

Michigan Municipal League

Legal Defense Fund

A Summary of 12 Recent Cases



michigan municipal league
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About the Legal Defense Fund

Formed in 1983, the Legal Defense Fund provides support to communities in Michigan involved in significant litigation or other forms of controversy which could affect the organization, operation, powers, duties or financing of Michigan municipalities. The Fund is designed to assist, and not replace the municipal attorney, and offers assistance at the discretion of its Board of Directors.

Typically, amicus curiae briefs are filed on behalf of the Michigan Municipal League in state and federal courts and financed in whole or in part by the Fund. The Fund is governed by a Board of Directors consisting of the President and Executive Director of the Michigan Municipal League and the Board of Directors of the Michigan Association of Municipal Attorneys.

Michigan Municipal League General Counsel William C. Mathewson serves as Fund Administrator.

Welcome to the first sequel of the Michigan Municipal League's Legal Defense Fund publication *The Top 25 Cases / 25 Years of Excellence!*

The Top 25 was published in 2008 in celebration of the 25th anniversary of the League's Legal Defense Fund. The LDF was formed in 1983 as an advocacy program for Michigan's municipalities in the state and federal appellate courts. The LDF provides support and assistance to member municipalities and their attorneys in cases in which the issues have a broad impact on both the municipality involved and on other municipalities throughout the state.

The form of assistance is generally through the preparation and filing of an *amicus curiae* brief. Typically the *amicus* briefs are filed on behalf of the Michigan Municipal League in the appellate courts, financed in whole or in part by the LDF.

The Top 25 Cases were selected as the most significant cases in which the LDF had participated from 1983 through 2008. This publication "picks up" from where we left off. It was prepared by Sue A. Jeffers, the League's former Associate General Counsel, with production assistance from Enid Wasserman, MML Legal Assistant. Twelve new cases have been selected for this sequel.

These cases represent a broad range of issues—from the public duty doctrine to the uncapping of assessments under Proposal A; from tax foreclosure to the effect of citations in criminal misdemeanor cases. The involvement of the LDF in each of the cases has provided a means by which the municipal voice is heard in the courts.

Again, we are proud to provide this booklet. The Michigan Municipal League's Legal Defense Fund continues to be a significant benefit for member municipalities by advocating their interests in the state and federal judicial systems.

Legal Affairs Department
William C. Mathewson
General Counsel
Michigan Municipal League

2 Legal Defense Fund: *A Summary of 12 Recent Cases*

Contents

The Public Duty Doctrine	3
<i>Koultas v Centerline</i>	
Open Meetings Act / constructive quorum	4
<i>Hoff v Spoelstra</i>	
Taxation / uncapping of assessments	6
<i>Klooster v City of Charlevoix</i>	
Public purpose / use of city-owned park	8
<i>Drake v City of Benton Harbor</i>	
Tax foreclosure / purchase of property by a municipality	10
<i>Bay City v Bay County Treasurer</i>	
Zoning / equal protection claim	12
<i>Shepherd Montessori Center Milan v Ann Arbor Charter Township</i>	
Sexual harassment / vicarious liability	14
<i>Hamed v Wayne County</i>	
Water rates / extraterritorial customers	16
<i>Oneida Charter Township v Grand Ledge</i>	
Power of county to site buildings in a township	18
<i>Herman v Berrien County</i>	
Effect of a citation in a misdemeanor case	20
<i>Plymouth v McIntosh</i>	
“Just compensation” in a partial taking	21
<i>MDOT v Tompkins</i>	
Doctrine of acquiescence used against a municipality	23
<i>Mason v Menominee</i>	

The Public Duty Doctrine

Centerline police officers responded to a call for “an unwanted subject” at a residence. When they arrived, they encountered Chrissy Lucero and ordered her to leave. The officers testified that there was nothing about Lucero’s appearance or demeanor to indicate that she had been drinking. However, Lucero testified that she told the officers that she was too intoxicated to drive. Minutes after she drove away, Lucero’s car collided with a vehicle driven by Sami Koultta. Koultta was killed in the accident. Lucero’s blood alcohol level was 0.11, in excess of that allowed under Michigan law to drink and drive.

Koultta’s estate sued the city of Centerline and the police officers, alleging that the police officers owed a duty to protect Koultta and that they were grossly negligent in performing that duty.

The police officers claimed that under Michigan law they owed no duty to Koultta himself, citing *White v Beasley*, a Michigan Supreme Court decision that held that an officer’s duty is to the *public*—not to any individual driver, except under limited circumstances where there is a “special relationship.” This is known as the *public duty* doctrine.

The trial court found that the officers owed a duty to Koultta to protect him from the actions of Lucero. The Michigan Court of Appeals reversed, finding that the officers owed no duty to Koultta individually. The court further found that even if a duty existed, the officers were nonetheless immune since their conduct was not *the* “proximate cause” of Koultta’s death. The court defined “proximate cause” as the one “most immediate, efficient, and direct cause preceding an injury.”

Koultta’s estate appealed to the Michigan Supreme Court. Before deciding whether to hear the case, the Michigan Supreme Court asked the parties to address issues related to the public duty doctrine, gross negligence and proximate cause. The Supreme Court asked the Michigan Municipal League to file an *amicus* brief.

Why did the LDF get involved?

The case presented significant issues affecting the liability/immunity of municipal police officers, i.e., the scope of the public duty doctrine, gross negligence, and proximate cause.

