

ORIGINAL

IN THE SUPREME COURT OF OHIO

15-1737

Gary L. Bibler, et al.,	:	
Appellant	:	On Appeal from the Hancock County Court of Appeals Third Appellate District
v.	:	
Jill D. Stevenson, et al.,	:	Court of Appeals Case No. 5-14-29
Appellee	:	

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MEMORANDUM IN SUPPORT OF JURISDICTION  
OF APPELLANT GARY L. BIBLER

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**EXPLANATION OF WHY THIS CASE IS OF PUBLIC  
AND GREAT GENERAL INTEREST**

This case presents critical issues for both the operators of motor vehicles in the State of Ohio and the Ohio legislature.

The decision of the Third District Court of Appeals allows the writings of an administrative agency to overrule the legislative authority given to the Ohio Legislature by the Ohio Constitution, particularly R.C. 4511.65.

The operators of motor vehicles are entitled to safety protections set forth in R.C. 4511.01 to 4511.78 including R.C. 4511.65 statutorily providing for the erection of a traffic control device at intersections with state highways.

The Ohio legislature, as the people's representative, is entitled on behalf of the people to the enforcement of the laws it creates and particularly those involving the safety of the people.

The legislature established rules for maintenance of highways for the safety of motorist via R.C. 4511.09 and 4511.10. The Ohio legislature also created in these sections rules of the road controlling drivers and the manner in which they operate their motor vehicles on the highways.

The legislature further created immunity for political subdivisions by legislation R.C. 2744.02, but provided exceptions to the grant of immunity in R.C. 2744.02(B)(3).

The efforts of the legislature to provide for safety on the roadways included in R.C. 4511.09, where the legislature ordered the director of highways to establish a system of uniform traffic control devices. The legislature, further in its desire to unify highway markings, created R.C. 4511.10, which prohibits the use by local authority of any such markings not designed by the director of highways.

R.C. 4511.65 mandates the erection of stop signs by local authority at all intersections with state highways under its jurisdiction unless some other traffic control device is provided.

The legislature in enacting R.C. 2744.02, intended to continue with its enactment, assured compliance by those governmental agencies in charge of maintaining roadways. One of the ways to force compliance is assuring that cities, such as Findlay, will bear the consequences its negligent acts cause.

R.C. 2744.02(B)(3) was enacted as an exception to the grant of governmental immunity. In *Walters v. City of Columbus*, 10<sup>th</sup> Dist. Franklin No. 07AP-917, 2008-Ohio-4258, in a case not dealing with a road intersecting a state highway, the court interpreted the definition of roadways in error creating a conflict between R.C. 2744.02(B)(3) and R.C. 4511.65 by making the exception dependent upon the recommendations of engineers and not legislative action.

All of the efforts of the legislature to insure the safety of Ohio motorists have been thwarted by the decision in this case by the Third District Court of Appeals relying on previous decisions of various courts of appeals around the state.

### **STATEMENT OF THE CASE**

This case arises from the decision of the Hancock County Court of Appeals, Third Appellate District, which sustained, by 2 to 1, a decision of the Hancock County Common Pleas Court awarding summary judgment to the City of Findlay on the basis of statutory immunity.

The Hancock County Common Pleas Court case began with the complaint of Gary and Yvonne Bibler (collective the "Biblers") naming Jill Stevenson and the City of Findlay

defendants claiming injury to Gary Bibler as a result of the collision between the vehicle Gary Bibler was operating and one operated by Jill Stevenson at the intersection of Sandusky Street (Ohio State Route 568) and Wilson Street in the City of Findlay on May 27, 2011. Biblers' Complaint and Stevenson's Answer and Eight Affirmative Defense both alleged that the stop sign controlling traffic on Wilson Street at the intersection of Sandusky Street was obscured by tree foliage and that the City of Findlay was negligent in failing to remove the obstruction.

The City answered and, after some discovery, moved for summary judgment on the basis of statutory immunity. The Hancock County Common Pleas Court, relying on the decision of the Court of Appeals for Franklin County, *Walters v. City of Columbus* 10<sup>th</sup> Appellate District 2008 Ohio 4258, granted the City's motion dismissing all claims against the City.

Biblers and Stevenson then settled the remaining issues and Biblers brought the matter to the Third District Court of Appeals which sustained the decision of the trial court.

#### **STATEMENT OF FACTS**

On May 27, 2011, Gary Bibler and Jill Stevenson were involved in a two vehicle accident. The accident occurred at the corner of Sandusky Street (Ohio State Route 568) and Wilson Street in Findlay, Ohio. Stevenson, traveling northbound on Wilson Street, failed to stop at a stop sign at the intersection. She collided with Bibler who, heading eastbound on Sandusky Street (Ohio State Route 568), had the right of way. The stop sign controlling northbound traffic on Wilson Street at the intersection was obscured by tree foliage; because of this, Stevenson claims she did not see the stop sign until it was too late. Officer Spieker of the Findlay Police Department investigated the accident and testified at

deposition that he felt there was enough of a view-obstruction that something should be done about the tree, noting that an accident had previously occurred at the intersection on September 13, 2010.

### **PROPOSITIONS OF LAW**

1. THE WORD "MANDATED" AS USED IN R.C. 2744.01(H) MEANS ANY TRAFFIC CONTROL DEVICE APPROVED FOR USE BY THE OHIO MANUAL OF UNIFORM TRAFFIC CONTROL DEVICES.
2. LOCAL AUTHORITIES ARE REQUIRED BY R.C. 4511.65 TO ERECT STOP SIGNS, YIELD SIGNS, OR TRAFFIC CONTROL DEVICES AT ALL INTERSECTIONS WITH STATE ROUTES UNDER THEIR JURISDICTION.
3. TRAFFIC CONTROL DEVICES REQUIRED BY R.C. 4511.65 ARE PART OF THE PUBLIC ROADS AS DEFINED IN R.C. 2744.01(H).

### **ARGUMENT IN SUPPORT OF PROPOSITION OF LAW NO. 1**

**THE WORD "MANDATED" AS USED IN R.C. 2744.01(H) MEANS ANY TRAFFIC CONTROL DEVICE APPROVED FOR USE BY THE OHIO MANUAL OF UNIFORM TRAFFIC CONTROL DEVICES.**

#### STATUTORY SCHEME AND PURPOSE

R.C. 4511.01 to 4511.76 - particularly R.C. 4511.09 through 4511.84 - directly affect the safety of the public when using the roadways in Ohio. The enactment of R.C. 4511.11, titled "Local conformity to manual for uniform system of traffic control devices," and particularly its sections relating to street signage, must have been for the purpose of protecting the safety of the public. R.C. 2744.02 - Ohio's statutory immunity for political subdivisions - has been codified in a manner that, without legislative exception, would

make the State and all political subdivisions immune from liability for negligence in their duties as imposed in the case of the City of Findlay by R.C. 723.01 and R.C. 4511.11.

Again it is presumed that this legislation was enacted in part to protect users of the highways from injury and to ensure uniformity throughout the State.

Uniformity of traffic control is the stated purpose of R.C. 4511.09 and the legislature makes it clear that local authorities shall place and maintain traffic control devices provided for in R.C. 4511.09 as are necessary to indicate and carry out R.C. 4511.01 to 4511.76: "to regulate and warn or guide traffic." R.C. 4511.11(A).

The legislature then makes it clear that those are the only traffic control devices to be used in Ohio and it is a crime for anyone to manufacture or sell devices that do not conform. *See* R.C. 4511.11(D)-(G)

To ensure compliance by political subdivisions with the obligations imposed by the previously described legislation and in part to protect the public, the legislature also created an exception to statutory immunity from suit in the form of R.C. 2744.02(B)(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.

