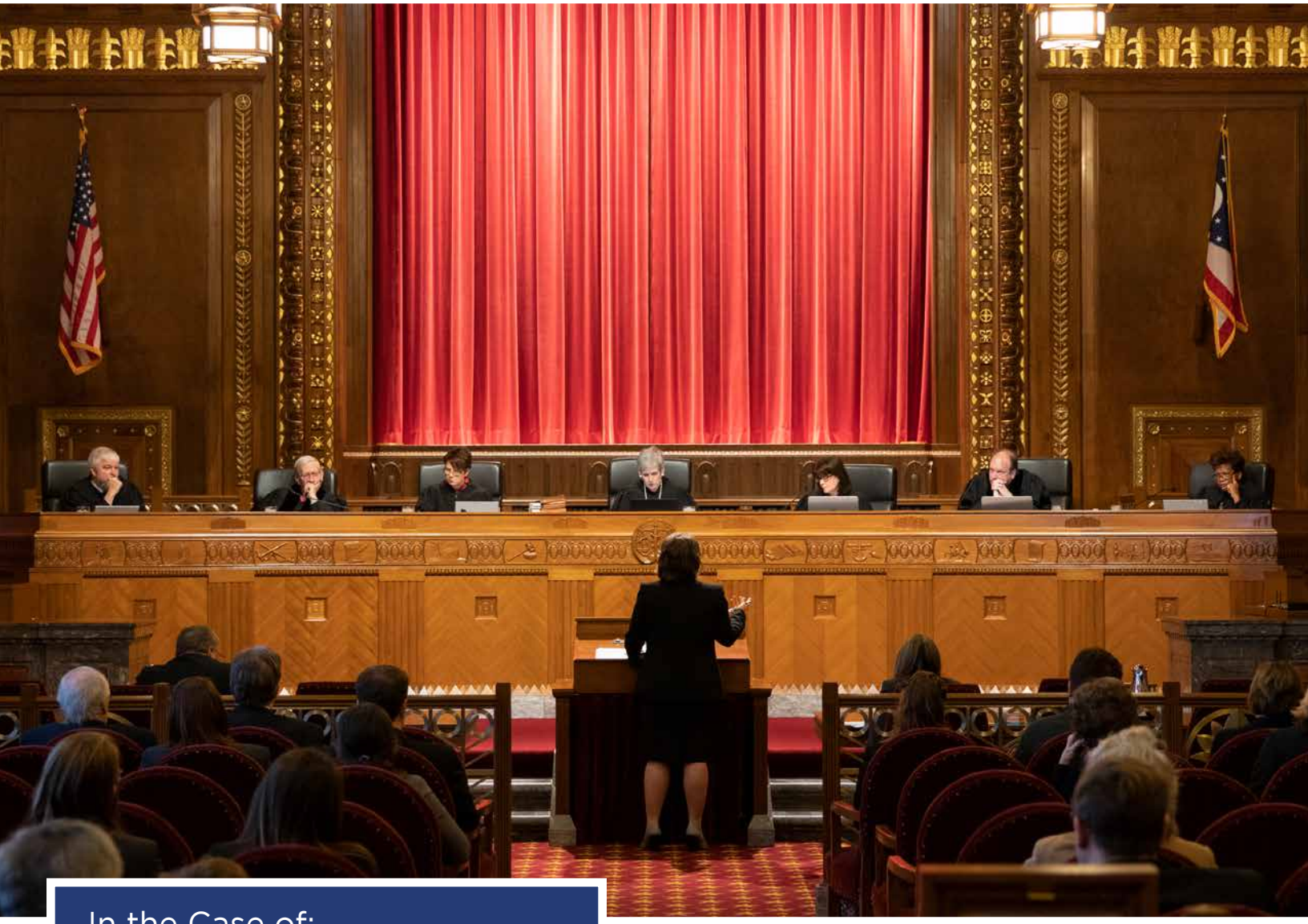
THE SUPREME COURT *of* OHIO

PRESENTS

UNDER ADVISEMENT

Ohio Supreme Court Cases On Demand

STUDENT RESOURCE GUIDE



In the Case of:

County of Wayne et al. v. Ricky Baker, administrator, Case no. 2014-2079

A teenage driver, 17-year-old Kelli Baker, was involved in a fatal car crash while driving on a county road that was repaved days prior to her accident. Baker's family filed a lawsuit claiming that Wayne County was negligent in its repair of the road, which led to her death. The Ohio Supreme Court is asked to decide if the county has immunity based on a state law that protects political subdivisions from such lawsuits.

Table of Contents:

Introduction 1

Oral Argument Preview 5

Observing the Oral Argument 14

Decision Summary 16

Decision News Article 20

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Introduction

The Supreme Court *of* Ohio

The title of this program, **Under Advisement**, comes from the statement that Chief Justice Maureen O'Connor uses to end each case heard during oral arguments, "Thank you. We'll take the matter under advisement and you'll be notified of our decision." In the Supreme Court setting, taking the matter "under advisement" means the justices will consider the legal arguments of each party in a case before issuing a ruling.

Wood County Courthouse, Bowling Green, Ohio

OHIO'S COURT SYSTEM

The courts oversee and administer the law. They resolve disputes under the law and strive to apply the law in a fair and impartial manner. As in other states, Ohio is served by separate state and federal court systems organized into trial courts, intermediate courts of appeals, and a Supreme Court in each system. State courts primarily deal with cases arising under state law, and federal courts primarily deal with cases arising under federal law.

STATE COURTS

Ohio Trial Courts

In Ohio, most cases begin and are resolved in trial courts, which are the workhorses of the state's judicial system. Ohio has several kinds of trial courts and each has venue and jurisdiction over cases. Simply stated, venue is the geographical location where a case is heard. Jurisdiction is the power and authority to hear and decide certain types of cases. Ohio's trial courts include common pleas courts, municipal and county courts, and mayor's courts.

