With all of the current rhetoric criticizing the public sector, at times it’s difficult to remember why we’re in public service to begin with. But at the end of the day, the bottom line stays the same: We’re in public service because we care – about our communities, about our neighbors, about our country.

This is why, on behalf of your 2012 Board of Directors, I’d like to re-affirm MIPRIMA's commitment toward helping our members respond to the challenges that public entities face today – because what you do is essential to the successful functioning and welfare of your community.

To help us accomplish this, we’re asking each of you to become involved. Engage. Attend our programs. Volunteer. In the face of rapidly shrinking staffs and budgets, we all have to accomplish more with less -- which means that each of us needs to take advantage of every opportunity to share, learn and help each other by way of networking with our peers. And MIPRIMA's conferences are probably the most cost-effective means of doing just that.

The MIPRIMA Achievement Award is another way that you can assist your peers. It’s not just a chance to “toot your own horn” – it’s an opportunity to acknowledge, recognize and share ideas that can help other entities respond to the challenges we’re all facing today. Please visit the “Achievement Award” link on the “About Us” tab on our website for details on this timely and important program.

To help attract a new generation to public service, MIPRIMA offers two categories of scholarships: the MIPRIMA 9-11 Memorial Scholarship, and the Donald P. Althoff Memorial Scholarship. With ever-increasing college tuitions, these scholarship programs are valuable resources for young people interested in pursuing careers in risk management and related fields. Please direct your questions about these scholarships and their applications to the Chair of the Scholarship Committee, Rick Hensley (City of Battle Creek).

The Website Committee continues to look for features and functionalities to add to the site that will be of value to our members. In addition to information on chapter events and programs, our membership directory, membership and meeting registration forms and our newsletter archive, the website now also features a job opportunities link. Please send your employment opportunities and any ideas for additional website features to me.

In addition to its three seasonal newsletters, MIPRIMA will also be holding its spring, summer and fall educational programs in 2012.
timely information to keep you on top of key issues affecting today’s public sector. Our spring program will be on Thursday, March 22, at the East Lansing Marriott at University Place in East Lansing. I hope to see you there. Please visit the website for program details and registration information.

And last, a huge thank you to our 2012 MIPRIMA corporate sponsors for making all of the above possible.

Chris Underwood, MIPRIMA President
City of Birmingham

Education and Professionalism are the Goals

As the newest member of the MIPRIMA Board, I look forward to contributing to our continued success.

You may ask what is the CPCU Society? The CPCU Society is an International Society of Insurance Professionals. CPCU stands for Charter Property Casualty Underwriters. However, the Society’s membership consists of insurance executives, underwriters, claims professionals, compliance, risk managers, reinsurers, marketing, attorneys, financial advisers, etc., all representing insurance carriers, agencies, brokers, independent administrators, law firms and insureds. A CPCU is a professional who has earned the premier professional designation of the property and casualty insurance industry. Considered to be the standard setters of the insurance industry, CPCU’s have made a commitment to continuing education, and promise to place the needs of others before their own. CPCU’s are experts in many different fields of insurance, and although professionally diverse, each shares the same dedication to insurance excellence.

The Detroit CPCU Chapter has partnered with Davenport University – Livonia Campus, to offer CPCU courses as well as ARM courses. CPCU consist of eight courses, each concluding with a national exam. ARM is an Associate in Risk Management, which consist of three courses to earn the ARM professional designation. In either course students are able to participate in both classroom and via Live Web Cast.

If you are involved in risk management, selecting and financing of insurance, administrating claims for your organization or generally want to increase your knowledge of insurance and contracts, you may want to consider enrolling in CPCU or ARM courses. To register or find out more you can call Davenport University at 616-233-2597 or go online at www.davenport.edu/ipex.

Charlie Stevens, CPCU, AIC
2011 Fall Educational Program

Michael Ellis and Holly Battersby
Tom Wolff, Christine Underwood and others
Judy Thomson-Torosian and doctors
Mark Andrew Kwartowitz DO and
Ronald S. Lederman MD

Fred Hill, Christine Underwood,
Donna Cianciolo and Tom Wolff

Steve Cooperrider, Fred Hill,
Christine Underwood, Donna
Cianciolo, Tom Wolff and
Paul Van Damme

Steve Cooperrider and Tom Wolff
Angi Magee and others
Holly Hood, Leigh Stepaniak and others
Michigan Public Risk Management Association
2012 Spring Educational Program

Thursday, March 22, 2012
East Lansing Marriott at University Place • 300 M.A.C. Avenue • East Lansing, Michigan 48823 • (517) 337-4440

8:00 – 9:00 REGISTRATION & CONTINENTAL BREAKFAST

9:00 – 9:15 President’s Remarks
Chris Underwood
MIPRIMA President

9:15 – 10:45 Best Practice Panel:
Jail Liability/ National Sheriff’s Association Imitative
Rick Kaledas, Jail Administrator
Washtenaw County

Creating a Road Safety Culture
Dennis G. Kolar, Managing Director,
Road Commission for Oakland County

Safely Barricading Schools
Kirk F. Grzelka
Facilities/Construction Manager
Flint Community Schools

