

THE POOL CUE

MICHIGAN COUNTY ROAD COMMISSION SELF-INSURANCE POOL

Volume XX Issue 4 November 2014



A NOTE FROM YOUR BOARD OF DIRECTORS

Recently, we decided to seek proposals for the Pool's claims management services. That decision was made after reviewing the Pool's 8-year history with Specialty Claims Services, and analyzing the associated costs, claim counts and other related issues. In order to streamline the process, we hired a consultant experienced in evaluating claims management service providers. We have also been working with our legal partners, our broker, and our actuarial firm to fully evaluate every available option.

Our Executive Committee met on Friday, October 31, to adopt an RFP, approve a list of potential claims management service providers, and discuss the possibility of designing an in-house claims department. As part of the review process, Specialty Claims Services was asked to outline a new service model that addressed some of our ongoing concerns. Instead of doing so, Specialty Claims notified us that it chose to terminate its relationship with the Pool effective December 31, 2014.

We are prepared to make a decision and either retain a new service provider or develop an in-house claim department, at our next Board Meeting scheduled for December 9 in Mt. Pleasant. We expect to be ready to transfer responsibility for servicing your Liability and Physical Damage claims on or before December 31. This change will neither alter the Pool's relationship with any of its current legal counsel, nor result in the re-assignment of any Member lawsuits.

We believe that these changes will be positive, productive, and ultimately help our Pool be even stronger. As we continue to work through the details, please do not hesitate to let us know if you have any questions or concerns, or issues with the servicing of your claims.



MICHIGAN SUPREME COURT UPDATE *HANNAY V MDOT AND HUNTER V SISCO:* BODILY INJURY REDUX

William L. Henn
Henn Lesperance PLC

In 2008, the Michigan Supreme Court determined in *Wesche v Mecosta County Road Commission* that the motor vehicle exception to governmental immunity precludes a plaintiff from recovering for loss of consortium and loss of society and companionship. The Court based its conclusion on the plain language of the immunity exception, which states that “[g]overnmental agencies shall be liable for **bodily injury and property damage** resulting from the negligent operation...of a motor vehicle of which the governmental agency is owner...” (emphasis added). According to the Court, because claims for loss of consortium or loss of society and companionship do not seek compensation for physical injuries, they do not constitute “bodily injury” for purposes of the immunity exception.

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In the years following the *Wesche* decision, governmental defendants argued that various types of injuries asserted by plaintiffs in both highway exception and motor vehicle exception cases were barred by *Wesche's* analysis. Defendants were largely successful



SNOW PLOW DRIVERS & HOURS OF SERVICE REGULATIONS

It's a question that comes up this time each year. How do the hours of service regulations in the Michigan Motor Carrier Act affect Road Commission employees? For emergency services such as snow removal, Road Commission employees are exempt from the hours of service regulations. Wendy Hardt from Michael R. Kluck and Associates provided us with this reference information on the subject...

The Michigan Motor Carrier Safety Act specifically adopts most of the provisions of the FMCSRs for intrastate commercial drivers in Michigan. However, MCL 480.15 (4) specifically provides that "this act and the rules promulgated under this act do not apply to a commercial motor vehicle owned and operated by a unit of government or its employees, except as otherwise provided by this act, and except for 49 CFR parts 382, 391, 392, and 393." As you will note, the 49 CFR Part 395 - Hours of Service is not one of the sections made applicable to governmental drivers. Therefore, it does not apply.

Prudent measures should be adopted to prevent operators from driving when excessively fatigued. For this reason, most Road Commissions have internal policies that limit hours of service.

If you have additional questions regarding hours of service requirements, please contact your MCRCSIP Loss Control Representative.

in persuading trial and appellate courts that these immunity exceptions precluded plaintiffs from recovering for things like emotional distress, anxiety, and fright and shock. However, two cases presently pending in the Michigan Supreme Court may test the limits of *Wesche*.

First, in *Hannay v Department of Transportation*, decided by the Michigan Court of Appeals in 2013, MDOT argued that the *Wesche* analysis precludes a plaintiff from recovering for work loss and loss of services allegedly incurred as a result of a motor vehicle collision. The Court of Appeals disagreed with MDOT, concluding instead that work loss and loss of services - although not bodily injuries in and of themselves - are "items of damages" that arise directly from a bodily injury, and hence may be recovered. MDOT appealed to the Michigan Supreme Court, which granted leave to review the issue.

