LEGISLATION

Transfer of Road Commission Duties to County Board of Commissioners – 2012 PA 14; MCL 224.6

The legislature amended the General Highway Law to allow the transfer of the duties of the board of country road commissioners to the county board of commissioners before January 1, 2015. The new legislation permits the transfer of Act 51 funds from road commissions to the county board of commissioners. In counties with an appointed board of road commissioners, the transfer may take place by resolution after two public hearings on the matter. In counties with an elected board of road commissioners, a resolution must be submitted to the voters in a county wide election for approval. The county road commission will dissolve as of the date of transfer.

Public Road Ends at Lakes - 2012 PA 56; MCL 324.30111b

This new statute governs the use of public roads ending at an inland lake or stream. The following uses are now prohibited at these public road endings unless a recorded deed, easement or dedication expressly provides otherwise:

a) The construction, installation, maintenance or use of boat hoists or anchors,

b) Mooring or docking of a vessel between midnight and sunrise, and

c) Any activity that obstructs access to or from the inland lake and stream.

The statute allows the local government to build a single seasonal public dock, to prohibit any use that violates the statute and make a violation punishable as a misdemeanor.

Commercial Snow Removal Vehicles – 2012 PA 262; MCL 257.682c

This addition to the Michigan Vehicle Code requires that a person who removes snow from a public street or highway for pay must display on the snow plow at least one flashing, rotating or oscillating yellow light that is clearly visible in a 360-degree arc from a distance of 500 feet when the vehicle is in use.

Vehicle Length – 2012 PA 80; MCL 257.719

This amendment to the Michigan Vehicle Code prohibits the following vehicles and combinations of vehicles from operation on a highway in this state in excess of these lengths:

- A recreational vehicle towing a trailer: 65 feet or,
- Recreational vehicles with drivers having group commercial motor vehicle designation on their operator or chauffeur's license, 75 feet.

There is no maximum overall length restriction for truck tractor and lowboy semitrailer combinations if the lowboy semitrailer does not exceed 59 feet. A lowboy semitrailer wheelbase cannot exceed 55 feet as measured from the kingpin coupling to the center of the rear axle.

A lowboy semitrailer more than 59 feet in length cannot operate with more than any combination of 4 axles on the lowboy unless an oversized load permit is issued by the state transportation department or a local authority for highways under its jurisdiction. “Lowboy semitrailer” means a flatbed semitrailer with a depressed section that has the specific purpose of being lowered and raised for loading and unloading.

Driveways In Critical Dunes – 2012 PA 297; MCL 324.35311a

This addition to Michigan’s Sand Dune Protection and Management Act was promoted by home builder and realtor associations to relax restrictions on construction in critical dune areas. The construction of a driveway in a critical dune area still requires obtaining a permit from the MDEQ. However, the new amendment eliminates some reasons which would have previously prohibited the issuance of a permit for the construction of a driveway in critical dunes. Depending on the slope of the dune, a homeowner must obtain a site plan from an architect or engineer before constructing a driveway. The site plan must include provisions for storm drainage without serious erosion, methods for controlling erosion, and restabilization efforts. For steeper slopes, an engineer must certify under seal that the driveway is not likely to increase erosion or decrease stability.

"Right to Work Act" – 2012 PA 349

The new "Right to Work Act" will prohibit road commission employees from being required as a condition of obtaining or continuing their employment any of the following:

1) To become or remain a member of a labor organization,

2) To refrain or resign from membership in, voluntary affiliation with, or voluntary financial support of a labor organization,

3) To pay any dues, fees, assessments, or other charges or expenses of any kind or amount to provide anything of value to a labor organization,

4) To pay to any charitable organization or third party an amount that was in lieu of, equivalent to, or any portion of dues, fees, assessments, or other charges or expenses required of members of or employees represented by a labor organization.

Moving Ahead for Progress in the 21st Century

On July 6, 2012, the President signed federal legislation entitled Moving Ahead for Progress in the 21st Century ("MAP-21"), which will fund the federal-aid highway program through September 30, 2014. MAP-21 authorizes funding at current levels with a small inflationary adjustment. The new legislation replaces the Safe, Accountable, Flexible, Efficient, Transportation Equity Act: A Legacy for Users. MAP-21 reauthorizes the collection of motor fuel taxes and the heavy vehicle use tax through September 30, 2016 and 2017, respectively.

GOVERNMENTAL IMMUNITY

Road Commission Immune from Claim for Failure to Remove Gravel from Roadway - *Paletta v Oakland County Road Commission*, 491 Mich 897 (2012)

Mr. Paletta lost control of his motorcycle when he struck loose gravel on an asphalt roadway. He sued the road commission claiming that it created the hazard by improperly scraping the gravel shoulders and failing to sweep the gravel debris from the roadway in accordance with industry standards.

The Court dismissed the claim against the road commission on the grounds that it enjoyed governmental immunity from the claim. The Court concluded that the accumulation of gravel on the paved roadway came under the highway exception to governmental immunity because an accumulation of gravel, whether natural or otherwise, does not implicate the road commission's duty to maintain the highway in "reasonable repair."

