

**IN THE SUPREME COURT OF OHIO**

RICKY ALLEN BAKER & SHARON  
MARIE BAKER, Individually and as  
Administrators of the Estate of  
KELLIE MARIE BAKER,

Appellees,

v.

COUNTY OF WAYNE & WAYNE  
COUNTY BOARD OF COMMISSIONERS,

Appellants.

Case No. 2014-2079

On Appeal from the Wayne  
County Court of Appeals,  
Ninth Appellate District,  
Case No. 13 CA 0029

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**MEMORANDUM OF AMICI CURIAE CITIES OF COLUMBUS,  
CLEVELAND, CINCINNATI, DAYTON, AKRON & TOLEDO  
IN SUPPORT OF JURISDICTION**

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**James F. Mathews** (0040206)

*Counsel of Record*

Kara D. Williams (0084245)  
BAKER, DUBLIKAR, BECK,  
WILEY & MATHEWS  
400 South Main Street  
North Canton, Ohio 44720  
(330) 499-6000 / (330) 499-6423 (fax)  
mathews@bakerfirm.com  
kwilliams@bakerfirm.com

Attorneys for Appellants

**Andrew D.M. Miller** (0074515)

*Assistant City Attorney*

CITY OF COLUMBUS, DEPARTMENT OF LAW  
RICHARD C. PFEIFFER, JR., CITY ATTORNEY  
77 North Front Street  
Columbus, Ohio 43215  
(614) 645-6947 / (614) 645-6949 (fax)  
admmiller@columbus.gov

Attorney for Amicus Curiae City of  
Columbus & Lead Attorney for City Amici

**Bradley J. Barmen** (0076515)

MANNION & GRAY CO., LPA  
1375 E. 9th Street, Suite 1600  
Cleveland, Ohio 44144  
(216) 344-9422 / (216) 344-9421 (fax)  
bbarmen@mansiongray.com

Attorney for Appellees

**Thomas J. Kaiser** (0014339)

*Chief Trial Counsel*

CITY OF CLEVELAND, DEPARTMENT OF LAW,  
BARBARA A. LANGHENRY, DIR. OF LAW  
601 Lakeside Avenue, Room 106  
Cleveland, Ohio 44114  
(216) 664-2800 / (216) 664-2663 (fax)  
tkaiser@city.cleveland.oh.us

Attorney for Amicus Curiae City of  
Cleveland

**Peter J. Stackpole** (0072103)

*Chief Counsel, Litigation*

CITY OF CINCINNATI, LAW  
DEPARTMENT, TERRANCE A. NESTOR,  
INTERIM CITY SOLICITOR  
801 Plum Street, Room 215  
Cincinnati, Ohio 45202  
(513) 352-1515 / (513) 352-1515 (fax)  
peter.stackpole@cincinnati-oh.gov

Attorney for Amicus Curiae City of  
Cincinnati

**John Christopher Reece** (0042573)

*Assistant Director of Law*

CITY OF AKRON, LAW DEPARTMENT,  
CHERI B. CUNNINGHAM, DIRECTOR OF LAW  
161 South High Street, Suite 202  
Akron, Ohio 44308  
(330) 375-2030 / (330) 375-2041 (fax)  
jreece@akronohio.gov

Attorney for Amicus Curiae City of Akron

**John C. Musto** (0071512)

*Assistant City Attorney*

CITY OF DAYTON, LAW DEPARTMENT,  
LYNN R. DONALDSON,  
INTERIM CITY ATTORNEY  
101 West Third Street  
P.O. Box 22  
Dayton, Ohio 45401  
(937) 333-4100 / (937) 333-3628 (fax)  
john.musto@daytonohio.gov

Attorney for Amicus Curiae City of Dayton

**Adam W. Loukx** (0062158)

*Director of Law*

CITY OF TOLEDO, LAW DEPARTMENT,  
ADAM W. LOUKX, DIRECTOR OF LAW  
One Government Center, 22nd Floor  
Toledo, Ohio 43604  
(419) 245-1020 / (419) 245-1090 (fax)  
adam.loukx@toledo.oh.gov

