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*Kevin L. Smith*

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ATTORNEY FOR APPELLEES:

**MATTHEW JON MCGOVERN**  
Evansville, Indiana

POSEY COUNTY and POSEY COUNTY  
SHERIFF'S DEPARTMENT,

VS.

Appellees - Plaintiffs.

[illegible]

No. 82A01-0910-CV-481

APPEAL FROM THE VANDERBURGH SUPERIOR COURT  
The Honorable J. Douglas Knight, Judge  
Cause No. 82D03-0808-CT-4343

**MEMORANDUM DECISION - NOT FOR PUBLICATION**

**FRIEDLANDER, Judge**

Upon interlocutory appeal, Posey County and the Posey County Sheriff's Department (hereinafter collectively referred to as Posey County unless otherwise indicated) challenge the denial of their motion for summary judgment in a personal injury action for damages filed by Angela and David Fuhs. Posey County presents several issues for review, one of which is dispositive: did the trial court err in denying Posey County's motion for summary judgment on the issue of immunity from suit pursuant to Ind. Code § 34-13-3-3(3) (West, Westlaw through 2009 1st Special Sess.) for an accident that occurred after a tree fell on a county road?

We reverse and remand.

We set out the facts most favorable to the Fuhses, the nonmovants. A storm had rolled through Posey County in the early morning hours of December 1, 2006. It downed several trees in the area. At approximately 2:40 a.m., Posey County dispatcher Cathy Hyatt received a report of a tree down near Springfield Road. At 2:46 a.m., she telephoned Daniel Yancy of the highway department and informed him of the situation.<sup>1</sup> Yancy was the highway department employee responsible for responding to such situations. At just about that same time, Posey County Sheriff Deputy Andy Porath was patrolling Posey County driving northbound on Springfield Road. He stopped his vehicle approximately 200 feet south of the intersection of Springfield Road and Haines Road because a large tree, approximately two feet in diameter, on the west side of Springfield Road had fallen and was

blocking the roadway. At approximately 2:48 a.m., Porath reported the downed tree to Posey County dispatch and informed them he was going to stay on Springfield Road and provide notice to motorists that the tree was across the roadway. At 2:52 a.m. Porath was dispatched to an emergency call and had to leave the scene. When Porath informed dispatch that he was leaving the scene, Hyatt called Yancy again but got no response. Hyatt called Yancy several more times before finally reaching him at 4:06 a.m. He was at home at the time, but indicated he was then departing for the location on Springfield Road where the tree was across the roadway.

The Fuhses live on Springfield Road. Angela left her home for work that morning at 4:10 a.m. It had stopped raining at that point. She headed north and intended to turn at Haines Road. As she approached Haines Road driving at what she later estimated to be forty miles per hour, Angela saw the tree in the road. She thought about “dodging” it, but instead hit her brakes. *Appellant’s Appendix* at 68. Angela applied her brakes as hard as she could, with both legs, but her vehicle collided with the tree. The tree broke on impact and went through the car’s doors, causing the side airbags to deploy.

At 4:27 a.m. Porath was dispatched to Angela’s accident. Because Angela’s car left no skid marks, Porath believed that the accident was caused by traveling at too high a rate of speed, failing to brake, or driving inattentively. Yancy, who lived far enough away from the

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<sup>1</sup> Fellow dispatcher Brian Devillez indicated in a deposition that the records reflect that the first call to Yancy was placed sometime between 2:36 a.m. and 2:48 a.m.

scene that it took approximately twenty-five minutes to travel there, arrived shortly after Angela's collision with the tree. Yancy called for another employee to respond with equipment necessary to remove the tree from the road. The equipment arrived forty-five minutes to an hour later and the tree was pushed off the roadway.

