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

RAYMOND SANDERBECK, : Appeal from the Court of Appeals
: Ninth Appellate District
Plaintiff-Appellee, : Medina County, Ohio
: :
v. : Court of Appeals
: Case No. 09 CA 0051-M
COUNTY OF MEDINA, et al. :
: :
Defendants-Appellants :

**PLAINTIFF-APPELLEE AND CROSS-APPELLANT, RAYMOND SANDERBECK,
INDIVIDUALLY AND AS THE ADMINSITRATOR OF THE ESTATE OF MICHELLE
SANDERBECK'S, COMBINED MEMORANDUM IN RESPONSE AND
MEMORANDUM IN SUPPORT OF JURISDICTION**

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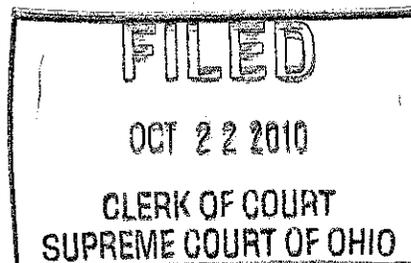
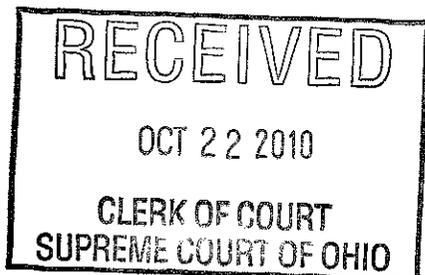
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TABLE OF CONTENTS

PAGE(S)

TABLE OF AUTHORITIES iii

I. EXPLANATION OF WHY THIS IS NOT A CASE OF PUBLIC OR GREAT GENERAL INTEREST AND INVOLVES NO CONSTITUTIONAL QUESTION..... 1

II. STATEMENT OF THE CASE AND FACTS2

A. PROCEDURAL HISTORY2

B. RELEVANT FACTS.....4

 1. The Subject Accident.....4

 2. The County’s notice of problems with East Smith Road4

 3. Plaintiff’s expert opinions5

 4. The East Smith Road “Rehabilitation” project.....7

III. ARGUMENT IN SUPPORT OF PROPOSITIONS OF LAW8

 PROPOSITION OF LAW I: SUMMARY JUDGMENT WAS PROPERLY DENIED BECAUSE QUESTIONS OF FACT EXIST AS TO WHETHER THE COUNTY FAILED TO KEEP EAST SMITH ROAD “IN REPAIR” IN THE PLAIN AND ORDINARY MEANING OF RC § 2744.03(B)(3).....8

 PROPOSITION OF LAW II: THE COURT OF APPEALS PROPERLY RELIED ON THE OPINIONS OF THE ESTATE’S EXPERT ENGINEER BECAUSE THE PHOTOGRAPHS IN THE RECORD CLEARLY SUPPORT THOSE OPINIONS.....10

IV. CONCLUSION 10

V. EXPLANATION OF WHY THIS CASE IS OF PUBLIC OR GREAT GENERAL INTEREST 11

VI. STATEMENT OF THE CASE AND FACTS 12

 C. STATEMENT OF THE CASE12

 D. RELEVANT FACTS.....12

VII. ARGUMENT IN SUPPORT OF PROPOSITIONS OF LAW 12

 PROPOSITION OF LAW: UNDER RC § 5591.36, THERE IS NO REQUIREMENT THAT A CULVERT MUST RUN UNDERNEATH OR PERPERNDICULAR

TO A COUNTY ROAD IN ORDER TO TRIGGER THE COUNTY'S DUTY
TO ERECT A GUARDRAIL.....12

VIII. CONCLUSION15

CERTIFICATE OF SERVICE.....16

TABLE OF AUTHORITIES

PAGE(S)

