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

DEFENDANTS/CROSS-APPELLEES COUNTY OF MEDINA AND MEDINA COUNTY BOARD OF COMMISSIONERS' MEMORANDUM IN OPPOSITION TO CROSS APPEAL

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I. PLAINTIFF/CROSS-APPELLANT'S CROSS APPEAL DOES NOT POSE A CASE OF PUBLIC OR GREAT GENERAL INTEREST

The Ninth District correctly ruled that R.C. 5591.36, entitled "Guardrails for Bridges," is "not intended to require counties to erect guardrails along every stretch of road that has a drainage ditch running alongside it" or provide a guardrail on a private driveway. (Op. at ¶ 17; Appx. 8.) The court simply refused to twist R.C. 5591.36 to reach a result that Cross-Appellant Sanderbeck would prefer. This Court should not exercise jurisdiction.

While he argues that the Ninth District was "offering only gratuitous lip service" to the intent of the legislature in interpreting R.C. 5591.36 (Br. at 11), Sanderbeck's overarching theme is that guardrails prevent cars from going off roads and therefore Section 5591.36 should be interpreted to require the County to erect a guardrail in this area. Of course, guardrails are designed to do just that. But, Sanderbeck's broad-brush claim does not show how the Legislature intended to require counties to erect guardrails in every location where a private driveway runs perpendicular to a county road. The Legislature did not intend this result.

Sanderbeck's argument to the contrary disregards the language of the statute. Under R.C. 5591.36, counties are required to "erect and maintain **on county roads** ... one or more guardrails **on each end of a county** bridge, viaduct, or **culvert** more than five feet high [emphasis added]." A drainage ditch running parallel to a county road obviously is not a culvert. A driveway running over a drainage ditch also is not a "culvert" under R.C. 5591.36 – that is, a private driveway cannot be a "county … culvert."

Section 5591.36 simply does not make sense applied to a private driveway that is perpendicular to the county road. Sanderbeck's interpretation ignores the text of the statute and leads to a strange and certainly unintended result. Under the facts of this case, if a county were to place a guard rail on "each end of a … culvert" then it would be either 1) putting the guardrail on

each end of a private driveway, or, even more absurdly, 2) putting the guardrail in such a way that it would block the driveway. It does not make sense. As the Ninth District held, to interpret R.C. 5591.36 in the manner which Sanderbeck requests, it would force counties to "erect a guardrail along the private driveway, which is inconsistent with the statute's direction to place them 'on county roads'." (Op. at ¶ 17; Appx. 8.)

Furthermore, while not mentioned in his brief, Sanderbeck does not – and cannot – demonstrate an essential requirement of R.C. 5591.36: That is, the "culvert [must be] more than five feet high." On this ground alone, Sanderbeck's claim has no merit and the Section does not apply. Finally, Sanderbeck's Cross-Appeal also faces another obstacle. While the Court has jurisdiction over the County's primary appeal because the courts' decisions denied immunity under 2744.02(C),[1] there is no apparent underlying jurisdiction for reviewing the Ninth District's decision that held that the County is entitled to summary judgment. Sanderbeck provided no jurisdictional basis for prosecuting his Cross-Appeal.

Sanderbeck does not present a colorable issue of general interest or public importance. Sanderbeck's interpretation of R.C. 5591.36 defies a reasonable interpretation of the statute. Under Supreme Court Rule III, §§ 6(A)(1) and 6(C)(1), this Court should decline jurisdiction to decide Sanderbeck's cross appeal on the merits.

II. STATEMENT OF THE FACTS

As the Ninth District correctly observed, the parties do not dispute that "there is a drainage ditch that runs parallel to the road in the area where the crash occurred. There is also a private driveway that connects to the road near the crash location. The driveway has a culvert

[1]"[A]n order that denies a political subdivision or an employee of a political subdivision the benefit of an alleged immunity from liability as provided in Chapter 2744 or any other provision of the law is a final order." R.C. 2744.02(C).

under it where it meets the drainage ditch. The culvert under the driveway is adjacent to East Smith Road and runs parallel to it. There is nothing beneath East Smith Road near where the car left the roadway." (Op. at ¶ 14.)

