

THE POOL CUE

MICHIGAN COUNTY ROAD COMMISSION SELF-INSURANCE POOL
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SHEDDING LIGHT ON GROSS NEGLIGENCE

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The Michigan Supreme Court recently reversed the Court of Appeals in a case involving governmental immunity and a claim of gross negligence against two governmental employees. Although the Supreme Court's Order ultimately awarded dismissal to all of the governmental defendants, the decision was not unanimous.

In *Luckett v Southeast Macomb Sanitary District*, a minor was riding his father's snowmobile on a frozen lake when he crashed into a pier and was thrown onto the ice. As a result, he was rendered quadriplegic. In the ensuing litigation, the minor's parents claimed the Southeast Macomb Sanitary District and two of its employees were liable for failing to inspect and maintain the lights on the pier. The Southeast Macomb Sanitary District was voluntarily dismissed from the lawsuit at the trial court level because the claim did not fit within any of the statutory immunity exceptions. The trial court also subsequently dismissed the claims against the individual employees, finding that their conduct did not constitute gross negligence as defined in the Governmental Tort Liability Act (the "GTLA").

On appeal, however, Plaintiffs argued that the evidence created a genuine issue of material fact about whether the two individual employees' conduct amounted to "gross negligence" that was the single most immediate, direct and efficient cause of the injury. In other words, Plaintiffs contended that the gross negligence issue could only be resolved by a jury, not the trial court judge. The Court of Appeals concluded that there was, indeed, a genuine issue of material fact as to one of the individual employees, and therefore remanded for trial.

A majority of the Supreme Court reversed the decision of the Court of Appeals in a peremptory Order issued April 10, 2105. Specifically, the Court concluded that the Plaintiffs' evidence concerning the lighting on the pier demonstrated only that lights were not functioning *after* the crash. According to the majority, there was no evidence addressing whether the pier lighting was malfunctioning *before* the accident - at a time when it could have or should have been observed by the employees. Thus, the Court found that there was no evidence from which a jury could find that the employees were grossly negligent, meaning "so reckless as to demonstrate a substantial lack of concern for whether an injury results."

The decision was not unanimous, however. Justice Bernstein, one of the newest members of the Court, disagreed with the majority and filed a dissent. Justice Bernstein would have concluded that the record contained sufficient evidence from which a jury could find gross negligence. Quoting a case from 1971, he wrote, "[a] close case calls for jury instruction and jury verdict rather than a verdict by order of the court." Justice Bernstein's dissent may provide some insight into his judicial philosophy, and specifically how he approaches governmental immunity cases.

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...Wednesday is now a full day of Workshops!!!!

★ This year CRASIF & MCRCSIP have joined resources to bring in a special Speaker to give you an introduction to a topic that we think is important for all of us: Enterprise Risk Management.

Enterprise Risk Management (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. ERM expands the process to include, not just risks associated with accidental losses, but also financial, strategic, operational and other risks. It is designed to advance the enterprise's capabilities around managing its priority risks.

In recent years, ERM has generated a heightened interest by Industry and government regulatory bodies, as well as investors; and has been found to be an effective way for boards and managers to assess, quantify, manage and monitor enterprise risks, using one unified system.

★ MCRCSIP and CRASIF will have a separate work session focusing on their specific coverage and risk areas.

★ Wednesday ends with a social hour and dinner for all of the attendees and their guests.

...Thursday Morning is now an Annual Membership Business Meeting Day.

★ The morning will start off with our business meeting at 8 a.m. Following our meeting, CRASIF will have their business meeting. These meetings will cover the financial health of our organizations, the results of the Board Elections and whether or not there are refunds. The Thursday conference portion will end around noon and will conclude the conference.

We are looking forward to having you all there!

MCRCSIP BOARD OF DIRECTORS ELECTION

This year, there are four open positions on our Board of Directors: two southern positions, one regular at-large position and one replacement at-large position. The following people have submitted letters of candidacy: **Note: (I) Denotes Incumbent**

At-Large Positions

- * One for a three year term
- * One for the remaining 2 years of a 3 year term

Darrel Spragg (I) Alpena CRC	Pete Stropich Delta CRC
Russ Gronevelt Houghton CRC	John Rogers Kalkaska CRC
Lester Livermore Mackinac CRC	Tim O'Rourke Roscommon CRC

Southern Positions

- * Two for three year terms

Bill Watkins Hillsdale CRC	Tim Haagsma (I) Kent CRC
Brett Laughlin (I) Ottawa CRC	W. C. Askew, Sr. Van Buren CRC
Doug Fuller Washtenaw CRC	

Voting for the Southern region positions is restricted to the counties that will be represented by those candidates. Official ballots will be sent to our Member contacts for mail-in voting. The results of the election will be announced during our Annual Membership Meeting on July 23.

