

# THE POOL CUE

## MICHIGAN COUNTY ROAD COMMISSION SELF-INSURANCE POOL

Volume XIX Issue 3 August 2013

### MCRCSIP MISSION STATEMENT

"The Mission of the Michigan County Road Commission Self-Insurance Pool is to administer a self-insurance program and to assist members with risk management efforts."

### COUNTY ROAD COMMISSION INSURANCE CONFERENCE

Our Annual Workshop and Business Meeting were held on July 24 and 25 at the Soaring Eagle in Mt. Pleasant. This year, CRASIF scheduled their annual meeting for the same time, and we were able to have a joint "Insurance Conference."

We had a great turnout – 188 attendees from 62 Road Commissions.

Our Wednesday workshop was the presentation of a Mock Trial (Edwards v Walloon County Road Commission) by attorneys Bill Henn and Kevin Lesperance and paralegal, Cathy Greer from Henn Lesperance, PLC and attorney R. Michael John from the firm of Zanetti and John, PC.

The trial was specially designed to demonstrate common problems found by our attorneys when defending our road commissions from road maintenance claims. You will find a follow-up article in this Pool Cue highlighting the take-aways.

On Thursday, our professional services team gave reports to summarize the progress of your Pool, and we were all pleased to report the completion of another successful year.

Chairman, Darrel Spragg, announced a liability refund in the amount of \$10,000,000.

Joe Valente, Marquette CRC and Dennis Stanek, Delta CRC were re-elected to the board for three year terms as our Upper Peninsula representatives. Dorothy Pohl, Ionia CRC was re-elected to a three year term as an At-Large representative. Lonny Lutke, Missaukee CRC, Tim Haagsma, Kent CRC, Darrel Spragg, Alpena CRC, Mike Power, Huron CRC, Brian Gutowski, Emmet CRC and Alan Cooper, Wexford CRC complete our Board of Directors. At a short board meeting following the annual membership meeting, Darrel Spragg was re-elected Chairman and Brian Gutowski was re-elected Vice Chairman.

All three of the Amendments presented to the membership passed by the required 2/3 majority votes. We will be sending new documents to the membership in September.

Thank you again, to all of our Members for 29 successful years.

Gayle Pratt  
MCRCSIP Administrator

### IN THE CUE

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## LESSONS LEARNED: EDWARDS V WALLOON COUNTY ROAD COMMISSION

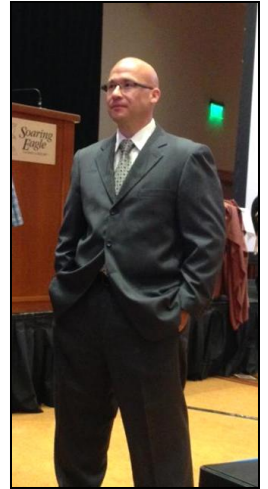
William L. Henn, Attorney  
Henn Lesperance PLC

Thank you, again, to everyone who attended and participated as jurors in the mock trial of the fictional case *Edwards v Walloon County Road Commission* on July 24, 2013. It was a great pleasure to prepare and present that case, and we hope you found it entertaining and thought provoking. We enjoyed and benefitted from the discussion afterward, and offer for your additional consideration the following observations:

**1. Proper Documentation is Key to Defending Lawsuits.** In the trial, the Walloon County Road Commission's Managing Director testified that the subject road was driven every two weeks and graded seven days before the accident. He could not, however, produce documentation of any inspections or repairs, and was therefore subjected to cross examination on both accounts. This opened the door for Plaintiff's counsel to argue in his closing argument that perhaps neither really occurred – a bad position for the Road Commission to have to defend without any supporting documentation. Such situations come down to the jury's assessment of the credibility of the opposing witnesses—leaving much to chance! In the group discussion afterward, one juror raised the possibility of GPS data from maintenance

vehicles. That certainly would have helped the Road Commission's defense, but again, its attorneys would have needed proof (i.e., documentation) from the GPS. The rule to follow is: "*document, document, document!*" This includes a system for documenting and responding to citizen complaints.

