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Chris Cadwell
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Via email: chris.cadwell@yorkrsg.com

Re: H.B. No. 27– Modify Political Subdivision Liability for Negligent Operation of Vehicle

Dear Mr. Cadwell:

H.B. No. 27 proposes a modification to certain sections of the Political Subdivision Tort Liability Act. The legislation seeks to amend sections of ORC 2744.02 and ORC 2744.05, which provide immunity to first responders and law enforcement while involved in a call to duty through an emergency response. In our experience, in many situations, seconds matter as to any potential emergency response. A fire, heart attack, gun violence, poison, serious physical injury, or mental/emotional crisis can be life altering depending on the immediacy of a safety force response. A few seconds or one minute may often determine the outcome. As a result, legislation which imposes liability for those public servants striving to help the community if the response is accelerated defeats the very purpose of safety force training and goals.

The proposed amendments may create more harm to the public. The purpose of the proposed amendments appears to be an effort to eliminate available immunity in order to possibly provide compensation to those who may be injured as a result of an emergency response. The better approach is to utilize the existing legislation, including Supreme Court precedent and interpretation of these immunity statutes, along with training and policy development to reduce or eliminate accidents. Unfortunately, the proposed amendments to the legislation may only heighten the risk of harm.

As you recognize, members of every community rely upon 911 dispatchers to send police, fire and EMS personnel immediately in the event of an emergency. Any citizen experiencing violence, breaking and entering, suspicious activity or other danger is entitled to rapid response by law enforcement. Similarly, any citizen experiencing fire, injury, stroke, heart attack, poison or any type of child endangerment demands immediate fire and EMS response. While there are risks inherent in any emergency response, a greater risk to the vast majority of 911 dispatch needs arises when law enforcement and first responders are deemed liable as any ordinary motor vehicle operator while

traveling to a potential life or death situation. In large part, the premise that proper training and policy do not reduce or prevent accidents is simply false. In our experience, training and policy adaptations in both law enforcement and fire/EMS are the most effective methods to improve performance and prevent unexpected accidents.

HISTORY OF IMMUNITY LEGISLATION

The history of sovereign immunity in Ohio today is most interesting. The history of the immunity doctrine in Ohio and across the country is associated with the English common-law concept that "the king can do no wrong." See *Haas v. Hayslip* (1977), 51 Ohio St. 2d 135. The concept of local governmental immunity can be traced to the English case of *Russell v. Men of Devon* (K.B.1788), 100 Eng.Rep. 359. The rule of *Russell* was first introduced into this country in *Mower v. Inhabitants of Leicester* (1812), 9 Mass. 247, 1812 WL 927.

During the period immediately following *Mower* and, throughout the early 1800's, Ohio courts favored the imposition of liability on local government units. The Ohio Supreme Court first introduced the doctrine of municipal sovereign immunity in 1854.

Political subdivision immunity was a judicially created doctrine that the Ohio Supreme Court ultimately abolished in the early 1980s. *Haverlack v. Portage Homes, Inc.* (1982), 2 Ohio St. 3d 26, *Zents v. Summit Cty. Bd. of Commrs.* (1984), 9 Ohio St. 3d 204, the Court's abolishment of political subdivision immunity was not complete. The Court made clear that political subdivisions remained immune from liability "for those acts or omissions involving 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 the exercise of a high degree of official judgment or discretion." *Enghauser Mfg. Co.*, paragraph two of the syllabus; see, also, *Zents*, syllabus. The Supreme Court recognized that local governments remained immune from liability for "certain acts which go to the essence of governing," i.e., conduct characterized by a high degree of discretion and judgment in making public policy choices. *Enghauser Mfg. Co.*

The General Assembly responded to *Haverlack*, *Enghauser Mfg.*, and *Zents* by enacting the Political Subdivision Tort Liability Act, declaring that political subdivisions would be liable in tort only as set forth in R.C. Chapter 2744. R.C. 2744.01 *et. seq.* was enacted November 20, 1985, Am. Sub. H.B. No. 176 (141 Ohio Laws 1699). The original act, as adopted, included the current sections 2744.01(C)(2)(j) and 2744.02. Section eight of the bill states:

"SECTION 8. "This act is hereby declared to be an emergency measure necessary for the immediate preservation of the public peace, health, and safety. The reason for such necessity is that the protections afforded to political subdivisions and employees of political subdivisions by this act are urgently needed in order to ensure the continued orderly operation of local government and the continued ability of local governments to provide public peace, health, and safety services to their residents. Therefore, this act shall go into immediate effect."

Consequently, it is apparent that the original legislative act, as adopted, was intended to offer political subdivisions a general grant of immunity from tort liability under most circumstances.

Over time, Ohio Courts have interpreted provisions of R.C. 2744, when determining whether political subdivision employees operating emergency vehicles are immune from liability. The scope of the statute, the breadth of conduct that constituted mere negligence, versus wanton, willful, or reckless action has developed in cases throughout Ohio. Immunity has, most certainly, not been found in all instances where accidents have occurred in the course of emergency operations by police and fire personnel. Ohio courts have scrutinized the facts of cases and the conduct of first responders to determine whether the specific conduct falls within the scope protected by R.C. 2744.

As cases with sometimes tragic facts worked their way up through the appellate courts, particular scrutiny of the conduct of emergency responders gave rise to a clearer understanding of how the interests of the public can be protected and taken into account while recognizing the need for quick response times in emergency circumstances. In 2012, the Ohio Supreme Court engaged in a detailed examination of the application of R.C. 2744.02(B), within the context of a tragic accident between a van and a fire truck en-route to a fire call. The Court clarified the varying degrees of conduct contemplated within the statute, holding that "willful, wanton, and reckless describe different degrees of care and are not interchangeable." *Anderson v. Massillon*, 2012 Ohio 5711. The Court emphasized that violation of a statute, ordinance, or departmental policy enacted for the safety of the public is not *per se* willful, wanton, or reckless conduct but may be relevant to determining the culpability of a course of conduct.

