

**Supreme Court Case No. 2017-0088
In the Supreme Court of Ohio**

JUDITH PELLETIER, *et al.*,

Plaintiff-Appellee

v.

CITY OF CAMPBELL, *et al.*,

Defendants-Appellants.

**On Discretionary Appeal from the Seventh District Court of Appeals,
Mahoning County, Ohio, Case No. 15-MA-0220**

**MERIT BRIEF OF *AMICUS CURIAE*,
OHIO ASSOCIATION OF CIVIL TRIAL ATTORNEYS
IN SUPPORT OF APPELLANT, CITY OF CAMPBELL**

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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 (including private practice, staff counsel, in-house counsel, and government attorneys) 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, many of which arise out of traffic accidents.

This appeal is of significant interest to OACTA because the Seventh District’s decision is contrary to this Court’s interpretation of “obstruction”, as used in R.C. 2744.02(B)(3), set forth by this Court in *Howard v. Miami Township Fire Dept.*, 119 Ohio St.3d 1, 2008-Ohio-2792, 891 N.E.2d 311. The Seventh District’s decision also ignores applicable prior decisions construing “in repair” and improperly broadens the duty to remove extraneous conditions, when the traffic control device itself is in proper condition and the degree of interference varies depending on a host of conditions other than the traffic control device itself. Ultimately, and especially troublesome, the Seventh District’s decision has the practical effect of reintroducing a “nuisance” standard, rejected by the General Assembly, that is uniquely (and improperly) focused on traffic control devices. While the Seventh District points to the involvement of a traffic control device to distinguish this case from *Howard*, that decision actually considered and rejected the argument that “obstruction” includes conditions such as impaired visibility. Thus, OACTA respectfully submits that the decision of the Seventh District should be reversed; affirming the decision would disrupt the continuity in this Court’s decisions and inject an ambiguous “nuisance” standard that is contrary to the intent of the General Assembly.

STATEMENT OF THE CASE AND STATEMENT OF FACTS

On August 22, 2013, Plaintiff-Appellee Judith Pelletier (“Pelletier”) was traveling eastbound on Sanderson Avenue in the City of Campbell (“City”) and failed to stop at the stop sign at the intersection of 12th Street, resulting in a collision with another vehicle southbound on 12th Street. Pelletier claims she did not see the stop sign because her view was impaired by a shrub bush growing in the tree lawn approximately 34 feet in front of the sign. (See Deposition of Judith Pelletier, Ex. B). Accident scene photographs indicate the visibility of the stop sign varies depending on the angle of view and the distance from the stop sign. *Id.*

When Pelletier sued the City for her accident, the City moved for summary judgment based on sovereign immunity. The trial court denied summary judgment and the City filed an interlocutory appeal pursuant to R.C. 2744.02(C). On appeal, the Seventh District affirmed the denial of summary judgment, ruling that the impaired visibility of a traffic control device could constitute a failure to “remove obstructions from public roads” as well as a “failure to keep public roads in repair” under R.C. 2744.02(B)(3). *Pelletier v. City of Campbell*, 2016-Ohio-8097 at ¶¶17-18, 21-22. The Seventh District declined to use this Court’s definition of “obstruction” in *Howard* on the grounds that *Howard* did not involve a mandatory traffic control device. *Id.* at ¶18. And the Seventh District cited no authority for finding that a traffic control device might be in need of “repair” despite being in good condition, if its functionality is impaired “because of some extraneous factor.” *Id.* at ¶22.

This Court has now granted review.

LAW & ARGUMENT

The City has submitted the following proposition of law:

Proposition of Law No. 1:

BECAUSE AN “OBSTRUCTION” FOR PURPOSES OF DETERMINING THE IMMUNITY OF A POLITICAL SUBDIVISION IN ALL CLAIMS WHICH ALLEGE A NEGLIGENT FAILURE TO MAINTAIN A “PUBLIC ROAD” IS CONFINED TO A CONDITION WHICH BLOCKS OR CLOGS THE ROADWAY, ROADSIDE FOLIAGE WHICH DOES NOT BLOCK OR CLOG TRAVEL OR RENDER A TRAFFIC CONTROL DEVICE INDISCERNIBLE DOES NOT QUALIFY AS AN OBSTRUCTION.