R.C. 2744.01(H) additionally contains a definition of public roads that excludes 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. ("OMUTCD").

This language has been debated and opinions written too numerous to mention that interpret first that the purpose of the definition and the language of R.C. 2744.02(B)(3) is to

limit the exposure of liability to political subdivisions. But, this reasoning is nonsensical: if this were the purpose, the exception of statutory immunity would have been stricken all together. Certainly, the legislature would not enact legislation requiring the City of Findlay to maintain streets in an unsafe manner to encourage injury to the public. Such would defy common sense and logic.

The legislature, in other sections, reduced the potential exposure of political subdivisions by adopting caps on damages and eliminating liability for medical expenses if paid by third parties. R.C. 2744.05(B)(1) and (C)(1). However, this in no way eliminates the *duty* that a political subdivision may have to a potential claimant, but rather sets a limit on what their damages may be. This is a crucial distinction that should not be overlooked.

The legislature clearly did not intend to reduce the duty imposed on political subdivisions to keep the roads in repair and free of obstructions.

#### THE CURRENT CONSTRUCTION

The Tenth District Court of Appeals in *Walters v. City of Columbus supra* concluded that the phrase “mandated by Ohio Manual of Uniform Traffic Control Devices” as contained in R.C. 2744.01(H) means that, unless the Department of Transportation in the manual says a stop sign “shall be used,” it is not part of the highway, thereby eliminating the exception of statutory immunity for the City of Findlay and the like. This case and its holding has been followed by many others and particularly *Darby v. City of Cincinnati*, 1<sup>st</sup> District Hamilton No. C-130430, 2014-Ohio-2426, and *Yonkings v. Piwinski et al.*, 10<sup>th</sup> District Court of Claims Nos. 11AP-07 & 11AP-09, 2011-Ohio-6232. All of these courts have inexplicably held that the OMUTCD is devoid of any language indicating that stop sign placement at an intersection is ever mandated.

## THE PROBLEM WITH THE CONSTRUCTION

If the purpose of the exception to statutory immunity is to require the city to protect the public using its roadways, then the holdings cited in the cases across the state that have addressed the issue thus far produce results completely contradictory of this intended purpose. In essence, they would allow the city to completely stop using stop signs at intersections like Wilson Street crossing Sandusky Street. Even if it were of a mind to actually put up a stop sign, the city can obscure it from drivers with buildings, trees, other signs, or whatever without the fear of liability. Such would defy common sense and practice.

The dissenting opinion in the case before this Court today squarely points to the obvious error in the *Walters supra* construction by pointing out that the legislature, via R.C. 4511.65, made the erection of traffic control devices at through highways designated as all state highways mandatory for political subdivisions such as the City of Findlay.

Further, this line of cases suggest a construction which renders the statute unconstitutional as an impermissible delegation of authority to the Department of Transportation to determine when a political subdivision is immune and when it is not. Article II, Section 1 of the Ohio Constitution provides "that the legislative power of the state shall be vested in a General Assembly consisting of a Senate and House of Representatives..." The Ohio Supreme Court has long recognized that, under certain circumstances, the Ohio legislature may delegate its power without running afoul of the constitution so long as it establishes the policy of the law by adopting standards. *Matz v. J.L. Curtis Cartage Co.*, 7 N.E. 2d 220, 132 Ohio St. 271 (1937). In R.C. 4511.09, the legislature provided the standard upon which the Department of Transportation should adopt a

manual and specifications for a uniform system of traffic control devices by using the known standard at the time approved by the American Association of State Highway Officials. Nowhere, however, did the legislature ever establish a standard that the Department of Transportation could use to determine if immunity should apply or not. R.C. 4511.09 and R.C. 4511.11 establish the traffic control devices that can be used in Ohio.

To avoid the problem of the conflict with R.C. 4511.65 and improper delegation, the courts should construe the use of the word “mandated” in R.C. 2744.01(H) to mean that the signs set forth in the OMUTCD are the only traffic control devices allowed in Ohio. Such an interpretation also avoids the absurd result problem that is so clear in the current construction.

#### **TRAFFIC CONTROL DEVICES MANDATED BY THE OHIO MANUAL OF UNIFORM TRAFFIC CONTROL DEVICES**

The 2005 version of the OMUTCD contains a description of each device that can be used on Ohio’s roadways and at Section 1A.10:

##### “Interpretations, Experimentations, Changes, and Interim Approvals Standard.

Design, application and placement of traffic control devices other than those adopted in this manual shall be prohibited unless the provisions of this section are followed.”<sup>1</sup>

The manual then provide lists with specifications, as in most cases, with pictures of the devices “mandated”.

The manual at Section 1A.10 also provides detailed instructions and criteria for testing and approval of changes to existing devices or approval of new devices.

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<sup>1</sup> The entire manual is available at [http://www.dot.state.oh.us/Divisions/Engineering/Roadway/DesignStandards/traffic/OhioMUTCD/Pages/OMUTCD2012\\_current\\_default.aspx](http://www.dot.state.oh.us/Divisions/Engineering/Roadway/DesignStandards/traffic/OhioMUTCD/Pages/OMUTCD2012_current_default.aspx) along with the updated 2012 version.

Appellants submit that the only interpretation that can be given to the words “mandated by the Ohio Manual of Uniform Traffic Control Devices” contained in R.C. 2744.01(H) is that once the devices are approved for use, they constitute the devices mandated by the manual, and when used become part of the highway.

Remember, to use a device not so mandated is a violation of R.C. 4511.11.

Such interpretation eliminates all the defects of the *Walters supra* interpretations described herein above and the obvious conflict between the manual and R.C. 4511.65.

The Department of Transportation will be doing its job by providing the devices to be used to regulate, warn and guide traffic and the legislature will have determined when the exception to immunity exists.

#### **ARGUMENT IN SUPPORT OF PROPOSITION OF LAW NO. 2**

#### **LOCAL AUTHORITIES ARE REQUIRED BY R.C. 4511.65 TO ERECT STOP SIGNS, YIELD SIGNS, OR TRAFFIC CONTROL DEVICES AT ALL INTERSECTIONS WITH STATE ROUTES UNDER THEIR JURISDICTION.**

R.C. 4511.65 requires the installation of traffic control devices at the intersection of all through highways whether it be a stop sign, yield sign, or traffic signals.

Because these traffic control devices are “mandated” by statute, they are part of the highway.

There are additional sections of the Revised Code making specific traffic control devices mandatory without regard to interpretation of the OMUTCD:

R.C. 4511.61(C)(1) The Department and local authorities shall erect stop signs at a railroad highway grade crossing in either of the following circumstances;

- (a) New warning devices that are not active grade crossing warning devices are being installed at the grade crossing, and railroad

crossbucks were the only warning devices at the grade crossing prior to the installation of the new warning devices.

(b) The grade crossing is constructed after the effective date of this amendment and only warning devices that are not active grade crossing warning devices are installed at the grade crossing.

(2) Division (C)(1) of this section does not apply to a railroad highway grade crossing that the director of transportation has exempted from the division because of traffic flow or other considerations or factors.

