

Revised Code Chapter 2744: What's Happened and What's to Come

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Introduction

The Ohio General Assembly codified political subdivision liability and immunity in Chapter 2744 of the Ohio Revised Code. In 1982, the Ohio Supreme Court abolished common law immunity for political subdivisions and determined that the defense was not available unless codified in

statute.¹ The legislature responded in 1985 by reinstating political subdivision immunity in R.C. 2744.02(A)(1).² The last major revisions to the Act occurred in 2003. Since that time, Ohio's Supreme Court and district courts of appeal have analyzed cases involving claims of immunity with guidance from the revised Act, which reinforced protections for political subdivisions after Ohio's courts eroded prior guarantees. While the Ohio Supreme Court often reviews cases involving Revised Code Chapter 2744, it has not reviewed an immunity case in the past year, and has only reviewed four cases in the past two years.

Supreme Court Cases

Over the past two years, the Ohio Supreme Court decided four cases addressing political subdivision immunity under Chapter 2744, which included issues of: the constitutionality of requiring cash payments for bail, civil liability in a state anti-discrimination statute, damages resulting from a police pursuit, and maintenance of a sanitary sewer system.³ The Court's rulings affirm the importance of Chapter 2744 and ensure the statutory scheme remains an effective tool to govern political subdivision immunity. At this time, the Supreme Court has accepted two appeals related to political subdivision immunity for its upcoming term.

State ex rel. Sylvester v. Neal

In *Neal*, a mandamus action, the Supreme Court addressed whether a ten-percent cash-only bond requirement violated the Ohio Constitution.⁴ Two individuals and a bail bonds

company alleged that Criminal Rule 46(A)(2), which permitted a court to require a ten-percent bond payment in cash only, violated the Ohio Constitution's provision stating that "[a]ll persons shall be bailable by sufficient sureties."⁵ The relators sued clerks of court, county judges, and the Licking County Court of Common Pleas.⁶ The Supreme Court determined that the Criminal Rule allowing courts to require an all-cash bail payment violated the Ohio Constitution.⁷ Individual defendants held on bond have a constitutional right to be bailed out "by sufficient sureties," not just a cash payment.⁸

One of the relators sought damages for loss of business from respondents, alleging that enforcement of the cash-only requirement cost his business approximately \$11,450.00.⁹ Chapter 2744 permits damages against political subdivision employees when the employee acts outside of his or her employment, acts maliciously, in bad faith, recklessly, or wantonly.¹⁰ The Supreme Court did not permit damages after determining the employees "were acting within the scope of their duties when setting and enforcing bail based on the language in Crim.R. 46(A)(2)."¹¹ Further, the respondents did not act maliciously or in bad faith, and simply enforced a law that they did not know the Court would determine was unconstitutional.¹² Lastly, no statute imposed civil liability for the employees' actions.¹³ The Supreme Court affirmed immunity for political subdivision employees acting within the scope of their employment.

Hauser v. Dayton Police Dept.

In *Hauser*, a City of Dayton police officer sued the Dayton Police Department and a major alleging gender-based discrimination, among other claims, in violation of Ohio's anti-discrimination law and the Civil Rights Act of 1964.¹⁴ The Supreme Court described the case as an analysis of political subdivision employee immunity and the imposition of civil liability by a section of the Ohio Revised Code.¹⁵ The officer alleged that her employer did not offer her opportunities for advancement and by taking actions against her that were not taken against other

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similarly-situated individuals.¹⁶ The Police Department and major alleged that a supervising officer could not be held personally liable in a discrimination action.¹⁷ The trial court and Eighth District Court of Appeals denied the major's immunity defense.

