



FROM GARAN LUCOW MILLER'S MUNICIPAL LAW DEPARTMENT

GOV LAW

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Garan Lucow Miller, P.C. 1000 Woodbridge Street Detroit, Michigan 48207 313.446.1530

From the Editor by John J. Gillooly



All too often we begin our mornings by hearing about lawsuit abuse and how civil litigation against individuals, corporations and municipalities have replaced some of our country's favorite pastimes. Although some argue that fundamental concepts of personal responsibility continue to erode, there are several easy steps that your company or municipality can take to root out frivolous claims.

When served with a lawsuit that you believe to be frivolous, agree with your legal representatives to develop an effective and efficient legal strategy to put some heavy-duty pressure on those bringing the claims against your organization or municipality. Combating fraudulent lawsuits does not necessarily mean a major investment in attorney time or resources.



For instance, consider retaining the services of a qualified private investigator to conduct a discreet video surveillance of the person suing you. In retaining the services of a private investigator, you should only give them very limited monetary authority at the very beginning of an assignment, with assurances that additional authority might come to play if they uncover some interesting information about the person suing you. The internet has proven to be an absolutely fantastic tool to develop and obtain additional information about those suing you. Websites such as zabasearch.com, knowx.com, google.com and many others can get you very personal information about your courtroom adversary. Oftentimes, information obtained from credit searches, bank records, Social Security Administration and many other depositories of public information can give you information about your opponent that you never dreamed of.



Most importantly, we simply need to bring more cases to trial. The odds are stacked in favor of defendants when we proceed to trial. Juries continue to be very hesitant to award money to people who deliberately lie about the facts and circumstances of their alleged accident.

While paying a nominal settlement has the immediate impact of getting rid of a lawsuit, such a practice can really hurt you in the long run. Once attorneys realize that your municipality or organization does not simply pay nuisance type settlements every time a lawsuit is filed, you will see the number of lawsuits against your municipality or organization begin to decline.

HEADS UP!



The City of Birmingham successfully sued its snow removal contractor for indemnification pursuant to the parties' contract for same. The injured party, who fell on a city sidewalk fracturing her ankle, claimed that both the City and the contractor were negligent. The claim against the City was a failure to maintain the sidewalk in reasonable repair and against the contractor for failure to remove snow and ice. The language in the contract provided that the contractor would indemnify the City for any damages associated with the performance of the contract unless the damages were caused by the sole negligence of the City. Because the City was not solely negligent, the contractor was required to indemnify it. *City of Birmingham v Royal Oak Landscaping & Snow Removal Service, Inc.*, Michigan Court of Appeals, Unpublished No 251863, issued May 3, 2005.

Municipal Liability for Summer Time Fun??

by Jami Leach



Summer is here, and the cure for sunny, hot and humid days are municipal-owned swimming pools, parks, and playgrounds. So exactly when will a municipality be liable for injuries sustained by residents having fun in the sun? Below you will find several cases dealing with recreational activities and what Michigan courts have said about governmental immunity in these situations.



Recreational Use Act. The Recreational Use Act (RUA), MCL 324.73301, which is part of the Natural Resources and Environmental Protection Act (NREPA), grants immunity to owners, tenants, or lessees of lands in certain circumstances. However, there is an exception for injuries that are caused by the owner's, tenant's, or lessee's gross negligence or willful and wanton misconduct. In *Ballard v Ypsilanti Township*, 457 Mich 564, 577 NW2d 890 (1998), the Supreme Court held that the RUA does not create an exception to governmental immunity. The act does not expressly waive immunity because it does not mention the state or its political subdivisions. No necessary inference that the Legislature intended to waive immunity arises from the act. It was intended to limit the liability of private landowners in an effort to encourage them to make their property available for the use of the general public. *Ballard*, supra. Therefore, municipal owners of such land continue to enjoy governmental immunity unless an exception applies.

The Public Building Exception to Governmental Immunity. MCL 691.1406 provides, in part:

Governmental agencies have the obligation to repair and maintain public buildings under their control when open for use by members of the public. Governmental agencies are liable for bodily injury and property damage resulting from a dangerous or defective condition of a public building if the governmental agency had actual or constructive knowledge of the defect and, for a reasonable time after acquiring knowledge, failed to remedy the condition or to take action reasonably necessary to protect the public against the condition...



City-Owned Swimming Pools. Public building exception to rule of governmental immunity did not apply to render city civilly liable for drowning of child in city-owned outdoor swimming pool, because pool and surrounding fence did not constitute "public building." *Summers v City of Detroit*, 206 Mich App 46 (1994), appeal den. 449 Mich 859, reconsideration den. 454 Mich 852.