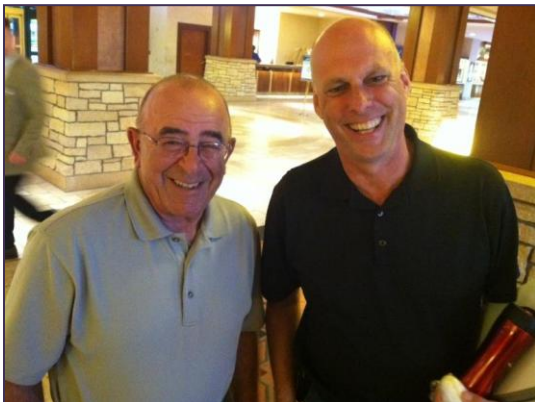
**2. Possession is Nine-Tenths of the Law.** In trial, the suggestion was made that perhaps the documentation of road grading had been misplaced (i.e. lost). Lost records are as bad for your defense as nonexistent records, and perhaps worse. There is a legal concept known as "spoliation" in which a party may be sanctioned for failing to preserve crucial evidence. Specifically, spoliation may allow the harmed party (here, the Plaintiff) to a rebuttable inference that the lost or stolen evidence was favorable to the harmed party. So here, the applicable rules are: 1) have an organized system for storing all documents/physical evidence, 2) immediately pull and store in a separate file any and all documents/physical evidence that might be involved in future litigation, and 3) when in doubt, don't throw it out!



**3. Think Before You Write.** In *Edwards*, Plaintiff's key piece of evidence was the Road Maintenance Request form filled out by the fictional former employee, Ted Boozer. He wrote, for example, "Fix potholes (recurrent) AGAIN or just pave once and for all." Mr. Boozer also responded to the question "Do you feel that this is an unsafe condition?" with a double "XX" followed by "Lady almost died last night because of dangerous potholes."

Unfortunately, this form is very similar to one defense counsel has encountered in an actual road commission case. **The rule:** educate your staff about the legal ramifications of expressing inflammatory statements/opinions/frustrations in writing. Emphasize the importance of memorializing facts, not opinions. Language matters because you may not be the only ones who read those words.

**4. Have Good Reasons for Everything.** In trial, you saw Plaintiff's expert testify that the Road Commission should have used 21-A aggregate instead of 23-A aggregate (as recommended by MDOT). This was not a joke. We have seen at least one expert (a former MDOT employee) offer this opinion in two actual lawsuits involving gravel roads and potholes. And while you must think this is "hogwash" as Joe Valente testified in the *Edwards* case, the reality is that experts are entitled to their own opinions, and it is difficult to exclude even "rogue" opinions from a qualified expert. So, the rule here is that you must have good reasons for everything you do. Anytime you can point to the specifications or standards of an independent, well respected third-party like MDOT, you're probably on the right track.



Mock trial Defendant, Joe Valente, Marquette County Road Commission, and Plaintiff's Expert, Tim Haagsma, Kent County Road Commission.

**5. Rogue Jurors/Sympathetic Plaintiffs.** Fifty-two of you must have thought to yourself "*how did five of you (fellow Road Commissioners and Road Commission employees) just award \$1.7-2 million to a Plaintiff?!?*" As "Judge" Mike John aptly noted in the post discussion, you will never have a jury of your peers, and in reality, none of you will likely ever be permitted to sit on a jury involving a road commission case (yours or another county). The lesson here is that these cases can be challenging when you have a sympathetic plaintiff like Eileen Edwards (aka the Church Lady) and regular folks from the community sitting as your jurors.

**6. A Picture is Worth 1,000 Words by Your Defense Counsel.** In *Edwards*, the Road Commission went to the scene and took the photographs which formed the basis of the Plaintiff's case. In post, the point was raised that the Road Commission had "made" Plaintiff's case for her by creating this evidence. Certainly, a good rule of thumb is that if you are going to investigate and photograph a scene, you should be mindful that your photographs will likely become evidence and may be used against you in a court of law; unless, of course, you lose them – after which the Road Commission will likely become subject to a spoliation inference (See # 2, above). There is no spoliation for photographs never taken. Although each situation is different, and you must use your best judgment, the general rule with taking photographs of an accident scene is: always be mindful of the potential ramifications, and if you ever have questions, consult with Specialty Claims.



**7. When in Doubt.** When in doubt, call Gayle Pratt or Mark Jahnke. They are on your team, and here to help you!



## A POSITIVE EFFECT?

Mark D. Jahnke  
Specialty Claims Services, Inc.

One year after Michigan eliminated the requirement for motorcyclists over the age of 21 to wear a helmet, an insurance study has shown a 22% increase in medical insurance claims costs associated with cycle crashes.

