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CUMMINGS, MCCLOREY, DAVIS & ACHO ATTORNEY GETS FOUR CASES DISMISSED WITHIN TEN DAYS

To say Ethan Vinson had a "good week" would probably be an understatement. The week of February 18, Ethan, an associate in our Livonia office, was able to get four cases dismissed.

Ethan Vinson

In one case, Ethan represented a township where the Plaintiff, a fire chief, had resigned and executed a Retirement and Release Agreement, which paid him six months pay. The chief then filed an action in the circuit court alleging sexual harassment, malicious prosecution, breach of contract, and his wife filed a claim for loss of consortium. Ethan filed a motion for summary judgment based upon the Retirement and Release Agreement the Plaintiff signed. The judge accepted Ethan's arguments and the motion for summary judgment was granted.

In another case, a police officer in a metropolitan Detroit township observed an individual weaving in his lane on April 12, 1999. The officer attempted to make a traffic stop and the Plaintiff continued driving. After the officer was finally able to stop him, the Plaintiff exited the car with his hands in his pockets. When the Plaintiff started to take his hands out of his pockets, the officer observed, what he believed to be, a knife in his hand. A police officer from a nearby city, who came to assist the officer, attempted to go over the back of the Plaintiff's vehicle and grab him from behind. The Plaintiff turned and stabbed the officer with the knife, at which time the two officers fired a total of 16 shots at the Plaintiff. Approximately seven or eight shots hit the Plaintiff, who was wounded. The Plaintiff subsequently filed an action in federal court. The federal court granted the Defendant's motion for summary judgment, based on the fact that the officer had probable cause to stop the individual; that the individual was bound over on felony charges in state court (a conclusive finding that could not be challenged) and that probable cause existed to arrest the Plaintiff. The court further found that the number of shots fired was not excessive and that there had been no showing that the Plaintiff had been treated any differently from any other individual.

Another case involved a Plaintiff's claim that his divorced wife had sought psychiatric treatment for his son, and during the treatment, the wife and the treating psychologist from the mental health agency had conspired to deprive the Plaintiff of his parental rights. Ethan filed a motion for summary judgment on behalf of the Defendant based on the fact that there had been no harm to the Plaintiff and that he had not articulated any federal right that had been violated. The magistrate agreed with the Defendant and recommended the Plaintiff's case be dismissed.

The last case Ethan recently got dismissed, involved a fire chief of a metropolitan Detroit city who was terminated in October 2000. The chief had a hearing before the Civil Service Commission that upheld the termination. The Plaintiff filed an action seeking superintending control (asking a higher court to take over consideration of the case) and alleging violation of his civil rights as he claimed to be a person with a disability, harassment, retaliation and breach of contract. Ethan filed a motion for summary judgment on behalf of the Defendant alleging that the presiding judge had already disposed of the Plaintiff's claim for superintending control, and therefore, he could not contest the termination, and that there was no basis for any other further claims. The judge agreed and granted the motion for summary judgment.

Ethan is an experienced trial attorney focusing his practice on Employment and Labor Law, Civil Rights, Municipal Defense and Insurance Defense. He can be reached by calling our Livonia office at (734) 261-2400 or via e-mail at evinson@cmda-law.com

Timothy Young, Executive Committee

CMDA ATTORNEYS TO SPEAK AT BASEMENT FLOODING CONFERENCE

Timothy Ferrand, a partner in our Roseville office, and Kurt Heise, an associate in our Livonia office, are speaking at an informative half-day conference on the new sewer exception to governmental immunity law, which was passed in January 2002. The conference, held by the Michigan Municipal Risk Management Authority (MMRMA), takes place on Tuesday, March 26 at the Marriott Pontiac at Centerpoint Hotel.

Tim will provide an overview of case law on sewer back-ups and an update on his Supreme Court case. Kurt will be leading a discussion on the new sewer exception law and what municipalities need to know, and do, to comply with the law. Call Kurt at our Livonia office at (734) 261-2400 for more information.

in this issue

MICHIGAN LEGISLATURE ENACTED SEVERAL AMENDMENTS TO THE GOVERNMENTAL TORT LIABILITY ACT

In an attempt to preserve and define legal accountability of governmental agencies for personal injury and property damage caused by sanitary and storm sewer backups onto private property, the Michigan Legislature recently enacted several amendments to the statute immunizing governmental agencies from tort liability. On January 2, 2002, Governor John Engler signed into law Public Act 222 of 2001, which took immediate effect.

