[Cite as *Cosimi v. Koski Constr.*, 2009-Ohio-5892.]

THE COURT OF APPEALS

ELEVENTH APPELLATE DISTRICT

ASHTABULA COUNTY, OHIO

CLAYTON COSIMI, et al.,	:	**O P I N I O N**
Plaintiffs-Appellants,	:	**CASE NO. 2008-A-0075**
- vs -	:	
THE KOSKI CONSTRUCTION COMPANY, et al.,	:	
Defendants-Appellees.	:	

Civil Appeal from the Court of Common Pleas, Case No. 2007 CV 909.

Judgment: Reversed and remanded.

Mitchell D. D'Amico, 7333 Center Street, Mentor, OH 44060 and *Brian L. Summers*, 7327 Center Street, Mentor, OH 44060 (For Plaintiffs-Appellants).

Shannon M. Fogarty, Davis & Young, 1200 Fifth Third Center, 600 Superior Avenue, East, Cleveland, OH 44114 (For Appellee The Koski Construction Company).

Cornelius J. O'Sullivan, Jr., Law Office of Steven K. Kelley, 6480 Rockside Woods Boulevard, #145, Independence, OH 44131 (For Appellee The City of Geneva).

MARY JANE TRAPP, P.J.

{¶1} Mr. Clayton Cosimi and his wife, Mrs. Mary Cosimi, appeal from the judgment of the Ashtabula County Court of Common Pleas granting the summary judgment motions of the City of Geneva (the "city") and Koski Construction Company ("Koski").

{¶2} The Cosimis were injured and their minivan destroyed as they were traveling eastbound on State Route 20 ("Rt. 20"), which runs directly through the heart of the city, and was under construction at the time. Koski, the contractor for the Ohio Department of Transportation ("ODOT") and the city undertook the repaving project of the road.

{¶3} On the day the Cosimis were traveling on Rt. 20, the surface of the road had been milled away, leaving manhole sewer covers raised above the surface. Because the road had been narrowed to two lanes, one for each direction of traffic, the only way one could avoid the manhole covers was to swerve into the oncoming lane, if, of course, there were no oncoming vehicles.

{¶4} The Cosimis had no choice but to drive over the manhole covers, which did not have the typical paved ramp around them. One of the manhole covers caught the steel suspension bar underneath their minivan, causing the airbags to deploy, injuring Mr. Cosimi's face and head, bruising Mrs. Cosimi's cheek, and rendering the minivan undriveable.

{¶5} Despite the uncontroverted evidence that Koski created the hazardous road condition and the city was aware of the multiple accidents that were occurring from the manhole covers prior to the Cosimis' accident, the trial court awarded summary judgment in favor of Koski and the city. The court held that as a matter of law the city was immune from liability as there were no obstructions on the roadway. The court also determined that Koski was neither negligent nor reckless, having no duty to warn, repair, or protect motorists from unsafe road conditions.

{¶6} We determine that both of the Cosimis' assignments of error have merit. There is no doubt that Koski was negligent, if not reckless, in failing to adequately ramp the manhole covers, and that it had ample notice that the manhole covers were not properly shielded for vehicles to travel safely down the street during the repaving project.

{¶7} The Cosimis' second assignment of error is also with merit since the city had ample notice that the street was in disrepair from the numerous accidents that occurred in the week prior to their accident. Thus, there is a question as to whether the city was negligent in failing to keep the road in repair and remove obstructions.

{¶8} As neither the city nor Koski took steps to rectify the situation, they cannot now claim they are either immune from liability or owed no duty to appellants because the street was safely passable and the accident unforeseeable. Whether the manhole covers were an "obstruction" or a mere "hindrance" as the trial court determined, and whether Koski or the city breached their duty to keep travelers safe from hazards they created, are genuine issues of material fact that can only be decided by a trier of fact. Thus, we reverse and remand.

{¶9} **Substantive and Procedural History**

{¶10} In the afternoon of July 29, 2005, Mr. Cosimi was driving eastbound on Rt. 20 with Mrs. Cosimi in the passenger seat, and one of their sons in the back seat. The street was obviously undergoing construction, and the normally three-lane street was narrowed to two lanes, one lane for each direction of traffic. The surface of the street had already been milled away, and manhole covers were protruding at least two inches from the surface.

