

GOV LAW

Monthly Publication for Michigan Cities, Townships, Villages and Schools

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From the Editor by John J. Gillooly

So You've Been Sued . . .

Your municipal clerk recently sent you a note. Not a note of appreciation or of thanks, but a note telling you that you have been sued. You are officially a defendant and boy are you angry. "How can I sue that dirty rotten scoundrel?" "Just wait until I get to vote on his re-zoning issue!!" "I'll show him!" Chances are that you'll be in a much better position to quickly remove yourself from a lawsuit if you follow these tips:

- ✓ Odds are that you have absolute immunity from suit if you are a councilperson or high level executive official. Make sure your lawyer considers an early motion to dismiss you from the lawsuit based on immunity.
- ✓ Do not publicly challenge the person suing you. Let your attorney speak on your behalf. The First Amendment protects a person's access to the courts without retaliation by the person being sued.
- ✓ Let federal judges decide federal claims. If a lawsuit alleges a violation of a federal law but is filed in state court, ask your attorney to remove the case to federal court.
- ✓ Insist on monthly status reports from your attorney. The handling attorney's goal is to make sure that you don't call and say "... I haven't heard from you in six months, what's happening with that lawsuit?"

- ✓ Make the plaintiff prove his/her case. Try to get out of the habit of paying everyone just to get rid of them. Eventually, that strategy will only cost you more money.
- ✓ Finally, keep in mind that you can ask your insurance company or city attorney to retain Garan Lucow Miller, P.C. to assist. We are in the business of helping your city attorney.

BREAKING NEWS!

The Michigan Supreme Court has overruled two earlier Supreme Court cases on the notice provision of the highway exception. In the earlier cases, the Court held that failure to comply with the 120 day notice provision in the statute would not bar a claim unless the defendant municipality could show "actual prejudice". On May 2, 2007, the Supreme Court issued its opinion in *Rowland v Washtenaw County Road Commission*. The Court ruled that the notice provision in MCL 691.1404(1) should be enforced as written – notice of the injuries sustained and of the highway defect must be served on the governmental agency within 120 days of the injury. This case is not only significant for future claims under the highway exception, but also for those currently pending. The Supreme Court has announced that this decision will be given full retroactive effect. Therefore, if you have claims pending against your municipality alleging the highway exception, now is the time to ascertain whether the claimant provided proper notice within 120 days of the injury. If not, a motion for summary disposition should be filed immediately.

MUNICIPAL LAW UPDATE
by Bennet Bush

Highway Exception

Plaintiff's grandson was killed when he was a passenger in a car that hit "chatter bumps" in the gravel road maintained by defendant. Plaintiffs alleged that the chatter bumps constituted a highway defect, which caused the driver to lose control of the car and strike a tree. Defendant moved for summary disposition based on lack of notice. In denying defendant's motion, the trial court found that there was a question of fact on the issue of whether defendant had notice of the chatter bumps. The Court of Appeals affirmed. Subsequently, the Supreme Court issued its decision in *Wilson v Alpena Co Rd Comm*, 474 Mich 161 (2006). In *Wilson*, the Supreme Court held that mere notice of a defect in a roadway is insufficient to avoid governmental immunity, rather, plaintiff must show that the governmental agency had notice of the defect which, if not repaired, would unreasonably endanger public travel. Upon reconsideration, the Court of Appeals held that the issue of notice still constituted a question of fact, both as to the existence of the defect and whether or not the defect unreasonably endangered public travel on the roadway. *Hughes v Jackson County Rd Comm*, unpublished opinion per curiam of the Court of Appeals, issued April 17, 2007 (Docket No. 256652).

Plaintiff slipped and fell in a plaza/terrace area because of a gap between cement slabs that caused uneven grading of the walking surface. Before starting litigation, plaintiff sent notice of the intent to file a claim to the Clerk of the Court and to the township building authority at the same address. The township filed a motion for summary disposition arguing that the plaintiff's notice was defective as it did not identify the exact area where she fell and it was not properly served on the township resulting in prejudice. In holding that notice was proper, the court relied on testimony from the township finance director that notice was received. The court indicated that the failure to serve the notice personally or by certified mail is inconsequential where the notice was timely received. In holding that the notice accurately identified the location of the fall, the court reasoned that the term exact, as used by the legislature in the statute, requires that the injured party give notice sufficient to allow the controlling governmental agency to easily and readily identify the

alleged defect; there is no requirement to, "give the exact longitude, latitude by inches and square feet and everything in between." *Botsford v Clinton Twp*, unpublished opinion per curiam of the Court of Appeals, issued March 20, 2007 (Docket No. 272513).

