

IN THE SUPREME COURT OF OHIO

RICKY ALLEN BAKER & SHARON)	CASE NO. 2014-2079
MARIE BAKER, Individually and as)	
Administrators of the Estate of)	
KELLI MARIE BAKER,)	
)	
Appellees,)	
)	
vs.)	Jurisdictional Appeal from the
)	Wayne County Court of Appeals,
)	Ninth Appellate District
COUNTY OF WAYNE, et al.,)	Court of Appeals
)	Case No. 13 CA 0029
Appellants.)	

**MERIT BRIEF OF APPELLANTS, COUNTY OF WAYNE,
WAYNE COUNTY BOARD OF COMMISSIONERS,
AND THEIR UNNAMED EMPLOYEES**

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STATEMENT OF FACTS

Kelli Marie Baker (appellees' decedent) died from injuries she sustained in a single-vehicle traffic accident which occurred while she was driving an automobile on County Road 44 ("CR 44") in Wayne County. (CP Doc. 1, Complaint, ¶7; CP Doc. 4, Answer, ¶8).¹ The accident occurred on October 19, 2011. Appellees alleged in their complaint that, at the time of the accident, "the traveled portion of CR 44 was not in repair and was in an unsafe condition." (CP Doc. 1, Complaint, ¶9). Actually, as fully developed and demonstrated by the record, the portion of CR 44 where the accident occurred had just been restored by full-width re-paving the day before the decedent's accident. Appellees have previously acknowledged that the roadway had just been restored by repaving. (CA Doc. 5, Appellants' Brief, p. 5).² The Wayne County Engineer's Office was in the midst of a CR 44 "scratch paving" project when the accident occurred. (CP Doc. 1, Complaint, ¶10).

It is undisputed that CR 44, or Apple Creek Road, is a two-lane roadway which is part of the county highway system, located in Wayne County. The road runs approximately north and south. Following an evaluation process, in 2011, the County Engineer determined that CR 44 qualified for repair due to rutting that the road surface had sustained.

Roger Terrill is the County Engineer and has served in that capacity in excess of 20 years. (CP LF No. 3, Terrill Depo., p. 8).³ Mr. Terrill is a registered engineer and registered surveyor in the state of Ohio.

¹ "CP Doc." refers to the "List of Documents" portion of the Common Pleas Court Record transmitted by the Wayne County Clerk of Courts.

² "CA Doc." refers to the "List of Documents" portion of the Court of Appeals Record transmitted by the Wayne County Clerk of Courts.

³ "CP LF No." is used to refer to the "List of Loose Filings" from the Common Pleas Record transmitted in this case.

(CP LF No. 3, Terrill Depo., p. 8). As a matter of engineering judgment, the decision was made to scratch pave the road. (CP LF No. 3, Terrill Depo., p. 47). Truck traffic uses CR 44 from SR 585 to reach the Route 30 bypass to the south. (CP LF No. 3, Terrill Depo., p. 49). The truck traffic causes some “rutting” where the wheels travel. (CP LF No. 3, Terrill Depo., p. 49; Wilcox Depo., p. 11). Scratch paving levels up the surface, and restores the crown for drainage purposes. (Wilcox Depo., p. 11; CP LF No. 7, Saurer Depo., p. 14; Weiker Depo., p. 11).

During the period extending from October 13, 2011 to approximately October 21, 2011, the County Engineer’s Office performed the “scratch paving” maintenance project on CR 44. This project included “Section H,” which is located just south of intersecting SR 585. (CP LF No. 3, Terrill Depo., pp. 17, 21). Scratch paving involves using approximately 1 inch of asphalt to restore the road surface, with up to an inch and one-half of asphalt placed in the “wheel tracks” (the ruts), to make the surface uniform from edge to edge. (CP LF No. 7, Saurer Depo., pp. 14-16).

The paving of the roadway itself is performed using a “paver” machine. (Weiker Depo., p. 32). Pavement material is placed into the paver from a truck, the paver machine lays out the stretch of pavement, and then the surface is compacted with a steel roller. (Weiker Depo., p. 32). Under this process, the entire roadway width receives a new layer of asphalt, edge to edge. (Weiker Depo., p. 14). The photographs taken as part of the OHP investigation following the accident accurately depict the new roadway surface of CR 44 resulting from the County Engineer’s project. (Appx. 11, pp. A49-A55). After the pavement work was completed, berm material was later placed along the road edges, and the road was striped by a striping contractor. (Weiker Depo., p. 26; CP LF No. 6, Spademan Depo., pp. 9, 12).

The CR 44 project was undertaken using a standard paving material, and that standard pavement asphalt was installed using standard, acceptable construction equipment and techniques. (CP LF No. 1,

Terrill Aff., ¶¶ 6-8). As the repaving work progressed on CR 44, the paver machine was operated in a fashion to follow the contour and design of the existing pavement to which the overlay was being applied. (Weiker Depo., p. 26; Wilcox Depo., p. 23).

It is undisputed that the paving of the section where the accident occurred, Section H south of SR 585, had been completed on October 18th, the day before the accident. (CP LF No. 7, Saurer Depo., pp. 17, 38-39).

The decedent's accident occurred as she was driving south on CR 44, south of the intersection with SR 585. The accident was investigated by the Ohio State Highway Patrol, and the information gathered during that investigation is perhaps the best available for purposes of describing what occurred. As part of the investigation, it was determined that the decedent was traveling from her home to school, and that the route being traveled was her "typical route of travel" to horse barns located on Apple Creek. (CP LF No. 5, Enderby Depo., p. 26).

The accident occurred at approximately 6:28 a.m. (CP LF No. 2, Abbuhl Depo., p. 7; CP LF No. 4, Topp Depo., p. 8, Exhibit 6). As summarized by Trooper Abbuhl: "The vehicle traveled off the - - while coming south on County Road 44, traveled off the right side of the road, came back on the roadway, traveled off the right side again, struck a concrete deer and tree." (CP LF No. 2, Abbuhl Depo., p. 10; CP LF No. 4, Topp Depo., p. 8, Exhibit 6). For purposes of reference, given the decedent's direction of travel, when she went off the roadway, she traveled off the west side of CR 44. (Wilcox Depo., p. 32). It is undisputed that the accident occurred while it was dark, and under light rain conditions. (CP LF No. 2, Abbuhl Depo., p. 10; CP LF No. 4, Topp Depo., p. 8, Exhibit 6). Following his investigation, Trooper Abbuhl attributed "unsafe speed" as a contributing factor for the accident, in his report. (CP LF No. 2, Abbuhl Depo., p. 11; CP LF No. 4, Topp Depo., p. 8, Exhibit 6). The decedent was 17 years old when the accident occurred.

(OHP Exhibit 6).

Photographs of the area where the decedent's accident occurred were taken as part of the OHP investigation. One of the photos shows the areas where the decedent's right tires left the roadway and then re-entered the roadway, at the location of the apex of a driveway. (CP LF No. 2, Abbuhl Depo., p. 13; Exhibit 2). Yellow paint marks shown in the photo indicate where the tires re-entered the roadway. (CP LF No. 2, Abbuhl Depo., pp. 15-16; Exhibit 10). (Appx. 11).

In the area of Section H, where the accident occurred, there was a 4-5 inch pavement to berm drop off noted by the OHP investigators. (CP LF No. 2, Abbuhl Depo., p. 21-22; Exhibit 3; CP LF No. 4, Topp Depo., p. 8, Exhibit 6). Trooper Abbuhl further explained:

Q If I understand correctly, then, looking at the sketch that you've turned to there, the farthest northern point that you marked for purposes of your sketch, or diagram, is labeled "M," correct?

