



Ready for the Defense

Supreme Court: Resurface, restripe, revisit Uniform Manual on center lines

This month's column will discuss a new Illinois Supreme Court case dealing with center lines and restriping center lines. The case of *Governmental Interinsurance Exchange v. Judge* (2006 WL 1350191) (Ill. S.Ct. filed 5/18/06), holds that when roads are resurfaced and center lines striped, the Uniform Manual must be revisited for compliance with the latest revisions. (For ease in reference, the "3 R's Rule" — Resurface, Restripe and Revisit the Uniform Manual).

The case involved a county road on which, in 1978, was resurfaced and striped with a center line — a broken yellow line which indicates passing is permitted. (See, 3B-1 Center Lines, MUTCD). In 1978, there was adequate sight distance for passing under the Uniform Manual's requirements.

The case has a long and complicated history and deals with multiple issues, but the rule of great significance to local government is the "3 R's Rule" of the case.

A brief summary of the rule, which will be discussed in detail herein along with four recommendations on coping with the "3 R's Rule", is this. When a road is resurfaced and the center line restriped, the restriped center line must conform to the latest revisions in the Uniform Manual. If the old center line markings have become outdated, merely replacing/restriping the old center line, as is, may result in liability for an accident.

In 1993, the county resurfaced the road and restriped the center line as marked in 1978 (a broken yellow line).

However, in 1984, the Uniform Manual's requirements for passing sight distance were lowered and, therefore, when the road was resurfaced and restriped in 1993, the center line did not comply with the Uniform Manual. Rather, the center line should have consisted of a normal broken yellow line and a normal solid yellow line indicating passing was permitted in only one direction.

In 1994, there was an accident on the hill on the county road between a westbound auto (the Wittenmyer auto) approaching the hill and an eastbound auto (the Gesell auto) driving up the hill and passing

another eastbound auto. The eastbound auto (Gesell) in the westbound lane collided with the westbound auto (Wittenmyer) at the apex of the hill.

Litigation followed and the county was sued, among others, on the theory that the county was negligent in placing a center line marking on the road indicating passing was permitted, instead of placing a center line marking on the road prohibiting passing.

The county defended, contending it was immune from liability for not placing a center line marking on the road showing passing was not permitted by virtue of § 3-104, signs, markings and traffic control device immunity, of the Tort Immunity Act (745 ILCS 10/3-104).

Section 3-104 provides as follows:

3-104. Neither a local public entity nor a public employee is liable under this Act for an injury caused by the *failure to initially provide* regulatory traffic control devices, stop signs, yield right-of-way signs, speed restriction signs, distinctive roadway markings or any other traffic regulating or warning sign, device or marking, signs, overhead lights, traffic separating or restraining devices or barriers. (Emphasis added). (745 ILCS 10/3-104)(West 1994).

Westbound driven Wittenmyer, who was severely injured in the head-on collision, contended that § 3-104's immunity was not applicable because it applies only to a "failure to initially provide" signs and markings and this case involved placing an improper center line marking on the road and not an "initial failure to provide" any marking at all.

The trial court denied the county's motion for summary judgment, finding § 3-104, signing, marking and traffic control device immunity, did not apply because the center line marking was the placement of an improper marking and not an initial failure to place any center line marking on the road. It was the wrong center line marking, not conforming to the Uniform Manual.

The Issue Before the Supreme Court on Center Line Markings

The question presented to the Supreme Court was whether § 3-104, initial failure to provide signing, markings and traffic control devices immunity, was available to the county to bar the claim? That is, was the resurfacing and restriping of the center line in 1993 the way it was in 1978 (a normal broken yellow line) a “failure to initially provide” a center line? Or, was the center line, as it existed at the time of the accident in 1994 an “improper placement” of the center line in violation of the Uniform Manual?

The Supreme Court held that the 1993 restriping of the center line was an improper placement and not a failure to initially provide a center line marking. The Court explained that the decision to mark or not mark a center line is a judgment call involving the balancing of competing interests and protected by § 3-104 immunity for failure to initially provide. But, once the decision is made to stripe the road with a center line, then the county must act non-negligently in conformance with the Uniform Manual in providing the proper striping and in maintaining it reasonably safe.

In reaching its decision, the Supreme Court explained, as it has done in previous cases, local government must comply with the Uniform Manual’s requirements in providing traffic control devices, signs and markings. The Court stated:

Section 11-304 of the Illinois Vehicle Code provides that, when placing traffic control devices, local authorities “shall”, *i.e.*, must, follow the Illinois Manual. See 625 ILCS 5/11-304 (West 1994). The Illinois Manual states that a broken yellow line indicates a two-direction passing zone. On those roads, passing is permitted for traffic traveling in either direction. In contrast, a broken yellow line and a solid yellow line indicate a one-direction no-passing zone. On those roads, passing is permitted only for the traffic traveling adjacent to the broken line. ...

