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Land Use: Public Use Is Determined by Presence Rather Than Volume of Public Traffic and Is Not Defeated by Concurrent Uses by a Private Party

Bayberry Cove Children's Land Trust v. Town of Steuben, 2018 ME 28 (Me. Feb. 27, 2018).

The Maine Supreme Court has affirmed a town's taking of interest in a portion of a road leading to a local bar.

The Maine town of Steuben (Town) initiated eminent domain process in response to a legal challenge commenced by a local land trust (Trust). The road at issue, Rogers Point Road, was found to be located on or within land owned in fee simple by the Trust. At the end of the road was a bar open to the public-meaning a very small portion of general public occasionally traveled along the road, including portions across the Trust, to get to the bar. The road's physical location had changed from boundaries originally laid out in 1825 because of an 1887 extension and a 1944 wash-out. In 2013, the Town commissioned a survey of the road's boundaries, which revealed that a small portion, approximately 2,470 square feet, of the existing road strayed outside the original bounds of the right of way that had been previously laid out. These

circumstances prompted the Town to lay out new boundaries for that portion of the road.

In 2015, the Trust filed a declaratory judgment action against the Town to establish the legal status, including title, to the portion of the road laid out on its property, pointing out that the road was only minimally used by the public and instead served functionally as a private driveway for the property on which the pub was located. While the declaratory judgment action was pending, the Town initiated the eminent domain process. As a part of the process, a Town meeting was held in May of 2016 and voters overwhelmingly approved authorized the Town to take the traveled part of the road.

The Maine Supreme Court ruled that the road fell under the definition of public use because the driveway's use could not be separated from the general public's use. Just because the owners of the bar derived an ancillary benefit from the Town's taking did not undermine the concurrent nature of the road's use as both a public road and a driveway servicing the bar's property.

LINK

Police: First Circuit Adopts and Clarifies Burden of Proof for "Emergency Aid" Exception to Warrantless Entries on Private Property

Hill v. Walsh, No. 17-1668 (1st Cir. Feb. 27, 2018).

Immunity for police granted where officers entered a home without a warrant to find and administer aid to an individual reported to be at risk of overdosing.

On March 3, 2015, Matthew Hill (Hill), age 28 and a habitual opioid user, overdosed and was taken to Morton Hospital in Taunton, Massachusetts (City). The next day his sister filed a petition to have Hill civilly committed, which permitted the court to issue a warrant for Hill's arrest if there were reasonable grounds to believe he would not appear at his commitment hearing and that further delay in the proceedings would present an immediate danger to his physical well-being. A district court judge approved the petition.

As a result, that afternoon, several City police officers arrived at Hill's parents' home to escort him to a state court civil-commitment hearing. The officers thought that they saw movement inside the home, but when no one came to the door, they entered, believing Hill to be in danger of overdosing inside. Damage was done to the home as the officers subdued the Hills' dogs with several fire extinguishers upon entry. Hill's parents sued the officers and the City under 42 U.S.C. § 1983, alleging that the police's entry had violated their Fourth Amendment rights.

The First Circuit found no clearly established law on the emergency aid exception and granted immunity to the police officers. The Court then clarified the burden of proof to be followed by police in such matters, holding that the under the First Circuit's emergency aid doctrine, officers seeking to justify their warrantless entry need only demonstrate an *objectively reasonable basis* for believing that a person within a home needs immediate aid. Officers do not need to establish that their belief approximated probable cause that such an emergency existed.

LINK

Privilege: Montana Supreme Court Protects Privileged Documents from Open Meetings Disclosure; Concurrence Cites Stormy Daniels

Nelson v. City of Billings and Montana Municipal Interlocutory Authority, no. DA 17-0074 (Mont. Feb. 28, 2018).

The Montana Supreme Court, after conducting a lengthy inquiry into the legislative history of the state's 1972 Constitution, has concluded that a City Council work session to discuss litigation strategy with counsel was privileged and not subject to open meetings discovery; a concurrence cited a current event as an example where the public's right to know might outweigh the privilege.

In 2006, a Billings, Montana (City) police officer filed a civil rights lawsuit against the City, winning $1.6 million. The Montana Municipal Interlocutory Authority (MMIA), a government agency that provides insurance coverage to the City, paid the judgment in full. MMIA later determined that the City's policy did not cover certain portions of the judgment and sued the City for reimbursement of $900,000.