{¶11} Normally, the surface surrounding the manhole covers are ramped with asphalt prior to the resurfacing so that a gradual incline is formed for cars to safely drive over the raised obstructions in the roadway.

{¶12} Mr. Cosimi was driving around 25 miles per hour through the construction zone in the middle of the city. Because he had safely driven over the other raised manhole covers, he did not feel in danger of the oncoming covers, nor was he able to avoid the manhole covers as that would entail maneuvering the van into the oncoming traffic lane. Because the manhole cover did not have an adequate asphalt ramp for a car to traverse, the cover caught the steel suspension bar on the van's underside, causing the crash. It was to the Cosimis complete surprise when they felt the van strike the manhole cover. Both front airbags deployed, smashing Mr. Cosimi's head and face and bruising Mrs. Cosimi's face. The Cosimis were able to maneuver the van to the side of the street and call the Geneva City Police Department. A police report was filed. The van was rendered virtually undrivable.

{¶13} The Contractor - Koski Construction Company

{¶14} Koski was awarded the repaving construction project for Rt. 20 through the public bid system by ODOT to mill and resurface the road. ODOT, not the city, assumed control of the project. Road surface repaving begins with removing or "milling" the old surface of the road, which naturally leaves manhole sewer covers exposed several inches above the road surface. The milling continues for about the first week. As the surface is milled away, smaller trucks follow that partially repair the areas around the manhole covers. The smaller trucks fill in the empty areas surrounding the manholes with asphalt, and create ramps to and around the manhole covers so that

cars can safely traverse the manhole covers. The "common" practice is to leave manhole covers raised about two inches above the surface, with the ramps leading up to them accordingly.

{¶15} Prior to the inception of a road project, ODOT ensures that road safety signs are properly placed, that traffic control is satisfactory, and that all of the ODOT safety handbook procedures are implemented. Throughout the project, an ODOT project engineer is on-site at all times to confirm safety measures are in place and the streets are safely maintained for vehicle travel. ODOT maintains daily progress reports documenting the day's events for each project.

{¶16} Mr. William Glass, the ODOT lead engineer on the project, testified that there were several problems with this project. Several ODOT inspector reports were attached to the Cosimis' answer briefs opposing the motions for summary judgment. The reports recorded that prior to the accident there were several issues with the milling work, grading problems with the sidewalk and handicap access, improperly placed signs, and workers working outside of the construction zone.

{¶17} The most notable report was that of July 13, which documented that the foreman, Mr. John Wright, spoke with Mr. Glass, advising him that Koski left unsafe conditions on the ramping work the previous night. While the road had been milled, several manhole covers were left unramped at the end of the work day, which is against ODOT safety procedures, because it creates a hazardous road condition. ODOT called Koski, informing them that the milling work needed to be stopped so that the ramping that was supposed to occur the day before could be completed.

{¶18} On July 18, a meeting was held between Koski and ODOT to address traffic control issues and the poor quality of work. The contractor's signs were improperly placed, workers were working outside of the construction zone, and Mr. Wright was again directed to address the traffic control issues and poor quality of the work performed.

{¶19} On July 20, the daily work was reported "satisfactory," although a manhole cover needed to be adjusted to grade. The following day, on July 21, traffic control was also reported as "satisfactory," with adequate signage, although there were additional problems with the manholes, which required Mr. Glass to again speak to Mr. Wright. On July 25, more discussions were had between Koski and ODOT to discuss additional grading problems with the sidewalks and handicap ramps.

{¶20} Also on July 21, ODOT received a letter from a motorist regarding damage to the undercarriage of the motorist's vehicle. ODOT received another email around that time regarding another accident where a motor vehicle hit an exposed manhole cover, which tore the undercarriage of the car, destroyed the oil pan, and damaged the transmission. These correspondences were forwarded to Koski, with a request that Koski send ODOT the results of the investigation.

{¶21} Mr. Thomas Pope, the vice-president of Koski, testified that the ODOT signs were properly placed, all the procedures as dictated by the ODOT guidelines for safety were followed, and he was unaware of any accidents that occurred on the construction site. No signs are required by ODOT to indicate raised manhole covers, and at no time would a hole around a manhole be open to traffic unless it was properly ramped.

