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**OHIO MUNICIPAL LIABILITY  
AND IMMUNITY MATERIALS**

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# **OHIO SOVEREIGN IMMUNITY OUTLINE**

## **IMMUNITIES AND OTHER LEGAL PROTECTIONS AVAILABLE IN THE DEFENSE OF POLITICAL SUBDIVISIONS AND THEIR EMPLOYEES IN OHIO**

MAZANEC, RASKIN, RYDER & KELLER Co., L.P.A. – September 2008

### **I. R.C. CHAPTER 2744 - POLITICAL SUBDIVISION TORT LIABILITY ACT**

R.C. Chapter § 2744 provides broad immunity to political subdivisions and their employees against tort claims of damage, injury or death. A political subdivision is immune from all tort claims that do not fall into one of five specific exceptions to immunity. Further, the political subdivision's "discretionary defenses" may also bar claims. Employees of political subdivisions are protected by a limited immunity, being immune from all tort claims except those based on bad faith, malicious, wanton or reckless misconduct, conduct outside of the scope of their employment or where civil liability is expressly imposed by the Revised Code.

#### **A. Application of Immunity – Six Basic Questions.**

- 1) Is insured a "political subdivision" and/or an "employee" of a political subdivision. (See: R.C. § 2744.01(F) and/or (B).)

If **"YES"** continue, if **"NO"** immunity does not apply.

- 2) Does the action seek to recover damages for injury, death or loss to persons or property? (See: R.C. § 2744.02(A)(1).)

If **"YES"** continue; if **"NO"** immunity does not apply.

- 3) Does the action involve any of the following:
  - a) Contractual liability;
  - b) Employment matters;
  - c) Fidelity or surety bonds; or
  - d) Alleged violations of the Constitution or statutes of the United States? (See: R.C. § 2744.09.)

If **"YES"** immunity does not apply; if **"NO"** continue.

- 4) If the action is against a "political subdivision", do any of the following five exceptions to immunity apply?
- a) Employee's negligent operation of motor vehicle on the job. **EXCEPTION:** No liability for police/fire/EMS emergency responses unless performed in a wanton or willful manner) (R.C. § 2744.02(B)(1));
  - b) Employee's negligent performance of a "proprietary" function (Note: "proprietary" functions do not include "governmental" functions) (R.C. § 2744.02(B)(2));
  - c) Negligent failure to repair or remove obstructions on public roads (R.C. § 2744.02(B)(3));
  - d) Negligence resulting in physical defects located within or on the grounds of buildings used for "governmental" functions. The buildings must be similar to office buildings and courthouses. Jails and detention facilities are specifically excluded (R.C § 2744.02(B)(4)); and,
  - e) When civil liability is expressly imposed by the Revised Code (R.C. § 2744.02(B)(5)).

If **"YES"** to any of the five exceptions, continue; if **"NO"** as to all five exceptions, a "political subdivision" (but not necessarily its "employees") is immune.

- 5) If any of the foregoing five immunity exceptions applies and the action is against a "political subdivision", does the case involve any of the following acts for which statutory "defenses" apply?
- a) Judicial, prosecutorial, legislative and similar acts (R.C. § 2744.03(A)(1));

- b) Acts which are necessary or essential to the powers of the political subdivision or employee (R.C. § 2744.03(A)(2));
- c) Discretionary policymaking, planning or enforcement acts (R.C. § 744.03(A)(3));
- d) Injuries incurred while performing a community service sentence if covered by Workers Compensation (R.C. § 2744.03(A)(4)); and,
- e) Discretionary decisions concerning the acquisition and/or use of equipment, personnel, facilities, etc., unless the decision amount to malicious, bad faith, wanton or reckless misconduct. (R.C. § 2744.03(A)(5)).

If the answer is **“YES”** to any of the foregoing categories, a “political subdivision” (but not “employees”) has a valid defense and it is statutorily immune. If the answer to all five of the foregoing categories is **“NO”** the statute does not apply and the case proceeds against the “political subdivision” according to the normal rules of law. The Plaintiff must still establish the elements of his or her case and other statutory or common law defenses may be asserted.

- 6) If the action is against an “employee”, the employee is immune unless one of the following applies:
  - a) The “employee” acted outside the scope of his or her employment or official responsibilities (R.C. § 2744.03(A)(6)(a));
  - b) The employee’s acts or omissions were malicious, in bad faith, wanton or reckless (R.C. § 2744.03(A)(6)(b)); or,
  - c) Civil liability is expressly imposed by the Revised Code (R.C. § 2744.03(A)(6)(c)).

**NOTE:** The exception, for malicious, bad faith, wanton or reckless conduct, is the exception most commonly pled by claimants. The

following definitions are provided for reference and derived from case law, not statute:

- “Wanton” misconduct refers to a failure to exercise any care whatsoever.
- “Reckless” misconduct causes an unreasonable risk of harm and is “substantially greater than that which is necessary to make his conduct negligent.”
- “Malice” is defined as the willful and intentional design to harm another by inflicting serious injury without excuse or justification.
- “Bad faith” implies sinister motive and also refers, by way of analogy to insurance law, to that which has “no reasonable justification.”

**NOTE:** This second exception is the most troublesome as it frequently gives rise to a question of fact that can preclude summary judgment for employees.

B. Interlocutory Appeals

Denials of immunity are now considered to be final orders and subject to an immediate appeal prior to trial. R.C. § 2744.02(C). **However**, a number of courts have held that there is no interlocutory appeal where immunity has been denied due to an unresolved issue of fact reasoning that immunity can be granted only when the issue of fact is favorable decided at trial.

C. Statute of Limitations.

Lesser of two years or normal statute of limitations. R.C. § 2744.04(A).

D. Damage Limitations.

- 1) No punitive damages can be awarded against a “political subdivision” (does not apply to “employee”). R.C. § 2744.04(A);
- 2) Benefits in the nature of insurance which claimant has or is entitled to receive are set off, regardless of

subrogation or rights of recoupment. R.C. § 2744.05(B)(1).

a) The political subdivision has the burden of proving the collateral award. *See Buchman v. Wayne Trace Local School Dist. Bd. of Edn.* (1995), 73 Ohio St.3d 260, 652 N.E.2d 952.

b) If the Plaintiff's contract with the insurance company requires him to re-pay benefits in the event of recovery from Defendant, that obligation is voided if Defendant is a political subdivision. R.C. §2744.05(B)(1).

3) No one may bring a subrogation action against a "political subdivision" or "employee". R.C. § 2744.05(B)(1);

a) Exception – when Plaintiff is awarded Workers' Compensation, the BWC may be subrogated to the rights of Plaintiff and bring suit in recoupment against the political subdivision. R.C. §4123.931(I)(2)

4) Recovery for "actual loss" (medical bills, wages, property damage, etc.) is unlimited. R.C. § 2744.05(C)(1);

5) Recovery for nonpecuniary losses (pain and suffering, loss of consortium, etc.) is limited to \$250,000 per person. This limitation does not apply in wrongful death actions. R.C. § 2744.05(B)(2).