The Fuhses filed a personal injury complaint against Posey County on January 16, 2008. The complaint included claims for damages for personal injuries Angela sustained in the accident Fuhs and for loss of consortium on behalf of David. In the complaint, the Fuhses alleged that Posey County had notice that the tree had fallen when Deputy Porath discovered the downed tree and contacted dispatch, and that the tree was nevertheless left unattended and then not promptly removed. The Fuhses alleged that these occurrences were the proximate cause of Angela's collision with the tree and the resulting injuries. On February 14, 2008, Posey County answered with the affirmative defense of immunity pursuant to the Indiana Tort Claims Act (the ITCA), specifically I.C. § 34-13-3-3(3). On May 15, 2009, Posey County filed a motion for summary judgment on grounds that it was immune pursuant to the ITCA on grounds that recovery was barred because of Angela's contributory negligence. On September 10, 2009, the trial court conducted a hearing on Posey County's motion. The next day, the trial court denied Posey County's motion for summary judgment. Posey County filed its motion for certification of the trial court's order on September 28, 2009. The trial court granted Posey County's subsequent motion to certify its ruling and this court accepted jurisdiction of the interlocutory appeal on November 16,

2009.

It has long been the law in Indiana that governmental bodies have a common-law duty to exercise reasonable care and diligence to keep streets in a reasonably safe condition for travelers. *Hochstetler v. Elkhart County Highway Dep't*, 868 N.E.2d 425 (Ind. 2007) (*see Higert v. City of Greencastle*, 43 Ind. 574 (1873)). Under the ITCA, however, although government entities may be liable in tort for damages flowing from negligence, immunity for that negligence may adhere only under certain specified circumstances. *See* I.C. § 34-13-3, *et seq.* (West, Westlaw through 2009 1st Special Sess.). “Immunity under the act is a question of law to be determined by the court.” *Hochstetler v. Elkhart County Highway Dep't*, 868 N.E.2d at 426. The party seeking immunity, in this case Posey County, bears the burden of establishing it. *Hochstetler v. Elkhart County Highway Dep't*, 868 N.E.2d 425.

The statute at issue in the instant case creates immunity for losses resulting from “[t]he temporary condition of a public thoroughfare ... that results from weather.” I.C. § 34-13-3-3(3). Two elements are necessary for the establishment of immunity under this section, one temporal and one causal. *Hochstetler v. Elkhart County Highway Dep't*, 868 N.E.2d 425. Beginning with the causal factor, “conditions caused ‘due to weather’ distinguish themselves from those in which the road condition was the result of, say, poor inspection, design, or maintenance.” *Id.* at 426-27. As for the temporal factor, the governmental entity seeking immunity must establish that the condition caused by the weather was “temporary.” We can find no case that announces a bright-line rule for determining temporariness in this

context. It is a fact-sensitive inquiry that considers the condition itself, the weather circumstances that caused it, and the facts relative to the county's response. Our Supreme Court in *Hochstetler* reiterated that immunity under this statute is a matter of law for the court to decide.

In *Hochstetler*, the storm struck at 1:00 a.m. and a call was received reporting a downed tree approximately one hour later. A motorist collided with that tree at approximately 5:00 a.m. the same morning. A county crew arrived at the scene at approximately 8:15 a.m. to remove the tree. Noting that the storm had produced multiple downed limbs and that county crews were on the job and working through the night after the storm had passed, the Supreme Court concluded that the county was entitled to immunity because this was not “a case in which weather-related conditions remained untended for so long a period that it no longer qualified as “temporary.”” *Id.* at 427.

In the recent case of *Bules v. Marshall County*, 920 N.E.2d 247 (Ind. 2010), our Supreme Court expanded upon the application of I.C. § 34-13-3-3(3). Briefly, the facts in *Bules* were that the plaintiff was driving on a Marshall County road, drove into some high water on a roadway, lost control of his vehicle, and crashed. The water on the roadway was the result of a weather condition that caused flooding and icy patches. The county responded by placing high-water warning signs at the location of the plaintiff's accident. The plaintiff claimed the county was negligent in its placement of warning signs. The county sought immunity under I.C. § 34-13-3-3(3), arguing that the accident was caused by a temporary,

weather-related condition. The trial court granted the motion, but this court reversed, holding that summary judgment was inappropriate. *See Bules v. Marshall County*, 910 N.E.2d 269 (Ind. Ct. App. 2009) (unpublished memorandum decision), *rev'd*, 920 N.E.2d 247.

