

ORIGINAL

**IN THE SUPREME COURT OF OHIO
CASE NO. 10-1654**

**Appeal from the Court of Appeals
Ninth Appellate District
Medina County, Ohio
Case No. 09 CA 0051-M**

RAYMOND SANDERBECK

Plaintiff-Appellee

v.

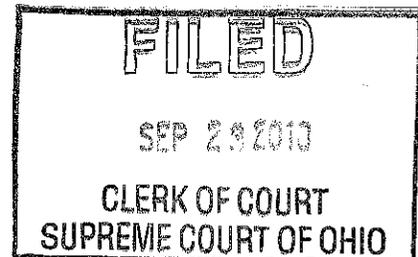
COUNTY OF MEDINA, et al.

Defendants-Appellants

**MEMORANDUM IN SUPPORT OF JURISDICTION OF AMICI CURIAE
THE COUNTY COMMISSIONERS ASSOCIATION OF OHIO,
THE OHIO TOWNSHIP ASSOCIATION, AND THE LORAIN COUNTY
TOWNSHIP ASSOCIATION, THE COUNTY ENGINEERS ASSOCIATION OF OHIO,
AND THE COALITION OF LARGE URBAN TOWNSHIPS
IN SUPPORT OF DEFENDANTS-APPELLANTS**

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INTEREST OF AMICI CURIAE

The County Commissioners' Association of Ohio (CCAO) works to promote the best practices and policies in the administration of county government for the benefit of Ohio residents. CCAO accomplishes these goals by providing legislative representation, technical assistance, and educational opportunities for county commissioners and their staffs.

The Ohio Township Association (OTA), organized in 87 counties across the state, has more than 5,200 active members. The organization is dedicated to the promotion and preservation of township government in Ohio. Among its many functions, the OTA works at the General Assembly on behalf of legislation that affects local governments in general and township governments in particular.

The Lorain County Township Association is comprised of 19 Townships of Lorain County, who are responsible for over 350 miles of roads and who have an interest in protecting their scarce resources in the face of the challenged decision, which leaves them open to claims they cannot reasonably anticipate or avoid.

The County Engineers Association of Ohio (CEAO) is a statewide association of the elected county engineers in each county. The county engineers are responsible for the design, construction, reconstruction and repair of roads, bridges and culverts within their respective jurisdictions. CEAO has as its mission advocating public policies and providing programs to assist the county engineers in executing their responsibilities.

The Coalition of Large Urban Townships ("CLOUT") is a group of large, urban townships in Ohio that has formed a committee for the purpose of providing its members with a forum for the exchange of ideas and solutions for problems and issues related specifically to the governance of large, urban townships. CLOUT works jointly with the OTA. Membership in CLOUT is limited to

those townships having either a population of 15,000 or more residents in the unincorporated area, or a budget over \$3,000,000.00.

These organizations ensure proper guidance to the political subdivisions of Ohio as well as the utmost protection of their interests. One of the most coveted interests and financial assets of a political subdivision is its property and the ability to utilize such property to fulfill duties and perform services for its citizens. The decision in this case will serve to protect political subdivisions and the interests of their respective residents across the state of Ohio.

I. EXPLANATION OF WHY THIS CASE IS A CASE OF PUBLIC OR GREAT GENERAL INTEREST

In an age when counties and townships are dealing with declining revenues and shrinking budgets, a case that increases their potential risk for increased tort liability is, by definition, a case of great public interest. This Court has recognized the right of the legislature to conserve “the fiscal resources of political subdivisions by limiting their tort liability.” *Menefee v. Queen City Metro* (1990), 49 Ohio St.3d 27. Thus, it should be a case of great public interest, when a court eviscerates the protections of the political subdivision tort liability act and replaces this well-reasoned statute with its own exception to tort liability involving the design and construction of a roadway

For years this Court has recognized that a county or township cannot be held liable for the conditions of the roadway, if those conditions were the result of a defective design or construction. *Haynes v. City of Franklin*, 95 Ohio St. 3d 344, 348 (Ohio 2002). Indeed, this Court “has never held that defective design or construction or lack of signage constitutes a nuisance.” *Franks v. Lopez* (1994), 69 Ohio St.3d 345, 349, 1994 Ohio 487, 632 N.E.2d 502. The logical underpinnings of the Court of Appeals opinion is on a slippery slope when it held that a plaintiff who alleges that a roadway designed with a “critical speed” less than the posted speed limit is a roadway in “need of

repair” and subject to tort liability under Revised Code Section 2744.02(B)(3). For an understanding as to how this case is a case of great public interest, this brief will entertain one proposition of law. A summary review of the proposition of law in this case necessarily leads to the conclusion that this case is a case of great public interest.