A Yes, sir.

Q And M is a point of reference where you were able to identify tires being off the edge of the roadway?

A Yes, sir.

Q There was apparently either indentations in the grass or other material that you were able to actually identify that tires were off the roadway?

A Yes, sir.

Q If I understood your earlier testimony, you were not able to necessarily verify that M is the point where the vehicle first left the roadway, but it's a point that you were able to identify, from these markings, as being the vehicle off the roadway?

A Right.

Q Okay. And if I understand your calculations, using your reference point, from 0 that point M is 468 feet 10 inches away, correct?

A Yes, sir.

...

Q From M, did you determine how far the tires were off of the roadway edge?

A Well, that would be from L to M.

Q And I'm going to restate my question so it's a little clearer.

A Right.

Q I'm talking about distance from the edge of the pavement to where the tire track is located. For instance, is it six inches off the road? Is it a foot off --

A Six inches.

...

Q Okay. Now, getting back to the point you were going to make, the distance between M and L on your diagram is the distance between where you were able to locate an indication that the vehicle was off the roadway and point L, which is essentially where you put that dot depicted in the photographs, the paint dot?

A Yes, sir.

...

Q And the paint dot is visible in that photograph right at the apex of the driveway?

A Yes, sir.

Q Now, Exhibit 10 is actually a little bit clearer for us. I'll point to the reference. But it's my understanding that first dot at the driveway is the one that you applied on the pavement material?

A Yes, sir.

Q Okay. Do we know the distance that you were able to measure where the vehicle was off the roadway from point M to L? We can calculate that, correct?

A Yes. That would be approximately 67 feet. 401 feet 9 inches from 468 feet 10 inches.

...

Q So apparently from this sketch you've indicated that you were able to identify that the vehicle was off the edge of the roadway for roughly 67 feet?

A Yes, sir.

...

Q Was there anything to indicate any braking or any type of reaction in the -- what you were able to see in terms of the track that was being left?

A No.

Q Okay. If we look back at Exhibit 10, that reference point L, if you will, where the tire is now reentering the roadway. Is that correct?

A Yes.

Q Did you happen to measure the depth of the pavement at that location?

A Not at that location, no.

Q Okay. And Mr. Barmen indicated that from that dot on Exhibit 10 a little farther up towards the top of the photograph you can actually visualize a tire track in the wet pavement, correct?

A Yes, sir.

Q And that is marked with the additional yellow dots that you already testified about, correct?

A Yes.

Q From your investigation and your reference to these photographs, was there anything to indicate that the vehicle was braking, accelerating, or making a movement that was otherwise out of control?

A No.

Q When is the first indication that there's any loss of control of the vehicle from the physical evidence that you've identified?

MR. BARMEN: Objection. Go ahead.

A It would have been back on the road. And you have the marks where the tires are separating.

Q Which is a bit farther to the south; is that correct?

A Yes.

Q And, again, relying upon the two portions of your OH-1, would the proper reference points be from L to J?

A L to I.

Q L to I. And that distance, based on what you recorded, was approximately what?

A 60 feet.

Q Was there any physical evidence left at the scene indicating what the vehicle was doing in that 60 feet, whether it was rotating at all, or was it tracking straight?

A Up to that point, there was -- that I saw, there was just the one mark where it came back on the road. And between there, nothing till you get the marks where it was separating.

Q And that's the reference points I and J, correct?

A Yes, sir.

Q And at I and J is when we have some documented indication that, using my term, there was a loss of control of the vehicle?

MR. BARMEN: Objection. Go ahead.

A Yes.

Q And evidently the vehicle began a rotation in a clockwise direction?

A Yes, sir.

Q And ultimately, as depicted on the diagram, left the -- it would be the what -- the west edge of the roadway?

A Yes, sir.

Q And ultimately collided with the concrete deer that you've referenced and the tree?

A Yes, sir.

Q Okay. The yaw marks are depicted in the photographs, correct?

A Yes, sir.

Q And do those yaw marks depict any type of braking activity?

A No.

Q Was there any indication from the physical evidence of braking in the vehicle?

A No.

Q And we do know that, tragically, the car struck the tree with a considerable amount of force. Didn't it?

A Yes.

Q In fact, we can look at some of these photographs -- I think they were 12 and 13 or 11 and 12.

MR. BARMEN: 11 through 13 show the car.

Q Trooper, I'll have you look at this one in particular, Exhibit 12. If I understand correctly, that depicts where the vehicle came to rest. Correct?

A Yes, sir.

Q The tree is depicted toward the left edge of that photograph?

A Yes, sir.

Q The vehicle actually impacted the other side of the tree, as indicated by the scar on the tree, at approximately where the indentation in the car is?

A Yes, sir.

Q And then the car had enough energy to continue around approximately 180 degrees before it came to rest?

A Yes.

...

Q Okay. The condition of the pavement that you noted in your report as being new was simply based upon an observation, correct?

A I had been by there, I saw them paving it a day or two prior to that. So I knew it was new.

Q Well, in addition to that particular experience you had, anyone turning off of 585 and entering the roadway heading south on Route 44 would have had in front of them a very apparent new, fresh paved roadway, correct?

A Yes.

(CP LF No. 2, Abbuhl Depo. pp. 33-42). *See also*, Deposition of Sgt. Andrew Topp, Ohio Highway Patrol, pp. 32-37; Exhibit 7 (Forensic Map). The decedent's vehicle struck the tree with significant force, causing extensive damage. (CP LF No. 4, Topp Depo., p. 37). A fire also resulted from the impact.

While we have the physical evidence of the crash itself, and we know the various distances that the decedent's vehicle traveled in this accident, precise evidence of speed was not calculated by the Highway Patrol. (CP LF No. 2, Abbuhl Depo., p. 44; CP LF No. 4, CP LF No. 4, Topp Depo., p. 10).

The appellees, Ricky Allen Baker and Sharon Marie Baker ("Baker"), filed their complaint for wrongful death in this case on June 4, 2012, as administrators of the Estate of Kelli Marie Baker and "individually." Named as defendants were the County of Wayne and Wayne County Board of Commissioners (collectively "Wayne County"). While the appellees included reference to "unnamed

employees” in their complaint, the record reveals that there was never any amendment of the complaint for the purpose of joining any individual defendants on any basis. (CP Doc. 1, Complaint).

The Wayne County defendants, appellants herein, timely filed their answer to the complaint on July 3, 2012. Among the averments and defenses raised by the appellants was that of governmental immunity pursuant to R.C. 2744.01, et seq. (CP Doc., 4, Answer, ¶24).

Following an exhaustive round of discovery, including numerous depositions, the appellants filed a motion for summary judgment on April 4, 2013. (CP LF No. 1). The appellees filed a memorandum in opposition, followed by appellants’ reply brief on May 22, 2013. (CP LF No. 9; CP Doc. 12). The trial court entered judgment granting the appellants’ motion on June 4, 2013. (Appx. 4, p. A15). The Ninth District Court of Appeals reversed and remanded the case on August 20, 2014 (Appx. 2, p. A4) and denied reconsideration on October 22, 2014. (Appx. 3, p. A13). This Court accepted review on May 20, 2015.

The appellees’ alleged claim relies upon the exception from governmental immunity found at R.C. 2744.02(B)(3). That exception, however, is not triggered under the facts of this case and, as a matter of law, immunity applies. There are no genuine issues of material fact, and the appellants were and remain entitled to judgment as a matter of law. Consequently, the entry of summary judgment should be reinstated. Vahila v. Hall (1997), 77 Ohio St. 3d 421, 428-429; and Dresher v. Burt (1996), 75 Ohio St. 3d 280, 286-295; Civ. R. 56(C).

