

**Supreme Court Case No. 2014-2079
In the Supreme Court of Ohio**

RICKY ALLEN BAKER, *et al.*,

Plaintiffs-Appellees

v.

COUNTY OF WAYNE, OHIO, *et al.*,

Defendants-Appellants.

**On Discretionary Appeal from the Ninth District Court of Appeals,
Wayne County, Ohio Case No. 13-CA-0029**

**BRIEF OF AMICUS CURIAE,
OHIO ASSOCIATION OF CIVIL TRIAL ATTORNEYS,
IN SUPPORT OF JURISDICTION**

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STATEMENT OF INTEREST OF AMICUS CURIAE

The Ohio Association of Civil Trial Attorneys (“OACTA”) is a state-wide organization of more than 500 Ohio attorneys, corporate executives, and managers who devote a substantial portion of time to the defense of civil lawsuits and the management of claims against individuals, corporations, and government entities. Issues of political subdivision liability are of keen interest to OACTA’s members; it has an active Governmental Liability committee, and OACTA has before this Court as amicus curiae in numerous appeals involving governmental liability issues. This appeal is of significant interest to OACTA because the large number of motor vehicle accidents across Ohio involving roadway departures, including “edge drops”, means that the Ninth District’s decision opens substantial risks of governmental liability which the General Assembly expressly intended to close. Additionally, the Ninth District’s decision essentially ignores and replaces the statutory definition of “public road” when any road is undergoing repairs, thus expanding governmental liability in all cases involving roadway repairs.

WHY THIS CASE IS OF GREAT GENERAL INTEREST

This case involves whether a motor vehicle accident which occurs when a vehicle drops its right wheels off the edge of the paved roadway, causing it to lose control and crash, has occurred as the result of any failure to properly maintain a “public road” as defined under R.C. 2744.01(H). It also involves whether the statutory definition of “public road” applies to roads undergoing repairs or improvements. This case is of great general interest because 1) a substantial number of crashes, fatalities and injuries involve roadway departures in general and edge-drops in particular, and 2) the Ninth District’s decision ignores the General Assembly’s definition of “public road” as excluding berms and shoulders, and 3) the Ninth District’s decision replaces R.C. 2744.01(H) in all cases involving ongoing roadway repairs or maintenance.

The General Assembly's 2003 amendment of the Ohio Political Subdivision Tort Liability Act reflects "a deliberate effort to limit political subdivisions' liability for injuries and deaths on their roadways." *Howard v. Miami Twp. Fire Division*, 119 Ohio St. 3d 1, 2008-Ohio-2792, ¶26. Speaking as the policy-making body of Ohio's general populace, the General Assembly narrowed the exception in R.C. 2744.02(B)(3) to liability for maintenance of public roads, and further narrowed the definition of "public roads" in R.C. 27744.01(H). As discussed below and in the memorandum filed by Wayne County, the decision of the Ninth District Court of Appeals attempts to expand governmental liability to include risks the General Assembly expressly intended to preclude, including accidents due to conditions of berms, shoulders,

The liability risk from cases such as the present one is substantial. Data from federal and Ohio agencies indicates that between 2006 and 2010, there were more than 2,900 crashes in Ohio, with more than 30 fatalities and 1,200 injuries, in motor vehicle accidents related to loss of control after dropping a wheel off the edge of the pavement.

In September, 2006, the AAA Foundation for Traffic Safety sponsored a study, conducted by the Center for Transportation Research and Education at Iowa State University in cooperation with the U.S. Department of Transportation's Federal Highway Administration, entitled "Safety Impacts of Pavement Edge Drop-Offs." ("AAA Study")¹ This report concluded that pavement edge drop-offs were a "probable" factor in approximately 2-3% of rural highway accidents and a "possible" factor in more than 20% of rural highway crashes. *Id.*, pp. 14, 100, Table 6.6. Moreover, the study found that crashes determined to be "probably" or "possibly" related to pavement edge drop-offs were "much more likely than other crashes on similar roadways to result in a fatality or serious injury." *Id.*, p. 15.

¹ https://www.aaafoundation.org/sites/default/files/PEDO_report.pdf

While the above statistics were gathered from crash data from North Carolina, Illinois, Iowa, and Missouri, applying these findings to available Ohio data reflects that edge-drops are involved a significant number of crashes on Ohio's rural highways.

