
GOVERNMENTAL IMMUNITY - NEW JERSEY

Turner v. Township of Irvington

Superior Court of New Jersey, Appellate Division - April 23, 2013 - A.3d - 2013 WL 1729241

Appeals court holds that immunity statute and provision of Tort Claims Act operate in combination to immunize township from liability for conduct of its 911 operators.

Residents, who placed calls to 911 based on conduct of resident's former boyfriend (who subsequently kidnapped and killed her), brought action against township and dispatchers, alleging negligence predicated on vicarious liability.

The court held that the statute immunizing 911 operators for conduct that is not wanton and willful, and general Tort Claims Act (TCA) provision which immunizes public entities for the wanton and willful conduct of their employees, operated in combination to immunize township from civil liability for conduct of its 911 operators, whether simply negligent or willful and wanton. Both statutory schemes shared common goal of expanding limitations on liability for public entities.

SCHOOLS - NEW YORK

Adami v. Warwick Valley Cent. School Dist.

Supreme Court, Appellate Division, Second Department, New York - April 24, 2013 - N.Y.S.2d - 2013 N.Y. Slip Op. 02703

School board granted summary judgment in student's personal injury claim arising from track & field accident.

Defendant school district was granted summary judgment in personal injury action by showing that plaintiff:

- Voluntarily engaged in the sport of track and field, including the discus event;
- Was aware of the possibility of being hit with a discus while participating in that activity;
- Understood the rules and procedures of the discus event, including those related to safety; and
- Understood the inherent risks associated with the sport.

Sadly, the court did not see fit to provide us with the undoubtedly hilarious details of the accident.

SCHOOLS - NEW YORK

Philippou v. Baldwin Union Free School Dist.

Supreme Court, Appellate Division, Second Department, New York - April 17, 2013 -

N.Y.S.2d - 2013 N.Y. Slip Op. 02556

School districts failed to establish, prima facie, that injured student assumed risk of being injured in wrestling match when mats that had been taped together came apart during the match.

Student and his mother brought personal injury action against two school districts involved in wrestling match, seeking damages for injuries allegedly sustained when two wrestling mats which had been taped together came apart during a match.

The Supreme Court, Appellate Division, held that school districts failed to establish, prima facie, that injured student assumed risk of being injured in wrestling match.

If the playing surface is as safe as it appears to be, and the condition in question is not concealed such that it unreasonably increases risk assumed by the players, the doctrine of assumption of risk applies. However, a board of education, its employees, agents and organized athletic councils must exercise ordinary reasonable care to protect student athletes voluntarily involved in extracurricular sports from unassumed, concealed or unreasonably increased risks.

The districts' moving papers failed to demonstrate, prima facie, that allegedly dangerous condition caused by improperly taped or secured mats did not unreasonably increase risk of injury inherent in sport of wrestling.

SCHOOLS - PENNSYLVANIA

Dallas School Dist. v. Northeast Pennsylvania School Districts (Health) Trust

Commonwealth Court of Pennsylvania - April 17, 2013 - A.3d - 2013 WL 1641341

Individual school districts not entitled to disgorgement of funds after withdrawing from health trust.

Two school districts brought civil action against health trust to compel an accounting and a disgorgement of funds from the trust following their withdrawal from the trust. The withdrawal occurred after the school districts became dissatisfied with the manner by which the trustees administered the trust.

The trial court sided with the school districts. The appeals court reversed.

The appeals court held that the members of the trust, including the school districts, delegated to the trust's board of trustees broad authority over the management of the affairs of the trust, including determining the amounts that member school districts would contribute to the trust fund and how any assets of the trust fund would be used or distributed. The appeals court found no abuse of the board's discretion and no grounds for the creation of separate, segregated trust accounts.

MUNICIPAL GOVERNANCE - PENNSYLVANIA

Parker Ave., L.P. v. City of Philadelphia

United States District Court, E.D. Pennsylvania - April 23, 2013 - Slip Copy - 2013 WL 1742498

City council's failure to pass ordinance to pave portion of street needed for property development

does not constitute due process, nor equal protection, violation.

Plaintiff had, over the past seven years, been seeking to develop his property with numerous residential units. While zoning was not an impediment and various necessary approvals from the city and the commonwealth had been obtained, the city council, despite the repeated requests of plaintiff, has never passed an ordinance to pave that part of the city street needed to access the property

Plaintiff sued the City of Philadelphia and the Philadelphia City Council under 42 U.S.C. § 1983 for violation of the Equal Protection Clause and the Due Process Clause of the Constitution.

As a result of the allegedly unconstitutional conduct of defendants, plaintiff asserts it has been prohibited "from reasonably using, developing and enjoying a tract of land it owns in the City" and has lost a substantial amount of money as a result. In addition to damages, it sought a writ of mandamus compelling the city and city council to authorize the paving of the street.

The defendants moved to dismiss on the ground that plaintiff has not stated a claim upon which relief can be granted under Rule 12(b)(6) of the Federal Rules of Civil Procedure.

The district court found no due process or equal protection violations and ruled in favor of the city.

ARBITRATION - TENNESSEE

Webb v. First Tennessee Brokerage, Inc.

Court of Appeals of Tennessee - April 23, 2013 - Slip Copy - 2013 WL 1737202

Purchaser of Lehman Brothers bonds not required to arbitrate dispute with broker; ensure that brokerage firm clients utilize enforceable arbitration agreements.

Account holder at First Tennessee Bank ("FTB") was induced by a financial advisor of FTB's brokerage subsidiary ("FTCB") to invest her entire savings in Lehman Brothers bonds. We all know how that movie ended.

Account holder sued and FTCB moved to stay the proceedings and compel arbitration.