Attorney for Amicus Curiae City of Toledo

## TABLE OF CONTENTS

Table of Contents .....	iii
Introduction.....	1
The Public or Great General Interest of this Case and the Substantial Constitutional Question Involved .....	1
I.    The Ninth District Has Impermissibly Encroached Upon the Legislative Powers of the General Assembly .....	4
II.   The Ninth District's Judgment Conflicts with Judgments of the Seventh & Twelfth Districts on the Same Legal Question .....	5
III.  The Ninth District's Judgment Creates Significant Confusion About Political Subdivision Liability in the Context of Road Repair and Maintenance .....	6
Statement of the Case & Facts .....	9
Argument in Support of Each Proposition of Law .....	9
I.    First Proposition of Law .....	9
<i>The definition of "public roads" found in R.C. 2744.01(H) always controls cases involving an application of R.C. 2744.02(B)(3), regardless of whether roadway at issue is subject to an ongoing maintenance or repair project.</i>	
II.   Second Proposition of Law .....	10
<i>If there are edge lines marking the outer boundaries of the regularly travelled portion of a paved roadway, the "public road" for purposes of R.C. 2744.02(B)(3) is the space between those edge lines but does not include those edge lines themselves.</i>	
III.  Third Proposition of Law .....	11
<i>If there are no edge lines marking the outer boundaries of the regularly travelled portion of a paved roadway, the "public road" for purposes of R.C. 2744.02(B)(3) is the space between the edges of that roadway's pavement but does not include either the pavement edges themselves or the drop-offs between the paved and unpaved portions of the roadway.</i>	

IV. Fourth Proposition of Law .....11

*If the edge lines marking the outer boundaries of the regularly travelled portion of a paved roadway have been temporarily removed as a result of an ongoing maintenance or repair project, and if those edge lines are to be replaced as part of that same project, the "public road" for purposes of R.C. 2744.02(B)(3) is the space between the points at which those edge lines had been prior to their removal but does not include those points themselves.*

Conclusion .....12

CERTIFICATE OF SERVICE .....14

## INTRODUCTION

Appellants Wayne County and the Wayne County Board of Commissioners (collectively, the "County") have filed a notice of appeal to the Supreme Court of Ohio from the two judgments of the Wayne County Court of Appeals, Ninth Appellate District, entered in Court of Appeals Case No.13 CA 0029 on August 20, 2014, and October 22, 2014. See generally COUNTY NOTICE OF APPEAL (filed Dec. 3, 2014).

The Cities of Columbus, Cleveland, Cincinnati, Dayton, Akron, and Toledo (collectively, the "City Amici"), acting as amici curiae, jointly and respectfully request that this Court: (a) accept jurisdiction over the County's appeal; (b) reverse the Ninth District's judgments; and (c) reinstate the summary judgment that was entered in favor of the County by the Court of Common Pleas for Wayne County in the Court of Common Pleas Case No.12-CV-0400 on June 4, 2013.

The claims at issue in this appeal are wrongful death and survivor claims asserted against the County by Appellees Ricky Allen Baker and Sharon Marie Baker, acting individually and as administrators of the estate of their daughter Kelli Marie Baker (collectively, the "Bakers").

### **THE PUBLIC OR GREAT GENERAL INTEREST OF THIS CASE AND THE SUBSTANTIAL CONSTITUTIONAL QUESTION INVOLVED**

Tort claims against political subdivisions of the State of Ohio are governed exclusively by the Ohio Political Subdivision Liability Act, codified at R.C. Chapter 2744, which has been the law of this State for almost thirty years. See Am. Sub. H.B. No. 176, Section 1, 141 Ohio Laws, Part I, 1707–24; see also Butler v. Jordan, 92 Ohio St. 3d 354, 376, 750 N.E.2d 554 (2001) (Cook, J., concurring) (“The General Assembly responded to [the abolition of common-law sovereign immunity] by enacting the Political Subdivision Tort Liability Act [and] declaring that political subdivisions would be liable in tort only as set forth in R.C. Chapter 2744.”). The

purpose of R.C. Chapter 2744 is to "preserve political subdivisions' fiscal integrity." Supportive Solutions v. Electronic Classroom of Tomorrow, 137 Ohio St. 3d 23, 2013-Ohio-2410, 997 N.E.2d 490, ¶ 11. Moreover, this Court has recognized that "early resolution of the immunity issue" is also consistent with that purpose because early resolution "may save the parties the time, effort, and expense of a trial and appeal." Id.

