

**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

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

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TABLE OF CONTENTS

TABLE OF AUTHORITIESii

I. INTEREST OF AMICI CURIAE1

II. STATEMENT OF THE FACTS2

 A. Statement Of The Case2

 B. Statement Of The Facts3

III. LAW AND ARGUMENT4

Proposition of Law No. 1: A POLITICAL SUBDIVISION IS NOT LIABLE FOR
 THE DESIGN OF A ROADWAY, INCLUDING ITS COEFFICIENT OF
 FRICTION, GRADE, CURVE RADIUS, AND SUPERELEVATION.....4

CONCLUSION10

CERTIFICATE OF SERVICE11

TABLE OF AUTHORITIES

CASES

Bonace v. Springfield Township (2008), 179 Ohio App. 3d 736, 2008-Ohio-6364,
903 N.E.2d 6838, 9

Ditmyer v. Bd. of County Comm'rs. of Lucas County (1980), 64 Ohio St. 2d 146,
413 N.E.2d 8299

Franks v. Lopez (1994), 69 Ohio St. 3d 3454

Haynes v. City of Franklin (2002), 95 Ohio St. 3d 344, 2002-Ohio-2334, 767 N.E.2d 11464

Heckert v. Patrick (1984), 15 Ohio St. 3d 402, 15 Ohio B. 516, 473 N.E.2d 12049

Israel v. Jefferson Township Bd. of Trustees (Dec. 10, 1990), 2nd Dist. No. 13071,
1990 Ohio App. LEXIS 54817

Mosler v. St. Joseph Twp. Bd. of Trs., 6th Dist. No. WM-07-016, 2008-Ohio-19637

Sanderbeck v. County of Medina, 9th Dist. No. 09CA0051-M, 2010-Ohio-36595

Sobczak v. City of Sylvania, 6th Dist. No. L-06-1102, 2007-Ohio-10456

OHIO REVISED CODE

2744.02 *et seq.*2, 3, 4, 8

2744.03 *et seq.*2, 4, 8

2744.05 *et seq.*8

3746.24 *et seq.*8

5591.36 *et seq.*2

I. INTEREST OF AMICI CURIAE

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

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

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

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

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

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

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

II. STATEMENT OF THE CASE AND FACTS

A. Statement Of The Case.

The Estate of Michelle Sanderbeck brought three claims in the Court of Common Pleas of Medina County arising out of a motor vehicle accident that occurred on March 4, 2006, and in which the decedent was a passenger. One of the claims involved the allegation that the subject county roadway was in disrepair in derogation of R.C. Section 2744.03(B)(3). The other counts, which addressed the guardrail statute, R.C. 5591.36, and whether it had any application to this high speed, one car accident, are not the subject of this brief.

The County moved for summary judgment. The motion noted that Count One of the plaintiff's complaint parroted the language in Chapter 2744.02(B)(3), but failed to cite this exception to the general protection of immunity provided by Chapter 2744. The second prong of the motion for summary judgment noted that Count Two of the complaint identified "nuisance" as its theory imposing liability, when the concept of nuisance has been statutorily eliminated in 2003. The third prong of the motion for summary judgment noted that there was no common law obligation to erect a guardrail. The plaintiff responded to this motion for summary judgment by noting that R.C. 2744.02(B)(3) authorizes civil liability against political subdivisions that negligently fail to keep

roadways in repair. The complaint was amended and the matter went forward on the motion for summary judgment.

The trial court denied the motion for summary judgment of the defendant Medina County. Germaine to this brief is that the trial court adopted the conclusory allegations of the plaintiff's expert that the subject roadway was in disrepair, and, as a result, the Court held the county liable under Chapter 2744.02(B)(3). The trial court did not cite to any analysis of the plaintiff or of the expert employed by the plaintiff, but, rather cited to the affidavit of the expert, which contained the conclusory allegation that the roadway was in "disrepair" for reasons that, on examination, were based upon claimed design defects. The defendants timely appealed this denial of statutory immunity. The Court of Appeals affirmed the decision of the trial court as to the violation of Chapter 2744.02(B)(3).

B. Statement Of The Facts.

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

The speed limit on this roadway was the statutorily mandated 45 miles per hour. (T.d 42, affidavit of county engineer Michael Salay at paragraph 6). Along this roadway is an S curve that parallels a private driveway. An advisory speed limit sign is posted, as are chevrons, and an "S" curve warning. (T.d. 42, Exh. C-13 through 17). Unfortunately, the Ward car was speeding. By the estimate of one of the Estate's own experts, it was travelling 10 miles above the speed limit, and at a speed that caused all of the passengers distress, such that Kelsey Rohe, a backseat passenger screamed to slow down and kicked the back of the driver's seat. (T.d. 57, Introtech report Ex. J at pp

4-5). The Ward vehicle did not slow down, and ultimately it went off the roadway killing passenger Michelle Sanderbeck. (T.d. 57, Dep. of Plaintiff's Expert Stanford at 122.) Ward later was found guilty of aggravated vehicular homicide.

III. LAW AND ARGUMENT

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

There can be no dispute that a political subdivision is not liable for design or construction defects. In *Franks v. Lopez* (1994), 69 Ohio St. 3d 345, 350, this Court, in construing the prior version of R.C. Section 2744.02(B)(3), noted that a County cannot be held liable for design or construction defects. This Court held that:

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

Franks v. Lopez (1994), 69 Ohio St. 3d 345, 350. Later, this Court noted in *Haynes v. City of Franklin, infra*, that the "plaintiff must establish that the cause of the condition was other than a decision regarding design and construction." *Haynes v. City of Franklin* (2002), 95 Ohio St. 3d 344, 348, 2002-Ohio-2334, 767 N.E.2d 1146.

