

ORIGINAL

IN THE SUPREME COURT OF OHIO

CYNTHIA ANDERSON, Administratrix of
the Estates of Ronald E. Anderson and
Javarre J. Tate, deceased,

Plaintiff-Appellee,

vs.

CITY OF MASSILLON, et al.,

Defendants-Appellants.

Case No. 2011-0743

On Appeal from the Stark
County Court of Appeals,
Fifth Appellate District

Court of Appeals
Case No. 2010 CA 00196

**MOTION FOR RECONSIDERATION OF APPELLANTS
THE CITY OF MASSILLON, SUSAN J. TOLES AND RICK H. ANNEN**

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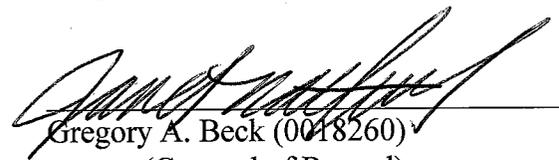
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MOTION FOR RECONSIDERATION OF APPELLANTS
THE CITY OF MASSILLON, SUSAN J. TOLES AND RICK H. ANNEN

Appellants, the City of Massillon, Susan J. Toles, and Rick H. Annen, respectfully move this Court, pursuant to Rule 11.2(B)(4) of the Rules of Practice of the Supreme Court of Ohio, for reconsideration of the decision rendered on the merits in this case on December 6, 2012. Specifically, appellants respectfully request that the Court address further the interplay between the “full defense” language of R.C. 2744.02(B)(1)(b) and the indemnity provision found in R.C. 2744.07(A)(2). Further clarification of the interaction between these provisions, for purposes of the remand to the Court of Common Pleas for further proceedings, may help avoid protracted litigation of same in another round of appeals.

Respectfully submitted,



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**MEMORANDUM IN SUPPORT OF THE
MOTION FOR RECONSIDERATION OF APPELLANTS
THE CITY OF MASSILLON, SUSAN J. TOLES AND RICK H. ANNEN**

In its opinion issued December 6, 2012, the Court clarified the distinctions between “willful,” “wanton,” and “reckless” conduct and settled the point that these terms, as used in R.C. Chapter 2744 in particular, are not the functional equivalent of one another. “Willful, wanton, and reckless describe different and distinct degrees of care and are not interchangeable.” *Anderson v. Massillon*, Slip Opinion No. 2012-Ohio-5711, syllabus 1. The Court also observed that R.C. 2744.02(B)(1)(b) operates as a “full defense” from liability for a municipality for a claim arising out of the operation of a fire safety vehicle on an emergency run, when such operation does not involve “willful or wanton misconduct.” R.C. 2744.03(A)(6)(b), on the other hand, generally extends immunity to employees, in the absence of conduct which is “with malicious purpose, in bad faith, or in a wanton or reckless manner.” These matters do not need any further consideration by the Court.

However, and importantly, the Court observed in its Opinion that:

Also relevant to this case is R.C. 2744.07(A)(1), which specifies:

[A] political subdivision shall provide for the defense of an employee, in any state or federal court, in any civil action or proceeding which contains an allegation for damages for injury, death, or loss to person or property caused by an act or omission of the employee in connection with a governmental or proprietary function. The political subdivision has the duty to defend the employee if the act or omission occurred while the employee was acting both in good faith and not manifestly outside the scope of employment or official responsibilities.

And R.C. 2744.07(A)(2) states:

[A] political subdivision shall indemnify and hold harmless an employee in the amount of any judgment, other than a judgment for punitive or exemplary damages, that is obtained against the employee in a state or federal court or as a result of a law of a foreign jurisdiction and that is for damages for injuries, death, or loss to person or property caused by an act of omission in connection with a governmental or

proprietary function, if at the time of the act or omission the employee was acting in good faith and within the scope of employment or official responsibilities.

Id., at ¶22. These provisions are indeed, as the Court correctly observed, “relevant to this case.”

The indemnity provision of R.C. 2744.07(A)(2), is of particular concern, because of the apparent failure of the General Assembly to account for the “different degrees of care that impose liability” when structuring the “full defense” language of R.C. 2744.02(B)(1)(b). This case requires reconciliation between R.C. 2744.02(B)(1)(b), 2744.03(A)(6)(b), and 2744.07(A)(2), insofar as these statutes can be reconciled. Only reconciliation of these code provisions, or preference to the specific language of the “full defense” clause, will avoid the potential anomaly that a political subdivision may be entitled to a “full defense” from liability (in the absence of “willful or wanton” misconduct) but yet be stripped of that full defense and potentially liable to indemnify for employee conduct (in the specific context involving the operation of emergency response vehicles) deemed “reckless.”