The court of appeals affirmed the trial court's ruling that the account holder was not obligated to arbitrate for the following reasons:

- Unlike other brokerage firms, the agreement between investor and FTCB did not require arbitration in disputes between a customer and an investment advisor employed by the brokerage;
- The agreement was not arbitratable under Tennessee law as an unconscionable contract of adhesion;
- Claims of fraud in the inducement are not arbitratable; and
- The arbitration agreement relied upon by FTCB appears to have been inserted into the file at some later date and thus the plaintiff had not consented to arbitration.

NUISANCE ABATEMENT - TEXAS

RBIII, L.P. v. City of San Antonio

United States Court of Appeals, Fifth Circuit - April 23, 2013 - F.3d - 2013 WL 1748056

State's determination that it is faced with an emergency requiring a summary abatement is entitled to deference on the property owner's procedural due process challenge; relevant inquiry is not whether an emergency actually existed, but whether the state acted arbitrarily or otherwise abused its discretion in concluding that there was an emergency requiring summary action.

Property owner brought action against city, asserting Fourteenth Amendment procedural due process claim and Fourth Amendment unreasonable search and seizure claim arising from city's demolition of building on its property without prior notice to owner.

The court of appeals held that:

- District court abused its discretion when instructing jury on due process claim, and
- Erroneous jury instruction on due process claim also constituted abuse of discretion with respect to Fourth Amendment claim.

Government's abatement of nuisance by summary demolition of building, when carried out in accordance with procedural due process, is a reasonable seizure under the Fourth Amendment in the absence of any factors that outweigh governmental interests, and factors favoring the property owner will generally not outweigh the government's interest when it effects a procedurally adequate summary deprivation.

Fourth Amendment reasonableness of city's seizure and demolition of nuisance property will ordinarily be established when the substantive and procedural safeguards inherent in state and municipal property standards ordinances have been fulfilled.

If the State acts pursuant to a valid summary-action ordinance in effecting a pre-notice deprivation of property, the State's determination that it was faced with an emergency requiring a summary abatement is entitled to deference on the property owner's procedural due process challenge. In such cases, the relevant inquiry is not whether an emergency actually existed, but whether the State acted arbitrarily or otherwise abused its discretion in concluding that there was an emergency requiring summary action.

But the district court abused its discretion, when instructing jury on property owner's procedural due process challenge to city's demolition of building without prior notice, by instructing jury that city was excused from providing notice to owner only if there was "immediate danger to the public" and making no mention of city's compliance with valid summary-demolition ordinance. The instruction improperly cast central factual dispute as whether or not building posed immediate danger to public, when issue should have been whether city acted arbitrarily or abused its discretion in determining that the building presented immediate danger.

Reversed and remanded.

BONDS - ARKANSAS

First Arkansas Bank & Trust, Trustee v. Gill Elrod Ragon Owen & Sherman, P.A.

Supreme Court of Arkansas - April 18, 2013 - S.W.3d - 2013 Ark. 159

Supreme Court of Arkansas discusses the liability of issuer's counsel to purchasers in bond offering, finding: 1) no liability under state securities act; 2) no relationship giving rise to a duty under contract, negligence, or breach of a fiduciary duty; but 3) existence of a question of material fact as

to whether liability could flow to the law firm under the fraud exception to privity set out under the attorney-malpractice statute.

Developer acquired property and filed a petition with the city of Fayetteville to form a municipal property owners' district, which was approved. The district intended to issue tax-free municipal bonds in order to finance public works.

The district issued Series A and Series B bonds. Only Series B bonds are at issue in this case. Pursuant to the POS, the Series B bonds were "limited obligations of the District, to which the District has pledged the Capital Improvement Use Fee Revenues and a mortgage of the land located with[in] the District that is owned by the Developer." The Series B bonds were to be paid by collection of the Capital Improvement Use Fees.

Developer defaulted on payment of the Capital Improvement Use Fees on the Series B bonds. Subsequently, developer defaulted on the original mortgage securing the purchase of the development property, and the property was sold. Appellants sued the law firm that drafted the POS, alleging that the loss of security had compromised their Series B bonds and alleging violations of the Arkansas Securities Act, attorney malpractice, and other causes of action arising from a failure to disclose in the bond offering that the purchase mortgage was superior to the lien created by the Capital Improvement Use Fees obligation.

At issue in this lawsuit were causes of action alleged to arise from representations, lack of representations, or misrepresentations made at the time of the negotiation and purchase of unrated municipal-improvement bonds. The purchasers allege that the law firm had a duty to inform them of the mortgage on the real property and that it failed to inform them. Purchasers further allege that had they been informed of a mortgage on the real property to which improvements were to be made with bond proceeds, and that the Series B bonds were not secured by a first lien on the real property, they would not have purchased the bonds.

The Supreme Court of Arkansas held that:

- There exists no liability under the Arkansas Securities Act because "an attorney acting as the attorney for the issuer of securities is not liable to the ultimate purchasers and does not act as a seller, a control person, an agent, or anyone who materially aids in the sale of the securities;"
- There exists a question of material fact as to whether liability could flow to the law firm under the fraud exception to privity set out under the attorney-malpractice statute; and
- There was no relationship giving rise to a duty under contract, negligence, or breach of a fiduciary duty.

EMPLOYMENT - CALIFORNIA

Sabey v. City of Pomona

Court of Appeal, Second District, Division 2, California - April 16, 2013 - Cal.Rptr.3d - 3 Cal. Daily Op. Serv. 3799

Court of appeal holds that when a partner in a law firm represents a city at a personnel arbitration, due process prohibits city from being advised on its review of the matter by a different partner from the same firm.

Police officer petitioned for writ of mandate challenging his termination.