{¶22} Ms. Mary Hilda Kiehl, Koski's payroll accountant, who is also in charge of accounts receivable, as well as general receptionist duties such as typing documents, answering the phone, and organizing the mail, was also deposed. She testified that people called in between July 1 and July 29, regarding damage to their vehicles on Rt. 20. By July 28, she had collected a list of at least nine names. Although she found this to be an extraordinary number of claims, she did not inform Mr. Pope or the president, Mr. Donald Koski. She testified Koski's custom was to simply inform the claimants to send police reports and estimates, which she would then forward to Koski's insurance company. She did not inquire as to the nature of the claims, although she noted that the accidents were occurring in the same location in a short period of time.

{¶23} The City of Geneva

{¶24} Officer Douglas Zetlaw was dispatched to the scene of the Cosimi accident. He first checked for injuries, observing Mr. Cosimi had no noticeable injuries, although he complained of a problem with his left ear. Since the accident, Mr. Cosimi has suffered from continuing, debilitating nausea and dizziness attributable to his left ear. Mrs. Cosimi had minor scrapes and burns from the air bag. Officer Zetlaw further observed that the undercarriage of the van was scraped, and documented in his crash report that the damage appeared to be from a raised manhole cover. He was aware that there were multiple other incidents and reports of vehicles that were also damaged from the roadway conditions during the period of road repair both before and after the accident. In fact, he was called to the scene of a similar accident several hours after that of the Cosimis'. Although he did not consider the manholes to be a hazard if the vehicles were able to travel around them, he admitted that this could occur only when

traffic was light. Because only two lanes were open for travel, heavy traffic restricted the vehicles' ability to maneuver around the manhole covers. Indeed, fellow Officer Christopher Cahill, who worked off-duty for Koski directing traffic, observed that cars were having trouble maneuvering around the manhole covers.

{¶25} Officer Zetlaw further testified that the police procedure for incidents involving city property was to file the reports with the city's financial director, Ms. Wanita Stuetzer, and to inform the accident victims to contact Koski, as well as their own insurance carriers.

{¶26} Several officers also testified as to the accidents that occurred the week before, all with similar damage to the undercarriage of the victims' vehicles. Depending on the damage, the police were either called to the scene or the victims were told to file police reports, which again, were forwarded to Ms. Stuetzer, as well as Koski.

{¶27} Officer Roger Wilt, Jr., responded to several of these accidents, specifically recalling two that occurred on July 18 and July 22. He took pictures of the manhole covers, after tracking the leaking transmission fluid and oil back to the manhole covers. He further testified that he drove by the construction site almost daily during the construction project, and would often stop and place construction barrels directly on top of the manhole covers.

{¶28} Ms. Stuetzer, the city finance director, testified as to what occurred when she received police reports of this nature. The police were directed to send the city manager any reports that may involve city property, who then forwarded the reports to her. She would send them to the city's insurance company and the construction company. She recalled receiving a packet of several incidents at once, which she sent

to Koski on July 27 and faxed to the city's insurance company on July 26. Because she was faxing them to the city's insurance company, she called Koski and spoke with Mrs. Kiehl, asking her if she would like them to be faxed that day as well. Mrs. Kiehl did not appear interested in the claims or inquire further as to their nature, and responded that ordinary mail was sufficient.

{¶29} Mr. Glass, ODOT's lead engineer, testified that he spoke with the Geneva Sanitary Department several times due to problems with manhole adjustments because the manhole covers were not settling correctly.

{¶30} The Cosimis filed a complaint based on the accident on July 29, 2007, against Koski, the city, Ashtabula County, and State Farm Insurance Company. The parties stipulated to dismiss, without prejudice, Ashtabula County as a defendant. The claims against State Farm Insurance Company were also dismissed except for the medical payments claim. In addition, there is a suit currently pending in the Court of Claims against ODOT.

{¶31} The city filed a partial motion for summary judgment on April 28, 2008, and two days later Koski also filed a partial motion for summary judgment. The Cosimis filed their answer briefs in opposition in early May, and the parties' reply briefs and supplemental motions were filed soon thereafter.

