



FROM GARAN LUCOW MILLER'S MUNICIPAL LAW DEPARTMENT

GOV LAW

Monthly Publication for Michigan Cities, Townships, Villages and Schools

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From the Editor by John J. Gillooly

ANNOUNCEMENTS



Garan Lucow Miller is proud to announce that four of our attorneys have been elected shareholders. We congratulate them and thank them for their dedication to providing our clients with quality legal representation. The new shareholders are:

- Ebony Duff - Detroit
- Ladd Culbertson - Grand Rapids
- Mark Mueller - Traverse City
- Patricia Dooley - Troy

The firm is very pleased to report two recent excellent results reached for our clients by Roger Smith (Troy) and Megan Cavanagh (Detroit):

- ◆ Summary judgment was granted to the City of Bad Axe, its police chief and one of its police officers in the United States District Court for the Eastern District of Michigan on wrongful arrest and malicious prosecution claims under 42 U.S.C. §1983. The Court agreed that the defendant officer's warrantless entry into a "safe house" was supported by exigent circumstances and was, therefore, legal. The City was represented by Roger Smith of the firm's Troy office. Appellate specialist Megan Cavanagh of the firm's Detroit office authored the briefs on summary judgment.
- ◆ Summary disposition was granted to the City of Harper Woods, its police officers and its City Manager in Wayne County Circuit Court on claims of

false arrest, malicious prosecution and intentional infliction of emotional distress. The Court held that the plaintiffs—a husband and wife, their three children, and two sets of grandparents—could not sustain their claims arising out of the arrest of the parents on suspicions of child abuse and obtaining money under false pretenses or out of the temporary removal of the children from the parents' custody. The City was represented by Roger Smith of the firm's Troy office. Appellate specialist Megan Cavanagh of the firm's Detroit office authored the briefs on summary disposition.

BREAKING NEWS!! By Megan Cavanagh

Sixth Circuit holds off-duty officer not seized for purposes of Fourth Amendment when required to submit to breathalyzer or risk losing his job



In an issue of first impression, the United States Court of Appeals for the Sixth Circuit held, under the totality-of-the-circumstances analysis, that a police officer was not seized for purposes of Fourth and Fourteenth Amendment analysis, when he submitted to the breathalyzer test following an off-duty altercation at a bar. The published opinion is *Pennington v Metropolitan Govt of Nashville, et al*, __ F.3d __ (6th Cir. 2007) (No. 07-5180, January 10, 2008).

After the plaintiff, an off-duty officer, was involved in an altercation with some patrons at a bar, the defendants—deputy chief and police captain requested that the plaintiff submit to a breathalyzer test. The plaintiff

officer agreed to do so because he was afraid that he would be suspended or terminated if he did not comply. Although the breathalyzer registered a .121 breath alcohol level, the police department concluded, after an internal investigation into the incident, that the plaintiff did not violate any departmental policies or regulations. The plaintiff filed suit, asserting that he was unlawfully required to take the test in violation of his rights under the Fourth, Fifth, Sixth, and Fourteenth Amendments.

The court first noted the Fourth Amendment's prohibition against unreasonable searches and seizures applies equally to police officers as to any other citizen and that drug or alcohol testing of a governmental employee implicates the Fourth Amendment even though the testing might not be related to enforcement of a criminal law. However, the relevant question was whether the breathalyzer test administered to the plaintiff officer amounted to an unconstitutional seizure. The court affirmed the district court's decision granting the defendants summary judgment, adopting the reasoning of the Seventh Circuit's decision in *Dreibel v City of Milwaukee*, 298 F.3d 622 (7th Cir 2002). In *Dreibel*, a number of police officers claimed that they had been unconstitutionally ordered to remain on duty and return to police headquarters for questioning relating to a criminal investigation into the officers' activities. According to the court in *Dreibel*, the possibility or even probability of a future adverse employment action, as opposed to physical detention, could not enter into a court's analysis of whether the officers in the case were seized. "A person is not seized simply because he believes that he will lose his job." *Dreibel*, 298 F.3d at 642.

In *Pennington*, the Sixth Circuit noted that the plaintiff officer was not handcuffed, placed in the back seat of a police car, or read his Miranda rights, and he was permitted to return home without first filing his report of the incident. The court concluded that a "reasonable off-duty officer" in the plaintiff's position "would not have feared seizure or detention if he had refused to take the breathalyzer test." The plaintiff did not appear to fear detention or seizure, only possible suspension or termination of his employment as a police officer. The Court concluded that, under these circumstances, the plaintiff had not established that the defendants had violated his constitutional rights and affirmed summary judgment.

