

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

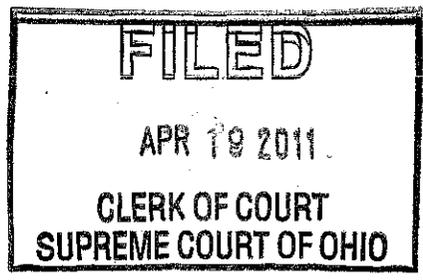
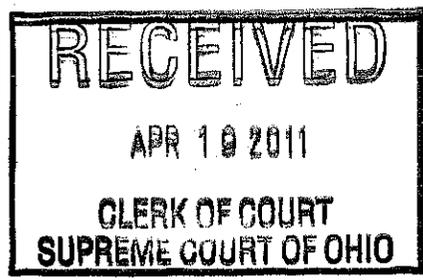
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MEDINA COUNTY BOARD OF COMMISSIONERS**

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## I. INTRODUCTION

In its Brief, the Estate sidesteps the accepted proposition of law. The Estate also does not address the County's arguments. Reviewing the accepted proposition of law, this case presents one primary question that the Estate ignores: Under R.C. 2744.02(B)(3), does the skid resistance of a road raise a repair issue when no evidence exists regarding the skid resistance of the road at the time of design or construction?

The answer is no.

Rather than address the relevant issue, the Estate asks this Court to disregard the "Ninth District's reliance on the opinions of the Estate's expert engineer." (Estate's Br. at 3.) But, relying on the expert's opinions, 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). (Op. at ¶¶ 5-6.) 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. (*Id.* at ¶6.) While the Estate wrongly suggests that this case is not novel (Estate's Br. at 1), the state of Ohio has never authorized such standard for road repair. In fact, the notion of a "worn out" road because of lack of skid resistance is a dramatic and erroneous change in Ohio law.

The ninth district created 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.

While the Estate does not challenge the accepted proposition of law, the County provides this clarification of the record.

## II. COUNTER STATEMENT OF THE FACTS

The Estate's claims in its statement of facts are irrelevant to the legal issues posed by this Appeal. Even if the Estate's claims made in its statement were true, they would not demonstrate that the Ninth District's decision should re-define the duties and standard for liability under R.C. 2744.02(B)(2). And, those contentions do not demonstrate that East Smith Road was not in repair. The Estate's contentions are misleading, if not simply untrue.

The Estate claims that "from December of 2001 and March 4, 2006, there were over 60 accidents within a half-mile stretch of the site of the subject accident." (Estate's Br. at 4.) This contention is, at best, misleading. According to the traffic-crash reports available to the Office of the Medina County Engineer, 68 automobile crashes occurred on East Smith Road (outside the City of Medina) after January 1, 2001, and before the crash in the present case. However, the great majority of those crashes involved cars that were traveling eastbound. In contrast, only 19 of the crashes on East Smith Road during that time period involved westbound vehicles (as did this Crash), and of those westbound crashes, **only 7 occurred at the curve where the Crash happened, and 2 of those involved deer**. In 2006, 8 of the 10 crashes before the Crash were eastbound, and **only one westbound crash was at the curve**. (T.d. 45, Supplemental Affidavit of Michael Salay, attached to reply brief, at ¶3.) The Estate's argument that the accidents on

East Smith Road indicated a danger to westbound vehicles such as the one involved in the crash is without merit; eastbound crashes say nothing about the cause of the few westbound crashes.

The Estate relies upon the Medina Area Transportation Task Force 2001 Final Report, asserting that it “had recommended that safety and traffic flow be improved.” (Estate’s Br. at 5.) What the Estate fails to tell is that David Miller, the former Medina County Engineer and Chairman of the Task Force, testified at his deposition that safety and capacity improvements were recommended for all routes leading into the City of Medina. (T.d. 44, Exhibit C, attached to the Plaintiff’s Opposition, at 35.) Additionally, the Task Force report (which was attached to the Complaint as Exhibit A) merely proposed a project on East Smith Road for the indeterminate “future” (most of the other projects in the report had a year specified), and the goal of improvement of safety on a road does not mean that a road is currently unsafe. Surely the Estate does not mean to argue – and no reasonable jury could find – that every road in Medina County for which safety improvements were recommended in very general terms was unsafe and in disrepair. This was a sharp curve. And like all curves of this nature, they can be dangerous if care is not taken to navigate that curve -- here, the teenage driver surely did not exercise even minimal care. But, because there were accidents on this curve does not establish that the County would have had notice of purported inadequate skid resistance of this road. Moreover, the road does not have any potholes or visibly crumbling pavement; it is not a road in disrepair under R.C. 2744.02(B)(3).

