International Municipal Lawyers Association



e-News: Issue 18 September 8, 2017

Click Here To Print This Issue

Quick Links

IMLA Website
Webinar Calendar
Municipal Jobs Board
Become a Member
Join The IMLA Community

In This Issue: 8 Cases

Contracts: Collective Bargaining Agreements Providing Municipal Retirees Health Insurance are Subject to Modification Unless Termination is Foreclosed by Express Language

Excessive Force: Contradictory Testimony about whether Decedent was Holding Hostage when Killed by Police is Irrelevant Based on Decedent's Other Threats

Forfeiture: Third Party Creditor Faces Virtually Impossible Challenge in Claiming Entitlement to Drug Monies Seized by the Government

Police: A Metal Garden Hose Nozzle, in the Right Context, Can Be Considered a Weapon

Prisons: State Court Is Most Appropriate Venue for Prisoner Seeking Damages for Negligent Destruction of Personal Property

Section 1983: Joining Majority of Circuits, Third Circuit finds that ADA and Civil Rights Act Claims are not Cognizable under Section 1983

Speech: Maine Law Prohibiting Loud Noises which are Intended to Interfere with Healthcare or Patients Survives Reed Scrutiny

Speech: Plaza Area within City-Owned Arena Deemed Nonpublic Forum despite Similarities to Spaces Considered Public Fora

THIS JUST IN: Another Chapter in the Legislative Prayer Story

Contracts: Collective Bargaining Agreements Providing Municipal Retirees Health Insurance are Subject to Modification Unless Termination is Foreclosed by Express Language

Serafino v. City of Hamtramck, No. 16-2370 (6th Cir. Sept. 1, 2017).

Heeding the counsel of the Supreme Court, and modifying its prior stance which had favored employees in CBA analyses, the Sixth Circuit has upheld a Michigan city's right to require retirees in its healthcare program to pay deductibles.

The City of Hamtramck (City) was facing a fiscal crisis, thus the state of Michigan appointed an emergency manager. One of the manager's actions was to alter the health-insurance plans offered to retired police officers and firefighters. While the City would continue to pay premiums on the retirees' plans, the retirees would henceforth have to pay deductibles. The retirees sued, alleging this violated provisions of the parties' existing collective-bargaining agreements (CBAs). The district court dismissed the retirees' breach-of-contract claims, holding the CBAs did not

create vested lifetime healthcare benefits. This resulted in the dismissal of their constitutional claims because those claims hinged on having a vested property interest.

The Sixth Circuit recognized this as a noteworthy case because a 2015 Supreme Court decision had abrogated a rule unique to the Circuit. That year the Court decided *M & G Polymers USA, LLC v. Tackett*, 135 S. Ct. 926 (2015), wherein it held that ordinary principles of contract interpretation should apply to collective bargaining agreements. While for most circuits this was ordinary, the Sixth Circuit had long followed its own rule, the *Yard-Man* inference, wherein it had reviewed collective bargaining agreements "with a thumb on the scale in favor of employees." Thus in reviewing this case, the Sixth Circuit looked, more closely than previously, to the plain language of the CBAs and heeded the Supreme Court's message "not to construe ambiguous writings to create lifetime promises." That meant looking to the termination dates (of the various CBAs at issue) to determine whether each had a *general durational clause* that applied to all clauses or whether the healthcare clauses in each had a *separate and distinct end date* from the CBA generally.

The Circuit held each CBA had a general durational clause that defeated the retirees' argument that they had vested, lifetime rights to healthcare benefits. For example, the retiree's argued clauses such as one stating that the City would provide "the cost of medical, hospital, and surgical insurance . . . for employees and eligible members of employees' families who retire on or after July 1, 1986 *until that retired employee attains the age of sixty-five (65) or is eligible for [M]edicare or [M]edicaid healthcare*" meant exactly that. However, the court held that the general durational clause meant the City only promised to provide such benefits until the CBA terminated. As the Circuit put it "unless there is a longer time limit in the context of a specific provision, the general durational clause supplies a final phrase to every term in the CBA: 'until this agreement ends.'" The lower court decision was affirmed.