- Common pleas courts have countywide venue and jurisdiction to decide all levels of civil and criminal cases. The common pleas court is Ohio's court of general jurisdiction, which means that it has the authority to hear almost any civil or criminal matter. The most serious civil or criminal cases must be heard in common pleas court. Each of the state's 88 counties has a common pleas court.
- Municipal and county courts have more limited jurisdiction than common pleas courts, and the authority to only decide less serious civil and criminal cases.
- Mayor's courts do not have civil jurisdiction and only have limited authority to hear minor criminal matters that occur within a city or village. Mayor's courts are not courts of record because they are not required to keep a record of their proceedings.

Ohio Courts of Appeals

The goal of every judicial system is to achieve complete and equal justice with every trial, but trial courts sometimes make mistakes or parties may disagree about the outcome of a particular case. This is why the courts of appeals were established. Ohio's courts of appeals review questions brought from common pleas courts, municipal courts, and county courts.

Only a final judgment or order can be appealed, and appeals generally must be on questions of law and not the facts of a case. Appeals court judges generally do not hear new testimony. They review transcripts from the lower court's hearings to determine if the law was interpreted and applied correctly. The party appealing the lower court's decision is the appellant, and files a written argument explaining why the trial court erred. The party that won the case in the trial court is the appellee, and also may file a written brief, but is not required to do so. The court then may hold oral arguments, at which time the judges can ask questions about the case before making a decision. Ohio's appeals court system is divided into 12 districts.

The number of judges in each district varies based on population, but each district has a minimum of four appellate judges. A panel of three of the district's judges hear cases challenging decisions made by a lower trial court located within its district. Although many cases end with a decision by a district court of appeals, such courts are not the last resort; rather they are an intermediate step from the trial courts to the Supreme Court of Ohio.

To qualify for election, court of appeals judges must be licensed attorneys with at least six years' experience. Once elected, they serve six-year terms.

The Supreme Court of Ohio

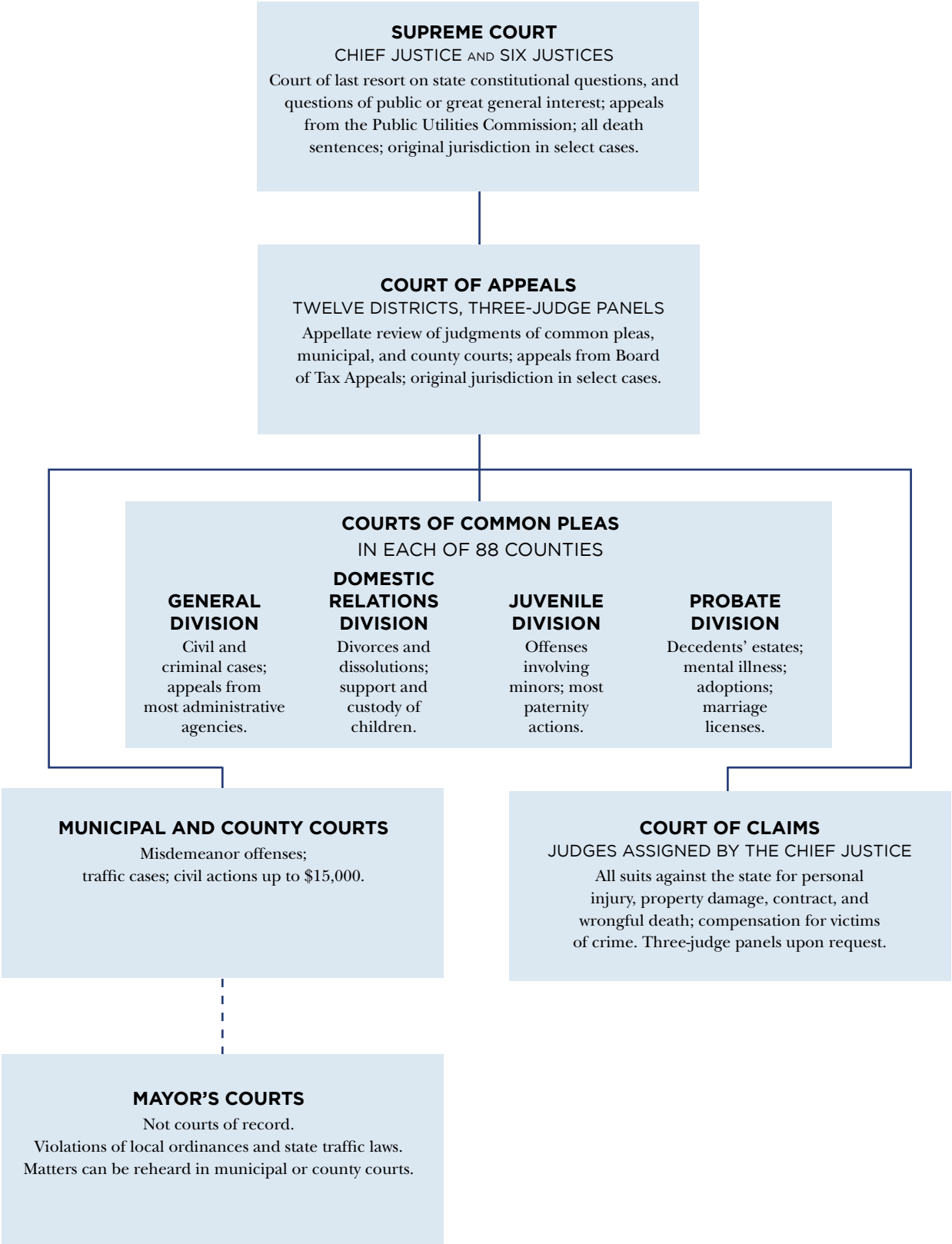
The Supreme Court of Ohio's main purpose is to serve as a court of appeals and Ohio's court of last resort. The Court is empowered to review final judgments and orders of lower courts; to affirm, reverse, remand (send back to a lower court), or modify judgments. Appeals to the Supreme Court generally are from the 12 district courts of appeals, rather than from the trial courts. The Court is required to hear some types of cases (cases involving the death penalty, some appeals from state agencies, cases involving state constitutional issues, and others), but most of its jurisdiction is discretionary and it selects cases of great importance or public interest to resolve.

