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Parked Government Vehicles? Municipalities Remain Immune

The Michigan Court of Appeals recently ruled that Wayne County could not be sued where a county dump truck, which was stationary in the right lane of a freeway, was struck by a driver. In this successful appeal, the Court held that because the vehicle was not being "operated," the "motor vehicle exception" to governmental immunity from tort suits did not apply. In other words, a stationary vehicle is treated very differently than a moving vehicle, at least when it is the government being sued.

In the case of *Sakofske v. Gering* (MiLW No. 08-101390, 2019 Mich. App., Unpublished), a driver passed away after colliding with a Wayne County dump truck, which was stationed in the right lane of I-275 to divert traffic away from work crews on the shoulder. Each truck had flashing arrow boards in the back to direct traffic accordingly. The foreman on duty, Mr. Majors, was parked in a pickup truck on the shoulder, and witnessed the crash in his rearview mirror. One person was also sitting in the driver's seat of the dump truck.

The first state trooper to arrive at the scene observed that the dump truck had its emergency brake engaged, and other evidence corroborated the assertion that the truck was not moving. According to the Court of Appeals, and despite Plaintiff's claims otherwise, it was undisputed that the dump truck was stationary.

After the crash, the decedent's estate brought several claims, including a claim of negligent operation of a motor vehicle against Wayne County.

The defendants moved for summary disposition of the case after discovery, asserting immunity under the Governmental Tort Liability Act, MCL 691.1401. Specifically, defendants argued that the "motor vehicle exception" to governmental immunity was inapplicable because although someone was sitting in the vehicle at the time it was hit, the person in the driver's seat was not "operating" the vehicle; rather, the vehicle had been stationary for at least 10 minutes prior to the crash. The Trial Court disagreed, denying summary disposition. Defendants appealed.

The Court of Appeals reversed, holding that "because [the dump truck's operator] was not engaged in 'activities that are directly associated with the driving of a motor vehicle' at the time of the collision, the motor vehicle exception to [governmental immunity] does not apply." The appellate decision and opinion were issued by Judges Kelly and Cameron, and concurred in by Judge Riordan.

This case serves as a fantastic example of the effects a minor deviation in circumstances could have on the outcome of a case; often, these facts go unnoticed by all, including judges, as there is scant case law on such issues. Additionally, hesitancy to incur any costs of appeal often leave parties stuck with the wrong decision, which can cost much more.

Med-Mal Patient Awarded $17 Million

In Ingham County, Michigan, a jury recently handed down what many believe to be among the largest ever medical malpractice verdicts in Mid-Michigan, after finding that a doctor's negligence caused paralysis and the loss of the plaintiff's leg.

In the case of *Bashore v. Sparrow Health System*, the jury awarded $17 million after finding that missteps by medical providers at Lansing's Sparrow Hospital during and after a routine procedure caused the plaintiff complications, which left her a paraplegic and required her leg to be amputated. The plaintiff had originally arrived at Sparrow for a routine outpatient procedure, designed to improve blood flow in her legs and relieve cramps she experienced while walking. As plaintiff's counsel argued, surgical sheaths placed in the plaintiff's leg as part of the procedure were left in too long, causing a blood clot.

Instead of removing the clot, the cardiovascular surgeon called to the scene allegedly delayed treatment, and then over-inflated angioplasty balloons and stents. This, plaintiff's counsel argued, caused internal bleeding and poor blood flow to plaintiff's leg and spine, leading to gangrene and paralysis.

It should be noted, however, that the damages award appears to be largely subject to Michigan's statutory cap on noneconomic damages in medical malpractice cases. The final amount does not appear to have been yet determined but will likely be significantly lower.

Providers Can Intervene in No-Fault Cases

A Michigan Court of Appeals panel recently affirmed a trial court's decision to allow two medical providers to intervene in a no-fault suit, for limited purposes.

In the case of *Lyle v. Farm Bureau Insurance* (MiLW No. 08-101173), Michigan Head and Spine Institute, along with VHS of Michigan, alleged they were owed more than $450,000 for medical services provided to their patient. The plaintiff in the case argued that the providers lacked "standing" to sue independently under the no-fault act, and that therefore they had no ability to intervene in the no-fault case.

The Wayne County Circuit Court disagreed and permitted intervention. Interestingly, however, the Court of Appeals, in affirming the decision, clarified that although the intervening plaintiffs could not pursue a direct claim for damages against Defendants, they could seek a declaration clarifying their right to payment in a specific amount.

The case arose from an incident in which the decedent was struck by a tow truck while attempting to walk across an intersection in Detroit. She died from her injuries eight months later. Her personal representative, as plaintiff, brought a tort suit against the truck's driver and its owner, with a claim for personal injury protection (PIP) benefits. The trial court granted the motion to intervene filed by the decedent's providers under MCR 2.209; in doing so, it disagreed with Plaintiff's argument that the decision in *Covenant v. State Farm*, rendered in 2017, precluded an intervention.