The court of appeal held that when a partner in a law firm represents a city at a personnel arbitration, due process prohibits city from being advised on its review of the matter by a different partner from the same firm.

When a partner in a law firm represents a department within a city at an advisory arbitration regarding a personnel matter, and when the city's decisionmaking body later reviews that arbitrator's award for confirmation or rejection, the principles of due process prohibit the decision maker from being advised on the matter by a different partner from the same law firm, since there is a clear appearance of unfairness and bias rendering the risk of actual bias too high to be constitutionally tolerable.

The attorney that advised the city council owed fiduciary duties of loyalty and care both to the firm and to the attorney that represented the department at the arbitration, and the attorney that advised the city council could have couched his advice in many different ways because the city council was vested with discretion about whether to accept the arbitration decision.

An attorney cannot act as both an advocate for an administrative agency and then as an advisor to the decision maker who reviews the result that the advocate achieved, but performance of both roles by government lawyers from the same law office is appropriate if there are assurances that the adviser for the decision maker is screened from any inappropriate contact with the advocate.

EMINENT DOMAIN - FLORIDA

Hillcrest Property, LLP v. Pasco County

United States District Court, M.D. Florida, Tampa Division - April 12, 2013 - F.Supp.2d - 2013 WL 1502627

Court strikes down novel eminent domain work-around in which the county would deny development permits to landowners that did not "voluntarily" convey – in fee simple and without compensation – that portion of their land that encroached into the development corridor.

Before 2025 Pasco County must build more and larger roads to accommodate the inevitable increase in automobile traffic. Preferring to avoid the payment of "just compensation" after acquiring the necessary land by eminent domain, Pasco County hatched a novel and effective, but constitutionally problematic idea, a very novel regulatory regime that is created by Pasco County's "Right of Way Preservation Ordinance."

The remarkable part of the regime, and the constitutional mischief, appear in the instance of a landowner whose land is encroached by the new transportation corridor but who plans to develop the remaining land, which adjoins the encroachment. The Ordinance requires Pasco County to deny the landowner's development permit and to forbid development of the land adjoining the new transportation corridor unless the landowner "dedicates" (conveys in fee simple) to Pasco County – for free – the land within the new transportation corridor.

If constitutional, the Ordinance undoubtedly would become quickly fashionable, as counties seize a singular opportunity to procure land for public use by the thrifty expedient of coerced conveyance rather than by the historically and constitutionally prescribed mechanism of eminent domain.

Alas, the court found the Ordinance "both coercive and confiscatory in nature and constitutionally offensive in both content and operation" and enjoined implementation.

BONDS - ILLINOIS

Barrett v. Henry

Appellate Court of Illinois, Second District - April 17, 2013 - N.E.2d - 2013 IL App (2d) 120829

Appeals court upholds the financing system in which bond proceeds are deposited into a working cash fund to enable the district to finance operations during the period before the property taxes levied for that purpose have been collected; legitimate alternative to the issuance of tax anticipation warrants.

Taxpayers filed tax objection complaints against county, seeking refunds for portions of their 2009 and 2010 property taxes that were collected to make payments on bonds issued by the school district. Taxpayers argued that the district abused its discretion in issuing the bonds.

Taxpayers objected to the deposit of bond proceeds into the school district's working cash fund, arguing that the district must first demonstrate that there has been a need for tax anticipation warrants in the most recent past or that there will be a continual need for tax anticipation warrants into the foreseeable future prior to 1) establishing a working cash fund and 2) increasing a working cash fund.

The court noted that the working cash arrangement is designed to enable the district to finance operations during the period before the property taxes levied for that purpose have been collected and serves as an alternative to the issuance of tax anticipation warrants.

The appeals court quoted from a prior Illinois Supreme Court case, stating that, "the working cash fund constitutes a revolving fund from which money may be transferred to other funds in anticipation of taxes to be collected for the purposes of such other funds, to be re-paid later out of the taxes levied for such other funds when collected, and a method is provided enabling the municipality to do business on a cash basis by transferring money from the working cash fund to other funds during the time between the levy of taxes for such other funds and the collection of the taxes so levied."

EMPLOYMENT - INDIANA

Mertz v. City of Greenwood

Court of Appeals of Indiana - April 12, 2013 - N.E.2d - 2013 WL 1497311

Court of appeals holds that city merit police commission had authority to discipline former assistant chief for conduct that occurred while demoted police officer served as assistant chief.

Police officer petitioned for judicial review of disciplinary decision by city merit police commission. Officer contended that the trial court erred when it concluded that the commission had authority to consider disciplinary action against him after he was removed as assistant chief for conduct that occurred while he was assistant chief.

The court of appeals held that city merit police commission had authority under city code and ordinance to discipline former assistant chief for conduct that occurred while police officer served as assistant chief.

Though under the code and ordinance the commission could not discipline an officer while that officer was serving as the chief or an assistant chief, officer remained a police officer subject to the same professional standards as other police officers, and the exception no longer applied after officer was demoted.

MUNICIPAL ORDINANCE - NEBRASKA

D-CO, Inc. v. City of La Vista

Supreme Court of Nebraska - April 12, 2013 - N.W.2d - 285 Neb. 676

Court upholds constitutionality of city ordinance requiring landlords to obtain a license to lease residential property and submit to periodic building code inspections, while exempting other residential property from those requirements.

Rental property owners brought action against city, seeking declaratory and injunctive relief and alleging that city ordinance establishing rental housing licensing and inspection program violated state constitution.

Under the ordinance, owners of rental property must obtain a license to lease the property to others and submit to periodic building code inspections of their rental property. The owners claimed that the ordinance's application to only rental property residences – and not to owner-occupied residences – was an arbitrary and unreasonable classification that violates Nebraska's constitutional prohibition against special legislation.

