



FROM GARAN LUCOW MILLER'S MUNICIPAL LAW DEPARTMENT

GOV LAW

Monthly Publication for Michigan Cities, Townships, Villages and Schools

www.garanlucow.com

Garan Lucow Miller, P.C. 1000 Woodbridge Street Detroit, Michigan 48207 313.446.5501

From the Editor

by John J. Gillooly

Campaign Reminders



In just a few days, people around the state will travel to their local polling places to exercise their privilege to vote. Just several days later, if history repeats itself, several lawsuits will be filed alleging illegal use of municipal facilities or equipment in connection with the elections. Most cases are brought under the Michigan Campaign Finance Act and are often very politically charged and should be avoided.

Following these basic ground rules will go a long way toward protecting you and your municipality:

- It is not proper to use or authorize the use of public funds or resources to make an election contribution.
- The act also provides that personnel, office space, computers and postage may not be used.
- A recent Court of Appeals decision allowed sanctions to be imposed against the losing party in an election case.

Garan Lucow Miller is pleased to assist your community with its election processes. Let us help you understand and comply with the Campaign Finance Act.

Did you know...

Previous issues of Gov Law can be found on our website at www.garanlucow.com

Sixth Circuit Holds Attorney-Client Privilege Can Be Invoked By Municipality And Cannot Be Waived By Employee

by Megan Cavanagh



In the recently published decision of *Ross v City of Memphis*, 433 F3d 596 (6th Cir. 2005), the Court of Appeals for the Sixth Circuit held that a government entity, such as a municipal corporation, can invoke the attorney-client privilege in the context of civil litigation. Prior to *Ross*, the Court had twice assumed, without having to decide, that the privilege is in fact applicable to confidential communications between a governmental corporation and its counsel. The *Ross* decision finally confirms this assumption and recognizes that the privilege allows governmental entities the freedom to “investigate potential wrongdoing more fully, and, equally important, pursue remedial options.”



In addition to holding that the municipality may invoke the attorney-client privilege in civil proceedings, the *Ross* Court held that a municipal official's assertion of the advice of counsel defense does not require the municipality to relinquish that privilege. In *Ross*, the defendant director of police asserted that he was entitled to the defense of qualified immunity because he relied upon the advice of the city's counsel when deciding to pursue disciplinary proceedings against the plaintiff. The district court ordered the director to reveal the content of his allegedly privileged conversations with the city's counsel. The city objected and filed an appeal with the Sixth Circuit.

The Sixth Circuit held that the city's ability to invoke the privilege could not be made contingent upon

the litigation choices of its employees. The Court reasoned that preventing the director from waiving the city's privilege and revealing the content of confidential communications was not unfair to the director because the director was not the client - the city was. Furthermore, the Court reasoned that the director, while not able to rely on the advice of counsel defense, was still entitled to assert the qualified immunity defense that his actions were objectively reasonable.

Finding that there may be some evidence in the record that the director indicated to the city's counsel that he was seeking advice in his individual - rather than official - capacity, the Court remanded the case to the district court for a determination of whether the privilege could in fact be invoked by the city in this case.

In light of *Ross*, it is now settled that a municipality can assert the attorney-client privilege in the context of civil litigation. However, it is important for municipalities, their employees and their counsel to be clear in what capacity - individual or official - the employee is seeking advice. If the advice is sought in the employee's official capacity, the attorney-client privilege is held by the government entity and cannot be waived by the employee in his individual defense. However, if the advice is sought in the employee's individual capacity - and the desire to seek individual advice is clearly announced - then the privilege is held by the individual, and counsel can determine whether it is appropriate to advise the employee, given counsel's obligation to the governmental employer.

HEADS UP!



The Michigan Legislature abolished the common law "fireman's rule" and enacted MCL 600.2967 in 1998. With certain specific exceptions and limitations, the statutory "fireman's rule" prevents "*a firefighter or police officer who seeks to recover damages for injury or death arising from the normal, inherent, and foreseeable risks of his or her profession while acting in his or her official capacity*" from recovering. Because the statute is specific as to police officers and firefighters, it could not be extended to a county-employed paramedic. *McKim v Forward Lodging, Inc*, 266 Mich App 373 (May 10, 2005).

Is There Really A "Highway Exception" To Governmental Immunity?

By Jami E. Leach

The so-called highway exception to governmental immunity can be found at MCLA 691.1402. The statute provides in part:

(1) Except as otherwise provided in section 2a, each governmental agency having jurisdiction over a highway shall maintain the highway in reasonable repair so that it is reasonably safe and convenient for public travel. A person who sustains bodily injury or damage to his or her property by reason of failure of a governmental agency to keep a highway under its jurisdiction in reasonable repair and in a condition reasonably safe and fit for travel may recover the damages suffered by him or her from the governmental agency.