Plaintiff slipped and fell on a raised portion of sidewalk. Defendant moved for summary disposition on the ground that the height differential was less than two inches and thus fell under the rebuttable presumption that the sidewalk was properly maintained. MCL 691.1402a(2). The trial court denied the motion on the basis of the plaintiff's expert's affidavit and that there was no inspection policy for the City to be placed on notice of whether or not the defect had existed for 30 days. The Court of Appeals reversed because plaintiff failed to suggest any other factor showing that the sidewalk was negligently maintained. The court also held that the statutory presumption is not limited to circumstances where the municipality creates and maintains a regular sidewalk inspection policy. *Gutierrez v Saginaw*, unpublished opinion per curiam of the Court of Appeals, issued March 29, 2007 (Docket No. 272619).

Plaintiffs were forced to walk on the street because the adjoining sidewalk was obstructed and made impassable by snow and ice that resulted from defendant's plowing of the street. While walking on the street, plaintiffs were struck by a vehicle. The two main issues confronted by the court were whether the temporary unnatural accumulation of ice and snow on the sidewalk constituted a failure to maintain the walkway in reasonable repair and whether or not the accumulation of ice and snow on the sidewalk by any means, natural or unnatural, constituted a defect in the sidewalk. Where the unnatural accumulation of ice and snow is only temporary, as part of a reasonable process of plowing a roadway, the city may be absolved of liability. The court further pointed out that while a defect in the sidewalk itself would be required to avoid governmental immunity in a *natural accumulation* case, a sidewalk defect is not required in an *unnatural accumulation* case such as this. The case was remanded for further factual development as to the temporary nature of the unnatural accumulation. *Buckner v Lansing*, unpublished opinion per curiam of the Court of Appeals, issued March 15, 2007 (Docket No. 270455).

Freedom of Information Act

Recently, the Court of Appeals held that home addresses and telephone numbers of employees were not automatically barred from disclosure under the privacy exception to the Freedom of Information Act. MCL 15.243(1)(a). The court reasoned that a persons home address and telephone number by themselves do not ordinarily reveal "intimate or embarrassing details of an individual's private life." Although the court did recognize that there are some people for whom disclosure of their names, addresses, or other seemingly harmless information could be extremely harmful, it is insufficient to state a generalized or speculative fear to prevent disclosure of such information. Consequently, on remand, the defendants were to determine whether any of its employees could demonstrate "truly exceptional circumstances" to prevent disclosure of their names, addresses and telephone numbers. *Michigan Federation of Teachers & School Related Personnel, AFT, AFL-CIO v University of Michigan*, unpublished opinion per curiam of the Court of Appeals, issued March 22, 2007 (Docket No. 25866).

The Proximate Cause

Plaintiff's decedent committed suicide while confined in a single cell at the Oakland County jail. Plaintiff brought a claim against the county and the individual officer. Employees of a governmental agency acting within the scope of their authority and in furtherance of a governmental function are immune from tort liability unless their conduct constitutes gross negligence that is the proximate cause of the injury. MCL 691.1407(2). Plaintiff argued that the defendant officer was grossly negligent when she cleared plaintiff's decedent for single cell housing without special watch and without regard for his serious mental illness, past conduct, and jail policy. Plaintiff further argued that, under the circumstances, the defendant officer's conduct constituted the proximate cause of plaintiff's decedent's ultimate death because it was foreseeable. The Court of Appeals disagreed and held that the defendant officer's conduct was not the proximate cause of plaintiff's death when, even if foreseeable, it was not the "most immediate, efficient, and direct cause preceding" the injury. *Perez v Oakland Co.*, unpublished opinion per curiam of the Court of Appeals, issued March 27, 2007 (Docket No. 271406).

ANNOUNCEMENTS

- ★ Megan Cavanagh, an appellate specialist in the firm's Detroit office, has been named by Michigan Lawyer's Weekly as one of 10 "Lawyers of the Year". Megan was honored at the 171st President's Awards Dinner of the Detroit Metropolitan Bar Association on May 22, 2007.
- ★ Summary disposition was granted in the case of *Goulet v Ann Arbor Public Schools* wherein the plaintiff tripped and sued under the highway exception. The school district was represented by Judith Moskus and James Wright of the firm's Ann Arbor office. Judy and Jim successfully argued that school districts do not have jurisdiction over public highways and therefore the highway exception to governmental immunity did not apply.
- ★ Summary disposition was granted to the City of New Baltimore in Macomb Circuit Court on a claim of promissory estoppel and breach of contract. The Court agreed with the city that resolutions passed by the city did not create a contract and that the unambiguous language in the resolutions prohibited plaintiff's claim of promissory estoppel. The city was defended by Roger Smith of the firm's Troy office. Appellate specialist Sarah Robertson of the firm's Detroit office authored the brief on summary disposition.
- ★ Summary disposition was granted to defendants in the case of *Weidenfeller v City of Milan*. Plaintiff fell off the shoulder/curb of a privately owned street in a subdivision and sued the city under the highway exception. The city was defended by Judith Moskus and James Wright of the firm's Ann Arbor office who successfully argued that the road where Plaintiff fell was private property at the time of Plaintiff's fall because the city had not yet accepted the road by dedication. Therefore, the highway exception did not apply.