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Admiralty: No Federal Jurisdiction Over Waterways Which Do Not Allow for Actual Interstate Commercial Activity

Tundidor v. Miami-Dade County, No. 15-12597 (11th Cir. Aug. 3, 2016)

Joining four other Circuits, the Eleventh Circuit has held that federal admiralty jurisdiction does not apply to a waterway which cannot support actual interstate commercial activity and is only navigable with extraordinary care and inconvenience.

In July 2013 Youry Tundidor was injured while riding on a pleasure boat with three other passengers on Coral Park Canal in southwest Miami-Dade County (County). The canal is crisscrossed with bridges and railroad tracks requiring boat users to duck in order to pass under the structures. Tundidor raised his head too early after passing under a crossing and was hit by a water pipe. He was seriously injured and ejected from the boat. The pipe was a water main operated by the County, leading Tundidor to sue the County in federal court for negligence under admiralty law. The County responded with a motion to dismiss based on jurisdiction: it argued the Coral Park Canal is not a navigable waterway for purposes of federal admiralty jurisdiction. The district court granted the motion to dismiss.

The Eleventh Circuit began with the jurisdiction at issue, noting that a complaint must satisfy two elements to invoke admiralty jurisdiction: "(1) there must be a significant relationship between the alleged wrong and traditional maritime activity (the nexus requirement) and (2) the tort must have occurred on navigable waters (the location requirement)." The Eleventh Circuit found that "a waterway is navigable for admiralty-jurisdiction purposes if, in its present state, it is capable of supporting commercial

activity." Applying the rule to the Coral Park Canal, it deemed the waterway "not navigable because the S-25B water control structure prevents vessels on the canal from traveling outside the State of Florida." The purposes of conferring federal maritime jurisdiction over waterways are not served unless the waterway is actually capable of allowing interstate commercial activity.

Here, even though the Coral Park Canal ultimately connected to other waterways leading to Biscayne Bay, the Canal's numerous obstructions made commercial activity impracticable. The Eleventh Circuit noted a number of cases where plaintiffs have unsuccessfully argued that waterways were navigable at high tide or due to passages around obstructions and joined the Second, Fourth, Eighth and Ninth Circuits, stating that "[e]very circuit court to consider the issue has ruled that when artificial obstructions on a waterway block interstate commercial travel, the waterway cannot support admiralty jurisdiction."

LINK

Immunity: Deliberate Indifference where Prison Guard Delays Obtaining Medical Help for Inmate for 100 Minutes after Attack by Cellmate

Alsobrook v. Alvarado et al., No. 15-13093 (11th Cir. Aug. 12, 2016)

A prison guard's delay of one hour and forty minutes in seeking medical help for an inmate who had been badly beaten by a cellmate constitutes deliberate indifference and requires reversal of summary judgment, according to the Eleventh Circuit.

In 2009 Christopher Uriah Alsobrook was attacked by his cellmate and beaten severely. Prison guards had been warned of the potential fight beforehand, observed it, and allowed Alsobrook to remain in the cell while bleeding profusely, as the beating began again. He filed suit alleging deliberate indifference to the substantial risk of serious harm from his cellmate by one guard, and deliberate indifference to his serious medical needs after the fight against another guard and other state officials. The district court granted summary judgment to both guards and the state officials.

The Circuit disagreed with the grant of immunity to the latter guard and state officials. As to the latter guard, Alsobrook's claim rested on the fact that the guard delayed one hour and forty minutes before getting him help after the attack. The guard argued, and the district court agreed, this was not deliberate indifference to his medical need since the injuries were not serious. The Circuit Court took issue with this holding, noting the four elements of the indifference claim are: "an objectively serious need, an objectively insufficient response to that need, subjective awareness of facts signaling the need, and an actual inference of required action from those facts."

The length of delay was the issue here – the "objectively insufficient" prong – a delay the guard claimed was because he could not handcuff the cellmate-attacker, thus preventing him under prison regulations from entering the cell. The court disagreed, holding the guard was required to enter the cell regardless of the handcuff issue since it already determined, based on the facts, that a reasonable jury could find Alsobrook was in serious need of medical attention and the guard was aware of it. Instead of entering, he left Alsobrook in the cell for a further one hour and forty minutes, during which he was further attacked by the cellmate. The Court thus reversed the summary judgment holding as to the guard.

