
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

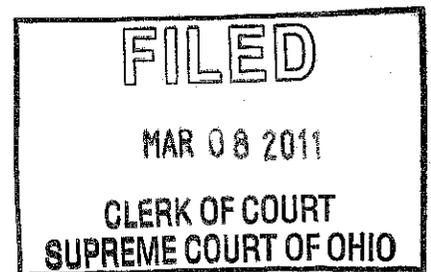
**MERITS BRIEF OF DEFENDANTS/APPELLANTS COUNTY OF MEDINA AND
MEDINA COUNTY BOARD OF COMMISSIONERS**

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I. INTRODUCTION

This case presents the first in Ohio to find that a public road is in disrepair, not because it developed crumbling pavement or pot holes after it was constructed, but because of allegedly insufficient skid resistance of the road. The ninth district court of appeals made this novel finding in the absence of any evidence regarding the skid resistance of the road at the time of design or construction. In doing so, the ninth district erroneously expanded the scope of a political subdivision's liability for roadway accidents under Ohio's Political Subdivision Tort Liability Act.

This case arises from the death of a teenager in a single-car automobile crash in which she was a backseat passenger. That teenage driver was found guilty of aggravated vehicular homicide and aggravated vehicular assault as a result of the crash and his passenger's death. Despite the undisputed fact that the crash would have never occurred had the 16-year-old driver of the car abided by the advisory speed limit and heeded the warning sign for the curve, the Plaintiff/Appellee (the Estate) seeks damages from Medina County and the Medina County Commissioners for the failure to keep their roads "in repair." The Estate makes this claim even though the County – which cannot control the State speed limit on the road – posted an advisory speed limit and installed numerous warning signs before the curve.

Relying on an expert's opinion, the ninth district improperly found that design-related issues such as the "coefficient of friction, grade, superelevation, curve radius" somehow are germane to the determination of whether a political subdivision can be held liable for failing to keep a road in repair under R.C. 2744.02(B)(3). Based on these factors used by the expert, the court accepted the expert's opinion on the standard for skid resistance fell below what that expert deemed "worn out," thus establishing a duty for political subdivisions to meet. The state of Ohio

has never authorized such standard. In fact, the notion of a “worn out” road because it is too slippery because of lack of skid resistance is a novel and erroneous change in Ohio law.

The improper merging of design with repair creates liability based on an improper construction of the in-repair exception under R.C. 2744.02(B)(3). Ohio’s Political Subdivision Tort Liability Act is designed to limit the liability of political subdivisions for roadway lawsuits. The ninth district’s decision does the exact opposite by expanding a public entity’s liabilities and duties to an unrealistic and ill-conceived standard. Political subdivisions cannot be -- and have never been -- held liable for design/construction issues. The Act and the precedent of this Court do not support liability. The policies behind the Act do not support liability. This Court should reverse the ninth district and hold that the exception to immunity under R.C. 2744.02(B)(3) does not apply.

II. STATEMENT OF THE CASE AND FACTS

A. Factual Background

On March 4, 2006, 16-year-old Steven J.W. Ward picked up several other teenagers in his 1996 Chrysler Cirrus LX. John D. Schweinfurth was in the front passenger’s seat. David B. Foster and Kelsey L. Rohe were in the back seats, with Michelle L. Sanderbeck seated between them. (T.d. 44, Ex. 2 at p. 2.)

Ward travelled westbound in the westbound lane of East Smith Road. (T.d. 57, Dep. of Pl’s Expert Stanford at 122.) While it was dark, the weather at the time was clear and the roadway was dry. (T.d. 44, Ex. 2 at p. 2.) The speed limit on East Smith Road outside of the City of Medina was 45 miles per hour. (T.d. 42, Aff. of Cty Engineer Michael Salay at ¶6, attached to Mot. for Summ. J.)

Ohio counties have no authority to set speed limits on county roads; rather, the speed limits on such roads are established by the State of Ohio, although counties may post an advisory speed limit, lower than the mandatory speed limit, for certain sections of roadway. (*Id.* Salay Aff. at ¶5.) On the day of the crash, the advisory speed limit for the curve where the crash occurred, which was established and plainly posted by Medina County, was 25 miles per hour. (*Id.* Salay Aff. at ¶7.) The approach to the curve is depicted in the photographs that are part of the appellate record. (*See* T.d. 42, Photographs of the Scene attached as Exs. C-1 through C-18 of Def.s' Mot. for Summ. J.) Photographs Ex. C-17, C-16, C-15, C-14 and C-13 depict the westbound approach to the curve. In addition to the speed limit and "S" curve warning, these pictures depict numerous reflective arrow signs that warn of the impending curve. (*Id.*) They also show a large, reflective arrow sign. (*Id.*)

There is no dispute that had the teenage driver Steven Ward operated his vehicle at the posted advisory speed of 25 mph or below that the accident would have never occurred. (T.d. 57, Dep. of Pl's Expert Stanford at 127.) Unfortunately, Ward drove too fast and lost control of his vehicle, crossed the eastbound lane, and left the roadway, killing his passenger Michelle L. Sanderbeck. (T.d. 57, Dep. of Pl's Expert Stanford at 122.) There is no dispute that Ward was found guilty of aggravated vehicular homicide and aggravated vehicular assault as a result of the crash and Michelle's death.