ARGUMENT

Proposition of Law No. I:

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

The appellate court ruling would permit the appellees’ alleged claim to proceed to trial based entirely upon the fact that the re-paving of CR 44 resulted in a berm, or edge drop, of approximately 4-5 inches measured from the roadway itself. However, and importantly, 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. This is based upon the amendment of Chapter 2744 enacted April 9, 2003, which added a specific, clear and unambiguous, definition for “public roads.”

R.C. 2744.01(H) provides:

(H) “Public roads” means public roads, highways, streets, avenues, alleys, and bridges within a political subdivision. **“Public roads” does not include berms, shoulders, rights-of-way, or traffic control devices unless the traffic control devices are mandated by the Ohio manual of uniform traffic control devices.** (Emphasis added).

(Appx. 7, p. A30; Appx. 10, p. A38). Given this limited definition, as a matter of law, the condition of the “berm” of CR 44 does not trigger the immunity exception set forth in R.C. 2744.02(B)(3).

The appellate court gave only passing reference to the statutory definition in its opinion. (Appx. 2, ¶7). The appellate court further stressed that “R.C. 2744.02(B)(3) is, by virtue of this definition, relatively narrow in scope.” (*Id.*). For this proposition, the court cited to *Ivory v. Austintown Twp.*, 2011-Ohio-3171, ¶21 (7th Dist.), “R.C. 2744.02(B)(3) is a narrow exception which applies to traveled portions of the street and which explicitly does not contemplate shoulders or berms as part of ‘public roads.’” However, considering this “*situation as a matter of first impression*” (Appx. 2, ¶11) the lower court then fashioned

its own “definition” for public road:

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

(Appx. 2, ¶11). There is nothing set forth by the General Assembly in the Political Subdivision Tort Liability Act offered as support for such a definition. The actual statutory definition does not provide any distinction for a road undergoing repair or reconstruction. If the “better analysis” is to have such a definition of “public road” that analysis must await enactment of legislation through the political and public policy process of the General Assembly. Contrary to the appellate court’s view, the General Assembly has expressly, and narrowly, defined “public roads” for purposes of the immunity statutes and any amendment, modification or extension of that definition should rest strictly within the province of the General Assembly. An appellate court’s notion of public policy is not a basis to override valid legislation and does not provide a justification for refusing to apply R.C. 2744.01(H) as written. *E.g., Supportive Solutions, LLC v. Electronic Classroom of Tomorrow*, 137 Ohio St. 3d 23, 2013-Ohio-2410, ¶21.

There is no basis for departing from the specific definition set forth in R.C. 2744.01(H). To the contrary, the law directs otherwise. R.C. 1.42 provides:

Words and phrases shall be read in context and construed according to the rules of grammar and common usage. **Words and phrases that have acquired a technical or particular meaning, whether by legislative definition or otherwise, shall be construed accordingly.** (Emphasis added).

For purposes of R.C. Chapter 2744, the words or phrase “public roads” has acquired a particular meaning by legislative definition. “Public roads” thus “**shall be construed accordingly.**” “A basic rule of statutory construction is that ‘shall’ is ‘construed as mandatory . . .’” *Bergman v. Monarch Const.*, 124 Ohio St. 3d 534, 2010-Ohio-622, ¶16. Utilizing the exclusive definition of “public roads” set forth by the General

Assembly in R.C. 2744.01(H) is mandatory in the analysis of this case and all cases premised upon an alleged negligent failure to maintain a public road.

“Where a statute defines terms used therein, such definition controls in the application of the statute” *State v. New*, 197 Ohio App. 3d 718, 2012-Ohio-468, ¶12, citing *Good Samaritan Hosp. of Dayton v. Porterfield* (1972), 29 Ohio St. 2d 25, 29. “[I]t is well- settled . . . that the General Assembly’s own construction of its language, as provided by definitions, controls in the application of a statute.” *Montgomery Cty. Bd. of Comm. v. Public Utilities Comm. of Ohio* (1986), 28 Ohio St. 3d 171, 175. In *Wingfield v. City of Cleveland*, 2014-Ohio-2772 (8th Dist.), the Eighth District Court of Appeals recently determined an immunity case under the R.C. 2744.02(B)(1) exception relating to the negligent operation of a motor vehicle. The court emphasized that “[w]ords and phrases that have acquired a particular meaning, whether by legislative definition or otherwise, shall be construed accordingly.” *Id.*, ¶15, citing *State v. Manocchio*, 138 Ohio St. 3d 292, 2014-Ohio-785, ¶17 and R.C. 1.42. The court then decided the question presented (whether riding a horse was equivalent to operating a motor vehicle) by turning to the applicable definition of “motor vehicle.” “Here, the legislature defined ‘motor vehicle’ for purposes of the Political Subdivision Liability Act. Under R.C. 2744.01(E), the term ‘motor vehicle’ as used in the Act has the same definition as in R.C. 4511.01.” *Wingfield v. City of Cleveland*, ¶16.

Just as the statutory definition of motor vehicle controlled in *Wingfield*, the statutory definition of “public roads” for purposes of Revised Code Chapter 2744 must control here. There is no distinction to be drawn whether a roadway is or is not undergoing some form of repair, reconstruction or maintenance. The dimension or scope a “public roads” does not expand when the road undergoes repair or maintenance, particularly when, as in this instance, the restoration of CR 44 by full-width re-paving was completed following the same contour and design of the existing pavement to which the overlay was applied. (Weiker

Depo., p. 26; Wilcox Depo., p. 23). That which qualifies as berm, shoulder, edge or right-of-way is not transformed into a portion of the “public road” under facts such as those demonstrated by the record of this case. Thus, any condition of the berm, should or right-of-way does not come within the definition of “public roads” set forth in R.C. 2744.01(H) and does not then implicate the R.C. 2744.02(B)(3) exception from immunity. Even during the course of repairs or maintenance, the berm of a road remains the berm of the road and, thus, not a portion of the “public road.”

Proposition of Law No. II:

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

As a matter of law, the condition of the “berm,” shoulder, edge or right-of-way adjacent to a public road does not expose a political subdivision to liability under the immunity exception set forth in R.C. 2744.02(B)(3). An “edge drop” at the limit of a paved roadway is not part of the “public road.” This point of law applies regardless of whether repair or other work is underway.

In general terms, “the berm of a highway begins at that point where the pavement ends.” *Lucchesi v. Fischer*, infra at ¶41. Citing, *Cupp v. Kudla*, 158 Ohio App. 3d 728, 2004-Ohio-5528, ¶22; *Sech v. Rogers* (1983), 6 Ohio St. 3d 462. Thus, that portion of CR 44 which qualified as the “public road” on the date of the accident at issue here was that consisting of the restored, re-paved roadway surface itself – extending the width of the pavement itself, from edge to edge. Where the pavement ended at the edges or margins of that surface was the berm. The record of this case fully documents that the “public road” CR 44, having just been restored from edge to edge, was “in repair,” and the appellants are immune from liability for Ms. Baker’s accident. Neither the condition of the berm nor the existence of an edge drop at that berm triggers

the immunity exception.

In more specific terms and application, these issues were thoughtfully examined by the Seventh District in the case of *Bonace v. Springfield Township*, 179 Ohio App. 3d 736, 2008-Ohio-6364. The *Bonace* case arose out a single-car accident in which the plaintiff was driving when her “right front tire ‘fell off’ the road and into an immediately adjacent ditch.” *Id.*, at ¶2. This incident occurred at a point where the road “tips to the right.” *Id.* Plaintiff hit a driveway apron, lost control, and the accident in which plaintiff’s vehicle rolled multiple time ensued.