Cases

<i>Bonace v. Springfield Twp.</i> , 7 th Dist. No. 07 MA 226, 2008-Ohio-6364	10, 11
<i>Hamilton v. Clermont Cty. Bd. of Commrs.</i> (12 th Dist. 2006), Case No. CA2005-09-088, 2006-Ohio-2024	18
<i>Heckert v. Patrick</i> (1984), 15 Ohio St.3d 402, 406	9, 10, 11
<i>Lesnau v. Andate Enterises, Inc.</i> (2001), 93 Ohio St.3d 467, 471	17
<i>Maggio v. Warren</i> , 11 th Dist. No. 2006-T-0028, 2006-Ohio-6880 at ¶ 37	9
<i>Riley v. McNicol</i> (1923), 109 Ohio St. 29, 33	17, 18
<i>Sheley v. Swing</i> (1 st Dist. 1938), 65 Ohio App. 109	10
<i>Slyder v. Bd. of Cty. Commrs. Of Preble Cty.</i> (1938), 133 Ohio St. 146, 149-150	18
<i>Starling v. Bd. of Commrs.</i> (1935), 53 Ohio App. 293	10
<i>Whitney v. Niehaus</i> (1915), 4 Ohio App. 208	10

Statutes

RC §§ 2744.02(B)(5)	3
RC § 2744.02	passim
RC § 2744.02(B)	9
RC § 2744.02(B)(3)	passim
RC § 5591.36	passim
RC § 5591.37	3
RC §§ 2744.02(B)(5)	2
RC 2744.02(B)(3)	1

I. EXPLANATION OF WHY THIS CASE DOES NOT PRESENT A CASE OF PUBLIC OR GREAT GENERAL INTEREST AND INVOLVES NO CONSTITUTIONAL QUESTION

As a threshold matter, while Defendants-Appellants assert in the heading of Section I of their Memorandum In Support of Jurisdiction that a Constitutional questions exists, they fail to espouse a single Constitutional question in the body of Section I. Thus, Plaintiff-Appellee (hereinafter collectively as “the Estate”) will focus solely on the alleged issue of “public or great general interest.” In truth, no such compelling interest exists.

This Appeal is about the denial of the Defendant-Appellants’ (hereinafter collectively as “the County”) Motion for Summary Judgment. Both the Trial Court and the Ninth District Court of Appeals determined that genuine issues of material fact exist regarding whether East Smith Road was “in repair” for purposes of RC 2744.02(B)(3). This is not a case that poses a question of first impression, or even a novel question, in the State of Ohio. To the contrary, both Courts simply construed the evidence in a light most favorable to the non-moving party and concluded that jury issues existed.

The County and Amicus Curie suggest that the Court of Appeals decision increases counties’ and/or townships’ potential tort liability and “eviscerates the protection of the political subdivision tort liability act.”¹ In reaching this conclusion, the County’s Memorandum, and the Amicus Curiae Memorandums, ignore the actual opinions written by the Trial Court and the Ninth Appellate District. More importantly they ignore the body of evidence upon which both Courts relied in rendering their respective opinions. Neither Court rewrote the standard by

¹ See Memorandum in Support of Jurisdiction of Amici Curiae The County Commissioners Association of Ohio, et al., pg. 2.

which a political subdivision may be held liable for failing to maintain a road as proscribed by ORC §§ 2744(B)(3).

Both the Court of Appeals and the Trial Court found that jury issues existed with respect to whether the County properly maintained the road at issue. In doing so, the Courts relied upon, in part, the report of an expert. However, while the County references the expert's report and supporting affidavit, the County completely fails to even acknowledge that the Ninth District had the benefit of the expert's deposition explaining in substantial detail the basis for his conclusion that the road was in disrepair. The lower Courts also had photographs showing the physical deterioration of the road. This Court has the benefits of the expert's deposition and the photographs as well.

While the County asserts that a reference to co-efficient of friction of the road interjects an element of road design, they misunderstand and even misstate to this Court the totality of the evidence. As set forth in more detail hereafter, the Ninth District Court of Appeals merely applied the facts of this case to law as established by this Court and found a jury trial was warranted. No new standard was created.

