

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

**RICKY ALLEN BAKER, *et al.*,**

**Plaintiffs-Appellees**

**v.**

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

**Defendants-Appellants.**

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

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**MERIT BRIEF OF AMICUS CURIAE,  
OHIO ASSOCIATION OF CIVIL TRIAL ATTORNEYS  
IN SUPPORT OF APPELLANT, COUNTY OF WAYNE, OHIO**

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## **STATEMENT OF INTEREST OF AMICUS CURIAE**

The Ohio Association of Civil Trial Attorneys (“OACTA”) is a state-wide organization of more than 500 Ohio attorneys, corporate executives, and managers who devote a substantial portion of time to the defense of civil lawsuits and the management of tort claims against individuals, corporations, and government entities. Issues of political subdivision tort liability are of keen interest to OACTA’s members; it has an active Governmental Liability committee, and OACTA has appeared before this Court as *amicus curiae* in numerous appeals involving governmental liability issues.

This appeal is of significant interest to OACTA because the Ninth District’s decision ignores the General Assembly’s definition of “public roads” within the Ohio Political Subdivision Tort Liability Act, specifically R.C. 2744.01(H), and opens substantial risks of governmental liability which the General Assembly expressly intended to close. Additionally, the Ninth District’s decision creates unnecessary ambiguity in situations where roads are undergoing maintenance and repair, or where edge lines are discretionary under the Ohio Manual of Uniform Traffic Control Devices, thus fostering unnecessary litigation and improperly expanding the risk of governmental liability in such cases.

## **STATEMENT OF THE CASE AND STATEMENT OF FACTS**

The facts of this case, while tragic, are straightforward. In the early morning hours of October 19, 2011, 17-year-old Kelli Baker lost control of her car when her right wheels dropped off the edge of the pavement of County Road 44 in rural Wayne County. After “Ms. Baker’s right tires went off the road... [s]he overcorrected by turning sharply to the left... [t]hen overcorrected again by turning sharply to the right”, sending the car into an uncontrolled spin which ended when the car went off the roadway and crashed into a tree. (9<sup>th</sup> Dist. Decision, C.A. Doc. #10, ¶2). Regrettably, Kelli Baker died in the crash.

The day prior to the crash, the Wayne County Engineer's department had re-paved County Road 44. Although the paving was complete, the fresh pavement had not yet been painted with new center and edge lines, and the berm had not yet been "banked" or built up to meet the new height of the re-paved road. (*Id.*, ¶2).

Kelli's parents sued Wayne County, claiming that "the County created a dangerous condition by virtue of the unfinished roadwork..." (*Id.*, ¶4), specifically the unfinished edge line painting and "re-berming." (Baker Memorandum in Opp. Juris., p. 4).

The trial court granted Wayne County summary judgment, holding without further elaboration, that the County was immune under the rationale in *Bonace v. Springfield Township*, 179 Ohio App.3d 736, 2008-Ohio-6364, 903 N.E.2d 863 (7th Dist.). On appeal, the Ninth District reversed and remanded, finding that because the County "paved over the white edge lines and added an additional layer of asphalt that resulted in an edge drop of approximately 4 ½ or 5 inches...the County could be liable for negligent failure to keep County Road 44 in repair under RC 2744.02 (B)(3)." (9<sup>th</sup> Dist. Decision, ¶

This Court has now granted jurisdiction to consider two propositions of law, which are:

Proposition of Law No. 1:

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

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.

## LAW & ARGUMENT

### Proposition of Law No. 1:

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

#### **I. The statutory definition of “public roads” applies regardless of any ongoing construction work.**

R.C. 2744.01(H) defines “public roads” as used in R.C. 2744.02(B)(3), stating:

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

The Ninth District apparently decided this definition was not clear enough in the context of an ongoing repair or maintenance project, stating:

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

(Decision, ¶11).

The Bakers argue that this statement does little more than restate the existing law, arguing that “no new standard was created, the definition of “public road” was not rewritten, and the General Assembly’s power was not usurped” and that “the Ninth District’s decision is wholly consistent with Ohio case law, specifically the portion of *Bonace v. Springfield Township* 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.’” (Baker Mem. In Opp. To Jurisdiction, pp. 3, 2, quoting *Bonace*, 2008-Ohio-6364 at ¶45).

