

IN THE SUPREME COURT OF OHIO

GARY L. BIBLER, et al.,

Appellant,

vs.

JILL D. STEVENSON, et al.,

Appellee.

) Case No.: 2015-1737

)

) On Appeal from the Hancock County

) Court of Appeals, Third App. District

) Case No.: 5-14-29

)

)

BRIEF ON THE MERITS
APPELLEE, CITY OF FINDLAY

On Behalf of Appellant Gary L. Bibler:

WILLIAM E. CLARK
Supreme Court No.: 0006702
ZACHARY J. BARGER
Supreme Court No.: 0089304
DRAKE, PHILLIPS, KUINCLI & CLARK
301 South Main Street, Suite 4
Findlay, Ohio 45840
(419) 423-0242
(419) 423-0186 – fax

On Behalf of City of Findlay, Ohio:

WILLIAM F. SCHMITZ
Supreme Court No.: 0029952
ERIC M. ALLAIN
Supreme Court No.: 0081832
ALLAIN LEGAL, Ltd.
28906 Lorain Road, Suite 101
North Olmsted, Ohio 44070
(440) 249-0932
(440) 540-4538 – fax
wschmitz@ealegal.net
eallain@ealegal.net

DONALD RASMUSSEN
Supreme Court No.: 0022439
FINDLAY DIRECTOR OF LAW
318 Dorney Plaza, Room 310
Findlay, Ohio 45840
(419) 429-7338
(419) 429-7245 – fax

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STATEMENT OF CASE

The Appellants were injured in an automobile accident in Findlay, Ohio. They filed a lawsuit alleging negligence against Jill D. Stevenson driver of the other vehicle for failing to stop, and the City of Findlay (Findlay) for allegedly allowing foliage to obstruct vision of a stop sign. The Court of Common Pleas granted summary judgment on behalf of Findlay finding it to be immune under R.C. Chapter 2744, the Political Subdivision Tort Liability Act. Reconsideration was requested claiming that Findlay is mandated to install and maintain a stop sign by R.C. 4511.65, and is therefore liable in damages. The Motion for Reconsideration was denied.

The Appellants appealed the decision on immunity to the Hancock County Court of Appeals, Third Appellate District. The decision to extend immunity to Findlay was affirmed.

The Appellants timely secured jurisdiction in the Ohio Supreme Court.

STATEMENT OF FACTS

Because this case arises out of summary judgment, the facts alleged by the Plaintiffs/Appellants are accepted and construed in their favor.

Appellants were driving on Sandusky Street, Ohio State Route 568, in the City of Findlay, on May 27, 2011. Defendant, Jill D. Stevenson was driving on Wilson Street, which intersected with Sandusky Street. Stevenson negligently crossed Sandusky Street without stopping or yielding to the intersecting traffic, and collided with Appellants causing injury.

Stevenson claimed that she did not see the stop sign until it was too late to stop. A responding officer from the City of Findlay Police Department testified in deposition that in his opinion the view of the stop sign was obstructed by foliage, and that a prior accident occurred at the intersection on September 13, 2010.

Based on these facts, and application of R.C. 2744.03(B)(3), the City of Findlay was held to be immune from damages. Stevenson eventually settled with the Plaintiff/Appellants.

LAW AND ARGUMENT

APPELLANTS' PROPOSITION OF LAW

Appellants' 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.

The decision of the Third District Court of Appeals should be affirmed because under R.C. Chapter 2744, the City of Findlay is immune from damages. R.C. 2744.02(B)(3) and R.C. 2744.01(H) clearly and unambiguously provide immunity for negligence in connection with the erection or maintenance of stop signs in this matter. Where the language is unambiguous, it is the Court's duty to apply the statute as written making neither additions nor subtractions. *Hubbard v. Canton City School Bd. of Edn.* 97 Ohio St.3d 451, 2002-Ohio-6718, at ¶14 (Citations omitted). If it is ambiguous, the Court must interpret the statute to determine the intent of the General Assembly.

The Intent Of The General Assembly Is Gleaned From The History Of The Political Subdivision Tort Liability Act.

The law providing immunity to municipalities has been the subject of debate over the last several decades. The 1912 Constitutional Convention established that the Ohio General Assembly may provide the manner in which suits could be brought against the state. Ohio Constitution, Section 16, Article 1. *Raudabaugh v. State*, 96 Ohio St. 513, 517 (1917). This included the issue of liability for Ohio's political subdivisions.

