

IN THE SUPREME COURT OF OHIO

07-0873

DONALD D. HOWARD :

Plaintiff/Appellee :

v. :

On Appeal from the Montgomery
County Court of Appeals
Second District

MIAMI TOWNSHIP FIRE DIVISION :

Defendants/Appellants :

Court of Appeals Case No. 21478

**MEMORANDUM IN OPPOSITION TO JURISDICTION
OF APPELLEE DONALD HOWARD**

Robert J. Surdyk(0006205)
Dawn M. Frick (0069068)
SURDYK, DOWD & Turner Co, L.P.A.
1610 Kettering Tower
40 North Main Street
Dayton OH 45423
(937) 222-2333
Fax No. (937) 222-1970

COUNSEL FOR APPELLANTS, MIAMI TOWNSHIP DIVISION OF FIRE
AND MIAMI TOWNSHIP

John A. Smalley (0029540) (COUNSEL OF RECORD)
DYER, GAROFALO, MANN & SCHULTZ
Attorney for Plaintiff-Appellee
131 N. Ludlow Street, Suite 1400
Dayton, Ohio 45402
(937)223-8888
Fax # (937) 824-8630
jsmalley@dgmslaw.com

COUNSEL FOR APPELLEE, DONALD HOWARD

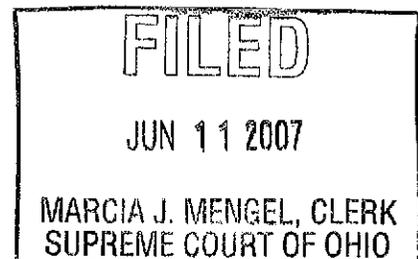


TABLE OF CONTENTS

	Page
EXPLANATION OF WHY THIS CASE IS NOT A CASE OF PUBLIC AND GREAT GENERAL INTEREST	2
STATEMENT OF THE CASE AND FACTS	5
ARGUMENT IN OPPOSITION TO PROPOSITIONS OF LAW	7
<u>Proposition of Law No. I:</u> An obstruction in the context of R.C. 2744.03(B)(3) should be given its plain and ordinary meaning of an “obstacle” or “something that blocks or closes up [a roadway] by obstacle	7
<hr/>	
<u>Proposition of Law No. II:</u> The duty of a political subdivision to remove an obstruction from a public road extends only to objects which block or close off the roadway for usual and ordinary travel	12
CONCLUSION	15
CERTIFICATE OF SERVICE	15
APPENDIX	15
<i>Huffman v. Board of Cty. Commrs.</i> , Seventh Dist. No. 05 CO 71, 2006-Ohio-3479.	EXHIBIT A
<i>Parker v. City of Upper Arlington</i> , Tenth Dist. App. No. 05AP-695, 2006-Ohio-1649.	EXHIBIT B
<i>Howard v. Miami Twp. Fire Division</i> , Second Dist. No. 21478, 2007-Ohio-1508.	EXHIBIT C
<i>Floering v. Roller</i> , Sixth Dist. No. WD-02-076, 2003-Ohio-5679.	EXHIBIT D
Merriam Webster’s Online Dictionary,	EXHIBIT E
<i>City of Cuyahoga Heights v. Howard</i> , Eighth Dist. No. 81025, 2003-Ohio-2862.	EXHIBIT F
Affidavit of Fred Lickert	EXHIBIT G

