

GOV LAW

Monthly Publication for Michigan Cities, Townships, Villages and Schools

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From the Editor by John J. Gillooly



COMPLIMENTARY SEMINARS

For more than 60 years, Garan Lucow Miller has been providing its clients with effective and efficient solutions to their legal needs. Keep in mind, however, that our work starts long before a lawsuit is filed. That's where we work for free. Absolutely free.

We are on the road just about every month educating leaders in government, business and insurance about current trends in the law. Our free breakfast seminars have become known as an important tool in recognizing current trends. We currently have a free auto liability seminar scheduled on February 26, 2007 in Lansing. The subject of attendant care valuation will be presented, along with other timely topics.

I will be presenting a seminar covering the Open Meetings Act on March 20, 2007 as part of the 2007 Michigan Municipal League Legislative Conference in Lansing. This annual legislative conference runs March 20-21, 2007 at the Lansing Center with several topics and short seminars which may be of interest to you.

When we aren't doing breakfast seminars, we are at claims offices, city halls and corporate conference rooms giving free advice on how to protect your assets. Whether talking about excessive force claims or pending legislation, an educated client has a decided advantage over the competition.

Please feel free to invite us to your claims office, city hall or corporate conference room for a free seminar. You won't be disappointed. Please call me directly at (313) 446-5501.

MUNICIPAL LAW UPDATE by Jami E. Leach

Collective Bargaining Agreements

◆ Plaintiff is the personal representative of the Estate of Eric Johnson who was shot and killed by a Wayne County Sheriff Deputy. The Estate obtained a \$300,000 default judgment against the deputy. Plaintiff sought to obtain payment of the judgment from Wayne County claiming that she was a third-party beneficiary of an indemnification provision in the deputy's collective bargaining agreement with the County. The Court held that Plaintiff was not an intended third-party beneficiary. Rather, the employees were the intended beneficiaries and plaintiff was only an "incidental" beneficiary. Therefore, plaintiff was not able to seek to enforce the contract and her claim against the County was dismissed. *Nelson v Wayne County*, Unpublished COA #270852, 12/14/06.

Legislative Immunity

◆ Plaintiff was hired as the township assessor. Defendant was the elected township clerk. Defendant disliked plaintiff and when she later resigned, he published the following minutes from the board meeting in the local newspaper, "Received and placed on file the Township Assessor's letter of resignation. YEAH!!!!" He also alleged during meetings that she had assaulted and battered his wife. Plaintiff filed a lawsuit alleging various torts, including defamation. It is undisputed that defendant was a member of the township board. Therefore, if he was acting in the scope of his legislative authority when he committed

the complained of actions, he would be entitled to absolute immunity pursuant to MCL 691.1407(5). Motive is not relevant. In this case, defendant was entitled to absolute immunity. *Zbranchik v Kuzner*, Unpublished COA#269159, 09/19/06.

Gross Negligence

- ◆ Plaintiff was a firefighter who was deployed to the Middle East. Rather than applying for military leave, he utilized a "buddy relief" system authorized in the collective bargaining agreement. Defendant, the deputy mayor, issued a press release about the situation. Plaintiff alleged defamation and other torts against the deputy mayor. After looking at all the circumstances and the actual press release, the Court found that the deputy mayor's conduct was not grossly negligent and therefore he was entitled to governmental immunity pursuant to MCL 691.1407(2). *May v Greiner*, Unpublished COA #269516, 10/19/06.

Interlocutory Appeal - No Jurisdiction

- ◆ Defendant police officers appealed the federal district court's denial of their motion for summary judgment in this 42 USC 1983 action based upon qualified immunity. The Sixth Circuit held that it did not have jurisdiction to hear the interlocutory appeal because the immunity issue was not a purely legal issue. Rather, there were disputed issues of fact that prevented summary judgment and upon which defendants relied in their appeal. The appeal was dismissed for lack of jurisdiction. *McKenna v City of Royal Oak*, ___ F3d ___ (6th Cir, Mich, 11/28/06).

Employee Right to Know Act (ERKA)

- ◆ Plaintiff was entitled to statutory damages under the ERKA, MCL 423.501, because his employer, Redford Township, divulged disciplinary action without giving him the required notice. The Court held that the defendant failed to comply with the notice requirement, and that the ERKA does not abrogate the right to free speech. The ERKA does not prohibit speech. Rather, it simply imposes a notice requirement which must be complied with either before or contemporaneously with the speech on a particular topic. *McManamon v Redford*, ___ Mich App ___ (12/05/06).