In October, 2014, ODOT launched a public safety outreach campaign called "Every Move You Make, Keep It Safe." One of the four focuses of the campaign is the reduction of "roadway departure" crashes.² A campaign tip card captioned "Roadway Departure Crashes" reflects that between 2006 and 2010, roadway departure crashes in Ohio resulted in 3,023 fatalities and 126,204 injuries. *Id.*, p. 24. Other data reflects that 65% of road departure crashes occur on rural highways. *Id.*, p. 23. Presumably the proportion of fatalities and injuries is similar, if not higher.

If the data from the AAA Study holds true in Ohio, then between 2006 and 2010 there were 30-60 fatalities and between 1,260 and 2,520 injuries in which edge-drops were a "probable" factor, and "possibly" related in more than 390 fatalities and 16,400 injuries.

Moreover, the Ohio Manual of Uniform Traffic Control Devices does not mandate white edge lines on rural roads unless traffic exceeds 6,000 vehicles per day...meaning a substantial percentage of Ohio's rural highways (including the road in this case) do not need or have white edge lines to mark the boundaries of the travelled roadway.

Accordingly, the effect of Ninth District's decision in this case is substantial. To paraphrase the AAA Study, "The number of edge drop-off-related crashes is relatively small compared to other crash types; however, even though small, the numbers are still large enough to" create substantial liability risks, and decisions altering the General Assembly's rules governing liability in such cases "warrants attention" from this Court. *AAA Study*, p. 15.

² See ODOT PowerPoint presentation at [http://www.dot.state.oh.us/Divisions/Planning/ Program Management/HighwaySafety/ActiveTransportation/Documents/SRTS/EMYM/EMYM_aug19_645pm.pptx](http://www.dot.state.oh.us/Divisions/Planning/Program%20Management/HighwaySafety/ActiveTransportation/Documents/SRTS/EMYM/EMYM_aug19_645pm.pptx), p. 12.

STATEMENT OF THE CASE AND STATEMENT OF FACTS

OACTA incorporates by reference the Statement of the Case and Statement of Facts in the Memorandum of Appellant Wayne County.

LAW AND ARGUMENT

OACTA concurs in and incorporates the arguments set forth in Wayne County's jurisdictional memorandum and submits the following brief additional observations:

Appellant's Proposition of Law No. 1:

R.C. 2744.01(H) IS THE EXCLUSIVE DEFINITION OF "PUBLIC ROADS" FOR PURPOSES OF DETERMINING THE IMMUNITY OF A POLITICAL SUBDIVISION IN ALL CLAIMS WHICH ALLEGE A NEGLIGENT FAILURE TO MAINTAIN.

R.C. 2744.01(H) provides:

(H) "Public roads" means public roads, highways, streets, avenues, alleys, and bridges within a political subdivision. "Public roads" does not include 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.

The Ninth District decided this definition was not clear enough in the context of an ongoing repair or maintenance project. Notwithstanding the lack of any evidence of disrepair or improper conditions, the Ninth District decided that

In the context of a road that is subject to a repair or maintenance project that extends from day-to-day in various stages of completion, such as the one at issue in this case, we believe that the better analysis is to consider a "public road" to be the area under the control of the political subdivision, subject to the ongoing repair work, and open to travel by the public.

(Decision, ¶11).

This is incompatible with R.C. 2744.01(H), which expressly excludes berms and shoulders from "public road." In this case, the accident occurred because the vehicle's right wheels dropped off the edge of the paved roadway and onto the unpaved berm or shoulder. The

Ninth District concluded that the absence of white edge lines, which were yet to be repainted, meant that the hazard of the edge-drop “had not yet been mitigated at the margins [of the pavement].” Decision, ¶10. But this statement itself recognizes that the edge of the pavement is “the margin.” Even if the entire paved surface of the roadway were considered part of the “public road,” there is no way to include the edge-drop and the adjoining, unpaved berm or shoulder—which are beyond the pavement surface—as part of the “public road” consistent with R.C. 2744.01(H).

Because this accident occurred when the vehicle’s right wheels went off the paved roadway and onto the unpaved berm or shoulder, it was not caused by any condition of the “public road” as defined by the General Assembly. The Ninth District’s redefinition improperly disregards the statutory definition excluding berms and shoulders and must be reviewed and reversed.

Appellant’s Proposition Of Law No. II:

AN “EDGE DROP” AT THE LIMIT OF A PAVED ROADWAY IS NOT PART OF A “PUBLIC ROAD,” AND A POLITICAL SUBDIVISION IS ENTITLED TO IMMUNITY WHEN A MOTOR VEHICLE ACCIDENT IS PREMISED UPON A CONDITION OF A BERM, SHOULDER, EDGE OR RIGHT-OF-WAY.

