

**IN THE SUPREME COURT OF OHIO**

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PAUL RISNER AND CATHERINE RISNER,  
CO-ADMINISTRATORS OF THE ESTATE OF  
AMBER RISNER, A DECEASED MINOR,

Plaintiffs-Appellees,

v.

OHIO DEPARTMENT OF TRANSPORTATION,

Defendant-Appellant.

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Case No. 2014-0862

On Appeal from the Franklin  
County Court of Appeals,  
Tenth Appellate District

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**BRIEF OF *AMICUS CURIAE***  
**THE OHIO ASSOCIATION FOR JUSTICE**  
**IN SUPPORT OF PLAINTIFFS-APPELLEES**

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**TABLE OF CONTENTS**

Table of Authorities ..... iv

Interest of *Amicus Curiae* the Ohio Association for Justice ..... 1

Statement of the Case and Facts ..... 1

Summary of Argument ..... 2

Argument ..... 6

    I. Immunity law and tort-duty law are independent. .... 6

    II. ODOT’s proposition of law does not implicate R.C. 2743.02(A)(1) immunity. .... 7

        A. Standard of review. .... 7

        B. *Reynolds v. State*, 14 Ohio St.3d 68 (1984), and its progeny. .... 8

        C. The State is not immune from liability for decisions “implementing” discretionary policies. .... 12

        D. ODOT’s proposition of law does not implicate “exercise of an executive or planning function involving the making of a basic policy decision which is characterized by the exercise of a high degree of official judgment or discretion.” ..... 12

        E. Conclusion. .... 16

    III. *Proposition of Law*: When the Ohio Department of Transportation chooses to “improve” a State road, the tort duty associated with implementing the improvement is to make the road around the improvement reasonably safe under then-current safety standards. .... 16

        A. Standard of review. .... 16

        B. Introduction. .... 16

        C. The Tenth District line of cases. .... 18

        D. ODOT’s Location and Design Manual effectively establishes the duty of care when implementing a road improvement. .... 21

        E. The more prudent rule of tort duty is that when ODOT chooses to “improve” a State road, the tort duty associated with implementing the improvement is to make the road around the improvement reasonably safe under then-current safety standards. .... 22

        F. ODOT’s “defenses by analogy.” ..... 27

G. Conclusion. ....	30
Conclusion .....	31
Certificate of Service .....	31

## TABLE OF AUTHORITIES

### Cases

<i>Anderson v. Ohio Dept. of Insurance</i> , 58 Ohio St.3d 215 (1990), overruled on other grounds, <i>Wallace v. Ohio Dept. of Commerce</i> , 96 Ohio St.3d 266, 2002-Ohio-4210, paragraph one of the syllabus, ¶ 31 .....	4, 6
<i>Balbach v. Ohio Dept. of Transp.</i> , 67 Ohio App.3d 582, 586-87 (10th Dist. 1990) .....	14, 21
<i>Bennett v. Ohio Dept. of Rehab. &amp; Correction</i> , 60 Ohio St.3d 107 (1991) .....	10-12
<i>Bowman v. Ohio Dept. of Transp.</i> , 10th Dist. No. 83AP-516, 84-LW4341, 1984 Ohio App. LEXIS 10745 (Aug. 30, 1984) .....	18, 19
<i>Coleman v. Portage Cty. Engineer</i> , 133 Ohio St.3d 28, 2012-Ohio-3881 .....	25-26
<i>Conley v. Shearer</i> , 64 Ohio St.3d 284 (1992) .....	7
<i>Crawford v. State</i> , 57 Ohio St.3d 184 (1991) .....	4, 6, 9
<i>Estate of Morgan v. Ohio Dept. of Transp.</i> , 10th Dist. No. 10AP-362, 2010-Ohio-5969 .....	14, 20-21, 26, 30
<i>Farmer v. Village of Gambier</i> , 5th Dist. No. 03-CA-35, 2004-Ohio-5000 .....	28
<i>Galay v. Ohio Dept. of Transp.</i> , 10th Dist. No. 05AP-383, 2006-Ohio-4113 .....	20
<i>Garland v. Ohio Dept. of Transp.</i> , 48 Ohio St.3d 10 (1990) .....	9
<i>Hayward v. Summa Health System</i> , 139 Ohio St.3d 238, 2014-Ohio-1913 .....	7, 16
<i>Hickey v. Zezulka</i> , 487 N.W.2d 106 (Mich. 1992), superseded on other grounds by statute as stated in <i>Lamp v. Reynolds</i> , 645 N.W.2d 311, 319 (Mich. App. 2002) .....	27
<i>Hubbell v. City of Xenia</i> , 115 Ohio St.3d 77, 2007-Ohio-4839 .....	7
<i>Hurier v. Ohio Dept. of Transp.</i> , 10th Dist. No. 01AP-1632, 2002-Ohio-4499 .....	12, 14, 19, 21
<i>Hurst v. Ohio Dept. of Rehab. &amp; Correction</i> , 72 Ohio St.3d 325 (1995), overruled on other grounds, <i>Wallace v. Ohio Dept. of Commerce</i> , 96 Ohio St.3d 266, 2002-Ohio-4210, paragraph one of the syllabus, ¶ 31 .....	4, 6
<i>Jeska v. Ohio Dept. of Transp.</i> , 10th Dist. No. 98AP-1402, 99-LW-3867, 1999 Ohio App. LEXIS 4246 (Sept. 16, 1999) .....	12
<i>Knickel v. Dept. of Transp.</i> , 49 Ohio App.2d 335 (10th Dist. 1976) .....	18
<i>Leskovac v. Ohio Dept. of Transp.</i> , 71 Ohio App.3d 22 (10th Dist. 1990) .....	12

<i>Longfellow v. State</i> , 10th Dist. No. 92AP-549, 92-LW-5998, 1992 Ohio App. LEXIS 6784 (Dec. 24, 1992) .....	19
<i>Lopez v. Ohio Dept. of Transp.</i> , 37 Ohio App.3d 69 (10th Dist. 1987) .....	18
<i>Lunar v. Ohio Dept. of Transp.</i> , 61 Ohio App.3d 143 (10th Dist. 1989) .....	19-20
<i>Manufacturer’s Natl. Bank of Detroit v. Erie Cty. Road Commn.</i> , 63 Ohio St.3d 318 (1992) .....	26
<i>Mistovich v. Ohio Dept. of Transp.</i> , Ct. Claims No. 2004-02989, 2005-Ohio-6308 .....	21
<i>Mussivand v. David</i> , 45 Ohio St.3d 314 (1989) .....	2, 14, 16, 21
<i>Rahman v. Ohio Dept. of Transp.</i> , 10th Dist. No. 05AP-439, 2006-Ohio-3013 .....	14, 20, 21, 26
<i>Reynolds v. State</i> , 14 Ohio St.3d 68 (1984) .....	4, 8, 9, 12
<i>Riches v. Ohio Dept. of Transp.</i> , Ct. Claims No. 2008-10749, 2009-Ohio-5446 .....	14, 21
<i>Risner v. Ohio Dept. of Transp.</i> , 10th Dist. No. 12AP-828, 2013-Ohio-5698 .....	14, 21
<i>Semadeni v. Ohio Dept. of Transp.</i> , 75 Ohio St.3d 128 (1996) .....	11
<i>Sobczak v. Ohio Dept. of Transp.</i> , 10th Dist. No. 09AP-388, 2010-Ohio-3324 .....	20
<i>State v. Hatfield</i> , 158 Ohio Misc.2d 51, 2010-Ohio-4003 (Morrow Cty. Muni. Ct.) .....	14, 21
<i>Steele v. Ohio Dept. of Transp.</i> , 162 Ohio App.3d 30, 2005-Ohio-3276 (10th Dist.) .....	14
<i>Stetter v. R.J. Corman Derailment Servs. LLC</i> , 125 Ohio St.3d 280, 2010-Ohio-1029 .....	24
<i>Theobald v. Univ. of Cincinnati</i> , 111 Ohio St.3d 541, 2006-Ohio-6208 .....	7
<i>Wallace v. Ohio Dept. of Commerce</i> , 96 Ohio St.3d 266, 2002-Ohio-4210 .....	4, 6, 11-12, 24
<i>White v. Ohio Dept. of Transp.</i> , 56 Ohio St.3d 39 (1990) .....	14, 21
<i>Wiebelt v. Ohio Dept. of Transp.</i> , 10th Dist. No. 93AP-117, 93-LW-3714, 1993 Ohio App. LEXIS 3242 (June 24, 1993) .....	19