Under R.C. Chapter 2744, political subdivisions like the City Amici are generally immune from any tort liability incurred in the performance of either their governmental functions or their proprietary functions. See R.C. 2744.02(A)(1). This general immunity is, however, subject to five statutory exceptions. See R.C. 2744.02(B). The only exception relevant to this appeal is R.C. 2744.02(B)(3), which states 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 and other negligent failure to remove obstructions from public roads." For purposes of that exception, the term "public roads" is statutorily defined as "public roads, highways, streets, avenues, alleys, and bridges within a political subdivision." R.C. 2744.01(H). Significantly, the definition specifically *excludes* "berms, shoulders, rights-of-way, or traffic control devices unless the traffic control devices are mandated by the Ohio manual of uniform traffic control devices." Id.

Prior to April 9, 2003, the scope of the R.C. 2744.02(B)(3) exception was far broader than it is today. Then, it applied to "roads, highways, streets, avenues, alleys, sidewalks, bridges, aqueducts, viaducts, [and] public grounds" and also included both negligent and non-negligent failures to keep such things "open, in repair, and free from nuisance," Am. Sub. S.B. No. 106, Section 1, 149 Ohio Laws, Part I, 3508. Nonetheless, the section was amended by the General Assembly in 2003, and this Court concluded that the legislature's 2003 amendments were "not whimsy but a deliberate effort to limit political subdivisions' liability for injuries and deaths on

their roadways." Howard v. Miami Township Fire Division, 119 Ohio St. 3d 1, 2008-Ohio-2792, 891 N.E.2d 311, ¶ 26.

Moreover, prior to April 9, 2003, R.C. Chapter 2744 did not define the term "public roads." The General Assembly added the current definition of "public roads" in the same legislation that deliberately narrowed the scope of R.C. 2744.02(B)(3). See Am. Sub. S.B. No. 106, Section 1, 149 Ohio Laws, Part I, 3506. Because R.C. 2744.02(B)(3) is the only place within R.C. Chapter 2744 that the term "public roads," can be found,<sup>1</sup> it stands to reason that the General Assembly added the new definition, with its specific exclusions for "shoulders" and "berms," as part of its overall legislative effort to generally limit R.C. 2744.02(B)(3)'s scope.

Prior to the Ninth District's decision in this case, only two other Ohio district courts have examined R.C. 2744.01(H)'s definition of "public roads," and its exclusion of the terms "shoulders" and "berms," in the context of claims asserted through 2744.02(B)(3). See Bonace v. Springfield Township, 179 Ohio App. 3d 736, 2008-Ohio-6364, 903 N.E.2d 683 (7th Dist. Mahoning); Lucchesi v. Fischer, 179 Ohio App. 3d 317, 2008-Ohio-5934, 901 N.E.2d 849 (12th Dist. Clermont). Both cases involved alleged conditions of disrepair that are virtually identical to the condition raised in the case below—namely, an allegedly dangerous drop-off at the edge of a roadway's pavement. Compare Baker v. Wayne County, 9th Dist. Wayne No. 13CA0029, 2014-Ohio-3529, 17 N.E.3d 639, ¶¶ 2, 10, 13, with Bonace, 2008-Ohio-6364, ¶ 7, 8; Lucchesi, 2008-Ohio-5934, ¶ 5, 28, 37. Moreover, both cases provided political subdivisions with two clear guidelines distinguishing between the boundaries of a "public road," for which liability could attach under R.C. 2744.02(B)(3), and the boundaries of "shoulders" and "berms," for which it could not. First, in both *Bonace* and *Lucchesi*, the courts found that, if there are edge lines

