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Public Corporation Law Quarterly

Developments in Michigan's Governmental Immunity Law

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Introduction

Michigan's Governmental Tort Liability Act (GTLA), MCL § 691.1401 et seq. provides a general statutory immunity from tort liability to governmental agencies. This is so long as "the governmental agency is engaged in the exercise or discharge of a governmental function." MCL § 691.1407(1). There are exceptions to this general immunity. The following six are codified in the GTLA: (1) the defective highway/sidewalk exception, MCL § 691.1402; (2) the motor vehicle exception, MCL § 691.1405; (3) the public building exception, MCL § 691.1406; (4) the proprietary function exception, MCL § 691.1413; (5) the governmental hospital exception, MCL § 691.1407; and (6) the sewage disposal system exception, MCL § 691.1417.

The liability of individual government employees and volunteers is governed by a different test, the gross negligence standard outlined at MCL § 691.1407(2) as well as, at the current time, the law of intentional torts.[1]

There are, of course, areas not encompassed by the GTLA where the Michigan legislature has permitted specific actions against a governmental agency notwithstanding governmental immunity. See, e.g., Michigan's Elliott-Larson Civil Rights Act, MCL § 37.2103. The same holds true for federal legislation such as the Americans with Disabilities Act and the Whistle Blowers' Protection Act. Such causes of action do not fall within the tort area of law and are outside the scope of this article. Rather, we will analyze certain developments which seemingly provide additional protection to governmental agencies in the tort liability area under the GTLA exceptions.

I. The Defective Highway/Sidewalk Exception - MCL §§ 691.1402, 691.1403, AND 691.1404.

(a) MCL § 691.1402-The Defective Highway/Sidewalk Exception Generally Defined.

In *Estate of Chantell Buckner, et al. v City of Lansing*,[2] the Supreme Court, in a case involving a tragic set of facts, dealt with claims involving alleged municipal sidewalk liability.

On January 29, 2005, 7-year old Chantell Buckner together with 13-year old LaQuatta Wright and Lanecia Wright, age 14, were walking from their home on Sagi-

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Chairperson's Corner

By Jeffrey V. H. Sluggett, Law Weathers & Richardson, PC

It's hard to imagine that this is my last column for the *Public Corporation Law Section Quarterly*. The year has passed quickly for me, and it has been my distinct pleasure and honor to serve as the chairperson of the section.

I am constantly impressed by the quality of the membership in this section. The section is comprised of talented attorneys who are able to master multiple areas. In my experience, section members are dedicated public servants who are a credit to the profession in their intellectual curiosity and commitment to the pursuit of public sector knowledge. Similarly, the members of the council are devoted to serving the membership's interests, often going "above and beyond" in order to facilitate information sharing and the planning of events. This tradition will, I am sure, continue under able officers and members. I would like to extend a special thanks to Tom Schultz and Steve Joppich, who serve as the editors of this *Quarterly*. Their efforts go largely unsung, and yet the *Quarterly*, the principal means of communication between and among members, is largely the result of their ongoing efforts.

I would also like to remind the membership that our annual meeting will be held on Friday, June 27, 2008, at the Drummond Island Resort and Conference Center, immediately following the first day of the PCLS/MAMA Summer Seminar. The agenda for that meeting will be sent out prior to the meeting and will include the annual election of council members. Another thank you to Mary Fales for assembling a current list of members and their terms of office; we will be seeking adoption of a resolution at the annual meeting confirming the members' various appointments and terms.

The PCLS/MAMA Summer Seminar will be held June 27 and 28 on Drummond Island. If you haven't already made your reservations I encourage you to do so. The speakers this year have been chosen to cover a variety of different areas in public sector law (e.g., the basics of municipal finance, labor and employment issues, and the creation of a proper record in zoning cases, among others). Consistent with the council's direction of the past several years, the emphasis is to offer practical advice and information for your practices. In addition, I am pleased to announce that Justice Elizabeth Weaver has agreed to act as our keynote speaker for the concluding dinner on June 28.

Finally, we noticed a decline this year in the number of requests received by the council to file amicus briefs in appellate matters affecting the section. One of the stated purposes of the section is to provide assistance in cases likely to impact the public sector bar. Accordingly, I want to encourage you to keep the council advised of the cases you are working on and, where appropriate, to request assistance from the section. These are difficult times for public entities in Michigan, and the ability to receive assistance in your pending cases is a tool that you should not hesitate to use.

Thank you, again, for allowing me the opportunity to serve as the chairperson of the section. I wish you and your clients well in the coming year.

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naw Street in Lansing to a nearby McDonald's restaurant. The three girls were walking on the sidewalk on the north side of Saginaw Street in a westbound direction facing oncoming traffic. However, when they reached the intersection of Saginaw and Prudden Streets, the sidewalk became impassable because of a *large, unnatural accumulation of snow and ice* that had been plowed off Saginaw Street and *piled onto the sidewalk by the City of Lansing*.

Reaching this blocked portion of the sidewalk, the girls decided to walk in the roadway along the north curb of Saginaw Street. As they did so, a car heading east toward the girls struck Chantelle and LaQuatta. Both suffered massive injuries. Chantelle died as a result. The car's driver was allegedly intoxicated at the time of the collision.

In its one-paragraph opinion, the majority concluded:

> A governmental agency with jurisdiction over a highway has the duty to "maintain the highway in reasonable repair," MCL § 691.1402(1); *Nawrocki*, supra at 160.[3] The term "highway" includes "sidewalks." MCL § 691.1401(e). In order to show that a governmental agency failed to "maintain [a] highway in reasonable repair," a plaintiff must demonstrate that a "defect" exists in the highway. *Nawrocki*, supra at 158; *Haliw v City of Sterling Heights*, 464 Mich 297 (2001). *Because the accumulation, by itself, of ice and snow on a sidewalk, regardless of whether it accumulated through natural causes or otherwise, does not constitute a "defect" in the sidewalk, plaintiffs have not shown that defendant violated its duty to "maintain" the sidewalk "in reasonable repair."*

In so ruling, the Court reiterated that a governmental agency has no legal liability with respect to a natural accumulation of ice or snow on a sidewalk or roadway.[4] Moreover, Justice Markman's concurrence, written specifically to respond to the dissent of Justice Weaver re-confirmed that the statutory duty provided under MCL § 691.1402 is to "maintain the highway in reasonable repair." The phrase following, i.e. so that the roadway is "reasonably safe and convenient for public travel," reflects only the desired outcome of the duty to maintain and repair, and does not, itself, establish a second duty. Because, in *Buckner*, there was no defect in the sidewalk there could be no breach of the duty to maintain it in reasonable repair, or as otherwise stated in *Nawrocki*, "the duty to repair would generally limit the government's liability to cases in which there are defects." Thus, where as here, no defect existed in the pavement, no liability existed even though the City had created the hazard by plowing the snow and ice onto the sidewalk blocking the young girls' passage.

(b) So Then What Constitutes a Defect?

Perhaps the most significant Michigan Supreme Court roadway/sidewalk case decided in the past number of years is *Wilson v Alpena County Road Commission*.[5] In *Wilson*, the Court provided significant defenses to governmental agencies with jurisdiction over highways or sidewalks under MCL § 691.1402.

In *Wilson*, the plaintiff was riding her bicycle on a county road, snaking her way through "innumerable potholes." At some point as she was riding, she suddenly felt her handlebars drop as she was thrown over the front of the bike onto the road suffering head injuries. Plaintiff asserted that the road had potholes in excess of six inches deep, that the potholes had existed more than 30 days prior to the accident, and that the road commission had failed to properly maintain the road so as to be safe for vehicle travel. Plaintiff also argued that mere patching of the potholes was insufficient and only full resurfacing of the road could make it safe.[6] In *Wilson*, the Court recognized that two separate sections of the defective highway/sidewalk exception applied, the General Duty Section (MCL § 691.1402) and the Notice Provision (MCL § 691.1403).[7]

Reiterating that the sole duty imposed upon governmental agencies in the highway/sidewalk context is the duty to maintain and repair as outlined in *Nawrocki,* the Court noted "...the legislature has not waived immunity if the repair is reasonable *but* the road is nonetheless still not reasonably safe because of some other reason." More significantly, the Court also concluded:

> *...the converse of this statement is true: that is the legislature has not waived immunity where the maintenance is allegedly unreasonable but the road is still reasonably safe for public travel.* We note that pursuant to MCL § 691.1403, in order for immunity to be waived, the agency must have had actual or constructive notice of "the defect" before the accident occurred. In determining what constitutes a "defect" under the Act, our inquiry is again informed by the "reasonably safe and convenient for public travel" language of MCL § 691.1402(1). *In other words, an imperfection in the roadway will only rise to the level of a compensable "defect" when that imperfection is one which renders the highway not "reasonably safe and convenient for public travel," and the governmental agency is on notice of that fact.*

It is the authors' view that this language in *Wilson* significantly raised the level of the plaintiff's burden of proof in a typical road or sidewalk case. While some defects may

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be so obvious that reasonable minds could not differ, most situations will involve pavement irregularities which could be readily avoided or traversed with due attention, i.e., the road/sidewalk is reasonably safe. The Court concluded its opinion with language that should be considered in drafting motions for summary disposition or jury instructions in highway/sidewalk cases:

> ...the governmental agency does not have a separate duty to eliminate *all* conditions that make the road not reasonably safe; rather, an injury will only be compensable when the injury is caused by an unsafe condition, of which the agency had actual or constructive knowledge, which condition stems from a failure to keep the highway in reasonable repair.

Thus in *Wilson*, even though the road commission knew that the road was bumpy and required frequent patching, according to the Court, "these problems do not invariably lead to the conclusion that the road was not reasonably safe for public travel. It may be that a road can be so bumpy that it is not reasonably safe, but to prove her case, *plaintiff must present evidence that a reasonable road commission, aware of this particular condition, would have understood it posed an unreasonable threat to safe public travel and would have addressed it."*[8]

A pair of unpublished Michigan Court of Appeals opinions suggest the direction which the courts may take in the future in light of *Wilson*. In *Horowitz v City of Southfield*,[9] the plaintiff claimed that she fell on a city sidewalk when her right foot caught on a raised part of the sidewalk. While the plaintiff testified that she observed a "very deep crevice" following the accident, she did not measure the depth of the crack. The city was not notified of the incident until seven months later. It took photographs and measured the vertical differential as less than a half inch."

Following *Wilson*, the unanimous Court of Appeals panel affirmed the grant of summary disposition to the city and concluded:

> An imperfection in the roadway will only rise to the level of a compensable "defect" when that imperfection is one which renders the highway not "reasonably safe and convenient for public travel," and the governmental agency is on notice of that fact. *Wilson v Alpena County Road Commission*, 474 Mich 161, 168; 713 NW2d 717 (2006). *Even if one assumed that the photographs taken several months after Plaintiff's fall accurately depicted the condition of the sidewalk at the time of her fall, and that Defendant had actual or constructive notice of that condition, reasonable jurors could not conclude that the condition as depicted rendered the sidewalk not "reasonably safe and convenient for public travel."*

Another panel of the Michigan Court of Appeals followed *Wilson* in a case involving a loose brick in the street at an intersection.[10] The plaintiff fell while he was crossing there, at the only point where pedestrians were permitted to cross during road construction. His foot caught between two bricks, and one brick rolled which the plaintiff believed caused him to fall. Again, following *Wilson*, the Court stated that the mere fact that a roadway is in disrepair does not entitle a plaintiff to recover under MCL § 691.1402(1). "Rather, the plaintiff must prove that the defect is one that renders the roadway 'not reasonably safe and convenient for public travel.'" This issue had been considered by a jury which determined that the road was in reasonable repair and reasonably safe and fit for travel. The Court of Appeals would not disturb that verdict.

(c) The Interplay of MCL § 691.1402(a).

MCL § 691.1402(a) was added to the highway/sidewalk exception to immunity by the Michigan Legislature effective December 21, 1999. Section (1) of the addition provides certain limits on a municipal corporation's duty to repair or maintain a county highway outside the improved portion designed for vehicular travel. More importantly, Subsection (2) notes:

> A discontinuity defect of less than two inches creates a rebuttable inference that the municipal corporation maintained the sidewalk, trailway, crosswalk, or other installation outside of the improved portion of the highway designed for vehicular travel in reasonable repair.

While some have wondered whether Subsection (2) applied only to the installations referenced in Section 1, the courts are seemingly applying it to all municipal roadways with the implicit approval of the Michigan Supreme Court.

Allgaier v City of Warren,[11] merely involved the denial of the plaintiff's Application for Leave to Appeal from decisions of the trial court and Michigan Court of Appeals dismissing his case. However, the dissent of Justice Kelly is telling.

Russell Allgaier was a then 50-year old blind man residing in the City of Warren. He routinely went for walks by himself. He used a cane to avoid tripping or running into things. Twice though, in front of a residential address, he fell. The cause of the falls was a one and one half inch discrepancy in height between adjoining sidewalk slabs. Evidence obtained from the

City Engineer reflected that Warren had a policy of replacing sidewalk slabs if the height differential was three-quarters of an inch or more. The engineer surmised that this represented a safety consideration.

In dissent, Justice Kelly noted that MCL § 691.1402a(2) provides a rebuttable inference that the City had maintained the sidewalk in reasonable repair since the discontinuity defect was less than two inches. However, she asserted that in *Allgaier*, the plaintiff had rebutted the inference because of the engineer's testimony which, in her view, reflected that Warren had decided that any differential more than three-quarters of an inch was unsafe and required remedying.