The Supreme Court granted transfer and affirmed the trial court's grant of summary judgment. The Court specifically addressed the plaintiff's arguments that the county's response to the weather-related condition was negligent and that the accident was caused by the inadequacy of the county's warnings, not a temporary weather condition. The Court noted that "the County had notice of the condition, had the opportunity to respond, and did in fact respond." *Bules v. Marshall County*, 920 N.E.2d at 251. Further, the Court noted that I.C. § 34-13-3-3(3) confers immunity during the "period of reasonable response" to a condition, *id.*, and that "[a]s a governmental entity responds to the temporary conditions, the statute confers immunity at least until the condition is stabilized and *the responses are completed.*" *Id.* (emphasis supplied). We understand that *Bules* stands primarily for the proposition that the critical "time of reasonable response" for purposes of determining whether a condition is "temporary" does not terminate at least until the causal weather event ends. We conclude, however, that *Bules* also teaches that a governmental entity's response is viewed as a process – a process that must be permitted to run to completion once started, so long as it is completed within a period of reasonable response.

The facts of the instant case are that the tree with which Angela collided fell in the roadway as a result of a storm that rolled through the area early on December 1. Posey

County received notice of one such downed tree, this one located on Springfield Road. The county commenced its responsive efforts immediately by contacting the highway personnel in charge of responding to emergencies of this nature. Angela hit the tree less than two hours later, at a time when Yancy, awakened in the middle of the night and living almost half an hour away, was traveling to the scene to assess the situation. He arrived at the scene shortly after the accident and called for the equipment necessary to remedy the situation. The tree was removed approximately one hour after the accident, and just three hours after it was first reported. Thus, less than two hours elapsed between the time the County received a report of the downed tree and Angela collided with it. Moreover, these events occurred in the early morning hours shortly after a storm had passed through the area and downed several trees. This timeline is remarkably similar to *Hochstetler's*, and we thus conclude the same result obtains.

Further, consistent with the *Bules* analysis, Posey County's response procedures began immediately and immunity was conferred under I.C. § 34-13-3-3(3) for as long as it took to complete those procedures, including such time as the weather event was ongoing and so long as the time necessary to complete the response process was reasonable under the circumstances. We understand that the Fuhses' complaint for negligence primarily focuses on the approximate one-hour-and-fifteen-minute delay between the time Yancy was informed of this particular downed tree and the time he left his house. It must be remembered,



however, that this occurred in the middle of the night.<sup>2</sup> Yancy not only had to arise and get himself ready for what might be a long day of storm damage clean-up, but it appears he might well also have had to notify other persons who would assist him, persons who very likely were also at home and in bed. We note in this regard that there was deposition testimony to the effect that the highway department facility did not open until 7 a.m., and that someone brought the necessary equipment to the scene when he called for it at approximately 4:30 a.m.

In summary, the tree in the roadway was clearly caused by the storm, and thus was weather-related. This satisfies the causal element of I.C. § 34-13-3-3(3). Moreover, after immediately initiating its clean-up procedures, considering the totality of the circumstances, and consistent with *Bules* and *Hochstetler*, the tree did not remain untended and the situation unresolved for so long a period that it no longer qualified as “temporary.” This satisfied the temporal element of I.C. § 34-13-3-3(3). Therefore, Posey County established both elements required to establish immunity under I.C. § 34-13-3-3(3) and the trial court should have granted its motion for summary judgment. We remand and instruct the trial court to grant Posey County’s motion for summary judgment.

Judgment reversed and remanded.

NAJAM, J., and BRADFORD, J., concur.

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<sup>2</sup> We note that when asked about the average response time for emergencies of this nature, Devillez responded: “Well, I guess time and circumstance would always make a difference. In the middle of the night it obviously takes longer, with it storming it takes even longer.” *Appellant’s Appendix* at 146.