BASIC TRAFFIC SIGNAGE USING THE MUTCD -- LIABILITY ISSUES

James S. Stephenson
STEPHENSON DALY MOROW & SEMLER
8710 N. Meridian, Suite 200
Indianapolis, IN 46260
Phone: 317/844-3830
Fax: 317/573-4194
As a general rule, governmental entities in Indiana owe a duty to maintain existing signage, i.e., making sure the sign is upright and not obstructed by foliage. The sign must be visible to the motoring public for a sufficient distance to convey the applicable warning or regulatory information. Unresolved, to a great degree, is the degree to which government can be liable for failing to install warning or regulatory signs in the first instance. Litigation over such claims tends to focus upon application of two immunities within the Indiana Tort Claims Act, immunity for discretionary functions of government and immunity for having failed to adopt an ordinance. This paper contains a summary of existing law concerning application of these immunity provisions, as well as the immunity for the design of a public roadway, provided the roadway had not been substantially redesigned for a period of over 20 years. Also included herein is a discussion concerning the current state of the law on actual or constructive notice of defects. To prevail against a governmental entity on a signing claim, the plaintiff has to prove that the entity was on actual or constructive notice of the fact that the sign was down, obstructed by foliage, etc.

A) The Performance of a Discretionary Function (Ind. Code § 34-13-3-3(6))

No immunity provision has been more heavily litigated that discretionary function immunity. This is so, at least in part, because the statute does not define what a discretionary function is, and the courts have fashioned their own tests, modified over the years, in an effort to assess whether a particular challenged act or omission constitutes a discretionary function of government.

Discretionary function immunity traditionally has been applied in claims asserting negligence in road design or maintenance, sidewalk repair, signage, or in claims asserting the failure to undertake a particular public service or improvement. Immunity was once readily available as a shield against claims predicated upon the failure to sign or mark roadways, but the scope of the immunity in that area became restricted in its application with the issuance of the decision in Peavler v. Board of Commissioners of Monroe County, supra.

Peavler changed the law, particularly in the context of road claims, by requiring governmental entities show policy-oriented decisionmaking in order to enjoy immunity. The supreme court in Peavler overruled a number of prior decisions which held, essentially, that certain challenged omissions were simply discretionary functions of government, as a matter of law, such as the failure to install regulatory signs on roadways. Under Peavler, on the other hand, the burden was shifted to the entity to show, by affirmative evidence, that it had engaged in planning or policymaking functions. In other words, the Peavler court reserved discretionary function immunity as a defense which "insulates only those significant policy and political decisions which cannot be assessed by customary tort standards." Peavler, 528 N.E.2d at 45.

Thus, the failure to sign or mark a roadway will not invoke discretionary function immunity absent the entity's showing that it specifically decided not to sign or mark, where that decision involved policy considerations: "The governmental entity seeking to establish immunity bears the burden of proving that the challenged act or omission was a policy decision made by consciously balancing risks and benefits." Peavler, 528 N.E.2d at 46.

In an effort to fashion a test for determining "whether the function is the type intended to benefit from immunity," the court described various factors which "point toward immunity," 528 N.E.2d at 46:
1) The nature of the conduct --
   a) whether the conduct has a regulatory objective;
   b) whether the conduct involved the balancing of factors without reliance on a readily ascertainable rule or standard;
   c) whether the conduct requires judgment based on policy decisions;
   d) whether the decision involved adopting general principles or only applying them;
   e) whether the conduct involved establishment of plans, specifications and schedules; and
   f) whether the decision involved assessing priorities, weighing of budgetary considerations or allocation of resources.

2) The effect on governmental operations --
   a) whether the decision affects the feasibility or practicability of a government program; and
   b) whether liability will affect the effective administration of the function in question.

3) The capacity of the courts to evaluate the propriety of the government's action --
   a) whether tort standards offer an insufficient evaluation of the plaintiff's claim.

These various factors were adopted by the court as a means of evaluating discretionary function immunity under the new test adopted in Peavler; the planning/operational test drawn from Federal Tort Claims Act litigation. Under the planning/operational test, courts are to distinguish between decisions involving formulation of policy, which are entitled to immunity, from decisions regarding only the execution or implementation of that policy, which are not entitled to immunity. Greathouse v. Armstrong, 616 N.E.2d 364, 366-67 (Ind. 1993).