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<sup>1</sup> Although R.C. 2744.01(C)(2)(w) refers to a "public road rail crossing," it does not appear that the term, in that context, has any bearing or relationship to the definition of "public road" in R.C. 2744.01(H).

marking the outer boundaries of the regularly travelled portion of a particular roadway, then the "public road" portion of that roadway for purposes of R.C. 2744.02(B)(3) exists only between those edge lines, and the "public road" does not include those edge lines themselves. Second, if there are *no* such edge lines, then the "public road" portion of the roadway in question exists only between the edges of that roadway's pavement, but it does not include the pavement's edges themselves or the drop-off between the paved and unpaved portions of the roadway. These two propositions of law are reasonable interpretations of the plain and unambiguous language of R.C. 2744.01(B) under virtually every cannon of statutory construction. They are also extremely easy for political subdivisions to understand and for the courts to apply.

Nonetheless, the Ninth District disregarded *Bonace* and *Lucchesi* because, it claims, neither case "accounts for the situation presented by this case: a roadway that was under repair at the time the accident occurred and whose condition may have been attributable to the ongoing maintenance work." Baker, 2014-Ohio-3529, ¶ 10. Rather, the Ninth District created a new definition of "public roads" to govern cases involving roadways that are in the midst of ongoing repairs or maintenance. See id. ¶ 11. In such situations, the Ninth District determined that the "better analysis" would be to define "public roads" as the "area under the control of the political subdivision, subject to the ongoing repair work, and open to travel by the public." Id.

#### **I. THE NINTH DISTRICT HAS IMPERMISSIBLY ENCROACHED UPON THE LEGISLATIVE POWERS OF THE GENERAL ASSEMBLY**

The Ninth District's judicially-created definition of "public road" directly contradicts the statutorily-enacted definition of "public roads" found in R.C. 2744.01(H). That is, the Generally Assembly has specifically and intentionally excluded the terms "shoulders" and "berms" from its definition of "public roads," while the Ninth District has included them within its new definition. Shoulders and berms are almost always under the political subdivision's control. Shoulders and

berms are usually subject to ongoing repair or maintenance as part of the more general maintenance and repair of the roadway itself. And, shoulders and berms are often open to travel by the public, albeit for less common travel such as making turns and stopping for emergencies.

In Ohio, the legislative power of the State is vested in the General Assembly, while the State's judicial power is vested in the courts. See OHIO CONSTITUTION, ARTICLE II, Section 1 & ARTICLE IV, Section 1. "[The courts'] role, in exercise of the judicial power granted to [them] by the Constitution, is to interpret and apply the law enacted by the General Assembly, not to rewrite it." Houdek v. Thyssenkrupp Materials, 134 Ohio St. 3d 491, 2012-Ohio-5685, 983 N.E.2d 1253, ¶ 29. Nor are the courts permitted to make policy through the guise of statutory construction. See Seeley v. Expert, 26 Ohio St. 2d 61, 71, 269 N.E.2d 121 (1971) ("[A] court, in interpreting a legislative enactment, may not simply rewrite it on the basis that it is thereby improving the law.").

By creating a definition of "public roads" that is inconsistent with the plain language enacted by the General Assembly in R.C. 2744.01(H), the Ninth District has effectively reached beyond its limited constitutional powers of statutory construction and into the impermissible realm of legislation and policymaking. Thus, this case raises a substantial constitutional question in that an intermediate appellate court of this State has rewritten a lawful enactment of the State's legislature. This Court, as the court of last resort on matters of state law and the state constitution, is the only tribunal remaining with the power to rectify this breach of the doctrine of separation-of-powers.

