

ORIGINAL

IN THE SUPREME COURT OF OHIO

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

Appellees,

vs.

COUNTY OF WAYNE, et al. Appellees.

)
)
)
) On Appeal from the Wayne County Court of Appeals, Ninth Appellate District Court of Appeals, Case No. 13 CA 0029
)
) Jurisdictional Appeal Case No. 2014-2079
)
)

PLAINTIFFS-APPELLEES, RICKY ALLEN BAKER & SHARON BAKER, INDIVIDUALLY AND AS ADMINISTRATORS OF THE ESTATE OF KELLI MARIE BAKER'S MEMORANDUM IN OPPOSITION OF JURISDICTION

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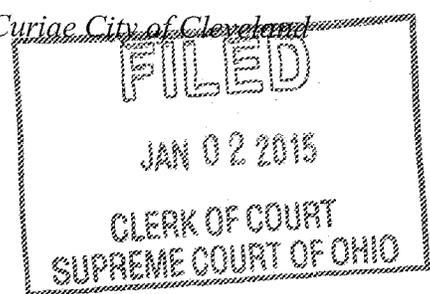
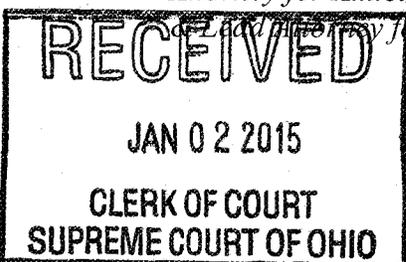
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I. EXPLANATION OF WHY THIS IS NOT A CASE OF PUBLIC OR GREAT GENERAL INTEREST AND DOES NOT INVOLVE A SUBSTANTIAL CONSTITUTIONAL QUESTION

As a threshold matter, while Defendants-Appellants (“the County”) assert in the heading of their jurisdictional explanation that a constitutional question exists, they fail to argue a single constitutional issue. Thus, Plaintiffs-Appellees (“Mr. and Mrs. Baker”) will focus solely on the issue of “public or general interest.” In truth, no such compelling interest exists.

This appeal is about the Ninth District Court of Appeals (“the Ninth District”) determining that in the context of the ongoing construction project to the underlying roadway at issue, the County could be liable for negligent failure to keep County Road 44 “in repair” under R.C. 2744.02(B)(3). Despite the County’s arguments to the contrary, the Ninth District did nothing more than determine that questions of fact exist. The Ninth District did not rewrite or expand statutory definitions and it did not usurp the power granted to the General Assembly.

At the time of the accident that resulted in Kelli Marie Baker’s death, C.R. 44 had no center or edge lines because they had been recently paved over but had not yet been repainted. Furthermore, the roadway contained a considerable sloped pavement drop-off at the edge of the roadway that was created by the County during the course of a maintenance project on C.R. 44. The road had been scratch paved, but because the project continued day-to-day, it had not yet been mitigated at the margins. Additionally, the way the roadway was paved created an issue of fact as to whether the road was missing asphalt and thus the County failed to keep the public road “in repair.” As such, the Ninth District ruled only that issues of fact existed as to whether the County kept C.R. 44 “in repair” as required by R.C. 2744.02(B)(3).

The County and Amicus Curiae suggest that the Ninth District’s decision increases counties’ and/or townships’ potential tort liability by “judicially crafting an exception” to

political subdivision liability not found in statute for a roadway under repair or reconstruction.¹ In so arguing, the County and Amicus Curiae ignore the actual opinions of the Ninth District, and the body of evidence it relied upon in rendering its decision.² The Ninth District did not rewrite the standard by which a political subdivision may be held liable for failing to maintain a road for purposes of R.C. 2744.02(B)(3). The Ninth District simply held that, under the unique facts of this case, genuine issues of material fact exist as to whether the County met its duty to keep C.R. 44 in repair.

In making its ruling, the Ninth District expressly acknowledged that the exception to political subdivision immunity contained in R.C. 2744.02(B)(3) is a narrow exception and did absolutely nothing to expand its application. The Ninth District's ruling did nothing more than determine that in this particular instance, genuine issues of material fact exist as to whether the County kept C.R. 44 "in repair" as required by R.C. 2744.02(B)(3). Therefore, the "public road" for purposes of R.C. 2744.02(B)(3) constituted the area under the control of the political subdivision, subject to the ongoing repair work, and open to travel by the public. The Ninth District's decision is wholly consistent with Ohio case law, specifically the portion of *Bonace v. Springfield Twp.* which holds that "if there was no edge line on the road, then the public road could be considered to reach to the edge of the pavement." 179 Ohio App. 3d 736, 747 (Ohio Ct. App., Mahoning County 2008).