Suit was filed alleging that Springfield Township “failed to provide adequate pitch, grade, berm and width, negligently maintained the road regarding these aspects and failed to warn of these problems.” *Id.*, at ¶3. According to plaintiff, the road conditions “seemed worse after the recent road repaving.” *Id.*, at ¶4. Further, plaintiff complained that the ditch was “immediately adjacent to the edge of the road and that the ditch was over twenty-eight inches deep at its center.” *Id.*, at ¶5. There was evidently a twelve inch “edge drop” from the pavement to the land itself and, when the plaintiff’s tire went off the edge, a steering linkage snapped while the vehicle was traveling in the ditch. *Id.*, at ¶¶ 5, 7. The trial court in *Bonace* denied the government’s motion for summary judgment. On appeal, the court of appeals reversed, and Springfield Township’s immunity was correctly recognized.

The court in *Bonace* stressed that R.C. Chapter 2744 had been significantly amended effective April 3, 2003. *See*, 2001-SB106 (addressed above); Appx. 10. The exception found in R.C. 2744.02(B)(3) was limited to “negligent failure to keep public roads in repair” (as well as “negligent failure to remove obstructions from public roads,” or maintain “mandated” traffic control devices, which is not implicated in this case). “It is important to recognize here that this language became effective on April 9, 2003 and that the prior version of this immunity exception provided government liability for injury ‘caused by their failure

to keep public roads . . . open, in repair, and free from nuisance.” *Id.*, at ¶21. “[T]he legislature acted to narrow the exception to immunity, thus providing more protection to political subdivisions.” *Id.*, at ¶23. “Besides changing the language of the roads exception itself, the legislature added a definition of public roads to be used when applying that exception. This new definition specifies that a public road does not include berms, shoulders, rights-of-way or any non-mandated traffic control devices.” *Id.* With the amendments, “the immunity exception only got harder for the plaintiff to establish.” *Id.*, at ¶27, citing *Howard v. Miami Twp. Fire Dept.*, 119 Ohio St. 3d 1, 2008-Ohio-2792, ¶26.

In *Howard v. Miami Twp. Fire Dept.*, *supra*, the Court acknowledged that the General Assembly’s amendments to R.C. 2744.02(B)(3) were “a deliberate effort to limit political subdivisions’ liability for injuries and deaths on their roadways.” *Id.*

The *Bonace* court addressed the fact that there was a twelve inch edge drop, and no berm constructed after the repaving project involved in that instance. Initially, the court held that “these conditions do not deal with the failure to make a repair but rather constitute failures to construct or problems with design.” Thus, the court held that the conditions did “not fall under the exception to immunity regarding road care.” *Id.*, at ¶31. The court then continued with its analysis of the amended statutory language of the immunity statutes. The court concluded that:

[T]he conditions concern items that are no longer part of the public road. Clearly, under the new definition of public road, ditches and berms are not encompassed in the immunity exception in R.C. 2744.02(B)(3). Finally, these conditions do not constitute obstructions and they do not block or clog the roadway.

Id., at ¶32.

For these same reasons, the condition of the berm, and of the “drop off” from the edge of the new pavement on CR 44 to the adjacent ground, are not encompassed within the immunity exception. Inasmuch

as the exception is not implicated by the appellees' alleged claim, Wayne County was entitled to immunity and to summary judgment, and the trial court's judgment should be reinstated. It is of no consequence that the "edge drop" existed during re-pavement.

A similar conclusion was reached by the Twelfth District in *Lucchesi v. Fischer*, 179 Ohio App. 3d 317, 2008-Ohio-5934. In *Lucchesi*, an accident occurred when a driver went off of the road and drove onto the berm. When the driver maneuvered back onto the road, the vehicle began to skid and crashed. A passenger was killed, and a wrongful death suit alleged that the Clermont County Board of Commissioners were liable for the accident because a "significant drop-off" existed on the roadway. *Id.*, at ¶5. The county was granted summary judgment, and the court of appeals affirmed.

The *Lucchesi* court applied the current version of R.C. 2744.02(B)(3), and the definition of "public roads" set forth in R.C. 2744.01(H). "We conclude that the edge drop that *Lucchesi* asserts was the cause of the fatal accident does not fall within the term 'public roads' for purposes of the exception to political subdivision immunity contained in R.C. 2744.02(B)(3)." *Id.*, at ¶44. "Because the General Assembly expressly excluded the terms 'shoulder' and 'berm' from the definitions of 'public roads' and 'roadways,' it is apparent that the legislature never intended for an edge drop to be considered part of the 'public roads, . . .' for which a political subdivision could be held liable for failing to keep 'in repair.'" *Id.*, at ¶45.

The appellate court decision here is in direct conflict with the Seventh District decision in *Bonace* and the Twelfth District decision in *Lucchesi*. Because *Bonace* and *Lucchesi* properly relied upon the legislative intent underlying R.C. 2744.01(H) – including this Court's express recognition of that intent in *Howard* – those rulings should be endorsed as the law in Ohio.

It is worth observing that, even under the former version of the immunity exception found in R.C. 2744.02(B)(3), the appellants would still be entitled to summary judgment. *See, Haynes v. Franklin*, 95

Ohio St. 3d 344, 2002-Ohio-2334. In *Haynes*, a seven-inch drop-off between the edge of the road and the berm was created by the placement of additional paving material added to the road surface during a maintenance project. *Id.*, at ¶2. During the construction project, the public was allowed to continue to use the road, and there were no signs, barrels, cones or temporary lines marking the edge of the road. The plaintiff sustained injuries when his right front tire went off the pavement onto the berm, resulting in an accident. *Id.*, at ¶2. The trial court granted the city, Franklin, Ohio, summary judgment on the grounds of immunity, and both the appellate court and Supreme Court affirmed. *See, Haynes v. Franklin*, (Sept. 25, 2000), 2000 Ohio App. LEXIS 4368.

The Court held that an edge drop between the road and berm, the result of construction, is not a nuisance, within the meaning of that term used in former R.C. 2744.02(B)(3). *Id.*, 2002-Ohio-2334, at ¶¶ 8, 19. It was deemed of no consequence that the edge drop was the result of recent construction. As for the allegation that the city could be potentially liable for failing to provide temporary lines, cones, barrels or temporary signs to warn motorists of the edge drop, the courts rejected that claim as well. The court rejected that this amounted to a nuisance, again, under the former standard of R.C. 2744.02(B)(3). In light of the amendment of R.C. 2744.02(B)(3) which is applicable to the present case, and given that the amendment was intended to *narrow* the exception to immunity for political subdivisions, it is clear that the drop-off at issue in this case does not subject the appellants to potential liability. *See, Seikel v. Akron*, 191 Ohio App. 3d 362, 2010-Ohio-5983, ¶12 (9th Dist.). Technically, *Haynes* has been superseded by the 2003 amendments to the applicable statutes. *Lucchesi*, *supra*. In any event, the road repair exception to immunity is now far more restrictive that it was at the time *Haynes* was decided, yet immunity still controlled in *Haynes*.

Precisely because the “edge drop” or “berm” of CR 44 is not, as a matter of law, part of the “public road” it is immaterial that, after the re-paving of the surface, there was a “drop off” of 4-5.” The exception

set forth in R.C. 2744.02(B)(3), which has been significantly restricted by the General Assembly, does not apply to such condition. The Court should reinstate the appellants' summary judgment.

