COURT ERRED IN GRANTING JUDGMENT ON THE PLEADINGS BECAUSE THE SAVINGS PROVISION OF R.C. 2125.04 CREATES A CONSTITUTIONALLY IMPERMISSIBLE DISTINCTION BETWEEN CLASSES OF PLAINTIFFS AND MUST BE STRICKEN ON EQUAL PROTECTION GROUNDS.

{¶5} "IV. THE TRIAL COURT ERRED WHEN IT GRANTED JUDGMENT ON THE PLEADINGS ON THE BASIS OF STATUTORY IMMUNITY BECAUSE THE RECORD IS INCOMPLETE."

{¶6} On August 3, 2005, appellant filed a complaint for wrongful death against appellees. Appellant dismissed the case without prejudice pursuant to Civ. R. 41 on

September 15, 2005. Thereafter, appellant re-filed his complaint on September 7, 2006.

{¶7} Appellant's re-filed complaint alleges on or about November 26, 2003, decedent Joshua M. Eppley was in the care of Tri-County Local School District when its employees recklessly, wantonly, and willfully engaged in conduct which caused harm to decedent. Appellant alleged the employees, John Does one through five, allowed Corey W. Jenkins to remove decedent from the premises without authority from decedent's parents. Subsequently, while decedent was with him, Corey W. Jenkins crashed his vehicle, killing the decedent. The re-filed complaint alleges but for the willful, wanton and reckless conduct and breach of duty of the appellants, decedent would not have been in the company of Corey W. Jenkins, and would not have been involved in the accident. Appellant's re-filed complaint alleges as a direct and proximate cause of appellees' negligence, the decedent suffered great pain and suffering of body and mind, loss of the enjoyment of life, mental anguish, and died.

{¶8} On September 25, 2006, appellees filed their answer to the complaint. The answer contained a general denial or denial for want of sufficient knowledge except that appellees admitted Joshua is deceased.

{¶9} The answer also raises fourteen affirmative defenses, including: statute of limitations; failure to state a claim upon which relief may be granted; failure to name indispensable parties; assumption of the risk; contributory negligence; statutory immunity pursuant to R.C. Chapter 2744; all the immunities and defenses available under R.C. Chapter 2744; insufficiency of process and service of process; lack of subject matter jurisdiction and personal jurisdiction; failure of commencement; plaintiff's

inability to sue on behalf of the estate; plaintiff's inability to sue in an individual capacity; and right to set off. Appellee's eighth affirmative defense states "Defendants state that Tri-Valley Local School District an entity susceptible to suit." Appellees' motion for a judgment on the pleadings argues Tri-Valley School District is not sui juris, which is apparently what their eighth affirmative defense was intended to raise.

{¶10} Appellees' motion for judgment on the pleadings argued the statute of limitations had run on appellant's complaint before he re-filed the lawsuit. The motion also argued Tri-Valley is immune from liability. Additionally, the motion for judgment on the pleadings argued appellant cannot bring the action in his individual capacity, but only in his representative capacity on behalf of the estate.

{¶11} Appellant's response to the motion for judgment on the pleadings argued the general savings statute, R.C. 2305.19 applies to this action, not R.C. 2125.04, the wrongful death savings statute. In the alternative, appellant argued to enforce R.C.2125.04 violates the appellant's right to equal protection as guaranteed by the Fourteen Amendment to the United States Constitution and the Ohio State Constitution. Appellant's response to the motion for judgment on the pleadings also argued appellees' claim of statutory immunity is premature because the record is incomplete.

{¶12} The trial court dismissed the complaint with prejudice pursuant to Civ. R. 12, but did not make any finding regarding whether its judgment is based on the running of the statute of limitations, or statutory immunity grounds.

{¶13} COMPARISON OF THE TWO STATUTES

{¶14} R.C. 2305.19 provides: "(A) In any action that is commenced or attempted to be commenced, if in due time a judgment for the plaintiff is reversed or if the plaintiff

fails otherwise than upon the merits, the plaintiff or, if the plaintiff dies and the cause of action survives, the plaintiff's representative may commence a new action within one year after the date of the reversal of the judgment or the plaintiff's failure otherwise than upon the merits or within the period of the original applicable statute of limitations, whichever occurs later. This division applies to any claim asserted in any pleading by a defendant."

{¶15} R.C.2125.04 provides: "In every civil action for wrongful death commenced or attempted to be commenced within the time specified by division (D)(1) or (D)(2)(c), (d), (e), (f), or (g) of section 2125.02 of the Revised Code, if a judgment for the plaintiff is reversed or the plaintiff fails otherwise than upon the merits and if the time limited by any of those divisions for the commencement of the action has expired at the date of the reversal or failure, the plaintiff or, if the plaintiff dies and the cause of action survives, the personal representative of the plaintiff may commence a new civil action for wrongful death within one year after that date."

{¶16} Prior to 2000, R.C. 2305.19, the general savings statute was similar to R.C. 2125.04, the wrongful death savings statute. It granted a plaintiff an additional year in which to re-file an action dismissed without prejudice, only if the dismissal occurred after the original statute of limitations had run. Known to the bar as the "malpractice trap", the effect of the statute was that a plaintiff whose case was dismissed without prejudice prior to the running of the original statute of limitations had to re-file the action before the applicable statute of limitations had run, regardless of how much time was left. This version of R.C.2305.19 was challenged on equal protection grounds, but courts generally found there was a rational basis underlying the savings statute's

requirement that the original dismissal occur after the limitations period had run in order to take advantage of the one year extension of time. In *Boron v. Brooks Beverage Management Company, Inc.* (June 30, 1999), Franklin App. No. 98AP-902, for example, the Twelfth District Court of Appeals found the distinction between plaintiffs whose cases are dismissed before the statute of limitations ran and those whose cases are dismissed after is not arbitrary nor capricious, because it merely distinguishes between those whose actions need saving and those who do not, and because the statute encourages litigants to re-file within the original statute of limitations if possible. The Ohio Supreme Court ultimately dismissed the *Boron* case sua sponte, citing no substantial constitutional question, *Boron v. Brooks Beverage Management, Inc.* (1999), 87 Ohio St. 3d 1440, 719 N.E. 2d 4.

{¶17} In 2004, the general savings statute was amended to its present language, which closed the "malpractice trap" and permits a plaintiff to re-file the action within a year after dismissal, or the time left under the statute of limitations, whichever is longer. Thus, the general saving statute no longer distinguishes between cases dismissed before the statute of limitations has run and those dismissed after.

{¶18} Although it subsequently amended the wrongful death savings statute, the Legislature did not close the "malpractice trap" in wrongful death actions.

#### {¶19} STANDARD OF REVIEW

{¶20} We review a decision made pursuant to Civ. R. 12 de novo, *Greely v. Miami Valley Maintenance Construction, Inc.* (1990), 49 Ohio St. 3d 228, 551 N.E. 2d 981. A motion to dismiss for failure to state a claim upon which relief can be granted pursuant to Civ. R. 12 (B)(6) is procedural, and tests the sufficiency of the complaint,

*State ex rel. Hanson v. Guernsey County Board of Commissioners*, 65 Ohio St. 3d 545, 1992-Ohio-73, 605 N.E. 2d 378. In conducting a de novo analysis, this court must assume all factual allegations in the complaint are true and we must draw all reasonable inferences in favor of the non-moving party, *Byrd v. Faber* (1991), 57 Ohio St. 3d 56, 565 N.E. 2d 584.

## I.

{¶21} In its first assignment of error, appellant argues the trial court erred in granting judgment on the pleadings because the savings provisions of R.C. 2305.19 applies to all causes of action. Appellant is correct in stating the statute does contain the language "any action that is commenced or attempted to be commenced", and does not provide any exceptions. However, while R.C. 2305.19 is a general statute, R.C.2125.04 is a specific statute applicable expressly only to wrongful death claims. Appellees argue a specific statute takes precedence over a general statute, citing *State v. Volpe* (1988), 38 Ohio St. 3d 191, 527 N.E. 2d 818, and R.C. 1.51. Appellees also direct our attention to R.C. 1.52, which provides a statute enacted later prevails over an earlier one. R.C. 2125.04 was effective April 7, 2005, later than the amended version of R.C. 2305.19, which was effective May 31, 2004.