The Supreme Court of Ohio has original (trial) jurisdiction for certain special remedies that permit a person to file an action in the Supreme Court. These extraordinary remedies include writs of habeas corpus (involving the release of persons allegedly unlawfully imprisoned or committed), writs of mandamus and procedendo (ordering a public official to do a required act), writs of prohibition (ordering a lower court to cease an unlawful act), and writs of quo warranto (against a person or corporation for usurpation, misuse, or abuse of public office or corporate office or franchise).

The Supreme Court of Ohio also has other important duties. These duties include prescribing rules of procedure for and providing general oversight of all lower courts, and overseeing the practice of law by attorneys.

The Supreme Court of Ohio consists of a chief justice and six justices. To qualify for election, candidates must be licensed attorneys with at least six years' experience. Once elected, they serve six-year terms. The Supreme Court of Ohio is located in downtown Columbus.

OHIO JUDICIAL STRUCTURE



Oral Argument Preview

County of Wayne et al. v. Ricky Baker, administrator, Case no. 2014-2079

KEY TOPICS FROM THIS CASE

- How does public policy shape the laws enacted in Ohio?
- What is a negligence lawsuit?
- What is statutory immunity for government entities?
- What is summary judgment?
- What is the role of amicus briefs?

Glossary of Legal Terms

Amicus curiae: Latin, meaning "friend of the court." A person or group that is not a party in a case, but who asks a court or is requested by a court to file a brief because of a special interest in the subject of the case.

Appeal: A request made by a party that has lost on one or more issues for a higher court to review the decision for correctness.

Appellant: The party who appeals a court's decision and seeks to have the decision overturned.

Appellee: The party who opposes an appeal and seeks to have an earlier court decision affirmed.

Brief: A written statement submitted to a court that explains legal and factual positions.

Civil lawsuit: Based on non-criminal statutes, such as disputes involving accidents or contracts. Civil suits typically seek to recover money damages or allow/disallow certain acts, rather than to imprison or punish a person.

Deposition: An oral statement made formally under oath, often taken to investigate a case or to be used later during trial.

Discovery: Procedures used to obtain disclosure of evidence before trial.

Estate: The net worth of a person at any point in time alive or dead. It is the sum of a person's assets – legal rights, interests, and entitlements to property of any kind – less all liabilities at that time.

Immunity: An exemption from duty or liability under the law.

Judge: An official of the judicial branch with authority to decide lawsuits brought before courts.

Jury: The group of persons selected to hear the evidence in a trial and decide a verdict based on the facts.

Justice: One of the seven members of the Supreme Court of Ohio.

Lawsuit: A legal action started by a plaintiff against a defendant based on a complaint.

Liable: Legally responsible or obligated.

Negligent: The failure to act as carefully as a reasonable person would in the same circumstances.

Ohio General Assembly: The state legislature of Ohio.

Ohio Revised Code: Contains all current statutes of the Ohio General Assembly of a permanent and general nature, consolidated into provisions, titles, chapters, and sections.

Opinion: A judge's written explanation of the decision of the court in a case.

Oral argument: An opportunity for lawyers to argue their positions and answer questions from the judges or justices who will decide the case being appealed.

Party: In court proceedings, one who files a civil or criminal case, one against whom a case is filed, or one with a direct interest in a case.

Political subdivision: An entity of the state, such as a municipal corporation, township, county, or school district, that carries out specific governmental functions.

Precedent: A decision in an earlier case – with facts and legal issues similar to a dispute currently before a court – that should be followed unless there is good reason to depart from the earlier ruling.

Glossary of Legal Terms

Reverse: The ruling of a reviewing court that changes the outcome of the case.

Statute: A law passed by the legislature.

Summary judgment: A court decision made on the basis of statements and evidence without a trial when the facts are undisputed and one party is entitled to judgment as a matter of law.

Trial: A formal court proceeding in which a judge or a jury decides disputed facts and determines guilt or liability based upon the evidence presented.

Wrongful-death lawsuit: A claim filed by the deceased's survivors against the organization or person felt to be responsible.

Background

Photo of the accident scene from case file.

TEEN DIES IN ACCIDENT

- In October 2011, 17-year-old Kelli Baker was driving on County Road 44 in Wayne County around 6:30 a.m.
- The day before the accident, the county had just completed repaving a portion of the road using a "scratch paving" technique. This added an additional inch of asphalt and created a 4 ½- to 5-inch drop from the edge of the pavement to the berm.
- During the resurfacing, there were no painted edge lines or additional berm materials added to make the berm level with the road surface.
- When one of Baker's car tires slipped off the edge of the road, she overcorrected to the left to get back on the two-lane road. She then overcorrected to the right in an attempt to keep in her lane, but she went off the right side of the road where she struck a concrete deer statue and a tree.
- Her car caught on fire, and she died.

PARENTS FILE LAWSUIT AGAINST COUNTY

Estate Established

- When a person dies, an estate is established to manage finances associated with the death.
  - Baker's parents established an estate for their daughter, and her father, Ricky Baker, was named administrator of the estate.

Lawsuit Filed

- On behalf of the estate, Baker's parents file a wrongful-death lawsuit against Wayne County and county officials in Wayne County Common Pleas Court.
  - The parents claim the county was negligent in its repair of County Road (CR) 44 by creating the large drop from the road to the berm and not providing proper warning of it.
  - The parents want compensation from the county to cover expenses associated with Kelli's death and for the emotional toll they suffered because of the loss of their daughter. A case that's not a criminal case and that usually involves one side's claim for money from another is called a civil lawsuit.

County Answers

- Wayne County answers the lawsuit by responding that it is immune from being sued based on a state law enacted by the state's legislative branch, the Ohio General Assembly, and written in the Ohio Revised Code (R.C.). The state law that Wayne County says gives it immunity was R.C. 2744.02.
  - An entity, such as a county, city, or school district that carries out specific functions of the government is known as a political subdivision.
  - Acts by political subdivisions sometimes lead to injuries and death.
  - When immunity is granted to a political subdivision, the government isn't financially responsible for any injuries or death associated with the government carrying out its function — in this case, repaving a roadway.