III. LAW AND ARGUMENT

Cross-Appellant's 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.

A. Ohio Rev. Code R.C. 5591.36 does not expressly impose liability on the County under the facts of this case.

Under Section 2744.02(B)(5), "a political subdivision is liable for injury, death, or loss to person or property when civil liability is expressly imposed upon the political subdivision by a section of the Revised Code, including, but not limited to, sections 2743.02 and 5591.37 of the Revised Code." Section 5591.37 provides that "[n]egligent failure to comply with section 5591.36 ... shall render the county liable for all accidents or damages resulting from that failure."

Under Section 5591.36, and the critical provision here, counties are required to "erect and maintain on county roads ... one or more guardrails on each end of a county bridge, viaduct, or culvert more than five feet high."

1. R.C. 5591.36 only applies to a "county ... culvert," not a private driveway.

The Ninth District properly deferred to the intent of the Legislature. (Op. at ¶ 19; Appx. 9.) This Court has recognized that "[i]t is a firm principle of statutory construction that liability imposed by statute shall not be extended beyond the clear import of the terms of the statute." *LaCourse v. Fleitz*, 28 Ohio St.3d 209, 212 (1986).

The Ninth District's decision correctly ruled that R.C. 5591.36, entitled "Guardrails for Bridges," is "not intended to require counties to erect guardrails along every stretch of road that

has a drainage ditch running alongside it" or provide a guardrail on a private driveway. (Op. at ¶ 17; Appx. 8.) The Ninth District held:

> [A]pplying Section 5591.36 to drainage ditches would result in an inconsistency. The section directs the County to erect guardrails "on county roads" "on each end" of a culvert. If the county attempted to place a guardrail on the end of the drainage ditch in this case, it would have to erect a guardrail along the private driveway, which is inconsistent with the statute's direction to place them "on county roads."

(*Id.* at ¶17.) Again, under the facts of this case, if a county were to place a guard rail on "each end of a ... culvert" then it would be either 1) putting the guardrail on each end of a private driveway, or, even more absurdly, 2) putting the guardrail in such a way that it would block the driveway. It does not make sense. By refusing to adopt Sanderbeck's argument, the Ninth District simply applied the text of R.C. 5591.36 and refused to extend the County's liability "beyond the clear import of the terms of the statute," *LaCourse v. Fleitz*, supra at 503, or create an absurd result.

Sanderbeck's argument that the "Ninth District's decision was based solely on its own subjective interpretation and application of the term 'culvert'" is wrong. (Sanderbeck's Br. at 12.) The Ninth District relied on this Court's precedent and the plain meaning of the word "culvert." (See Op. at ¶ 16; Appx. 8, citing *Riley v. McNicol*, 109 Ohio St. 29, 33 and Webster's Third New Int'l Dictionary at 553 (1993). Moreover, the Ninth District properly applied the text of the statute requiring there be a "county ... culvert," not merely a private driveway that goes over a drainage ditch.

Finally, Sanderbeck argues that guardrails are designed to protect the traveling public and therefore the County must erect a guard rail. (Sanderbeck's Br. at 14.) Again, this overlybroad contention does not change the language of the statute or require the Ninth District to judicially create a result Sanderbeck would prefer. This Court has identified that "the manifest statutory

purpose of R.C. Chapter 2744 is the preservation of the fiscal integrity of political subdivisions." *Wilson v. Stark Ctr. Dept. of Hum Serv.* (1994), 70 Ohio St.3d 450, 453. Sanderbeck's novel interpretation, which no Ohio court has ever adopted or even suggested, would expand liability far beyond any reasonable interpretation of R.C. 5591.36. The text of the provision or the policy behind tort immunity does not support such interpretation.

IV. CONCLUSION

This Court should deny review of Plaintiff's/Cross-Appellant's cross assignment of error.