As set forth in more detail hereafter, the Ninth District merely applied the facts of this case to established law and found that questions of fact existed as to whether the County

¹ See Memorandum in Support of Jurisdiction of Appellants, County of Wayne, et al., at p. 1.

² Not surprisingly, the political subdivision immunity usual suspects support this Court accepting jurisdiction and argue that the sovereign immunity sky will fall if the Ninth District's decision is permitted to stand. In typical fashion, the Amicus Briefs ignore the actual Ninth District holding that did nothing more than determine that material issues of fact exist for trial.

complied with its duty to keep the public road “in repair.” No new standard was created, the definition of a “public road” was not rewritten, and the General Assembly’s power was not usurped.

II. STATEMENT OF THE CASE AND FACTS

A. Procedural History

Mr. and Mrs. Baker filed suit in this matter on June 4, 2012, individually and on behalf of the estate of their minor daughter, Kelli Marie Baker (“Ms. Baker” or “the Decedent”), against the County following their daughter’s death in a one-car accident on C.R. 44 in Greene Township, Wayne County on October 19, 2011. The Wayne County Court of Common Pleas issued a final judgment in this matter and granted summary judgment in favor of the County on June 4, 2013. The trial court found, as a matter of law, that no genuine issue of material fact existed and that pursuant to *Bonace*, supra, the County was immune from liability. Mr. and Mrs. Baker appealed to the Ninth District Court of Appeals, which reversed the trial court’s decision on August 20, 2014.³ The Ninth District denied reconsideration on October 22, 2014. The County filed a Notice of Appeal and a Memorandum in Support of Jurisdiction on December 3, 2014.

B. Relevant Facts

On October 19, 2011, 17-year-old Kelli Baker died when the dangerous conditions created by the County in the course of a day-to-day maintenance project on C.R. 44 caused her to lose control of her vehicle. The dangerous conditions created by the County included: no edge lines, no center lines, a 4 ½ to 5” drop-off between the edge of the roadway’s new asphalt surface and the berm, inadequate signage, and/or missing asphalt. The County created these

³ In its decision, the Ninth District went to great lengths to distinguish *Bonace* due to the unique facts at issue in this case.

dangerous conditions in the course of an on-going road maintenance project on C.R. 44 that was wholly lacking in any engineering input or judgment.

C.R. 44 was scheduled for scratch-paving work in October, 2012 because, according to the Wayne County Highway Foreman, “the condition of the road was very pushed out and shoved out from the semi-traffic” and because significant “rutting” existed in the roadway. Scratch-paving is the process of adding a new layer of asphalt to existing pavement on a road to flatten it out. Generally speaking, scratch-paving adds about an inch to an inch-and-a-half of new asphalt to the surface of the roadway. The scratch-paving is then followed by a process of re-berming for the purpose of eliminating one of the dangerous conditions created that was a substantial contributing factor in causing the accident that resulted in the death of Kelli Marie Baker.

Prior to the County commencing the maintenance and repair project to C.R. 44, the road had painted edge lines and a painted center line. It is undisputed that the County always intended to repaint the center and edge lines before concluding the maintenance project. The Wayne County Road Superintendent testified that the purpose of the edge lines and the center line on the road are to give drivers a reference point to keep them in the proper lane of travel. However, during the course of this maintenance project, the center line and the edge lines were paved over with new asphalt. As the road was still open to the public during this project, drivers, including Kelli Marie Baker, were left without these critical reference points on a road with no street lights.

The accident that resulted in the death of Ms. Baker occurred at approximately 6:24 a.m. on the morning of October 19, 2011. It was dark and raining at the time of the accident and there were no street lights in the area. Because the edge lines had been paved over the night before the accident, there were no reference points for drivers, including Ms. Baker, and there was no

notice of the unreasonably dangerous conditions created by the County. Again, the County always intended to repaint the edge lines and center line before concluding the maintenance project. Ultimately, the center line was repainted on November 4, 2011 and the edge lines were repainted on November 17, 2011.

