

ORIGINAL

Case No. 2011-0743

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## In the Supreme Court of Ohio

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ON APPEAL FROM THE STARK COUNTY COURT OF APPEALS,  
FIFTH APPELLATE DISTRICT,  
CASE No. 2010 CA 00196

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CYNTHIA ANDERSON, ADMINISTRATRIX,  
*Plaintiff-Appellee,*  
v.  
THE CITY OF MASSILLON, et al.,  
*Defendants-Appellants.*

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**MEMORANDUM IN OPPOSITION TO MOTION TO RECONSIDER  
OF APPELLEE CYNTHIA ANDERSON, ADMINISTRATRIX  
OF THE ESTATES OF RONALD E. ANDERSON AND JAVARRE J. TATE**

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## I. INTRODUCTION

Appellants' request that this Court engage in statutory construction, and construe the political subdivision employee immunity set forth in R.C. § 2744.03(A)(6) to be subsumed within the political subdivision defense set forth in R.C. § 2744.02(B)(1), should be rejected.

*First*, the scenario Appellants envision whereby the individual employees in this case are liable for the injuries at issue due to having engaged in "reckless" conduct within the meaning of R.C. § 2744.03(A)(6), the political subdivision being entitled to a defense from liability pursuant to R.C. § 2744.02(B)(1), and the political subdivision having to indemnify its employee pursuant to R.C. § 2744.07(A)(2), has not yet occurred. Such a scenario can only happen after the entry of final judgment. Therefore, Appellants' Motion is a request for an advisory opinion, and it should not be entertained.

*Second*, there is no need for this Court to engage in the statutory construction Appellants request because the relevant statutory provisions are not in conflict. Appellants' Motion fails to appreciate that a political subdivision's obligation to indemnify its employee pursuant to R.C. § 2744.07(A)(2) is very different than imposing direct liability on a political subdivision pursuant R.C. § 2744.02(B)(1). The statutory provisions are simply not in conflict with each other, and there is therefore nothing for this Court to construe.

*Third*, merging the employee liability analysis of R.C. § 2744.03(A)(6) into the political subdivision defense analysis of R.C. § 2744.02(B)(1) would be contrary to the plain language of R.C. § 2744.03(A)(6). If the General Assembly wished this analysis to be one and the same, it would have said so. To the contrary, the General Assembly has manifested an intent that these analyses be separate, a point which this Court acknowledged in its opinion in this case.

*Fourth*, extending the political employee subdivision immunity of R.C. § 2744.03(A)(6) to only allow liability when the political subdivision itself is liable pursuant to R.C. § 2744.02(B) would have

dramatic unintended consequences. It would extend far beyond the facts presented by this case. This Court should not fundamentally change Ohio Political Subdivision Law as Appellants have requested.

For these reasons, more fully explained below, Appellants' Motion for Reconsideration should be denied.

## II. LAW AND ARGUMENT

As clarified by the Court in this case, an employee of a political subdivision is immune from liability unless the employee acted "with malicious purposes, in bad faith, or in a wanton or reckless manner." *Anderson v. Massillon*, Slip Opinion No. 2012-Ohio-5711, ¶ 21 (quoting, R.C. § 2744.03(A)(6)). In the context of firefighters causing injury when responding to an emergency, the political subdivision itself has a full defense from liability unless the employee's actions "constitute willful or wanton misconduct." *Id.* at ¶ 20 (citing, R.C. § 2744.02(B)(1)). Applying the plain language of these statutes, this Court observed:

When the General Assembly used the terms "willful" or "wanton" in R.C. 2744.02(B)(1)(b) to deny a full defense to liability for a political subdivision and the terms wanton or reckless in R.C. 2744.03(A)(6)(b) to remove the immunity of an employee of the political subdivision, it intended different degrees of care.