Sean Doyle, who the Estate has identified as an expert in this case, has opined in a report provided to Medina County that the travel speed of the car involved in the Crash was approximately 56 miles per hour at the loss of control. The Montville Township Police, who investigated the Crash, calculated a higher speed range, but even according to the Estate, the car was going more than 10 miles per hour over the speed limit (for the entire stretch of road,

including straightaway) and more than 30 miles per hour over the advisory speed limit for the curve. Passenger David Foster told police that Ward was speeding excessively before the curve and all occupants had told Ward to slow down. Kelsey Rohe and Michelle Sanderbeck were screaming out of fear. Passenger Kelsey Rohe yelled at Ward and kicked the back of his seat to get him to stop or slow down. (T.d. 57, Introtech Report, Ex. J at pp. 4-5.)

B. The Trial Court Denied the County the Benefit of Immunity Based on a Conclusory Affidavit

The parties briefed the issue of immunity in the context of summary judgment. Based on the conclusory affidavit of a plaintiff's expert, the trial court ultimately held that questions of fact remain as to whether East Smith Road was in disrepair as of March 4, 2006 under R.C. 2744.02(B)(3). (Tr. Ct. Op. at 3; Apx. at 16.) The Estate did not mention skid numbers in its briefing to the trial court. The trial court also held that under R.C. 2744.02(B)(5) there were "disputed questions of fact" as to whether the County was required to erect a guardrail along the curve.

C. The Ninth District Found the Road in Disrepair Because the Road Was Too Slippery, An Argument that the Estate Never Specifically Made

While it properly reversed the guard-rail ruling, the ninth district became the first court in Ohio to hold that a road was not in repair because of the skid-resistance reading of the road reached a certain point and therefore was "worn out." In other words, the ninth district found that the road did not provide enough traction for the speed of the curve and therefore was in disrepair. Devoid of evidence of what the roadway's skid resistance was designed to be or was at the time of construction, the ninth district concluded that the road could be in disrepair because "the critical speed of East Smith Road at the time of the crash was at or below the posted speed

limit.” (Op. at ¶ 5; Apx. 6.) This is simply another way of saying that the curve is too sharp for the speed.

III. LAW AND ARGUMENT

PROPOSITION OF LAW I: UNDER R.C. 2744.02(B)(3), THE SKID RESISTANCE OF A ROAD DOES NOT RAISE A REPAIR ISSUE WHEN NO EVIDENCE EXISTS REGARDING THE SKID RESISTANCE OF THE ROAD AT THE TIME OF DESIGN OR CONSTRUCTION. (R.C. 2744.02(B)(3) INTERPRETED AND APPLIED.)

A. The ninth district erred under the record before it and erred by improperly expanding the in repair exception under R.C. 2744.02(B)(3).

Ohio political subdivisions have never been the insurers or guarantors of the safety of motorists using their roads. See *City of Dayton v. Glaser* (1907), 76 Ohio St. 471, 81 N.E. 991. Historically Ohio courts have strictly construed statutes against finding liability for roadway accidents. See *Lovick v. City of Marion* (1975), 43 Ohio St.2d 171, 173, 331 N.E.2d 445. Most recently, the Legislature has made a “deliberate effort to limit political subdivisions’ liability for injuries and deaths on their roadways” by eliminating the term “nuisance” from R.C. 2744.02(B)(3). *Howard v. Miami Twp. Fire Division*, 119 Ohio St.3d 1, 2008-Ohio-2792, 891 N.E.2d 311, at ¶26. This Court has made clear that political subdivisions, like the Defendants/Appellants Medina County and the Medina County Commissioners,¹ simply have “never” been held liable for the purported “defective design or construction” of a roadway. *Franks v. Lopez* (1994), 69 Ohio St.3d 345, 349, 632 N.E.2d 502.

Yet, that is what the ninth district did in this case.

Despite contrary historical, legislative, and judicial precedent, the ninth district became the first court in Ohio to find that a public road is in disrepair, not because it developed

¹ The Appellants/Defendants will jointly refer to themselves as “the County” in this appeal. A lawsuit against a county’s board of commissioners is, in effect, a lawsuit against the county itself. *Carpenter v. Scherer-Mountain Ins. Agency* (4th Dist. 1999), 135 Ohio App.3d 316, 330 fn. 4; *Engle v. Salisbury Twp.*, 4th Dist., No. 03CA11, 2004-Ohio-2029 at ¶ 16.

crumbling pavement or pot holes after it was constructed, but because of allegedly insufficient skid resistance of the road. The ninth district made this novel finding in the absence of any evidence regarding the skid resistance of the road at the time of design or construction. Without evidence of what the skid resistance of the road was designed to be or was at construction – or at any point other than post accident – the road could not be out of repair, even assuming skid resistance is an element of repair, which it is not.