#### E. Defense/Indemnification of Employees

A "political subdivision" has a duty to defend its employees in any civil action caused by an act or omission of the employee in connection with a governmental or proprietary function, **EXCEPT**:

1) Where the "employee's" conduct was not performed in good faith **OR** the conduct was manifestly outside the scope of employment. The determination of good faith/course and scope is NOT based on allegations made in the complaint. R.C. § 2744.07(A)(1); and

- 2) Indemnification not required for punitive or exemplary damages. R.C. § 2744.07(A)(2).

## **2744.01 Political subdivision tort liability definitions.**

As used in this chapter:

(A) "Emergency call" means a call to duty, including, but not limited to, communications from citizens, police dispatches, and personal observations by peace officers of inherently dangerous situations that demand an immediate response on the part of a peace officer.

(B) "Employee" means an officer, agent, employee, or servant, whether or not compensated or full-time or part-time, who is authorized to act and is acting within the scope of the officer's, agent's, employee's, or servant's employment for a political subdivision. "Employee" does not include an independent contractor and does not include any individual engaged by a school district pursuant to section 3319.301 of the Revised Code. "Employee" includes any elected or appointed official of a political subdivision. "Employee" also includes a person who has been convicted of or pleaded guilty to a criminal offense and who has been sentenced to perform community service work in a political subdivision whether pursuant to section 2951.02 of the Revised Code or otherwise, and a child who is found to be a delinquent child and who is ordered by a juvenile court pursuant to section 2152.19 or 2152.20 of the Revised Code to perform community service or community work in a political subdivision.

(C)(1) "Governmental function" means a function of a political subdivision that is specified in division (C)(2) of this section or that satisfies any of the following:

(a) A function 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;

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

(c) 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 division (G)(2) of this section as a proprietary function.

(2) A "governmental function" includes, but is not limited to, the following:

(a) The provision or nonprovision of police, fire, emergency medical, ambulance, and rescue services or protection;

(b) The power to preserve the peace; to prevent and suppress riots, disturbances, and disorderly assemblages; to prevent, mitigate, and clean up releases of oil and hazardous and extremely hazardous substances as defined in section 3750.01 of the Revised Code; and to protect persons and property;

(c) The provision of a system of public education;

(d) The provision of a free public library system;

(e) The regulation of the use of, and the maintenance and repair of, roads, highways, streets, avenues, alleys, sidewalks, bridges, aqueducts, viaducts, and public grounds;

(f) Judicial, quasi-judicial, prosecutorial, legislative, and quasi-legislative functions;

(g) The construction, reconstruction, repair, renovation, maintenance, and operation of buildings that are used in connection with the performance of a governmental function, including, but not limited to, office buildings and courthouses;

(h) The design, construction, reconstruction, renovation, repair, maintenance, and operation of jails, places of juvenile detention, workhouses, or any other detention facility, as defined in section 2921.01 of the Revised Code;

(i) The enforcement or nonperformance of any law;

(j) The regulation of traffic, and the erection or nonerection of traffic signs, signals, or control devices;

(k) The collection and disposal of solid wastes, as defined in section 3734.01 of the Revised Code, including, but not limited to, the operation of solid waste disposal facilities, as "facilities" is defined in that section, and the collection and management of hazardous waste generated by households. As used in division (C)(2)(k) of this section, "hazardous waste generated by households" means solid waste originally generated by individual households that is listed specifically as hazardous waste in or exhibits one or more characteristics of hazardous waste as defined by rules adopted under section 3734.12 of the Revised Code, but that is excluded from regulation as a hazardous waste by those rules.

(l) The provision or nonprovision, planning or design, construction, or reconstruction of a public improvement, including, but not limited to, a sewer system;

(m) The operation of a job and family services department or agency, including, but not limited to, the provision of assistance to aged and infirm persons and to persons who are indigent;

(n) The operation of a health board, department, or agency, including, but not limited to, any statutorily required or permissive program for the provision of immunizations or other inoculations to all or some members of the public, provided that a "governmental function" does not include the supply, manufacture, distribution, or development of any drug or vaccine employed in any such immunization or inoculation program by any supplier, manufacturer, distributor, or developer of the drug or vaccine;

(o) The operation of mental health facilities, mental retardation or developmental disabilities facilities, alcohol treatment and control centers, and children's homes or agencies;

(p) The provision or nonprovision of inspection services of all types, including, but not limited to, inspections in connection with building, zoning, sanitation, fire, plumbing, and electrical codes, and the taking of actions in connection with those types of codes, including, but not limited to, the approval of plans for the construction of buildings or structures and the issuance or revocation of building permits or stop work orders in connection with buildings or structures;

(q) Urban renewal projects and the elimination of slum conditions;

(r) Flood control measures;

(s) The design, construction, reconstruction, renovation, operation, care, repair, and maintenance of a township cemetery;

(t) The issuance of revenue obligations under section 140.06 of the Revised Code;

(u) The design, construction, reconstruction, renovation, repair, maintenance, and operation of any school athletic facility, school auditorium, or gymnasium or any recreational area or facility, including, but not limited to, any of the following:

(i) A park, playground, or playfield;

(ii) An indoor recreational facility;

(iii) A zoo or zoological park;

(iv) A bath, swimming pool, pond, water park, wading pool, wave pool, water slide, or other type of aquatic facility;

(v) A golf course;

(vi) A bicycle motocross facility or other type of recreational area or facility in which bicycling, skating, skate boarding, or scooter riding is engaged;

(vii) A rope course or climbing walls;

(viii) An all-purpose vehicle facility in which all-purpose vehicles, as defined in section 4519.01 of the Revised Code, are contained, maintained, or operated for recreational activities.

(v) The provision of public defender services by a county or joint county public defender's office pursuant to Chapter 120. of the Revised Code;

(w)(i) At any time before regulations prescribed pursuant to 49 U.S.C.A 20153 become effective, the designation, establishment, design, construction, implementation, operation, repair, or maintenance of a public road rail crossing in a zone within a municipal corporation in which, by ordinance, the legislative authority of the municipal corporation regulates the sounding of locomotive horns, whistles, or bells;

(ii) On and after the effective date of regulations prescribed pursuant to 49 U.S.C.A. 20153, the designation, establishment, design, construction, implementation, operation, repair, or maintenance of a public road rail crossing in such a zone or of a supplementary safety measure, as defined in 49 U.S.C.A 20153, at or for a public road rail crossing, if and to the extent that the public road rail crossing is excepted, pursuant to subsection (c) of that section, from the requirement of the regulations prescribed under subsection (b) of that section.

(x) A function that the general assembly mandates a political subdivision to perform.

(D) "Law" means any provision of the constitution, statutes, or rules of the United States or of this state; provisions of charters, ordinances, resolutions, and rules of political subdivisions; and written policies adopted by boards of education. When used in connection with the "common law," this definition does not apply.