LINK

Excessive Force: Contradictory Testimony about whether Decedent was Holding Hostage when Killed by Police is Irrelevant Based on Decedent's Other Threats

Beans v. City of Massillon, No. 17-3088 (6th Cir. Aug. 29, 2017).

Upholding the district court's finding, the Sixth Circuit has affirmed qualified immunity where, despite contradictory testimony about whether the decedent was holding a hostage when shot by officers, the decedent had threatened to light a gas line and blow up the premises.

Shane Ryan (Ryan), an emotionally disturbed individual, wanted to reach his ex-girlfriend, but when she did not answer the phone, he decided to walk ten miles to her job - a hair salon in Massillon, Ohio (City). While he was walking he called the Crisis Intervention and Recovery Center, a discussion which prompted the staff to call police warning him that he might be dangerous. The county sheriff's office began looking for Ryan and called the City of Massillon Police Department, who also started looking for him. Ryan reached the salon, however, only to find his girlfriend was not there and, upset, took a hostage, threatening to kill her and blow up the building and promising officers that they would have to kill him. Ultimately, Ryan became more unstable and threatening and the officers breached the salon, saving the hostage and killing Ryan. The administratrix of his estate filed suit, alleging both that excessive force was used against Ryan and that the Massillon Police Department violated the Americans with Disabilities Act (ADA). The district court granted the officers involved (and the City) immunity, generating an appeal.

The Sixth Circuit handled the ADA question first. Noting first it had never determined whether the ADA applied to arrests, but concluding it need not decide. The court assumed the ADA did apply and that Ryan had a qualifying disability, but found the facts did not support the assertion that the officers acted because of Ryan's assumed disability rather than his threatening and dangerous behavior. The Circuit put it bluntly: "the officers only employed deadly force against Ryan because he threatened to kill his hostage and blow up the salon-not because of Ryan's disability. [The administratrix] has failed to offer evidence of any animus by Defendants against people with mental illnesses . . . ."

As for excessive force the administratrix's primary argument was that the district court had refused to consider hearsay evidence from the officer who physically rescued the hostage--specifically his testimony that he was out of the room with the hostage *before* hearing the two gunshots that killed Ryan. This contradicted the statement by the officers who shot Ryan, whose testimony was that the hostage was present with Ryan at the time. Sidestepping the merit of the evidentiary ruling, the court held that even if that officer's testimony was considered it did not create a genuine issue of material fact because all three of the *Graham* factors used to determine the reasonableness of the force favored the officers and City and that the addition of the statement did not alter that balance. The level of force applied was constitutional even with the contradictory statement in the mix because Ryan threatened to blow up the entire building, not just kill the hostage, and specifically said he had broken the natural gas line and, as the officers witnessed, actually had a lighter in his hand.

Thus, even if the hostage was already at the door she--not to mention the officers--was still in imminent danger, making the lethal force reasonable. The Circuit affirmed the lower court.

LINK

Forfeiture: Third Party Creditor Faces Virtually Impossible Challenge in Claiming Entitlement to Drug Monies Seized by the Government

United States v. Catala, No. 17-1096 (1st Cir. Aug. 30, 2017).

Despite having a valid judgment against an acquaintance, a creditor could not demonstrate chronological--and therefore legal--priority over the government's rights to monies forfeited by the acquaintance due to criminal drug dealing, because the forfeited funds did not come into existence until the crime was committed.

David Vogel (Vogel) loaned an acquaintance, Juan Catala (Catala) $8,500 during a trip to Las Vegas. Catala did not pay it back, prompting Vogel to file in Rhode Island state court where he obtained a judgment against Catala. Despite that outcome being litigated all the way to the Rhode Island Supreme Court, Catala still did not make payment and Vogel kept pursuing him. Soon thereafter, but in an unrelated turn of events, federal authorities charged Catala with distributing oxycodone and marijuana, a process during which the government recovered $14,792 in cash from the accused. Catala pleaded guilty to the drug charges, resulting in a finding that the $14,792 was cash proceeds of his illegal activity and was subject to government forfeiture. Vogel filed a third-party petition under federal law and the Federal Rules of Civil Procedure, claiming $8,500 of the funds. The district court dismissed Vogel's motion, holding he lacked standing and/or failed to state a claim for which relief could be granted. Vogel appealed.