{¶22} We find although R.C.2305.19 provides it applies to all actions, R.C.2125.04, the specific statute, controls over actions for wrongful death. Accordingly, the first assignment of error is overruled.

## II.

{¶23} In the second assignment of error appellant argues the trial court should not have granted judgment on the pleadings because in so doing it created a conflict of

constitutional magnitude between the two savings statutes. Appellant argues the difference in the two statutes may be attributable to a scrivener's error or inadvertent oversight, because the purpose in amending the wrongful death statutes in 2005 was to modify the list of persons for whom compensatory damages may be awarded. Appellant argues the General Assembly may have overlooked the "malpractice trap" in R.C. 2125.04, and intended to amend the statute to mirror R.C. 2305.19,

{¶24} In construing a statute, this court's paramount concern must be to enforce the legislative intent underlying the statute, *State v. S. R.* (1992), 63 Ohio St. 3d 590, 594, 589 N.E. 2d 1319. A cardinal rule of construction requires us to look first to the language of the statute itself to determine the legislative intent, *Shover v. Cordis* (1991), 61 Ohio St. 3d 213, 218, 574 N.E. 2d 457. Words and phrases in the statute must be read in context and construed according to rules of grammar and common usage, *Independent Insurance Agents of Ohio, Inc. v. Fabe* (1992), 63 Ohio St. 3d 310, 314, 587 N.E. 2d 814; and R.C. 1.42. We may not ignore plain and unambiguous language in a statute, but must give effect to the words the legislature chose, *State ex rel. Fenley v. Ohio Historical Society* (1992), 64 Ohio St. 3d 509, 511, 597 N.E. 2d 120. We may not delete or insert words, *Cline v. Bureau of Motor Vehicles* (1991), 61 Ohio St. 3d 93, 97, 573 N.E. 2d 77.

{¶25} This court will not assume the Legislature intended for R.C. 2125.04 to be read other than as it is written, and we will not revise it to mirror the general savings statute. The second assignment of error is overruled.

## III.

{¶26} In his third assignment of error, appellant argues R.C. 2125.04 creates a constitutionally impermissible distinction between classes of plaintiffs and must be stricken on equal protection grounds.

{¶27} The equal protection clause of the Fourteenth Amendment requires a state to govern impartially, *New York Transit Authority v. Beazer* (1979), 440 U.S. 568, 99 S.Ct. 1355. The equal protection clause requires all persons in similar circumstances to be treated alike, *Plyler v. Doe* (1982), 457 U.S. 202, 102 S.Ct. 2382. An analysis pursuant to the equal protection clause is necessary when a state adopts a rule that has a special impact on fewer than all persons in its jurisdiction, *Beazer* at 587-588.

{¶28} As appellant correctly sets forth, the U.S. Supreme Court has fashioned three levels of scrutiny: strict, intermediate, and rational basis. Laws are subject to strict scrutiny when they discriminate against certain suspect classes, *Grutter v. Bollinger* (2003), 539 U.S. 306, 326, 123 S. Ct. 2325. Courts also apply the strict scrutiny review if a law abridges the exercise of fundamental rights, *Reynolds v. Sims* (1964), 377 U.S. 533, 562, 84 Sup. Ct. 1362.

{¶29} Courts have defined fundamental rights as those enumerated in the Bill of Rights, or identified as fundamental rights by the United States Supreme Court, *Washington v. Glucksberg* (1997), 521 U.S. 702, 721, 117 S. Ct. 2258.

{¶30} Courts apply the intermediate scrutiny standard when laws discriminate based on certain other suspect classifications, as determined by the United States Supreme Court, *Mississippi University For Women v. Hogan* (1982), 458 U.S. 718, 723, 102 S. Ct. 3331.

{¶31} All other laws are subject to review under the rational basis test. A law will survive the rational basis test so long as it bears a rational relation to some legitimate state interest, *Roamer v. Evans* (1996), 517 U.S. 620, 631, 116 Sup. Ct. 1620.

{¶32} Appellant argues the right of parents to recover for the wrongful death of the child is a fundamental right, because it is based the fundamental right of parents to enjoy a loving relationship with their child. While we recognize the right to parent one's children is a fundamental right, see *Troxel v. Granville* (2000), 530 U.S. 57, 66, 120 S.Ct. 2054, the right to pursue a wrongful death action is not a fundamental right, and is not among the rights found in our nation's history and traditions, see *Moore v. City of East Cleveland* (1977), 431 U.S. 494, 97 S. Ct. 1932.

{¶33} In the alternative, appellant argues R.C.2125.04 cannot withstand even the rational basis test. The statute creates a distinction between wrongful death plaintiffs who voluntarily dismiss their claim prior to the lapse of the statute of limitations as opposed to any other plaintiff who voluntarily dismisses his or her claim prior to the lapse of the applicable statute of limitations. Thus, our inquiry must be whether wrongful death actions are different from all other actions, and if so, whether treating a wrongful death action differently is rationally related to a legitimate state interest.

{¶34} Appellees list a number of ways in which wrongful death actions are unique. First, the statute of limitations in a wrongful death action is not a statute of repose, but rather is an element of the action itself, *Fish v. Ohio Casualty Insurance Company*, Stark App. No. 2003CA00030, 2003-Ohio-4380, at paragraph 30, citing *Sabol v. Pekoc* (1947), 148 Ohio St. 545, 76 N.E. 2d 84. However, this distinction does not explain why a plaintiff who dismisses his action prior to the running of the statute of

limitations should not have one year to re-file, while a plaintiff who dismisses an identical action after the running of the statute of limitations is "saved" by the statute.

{¶35} Appellees argue a wrongful death claim is a statutory claim, unlike most claims for personal injury, which are based on common law. However, the Ohio Supreme Court has applied R.C.2305.19 to statutory claims such as will contest actions, see *Allen v. McBride*, 105 Ohio St. 3d 21, 2004-Ohio-7112, 821 N.E. 2d 1001 and *Vitantonio, Inc. v. Baxter*, slip opinion 2007-Ohio-6052. R.C. 2305.19 is applicable to suits against the State in the Court of Claims, *Reese v. Ohio State University Hospital* (1983), 6 Ohio St. 3d 162, 451 N.E. 2d 1196. The Supreme Court made R.C. 2305.19 applicable to Workers' Compensation cases in *Lewis v. Connor* (1985), 21 Ohio St. 3d 1, 487 N.E. 2d 285. R.C. 2305.19 applies to age discrimination actions, see *Osborne v. AK Steel/Amco Steel Company*, 96 Ohio St. 3d 368, 2002-Ohio-4846, 775 N.E. 2d 483.

{¶36} Appellees also argue personal injury claims are direct claims, while wrongful death claims are derivative in nature, and are brought by the decedent's estate's representative on behalf of the next of kin as defined by the statute. Additionally, the Ohio Constitution provides damages recoverable in wrongful death claims cannot be limited by law, although damages for personal injury can and have been limited. Again, while appellees' arguments are correct, appellees do not take the final step of the analysis and explain what rational relationship to a legitimate state interest exists because of the disparate treatment of wrongful death plaintiffs from other plaintiffs, and the disparate treatment of wrongful death plaintiffs who dismiss their cases too early from those who wait until after the statute of limitations has run.

{¶37} Finally, appellees argue R.C. 2125.04 was enacted to further the State's rational and legitimate interest in insuring Ohio has a fair, predicable system of civil justice, preserving the rights of those who have been harmed by negligent behavior while curbing frivolous lawsuits. Certainly this is a legitimate state interest, but appellees have not demonstrated how this interest is rationally related to treating wrongful death claimants differently than other plaintiffs. To close the malpractice gap in wrongful death actions would not impair a fair and predictable system of civil justice preserving the rights of those who have been harmed by negligent behavior while curbing frivolous lawsuits. Preserving our justice system has not required any other claim be subject to the malpractice gap.

{¶38} We find there is no legitimate state interest to which the distinctions in the wrongful death statute are rationally related. Accordingly, we find the statute is unconstitutional as applied to appellant's action.

{¶39} The third assignment of error is sustained.

#### IV.

{¶40} In his fourth assignment of error, appellant argues the issue of statutory immunity has not been fully developed on the record, and thus, the court had no basis to dismiss his action.

{¶41} R.C. 2744.02(A)(1) provides:

{¶42} "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.”