**Statutes**

R.C. 303.19 .....	28
R.C. 2125.01 .....	24
R.C. 2315.18 – .21 .....	24
R.C. 2501.01(J) .....	16

R.C. 2743.02(A)(1) .....	<i>passim</i>
R.C. 2743.20 .....	16
R.C. 2744.01 .....	25-26
R.C. 2744.02(B)(3) .....	26
R.C. 4511.21 .....	30

**Other Authorities**

Black’s Law Dictionary (9th ed. 2009) .....	28
Ohio Dept. of Public Safety, Table 1.01, General Statistics, Ohio Motor Vehicle Crash Highlights at a Glance, <a href="https://ext.dps.state.oh.us/crash%20statistics/CrashReports.aspx">https://ext.dps.state.oh.us/crash statistics/CrashReports.aspx</a> .....	29
Ohio Dept. of Transp., Location and Design Manual .....	<i>passim</i>
Ohio Dept. of Transp., Manual of Uniform Traffic Control Devices (2012) .....	14, 21, 28, 30
Oliver Wendell Holmes, Jr., The Common Law (Univ. Toronto Law School 2011) .....	26
W. Page Keeton, <i>et al.</i> , Prosser and Keeton on Torts (5th ed. 1984) .....	4, 6, 24-25, 30

**INTEREST OF *AMICUS CURIAE***  
**THE OHIO ASSOCIATION FOR JUSTICE**

The Ohio Association for Justice is Ohio’s largest victims-rights advocacy association, comprised of 1,500 attorneys dedicated to promoting the public good through efforts to secure a safe workplace, clean and safe environment, safe products, and quality health care. The OAJ is devoted to strengthening the civil justice system so that deserving individuals can get justice and wrongdoers are held accountable.

**STATEMENT OF THE CASE AND FACTS**

The Ohio Association for Justice accepts the Statement of the Case and the Statement of Facts in the brief of Plaintiffs-Appellees.

## SUMMARY OF ARGUMENT

***Proposition of Law:* When the Ohio Department of Transportation chooses to “improve” a State road, the tort duty associated with implementing the improvement is to make the road around the improvement reasonably safe under then-current safety standards.**

The Risners’ action is an action for negligence against the State, acting through the Ohio Department of Transportation (ODOT). In a negligence action, the plaintiff must prove three elements: (1) a duty of care, (2) breach of that duty, and (3) injury proximately caused by that breach of duty. *Mussivand v. David*, 45 Ohio St.3d 314, 318 (1989). The sole proposition of law proposed by Appellant ODOT is:

When ODOT makes discrete highway improvements, only those particular improvements need to meet the current construction standards.<sup>[1]</sup>

ODOT’s proposition of law concedes (1) that ODOT “improved” the intersection at which Amber Risner died, and (2) that ODOT had a tort duty to implement that “discrete improvement” in compliance with then-current construction standards. The question presented by ODOT’s proposition of law is whether that tort duty of care when implementing an improvement is

- to make only the discrete improvement safe—even if doing so leaves the road around the improvement unreasonably dangerous under the then-current safety standards (as ODOT proposes), or
- to make the discrete improvement and the road around the improvement reasonably safe under the then-current safety standards (as required by the court of appeals decision in this case).

The latter rule is the more prudent rule of tort duty, because it encourages upgrading the safety of roads yet leaves to ODOT the absolute, unreviewable, immunized discretion to decide whether,

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<sup>1</sup> The proposition of law quoted above is that set forth in ODOT’s May 27, 2014 Memorandum in Support of Jurisdiction (pp. i, 9), and thus is the proposition of law accepted by this Court for review. The proposition of law set forth in ODOT’s October 28, 2014 brief (pp. i, 7) is: “When ODOT makes discrete improvements to a roadway, only those particular improvements need to meet the current construction standards.” This *amicus* brief assumes there is no substantive difference between these two propositions.

if ever, to improve a road.

The rule encourages upgrading the safety of roads. Under ODOT's proposed rule, Ohioans could expect only partial solutions to dangerous roads. This case is an example. ODOT knew for years before Amber Risner died that this intersection was dangerous. ODOT's partial fix left the road out of compliance with ODOT's own safety standards in effect at that time. A rule of tort duty exposing the State to liability if it makes an improvement that falls short of fixing a known danger will encourage upgrading roads to ODOT's own safety standards—to actually remediate known dangers.

The rule also keeps the judiciary out of road-improvement decision-making, leaving all such decision-making to ODOT:

- ODOT has no tort duty to improve a road, no matter how obsolete and unreasonably dangerous the road is. ODOT has absolute, unreviewable, immunized, discretionary authority to decide when, if ever, to improve a road.
- The Tenth District Court of Appeals has effectively adopted ODOT's own safety standards as the tort duty of care.
- ODOT's safety standards are minimum standards that ODOT is at liberty to exceed.
- The duty at issue is merely a tort duty—not a “legal duty” enforceable in mandamus. The Tenth District line of cases requires nothing of ODOT except to pay damages when violation of a tort duty proximately causes injury. So

For all these reasons, this Court should hold that when the Ohio Department of Transportation chooses to “improve” a State road, the tort duty associated with implementing the improvement is to make the road around the improvement reasonably safe under then-current safety standards.

**ODOT’s proposition of law does not implicate R.C. 2743.02(A)(1) immunity.**

The law of immunity and the law of tort duty are independent. This is necessarily so: the whole purpose of immunity is to absolve of liability a defendant who otherwise would be liable. See W. Page Keeton, *et al.*, Prosser and Keeton on Torts 1042-43 (5th ed. 1984); *Hurst v. Ohio Dept. of Rehab. & Correction*, 72 Ohio St.3d 325, 329 (1995), overruled on other grounds, *Wallace v. Ohio Dept. of Commerce*, 96 Ohio St.3d 266, 2002-Ohio-4210, paragraph one of the syllabus, ¶ 31; *Crawford v. State*, 57 Ohio St.3d 184, 187-90 (1991) (separately analyzing questions of immunity and duty, and ruling a duty existed); *Anderson v. Ohio Dept. of Insurance*, 58 Ohio St.3d 215, at 217-19 (1990) (same, except ruling that no duty existed), overruled on other grounds, *Wallace*, 96 Ohio St.3d 266, 2002-Ohio-4210, at paragraph one of the syllabus, ¶ 31. ODOT’s brief erroneously conflates the two bodies of law under a single proposition of law.

ODOT’s proposition of law does not implicate R.C. 2743.02(A)(1) immunity. R.C. 2743.02(A)(1) provides the general rule that the State waives its immunity and consents to being held liable “in accordance with the same rules of law applicable to suits between private parties.” The Risners are entitled to pursue their negligence claims “in accordance with the same rules of law applicable to suits between private parties.”

In the landmark case *Reynolds v. State*, 14 Ohio St.3d 68 (1984), the Court explained that this phrase means that the State retains sovereign immunity with respect to “the exercise of an executive or planning function involving the making of a basic policy decision which is characterized by the exercise of a high degree of official judgment or discretion.” *Id.* at paragraph one of the syllabus. ODOT’s proposition of law does not implicate R.C. 2743.02(A)(1) immunity because it does not implicate such discretionary decision-making. ODOT’s proposition of law raises not a question of immunity but rather a question of tort duty—namely, what the “duty of care,” or “standard of care,” shall be in *implementing* ODOT’s immunized, discretionary, poli-

cy-making decision to “improve” a road. The issue for judicial determination in this case is *not* what particular improvements should have performed to make this particular intersection safe. ODOT’s proposition of law *concedes* that ODOT “improved” the intersection at which Amber Risner died. The question presented by ODOT’s proposition of law is an either/or question: whether the duty of care when implementing an improvement is

- to make only the discrete improvement safe, even if that improvement leaves the road around the improvement unreasonably dangerous (as ODOT proposes), or
- to make the discrete improvement and the road around that improvement safe (as required by the court of appeals decision in this case).