Principle of Nonestoppel

- ◆ Generally, estoppel will not be applied to preclude a municipality from enforcing its ordinances unless

there are exceptional circumstances. Expenditures made in reliance on erroneous approval by municipal officers do not necessarily establish the exceptional circumstances that may estop a municipality from enforcing its ordinances. No single factor is in itself decisive of the case; the entire circumstances, viewed together, must present compelling reasons why equity should refuse the request for an injunction. In this case, plaintiffs built an exterior staircase and porch to the second level of their home. The Court held there were no "exceptional circumstances" present and that plaintiffs would have to alter or remove the staircase and porch to comply with the ordinance, even though the building permit was originally (erroneously) granted. *Fox v Oxford Township*, Unpublished COA#269805, 10/19/06.

Municipal Liability under 42 USC 1983

- ◆ Where plaintiff sued the City only for alleged violations of 42 USC 1983, his claim must fail because he has not established how a specific city policy or custom was the moving force behind the alleged constitutional deprivation (here, an alleged false arrest). Municipal liability under 42 USC 1983 cannot be based upon respondeat superior liability. Rather, the plaintiff must plead and prove that the municipality, through its *deliberate* conduct, was the moving force behind the injury alleged. *Turner v City of Grand Rapids*, Unpublished COA#268899, 10/31/06).

42 USC 1983

- ◆ Plaintiff contends that a search of his home violated his fourth amendment rights. The Court found that the search was conducted pursuant to a valid warrant, and therefore, there was no constitutional violation. In so ruling, the Court discussed the proper analysis for a claim under 42 USC 1983. The Sixth Circuit, which had traditionally utilized a three-step analysis, has more recently reiterated the two stage analysis announced in *Saucier v Katz*, 533 US 194 (2001). The Sixth Circuit insists that the analysis proceed in the prescribed order and must first determine whether a constitutional right was violated before assessing the reasonableness of the officers' conduct and whether the right was clearly established. *Nali v City of Grosse Pointe Woods*, Slip Copy, 2006 WL 2042379 (E.D.Mich).

NEW LAW PROTECTS GARRITY STATEMENTS
by Jami E. Leach



On December 29, 2006, Governor Jennifer Granholm signed into law a bill to keep involuntary statements made by police officers from appearing in the media.

Senate Bill 647 easily passed the House and Senate. The bill was designed to restrict the use and disclosure of certain statements made by law enforcement officers. The bill has its origins in *Garrity v New Jersey*, a 1967 case in which the Supreme Court held that statements made by police officers, under threat of dismissal, during internal disciplinary proceedings were "involuntary" for purposes of the Fifth Amendment against self-incrimination and could not be used against the officer in a criminal proceeding.

The bill, however, does allow for disclosure of such statements under certain circumstances. The bill provides as follows:

An involuntary statement made by a law enforcement officer is a confidential communication that is not open to public inspection. The statement may be disclosed by the law enforcement agency only under 1 or more of the following circumstances:

- (a) With the written consent of the law enforcement officer who made the statement.
- (b) To a prosecuting attorney or the attorney general pursuant to a search warrant, subpoena, or court order, including an investigative subpoena . . . (with limited disclosure).
- (c) To officers of, or legal counsel for, the law enforcement agency or the collective bargaining representative of the law enforcement officer, or both, for use in an administrative or legal proceeding involving a

law enforcement officer's employment status with the law enforcement agency or to defend the law enforcement agency or law enforcement officer in a criminal action. However, a person who receives an involuntary statement under this subdivision shall not disclose the statement for any reason not allowed under this subdivision, or make it available for public inspection, without the written consent of the law enforcement officer who made the statement.

- (d) To legal counsel for an individual or employing agency for use in a civil action against the employing agency or the law enforcement officer. Until the close of discovery in that action, the court shall preserve the confidentiality of the involuntary statement, which may include granting protective orders in connection with discovery proceedings, holding in camera hearings, or ordering any person involved in the litigation not to disclose the involuntary statement without prior court approval.

It is not yet known how this new public act will effect discovery in civil litigation. We will continue to follow this Act and advise as to how it is being used and applied. If you would like to review a complete copy of the bill, it can be found at www.milawyersweekly.com in the "Important Documents" section.