In roadway lawsuits, political subdivisions are presumptively immune from liability unless a plaintiff demonstrates that they failed to keep the road “in repair.” R.C. 2744.02²; *see also Cook v. City of Cincinnati* (1995), 103 Ohio App.3d 80, 85-86, 90 (observing a presumption of immunity); R.C. 2744.02(B)(3). Whether a political subdivision is immune is a question of law. *Conley v. Shearer* (1992), 64 Ohio St.3d 284, 292, 595 N.E.2d 862. The parties do not dispute that the County is presumptively immune. The Estate bears the burden of demonstrating an exception to immunity applies. When immunity is raised, as here, the “burden lies with the plaintiff to show that one of the recognized exceptions apply” under R.C. § 2744.02(B). *See Maggio v. Warren*, 11th Dist. No. 2006-T-0028, 2006-Ohio-6880 at ¶ 37. The only exception at issue in this case is for the “negligent failure to keep roads in repair” under R.C. 2744.02(B)(3). The Estate failed to meet that burden.

1. The road was not out of repair under R.C. 2744.02(B)(3).

The in-repair exception provides in relevant part:

[P]olitical subdivisions are liable for injury, death, or loss to person or property caused by their negligent failure to keep public roads in repair ...

² Determining whether a political subdivision is immune from liability under R.C. 2744.02 involves a three-tiered analysis. *Elston v. Howland Local Schools*, 113 Ohio St.3d 314, 2007-Ohio-2070, 865 N.E.2d 845, ¶ 10. In the present case, only the in-repair exception under R.C. 2744.02(B)(3) is at issue.

R.C. 2744.02(B)(3).

The ninth district held that a road was not in repair because of the skid-resistance reading of the road reached a certain point and therefore was “worn out.” In other words, the ninth district found that the road did not provide enough traction for the speed of the curve and therefore was in disrepair. Devoid of evidence of what the roadway’s skid resistance was designed to be or was at the time of construction, the ninth district concluded that the road could be in disrepair because “the critical speed of East Smith Road at the time of the crash was at or below the posted speed limit.” (Op. at ¶ 5; Apx. 6.)

The in-repair exception does not support the ninth district’s holding. The exception to immunity under R.C. 2744.02(B)(3) provides that political subdivisions may not be immune when injury is “caused by their negligent failure to keep public roads in repair ...”

Under R.C. § 2744.02(B)(3), “‘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.” *Bonace v. Springfield Twp.* (7th Dist. 2008), 179 Ohio App.3d 736, 2008-Ohio-6364 ¶ 29, citing *Heckert v. Patrick* (1984), 15 Ohio St.3d 402, 406. This Court has recognized that the repair function in R.C. 2744.02(B)(3) is defined to mean a “duty to put back in good condition after damage.” *Ditmyer v. Board of Cty. Commrs.* (1980), 64 Ohio St.2d 146, 413 N.E.2d 829. The common definition of “repair” is “a : to restore by replacing a part or putting together what is torn or broken : fix <repair a shoe> b: to restore to a sound or healthy state : renew <repair his strength>” See <http://www.merriam-webster.com/dictionary/repairer>, last visited on February 15, 2011.

The ninth district erred for the simple reason that without evidence of what the skid resistance of the road was designed to be or was at construction, the Estate failed to demonstrate that the road was out of repair, even assuming *arguendo* skid resistance is an element of repair. Under the plain understanding of “repair,” which requires restoring something to its original condition, the skid resistance of the road at construction must be established. Here, the road was not in disrepair as a matter of law. The road was not crumbling. It did not have any pot holes. It did not have any ruts. The photographs taken one day after the accident depict a normal, well maintained road. (See T.d. 42, Photographs of the Scene attached as Exs. C-1 through C-18 of Def.s’ Mot. for Summ. J.) Only under the ninth district’s erroneous decision, could anyone conclude that the road is out of repair.

This Court must reverse the ninth district’s decision on this ground. But, moreover, this Court should correct the ninth district’s improper expansion of the “in repair” exception to immunity, which is contrary to the Legislature’s text and the previous precedent of this Court.

2. The ninth district’s standard for “in repair” is wrong and improperly merged a “repair” function with public entities’ immune design and construction functions.

In his expert report, which the ninth district relied upon to deny immunity, plaintiff’s expert stated that the critical speed of the 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.” (Op. at 3, ¶5; Apx. 6.)

Determinations of critical speed rely on immune design or construction factors.

The ninth district’s decision enlarges the scope of the Act beyond that which the General Assembly enacted. The Legislature could have easily expanded liability under R.C. 2744.02(B)(3) by incorporating design- and construction-related language into the exception.

The Legislature did not. To the contrary, design and construction are immune activity.

If the Legislature intended such result, one could easily conceive that the “in repair” exception would read: “[P]olitical subdivisions are liable for injury, death, or loss to person or property caused by their negligent failure to design and construct public roads.”

Rather, the Legislature expressly provided that “[P]olitical subdivisions are liable for injury, death, or loss to person or property caused by their negligent failure to keep public roads in repair ...” R.C. 2744.02(B)(3). The ninth district improperly transformed the word “repair” to mean construct or design. The judicial branch of government “cannot extend the statute beyond that which is written, for “[i]t is the duty of this court to give effect to the words used [in a statute], not to delete words used or to insert words not used.” *Sarmiento v. Grange Mut. Cas. Co.*, 106 Ohio St.3d 403, 408-09, 2005-Ohio-5410, 835 N.E.2d 692 (citing *Bernardini v. Conneaut Area City School Dist. Bd. of Edn.* (1979), 58 Ohio St.2d 1, 4, 387 N.E.2d 1222.). In the face of no evidence about the original skid resistance of the road, the ninth district improperly merged classically immune road design/construction with repair.