The answer to this question will have global application. It is one rule or the other, and neither would have courts on a case-by-case basis second-guessing any ODOT decision.

**Conclusion.**

One of the purposes of tort law is to encourage safety. The Tenth District’s decision in this case is prudent, advances a purpose of tort law, and is consistent with a line of Tenth District cases dating back to the enactment of the Court of Claims Act. This Court should affirm.

## ARGUMENT

### I. Immunity law and tort-duty law are independent.

The law of immunity and the law of tort duty are independent. In discussing the common-law public-duty rule, this Court illustrated this independence:

The public duty rule comprises a defense independent of sovereign immunity. The rule originated in English common law and survived the abrogation of sovereign immunity. It is used to determine the first element of negligence, the existence of a duty on the part of the state.

*Hurst v. Ohio Dept. of Rehab. & Correction*, 72 Ohio St.3d 325, 329 (1995) (citations omitted), overruled on other grounds, *Wallace v. Ohio Dept. of Commerce*, 96 Ohio St.3d 266, 2002-Ohio-4210, paragraph one of the syllabus, ¶ 31. See *Crawford v. State*, 57 Ohio St.3d 184, 187-90 (1991) (separately analyzing questions of immunity and duty, and ruling a duty existed); *Ander-son v. Ohio Dept. of Insurance*, 58 Ohio St.3d 215, at 217-19 (1990) (same, except ruling that no duty existed), overruled on other grounds, *Wallace*, 96 Ohio St.3d 266, 2002-Ohio-4210, at paragraph one of the syllabus, ¶ 31. This independence is necessarily so, because the whole purpose of immunity is to absolve of liability a defendant who otherwise would be liable. The leading treatise on torts explains that while confusion is common, the distinction is significant not only as a technical matter but as a practical matter:

[C]ourts have confused the issues of duty and negligence on the one hand with the issue of the discretionary immunity on the other. It seems fairly clear in at least some of the cases that courts have decided negligence or duty issues under the guise of “discretion.” Perhaps this has not always led to a bad result, but the difference is quite important in many cases. The discretionary immunity issue, often viewed as jurisdictional, is usually resolved on motion to dismiss or on summary judgment motion—in other words, resolved without a full trial on the merits. If this device is in fact used to decide negligence and duty issues, the judge is likely to be acting without adequate factual development.

W. Page Keeton, *et al.*, *Prosser and Keeton on Torts* 1042-43 (5th ed. 1984) (footnote omitted).

To its credit, ODOT’s brief reflects this distinction between these two areas of the law in that Parts A and B (pp. 8-23) of ODOT’s brief address immunity law, and Part C (pp. 23-26) mostly addresses tort-duty law. To its discredit, however, ODOT’s brief conflates the two bodies of law under a single proposition of law and argues in Part D (pp. 27-33) as if immunity and tort duty cannot be separated. Indeed, even in Part C of its brief, ODOT conflates the two: The first and last sentences on page 26, respectively, inconsistently assume there is no discretionary-function doctrine and argues for the discretionary-function doctrine.

ODOT’s proposition of law concerns the scope of the “duty” element in a negligence action and does not implicate immunity law. But because ODOT argues to the contrary, and because immunity is a threshold issue, this brief discusses immunity first, in Part II below. Part III addresses the law of tort duty, arguing that when ODOT chooses to “improve” a State road, the tort duty associated with implementing the improvement is to make the road around the improvement reasonably safe under then-current safety standards, such standards being those set forth in the latest version of ODOT’s Location and Design Manual.

## **II. ODOT’s proposition of law does not implicate R.C. 2743.02(A)(1) immunity.**

### **A. Standard of review.**

The applicability of an immunity from liability is a question of law. *Conley v. Shearer*, 64 Ohio St.3d 284, 292 (1992); *Hubbell v. City of Xenia*, 115 Ohio St.3d 77, 2007-Ohio-4839, ¶¶ 20-21; *Theobald v. Univ. of Cincinnati*, 111 Ohio St.3d 541, 2006-Ohio-6208, ¶ 14. Appellate courts review questions of law *de novo*. *Hayward v. Summa Health System*, 139 Ohio St.3d 238, 2014-Ohio-1913, ¶ 23.

**B. *Reynolds v. State*, 14 Ohio St.3d 68 (1984), and its progeny.**

Prior to 1975 the State of Ohio enjoyed sovereign immunity with respect to the design and construction of State roads. In 1975, the Ohio General Assembly waived the State's sovereign immunity and adopted the Court of Claims Act, codified in R.C. Chapter 2743. *Reynolds*, 14 Ohio St.3d at 69. Other than a minor amendment in 2012 that is not material to this case, R.C. 2743.02 remains unchanged since before the 2009 accident that killed Amber Risner.

R.C. 2743.02(A)(1) provides the general rule that the State waives its immunity and consents to being held liable in accordance with the same rules of law applicable to suits between private parties:

The state hereby waives its immunity from liability . . . and consents to be sued, and have its liability determined, in the court of claims created in this chapter in accordance with ***the same rules of law applicable to suits between private parties***, except that the determination of liability is subject to the limitations set forth in this chapter . . . .

R.C. 2743.02(A)(1) (emphasis added). This Court has clarified the meaning of the phrase “the same rules of law applicable to suits between private parties” in the following series of cases.

In the landmark case *Reynolds v. State*, 14 Ohio St.3d 68 (1984), the Court explained that this phrase means that the State retains sovereign immunity with respect to “the exercise of an executive or planning function involving the making of a basic policy decision which is characterized by the exercise of a high degree of official judgment or discretion”:

The language in R.C. 2743.02 that “the state” shall “have its liability determined \* \* \* in accordance with the same rules of law applicable to suits between private parties \* \* \* ” means that the state cannot be sued for its legislative or judicial functions or ***the exercise of an executive or planning function involving the making of a basic policy decision which is characterized by the exercise of a high degree of official judgment or discretion***. However, once the decision has been made to engage in a certain activity or function, the state may be held liable, in the same manner as private parties, for the negligence of the actions of its employees and agents in ***the performance*** of such activities.

*Id.* at paragraph one of the syllabus (emphasis added). *Reynolds* thus established a line between

- “the exercise of an executive or planning function involving the making of a basic policy decision which is characterized by the exercise of a high degree of official judgment or discretion,” and
- “the performance of such activities.”

The challenge thereafter for the Court of Claims, the Tenth District Court of Appeals, and this Court was to decide which activities fall on either side of that line. In *Reynolds*, this Court held that the State’s decision to grant work-release furlough to a prisoner is immunized, but the State’s violation of a statute requiring the State to confine a work-release-furloughed prisoner during off hours is not immunized and is (as a matter of tort-duty law) negligence *per se*. *Id.* at 70.

Six years later, in *Garland v. Ohio Dept. of Transp.*, 48 Ohio St.3d 10 (1990), the Court addressed the temporal aspect of the distinction between immunized, discretionary policy/planning and non-immunized performance/implementation. The Court held that both the decision whether to install a traffic control device and the decision of which traffic control device to install are immunized, discretionary, policy/planning decisions. *Id.* at paragraph one of the syllabus, 11-12. The Court also held that “once an agency has made a discretionary decision, it has a reasonable amount of time to implement that decision without incurring tort liability.” *Id.* at 12. The “reasonable amount of time” qualification, and the Court’s statement that “an agency may not delay implementation indefinitely,” *id.*, suggested that the State loses immunity once a “reasonable amount of time” has passed without performance/implementation.