**EXPLANATION OF WHY THIS CASE IS NOT A CASE OF PUBLIC OR GREAT
GENERAL INTEREST**

In a desperate attempt at an opportunity to obtain another appeal of the summary judgment decision in this case, Defendants/Appellants have misstated the facts and misstated the appellate court's decision in an attempt to create an issue of public and great general interest in this case. The appellate court merely applied the plain language of the statute with the plain dictionary definition of the terms and even conducted an additional layer of analysis, which both the trial court and Defendants/Appellants had neglected to address, in determining the exception contained in R.C. 2744.02(B)(3) applied to this case. Additionally, this case does not involve a use of the roadway that was outside of its usual and customary use. Therefore, there is no reason to delve into whether this aspect of the definition of "nuisance" is part of the definition of "obstruction." While a phrase in the statute may have been changed by the legislature and this Court has not addressed this new phrase, this does not automatically mean a issue of public and great general interest exists in this case. Every statutory amendment does not create an issue of public and/or great general interest. The statutory language is clear and unambiguous. The appellate court gave the words in the statute their plain and ordinary meaning, which was also consistent with the use of the terms in other statutes. The appellate court's decision did not excessively broaden the exception provided in R.C. 2744.02(B)(3).

Defendant/Appellant's essential framework of their argument to the court of appeals and to this Court wants to ignore the plain language of the statute. Defendants/Appellant's narrowly focus on the term "obstruction" and their incorrect belief that its meaning in R.C. 2744.02(B)(3) should be limited to only one of the definitions of the word given in the dictionary and should also have to

meet the requirements of a nuisance. Essentially, Defendants/Appellants argue that an obstruction should mean only “to block or clog up” - and not also to “to hinder, to impede or to interfere with.”

Defendants/Appellants want to ignore half of the words used to define the term obstruct and obstruction in the dictionary. This is true despite the fact that several Ohio Appellate courts have now addressed this term and found that its meaning encompasses hindering, impeding, and interfering with travel on roadways. *Huffman v. Board of Cty. Commrs.*, Seventh Dist. No. 05 CO 71, 2006-Ohio-3479 (attached as exhibit “A”); *Parker v. City of Upper Arlington*, Tenth Dist. App. No. 05AP-695, 2006-Ohio-1649 (attached as exhibit “B”); *Howard v. Miami Twp. Fire Division*, Second Dist. No. 21478, 2007-Ohio-1508 (attached as exhibit “C”); *Floering v. Roller*, Sixth Dist. No. WD-02-076, 2003-Ohio-5679 (attached as exhibit “D”). Further, Defendant/Appellants’ definition would give the term “obstruction” in R.C. 2744.02(B)(3) a different definition than the term is used in other sections of the revised code. Despite Defendants/Appellants arguments, the plain meaning of the term “obstruction” is that which interferes or impedes. There was no ambiguity in R.C. 2744.02(B)(3) and thus, the plain meaning should be applied, which is what the Second District Court of Appeals did in its decision.

In support of their argument that this case poses public or great general interest, Defendant/Appellants are arguing the Second District’s definition of “obstruction” would make municipalities liable for any slight impediment to an unusual use of a roadway. Not only does this completely ignore the Second District’s analysis in its opinion but it ignores the language of the statute. R.C. 2744.02(B)(3) creates an exception to immunity “for injury, death, or loss to person or property **caused by [the political subdivisions] * * * negligent failure to remove obstructions from public roads.**” (Emphasis added). This statute was amended in 2003 to change the exception

in this section from removing liability when a municipality failed to keep a public road free from nuisance to **negligently** failing to remove obstructions from the public road. Both the trial court in its analysis and Defendants/Appellants in its arguments ignored that R.C. 2744.02(B)(3)' s new language required a court to determine not only that the political obstruction had not removed an obstruction from a roadway but to determine that the failure to remove was negligent.

In its decision the Second District conducted a lengthy analysis of whether the Defendants/Appellants were negligent in failing to remove the watery, icy, and slushy mixture on the roadway they had created. The Second District merely stated that since the legislature had chosen to remove the term "nuisance" from the statute and replace it with a different phrase the Court need not determine whether the facts in this case would rise to the level of a nuisance under the *Haynes* court's analysis. The Second District instead stated the proper analysis was whether the political subdivision's failure to remove the obstruction was negligent. An analysis of whether the political subdivision's failure to remove the object was negligent will necessarily encompass at least a determination of whether the road was used in the ordinary and usual manner. Negligence inherently involves considerations of foreseeability and a political subdivision can only foresee the ordinary and usual use of a roadway. Thus, Second District Court's opinion did not make political subdivisions liable for interferences with using a roadway in an unusual and unforeseeable manner as Defendants/Appellants argue.