There is a small charge to secure your place at the workshops and the business meetings. That charge includes Breakfast on Wednesday and Thursday, and lunch and dinner on Wednesday. Be sure to register to attend at our website, www.mcrcsip.org

You can reserve an overnight room at the Soaring Eagle at a special rate through the link on our website. Our group code is **MCRC072115**.



CHALLENGING LOSS OF SUPPORT & LOST WAGES IN A WRONGFUL DEATH ACTION UNDER THE HIGHWAY EXCEPTION

Bill Henn & Benjamin Dost Henn Lesperance PLC

By now, word of the Michigan Supreme Court's decision in *Hunter v Sisco* and *Hannay v MDOT* is widespread. In those consolidated cases, the Supreme Court held that a plaintiff in a motor vehicle exception case may recover damages for things such as emotional distress, anxiety, fear, or shock (among others) as a result of the negligent operation of a government owned automobile. In essence, *Hunter* and *Hannay* refused to extend the Court's 2008 ruling in *Wesche v Mecosta Cty Rd Comm'n* beyond the parameters of a wrongful death action where the personal representative of the decedent's estate was attempting to recover for damages that were incurred by someone other than the decedent. Although *Hunter* and *Hannay* certainly curb *Wesche's* reach, *Wesche* itself was not overturned and remains a valid basis on which to challenge a plaintiff's damage claims under certain circumstances. One particular instance where arguments based on *Wesche* should be presented is a wrongful death action brought pursuant to the highway exception to governmental immunity.

The highway exception waives governmental immunity only for damages suffered **by the person** who sustains bodily injury or property damage due to a governmental agency's failure to keep a highway under its jurisdiction in reasonable repair. Specifically, the highway exception provides in part, "A **person who sustains bodily injury or damage to his or her property** by reason of failure of a governmental agency to keep a highway under its jurisdiction in reasonable repair and in a condition reasonably safe and fit for travel **may recover the damages suffered by him or her** from the governmental agency." (emphasis added). This language creates two limits on the waiver of immunity. First, damages can only be recovered for bodily injury or property damage. Second, damages may only be recovered **by the person** sustaining the bodily injury or property damage.

So, for example, if the plaintiff in a highway exception case survived the crash and is suing in his or

her own name, damages for lost wages would likely be recoverable under *Hunter* and *Hannay*. However, in a case where a person dies as a result of the crash, his or her claim is "filtered" through the Wrongful Death Act ("WDA"). This is where some interesting things happen. The WDA permits a personal representative of the decedent's estate to bring suit on the decedent's behalf and recover damages listed in the WDA. The decedent's lost wages are not enumerated damages in the WDA. In place of those damages, however, the WDA authorizes certain named statutory beneficiaries (spouse, children, grandparents, descendants, etc.) to recover **their own damages** for loss of support from the decedent. That these damages, if proven, belong to the statutory beneficiaries themselves is supported by, among other things, the way in which those damages are distributed. The WDA mandates that any such award for loss of support be distributed to the statutory beneficiaries directly - and specifically not through the decedent's estate.

That may seem like legal minutia, but it is not. Remembering that the highway exception waives governmental immunity only for the damages suffered **by the person** who sustains bodily injury or property damage, it becomes evident that a claim for loss of support by the statutory WDA beneficiaries **for their own losses** remains barred by governmental immunity.

To summarize, the WDA permits certain beneficiaries to recover damages for their own loss of support from the decedent. However, the highway exception waives immunity only for damages suffered by the person who sustains bodily injury or property damage. *Wesche* stands for the principle that the WDA cannot expand the limited waiver of governmental immunity found in the narrow statutory exceptions. Therefore, in wrongful death actions brought pursuant to the highway exception, Road Commissions should advance the argument that lost wages of the decedent are not available under the WDA, while at the same time loss of financial support of the decedent is barred by governmental immunity. This argument has gained some favor at the trial court level, but at this time there is no appellate decision on point. However, given that many claims for "loss of support" constitute the bulk of damages available in a WDA claim, it is a near certainty that within the next few years the issue will be presented to an appellate court.