LINK

Immunity: In Arresting Non-Violent Citizen Who Was Recording Transaction at County Courthouse, Officers Cannot Claim Immunity from Fourth Amendment Action

Galinis v. County of Branch, Nos. 15-1993/2015 (6th Cir. Aug. 22, 2016)

The Sixth Circuit has upheld a lower court determination that officers could not claim qualified immunity in a §1983 action brought by a man who was arrested while recording his interaction with a courthouse clerk, finding that there was no law at the time which prohibited such recording and that the plaintiff had not used any force to resist the arrest.

In August of 2011 Peter Galinis bought a DVD recording a 2009 trial from the Branch County Michigan (County) Courthouse and, finding it did not work, sought to return it. Galinis, upset and under the impression that the video was rendered inoperable on purpose, recorded his interaction with the clerk on his cellphone (and subsequently posted it on Youtube). Police officers on the scene instructed him to stop recording and leave the courthouse. Galinis refused to leave, prompting an arrest and forced removal from the building. He was charged with resisting and obstructing, a violation of Michigan state law, and "disorderly jostling," a local ordinance violation.

The circuit judge in the case dismissed all charges, holding that Galinis had a right to refuse to leave the courthouse and that there were no rules against cellphone use in the courthouse. Galinis filed suit, alleging a variety of theories in federal district court against the County and individual officers involved. The court dismissed some but denied qualified immunity for unlawful arrest and unlawful confinement in violation of the United States Constitution.

The Sixth Circuit delved into the appeal, determining the case turned on whether the officers had probable cause to arrest Galinis. It noted that the lower court denied qualified immunity because there was no law prohibiting filming in the courthouse at the

time, meaning Galinis had a right to remain there and the officers lacked probable cause for his arrest. The defendants argued they had probable cause, or reasonably thought they did, because a state case effective at the time - *Michigan v. Ventura*, 686 N.W.2d 748 (Mich. Ct. App. 2004), *overruled by Michigan v. Moreno*, 814 N.W.2d 624 (Mich. 2012) – held that a person can be guilty under Michigan Compiled Laws § 750.81d(1) if one uses "force to resist an arrest made by one he knows or has reason to know is performing his duties regardless of whether the arrest is illegal." The Sixth Circuit deemed this too broad a reading of the formerly-controlling *Ventura* case since it only held that §750.81d(1) could be violated if one used force to resist arrest (whether legal or illegal), and Galinis had never used force. As his video showed, he was arrested solely for refusing to leave the courthouse, not for swearing, yelling, kicking, throwing a tantrum, or battering the officers. The Court closed noting "[r]efusing to allow video recordings in a courthouse may be a sensible policy. Indeed, it is the policy of this federal appellate court and the policy of the Branch County Courthouse today. But for whatever reason, no such policy existed when Galinis made his recording, and he had a lawful right to be in the courthouse." It affirmed the lower court, entitling Galinis to a trial on § 1983 claims.

LINK

Immunity: No Immunity for Officers or County in Pretrial Detainee's Due Process Claim Where Policy was to House At-Risk Inmates in Cells with Inadequate Audio Monitoring;

Castro v. County of Los Angeles, No. 12-56829 (9th Cir. Aug. 15, 2016)

The Ninth Circuit has affirmed a district court determination that two correctional officers violated a pretrial detainee's due process rights and were not entitled to qualified immunity. It also reversed a lower court finding that the county had immunity. The officers were following the county's custom or policy of housing intoxicated inmates in sobering cells with inadequate audio monitoring, despite the availability of separate housing, and were deliberately indifferent to the risk of serious harm to detainees from this custom or policy.

In October 2009, two Los Angeles Sheriff's Department (LASD) deputies arrested Castro for public drunkenness. He was placed in the West Hollywood police station "sobering cell." The cell did not conform to California standards requiring maximum visual supervision and audio monitoring. Several hours later, the LASD arrested Gonzalez on a felony charge after he shattered a glass door with his fist at a nightclub. Although he was acting bizarrely, authorities placed him in the sobering cell with Castro. Gonzales later stomped Castro's head, to the point that when paramedics arrived, Castro was unconscious, in respiratory distress, and blue. He was hospitalized for almost a month, after which he was transferred to a long-term care facility, where he

remained for four years. He suffers from severe memory loss and other cognitive difficulties.