Plaintiff Kevin Nelson (Nelson) alleges that during the course of that litigation, the City held closed meetings-in violation of the Montana Constitution and Open Meeting laws-to discuss litigation strategy, including a work session on June 24, 2013, which Nelson had asked to attend. The City eventually agreed to pay MMIA $500,000 to settle the lawsuit.

Nelson formally requested "all documents in the matter of City of Billings/Feuerstein." He wrote that he would "pay any reasonable copying and postage fees of not more than $50.00" for the documents. MMIA informed him that the files contained privileged documents that would need to be reviewed by general counsel and redacted, and the costs of such work, involving thousands of pages, would far exceed $50.00. MMIA requested that Nelson agree to pay these costs before proceeding.

Nelson did not respond to the payment request and continued to seek documents. In 2014, Nelson filed a Petition for Release of Documents alleging that the closure of meetings during the litigation was a violation of the Montana Constitution and open meeting laws. He asked the court to compel the release of all documents, order an investigation to determine whether his constitutional rights were violated, and order other remedies. MMIA and the City provided Nelson with over seven thousand pages of documents and a privilege log detailing the documents withheld. MMIA and the City then moved for summary judgment on the basis that all non-privileged documents had been released. That motion was granted.

On appeal, Nelson argued that Montana Constitution Article II, Section 9, protects his right to know and allows him to examine any documents of public bodies or agencies of state government with only one exception: when individual privacy clearly exceeds the merits of public disclosure. He argued that because neither the City nor MMIA could claim any right to individual privacy, they could not refuse to produce any documents based on the attorney-client or attorney-work-product privileges.

MMIA and the City responded that privileged documents are not subject to disclosure under the Montana Constitution because they are not "documents ... of ... public bodies." Therefore, they reasoned, Article II, Section 9, does not require production of documents protected by the attorney-client or attorney-work-product privileges.

The Montana Supreme Court quoted Montana Constitution Article II, Section 9, which provides: "No person shall be deprived of the right to examine documents of all public bodies or agencies of state government and its subdivisions, except in cases in which the demand of individual privacy clearly exceeds the merits of public disclosure." The court stated that the language of Article II, Section 9, is "unique, clear, unambiguous, and speaks for itself without requirement for 'extrinsic aids or rules of construction, ' " and that it had previously construed the term "documents... of ... public bodies or agencies" to mean documents "generated or maintained" by

the bodies or agencies in relation to their "function and duties."

The court acknowledged that, as enumerated in the Montana Constitution, "the right to know is a fundamental right subject to the highest degree of protection." It pointed out, however that the right is not absolute:

> Even in the context of clear and unambiguous language, however, we have long held that we must determine constitutional intent not only from the plain meaning of the language used, but also in light of the historical and surrounding circumstances under which the Framers drafted the Constitution, the nature of the subject matter they faced, and the objective they sought to achieve.

The court had not previously considered whether any privileges protected by statute or common law at the time of adoption survived enactment of the 1972 Constitution, and "Nelson's appeal presents that question." Conducting an exhaustive survey of the 1972 Constitution's legislative history, the court concluded that "the Framers did not intend for Article II, Section 9, to abolish, supersede, or alter preexisting legal privileges applicable to government proceedings and documents." That same legislative history made it abundantly clear that there were many instances where the right to know was subordinate to other interests. These included the court's own deliberations, priest-penitent and attorney-client communications, discussions among jurors and the like.

The court considered the competing public policy interests at stake when the attorney-client privilege is asserted by governmental bodies: "[B]ecause they obstruct 'the truth-finding process' and-as applied to government agencies and public bodies-collide with the public's fundamental right to know under Article II, Section 9, the attorney-client and work-product privileges must be narrowly construed to effect their limited purposes."

Here, the City and MMIA had produced detailed privilege logs from which the validity of their privilege claims could be evaluated. In response, Nelson simply presented a blanket challenge, insisting that no documents could be withheld on privilege grounds consistent with Article II, Section 9. The court found ample grounds to uphold the privilege and deny production of the requested documents. Affirmed.

