



FROM GARAN LUCOW MILLER'S MUNICIPAL LAW DEPARTMENT

GOV LAW

Monthly Publication for Michigan Cities, Townships, Villages and Schools

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From the Editor by John J. Gilooly



It's really very simple. Tax dollars are vital to your community. Right now, businesses are preparing to protest your legitimate assessments in an attempt to avoid paying their fair share of taxes for the municipal services they receive.

In order to preserve the life blood of your community, consider these helpful suggestions:

- ✓ Prepare to fight. The days of simply going in to your local business taxpayer are long gone. The Chief Financial Officers doing business in your town have been told to lower their tax obligations at whatever cost. They have attorneys, personal property examiners and financial analysts at their disposal.
- ✓ You don't need to pay \$300 to \$500 an hour for tax counsel. Does this sound familiar? Your law firm charges you several hundred dollars an hour and promises a great result in the Tax Tribunal. Unfortunately, only several weeks before your matter is scheduled to go to trial, your attorneys tell you to settle the case. And the loser is . . . the community that has just paid tens of thousands in fees and given up the ability to collect millions in taxes.
- ✓ Garan Lucow Miller can help. When you visit one of our nine Michigan offices, you won't notice a bunch of fancy artwork on the walls. What you will see is a dedicated team of experience and hardworking attorneys

with special emphasis in municipal and tax litigation. Our 60-year old, AV rated law firm was founded on the belief of giving its clients superior legal services at an efficient cost.

- ✓ Did you know that some law firms representing these businesses handle these cases on a contingency fee basis? That means they could recover one-third of whatever they save the business in property taxes.
- ✓ In tax matters, you will be represented by an experienced team of attorneys with an extensive tax background on both state and federal levels.

Please call us today to see how we can assist your community in keeping its tax dollars close to home.

Township and Firefighter Immune from Liability in Deadly Fire

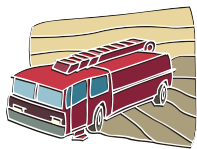
by Rosalind Rochkind & Roger Smith



Although "public safety officers" include police officers, firefighters, and emergency medical personnel, our attention is usually drawn to claims brought against police officers.

However, today we draw your attention to issues which arose in the context of firefighting, and a future issue of Gov Law will focus on issues particular to emergency medical personnel. It is evident that an aggressive posture can push the law in the direction of protection for these public servants.

In *Dean v Childs*, 262 Mich App 48 (2004), rev'd in part 474 Mich 914 (2005), the Michigan Supreme Court recently entered a summary order ending litigation which had complained about the manner in which a fire had been fought, and which sought to impose liability against the acting fire chief and his township under both state and federal law for the deaths of several children who perished in the fire. An early motion for summary disposition was brought on the pleadings, arguing that no viable claim under 42 USC §1983 was available, that both the entity and the firefighter were entitled to governmental immunity under state law, that the firefighter was also entitled to the absolute defense accorded by the "public duty doctrine", and that, in any event, no common law duties were owed by the firefighter to the victims of the fire. It was the combination of defenses presented to the circuit court, as well as to both the Michigan Court of Appeals and Michigan Supreme Court that successfully secured the dismissal of all claims.



Moreover, the Supreme Court's reversal of the Michigan Court of Appeals discussion of the meaning of "the proximate cause" in the context of firefighting, and its adoption of the dissenting opinion of Judge Griffin, has given some additional guidance on the proper application of this sometimes elusive term when considering the governmental immunity available to public employees. Of equal significance, the discussion of the Michigan Court of Appeals provides insight into the strong defense available when a claim is brought under 42 USC §1983, which alleged that officers failed to protect citizens from danger created by others. Unfortunately, however, the Court of Appeals rejected the argument that the public duty doctrine, restricted in *Beaudrie v Henderson*, 465 Mich 124 (2001) to police officers, should be extended to firefighters, and it ignored the argument that no common law duties were owed. Given the Supreme Court's ruling which conferred immunity on the firefighter, it had no need to consider the question of duty. A fight for another day.

The Township and Firefighter in the *Dean* case were represented by Garan Lucow Miller trial attorney, Roger Smith, and appellate specialist Rosalind Rochkind.