What might now be called the "sewer backup" exception to governmental immunity adds sections 16 through 19 to the Governmental Tort Liability Act (GTLA), Michigan Compiled Laws (MCL) 691.1416 through 1419. For the first time since the GTLA was enacted in 1965, the Act expressly defines the scope of tort liability for personal injury and property damage caused by a sanitary or storm sewer backup onto private property, liability which up until now had municipalities and the State of Michigan spending millions of dollars in settlements to thousands of property owners affected by sewer overflows and backups.

The new law provides a governmental entity with immunity from tort liability for a sewer overflow or backup, unless the occurrence qualifies as a "sewage disposal system event" *and* the agency owns or controls the portion of the sewer system that causes a backup or discharges into the system.

A "sewage disposal system event" is synonymous with an overflow or backup. The definition excludes, however, an occurrence where 50% or more of the cause of the event is an obstruction in a service lead not caused by the agency, a connection to the sewer system on the affected property (such as a sump system or downspout) or acts of war or terrorism. These exclusions exemplify the Legislature's desire to immunize agencies from backups beyond their control. Adding an exclusion for acts of war or terrorism also results from concerns of potential terrorism directed at municipal water and sewer systems that have arisen since the terrorist events of September 11, 2001.

Storm sewers, which carry away precipitation and other surface water runoff, generally adjoin a road or highway and are the responsibility of the governmental agency in charge of the road. With the increase in the separation of storm and sanitary sewers, the government agency responsible for the storm sewer is, in many cases, different from the owner of a sanitary system, which takes away raw sewage from private property to a disposal or treatment plant. By specifying that immunity extends to an entity unless it owns the affected system or discharges into it, the law aims to prevent government agencies from getting lumped together as defendants for the liability of only one or a few.

Another significant change affects the rights of persons injured as a result of sewer backups. A person sustaining bodily injury may not recover for noneconomic damages, such as pain and suffering or emotional distress, unless the injury results in "death, serious impairment of body function or permanent serious disfigurement". If these phrases sound familiar, it is because they are the same standards for noneconomic loss found in the Michigan No-Fault Act for motor vehicle liability. The definition of "serious impairment of body function" expressly incorporates the No-Fault definition of that term. The other requirements of the No-Fault Act for noneconomic loss, such as making the question of whether an injury constitutes a "serious impairment" a question of law for a court, also apply to sewer liability.

Finally, the amendments to the GTLA set forth procedures that a claimant must follow as a condition precedent to filing litigation for property damages, beginning with oral or written notice to the proper agency within 45 days of the injury or damage. The government agency then has an additional 45 days to investigate the incident. If, after this period, the agency and the claimant cannot agree on a resolution of the claim, the claimant may file a civil suit for damages. This notice and investigation process does not apply to claims of bodily injury and noneconomic loss.

The sewer amendments are the culmination of the Legislature's efforts to make uniform the liability for sewer overflows or backups, in the face of the murky state of the law as it has developed over the past decade and a half, since the 1986 overhaul of the GTLA.

In 1988, the Michigan Supreme Court recognized the theory of "trespass-nuisance" as an exception to governmental immunity from tort liability, for invasions of property caused by governmental agencies. The GTLA itself contained no such exception.

Since that time, the Michigan courts have applied "trespass-nuisance" to claims of personal injury and property damage arising from, among other things, sanitary and storm sewer backups onto private property. In doing so, the various courts have also employed inconsistent standards of liability, based on their differing interpretations of what constitutes a "trespass-nuisance" in the context of the governmental immunity statute and prior case law.

Government agencies have been held liable under principles ranging from simple negligence, where the government agency fails to act in the face of a situation of which it knew or should have known, to strict liability, where a claimant need prove only that the invasion came from property owned or controlled by the government, without any sort of "fault" or even knowledge by the government agency.

The amended sections now guarantee that liability will be predicated on fault by, at a minimum, a showing that the government agency's negligence caused a defect in the system and an ensuing overflow or backup. The legislation has clarified much of the uncertainty previously created by differing judicial points of view.

The timing of the action by the Legislature and Governor is also noteworthy. The Michigan Supreme Court recently heard arguments in two cases questioning the continued recognition of the "trespass-nuisance" exception and the parameters of sewer liability. In October, 2001, Timothy Ferrand, a partner in our Roseville office, argued on behalf of the defendant-city in *Jones vs. City of Farmington Hills*, which the Court heard with *Pohutski vs. City of Allen Park*. The Court is expected to rule on those cases fairly soon.