CONCURRENCE: Justice Laurie McKinnon concurred, but viewed the majority's opinion as a blanket conclusion that all privileged communications are inherently not subject to disclosure. She found an illustration of the majority's inadequate reasoning in a current news item:

> The Court's blanket exclusion of all privileged documents from Article II, Section 9, analysis is unwarranted, as there are some instances where the merits of public disclosure may indeed exceed the asserted privilege. To use a current national event as an example, it was recently revealed that Stormy Daniels (Stephanie Clifford) was paid $130,000 in the fall of 2016 to keep quiet about an alleged on-again, off-again affair between herself and Donald Trump. Daniels received the payment from a shell company in Delaware; a company set up by Trump's lawyer, Michael Cohen, for the sole purpose of passing the payment to Daniels. Cohen, in a recent statement, indicated that he used personal funds to facilitate the payment, but it is still unclear who actually paid Daniels the $130,000. It is also unclear whether and to what extent Trump himself was personally involved in any negotiation discussion or payment. Because Cohen is Trump's attorney, the attorney-client privilege likely protects most of the information regarding Trump's potential involvement. Under the Court's decision, if a similar matter was at issue in Montana, the public would be excluded from requesting any information regarding the monetary exchange pursuant to Article II, Section 9, if the information is protected by the attorney-client privilege. However, it is my view that the public should be able to utilize its right to know and ask for privileged information if the public's interest in the information is sufficiently weighty or compelling. Accordingly, in situations where attorney-client privileged documents are requested pursuant to Article II, Section 9, I believe the

appropriate approach is to balance the public's right to know with the weighty and compelling attorney-client privilege to determine whether, in that case, the merits of public disclosure exceed the privilege's protections.

LINK

Qui Tam: Relator Not Entitled to False Claims Proceeds where his Information was not Original and was not Provided Voluntarily

City of Chicago ex rel Rosenberg v. Redflex Traffic Systems, Inc. No. 17-1524 (7th Cir. Mar. 12, 2018).

A purported qui tam relator cannot recover proceeds where the general facts about the underlying bribery in which he participated were already in the public domain when he filed, and where, even if he provided additional non-public information, that data was not provided "voluntarily," but under apprehension of imminent legal action against him.

In what the Seventh Circuit Judge labeled a "classic case of chutzpah," Aaron Rosenberg (Rosenberg), a former employee of Redflex Traffic Systems, Inc. (RTSI), sought a share of the proceeds his former employer paid the City of Chicago (City) to settle the case against it arising out of the fraud Rosenberg helped perpetrate. The district court concluded that Rosenberg was neither the original source of the information on which the action was based, nor was he a volunteer within the meaning of the Chicago false claims ordinance that authorized the action. "Compounding his audacity even more," Rosenberg appealed.

In 2003, RTSI, had entered into a contract to manage the City's digital automated red light enforcement program (DARLEP). The Chicago Tribune (Tribune) ultimately broke a story revealing RTSI's bribery of a City official. Subsequent evaluation of the facts by the City revealed that between 2003 and 2012, RTSI had paid more than $2,000,000 to one or more City officials to retain the DARLEP contract. In 2013, the Tribune reported that RTSI had terminated Rosenberg for his "dishonest and unethical conduct" and filed a lawsuit against him. The Tribune continued reporting the scheme into 2014.

In April 2014, Rosenberg filed an action against RTSI pursuant to the *qui tam* provision of the City's False Claims Ordinance (FCO), alleging that RTSI engaged in a bribery scheme and other illegal activities to obtain a contract with the City. RTSI moved to dismiss Rosenberg as relator. When the City and RTSI subsequently reached a settlement in 2017, Rosenberg filed a petition for an award of a relator's share of the settlement proceeds and attorney's fees for his lawyer's contributions to the case.

The City's FCO closely mirrors the federal False Claims Act. Under the FCO, a party that engages in fraud against the City is liable for civil penalties and treble damages. An action may be brought on behalf of the City by either corporation counsel or a private person, a relator, through the FCO's *qui tam* provision. *Id.* § 1-22-030. The City may choose to intervene in a *qui tam* action or allow the relator to proceed alone. If the relator remains as a party, he is entitled to a percentage of any proceeds or settlement that is obtained. *Id.* In addition, the ordinance provides that a person who is entitled to a share of proceeds shall also receive reasonable attorney's fees and costs.

