

GOV LAW

Monthly Publication for Michigan Cities, Townships, Villages and Schools

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From the Editor

by John J. Gillooly



'Tis the Season...

A sure sign that the holiday season is in full swing is the number of questions we get from municipal clients about holiday parties and gifts. To avoid legal and ethical problems during this time of giving, please keep the following pointers in mind:



The Spending Rules. A municipality's authority to spend money comes from either the Michigan Constitution or the Michigan Compiled Laws: A municipality may only spend money for a public purpose. A public purpose exists when

the money spent confers a direct benefit of a general character to a significant part of the public.



May a municipality spend public monies on holiday parties, gifts, or donations to charities? We strongly recommend not doing so. The same rules prohibit the use of public funds to buy birthday cakes, flowers, lunches, or to throw a great local leader a retirement party. In deciding

whether to spend public monies, ask yourself: ***Is the money spent for a legitimate public purpose relating to the reasons why a municipality exists?*** If the answer is no, save yourself a lot of grief: Take up a collection for the gift. Do not write a check from your general fund.



May a government employee accept a gift of cash or services from a resident?

Michigan law addresses the obvious concern that allowing public officials to accept gifts from members of the community could influence them to treat those persons more favorably while carrying out their official civic duties:

**A public officer or employee shall not solicit or accept a gift or loan of money, goods, services, or other thing of value . . . which tends to influence the manner in which the public officer or employee . . . performs official duties. MCL 15.342(4).*

**[A] public officer or employee shall not engage in or accept employment or render services for a private or public interest when that employment or service is incompatible or in conflict with that discharge of the officer or employee's official duties or when that employment may tend to impair his or her independence of judgment or action in the performance of official duties. MCL 15.342(6).*



Kindly thank the giver, but refuse the gift.

While residents or businesses that do business in your municipality may have good intentions in offering cash or other items of value to an employee, Michigan law disfavors the acceptance of such items on an individual basis. Please do not hesitate to call me directly if you have any questions. **Most importantly, GLM hopes that you and yours have a very safe, happy, and healthy holiday season.**

MUNICIPAL LAW UPDATE

by Jami E. Leach

Highway Exception

- ◆ This case reaffirms that the shoulder is not within the highway exception to governmental immunity because it is not designed for vehicular travel. Summary disposition was proper where plaintiff, who was riding his bicycle, was struck by a vehicle when he swerved into traffic to avoid a drain hole on a bridge in an area between the fog line and the curb. *Price v Dept of Transportation*, Unpublished COA #257577, 12/05/06.
- ◆ Plaintiff tripped and fell in a paved area near a business. The city was not liable under the highway exception because the area was not a public sidewalk. There had never been a permit to build a sidewalk there. Rather, the area was more like a private driveway which was used by the nearby business to park vehicles. Therefore, summary disposition was proper. *Roby v City of Mt. Clemens*, Unpublished COA #269563, 11/21/06.

Governmental Function

- ◆ Plaintiff was fired after a criminal background check revealed a conviction which was not disclosed on her employment application. When defendant hired, supervised, and later fired plaintiff after defendant learned that plaintiff had omitted disclosing her felony conviction on her employment application, it was supervising a public employee and, therefore, engaged in an authorized governmental function, even if it later learned of plaintiff's criminal history by improper means. Therefore, defendant was entitled to governmental immunity and summary disposition was appropriate. *Dorkins v City of Pontiac*, Unpublished COA#269265, 11/16/06.

Sewage Disposal System Event Exception

- ◆ Is a rural, roadside drainage ditch within the purview of "storm water drain system" as set forth in MCL 691.1416? In this case, the Road Commission cut down trees, limbs and branches along a road and deposited the debris into a roadside drainage ditch. The spring rains caused the debris to float down the

ditch and form a dam near plaintiff's property. Plaintiff notified the Road Commission on two occasions, however, no action was taken. The ditch later flooded, causing damage to plaintiff's property. The Court held that the term "sewage disposal system" as used in the sewage disposal system exception, refers to more than instrumentalities dealing with actual sewage. Pursuant to the statutory language, the exception also applies to systems designed for storm water drainage. The court also concluded that, as a ditch serving as a conduit for the drainage of storm water, the roadside drainage ditch here was a "storm water drain". But the issue of whether the roadside drainage ditch here was part of a "storm water drain system", requires further inquiry and consideration on remand. *Linton v Arenac County Road Commission*, ___ Mich App ___, 11/28/06.

