



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



Welcome to the first edition of Garan Lucow Miller's Gov Law. We started this newsletter with one goal in mind: To offer the most in-depth, cutting edge legal information to municipalities, their leaders and their counsel, from the most knowledgeable and experienced municipal attorneys in Michigan. This monthly publication, delivered right to your desktop, will bring you legal analysis, insights, and practice pointers to assist you in handling claims on issues that matter most in your practice and in your community.

Over the past 20 years, Garan Lucow Miller has provided no-fault legal news and analysis to our clients through our *Law Fax* publication. Coupled with our quarterly breakfast seminars throughout the mid-west, we have garnered a reputation as the law firm that continually strives to inform and educate its clients. We now offer Gov Law as another, exclusive resource for legal information important to local governments.

For close to 60 years, Garan Lucow Miller has represented the interests of its municipal clients across the State of Michigan in a wide variety of legal matters. With 90 attorneys and 9 offices across the State of Michigan, Garan Lucow Miller is uniquely suited to handle your most complex legal issues whether they involve tax, the environment, property rights, elections, litigation or appeals. We are comprised of pre-eminent attorneys with nationally recognized expertise, and are well-known by judges, lawyers and our clients as remarkably dedicated, respected and ethical attorneys.

We are fortunate to have been involved in many of the most complex and important appellate decisions involving municipalities in both state and federal courts, from *Ross v Consumers Power* to *Robinson v City of Detroit* to *Pohutski v City of Allen Park*. We take great pride in our representation of over 200 public entities across the state and we continue to expand our client base and our areas of expertise.

We look forward to working with you and hope to see you at one of our complimentary breakfast or in-house seminars. In the meantime, I am happy to answer any questions you may have and provide any further information that might assist your municipal leaders or attorneys. Feel free to call me directly at 313.446.5501. To add or remove a name from this email list, write to glmgovlaw@garanlucow.com

BREAKING NEWS!!



In an opinion released on 9/21/04, the Michigan Court of Appeals holds that township fire department is not a "level of government" and, therefore, fire chief is not the highest appointed executive official entitled to absolute immunity under the GTLA. *Grahovac v Munising*, ___ Mich App ___ (2004).



GLM prevails in a nationally-reported, multi-million dollar case involving law enforcement liability for failing to prevent a drag race. On 9/17/04, Eastern District grants summary judgment in favor of police officers and city. *Jones v Lincoln Park*.

Marching On...

by Rosalind H. Rochkind and Melissa A. Taylor

Recent decisions that traverse the changing landscape of municipal law: Most topics will be covered in greater depth in upcoming issues.



THE "PUBLIC DUTY DOCTRINE" MOVES IN, MOVES BACK, AND STALLS

In 1996, the Michigan Supreme Court recognized a "public duty doctrine" holding that the duties owed by governmental employees were owed to the public generally and, therefore, circumstances where suits by individuals would be allowed were quite limited. *White v Beasley*, 453 Mich 308 (1996). In 2001, the Michigan Supreme Court narrowed the "public duty doctrine", and restricted it to "police officers" providing "police protection." *Beaudrie v Henderson*, 465 Mich 124 (2001). In 2004, the Michigan Supreme Court has been asked to review an opinion from the Michigan Court of Appeals that refused to apply the doctrine to bar suit against a firefighter for alleged gross negligence while fighting a fire. *Dean v Childs*, 262 Mich App 48 (2004).



THE POWER OF EMINENT DOMAIN LOSES GROUND

Calling the Supreme Court's prior interpretation of Michigan's Constitution "erroneous," in *Wayne County v Hathcock*, 471 Mich 445 (2004) the Court overruled *Poletown Neighborhood Council v Detroit*, 410 Mich 616 (1981), in which the Court upheld the use of eminent domain to condemn property for conveyance to private users if the project would clearly and significantly benefit the public. The *Poletown* Court approved the city's plan to alleviate unemployment and revitalize the city's economic base by condemning private property for General Motors to build an assembly plant. In *Hathcock*, the county sought to condemn land near Metro Airport for

a business and technology park which would ultimately be transferred to private parties. The Court ruled that *Poletown* was wrongly decided and, to pass constitutional muster, the condemnation and transfer of land to a private entity must only occur if the public necessity is "extreme," such as for the construction of "highways, railroads, canals, and other instrumentalities of commerce." The Court further ruled that the act of condemnation itself must be for a public use and the transferred property must remain subject to public oversight.