*Id.* at ¶ 36. This Court's analysis was based upon the intent of the Ohio General Assembly as evidenced by the plain language of R.C. § 2744.02(B)(1)(b) and R.C. § 2744.03(A)(6)(b). *See, State v. Lowe*, 112 Ohio St.3d 507, 2007-Ohio-606, 861 N.E.2d 512, ¶ 9.

Now Appellants have shifted gears. Though not raised as an assignment of error or in the arguments of Appellants' briefs, Appellants claim that the indemnity provisions found in R.C. § 2744.07(A)(2) create a statutory conflict between R.C. § 2744.02(B)(1)(b) and R.C. § 2744.03(A)(6)(b). R.C. § 2744.07(A)(2) provides that a political subdivision must indemnify its employee from any judgment obtained against that employee "for damages for injury, death, or loss to person or property ...

in connection with a governmental or proprietary function if ... employee was acting in good faith and within the scope of employment or official responsibilities.”<sup>1</sup>

This conflict, according to Appellants, would arise in the event: (1) the employee was denied immunity because the employee engaged in “reckless misconduct” within the meaning of R.C. § 2744.03(A)(6)(b); (2) the political subdivision successfully asserts its defense to liability because the employee’s actions did not “constitute willful or wanton misconduct” within the meaning of R.C. § 2744.02(B)(1); and (3) the employee acted in good faith and within the scope of their employment, entitling the employee to indemnity pursuant to R.C. § 2744.07(A)(2).

To resolve this perceived conflict, Appellants’ Motion for Reconsideration urges the Court to engage in substantial statutory construction. Namely, re-write R.C. Chapter 2744, disregard the plain language of R.C. § 2744.03(A)(6), and hold that *an employee* of a political subdivision is immune in the emergency vehicle context unless the employee’s actions constitute willful or wanton misconduct within the meaning of R.C. § 2744.02(B)(1). In other words, Appellants ask this Court to ignore the exceptions to immunity for employees found in R.C. § 2744.03(A)(6), and extend the political subdivision defense from liability found in R.C. § 2744.02(B)(1) to employees. This requested statutory construction seeks to undo the finding of legislative intent made by this Court when interpreting R.C. § 2744.02(B)(1) and R.C. § 2744.03(A)(6). *See, Anderson*, 2012-Ohio-5711 at ¶ 36. And, equally important, it would drastically change Ohio’s Political Subdivision Immunity Law.

As explained below, this Court should decline Appellants’ invitation.

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<sup>1</sup> The related provision that requires a political subdivision to provide a defense for its employee is not at issue in this case because Appellants have not challenged this obligation pursuant to the defined statutory procedures. R.C. § 2744.07(A)(1) provides that “a political subdivision shall provide for the defense of an employee ... in any civil action ... for damages for injury, death, or loss to person or property ... in connection with a governmental or proprietary function ... 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.” However, if a political subdivision wishes to challenge its obligation to provide its employee a defense in a particular matter, a motion must be filed within 30 days of the close of discovery for a judicial determination pursuant to R.C. § 2744.07(C). That did not occur in this case.

**A. This Court Should Refrain From Issuing the Advisory Opinion Appellants Seek.**

First, it must be acknowledged that Appellants' Motion for Reconsideration is a request for an advisory opinion from this Court. The conflict perceived by Appellants will only come into play *after final judgment* in the following limited circumstance:

- IF** the employee **DID** engage in "reckless conduct" per R.C. § 2744.03(A)(6); and
- IF** the employee **DID NOT** engage in "willful or wanton misconduct" per R.C. § 2744.02(B)(1); and
- IF** the employee **DID** act in "good faith" and "within scope of employment" per R.C. § 2744.07(A)(2).

There are whole host of alternative possibilities that may come to bear in this case. If, for instance, a jury finds the employee in this case engaged in "wanton" misconduct as the phrase is used in *both* R.C. § 2744.02(B)(1) and R.C. § 2744.03(A)(6), Appellants' perceived statutory conflict will not materialize – the political subdivision will be directly liable pursuant to R.C. § 2744.02(B)(1). Similarly, if a jury or judge finds that the employee was merely negligent, and did not engage in wanton or reckless conduct, the entire perceived conflict between R.C. § 2744.02(B)(1) and R.C. § 2744.03(A)(6) will be moot.