## **II. THE NINTH DISTRICT'S JUDGMENT CONFLICTS WITH JUDGMENTS OF THE SEVENTH & TWELFTH DISTRICTS ON THE SAME LEGAL QUESTION**

Moreover, by creating a new definition of "public roads" that is in direct conflict with the judgments and opinions of the Seventh District's decision in *Bonace* and the Twelfth District's

Decision in *Lucchessi*, the Ninth District has created an actual conflict regarding a proposition of law which can be clearly stated as follows: *Because of the specific exclusion of "shoulders" and "berms" from the definition of "public roads" found in R.C. 2744.01(H), the term "public roads" cannot include "shoulders" and "berms" for purposes of R.C. 2744.02(B)(3), even if the roadway at issue is subject to an ongoing repair and maintenance project.*

Although the Ninth District determined that there was no conflict between its decision and those reached by the *Bonace* and *Lucchessi* Courts, it did so upon the erroneous basis that the ongoing repair or maintenance project in case *sub judice* made it factually dissimilar to either *Bonace* or *Lucchessi*. Nonetheless, because R.C. 2744.01(H) does offer alternative definitions for "public roads" depending upon whether the roadways in question are or are not subject to such projects, an ongoing repair or maintenance project is immaterial to a reasonable interpretation of the controlling statutory law. Accordingly, this case also raises a substantial constitutional question in that the Ninth District's judgment, if allowed to stand, would be in direct conflict with judgments pronounced upon the very same question by two other courts of appeals in this State. The Ohio Constitution specifically tasks this Court with the review and a final determination of such conflicts and judgments. See OHIO CONSTITUTION, ARTICLE IV, Section 3(B)(4).

### **III. THE NINTH DISTRICT'S JUDGMENT CREATES SIGNIFICANT CONFUSION ABOUT POLITICAL SUBDIVISION LIABILITY IN THE CONTEXT OF ROAD REPAIR AND MAINTENANCE**

Regardless of whether the conflict between the Ninth District's judgment at issue in this appeal and the Seventh and Twelfth Districts' judgments in *Bonace* and *Lucchessi* creates the sort of conflict outlined in the Article IV, Section 3(B)(4) of the Ohio Constitution, the judgment at issue has the potential to create substantial confusion in a matter of public interest—namely, road repair and maintenance. The General Assembly has tasked municipal corporations with the

"care, supervision, and control of the public highways, streets, avenues, alleys, sidewalks, public grounds, bridges, aqueducts, and viaducts within" their boundaries. R.C. 723.01; see also Independence v. Cuyahoga County, No. 2013-0984, 2014-Ohio-4650, ¶ 47 (defining the limits of a city's responsibility under R.C. 723.01 to "municipal boundaries"); R.C. 2744.01(C)(2)(e) (defining the "regulation of the use of, and the maintenance and repair of, roads, highways, streets, avenues, alleys, sidewalks, bridges, aqueducts, viaducts, and public grounds" to be a "governmental function").

Moreover, in modern American political discourse, there is very little agreement about the nature of government and the proper limits of its powers and responsibilities. Thus, when one considers that road maintenance and repair is one of the few governmental responsibilities upon which everyone, regardless of political ideology, can agree, it is not hyperbolic to say that such a responsibility is likely to be one of a government's most important duties to its citizens. In fact, the quality of a particular city's roads is often the first thing one considers when he or she attempts to evaluate the quality of that city's government, and nothing starts a debate about city politics like a discussion of the roads.

Dissatisfaction with a city's maintenance and repair of its roads is most commonly addressed through that city's political and electoral processes. Nonetheless, R.C. 2744.02(B)(3) provides probably the only means through which one can actually assign tort liability against a city—and thus obtain funds from the public fisc—based upon claims of inadequate road maintenance or repair. Accordingly, the Ninth District's expansion of a political subdivision's liability under R.C. 2744.02(B)(3) is a matter of public interest.

Furthermore, the fact that the Ninth District's holding is ostensibly limited to only those situations in which the roadway in question is subject to an ongoing repair or maintenance

project does not actually limit the significance of the public interest at issue. This is, after all Ohio, and there is an old joke (admittedly born from a seed of truth) that the word "Ohio" actually comes from the Iroquois word for "Land of the Orange Construction Barrel." In other words, road maintenance and repair is a part of every Ohioan's ongoing and daily life, and one would be hard pressed to find a single major city in this State that is not perpetually engaged in some ongoing road maintenance and repair project. The Ninth District's expansion of the R.C. 2744.02(B)(3) exception not only affects a matter of major public interest, it affects a matter of major public interest in which the City Amici are perpetually engaged.

