

# GOV LAW

Monthly Publication for Michigan Cities, Townships, Villages and Schools

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## From the Editor by John J. Gillooly



### Complimentary Seminars and Continuing Education

For more than 60 years, Garan Lucow Miller has been providing its clients with what we call "continuing client education".

By teaming up with you and keeping track of current legal issues, many legal expenses are often reduced.

Whether its presenting a GLM seminar or speaking at a seminar sponsored by another organization, members of Garan Lucow Miller are on the road nearly every month educating leaders in government, business and the insurance industry about current trends in the law. Our complimentary seminars are widely known as an important tool in recognizing legal trends. Garan Lucow is offering two free seminars in October:

### Garan Lucow Miller's Second Annual Gateway Breakfast Seminars On Michigan No-Fault and Premises Liability

October 24, 2007 in St. Louis

October 25, 2007 in Kansas City



These seminars are intended to provide the most current updates to those who presently handle claims in these complicated and ever-changing areas. We will also outline the important basics of handling such claims effectively for those who are new to Michigan law or seeking to expand their lines of business.

I will be speaking at two upcoming seminars in October which are sponsored by the MML. On October 12, 2007 in Grand Rapids I will discuss the FOIA and the OMA in two lectures entitled "**Understanding FOIA and Making the Proper Responses**" and "**Open Meetings Act**". I will be presenting similar lectures on October 18, 2007 in Frankenmuth. To register for either of these programs, please visit [www.mml.org](http://www.mml.org).

Garan Lucow Miller can also tailor a seminar to meet your specific needs. Please feel free to call me for further details at 313.446.5501. All our best.

## Municipal Law Update by Jennifer Bruening



### Highway Exception - Sidewalks

◆ Plaintiff slipped and fell on a sidewalk near her home, injuring her knee. On the night of her fall, her street was closed for construction, so her friend dropped her off in front of a neighbor's home instead and plaintiff traversed the sidewalk adjacent to the closed road to get to her home. On the walk to her own home, plaintiff fell. The trial court denied defendant's motion for summary disposition, finding that the highway exception applied to the sidewalk, even though the road itself was closed for repairs. The Court of Appeals reversed, holding that the highway exception applies to sidewalks laying adjacent to public highways. A municipality can suspend its duty to maintain a highway by erecting barricades and closing the road to through traffic. Closing a road to public traffic suspends liability under the highway exception for the road, as well as the adjacent sidewalk. In this

case, the road had been closed for construction. Plaintiff fell on the sidewalk next to the closed road. The highway exception does not apply in such a case, therefore summary disposition on behalf of the defendant was appropriate. *Marshall v Bay City*, unpublished opinion per curiam of the Court of Appeals, issued April 19, 2007 (Docket No. 272139).



◆ Plaintiff lost control of his bike when the bike slid on a slippery surface under a puddle of standing water on the municipal sidewalk. Plaintiff's expert testified that the sidewalk had an incorrect pitch and a depression in the walkway that caused water and muck to accumulate. The trial court ruled that whether the sidewalk was defective was a question of fact. The Court of Appeals reversed, citing *Haliw v Sterling Heights*, 464 Mich 297 (2001), and ruling that plaintiff must show that his injuries resulted directly, not indirectly, from a persistent defect in the sidewalk. In this case, like *Haliw*, plaintiff showed only that an accumulation of water and other substances caused the accident leading to injury. It is not sufficient to show the presence of an accumulation leading to an accident, regardless of whether a defect caused the accumulation. Plaintiff could not show any sidewalk defect that directly caused his injuries, therefore the municipality was entitled to summary disposition. *Burton v Waterford Township*, unpublished opinion per curiam of the Court of Appeals, issued April 26, 2007 (Docket No. 274332).

- ◆ Denial of summary disposition in favor of the municipality was improper in this action involving a dispute about the height differential in a sidewalk plaintiff claimed caused her to fall. MCL 691.1402(a)(2) states that a "discontinuity defect of less than 2 inches creates a rebuttable presumption" that the city maintained the highway, or sidewalk, at issue. In this case, photographs showed a sidewalk differential less than two inches. Plaintiff presented different photographs purporting to show a differential greater than two inches, but her photos did not contradict defendant's measurements showing that the defect was less than two inches. Other alleged defects in the sidewalk were not relevant to the analysis, because those defects did not cause plaintiff's

fall. Because she could not present any evidence rebutting the presumption that the sidewalk was maintained, defendant was entitled to summary disposition. *Baine v City of Inkster*, unpublished opinion per curiam of the Court of Appeals, issued April 26, 2007 (Docket No. 274261).