CASE PROCEEDINGS

Initial Steps

- At the early stages of a civil lawsuit, the common pleas court judge instructs the parties to complete discovery.
  - Discovery is a process where information is exchanged. This is when potential witnesses in the case give statements under oath, known as depositions.
  - Reports by investigators and experts in the field of automobile accidents are examined.

Wayne County Courthouse, Wooster, Ohio

Request for Summary Judgment

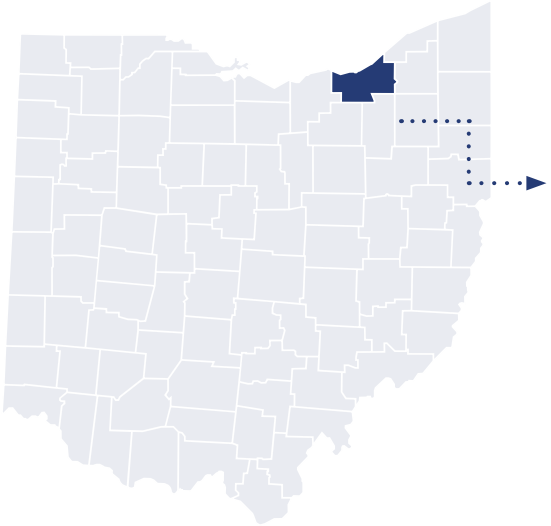
- Wayne County asks the court for summary judgment.
  - A judge can grant summary judgment before the trial begins.
  - Summary judgment is granted when the facts of what occurred aren't disputed. One party argues that based on the law, it is entitled to win the case without going further in the legal process.
  - The trial court grants summary judgment to Wayne County, finding that the law gave the county immunity from this type of lawsuit.

Bakers' Appeal

- Parties that lose a case in a trial court can appeal the decision to a higher court for review.
  - Ohio has 12 district courts of appeals, which review and consider arguments in cases from trial courts in their region of the state.
  - The Bakers appeal to the Ninth District Court of Appeals, located in Akron.
  - The Ninth District reverses the trial court's decision.
  - The Ninth District rules that the county could be held legally responsible, or liable, for negligently failing to keep a public road in repair because the area was under the control of the county and open to the traveling public.
  - The appeals court returns the case to the trial court for more proceedings, perhaps even having a trial.
  - The Ninth District states that no previous cases in Ohio have dealt with the particular situation that led to Kelli Baker's death. It rules no court has answered the question of whether a county is immune when road conditions are affected by ongoing maintenance and repair.

County's Appeal

- Wayne County appeals the Ninth District's decision to the Ohio Supreme Court.
  - Parties that lose at the appeals-court level can ask the Ohio Supreme Court to review their case.
  - The Supreme Court chooses whether it will hear this case.
  - The Supreme Court agrees to hear Wayne County's appeal.
  - Because the Supreme Court agreed to hear the case, the Ninth District's order for the case to return to trial court is put on hold.



The Ninth District: Lorain, Medina, Summit, and Wayne counties.

ORAL ARGUMENT SCHEDULED

When the Supreme Court accepted this case, it set a date for oral argument, and a number of steps followed.

- Prior to appearing before the Supreme Court, the parties are expected to submit merit briefs. These are written arguments explaining why each side thinks it should win the case.
- An attorney for each party typically presents arguments in front of the justices of the Supreme Court and answers questions from the justices.
- Other organizations interested in how the Court might rule and the importance of the ruling can file amicus briefs, also known as friend-of-the-court briefs.

STATUTES EXPLAINED

Two statutes are relevant in this case.

- Public roads are defined in the definition section of the state law that explains when political subdivisions can be liable for their actions. The definition section, which is R.C. 2744.01(H), states: "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 next statute, R.C. 2744.02, states that political subdivisions are immune from civil lawsuits that result in injury, death, or loss of property. However, there are exceptions. The one at issue in this case is R.C. 2744.02(B)(3). It states: "Except as otherwise provided in section 3746.24 of the Revised Code, political subdivisions are liable for injury, death, or loss to person or property caused by their negligent failure to keep public roads in repair and other negligent failure to remove obstructions from public roads, except that it is a full defense to that liability, when a bridge within a municipal corporation is involved, that the municipal corporation does not have the responsibility for maintaining or inspecting the bridge."

The Ohio Statehouse, Columbus

COUNTY'S ARGUMENTS

Wayne County maintains that the Bakers' lawsuit focuses on an approximately 5-inch drop from County Road 44's repaved roadside surface to the berm as the cause of their daughter's accident. Wayne County asserts that because of the limited definition of "public road" in the law, "the condition of the 'berm' of CR 44 does not trigger the immunity exception set forth in R.C. 2744.02(B)(3)."

Objection to Ninth District's Decision

Wayne County argues the Ninth District aligned with the Bakers and took a more expansive approach in its interpretation of the definition of public roads. The Ninth District stated the definition of public road differs when the road is in various stages of repair at the time of the accident. It wrote that the public road in those cases is the area under the control of the political subdivision, subject to the ongoing repair work, and open to travel by the public.

Wayne County rejects the Ninth District's interpretation, arguing the court effectively rewrote the law. The county is adamant that only the definition in the state law is relevant. The actual definition in the law doesn't distinguish a road in general from a road undergoing repair or reconstruction, the county notes.

Edge Drop Not Part of Road

The county also argues that a drop at the edge of a paved roadway is not part of a public road. It argues that a political subdivision is entitled to immunity when a motor vehicle accident occurs because of the condition of a berm, shoulder, or right-of-way. It considers the edge drop to be part of the berm, not the road. Based on the law's definition, the county concludes that any claims that the berm caused the accident can't be made against the county because the berm isn't part of a public road.

BAKERS' ARGUMENTS

As a result of the unusual circumstances, the Ninth District found a question exists for a jury to decide how the edge drop should be considered based on the law. The parents urge that the case should return to the Wayne County Common Pleas Court for a trial.

