



S.B. 106

124th General Assembly
(As Introduced)

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 school athletic facility, school auditorium, or gymnasium.
- Re-enacts changes made by Am. Sub. H.B. 350 of the 121st General Assembly to the Political Subdivision Sovereign Immunity Law.
- Retains as existing law any amendments to sections of law in the bill that were made by acts after the enactment of Am. Sub. H.B. 350 of the 121st General Assembly.

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CONTENT AND OPERATION

General overall operation of the bill

The bill includes as a "governmental function" under the Political Subdivision Sovereign Immunity (PSSI) Law the design, construction, reconstruction, renovation, repair, maintenance, and operation of any school athletic facility, school auditorium, or gymnasium (explained in more detail below).

In addition, the bill re-enacts changes made by Am. Sub. H.B. 350 of the 121st General Assembly (the Tort Reform Act) to the PSSI Law (explained generally below). Because the Tort Reform Act was held by the Ohio Supreme Court to be unconstitutional for violation of the one-subject provision of the Ohio Constitution, those changes cannot operate until re-enacted by the General Assembly. *State, ex rel. Ohio Academy of Trial Lawyers v. Sheward* (1999), 86 Ohio St.3d 451. The bill also retains as existing law any amendments to the sections of law within it that were made by acts enacted after the Tort Reform Act.

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 currently *is liable* in damages in a civil action in the following circumstances (R.C. 2744.02(A) and (B) and 2744.05):

(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 (this provision is changed by the bill--see "Re-enactment of Am. Sub. H.B. 350 provisions," below);

(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 (this provision is changed by the bill--see "Re-enactment of Am. Sub. H.B. 350 provisions," below);

(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 (this provision is changed by the bill--see "Re-enactment of Am. Sub. H.B. 350 provisions," below).

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 so specified 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 listed 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 so specified 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."

(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.

Changes made by the bill

The bill adds to the specifically designated governmental functions of the PSSI Law the design, construction, reconstruction, renovation, repair, maintenance, and operation of any school athletic facility, school auditorium, or gymnasium. 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 school athletic facility, school auditorium, or gymnasium, the political subdivision generally is not liable in damages in a civil action arising from those actions or omissions. Similarly, the political subdivision is not liable in damages in a civil action arising from those actions or omissions under the provision of existing law that generally provides for political subdivision liability for harm arising from employees' negligent acts performed with respect to proprietary functions. (R.C. 2744.02.) Thus, generally, the political subdivision will be immune from liability in damages in a civil action arising from those actions or omissions of an employee. (R.C. 2744.01(C)(2)(u).)

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):

(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. (This provision is changed by the bill--see "*Re-enactment of Am. Sub. H.B. 350 provisions*," below.)

(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.

Re-enactment of Am. Sub. H.B. 350 provisions

The provisions explained in this portion of the analysis, re-enacted by the bill, were enacted by Am. Sub. H.B. 350 of the 121st General Assembly but were held to be unconstitutional by the Ohio Supreme Court in *State ex rel. Ohio Academy of Trial Lawyers v. Sheward* (1999), 86 Ohio St.3d 451, for violating the one-subject provision of the Ohio Constitution. These provisions relate to political subdivision sovereign immunity and are amended (re-enacted) by the bill as follows:

- Amends the provision of existing law that provides that political subdivisions are generally liable for injury, death, or loss to persons or property that is caused by the negligence of their employees and that occurs within or on the grounds of buildings that are used in connection with the performance of a governmental function to also require that the injury, death, or loss be due to physical defects within or on the grounds of buildings that are used in connection with a governmental function (R.C. 2744.02(B)(4)).
- Amends the provision of law that provides that a political subdivision is liable for injury, death, or loss to person or property when liability is expressly imposed upon the political subdivision by a section of the Revised Code to provide that liability shall not be construed to exist because the term "shall" is used in a provision of the Revised Code pertaining to a political subdivision or a section of the Revised Code imposes a mandatory duty upon a political subdivision (R.C. 2744.02(B)(5)).
- Provides that civil liability of an employee of a political subdivision shall not be construed to exist merely because a responsibility or mandatory duty is imposed upon an employee, because of a general authorization that an employee may sue and be sued, or because the term "shall" is used in a provision pertaining to an employee (R.C. 2744.03(A)(6)(c)).
- Clarifies that the statute of limitations for actions brought against a political subdivision under the PSSI Law is subject to the statute tolling periods of limitations on the basis of minority or unsound mind (R.C. 2744.04).

