ORIGINAL

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

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

# MOTION FOR RECONSIDERATION

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Now come Ricky Allen Baker & Sharon Marie Baker, Plaintiff-Appellees, and move this honorable Court for reconsideration of the April 19, 2016 Decision reinstating summary judgment in favor of the County of Wayne, et al., Defendant-Appellants. As set out fully in the memorandum below, pursuant to S.Ct.Prac.R. 18.02(B)(4), this Court is urged to reconsider its Decision on the above captioned case.

Respectfully submitted,

Bradley J. Barmen

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**MEMORANDUM IN SUPPORT OF RECONSIDERATION**

On April 19, 2016, this Court reinstated summary judgment in favor of the Appellants. The Ohio Supreme Court may use its authority to "correct decisions which, upon reflection, are deemed to have been made in error." See S.Ct.Prac.R. 18.02, and *Dublin City Sch. Bd. of Educ. v. Franklin County Bd. of Revision*, 139 Ohio St. 3d 212, 214 (Ohio 2014), quoting *State ex rel. Huebner v. W. Jefferson Village Council* 75 Ohio St.3d 381, 383, 662 N.E.2d 339 (1995).

In the Decision to reinstate the Trial Court's summary judgment in favor of the Appellants, this Court considered the meaning of "public roads" as set forth in R.C. 2744.01(H). Specifically, what constitutes the "public road" with regard to the sovereign immunity exception for negligent failure to keep public roads in repair under 2744.02(B)(3). This Court held the edge drop at the limit of the paved road is part of the berm or shoulder, and therefore does not fall within the definition of the public road.

Generally, the public road is the space between the painted edge lines. See *Lucchesi v. Fischer*, 179 Ohio App.3d 317, 2008-Ohio-5934, 901 N.E.2d 849, p. 44-45 (12th Dist.). When the road has been paved and the edge lines have not yet been repainted, the roadway "could be considered to reach the edge of the pavement." *Bonace v. Springfield Twp.*, 179 Ohio App.3d 736, 2008-Ohio-6364, 903 N.E.2d 683 p. 45 (7th Dist.). The key here is, in the absence of edge lines, the roadway is considered to exist to the edge of the pavement.

Because there were no edge lines on County Road 44 ("CR 44") on the morning of Kelli Baker's death, the public road was the entire paved surface. This, as stated in *Bonace*, is including the edges of the pavement, which in this instance was comprised of the same new material added by the County the day before. With no edge lines, there was no clear delineation between the public road and the shoulder or berm, however, the shoulder or berm was never the issue. On the contrary, it was the edge of the pavement, created by the County, which was a significant contributing factor in Kelli Baker's death.

Here, the Majority holds that because berms and shoulders are specifically excluded from the definition of public road, "the edge drop must be considered part of the berm or shoulder, not the public road." *Baker v. Wayne Cty.*, Slip Opinion No. 2016-Ohio-1566, p. 23. This Court's assertion that the roadway exists, that berms and shoulders are not part of the roadway, and therefore the edge must be the berm and not the roadway, does not explain why the edge must be the berm and not the roadway. Particularly since the edge of the road could only have been created when the material which comprised the road was laid down by the County. Especially since *Bonace* notes that without an edge line, the public road goes from edge to edge.

On the other hand, the Dissent says it best, "A roadway has depth; it is not a two-dimensional geometric plane. The edge consists of the same materials as the surface of the road. Just as the edge

of a table is part of the table and not part of the floor below, the edge of the roadway is part of the roadway and not the shoulder or the berm." *Baker* p. 29. It was not the shoulder, or the mud and gravel next to the road that killed Kelli Baker, it was the pavement. It was not the shoulder, or the mud and gravel next to the road that caused Kelli Baker to lose control of her vehicle, it was the five inch edge drop. The metaphysics of what is or isn't the berm is a misdirection at best, and results in a horrifying conclusion.

This holding, that the edge of any road that does not have edge lines is part of the berm or shoulder and therefore does not qualify for the exception to sovereign immunity set forth in R.C. 2744.01(H), effectively allows political subdivisions to operate with impunity and be shielded from all consequences of their actions. Holding that the edge is not part of the road means there could be an edge drop of any height and the County would have no duty to maintain a reasonable edge. The purpose of sovereign immunity is to prevent frivolous litigation, but Kelli Baker's death due to the County's failure to mitigate the dangerous circumstances presented by CR 44 at the time of her accident is anything but frivolous.

The County negligently created a dangerous condition on CR 44 on the morning of Kelli Baker's accident. Here, in spite of a five inch drop from the driving surface to the unpaved berm, the County did not attempt to lessen or warn of the potential danger. There was no painted edge line. There was no lowering of the 55 mile per hour speed limit. There was not a low shoulder sign in the direction that Kelli Baker was traveling, although there was one posted in the other direction. The County failed to follow the Ohio Department of Transportation specifications that require a drop exceeding two inches to be delineated with traffic control devices such as drums or lights. To say that the County had no responsibility whatsoever to mitigate these dangerous conditions, which were

negligently created by the County, because of some mental gymnastics regarding the supposed difference between the road and the shoulder, is both absurd and frightening.

The Majority's conclusion is in error as the result of misplaced focus. The matter at issue in this case is not whether the edge drop itself is part of the public roadway or not. Rather, the issue is a matter of fact: at the time of Kelli Baker's accident in the early morning on October 19, 2011, was CR 44 in a state such that it would be considered "in repair" under R.C. 2744.02(B)(3)? Had Wayne County fulfilled its responsibilities in making sure CR 44 was "in repair?" Instead of looking to the definition of a public road, the inquiry conducted by this Court ought to have been what constitutes a road being "in repair." Whether or not the specific facts in this case showed that the road was, or was not, "in repair" is a matter for the finder of fact to consider.

## CONCLUSION

For the foregoing reasons, it is respectfully urged that the motion for reconsideration be granted and this Court overturn its reinstatement of summary judgment and remand this case to be tried before a jury.

Respectfully submitted,

Bradley J. Barmen

Bradley J. Barmen (0076515)

COUNSEL FOR APPELLEES
BAKER ET AL.

**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that a copy of the foregoing *Motion for Reconsideration* has been served by ordinary U.S. Mail upon James F. Matthews, Baker, Dublikar, Beck, Wiley & Mathews, 400 S. Main St. North Canton, OH 44720 this 28 April, 2016.

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