On appeal, the Supreme Court addressed whether R.C. § 4112.02(A), which prohibits employers from discriminating based on gender and other characteristics, also imposes civil liability on a political subdivision employee.¹⁸ The Court discussed the history of the definition and meaning of "employer" and noted that the legislature could have expressly imposed liability on individual employees, and actually did so in other parts of the anti-discrimination statute.¹⁹ The definition of "employer" chosen for the Act in 1959 mirrored the definition the United States Supreme Court used in the 1947 case of *Packard Motor Car Co.*, which dealt with labor relations.²⁰ The Supreme Court defined an "employer" as "any person acting in the interest of an employer, directly or indirectly[.]"²¹ While the current definition is slightly different, the United States Supreme Court's definition of "employer" was meant "to render employers responsible in labor practices for acts of any persons performed in their interests."²²

The Ohio Supreme Court refused to ignore the historical import of the United States Supreme Court's definition of "employer."²³ Had the Ohio legislature intended to impose liability on individual employees in R.C. § 4112.02(A), it would have explicitly provided for individual liability, as opposed to employer liability. The Court ultimately determined that R.C. §§ 4112.01(A)(2) and 4112.02(A) "do not expressly impose civil liability on political-subdivision employees."²⁴ Instead, R.C. §§ 4112.01(A)(2) and 4112.02(A) provide for vicarious liability of a political subdivision for discriminatory acts committed by their employees.²⁵ The Court's holding is limited to those sections dealing with employer liability and does not abrogate other portions of the Act that may impose liability on individual employees.²⁶

State ex rel. City of Cleveland v. Astrab

In *State ex rel. Cleveland v. Astrab*, another mandamus action, the Ohio Supreme Court addressed political subdivision and political subdivision employee immunity in the context of a police pursuit that resulted in the death of a woman after she was hit and killed by a stolen vehicle pursued by police.²⁷ The City of Cleveland and its employees filed a motion to dismiss based on political

subdivision immunity, which was denied by the trial court and overturned by the Eighth District Court of Appeals.²⁸ The trial court dismissed the Plaintiffs' Complaint without prejudice, subjecting the City and its employees to the potential of additional litigation.²⁹ The City and its employees filed a mandamus action with the Eighth District, which determined that it had not mandated a dismissal with prejudice in its prior decision, that the mandamus action was improper, and that the City and its employees failed to demonstrate "entitlement to extraordinary relief by clear and convincing evidence."³⁰

In its decision, the Ohio Supreme Court addressed immunity in official-capacity claims and the exceptions to immunity in individual-capacity claims.³¹ Citing the "law of the case" doctrine, the Court determined that the Eighth District's decision on official-capacity immunity obligated Judge Astrab to dismiss all official-capacity claims with prejudice.³² Judge Astrab's contention that the City and its employees could file dispositive motions and relitigate the issue of official-capacity immunity countered the general policy recognizing the importance of an early determination of whether immunity applies and the finality of that decision after an early appeal.³³ As a result, the Supreme Court reversed the lower court and granted the City's and its employees' request for a writ of mandamus.

In its consideration of the individual-capacity claims, the Supreme Court determined that the lower court did not make a determination of whether the individual Defendants were entitled to immunity, but found the Plaintiffs did not state sufficient allegations to overcome Defendants' claims of immunity.³⁴ Since the individual-capacity claims were not dismissed on the basis of political subdivision immunity, but for failure to state a claim, the trial court had the authority to dismiss Plaintiffs' Complaint without prejudice and permit them to file a new Complaint alleging additional facts, or to amend their original Complaint.³⁵

Riscatti v. Prime Properties Ltd. Partnership

In *Riscatti*, the Court addressed a gasoline leak into a sanitary sewer, which led to damages to one hundred current and former property owners in Cuyahoga County.³⁶ The Court defined the narrow issue before it as "whether a denial of a public subdivision's dispositive motion asserting a statute-of-limitations defense pursuant to R.C. 2744.04 is a final, appealable order."³⁷ The property owners alleged various damages, including a house fire and the smell of gasoline in homes and along State Road.³⁸ A citation and

prior leaks never led the culprit, a local petrol station, to rectify the gas leak.³⁹ Property owners sued the petrol station, Cuyahoga County, and other entities; however, the Supreme Court only addressed claims against the County in the appeal.⁴⁰