Edge Issue Unique

The Bakers note that the word "edge" is not mentioned in the statute. The Bakers maintain the Ninth District opinion should be upheld by the Supreme Court. They argue that the Ninth District didn't rewrite the statute or usurp the General Assembly's authority. Instead they argue the Ninth District applied the law's definitions to the specific facts of the case.

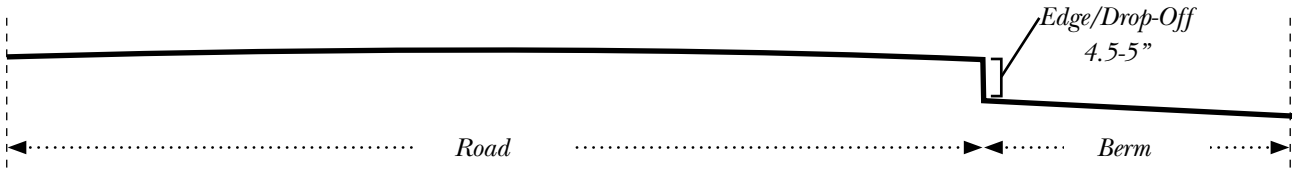
The Bakers' brief states, "All the Ninth District's opinion did was find that, under the unique circumstances of this tragic accident, a question of fact exists as to whether the county met its duty to keep C.R. 44 in repair on the date in question."

Typical Road Stripes Absent

The parents bolster their argument that the county was negligent by pointing out that the white striping on the roadway edge was missing at the time of the accident because of the repaving. Without the stripes, the public roadway extended from edge to edge of the asphalt, regardless of whether the asphalt extended down the road sides toward the berm.

The Bakers' brief also states, "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."

Refer to the diagram below to help visualize the drop-off or edge of the road that is referenced by the county prosecutor and the Bakers' attorney during the oral argument. Consider how each interprets whether the edge is part of the public road or berm.



FRIEND-OF-THE-COURT BRIEFS

- Amicus curiae briefs were filed by organizations with a high level of interest in the outcome of the case.
  - The Supreme Court allows these groups to submit written briefs, but generally doesn't allow them to present oral arguments.
  - In some cases, a party named in a lawsuit will agree to split oral argument time with one of the amicus groups supporting their position.
- Groups that filed amicus briefs in this case:
  - The County Commissioners Association of Ohio and six other large groups that represent the interests of local government officials who also have responsibility for maintaining public roads supported Wayne County. The groups urged the Supreme Court to adopt Wayne County's position and provided additional arguments.
  - The Ohio Association of Civil Trial Attorneys in support of Wayne County. The association is a group of lawyers who defend private businesses and government bodies against civil lawsuits.
  - The Ohio Association of Justice supported the Bakers. The association is a group of lawyers representing injured Ohioans.

Observing the Oral Argument

County of Wayne et al. v. Ricky Baker, administrator, Case no. 2014-2079

At the beginning of the first oral argument on the day this case was heard, Chief Justice Maureen O'Connor explained that Justice Paul E. Pfeifer would not participate in the oral argument. However, he watched the recording of the oral argument and participated in the deliberation. His chair beside Chief Justice O'Connor is empty for this reason.

Attorneys Will Refer to Ohio Statutes:

Ohio Revised Code 2744.02, 2744.02(B)(3), 2744.01(H)

- R.C. 2744.02: "A political subdivision is not liable in damages in a civil action for injury, death, or loss to person or property allegedly caused by any act or omission of the political subdivision or an employee of the political subdivision in connection with a governmental or proprietary function."
- R.C. 2744.02(B)(3): "Except as otherwise provided in section 3746.24 of the Revised Code, political subdivisions are liable for injury, death, or loss to person or property caused by their negligent failure to keep public roads in repair and other negligent failure to remove obstructions from public roads, except that it is a full defense to that liability, when a bridge within a municipal corporation is involved, that the municipal corporation does not have the responsibility for maintaining or inspecting the bridge."
- R.C. 2744.01(H): "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."

Attorneys Will Refer to Previous Ohio Court Decisions

Howard v. Miami Twp. Fire Dept., 119 Ohio St.3d 1, 2008-Ohio-2792

In 2008, the Ohio Supreme Court concluded that for purposes of R.C. 2744.02(B)(3), an "obstruction" must be an obstacle that blocks or clogs the roadway and not merely a thing or condition that hinders or impedes the use of the roadway or that may have the potential to do so. Accordingly, the Court reversed the judgment of the court of appeals and reinstated the trial court's order granting summary judgment in favor of appellants.