A significant aspect of *Allgaier* though is its apparent adoption of the two-inch rule to municipal sidewalks. Since it is unlikely that 32849 Grinsell Drive, near which plaintiff fell, is any sort of county highway or installation, it appears that the two inch presumption will be applied across the board to municipal sidewalks generally. It certainly has been in four later unpublished Michigan Court of Appeals opinions, one of which was confirmed, again, by the Supreme Court's denial of leave to appeal.[12]

In *Gutierrez v City of Saginaw*,[13] the plaintiff claimed that she was walking along a sidewalk when her toe caught in a crack causing her to fall and fracture her right wrist. Saginaw sought summary disposition on the ground that the height differential was less than two inches and thus fell under the Section 1402a(2) rebuttable presumption of proper maintenance.

The trial court denied the City's motion because the City had no sidewalk inspection policy in place. The Court of Appeals reversed noting that "A municipality faces liability for injuries caused by defects in sidewalks if that municipality knew or should have known of the defect for at least 30 days before the incident. MCL § 691.1402a(1)(a). However, "[a] discontinuity defect of less than two inches creates a rebuttable inference that the municipal corporation maintained the sidewalk in reasonable repair." MCL § 691.1402a(b)(2).

The plaintiff submitted an affidavit from an investigator reporting that the raised portion of the sidewalk ranged from three-quarters of an inch to one inch in height and traversed the entire width of the sidewalk. The expert also opined that this became an undetectable obstruction because of the darkness of night (the time of the fall) and interestingly that "gate analysis studies have shown that the average pedestrian when walking across a level surface will have a clearance between three eights to five eights of an inch between toe and ground." Notwithstanding the expert's opinions, the appellate court dismissed the case stating:

> Plaintiff's investigator, however, only reported that the defect in question did indeed present an irregularity of less than two inches, opined that it was caused by tree roots, provided data concerning average walking patterns, and observed that Plaintiff's ability to see the defect was hindered by darkness of night. *The legislative determination that a discontinuity defect in a sidewalk of less than two inches is presumptively inactionable is hardly rebutted by evidence of such obvious considerations. The statutory presumption would be eviscerated if such ordinary factors as average walking patterns, the progress of underground roots, or nighttime darkness defeated it.*

(d) MCL § 691.1403 - Actual or Constructive Notice of the Defect by the Governmental Agency Remains Required.

In *Hughes v Jackson County Road Commission*,[14] the Supreme Court denied the plaintiff's Application for Leave to Appeal an adverse decision of the Michigan Court of Appeals.[15]

In *Hughes*, the plaintiff brought suit seeking to recover damages for the death of their grandson who died in an automobile accident on Hawkins Road in Jackson County. The grandson, Steven, was killed when the driver of the car in which he and another passenger were riding, lost control, went airborne and struck a tree. The plaintiffs complained that the Jackson County Road Commission had failed to maintain Hawkins Road in reasonable repair because the gravel road contained "chatter bumps" which caused the loss of control of the vehicle. On its first trip through the Michigan Court of Appeals process, the road commission lost the MCL § 691.1403 notice defense argument because there was evidence that a road commission employee regularly used the road and if the road were defective, the defects were such that it was unlikely that it became noticeable on the very day of the fatal accident. The Court further noted that the road commission had knowledge that the road required regular re-grading and had done so in the past because of the ongoing washboarding effect.

On the initial appeal, the Supreme Court remanded the case back to the Court of Appeals for consideration in light of *Wilson*. The subsequent opinion, much like in *Wilson* itself, resulted in a remand to the trial court for additional findings of fact on the issue of notice. Applying *Wilson* to MCL § 691.1403, the Court of Appeals quoted the holding in *Wilson* which reflected that MCL § 691.1403 requires that the government agency must have actual or constructive notice of "the defect" and that what constitutes a "defect" is formed by the reasonably safe and convenient for public travel language of MCL § 691.1402(1) and that not all imperfections in a roadway rise to the level of a compensable defect. On remand, the trial court was to review argument and evidence from the parties as to whether or not the road commission knew that a

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"defect" existed on the road which rendered that road not reasonably safe and convenient for public travel.

It will be interesting to note the levels of proof which will be required by the courts in evaluating this standard. For example, what sort of evidence would be compelling that the governmental agency did not consider the defect to render the road not reasonably safe. Would it be testimony of the city or county engineer? Would an affidavit from a plaintiff's expert be more persuasive? Will these result in a question of fact in most cases or will deference be provided to the government agency's viewpoint as the *Wilson* opinion perhaps suggests?

(e) The Written Notice to be Provided under MCL § 691.1404 Attains Significant Importance.

The Supreme Court of Michigan, in *Rowland v Washtenaw County Road Commission*,[16] explicitly warned the plaintiffs' bar that they must fully and timely comply with all aspects of the notice provision of MCL § 691.1404 or highway/sidewalk cases will be dismissed.

In *Rowland*, the plaintiff fell while crossing an intersection on a county roadway. She filed her Section 1404 notice 140 days after her fall. The statute requires that the notice be filed within 120 days. The majority had no difficulty in making short work of the issue. In an opinion by Justice Taylor, the Court concluded:

> MCL § 691.1404 is straight forward, clear, unambiguous, and not constitutionally suspect. Accordingly, we conclude that it must be enforced as written. As this Court stated in *Robertson v Daimler Chrysler Corp.*, 465 Mich 732, 748; 641 NW2d 567 (2002), 'The legislature is presumed to have intended the meaning it has plainly expressed, and if the expressed language is clear, judicial construction is not permitted and the statute must be enforced as written.' Thus, the statute requires notice to be given as directed, and notice is adequate if it is served within 120 days and otherwise complies with the requirements of the statute, i.e., it specifies the exact location and nature of the defect, the injury sustained, and the names of the witnesses known at the time by the claimant, no matter how much prejudice is actually suffered. Conversely, the notice provision is not satisfied if it is served more than 120 days after the accident even if there is no prejudice.

In so ruling, the Court expressly overturned *Hobbs v Dep't of State Highways,*[17] and *Brown v Manistee County Road Commission*.[18]

Justice Weaver along with Justices Kelly and Cavanagh dissented. Reflecting her obvious frustration with the majority's interpretation of Section 1404, she felt compelled to harken back to a quote from former Michigan Supreme Court Justice, Eugene Black:

> Clapping a black nightshirt on a lawyer and packing him off to the State capital and thenceforth calling him 'Mr. Justice' makes him no less fallible and uncertain than he was when he was back home drawing 5-dollar wills.[19]

The majority's opinion reflects that everything required in Section 1404 must be provided within the 120 days referenced, and the opinion is fully retroactive.[20] Moreover, again, everything in the notice must be properly provided in addition to its timely submission. This includes "the *exact* location and *nature* of the defect, the injury sustained and the names of witnesses known at the time by the claimant."[21]

II. Liability for the Negligent Operation of a Government Owned Motor Vehicle - MCL § 691.1405.

Wesche v Macosta County Road Commission[22] is another decision arising out of the Supreme Court majority's strict constructionist approach, which will be significant to governmental agencies in motor vehicle cases.

In *Wesche*, the plaintiff was seated in an automobile at a red light when a Mecosta County Road Commission gradall hydraulic excavator[23] rear-ended him. Daniel Wesche suffered injuries to his cervical spine. His wife filed a loss of consortium claim.

Kik v Sbraccia was the companion case in *Wesche*. In that case, Rebecca Kik was pregnant with Sharon Kik and was being transported to Lansing from Sault St. Marie in an ambulance owned and operated by Kinross Charter Township and driven by Defendant John Sbraccia, a township employee. Unfortunately, Mr. Sbraccia lost control of the ambulance, which overturned in a ditch. Mrs. Kik went into labor prematurely giving birth to Sharon who tragically died the same day.

In these two consolidated cases, the Supreme Court held that the motor-vehicle exception to governmental immunity under MCL § 691.1405 did not waive immunity for a loss of consortium claim against a governmental agency. While the exception permits the recovery of damages for bodily injury and property damage, the Court found that loss of consortium was not a physical injury to the body and was an independent cause of action. Moreover, the majority ruled that the Michigan Wrongful-Death Act, MCL § 600.2922, did not permit a

consortium claim against a governmental agency. Finally, the Supreme Court majority ruled that governmental employees were not immune from liability for loss of consortium damages, as the government agency employer is, because the liability of individual employees is governed by MCL § 691.1407(2) (the gross negligence exception) and not MCL § 691.1405 (the motor vehicle exception).

The reasoning leading to the opinion was simple and straight forward. The majority noted that MCL § 691.1405 mandates that governmental agencies shall be liable for bodily injury and property damage resulting from the negligent operation of the vehicle by any government employee or agent. Nowhere was the term loss-of-consortium referenced by the legislature in this statute and "loss of consortium" is not a "bodily injury" for which the motor-vehicle exception waives immunity.

Nor did the Wrongful Death Act save the plaintiff's loss of consortium argument. The Court noted "as a condition to a successful action under the Wrongful Death Act, it must be shown that the decedent, if death had not ensued, could have maintained an action and recovered damages for his injuries."[24] Because a loss of consortium is, again, not a "bodily injury" no such claim could have been pursued had the baby's death not ensued.

This case has potentially significant implications in the litigation arena. Not only is loss of consortium not available against the governmental agency in a tort action for wrongful death arising out of a motor vehicle accident under the only statutory exception which permits it, MCL § 691.1405, but the Court's reasoning seemingly may be applied to all damages for loss of society and companionship as outlined in the Wrongful Death Act and similar claims not expressly permitted in the motor vehicle exception. While the Court did indicate the viability of such claims, potentially, against a governmental employee pursuant to the gross negligence standard outlined at MCL § 691.1407(2), the decision effectively eliminates the municipal defendant and leaves the jury with the choice of imposing potentially large awards against an individual only. Moreover, for liability to be established against a governmental employee, that person's conduct must be found to not only demonstrate gross negligence (i.e., conduct so reckless as to demonstrate a substantial lack of concern for whether an injury will result) but also must be "the" proximate cause of the collision. *Robinson* v *City of Detroit*.[25]

A case with an interesting result, but with likely far less significant implications is *Martin v The Rapid Inter-Urban Transit Partnership and City of Grand Rapids*.[26] In this case, Gaila Martin claimed that she slipped and fell down the steps of a shuttle bus operated by the defendants as she was attempting to exit. The Court, in reversing the Michigan Court of Appeals, remanded the matter to the Circuit Court for further proceedings stating that "[t]he loading and unloading of passengers is an accident within the 'operation' of a shuttle bus" and thus the provisions of MCL § 691.1405 applied.

Justice Corrigan dissented. She noted that the plaintiff had alleged that the defendant had failed to install step heaters or to scrape the steps to eliminate snow and ice on which the plaintiff apparently fell. This, to the Justice, sounded more in terms of negligence maintenance rather than negligent operation of a motor vehicle and she stated:

> ...indeed, the majority's order raises more questions than it answers. For example, suppose that a governmental agency fails to repair a broken seat or a loose handrail on a bus. Would these omissions now constitute 'operation' within the motor vehicle exception? After all, a passenger must use a seat to sit on a bus and must grasp a handrail to safely walk or stand. Thus, would the majority analyze a broken seat or a loose handrail differently than a slippery step? If not, then how would the existence of these defects arise from the negligent 'operation' of the bus.

III. Negligent Maintenance of a Public Building – MCL § 691.1406.

In *Renny v Michigan Department of Transportation*, the Michigan Supreme Court confirmed that under the Public building exception to governmental immunity, MCL § 691.1406, claims arising out of a "design defect" are not cognizable.[27]

In January 2000, Karen Renny visited a rest area along I-75 in Roscommon County. She claimed in a subsequently filed lawsuit, that while leaving the rest area building she slipped on a patch of snow and ice on the sidewalk in front of the door suffering serious injuries to her wrist. Plaintiff alleged that the Michigan Department of Transportation designed, constructed, kept or maintained the rest area in a defective condition, allowing melted snow and ice to accumulate on the sidewalks and attributed the accumulation in part to MDOT's failure to install and maintain gutters and downspouts around the roof of the building.

The Supreme Court majority, in an opinion by Justice Young began by quoting the statute:

> *[g]overnmental agencies have the obligation to repair and maintain public buildings under their control when open for use by members of the public*. Governmental agencies are liable for bodily injury and property damage resulting from a dangerous or defective condition of a public building if the governmental agency had actual or constructive knowledge of the defect and, for a reasonable time after acquir-

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> ing knowledge, failed to remedy the condition or to take action reasonably necessary to protect the public against the condition.

The majority noted that, previously, defective design cases had been permitted to proceed under the public building exception pursuant to *Busch v Oscoda Area Schools* and *Reardon v Department of Mental Health*.[28] Justice Young appreciated the argument asserted by MDOT that the plaintiff's reliance on *Busch* was misplaced because the Court had since dismantled the reasoning underpinning *Busch*. Without saying so, the majority implied that the reasoning in *Busch* and *Reardon* had been formed out of whole cloth as respects design defect claims under the public building exception since nothing in the exception, according to them, permitted such a claim. Justice Young alluded to the changes in the Court's "more textually faithful interpretation of the highway exception" to immunity as noted in *Nawrocki*.[29] It was further observed that in *Hanson v Mecosta County Road Commission*,[30] the Court had disavowed the line of highway exception cases that recognized a design defect claim. The opinion in *Renny* stated:

> While plaintiff relies almost exclusively on case law, MDOT largely appeals to the statutory language. In order to decide an issue of statutory construction, we must *first* resort to the plain language of the public building exception to determine the Legislature's intent. We agree with MDOT that this provision clearly does not support a design defect claim. The first sentence of MCL § 691.1406 states that '[g]overnmental agencies have the obligation to repair and maintain public buildings under their control when open for use by members of the public.' This sentence unequivocally establishes the duty of a governmental agency to 'repair and maintain' public buildings. Neither the term 'repair' nor the term 'maintain,' which we construe according to their common usage, encompasses a duty to design or redesign the public building in a particular manner.[31]

Thus, the Court dismissed the design defect claim in *Renny* but remanded the case to the Court of Claims to determine whether or not the plaintiff's suit could proceed with respect to an alleged failure to repair and maintain as is referenced in the statute.