TO PAY OVERTIME OR NOT – THAT IS THE QUESTION

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

Many road commissions struggle with whether their administrative employees are exempt or non-exempt under the Fair Labor Standards Act. Changes are coming to the FLSA exemption tests which may affect many road commission employees. In March 2014, President Obama ordered the U.S. Department of Labor to revise the “white collar” overtime exemption regulations, with the goal of making millions more workers eligible for overtime pay. On May 5, 2015, Secretary of Labor Perez announced that the Department of Labor has submitted the proposed changes to the overtime regulations to the White House’s Office of Management and Budget (OMB) for approval. Once they have been approved, the proposed rules will be published for public review and comment.

It is likely that the Department of Labor will propose an increase in the minimum salary level required for exemption from the FLSA overtime requirements. Currently, the threshold is \$455 per week (\$23,660 annually), which was set in 2004. Some are speculating that this threshold will be increased to \$42,000 or higher. The union-funded Economic Policy Institute has advocated a minimum salary of over \$51,000, while 30 congressional Democrats have sent a letter to Secretary Perez calling for a salary level of \$69,000. We will have to wait and see what actually is proposed in the regulations, but, if too high, I would expect the Department of Labor to receive many comments from the business community challenging the increase.

As for changes to the “duties” tests, speculation is that most of those will occur to the “executive” exemption. The Department of Labor is likely to propose a rule that exempt employees must spend more than 50% of their time performing exempt work. Currently, under the FLSA duties test, primary duty is determined by looking at the job as a whole to identify an employee’s most important duty. Other changes to the executive exemption are also anticipated. Once the proposed rules are published, they will be available to the public for inspection and comment. After final rules

are adopted, each employer will need to become familiar with them and review their FLSA-exempt employees’ status to determine if they are still eligible for the exemption. If not, appropriate changes in compensation status will need to be made.

Recently, the Sixth Circuit also decided two cases concerning when FLSA non-exempt employees must be paid for performing work during their lunch hour. Historically, the Sixth Circuit has applied a “predominant benefit” test, which provides that a meal period need not be paid “[a]s long as the employee can pursue his or her mealtime adequately and comfortably, is not engaged in the performance of any substantial duties, and does not spend time predominantly for the employer’s benefit.” *Hill v United States*, 751 F2d 810, 814 (6th Cir. 1984).

So, what is a “substantial” duty? In two recent cases, the Sixth Circuit has clarified that the mere act of monitoring a radio during lunch (for emergencies or a call to return to service) is not itself a substantial duty, even when the radio traffic is near-constant. At the same time, the Court made clear that if the radio calls lead to actual work on a regular enough basis, then every such meal period will be compensable whether the employee is called from his or her lunch on any particular day. These cases establish that employees on a meal break are not “working” for FLSA purposes simply because they are required to be vigilant or otherwise available to respond to events that happen to occur during their meal periods. At the same time, these cases make it clear that pay is required for meal periods in two situations: (1) if the employee is actually interrupted and has to work, then the employee must be paid for the time actually working; and (2) if an employee is interrupted on a frequent enough basis as a result of his duty to remain vigilant, then the meal period will always be considered compensable working time whether or not an interruption happens on any given day.

When in doubt about whether overtime compensation is required, you should check with your legal counsel. Employers who do not pay hourly employees for meal breaks, but whose employees in fact do work during their meal breaks, potentially face FLSA lawsuits for back pay, liquidated damages, and attorney fees.

WORK ZONE SEASON “Stay In The Zone”



Mike Shultz
Director of Loss Control/Training

Spring is here in Michigan and orange traffic signs, barrels and cones are in full bloom around the state. As in previous years, special safety precautions should be followed by the work crews, as well as motorists, on our state highways and local roads. For road crews, routine safety training is important and always recommended. Work Zone Safety Awareness training is available in-house upon request by MCRCSIP members. Communicating with the public is another important measure for preventing work zone accidents. Sometimes we forget to share the safety message within our communities and generally motorists do not think about the risks and necessary precautions. As a local road agency, take advantage of your local newspapers, radio, television and community events. A driver's education program is a great place to start. National campaigns promote work zone safety, including Michigan. The 2015 campaign for Michigan was held during the week of March 23rd. Supportive information can be reviewed by visiting the MDOT website.