Castro filed a complaint against the County of Los Angeles and the LASD (the "entity defendants"), and the individual officers and was awarded more than $2 million in damages. On appeal, in a case previously summarized in IMLA eNews, a three-judge panel of the Ninth Circuit affirmed the judgment of the district court as to the individual defendants but reversed as to the entity defendants. A majority of active non-recused judges voted to rehear the case en banc.

On rehearing, the Ninth Circuit affirmed, relying on *Kingsley v. Hendrickson*, 135 S. Ct. 2466 (2015) which had defined the parameters of Fourteenth Amendment protections for pretrial detainees. Although *Kingsley* had involved use of force against a pretrial detainee, the Ninth Circuit found Kingsley also applied in failure to protect situations: the Court had stated:

> On balance, we are persuaded that *Kingsley* applies, as well, to failure-to-protect claims brought by pretrial detainees against individual defendants under the Fourteenth Amendment. Excessive force applied directly by an individual jailer and force applied by a fellow inmate can cause the same injuries, both physical and constitutional. Jailers have a duty to protect pretrial detainees from violence at the hands of other inmates, just as they have a duty to use only appropriate force themselves.

Under *Kingsley*, the test of whether the force used--or the force implicitly allowed through failure to protect—is purely objective. "A pretrial detainee can prevail by providing only objective evidence that the challenged governmental action is not rationally related to a legitimate governmental objective or that it is excessive in relation to that purpose." The Circuit found ample objective evidence that the officers appreciated the risks to which they put the defendant.

The en banc Circuit reversed as to the County. "Substantial evidence supported the jury's finding that the County knew that its cell design might lead to a constitutional violation among its inhabitants."

LINK

Speech: City Manager's Disclosures about Corruption by City Council Members are not Job Responsibility and Can Support Retaliation Claim

Carollo v. Boria, No. 15-11512 (11th Cir. Aug. 17, 2016)

Applying *Lane v. Franks,* the Eleventh Circuit has allowed a First Amendment retaliatory firing case to be brought by a city manager who reported violations of campaign finance laws and other corruption by city council members, finding that such reporting was not made as part of the manager's ordinary job responsibilities.

In 2013 Joe Corollo was hired as the city manager for Doral City, Florida (City). During his tenure he learned of violations by city council members of campaign finance laws, financial disclosure laws, and corruption. He reported these potential violations to local and federal authorities and made public disclosures about them at city council meetings. He was subsequently terminated, with the three appellants in the case casting the only votes in favor of his termination.

Corollo filed suit against the individual council members who had voted to terminate his employment and the City, alleging he was unlawfully retaliated against under the First Amendment.

The district court rejected defendants' motion to dismiss, holding Corollo spoke as a citizen and not pursuant to his official duties, and that his rights were clearly established at the time. The defendants conceded that Corollo spoke on a matter of public concern, leaving the Circuit focused only on whether Corollo spoke as a citizen or as an employee under the *Garcetti* framework: "The critical question under Garcetti [is] whether the speech at issue is itself ordinarily within the scope of an employee's duties, not whether it merely concerns those duties . . . ."

As for Corollo's reports about campaign finance law violations, the Circuit looked to the city manager job description, which included:

(2) Direct and supervise the administration of all departments and offices but not City boards or agencies . . . ; (3) Attend all Council meetings and have the right to take part in discussion but not the right to vote; (4) Ensure that all laws, provisions of this Charter and acts of the Council, subject to enforcement and/or administration by him/her or by officers subject to his/her direction and supervision, are faithfully executed[.]

Finding some support for both parties due to the lack of precision and clarity in the description, the court held it was not appropriate at the motion to dismiss stage of proceedings to "interpret the Municipal Charter's ambiguous job description . . . ." The Circuit Court also rejected the defendants' arguments that Corollo's job necessarily "implied" his duty to report misconduct as part of his employment.