What action did the LDF take?

Filed a co-*amicus* brief joined by the Michigan Townships Association with the Michigan Supreme Court.

What was the outcome?

The Michigan Supreme Court, after hearing oral argument, declined to hear the case. Therefore, the decision of the Michigan Court of Appeals dismissing the action against the officers stands - - on the basis that the officers owed no duty to Koultta and, as a result, were not grossly negligent.

What are the implications for local communities?

The unpublished decision of the Court of Appeals affirms the public duty doctrine in Michigan, i.e., police officers cannot be held liable because of failure to protect individual members of the public.

Who prepared the *amicus* brief?

Rosalind Rochkind (Garan Lucow Miller, P.C.)

Koultta v City of Centerline

Michigan Court of Appeals, No. 266886 (2006) (unpublished)
Michigan Supreme Court, No. 131891 (2007)

Open Meetings Act / constructive quorum

On January 31, 2005, at a regularly scheduled and open meeting, the seven-member Marquette city commission voted (4-3) to terminate the contract of its city attorney. Earlier that day, two of the commissioners Sandra Spoelstra and Suzanne Kensington met individually with three other commissioners to discuss their concerns about the city attorney's performance. Kensington, in a deposition, testified that she knew at the time that the Open Meetings Act (OMA) prohibited the commissioners from meeting in groups larger than three, i.e., a quorum. Spoelstra confirmed that the visits were made one at a time because she knew that having four commissioners together discussing city business was a violation of the OMA. (Two other commissioners, Jerry Irby and Stu Bradley, were aware of but did not participate in the discussions.)

In March 2005, the former city attorney filed a lawsuit that ultimately included claims against the city, the city manager, and several of the city commissioners. One of the claims was that commissioners Spoelstra, Kensington, Irby and Bradley violated the OMA.

The circuit court found that Spoelstra and Kensington had violated the OMA but that Irby and Bradley had not. The court found that Spoelstra and Kensington had engaged in subquorum discussions with three commissioners, individually, with the specific intent to circumvent the OMA and that the purpose of the meetings was *to deliberate* on the public matter of Hoff's continuing employment.

The Michigan Court of Appeals affirmed, holding that the commissioners' deliberate avoidance of attending any meeting if a

quorum of the city commission was present was, in fact, an intentional violation of the OMA.

Why did the LDF get involved?

Although the OMA contains no language barring subquorum groups from deliberating together nor does it include the term "constructive quorum," the Court of Appeals' finding that a violation had occurred raises numerous and serious concerns for local units of government. Specifically, the effect of such a decision interferes with lawful discussions by council members not intended to be violations under the OMA. It was hoped that the Michigan Supreme Court would provide some answers to the questions raised.

What action did the LDF take?

Filed a co-*amicus* brief joined by the Michigan Townships Association and the Public Corporation Law Section of the State Bar of Michigan with the Michigan Supreme Court.

What was the outcome?

The Michigan Supreme Court declined to hear the appeal of the Court of Appeals' decision. As a result, many questions remain as to the scope of the so-called subquorum discussions under the provisions of the OMA.

What are the implications for local governments?

- Courts may, and likely will, find that if a group of council members meets and deliberates toward making a decision on a public matter that should be made by the entire council and that this process leads to the ultimate decision of the entire council the rules of the OMA have been violated even if the number of council members meeting is less than a quorum.

- To reach this conclusion in the *Hoff* case, the court used the concept of a “constructive quorum.” This means that even though an actual quorum of the council does not meet, the manner in which a subgroup of council members acts and the authority the subgroup has over the ultimate decision of the entire council may require that the subgroup comply with the OMA.
- Even if no member of the council is present at a meeting at which an issue to be decided by the council is discussed, a court may rule that the group must follow the OMA. Why? If the council has delegated its authority to this group to make a decision and the council merely rubber stamps the decision, the group is deemed the real decision maker and must follow the OMA.
- In short, if a municipality creates or allows a process for decisions to be made other than by the entire council in an open meeting, a court may find that a violation of the OMA has occurred.

Who prepared the *amicus* brief?

Don M. Schmidt (Miller, Canfield, Paddock and Stone, P.L.C.)

Hoff v Spoelstra

Michigan Court of Appeals, No. 272898

(2008) (unpublished)

Michigan Supreme Court, No. 137102

(2009)

Taxation / uncapping of assessments

Proposal A amended the Michigan Constitution in 1995 to limit the annual increase in property tax assessments. The purpose of Proposal A was to limit annual tax increases on property as long as the property is owned by the same person even though the actual market value of the property may have risen at a greater rate.

After the passage of Proposal A, the Michigan General Property Tax Act (GPTA) was amended by the Legislature to provide, in part, that a parcel's value would be reassessed (uncapped) upon a *transfer of ownership* of the property. MCL 211.271a(3). A transfer of ownership allows reassessment of property based on its state equalized value.

One of the exceptions to the uncapping of a property's value is the so-called joint tenancy exception, MCL 211.271a(7)(h).

James and Dona Klooster, husband and wife, acquired title to property in Charlevoix in 1959. In 2004, Dona conveyed her interest in the property to James who then conveyed the property to himself and his son Nathan as joint tenants with rights of survivorship. In January 2005, James died. This left Nathan as the sole owner of the property. In September 2005, he conveyed the property to himself and his brother Charles as joint tenants with rights of survivorship.