### Motor Vehicle Exception

- ◆ Plaintiff went to Lincoln High School to watch a football game when Defendant Howard, an athletic trainer for the school district, ran over plaintiff's foot with a golf cart. Plaintiff's complaint alleged the defendants negligently operated the golf cart, causing injury to her foot. She argued that immunity was not available pursuant to the motor vehicle exception. The governmental immunity act does not define "motor vehicle," nor does it reference the vehicle code. Consequently, the Court defined the term according to its plain meaning. Using this ordinary definition, the Court found that the golf cart constituted a motor vehicle, for which the motor vehicle exception to immunity applied. The defendant school district, therefore, was not entitled to immunity. Defendant Howard, however, was entitled to immunity. The motor vehicle exception acts to modify provisions arising under MCL 691.1405, which only addresses a governmental agency's immunity. The agency, therefore, was not entitled to immunity pursuant to the motor vehicle exception. Government employees, however, are treated differently than the agencies for which they work, so the Court looked to MCL 691.1407(2) to address whether Howard was entitled to immunity. MCL 691.1407 grants immunity to government employees except when their conduct amounts to gross negligence. Plaintiff admitted in the lower proceedings and on appeal that she was not alleging gross negligence against Howard. Because no gross negligence had been asserted, plaintiff's action against Howard could not stand, and Howard was entitled to immunity. *Overall v Howard*, unpublished opinion per curiam of the Court of Appeals, issued April 26, 2007 (Docket No. 274588).

### Official Capacity

◆ Defendant Strong was responsible for digging graves, filling them in, and keeping records of who is buried in a cemetery. He received payment for his services directly from funeral homes or decedents' families. In 2002, the township clerk asked that he move a vault. He secured payment from the deceased's family, made arrangements to move the vault, and dug unmarked holes for removal of the vault. Typically, such holes remained open for a couple of days while awaiting a move. Plaintiff was injured when she stepped into one of the holes and fell. At the time she fell, she was looking into the distance, rather than at the ground. At issue was whether Defendant was entitled to governmental immunity for digging the holes. Plaintiff alleged he was not working as an officer for the municipality at the time he dug the grave, but that he was instead working as a contractor for the family of the deceased, who paid him to move the grave. As an independent contractor, she argued, he was not entitled to immunity. The Court found, however, that Township rules required Defendant to be appointed as sexton in order to perform services related to grave digging and cemetery work. The Township rules also required that he receive payment for these services directly from the families or funeral homes. In essence, defendant could not perform his job unless he was appointed as a Township officer, and he could not legally receive payment from someone other than the family of a deceased, or a funeral home. Based upon the Township's requirements, the Court held that Defendant, who was operating pursuant to the Township's rules, was working in his official capacity when he dug the graves. He was therefore entitled to immunity and could not be liable unless his conduct amounted to gross negligence. In this case, there was no evidence of gross negligence, because the defendant followed all the ordinary processes for carrying out his job duties, and the large size of the hole was so unmistakable that its size was marker enough to alert passers by to its presence. *Hiar v Strong*, unpublished opinion per curiam of the Court of Appeals, issued April 26, 2007 (Docket No. 274247).



### PPO - Failure to Arrest

◆ At the time of the events giving rise to litigation, beginning in August 2000, the decedent was going through a tumultuous divorce with her husband. She obtained a PPO against him and contacted the Waterford Township police department on multiple occasions because he was violating the PPO terms. On at least one occasion, the WTPD arrested him for violating the PPO. On February 10, 2001, several officers responded to a hang-up call received from decedent's residence. They arrived at decedent's home, where her husband was upset about a check he had not received. In the meantime, the officers learned that the PPO had been modified and he had not been served with it. The officers verbally served him with the modified PPO, and allowed him the chance to comply with the modified PPO rather than be arrested on the spot. He chose to comply and left the scene. The next day, he forcefully entered decedent's home, where he shot and killed both his wife and himself. Suit was filed against Waterford Township and several of its officers alleging a violation of civil rights by failing to enforce the PPO, and denial of a public service based upon gender and marital status. The Court of Appeals first noted that Brenda had been assisted by the WTPD on at least 5 prior occasions. The crux of plaintiffs' complaint, therefore, was that the officers did not perform their services in a satisfactory manner, not that decedent had been denied a public service. Further, absolutely no evidence in the record suggested that decedent's gender or marital status influenced the officers' decision-making process. Finally, plaintiffs argued that because the officers could have arrested Gilbert at any time for his PPO violations, yet chose not to, indirect evidence of discrimination existed. The Court rejected the plaintiffs' argument, finding that plaintiffs cited no statute compelling the officers to arrest Gilbert and that their conclusion that the officers' failure to arrest constituted discrimination was impermissible speculation. Summary disposition for the defendants was therefore proper in this case. *Brooks v Knapp et al*, unpublished opinion per curiam of the Court of Appeals, issued May 10, 2007 (Docket No. 274707).

### Zoning

◆ Berrien County chose to a site for a new law enforcement training facility, which included several shooting ranges. The parties did not dispute that the County could construct the building itself at the desired site without regard to Township zoning and anti-noise ordinances. Rather, the Plaintiffs, all neighboring residents, filed suit to challenge the county's ability to build the improvements to the facility, specifically the shooting ranges, alleging that the shooting ranges were subject to the Township's ordinances and thus could not be built. The Court of Appeals analysis began by noting that *Pittsfield Charter Township v Washtenaw County*, 468 Mich

702 (2003), coupled with MCL 46.11(b) and (d), exempt a county from township zoning ordinances with respect to siting county buildings. In this case, the Court reasoned that a county building "site" includes not just the building on a specific lot, but the entire parcel where a County intends to locate a building. In other words, the holding in *Pittsfield* extends to all ancillary improvements, such as parking lots, sidewalks, lighting, and landscaping. Consequently, all improvements located on the county site are exempt from Township ordinances and therefore, the shooting ranges were also exempt from the ordinances. *Herman v County of Berrien*, 275 Mich App 382 (2007) (Docket No. 273021).