In analyzing the issue on appeal, the Michigan Court of Appeals stated that the *Covenant* case overturned decades of case law which had stated that providers *did in fact* have full intervention rights; nonetheless, the court found, a provider's legitimate interest in being paid does entitle them

to intervene to seek at least a declaration of their rights.

Michigan Car Insurance Fee Falling to $100 a Vehicle in July

Beginning in July 2020, Michigan drivers who want unlimited medical coverage for crash injuries will pay $100 per vehicle, which will be 55% less than the record-high $220 annual fee they currently pay.

The Michigan Catastrophic Claims Association, a state-created nonprofit entity that reimburses auto insurers for health care claims surpassing $580,000, announced the cut.

Motorists who forego personal protection benefits entirely (they can do so if they have Medicare or separate health insurance that covers car crash-related injuries) and those who choose less coverage will avoid the assessment altogether, according to the MCCA.

Lawmakers and the insurance industry, whose members sit on the MCCA board, also say the steep fee decrease is proof that the changes signed into law will work to reduce costs for Michigan drivers.

Court of Appeals Affirms Jury's Verdict for Defense After Crash

A Michigan Court of Appeals panel recently affirmed a jury's verdict assessing 60% of fault for an accident to the Plaintiff's decedent.

In *Xerri v. Williams* (MiLW No. 08-100803), the decedent died after his 2010 Ford Taurus collided with a garbage truck. After the Monroe Circuit Court jury's decision resulted in no damages to the decedent's estate, the appeals court rejected plaintiff's arguments on appeal.

The fatal accident occurred at North Telegraph and Mall Road in Frenchtown Township, of Monroe County. The decedent was 70 years old, and his right leg had been amputated in 2010. While driving southbound, the decedent crashed into the garbage truck driver, as that driver was driving northbound and attempted to turn left at the intersection. The decedent's son, acting as personal representative of the estate, filed suit alleging negligence, including by failing to yield to oncoming traffic. After a five-day trial, the jury found that the decedent was 60% at fault.

On appeal, Plaintiff argued that the trial court abused its discretion by excluding evidence of a drug test in which one of the drivers tested positive for methamphetamine. However, the panel stated that the plaintiff failed to present error, stating, "We find plaintiff's argument… difficult to follow…" and irrelevant to negligence, since there was no evidence that the garbage truck driver was actually *impaired*, and the fact of his drug habit was already beyond dispute.

The panel also ruled for the defense on plaintiff's argument that the trial court erred by refusing to allow plaintiff to use an animated video depicting the accident. According to the COA, "the jury heard the testimony of the eyewitnesses and did not need an animated video to understand what occurred."

Plaintiff Prevails on Appeal in Ambulance Stretcher Case

A Michigan Court of Appeals panel ruled in favor of the plaintiff in a case stemming from the death of a man injured while being transported from an assisted living facility to the hospital.

In *Estate of Ralph Brown v. Wolan, et. al.* (MiLW No. 08-101010) the panel affirmed an

Oakland County Circuit Court ruling which denied a motion for summary disposition brought by defendants.

The death occurred after a 2015 incident where paramedics were dispatched to an assisted living facility in order to transport a resident to the hospital, who had reported blood in his urine. The decedent was a paraplegic, and the paramedics used a stretcher on wheels to move him from the facility to the ambulance outside. While one of the paramedics was wheeling the decedent around a corner on the sidewalk, one of the wheels left the pavement, causing the stretcher to tilt onto the grass a few inches lower. The paramedic caught the stretcher as it toppled over, and the decedent never fell from it nor did the stretcher hit the ground. Nonetheless, an MRI and CT revealed multiple acute fractures in the cervical and thoracic vertebrae. While treating for his injuries, the decedent developed pneumonia, and died in a nursing facility about a month later.

The plaintiff representative filed an action for negligence, alleging that the paramedics breached their duties by allowing the stretcher to tip, failing to use spinal precautions before repositioning the stretcher, and for failing to report the incident to hospital staff timely. Among the defendant's responses in its motion for summary disposition was that the plaintiff had failed to establish evidentiary support for a finding of gross negligence (there was also an issue of governmental immunity, making gross negligence the appropriate standard).

The trial court disagreed with defendants on the gross negligence issue, denying summary disposition. Defendants appealed.

On appeal, the appellate panel wrote in its unpublished opinion that only one EMT operating a gurney is a "substantial departure" from the standard of care. However, this alone, wrote the court, would only constitute evidence of ordinary negligence. Nonetheless, "knowledge of the standard of care, breach of that standard, awareness of special circumstances, and a conscious decision not to follow the standard of care support a claim of gross negligence." On this basis, the panel affirmed the decision.

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If you have questions regarding the decisions discussed in this newsletter and how they may affect your claims, please do not hesitate to contact our firm.