



FROM GARAN LUCOW MILLER'S MUNICIPAL LAW DEPARTMENT

GOV LAW

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From the Editor by John J. Gillooly

The Open Meetings Act

Each and every week we receive several questions about the Open Meetings Act. Last year, we were even asked by a local circuit court judge to put on a seminar for a mid-Michigan city council that ended up being televised for all to see.

If you missed that or our other seminars wherein the Open Meetings Act was discussed, here are some key points to remember about the Open Meetings Act:

- ◆ Enacted in the wake of Watergate to promote full disclosure of governmental affairs;
- ◆ All meetings of a public body shall be open to the public;
- ◆ All meetings must be held in a place available to the general public;
- ◆ Social or chance gatherings not designed to avoid the Act are excluded from the coverage of the Act;
- ◆ Public bodies with a regular meeting schedule must post the schedule of their meetings for the calendar year within 10 days of their first meeting in that year;
- ◆ Any change in the meeting schedule must be posted within three (3) days after the meeting where the change is made;
- ◆ Special meeting notices must be posted at least eighteen (18) hours prior to the meeting;
- ◆ Public bodies may establish rules to ensure the orderly conduct of meetings including setting time limits on comments from the general audience;
- ◆ A person may not be excluded from a public meeting except for a breach of the peace;
- ◆ Minutes shall be kept of each meeting whether the meeting is open or closed;

- ◆ A closed session is permitted by a two-thirds majority roll call vote to consider any of the following:
 - the purchase or lease of real property;
 - to consult with municipal attorneys regarding trial or settlement strategy; and
 - to review the specific contents of an application for employment or appointment to a public office when the candidate requests that the application remain confidential.

With regard to the last item, please note that all interviews by a public body for employment or appointment to a public office shall be held in an open meeting.

If you have any questions on the Open Meetings Act or any topic involving municipal law, please call me directly at 313.446.5501.

Happy Summer!

BREAKING NEWS !!!!!

Harper Woods defendants recently prevailed in a case alleging false arrest, malicious prosecution and intentional infliction of emotional distress. The case evaluation panel awarded plaintiffs \$60,000 against some of the many defendants. That amount was accepted by plaintiffs but rejected by defendants. Thereafter, defendants filed two motions for summary disposition, both of which were granted by Wayne County Circuit Judge Prentis Edwards and the entire case was dismissed. The defendants moved for and were awarded costs and sanctions in the amount of \$12,479.36 against the plaintiffs. The Harper Woods defendants were represented by Garan Lucow Miller attorneys Roger Smith and Megan Cavanagh.

Michigan Supreme Court Limits Damages
in Municipal Cases
By William Brickley

Recently the Michigan Supreme Court issued a decision that should have rather significant ramifications for the types of damages injured parties may claim from government agencies. This decision limits the types of damages that can be recovered. As you all know the Michigan Legislature provided most government agencies with immunity for many types of cases based upon tort. The legislature did provide some exceptions to this general grant of immunity and specifically allowed claims to be brought for the negligent operation of a motor vehicle, a defective highway, a defective public building, and for gross negligence on the part of government employees. In many of the past issues we have discussed the parameters of these exceptions. This recent case did not discuss whether the exception to immunity applied but instead discussed the type of damages that could be collected.

As a start it is best to understand the types of damages that one can claim as a result of being injured. We have all heard of the standard pain and suffering -- compensation for the hurt one suffers as the result of an injury. In addition the law recognizes other types of damages. This could be humiliation, fright and shock, and disfigurement. Mental and emotional distress is also sometimes claimed. Often a spouse will claim they have been damaged as well because they have lost some of the society and companionship that they would have enjoyed if their spouse had not suffered an injury.

In the case of *Wesche v Mecosta County Road Com'n*, 480 Mich 75, --- N.W.2d ----, 2008 WL 899218, decided on April 3, 2008, the plaintiff's wife was seeking to claim her loss of society and companionship which she claimed was diminished following her husband's auto accident with a government owned vehicle. The trial court dismissed her claims but a special panel of the Court of Appeals allowed the claim to survive. The Supreme Court agreed with the trial court and dismissed the claim. While loss of consortium claims rarely have much value it was the reasoning of the court and its application to a companion case which leads us to believe that this decision will have far reaching ramifications.

The statute authorizing the exception to tort immunity allowed only claims for *bodily injury or property damage*.

Clearly a loss of consortium claim did not involve a claim for property damage and since the spouse suffered no injuries to her body her damages could not be claimed. The Court then applied this rationale to a case involving a damage claim for wrongful death called *Kik v Sbraccia*. There the Estate was seeking all damages allowed by the wrongful death statute which included claims by the surviving relatives of the decedent that they were grieving over the loss of society and companionship they no longer received from the decedent. Applying the same rationale they ruled this was neither bodily injury nor property damage and therefore the claims could not survive.

