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Survey of 2011 Municipal Law Cases

Moveable sign remaining stationary for a season is a "condition of public property."

By: Darcy L. Proctor and Lucy B. Bednarek
Ancel, Glink, Diamond, Bush, DiCianni & Krafthefer, P.C., Chicago

A zoo visitor was injured after tripping over the steel leg of a sign at an outdoor café in the zoo. The First District Appellate Court held a moveable sign remaining stationary for a season is a "condition of any public property" under Section 3-106 of the Tort Immunity Act, which provides immunity for injuries caused by a condition of any public property intended or permitted to be used for recreational purposes.

Grundy v. Lincoln Park Zoo, 2011 Ill. App. (1st) 102686 (Aug. 1, 2011).

Failure to warn tennis players of steel beam did not rise to the level of willful and wanton conduct.

A tennis player was injured while playing tennis at a Park District after he allegedly ran into a structural steel beam that was placed at an angle and hidden by a tarp. The Fourth District Appellate Court affirmed the dismissal of the complaint, recognizing the Park District was immune from negligence under Section 3-106, which provides immunity for injuries caused by a condition of any public property intended or permitted to be used for recreational purposes. The plaintiff's allegations that the Park District failed to warn patrons about the beams or protect them from the danger posed by the beam did not rise to the level of willful and wanton conduct required to defeat Section 3-106 immunity.

Thurman v. Champaign Park District, 2011 Ill. App. (4th) 101024 (Aug. 10, 2011).

Tort Immunity Act protected police officers from failing to report a student's arrest to the school.

In July, 2004, a summer school student was arrested by Schaumburg police for aggravated criminal sexual assault of a minor child. The Schaumburg police did not report the arrest to the School District, despite the School Code's reporting requirements, and the existence of a reciprocal reporting agreement between the Villages and School District. Later that year, the summer school student went on to sexually assault his classmates in a special education program. The First District Appellate Court held the Village and police officers were immune from liability under Section 4-102 of the Tort Immunity Act, which provides immunity for failure to provide adequate police protection or service or failure to prevent the commission of a crime. In addition, the Court held the defendants were immune under Section 2-205 of the Tort Immunity Act, which provides immunity for the failure to enforce any law, including the School Code.

Doe v. Village of Schaumburg, 2011 Ill. App. (1st) 093300 (June 30, 2011).

Government Employees do not have First Amendment Right to File Union Petitions

By: Michael A. Airdo and Emily E. Gleason
Kopon Airdo, LLC, Chicago

On June 20, 2011, the U.S. Supreme Court decided *Borough of Duryea v. Guarnieri*, 131 S. Ct. 2488 (2011). There, a police chief's employment was terminated and subsequently reinstated after he prevailed with a union grievance against the Borough of Duryea. When the police chief returned to work, the Borough withheld $338.00 in overtime pay from his paycheck. The police chief sued, arguing that the withholding of overtime was in retaliation for filing and winning his union grievance, in violation of the First Amendment's "right… to petition the government for a redress of grievances." The jury ruled in favor of the police chief, and the Third Circuit affirmed. However, the Supreme Court vacated and remanded, holding that the First Amendment's Petition Clause did not apply to the case because the police chief's grievance was not a matter of public concern. Similar to lawsuits brought under the Speech Clause of the First Amendment, the Court held that lawsuits brought under the Petition Clause must involve matters of public concern in order to receive First Amendment protection.

Borough of Duryea v. Guarnieri, 131 S. Ct. 2488 (2011).

Municipal Election Ordinances must be passed by Referendum

In *Bocanegra v. City of Chicago*, 954 N.E.2d 859 (Ill. App. 1st Dist. 2011), the Illinois Appellate Court held that the City of Chicago's election law, which required every candidate to file a statement of financial interests within five days of qualifying as a candidate, was ineffective because it was not passed by a referendum in accordance with the Illinois Constitution. The Court explained that home-rule municipal elective offices are created by the Illinois legislature and, therefore, municipalities lack the power to add qualifications for any office without a municipal ordinance approved by a referendum, in accordance with the Illinois Constitution. Thus, a municipal election ordinance is essentially meaningless unless it is passed by a referendum.

