

# THE POOL CUE

## MICHIGAN COUNTY ROAD COMMISSION SELF-INSURANCE POOL

Volume XXI Issue 3 August 2015

### 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."



On July 22<sup>nd</sup> and 23<sup>rd</sup>, we held our third "Joint Insurance Conference" at the Soaring Eagle in Mt. Pleasant.

On Wednesday, we partnered with CRASIF, to bring in Mr. Wendell Bosen, Moreton & Company, based in Salt Lake City, Utah, to give us an introduction to Enterprise Risk Management (ERM). ERM is the process of planning, organizing, leading and controlling the activities of an organization to minimize the impact of risk on the organization's capital and earnings.

During the afternoon session, Wendy Hardt, Attorney, Michael R. Kluck & Associates (a MCRCSIP defense firm), reviewed key components from our Employment Practices Guidelines.

Following Wendy's presentation, CRASIF presented their work session/program.

On Thursday, our professional services team reported on the progress of your Pool. It was another successful year!

Jerry Smigelski, Canvassing Committee Chairman, announced the results of the Board of Directors election:

Tim Haagsma from Kent County Road Commission was re-elected as a representative of our Southern district for three years, and Doug Fuller from Washtenaw County Road Commission was also elected as a southern representative for three-years. Darrel Spragg from Alpena County Road Commission was re-elected to his At-Large position for a three year term of office, and Tim O'Rourke from Roscommon County Road Commission was elected At-Large to serve the remaining two years of a three year term of office.

Following the annual membership meeting, the new Board elected Brian Gutowski from Emmet County Road Commission as Chairman and Tim Haagsma as Vice Chairman.

Thank you to all of you that attended the conference. We appreciate your support.

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## REASONABLE ACCOMMODATION UNDER THE AMERICANS WITH DISABILITIES ACT

Wendy S. Hardt, Attorney  
Michael R. Kluck & Associates

The Americans with Disabilities Act requires an employer to provide reasonable accommodation to qualified individuals with disabilities who are employees or applicants for employment, unless to do so would cause undue hardship. In general, an accommodation is any change in the work environment or in the way things are customarily done that enables an individual with a disability to enjoy equal employment opportunities. Generally, the individual with a disability must inform the employer that an accommodation is needed. The only statutory limitation on an employer's obligation to provide a reasonable accommodation is if it would cause "undue hardship" to the Employer. Undue hardship refers not only to financial difficulty, but to reasonable accommodations that are unduly extensive, substantial, or disruptive, or those that would fundamentally alter the nature or operation of the business. An employer must assess on a case-by-case basis whether a particular reasonable accommodation would cause undue hardship.

To request an accommodation, an individual may use "plain English" and need not mention the ADA or use the phrase "reasonable accommodation." Requests for reasonable accommodation do not need to be in writing. An employer may ask the individual to fill out a form or submit the request in written form, but the employer cannot ignore the initial request. Once such a request is received, the employer and the individual should engage in an informal process to clarify what the individual needs and identify the appropriate reasonable accommodation. When the disability and/or the need for accommodation is not obvious, the employer may ask the individual for reasonable documentation about his/her disability and any functional limitations. The employer may require that the documentation come from an appropriate health care professional. If an individual's disability or need for reasonable accommodation is not obvious and he/she refuses to provide the reasonable documentation requested by the employer, then he/she is not entitled to reasonable accommodation. On the other hand, failure by the employer to initiate or participate in an informal dialogue with the individual after receiving a request for reasonable accommodation could result in liability for failure to provide a reasonable accommodation.

An employer's duty to accommodate employees with disabilities is not absolute. The Sixth Circuit recently decided the case of EEOC v Ford Motor Company. In that case, the plaintiff, a woman with irritable bowel syndrome, requested to be allowed to work from home for four days a week as a reasonable accommodation. Ford Motor Company denied her this accommodation. The Sixth Circuit Court of Appeals, in rehearing the case *en banc*, affirmed summary disposition for the employer, noting that attending work on-site is essential to most jobs, especially interactive ones. Consequently, the plaintiff's repeated absences made her unable to perform the essential functions of her job. The Court further noted that the



### LIABILITY REFUND

During our 31<sup>st</sup> Annual Membership Meeting held on July 23<sup>rd</sup>, Chairman Brian Gutowski announced that there would be a \$10,000,000 liability refund back to our Members. This brings the cumulative total refund amount to \$154,460,194 over 31 years.



employee bears the burden of proposing an accommodation that will permit her to effectively perform the essential functions of her job. Since the only accommodation the plaintiff proposed would not allow her to perform the essential functions of the job, that proposed accommodation was unreasonable.