Recognition that an "edge drop" is not a condition to which the exception under review is applicable then extends to the evaluation of the appellants' immunity under R.C. Chapter 2744. Governmental immunity is generally determined by utilizing a three-tier analysis under R.C. Chapter 2744. As a general rule, political subdivisions are not liable in damages. *Bonace v. Springfield Township*, supra, ¶14. The applicable governmental immunity standards are set forth in R.C. Chapter 2744. R.C. Chapter 2744 provides for a "three-tier analysis for determining whether a political subdivision is immune from liability." *Hubbard v. Canton City Sch. Bd of Educ.* (2002), 97 Ohio St.3d 451, 453, 2002-Ohio-6718, ¶ 10, citing *Greene Cty. Agricultural Soc. v. Liming* (2000), 89 Ohio St.3d 551, 556-557; *Ryll v. Columbus Fireworks Display Co., Inc.* (2002), 95 Ohio St.3d 467, 469, 2002-Ohio-2584, ¶ 19. First, R.C. 2744.02(A)(1) sets forth the general rule that all political subdivisions are entitled to blanket immunity and provides that they:

[Are] not liable in damages in a civil action for injury, death, or loss to person or property allegedly caused by any act or omission of the political subdivision or an employee of the political subdivision in connection with a governmental or proprietary function.

Second, according to R.C. 2744.02(B), a political subdivision is immune from liability for its acts, and the acts of its employees, unless one of the exceptions applies. *Id.* Only if there is an exception to the immunity triggered does the third inquiry come into play, that is, whether the immunity is reinstated by one of the defenses listed in R.C. 2744.03.

It is undisputed that the appellants qualify as a "political subdivision," for purposes of the immunity analysis. A "county" is expressly included in the definition of a "political subdivision" under R.C. 2744.01(F). The code provides, in pertinent part:

(F) "**Political subdivision**" or "**subdivision**" means a municipal corporation, township,

county, school district, or other body corporate and politic responsible for governmental activities in a geographic area smaller than that of the state. (Emphasis added).

In light of the breadth of this definition, the appellees previously conceded that the appellants are “political subdivisions,” for purposes of the claim alleged in this case. (CP Doc. 1, Complaint, ¶¶ 3-5).

Roadway maintenance and repair qualify as “governmental functions” for purposes of R.C. Chapter 2744. Pursuant to R.C. 2744.01, the following qualify as “governmental functions:”

(C) (1) “Governmental function” means a function of a political subdivision that is specified in division (C)(2) of this section or that satisfies any of the following:

(a) A function that is imposed upon the state as an obligation of sovereignty and that is performed by a political subdivision voluntarily or pursuant to legislative requirement;

(b) A function that is for the common good of all citizens of the state;

(c) A function that promotes or preserves the public peace, health, safety, or welfare; that involves activities that are not engaged in or not customarily engaged in by nongovernmental persons; and that is not specified in division (G)(2) of this section as a proprietary function.

(2) A “governmental function” includes, but is not limited to, the following:

...

(e) The regulation of the use of, and the maintenance and repair of, roads, highways, streets, avenues, alleys, sidewalks, bridges, aqueducts, viaducts, and public grounds;

Thus, it is clear that, when the County engaged in the CR 44 project in October of 2011, the County was engaged in a “governmental function.”

Further, R.C. 2744.01(C)(2)(1) provides that a governmental function is:

The provision or nonprovision, planning or design, construction, or reconstruction of a public improvement, including, but not limited to, a sewer system.

Accordingly, the construction work undertaken as part of the CR 44 project by the County was a “governmental function,” to which immunity attaches in this case.

The exception from immunity replied upon by the appellees is not triggered under the facts of this case. Under the second part or tier of the governmental immunity analysis, the only exception outlined in R.C. 2744.02(B) at issue in this case is that found in R.C. 2744.02(B)(3). This section states:

(B) Subject to sections 2744.03 and 2744.05 of the Revised Code, a political subdivision is liable in damages in a civil action for injury, death, or loss to person or property allegedly caused by an act or omission of the political subdivision or of any of its employees in connection with a governmental or proprietary function, as follows:

...

(3) Except as otherwise provided in section 3746.24 of the Revised Code, political subdivisions are liable for injury, death, or loss to person or property caused by their negligent failure to keep public roads in repair and other negligent failure to remove obstructions from public roads, except that it is a full defense to that liability, when a bridge within a municipal corporation is involved, that the municipal corporation does not have the responsibility for maintaining or inspecting the bridge.

For purposes of this case, consideration of this exception necessarily turns on proof that the alleged injury, death, or other loss was “caused” by the “negligent failure to keep public roads in repair.” There was no allegation that the County failed to remove any obstruction from CR 44.

The record in this case establishes that the public road in question, CR 44, had just been repaired and restored to a like-new condition the day before the decedent’s accident. Consequently, reasonable minds can reach but one conclusion in this case, finding that the County did not somehow negligently fail to “keep [CR44] in repair.” Stated otherwise, from the record of undisputed facts, CR 44 was not, in any fashion, “out of repair” at the time of Ms. Baker’s accident.

“‘[I]n repair’ in its ordinary sense refers to maintaining a road’s condition after construction or reconstruction, for instance by fixing holes and crumbling pavement.” *Bonace v. Springfield Township*, supra at ¶29. *Accord, Sanderbeck v. County of Medina*, 2010-Ohio-3659 (9th Dist.), ¶¶ 7, 8. In this case, CR 44 had literally just been repaved, effectively reconstructed, the day before the decedent’s accident. The

exception “deals with repairs after deterioration.” *Id.* There is no evidence that the new roadway surface had any deterioration, holes or crumbling pavement, on the morning of the accident. Consequently, the road was not out of repair, as that phrase is used in the immunity exception set forth at R.C. 2744.02(B)(3).

Further, and contrary to any suggestion otherwise, there is no evidence that there was any “missing pavement” following the repaving work. The repaving was completed for the “full width” of the roadway surface. The “sloughing” of material, to which various witnesses referred, *only* occurs beyond the width of the paved roadway itself, at the berm. As addressed herein above, the “berm” or edge of the roadway is not, as a matter of law, part of the “public road” for purposes of the immunity exception relied upon by the appellees.

For these reasons alone, the appellants were and are entitled to summary judgment based upon the undisputed material facts involved in this case. The judgment of the Common Pleas Court should be reinstated.

The appellees claim is, for the most part, premised upon the fact that the re-paving of CR 44 resulted in a berm, or roadway edge, of approximately 4-5 inches in relation to the adjacent land itself. (CP LF No. 3, Terrill Depo., p. 32, Exhibit C). However, and importantly, as addressed herein the “public road,” for purposes of the R.C. 2744.02(B)(3) exception only extends to the extent of the pavement itself and not beyond. Precisely because the “edge” or “berm” of CR 44 is not, as a matter of law, part of the “public road” it is immaterial that, after the repaving of the asphalt surface, there was a “drop off” of 4-5.” These points of law make it equally immaterial that appellees tendered an affidavit in which the affiant opined that the drop off was “unreasonably dangerous.” Simply, as a matter of law, the drop off, or condition of the edge or berm, is not a condition for which liability may be imposed. The exception set forth in R.C. 2744.02(B)(3), which has been significantly restricted by the General Assembly, does not apply to such

condition.