Second, in *Hunter v Sisco*, defendant Flint Transportation Department argued that the plaintiff should be prevented from recovering for "emotional injuries" such as stress and disappointment allegedly caused by a motor vehicle collision. The Court of Appeals agreed with the defendant, concluding that *Wesche's* analysis barred recovery for such injuries. The plaintiff appealed to the Michigan Supreme Court, which ordered that the case be submitted with *Hannay*.

Oral argument in *Hannay* and *Hunter* occurred on October 8, 2014. Although the outcome of any given case is impossible to predict merely from observing an appellate hearing, it was evident from the questions posed by the Justices that they shared a healthy dose of skepticism toward the defendants' arguments. One Justice, in particular, appeared to be persuaded that the term "bodily injury" is a legal term of art that has been defined throughout the past hundred years of Michigan jurisprudence as permitting recovery for nonphysical manifestations of damages in instances where a bodily injury - i.e., a physical injury - is established. While different Justices did not necessarily appear to prescribe to

that same school of thought, it was evident from the questions posed, as a whole, that the majority of the Court - if not the entire Court - was reluctant to apply *Wesche* in the manner advocated by the defendants.

There is no specific timetable in which the Court is required to render its decision. Given the procedural posture of the cases, it is likely that the Court will issue a full opinion discussing the breadth of *Wesche* and clarifying the meaning of “bodily injury” in the immunity statutes. We are left to watch and wait, and perhaps to ponder whether United States Supreme Court Justice Oliver Wendell Holmes, Jr.’s pen will prove apropos: “A word is not a crystal, transparent and unchanged, it is the skin of a living thought and may vary greatly in color and content according to the circumstances and the time in which it is used.” We shall see.

FOOTNOTE OF NOTE

Mark D. Jahnke
Specialty Claims Services, Inc.



Many who read this issue of the Pool Cue are already aware of a recent ruling by the Michigan Court of Appeals in the matter of *Helen Yono vs. Department of Transportation*. The plaintiff in *Yono* was a pedestrian who was injured when she fell in an area designated for parallel parking adjacent to M-22 in Suttons Bay. Plaintiff sued the Michigan Department of Transportation under the highway exception to governmental immunity and argued that the parking area was part of the “improved portion of the highway designed for vehicular travel” and, thereby, MDOT could be held liable for failure to properly maintain the parking area. MDOT filed a motion to dismiss Ms. Yono’s lawsuit arguing that the parking area was not designed for vehicular travel. The trial court denied MDOT’s motion and the Court of Appeals recently affirmed the ruling of

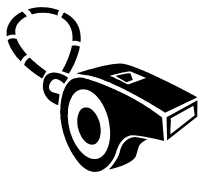
the trial court finding that plaintiff’s lawsuit successfully pled allegations in avoidance of governmental immunity.

The *Yono* ruling, with its finding that an area designated for parallel parking may be part of the improved portion of the highway designed for vehicular travel, is cause for concern for all road authorities in the State of Michigan. What may be of more concern, however, is a *footnote* contained in the ruling. To further clarify its viewpoint of MDOT’s duty to repair and maintain highways, the footnote states “...the statute clearly imposes a duty to maintain in reasonable repair all improvements within the highway that were purposed or intended to support vehicular travel, ***not just the roadbed.***” This statement, contained in footnote #3 of the Court of Appeals’ ruling in *Yono*, clearly conflicts with the Michigan Supreme Court’s ruling in *Evens vs. Shiawassee County Road Commission* (commonly referred to as the *Nawrocki* decision) that states a road authority’s “duty...is only implicated upon their failure to repair or maintain the ***actual physical structure of the roadbed surface***”. Is the footnote in *Yono* a harbinger of things to come or an aberration?

The legal climate applicable to highway law in Michigan has often been referred to as a pendulum. In the early years of the Pool the pendulum was swung strongly in favor of plaintiffs. Virtually any condition that affected safe travel on a roadway, whether the condition was located on the road or off the road, could constitute a viable theory of liability against a county road commission. Starting with the *Nawrocki* decision in 2000, the pendulum has swung strongly in favor of road authorities with liability under the highway exception restricted to maintenance of the roadbed surface. Years from now, will the *Yono* case be looked back upon as the beginning of the Pendulum’s swing away from road authorities and back toward plaintiffs? Only time will tell.

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The *Yono* case dealt specifically with a parking area adjacent to a highway, but if the decision stands, could a road authority's duty to repair and maintain and liability for that duty, begin to expand beyond the roadbed as was the case during the not-too-distant past? It is our understanding that MDOT intends to file an Application for Leave to Appeal with the Michigan Supreme Court requesting a reversal of the Court of Appeals' decision in *Yono*. MCRCSIP has been closely monitoring developments in this case as it has proceeded through the appellate process and will continue to do so given the decisions' potential ramifications on member road commissions.