### **ARGUMENT IN SUPPORT OF PROPOSITION OF LAW NO. 3**

#### **TRAFFIC CONTROL DEVICES REQUIRED BY R.C. 4511.65 ARE PART OF THE PUBLIC ROADS AS DEFINED IN R.C. 2744.01(H).**

The Third District Court of Appeals in the case cited the following from the manual as it existed:

Sections 2B.04-06 of the OMUTCD regulate the use and maintenance of stop signs. Specifically, Section 2B.05, entitled "STOP Sign applications," states:

Guidance:

STOP signs *should* be used if engineering judgment indicates that one or more of the following conditions exist:

- A. Intersection of a less important road with a main road where application of the normal right-of-way rule would not be expected to provide reasonable compliance with the law;
- B. Street entering a through highway or street (O.R.C. Section 4511.65 provides information on through highways (see appendix B2));
- C. Unsignalized intersection in a signalized area; and/or
- D. High speeds, restricted view, or crash records indicate a need for control by the STOP sign.

(Emphasis added.) The use of the word "should" instead of the word "shall" indicates that stop signs like the one at issue here are not mandatory. Rather, they are discretionary. Because the decision to erect the stop sign was

discretionary. We find that it was not mandated by the OMUTCD. Thus, the stop sign does not fall under the definition of “public road.”

*Bibler v. Stevenson*, 3<sup>rd</sup> Dist. Hancock No. 5-14-29, 2015-Ohio-3171, ¶23. This language directly conflicts with R.C. 4511.65 which very succinctly says “shall be erected.”

Third District Judge Willamowski, a former member of the Ohio House of Representatives from 1997 to 2006, in his dissent opines:

While I agree with the majority that not all traffic control devices are mandated by the OMUTCD, in this case, a traffic control device was mandated at this intersection by statute, which the majority acknowledges. See R.C. 4511.65 and ¶13. No administrative agency has the authority to pass rules which contradict a statutory mandate. *Williams v. Spitzer Autoworld Canton, L.L.C.* 122 Ohio St. 3<sup>rd</sup> 546, 2009-Ohio-3554, 913 N.E. 2<sup>nd</sup> 410, ¶18. Although the OMUTCD appears to make the location of the traffic control device optional, in this case, at this intersection, the statute says they are mandatory. The City of Findlay had the option of which particular traffic control device to use at this intersection and could have chosen something other than a “Stop” sign, such as a flashing red light, but it did not have an option as to whether a traffic control device was placed at this intersection. To follow the logic of the majority, no specific traffic control device would ever be mandated merely because the OMUTCD uses the word “should” instead of “shall”. This despite the fact that R.C. 4511.65 clearly mandates a traffic control device be placed at locations such as the intersection in this case. Once the City of Findlay chose the “Stop” sign, in lieu of any other traffic control device, as the traffic control device to be used at the intersection in question, that “Stop” sign became the mandated traffic control device. That makes it part of the public road.”

*Bibler v. Stevenson* 2015-Ohio-3171, ¶35.

When the legislature says “shall” the Director of Highways cannot override by saying “should.”

Respectfully submitted,

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William E. Clark

COUNSEL FOR APPELLANT,  
GARY L. BIBLER, ET AL.

**CERTIFICATE OF SERVICE**

I certify that a copy of this Notice of Appeal was sent by ordinary U.S. mail to Donald Rasmussen, Attorney for Appellee City of Findlay, 318 Dorney Plaza, Rm. 310, Findlay, Ohio 45840, by Regular U.S. Mail, on the 26<sup>th</sup> day of October, 2015.

A handwritten signature in black ink, appearing to read "W E Clark", written over a horizontal line.

William E. Clark

COUNSEL FOR APPELLANT,  
GARY L. BIBLER, ET AL.

## **APPENDIX**

IN THE COURT OF APPEALS OF OHIO  
THIRD APPELLATE DISTRICT  
HANCOCK COUNTY



GARY L. BIBLER, ET AL.,

PLAINTIFFS-APPELLANTS,

CASE NO. 5-14-29

v.

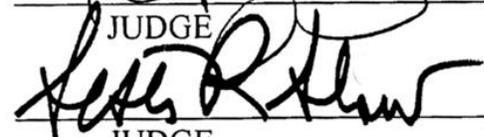
JILL D. STEVENSON, ET AL.,

JUDGMENT  
ENTRY

DEFENDANTS-APPELLEES.

For the reasons stated in the opinion of this Court, the assignment of error is overruled and it is the judgment and order of this Court that the judgment of the trial court is affirmed with costs assessed to Appellants for which judgment is hereby rendered. The cause is hereby remanded to the trial court for execution of the judgment for costs.

It is further ordered that the Clerk of this Court certify a copy of this Court's judgment entry and opinion to the trial court as the mandate prescribed by App.R. 27; and serve a copy of this Court's judgment entry and opinion on each party to the proceedings and note the date of service in the docket. See App.R. 30.

  
\_\_\_\_\_  
JUDGE  
  
\_\_\_\_\_  
JUDGE

WILLAMOWSKI, J., DISSENTS  
\_\_\_\_\_  
JUDGE

DATED: September 14, 2015

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Clerk  
HANCOCK COUNTY, OHIO

**IN THE COURT OF APPEALS OF OHIO  
THIRD APPELLATE DISTRICT  
HANCOCK COUNTY**

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**GARY L. BIBLER, ET AL.,**

**PLAINTIFFS-APPELLANTS,**

**CASE NO. 5-14-29**

**v.**

**JILL D. STEVENSON, ET AL.,**

**OPINION**

**DEFENDANTS-APPELLEES.**

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**Appeal from Hancock County Common Pleas Court  
Trial Court No. 2013 CV 243**

**Judgment Affirmed**

**Date of Decision: September 14, 2015**

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**APPEARANCES:**

*William E. Clark* for Appellants

*Donald J. Rasmussen* for Appellee, City of Findlay

**ROGERS, P.J.**

{¶1} Plaintiffs-Appellants, Gary Bibler and Yvonne Bibler (collectively “the Biblers”), appeal the judgment of the Court of Common Pleas of Hancock County granting summary judgment in favor of Defendant-Appellee, the City of Findlay (“the City”). On appeal, the Biblers argue that the trial court erred in granting the City’s motion for summary judgment because sovereign immunity was not applicable in this case. For the reasons that follow, we affirm the judgment of the trial court.

{¶2} The facts of this case are undisputed. On May 27, 2011, Gary Bibler and Jill Stevenson were involved in a two-vehicle accident. The accident occurred at the corner of Sandusky Street and Wilson Street in Findlay, Ohio. Stevenson failed to stop at a stop sign at the intersection and collided with Bibler who had the right of way. The stop sign controlling the northbound traffic on Wilson Street at the intersection was obscured by tree foliage. Because of this, Stevenson claimed she did not see the stop sign until it was too late.

{¶3} On May 17, 2013, the Biblers filed a complaint against the City and Stevenson. In it, they alleged that both Stevenson and the City were liable for negligence. Specifically, they alleged that Stevenson was negligent for failing to stop at a stop sign, which caused the accident and that the City was negligent for allowing the view of the stop sign to be obstructed. On June 18, 2013, the City filed its answer

denying the Biblers' allegations and pleaded numerous affirmative defenses, including sovereign immunity pursuant to R.C. 2744.01, et seq.

{¶4} On December 6, 2013, the City filed a motion for summary judgment. In the motion, the City argued that it was immune from liability pursuant to R.C. 2744.01, et seq. On December 30, 2013, Stevenson filed her memorandum in opposition. On January 15, 2014, the Biblers filed their memorandum in opposition of the City's motion. In addition to the three memoranda, the trial court also possessed the complete depositions of Stevenson and Officer Kevin Spieker of the Findlay Police Department.