THE "EXCLUSIONARY RULE" RETREATS

Falling in line with the U.S. Supreme Court's landmark ruling in *United States v. Leon*, 468 U.S. 897 (1984), the Michigan Supreme Court adopted a "good faith" exception to the exclusionary rule for a police officer's reliance on a search warrant that is later deemed defective in *People v Goldston*, 470 Mich 523 (2004). Since *People v Marxhausen*, 204 Mich. 559 (1919), issued a short time after *Weeks v United States*, 232 US 383 (1914) and before the Court extended the rule to the states in *Mapp v Ohio*, 367 US 643 (1961), Michigan had followed the Supreme Court's rule that evidence obtained pursuant to an illegal search or seizure is barred from admission at trial. Years after the exception carved out by *Leon*, the Michigan Supreme Court observed in *Goldston* that the rule excluding such evidence serves only to deter police misconduct and is a judicially created remedy without constitutional mandate. Thus, the Court held that evidence seized on the basis of an objectively reasonable, good faith reliance on a search warrant is not subject to automatic suppression on the basis of errors later found in the warrant.



"THE PROXIMATE CAUSE" MOVES BACK IN TIME AND CIRCLES IN PLACE

MCL 691.1407(2) provides governmental immunity to governmental employees as long as their conduct does not constitute gross negligence which was "the proximate cause" of the plaintiff's injuries. It has

long been recognized that there can be more than one "proximate cause" of an injury. However, in 1994, the Michigan Supreme Court rejected the defense contention that the phrase "the proximate cause" of the injuries meant "the sole proximate cause of the injury." *Dedes v Asch*, ___ Mich ___ (1994). In 2000, the Michigan Supreme Court overruled *Dedes*, and, citing the 1913 opinion in *Stoll v Laubengayer*, 174 Mich 701 (1913), held that the phrase "the proximate cause" meant "the one most immediate, efficient, and direct cause preceding an injury." *Robinson v Detroit*, 462 Mich 439 (2000). Since then litigants have been debating the meaning of the phrase "the one most immediate, efficient, and direct cause preceding an injury." In 2004, the Michigan Supreme Court has been asked to review an opinion from the Michigan Court of Appeals that held the actions of a firefighter could constitute "the proximate cause" of the injuries sustained in the fire. *Dean v Childs*, 262 Mich App 48 (2004).



APPLICATION OF HIGHWAY EXCEPTION TO CITIES STANDS STILL

The Michigan Court of Appeals has ordered a special panel to resolve the conflict between two cases against cities for injuries allegedly caused by malfunctioning traffic control devices, *Marchyok v Ann Arbor*, 260 Mich App 684 (2004) and *Johnson-McIntosh v Detroit*, 261 Mich App 801 (2004). The *Marchyok* majority ruled that the Supreme Court in *Nawrocki v Macomb Co Road Comm*, 463 Mich 143 (2000) implicitly overruled *Cox v Dearborn Hts*, 210 Mich App 389 (1995), and that, extending *Nawrocki* to municipalities, the highway exception to governmental immunity does not apply to a claim for failure to maintain traffic control devices because the devices are not part of the highway under the government tort liability act. The *Johnson* panel followed *Marchyok*, but disagreed with its reasoning and urged the continued viability of *Cox*, in which the Court ruled that the highway exception merely limits liability for the state and county road commissions, not municipalities for injuries caused by defective traffic control devices. Expect a decision resolving this issue (at least temporarily) in the near future . . .

HEADS UP!!



Municipal Alerts and Practice Pointers:

- Safety belt statute's cap on the reduction of damages does not apply to suit brought under the highway exception to governmental immunity. *Mann v St. Clair Cty Rd Comm*, 470 Mich. 347 (2004).
- Despite the court rule designating as a "final order" one that denies governmental immunity to a governmental party, see *Newton v Michigan State Police*, ___ Mich App ___ (2004), in which the Court of Appeals ruled that there is no immediate right of appeal from an order denying summary disposition to a governmental party if the ruling is based on the finding of an issue of material fact. But an opinion released on September 23rd takes the contrary view and calls for a special panel to resolve the issue. *Walsh v Taylor*, ___ Mich App ___ (2004).
- Cases filed in state court that involve federal claims must be removed to federal court within 30 days. Do not rely on unlimited extensions to answer the complaint – it will defeat your ability to remove to federal court.

Join Us for Garan Lucow Miller's
Governmental Liability Seminar on
Tuesday, November 16, 2004 at the Troy
Marriott. Written details and agenda to
follow or call John Gillooly at
313.446.5501