II. STATEMENT OF THE CASE AND FACTS

A. PROCEDURAL HISTORY

The Estate brought this action in the Medina County Court of Common Pleas alleging that the County failed to keep East Smith Road "in repair" pursuant to RC § 2744.02(B)(3), and for failing to erect and maintain a guardrail along East Smith Road pursuant to RC §§ 2744.02(B)(5), 5591.36 and 5591.37.² [T.d. 1, Compl.; T.d. 62, Amend Compl.]. The Estate

² This portion of the Estate's Combined Memorandum deals only with the "in repair" claim pursuant to RC §2744.02(B)(3). The cross-appeal pertaining to the "guardrail" claim pursuant to

also alleged that the County's failure to comply with these statutory provisions was a significant contributing factor in causing a motor vehicle accident that claimed the life of fifteen-year-old Michelle Sanderbeck. (Id).

On December 1, 2008 the County moved for summary judgment claiming immunity from suit pursuant to RC § 2744.02. [T.d. 42]. The Estate opposed the County's Motion on December 19, 2008. [T.d. 44]. The County then filed a Reply in Support of its Motion on January 2, 2009. [T.d. 45]. After all briefing was complete, and while the trial court's decision on summary judgment was pending, the County requested to take the discovery deposition of the Estate's expert engineer, Richard Stanford, II. After conducting Mr. Stanford's deposition, the County then moved to exclude his opinions. [T.d. 55]. The Trial Court denied that motion and the County never appealed this decision.³ [T.d. 68].

In addition to extensive briefing, the Trial Court held oral arguments on the County's Motion for Summary Judgment on April 17, 2009. [T.d. 69]. Following the oral arguments, the Trial Court denied the County's Motion, having determined that issues of material fact existed as to whether East Smith Road was "in repair," and whether the existence of a culvert running along the south side of East Smith Road implicated the duties imposed by RC § 5591.36. [T.d. 72].

The County appealed the Trial Court's decision, arguing that it was immune from liability pursuant to RC § 2744.02. The Ninth District Court of Appeals also concluded that there were genuine issues of material fact regarding whether East Smith Road was "in repair" when Ms. Sanderbeck was killed. However, the Ninth District determined that the County did

RC §§ 2744.02(B)(5) and 5591.36 is addressed in the affirmative portion of this Combined Memorandum.

³ Defendants Motion was pursuant to Evidence Rule 702.

not have a duty to erect a guardrail in the area of the crash. In so doing, the Ninth District reversed the denial of summary judgment on that particular count. This appeal and cross-appeal followed.

B. RELEVANT FACTS

i. The Subject Accident

Michelle Sanderbeck was killed in a one-car accident on East Smith Road in Medina County on March 4, 2006. The accident occurred when the 16-year old driver of the vehicle in which she was riding lost control on an “S” curve. The vehicle, traveling westbound, crossed the eastbound lane of traffic and left the roadway. The vehicle then nosed into a drainage ditch and flipped onto its roof, coming to rest on a stone retaining wall near the end of a culvert running parallel to the roadway beneath the apron of a private driveway. Ms. Sanderbeck, seated between two other teens in the back seat of the vehicle, was killed instantly. She was the only fatality.

This was not the first accident along this portion of East Smith Road. It was a dangerous stretch of road that, for some reason, was becoming more dangerous over time. The County was aware of the danger and the increasing number of accidents prior to March 4, 2006 but failed to act until after Ms. Sanderbeck died. It is undisputed that between December of 2001 and March 4, 2006, there were over 60 accidents within a half-mile stretch of the site of the subject accident. Several of those accidents involved vehicles leaving the south side of the road in a manner similar to the subject accident. [T.d. 44, Ex A, Attachment 2, p. 2; Ex. B, pg. 24 at 4-25].

ii. The County’s notice of problems with East Smith Road

Prior to the accident at issue, Ken Hotz, the former County Sanitary Engineer and a resident living on East Smith Road near the curve in question, told the current County Engineer,

Michael Salay, that “something on the road had changed” and cars were leaving the roadway more frequently than in past years. [T.d. 44, Ex. B pp. 25-26, at 1-25]. Undisputed statistical evidence supported Mr. Hotz’s concerns. Based on the County’s own records, the number of accidents on this stretch of East Smith Road increased by a third between 2002 and 2003. In 2004, the number of accidents increased by 144% over the previous year. There were 15 accidents in 2005 and in 2006 there were 11 accidents in the two months preceding the March 4, 2006 accident that claimed Ms. Sanderbeck’s life.

