

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

RICKY ALLEN BAKER & SHARON	:	Appeal from the Court of Appeals
MARIE BAKER, Individually and as	:	Ninth Appellate District
Administrators of the Estate of KELLI	:	Wayne County, Ohio
MARIE BAKER	:	
	:	
	:	Court of Appeals
Plaintiff-Appellee,	:	Case No. 13 CA 0029
	:	
v.	:	
	:	
COUNTY OF WAYNE, et al.	:	
	:	
Defendants-Appellants	:	

**MERIT BRIEF OF APPELLEES RICKY ALLEN BAKER & SHARON MARIE BAKER,
INDIVIDUALLY AND AS ADMINISTRATORS OF THE ESTATE OF KELLI MARIE BAKER**

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I. 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 Defendants (“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 v. Springfield Twp.*, 7th Dist. No. 07 MA 226, 2088-Ohio-6364, 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, 2014.¹ The Ninth District denied the County’s Motions for Reconsideration and to Certify a Conflict on October 22, 2014. The County then filed a Notice of Appeal and a Memorandum in Support of Jurisdiction on December 3, 2014. On May 20, 2015, this Court accepted the appeal solely on Propositions of Law No. I & II.

The primary issue on appeal currently before this Court is straight forward and simple. Did the Ninth District re-write the definition of a “public road” and/or usurp the authority of the Legislature as the County now alleges? A plain reading of the Ninth District’s Opinion demonstrates that, contrary to the County’s meritless assertion, the Ninth District did no such thing. The Ninth District’s Opinion is wholly consistent with *Bonace*, supra, and with the definition of a “public road” as articulated in R.C. § 2744.03(H). Contrary to the arguments of the County and their Amici, The Ninth District’s Opinion will not cause the sky to fall, it will not cause the flood

¹ In its decision, the Ninth District went to great lengths to distinguish *Bonace* due to the unique facts at issue in this case.

gates of litigation to open, and it does not change the state of the law relative to political subdivision immunity in Ohio. All the Ninth District's Opinion did was find that, under the unique circumstances of this tragic accident, a question of fact exists as to whether the County met its duty to keep C.R. 44 in repair on the date in question. As a result, a jury question exists and the Ninth District's Opinion should be affirmed and this matter remanded to the trial court for trial.

B. Relevant Facts

On October 19, 2011, 17-year-old Kelli Marie 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. (CP Doc. 1, Complaint, ¶7).² The dangerous conditions created by the County included: no painted edge lines, no painted center lines, improper and/or missing warning signs, missing asphalt, and an unmarked 4 ½ to 5" lip at the edge of the pavement. The County created these 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 whatsoever. (CP LF No. 3, Terrill Depo. pp. 11, 18; Wilcox Depo. pg. 14; CP LF No. 6, Spademan Depo. pg. 7).

C.R. 44 was scheduled for scratch-paving work in October, 2011 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. (Weiker Depo. pg. 11). 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. (Id). The scratch-paving is then followed by a process of re-berming for the purpose of eliminating one of the dangerous conditions created that

² In the interest of convenience and consistency, Appellees will use the same record designations as the Appellant herein.

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. (CP LF No. 3, Terrill Depo. pg. 30). It is undisputed that the County always intended to repaint the center and edge lines before concluding the maintenance project. (Id). 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. (Wilcox depo. pg. 15). 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 jet black road with no street lights and lacking proper warnings.³

The accident that resulted in the death of Ms. Baker occurred at approximately 6:24 a.m. on the morning of October 19, 2011. (CP LF Doc. 1, Exhibit 6). It was dark and raining at the time of the accident and there were no street lights in the area. (CP LF Abbuhl Depo. pg. 10; CP LF Enderby Depo. pg. 15). 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. (CP LF Doc. 1, Exhibit 1). Again, the County always intended to repaint the edge lines and center line before concluding the

³ The County has repeatedly argued that edge and center lines and warning signs were not required under the OMUTCD because C.R. 44 was not a high volume road. However, in so arguing, the County has repeatedly ignored the age-old axiom that a duty assumed is a duty owed. By commencing this maintenance project while keeping the road open to the motoring public, the County had a duty to act reasonably regardless of what was mandatory.

maintenance project. It is undisputed that 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 the new asphalt surface being built up over the old, deteriorated surface, creating a significant 4 ½ - 5” lip at the edge of the road. Wayne County employees admit that this lip or drop-off was unusual and not something expected in a project of this nature. (Wilcox Depo, pg. 21; Weiker Depo, pg. 24; CP LF Sauer Depo, pg. 39). In fact, the only person anyway involved in this matter who did not think that the 4 ½ to 5” lip at the edge of the pavement was unusual was County Engineer Roger Terrill, who admittedly, and contrary to the representation of the County, had not involvement whatsoever in this road maintenance project at any point in time. (CP LF Terrill Depo. pg. 32).

Not only was the 4 ½ to 5” lip highly unusual in a maintenance project like this, it also exceeded the maximum two-inch threshold specified by the Ohio Department of Transportation. (CP LF Doc. 1, Exhibit 1, ¶11). ODOT specifications require that any such condition exceeding the two-inch maximum threshold be delineated with sufficient traffic controls such as drums and lights. (Id. ¶12). Here, it is undisputed that the County had nothing delineating this unreasonably dangerous condition in the direction that Ms. Baker travelled on October 19, 2011. 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. (CP LF Abbuhl Depo. pg. 28).

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. (CP LF Enderby Depo. pp. 19-20; CP LF Saurer Depo. pp. 46-47). As with the unreasonably dangerous lip 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 to guide Ms. Baker in her travels.

