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GARAN LUCOW MILLER P.C.

FROM GARAN LUCOW MILLER'S MUNICIPAL LAW DEPARTMENT

GOV LAW

Monthly Publication for Michigan Cities, Townships, Villages and Schools *www.garanlucow.com*

Garan Lucow Miller, P.C. 1000 Woodbridge Street Detroit, Michigan 48207 313.446.5501

From the Editor
by John J. Gillooly

MUNICIPAL LIABILITY: YOUR KEYS TO SUCCESS

At Garan Lucow Miller, P.C., we are fortunate to try several cases each year on behalf of public entities. We are firm believers that all types of public entities need to proceed to trial more often than not. Following these simple rules will undoubtedly assist you and your community in getting the results you want: WINS.

Try More Cases

- Municipalities need to send a message that their pockets are not bottomless.
- The odds are generally stacked in your favor in going to trial. Close to 85% of all cases result in verdicts for those being sued.

Let Federal Judges Hear Federal Claims

- Claims that are brought under the federal constitution and statutes (42 USC 1983) are complicated and best understood by the federal bar.
- There can be significant cost and time savings in federal courts where dockets are much less congested.

Use Your State Appellate Courts

- The Michigan Court Rules were recently amended to allow a governmental entity to take an immediate appeal from the entry of an order denying them summary disposition on the grounds of governmental immunity. Such an appeal can halt a given lawsuit for months, even years, and gives an appellate court an opportunity to visit important issues in your cases.

Understand Requests for Punitive Damages

- Punitive damages are generally not available in state court and cannot be awarded against a municipality. Punitive damages may only be awarded against an individual.

Attack Damage Claims of Those Suing You Without Adversely Affecting Your Liability

- Be on the offensive. Liability and damages are not discrete topics or parts of the case. They are symbiotic in nature and how you confront one topic will influence how you deal with the other. Do not be afraid or reluctant to challenge catastrophic damage claims. There are many ways to challenge damages claimed by a severely injured party without promoting a sympathetic result.

Take Advantage of Our Free Breakfast Seminars and Newsletters

- We are pleased to offer a monthly newsletter and frequent breakfast seminars on topics of interest to municipal administrators, risk managers and law enforcement officials. To register for our newsletters or to get more information on one of our upcoming seminars, please call (313) 446-5501.

MUNICIPAL LAW UPDATE
by Matthew LaBeau

Public Employment/Mandatory and Permissive Subjects of Bargaining

A dispute on minimum staffing between a police officers' union and the city ended in favor of the city. The Michigan Employment Relations Commission (MERC)

held an unfair labor practice hearing. The administrative law judge ruled minimum staffing was a permissive subject because it did not significantly impact worker safety. Plaintiff filed exceptions to the administrative law judge's ruling arguing it applied the wrong standard of "inexplicably intertwined with safety." The Michigan Court of Appeals affirmed the ruling. Mandatory subjects are determined on a case-by-case basis and have a significant impact on wages, hours, other terms and conditions of employment. Matters of policy like staffing levels are generally left to management unless they significantly impact safety. The legal standard applied by MERC was proper. Further, the administrative law judge's findings were supported by competent, material and substantial evidence on the record. *Oak Park Public Safety Officers Association v City of Oak Park*, unpublished per curiam opinion of the Court of Appeals, dated October 18, 2007 (Docket No. 271767).

Governmental Immunity/Highway Exception
Plaintiff's Complaint alleged that plaintiff's decedent died in a motor vehicle accident that was proximately caused by defendant Eaton County Road Commission's negligence when it permitted a barricade along with other signage to obscure oncoming traffic. Defendant moved for summary disposition on the basis that Plaintiff failed to provide proper notice as required by MCL 691.1404. The trial court denied defendant's motion. The Court of Appeals affirmed, finding that defendant Road Commission had actual notice of the incident because a civil engineer for the Eaton County Road Commission and two other personnel were present at the crash scene. The Michigan Supreme Court granted peremptory reversal of the Court of Appeals. The court found that plaintiff did not provide notice to defendant Eaton County Road Commission as required by MCL 691.1404 and *Roland v Washtenaw County Road Commission. Ells v. Eaton County Road Comm'n*, Supreme Court Order, October 5, 2007 (Docket No. 130732).

Governmental Immunity/Highway Exception
Plaintiff was traveling on Jefferson Avenue in the City of Detroit when he ran over an unbolted or loose sewer gate and it shot up underneath his vehicle. He lost control of his vehicle and struck a nearby curb, causing injury to himself and a minor child. Plaintiff filed suit against the City of Detroit alleging the manhole was a dangerous condition in the street. Defendant brought a motion for summary disposition, arguing that it had no prior notice of the unbolted grate and that it was entitled to governmental immunity. The trial court denied defendant's motion and the Court of Appeals affirmed. Plaintiff's expert accident reconstructionist determined four of the five large bolts were missing from the grate and it would have taken several weeks or months of pounding from vehicles to dislodge the bolts. It also could be extrapolated from his report that the highway was not reasonably safe and convenient for public travel. Plaintiff's expert testimony could potentially provide a basis for recovery. *Anderson, et al v City of Detroit*, unpublished per curiam opinion of the Court of Appeals, dated September 20, 2007 (Docket No. 273727).