(E) "Motor vehicle" has the same meaning as in section 4511.01 of the Revised Code.

(F) "Political subdivision" or "subdivision" means a municipal corporation, township, county, school district, or other body corporate and politic responsible for governmental activities in a geographic area smaller than that of the state. "Political subdivision" includes, but is not limited to, a county hospital commission appointed under section 339.14 of the Revised Code, board of hospital commissioners appointed for a municipal hospital under section 749.04 of the Revised Code, board of hospital trustees appointed for a municipal hospital under section 749.22 of the Revised Code, regional planning commission created pursuant to section 713.21 of the Revised Code, county planning commission created pursuant to section 713.22 of the Revised Code, joint planning council created pursuant to section 713.231 of the Revised Code, interstate regional planning commission created pursuant to section 713.30 of the Revised Code, port authority created pursuant to section 4582.02 or 4582.26 of the Revised Code or in existence on December 16, 1964, regional council established by political subdivisions pursuant to Chapter 167. of the Revised Code, emergency planning district and joint emergency planning district designated under section 3750.03 of the Revised Code, joint emergency medical services district created pursuant to section 307.052 of the Revised Code, fire and ambulance district created pursuant to section 505.375 of the Revised Code, joint interstate emergency planning district established by an agreement entered into under that section, county solid waste management district and joint solid waste management district established under section 343.01 or 343.012 of the Revised Code, community school established under Chapter 3314. of the Revised Code, the

county or counties served by a community-based correctional facility and program or district community-based correctional facility and program established and operated under sections 2301.51 to 2301.58 of the Revised Code, a community-based correctional facility and program or district community-based correctional facility and program that is so established and operated, and the facility governing board of a community-based correctional facility and program or district community-based correctional facility and program that is so established and operated.

(G)(1) "Proprietary function" means a function of a political subdivision that is specified in division (G)(2) of this section or that satisfies both of the following:

(a) The function is not one described in division (C)(1)(a) or (b) of this section and is not one specified in division (C)(2) of this section;

(b) 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.

(2) A "proprietary function" includes, but is not limited to, the following:

(a) The operation of a hospital by one or more political subdivisions;

(b) The design, construction, reconstruction, renovation, repair, maintenance, and operation of a public cemetery other than a township cemetery;

(c) The establishment, maintenance, and operation of a utility, including, but not limited to, a light, gas, power, or heat plant, a railroad, a busline or other transit company, an airport, and a municipal corporation water supply system;

(d) The maintenance, destruction, operation, and upkeep of a sewer system;

(e) 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.

(H) "Public roads" means public roads, highways, streets, avenues, alleys, and bridges within a political subdivision. "Public roads" does not include berms, shoulders, rights-of-way, or traffic control devices unless the traffic control devices are mandated by the Ohio manual of uniform traffic control devices.

(I) "State" means the state of Ohio, including, but not limited to, the general assembly, the supreme court, the offices of all elected state officers, and all departments, boards, offices, commissions, agencies, colleges and universities, institutions, and other instrumentalities of the state of Ohio. "State" does not include political subdivisions.

Effective Date: 04-09-2003; 04-27-2005; 10-12-2006

## **2744.02 Governmental functions and proprietary functions of political subdivisions.**

(A)(1) For the purposes of this chapter, the functions of political subdivisions are hereby classified as governmental functions and proprietary functions. Except as provided in division (B) of this section, 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.

(2) The defenses and immunities conferred under this chapter apply in connection with all governmental and proprietary functions performed by a political subdivision and its employees, whether performed on behalf of that political subdivision or on behalf of another political subdivision.

(3) Subject to statutory limitations upon their monetary jurisdiction, the courts of common pleas, the municipal courts, and the county courts have jurisdiction to hear and determine civil actions governed by or brought pursuant to this chapter.

(B) Subject to sections 2744.03 and 2744.05 of the Revised Code, a political subdivision is liable in damages in a civil action for injury, death, or loss to person or property allegedly caused by an act or omission of the political subdivision or of any of its employees in connection with a governmental or proprietary function, as follows:

(1) Except as otherwise provided in this division, political subdivisions are liable for injury, death, or loss to person or property caused by the negligent operation of any motor vehicle by their employees when the employees are engaged within the scope of their employment and authority. The following are full defenses to that liability:

(a) A member of a municipal corporation police department or any other police agency was operating a motor vehicle while responding to an emergency call and the operation of the vehicle did not constitute willful or wanton misconduct;

(b) A member of a municipal corporation fire department or any other firefighting agency was operating a motor vehicle while engaged in duty at a fire, proceeding toward a place where a fire is in progress or is believed to be in progress, or answering any other emergency alarm and the operation of the vehicle did not constitute willful or wanton misconduct;

(c) A member of an emergency medical service owned or operated by a political subdivision was operating a motor vehicle while responding to or completing a call for emergency medical care or treatment, the member was holding a valid commercial driver's license issued pursuant to Chapter 4506. or a driver's license issued pursuant to Chapter 4507. of the Revised Code, the operation of the vehicle did not constitute willful or wanton misconduct, and the operation complies with the precautions of section 4511.03 of the Revised Code.

(2) Except as otherwise provided in sections 3314.07 and 3746.24 of the Revised Code, political subdivisions are liable for injury, death, or loss to person or property caused by the negligent performance of acts by their employees with respect to proprietary functions of the political subdivisions.

(3) Except as otherwise provided in section 3746.24 of the Revised Code, political subdivisions are liable for injury, death, or loss to person or property caused by their negligent failure to keep public roads in repair and other negligent failure to remove obstructions from public roads, except that it is a full defense to that liability, when a bridge within a municipal corporation is involved, that the municipal corporation does not have the responsibility for maintaining or inspecting the bridge.

(4) Except as otherwise provided in section 3746.24 of the Revised Code, political subdivisions are 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, and is due to physical defects within or on the grounds of, buildings that are used in connection with the performance of a governmental function, including, but not limited to, office buildings and courthouses, but not including jails, places of juvenile detention, workhouses, or any other detention facility, as defined in section 2921.01 of the Revised Code.

(5) In addition to the circumstances described in divisions (B)(1) to (4) of this section, a political subdivision is liable for injury, death, or loss to person or property when civil liability is expressly imposed upon the political subdivision by a section of the Revised Code, including, but not limited to, sections 2743.02 and 5591.37 of the Revised Code. Civil liability shall not be construed to exist under another section of the Revised Code merely because that section imposes a responsibility or mandatory duty upon a political subdivision, because that section provides for a criminal penalty, because of a general authorization in that section that a political subdivision may sue and be sued, or because that section uses the term "shall" in a provision pertaining to a political subdivision.

(C) An order that denies a political subdivision or an employee of a political subdivision the benefit of an alleged immunity from liability as provided in this chapter or any other provision of the law is a final order.