Bocanegra v. City of Chicago, 954 N.E.2d 859 (Ill. App. 1st Dist. 2011).

Park District not Immune from Liability for Unnatural Accumulation of Snow and Ice

By: Theresa Bresnahan-Coleman
Langhenry, Gillen, Lundquist & Johnson LLC, Chicago

After attending a water aerobics class offered by the Chicago Park District, Plaintiff's decedent attempted to walk back to her car in the Park District parking lot. It had snowed several inches over the weekend and a Park District employee had shoveled the snow on the sidewalks by pushing the snow to the curb. As a result, cars were parked on or near the handicap parking space and blocked easy access to the parking lot, causing

Plaintiff's decedent to step between two parked cars where there was a build-up of snow and ice. While stepping over the snow, Plaintiff's decedent fell and broke her leg. After undergoing an operation to repair her broken leg, the decedent suffered brain damage and subsequently died.

Plaintiff filed a two-count complaint asserting a survival action and a wrongful death claim, alleging the Park District negligently created an unsafe accumulation of ice and snow on its property which caused injuries and the death of the decedent. The trial court certified a question raised by the Park District after denying the Park District's motion for summary judgment: does an unnatural accumulation of snow and ice constitute the "existence of a condition of any public property" as this expression is used in Section 3-106 of the Local Government and Governmental Employees Tort Immunity Act (745 ILCS 10/3-106 (West 2008)). The First District answered in the negative, holding that because the snow and ice, which are not permanent conditions of the property, were moved and stored negligently by the Park District, they became an unnatural accumulation, and the court could not say that the unnatural accumulation of snow and ice is a condition of public property under section 3-106 of the Act. The court reasoned that the snow was not affixed to the property so as to become part of the property itself. Therefore, the property itself was not unsafe, but rather the moving of the snow and ice was an unsafe activity on otherwise safe property. As a result, the Park District could not rely on the immunity provided by section 3-106 of the Act because the unnatural accumulation of snow and ice in this case did not constitute a condition of the property under the Act.

The court declined to follow *Callaghan v. Village of Clarendon Hills*, 401 Ill. App. 3d 287 (2010), in which the Second District held that although snow and ice are "theoretically moveable," they are not of the same nature as something that would be moved around and stored. The First District commented that the notion that snow and ice are "'theoretically moveable' belies reality."

A petition for leave to appeal has been filed with the Illinois Supreme Court.

Moore v. Chicago Park District, No. 1-10-3325, 2011 Ill.App. (1st) 103225 (June 28, 2011).

Ries v. City of Chicago

*By: Paul Rettberg**
Querrey & Harrow, Ltd., Chicago

The Illinois Supreme Court, in *Ries*, held that *Doe v. Calumet City*, 161 Ill. 2d 374, 641 N.E.2d 498 (1994) is no longer good law, overruling its holding that there is a general "willful and wanton" exception to other immunities.

To understand the impact of the ruling, some history is helpful. Among other holdings, *Doe* held that 745 ILCS 10/2-202 created a willful and wanton exception to immunities for failing to prevent a crime, 745 ILCS 10/2-402 and 407.

Yet just three years later, in *In re Chicago Flood Litigation*, 176 Ill. 2d 179, 680 N.E.2d 265 (1997), the Illinois Supreme Court appeared to take the exact opposite approach, holding that if a Tort Immunity provision does not contain an exception for willful and wanton misconduct, then no such exception exists, and specifically focusing on 745 ILCS 10/2-201.

In re Chicago Flood, was followed by a host of subsequent Illinois Supreme Court decisions following suit. *See, e.g., Harinek v. 161 North Clark Street Ltd. Partnership*, 181 Ill. 2d 335, 347, 692 N.E.2d 1177 (1998); *Village of Bloomingdale v. CDG Enterprises*, 196 Ill. 2d 484, 491-94, 752 N.E.2d 1090 (2001).