Since the clarification in *Anderson*, judges, juries and Courts of Appeals in Ohio have dealt with "emergency run" cases by applying the Ohio Supreme Court's definitional analysis. There is no indication that, somehow, communities and their first responders are being ill served by maintaining the statutory protections and scrutinizing the conduct on a case by case basis.

CURRENT LEGISLATIVE PROTECTIONS

The current legislative restrictions regarding emergency response properly protect the public. While the General Assembly directed that immunity does not exist for public sector employees operating a motor vehicle under normal conditions, (ORC 2744. 02(B)(1)), section 2744.02(B)(1) (a)-(c) provides that employees are entitled to immunity while involved in a call to duty in response to police, fire or EMS public needs. However, the well-developed concept of immunity for emergency situations is not absolute, and may be lost, and in that event, negligence principles apply where the vehicle operation rises to the level of willful, wanton or reckless conduct. As stated, the Ohio Supreme Court defined these terms through a series of decisions, including *Anderson v. Massillon* 2012-Ohio-5711. The *syllabus* of *Anderson v. Massillon* properly defines the conduct which would remove the immunity protection to law enforcement and first responders through ORC 2744.02 (B)(1), including willful, wanton, or reckless conduct:

1. "Willful," "wanton," and "reckless" describe different and distinct degrees of care and are not interchangeable. (*Thompson v. McNeill* (1990), 53 Ohio St.3d 102, 559 N.E.2d 705, modified.)

2. Willful misconduct implies an intentional deviation from a clear duty or from a definite rule of conduct, a deliberate purpose not to discharge some duty necessary to safety, or purposefully doing wrongful acts with knowledge or appreciation of the likelihood of resulting injury. (*Tighe v. Diamond*, 149 Ohio St. 520, 80 N.E.2d 122 (1948), approved and followed.)

3. Wanton misconduct is the failure to exercise any care toward those to whom a duty of care is owed in circumstances in which there is great probability that harm will result. (*Hawkins v. Ivy*, 50 Ohio St.2d 114, 363 N.E.2d 367 (1977), approved and followed.)

4. Reckless conduct is characterized by the conscious disregard of or indifference to a known or obvious risk of harm to another that is unreasonable under the circumstances and is substantially greater than negligent conduct. (2 Restatement of the Law 2d, Torts, Section 500 [****2] (1965), adopted.)

The purpose of these immunity restrictions is to balance the public demand for rapid emergency response while at the same time protecting the emergency process by limiting the manner in which the safety forces respond to the emergency need. The limitations on immunity along with department policy and training are designed to balance these competing demands of rapid response while traveling on public highways.

In addition, many police and fire departments incorporate standards within their policies to limit the duration and method of an emergency responses, including prohibiting speeds significantly in excess of the speed limit, limiting police pursuits to only certain types of criminal conduct and breaking off most police pursuits after a short duration. All of these inherent modifications are designed to further protect the public at large while preserving the discretion of each emergency responder in a given situation to react appropriately.

Eliminating immunity for emergency responders will create a chilling effect on any call to duty; the individual responder and the political subdivision itself would be subject to liability for negligence while responding to the emergency, thus the response will be slower, which may have disastrous impact at the level of the emergency need. Again, any person experiencing a medical emergency or potential crime, particularly a crime of violence, will not be comforted to know the police or fire responders were delayed because of ordinary traffic conditions.

It should also be understood that members of law enforcement and first responders suffer greatly whenever they are involved in any harm to the public, either in the process of the response, or because of the suffering by the person in need. In fact, the irony of causing injury to the public while trying to save or help another creates the greatest emotional challenge to any emergency responder. In our experience, these men and women are devoted to helping others, and causing any type of harm is contrary to every aspect of their vocation and character. Yet, the nature of police and fire/EMS needs demand the flexibility of rapid response, within pre-set limitations, as both the current legislation and most policy and training require. Thus, revoking immunity will cause a greater loss, in that the delay in response could have catastrophic consequences, and first responders may still be involved in accidents, despite their best efforts, which will then cause more litigation and cost to political subdivisions. Such outcomes are completely contrary to protecting the public and preserving public funds to the extent possible.

Conclusion

In summary, safety forces take great pride in providing service that protects the public during the worst of events. A necessary aspect of such devoted service is rapid response.

The elimination of political subdivision immunity, except when the plaintiff is attempting to flee from the police, is not the answer to the challenges associated with emergency vehicle crashes. The policies incorporated by police, EMS and fire departments to limit the duration and method of emergency responses must be balanced with legislative protection for political subdivisions and their employees in order to provide adequate protection for the public that is neither cost prohibitive nor fraught with the threat of liability. Holding police, fire and EMS personnel to the same standard as other drivers on the road does not take into account the countless obstacles that may arise en-route to an emergency situation. If responders are prohibited from bypassing such obstacles, without the fear of legal repercussion, the result will be ineffective provision of safety services to the public. As is stands, H.B. No. 27 would cripple first responders from responding to emergencies in a timely fashion and would have the unintended consequence of jeopardizing the lives of those depending on rapid response in the event of an emergency. These emergencies are not limited to police pursuits, but more often than not are fire, medical, or serious criminal situations where seconds matter.

Very truly yours,

s/Gregory A. Beck

Gregory A. Beck

GAB:sm

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