The public building exception also contains a notice provision similar to that contained with regard to sidewalks and highways at MCL § 691.1404. Specifically, the public building exception notes:

> As a condition to any recovery for injury sustained by reason of any dangerous or defective public building, the injured person, within 120 days from the time the injury occurred, shall serve a notice on the responsible governmental agency of the occurrence of the injury and the defect. The notice shall supply the exact location and nature of the defect, the injury sustained and the names of the witnesses known at the time by the claimant.

It was not long before the courts recognized that the Supreme Court's holding in *Rowland*, *supra*, as pertains to defective highways and sidewalks would or should be equally applicable to a public building exception claim because the statutory language is identical in all relevant aspects. This is recognized in two Michigan Court of Appeals unpublished opinions, *Jones v Department of Transportation*[32] and *Chambers v Wayne County Airport Authority*.[33]

In *Jones*, a unanimous panel concluded that pursuant to *Rowland*, a plaintiff in a public building exception case must provide statutory notice. Since Mr. Jones had not, his case was dismissed. In an interesting twist to this, the Court of Appeals panel in *Chambers* seemingly recognized the rule and requirement but found that, even though the plaintiff had not provided written notice pursuant to MCL § 691.1406, the investigation report prepared by the airport authority defendant itself constituted sufficient notice to meet the requirements of the statute. A dissent by Judge Murray concluded to no avail:

> In this case, there is not dispute that plaintiff did not serve notice as required by this statute, as the incident report was not completed by plaintiff, but by a Joseph Phillipson, who plaintiff alleges does associate 'with the Wayne County Division of Airports.' Thus, plaintiff did not personally serve this written notice on defendant. Instead, defendant filled out its own internal form...

IV. Proprietary Function Exception – MCL 691.1413.

The Governmental Tort Liability Act does not provide immunity to a governmental agency for bodily injury or property damage which arises out of the performance of a proprietary function. A proprietary function is defined 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.

In *Davis v City of Detroit*,[34] plaintiff filed suit arising out of a fire at her residence that injured her and killed her children. It was claimed that the first two fire hydrants that the Detroit Fire Department attempted to use did not work and that a third hydrant could not provide enough water. Plaintiff's lawsuit asserted that the defendants were liable for failing to maintain the hydrants, for failing to train the firefighters and for gross negligence in the execution of their duties.

In order to avoid the defense of governmental immunity, plaintiff attempted to claim that the City was engaged in a proprietary function because it commercially sold water to other cities. The Appellate Court disagreed. Referencing MCL § 691.1413, the Court stated:

> The first part of this test – whether the activity was intended to generate profit – requires consideration of whether there actually is profit and of how any revenue generated is spent. *Coleman v Kootsillas*, 456 Mich 615, 621-622; 575 NW2d 527 (1988). However, MCL § 123.141(2) requires the price of any water sold to be based on, and forbids the price to exceed, 'the actual cost of service as determined under the utility basis of rate-making.' Furthermore, the Detroit City Charter forbids the City from profiting from the sale of water and requires that all revenues therefrom be used only to fund the activity itself...Therefore, operation of the water department is not a proprietary activity...

In another case, *Wolf Capitol Management Trust v City of Ferndale*,[35] the Court of Appeals stated that the issue was not whether a proprietary function was involved but, instead, whether plaintiff's tortuous interference claims could constitute an action to recover for "property damage" within the contemplation of the statutory language of MCL § 691.1413. The Court of Appeals concluded that they did, overruling the trial judge who had held that the claims instead of involving property damage, were for prospective economic injury arising out of a failed cell phone tower lease. The Court of Appeals ruled, however:

> Plaintiff's alleged 'property damage' was the harm or injury to their right of lawful, unrestricted use of their res for the particular business purpose that they had negotiated. That the loss of the business deal resulted in lost income is relevant for the purpose of attempting to measure the resulting damages.

After originally requesting briefs on the issue, the Michigan Supreme Court denied the City's Application for Leave to Appeal on November 29, 2006.

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Insider Insight

Editor's note: A regular feature from the perspective of the practitioner involved in a case or other matter. This month's feature is prepared by Catherine Mish, Grand Rapids City Attorney

No Fault Act— Governmental Vehicle— Serious Impairment

On April 25, 2008, the Michigan Supreme Court issued an order in the case of *Minter v City of Grand Rapids, et al*, reversing the authored, published decision of the Court of Appeals and reinstating the judgment of the Kent County Circuit Court granting the defendants' motion for summary disposition on all of plaintiff's claims.

This third-party threshold case brought under the Michigan No-Fault Act arose from an August 15, 2002 auto accident involving a police cruiser and a pedestrian. While responding to assist with a foot pursuit of a suspect, the defendant police officer made an improper turn and struck an elderly pedestrian who was in the crosswalk. The defendants admitted that the police officer was at fault in causing the accident. The elderly pedestrian suffered four categories of injury: a minor closed head injury, a forehead laceration resulting in a permanent scar, a cervical strain, and a broken toe. The plaintiff named both the City and the police officer in the resulting civil suit for non-economic damages.

The defendants initially sought summary disposition of plaintiff's claims against the individual police officer, which were premised on a gross negligence theory. The trial court denied the motion, stating that while the court did not believe gross negligence had occurred, the court was unwilling to rule that no reasonable jury could find gross negligence. The defendants appealed, and the Court of Appeals affirmed that ruling. The defendants did not file an application for leave to appeal with the Michigan Supreme Court.

Returning to the trial court, the defendants sought summary disposition of the entire case under MCR 2.116(C)(10), based on the language of MCL 500.3135 and the ruling in *Kreiner v Fischer*, 471 Mich 109 (2004). The trial court, Chief Judge Paul J. Sullivan of the Kent County Circuit Court, granted the defendants' motion, ruling that plaintiff had not suffered a threshold injury, either with regard to a serious impairment of body function or a permanent serious disfigurement. The trial court noted that the plaintiff's treating physician who specialized in closed head injuries found that plaintiff had met all short- and long-term goals of therapy within

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Reductions in Force: A Primer for Municipal Attorneys

By Rebekah Page-Gourley, Esq., Johnson, Rosati, LaBarge, Aseltyne & Field, P.C.

Given the current economic climate in Michigan, reductions in force are a reality for a growing number of employees and employers. Increasingly, employees laid off in the course of corporate reorganizations are bringing a combination of wrongful discharge and discrimination claims, alleging that their employer's reduction in force was illegitimate and/or that it was a pretext for discrimination. Attorneys representing employers in the event of litigation must be familiar with the defenses available for claims made under these unique circumstances. This article does not purport to address every legal question raised by lawsuits stemming from reductions in force, but it does attempt to give an overview of the most important considerations for municipal attorneys in the unfortunate event that a reduction in force becomes necessary. Although primarily written as a roadmap for defending possible claims arising out of an RIF, this article also outlines important issues for employers and their counsel to keep in mind at the planning and implementation stages of an economically motivated workforce reduction.

Demonstrating a Bona Fide Reduction in Force Due to Economic Necessity

It is generally accepted that a workforce reduction "occurs when business considerations cause an employer to eliminate one or more positions within the company." *Barnes v GenCorp, Inc*, 896 F2d 1457, 1465 (6th Cir), cert denied, 498 US 878 (1990). There are no strict rules regarding the number or type of positions eliminated, but in both wrongful discharge and discrimination contexts, the defendant employer always has the initial burden of presenting evidence of the legitimacy of its RIF.

In order to demonstrate a bona fide reduction in force due to economic necessity, an employer must be able to document the existence of adverse business conditions and the necessity of the workforce reduction in light of those conditions. There is no definitive rule for what specific "proofs" are required to demonstrate economic necessity. In *Hirsch v AZ Automotive Corp*, Slip Copy, 2008 WL 115532 (ED Mich 2008), the plaintiff disputed the employer's claim that a reduction in force was involved in his layoff. The defendant offered evidence of the decline in the automotive industry as a whole and its effects on the company, which necessitated removal of production lines and laying off of certain skilled employees. The plaintiff did not provide evidence disputing the accuracy of this information. The Court held, "Based on the uncontroverted evidence as to AZ Automotive's decline in business and the automation of its lines decreasing its need for employees, the Court concludes that the standard for a reduction in force case applies." *Id.* at 4, fn 5.

Other courts may not make a finding that economic necessity has been established as readily as the Court in *Hirsch*, so thoroughness and specificity are essential. Of course, this begins at the planning and implementation stage of the RIF. Counsel should be involved in working with the individuals in charge of the reduction, assisting with documentation of the economic concerns necessitating the reduction and outlining the process for budget cuts and layoffs. In a reduction in force, positions—as opposed to individuals—are eliminated, and this should be reflected in the documentation. Counsel should also assist the municipality in articulating the rationale for their reorganization plan, and advise them about any procedural considerations implicated by internal policies for layoffs.

If faced with litigation, attorneys defending a municipal employer should certainly retain an economic expert who can perform an analysis of the general economic climate in the area and how that climate specifically affected the municipality as an employer. Internal documents such as memos, presentations, audit documents, and budget reports outlining the reorganization are also key, and the employer has an affirmative duty to preserve them. It is important to investigate which employee or employees within the company or municipality were responsible for planning and carrying out the reduction in force, and to document their rationale through affidavits or deposition testimony for use in dispositive motions and at trial. When an employer asserts an economic necessity defense, it is likely that opposing counsel will seek the production of this evidence through written discovery. Opposing counsel will also likely seek evidence of the employee's performance, such as evaluations or disciplinary records, in an attempt to undermine the legitimacy of the RIF or the employer's choice to eliminate the positions it did. When drafting their own discovery requests, municipal attorneys should focus on limiting

the plaintiff's ability to expand his arguments after the discovery stage. For example, counsel should establish that the documentary evidence and testimony plaintiff has provided in response to written discovery and deposition questioning constitutes his complete basis for disputing the RIF.

Wrongful Discharge Claims in the Context of a Reduction in Force

As a matter of law, bona fide economic reasons for discharge constitute "just cause." *McCart v J Walker Thompson Inc*, 437 Mich 109, 114; 469 NW2d 284 (1991). Thus, assuming an employee is able to prove his entitlement to termination only for cause—by establishing the existence of an express written or oral contract or by successfully bringing a *Toussaint* legitimate expectations claim—an employer may show cause by demonstrating that the employee's position was eliminated as part of an economically motivated reduction in force.

In order to defeat a motion for summary disposition once a defendant has presented proofs demonstrating economic necessity, the plaintiff must raise a genuine issue of fact as to the legitimacy of the defendant's proofs. In other words, a reduction in force will only constitute just cause as a matter of law if the plaintiff cannot produce evidence that casts doubt on its legitimacy; otherwise, the question of whether the RIF was just cause is one for the jury. In *Ewers v Stroh Brewery*, 178 Mich App 371; 443 NW2d 504 (1989), the plaintiff successfully rebutted the defendant's claim of economic necessity by introducing deposition and documentary evidence indicating that the employer "was experiencing substantial economic growth and operating at a substantial profit before and after his discharge:"

> Using defendant's Form 10-K annual report filed with the Securities and Exchange Commission, plaintiff showed a pattern of positive net earnings and increased dividends over the 1980-82 period. The same document showed an increase in the total salaried work force from 600 to approximately 2,100. The evidence established that full bonuses were to be paid to participants in the incentive compensation plan based on the company's profitable performance in fiscal 1983. During the same time period defendant bought Schaefer Brewery for $80,000,000 and Schlitz for $660,000,000. The reduction in force was carried out with little or no advanced planning and with no study of its need or effect on the corporation, according to testimony of Stroh executives. In fact, the president of the corporation testified that no study was done before the decision was made to terminate the employees. *Id*. at 375-376.

In contrast, in *McCart, supra*, the Court granted the defendant's motion for summary disposition, holding, "While plaintiff alleges that [his supervisor] disliked him, he has failed to raise any genuine issue of fact regarding the validity of defendant's proofs that adverse business conditions existed and that the elimination of plaintiff's position was necessitated by those conditions." *McCart v J Walker Thompson Inc*, 437 Mich 109, 114-115; 469 NW2d 284 (1991). The Court in *Riskin v Detroit Receiving Hosp*, 1997 WL 33347865 (Mich App, June 10, 1997) (unpublished), likewise dismissed plaintiff's wrongful discharge claim, holding that the plaintiff "failed to present sufficient documentary proofs to rebut defendants' economic necessity defense and create a jury question on the legitimacy of that defense." *Id*. at 1.

These cases indicate that at the dispositive motion stage, an employer should always emphasize the plaintiff's lack of documentary evidence disputing the reduction, pointing out that, under MCR 2.116(C)(10) or FRCP 12(b)(6), a "mere pledge" to provide evidence at time of trial is insufficient to defeat a motion for summary. The rules require the adverse party to set forth specific facts at the time of the motion, showing a genuine issue for trial. *Maiden v. Rozwood*, 461 Mich. 109, 121; 597 N.W.2d 817 (1999). Thus, if the defendant has a qualified economic expert who has testified as to the existence of economic necessity and the plaintiff fails to present such economic expert testimony, the employer has a strong argument that the plaintiff's documentary proofs are insufficient to dispute the legitimacy of the RIF.