*Crawford v. State*, 57 Ohio St.3d 184 (1991), like *Reynolds*, arose from crime committed by a work-release-furloughed prisoner. In *Crawford*, the Court ruled that the State’s decision to send the prisoner to an Alcoholics Anonymous meeting (from which he absconded), is not entitled to immunity for three reasons: (1) “[t]he determination to send one particular individual to outside A.A. meetings cannot be said to be a ‘basic policy decision’ within the meaning of *Reyn-*

*olds;*” (2) “[t]he determination is not characterized by the exercise of a high degree of official judgment or discretion [but] [r]ather . . . is a decision that is operational in nature, relating to the day-to-day business of the [Adult Parole Authority] Center;” and (3) “there is no statutory authority” for allowing a furlougee to attend an outside A.A. meeting. *Id.* at 187. The Court also followed *Reynolds* by ruling that allowing the furlougee to attend the outside A.A. meeting was negligence *per se*. *Id.* at 189-90.

In *Bennett v. Ohio Dept. of Rehab. & Correction*, 60 Ohio St.3d 107 (1991), a former prisoner asserted a tort claim for false imprisonment on the ground that he was confined beyond the expiration of his sentence. *Id.* at 109. This Court ruled that the State was not immune from the claim. *Id.* at 110.

The Court in *Bennett* also rejected one of the arguments that ODOT makes here, that the unique sovereignty of the State is a factor in determining whether the State’s liability can be “determined in accordance with the same rules of law applicable to suits between private parties.” ODOT contends that R.C. 2743.02(A)(1) immunity “does not extend to actions that only the State can carry out” (ODOT Brf. 1, ¶ 3) and that R.C. 2743.02(A)(1), in the guise of the “discretionary-function doctrine, . . . recognizes that when the State acts in a way that private citizens do not, the State cannot be liable in tort for breaching a duty to private actors” (ODOT Brf. 1, last paragraph). ODOT contends that “[t]his principle is expressed in the Court of Claims Act’s language that limits suits against the State to those that can be decided by the same ‘rules of law’ applicable to private parties.” (ODOT Brf. 2, ¶ 1.) The Court in *Bennett* rejected such notions:

The state’s second contention is that the state is immune from liability on the false imprisonment claim because the claim is really for ‘parole revocation improprieties and therefore is not based on “the same rules of law applicable to suits between private parties.” . . . . [¶] The tort of false imprisonment is a rule of law that is generally applicable to private parties. Consequently, pursuant to R.C. 2743.02(A)(1), the state may be held liable for the false imprison-

ment of its prisoners. The state cannot avoid that liability in this case merely because the lawfulness of its asserted privilege to confine plaintiff must be determined by legal principles governing alleged “parole revocation improprieties.”

*Bennett*, 60 Ohio St.3d at 110. (The Court reiterated this proposition in clearer terms in the 2002 *Wallace* decision, which is described below.)

Five years later, in *Semadeni v. Ohio Dept. of Transp.*, 75 Ohio St.3d 128 (1996), the Court re-visited the temporal aspect of the distinction between discretionary policy/planning and performance/implementation, which had been the basis of the 1990 *Garland* decision. In *Semadeni*, the plaintiff’s decedent was killed by a chunk of concrete dropped from an interstate overpass. The plaintiff sued ODOT for failing to install protective fencing along the overpass. More than four years before this incident, ODOT had adopted a policy, “Policy 1005.1,” calling for this and other overpasses to be fenced. This Court ruled that the adoption of that policy was an immunized, discretionary, policy/planning decision but that the decision to delay the installation of fencing was part of the performance/implementation and therefore not immunized:

[W]e find that adoption of Policy 1005.1 in 1985 was a “basic policy decision,” and that ODOT failed to implement Policy 1005.1 within a reasonable amount of time. The Court of Claims erred in its legal conclusion that subsequent “time and manner” decisions made to implement Policy 1005.1 were themselves entitled to immunity.

*Id.* at 132.

In *Wallace v. Ohio Dept. of Commerce*, 96 Ohio St.3d 266, 2002-Ohio-4210, the Court expressly declined to review the State’s immunity argument, *id.* at ¶ 40, but in *dicta* said that the State fire marshal’s decision to forgo a seasonal fire inspection arguably is an immunized, discretionary, policy/planning decision and that decisions made in the performance of an inspection are not immunized, *id.* at ¶ 36. The main holding in *Wallace* was that R.C. 2743.02(A)(1)’s requirement that the State’s liability be determined “in accordance with the same rules of law ap-

plicable to suits between private parties” superseded the common-law “public-duty rule.” *Id.* at ¶ 31. As it had done in *Bennett* in 1991, the Court rejected the argument ODOT makes here, that the unique sovereignty of the State is a factor. The Court rejected “the premise that statutes creating duties for governmental actors cannot satisfy the duty element for purposes of the state’s liability for negligence because there are no statutory duties that may similarly bind private parties.” *Id.* at ¶ 30. “[A]s a general matter, government actors are not alone in having duties imposed upon them by statute. The fact that a statute may impose a duty to act, even if a private person would not have such a duty, ‘does no more than identify the source of the duty.’” *Id.*

**C. The State is not immune from liability for decisions “implementing” discretionary policies.**

ODOT’s thesis paragraph asserts that R.C. 2743.02(A)(1) immunity covers “acts of governing, like setting and implementing policy.” (ODOT Brf. 7, last paragraph.) As explained in Part II-B above, under *Reynolds* and its progeny, R.C. 2743.02(A)(1) immunity does *not* cover “implementation” of immunized, discretionary, policy decisions.

**D. ODOT’s proposition of law does not implicate “exercise of an executive or planning function involving the making of a basic policy decision which is characterized by the exercise of a high degree of official judgment or discretion.”**

The Risners’ action is an action against the State for the tort of negligence. (A species of negligence known as “qualified nuisance” may also describe the Risners’ action. *See Hurier v. Ohio Dept. of Transp.*, 10th Dist. No. 01AP-1632, 2002-Ohio-4499, ¶ 21; *Leskovac v. Ohio Dept. of Transp.*, 71 Ohio App.3d 22, 26-27 (10th Dist. 1990); *Jeska v. Ohio Dept. of Transp.*, 10th Dist. No. 98AP-1402, 99-LW-3867, 1999 Ohio App. LEXIS 4246, \*4 (Sept. 16, 1999).) The Risners are entitled to pursue that negligence claim “in accordance with the same rules of law applicable to suits between private parties.” R.C. 2743.02(A)(1).

The reason ODOT’s proposition of law does not implicate R.C. 2743.02(A)(1) immunity is that ODOT’s proposition of law does not implicate what *Reynolds* termed “the exercise of an executive or planning function involving the making of a basic policy decision which is characterized by the exercise of a high degree of official judgment or discretion.”

ODOT’s proposition of law is:

When ODOT makes discrete highway improvements, only those particular improvements need to meet the current construction standards.

This proposition of law raises not a question of immunity but rather a question of tort duty—namely, what the “duty of care,” or “standard of care,” shall be in *implementing* ODOT’s immunized, discretionary, policy-making decision to “improve” a road. ODOT’s brief wrongly portrays ODOT’s proposition of law as addressing a battle between the State’s executive branch and the State’s judicial branch over which branch shall control upkeep of State roads in Ohio. There is no such battle, neither in this case nor generally.

The issue for judicial determination in this case is *not* what particular improvements should have performed to make this particular intersection safe. ODOT’s proposition of law raises only a question regarding the scope of the negligence-law duty of care when implementing ODOT’s absolute, unreviewable, immunized decisions to improve a road. ODOT’s proposition of law *concedes* that ODOT “improved” the intersection at which Amber Risner died. The question presented by ODOT’s proposition of law is an either/or question: whether the duty of care when implementing an improvement is to

- make only the discrete improvement safe, even if that improvement leaves the road around the improvement unreasonably dangerous (as ODOT proposes), or
- make the discrete improvement and the road around that improvement reasonably safe (as required by the court of appeals decision in this case).

The answer to this question will have global application. It is one rule or the other, and neither

would have courts on a case-by-case basis second-guessing any ODOT decision.