I. The definition of “obstruction” in *Howard* controls, because *Howard* considered and rejected extraneous conditions such as visibility.

The Seventh District declined to apply the definition of “obstruction” set forth in *Howard*, asserting that *Howard* was not intended to address conditions that might impair the visibility of a traffic control device.

OACTA respectfully submits that the definition of “obstruction” provided by this Court in *Howard* should be applied here and not be disturbed, because the analysis in *Howard* demonstrates that this Court did consider precisely the visibility issues in question here, and nevertheless deliberately adopted a definition of “obstruction” that excluded extraneous factors, including visibility, and focused exclusively on physical obstructions of the roadway itself.

While the factual context in *Howard* did not include a traffic control device, the analysis in *Howard* shows that in attempting to formulate both a workable interpretation of “obstruction” and a broadly applicable rule of law, the *Howard* court did in fact consider visibility issues. Both the majority and the dissent in *Howard* discussed the case of *Manufacturer’s Nat’l Bank of Detroit v. Erie County Road Comm.*, 63 Ohio St.3d 318, 587 N.E.2d 819 (1992) which is factually very

similar to this case and involved the exact issue...vegetation that obscured the visibility of the road and “directly jeopardize[d] the safety of traffic on the highway.” *Howard*, at ¶27.

Manufacturer’s involved a cornfield planted in the right-of-way adjacent to an intersection, which blocked the view of traffic approaching on the through highway. Loretta Murray, headed northbound on Rye Beach Road in Erie County, stopped at the stop sign at the intersection with the through highway, Fox Road, but was unable to see approaching vehicles on Fox Road because of the cornfield. When she pulled into the intersection, her vehicle was hit by a westbound truck, killing her husband and daughter.

In considering whether a visibility obstruction created a “nuisance” under former R.C. 2744.02(B)(3), this Court ruled in *Manufacturer’s* that “a permanent obstruction to visibility, within the highway right-of-way, which renders the regularly travelled portions of the highway unsafe for the usual and ordinary course of travel, can be a nuisance for which a political subdivision may be liable under R.C. 2744.02(B)(3).”

The *Howard* Court’s subsequent discussion of *Manufacturer’s* is quite telling. In *Howard*, the majority decision cited *Manufacturer’s* as an example of conditions that created liability under a “nuisance” standard because they “directly jeopardize the safety of traffic on the highway ***even if they did not appear on the roadway itself.***” *Howard*, 2008-Ohio-2792, at ¶27 (***emphasis*** added). It then contrasted such conditions with amended R.C. 2744.02(B)(3), finding that “[t]he General Assembly, in furtherance of its [intent to limit political-subdivision liability for roadway injuries and deaths], used the word ‘obstructions’ in a deliberate effort to impose a condition more demanding than a showing of a ‘nuisance’...to establish an exception to immunity.” *Id.*, at ¶29. The *Howard* Court determined that “obstruction” was a physical obstacle to traffic, “not merely a

thing or condition that hinders or impedes the use of the roadway”, such as the visibility condition in *Manufacturer’s. Id.*, at ¶30.

The implication of this discussion was not lost on the dissenting justices in *Howard*, who likewise cited *Manufacturer’s* in arguing for a broader definition of “obstruction” and “obstruct” that would include conditions “that *either* block *or* impede safe travel.” *Id.*, at ¶34 (*emphasis* in original). In their view, impaired visibility such as existed in *Manufacturer’s* was as much an “obstruction” as a physical obstacle in the roadway. But this broader definition was rejected by the *Howard* majority, which limited “obstruction” to physical obstacles that completely blocked the physical movement of traffic.

Thus, although the fact pattern in *Howard* did not involve visibility issues, it is clear that in fashioning a workable and broadly applicable interpretation of “obstruction”, the *Howard* court specifically considered—and rejected—extraneous conditions such as visibility that might “jeopardize the safety of traffic on the highway” or “impede safe travel” but did not physically obstruct vehicular movement.