Even if the employee does not dispute that a reduction in force occurred, he may still be able to prevail on a wrongful discharge claim if he can show that the employer failed to follow established procedures concerning the elimination of his position. *King v Michigan Consol Gas Co*, 177 Mich App 531, 442 NW2d 714 (1989). Again, this underscores the importance of proper planning and review of the applicable procedures at the outset of an RIF.

Discrimination Claims in the Context of a Reduction in Force

In addition to pursuing common law wrongful discharge claims, employees laid off in purported reductions in force often seek redress under the federal and state civil rights statutes. The analysis in the context of discrimination claims is somewhat similar to that of wrongful discharge. However, as further discussed below, a plaintiff bringing claims under Title VII of the Elliott-Larson Civil Rights Act (ELCRA) not only has the burden of raising a genuine issue of fact as to the economic necessity for the workforce reduction, but also must provide evidence that the employer terminated him for discriminatory reasons. This article focuses on age discrimination claims, but the analysis can be applied to other discrimination claims.

"A layoff in the context of an overall workforce reduction provides a nondiscriminatory explanation for [a] plaintiff's

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Reductions . . .
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discharge." *Town v Michigan Bell,* 455 Mich 688, 702-703; 568 NW2d 64 (1997). However, establishing a bona fide reduction in force due to economic necessity does not provide an absolute defense to a discrimination claim. Rather, discrimination cases involving a reduction in force fit into the standard *McDonnell-Douglas* burden-shifting framework: If the plaintiff establishes a prima facie case and the employer articulates a legitimate, nondiscriminatory reason for its action—namely, a bona fide workforce reduction due to economic necessity—the burden then shifts back to the plaintiff to establish that the reduction in force was actually a pretext for discrimination. If a plaintiff presents sufficient evidence "from which a jury could find that defendants unlawfully implemented this reduction in force—that is, direct, circumstantial, or statistical evidence tending to indicate that the employer singled out [the employee] for impermissible reasons," then courts will not grant the employer summary disposition. *Barnes, supra* at 1465.

Plaintiffs have a heightened burden in establishing a prima facie case of discrimination in the context of workforce reductions. In an age discrimination case, the plaintiff must first make the standard four-prong showing: (1) he was a member of a protected class, (2) he was discharged, (3) he was qualified for the position, and (4) he was replaced by a younger person. *Featherly v Teledyne*, 194 Mich App 352, 359; 486 NW2d 361 (1992). However, with respect to the fourth element of the prima facie case, a plaintiff cannot show that he was "replaced" by someone younger merely by showing that a younger employee is performing the plaintiff's old duties along with his own. See *Barnes, supra* at 1465 ("[a] person is not replaced when another employee is assigned to perform the plaintiff's duties in addition to other duties, or when the work is redistributed among other existing employees already performing related work"). See also *McFarland v Century Truss Co*, 518 F Supp 2d 977, 982 (ED Mich 2007) (holding that the plaintiff failed to establish a prima facie case under the ADEA: "Plaintiff does not argue, much less offer evidence, that another employee was reassigned to cover plaintiff's duties to the exclusion of the employee's previous duties, or that a new employee was hired to take over plaintiff's duties. Rather, plaintiff only argues that his duties were redistributed to existing employees.")

Some courts exclude the fourth element of the prima facie case in the RIF context: "Whereas a Title VII plaintiff would ordinarily have to prove that he or she was replaced by a person outside the protected class, when a plaintiff is terminated in the context of a RIF, that element need not be shown; rather, the plaintiff is required to produce 'additional direct, circumstantial, or statistical evidence that [the protected characteristic] was a factor in his termination.'" *EEOC v Lucent Technologies, Inc*, 226 Fed Appx 587, 590 (6th Cir, 2007), citing *LaGrant v Gulf & W Mfg Co*, 748 F.2d 1087, 1091 (6th Cir, 1984). To frame the issue another way, "Evidence that a competent older employee was terminated and a younger employee was retained, standing alone, is insufficient to establish a prima facie case when the employer reduces his work force because of economic necessity." *Id.* at 359. Thus, in a reduction in force context, the plaintiff must provide evidence that age was a determining factor in his layoff in order to make out a prima facie case. *Id*. at 360. See also *Matras v Amoco Oil Co*, 424 Mich 675; 385 NW2d 586 (1986). Put simply, most courts blend the pretext inquiry into the prima facie showing in an RIF case.

Again, with respect to demonstrating pretext, it is not enough for the plaintiff to present evidence establishing that the reduction in force was not genuine; the burden is still on the plaintiff to show that he was terminated for discriminatory reasons. See, e.g., *Lytle v Malady* (*On Rehearing*), 458 Mich. 153, 177; 579 NW2d 906 (1998) (holding that "[D]isproof of an employer's articulated reason for an adverse employment decision defeats summary disposition only if such disproof also raises a triable issue that discriminatory animus [based on age] was a motivating factor underlying the employer's adverse action.") Because of this heightened standard, the same failure to follow established procedures that might allow the plaintiff to demonstrate pretext in the wrongful discharge context is insufficient in a discrimination case: "'[A]n employer's failure to follow self-imposed regulations or procedures is generally insufficient to support a finding of pretext.'" *Lucent Technologies, supra,* at 592, citing *White v Columbus Metro Housing Auth*, 429 F3d 232, 246 (6th Cir, 2005); *Skalka v Fernald Env Rest Mgt Corp*, 178 F3d 414, 422 (6th Cir, 1999) (holding, "if [the supervisor] failed to follow [company] procedures, he did so as to all of the employees who were evaluated, not just [plaintiff]. Therefore, any failure to follow [company] procedures would not have prejudiced [plaintiff] more than anyone else.") *Id*. Again, these holdings indicate that counsel should be involved in the RIF process to avoid these problems.

In *Ercegovich v Goodyear Tire & Rubber Co*, 154 F3d 344, 354 (6th Cir, 1998), the Court found that the plaintiff established a genuine issue of material fact as to pretext under the ADEA because he provided evidence that the employer did not afford the plaintiff the same opportunity to transfer to available positions within the company that it offered to younger, similarly affected employees. *Id*. at 357. Courts have also found sufficient evidence of pretext where the plaintiff successfully demonstrates superior qualifications for his position. *Moradian v SEMCO Energy Gas Co*, 315 F Supp 2d

870 (ED Mich 2004). As in the wrongful discharge context, sufficient documentary and statistical evidence disputing the legitimacy of the RIF (and also providing some evidence of discriminatory animus) may be sufficient to demonstrate pretext. In *McMahon v Libbey-Owens Ford*, 870 F2d 1073, 1077 (6th Cir, 1989), the Court found that plaintiff established pretext by providing evidence of profits earned by the company, increases in salaried employees, raises given to existing employees, and statistical evidence showing that age was a factor used in determining which employees would be terminated.

In contrast to the above holdings, in *Harris v Detroit Public Schools*, unpublished opinion of the Michigan Court of Appeals, No. 277308 (May 13, 2008), the Court rejected plaintiff's age discrimination claim, holding, "Although plaintiff alleges younger employees were not terminated or received favorable consideration for the position of assistant superintendant, he fails to come forward with any supporting evidence. Plaintiff submits no documentation or proof that the type of seniority criteria used by defendants in the terminations was based on an improper or discriminatory basis." The Court concluded:

> In this instance defendants have provided documentary evidence of the financial problems facing the school district and the existence of a deficit elimination plan. As such, economic necessity comprised a legitimate and nondiscriminatory basis for defendants' decision to terminate plaintiff's employment. Plaintiff fails to demonstrate or provide any evidence that the proffered reason was pretextual. In fact, plaintiff does not dispute the existence of significant economic concerns faced by the school district necessitating a work force reduction. Further, plaintiff does not contest the fact that his previous retirement impacted his seniority status or assert that his seniority ranking was incorrectly determined. Neither does he demonstrate that the seniority methodology chosen by defendants to effectuate their deficit reduction plan was inherently discriminatory. At best, plaintiff merely contends that he was negatively impacted by the decision. Standing alone, this is insufficient to establish a factual issue regarding whether defendants' legitimate, nondiscriminatory reason for plaintiff's employment termination was merely a pretext for illegal age discrimination. *Id*. at 4.

Finally, counsel should note a difference in federal and state analyses of the pretext issue in a case involving an RIF. The Sixth Circuit, unlike state courts, will evaluate the "reasonableness" of the employer's judgment in conducting the RIF in order to evaluate pretext: "[T]he reasonableness of an employer's decision may be considered to the extent that such an inquiry sheds light on whether the employer's proffered reason for the employment action was its actual motivation." *Wexler v White Fine Furniture*, 317 F3d 564, 576 (6th Cir, 2003). The Sixth Circuit has cited several specific factors, discussed in the Eighth Circuit decision in *Hillebrand v M-Tron Industries, Inc,* 827 F.2d 363 (8th Cir.1987), that might indicate that a claimed reduction in force is mere pretext, including "general business improvement, a lack of evidence regarding a company's objective plan to carry out a reduction in force, and a situation in which only one or two management employees are aware of the reduction plan." *Gotfredson v Hess & Clark, Inc*, 173 F3d 365, 374 (6th Cir, 1999). The Court in *Gotfredson, supra,* rejected plaintiff's claim that the RIF was pretextual because the company did indeed fail to make a profit, there was evidence of an "objective plan" to carry out the RIF, and there was testimony that at least three individuals participated in devising the plan to execute the RIF. *Id*.

In contrast, in *Blair v Henry Filters, Inc*, 505 F3d 517, 533-534 (6th Cir, 2007), the Court found that the employer's lack of evidence of an "objective plan" was one factor indicating that the RIF was pretextual. The Court held, "[T]he record indicates that a substantial number of Henry Filters employees…lost their jobs, but reveals no blueprint for this reduction. Instead, the shedding of employees appears to have been chaotic, occurring in fits and starts. Further, the record does not clearly indicate even when Henry Filters' plan for workforce reduction began." (As noted above, early involvement of counsel is an effective way to guard against this type of disorganization and lack of documentation.) It is significant that the *Blair* Court held that the employer's lack of an objective plan for its RIF, *coupled with* circumstantial evidence of age discrimination, was sufficient to raise a genuine issue as to whether the RIF was pretext for discrimination.[1] *Id*. at 534. Thus, the plaintiff must demonstrate discriminatory animus along with any "unreasonableness."

Case law indicates that the "objective plan" or "reasonableness" inquiry is not part of the analysis in Michigan state courts for ELCRA claims. The Michigan Supreme Court has held that in order to establish a discrimination claim, a plaintiff may not simply attempt to analyze or critique the "business judgment" of the defendant, as the question is not whether the reduction in force was performed prudently, but whether plaintiff's position was eliminated as a result of age-based animus. *Hazle v Ford*, 464 Mich 456, 476; 428 NW2d 515 (2001). See also *Dubey v Stroh Brewery Co*, 185 Mich App 561; 462 NW2d 758 (1990) (holding that "at most, plaintiff raises questions about the soundness of defendant's business judgment and that is insufficient to show a genuine issue of fact regarding pretext.") This would render futile any questioning of the reasonableness or intelligence of the business decisions going into a RIF in an ELCRA case.

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Opinions of Attorney General Mike Cox

By George M. Elworth, Assistant Attorney General

Editor's note: Assistant Attorney General George M. Elworth of the Finance Division and a member of the Publications Committee furnished the text of the headnotes of these opinions. The full text of these opinions may be accessed at www.mi.gov/ag.

Marriage Licenses

Requirement to Provide Social Security Number on Marriage License Applications

Under Section 2(1) of the Marriage License Act, MCL 551.102(1), a county clerk may issue a marriage license to an applicant who fails to provide his or her Social Security Number on the application if the person has never been issued a Social Security Number and so states on the affidavit for license to marry or in a separate sworn statement made a part of the application.

Where the applicant for a marriage license does not provide a Social Security Number on the application for the license, the county clerk is not authorized to investigate the underlying reason why the applicant has failed to provide a Social Security Number. However, the Act does not prohibit a county clerk from forwarding significant information to the appropriate authorities where, in the opinion of the clerk, the circumstances warrant that action.

Opinion No. 7212
March 19, 2008

State Real Estate Transfer Tax Act

Exemption from State Real Estate Transfer Taxes

An exemption from the requirement imposed by the State Real Estate Transfer Tax Act, MCL 207.521 *et seq,* to pay state real estate transfer taxes upon the transfer or sale of real property may be claimed under MCL 207.526(t) if, on the date a parcel occupied as a principal residence is transferred, its state equalized value is less than or equal to its state equalized value on the date the owner purchased or acquired the parcel *and* the property is sold for not more than its true cash value at the time of sale.

Opinion No. 7214
April 3, 2008

Vacancies in Office

Whether a County Officeholder's Conviction on the Charge of Extortion by a Public Officer Creates a Vacancy in the Office by Operation of Law

A county drain commissioner's conviction on the charge of extortion by a public officer under Section 214 of the Michigan Penal Code, MCL 750.214, created a vacancy in that office by operation of Section 206 of the Michigan Election Law, MCL 168.206, and Section 3 of chapter 15 of the Revised Statutes of 1846, MCL 201.3, because extortion constitutes "an offense involving the violation of his oath of office" within the meaning of these laws.

Opinion No. 7213
March 20, 2008

Section Mission:

The Public Corporation Law Section of the State Bar of Michigan provides education, information and analysis about issues of concern through meetings, seminars, the section webpage, public service programs, and publication of a newsletter. Membership in the section is open to all members of the State Bar of Michigan. Statements made on behalf of the section do not necessarily reflect the views of the State Bar of Michigan.