In fact, the Second District Court never stated in its opinion that this case involved a use of a public roadway that was not consistent with the usual and ordinary use of the road. The evidence before the courts all established that the driver was using the roadway in the usual and customary manner. The driver of the vehicle was only five mph above the speed limit at the time the vehicle

slid across the icy, watery, slushy mixture Defendants/Appellants had spread across the roadway in the middle of January. Further, there was no evidence that the driver had passed through the roadway at a slower speed shortly before the crash. Traveling on an otherwise dry roadway during dry weather conditions at approximately the posted speed limit is within the usual and ordinary usage of a roadway. Thus, this case does not even present a good question of whether a political subdivision may be liable for failing to remove an obstruction from the roadway if the roadway is being used in a manner that is not consistent with the ordinary or usual manner.

Therefore, this case and the Second District Court's application of the language of R.C. 2744.02(B)(3) herein does not create an issue of public and great general interest.

STATEMENT OF THE CASE AND FACTS

On January 24, 2004, Defendants/Appellants burned a building at 5460 Bear Creek Road in Miami Township, Montgomery County, Ohio as a practice drill for the fire department. Deposition of Matthew Queen ("Queen Depo.") at 3-4; Deposition of Scott Aronoff ("Aronoff Depo.") at 4. In this process, Defendants/Appellants used up to 10,000 gallons of water and allowed this water to run down the hill and onto and across the road in below freezing temperatures. Queen Depo. at 12-14; Affidavit of Fred Lickert ("Lickert Aff.") attached as exhibit "G", at 2, 3,6. Several of Defendants/Appellants personnel noticed a problem with water on Bear Creek road and the potential for this creating icy conditions on the road. Deposition of Rex Thompson ("Thompson Depo.") at 17-31; Queen Depo. at 25-29; Deposition of Steven Shupert ("Shupert Depo.") at 11, 13. This was particularly concerning because an S curve existed in the road at this point.

Firefighters Pirk, Keyser, and Haney ("Firefighters") were ordered to periodically check the roadway and the embers of the burned structure. Deposition of Joshua Pirk ("Pirk Depo.") at 62-63.

Keyser suggested calling for a salt truck to solve the problem of the water and ice on the roadway. Deposition of J.C. Keyser (Keyser Depo.™) at 25. Keyser’s suggestion was ignored. Instead, Deputy Chief Huffman advised Pirk, Keyser, and Haney to retrieve salt from Fire Station 49 and to apply it to the road near the burn site. Pirk Depo. at 43. Thereafter, the three firefighters haphazardly tossed by hand the single five gallon bucket of salt on the wet roadway. Id. at 44, Keyser depo. at 42. The five gallons was used to cover the entire width of the roadway for a stretch of 10-15 yards. Deposition of Scott Fitzgerald (“Fitzgerald Depo.™) at 15.

Firefighters returned to the scene again at 7:24 p.m. Pirk Depo. at 51. The Firefighters were admittedly tired at this late hour and were mainly concerned with checking the embers of the burned structure. Id. at 51, 58; Keyser Depo. at 31. Even at this late visit, the firefighters were aware of water on the road as they saw mud splash their Medic unit all the way up to their side windows. Pirk Depo. at 65; Keyser Depo. at 32. Even though Keyser recalled the mud splashing their vehicle, Keyser did not recall checking the roadway. Keyser at 31-32. The Firefighters added no additional salt or requested a salt truck. Id. at 58. Although Pirk claim he did not see any ice, the scene was pitch dark at the time. Pirk Depo. at 58; Keyser Depo. at 36, 38.

