

# GOVERNMENTAL LAW UPDATE

OCTOBER 2010

## Continue to Expect the Unexpected From the Michigan Supreme Court

Anyone who keeps at least one eye on Michigan law knows that these days, change is the one thing that remains constant. In November 2008, Chief Justice Clifford Taylor lost his campaign for reelection to the Michigan Supreme Court, and was replaced in January 2009 by Justice Diane Hathaway. The results of that election shifted the political balance on the Court, and since that time, the newly empowered majority has overturned significant cases that had been decided in the roughly eight years preceding the November 2008 elections. While much of the change to date has occurred in areas outside of the governmental immunity arena, late last spring the Court decided to hear two governmental immunity cases that could result in changes to highway exception law. Those cases are discussed in this newsletter, and will likely be argued in late fall or early winter 2010. Whether those cases actually result in changes to the law is something that only time will tell.

To add to the unpredictability of things, in late summer 2010 more political upheaval beset the Court. Shortly prior to the political parties' conventions – at which each party would nominate its candidates for the Court – Justice

Weaver announced her resignation from the Court, effective immediately. Nearly simultaneously, Governor Granholm elevated Court of Appeals Judge Alton Davis to the vacant seat. Now, Justice Davis, along with Justice Robert Young, must seek reelection. Both Justices Young and Davis were nominated to the Court by their respective political parties. In addition, two challengers for those vacant seats were also selected by the political parties – Judge Mary Beth Kelly was nominated by the Republican Party, and Judge Denise Langford Morris was nominated by the Democratic Party. Judge Kelly is currently a Wayne County Circuit Court judge, and Judge Morris is currently an Oakland County Circuit Court judge.

What all this means is that, at least in the short term, expect the unexpected from the Michigan Supreme Court. There are certainly many different scenarios that could play out, each with its own potential impact on the direction of Michigan jurisprudence. We will continue to keep you updated on current events, and as always, please do not hesitate to contact one of the governmental law attorneys at Smith Haughey Rice & Roegge with any questions you might have.

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## Supreme Court to Review Two Governmental Immunity Cases

By William L. Henn, Attorney and Brian Shekell, Summer Clerk

The Michigan Supreme Court has ordered oral argument in two governmental immunity cases: *Plunkett v Department of Transportation* and *Pollard v Suburban Mobile Authority for Regional Transportation (SMART)*.

The first case, *Plunkett v Department of Transportation*, involves multiple highway exception issues, including the standard for proximate cause, and whether rutting on a highway surface which allegedly causes vehicles to hydroplane is an actionable defect under the highway exception to governmental immunity.

Underlying the case is a single vehicle accident that occurred on a state trunkline highway. While driving in a light rain, Holly Plunkett lost control of her minivan and struck a tree. She died as a result of her injuries. Her husband filed suit against MDOT, alleging that rutting of the pavement surface, combined with the rain and inadequate cross slope and superelevation, rendered the highway unsafe for vehicular travel and proximately caused the crash. MDOT subsequently filed a motion for summary disposition, arguing that the plaintiff had failed to plead a cause of action in avoidance of governmental immunity. The trial court denied MDOT's motion.

The Court of Appeals, relying on *Haliw*, stated that in a case such as this—where an alleged highway surface defect allows a natural accumulation of water or snow or ice that in turn allegedly causes a crash—to show that the surface defect was a direct cause of the crash, the plaintiff must demonstrate that the defect was “persistent” and acted “in tandem” with the natural accumulation. “Persistent” means that the defect renders the highway unsafe at all times and under all conditions. Acting “in tandem” means that the surface defect contributed to the crash in a more direct way than merely allowing the water to accumulate. The Court reversed the

trial court, concluding that plaintiff had failed to meet the *Haliw* standard because he did not offer evidence to show that the rutting of the road was a “persistent” defect. The Court further determined that plaintiff's claims concerning superelevation and cross slope were allegations of negligent design, and therefore were not actionable under the highway exception.

The Supreme Court issued an Order on May 28, 2010 directing oral argument on whether the highway exception applies to “an alleged failure to maintain a highway to correct rutting that allegedly resulted in the accumulation of water on the rutted portion of the pavement, causing hydroplaning and the loss of control of the vehicle that led to the fatal accident.” Oral argument is expected to occur yet this year, and a decision is likely to shortly follow.

The second case, *Pollard v Suburban Mobile Authority for Regional Transportation (SMART)*, involves whether statutes that require a plaintiff to provide notice of a claim to a government agency must be strictly enforced. The Supreme Court directed oral argument specifically for the purpose of determining whether to overturn *Rowland v Washtenaw Co Rd Comm'n*, which held that notice of a highway exception claim must be provided within the 120 or 180 day timeframe created by law, and that a highway authority need not show “actual prejudice” as a result of delayed notice to be entitled to dismissal.