State Law Update

By Christopher W. Braverman, Foster, Swift, Collins & Smith, PC

Michigan Supreme Court

Accumulation of Ice and Snow Cannot Constitute a Defect in Sidewalk

Estate of Buckner v City of Lansing, 480 Mich 1243 (Issued April 25, 2008)

In this case, a City of Lansing sidewalk was obstructed by an accumulation of snow and ice, due to the City's snow-plowing on the adjacent street. Plaintiffs, unable to use the sidewalk, walked in the adjoining street and were struck by a car. Plaintiffs sued the City for damages, and the City moved for summary disposition, asserting governmental immunity. Plaintiffs argued that the "highway exception" to governmental immunity applied. MCL 691.1402. The Court of Appeals ruled that Plaintiffs had sufficiently alleged facts to invoke this exception, based on the "natural accumulation" doctrine, which holds that when an accumulation of ice and snow is the result of unnatural causes, a public body may be liable for injuries proximately caused by the accumulation.

The Supreme Court reversed, finding that under *Nawrocki v Macomb Co Rd Comm*, 463 Mich 143 (2000), a municipality's only duty is to keep a highway (which includes sidewalks) "in reasonable repair." Even though the statute includes the language, "so that it is reasonably safe and convenient for public travel," the Court has found that keeping the highway "reasonably safe" is not a separate duty, but rather a statement of the desired outcome of reasonably repairing and maintaining the highway. In this case, the Court held that "the accumulation, by itself, of ice and snow on a sidewalk, regardless of whether it accumulated through natural causes or otherwise, does not constitute a 'defect' in the sidewalk." Therefore, the Court ruled that Plaintiffs did not demonstrate that the City violated its duty to keep the sidewalk in reasonable repair.

Governmental Immunity Bars Loss of Consortium Claim Under Motor-Vehicle Exception

Wesche v Mecosta Co Road Comm, 480 Mich 75 (Issued April 3, 2008)

This case involved two claims asserted against governmental agencies arising from accidents involving government motor vehicles. In the first case, Plaintiff was rear-ended by a Road Commission vehicle, and his wife claimed loss of consortium. In the second case, Plaintiff, who was pregnant, was in an ambulance that overturned. She went into premature labor, and the baby died that day. She and her husband brought a wrongful death claim against the Township, asserting loss of society and companionship.

The Supreme Court first addressed the "motor-vehicle exception" to governmental immunity. MCL 691.1405. This exception provides that governmental agencies are liable for "bodily injury and property damage" that is the result of a governmental employee's negligent operation of a government-owned vehicle. The Court stated that this exception specifically limits recovery to bodily injuries and property damage. Because a loss of consortium claim "is not a physical injury to a body," it therefore "does not fall within the categories of damage for which the motor-vehicle exception waives immunity." Therefore, governmental agencies are entitled to immunity from such loss of consortium claims.

The Court then addressed whether the wrongful death statute allows for a loss of consortium claim against a governmental agency, despite the express limitations contained in the motor-vehicle exception. The statute, MCL 600.2922(6), states that in a wrongful death action, damages may be awarded "for the loss of the society and companionship of the deceased." Thus, Plaintiffs argued that this expressly allowed a loss of consortium claim. The Court, however, cited to a separate provision of the wrongful death statute, which makes liability "contingent on whether the party injured would have been entitled to maintain an action and recover damages if death had not ensued." The Court has interpreted this to mean that any statutory or common-law limitations on the underlying claim apply to the wrongful death claim. Therefore, because the motor-vehicle exception bars loss of consortium claims, the Court held that the wrongful death statute does not waive governmental immunity by authorizing such a claim.

Finally, the Court ruled that individual governmental employees are not necessarily immune from loss of consortium claims. Such employees are only immune when their "conduct does not amount to gross negligence that is the proximate cause of the injury or damage." MCL 691.1407(2)(c). If the employee is grossly negligent, he or she may be liable for loss of consortium, even though the governmental agency itself would be immune.

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State Law Update

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Michigan Court of Appeals

Landowner Entitled to Mine Gravel Despite Township Zoning Ordinance

Kyser v Kasson Twp, __ Mich App __ (Issued May 6, 2008)

Based on the fact that significant gravel deposits exist in Kasson Township, the Township, after substantial planning and public input, adopted a zoning ordinance that created a "Gravel District." The ordinance provided that gravel mining and extraction were permitted uses in the District, but were not permitted outside the District. Plaintiff owned a parcel of property adjacent to, but outside, the District. Plaintiff applied to have the property rezoned for inclusion within the District to enable the property to be sold to a gravel-mining operator. The Township denied the request, finding that the rezoning would undermine its zoning scheme and lead to a "domino effect" of other requests to allow mining outside the District. Plaintiff sued, alleging that the Township's refusal was invalid and unconstitutional. The trial court found in Plaintiff's favor and enjoined the Township from interfering with Plaintiff's right to mine gravel on the property.

The primary issue addressed by the Court of Appeals was the application of a test set forth in *American Aggregates Corp v Highland Twp*, 151 Mich App 37 (1986). Although zoning ordinances are generally presumed valid, there is an important public interest in extracting and using natural resources. Thus, courts will use "a more rigorous standard" when reviewing ordinances that prevent the extraction of natural resources. Specifically, the *American Aggregates* test for challenging a zoning ordinance that prevents extraction requires the party to show that (1) "valuable natural resources" are located on the land; and (2) no "very serious consequences" will result from the extraction of those resources. Some consequences are acceptable, so long as they are not "very serious" in nature.

The Court first upheld the trial court's finding that the gravel underneath Plaintiff's property was a valuable natural resource, noting that the focus is whether the landowner could raise revenues and operate at a profit. With respect to the second prong of the test, the Court analyzed a number of factors. The Court affirmed that the degree of public interest in the gravel was low, meaning that Plaintiff needed to make a stronger showing that extraction would not result in "very serious consequences." The Court then affirmed that none of the potential consequences identified rose to the level of "very serious," which included (1) truck safety and traffic; (2) traffic noise; (3) loss of property values; (4) impact on residential development; and (5) the "domino effect." This analysis was fact-specific, and the Court's ruling was that the trial court's findings as to the potential consequences were not "clearly erroneous." As a result, the Court found that as a matter of law, Plaintiff was entitled to engage in gravel mining, and the Township could not enforce the zoning ordinance to prevent such activity.

Municipality Lacks Standing to Sue on Behalf of Its Citizens

Twp of Coldsprings v Kalkaska Co Zoning Bd of Appeals, Mich Ct App unpublished decision (No 268753, Issued May 13, 2008)

In an issue of first impression, the Court of Appeals recently addressed "whether a municipality can sue on behalf of its residents." In 2004, the owners of property located in Coldsprings Township applied for a zoning variance from the County Zoning Board of Appeals (ZBA). The variance concerned the setback of a proposed house from Manistee Lake. At the public hearing, the Township Supervisor stated that allowing the construction to proceed with a shorter setback would lead to poor water quality in the lake, along with erosion. The ZBA granted the variance application, and the Township filed a petition challenging the decision. The trial court ruled that the Township lacked standing and dismissed the claim.

The Court of Appeals first noted that the general standing requirements must be satisfied in any lawsuit, even in environmental suits involving an organization. Those requirements are (1) an "injury in fact" suffered by the plaintiff, which means a concrete and actual or imminent injury; (2) a connection between the injury and the alleged improper conduct; and (3) that a favorable decision would likely redress the injury. The Township argued that it was similar to a non-profit organization, which may sue on behalf of its members when the members themselves would be able to sue individually. The Court, however, rejected this analogy, reasoning that a municipality "does not have 'members' who have voluntarily associated." The Court relied on several federal cases in finding that this concept of standing, known as *parens patriae*, does not apply to "political subdivisions such as cities and counties." Therefore, the Township itself would need to demonstrate that it suffered some injury from the granting of the variance "in a manner

distinct from the interest of the general public." Because the Township did not demonstrate such an "injury in fact," the Court affirmed the dismissal of its claim.

Football Stadium Not a "Building" for Purpose of Governmental Immunity

Williams v Central Michigan Univ, Mich Ct App unpublished decision (No 276445, Issued April 8, 2008)

Plaintiff attended a performance of her daughter's high school band at a camp held at Central Michigan University's football stadium. While inside the stadium, she stepped on a crack and fell, suffering injuries to her wrist and hand. She sued the University, arguing that the "public building" exception to governmental immunity applied. The trial court ruled in favor of the University.

The public building exception, MCL 691.1406, requires public entities "to repair and maintain public buildings under their control when open for use by members of the public." The statute, however, does not define "building," so the Court turned to two definitions that had been cited in earlier cases: (1) "relatively permanent, essentially boxlike construction having a roof and used for any of a wide variety of activities;" and (2) "structure designed for habitation, shelter, storage, trade, manufacturing, religion, business, education and the like… enclosing a space within its walls, and usually, but not necessarily, covered with a roof." The stadium in this case was not enclosed on all sides (a "horseshoe" shape) and was not covered by a roof. The Court, without detailed analysis, found that the stadium did not satisfy "the general criteria to be defined as a 'building' based on its open construction." Further, even if it could be considered a building, the Court ruled that it was not "open for use by members of the public" at the time of Plaintiff's injury, because access to the stadium was limited to participants in the camp. Therefore, the public building exception did not apply, and the University was entitled to governmental immunity.

Governmental Agency Entitled to Immunity From Retaliatory Discharge Claim

Thompson v Wayne Co Treasurer, Mich Ct App unpublished decision (No 277837, Issued May 8, 2008)

Plaintiff, who worked for the Wayne County Treasurer's Office, learned that certain properties that had been deeded to her were subject to foreclosure proceedings for unpaid taxes. She attempted to contest the taxes that had been assessed. The Treasurer informed Plaintiff that she needed to resolve the tax issues within several days, as it was expected that she was not to become delinquent. When the issues were not resolved, Plaintiff's employment was terminated. She sued the Treasurer's Office and the Treasurer individually for wrongful discharge, alleging that she was terminated for exercising a right (contesting the taxes) conferred by statute. Defendants moved for summary disposition on the basis of governmental immunity. The trial court granted summary disposition in favor of the Treasurer, but denied with respect to the Treasurer's Office. The trial court relied on the rationale that "some grounds for discharging an employee are so contrary to public policy as to be actionable," such as retaliation for an employee's exercise of a statutory right.

The Court of Appeals rejected that finding and held that the Treasurer's Office was entitled to governmental immunity from Plaintiff's claims. First, the tort of retaliatory termination is only a judicially recognized public policy, and is not included among the statutory exceptions to governmental immunity. The Court therefore held that because statutory exceptions are to be narrowly construed, retaliatory termination "is not actionable against a governmental agency." Additionally, the tort is intentional in nature, and "a governmental entity cannot be held liable for the intentional torts of its employees." Thus, the Court ordered summary disposition to be granted in favor of the Treasurer's Office.

Federal Law Update

By Phil Erickson, Michael S. Bogren, and Edward D. Dudendorf, Plunkett & Cooney, P.C. [U.S. Court of Appeals, Sixth Circuit]; Carlito H. Young, Esq.; Timothy S. Wilhelm, Esq.; Rebekah Page-Gourley, Esq.; and Marcia Howe, Esq.; Johnson, Rosati, LaBarge, Aseltyne & Field, P.C. [U.S. Supreme Court and U.S. District Court, Eastern District of Michigan]

United States Supreme Court

Police Misconduct–42 USC 1983–Fourth Amendment, Probable Cause to Arrest–State Law

Virginia v Moore, 128 S Ct 1598 (2008)

The police radio advised two (2) police officers that a person known as "Chubs" was driving with a suspended license. Moore's nickname of "Chubs" was known to one of the officers. After determining that Moore's license was in fact suspended, they stopped and arrested him for the misdemeanor of driving on a suspended license. The state statute, however, required the issuance of a citation, not arrest. Nonetheless, the officers arrested Moore after taking him into custody without a search because each officer believed the search was performed by the other officer. When they realized their mistake upon arriving at Moore's hotel room, he gave them consent to search him. Moore was carrying 16 grams of crack cocaine and $516 in cash. Although Moore argued that the arrest violated the Fourth Amendment because the officers did not have authority under state law to arrest him, the Supreme Court disagreed. When the arrest is supported by probable cause, the Fourth Amendment is not violated even if the arrest was not authorized or may be prohibited by state laws. Tying the Fourth Amendment protections to a state's local rules would alter the Fourth Amendment's overall meaning, and impermissibly allow the Fourth Amendment protections to "vary from place to place and from time to time." Here, probable cause for a crime committed in the presence of an arresting officer existed. The warrantless arrest was reasonable, and the evidence was admissible.

United States Court of Appeals, Sixth Circuit

Due Process–Procedural–Substantive–Zoning

Braun v Ann Arbor Charter Township,
Case No. 07-1370; ___ F.3d ___ (March 13, 2008)

Plaintiffs were owners of agricultural property north of Ann Arbor who sought to have the property rezoned to "R-6" and "R-3" zoning classifications to allow for the development of a trailer park and single family residences. The rezoning request was denied by the planning commission and the township board in the fall of 2001. Plaintiffs then filed suit in state court prior to petitioning the ZBA for a variance. The state court action was dismissed, because plaintiffs had not sought a use variance from the Township ZBA, and the Michigan Court of Appeals affirmed. The plaintiffs then requested a use variance from the township ZBA. When the requested use variance was denied, the plaintiff filed an action in federal court asserting takings claims and violations of procedural and substantive due process. The district court granted summary judgment for defendant, and the Sixth Circuit affirmed. The court held that plaintiffs' taking claim was not ripe, because plaintiff had not sought or been denied just compensation in state court. Plaintiffs' due process claims were dismissed as ancillary to the takings claim. In addition, the court found that the due process claims were deficient for the reason that the plaintiffs did not have an entitlement to have their property rezoned to allow for the development of a trailer park.