In *DeSmet v. County of Rock Island*, 219 Ill. 2d 497, 848 N.E.2d 1030 (2006), the Illinois Supreme Court looked to the specific facts of *Doe* to determine when Section 2-202 could create an exception to Section 2-402 immunity. *DeSmet* held that the police must exercise control over the scene where the injury occurred in order

for Section 2-202 to act as an exception to Section 4-102 immunity. Yet, *DeSmet* did not explicitly overrule *Doe*.

In *Ries*, the police placed a suspect in the squad car without handcuffs. There was no cage in the squad car, and the officer left the keys in the ignition. The suspect stole the squad car, and a high speed chase ensued. The Plaintiffs were catastrophically injured when the suspect ran a red light and crashed into their vehicle.

The Illinois Supreme Court that the immunity against injuries caused by an escaping prisoner, 745 ILCS 10/2-406, applied. The Court reasoned that the suspect was an "escaping prisoner" because the term "escaping prisoner" includes those in custody, and it is not limited to only those that are imprisoned. Because the suspect was an escaping prisoner when he caused Plaintiffs' injuries, Section 4-106 immunity applied.

The *Ries* Court rejected plaintiffs' argument that Section 2-202 and *Doe* created a "willful and wanton" exception to Section 4-106 immunity. The Supreme Court not only rejected this argument, it held that *Doe* and its progeny are not longer good law:

> Given that Doe's legal underpinning has been consistently repudiated by this court, there is simply no longer any reason to try to either apply or distinguish that case. We agree with those decisions that have held that *Doe* is no longer good law, and we overrule such cases as *Ozik v. Gramins*, 345 Ill. App. 3d 502, 279 Ill. Dec. 68, 799 N.E.2d 871 (2003), and *Cadena v. Chicago Fireworks Manufacturing Co.*, 297 Ill. App. 3d 945, 232 Ill. Dec. 60, 697 N.E.2d 802 (1998), which continued to treat *Doe* as good law following *Chicago Flood*. Because *Doe's* holding that section 2-202 provides a general willful and wanton exception to the immunities otherwise provided by the Tort Immunity Act is no longer good law, we will not read a willful and wanton exception into section 4-106(b).

Ries, 242 Ill. 2d 205, 950 N.E.2d 631 at 644.

Ries v. City of Chicago, 242 Ill. 2d 205, 950 N.E.2d 631 (2011).

Collins v. Town of Normal

The Fourth District Court of Appeals, in *Collins*, held that the one-year statute of limitations under the Tort Immunity Act, 745 ILCS 10/8-101, did not apply to a claim for Workers Compensation retaliatory discharge. The Court found that because the general exceptions to the Tort Immunity Act, 745 ILCS 10/2-101, excepted "liability" under the Worker's Compensation Act, the Tort Immunity Act, including its one year statute of limitations, did not apply to the cause of action.

In *Collins*, the plaintiff alleged that she was discharged in retaliation for exercising her Worker's Compensation rights. Sixteen months after her termination, the plaintiff sued, and the trial court dismissed, finding the action barred by the one year statute of limitations.

On appeal to the Fourth District, the plaintiff claimed that the Tort Immunity Act did not apply to the cause of action because of the exceptions found in 745 ILCS 10/2-101. As a result, plaintiff argued that the 5-year statute of limitations in 735 ILCS 5/13-205 applied.

Relying on *Raintree Homes, Inc. v. Village of Long Grove*, 209 Ill. 2d 248, 261, 807 N.E.2d 439, 447 (2004), the Appellate Court held that the exception for workers' compensation liability in Section 2-101 includes the application of the one-year statute of limitations.

The concurring opinion urged the Illinois Supreme Court to reconsider its holding in *Raintree Homes*, because the application of an statute concerning the statute of limitations is distinct from an immunity that limits "liability," and Section 2-101 only concerns "liability" under the Workers Compensation Act.

Collins appears to create a direct conflict with the First District Court of Appeals in *Halleck v. County of Cook*, 264 Ill. App. 3d 887 (1st Dist. 1994). It also appears to create discord with the Illinois Supreme Court's holding that the Tort Immunity Act precluded punitive damages against municipalities for worker's compensation retaliatory discharge. *See Boyles v. Greater Peoria Mass Transit District*, 113 Ill. 2d 545 (1986).