In 2006 Charlevoix reassessed the property but did not specifically indicate whether the death of James in January 2005 or the September 2005 conveyance to Charles constituted a transfer of ownership, which allowed the uncapping.

The Michigan Tax Tribunal found that a transfer of ownership occurred by virtue of James' death that allowed the taxable value of the real property to be reassessed at a higher value. On appeal, the Michigan Court of Appeals found that there was no transfer of ownership by virtue of James' death and the taxable value of the property should not have been uncapped. The Court of Appeals based its decision on its finding that a conveyance must be in writing and cannot occur by the death of a joint tenant.

Why did the LDF get involved?

The issues of what constitutes a transfer of ownership and when uncapping occurs in joint tenancy situations have significant financial implications for every local governmental entity in Michigan. Creating joint tenancies has long been recognized as an estate planning tool. For municipalities, it is critical to know under what circumstances uncapping occurs when property is owned by two or more people in a joint tenancy situation.

What action did the LDF take?

Filed a *co-amicus* brief joined by the Michigan Townships Association, Michigan Association of Equalization Directors and the Michigan Assessors Association with the Michigan Supreme Court.

What was the outcome?

The Michigan Supreme Court held that 1) a "conveyance" does not require a written instrument, 2) the property in question was not uncapped on James' death by virtue of the application of the joint tenancy exception (MCL 211.271(7)(h)), but that 3) the property in question was uncapped when Nathan conveyed the property to himself and his brother. The Court held that the conveyance from Nathan to himself and his brother did not meet the requirements of the joint tenancy exception. i.e., Nathan was not

an original owner of the property before he created the joint tenancy with his brother.

What are the implications for local governments?

- The State Tax Commission’s advisory dated March 21, 2011 states “The most immediate effect of the *Klooster* decision will be to require assessors to review all decisions previously made relating to the uncapping of the taxable value of real property where a joint tenancy has been created, modified or terminated. This review may necessitate examination of conveyances dating back to the beginning of Proposal A in 1995.”
- And, in plain terms, it means that the creation and termination of joint tenancies will need to be scrutinized according to the criteria set out by the Supreme Court.

Who prepared the *amicus* brief?

Steven D. Mann (Miller, Canfield, Paddock and Stone, P.L.C.) and Don M. Schmidt (Miller, Canfield, Paddock and Stone, P.L.C.)

Klooster v City of Charlevoix

Michigan Court of Appeals, No. 286013 (2008)
Michigan Supreme Court, No. 140423 (2011)

Public purpose / use of city-owned park

In 1917, Mr. and Mrs. Klock gave a 90-acre parcel of land with Lake Michigan frontage, known as Jean Klock Park, to the city of Benton Harbor. The deed conveyed the property on the condition:

that [the] lands . . . shall forever be used by [the city] for bathing beach, park purposes, or other public purpose.

Until approximately 2003, Benton Harbor undisputedly used and maintained Jean Klock Park consistent with the deed, i.e. as a beach and public park. In 2003, the city announced its plan to sell part of the park to a private housing developer. Plaintiffs and other Benton Harbor citizens in that lawsuit sued, challenging the city's right to convey the property under the assertion that such sale violated the deed covenants and restrictions.

The lawsuit resulted in a consent judgment agreed to by the parties in 2004. The consent judgment allowed for the sale of a portion of the property to the developer and also permanently enjoined Benton Harbor:

from using any portion of the property depicted as "Jean Klock Park" . . . for any purpose other than a bathing beach, park purposes, or other public purposes related to bathing beach or park use . . .

In 2005 the city indicated that it intended to lease a portion of the remaining Park lands to Harbor Shores Community Redevelopment Corporation for three holes of a proposed golf course. The golf course was one part of a large economic redevelopment project in Benton Harbor. A new lawsuit was filed on the basis that the lease violated the 1917 deed restrictions and the 2004 consent judgment.

The circuit court found that the lease did not violate the deed restriction or the consent judgment. The Michigan Court of Appeals unanimously affirmed, noting with approval the circuit court's finding that "nothing in the deed or the consent judgment expressly prohibits the lease of part of the park to a private, nonprofit entity to carry out or implement a park purpose."

Why did the LDF get involved?

The case posed a significant risk of producing a new legal standard by which home rule cities would have their legislative decisions regarding the use and development of municipal park land challenged by citizens and scrutinized by the courts.

What action did the LDF take?

Filed an *amicus* brief with the Michigan Supreme Court after having been specifically invited to do so by the Court.

What was the outcome?

The Michigan Supreme Court heard oral argument on whether to grant the application for appeal. Ultimately, the Court decided not to hear the case and the application was denied. The Court of Appeals' favorable decision for municipalities stands.

What are the implications for local units of governments?

The questions raised in the case were 1) whether the restriction in the 1917 deed and 2) whether the language in the consent judgment were violated by the city in its actions. As such, the case is restricted to the specific language in the deed and the consent judgment. The Court of Appeals interpreted the language in the deed to limit the use of the property but did not preclude the city from leasing a portion of the park for use of a golf course open to the general public.

The court also affirmed long-standing law that a golf course falls within the definition of a “park purpose” or “public purpose.” Despite the specific reliance on the language of the deed, the case nonetheless reaffirms the constitutional power of a city or village to own, establish and maintain a park.

Who prepared the *amicus* brief?