The General Assembly did not address the subject, leaving the courts to apply their own concepts of sovereign immunity. Through the years, Ohio Courts have granted immunity based on whether the state or a political subdivision was performing either a governmental or proprietary function. The Court extended immunity from liability for the exercise of a

governmental function, but denied immunity for negligent acts committed while engaging in proprietary functions. Throughout the decades, Ohio Courts have struggled over the distinction between government and proprietary acts.

In 1975, the Ohio General Assembly, pursuant to its constitutional authority, adopted R.C. Chapter 2743, waiving immunity for the State, and permitting it to be sued in the newly created Court of Claims. The Ohio Supreme Court subsequently determined that R.C. 2743 did not apply to Ohio's political subdivisions. *Haas v. Hayslip*, 51 Ohio St.2d 135, 139 (1977). It continued to apply immunity to them based on prior case law distinguishing governmental and proprietary functions. See, e.g., *Haas* at 140, (Brown, W., dissenting).

In his dissenting opinion in *Haas*, Justice Brown, joined by Justice Sweeney and Chief Justice Celebrezze, suggested that the doctrine of sovereign immunity as applied to municipalities through judicial precedent is a legal anachronism. The dissenters noted that sovereign immunity for political subdivisions is a judicially-created doctrine that could be judicially abolished. *Haas* at 142 (Brown, W., dissenting).

In 1982, the Court referred to the confusion and unpredictability created by applying immunity based on whether the municipality was acting in its governmental or proprietary function as a "bramble bush." *Haverlack v. Portage County Homes*, 2 Ohio St.3d 26, 29 (1982). The *Haverlack* Court reasoned, citing *Eversole v. Columbus* 169 Ohio St. 205, 208 (1959), that, "It is impossible to reconcile all the decisions of this Court dealing with the subject of governmental and proprietary functions in relation to a municipality." *Id.* at 208.

Haverlack held as follows:

We hold that the defense of sovereign immunity is not available in the absence of a statute providing immunity, to a municipal corporation in an action for damages alleged to be caused by the negligent operation of a sewage treatment plant. (Emphasis Added)

Haverlack at 30.

Following *Haverlack*, municipal immunity was extended to various proprietary functions. In *Engehauser Manufacturing Company v. Erikson Engineering Ltd.*, 6 Ohio St.3d 31 (1983), the Court further clarified its position on political subdivision immunity. There, the Court stated, “henceforth, so far as municipal government responsibility for torts is concerned, the rule is liability – the exception is immunity.” *Id.* at 32. *Engehauser* held that immunity would be applied in only two circumstances: (1) for the exercise of a legislative, or judicial function, or the exercise of an executive or planning function involving the making of a basic policy decision which is characterized by a high degree of official judgment or discretion, and (2) where a statute provides immunity. *Id.* at 35.

Engehauser, like *Haas*, contained a vigorous dissent which questioned the extent and circumstance under which this new doctrine on political subdivision liability should be applied. In conclusion, Justice Holmes, author of the *Engehauser* dissent, stated:

This [C]ourt’s decision in the area of governmental immunity cries out for a legislative response. I, for one, hopefully anticipate that the General Assembly will proceed as have the legislative bodies in other states, and enact responsive laws. See, e.g., Cal. Govt. Code Anno., Section 810, et seq.

Engehauser at 38 (Holmes, J., dissenting).

The Political Subdivision Tort Liability Act.

In 1985, the General Assembly, pursuant to the authority provided in Art. II, Section 16 of the Ohio Constitution, responded by enacting the Political Subdivision Tort Liability Act, codified at Chapter 2744 of the Ohio Revised Code. The General Assembly chose a three tier scheme to provide immunity for Ohio’s political subdivisions.

After recognizing the governmental/proprietary distinction, the General Assembly provided blanket immunity declaring that political subdivisions are not liable in civil damages for injury, death, or loss allegedly caused by an act or omission in connection with a governmental or proprietary function. R.C. 2744.02(A)(1).

The General Assembly then provided five exceptions to blanket immunity. See, R.C. 2744.02(B)(1) through (5). At issue in this matter is R.C. 2744.02(B)(3), which at the time of adoption, stated:

“(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 failure to keep public roads, highways, streets, avenues, alleys, sidewalk, bridges, aqueducts, viaducts, or public grounds within the political subdivisions open, in repair, and free from nuisance, 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.

Chapter 2744 then provides political subdivisions and their employees with a list of affirmative defenses and immunities for defense in a civil action. R.C. 2744.03(A)(1) through (7). The affirmative defenses at R.C. 2744.03(A)(3) and (5) provide Findlay with an added layer of protection from liability for the exercise of discretion and judgment in deciding whether to install traffic control devices that are not mandated.

