



FROM GARAN LUCOW MILLER'S SPORTS & RECREATION LAW DEPARTMENT

LEISURE SUIT

www.garanlucow.com

Garan Lucow Miller, P.C. 1000 Woodbridge Street Detroit, Michigan 48207 313.446.5523

From the Editor by Nathan A. Dodson



Welcome to the first edition of Garan Lucow Miller's Leisure Suit. We started this newsletter with one goal in mind: To offer the most in-depth, cutting edge information regarding the legal aspects of sports and recreation to owners, operators and managers of athletic, recreation and fitness facilities, youth sports leagues, and day and overnight camps, as well as to public schools, coaches, and municipalities. This quarterly publication, delivered right to your desktop, will bring you analysis, insights, and practice pointers to assist you in handling claims related to legal issues impacting your business.

For over 60 years, Garan Lucow Miller has represented the interests of its 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 any of your sports and recreation legal issues whether they involve slip and falls, sports related injuries, intentional torts, crowd-control, security, dramshop, food liability, general negligence, gross negligence and recklessness, or civil rights violations. 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.

Over the past 20 years, Garan Lucow Miller has provided no-fault, premises liability, commercial law, municipal law, and maritime legal news and analysis to our clients through our Law Fax, Boat Fax, Gov Law, and Commercial Law Reporter publications. Coupled with our seminars, now offered nationwide, we have garnered a reputation as the law firm that continually strives to inform and educate its clients. We now

offer Leisure Suit as another, exclusive resource for legal information important to you and your business.

We are happy to answer any questions you may have and provide any further information that might assist you. Feel free to call me directly at 313.446.5523.

To add or remove a name from this email list, write to ndodson@garanlucow.com

DECISIONS, DECISIONS *Highlighting recent court decisions that affect your business*



SWING... AND MISS

Michigan Court of Appeals declares a net loss for claimant's suit against city owned golf course

In the case of *Transou v. City of Pontiac*, ____ Mich App ____, 2009 WL 153395, the plaintiff was injured when he was struck by a golf ball at the Crystal Lake Golf Course, which was owned by the City of Pontiac. The City moved for summary disposition asserting that the action was barred by governmental immunity. The trial court granted the motion and the plaintiff appealed.

The Michigan Court of Appeals agreed with the lower court's ruling. Generally government agencies are immune from tort liability. MCL 691.1407(1). On the other hand, governmental immunity does not apply to actions to recover for bodily injury arising out of the performance of a proprietary function. MCL 691.1413. Proprietary function is defined by statute as "any activity which is conducted primarily for the purpose of producing a pecuniary profit for the governmental agency, excluding, however, any activity normally supported by taxes or fees." MCL 691.1413.

The Court's review of the record revealed that the City's golf course was not a proprietary function within the meaning of the statute because it was not "conducted primarily for the purpose of producing a pecuniary profit." Any revenue generated from the golf course was used in a self-sustaining manner to meet operation costs, rather than deposited in a general fund or used on unrelated events. Additionally, the golf course had operated at a loss for several years and was not considered as a basis to reduce tax milage or other city operations.

Because the evidence did not show the golf course was operated primarily for the purpose of producing a pecuniary profit, the Court of Appeals concluded the City was immune from liability and affirmed summary disposition in favor of the City.



KEPT IN THE DARK

Michigan Court of Appeals gives icy reception to premises liability action with inadequate lighting claim

Recently, in the case of *Estate of Gorges v. Kenna*, ___ Mich App ___, 2009 WL 153421, the Michigan Court of Appeals

affirmed the trial court's grant of summary disposition to the defendant in this premises liability and wrongful death action because the alleged hazardous condition was open and obvious and there were no special aspects rendering the condition unreasonably dangerous despite its open and obvious nature.

The decedent died two weeks after slipping and falling on the defendant's icy sidewalk. The decedent had lived in Michigan for approximately 12 years, was familiar with Michigan winters, and knew there could be ice in winter conditions. The evidence also showed that when the decedent arrived at defendant's premises, it was late at night, there was freezing rain, and it was cold and windy. The Court of Appeals found that given the time of night and the weather conditions, a reasonable person would have anticipated and foreseen there could be ice on the sidewalk. Thus, the condition was open and obvious.

The plaintiff argued "special aspects" removed this case from the open and obvious doctrine because the sidewalk violated building codes in that it was not level and not lit. The Court disagreed, finding that dark nights and uneven sidewalks are encountered on a daily basis. Moreover, the court pointed out that "even in cases of code violations, the relevant inquiry remains whether any special aspects rendered the otherwise open and obvious condition unreasonably dangerous." There

was nothing unusual or unreasonably dangerous about this sidewalk.