For purposes of state constitution's prohibition against special legislation, a legislative act constitutes "special legislation" if 1) it creates an arbitrary and unreasonable method of classification, or 2) it creates a permanently closed class. To be valid under state constitution's clause prohibiting special legislation, a legislative classification must be based upon some reason of public policy, some substantial difference in circumstances, that would naturally suggest the justice or expediency of diverse legislation regarding the objects to be classified.

The court concluded that the record showed that the city based its classification of rental property residences on a real distinction from other residential properties and that its distinctive treatment was reasonably related to legitimate goals. Protecting tenants' safety within the context of the landlord/tenant relationship creates a unique public policy concern that distinguishes rental properties from other residential properties.

Furthermore, because the renting of residential housing is a business, a city can reasonably require the owners of such housing to pay fees to offset the cost of regulating that business.

ZONING - NEW HAMPSHIRE

Town of Bartlett Bd. of Selectmen v. Town of Bartlett Zoning Bd. of Adjustment

Supreme Court of New Hampshire - April 12, 2013 - A.3d - 2013 WL 1497323

The Supreme Court of New Hampshire holds that the word "premises" in town zoning ordinance prohibiting off-premise signs included buildings and grounds associated with resort's general area, including ownership units and registration office, rather than a single lot of land.

Town board of selectmen appealed order of the superior court upholding a decision of town zoning board of adjustment (ZBA) finding that a sign erected by applicant, giving directions to registration office of resort, was permitted under town's zoning ordinance.

Selectboard approved landowner's application to place a sign on Route 302. The sign was erected at the westerly entrance to the resort area. At some point, an additional, smaller sign was affixed underneath the approved sign, reading "REGISTRATION .3 MILES BACK ON LEFT." The registration office to which the sign refers is the office at which patrons register for the resort. The office is located on a lot within the resort, separate from the lot on which the sign is located.

The Selectboard denied the resort's application to approve the second sign, citing the town ordinance that prohibits the erection of an outdoor sign "on any premises other than on the premises where the activity to which the sign pertains is located," and Section D, which prohibits off-premise signs "in all districts except as provided elsewhere in [the] Ordinance."

The Supreme Court disagreed, ruling that the word "premises" in town zoning ordinance prohibiting off-premise signs included buildings and grounds associated with resort's place, including ownership units and registration office, rather than a single lot of land. Although ordinance did not define "premises," it defined "lot" as tract, parcel, or plot of land, and, had it been intent of drafters of ordinance to interpret word "premises" as a single lot of land, they could have done so by using the word "lot."

TAX - NEW HAMPSHIRE

In re City of Nashua

Supreme Court of New Hampshire - April 12, 2013 - A.3d - 2013 WL 1499318

Supreme Court New Hampshire holds that only encumbrances on includable assets are deductable when calculating net assets for purposes of elderly exemption.

Taxpayer filed an application with the city for an elderly exemption for tax year 2011. The application listed total assets, not including the value of her residence, of $145,724.19. It also noted the existence of an equity loan secured by the taxpayer's residence in the amount of $42,000. To qualify for the elderly exemption under the city's ordinance, the taxpayer's net assets could not exceed $125,000, excluding the value of the taxpayer's residence. The city denied the exemption on the ground that the taxpayer's net assets exceeded $125,000.

The taxpayer appealed to the BTLA. She contended that because the statutory definition of "net assets" deducts the value of "good faith encumbrances," the amount of her equity loan should be subtracted from her total assets (excluding the value of her residence) to arrive at "net assets," thereby bringing her "net assets" below the prescribed limit. The BTLA agreed, and the City appealed.

The Supreme Court New Hampshire held that only encumbrances on includable assets are deductable when calculating net assets for purposes of elderly exemption, reversing the BTLA's decision.

Term "net assets" in statute providing elderly exemption from property taxes meant the value of all includable assets net of any encumbrances on those assets, rather than encumbrances on any assets of taxpayer, and therefore encumbrance on taxpayer's residence, which, pursuant to statute, was not counted as an asset in the net asset calculation, was not deducted in the net assets calculation in

determining applicability of exemption to taxpayer.

ZONING - NEW JERSEY

Mahwah Realty Associates, Inc. v. Township of Mahwah

Superior Court of New Jersey, Appellate Division - April 15, 2013 - A.3d - 2013 WL 1500362

Under statute governing notice of a hearing on an amendment to zoning ordinance proposing a change to the classification or boundaries of a zoning district, it is only when a boundary change is proposed that the notice must identify such change by street names, etc.

Health club owner brought action against township, challenging ordinance that sought to include health and wellness centers and fitness and health clubs as principal permitted uses in general industrial and industrial park zones. Owner contended that the ordinance changed the "classification" of those zones, thereby requiring compliance with notice provisions.

The appeals court held that:

- Ordinance changed the classification of industrial zones, thus triggering statutory notice requirements; but
- Under statute governing notice of a hearing on an amendment to zoning ordinance proposing a change to the classification or boundaries of a zoning district, it is only when a boundary change is proposed that the notice must identify such change by street names, common names or other identifiable landmarks, and by reference to lot and block numbers.

ZONING - NEW HAMPSHIRE

Trefethen v. Town of Derry

Supreme Court of New Hampshire - April 12, 2013 - A.3d - 2013 WL 1497321

The Supreme Court of New Hampshire holds that, because original 30-day filing deadline fell on a Saturday, property owners could timely file their appeal with the zoning board of adjustment on the following Monday.