In essence, the General Assembly, by adoption of R.C. 2744, legislatively declared that immunity is the rule, and liability is the exception.

The General Assembly Amended R.C. 2744.02(B)(3) For The Purpose of Extending Political Subdivision Immunity

In 2002, the General Assembly amended Chapter 2744 to further limit the liability of political subdivisions. R.C. 2744.02(B)(3) proved to be a continuing source of considerable litigation for municipalities distressing their budgets. Examples of the continued liability being

imposed upon political subdivisions under the original version of R.C. 2744.03(B)(3) include: corn growing in the right-of-way of the road obstructing driver visibility, *Manufacturer's Natl. Bank of Detroit v. Erie Cty. Rd. Comm.*, 63 Ohio St.3d 318, 587 N.E.2d 819 (1992), failure to maintain traffic signs already in place, *Franks v. Lopez*, 69 Ohio St.3d 345, 632 N.E.2d 502 (1994), and numerous cases involving slip and falls on sidewalks and injuries on public grounds.

The General Assembly responded by removing liability for injury, death, or loss allegedly caused by failure to keep, “highways, streets, avenues, alleys, sidewalks, bridges, aqueducts, viaducts, or public grounds within the political subdivision open . . . and free from nuisance” from the items excepted from immunity. Section 2744.02(B)(3), as amended, now states:

(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.

The amendment ended the overflow of lawsuits against political subdivisions alleging negligence or nuisance involving sidewalks and public grounds. Cases such as *Franks, supra*, which denied immunity for an obstructed view of a stop sign, are now distinguished on the basis of the 2002 amendment to R.C. 2744.03(B)(3). See, *Rastaedt v. Youngstown*, 7th Dist. Mahoning No. 12 MA 82, 2013-Ohio-750, at ¶¶24-25; *Shope v. Portsmouth*, 4th Dist. Scioto No. 11 CA 3459, 2012-Ohio-1605, at ¶29; *Hale v. CSX Transp.*, 2d Dist. Montgomery Nos. 22546, 22547 and 22592, 2008-Ohio-5644, ¶¶48-49; *Walters v. Columbus*, 10th Dist. Franklin No. 07 AP-917, 2008-Ohio-4258, at ¶¶16-18. The only exceptions to the general grant of immunity under R.C.

2744.03(B)(3) is the “negligent failure to keep public roads in repair, and other negligent failure to remove obstructions from public roads”

A definition of “public roads” is provided by the General Assembly at R.C. 2744.01(H). It provides that traffic control devices are not part of the public road unless “mandated” by the Ohio Manual of Uniform, Traffic Control Devices, (OMUTCD). Section 2744.01(H) states:

“Public roads” means public roads, highways, streets, avenues, alleys, and bridges within a political subdivision.” “Public roads” does not include berms, shoulders, rights-of-way, or traffic control devices unless the traffic control devices are mandated by the Ohio manual of traffic control devices.

When interpreting statutes such as R.C. 2744.02(B)(3) and R.C. 2744.01(H), this Court recently instructed in *Baker v. Wayne County* (2016), ____ Ohio St.3d ____; Slip Opinion No. 2016-Ohio-3527, as follows:

{¶12} To interpret these statutes, we apply familiar rules. “[W]here the language of a statute is clear and unambiguous, it is the duty of the court to enforce the statute as written, making neither additions to the statute nor subtractions therefrom.” *Hubbard v. Canton City School Bd. of Edn.*, 97 Ohio St.3d 451, 2002-Ohio-6718, 780 N.E.2d 543, ¶14. “If it is ambiguous, we must then interpret the statute to determine the General Assembly’s intent. If it is not ambiguous, then we need not interpret it; we must simply apply it.” *State v. Hairston*, 101 Ohio St.3d 308, 2004-Ohio-969, 804 N.E.2d 471, ¶13. When a statute includes definitions, those definitions must be given effect; “[d]efinitions provided by the General Assembly are to be given great deference in deciding the scope of particular terms.” *Montgomery Cty. Bd. of Commrs. v. Pub. Util. Comm.*, 28 Ohio St.3d 171, 175, 503 N.E.2d 167 (1986).

It was further stated in *Baker* that when interpreting the exceptions to sovereign immunity provided in R.C. 2744.02(B) that judicial standards “cannot apply to reformulate a definition * * * provided by the General Assembly.” *Baker* at ¶13. As for the intent of the amendment to RC 2744.03(B)(3), the Court in *Baker* stated that the statute reflects, “a deliberate

effort to limit political subdivision liability for injuries and deaths on their roadways.” *Baker* at ¶11, citing *Howard v. Miami Twp. Fire Div.*, 119 Ohio St.3d 1, 2008-Ohio-2792 (2008).