Effective Date: 04-09-2003; 2007 HB119 09-29-2007

## **2744.03 Defenses - immunities.**

(A) In a civil action brought against a political subdivision or an employee of a political subdivision 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:

(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, other than negligent conduct, that gave rise to the claim of liability was required by law or authorized by law, or if the conduct of the employee involved that gave rise to the claim of liability 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 discretion of the employee with respect to policy-making, planning, or enforcement powers by virtue of the duties and responsibilities of the office or position of the employee.

(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 and who, at the time of the injury or death, was serving any portion of the person's sentence by performing community service work for or in the political subdivision whether pursuant to section 2951.02 of the Revised Code or otherwise, or resulted in injury or death to a child who was found to be a delinquent child and who, at the time of the injury or death, was performing community service or community work for or in a political subdivision in accordance with the order of a juvenile court entered pursuant to section 2152.19 or 2152.20 of the Revised Code, and if, at the time of the person's or child's injury or death, the person or child was covered for purposes of Chapter 4123. of the Revised Code in connection with the community service or community work for or in the political subdivision.

(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 in division (A)(7) of this section and in circumstances not covered by that division or sections 3314.07 and 3746.24 of the Revised Code, 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;

(c) Civil liability is expressly imposed upon the employee by a section of the Revised Code. Civil liability shall not be construed to exist under another section of the Revised Code merely because that section imposes a responsibility or mandatory duty upon an employee, because that section provides for a criminal penalty, because of a general authorization in that section that an employee may sue and be sued, or because the section uses the term "shall" in a provision pertaining to an employee.

(7) The political subdivision, and an employee who is 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 a court of this state is entitled to any defense or immunity available at common law or established by the Revised Code.

(B) Any immunity or defense conferred upon, or referred to in connection with, an employee by division (A)(6) or (7) of this section does not affect or limit any liability of a political subdivision for an act or omission of the employee as provided in section 2744.02 of the Revised Code.

Effective Date: 04-09-2003

## **2744.04 Statute of limitations - demand for judgment for damages.**

(A) An action against a political subdivision 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, whether brought as an original action, cross-claim, counterclaim, third-party claim, or claim for subrogation, shall be brought within two years after the cause of action accrues, or within any applicable shorter period of time for bringing the action provided by the Revised Code. The period of limitation contained in this division shall be tolled pursuant to section 2305.16 of the Revised Code. This division applies to actions brought against political subdivisions by all persons, governmental entities, and the state.

(B) In the complaint filed in a civil action against a political subdivision or an employee of a political subdivision to recover damages for injury, death, or loss to person or property allegedly caused by an act or omission in connection with a governmental or proprietary function, whether filed in an original action, cross-claim, counterclaim, third-party claim, or claim for subrogation, the complainant shall include a demand for a judgment for the damages that the judge in a nonjury trial or the jury in a jury trial finds that the complainant is entitled to be awarded, but shall not specify in that demand any monetary amount for damages sought.

Effective Date: 04-09-2003

## 2744.05 Damage limitations.

Notwithstanding any other provisions of the Revised Code or rules of a court to the contrary, in an action against a political subdivision to recover damages for injury, death, or loss to person or property caused by an act or omission in connection with a governmental or proprietary function:

(A) Punitive or exemplary damages shall not be awarded.

(B)(1) If a claimant receives or is entitled to receive benefits for injuries or loss allegedly incurred from a policy or policies of insurance or any other source, the benefits shall be disclosed to the court, and the amount of the benefits shall be deducted from any award against a political subdivision recovered by that claimant. No insurer or other person is entitled to bring an action under a subrogation provision in an insurance or other contract against a political subdivision with respect to those benefits.

The amount of the benefits shall be deducted from an award against a political subdivision under division (B)(1) of this section regardless of whether the claimant may be under an obligation to pay back the benefits upon recovery, in whole or in part, for the claim. A claimant whose benefits have been deducted from an award under division (B)(1) of this section is not considered fully compensated and shall not be required to reimburse a subrogated claim for benefits deducted from an award pursuant to division (B)(1) of this section.

(2) Nothing in division (B)(1) of this section shall be construed to do either of the following:

(a) Limit the rights of a beneficiary under a life insurance policy or the rights of sureties under fidelity or surety bonds;

(b) Prohibit the department of job and family services from recovering from the political subdivision, pursuant to section 5101.58 of the Revised Code, the cost of medical assistance benefits provided under sections 5101.5211 to 5101.5216 or Chapter 5107., 5111., or 5115. of the Revised Code.

(C)(1) There shall not be any limitation on compensatory damages that represent the actual loss of the person who is awarded the damages. However, except in wrongful death actions brought pursuant to Chapter 2125. of the Revised Code, damages that arise from the same cause of action, transaction or occurrence, or series of transactions or occurrences and that do not represent the actual loss of the person who is awarded the damages shall not exceed two hundred fifty thousand dollars in favor of any one person. The limitation on damages that do not represent the actual loss of the person who is awarded the damages provided in this division does not apply to court costs that are awarded to a plaintiff, or to interest on a judgment rendered in favor of a plaintiff, in an action against a political subdivision.

(2) As used in this division, "the actual loss of the person who is awarded the damages" includes all of the following:

(a) All wages, salaries, or other compensation lost by the person injured as a result of the injury, including wages, salaries, or other compensation lost as of the date of a judgment and future expected lost earnings of the person injured;

(b) All expenditures of the person injured or another person on behalf of the person injured for medical care or treatment, for rehabilitation services, or for other care, treatment, services, products, or accommodations that were necessary because of the injury;

(c) All expenditures to be incurred in the future, as determined by the court, by the person injured or another person on behalf of the person injured for medical care or treatment, for rehabilitation services, or for other care, treatment, services, products, or accommodations that will be necessary because of the injury;

(d) All expenditures of a person whose property was injured or destroyed or of another person on behalf of the person whose property was injured or destroyed in order to repair or replace the property that was injured or destroyed;

(e) All expenditures of the person injured or of the person whose property was injured or destroyed or of another person on behalf of the person injured or of the person whose property was injured or destroyed in relation to the actual preparation or presentation of the claim involved;

(f) Any other expenditures of the person injured or of the person whose property was injured or destroyed or of another person on behalf of the person injured or of the person whose property was injured or destroyed that the court determines represent an actual loss experienced because of the personal or property injury or property loss.

"The actual loss of the person who is awarded the damages" does not include any fees paid or owed to an attorney for any services rendered in relation to a personal or property injury or property loss, and does not include any damages awarded for pain and suffering, for the loss of society, consortium, companionship, care, assistance, attention, protection, advice, guidance, counsel, instruction, training, or education of the person injured, for mental anguish, or for any other intangible loss.

