Supreme Court of Ohio Clerk of Court - Filed October 06, 2015 - Case No. 2014-2079

IN THE SUPREME COURT OF OHIO

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

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

James F. Mathews (0040206)
(*Counsel of Record*)
Kara D. Williams (0084245)
BAKER, DUBLIKAR, BECK,
WILEY & MATHEWS
400 South Main Street
North Canton, Ohio 44720
Phone: (330) 499-6000
Fax: (330) 499-6423
E-mail: mathews@bakerfirm.com
kwilliams@bakerfirm.com
Counsel for Appellants

Bradley J. Barmen (0076515)
MANNION & GRAY CO., LPA
1375 E. 9th Street, Suite 1600
Cleveland, Ohio 44114
Phone: (216) 344-9422
Fax: (216) 344-9421
E-mail: bbarmen@manniongray.com
Counsel for Appellees

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REPLY 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.

Neither the appellees nor the amicus curiae supporting the appellees have offered authoritative support for the definition of "public road" created and used by the court of appeals. The definition for "public roads" enacted by the General Assembly draws no distinction whatsoever between a road under repair or restoration at the time of an accident as opposed to one that is not. There is no support in the plain language of R.C. 2744.01(H) for the appellate court's sweeping conclusion and pronouncement 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; Appx. p. A9).

The appellees continue to direct the focus of their alleged claim to the existence of the "drop off" beyond the limit of the new pavement installed during Wayne County's restoration of CR 44 just prior to the decedent's accident. It is precisely because that drop off is at the berm – it is a condition of the berm – that the condition does not qualify as part of the "public road" for consideration of the immunity exception found at R.C. 2744.02(B)(3).

The court of appeals was not authorized to expand the operative definition of public roads; but that is precisely what it did in this instance. By re-defining "public roads" to broadly include "areas under control" or "subject to ongoing repair work" the lower court bootstrapped the condition of the berm within such a definition. However, the General Assembly's actual definition – R.C. 2744.01(H) itself –must control, and that definition is what must be exclusively applied in this context generally and to the facts of this case specifically.

Proposition of Law No. II:

AN "EDGE DROP" AT THE LIMIT OF A PAVED ROADWAY IN 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.

The appellees suggest that the court of appeals merely determined that 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." (Appellees' Merit Brief, p. 2). The question of whether the immunity exception set forth in R.C. 2744.02(B)(3) is arguably triggered by some "negligent failure to keep public roads in repair" must, necessarily, be preceded by an inquiry into whether or not the condition at issue is even part of the "public road." Here, there is the allegation that the condition of the berm along re-paved CR 44 was not in repair, because the berm was approximately 4-5 inches lower than the restored roadway surface itself. It bears repeating that the berm, however, is not part of the public road and, consequently, its condition does not fall within the (B)(3) exception.

Not from a single word in the court of appeals' opinion is there any criticism of the condition of the re-surfaced area of CR 44 itself. Rather, the appellate court's *singular* focus, drawn from the focus of the appellees, was directed to the condition of the "drop off" or "edge drop" beyond the limit of the pavement. The court stated, in part, that during the CR 44 re-paving project the County had "added an additional layer of asphalt that resulted in an edge drop of approximately 4 ½ or 5 inches. In the context of the ongoing construction project, the County could be liable for negligent failure to keep County Road 44 in repair under R.C. 2744.02(B)(3)." (Opinion, p. 7; Appx. p. A10). For whatever reason, the appellate court glossed over its salient observation, earlier in its opinion, that "The ***berms*** had not yet been banked to mitigate drop-off at the road's edge, . . . " during the CR 44 project. (Opinion, p. 2; Appx. p. A5, Emphasis added). In other

words, it was a condition of the "berm" along CR 44 – where the "edge drop" existed – which the appellate court concluded exposed Wayne County to potential liability under R.C. 2744.02(B)(3). Any condition of the "berm" however is not, in answer to the threshold question presented by R.C. 2744.01(H), part of the "public road" for purposes of applying the immunity exception.

It is important to recognize that the parties agree that the "scratch paving" project for the re-surfacing of CR 44 involved the placement of new asphalt material to a depth ranging from one, to one and one-half inch. (Appellees' Merit Brief, p. 2). Thus, the CR 44 project did not create the entire 4 ½ to 5 inch edge drop to the berm that is the focus of the claim. Moreover, there was no "missing asphalt" as appellees contend in passing. There is no reference to any missing asphalt in the court of appeals' opinion, and no theory of missing asphalt was relied upon for the appellate court's decision. The "jut out" to which there has been reference was not somehow created as a result of the CR 44 repaving project undertaken in October of 2011. The deposition testimony in the record demonstrated, without challenge, 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 road contour is followed, and the project did not involve adding material "going out" or "coming in" from the established edge or berm. (Wilcox Depo., p. 23).

Regardless, the "jut out" is not, as a matter of law, 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; the space immediately beyond all points where the pavement ends is the berm off the edge of the road. At best, 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 latter point was stressed in *Bonace v. Springfield Township*, infra. In *Bonace*, one of the plaintiff's contentions concerned a slope to the roadway which was allegedly 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 and it remained such during subsequent repaving projects, to which immunity attached. *Id.*, at ¶30. Likewise, the "jut out" was a design feature that remained constant after the CR 44 repaving project, to which immunity attaches.