First Amendment–Speech–Sexually Oriented Business

729, Inc. v. Kenton County Fiscal Court, Kentucky,
Case No. 066390; ___ F.3d ___ (February 6, 2008)

Kenton County (Covington), Kentucky adopted a licensing ordinance which comprehensively regulates sexually-oriented businesses. The ordinance, among other things, forbids anyone from being semi-nude anywhere but on stage and also requires that entertainers stay at least five feet away from areas occupied by patrons for a period of at least one hour after performing. Plaintiffs, a group of sexually-oriented businesses, asserted that the ordinance violated their First Amendment right to freedom of expression. The district court upheld the ordinance, and the Sixth Circuit affirmed. The court applied intermediate scrutiny to the matter. The court found that the provision was intended to target prostitution, was likely to have an impact on reducing prostitution, and leaves the quantity and accessibility of protected speech substantially intact. In addition, the court rejected an argument by plaintiffs that the ordinance did not provide for sufficiently prompt judicial review, but also remanded the matter back to the district court for further proceedings regarding the reasonableness of the licensing fees.

First Amendment–Speech–Sexually Oriented Business

Sensations, Inc. v. City of Grand Rapids,
Case Nos. 06-2168/2508/2510; 07-1504; ___ F.3d ___
(May 20, 2008)

In April of 2006, the City of Grand Rapids passed ordinance 2006-23 entitled "Conduct in Sexually-Oriented Businesses." Plaintiffs are sexually-oriented business whose separate actions were consolidated by the district court for review. "Sexually-Oriented Business" was broadly defined in the ordinance and included "any adult motion picture theater, adult bookstore, adult novelty store, adult cabaret, or semi-nude model studio." The ordinance contained, among other provisions: (1) a prohibition on total nudity, (2) a requirement that performers maintain a six-foot distance from customers, (3) a rule disallowing table dances by requiring that performers perform on a stage, (4) a rule disallowing private dances by requiring the performers perform in a room of at least 600 square feet; and (5) a prohibition of peep show booths by requiring that the operator of "image producing devices" have an unobstructed view of the premises. The court applied the test set out by the United States Supreme Court in *United States v. O'Brien,* 391 U.S. 367 (1968). The court first found that the City had enacted the ordinance within its constitutional power. The court then found that the secondary effects which the city sought to reduce were "undeniably important" government interests. Third, the court found that the city intended to limit the secondary effects associated with sexually-oriented businesses and not the speech communicated by those businesses. Fourth, the court held that the ordinance was narrowly tailored to the reduction of secondary effects.

First Amendment–Speech–Sign Ordinance

Midwest Media Property, LLC v. Symmes Township, Ohio,
Case No. 06-3828; ___ F.3d ___ (January 10, 2008)

In its initial decision on October 1, 2007, the original panel dismissed the claims of the plaintiff for lack of standing. The plaintiff filed nine separate applications to erect a billboard in Symmes Township. Each of the applications requested to erect a 40-foot high, 672-square-foot sign, which exceeded the height and size restrictions in the township zoning ordinance. When the applications were rejected, plaintiff brought suit, challenging other aspects of the ordinance, but not the height and size restrictions. The Sixth Circuit found that plaintiff had no standing, where plaintiff had failed to challenge the height and size restrictions. "The key problem with plaintiffs' claims is one of redressability. . . . Having chosen not to challenge the size and height regulations and having filed nine applications to post a sign in the township that violated these regulations, plaintiffs cannot tenably show that success in challenging *other* regulations of the sign ordinance will redress any injury caused by these regulations."

Plaintiff then filed a petition for rehearing *en banc*. A majority of the members of the court failed to approve the petition, and the matter was referred back to the original panel, which denied the petition for rehearing. In a dissent, Judge Clay, joined by Judges Martin, Moore, and Cole stated: "The panel majority's decision not only errs as a matter of law, it creates unreconcilable conflicts in an exceptionally important area of First Amendment jurisprudence. I pity the poor litigants and district judges who, faced with such clashing decisions and lack of guidance from this court, must now attempt to unravel the confusion which the panel majority has created. Even worse, I regret that the *en banc* court has chosen to stay silent on this question, thereby quashing the First Amendment rights of plaintiffs through its silence."

Fourth Amendment–Arrest–Qualified Immunity

King v Ambs,
Case No. 06-2054; ___ F.3d ___ (March 21, 2008)

Plaintiff Sean King was arrested by Officer Kevin Ambs of the Columbia Township Police Department after he repeatedly told a third person not to talk to Officer Ambs. Officer Ambs found marijuana in plain view on the dashboard of a vehicle. He then determined that vehicle belonged to a resident of a dwelling across the street. When Officer Ambs was attempting to interview the vehicle owner, Sean King twice interrupted Officer Ambs and advised the vehicle owner not to talk to the officer. Officer Ambs told Sean King that if he continued with this conduct, he would be arrested. When King interrupted a third time, he was arrested (after being subdued) for being drunk in public, opposing an officer in the performance of his duty, resisting arrest, and possessing marijuana. Plaintiff was successful in getting these charges dismissed in state district court (presumably in Jackson County).

Plaintiff then brought claims against Officer Ambs in federal court under the Fourth Amendement and the First Amendment. The federal district court granted summary judgment to Officer Ambs, and the Sixth Circuit affirmed. The court disagreed with the state court and found that Officer Ambs had probable cause to arrest plaintiff, and that, therefore, there was no violation of his Fourth Amendment rights. The court further stated that Officer Ambs would be entitled to qualified immunity even if one assumed a violation of the Fourth Amendment. The court further found that plaintiff's speech was not protected by the First Amendment given the time and manner of the speech.

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Federal Law Update . . .

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Fourth Amendment–Excessive Force

Davenport v Causey, Case Nos. 07-5168/5215

Plaintiffs brought an action in federal district court after their father was shot by Officer Samuel Causey of the City of Crossville, Tennessee, following a routine traffic stop. He subsequently died from the gunshot wound. The events leading up to the shooting occurred over only approximately 68 seconds. After being stopped, plaintiff's decedent, Ben Davenport, exited his vehicle and walked to the rear of the vehicle. He refused to return to his vehicle. When Officer Causey attempted to arrest him, he resisted arrest. Officer Causey tried his taser, which did not appear to work, and Ben Davenport started to take the taser from Officer Causey. Ben Davenport then assaulted Officer Causey, knocking him to the ground. As Ben Davenport was assaulting another officer who arrived as backup, he was shot by Officer Causey. Officer Causey testified that at the time he shot Ben Davenport, he was fearful that plaintiff's decedent was going to cause him great bodily harm or even kill him.

Plaintiffs brought an action asserting excessive use of force under the Fourth Amendment. The federal district court denied defendants motion for summary judgment, finding issues of fact regarding the application for qualified immunity. The Sixth Circuit reversed and awarded summary judgment on the basis that plaintiff was unable to prove a constitutional violation. The court stated: "While neither Officer Pugh nor Officer Casey had been knocked unconscious, the situation here was similar enough to allow the use of deadly force without violating the Constitution. The officers were facing a large, violent, and angry individual who was unwilling to be brought under control by the officers. Mr. Davenport had already knocked Officer Causey to the ground and was delivering blows in rapid succession to Officer Pugh's head . . . . While Officer Causey may have been mistaken in deciding that deadly force was required and that there was no time to warn Mr. Davenport, we cannot say, given the rapidly evolving circumstances, his decision was unreasonable."

United States District Court, Eastern District of Michigan

Municipal Law–Nuisance Violation–Procedural Due Process

Kircher v City of Ypsilanti, 2008 WL 2026143 (E.D., Mich.)

The City investigated a suspected illegal occupancy of plaintiff's vacant rental house. Based on an inspection, City determined that the house was unfit for human occupancy due to lack of certificate of occupancy, lack of water service for months, trash strewn about the house, and a bathtub filled with human excrement. In light of recent arson problem in the area, the city fire marshal determined that the unsecured vacant house presented an emergency situation posing a danger to persons or property. He ordered the house evacuated, the windows boarded up, and the doors locked.

After a state court jury convicted the plaintiff of ordinance violations, the plaintiff then filed a federal lawsuit alleging violations of his rights under the Fourth and Fourteenth Amendments. The federal court dismissed the Fourth Amendment claim and rule on the extent of his property interest. Outstanding factual questions prevented summary judgment on the procedural due process claims until after discovery. Subsequently, the court granted the City's Motion for Summary Judgment on plaintiff's procedural due process claim. Relying on *Harris v City of Akron*, 20 F.3d 1396 (6th Cir., 1994) (emergency demolition of severely damaged building) and *Flatford v City of Monroe*, 17 F.3d 162 (6th Cir., 1994) (emergency eviction of dangerous rental building), Judge Zatkoff found that the existence of exigent circumstances requiring immediate government action made meaningful pre-deprivation process impractical. The post-deprivation process provided to the plaintiff was adequate, and no procedural due process violation occurred.

First Amendment Free Exercise–Younger Abstention Doctrine–Rooker-Feldman Doctrine–Subject matter jurisdiction

Muhammad v. Paruk, ___ F. Supp. 2d. ___; 2008 WL 2098146 (E.D. Mich., 2008)

State Court Judge Paul Paruk presided over the small claims action filed by Ginnah Muhammad, an African-American woman and practicing Muslim, against a rental car company, which had filed its own small claims action against her for damaging a rental car. Before proceeding with Muhammad's testimony, Judge Paruk asked Muhammad to remove her veil so he could see her face and evaluate her credibility. Based upon her religion, she explained she could only remove her veil for a female judge. Seeing no choice, the state court judge dismissed Muhammad's action without prejudice. The rental car company prevailed on its small claims action against Muhammad. A state court appeal is pending.

Meanwhile, Muhammad filed a federal lawsuit seeking injunctive and declaratory relief, and alleging a violation of her First Amendment right to free exercise and her right of access to the courts. The defendant judge moved to dismiss plaintiff's claims based on the *Rooker-Feldman* doctrine, *Younger* absten-

tion doctrine, judicial immunity, the Declaratory Act, and for failure to state a claim.

Judge Feikens rejected the defendant judge's *Rooker-Feldman* doctrine argument because the Court was not precluded from exercising jurisdiction over Muhammad's claims where her federal claims were not inextricably intertwined with and would not invite the federal court to review issues decided in the state court proceedings, specifically whether Muhammad was liable for damages to the rental car. He also ruled that the *Younger* abstention doctrine, which requires federal courts to abstain from granting injunctive or declaratory relief that would interfere with pending state court proceedings, did not preclude him from exercising jurisdiction because Muhammad's small claims action was no longer pending, and her appeal in the rental car company's case was a separate legal proceeding.

Judge Feikens then granted a partial summary judgment because the state judge was entitled to partial judicial immunity for Muhammad's claims for injunctive relief because 42 USC §1983 prohibits the granting of injunctive relief against judicial officers in their official capacities. Based upon the Declaratory Act, 28 USC §2201, conferring discretion upon federal courts to decide whether to declare the rights of parties, Judge Feikens declined to exercise jurisdiction over her declaratory judgment claims, finding three of the five factors weighed against exercising jurisdiction.

As to Muhammad's free exercise claim, Judge Feikens refused to conduct a detailed examination of how the state court judge managed his courtroom, or to determine if Muhammad's small claims action was colorable or whether the state court interfered with her access to the court. These detailed factual and legal analyses would undoubtedly increase the friction between the federal and state courts. Moreover, clarifying the rights of the parties would not resolve an active dispute because Muhammad had never re-filed her small claims action. Additionally, he declined to exercise jurisdiction because she had other remedies available to her such as asserting counter claims in response to the rental car company's claims, and re-filing her small claims action in the general civil division where she would have a right of appeal.

Employment–Sexual Harassment

Hensman v City of Riverview, Slip Copy, 2008 WL 821940 (ED Mich 2008)

Plaintiff's claims of sexual harassment by her supervisor under the ELCRA and Title VII were dismissed where the court found that plaintiff failed to establish the existence of severe and pervasive sexual harassment. Judge Rosen noted that the majority of the alleged harassing conduct was not "based on sex" under either Title VII or the ELCRA, holding "There is nothing inherently sexual or anti-female about calling someone by the wrong name, keeping an office door closed while meeting with a subordinate, walking too closely behind someone, sniffing and asking what fragrance someone was wearing, noticing someone's eyes or telling someone that she looked cute in what she is wearing, or in bringing someone flowers and bagels to apologize for disturbing her the previous evening." The Court further held that the minimal conduct that might be considered sexual—several hugs and a comment that plaintiff was "voluptuous"—did not constitute severe and pervasive harassment under the totality of the circumstances, and therefore granted defendant summary judgment.

Employment–Title VII–Bankruptcy

McDaniel v Guaranty Bank, Slip Copy, 2008 WL 126611 (ED Mich 2008)

In this case involving alleged discrimination by a former employer, Judge Duggan summarily dismissed plaintiffs' claims where she failed to disclose the cause of action in her bankruptcy proceedings. Because she filed a complaint with the EEOC and received a right to sue letter before filing for bankruptcy, she was unable to prove "mistake or inadvertence" when attempting to explain her failure to disclose the bankruptcy.

Age Discrimination; Reduction in Force

Hirsch v AZ Automotive Corp, Slip Copy, 2008 WL 115532 (ED Mich 2008)

In this age discrimination claim, plaintiff disputed the employer's defense that a reduction in force due to economic necessity was involved in his layoff. The defendant offered evidence of the decline in the automotive industry as a whole and its effects on the company, which necessitated removal of production lines and laying off of certain skilled employees. Judge Cohen held that because the plaintiff did not provide evidence disputing the accuracy of this information, the standard for a reduction in force applied, requiring an additional showing at the prima facie case stage that he was "singled out because of his age." Because the plaintiff provided no evidence that he was treated differently from similarly situated younger employees, Judge Cohen dismissed the claim.