This Court's precedent disfavors the type of advisory opinion Appellants' request with their Motion. As this Court explained in *N. Canton v. Hutchinson*, 75 Ohio St.3d 112, 114, 661 N.E.2d 1000 (1996):

"It is tempting to us to consider, discuss and rule on some or all of the foregoing issues and even some others not set forth. In addition, we recognize that the main issue presented is one that is capable of repetition. However, none of this matters because the issue being appealed to us does not emanate from an order which is final and appealable, as explained *infra*. Accordingly, any opinion we would render on an issue which is not the subject of a final judgment would be, at best, advisory in nature. It is, of course, well settled that this court will not indulge in advisory opinions."

*See also, Arbino v. Johnson & Johnson*, 116 Ohio St.3d 468, 2007-Ohio-6948, 880 N.E.2d 420, ¶ 84 ("Every court must refrain from giving opinions on abstract propositions and avoid the imposition by judgment of premature declarations or advice upon potential controversies. It is well-settled law that

this court will not issue such advisory opinions.”); *Fortner v. Thomas*, 22 Ohio St.2d 13, 257 N.E.2d 371 (1970); *Egan v. Natl. Distillers & Chem. Corp.*, 25 Ohio St.3d 176, 495 N.E.2d 904, syllabus (1986).

This Court should deny Appellants’ Motion as it seeks an advisory opinion based upon facts not before the Court.

**B. The Statutory Provisions Appellants Cite are Not in Conflict, Therefore There is No Need for this Court to Engage in the Statutory Construction Appellants Request.**

Pressing further, the first step in analyzing the position Appellants’ Motion asserts is determining whether the full defense to liability of R.C. § 2744.02(B)(1) conflicts with the employee immunity provision of R.C. § 2744.03(A)(6) as a result of the indemnity provisions of R.C. § 2744.07(A)(2). *See, Cater v. Cleveland*, 83 Ohio St.3d 24, 29, 697 N.E.2d 610 (1998) (finding R.C. § 1.51 inapplicable due to lack of statutory conflict). Only then will this Court need to engage in the statutory construction Appellants advocate.

In order to demonstrate a conflict between these statutory provisions, Appellants claim that an obligation of a political subdivision to indemnify an employee is exactly the same as imposing liability on the political subdivision directly. But this is simply not the case – an obligation to indemnify is dramatically different from direct liability.

The Ninth District Court of Appeals acknowledged the difference between direct liability on a political subdivision and the obligation to indemnify its employee as follows:

“This section [R.C. § 2744.07(A)(2)] does not remove the political subdivision’s immunity in any way. Instead, it requires the political subdivision to indemnify its employee if the employee is liable for a good faith act related to a governmental or proprietary function. ***Requiring the subdivision to indemnify its employee is entirely different from imposing direct liability on the subdivision.***”

*Piro v. Franklin Twp.*, 102 Ohio App.3d 130, 141, 656 N.E.2d 1035 (9th Dist.1995) [emphasis added].

This point was not likely lost on the General Assembly when drafting R.C. Chapter 2744. An obligation to indemnify an employee can be satisfied contractually and privately by the purchase of automobile liability insurance. Imposing direct liability on the municipality however, is much different.

The most immediate difference is that it exposes the political subdivision and its elected officials to much more negative public scrutiny. Based upon the plain text of R.C. § 2744.02(B)(1), R.C. § 2744.03(A)(6) and R.C. § 2744.07(A)(2), the General Assembly recognized this difference.

Because the obligation to indemnify an employee is different than direct liability, R.C. § 2744.02(B)(1) and R.C. § 2744.03(A)(6) are not in conflict as a result of R.C. § 2744.07(A)(2), and there is no need for this Court to engage in any statutory construction, and Appellants' Motion should be denied.