10:45 – 11:00 BREAK

11:00 – 11:30 Stepping on the Gas Pedal at the Workers’ Compensation Agency - Director
Elsenheimer’s Update on Implementation of the Changes
Kevin A. Elsenheimer, Director,
Workers’ Compensation Agency,
State of Michigan

11:30 – 12:00 HB 5002—Denice’s Top 10 Wish List Came True!
Denice LeVasseur,
LeVasseur & LeVasseur

12:00 – 12:45 LUNCH

12:45 – 2:00 MSA—Not Just for Workers’ Compensation Claims
Richard J. Joppich, Kitch Drutchas
Wagner Valitutti & Sherbrook

2:00 – 2:15 BREAK

2:15 – 3:00 ADA Update
Sandy Altschul,
Wayne County Airport Authority

3:00 – 4:00 NETWORKING RECEPTION

MIPRIMA 2012
Spring Educational Program Registration
Please Return by March 9, 2012

Name__________________________________
Title___________________________________
Organization____________________________
Address________________________________
City___________________________________
State_____ Zip_______ Tel______________
E-mail (MANDATORY)_____________________

Joining us for lunch? Yes_______ No_______

Registration Fee:
MIPRIMA Public Entity Member $25
Public Entity Non- Member $50
Non-Public Entity Member $75
Non-Member (Other than a public entity) $150

NOTE: You will be charged if you register but do not attend unless cancellation is received by March 18th.

Please enclose payment payable to MIPRIMA and return to:
Paul VanDamme
MIPRIMA Secretary/
Purchasing Department
City of Roseville
29777 Gratiot Avenue
Roseville, MI 48066-0290
Phone: 586-447-4622
pvandamme@roseville-mi.com
MIPRIMA is interested in your outstanding achievements within your organization. We believe that hard work along with results should be recognized and shared with your peers. We want to hear about your ideas and perseverance for implementation and the benefits it provides to your organization. Whether it is time saving, cost saving or “a better way to do things”, MIPRIMA would like to reward you for your achievement.

Please complete this Application. MIPRIMA will select the most creative and rewarding outstanding achievement and select the public entity for the 2012 MIPRIMA MEMBERSHIP ACHIEVEMENT AWARD. As part of this award, your public entity will receive a plaque, your spotlight in our newsletter and an opportunity to share your accomplishment as our guest at our summer conference.

**Public Entity**

__________________________________________________________

**Name:**

__________________________________________________________

**Title:**

__________________________________________________________

Please provide simple and direct answers to each question. Provide specific data (budget, number of people, hours, etc.) where appropriate. *If necessary, use additional pages.*

1. **General description:** Provide a brief general description of the product or program being submitted.

2. **Describe the local problem or circumstances that led to the development of this product/program.**

3. **Who participated, and how much time did each participant devote to developing this product/program? Were outside consultants used?**

*Continued....*
4. Significance: Explain why this entry is important in the public sector. What concepts, standards or techniques are displayed or advanced?

5. Transferability: Describe how this product/program can be adapted for use by other organizations. What other types of entities could benefit from this program? Would significant modification be required for implementation?

6. Cost/Benefit: How much did the project/program cost? Be sure to include time invested. Identify the value added (both tangible and intangible) as a result of its undertaking. Quantify this value when possible.

7. Originality/Innovation: What makes your approach unique?

8. Optional: Use this space to highlight any other noteworthy features about the program/product.

Submit your original application and supporting material to:

Tom Wolff, Claim Manager
Michigan Municipal League
1675 Green Rd.
Ann Arbor, MI 48105
Phone: 734-669-6343
FAX: 734-741-1774
THE 10th ANNUAL
MIPRIMA - DON ALTHOFF SCHOLARSHIP
GOLF OUTING

June 12, 2012

Lyon Oaks Golf Course
52251 Pontiac Trail
Wixom, Michigan

Mark your calendars, and plan to join us for the 18-hole scramble event with a shotgun start at 9:30am. Lunch at the turn.

Registration and coffee/donuts begin at 8:30am.

****FULLY PAID FOURSOMES ONLY****
$360 Per Team

Teams should submit one check for the team. PLEASE PROVIDE THE NAMES OF ALL FOUR GOLFERS ON YOUR TEAM.

Send your check now to reserve a spot for your team; we are limited to 144 golfers.

Price includes: Golf with cart, coffee/danish, lunch, three hour open bar starting at 2:00pm, dinner and prizes. (Beverage cart on course is cash only.)