In 2001, the County received the Medina Area Transportation Task Force 2001 Final Report. [T.d. 44, Ex. C pp. 30-31 at 24-25, 1-24]. The Report recommended that safety and traffic flow be improved on East Smith Road precisely where the subject accident occurred. [T.d. 44, Ex. C pp. 33-34 at 22-25, 1-11]. In October of 2005, Montville Township Chief of Police Thomas Acklin personally requested that the speed limit on this portion of East Smith Road be lowered due to the increasing number of accidents. [T.d. 44, Ex. B pg. 52 at 6-18]. When the County decided to actually follow up on Chief Acklin’s request and petition the State to lower the speed limit after the accident at issue, County Commissioner Sharon Ray expressed her gratitude because, in her own words, East Smith Road was a “very dangerous road.” [T.d. 44, Ex. D, pg. 12 at 4-10].

iii. Plaintiffs’ Expert Opinions

The Estate’s expert engineer, Mr. Stanford, issued a report and a sworn affidavit expressly stating that East Smith Road was “in disrepair” and “posed an unreasonable hazard to motorists” on March 4, 2006. [T.d. 44, Ex. A, Attachment 2, pg. 2]. Mr. Stanford’s opined to a reasonable degree of engineering certainty that the County’s failure to keep East Smith Road “in repair” was a substantial contributing factor in causing the accident that resulted in Ms.

Sanderbeck's death. Contrary to the County's assertions, Mr. Stanford's opinions were not based solely on the skid resistance and/or the coefficient of friction on the road's surface, nor did he opine that the road was in disrepair simply because it "was too slippery."⁴ Mr. Stanford's opinion was primarily based on the fact that the surface of the road was deteriorating.

Mr. Stanford testified that the co-efficient of friction for the section of road in question was .252. (T.d. 57, Stanford Depo. p. 45). This translates to a skid number of 25 (Id.) Any skid number below 38 would reflect pavement which is in disrepair. (Id.) This conclusion is based, in part, upon the Road Engineering Journal, Forty Eight State Survey Showed Skid Resistance Evaluation Varied Considerably (June 1, 1997). However, the skid number or co-efficient of friction was hardly the sole basis of his opinion.

Mr. Stanford relied on the increase in accidents over a five year period that reflected a change in condition. (T.d 57, Affidavit of Stanford, with report Ex. 2). Mr. Stanford testified that the photographs of the road reveal deterioration. (T.d. 57, Stanford Depo. p. 51). In his words, there was "deteriorating pavement ... throughout this photograph [C-12]". (Id.) Indeed, Mr. Stanford stated that anyone merely looking at the road "should recognize that [deterioration]". (Id. at p. 52) The testing merely "validated" what he saw in the photographs. (Id. at p. 53).

As recognized by the Trial Court and Ninth District, Mr. Stanford opined that the County failed to keep East Smith Road "in repair" as evidenced by the deterioration and/or "spalling" of the pavement in the area of the accident.⁵ This "spalling," which is physical deterioration of the pavement, is plainly evident in the photographs taken of the road's surface the day after the

⁴ The County's Memorandum in Support of Jurisdiction at pg. 5.