The Peavler court did not suggest how many of the factors require proof in order to warrant application of discretionary function immunity, but the essential conclusion is that a challenged decision is subject to immunity, if the decision resulted from a policy-oriented decisionmaking process. If entities engage in that process, the courts may not judge the wisdom of their decisions, as that judgment is left to the political process.

Typically, proof of policy-oriented decisionmaking involves issuance of board minutes, studies, surveys, or other evidence showing the policymaking authority of the entity considered a particular
public improvement, even a minor one, and rejected it or put it on hold. The best application of the immunity, in a reported decision in recent years, is in City of Crown Point v. Rutherford, 640 N.E.2d 750 (Ind.App. 1994). In that case, a pedestrian slipped and fell on a city sidewalk. The city offered evidence that it financed the rehabilitation of its sidewalks from two funds, a HUD program and a 50/50 program designed to operate as a gap filler to the HUD program. Under the 50/50 program, the Board of Public Works targeted a particular area for sidewalk rehabilitation and the board and residents split the cost of sidewalk repairs. While there was no evidence that the city engaged in planning or budgetary considerations concerning the area where the plaintiff fell, the court of appeals found the record was sufficient to apply discretionary function immunity, because the city had instituted a comprehensive scheme to renovate its sidewalks. There was testimony regarding a decision to target school zones, children's play areas and other high traffic zones such as the town square, all of which was a sufficient showing by the city of discretionary decisions, even though the specific sidewalk was not addressed at a policymaking level.

A contrary result is seen in Scott v. City of Seymour, 659 N.E.2d 585 (Ind.App. 1995), where the plaintiff fell when her shoe became caught in a hole in the street. The city was in the middle of a downtown redevelopment project. The street had been cut to its base and the city intended to resurface it with asphalt, but only after other work on the project was complete. The intent was that once an asphalt overlay went down, the city would not have to cut into it again for other improvements, thereby conserving resources. Despite this record, the court of appeals held the city was not entitled to immunity, because there was no evidence the Board of Public Works engaged in a systematic decisionmaking process. The evidence instead consisted of conclusions from board members or the mayor concerning their overall thoughts behind not putting down the asphalt overlay, but no minutes or other evidence of official board action to delay the resurfacing. The Scott court distinguished City of Crown Point by noting that in Crown Point there was evidence of a board decision to utilize public monies to target certain areas.

In the highway context, the immunity was applied where the plaintiff contended the county was negligent in failing to extend a culvert pipe, widen traffic lanes, widen a shoulder and install guardrails. Voit v. Allen County, 634 N.E.2d 767 (Ind.App. 1994). The county in Voit was able to show that it had engaged in a systematic process for determining what improvements were to be made to highways in the county, and its urban transportation advisory board had concluded that traffic projections did not show a need to widen or improve the road in question. This was sufficient to entitle the county to immunity. See also State v. Livengood, 688 N.E.2d 189 (Ind.App. 1997) (state immune for adopting highway standard for installation of guardrail end treatments); Lee v. State, 682 N.E.2d 576 (Ind.App. 1997) (state's improvement of dangerous curves in road in "planning" stage on date of accident, state immune).

On the other hand, in Hanson v. Vigo County Board of Commissioners, 659 N.E.2d 1123 (Ind.App. 1996), the court did not find discretionary function immunity in a case involving a plaintiff who was struck at an intersection while riding a bicycle. The intersection, out in the country, was not marked with stop or yield signs. Two years earlier a consulting engineering firm informed the county board of commissioners of the availability of federal funds to implement a program for the installation and replacement of road signs. The program was to ensure uniform signs at every intersection, and the board retained consulting engineers to design a plan for the placement and replacement of signs on roads in the county. The board approved the plan without deliberation and delivered it to the county.
engineer for implementation. Because the plan gave no priority to placement of signs at unmarked intersections over replacement of signs at marked intersections, and due to other factors, the court determined the county had made an insufficient showing of its entitlement to immunity. It was the county engineer and not the board of commissioners who decided how to implement the plan, so the court felt the board of commissioners, the county's policymakers, had not engaged in a systematic process for determining how to implement the sign plan. Compare Mullin v. City of Mishawaka, 531 N.E.2d 229 (Ind.App. 1988) (City engineer discussed recommendations of comprehensive plan with city council, council passed ordinance adopting plan for installation of warning signs at certain locations within the city; city deemed entitled to immunity for failure to put up warning sign at particular location).