Cuyahoga County sought immunity based on the statute of limitations in R.C. § 2744.04(A) and immunity for the design of sewer systems found in R.C. §§ 2744.01(C)(2)(1) and 2744.02.⁴¹ The trial court considered multiple dispositive motions filed by the County and held the County's summary judgment motion until the completion of discovery, denied its dispositive motion as it related to Civ.R. 12(C), and denied the County's motion based upon the statute of limitations.⁴² On appeal, the Eighth District determined that the trial court's decision on the statute of limitations was not a final appealable order, and the appellate court did not have jurisdiction to hear the County's appeal.⁴³ Cuyahoga County appealed to the Ohio Supreme Court.

The Supreme Court affirmed the importance of immunity determinations and the legislature's enactment of R.C. § 2744.02(C), which allows political subdivisions to appeal immunity denials immediately after the court enters its order.⁴⁴ While the Court generally applies R.C. § 2744.02(C) broadly, it determined that an appellate court's denial of a motion for judgment on the pleadings is not a final appealable order when the basis of the motion is a statute of limitations defense.⁴⁵ In upholding the decision of the Eighth District, the Supreme Court distinguished a defense based on political subdivision immunity and a defense based on the statute of limitations within Chapter 2744. The denial of a dispositive motion based on the statute of limitations does not limit a subdivision's claim to immunity.⁴⁶

Upcoming Cases

The Supreme Court has accepted two cases that address political subdivision immunity for its upcoming term.⁴⁷ *Baker v. Wayne Cnty.*, from the Ninth District, addresses a political subdivision's liability for injuries or death resulting from a failure to maintain public roads.⁴⁸ The Ninth District overruled the trial court's grant of immunity and determined that Wayne County could be liable for a fatal car accident that occurred on a road involved in a scratch paving project that removed the road's white edge lines. The Ninth District stated, "Within this framework, an exception to immunity under R.C. 2744.02(B)(3) may exist if, in the course of the ongoing construction project, a political subdivision

negligently failed to keep a public road 'in repair.'"⁴⁹ The appellate court determined that the trial court did not consider whether the road was "in repair" for the purposes of Chapter 2744.⁵⁰

Argabrite v. Neer, from the Second District, addresses a damages claim filed by a driver who was injured during a police pursuit of a burglary suspect.⁵¹ The defendants claimed immunity and alleged they did not act wantonly or recklessly and that they were not the proximate cause of the injured driver's damages.⁵² The Second District refused to overturn the "no proximate cause" rule adopted throughout Ohio, which states that when a suspect injures a third-party while being chased by law enforcement, the law enforcement officers' pursuit is not the proximate cause of the third party's injuries unless that officers engage in extreme or outrageous conduct.⁵³ The appellate court determined that "no reasonable juror could conclude that the officers' speeds during the pursuit were extreme or outrageous."⁵⁴ Further, it could not be said that the possible violation of the officers' departmental pursuit policies was extreme or outrageous and there was no evidence that the officers knew their pursuit would probably lead to personal injuries.⁵⁵ Finding no causal connection, the court withheld its immunity determination.⁵⁶

Conclusion

The Ohio Supreme Court's rulings on political subdivision immunity over the past two years affirm the importance of Chapter 2744 and the limits it places on political subdivision liability. In addressing procedural issues and drawing distinctions between immunity and non-immunity defenses, the Court provides practitioners and political subdivisions with a clearer understanding of how Chapter 2744 operates and how it benefits municipalities and other political subdivisions engaged in litigation. Immunity remains a strong, valuable defense against claims of liability.

Endnotes

¹ *Riffle v. Physicians & Surgeons Ambulance Serv., Inc.*, 135 Ohio St.3d 357, 2013-Ohio-989, 986 N.E.2d 983, ¶ 14, citing *Haverlack v. Protage Homes, Inc.*, 2 Ohio St.3d 26, 30, 442 N.E.2d 749 (1982).

² *Riffle* at ¶ 15.