If attending for Dinner and bar only: $45.00 Per Person

Make checks payable to MIPRIMA and send to
Drew Dunsky, Risk Manager
Road Commission Risk Department
31001 Lahser Rd. Beverly Hills, MI 48025
adunsky@rcoc.org 248-645-2000
THE 10th ANNUAL
MIPRIMA - DON ALTHOFF SCHOLARSHIP
GOLF OUTING

June 12, 2012
Lyon Oaks Golf Course
52251 Pontiac Trail
Wixom, Michigan

Instructions:
1. List names, titles and company of all team members.
2. Make check payable to MIPRIMA for $360, fully paid foursomes only.
3. Mail your reservation form and check to:   Drew Dunsky
   31001 Lahser Rd.
   Beverly Hills, MI 48025
4. Deadline for all reservations is June 1, 2012.
5. Proper golf attire is required. (soft spike course)

Reservations made by:______________________________
Phone:   ______________________________
Amount of Check: ______________________________
Date:   ______________________________

Reservations for Golf and Dinner ($360.00 per foursome)

1. ____________________________ 2.____________________________
                                       ______________________________
                                       ______________________________

Reservations for Dinner only ($45.00 per person)

1. ____________________________ 2.____________________________
                                       ______________________________
                                       ______________________________
MIPRIMA – DON ALTHOFF SCHOLARSHIP 
GOLF OUTING 2012

GOLF HOLE SPONSORSHIP

Please join MIPRIMA in supporting public risk management in Michigan by sponsoring a hole at the MIPRIMA – Don Althoff Scholarship Golf Outing on Wednesday, June 12, 2012 at Lyon Oaks Golf Course, Wixom. This fun filled event is to raise funds for the MIPRIMA – Don Althoff Scholarship, awarded by MIPRIMA to eligible college students in Michigan pursuing a career in insurance and risk management. There are a total of 20 sponsor spots available: 18-holes, and breakfast and lunch locations. The cost is $1,000 per sponsorship.

Sponsorship will include a large sign with your company logo and name prominently displayed at the tee area of one hole, or at the breakfast or lunch area. Additional advertising and recognition will also be provided in literature and at the dinner.

Michigan Public Risk Management Association is hereby authorized to publish the sponsorship advertisement for the MIPRIMA – Don Althoff Scholarship Golf Outing.

Signed: ______________________________________________________________

Name of Organization: _____________________________________________________

Address: ________________________________________________________________

City, State, Zip: ___________________________________________________________

Phone / Fax / e-mail: ______________________________________________________

Mail completed form and check to: (make checks payable to MIPRIMA)

Drew Dunsky
Risk Manager
MIPRIMA-Don Althoff Scholarship Golf Outing Chair
C/O Road Commission Oakland County
31001 Lahser Rd.
Beverly Hills, MI 48025

Email: adunsky@rcoc.org
Tx: 248-645-2000
Court TV
The U.S. Senate Judiciary Committee voted 11 to 7 in favor of a bill that would require live broadcasts of arguments before the U.S. Supreme Court.

Only last summer, Justice Ruth Bader Ginsburg had joked that televising oral arguments was a bad idea. Unfortunately, she tantalized reporters in the audience with tales of odd questions like, “Where is the 9,000 foot cow?” Clearly, the producers of reality TV are excited about this new concept of showing actual Supreme Court action at the national level.

The bill is S1945 and we will definitely follow up on its status.

Even on Vacation, the Justices make News
Vacationing U.S. Supreme Court Justice Stephen Breyer and his wife, Joanne, were robbed. They had taken a break from the Washington winter and were on vacation on the Island of Nevis in the West Indies, when a masked man with a machete broke in and robbed the couple. It was after 9:00 PM on February 9, 2012, when the robbery occurred and the Breyers were at their vacation home with another couple when the robber broke in, no one was injured.

Robinson and the 2” Rule
In the Robinson vs. City of Lansing case, the Michigan Supreme Court held that the defense to sidewalk trip and fall cases known as the 2” Rule was only available to counties. Many believed that while that may have been what the legislature said, it was not what they intended. Immediately remedial legislature was introduced. House Bill 4589 would clarify that the 2” Rule was a defense available to any municipal corporation. Further, this bill clarifies that the defect must be measured “vertically”.

House Bill 4589 has been passed by the House and is working its way through the Senate.

If passed, this will greatly benefit municipalities throughout Michigan.

Michigan Courts:
Legislation continues to progress in advancing bills that will reduce the number of probate, district and circuit court judgeships. Current plans by the legislature would result in a state wide reduction of 36 judgeships. This can only act to further slow the time to trial for civil cases.

Court Consolidation Gone Wrong
$2.2 million was awarded to three Clinton Township court employees who were accused of lying and then fired in 2004. A nine-member local federal jury, of five men and four women, voted 6-3 in favor of awarding damages. Because the parties had previously agreed to be bound by a less than unanimous verdict, the award stands.

The case arises out of an investigation back in 2004 by the State Court Administrative Office into the goings on at 41B District Court. The court had in two locations: Mount Clemens and Clinton Township. The Chief Judge Linda Davis had oversight over both locations: Judge William Cannon worked at the Clinton Township location where his wife Peggy McBride Cannon was the Court Administrator and reported directly to him. The media is covering the verdict extensively and a Google of Barachkov, et al. v 41B District Court, et al. will show what both sides are saying to the press.

Remote Testimony from Experts Allowed
Michigan HB4647 would allow expert witnesses to testify by using video communication equipment. It
would require the consent of all parties or be “for good cause.” This has the potential for reducing the costs for all participants and is a bill we will watch.

Open Meetings Require Physical Presence
Michigan HB5335 would hold that “a meeting is not open to the public if a member of the public body is permitted to cast his or her vote on a decision of the public body without being physically present at the meeting”. This will stop the practice of having members participate by conference call. This may be very disruptive to state-wide bodies where considerable travel is required for attendance. The impact that this will have will vary greatly depending on the public entity’s past practices. This is clearly a bill that some risk managers will need to monitor.