⁵ Mr. Stanford defined the term "spalling" as "the breaking away of material and leaving voids where the material broke away" in his deposition at pg. 4.

subject accident that were entered into the record by the County.⁶ These photographs were relied upon by Mr. Stanford in formulating his opinions and by the Trial Court who opined that the “photographic evidence that shows the condition of the road as it existed ... give rise to an issue of material fact.” The photographs alone create a genuine issue of material fact as to whether East Smith Road was “in repair” for purposes of RC § 2744.02(B)(3) on March 4, 2006.

iv. The East Smith Road “Rehabilitation” project

The County vigorously maintains that East Smith Road was “in excellent repair” on March 4, 2006. [T.d. 42, Salay Aff. ¶4]. However, the County completely ignores the sworn testimony of County Engineer Salay who admitted that shortly after Ms. Sanderbeck’s death, East Smith Road was closed so that the road could be “rehabilitated.”⁷ [T.d. 44, Ex. B, pp. 31-32, at 1-25, 1-16]. According to Engineer Salay, the road “rehabilitation” was actually planned prior to the March 4, 2006 accident and the purpose of the “rehabilitation” was to make “spot repairs” to the road. [T.d. 44, Ex. B, p. 30 at 6-12]. Thus, the County acknowledged, prior to the accident, that it appreciated the need to repair East Smith Road where the accident happened. Indeed, part of the “rehabilitation” included the application of a sealant specifically designed to increase the co-efficient of friction on the roadway.⁸

Based on the record before the Trial Court and the Ninth District, issues of material fact exist as to whether East Smith Road was “in repair” at the time of Ms. Sanderbeck’s death. The lower Courts both followed the mandates of this Court in interpreting RC § 2744.02 (B)(3) and in applying the plain meaning of “in repair.” The lower Courts considered ample competent and

⁶ See photographs C-12 to C-17, attached to the County’s Motion for Summary Judgment.

⁷ County Engineer Salay testified that the East Smith Road project was the only road project during his tenure as County Engineer to be called a “rehabilitation” project as opposed to a road repair or construction project.

⁸ This is not a subsequent remedial measure as it was planned prior to the accident.

credible evidence demonstrating that the surface of East Smith Road was deteriorating such that it was not “in repair” on March 4, 2006. As such, genuine issues of material fact exist making the denial of the County’s Motion for Summary Judgment necessary and proper.

III. ARGUMENT IN SUPPORT OF PROPOSITIONS OF LAW

PROPOSITION OF LAW I: SUMMARY JUDGMENT WAS PROPERLY DENIED BECAUSE QUESTIONS OF FACT EXIST AS TO WHETHER THE COUNTY FAILED TO KEEP EAST SMITH ROAD “IN REPAIR” IN THE PLAIN AND ORDINARY MEANING OF RC § 2744.03(B)(3)

There is no dispute that as a political subdivision, the County is presumptively immune for acts and omissions in connection with a governmental or proprietary function. RC § 2744.02; *see also, Cook v. City of Cincinnati* (1995), 103 Ohio App.3d 80, 85-86. Because the County has raised the defense of immunity here, “the burden lies with the plaintiff to show that one of the recognized exceptions [to immunity] apply” under RC § 2744.02(B). *Maggio v. Warren*, 11th Dist. No. 2006-T-0028, 2006-Ohio-6880 at ¶ 37. Both the Trial Court and the Ninth District determined that the Estate met this burden.

The applicable exception to the County’s immunity is provided for in RC § 2744.02 (B)(3) as follows:

[P]olitical subdivisions are liable for injury, death, 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***.

RC § 2744.02 (B)(3).

In *Heckert v. Patrick* (1984), 15 Ohio St.3d 402, 406, this Court held that the “statute placing liability upon the county commissioners for failure to keep county roads in repair placed a duty on the commissioners only in matters concerning either the deterioration or disassembly of county roads [...]” The Court reasoned that, “[T]he intent of the General Assembly was to

place a duty on the commissioners only in matters concerning either the deterioration or disassembly of county roads and bridges.” *Id.*, citing *Starling v. Bd. of Commrs.* (1935), 53 Ohio App. 293 (liable for ruts in the road); *Whitney v. Niehaus* (1915), 4 Ohio App. 208 (liable for trench in roadway).

In *Bonace v. Springfield Twp.*, 7th Dist. No. 07 MA 226, 2008-Ohio-6364, the Seventh Appellate District, citing to *Heckert*, determined that “in repair” for purposes of RC § 2744.02 (B)(3) “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 [...].” *Id.*, see also, *Sheley v. Swing* (1st Dist. 1938), 65 Ohio App. 109 (holding that to “repair” means to mend after wear and tear; to eliminate the effects of decay or partial destruction; to restore to a state of soundness, usable for the purposes of original construction; and in the case of a road, to repair connotes keeping it in a safe condition, suitable for use by the traveling public.).

