

## Immunity Door Ajar?

Political subdivision immunity is often a difficult obstacle to circumvent. There are narrow exceptions in R.C. 2744.02(B)(3), but the Supreme Court's interpretation of the exceptions has been even more limiting—at least until the recent decision of *Bibler v. Stevenson, et al.*, Slip Opinion No. 2016-Ohio-8449.

The issue in *Bibler* was whether a stop sign which Bibler failed to see due to alleged obstructing foliage falls outside the statutory definition of a “public road,” or if it was “mandated by the Ohio Manual of Uniform Traffic Control Devices” (OMUTCD), whether the stop sign constituted a part of the “public road” that must be kept in repair?

On December 29, 2016, the *Bibler* Court reversed the Trial and Appellate Courts' construction of R.C. 2744.02(B)(3) which states: “Political subdivisions are liable for injury, death... caused by their negligent failure to keep public roads in repair and other negligent failure to remove obstructions from public roads.”

R.C. 2744.01(H) defines “public roads” as “Public roads, highways, streets... within a political subdivision,” and also states that “public roads” do not include “...traffic control devices unless the traffic control devices are mandated by the Ohio Manual of Uniform Traffic Control Devices.”

R.C. 4511.11(A) provides:

“Local authorities in their respective jurisdictions shall place and maintain traffic control devices in accordance with the Department of Transportation Manual of Uniform System of Traffic Control Devices adopted under section 4511.09 of the Revised Code...”

R.C. 4511.65(A), however, expressly mandates that “Stop signs... or traffic control signals shall be erected at all intersections with... through highways... by local authorities as to highways under their jurisdiction...” This provision of the Revised Code, however, is not part of the OMUTCD.

The *Bibler* Court held that OMUTCD cannot override the clear mandates of a provision of the Revised Code. As noted above, one of the requirements of the Ohio Revised Code, as is set forth in R.C. 4511.65(A), is the mandatory erection of stop signs (or some other traffic control device) at intersections involving through highways.

Because the stop sign in *Bibler* was statutorily mandated, it was not excluded from the definition of a public road with respect to R.C. 2744.02(B)(3), even though it may not have been also mandated by the OMUTCD. Therefore, the Supreme Court held the City of Findlay did not establish it was entitled to Judgment as a matter of law regarding its immunity.

Surprisingly, given the tenor of the Ohio Supreme Court's prior decisions, the Court held that the stop sign (traffic control device) in *Bibler* fell within the definition of a "public road." The accident allegedly occurred because a stop sign was not in repair because it was obstructed by foliage. The *Bibler* Court concluded the City of Findlay is not immune pursuant to R.C. 2744.02(B)(3) and is, therefore, potentially amenable to liability.

The *Bibler* Decision was written by departing Judge Pfeiffer. It is the first decision since *Howard v. Miami Twp. Fire Div.*, 119 Ohio St. 3d 1, 2008-Ohio-2792, which narrowly construed the political subdivision immunity statute. The *Howard* Court considered whether an accumulation of ice on a roadway was an "obstruction" within the meaning of R.C. 2744.02(B)(3). This statutory subsection provided an exception to immunity if the injuries or death were caused by a political subdivision's "negligent failure to keep public roads in repair and other negligent failure to remove obstructions from public roads." The *Howard* Court concluded that an "obstruction" must be an obstacle that blocks or clogs the roadway and not merely a thing or condition which hinders or impedes the use of the roadway, or that may have the potential to do so, regardless how obviously dangerous ice on a public road may be.

Subsequent to *Howard*, the Franklin County Court of Appeals, in *W. Justin Crabtree v. Andre L. Cook, et al.*, 196 Ohio App. 3<sup>rd</sup> 546, 2011-Ohio-4612, 964 N.E. 2<sup>nd</sup> 47 (10<sup>th</sup> Dist.), reversed a Summary Judgment in favor of the City of Columbus in a case involving alleged municipal liability for pothole repair neglect. The Trial Court relied on *Howard, supra*, and held that a municipality is liable only for "other negligent failure to remove obstructions".

The Franklin County Court of Appeals in *Crabtree* distinguished *Howard* and recognized that the General Assembly, in R.C. 2744.02(B)(3), clearly stated that political subdivisions may be liable under two alternate theories:

1. Negligent failure to keep roads in repair; or
2. Other negligent failure to remove obstructions from public roads.

*Howard, supra*, did not change the statutory law. Rather, *Howard* dealt solely with a municipality's liability for "other negligent failure to remove obstructions from public roads" – the second prong of R.C. 2744.02(B)(3) upon which a municipality may held liable. The *Crabtree* appellate decision was based on the City's alleged negligent failure to keep public roads in repair.

In *Green v. Columbus*, 2016-Ohio-826, the Franklin County Court of Appeals was faced with a fact scenario similar to *Bibler* and *Crabtree*. The Franklin County Common Pleas Court granted summary judgment in favor of the City of Columbus. The driver of Green's motor vehicle ran a red light at an intersection and collided with another vehicle. The police report referenced several mature trees just east of the intersection, and noted that some of the branches potentially obstructed a driver's view of the traffic signal ahead, which, along with the setting sun, prevented the driver from seeing the traffic signal until it was too late to stop.

The plaintiff in *Green* claimed that the overhanging foliage should be considered an obstruction to “public roads,” even though the traffic signals were not considered part of the “public roads.” The Franklin County Court of Appeals in *Green* held that there was no evidence that the tree limbs that obstructed the view of the overhead traffic signals were “blocking or clogging the roadway.” The Court of Appeals further held that the tree branches were a purely visual obstruction, whereas the pothole at issue in *Crabtree* affected the surface conditions on the roadway. The *Green* Court also held that political subdivisions are immune from liability for the non-erection of traffic control devices, even where the OMUTCD mandates the installation of the particular traffic control devices.

The Ohio Supreme Court in *Bibler* did not address the potentially conflicting *Crabtree* and *Green* appellate decisions. Rather, the *Bibler* decision seems to create a limited exception to political subdivision immunity by holding that a statutorily mandated stop sign falls within the statutory definition of a “public road,” which renders a political subdivision potentially amendable to liability, even though it may not have been mandated by the OMUTCD. Simply stated, because the stop sign was mandated to R.C. 4511.65(A), it is not excluded from the definition of a “public road” with respect to R.C. 2744.02(B)(3).

In future cases where a traffic control device is alleged to be in disrepair, an argument can now be made under *Bibler* that any traffic control device that is either statutorily required, or mandated by the OMUTCD, is part of the “public road” which a political subdivision has a duty to repair. This is a theory of liability the Supreme Court has never condoned until *Bibler*.<sup>1</sup>

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<sup>1</sup>See also Ohio Trial Article “Pothole Neglect” in Ohio Trial, Vol. 23, Issue 1, further discussing political subdivision immunity under *Crabtree*, *supra*, and *Miller v. Ohio Dept. of Transportation* (Court of Claims).