



Sub. S.B. 24

124th General Assembly
(As Reported by H. Civil and Commercial Law)

Sens. Johnson, Amstutz, Blessing, Harris, Wachtmann, Armbruster, Mead, Spada

Reps. Manning, Grendell, Seitz, Willamowski

BILL 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 any recreational area or facility.
- Specifies that a bicycle motocross facility or other type of recreational area or facility in which bicycling, skating, skate boarding, or scooter riding is engaged is included in the term recreational area or facility.
- Specifies that a rope course or climbing wall is included in the term recreational area or facility.
- Specifies that an all-purpose vehicle facility in which all-purpose vehicles are contained, maintained, or operated for recreational activities is included in the term recreational area or facility.

CONTENT AND OPERATION

Background law--general nonliability/liability of political subdivisions

For the purposes of R.C. Chapter 2744., 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, 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 (R.C. 2744.02(A) and (B) and 2744.05--not in the bill):

(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 an employee of the political subdivision upon the public roads, highways, or streets when the employee is engaged within the scope of the employee's employment and authority;

(2) Generally, if the injury, death, or loss to person or property is caused by the negligent performance of acts by an employee 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 failure to keep public roads, highways, streets, avenues, alleys, sidewalks, bridges, aqueducts, viaducts, or public grounds within the political subdivision open, in repair, and free from nuisance;

(4) Generally, if the injury, death, or loss to person or property is caused by the negligence of a political subdivision employee and occurs 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 section of the Revised Code merely because that section imposes a responsibility upon a political subdivision or because of a general authorization in that section that a political subdivision may sue and be sued.

Definitions of "governmental function" and "proprietary function" for PSSI Law

Existing law

For purposes of the PSSI Law, "governmental function" means a function of a political subdivision that is specified as such in that Law (see the fourth succeeding paragraph) or that is any of the following (R.C. 2744.01(C)(1)):

(1) A function that is imposed upon the state as an obligation of sovereignty and is performed by a political subdivision voluntarily or pursuant to legislative requirement;

(2) A function that is for the common good of all citizens of the state;

(3) A function that promotes or preserves the public peace, health, safety, or welfare; that involves activities that are not engaged in or not customarily engaged in by nongovernmental persons; and that is not specified in the PSSI Law as a proprietary function.

A "governmental function" includes, but is not limited to, several types of functions or activities that are specified in existing R.C. 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, swimming pool, pond, water park, wading pool, wave pool, water slide, and other type of aquatic facility, or golf course (R.C. 2744.01(C)(2)(u)). The other examples of "governmental functions" are listed in **COMMENT 1**.

For purposes of the PSSI 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 (R.C. 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.

Operation of the bill

The bill adds to the specifically designated *governmental functions* specified in existing law the design, construction, reconstruction, renovation, repair, maintenance, and operation of any *recreational area or facility, including, but not limited to: (1) a rope course or climbing walls, (2) a bicycle motocross facility or other type of recreational area or facility in which bicycling, skating, skate boarding, or scooter riding is engaged, or (3) an all-purpose vehicle facility in which "all-purpose vehicles" are contained, maintained, or operated for*

recreational activities (see **COMMENT 3**). The effect of the bill'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 any recreational area or facility, including, but not limited to, any of the recreational areas or facilities described in clauses (1), (2), and (3), above, the political subdivision generally is not liable in a civil action for damages arising from those actions. Similarly, the political subdivision is not liable for damages arising from those actions under the existing provision that generally provides for political subdivision liability for damages arising from its employees' negligent acts performed with respect to proprietary functions. (R.C. 2744.02--not in the bill, see paragraph (2) under "**Background law**," above.) Thus, generally, the political subdivision will be immune from liability in a civil action for damages arising from employee actions of that nature. (R.C. 2744.01(C)(2)(u).)