{¶32} On November 26, 2008, the court awarded summary judgment in favor of the city, finding that the city was immune from liability pursuant to R.C. 2744.01(F). The court dismissed the Cosimis' argument that the manhole covers were an exception to the general rule of immunity under R.C. 2744.01(C)(2)(e). The court found this exception did not apply because a manhole is not an "obstruction" as defined by that

statute. The court also awarded summary judgment in favor of Koski, finding that the Cosimis failed to introduce any evidence that a legal duty of care of existed, and that the Cosimis failed to introduce any evidence of Koski's recklessness.

{¶33} The Cosimis now timely raise the following two assignments of error:

{¶34} "[1.] The trial court erred as a matter of law by granting summary judgment to appellee Koski Construction Company.

{¶35} "[2.] The trial court erred as a matter of law by granting summary judgment to appellee City of Geneva."

{¶36} **Summary Judgment Standard of Review**

{¶37} "This court reviews de novo a trial court's order granting summary judgment. *Hapgood v. Conrad,* 11th Dist. No. 2000-T-0058, 2002-Ohio-3363, ¶13, citing *Cole v. Am Industries and Resources Corp.* (1998), 128 Ohio App.3d 546. 'A reviewing court will apply the same standard a trial court is required to apply, which is to determine whether any genuine issues of material fact exist and whether the moving party is entitled to judgment as a matter of law.' Id., citing *Parenti v. Goodyear Tire & Rubber Co.* (1990), 66 Ohio App.3d 826, 829.

{¶38} "Since summary judgment denies the party his or her 'day in court' it is not to be viewed lightly as docket control or as a 'little trial.' The jurisprudence of summary judgment standards has placed burdens on both the moving and the nonmoving party. In *Dresher v. Burt* [(1996), 75 Ohio St.3d 286], the Supreme Court of Ohio held that the moving party seeking summary judgment bears the initial burden of informing the trial court of the basis for the motion and identifying those portions of the record before the trial court that demonstrate the absence of a genuine issue of fact on a material element

of the nonmoving party's claim. The evidence must be in the record or the motion cannot succeed. The moving party cannot discharge its initial burden under Civ.R. 56 simply by making a conclusory assertion that the nonmoving party has no evidence to prove its case but must be able to specifically point to some evidence of the type listed in Civ.R. 56(C) that affirmatively demonstrates that the nonmoving party has no evidence to support the nonmoving party's claims. If the moving party fails to satisfy its initial burden, the motion for summary judgment must be denied. If the moving party has satisfied its initial burden, the nonmoving party has a reciprocal burden outlined in the last sentence of Civ.R. 56(E) to set forth specific facts showing there is a genuine issue for trial. If the nonmoving party fails to do so, summary judgment, if appropriate, shall be entered against the nonmoving party based on the principles that have been firmly established in Ohio for quite some time in *Mitseff v. Wheeler* (1988), 38 Ohio St.3d 112. *Welch v. Ziccarelli*, 11th Dist. No. 2006-L-229, 2007-Ohio-4374, ¶40." *Furano v. Sunrise Inn of Warren, Inc.,* 11th Dist. No. 2008-T-0132, 2009-Ohio-3150, ¶9-10.

{¶39} **Koski's Duty**

{¶40} In their first assignment of error, the Cosimis contend the trial court erred as a matter of law by granting summary judgment to Koski on the issues of negligence and recklessness. Specifically, they argue the trial court erred in concluding that Koski owed no legal duty to them or similarly situated motorists traveling through the construction zone, and that they failed to introduce any evidence of recklessness. Thus, the Cosimis contend the trial court erred because, at the very least, there was

evidence of negligence, if not reckless behavior, on the part of Koski in the construction and maintenance of inadequately ramped manhole covers.

{¶41} Whether Koski was Negligent

{¶42} "In order to establish an actionable claim for negligence, the plaintiff must establish: (1) the defendant owed a duty to him; (2) the defendant breached that duty; (3) the defendant's breach of duty proximately caused his injury; and (4) he suffered damages." Id. at ¶11, quoting *Frano v. Red Robin Int'l Inc.,* 11th Dist. No. 2008-L-124, 2009-Ohio-685, ¶17, citing *Chambers v. St. Mary's School* (1998), 82 Ohio St.3d 563, 565; *Bond v. Mathias* (Mar. 17, 1995), 11th Dist. No. 94-T-5081, 1995 Ohio App. LEXIS 979, 6.

