

1906

HIGHWAYS — GUARD RAILS — ABSOLUTE DUTY UPON
COUNTY COMMISSIONERS—§§5591.36, 5591.37, 5591.16 R.C.

SYLLABUS:

1. Section 5591.36, Revised Code, imposes an absolute duty upon the County Commissioners requiring the erection of guard rails at the heights designated therein as points of danger.

2. The County Commissioners have no discretion to omit guard rails where Section 5591.16, Revised Code, requires them but where there is not in fact an embankment along the side of the approach to a bridge, viaduct, or culvert which is six feet in height, constituting a point of danger, the law imposes no duty to erect such guard rails. Where a private drive intersects such embanked approach at a reasonably safe grade there is no requirement under this section to erect such guard rails and thereby deny access to such abutting owner.

3. If a guard rail is omitted at a point where one is required by Section 5591.36, Revised Code, the county would be liable for damages resulting from such omission, as provided in Section 5591.37, Revised Code.

Columbus, Ohio, April 1, 1958

Hon. George Cleveland Smythe, Prosecuting Attorney
Delaware County, Delaware, Ohio

Dear Sir:

I have before me your request for my opinion reading as follows:

“Does Section 5591.36, R.C., impose an absolute duty upon County Commissioners requiring the erection of guard rails at the heights designated therein?”

“Do said Commissioners have the discretion to omit said guard rail at a point on said approach, which is over six feet in height, where a private driveway to private lands intersects said approach at a point on said approach over six foot high?”

“If a guard rail would be omitted at said point would the County be liable for damages resulting from such failure?”

“Your attention is called to the case in 96 Ohio St., 163.”

Section 5591.36, Revised Code, provides:

“The board of county commissioners *shall* erect and maintain, * * * one or more guard rails * * *, on each side of every approach to a county bridge, viaduct, or culvert, if the approach or embankment is more than six feet high, * * *” (Emphasis added)

The courts have uniformly held that Section 5591.36, Revised Code, creates a mandatory or absolute duty to erect and maintain guard rails where approaches are more than six feet high. *Zimmer v. Kennedy*, 54 Ohio App., 361, 8 O. O., 125, 7 N. E. 2d, 574; *Commissioners v. Darst*, 96 Ohio St., 163, 117 N. E., 166.

Your second question "whether the Commissioners have a discretion to omit guard rails at a point, which is over six feet in height, where a private driveway to private lands intersects said approach at a point on the approach over six feet high," an interpretation is raised of the language "if the approach or embankment is more than six feet high."

In *Commissioner v. Darst, supra*, the court stated, at page 169:

"It is common knowledge that many of these approaches, embankments and wash-banks are of great extent and usually form a gradual decline which extends for considerable distance but a few inches above the level. To insist that the whole extent of these should be protected by guard rails would be *reductio ad absurdum*, and a grave test upon the public funds. This could not have been the legislative intent. At any rate it would be of such doubtful and ambiguous import, that under the rule stated, the doubt should be resolved in favor of the public. It is evident from the whole scope of the statute that the legislature intended to protect only those places designated by it peculiarly as points of danger."

It would logically follow then that the law contemplates guard rails being placed where there is some danger of a vehicle driving off, falling or dropping from the side of the embankment or approach. I can see no more reason for placing a guard rail across an entrance to a private drive than there would be of placing a guard rail across a street where two streets are raised at an intersection. The only time that a problem might arise is where the driveway is at such an extreme grade that in fact there is an embankment created six feet in height. In this situation either the driveway would have to be filled or guard rails erected. This, of course, would be a question of fact.

Section 5591.37, Revised Code, reads as follows:

"Failure to comply with Section 5591.36 of the Revised Code shall render the county liable for all accidents or damages as a result of such failure."

This section clearly imposes liability on the County for an omission of a guard rail if such guard rail is required under Section 5591.36,

Revised Code. Where guard rails are not required the county would continue to enjoy limited liability since the legislature has not imposed any liability.

Therefore, in specific answer to your questions, you are advised:

1. Section 5591.36, Revised Code, imposes an absolute duty upon the County Commissioners requiring the erection of guard rails at the heights designated therein as points of danger.

2. The County Commissioners have no discretion to omit guard rails where Section 5591.16, Revised Code, requires them but where there is not in fact an embankment along the side of the approach to a bridge, viaduct, or culvert which is six feet in height, constituting a point of danger, the law imposes no duty to erect such guard rails. Where a private drive intersects such embanked approach at a reasonably safe grade there is no requirement under this section to erect such guard rails and thereby deny access to such abutting owner.

3. If a guard rail is omitted at a point where one is required by Section 5591.36, Revised Code, the county would be liable for damages resulting from such omission, as provided in Section 5591.37, Revised Code.

Respectfully,
WILLIAM SAXBE
Attorney General