While the above statute appears very broad, the courts have strictly limited liability in highway cases. Several recent cases reveal a trend toward further limiting the liability of governmental agencies:

- A recent unpublished opinion of the Court of Appeals upheld summary disposition where the plaintiff's claim under the highway exception essentially asserted inadequate signage and improper design. Supreme Court precedent *Nawrocki v Macomb Co Rd Comm*, 463 Mich 143 (2000) and *Hanson v Mecosta Co Rd Comm'rs*, 465 Mich 492 (2002) barred both claims. Plaintiff agreed that *Nawrocki* and *Hanson* barred her claims. However, she argued that both cases were wrongly decided. The Court of Appeals stated "It is the Supreme Court's obligation to overrule or modify case law if it becomes obsolete, and until that Court takes such action, the Court of Appeals and all lower courts are bound by that authority." The unpublished case is *Sunman v Dept of Transportation*, No. 262758, 09-27-05. We expect that plaintiff will attempt to get this case before our Supreme Court. Stay tuned . . .

- The Court of Appeals has once again affirmed summary disposition in a slip and fall case – this time against the City of Detroit. The plaintiff alleged there was a drainage defect in the road which permitted ice to form. The Court relied upon *Haliw v Sterling Heights*, 464 Mich 297 (2001) and held that the alleged drainage defect was not a persistent defect that rendered the street unsafe for public travel at all times and, therefore, it did not render the street out of repair within the meaning of the highway exception. *MCLA 691.1402(1)*. The unpublished case is *Major v City of Detroit*, No. 261583, issued September 15, 2005.



- A plaintiff who tripped and fell on a 3/4 inch rise on a village sidewalk had her case dismissed in *Bates v Village of Addison*, Michigan Court of Appeals, Unpublished No. 253374, October 4, 2005. Plaintiff argued that the village had never inspected or maintained the sidewalk. However, the Court found that the lack of inspections or maintenance was insufficient to rebut the motion because plaintiff offered no evidence that, before the accident, the village was aware of the 3/4 inch rise or that it knew or should have known that it posed an unreasonable danger. The fact that the defendant village allegedly failed to inspect or maintain the sidewalk does not, by itself, establish that the sidewalk was in a state of unreasonable repair. *Special note: The Village of Addison was represented on Appeal by Garan Lucow Miller appellate attorney Megan Cavanagh.*



A ray of hope for plaintiffs?

- On October 11, 2005, the Court of Appeals issued its unpublished opinion in *Leech v Kent County Board of Road Comm*, No. 253827. In that case, the plaintiff claimed that she was injured when the car she was riding in encountered rain water which had collected in ruts and grooves in the road bed, causing the vehicle to hydroplane and crash. Denial of summary disposition for the Road Commission was affirmed. Plaintiff implicated the highway exception because she claimed that the physical structure of the surface of the road bed, i.e., the ruts and grooves, constituted a defect



in the road surface itself. She also alleged proximate cause because she claimed that the combination of the ruts and grooves, which were in themselves hazardous defects in the road bed, and the accumulation of rain water in them is what caused the accident.

- The same case upheld Supreme Court precedent that before untimely notice under MCLA 691.1404 would bar a claim, the defendant must show actual prejudice. The defendant pointed out that the statute itself makes no mention of “actual prejudice” being a requirement. If the defendant appeals, the Supreme Court will have an opportunity to overrule precedent and strictly interpret the terms of the notice requirement.



Note: You can locate, read and print unpublished opinions if you have the case name or docket number by visiting the Court of Appeals website or by clicking on the following link:
<http://www.courtofappeals.mijud.net/resources/opinions.htm>

BREAKING NEWS!



The motor vehicle exception to governmental immunity was not applicable and defendant County of Macomb was immune from liability when a parked county-owned vehicle began rolling toward the plaintiff causing him injury. The court held that the vehicle was not being operated as a motor vehicle at the time of the accident. *Markel v. County of Macomb & Degraw*, Unpublished Court of Appeals No. 252054, decided May 12, 2005.

A recent Court of Appeals decision relied upon *Endykiewicz v State Highway Comm*, 414 Mich 377 (1982) in ruling that damages for loss of a decedent's companionship and society are recoverable in a suit for wrongful death premised on the highway exception to governmental immunity. *Beam v Genesee County Road Commission*, Unpublished Court of Appeals No. 252139, decided May 10, 2005.