

IN THE SUPREME COURT OF OHIO

CASE NO. 07-0873

DONALD D. HOWARD
Plaintiff-Appellee

-vs-

MIAMI TOWNSHIP; MIAMI TOWNSHIP DIVISION OF FIRE
Defendant-Appellants

**BRIEF OF *AMICUS CURIAE*,
OHIO ASSOCIATION OF JUSTICE
IN SUPPORT OF PLAINTIFF-APPELLEE, DONALD D. HOWARD**

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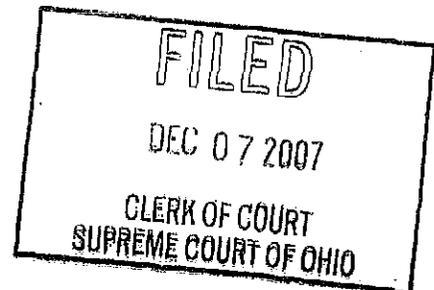


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INTRODUCTION AND INTERESTS OF AMICUS CURIAE

This *Amicus Curiae* represents the interests of the Ohio Association for Justice (“OAJ”). OAJ is comprised of approximately two thousand (2,000) attorneys practicing personal injury and consumer law in the State of Ohio. These lawyers are dedicated to preserving the rights of private litigants and to the promotion of public confidence in the legal system.

This *Amicus Curiae* is intervening in this appeal on behalf of Plaintiff-Appellee, Donald D. Howard. In order to ensure the safety of the motoring public, political subdivisions must be discouraged from creating dangerous hazards in roadways and expected to assume legal responsibility for the damages that they cause. An overly narrow definition of the term “obstruction” for purposes of R.C. §2744.02(B)(3) will artificially constrain the liability that the General Assembly has elected to impose to the point that recoveries will rarely be available. Political subdivisions will only need to concern themselves with avoiding and removing roadway hazards qualifying as “barriers” and “structures”. Any reasonable person would view man-made ice and slush as a serious “obstruction” which threatens the lives and safety of every unwary motorist and their passengers. It is for these reasons that the OAJ seeks to stress the importance of affording a common sense construction to R.C. §2744.02(B)(3).

ARGUMENT

I. THE ICY, SLUSHY ROADWAY CREATED BY THE MIAMI TOWNSHIP FIRE DIVISION WAS NO "OBSTRUCTION"

It is evident to this *Amicus*, as it would be to any sensible person, that the conditions of the roadway were created solely by Defendant-Appellant Miami Township Fire Division, and fall squarely within the definition of an "obstruction." Pursuant to R.C. 2744.02(B)(3), Defendant-Appellants are liable for the injury, death, or loss of person or property caused by its negligent failure to remove "obstructions" from public roads. It has been well laid out in all Briefs that the General Assembly amended R. C. 2744.02 in April 2003 to remove the words "free from nuisance" and insert "negligent failure to remove obstructions." The legislature thus added a new requirement to the statute that the exception to a political subdivision's immunity only applies when the political subdivision negligently fails to remove the obstruction. They also changed the scope of the statute from "nuisance" to "obstruction." The Second District Court of Appeals correctly concluded that the General Assembly was responding to cases in which the duty of a political subdivision to care for public roadways extended beyond the paved and traveled portion of the roadways themselves. In other words, the legislature was attempting to limit a political subdivision's liability to those obstructions that were actually on the roadway. Additionally, the legislature created an additional burden of showing not only that the obstruction was on the roadway, but that it was negligently on the roadway.

The OAJ urges this Court to afford the term "obstruction" its plain and ordinary meaning. It is not defined in the statute. *State ex rel. Montgomery Cty. Pub. Defender v. Rosencrans*, Montgomery App. No. CA 20416, 2005-Ohio-6681 at ¶18. "Obstructs" is defined as "(1) to block or close up by an obstacle; (2) to hinder from passage, action or operation; impede; [or] (3) to cutoff in sight." Merriam Webster Online Dictionary. In this case, the

mixture on the roadway of ice, slush, and water, was an obstruction under the Merriam Webster's definition, as well as the plain meaning of the word. An obstruction is something that usually hinders a motorist traveling on the roadway. It is well known that ice, slush and water on a roadway can impede a motorist's ability to travel. Simply ask any driver within the State of Ohio who encounters an icy, slippery road. That is why schools are closed or delayed after a winter storm; because the roads are not safe and passable, which is why they are an obstruction.