The appellees also suggested that a so-called “jut out” of the berm area could trigger the immunity exception. The “jut out” was not, however, created as a result of the CR 44 repaving project undertaken in October of 2011. Instead, the deposition testimony (even that relied upon by appellees) clearly demonstrated that during the process of operating the paving equipment, “They just overlay the existing pavement.” (CP LF No. 7, Saurer Depo., pp. 46-47). *Accord*, (Weiker Depo., p. 26; Wilcox Depo., p. 23). The project did not involve adding material “going out” or “coming in” from the edge or berm. (Wilcox Depo., p. 23). Regardless, the “jut out” does not qualify as a matter of law as a condition for which one could find the “public road” in any state of being “out of repair.” The “jut out” is merely a slight deviation in the width of the pavement, and immediately beyond the point where the pavement ends is the berm or edge of the road; again, not part of the public road, as a matter of law. Otherwise, at best, the area of the jut out reflects the design of the roadway itself. The appellants do not face potential liability exposure in this case for any claim relating to the design of CR 44; nothing within R.C. 2744.02(B)(3) provides an exception from immunity for the design of a public road.

This was recognized and discussed in *Bonace v. Springfield Township*, *supra*. In *Bonace*, one of the plaintiff’s contentions concerned a slope to the roadway, reportedly exaggerated when the road was repaved. 2008-Ohio-6364, ¶26. “In repair” did not require the political entity to change any road features or designs. *Id.*, at ¶29. The slope was a design feature that remained such during subsequent repaving projects, to which immunity attached. *Id.*, at ¶30. Likewise, the “jut out” was a design feature that remained after the CR 44 repaving project, to which immunity attaches.

Otherwise, the immunity to which the appellants are entitled remains intact irrespective of the appellees’ alleged critique of the construction signs utilized and posted during the CR 44 project. Temporary

roadway construction signs are discretionary traffic control devices and, consequently, the exception to immunity relied upon by the appellees was, once again, not triggered.

Appellees asserted reliance upon the immunity exception in R.C. 2744.02(B)(3) and suggested that the County may be exposed to potential liability in light of the signs posted during the CR 44 project, and absence of other signs. However, the definition “public roads” does not include traffic control devices *unless* such traffic control devices are *mandated* by the Ohio Manual of Uniform Traffic Control Devices (OMUTCD). Because the utilization and placement of temporary construction signs are not mandatory under the OMUTCD, the appellees’ theory failed as a matter of law.

The OMUTCD is published by the Ohio Department of Transportation and establishes statewide standards for the use and design of traffic control devices. Section 1 of the OMUTCD provides a general overview of the manual, along with definitions of terms used throughout the manual. Section 1A.13, titled “Definition of Headings, Words and Phrases in this Manual,” explains the significance of the text headings, and distinguishes between the mandatory and advisory nature of the text headings “Standard” and “Guidance.” “Standard,” which uses the verb “shall,” delineates a mandatory provision. “Guidance,” which uses the verb “should,” is merely a statement of recommendation and not a mandatory provision. Ohio courts recognize that liability may result when obligatory and mandatory provisions of the OMUTCD are not complied with, and provisions are mandatory only when the term “shall” is utilized. *Galay v. DOT*, 2006-Ohio-4113, ¶42 (10th Dist.), *citing Rhodus v. Ohio DOT*, 67 Ohio App. 3d 723, 730 (10th Dist., 1990). Conversely, “where the word ‘should’ is used, it is considered to be advisable usage, recommended but not mandatory.” *Jeska v. Ohio DOT*, 1999 Ohio App. LEXIS 4246, at *6 (Sept. 16, 1999). “[T]he key to determining what type of decision is discretionary is the manual’s use of the would ‘should’ rather than ‘shall.’” *Dunlap v. W.L Logan Trucking Co.*, 161 Ohio App. 3d 51, 2005-Ohio-2386, ¶16 (10th Dist.).

Again, the Ohio Revised Code states that the term “public roads” does not include traffic control devices unless they are mandated by the Ohio Manual of Uniform Traffic Control Devices. R.C. 2744.01(H). Therefore, unless the OMUTCD lists a traffic control device under a heading titled “standard” or employs the term “shall,” the traffic control device is not a part of the public highway as defined for purposes of Chapter 2744 of the Ohio Revised Code.

None of the traffic control devices identified below by the appellees was mandated by the OMUTCD. As a result, none of the traffic control devices identified by the appellees are a part of the “public road,” and the decisions whether or not to use such devices was left to the discretion of the Wayne County Engineer.

Section 6 of the OMUTCD outlines the requirements and recommendations for Temporary Traffic Control Devices. Section 6F.44, which addresses Shoulder Signs and Plaques makes no mandatory requirements for the posting of warning signs relating to the shoulder. Section 6F.44 states that Soft Shoulder and Low Shoulder signs may be used and that Shoulder Drop Off signs should be used when a shoulder drop off “exceeds 3 inches in depth for a continuous length along the highway.” Section 6F.45 provides guidance of Uneven Lanes signs, stating that such signs should be used “during operations that create a difference in elevation between adjacent lanes that are open to travel.” Finally, Section 6F.47 states that signs warning of no center line or no edge line should be used when such lines are obliterated during the work. *See also*, 6F.78. None of these sections contains a provision stating that any of the signs are mandatory, therefore the presence or lack of such signs do not constitute a part of the public roadway and the decision as to what temporary traffic control devices to use was left to the discretion of the Wayne County Engineer Department. (Appendix 5 contains applicable provisions from the OMUTCD as published in the 2012 version. While the section numbering was modified from the 2005 version of the OMUTCD, the operative language remained constant. *See*, Appx. 6).

The orange signs that were used were “temporary traffic control signs.” (CP LF No. 3, Terrill Depo., p. 37). In construction zones, the signs used are temporary. “They’re moving, flowing zones, so the signs are moved and we maintain the ones the are pertinent to the situation.” (CP LF No. 7, Saurer Depo., p. 26). Standard orange construction signs were used for the scratch paving project, “as an advisory,” to alert motorists “that there’s work being done in that area.” (CP LF No. 7, Saurer Depo. pp. 28, 29). The decision to put up the signs was discretionary. (CP LF No. 7, Saurer Depo., p. 55; CP LF No. 3, Terrill Depo., p. 19; CP LF No. 8, Conn Depo., p. 17). A map which depicts the location of various temporary construction signs used during the CR 44 project is contained in the record. (CP LF No. 8, Conn Depo., p. 16; Exhibit A). What signs were used and placed, those decisions, were made based on the foreman’s experience and judgment. (Wilcox Depo., p. 18; CP LF No. 8, Conn Depo., p. 18).

Among the signs that were posted were: “no center line,” “uneven lanes,” and “road construction” sign north of the accident site, at the “Five Points” intersection. (CP LF No. 7, Saurer Depo., pp. 39-42). The “road construction sign is placed to alter motorists: “That’s especially the road construction sign at the beginning of the road is to let them know that there’s work being done on that road.” (CP LF No. 7, Saurer Depo., pp. 29, 56).

Appellees have acknowledged, and thus may continue to acknowledge, that the use and placement of temporary construction signs is discretionary under the OMUTCD, yet argue that once the discretion is exercised to use such a sign, then strict adherence to the OMUTCD is otherwise required as to those signs. This proposition has been rejected, most recently in the case of *Shope v. City of Portsmouth*, 2012-Ohio-1605 (4th Dist.). Authority relied upon by the appellees for the proposition that once discretion is exercised strict use of the OMUTCD is called for no longer represents Ohio law, given the substantive amendments to the code. *See also, Darby v. City of Cincinnati*, 2014-Ohio-2426, ¶19 (1st Dist.).