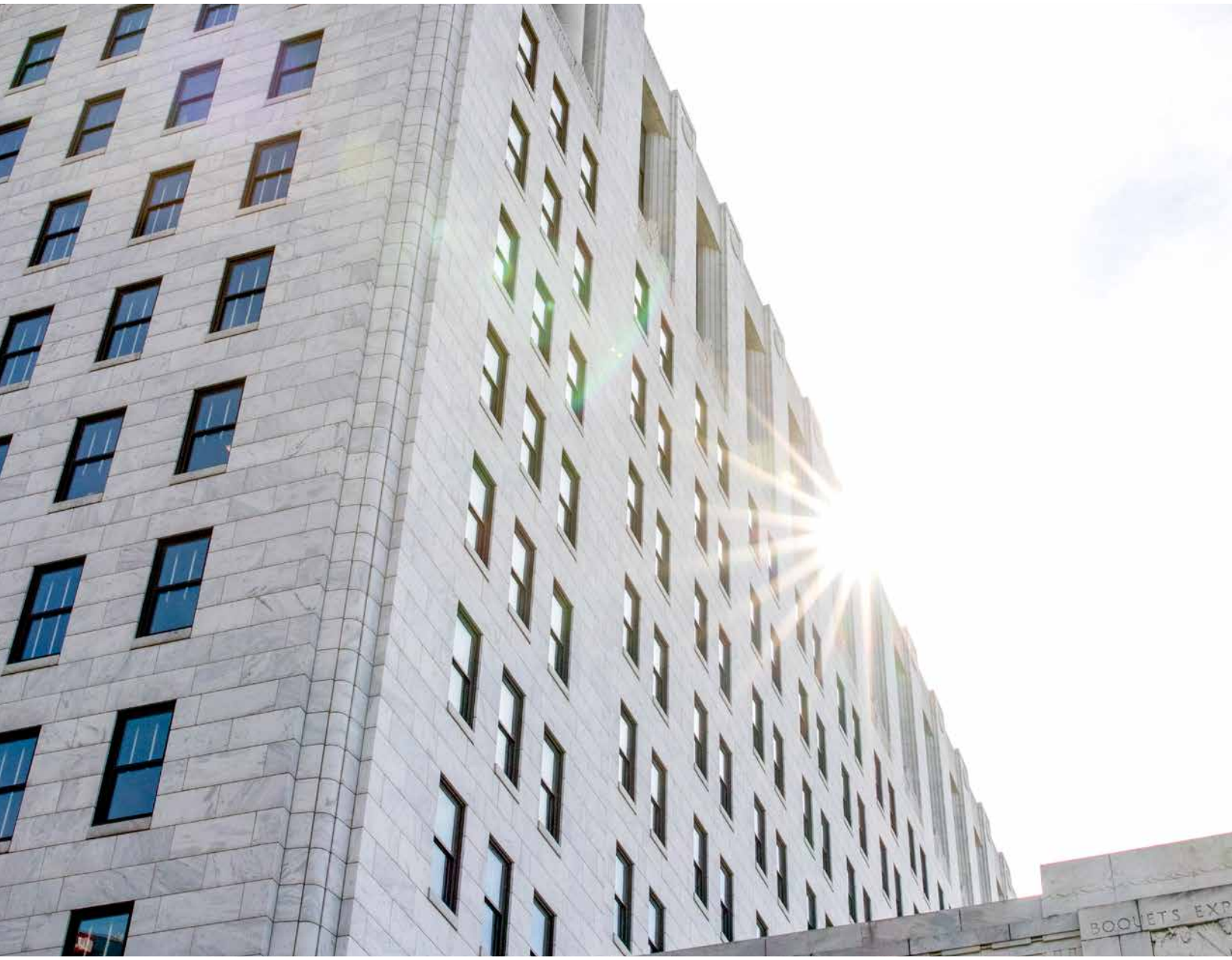
Bonace v. Springfield Township, 179 Ohio App.3d 736, 2008-Ohio-6364

Also in 2008, the defendant-appellant, Springfield Township, appealed the decision of the Mahoning County Common Pleas Court, which denied the township's motion for summary judgment regarding the negligent-road-repair complaint filed by plaintiffs-appellees Mary Bonace and her husband. The Seventh District Court of Appeals determined that the township is immune from the claims of Bonace, which do not fall within the immunity exception provided in R.C. 2744.02(B)(3), as they do not involve the negligent failure to keep a public road in repair or free from obstruction. The Seventh District Court of Appeals overturned the trial court's ruling and approved summary judgment for Springfield Township.

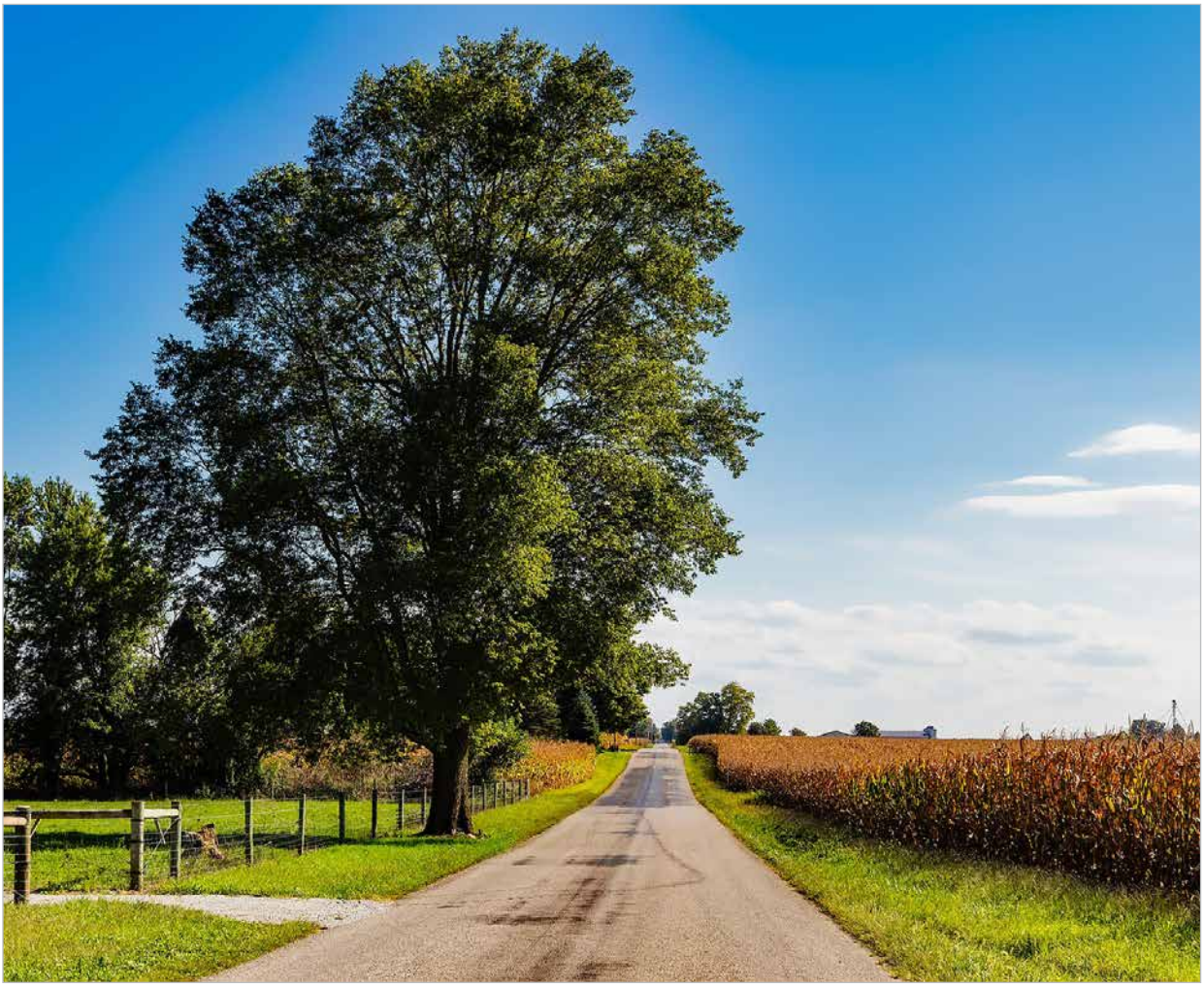
This is your final reading activity until after observing the case.

