POTHOLE NEGLECT

Recently two decisions were rendered by the Court of Claims and the Tenth District Court of Appeals which clarify the law concerning the duty of the State of Ohio and municipalities to repair potholes. The purpose of this article is to address the pertinent facts and law in each including any distinctions between state and political subdivision liability.

I. STATE ROADS

In *Dennis C. Miller v. Ohio Dept. of Transportation*, Ct. of Cl. No. 2009-07679, 2012-Ohio-6324, the issues of liability and damages were bifurcated and the case proceeded to trial on the issue of liability in 2012. Jamie Lebovitz and Ellen McCarthy of Nurenberg Paris represented the plaintiff. The case arose out of a motor vehicle collision that occurred on March 11, 2008 on State Route 165 in Columbiana County, Ohio. A series of large potholes existed in the southbound lane. A truck driver proceeding lawfully southbound on SR 165 struck a pothole which caused him to lose control of his truck, cross the center line and strike the Miller vehicle thereby killing Pauline Miller.

Her estate claimed that ODOT was negligent in failing to repair the potholes prior to the collision and that such failure was a proximate cause of Miller's death. The state highway patrol investigated the accident, took measurements of the potholes located on the right side of the truck driver's lane of travel and noted in the official report: "Pavement in poor condition due to large potholes at the scene. Large pothole measured and found to be 5" in depth with the width of 24" into the southbound lane. The south end was not gradual but abrupt and near straight down." The Trooper explained that instead of being a gradual incline or decline, the pothole was "basically like hitting a curb, straight down." He called ODOT's local superintendent who closed the road until the potholes were repaired.

Notice of roadway hazard is always an issue in failure to maintain roadway cases. Another driver testified that he had struck the same set of potholes two to three weeks prior to the accident and spoke with someone at ODOT regarding the bad road condition and the approximate area of the potholes. When shown photographs of the potholes at the time of the collision, he testified that the potholes had increased in depth, width and length since he struck them two to three weeks earlier.

ODOT's website encourages the public to report the existence of potholes to ODOT by phone, email or completing a "feedback form." ODOT admitted that there is no requirement to document calls from the public and not every call or complaint from the public is recorded in ODOT's logs.

An ODOT employee testified that five days before the accident he observed potholes on SR 165, but determined that none of the potholes warranted immediate repair. He described them as "first layer" potholes approximately 2" deep, 12" long and 8" wide and acknowledged they could have been repaired with a "shovel full" of patching material. ODOT employees sent no crew to repair any potholes on SR 165 from March 6 until March 11 despite admitting that the potholes that existed on the day of the accident were large, deep and needed to be filled. The ODOT employee also stated that the potholes had increased in size by ten times in the five-day interim. The ODOT employee also agreed that SR 165 was designated by ODOT as a poor-performing road prior to the accident and that it was scheduled to be repaved, but the repaving schedule was "about two years out."

A transportation manager for ODOT stated that if a pothole is over 2" deep, it must be filled. One of his job responsibilities was to identify potholes and repair those that are hazardous to the travelling public. A resident near the scene of the accident testified that potholes were

present on SR 165 for weeks prior to the accident and that the size and severity of the potholes increased over time.

Plaintiff called two expert witnesses regarding the duty of ODOT to develop a preventative maintenance plan regarding pothole repair and the failure to repair potholes as a contributing cause of the collision.

ODOT has a general duty to maintain its highways in a reasonably safe condition for the traveling public. *Knickel v. Ohio Dept. of Transp*., 49 Ohio App. 2d 335, 339, 361 N.E.2d 486, 489 (10th Dist. 1976). ODOT may be subject to liability for its failure to exercise reasonable care in maintaining state highways. *White v. Ohio Dept. of Transp.*, 56 Ohio St. 3d 39, 42, 564 N.E.2d 462, 465 (1990). ODOT, however, is not liable for damages caused by dangerous conditions on state highways unless it has actual or constructive notice of the precise condition alleged to have caused the injuries in question. *Manning v. Ohio Dept. of Transp*., 10th Dist. Nos. 96AP107-931, 96AP107-932, 96AP107-937, 1997 WL 202270 (April 24, 1997), *citing McClellan v. Ohio Dept. of Transp*., 34 Ohio App. 3d 247, 249, 517 N.E.2d 1388, 1390 (10th Dist. 1986). "In order for there to be constructive notice of a nuisance or defect in the highway, it must have existed for such length of time as to impute knowledge or notice." *McClellan*, 34 Ohio App.3d at 250, 517 N.E.2d at 1391, *citing Bello v. Cleveland*, 106 Ohio St. 94, 138 N.E. 526 (1922). The state cannot be charged with neglect unless it is demonstrated that the state had either constructive or actual knowledge of the roadway defect complained of and sufficient time to remedy it. *Danko v. Ohio Dept. of Transp*., Ct. of Cl. No. 90-05881, 1992 WL 12007091 (July 29, 1992), *aff'd*, 10th Dist. No. 92AP-1183, 1993 WL 27692 (Feb. 4, 1993). ODOT must be given a reasonable amount of time to mobilize its resources for the repair of highway defects and also to prioritize among competing repair needs of the state's highways. *Danko*, 1992 WL 12007091 at *1. Size of

a defect in the roadway is insufficient to show notice or duration of existence. *O'Neil v. Ohio Dept. of Transp*., 61 Ohio Misc.2nd 287, 287-88, 578 N.E. 891, 892 (Ct. of Cl. 1988).