Court Strictly Enforces Statutory Notice Provisions as Prerequisite to Suit Against Government - *Atkins v SMART*, 492 Mich 707 (2012)

Ms. Atkins was injured in a motor vehicle accident while a passenger on a regional transportation authority bus. She applied to the authority's insurer for first-party no fault benefits. But, she failed to file a formal notice of intent to sue the authority for personal injury within 60 days of the occurrence as required by The Metropolitan Transportation Authority Act. The *Atkins* Court ruled that even though the government agency had "institutional knowledge" of the personal injury because of the request for no-fault benefits, Ms. Atkins did not file the formal notice of intent. As a result, the Court dismissed the lawsuit.

This case is important because it reaffirmed the Michigan Supreme Court's holding in *Rowland v Washtenaw County Road Commission*, that warned other courts not to judicially create saving provisions for injured people who did not meet formal statutory notice provisions before filing a lawsuit. In *Rowland,* the Court dismissed an injured person's lawsuit because she had not given the road commission the required notice of her claim of personal injury due to a defective highway within 120 days from the time of her injury. MCL 691.1401(1). The *Rowland* case was significant because it rejected a line of cases in which courts decided that an injured person did not have to meet formal statutory notice requirements if the government had not been prejudiced by a lack of notice.

Court Enforces Governmental Notice Provision as Prerequisite to Suit - *McCahan v Brennan*, 492 Mich 730 (2012)

Similar to the holding in the *Atkins* case, above, the Michigan Supreme Court further strengthened the reasoning in *Rowland v Washtenaw County Road Commission* in the *McCahan* decision this year.

The Court dismissed Ms. McCahan's claim because she failed to meet a formal statutory notice requirement. Specifically, she didn't file a notice of intent to file a personal injury claim against the defendant public university *with the court clerk* within six months of the accident as required by law. The Court rejected her argument that it should overlook the omission because she had given notice to the university, its legal counsel, and a university claim's representative.

Defendant Immune from Suit Because Curb Cutout Not Portion of Highway Designed for Vehicular Travel - *Moraccini v City of Sterling Heights*, 296 Mich App 387 (2012)

The operator of a motorized scooter claimed that he was injured when the wheels of his scooter struck a defective curb cutout located at the intersection of a municipal sidewalk and a county road. The court stated that while the curb cutout was a portion of the county highway, it was not an improved portion of the highway *designed for vehicular travel*.

The court reasoned that the curb cutout was only designed for pedestrian travel and fit within the definition of "installation" and "sidewalk." The Court's reasoning supports other good authority which limits a road commission's duty to repair and maintain "the improved portion of the highway designed for vehicular travel and cannot include sidewalks, crosswalks, or any other installation outside of the improved portion of the highway designed for vehicular travel."

Plaintiff's Failure to Identify the East or West Portion of a Street Dooms Plaintiff's Statutory Notice; Government Immune from Suit - *Thurman v City of Pontiac*, 295 Mich App 381 (2012)

Mr. Thurman injured himself when he allegedly tripped on a defective sidewalk. Within 120 days of his injury, he sent a notice to the defendant city in which he identified the location of his injury as "35 Huron, Pontiac, Michigan." The city had both a 35 *East* and 35 *West* Huron Street. According to the Governmental Tort Liability Act, Mr. Thurman had to notify the government defendant of his claim within 120 days of his injury. The notice had to "specify the *exact location* and nature of the defect, the injury sustained and the names of the witnesses known at the time by the claimant."

The Court of Appeals dismissed Mr. Thurman's claim by following the Michigan Supreme Court's instruction to strictly construe the language of the 120-day statutory notice of defect provision. The court explained that Mr. Thurman failed to identify East or West Huron Street. Additionally, the notice did not state whether the defect was on the north or south side of the street.

CIVIL RIGHTS

"Cat's Paw" Theory of Discrimination is Alive and Well - *Chattman v Toho Tenax America*, 686 F3d 339 (2012)

The federal court reminded employers that they may be found liable for discrimination even where a decision maker does not intentionally engage in discriminatory behavior.

Under the "cat's paw" theory, an employee may successfully sue his employer for discrimination if a mid-level supervisor is motivated by racism to report the employee up the chain of command for workplace misconduct. If a decision-maker then innocently relies upon the report to discipline the employee, then the employer may be held liable.

In this particular case, the supervisor reported Mr. Chattman, an African American, for horseplay at work and recommended termination. The court determined that the supervisor's report was racially motivated. Although the employee was not terminated, upper management relied upon the supervisor's report to make a decision, which ultimately resulted in Mr. Chattman losing a promotion.

The federal court ruled that Mr. Chattman had demonstrated that the supervisor ("the cat") made the report because Mr. Chattman was African American, and that upper management ("the cat's paw") unwittingly disciplined him because of the racially motivated report. The federal court held that – even though the upper management people who disciplined Mr. Chattman were not motived by discrimination -- nevertheless the employer could be held liable for the discriminatory information flow which resulted in the discipline.