Eric D. Williams, city attorney, Big Rapids

Drake v City of Benton Harbor

Michigan Court of Appeals, No. 287502

(2010) (unpublished)

Michigan Supreme Court, No. 140685

(2011)

Tax foreclosure / purchase of property by a municipality

By statute, a property may be foreclosed if taxes remain unpaid for a specified period of time. The statute also gives the State of Michigan a right of first refusal to purchase any tax-foreclosed properties in the state. If the state declines to purchase a property, the city, village, or township within whose limits the property is located has the option to purchase it for a public purpose. MCL 211.78m(1).

The purchase price is set at what the minimum bid would be if the property were being auctioned off, which is determined by adding all taxes, interest, and fees owed on the property, so that the foreclosing governmental unit (FGU) breaks even on the property.

Before 1999, the state administered the tax foreclosure process in every Michigan county. In 1999, the legislature passed an act which allowed counties to “opt-in” and replace the state as the FGU. In 2004, Bay County elected to name its treasurer as its FGU.

In 2008, Bay City decided to purchase four parcels being foreclosed upon by the county. A check was forwarded to the county treasurer in the amount of the total of the minimum bids. The treasurer, however, refused to convey the properties to the city, indicating that he was not obligated to sell the properties to the city unless “he was satisfied that [the city] would be returning the property to a position in which the property would generate tax revenue.”

The city filed a lawsuit requesting that the court order the treasurer to convey the properties to it. The city stated that its public purpose was to reduce the number of vacant tax reverted properties, to remove

blighted conditions, and, through redevelopment, to ensure a growing tax base.

The treasurer argued that he had a duty to confirm that the city wanted the property for a public purpose and that the city would be able to accomplish that purpose efficiently and expeditiously.

The trial court found in favor of the county treasurer on two of the properties. The trial court found that the city could not carry out its public purpose efficiently and expeditiously. The city appealed to the Court of Appeals.

Why did the LDF get involved?

At stake was an erroneous decision that would allow counties to add conditions to the “public purpose” requirement, conditions which are not found in the language of the statute. It also allowed for an interpretation that a treasurer has the discretion not to convey a tax-foreclosed property to a city even though the language of the statute uses the word “shall” and not “may.” Finally, the decision left open the interpretation that a county treasurer has review authority regarding the city’s determination of a public purpose.

What action did the LDF take?

Filed a co-*amicus* brief joined by the Michigan Townships Association with the Michigan Court of Appeals.

What was the outcome?

The Michigan Court of Appeals found on behalf of the city on all of its issues. The court found that the trial court abused its discretion by adding conditions to the “public purpose” requirement. It also found that the statute’s use of the word “shall” compels the county treasurer to convey tax foreclosed properties to the city as a mandatory, non-discretionary act.

And, finally, the court held that the county treasurer has no review authority regarding the city's determination of a public purpose as such a determination is "an essentially legislative function," i.e., city council, subject only to a court's review, and not an administrator of a county.

What are the implications for local governments?

This decision is extremely favorable to local units of government. Not only does the decision make clear that the county treasurer (and the trial court) exceeded the authority found in the tax foreclosure act but it also strips any treasurer's notion that he or she can second guess a city council's declaration of public purpose. The statute is to be construed strictly and a treasurer has no discretionary authority to refuse to convey property to a local unit of government under the stated language of the statute.

Who prepared the *amicus* brief?

Steven Mann (Miller, Canfield, Paddock and Stone, P.L.C.)

Bay City v Bay County Treasurer

Michigan Court of Appeals, No. 294556
(2011)

Zoning / equal protection claim

The property at issue is zoned as an office park (OP) district pursuant to the Ann Arbor Township zoning ordinance. The property is located in the Domino's Farms office complex. Among the uses permitted in the township's OP zoning district is a daycare facility for use by children of office park employees.

Rainbow Rascals, a former tenant, had operated a 100-child capacity secular preschool daycare facility in the office park limited to children of office park employees. In 1991, a variance was granted by the township to allow children whose parents did not work at Domino's Farms to attend the daycare facility.

In 1998, Shepherd Montessori opened a Catholic preschool daycare facility which was limited to children of employees of the same office park. It subsequently requested and was granted a variance identical to the one granted to Rainbow Rascals to allow children whose parents did not work at the office complex.

In 2000, Rainbow Rascals moved out of the office park and Shepherd Montessori proposed to move into the vacated space and operate a K-3 primary school program. Shepherd Montessori sent a letter to the township's zoning administrator describing the proposal. The zoning administrator denied the proposed use, explaining that the operation was not a permitted use within the OP district. Shepherd Montessori filed a petition appealing the decision.

The Zoning Board of Appeals (ZBA) ruled that it agreed with the zoning administrator that a primary school is not a permitted use within an OP district. It also ruled that the proposed nonconforming primary school use

could not be substituted for Rainbow Rascals' use of the property because the daycare was a permitted use.

Finally the ZBA denied the request for a use variance since Shepherd Montessori did not prove that, without a variance, there could be no other viable economic use of the property.

Shepherd Montessori sued the township—alleging, among other things, that its equal protection rights were violated by the township's denial of the variance request based on religion. Allegations that the actions of the township violated plaintiff's rights under the Religious Land Use and Institutionalized Persons Act (RLUIPA) had previously been resolved by the courts in favor of the township.