While there was no evidence of skid resistance at the time of construction or design, the ninth district reached this unprecedented result based on an expert’s determination of critical speed. But, this determination relied on factors that have nothing to do with repair, involved design issues, and/or are beyond the control of the political subdivision. The ninth district effectively held that “in repair” is tantamount to design.

The “grade, superelevation and curve radius” have nothing to do with a repair issue at all. The improper injection of these design factors – some of which are part of the historical topography of the land – into a repair issue is a denial of immunity for design. Design is not repair and political subdivisions cannot be – and have never been – subjected to liability for such

claims. This Court has “never held that defective design or construction” of a roadway imposes liability on a public entity. *Franks v. Lopez* (1994), 69 Ohio St.3d 345, 349, 632 N.E.2d 502 (Holding that design and construction defects do not constitute a nuisance under R.C. 2744.02[B][3]; see *Haynes v. Franklin*, 95 Ohio St.3d 344, 2002-Ohio-2334, 767 N.E.2d 1146, at ¶ 18 (“[i]f the dangerous condition is the result of negligent design or construction decisions, the condition does not constitute a nuisance, and immunity attaches.”)).

Likewise, the condition of tires, the weather, and even the posted speed of the curve are simply not in control of the political subdivision. In this case, there is no dispute that the County did not control the posted speed of the road, which was the responsibility of the State of Ohio. Yet, the County posted advisory speed limits below the State-posted limits, which the teenage driver far exceeded under every litigant’s estimation. Sean Doyle, who the Estate has identified as an expert in this case, has opined in a report provided to Medina County that the travel speed of the car involved in the Crash was approximately 56 miles per hour at the loss of control. The Montville Township Police, who investigated the Crash, calculated a higher speed range, but even according to the Estate, the car was going more than 10 miles per hour over the speed limit for the curve (and for the entire stretch of road, including straightaway) and more than 30 miles per hour over the advisory speed limit for the curve. Passenger David Foster told police that Ward was speeding excessively before the curve and all occupants had told Ward to slow down. Kelsey Rohe and Michelle Sanderbeck were screaming out of fear. Passenger Kelsey Rohe yelled at Ward and kicked the back of his seat to get him to stop or slow down. (T.d. 57, Introtech report Ex. J at pp. 4-5.)

Under the ninth district’s holding, a road during inclement weather would not be “in repair” because snow would cause skid resistance to fall below what would fall within an

expert's determination of skid resistance. Like design-related issues, long standing Ohio law provides that snow removal is not a component of keeping a road in repair. See *Ditmyer v. Board of County Com'rs of Lucas County* (1980), 64 Ohio St.2d 146, 413 N.E.2d 829. The ninth district has embraced a malleable standard that could be used to impose liability – or force jury trials – on cases where liability does not exist under established law.

- a. **Contrary to the ninth district's expansion of liability, the Legislature has done the exact opposite and sharply narrowed the exception under R.C. 2744.02(B)(3).**

The Legislature has made a “deliberate effort to limit political subdivisions' liability for injuries and deaths on their roadways” by eradication of the term “nuisance” from the in-repair exception. *Howard v. Miami Twp. Fire Division*, 119 Ohio St.3d 1, 2008-Ohio-2792, 891 N.E.2d 311, at ¶26. The ninth district's decision reverses the Legislature's decision to immunize political subdivisions for nuisance by effectively finding that the in-repair language somehow encompasses the previous – and now eliminated – concept of nuisance.

The ninth district's decision is not consistent with existing law. The Ohio Legislature has expressly limited the scope of the liability for roadway lawsuits by removing “nuisance” from the wording of R.C. 2744.02(B)(3) and limiting the definition of public roads. See R.C. 2744.03(B)(3)(effective April 9, 2003); R.C. 2744.01(H)(effective April 9, 2003.) This Court has found the Legislature purposely replaced the phrase “free from nuisance” in light of judicial decisions interpreting the term “nuisance” broadly. This Court stated, “[w]e are persuaded that the legislature's action in amending R.C. 2744.02(B)(3) was not whimsy but a **deliberate effort to limit political subdivisions' liability for injuries and deaths on their roadways** [emphasis added].” *Howard, supra* at ¶26. This Court further stated that the Legislature “in furtherance of its goal, used the word “obstructions” in a deliberate effort to impose a condition more

demanding than a showing of a “nuisance” in order for a plaintiff to establish an exception to immunity. *Id.* at ¶ 29.

The ninth district’s expansive – and never before endorsed – interpretation of “in repair” judicially expands municipal liability for roadway injuries in the face of the Legislature’s effort to significantly limit such liability. The ninth district has effectively held “in repair” means “free from nuisance,” which the Legislature has eliminated from the Act.

- b. The ninth district’s standard for repair is unworkable and improperly imposes a standard for road repair that is dictated by an expert’s opinion, not the Legislature.**

The ninth district’s unprecedented holding not only damages the Legislature’s desire to provide immunity to political subdivisions, but creates an unworkable standard that public entities could not meet.