In *Shope*, the decedent died in an ATV accident. The accident occurred where a city roadway turns from pavement to an “unpaved, grassy area.” *Id.*, at ¶¶ 2, 4. There was a “parking curb” placed at the location in question, which the decedent struck, causing him to go airborne and resulting in his fatal injuries. *Id.* In a wrongful death action, the plaintiff claimed that the city violated the OMUTCD, because there were no form of warning signs, pavement markings, standard barricades or guardrails. *Id.*, at ¶5. There was evidence that the “parking block” had been installed by a city work crew. *Id.* The trial court denied Portsmouth’s motion for summary judgment, based upon immunity, and the court of appeals reversed. As part of its decision, the court was called upon to address “whether R.C. 2744.02(B)(3) applies to Portsmouth’s use (or nonuse) of traffic control devices.” *Id.*, at ¶¶20.

Because provisions of the OMUTCD dealing with the use of “dead end,” “no outlet” or “pavement ends” signs “is devoid of any mandatory ‘shall’ language,” the signs were not mandatory. *Id.*, at ¶¶ 22, 24. Precisely because the signs were not mandatory, “none of them fall within the scope of ‘public road’ as defined in R.C. §2744.01(H).” *Id.* “Standards using the word ‘should’ are considered to be advising, but not mandating, the particular signage or other device.” *Id.*, at ¶23.

The plaintiff in *Shope* also argued that Portsmouth could be held liable “because it ‘breached the [Traffic Manual’s] mandate to use engineering studies or judgments in deciding whether to install warning signs.’” The court held that:

R.C. 2744.01(H) clearly states that traffic control devices are not public roads unless those traffic control devices are mandated by the Traffic Manual. Therefore, regardless of whether a political subdivision uses engineering studies or judgments, R.C. 2744.02(B)(3) cannot apply to the failure to maintain discretionary warning signs. R.C. 2744.02(B)(3) applies *only* to mandatory traffic control devices, which makes sense considering the “discretion” defenses available under the third tier of political-subdivision immunity. *See* R.C. 2744.03(B)(3) and 2744.03(B)(5). Simply put, when it comes to discretionary traffic control devices, failing to use engineering studies or judgments does not fit within the narrow exception of R.C. 2744.02(B)(3).

Finally, with respect to the “large parking curb” that the decedent in *Shope* struck, the plaintiff claimed that the curb or block did not conform to the requirements of the OMUTCD. Plaintiff argued that, while a barricade was not mandatory, “once a decision to install is made, [the barricade] must conform to the specifications contained in the [Traffic Manual].” The court rejected this argument.

The court accepted that the “General Assembly completely eliminated the nuisance language [from former R.C. 2744.02(B)(3)] in an attempt to narrow the exceptions to immunity for political subdivisions.” *Id.*, at ¶29, citing Seikel v. Akron, supra, ¶12 (9th Dist.). The court stressed, again, that “the current R.C. 2744.02(B)(3) applies only to mandatory traffic control devices.” *Shope v. Portsmouth*, supra at ¶30. “Barricades are not mandatory. Therefore, failing to adhere to the Traffic Manual’s specifications for barricades does not fit within the narrow exception to immunity found in R.C. 2744.02(B)(3).” *Id.*

Appellees’ prior reliance upon the argument that, once a decision is made to post signage within a construction zone, some duty springs into effect requiring mandatory compliance with other provisions of the OMUTCD, ignores the fact that *Franks v. Lopez*, is no longer recognized as the operative law. The case of *Shope v. City of Portsmouth*, supra, perhaps best addresses this point as well:

To support her barricade-related argument, [plaintiff] relies upon *Franks v. Lopez*, 69 Ohio St. 3d 345, . . . (1994). In *Franks*, the Supreme Court of Ohio held that a “township’s alleged failure to maintain . . . signage already in place may constitute an actionable nuisance claim.” *Id.* at 348. We find, however, that *Franks* has no application to the present case. The Supreme Court of Ohio decided *Franks* under the old Political Subdivision Tort Liability Act, which provided that political subdivisions were “liable for injury caused ‘by their failure to keep road, highways, [and] streets . . . within the political subdivisions open, in repair, and free from nuisance . . .’” . . . *Id.* at 347, quoting the former R.C. 2744.02(B)(3). But the current version of the Act provides that “political subdivisions are liable for injury, death, or loss to person or property caused by their negligent failure to keep public roads in repair and other negligent failure to remove obstructions from public roads[.]” R.C. 2744.02(B)(3). The General Assembly completely eliminated the nuisance language in an attempt to narrow the exceptions to immunity for political subdivisions. See *Seikel* [v. Akron], 191 Ohio App. 3d 362, 2010 Ohio 5983, . . . at ¶12. Therefore, the holding in *Franks* is irrelevant to the current R.C. 2744.02(B)(3).

Instead, the current R.C. 2744.02(B)(3) applies only to mandatory traffic control devices. (Emphasis original). *Shope v. City of Portsmouth*, supra at ¶¶ 29, 30. *See too*, R.C. 2744.01(H); *Darby v. City of Cincinnati*, supra.

In any event, as a matter of law, there was no mandatory duty to place any temporary traffic control sign – advising of a “Low Shoulder” – north of the accident location. The provisions of the OMUTCD, relating to temporary traffic control devices during work or construction, are not written with the word shall and, thus, *are not mandatory*. Simply, temporary road construction signs are not mandatory under the OMUTCD. Thus, any alleged failure to adhere to the specifications for such signs, under the OMUTCD, does not fit within the narrow exception to immunity set forth in R.C. 2744.02(B)(3). The judgment of the Common Pleas Court should be reinstated for these additional reasons as well.

For the same reason, any reliance by the appellees upon that fact that white edge lines did not exist on CR 44 at the time of the accident, in an effort to utilize the exception from immunity, must be rejected. White pavement edge markings are not mandatory on a roadway such as CR 44.

Appellees previously agreed that white edge lines are not mandatory on CR 44. (CA Doc. 5, Appellants’ Brief, p. 15). Nevertheless, appellees suggest that the County may be exposed to potential liability because CR 44 did not have painted white edge lines on the morning of the accident. Again, however, “public roads” does not include traffic control devices unless such devices are mandated by the OMUTCD. Because white edge lines for CR 44 are not mandatory under the OMUTCD, this theory advanced by the appellees also fails as a matter of law.

Section 3 of the OMUTCD addresses markings on roadways; Section 3B.07 specifically addresses when edge lines are necessary on public roadways. Section 3B.07 reads, in pertinent part:

Standard:

Edge line markings shall be placed on paved streets or highways with the following characteristics:

- A. Freeways
- B. Expressways, and
- C. Rural arterials with a traveled way of 20 feet or more in width and an ADT of 6,000 vehicles per day or greater.

Guidance:

Edge line markings should be placed on paved streets or highway with the following characteristics:

- A. Rural arterials and collectors with a traveled way of 20 feet or more in width and an ADT of 3,000 vehicles per day or greater.

(Again, Appendix 5 contains applicable provisions from the OMUTCD as published in the 2012 version. The 2012 version of the OMUTCD, regarding edge lines, was unchanged from the 2005 version. *See*, Appx. 6).

The section of CR 44 between SR 585 and Northeast Street (TR 226) is considered a Rural Major Collector, has the surface width of 20 feet, and pursuant to the latest study (2008), has a Average Daily Traffic County (ADT) of approximately 307 vehicles per day. (CP LF No. 1, Terrill Aff., ¶¶ 2-3). For white edge lines to be mandatory, the ADT must be 6,000 vehicles per day or greater. Here, because the ADT on CR 44 is quite low, at 307 vehicles per day, white, painted edge lines are not mandatory on that road. Even under Section 5E.03, for “low volume roads,” edge line markings are discretionary. Therefore, the application of such lines was at the complete discretion of the County and not a part of the public roadway which the defendant had the duty of keeping “in repair.”

