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Verdict Spotlight

by Christopher Mellino



Jamie R. Lebovitz



Ellen M. McCarthy

After a long and difficult fight (that is still not quite over), CATA members **Jamie R. Lebovitz** and **Ellen M. McCarthy** won a liability verdict in the Court of Claims for the wrongful death of a nurse killed in a collision as a result of ODOT's failure to repair massive potholes in a state road.

The nurse, Pauline J. Miller, was a 47 year old wife and mother, heading north on SR 165 in Columbiana County on her way to work.

A long series of potholes in the oncoming lane of travel caused a box truck to lose control, go left of center and collide with Mrs. Miller's vehicle, killing her. The potholes were located just over the crest of a hill in the path of the right wheels of any vehicle traveling in the oncoming lane. They were 20' long, 24" wide, and 5" deep, with a hard edge that one witness described as being like hitting a curb.

The potholes had been reported two weeks earlier to the local ODOT office by a driver who lost control of his car when he encountered them, but ODOT had a policy of not requiring such complaints to be documented. By refusing to have a policy of documenting reports of potholes, ODOT is able to come into court and claim it had no notice of the potholes, making it difficult to establish liability.

One of the interesting twists in this case came when the plaintiffs attempted to discover driver complaint reports from ODOT's sister department, the Ohio State Highway Patrol ("OSHP"). In deposition, one of the State Troopers who responded to the accident scene described how OSHP kept records of complaints, so the plaintiffs sought these records in discovery. ODOT's attorneys claimed not to have an obligation to search for these records as OSHP wasn't their client (even though, during the deposition, they asserted the attorney-client privilege on the Trooper's behalf); but ultimately ODOT's counsel reported to the court that no such records existed. On the first day of trial, however, one of the State Troopers showed up with the very documents ODOT's counsel claimed not to exist – which resulted in an eight month "postponement" of trial, during which further discovery and motion practice proceeded.

The trial resumed in July of 2011. In addition to testimony from the individual who had reported hitting the potholes prior to Mrs. Miller's accident, plaintiffs elicited evidence of notice from a neighbor who owned property adjacent to the accident scene and from ODOT's County Manager. The County Manager testified that he had traveled that same road a week earlier and had seen the potholes. He didn't order them to be repaired immediately, although he admitted they were of a size (about 10" x 8" x 2" deep) that ODOT's manual indicated required repair.

At trial, ODOT denied that it had actual or constructive notice of the potholes – its



contention being that notice required the potholes to have been of the same magnitude at the time of notice as at the time of the accident. The Magistrate agreed with this contention, but found that the testimony of the neighbor who owned the adjacent property showed that, about 48 hours before the accident, the potholes were in the exact same condition as they were at the time of the accident and required immediate repair.

ODOT also argued that the box truck driver didn't hit the potholes but must have been tired and drifted left-of-center. This theory was in conflict with the belief of all the witnesses who responded to the scene – including ODOT's County Manager who recorded in his daily log book for that day "fatal pothole." This theory was also inconsistent with the physical facts: the truck came to rest 180 feet from the potholes, and the driver, who told the Troopers at the scene that he had hit the potholes, had never left the vicinity of the vehicles, and thus would have had no way of knowing about the potholes if he hadn't hit them.

The plaintiffs presented expert

testimony from Joseph Filipino, a former PennDOT maintenance official who testified as an expert on road maintenance, and Henry Lipian, who testified as an accident reconstructionist. The defense offered Timothy Tuttle, formerly of OSHP, as their accident reconstructionist, and David Ray, an ODOT maintenance engineer, who testified about state inspections and pothole repairs.

In addition to finding that ODOT had constructive notice of the potholes giving rise to a duty to repair them, the Magistrate found that ODOT's failure to repair the potholes was the sole proximate cause of the accident.

The trial judge preliminarily adopted the Magistrate's findings, but as of this writing, objections to the Magistrate's decision remain pending. If the trial court overrules the objections, the case should proceed to a trial on damages in the next few months.

Congratulations to Jamie and Ellen for achieving a positive result for their clients in a venue where it is notoriously difficult for injury victims to prevail! ■