I. Case Law Update

Sixth Circuit

Wheeler v. City of Lansing, 660 F.3d 931 (6th Cir. 2011)

Plaintiff Stella Wheeler appeals the district court’s grant of summary judgment for defendant, Officer Dennis Wirth, on her 42 U.S.C. § 1983 claim that he violated her constitutional rights in obtaining a search warrant for, and executing a no-knock search of, her apartment. Wheeler alleges that Wirth infringed on her Fourth Amendment rights by relying on a warrant that was not supported by probable cause as to some of the items to be seized and that failed to describe with particularity some of the items to be seized. The district court found that Wirth had violated the Fourth Amendment, but that he was entitled to qualified immunity because this violation would not have been apparent to the reasonable officer. Wirth cross-appeals the district court’s finding of a constitutional violation.

A reasonable officer would have believed that probable cause for the warrant existed and therefore the district court did not err in granting Wirth qualified immunity as to this aspect of Wheeler's Fourth Amendment claim. We need not determine whether the warrant affidavit was sufficient to establish probable cause for the warrant in the first place; moreover, Wirth's cross-appeal, which raises that issue, must be dismissed because the district court ordered no relief adverse to Wirth.

However, because it would have been apparent to a reasonable officer that the warrant Wirth obtained lacked the required specificity in its description of the items to be seized, he is not entitled to qualified immunity from this aspect of Wheeler’s Fourth Amendment claim. The district court’s grant of summary judgment in favor of Wirth must therefore be reversed in part.

The warrant affidavit stated in a paragraph entitled “The PROPERTY to be searched for and seized, if found” that officers were looking for personal property, specifically listed in various categories and “taken in approximately nineteen home invasions.” However, the paragraph entitled “The FACTS establishing probable cause or the grounds for the search” described only two home invasions, the two invasions in the City of Lansing. The basis for the warrant, in Wirth’s view, was the commission of the home invasions in both Ingham County and Eaton County. Thus, it was reasonable for him to believe that, as long as the search warrant established probable cause for the search, which it clearly did, he could seize any items he encountered that constituted evidence of the commission of the home invasions, which stolen property clearly does. Wirth is thus entitled to qualified immunity from this aspect of Wheeler's Fourth Amendment claim.

The district court however did err in granting qualified immunity as to the second aspect of Wheeler’s Fourth Amendment claim, in which she alleges that the warrant was constitutionally deficient because it failed to describe with particularity some of the items to be seized. Wheeler claims that Wirth had a “wealth of information available to him concerning the particulars of the stolen property,” but that the affidavit and warrant only listed broad categories of property to be seized. As an example, Wheeler notes that “[f]or the two incidents in the affidavit, [Wirth] had the brand and dimensions of the televisions, the brand of the camera and Playstation and the exact amount of cash reported as stolen,” but the warrant merely

Continued...
lists the items to be seized as cameras, video game systems, big screen televisions, and coin collections. The warrant's description of some of the items to be seized was in fact overbroad. Although we refused to address whether Wheeler's first Fourth Amendment claim actually presented a constitutional violation, we must address the constitutionality of her second claim in order to determine whether Wirth is entitled to qualified immunity. This court has stressed the particularity requirement by noting that “[g]eneral warrants that fail to describe with particularity the things to be searched for and seized ‘create a danger of unlimited discretion in the executing officer's determination of what is subject to seizure and a danger that items will be seized when the warrant refers to other items.’” *United States v. Henson*, 848 F.2d 1374, 1382 (6th Cir.1988) (quoting *United States v. Savoca*, 761 F.2d 292, 298–99 (6th Cir.1985)). “[T]he degree of specificity required is flexible and will vary depending on the crime involved and the types of items sought,” making “a description ... valid if it is as specific as the circumstances and nature of the activity under investigation permit.” *Id.* at 1383 (quoting *United States v. Blum*, 753 F.2d 999, 1001 (11th Cir.1985) (internal quotation marks omitted)). However, we have noted that “a warrant referring to stolen property of a certain type is insufficient if that property is common.” *United States v. Campbell*, 256 F.3d 381, 388–89 (6th Cir.2001).

Wirth is not entitled to qualified immunity from this aspect of Wheeler's claim, as it would be apparent to a reasonable officer that listing general categories of items to be seized even though further details are available violates the Fourth Amendment's specificity requirement. *Campbell* makes clear that when dealing with common items that can be possessed legally, like all of the property included in the warrant to search Wheeler's apartment, specificity is especially important. 256 F.3d at 388–89. It appears that Wirth could have described the stolen items that he and Sharp hoped to uncover with greater specificity because the victims of the home invasions had gone into detail in describing the missing items and these details were recorded in the various police reports. In *United States v. Blakeney*, 942 F.2d 1001, 1026 (6th Cir.1991), we held that a search warrant was overbroad when it described stolen jewelry to be searched for and seized as merely "jewelry" even though an inventory of the particular items taken was available to the official applying for the warrant. Here, the items to be searched for and seized included many common household items that one could expect to find in a person's apartment, necessitating greater specificity in order to distinguish the stolen items from the items belonging to the resident. Considering this along with the clearly articulated standards from Henson and *Campbell*, it should have been apparent to Wirth that the warrant's description was not specific enough to satisfy the Fourth Amendment. Because a reasonable officer would have known that the warrant was deficient, Wirth is not entitled to qualified immunity on this portion of Wheeler's Fourth Amendment claim.