Cases continue to come down from the court of appeals, and they continue to go both ways, predicated upon both the nature of the claim and the sufficiency of the record. Town of Highland v. Zerbel, 659 N.E.2d 1113 (Ind.App. 1995) involved a pedestrian who sued the town due to a slip and fall on a sidewalk. The town's informal sidewalk replacement program was deemed insufficient to fulfill the Peavler requirements. The policy was simply "reactive," meaning the town would inspect and repair a sidewalk if someone complained about it.

In LKI Holdings v. Tyner, 658 N.E.2d 111 (Ind.App. 1995), the plaintiff claimed there should have been some type of traffic control device at an intersection, but the city was able to produce an executive order from the mayor prioritizing new subdivisions so that those with greatest need for traffic control devices would be the first ones examined by the city engineer, who would then submit recommendations to the transportation board regarding installation of traffic control devices. This was deemed sufficient for discretionary function immunity.

Lee v. State, 682 N.E.2d 576 (Ind.App. 1997), involved a July 1992 accident where the driver failed to negotiate a series of curves. The plaintiff alleged negligent construction and failure to warn. However, because INDOT's improvement of the curves was in the planning phase at the time of the accident and not its operational phase, the county was immune under Section 3(6). This was so even though the design and engineering aspects of the project were complete.

In Wade v. Norfolk & Western Ry Co., 694 N.E.2d 298 (Ind.App. 1998), the plaintiff's expert claimed the county was negligent in failing to realign or close a railroad crossing. The evidence showed the director of the county highway department established an annual budget for crossing improvements, and chose to pursue only those projects which were eligible for federal funding. The court held this was sufficient to invoke discretionary function immunity. See also Streiler v. Norfolk & Western Ry Co., 642 N.E.2d 1019 (Ind.App. 1994) (county immune for not installing warning devices at unimproved crossing; State v. Livengood by Livengood, 688 N.E.2d 189 (Ind.App. 1997) (state immune for using certain guardrail end treatments per standards adopted but replacement of guardrail end treatment does not invoke discretionary function immunity).

In PNC Bank v. State, 750 N.E.2d 444 (Ind.App. 2001), the plaintiff was involved in an intersection collision. The traffic signal did not have a left turn arrow; the plaintiff alleged the county was negligent for not having a left turn arrow. The record showed INDOT's districts submitted proposed improvement projects; the original project for the intersection did not include left turn signals, though a later one did. Due to a variety of reasons, the improvement project was delayed. The court found the record sufficient to afford discretionary function immunity.

In summary, the availability of discretionary function immunity is necessarily dependent upon
the practices of the insured. If the insured goes about considering public improvements in a systematic way, chances are a record will exist for application for discretionary function immunity, certainly more so than in cities, towns or counties operating under traditional informal practices. Also, the larger and more populated entities are more likely to have systems in place which can afford application of the immunity than will smaller cities, towns or rural counties. To the extent insureds can be encouraged to adopt practices, such as county-wide signage plans, or simply consideration of even minor public improvements before the policymaking authority, with accompanying recording of minutes, these type of efforts can go a long way toward availing these entities of discretionary function immunity in the event of a loss.

B) The Adoption and Enforcement of or Failure to Adopt or Enforce a Law, Unless the Act of Enforcement Constitutes False Arrest or False Imprisonment (Ind. Code § 34-13-3-3(7))

Immunity for enforcing or failing to enforce or adopt a law was severely restricted by the supreme court's 1993 decision in Quakenbush v. Lackey, 622 N.E.2d 1284 (Ind. 1993), but only in the context of immunity for law enforcement activities. The immunity still applies to claims which rest on the assertion that a governmental entity failed to undertake a legislative act, or in ordinance and code enforcement contexts. For example, governmental entities are immune from liability in claims which allege that an unsafe or dangerous speed limit was established on a certain road. Speed limits are established by legislative act of the governing body of the city, town or county. Cromer v. City of Indianapolis, 540 N.E.2d 663 (Ind.App. 1989); Holiday Rambler Corporation v. Gesinger, 541 N.E.2d 559 (Ind.App. 1989). In Joseph v. LaPorte County, 651 N.E.2d 1180 (Ind.App. 1995), the court found the decision to establish a speed limit at 45 miles per hour was subject to immunity under subsection 7. Similarly, governmental entities are immune from liability for failing to install (or change) regulatory signs which, under Ind. Code § 9-21, require enactment of ordinances. Bd. Commissioners Harrison County v. Lowe, app. no. 22C01-9908-CT-32) (slip op. 8/2/01).