At approximately 9:50 p.m., Christopher Howard was driving northbound on Bear Creek Road. Howard approached the initial left-hand turn of the S curve at 5460 Bear Creek Road. See Police Report at pp. 3-4, exhibit 1 to the deposition of Scott Fitzgerald (“Police Report.™). As Howard entered the turn, he began to lose traction due to the surface of the roadway. Lickert Aff. at ¶ 12. Because of the water, rock salt, and ice on the road, Howard could not make the left hand turn. Id. Unable to maintain control, he crossed the center-line, collided with a tree, and was killed. Id; Pirk depo. at 60-61; 74-75.

At the time of the accident, the Patrol Officer at the scene, Aronoff, and the Road Patrol Supervisor, Sergeant Fitzgerald noted the hazardous condition of the roadway, which was created by the fire department's "controlled burn." See Police Report at p. 22; see also Fitzgerald Depo. at 14-16. The water was frozen in some places and slushy in other places. Fitzgerald Depo. at 14. This mixture of ice, running water, and slush covered an area from the steep drive to the burned structure and to the south for 10-15 yards. Id. at 15. Fred Lickert, an independent accident reconstructionist, also performed an investigation. Lickert opined that the water and ice on the roadway was a hazardous condition and the direct and proximate cause of the fatal collision. Lickert Aff. ¶ 8, 12. The speed limit on Bear Creak Road is 55 mph and Howard was traveling at 60 mph, five seconds prior to the impact. Id. at ¶ 4. As Howard negotiated the curve, he lost traction because of this mixture of ice, slush, and water that had formed on the surface of the road.

As a result of Howard's death, Donald Howard, the administrator of his estate, brought this action against Defendants/Appellants. Defendants/Appellants moved for summary judgment based on R.C. 2744.01 et seq., which the trial court granted. Howard's estate appealed this decision to Ohio's Second District Court of Appeals. On March 30, 2007, the Second District issued its decision reversing the trial court's grant of summary judgment and remanding the case to trial. Defendants/Appellants are now attempting to convince this Court to accept jurisdiction of the matter. As this case involves very unique facts and the Township's propositions of law are not new arguments, this case does not present an issue of public or great general interest.

ARGUMENT IN OPPOSITION TO PROPOSITIONS OF LAW

I. Appellant Miami Township's Proposition of Law No. I: An obstruction in the context of R.C. 2744.03(B)(3) should be given its plain and ordinary meaning of an "obstacle" or "something that blocks or closes up [a roadway] by obstacle."

As there is no ambiguity in the language contained in R.C. 2744.03(B)(3), terms should be given their plain and ordinary meaning. The plain and ordinary meaning of the term obstacle encompasses more than a blocking or clogging up but also a hindrance, interference, or impediment. A definition of the term “obstruction” as something that hinders, interferes, or impedes a roadway is consistent with the dictionary definition and the terms use in other sections of the revised code.

Immunity is bestowed on political subdivisions pursuant to R.C. 2744, et seq. Generally, political subdivision are immune. *Colbert v. Cleveland*, 99 Ohio St.3d 215, 2003-Ohio-3319. However, that immunity is not absolute. *Id.* R.C. 2744.02(B) provides several exceptions to the immunity. *Id.* If one of these exceptions applies to the case, then the trial court must determine whether any of the defenses in R.C. 2744.03 apply, giving the political subdivision a defense to liability. *Id.*

The exception in R.C. § 2744.02(B)(3) states in part:

(3) * * * 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**, * * *. (Emphasis added).

Pursuant to R.C. 2744.02(B)(3), Defendants/Appellants may be liable for the injury, death, or loss to person or property caused by its negligent failure to remove “obstructions” from public roads. Several appellate court have had the opportunity to discuss the meaning of the term “obstruction” in this exception. *Huffman*, supra at ¶53 (finding that an obstruction is something that “hinder[s] from passage, action, or operations: impede”); *Floering*, supra at ¶27 (noting the change in R.C. 2744.02(B)(3)’s language but finding it still obligated political subdivisions to keep the public roads open for safe travel); *Parker*, supra (finding an obstruction is that which creates a

impediment to passing on a roadway).