Effective Date: 04-09-2003; 2008 HB562 09-22-2008

## **2744.06 Satisfying a judgment against political subdivision.**

(A) Real or personal property, and moneys, accounts, deposits, or investments of a political subdivision are not subject to execution, judicial sale, garnishment, or attachment to satisfy a judgment rendered against a political subdivision in a civil action to recover damages for injury, death, or loss to person or property caused by an act or omission of the political subdivision or any of its employees in connection with a governmental or proprietary function. Those judgments shall be paid from funds of the political subdivisions that have been appropriated for that purpose, but, if sufficient funds are not currently appropriated for the payment of judgments, the fiscal officer of a political subdivision shall certify the amount of any unpaid judgments to the taxing authority of the political subdivision for inclusion in the next succeeding budget and annual appropriation measure and payment in the next succeeding fiscal year as provided by section 5705.08 of the Revised Code, unless any judgment is to be paid from the proceeds of bonds issued pursuant to section 133.14 of the Revised Code or pursuant to annual installments authorized by division (B) or (C) of this section.

(B)(1)(a) As used in this division, "the actual loss of the person who is awarded the damages" includes all of the following:

(i) All wages, salaries, or other compensation lost by the person injured as a result of the injury, as of the date of the judgment;

(ii) All expenditures of the person injured or of another person on behalf of the person injured for medical care or treatment, for rehabilitation services, or for other care, treatment, services, products, or accommodations that were necessary because of the injury;

(iii) All expenditures of a person whose property was injured or destroyed or of another person on behalf of the person whose property was injured or destroyed in order to repair or replace the property that was injured or destroyed;

(iv) All expenditures of the person injured or whose property was injured or destroyed or of another person on behalf of the person injured or whose property was injured or destroyed in relation to the actual preparation or presentation of the person's claim;

(v) Any other expenditures of the person injured or whose property was injured or destroyed or of another person on behalf of the person injured or whose property was injured or destroyed that the court determines represent an actual loss experienced because of the personal or property injury or property loss.

(b) As used in this division, "the actual loss of the person who is awarded the damages" does not include any of the following:

(i) Wages, salaries, or other compensation lost by the person injured as a result of the injury, that are future expected earnings of that person;

(ii) Expenditures to be incurred in the future, as determined by the court, by the person injured or by another person on behalf of the person injured for medical care or treatment, for rehabilitation services, or for other care, treatment, services, products, or accommodations that will be necessary because of the injury;

(iii) Any fees paid or owed to an attorney for any services rendered in relation to a personal or property injury or property loss;

(iv) Any damages awarded for pain and suffering, for the loss of society, consortium, companionship, care, assistance, attention, protection, advice, guidance, counsel, instruction, training, or education of the person injured, for mental anguish, or for any other intangible loss.

(2) Except as specifically provided to the contrary in this division, a court that renders a judgment against a political subdivision as described in division (A) of this section and that is not in favor of the state may authorize the political subdivision, upon the motion of the political subdivision, to pay the judgment or a specified portion of the judgment in annual installments over a period not to exceed ten years, subject to the payment of interest at the rate specified in division (A) of section 1343.03 of the Revised Code. A court shall not authorize the payment in installments under this division of any portion of a judgment or entire judgment that represents the actual loss of the person who is awarded the damages.

Additionally, a court shall not authorize the payment in installments under this division of any portion of a judgment or entire judgment that does not represent the actual loss of the person who is awarded the damages unless the court, after balancing the interests of the political subdivision and of the person in whose favor the judgment was rendered, determines that installment payments would be appropriate under the circumstances and would not be unjust to the person in whose favor the judgment was rendered. If a court makes that determination, it shall fix the amount of the installment payments in a manner that achieves for the person in whose favor the judgment was rendered, the same economic result over the period as that person would have received if the judgment or portion of the judgment subject to the installment payments had been paid in a lump sum payment.

(C) At the option of a political subdivision, a judgment as described in division (A) of this section and that is rendered in favor of the state may be paid in equal annual installments over a period not to exceed ten years, without the payment of interest.

Effective Date: 04-09-2003

## **2744.07 Defending and indemnifying employees.**

(A)(1) Except as otherwise provided in this division, a political subdivision shall provide for the defense of an employee, in any state or federal court, in any civil action or proceeding which contains an allegation for damages for injury, death, or loss to person or property caused by an act or omission of the employee in connection with a governmental or proprietary function. The political subdivision has the duty to defend the employee if the act or omission occurred while the employee was acting both in good faith and not manifestly outside the scope of employment or official responsibilities. Amounts expended by a political subdivision in the defense of its employees shall be from funds appropriated for this purpose or from proceeds of insurance. The duty to provide for the defense of an employee specified in this division does not apply in a civil action or proceeding that is commenced by or on behalf of a political subdivision.

(2) Except as otherwise provided in this division, a political subdivision shall indemnify and hold harmless an employee in the amount of any judgment, other than a judgment for punitive or exemplary damages, that is obtained against the employee in a state or federal court or as a result of a law of a foreign jurisdiction and that is for damages for injury, death, or loss to person or property caused by an act or omission in connection with a governmental or proprietary function, if at the time of the act or omission the employee was acting in good faith and within the scope of employment or official responsibilities.

(B)(1) A political subdivision may enter into a consent judgment or settlement and may secure releases from liability for itself or an employee, with respect to any claim for injury, death, or loss to person or property caused by an act or omission in connection with a governmental or proprietary function.

(2) No action or appeal of any kind shall be brought by any person, including any employee or a taxpayer, with respect to the decision of a political subdivision pursuant to division (B)(1) of this section whether to enter into a consent judgment or settlement or to secure releases, or concerning the amount and circumstances of a consent judgment or settlement. Amounts expended for any settlement shall be from funds appropriated for this purpose.

(C) If a political subdivision refuses to provide an employee with a defense in a civil action or proceeding as described in division (A)(1) of this section, upon the motion of the political subdivision, the court shall conduct a hearing regarding the political subdivision's duty to defend the employee in that civil action. The political subdivision shall file the motion within thirty days of the close of discovery in the action. After the motion is filed, the employee shall have not less than thirty days to respond to the motion.

At the request of the political subdivision or the employee, the court shall order the motion to be heard at an oral hearing. At the hearing on the motion, the court shall consider all evidence and arguments submitted by the parties. In determining whether a political subdivision has a duty to defend the employee in the action, the court shall determine whether the employee was acting both in good faith and not manifestly outside the scope of employment or official responsibilities. The pleadings shall not be determinative of whether the employee acted in good faith or was manifestly outside the scope of employment or official responsibilities.

If the court determines that the employee was acting both in good faith and not manifestly outside the scope of employment or official responsibilities, the court shall order the political subdivision to defend the employee in the action. Effective Date: 04-09-2003

## **2744.09 Exceptions.**

This chapter does not apply to, and shall not be construed to apply to, the following:

(A) Civil actions that seek to recover damages from a political subdivision or any of its employees for contractual liability;

(B) Civil actions by an employee, or the collective bargaining representative of an employee, against his political subdivision relative to any matter that arises out of the employment relationship between the employee and the political subdivision;

(C) Civil actions by an employee of a political subdivision against the political subdivision relative to wages, hours, conditions, or other terms of his employment;

(D) Civil actions by sureties, and the rights of sureties, under fidelity or surety bonds;

(E) Civil claims based upon alleged violations of the constitution or statutes of the United States, except that the provisions of section 2744.07 of the Revised Code shall apply to such claims or related civil actions.