**Michigan Court of Appeals**

*Strozier v Flint Community Schools, ____ Mich App ____ (2011)*

This issue involves an interesting conundrum that arises when motions for summary disposition are brought under both MCR 2.116(C)(10) and MCR 2.116(C)(7). Under MCR 2.116(C)(10) when a court determines that a genuine issue of material fact exists, it must deny the motion for summary disposition and allow the fact-finder to resolve the disputed issues of fact at a trial. *Dextrom v. Wexford County*, 287 Mich.App 406, 430; 789 NW2d 211 (2010). However, as this Court stated in *Dextrom*, “[a] trial is not the proper remedial avenue to take in resolving the factual questions under MCR 2.116(C)(7) dealing with governmental immunity.” *Id.* at 431 (emphasis in original). Whether the motor vehicle exception to governmental immunity applies here is a matter of law, and it is a threshold matter of law at that. *Id.* at 431. The *Dextrom* Court, when faced with a nearly identical procedural issue, resolved this dilemma by remanding the case to the trial court for a full evidentiary hearing.

The Court held that an evidentiary hearing was not required, as the facts as alleged by defendants allowed only one conclusion. The Court found that temporary stops on the road to pick up garbage are included in the meaning of “operation” of a garbage truck and that the motor vehicle exception to governmental immunity applies.

"The governmental immunity statute does not itself create a cause of action called 'gross negligence,' \(^{11}\) and this Court has consistently "rejected attempts to transform claims involving elements of intentional torts into claims of gross negligence."\(^{12}\) Gentry's claim of "gross negligence" is based on the same facts and allegations that underlie his claim of assault and battery as evidenced by his reference in both counts to Carmona's alleged use of "excessive force." As recognized previously by this Court, "the tort of assault and battery by gross negligence does not exist ."\(^{13}\) As Gentry's assertion of "gross negligence" is "fully premised on [the] claim of excessive force," it is subsumed within the intentional tort claim.\(^ {14}\) It is well recognized that how a party chooses to characterize or label his or her cause of action is not dispositive and would effectively result in placing form over substance.\(^ {15}\) Summary disposition is not avoidable simply because of artful pleading.\(^ {16}\) As the gravamen of Gentry's claim is premised on the alleged assault by Carmona, the trial court should have dismissed his claim of gross negligence at summary disposition.

Petipren v Jaskowski, ____ Mich App ____ (2011)

Plaintiff brought suit against Jaskowski, Chief of Police for the Village of Port Sanilac. Plaintiff alleged assault and battery and false arrest. Jaskowski moved for summary disposition, arguing that he was absolutely immune from plaintiff's claims because he was the highest appointive official at the pertinent level of government and his actions were taken within the scope of his authority. Governmental immunity from tort liability is governed by MCL 691.1407. Of particular relevance in this case, MCL 691.1407(5) provides:

A judge, legislator, and the elective or highest appointive executive official of all levels of government are immune from tort liability for injuries to persons or damages to property if he or she is acting within the scope of his or her judicial, legislative, or executive authority.

A police chief is generally recognized as the highest appointive official in the police department. See Payton v. Detroit, 211 Mich.App 375, 394; 536 NW2d 233 (1995). However, the highest executive officials of a level of government are not immune from tort liability unless their acts fall within the scope of their executive authority. MCL 691.1407(5); American Transmissions, Inc v. Attorney General, 454 Mich. 135, 144; 560 NW2d 50 (1997); Marrocco v. Randlett, 431 Mich. 700, 711; 433 NW2d 68 (1988). Whether the highest executive official of local government was acting within his authority depends on a number of factors, including the nature of the acts, the position held by the official, the local law defining his authority, and the structure and allocation of powers at that particular level of government. Id. at 141; Bennett v. Detroit Police Chief, 274 Mich.App 307, 312; 732 NW2d 164 (2006). The official's motive is irrelevant.\(^ {2}\) American Transmissions, 454 Mich. at 143–144; Brown v. Detroit Mayor, 271 Mich.App 692, 722; 723 NW2d 464 (2006), aff’d in part, vacated in part on other grounds 478 Mich. 589; 734 NW2d 514 (2007).

The essential duties of the police chief as set forth in the job description for the police chief for the Village of Port Sanilac are administrative in nature and are clearly distinct from the nature of the duties of an ordinary police officer. Although a police chief may occasionally perform the duties of an ordinary police officer, he is not acting within the scope of his executive authority as the highest executive official in the police department when doing so. Rather, the nature of his act is that of an ordinary police officer. As an ordinary police officer, he would be entitled to the immunity provided to government employees under MCL 691.1407(2) if all statutory requirements are satisfied. Indeed, it would lead to an illogical result to limit a plaintiff's intentional tort claims arising from the conduct of a police officer in those cases where the police officer is also the police chief who was acting as an ordinary police officer at the time he allegedly committed the tortious act.
Ader v. Delta College Board of Trustees

Contributed by Anne M. McLaughlin of Johnson, Rosati, Schultz and Joppich on behalf of Christopher J. Johnson, Legislative Committee Member

Ader v. Delta College Board of Trustees – In a case that will surely garner the interest of public agencies, the Michigan Supreme Court has agreed to decide whether a person may file suit to enforce the Open Meetings Act. The test for legal standing to sue, that is, the right of a person to bring a lawsuit in a civil case, seems to have become a political ping-pong ball, as the Court’s answer to that question has changed as the political composition of the Supreme Court has changed.