*First:* It is ODOT, not the judiciary, that decides when, if ever, to “improve” a road. ODOT’s decision whether or not to improve a road is absolute, unreviewable, and immunized.

*Second:* Even though the scope of a defendant’s duty is a question of law for the court to determine, *Mussivand v. David*, 45 Ohio St.3d 314, 318 (1989), in actions alleging negligent road design or construction, the Tenth District Court of Appeals and the Court of Claims have effectively adopted the mandatory provisions of ODOT’s Location and Design Manual as articulating the duty of care. See *Risner v. Ohio Dept. of Transp.*, 10th Dist. No. 12AP-828, 2013-Ohio-5698, ¶ 9; *Estate of Morgan v. Ohio Dept. of Transp.*, 10th Dist. No. 10AP-362, 2010-Ohio-5969, ¶¶ 15-17, 19, 28 (citing ODOT’s Bridge Inspection Manual and ODOT’s L & D Manual); *Rahman v. Ohio Dept. of Transp.*, 10th Dist. No. 05AP-439, 2006-Ohio-3013, ¶ 38; *Steele v. Ohio Dept. of Transp.*, 162 Ohio App.3d 30, 2005-Ohio-3276 (10th Dist.), ¶¶ 7-10; *Hurier v. Ohio Dept. of Transp.*, 10th Dist. No. 01AP-1362, 2002-Ohio-4499, ¶¶ 27-29; *Balbach v. Ohio Dept. of Transp.*, 67 Ohio App.3d 582, 586-87 (10th Dist. 1990); *Riches v. Ohio Dept. of Transp.*, Ct. Claims No. 2008-10749, 2009-Ohio-5446, ¶ 7. See *State v. Hatfield*, 158 Ohio Misc.2d 51, 2010-Ohio-4003, ¶¶ 7-8 (Morrow Cty. Muni. Ct.) (citing L & D Manual and citing cases). (With regard to a sister manual, ODOT’s Manual of Uniform Traffic Control Devices (MUTCD), this Court has held that “R.C. 4511.10 requires ODOT to comply with the MUTCD.” *White v. Ohio Dept. of Transp.*, 56 Ohio St.3d 39, 41 (1990). Accord ODOT Brf. 28, ¶ 1 (“If ODOT improves an intersection by installing new signs, those signs must comply with mandatory elements of the Ohio Manual of Uniform Traffic Control Devices.”)) So as a technical matter, when ODOT chooses to “improve” a State road, the tort duty associated with implementing the improvement is to make the road around the improvement “reasonably safe”—the generally ap-

plicable negligence standard of care. But as a practical matter, ODOT is effectively authoring its own duty of care for itself. Thus, in cases alleging negligent design and construction, Ohio courts are not even playing their usual role of independently determining the duty of care.

*Third:* ODOT has absolute, unreviewable, immunized, discretionary authority to exceed the safety standards in the L & D Manual.

Another indication that ODOT's proposition of law does not implicate immunity law is that if this Court rejects ODOT's proposition of law, ODOT's "exercise of an executive or planning function involving the making of a basic policy decision which is characterized by the exercise of a high degree of official judgment or discretion" will not change. ODOT will continue to have the "evaluation policy" and "prioritization policy" that ODOT describes at pages 22-23 of its brief; the only difference is that once ODOT makes the immunized decision to improve a road, the tort duty is to make the road around the improvement reasonably safe under then-current safety standards.

The greatest fault of ODOT's position regarding immunity may be the lack of any anchoring principle. If, as ODOT suggests, the decision whether to make the road around an improvement reasonably safe as articulated by current safety standards is an immunized "policy decision," then necessarily the decision whether to comply with current safety standards when building a *new* road is also an immunized policy decision. And why does ODOT's proposition of law concede that ODOT is liable when a "discrete improvement" violates current safety standards? A decision to ignore current safety standards with respect to a "discrete improvement" due to limited financial resources is as much a discretionary policy decision as a decision to refrain from upgrading a road for the same reason. All of this goes to show that (1) ODOT's proposition of law does not implicate R.C. 2743.02(A)(1) immunity but instead lies in the realm

of the law of tort duty, and (2) as will be shown in Part III below, the Tenth District’s maintenance/improvement dichotomy for determining tort duty with respect to upkeep of roads is a prudent rule.

#### **E. Conclusion.**

ODOT’s proposition of law does not implicate R.C. 2743.02(A)(1) immunity. If there is any merit in ODOT’s proposition of law, the merit lies in the realm of the law of tort duty, not the realm of immunity law.

### **III. *Proposition of Law*: When the Ohio Department of Transportation chooses to “improve” a State road, the tort duty associated with implementing the improvement is to make the road around the improvement reasonably safe under then-current safety standards**

#### **A. Standard of review.**

“The existence of a duty in a negligence action is a question of law for the court to determine.” *Mussivand v. David*, 45 Ohio St.3d 314, 318 (1989). Appellate courts review questions of law *de novo*. *Hayward v. Summa Health System*, 139 Ohio St.3d 238, 2014-Ohio-1913, ¶ 23.

#### **B. Introduction.**

The Risners’ action is an action for negligence against the State, acting through the Ohio Department of Transportation (ODOT). In a negligence action, the plaintiff must prove three elements: (1) a duty of care, (2) breach of that duty, and (3) injury proximately caused by that breach of duty. *Mussivand*, 45 Ohio St.3d at 318.

The Tenth District Court of Appeals is the only intermediate appellate court that reviews judgments of the Ohio Court of Claims. *See* R.C. 2743.20; R.C. 2501.01(J). Thus, the Tenth District has been the most frequent appellate expositor of the scope of the tort duty associated

with implementing road improvements. The Tenth District does *not* hold ODOT to the generally applicable “reasonable man” duty of care. Instead, in a line of cases (analyzed below) dating back to the adoption of the Court of Claims Act and carrying through to this case, the Tenth District has held that (1) no matter how unreasonably dangerous a road is, as long as the road met the design and construction standards of the time the road was constructed, ODOT has no duty to improve the road, and (2) when ODOT chooses to improve a road, ODOT’s tort duty is to comply with ODOT’s current safety standards.

For the sake of saving lives, if not mere good government, one might wish that Ohio tort law would require that roads be upgraded within a reasonable time as safety standards change. But it is not so. Ohioans may well deserve *more* protection than that provided by the current rule. But that is a question for another day, because ODOT’s proposition of law in this appeal concedes (1) that ODOT “improved” the intersection at which Amber Risner died, and (2) that ODOT had a tort duty to implement that improvement in compliance with the then-current safety standards.

The question presented by ODOT’s proposition of law is whether that tort duty of care when implementing an improvement is

- to make only the discrete improvement safe—even if doing so leaves the road around the improvement unreasonably dangerous (as ODOT proposes), or
- to make the discrete improvement and the road around the improvement reasonably safe under then-current standards (as required by the court of appeals decision in this case).

The latter rule is the more prudent rule of tort duty, because it encourages upgrading the safety of roads yet leaves to ODOT the absolute, unreviewable, immunized discretion to decide whether, if ever, to improve a road.

### C. The Tenth District line of cases.

The line of Tenth District cases divides the universe of road work in two: “maintenance” and “improvement.” Under this line of cases, ODOT has a duty to “maintain” State roads but has *no duty* to “improve” any road that was constructed to the prevailing design and construction standards at the time of construction—even if the road is obsolete and unreasonably dangerous. However, if ODOT *chooses* to improve a State road, the tort duty associated with implementing the improvement is to make the road around the improvement reasonably safe under then-current safety standards

The Tenth District line of cases begins with *Knickel v. Dept. of Transp.*, 49 Ohio App.2d 335 (10th Dist. 1976), in which the court held that “the state has a duty to maintain its highways in a reasonably safe condition.” *Id.* at 339. The court in *Knickel* ruled that ODOT was liable for failing to repair a two-foot upheaval of a concrete slab of the road.

