



Dennis M. Papp

Final Analysis
Legislative Service Commission

H.B. 205

123rd General Assembly
(As Passed by the General Assembly)

Reps. Corbin, Salerno, Callender, Willamowski, Mead, Tiberi, Austria, DePiero, Core

Sens. Latta, Horn

Effective date: *

ACT SUMMARY

- Expands the definition of "governmental function" in the Political Subdivision Sovereign Immunity Law, for purposes of a political subdivision's general immunity from tort liability, to include the design, construction, reconstruction, renovation, repair, maintenance, and operation of a water park, wading pool, wave pool, water slide, and other type of aquatic facility and the design, construction, reconstruction, renovation, repair, and maintenance of a golf course.
- Declares the General Assembly's intent in expanding the definition of "governmental function," in part, to supersede the effect of the holding in *Garrett v. Sandusky* (1994), 68 Ohio St.3d 139.

CONTENT AND OPERATION

Background law

General nonliability/liability of political subdivisions

For the purposes of Chapter 2744. of the Revised Code, the Political Subdivision Sovereign Immunity (PSSI) Law, the functions of political subdivisions are classified as *governmental functions* and *proprietary functions* (see below). Generally, except as specifically provided in statute (see the next

* *The Legislative Service Commission had not received formal notification of the effective date at the time this analysis was prepared.*

sentence) a political subdivision *is not liable* in damages in a civil action for injury, death, or loss to person or property allegedly caused by any act or omission of the political subdivision or an employee of the political subdivision in connection with a governmental or proprietary function. However, subject to specific statutory defenses and immunities (see below) and to specified limitations on the damages that may be awarded, a political subdivision *is liable* in damages in a civil action in the following circumstances (secs. 2744.02(B) and 2744.05--not in the act):

(1) Generally and subject to specified defenses related to police, fire department, and emergency medical service emergency responses, if the injury, death, or loss to person or property is caused by the negligent operation of any motor vehicle by employees of the political subdivision upon the public roads when the employees are engaged within the scope of their employment and authority;

(2) Generally, if the injury, death, or loss to person or property is caused by the *negligent performance of acts* by employees of the political subdivision *with respect to proprietary functions* of the political subdivision;

(3) Generally and subject to a specified defense, if the injury, death, or loss to person or property is caused by the political subdivision's negligent failure to keep public roads in repair or by other negligent failure to remove obstructions from public roads;

(4) Generally, if the injury, death, or loss to person or property is caused by the *negligence* of the political subdivision's employees and occurs *within or on the grounds of*, and is due to physical defects within or on the grounds of, *buildings* that are *used in connection with* the performance of *a governmental function*, other than adult or juvenile detention facilities;

(5) If liability is expressly imposed upon the political subdivision by a section of the Revised Code. Liability is not construed to exist under another Revised Code section merely because that section imposes a responsibility or mandatory duty upon a political subdivision, 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.

Political subdivision and employee defenses and immunities

In a civil action brought against a political subdivision or a political subdivision employee to recover damages for injury, death, or loss to persons or property allegedly caused by any act or omission *in connection with a*

governmental or proprietary function, the following defenses or immunities may be asserted to establish nonliability (sec. 2744.03--not in the act):

(1) The political subdivision is immune from liability if the employee involved was engaged in the performance of a judicial, quasi-judicial, prosecutorial, legislative, or quasi-legislative function.

(2) The political subdivision is immune from liability if the conduct of the employee involved that gave rise to the claim of liability: (a) was not negligent conduct and was required or authorized by law, or (b) was necessary or essential to the exercise of powers of the political subdivision or employee.

(3) The political subdivision is immune from liability if the action or failure to act by the employee involved that gave rise to the claim of liability was within the employee's discretion with respect to policy-making, planning, or enforcement powers by virtue of the duties and responsibilities of the employee's office or position.

(4) The political subdivision is immune from liability if the action or failure to act by the political subdivision or employee involved that gave rise to the claim of liability resulted in injury or death to a person who had been convicted of or pleaded guilty to a criminal offense or was found to be a delinquent child and who, at the time of the injury or death, was performing, in specified circumstances, community service work.