{¶5} On April 8, 2014, the trial court granted the City's motion. It found that "Officer Kevin Spieker of the Findlay Police Department investigated the accident and testified that he felt there was enough of a view obstruction that something should be done about the tree noting that an accident had previously occurred at the intersection on September 13, 2010, less than nine months prior to [this action] \* \* \*." (Docket No. 58, p. 2). However, it found that the City was a political subdivision engaged in a governmental function and that no exception to the statute applied.

{¶6} On April 23, 2014, the Biblers filed a motion for reconsideration of the trial court's decision to grant the City summary judgment. The trial court denied the motion and affirmed its previous decision awarding the City summary judgment on May 14, 2014.

{¶7} After the City was dismissed from the case, the Biblers and Stevenson settled the remaining claims. On September 16, 2014, the trial court rendered a judgment entry dismissing the case.

{¶8} The Biblers filed this timely appeal, presenting the following assignment of error for our review.

*Assignment of Error*

**THE TRIAL COURT ERRED IN GRANTING SUMMARY JUDGMENT TO THE DEFENDANT/APPELLEE, THE CITY OF FINDLAY, ON ITS CLAIM OF GOVERNMENTAL IMMUNITY.**

{¶9} In their sole assignment of error, the Biblers argue that the trial court erred by granting the City's motion for summary judgment. Specifically, they claim that an exception applies to the general rule that political subdivisions enjoy immunity while engaging in either governmental or proprietary functions. We disagree.

*Summary Judgment*

{¶10} An appellate court reviews a summary judgment order de novo. *Hillyer v. State Farm Mut. Auto. Ins. Co.*, 131 Ohio App.3d 172, 175 (8th Dist.1999). Accordingly, a reviewing court will not reverse an otherwise correct judgment merely because the lower court utilized different or erroneous reasons as the basis for its determination. *Diamond Wine & Spirits, Inc. v. Dayton Heidelberg Distrib. Co., Inc.*, 148 Ohio App.3d 596, 2002-Ohio-3932, ¶ 25 (3d Dist.), citing *State ex rel. Cassels v. Dayton City School Dist. Bd. of Edn.*, 69 Ohio St.3d 217, 222 (1994). Summary judgment is appropriate when, looking at the evidence as a whole: (1) there is no genuine

issue as to any material fact, and (2) the moving party is entitled to judgment as a matter of law. Civ.R. 56(C). In conducting this analysis, the court must determine “that reasonable minds can come to but one conclusion and that conclusion is adverse to the party against whom the motion for summary judgment is made, [the nonmoving] party being entitled to have the evidence or stipulation construed most strongly in the [nonmoving] party’s favor.” *Id.* If any doubts exist, the issue must be resolved in favor of the nonmoving party. *Murphy v. City of Reynoldsburg*, 65 Ohio St.3d 356, 358-359 (1992).

{¶11} The party moving for summary judgment has the initial burden of producing some evidence which demonstrates the lack of a genuine issue of material fact. *Dresher v. Burt*, 75 Ohio St.3d 280, 292 (1996). In doing so, the moving party is not required to produce any affirmative evidence, but must identify those portions of the record which affirmatively support his argument. *Id.* at 292. The nonmoving party must then rebut with specific facts showing the existence of a genuine triable issue; he may not rest on the mere allegations or denials of his pleadings. *Id.*; Civ.R. 56(E). Here, the facts are undisputed. Rather, the parties disagree on an issue of law.

*Reconciling R.C. 4511.65 & R.C. 2744.02(B)(3)*

{¶12} This court acknowledges that the requirements of R.C. 4511.65 make situations like this case confusing. R.C. 4511.65 reads, in part, “All state routes are hereby designated as through highways, provided that *stop signs \* \* \* shall* be erected at all intersections with such through highways \* \* \*.” (Emphasis added.)

{¶13} It is undisputed that East Sandusky Street in Findlay is also State Route 586, which makes East Sandusky Street a through highway. Thus, under R.C. 4511.65, a stop sign or other suitable traffic control device was required to be located at the intersection of East Sandusky Street and Wilson Street.

{¶14} R.C. 2744.02(B)(3) is part of the political subdivision immunity statute and provides that immunity will not apply if the state negligently fails to repair “public roads” or remove “obstructions” from “public roads.” The definition of “public roads,” stated *infra*, includes through highways, but not the traffic control devices located at those intersections. *See* R.C. 2744.01(H). Rather, “public roads” only includes those traffic control devices that are *mandated* by the Ohio manual of uniform traffic control devices (“OMUTCD”). *Id.* Under R.C. 2744.02(B)(3), not all stop signs are mandated. Therefore, it is possible to have the same stop sign considered mandatory under R.C. 4511.65, but not considered mandatory under R.C. 2744.02(B)(3). Only one of these statutes involves sovereign immunity, and since that is the issue here, R.C. 2744.02(B)(3) is controlling.

#### *Political Subdivision Immunity*

{¶15} R.C. Chapter 2744 governs political subdivision tort liability and immunity. *Brady v. Bucyrus Police Dept.*, 194 Ohio App.3d 574, 2011-Ohio-2460, ¶ 44 (3d Dist.). To determine whether a political subdivision is entitled to immunity under R.C. Chapter 2744, a reviewing court must engage in a three-tiered analysis. *Ward v. City of Napoleon*, 3d Dist. Henry No. 7-07-14, 2008-Ohio-4643, ¶ 11, citing *Cramer v. Auglaize*

*Acres*, 113 Ohio St.3d 266, 2007-Ohio-1946, ¶ 14. First, the court must determine whether the entity claiming immunity is a political subdivision and whether the alleged harm occurred in connection with either a governmental or a proprietary function. R.C. 2744.02(A)(1); *Cramer* at ¶ 14. The general rule is that political subdivisions are not liable in damages. *Hubbard v. Canton City School Bd. of Edn.*, 97 Ohio St.3d 451, 2002-Ohio-6718, ¶ 10, *superseded by statute on other grounds as stated in Roberts v. Switzerland of Ohio Local School Dist.*, 7th Dist. Monroe No. 12MO8, 2014-Ohio-78 ¶ 16. If the entity is a political subdivision entitled to immunity, then the court must determine whether any of the exceptions enumerated in R.C. 2744.02(B) apply. *Id.* at ¶ 12, citing *Cater v. City of Cleveland*, 83 Ohio St.3d 24, 28 (1998), *abrogated on other grounds by M.H. v. City of Cuyahoga Falls*, 134 Ohio St.3d 65, 2012-Ohio-5336, ¶ 11. If any of the exceptions apply, then the political subdivision can reinstate its immunity by showing that an R.C. 2744.03 defense applies. *Cater* at 28.

{¶16} Here, the Biblers do not dispute that the City is a political subdivision and qualifies for general immunity. Therefore, we find that the city has satisfied the first tier and is entitled to immunity under R.C. 2744.02(A)(1).

{¶17} Moving to the second tier, R.C. 2744.02(B) removes the general statutory presumption of immunity for a political subdivision 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), and (5) express imposition of liability by statute, R.C. 2744.02(B)(5).

{¶18} Once general immunity has been established by the political subdivision, the burden lies with the plaintiff to show that one of the recognized exceptions applies. *Brady*, 2011-Ohio-2460, at ¶ 47, citing *Maggio v. City of Warren*, 11th Dist. Trumbull No. 2006-T-0028, 2006-Ohio-6880, ¶ 38.