In *Bowman v. Ohio Dept. of Transp.*, 10th Dist. No. 83AP-516, 84-LW4341, 1984 Ohio App. LEXIS 10745 (Aug. 30, 1984), the plaintiff’s car was impaled by the exposed end of a guardrail. ODOT had known for over a decade that burying the end of the guardrail in the ground was safer and would prevent the type of impalement that injured the plaintiff. The court ruled “that the guardrail in question was reasonably safe when installed, and that the state did not have a duty to upgrade the guardrail as technology developed.” *Id.* at \*6.

In *Lopez v. Ohio Dept. of Transp.*, 37 Ohio App.3d 69 (10th Dist. 1987), the plaintiff was injured by the exposed end of a guardrail. The court ruled that ODOT was not liable, because “the design and construction of this particular guardrail was in conformance with generally accepted standards that were in effect in Ohio throughout the late 1950s,” and the plaintiff “failed to show that the state had actual or constructive notice that this particular type of guardrail was obsolete, hazardous or dangerous.” *Id.* at 71-72.

In *Lunar v. Ohio Dept. of Transp.*, 61 Ohio App.3d 143 (10th Dist. 1989), the plaintiff alleged that ODOT was negligent for not installing a guardrail on a State highway in an urban area, even though in 1962, at the time the road around the accident site was last improved, prevailing safety standards did not call for a guardrail. The court, citing *Bowman*, ruled that “ODOT was under no duty after 1962 to implement state of the art cross-over barricades.” *Id.* at 150.<sup>2</sup>

In *Longfellow v. State*, 10th Dist. No. 92AP-549, 92-LW-5998, 1992 Ohio App. LEXIS 6784, \*26 (Dec. 24, 1992), the court stated:

Read together, *Lunar* and *Lopez* demonstrate that the standard of care to be applied to ODOT in [road-improvement] cases is that of the current written standards in effect at the time of the planning, approval or construction of the site and that, absent such written standards, the standard is that of a reasonable engineer using accepted practices at the time of construction.

In *Hurier v. Ohio Dept. of Transp.*, 10th Dist. No. 01AP-1632, 2002-Ohio-4499, ¶ 29, the court ruled that resurfacing and patching constitute “maintenance” rather than “improvement,” and thus there was no duty to upgrade the road to bring it into compliance with the L & D Manual.

In *Wiebelt v. Ohio Dept. of Transp.*, 10th Dist. No. 93AP-117, 93-LW-3714, 1993 Ohio App. LEXIS 3242, \*4 (June 24, 1993), the court explained the distinction between “maintenance” and “improvement”:

A duty to maintain state highways is distinguishable from a duty to redesign or reconstruct. Maintenance involves only the preservation of existing highway facilities, rather than the initiation of substantial improvements. This court has held that ODOT has no duty to upgrade highways to current design standards

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<sup>2</sup> ODOT wrongly contends that the court of appeals decision in this case contradicts the *Bowman/Lunar* holding that “the state does not have the duty to upgrade . . . as technology develops.” *Lunar*, 61 Ohio App.3d at 149 (citing *Bowman*). (ODOT Brf. 32, ¶ 2.) In *Bowman* and *Lunar*, the roads met the safety standards in effect at the time they were last improved. In this case, the road was improved without meeting the then-current safety standards.

when acting in the course of maintenance. *Lunar v. Ohio Dept. of Transp.* (1989), 61 Ohio App.3d 143, 149.

Thus, the court rejected the plaintiff's contention "that ODOT had a duty to improve upon the super-elevation of the curve near the site of the accident." *Id.*

In *Rahman v. Ohio Dept. of Transp.*, 10th Dist. No. 05AP-439, 2006-Ohio-3013, ¶¶ 30-31, the court ruled that resurfacing and widening constitute "maintenance" rather than "improvement."

In *Galay v. Ohio Dept. of Transp.*, 10th Dist. No. 05AP-383, 2006-Ohio-4113, the accident occurred at an intersection of two roads at a 30-degree angle, built in 1932. At the time of the accident in 2001, the safety standard called for an angle of no less than 70 degrees. *Id.* at ¶¶ 15-16. The court ruled that ODOT did not have a duty to improve the road by changing the intersection angle. *Id.* at ¶¶ 29, 52-54.

In *Sobczak v. Ohio Dept. of Transp.*, 10th Dist. No. 09AP-388, 2010-Ohio-3324, the road around the accident site had been "designed and built . . . in the 1950's in accordance with design requirements in place at the time." *Id.* at ¶ 2. By the time of the plaintiff's accident in 2002, the road "ha[d] been the site of many accidents," and the police chief, mayor, and city council had requested ODOT's help to no avail. *Id.* at ¶¶ 3-4. The court held that the "no duty to improve" rule applies even when ODOT is aware "that a particular portion of a highway is extremely dangerous." *Id.* at ¶¶ 8-13.

In *Estate of Morgan v. Ohio Dept. of Transp.*, 10th Dist. No. 10AP-362, 2010-Ohio-5969, an intersection, a bridge, and a culvert draining a dry run, or wash, that fills during rainstorms had been built in 1939 and never improved. *Id.* at ¶¶ 2-4, 14, 19. The configuration lacked the guardrail or "clear zone" between the road and the run called for by the safety standards prevailing at the time of the accident. *Id.* at ¶¶ 15-17, 28. Following a heavy rain, a car

drove off the road and into the swollen run, fatally breaking the driver's neck and drowning the driver's baby. *Id.* at ¶ 6. The court ruled that ODOT had no duty to "improve" the road to contemporary safety standards. *Id.* at ¶¶ 14, 28-29.

Finally, in this case, the court of appeals ruled that collective, first-time installation of overhead flashing lights and advance warning signs constitute an "improvement" rather than maintenance. 2013-Ohio-5698 at ¶ 14.

**D. ODOT's Location and Design Manual effectively establishes the duty of care when implementing a road improvement.**

The scope of a defendant's duty is a question of law for the court to determine. *Mussivand v. David*, 45 Ohio St.3d 314, 318 (1989). With respect to road design and construction, the Tenth District Court of Appeals and the Court of Claims have effectively adopted the mandatory provisions of ODOT's Location and Design Manual as articulating the tort duty of care. *See Risner*, 2013-Ohio-5698 at ¶ 9; *Estate of Morgan*, 2010-Ohio-5969 at ¶¶ 15-17, 19, 28 (citing ODOT's Bridge Inspection Manual and ODOT's L & D Manual); *Rahman*, 2006-Ohio-3013 at ¶ 38; *Steele*, 162 Ohio App.3d 30, 2005-Ohio-3276, at ¶¶ 7-10; *Hurier*, 2002-Ohio-4499 at ¶¶ 27-29; *Balbach*, 67 Ohio App.3d at 586-87; *Riches*, 2009-Ohio-5446 at ¶ 7. *See Hatfield*, 158 Ohio Misc.2d 51, 2010-Ohio-4003 at ¶¶ 7-8 (citing L & D Manual and cases). And ODOT uses its compliance with the L & D Manual as evidence of non-negligence. *E.g., Mistovich v. Ohio Dept. of Transp.*, Ct. Claims No. 2004-02989, 2005-Ohio-6308, ¶ 6. (With regard to a sister manual, ODOT's Manual of Uniform Traffic Control Devices (MUTCD), this Court has held that "R.C. 4511.10 requires ODOT to comply with the MUTCD." *White v. Ohio Dept. of Transp.*, 56 Ohio St.3d 39, 41 (1990). *Accord* ODOT Brf. 28, ¶ 1 ("If ODOT improves an intersection by installing new signs, those signs must comply with mandatory elements of the Ohio Manual of Uniform Traffic Control Devices."))

Thus, as a technical matter, the tort duty associated with implementing a road improvement is to make the road “reasonably safe”—the generally applicable negligence duty of care. But as a practical matter, the duty is to comply with the mandatory provisions of ODOT’s L & D Manual. This is significant in light of ODOT’s contention—misguided though it is—that the court of appeals decision allows courts to second-guess ODOT road-improvement decisions. The tort duty effectively imposed upon ODOT is merely a duty to adhere to ODOT’s own safety standards.