{¶43} In the majority of cases, the broad immunity of R.C. Chapter 2744 provides a complete defense to a negligence cause of action, *Turner v. Central Local School Dist.*, 85 Ohio St.3d 95, 98, 706 N.E.2d 1261, 1999-Ohio-207; However, “[t]he immunity afforded a political subdivision in R.C. 2744.02(A)(1) is not absolute.” *Cater v. Cleveland*, 83 Ohio St.3d 24, 28, 697 N.E.2d 610, 1998-Ohio-421, citing *Hill v. Urbana*, 79 Ohio St.3d 130, 679 N.E.2d 1109, 1997-Ohio-400.

{¶44} The statute and the Ohio Supreme Court set forth a three-tiered analysis to determine whether a political subdivision is immune from tort liability: The first tier is to establish immunity under R.C. 2744.02(A)(1); the second tier is to analyze whether any of the exceptions to immunity under R.C. 2744.02(B) apply; if so, then under the third tier, the political subdivision has the burden of showing that one of the defenses of R.C. 2744.03 applies. If it establishes one of the defenses, then immunity is reinstated. *Cater*, 83 Ohio St.3d at 28, 697 N.E.2d 610; *Hubbard v. Canton City School Bd. of Education.*, 97 Ohio St.3d 451, 780 N.E.2d 543, 2002-Ohio-6718, paragraphs 11-12.

{¶45} For the purposes of the immunity statute, the Board qualifies for general immunity since a public school district is a “political subdivision” pursuant to R.C. 2744.01(F), and providing a system of public education is considered a “governmental function” under 2744.01(C)(2)(c). Appellees meet the first prong of the *Cater* test.

{¶46} Next we must determine whether any of the exceptions under R.C. 2744.02(B) apply. R.C. 2744.02 removes the general statutory presumption of immunity for political subdivisions only under the following express conditions: (1) the negligent

operation of a motor vehicle by an employee, R.C. 2744.02(B)(1); (2) the negligent performance of proprietary functions, R.C. 2744.02(B)(2); (3) the negligent failure to keep public roads open and in repair, R.C. 2744 .02(B)(3); (4) the negligence of employees occurring within or on the grounds of certain buildings used in connection with the performance of governmental functions, R.C. 2744.02(B)(4); (5) express imposition of liability by statute, R.C. 2744.02(B)(5). *Sabulsky*, 2002-Ohio-7275, at paragraph 13, citation deleted.

{¶47} Pursuant to R.C. 2744.03 (A)(6), an employee of a political subdivision is immune from liability unless (1) the employee's acts or omissions were manifestly outside the scope of the employment or official responsibilities, (2) the employee's acts or omissions were with a malicious purpose, and in bad faith, or in a wanton or reckless manner; or (3) when the Revised Code expressly imposes civil liability.

{¶48} Appellees argue Joshua's death was caused by the negligent operation of a motor vehicle, but the operator of the motor vehicle was not one of the Board's employees. The Board did not own the road on which the accident occurred, and the accident did not occur on school grounds. Decedent's death was not caused by a defect on or within the grounds or buildings used by the Board.

{¶49} Appellant's complaint alleges the employees of Tri-County Local School District acted recklessly, wantonly or willfully when they allowed an unauthorized person to remove decedent from school premises. We find construing the allegations of the complaint to be true, appellant could prove a set of facts entitling him to recover, but only as to the Board and the John Does. Tri-Valley Local School District is not sui juris. We further find appellees are correct in that appellant can only prosecute the claim for

wrongful death as the personal representative of the decedent, and not on his individual capacity.

{¶50} The fourth assignment of error is sustained.

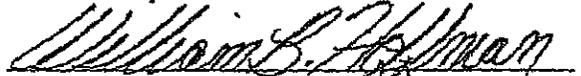
{¶51} For the foregoing reasons, the judgment of the Court of Common Pleas of Muskingum County, Ohio, is reversed, and the cause is remanded to the court for further proceedings in accord with law and consistent with this opinion.

By Gwin, P.J.,

Hoffman, J., and

Delaney, J., concur

  
HON. W. SCOTT GWIN

  
HON. WILLIAM B. HOFFMAN

  
HON. PATRICIA A. DELANEY

WSG:clw 1210

IN THE COURT OF APPEALS FOR MUSKINGUM COUNTY, OHIO

FIFTH APPELLATE DISTRICT

FILED  
FIFTH DISTRICT  
COURT OF APPEALS  
  
JAN - 3 2008  
  
MUSKINGUM COUNTY, OHIO  
TODD A. BICKLE, CLERK

RANDY J. EPPLEY, ET AL

Plaintiff-Appellant

-vs-

TRI-VALLEY LOCAL SCHOOL  
DISTRICT, ET AL

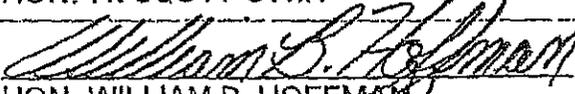
Defendants-Appellees

JUDGMENT ENTRY

CASE NO. CT2007-0022

For the reasons stated in our accompanying Memorandum-Opinion, the judgment of the Court of Common Pleas of Muskingum County, Ohio, is reversed, and the cause is remanded to that court for further proceedings in accord with law and consistent with this opinion. Costs to appellees.

  
HON. W. SCOTT GWIN

  
HON. WILLIAM B. HOFFMAN

  
HON. PATRICIA A. DELANEY

IN THE COURT OF APPEALS FOR MUSKINGUM COUNTY, OHIO

FIFTH APPELLATE DISTRICT

RANDY J. EPPLEY, ET AL

Plaintiff-Appellant

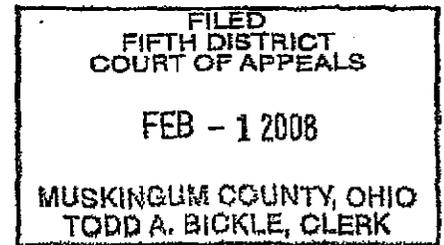
-vs-

TRI-VALLEY LOCAL  
SCHOOL DISTRICT, ET AL

Defendant-Appellee

JUDGMENT ENTRY

CASE NO. CT2007-0022



This cause comes before us on Appellee Tri-Valley Local School District Board of Education's application to reconsider our opinion in the within, filed January 3, 2008.

"App.R. 26 provides a mechanism by which a party may prevent miscarriages of justice that could arise when an appellate court makes an obvious error or renders an unsupportable decision under the law." *State v. Owens* (1997), 112 Ohio App.3d 334, 336, 678 N.E.2d 956, dismissed, appeal not allowed, 77 Ohio St.3d 1487, 673 N.E.2d 146.

However, "[a]n application for reconsideration is not designed for use in instances where a party simply disagrees with the conclusions reached and the logic used by an appellate court." *Owens*, at 336. Furthermore, "App. R. 26 does not provide specific guidelines to be used by an appellate court when determining whether a decision should be reconsidered or modified." *Id.* at 335. See, also, *Matthews v. Matthews* (1981), 5 Ohio App.3d 140, 143, 450

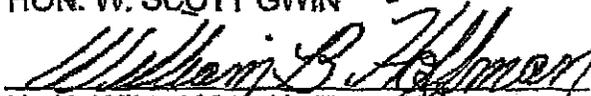
In *Matthews*, the court stated, "[t]he test generally applied is whether the motion for reconsideration calls to the attention of the court an obvious error in its decision or raises an issue for our consideration that was either not considered at all or was not fully considered by us when it should have been." *Id.* at 143.

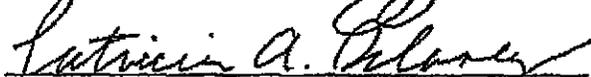
The application for reconsideration does not call to our attention an obvious error or omission, but argues our decision was incorrect. Upon review, we adhere to our previously announced decision.

The application to reconsider is denied.

IT IS SO ORDERED.

  
HON. W. SCOTT GWIN

  
HON. WILLIAM B. HOFFMAN

  
HON. PATRICIA A. DELANEY

MAR -7 PM 2:06

IN THE COURT OF COMMON PLEAS  
MUSKINGUM COUNTY, OHIO

RANDY J. EPPLEY, Individually and as  
Administrator for the Estate of Joshua M.  
Eppley, Deceased

Plaintiff,

v.