The Eleventh Circuit agreed with the Supreme Court's analysis in *Lane v. Franks*, 134 S. Ct. 2369 (2014) that "[i]t would be antithetical to our jurisprudence to conclude that the very kind of speech necessary to prosecute corruption by public officials — speech by public employees regarding information learned through their employment — may never form the basis for a First Amendment retaliation claim." As for the remainder of Corollo's speech, the court found his "poorly-drafted" complaint did not posit plausible claims. These claims were remanded to give Corollo a chance to amend. Finally, the Circuit agreed with the district court that *Pickering* and its progeny in the Eleventh Circuit, as well as *Garcetti*, put the city council on fair warning about terminating a colleague for speaking about matters of public concern outside the scope of his ordinary job responsibilities.

LINK

Speech: Ordinance which Allows City to Temporarily Bar Offender from Re-entering Public Forum where Offense Occurred Does Not Violate First Amendment

Wright v. City of St. Petersburg, No. 15-10315 (11th Cir. Aug. 15, 2016)

An ordinance whereby a Florida city imposed a one-year bar against a minister from re-entering a park where he had been arrested for obstructing a police investigation and resisting arrest was a reasonable time, manner and place restriction and did not constitute an unconstitutional restraint of the minister's rights to free expression.

Bruce Wright, a minister who conducted outreach among the destitute in Williams Park in St. Petersburg, Florida (City), was arrested when he obstructed a police investigation of a man in the park. He was then issued a "trespass warning" under a City ordinance which allowed authorities to prohibit his entry into the public place in which the incident took place—barring him from Williams Park for one year. Wright filed suit against the City, alleging that the ordinance prevented him from entering the park to exercise his First Amendment rights.

Wright argued that the ordinance "as a whole violates the First Amendment on its face and as applied to him because it allows the City to exclude people from traditional public fora, including people who wish to engage in protected expression." The Court rejected Wright's facial challenge because he could not demonstrate how the law was unconstitutional. As for Wright's as-applied challenge, the Circuit pointed out the Supreme Court's rule that in the context of legal remedies, First Amendment scrutiny applies "only where it was conduct with a significant expressive element that drew the legal remedy in the first place . . . or where [an ordinance] based on a nonexpressive activity has the inevitable effect of singling out those engaged in expressive activity."

In this case, the trespass warning ordinance only incidentally burdened Wright's subsequent free speech exercise, because he was free to continue his activities elsewhere. Furthermore, the ordinance would have applied to anyone in the public park – from protestors to morning joggers; there was no evidence that the ordinance "singled out" Wright or anyone else engaged in expressive activity. The Circuit found it noteworthy that Wright failed to show he was barred from the park for his expressive activity; he had pled guilty to obstruction of justice and resisting arrest.

Wright also argued that the ordinance, which gives a City official discretion to grant temporary or permanent suspensions of a ban on entering city parks to exercise First Amendment rights, violates the First Amendment because it amounts to a prior restraint on speech in a traditional public forum. (Wright had requested, and received, a one-time suspension of the trespass ban to enter the park for May Day activities). The court disagreed, holding that, unlike permitting schemes where individuals already have a right to be in a park but require additional permission for specific activities, Wright had no preexisting right to be in the park for an entire year after the trespass warning. The official's discretion to suspend the ban does not restrict speech in this instance; it grants someone without the right to access the park the ability to do so: thus it "allows more speech, not less . . . ." The Circuit affirmed the lower court.

LINK

Speech: Unequal and Ad Hoc Enforcement and Administration of Sign Ordinance is Content Discrimination Under *Reed* Regardless of a Local Government's Benign Intent

Constr. & Gen Laborers' Local Union No. 330 v. Town of Grand Chute, No. 15-1932 (7th Cir. Aug. 19, 2016)

In dicta, the Seventh Circuit indicated that while local governments are permitted to distinguish between public and private signs, they may not make ad hoc enforcement and administrative decisions without engaging in content discrimination.

Grand Chute, Wisconsin's municipal code forbids private signs on the public way, as well as structures or devices attached to private signs that convey a message. Picket signs and sandwich boards, however, are considered lawful. In protest of a particular construction project, a local union used both picket signs as well as a giant inflatable cat and rat. The giant cat and rat were staked to the median of a highway. Because the cat and rat were staked to the ground, rather than being held down by picketers or attached to the flatbed of a truck (per the town's suggestion), the inflatable animals were considered to be structures under Grand Chute's definition of a private sign. Thus, Grand Chute ordered them to be removed. The Union requested that the town make an

exception, since the rat and cat were 1) temporary and 2) not jeopardizing traffic safety; however, the town denied the Union's request.