Finally, it should be noted that the Ninth District's decision also has the potential to be expanded beyond its self-expressed limitation to ongoing road repair and maintenance projects. That is, if one were to read that limitation out of the Ninth District's opinion, the Ninth District's new definition of "public road" has the potential to completely replace the statutory definition found in R.C. 2744.01(H) in all cases involving R.C. 2744.02(B)(3), whether or not the roadway in question is subject to an ongoing repair and maintenance project. In fact, the City of Columbus has already been presented with an argument in another, unrelated case—one not involving any sort of ongoing project—that a "public road" consists of the "area under the control of the political subdivision, subject to the ongoing repair work, and open to travel by the public," and the party making that argument specifically quoted the Ninth District's opinion below. Thus, this case offers a matter of public interest in that the application of R.C. 2744.02(B)(3) throughout this State and under any circumstances would be well-served by a holding from this Court that the statutory definition found in R.C. 2744.01(H) is the only definition that governs the application of that immunity exception.

## STATEMENT OF THE CASE & FACTS

To avoid redundancy, the City Amici incorporate the "Statement of the Case and Facts" contained in the County's memorandum in support of jurisdiction as if it were fully rewritten here. See COUNTY MEMO RE JURIS. (filed Dec. 3, 2014) at pp.2–4.

### ARGUMENT IN SUPPORT OF EACH PROPOSITION OF LAW

#### I. FIRST PROPOSITION OF LAW

*The definition of “public roads” found in R.C. 2744.01(H) always controls cases involving an application of R.C. 2744.02(B)(3), regardless of whether roadway at issue is subject to an ongoing maintenance or repair project.*

Under R.C. 2744.02(B)(3), political subdivisions can be liable for losses that are "caused by their negligent failure to keep public roads in repair and other negligent failure to remove obstructions from public roads." For purposes of the R.C. 2744.02(B)(3), the General Assembly has defined "public roads" to **include** "public roads, highways, streets, avenues, alleys, and bridges" and to **exclude** "berms" and "shoulders." R.C. 2744.01(H).

"Where a statute defines terms used therein which are applicable to the subject matter affected by the legislation, such definition controls in the application of the statute." Woman's International Bowling Congress v. Porterfield, 25 Ohio St. 2d 271, 267 N.E.2d 781 (1971), paragraph two of the syllabus (citing Terteling Brothers v. Glander, 151 Ohio St. 236, 85 N.E.2d 379 (1949), paragraph one of the syllabus); see also R.C. 1.42 ("Words and phrases that have acquired a technical or particular meaning, whether by legislative definition or otherwise, shall be construed accordingly."). Thus, for purposes of R.C. 2744.02(B)(3), the unambiguous definition of “public roads” found in R.C. 2744.01(H) controls.

Further, "a statute, free from ambiguity and doubt, is not subject to judicial modification in the guise of interpretation." Crowl v. De Luca, 29 Ohio St. 2d 53, 58–59, 278 N.E.2d 352

(1972) (quotations omitted). Because R.C. 2744.01(H) does not offer a different definition—one that includes "shoulders" and "berms"—if the roadway at issue is subject to an ongoing repair or maintenance project, the Ninth District has now impermissibly modified a legislative enactment and acted beyond its limited constitutional powers of statutory construction.

## II. SECOND PROPOSITION OF LAW

*If there are edge lines marking the outer boundaries of the regularly travelled portion of a paved roadway, the "public road" for purposes of R.C. 2744.02(B)(3) is the space between those edge lines but does not include those edge lines themselves.*