Property owners sought rehearing after township's Zoning Board of Adjustment (ZBA) granted a special exception to the lessee of abutting property, permitting the property to be used as a day care facility. The ZBA denied rehearing, and property owners appealed. The superior court dismissed, ruling that the property owners did not satisfy the 30-day filing deadline.

The Supreme Court of New Hampshire held that because original 30-day filing deadline fell on a Saturday, property owners could timely file their appeal on the following Monday.

GOVERNMENTAL IMMUNITY - NEW YORK

Banigo v. Board of Educ. of Roosevelt Union Free School Dist.

Supreme Court, Nassau County, New York - April 15, 2013 - N.Y.S.2d - 2013 N.Y. Slip Op. 23126

Legitimate elimination of teacher position created immunity against unlawful termination claim; filing of EEOC complaint does not satisfy notice requirement prior to initiation of lawsuit against the district.

Teacher brought action against board of education, school district, and superintendent, alleging violations of education law, age discrimination in particular.

The Supreme Court held that:

- Superintendent was entitled to governmental immunity; and
- Filing of complaint with Equal Employment Opportunity Commission (EEOC) did not satisfy notice requirement.

The court found that superintendent was entitled to governmental immunity from teacher's claims that her termination violated various education law provisions, even if his motives were venal or malicious, where teacher had no right to continued employment once her position was eliminated and elimination was act of discretion within superintendent's powers.

Teacher's filing of complaint with Equal Employment Opportunity Commission (EEOC) did not satisfy notice requirement provision of education law, required before bringing claims regarding her termination against board of education and school district. The EEOC complaint was filed eight months after her discharge, and it was not served upon board or district.

GOVERNMENTAL IMMUNITY - VIRGINIA

Board of Sup'rs of Fluvanna County v. Davenport & Co. LLC

Supreme Court of Virginia - April 18, 2013 - S.E.2d - 2013 WL 1687514

Supreme Court of Virginia holds that county board of supervisors waived its legislative immunity in bond-related action against its financial advisor.

County board of supervisors brought action against board's financial advisor alleging breach of fiduciary duty, actual fraud, gross negligence, constructive fraud, unjust enrichment, breach of contract, and breach of the Virginia Securities Act in connection with advice rendered to the board regarding a bond issuance.

The Supreme Court, Leroy F. Millette, Jr., J., held that board waived legislative immunity in regards to issues relating to complaint against financial advisor.

The advisor argued that the court should dismiss the complaint, as it violated the separation of powers doctrine because the elements of the claims and advisor's defenses required the court to adjudicate issues not properly before the judiciary. The circuit court agreed, holding that the separation of powers doctrine prohibited the court from resolving the dispute because to do so would require inquiry into the motives of the board.

The Supreme Court of Virginia reversed, finding that County waived legislative immunity, and thus, immunity did not bar action against county's financial advisor, by: 1) declining to assert legislative immunity; 2) voluntarily filing a complaint that, due to the Board's burden of proof, involved issues protected by legislative immunity; and 3) making an unequivocal waiver of protection from inquiry into legislative motivation in the text of its complaint.

SECURITIES - CALIFORNIA

McDaniel v. Wells Fargo Investments, LLC

United States Court of Appeals, Ninth Circuit - April 9, 2013 - F.3d - 2013 WL 1405949

Federal securities laws held to preempt suits by investment advisors alleging that banks' in-house trading policies amount to forced-patronage in violation of California labor law.

Federal law requires brokerage firms to take measures reasonably designed to prevent their employees from misusing material, nonpublic information. To meet that obligation, defendants Wells Fargo, Morgan Stanley, and Merrill Lynch adopted policies generally forbidding their financial advisors from opening self-directed trading accounts outside the firm.

Former California employees of the firms sued, contending that the firms' trading policies allowing members to open self-directed trading accounts only in house, thus force each "employee … to patronize his or her employer … in the purchase of [a] thing of value" and thus amount to forced patronage in violation of section 450(a) of the California Labor Code.

The firms raised the defense of preemption. They contended that section 450(a) is an obstacle to the accomplishment of a significant objective of federal securities law – namely, that brokerage firms use their discretion to adopt whatever trading polices they think best suited to preventing insider trading and similar abuses.

After analysis, the appeals court affirmed the district court's ruling that the Securities Exchange Act and related SRO rules preempt the employees' forced-patronage suits.

EMPLOYMENT - CALIFORNIA

Wedbush Securities, Inc. v. Stephen Kelleher

Court of Appeal, First District, Division 4, California - April 9, 2013 - Not Reported in Cal.Rptr.3d

FINRA arbitration panel finds firm's failure to compensate the head of its tax-exempt sales and trading desk "morally reprehensible."

Plaintiff is an experienced municipal bond trader who went to work for a financial services firm as the head of its tax-exempt sales and trading desk.

Several years later, plaintiff filed a "Statement of Claim" (SOC) with the Financial Industry Regulatory Authority (FINRA), the designated adjudicator of any dispute between plaintiff and the firm concerning his compensation. The SOC outlined the basic facts relating to plaintiff's claim for unpaid compensation, and sought more than $6 million against the firm.

A hearing was held before a three-person panel. The panel awarded plaintiff $3.5 million in compensation the panel found was owed because of the firm's "morally reprehensible failure and refusal to compensate" plaintiff in a timely fashion.

The firm filed suit to vacate the arbitration award, claiming: 1) error by the panel in denying the firm's request to postpone the arbitration hearing; 2) error by the panel in excluding the firm's late proffered evidence concerning the company's investigation into possible regulatory irregularities by

plaintiff and/or his department; and 3) the failure by one of the arbitrators to disclose a ground for his disqualification.

The appeals court found no error and confirmed the award.