MUNICIPAL LAW UPDATE by Matthew LaBeau

Qualified Immunity/Right to Privacy



Plaintiff and her husband, an undercover sheriff's deputy, were involved in an alcohol-related automobile accident. At the scene, Bailey told officers she was driving the vehicle, but investigation revealed that her husband was driving. A press release named plaintiff and her husband, listed their personal information, posted a mug shot of plaintiff, and noted her husband was on undercover assignment. Plaintiff claimed that the publicity caused several negative incidents, including people following them in a store, claiming that their cable was deliberately cut, their windshield was cracked intentionally, and someone was in their back yard late at night. Plaintiff filed a 1983 claim alleging the defendant Port Huron violated her 14th Amendment due process right to privacy by releasing her photograph and personal information. The district court granted summary judgment on the grounds of qualified immunity because plaintiff failed to show violation of a constitutional right. The Sixth Circuit Court of Appeals affirmed. A criminal suspect has no constitutional right to privacy in one's criminal record, including plaintiff's mug shot and personal information that was in a police report. *Bailey v City of Port Huron, et al*, __ F.3d __ (6th Cir. 2007).

Governmental Immunity/Highway Exception



Plaintiff was injured in a trip and fall accident on an alleged defect in a crosswalk in St. Clair Shores. Plaintiff filed a negligence action against the City of St. Clair Shores pursuant to the highway exception to governmental immunity. Defendant moved for summary disposition asserting the crosswalk defect was less than two inches in depth; thus, defendant was entitled to an inference that it maintained the crosswalk in reasonable repair. The motion was denied. The Michigan Court of Appeals affirmed. The plain language of MCL 691.1402a(2) does not only apply to height and depth without regard to width and other measurements of the defect. The motion was properly

denied as plaintiff made a showing that the width of the crack was greater than two inches in certain places. *Semon v. City of St. Clair Shores*, unpublished per curiam opinion of the Court of Appeals, dated October 30, 2007 (Docket No. 274777).

Governmental Immunity/Public Building Exception



Plaintiff was an employee of the Cheboygan County Road Commission and went to a rest stop to perform maintenance duties. At the rest stop, he encountered liquid on the floor, seeping from pipes from the men's urinals. While mopping the floor he slipped and fell. Plaintiff grabbed a pipe to prevent him from falling and injured his rotator cuff. Plaintiff filed suit against MDOT, alleging the leaking fluids constituted a defective and dangerous condition pursuant to the public building exception to governmental immunity. The trial court granted defendant's motion for summary disposition because plaintiff failed to provide the statutorily required notice and that said failure prejudiced defendant. (MCLA 691.1406). The Michigan Court of Appeals affirmed the lower court's decision, adding however, that a showing of prejudice was not required. Plaintiff's failure to give the required notice, alone, was sufficient to grant the motion. *Jones, et al v MDOT*, unpublished per curiam opinion of the Court of Appeals, dated October 25, 2007 (Docket No. 275076).

Election Proceedings



Defendant city clerk sent absent voter ballot applications to potential absent voters along with a signed cover letter identifying her as the city clerk and chairperson of the Elections Commission. Plaintiff was a candidate for Detroit City Council, who appeared on the August 2005 primary, but did not obtain enough votes to proceed to the general election. Plaintiff filed suit alleging several election improprieties and the clerk was enjoined from mailing the ballots. Eventually the Court issued a permanent injunction against mailing unsolicited absent voter ballots and awarded attorneys fees to plaintiff. Defendant appealed the permanent injunction prohibiting unsolicited mailings of absent voter applications. The Court of Appeals affirmed, finding MCL 168.759 does not permit

a city clerk to mail unsolicited ballot applications. *Taylor v Currie*, 277 Mich App 85 (2007).

Governmental Immunity/Highway Exception



On January 18, 2002, Plaintiff was the driver of an automobile with several passengers. A car driving in the other direction crossed the center line and forced plaintiff's car off the road and into a ditch. One passenger was killed and another occupant was injured. Plaintiff filed suit against defendant Manistee County Road Commission for failing to maintain the road in a reasonably safe condition. On August 15, 2002, plaintiff mailed a letter giving notice of the accident. Subsequently, defendant repaved the road. Plaintiff filed suit on November 12, 2002. Defendant moved for summary disposition on grounds of governmental immunity. The trial court denied the motion on the basis that further discovery was needed. Defendant appealed on grounds that plaintiff failed to provide timely notice of the highway defect. The Court of Appeals affirmed the trial court. While plaintiff's notice was not timely under MCL 691.1404, defendant was still required to show actual prejudice as a result of the delay. The court found that plaintiff provided notice to defendant before it repaved the road, therefore defendant was not prejudiced by plaintiff's delay. Plaintiff's detailed letter which incorporated the police report was sufficient to apprise defendant of possible litigation and for defendant to be able to quickly investigate the claim and gather evidence. On appeal, the Michigan Supreme Court reversed. Defendant was entitled to governmental immunity because the notice was untimely irrespective of prejudice. *Mauer et al v. Topping et al*, 739 N.W.2d 625 (2007).