TRI-VALLEY LOCAL SCHOOL  
DISTRICT, *et al.*,

Defendants.

) CASE NO. CH2006-0529

) JUDGE MARK C. FLEEGLE

) ORDER

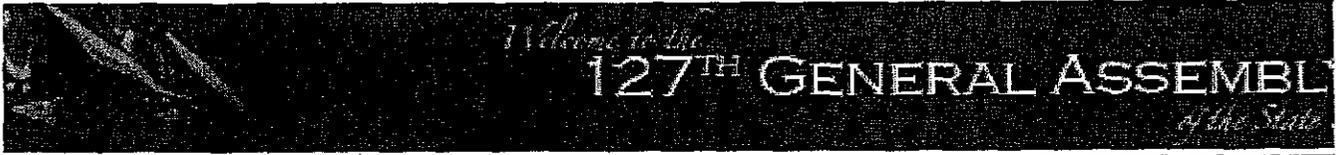
368/965

Defendants, Tri-Valley Local School District and Tri-Valley Local School Board's, Motion for Judgment on the Pleadings came on to be heard this \_\_\_ day of \_\_\_\_\_, 2007. The Court, after reviewing the Motion and all Briefs filed in support thereof and in opposition thereto, finds that the Motion is well taken. Wherefore, Defendants, Tri-Valley Local School District and Tri-Valley Local School Board's, Motion for Judgment on the Pleadings is granted. This matter is dismissed, with prejudice, at Plaintiff's Court costs.

IT IS SO ORDERED.

  
JUDGE MARK C. FLEEGLE

MAR -7 2007  
DATE



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**§ 1.02** Right to alter, reform, or abolish government, and repeal special privileges or immunities shall ever be granted, that may not be altered by general assembly.

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### § 1.19a Damages for wrongful death (1912)

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The amount of damages recoverable by civil action in the courts for or default of another, shall not be limited by law.

(Adopted September 3, 1912.)

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Lawriter - ORC - 1.51 Special or local provision prevails as exception to general provision Page 1 of 1

## **1.51 Special or local provision prevails as exception to general provision.**

If a general provision conflicts with a special or local provision, they shall be construed, if possible, so that effect is given to both. If the conflict between the provisions is irreconcilable, the special or local provision prevails as an exception to the general provision, unless the general provision is the later adoption and the manifest intent is that the general provision prevail.

Effective Date: 01-03-1972

## **1.52 Irreconcilable statutes or amendments - harmonization.**

(A) If statutes enacted at the same or different sessions of the legislature are irreconcilable, the statute latest in date of enactment prevails.

(B) If amendments to the same statute are enacted at the same or different sessions of the legislature, one amendment without reference to another, the amendments are to be harmonized, if possible, so that effect may be given to each. If the amendments are substantively irreconcilable, the latest in date of enactment prevails. The fact that a later amendment restates language deleted by an earlier amendment, or fails to include language inserted by an earlier amendment, does not of itself make the amendments irreconcilable. Amendments are irreconcilable only when changes made by each cannot reasonably be put into simultaneous operation.

Effective Date: 01-03-1972

## 2125.02 Parties - damages.

(A)(1) Except as provided in this division, a civil action for wrongful death shall be brought in the name of the personal representative of the decedent for the exclusive benefit of the surviving spouse, the children, and the parents of the decedent, all of whom are rebuttably presumed to have suffered damages by reason of the wrongful death, and for the exclusive benefit of the other next of kin of the decedent. A parent who abandoned a minor child who is the decedent shall not receive a benefit in a civil action for wrongful death brought under this division.

(2) The jury, or the court if the civil action for wrongful death is not tried to a jury, may award damages authorized by division (B) of this section, as it determines are proportioned to the injury and loss resulting to the beneficiaries described in division (A)(1) of this section by reason of the wrongful death and may award the reasonable funeral and burial expenses incurred as a result of the wrongful death. In its verdict, the jury or court shall set forth separately the amount, if any, awarded for the reasonable funeral and burial expenses incurred as a result of the wrongful death.

(3)(a) The date of the decedent's death fixes, subject to division (A)(3)(b)(iii) of this section, the status of all beneficiaries of the civil action for wrongful death for purposes of determining the damages suffered by them and the amount of damages to be awarded. A person who is conceived prior to the decedent's death and who is born alive after the decedent's death is a beneficiary of the action.

(b)(i) In determining the amount of damages to be awarded, the jury or court may consider all factors existing at the time of the decedent's death that are relevant to a determination of the damages suffered by reason of the wrongful death.

(ii) Consistent with the Rules of Evidence, a party to a civil action for wrongful death may present evidence of the cost of an annuity in connection with an issue of recoverable future damages. If that evidence is presented, then, in addition to the factors described in division (A)(3)(b)(i) of this section and, if applicable, division (A)(3)(b)(iii) of this section, the jury or court may consider that evidence in determining the future damages suffered by reason of the wrongful death. If that evidence is presented, the present value in dollars of an annuity is its cost.

(iii) Consistent with the Rules of Evidence, a party to a civil action for wrongful death may present evidence that the surviving spouse of the decedent is remarried. If that evidence is presented, then, in addition to the factors described in divisions (A)(3)(b)(i) and (ii) of this section, the jury or court may consider that evidence in determining the damages suffered by the surviving spouse by reason of the wrongful death.

(B) Compensatory damages may be awarded in a civil action for wrongful death and may include damages for the following:

(1) Loss of support from the reasonably expected earning capacity of the decedent;

(2) Loss of services of the decedent;

(3) Loss of the society of the decedent, including loss of companionship, consortium, care, assistance,

attention, protection, advice, guidance, counsel, instruction, training, and education, suffered by the surviving spouse, dependent children, parents, or next of kin of the decedent;

(4) Loss of prospective inheritance to the decedent's heirs at law at the time of the decedent's death;

(5) The mental anguish incurred by the surviving spouse, dependent children, parents, or next of kin of the decedent.

(C) A personal representative appointed in this state, with the consent of the court making the appointment and at any time before or after the commencement of a civil action for wrongful death, may settle with the defendant the amount to be paid.

(D) (1) Except as provided in division (D)(2) of this section, a civil action for wrongful death shall be commenced within two years after the decedent's death.

(2)(a) Except as otherwise provided in divisions (D)(2)(b), (c), (d), (e), (f), and (g) of this section or in section 2125.04 of the Revised Code, no cause of action for wrongful death involving a product liability claim shall accrue against the manufacturer or supplier of a product later than ten years from the date that the product was delivered to its first purchaser or first lessee who was not engaged in a business in which the product was used as a component in the production, construction, creation, assembly, or rebuilding of another product.

(b) Division (D)(2)(a) of this section does not apply if the manufacturer or supplier of a product engaged in fraud in regard to information about the product and the fraud contributed to the harm that is alleged in a product liability claim involving that product.

(c) Division (D)(2)(a) of this section does not bar a civil action for wrongful death involving a product liability claim against a manufacturer or supplier of a product who made an express, written warranty as to the safety of the product that was for a period longer than ten years and that, at the time of the decedent's death, has not expired in accordance with the terms of that warranty.

(d) If the decedent's death occurs during the ten-year period described in division (D)(2)(a) of this section but less than two years prior to the expiration of that period, a civil action for wrongful death involving a product liability claim may be commenced within two years after the decedent's death.

(e) If the decedent's death occurs during the ten-year period described in division (D)(2)(a) of this section and the claimant cannot commence an action during that period due to a disability described in section 2305.16 of the Revised Code, a civil action for wrongful death involving a product liability claim may be commenced within two years after the disability is removed.

(f)(i) Division (D)(2)(a) of this section does not bar a civil action for wrongful death based on a product liability claim against a manufacturer or supplier of a product if the product involved is a substance or device described in division (B)(1), (2), (3), or (4) of section 2305.10 of the Revised Code and the decedent's death resulted from exposure to the product during the ten-year period described in division (D)(2)(a) of this section.

(ii) If division (D)(2)(f)(i) of this section applies regarding a civil action for wrongful death, the cause

of action that is the basis of the action accrues upon the date on which the claimant is informed by competent medical authority that the decedent's death was related to the exposure to the product or upon the date on which by the exercise of reasonable diligence the claimant should have known that the decedent's death was related to the exposure to the product, whichever date occurs first. A civil action for wrongful death based on a cause of action described in division (D)(2)(f)(i) of this section shall be commenced within two years after the cause of action accrues and shall not be commenced more than two years after the cause of action accrues.