**PUBLIC EMPLOYER
WHISTLEBLOWER CLAIMS
JUST GOT A LITTLE MORE INTERESTING**

Wendy Hardt
Michael R. Kluck & Associates

Whistleblowing cases involving public employers continue to evolve in the State of Michigan. Last year, we informed you that the Michigan Supreme Court had reversed the case of Shallal v Catholic Social Services of Wayne County, which had been interpreted by the lower courts to require an employee bringing an action under the Whistleblowers Protection Act (WPA) to be motivated by a desire to inform the public on matters of public concern and not to use the statute for personal reasons. In Whitman v City of Burton, the Michigan Supreme Court held that nothing in the statutory language of the WPA required an employee's primary motivation to be a desire to inform the public about matters of public concern.

The Court stated that the plaintiff's motivation is not relevant to the issue of whether the plaintiff has engaged in protected activity. The Court remanded the case to the Court of Appeals for a determination of whether the adverse employment action was caused by the whistleblowing.

In the second round of appeals, the Court of Appeals dismissed the case again, not based on the causation element, but rather on reasons similar to the first dismissal. Specifically, the Court of Appeals found that the plaintiff's alleged "whistleblowing" was simply a disagreement regarding the proper interpretation of a city ordinance involving employee benefits. The Court of Appeals once again looked at the plaintiff's conduct and stated that, while he may have been entitled to his employment benefits, he was not entitled to the WPA's protection where his conduct served his own interest and harmed the public's interest.

Not surprisingly, an application for leave to appeal this latest decision has been filed with the Michigan Supreme Court. It would not be surprising for the Court to grant leave and make another attempt to resolve some of these whistleblowing issues once and for all. Since this case has potentially a big impact on public whistleblowing cases in Michigan, we will be watching it closely.

As we have previously indicated, whistleblowing cases are among the most difficult to defend. Since road commissions are public entities, even internal employee complaints about possible statutory, regulatory or policy violations may be deemed protected activity, based upon current caselaw. You must exercise extreme caution whenever terminating an employee who has engaged in any potential whistleblowing activities i.e. reporting or being about to report a violation or suspected violation of a law, regulation, or rule. It would be wise to consult with your legal counsel before doing so.



SNOW PLOW OPERATIONS – “Safety Begins With You”

Michael E. Shultz
MCRCSIP Director of Loss Control

Now experiencing cold air and fall colors, we are reminded that another Michigan winter is just around the corner. This seasonal transition from summer to winter has members evaluating their snow removal equipment and how day to day operations will be performed over the next six months. Realizing Mother Nature can be an unpredictable lady, we prepare for the worse, but hope for a mild winter.

To the individual operator, snow plow activities brings many long hours of operating equipment, often during harsh weather conditions. Add motorists, pedestrians and occasional recreational vehicles to these conditions and a driver has his or her hands full! Realizing the risks associated with snow plowing the many thousands of miles of Michigan roads, we hope this article and some upcoming driver safety training can be of assistance to any new driver or those with many years of snow plowing experience. Reinforce and remember, “Safety Begins With You!”

OPERATIONS: There are a number of important things to consider when performing snow plow operations. Listed are a few safety issues to keep in mind:

❖ **DRIVER TRAINING** – Snow plow operators should be trained in the standard operating procedures (SOP) of your organization's winter maintenance program. This includes knowledge of their assigned equipment and their assigned snow routes.

All drivers can benefit from refresher training. New and/or seasonal drivers should experience training before the work begins. Supervisors should be encouraged to perform “Driver Ride Along” activities to help guide and assist snow plow operators.

❖ **DRIVER ROUTES** - Becoming familiar with the snow plow routes before the snow starts flying is beneficial. Identifying and/or correcting problems early can help save equipment downtime and repair expenses. Items to look for include (but are not limited to) raised manhole covers and curb drains, concrete hazards, road surface defects, soft/narrow shoulders, etc. Some members mark their routes to help guide the snow plow operator when the road can be difficult to identify.