After the more conservative justices lost their majority in the 2008 election, the Court issued a decision in 2010 that relaxed the criteria for determining standing, holding in part that a person has standing if a statute simply creates a cause of action. The Open Meetings Act says that in addition to the attorney general or a county prosecutor, “a person” may file suit for violation of the Act. Before the 2010 case, the Court had previously considered this sort of citizen-as-plaintiff proviso, but not in the particular context of the Open Meetings Act.

In Ader, the February 1 order granting leave to appeal might signal the Court’s readiness to reinstate the previous test, that in order to sue, a person must show that s/he has suffered an actual injury that is different from the public at large. A decision is not expected for several months.

Lameau/Estate of Crnkovich v. City of Royal Oak – The Supreme Court decided without a written opinion that neither a city nor its employees were liable for a man’s death apparently caused by a guy wire that ran across a sidewalk from a utility pole to an anchor in the asphalt of the sidewalk. Driving a motorized scooter at night, the man apparently rode on the sidewalk and died as a result of striking the guy wire, which nearly decapitated him.

The man’s estate sued the city claiming liability under the highway exception to governmental immunity. The lawsuit also named two city engineering department employees, alleging that they were grossly negligent by not having the guy wire removed by the utility company that owned it or making sure that barricades stayed in place. The Supreme Court issued an order to the trial court, saying it was relying on the dissenting opinion from the Court of Appeals. The judge concluded that the city was not liable because the guy wire was part of the utility pole, which is expressly excluded from the definition of “highway” under the exception. He also reasoned that the guy wire was not a “defect” in the sidewalk itself, necessary to impose liability on the city.

For the city employees, the dissenting judge articulated that governmental employees can be liable only if their conduct is “the” legal cause of the injury. The judge pointed out that the man’s injury was not the result only of the conduct of the city employees, but also the conduct of the utility company in installing and failing to remove the guy wire, and the man’s own conduct of “traveling at night without lights or a helmet, at a potentially unsafe speed while drunk.”

The Estate is requested for reconsideration by the Supreme Court remains pending.
Summary of Amendment to Michigan WC Act
By Brian Fleming

Effective Date of Legislative Changes. Applies to dates of injury on or after 12/19/2011.

28 Day Employer Controlled Medical Treatment. Current 10 day period is increased to 28 days.

Disability. Adopts Sington / Stokes concepts. Threshold for recovering wage loss is proof of a limitation of wage earning capacity, such that the worker is unable to perform all jobs paying maximum wages. Wage earning capacity includes wages the employee is capable of earning at a job “reasonably available” to that employee, whether or not the wages are actually earned. But, “good faith job search effort” can be utilized to determine whether jobs are reasonably available.

Partial Wage Earning Capacity. Adopts Lofton concept. If there is partial disability and wage loss, wage benefits are owed in an amount calculated by taking the workers compensation weekly rate at the time of injury and reducing that amount by the worker’s wage earning capacity after the injury. But, a failed good-faith effort to procure work will entitle the worker to full wage benefits.

100 Week Rule. Eliminated. No longer is the employer obligated to pay wage benefits after an employee performing light duty for less than 100 weeks is terminated for “whatever reason.” The concept of just cause termination has presumably returned.

Causal Connection. Adopts Romero; must be causal connection between injury and wage loss.

Unemployment. Credit against WC exposure for unemployment received from any source.

Wage Earning Capacity. Employee must rebut presumption of a reestablishment of a wage earning capacity for post injury employment of 100 to 250 weeks; presumption of reestablishment of wage earning capacity is established for post injury employment greater than 250 weeks.

Pathological Change Required. Adopts Rakestraw and Fahr concepts. Injury must create a “medically distinguishable” change in condition and “aggravate pathology” from any preexisting condition.

Degenerative Arthritis. Is a condition of the aging process and thus subject to a higher burden of proof (significant manner standard) for compensability.

Scheduled/Specific Loss. Overturns Trammel concept. The success of medical treatment (e.g., artificial joints) to be considered when determining if scheduled/specific loss payments are owed.

Psychiatric Reasonable Person Standard. Tightens requirements by making perception of event subject to a reasonableness standard.

Social Security Retirement. If worker is already receiving SS Retirement on the DOI, then 50% SS coordination (§ 354) may only reduce the compensation rate by no more than one-half.

Independent Contractor. After 1/1/13, to be determined by a 20-factor test utilized by the IRS.