EXEMPT ORGANIZATIONS - COLORADO

Larimer County Board of Commissioners, et. al. v. Colorado Property Tax Administrator and YMCA of the Rockies

Colorado Court of Appeals, Div. V - April 11, 2013 - P.3d - 2013 COA 49

Court holds that Board of Assessment did not apply the proper legal standards when it denied a YMCA facility both religious purpose and charitable use tax exemptions.

The Young Men's Christian Association of the Rockies and the Colorado Property Tax Administrator appealed the Board of Assessment Appeals orders finding that the YMCA was not entitled to a charitable use exemption or a religious purposes exemption from property taxes, except for its chapels and religious activity center.

As to the religious purposes exemption, the court or appeals concluded that the Board did not apply the proper legal standards and, therefore, erred as a matter of law.

The majority of the Board's order identified evidence in the record related to the YMCA's application. However, in its analysis, the Board did not address the YMCA's declaration of religious purposes contained in its application, the effect of the declaration's presumed validity, or whether the presumption had been overcome. Because such declarations are presumptive with regard to the religious purposes for which property is used under section, the Board erred as a matter of law.

As to the charitable use exemption, the court of appeals again found that the Board did not apply the correct legal standards and thus erred as a matter of law.

In its order, the Board repeatedly said that it was applying a statutory presumption against exemption in this case. However, this presumption was not accurate in light of the applicable constitutional provisions and more recent supreme court authority. The Colorado Constitution provides that property that is used solely and exclusively for strictly charitable purposes shall be exempt from taxation. To that end, the court strictly construes what constitutes a charitable purpose but liberally construes the means used to achieve it.

Based on the record, the appeals court concluded that the Board did not properly consider whether the YMCA used the properties solely and exclusively for strictly charitable purposes.

The YMCA contended that remand was unnecessary because the relevant facts are undisputed, and that under the court of appeals' standard of review, it may conclude as a matter of law that the YMCA is entitled to one or both exemptions. Therefore, the YMCA asked the court to uphold the tax administrator's determinations.

Although it agreed that the Board did not apply the correct legal standards, it could not conclude that the tax administrator's findings necessarily should be reinstated. "These are complex applications that involve a significant amount of evidence and testimony." Moreover, both the religious purposes and charitable use exemptions allow for partial exemptions. Therefore, remand is necessary because the court could not make the factual findings required to review the tax

administrator's determinations.

SCHOOLS - FLORIDA

Hatcher ex rel. Hatcher v. DeSoto County School Dist. Bd. of Educ.

United States District Court, M.D. Florida, Fort Myers Division - April 5, 2013 - Slip Copy - 2013 WL 1395810

Court declines to let high school principal off the hook – either officially or individually – in student's First Amendment suit.

High school student filed suit against school district and principal, asserting that they interfered with her First Amendment right to organize and participate in the National Day of Silence and have asserted again this year that she will not be allowed to participate as she proposes.

The principal sought dismissal of the complaint, arguing, *inter alia*, that: 1) the official capacity claim against her is duplicitous of the claim against the school district; 2) the individual capacity claim against her for injunctive relief is not available to plaintiff; and 3) the individual capacity claims against her are barred by qualified immunity.

The court agreed that an official capacity claim may be redundant when the entity is also a named defendant. The school board, however, was contesting any liability based on the principal's conduct, and therefore it remained plausible at this stage of the proceedings that a separate official capacity claim could be maintained against her.

As to the principal's assertion that the claim for injunctive relief must be dismissed because injunctive relief against a government official in her individual capacity is not appropriate with regard to that defendant's official duties, the court found that personal liability under 42 U.S.C. § 1983 is available when an official's allegedly unconstitutional actions are "within the official's authority and necessary to the performance of governmental functions." The Court saw no reason why such personal liability cannot be remedied by injunctive relief.

The court also found that the principal was not entitled to qualified immunity, which provides "complete protection for individual public officials performing discretionary functions insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." The complaint alleged facts showing the principal was operating in her discretionary capacity as principal of the high school. The Complaint also alleged facts showing that the principal violated plaintiff's clearly established First Amendment rights.

Although not at issue in this stage of the proceedings, the court made it abundantly clear that the school district's policy of forbidding any and all protests on school grounds would be going down in flames.

EMPLOYMENT - GEORGIA

Demaree v. Fulton County School Dist.

United States Court of Appeals, Eleventh Circuit - April 8, 2013 - Slip Copy - 2013 WL 1395791

U.S. Court of Appeals finds rational basis for elimination of all school orchestra and band positions, denying Equal Protection claim.

Entire cadre of elementary school orchestra and band teachers lost their jobs during a reduction in force ("RIF") implemented by the school district. Teachers sued, alleging that the school district violated their rights under the Equal Protection Clause of the United States and Georgia Constitutions.

The RIF described a five-step analysis considering factors of performance and tenure. The positions of elementary orchestra and band school teachers, however, were not eliminated through this five-step analysis. Instead, the school district voted to non-renew all elementary band and orchestra teachers because those positions were deemed "non-essential" functions. These positions were described as "programs/functions eliminated."

One group besides elementary orchestra and band teachers was also placed in the "programs/functions eliminated" – Grades 1 through 3 paraprofessionals. However, the 165 Grades 1 through 3 paraprofessionals were not eliminated as a group like the elementary orchestra and band teachers; rather, they were analyzed through the five-step RIF process. This resulted in some of the Grades 1 through 3 paraprofessionals' continued employment in other paraprofessional positions.

Plaintiffs alleged that they were similarly situated with the Grades 1 through 3 paraprofessionals and that the school district had no rational basis for treating the two groups differently.

"Because Plaintiffs have failed to meet their burden of negating 'every conceivable basis which might support' the RIF's classification, the district court did not err in rejecting their Equal Protection claim."