The Supreme Court then noted that once a traffic control device, sign or warning is installed, local government has a duty to maintain such improvement in a reasonably safe condition. In terms of the center line installed on the road in 1978, the county had a duty to maintain it reasonably safe, non-negligently. And, when the road was resurfaced and restriped in 1993, it was not properly maintained because the Uniform Manual (the 1984 revision) required a different center line. The Court reasoned:

In 1978, the County developed an improvement plan for Galena Road, resurfaced the road, and then-initially-improved the road with a traffic control marking, *i.e.*, the two-direction passing zone. Once the road was improved, the County had the duty to use ordinary care to maintain the road in a reasonably safe condition. (Citation omitted). When the County resurfaced Galena Road in 1993, the County’s duty to maintain the road in a reasonably safe condition required the County to conform the then-existing traffic control marking to the Illinois Manual by replacing the two-direction passing zone with a no-passing zone. *See Snyder*, 167 Ill.2d at 472, 212 Ill. Dec. 643, 657 N.E.2d 988. However, the County breached its duty by negligently replacing the passing zone. The County’s negligent act constituted a non-immunized improper placement.

Thus, the decision in *Governmental Interinsurance Exchange v. Judge* concludes that the failure to follow the Uniform Manual in restriping the road’s center line in 1993 was an erroneous or negligent placement of a center line marking, not a failure to initially provide a center line marking. Two reasons supporting its rationale for concluding no § 3-104 immunity was available to protect the county from liability were provided:

First, this is not a case where a creative plaintiff circumvents section 3-104 by pointing to some *other* traffic control device. Rather, the County’s mistake in the present case involves the erroneous placement of one traffic signal, the centerline of Galena Road. Second, in the present case, the County’s failure to correct the erroneous traffic control marking was not a result of the County’s balancing “a host of competing interests, among them, safety, convenience and cost.” ... Rather, the Illinois Manual states: ““markings that are no longer applicable for roadway conditions or restrictions and that might cause confusion for the road user shall be removed or obliterated to be unidentifiable as a marking as soon as practical.” ... thus, the County’s failure to correct the erroneous traffic control marking was simply a negligent oversight and not the sort of decision immunized by section 3-104....

Considerations for Local Government Based Upon the Supreme Court's Decision

The analysis and reasoning of the Supreme Court in this case suggest that the following "3 R's" be given consideration in providing traffic control devices, signs and markings:

- (1) The Supreme Court noted that the Uniform Manual requires that: "Markings no longer applicable that might create confusion in the minds of vehicle operators and pedestrians shall be removed or obliterated as soon as practicable" (6D-1 Pavement Marking Application – MUTCD). Thus, all old and misleading markings should be removed.
- (2) The Supreme Court also noted the three types of center line markings:
 - (a) a normal, broken yellow line where passing is permitted;
 - (b) a double line consisting of a normal broken yellow line and a normal solid yellow line where passing is permitted in one direction; or
 - (c) a double line consisting of two normal solid yellow lines where passing is prohibited in both directions (3B-1 Center Lines – MUTCD).

Thus, revisit the center line marking for compliance with the latest MUTCD revision.

- (3) The Supreme Court's decision holds that when roads are resurfaced and restriped, the Uniform Manual in effect at the time must be complied with. Thus, the Uniform Manual should be consulted for updates/revisions before resurfacing or restriping or resigning a road in the same manner such was originally or previously done. Thus, apply the "3R's Rule."
- (4) The Supreme Court's decision helps clarify the situations in which § 3-104, signing, marking and traffic control devices immunity is available as a defense and when it is not available. That is, the "failure to initially provide" such traffic controls (for which there is immunity) as opposed to a negligent or erroneous placement not conforming to the Uniform Manual.

Status on the *Nelson v. Metra* Case Involving § 3-102(a) and The Open and Obvious Danger Rule and Frequent Trespassers

As was discussed in our May column, because of its significant impact and possible ramifications on local government, there is a new Appellate Court decision which, we believe, seriously undermines two areas of

law affecting local government. It is the case of *Nelson v. Metra*, 364 Ill. App.3d 181, 845 N.E.2d 884 (1st Dist. 2006) which holds:

- (1) The "open and obvious danger no duty" rule does not apply to "frequent trespassers or so-called beaten path trespassers";
- (2) Section 3-102(a)'s immunity providing a local public entity owes only a duty to maintain its property in a reasonably safe condition for "intended and permitted users" does not apply to trespassers for "activities" taking place on the premises. (745 ILCS 10/3-102(a)).

Defendant METRA has filed a Petition for Leave to Appeal to the Illinois Supreme Court in *Nelson* and Plaintiff Nelson has filed an Answer to the Petition. The Supreme Court gets inundated with Petitions for Leave to Appeal and only grants leave to appeal in about 3% or 4% of the cases. Hence, whether this case will be reviewed is presently unknown.

However, if the Supreme Court does grant leave to appeal, we believe local government will want to consider the possibility of filing an *Amicus Curiae* Brief.

Two questions of interest to local government because of the effect of *Nelson v. Metra* upon its liability exposure would be as follows:

- (1) The "open and obvious danger no duty" bars claims of invitees, licensees and trespassers against landowners/possessors with only two exceptions:
 - (a) The momentary distraction exception; and
 - (b) The deliberate encounter, economic compulsion exception. Does the *Nelson v. Metra* case create a third exception: the frequent trespasser exception?
- (2) Does § 3-102(a)'s immunity, which limits a local public entity's duty to maintain its property in a reasonably safe condition only for "intended and permitted users", apply to both the physical conditions of the property and the activities taking place on the property (745 ILCS 10/3-102(a))?

As the common law and under the Premises Liability Act (740 ILCS 130(2)), the duty of reasonable care owed by a property owner/occupier to entrants on the property was owed for "the state of the premises or acts done or omitted on them".

What involvement, if any, local government believes is necessary as a result of the *Nelson v. Metra* decision remains open for discussion.