The Defendant-Appellants are requesting the Court to define obstruction in an absurdly narrowly fashion. Specifically, they want the Court to conclude that obstruction means only those items which physically impede a driver's ability to see the road. It is hard to even imagine what type of an object that a political subdivision would place literally onto the roadway which would physically impede a driver's ability to see the road. Unless they constructed a tall brick wall across the road, it is virtually impossible to come up with an example that would fit the proposed definition by the Defendants/Appellants. To accept their definition in essence grants blanket immunity to political subdivisions which is clearly not the legislature's intent in craving out an exception to sovereign immunity.

Upholding the Second District Court of Appeals sensible definition of obstruction will not open the floodgates of litigation every time it snows. The statute contains a new key element that a party is required to establish that the political subdivision negligently failed to remove obstruction from public roadways. *R.C. 2744.02 (B)(3)*. Thus, the Defendant-Appellants' assertion that if it snows or rains there will be an avalanche of litigation against the affected local governments is simply absurd. The facts of this case are unique. The political subdivision affirmatively created the grave hazard by pouring over 10,000 gallons of water onto a roadway in subzero conditions. They attempted to alleviate the readily apparent danger

by hand spreading a few pounds of salt on one occasion. This is completely different than a situation in which a political subdivision is removing snow or ice after a winter storm. In order to hold political subdivisions accountable for the hazards they create and encourage public safety, this Court should adopt the Second District Court of Appeals' sound definition of "obstruction".

II. CHRISTOPHER HOWARD WAS TRAVELING IN THE "USUAL AND ORDINARY" MANNER

Christopher Howard was not on a joyride. He was traveling in the usual and ordinary manner when he was proceeding along Bear Creek Road, particularly when the facts are reviewed in a light most favorable to him. The Defendant-Appellants continually attempt to insert into the records the statements about the nature of Mr. Howard's driving without any evidentiary substantiation. Specifically, "Christopher Howard and his passenger safely negotiated the curve on Bear Creek Road in front of the burn site. Apparently, Christopher Howard wanted to see if he could negotiate the curve at a higher rate of speed, so he retraced his path of travel and again proceeded northbound on Bear Creek Road." *Merit Brief of Defendants-Appellants, p. 3*. There is absolutely no citation to support these bald assertions.

The admissible evidence in the record establishes that the speed limit on Bear Creek Road is 55 mph. Mr. Howard was only traveling 5 mph above the speed limit of 55 mph. Thus, he was using the road in a usual and ordinary manner.

Defendants-Appellants' reliance on *McQuaide v. Bd. of Commrs. Of Hamilton Cty.*, 1st Dist. No. C-030033, 2003-Ohio-442 is misplaced. The evidence in the *McQuaide* case was that the driver purposely traveled at a high rate of speed in an effort to get the vehicle airborne for purposes of "hill hopping." The First District Court of Appeals determined that the hump in the road was not a hazard because the driver was not using the road in an ordinary course. The

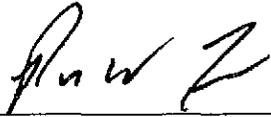
McQuaide case is no way factually similar to what occurred here. There is no evidence that Mr. Howard engaged in any type of inherently dangerous activity, other than simply traveling down the road at 5 mph above the speed limit. Who hasn't been guilty of that at some time or another?

Further, in *McQuaide*, the plaintiff presented no expert evidence that the hump posed a hazard to people using the road in the usual and ordinary manner. In this case, Mr. Howard's expert, Fred Lickert, performed tests to prove that under normal conditions the vehicle could make the curve at Bear Creek Road in speeds in excess of 70.9 mph. Mr. Howard was only traveling at approximately 60 mph when he attempted to negotiate the turn. Both Mr. Lickert and the Defendant-Appellants' expert, Mr. Thomas, opined that Mr. Howard lost control of the vehicle due to the ice, slush and running water caused by the Defendant-Appellant pouring thousands of gallons of water onto the road. There is absolutely nothing in the records before this Court to establish, as a matter of law, that Mr. Howard had previously traveled at a slower rate of speed and had been able to traverse the same hazard without incident. The only persuasive evidence in the record before this Court confirms that the ice and slush obstruction did indeed impede Christopher Howard's usual and ordinary use of the roadway.

CONCLUSION

For the foregoing reasons, *Amicus Curiae* Ohio Association of Justice urges this Court to affirm the sage decision of the Second District Court of Appeals in all respects.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that the foregoing **Brief** was served by regular U.S. Mail on this 6th day of December, 2007 upon:

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