Upon Grand Chute's request, the Union took down the cat and rat and immediately filed suit under 42 U.S.C. § 1983. District court denied the Union's motion for a preliminary injunction and one year later entered summary judgment in favor of Grand Chute.

The Seventh Circuit first addresses the issue of mootness, pointing out that because the construction project that led to the use of the cat and rat had been completed, the Union was no longer picketing and had not asked for an award of damages. While the Union argued that a dispute might crop up again against a future construction project, thus, making the controversy capable of repetition, the court points out the record did not contain information about this likelihood. Additionally, the town had since amended its code and changed the definition of a sign. Therefore, the Seventh Circuit remanded it to the district court to determine the mootness issue.

While they could have ended the opinion at this point, the Seventh Circuit proceed to opine, in dicta, on the merits of the case. Specifically, it indicated that the distinction the town ordinance makes between public and private signs was comprehensive and content-neutral. The ad hoc exception the Union had requested the town make, however, would have resulted in content discrimination because it would have allowed the Grand Chute too much open-ended discretion.

To this point, the Union argued that the ordinance, in operation, resulted in content discrimination because it was not equally applied to all private signs in the area, pointing to a number of other message-bearing structures that they believed also violated the ordinance and had not been asked to be taken down. One of these examples included signs posted on or near the town's fire stations. The district court responded to this point by indicating that there was no evidence that previous enforcement of the ordinance had been arbitrary or for an invidious reason. Further, it cited *Summum* for the proposition that a public body, in the case of the fire station, may engage in speech on its own behalf without offering public citizens equal access to public property.

The Seventh Circuit, invoking *Reed*, disagreed. While the district court's reliance on government motivation was permissible for a dispute about zoning variances, the Seventh Circuit holds that when speech is being regulated, including the way in which the ordinance is being administrated, government motivation is irrelevant if the end result is discrimination against certain speakers—including situations in which government employees' speech has been favored over the general public's speech.

The district court's judgment was vacated and the case was remanded for further proceedings.

LINK

Voting: Hawaii Requirement that Party Primaries be Open to All Voters Regardless of Party Affiliation does not Violate First Amendment Associational Rights

Democratic Party of Hawaii v. Nago, No. 13-17545 (9th Cir. Aug. 15, 2016)

The mere fact that Hawaii's open ballot policy allows many more voters to participate in Hawaii's Democratic primary than the state's 65,000 registered Democrats is insufficient to show a substantial burden on the Democratic Party's associational rights.

The Democratic Party of Hawaii challenged Hawaii's open primary system, alleging that allowing registered voters to participate in any party's primary without formally joining or declaring support for that party severely burdens the Democratic Party's First Amendment associational rights. Scott Nago, the state's chief election officer, answered that the system was constitutional on its face. The parties agreed there were no material issues of fact and sought judgment as a matter of law. The district court granted summary judgment to Nago.

Despite the seemingly thorny issue before it, the Ninth Circuit affirmed the case in short order. It began noting that "Election regulations that impose a severe burden on associational rights are subject to strict scrutiny . . . ." *Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 451 (2008). And the analysis of that burden is a factual matter: "Under *California Democratic Party v. Jones*, 530 U.S. 567 (2000), the severity of the burden that a primary system imposes on associational rights is a factual, not a legal, question."

The Hawaii Democratic Party had failed to provide the requisite factual support. It merely stated that, while there were only 65,000 registered Democrats in Hawaii, more than 250,000 people typically voted in the Democratic primary—raising the inference that non-Democrats must be adversely influencing the primary outcome. This was no evidence of substantial burden.

The circumstances in Hawaii were vastly different from those in *California Democratic Party.* There, the party primary ballots had been required to list candidates of all parties, and voters of any party were allowed to vote in the primary. Numerous non-Democrat voters could therefore vote for non-Democrat candidates, resulting in the Democratic Party having to nominate non-Democrats, or at least forcing Democratic primary candidates to moderate their positions for fear of losing to non-Democrats. The court found that this anomaly had in fact put unconstitutional pressures on California party members' associational rights. Hawaii had demonstrated no such interference. The Circuit affirmed the district court's grant of summary judgment to Nago.