Public Policy Update

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Legislative Update

By Kester K. So, Dickinson Wright PLLC

Over the course of the last several months, the Michigan Senate and House of Representatives have considered numerous bills of municipal interest. The following are summaries of some of those bills:

Laws Enacted

- Joint Municipal Planning Act. **SB 420, PA 134.** Provides for joint land use planning and the joint exercise of certain zoning powers and duties by local units of government and the establishment, powers, and duties of joint planning commissions. Amends Sections 3, 5, and 7 of 2003 PA 226 (MCL 125.133, 135, and 137).
- Telecommunications. **SB 108, PA 130.** Amends the Metropolitan Extension Telecommunications Rights-of-Way Oversight (METRO) Act, MCL 484.3101 et seq., to allow additional municipalities to opt to receive funds under the METRO Act. Amends Section 13 of 2002 PA 48 (MCL 484.3113).
- Technology Parks. **HB 5609, PA 105.** Amends the Local Development Financing Act to allow the Michigan Economic Development Corporation to designate three additional certified technology parks between February 1, 2008 and December 31, 2008. Amends Section 12a of 1986 PA 281 (MCL 125.2162a).
- Commercial Rehabilitation Districts. **HB 5459, PA 118.** Amends the Commercial Rehabilitation Act to make property tax abatements available for new commercial buildings constructed on vacant property where previous structures have been demolished, if the new construction is an economic benefit to the local community. Amends Section 2 of 2005 PA 210 (MCL 207.842).
- Renaissance Zones. **SB 885, PA 117.** Amends the Michigan Renaissance Zone Act to require the recommendation of the Agriculture Commission, in addition to the Michigan Strategic Fund board, in order for the State Administrative Board to designate a renaissance zone for a renewable energy facility that used agricultural crops or residues or processed products from agricultural crops as its primary raw material source and allows for expanded tool and die renaissance recovery zones. Amends 1996 PA 376 (MCL 125.2683, 2688d, 2688e and 2690).
- Renaissance Zones. **HB 5600, PA 116.** Amends the Michigan Renaissance Zone Act to expand the definition of "renewable energy facility," increase the number of distinct geographic areas in a renaissance zone that may have no minimum size requirement, allow the designation of additional distinct geographic areas if they would increase either capital investment or job creation, and allow for revocation of an extension. Amends 1996 PA 376 (MCL 125.2684 and 2688a).
- Local Development Financing Act. **SB 1203, PA 104.** Amends the Local Development Financing Act to allow the Michigan Economic Development Corporation to designate certain additional certified technology parks (Smart Zones). Amends 1986 PA 281 (MCL 125.2151 et seq by adding Section 12b).
- Water Improvement Tax Increment Finance Authority. **SB 47, PA 94.** Provides for the establishment of a water improvement tax increment finance authority and provides for the powers and duties of the authority.
- Highway Advertising. **SB 351, PA 93.** Amends the Highway Advertising Act to add counties to the list of local units of government authorized to enact ordinances to regulate signs and sign structures under the Act. Amends Section 4 of 1972 PA 106 (MCL 252.304).
- Michigan Planning Enabling Act. **SB 206, PA 33.** Creates the Michigan Planning Enabling Act to repeal and replace statutes that govern municipal, county, and township planning. The new legislation is effective September 1, 2008. For a summary of the new legislation, see Gerry Fisher's ICLE summary entitled "New Michigan Planning Enabling Act."

Bills Passed by the Senate

- Michigan Renaissance Zone. **SB 1122.** Allows the board of the Michigan Strategic Fund to designate five additional alternative energy renaissance zones with a focus on the production of celluosic biofuels, and allows the State Administrative Board and the Michigan Strategic Fund to designate certain additional renaissance zones under the Michigan Renaissance Zone Act. Amends Section 8a of 1996 PA 376 (MCL 125.2688a).
- Distressed Parcels. **SB 980.** Allows the governing body of an eligible local assessing district to exempt all new personal property owned or leased by an eligible business

located in one or more "distressed parcels" from the collection of taxes under the General Property Tax Act. Amends Section 9f of 1893 PA 206 (MCL 211.9f).

- New Tax Exemptions. **SB 974.** Allows new tax exemptions under the Commercial Redevelopment Act to be granted until December 31, 2020 for a new or replacement facility in a redevelopment district in a city or village, on property zoned for mixed-use (including high-density residential use) that was located in a qualified downtown revitalization district. Tie-barred to SB 976. Amends Sections 4, 12, and 18 of 1978 PA 255 (MCL 207.653 et seq.).
- Neighborhood Enterprise Zones. **SB 976.** Includes in the definition of "new facility" under the Neighborhood Enterprise Zone Act a new structure that is rental property, is, or is located in, a mixed-use building that contains retail business space on the street level floor, and is located in a "qualified downtown revitalization district," which is an area located within a downtown district, a principal shopping district, a business improvement district, or an area of the local unit zoned and primarily used for business. Amends Section 2 of 1992 PA 147 (MCL 207.772).

Bills Passed by the House of Representatives

- Michigan Promise Zones. **HB 5375.** (See also SB 861). Creates the Michigan Promise Zone Act to permit the governing body of an eligible entity (a city, township, county, school district, or intermediate school district in an area where the percentage of families with children living at or below the federal poverty rate is higher than the state average), after a public hearing, to establish a promise zone and provide a promise of financial assistance for postsecondary education to students who graduated from a public or nonpublic high school within that zone.
- Renewable Energy Facilities. **HB 4950.** Redefines "renewable energy facility" in the Michigan Renaissance Zone Act as a facility that creates energy directly or fuel from the wind, sun, trees, grasses, biosolids, algae, agricultural commodities, processed products from agricultural commodities, or residues from agricultural processes, wood or forest processes, food production and processing, or the paper products industry. The term would include a facility that creates energy or fuels from solid biomass, animal wastes, or landfill gases, and would include a facility that focuses on research, development, or manufacturing of systems or components of systems used to create energy or fuel from the items described above. Amends Section 3 of 1996 PA 376 (MCL 125.2683).
- Individuals Authorized to Work. **HB 5781, 5785, 5788, 5789, and 5790.** These bills (together with other bills), would amend a number of state purchasing and local economic development statutes to require that preference be given to Michigan residents and to disqualify firms from eligibility unless they agree not to knowingly hire individuals who are not authorized under federal law to work in the United States. This package of bills would amend, among others, the Brownfield Redevelopment Financing Act, the Michigan Renaissance Zone Act, the Obsolete Property Rehabilitation Act, the Industrial Development Revenue Bond Act, and the Plant Rehabilitation and Industrial Development Districts Act.

Bills Introduced in the Senate

- Renewable Energy Facilities. **SB 1042.** Increases the maximum number of renewable energy facility renaissance zones from 10 to 20 under the Michigan Renaissance Zone Act. Amends Section 8e of 1996 PA 376 (MCL 125.2688e).

Bills Introduced in the House of Representatives

- Assessor's Role in Enterprise Zones. **HB 6032.** Provides that the assessor of the local governmental unit perform the duties previously performed by the state tax commission under the Neighborhood Enterprise Zone Act. Amends Sections 5,6,7,11 and 16 of 1992 PA 147 (MCL 207.771 et seq.).

Developments . . .
Continued from page 9

V. The Sewage Disposal System Exception – MCL § 691.1417.

In a case of some potential significance, the Michigan Court of Appeals in *Lenton v Arenac County Road Commission*,[36] concluded that the sewage disposal system event exception "clearly" applies to more than just sewage disposal systems as that term would ordinarily be understood. According to the Court, pursuant to the statutory language, the exception applies to systems designed for storm water drainage.

In *Lenton*, the plaintiff asserted that in the fall of 2003, the road commission cut down trees, limbs and branches along Roseburgh Road, which was near the plaintiff's home, and deposited this debris into a roadside drainage ditch. The following spring, rains floated the debris down the roadside drainage ditch and formed a dam at a culvert near the Lenton property. This dam, in turn, caused the Lenton property to flood. Damage to the Plaintiff's house, barn, furniture, and other personal property resulted.

The plaintiffs filed suit against the road commission under the sewage disposal system event exception, MCL § 691.1417. They asserted that the road commission had breached its duty to maintain the drainage ditch and culvert which was under the commission's jurisdiction.

The road commission moved for summary disposition arguing that the drainage ditch and culvert were not part of any "sewage disposal system" or "storm water drain system" and further that the event at issue was not a "sewage disposal system event". According to the road commission, the plaintiff was attempting to extend liability under the exception to a "simple roadside ditch, in a circumstance which does not involve the overflow or backup of sewage..." The road commission further claimed that the phrase "storm water drain system" referred solely to urban, underground storm drains that connect to a sewage system.

The terms "sewage disposal system event" and "sewage disposal system" are, of course, defined statutorily at MCL § 691.1416(k) and MCL § 691.1416(j) respectively.

Referencing *Jackson County Drain Commissioner v Village of Stockbridge*,[37] the Appellate Court noted that the sewage disposal system event exception applied to county drains that carry drainage water. Although the road commission had argued in *Lenton* that the runoff of surface waters caused by heavy spring rains was not the result of a sewage disposal system event, the Court felt that the flooding of the plaintiff's property was similar to the heavy rain flooding experienced by the plaintiffs in *Jackson*. Thus, it stated that the exception applied to systems designed for storm water drainage.

The Court then considered the next question which it described as, "whether the overflow of a simple county roadside ditch,... which allowed surface water from heavy spring rains to flood [the Lenton] property, falls within this exception, " i.e. whether the roadside drainage ditch and culvert were a "storm water drain system," as defined by the statute. Turning to the Random House Webster's College Dictionary (1997) and the Michigan Drain Code, MCL § 280.1, the Court concluded that the ditch could well be a storm water drain for purposes of the exception. The appeals court then remanded the matter to the trial court to determine whether or not the ditch was part of a storm water drain "system" which would require discovery. The Court also concluded interestingly:

> We note that if the trial court concludes on remand that the roadside drainage ditch was a sewage disposal system, then it follows that the overflow and flooding that occurred here was a sewage disposal system 'event': 'the overflow or backup of a sewage disposal system onto real property.'

The Michigan Supreme Court denied leave to appeal.[38]

VI. Liability of Indivdual Governmental Employees

(a) Medical Malpractice: No Loss of Governmental Immunity Benefit Despite Failing to File Affidavit of Meritorious Defense.

In *Costa v. Community Emergency Medical Services*,[39] the plaintiff filed suit against EMT's for failing to provide proper medical treatment to Richard Costa after his friend knocked him out. Costa originally seemed fine after the EMTs brought him back to consciousness, so they did not transport him to the hospital for treatment. But the ambulance had to return the next day when Costa's friend could not wake him. Costa eventually underwent a craniotomy to treat an epidural hematoma.

After Costa filed suit, the defendants, emergency medical service employees from the City of Taylor Fire Department moved for summary disposition under the Governmental Tort Liability Act.[40] Costa responded by requesting a default judgment when the defendants failed to file affidavits of meritorious defense pursuant to MCL § 600.2912e, Michigan's medical malpractice statute. The trial court denied the parties' motions, the Court of Appeals reversed, and the Michigan Supreme Court affirmed the reversal. Specifically, the Supreme Court held that, because governmental immunity provides a complete defense from tort liability for governmental employees, a governmental employee who satisfies the requirements of MCL § 691.1407(2) was not required to file an affidavit of meritorious defense under MCL § 600.2912e, where he was a

defendant in a medical malpractice action.[41] Because governmental employees are immune from breaches of the standard of ordinary care, the affidavit of merit requirements are irrelevant to a defendant otherwise entitled to governmental immunity; therefore, such a defendant may not lose the benefit of that immunity merely by failing to timely file the affidavit of meritorious defense.[42] Furthermore, the Court concluded that where a governmental employee has invoked the defense of governmental immunity, but an order denying immunity is entered, the requirements of § 600.2912e should be stayed during the pendency of any appeal on that issue.[43]

(b) Intentional Torts: Scope of Governmental Immunity Statute to be Determined by Michigan Supreme Court.

Some questions the Michigan Supreme Court will soon decide: (1) what is the proper interpretation of MCL § 691.1407(3), which states that ""[MCL § 691.1407(2)] does not alter the law of intentional torts as it existed before July 7, 1986"; (2) can intentional torts claims be brought under MCL § 691.1407(2); and (3) for an intentional tort claim, what must a plaintiff plead to avoid governmental immunity?

In *Odom v Wayne County,*[44] the plaintiff was arrested after a deputy observed behavior consistent with that of known prostitutes, such as walking back and forth on the street and making eye contact with drivers in an area known for prostitution. When the charges were subsequently dismissed, the plaintiff sued the deputy for false imprisonment and malicious prosecution.

Although the plaintiff did not allege gross negligence, the trial court held that the defendant's conduct did not amount to a claim of an "intentional act," and that the issue was whether the defendant was grossly negligent, defining this in terms of whether the defendant had "probable cause" to arrest the plaintiff.[45] The Court of Appeals, however, held that a question of fact existed regarding whether the defendant acted in an "objectively reasonable" manner.[46] On appeal to the Supreme Court, the defendant argued that imposing liability for "unreasonable" conduct contravenes the Legislature's grant of governmental immunity. As a result of the confusion between all of these standards, the Supreme Court granted leave to appeal to clarify the standard of liability applicable to the conduct of police officers in undertaking arrests.[47]

The Supreme Court seems particularly interested in the standard to be applied in cases where intentional torts are alleged against individual defendants. Confusion certainly exists among Michigan courts about whether Michigan's governmental immunity statute covers intentional torts by government employees. In *Smith v Dep't of Public Health*,[48] the Michigan Supreme Court squarely held that there is "no intentional tort exception to the governmental immunity statute." *Smith* has not been overruled and has been repeatedly cited by lower Michigan courts as holding that governmental immunity bars intentional tort claims against both government agencies and government employees. Unfortunately, the picture gets more complicated, particularly with respect to lower-level government employees. Several panels of the Michigan Court of Appeals have interpreted *Smith* as holding that governmental immunity shields only state agencies, not state officers, from intentional tort liability. Therefore, it will be beneficial to have the Supreme Court sort out the conflicting interpretations of *Smith*, and clarify the state of the law regarding governmental immunity and intentional torts.