- Modifies the responsibility of boards of county commissioners with respect to guardrails by requiring the boards: (1) on county roads, to erect and maintain, where not already done, guardrails on each end of a county bridge, viaduct, or culvert more than five feet high (removes the requirement that the boards maintain guardrails on each side of an approach to a county bridge, viaduct, or culvert if the approach or embankment is more than six feet high), and (2) to protect, by guardrails, all embankments with a rise of more than eight feet in height and with a downward slope of greater than 70 degrees, where the embankments have an immediate connection with a county road (replaces the requirement that the boards protect by suitable guardrails all perpendicular wash banks more than eight feet in height that have an immediate connection with a public highway other than a state highway) (R.C. 5591.36).
- Removes the existing statement that it is sufficient in order to comply with the existing guardrail requirements if a board causes to be erected and maintained a good stockproof hedge fence where a guardrail is required and the requirement that guardrails or hedge fences be erected in a substantial manner, having sufficient strength to protect life and property (R.C. 5591.36).
- Changes a county's liability for all accidents or damages that result from the county's failure to erect and maintain guardrails from a strict liability standard to a negligence standard (R.C. 5591.37).
- Removes a provision requiring the legislative authority of a municipal corporation to keep public highways, streets, avenues, alleys, sidewalks, public grounds, bridges, aqueducts, and viaducts within the municipal corporation open, in repair, and free from nuisance, and provides that a municipal corporation's liability or immunity from liability for injury, death, or loss to person or property allegedly caused by a failure to perform the responsibility of having care, supervision, and control of public highways, streets, avenues, alleys, sidewalks, public grounds, bridges, aqueducts, and viaducts within the municipal corporation is to be determined under the PSSI Law (R.C. 723.01).
- Removes political subdivision liability for failing to keep public roads, highways, streets, avenues, alleys, sidewalks, public grounds, bridges, aqueducts, and viaducts within the political subdivision open, in repair, and free from nuisance and replaces it with liability for injury, death, or loss to person or property caused by a negligent failure to keep "public roads" (defined to mean public roads, highways, streets, avenues, alleys, and bridges) within the political subdivision in repair and other negligent failure to remove obstructions from such "public roads" (R.C. 2744.01(H) and 2744.02(B)(3)).

- Excludes from the definition of "public road" berms, shoulders, rights-of-way, and certain traffic control devices (R.C. 2744.01(H)).
- Provides that an order that denies a political subdivision or an employee of a political subdivision the benefit of an alleged immunity from liability is a final order (R.C. 2744.02(C)).
- Repeals a provision in existing law that provides specific qualified immunity from liability for port authority directors, officers, and employees for actions and omissions in the performance of their duties and provides for limited indemnification of these individuals for liability incurred in the performance of their duties, bringing these individuals under the scope of the immunity and indemnification provisions of the general PSSI Law (R.C. 4582.27).

Uncodified law

The bill states in uncodified law that some sections (R.C. 723.01, 2744.04, 2744.06, 5591.36, and 5591.37) have not been amended subsequent to their amendment by Am. Sub. H.B. 350 of the 121st General Assembly and are amended by the bill to re-enact the changes made by the Tort Reform Act (Section 7(A)(1)).

Other sections amended after the enactment of Am. Sub. H.B. 350 (R.C. 2744.01, 2744.02, 2744.03, 2744.05, and 4582.27) are amended by the bill to re-enact changes made by that act. Amendments made by subsequent acts to those sections, independent of and unrelated to Am. Sub. H.B. 350, are retained as existing law in the bill. (Section 7(A)(2), (3), (4), and (5), and Section 7(B).)

The bill states that its provisions apply only to causes of action that accrue on or after its effective date. Any cause of action that accrues before the bill's effective date is governed by the law in effect when the cause of action accrued. (Section 6.)

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 (should be changed by amending 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)).

HISTORY

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