Wendy H. Gridley *Legislative Service Commission*

Sub. S.B. 106*

124th General Assembly
(As Reported by S. State & Local Government & Veterans Affairs)

Sens. Hottinger, Wachtmann, Nein, Johnson

BILL SUMMARY

? Expands the definition of a "governmental function" in the Political Subdivision Sovereign Immunity (PSSI) 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.

? Expands the definition of a "governmental function" for similar purposes to include the designation, establishment, design, construction, implementation, operation, repair, or maintenance of a public road rail crossing in a "quiet zone" or of a supplementary safety measure at or for such a crossing.

? Expands the motor vehicle operation liability of political subdivisions to include liability for harm caused by negligent operation other than upon the public roads, highways, or streets.

? Makes changes proposed by Am. Sub. H.B. 350 of the 121st General Assembly to the PSSI Law.

? Limits a political subdivision's obligation to defend an employee to acts or omissions that occur while the employee is acting both in good faith and not manifestly outside the scope of employment or official responsibilities.

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* *This analysis was prepared before the report of the Senate State and Local Government and Veterans Affairs Committee appeared in the Senate Journal. Note that the list of co-sponsors and the legislative history may be incomplete.*

? Makes other changes to the PSSI Law.

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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 (1) the design, construction, reconstruction, renovation, repair, maintenance, and operation of any school athletic facility, school auditorium, or gymnasium (explained in more detail below) and (2) the designation, establishment, design, construction, implementation, operation, repair, or maintenance of a public road rail crossing in a "quiet zone" or of a supplementary safety measure at or for a public road rail crossing (explained in more detail below).

In addition, the bill makes changes proposed 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 proposed changes did not operate. *State ex rel. Ohio Academy of Trial Lawyers v. Sheward* (1999), 86 Ohio St.3d 451. The 124th General Assembly, in Sub. S.B. 108, repealed the Tort Reform Act, in response to the confusion over the status of the law after *Sheward*. In Sub. S.B. 106, the 124th General Assembly seeks to re-enact the substantive changes to the PSSI Law that were originally proposed by the Tort Reform Act and did not operate because of *Sheward*.

The bill also makes changes to the PSSI Law pertaining to a political subdivision's obligation to provide a defense for an employee in relation to certain acts or omissions, and it expands the existing scope of liability of a political subdivision for employees' negligent operation of motor vehicles to include negligent operation other than upon public roads, highways, or streets (explained in more detail below). Lastly, the bill specifies when civil liability of a political subdivision or an employee of a political subdivision cannot be construed to exist under another section of law, including (among other reasons) because that section provides for a criminal penalty (explained in more detail below).

Background law--general nonliability/liability of political subdivisions

For purposes of R.C. Chapter 2744., the 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), 2744.03, 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 (this provision is changed by the bill--see "***Political subdivision's liability for an employee's negligent operation of a motor vehicle***," below);

(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 the Law 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 recreational area or facility, such as any park, playground, or playfield; an indoor recreational facility; a zoo or zoological park; a bath, swimming pool, pond, water park, wading pool, wave pool, water slide, or other type of aquatic facility; a golf course; a bicycle motocross facility or other type of recreational area or facility in which bicycling, skating, skateboarding, or scooter riding is engaged; a rope course or climbing walls; or an all-purpose vehicle facility in which such vehicles are contained,

maintained, or operated for recreational activities (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 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

New governmental functions. The bill adds to the specifically designated governmental functions of the PSSI Law (1) the design, construction, reconstruction, renovation, repair, maintenance, and operation of any school athletic facility, school auditorium, or gymnasium and (2) the designation, establishment, design, construction, implementation, operation, repair, or maintenance of a public road rail crossing in a "quiet zone" or of a supplementary safety measure at or for a public road rail crossing. 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 either (1) the design, construction, reconstruction, renovation, repair, maintenance, and operation of any school athletic facility, school auditorium, or gymnasium, or (2) the designation, establishment, design, construction, implementation, operation, repair, or maintenance of a public road rail crossing in a "quiet zone" or of a supplementary safety measure at or for a public road rail crossing (see further explanation below), the political subdivision generally is not liable in damages in a civil action arising from those acts or omissions. Similarly, the political subdivision is not liable in damages in a civil action arising from those acts 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 acts or omissions of an employee. (R.C. 2744.01(C)(2)(u) and (w).)