Bonace and *Lucchesi* are not materially distinguishable in this case. *Bonace v. Springfield Township*, 179 Ohio App. 3d 736, 2008-Ohio-6364; *Lucchesi v. Fischer*, 179 Ohio App. 3d 317, 2008-Ohio-5934. R.C. 2744.01(H) does not draw some artificial distinction between a roadway undergoing a repair or re-surfacing project, and the holdings of both *Bonace* and *Lucchesi* are thus applicable. It is equally immaterial that CR 44 did not have painted white edge lines on the morning of the accident. This is because, as it is undisputed, edge markings were *not* mandatory on CR 44 in light of its minimal average daily traffic volume. As addressed in appellants' merit brief, the immunity exception at issue no longer retains the much-broader language that previously existed, which extended liability exposure to "nuisance" conditions. When the General Assembly removed such language, with the express purpose of limiting political subdivision liability for roadway accidents, the General Assembly eliminated liability exposure under the "duty assumed, duty owed" argument advanced by the appellants. *Shope v. City of Portsmouth*, 2012-Ohio-1605 (4th Dist.). The "public road" CR 44 was that portion extending to the limits of the newly-restored asphalt. There is nothing in this record suggestive that the restored and re-surfaced traveled way of CR 44 was out of repair.

Finally, it must again be stressed that none of the traffic control devices identified below by the appellees, or referenced in their merit brief, was mandated by the OMUTCD. As a result, none of the traffic control devices referred to by the appellees were a part of the "public road."

There was no "requirement" that any traffic control device be used for any edge drop exceeding two inches, as suggested. Instead, 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." These sections are not mandatory; they do not trigger the immunity exception. Section 6F.45 provides guidance for 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. Again, none of these sections contains a provision stating that any of the signs are mandatory. Consequently, the presence or lack of such signs does 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.

CONCLUSION

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 in R.C. 2744.02(B)(3). An "edge drop" extending beyond the limit of a paved roadway to the berm or shoulder is not part of the "public road." This is so regardless of whether repair or other work is underway. Further, the berm remains such without regard to its elevation in relation to the adjacent road.

There is no "sleight-of-hand" at work in this case; "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. Accordingly, 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.

Ms. Baker's accident was not a product of the re-surfaced asphalt. Unfortunately, she did leave the roadway, and that action precipitated the accident. Even the court of appeals made such observation, "Ms. Baker's right tires went off the road," and the actions of over-correction at a high rate of speed then produced the accident. (Opinion, p. 1, Appx. p. A4).

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,

s/James F. Mathews

James F. Mathews (0040206)
(*Counsel of Record*)
Kara D. Williams (0084245)
BAKER, DUBLIKAR, BECK,
WILEY & MATHEWS
400 South Main Street
North Canton, Ohio 44720
Phone: (330) 499-6000
Fax: (330) 499-6423
E-mail: mathews@bakerfirm.com
kwilliams@bakerfirm.com
Counsel for Appellants
County of Wayne,
the Wayne County Board of Commissioners
(and their unnamed employees)

PROOF OF SERVICE

A copy of the foregoing merit reply brief of appellants was served by ordinary U.S. mail this 6th day of October, 2015, to:

Bradley J. Barmen, Esq.
Mannion & Gray Co., LPA
1375 E. 9th Street, Suite 1600
Cleveland, Ohio 44114
bbarmen@manniongray.com
Counsel for Appellees

Kurt D. Anderson, Esq.
Collins, Roche, Utley & Garner, LLC
800 Westpoint Parkway, Suite 1100
Cleveland, Ohio 44145
kanderson@cruglaw.com
Counsel for Amicus Curiae
Ohio Association of Civil Trial Attorneys

Frank H. Scialdone, Esq.
Mazanec, Raskin & Ryder Co., LPA
100 Franklin Row
34305 Solon Road
Cleveland, Ohio 44139
fscialdon@mrrlaw.com
Counsel for Amici Curiae
County Commissioners Association of Ohio, County Risk Sharing Authority,
Public Entities Pool of Ohio, and Ohio Township Association Risk Management Authority

Andrew D.M. Miller, Esq.
City of Columbus, Department of Law
Richard C. Pfeiffer, Jr., City Attorney
77 North Front Street
Columbus, Ohio 43215
admmiller@columbus.gov
Counsel for Amicus Curiae
City of Columbus & Lead Attorney for City Amici

John Christopher Reece, Esq.
City of Akron, Law Department,
Cheri B. Cunningham, Director of Law
161 South High Street, Suite 202
Akron, Ohio 44308
jreece@akronohio.gov
Counsel for Amicus Curiae
City of Akron

Thomas J. Kaiser, Esq.
City of Cleveland, Department of Law
Barbara A. Langhenry, Dir. of Law
601 Lakeside Avenue, Room 106
Cleveland, Ohio 44114
tkaiser@city.cleveland.oh.us
Counsel for Amicus Curiae
City of Cleveland

Peter J. Stackpole, Esq.
City of Cincinnati, Law
Department, Terrance A. Nestor,
Interim City Solicitor
801 Plum Street, Room 215
Cincinnati, Ohio 45202
peter.stackpole@cincinnati-oh.gov
Counsel for Amicus Curiae
City of Cincinnati

John C. Musto, Esq.
City of Dayton, Law Department,
Lynn R. Donaldson - Interim City Attorney
101 West Third Street - P.O. Box 22
Dayton, Ohio 45401
john.musto@daytonohio.gov
Counsel for Amicus Curiae
City of Dayton

Adam W. Loukx, Esq.
City of Toledo, Law Department,
Adam W. Loukx, Director of Law
One Government Center, 22nd Floor
Toledo, Ohio 43604
adam.loukx@toledo.oh.gov
Counsel for Amicus Curiae
City of Toledo

Drew Legando, Esq.
Landskroner Grieco Merriman, LLC
1360 West 9th Street, Suite 200
Cleveland, Ohio 44113
drew@lgmlegal.com
Counsel for Amicus Curiae OAJ

s/James F. Mathews
James F. Mathews
BAKER, DUBLIKAR, BECK,
WILEY & MATHEWS