The First Circuit was tasked with determining "the relative priority, as between the government and a general creditor, with respect to claims relating to assets forfeited as the proceeds of criminal activity," an issue of first impression in the First Circuit. The law at issue in the case

holds that individuals convicted of drug crimes forfeit "any property constituting, or derived from, any proceeds the person obtained, directly or indirectly, as the result" of the crime and "any instrumentalities used to commit the crime." Once a court has issued a preliminary order forfeiting the property to the government, an interested third-party trying to obtain some or all of the property must file a motion, establish his/her legal interest in the property, and then establish that the preliminary order of forfeiture is invalid by showing his interest in the property was vested in him before the government.

The Circuit found Vogel's argument hinged on timing: the federal law "specifies that the right to all property used in committing, and any proceeds derived from, a criminal offense vests in the United States *upon the commission of the act* giving rise to [the] forfeiture."

Thus Vogel had to prove that his interest in that money *existed before* the commission of the drug distribution crime that led to the forfeiture of the money. Obviously, Vogel could not possibly have in interest in proceeds that did not yet exist. Referring to Second and Eighth Circuit cases, the Circuit held that "[s]ince proceeds from a crime do not precede [the commission of] the crime, the government's interest in proceeds forfeited pursuant to [21 U.S.C.] 853(a)(1) will almost always pre-date that of a third party who is a general creditor." Vogel's case was essentially unwinnable: since the facts indicated the money was from drug distribution crimes, the government's interest vested immediately at that point, and it is impossible that Vogel could have had an interest in proceeds before they existed. Even the Rhode Island Supreme Court judgment in his favor did not prove otherwise. The Circuit affirmed the lower court.

LINK

Police: A Metal Garden Hose Nozzle, in the Right Context, Can Be Considered a Weapon

***Roell v. Hamilton Cnty. Bd. of Comm'rs*, No. 16-4045 (6th Cir. Sept. 5, 2017).**

A decedent's mental condition and diminished capacity did not preclude deputies from using tasers and other reasonable amounts of force to subdue him, even if his only "weapon" was a garden hose.

Ronald Roell (Roell), who suffered from schizoaffective disorder and paranoid delusions, stopped taking his medication in June 2013. Predictably, he soon began exhibiting signs of mental decompensation which culminated in a condition known as excited delirium. In his excited state, Roell damaged his condominium, then went to the condominium of his neighbor and threw a flower pot through its window. The neighbor called 911 and later testified that Roell appeared angry, his face red and his eyes bulging, as he muttered unintelligible things, while pacing in front of the broken window, peering into her condominium.

Deputies arrived and saw Roell half-naked and swinging a garden hose with a metal nozzle in one hand and a garden basket in the other. According to the deputies, Roell was swinging the hose around as if he were trying to hit someone. As Roell approached the deputies, he was told to stop and to get on the ground or he would be tased. Roell twice ignored the deputies' warning and kept moving towards the officers.

While attempting to subdue Roell, the deputies struggled with him and unsuccessfully tased him multiple times. Roell stopped breathing during the encounter and was pronounced dead shortly thereafter. His death was documented by the coroner as natural, resulting from his excited delirium. Included with the Death Record was a report drafted by the coroner stating that Roell

had a history of "physical altercation with police officers" and that the "use of a conducted energy device against decedent" had occurred. Also noted were Roell's various abrasions and contusions, injuries from the taser barbs, and four broken ribs. The report, however, did not find that any of these injuries contributed to Roell's death.

In applying the three *Graham* factors (severity of crime, presence of immediate threat, and active resistance of arrest) the court concluded that Deputies' use of force was lawful. Roell's demeanor, when combined with the fact that he had thrown a potted plant through his neighbor's window, supported the finding that Roell had committed a series of crimes that could escalate. Further, Roell's use of a garden hose and garden basket amid a scene of property destruction provided deputies with a reasonable basis to believe Roell presented an immediate threat to himself and others. Finally, the court concluded that in addition to meeting the requsite *Graham* factors, the totality of the circumstances of Roell's seizure warranted a reasonable degree of force.

With regards to the Section 1983 claim, the Sixth Circuit affirmed summary judgment in favor of the deputies and Hamilton County.