“The cost per injury claim is significantly higher after the law changed than before, which is consistent with other research that shows riding without a helmet leads to more head injuries”, according to David Zuby, Chief Research Officer for the Highway Loss Data Institute (HLDI), an affiliate of the Insurance Institute for Highway Safety. While other studies have documented an increase in motorcycle *fatalities* after states eliminated helmet requirements, the HLDI is the first to measure the effect of the elimination of a helmet law on medical insurance claims.

Nationally, motorcycle deaths have risen in 14 of the past 15 years, including a 9% increase in 2012 compared to 2011. Preliminary data compiled by the Governors Highway Safety Administration reflected an even more significant increase in motorcycle deaths in Michigan during the first nine months of 2012 (120) compared to the first nine months of 2011 (99), an increase of over 21%!

Statistics can be misleading, but the numbers outlined above are hard to ignore. The repeal of the helmet law is apparently one variable affecting the statistics while increased ridership and driver distraction undoubtedly contribute as well. Of significance to the Pool and its Members is the increased likelihood of a motorcycle accident taking place on your county road system that could result

in serious injuries or death. And, along with the increased chance of such an accident comes an increased possibility of a claim brought under the *highway exception* to governmental immunity.

The highway exception (MCL691.1402) states that a “person” who is injured resulting from the failure of a governmental agency to maintain a highway under its jurisdiction in “reasonable repair” can recover damages from the governmental agency. The Michigan Supreme Court, in *Nawrocki vs Macomb County Road Commission*, ruled that *any* “person” who sustains damages from a defective highway may pursue a claim including pedestrians, bicyclists, *motorcyclists* and motor vehicle operators. The court ruled that the *type* of travel or traveler does not affect the ability to sue a road agency under the highway exception.

Thanks in large part to favorable case law created by Pool-retained counsel, a Road Commission’s exposure to liability under the highway exception has been significantly reduced. Liability for virtually all highway-related conditions has been eliminated *except* liability for failure to properly maintain the *physical structure of the roadbed surface*. Given this remaining liability exposure, and the fact that road surface conditions can have a material effect on a motorcyclist’s ability to safely navigate a road (not to mention the ability of pedestrians and bicyclists to do the same!) we strongly encourage Member road commissions to emphasize *road surface maintenance* in their daily operations. Performing regular roadway inspections, promptly and appropriately responding to service requests, repairing road surface irregularities *before* they may contribute to an accident and keeping accurate records to document your road surface maintenance activities are all effective methods to control potential claims costs in this area. By taking the steps necessary to minimize liability under the highway exception, we can help control the increased exposure to damages that has resulted from the greater number of motorcycle fatalities and the higher costs associated with treating motorcycle-related injuries in Michigan.





## HAZARD COMMUNICATION AND THE GLOBAL HARMONIZATION SYSTEM

Mike Shultz

MCRCSIP Director of Loss Control/Training

A significant change is taking place to the MIOSHA Hazard Communication or “Right to Know” requirements. It is called the Global Harmonization System (GHS) and it is a way to better standardize how chemical information is presented and to address the very real problem of workplace illiteracy.

Like other businesses and governmental entities, Road Commissions will be required to comply with the new standard. This will involve rewriting policies and procedures for Hazard Communication, updating Safety Data Sheets (SDS), posting the two new SDS Posters, and training employees on the Global Harmonization System (GHS).

Fortunately, the MIOSHA Consulting, Education, and Training (CET) Division has already done much of the work for us. They have developed policies, handouts, and even a PowerPoint program with instructor’s notes.

This information from MIOSHA CET was recently emailed to you ...

- Compliance Guide
- Written Program
- SDS Poster
- SDS New or Revised Poster
- PowerPoint with Instructor’s Notes

Train the trainer events are being held by MIOSHA CET throughout the state. These events will teach your representative how to conduct the required GHS training. MIOSHA CET may also be available to come to your facility to conduct train the trainer events and/or employee training.

Follow this link for a schedule of events or to contact MIOSHA CET...

**[http://www.michigan.gov/documents/lara/lara\\_miosha\\_ghs\\_training\\_403867\\_7.htm](http://www.michigan.gov/documents/lara/lara_miosha_ghs_training_403867_7.htm)**

CRASIF and MCRCSIP will be working together to develop employee training programs, available in the fall 2013. If you have any questions regarding the GHS requirements, please do not hesitate to contact a CRASIF or MCRCSIP Loss Control Representative.