*Pollard* involves a bus passenger who sustained injuries when he fell after the bus driver sped up and then suddenly applied the brakes. The plaintiff filed suit against SMART, but had not sent notice of the claim to SMART within 60 days of the incident, as required by law. The trial court denied summary disposition to SMART, but the Court of Appeals reversed, citing *Rowland* for the proposition that notice

statutes must be strictly applied, and that therefore because notice had not been given to SMART within the 60-day timeframe, no claim could be pursued.

In its Order, the Supreme Court has directed the parties to address whether *Rowland* was

correctly decided. Oral argument will occur in the fall of 2010.

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## Road Commissions Have the Final Say

By Karl W. Butterer, Attorney

*In Oshtemo Charter Township v Kalamazoo County Road Commission, et al, Smith Haughey attorney Karl Butterer successfully represented the Road Commission in both the lower court proceedings and at oral argument in the Court of Appeals. The controversy is not over yet, as the case is now pending before the Michigan Supreme Court on an application for leave to appeal.*

In a published opinion, the Michigan Court of Appeals recently confirmed that county road commissions have the authority to void or approve a township's trucking route ordinance where an adjacent township objects to that trucking ordinance.

The dispute at the center of this action arose out of the routes that gravel trucks used to travel to and from a gravel pit located in Alamo Township in Kalamazoo County. Neighboring Oshtemo Charter Township decided to prohibit the gravel trucks from accessing US-131 over certain Oshtemo roadways. It adopted a truck route ordinance which prohibited truck traffic on three streets within Oshtemo. As a consequence, the gravel trucks were necessarily diverted onto the roads of Alamo and Kalamazoo Charter Township.

Both Alamo and neighboring Kalamazoo Charter Townships objected to Oshtemo's diversion of those trucks onto their roadways. They turned to the Kalamazoo County Road Commission to resolve that dispute pursuant to a statutory procedure adopted by the Michigan Legislature

in 2008. The statute makes the Road Commission the final arbiter of such disputes between townships within its jurisdiction. When Alamo and Kalamazoo Townships objected to Oshtemo's ordinance, the Road Commission was ultimately to decide whether to "approve or void" those portions of Oshtemo's ordinance to which Alamo and Kalamazoo objected. The Road Commission acted as the statute required of it, and it chose not to approve, but rather to void, those portions of Oshtemo's ordinance to which Alamo and Kalamazoo objected.

Oshtemo filed a lawsuit in the Circuit Court and asked for a preliminary injunction against the Road Commission to prevent it from enforcing its decision. Ultimately, the Circuit Court held that Oshtemo would likely prevail on its claim that the statutory procedure of this Road Commission was meaningless and a nullity, on account of a misnumbered statutory reference within the statute and therefore issued the preliminary injunction. Specifically, the statute that gives Road Commissions authority to approve or void truck route ordinances only gives it authority to do so on "county primary roads." The statute defines "county primary roads" as those designated "*pursuant to 1951 PA 51, MCL 247.671 to MCL 247.675.*" (Emphasis added). Examination of MCL 247.671 to 247.675 reveals that those statutes do not deal with the designation of county primary roads. Rather, they deal with the State Trunk Line Highway System, and the allocation of funds thereto. The Circuit Court explained that except for this typographical error, it would have

deferred to the Road Commission's resolution of the inter-township dispute, because the Road Commission is the proper agency to weigh the public interests on roadway usage and safety issues.

Smith Haughey successfully argued to stay the proceedings and filed an application for immediate appeal to the Court of Appeals on behalf of the Kalamazoo County Road Commission. The Court of Appeals then decided that the issue was important enough to review on appeal before the conclusion of trial court proceedings. Smith Haughey argued to the appellate judges that the legislature had intended to give road commissions authority to void or approve trucking ordinances over "county primary roads" as that term is defined in MCL 247.651 through 247.675, not 247.671 through 257.675. In those sections, and specifically in MCL 247.655, there is a mechanism for the designation by a county road commission of "county primary roads." The Court of Appeals agreed, and held that through a "slip of the pen"

the legislature mistakenly wrote a "7" where it obviously intended to write a "5." Accordingly, the Kalamazoo County Road had statutory authority to void the Oshtemo trucking ordinance.

The authority of road commissions to approve or void township trucking ordinances remains in controversy. Oshtemo requested the Michigan Supreme Court to review the Court of Appeals decision regarding the typographical error. Moreover, Oshtemo Charter Township recently enacted a "Traffic Control Order" which is identical to the earlier trucking ordinance. However, Oshtemo argues that it enacted the Traffic Control Order under the Uniform Traffic Code and therefore the Traffic Control Order is beyond the reach of the authority given to road commissions under MCL 257.726(3).

*Interested in road commission authority under MCL 257.726? Contact Karl Butterer at [kbutterer@shrr.com](mailto:kbutterer@shrr.com) or (616)458-9294 to find out more.*

## **City Not Entitled To Governmental Immunity – Guy Wire Is Included In Highway Exception**

By: William L. Henn, Attorney & Charissa Huang, Summer Clerk

This past summer, the Michigan Court of Appeals issued a published opinion in *Lameau v City of Royal Oak*, holding that the city and city engineers were not entitled to governmental immunity from potential tort liability that arose when a man was killed after colliding with a guy wire that had been imbedded in a sidewalk. The deceased, John Crnkovich, was riding his motor scooter at a high speed down the sidewalk at night, without safety gear, and while under the influence of alcohol and marijuana. He struck the guy wire and sustained a fatal injury to his neck.