If this were true, this Ninth District would have merely applied the statutory language, and/or even the language from *Bonace*, to identify the scope of “public road”. But it did not. Indeed, it specifically distinguished *Bonace*, asserting there was a “better analysis” to apply in the context of ongoing repairs. But the ongoing repairs are a merely a factual distinction without a legal significance. It amounts to merely a pretext for a new standard which ignores both the limitation inherent in *Bonace*, i.e. that the County’s liability stops at the edge of the pavement, and ignores the express exceptions to “public roads” stated in R.C. 2744.01(H)—specifically non-mandated traffic control devices (i.e., the edge lines) and berms.

**A. The unpainted edge lines were not mandatory and thus were not part of the “public road”.**

The Ninth District reasoned that until the white edge lines were re-painted, and until the road was “re-bermed”, i.e., until the berm was “banked [i.e., built up] to mitigate the drop-off at the road’s edge” (Decision, ¶2), the edge-drop constituted an arguable “negligent failure to keep public roads in repair” under R.C. 2744.02(B)(3). But this cannot be true because both conditions are excluded from “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).

R.C. 2744.01(H) expressly excludes “traffic control devices unless...mandated by the Ohio manual of uniform traffic control devices.” Section 3 of the ODOT Manual of Uniform

Traffic Control Devices, 2005 edition,<sup>1</sup> governs pavement markings. Section 3B.07 provides that white edge lines are mandatory for freeways, expressways, and “[r]ural arterials with a traveled way of 20 feet or more in width and an ADT [average daily traffic] of 6,000 vehicles per day or greater.”

And it is undisputed that County Road 44 does not fall within the requirements of OMUTCD Section 3B.07. The Bakers themselves acknowledge, “it is true that *edge lines were not mandatory* on C.R. 44 because it is not a high volume road....” (Baker Memorandum in Opposition to Jurisdiction, p. 11)(*emphasis* added).

Thus, as a matter of law, the presence or absence of the white edge lines cannot constitute a “failure to keep [County Road 44] in repair” under R.C. 2744.02(B)(3).

**B. “Re-berming” is not work on a “public road” within R.C. 2744.01(H).**

The other condition identified by the Ninth District—the height of the edge drop-off—was not due to the pavement itself but because “the berms had not yet been banked [i.e., built up] to mitigate the drop-off at the road’s edge.” In their Memorandum in Opposition to Jurisdiction, the Bakers describe this unfinished work as “re-berming”. (Baker Mem. in Opp., p. 4). In other words, the “dangerous condition” yet to be “mitigated” was not the height of the roadway but the depth of the berm. All the paving had been done and completed. What was unfinished was the “re-berming” to “bank” or build up the berm.

But R.C. 2744.01(H) expressly excludes berms from “public roads”. Thus, the “re-berming” would not have been work on any part of County Road 44 that fell within “public roads” under R.C. 2744.01(H).

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<sup>1</sup> Section 3 of the 2005 edition of the ODOT Manual of Uniform Traffic Control Devices, in effect on the date of the subject accident, can be viewed at: [http://www.dot.state.oh.us/Divisions/Engineering/Roadway/DesignStandards/traffic/OhioMUTCD/Documents/2005%20MUTCD%20Revision1\\_file%203\\_Part%203%20Markings\\_no%20change%20from%202005\\_bookmarked.pdf](http://www.dot.state.oh.us/Divisions/Engineering/Roadway/DesignStandards/traffic/OhioMUTCD/Documents/2005%20MUTCD%20Revision1_file%203_Part%203%20Markings_no%20change%20from%202005_bookmarked.pdf)

Ultimately, the Ninth District’s definition of “public roads” must be rejected, and the application of R.C. 2744.01(H) enforced, in order to preserve the limited scope of “public roads” which does not include discretionary edge lines or berms. The General Assembly carved out no exception for “public roads under construction” or repair, and the Ninth District’s decision must be reversed in order to preserve the General Assembly’s intent.

**C. “Under repair” is not synonymous with “disrepair.”**

While not part of the questions expressly before this Court, there is a disturbing assumption underlying the Ninth District’s analysis which deserves attention and correction. By creating a standard which applies to “repair or maintenance project[s]...in various stages of completion,” the Ninth District appears to have equated “under repair” with “disrepair”, such that a road is not considered to be “in repair” until ongoing maintenance and repair operations are complete. Indeed, in their Memorandum in Opposition to Jurisdiction, the Bakers expressly argue:

Obviously, at the time of the accident, the roadway was not ‘in repair’ because the County has not completed [repairs]. 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....

(Baker Mem. In Opp., p. 7).

This is a dangerous proposition which is also outside the scope of R.C. 2744.02(B)(3), and could arguably expose political subdivisions to liability any time road maintenance is being performed. It is directly contrary to not only the current—and narrower—statute, but is actually contrary to this Court’s decisions even under the prior version of the Political Subdivision Tort Liability Act.