This narrow interpretation is consistent with the long-standing principle that immunity is the rule, not the exception, and that exceptions to immunity in R.C. 2744.02(B) must be interpreted narrowly and strictly. *Wall v. Cincinnati*, 150 Ohio St. 411, 83 N.E.2d 389 (1948); *Wooster v. Arbenz*, 116 Ohio St. 281, 283, 156 N.E. 210 (1927), paragraph three of the syllabus (finding that exceptions to political subdivision immunity “are in derogation of the common law and must therefore be strictly construed[.]”) *See also Doe v. Dayton City School Dist. Bd. of Edn.*, 137 Ohio App.3d 166, 169, 738 N.E.2d 390 (2d Dist., 1999)(Exceptions are “in derogation of a general grant of immunity, [so] they must be construed narrowly if the balances which have been struck by the state's policy choices are to be maintained.”)

Because *Howard* considered and rejected a broad definition of “obstruction” that would include visibility factors, and instead limited “obstruction” to physical obstructions, the decision of the Seventh District in this case should be reversed based on the ruling in *Howard*.

II. The involvement of a traffic control device is not a distinction.

The Seventh District refused to apply the definition of “obstruction” provided by this Court in *Howard*, claiming the present case is distinguishable because it involves a traffic control device. *Pelletier*, at ¶18.

However, R.C. 2744.02(B)(3) does not distinguish between “road” and “[mandatory] traffic control devices”. Rather, the definition statute, R.C. 2744.01(H), explicitly equates the terms, defining “road” as including mandatory traffic control devices. Thus, “mandatory traffic control device” is the same as “road”, not a separate and distinguishable feature. And because the duty under R.C. 2744.02(B)(3) is to remove “obstructions” from “roads” generally, it would be contrary to the statute to define “obstruction” in a way that applies uniquely to mandatory traffic control devices.

This also highlights the fact that the alleged “obstruction” here is a condition—impaired visibility—that can apply just as much to the entire road as to a specific traffic control device. Because “road” includes but is not limited to mandatory traffic control devices, any ruling concerning the visibility of a traffic control device will naturally extend to visibility of any other feature of a “road”. And here again, the discussion of *Manufacturer’s* in *Howard* is telling.

In *Manufacturer’s*, the obstructing vegetation blocked a clear view of the entire intersecting “road”, not merely some specific feature of it. That the stop sign at the intersection was clearly visible was meaningless; the real hazard was the approaching traffic, which could not be seen because the entire “road” itself could not be seen. Nevertheless, while acknowledging the

visibility condition in *Manufacturer's* as a “condition[] that directly jeopardize[s] the safety of traffic on the highway”, *Howard* at ¶27, the *Howard* majority nevertheless held such conditions to be outside the scope of “obstruction” in amended R.C. 2744.02(B)(3). “Obstruction” is limited to physical obstacles.

And the fact that the vegetation in *Manufacturer's* blocked the view of traffic “on the roadway” was likewise not sufficient. This was precisely the concern behind the *Howard* dissent’s advocacy for a broader definition of “obstruction” to include conditions that impede or impair “safe travel.” Nevertheless, the *Howard* majority adopted a narrow definition of “obstruction” that was limited to physical obstacles, and expressly rejected a broader definition that would include a condition—such as impaired visibility—“that hinders or impedes the use of the roadway or that may have the potential to do so.” *Id.*, at ¶30.

Thus, the involvement of a traffic control device in this case is not a point of distinction. The duty to remove “obstructions” applies broadly to “roads”, including mandatory traffic control devices; there should be no different interpretation of “obstruction” unique to traffic control devices.

III. The Seventh District’s decision would reimpose a “nuisance” standard for traffic control devices.

As discussed above, the Seventh District’s decision creates a rule that applies uniquely to mandatory traffic control devices, whereas the statutory duty applies broadly to “roads.” Moreover, defining impaired visibility as an “obstruction” effectively reinstates the “nuisance” standard rejected by the General Assembly.

In fact, substituting “obstruction” for “nuisance”, paragraph one of the syllabus in *Manufacturer's* reflects precisely what the Seventh District has decided here: “A permanent obstruction to visibility, within the highway right-of-way, which renders the regularly travelled

portions of the highway unsafe for the usual and ordinary course of travel, can be a[n “obstruction”] for which a political subdivision may be liable under R.C. 2744.02(B)(3).”