### LIABILITY REFUND

During our July 25th Annual Membership Meeting, Chairman, Darrel Spragg, announced that there would be a \$10,000,000 liability refund back to our Members. This brings the total amount refunded over the past 29 years to **\$134,000,000.**



## WHISTLEBLOWERS CLAIMS IN MICHIGAN BECOME TOUGHER TO DEFEND

Wendy Hardt  
Michael R. Kluck & Associates

Recently, the Michigan Supreme Court dealt a serious blow to employers in defending Whistleblower's Protection Act claims. Specifically, in the case of Whitman v City of Burton, the Michigan Supreme Court held that a whistleblower's motivation in making a complaint of unlawful activity is irrelevant in determining whether the whistleblower has engaged in protected activity under the Act. This represents a departure from other recent cases which have depended on an earlier case, i.e. Shallal v Catholic Social Services of Wayne County, to hold that a whistleblower must be acting in good faith in making a complaint to receive protection under the Act.

In Whitman, the plaintiff was employed by the City of Burton as its Police Chief. When the City of Burton refused to pay him (and other City employees) his previously accumulated unused sick and personal leave time in accordance with City Ordinance, Whitman complained to the Mayor and the City Attorney, threatening to pursue the violation "as far as it needs to go." After several such complaints were made, the City relented and authorized payments for all unused days to Whitman and all other officers who had requested it. Three years later, following a reelection, the Mayor declined to reappoint Whitman as Chief of Police.

Whitman's case went to jury trial, resulting in an award of \$232,500.00. The defendant then moved for judgment notwithstanding the verdict or a new trial, which the Circuit Court denied. The Court of Appeals reversed, holding, as a matter of law, that Whitman's claim was not actionable under the Whistleblower's Protection Act because

Whitman "clearly intended to advance his own financial interests. He did not pursue the matter to inform the public on a matter of public concern." It did so relying on the Shallal case, which held that the primary motivation of an employee pursuing a whistleblower claim must be a desire to inform the public on matters of public concern, as opposed to personal vindictiveness.

On appeal, the Supreme Court reversed the Court of Appeals, finding that no such requirement can be read into the statute. To establish a prima facie case under the WPA, a plaintiff need only show that (1) he or she was engaged in protected activity as defined by the Act, (2) he or she suffered an adverse employment action, and (3) a causal connection exists between the protected activity and the adverse employment action. Additionally, MCL 15.362 makes plain that protected conduct does not include reports made by an employee that the employee knows are false, or reports given because the employee is requested to participate in an investigation by a public body. However, the Supreme Court noted that MCL 15.362 does not address an employee's "primary motivation," nor does the statute's plain language suggest or imply that any motivation must be proved as a prerequisite for bringing a claim. The Supreme Court further indicated that since there was no statutory basis for imposing a motivation requirement, the Supreme Court would not judicially impose one. Accordingly, it reversed the judgment of the Court of Appeals.

In the wake of this decision, whistleblower claims will be even more difficult to defend than they were previously. A more comprehensive discussion of the Whistleblower's Protection Act can be found in the MCRCSIP Employment Practices Manual. You should always consult with your legal counsel before discharging an employee.



## FREEZING THE FACTS

Specialty Claims Services, Inc.



## BEHAVIOR BASED OBSERVATION TRAINING DRIVER RIDE ALONG "COACHING" PROGRAM

Mike Shultz,  
Director of Loss Control

### Michigan County Road Commission Self-Insurance Pool Supervisory Training

# REGISTER NOW!

		Date	Facility
8:00 a.m.	Registration	Monday - September 16 <sup>th</sup>	Delta CRC
8:30	Introduction		
8:40	Freezing The Facts		
9:45	Coffee Break	Tuesday - September 17 <sup>th</sup>	Roscommon CRC
10:00	Freezing The Facts		
10:45	Behavior Based Observation Driver Ride Along "Coaching" Program	Wednesday - September 18 <sup>th</sup>	Kalamazoo CRC
Noon	End	Thursday - September 19 <sup>th</sup>	Washtenaw CRC

To register, please contact:  
MCRCSIP  
417 Seymour Ave, Suite 2  
Lansing, MI 48933

OR:  
Email: [training@mcrقسip.org](mailto:training@mcrقسip.org)  
Phone: 800-842-4971  
Register online - [www.mcrقسip.org](http://www.mcrقسip.org)



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