



FROM GARAN LUCOW MILLER'S MUNICIPAL LAW DEPARTMENT

# GOV LAW

Monthly Publication for Michigan Cities, Townships, Villages and Schools

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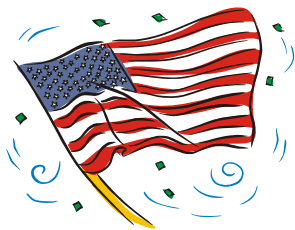
## From the Editor

by John J. Gillooly



All too often we begin our day by hearing of the ways in which municipalities are trying to conserve precious resources: tax dollars. So far this year, Garan Lucow Miller has helped several communities save hundreds of thousands of dollars by negotiating more competitive refuse and recycling hauling contracts. Did you know that some resource recovery authorities are in need of refuse just to meet their monthly quotas? Or how about the willingness of some refuse disposal companies to actually reduce their rates in exchange for a contract for a term of years. The refuse disposal business has never been so competitive. Use the competition among the various refuse haulers to your advantage. Contrary to many reports, disposal rates at local landfills and transfer stations has never been cheaper.

Please call us to see how Garan Lucow Miller can assist your community in negotiating or re-negotiating its next refuse disposal contract.



Have a Safe and Happy Memorial Day

## Garan Lucow Miller Demonstrates Commitment to Continuing Legal Education

by Jami E. Leach

Many of you are aware of our firm's commitment to educating our clients in the law through our numerous publications and free seminars. But, did you know that our firm is also committed to continuing education for its own members. Garan Lucow Miller encourages and supports its attorneys' needs and desires to attend continuing education programs.



On April 27-28, 2006, several Garan Lucow Miller attorneys attended the 23rd Annual Conference on Section 1983 Civil Rights Litigation at the Chicago-Kent College of Law. The group was comprised of attorneys from our firm's appellate and municipal groups from five of our nine Michigan offices.

The two-day seminar covered several interesting topics, presented by renowned professors and practitioners from across the country. The topics included:

- ★ The Prima Facie Case Against Individuals
- ★ Individual Immunities
- ★ Title VII and Section 1983 Sexual Harassment Claims
- ★ Public Employees: First Amendment and Procedural Due Process
- ★ Municipal Liability
- ★ Police Misconduct

Attendees were reminded of several important issues which we would like to call to your attention with regard to 42 USC §1983 litigation:

- Punitive damages are not available against municipalities;
- Immunity is an affirmative defense;
- Denial of immunity is immediately appealable;
- Suits naming individuals in their "official capacity" rather than their "individual capacity" are actually suits against the municipality (the chart which follows demonstrates some of the important differences between official and individual capacity lawsuits).

<u>Individual Capacity</u>	vs.	<u>Official Capacity</u>
Suit against a person (officer)		Suit against entity
Officer can claim qualified immunity		No qualified immunity for entity
Punitive damages available		Punitive damages not available

With regard to claims against municipalities (or individuals in their "official capacity") the plaintiff must plead and prove an unconstitutional policy, practice or custom. A plaintiff can do this in several different ways:

1. By showing a formally adopted policy that is unconstitutional on its face;
2. By showing a custom, practice, or usage of a facially constitutional policy in an unconstitutional manner;
3. By showing deliberate indifference on the part of policymakers that encourages non policymakers to violate rights (i.e. fail to train / fail to discipline); or
4. By showing unconstitutional conduct on the part of the final policymaker.

In order to avoid liability under number 1 above, municipal attorneys should take a look at written policies, procedures and general orders at least once a year to determine whether they remain constitutional in light of recent case law and legislation.

A good way to avoid liability under numbers 2-4 is to thoroughly investigate allegations of abuse and to appropriately address cases where the investigation reveals that an abuse occurred. Another excellent way to avoid liability is through continuing education. All personnel should receive updated training on at least an annual basis to be sure that they are aware of changes in the law. Many municipalities have great initial training for new employees but forget about re-training existing employees. Garan Lucow Miller would be happy to assist you in this area. Feel free to give us a call to discuss how we can help.