As perhaps best stated in *Bonace v. Springfield Township*:

We note that there is no longer an immunity exception for problems with traffic control devices unless those devices are mandated. So, for instance, one could not complain about

a faded or absent edge line unless it was mandatory. . . . Thus, [plaintiff] cannot complain for instance that a missing line misled her.

Bonace v. Springfield Township, supra at ¶35.

Further, it is inconceivable that edge lines would be re-painted on a freshly-paved road immediately. Rather, after a road project such as the CR 44 project, the road striping is done within approximately two weeks. (CP LF No. 6, Spademan Depo. p. 13). The scheduling and sequence of such work falls within the design discretion of a political subdivision and, for this additional reason, the appellees are not exposed to potential liability under the facts of this case.

For all of the reasons addressed above, appellants maintain that the “third” tier of immunity analysis is not required in this case. The immunity exception set forth in R.C. 2744.02(B)(3) is now restricted to expressly narrow the circumstances that may expose a political subdivision to liability. In any event, to the extent the “defenses” found in R.C. 2744.03 require attention, appellants are entitled to the defenses based upon the exercise of discretion in the course of the CR 44 project. *See*, R.C. 2744.03(A)(5).

In *Haynes v. Franklin*, supra, the court found that the “edge drop” at issue, which was created during a roadway repaving project, was the “result of the implementation of a discretionary design plan.” *Haynes*, supra, 2002-Ohio-2334, ¶20. Plaintiff in *Haynes* asserted, “in effect that the plan for constructing the berm separately from the repaving contract was defective, and that the city was negligent in determining the order in which it addressed the berming process.” *Id.* The court concluded: “This is a challenge to the design of the repaving project, which falls within the scope of immunity provided by R.C. Chapter 2744.” *Id.*

In this case, the County Engineer exercised its discretion as to the sequence and timing of the various components of the CR 44 repaving project. That sequence involved placement of various temporary construction signs, installation of the new asphalt pavement, followed by completion of the berm work and

then application of center lines and edge lines. All of these planning functions are discretionary, and the appellants remain entitled to summary judgment on the grounds of immunity.

The accident that occurred on October 19, 2011, was most unfortunate and tragically resulted in the death of a young woman. However, it does not follow that the condition of CR 44, which was “in repair” – having just been repaved – was in any manner a proximate cause of the accident. Ohio courts have recognized that although the issue of proximate cause is usually an issue of fact to be determined by the jury, “the issue may be determined as a matter of law where, with the evidence construed most strongly in favor of the plaintiff, the undisputed facts are such that no reasonable person could infer that a defendant’s acts were the cause of a plaintiff’s injuries.” *Williams v. 312 Walnut P’Ship*, (Dec. 31, 1996) 1996 Ohio App. LEXIS 5887. In such cases, a defendant is entitled to judgment as a matter of law. *Id.*

From the investigation into the accident conducted by numerous members of the OHP, reasonable minds can reach but one conclusion, finding that the accident occurred when: (1) the decedent operated her vehicle in a manner which caused the right-side tires to leave the “public road” and drive on the berm beyond the edge of the road; and (2) in the course of returning her vehicle to the roadway, the decedent “overcorrected” which led to her vehicle entering a rotation, losing control and striking a tree. Further, speed was excessive for conditions. As Sgt. Topp, and accident reconstructionist with the OHP explained:

Q Okay. In the Narrative of the report, it states that she went off the right side of the road, overcorrected to the left, reentered the road, and overcorrected to the right. Was that strictly based on the evidence you found at the scene?

A Yes, sir, it was.

Q Tracks in the berm north of the driveway and then the yaw marks?

A Yes, sir.

(CP LF No. 4, Topp Depo., p. 19).

Lieutenant Enderby, with the OHP, testified that the sequence of the accident was determined from the physical evidence at the scene, including the yaw marks left on the roadway. (CP LF No. 5, Enderby Depo., p. 17). The decedent's right-side tires dropped off the roadway, there was then a "sudden jerking motion" to the left to come back on the road and another "quick jerk" to the right, which set the vehicle into a rotation. (CP LF No. 5, Enderby Depo., p. 19). Further, Lieutenant Enderby testified regarding the contributing factor of speed, for conditions:

Q A couple of things. I just want to go through it -- and I know you didn't prepare it -- but, based on what you do know. On the second page of the report, it indicates, under Contributing Circumstances, 05, which is unsafe speed --

A Um-hum.

Q -- of the driver. Was any calculation ever done to determine what speed she was traveling?

A No.

Q The posted speed limit on that road's 55 miles an hour, correct?

A That's correct.

Q And it's my understanding there was no advisory or reduced speed limit posted because of the maintenance that was going on. Is that true?

A I don't believe there was any reduction in speed on that road posted, no.

Q Okay. Do you know why unsafe speed was listed as a contributing circumstance?

A Based upon the road conditions being wet. Anytime a vehicle loses control, you know, we have to mark some sort of a contributing circumstance. And in this case, although it may not have been over the posted speed limit, a slower speed may have lessened the severity of the crash or the distance that the vehicle traveled.

Q Because the vehicle, once it left the roadway, slid a good distance across a

lawn before striking a tree?

A Right. But there's minimal friction on wet grass. So you could slide for a great distance even at a slower speed.

Q Is it your understanding that that was listed, though, because something had to be listed and the crash occurred?

A It was the most appropriate contributing circumstance.

(CP LF No. 5, Enderby Depo., pp. 12-14). From the record of evidence in this case, developed in the accident investigation, it is apparent that the proximate cause of this accident was excessive speed for conditions, regardless of the posted speed, coupled with the driver's actions.

No arm of government, including Wayne County, is an insurer of the safety of its roadways. *E.g.*, *Siemens v. DOT*, 2011-Ohio-3965, ¶5 (Misc.); *Klisuric v. DOT*, 2011-Ohio-6901, ¶4 (Misc.). To the contrary, Wayne County is entitled to the recognition of its immunity from liability for the condition of its "public roads," in the absence of evidence that it has negligently failed to keep any such public roads "in repair." CR 44 was "in repair" at the time of the unfortunate accident which precipitated this case. CR 44 had just been re-paved the day before the decedent's accident, and there is no evidence in the record of this case that the new roadway surface had any deterioration, holes, missing or crumbling pavement on the morning of the accident.

The obvious expression of policy behind R.C. 2744.02(B)(3) is to encourage reasonable maintenance and repair of the public roads. When a political subdivision, such as Wayne County in this instance, uses its resources to restore the traveled portion of a roadway through the process of full-width re-paving, it is providing not only for the public convenience in the use of such roadway but it should be recognized as insulating itself from potential liability claiming "negligent failure to keep public roads in repair." The "roadway itself" was in repair, and the appellants are entitled to immunity. *Howard*, supra ¶29.

CONCLUSION

Wayne County did not negligently fail to keep CR 44 “in repair,” at the time of the decedent’s accident. To the contrary, the “public road,” as defined for purposes of R.C. Chapter 2744 had just been resurfaced, full width from edge to edge, and was free from any deterioration. There is no evidence that the new roadway surface installed on CR 44 by the County Engineer’s Office had any deterioration, holes or crumbling pavement, on the morning of the accident. The appellants were and remain entitled to immunity under the record of this case.

Neither the berm nor the edge drop on CR 44 are recognized as part of the “public roads” for purposes of immunity under R.C. Chapter 2744. Consequently, Wayne County is not liable for the accident which allegedly occurred as a result of the conditions of the berm or edge drop.

WHEREFORE, appellants, County of Wayne and Wayne County Board of Commissioners (and their unnamed employees), respectfully request that the appellants’ propositions of law be adopted by the Court and that the judgment of the Wayne County Court of Common Pleas be reinstated.

Respectfully submitted,

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