Reasonable accommodations always need to be determined on a case-by-case basis, based upon the employee's functional limitations and the essential functions of the job. If one of your employees requests an accommodation, it would be wise to consult with your legal counsel in performing this analysis. Requests for reasonable accommodation must be handled very carefully to minimize potential exposure for liability.



## TRIPPED UP BY LACK OF EVIDENCE

Bill Henn and Andrea Nester  
Henn Lesperance PLC

The Michigan Court of Appeals recently ruled in *Kozak v City of Lincoln Park* that a plaintiff did not provide sufficient evidence to counter the City's assertion that a road was reasonably safe and convenient for public travel - despite the existence of three-inch discontinuity between cement slabs.

In *Kozak*, the plaintiff tripped and fell in the middle of a street in the City of Lincoln Park. Plaintiff alleged that a three-inch difference in the elevation between two slabs of concrete caused her fall. She filed against Lincoln Park, arguing that the City had failed to maintain the road on which she fell in reasonable repair and in a condition reasonably safe and fit for travel, as required under the highway exception to governmental immunity.

The City filed a motion for summary disposition, arguing that plaintiff's case should be dismissed because she presented no evidence that the City failed to maintain the road in a reasonably safe condition. To support its argument, the City filed an affidavit from its director of public services, who was responsible for road maintenance. In his affidavit, the director stated that the difference in elevation of the concrete slabs did not render the highway "defective" in the sense that it was either unsafe or inconvenient for public travel.

To counter the City's argument, plaintiff submitted photographs depicting the road where she fell and a deposition of a local resident. The deposition, however, did not address the safety of the road.

The Circuit Court dismissed plaintiff's claim, and the Court of Appeals affirmed, holding that plaintiff failed to show that the uneven pavement was "defective" to the degree that it rendered the highway not reasonably safe for travel. According to the Court, a "defect" that gives rise to a cause of action must be more than merely an imperfection in the highway surface. Rather, the defect must actually render the road "not reasonably safe and convenient for public travel." Most importantly, the plaintiff must produce competent evidence to prove that element of the claim. The plaintiff in *Kozak*, however, failed to do so because the photographs of the discontinuity said nothing about whether the road was not reasonably safe for travel as a result.

In other words, the plaintiff had failed to counter the City's affidavit with evidence that was competent to create an issue of fact for a jury.

The decision was not unanimous, however. One Court of Appeals judge filed an elaborate dissent, arguing that the photos, by themselves, were enough for a reasonable juror to conclude that the road was not reasonably safe and convenient for public travel.

There is no indication, yet, whether the plaintiff will seek leave to appeal in the Michigan Supreme Court.



## NOTICE ANYTHING NEW?

Bill Henn and Andrea Nester  
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To recover for damages sustained by reason of a defective highway, a plaintiff must serve a written notice that describes, among other things, the “exact location” of the alleged defect. Specifically, MCL 691.1404(1) states:

As a condition to any recovery for injuries sustained by reason of any defective highway, the injured person, within 120 days from the time the injury occurred . . . shall serve a notice on the governmental agency of the occurrence of the injury and the defect. *The notice shall 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. [MCL 691.1404(1) (emphasis added).]

This notice statute has spawned many appellate decisions. Two recent Court of Appeals opinions tackled the question of what satisfies the “exact location” requirement. Interestingly, they reached different conclusions. First, in *Felder v City of Lincoln Park*, the Court of Appeals affirmed the trial court’s conclusion that the plaintiff’s notice failed to satisfy the “exact location” requirement. Specifically, in *Felder*, plaintiff was exiting her vehicle to access an ATM when she stepped into a “large, unseen pothole,” causing her to fall. Plaintiff’s first notice stated that her fall occurred at “Ford Road at Fort Street, Lincoln Park, MI,” “in front of the PNC Bank[.]” Plaintiff also sent a second notice, stating that the incident occurred at “Ford Road in front of the PNC Bank at Fort Street,” and that the fall occurred “on Ford Road in front of the PNC Bank at Fort Street[.]”

In ruling that these descriptions were insufficient, the Court of Appeals stated that “[t]he two most obvious concerns with plaintiff’s notice are the lack of an address for the location and the lack of a photograph or a map attached to the notice

to provide further description.” *Id.* The Court further opined that “Plaintiff also could have provided an adjacent address for the PNC bank with the notice.” Finally, the Court agreed with defendant that several aspects of the notice were ambiguous, including (1) plaintiff’s reference to the intersection, as plaintiff actually fell “several car lengths” away from the intersection; (2) lack of a description of an accessible landmark in relation to the description of the pothole; and (3) absence of clarification that the pothole was in the middle of the street as opposed to near the curb. Accordingly, the Court concluded that, while the general area of plaintiff’s accident could be ascertained from the provided notice, the “exact location” of the pothole was not clear and dismissal based on plaintiff’s failure to satisfy MCL 691.1404 was appropriate.