Respectfully submitted,

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CERTIFICATE OF SERVICE

A copy of the foregoing Memorandum in Opposition to Cross Appeal has been sent by regular U.S. Mail, postage prepaid, November 19, 2010 to the following:

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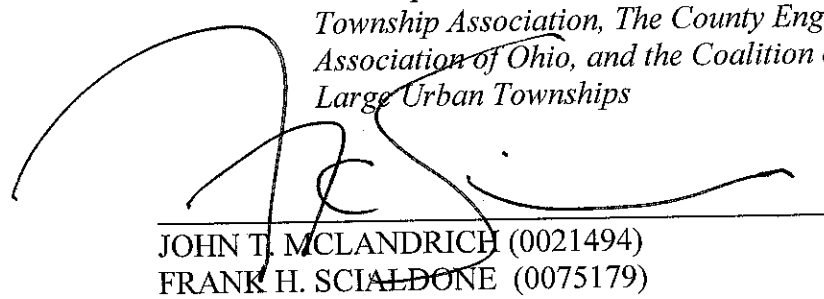

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APPENDIX

Ninth District Court of Appeals Opinion dated August 9, 2010

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Ninth Judicial District
Medina County

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Case #09CA0051-M

RAYMOND J. SANDERBECK
PLAINTIFF/APPELLEE

VS

COUNTY OF MEDINA ET AL
DEFENDANTS/APPELLANTS

Please be advised that a Decision/Order of Judgment was filed in the above entitled case on AUGUST 9, 2010.

KATHY FORTNEY
CLERK OF COURTS
By: Mitchell W. Ulco Jr
Deputy Clerk

Notice was sent to Counsel of Record and/or Parties not represented by Counsel on August 9, 2010.

Cc: BRADLEY J. BARMEN; WILLIAM A. MEADOWS; ADAM J. DAVIS; TODD M. RASKIN; CARL E. CORMANY; JOHN T. MCLANDRICH; FRANK H. SCIALDONE

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STATE OF OHIO)
)ss:
COUNTY OF MEDINA)

IN THE COURT OF APPEALS
NINTH JUDICIAL DISTRICT

RAYMOND J. SANDERBECK, INDIVIDUALLY AND AS ADMINISTRATOR OF THE ESTATE OF: MICHELLE L. SANDERBECK

Appellee

v.

COUNTY OF MEDINA, et al.

Appellants

C.A. No. 09CA0051-M

APPEAL FROM JUDGMENT ENTERED IN THE COURT OF COMMON PLEAS COUNTY OF MEDINA, OHIO CASE No. 08CIV0414

DECISION AND JOURNAL ENTRY

Dated: August 9, 2010

DICKINSON, Presiding Judge.

INTRODUCTION

{¶1} Raymond Sanderbeck's 15-year-old daughter, Michelle Sanderbeck, died in an automobile crash. Ms. Sanderbeck was a rear-seat passenger in a car that was being driven by a 16-year-old boy on East Smith Road in Medina County. As they were traveling through an "S" curve, the car left the road, traveled down an embankment, flipped over, and came to rest on its roof against a stone wall. Mr. Sanderbeck brought this action against Medina County on behalf of himself and as administrator of Ms. Sanderbeck's estate. He alleged that the crash was proximately caused by the County's failure to keep East Smith Road in repair and its failure to install guardrails in the area where the car left the road. The County moved for summary judgment, arguing that, under Chapter 2744 of the Ohio Revised Code, it was immune from liability. The trial court denied the County's motion, and it has appealed under Section

2744.02(C) of the Ohio Revised Code. This Court affirms in part because Mr. Sanderbeck presented evidence establishing a question of fact regarding whether East Smith Road was in disrepair in the area where the car left the road. We reverse in part because the County did not have a duty to install a guardrail along the drainage ditch that ran parallel to the road or at the end of a culvert that ran under a private driveway that was adjacent to the location of the crash.

POLITICAL SUBDIVISION IMMUNITY

{¶2} The County's assignment of error is that the trial court incorrectly denied its motion for summary judgment. It has argued that it is immune from liability under Section 2744.02 of the Ohio Revised Code. In reviewing a trial court's ruling on a motion for summary judgment, this Court applies the same standard a trial court is required to apply in the first instance: whether there are any genuine issues of material fact and whether the moving party is entitled to judgment as a matter of law. *Parenti v. Goodyear Tire & Rubber Co.*, 66 Ohio App. 3d 826, 829 (1990).