³ *State ex rel. Sylvester v. Neal*, 140 Ohio St.3d 47, 2014-Ohio-2926, 14 N.E.3d 1024; *Hauser v. Dayton Police Dept.*, 140 Ohio St.3d 268, 2014-Ohio-3636, 17 N.E.3d 554; *State ex rel. City of Cleveland v. Astrab*, 139 Ohio St.3d 445, 2014-Ohio-2380, 12 N.E.3d 1197; *Riscatti v. Prime Properties Ltd. Partnership*, 137 Ohio St.3d 123, 2013-Ohio-4530, 998 N.E.2d 437.

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⁴ *Neal* at ¶ 2.
⁵ *Id.*, citing Ohio Const., Art. I § 9.
⁶ *Neal* at ¶ 1.
⁷ *Id.* at ¶ 47.
⁸ *Id.*
⁹ *Id.* at ¶ 48.
¹⁰ *Id.*
¹¹ *Id.*
¹² *Id.*
¹³ *Id.*
¹⁴ *Hauser* at ¶ 2.
¹⁵ *Id.* at ¶ 1.
¹⁶ *Id.* at ¶ 2.
¹⁷ *Id.* at ¶ 3.
¹⁸ *Id.* at ¶¶ 7-8.
¹⁹ See R.C. § 4112.02(G), (J).
²⁰ *Packard Motor Car Co. v. Natl. Labor Relations Bd.*, 330 U.S. 485, 488 (1947).
²¹ *Hauser* at ¶ 10, quoting *Packard* at 488.
²² *Hauser* at ¶ 10, quoting *Packard* at 489.
²³ *Hauser* at ¶ 11.
²⁴ *Id.* at ¶¶ 9, 12.
²⁵ *Id.* at ¶ 15.
²⁶ See e.g. R.C. § 4112.02(J).
²⁷ *Astrab* at ¶ 7.
²⁸ *Id.* at ¶ 2.
²⁹ *Id.* at ¶¶ 3, 14.
³⁰ *Id.* at ¶¶ 4, 16.
³¹ *Id.* at ¶¶ 21-30.
³² *Id.* at ¶ 21.
³³ *Id.* at ¶ 27, quoting *Hubbell v. Xenia*, 115 Ohio St.3d 77, 2007-Ohio-4839, 873 N.E.2d 878, quoting *Burger v. Cleveland Hts.*, 87 Ohio St.3d 188, 199-200, 718 N.E.2d 912 (1999) Lundberg Stratton, J., dissenting).
³⁴ *Astrab* at ¶ 30.
³⁵ *Id.* at ¶ 32.
³⁶ *Riscatti* at ¶ 1.
³⁷ *Id.* at ¶ 2.
³⁸ *Id.* at ¶¶ 4, 8, 10.
³⁹ *Id.* at ¶ 9.
⁴⁰ *Id.* at ¶ 11, fn. 2.
⁴¹ *Id.* at ¶¶ 12-13.
⁴² *Id.*
⁴³ *Id.* at ¶ 14.
⁴⁴ *Id.* at ¶ 18.
⁴⁵ *Id.* at ¶ 19.
⁴⁶ *Id.* at ¶ 20.
⁴⁷ *Argabrite v. Neer*, 2d Dist. Montgomery No. 26220, 2015-Ohio-125; *Baker v. Wayne Cnty.*, 9th Dist. Wayne No. 13CA0029, 2014-Ohio-3529.
⁴⁸ *Baker* at ¶¶ 2, 7; R.C. § 2744.02(B)(3).
⁴⁹ *Id.* at ¶ 11.
⁵⁰ *Id.* at ¶ 13.
⁵¹ *Argabrite* at ¶ 1.
⁵² *Id.* at ¶ 2.
⁵³ *Id.* at ¶ 5, quoting *Lewis v. Bland*, 75 Ohio App.3d 453, 456, 599 N.E.2d 814 (9th Dist.1991).
⁵⁴ *Argabrite* at ¶ 23.
⁵⁵ *Id.* at ¶ 25.
⁵⁶ *Id.* at ¶ 28.

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