The County made the decision to commence this maintenance project with no engineering input or oversight whatsoever. The County made the decision to allow C.R. 44 to remain open despite the unreasonably dangerous conditions created by its actions. The County had a duty to keep C.R. 44 in repair and its failure to do so was a significant contributing factor in the tragic death of Kelli Marie Baker. (CP LF Doc. 1, Exhibit 1, ¶¶8, 13). The County cannot be permitted to create unreasonably dangerous conditions with impunity only to hide under a blanket of immunity. R.C. §2744 was not designed to permit political subdivisions to act unreasonably and irresponsibly to the detriment of the public they serve.

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) at the time of the accident at issue. Contrary to the County's baseless assertion, the Ninth District did not create a new definition of a public road or usurp the power of the Legislature. The Ninth District simply and properly applied the law to the unique facts of this case and determined that questions of fact exist as to whether the County satisfied its duty to Kelli Marie Baker.

II. ARGUMENT IN SUPPORT OF PROPOSITIONS OF LAW

Proposition of Law No. I:

THE NINTH DISTRICT'S DECISION IS WHOLLY CONSISTENT WITH THE PLAIN LANGUAGE OF R.C. 2744.02(B)(3) AND R.C. 2744.01(H) AND SHOULD NOT BE REVERSED

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 briefing: "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 then makes the 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" lip that existed at the edge of pavement before the road reaches the berm. As the Ninth District unanimously determined, the County is wrong. Here, it was the edge of the pavement itself, not the berm or the shoulder, that was the primary dangerous condition at issue. Here, because of the absence of the painted edge lines, the traveled portion of the roadway, and therefore the "public road" by definition, extended to the edge of the pavement which was not in repair as required on the date in question.

In addition to trying to cloud the issues by repeatedly referencing the berm when it was actually the edge of the pavement created by the County during the maintenance project that caused

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

Ms. Baker to lose control of her vehicle, the County also continues to argue that C.R. 44 was in repair on the date of the accident because the surface of the road had been repaved the day before the accident. In so arguing the County repeatedly ignores the undisputed fact that the maintenance project was not yet complete on October 19, 2011. The repaving of the road's surface was just one component of a multi-phase project. The County undertook the maintenance project expressly because C.R. 44 was not "in repair." It simply defies logic for the County to allege that C.R. 44 was somehow "in repair" before the maintenance project was actually complete. If the road was actually in repair the project would have been unnecessary in the first place. Not only was the road not "in repair" on the day Kelli Marie Baker was killed, the County's haphazard maintenance project actually made the road unreasonably dangerous until the project was completed, after she died.

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 C.R. 44 was under a day-to-day repair project while still being open for public travel on the day Kelli Marie Baker was killed. 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 in this case. It is also consistent with *Bonace's*

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.

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. 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 The Ninth District did not carve out any exceptions to or expand the reach of the exception to immunity enumerated on R.C. § 2744(B)(3). The Ninth District did not change the definition of a “public road” in any way. Once again, the Ninth District simply applied the law to the tragic facts of this case and determined that questions of fact exists for a jury.

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 solely upon *Bonace*. However, *Bonace* made it clear that when, as here, the road is lacking painted edge lines, the “public road” reaches the edge of the pavement. 179 Ohio App. 3d at 747. Furthermore, if the road is 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, unlike here, the project was completed at

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.

the time of the subject accident and the roadway was therefore “in repair.” Also unlike here, in *Bonace*, the white edge lines had been repainted and were present at the time of the subject accident. *Id.* As a result, and 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 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. Here, it is also undisputed that although the County always intended to repaint the edge lines at the completion of the maintenance project, they were not present on the day of the accident at issue. As a result, the traveled portion of the roadway extended to the edge of the pavement and the County had a duty to keep the entire roadway 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 Kelli Marie Baker’s death. Therefore, the “public road” reached the edge of the pavement, which necessarily includes the 4 ½ - 5” lip – a temporary condition created by the County’s maintenance project which the County always intended to alleviate specifically because of the dangers created.

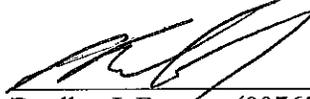
Furthermore, in this case, there is also a question of fact as to whether the road was actually missing asphalt. Road Foreman Charles Weiker testified that some of the new asphalt “sloughed” over the edge of the pavement making it “hard to even tell where the old edge of the pavement is because we straighten the edge of the pavement up especially if it’s broken.” (Weiker Depo. pg. 34). 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 additional questions 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 "public road" would have been only the space between the lines, and under those circumstances, the County would have been entitled to immunity pursuant to R.C. § 2744. However, under the unique circumstances of this case, the exception to immunity under R.C. §2744(B)(3) applies because the County failed to keep the entire roadway in repair from edge to edge.

III. CONCLUSION

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 affirm the decision of the Court of Appeals reversing the trial court's summary judgment ruling in favor of Wayne County and remand this matter for trial.

Respectfully submitted,



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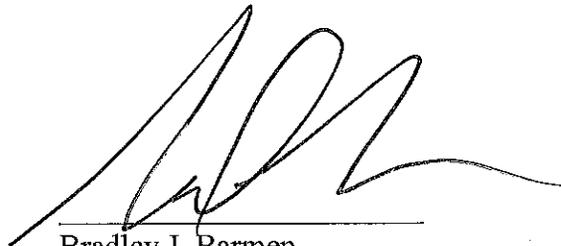
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PROOF OF SERVICE

I certify that a copy of the foregoing was served by regular U.S. mail and/or email to all Parties or their Attorneys on this 16th day of September, 2015:

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A handwritten signature in black ink, appearing to read 'Bradley J. Barmen', written over a horizontal line.

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