The new legislation, however, will preempt the Supreme Court's ruling in *Jones*, regardless of the outcome, for backups occurring on or after January 2, 2002. The Legislature and the Governor have thus ensured that governmental agencies will continue to be held liable for sewer events, but only in appropriate cases.

Contact Cummings, McClorey, Davis & Acho for more information on the amendments to the GTLA.

Anne McClorey McLaughlin

Attorney Profile

Anne McClorey McLaughlin

Anne focuses her practice on Governmental and Liability Defense, Municipal Law, Insurance and Self-Insurance Law, No-Fault and Motor Vehicle Liability Law and Litigation and Appellate Law.

She is a member of the State Bar of Michigan (Public Corporation Law and Appellate Law Practice sections), the Incorporated Society of Irish-American Lawyers and Phi Alpha Delta Law Fraternity International.

Anne received her Juris Doctorate degree, cum laude, from the University of Detroit School of Law in 1987 and her Bachelor of Arts degree in Political Science from the University of Michigan in 1984. She works out of our Livonia office and can be reached by calling (734) 261-2400 or via e-mail at amclaughlin@cmda-law.com.

Kurt L. Heise

Kurt L. Heise focuses his practice on Environmental Law, Labor and Employment Law, Municipal Law, Labor Contract Negotiations, Labor Arbitration, Brownfield Development Law and School District/Education Law.

He is Chairman of the Michigan Department of Environmental Quality's Rouge River Remedial Action Plan Advisory Council and the Middle 3 and Lower 2 Subwatershed Advisory Groups and is a member of the Rouge River Watershed Steering Committee, the State Bar of Michigan (Public Corporation Law section), the Michigan Association of Municipal Attorneys and the Dearborn Bar Association.

Kurt received his Juris Doctorate degree from Wayne State University in 1991, his LL.M. degree in Labor Law from Wayne State University in 1993 and his Bachelor of Arts degree in Political Science from the University of Michigan in 1988. He works out of our Livonia office and can be reached by calling (734) 261-2400 or via e-mail at kheise@cmda-law.com.

New Stormwater Regulations in 2003

Learn more about the Phase Two Stormwater Regulations at April Seminar where Kurt Heise will Speak

The Environmental Protection Agency (EPA) has published new mandatory regulations concerning stormwater management. "Phase Two" Stormwater Regulations will be mandatory for all Michigan cities, townships and villages with a population over 10,000 and will require all affected municipalities to seek permit coverage by March 2003. The ultimate goal of the Phase Two Stormwater Regulations is the implementation of a Stormwater Permit, which will require the community to develop, implement and enforce a stormwater management program that includes each of the following six measures:

- A public education program
- A public involvement/participation program
- An illicit discharge elimination program
- A program for post construction controls for development/redevelopment
- A pollution prevention program
- A soil erosion control program

Michigan also offers an optional "Watershed based" permit. Phase Two communities will have an option for how to best seek permit coverage, but they must obtain coverage or be subject to enforcement (including substantial fines) under the Clean Water Act.

In Michigan, communities within the Rouge River Watershed have been operating under a voluntary Stormwater Permit for over a year. Each of the 42 communities in the Rouge Watershed have adopted a Stormwater Pollution Prevention Initiative. It is vital for communities not yet covered under a Stormwater Permit to begin planning now for next year's Phase Two Stormwater Regulations.

On Wednesday, April 3, 2002, a day-long seminar on the Phase Two Stormwater Regulations will be held at Cobo Hall in Detroit. The seminar, hosted by the Southeast Michigan Council of Governments (SEMCOG), is designed to provide information to communities on the new regulations. Kurt Heise, an associate in our Livonia office, will serve as a panelist at the seminar and attend on behalf of the firm to answer any questions that participants may have.

If you have not received notice of the seminar, call our Livonia office at (734) 261-2400, and we will work with SEMCOG to reserve a seat for you. Kurt is also available to meet with you, your consultants and/or public works staff with any water and sewer, stormwater or environmental issue that you may have.

Kurt L. Heise

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Our Vision

To meld our legal expertise, professional support staff, technical resources and variety of locations to deliver first rate legal services at a fair value to a full range of business, municipal, insurance and individual clients.

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Comments and questions regarding specific articles should be addressed to the attention of the contributing writer. Remarks concerning miscellaneous features or comments to the editor should be addressed to the attention of Jennifer Sherman.

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