LINK

Prisons: State Court Is Most Appropriate Venue for Prisoner Seeking Damages for Negligent Destruction of Personal Property

Streckenbach v. VanDensen, No. 16-1695 (7th Cir. Aug. 21, 2017).

Upholding the decision below--but not its reasoning-the Seventh Circuit has found that a prison sergeant overseeing mailroom operations was not liable under § 1983 for the prison's failure to notify an inmate that his property would be destroyed due to a lack of postage to ship it.

In 2014 Christopher Streckenbach (Strekenbach) was an inmate the Redgranite Correctional Institution in Wisconsin and left two boxes of belongings with prison authorities for his son to pick up. According to the prison, a policy became effective in 2013 that required belongings be picked up within 30 days, after which the belongings would be shipped to a designee of the inmate--but if the inmate's account did not have enough money to cover shipping, the property would then be destroyed. Streckenbach's property was destroyed. He filed suit under § 1983 alleging that Charles VanDensen (VanDensen), the sergeant in charge of the mailroom, violated his Due Process rights by destroying the property. He argued the policy had not been communicated to inmates and that an old policy was posted at the library that required staff to contact the inmate if the property was not picked up in 30 days. The district court granted summary judgment for VanDensen, holding the complaint failed to specify the legal theories Streckenbach was relying on and, second, that VanDensen has qualified immunity.

The Seventh Circuit determined neither of these reasons was adequate to justify summary judgment. As to the first reason, the Court summarily announced that "[c]omplaints need not plead law or spell out theories of liability." As for the second, the Circuit found the lower court had mistakenly evaluated the consequences of the fact that VanDensen was not responsible for giving notice to Streckenbach. The Circuit found that, because he was not responsible for such failure, he could not therefore be liable for the absence of notice and could not, logically, be granted immunity. However, the court, picking through details, found it possible that VanDensen, as the mailroom sergeant, could have made a mistake in paperwork: VanDensen would have noted that Streckenbach had insufficient funds to cover postage and could have alerted another officer to contact Streckenbach. If so, the inaction amounted to negligence "and negligent bureaucratic errors do not violate the Due Process Clause."

The court determined the proper remedy for Streckenbach was in state court where inmates can vindicate their long-held Due Process rights not to have their property destroyed by obtaining the value of the property through litigation. Thus, the Circuit affirmed the result of the lower court, but not the reasoning.

LINK

Section 1983: Joining Majority of Circuits, Third Circuit finds that ADA and Civil Rights Act Claims are not Cognizable under Section 1983

Williams v. Pennsylvania Human Relations Commission, No. 16-4383 (3d Cir. Aug. 30, 2017).

Joining the majority of Circuits, and mindful of Supreme Court discussion of the subject, the Third Circuit has found that a government employee could not bring an ADA and Civil Rights Act claim under §1983, because those statutes incorporate their own comprehensive enforcement schemes.

Cheryl Williams (Williams) was employed at the Pennsylvania Human Relations Commission (Commission) from 1999 to 2014. She alleged during her last few years at the Commission, when she was supervised by two males, she endured a hostile work environment and was ultimately constructively discharged unlawfully under Title VII of the Americans with Disabilities Act (ADA) and Title VII of the Civil Rights Act (Title VII). She filed suit under §1983, arguing such violations of the ADA and Title VII could be brought under §1983. The Third Circuit had never addressed this issue, but ultimately held, in line with other circuits, that such claims were not cognizable under §1983.

The Circuit Court began with the common refrain that §1983 does not confer substantive rights, but provides a method to vindicate federal rights originating elsewhere and that, critically, Congress can foreclose access to §1983 relief by express statutory language or by "creating a comprehensive enforcement scheme that is incompatible with individual enforcement under § 1983." The court found the latter relevant, noting Congress created a complex and comprehensive scheme for Title VII and the ADA involving administrative exhaustion requirements through the Equal Employment Opportunity Commission and then, after that fails, the opportunity for attorney's general and, ultimately, the individual to file suit. Juxtaposed against this comprehensive remedial scheme, the court noted that §1983 allows a one-step process where individuals simply file a case in federal court. Thus, to allow Title VII and ADA claims under §1983 would undermine the scheme Congress created and, in the Circuit's words, would be "thwart[ing] Congress's carefully crafted administrative scheme by throwing open a back door to the federal courthouse when the front door is purposefully fortified."

