

IN THE SUPREME COURT OF OHIO
CASE NO.: 2014-2079

On Appeal From The Court of Appeals
Ninth Appellate District
Wayne County, Ohio
Case No. 13 CA 0029

RICKY ALLEN BAKER and SHARON MARIE BAKER,
Individually and as Administrators of the Estate of KELLI MARIE BAKER
Plaintiffs-Appellees

vs.

COUNTY OF WAYNE, et al.,
Defendants-Appellants

**AMICUS CURIAE BRIEF OF THE COUNTY COMMISSIONERS ASSOCIATION OF OHIO, THE
COUNTY RISK SHARING AUTHORITY, THE PUBLIC ENTITIES POOL OF OHIO, AND THE OHIO
TOWNSHIP ASSOCIATION RISK MANAGEMENT AUTHORITY IN
SUPPORT OF APPELLANTS COUNTY OF WAYNE, THE WAYNE COUNTY BOARD OF
COMMISSIONERS, AND THEIR UNNAMED EMPLOYEES**

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Proposition of Law of Amici Curiae: The road-repair exception contained in R.C. 2744.02(B)(3) only applies to "public roads" as defined by the Legislature under R.C. 2744.01(H). A court cannot redefine the term "public road" to include berms, shoulders, or rights-of-way when the Legislature itself has expressly refused to do so. (R.C. 2744.01(H) and R.C. 2744.02(B)(3) interpreted and applied.) 7

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I. STATEMENT OF INTEREST OF AMICI CURIAE AND INTRODUCTION

Amicus Curiae County Commissioners Association of Ohio (CCAO) is a private, not-for-profit statewide association of county commissioners and county council members founded in 1880 to promote the best practices and policies in the administration of county governments for the benefit of Ohio residents. CCAO's membership consists of the county commissioners of 86 of Ohio's 88 counties and the members of the Summit and Cuyahoga County Councils.

Amicus Curiae the County Risk Sharing Authority (CORSA) is a public entity risk pool providing broad property and liability coverage as well as comprehensive risk-management services. As of this filing, CORSA has 65 Ohio member counties, and 28 multi-county facilities and county-related entities. CORSA represents counties, boards of county commissioners and other elected officials throughout Ohio. CORSA is responsible for providing a defense for covered lawsuits filed in state and federal court for its member counties.

Amicus Curiae the Public Entities Pool of Ohio (PEP) is a local government risk-sharing pool endorsed by the Ohio Parks and Recreation Association, as well as the Association of Ohio Health Commissioners. The Pool was formed in 1987 for the primary purpose of providing cities, counties, villages, health districts, park districts and agricultural societies throughout the State of Ohio with an alternative to traditional insurance. PEP currently has 475 Members.

Amicus Curiae the Ohio Township Association Risk Management Authority (OTARMA) is a local government risk-sharing pool endorsed by the Ohio Township Association (OTA). The Pool was originally formed in 1987 for the primary purpose of providing townships throughout the State of Ohio with an alternative to traditional property and casualty insurance. The OTARMA Program is designed to provide Ohio townships with the coverages necessary to properly protect their assets. As of this filing, OTARMA currently has 957 members.

These amicus parties have a profound interest in seeing the Political Subdivision Tort Liability Act (R.C. § 2744.01 et seq.) interpreted properly. This case directly affects amici curiae and all of their members, which are political subdivisions. This case concerns an exception to presumptive immunity when injury is caused by the disrepair of a public road under R.C. 2744.02(B)(3). The Ninth District has improperly expanded liability for road-related injuries by effectively re-writing the Legislature's critical definition of "public road." In doing so, the Ninth District improperly created a judicial exception to Chapter 2744 immunity affecting all Ohio political subdivisions that are engaged in road construction, reconstruction, and maintenance. Amici Curiae respectfully urge this Court to accept jurisdiction to resolve the confusion created by the Ninth District's decision, and to ensure a uniform application of the Legislature's definition of "public road" under Ohio's Political Subdivision Tort Liability Act.