The plaintiff's claim was that the township had treated “a secular entity more favorably than plaintiff, a religious entity, and that the township offered no evidence to show that the denial of plaintiff's variance achieved a compelling governmental interest.”

The equal protection clauses of the Michigan and U.S. constitutions provide that no person shall be denied equal protection of the law. The equal protection clause requires that persons similarly situated be treated alike under the law.

Generally, legislation that treats similarly situated groups disparately is presumed valid if the classification drawn by the legislation is rationally related to a legitimate state interest. However, legislation that treats similarly situated groups disparately on the basis of a suspect classification (which in this case is the free exercise of religion) will be sustained only if the government can show that the classification is narrowly tailored to serve a compelling governmental interest.

The most recent decision of the Court of Appeals regarding the issue had found in favor of the plaintiff.

Why did the LDF get involved?

The Court of Appeals' decision that there was discrimination on the equal protection claim even though prior decisions in the same case found no discrimination on the RLUIPA claim created confusion for local units of government. The Court of Appeals' decision was clearly in error and conflicted with well-founded principles of zoning.

What action did the LDF take?

Filed a *co-amicus* brief joined by the Michigan Townships Association with the Michigan Supreme Court.

What was the outcome?

In determining whether plaintiff and Rainbow Rascals are similarly situated entities, the Michigan Supreme Court examined their respective variance requests. The Court noted that plaintiff's request was for a variance to operate a K-3 primary school, i.e. a use not permitted within an OP. The previous requests by both Rainbow Rascals and the plaintiff to include children whose parents did not work in the office park were treated similarly. The Court reasoned that the current request to operate a primary school had never been requested by Rainbow Rascals. "The township's consideration of a different request does not constitute different treatment of similarly situated entities."

The Court further found that plaintiff was not seeking similar treatment; rather plaintiff was asserting religion in an effort to obtain preferential treatment. As a result, the Court found that the plaintiff had failed to demonstrate that it was treated differently from similarly situated entities.

The Court finally addressed whether the facially neutral zoning ordinance was applied in a discriminatory manner against the plaintiff because of its religious affiliation. The Court found that no evidence had been presented to support such a claim.

What are the implications for local governments?

The case not only resolves the issues in favor of local units of government in similar zoning requests but also provides clear standards and guidance for making zoning decisions in the face of equal protection challenges.

Who prepared the *amicus* brief?

John K. Lohrstorfer (Bauckham, Sparks, Lohrstorfer, Thall & Seeber, P.C.)

Shepherd Montessori Center Milan v Ann Arbor Charter Township

Michigan Court of Appeals, No. 272357 (2007)

Michigan Supreme Court, No. 137443 (2010)

Sexual harassment / vicarious liability

Tara Hamed, while in custody in the Wayne County jail for alleged probation violations, was sexually assaulted by a Wayne County deputy sheriff. The deputy was fired and later convicted of criminal sexual conduct. Hamed sued him, Wayne County, the Wayne County Sheriff's Department, and several of its employees claiming violations of *quid pro quo* sexual harassment under the Michigan Elliot Larsen Civil Rights Act (ELCRA).

ELCRA prohibits discrimination because of sex, i.e., sexual harassment, in employment, places of public accommodation, and in relation to the provision of *public services*. Under the facts of this case, sexual harassment may occur if submission to certain conduct is made a term or condition to obtain employment, a place of public accommodation or in the public services context. In addition, sexual harassment may occur if submission to or rejection of conduct is used as a factor in decisions affecting a person in the employment, public accommodation or public services contexts.

These situations are generally referred to as *quid pro quo* harassment. In this case, Hamed had been promised better "conditions in the jail" if she assented to sexual advances by the deputy sheriff. Hamed claimed that "public services" language of ELCRA applied to her stay in the county jail.

Generally, under Michigan agency principles, an employer is responsible for the wrongful acts that its employees commit within the scope of their employment. The imposition of liability on the employer is referred to as vicarious liability. As a corollary to this general rule, an employer is not liable for acts of an employee that do not

fall within the scope of employment and are intended solely to further the employee's individual interests. Nonetheless, an employer may be liable if he or she could have reasonably foreseen the employee's acts even though such acts were beyond the scope of employment,

The basic issue of this case is whether, in the "public services" context, the county (as well as the sheriff's department and other personnel) can be held liable under ELCRA for the unforeseeable criminal acts of sexual harassment by its employee, even though the acts were plainly beyond the scope of the employee's employment.

The trial court ruled in favor of the county on this issue; however, the Michigan Court of Appeals relied on an earlier Michigan Supreme Court decision, *Champion v Nation Wide Security, Inc.*, and found the county liable. The *Champion* case involved a situation in the employment setting rather than the public services context of this case. In *Champion*, the Court held the employer vicariously liable for acts of *quid pro quo* sexual harassment by an employee who used his supervisory authority to perpetrate the harassment.

Why did the LDF get involved?

The LDF was concerned that the principles applied under the *Champion* decision, a case involving the first category under ELCRA, i.e., employment sexual harassment, would be applied against an employer for acts of sexual harassment by an employee in the provision of public services context, i.e, the third category under ELCRA.

What action did the LDF take?

Filed a co-*amicus* brief joined by the Michigan Municipal League Liability & Property Pool with the Michigan Supreme Court.

What was the outcome?

The outcome of the case by the Michigan Supreme Court is even more favorable for public bodies than initially requested. Not only did the Michigan Supreme Court *not* extend the standard that the *Champion* case had advanced in employment situations to public services situations, it overruled the *Champion* decision as well.

