

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

RAYMOND SANDERBECK, :
 :
Plaintiff-Appellee, :
 :
v. :
 :
COUNTY OF MEDINA, et al. :
 :
Defendants-Appellants :

Appeal from the Court of Appeals
Ninth Appellate District
Medina County, Ohio

Court of Appeals
Case No. 09 CA 0051-M

MERIT BRIEF OF APPELLEES RAYMOND SANDERBECK, INDIVIDUALLY AND AS THE ADMINISTRATOR OF THE ESTATE OF MICHELLE SANDERBECK

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I. INTRODUCTION

This entire Appeal is about the denial of the Defendant-Appellants' (hereinafter collectively as "the County") Motion for Summary Judgment, nothing more. Both the Trial Court and the Ninth District Court of Appeals (Ninth District) rightly determined that genuine issues of material fact exist regarding whether East Smith Road was "in repair" for purposes of R.C. §2744.02(B)(3). This is not a case that poses a question of first impression, or even a novel question, in the State of Ohio. This is not a case in which any court has definitively ruled that East Smith Road was in disrepair, or that the County, or any political subdivision, has any specific duty whatsoever beyond what is unambiguously mandated by the express language of RC §2744.02(B)(3). To the contrary, both lower Courts simply construed the evidence in a light most favorable to the non-moving party and concluded that jury issues existed.

The County and Amicus Curie expressly state that the Ninth District determined that East Smith Road was "in disrepair, not because it developed crumbling pavement or pot holes after it was constructed, but because of the allegedly insufficient skid resistance of the road." [The County's Brief, at 1].¹ In reaching this erroneous conclusion, the County and the Amicus Curiae, simply ignore the actual opinions written by the Trial Court and the Ninth District. More importantly, they ignore the broad body of evidence upon which both Courts relied in rendering their respective opinions denying the County's Motion for Summary Judgment. Neither Court rewrote the standard by which a political subdivision may be held liable for failing to maintain a road as proscribed by RC § 2744(B)(3) and neither Court imposed any additional burdens or requirements on the County, or on any other political subdivision.

Both the Trial Court and the Ninth District found that jury issues existed with respect to whether the County properly maintained the road at issue. In doing so, the Courts relied upon, in part, the report of an expert. However, while the County references the expert's report and supporting affidavit, the County completely fails to even acknowledge that the Ninth District had the benefit of the expert's

¹ The County states that the Ninth District Court of Appeals "held," "found," or "determined" that East Smith Road was in disrepair at the time of the accident at issue no less than ten (10) times in its Brief. However, a cursory review of the Ninth District's actual Opinion attached to the County's Brief unequivocally demonstrates that the Ninth District held only that the Estate presented sufficient evidence demonstrating that a genuine issue of material fact exists as to whether East Smith Road was "in repair" on March 4, 2006.

deposition explaining in substantial detail the basis for his conclusion that the road was in disrepair on the date of the accident at issue. The lower Courts also had photographs showing the actual physical deterioration of the road in the area of the accident. This Court has the benefits of the expert's deposition and the photographs as well. As recognized by the Trial Court in its Judgment Entry denying the County's Motion for Summary Judgment, the photographic evidence depicting the condition of the roadway at the time of the accident alone "gave rise to an issue of material fact." [T.d. 72, pg 2].² The photographs clearly show the actual deterioration and/or crumbling of the pavement that the County repeatedly asserts did not exist.

While the County alleges that a reference to co-efficient of friction of the road interjects an element of road design into the analysis, they misunderstand and even misstate the totality of the evidence, as well as the actual opinions of the lower Courts. As set forth in more detail hereafter, the Ninth District merely applied the specific facts of this case to the law as established by this Court and found a jury trial was warranted. No new standard was created and no new burdens were imposed. Again, no court has ever ruled that East Smith Road was in disrepair on March 4, 2006 despite the County's repeated representations. On the contrary, the lower Courts, after properly weighing the evidence in the light most favorable to the Estate as the non-moving party, simply found that genuine issues of material fact existed regarding whether the County complied with its duty to keep East Smith Road in repair. Because the Estate provided sufficient evidence to create a genuine issue of material fact, a jury must now determine if the County failed to keep East Smith Road "in repair" on March 4, 2006. As such, the Ninth District's decision affirming the denial of Summary Judgment should not be reversed.

