

No. 2014-2079

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IN THE SUPREME COURT OF OHIO

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Appeal from the Court of Appeals  
Ninth Appellate District  
Case No. 13CA0029

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RICKY ALLEN BAKER, *etc.*  
*Plaintiff-Appellee*

v.

COUNTY OF WAYNE, *et al.*  
*Defendants-Appellants*

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**MERIT BRIEF OF AMICUS CURIAE  
THE OHIO ASSOCIATION FOR JUSTICE  
IN SUPPORT OF APPELLEE**

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**TABLE OF CONTENTS**

TABLE OF AUTHORITIES ..... iii

STATEMENT OF INTEREST ..... 1

STATEMENT OF FACTS ..... 2

ARGUMENT..... 3

**PROPOSITION OF LAW NO. I:** ..... 3

**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.**..... 3

**PROPOSITION OF LAW NO. II:**..... 4

**An “edge drop” at the limit of the 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.**..... 4

CONCLUSION ..... 7

**TABLE OF AUTHORITIES**

**Cases**

*Hudson v. Petrosurance, Inc.*, 127 Ohio St.3d 54, 2010-Ohio-4505, at ¶31 ..... 4

*Hulsmeyer v. Hospice of Southwest Ohio, Inc.*, 142 Ohio St.3d 236, 2014-Ohio-5511, at ¶27..... 4

*Sech v. Rogers*, 6 Ohio St.3d 462, 464 (1983) ..... 4

*State v. Hull*, 110 Ohio St.3d 138, 2006-Ohio-4252, at ¶18 ..... 4

**Statutes**

R.C. 2744.01(H) ..... 1, 3

R.C. 2744.02(B)(3)..... 1, 3

R.C. 4511.01(BB)..... 5

R.C. 4511.01(EE) ..... 4

## **STATEMENT OF INTEREST**

The Ohio Association for Justice (OAJ) is a frequent contributor to this court on issues affecting the rights of injured citizens. OAJ counsels that the Political Subdivision Tort Liability Act (the “Act”) should be interpreted according to standard canons of statutory construction, and the words employed by the various provisions of the Act given their plain and ordinary meaning.

In this instance, the Act provides an exception to a political subdivision’s immunity for its negligent failure to keep “public roads” in repair, R.C. 2744.02(B)(2). The words *public roads* are defined by the Act to include “public roads, highways, streets, avenues, alleys, and bridges,” but to exclude “berms, shoulders, rights-of-way, [and] [un-mandated] traffic control devices,” R.C. 2744.01(H). OAJ respectfully submits that—in the absence of edge lines demarcating the roadway from the berm/shoulder—the commonly-accepted meaning of *public roads* includes the paved surface of the roadway on which motor vehicles typically or reasonably travel.

## **STATEMENT OF FACTS**

OAJ defers to the Appellee's Statement of Facts, but submits that the critical facts on which the primary statutory question turn are as follows: (1) County Road 44 had been re-paved the day prior to the crash; (2) Ms. Baker was traveling on the re-paved roadway at the time of the crash; (3) at the time of the crash, the roadway did not have an edge line demarcating any berm or shoulder.

## 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.**

OAJ does not take a position on whether R.C. 2744.01(H) is the *exclusive* definition for “public roads” as those words are used in R.C. 2744.02(B)(3). Indeed, there may be appropriate cases in which other definitions for *public roads*—either from other portions of the Revised Code or from industry- or generally-accepted usage—may supplement or clarify the Act’s definition.

What is at issue in this appeal is whether the roadway on which Ms. Baker was traveling—which did not contain an edge line demarcating the roadway from the berm—constitutes a “public road, highway, or street” or whether it constitutes a “berm or shoulder” under the Act. Since the Act does not provide any guidance on how to draw the distinction between “roads, highways, and streets” on the one hand, and “berms or shoulders” on the other, those terms (or groups of terms) should be given their plain and ordinary meaning, which OAJ discusses below under the second proposition of law.

But the Court should note the sleight-of-hand in the Appellants’ Merit Brief. The appellants say the crash resulted from an “edge drop” at the “edge” of the roadway (pp. 5, 11). The words *edge drop* and *edge* do not appear in the Act’s definition of “public roads.” That is, whether the edge of the roadway is part of the “road, highway, or street” or whether it is part of the “berm, shoulder, or right-of-way” is left unaddressed by the statute. Yet the appellants repeatedly slip the word *edge* into the statute, listing it along with “berm, shoulder, or right-of-way.” On page 14, the appellants three times improperly insert the word *edge* into the statutory definition, *including in their*

*proposition of law*: “berm, shoulder, **edge** or right-of-way.” Thus, the appellants are asking this court to re-write the statute in their favor, as follows:

“Public roads” does not include berms, shoulders, **<edges>**, rights-of-way, or traffic control devices...