Effective Date: 11-20-1985

## II. THE PUBLIC DUTY RULE

### A. Generally

The public duty rule is a common law doctrine that applies to the first element of a negligence claim, the existence of a duty owed to the claimant. The public duty rule applies to both political subdivisions and their employees. The public duty rule is particularly important to employees because their immunities under R.C. Chapter 2744 are more difficult to establish as a matter of law in dispositive motions than the immunities available to political subdivisions.

The public duty rule provides that a political subdivision or an employee of a political subdivision generally owes a duty only to the public at large and not to any particular individual. The breach of a duty owed only to the general public does not provide a cause of action to any particular individual against either a political subdivision or its employees. **However**, if a claimant can establish that a political subdivision or an employee owes a "special duty" to the claimant, a breach of that duty can provide the claimant with a viable cause of action.

### B. The "Special Duty" Exception to the Public Duty Rule

In order to establish a "special duty," a claimant must establish each of the following elements:

- 1) The assumption, by word or deed, by the political subdivision or its employee of an affirmative duty to act on behalf of the claimant;
- 2) Knowledge that inaction could lead to harm;
- 3) Some form of direct contact between the political subdivision's employees and the claimant; and,
- 4) Justifiable reliance by the claimant on the assumption of duty by the political subdivision or its employees.

*See Sawicki v. Ottawa Hills*, (1988) 37 Ohio St. 3d 222.

### C. Is the Public Duty Rule Still Viable After the Passage of R.C. Chapter 2744?

For years, Ohio courts of appeals have been divided over whether the public duty rule was abrogated by the enactment of the Political Subdivision Tort Liability Act, R.C. Chapter 2744. Then in 2004, the Supreme Court of Ohio, after years of silence on the subject, stated in *Yates v. Mansfield Bd. of Ed.*, 2004-Ohio-2491:

At present, the Public Duty Rule remains viable as applied to actions brought against political subdivisions pursuant to R.C. Chapter 2744.

This important declaration was made by the Court in a footnote and it was not necessary to the decision in the *Yates* case. Accordingly, the Court's statement is *dicta* and it is not technically binding on lower courts.

Some judicial districts have followed the Supreme Court's lead in *Yates* in holding that the public duty rule was not abolished by R.C. Chapter 2744. See *Dearth v. Stanley* (2008) 2008-Ohio-487 (Second District Court of Appeals); *M.B. v. Elyria Bd. Of Edn.* (2006) 2006-Ohio-4533 (Ninth Appellate District); *Kraynak v. Youngstown City School Dist. Bd. of Edn.* (2007), 172 Ohio App.3d 545

One appellate district has recently retreated from this view and has held that the public duty doctrine has been abrogated by R.C. 2744. See *Coleman v. GCRTA* (2008) 174 Ohio App. 3d 735 (Eighth District Court of Appeals). Many others have adhered to this view. See *Franklin v. Columbus* (1998), 130 Ohio App.3d 53 (Tenth District Court of Appeals); *Amborski v. Toledo* (1990), 67 Ohio App.3d 47 (Sixth District Court of Appeals).

Thus, the Ohio Appellate Districts seem to be split on the issue of whether the public duty rule has been abolished by R.C. Chapter 2744. The Supreme Court of Ohio has not addressed it since *Yates*, and only then in non-binding dicta.

### **III. RECREATIONAL USER STATUTES - R.C. § 1533.18 and § 1533.181**

To encourage owners, lessees, and occupants of premises suitable for recreational pursuits to open their land to the public without worry of liability, the Ohio Legislature enacted the Recreational Users Statute, R.C. § 1533.18 and § 1533.181. The statute generally provides that owners, lessees and occupants of certain property owe no duty to recreational users to keep the premises safe for entry or use nor do they assume any responsibility for the acts of any recreational users.

R.C. § 1533.18, defines a “recreational user” as:

[A] person to whom permission has been granted, without the payment of a fee or consideration to the owner, lessee, or occupant of premises, other than a fee or consideration paid to the state or any agency of the state, to enter upon premises to hunt, fish, trap, camp, hike, swim, operate a snowmobile or all-purpose vehicle, or engage in other recreational pursuits. (Emphasis added.)

R.C. § 1533.18 defines “premises” as:

[A]ll privately-owned lands, ways, and waters, and any buildings and structures thereon, and all state-owned lands, ways, and waters leased to a private person, firm, or organization, including any buildings and structures thereon.

This definition would seem on its face to encompass only property owned or leased by private parties. However, case law throughout the State of Ohio has very clearly established that the statute covers property owned or leased by the State itself as well as virtually all political subdivisions of the State including counties, township, cities, villages, school districts, park districts and numerous other public entities.

If the statute applies, it provides that owners, lessees or occupants of a subject premises:

- a) owe no duty to a recreational user to keep premises safe for entry or use. R.C.§ 1533.181(A)(1).
- b) do not extend any assurance to the recreational user, through the act of giving permission, that premises are safe for entry or use. R.C.§ 1533.181(A)(2).

- c) assume no responsibility for or incur liability for any injury to person or property caused by any act of a recreational user. R.C. § 1533.181(A)(3).

R.C. § 1533.181 applies to the owner, lessee, or occupant of privately owned, nonresidential premises, whether or not the premises are kept open for public use and whether or not the owner, lessee, or occupant denies entry to certain individuals.

## **1533.18 Recreational user definitions.**

As used in sections 1533.18 and 1533.181 of the Revised Code:

(A) "Premises" means all privately owned lands, ways, and waters, and any buildings and structures thereon, and all privately owned and state-owned lands, ways, and waters leased to a private person, firm, or organization, including any buildings and structures thereon.

(B) "Recreational user" means a person to whom permission has been granted, without the payment of a fee or consideration to the owner, lessee, or occupant of premises, other than a fee or consideration paid to the state or any agency of the state, or a lease payment or fee paid to the owner of privately owned lands, to enter upon premises to hunt, fish, trap, camp, hike, or swim, or to operate a snowmobile, all-purpose vehicle, or four-wheel drive motor vehicle, or to engage in other recreational pursuits.

(C) "All-purpose vehicle" has the same meaning as in section 4519.01 of the Revised Code.

Effective Date: 04-09-2003; 04-07-2005; 2007 HB67 07-03-2007

## **1533.181 Immunity.**

(A) No owner, lessee, or occupant of premises:

(1) Owes any duty to a recreational user to keep the premises safe for entry or use;

(2) Extends any assurance to a recreational user, through the act of giving permission, that the premises are safe for entry or use;

(3) Assumes responsibility for or incurs liability for any injury to person or property caused by any act of a recreational user.