Road commission crews working on local roads require the same level of safety awareness as those working on state highways and interstates.

Just one vehicle crashing into a crew on a local county road can be just as devastating, deadly, and disruptive. Never assume motorists see you and will make the proper judgment calls such as slowing down. Provide them with advance warning sign messages whenever possible. This is a measure worth taking. An extra 20 minutes setting up signs can help prevent a lifetime of anguish and regret.

ROAD CREWS should be properly trained and closely monitored by supervisors to ensure all the necessary precautions are taken. This includes the wearing of all the necessary personal protective equipment. Other areas include (but are not limited to):

1. LIGHTS

Use warning lights and flashers on vehicles and off-road equipment. Always activate them when performing work activities. Keep your truck lights on even during the daytime.

2. POSITIONING

Monitor vehicle positioning in/near the roadway. Avoid leaving trucks and equipment in the road unless the road or traffic lane is closed off. Rear-end collisions often occur when trucks are stopped without advance warning. If you can park on the shoulder, that should be your first option.

3. TRAFFIC CONTROL DEVICES:

Use of advance warning signs, arrow boards and cones/barrels should be considered whenever possible or practical. Traffic control devices do not guarantee against an accident, but greatly reduces the risk. The MMUTCD Part 6. will guide you in selecting the proper set-up. If you need a few copies, contact your local MDOT - TSC office. Remember, traffic control devices are part of the job, not something additional.

4. ROAD CLOSURES

Use of Type III barricades can be very helpful in reducing collisions in a work zone. Closures help to keep unnecessary traffic out of your work area. Remember to close off roads having work activities per the MMUTCD requirements.

5. TRAFFIC REGULATING

Traffic regulating at work sites requires special knowledge and Personal Protective Equipment. Initial and annual training is very important and should be accomplished. Training helps to address any new information and serves as an important reminder to work procedures that might have been forgotten or misunderstood.

NOTE: A video link to a new thirteen minute video, “MDOT - How to Safely Regulate Traffic in Michigan” is available on the MDOT website, www.michigan.gov/mdotworkzones. Contact Mike Shultz if you have questions.

6. TRAFFIC CONTROL PLANS

Traffic control plans provide important details (the set up of work zone) and come from the MMUTCD Part 6. Guiding employees with a plan helps ensure what is necessary based upon the location of the work site.

7. VEHICLE MANEUVERING

Vehicle/equipment operations require the upmost communication with people on the ground. Make sure dangerous areas are identified and keep foot traffic away whenever possible. Many blind spots are on trucks and equipment that cause serious risks. Never assume that it is safe to back up or move ahead without taking all the necessary precautions. Spotters, back-up alarms and sounding the horn are just a few safety measures.

NOTE: Back-up cameras can be helpful on trucks and equipment. Contact Mike Shultz or Mike Phillips if you need additional information. Workers on the ground should be in visual contact with drivers operating the equipment. Keep in mind that safety precautions and control measures should be in place for motorists and pedestrians.

MOTORISTS play an important role in maintaining a safe work zone and have many responsibilities. It has been reported that 85% to 90% of accidents and fatalities involve drivers and passengers. One life lost in a work zone is one too many! To help motorists “Stay in the Zone”, listed are a few (but not limited to) safety tips that can be shared with drivers:

DO...

- Pay attention to the orange diamond-shaped warning signs or electronic message boards posted in advance of a road construction project.
- Stay alert and slow down. Dedicate your full attention to driving.
- Minimize distractions. Avoid changing radio stations, using a cell phone, etc. while driving in a work zone.
- Drive carefully and slowly through the construction site; always obey the posted speed limits in the work zone area. When workers are noted, the maximum speed is 45 mph.
- Pay close attention and heed directions on work zone warning signs. Signs and work zone traffic regulators (i.e. Flag Persons) are there to save lives. Follow their instructions!
- Watch for stopped or slowing traffic. *Do not tailgate.*

- Expect the unexpected. Anticipate potential dangers from road conditions, placement of traffic control devices and maneuvering of equipment.
- Watch how the traffic ahead is flowing. Taking a sudden evasive maneuver could endanger you and workers on the ground.
- Keep an eye out for construction workers, their equipment and vehicles, as well as the vehicles around you. Workers should be wearing high visibility vests and possibly hard hats. If you see this attire, please bring your travel speed down below 45 MPH.
- Use extra caution when driving through a work site at night. Maneuvering thru night time work activities can be challenging, especially during rainy/foggy weather.
- Watch for detours and lane diversions. Warning signs are there for your benefit. Black and White regulatory signs will be enforced by police agencies.