II. STATEMENT OF THE CASE AND FACTS

A. PROCEDURAL HISTORY

The Estate brought this action in the Medina County Court of Common Pleas alleging that the County failed to keep East Smith Road "in repair" pursuant to RC § 2744.02(B)(3), and for failing to erect

² The Trial Court's Judgment Entry denying the County's Motion for Summary judgment is attached to the County's Brief as Appendix 14.

and maintain a guardrail along East Smith Road pursuant to RC §§ 2744.02(B)(5), 5591.36 and 5591.37. [T.d. 1, Compl.; T.d. 62, Amend Compl.]. The Estate also alleged that the County's failure to comply with these statutory provisions was a significant contributing factor in causing a motor vehicle accident that claimed the life of fifteen-year-old Michelle Sanderbeck. [Id].

On December 1, 2008 the County moved for summary judgment claiming immunity from suit pursuant to RC § 2744.02. [T.d. 42]. The Estate opposed the County's Motion on December 19, 2008. [T.d. 44]. The County filed a Reply in Support of its Motion on January 2, 2009. [T.d. 45]. After all briefing was complete, and while the Trial Court's decision on summary judgment was pending, the County then requested to take the discovery deposition of the Estate's expert engineer, Richard Stanford, II. After conducting Mr. Stanford's deposition, the County moved to exclude his opinions. [T.d. 55]. The Trial Court denied that motion and the County never appealed this decision.³ [T.d. 68]. (As this Court previously rejected the County's Second Proposition of Law related to the Ninth District's reliance on the opinions of the Estate's expert engineer, all arguments raised in the County's Brief relating to the Estate's expert, and the Ninth District's reliance thereon, should be stricken and/or rejected).

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

The County immediately appealed the Trial Court's decision denying Summary Judgment, arguing that it was immune from liability pursuant to RC § 2744.02. The Ninth District also concluded that there were genuine issues of material fact regarding whether East Smith Road was "in repair" when Ms. Sanderbeck was killed. However, the Ninth District determined that the County did not have a duty to erect a guardrail in the area of the crash. In so doing, the Ninth District reversed the denial of summary judgment on that particular count. This appeal, and a since-dismissed cross-appeal, followed.

³ Defendants Motion was pursuant to Evidence Rule 702.

B. RELEVANT FACTS

i. The Subject Accident

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

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

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

Prior to the accident at issue, Ken Hotz, the former elected County Sanitary Engineer and a resident living on East Smith Road near the curve in question, told the current County Engineer, Michael Salay, that "something on the road had changed" and cars were leaving the roadway more frequently than in past years. [T.d. 44, Ex. B pp: 25-26, at 1-25]. Undisputed statistical evidence supported Mr. Hotz's concerns. Based on the County's own records, the number of accidents on this stretch of East Smith Road increased by one third between 2002 and 2003. In 2004, the number of accidents increased by 144% over the previous year. There were 15 accidents in 2005, and in 2006 there were 11 accidents in the two months preceding the March 4, 2006 accident that claimed Ms. Sanderbeck's life.

In 2001, the County received the Medina Area Transportation Task Force 2001 Final Report. [T.d. 44, *Ex. C* pp. 30-31 at 24-25, 1-24]. The Report recommended that safety and traffic flow be improved on East Smith Road precisely where the subject accident occurred. [T.d. 44, *Ex. C* pp. 33-34 at 22-25, I-II]. In October of 2005, Montville Township Chief of Police Thomas Acklin personally requested that the speed limit on this portion of East Smith Road be lowered due to the increasing number of accidents. [T.d. 44, *Ex. B* pg. 52 at 6-18]. When the County decided to actually follow up on Chief Acklin's request and petition the State to lower the speed limit after the accident at issue, County Commissioner Sharon Ray expressed her gratitude because, in her own words, East Smith Road was a "very dangerous road." [T.d. 44, *Ex. D*, pg. 12 at 4-10]. There is no question that the County was aware of the dangers associated with this stretch of East Smith Road prior to the accident at issue. Despite the knowledge and concern of various public officials regarding the dangers associated with the subject stretch of East Smith Road prior to March 4, 2006, the County did absolutely nothing until after Michelle Sanderbeck was killed.