A. Proposition of Law No. I: A POLITICAL SUBDIVISION IS NOT LIABLE FOR THE DESIGN OF A ROADWAY, INCLUDING ITS COEFFICIENT OF FRICTION, GRADE, CURVE RADIUS, AND SUPERELEVATION.

The subject accident in this case was caused by a teenage driver Steven Ward, who according to one expert was driving his vehicle 31 miles above the posted speed advisory. (T.D. 57, Introtech Report Exhibit J at pp 4-5.). One passenger yelled at Ward to slow down and kicked the back of Ward’s seat out of fear. Yet, the Court of Appeals extends potential liability to the County by accepting the conclusion of the plaintiff’s expert that since the “critical speed” of the roadway was less than the posted speed limit, the roadway could be found to be in disrepair. The Court of Appeals cited the following portion of the plaintiff’s expert report to support this conclusion:

He explained that roadway curves have a characteristic known as their "critical speed," which is "the speed at which the tires of a turning vehicle attempting to negotiate the curve will begin to sideslip, often resulting in a loss of control of the vehicle." He explained that the *critical speed of a curve is influenced by several factors, such as "coefficient of friction, grade, superelevation, curve radius, condition of tires and/or pavement, contaminants on the roadway surface, weather and speed."* He also explained that, based on the conditions reported at the time of the crash and the measurements taken by the police officers who investigated the crash, he had calculated that the critical speed of East Smith Road at the time of the crash was at or below the posted speed limit.

Sanderbeck v. County of Medina, 2010 Ohio 3659, P5 (Ohio Ct. App., Medina County Aug. 9, 2010) (emphasis added)

Many of the elements cited as influencing the “critical speed” are design elements, such as the grade, the superelevation, and the curve radius. Moreover, the coefficient of friction may have both design and construction elements. The choice of concrete, asphalt, or gravel determines the co-efficient of

friction. In other words, the Court of Appeals opinion authorizes a case against a political subdivision for the conditions of the roadway even when that condition is a product of the roadway or construction design. The legislature and this Court have never allowed this type of claim.

If local governments are open to design claims, consider the potential exposure to the fiscal resources to counties and townships alike. The accident in this case occurred in 2006. Data from the National Highway Transportation Safety Administration demonstrates the potentially significant exposure to political subdivisions. One design engineer has summarized the statistics:

In 2006, there were 42,708 traffic fatalities, 30 percent (13,113) of which involved speeding. Of these fatalities, 13,543 (32%) occurred as a result of a speeding-related crash. Only 13% of all speeding-related traffic fatalities occurred on Interstate roadways, while 72% occurred on non-Interstate roads. Of the crashes on non-Interstate roads, 29% occurred on low-speed non-Interstate roads (defined for the purpose of this report as roads with a speed limit of 40 mph or less), and 43% occurred on high-speed non-Interstate roads (roads with a speed limit of 45 mph or more). Roadways with unknown or no statutory speed limits accounted for 15 percent of speeding-related fatalities.¹

In other words, in 2006, nationwide, 4192 people died in speeding related crashes on high speed non-interstate roads. If the decision of the Court of Appeals is left unchanged it will be used to bring claims against political subdivisions that the General Assembly has forbidden. For example, the critical speed of a roadway that has snow or ice on it would be in many cases less than the posted speed limit. A creative plaintiff citing this case may attempt to hold a political subdivision liable for failing to remove snow or ice. Yet, on two occasions this Court has rejected these claims. *Ditmyer v. Board of County Comm'rs.*, 64 Ohio St. 2d 146 (Ohio 1980); *Howard v. Miami Twp. Fire Div.*, 119 Ohio St. 3d 1 (Ohio 2008).