It is undisputed that when ODOT last improved the intersection at which Amber Risner died, ODOT did not leave the intersection in compliance with the then-current version of the L & D Manual. Thus, this Court need not decide here whether “reasonable care” might require safety precautions beyond those set forth in ODOT’s L & D Manual.

**E. The more prudent rule of tort duty is that when ODOT chooses to “improve” a State road, the tort duty associated with implementing the improvement is to make the road around the improvement reasonably safe under then-current safety standards.**

The question presented by ODOT’s proposition of law is whether the tort duty of care when implementing a road improvement is

- to make only the discrete improvement safe—even if doing so leaves the road around the improvement unreasonably dangerous, or
- to make the discrete improvement and the road around the improvement reasonably safe under then-current safety standards.

The latter rule is the more prudent rule of tort duty, because it encourages upgrading the safety of roads yet leaves to ODOT the absolute, unreviewable, immunized discretion to decide whether, if ever, to improve a road.

The rule encourages upgrading the safety of roads. Under ODOT’s proposed rule, Ohioans could expect only partially effective, half-solutions to dangerous roads. This case is an ex-

ample. ODOT knew for years before Amber Risner died that this intersection was dangerous. ODOT's partial fix left the road out of compliance with ODOT's own safety standards in effect at that time. A rule of tort duty exposing the State to liability if it makes an improvement that falls short of fixing a known problem will encourage the State to comply with its own safety standards.

It is no criticism of this rule that ODOT can avoid such liability by completely ignoring a dangerous road and not making any improvement. ODOT is funded by the public and exists to serve the public and improve and maintain public roads. The public should expect safe roads, and the common-law tort duty associated with road improvement should reflect this expectation.

The rule also keeps the judiciary out of road-improvement decision-making. ODOT argues that its immunized, discretionary decision to improve a road “[o]ften ... is the start, not the end, of the policy choices.” (ODOT Brf. 28.) But under this tort duty, ODOT is the sole decision-maker:

- ODOT has no tort duty to improve a road, no matter how obsolete and unreasonably dangerous the road is. ODOT has absolute, unreviewable, immunized, discretionary authority to decide when, if ever, to improve a road.
- The safety standards are ODOT's own safety standards, not standards determined by a court. The Tenth District line of cases does not hold ODOT to the generally applicable “reasonable man” standard; instead, the Tenth District line of cases adopts ODOT's manuals as ODOT's negligence-law standard of care.
- The point of the Tenth District line of cases—indeed, the point of any adjudication of negligence duty—is to establish a *minimum* standard of care. ODOT has absolute, unreviewable, immunized, discretionary authority to exceed its safety standards.
- The duty at issue is merely a tort duty—not a “legal duty” enforceable in mandamus. The Tenth District is not “making” ODOT do anything, other than pay damages when violation of a tort duty proximately causes injury—“the same rules of law applicable to suits between private parties.”

ODOT statements such as, “Courts interpret law in specific cases and controversies; they do not set statewide policy,” and the criticism that the court of appeals’s decision “create[s] new tort duties” (ODOT Brf. 1, ¶ 1), suggest, at best, confusion over the mutual independence of immunity law and tort-duty law. At worst, they disrespect the role judges play as the authors of the common law. The Ohio General Assembly is the ultimate expositor of the general laws of Ohio. Thus, the General Assembly could, if it wished, become the *only* source of tort law by fully occupying the field of tort law by statute. See *Stetter v. R.J. Corman Derailment Servs. LLC*, 125 Ohio St.3d 280, 2010-Ohio-1029, ¶ 36. The General Assembly has enacted some statutes in the tort field—from waiving sovereign immunity and abrogating the “public duty doctrine,”<sup>3</sup> to limiting damage awards,<sup>4</sup> to creating causes of action.<sup>5</sup> But for the most part, the General Assembly, like legislatures throughout the nation, has left the field of tort law to the common law. See Keeton, *supra*, at 19 (“Tort law is overwhelmingly common law, developed in case-by-case decisionmaking by courts.”). It is the judicial branch that is the author of the common law:

[W]here relevant legislation does not exist, courts must by necessity decide a controversy without legislative guidance. In doing so within a common law system in which each decision is precedent, they necessarily make law.

Keeton, *supra*, at 18. Sound public policy is as much an ingredient in writing the common law as it is in writing statutes and other positive laws:

Perhaps more than any other branch of the law, the law of torts is a battleground of social theory. . . . The notion of “public policy” involved in private cases is not by any means new to tort law, . . . but it is only in recent dec-

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<sup>3</sup> R.C. 2743.02(A)(1) (waiving sovereign immunity and thereby abrogating the common-law public-duty doctrine, as stated in *Wallace v. Ohio Dept. of Commerce*, 96 Ohio St.3d 266, 2002-Ohio-4210, ¶ 33).

<sup>4</sup> R.C. 2315.18 - .21 (limiting certain damage awards).

<sup>5</sup> *E.g.*, R.C. 2125.01 (creating cause of action for wrongful death).

ades that its influence on tort law has been openly considered in judicial decisions, and not merely in commentaries on the law.

*Id.* at 15 (footnote omitted). It is the job of this Court to determine tort duties. Ironically in this case, Plaintiffs and *amicus curiae* the Ohio Association for Justice are asking that ODOT be held to no higher safety standard than that which ODOT establishes for itself in its L & D Manual.

The Tenth District’s maintenance/improvement dichotomy is a prudent paradigm for defining the tort duty associated with upkeep of roads. Like many legal distinctions (*e.g.*, employee versus independent contractor, privity versus non-privity, procedural versus substantive) the Tenth District’s maintenance/improvement dichotomy requires drawing distinctions—inevitably in some cases, distinctions upon which reasonable judges could differ. But it is a prudent paradigm for four reasons.

*First:* The dichotomy is common sense, because

- “maintenance” is essentially an ongoing, never-ending task—or at least consists of the same activities repeated periodically—while
- an “improvement” is a one-time project.

*Second:* The General Assembly adopted this dichotomy in the realm of political-subdivision sovereign immunity with respect to sewer systems. R.C. 2744.01 creates a maintenance/improvement dichotomy under which political subdivisions are immunized with respect to “planning or design, construction, or reconstruction of a public improvement, including, but not limited to, a sewer system,” R.C. 2744.01(C)(2)(l), but exposed to liability with respect to “maintenance . . . of a sewer system,” R.C. 2744.01(C)(2)(d). *See Coleman v. Portage Cty. Engineer*, 133 Ohio St.3d 28, 2012-Ohio-3881, ¶ 18. The Court in *Coleman* cited the dictionary-definition distinction between “upgrade” and “maintain,” as well as the fact that “[o]ur courts of appeals have recognized this distinction.” *Id.* at ¶ 24. The General Assembly’s adoption of this

dichotomy suggests that the Tenth District’s maintenance/improvement dichotomy is not unworkable as ODOT suggests.

*Third:* The maintenance/improvement dichotomy covers the entire universe of upkeep of roads. Every class of work on a road—from sweeping to re-routing—can be characterized as either maintenance or an improvement. Compared to any alternative paradigm (including ODOT’s implied maintenance/non-substantial-improvement/substantial-improvement paradigm), this simplicity makes for relative ease and predictability for both ODOT officials and users of the roads.

*Fourth:* Court decisions over time will make the line of distinction between “maintenance” and “improvement” brighter. This is as it should be. “The business of the law of torts is to fix the dividing lines between those cases in which a man is liable for harm which he has done, and those in which he is not.” Oliver Wendell Holmes, Jr., *The Common Law* 72 (Univ. Toronto Law School 2011). At the dawn of the statutory political-subdivision-immunity era, this Court acknowledged that “[b]ecause the General Assembly recently enacted R.C. 2744.02(B)(3), no case law under that statute has yet developed to construe a political subdivision’s duty in the circumstances presented to us here.” *Manufacturer’s Natl. Bank of Detroit v. Erie Cty. Road Commn.*, 63 Ohio St.3d 318, 321 (1992). For example, the Tenth District has established that resurfacing and widening constitute “maintenance” rather than “improvement.” *Rahman*, 2006-Ohio-3013 at ¶¶ 30-31. Installation of a guardrail constitutes an improvement, as does creation of a road-side “clear zone” providing recovery time for drivers who leave the road. *Estate of Morgan*, 2010-Ohio-5969 at ¶¶ 14, 28-29 (ruling that ODOT had no duty to improve an intersection, built in 1939, despite dangerous conditions that allowed car to drive into a creek, fatally breaking the driver’s neck and drowning the driver’s baby).