The Estate also relies on anecdotal claims that there were traffic accidents on this road (which all roads experience). (Estate’s Br. at 5.) There is no evidence, however, that the skid resistance of the road (or potholes or crumbling pavement) was causing any accidents. The Estate also asserts that “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." (Estate's Br. at 5.) But, Chief Acklin was asking that the speed limit be lowered, not that any physical changes be made in the road. Again, the speed limit pertains to a matter not within the control of Medina County. The Estate relies upon an isolated comment by County Commissioner Ray without acknowledging the context for the remark that she provided at her deposition. (Estate's Br. at 5.) Specifically, Commissioner Ray's comment about Smith Road being dangerous was based upon her personal feelings about driving downhill on the road going eastbound at night. (Exhibit D, attached to the Plaintiff's Opposition to Summary J., at 9, 20.) At the May 8, 2006, Commissioners' meeting, Ms. Ray simply stated that she was glad that a request to lower the speed limit had been made. (*Id.* at 12.) Again, while ignored by the Estate, there is no dispute that the State of Ohio, not counties, establishes the speed limits on county roads.

The Estate also claims that its expert "Mr. Stanford's opinion was primarily based on the fact that the surface of the road was physically deteriorating."<sup>1</sup> (Estate's Br. at 5.) This is flat wrong. The Estate's claim is contradicted by Stanford's own testimony. Stanford testified the "key point" of his opinion was the alleged insufficient friction characteristics of the road, not deterioration in the form of potholes or crumbling pavement. (Dep. of Stanford at 51.) **"The key point is we have a measurement of the friction characteristics which tell us that [the curve] was worn out or out of repair."** (*Id.*) This is not surprising that this is the focus of his opinion, because he never personally observed the road at any relevant time, but merely viewed it through

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<sup>1</sup> While the Estate also references its expert's conclusory affidavit that the road was not "in repair" (Estate's Br. at 5), Ohio law expressly provides that "[I]t is improper for an expert's affidavit to set forth conclusory statements and legal conclusions without sufficient supporting facts." *Wall v. Firelands Radiology, Inc.* (1995), 106 Ohio App.3d 313, 335-336; see e.g., *Douglass v. Salem Community Hosp.*, 153 Ohio App.3d 350, 360-361, 2003-Ohio-4006 at ¶ 28.

a picture that -- as a matter of law -- showed a road free of crumbling pavement or potholes. The Ninth District's decision to find that the County should be denied immunity is primarily based on the Estate's expert's contentions about critical speed and skid resistance, not crumbling pavement or potholes.<sup>2</sup>

Finally, the Estate argues that previously planned repairs to East Smith Road somehow demonstrate that the road was in disrepair or demonstrate an "inherent contradiction" in the County's position. (Estate's Br. at 7.) But, the Estate fails to tell the Court the nature and location of those planned repairs. The planned repairs addressed increasing the superelevation (banking) of the eastbound lane, not the westbound lane. (T.d. 44, Ex. B, p. 23-24.) The County addressed the eastbound lane because there were accidents occurring when people would drive down the hill too fast and leave the roadway to the right. (*Id.* at 24.) The increased banking of the eastbound curve has no relevance to the issues in this case because the vehicle in which the decedent was riding was traveling westbound and crossed the yellow lines. Further, the superelevation of the irrelevant eastbound lane is an immune design consideration, not a repair issue.

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<sup>2</sup> In one sentence, the ninth district notes that the plaintiff's engineer testified in his deposition that East Smith Road was deteriorated. (Op. at ¶ 8.) But, this conclusion is based on tangential deposition testimony of Expert Stanford reviewing pictures that the County itself put into the record. It is a legal conclusion that is entitled to no deference. See *Wall, supra*; see also *Douglass, supra*. It does not meet the previous standard embraced by Ohio courts that "in repair" under R.C. 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." *Bonace v. Springfield Twp.*, 179 Ohio App.3d 736, 2008-Ohio-6364 at ¶ 29. Immunity is determined as a matter of law. No reasonable jury could believe that the roadway was deteriorated, cracking or with potholes. *Scott v. Harris* (2007), 550 U.S. 372 (when a story told by one of the parties is blatantly contradicted by the record, so that no reasonable jury could believe it, a court should not adopt that party's version of the facts for purposes of ruling on a motion for summary judgment). The photographs taken one day after the accident depict a normal, well maintained road. In circumstances such as this, this Court need not defer to an expert's conclusory testimony based on a picture.

### 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.)**

The Estate does not address the accepted proposition of law. Consequently, the County refers this Court to its primary brief addressing this Proposition. The County also refers the Court to the various amicus curiae litigants' briefing that addressed the proposition of law.

### 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**

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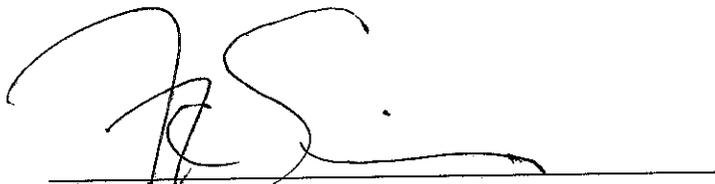
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