(g) Division (D)(2)(a) of this section does not bar a civil action for wrongful death based on a product liability claim against a manufacturer or supplier of a product if the product involved is a substance or device described in division (B)(5) of section 2315.10 of the Revised Code. If division (D)(2)(g) of this section applies regarding a civil action for wrongful death, the cause of action that is the basis of the action accrues upon the date on which the claimant is informed by competent medical authority that the decedent's death was related to the exposure to the product or upon the date on which by the exercise of reasonable diligence the claimant should have known that the decedent's death was related to the exposure to the product, whichever date occurs first. A civil action for wrongful death based on a cause of action described in division (D)(2)(g) of this section shall be commenced within two years after the cause of action accrues and shall not be commenced more than two years after the cause of action accrues.

(E)(1) If the personal representative of a deceased minor has actual knowledge or reasonable cause to believe that the minor was abandoned by a parent seeking to benefit from a civil action for wrongful death or if any person listed in division (A)(1) of this section who is permitted to benefit from a civil action for wrongful death commenced in relation to a deceased minor has actual knowledge or reasonable cause to believe that the minor was abandoned by a parent seeking to benefit from the action, the personal representative or the person may file a motion in the court in which the action is commenced requesting the court to issue an order finding that the parent abandoned the minor and is not entitled to recover damages in the action based on the death of the minor .

(2) The movant who files a motion described in division (E)(1) of this section shall name the parent who abandoned the deceased minor and, whether or not that parent is a resident of this state, the parent shall be served with a summons and a copy of the motion in accordance with the Rules of Civil Procedure. Upon the filing of the motion, the court shall conduct a hearing. In the hearing on the motion, the movant has the burden of proving, by a preponderance of the evidence, that the parent abandoned the minor . If, at the hearing, the court finds that the movant has sustained that burden of proof, the court shall issue an order that includes its findings that the parent abandoned the minor and that, because of the prohibition set forth in division (A)(1) of this section, the parent is not entitled to recover damages in the action based on the death of the minor .

(3) A motion requesting a court to issue an order finding that a specified parent abandoned a minor child and is not entitled to recover damages in a civil action for wrongful death based on the death of the minor may be filed at any time during the pendency of the action.

(F) This section does not create a new cause of action or substantive legal right against any person involving a product liability claim.

(G) As used in this section:

(1) "Annuity" means an annuity that would be purchased from either of the following types of insurance companies:

(a) An insurance company that the A. M. Best Company, in its most recently published rating guide of life insurance companies, has rated A or better and has rated XII or higher as to financial size or strength;

(b)(i) An insurance company that the superintendent of insurance, under rules adopted pursuant to Chapter 119. of the Revised Code for purposes of implementing this division, determines is licensed to do business in this state and, considering the factors described in division (G)(1)(b)(ii) of this section, is a stable insurance company that issues annuities that are safe and desirable.

(ii) In making determinations as described in division (G)(1)(b)(i) of this section, the superintendent shall be guided by the principle that the jury or court in a civil action for wrongful death should be presented only with evidence as to the cost of annuities that are safe and desirable for the beneficiaries of the action who are awarded compensatory damages under this section. In making the determinations, the superintendent shall consider the financial condition, general standing, operating results, profitability, leverage, liquidity, amount and soundness of reinsurance, adequacy of reserves, and the management of a particular insurance company involved and also may consider ratings, grades, and classifications of any nationally recognized rating services of insurance companies and any other factors relevant to the making of the determinations.

(2) "Future damages" means damages that result from the wrongful death and that will accrue after the verdict or determination of liability by the jury or court is rendered in the civil action for wrongful death.

(3) "Abandoned" means that a parent of a minor failed without justifiable cause to communicate with the minor, care for the minor, and provide for the maintenance or support of the minor as required by law or judicial decree for a period of at least one year immediately prior to the date of the death of the minor.

(4) "Minor" means a person who is less than eighteen years of age.

(5) "Harm" means death.

(6) "Manufacturer," "product," "product liability claim," and "supplier" have the same meanings as in section 2307.71 of the Revised Code.

(H) Divisions (D), (G)(5), and (G)(6) of this section shall be considered to be purely remedial in operation and shall be applied in a remedial manner in any civil action commenced on or after the effective date of this amendment, in which those divisions are relevant, regardless of when the cause of action accrued and notwithstanding any other section of the Revised Code or prior rule of law of this state, but shall not be construed to apply to any civil action pending prior to the effective date of this amendment.

Effective Date: 07-06-2001; 04-07-2005

Westlaw

OH LEGIS 172 (1992)

1992 Ohio Laws File 172 (H.B. 166)

(Publication page references are not available for this document.)

Page 1

OHIO 1992 SESSION LAW SERVICE  
119th GENERAL ASSEMBLY

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Additions are indicated by <<+ Text +>>; deletions by  
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Vetoed provisions within tabular material are not displayed.

File 172

H.B. No. 166

PROBATE--ABANDONED MINORS--INTESTATE SUCCESSION OR WRONGFUL DEATH ACTIONS

AN ACT to amend sections 2125.02 and 2125.03 and to enact section 2105.10 of the Revised Code to deny intestate succession or the benefit from a wrongful death action to a parent of a deceased minor child if the parent abandoned the child.

Be it enacted by the General Assembly of the State of Ohio:

Section 1. That sections 2125.02 and 2125.03 be amended and section 2105.10 of the Revised Code be enacted to read as follows:

(Publication page references are not available for this document.)

<< OH ST § 2125.02 >>

Sec. 2125.02. (A) (1) <<-An->> <<+Except as provided in this division, an+>> action for wrongful death shall be brought in the name of the personal representative of the decedent for the exclusive benefit of the surviving spouse, the children, and the parents of the decedent, all of whom are rebuttably presumed to have suffered damages by reason of the wrongful death, and for the exclusive benefit of the other next of kin of the decedent. <<+A parent who abandoned a minor child who is the decedent shall not receive any benefit in a wrongful death action brought under this division.+>>

(2) The jury, or the court if the action is not tried to a jury, may award damages authorized by division (B) of this section, as it determines are proportioned to the injury and loss resulting to the beneficiaries described in division (A) (1) of this section by reason of the wrongful death and may award the reasonable funeral and burial expenses incurred as a result of the wrongful death. In its verdict, the jury or court shall set forth separately the amount, if any, awarded for the reasonable funeral and burial expenses incurred as a result of the wrongful death.

(3) (a) The date of the decedent's death fixes, subject to division (A) (3) (b) (iii) of this section, the status of all beneficiaries of the action for purposes of determining the damages suffered by them and the amount of damages to be awarded. A person who is conceived prior to the decedent's death and who is born alive after his death is a beneficiary of the action.

(b) (i) In determining the amount of damages to be awarded, the jury or court may consider all factors existing at the time of the decedent's death that are relevant to a determination of the damages suffered by reason of the wrongful death.

(ii) Consistent with the Rules of Evidence, any party to an action for wrongful death may present evidence of the cost of an annuity in connection with any issue of recoverable future damages. If such evidence is presented, then, in addition to the factors described in division (A) (3) (b) (i) of this section and, if applicable, division (A) (3) (b) (iii) of this section, the jury or court may consider that

evidence in determining the future damages suffered by reason of the wrongful death. If such evidence is presented, the present value in dollars of any annuity is its cost.

(iii) Consistent with the Rules of Evidence, any party to an action for wrongful death may present evidence that the surviving spouse of the decedent is remarried. If such evidence is presented, then, in addition to the factors described in divisions (A)(3)(b)(i) and (ii) of this section, the jury or court may consider that evidence in determining the damages suffered by the surviving spouse by reason of the wrongful death.

(B) Compensatory damages may be awarded in an action for wrongful death and may include damages for the following:

(1) Loss of support from the reasonably expected earning capacity of the decedent;

(2) Loss of services of the decedent;

(3) Loss of the society of the decedent, including loss of companionship, consortium, care, assistance, attention, protection, advice, guidance, counsel, instruction, training, and education, suffered by the surviving spouse, minor children, parents, or next of kin;

(4) Loss of prospective inheritance to the decedent's heirs at law at the time of his death;

(5) The mental anguish incurred by the surviving spouse, minor children, parents, or next of kin.