The court found support for this logical position from the Supreme Court, wherein it previously prohibited §1983 suits for the Telecommunications Act of 1996, the Federal Water Pollution Control Act Amendments of 1972 and the Marine Protection, Research, and Sanctuaries Act of 1972, all decisions it based on their "novel," "complex," or "unusually elaborate enforcement provisions." Thus, the Third Circuit joined the majority of circuits prohibiting plaintiffs from bringing ADA and Title VII claims under §1983.

LINK

Speech: Maine Law Prohibiting Loud Noises which are Intended to Interfere with Healthcare or Patients Survives *Reed* Scrutiny

March v. Mills, no. 16-1771 (1st Cir. Aug. 8, 2017).

A law penalizing those who shout or make noises outside a healthcare facility with the intent to disrupt activities within has been found by the First Circuit not to trigger the content-based strict scrutiny required under Reed, leading to a reversal of the decision below to grant injunctive relief.

Andrew March (March), co-founder of a church in Lewiston, Maine dedicated to fighting for the lives of the unborn, sought to enjoin the enforcement of a provision of the Maine Civil Rights Act (MCRA) on the grounds that it facially violated the First Amendment. The challenged provision defines the "conduct" that may give rise to an action under the MCRA as follows:

> After having been ordered by a law enforcement officer to cease such noise, intentionally making noise that can be heard within a building and with the further intent either:
>
> 1. To jeopardize the health of persons receiving health services within the building; or
> 2. To interfere with the safe and effective delivery of those services within the building.

March alleged that law enforcement told him on three occasions in 2015 to lower the volume of his activity outside the Planned Parenthood facility in Portland, Maine, based on the MCRA provision. He alleges that he repeatedly "asked for a definitive volume level that he could speak at" but did not receive a standard. Thus, he could no longer "communicate audibly" due to fears that his speech would subject him to an enforcement action. He moved for a preliminary injunction.

In opposing the motion, Maine emphasized that "[p]atients have the right to receive safe and effective health care . . . without interference from Mr. March or anyone else." The state relied on affidavits from health professionals which noted the "physiological effect on patients, often causing additional stress and elevated blood pressure, pulse, and respiratory rates" that noise can cause when so loud it can be heard inside a health facility, disrupting safe and effective treatment. Maine also challenged March's allegations that the MCRA restricted speech, pointing out that March remained free to express his views loudly enough to conduct conversations and be heard within the immediate vicinity.

The district court ruled that the measure restricted speech based on its content rather than on the time, place, or manner of its expression. Therefore, the provision would likely not survive the strict constitutional scrutiny applicable to such content-based speech restrictions. The court granted March's request for a preliminary injunction.

The First Circuit reversed. The threshold question it confronted was whether the MCRA provision was content-based or content-neutral. The former would require a showing of compelling governmental interest served by the least restrictive means, while the latter would need only to be narrowly tailored to serve a significant governmental interest and to leave open ample alternative channels for communication.

The Circuit found that the MCRA provision was a content-neutral time, place, or manner restriction. It found ample precedent supporting reasonable restrictions on noisemaking in public: As Justice Black said in his concurrence in *Gregory v. City of Chicago*, 394 U.S. 111 (1969), "[N]o mandate in our Constitution leaves States . . . powerless to pass laws to protect the public from the kind of boisterous and threatening conduct that disturbs the tranquility of . . . buildings that require peace and quiet to carry out their functions, such as courts, libraries, schools, and hospitals."

Citing *Reed's* admonition that a regulation may be content-based if cannot be justified without reference to the content of the regulated speech, March contended that the MCRA provision's "disruptive intent" requirement meant that it only targeted those loud noises made with the intent to "jeopardize the health of persons receiving health services within the building; or . . . interfere with the safe and effective delivery of those services within the building." Abortion rights protestors would be treated less favorably than other noisemakers because, unlike in the case of other speakers, the content of their message necessarily would establish their disruptive intent.