When interpreting a statute, a court's primary concern is legislative intent, and the best way to discern legislative intent is to read the words and phrases that the legislature actually used and to read those words and phrases in their proper context and in accordance with the rules of grammar and common usage. See Ohio Neighborhood Financial v. Scott, 139 Ohio St. 3d 536, 2014-Ohio-2440, 13 N.E.3d 1115, ¶ 22; R.C. 1.42 ("Words and phrases shall be read in context and construed according to the rules of grammar and common usage."). Given the plain and unambiguous language of R.C. 2744.01(H) and the commonly understood meanings of the words "shoulder" and "berms" in the context of a roadway, the Seventh District reasonably interpreted a "public road" for purposes of R.C. 2744.02(B)(3) to be the paved portion of the roadway between its edge lines, but not the edge lines themselves. See Bonace, 2008-Ohio-6364, ¶¶ 43–44. Although the Twelfth District did not rely exclusively upon a roadway's edge lines to define the boundaries of a "public road," it noted that other definitions of "street," "highway," and "roadway" at least implied a consistency with such an interpretation. See Lucchesi, 2008-Ohio-5934, ¶ 44 (quoting R.C. 4511.01(BB), (EE)).

### III. THIRD PROPOSITION OF LAW

*If there are no edge lines marking the outer boundaries of the regularly travelled portion of a paved roadway, the "public road" for purposes of R.C. 2744.02(B)(3) is the space between the edges of that roadway's pavement but does not include either the pavement edges themselves or the drop-offs between the paved and unpaved portions of the roadway.*

Given the plain and unambiguous language of R.C. 2744.01(H) and the commonly understood meanings of the words "shoulder" and "berms" in the context of a roadway, both the Seventh and Twelfth Districts reasonably interpreted a "public road" per R.C. 2744.01(H) to be the space between the edges of a roadway's pavement if that roadway has no edge lines, but they also noted that the "public road" would not include either the pavement edges themselves or the drop-offs between the paved and unpaved portions of the roadway. See Bonace, 2008-Ohio-6364, ¶¶ 36, 42, 45; Lucchesi, 2008-Ohio-5934, ¶¶ 43, 45, 46.

### IV. FOURTH PROPOSITION OF LAW

*If the edge lines marking the outer boundaries of the regularly travelled portion of a paved roadway have been temporarily removed as a result of an ongoing maintenance or repair project, and if those edge lines are to be replaced as part of that same project, the "public road" for purposes of R.C. 2744.02(B)(3) is the space between the points at which those edge lines had been prior to their removal but does not include those points themselves.*

If the roadway at issue has no edge lines only because those edge lines had been temporarily removed as part of an ongoing maintenance or repair project, but were to be replaced soon as part of that same project, this Court could reasonably interpret R.C. 2744.01(H) and apply R.C. 2744.02(B)(3) in the same way they would interpret and apply those statutes if the roadway had never had any edge lines at all. That is, in such cases, the "public road" would be the space between the edges of the roadway's pavement but would not include the edge itself or the drop-off. Alternatively, this Court could also reasonably interpret "public road" under such circumstances to be the space between the points at which the temporarily removed edge lines

had been prior to their removal but would not include the points themselves. Given the legislature's "deliberate effort to limit political subdivisions' liability for injuries and deaths on their roadways," Howard, 2008-Ohio-2792, ¶ 26, and the long-standing principle that exceptions to a rule of general application should be interpreted narrowly, see In re Adoption of Sunderhaus, 63 Ohio St. 3d 127, 132 fn.4, 585 N.E.2d 418 (1992), the latter interpretation of R.C. 2744.01(H) under such circumstances is *more* reasonable than the former.

### CONCLUSION

For the reasons stated above, the Cities of Columbus, Cleveland, Cincinnati, Dayton, Akron, and Toledo, acting as amici curiae, jointly and respectfully request that this Court: (a) accept jurisdiction over the County's appeal; (b) reverse the Ninth District's judgments; and (c) reinstate the summary judgment entered in favor of the County by the Court of Common Pleas for Wayne County, Ohio.