{¶43} Further, "[t]he existence of a duty is fundamental to establishing actionable negligence, without which there is no legal liability." Id. at ¶12, quoting *Adelman v. Timman* (1997), 117 Ohio App.3d 544, 549.

{¶44} First, we determine the trial court erred as a matter of law in concluding "no legal duty existed." There is no doubt that Koski had a duty to create a safe lane of travel for motorists during the construction repaving project. Koski admittedly stripped the road, and, as is customary, ramped the manhole covers before the street was repaved to prevent exactly the type of accident that occurred.

{¶45} Even if the protruding manhole covers are determined to be "open and obvious" this does not obviate Koski's duty to maintain safe lanes of travel. "An independent contractor who creates a dangerous condition on real property is not relieved of liability under the doctrine which exonerates an owner or occupier of land from the duty to warn those entering the property concerning open and obvious dangers

on the property." *Simmers v. Bentley Constr. Co.* (1992), 64 Ohio St.3d 642, syllabus. See, also, *Sanders v. Anthony Allega Contractors* (Dec. 30, 1999), 1999 Ohio App. LEXIS 6359, 9.

{¶46} Thus, the general law of negligence guides our analysis. "Under the law of negligence, a defendant's duty to a plaintiff depends upon the relationship between the parties and the foreseeability of injury to someone in the plaintiff's position." Id. at 645, citing *Huston v. Konieczny* (1990), 52 Ohio St.3d 214, 217; *Commerce & Industry Ins. Co. v. Toledo* (1989), 45 Ohio St.3d 96, 98; *Jeffers v. Olexo* (1989), 43 Ohio St.3d 140, 142-143; *Menifee v. Ohio Welding Products, Inc.* (1984), 15 Ohio St.3d 75, 77. "Injury is foreseeable if a defendant knew or should have known that its act was likely to result in harm to someone." Id., citing *Huston; Commerce & Industry*.

{¶47} In other words, "[w]hile negligence actions involve both questions of law and fact, the existence of a duty is in the first instance a question of law for the trial court. *Clemets v. Heston* (1985), 20 Ohio App.3d 132, paragraph one of the syllabus. Under Ohio law, the existence of a duty depends on the injury's forseeability. *Menifee* at 77. The test for forseeability is whether a reasonably prudent person would have anticipated that an injury was likely to result from the performance or nonperformance of an act. Id. The foreseeability of harm generally depends on a defendant's knowledge." *Frano* at ¶65.

{¶48} In this case, the Cosimis presented evidence that Koski constructed the inadequate asphalt ramping for the manhole covers. Furthermore, the Cosimis presented evidence that Koski (and the city for that matter) had actual knowledge of the inadequate construction and the resultant damage. Further, the Cosimis introduced

more than enough evidence of similar accidents during the weeks leading up to the accident by way of police testimony and multiple police reports.

{¶49} Koski fully admits to milling the road to ready the surface for repaving and to ramping the manhole covers so that motorists could safely travel during the construction project. Thus, there is no doubt that it had a legal duty to motorists during the construction project. It was foreseeable that an improperly and inadequately ramped manhole cover could damage vehicles and result in accidents. In fact, ODOT discussed the inadequate ramping and poor workmanship with Koski at the beginning of the project. The milling of the road surface was occurring at a faster rate than the ramping, thus leaving holes around the manhole covers at the conclusion of the workday. This was in direct violation of ODOT procedures and dangerous to motorists who were restricted to one lane and driving in darkness. Thus, it is clear Koski was under a duty to properly ramp the manhole covers while the street was undergoing repaving.

{¶50} "Once the existence of a duty is found, a plaintiff must show that the defendant breached its duty of care and that the breach proximately caused the plaintiff's injury." *Simmers* at 646, citing *Mussivand v. David* (1989), 45 Ohio St.3d 314, 318; *Di Gildo v. Caponi* (1969), 18 Ohio St.2d 125.