WHEN ARE "NO CONTEST" PLEAS ADMISSIBLE IN CIVIL LITIGATION?

By John J. Gillooly

In Michigan, such a plea is admissible if it is used to support a defense against a claim brought by the person who entered the plea. In Federal Court, it is not only admissible, but in some circuits, is also given collateral estoppel effect, if the criminal defendant is the plaintiff in the subsequent civil proceeding.

MRE 410 governs the admissibility of pleas. It provides, in relevant part:

Evidence of the following is not, in any civil or criminal proceeding, admissible against the defendant who made the plea or was a participant in the plea discussions:

(2) A plea of nolo contendere, except that, to the extent that evidence of a guilty plea would be admissible, evidence of a plea of nolo contendere to a criminal charge may be admitted in a civil proceeding to support a defense against a claim asserted by the person who entered the plea ...

The Court of Appeals in *Home-Owners Ins Co v Bonnville*, unpublished per curiam opinion of the Court of Appeals, dated June 8, 2006 (Docket No. 2006) opined:

"The rule indicates that where a defendant who entered a no contest plea is later a plaintiff in a related civil action, the defendant may use the plea as evidence in building a defense against that plaintiff's claim. The protection afforded a [criminal] defendant who chooses not to contest a charge may act as a shield where that defendant is a defendant again in a civil action, but not as a sword if a defendant in a criminal proceeding later becomes plaintiff in a related civil action."

FRE 410 governs the admissibility of pleas in Federal Court. However, it does not provide a counterpart to the exception in MRE 410 for nolo contendere pleas. There is a split in the circuits as to how this rule is applied. Some apply the rule strictly, declaring such a plea inadmissible for all purposes. Fortunately, the Sixth Circuit is not one of those circuits. Rather, the Court in *Shelton v City of Taylor*, 92 Fed App 178, 183 (6th Cir, 2004), citing *Walker v R. Shaeffer*, 854 F.2d 138 (6th Cir., 1988) opined:

This circuit declined to allow Rule 410 to become an offensive weapon and thereby undermine its basic purpose: to promote settlement by ensuring that a defendant need not fear later repercussions from cooperating with the judicial system.

In *Walker, supra*, Plaintiffs Walker and Turner brought a 42 USC 1983 claim against two police officers for false arrest, detention, and imprisonment in violation of their constitutional rights. Plaintiff Walker had been arrested and charged with disorderly conduct and Plaintiff Turner had been arrested and charged with reckless driving in the underlying criminal case. Both plaintiffs in the criminal case entered a plea of no contest in open court. Defendants brought a motion in District Court for summary judgment based on qualified immunity grounds, arguing that Plaintiffs were estopped from seeking damages based on false arrest and false imprisonment because of their no contest pleas. The District Court denied Defendants' motion.

The Sixth Circuit Court of Appeals reversed. The Court found that the motion should have been granted because Plaintiffs' no contest pleas in the underlying criminal matter provided a sound basis for qualified immunity. In reversing the District Court, the Court opined:

"We do not consider our conclusion to be barred by Fed.R.Evid. 410, which provides that evidence of a 'plea of nolo contendere' is not, 'in any civil or criminal proceeding, admissible against the defendant who made the plea.' This case does not present the kind of situation contemplated by Rule 410: the use of a nolo contendere plea against the pleader in a subsequent civil or criminal action in which he is the *defendant*. See, e.g., *United States v Manzella*, 782 F.2d 533 (5th Cir.), *cert. denied*, 476 US 1123 (1986) (use of nolo contendere plea to impeach defendant in subsequent criminal prosecution.) In this case, on the other hand, the persons who entered prior no-contest pleas are now plaintiffs in a civil action. Accordingly, use of the no-contest plea for estoppel purposes is not 'against the defendant' within the meaning of Fed.R.Evid. 410....

We find a material difference between using the nolo contendere plea to subject a former criminal defendant to subsequent civil or criminal liability and using the plea as a defense against those submitting a plea interpreted to be an admission which would preclude liability. Rule 410 was intended to protect a criminal defendant's use of the nolo contendere plea to defend himself from future civil *liability*. We decline to interpret the rule so as to allow the former defendants to use the plea offensively, in order to obtain damages, after having admitted facts which would indicate no civil liability on the part of the arresting police." *Id* at 143.

Given the above rules and case law, we again stress the importance of a favorable resolution in the underlying criminal matters.