Appellants’ first proposition of law challenges the interpretation and legality of the term “mandated” as used in R.C. 2744.01(H). Section 1.42 of the General Provisions of the Ohio Revised Code requires statutes to be read in context and construed according to the rules of grammar and common usage. Words with a technical or particular meaning, or that are defined by the legislature are to be construed accordingly. R.C. §1.42.

R.C. 2744.03(B)(3), read in conjunction with R.C. 2744(H), unambiguously establishes that liability arises from the negligent placement or maintenance of traffic control devices by a political subdivision only when the device becomes part of the public road, as defined in R.C. 2744.01(H). Traffic control devices become part of the public roadway under R.C. 2744.01(H) only when they are “mandated” by the OMUTCD. The term “mandated” is defined as “an authoritative command; order; a prescript from a superior court or official to an inferior one”. See, *Webster’s Collegiate Dictionary*, Fifth Edition. The dictionary definition is in accord with common usage. A review of the OMUTCD using the dictionary definition establishes that a stop sign at the intersection of Sandusky Street and Wilson Street in Findlay is not mandated.

The OMUTCD Does Not Mandate The Erection Of A Stop Sign At The Intersection Of Sandusky Street (State Route 568) And Wilson Street In Findlay.

The OMUTCD is the state’s official specifications for highway signs and markings under the mandate of R.C. 4511.09. *White v. Ohio Sept. of Transp.*, 56 Ohio St.3d 39, 41, 564, N.E.2d 462 (1990). Under R.C. 4511.11, local authorities must use only those traffic control devices according to the manual’s instructions. *Winwood v. Dayton*, 37 Ohio St.3d 282, 284, 525 N.E.2d 808 (1988); *Maple Hts. v. Smith*, 131 Ohio App.3d 406, 408, 722 N.E.2d 607 (8th Dist. 1999).

Compliance with the OMUTCD is an issue of law that this Court can determine. *Hopkins v. Porter*, 3d Dist. Mercer No. 10-13-17, 2014-Ohio-757, at ¶61.

The OMUTCD regulates the installation of traffic control devices in terms that are mandatory, recommended, or those which are discretionary, using terms such as “shall,” “should,” and “may.” (See, *infra* at 19) “Standards using the word “shall” are considered mandatory. Standards using the word “should” are considered to be advising, but not mandating, and those using the word “may” carry no requirement or recommendation, and are totally discretionary.” *Darby v. City of Cincinnati*, 1st Dist. Hamilton No. C-130430, 2014-Ohio-2426 at ¶10 quoting *Shope v. Portsmouth*, (2012, 4th Dist.) Scioto No. 11CA3459, 2012-Ohio-1605 at ¶23, citing *Webb v. Edwards* (2005, 4th Dist.), 165 Ohio App.3d 158, 2005-Ohio-6379, 845, N.E.3d 530, at ¶23. In *Webb*, the Appellate Court granted municipal immunity finding that use of the word “should” in Section 7G-8 of the OMUTCD, concerning flashing arrow panels on shadow vehicles, was recommended not mandated. *Id.* at ¶25.

Section 2B.05 of the OMUTCD, entitled “STOP Sign Application,” provides:

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 rules would not be expected to provide reasonable compliance with the law;
- B. Street entering a through highway or street (O.R.C. Section 45121.65 provides information on through highways (see Appendix B2));
- C. Unsignalized intersections in a signalized area;
- D. High speeds, restricted view, or crash records indicate a need for control by the STOP sign. (Emphasis added)

By using the term “should” and linking it with the inherently discretionary term “engineering judgment” it is obvious that Section 2B.05 is advisory. The erection of a stop sign

is not “mandated” unless the regulation is written with commanding language using the term “shall”.

According to the clear and unambiguous language used in RC Chapter 2744, the General Assembly intended that a political subdivision incurs liability under R.C. 2744.02(B)(3) only when the injury or loss results from the negligent failure to keep the public road in repair, or by negligent failure to remove an obstruction from the public road. A traffic control device is excluded from the definition of public road unless mandated by the OMUTCD. *Bibler* at ¶23 citing *Walters v. City of Columbus*, 10th Dist. Franklin No. 07AP-917, 2008-Ohio-4258, ¶ 20.. The OMUTCD does not mandate the erection or maintenance of a stop sign at the intersection of Sandusky Street (State Route 586) and Wilson Street in Findlay.