A petition for leave to appeal has been filed with the Illinois Supreme Court.

Collins v. Town of Normal, 2011 Ill. App. (4th) 100964, 951 N.E.2d 1285 (4th Dist. 2011) (petition for leave to appeal pending).

* Special thanks to **Brandon Lemley** for his valuable contributions to these case summaries.

Ineffective Medical Care in Police Custody

By: John M. O'Driscoll
Tressler LLP, Chicago

A known diabetic was detained in a facility that separated her from her drugs. She died in custody. The defendants were not entitled to summary judgment on plaintiff's claim of ineffective medical care after her mother died in police custody because the plaintiff sufficiently showed that: (1) each individual defendant was on notice of decedent's condition, (2) her medical needs were serious, and (3) their failure to act caused her harm.

Ortiz v. City of Chicago, No. 10-1775 (7th Cir. Aug. 25, 2011).

School District who Directed Teacher to Tend to "Shocking" Special Needs Student is not in Violation of Teacher's Due Process Rights

Special education students can cause difficult situations for school administration. In *Jackson v. Indian Prairie School Dist. 204*, 10-2290 (7th Cir. Aug. 11, 2011). A special education teacher filed a 1983 action against the school district alleging that defendant violated her substantive due process where: (1) the school principal directed her to tend to an autistic student with a long history of outbursts and who subsequently injured the plaintiff during a violent outburst; and (2) prior to the incident, the defendant repeatedly failed to transfer the student to an alternative school in spite of complaints registered by other teachers and parents of classmates. While the defendant's conduct might have been negligent, it did not rise to "shock the conscious" level required to impose liability for substantive due process violation where the student appeared to be calm just prior to the incident and where, prior to the incident, the student's behavior had generally improved in terms of fewer number of incidents. Summary judgment for the school district was affirmed.

Jackson v. Indian Prairie School Dist. 204, 10-2290 (7th Cir. Aug. 11, 2011).

Police get out of Videotaping Problem

In *Reher v. Vivo*, No. 10-2180 (7th Cir., Sept. 7, 2011), the appellate court upheld the defendants-police officials' motion for summary judgment in a section 1983 action. The Complaint alleged that defendants lacked probable cause to arrest plaintiff on a disorderly conduct charge stemming from an incident in which a

group of citizens (including one individual with whom plaintiff had a difficult history) accused plaintiff of filming their children in a neighborhood park. Filming others in public is not illegal. The accusations by the parents were not enough to support "probable cause" by itself. However, videotaping when accompanied by suspicious circumstances was found to constitute disorderly conduct. Additionally, one police officer who was aware of the difficult history between plaintiff and one accuser was entitled to qualified immunity in light of the complaints of parents at the scene. Moreover, the second officer was also entitled to qualified immunity where he could have reasonably, though mistakenly, believed that plaintiff was harassing children and alarming their parents. In sum, though there is actually more to this story (domestic entanglements), the growing availability of cameras is leading to more issues for police officers to have to resolve.

Reher v. Vivo, No. 10-2180 (7th Cir., Sept. 7, 2011).

The Board Can Watch Pornography in Order to Fire a Police Officer

In *Hurst v. Board of Fire and Police Commission for the City of Clinton*, 952 N.E.2d 1246 352 Ill. Dec. 20 (4th Dist. 2011), Plaintiff police officer sought administrative review of the board's decision to terminate his employment. He was terminated because monitoring software showed that plaintiff was watching porn on his work computer during work hours in violation of written policy. Plaintiff claimed the evidence was inadmissible as it was obtained in violation of the eavesdropping statute. The board admitted the evidence and terminated the plaintiff. The appellate court found that the evidence was properly admitted and termination upheld. It noted that the statute indicates that an electronic communication may be protected only if both the sending and receiving parties intend it to be private under circumstances that justify the expectation of privacy. His viewing of pornography was not a private communication. Further, the written department policy explicitly states that computer activity would be monitored. The evidence was properly considered by the Board.

Hurst v. Board of Fire and Police Commission, 2011 Ill. App. (4th) 100964 (July 12, 2011).

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