The decision creates a completely new duty for political subdivisions to do skid testing on all roads to determine whether they are too slippery because the skid resistance reached a certain level, without any reference to what skid resistance they were designed to have or had at the time of the construction. Public entities would have to conduct this testing even in the face of a road by all appearances does not have any ostensible defects. The ninth district’s obligation presents an onerous if not impossible burden to monitor roads. To comply with that impractical duty, public entities will have to constantly monitor roads with skid testing. Further, making this task impossible or entirely flawed, skid resistance also will change over time and there will be significant seasonal variation from winter to summer, for instance. Certainly, skid testing to ensure roads are “in repair,” under the ninth district’s unprecedented decision, will expend vital resources that could be used to fix roads that are visibly crumbling and with holes.

The ninth district's reliance on the expert's standard is erroneous when it found that a skid number of 25 constitutes a road in disrepair under R.C. 2744.02(B)(3). (See Op. at ¶¶ 4-6; Apx. 6-7.) The court explained its erroneous conclusion as follows:

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."

(Op. at ¶ 6.)

The State of Ohio has not set a skid number for deeming a road in disrepair and it is troubling that an expert can now set this novel standard. The expert seemingly relied on an *excerpt* of an article that appeared in a trade publication in which he did not know even the author's name, let alone the details of how the unknown author arrived at his conclusions. (See Dep. of Richard Stanford II at 9-17.) At least one non-Ohio jurisdiction has observed that a "coefficient of friction range between .25 and .55" was a safe range. *Texas Dept. of Transportation v. Martinez* (Tex. App. 2006), NO. 04-04-00867 CV, 2006 WL 1406571 at *6.

Without any evidence of the skid resistance at the time of construction or design, the ninth district determined that the County failed to keep the road in repair based on a statement as to its skid resistance. The ninth district's standard interjects a pavement-performance standard into the definition of "in repair," without requiring or providing a frame of reference – that is, what the pavement skid resistance was at construction. Without evidence of what the skid resistance of the road was designed to be or was at construction, the ninth district erred when it found the road was out of repair, even assuming *arguendo* skid resistance is an element of repair.

Under the ninth district's decision and in the absence of the road's original skid resistance, gravel or chip-sealed roads could not be "in repair" under R.C. 2744.02(B)(3) because

skid resistance would fall far below the new standard, or at the very least subject the standard to an arbitrary determination of what the road was designed to be at construction. The Ohio Legislature has provided that townships must drag gravel roads under R.C. 5571.12 to keep them in repair. Under the ninth district's decision, these roads would undoubtedly fail to meet the arbitrary standard for skid resistance and could not be kept "in repair" by merely dragging them. Gravel roads could even be per se not "in repair" as originally constructed. Similarly, under the difficult financial constraints that political subdivisions face, some have turned to chip-seal roads, which involves a road being sprayed with liquid asphalt and a roller is used to adhere rock chips to the asphalt. These roads would also not be "in repair" under R.C. 2744.02(B)(3) and the under the ninth district's new standard. Skid resistance, under the ninth district's opinion, would dictate the type of pavement used on a road so as to obtain an arbitrary skid resistance. This would require a change in the road type as the road becomes busier.

If there was any doubt with regard to the error of the ninth district, that doubt would have to be resolved with the well-established policy behind immunity to limit liability and preserve resources.

c. The ninth district's decision undermines the reason for immunity and the benefits it provides to political subdivisions

Ohio's Political Subdivision Tort Liability Act is designed to limit liability, not expand the liabilities and the duties of political subdivisions. The ninth district's holding defies the Legislative policy determinations underlying the Act.

The General Assembly enacted R.C. Chapter 2744, stating that "the protections afforded to political subdivisions and employees of political subdivisions by this act are urgently needed in order to ensure the continued orderly operation of local governments and the continued ability of local governments to provide public peace, health, and safety services for their residents." ... " '[t]he manifest statutory purpose of R.C. Chapter 2744 is the preservation of the fiscal integrity of political subdivisions.' " [Citations omitted.]

Summerville v. Forest Park, --- N.E.2d ----, 2010-Ohio-6280 at ¶ 38.

The ninth district's decision unnecessarily creates liability where none previously existed. The ninth district's decision could not come at a more dire time of fiscal crisis for public entities in Ohio. With decreasing revenues and increased costs, political subdivisions are faced with a significant reduction of funding at the state level and forced to do more with less. Indeed, some believe that municipal bankruptcies are in the near to immediate future. The ninth district has determined that a road can be in disrepair even though it appears to be in perfect condition.

Skid testing to ensure roads are "in repair," under the ninth district's unprecedented decision, will expend vital resources that could be used to fix roads that are visibly crumbling and with holes. The County here posted 25-mph speed limits and numerous cautionary signs, warning of a sharp curve – an obvious design hazard likely necessitated by the topography of the land. The fact that Mr. Ward did not heed the warnings or use care in driving around the corner that everyone in his vehicle knew was dangerous does not reflect on the condition of the road. The unprecedented and new duties and liability that the ninth district has imposed are contrary to R.C. 2744.02(B)(3) and the case law interpreting it. Further, the ninth district's decision and its necessary implications are in stark contrast to the policy behind Ohio's Political Subdivision Tort Liability Act.