**C. Adoption of the Appellants' Arguments Eviscerates the Plain Language of the Political Subdivision Indemnity Statute.**

Furthermore, eliminating the employee immunity analysis pursuant to R.C. § 2744.03(A)(6) in the emergency vehicle context, as Appellants advocate, contravenes the plain language of R.C. § 2744.03(A)(6).

If the General Assembly wished to exempt employees from the R.C. § 2744.03(A)(6) immunity analysis when the political subdivision may have a defense to liability pursuant to R.C. § 2744.02(B)(1), the General Assembly would have said so. They did not. This Court should not re-write this unambiguous statute. *See, Ramsey v. Neiman*, 69 Ohio St.3d 508, 512, 634 N.E.2d 211, 213 (1994). Indeed, this canon of statutory construction was the linchpin of the Court's decision in this case, when it recognized that "reckless," "wanton," and "willful" conduct are not functional equivalents. *Anderson*, 2012-Ohio-5711 at ¶ 36. Adoption of Appellants' proposed statutory construction does damage to this established notion.

To the contrary, the General Assembly has made clear that the defenses available to a political subdivision *are subject to* the immunity that may be afforded the employee by operation of R.C. § 2744.03(A)(6).

R.C. § 2744.02(B) provides:

**(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:

\* \* \*

(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].

In turn, R.C. § 2744.03(A)(6) provides:

(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;

Finally, R.C. § 2744.03(B) provides:

(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.***

[Emphasis added].

Based upon this language, it is clear that the General Assembly *did not* intend that the employee immunity analysis pursuant to R.C. § 2744.03(A)(6) be subsumed into the political subdivision defense analysis pursuant to R.C. § 2744.02(B)(1). To the contrary, the defenses of R.C. § 2744.02 are “subject

to” R.C. § 2744.03, and R.C. § 2744.03 “does not affect” the liability of a political subdivision pursuant to R.C. § 2744.02.

Thus, by the plain language of R.C. § 2744.02 and R.C. § 2744.03, the immunity afforded to an employee of a political subdivision should not be merged into the analysis of the defenses afforded to a political subdivision, as Appellants urge in their Motion.

**D. Adoption of Appellants’ Arguments Would Open a Pandora’s Box of Unintended Consequences.**

Finally, the practical consequences of exactly what the Appellants are requesting deserves pause. There are a whole host of instances where an employee may be liable for an act or admission pursuant to R.C. § 2744.03(A)(6), and the political subdivision is not directly liable pursuant to R.C. § 2744.02(B). *See generally, Minnick v. Springfield Local Sch. Bd. of Edn.*, 81 Ohio App.3d 545, 550, 611 N.E.2d 926 (1992). If this Court were to accept Appellants’ position and say that the employee can only be liable if the political subdivision is also liable pursuant to R.C. § 2744.02, Ohio Political Subdivision Law would change dramatically. Thousands of persons harmed by the actions of political subdivisions would be without a remedy. This was not the intent of the General Assembly, as evidenced by the enactment of R.C. § 2744.03(A)(6) itself.

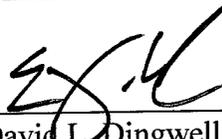
**III. CONCLUSION**

Based upon the foregoing, Appellee Cynthia Anderson, Administratrix of the Estates of Ronald E. Anderson and Javarre J. Tate, request that this Court deny Appellants the City of Massillon, Susan J. Toles, and Rick H. Annen’s Motion to Reconsider in its entirety.

DATED: December 27, 2012

Respectfully Submitted,

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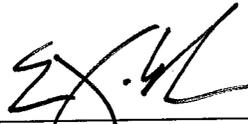
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**CERTIFICATE OF SERVICE**

A true and accurate copy of the foregoing was sent by regular U.S. Mail this 27th day of  
December 2012 to:

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