(C) A personal representative appointed in this state, with the consent of the court making the appointment and at any time before or after the commencement of an action for wrongful death, may settle with the defendant the amount to be paid.

(D) An action for wrongful death shall be commenced within two years after the decedent's death.

<<+(E) (1) If the personal representative of a deceased minor has actual knowledge or reasonable cause to believe that the minor was abandoned by a parent seeking to benefit from the wrongful death action or if any person listed in division (A)(1) of this section who is permitted to benefit in a wrongful death action filed in relation to a deceased minor has actual knowledge or reasonable cause to believe that the minor was abandoned by a parent seeking to benefit from the wrongful death action, the personal representative or the person may file a motion in the court in which the wrongful death action is filed requesting the court to issue an order finding that the parent abandoned the child and is not entitled to recover damages in the wrongful death action based on the death of the deceased minor

child.+>>

<<+(2) The movant who files a motion described in division (E)(1) of this section shall name the parent who abandoned the child and, whether or not that parent is a resident of this state, the parent shall be served with a summons and a copy of the motion in accordance with the Rules of Civil Procedure. Upon the filing of the motion, the court shall conduct a hearing. In the hearing on the motion, the movant has the burden of proving, by a preponderance of the evidence, that the parent abandoned the deceased minor child. If, at the hearing, the court finds that the movant has sustained that burden of proof, the court shall issue an order that includes its finding that the parent abandoned the deceased minor child and, because of the prohibition set forth in division (A) of this section, the parent is not entitled to recover damages in the wrongful death action based on the death of the deceased minor child.+>>

<<+(3) A motion requesting a court to issue an order finding that the specified parent abandoned the child and is not entitled to recover damages in the wrongful death action based on the death of the deceased minor child may be filed at any time during the pendency of the wrongful death action.+>>

<<+(F)+>> As used in this section:

(1) "Annuity" means an annuity that would be purchased from either of the following types of insurance companies:

(a) An insurance company that the A.M. Best Company, in its most recently published rating guide of life insurance companies, has rated A or better and has rated XII or higher as to financial size or strength;

(b)(i) An insurance company that the superintendent of insurance, under rules adopted pursuant to Chapter 119. of the Revised Code for purposes of implementing this division, determines is licensed to do business in this state and, considering the factors described in division <<-(E)->> <<+(F)+>> (1)(b)(ii) of this section, is a stable insurance company that issues annuities that are safe and desirable.

(ii) In making determinations as described in division <<-(E)->> <<+(F)+>>(1)(b)(i) of this section, the superintendent shall be guided by the principle that the jury or court in an action for wrongful death should be presented only with evidence as to the cost of annuities that are safe and desirable for the beneficiaries of such an action who are awarded compensatory damages under this section. In making such determinations, the superintendent shall consider the financial condition, general standing, operating results, profitability, leverage, liquidity, amount and soundness of reinsurance, adequacy of reserves, and the management of any insurance company in question and also may consider ratings, grades, and classifications of any nationally recognized rating services of insurance companies and any other factors relevant to the making of such determina-

tions.

(2) "Future damages" means damages that result from the wrongful death and that will accrue after the verdict or determination of liability by the jury or court is rendered in the action for wrongful death.

<<+(3) "Abandoned" means that a parent of a minor failed without justifiable cause to communicate with the minor, care for him, and provide for his maintenance or support as required by law or judicial decree for a period of at least one year immediately prior to the date of the death of the minor.+>>

<<+(4) "Minor" means a person who is less than eighteen years of age.+>>

## **2125.04 New action.**

In every civil action for wrongful death commenced or attempted to be commenced within the time specified by division (D)(1) or (D)(2)(c), (d), (e), (f), or (g) of section 2125.02 of the Revised Code, if a judgment for the plaintiff is reversed or the plaintiff fails otherwise than upon the merits and if the time limited by any of those divisions for the commencement of the action has expired at the date of the reversal or failure, the plaintiff or, if the plaintiff dies and the cause of action survives, the personal representative of the plaintiff may commence a new civil action for wrongful death within one year after that date.

Effective Date: 07-06-2001; 04-07-2005

## **2305.19 Saving in case of reversal.**

(A) In any action that is commenced or attempted to be commenced, if in due time a judgment for the plaintiff is reversed or if the plaintiff fails otherwise than upon the merits, the plaintiff or, if the plaintiff dies and the cause of action survives, the plaintiff's representative may commence a new action within one year after the date of the reversal of the judgment or the plaintiff's failure otherwise than upon the merits or within the period of the original applicable statute of limitations, whichever occurs later. This division applies to any claim asserted in any pleading by a defendant.

(B) If the defendant in an action described in division (A) of this section is a foreign or domestic corporation, and whether its charter prescribes the manner or place of service of process on the defendant, and if it passes into the hands of a receiver before the expiration of the one year period or the period of the original applicable statute of limitations, whichever is applicable, as described in that division, then service to be made within one year following the original service or attempt to begin the action may be made upon that receiver or the receiver's cashier, treasurer, secretary, clerk, or managing agent, or if none of these officers can be found, by a copy left at the office or the usual place of business of any of those agents or officers of the receiver with the person having charge of the office or place of business. If that corporation is a railroad company, summons may be served on any regular ticket or freight agent of the receiver, and if there is no regular ticket or freight agent of the receiver, then upon any conductor of the receiver, in any county in the state in which the railroad is located. The summons shall be returned as if served on that defendant corporation.

Effective Date: 03-02-2004

## **2744.01 Political subdivision tort liability 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;

(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;

(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 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.

Effective Date: 04-09-2003; 04-27-2005; 10-12-2006

## **2744.02 Governmental functions and proprietary functions of political subdivisions.**

(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, 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.

Effective Date: 04-09-2003; 2007 HB119 09-29-2007

## **2744.03 Defenses - immunities.**

(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:

(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.

(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.

(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.

(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.

(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.

(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:

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

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

(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.

(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.

(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.

Effective Date: 04-09-2003

### **3313.17 Corporate powers of the board.**

The board of education of each school district shall be a body politic and corporate, and, as such, capable of suing and being sued, contracting and being contracted with, acquiring, holding, possessing, and disposing of real and personal property, and taking and holding in trust for the use and benefit of such district, any grant or devise of land and any donation or bequest of money or other personal property.

Effective Date: 10-01-1953

**COPY**

**IN THE COURT OF COMMON PLEAS  
FRANKLIN COUNTY, OHIO**

SHARMA PRESLEY, Admx., et al,	:	CASE NO. 06CVC-05-6963
Plaintiffs,	:	Judge Alan C. Travis by Assignment
vs.	:	
JANETTE A. FRALEY, et al,	:	
Defendants.	:	

FILED  
 COURT OF COMMON PLEAS  
 FRANKLIN COUNTY, OHIO  
 MAY 13 10:11:54  
 CLERK OF COURTS

**DECISION**  
**GRANTING DEFENDANT'S MOTION**  
**FOR JUDGMENT NOTWITHSTANDING THE VERDICT**  
**(Motion filed on May 7, 2008.)**

Rendered this 13<sup>th</sup> day of June, 2008.

TRAVIS, J.

This case comes before the court upon the defendant's motion for judgment notwithstanding a jury verdict returned on April 23, 2008. The motion was filed on May 7, 2008. Plaintiff filed her opposing memorandum on May 20, 2008 and defendant filed a reply on May 23, 2008. The matter is ripe for decision.

**Background.**

This case involves a claim for wrongful death. Jarrod Payne, a pedestrian, was killed on September 5, 2003, when he was struck at the intersection of Livingston and Zettler Avenues in Columbus, Ohio by a car driven by defendant, Janette Fraley. Plaintiff is the administratrix of the estate of the decedent. Plaintiff brought her claim against Fraley under the Ohio Wrongful Death Act, R.C. Sections 2125.01, et seq. Plaintiff also brought a claim against the City of Columbus, alleging that the area where the collision occurred was a school zone as defined in R.C. 4511.21(B)(1)(c) and that the City of Columbus had failed to post appropriate signs advising

vehicular traffic that the speed limit was twenty miles per hour during restricted hours. The city defended on the ground that it was immune from suit. On March 21, 2007, plaintiff voluntarily dismissed her cause of action against the city.