Police and Fire. Slightly different standard of disability, making a claim easier for them to prove.
WC - Summary of Significant Changes

Effective Date
The effective date of the legislation is December 19, 2011. The amended Act only applies to injuries occurring on or after December 19, 2011, regardless of the date reported or the date of the Application for Mediation or Hearing - Form A; the “old” version of the Act still applies to injuries that occurred prior to December 19, 2011. Exceptions include 1) §301 and §401 (definitions of disability), which may apply to all injuries/work related conditions occurring on or after June 30, 1985 (this is unclear and will be litigated); and 2) the new definition of independent contractor is effective January 1, 2013.

28 Day Employer Controlled Medical Treatment
An employee can treat with his or her own physician only after 28 days from the start of medical care; previous time period was 10 days. The only change to the statute is that the number “10” was deleted and the number “28” inserted; thus, all aspects of how an employer can control medical expenses at the start of a claim remain the same, just the time has been extended to 28 days. See §315(1).

Disability
Codifies Sington / Stokes case concepts. Threshold for recovering wage loss is proof of a limitation of wage earning capacity, such that the worker is unable to perform all jobs paying maximum wages. Wage earning capacity includes wages the employee is capable of earning at a job “reasonably available” to that employee, whether or not the wages are actually earned. A “good-faith job search effort” can be utilized to determine whether jobs are reasonably available. One can expect litigation to follow regarding what constitutes a “reasonably available job” and what also constitutes a “good-faith job search effort.” See §301(4)-(6); §401(1)-(3).

Partial (Residual) Wage Earning Capacity
Codifies Lofton case concept. If there is partial disability and wage loss, indemnity benefits are owed in an amount calculated by taking the workers’ compensation weekly rate for the DOI and reducing that amount by the partial (residual) wage earning capacity after the injury. If an employee returns to work, benefits are calculated by taking the rate as of the DOI reduced by the rate of weekly wages earned. But, a failed good-faith effort to procure work can entitle the worker to full wage benefits. The disability and partial (residual) wage earning capacity changes were the most hotly contested, with multiple revisions throughout the legislation process, and with a final result which can be argued is less than clear. Court case law through litigation will flush out the nuances of these legislative changes for years to come. See §301(8)-(9); §401(6).

Job Search
Employee has an affirmative duty to look for work post injury. See § 301(4)(B)

100 Week Rule / §301(5)(e) Eliminated
No longer is the employer obligated to pay wage benefits after an employee performing light duty for less than 100 weeks is terminated for “whatever reason.” Now, if an employee is terminated from reasonable employment (light duty) due to the employee’s fault, he or she is considered to have voluntarily removed himself or herself from the workforce and is not entitled to wage loss benefits. See §301(9)(b); §401(7)(b).

Causal Connection
Codifies Romero case concept; an employee must always establish a causal connection between the disability and reduced wages when establishing wage loss. This concept is applicable to situations, for example, where there is a post-injury non-work-related event causing additional need for restrictions or time off work, as well as situations where the employee would not be earning wages even if uninjured. For example, if there is a non-work related auto accident post injury and it is the auto accident that causes the worker to miss work, then there is no causal connection between the injury and wage loss and wage benefits would not be owed. Also, if the worker was seasonally employed and normally did not work during the off-season, workers’ compensation wage payments would not be owed during that off-season as there is no connection between the injury and wage loss. This is a very fluid and developing concept. See §301(4)(c); §401(2)(d).
Unemployment Benefits
Previously an employer could take a dollar-for-dollar credit for unemployment benefits paid if those benefits were chargeable to the employer where the injury occurred; it is now irrelevant whether the unemployment benefits are chargeable to the same employer. Even if the unemployment benefits are chargeable to an employer before or after the employer where the injury occurs, the employer where the injury occurs receives a credit against workers’ compensation wage exposure for any/all unemployment paid. See §358.

Presumption of New Wage Earning Capacity
Employee must rebut the presumption of establishment of a new wage earning capacity for post injury employments of 100 to 250 weeks; presumption of a new wage earning capacity for post injury employment greater than 250 weeks. This is a slight modification from the “old” law, potentially providing additional defenses to wage loss for post injury employments lasting greater than 100 weeks. See §301(9)(e)(ii)-(iii); §401(e).

Mediation / Mediators
Mediation/Mediator provisions pertaining to mandatory and voluntary mediation are abolished entirely. Some telephonic mediations will continue with Agency personnel, but the Mediators have been laid-off. Thus, the four Mediators (Miron, Cooper, Burden and Riley) have been laid off, and only certain claims (likely medical bill only and plaintiffs unrepresented by an attorney) will be assigned to the telephonic mediation process.

Pathological Change Required
Codifies Rakestraw and Fahr case concepts. Work injury must cause, contribute to, or aggravate “pathology” so that the injury creates pathology that is a “medically distinguishable” from any pathology that existed prior to the injury. Thus, if the worker had a preexisting condition, the work injury must alter pathology, and not just create symptoms. This was the current status of the case law, and now has been written into the statute, and thus cannot be changed should the political winds change in the courts. See §301(1); §401(2)(b).

Degenerative Arthritis
The medical condition of degenerative (old age) arthritis is added to Act as a specific condition of the aging process and thus is now subject to a higher burden of proof: employment must contribute to, aggravate or accelerate the degenerative arthritis in a significant manner in order to be compensable. See §301(2); §401(2)(b).