Decision Summary

County of Wayne et al. v. Ricky Baker, administrator, Case no. 2014-2079



UNUSUALLY HIGH PAVEMENT EDGE DROP



Full Opinion

sc.ohio.gov/rod/docs/pdf/0/2016/2016-Ohio-1566.pdf

The Ohio Supreme Court ruled that Wayne County could not be held legally responsible for the death of 17-year-old Kelli Baker, who died in an accident while driving on a county road that was being repaved and had a 4 ½- to 5-inch edge drop from the asphalt to the dirt berm.

Writing for the Court majority, Justice Sharon L. Kennedy stated that for the purposes of the state's immunity law, the road edge is not part of the public road, and the government is not responsible for accidents that involve the condition of the edge, berm, shoulder, or right-of-way.

Dissenting justices agreed with the arguments of the girl's parents that a jury should decide whether the county was responsible for creating a dangerous condition while the road was undergoing maintenance and whether the county should be held financially responsible for the accident.

Baker Died in Early Morning Accident

Baker's parents filed a wrongful-death lawsuit against Wayne County, seeking financial compensation for the loss of their daughter. The county claimed it was immune from the lawsuit based on the state law that shields government bodies from lawsuits involving injuries and death on public property. The Bakers argued the law has an exception for instances where the government acts negligently and fails to keep members of the public safe.

The trial court granted the county summary judgment, finding the county's actions were covered by the immunity law. The Bakers appealed to the Ninth District Court of Appeals, which reversed the trial court. The Ninth District ruled the county could be held responsible for failing to keep a public road in repair. The county appealed the decision to the Supreme Court, which agreed to hear the case.

Court Defines Public Road

State law — R.C. 2744.02(B)(3) — permits local governments to be sued for injuries, death, or property damages that are "caused by their negligent failure to keep public roads in repair and other negligent failure to remove obstructions from public roads."

The law defines the term "public roads," but it does not mention edge drop.

The Court's opinion explained that the Bakers' case depends on whether the definition of public road includes the edge drop. If it does, then the county may not be able to claim it is shielded from the lawsuit.

The Ohio Revised Code states that public roads included highways, and specifies that shoulders, berms, and rights-of-way are not part of the public road.

Because the law did not mention edges, the Court looked at decisions made by appeals courts in Ohio. The Court found in those other cases that the berm commonly is defined as the "shoulder of the road," and the shoulder is defined as "either edge of a roadway," and "the part of a roadway outside of the traveled way on which vehicles may be parked in an emergency."

"Applying those definitions in this case, when Baker's tire traveled off the edge of the pavement, it left the public road and dropped onto the berm or shoulder. The General Assembly excluded berms and shoulders from the definition of public road," Justice Kennedy wrote. "Therefore, the edge drop must be considered part of the berm or shoulder, not the public road."

Because the edge drop is not part of the public road, the county is entitled to immunity and the Bakers cannot sue the county for their daughter's death, the Court concluded.

Justices Judith Ann Lanzinger and Judith L. French joined Justice Kennedy's opinion. Chief Justice Maureen O'Connor concurred in judgment only, for a total of four votes supporting the county's position.

Dissents Question Road Condition

Three justices voted for the Bakers' position. Justices Paul E. Pfeifer and William M. O'Neill wrote separate dissenting decisions explaining their objections. Justice Terrence O'Donnell did not issue a written opinion, but stated he agreed with the Ninth District's opinion.

Justice Pfeifer wrote the Bakers should be entitled to argue at a trial that the severity and depth of the edge of the drop caused the accident.

Justice Pfeifer explained that under typical circumstances, the Court would consider the public road to be the space between the painted

edge lines. But because the road was under repair, and the painted edge lines were paved over and the road could be considered to reach to the edge of the pavement, the edge then was part of the road.

"The excessive height of the edge of the roadway itself is the issue in this case. A roadway has depth; it is not a two-dimensional geometric plane. Just as the edge of a table is part of a table and not part of the floor below, the edge of the roadway is part of the roadway, not part of the shoulder or the berm," Justice Pfeifer wrote.

He noted the Ohio Department of Transportation requires that when an edge drop exceeds 2 inches, there should be traffic controls, like orange drums and lights, to warn motorists, and that there were no such devices on CR 44 when the county was repaving it.

Justice O'Neill objected to defining the edge as part of the berm.

"It is simply make-believe to suggest that the portion of the asphalt that dropped off five inches to meet the berm on the side of the road is not also part of the road," he wrote. "It is like saying the period at the end of this sentence is not part of the sentence."

Decision News Article

County of Wayne et al. v. Ricky Baker, administrator, Case no. 2014-2079

- *The decision news article explains an Ohio Supreme Court opinion in non-legal language. The article is in news story form and intended to inform Ohioans about a ruling of the Court and how it might be relevant to their lives.*
- *The decision news article is drafted by public information staff and then edited by the justices and attorneys for the justices to ensure the legal accuracy and that the justices' positions on the case are clear. The article also is helpful to Ohio lawyers by giving them the "highlights" of a Court decision. The article always contains a link to the actual opinion for those who wish to read the opinion in its entirety, which is written in traditional legal form and language.*

County Not Liable for Accident Where Teen Driver Hit Unusually High Pavement Edge Drop

By Dan Trevas | April 19, 2016

Ohio state and local governments are immune from lawsuits claiming negligent failure to keep public roads in repair when an accident is based on harm caused by the "edge drop" on the side of the road, the Ohio Supreme Court ruled today.