Plaintiff filed her first complaint on June 14, 2004 under Case No. 04CVC-06-6262. Plaintiff voluntarily dismissed her first case on May 31, 2005 pursuant to Civ. R. 41(a). On May 26, 2006, plaintiff re-filed her complaint under Case No. 06CVC-05-6963. The case came on for trial before a jury on April 21, 2008. On April 23, 2008, the jury found that the defendant negligently caused the death of plaintiff's decedent. The verdict was filed on April 24, 2008.

### Discussion

A motion for judgment notwithstanding the verdict is governed by Civ. R. 50. The rule provides that whether or not a motion to direct a verdict has been made or overruled, a party may move to have the verdict and any judgment entered thereupon set aside and to have judgment entered in favor of the moving party. The motion must be filed with fourteen days of the entry of judgment upon the verdict. Civ. R. 50(B). The defendant's motion is timely.

The test to be applied when ruling on a motion for judgment notwithstanding the verdict is whether the moving party is entitled to judgment as a matter of law. In doing so, the court must construe the evidence most strongly in favor of the nonmoving party. *Posin v. A.B.C. Motor Court Hotel, Inc.* (1976), 45 Ohio St. 2d 271, 275; *Hinkle v. City of Columbus, et al.*, Franklin App. No. 04AP-1195, 2006 Ohio 1522, Par 19. The test is the same test applied in the case of a motion for directed verdict under Civ. R. 50(A). If there is substantial evidence upon which reasonable minds could differ, the motion must be overruled.

Defendant's motion for judgment notwithstanding the verdict includes two arguments. First, defendant asserts that although plaintiff filed her original action within two years of the

decedent's death, she voluntarily dismissed the original action prior to expiration of that two-year period. Plaintiff failed to re-file her lawsuit within the two-year limitation of R.C. 2125.04. Therefore, the savings provision of that statute does not apply and plaintiff's current action is barred. Second, the defendant states that under controlling Ohio decisional law, the two-year time period within which an action for wrongful death must be filed is not a remedial statute of limitations or defense, but is a condition precedent to the right to bring the action; an integral element of the claim itself. From defendant's viewpoint, because plaintiff did not timely file her second case within the period of time dictated by the statute, plaintiff failed to prove a necessary element of the claim. Accordingly, as in any case where a party fails to present evidence to support a necessary element of a claim, the defendant states that she is entitled to judgment in her favor as a matter of law.

In this case, the time periods relevant to defendant's argument are undisputed. Plaintiff's decedent died on September 5, 2003. Thus, the two-year period within which an action for wrongful death could be brought pursuant to R.C. 2125.02(D) extended from the date of death until September 5, 2005. Plaintiff brought her first suit for wrongful death against the defendant on June 14, 2004, within that two-year period. Plaintiff voluntarily dismissed her first suit on May 31, 2005, also within the two-year period required by the statute. The two-year period expired on September 5, 2005. Plaintiff re-filed her wrongful death action on May 26, 2006, after the two-year period had expired.

An action for wrongful death was unknown at common law. The provisions of the Ohio Wrongful Death Act, R.C. 2125.01 et seq. are in derogation of the common law and must be strictly construed according to their essential terms. *Keaton v. Ribbeck* (1979), 58 Ohio St.2d

443; *Rubeck v. Huffman* (1978), 54 Ohio St. 2d 20, 21; *Kissinger et al., v. Pavius, et al.*, Franklin App. No. 01AP- 1203, 2002 Ohio 3083, Par 17.

Although Section 2125.04 limits the time within which an action for wrongful death may be brought, the provision has been construed by the Ohio Supreme Court to be an essential element of the cause of action itself; not a statute of limitations or defense.

[T]he time limitation in the wrongful-death statute does not constitute a remedial limitation upon the right of action. Commencing the action within the prescribed time is a necessary element of the right to bring it and if a petition shows upon its face that it is not filed within the two-year period, a demurrer to it must be sustained, not because of a statute of limitation is interposed as a defense but because an averment of an essential element of the action is absent.”

*Sabol, Admr. v. Pekoc* (1947), 148 Ohio St. 545, at 554, construing former analogous General Code Section 10509-169.

This principle retains vitality today. *Brookbank, Admr. v. Gray* (1996), 74 Ohio St. 3d 279 at 291. The limitation on the right to bring an action for wrongful death is an element of the claim rather than a defense to be raised by pleading or motion. *Sabol, supra*, 148 Ohio St. at 552. Thus, plaintiff was required to bring her wrongful death action within two years of the date of the decedent's death.

Plaintiff maintains that the savings provision of R.C. 2125.04 permitted her to re-file her action within one year after her voluntary dismissal and to do so without regard to the timing of that dismissal. Compare R.C. 2305.19. Plaintiff believes that because her re-filed petition was within one year of her voluntary dismissal, her wrongful death action was timely re-filed. Plaintiff's position is not supported by decisional authority or the statute itself.

As construed by several districts of the Ohio Court of Appeals, the one-year savings clause contained in R.C. 2125.04 does not apply where a plaintiff voluntarily dismisses a wrongful death action before the two-year period of limitation has expired. Instead, an action dismissed within the original two-year period must be re-filed within the time that remains

before the two-year period expires. *Boron, Admr. v. Brooks Beverage Management, Inc.*, Franklin App. No. 98AP-902, 1999 Ohio App. LEXIS 3032; *Dougherty, Exec. v. Fecsik*, (1996), 116 Ohio App. 3d 456; *Grubb, Admx. v. Holingsworth*, Preble App. No CA91-12-024, 1992 Ohio App. LEXIS; *Day, Admx. v. Brandt Medical Associates, Inc.*, Montgomery App. No. 13127, 1992 Ohio App. LEXIS 3021. Because plaintiff voluntarily dismissed her wrongful death action prior to September 5, 2005, and only re-filed her action after that date had passed, plaintiff is not entitled to the one-year savings provisions of R.C. 2125.04.

Plaintiff argues that the failure to bring a wrongful death action within the two-year period prescribed by R.C. 2125.02(D) is a defense that must be raised before or during trial or will be deemed waived. Plaintiff relies upon Civ. R. 12(H). That rule provides as follows.

(1) A defense of lack of jurisdiction over the person, improper venue, insufficiency of process, or insufficiency of service of process is waived (a) if omitted from a motion in the circumstances described in subdivision (G), or (b) if it is neither made by motion under this rule nor included in a responsive pleading or an amendment thereof permitted by Rule 15(A) to be made as a matter of course.

(2) A defense of failure to state a claim upon which relief can be granted, a defense of failure to join a part indispensable under Rule 19, and an objection of failure to state a legal defense to a claim may be made in any pleading permitted or ordered under Rule 7(A), or by motion for judgment on the pleadings, or at the trial on the merits.

(3) Whenever it appears by suggestion of the parties or otherwise that the court lacks jurisdiction of the subject matter, the court shall dismiss the action.

In plaintiff's view, the defendant waived her defense of the wrongful death action by failing to raise the issue prior to or during trial.

The two-year period set out in R.C. 2125.02(D) is not a defense. Instead it "is a condition precedent to bringing an action, and the question can be raised at any time during the progress of the action. The lapse of more than two years between the death and the filing of the petition

defeats the action for the reason that an essential element of the action as established by the statute is absent." *Sabol v. Pekoc*, supra., 148 Ohio St. at 552, construing former analogous Section 10509-167, General Code.

Ohio courts have long held that the two-year provision within which an action in wrongful death must be brought is not a defense, but is an element of the cause of action itself.

On the basis of their position that a wrongful death action is one which is statutorily created, without any origins in the common law, Ohio courts have long held that the limitations period set forth in R.C. 2125.02(D) is an integral element of the right of action itself. (Citations omitted.)

*Ritz v. Brown*, (1989), 61 Ohio App. 3d 65, at 69.

Accord, *Russ v. Nationwide Mutual Ins. Co.*, Franklin App. No. 03AP-783, 2004 Ohio 1616, Par. 16; *Welsh v. Indiana Ins. Co.*, Stark App. No. 2002CA00378, 2003 Ohio 5054, Par. 35-36; *McDonald, Admr. v. State Farm Mutual Auto Ins. Co.*, Cuyahoga App. No. 67808, 200 Ohio App. LEXIS 3621; *Schaffer v. Gateway Harvestore, Inc.* (1998), 129 Ohio App. 3d 448.