Furthermore, the scratch paving resulted in new asphalt surface built up over the old, deteriorated surface, creating a significant 4 ½ - 5" sloped pavement drop at the edge of the road. Wayne County employees admit that this pavement drop was unusual and not something expected in a project of this nature. It also exceeded the maximum two-inch drop threshold specified by the Ohio Department of Transportation. ODOT specifications require that any drop exceeding the two-inch maximum threshold be delineated with sufficient traffic controls such as drums and lights. Here, the County had nothing delineating this unreasonably dangerous condition in the direction that Ms. Baker travelled. While the County posted a "Low Shoulder" sign for southbound traffic on C.R. 44, the County failed to post "Low Shoulder" signs north of the accident scene to alert the motoring public, including Ms. Baker, of the dangerous conditions created.

Not only did the County create an unreasonably dangerous condition on the road and fail to warn southbound motorists of the dangerous condition created, they added to the danger by creating an area in the southbound lane where the pavement inexplicably juts in to the east into the southbound lane of travel. Ohio State Highway Patrol Lt. Chad Enderby, who was on-scene shortly after the accident to investigate its cause, testified that Ms. Baker's right side tires initially left the road in the area where the pavement juts in. As with the unreasonably dangerous drop at the edge of the pavement, the County did nothing to warn southbound traffic of this additional dangerous condition they created on the roadway, and there was absolutely no way for

this defect to be seen in the dark. This is especially true considering that there were no edge lines on the road at the time of the accident. Ultimately the County argues that it can create unreasonably dangerous conditions with impunity only to hide under the umbrella of immunity.

For these reasons, the Ninth District properly determined that the County should not be afforded political subdivision immunity and that questions of fact remains as to whether the County negligently failed to keep C.R. 44 “in repair” pursuant to R.C. 2744.02(B)(3).

III. ARGUMENT IN SUPPORT OF PROPOSITIONS OF LAW

Proposition of Law No. I:

THE NINTH DISTRICT’S DECISION IS CONSISTENT WITH THE PLAIN LANGUAGE OF R.C. 2744.02(B)(3) AND R.C. 2744.01(H)

The Ninth District’s decision is consistent with the plain language of R.C. 2744.02(B)(3), which provides that a political subdivision is liable in damages in a civil action for injury, death, or loss to person or property allegedly caused by an their “negligent failure to keep public roads in repair.” R.C. 2744.01(H) defines “public roads” as:

“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 County makes an important concession in its Memorandum in Support of Jurisdiction: “the ‘public road’ in this case, for purposes of the R.C. 2744.02(B)(3) exception, only extends to the limits of the new pavement itself and not beyond.”⁴ The County’s Memorandum also makes an illogical jump that because the “berm” exists outside the legal definition of the roadway, somehow that removes the County’s liability for damages caused as a result of the 4 ½ - 5” sloped pavement drop in the roadway before the road reaches the berm. As

⁴ See Appellant’s Memorandum in Support of Jurisdiction, at pg. 5.

the Ninth District unanimously determined, the County is wrong. Here, it was the edge of the pavement, not the berm or the shoulder, that was the primary dangerous condition at issue.

In fact, as conceded by the County, the “public road” extended to the limits of the new pavement, which includes the 4 ½ - 5” sloped pavement drop. Ohio State Highway Trooper Charles Abbuhl, who completed the police report following the accident, testified that the 4 ½ - 5” sloped pavement drop existed where Ms. Baker’s vehicle left the roadway. Obviously, at the time of the accident, the roadway was not “in repair” because the County had not completed leveling off the sloped pavement to make it flush with the berm. It simply defies logic for the County to allege that C.R. 44 was “in repair” when it is undisputed that the maintenance project at issue was not yet completed when Ms. Baker was killed. While the County is correct in asserting that the berm is not recognized as part of the roadway, the County’s Memorandum fails to understand that it was the condition of the pavement at its edge which lead to Ms. Baker’s death.