This interpretation was applied by both the Hancock County Court of Common Pleas, and the Third District Court of Appeals in resolving this case. Furthermore, as set forth in the Appellant’s brief, three other Ohio courts of appeals have reached the same conclusion. See, *Walters, supra; Darby, supra; Yonkings v. Pivenski*, 10th Dist. Lorain No. 11 AP-07, and 11 AP-09, 2011-Ohio-6232.

This Court’s recent decision in *Baker, supra*, is instructive on interpreting the term “public roads” as used in R.C. 2744.02(B)(3), and R.C. 2744.01(H). *Baker* involved a newly constructed layer of asphalt on a county road leaving a five inch drop where the pavement met the berm. A vehicle on the roadway drove over the five inch drop and was involved in a tragic accident while attempting to make a correction. This Court was called on to determine if Wayne County was immune from damages based on R.C. 2744.03(B)(3) and R.C. 2744.01(H). This Court noted that the definition of “public roads”, set forth at R.C. 2744.01(H), is the exclusive definition and must be interpreted as written. *Id.* at ¶¶18, 24. Because 2744.01(H) excluded

berms and shoulders from the definition of public roads, the Court found that the public road ended at the edge of the new pavement and did not include the five inch drop where the public road met the berm. *Id.* at ¶ 24.

The Opinion in *Baker* contains considerable debate over the definition of public road and whether the drop itself is part of the road or part of the berm, or whether the edge of the roadway should have been painted. This case does not involve such subtle distinctions. Immunity applies because a stop sign is simply not mandated at the intersection of Sandusky and Wilson Streets by the OMUTCD. The important lesson from *Baker* is that RC 2744.03(B)(3) and RC 2744.01(H) were strictly construed to limit political subdivision liability as intended by the General Assembly.

Every court that has interpreted R.C. 2744.02(B)(3) and R.C. 2744.01(H) has declared that the term “mandated” is synonymous with the word shall. Every court that has reviewed these statutes has found that Section 2B.05 of the OMUTCD does not mandate stop signs, and that political subdivision immunity is not excepted due to alleged failure of a political subdivision to place or maintain a stop sign. All of these decisions are based on application of the clear and unambiguous language used in both the statutes and regulations.

The General Assembly Did Not Delegate Its Authority To Legislatively Determine The Civil Immunity Of Ohio’s Political Subdivisions To The Department Of Transportation.

At page 7 of the Appellants’ Brief on the Merits, they claim that because the Department of Transportation was delegated, the authority to determine when a political subdivision is immune from liability. Based on this claim, the Appellants claim that this constitutional infirmity can be avoided if the term “mandate” in RC 2744.01(H) is interpreted as “signs set forth in the OMUTCD are the only traffic control devices allowed in Ohio.” Appellants’ Brief

on the Merits, pg. 7. This interpretation clearly runs afoul of the legislative intent and would lead to an absurd result.

The Department of Transportation was not delegated the authority to determine the immunity of Ohio's political subdivisions. Rather, it was given the authority to adopt a uniform system of traffic control devices. R.C. 4511.09, the delegating statute, states:

The department of transportation shall adopt a manual for a uniform system of traffic control devices, including signs denoting names of streets and highways, for use upon any street, highway, bikeway, or private road open to public travel within this state. Such uniform system shall correlate with, and so far as possible conform to, the system approved by the federal highway administration.

Notably, the delegation includes guidance in that the manual is to correlate and conform as much as possible with the system approved by the federal highway administration. There is no delegation of legislative authority to the Department of Transportation to determine immunity. The Appellants offer no explanation or rationale to support its claim of unlawful delegation.

Based on this alleged constitutional infirmity, the Appellants urge this Court to save R.C. 2744.01(H) from its infirmity by construing the term "mandated" to mean that, "the signs set forth in the OMUTCD are the only traffic control devices allowed in Ohio". Merit Brief of Appellants, pg. 7. The Hancock County Court of Appeals noted that the Appellants requested it to construe the term "mandated" as, "any traffic control device that is approved for use." See, *Bibler* at ¶ 21. The Court of Appeals refused to do so. There is no wrongful delegation.

Appellants, at page 5 of their brief, state that interpretation of statutes should not lead to absurd results. Yet, that is exactly what would happen under their interpretation. If the Appellants' interpretation was applied, R.C. 2744.01(H) would read as follows:

“Public roads” means public roads, highways, streets, avenues, alleys, and bridges within a political subdivision.” Public roads does not include berms, shoulders, rights-of-way, or traffic control devices, unless the traffic control devices *are approved for use* by the Ohio Manual of Traffic Control Devices.