As this Court noted in *Howard*, the General Assembly clearly intended a more narrow and objective requirement than the “nuisance” standard. Visibility, particularly with respect to foliage and vegetation, is too variable to mandate. Visibility can be affected by a wide variety of factors, including the location of the driver, the type and growth rate of foliage, weather conditions such as rainfall that may cause growth spurts, and seasonal changes in the density of foliage. For example, overhanging foliage may affect the vision of a truck driver, being more elevated, without affecting than the vision of the driver of a sedan. Shrubbery in a tree lawn may interfere with the vision of a motorcyclist driving closer to the curb but not the vision of an automobile driver, positioned closer to the center line, who has a wider angle of view. And the difference between foliage that impairs and that does not impair the view of a traffic control device can literally be a matter of inches; depending on the type of plant and weather conditions such as rainfall or spring growth, the height, reach, or thickness of a plant can grow from non-intrusive to intrusive within a few short days. The General Assembly did not intend that municipal liability should hinge on such unpredictable variables.

In *Howard*, this Court recognized that conditions such as impaired visibility may have formerly constituted a “nuisance”, but that the General Assembly intended a much narrower and more objective. The Seventh District’s decision here mirrors the “nuisance” standard stated in *Manufacturer’s* and rejected *Howard*, and should therefore be reversed.

IV. The Manual of Uniform Traffic Control Devices does not mandate visibility.

The General Assembly has determined that liability with respect to traffic control devices is governed by the mandates of the Ohio Manual of Uniform Traffic Control Devices. R.C.

2744.01(H). *See also Bibler v. Stevenson*, 150 Ohio St.3d 144, 2016-Ohio-8449 at ¶18, describing the Manual as “the format by which authorities are made aware of how to comply with statutes.”

Importantly, the Manual distinguishes between road features that are mandatory and those that are recommended and require engineering discretion. Section 1A.13 of the Manual distinguishes between “Standards”, defined as “required, mandatory or specifically prohibited practices” employing the verb “shall”, and “Guidance”, defined as “recommended, but not mandatory, practice” using the verb “should.”

As the Tenth District has stated:

Where [a political subdivision] chooses to act, it is under a duty to conform to requirements in the MUTCD; however, the Manual leaves some decisions up to...reasonable engineering judgment.... ***The key to determining what type of decision is discretionary is the Manual's use of the word “should” rather than “shall.”*** Thus, while the word “shall” establishes a mandatory duty, ***the word “should” requires...discretion and engineering judgment.***

Dunlap v. W.L. Logan Trucking Co., 161 Ohio App.3d 51, 2005-Ohio-2386, 829 N.E.2d 356, at ¶16 (***emphasis*** added).

If maintaining visibility were considered to be an obligatory component of a mandatory traffic control device, one would expect that the Manual’s instructions regarding visibility and sightlines would likewise be mandatory. They are not. Rather, the Manual consistently avoids “shall” mandates regarding visibility and instead provides “should” recommendations, making treatment of visibility conditions a matter of discretion.

For example, Section 1A.04 Placement and Operation of Traffic Control Devices states, in relevant part:

Placement of a traffic control device ***should*** be within the road user’s view so that adequate visibility is provided. ...

(***emphasis*** added).

Section 2A.16 Standardization of Location explicitly recognizes that “standardization of position cannot always be obtained in practice.” Paragraph 06 states:

Signs *should* be located so that they:

A. Optimize nighttime visibility;

B. Do not obscure each other;

F. *Are not hidden from view.*

(*emphasis* added).

Particularly relevant to this case is Section 2A.22 Maintenance, Paragraph 03, which states:

Steps *should* be taken to see that weeds, trees, shrubbery, and construction, maintenance, and utility materials and equipment do not obscure the face of any sign or object marker.

(*emphasis* added).