{¶3} "Determining whether a political subdivision is immune from liability . . . involves a three-tiered analysis." *Lambert v. Clancy*, 125 Ohio St. 3d 231, 2010-Ohio-1483, at ¶8. "The starting point is the general rule that political subdivisions are immune from tort liability." *Shalkhauser v. Medina*, 148 Ohio App. 3d 41, 2002-Ohio-222, at ¶14. Under Section 2744.02(A)(1), "a political subdivision is not liable in damages in a civil action for injury, death, or loss to person or property allegedly caused by any act or omission of the political subdivision . . . in connection with a governmental or proprietary function." "At the second tier, this comprehensive immunity can be abrogated pursuant to any of the five exceptions set forth at R.C. 2744.02(B)." *Shalkhauser*, 2002-Ohio-222, at ¶16. "Finally, immunity lost to one of the

R.C. 2744.02(B) exceptions may be reinstated if the political subdivision can establish one of the statutory defenses to liability." *Id.*; see R.C. 2744.03(A).

DUTY TO KEEP ROAD IN REPAIR

{¶4} There is no dispute that the County is a "[p]olitical subdivision." R.C. 2744.01(F). Mr. Sanderbeck, however, argued that its immunity under Section 2744.02(A)(1) is abrogated under subsection (B)(3), which provides that "political subdivisions are liable for injury, death, or loss to person or property caused by their negligent failure to keep public roads in repair . . . ." He submitted an affidavit from a professional engineer asserting that, at the time of the automobile crash, "East Smith Road was in disrepair and a contributing factor in the accident that claimed Michelle Sanderbeck's life."

{¶5} The County has argued that the engineer's opinion that the road was "in disrepair" is insufficient to abrogate its immunity because it is a conclusory assertion not supported by sufficient facts. The engineer, however, attached a report to his affidavit in which he explained his opinion. 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 "coeffcient 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.

{¶6} At his deposition, the engineer further explained his analysis. He testified that, based on its traffic count numbers, East Smith Road is a high volume road. He said that roads are assigned a "skid number" based on their coefficient of friction. He said that anything less than a skid number of 38 on a high volume road "would be a disrepaired pavement." He said that East Smith Road had a skid number of 25, indicating that its pavement was "worn out."

{¶7} The County has argued that the road was "in repair" because it did not contain any potholes or ruts. The term "in repair" is not defined by Chapter 2744 of the Ohio Revised Code. In *Heckert v. Patrick*, 15 Ohio St. 3d 402 (1984), the Ohio Supreme Court interpreted language under a previous version of Section 305.12 directing counties to keep roads "in proper repair." *Id.* at 406 (quoting R.C. 305.12 (1982)). It determined that it was "the intent of the General Assembly . . . to place a duty on the commissioners only in matters concerning either the deterioration or disassembly of county roads and bridges." *Id.* at 406. The Seventh District, citing *Heckert*, has concluded that "in repair" under Section 2744.02(B)(3) refers, "in its ordinary sense . . . 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." *Bonace v. Springfield Twp.*, 179 Ohio App. 3d 736, 2008-Ohio-6364, at ¶29.

{¶8} According to the County, *Bonace* provides the correct test for whether a road has been kept "in repair" under Section 2744.02(B)(3). Even assuming it is correct, the engineer testified that East Smith Road was "deteriorated" in the area where the 16-year-old boy lost control of his vehicle.

{¶9} The County has also argued that Mr. Sanderbeck forfeited his ability to rely on skid numbers to establish that the road was not kept in repair. Although Mr. Sanderbeck did not

specifically refer to skid numbers in his brief to the trial court, he pointed to the engineer's opinion and argued that it established that a genuine issue of material fact existed about the condition of East Smith Road at the time of the crash.