In Quakenbush, the supreme court held the immunity did not apply in favor of a police officer who was allegedly negligent in the operation of a patrol vehicle. An entire body of case law was overruled both under Quakenbush and the 1991 supreme court decision in Tittle v. Mahan, 582 N.E.2d 796 (Ind. 1991). Without rehashing the entire history of law enforcement immunity, in a police context, and without commenting on the merits of Quakenbush or Tittle, it can be fairly said that immunity for police-related activities no longer exists. Quakenbush holds little more than if the police officer's conduct was lawful, then the immunity applies, but if lawful or non-negligent why does he need immunity to begin with? Instead, the clear intent of Quakenbush is to restrict application of this immunity to situations involving the decision of a governmental entity about whether to adopt or enforce a statute, rule or regulation. To that degree, the Quakenbush court reaffirmed certain previous decisions, including those involving a decision concerning legal action to end a strike by firefighters, Boyle v. Anderson Firefighters Association, 497 N.E.2d 1073 (Ind.App. 1986); an administrative order from the Department of Natural Resources that a property owner stop construction of a dam, State v. Taylor, 419 N.E.2d 819 (Ind.App. 1981); the issuance of a stop work order in order to enforce a zoning ordinance, City of Seymour v. Onyx Paving Company, 541 N.E.2d 951 (Ind.App. 1989); a sanitation officer's enforcement of a local disposal ordinance, Board of Commissioners of Hendricks County v. King, 481 N.E.2d 1327 (Ind.App. 1985). Each of these activities related to enforcement of
or failure to enforce laws, rules or regulations by a governmental entity.

There is also some indication the old "law enforcement immunity" may be making a comeback, in apparent adherence to the Supreme Court's dictum in Benton v City of Oakland City, 721 N.E.2d 224 (Ind. 1999), that immunity analysis should focus on the language of the Tort Claims Act itself, rather than on "judicially created tests." City of Anderson v Davis, 743 N.E.2d 359, 364 (Ind.App. 2001); Benton, 721 N.E.2d at 232. Thus, in Davis, the Court of Appeals applied law enforcement immunity to a claim involving the release of a police dog on a fleeing suspect. The Davis opinion asserts Benton "nullified much of Quakenbush." Davis, 743 N.E.2d at 363, by rejecting the distinction between "public" and "private" duties. Id. at 364. Because the officer in Davis was attempting to compel obedience to a law, the immunity applied, and the court rejected the argument that the immunity should not apply to intentional torts. Id. at 365. The court refused to apply the "excessive force exception" to law enforcement immunity under section 3(7) advanced by the Supreme Court in Kemezy v Peters, 622 N.E.2d 1296 (Ind. 1993), noting that in light of Benton's abandonment of the Quakenbush test, "Kemezy cannot be regarded as good law to the extent it is based on the Quakenbush test." Davis, 743 N.E.2d at 365 n. 4.

Davis, in a footnote, even goes so far as to suggest that a police officer's use of excessive force or performance of duties in an otherwise illegal manner does not appear to defeat application of the immunity. Id.

In Minks v Pina, 709 N.E.2d 379 (Ind.App. 1999), police officers stopped a drunk driver and told his unlicensed minor passenger to do the driving; the officers did not arrest the drunk because the paperwork would take too much time. The court held the city immune for the officers' failure to enforce the law. See also City of Anderson v Weatherford, 714 N.E.2d 181 (Ind.App. 1999) (arresting officers immune on claim for intentional infliction of emotional distress where they executed arrest warrant, despite instructions from chief to not execute warrant); court in dicta noted willful and wanton behavior or even intentional criminal conduct may fall within the scope of a police officer's employment); O'Bannon v City of Anderson, 733 N.E.2d (Ind.App. 2000) (police officers attempting to arrest armed felon did not use excessive force as a matter of law and were entitled to immunity under Section 3(7)).