IV. CONCLUSION

This Court should reverse the ninth district court of appeals and hold that the exception under R.C. 2744.02(B)(3) does not apply.

Respectfully submitted,

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CERTIFICATE OF SERVICE

A copy of the foregoing Merits Brief has been sent by regular U.S. Mail, postage prepaid,

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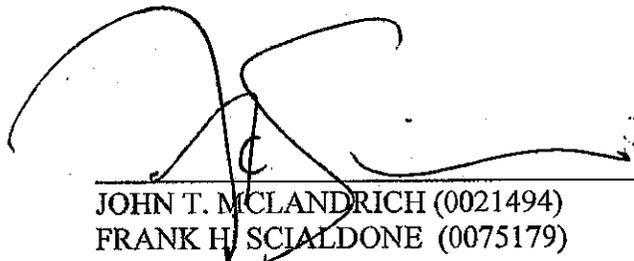
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APPENDIX

Notice of Appeal to the Ohio Supreme Court (September 22, 2010).....Apx. 1

Ninth District Court of Appeals Opinion (August 9, 2010).....Apx. 4

Judgment Entry of the Medina County Common Pleas Court,
denying summary judgment motion dated July 28, 2009.....Apx. 14

Ohio R.C. § 2744.02Apx. 20

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

**NOTICE OF APPEAL OF DEFENDANTS/APPELLANTS COUNTY OF MEDINA AND
MEDINA COUNTY BOARD OF COMMISSIONERS**

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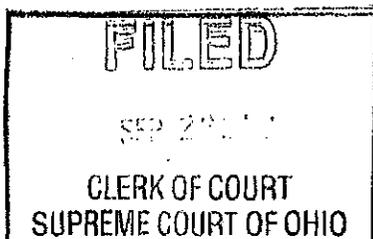
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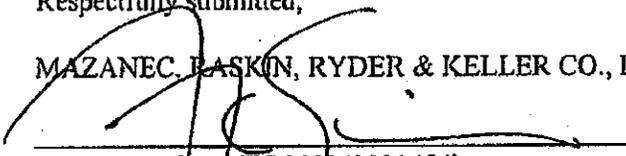


Pursuant to Supreme Court Rule II § 2(A)(3), Appellants/Defendants County of Medina and Medina County Board of Commissioners, hereby give notice of appeal to the Supreme Court of Ohio from the Ninth District Court of Appeals' August 9, 2010 decision and judgment entry. A copy of the court of appeals decision is attached to this Notice. (See Ex. "A.")

This case raises a substantial constitutional question and is one of public or great general interest.

Respectfully submitted,

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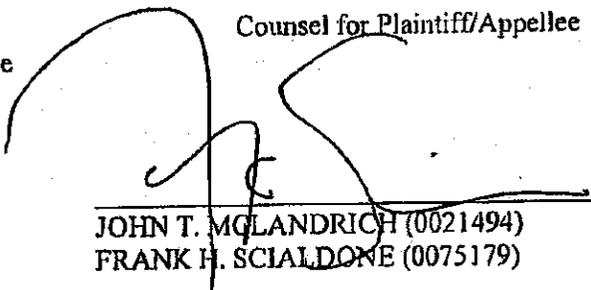
A copy of the foregoing Notice of Appeal was served September 22, 2010 by depositing same in first-class United States mail, postage prepaid, to the following:

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COURT OF APPEALS

STATE OF OHIO)

IN THE COURT OF APPEALS

)ss: 10 AUG -9 AM 10: 50 NINTH JUDICIAL DISTRICT

COUNTY OF MEDINA)

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

FILED
KATHY FORTNEY
MEDINA COUNTY
CLERK OF COURT

C.A. No. 09CA0051-M

Appellee

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

v.

COUNTY OF MEDINA, et al.

Appellants

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 "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.

{¶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.

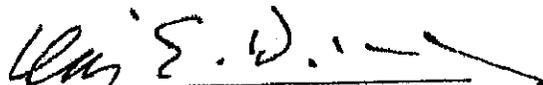
Judgment affirmed in part,
reversed in part,
and cause remanded.

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.

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IN THE COURT OF COMMON PLEAS
MEDINA COUNTY, OHIO

FILED
KATHY FORTNEY
MEDINA COUNTY
CLERK OF COURTS

RAYMOND J. SANDERBECK,)
Individually and as)
Administrator of the Estate of)
Michelle L. Sanderbeck,)
Plaintiff,)
-vs-)
COUNTY OF MEDINA, et al.)
Defendants.)

CASE NO. 08CIV0414

JUDGE THOMAS P. CURRAN

JUDGMENT ENTRY DENYING
DEFENDANTS' MOTION FOR
SUMMARY JUDGMENT,
CIVIL RULE 56.