Governmental Immunity/Motor Vehicle Exception
Plaintiff was at a Lincoln High School football game. Defendant was an athletic trainer for the schools, who drove past plaintiff in a golf cart and allegedly rolled over plaintiff's right foot and ankle. Plaintiff filed suit alleging negligence by defendants, asserting the motor vehicle exception to governmental immunity. Defendants moved for summary disposition arguing a golf cart was not a motor vehicle. The trial court denied the motion, noting that MCL 691.1405 did not require that a vehicle had to be driven on the roadway to be considered a motor vehicle and that a governmental employee could be held liable under MCL 691.1405. The Michigan Court of Appeals affirmed the trial court as to Defendant Lincoln Consolidated Schools, but reversed as to Defendant Howard finding he was not grossly negligent under MCL 691.1407. The Michigan Supreme Court reversed the Court of Appeals as to Lincoln Consolidated Schools. The Court cited the dissenting opinion, which found a golf cart is not a motor vehicle, as it was not similar to an automobile, bus or truck, and not designed for operation on or alongside the roadway. Therefore, Lincoln Consolidated Schools had no liability. *Overall v Howard, et al*, 738 N.W.2d 760 (2007).

Right to Fair Trial
Defendant was convicted of several counts arising out of a shooting incident in which several people were injured. Three witnesses identified defendant as the shooter. Several witnesses testified the shooter wore a baseball cap. A cap was recovered at the scene, but could not be

found one week later. The cap was lost before defendant's motion for discovery and evidence showed both the police and prosecutor conducted a search to no avail. Defendant asserted the cap may have had DNA that would have exonerated him. On appeal, the Court of Appeals noted that the failure to preserve evidence that may potentially exonerate a defendant does not constitute a denial of due process unless the police acted in bad faith. Defendant failed to produce evidence that the baseball cap was exculpatory. Defendant's assertion that the cap may contain DNA was speculative. Regardless, there was no evidence the police acted in bad faith. *People v Younger*, unpublished per curiam opinion of the Court of Appeals, dated September 20, 2007 (Docket No. 269299).

Governmental Immunity/Gross Negligence

Plaintiff's decedent was an 11-year-old girl who drowned in a hotel pool on a school sponsored field trip. Defendant Joyce Ewing, who was there with several other defendant chaperones, was the sole chaperone by the pool. At first she believed plaintiff was floating or swimming underwater, thinking she was playing. When a student told her the girl was not playing, defendant jumped in to try to save her. Another chaperone attempted to resuscitate her as well. Plaintiff filed suit alleging gross negligence. Defendants filed a motion for summary disposition arguing their actions were not grossly negligent or the proximate cause of plaintiff's injuries. The trial court granted summary disposition in favor of several of the chaperones, but not all of them. The Court of Appeals affirmed in part and denied in part, finding that summary disposition should have been granted as to all of the defendants. The Court found defendants' actions were not the proximate cause of plaintiff's injuries. Evidence showed that either other kids pushed plaintiff's decedent in the pool or she voluntarily went into the deep end. Her entry into the deep end of the pool was the proximate cause of her injuries. Defendants' actions may have been a proximate cause, but not the most immediate cause. *Watts, et al v Nevils*, et al, unpublished per curiam opinion of the Court of Appeals, dated September 18, 2007 (Docket No. 267503).

42 USC 1983/Procedural Due Process

Plaintiff's minor was an eighth grade student in Tennessee. On September 16, 2005, her cellular phone rang during class. Her teacher confiscated the phone and delivered it to the school principal's office. The school code of conduct prohibited personal communication devices during school hours. A first offense required confiscation of the device and a return of the device to a parent after 30 days along with one day in-school suspension for the student. On September 19, 2005, the principal refused to return the cell phone to plaintiff's minor's father before the expiration of the 30 days. Plaintiff's minor served her one day suspension on September 20, 2005, but her parents were not aware of their daughter's suspension until she told them that night. The student's father brought suit under 42 USC 1983 related to the 30 day retention of the phone and the in-house suspension, along with other claims. The district court granted summary judgment as to all of plaintiff's claims, except concerning procedural due process rights related to the in-school suspension. Specifically, that they were given no formal hearing or notice concerning their daughter's suspension. Defendant sought and was granted interlocutory appeal. The Sixth Circuit Court of Appeals reversed the trial court's denial of summary judgment. Plaintiff's daughter's one day in-school suspension did not implicate her property interest in public education. Unlike with out-of-school suspension, she was not deprived of educational opportunities and was required to complete her schoolwork, even though she was removed from the classroom. Also, in-school suspension does not trigger due process protections for a student's liberty interests and their reputation. Finally, a one day suspension is a de minimus deprivation requiring minimum due process. *Lainey et al v Farley*, 501 F.3d 577 (6th Cir. 2007).