This interpretation is patently absurd. The Hancock County Court of Appeals refused to apply the Appellants’ interpretation, as therein requested, noting that all stop signs would become mandated, unless different in design. *Bibler* at ¶ 22. In fact, the absurdity extends even further, adopting the Appellants’ interpretation would make all traffic control devices referred to in the OMUTCD part of the public road, and would further obviate the preceding phrase that fully removes traffic control devices from the definition of “public roads.” This was not the intent of the General Assembly.

Appellants’ justification for redefining the term mandate to avoid an unlawful delegation of legislative authority fails.

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.

The Appellants argue that R.C. 4511.65 mandates construction of stop signs at intersections with state routes, and that any negligence arising from failure to erect or maintain the stop sign establishes liability under R.C. Chapter 2744. The issue of whether 4511.65 mandates the construction of a stop sign at the accident scene is subject to debate. However, even if it does, the immunity provided by R.C. Chapter 2744 still applies.

The issue of whether R.C. 4511.65 mandates the erection of stop signs at streets intersecting with state routes is irrelevant. The legislative command on the issue of immunity is that there is no liability for the erection and maintenance of a traffic control device unless

mandated by the OMUTCD. The legislature could have, but did not include language stating, unless mandated in another provision of the revised code.”

R.C. 4511.65 states as follows:

4511.65 Designation of through highways.

(A) All state routes are hereby designated as through highways, provided that stop signs, yield signs, or traffic control signals shall be erected at all intersections with such through highways by the department of transportation as to highways under its jurisdiction and by local authorities as to highways under their jurisdiction, except as otherwise provided in this section. Where two or more state routes that are through highways intersect and no traffic control signal is in operation, stop signs or yield signs shall be erected at one or more entrances thereto by the department, except as otherwise provided in this section (emphasis added).

Whenever the director of transportation determines on the basis of an engineering and traffic investigation that stop signs are necessary to stop traffic on a through highway for safe and efficient operation, nothing in this section shall be construed to prevent such installations. When circumstances warrant, the director also may omit stop signs on roadways intersecting through highways under his jurisdiction. Before the director either installs or removes a stop sign under this division, he shall give notice, in writing, of that proposed action to the affected local authority at least thirty days before installing or removing the stop sign.

(B) Other streets or highways, or portions thereof, are hereby designated through highways if they are within a municipal corporation, if they have a continuous length of more than one mile between the limits of said street or highway or portion thereof, and if they have “stop” or “yield” signs or traffic control signals at the entrances of the majority of intersecting streets or highways. For purposes of this section, the limits of said street or highway or portion thereof shall be a municipal corporation line, the physical terminus of the street or highway, or any point on said street or highway at which vehicular traffic thereon is required by regulatory signs to stop or yield to traffic on the intersecting street, provided that in residence districts a municipal corporation may be ordinance designate said street or highway, or portion thereof, not to be a through highway and thereafter the affected residence district shall be indicated by official traffic control devices. Where two or more through highways designated under this division intersect and no traffic control signal is in operation, stop signs or yield signs shall be erected at one or more entrances thereto by the department or by local authorities having jurisdiction, except as otherwise provided in this section.

(C) The department or local authorities having jurisdiction need not erect stop signs at intersections they find to be so constructed as to permit traffic to safely enter a through highway without coming to a stop.

Signs shall be erected at such intersections indicating that the operator of a vehicle shall yield the right-of-way to or merge with all traffic proceeding on the through highway.

(D) Local authorities with reference to highways under their jurisdiction may designate additional through highways and shall erect stop signs, yield signs, or traffic control signals at all streets and highways intersecting such through highways, or may designate any intersection as a stop or yield intersection and shall erect like signs at one or more entrances to such intersection.

The 2002 amendment to R.C. 2744.02(B)(3) establishes the General Assembly intended to extend political subdivision immunity even when the political subdivision is charged with care, supervision, and control of various parts of its infrastructure such as sidewalks and public grounds by other parts of the Revised Code.

Consider R.C. Section 723.01, it provides in mandatory terms, as follows:

Municipal corporations shall have special power to regulate the use of the streets. Except as provided in section 5501.49 of the Ohio Revised Code, the legislative authority of a municipal corporation shall have the care, supervision, and control of the public highways, streets, avenues, alleys, sidewalks, public grounds, bridges, aqueducts, and viaducts within the municipal corporation. The liability or immunity from a liability of a municipal corporation for injury, death, or loss to person or property allegedly caused by a failure to perform the responsibilities imposed by this section shall be determined pursuant to divisions (A) and (B)(3) of section 2744.02 of the Revised Code.