❖ **TRUCKS/EQUIPMENT READINESS** - Your trucks and equipment must be ready to roll when needed. Therefore, an effective preventive maintenance program is the key to ensure that your equipment has minimal breakdowns and operates productively. Ask any fleet manager, roadside breakdowns are less likely when inspections are performed and problems are identified and corrected at the garage. Drivers should never take your vehicle inspection program lightly. A driver performing “driver seat inspections” is substituting safety with laziness! Finally, drivers must operate their equipment with care and respect. Abusive behavior can cause trucks and equipment breakdowns or accidents.

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➤ **DISTRACTED/FATIGUED DRIVERS** –

Mixing driver distractions with fatigue and poor weather conditions can be dangerous. A professional snow plow driver owes it to him/herself to learn how to effectively manage all three. To effectively do this:

- A cell phone must remain out of the employee's hand when driving. This is a common temptation for most drivers.
- Arrive at work well rested!

➤ **DRUGS AND ALCOHOL** – The federal drug and alcohol regulations for any CDL safety sensitive driver has been effective in reducing commercial truck related accidents. The regulations hold motor carriers and drivers accountable for drug and alcohol consumption and misuse. Drivers should be routinely reminded about the importance of drug avoidance, including the use of certain prescription and over the counter drugs. Alcohol consumption is illegal prior to and during the performance of safety sensitive jobs. If drivers are called in to plow snow soon after consuming alcohol, they must understand their responsibilities and the rules. NOTE: A new program titled “Drugs and Alcohol – What Every Driver Should Know”, is available to all MCRCSIP members.

➤ **DEFENSIVE DRIVING** – A professional snow plow operator must drive defensively at all times in order to avoid accidents. They must continuously stay alert to the behavior of other drivers. Consider using the “5-Seeing Habits to Safe Driving” referenced below:

1. Aim High in Steering - The vehicle steering wheel should be held at the 2:00 and 10:00 hand positions. This allows the driver to keep total control of the vehicle, especially during evasive maneuvering.

2. Get the Big Picture – Look far enough down the road to identify hazards before you arrive. This allows you to prepare and avoid risky situations or conditions.
3. Keep Your Eyes Scanning – Don't lock onto any one item in your path. Keep scanning from side to side to identify changing conditions and potential problems.
4. Leave Yourself an Out – Don't box yourself into a poor situation when traveling. Try to keep other drivers out of your blind spots and maintain a mental escape route.
5. Make Sure Others See You – A large orange/red/yellow colored truck generally can be spotted from a great distance, especially in the winter. Help ensure pedestrians and motorists see you by keeping your lights and beacons working. To obtain eye contact, try a friendly tap on the horn!

Faster isn't better when operating snowplow equipment. Excessive speeds can likely place you into the ditch and/or cause damage to your equipment. Getting the job done effectively and efficiently requires a proper balance of driver skill and safe driving!

❖ **MISCELLANEOUS DRIVER ISSUES:**

1. Safe Vehicle Entry – Climbing into the truck cab can be difficult especially when truck steps are slippery with snow and ice. Remember to use the 3-point contact method when climbing into/exiting vehicle cabs.
2. Seat Belts - Wear your seat belt at all times! Don't be fooled into believing that being in a large vehicle can protect you from injury during a collision. The seat belt holds you in your seat and reduces the potential of being ejected from the cab.

3. Mirrors - Drivers should always check mirror adjustment before driving. A mirror out of adjustment has limited value to the driver and can be a contributing factor to an accident.



Basically, keep the door mirrors dialed out so not to show the side of your vehicle.

4. Equipment Blind Spots – In the process of winter maintenance activities, a driver needs to make



maneuvers that are often risky. Always know your blind spots and check them often. The forward corners of the windshield should

be checked when approaching and entering into intersections. Vehicles can be easily hidden behind cab posts as shown below.



5. Backing Maneuvers - Objects can be hidden behind a snowplow truck. Remember that the dead space can range from a distance of 80-90 feet behind your truck. This distance can be identified with a simple dead space demonstration. We encourage drivers to avoid having to back up whenever possible, keeping in mind that if the motorist cannot see your mirrors, you are likely not seeing the motorist!



To assist your new or experienced drivers, MCRCSIP Loss Control offers driver safety training. We can tailor the training based on available time and topic areas you believe most important. If you haven't done so already, contact Mike Shultz (616-283-1103) or Mike Phillips (616-283-1296) to discuss this valuable training opportunity.

WORD SEARCH



Administrator
Claims
Fatigue
Plaintiff
Safety

Appeal
Damage
Footnote
Plowing
Winter

Bodily
Directors
Injury
Roadbed



Michigan County Road Commission Self-Insurance Pool
417 Seymour Avenue, Suite #2
Lansing, Michigan 48933

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