Scheduled / Specific Loss
Reverses Trammel case concept; the employee’s post-surgical status is to be utilized in determining compensability. The success of medical treatment (such as artificial joints) is to be considered when determining if scheduled / specific loss payments are owed. This change brings our Act up to speed with medical science, essentially requiring that we wait to see what medical treatment does to cure an injury prior to determining of there is a scheduled / specific loss. See §361(2).

Psychiatric Reasonable Person Standard
Mental disability was previously compensable if it arose out of actual events of employment and not “unfounded perceptions thereof”. Now the employee’s perception of the actual events must also be reasonably grounded in fact or reality. See §301(2); §401(2)(b).

Old Age Social Security
If the employee was receiving Social Security Retirement on or before the DOI, then the 50% Social Security Retirement coordination permitted under § 354 may reduce the compensation rate by no more than one-half of the uncoordinated WC rate. Out of approximately 25 total changes to the Act created by this new legislation, only this change is on its face is unfavorable to employers. Previously we could fully offset Social Security Retirement received even if the worker was receiving the benefit prior to the injury; now our reduction is limited if the worker was already receiving Social Security Retirement at the time of injury. See §354(1)(a).
Independent Contractor
Employee or Independent Contractor determination previously made using a combination of statutory factors and case law interpretation. After January 1, 2013, the employer-employee relationship will be determined by a 20-factor test utilized by the IRS. See §161(1)(n).

Interest Rate
The prior fixed 10% per annum interest rate is changed to a floating rate, currently approximately 2%, just as provided for money judgments in civil actions. See §801(6).

Police and Fire
Special definition of “wage earning capacity” deleting requirement that consideration be given to wages not actually earned. Thus, concepts mentioned above in sections titled “Disability” and “Partial (Residual) Wage Earning Capacity” are partially inapplicable to Police and Fire, a result achieved via significant lobbying by these groups. Thus, disability is easier to prove for a member of the Police and Fire. See § 302.

Board of Magistrates
Selection process essentially relegated to the Governor and term limits are eliminated. Thus, the Governor is not limited to only candidates for Magistrate positions recommended by the Qualifications Advisory Committee (which was eliminated), and the maximum 3 term (12 years total) limitation was also eliminated. See §§ 210-213.

Administrative Efficiency
Various provisions enacted allowing for electronic filing, affidavit redemptions, consolidation of workers’ compensation and unemployment appeals, and attorney execution of subpoenas.

Professional Athlete
Defines if Michigan has jurisdiction over workers’ compensation claims. Statutory changes apply only to the very limited category of workers who are traveling professional athletes. See §360.

Death Benefits
Act reworded to provide clarification of dependency status and eliminate the conclusive presumption that a wife is wholly dependent on a husband with whom she lived at the time of his work-related death; children under 16 are still conclusively presumed dependant. See §331-353.

Additional Reading
The above is the link to the Michigan Legislature website regarding this legislation.

Click on “Public Act” for a copy of the final legislation.
Click on “House Concurred Bill” for a copy of the final legislation with the changes (additions and deletions) noted.
Click on “Summary as Enrolled” for an overview of the final legislation from the Senate Fiscal Agency.
Hot Topics

Police And Fire: Does The New 28 Days for Employer Control of Medical Apply?

Denise LeVasseur

There is a rumor going around that the 12-19-11 changes to the Workers’ Compensation Act, particularly the provision giving employers the right to control medical for 28 days, do not apply to police and fire. **Not true.**

The police and fire did received a special carve out in the recent changes to the workers’ compensation statute. However, the 28 days for medical control by the employer applies to police and fire just as it does to all other employees.

POLICE AND FIRE CARVE OUT

In the course of the negotiations for changes in the workers' compensation act, the police and fire persuaded the legislators to add a new section to the act that applies only to them. The new section is 418.302 regarding “wage earning capacity”. The significance of the language in section 302 is seen when you compare it to the definition of wage earning capacity that applies to everyone else. For all employees except police and fire, Section 301(4)(b) defines wage earning capacity as the wages the employee earns or is capable of earning at a job reasonably available to that employee, **whether or not wages are actually earned**.

But for police and fire, Section 302, the definition of wage earning capacity does not include the phrase "whether or not wages are actually earned." It is because of the omission of this phrase that we say that the police and fire received a "carve out." But that is the limit of the carve out in the changes to the statute. The rest of the changes in the statute apply to all employees including police and fire.

EMPLOYER CONTROL OF MEDICAL FOR 28 DAYS

Before the changes became effective on December 19, 2011, the employer had the right to control medical treatment for the first 10 days for all employees including police and fire. This was in Section 315(1). The only change to Section 315(1) regarding this is the change from 10 to 28 days. There is no carve out of this provision for police and fire. The employer control of medical for 28 days applies to police and fire just as the employer control of medical for 10 days applied to police and fire prior to the change.

THE POLICE AND FIRE ELECTION OF LIKE BENEFITS, SECTION 161

It has been suggested that Section 161(c) can be used to argue that the employer’s control of medical for 28 days does not apply to police and fire. The provisions of section 161 have no relevance whatsoever to the question of control of medical.

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