Because R.C. 2744.01(H) expressly excludes berms and shoulders, the “public road” necessarily ends at the end of the horizontal surface of the pavement, even if there is no white edge line. Accordingly, an edge-drop—i.e., the vertical difference between the pavement surface and the unpaved berm or shoulder—by definition cannot be part of the “public road.” Accordingly, a vehicle which travels off the pavement has necessarily driven off the “public road”. By statutory definition and as a matter of law, the edge drop and the unpaved berm or shoulder cannot be part of the “public road” for which the political subdivision may be liable. The Ninth District’s decision is wrong as a matter of law and must be reviewed and reversed.

Appellants' Proposition of Law No. III:

THE ABSENCE OF WHITE EDGE LINES DOES NOT CONSTITUTE A FAILURE TO MAINTAIN A PUBLIC ROAD "IN REPAIR," UNLESS MANDATED BY THE OHIO MANUAL OF UNIFORM TRAFFIC CONTROL DEVICES.

The Ninth District's decision implies that the lack of white edge lines may have been negligence in the maintenance of the "public road." This ignores the express instruction of the General Assembly in R.C. 2744.01(H) that traffic control devices—which includes edge lines—are not part of a "public road" unless they are mandated by the Manual of Uniform Traffic Control Devices. In this case, white edge lines were not mandatory due to the low volume of traffic on the rural road. (Nor does the Ninth District even suggest that white edge lines were mandated in this case by the MUTCD as to become part of the "public road.") Thus, as a matter of law, the absence of the white edge lines could not have constituted a "failure to keep [the] public road in repair...." Indeed, had the county affirmatively decided not to spend the money to repaint the edge lines, it would not only have been entitled to do so by MUTCD but would have been immune in that decision under R.C. 2744.03(A)(5) as the exercise of judgment or discretion in the use of materials and supplies. It would be anomalous for the county to be liable for not yet doing something it could have decided not to do at all. Because white edge lines are not part of a "public road" unless expressly found to be mandatory, the Ninth District's decision must be reviewed and reversed.

Appellants' Proposition of Law No. IV:

WHEN A PUBLIC ROAD HAS BEEN RESTORED THROUGH THE PROCESS OF FULL-WIDTH RE-PAVING, SUCH ROAD IS "IN REPAIR" FOR PURPOSES OF R.C. 2744.02(B)(3) AS A MATTER OF LAW.

Appellants' Proposition of Law No. V:

ONGOING ROADWAY REPAIRS ARE NOT A "FAILURE TO KEEP PUBLIC ROADS IN REPAIR," UNLESS SUCH REPAIRS VIOLATE MANDATORY PROVISIONS OF THE OHIO MANUAL OF UNIFORM TRAFFIC CONTROL DEVICES.

OACTA will consider these two propositions together. The Ninth District's decision is troubling in that it suggests the statutory definition of "public road" is insufficient or inapplicable in the context of any ongoing roadway repair or maintenance project. The Ninth District considered the ongoing maintenance, which paved over the original white edge lines, might constitute negligence in maintaining the "public road." But as discussed above, the white edge lines were not mandatory and their absence could not have constituted failure to keep a "public road in repair." In crafting an unnecessary, novel, and expansive definition of "public road", the Ninth District has exposed political subdivisions to significant, unexpected liabilities not just in cases involving edge lines and edge drops but in all cases involving ongoing repairs. To the extent necessary to address ongoing repairs and maintenance, "failure to keep public roads in repair" must be construed consistent with R.C. 2744.01(H), i.e, that repair activities are not a "failure" to keep the public road in repair unless such repairs violate mandatory provisions of the Ohio Manual of Uniform Traffic Control Devices. Otherwise, the Ninth District's definition of "public road" will result in significant litigation across the state which the General Assembly intended to avoid.

CONCLUSION

For all the above reasons, Amicus Curiae Ohio Association of Civil Trial Attorneys respectfully requests that the Court accept jurisdiction of this appeal.

Respectfully submitted,

/s/ Kurt D. Anderson

Kurt D. Anderson (S.Ct. # 0046786)

*Counsel for Amicus Curiae Ohio
Association of Civil Trial Attorneys*

CERTIFICATE OF SERVICE

This hereby certifies that all counsel of record have been served by regular United States mail, postage prepaid, and electronic mail pursuant to applicable rule this 8th day of December, 2014.

/s/ Kurt D. Anderson

Kurt D. Anderson (S.Ct. # 0046786)