



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. Gillooly

School's In - Liability Claims to Follow

Shortly after the school bells begin to ring in another year early next month, liability claims are, unfortunately, soon to follow. As tort reform continues to reduce the number of product liability, medical malpractice and auto negligence cases, plaintiff attorneys have set their sights on public entities. Public entities are often viewed as "deep pockets", with endless resources and little willingness to proceed to trial.

To combat the ever-increasing number of claims and the costs associated with defending these claims, please consider these helpful hints:

- ✓ If your claim arises under federal law, make sure the case is properly removed to federal court. Federal judges know federal law and their dockets are far less crowded than the average state court docket which translates to a more efficient resolution.
- ✓ Insist on a comprehensive litigation plan and budget within 30 days of a new suit being filed. The preparation of a plan can help focus the attention of your legal team and your employees.
- ✓ Communication is the key to success. Every 30-45 days, you should be provided with a comprehensive written update on the status of each and every matter in litigation. These monthly reports help keep your entire team focused.

- ✓ Use a variety of techniques to investigate those bringing claims against you. With the exploding popularity of the internet, we are able to find a wealth of information on those who are suing you.

These are only a few ideas that can help you and your organization successfully defend a lawsuit. Garan Lucow Miller has many more great ideas that can work for you. Give us a call at 313.446.5501.

MUNICIPAL LAW UPDATE

by Matthew LaBeau

Public Building Exception

Plaintiff slipped and fell on ice and snow in front of a building at a rest area in Roscommon, Michigan and allegedly suffered injury. Plaintiff brought suit alleging the building was in a defective condition because, as a result of MDOT's design, construction or maintenance, ice and snow was allowed to accumulate in front of the entrance. Namely, MDOT failed to install downspouts and gutters to channel water from the sidewalk. The Michigan Supreme Court held that the claim did not fall under the public building exception to governmental immunity. The Court found that the plain language of MCL 691.1406 only imposes a duty to repair and maintain a public building. Any claim based on a design defect is not actionable under the building exception to governmental immunity. *Renny v MDOT*, 478 Mich. 490 (2007).

42 U.S.C. 1983/Qualified Immunity

Plaintiff was driving a stolen Dodge Shadow. Officers Miller and Hoshaw determined the vehicle was stolen and pursued the vehicle. A chase ensued, culminating in Plaintiff's vehicle being blocked by Officer Miller's vehicle. Officer Hoshaw exited his vehicle and pointed his gun in the driver's side window at Plaintiff's head. Plaintiff then accelerated, knocking Officer Hoshaw down. Officer Miller then fired several rounds at Plaintiff, striking him in the neck and paralyzing him. Plaintiff filed suit against Defendants under 42 U.S.C. 1983 alleging excessive force. The district court granted Defendants' Motion for Summary Judgment, relying heavily on the in-car video, that the officers did not violate Plaintiff's constitutional rights and were therefore entitled to qualified immunity. The Sixth Circuit Court of Appeals affirmed. From Officer Miller's viewpoint, Plaintiff was a danger because he was undeterred by having a gun pointed at him, showed disregard for Officer Hoshaw's safety, had intent to escape, and was willing to risk the safety of others to evade capture. Officer Miller was entitled to qualified immunity because his actions were objectively reasonable and therefore did not violate Plaintiff's constitutional rights. *Williams v City of Grosse Pointe Park*, 496 F.3d 482 (6th Cir. 2007).

42 U.S.C. 1983/Qualified Immunity

Plaintiff was traveling in a prison vehicle driven by Defendants. Plaintiff asked Defendants to buckle his seatbelt because he was shackled and could not do it himself. Defendants refused and then drove recklessly at 15 miles per hour over the speed limit and weaving in and out of traffic. The vehicle got into an accident and Plaintiff suffered injury. Plaintiff sued alleging violation of his Eighth Amendment rights. The United States District Court granted Defendant's Motion to Dismiss on grounds Defendants were entitled to qualified immunity. The Court found that no Eighth Amendment violation occurred simply by transporting a prisoner unseatbelted in a prison vehicle. Refusing to seatbelt a prisoner and driving at excessive speed does not constitute an excessive risk to an inmate's health and safety. Furthermore, Defendants were entitled to qualified immunity because no case law from the Sixth Circuit had found a failure to seatbelt violates the constitutional rights of a prisoner. *Young v Hightower*, unpublished opinion

of the U.S. District Court, Eastern District of Michigan, dated July 27, 2007.