In *Haynes v. City of Franklin*, 95 Ohio St.3d 344, 2002-Ohio-2334, 767 N.E.1146, this court held that under the former Act, an edge-drop may become a hazardous “nuisance” by virtue

of deterioration and disrepair, but not as a result of deliberate design or construction. This Court stated:

An edge drop may constitute a nuisance for purposes of that statute where the drop *resulted from a failure to maintain a preexisting shoulder or berm*... and where the political subdivision has failed to correct the defect upon being charged with actual or constructive notice of its existence. *If, however, a dangerous edge drop is the result of design or construction, it is under our precedent and, by definition, not a nuisance* within the scope of R.C. 2744.02(B)(3).

*Haynes*, 2002-Ohio-2334 at ¶19.

And as noted in *Bonace*, the subsequent amendment of R.C. 2744.02(B)(3) and 2744.01(H) only made “the immunity exception...harder for the plaintiff to establish”. *Bonace* at ¶27. *Bonace* found that the rationale in *Haynes* applied with even more force under the amended statute, stating:

Just as the nuisance element did not include a claimed design or construction flaw, nor does the “in repair” element. Otherwise, *Haynes* would have discussed this element as well as nuisance. See *Haynes*, 95 Ohio St.3d 344, 2002-Ohio-2334, 767 N.E.2d 1146.

Even without resorting to what *Haynes* did not say, “in repair” in its ordinary sense refers to *maintaining a road's condition after construction* or reconstruction, for instance by fixing holes and crumbling pavement. It deals with repairs *after deterioration of a road* ...Consequently, “*in repair*” *does not create a duty to change [allegedly hazardous features] that were constructed (and recently reconstructed) into a road.*

*Bonace*, 2008-Ohio-6364 at ¶¶ 28-29 (*emphasis* added).

Here, the alleged liability does not arise from deterioration of any original conditions of the roadway, but rather out of the features created by ongoing but incomplete construction.

The Ninth District’s decision completely disregards this distinction, by asserting a new standard which specifically applies “[i]n the context of a road that is subject to a repair or maintenance project...in various stages of completion...” The Ninth District’s decision creates

an improper and illogical presumption that ongoing repairs are themselves evidence of disrepair, until such repairs are fully complete. But as this Court held in *Haynes*, the duty to keep public roads “in repair” is a duty to prevent and mitigate deterioration and disrepair. Liability only arises out of conditions which are the result of deterioration, not features “that were constructed...into a road.” *Bonace*, at ¶29.

Here, the allegedly hazardous conditions were not the result of deterioration but rather features “constructed into” County Road 44. For this additional reason, the decision of the Ninth District must be reversed.

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.

**II. Where there are no mandated edge lines, an edge-drop is a condition beyond the edge and traveled surface of the pavement and is not part of the “public road.”**

This accident occurred when the vehicle’s right wheels went off the paved roadway and dropped down onto an unpaved berm or shoulder which had not yet been “re-bermed”, “banked” or built up to compensate for the new height of the pavement. Thus, the “hazard” of which the Bakers complain was a condition of the berm, not a condition of the surface of the roadway.

*Bonace* correctly states, ‘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 (*emphasis* added). Because R.C. 2744.01(H) expressly excludes berms and shoulders, the “public road” necessarily ends at the edge of the horizontal surface of the pavement, even if there is no white edge line. Accordingly, an edge-drop—i.e., the vertical difference between the pavement surface and the unpaved berm or shoulder—by definition cannot be part of the “public road.” By statutory

definition, a vehicle which travels off the pavement has necessarily driven off the “public road”. As a matter of both statutory definition and common logic, the edge drop is not a part of the travelled surface of the roadway. And the unpaved berm or shoulder is not part of the “public road” for which the political subdivision may be liable...even if it had not yet been “re-bermed” to lessen the vertical distance to the new pavement surface. The Ninth District’s decision is simply wrong as a matter of law and must be reversed.

### **CONCLUSION**

For all the above reasons, Amicus Curiae Ohio Association of Civil Trial Attorneys respectfully requests that the Court reverse the decision of the Ninth District Court of Appeals in this matter, and reinstate the summary judgment granted to Appellant Wayne County.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

This hereby certifies that all counsel of record have been served by regular United States mail, postage prepaid, and electronic mail pursuant to applicable rule this 3<sup>rd</sup> day of August, 2015.

*/s/ Kurt D. Anderson* \_\_\_\_\_  
Kurt D. Anderson (S.Ct. # 0046786)