In this case, the opinion of the Court of Appeals noted:

He explained that roadway curves have a characteristic known as their "critical speed," which is "the speed at which the tires of a turning vehicle attempting to negotiate the curve will begin to sideslip, often resulting in a loss of control of the vehicle." He explained that the *critical speed of a curve is influenced by several*

factors, such as "coefficient of friction, grade, superelevation, curve radius, condition of tires and/or pavement, contaminants on the roadway surface, weather and speed." He also explained that, based on the conditions reported at the time of the crash and the measurements taken by the police officers who investigated the crash, he had calculated that the critical speed of East Smith Road at the time of the crash was at or below the posted speed limit.

Sanderbeck v. County of Medina, 9th Dist. No. 09CA0051-M, 2010-Ohio-3659. (Emphasis added).

All of the terms emphasized above are design elements commonly referred to in traffic engineering manuals as design speed. The Ohio Manual on Uniform Traffic Control Devices defines "design speed" as: "a selected speed used to determine the various geometric design features of a roadway." MUTCD (2009) Section 1.A, 13, definition of speed, p. 21. These geometric design features include the substantial factors influencing critical speed; grade, superelevation, and curve radius. See Table V, NCHRP, Design Speed, Operating Speed, and Posted Speed Practices, Transportation Research Board (Washington D.C. 2003).

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

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

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

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

Sobczak v. City of Sylvania, 6th Dist. No. L-06-1102, 2007-Ohio-1045, ¶¶20-21. (Emphasis added).

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

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

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

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

Mosler v. St. Joseph Twp. Bd. of Trs., 6th Dist. No. WM-07-016, 2008-Ohio-1963, at ¶¶18-19.

The Second Appellate District, as early as 1990 recognized that a township cannot be liable for the curvature of the road, as that is a design defect. *Israel v. Jefferson Township Bd. of Trustees* (Dec. 10, 1990), 2nd Dist. No. 12071, 1990 Ohio App. LEXIS 5482.

Furthermore, the Court of Appeal's reliance on the plaintiff's expert opinion that the roadway was in disrepair based upon the alleged low coefficient of friction of the roadway is error. Appellants demonstrate the inherent unreliability of this testimony in their jurisdictional brief in this Court, in their discussion of Proposition of Law 2. In addition, the sole basis for the testimony demonstrates that the conclusion that the coefficient of friction was caused by disrepair was an article that discussed design criteria to improve the coefficient of friction of state highways. (T.D. 56, Defendant's motion to exclude expert testimony, deposition excerpts and Exhibit B attached). Indeed, the article states that its purpose was to examine "the procedures used in the various states (excluding Alaska and Hawaii) for evaluating HMAC pavement materials and for setting standards

to define acceptable skid-resistance performance in new pavement and over the life of paved surfaces.” (T.D. 56, Exhibit B attached, page 2 of 9).

In other words, the plaintiff’s expert presented a conclusory opinion that the roadway was in disrepair—i.e. not maintained—based upon an article describing the effects of roadway design on roadway coefficients of friction. To state it another way, as in the decision of the court of appeals related to the curvature of the roadway and critical speed as described above, the plaintiff’s expert’s failure to demonstrate that there was a change to the original coefficient of friction from the original design or construction is fatal to their case.

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

(B) Subject to sections 2744.03 and 2744.05 of the Revised Code, a political subdivision is liable in damages in a civil action for injury, death, or loss to person or property allegedly caused by an act or omission of the political subdivision or of any of its employees in connection with a governmental or proprietary function, as follows:

* * *

(3) Except as otherwise provided in section 3746.24 of the Revised Code, political subdivisions are liable for injury, death, or loss to person or property caused by their ***negligent failure to keep public roads in repair*** and other negligent failure to remove obstructions from public roads, except that it is a full defense to that liability, when a bridge within a municipal corporation is involved, that the municipal corporation does not have the responsibility for maintaining or inspecting the bridge.

R.C. 2744.02 (emphasis added). Thus, the critical inquiry is: what does it mean to keep a public road “in repair.”

Both the trial court and Court of Appeals correctly relied upon the definition of repair as stated in the appellate decision of *Bonace v. Springfield Township* (2008), 179 Ohio App. 3d 736, 743, 2008-Ohio-6364, 903 N.E.2d 683. In *Bonace, supra*, the Court noted:

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

Id. at 743, 903 N.E.2d 683.

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

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

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

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

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

Ditmyer v. Bd. of County Comm'rs. of Lucas County (1980), 64 Ohio St. 2d 146, 148-149, 413 N.E.2d 829.

In this case, instead of recognizing the temporal element to the term "repair," the Court of Appeals held that an expert opinion which stated that the critical speed of a roadway is less than the posted speedway must be in disrepair. The problem with this holding is that it fails to compare what the critical speed of the roadway was when first designed or constructed to the time of the accident. This failure to make a temporal analysis is fatal to the plaintiff's case because, by failing to make this

analysis, the plaintiff has not eliminated design issues which, by the expert's own words contribute to the critical speed of the roadway.

CONCLUSION

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

Respectfully submitted,



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The undersigned hereby certifies that a copy of the foregoing was served by ordinary U.S.

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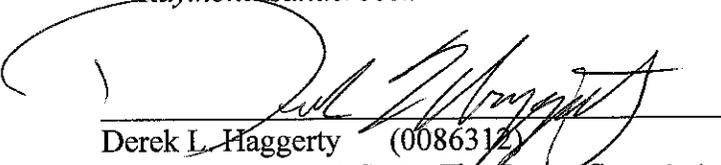
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