Effective Date: 04-09-2003

In R.C. 723.01, the General Assembly established that municipal corporations have the care, supervision and control of, “public highways, streets, avenues, alleys, sidewalks, public grounds, bridges, aqueducts, and viaducts” within the municipal corporation. However, while continuing to mandate the power to care for, supervise, and control the above list of public thoroughfares the General Assembly removed that same list from the exception to immunity provided at O.R.C. 2744.03(B)(3). The failure to install or maintain stop signs under RC 4511.65

does not create political subdivision liability even if mandated. The stop sign must be mandated by the OMUTCD.

Pursuant To R.C. 2744.01(B)(5) Statutes That Impose A Responsibility Or Mandatory Duty Upon A Political Subdivision Cannot Be Construed To Create Civil Liability.

The General Assembly was cognizant of the various degrees of responsibility imposed on political subdivisions by other provisions in the Revised Code when enacting or amending the Political Subdivision Tort Liability Act. It distinguished statutes that impose liability from those that impose responsibility or mandatory duty. R.C. Section 2744.02(B)(5) states:

(5) In addition to the circumstances described in divisions (B)(1) to (4) of this section, a political subdivision is liable for injury, death, or loss to person or property when civil liability is expressly imposed upon the political subdivision by a section of the Revised Code, including, but not limited to, sections 2743.02 and 5591.37 of the Revised Code. Civil liability shall not be construed to exist under another section of the Revised Code merely because that section imposes a responsibility or mandatory duty upon a political subdivision, because that section provides for a criminal penalty, because of a general authorization in that section that a political subdivision may sue and be sued, or because that section uses the term “shall” in a provision pertaining to a political subdivision.

R.C. 4511.65 does not expressly impose civil liability for negligence in the installation or maintenance of stop signs. Any negligence in failing to fulfill any duty imposed by R.C. 4511.65 cannot become the basis for civil liability. Thus, even if R.C. 4511.65 mandates erection and maintenance of stop signs it cannot be construed as the “mandate” required by R.C. 2744.01(H).

R.C. 4511.65 Describes How A State Route Becomes Designated As A Through Highway And Mandates Stop Signs Only When Two State Routes That Are Through Highways Intersect.

R.C. 4511.65 does not mandate the installation or maintenance of traffic control devices. Rather, it provides the manner in which a state route becomes designated as a through highway.

Subsection (A) provides “All state routes are designated as through highways, provided that stop signs, yield signs, or traffic control signals shall be erected at all intersections with such through highway by the department of transportation as to highways under its jurisdiction and by local authorities as to highways under their jurisdiction, except as otherwise provided in this section.” It does not mandate stop signs, yield signs, or traffic control signs be placed at any particular intersection, except at the intersection of two through highways. It simply provides that if such signs are not erected at all intersections, then the state route is not to be designated a through highway.” Because subsection (A) provides for existing stop signs to be omitted “when circumstances warrant”, it cannot be said that they are mandated.

The remaining Sections of R.C. 4511.65, paragraphs (B), (C), and (D), set forth other ways in which the Department of Transportation or the local jurisdiction may designate a street or route a “through highway.” It is clear, however, that R.C. 4511.65 does not “require” or “mandate” the posting of stop signs at all intersections with a through highway. R.C. 4511.65(A) and (B) specifically provide for the use of yield signs as well as traffic control signals. R.C. 4511.65(C) specifically provides that local authorities need not erect stop signs at intersections with through highways they find to be constructed as to permit traffic to safely enter a through highway without coming to a stop so long as yield or merge signs are erected.

Findlay’s argument is further supported by R.C. 4511.01(HH), the definitional section of Chapter 4511, wherein it defines “through highway” as every street or highway as provided in Section 4511.65 of the Revised Code.” R.C. 4511.65 defines and designates through highways, it does not mandate stop sign placement. Even if it did, the General Assembly did not include R.C. 4511.65 or any of its subsections in its definition of public road as defined in RC Chapter

2744. To become part of the public road for the purpose of establishing political subdivision liability, the traffic control device must be mandated by the OMUTCD.

Proposition of Law No. 3:

TRAFFIC CONTROL DEVICES ARE PART OF THE PUBLIC ROADS
AS DEFINED IN R.C. 2744.01(H).

