

# GOV LAW

Monthly Publication for Michigan Cities, Townships, Villages and Schools

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## From the Co-Editor by Jami E. Leach



There are six statutory exceptions to the broad grant of governmental immunity in Michigan. This is the second installment in a series of articles that will provide a summary of each exception. We started with the highway exception – one of the most used and most litigated exceptions. Today we touch briefly on the "motor vehicle exception". Remember that the exceptions to immunity are very narrowly construed – therefore attention to each word in the statute is imperative. As always, if you have any questions or need some assistance on this or any governmental issue, please feel free to contact one of our nine offices.

### MOTOR VEHICLE EXCEPTION

MCLA 691.1405 creates the "motor vehicle exception" and provides:

Governmental agencies shall be liable for bodily injury and property damage resulting from the negligent operation by any officer, agent, or employee of the governmental agency, of a motor vehicle of which the governmental agency is owner, as defined in Act No. 300 of the Public Acts of 1949, as amended, being sections 257.1 to 257.923 of the Compiled Laws of 1948.

- Motor vehicle means an automobile, truck, bus or similar motor-driven conveyance.

- A broom tractor and a tractor mower are motor vehicles under this exception.



- A hydraulic excavator is a motor vehicle.
- Negligent operation by the employee imposes liability upon the agency. An employee is not liable unless they are grossly negligent.
- Operation means driving the vehicle or participating in activities that are directly associated with driving.



- The injury or damage must have resulted from the negligent operation. In other words, the negligently operated vehicle must have been physically involved in the accident. *Robinson v Detroit*, 462 Mich 439 (2000).
- Police owe no duty to the driver or voluntary passenger in a fleeing vehicle.
- No damages for loss of consortium because this is not a physical injury.

## HEAD'S UP



On January 27, 2009, the Court of Appeals released its published opinion in *Gadigan v City of Taylor*. The court held that the portion of the highway exception that deals with sidewalks and the "2-inch rule" provides municipal defendants with only a rebuttable inference rather than a rebuttable presumption. The difference, according to the court, is that an inference allows a trier of fact to conclude the ultimate fact but does not compel them to do so. On the other hand, a presumption does. The opinion is not clear as to whether summary disposition is ever appropriate with a rebuttable inference or what evidence would be necessary to rebut the inference. The city intends to file an application for leave to appeal. Stay tuned.



Under federal practice, a 12b6 motion **is not a responsive pleading**, although most lawyers treat it as one. Accordingly, a plaintiff could file a default for not answering the complaint, and unless the motion is granted, liability has been established. Therefore to protect against that possibility, after the 12b6 is filed, an answer should also be filed to protect the defendants in the event the motion is denied.



The Michigan Supreme Court has issued its opinion in *Odom v Kelly*, holding that the "Ross" standards apply to determine the immunity available to governmental employees as to allegations of intentional tort directed against them. PLEASE NOTE THAT THIS IS AN AFFIRMATIVE DEFENSE AS TO THESE EMPLOYEE DEFENDANTS and must be pled as such – unlike the law as to the entities which says that the defense can be raised at any time. Also, the burden as to the employees will be on them, while the burden as to the entities is on the plaintiff.

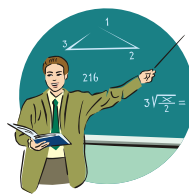


The US Supreme Court released its opinion in *Pearson v Callahan*, holding that the order of the two step qualified immunity test for 42 USC 1983 cases, mandated by the Saucier opinion, is no longer mandatory, but now discretionary. In other words, in appropriate cases, the court can skip right to the question of "clearly established law" without having first resolved whether there was a constitutional deprivation.



The US Supreme Court released its opinion in *VanDeKamp v Goldstein*, finding absolute prosecutorial immunity for actions that are intimately associated with the judicial phase of the criminal process. Absolute immunity may not apply when a prosecutor is engaged in investigative or administrative tasks.

## ESTABLISHMENT CLAUSE by Paul E. Tower



The Establishment Clause of the Constitution prevents a state from enacting laws that have the purpose or effect of advancing or inhibiting religion. The Sixth Circuit Court of Appeals in *Smith v Jefferson County School Board*, 549 F 3d 641 (6th Cir. 2008) held that former teachers of a school district could proceed against a school board under the Establishment Clause when the school board shut down its public alternative school and replaced it with a private school that espoused a Christian orientation. The biggest obstacle for the teachers was the issue of standing to bring such a claim.

The court looked at two types of standing: individual standing and municipal taxpayer standing. The school board argued that the teachers did not have individual standing because their alleged injuries did not occur as a result of any religious belief. The court rejected this argument. The court decided that their injuries were directly linked to the board's decision to abolish the alternative school that it once operated in order to contract out for services of the private school. With respect to municipal taxpayer standing, the school board argued that

it did not directly subsidize a sectarian school, and that the teachers could not establish that the funds that the board contracted to pay the private school would have resulted in a measurable loss directly to the teacher taxpayers. The court also rejected this argument. The court conceded that federal and state taxpayer standing has a rigorous standard to meet. However, the court stated that the teachers established municipal taxpayer standing because they could prove an injury, that the allegedly unconstitutional expenditure caused this injury, and that the injury could be redressed through their action in district court.



The teachers also raised a procedural due process claim and a substantive due process claim. The court dismissed the teachers' procedural due process claim on the basis of legislative immunity because the board engaged in legislative activity when it made the budgetary determination to eliminate the alternative school. With respect to substantive due process, because the teachers' Establishment Clause claim directly addressed the conduct at issue, the court held that the teachers' substantive due process claim was extinguished. The court also determined that the individual board members were immune from suit because the members of the board were entitled to legislative immunity in their individual capacities.



There was one dissent as it pertains to the standing issue. The dissent believed that the injuries the teachers suffered when their positions were eliminated were not the type that the Establishment Clause protects. He believed that the teachers could not establish what their individual rights were as opposed to the rights of others not party to the proceedings. He also thought that the teachers did not have standing to bring the Establishment Claim as taxpayers because they could not show that the challenged municipal action depleted the municipal treasury such that they would at least, in theory, be subject to increased taxation.