However, just days after *Felder* was issued, a separate Court of Appeals panel reached a much more plaintiff-friendly result, finding that photographs can actually cure an ambiguous written notice in some circumstances. In *Bernardoni v City of Saginaw*, the plaintiff fell on an uneven slab of sidewalk under the City’s jurisdiction. The Court agreed that the *written* portion of plaintiff’s notice, which described an entire city block, would “likely” be deemed insufficiently “exact.” However, the plaintiff also “included photographs with her notice that show landscaping and houses in the background which would make the exact location immediately apparent to anyone on site.”

Accordingly, taken as a whole, the Court concluded that “plaintiff sufficiently identified the exact location of the defect because she included photographs showing the exact location (as well as the nature of the defect) with her notice of intent to file suit.” *Id.*

What these recent cases demonstrate is that when dealing with challenges to notices of highway defects, there is no universal measuring stick. Rather, the contents of the notice, viewed in light of the unique circumstances surrounding each incident, are critically important to the question of whether

the notice passes statutory muster. County Road Commissions are advised, when receiving a notice, to preserve and document all aspects of the notice, even including the envelope in which it was mailed and the manner of mailing, i.e., first-class mail, certified mail, hand delivery, etc. When it comes to notices, even the minor details can become hugely important to the defense of the case.



### **“SERVICING & SUPPORTING OUR MEMBERS”**

Michael E. Shultz  
Director of Loss Control/Training

It is very gratifying to report that we have completed another busy, yet successful, MCRCSIP Policy Year. As your Loss Control department, we continue to assist all 78 members in a variety of ways. All efforts are designed to help prevent losses and costly claims to our program. Our goal is still to help MCRCSIP members foresee and manage occupational risks that have the potential of creating costly and unnecessary liabilities, accidents, and expenses (direct and indirect) to your organization and our program. Now into our 32nd year, we thank you for allowing us to be of service to you.

#### **Activities for Policy Year 2014 – 2015:**

MCRCSIP Service Visits / Activities = 270  
Facility&Work Site Audit Recommendations = 751  
In-house Training Sessions = 87  
(Many with more than one subject per session)  
Statewide Regional Seminars = 2  
(2 Sessions / 10 Locations)  
Pool Cue Newsletter Articles = 4  
Road Surveillance Miles = 1,845  
Combined Service Miles Traveled = 48,186

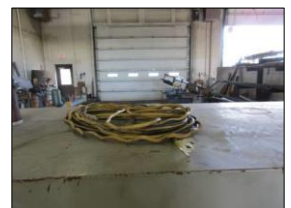
We continue to provide assistance in the following areas:

- Managing risks associated with member county road commissions as it pertains to Property/Casualty coverage areas.
- Address liability concerns and exposures pertaining to county road agencies including road liability and employment law matters.
- Identify and comply with the minimal requirements of Federal and Michigan Labor regulations OSHA AND MIOSHA.
- Address and comply with DOT, MSHA and MMUTCD regulations.
- Identify and address member P/C claims and associated claim trends.
- Provide educational assistance in “Safety and Loss Control” and/or help find a training resource that might elevate your organization’s need for further knowledge and understanding.

#### **SERVICE VISITS:**

Member service visits consist of pre-arranged appointments with our safety contacts and/or management staff. These activities can vary depending on a variety of considerations including claim / accident frequency and severity. As part of our visits:

- We are interested in reviewing work activities in/near the roadway, primarily during road construction / maintenance seasons.
- A review of garage facilities and outside property can occur any time of the year.
- Employee training can occur during any service visit, depending on work demands, time available and schedules, and sometimes, weather in your area.
- Supportive meetings might include attending a council meeting, in-house safety meeting, or goal setting discussion with management and supervision.



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Note: Service visits include a follow up report that generally includes recommendations and other comments. Training verification letters are also provided following any in-house safety and loss control activity.

### MEMBER TRAINING:

Loss Control training is a key component to effective risk management and your in-house accident prevention program. Many days are spent performing in-house training and/or conducting regional seminars each year. We realize this is a “down time expense” to member budgets, however, training (new and refresher) can make a huge difference over the long haul. Reminds



me of the “You Can Pay Me Now” or Pay Me Later” oil filter commercial from decades ago. So always look at

training as an investment in preventing accidents. In addition to a few hours of training during workdays, a number of members are organizing safety days. They are designed to be a full day event, with the participation of multiple speakers. If you are interested in having a safety day later this year or next, give us a call.