Regulation of locomotive warning sounds. Current Ohio law requires locomotives to sound a warning as they approach within 1,320 and 1,650 feet of a highway grade crossing, or for some other audible warning system to be activated (secs. 4955.32 and 4955.321--not in the bill). However, neither sound warning requirement applies if it would "interfere with" compliance with a municipal ordinance regulating railroads, locomotives, and locomotive sound warnings (presumably, an ordinance prohibiting warning sounds in certain places or at certain hours of the day--often referred to as "quiet zones") (sec. 4955.32(C)--not in the bill).

Current Ohio law eventually may be preempted by federal regulations that the United States Secretary of Transportation currently is required to issue. 49 U.S.C.A. 20153. These regulations, once issued, must require locomotives to sound warnings at grade crossings unless an exception is made by the Secretary. The Secretary may grant exceptions for categories of grade crossings for which no significant risk is posed by the lack of a locomotive sound warning, for which the requirement is impractical, or for which a satisfactory "supplementary safety measure" is in place. A supplementary safety measure essentially is some means of warning persons of approaching locomotives without the use of a locomotive sound warning. To be considered for an exception from the federal sound warning requirement on the basis of a supplementary safety measure, local governments and railroad operators will have to jointly apply to the Secretary.

Until the federal regulations are finally issued, the extent to which they will preempt Ohio law remains uncertain. It is possible that the federal regulations will render every municipal "quiet zone" unlawful unless the grade crossings in a quiet zone are excepted from the federal locomotive sound warning requirements by the Secretary.

As noted under '***New governmental functions***," above, the bill generally provides immunity from liability to a political subdivision for specified actions pertaining to public road rail crossings in quiet zones. Because it is not certain when or if the Secretary of Transportation will issue locomotive sound warning regulations, the bill addresses these actions for the period before the regulations take effect and for the period after they are in effect. Before the regulations take effect, municipal corporations will have immunity in connection with the specified actions in the same manner they currently have for other governmental functions; after the regulations take effect, municipal corporations and other political subdivisions will have immunity from liability for acts or omissions in connection with the "governmental function" of the designation, establishment, design, construction, implementation, operation, repair, or maintenance of a public road rail crossing in a quiet zone or of a supplementary safety measure at or for a public road rail crossing, if, and to the extent that, the crossing is excepted from the

federal sound warning requirements by the Secretary (for example, if a supplementary safety measure is in place at a crossing that has been excepted by the Secretary). (Sec. 2744.01(C)(2)(w).)

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 person 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 person 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

Most of the provisions explained in this portion of the analysis were originally proposed by Am. Sub. H.B. 350 of the 121st General Assembly, were held to be unconstitutional by the Ohio Supreme Court in *Sheward* for violating the one-subject provision of the Ohio Constitution, and were subsequently repealed by Sub. S.B. 108 of the 124th General Assembly. The provisions relate to political subdivision sovereign immunity, and Sub. S.B. 106 proposes to re-enact them (with some additional modifications as noted) as follows:

? The provision of existing law that political subdivisions are generally liable for injury, death, or loss to person 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 is amended 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)).

? The provision of existing law 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 is amended to provide (1) that the liability must be expressly imposed "civil" liability and (2) that "civil" liability cannot be construed to exist (in addition to existing law's grounds) 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 (re-enactment of Am. Sub. H.B. 350 provisions). The bill adds that civil liability cannot be construed to exist

because another statute provides for a criminal penalty (this was not proposed in Am. Sub. H.B. 350). (R.C. 2744.02(B)(5).)