EMPLOYMENT

Decision to Not Renew Employment Contract May Form Basis of Whistle Blower Protection Act Claim - *Wurtz v Beecher Metropolitan District*, __ Mich App __ (2012)

The Court of Appeals ruled for the first time that an employer's decision to not renew an expired employment contract may be the basis of a Whistle Blower Protection Act ("WPA") claim. The defendant district is a public body that provided water and sewage services to the public. The district hired Mr. Wurtz for a fixed ten-year term pursuant to an employment contract. During his employment, Mr. Wurtz sent letters to public officials alleging that members of the district's board had violated the Open Meetings Act when they met to discuss business with an attorney. Upon expiration of his employment contract, the district did not renew the contract. In finding for Mr. Wurtz, the Court of Appeals held for the first time that a defendant's failure to renew a contract with a fixed term constituted an "adverse employment action" under the WPA.

Equal Employment Opportunity Commission Enforcement Guidance – Use of Criminal Convictions in Employment Candidate Screening

The EEOC issued new recommendations, which primarily codify existing laws, regarding the use of criminal background checks in hiring decisions. The EEOC advises that employers should not have a uniform rule that automatically excludes any candidate with a criminal conviction. Rather, an employer should consider the following three factors:

1) The nature and gravity of the offense or conduct,

2) The time that has passed since the offense or conduct and/or completion of the sentence, and

3) The nature of the job held or sought.

The EEOC also recommends that the candidate be given a chance to explain the circumstances of the conviction and to provide information that may be important in the employer's decision.

Employer Did not Violate FMLA Where It Terminated Plaintiff Based Upon an Honest Belief that Plaintiff Had Engaged in Dishonesty Regarding His Leave - *Seeger v Cincinnati Bell Telephone Company*, 681 F.3d 274 (6th Cir. 2012)

The federal court gave further assurance to employers that they may terminate employees for misuse of leave time, even where the employer terminated the employee shortly after returning from Family Medical Leave Act ("FMLA") leave.

Mr. Seeger simultaneously took FMLA and paid disability leave to recover from a herniated disc. The employer's disability policy required that the employee perform light duty if possible. Mr.

Seeger reported to his physician that he had difficulty walking and getting in and out of a chair. The physician advised the defendant of his limitations.

As a result, Mr. Seeger continued to be paid without performing any light duty work. Several days later, co-workers observed Mr. Seeger at a festival walking at least ten blocks and consuming alcohol. Defendant Cincinnati Bell found out and discharged him for over-reporting his symptoms to his physician in order to avoid light duty.

Mr. Seeger sued Cincinnati Bell for retaliating against him for taking FMLA leave. The federal court dismissed the claim holding that Cincinnati Bell had a legitimate interest in ensuring that employees on leave from work do not abuse their leave. In applying the "honest belief" rule, the court held that the company had enough facts to honestly believe that Mr. Seeger had behaved fraudulently regarding his disability, even if it ultimately turned out that the employer's belief was mistaken.

Excessive Absenteeism Due to Surgeries Not Sufficient for Plaintiff's American With Disabilities Act Claim - *Gecewicz v Henry Ford Macomb Hospital Corporation*, __ F3rd __ (6th Cir)

Henry Ford Macomb Hospital Corp. terminated its employee, Ms. Gecewicz, due to excessive absences, which were caused by several surgeries over the course of several years. Ms. Gecewicz sued the Hospital for discriminating against her in violation of the Americans With Disabilities Act (ADA).

She based her ADA suit on the portion of the ADA, which defines the term "disability" to include "*being regarded* as having [an] impairment." Ms. Gecewicz argued that the Hospital regarded her as disabled because a supervisor had made comments to her regarding the number of her surgeries, and the risky nature of the surgeries.

The court dismissed her claim on the grounds that she had not established that the Hospital regarded her as disabled. Specifically, the supervisor's statements centered on Ms. Gecewicz' excessive absenteeism, *not* a perceived disability. The court stated that being absent from work is not a disability.

Employee Has No Right to Rehire After Termination - *Berrington v Wal-Mart Stores, Inc.*, 696 F3d 604 (2012)

Although it may be unlawful for an employer to terminate an employee for filing unemployment benefits, in this case, the court ruled that Wal-Mart could lawfully refuse to rehire a former employee for filing for unemployment benefits.

Wal-Mart terminated Mr. Berrington for not returning to work after a leave of absence. Wal-Mart encouraged him to reapply for his job; however, he filed for unemployment benefits, which Wal-Mart opposed. Mr. Berrington reapplied for his job, but was not rehired.

Mr. Berrington sued on the theory that Wal-Mart refused to rehire him in retaliation for filing unemployment benefits, and that such retaliation was against Michigan public policy. The federal Sixth Circuit court rejected Mr. Berrington's theory on the grounds that Michigan law did not recognize an employee's right to be rehired.

If you have any questions, please contact **Karl W. Butterer**.

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