The Circuit disagreed. The MCRA provision "says not a word about the relevance -- if any -- of the content of the noise that a person makes to the determination of whether that person has the requisite disruptive intent." For example, the measure, by its terms, would restrict the volume that hospital staff might use in calling for higher wages during a labor strike outside a hospital, or the vehemence of protestors demanding the cessation of vaccination practices. If any of these activities, and many others (even those using noisemakers in lieu of shouting), were intended to cause disruption in the healthcare facility, they were not permitted. In contrast, if the noise was not intended to affect patient care, it would not violate the MCRA provision.

The challenge would be to determine the speaker's intent. That would require a fact-specific inquiry that might depend on a variety of factors "including, crucially, whether the individual has ignored an initial order 'by a law enforcement officer to cease such noise.'" March contended, as the district court had ruled, that the MCRA measure was content-based on its face because, in targeting noise based on the noisemaker's purpose, the measure necessarily regulated speech based on its "function or purpose." This was a reference to a single sentence in *Reed*, in which the Court noted that while "[s]ome facial distinctions based on a message are obvious, defining regulated speech by particular subject matter, . . . others are more subtle, defining regulated speech by its function or purpose." The Circuit found the argument inapposite. "Considered in context . . . this passage has little bearing on our case."

The court challenged the analysis of the lower tribunal, which had looked to *McCullen* to find the MCRA provision suspect. But the Circuit did not find precedential support for the district court's determination:

> Nor are we aware of authority to support the conclusion below that a restriction on disruptive noise . . . necessarily becomes content based if it targets only those noisemakers who actually intend for their noise to be disruptive. Indeed, we would be surprised to find authority to that effect. It is hard to discern the First Amendment interest furthered by a rule that would deem such an otherwise content-neutral restriction to be especially constitutionally suspect simply because it excuses those who violate it only inadvertently.

The Circuit found that the MCRA provision did not implicate content. "[N]othing on the face of the Noise Provision indicates that enforcement authorities must examine the content of the speaker's communication in order to find a violation." Even though, on the facts of a given case, "the communicative content of noise may supply helpful evidence (to one side or the other) regarding the noisemaker's intent . . . . that fact does not show that the measure is content based on its face." The court interpreted that *Reed* "does not suggest that a provision is content based merely because the communicative content of noise could conceivably be relevant in ascertaining the noisemaker's disruptive intent."

The Circuit also evaluated whether Maine had, in adopting the MCRA provision, codified a disagreement with the nature of speech likely to be hurled at abortion facilities. It found no such evidence.

Given that the MCRA provision was not content-oriented, the court had to determine whether it satisfied the less-demanding intermediate scrutiny standard. The provision survived intermediate scrutiny: It served a significant governmental interest (protecting patients and their

loved ones, all of whom require a calming restorative atmosphere). The statute was narrowly-enough tailored; Maine's Attorney General had interpreted the MCRA provision not to apply when a building providing health services was closed, or when there were no patients inside, and the absence of specifics about maximum decibels did not undermine its effectiveness. Finally, the provision left open ample alternate means of communication-the protestors could easily carry signs, for example.

LINK

Speech: Plaza Area within City-Owned Arena Deemed Nonpublic Forum despite Similarities to Spaces Considered Public Fora

Ball v. City of Lincoln, No.16-3210 (8th Cir. Aug. 29, 2017).

Rebuffing a religious leafletter who claimed deprivation of his free speech rights, the Eighth Circuit has pointed to the usage history of the "plaza area" of Lincoln, Nebraska's Pinnacle Bank Arena, its public safety purpose, and its proximity to designated public fora as evidence of its nonpublic forum status.

Larry Ball (Ball) hands out leaflets with Christian messages to the public in Lincoln, Nebraska (City). One of the places he has done so, or tried to do so, since at least 2014 is the Pinnacle Bank Arena--a facility built and owned by the City and the University of Nebraska. After numerous incidents of being cited or required to move from the "Plaza Area" of the Arena to the public sidewalks, Ball sued, alleging that the City violated his First Amendment free-speech rights by issuing him citations in 2014 and 2015 for trespassing on the Plaza Area. The district court granted summary judgment to the City, concluding that the Plaza Area where Ball was ticketed was a nonpublic forum and that the policy governing it was a reasonable restriction on speech. Ball appealed.