In this wrongful death action, Raymond J. Sanderbeck, the administrator of the Estate of Michelle Sanderbeck, a minor, seeks money damages against the defendants. In turn, the defendants have filed a Motion for Summary Judgment pursuant to Civil Rule 56 on the ground that they are immune from such claims pursuant to Revised Code 2744.01, *et seq.*

In order for Summary Judgment to be granted, the moving party must prove: (1) no genuine issue as to any material fact remains to be litigated; (2) the moving party is entitled to judgment as a matter of law; (3) it appears from the evidence that reasonable minds can come to but one conclusion, and viewing such evidence most strongly in favor of the non-moving party, that conclusion is adverse to the party against whom the motion for summary judgment is directed. *Mootispaw v. Eckstein* (1996), 76 Ohio St.3d 383,385.

The moving party bears the initial responsibility of informing the trial court of the basis for the motion, in identifying those portions of the record that demonstrate the absence of a genuine issue of fact on a material element of the non-moving party's claim. *Drescher v. Bert* (1996), 75 Ohio St.3d 280, 296. If the moving party satisfies the burden, then the non-moving party has the burden pursuant to Civil Rule 56(E) of providing evidence demonstrating a genuine issue of material fact. *Id.* If the non-moving party does not satisfy this burden, then summary judgment is appropriate. Civ. R. 56(E).

Upon review, the Court finds Defendants' Motion for Summary Judgment on Plaintiff's claims should be denied.

With regard to Plaintiff's first claim—brought pursuant to Revised Code 2744.02(B)(3)—when viewing the evidence most strongly in favor of Plaintiff, questions of fact remain as to whether East Smith Road was in repair as of March 4, 2006, the date of Michelle Sanderbeck's accident. Plaintiff has submitted expert testimony of Richard L. Stanford II who has opined that East Smith Road was not in repair and was a contributing factor in the accident that claimed Michelle Sanderbeck's life. Plaintiff has also submitted photographic evidence that shows the condition of the roadway as it existed at or around the time of the accident and that give rise to an issue of material fact.

An exception to Defendants' immunity as a political subdivision is set forth in R.C. 2744.02(B)(3) as follows: political subdivisions are liable for injury, death, or loss to personal property caused by the negligent failure to keep public roads in repair and other negligent failure to remove obstructions from public roads. "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. See *Bonace v Springfield Township*, 179 Ohio

App.3d 736, (7th Dist.) 2008-Ohio-6364. Accordingly, issues of fact remain as to whether the spalling of the pavement on East Smith Road rendered the road in disrepair. Accordingly, Defendants' Motion on Plaintiff's first claim shall be denied.

Defendants' Motion for Summary Judgment on Plaintiff's second claim, a claim brought pursuant to Ohio Revised Code Sections 2744.02(B)(5) and 5591.36, presents a closer question.

Section 2744.02(B)(5) provides as follows:

In addition to the circumstances described in divisions (B)(1) to (4) of this section, 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. Civil liability shall not be construed to exist under another section of the Revised Code merely because that section imposes a responsibility or mandatory duty upon a political subdivision, because that section provides for a criminal penalty, because of a general authorization in that section that a political subdivision may sue and be sued, or because that section uses the term "shall" in a provision pertaining to a political subdivision.

See also Sections 5591.37 and .37:

5591.36 Guardrails for bridge or steep embankment.

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.

The expense for a guardrail required under this section shall be paid out of the county bridge fund.

Effective Date: 04-09-2003

5591.37 Noncompliance.

Negligent failure to comply with section 5591.36 of the Revised Code shall render the county liable for all accidents or damages resulting from that failure.

Effective Date: 04-09-2003

The parties agree that the culvert at issue, was situated parallel to East Smith Road, not perpendicular and not underneath East Smith Road. Yet the plaintiff contends that the statute is nevertheless applicable. It appears that purpose of the culvert, however, is to service a private drive for ingress and egress to the county road itself. As such, the temptation is to rule that the culvert does not qualify as a culvert within the meaning of R.C. 5591.36. To do so, however, is to read into the statute concepts that are not necessarily implicit. In fact, this court has observed guard rails servicing private drives on state roads elsewhere in Ohio, where the culverts run parallel to the roadway.¹

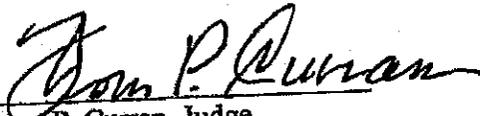
According to the statute, a guardrail should be placed at either end of a culvert more than five feet high. The statute does not exclude, per se, culverts running parallel to the roadway. Of course, whether this failure to install a guardrail was a proximate cause of the death of Plaintiff's decedent remains an issue in this case. Nor are the defendants precluded from offering testimony at trial that would preclude the applicability of the statute to the particular or peculiar facts of this case.

In conclusion, there are disputed questions of fact as to the applicability of Plaintiff's two theories of liability, precluding resolution by summary judgment.

¹ A new stretch of Route 422, west of Warren, Ohio, includes several examples of guard rails at either end of a culvert parallel to 422.

WHEREFORE, it is the Order of this Court that the Motion for Summary Judgment of Defendants County of Medina and Medina County Board of Commissioners is hereby denied.

IT IS SO ORDERED this 24th day of July 2009.



Thomas P. Curran, Judge
On Assignment, Article IV, Sec. 6
Ohio Constitution.