{¶19} The Biblers argue that the stop sign involved in the accident falls under the definition of “public roads,” which would strip the City of immunity under R.C. 2744.02(B)(3). Thus, the crux of this case is whether the stop sign located at the intersection of Sandusky Street and Wilson Street is included in the definition of “public roads,” which requires this court to look at the language of the statute. We are mindful that when “the language of a statute is plain and unambiguous and conveys a clear and definite meaning, there is no need to apply rules of statutory interpretation.” *State v. Taylor*, 114 Ohio App.3d 416, 422 (2d Dist.1996).

{¶20} “Public Roads” are defined as “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.*” (Emphasis added.) R.C. 2744.01(H). The definition of “traffic control devices” includes stop signs like the

one in this case. See R.C. 4511.01(QQ). At the time of the accident, the relevant edition of the OMUTCD was the 2005 edition, second revision.

{¶21} The question then becomes what is the meaning of the word “mandated” in reference to the OMUTCD. The Biblers argue that “mandated” means any traffic control device that is approved for use. Specifically, once a stop sign is approved for use, it constitutes a device mandated by the OMUTCD and is considered part of the public roadway. However, the City argues that “mandated” means only traffic control devices that must be erected in a specific location under the OMUTCD.

{¶22} If we were to adopt the Biblers’ interpretation, then all stop signs would be considered mandated by the OMUTCD, unless the signs did not match the designs as provided in the manual. We do not find this argument persuasive. We note that the General Assembly explicitly excluded “traffic control devices” from the definition of a “public road” unless they were mandated by the OMUTCD. *Walters v. City of Columbus*, 10th Dist. Franklin No. 07AP-917, 2008-Ohio-4258, ¶ 20. “By its clear language, it is evident that the General Assembly did not intend all erected traffic control devices to be considered part of a public road.” *Id.* The statute’s language is quite clear and unambiguous. It differentiates between traffic control devices that are and are not mandated by the OMUTCD.

The OMUTCD contains mandatory, advisory, and permissive conditions, differentiated by the use of the terms “shall, should, and may.” Standards using the word “shall” are considered mandatory. Standards using the word “should” are considered to be advising, but not mandating, the particular

signage or other device. Standards using the word “may” carry no requirement or recommendation.

*Webb v. Edwards*, 165 Ohio App.3d 158, 2005-Ohio-6379, ¶ 23 (4th Dist.).

{¶23} Sections 2B.04-06 of the OMUTCD regulate the use and maintenance of stop signs. Specifically, Section 2B.05, entitled “STOP Sign Applications,” states:

Guidance:

STOP signs *should* be used if engineering judgment indicates that one or more of the following conditions exist:

- A. Intersection of a less important road with a main road where application of the normal right-of-way rule would not be expected to provide reasonable compliance with the law;
- B. *Street entering a through highway or street* (O.R.C. Section 4511.65 provides information on through highways (see Appendix B2));
- C. Unsignalized intersection in a signalized area; and/or
- D. High speeds, restricted view, or crash records indicate a need for control by the STOP sign.

(Emphasis added.) The use of the word “should” instead of the word “shall” indicates that stop signs like the one at issue here are not mandatory. Rather, they are discretionary. Because the decision to erect the stop sign was discretionary, we find that it was not mandated by the OMUTCD. Thus, the stop sign does not fall under the definition of “public road.”

{¶24} Although the OMUTCD does not contain mandatory language in regard to the erection of stop signs, it does contain mandatory language regarding stop signs in other aspects. Section 2B.06 of the OMUTCD, entitled STOP Sign Placement, reads,

**Standard:**

**The STOP sign shall be installed on the right side of the approach to which it applies. When the STOP sign is installed at this required location and the sign visibility is restricted, a Stop Ahead sign (see Section 2C.29) shall be installed in advance of the STOP sign.**

**The STOP sign shall be located as close as practical to the intersection it regulates, while optimizing its visibility to the road user it is intended to regulate.**

**STOP signs and YIELD signs shall not be mounted on the same post.**

(Emphasis sic.)

{¶25} The OMUTCD does not suggest that all traffic control devices are discretionary. For example, a YIELD sign is required to be placed at the entrance to every roundabout. See OMUTCD Sec. 2B.09.

{¶26} The Biblers also argue that although the decision to erect the stop sign may have been discretionary, once the decision was made, the City had a duty to maintain the sign. In support of this argument, the Biblers cite to *Franks v. Lopez*, 69 Ohio St.3d 345 (1994). In *Franks*, the Supreme Court of Ohio interpreted the former R.C. 2744.02(B)(3), which provided that “political subdivisions are liable for injury caused ‘by their failure to keep public roads, highways, [and] streets \* \* \* within the political subdivisions open, in repair, and *free from nuisance.*’ ” (Emphasis added.) *Franks* at 347, quoting former R.C. 2744.02(B)(3). The Court found that the failure to maintain a sign may constitute an actionable nuisance claim. *Id.* at 348. Further, it found that

Overhanging branches and foliage which obscure traffic signs, malfunctioning traffic signals, signs which have lost their capacity to

reflect, or even physical impediments such as potholes, are easily discoverable, and the elimination of such hazards involves no discretion, policy-making or engineering judgment. The political subdivision has the responsibility to abate them and it will not be immune from liability for its failure to do so.

*Id.* at 349.

{¶27} However, *Franks* was decided prior to the amendments of R.C. 2744.01(H) and 2744.02(B)(3), which became effective in April 2003. The amendments defined “public roads” and removed the nuisance language and replaced it with the current “obstruction” language. The Supreme Court of Ohio has found that this replacement was significant. *See Howard v. Miami Twp. Fire Div.*, 119 Ohio St.3d 1, 2008-Ohio-2792. The Court stated, “We are persuaded that the legislature’s action in amending R.C. 2744.02(B)(3) was not whimsy but a deliberate effort to limit political subdivisions’ liability for injuries and deaths on their roadways.” *Id.* at ¶ 26.

{¶28} Several other appellate courts have declined to follow *Franks* for this reason. *See Darby v. City of Cincinnati*, 1st Dist. Hamilton No. C-130430, 2014-Ohio-2426, ¶ 19; *Rastaedt v. City of Youngstown*, 7th Dist. Mahoning No. 12MA82, 2013-Ohio-750, ¶ 25; *Shope v. City of Portsmouth*, 4th Dist. Scioto No. 11CA3459, 2012-Ohio-1605, ¶ 29; *Hale v. CSX Transp.*, 2nd Dist. Montgomery Nos. 22546, 22547, 22592, 2008-Ohio-5644, ¶ 49; *Walters*, 2008-Ohio-4258 at ¶ 18 (10th District).

{¶29} Only the Sixth District has found *Franks* to be relevant to this analysis. *See Butler v. City Comm.*, 6th Dist. Erie No. E-10-026, 2011-Ohio-1143, ¶ 13. However, the Sixth District did not address the 2003 amendment of R.C. 2744.02(B)(3) in its opinion.

*See Darby* at ¶ 18. For this reason, we decline to adopt the Sixth District's view. Rather, we join the numerous other appellate courts that have found *Franks* is no longer applicable to R.C. 2744.02(B)(3).

{¶30} At first glance, it may appear that this court and the other appellate courts are finding that the erection of stop signs is never required. That is certainly not the case. R.C. 4511.65 provides that stop signs must be erected under certain scenarios. This opinion is limited to the narrow question of whether the stop sign in this case is considered a "public road" for the purposes of sovereign immunity, and the answer is no.

{¶31} Accordingly, the Biblers' sole assignment of error is overruled.

{¶32} Having found no error prejudicial to the Biblers in the particulars assigned and argued, we affirm the judgment of the trial court.