1 NCHRD Report 500, A Guide For Reducing Speeding Related Crashes Transportation Research Board (Washington DC 2009) .

In addition, with over 28,000 miles under the control of county engineers in the State of Ohio, and over 41,000 miles under the control of township trustees in the State of Ohio, this decision, if left unchanged, could threaten the scarce fiscal resources of these political subdivisions with potential liability not envisioned by the state legislature.² Notably, this case creates an unfunded mandate for political subdivisions to skid test and do embankment studies to determine that the critical speed of the roadway exceeds the posted speed limit, which is not mandated by the state legislature.

Finally, the decision of the Court of Appeals in this case is at odds and in conflict with three decisions from two different Courts of Appeals. As explained below in the discussion as to the proposition of law, two different Courts of Appeal have rejected cases proposing liability for the curvature of the road, as being based on design issues and not maintenance issues. *Sobczak v. City of Sylvania*, 2007 Ohio 1045, P20-P21 (Ohio Ct. App., Lucas County Mar. 9, 2007); *Israel v. Jefferson Township Bd. of Trustees*, 1990 Ohio App. LEXIS 5482 (Montgomery Cty. Ct. App., Dec. 10, 1990).

Simply, this is a case of great public interest.

STATEMENT OF THE CASE AND FACTS

A. Statement of the Case.

The Estate of Michelle Sanderbeck brought three claims in the Court of Common Pleas of Medina County arising out of a motor vehicle accident in which the decedent was a passenger that occurred on March 4, 2006. Although there was dispute in the trial court as to the nature of the claims, one of the claims involved the allegation that the subject county roadway was in disrepair in derogation of R.C. Section 2744.03 (B)(3). The other counts involved the guardrail statute, R.C.

² Ohio Department of Transportation system, NHS and PAS mileage by Functional Class for each County (May 25, 2010)

5591.36, and whether it had any application to this high speed, one car accident. These claims are not the subject of this brief.

The County moved for summary judgment. The motion noted that Count One of the plaintiff's complaint parroted the language in Revised Code Section 2744.02(B)(3), but failed to cite this exception to the general protection of immunity provided by Chapter 2744. The second prong of the motion for summary judgment noted that Count 2 of the complaint identified "nuisance" as its theory imposing liability, when the concept of nuisance has been statutorily eliminated in 2003. The third prong of the motion for summary judgment noted that there was no common law obligation to erect a guardrail. The complaint was amended and the matter went forward on the motion for summary judgment.

The plaintiff responded to this motion for summary judgment by noting that R.C. 2744.02(B)(3) authorizes civil liability against political subdivisions that negligently fail to keep roadways in repair. Further, the plaintiff abandoned the common law argument attempting to impose liability for failing to erect a guardrail, but did argue that the decedent crashed in close proximity to a culvert as defined by R.C. Section 5591.36, and since a guardrail was not present liability could be imposed against the County.

The trial court denied the motion for summary judgment of the defendant Medina County. Germaine to this brief is that the trial court adopted the conclusory allegations of the plaintiff's expert that the subject roadway was in disrepair, and, as a result the county could be held liable under Revised Code Section 2744.02(B)(3). The trial court did not cite to any analysis of the plaintiff or of the expert employed by the plaintiff, but, rather cited to the affidavit of the expert, which contained the conclusory allegation that the roadway was in disrepair. The trial court also denied the motion for summary judgment as to the issue of whether the ditch that ran parallel to the road constituted a

culvert that required the protection of R.C. Section 5591.36.

The defendants timely appealed this denial of statutory immunity. As noted above, the Court of Appeals affirmed the decision of the trial court as to the violation of Revised Code Section 2744.02(B)(3), but reversed the decision of the trial court on the issue of whether the private driveway ditch constituted a culvert as defined by Revised Code Section 2744.02(B)(3).

B. Statement of the Facts.

On March 4, 2006, Steven J. W. Ward, a 16 year old, drove his 1996 Chrysler Cirrus westbound in the westbound lane on East Smith Road in Montville Township in Medina County, Ohio. In his car were four other teenagers, including Michelle Sanderbeck, who was seated between two other passengers in the back seat. (T.d. 44, Ex.2 at p.2).