II. EXPLANATION OF WHY THIS CASE IS OF PUBLIC AND GREAT GENERAL INTEREST

Ohio's Political Subdivision Tort Liability Act provides presumptive immunity to all political subdivisions, including the Wayne County appellants. The primary legal issue is: Whether a court can impose liability on a political subdivision by re-defining an unequivocal legislative term (i.e., "public road") when the Legislature's definition ensures immunity be provided. The Ninth District's decision presents a pure legal issue of public and great general interest that is ideally suited for review in this Court.

The facts are simple and undisputed. An inexperienced teenage driver drove off the edge of a Wayne County road and then lost control of her car. (*See* Ninth District Opinion at ¶2.) The berm or shoulder had a slight drop from the road because it had not yet been built up during on-

going construction. The road itself was not in disrepair at the time of the accident. In fact, the road had just been repaved. Unfortunately, the driver was fatally injured.

Despite no evidence the road was in disrepair, the drivers' estate sued the Wayne County defendants. After extensive discovery, the trial court granted summary judgment in favor of the county defendants because the berm was not part of the "public road" and therefore plaintiff could not satisfy the negligent road-repair exception to immunity under R.C. 2744.02(B)(3). The trial court held the Wayne County defendants were immune under the express terms of the statute.

The Ninth District reversed and rendered a decision that contradicts the Legislature's express language and unequivocal intent, as well as Ohio precedent interpreting that language and intent. Even though the road itself was not in disrepair and a berm or shoulder by definition is not considered a "public road" under R.C. 2744.01(H), the Ninth District improperly re-defined "public road" in a construction context, holding "a public road is to be the area under control of the political subdivision, subject to the ongoing repair work, and open to travel by the public." (Opinion at ¶11.) This has no textual basis in the Act. Further, no court has ever endorsed this judicial expansion of liability to shoulders or berms that are "under control of the political subdivision." In fact, the Legislature and this Court have rejected this position. R.C. 2744.01(H) ("Public roads' means public roads, highways, streets, avenues, ... 'Public roads' does not include berms, shoulders, rights-of-way ..."); *Howard Miami Twp. Fire Division*, 119 Ohio St.3d 1, 2008-Ohio-2792, ¶29 (the Legislature "limited the definition of 'public roads' from the more expansive reading that included 'berms, shoulders, rights-of-way, or traffic control devices' to one that focused solely on the roadway itself.").

The Ninth District's decision presents a substantial issue of great general and public interest for several reasons. The Ninth District's decision is legally wrong and defies the Legislature's intent. It is impossible to believe that the Legislature when it drafted the limited "road repair" exception intended to change the definition of "public road" when the area near the road was under construction. Militating against the Ninth District's creation of new law, the Legislature's purpose was to limit liability of political subdivisions when it passed the Act. See *Doe v. Marlinton Local School District Bd. of Edn.*, 122 Ohio St.3d 12, 2009-Ohio-1360, ¶ 10 (The "manifest statutory purpose of R.C. Chapter 2744 is the preservation of the fiscal integrity of political subdivisions." [citations omitted].) Certainly, if the Legislature wanted to embrace this view of the "road repair" exception, it would have unequivocally stated that immunity did not apply when there is ongoing construction on a berm or shoulder. And, **moreover**, the Legislature would have certainly made clear that berms or shoulders were part of the "public road" in that circumstance.

Tellingly, the Legislature unequivocally provided that berms or shoulders are not part of the definition of "public road." R.C. 2744.01(H). This Court has long held that courts must not "under the guise of construction, [] ignore the plain terms of a statute or to insert a provision not incorporated by the legislature." *Akron v. Rowland*, 67 Ohio St.3d 374, 380 (1993). Here, despite the legislature's express definition of "public road," the Ninth District has effectively re-written the definition of "public road" to include the berm or shoulder in the legislative enactment. The Ninth District has improperly injected uncertainty into the law. This approach destroys the very purpose of the Statute to limit liability. It greatly expands liability far beyond the Legislature's intent.