In this case, the Trial Court and the Ninth District determined that the Estate presented sufficient competent and credible evidence demonstrating deterioration of the roadway’s surface which raise questions of material fact regarding whether the County fulfilled its duty to keep East Smith Road “in repair” for purposes of RC § 2744.02(B)(3).

In evaluating the evidence presented in this case, the Trial Court and the Ninth District stayed true to this Court’s holding in *Heckert* and applied the definition of “in repair” articulated by the Seventh District in *Bonace*. Both Courts cited evidence depicting the “deterioration” of the roadway and neither made their decision based solely on “skid tests” or the coefficient of friction of the road’s surface. Most importantly, both courts recognized and accounted for the differences between road design and/or construction and a political subdivision’s duty relative to road repair and maintenance. As such, the Ninth District’s ruling is wholly consistent with the

General Assembly's intent in drafting RC § 2744.02 (B)(3), as well as with this Court's interpretation and application of RC § 2744.02(B) (3).

PROPOSITION OF LAW II: THE COURT OF APPEALS PROPERLY RELIED ON THE OPINIONS OF THE ESTATE'S EXPERT ENGINEER BECAUSE THE PHOTOGRAPHS IN THE RECORD CLEARLY SUPPORT THOSE OPINIONS

The County's second proposition of law fails to raise any issue of public or great general interest whatsoever. It simply challenges the weight or sufficiency of the evidence, in particular, Mr. Stanford's affidavit. The County argues that Mr. Stanford's opinions should be disregarded because the photographs depicting the condition of East Smith Road at the time of the accident, upon which he relied, do "not show a road that is in disrepair, there was no cracking, potholes or crumbling pavement."⁹ However, Mr. Stanford disagrees and testified that the photographs depict deteriorating road conditions. (T.d. 57, Stanford Depo. p. 51). Moreover, the Trial Court expressly relied on those very same photographs when it denied summary judgment because of the "spalling" and "deterioration" of the pavement clearly evident in those photographs. The Ninth District, having the benefit of the photographs in the record for its *de novo* review, also noted that "East Smith Road was deteriorated in the area [of the accident]" in its decision affirming the trial court's denial of summary judgment. (Id. at 9). Thus, the County simply asks this Court to revisit their Motion to Exclude Mr. Stanford, a ruling which was not appealed.

Based upon the abundance of credible evidence supporting the denial of summary judgment, the County's arguments are without merit.

IV. CONCLUSION

For the foregoing reasons, this Court should refuse to accept jurisdiction.

⁹ The County's Memorandum in Support of Jurisdiction at pg. 8.

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

While the issue raised by the County is not of public or great general interest, the Ninth District's decision reversing the Trial Court's denial of the County's Motion for Summary Judgment on the Estate's "guardrail claim" is a serious matter of public safety affecting every citizen of the State of Ohio. In reaching the conclusion that no culvert existed within the meaning of RC § 5591.36 at the location of the subject accident, the Ninth District injected arbitrary qualifications on the term "culvert" that simply are not present in the statute while offering only gratuitous lip service to the express intent of the General Assembly in enacting the statute.

The Ninth District held that "the culvert running under the private driveway [] is not a "culvert" within the coverage of Section 5591.36."¹⁰ The Ninth District made this determination despite the fact that it also recognized that the intent of the statute is to "protect motorists traveling along county roads."¹¹ In other words, the intent of the statute is to prevent exactly the type of accident that claimed the life of Ms. Sanderbeck on March 4, 2006.

By ruling that the culvert that is indisputably present at the accident scene is not a "culvert" within the meaning of the statute, the Ninth District added qualifications to the statute that the General Assembly chose not to include. The purpose and intent of the statute, specifically protecting the motoring public, can certainly be effectuated whether the culvert is parallel or perpendicular to the roadway. When all other qualifications of RC § 5591.36 are met, the actual position or direction of the culvert is irrelevant if the purpose and intent of the statute, the public safety, would be furthered by the erection and maintenance of guardrails.