What are the implications for local governments?

This decision is extremely favorable to local units of government. As a result, the general rule, that an employer is not liable for unforeseeable criminal acts of its employee committed outside the scope of his or her employment, applies in the employment and public services contexts.

Who prepared the *amicus* brief?

Julie McCann O'Connor (O'Connor, DeGrazia, Tamm & O'Connor, P.C.)

Hamed v Wayne County

Michigan Court of Appeals, No. 278017
(2009)
Michigan Supreme Court, No. 139505
(2011)

Water rates / extraterritorial customers

In 1980, Oneida Township wanted to expand residential development by contracting with Grand Ledge for the purchase of sanitary sewer and potable water services. Accordingly, Grand Ledge and Oneida entered into a water agreement under which Grand Ledge supplies water and sanitary sewer services to Oneida residents within a designated area. The water is delivered directly to the residents and the resident is billed directly by the city. Although Oneida is the contracting party, it does not receive any water service. Under the agreement, Oneida users are to pay twice the rate charged to city customers.

The state statute in effect at the time that the agreement was entered into, i.e., MCL 123.141, allowed such agreements between municipalities and specifically provided that the rate charged, under most circumstances, was to be twice that charged to the residents of the municipality providing the water services.

Eight months after the agreement was entered into between Grand Ledge and Oneida, the statute was amended. The provisions of the statute relating to permissible charges were expanded and language related to “contractual customer,” “wholesale customers,” and “retail rate” was included. In particular, an exception to the provision pertaining to actual costs of service was included. The exception states: “This subsection shall not apply to a water system that is not a contractual customer of another water department and that serves less than 1% of the population of the state.”

Oneida and some of its residents sued Grand Ledge claiming that the statute expressly prohibited the rate charged under the agreement and that the rate could not exceed

the actual cost of providing the services. Grand Ledge claimed that an exemption in the statute applied and that it was authorized to charge the rate provided under the agreement, i.e., twice that charged to city residents. Both Grand Ledge and Oneida claimed that language of the statute supported their respective arguments.

The trial court resolved the issue in favor of the city. However, the Court of Appeals overturned the trial court’s decision and held for the township and its residents. The Court of Appeals distinguished language in the statute on the basis of “wholesale” and “retail” customers. Finding that Oneida residents were retail customers, the Court of Appeals applied MCL 123.141(3) and, accordingly, Grand Ledge was not permitted to charge beyond the actual cost of providing the service, despite the language of the agreement.

Why did the LDF get involved?

A large number of cities have agreements to supply water services to extraterritorial customers, some of which are other municipalities and some of which are individual residents. This case was extremely important to support the terms of those agreements.

What action did the LDF take?

Filed a co-*amicus* brief joined by the Public Corporation Law Section of the State Bar of Michigan with the Michigan Supreme Court.

What was the outcome?

The Michigan Supreme Court reversed the decision of the Court of Appeals. The Court found the Courts of Appeals misinterpreted the statute.

As a result, Grand Ledge was permitted to continue to charge Oneida Township residents the rate outlined in its agreement with the Township. The Michigan Supreme

Court ruled that the provisions of the statute that outlawed charging more than the actual cost of service did not apply to Grand Ledge.

What are the implications for local governments?

According to the Michigan Supreme Court, municipalities that supply water services to less than 1% of the state's population and are not contractual customers of another water system are not subject to the "actual cost" requirement of the state statute.

Who prepared the *amicus* brief?

Don M. Schmidt (Miller, Canfield, Paddock and Stone, P.L.C.)

Oneida Charter Township v Grand Ledge

Michigan Court of Appeals, No. 277093

(2009)

Michigan Supreme Court No. 138520

(2009)

Power of county to site buildings in a township

Berrien County leased property in 2005 with the intention of using it, along with other law enforcement agencies, for a firearms training facility. The property is located in Coloma Township. A master plan and feasibility study were prepared for the proposed facility, which included a building at the center of the property to serve as a training and support building. The facility would also have numerous outdoor shooting ranges. The ranges were to be set up like the spokes of a wheel that require the shooter to fire out from the center of the parcel. During the course of the litigation, both the shooting ranges and building were constructed.

Operation of the shooting ranges would violate several local township ordinances adopted under the Township Zoning Act i.e., 1) the shooting ranges are not a permitted land use under the township's zoning ordinance and 2) gun clubs are not permitted in this zoning status unless the township issued a special land use permit. In addition, it was alleged that the gun ranges would produce noise levels that would exceed the township's anti-noise ordinance.

The plaintiffs in the lawsuit are individuals who own property in close proximity to the shooting range. They raised several issues:

- 1) one type of gun used can fire a bullet 2.4 miles
- 2) the ranges all point outward toward surrounding privately-owned properties
- 3) children's sports fields are located within one mile of the ranges and

- 4) the ranges are within 2.4 miles of the Coloma schools and within one mile of over 50 homes.

Berrien County argued that the Michigan Supreme Court's decision of *Pittsfield Charter Twp v Washtenaw Co* was determinative of the issue and that the county had the authority to site and erect buildings under the County Commissioners Act (CCA) even if the use of such buildings violated local ordinances. The Michigan Court of Appeals found in favor of the county.

Why did the LDF get involved?