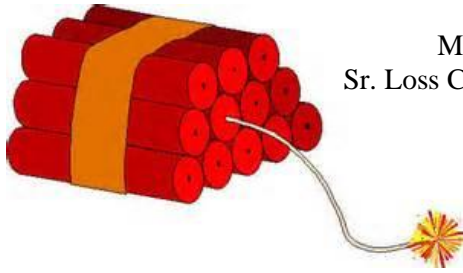
DO NOT...

- Speed up or slow down significantly while going through a work zone.
- Slow down to look at the construction work being done. Adjust your speed when workers are noted.
- Resume normal speed until after you emerge completely out of the work zone area.
- Tailgate. Most of the accidents within a workzone are rear-end collisions.
- Change lanes within a work zone.

Remind motorists that the State of Michigan has instituted laws regarding speeding and careless driving in work zones. In the event that the accident kills or injures a worker, fines and imprisonment may result.



CONSIDERATIONS FOR USING EXPLOSIVES IN THE WORKPLACE



Mike Phillips
Sr. Loss Control Specialist

Concern and perhaps more than a little fear are the usual reactions to the question of whether or not to use explosives in the workplace. If you share these anxieties, then perhaps contracting out explosive work is the right decision for your organization. For those of you who currently use explosives or are planning to do so, you have likely considered the potential for things to go wrong. Explosives can be a useful tool, but with so much at stake, it's important to understand the consequences before taking on such a hazardous operation.

Explosives are used by Road Commissions for drainage or demolition work. The concern is that flying debris could strike property or individuals. A blast also has the potential to release a large amount of water, resulting in property damage. These are but a few examples of what could happen. Following safety procedures can lower the risk, but there will always be an element of unpredictability in dealing with explosives.

Authority over the use of explosives in the workplace rests with MIOSHA for work related to construction activities and with MSHA for work taking place in a gravel pit or quarry. MIOSHA regulations are covered in Construction Safety Standard Part 27: Blasting and Use of Explosives. MSHA rules are under 30 CFR Parts 56 and 57 Safety Standards for Explosives at Metal and Non-Metal Mines. Links to both are listed below. These standards outline requirements for everything from training to storage to detonation.

Licenses to obtain explosives are issued by the Michigan State Police and by your County Sheriff's Department. A permit to use explosives may be required for each project. Procedures vary by region, so contact the Michigan State Police and your County Sheriff for more information on the explosive permitting process.

Some final considerations should be made if you are planning to use explosives. Review applicable environmental regulations. Use the Miss Dig system. Contact underground and overhead utility owners concerning your intentions to use explosives.

Finally, the noise and shock of explosives could surprise unsuspecting individuals. Warn adjacent property owners of your plan to use explosives. If the blast radius is located in a public area or near the right of way, post signs to alert motorists.

Explosives can be a valuable tool, but the rules governing their use are complicated. We can't possibly cover every aspect of using explosives safely. If you plan to use explosives in your operations, take note of these guidelines and implement training and procedures that will protect the public, your employees, and your material resources.

Listed below are some helpful links:

- National Association of Ordinance Contractors:
 - <http://www.naoc.org/>
- International Society of Explosive Engineers:
 - <https://www.isee.org/>
- MIOSHA Part 27, Blasting and the Use of Explosives:
 - http://www.michigan.gov/documents/CIS_WS_H_part55_51266_7.pdf
- MSHA Explosive Standard, 30 CFR Parts 56 and 57:
 - <http://www.dol.gov/msha/regs/fedreg/final/9616861.htm>
- Michigan State Police, Fire Marshall Division [Call: 517-322-1924]:
 - <http://www.michigan.gov/statelicensesearch/0,1607,7-180-24786-81082--,00.html>
- Michigan DEQ:
 - http://michigan.gov/deq/0,4561,7-135-3306_3329---,00.html
- Michigan Miss Dig:
 - <http://www.missdig.org/>





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