Because the two-year limitation is an element of the right of action, not a defense, the defendant has no burden to present evidence or prove that element. Proof of an element of a claim is the plaintiff's burden. Failure to prove a necessary element of a claim or cause of action may be brought to the attention of the court by motion for directed verdict in the case of a jury trial, motion to dismiss in the case of a bench trial or by motion for judgment notwithstanding the verdict. Therefore, defendant did not waive her position that plaintiff failed to prove a necessary, integral element of plaintiff's wrongful death claim.

Plaintiff argues that to apply the provisions of the wrongful death savings statute, R.C. 2125.04, would violate her right to equal protection of the law. Plaintiff correctly notes that the general savings clause, R.C. 2305.19, was amended in 2004 to permit other cases to be re-filed within one year after either a failure other than on the merits or the applicable statute of

limitations has expired, whichever took place later. See 150 v H 161 Section 1, eff. 5-31-04. However, the general savings statute, R.C. 2305.19, does not apply in the case of a claim under the Wrongful Death Act.

Although the General Assembly reviewed and amended R.C. 2125.04 in 2005, it did not include language similar to amended R.C. 2305.19 in the amendment to the wrongful death savings statute. See 150 v S 80, eff. 4-7-05. Thus, while the general savings statute, R.C. 2305.19, permits a party to dismiss and re-file an action within one year regardless of when the voluntary dismissal was filed, the savings statute contained in the Wrongful Death Act does not.

Plaintiff relies on *Eppley v. Tri-Valley Local Schools*, Muskingum App. No. CT2007-0022, 2008 Ohio 32, (stay granted, 117 Ohio St. 3d 1410, 2008 Ohio 722), for the proposition that R.C. 2305.19 and 2125.04 provides disparate treatment to similarly situated parties and therefore, R.C. 2125.04 violates the Equal Protection Clause. While *Eppley* may be considered by this court, it is not controlling authority in this district. For the reasons below, the court declines to follow the reasoning of that court.

Legislative enactments are entitled to a strong presumption of validity and constitutionality. *Adamsky v. Buckeye Local Sch. District* (1995), 73 Ohio St. 3d 360, 361. Therefore, any challenged legislation will not be invalidated unless the challenging party proves that the legislation is unconstitutional beyond any reasonable doubt. *State v. Anderson* (1991), 57 Ohio St. 3d 168.

A classification that involves neither a fundamental right nor proceeds along suspect lines cannot violate the Equal Protection Clause if there is a rational relationship between disparity of treatment of those similarly situated and some legitimate governmental purpose. *Central State University v. American Assn. of University Professors*, (1999), 926 U.S. 124, 119 S. Ct. 1162

at 1163; *Heller v. Doe*, (1993), 509 U.S. 312, 219-321, 113 S. Ct. 2637. A State has no obligation to produce evidence to sustain the rationality of the legislative decision. *Central State*, *supra*, citing *Heller*, *supra*, at 320. Instead, legislation "...may be based upon rational speculation unsupported by evidence or empirical data." *Fed. Communications Comm. v. Beach Communications, Inc.* (1993), 508 U.S. 307, at 315, 113 S. Ct. 2096.

Under the rational basis test, "a statute's classification will be upheld unless it is wholly irrelevant to the achievement of the state's purpose." *State, ex rel. Vana v. Maple Hts., Council* (1990), 54 Ohio St. 3d 91, 92. The applicable test for equal protection analysis is whether action taken by the legislative branch of government "...has imposed differential treatment upon similarly situated classes of individuals, which treatment cannot be rationally justified by any conceivable, legitimate state interest. *Keaton, Admr. v. Ribbeck* (1979), 58 Ohio St. 2d 443, 445. It is plaintiff's burden to demonstrate that there is no possible basis for the legislation. "[T]he burden is on is on the one attacking the legislative arrangement to negative every conceivable basis which might support it." *Lehnhausen v. Lake Shore Auto Parts Co.*, (1973), 410 U.S. 356, 364, 93 S.Ct. 1001, 1006.

At the outset, it is questionable whether a plaintiff who brings an action under the Wrongful Death Act is similarly situated to a plaintiff who brings a claim for tortuously caused injury. If parties are not similarly situated, equal protection is not required. Assuming for purposes of discussion that a tort claim and a wrongful death claim involve similarly situated plaintiffs, an analysis of equal protection principles does not support plaintiff's position.

An action for wrongful death was unknown at common law and is purely a creature of statute. It affords the only civil remedy to compensate others for death resulting from the wrongful acts of another. *Keaton, Admr. v. Ribbeck*, (1979), 58 Ohio St. 2d 443. The Ohio

Supreme Court has recognized that the statutorily created action for wrongful death is distinct from other causes of action brought to recover for injury.

[T]he cases identify the need to establish some method to deal with the danger of fraudulent claims and to accord finality to wrongful death actions as important governmental objectives. Whether a particular statutory classification based on illegitimacy is substantially related to these objectives in wrongful death statutes depends critically upon the extent to which the statute already has built into it protection against the evils sought to be avoided.

Under Ohio's Wrongful Death Act, damages are keyed to the losses suffered by the surviving beneficiaries. The amount of damages is determined on the basis of pecuniary and dependency-related factors. Accordingly...our statute provides protection against uninjured or undeserving potential distributees. Moreover, the two-year time limitation on bringing a wrongful death action imposed by R.C. 2125.02(D) is not merely a time limitation on the remedy; it is a restriction which qualifies the right of the action itself. See *Sabol v. Peko* (1947), 148 Ohio St. 545, paragraph one of the syllabus.....These provisions operate to substantially reduce the possibility of spurious and multiple claims.  
*Brookbank, Admr. v. Gray, supra*, 74 Ohio St. 3d at 291.

Although the issue in *Brookbank* was whether an illegitimate child fell within the class of persons for whom a wrongful death action could be brought, the decision is instructive in its acknowledgment that legitimate governmental objectives exist that differentiate an action under the Wrongful Death Act from other causes of action.

*Brookbank* also continues the recognition that the two-year time restriction contained in R.C. 2125.02(D) qualifies the very right to institute a wrongful death action. Further, this element and other provisions of the Wrongful Death Act, "operate to substantially reduce the possibility of spurious and multiple claims." 79 Ohio St. 3d at 291.

As a result, it is conceivable that the General Assembly may have concluded that the savings provision of R.C. 2125.04 served a different, legitimate governmental purpose than the purposes served by the general savings statute, R.C. 2305.19. It is not irrational to conclude that amending R.C. 2125.04 to extend the time to file a wrongful death action would not further those

legitimate governmental purposes identified in **Brookbank**. Moreover, because the Wrongful Death Act serves purposes that are different from an action for personal injury or other tortious conduct, the General Assembly was within its right to differentiate between the causes of action.

Plaintiff has not met her burden "to negative every conceivable basis which might support (the statute)." *Lenhausen v. Lake Shore Auto Parts Co.* (1973), 410 U.S. 356, 364; 93 S. Ct. 1001, 1006. Plaintiff's equal protection attack upon R.C. 2125.04 must fail.

### **Conclusion**

For the reasons set forth above, the court finds the defendant's motion for judgment notwithstanding the verdict well-taken. Defendant is entitled to judgment in her favor as a matter of law. The motion is **GRANTED**. Judgment will be entered for the defendant. Costs to plaintiff.

Pursuant to Local Rule 25.01 through 25.04, counsel for the defendant is requested to prepare and circulate and appropriate journal entry that reflects this decision. If counsel fails to present an appropriate entry within twenty days of the date of this decision, the court will cause the proper entry to be prepared and filed without further notice to counsel. To enable the Clerk to identify and remove from the docket motions that have been decided, the entry should include the following caption:

**JOURNAL ENTRY**  
**Granting Defendant's Motion**  
**For Judgment Notwithstanding the Verdict**  
**(Motion filed on May 7, 2008)**  
**THIS IS A FINAL ORDER**

SO ORDERED.

June 13, 2008

  
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Judge Alan C. Travis  
by Assignment

Appearances on next page.

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CASE NO. 06CVC-05-6963

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