iii. Plaintiffs' Expert Opinions

The Estate's expert engineer, Mr. Stanford, issued a report and a sworn affidavit expressly stating that East Smith Road was "in disrepair" and "posed an unreasonable hazard to motorists" on March 4, 2006. [T.d. 44, *Ex. A*, Attachment 2, pg. 2]. Mr. Stanford opined to a reasonable degree of engineering certainty that the County's failure to keep East Smith Road "in repair" was a substantial contributing factor in causing the accident that resulted in Ms. Sanderbeck's death. Contrary to the County's assertions, Mr. Stanford's opinions were not based solely on the skid resistance and/or the coefficient of friction on the road's surface, nor did he opine that the road was in disrepair simply because it was "too slippery."⁴ Mr. Stanford's opinion was primarily based on the fact that the surface of the road was physically deteriorating precisely at the location of the subject accident. This deterioration of the surface of the roadway is clearly depicted in the photographs taken on behalf of, and entered into the record by, the County.

⁴ The County's Brief at 2, 4.

Mr. Stanford testified that the co-efficient of friction for the section of road in question was .252. [T.d. 57, Stanford Depo. p. 45]. This translates to a skid number of 25. [Id]. Any skid number below 38 would reflect pavement which is in disrepair. [Id]. This conclusion is based, in part, upon the Road Engineering Journal, Forty Eight State Survey Showed Skid Resistance Evaluation Varied Considerably (June 1, 1997). However, the skid number or co-efficient of friction was hardly the sole basis of his opinion, nor was it the basis of the Ninth District's Opinion affirming the Trial Court's denial of summary judgment.

Among other evidence, Mr. Stanford relied on the increase in accidents over a five year period that reflected a change in condition. [T.d 57, Affidavit of Stanford, with report Ex. 2]. Mr. Stanford testified that the photographs of the road reveal deterioration of the pavement in the location of the subject accident.⁵ [T.d. 57, Stanford Depo. p. 51]. In his words, there was "deteriorating pavement ... throughout this photograph [C-12]". [Id]. Indeed, Mr. Stanford stated that anyone merely looking at the road "should recognize that [deterioration]". [Id. at p. 52]. The skid testing merely "validated" what was clearly evident to him, and to the Trial Court, in the photographs. [Id. at p. 53].

As recognized by the Trial Court and Ninth District, Mr. Stanford opined that the County failed to keep East Smith Road "in repair" as evidenced by the deterioration and/or "spalling" of the pavement in the area of the accident.⁶ This "spalling," which is actual physical deterioration of the pavement, is plainly evident in the photographs taken of the road's surface the day after the subject accident by an investigator retained on behalf of the County.⁷ These photographs were relied upon by Mr. Stanford in formulating his opinion that East Smith Road was in disrepair on March 4, 2006. These same photographs were expressly relied upon by the Trial Court in its Journal Entry denying the County's Motion for Summary Judgment when it stated that "photographic evidence that shows the condition of the road as it existed ... give rise to an issue of material fact." [T.d. 72, at 2]. As the Trial Court recognized,

⁵ The photographs, taken one day after the accident at issue, were entered into the record by the County as exhibits to its Motion for Summary Judgment.

⁶ Mr. Stanford defined the term "spalling" as "the breaking away of material and leaving voids where the material broke away" in his deposition at pg. 4.

⁷ See photographs C-12 to C-17, attached to the County's Motion for Summary Judgment.

the photographs of the road alone create a genuine issue of material fact as to whether East Smith Road was "in repair" for purposes of RC § 2744.02(B)(3) on March 4, 2006.

iv. The East Smith Road "Rehabilitation" project

The County vigorously maintains that East Smith Road was "in excellent repair" on March 4, 2006. [T.d. 42, Salay Aff. ¶4]. However, the County completely ignores the sworn testimony of County Engineer Salay who admitted that shortly after Ms. Sanderbeck's death, East Smith Road was closed so that the road could be "rehabilitated."⁸ [T.d. 44, Ex. B, pp. 31-32, at 1-25, 1-16]. According to Engineer Salay, the road "rehabilitation" was actually planned prior to the March 4, 2006 accident and the purpose of the "rehabilitation" was to make "spot repairs" to the road. [T.d. 44, Ex. B, p. 30 at 6-12]. Thus, the County acknowledged that it appreciated the need to repair East Smith Road in the area of the accident *before* the accident ever occurred. Indeed, part of the "rehabilitation" included the application of a sealant specifically designed to increase the co-efficient of friction on the roadway.⁹ The inherent contradiction in the County's position cannot be ignored. The County vehemently argues that East Smith Road was in "excellent repair" on the date of the subject accident while at the same time acknowledging that a plan to make "spot repairs" to the road in the location of the accident was being contemplated prior to the subject accident. [T.d. 42, affidavit of Michael Salay]. The County simply cannot have it both ways. Either East Smith Road was "in excellent repair" on March 4, 2006 or it needed "rehabilitation," including "spot repairs." As it is undisputed that the "rehabilitation" and "spot repairs" occurred shortly after the subject accident, a genuine issue of material fact exists regarding the County's duty to keep East Smith Road in repair and the County's Motion for Summary Judgment was properly denied.