Garrity Protects Officers Against Self-incrimination During an Internal Investigation.... Sometimes

by Roger Smith & Karen Libertiny Ludden



If you find yourself reciting the Garrity Doctrine to a police officer under investigation, it is important to be cognizant of the limits of the protection offered by Garrity. This is important for two reasons. First, the officer should not mistakenly believe that he or she is protected from any criminal proceeding arising from statements made during the investigation, no matter the context. One wants to provide clear information to the officer and to avoid the possibility of a malicious prosecution action by that officer if the limits of protection offered are not clearly represented or understood. Second, the limits of Garrity could affect the manner of the investigation. If the subject of the investigation moves from the original inquiry to another area, the questions posed could flip the switch and turn Garrity protection on or off, depending on what evolves, for the reasons explained below.

The Garrity Doctrine arises from a watershed 1967 United States Supreme Court case where the Court held that, when police officers who are under investigation are given a choice either to incriminate themselves or to forfeit their jobs, their statements are not voluntary but are coerced, and the Fourteenth Amendment prohibits their use in subsequent criminal prosecution in state court. In *Garrity*, the Attorney General was investigating certain police officers with regard to irregularities in handling cases in municipal court. Before each police officer was questioned, he was warned that: 1) anything he said might be used against him in any state criminal proceeding; 2) he had the privilege to refuse to answer if the disclosure would tend to incriminate him; but 3) if he refused to answer, he would be subject to removal from office. The Supreme Court held that coercion can be "mental as well as physical" and thus the officers' statements were "infected by the coercion inherent in this scheme of questioning and cannot be sustained as voluntary...." The

Court concluded that Garrity protects an officer in this situation from prosecution for the condemned act in question.

Importantly, and as a general rule, Garrity does not protect officers from a secondary offense that occurs during the investigation, like perjury or obstruction of justice. A recent Sixth Circuit case, *McKinley v City of Mansfield*, 404 F. 3d 418 (6th Cir. 2005) clarified that "As a matter of Fifth Amendment right, Garrity precludes use of public employees' compelled incriminating statements in a later prosecution for the conduct under investigation. However, Garrity does not preclude use of such statements in prosecutions for the independent crimes of obstructing the public employer's investigation or making false statements during it."



This exception, however, has a very thin edge. In *McKinley*, a police officer allegedly lied during the initial investigation probing whether he was using illegal wire tapping to make arrests. In a second investigation, he

was encouraged to come clean and ultimately admitted a more incriminating sequence of events, but claimed Garrity protection. When he was prosecuted for falsification/ obstruction, he sued for malicious prosecution. The Sixth Circuit held that if, by the time of the second interview, he was a target of a second, independent falsification and obstruction investigation, his statements should not have been used against him. The Court clarified, however, that this was only because the second investigation appeared specifically contrived to coerce him into incriminating himself on the falsification/obstruction charge. If the first interview had taken place in the context of just wire tapping, and he was proven to have given false testimony through collateral sources, Garrity would not have protected him from prosecution for falsification.

The *McKinley* Court ultimately ruled that there was a question of fact as to the nature and purpose of the second hearing. Questions asked during an internal investigation must be carefully evaluated to avoid the threat of claims for malicious prosecution and to satisfy the purposes intended.

BREAKING NEWS!!

Herrington v Lifecare Ambulance Service (Unpub, COA No. 263583, 01-24-06)



Plaintiff suffered an asthma attack. Defendant EMTs arrived on the scene and inserted first an esophageal tracheal double lumen airway tube, and then, when that did not work, an endotracheal tube. During the course of treatment, plaintiff was transported to the hospital, where he was pronounced dead. Where the evidence established that the EMT chose to use the combitube based on his professional judgment and assessment of the emergency, the Court found that defendant's use of the combitube rather than the endotracheal tube did not constitute "conduct so reckless as to demonstrate a substantial lack of concern for whether an injury results." Accordingly, defendants were entitled to immunity under EMSA.

Czybor's Timber, Inc. v City of Saginaw, ___ Mich App ___; ___ NW2d ___ (01-26-06)



Plaintiffs filed a declaratory action challenging the validity of two ordinances that prohibit the discharge of firearms and the discharge of projectiles by bows, slingshots, and similar devices within the city limits of Saginaw. Neither ordinance contains an exception for hunting. Plaintiff argued that the ordinances were preempted by MCL 324.41901, the Natural Resources and Environmental Protection Act, which regulates hunting. The Court noted that the field of hunting regulation is separate and distinct from firearm control, and that the Legislature specifically granted home rule cities the authority to take measures to assure public peace and safety. That authority includes the prohibition of weapon discharges within city limits. The Court held that the ordinances were not preempted by MCL 324.41901.