(5) The political subdivision is immune from liability if the injury, death, or loss to persons or property resulted from the exercise of judgment or discretion in determining whether to acquire, or how to use, equipment, supplies, materials, personnel, facilities, and other resources unless the judgment or discretion was exercised with malicious purpose, in bad faith, or in a wanton or reckless manner.

(6) In addition to any immunity or defense referred to below in paragraph (7) and in circumstances not covered by that provision or other specified provisions, the employee is immune from liability unless one of the following applies: (a) the employee's acts or omissions were manifestly outside the scope of the employee's employment or official responsibilities, (b) the employee's acts or omissions were with malicious purpose, in bad faith, or in a wanton or reckless manner, or (c) liability is expressly imposed upon the employee by a section of the Revised Code; under this provision, liability is not construed to exist under another section of the Revised Code merely because that section imposes a responsibility or mandatory duty upon an employee, because of a general authorization in that section that an employee may sue and be sued, or because the section uses the term "shall" in a provision pertaining to an employee.

(7) The political subdivision, and a county prosecuting attorney, city director of law, village solicitor, or similar chief legal officer of a political subdivision, an assistant of any such person, or a judge of an Ohio court is entitled to any defense or immunity available at common law or established by the Revised Code.

The immunities and defenses of an employee referred to in paragraphs (6) and (7), above, do not affect or limit any liability of a political subdivision for an act or omission of the employee as provided in section 2744.02, as described above.

Definitions of "governmental function" and "proprietary function"

Formerly

Formerly, the preexisting PSSI Law specified that, for purposes of that Law, "governmental function" meant a function of a political subdivision that was specified as such in that Law (see the fourth succeeding paragraph) or that was any of the following (sec. 2744.01(C)(1)):

- (1) A function that was imposed upon the state as an obligation of sovereignty and was performed by a political subdivision voluntarily or pursuant to legislative requirement;
- (2) A function that was for the common good of all citizens of the state;
- (3) A function that promoted or preserved the public peace, health, safety, or welfare; that involved activities not engaged in or not customarily engaged in by nongovernmental persons; and that was not specified in the PSSI Law as a proprietary function.

A "governmental function" included, but was not limited to, several types of functions or activities specified in existing section 2744.01(C)(2). Among the list of these governmental functions are the design, construction, reconstruction, renovation, repair, maintenance, and operation of any park, playground, playfield, indoor recreational facility, zoo, zoological park, bath, or *swimming pool* or pond, and the operation and *control* of any golf course (sec. 2744.01(C)(2)(u)). The other examples of "governmental functions" are listed in **COMMENT 1**.

Another portion of the PSSI Law, unchanged by the act, specified that, for purposes of that Law, "proprietary function" means a function of a political subdivision that is specified as such in that Law (see **COMMENT 2** for a list of the specified proprietary functions) or that satisfies *both* of the following (sec. 2744.01(G)(1)):

(1) The function is *not* one that is imposed upon the state as an obligation of sovereignty and that is performed by a political subdivision voluntarily or pursuant to legislative requirement, is *not* one that is for the common good of all citizens of the state, and is *not* one specified as a "governmental function" (see the second preceding paragraph and **COMMENT 1**).

(2) The function *is* one that promotes or preserves the public peace, health, safety, or welfare and that involves activities that are customarily engaged in by nongovernmental persons.

In *Garrett v. Sandusky* (1994), 68 Ohio St.3d 139, the Ohio Supreme Court held that a wave action pool is not a "swimming pool" pursuant to R.C. 2744.01(C)(2)(u) (see above) and its operation is not a governmental function for which a city is immune from tort liability. In effect, under the *Garrett* holding, the operation of a wave action pool is a proprietary function for which a city is "expose[d] to liability," particularly for injury, death, or loss to person or property caused by the negligent performance of acts by its employees with respect to the wave action pool. (See **COMMENT 3**.)