The Ninth District expressly acknowledged that the exception to political subdivision immunity contained in R.C. 2744.02(B)(3) is a narrow exception and did absolutely nothing to expand the definition of “public roads.” The Ninth District’s ruling did nothing more than determine that in this particular instance, the roadway was under a day-to-day repair project and its white edge lines had not been repainted. Therefore, in this case and consistent with *Bonace*, the “public road” for purposes of R.C. 2744.02(B)(3) constituted “the area under the control of the political subdivision, subject to the ongoing repair work, and open to travel by the public.”⁵ The Ninth District’s decision is wholly consistent with the County’s concession that its liability extends to the limits of the new pavement. It is also consistent with *Bonace*’s holding that “if

⁵ Clearly by specifying that its holding was limited to the area of the road “open to travel by the public,” the Ninth District held true to the definition of a “public road” articulated in R.C. 2744.02(B)(3) as it is well settled that the berm and should of a road are outside of the area open to travel by the public.

there was no edge line on the road, then the public road could be considered to reach to the edge of the pavement.” 179 Ohio App. 3d at 747. Again, this is precisely why the Ninth District went to great lengths to distinguish *Bonace* in its decision. It is also why the Ninth District denied the County’s Motion to Certify a Conflict and its Motion for Reconsideration.⁶

Proposition of Law No. II:

THE ACCIDENT RESULTED AS A CONDITION OF THE “PUBLIC ROAD” AND NOT THE BERM OR SHOULDER, THEREFORE, THE COUNTY IS NOT ENTITLED TO IMMUNITY

The trial court erroneously granted the County’s Motion for Summary Judgment, holding that the County could not be held liable for the 4 ½ - 5” drop it created during the work on C.R. 44 because the berm and/or shoulder are not considered part of the road for purposes of the sovereign immunity statute. In issuing its ruling, the trial court relied upon *Bonace*. However, *Bonace* made it clear that had the roadway in that case not had painted edge lines on the road, as was the case with C.R. 44, then the “public road” would have reached the edge of the pavement. 179 Ohio App. 3d at 747. Furthermore, if the road was missing asphalt it could also be considered a failure to keep the road in repair. *Id.*

In *Bonace*, the plaintiff sued Springfield Township for negligence in connection with what she alleged to be inadequate grading between a roadway and an adjacent ditch. *Id.* at 738. Although the road had recently undergone construction, the project was completed and the roadway was no longer not “in repair.” The asphalt contained white edge lines. *Id.* With respect to plaintiff’s claim relating to the “crumbling of asphalt outside and into the white edge line”, the Seventh District Court of Appeals concluded that an edge line and the asphalt to the

⁶ The Ninth District held: “In other words, *Bonace* and *Lucchesi* are not factually on point with this case, and the distinctions between them are differences of fact rather than conflicts of law. Accordingly, Appellees’ motion to certify a conflict is denied. Ninth District Court of Appeals’ Journal Entry Denying Appellees’ Motion to Certify a Conflict, October 22, 2014.

right of an edge line are considered berm or shoulder instead of part of the public road and, consequently, the exception to immunity did not apply. *Id.* at 744; 746. The Court noted:

Unfortunately, shoulder and berm are not defined in the statutes. However, the common definition of shoulder is the area adjacent to or along the edge of a more important part, or more specifically, the part of the roadway outside of the traveled way. . . . [B]erm is then defined as the shoulder of a road. The space between the lines is the traveled way. . . .

In conclusion, **if there was no edge line on the road, then the public road could be considered to reach to the edge of the pavement. If said road is missing asphalt, it could be considered a failure to keep the public road in repair.** However, by painting an edge line within which the public is to travel, the political subdivision can now limit their liability and provide itself guides within which their road repairs and obstruction removals must occur.

Id. at 746-747 (emphasis added). The *Bonace* court made an important distinction between roads with painted edge lines and roads without painted edge lines. The *Bonace* Court also noted that political subdivisions are always immune in situations involving road construction and design. These are critical distinctions that the County continues to ignore in this case. Here, it is undisputed that the road project at issue was a maintenance project undertaken specifically because C.R. 44 was not in repair.

Likewise, the County improperly relies upon *Lucchesi v. Fischer*, 179 Ohio App. 3d 317 (Ohio Ct. App., Clermont County 2008), which dealt with “the edge drop between the paved shoulder and the unpaved berm.” Again, the *Lucchesi* case is factually distinguishable because the roadway at issue was not undergoing a day-to-day maintenance project and also contained marked edge lines on the pavement. The Twelfth District acknowledged that the area at issue in *Lucchesi* was outside the marked edge lines, thereby part of the roadway outside of the travelled way. *Id.* at 325. Once again this distinction is critical because the absence of painted edge lines on C.R. 44 on the date of the accident at issue extended the traveled portion of the roadway to the edge of the pavement.