The personal representative of Crnkovich's estate sued, among others, the city, its engineer,

and engineering assistant. The defendants moved for summary disposition based on governmental immunity, arguing that the guy wire was not part of the sidewalk surface so as to fall within the highway exception, and that the individual employees' conduct was not gross negligence that was the most immediate, efficient and direct cause of the injury. The trial court denied summary disposition to the defendants. In affirming the trial court's denial, the Court of Appeals held that a reasonable jury could conclude that the city had breached its duty to maintain the sidewalk surface in reasonable repair, and that the actions of the individual engineer and engineering assistant had

amounted to gross negligence that was the direct cause of the injury.

In support of its decision, the Court relied heavily on a detailed recital of the particular factual circumstances leading to the accident. In May 2005, as the sidewalk was being planned, the city engineer and his engineering assistant noticed a telephone pole guy wire anchored into the soil that crossed the proposed path of the sidewalk. The city engineer asked Detroit Edison to relocate the wire to a safe location, but no one from Detroit Edison responded. Nevertheless, the city began to construct the sidewalk that summer. Foremen for the concrete contractor warned the city's inspector about the guy wire, but the city engineering assistant ordered the foremen to pave up to and around the guy wire because the project's schedule demanded it. The city instructed the contractor to surround the area with barricades, but vandals removed them. In the spring of 2006, Detroit Edison was dispatched to the street regarding a bicyclist who had struck the guy wire. At approximately 11:00 p.m. on May 24, 2006, Crnkovich collided with the guy wire and died from blunt force trauma to his neck and head.

The Court of Appeals first discussed whether the highway exception to governmental immunity applied to the claim against the city. The law applicable to municipalities defines the term "highway" to include "sidewalks." The city argued that improper placement of the guy wire and its anchor could not give rise to liability because those structures are never part of a "highway." The court disagreed, however, finding that once the city decided to pave through the guy wire and anchor in such a way as to incorporate it into the sidewalk, the anchor and guy wire were part of the sidewalk, and the city necessarily acquired jurisdiction over those structures. Based on this reasoning, the court affirmed the denial of the city's motion for summary disposition.

Next, the court analyzed the claims against the engineer and engineering assistant. In its

discussion, the court focused upon whether the conduct of the engineers amounted to gross negligence that proximately caused Crnkovich's injuries. Although the decision to place the sidewalk along the area occupied by the guy wire was not inherently negligent, the court concluded that a reasonable jury could find the individual employees were grossly negligent in paving up to the anchor after receiving multiple warnings of the potential danger. The court also found that reasonable minds could differ as to whether the employees' actions were the most immediate, efficient, direct cause of Crnkovich's injuries. Thus, the court held that summary disposition was properly denied with respect to the engineers.

Judge Talbot dissented from the majority opinion on grounds that the plaintiff failed to demonstrate a "defect" within the meaning of the highway exception, and that the city was entitled to immunity because the guy wire was part of a "utility pole" that is expressly excepted from the definition of "highway." Judge Talbot also opined that a reasonable jury could not conclude the employees' conduct was "the" proximate cause of Crnkovich's injuries, where Crnkovich's own behavior and that of Detroit Edison comprised a more "direct" and "immediate" cause of the injuries.

Ultimately, the majority's decision in *Lameau* is driven largely by the particular facts of the case. With respect to the city, if the guy wire had not been anchored directly into the sidewalk, the outcome very well may have been different. Similarly, concerning the individual employees, there can be little doubt that the majority viewed the repeated warnings that were ignored, and the apparent preference for the "schedule" over human safety, as facts on which a jury could find gross negligence. Thus, *Lameau* serves as a cautionary tale for any governmental entity charged with planning and executing a highway project.

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## Smith Haughey's Governmental Law Practice Group News & Success

Governmental law attorneys **Chip Behler**, **Mark Bickel**, and **Todd Millar** are three of 15 Smith Haughey attorneys who have been selected for inclusion in this year's edition of *Best Lawyers in America*. This publication is regarded as the definitive guide of legal excellence and inclusion is based on peer-review surveys.

**Chip Behler** and **Craig Noland** are two of 14 Smith Haughey attorneys who have been selected for inclusion in this year's edition of *Michigan Super Lawyers*. This publication lists outstanding attorneys who have attained a high degree of peer recognition and professional development. Selections are made using a combination of peer reviews and third-party research.

Smith Haughey was selected as legal counsel for Peaine Township, one of two general law townships on Beaver Island. Smith Haughey's team, led by **Chuck Judson**, was selected based in part on their experience with airport representation and intergovernmental agreements.

**Craig Noland** was granted summary disposition under governmental immunity in a case that alleged gross negligence against our clients a public school system and its teachers. The case arose from an unfortunate incident where a sixth grade student was injured during a class field trip.

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