{¶10} The County has also argued that the engineer admitted that, if the 16-year-old boy had abided by the County's advisory speed limit, the crash would not have occurred. Although East Smith Road had a speed limit of 45 miles per hour, the County had posted a sign recommending that drivers go only 25 miles per hour on the curve. The County's highway engineer admitted at his deposition that the advisory speed limit was merely a "recommendation" and that a driver could legally go 45 miles per hour through the "S" curve. The County has not cited any authority suggesting it can avoid its duty to keep roads in repair simply by posting an advisory speed limit sign.

{¶11} The County has further argued that the engineer's testimony is not reliable because he did not do his own testing at the crash site and relied on non-authoritative sources to support his methodology. Since its argument goes to the weight of the engineer's testimony, it is not an appropriate consideration for summary judgment because "[t]he filed materials must be construed most strongly in the nonmoving party's favor . . . ." *Kaminski v. Metal & Wire Prods. Co.*, 125 Ohio St. 3d 250, 2010-Ohio-1027, at ¶103.

{¶12} Mr. Sanderbeck presented evidence establishing that a genuine issue of material fact exists regarding whether the County failed to keep the road where the crash occurred "in repair." R.C. 2744.02(B)(3). The County did not argue to the trial court that, even if the road was not in repair, its breach was not a proximate cause of the crash. It also did not argue to that court that, even if its immunity is abrogated under Section 2744.02(B)(3), it is reinstated by one of the statutory defenses to liability under Section 2744.03(A). See *Elston v. Howland Local*

Schs., 113 Ohio St. 3d 314, 2007-Ohio-2070, at ¶12. The trial court, therefore, properly denied the County's motion for summary judgment on Mr. Sanderbeck's claim under Section 2744.02(B)(3).

DUTY TO ERECT A GUARDRAIL

{¶13} The County has also argued that the trial court incorrectly denied it summary judgment on Mr. Sanderbeck's claim that it was liable for the crash because it did not erect a guardrail along the curve in the road. Under Section 2744.02(B)(5), "a political subdivision is liable for injury, death, or loss to person or property when civil liability is expressly imposed upon the political subdivision by a section of the Revised Code, including, but not limited to, sections 2743.02 and 5591.37 of the Revised Code." Mr. Sanderbeck alleged that the County violated Section 5591.36, under which it was required to "erect and maintain on county roads . . . one or more guardrails on each end of a county bridge, viaduct, or culvert more than five feet high." Section 5591.37 provides that "[n]egligent failure to comply with section 5591.36 . . . shall render the county liable for all accidents or damages resulting from that failure."

{¶14} The County has argued that it did not have a duty to erect a guardrail along the curve under Section 5591.36 because there was no culvert running under East Smith Road. The parties agree that there is a drainage ditch that runs parallel to the road in the area where the crash occurred. There is also a private driveway that connects to the road near the crash location. The driveway has a culvert under it where it meets the drainage ditch. The culvert under the driveway is adjacent to East Smith Road and runs parallel to it. There is nothing beneath East Smith Road near where the car left the roadway.

{¶15} Mr. Sanderbeck argued to the trial court that the County had a duty to erect a guardrail along East Smith Road because of the culvert running under the private driveway. He

argued that Section 5591.36 does not limit the term "culvert" to culverts running underneath county roads. He also argued that the drainage ditch is a "culvert" within the meaning of Section 5591.36. The trial court denied the County's motion for summary judgment, concluding that Section 5591.36 does not exclude culverts running parallel to a road.

{¶16} Section 5591.36 does not define "culvert." Its dictionary definition is "a transverse drain or waterway (as under a road, railroad, or canal)." Webster's Third New Int'l Dictionary 553 (1993). The Ohio Supreme Court has explained that, even if a conduit satisfies the "description [of culvert] . . . given by lexicographers," it is not a "culvert" under the statute unless it also satisfies the purpose and intent of the statute. *Riley v. McNicol*, 109 Ohio St. 29, 33 (1923) (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.'"). In addition, the Ohio Supreme Court has recognized that "[i]t is a firm principle of statutory construction that liability imposed by statute shall not be extended beyond the clear import of the terms of the statute." *LaCourse v. Fleitz*, 28 Ohio St. 3d 209, 212 (1986).