{¶51} Despite evidence introduced by the Cosimis that from the inception of the resurfacing project there were issues with the ramping of the manhole covers and that multiple accidents of a similar nature occurred in the weeks prior to their accident, Koski did nothing to investigate whether the manhole covers were adequately ramped. The manhole covers were directly in the lanes the vehicles were required to travel on during

the construction. The street had been narrowed to two lanes so that vehicles could avoid the manhole covers only if the oncoming lane was free of traffic. If traffic was heavy, vehicles had no choice but to attempt to drive over the covers. Furthermore, Koski was on notice of numerous accident claims prior to the Cosimis' accident. It failed, however, to inquire into the substance of the claims, and chose not to further investigate or remediate the problem, simply forwarding the claims to its insurance carrier.

{¶52} Accordingly, factual questions exist as to whether Koski breached its duty of care. Reasonable minds could reach different conclusions as to whether Koski breached its duty to provide safe lanes of travel during the construction and if it was negligent in failing to investigate and repair, if needed, the ramps. Thus, we determine that Koski indeed, owed a duty of care, and that genuine issues of material fact exist whether it negligently breached that duty.

{¶53} Whether Koski was Reckless

{¶54} In the second issue raised under this assignment of error, the Cosimis argue that the trial court erred as a matter of law in concluding there was no evidence that Koski recklessly disregarded the other manhole cover accidents that involved similarly situated motorists traveling through the same construction zone. We agree with this contention.

{¶55} Specifically, the trial court found that there was ample evidence by way of the ramping of the manhole, proper signage, and "compliance" with ODOT specifications, and that as such, the Cosimis failed to introduce any evidence of recklessness on the part of Koski.

{¶56} First, that Koski was in compliance with ODOT's signage requirements and specifications has no bearing on the improper ramping of the manholes. Indeed, as Mr. Glass, the ODOT lead project engineer, testified, there are no specific signs required for manhole covers. It is assumed that if a manhole cover is placed directly in the lane of traffic, it will be adequately ramped so that a vehicle can safely traverse the manhole cover, especially when the cover is in the only open lane of traffic. Thus, the trial court's reliance upon evidence of compliance with signage requirements and specifications in its analysis did not address the real issue presented; which is whether evidence of Koski's actual knowledge of the improperly constructed ramped manhole covers, which caused similar accidents before the date of the Cosimis' accident, created a genuine issue of material fact as to Koski's recklessness.

{¶57} "Wanton misconduct is the failure to exercise any care whatsoever. *Hawkins v. Ivy* (1977), 50 Ohio St.2d 113, syllabus. Reckless misconduct has been defined as a perverse disregard of a known risk which suggests conduct more egregious than simple carelessness. *Jackson v. Butler Cty. Bd. of Cty. Commrs.* (1991), 76 Ohio App.3d 448, 454. The Supreme Court of Ohio views the standard for wanton misconduct as interchangeable with the standard for reckless conduct. See *Fabre v. McDonald* (1994), 70 Ohio St.3d 351, 356. Both standards refer to conduct that causes risk 'substantially greater than that which is necessary to make [the] conduct negligent.' *Thompson v. McNeil* (1990), 53 Ohio St.3d 102, 104-105. 'Mere negligence is not converted into wanton [or reckless] misconduct unless the evidence establishes a disposition to perversity on the part of the tortfeasor.' *Roszman v.*

Sammett (1971), 26 Ohio St.2d 94, 96-97." *Salmon v. Jordan* (Nov. 12, 1999), 11th Dist. No. 98-P-0096, 1999 Ohio App. LEXIS 5360, 8-9.

{¶58} The trial court concluded that the Cosimis failed to introduce any evidence that Koski "failed to exercise any care whatsoever." Our review of the evidence, however, reveals otherwise. The Cosimis introduced ample evidence of Koski's negligent, if not reckless, disregard of the known dangers the inadequately ramped manhole covers presented and the numerous prior accidents caused by them.

{¶59} The Supreme Court of Ohio has stated that "constructive notice occurs when (1) the nuisance existed in a manner that it could or should have been discovered; (2) it existed for a sufficient length of time to have been discovered; and (3) if it had been discovered, it would have created a reasonable apprehension of a potential danger or an invasion of private rights." *Shepard v. City of Cincinnati,* 168 Ohio App.3d 444, 2006-Ohio-4286, ¶20 (citations omitted).