This Court has held that it “will not add [ ] words by judicial fiat.” *Hulsmeyer v. Hospice of Southwest Ohio, Inc.*, 142 Ohio St.3d 236, 2014-Ohio-5511, at ¶27 (citation omitted); *see also Hudson v. Petrosurance, Inc.*, 127 Ohio St.3d 54, 2010-Ohio-4505, at ¶31 (“We decline to add words to the statute or interpret the legislative silence...”); *State v. Hull*, 110 Ohio St.3d 138, 2006-Ohio-4252, at ¶18 (citation omitted) (“courts are not free to delete or insert other words”).

Since R.C. 2744.01(H) does not define the *edge* of the roadway at all—to wit, the statute does *not* include *edge* in the “berm, shoulder, or right-of-way” category of excluded items—this Court is left to determine whether the *edge of the roadway* is part of the “road” or whether it is part of the “berm” as those undefined terms are understood in common English usage.

#### **PROPOSITION OF LAW NO. II:**

**An “edge drop” at the limit of the 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.**

The question is not *what is a roadway*. The answer to that question is clear: “Roadway means that portion of a highway improved or designed or ordinarily used for vehicular travel except the berm or shoulder.” *Sech v. Rogers*, 6 Ohio St.3d 462, 464 (1983). There is really no question that Ms. Baker was traveling on the improved portion of the road ordinarily used for such vehicular travel, and she was thus on the “roadway” under R.C. 4511.01(EE), as interpreted by this Court in *Sech*—which is certainly

instructive on what *road* means as used in R.C. 2744.03(B)(3). Similarly, *street* and *highway* mean “the entire width between the boundary lines of every way open to the use of the public as a thoroughfare for purposes of vehicular travel.” R.C. 4511.01(BB).

The words *berm* and *shoulder* are not defined in R.C. Chapters 2744 or 4511, and the words *edge* or *edge drop* are not used in either chapter. Merriam-Webster defines *berm* as “(1) a narrow shelf, path, or ledge typically at the top or bottom of a slope; a mound or wall of earth or sand; (2) the shoulder of a road.” The Oxford English Dictionary defines *berm* as “a narrow space or ledge” or a strip of land bordering a bank or canal. The Ohio Department of Transport treats *berm* as synonymous with “shoulders.”<sup>1</sup> Thus, within the context of public roads, *berm* refers to an unpaved shoulder.

Merriam-Webster defines *shoulder* as “the part of the roadway outside of the traveled way.” The Oxford English Dictionary defines *shoulder* as “a strip at the side of the main carriageway on which vehicles may stop in an emergency.” The Federal Highway Administration also uses *shoulder* to refer to the area where vehicles may stop “for emergency use.”<sup>2</sup>

Given these definitions, the central factual question in this case is whether Ms. Baker left the *portion of the roadway ordinarily used for travel* or whether she left the roadway to use the *portion of the roadway outside of the traveled way on which vehicles may stop in an emergency*. The answer is clear: Ms. Baker was traveling on the paved

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<sup>1</sup> See March 11, 2011 ODOT publication regarding financial and policy implications on assuming primary responsibility for all state routes throughout Ohio regardless of local government jurisdiction (p. 17), available at: <http://www.dot.state.oh.us/Divisions/Legislative/Documents/ODOT%20REPORT%20-%20Maintenance%20of%20Municipal%20Routes%203-11-11.pdf>

<sup>2</sup> See February 2, 1990 FHA technical advisory regarding paved shoulders, available at: <http://www.fhwa.dot.gov/pavement/t504029.cfm>



portion of the roadway ordinarily used for travel, and she was not leaving the roadway to stop outside of it for an emergency.

Had there been a white edge-line indicating where the portion of the roadway ordinarily used for travel ended, and the portion of the roadway outside of the traveled way and used for emergencies began, things might be different. But in the absence of a (literal) bright-line separating the paved roadway into the *road used for travel* from the *road not used for travel*, reasonable motorists would use the paved roadway for travel.

Since Ms. Baker was traveling on the paved portion of the roadway, and did not cross an edge-line demarcating the portion on which travel is inappropriate, she was traveling on a “public road” and not on a “berm” or “shoulder.” As such, the appellee’s claims sound under the public-roads exception to immunity.

## CONCLUSION

The Court should hold that, absent an edge-line demarcating the roadway from the berm, the edge of the roadway is part of the “public road” as defined in R.C. 2744.01(H), such that a motor vehicle crash arising from the condition of the roadway’s edge falls under the exception to immunity under R.C. 2744.02(B)(3). Therefore, the Ninth District Court of Appeals’ decision should be affirmed and the case remanded to the Wayne County Court of Common Pleas for further proceedings.

Respectfully submitted,

*s/ Drew Legando*

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A copy of this document was served by email on counsel of record on September 16, 2015, pursuant to Civil Rule 5(B)(2)(f):

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