R.C. 2744.03(A)(6)(b) and 2744.07(A)(2) are general statutes which must be assessed under a wide variety of facts and claims. R.C. 2744.02(B)(1)(b), on the other hand, is specific and applicable only when claims arise out of the operation of a fire department vehicle on an emergency run. It is readily apparent that the General Assembly intended to treat this limited category of claims differently. R.C. 2744.02(B)(1) begins as an exception from immunity, for the negligent operation of motor vehicles by employees of a political subdivision:

(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:**

...

(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; (Emphasis added).

The “full defense” fixed by R.C. 2744.02(B)(1)(b) represents the legislature’s recognition of the important public function served by emergency response vehicles. The General Assembly crafted the full defense for all conduct in the operation of a fire department emergency response vehicle except conduct which rises to the level of “willful or wanton.”

The specific provisions of R.C. 2744.02(B)(1)(b) should control when conduct involving the operation of a fire department vehicle on an emergency run is being assessed, to the exclusion of the general provisions relating to employee conduct found in R.C. 2744.03(A)(6)(b). Implicit in R.C. 2744.02(B)(1)(b) is the General Assembly’s determination that liability for claims stemming from the operation of an emergency response vehicle should only attach when conduct is “willful or wanton.” If the General Assembly intended “reckless” conduct to suffice, presumably the legislature would have included that degree of conduct in this particular context.

To the extent the conflict between these sections is viewed as irreconcilable, R.C. 1.51 provides guidance. This code states, in pertinent part:

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.

Where a conflict between statutes exists, and that conflict is deemed irreconcilable, “R.C. 1.51 mandate[s] that one provision shall prevail over the other.” *State ex rel. Data Trace Information Services v. Cuyahoga County Fiscal Officer*, 131 Ohio St. 3d 255, 2012-Ohio-753, ¶48. The specific provision is to control. Here, the “full defense” in R.C. 2744.02(B)(1)(b) should prevail.

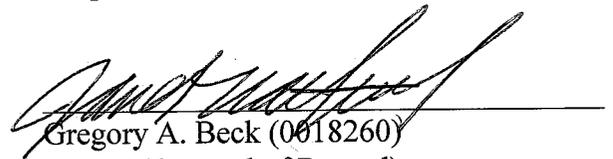
The Court has remanded this case to the common pleas court “for further proceedings to determine, pursuant to our clarification of these terms, whether the city has a full defense to liability and whether the firefighters are entitled to immunity.” *Id.*, at ¶3. With the clarification of the degrees of conduct in place, and the distinct characteristics of these standards fixed, the trial court will be called upon to address the record once again by way of summary judgment. Assuming that the record does not demonstrate a genuine issue of material fact under the “willful” or “wanton” degrees of conduct, the “full defense” of R.C. 2744.02(B)(1)(b) will be triggered. Once that “full defense” is met, the inquiry for liability exposure from the operation of a fire department vehicle on an emergency run should come to an end – for the fire department employees as well. If the department’s employees are exposed to potential liability for a lesser degree of conduct, that is, for conduct in the operation of the vehicle deemed “reckless,” R.C. 2744.07(A)(2) would appear to expose the municipality to an indemnity obligation for such claim. Such extension of liability, through the mechanism of indemnity, would undermine the “full defense” to liability otherwise afforded the municipality in R.C. 2744.02(B)(1)(b). The General Assembly could not have intended this result.

Similarly, the General Assembly could not have intended to expose fire department personnel to potential liability arising out of the operation of a department vehicle on an emergency run deemed “reckless,” without providing indemnity for such claims.

There is only one reasonable manner in which to reconcile the effect and application of these code provisions, or recognize the preference of R.C. 2744.02(B)(1)(b). The Court should declare that, in the limited context of a claim involving the operation of a fire department vehicle on an emergency run, the General Assembly intended to confine potential liability exposure to facts rising

to the level of “willful” or “wanton” misconduct. R.C. 2744.02(B)(1)(b) is specific to this point and operates as an exception for an employee’s exposure to liability for “reckless” conduct generally found in R.C. 2744.03(A)(6). Accordingly, the appellants respectfully request that the Court clarify its Opinion in this case and further direct the trial court, on remand, to address whether R.C. 2744.02(B)(1)(b), 2744.03(A)(6)(b), and 2744.07(A)(2) can be reconciled, or determine whether, as a matter of law, R.C. 2744.02(B)(1)(b) is specific and prevails over R.C. 2744.03(A)(6)(b) in this context.

Respectfully submitted,



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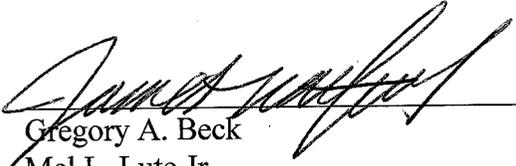
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