{¶17} There is no genuine issue of material fact that the drainage ditch running parallel to East Smith Road is not a "culvert" as that term is used in Section 5591.36. It is not a transverse waterway running under a road, as required by the dictionary definition of "culvert." Looking at the purpose of Section 5591.36, the section is entitled "[g]uardrails for bridges." It is not intended to require counties to erect guardrails along every stretch of road that has a drainage ditch running alongside it, as Mr. Sanderbeck's interpretation would appear to require. Furthermore, applying Section 5591.36 to drainage ditches would result in an inconsistency. The section directs the County to erect guardrails "on county roads" "on each end" of a culvert. If the county attempted to place a guardrail on the end of the drainage ditch in this case, it would

have to erect a guardrail along the private driveway, which is inconsistent with the statute's direction to place them "on county roads."

{¶18} The culvert running under the private driveway also is not a "culvert" within the coverage of Section 5591.36. The section only requires the County to erect guardrails "on county roads." Expanding the definition of "culvert" to include culverts running under private driveways would necessarily require the County to place guardrails along those driveways. Such placement would not protect motorists travelling along county roads, which is the intent of the statute.

{¶19} The trial court's interpretation of Section 5591.36 extends the County's liability "beyond the clear import of the terms of the statute." *LaCourse v. Fleitz*, 28 Ohio St. 3d 209, 212 (1986). It incorrectly concluded that the culvert running under a private driveway was a "culvert" that imposed a duty on the County to erect a guardrail at its ends under Section 5591.36. To the extent that the trial court denied the County summary judgment on Mr. Sanderbeck's claim under Section 2744.02(B)(5), the County's assignment of error is sustained.

CONCLUSION

{¶20} The trial court correctly determined that genuine issues of material fact exist regarding whether the County kept East Smith Road "in repair" near the crash site. It incorrectly concluded that the County had a duty to erect a guardrail along the curve in East Smith Road under Section 5591.36. The judgment of the Medina County Common Pleas Court is affirmed in part and reversed in part and this matter is remanded for further proceedings consistent with this opinion.

Judgment affirmed in part,
reversed in part,
and cause remanded.

There were reasonable grounds for this appeal.

We order that a special mandate issue out of this Court, directing the Court of Common Pleas, County of Medina, State of Ohio, to carry this judgment into execution. A certified copy of this journal entry shall constitute the mandate, pursuant to App.R. 27.

Immediately upon the filing hereof, this document shall constitute the journal entry of judgment, and it shall be file stamped by the Clerk of the Court of Appeals at which time the period for review shall begin to run. App.R. 22(E). The Clerk of the Court of Appeals is instructed to mail a notice of entry of this judgment to the parties and to make a notation of the mailing in the docket, pursuant to App.R. 30.

Costs taxed to all parties equally.

CLAIR E. DICKINSON
FOR THE COURT

CARR, J.
CONCURS

BELFANCE, J.
CONCURS IN PART, AND DISSENTS IN PART, SAYING:

{¶21} I concur with the first portion of the majority's analysis. However, I respectfully dissent from that portion of the majority's analysis of R.C. 5591.36 as I would conclude that the trial court properly analyzed and denied the County's motion for summary judgment.

{¶22} The trial court correctly observes that R.C. 5591.36 does not exclude culverts situated parallel to the roadway. Further, there is no requirement that the culvert be situated under a county road or that it must be perpendicular to the county road. The only qualification in

the statute concerning a culvert and the duty to erect guardrails is its height. R.C. 5591.36 expressly provides that a guardrail should be placed at either end of a culvert more than five feet high. The County did not establish that the culvert at issue was less than five feet high.

{¶23} Both parties acknowledged the existence the culvert's location. The majority states that the culvert under the driveway runs parallel to the road and connects to the road near the crash location. However, it concludes that there is no culvert within the meaning of the statute. I am unwilling to inject qualifications upon the term culvert that are simply not present in the statute. I am also not convinced that the purpose of the statute cannot be effectuated simply because a culvert may run parallel to the road. Accordingly, I dissent.

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BRADLEY J. BARMEN, attorney at law, for appellee.