The Tenth District in *Parker* has addressed the term as well. *Parker*, supra. The *Parker* court determined that the term “obstruction” should be given its ordinary and natural meaning. *Id.* citing *Layman v. Woo*, 78 Ohio St.3d 485, 487, 1997-Ohio-195. The appellate court stated that “obstruct” is defined in Webster’s Third International Dictionary as “to ‘block up[,] stop up[,] or close up [, or to] place an obstacle in or fill with obstacles or impediments to passing.” *Id.* at ¶14. ~~In *Parker*, the court determined that a poorly placed stop sign and crosswalk was not an obstruction under R.C. 2744.02(B)(3) because it did not create an obstacle or impediment to passing. *Id.*~~

The Merriam-Webster Online Dictionary defines “obstruction” as something that “obstructs.” Merriam Webster Online Dictionary (June 11, 2007), a copy is attached at exhibit “E”. “Obstructs” is then defined as “(1) to block or close up by an obstacle; (2) to hinder from passage, action or operation : impede; [or] (3) to cut off from sight.” *Id.* Similarly, The American Heritage College Dictionary defines obstructs as (1) “to block or fill with obstacles,” (2) “to impede, retard, or interfere with; hinder,” and (3) “to get in the way of so as to hide from sight.” The American Heritage College Dictionary, Third Edition, (1993) 942. Therefore, included in the definition of “obstruction” is a hindrance or impediment to safe passage.

Additionally, the term “obstruction” is used in another contextually similar provision of the Ohio Revised Code with a meaning consistent with the Second District Court of Appeals opinion.

R.C. 5547.04 states:

[t]he owner or occupier of lands situated along the highways shall remove all obstructions within the bounds of the highways, which have been placed there by them or their agents, or with their consent. * * * No person, partnership, or corporation shall erect, within the bounds of any highway or on the bridges or culverts thereon, any obstruction without first obtaining the approval of the board [of

county commissioners] in case of highways other than roads and highways on the state highway system and the bridges and culverts thereon.

The term obstruction in R.C 5547.04 has been interpreted by the Ohio Attorney General on several occasions, when referencing whether this section authorizes a county to remove foreign materials blocking a side ditch within the county's right of way if it interferes with the free flow of water and impair the function of the county road. The Ohio Attorney General has stated:

It appears that 'obstruction' must be defined so as to include virtually any object within the bounds of a highway that has been 'placed' or 'erected' there. In other words, an obstruction is any object that has the potential of interfering with the highway easement. Whether an object interferes with the easement will depend upon the nature of the object, its size, and its precise location."

1980 Ohio Atty. Gen Ops. No. 80-071, at 2-282. See also 1980 Ohio Atty Gen. Ops. No. 80-043, at 2-181.

In this case, the mixture on the roadway of ice, slush, and water was an obstruction under Merriam-Webster's definition and the definition used by the *Parker* and *Huffman* courts. The Merriam-Webster definition of obstruction is something that "obstructs," specifically something that "hinder[s] from passage, action, or operation, [or] impedes." Also, the definition applied by the Tenth District in *Parker*, states that an "obstruction" is that which creates an impediment to passing or traveling through the roadway." The icy, slushy, and watery mixture on the roadway was a hazard that hindered or impeded safe passage on the roadway. In this case, Defendants/Appellants created an icy, slushy, and watery mixture over the entire width of the roadway for 10 to 15 yards on the roadway even though the roadway possessed a S shaped curve at this point. Police Report at p. 22; Fitzgerald Depo. at 14-16. Howard was only traveling at 60 mph in an area zoned for 55 mph when he began the left turn on this roadway. Thompson Depo. at 8; Lickert Aff. at ¶4. Without the

hazardous mixture on the road, the road could be safely traversed up to speeds of 70.9 mph. Lickert Aff. at ¶11. But, on January 24, 2004, the layer of the ice, slush, and water mixture prevented vehicles, such as Howard's, from traversing the roadway at approximately the speed limit.