Here, there were no edge lines painted on the road at the time of the accident that caused Ms. Baker's death. Therefore, the "public road" reached the edge of the pavement, which thereby includes the 4 ½ - 5" sloped pavement drop – a temporary condition created by the County's maintenance project which the County always intended to alleviate specifically because of the dangers created.

Furthermore, in this case, there is also a question of fact as to whether the road was actually missing asphalt. Road Foreman Charles Weiker testified that some of the new asphalt "sloughed" over the edge of the pavement making it "hard to even tell where the old edge of the pavement is because we straighten the edge of the pavement up especially if it's broken." Numerous photographs in the record depict the area where the pavement inexplicably juts in. This is the same area where Ms. Baker's right side tires left the roadway. At the very least, this presents another question of fact as to whether the roadway was missing pavement in that area and, therefore, whether the road was "in repair" for purposes of R.C. 2744.02(B)(3). Rightly, the Ninth District considered all of these facts and determined only that questions of fact exist as to whether C.R. 44 was in repair as required by law.

The County's failure to have edge lines painted on the road on October 19, 2011 means that the roadway extended to reach the edge of the pavement. Had the edge lines been painted, then the "road" would have been only the space between the lines. As a result, the County cannot be extended immunity for the accident which cost a teenage girl her life because the entire pavement constituted the "public road" which the County failed to keep "in repair."

Proposition of Law No. III:

THE ABSENCE OF WHITE EDGE LINES WHILE THE ROAD UNDERWENT A MAINTENANCE PROJECT REQUIRED THE COUNTY TO KEEP THE ENTIRE PAVEMENT, INCLUDING THE SLOPE TO THE EDGE OF THE PAVEMENT, "IN REPAIR"

There is absolutely no dispute in the record that C.R. 44 was part of an ongoing maintenance project at the time of Kelli Marie Baker's tragic accident. This Honorable Court should not be fooled by the County's argument that the Ohio Manual of Uniform Traffic Control Devices ("OMUTCD") did not require edge lines on a road with lower volume traffic and thus the road was "in repair." While it is true that edge lines were not mandatory on C.R. 44 because it is not a high volume road, it is undisputed that C.R. 44 had edge lines before the roadwork project started and that as part of the maintenance project, the County always intended to repaint the lines. That is, the County did not consider the road repair project complete until the center and edge lines were repainted. The County acknowledged that edge lines on the roadway serve as reference points and warnings to motorists designed to alert drivers to the location of the edge of the road. At the very least, the County's failure to repaint the roadway creates a question of material fact as to whether the road was "in repair."

Furthermore, the record is replete with evidence which would enable a jury to determine that the road was not "in repair" at the time of the accident. For example, the Wayne County Road Superintendent testified that at the time of the accident, the County still needed to "crown the edge of the road" before the project was completed. Crowning the edge of the road, combined with repainting the center and edge lines, were all tasks that needed completed before the County was finished with this maintenance project. Additionally, as aforementioned, there is still a question of fact whether the road was missing pavement that needed repaired. For these reasons, the County's third proposition of law must fail.

Proposition of Law No. IV:

HAPHAZARDLY REPAVING A ROAD DOES NOT MEAN THAT THE ROAD WAS “IN REPAIR” FOR PURPOSES OF R.C. § 2744.02(B)(3)

There is no question that genuine issues of material fact exist as to whether C.R. 44 was “in repair” on October 19, 2011 pursuant to R.C. § 2744.02(B)(3). The County makes the illogical and unsupported argument that simply because C.R. 44 was haphazardly repaved, this requires the automatic conclusion that the road was “restored” as a matter of law. In fact, the repaving itself did not “restore” the road. Rather, the scratch paving added new materials to the surface of the road, thus building the surface up and thereby increasing the sloped pavement drop at the edge of the roadway. In addition to repainting the center and edge lines on the road, the County had yet to re-berm the road to correct the unreasonably dangerous condition created at the edge of the pavement that was a substantial contributing factor in causing the accident that resulted in Kelli Marie Baker’s death. It is undisputed that the maintenance project itself was actively on-going and not yet complete on October 19, 2011. Using the County’s logic, it could just as easily be argued that a road undergoing a day-to-day maintenance project is not “in repair” unless and until the entire project is complete.