(B) Division (A) of this section applies to the owner, lessee, or occupant of privately owned, nonresidential premises, whether or not the premises are kept open for public use and whether or not the owner, lessee, or occupant denies entry to certain individuals.

Effective Date: 09-29-1995

#### IV. **FIRST RESPONDERS IMMUNITY STATUTE - R.C. § 4765.49**

R.C. § 4765.49 provides immunity against claims of damage, injury or death to a variety of “first responders,” associated agencies and personnel for the administration of emergency medical and related services.

Under the statute, where the services of the individual or entity were administered in a manner that constitutes ***willful or wanton misconduct***, immunity will not apply. Otherwise, immunity will apply to individuals and entities if they fall into one or more of the protected categories enumerated under the statute.

**CAUTION:** The following categories have been partially abbreviated for the purposes of this outline. The statutory categories under R.C. § 4765.49 are specific, and reference to the actual statute is advised.

1. **EMERGENCY MEDICAL/PARAMEDICS:** A first responder, emergency medical technician, or paramedic;
2. **POLITICAL SUBDIVISIONS / EMERGENCY AGENCIES:** A political subdivision, joint ambulance district, joint emergency medical services district, or other public agency, and any officer or employee of a public agency or of a private organization operating under contract or in joint agreement with one or more political subdivisions, that provides emergency medical services, or that enters into a joint agreement or a contract with the state, any political subdivision, joint ambulance district, or joint emergency medical services district for the provision of emergency medical services, for conduct arising out actions taken by a first responder, EMT, or paramedic working under the officer’s or employee’s jurisdiction, licensed medical personnel advising or assisting such personnel;
3. **MEDICAL STUDENTS:** A student who is enrolled in an accredited emergency medical services training program or an approved emergency medical services continuing education program where:
  - a) The student’s administration of emergency medical services or patient care or treatment is administered while the student is under the direct supervision and in the immediate presence of an EMT, paramedic, registered nurse, or physician and while the student is receiving required clinical training that is required by the program; or

- b) The student is training as an ambulance driver;
4. **AMBULANCE DRIVERS:** An EMT, paramedic, or other operator holding a valid commercial driver's license and who is employed by an emergency medical service organization that is not owned or operated by a political subdivision that caused injury, death or damage by the operation of an ambulance while responding to or completing a call for emergency medical services. NOTE: Immunity applies unless the operation constitutes willful or wanton misconduct or does not comply with the precautions of R.C. § 4511.03;
- a) **NOTE:** An emergency medical service organization is immune from liability for damages caused by the operation of an ambulance by its employee or agent, if the employee or agent is immune under R.C. § 4765.49;
5. **DISPATCHERS:** An employee/agent of an emergency medical service who receives requests for emergency medical services and dispatch and/or communicate with first responders, EMTs, or paramedics in response to those requests;
6. **OUT-OF-STATE PARAMEDICS/DOCTORS/NURSES:** A person who is performing the functions of a first responder, EMT, or paramedic under the authority of the laws of a state that borders Ohio and who provides emergency medical services to or transportation of a patient in Ohio; also an advising or assisting licensed physician or registered nurse designated by a physician;
7. **EMERGENCY MEDICAL TEACHERS:** A certified teacher in an emergency medical services training program, emergency medical services continuing education program, Ohio fire academy, or fire service training;
8. **STATE BOARD ACCREDITORS:** In the accreditation of emergency medical services training programs or approval of emergency medical services continuing education programs, the state board of emergency medical services and any person or entity authorized by the board to evaluate applications for accreditation or approval;

9. **MEDICAL REVIEW PERSONNEL:** An authorized person that reviews the performance of first responders, EMTs, and paramedics or administers quality assurance programs.

## **4765.49 Emergency medical personnel and agencies - immunity.**

(A) A first responder, emergency medical technician-basic, emergency medical technician-intermediate, or emergency medical technician-paramedic is not liable in damages in a civil action for injury, death, or loss to person or property resulting from the individual's administration of emergency medical services, unless the services are administered in a manner that constitutes willful or wanton misconduct. A physician or registered nurse designated by a physician, who is advising or assisting in the emergency medical services by means of any communication device or telemetering system, is not liable in damages in a civil action for injury, death, or loss to person or property resulting from the individual's advisory communication or assistance, unless the advisory communication or assistance is provided in a manner that constitutes willful or wanton misconduct. Medical directors and members of cooperating physician advisory boards of emergency medical service organizations are not liable in damages in a civil action for injury, death, or loss to person or property resulting from their acts or omissions in the performance of their duties, unless the act or omission constitutes willful or wanton misconduct.

(B) A political subdivision, joint ambulance district, joint emergency medical services district, or other public agency, and any officer or employee of a public agency or of a private organization operating under contract or in joint agreement with one or more political subdivisions, that provides emergency medical services, or that enters into a joint agreement or a contract with the state, any political subdivision, joint ambulance district, or joint emergency medical services district for the provision of emergency medical services, is not liable in damages in a civil action for injury, death, or loss to person or property arising out of any actions taken by a first responder, EMT-basic, EMT-I, or paramedic working under the officer's or employee's jurisdiction, or for injury, death, or loss to person or property arising out of any actions of licensed medical personnel advising or assisting the first responder, EMT-basic, EMT-I, or paramedic, unless the services are provided in a manner that constitutes willful or wanton misconduct.

(C) A student who is enrolled in an emergency medical services training program accredited under section 4765.17 of the Revised Code or an emergency medical services continuing education program approved under that section is not liable in damages in a civil action for injury, death, or loss to person or property resulting from either of the following:

(1) The student's administration of emergency medical services or patient care or treatment, if the services, care, or treatment is administered while the student is under the direct supervision and in the immediate presence of an EMT-basic, EMT-I, paramedic, registered nurse, or physician and while the student is receiving clinical training that is required by the program, unless the services, care, or treatment is provided in a manner that constitutes willful or wanton misconduct;

(2) The student's training as an ambulance driver, unless the driving is done in a manner that constitutes willful or wanton misconduct.

(D) An EMT-basic, EMT-I, paramedic, or other operator, who holds a valid commercial driver's license issued pursuant to Chapter 4506. of the Revised Code or driver's license issued pursuant to Chapter 4507. of the Revised Code and who is employed by an emergency medical service organization that is not owned or operated by a political subdivision as defined in section 2744.01 of the Revised Code, is not liable in damages in a civil action for injury, death, or loss to person or property that is caused by the operation of an ambulance by the EMT-basic, EMT-I, paramedic, or other operator while responding to or completing a call for emergency medical services, unless the operation constitutes willful or wanton misconduct or does not comply with the precautions of section 4511.03 of the Revised Code. An emergency medical service organization is not liable in damages in a civil action for any injury, death, or loss to person or

property that is caused by the operation of an ambulance by its employee or agent, if this division grants the employee or agent immunity from civil liability for the injury, death, or loss.