¹⁰ Ninth District Decision and Journal Entry at pg. 8

¹¹ Id.

For these reasons, this Court should accept jurisdiction and examine this question to ensure that statutes intended to promote and protect public safety are effectuated and applied in a manner consistent with the intent of the General Assembly.

VI. STATEMENT OF THE CASE AND FACTS

C. STATEMENT OF THE CASE

The Estate incorporates Section A of this Memorandum as if fully rewritten herein.

D. RELEVANT FACTS

It is undisputed that a culvert exists running under the apron of a private driveway and parallel to the traveled surface of East Smith Road at the precise location where the subject accident occurred. The County defined the term “culvert” as “a structure that conveys water or forms a passageway through an embankment and is designed to support a super-imposed load or other fill material plus live loads.” [T.d. 42, p. 7]. There is no question that a culvert exists where this accident occurred. It is the undisputed presence of the culvert under the driveway apron, a few feet from the surface of the roadway, that triggered the County’s duty to erect a guardrail pursuant to RC § 5591.36.

VII. ARGUMENT IN SUPPORT OF PROPOSITIONS OF LAW

PROPOSITION OF LAW: UNDER RC § 5591.36, THERE IS NO REQUIREMENT THAT A CULVERT MUST RUN UNDERNEATH OR PERPENDICULAR TO A COUNTY ROAD IN ORDER TO TRIGGER THE COUNTY’S DUTY TO ERECT A GUARDRAIL

The Ninth District erred when it reversed the Trial Court’s denial of summary judgment and determined that no genuine issues of material fact existed regarding whether the County had a duty to install guardrails along East Smith Road at the location of the subject accident. The Ninth District’s decision was based solely on its own subjective interpretation and application of the term “culvert.” The Ninth District made this decision despite the undisputed fact that, by

enacting RC § 5591.36, the General Assembly intended to prevent exactly the type of accident that occurred in this case.

RC § 2744.02(B)(5) states, in relevant part, that a political subdivision is liable “when liability is expressly imposed upon the political subdivision by a section of the Revised Code.”¹²

RC § 5591.36, expressly imposing such liability, states:

The board of county commissioners shall erect and maintain on county roads, where not already done, one or more guardrails on each end of a county bridge, viaduct, or culvert more than five feet high. The board also shall protect, by guardrails, all embankments with a rise of more than eight feet in height and with a downward slope of greater than seventy degrees, where the embankments have an immediate connection with a county road.¹³

The County argued that it did not have a duty to erect a guardrail along the curve on East Smith Road pursuant to RC § 5591.36 because there was no culvert running under East Smith Road. Ultimately the Ninth District agreed, believing that the Estate’s position would “require counties to erect guardrails along every stretch of road that has a drainage ditch running along side it,” as well as along private driveways “inconsistent with the statute’s direction to place them on “county roads.”¹⁴ However, in so doing, the Ninth District inappropriately “inserted words not used” in RC § 5591.36 and lost site of the purpose and intent of the statute. *Lesnau v. Andate Enterprises, Inc.* (2001), 93 Ohio St.3d 467, 471.

Ohio law does not provide a definition of the term “culvert” for purposes of RC § 5591.36. This Court has explained that, even if a conduit satisfies the “description of [a culvert] ... given by lexicographers,” it is not a culvert under the statute *unless it also satisfies the purpose and intent of the statute, that being to protect the traveling public.* *Riley v. McNicol*

¹² RC § 2744.02(B)(5)

¹³ RC § 5591.36

¹⁴ Ninth District Decision and Journal Entry at pp. 7-8

(1923), 109 Ohio St. 29, 33 (emphasis added)(interpreting former General Code Section 7563 requiring “the county commissioners to erect or cause to be erected ‘one or more guard rails on each end of a ... culvert more than five feet high’” and holding that a culvert 13 feet below the surface of the road and extending 10 to 11 feet beyond the outer edge of the driveway adjoining the pavement was not a culvert requiring the erection of guardrails within the meaning of Code Section 7563 because “manifestly that would be useless, for it would give no protection to the traveling public if erected at such points).