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

⁸ County Engineer Salay testified that the East Smith Road project was the only road project during his tenure as County Engineer to be called a "rehabilitation" project as opposed to a road repair or construction project.

⁹ The "rehabilitation" of East Smith Road was not a subsequent remedial measure as it was planned prior to the accident.

demonstrating that the surface of East Smith Road was deteriorating such that it was not "in repair" on March 4, 2006. As such, genuine issues of material fact exist making the denial of the County's Motion for Summary Judgment necessary and proper. Therefore, the denial of the County's Motion for Summary should be affirmed so that a jury can rightly determine whether or not the County failed to keep east Smith Road "in repair" as required by RC § 2744.02 (B)(3).

III. ARGUMENT IN SUPPORT OF PROPOSITIONS OF LAW

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

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

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

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

RC § 2744.02 (B)(3).

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

citing *Starling v. Bd. Of Commrs.* (1935), 53 Ohio App. 293 (liable for ruts in the road); *Whitney v. Niehaus* (1915), 4 Ohio App. 208 (liable for trench in roadway).

In *Bonace v. Springfield Twp.*, 7th Dist. No. 07 MA 226, 2008-Ohio-6364, the Seventh Appellate District, citing to *Heckert*, determined that "in repair" for purposes of RC § 2744.02 (B)(3), "refers to maintaining a road's condition after construction or reconstruction, for instance by fixing holes and crumbling pavement. It deals with repairs after deterioration of a road [...]." *Id.*, see also, *Sheley v. Swing* (1st Dist. 1938), 65 Ohio App. 109 (holding that to "repair" means to mend after wear and tear; to eliminate the effects of decay or partial destruction; to restore to a state of soundness, usable for the purposes of original construction; and in the case of a road, to repair connotes keeping it in a safe condition, suitable for use by the traveling public). In this case, both the Trial Court and the Ninth District determined that the Estate presented sufficient competent and credible evidence demonstrating actual deterioration of the roadway's surface which raise questions of material fact regarding whether the County fulfilled its duty to keep East Smith Road "in repair" for purposes of RC § 2744.02(B)(3).

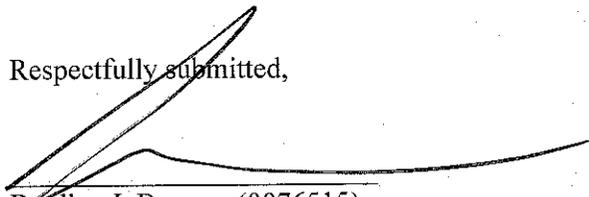
In evaluating the evidence presented in this case, the Trial Court and the Ninth District stayed true to this Court's holding in *Heckert* and applied the definition of "in repair" articulated by the Seventh District in *Bonace*. Both Courts cited evidence depicting the "deterioration" of the roadway and neither made their decision based solely on "skid tests" or the coefficient of friction of the road's surface. Most importantly, both Courts recognized and specifically accounted for the differences between road design and/or construction on the one hand, and a political subdivision's duty relative to road repair and maintenance on the other. As such, the Ninth District's ruling is wholly consistent with the General Assembly's intent in drafting RC § 2744.02 (B)(3), as well as with this Court's interpretation and application of RC § 2744.02(B)(3).

IV. CONCLUSION

Based on the record before this Court, it is clear that genuine issues of material fact exist regarding whether or not the County complied with its duty to keep East Smith Road in repair on March

4, 2006. Because the Estate presented sufficient evidence warranting submission of this question to a jury, the Ninth District's decision must be affirmed.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'Bradley J. Barmen', written over a horizontal line.

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