***Note** While this case involved a residential sidewalk, the court ruled that the plaintiff's status as an invitee vs. a licensee was unimportant to its decision. Therefore, this case may apply equally to private businesses.*



TEMPERING THE ALLEGATIONS

Restaurant employee attacks customer, but Michigan Court of Appeals finds criminal activity unforeseeable and no notice on part of defendant employer of an imminent risk of harm to the plaintiff

In *Hodges v. ECS Partnership*, ___ Mich App ___, WL 50027, the plaintiff, a mentally incapacitated adult, was waiting for his food to be prepared at the defendant's restaurant, when a restaurant employee cursed at him with no provocation. When the plaintiff screamed out in response, the employee told plaintiff to shut up or else he would resort to physical violence. The plaintiff alerted the restaurant supervisor, who silenced the employee. Soon thereafter, however, the employee attacked the plaintiff without any provocation. The supervisor tried to pull the employee off the plaintiff and called the police. The plaintiff alleged negligent hiring, negligent supervision/retention, and vicarious liability. Summary disposition was granted to the defendant.

On appeal, the plaintiff argued that defendant owed a duty to the plaintiff once its employee made verbal threats to assault the plaintiff. The Court of Appeals affirmed summary disposition and ruled that merchants have a duty to respond reasonably to situations occurring on their premises that pose a risk of imminent and foreseeable harm to identifiable invitees, citing *Mason v. Royal Dequindre, Inc*, 455 Mich. 391, 398, 405; 566 NW2d 199 (1997). This duty is limited to reasonably responding, by calling the police, to situations that occur on the premises and pose a risk of imminent and foreseeable harm to identifiable invitees. *MacDonald v. PKT, Inc*, 464 Mich. 322, 345; 628 NW2d 33 (2001). When an employee's criminal activity is unforeseeable by his employer, the employer will not be held liable for that criminal activity, citing *Brown v. Brown*, 478 Mich. 545, 553; 739 NW2d 313 (2007).

In the instant case, the restaurant employee had no criminal record and no history of aggressive behavior before the subject incident. Therefore, the employee's actions were not foreseeable and the defendant owed no duty to the defendant. While the employee's threat was lewd and tasteless, it was not an inevitable prelude to the attack since it did not clearly and

unmistakably threaten particular criminal activity that would have put a reasonable employer on notice of an imminent risk of harm to a specific victim.

The Court additionally held that even if it were to find that the defendant owed a duty to the plaintiff, the supervisor was not negligent in the performance of that duty since he responded reasonably to the situation by calling the police, and when the unforeseeable attack did occur, the supervisor intervened on the plaintiff's behalf.

KEEPING UP WITH THE JONES'
A look at recent decisions from other jurisdictions that could affect or change Michigan law



LET'S GET PHYSICAL
Cheerleading the new football? Well, not quite, but Wisconsin Supreme Court declares cheerleading a contact sport

On January 27, 2009, the Wisconsin Supreme Court unanimously ruled in a lawsuit brought by a female varsity basketball cheerleader that high school cheerleading is a contact sport and therefore its participants cannot be sued for accidentally causing injuries.

While practicing a stunt for the first time before a basketball game in 2004, the plaintiff fell backwards off the shoulders of another cheerleader and suffered a head injury. She then filed a lawsuit against the 16-year-old male cheerleader who was supposed to be her spotter, but failed to catch her, as well as the school district and its insurer. The plaintiff claimed that the coach was negligent for failing to supervise the stunt and not making sure that mats were being used.

The Wisconsin Supreme Court rejected the plaintiff's argument that contact sports were limited to aggressive sports. In its opinion, the court ruled that lawmakers meant to limit liability for "any recreational activity that includes physical contact between persons in a sport involving amateur teams." The court further held that cheerleading involves "a significant amount of physical contact between the cheerleaders that at times results in a forceful interaction between the participants."

The decision means that cheerleaders can only be sued for acting recklessly in causing injuries, and that the plaintiff's teammate's actions were only a mistake. The court also concluded that the district could not be sued for the coach's behavior under Wisconsin law that shields government

agencies from lawsuits for the actions of employees. This is the first decision of its kind in the nation.

***Note** The reckless misconduct standard has already been adopted by the Michigan Supreme Court as the minimum standard of care for co-participants injured while engaged in certain recreational activities. Ritchie-Gamester v. City of Berkley, 461 Mich. 73; 597 NW2d 517 (1999).*

FAST FORWARD
A sneak peak at proposed changes in the law



HEADS UP
Michigan lawmakers considering helmet requirement for skiers and snowboarders

2008 House Bill 5628, introduced by State Representative Bob Constan was referred to the House Tourism, Outdoor Recreation, and Natural Resources Committee. The bill amends the Ski Area Safety Act of 1962 by mandating skiers and snowboarders to wear helmets while on the slopes. The bill also requires parents to ensure that minors wear helmets on the slope. The bill further specifies that helmets would be required to comply with the American Society for Testing and Materials Standard (ASTM) F2040-02. Violation of the statute would be a civil infraction subject to a \$100 fine.

Remember that Garan Lucow Miller, P.C. has nine offices throughout the State of Michigan to serve all of your municipal needs:

Wayne County Office. 1-800-875-1530
Washtenaw County Office. 1-800-878-5600
Ingham County Office. 1-888-910-0300
St. Clair County Office. 1-800-875-4400
Oakland County Office. 1-800-875-7600
Genesee County Office. 1-800-875-3700
Kent County Office. 1-800-494-6312
Northern Michigan Office. 1-888-923-1611
Upper Peninsula Office. 1-888-841-7772