Respectfully submitted,  
/s/ Andrew D.M. Miller  
**Andrew D.M. Miller** (0074515)  
*Assistant City Attorney*  
CITY OF COLUMBUS, DEPARTMENT OF LAW  
RICHARD C. PFEIFFER, JR., CITY ATTORNEY  
77 North Front Street  
Columbus, Ohio 43215  
(614) 645-6947 / (614) 645-6949 (fax)  
admmiller@columbus.gov

Attorney for Amicus Curiae City of  
Columbus & Lead Attorney for City Amici

Respectfully submitted,  
/s/ T.J.K.<sup>1</sup>  
**Thomas J. Kaiser** (0014339)  
*Chief Trial Counsel*  
CITY OF CLEVELAND, DEPARTMENT  
OF LAW, BARBARA A. LANGHENRY,  
DIRECTOR OF LAW  
601 Lakeside Avenue, Room 106  
Cleveland, Ohio 44114  
(216) 664-2800 / (216) 664-2663 (fax)  
tkaiser@city.cleveland.oh.us

Attorney for Amicus Curiae City of  
Cleveland

<sup>1</sup> By ADMM per email authorization granted 12/2/14

**[ADDITIONAL SIGNATURES ON FOLLOWING PAGE]**

Respectfully submitted,  
/s/ P.J.S.<sup>2</sup>

---

**Peter J. Stackpole** (0072103)  
*Chief Counsel, Litigation*  
CITY OF CINCINNATI, LAW  
DEPARTMENT, TERRANCE A. NESTOR,  
INTERIM CITY SOLICITOR  
801 Plum Street, Room 215  
Cincinnati, Ohio 45202  
(513) 352-1515 / (513) 352-1515 (fax)  
peter.stackpole@cincinnati-oh.gov

Attorney for Amicus Curiae City of  
Cincinnati

<sup>2</sup> By ADMM per email authorization granted 12/1/14

Respectfully submitted,  
/s/ J.C.R.<sup>4</sup>

---

**John Christopher Reece** (0042573)  
*Assistant Director of Law*  
CITY OF AKRON, LAW DEPARTMENT,  
CHERI B. CUNNINGHAM, DIRECTOR OF LAW  
161 South High Street, Suite 202  
Akron, Ohio 44308  
(330) 375-2030 / (330) 375-2041 (fax)  
john.musto@daytonohio.gov

Attorney for Amicus Curiae City of Akron

<sup>4</sup> By ADMM per email authorization granted 12/1/14

Respectfully submitted,  
/s/ J.C.M.<sup>3</sup>

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**John C. Musto** (0071512)  
*Assistant City Attorney*  
CITY OF DAYTON, LAW DEPARTMENT,  
LYNN R. DONALDSON,  
INTERIM CITY ATTORNEY  
101 West Third Street  
P.O. Box 22  
Dayton, Ohio 45401  
(937) 333-4100 / (937) 333-3628 (fax)  
john.musto@daytonohio.gov

Attorney for Amicus Curiae City of Dayton

<sup>3</sup> By ADMM per email authorization granted 12/1/14

Respectfully submitted,  
/s/ A.W.L.<sup>5</sup>

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**Adam W. Loukx** (0062158)  
*Director of Law*  
CITY OF TOLEDO, LAW DEPARTMENT,  
ADAM W. LOUKX, DIRECTOR OF LAW  
One Government Center, 22nd Floor  
Toledo, Ohio 43604  
(419) 245-1020 / (419) 245-1090 (fax)  
adam.loukx@toledo.oh.gov

Attorney for Amicus Curiae City of Akron

<sup>5</sup> By ADMM per email authorization granted 12/1/14

**CERTIFICATE OF SERVICE**

I certify that a copy of the foregoing was served by ordinary U.S. mail, postage prepaid, and by electronic mail to the following individual(s) on December 8, 2014:

**James F. Mathews** (0040206)  
Kara D. Williams (0084245)  
BAKER, DUBLIKAR, BECK,  
WILEY & MATHEWS  
400 South Main Street  
North Canton, Ohio 44720  
(330) 499-6000 / (330) 499-6423 (fax)  
mathews@bakerfirm.com  
kwilliams@bakerfirm.com

Attorneys for Appellants

**Bradley J. Barmen** (0076515)  
MANNION & GRAY CO., LPA  
1375 E. 9th Street, Suite 1600  
Cleveland, Ohio 44144  
(216) 344-9422 / (216) 344-9421 (fax)  
bbarmen@mansiongray.com

Attorney for Appellees

/s/ Andrew D.M. Miller

**Andrew D.M. Miller** (0074515)

Lead Attorney for the City Amici Curiae