(E) An employee or agent of an emergency medical service organization who receives requests for emergency medical services that are directed to the organization, dispatches first responders, EMTs-basic, EMTs-I, or paramedics in response to those requests, communicates those requests to those employees or agents of the organization who are authorized to dispatch first responders, EMTs-basic, EMTs-I, or paramedics, or performs any combination of these functions for the organization, is not liable in damages in a civil action for injury, death, or loss to person or property resulting from the individual's acts or omissions in the performance of those duties for the organization, unless an act or omission constitutes willful or wanton misconduct.

(F) A person who is performing the functions of a first responder, EMT-basic, EMT-I, or paramedic under the authority of the laws of a state that borders this state and who provides emergency medical services to or transportation of a patient in this state is not liable in damages in a civil action for injury, death, or loss to person or property resulting from the person's administration of emergency medical services, unless the services are administered in a manner that constitutes willful or wanton misconduct. A physician or registered nurse designated by a physician, who is licensed to practice in the adjoining state and who is advising or assisting in the emergency medical services by means of any communication device or telemetering system is not liable in damages in a civil action for injury, death, or loss to person or property resulting from the person's advisory communication or assistance, unless the advisory communication or assistance is provided in a manner that constitutes willful or wanton misconduct.

(G) A person certified under section 4765.23 of the Revised Code to teach in an emergency medical services training program or emergency medical services continuing education program, and a person who teaches at the Ohio fire academy established under section 3737.33 of the Revised Code or in a fire service training program described in division (A) of section 4765.55 of the Revised Code, is not liable in damages in a civil action for injury, death, or loss to person or property resulting from the person's acts or omissions in the performance of the person's duties, unless an act or omission constitutes willful or wanton misconduct.

(H) In the accreditation of emergency medical services training programs or approval of emergency medical services continuing education programs, the state board of emergency medical services and any person or entity authorized by the board to evaluate applications for accreditation or approval are not liable in damages in a civil action for injury, death, or loss to person or property resulting from their acts or omissions in the performance of their duties, unless an act or omission constitutes willful or wanton misconduct.

(I) A person authorized by an emergency medical service organization to review the performance of first responders, EMTs-basic, EMTs-I, and paramedics or to administer quality assurance programs is not liable in damages in a civil action for injury, death, or loss to person or property resulting from the person's acts or omissions in the performance of the person's duties, unless an act or omission constitutes willful or wanton misconduct.

Effective Date: 03-19-2003; 04-05-2007

## V. OTHER STATUTES INVOLVING POLITICAL SUBDIVISION LIABILITY

### A. R.C. Chapter 4123.90 – Retaliatory Discharge for Pursuing a Workers’ Compensation Claim

- 1) No employer (including political subdivisions) may discharge, demote, reassign, or take punitive action against an employee because he in any way pursued or testified in a proceeding regarding a workers’ compensation claim filed against the employer.
- 2) Remedies for an employer’s violation:
  - a. Reinstatement with backpay if the employee was discharged
  - b. Wages lost if the employee was demoted, reassigned, or some other punitive action was taken.
  - c. Plus reasonable attorney’s fees.
- 3) No public policy tort for separate damages exists for violations of this statute. *See Pinkerton v. Thompson* (2007), 174 Ohio App.3d 229, 237.
  - a. Thus, damages are limited to those mentioned above.
- 4) Fellow Servant Immunity:
  - a. “precludes an employee from bringing suit against a fellow employee for injury incurred in the course and scope of the injured employee’s employment when the injury is compensable under the workers’ compensation statutes.” *Snyder v. Am. Family Ins. Co.* (2007) 114 Ohio St.3d 239, 242.
- 5) Loaned Servant doctrine
  - a. For purposes of Workers’ Compensation laws (including Fellow Servant Immunity), a third party is considered to be the employer if this third party has the right to control the employee. Right to control, and not the exercise of that right, is material in this analysis. *See Bobik v. Industrial Com’n* (1946), 146 Ohio St. 187, 191-2.

B. R.C. Chapter 4112.02 – Civil Rights

- 1) No employer (including political subdivisions) may discriminate against an employee or potential employee based on race, color, religion, sex, military status, national origin, disability, age, or ancestry of any person in reference to their hiring, employment, or discharge. R.C. 4112.02(A) *et seq.*
- 2) No proprietor or employee (including those of political subdivisions) of a place of public accommodation may discriminate against a person based on these same characteristics. R.C. 4112.02(G).
  - b. “place of public accommodation” is any inn, restaurant, eating house, barbershop, public conveyance by air, land, or water, theater, store or other place for the sale of merchandise, or any other place of public accommodation or amusement where the accommodations, advantages, facilities, or privileges thereof are available to the public. R.C. 4112.01(A)(9).
- 3) No person may discriminate based on the above-mentioned characteristics in reference to providing housing. R.C. 4112.02(H).
  - a. “Person,” as used throughout this statute, includes political subdivisions. R.C. 4112.01(A)(1).
- 4) No person may discriminate based on the above-mentioned characteristics in reference to another’s opposing, in any way, an unlawful discriminatory practice. R.C. 4112.02 (I).
- 5) No person may aid in any way discrimination as otherwise defined in this statute. R.C. 4112.02(J).

C. R.C. Chapter 124.341 – Whistleblower’s Protection for Government Employees

- 1) An employee in the civil service who discovers that his place of employment is violating a state or federal law, rule, or is otherwise misusing public funds, may report this violation to an appropriate supervisor or other appropriate authority. **The employer may not discipline the employee for making this report** (including termination or suspension, among other disciplinary procedures), unless the report was erroneously based and the employee either purposely filed the false report or did so in reckless disregard for its falsity.

- 2) A similar statute for non-government employees is found in R.C. 4113.52, and the courts have predominantly interpreted them similarly.
- 3) This exception to the employment at-will doctrine first developed in *Greeley v. Miami Valley Maintenance Contractors, Inc.* (1990), 49 Ohio St.3d 228, 234, in which the Ohio Supreme Court held that discharging an employee for a reason prohibited by statute violated public policy and allowed this employee to sue the employer in tort. This common law doctrine was codified in R.C. 4133.52 (the "Whistleblower's Statute") and R.C. 124.341 (the "Whistleblower's protection for government employees.") However, a separate common law action for wrongful retaliatory discharge remained. *See Armstrong v. Trans-Service Logistics, Inc.* (2005), 2005-Ohio-2723.
- 4) In 2006, the Fifth District Court of Appeals, in *Miller v. MedCentral Health Sys, Inc.* (2006) 2006-Ohio-63, ¶47, reiterated the Ohio Supreme Court's holding in *Kulch v. Structural Fibers, Inc.* (1997) 78 Ohio St. 3d 134, ¶2, in stating that " 'an at-will employee who is discharged or disciplined in violation of R.C. 4113.52 may maintain a statutory cause of action for the violation, a common-law cause of action at tort, or both.' "