### NEWSLETTERS AND HANDOUTS:

We make an effort to provide supportive materials and information in our Pool Cue Newsletter, and have a buffet of materials available at conferences and other events. “Road Side Chat” handouts are available via hardcopy or electronic, designed to be an educational resource.

### AUDITS & RECOMMENDATIONS:

Our loss control audits benefit members by placing “an extra set of eyes” on your buildings and work environments. From that activity, we can help you identify and seek a reasonable solution to a particular situation. From hundreds of recommendations generated

each year, we have provided a short list of examples for your review. As a reminder, we have safety checklists for facilities and worksites that can be used as part of your organization’s ongoing loss control inspections.

### GARAGE/FACILITIES:

- Garage and Vehicle Housekeeping – Unnecessary clutter, debris and disorganization.
- Chemical Hygiene – The identification, storage, transporting and use of chemicals, including fuels.
- Chemical / Fuel Containers – Proper use and storage of plastic and metal containers.



- Facility and Equipment Electrical Safety – Safe use and proper maintenance of electrical cords, wiring, breaker boxes and panels. This includes lighting devices.

- Battery Disconnect Switches:



The availability, installation, care, maintenance and use of battery disconnect switches on required trucks and off road equipment.

- Fire Safety – Addressing combustibles and flammables in the workplace and when being transported in certain vehicles. This extends to the availability of portable fire extinguishers and sprinkler systems.
- Building Care and Maintenance – Factoring in building age and design, recent weather events (i.e. strong wind, heavy rain, accumulations of ice and snow), we support an ongoing building inspection program including roofs, as well as prompt and professional repairs. We encourage monitoring seasonal, cold storage and other insured buildings for damage due to weather, vandalism, and other factors.

## VEHICLES/EQUIPMENT:

- Vehicle Equipment: This can range from required lights, overhead warning lights to the availability and use of back up alarms.
- CDL Rules / Regulations: Ranging from alcohol drug testing to hands free cell phones.
- Seat Belt Usage: Monitoring and encouraging the availability and use of seat belts per state law and your company policy.



NOTE: As a driver's guide, the new MCTS Driver's Handbook (16<sup>th</sup> Edition) is now available on their website. Or, ask us for a copy (while supplies last).

## WORK ZONES / WORK ACTIVITIES:

- Traffic Control Devices and Vehicles: This generally includes the availability and use of advance warning signs, arrow boards, barricades and traffic cones. Use of properly trained "Traffic Regulators" fit into this category. Your knowledge and minimal compliance can be found in the most recent copy of the MMUTCD Part 6 and MIOSHA Construction Standard Part 22. NOTE: A new traffic regulator video, titled "Safely Regulating Traffic in Michigan", can be found on YouTube. A DVD copy can be made available upon your request.

Vehicle positioning is an essential element to roadway risk management, whether parked or moving. Our goal is not to have collisions with motorists or our own equipment. Warning devices, including lights and flashers, are essential and must be used when working in/near the roadway. Whenever possible or practical, allow for advance warning to motorists for the work activities they are about to encounter.

## EMPLOYMENT LAW AND LIABILITY AWARENESS:

- The many human resource subjects available can be very overwhelming to the most seasoned managerial or clerical personnel. The liability can range in a wide variety of areas from hiring to discharge including dealing with employee behavior to making sure that work environments are free from harassment, hostility, violence and discriminatory behavior. We can help you address some of the basic areas with in-house awareness training and other supportive materials.
- MCRCSIP generated an Employment Practices Guideline manual which is designed to help all commissioners and managers make informed decisions in regards to twenty four (24) different employment law categories. The recent training programs provided by Wendy Hardt (Sessions 1-4) are now available on voice recorded PowerPoint (two thumb drives). Having their own limitations for assistance, they can help reduce knee jerk decisions. NOTE: A phone call to your labor attorney can be money well spent and we encourage that whenever necessary.



## ROAD LIABILITY:

- Road liability is considered a very specialized area that warrants a complete understanding by management personnel. It is so specialized that it has involvement of a specialized claim administrator and attorneys knowledgeable and experienced in Michigan Road Law. Recently, key personnel have been working tirelessly to create an improved claim system that is efficient and effective. During visits we continue to serve as your extra set of eyes to help identify conditions and situations that could become a liability concern to you and MCRCSIP. From road defects to right-of-way encroachments, we can help you address these areas before losses and costly claims occur.





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