The Manual’s consistent treatment of visibility as a discretionary component of traffic control devices demonstrates that visibility involves too many variables to standardize. *See, e.g.*, Section 2A.16 (“standardization...cannot always be obtained in practice”). Given the General Assembly’s clear intention to confine liability arising out of traffic control devices to the mandates of the Manual, this Court should not impose a standard more stringent than the Manual. Imposing liability for impaired visibility of a traffic control that conforms to the mandates of the Manual but is affected by extraneous conditions such as vegetation, would improperly broaden the definition of “road” in R.C. 2744.01(H), which the General Assembly intended to confine to the mandates of the OMUTCD.

IV. “In repair” is the correction of inherent defects, not extraneous conditions.

The City has submitted the following additional proposition of law:

Proposition of Law No. 2

“FAILURE TO KEEP PUBLIC ROADS IN REPAIR” PURSUANT TO THE IMMUNITY EXCEPTION SET FORTH IN R.C. 2744.02(B)(3), REQUIRES THAT THE ACTUAL PUBLIC ROAD BE IN A DETERIORATED, DAMAGED OR DISASSEMBLED STATE FROM THAT EXISTING AT CONSTRUCTION, PLACEMENT, OR RECONSTRUCTION.

The Seventh District’s opinion does not cite any authority nor offer any explanation for determining that the duty “to keep public roads in repair” encompasses removing an acknowledged “extraneous factor” that affects an otherwise perfectly functional traffic control device. Rather, the Seventh District ignored its own controlling precedent, alluded to in the City’s second proposition of law, in *Bonace v. Springfield Township*, 179 Ohio App.3d 736, 2008-Ohio-5364, 903 N.E.2d 683. *Bonace* interpreted the requirement in R.C. 2744.02(B)(3) to keep roadways “in repair” as correcting “deterioration” or “disassembly”. *Id.*, at ¶29.

Even more notable is that *Bonace* is rooted in this Court’s decision in *Heckert v. Patrick*, 15 Ohio St.3d 402, 473 N.E.2d 1204, holding that a corollary duty under R.C. 305.12 to keep roads and bridges “in proper repair” applied “only in matters concerning either the deterioration or disassembly of county roads and bridges.” *Heckert*, 15 Ohio St.3d at 406. The analysis in *Heckert* controls here and requires reversal.

The Seventh District’s decision in this case acknowledges that any impairment of the visibility of the stop sign was due to “some extraneous factor”, *Pelletier*, at ¶22. But *Heckert* held that the duty to keep roads and bridges “in proper repair” did not apply to extraneous factors, namely, “when the obstructions or interferences are unrelated to the conditions of the roadway ***[such as] tree limbs obscuring [the] view of [a] stop sign.***” *Heckert*, 15 Ohio St.3d at 407, citing *Western Pa. Nat’l Bank v. Ross*, 345 F.2d 525 (6th Cir. Ohio 1965)(***emphasis*** added).

Heckert recognized that keeping a road “in [proper] repair” necessarily means correcting a defective condition inherent within the roadway itself. The presence of an external or “extraneous factor” does not mean that a road (including a stop sign) is in disrepair, even if the external condition interferes in some respect with the road or sign. It would make little sense to say that a street or stop sign could be “repaired” by trimming shrubs in the tree lawn, without ever touching the street or sign.

Ultimately, the Seventh District’s decision in this case ignores *Bonace* and *Heckert* and—like its definition of “obstruction”—substitutes what amounts to a “nuisance” standard, which the General Assembly has rejected.

This Court should instead apply the rationale of *Bonace* and *Heckert*, and hold that “in repair” refers to the correction of “deterioration”, “disassembly”, or other defective conditions inherent in the “road” itself (including mandatory traffic control devices), and does not apply to “obstructions or interferences...unrelated to the conditions of the roadway [such as] tree limbs [or other vegetation] obscuring [the] view of [a] stop sign.” *Heckert*, 15 Ohio St.3d at 407.

CONCLUSION

For all the above reasons, Amicus Curiae Ohio Association of Civil Trial Attorneys respectfully urges this Court to reverse the decision of the Seventh District Court of Appeals in this matter, and to remand this matter with instructions that Appellant, City of Campbell, is entitled to summary judgment on the basis of sovereign immunity.

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 by electronic mail pursuant to applicable rule this 8th day of November, 2017.

/s/ Kurt D. Anderson_____

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