There can be no doubt that the purpose and intent of RC § 5591.36 in requiring the erection of guardrails on bridges, viaducts, and culverts more than five feet high is to protect the traveling public. See *Riley*, supra., see also; *Hamilton v. Clermont Cty. Bd. of Commrs.* (12th Dist. 2006), Case No. CA2005-09-088, 2006-Ohio-2024 (holding that the purpose of a guardrail is to prevent vehicles from leaving the roadway and careening off an embankment); *Slyder v. Bd. of Cty. Commrs. Of Preble Cty.* (1938), 133 Ohio St. 146, 149-150 (construing GC § 7563 and holding that guardrails are erected “to serve both as a warning and a barrier). In this case, there is no dispute that there was a culvert running along East Smith Road where the subject accident occurred. More importantly, the purpose and intent of RC § 5591.36, as well as the dangers associated with steep drop offs adjacent to county roads, are the same whether the culvert is parallel or perpendicular to the roadway. Here, unlike in *Riley*, erection of a guardrail at the ends of the culvert, “along the county road,” would have provided the protection to the traveling public necessary making this culvert exactly the type contemplated in the statute.¹⁵

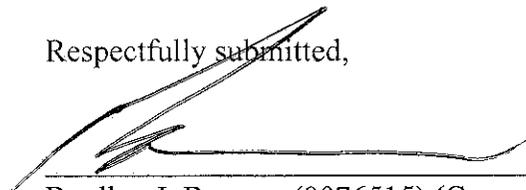
¹⁵ RC § 5591.36

In the present case, a question of fact exists as to whether the County had a duty to erect a guardrail on either end of the culvert running parallel to the roadway.¹⁶ The language of RC § 5591.36 does not mandate that the culvert run underneath or perpendicular to the roadway to trigger a county's duty to act. At the same time, the express language of RC § 5591.36 stating that guardrails be erected "on county roads" clearly demonstrates that the Ninth District's concern about requiring counties to "place guardrails along [private] driveways" is unwarranted and misplaced.¹⁷ As expressed in this Court's holding in *Riley*, the County only has a duty to erect guardrails in places where doing so will protect the traveling public. Here, the Estate has offered ample evidence that a properly installed and maintained guardrail along the "S" curve on East Smith Road would have redirected the vehicle in which Ms. Sanderbeck was riding back onto the traveled portion of the roadway, preventing the vehicle from going over the embankment and landing on its roof. [T.d. 44, Ex. A, ¶5]. In other words, a guardrail at the end of the culvert, along the county road, would have protected the traveling public by preventing exactly what occurred on March 4, 2006.

VIII. CONCLUSION

This Court should accept jurisdiction and examine this question to ensure that the specific intent of RC § 5591.36 is being effectuated.

Respectfully submitted,



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¹⁶ Considering this culvert ran along a road that is described as an "S" curve, its location is in fact perpendicular to the direction of travel when entering the turn. This creates an even greater hazard to the public.

¹⁷ *Id.* at 8.

CERTIFICATE OF SERVICE

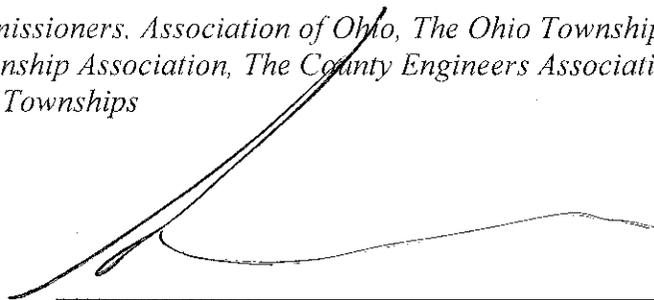
A copy of the foregoing has been sent via regular U.S. Mail on the 21st day of October,

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