***Judgment Affirmed***

**SHAW, J., concurs.**

**WILLAMOWSKI, J., Dissents.**

{¶34} I respectfully dissent from the majority opinion and would reverse the trial court's granting of summary judgment. While I agree with the majority that not all traffic control devices are mandated by the OMUTCD, in this case, a traffic control device was mandated at this intersection by statute, which the majority acknowledges. *See* R.C. 4511.65 and ¶ 13. No administrative agency has the authority to pass rules which contradict a statutory mandate. *Williams v. Spitzer Autoworld Canton, L.L.C.*, 122 Ohio

St.3d 546, 2009-Ohio-3554, 913 N.E.2d 410, ¶18. Although the OMUTCD appears to make the location of the traffic control device optional, in this case, at this intersection, the statute says they are mandatory. The City of Findlay had the option of which particular traffic control device to use at this intersection and could have chosen something other than a “Stop” sign, such as a flashing red light, but it did not have an option as to whether a traffic control device was placed at this intersection. To follow the logic of the majority, no specific traffic control device would ever be mandated merely because the OMUTCD uses the word “should” instead of “shall”. This despite the fact that R.C. 4511.65 clearly mandates a traffic control device be placed at locations such as the intersection in this case. Once the City of Findlay chose the “Stop” sign, in lieu of any other traffic control device, as the traffic control device to be used at the intersection in question, that “Stop” sign became the mandated traffic control device. That makes it part of the public road.

{¶35} Additionally, even if the placement of the “Stop” sign was not mandated, a “Stop Ahead” sign was mandated if the visibility was restricted. OMUTCD Section 2B.06 and ¶ 25. Since no “Stop Ahead” sign was present and there was a question of fact regarding the visibility of the “Stop” sign, a mandatory traffic control device was missing. Thus, the City may not be immune from liability in this case. A reasonable jury could conclude, viewing the evidence in a light most favorable to the injured party, that the City failed to maintain the public road by keeping the view of the “Stop” sign unobstructed or by failing to place a “Stop Ahead” sign as required by OMUTCD, in

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which case, the City of Findlay would not be immune from liability. Therefore, I would reverse the trial court's grant of summary judgment and remand the matter for trial.

/jlr

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CLETON, OHIO  
CLERK OF COURT

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

**GARY L. BIBLER, et al.,**

**Case No. 2013 CV 243**

**Plaintiffs,**

**vs.**

**DECISION &  
JUDGMENT ENTRY**

**JILL D. STEVENSON, et al.,**

**Defendants.**

**April 8, 2014**

\_\_\_\_\_/

This day this cause came before the Court for decision and ruling on the motion for summary judgment filed by Defendant City of Findlay ("Findlay") through its counsel of record Donald J. Rasmussen on December 6, 2013. Defendant Jill D. Stevenson ("Stevenson") filed a Memorandum in Opposition to Defendant City of Findlay's Motion for Summary Judgment on December 30, 2013 through her counsel of record Mark P. Seitzinger. As a part of Defendant Stevenson's memorandum in opposition, the Court has excerpts from the depositions of Defendant Stevenson and Kevin Spieker, a police officer for Defendant, City of Findlay, Ohio.

Plaintiffs filed a Motion for Extension of Time to file responsive pleadings on December 23, 2013, through their counsel of record William E. Clark. The Court granted this motion and allowed Plaintiffs until January 15, 2014, to file a response. Plaintiffs filed their Response to City of Findlay's Motion for Summary Judgment on January 15, 2014. In addition, the Court has the complete deposition of Defendant Stevenson, taken on October 25, 2013, and filed of record on

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February 11, 2014, and the complete deposition of Kevin Spieker, taken on October 25, 2013, and filed of record on January 15, 2014.

**STATEMENT OF THE CASE**

This matter relates to an automobile accident on May 27, 2011, wherein Plaintiff Gary L. Bibler ("Bibler") was operating his 1991 Ford F150 pick-up truck eastbound on East Sandusky Street in the City of Findlay and Defendant Jill Stevenson was the owner and operator of a 2002 Buick Regal traveling Northbound on Wilson Street. Plaintiff alleges that Defendant Stevenson failed to stop at a stop sign and collided with Plaintiff Bibler who enjoyed the right-of-way. Plaintiffs have brought suit against Defendant Stevenson alleging her negligence in failing to stop at the intersection and against the City of Findlay alleging that they negligently permitted foliage from a tree, planted within the street right-of-way, to obscure the stop sign at the intersection of Wilson Street and East Sandusky Street in the city of Findlay. Officer Kevin Spieker of the Findlay Police Department investigated the incident after the accident and testified that he felt there was enough of a view obstruction that something should be done about the tree, noting that an accident had previously occurred at that intersection on September 13, 2010, less than nine months prior to the accident which forms the basis of Plaintiffs' complaint.

Findlay asserts that it is entitled to summary judgment pursuant to Ohio Revised Code section 2744, the political subdivision immunity statute in that it is a political subdivision as defined in R.C. §2744.01(F) and engaged in a governmental function pursuant to R.C. §2744.01(C)(2)(e). Defendant Findlay asserts that once general immunity has been established the burden lies with the opposing party to show one of the recognized exceptions to immunity exists as are outlined in R.C. §2744.02(B).

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Stevenson alleges that the City of Findlay has failed to set forth evidence in support of its motion as required by Civ.R. 56 and that the City of Findlay is not immune under R.C. §2744 because 2744.02(B)(3) provides that a political subdivision is liable for injury caused by negligent failure to remove obstructions from public roads. Bibler asserts that the City of Findlay is not entitled to summary judgment because it has failed to meet its evidentiary burden as required by Civ.R. 56 and further that pursuant to R.C. §2744.02(B)(3) an exception exists to the statutory grant of immunity.

#### **STANDARD OF REVIEW**

The requirements and parameters of summary judgment are set forth in Civil Rule 56 of the Ohio Rules of Civil Procedure. Civil Rules 56(A) and (B) provide that both parties, those seeking affirmative action and defending parties, are permitted to move for summary judgment. The Ohio Supreme Court has held that Civil Rule 56(A) makes summary judgment available to a “party seeking to recover upon a claim” while Civil Rule 56(B) makes summary judgment available to a “party *against whom* a claim is asserted.” *Robinson v. B.O.C. Group* (1998), 81 Ohio St.3d 361, 367, 691 N.E.2d 667, 671 (emphasis in original).

The evidence that may be set forth, and how that evidence must be construed by the Court when determining the appropriateness of summary judgment, is set forth in Civil Rule 56(C). This portion of the Rule states that:

Summary judgment shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, written admissions, affidavits, transcripts of evidence, and written stipulations of fact, if any, timely filed in the action, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. No evidence or stipulation may be considered except as stated in this rule. A summary judgment shall not be rendered unless it appears from the evidence or stipulation, and only from the evidence or stipulation, that reasonable minds can come to but one conclusion and that conclusion is adverse to the party against whom the motion for summary

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judgment is made, that party being entitled to have the evidence or stipulation construed most strongly in the party's favor.

Civ. R. 56(C).

Any supporting or opposing affidavits must "be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify as to the matters stated in the affidavit." Civ. R. 56(E).