ELECTIONS - ILLINOIS

Atkinson v. Schelling

Appellate Court of Illinois, Second District - April 9, 2013 - N.E.2d - 2013 IL App (2d) 130140

Appeals court affirms electoral board's decision that mayoral candidates were entitled to rely on village clerk's miscalculated minimum signature number, citing equitable estoppel.

Two candidates timely filed nomination papers to have their names appear on the ballot for the office of mayor. One candidate's papers contained 110, the other's 105. Both candidates relied on a letter from the village clerk stating that mayoral candidates must obtain a minimum of 80 signatures.

Petitioner filed objections to the candidates' nominating papers, arguing that the papers did not contain the minimum number of signatures required by section 10–3 of the Illinois Election Code, which in this case was actually 123. All parties subsequently agreed that the village clerk had miscalculated the formula contained in section 10-3.

The Electoral Board overruled petitioner's objections and ordered the candidates' names to be included on the ballot, citing equitable estoppel. The trial court affirmed the Electoral Board's decisions, as did the appeals court.

EMPLOYMENT - ILLINOIS

Cromwell v. City of Momence

United States Court of Appeals, Seventh Circuit - April 12, 2013 - F.3d - 2013 WL 1490099

U.S. Court of Appeals holds that police department employee handbook did not give terminated officer a constitutionally protected property interest in continued public employment.

Former city police officer brought action against city alleging that his termination was procedurally inadequate under the Due Process Clause because the police department rules and regulations, adopted by city ordinance, gave him a constitutionally protected property interest in continued public employment.

Because employment relationships in Illinois are presumed to be at will, establishing an expectation of continued employment requires a clear statement made in some substantive state-law predicate. In this case the officer argued that the presence in the city police department's rules and regulations of a few explicit grounds for disciplining nonprobationary employees created a clear promise of continued employment for nonprobationary employees in the absence of cause for termination, sufficient to give rise to a protected property interest under the Due Process Clause. In contrast, the rules and regulations provided that probationary employees could be fired at any time for any reason.

The court began its analysis by noting that the listed grounds for disciplining nonprobationary employees were extremely broad, and, more importantly, did not purport to list all permissible grounds for termination.

Under Illinois law, promises made in an employee handbook can in certain circumstances give rise to a legitimate claim of entitlement to continued employment sufficient to be protected as a property interest by due process. An employee handbook will create an enforceable due process right to a protected property interest in continued employment only if the traditional requirements for contract formation are present, the first of which is that the promise must be clear enough that an employee would reasonably believe that an offer has been made. The promise cannot be a mere procedural guarantee, but rather, substantive criteria limiting the state's discretion is required in order for a property interest to be created.

The court of appeals held that no such contract had been formed here, and thus the officer did not have a protectable property interest in continued employment.

MUNICIPAL LIABILITY - LOUISIANA

Broussard v. State ex rel. Office of State Bldgs., Under Div. of Admin.

Supreme Court of Louisiana - April 5, 2013 - So.3d - 2012-1238 (La. 4/5/13)

Supreme Court of Louisiana holds that defective condition – misaligned elevator in a state building – is more properly considered an unreasonably dangerous condition where comparative fault is applicable, rather than an open and obvious hazard where no duty is owed.

Delivery driver, who sustained back injury while pulling loaded dolly into misaligned elevator in state building, brought premises-liability action against state. A jury returned a verdict in driver's favor. The appeals court held the jury's factual determination that the elevator's defective condition

presented an unreasonable risk of harm was manifestly erroneous because the defect was open and obvious, and reversed.

The supreme court granted driver's writ to further examine, under the manifest error doctrine, whether a defective condition is more properly considered an open and obvious hazard where no duty is owed, rather than an unreasonably dangerous condition where comparative fault is applicable.

The Supreme Court of Louisiana held that:

- Elevators were part of state building, for purposes of state's liability under civil code article governing damage caused by ruin of building;
- Evidence supported jury's finding that one and one-half to three inch offset between floor of elevator and floor of state building's lobby presented unreasonable risk of harm; and
- Evidence supported jury's finding that elevator's defective condition was not open and obvious to all.

The state, therefore, breached its duty of care by failing to remedy the defect or warn of its existence until the defect could be remedied.

Although the elevator served a valuable societal function, and although no prior injuries had been reported, the evidence indicated that the public did not ordinarily anticipate offsets between floors of elevators and buildings. Numerous individuals had tripped due to building's misaligned elevators and inexpensive steps could have been taken to warn employees and visitors of hazard posed by elevator.

UNIONS - MARYLAND

Mayo v. Board of Educ. of Prince George's County

United States Court of Appeals, Fourth Circuit - April 11, 2013 - F.3d - 2013 WL 1459249

Court holds that temps are not third-party beneficiaries under the CBA between school board and union, and therefore not entitled to bring a breach of contract action against the school board.

Temporary employees of board of education filed a class action complaint asserting employee-compensation claims against the school board and union. They alleged that even though the collective bargaining agreement excluded "temporary employees" from the bargaining unit, they were entitled to the benefits of an arbitration award entered as the result of an arbitration between the school board and the union, as well as benefits from the underlying CBA.

The court of appeals concluded that temps were not third-party beneficiaries under the CBA between school board and union, and therefore could not bring a breach of contract action against the school board. The CBA explicitly excluded temporary employees from coverage, and although the CBA did allow the use of substitute or temporary employees to fill "authorized positions" – which would make those employees part of the bargaining unit – it did so to protect those positions for members of the bargaining unit.