The speed limit on this roadway was the statutorily mandated 45 miles per hour. (T.d 42, affidavit of county engineer Michael Salay at paragraph 6). Along this roadway is an S curve that parallels a private driveway. An advisory speed limit sign is posted, as are chevrons, and an "S" curve warning. (T.d. 42, Exh. C-13 through 17). Unfortunately, the Ward car was speeding. By the estimate of one of the Estate's experts it was travelling 10 miles above the speed limit, and at a speed that caused all of the passengers distress, such that Kelsey Rohe, a backseat passenger screamed to slow down and kicked the back of the driver's seat. (T.D. 57, Introtech report Ex. J at pp 4-5) The Ward vehicle did not slow down, and ultimately it went off the roadway killing his passenger Michelle Sandebeck. (T.d. 57, Dep. of Plaintiff's Expert Stanford at 122.) Ward later was found guilty of aggravated vehicular homicide.

LAW AND ARGUMENT IN SUPPORT OF PROPOSITIONS OF LAW

I. Proposition of Law No. 1: A POLITICAL SUBDIVISION IS NOT LIABLE FOR THE DESIGN OF A ROADWAY, INCLUDING ITS COEFFICIENT OF FRICTION, GRADE, CURVE RADIUS, AND SUPERELEVATION.

There can be no dispute that a political subdivision is not liable for design or construction defects. In *Franks v. Lopez, supra*, this Court in construing the prior version of R.C. Section 2744.02(B)(3) noted that a County cannot be held liable for design or construction defects. This Court held:

Appellants, however, not content with this finding, have asked us to expand our nuisance definition to include design and construction defects and the failure to erect signage. This we decline to do. This court has never held that defective design or construction or lack of signage constitutes a nuisance. These categories simply do not constitute a nuisance as this term has been defined by this court. Additionally, these allegations involve discretionary functions as provided in R.C. 2744.03(A)(3) and (5). Thus, the defenses found in R.C. 2744.03(A)(3) and (5) preclude the imposition of liability on a political subdivision for any acts or omissions related to these discretionary functions. Therefore, appellants' claims pertaining to defective design and construction and the failure to install signage must fail.

Franks v. Lopez, 69 Ohio St. 3d 345, 350 (Ohio 1994)

Later, this Court in *Haynes v. Franklin, infra*, noted that the “plaintiff must establish that the cause of the condition was other than a decision regarding design and construction. *Haynes v. City of Franklin*, 95 Ohio St. 3d 344, 348 (Ohio 2002)

In this case, the plaintiff claims that the condition of the roadway could subject the county to liability under R.C. Section 2744.02(B)(3). This statute states:

(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:

* * *

(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.

ORC Ann. 2744.02 (emphasis added).

Thus, the critical inquiry is what does it mean to keep a public road "in repair."

Both the trial court and Court of Appeals correctly relied upon the definition of repair as stated in the appellate decision of *Bonace v. Springfield Township*, 179 Ohio App. 3d 736, 743 (Ohio Ct. App., Mahoning County 2008). In *Bonace, supra*, the Court noted:

Even without resorting to what Haynes did not say, "in repair" in its ordinary sense refers to maintaining a road's condition after construction or reconstruction, for instance by fixing holes and crumbling pavement. It deals with repairs after deterioration of a road or disassembly of a bridge for instance. *Heckert v. Patrick* (1984), 15 Ohio St.3d 402, 406, 15 Ohio B. 516, 473 N.E.2d 1204 (interpreting "in proper repair" in county immunity statute).

Bonace v. Springfield Twp., 179 Ohio App. 3d 736, 743 (Ohio Ct. App., Mahoning County 2008).

This Court had previously adopted the Black's Law Dictionary definition of repair, which clearly reflects the temporal element of repair, which essentially means to restore to a prior state. This Court in rejecting an attempt to impose liability for a county's failure to remove snow from a roadway held in 1980:

Analysis of the issue herein pivots upon the word "repair" in R. C. 305.12. The Court of Appeals determined "that the plain meaning of repair is 'to put back in good condition after damage.' In other words, repair means to remedy. Such remedy includes snow removal."

However, we feel that the Court of Appeals has over-extended the definition of "repair" far beyond the ordinary meaning of the word. For example, in Black's Law Dictionary (5 Ed.), "repair" is defined as follows:

"To mend, remedy, restore, renovate. To restore to a sound or good state after decay, injury, dilapidation, or partial destruction."

Clearly, snow removal, which does not mend, remedy, [*149] restore, or renovate roads, is not encompassed within the usual definition of repair.