The courts will also apply common law judicial immunity to police actions undertaken pursuant to court order. Mendenhall v City of Indianapolis, 717 N.E.2d 1218 (Ind.App. 1999) (padlocking property per court order); Grant County v Cotton, 677 N.E.2d 1103 (Ind.App. 1997) (detaining arrestee until validity of warrant could be ascertained subject to judicial immunity).

City of Anderson v Davis, of course, is only a decision of the Court of Appeals. The Supreme Court has yet to address the proper application of Section 3(7) to law enforcement related claims in light of abandonment of the public/private duty test. Nor has there been a law enforcement immunity decision, since Benton, which addresses application of the immunity in the auto-related context.

It's possible, if transfer is accepted in Davis, that the Supreme Court will come full circle and apply law enforcement immunity broadly, to virtually any law enforcement related activity, as originally held by the Supreme Court in Seymour National Bank v State, 422 N.E.2d 1223 (Ind. 1981), clarified on rehearing, 428 N.E.2d 203. But such a result isn't likely. After all, it was the 1990s court's inability to accept the result in Seymour National Bank (100 mile per hour police chase, collision with innocent third party) which initiated the successive waves of "judicially created tests," fashioned to minimize the harsh effect of applying the immunity to all facets of police negligence. Look for the Supreme Court to
uphold holdings like that in Davis to arrest situations or pursuit of felons, but to somehow circumvent application of the immunity to auto claims.

C) **Design of a Highway if the Loss Occurs at Least Twenty (20) Years After the Highway Was Designed or Substantially Redesigned (Ind. Code § 34-13-3-3 (17))**

This immunity, which was added to the list of immunities in the late 1980s, was intended to serve as something of a statute of repose in claims involving negligent design of highways.
Section 17 affords immunity for the design of a highway, if the loss occurs at least 20 years after the highway was designed or substantially redesigned. The immunity has been held to apply to the original design of a highway, including its right-of-way and existing improvements, e.g., the width of a shoulder, the absence of guardrails, etc. Immunity has also been held, however, to have no application where the plaintiff rests on a theory of failing to update, improve or modernize a roadway, i.e., failing to adopt a "new design." Voit v. Allen County, 634 N.E.2d 767 (Ind. App. 1994). The Voit court’s construction of the immunity restricts its application, as design claims often turn on the allegation that the governmental entity should have modernized or updated the overall design of a road.

The immunity continues to be recognized where the claim rests on deficiencies in the original design. Shand Mining, Inc. v. Clay County Board of Commissioners, 671 N.E.2d 477 (Ind. App. 1996); State v. Livengood by Livengood, 688 N.E.2d 189 (Ind. App. 1997) (state immune under design immunity for continued utilization of guardrail installed in 1960s).

If the highway undergoes "substantial redesign" within 20 years of the date of loss, the immunity may not apply. State v. Livengood, supra.

In Jacobs v. Board of Commissioners of Morgan County, 652 N.E.2d 94 (Ind. App. 1995), the court held the immunity did not apply to the absence of a warning sign at a curve on a roadway, even though the road had never been signed and the county engineer attested, by way of affidavit, that signage is part of design. The court conceded the county was immune from liability for the original design and configuration of the road, but that "design" under section 17 does not encompass warning signs. Thus, the plaintiff can't complain about the curvy nature of a roadway, but can complain about the fact that warning signs were not installed to advise him of the approach of the curves. See also Harkness v. Hall, 684 N.E.2d 1156 (Ind. App. 1997) (design immunity not applicable to claim of defective signage).