{¶60} As the Cosimis introduced more than sufficient evidence that Koski was aware of the inadequate ramping of the manhole covers, genuine issues of fact exist that are not properly determined on summary judgment. The police testimony, the many incident reports, the testimony of Ms. Kiehl, who recorded the multiple claims of similar accidents in the same location in the week prior to the incident; as well as the evidence that the city forwarded police reports of these accidents to Koski several days prior to the Cosimis' accident, provided ample notice there was a problem with the manhole covers.

{¶61} As genuine issues of material exist as to whether Koski negligently, if not recklessly, created a hazardous road condition, the Cosimis' first assignment of error is with merit.

{¶62} **Whether the City of Geneva is Statutorily Immune from Liability**

{¶63} In their second assignment of error, the Cosimis contend the trial court erred as a matter of law in finding that the city was immune from liability pursuant to R.C. 2744.01(C)(2)(e). The Cosimis contend that the city is not immune pursuant to the exceptions to the general rule of immunity under R.C. 2744.02(B)(3). We find this argument has merit as a genuine issue of material fact has been created as to whether the improperly raised manhole covers were an "obstruction" as defined by R.C. 2744.02(B)(3).

{¶64} The Supreme Court of Ohio recently reviewed the exception for immunity regarding public roadways found in R.C. Chapter 2744 in *Howard v. Miami Township Fire Div.*, 119 Ohio St.3d 1, 2008-Ohio-2792. The rubric for analysis of immunity claims is clear. "First we begin with the understanding that political subdivisions are not liable generally for injury or death to persons in connection with a township's performance of a governmental or proprietary function. R.C. 2744.02(A)(1). Second, we consider whether an exception to that general of rule of immunity applies. R.C. 2744.02(B). If an exception does apply, we proceed to the third inquiry: whether the township can still establish immunity by demonstrating another statutory defense. R.C. 2744.03." Id. at ¶18. As in *Howard*, this case turns on the second prong of the analysis.

{¶65} Thus, "[p]ursuant to R.C. 2744.02(B)(3), an exception for immunity exists for injuries or death caused by a township's 'negligent failure to keep public roads in

repair and other negligent failure to remove obstructions from public roads ***.'" Id. at ¶19.

{¶66} The trial court based its determination that the city was immune from liability upon a determination that the manhole covers were not an "obstruction" as that term was defined in *Howard.* The court found that "a manhole cover may hinder or impede the use of the roadway, but it does not block or clog it." Thus, the court concluded that "the manhole at issue in the instant matter was not an obstruction for purposes of R.C. 2744.02(B)(3)."

{¶67} We agree with the Cosimis that the manhole cover did not simply impede or hinder the road, but was an obstruction pursuant to R.C. 2744.02(B)(3). Quite simply, the manhole covers meet the very definition of "obstruction" as they "blocked and clogged" the only open lane of traffic.

{¶68} As the term "obstruction" is not statutorily defined, the court in *Howard* was asked to determine whether ice was an "obstruction" or an impediment that merely hindered the roadway. The court found it to be the latter and, in doing so, the court held 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." Id. at ¶30.

{¶69} Using this definition, we determine that a protruding manhole cover that is inadequately ramped and directly in the only open lane of traffic cannot be said to simply hinder or impede the roadway, but instead, clearly blocks traffic from continuing safely and uninterruptedly along the roadway.

{¶70} Indeed, the dissenting opinion of Chief Justice Moyer in *Howard* gives us a cogent and directly applicable example of an obstruction that meets the *Howard* majority's interpretation of that statutory term: "under the majority's interpretation of the word "obstruction," [the township] could be liable if it negligently leaves a large oil drum in one lane of a public road, but not if it negligently leaves a large quantity of oil on the road, because the former would block the road and the latter would not." Id. at ¶136.