Ditmyer v. Bd. of County Commsrs. of Lucas Cty. 64 Ohio St.2d 146, 148-149 (Ohio 1980).

Instead of recognizing the temporal element to the term “repair,” the Court of Appeals held that an expert opinion which stated that the critical speed of a roadway is less than the posted speedway must be in disrepair. The problem with this holding is that the opinion utterly fails to state that the roadway “deteriorated” or “decayed” in some way. It fails to compare what the critical speed of the roadway was when first designed or constructed to the time of the accident. This failure to make a temporal analysis is fatal to the plaintiff’s case because, by failing to make this analysis the plaintiff has not eliminated design issues which, by the expert’s own words contribute to the critical speed of the roadway. The opinion of the Court of Appeals noted:

He explained that roadway curves have a characteristic known as their "critical speed," which is "the speed at which the tires of a turning vehicle attempting to negotiate the curve will begin to sideslip, often resulting in a loss of control of the vehicle." He explained that the *critical speed of a curve is influenced by several factors, such as "coefficient of friction, grade, superelevation, curve radius, condition of tires and/or pavement, contaminants on the roadway surface, weather and speed."* He also explained that, based on the conditions reported at the time of the crash and the measurements taken by the police officers who investigated the crash, he had calculated that the critical speed of East Smith Road at the time of the crash was at or below the posted speed limit.

Sanderbeck v. County of Medina, 2010 Ohio 3659, P5 (Ohio Ct. App., Medina County Aug. 9, 2010) (emphasis added).

All of the terms emphasized above are design elements commonly referred to in traffic engineering manuals as design speed. The Ohio Manual on Uniform Traffic Control Devices defines “design speed” as: “a selected speed used to determine the various geometric design features of a roadway.” MUTCD (2009) Section 1.A, 13, definition of speed, p. 21 These geometric design features include the substantial factors influencing critical speed; grade, superelevation, and curve radius. See Table

V, NCHRP, Design Speed, Operating Speed, and Posted Speed Practices, Transportation Research Board (Washington D.C. 2003)

This is the fatal flaw to plaintiff's theory and the holding of the Court of Appeals, and what brings this case outside the language of the General Assembly. By failing to eliminate these design elements from the determination of critical speed, the Court of Appeals has in effect, created an exception to long standing precedent of this Court, and the legislative intent to hold political subdivisions immune from construction and design defects.

Other Courts of Appeals decisions have recognized this fatal flaw, and recognized that a political subdivision cannot be held liable for the curvature of the road. Consider the following decision of the Sixth District Court of Appeals where the plaintiff was attempting to recover against the City of Sylvania arising out of an accident allegedly caused by the curvature of an exit ramp. The Sixth District rejected these claims and noted:

In the current case, the alleged dangerous conditions consisted of the curvature of the entrance ramp, the surface of the pavement, and the absence of a guardrail. All of these conditions are the result of decisions regarding design and construction. As such, none of them qualifies as a nuisance under R.C. 2744.02(B)(3). Haynes, supra. On this basis alone, it would appear that summary judgment was properly granted in favor of the city.

[*P21] In an attempt to avoid this result, appellant argues that, given the particular circumstances of this case, it is error to conclude that the city could not be liable for nuisance simply because the condition of the road resulted from a design decision. According to appellant, "under certain conditions, which are present in the case at bar, a defectively designed road can constitute a nuisance for which the city would be liable." Specifically, appellant contends that the city exposed itself to liability when, after recognizing that the subject ramp was a hazard and needed to be reconfigured, it took the "wrong actions" to effect the necessary changes, thereby causing unreasonable delay in getting the problem addressed. The so-called "wrong actions" that appellant refers to consist of the city's repeated writing of letters to ODOT over a period of years (beginning sometime in the 1980's and continuing well into the 1990's) in a continuing effort to have ODOT fix the ramp.

Sobczak v. City of Sylvania, 2007 Ohio 1045, P20-P21 (Ohio Ct. App., Lucas County Mar. 9, 2007) (emphasis added).

The Court then rejected the claim by noting that in addition to no liability for construction or design defects, the city could not be held liable for these “defects” as it would have a reasonable amount of time to fix the problem.