D) Actual or Constructive Notice

To impose liability on a municipality for injuries suffered due to a dangerous or defective condition on municipal property, a claimant must prove the dangerous or defective condition existed, and that the municipality had actual or constructive knowledge of it, as well as a reasonable opportunity to repair the defect, prior to the accident. Butler v. City of Indianapolis, 653 N.E.2d 501, transfer granted, 668 N.E.2d 1227 (Ind. 1996). Notice to a municipality of the existence of a defect may be of two kinds, actual or constructive. Actual notice is simply knowledge of a part of a municipality, acquired either by personal observation or through communication from a third person, of the existence of the defective condition. Notice to the municipal employee is imputed to the municipality, via agency principles. The general rule requires receipt of notice by a municipal officer or employee who had a duty to report the defect to proper municipal authorities. McQuillan on Municipal Corporations, Section 54.107 (1994). For example, notice of a defect in a street or sidewalk provided to a street commissioner or a city councilman constitutes notice to the city. City of Hammond v. Jahnke, 178 Ind. 177, 99 N.E. 39 (1912); City of Columbus v. Strassner, 124 Ind. 482, 25 N.E. 65 (1890). Notice to members of a fire department of defects in the foundation of a sidewalk is not notice to the city, however. City of Indianapolis v. Ray, 52 Ind. App. 388, 97 N.E. 795 (1912).

Once the entity has notice of a dangerous condition, it has a "reasonable time" to remedy the problem. Howard v. Trevino, 613 N.E.2d 847, 848 (Ind. App. 1993). Determination of what is a "reasonable time" is not susceptible to precise definition, and typically involves a question of fact for the jury. There are reported decisions outside Indiana which hold that the period of time between
discovery and accident may be so brief as to preclude a jury determination, but the Indiana Court of Appeals has held that a three hour delay between the city's notice of a missing stop sign and the time of accident was a sufficient lapse of time to present a jury question on whether the city was able to remedy the defect in a reasonable time. Howard v. Trevino, supra (state department received notice of missing stop sign at 9:15 a.m., work order for replacement of sign prepared at 12:22 p.m., sign replaced at 1:15 p.m. Accident occurred around noon. City argued no jury issue was presented because the lapse of time was insufficient, in light of difficulties presented by the number of miles of city streets, available employees, etc.).

While there is no Indiana case on point, other jurisdictions hold that notice to police officers is ordinarily not notice to the municipality, except where the officer is charged with the duty of reporting defects. McQuillan on Municipal Corporations, Section 54.106.10 (1994).

Most premises claims do not turn on proof of actual notice, because constructive notice is sufficient. The rule of constructive notice of a defect applies to defects which might have been discovered by the exercise of ordinary care and diligence. Gilson v. City of Anderson, 141 Ind.App. 180, 226 N.E.2d 921, 924 (1967). Knowledge is imputed to the entity if the defect existed for a sufficient period of time that the entity should have known of its existence, by the exercise of reasonable care and diligence:

In cases like this one before us, it is well settled in this state that the complaining party must not only prove that the alleged defective condition existed, but that the city had knowledge thereof, actual or constructive, long enough before the accident to repair the defect, and failed to do so. The rule of constructive knowledge applies only to such defects as might have been discovered by the exercise of ordinary care and diligence:


Thus, to fulfill proof requirements for constructive notice, the plaintiff must come forward with some evidence showing the defect existed for a long enough time such that notice may fairly be imputed to the entity. Failing that, judgment in favor of the entity is appropriate.

For example, in Bodnar v. City of Gary, 629 N.E.2d 278 (Ind.App. 1994), the plaintiff alleged she was unable to see a stop light because it was obscured by trees. She ran the red light, collided with another vehicle, and then sued the city, alleging negligence in failing to trim the tree which obscured the stop light. The court of appeals concluded Bodnar had failed to offer any evidence to support actual or constructive notice to the city, and therefore affirmed entry of judgment in favor of the city:

... Bodnar needed to demonstrate that the city had actual or constructive knowledge of the visibility problem in this case. She has, however, put forth no evidence from which a jury could conclude that the city had the requisite knowledge. See Id., at 1013. We will not assume a breach of duty in this case in the absence of evidence from which a proper inference of knowledge can be drawn.

Bodnar, 629 N.E.2d at 280.

Failing to offer some evidence as to how long a sign was down, or how long a hole existed, will defeat a plaintiff's claim on the basis of having failed to offer evidence on an element of plaintiff's
cause of action. A plaintiff cannot rest on the mere assertion that a sign, for example, may have been down for days or even hours; it also may have been down for only five minutes. An evidentiary inference cannot be based on speculation or even probability. Pardue v. Seven-Up Bottling Company, 407 N.E.2d 1154, 1159 (Ind.App. 1980).