**Court of Appeals Gives More Protection to Municipalities in Sewer Backup Cases**  
by Megan Cavanagh



In the recently published decision of Willett v Charter Township of Waterford, \_\_\_ Mich App \_\_\_ (released on May 2, 2006), the Michigan Court of Appeals addressed the issue of what a plaintiff must establish in order to avoid

governmental immunity for a sewage back up claim under MCL 691.1417. In this case, the plaintiff alleged that he suffered property damage as a result of raw sewage which flooded his basement. Within approximately two and one-half hours of being notified of the problem, the Township of Waterford had responded to the plaintiff's complaint, investigated and identified the cause of the backup and utilized a jet truck to successfully dislodge the obstruction. Although it was never definitively determined what caused the sewer backup, it was believed that a piece of concrete or asphalt had been introduced into the sewer line by an unknown third party.

The plaintiff filed suit and argued that he had sufficiently pled in avoidance of governmental immunity under MCL 691.1417(2) because he had alleged that the sewage backup was an "event" under the statutory definition and that the defendant was an appropriate governmental agency under the statutory definition. The defendant Township sought summary disposition on the basis of governmental immunity, arguing that the plaintiff was required to, but could not, establish the five elements

of MCL 691.1417(3). Specifically, MCL 691.1417(3) requires the plaintiff to establish that (1) the governmental agency was an appropriate governmental agency, (2) the sewage disposal system had a defect, (3) the governmental agency knew, or in the exercise of reasonable diligence should have known of the defect, (4) the governmental agency failed to take reasonable steps in a reasonable amount of time to repair, remedy or correct the defect, and (5) the defect was a substantial proximate cause of the event and the property damage or physical injury complained of. The trial court granted the Township summary disposition finding that the Township was entitled to immunity because the sewer obstruction was not a "defect," as defined in MCL 691.1416(e) and that the Township employees' initial method of trying to correct the defect - opening manhole covers without the benefit of drawings - did not constitute an "event" under the statute.

On appeal, while the plaintiff homeowner argued that he need establish only the two elements of MCL 691.1417(2) - namely that the sewage backup was an "event" under the statutory definition and that the defendant was an appropriate governmental agency under the statutory definition - a majority of the Court of Appeals held that the plaintiff did not avoid governmental immunity because he could not establish all of the elements of MCL 691.1417(3), in addition to the requirements of MCL 691.1417(2). The majority held that the circuit court erred in holding that the obstruction was not a "defect," as defined in MCL 691.1416(e) and that the Township's employees' actions of opening the manhole covers was not an "event" under the statute. However, the majority concluded that the Township was, nevertheless, immune from suit because no reasonable juror could conclude that the Township knew or should have known of the defect or that the Township's efforts to repair or correct the obstruction were anything other than reasonable.

Judge Murphy concurred in the majority's decision to affirm summary disposition in favor of the Township but specifically disagreed with the majority's analysis. Judge Murphy concluded that MCL 691.1417(2), alone, set forth the only two requirements to avoid immunity, while MCL 691.1417(3) articulated what a plaintiff needed to prove in order to establish liability under the statute. While the

result - summary disposition to the municipal defendant - was the same regardless of whether it was viewed as the plaintiff's inability to avoid immunity or the plaintiff's inability to establish liability, Judge Murphy concluded that the immunity analysis was separate and distinct from the liability analysis and that the majority was incorrect in grafting the language of MCL 691.1417(3), regarding liability, onto the language MCL 691.1417(2), regarding immunity.

This distinction between immunity and liability is often blurred, both by the court and by the parties. While, as noted by Judge Murphy, the end result is oftentimes the same, the distinction does have some relevance. For instance, a governmental party has an appeal as of right from an order denying governmental immunity but must seek interlocutory relief from non-final orders denying summary disposition on the basis of liability. Under the majority's holding in Willett, a governmental defendant wishing to challenge a trial court's ruling regarding the elements of a claim under MCL 691.1417(3) - arguably an issue of liability - will now be able to file an appeal as of right on the basis of immunity.

**HANDS UP!!**

*People v Nathan Lamarr Fisher*, COA #260397  
(April 25, 2006)



A recent unpublished opinion of the Michigan Court of Appeals reiterated that where police have probable cause to arrest, they may conduct a search of the sort properly incidental to arrest whether or not the suspect is in fact arrested. The Court quoted a 1988 Supreme Court opinion which stated: "There is no case in which a defendant may validly say, 'Although the officer had a right to arrest me at the moment when he seized me and searched my person, the search is invalid because he did not in fact arrest me until afterwards.'" *People v Arterberry*, 431 Mich 381 (1988).