In interpreting Rule 56(C), the Ohio Supreme Court has stated that prior to summary judgment being granted, a court must determine that "(1) No genuine issue as to any material fact remains to be litigated; (2) the moving party is entitled to judgment as a matter of law; and (3) it appears from the evidence that reasonable minds can come to but one conclusion, and viewing such evidence most strongly in favor of the party against whom the motion for summary judgment is made, that conclusion is adverse to that party." *Temple v. Wean United, Inc.* (1977), 50 Ohio St.2d 317, 327, 364 N.E.2d 267, 274. The party moving for summary judgment bears the burden of establishing that no genuine issue of material fact exists. The moving party is also required to show, through some type of evidence specified in Civil Rule 56(C), that the "nonmoving party has no evidence to support [its] claims." *Dresher v. Burt* (1996), 75 Ohio St.3d 280, 293, 662 N.E.2d 264, 274. While the moving party is not required to present any affirmative evidence in support of its motion, it does bear "the initial responsibility of informing the trial court of the basis for that motion, and identifying those portions of the record before the trial court which demonstrate the absence of a genuine issue of fact on a material element of the nonmoving party's claim." *Dresher*, 75 Ohio St.3d at 292.

If the moving party is able to satisfy its initial burden, the nonmoving party is then required to fulfill its burden, outlined in Civil Rule 56(E). This burden requires that the nonmoving party present specific facts that show there is a genuine issue for trial. These facts

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are to be set forth using evidence specified in Rule 56(C). The nonmoving party may not rest on the mere allegations contained in its pleadings. *State ex rel. Burns v. Athens County Clerk of Courts* (1998), 83 Ohio St.3d 523, 524, 700 N.E.2d 1260, 1261.

### CONCLUSIONS OF LAW

#### **I. Civ.R. 56 Standard**

Plaintiff Bibler and Defendant Stevenson assert that the City of Findlay's motion for summary judgment should be denied because the City of Findlay has failed to put forth any evidence whatsoever in support of its position that it is entitled to the general immunity provided in R.C. §2744. Civ.R. 56(C) provides the following:

The motion shall be served at least fourteen days before the time fixed for hearing. The adverse party, prior to the day of hearing, may serve and file opposing affidavits. Summary judgment shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, written admissions, affidavits, transcripts of evidence, and written stipulations of fact, if any, timely filed in the action, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. No evidence or stipulation may be considered except as stated in this rule. *A summary judgment shall not be rendered unless it appears from the evidence or stipulation, and only from the evidence or stipulation, that reasonable minds can come to but one conclusion and that conclusion is adverse to the party against whom the motion for summary judgment is made, that party being entitled to have the evidence or stipulation construed most strongly in the party's favor.* A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

Civ.R. 56(C) (emphasis added).

The parties have conceded that the facts are largely undisputed. The motion for summary judgment before the Court depends not on a question of fact but upon a question of law: to wit,

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whether the City of Findlay is entitled to immunity pursuant to R.C. § 2744 under the facts which have been provided to this Court and are not in dispute from the depositions of Defendant Stevenson and police officer Spieker. The argument for summary judgment asserted by the City of Findlay stands on the factual background set forth in the pleadings, which may be reviewed by the Court when ruling on a motion for summary judgment pursuant to Civ.R. 56. The City of Findlay may assert that there is no genuine issue of material fact and it falls upon the responding parties to show with evidence outside of the pleadings that there exists a genuine issue of material fact and that reasonable minds may differ.

## **II. Political Subdivision Immunity**

“Under Ohio's Political Subdivision Tort Liability Act, codified under R.C. Chapter 2744, it is well-established that a reviewing court must engage in a three-tiered analysis to determine whether a political subdivision is entitled to immunity from civil liability.” *Contreras v. Village of Bettsville*, 3rd Dist. Seneca No. 13-10-48, 2011-Ohio-4178, ¶22 (citing *Hubbard v. Canton Cty. Sch. Bd. of Edn.*, 97 Ohio St.3d 451, 2002-Ohio-6718, 780 N.E.2d 543, ¶10) “The first tier of the analysis is to determine whether the entity claiming immunity is a political subdivision and whether the harm occurred in connection with a governmental or proprietary function.” *Id.* (citing R.C. 2744.02(A)(1); *Hubbard* at ¶10). “Generally, political subdivisions are not liable for damages in civil actions for the ‘injury, death, or loss to a 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.’” *Id.* (citing R.C. 2744.02(A)(1)).

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“However, the immunity established under R.C. 2744.02(A)(1) is not absolute; and the subdivision's immunity is subject to a list of exceptions under R.C. 2744.02(B)(1)-(5). Once general immunity has been established by the political subdivision, the burden lies with the plaintiff to show that one of the five exceptions under R.C. 2744.02(B) apply.” *Id.* (citations omitted). “Thus, if the entity is a political subdivision entitled to immunity under the first tier of the analysis, then the court must go to the second tier of the analysis and determine whether any of the exceptions to liability enumerated in R.C. 2744.02(B) apply.” *Id.* (citing *Hubbard* at ¶12). “If any of the exceptions to immunity are found to be applicable, then the political subdivision will lose its immunity. If this occurs, then the court must move on to the third tier of the analysis, where it must determine whether the political subdivision's immunity can be reinstated as long as the political subdivision proves one of the defenses to liability under R.C. 2744.03.” *Id.*

In the present case no one has disputed that the City of Findlay is a political subdivision, R.C. §2744.01(F), and that the regulation of the use of, and maintenance and repair of, roads, highways, streets, avenues, alleys . . . and public grounds” constitutes a “governmental function.” R.C. §2744.01(C)(2)(e). “Governmental functions” also includes the regulation and erection/non-erection of traffic signs. R.C. §2744.01(C)(2)(j). As such the Court finds that the City of Findlay has satisfied the first tier of analysis. The burden therefore shifts to the Defendant Stevenson and/or Plaintiff Bibler to show that one of the exceptions provided in R.C. §2744.02(B) apply.

Defendant Stevenson and Plaintiffs Bibler assert that the City of Findlay is not entitled to governmental immunity because of R.C. 2744.02(B)(3), which provides, in part, that “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

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public roads. . . ." See *Crabtree v. Cook*, 10th Dist. Franklin No. 10AP-343, 196 Ohio App.3d 546, 2011-Ohio-5612; *Todd v. City of Cleveland*, 8th Dist. No. 98333, 2013-Ohio-101. The City of Findlay points to *Howard v. Miami Twp. Fire Div.*, 119 Ohio St.3d 1, 2008-Ohio-2792 to support its position that R.C. §2744.02(B)(3) does not apply to the facts set forth in this matter.

In *Howard*, the Supreme Court of Ohio reviewed the recently amended R.C. §2744.02(B)(3), which previously required political subdivisions to keep roadways "free from nuisance" but now requires political subdivisions to "remove obstructions" from public roadways, and concluded that the term "obstruction" as used in R.C. §2744.02(B)(3) means "an obstacle that blocks or clogs the roadway and not merely a thing or condition that hinders or impedes the use of the roadway or that may have the potential to do so." *Howard* at ¶30. Defendant Stevenson and Plaintiff Bibler assert that the definition of "obstruction" used in *Howard* is unreasonably broad and also that the negligence of the City of Findlay arose from their failure to keep the intersection *in repair*.