The Ninth District's decision also conflicts with governing Supreme Court of Ohio precedent in *Howard v. Miami Twp. Fire Division*, 119 Ohio St.3d 1, 2008-Ohio-2792. The *Howard* court was explicit about the language and the intent of the Legislature's definition of "public road." This Court held that "S.B. 106 [which amended the Tort Liability Act in 2003] **limited the definition of 'public roads' from the more expansive reading that included 'berms, shoulders, rights-of-way, or traffic control devices' to one that focused solely on the roadway itself.** [emphasis added]" *Howard*, supra, at ¶ 29. If there could be any dispute on that point, that dispute would end with this Court's holding that the Legislature amended the definition of "public road" with a "legislative intent to limit political-subdivision liability for roadway injuries and death." (*Id.*)

While this Court explicitly held that a berm or shoulder is not considered a "public road" under R.C. 2744.01(H), the Ninth District improperly re-defined "public road" in a construction context. Failing to offer any proper authority for doing so (and none exists), the Ninth District created a new definition for "public road" that expands the Legislature's definition. As this Court has held in *Howard*, this is improper and contrary to the Legislature's text and intent.

The fact pattern posed by this case will frequently recur and the legal issue surpasses the narrow interests of the parties. The Ninth District's decision will touch almost every political subdivision large and small in the district and has implications for the entire state. With the thousands of miles of public roads that citizens travel every day and the ongoing maintenance and re-construction of these roads, these types of claims will regularly occur. Based on the conflict that the Ninth District created by redefining "public road" to include the berm or shoulder with the statutory definition of public road that excludes those terms, future litigants will undoubtedly be before this Court on this issue. This case presents an ideal platform to clarify

the law before unnecessary additional litigation ensues. Furthermore, the case presents a pure legal issue, devoid of factual conflict or a complicated fact pattern, making it ideally suited for review.

The Legislature has defined what constitutes a public road for purposes of political subdivision immunity. The judicial expansion of what constitutes a public road is an improper exercise of judicial powers that defies both the Legislature's intent and language as well as the bedrock principles of separation of powers. The Ninth District has expanded what constitutes a public road to encompass the berm, which the Legislature has intentionally kept distinct. When an accident is caused by the disrepair of a public road, there may be an exception to immunity under R.C. 2744.02(B)(3). But, the berm is not part of the public road. Yet, the Ninth District effectively re-wrote the definition of "public road" to include the berm when a road is under construction while adjudicating this tragic motor vehicle accident. That is not the role of the court. Despite the sad facts, a court cannot expand the legislature's grant of immunity or add words to the definition of public road. More than just a case of judicial overreach that forms a compelling basis for review, the Ninth District's decision creates unnecessary confusion in the case law that has consistently maintained the Legislature's distinction. (See e.g., *Howard*, supra.)

This case presents issues of critical importance to Ohio's political subdivisions. Review by this Honorable Court will provide guidance to all Ohio courts in which political subdivisions - and especially counties and townships -- are litigants. Therefore, this matter is of great general or public interest warranting this Court's review.

III. STATEMENT OF THE CASE AND FACTS

Amici Curiae adopt Appellants/Defendants' statement of the case and facts.

IV. LAW AND ANALYSIS

PROPOSITION OF LAW OF AMICI CURIAE: THE ROAD-REPAIR EXCEPTION CONTAINED IN R.C. 2744.02(B)(3) ONLY APPLIES TO "PUBLIC ROADS" AS DEFINED BY THE LEGISLATURE UNDER R.C. 2744.01(H). A COURT CANNOT REDEFINE THE TERM "PUBLIC ROAD" TO INCLUDE BERMS, SHOULDERS, OR RIGHTS-OF-WAY WHEN THE LEGISLATURE ITSELF HAS EXPRESSLY REFUSED TO DO SO. (R.C. 2744.01(H) AND R.C. 2744.02(B)(3) INTERPRETED AND APPLIED.)

Whether a political subdivision is immune is a question of law. *Conley v. Shearer* (1992), 64 Ohio St.3d 284, 292. As a political subdivision, Wayne County -- and the Wayne County Defendants -- are presumptively immune. R.C. § 2744.02(A); *see also Cook v. City of Cincinnati*, 103 Ohio App.3d 80, 85-86, 90 (1995) (observing a presumption of immunity). Plaintiffs bear the burden of demonstrating an exception to immunity applies. When immunity is raised, as here, the “burden lies with the plaintiff to show that one of the recognized exceptions apply” under R.C. § 2744.02(B). *Maggio v. Warren*, 11th Dist. No. 2006-T-0028, 2006-Ohio-6880 at ¶ 37.