? The provision of existing law that confers a qualified immunity from liability upon an employee of a political subdivision is amended (1) to provide that the immunity is forfeited (in addition to existing law's other grounds) if "civil" liability is expressly imposed upon the employee by a statute and (2) to provide that "civil" liability of an employee cannot 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 (re-enactment of Am. Sub. H.B. 350 provisions). The bill adds that civil liability cannot be construed to exist because another statute provides for a criminal penalty (this was not proposed in Am. Sub. H.B. 350). (R.C. 2744.03(A)(6)(c).)

? The statute of limitations for actions brought against a political subdivision under the PSSI Law is made subject to the statute tolling periods of limitations on the basis of minority or unsound mind (R.C. 2744.04).

? The responsibility of a board of county commissioners with respect to guardrails is modified to require a board: (1) to erect and maintain on county roads, 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 board 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 a board 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).

? Repealed is 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).

? A county's liability for all accidents or damages that result from the county's failure to erect and maintain guardrails is changed from a strict liability standard to a negligence standard (R.C. 5591.37).

? The existing requirement that the legislative authority of a municipal corporation keep public highways, streets, avenues, alleys, sidewalks, public grounds, bridges, aqueducts, and viaducts within the municipal corporation open, in repair, and free from nuisance is repealed, and a provision is substituted 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).

? The liability of a political subdivision 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 is repealed and replaced 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), 2744.02(B)(3), and 5511.01).

? The proposed definition of "public road" excludes berms, shoulders, rights-of-way, and certain traffic control devices (R.C. 2744.01(H)).

? An order that denies a political subdivision or an employee of a political subdivision the benefit of an alleged immunity from liability is specified as a final order (R.C. 2744.02(C)).

? The existing collateral benefits provisions are amended (1) to require a deduction of benefits from an award against a political subdivision regardless of whether a claimant is under an obligation to pay the benefits back after a recovery and (2) to specify that a claimant whose benefits are deducted from an award is not considered fully compensated and cannot be required to reimburse a subrogated claim for benefits (R.C. 2744.05(B)(1)).

? Repealed is 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).

Political subdivision's liability for an employee's negligent operation of a motor vehicle

As explained above, under "***Background law--general nonliability/liability of political subdivisions***," a political subdivision currently is generally liable (subject to specified defenses for police, fire department, and emergency medical services emergency responses) in damages in a civil action if injury, death, or loss to person or property is caused by the negligent operation of any motor vehicle by an employee upon the public roads, highways, or streets when the employee is engaged within the scope of the employee's employment and authority. The bill removes the requirement for the negligent operation of a motor vehicle to occur on a public road, highway, or street, thereby expanding the scope of a political subdivision's liability to include negligent operation of a motor vehicle occurring other than upon a public road, highway, or street (sec. 2744.02(B)(1)).

Defense of an employee by a political subdivision

Under existing law, a political subdivision is required to provide for the defense of an employee in any federal or state court civil action or proceeding to recover damages for injury, death, or loss to person or property allegedly caused by an act or omission of the employee in connection with a governmental or proprietary function if the act or omission *occurred or is alleged to have occurred* while the employee was acting in good faith and not manifestly outside the scope of employment or official responsibilities (sec. 2744.07(A)). If a political subdivision refuses to provide an employee with such a defense, the employee may file in the court of common pleas an action seeking a determination as to the appropriateness of that refusal (sec. 2744.07(C)).

The bill removes this qualified requirement for the provision of a defense for an *alleged* occurrence of an act or omission by an employee seeking the defense, and it clarifies that an employee's act or omission must have occurred while the employee was acting "both" in good faith and not manifestly outside the scope of employment or official responsibilities. In addition, the bill directs a court of common pleas, in determining the appropriateness of a political subdivision's refusal to provide a defense to an employee, to determine a refusal to be appropriate unless there was an abuse of discretion on the part of the political subdivision. (Sec. 2744.07(A) and (C).)

Application

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 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

ACTION	DATE	JOURNAL ENTRY	
Introduced	05-08-01	p.	351
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