The *Pittsfield* case (2003) held that the County Commissioners Act had priority over the Township Zoning Act. (Note: The Township Zoning Act has been replaced with the Michigan Zoning Enabling Act.) The plaintiffs in this lawsuit did not argue that *Pittsfield* was wrongly decided; rather, the plaintiffs argued that the scope of the priority granted by the CCA is not without limits. The LDF was willing to participate since the rationale would be applicable to city and village ordinances as well. The decision in *Pittsfield*, without restrictions, would be argued to preempt counties from local ordinances. This case was important since it provided the opportunity to narrow the application of *Pittsfield*.

What action did the LDF take?

Filed a co-*amicus* brief joined by the Michigan Townships Association with the Michigan Supreme Court.

What was the outcome?

The Michigan Supreme Court reversed the decision of the Michigan Court of Appeals and found that land uses that are ancillary to the county building and not indispensable to its normal use are not covered by the CCA's grant of priority over local regulations. The Court held that Berrien County's outdoor

shooting ranges do not have priority over the township ordinances because they are land uses that are not indispensable to the normal use of the county building.

The Court determined that there was no question that the county had priority to site and erect buildings; however, the question of whether that priority extended to the shooting ranges that are ancillary to its buildings was the central issue in the case. To answer the question, the Court found that a court must ask whether the ancillary land use is indispensable to the building's normal use. The Court found that in this case the shooting ranges were not indispensable to the normal use of the building.

What are the implications for local governments?

This decision is important for local units of government. While a county has authority to site and erect a building, there are limits. The decision requires, on a case by case basis, an analysis of the ancillary land uses and whether those uses are indispensable to the building's normal use.

Who prepared the *amicus* brief?

John H. Bauckham (Bauckham, Sparks, Rolfe, Lohrstorfer & Thall, P.C.)

Herman v Berrien County

Michigan Court of Appeals, No. 273021
(2007)

Michigan Supreme Court, No. 134097
(2008)

Effect of a citation in a misdemeanor case

Michael McIntosh was arrested in Plymouth for operating a motor vehicle while intoxicated, commonly referred to as OWI. A first offense of OWI is a criminal misdemeanor. McIntosh was issued a citation for the offense by a city police officer who had observed his driving. The citation was filed with the district court and included the language, “I declare under the penalties of perjury that the statements above are true to the best of my information, knowledge, and belief.” The citation indicated that he was to appear in court on or before a certain date. McIntosh was released after posting bond. Subsequently, his attorney waived the arraignment and asked the court to enter a not-guilty plea and set the matter for trial in the district court. He was later found guilty by a jury of a lesser offense.

On appeal to the circuit court, McIntosh argued that his case should be dismissed since a sworn complaint had not been filed with the court. McIntosh argued that a section of the Code of Criminal Procedure requires that a sworn complaint must be filed in order for prosecution to continue if a not guilty plea is entered. Once he plead not guilty, McIntosh asserted that the prosecutor could not proceed until a sworn complaint was filed with the district court.

The circuit court agreed with McIntosh and held that it was not proper for the prosecutor to proceed on the citation alone. Plymouth appealed to the Michigan Court of Appeals.

Why did the LDF get involved?

The process followed by the Plymouth police officer and prosecutor for a misdemeanor violation is exactly the same process followed every day in every district court in the state. If the defendant were

correct, i.e., that a sworn complaint would need to be filed after a not guilty plea in every misdemeanor case, time and expenses would be added to the caseload and budgets of local units of government.

What action did the LDF take?

Filed a co-*amicus* brief joined by the Michigan Townships Association with the Michigan Court of Appeals.

What was the outcome?

The Court of Appeals agreed with Plymouth and the position of the *amicus* brief. The Court of Appeals first found that the applicable statutes did not require that a sworn complaint be filed after a not guilty plea had been entered in a misdemeanor case. Furthermore, the court noted that a citation may constitute a sworn complaint under certain specific circumstances—and that those circumstances were present in this case. Basically, those circumstances exist if a citation for a misdemeanor is signed by a police officer in whose presence the offense occurred and the citation includes language that it was signed under penalties of perjury.

As a result of the decision of the Court of Appeals, the conviction stands.

What are the implications for local governments?

The decision upheld the standard practice for hundreds of local units of government in the processing of misdemeanor violations, and needless extra costs were avoided.

Who prepared the *amicus* brief?

Rosalind Rochkind (Garan Lucow Miller, P.C.)

Plymouth v McIntosh

Michigan Court of Appeals, No. 297614 (2010)
Michigan Supreme Court, No. 142611 (2011)

“Just compensation” in a partial taking

In connection with its construction of the M-6 limited-access highway in the southern part of Kent County, the Michigan Department of Transportation determined that it was necessary to condemn a portion of Rodney and Darcy Tomkins’ two-acre parcel. The portion to be condemned was approximately 49 feet by 120 feet. The Tomkins rejected the offer of \$4200 for the strip of land and sought an additional \$48,200 in damages to their remaining property for “dust, dirt, noise, vibration, and smell” referred to as “general effects.” MDOT rejected the claim for “general effects” damages and filed suit. The parties then agreed to a value of \$3800 for the property but disagreed as to whether the Tomkins were entitled to damages for “general effects.”

The circuit court relied upon a Michigan statute (MCL 213.70(2)) to exclude evidence of “general effects” damages attributable to the highway. The statute in question is part of the Uniform Condemnation Procedures Act (UCPA) which governs the exercise and procedure of eminent domain. It specifically excludes compensation for the “general effects” of a project, i.e., those effects that are experienced by the general public.