The court of appeals noted that the plaintiff invited just such "inferential speculation" in Butler v. City of Indianapolis, 653 N.E.2d 501 (Ind.App. 1995), affirming summary judgment for the city on grounds that plaintiff failed to raise a factual dispute regarding whether the city had actual or constructive notice of the presence of a hole, but the supreme court vacated the summary judgment and remanded, 668 N.E.2d 1227, holding a fact issue existed as to whether the city had notice.

In Butler, a minor stepped into a hole which resulted from removal of a temporary no parking sign. The sign had been installed for the Indianapolis 500, and removed after the race. The city offered proof that a city employee removed the sign and filled the hole with sand on 5/26/92. Plaintiff responded to the city's motion with affidavits from neighbors who merely stated that it was typical for the city not to fill holes left by the temporary parking signs. The supreme court found this evidence sufficient to raise a jury issue on whether the hole was in fact filled on 5/26/92; if it was not, the city then had actual knowledge of its existence, since its own employee removed the sign.

Butler is interesting because the court acknowledges plaintiff could offer no direct evidence as to the hole in question, but the broad statement that the city never filled any of the holes, in a general area, was deemed sufficient to create a jury issue concerning whether the hole was in fact filled.

Butler is important because it arose from a fall into a hole that resulted from a temporary no parking sign. Under the more typical facts, plaintiffs must still offer evidence as to how long the particular hole had been around. There is no reason to read Butler to hold that evidence concerning the length of time that "nearby" holes existed is sufficient to get to a jury.

Sometimes circumstantial evidence is available to prove constructive notice. For example, in Spier by Spier v. City of Plymouth, 593 N.E.2d 1255 (Ind.App. 1992), a minor plaintiff was injured when a city sign post broke and fell on his hand. The sign post had rusted through near its base, the point at which it broke. The extent of the rust suggested that the rust had been building up for a long time. One of the neighbors had landscaped and mulched the right-of-way on which the sign post was located, but the rusted area of the sign post was immediately above the level of the mulch. The city was aware sign posts tended to rust and had a program of inspection and maintenance. The court found this evidence was sufficient to create a jury issue on constructive notice, as a material issue of fact existed as to whether the rusted out condition existed for a sufficient period of time for the city to be charged with constructive knowledge of its existence.

Other circumstances come to mind. For example, assume a sign is found lying in the weeds, but no local resident can recall it ever being down. If the plaintiff can offer no evidence as to how long the sign was down, there has been a failure of proof on the constructive notice element of the cause of action, and summary judgment in favor of the entity is appropriate. Plaintiff must resort to attempting to find some circumstantial evidence, e.g., if the sign was found lying in the weeds, is the grass under the sign dead or matted? Was the sign covered with snow? Is there other physical evidence which could suggest the sign had been lying on the ground for a period of time, and not on the post?

Sometimes expert opinion even comes into play, in close cases. For example, assume a sign is down only one hour and the governmental entity offers an expert's opinion that 1) the entity cannot be expected to discover fallen signs, as a general rule, with any greater frequency than every 24 hours, or
2) even if the entity was placed on actual notice of the fallen sign, a reasonable response time, in order to install a new sign, is two hours. Is this opinion evidence enough to warrant summary judgment on breach of duty absent any countervailing opinion evidence from plaintiff?

Another example: assume a sign is obscured by leaves. The accident occurs in May. Is it necessary to hire a horticultural expert to prove leaves grow in May, such that the sign must have been obscured for at least a few weeks during the month of May? Or can the jury infer that on its own? Bodnar v City of Gary, supra, which involved an overhanging tree limb, suggests it may be unwise to presuppose that certain facts, in and of themselves, constitute evidence supporting constructive notice.

Finally, notice can be in issue even in claims not involving streets or sidewalks. In Czaja v City of Butler, 604 N.E.2d 9 (Ind.App. 1992), homeowners were injured by a fallen tree. The only evidence they could muster was that limbs and branches occasionally fell from the tree, and that the adjacent sidewalk had buckled due to tree roots. There was no outward evidence that the tree was rotten. Summary judgment in favor of the city was therefore affirmed.