The significance of this application is tremendous in the context of a wrongful death claim. While claims for loss of consortium for a spouse that survives an accident generally have little value that is not the case when the injured person dies. In fact the major damage in wrongful death cases is often the claim for loss of consortium. This ruling would therefore significantly limit the damages that are available in wrongful death cases.

It should be noted that both cases involved claims of negligent operation of a motor vehicle and the Court did not say how this rationale would apply to cases involving public buildings or defective highways. Since both of these statutory provisions also refer to *bodily injury and property damage* it is likely that the same rationale should apply. One must also wonder if claims for damages not linked to a *bodily injury*, such as a claim for mental or emotional distress, will be allowed. At this point, claims against government employees will not be limited by this decision because the statutory section authorizing such claims does not define the types of damages so narrowly. Please note that in order to succeed against a government employee a plaintiff still must allege and prove gross negligence, a rather significant hurdle.

There is no doubt that there will be many more decisions on the full scope of this decision and we will continue to keep you apprised of its ramifications. For the time being be aware that the damages recoverable may be limited for anything not considered *bodily injury or property damage*.

Municipal Law Update
by Jami E. Leach

Highway Exception

- ◆ Summary disposition was properly denied where plaintiff was injured by an uncovered hand hole containing subsurface electrical wiring for the overhead street lighting. The court found that even though the City of Detroit did not have responsibility over the roadway, it did have responsibility for the sidewalk. The City was responsible for maintaining the overhead lighting and it counted the mileage on the overpass for funding purposes. Therefore, the court properly held that the City had jurisdiction over the sidewalk where the accident occurred. The court also rejected defendants argument that it was not liable because the overpass was closed. The overpass was only closed to vehicular traffic, not pedestrian traffic. *Thursam v. City of Detroit*, Unpublished COA #277071, 04/10/08.

Intentional Torts & Governmental Immunity

- ◆ Plaintiff, a township employee, sued three township officials alleging intentional infliction of emotional distress, invasion of privacy based on violations of the Bullard-Plawecki Employee Right to Know Act, defamation and violation of the Whistleblowers' Protection Act. The Court of Appeals held that the trial court properly granted summary disposition to defendants on the claims of defamation and intentional infliction and intentional interference because those claims were barred by governmental immunity. "There is no intent exception to governmental immunity". Plaintiff's contention that defendants' conduct was outside the scope of their authority was meritless. Plaintiff's claim that governmental immunity is an affirmative defense that defendants bore the burden of proving was also meritless. Governmental immunity is a characteristic of government, not an affirmative defense, and the party suing a governmental unit must plead in avoidance of governmental immunity. *Riopelle v. Zittel*, Unpublished COA#275403, 05/20/08.

Gross Negligence

- ◆ Defendant's action of closing the doors of the bus while the plaintiff was attempting to exit the vehicle was nothing more than ordinary negligence where plaintiff failed to conduct any discovery and never took the defendant's deposition. The plaintiff was

required to overcome defendant's entitlement to governmental immunity but failed to do so. Summary disposition in favor of defendant was ordered. *Fundunburks v. Beard*, Supreme Court Order 134408, 05/23/08.

FOIA and OMA

- ◆ Plaintiffs requested the minutes from a Township Board Meeting. Plaintiff requested minutes from a closed session of that meeting, claiming she was entitled to them under FOIA because the closed session was held in violation of the Open Meetings Act. The purpose of the closed session was to discuss plaintiff's lawsuit against the township with the township's attorney. The plaintiff's FOIA request was denied. The court held that the minutes were exempt from disclosure under MCL 15,243(1)(v), which exempts from disclosure records or information relating to a civil action in which the requesting party and the public body are parties. The Court held that while the Township technically violated FOIA because it failed to set forth specific exemptions and other language in its denial, no attorney fees would be ordered since the records were properly denied. *Schellenberg v Bingham Township*, Unpublished COA#274403, 05/29/08

Public Building Exception - Notice Requirement

- ◆ The notice requirement in the public building exception was complied with where the original incident report constitutes sufficient and timely notice to the defendant. Plaintiff slipped and fell in a puddle of water at the airport. Defendant's employee completed an incident report following the accident. Plaintiff sued under the public building exception to governmental immunity. Defendant argued that plaintiff's claim must be dismissed because he failed to provide the statutorily required notice within 120 days of the incident. Plaintiff argued that the original incident report was sufficient notice. The court agreed. "Notice" is not defined in the governmental tort liability act. Dictionary definitions indicate that notice is to bring knowledge to the attention of another. The Court here held that the incident report taken by defendant's employee satisfied the statutory notice requirement in the public building exception to governmental immunity. *Chambers v Wayne County Airport Authority*, Unpublished COA#277900, 06/05/08.