The exception for the “negligent failure to keep roads in repair” is at issue in this case.

That exception provides:

[P]olitical 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** ...

R.C. § 2744.02(B)(3)(emphasis added). Importantly, this exception only applies to public roads as defined by R.C. 2744.01(H).

A. The Legislature has unequivocally defined a "public road" under the Tort Liability Act.

The Legislature has unequivocally defined what constitutes a "public road." "'Public roads' means public roads, highways, streets, avenues, alleys, and bridges within a political subdivision." R.C. 2744.01(H). The Legislature has also defined what does not constitute a "public road." "'Public roads' **does not include** berms, shoulders, rights-of-way ..." *Id.*

Here, the Ninth District acknowledged that the teenage driver drove off of the road. This case does not present a road-repair issue. Rather, the issue is whether a court can inject terms into a legislative definition to create an exception to immunity. A court cannot. Yet, the Ninth District did exactly that and created its own definition that is contrary to the Legislature's definition. The Ninth District improperly re-defined "public road" in a construction context, holding "a public road is to be the area under control of the political subdivision, subject to the ongoing repair work, and open to travel by the public." (Opinion at ¶11.)

Well-established statutory interpretation rules prohibit a court from creating an exception that does not exist in Chapter 2744. A court's duty is to construe statutes in a manner to "ascertain and give effect to the legislative intent." *Elston v. Howland Local Schools* (2007), 113 Ohio St.3d 314. The judicial branch of government "cannot extend the statute beyond that which is written, for '[i]t is the duty of this court to give effect to the words used [in a statute], not to delete words used or to insert words not used.'" *Sarmiento v. Grange Mut. Cas. Co.* (2005), 106 Ohio St.3d 403, 408-09, citing *Bernardini v. Conneaut Area City School Dist. Bd. of Edn.* (1979), 58 Ohio St.2d 1, 4. To do so would enlarge the scope of the statute beyond that which the General Assembly enacted.

The appellate court may have disagreed with the principles of political subdivision immunity. Or, the court may have believed those principles should not apply to the tragic facts of this case. Or, the appellate court may have simply misinterpreted the Legislative intent. Despite the reason, the judiciary cannot create an exception to immunity by re-defining a statutory term. This Court has made clear that the "wisdom of legislation is beyond the purview of the courts." *State ex rel. Ohio Academy of Trial Lawyers v. Sheward* (1999), 86 Ohio St.3d 451, 455. The lower appellate court effectively made a policy choice and judicially created an

exception to avoid the statutory required result of immunity. All arguments going to the soundness of legislative policy choices, however, are directed to their proper place, which is outside the door of this courthouse. Even this Court “has nothing to do with the policy or wisdom of a statute. That is the exclusive concern of the legislative branch of the government.” *State ex rel. Bishop v. Mt. Orab Village School Dist. Bd. of Ed.* (1942), 139 Ohio St. 427, 438. Even the judicial inquiry into the constitutionality of a statute involves the question of legislative power, not legislative wisdom. *State ex rel. Bowman v. Allen Cry. Bd. of Commrs.* (1931), 124 Ohio St. 174, 196, 177 N.E. 271, 278.

The Ninth District has chosen to disagree with the legislative balance struck in the immunity statute and has adopted its own view of the legislative priorities under a cloak of statutory interpretation of the Act. This improper judicial activism should not be allowed. Policy is for the legislature. Courts are not to legislate from the bench.

B. A court cannot re-define a legislatively defined term without improperly overlapping judicial and legislative authority.

The court of appeals decision is inimical to the separation of powers doctrine that goes to the heart of Ohio’s governmental system. The Legislature defined "public road," expressly providing what constitutes a public road and what does not constitute a public road.

Yet, the Ninth District improperly re-defined "public road" in a construction context, holding “a public road is to be the area under control of the political subdivision, subject to the ongoing repair work, and open to travel by the public.” There is no authority for changing the definition of public road under R.C. 2744.01(H) in a construction context or otherwise. Only the Legislature can change the definition.