Endnotes

1 *Sudul v City of Hamtramck*, 221 Mich App. 455 (1997).

2 480 Mich 1243 (2008).

3 *Nawrocki v Macomb County Road Commission*, 463 Mich 143 (2000).

4 *Haliw v City of Sterling Heights*, 464 Mich 297 (2001).

5 474 Mich 161 (2006).

6 The Court recognized that the plaintiff framed her claim in terms of a defect resulting from failure to maintain and repair because the claim may not be brought for defective design. See *Hanson v Mecoska County Road Commissioners*, 465 Mich 492 (2002).

7 MCL § 691.1403 states: "No governmental agency is liable for injuries or damages caused by defective highways unless the governmental agency knew, or in the exercise of reasonable diligence should have known, of the existence of the defect and had a reasonable time to repair the defect before the injury took place. Knowledge of the defect and time to repair the same shall be conclusively presumed when the defect existed so as to be readily apparent to an ordinarily observant person for a period of 30 days or longer before the injury took place."

8 In making this statement, the Court favorably referenced *Jones v Detroit*, 171 Mich 608 (1912) where the Court stated that "Nearly all highways have more or less rough and even places in them, over which it is unpleasant to ride; but because they have, it does not follow that they are unfit and unsafe for travel. The most that can be said for the testimony in this case is that it established the fact that the pavement on that part of [the street] was rough and called for more careful driving than did other portions of it."

9 Court of Appeals of Michigan, 2007 Mich App. LEXIS 952 (March 27, 2007).

10 *Fahey v City of Detroit*, Court of Appeals of Michigan 2007 Mich App. LEXIS 2623 (November 20, 2007).

11 477 Mich 993 (2007).

12 *Semon v City of St. Clair Shores*, Supreme Court of Michigan 2008 Mich LEXIS 922 (May 7, 2008).

13 Court of Appeals of Michigan 2007 Mich App LEXIS 887 (March 29, 2007). The Court likewise did not accept the implied argument that the statutory presumption applies only where the

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Developments . . .

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municipality involved creates and administers a regular sidewalk inspection policy. Indeed, the Court went so far as to state that given the fact that the defect was less than two inches, no repair would have been required as the sidewalk was in "reasonable repair" under 1402a(b)(2) even if the City had known about it. It reiterated that a discontinuity defect of less than two inches fell within the rebuttable inference of 1402a(2) and that the plaintiff had failed to rebut the inference notwithstanding an apparently somewhat questionable photograph of the defect adjacent to a ruler and the overall state of disrepair of the entire sidewalk flag because that "did not cause plaintiff's fall." The Court also noted that the hazard posed was apparent and could have been avoided; See also *Jurstik v City of Owosso*, Court of Appeals of Michigan 2008 Mich App, LEXIS 1081 (May 22, 2008) involving an alleged discontinuity defect of one and seven eights inches and a City of Owosso policy to repair defects greater than three eights of an inch. The Court again found the 1402a(2) rebuttable inference to apply and dismissed the City repair policy as essentially irrelevant; but see also *Semon v City of St. Clair Shores*, where the Michigan Supreme Court denied leave to appeal in a case where the Court found that even applying the inference of MCL § 691.1402a(2), and even though the differential was less than two inches in height, the Courts must also consider the width of the crack and not just the height difference, which in that case was greater than two inches in certain places and thus resulted in the denial of the City's motion for summary disposition.

14 480 Mich 862 (2007).

15 Court of Appeals of Michigan 2007 Mich App. LEXIS 1016 (April 17, 2007). In *Hughes*, the matter had been remanded from the Supreme Court in light of *Wilson v Alpena County Road Commission*, 474 Mich 161 (2006), discussed previously.

16 477 Mich 197 (2007).

17 398 Michigan 90 (1976).

18 452 Mich 354 (1996).

19 *Autio v Troksch Construction Company*, 377 Mich 517 (1966).

20 *Ells v Eaton County Road Commission*, 480 Mich 902 (2007).

21 See concurrence of Justice Weaver in *Mauer v Board of County Road Commissioners of Manistee County*, 480 Mich 912 (2007).

22 480 Mich 75 (2008).

23 The Michigan Court of Appeals held that the gradall was a motor vehicle for the purposes of MCL § 691.1405. The Supreme Court denied Leave to Appeal on the issue. 477 Mich 1030 (2007).

24 Citing *Maiuri v Sinacola Construction Company*, 382 Mich 39 (1969).

25 462 Mich 439 (2000).

26 480 Mich 936 (2007).

27 478 Mich 490 (2007).

28 405 Mich 716 (1979); 430 Mich 398 (1988).

29 Supra Footnote 2

30 465 Mich 492, 502 (2002).

31 The majority opinion further noted that the second sentence of MCL § 691.1406, which imposes liability resulting from a dangerous or defective condition, does not expand the duty beyond the repair and maintenance of the building.

32 Court of Appeals of Michigan, 2007 Mich App. LEXIS 2464 (October 25, 2007).

33 Court of Appeals of Michigan, 2008 Mich App. LEXIS 1186 (June 5, 2008).

34 269 Mich App 376 (2006).

35 269 Mich 365 (2006).

36 273 Mich App 107 (2006).

37 270 Mich at 273 (2006).

38 477 Mich 1114 (2007).

39 475 Mich 403 (2006).

40 MCL § 691.1407(2).

41 475 Mich at 412-13.

42 *Id.*

43 *Id.* at 414.

44 480 Mich 1184 (2008).

45 *Odom v Wayne County*, unpublished opinion per curiam of the Court of Appeals, decided February 1, 2007 (Docket No. 270501) at *2-3.

46 *Id.* at *3.

47 480 Mich 1184.

48 428 Mich 540, 593 (1987).

Reminder

Our annual meeting is Friday, June 27, 2008, at the Drummond Island Resort and Conference Center, immediately following the first day of the PCLS/MAMA Summer Seminar. For details, vist http://www.mml.org/mama/summer_conference08.html

I'll Bet You Didn't Know (or maybe you forgot):

~~"Arkansas'~~ Arkansas's Dilemma"

A regular feature submitted by Richard J. Figura, Simen, Figura & Parker, P.L.C., Flint and Empire, Michigan

I was curious recently when I learned that the Arkansas legislature finally got around to addressing an issue which has troubled many of us: i.e., what is the proper spelling of the possessive form of "Arkansas"? On an apparently slow work day back in February, the Arkansas legislature adopted House Concurrent Resolution 1016, which declared "Arkansas's" to be the correct spelling of the possessive form "of the name of our state."

Lest you think the Arkansas legislature rushed into this matter willy-nilly, please note that the recitals of the resolution show that the legislature recognized that "confusion has arisen concerning the appropriate spelling of the possessive form of" Arkansas. Secondly, they deemed it important that the correct spelling of the possessive form "be used in official documents and publications." They also found that "the matter has been thoroughly investigated" before arriving at the conclusion that the preferred form is "Arkansas's."

What is also interesting is that this is not the first time such matters have occupied the legislature of the Razorback State.[1] Let's take a look back in history and the source of the name *Arkansas*.

> The name *Arkansas* derives from the same root as the name for the state of Kansas. The Kansas tribe of American Indians are closely associated with the Sioux tribes. The word is a French pronunciation of a Quapaw (a related "Kaw" tribe) word meaning "land of downriver people" or "people of the south wind." The pronunciation of Arkansas (ar-kan-saw) was made official by an act of the state legislature in 1881 after a dispute between the two U.S. senators from Arkansas. One wanted to pronounce the word ar-kan-sas, and the other wanted ar-kan-saw.[2]

Thus, Arkansas became, and still is, the only state to specify the pronunciation of its name by law (AR-kan-saw).

Accordingly, the Arkansas legislature in 2008 (127 years and 1012 concurrent resolutions later), in Concurrent Resolution 1016, declared "Arkansas's'" to be the correct form of the possessive of Arkansas, and, in doing so, determined "this resolution shall be considered to be supplemental to Concurrent Resolution 4 of 1881, which established the correct pronunciation of the name of our state."

So when you are referring to Bill Clinton's job before he became president, remember, he was not Arkansas' governor, but Arkansas's governor.

One more thing, before we leave the great state of Arkansas. I'll bet you didn't know, or maybe you forgot, that some of Arkansas's counties have two county seats, as opposed to the usual one seat. That's right, count 'em—two! The arrangement dates back to when travel was extremely difficult in the state, and the seats are usually on opposite sides of the county. Though travel is no longer the difficulty it once was, there have been few efforts to eliminate the two-seat arrangement where it exists, since the county seat is a source of pride (and jobs) to the city involved.

Is it Smith, Smiths, or Smith's? And What About Jones?

Reflecting on the interest of Arkansas's (I got it right) legislature in the possessive form of the state's name made me wish that the Michigan legislature, or maybe Congress, would establish the proper possessive and plural forms for home name signs. How many times have you seen house name signs that should be plural use the possessive form? For example, often a sign will say *Smith's* when it should say *Smiths* because the intent is to say, "The Smiths live here." Or the sign will say *Jones'* or *Jones's* when it should say *Joneses* because the intent is to say, "The Joneses live here."

When, however, the possessive form is intended, it should be accompanied by the definite article *the*, as in *The Smiths'*. This still begs the question, however: the Smiths' what? The Smiths' house? The Smiths' car? The Smiths' sign? Therefore, when the intent is to use the possessive, the sign should also describe what is being possessed, such as *The Smiths' House*, or *The Joneses' House*. Then again, in the case of *Jones*, one could follow the lead of Arkansas and use the possessive *Joneses's*, so that the sign would read *The Joneses's House*. The following summary can be used as a guide.

If the intent is to say	**The sign should read**
Smith lives here	Smith
Jones lives here	Jones
The Smiths live here	Smiths or The Smiths
The Joneses live here	Joneses or The Joneses
This is the Smiths' house	The Smiths' House
This is the Joneses' House	The Joneses' House
This is the Joneses' house in Arkansas	The Joneses's House

Endnotes

1 While we all know Arkansas as the Razorback State, the official nickname is the Natural State.

2 Source: *http://en.wikipedia.org/wiki/Arkansas*

Insider Insight. . .

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four months from the auto accident, and that her closed head injury had essentially resolved during that time period. The trial court also ruled that the facial scar, while permanent, was not readily noticeable and did not constitute a permanent serious disfigurement.

Plaintiff appealed the trial court's dismissal, through her counsel, Bernstein & Bernstein. The Michigan Court of Appeals issued an authored, published opinion affirming in part and reversing in part the trial court's grant of summary disposition. The Court of Appeals held that plaintiff's claims regarding the closed head injury and facial scar should have been allowed to reach a jury. The Court of Appeals opinion was authored by Judge Davis, with a concurring opinion by Judge O'Connell and a dissenting opinion by Judge Murray.

Importantly, this was the first published appellate court decision addressing the permanent serious disfigurement component of the No-Fault Act since the 1994 amendments to the statute, and the first published appellate court decision finding a facial scar to qualify as a permanent serious disfigurement.

The defendants appealed to the Michigan Supreme Court, which conducted oral argument on the application on January 9, 2008. On April 25, 2008, the Court issued a one-paragraph order which reversed the judgment of the Court of Appeals and reinstated the judgment of the Kent County Circuit Court granting the defendants' motion for summary disposition, for the reasons set forth in the Court of Appeals' dissenting opinion. Four justices joined in the order: Chief Justice Taylor, Justice Corrigan, Justice Young, and Justice Markman. Justice Weaver and Justice Kelly issued separate dissenting statements, and Justice Cavanagh would have denied leave to appeal.

Reductions . .

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regarding pretext.") This would render futile any questioning of the reasonableness or intelligence of the business decisions going into a RIF in an ELCRA case.

IV. Conclusion

When confronted with a wrongful discharge or discrimination claim arising out of a reduction in force, counsel must be aware of several unique legal issues. Counsel should be cognizant of differences between federal and state claims, and be prepared to frame the issue in a manner advantageous to her client. In all circumstances, counsel must build a record containing sufficient testimonial and documentary evidence of the economic necessity for the reduction. Counsel should meet with the employee or employees who implemented the RIF to get a complete understanding of their rationale, keeping in mind that federal courts may evaluate the reasonableness of the employer's judgment as one factor influencing the pretext inquiry in a discrimination claim. Once counsel has assembled a record sufficiently establishing economic necessity, she should focus her attention on identifying and exposing the weaknesses in plaintiff's attempt to dispute the legitimacy of the RIF. Highlight the plaintiff's lack of expert testimony or documentary evidence, and, in discrimination cases, emphasize the plaintiff's failure to meet her heightened burden of providing additional evidence of discriminatory animus in order to establish a prima facie case. Being mindful of these considerations will go a long way toward protecting your client's interests in the event that a lawsuit results from an RIF.

Endnote

1 Interestingly, at least one court has generalized *Blair*'s holding thusly: "In reduction in force cases, this circuit has held that a reduction in force is legitimate when there is a non-age based reason for such a reduction." *Simoliunas v City of Detroit*, Slip Copy, 2008 WL 786656, 3 (ED Mich 2008).

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