In *Miller*, Judge Alan Travis found that ODOT had actual notice that potholes existed on SR 165 on March 6, 2008. On March 7 a snow storm hit the area. Snow and ice removal by ODOT occurred on March 6-10. ODOT also patched potholes on other roadways in the county on March 6, 7 and 10. Sufficient time passed from March 6 to March 11 for ODOT to have learned that the potholes that existed in SR 165 on March 6 were deteriorating and becoming a hazard to the motoring public. It is foreseeable that a pothole that is left unrepaired, especially during the winter months, can grow into the hazard that existed on March 11.

Therefore, the Court found that the plaintiff proved that by March 9, ODOT had constructive notice that the potholes on SR 165 were unreasonably dangerous to the traveling public and in need of immediate repair. ODOT's failure to repair the potholes before March 11 was a breach of its duty owed to plaintiff's decedent and to the traveling public and was the sole proximate cause of plaintiff's injuries. The truck driver testified credibly that after his truck struck the potholes, he was unable to control his truck and crossed the center line striking plaintiff's decedent's vehicle. But for the existence of potholes, the Court found that the motor vehicle collision would not have occurred.

The damages trial occurred on January 23, 2013. The Court had not rendered a decision as of the date of this publication.

II. CITY/COUNTY ROADS

In *W. Justin Crabtree v. Andre L. Cook, et al*.,196 Ohio App.3d 546, 2011-Ohio-5612, 964 N.E.2d 47 (10th Dist.), the Court reversed a summary judgment in favor of the City of Columbus involving alleged municipal liability for pothole repair neglect. Justin Crabtree

suffered serious injuries and was rendered a quadriplegic when while bicycling, he was struck by a vehicle driven by Andre L. Cook. The claim against Cook was resolved. The issue on appeal was whether the City of Columbus was statutorily immune from liability arising from road conditions at the site of the accident.

In *Crabtree*, the investigating police officers made no reference to potholes in their report. In fact, at least one signed an affidavit stating that potholes were nowhere near the point of impact between the Crabtree bicycle and the Cook Cadillac. An independent witness, however, gave deposition and affidavit testimony regarding Crabtree swerving towards the center of his lane of travel to avoid a pothole prior to being struck by the Cook vehicle.

For years prior to the crash, the portion of the road near the accident location flooded with every heavy rain, sometimes to the point of becoming impassable to vehicular traffic. This periodic flooding contributed to the development of potholes in both lanes of travel. In the latter half of the 1990's, the City repeatedly heard complaints about the flooding problem and the resulting potholes, but the flooding problem was never fixed prior to the crash. The City periodically patched the potholes that would develop, but the patches did not last long because the heavy vehicular traffic on the road combined with the periodic flooding damaged the patches and make the same potholes reappear.

The pothole in the eastbound lane of the road had been present for years before the crash. It was patched periodically only to have the patches fail due to the two factors mentioned above. The pothole present on the day of the accident had been present for at least two months. During this time period, and on the day of the accident, the pothole started about one and one-half feet from the right edge of road and extended left toward the center of the road about two and one-half feet. (This north-south width of the pothole is why the Crabtree bicycle ended up in the

middle of the eastbound lane because, to ride his bicycle around this pothole, Crabtree had to move that far left.) In an east-west direction, the pothole was at least three and one-half feet long. The pothole varied in depth, but portions of the pothole were at least four inches deep.

> "Keep an eye on the road surface. If the lane is too narrow for cars to pass you safely, *or if there is debris in the road, you may move to the center of the lane.* Check behind you and signal your intent before "*taking the lane." When the road widens again, move over to the right* to allow traffic to pass. Ride predictably without sudden movements." (emphasis added)
>
> [Columbus Metro Bike Users Map (Exhibit 1)][1]

Such was the public advice disseminated by the City as part of a campaign to "make Columbus one of the nation's leading bike-friendly communities." Accompanying this guidance was a sketch depicting a bicyclist swerving around scattered road debris and a storm water grate, and moving into the center of the traffic lane.