Unfortunately at the time of issuing its decision, the trial court did not have the benefit of the *Parker* or the *Huffman* decisions. Instead, the trial court looked to the Ohio Supreme Court's decision in *Manufacturer's National Bank v. Erie County Road Commission* (1992), 63 Ohio St.3d 318. In *Manufacturer's* the Court addressed a situation in which a driver's visibility was limited by an object to the side of the roadway. *Id.* The Court found that the term "nuisance" included such "obstructions." *Id.* In this case, the trial court pointed to *Manufacturer's* and narrowly interpreted "obstructions" as things which impair a driver's ability to see the road. While this is one of the dictionary definitions of an "obstruction," the trial court completely ignored the other definitions of "obstruction." Under this interpretation, a four foot high plexiglass cube in a roadway would not be an obstruction because it would not impair the view of the roadway. Clearly, such a barrier would be an obstruction. Thus, the trial court's interpretation could not have been accurate. Thus, the appellate court looked at all of the definitions provided in the dictionary. Under the definition describing an obstruction as that which impedes, interferes with, or hinders passage or operation on a roadway, the hazardous mixtures placed on the roadway by the Township and the Township Fire Department was an obstruction.

Defendants/Appellants are unable to point to a single case that has addressed the term "obstruction" in R.C. 2744.02(B)(3) and found it to mean only something which "blocks or clogs up" a roadway. Such a definition would pose an unnaturally strict meaning of the term. Under this definition, a municipality would have carte blanche to cover a fifty foot stretch of roadway where

the speed limit is 55 mph, with a one inch layer of motor oil and this would not amount to an obstruction. Because the motor oil could technically be driven through and not “block up” the road, it would not be an “obstruction” under Defendants/Appellants proposition of law. In reality, the motor oil would make the roadway exceptionally slick and hazardous, likely causing several accidents. Under a common meaning of the term, this roadway would have an obstruction in it.

Based on the plain meaning of the term “obstruction as supported by the dictionary definition and the definition of the term in R.C. 5547.04, the Second District Court of Appeals definition of the term was correct. Defendants/Appellants proposition of law would run contrary to the plain meaning of the term “obstruction” as set forth in dictionaries, Ohio appellate opinions, and other sections of the revised code. Thus, this Court could should not consider Defendants/Appellants first proposition of law.

II. Appellant Miami Township’s Proposition of Law No. II: The duty of a political subdivision to remove an obstruction from a public road extends only to objects which block or close off the roadway for usual and ordinary travel.

Defendants/Appellants’s second Proposition of Law argues that an obstruction must be defined as only that which is a danger for ordinary traffic on the roadway. First, it must be noted that the Second District Court of Appeals never stated that a political subdivision may be liable for obstructions to unusual or other than ordinary traffic. Rather, the trial court’s analysis under the new version of R.C. 2744.02(B)(3) only first determined whether an obstruction existed in the roadway and then, whether the obstruction was a danger to ordinary traffic. The appellate court stated that this was the incorrect analysis.¹ Instead, the appellate court stated that under the new version of R.C.

¹Neither Defendants/Appellants in its briefs nor the trial court in its opinion analyzed, R.C. 2744.02(B)(3)’s new requirement that its exception to a political subdivision’s immunity only applies where the political subdivision **negligently** fails to remove the obstruction.

2744.02(B)(3), the court must first determine whether an obstruction existed in the roadway and then determine whether the political subdivision was negligent in failing to remove the obstruction. In this case, the court found that Defendants/Appellants were negligent for failing to remove the icy, slushy, watery mixture it created in the roadway.