Madam Clerk: Please serve the Attorneys below by regular mail.



Thomas P. Curran, Judge

Copies to:

William A. Meadows, Esq.
Bradley J. Barmen, Esq.
Adam J. Davis, Esq.
Todd M. Raskin, Esq.
Carl E. Cormany, Esq.

Instructions to the Clerk

Please send notice of the foregoing Journal Entry to the following parties or their counsel of record:

Bradley J. Barmen
Eaton Center, Suite 620
1111 Superior Ave
Cleveland, OH 44114-2584

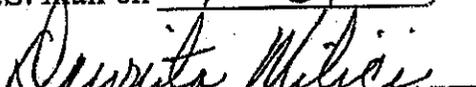
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Notice was sent by ordinary U.S. mail on 7-31, 2009.


DEPUTY CLERK OF COURT

Baldwin's Ohio Revised Code Annotated Currentness
 Title XXVII. Courts--General Provisions--Special Remedies
 Chapter 2744. Political Subdivision Tort Liability (Refs & Annots)
 → 2744.02 Political subdivision not liable for injury, death, or loss; exceptions

(A)(1) For the purposes of this chapter, the functions of political subdivisions are hereby classified as governmental functions and proprietary functions. Except as provided in division (B) of this section, 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 or an employee of the political subdivision in connection with a governmental or proprietary function.

(2) The defenses and immunities conferred under this chapter apply in connection with all governmental and proprietary functions performed by a political subdivision and its employees, whether performed on behalf of that political subdivision or on behalf of another political subdivision.

(3) Subject to statutory limitations upon their monetary jurisdiction, the courts of common pleas, the municipal courts, and the county courts have jurisdiction to hear and determine civil actions governed by or brought pursuant to this chapter.

(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:

(1) Except as otherwise provided in this division, political subdivisions are liable for injury, death, or loss to person or property caused by the negligent operation of any motor vehicle by their employees when the employees are engaged within the scope of their employment and authority. The following are full defenses to that liability:

(a) A member of a municipal corporation police department or any other police agency was operating a motor vehicle while responding to an emergency call and the operation of the vehicle did not constitute willful or wanton misconduct;

(b) A member of a municipal corporation fire department or any other firefighting agency was operating a motor vehicle while engaged in duty at a fire, proceeding toward a place where a fire is in progress or is believed to be in progress, or answering any other emergency alarm and the operation of the vehicle did not constitute willful or wanton misconduct;

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(c) A member of an emergency medical service owned or operated by a political subdivision was operating a motor vehicle while responding to or completing a call for emergency medical care or treatment, the member was holding a valid commercial driver's license issued pursuant to Chapter 4506, or a driver's license issued pursuant to Chapter 4507, of the Revised Code, the operation of the vehicle did not constitute willful or wanton misconduct, and the operation complies with the precautions of section 4511.03 of the Revised Code.

(2) Except as otherwise provided in sections 3314.07 and 3746.24 of the Revised Code, political subdivisions are liable for injury, death, or loss to person or property caused by the negligent performance of acts by their employees with respect to proprietary functions of the political subdivisions.

(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.

(4) 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 that is caused by the negligence of their employees and that occurs within or on the grounds of, and is due to physical defects within or on the grounds of, buildings that are used in connection with the performance of a governmental function, including, but not limited to, office buildings and courthouses, but not including jails, places of juvenile detention, workhouses, or any other detention facility, as defined in section 2921.01 of the Revised Code.

(5) In addition to the circumstances described in divisions (B)(1) to (4) of this section, 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. Civil liability shall not be construed to exist under another section of the Revised Code merely because that section imposes a responsibility or mandatory duty upon a political subdivision, because that section provides for a criminal penalty, because of a general authorization in that section that a political subdivision may sue and be sued, or because that section uses the term "shall" in a provision pertaining to a political subdivision.

(C) An order that denies a political subdivision or an employee of a political subdivision the benefit of an alleged immunity from liability as provided in this chapter or any other provision of the law is a final order.

CREDIT(S)

(2007 H 119, eff. 9-29-07; 2002 S 106, eff. 4-9-03; 2001 S 108, § 2.01, eff. 7-6-01; 1997 H 215, eff. 6-30-97; 1996 H 350, eff. 1-27-97 (*State, ex rel. Ohio Academy of Trial Lawyers, v. Sheward* (1999)); 1994 S 221, eff. 9-28-94; 1989 H 381, eff. 7-1-89; 1985 H 176)

R.C. § 2744.02

Page 3

CONSTITUTIONALITY

"Ohio Revised Code § 2744" was held on 12-16-2003 to violate the right to trial by jury, under Ohio Constitution Article 1, § 5, and the right to a remedy, under Ohio Constitution Article 1, § 16. The ruling was by the U.S. District Court for the Southern District of Ohio, deciding as it believes the Supreme Court of Ohio would have, in the case of *Kammeyer v City of Sharonville*, 311 F.Supp.2d 653 (SD Ohio 2003). The Court also observed that the state is sovereign but political subdivisions are not.

Current through 2009 File 9 of the 128th GA (2009-2010), apv. by 10/21/09 and filed with the Secretary of State by 10/21/09.

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END OF DOCUMENT

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