It is important to note that the Plaintiffs assert that the City of Findlay negligently permitted foliage to block the view of a *stop sign*. The parties seemingly concur that a stop sign is considered part of "public roads" which would fall under R.C. §2744.02(B)(3). The Court notes that "public roads" as used in R.C. §2744.02(B)(3) 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.*" R.C. §2744.01(H) (emphasis added). Stop signs are included in the definition of "traffic control devices" set forth in R.C. §4511.01. There is no evidence as to whether the stop sign in question is mandated by the Ohio manual of traffic control devices since no party presented evidence of such to the Court. If the

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stop sign was not mandated, R.C. §2744.02(B)(3) would not apply and the City of Findlay would be entitled to immunity. See *Walters v. City of Columbus*, 10th Dist. No. 07AP-917, 2008-Ohio-4258, ¶23. If the stop sign was mandated then it would fall under a public road and R.C. §2744.02(B)(3) may apply. *Id.* In *Walters*, which the Court finds to be quite analogous to the facts presented in this matter, the plaintiff alleged that the city of Columbus was negligent in failing to remove an obstruction from the stop sign (overhanging tree branches) and in failing to maintain and repair a public road. The Court found, after review of the Ohio Manual of Traffic Control Devices (“OMUTCD”), found that the stop sign was not mandatory and therefore not within the definition of “public roads” as used in R.C. §2744.02(B)(3), so immunity applied.

The burden rests with the Plaintiffs Bibler and Defendant Stevenson to show that an exception to political subdivision immunity applies once the City of Findlay has shown that it is a political subdivision engaging in governmental functions. *Contreras* at ¶23 (citations omitted). It was therefore incumbent upon Plaintiffs Bibler and Defendant Stevenson to show that the traffic control device in question was mandatory under the OMUTCD and consequently within the definition of “public roads” as used in R.C. §2744.02(B)(3). Plaintiffs Bibler and Defendant Stevenson have failed to carry that burden. As a result the Court finds that the Defendant City of Findlay is entitled to political subdivision immunity pursuant to R.C. §2744.01(A)(1) and that there is no exception which applies.

#### CONCLUSION

The Defendant City of Findlay has satisfied the first tier of political subdivision immunity analysis and shown that it is entitled to immunity. The Plaintiff Bibler and Defendant Stevenson have failed to meet their burden of showing that an exception to immunity applies pursuant to R.C. §2744.02(B)(3). It is therefore **ORDERED, ADJUDGED AND DECREED**

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that Defendant City of Findlay's Motion for Summary Judgment is found well taken and granted.

The City of Findlay is therefore dismissed from this action with prejudice.

This matter shall proceed to trial between the remaining parties as scheduled on May 19, 2014, at 8:30 a.m.

All until further Order of the Court.

  
JOSEPH H. NIEMEYER, JUDGE

**CERTIFICATE OF SERVICE**

The undersigned does hereby certify that on April 8<sup>th</sup>, 2014, a time-stamped copy of the foregoing was delivered to counsel for the parties as follows:

Mark P. Seitzinger  
Brad A. Everhardt  
1850 PNC Bank Building  
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By Ordinary US Mail

William E. Clark  
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By placing a copy of same in his delivery box in the Clerk's Office

Don Rasmussen  
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By placing a copy of same in his delivery box in the Clerk's Office

  
Carol Pierce, Judicial Assistant

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HANCOCK COUNTY, OHIO  
FILED

2014 MAY 14 P 2:39

CATHY PROSSER, CLERK  
CLERK OF COURT

IN THE COMMON PLEAS COURT OF HANCOCK COUNTY, OHIO

GARY L. BIBLER, et al.,

Case No. 2013 CV 243

Plaintiffs,

vs.

**DECISION &  
ORDER**

JILL D. STEVENSON, et al.,

Defendants.

May 14, 2014

\_\_\_\_\_ /

This matter is before the Court for consideration and ruling on separate Motions for Reconsideration of the Court's Summary Judgment Decision filed by the Plaintiffs Gary L. Bibler and Yvonne Bibler on April 23, 2014 through their counsel of record William E. Clark, and by the Defendant Jill D. Stevenson on April 25, 2014, through her counsel of record Mark P. Seitzinger. The Defendant City of Findlay filed a response on April 30, 2014, through its counsel of record Donald J. Rasmussen.

The Court previously granted summary judgment in favor of the Defendant City of Findlay in an Entry filed April 8, 2014, after finding that sovereign immunity applied pursuant to R.C. §2744 and that the City of Findlay consequently could not be found liable as to the events of May 27, 2011. The Court determined that the Plaintiff Bibler and Defendant Stevenson failed to establish that an exception to the sovereign immunity statute applied. See *Hubbard v. Canton Cty. Sch. Bd. of Edn.*, 97 Ohio St.3d 451, 2002-Ohio-6718, ¶ 12.

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R 389-364

Bibler and Stevenson have moved this Court to reconsider its prior ruling, asserting that the language set forth in R.C. 2744.01(H) which provides that stop signs are not included in the definition of public roads unless they are “mandated by the Ohio manual of uniform traffic control devices (‘OMUTCD’)” is satisfied because the intersection in question mandates the placement of a traffic control device. Plaintiff asserts that R.C. §4511.65(A) mandates the placement of a stop sign or other traffic control device at an intersection of a through highway. When read in its entirety, R.C. §4511.65(A) also provides that the “mandatory” traffic control device may be omitted at the discretion of the director of transportation. R.C. 4511.65(A) does not mandate the placement of a stop sign or other traffic control device at the intersection in question. Moreover, R.C. §2744.01(H) provides that a stop sign or other traffic device constitutes a public road *only* if the traffic control device is mandated by the OMUTCD. R.C. §2744.01(H) (Emphasis added). No reference to R.C. §4511.65(A) is made within the sovereign immunity statutes.

Defendant Stevenson asserts that R.C. §4511.65 mandates the placement of a stop sign at a through highway and that Section 2B.05 of the OMUTCD entitled “STOP Sign Application” specifically incorporates the definition of a “through highway” under R.C. §4511.65- thus, the stop sign at issue is mandated. This argument is not an accurate representation of Section 2B.05. Section 2B.05 of the OMUTCD provides that stop signs *should* be used at a street entering a through highway, but this is clearly marked as guidance rather than a mandate. (Emphasis added). The mandates are located within the **Standard** section within Section 2B.05 of the OMUTCD. (Emphasis in original).

Upon review of this matter the Court finds that it appropriately applied the law to the facts as presented by the parties and that the City of Findlay is entitled to sovereign immunity

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pursuant to R.C. 2744. The Court concurs with the interpretation of the law as set forth in *Walters v. City of Columbus*, 10th Dist. No. 07AP-917, 2008-Ohio-4258, which provides that stop signs are not included within the definition of "public roads" as used in R.C. §2744.02(B)(3) unless they are mandated by the OMUTCD, and will follow the 10th District's interpretation in this action. *Walters* at ¶ 12. The Court has now reviewed the OMUTCD and finds that the stop sign in question is not mandated and therefore does not fall within the definition of a "public road" as used in R.C. §2744.02(B)(3). As such, Plaintiff Bibler and Defendant Stevenson have failed to establish the existence of an exception to the sovereign immunity statute and Defendant City of Findlay is entitled to summary judgment.

**CONCLUSION**

Based upon the foregoing analysis, it is therefore **ORDERED, ADJUDGED AND DECREED** that Plaintiff Gary L. Bibler and Defendant Jill D. Stevenson's Motions for Reconsideration are found not well taken and accordingly denied.

This matter shall proceed to mediation between the remaining parties as scheduled on May 19, 2014, at 9:30 a.m.

All until further Order of the Court.

  
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JOSEPH H. NIEMEYER, JUDGE

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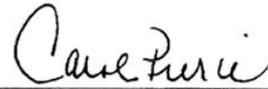
**CERTIFICATE OF SERVICE**

The undersigned does hereby certify that on May 14<sup>th</sup>, 2014, a time-stamped copy of the foregoing was delivered to counsel for the parties as follows:

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\_\_\_\_\_  
Carol Pierce, Judicial Assistant

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