



FROM GARAN LUCOW MILLER'S MUNICIPAL LAW DEPARTMENT

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From the Editor by John J. Gillooly



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Supreme Court Widens the Road to Immunity in Highway Cases

by Sarah Robertson



The Michigan Supreme Court recently released two opinions addressing the highway exception to governmental immunity. The common thread running through each of these opinions is the desire of the Court to apply the Governmental Tort Liability Act (GTLA) *as it is written* even when that means overruling recent decisions by the Supreme Court and the Court of Appeals.

In *Grimes v MDOT*, ___ Mich ___ (5/31/06), the Court granted leave to consider whether the shoulder is part of the improved portion of the highway designed for vehicular travel for the purpose of the highway exception to governmental immunity. The Court found that the shoulder is not "designed for vehicular travel" and so does not fall within the highway exception to governmental immunity. It reasoned that the scope of the highway exception is narrowly drawn. When the governmental agency is the state or county road commission, as it is here, the duty of these agencies to repair and maintain attaches only to the improved portion of the highway that is also designed for vehicular travel. A shoulder is not *designed* for vehicular travel simply because it may be

used by vehicles. Accordingly, only the travel lanes of a highway are subject to the duty of repair and maintenance specified in MCL 691.1402(1).

This holding overruled the Court's prior decision in *Gregg v State Hwy Dep't*, 435 Mich 307 (1990), that a shoulder is "designed for vehicular travel." The *Grimes* Court reasoned that *Gregg* had been wrongly decided where it relied on the doctrine of legislative acquiescence - the idea that decisions that have not been legislatively overturned are tacitly approved by the Legislature. The Court noted that the Legislature's words, not its silence, are controlling. The Court also disagreed with the *Gregg* Court's use of definitions found in the motor vehicle code, especially where that Court ignored the MVC's definition of "shoulder" which clearly stated that the shoulder of a highway was not designed for vehicular travel.



The Court's second decision regarding the highway exception is *Wilson v Alpena County Road Commission*, 474 Mich 161 (4/26/06). In *Wilson*, the Court addressed the question of what notice a governmental agency in charge of road maintenance and repair must have before it can be held liable for damage or injury incurred because of the defect. The Court held that, pursuant to MCL 691.1402(1) and 1403, the agency must be aware that the defect rises to the level that, if not repaired, it unreasonably endangers public travel. Accordingly, "a plaintiff must allege that the agency had actual or constructive notice of a defect in the road that, because of the agency's failure to reasonably maintain or repair, resulted in the road being not reasonably safe and convenient for public travel."

The *Wilson* Court reasoned that, while the Legislature has waived immunity if the road has become not reasonably safe for public travel due to the agency's lack of repair or maintenance, it has not waived immunity if the repair is reasonable but the road is nonetheless still not reasonably safe because of some other reason. The Court found that an agency does not have a duty to eliminate *all* conditions that make the road not reasonably safe. Rather, an injury will only be compensable when the injury is caused by an unsafe condition, of which the agency had actual or constructive knowledge, which stems from a failure to

keep the highway in reasonable repair. If the agency has notice of such a condition, it has only a reasonable time to repair it.

In *Wilson*, then, where all parties acknowledged that the road had problems - it was bumpy and required frequent patching - those problems did not lead to the conclusion that the road was not reasonably safe for public travel. While a bumpy road *may* not be reasonably safe, plaintiff in this case failed to show that a reasonable road commission, aware of the particular condition, would have understood it to pose an unreasonable threat to safe public travel. The case was remanded to the circuit court for further proceedings.

The Public Building Exception

by Jami E. Leach



The so called "public building exception" to governmental immunity imposes on governmental agencies the obligation to repair and maintain public buildings under their control when open for use by members of the public. MCL 691.1406. Governmental agencies are liable for bodily injury and property damage resulting from a dangerous or defective condition of a public building, provided the governmental agency knew of the defect and failed to remedy the condition or take action reasonably necessary to protect the public against the condition.

In order to establish this exception, a plaintiff must prove all of the following:

- 1) a governmental agency is involved;
- 2) the public building in question is open for use by members of the public;
- 3) a dangerous or defective condition of the public building itself exists;
- 4) the governmental agency had actual or constructive knowledge of the alleged defect; and
- 5) the governmental agency failed to remedy the alleged defective condition after a reasonable period of time.

Open to the Public

A building that is owned by a governmental agency but is not open to the public, i.e. it is always locked, privately leased, or closed for remodeling or renovations, is not within the exception. On the other hand, a member of the public injured as the result of a defective or dangerous condition of a building that is open to members of the public may invoke the exception, even if the person is injured in an area of the building not open for public use.

If the government has restricted entry to the building to those persons who are qualified on the basis of some individualized, limiting criteria of the government's creation, the building is not open to the public. For example, a residence hall at the University of Michigan, which was locked 24 hours a day was not "open to the public". Visitors could gain access to the building only by using a courtesy phone to contact a resident, who could then unlock the door to allow entry. *Maskery v University of Michigan Bd of Regents*, 468 Mich 609 (2003).

Condition "of" the Building Itself

A recent published opinion of the Michigan Court of Appeals clarified when a condition on an adjacent walkway can support a claim under the public building exception. Traditionally, injuries arising from a dangerous or defective condition existing in an area adjacent to an entrance or exit, but nevertheless still not a part of a public building do not come within the public building exception to governmental immunity. *Horace v City of Pontiac*, 456 Mich 744 (1998).



In *Renny v Michigan Dept of Transportation*, 270 Mich App 318 (2006), the plaintiff was injured when she slipped on a patch of ice directly in front of the door way to a rest area. Plaintiff argued that her injuries arose out of a known defective condition in a public building that MDOT failed to remedy. Plaintiff argued that the rest area building was clearly defective because of improper insulation and lack of gutters, thereby causing snow and ice to melt, run off the building roof, and create ice patches in front of the building's door. Defendant argued that the public building exception did not apply because a patch of ice on a sidewalk was a condition that was clearly not "of the building itself".

The Court held that the public building exception did apply under the facts presented in the case. Specifically stating that it did not intend to broaden the scope of the exception, the Court held that when the plaintiff pleads that the dangerous condition that directly caused the injury (here the ice patch) was directly attributable to a dangerous or defective condition of the building itself (here the inadequate insulation and lack of gutters), the public building exception may be implicated. Of course, the plaintiff would be required to prove all of the other elements set forth above in order to establish liability against the municipal agency.

"Defective" Condition?

The question is not only whether the physical condition of the building caused the injury, but also whether the physical condition was dangerous or defective under the circumstances presented. For example, where decedent hanged himself from a bathroom stall partition in a mental hospital, the court held that the use of the partition support bar to commit suicide did not transform an otherwise benign part of the building into a defective condition. *DeSanchez v State*, 467 Mich 231 (2002).

Notice

If a plaintiff can show that the dangerous or defective existed for 90 or more days before the injury occurred, and if the condition was readily apparent to an ordinary, observant person, then a *conclusive* presumption arises under the statute that the agency knew of the defect or dangerous condition and had a reasonable amount of time to correct it.

Conclusion

Governmental Immunity is alive and well where the case involves a public building. Establishing a cause of action under the public building exception to governmental immunity can be difficult and time-consuming. The exception is very narrow and the requirements to prove the claim are many. In defending such a claim, be sure that the claimant has pled and is able to prove each of the necessary elements. Otherwise, a motion for summary disposition may be warranted.