The Ninth District's novel definition does not exist in the express language of the statute, and cannot be fairly inferred from the intent of the Legislature in drafting the statute. Indeed, the General Assembly, as the final arbiter of public policy in Ohio, has intended “to limit political-subdivision liability for roadway injuries and deaths,” *Howard v. Miami Twp. Fire Div.*, 119 Ohio St.3d 1, 2008-Ohio-2792, 891 N.E.2d 311, ¶ 29. The Legislature’s role in establishing public policy for the state is reinforced by the Ohio Constitution Art. II, § 1 (1912), which provides that “the Legislative power of the state shall be vested in a General Assembly ...” If allowed to stand, a court’s creation of this exception would override this constitutional mandate by authorizing overlapping authority.

This Court has long recognized the importance of the doctrine of separation of powers. *Drake v. Rogers* (1861), 13 Ohio St. 21, 29-30. Although the Ohio Constitution does not contain a provision expressly creating the separation of powers doctrine, this Court has recognized the doctrine to be “implicitly embedded in the entire framework of those sections of the Ohio Constitution that define the substance and scope of powers granted to the three branches of state government.” *South Euclid v. Jemison* (1986), 28 Ohio St.3d 157, 159. The doctrine of separation of powers is implied in the Ohio Constitution because “... each of the three grand divisions of the government, must be protected from encroachments by the others, so far that its integrity and independence may be preserved.” *Id. citing Fairview v. Giffie* (1905), 73 Ohio St. 183.

The Ninth District's judicial limitation on statutory immunity is destructive to the separation of powers doctrine that this Court has long held in the highest regard. This Court has asserted, “Probably our chief contribution to the science of government is the principle of the complete separation of the three departments of government, executive, legislative and judicial.

No feature of the American system has excited greater admiration.” *State ex. rel. Greenlund v. Fulton* (1919), 99 Ohio St. 168, 187, 124 N.E. 172, 177. In accord with the bedrock principles of separations of powers and constitutional mandates, this Court should accept this case to overrule the appellate court’s decision and protect the statutory definition.

C. The intent of the Tort Liability Act rejects the Ninth District's decision.

Immunity under the Political Subdivision Tort Liability Act is designed to limit liability to certain causes of action and bring an early end to litigation without the need for a trial and extensive discovery. The ninth district’s decision expands liability and opens the door to new litigation, while doing violence to the Act. The ninth district has created a new imposition of a duty and consequent liability, while eliminating a recognized immunity. Political subdivisions are not insurers of the safety of motorists on public roadways. The ninth district’s decision was legally wrong and contravenes the Legislature’s intent to limit liability for roadway lawsuits for a failure to keep roads in repair.

This Court has held:

The General Assembly enacted R.C. Chapter 2744, stating that “the protections afforded to political subdivisions and employees of political subdivisions by this act are urgently needed in order to ensure the continued orderly operation of local governments and the continued ability of local governments to provide public peace, health, and safety services for their residents.” ... “ [t]he manifest statutory purpose of R.C. Chapter 2744 is the preservation of the fiscal integrity of political subdivisions.’ ” [Citations omitted.]

Summerville v. Forest Park, 128 Ohio St.3d 221, 2010-Ohio-6280 at ¶ 38.

The Ninth District’s decision imposed liability where none previously existed under the Tort Liability Act. In the Legislative wake of limiting liability (see *Howard supra*), the Ninth District’s decision expands the duties and liabilities of public entities across the state. This case presents an issue of critical importance to Ohio’s public entities. Review by this Honorable Court

will provide guidance to all Ohio courts and litigants. Therefore, this matter is of great general or public interest warranting this Court's review.

V. CONCLUSION

Amici Curiae on behalf of the Appellants/Defendants County of Wayne, Wayne County Board of Commissioners and their Unnamed Employees respectfully ask this Court to accept this appeal for review.

Respectfully submitted,

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CERTIFICATE OF SERVICE

A copy of the foregoing Amicus Curiae Brief of the County Commissioners Association of Ohio, The County Risk Sharing Authority, The Public Entities Pool of Ohio, and The Ohio Township Association Risk Management Authority in Support of Appellants was served December 8, 2014 by depositing same in first-class United States mail, postage prepaid, to the following:

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