Uncodified law

The bill states in uncodified law that R.C. 2744.01 was amended by Am. Sub. H.B. 350 of the 121st General Assembly and by acts subsequent to its amendment by Am. Sub. H.B. 350. The bill further states that it amends R.C. 2744.01 to remove substantive matter inserted by, and to revive substantive matter removed by, Am. Sub. H.B. 350, and that it retains in R.C. 2744.01 amendments that were made subsequent to Am. Sub. H.B. 350 and that are independent of the purposes of Am. Sub. H.B. 350. The bill specifies that the removal, revival, or retention of that language is not intended to have any substantive effect and is intended to present in the bill the version of R.C. 2744.01 that is currently effective. (Section 6.) (See **COMMENT 4**.)

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 (R.C. 2744.03--not in the bill):

(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.

(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 R.C. 2744.02, as described above.

COMMENT

1. Examples of specified governmental functions in the 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 and extremely 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; provision or nonprovision, planning or design, construction, or reconstruction of a public improvement including, but not limited to, a sewer system; operation of a human services (changed by the bill to job and family 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; provision or nonprovision of 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 (R.C. 2744.01(C)(2)(a) to (t), (v), and (w)).

2. The specified proprietary functions under the 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 (R.C. 2744.01(G)(2)(a) to (e)).

3. The bill defines "all-purpose vehicle" as having the same meaning as in the Special Vehicles Law, that is, any self-propelled vehicle designed primarily for

cross-country travel on land and water, or on more than one type of terrain, and steered by wheels or caterpillar treads, or any combination thereof, including vehicles that operate on a cushion of air, vehicles commonly known as all-terrain vehicles, all-season vehicles, mini-bikes, and trail bikes, but *excluding* any self-propelled vehicle not principally used for purposes of personal transportation, any vehicle principally used in playing golf, any motor vehicle or aircraft required to be registered under the Motor Vehicle Licensing Law or the Aircraft and Aeronautics Law, and any vehicle excepted from the definition as a motor vehicle by the Motor Vehicle Law. (R.C. 2744.01(C)(2)(u)(viii) and R.C. 4519.01(B)--not in the bill.)

4. R.C. 2744.01 was substantively amended by the Tort Reform Act, Am. Sub. H.B. 350 of the 121st General Assembly, effective January 27, 1997, to add a definition of "public roads" in division (H) of that section. In *State ex rel. Ohio Academy of Trial Lawyers v. Sheward* (1999), 86 Ohio St.3d 451, the Supreme Court, in paragraph three of the syllabus, held that "Am. Sub. H.B. No. 350 violates the one-subject provision of Section 15(D), Article II of the Ohio Constitution, and is unconstitutional *in toto*."

Subsequent to the amendment of R.C. 2744.01 by Am. Sub. H.B. 350 of the 121st General Assembly, R.C. 2744.01 was amended by Am. Sub. H.B. 215 of the 122nd General Assembly to add a community school established under R.C. Chapter 3314. to the definition of "political subdivision" or "subdivision." R.C. 2744.01 also was amended by H.B. 205 of the 123rd General Assembly to add to the definition of "governmental function" the design, construction, reconstruction, renovation, repair, maintenance, and operation of any water park, wading pool, wave pool, water slide, and other type of aquatic facility.

The bill amends R.C. 2744.01 to remove the substantive amendment to that section by Am. Sub. H.B. 350 of the 121st General Assembly as described in the second preceding paragraph. The bill retains in R.C. 2744.01 the amendments made to that section by Am. Sub. H.B. 215 of the 122nd General Assembly and H.B. 205 of the 123rd General Assembly as described in the preceding paragraph, and states that these amendments are independent of the purposes of Am. Sub. H.B. 350.

HISTORY

ACTION	DATE	JOURNAL ENTRY
Introduced	01-30-01	p. 93
Reported, S. Judiciary-- Civil Justice	02-27-01	p. 160
Passed Senate (31-2)	02-27-01	p. 163
Reported, H. Civil and Commercial Law	04-05-01	p. 295

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