In truth, the Second District's standard is a higher burden for a plaintiff to have to reach. The plaintiff will have to show that the political subdivision was negligent in not removing the obstruction - rather than just that the plaintiff was a part of ordinary traffic. Thus, the plaintiff will have to demonstrate that the political subdivision was on notice of the obstruction, the political subdivision was unreasonable in failing to alleviate the obstruction, and, of course, that it was foreseeable that the obstruction would interfere with the public's use of the roadway. Just as foreseeability is a natural part of finding negligence, it is natural that a political subdivision will only be able to foresee obstructions which interfere with the ordinary use of the roadway. Thus, the Second District's opinion did not remove the requirement that the political subdivision only owes a duty to ordinary traffic on the roadway, but enforced the statute's harsher standard of negligence which encompasses that requirement. Thus, Defendants/Appellants second proposition of law misconstrues the new version of R.C. 2744.02(B)(3), seeking to impose an "ordinary traffic" requirement on the term "obstruction," when the concept is already encompassed by the statute's requirement of **negligence** in failing to remove the obstruction.

Secondly, this case does not present a factual question of whether an obstruction under R.C. 2744.02(B)(3) must obstruct "ordinary traffic." Howard was traveling in a usual and ordinary manner when he was driving on Bear Creek Road, particularly when the facts are viewed in a light most favorable to Howard. Defendants/Appellants misstate the facts surrounding this accident. First,

Defendants/Appellants incorrectly claim that Howard was traveling at 60 mph when the speed limit for the roadway was 30 mph. The speed limit for the roadway was actually 55 mph. There was present a yellow advisory sign advising the curve on Bear Creek Road be taken at 30 mph. However, a yellow speed limit sign is “an advisory speed plate” only and merely indicates the recommended speed. *City of Cuyahoga Heights v. Howard*, Eighth Dist. No. 81025, 2003-Ohio-2862, at ¶15 (attached as exhibit “F”). Thus, a speeding violation does not occur when a vehicle travels at a speed higher than that posted on an yellow “advisory speed plate.” *Id.* Thus, Howard was only traveling five miles above the speed limit of 55 mph, which is reasonable. Additionally, Howard’s expert performed tests that prove that under normal conditions a vehicle could make the left-hand curve at 540 Bear Creek Road in speeds in excess of 70.9 mph. Lickert Aff. at ¶11. Also, Defendants/Appellants boldly accuse Howard of having traveled through the Bear Creek Road curve shortly before the accident at a slower speed without citing to any evidence. Defendants made this allegation to the trial court and to the appellate court and never once provided a citation to admissible evidence to support the claim. Thus, there is no basis for this argument and the Court should disregard the allegation.

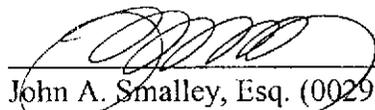
As a result, the evidence before the trial and appellate court only indicated that Howard was driving down Bear Creek Road within five mph of the posted speed limit. Howard was operating his vehicle within the confines of Ohio law, committing no violations. As this is the case, Defendants/Appellants argument that he was not driving his vehicle in a usual and ordinary manner is simply false. Considering that this case does not raise an issue where the motorist was not a part of ordinary traffic, this case is not the proper forum for considering whether the ordinary traffic requirement should be encompassed in the definition of obstruction.

As the appellate court's analysis of whether the failure to remove the obstruction was negligent encompassed whether the driver's use of the roadway was usual and ordinary, and this case involves facts in which the driver was a part of ordinary traffic, Defendants/Appellants' second proposition of law does not raise an issue of public or great general interest.

CONCLUSION

For the above stated reasons, this case does not involve a matter of public or great general interest. This Court should refuse to accept this discretionary appeal and deny jurisdiction.

Respectfully submitted,
DYER, GAROFALO, MANN & SCHULTZ



John A. Smalley, Esq. (0029540)
Attorney for Plaintiff/Appellee
131 N. Ludlow Street, Suite 1400
Dayton, Ohio 45402
(937)223-8888
Fax # (937) 824-8630
jsmalley@dgmslaw.com

CERTIFICATE OF SERVICE

The undersigned does hereby certify that a copy of the foregoing was sent to the following this 11th day of June, 2007 via U.S. Ordinary Mail:

Robert J. Surdyk, Esq., Surdyk, Dowd & Turner Co., L.P.A., 40 North Main Street, Suite 1610, Dayton, OH 45423.



John A. Smalley, (#0029540)
Attorney for Plaintiff/Appellee