The more prudent rule of tort duty is that when ODOT chooses to “improve” a State road, the tort duty associated with implementing the improvement is to make the road around the improvement reasonably safe under then-current safety standards.

#### **F. ODOT’s “defenses by analogy.”**

ODOT proposes three “defenses” (ODOT Brf. 23-26) that ODOT says apply by analogy but upon which ODOT apparently wants this Court to grant ODOT judgment, as if on a directed verdict. None of these pseudo-defenses are good analogies, much less defenses.

##### **1. ODOT’s “state of the art” defense.**

ODOT’s “state of the art” defense (ODOT Brf. 24) is a poor argument for four reasons.

*First:* The “state of the art” defense is a defense to a claim of strict product liability. A holding applying the defense in this context apparently would be unprecedented. ODOT does not cite any such precedent. ODOT cites *Hickey v. Zezulka*, 487 N.W.2d 106 (Mich. 1992), superseded on other grounds by statute as stated in *Lamp v. Reynolds*, 645 N.W.2d 311, 319 (Mich. App. 2002), but *Hickey* seems to say the opposite of the proposition for which ODOT cites it. The court in *Hickey* said that “a claim of improper design *may* allow the public building exception [to government immunity] to be applied.” *Id.* at 112 (emphasis added). The Court suggested that proof that a jail facility was not up-to-date and lacked state-of-the-art technology *could* help prove that the facility was in a dangerous or defective condition but that such evidence, standing alone, was insufficient. *Id.* at 113.

*Second:* Product liability law is a very poor analogy to this case. It is good, sensible policy to limit claims with respect to short-lived consumer products, which leave the control of the manufacturer soon after manufacture. Here, in contrast, (1) the “product” is not short-lived but

instead is a road that might go a century before being improved, and (2) the “manufacturer,” ODOT, perpetually maintains and has control of the “product,” the road.

*Third:* If the Court is looking for an analogy, the more apt analogy is land use and zoning law and its “grandfathering” concept. A “grandfather clause” is a “provision that creates an exemption from the law’s effect for something that existed before the law’s effective date; specif., a statutory or regulatory clause that exempts a class of persons or transactions because of circumstances existing before the new rule or regulation takes effect.” Black’s Law Dictionary 767 (9th ed. 2009). In the land use and zoning context, it is generally the case that a property or a use that is grandfathered loses the protection of the grandfather provision, and thus must begin complying with the contemporary use and zoning regulations, if the property is sold or the use changes. *See, e.g.,* R.C. 303.19; *Farmer v. Village of Gambier*, 5th Dist. No. 03-CA-35, 2004-Ohio-5000, ¶¶ 44-51. The Tenth District line of cases discussed above, including this case, is analogous. Unreasonably dangerous roads are “grandfathered;” it is only ODOT’s discretionary, immunized decision to improve a road that triggers any tort duty to bring the road around the improvement “up to code.”

*Fourth:* This defense—indeed all three of ODOT’s defenses—ignores the very reason ODOT issues and is expected to comply with the detailed standards of its L & D Manual, MUTCD, and other manuals: the inherent and extraordinary danger associated with using roads. According to the Ohio Department of Public Safety, in 2013 there were 269,078 road-vehicle crashes, involving 622,791 people (drivers and passengers).<sup>6</sup> Any consumer product with user

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<sup>6</sup> Source: Ohio Dept. of Public Safety, Table 1.01, General Statistics, Ohio Motor Vehicle Crash Highlights at a Glance, [https://ext.dps.state.oh.us/crash statistics/CrashReports.aspx](https://ext.dps.state.oh.us/crash%20statistics/CrashReports.aspx).

statistics like this would be facing regulatory recall and a heightened common-law standard of care, not the forgiving standard tolerated by the Tenth District line of cases.

**2. ODOT’s “no duty to upgrade” defense.**

ODOT contends that there is a generally applicable principle in the law of negligence that there is a “very limited scope of a duty to upgrade.” (ODOT Brf. 25.) This argument does not advance ODOT’s argument beyond the *status quo* of Ohio law. The Tenth District line of cases already absolves ODOT of *any* duty to improve unreasonably dangerous State roads. It is only when ODOT makes a discretionary, immunized decision to improve a road that ODOT has any tort duty to improve a road.

**3. ODOT’s “evidence of subsequent remedial measures is inadmissible” defense.**

ODOT’s suggestion that a rule of evidence should provide a rule of substantive law (ODOT Brf. 26) is a stretch of logic. But the particulars of ODOT’s logic are disturbing. As ODOT says, the purpose of the rule that evidence of subsequent remedial measures is inadmissible is to encourage, or at least not discourage, safety improvements. Profit-motivated individuals and businesses rightly would balance the benefit of a safety improvement against the prejudice evidence of the improvement might have to pending or anticipated litigation. ODOT, protected by R.C. 2743.02(A)(1) immunity, will prioritize safety-upgrade road projects. But ODOT is not a private individual or business. ODOT exists only to protect and serve Ohio’s taxpayers, citizens, and visitors. ODOT’s suggestion that ODOT officials will withhold safety-enhancing road projects out of fear of Court of Claims litigation over roads that ODOT acknowledges do not comply with ODOT’s own safety standards is a cynical, and presumably insincere, perspective on State government.

But ODOT’s “fear of litigation” specter in truth is just a red herring. In virtually every instance of a dangerous road condition, ODOT could achieve its safety goal merely by replacing the speed-limit signs and lowering the speed limit.<sup>7</sup> Replacing speed-limit signs is “maintenance” and would not trigger any duty to upgrade the road.

### **G. Conclusion.**

One of the purposes of tort law is to encourage safety. Keeton, *supra*, at 25-26. The horrific injuries and deaths that occurred in *Estate of Morgan* and in this case, to cite just two examples, probably would not have happened had the roads complied with the prevailing safety standards. The Tenth District’s decision in this case is prudent, advances a purpose of tort law, and is consistent with a line of Tenth District cases dating back to the enactment of the Court of Claims Act. This Court should affirm.

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<sup>7</sup> ODOT has the discretionary authority to set any speed limit safety warrants. R.C. 4511.21 specifies the speed limit generally applicable to various types of roads. R.C. 4511.21(B), (D). But for any stretch of road under ODOT’s jurisdiction, R.C. 4511.21 authorizes ODOT to set whatever speed limit ODOT deems prudent, based upon an engineering study. R.C. 4511.21(H)(1) provides:

Whenever the director [of transportation] determines upon the basis of a geometric and traffic characteristic study that any speed limit set forth in divisions (B)(1)(a) to (D) of this section is greater or less than is reasonable or safe under the conditions found to exist at any portion of a street or highway under the jurisdiction of the director, the director shall determine and declare a reasonable and safe prima-facie speed limit, which shall be effective when appropriate signs giving notice of it are erected at the location.

*See* OMUTCD 68-70, §§ 2B.13-01, -02, -03, 07(B), -08, -17 (2012). The OMUTCD states that “statutory limits might restrict the *maximum* speed limit that can be established on a particular road, notwithstanding what an engineering study might indicate.” OMUTCD 69, § 2B.13-08 (2012) (emphasis added). There are no statutory *minimum* speeds restricting ODOT’s authority to reduce a speed limit.

## CONCLUSION

This Court should affirm.

Respectfully submitted,

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## CERTIFICATE OF SERVICE

A PDF electronic image of this document was sent by e-mail on December 22, 2014 to:

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*/s Paul Giorgianni*