However, the FCO contains a public disclosure bar to suit, which states:

> No court shall have jurisdiction over an action under this section based upon the public disclosure of allegations or transactions in a criminal, civil, or administrative hearing, in a

> legislative, administrative, or Inspector General's report, hearing audit, or investigation, or from the news media, unless the action is brought by the corporation counsel or the person bringing the action is an original source of the information ...."

The Court of Appeals applied three tests to assess Rosenberg's entitlement as a relator: were the facts revealed by him already "publicly disclosed;" were the charges in his pleadings "based on" that already-disclosed information; and were his charges based on information which, even if similar to that already in the public domain, came from him as an "original source."

He failed all of these. It was indisputable that, when Rosenberg filed his complaint in 2014, the facts of the bribery scheme were already "publicly disclosed." And, although he added additional non-public facts in his complaint, his charges were undoubtedly "based on" the same facts as in the publicly-disclosed news accounts.

Finally, in order to be the "original source" of information, the FCO requires that the source is "an individual who has direct and independent knowledge of the information on which the allegations are based and has voluntarily provided the information to the city before filing an action under this section which is based on the information." The parties did not dispute that Rosenberg had direct knowledge of the scheme; however, he had not "voluntarily provided" the information. As the court explained it, to accomplish that purpose, "voluntary," as used in the FCO, "must mean something more than the absence of physical coercion or immediate legal compulsion." Even though Rosenberg had not been served with a subpoena, his disclosures to the City were hardly voluntary; they were motivated purely by his own self-interest. Authorities had requested that Rosenberg submit for an interview and provide information in exchange for an express immunity agreement.

> Having read the writing on the wall, Rosenberg divulged information about the bribery scheme in which he was an active and essential participant for nearly ten years. . . . To hold that Rosenberg's disclosure was voluntary simply because no formal legal process required his cooperation in the investigation would frustrate the FCO's essential goal of motivating true volunteers. . . .

The FCO's bar provisions foreclosed Rosenberg's entitlement to any proceeds. Affirmed.

LINK

Religion: Under "Ministerial Exception," Termination of Hospital Chaplain on Religious Grounds Cannot be Evaluated as Pretextual

Penn v. New York Methodist Hospital, no. 16-474 cv (2d Cir. Mar. 7, 2018).

Affirming the district court and citing Supreme Court Establishment Clause "ministerial exception" precedent, the Second Circuit has found that a religiously-oriented hospital's termination of a chaplain whose function was to provide spiritual support cannot be second-guessed by the judiciary.

Marlon Penn (Penn) served as a duty chaplain in the Department of Pastoral Care of the New York Methodist Hospital (Hospital), where his responsibilities including counseling end-of-life patients and their families. He was overlooked for various supervisory openings and was ultimately dismissed after several complaints by patients about indelicate statements while counseling, failure to administer last rites to a patient, and a sexual harassment complaint by a co-worker. He sued under Title VII of the Civil Rights Act (42 U.S.C. §1981) and the anti-

discrimination laws of the state and city of New York, alleging that the Hospital and one if its executives discriminated against him on the basis of his race and religion, and retaliated against him after he filed charges with the EEOC and the New York City Commission on Human Rights.

Defendants-Appellees moved for summary judgment, arguing that the "ministerial exception" afforded to religious employers under the Establishment and Free Exercise Clauses of the First Amendment governed their termination of Penn's employment. The district court granted the motion.

On appeal, the Second Circuit affirmed. It evaluated the ministerial exception, the purpose of which is to "ensure that the authority to select and control who will administer to the faithful - a matter 'strictly ecclesiastical,' . . .-is the church's alone." *Hosanna-Tabor Evangelical Lutheran Church & School v. E.E.O.C.*, 565 U.S. 171, 194-95 (2012). The exception has its roots in the colonial struggle against a "national church" and "operates as an affirmative defense to an otherwise cognizable claim, not a jurisdictional bar."

The district court had concluded that the "ministerial exception should be viewed as a sliding scale, where the nature of the employer and the duties of the employee are both considered in determining whether the exception applies." The more "pervasively religious" the relationship between employee and employer, the more salient the Free Exercise concern becomes. It noted "where an employee's role is extensively religious, a less religious employer may still create entanglement issues."