The Court of Appeals reversed, holding that the UCPA’s limitation on damages was unconstitutional because it conflicted with the established constitutional meaning of “just compensation” under the Michigan Constitution of 1963.

Why did the LDF get involved?

The doctrine of eminent domain, i.e., the power of the government to take private property for a public use for just compensation, is firmly established in both

the federal and state constitutions. The power of eminent domain has been reserved in all Michigan constitutions dating back to the earliest days of statehood. The UCPA sets out the procedures governing the exercise of eminent domain. The UCPA cannot, however, lower the constitutional minimum of “just compensation” as understood at the time of the ratification of the 1963 constitution.

To be required to award “general effects” damages to landowners in partial takings cases would have considerable impact upon a government’s financial ability to condemn property for public purposes and would fly in the face of established procedures for determining “just compensation” as established by the 1963 constitution.

What action did the LDF take?

The LDF joined with the Michigan Association of Counties and the County Road Association of Michigan and filed a *co-amicus* brief with the Michigan Supreme Court.

What was the outcome?

The Michigan Supreme Court determined that at the time of the ratification of the Michigan Constitution of 1963 there was no clear indication that “just compensation” included “general effects” damages. As such, MCL 213.70(2) which specifically excludes “general effects” from “just compensation” is constitutional.

What are the implications for local governments?

The outcome preserves the understanding and practice that, in Michigan, “just compensation” does not include damages for “general effects.” If the Court of Appeals’ decision had been upheld, state entities and local governments would have faced broad uncertainty as to costs of a public project,

although costs would most certainly have increased.

Who prepared the *amicus* brief?

William J. Danhof and Jeffrey S. Aronoff
(Miller, Canfield, Paddock and Stone,
P.L.C.)

MDOT v Tomkins

Michigan Supreme Court, No. 132983

(2008)

Michigan Court of Appeals, No. 256038

(2006)

Doctrine of acquiescence used against a municipality

Gerald and Karen Mason are owners of real property in Menominee, Michigan. The city of Menominee owns property known as Water Tower Park surrounding the Masons' property on three sides. A 60-foot strip of property, running north and south through the Water Tower Park, adjoins the eastern border of the Masons' property. The strip of land had previously been deeded to the city for a proposed street; however, the street was never improved and never used as a roadway. The Masons used a portion of the strip as an extension of their driveway.

The Masons sued to "quiet title," i.e., be declared to own the portion of the strip of land that they used as the extension of their driveway. The Masons based their claim on the doctrine of acquiescence which is set out in Michigan statutes. The city claimed that the statute in question shields municipalities from claims for the possession of property based on acquiescence.

Michigan law generally provides for the acquisition of title to property through a number of different means. The most direct is a conveyance, usually in the form of a deed. Adverse possession is a more indirect method by which someone acquires title by possessing property adverse to the interests of the record owner for a period of time, usually 15 years. Generally, adverse possession may not be used against a municipality to gain title to a public highway, street, alley, or other public ground. Acquiescence is also an indirect method to acquire title based upon the acceptance of a boundary line by the parties, again usually for 15 years.

The provisions of the statute governing claims against governmental bodies based on the doctrines of adverse possession and

acquiescence distinguish claims against the state and claims against municipalities. In particular, the provision regarding municipalities states that "[a]ctions brought by any municipal corporations for the recovery of [public land] is not subject to the period of limitations," i.e. 15 years.

Based upon a long history of case law in Michigan that holds that the 15-year-period cannot be used against a municipality on the basis of adverse possession, the city likewise argued that the 15-year-period cannot be used against a municipality on the basis of acquiescence.

Why did the LDF get involved?

The plaintiffs' assertion that private parties may sue and be declared owners of public land on the grounds that the municipality acquiesced to a particular boundary line is contrary to a long line of cases that have precluded such a result on the basis of adverse possession.

What action did the LDF take?

The LDF filed an amicus brief with the Michigan Court of Appeals. Along with the Michigan Townships Association, the Public Corporation Law Section, and the County Road Association of Michigan, the LDF filed a co-*amicus* brief with the Michigan Supreme Court.

What was the outcome?

The Michigan Court of Appeals applied the literal language of the statute against the city. The court found that since the Masons had brought the action, and not the city, the period of limitations did apply and that the Masons had acquired title by virtue of the parties' acquiescence to the boundary line. The practical effect of the decision is that a private party has gained property owned by a municipality without compensation. The court did not attempt to reconcile a long history of case law that precludes similar

claims brought on the basis of adverse possession. The Michigan Supreme Court denied leave to appeal.

As a result of the court's decision, amendments to the statute in question have been proposed by the LDF.

What are the implications for local governments?

In light of the decision, municipalities need to pay close attention to recognized property lines that may be subject to claims by neighboring property owners.

Additionally, the League's legislative staff will work with the Michigan Association of Municipal Attorneys' Legislative Committee on a possible legislative remedy.

Who prepared the *amicus* briefs?

Thomas R. Schultz (Secretst Wardle) in the Michigan Court of Appeals
Mary Massaron Ross (Plunkett Cooney) in the Michigan Supreme Court

Mason v Menominee

Michigan Court of Appeals, No. 282714
(2009)
Michigan Supreme Court, No. 138625
(2009)