The Supreme Court ruled that Wayne County cannot be held legally responsible for the death of 17-year-old Kelli Baker, who was driving on a county road that was being repaved and had a 4 ½- to 5-inch drop edge drop from the asphalt to the dirt berm. Writing for the Court majority, Justice Sharon L. Kennedy stated that for the purposes of the "sovereign immunity" law, the road edge is not part of the public road, and the government is not liable for accidents premised on the condition of the edge, berm, shoulder, or right-of-way.

Dissenting justices suggest a jury ought to consider whether the county was negligent because the road was undergoing maintenance and was not in its typical condition.

Baker Died in Early Morning Accident

Baker was driving on County Road 44 around 6:30 a.m. in October 2011 when one of her tires slipped off the edge of the road. She overcorrected to the left to get back on the two-lane road, then overcorrected to the right in an attempt to keep in her lane, but she went off the right side of the road where she struck a concrete deer statue and a tree. Her car caught on fire, and she died.

An Ohio State Highway Patrol investigation determined the driver's age and inexperience, as well as the speed she was traveling on the rainy morning contributed to the accident. The day before the accident, the portion of CR 44 where the accident happened was "scratch paved," which added an additional inch of asphalt and created a 4 ½- to 5-inch drop from the edge of the pavement to the berm. During the resurfacing there were no painted edge lines or additional berm materials added to make the berm level with the road surface.

Baker's parents and estate filed a wrongful death lawsuit against Wayne County. The county claimed it was immune from the lawsuit by R.C. 2744.02, and the trial court granted the county summary judgment. The Bakers appealed to the Ninth District Court of Appeals, which reversed the trial court and ruled that the county could be held liable for negligently failing to keep a public road

in repair because the area was under the control of the county and open to the traveling public. The county appealed the decision to the Supreme Court, which agreed to hear the case.

Court Defines "Public Road"

State law generally exempts government bodies from being liable for personal injuries, but sets out certain exceptions. R.C. 2744.02(B)(3) permits local governments to be sued for injuries, death, or property damages that are "caused by their negligent failure to keep public roads in repair and other negligent failure to remove obstructions from public roads." Justice Kennedy wrote this is the first time the Court has sought to define "public roads" for this section of the state law.

Citing the Court's 2008 *Howard v. Miami Twp. Fire Div.* decision, Justice Kennedy wrote the statute reflects "a deliberate effort to limit political subdivisions' liability for injuries and death on the roadways." She explained the Bakers' case depends on whether the General Assembly's definition of "public road" includes the edge drop, and if it does, the county may not be able to claim it is shielded from the lawsuit.

The definition of "public roads" in the sovereign immunity statute includes highways, and specifies that shoulders, berms, and rights-of-way are not part of the public road, but does not mention edges. Justice Kennedy noted that in finding the county may be liable, the Ninth District held the public road is the "area under the control of the political subdivision, subject to ongoing repair work and open to travel by the public." The Court found the Ninth District impermissibly expanded the definition of public road beyond the definition in the statute when it added that provision.

Wayne County argued not only does the Ninth District "area of control" standard not apply, but also the edge drop is part of the road's berm, not the public road. The county claimed it is immune from lawsuits caused by harm from the berm. The Bakers argued the edge drop is part of the public road and was made higher than normal by the additional layer of asphalt applied by the county.

Citing other Ohio appeals court rulings, Justice Kennedy wrote the "berm" is commonly defined as the "shoulder of the road," and the "shoulder" is defined as "either edge of a roadway," and "the part of a roadway outside of the traveled way on which vehicles may be parked in an emergency."

"Applying those definitions in this case, when Baker's tire traveled off the edge of the pavement, it left the public road and dropped onto the berm or shoulder. The General Assembly excluded berms and shoulders from the definition of public road," she wrote. "Therefore, the edge drop must be considered part of the berm or shoulder, not the public road."

Because the edge drop is not part of the public road, the county is entitled to sovereign immunity and the Bakers cannot sue the county for their daughter's death, the Court concluded.

Justices Judith Ann Lanzinger and Judith L. French joined Justice Kennedy's opinion. Chief Justice Maureen O'Connor concurred in judgment only.

Dissents Question Road Condition

Separate dissenting opinions were issued by Justices Paul E. Pfeifer and William M. O'Neill. Justice Terrence O'Donnell, did not issue a written opinion, but stated he agreed with the opinion of the Ninth District. Justice Pfeifer wrote the Bakers should be at least entitled to argue at a trial that the severity and depth of the edge of the drop caused the accident.

Justice Pfeifer explained under typical circumstances, the Court would consider the public road to be the space between the painted edge lines, and the shoulder would be the paved part of the road outside of the edge lines. The berm is typically the unpaved surface adjacent to the shoulder. Since the road was under repair, the painted edge lines were painted over and the road could be considered to reach the edge of the pavement. In the lead opinion, Justice Kennedy noted CR 44 was not required to have paved edge lines, and in this case, it had no paved shoulder, just roadway and the unpaved berm.

"The excessive height of the edge of the roadway itself is the issue in this case. A roadway has depth; it is not a two-dimensional geometric plane. Just as the edge of a table is part of a table and not part of the floor below, the edge of the roadway is part of the roadway, not part of the shoulder or the berm," Justice Pfeifer wrote.

He stated Wayne County is potentially liable because the road lacked edge lines and that county workers acknowledged the edge was higher than normal. He noted an expert witness for the Bakers stated the Ohio Department of Transportation requires that when an edge drop exceeds 2 inches, there should be traffic controls like orange drums and lights to warn motorists, and that there were no such devices on CR 44 when the county was repaving it.

Justice O'Neill joined Justice Pfeifer's dissent. In his own separate dissent, Justice O'Neill objected to defining the edge as part of the berm.

"It is simply make-believe to suggest that the portion of the asphalt that dropped off five inches to meet the berm on the side of the road is not also part of the road," he wrote. "It is like saying the period at the end of this sentence is not part of the sentence."

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2014-2079. *Baker v. Wayne Cty.*, Slip Opinion No. 2016-Ohio-1566.

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