The trial court granted summary judgment based solely on R.C. 2744.02(B) which states that a political subdivision is not liable unless damages resulted from a "negligent failure to keep public roads in repair [or] other negligent failure to remove obstructions from public roads [.]" R.C. 2755.02(B)(3). The trial court found that the road conditions cited as the basis for plaintiff's theory of liability did not meet the requirements for holding a political subdivision liable under the statute. The City's immunity argument was based on *Howard v. Miami Twp. Fire Div.*, 119 Ohio St. 3d 1, 2008-Ohio-2792, 891 N.E.2d 311, which the City claimed held that liability can only ensue if there is an obstruction in the road. The trial court held that under *Howard* a municipality is liable only for "other negligent failure to remove obstructions" and that the legislature's removal of the phrase "free from nuisance" when R.C. 2744.02(B)(3) was amended in 2003 deliberately limited or eliminated a political subdivision's liability for damages caused by potholes. The trial court further held that to impose liability upon a political subdivision, "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."

The Tenth District Court of Appeals reversed that decision on November 1, 2011 and recognized that even under the 2003 amendment to R.C. 2744.02(B)(3), the legislature 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. *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) on which a municipality may be held liable. *Crabtree* was based on the City's alleged negligent failure to keep public roads in repair.

Potholes have long been actionable in Ohio, *see e.g*., *Dickerhoof v. Canton*, 6 Ohio St. 3d 128, 451 N.E.2d 1193 (1983), and will remain actionable unless and until the General Assembly deletes "in repair" from R.C. §2744.02(B)(3). Prior to 2003, R.C. 2744.02(B)(3) provided that political subdivisions were "liable for injury, death, or loss to person or property caused by their failure to keep public roads ... open, in repair and free from nuisance." The statute closely mirrored its predecessor R.C. 723.01. On April 9, 2003 the Ohio legislature replaced the phrase "free from nuisance" with "other negligent failure to remove obstructions" in a "deliberate effort to limit political subdivisions' liability for injuries and deaths on their roadways." *Howard*, at ¶ 26.

The City argued that as a result of that change in statutory language, defects or dangerous conditions affecting the roadway contributing to the accident did not form a basis for liability because they do not rise to a level of obstruction under R.C. 2744.02(B)(3). The Court of

Appeals disagreed with the City and held that potholes and other surface conditions can still give rise to municipal liability under R.C. 2744.02(B)(3) after *Howard, supra*. It further stated that the City's proposition that potholes, accumulated mud and rocks and overhanging vegetation could never, as a matter of law, rise to the level of "obstructions" under the statute constitutes an overly broad exclusion from liability. The extent to which a condition acts as a mere hindrance or becomes an obstacle may vary with the location, circumstances and nature of the road and the user encountering it. As such, potholes, overhanging vegetation or the presence of a strip of mud along the curb might constitute obstructions for purpose of a bicyclist who is a lawful user of the road.

In addition, the Court of Appeals aptly noted that R.C. 2744.02(B)(3) provided Crabtree with an alternative basis for the City's liability, *i.e.* "negligent failure to keep public roads in repair" which has existed since the original version of R.C. 723.01 was enacted in the 1970's. The failure to keep roads in repair "refers to maintaining the road's condition after construction or reconstruction" including the obligation to fix holes and crumbling pavement. *Bonace v. Springfield Twp.*, 179 Ohio App. 3d 736, 2008-Ohio-6364, 903 N.E.2d 683, ¶29.

Therefore, the Court of Appeals held that there was a genuine issue of material fact regarding the presence and impact of potholes, heavy brush on the side of the road and a strip of mud and debris along the curb as possible contributing factors to the accident that forced Crabtree to ride further from the curb than would allow overtaking vehicles room to pass safely.

The City of Columbus filed a Memorandum in Support of Jurisdiction in the Supreme Court (Case No. 11-2103) which was denied on March 7, 2012. The Crabtree case settled in October 2012 after nearly seven years of litigation. This author represented the plaintiff.

III. CAPS ON NON-ECONOMIC DAMAGES

In personal injury claims against the State of Ohio (other than against state universities), there are no caps on non-economic damages. In the *Miller* case this was a non-issue since *Miller* was a wrongful death case to which caps do not apply against private or public entities.

Crabtree was a personal injury claim against a political subdivision. Caps on non-economic damages in claims against political subdivisions have been in existence for more than 35 years. The cap is $250,000. R.C. 2744.05(C)(1). There is no exception to it. That cap was upheld as constitutional by the Ohio Supreme Court in *Oliver v. Cleveland Indians Baseball Co. Ltd. Partnership*, 123 Ohio St. 3d 278, 2009-Ohio-5030, 915 N.E.2d 1205.

IV. CONCLUSION

Prior to the *Miller* and *Crabtree* cases, the law was not clear regarding any duty of the state, county or municipality to repair roads after *Howard*. *Miller* and *Crabtree* unequivocally confirm that public liability is alive and well for injuries or death due to pothole neglect.

[1] This map contains a message signed by Mayor Michael B. Coleman, the City's logo, and an acknowledgement that the map was funded and published by the City and others. As an official publication, the map is self-authenticating under Evid. R. 902(5), and its contents are admissible as party-opponent admissions under Evid. R. 801(D)(2).