An outdoor swimming pool is neither a building nor a part of a public building, and therefore, city is entitled to governmental immunity. *Dew v City of Livonia*, 180 Mich App 676 (1989). Moreover, while the swimming pool was in a public place, the Supreme Court has clarified that "the duty to maintain safe public places relates to, but does not extend beyond, the condition of a public building itself of the immediately adjacent premises. *Reardon v Dep't of Mental Health*, 430 Mich 398 (1988).



Park Bench Shelter. A park bench shelter is not a "building" for purposes of the public building exception to city's governmental immunity. *Freedman v City of Oak Park*, 170 Mich App 349 (1988). While the shelter was open to the public and it was a man-made structure, the court did not believe it to be a building as contemplated by the statute. The court noted that the shelter merely provides a place to sit or a place to seek refuge from inclement weather.



Playground Equipment. Public building exception to governmental immunity was inapplicable to action arising out of injuries sustained by child when basketball hoop fell and struck child on playground of elementary school. *Eberhard v St. Johns Public Schools*, 189 Mich App 466 (1991), appeal denied 439 Mich 952.

The 1978 Supreme Court case of *Pichette v Manistique Public Schools*, 403 Mich 268, is no longer good law. In that case, the court ruled that a permanently attached slide located on a school playground came within the public building exception to governmental immunity. The case was decided before *Ross*, which instructed that the exceptions to governmental immunity are to be narrowly construed. If such a case were presented to the court today, a slide on a playground would not be found to be a public building.

Highway Exception: Design Defect or Failure to Maintain/Repair? by Megan Cavanagh



In the seminal case of *Nawrocki v Macomb Co Rd Comm*, 463 Mich 143 (2000), the Michigan Supreme Court established that the highway exception, MCL 691.1402(1), did not contemplate conditions arising from “points of hazard” or “points of special danger” outside the actual roadbed designed for vehicular travel. Instead, a governmental defendant’s duty is implicated only if their failure to repair or maintain the actual physical structure of the roadbed surface proximately caused an injury or damage. The *Nawrocki* court specifically rejected claims that state and county road commissions have a duty to install, repair, maintain, or improve traffic control devices, including signs and lighting.

In 2002, the Supreme Court, relying on *Nawrocki*, limited the scope of the highway exception even further and held that governmental defendants have no duty to design or correct defects arising from the original design or construction of a highway. *Hanson v Mecosta Co Rd Comm’s*, 465 Mich 492 (2002). The *Hanson* court held that the duty is only one of repair and maintenance - not design or construction. In *Hanson*, the court held that the county road commission did not have a duty to design or construct the highway so as to eliminate a limited sight distance caused by the curvature of a hill.



Since *Hanson*, various panels of the Michigan Court of Appeals have rejected plaintiffs’ claims of liability arising from defective highway design or construction. Though a majority of these opinions are unpublished, they help to define the limits of a governmental defendant’s duty under the highway exception:

- ✓ No duty to design highway to have shoulder sufficiently wide enough to accommodate a disabled vehicle. *Kozlowski v Dept of Trans.* (Unpublished COA 07-19-02).
- ✓ No duty to design highway so as to eliminate curves which are difficult for drivers to negotiate. *Houser v Hillsdale Co Road Comm* (Unpublished COA 10-29-02).

- ✓ No duty to design or construct intersection to be safe for travel. *Wonnacott v Dept of Trans.* (Unpublished COA 12-13-02).
- ✓ No duty to design intersection to have sufficient width and turn radius. *Kamischke v Dept of Trans.* (Unpublished COA 12-17-02).
- ✓ No duty to design highway median between opposing lanes of traffic to be of a sufficient width to prohibit vehicles from crossing into the opposing lanes. *Freidline v Dept of Trans.* (Unpublished COA 01-14-03).
- ✓ No duty to eliminate water on the roadway because water on the roadway is a design issue controlled by design factors, such as the elevation of the road and its substructure, the graded angle of the road surface, the width of the shoulder and how much rainfall per hour the road is designed to handle. *Ulrich v Dept of Trans.* (Unpublished COA 04-14-05).

Despite creative plaintiffs’ attempts to craft their design defect claims as claims of failure to maintain or repair, Michigan Courts will typically recognize and dismiss such claims.

PRACTICE POINTERS



If a case is filed against your municipality or an employee of your municipality which alleges a violation of federal law, you have the right to have that case heard in federal court. To have the case heard in federal court:

- ✓ File a notice of removal with the U.S. District Court, which will remove the entire case.
- ✓ The notice of removal must be accomplished within 30 days of the date of service of process.
- ✓ If there are co-defendants who will be represented by other counsel, they will have to consent to the removal.