Operation of the act

The act adds to the specifically designated *governmental functions* specified in preexisting law the design, construction, reconstruction, renovation, repair, maintenance, and operation of a *water park, wading pool, wave pool, water slide, and other type of aquatic facility*. The act also includes as specifically designated *governmental functions* the design, construction, reconstruction, renovation, repair, and maintenance, in addition to the *operation* (as in preexisting law), of a golf course, and eliminates as a specifically designated governmental function the "control" (in preexisting law) of a golf course. (Sec. 2744.01(C)(2)(u).) The effect of the act's expansion of the definition of "governmental function" is to provide that, regarding any injury, death, or loss to person or property that allegedly is caused by any act or omission of the political subdivision or an employee of the political subdivision in connection with the design, construction, reconstruction, renovation, repair, maintenance, and operation of a water park, wading pool, wave pool, water slide, and other type of aquatic facility, or a golf course, the political subdivision will not face potential liability under the preexisting provision that generally provides for political subdivision liability for its employees' negligent acts performed with respect to proprietary functions. (Sec. 2744.02--not in the act, see paragraph (2) under "**General nonliability/liability...**" of "**Background law**," above.) Thus, generally, the political subdivision will be immune from liability in a civil action for damages of that nature.

Uncodified law

The act declares in uncodified law that it is the intent of the General Assembly in expanding the definition of "governmental function," in part, to supersede the effect of the holding of the Ohio Supreme Court in *Garrett v. Sandusky, supra*, that a wave pool is not a "swimming pool" within governmental functions for which a city enjoys tort immunity (Section 3).

COMMENT

1. Examples of specified governmental functions in the preexisting PSSI Law are: police, fire, emergency medical, ambulance, and rescue services or protection; power to preserve the peace, to prevent and suppress riots, disturbances, and disorderly assemblages, to protect persons and property, and to prevent, mitigate, and clean up oil and hazardous substances; provision of a system of public education and a free public library system; regulation of the use of and the maintenance and repair of roads, highways, streets, avenues, alleys, sidewalks, bridges, aqueducts, viaducts, and public grounds; judicial, quasi-judicial, prosecutorial, legislative, and quasi-legislative functions; construction, reconstruction, repair, renovation, maintenance, and operation of buildings used in connection with the performance of a governmental function; design, construction, reconstruction, renovation, repair, maintenance, and operation of jails, places of juvenile detention, workhouses, or other detention facilities; enforcement or nonperformance of any law; regulation of traffic and erection or nonerection of traffic signs, signals, or control devices; collection and disposal of solid wastes; planning or design, construction, or reconstruction of a public improvement including, but not limited to, a sewer system; operation of a human services department or agency, a health board, department, or agency, mental health facilities, mental retardation or developmental disabilities facilities, alcohol treatment and control centers, and children's homes or agencies; inspection services of all types; urban renewal projects and the elimination of slum conditions; flood control measures; design, construction, reconstruction, renovation, operation, care, repair, and maintenance of a township cemetery; issuance of certain revenue obligations; public defender services by a county or joint county public defender's office; and any function that the General Assembly mandates a political subdivision to perform (sec. 2744.01(C)(2)(a) to (t), (v), and (w)).

2. The specified proprietary functions under the preexisting PSSI Law are: the operation of a hospital; the design, construction, reconstruction, renovation, repair, maintenance, and operation of a public cemetery other than a township cemetery; the establishment, maintenance, and operation of a utility,

including a light, gas, power, or heat plant, a railroad, a busline or other transit company, an airport, and a municipal corporation water supply system; the maintenance, destruction, operation, and upkeep of a sewer system; and the operation and control of a public stadium, auditorium, civic or social center, exhibition hall, arts and crafts center, band or orchestra, or off-street parking facility (sec. 2744.01(G)(2)(a) to (e)).

3. *Garrett v. Sandusky, supra*, at p. 140. The Supreme Court also noted that the wave activation device at the aquatic center operated by the city materially transformed the pool from a placid body of water, commonly known as a swimming pool, to a potentially hazardous body of churning water, and a wave pool is more akin to an amusement ride which is not an immunized municipal function.

HISTORY

ACTION	DATE	JOURNAL ENTRY
Introduced	02-23-99	p. 225
Reported, H. Civil & Commercial Law	03-17-99	pp. 319-320
Passed House (91-1)	03-23-99	pp. 339-340
Reported, S. Judiciary	05-13-99	p. 426
Passed Senate (33-0)	05-13-99	pp. 429-430

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