It bears noting that to this day, the County has failed to offer a single expert or objective engineering opinion regarding the condition of C.R. 44 on October 19, 2011. The County also ignored the simple fact that because the roadwork project was being conducted at all demonstrates that C.R. was not “in repair” at the time of the accident. Logic dictates that governmental entities do not expend public funds to maintain or repair roads that are in a “restored” condition. If it was not broke, the County would not fix it.

In contrast, Appellees submitted the sworn affidavit of expert engineer Alan Kundtz who expressly opined that C.R. 44 was in a state of disrepair on October 19, 2011 and that the

condition of the road was a significant contributing factor in causing the accident at issue. There are several genuine issues of material fact that exist regarding the condition of C.R. 44 on October 19, 2011, as a result, the exception to immunity found in R.C. 2744.02(B)(3) applies.

Furthermore, according to the County's own definitions, there is almost no difference between the official definitions of "maintenance" and "repair" work. The Wayne County Engineer's Office, defines "maintenance" as the "[a]ct of maintaining or keeping up... Typically this would include generally anticipate work due to normal wear and tear," and includes both the type of roadwork work which occurred on C.R. 44, prior to and in the wake of Ms. Baker's fatal accident. The Wayne County Engineer's Office, defines "repair" as:

To mend, remedy, restore, renovate. To restore to a sound, or good state after decay, injury, dilapidation, or partial destruction. The word 'repair' contemplates an existing structure or thing which has become imperfect, and means to supply in the original existing structure that which is lost or destroyed, and thereby restore it to the condition which it originally, as near may be. Typically this would include generally unanticipated work, such as damage caused by acts of nature or damage created by the public.

By the County's own definition, "repair" also includes both the type of roadwork which occurred on C.R. 44, prior to and in the wake of Ms. Baker's fatal accident. Given that this repair work was incomplete at the time of Ms. Baker's fatal accident, C.R. 44 cannot be described as "in repair" and thus Wayne County failed in their responsibility to properly maintain the road pursuant to R.C. § 2744.02(B)(3).

Proposition of Law No. V:

THE COUNTY CAN FAIL TO KEEP PUBLIC ROADS IN REPAIR WITHOUT VIOLATING MANDATORY PROVISIONS OF THE OHIO MANUAL OF UNIFORM TRAFFIC CONTROL DEVICES

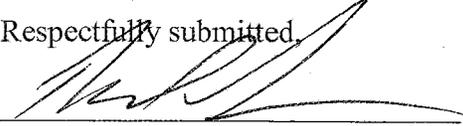
The County can fail to keep public roads in repair without violating mandatory provisions of the Ohio Manual of Uniform Traffic Control Devices. The plain language of 2744.02(B)(3)

states: “. . . political subdivisions are liable for injury, death, or loss to person or property caused by their negligent failure to keep public roads in repair. . .” and makes absolutely no reference to the OMUTCD. As defined in R.C. § 2744.01(H), “public roads” means: “public roads, highways, streets, avenues, alleys, and bridges within a political subdivision” and 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.” Therefore, by the plain language of the controlling statutes, the County can fail to keep C.R. 44 in repair without ever violating the OMUTCD.

IV. CONCLUSION

There is no compelling public or general interest at issue such to invoke this Honorable Court’s jurisdiction. The Ninth District acknowledged that the exception to political subdivision immunity contained in R.C. 2744.02(B)(3) is a narrow exception and did absolutely nothing to expand its application. The Ninth District’s ruling did nothing more than determine that in this particular instance, the roadway was under a day-to-day repair project and its white edge lines had not been repainted. Therefore, the “public road” for purposes of R.C. 2744.02(B)(3) constituted the area under the control of the political subdivision, subject to the ongoing repair work, and open to travel by the public. The Ninth District’s decision is actually consistent with prior case law, including *Bonace*’s holding that “if there was no edge line on the road, then the public road could be considered to reach to the edge of the pavement.” 179 Ohio App. 3d at 747. The Ninth District merely applied the facts of this case to established law and found that a jury trial was warranted. No new standard was created. For these reasons, this Honorable Court should decline to accept jurisdiction and dismiss the County’s appeal.

Respectfully submitted,



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