LINK

THIS JUST IN: SEC CHARGES 71 ISSUERS IN MUNI BOND DISCLOSURE INITIATIVE – IMLA to Offer Book and Webinar Regarding SEC Action and Municipal Securities Enforcement

On August 24, the SEC announced enforcement actions against 71 municipal issuers and other obligated persons for violations in municipal bond offerings. The entities came from nearly every state in the nation.

The actions were brought under the Municipalities Continuing Disclosure Cooperation (MCDC) Initiative, a voluntary self-reporting program targeting material misstatements and omissions in municipal bond offering documents.

The SEC found that from 2011 to 2014, the 71 issuers and obligated persons sold municipal bonds using offering documents that contained materially false statements or omissions about their compliance with continuing disclosure obligations.

The parties settled the actions without admitting or denying the findings and agreed to cease and desist from future violations. The full SEC announcement is available HERE.

IMLA'S BOOK AND WEBINAR: *Following the SEC's major MCDC announcement, IMLA is releasing a new book and hosting a webinar on the subject*

BOOK: On Monday, August 29, IMLA will publish its new municipal securities book:

EXPANDING MUNICIPAL SECURITIES ENFORCEMENT: PROFOUND CHANGES FOR ISSUERS & OFFICIALS, by Robert Doty.

Well-known to securities law practitioners and a frequent lecturer at IMLA events, Robert Doty is a Harvard Law School graduate and veteran of more than 40 years in the municipal securities market as bond counsel, underwriter counsel, investor counsel, and advisor to issuers and underwriters. He is the author of two books and numerous articles on municipal securities law. He has now written the dispositive account of the SEC's decisive foray into local government securities and the new environment for municipal issuers, published by IMLA.

As **EXPANDING MUNICIPAL SECURITIES ENFORCEMENT** details, since 2013, federal scrutiny of municipal bonds has dramatically accelerated. Fines and other sanctions are now being imposed by the SEC against a wide swathe of local

governments. And city and county officials now have unavoidable responsibility to read and stand behind bond disclosures.

Mr. Doty details the rapid proliferation of SEC complaints against local governments, with specifics of each case -- including recent actions where the Department of Justice has joined the enforcement process, bringing criminal charges against mayors and municipal attorneys. He also explains the SEC's Municipal Continuing Disclosure Cooperation (MCDC) initiative, which allows municipalities to reduce sanctions based on voluntary disclosure of past violations. His book includes a comprehensive series of hypotheticals designed for self-study.

EXPANDING MUNICIPAL SECURITIES ENFORCEMENT (185 pages) is available for $99 and to IMLA members for $39. Please contact info@imla.org for more information.

WEBINAR: On Wednesday, September 14, at 1 PM Eastern time IMLA will host its Webinar on Municipal Securities Enforcement:

The IMLA Webinar will cover the Securities and Exchange Commission's Municipalities Continuing Disclosure Cooperation (MCDC) Initiative, allegations made by the SEC in MCDC actions, examples of the antifraud violations identified, and the remedies and other consequences for issuers, underwriters and the market as a whole. This includes the movement toward issuer adoption of disclosure policies and procedures, and the structuring and implementation of such policies and procedures. In addition, the presentation also covers the expanding SEC reliance upon antifraud enforcement actions as a means of indirectly regulating municipal securities issuers, why the Commission is utilizing that approach, recent actions of interest, and notable SEC "firsts" since early 2013.

The 90-minute IMLA Webinar will be headlined by:

Robert Doty, President, AGFS and author of EXPANDING MUNICIPAL SECURITIES ENFORCEMENT and will feature two acknowledged experts in SEC matters:

Elaine Greenberg, Shareholder, Greenberg Traurig, LLP, and former head of the Public Finance Unit of the SEC Division of Enforcement, and

John McNally, Partner, Hawkins Delafield & Wood, Washington DC, and former SEC official

For more information about the Webinar, please contact info@imla.org.