The Court of Appeals adopted the same sliding scale approach. Penn had challenged the Hospital's bona fides as a religious entity, focused on the fact that the Hospital had modified its certificate of incorporation to "sever all ties with the Methodist Church." The Circuit did not find this fact dispositive, noting that "vestiges of NYMH's religious heritage remain." The Hospital had steadfastly kept the appellation "Methodist" in its name. It had produced a booklet calling itself "the mother hospital of Methodism." And the Hospital's bylaws continued to require "significant representation" of the United Methodist Church on its board of Trustees.

More important was the nature of Penn's duties at the Hospital-to provide an "ecumenical program of pastoral care." Although he was not a minister, he was indisputably responsible for providing religiously-based spiritual guidance and comfort-regardless of the faith of the patient. The Hospital's determination about how well-and whether-Penn was fulfilling his role could not properly be second-guessed:

> Any jury hearing Mr. Penn's employment and discrimination claims therefore would have to determine how a minister should conduct religious services or provide spiritual support. Jurors would have to measure the importance of a patient's last rites, a chaplain's selection of a particular hymn, and a Catholic's access to Communion . . . . Any of these decisions, all indisputably necessary to the adjudication of Mr. Penn's claims-even if intertwined with secular concerns-"would plunge [the Court] into a maelstrom of Church policy, administration, and governance." (citations omitted).

In conclusion, the court found, "the First Amendment prohibits . . . [the courts] from inquiring into an asserted religious motive to determine whether it is pretextual." Dismissal affirmed.

LINK

Speech: "Unacceptable" Email Deemed Proper Grounds for Mayor to Decline Reappointment of City Planner

***Knopf v. Williams*, No. 17-8025 (10th Cir. Mar. 5, 2018).**

A city planner's email expressing concern about potential collusion between a city employee and a subcontractor was considered to be sent within the scope of the city planner's duties, making a mayor's decision to decline to reappoint the city planner lawful and not a First Amendment violation.

City planner Paul Knopf (Knopf), served on a 30-year project aiming to develop a public greenway along the Bear River over a series of phases laid out in the Evanston, Wyoming (City) master plan. While Knopf was not in charge of every individual section of the project, his role as city planner meant that he was involved with much of the work being done. Disagreement around a portion of the project Mr. Knopf was not directly overseeing arose when a sub-contractor requested $22,300 more than what had been originally budgeted for topsoil. The private engineering firm hired to work on this aspect of the project recommended denying the request because they believed the sub had been performing substandard work and had improperly calculated its costs. This recommendation was overruled by City officials, of whom included a City engineer whose brother owned the sub-contractor allegedly performing substandard work.

Knopf learned of this dispute from a contact at the private engineering firm and later from a public City Council meeting. He emailed the City Attorney to express his concerns about possible "collusion" between the city engineer and the sub-contractor in question. One month later, the Mayor met with Mr. Knopf and told him he would not be reappointed City Planner and that Knopf's email was unacceptable.

Knopf filed a complaint alleging First Amendment retaliation under Section 1983 and was granted summary judgment by the district court. On appeal, the Tenth Circuit found that Knopf failed to show a violation of clearly established federal law and that the Mayor was entitled to qualified immunity. The key question was whether the mayor reasonably could have believed, at the time he fired Knopf that a government employer could fire an employee because of speech stemming from almost thirty years of high-level involvement with the greenway project. Knopf had not shown that such a belief was unreasonable based on then-existing law. The court also held it would not have been "beyond debate" to a reasonable official that Knopf's email exceeded the scope of his official duties, given his extensive 30-year involvement in the project; therefore, the Mayor was entitled to qualified immunity on the facts of the case.

LINK

THIS JUST IN: A Novel Methodology for Assessing the Level of a Community's Opioid Use

A new company, Biobot Analytics, has just won a $10,000 prize for the most innovative idea pitched at the Mayor's track at the current SXSW (South-by-Southwest) event in Austin, Texas. Without going into extreme detail, suffice it to say that the company's "thinking outside the envelope" approach-already being used in Cambridge, Massachusetts, and about to launch in Cary, North Carolina-involves sampling sewage to discern the components thereof.

The article, produced by Governing.com and including a link to the actual Biobot pitch, is available HERE.

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