This Proposition of Law is difficult to comprehend. Appellants seem to be arguing that there is a conflict between RC 4511.65 and the OMUTCD regulations, and that the language in the statute trumps the regulation.

In the proceedings below, the City of Findlay advised the Introduction to the OMUTCD instructs that its regulations are written in mandatory, advisory, or permissive conditions, differentiated by use of terms such as “shall,” “should,” or “may.” Findlay cited the introduction to the 2005 edition of the OMUTCD, effective April 15, 2011, which states as follows:

“When used in this Manual, the text headings shall be defined as follows:

1. Standard – a statement of required, mandatory, or specifically prohibitive practice regarding a traffic control device. All standards are labeled, and the text appears in bold type. This verb “shall” is typically used (emphasis added).
2. Guidance – a statement of recommended, but no mandatory, practice in typical situations, with deviations allowed if engineering judgment or engineering study indicates the deviation to be appropriate. All Guidance statements are labeled, and the text appears in unbold type. The verb “should” is typically used (emphasis added).
3. Option – a statement of practice that is a permissive condition and carries no requirements or recommendation. Options may contain allowable modifications to a Standard or Guidance. All Option statements are labeled, and the text appears in unbold types. The verb “may” is typically used.” (emphasis added) (See Exhibit B – Introduction to OMUTCD)

Notably, Section 2B.05 of the OMUTCD instructs on stop sign usage. The heading states, “Guidance,” and further that “STOP signs should be used if engineering judgment indicates” . . . the existence of one or more of four conditions. See, *supra*, at pg. 10. Clearly,

under the OMUTCD Introduction, Section 2B.05 falls in the Guidance category and is, “a statement of recommended, but not mandatory, practice in typical situations.” (emphasis added)

The Appellants also argue that use of the term “should” in Section 2B.05 of the OMUTCD conflicts with R.C. 4511.65 which uses the mandatory term “shall be erected.” Appellants’ Brief on the Merits, Pg. 10. Appellants fail to inform the Court that the only portion of R.C. 4511.65 stating that a stop sign or yield sign “shall be erected” is when “two or more state routes that are through highways intersect.” The entire second sentence of R.C. 4511.65(A) states:

Where two or more state routes that are through highways intersect and no traffic control signed is in operation, stop signs or yield signs shall be erected at one or more entrances thereto by the department, except as otherwise provided in this section.

Thus, the term “shall be erected” does not apply in this case because Wilson Street is not a state route designated as a through highway, and there is no conflict.

The Opinion of the Third District Court of Appeals in this case contains a dissent finding that R.C. 4511.65 mandates erection of a stop sign at this intersection. Based on case law stating that a Regulation cannot contradict a Statute, the dissent declares that R.C. 4511.65 prevails over the OMUTCD, and the stop sign recommended by the Department of Transportation is now somehow mandated.

The dissent misses two critical points. First, R.C. 2744.02(B)(3), as clearly written, excepts immunity for negligence in the installation and maintenance of traffic control devices unless mandated in the OMUTCD. Second, R.C. 2744.02(B)(5) states that “[c]ivil liability shall not be construed to exist under another section of the Revised Code merely because that section imposes a responsibility or a mandatory duty upon a political subdivision.” Yet, that is exactly

what the dissent suggests. Civil liability cannot be construed to exist in this matter even if R.C. 4511.65 mandates the installation and maintenance of a stop sign.

According to legislative command, R.C. 4511.65 cannot be used to construe liability on the City of Findlay.

CONCLUSION

In view of the aforestated law and argument, it is respectfully requested that the decision of the Third District Court of Appeals be affirmed.

Respectfully submitted,

/s/ Eric M. Allain
Eric M. Allain (#0081832)
William F. Schmitz (#0029952)
ALLAIN LEGAL Ltd.
28906 Lorain Road, Suite 101
North Olmsted, Ohio 44070
Phone: (440) 249-0932
Fax: (440) 540-4538
eallain@ealegal.net
wschmitz@ealegal.net

Co-Counsel for City of Findlay

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing Brief on the Merits, Appellee City of Findlay was served upon the following persons via Regular U.S. mail, postage prepaid, this 13th day of May, 2016:

William E. Clark
Zachary J. Barger
Drake, Phillips, Kuenzli & Clark
301 South Main Street, Suite 4
Findlay, Ohio 45840
Counsel for Plaintiffs

Donald Rasmussen
City of Findlay
318 Dorney Plaza, Rm. 310
Findlay, Ohio 45840
Co-counsel for Defendants

/s/ Eric M. Allain
Eric M. Allain (#0081832)