Qualified Immunity/Gun Free Schools Act

Plaintiff was a mentally incapacitated high school student and played on the varsity basketball team. One day after practice, a fellow student and teammate pointed an unloaded firearm at Plaintiff and pulled the trigger. Months later, several students and teammates were in the locker room and attempted to sodomize Plaintiff with a wooden dowel. Plaintiff reported the incidents to his parents, but asked them not to report the incidents. Eventually the incidents were reported multiple times, but no action was taken by the school. Plaintiff filed suit against the school and its officials for constitutional violations under 42 U.S.C. 1983. Plaintiff alleged Defendants consistently failed to enforce school policies that were in place to ensure the protection of the students. The U.S. District Court dismissed this claim because no affirmative act was alleged to have caused harm to Plaintiff, only a failure to act. Further, no special danger to Plaintiff was alleged, poor enforcement of the policies affected the entire school. Plaintiff also alleged Defendants' failure to supervise students and train personnel violating Plaintiff's rights to free appropriate public education under The Individuals with Disabilities and Education Act. The Court dismissed this claim because the assaultive acts by students, were not discipline imposed by the school and had no relation to appropriate education for a disabled child. The Court also dismissed Plaintiff's claim under the Gun Free Schools Act because the statute does not confer an individual right of action. *Smith v Port Hope School District*, unpublished opinion of the U.S. District Court, Eastern District of Michigan, dated August 6, 2007.

42 U.S.C. 1983/Probable Cause

Defendant Strong was a DNR officer executing an arrest warrant for Daniel Eichorn for poaching. Defendant became aware Einhorn was residing at the residence of Plaintiff Roland Bourgeois. Defendant went to Plaintiff's home and arrested both men. Subsequently, Plaintiff's indictment was quashed by a Michigan circuit court judge for lack of evidence on the charge of resisting and obstructing and harboring a fugitive. Plaintiff then sued Defendant for unlawful arrest under state law and 42 U.S.C. 1983. The case progressed to trial, where a jury

found in favor of Defendant. Plaintiff brought a motion notwithstanding the verdict, arguing the verdict was against the great weight of the evidence which he claimed overwhelmingly showed Defendant did not have probable cause to arrest Plaintiff. The United States District Court found a jury could reasonably infer that Defendant had probable cause to arrest Plaintiff for harboring a fugitive. Defendant testified that the officers knocked on the door and yelled that they had a warrant for Eichorn's arrest for 20 to 30 minutes. When Plaintiff came to the door, he acknowledged that Eichorn was inside, but told the officers they had the wrong guy. The jury had to weigh the credibility of witnesses and rely upon one version of the testimony. *Bourgeois v Strong*, __ F.3d __ (E.D. Mich. 2007).

First Amendment

Defendant Time Warner Cable Northeast provided a public access channel to its Akron, Ohio viewing audience, pursuant to an agreement with the City of Akron. Beginning in December 2004, Defendant Time Warner required an administrative fee of \$25.00 for each tape submitted for broadcast and would only accept tapes from Akron residents. This rule was approved by the City, pursuant to agreement. Plaintiff, an Akron resident, filed suit claiming violation of her First Amendment rights against Time Warner, the City of Akron and its mayor. District court dismissed the case against all Defendants because Plaintiff failed to allege facts showing state action. Plaintiff appealed. The Sixth Circuit affirmed. Time Warner did not perform a governmental function and was not coerced by the City in promulgating regulations. A cable operator does not become a state actor when its rules are approved by local government. Furthermore, even though the City of Akron was a state actor, the fee imposed was content neutral and applies to all tapes submitted regardless of the subject matter of the speech. Therefore, Plaintiff's First Amendment rights were not violated. *Wilcher v City of Akron*, __ F/3d __ (6th Cir.2007)

First Amendment

Plaintiff was host of a radio program for WEMU, a station run by Eastern Michigan University and an NPR affiliate. Defendant was general manager of the radio station. In 1976, WEMU adopted a neutrality policy. In October of 2001, Defendant sent an e-mail reminding

employees of the neutrality policy and requiring all on-air hosts to refrain from expressing personal opinions on controversial issues. On March 30, 2003, Plaintiff disparaged NPR newscasts on the air, refused to run NPR newscasts as required, and expressed strong support for the military action taken in Iraq. Plaintiff was subsequently terminated. Plaintiff filed suit alleging he was discharged for speaking out on an issue of public concern, violating his First Amendment rights. The Michigan Court of Appeals, in light of *Garcetti v Ceballos*, 547 U.S. ____ (2006), found that Plaintiff's comments and refusal to run NPR broadcasts constituted part of his official job duties as a government employee. Therefore, his speech was not protected by the First Amendment and he was not immune from employer discipline. *Hughes v Timko*, unpublished per curiam opinion of the Michigan Court of Appeals, dated August 2, 2007 (Docket No. 255229).

Governmental Immunity/Medical Care Exception

Plaintiff's decedent was in the Oakland County jail and was injured when he fell from an upper bunk. Plaintiff's decedent eventually died in jail. Plaintiff brought suit alleging Defendant Oakland County and its jail officers' actions or inactions caused Plaintiff's death. Defendants argued that they were entitled to governmental immunity and that the medical care exception did not apply here. Defendants also argued that there was no factual support for a claim that Defendants acted with gross negligence. The Michigan Court of Appeals found that this case clearly fell within the medical care exception to governmental immunity because Defendants were employees of a governmental agency providing medical care to the decedent. The Court went on to rule that Defendants' action did not rise to the level of gross negligence and Defendants were entitled to governmental immunity. *Briggs v Oakland County*, __ Mich.App. __ (2007)