One year later, the Sixth District Court of Appeals had the opportunity again to remind litigants of the distinction between design and construction defects and maintenance defects. In a tragic case similar to the case at bar, without the significant evidence of speeding, the guardian of a 17 year old girl brought suit against a township for stones that were left on the roadway following a paving project. The township had presented evidence that this gravel was intentionally left on the roadway as part of the paving project. The Court of Appeals then held that the plaintiff’s theory of the case—that a township can be held liable for the conditions of the roadway when it leaves gravel on the roadway—is without merit, because to do so would ignore the distinction between design and construction defects and maintenance defects. The Court explained:

To determine whether a condition is the right of way of a road should be deemed a nuisance and, therefore, exempt from immunity, a plaintiff must both “* * * establish[] that the condition alleged to constitute a nuisance creates a danger for ordinary traffic on the regularly travelled portion of the road [and] that the cause of the condition was other than a decision regarding design and construction. * * * Both prongs of this test require the resolution of issues of fact.” *Haynes v. City of Franklin*, 95 Ohio St.3d 344, 348, 2002 Ohio 2334, P 18, 767 N.E.2d 1146.

[*P19] In this matter, appellees presented deposition testimony from a township trustee who averred that the decision not to remove loose stone from the pavement was a conscious decision predicated on considered advantages. This testimony is sufficient to establish that the condition that appellants contend caused Sonya Mosler’s crash was the result of a decision regarding design or construction. Appellants failed to come forth with any evidence rebutting this testimony. Consequently, appellees were entitled to summary judgment on this issue. Accordingly, appellants’ first and third assignments of error are not well-taken.

Mosler v. St. Joseph Twp. Bd. of Trs., 2008 Ohio 1963, P18-P19 (Ohio Ct. App., Williams County Apr. 15, 2008).

The Second District Court of Appeals, as early as 1990 recognized that a township cannot be liable for the curvature of the road, as that is a design defect. *Isreal, supra*.

These decisions make clear that the Ninth District Court of Appeals needs guidance from this Court to distinguish between maintenance and design. Moreover, it demonstrates the need for the law in Ohio to speak with one voice. There is an apparent conflict among the districts and the Ninth District Court of Appeals if not reviewed here, will damage the law and local government.

Finally, the Court of Appeal's reliance on the plaintiff's expert opinion that the roadway was in disrepair based upon the alleged low coefficient of friction of the roadway is error. Appellants in their jurisdictional brief in this Court, in their discussion of Proposition of Law 2, demonstrate the inherent unreliability of this testimony. In addition, the sole basis for the testimony demonstrates that the conclusion that the coefficient of friction was caused by disrepair was an article that discussed design criteria to improve the coefficient of friction of state highways. (T.D. 56, Defendant's motion to exclude expert testimony, deposition excerpts and Exhibit B attached). Indeed, the article states that its purpose was to examine "the procedures used in the various states (excluding Alaska and Hawaii) for evaluating HMA pavement materials and for setting standards to define acceptable skid-resistance performance in new pavement and over the life of paved surfaces." (T.D. 56, Exhibit B attached, page 2 of 9). In other words, the plaintiff's expert presented a conclusory opinion that the roadway was in disrepair—i.e. not maintained—based upon an article describing the effects of roadway design on roadway coefficients of friction. To state it another way, as in the decision of the court of appeals related to the curvature of the roadway and critical speed as described above, the plaintiff's expert failure to demonstrate that there was a change to the original

coefficient of friction from the original design or construction is fatal to their case.

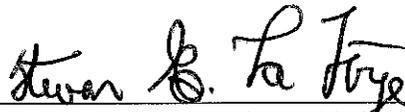
This is a case of great public interest.

CONCLUSION

The law as pronounced by this Court is clear: a political subdivision may not be liable for construction or design defects, and if a plaintiff fails to show that a maintenance issue caused a roadway to be in disrepair, then the plaintiff's claim fails as a matter of law. Unfortunately, the Ninth District Court of Appeals failed to follow this Courts' decisions and failed to follow the mandate of the state legislature. The result is that if this decision is left to stand unchanged, it will be used to threaten the scarce fiscal resources of counties and townships alike.

On its face, this is a case of great public interest.

Respectfully submitted,



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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing was served by ordinary U.S. Mail, postage prepaid, on this 23rd day of September 2010 upon the following:

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