{¶71} Officer Zetlaw testified that while he did not consider the manhole covers to be a hazard per se when the other lane was free from oncoming traffic because vehicles could then safely maneuver around the manholes, he testified that they did become a hazard when traffic was heavy. With only two lanes open, he opined traffic in both open lanes restricted the vehicles' ability to get around the manholes. Similarly, Officer Cahill testified that when vehicles were able to get around the manhole covers they were not a hazard, but this occurred only when traffic was light. Ergo, the road was blocked at times of heavy traffic. It should be noted that Rt. 20 runs directly through the heart of the city, and that the chance of the other lane being free from oncoming traffic is purely chance. Officer Cahill personally observed that when he was directing traffic on a Saturday morning, cars were having trouble getting around the manhole covers.

{¶72} At least eight incident reports were taken by the Geneva police in the weeks prior to the Cosimis' accident. Indeed, another accident at the same location was reported several hours after the Cosimis' run-in with the manhole cover. All the incidents reported in the weeks prior concerned similar accidents where damage was caused to the undercarriage of the vehicles, rendering some of them undriveable. As

was customary with incidents involving city property, the police followed the procedure of copying those reports to the city manager, who would then send them to the city's finance director to forward to the construction company and the city's insurance carrier. Thus, the city cannot claim they were unaware of the problem.

{¶73} We disagree with the trial court's determination that a protruding manhole cover is not an "obstruction" pursuant to R.C. 2744.02(B)(3). Quite simply, the manhole covers were directly in the lanes the vehicles were required to travel in the construction zone. The fact that vehicles could potentially maneuver around the manhole covers does not render the inadequate ramping a mere hindrance, but raises a question of material fact for jury determination as to whether these manhole covers blocked or clogged the roadway.

{¶74} It is important to note, however, that because we find an exception under the second prong of the *Howard* analysis, there is a necessity to explore the analysis under the third inquiry. That is, whether the city of Geneva can establish immunity by demonstrating a statutory defense. R.C. 2744.03. As the *Howard* court stated, "[i]f an exception does apply, we proceed to the third inquiry." Id. at ¶18.

{¶75} In this case, the city did not raise, nor did it argue, in its motion for summary judgment or in its brief on appeal, that it was entitled to summary judgment as a result of the statutory defenses set forth in R.C. 2744.03. It does appear that it raised the defense it was entitled to immunity "pursuant to Revised Code Chapter 2744" and has therefore apparently not waived the defenses in R.C. 2744.03.

{¶76} R.C. 2744.03, titled, "Defenses or immunities of subdivision and employee," provides in relevant part:

{¶77} "(A) In a civil action brought against a political subdivision or an employee of a political subdivision to recover damages for injury, death, or loss to person or property allegedly caused by any act or omission in connection with a governmental or proprietary function, the following defenses or immunities may be asserted to establish nonliability:

{¶78} "***.

{¶79} "(3) The political subdivision is immune from liability if the action or failure to act by the employee involved that gave rise to the claim of liability was within the discretion of the employee with respect to policy-making, planning, or enforcement powers by virtue of the duties and responsibilities of the office or position of the employee.

{¶80} "***.

{¶81} "(5) The political subdivision is immune from liability if the injury, death, or loss to person or property resulted from the exercise of judgment or discretion in determining whether to acquire, or how to use, equipment, supplies, materials, personnel, facilities, and other resources unless the judgment or discretion was exercised with malicious purpose, in bad faith, or in a wanton or reckless manner."

{¶82} Thus, based on the above sections, Ohio courts have found summary judgment appropriate in factual situations such as that presented in this case where there is discretion exercised as to design and construction matters. See, e.g., *Hortman v. Miamisburg,* 161 Ohio App.3d 559, 2005-Ohio-2862 (reversed on other grounds);

Shank v. Springfield (May 3, 1995), 2d Dist. No. 94-CA-71, 1995 Ohio App. LEXIS 1818.[1]

{¶83} Thus, there are genuine issues as to material facts and the inferences which may be properly drawn therefrom, so that Koski and the city have failed in their burden of establishing that material facts are not in dispute entitling them to a judgment as a matter of law.

{¶84} The judgment of the Ashtabula County Court of Common Pleas is reversed, and the matter is remanded for further proceedings consistent with this opinion.

CYNTHIA WESTCOTT RICE, J.,

TIMOTHY P. CANNON, J.,

concur.

1. We decline to determine the propriety of those defenses as applied to this case since neither party has addressed them, although we note that the application of the statutory defenses as delineated in R.C. 2744.03 may provide an avenue for summary judgment to the city.