The Eighth Circuit began with the familiar recital of the three types of fora guiding First Amendment rights, and the refrain that in determining to which type of forum a specific area belongs, the Court takes into account the "physical appearance of the property," "the traditional use of the property, the objective use and purposes of the space, and the government intent and policy with respect to the property . . ." but that "[n]o single factor is dispositive." As for physical characteristics, the court found the Plaza Area had some features of a traditional public forum, but that "there [wa]s no evidence that it has been used for expressive activities" or that the City ever intended to open it for expressive activities, and, notably, that there was evidence that the City "used [the Plaza Area] primarily in conjunction with Arena activities."

As for usage, Ball argued the public used a pedestrian bridge in the Plaza Area and a portion connected it - both of which accessed the public sidewalks and neighborhood around the Arena - as a traditional public forum. The Court held that these portions were not *primarily* used as a thoroughfare for the public, but rather "as a means to facilitate safe and orderly access to the Arena for its patrons, as a security screening area, and as a gathering place and entryway for Arena patrons." As for the City's intended use, Ball argued it did not intend the Plaza Area to be a nonpublic forum because it did not designate it as such until *after* he was arrested and cited. The Court agreed the City could not "transform the character of the property by the expedient of including it within the statutory definition" of a nonpublic forum, but found that there was just no evidence or history showing that the City intended it to be used for expressive activity. Rather, it found evidence that the City's principal purpose since building the Pinnacle Bank Arena was to "protect the contractual rights of [a]rena [t]enants, to allow for crowd management and safety, to provide a forecourt or gathering place for Arena patrons, and to provide an area for security screening." As a result, the Circuit Court agreed with the lower court that the entire Plaza Area

was a nonpublic forum.

With this conclusion came the Court's final task of determining the legality of the policy governing the use of the Plaza Area, which as a nonpublic forum required a policy that was "viewpoint neutral and 'reasonable in light of the purpose which the forum at issue serves." It was viewpoint neutral because the policy prohibited all expressive activity. Ball countered that the fact he was the only one cited under the policy showed it was not viewpoint neutral as applied to him. The court found, however, that other people practicing expression *complied with the policy* and that's why they were not cited. This evidenced that Ball was not targeted, but rather was simply the only person - in the Pinnacle Bank Arena's short four-years of existence - to violate the policy. As for reasonableness in light of the Plaza Area's intended purpose, the court found the availability of other nearby public fora, the primary goal of protecting the paying tenant's contractual use, and the goal of providing safe access and security screening of patrons persuasive. It concurred with the lower court that the policy was reasonable and rejected Ball's appeal.

DISSENT: Judge Melloy dissented in part, specifically arguing that the Plaza Area *as a whole* should not have been deemed a nonpublic forum, but rather that a small portion of it should have been deemed a traditional public forum. Judge Melloy, essentially agreeing with Ball, believed the portion of the Plaza Area connecting a pedestrian footbridge and the public sidewalk "has the physical characteristics of a public thoroughfare, . . . the objective use and purpose of open public access . . . and purpose inherently compatible with expressive conduct" such that it creates more robust First Amendment rights for the public. Following from this, Judge Melloy agreed with the majority holding that the policy guiding use for the nonpublic areas was reasonable, but that in the portions he would have deemed a traditional public forum, the policy would have been illegitimate under the strict scrutiny analysis.

LINK

THIS JUST IN: Another Chapter in the Legislative Prayer Story

Yesterday, the Sixth Circuit, sitting en banc and reversing itself, declined to find fault with the practice by the Jackson County, Michigan Board of Commissioners of opening their monthly meetings with a Christian prayer. The case was commenced by Peter Bormuth, a non-Christian attendee who claims he felt intimidated when he did not rise and bow his head as the Board instructed. His application to serve on a County environmental committee was subsequently declined by the Board.

Given the recent dynamism in High Court review of Establishment Clause issues, this decision could well be subject to further review. That possibility is heightened because of the recent Fourth Circuit decision in *Lund v. Rowan County*, which found a similar practice in North Carolina to violate the First Amendment.

The case is *Bormuth v. Jackson County*, no. 15-1869 (6th Cir. Sept. 6, 2017)

LINK

IMLA

www.imla.org
51 Monroe Street
Suite 404
Rockville, MD 20850
202-466-5424