ARBITRATION AWARD - MASSACHUSETTS

Kaplan v. Shanahan

Appeals Court of Massachusetts - April 10, 2013 - Slip Copy - 83 Mass.App.Ct. 1124

Court affirms arbitration award in which prevailing party was awarded attorneys' fees, as the parties had agreed to be bound by FINRA arbitration rules, which permit such fees.

Plaintiffs claimed error in a judgment entered by a judge in the superior court confirming an arbitration award. The plaintiffs maintain that the arbitrators exceeded their authority when they awarded the defendants their fees because no authority existed for such an award.

The defendants countered, and the arbitrators agreed, that pursuant to the underlying contract and the rules of the Financial Industry Regulatory Authority (FINRA) to which the plaintiffs agreed to be bound, the circumstances of this case permitted attorneys' fees. The judge agreed with the defendants, holding that according to the FINRA Dispute Resolution Arbitrators' Guide, attorney's fees are allowed when the contract includes a clause that provides for the fees and the all of the parties request or agree to such fees, as was the case in this matter.

The plaintiffs filed a FINRA "Arbitration Submission Agreement" stating that they would agree to abide by any award rendered. The parties filed several claims and asked for attorney's fees to be decided as part of the arbitration award. Arbitration award affirmed.

MUNICIPAL CONTRACTS - MINNESOTA

Rochon Corp. v. City of St. Paul

Court of Appeals of Minnesota - April 8, 2013 - N.W.2d - 2013 WL 1395596

A prospective contractor for a municipal project that successfully challenges a bid-submission process and recovers under the Minnesota Uniform Municipal Contract Law cannot circumvent the prohibition of attorneys' fee awards by claiming that the contract violation entitles it to attorneys' fees under Minnesota's private attorney general statute.

Bidder challenged the district court's refusal to award attorney fees and litigation costs incurred after it successfully challenged city's bidding process for a municipal-contracting project. Bidder was awarded the full costs of its bid submission as allowed under the Minnesota Uniform Municipal Contracting Law (UMCL). Because the UMCL unambiguously prohibits the award of attorney fees under these circumstances, the court declined to adopt bidder's argument that it was entitled to attorney fees and costs under Minnesota's private attorney general statute.

The Private AG statute provides private litigants the right to commence a civil action and recover damages, including attorneys' fees, if the claimed injury stems from a legal violation that would normally fall within the purview of the attorney general's investigatory powers. Such injuries include "unfair, discriminatory, and other unlawful practices in business, commerce, or trade." The statute contains a nonexhaustive list of applicable statutory sections. The UMCL is not included.

Because the bidder had already received bid-preparation costs under the UMCL, it was required to allege a viable additional claim falling within the Private AG statute to be eligible to recover under its provisions. Otherwise, the UMCL's prohibition of awarding attorney fees will govern. Bidder pointed to the city's violation of its own ordinances and instructions regarding the project. The court stated that, while these claims certainly allege unfair and unlawful practices, they fail to differentiate themselves from the governing tenets of the UMCL and its prohibition of awarding

attorney fees.

MUNICIPAL ORDINANCES - MINNESOTA

State v. McElroy

Court of Appeals of Minnesota - April 8, 2013 - N.W.2d - 2013 WL 1393622

City ordinance restricting the volume of music emanating from an electronic device located within a motor vehicle that is being operated on a public street is not unconstitutionally overbroad or vague.

Local ordinance prohibits "the operation of any electronic device used for the amplification of music or other entertainment, which is located within a motor vehicle being operated on a public street or alley, or in commercial or residential parking facilities, which is audible by any person from a distance of fifty (50) feet or more from the vehicle."

Individual challenged his conviction for violating the ordinance, arguing that: 1) the ordinance is unconstitutionally vague and overbroad; 2) the state failed to prove the element of amplification beyond a reasonable doubt; and 3) the district court erred by instructing the jury that it must reach a verdict.

The court of appeals held that the ordinance is neither vague nor overbroad, and thus constitutional. And because the evidence was sufficient to sustain appellant's conviction, and the district court properly instructed the jury, the conviction was affirmed

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GOVERNMENTAL IMMUNITY - NEW HAMPSHIRE

Ojo v. Lorenzo

Supreme Court of New Hampshire - April 3, 2013 - A.3d - 2013 WL 1316980

Supreme Court of New Hampshire holds that grand jury's finding of probable cause did not retroactively establish probable cause at time or arrest, declines to extend immunity to arresting officers.

Arrestee sued arresting officer and police department for false imprisonment and malicious prosecution. The superior court granted defendants' motion to dismiss on ground of they were immune from suit because the grand jury found probable cause in the prior criminal prosecution.

On appeal, the Supreme Court of New Hampshire held that:

- Grand jury's probable cause finding did not establish probable cause at time of arrest, so as to entitle officer to immunity;
- Indictments did not collaterally estop arrestee from establishing that probable cause did not support his arrest;
- Arrestee's stated claims not barred by immunity;
- Finding of probable cause to bind arrestee over did not collaterally estop him from establishing that probable cause did not support his arrest;
- Police did not establish probable-cause defense to false imprisonment claims; and
- Indictments defeated malicious prosecution claim.

"In conclusion, we repeat that the 'public simply cannot afford for those individuals charged with securing and preserving community safety to have their judgment shaded out of fear of subsequent lawsuits or to have their energies otherwise deflected by litigation, at times a lengthy and cumbersome process.' We understand that '[p]olice officers are trusted with one of the most basic and necessary functions of civilized society, securing and preserving public safety.' Nonetheless, at this stage of the proceeding, the defendants have not demonstrated that they are entitled to immunity from suit, or that probable cause supported the plaintiff's arrest. We note that if further factual development of the record establishes the lack of any genuine issue of material fact regarding the existence of probable cause for the plaintiff's arrest, the summary judgment procedure remains available to the defendants to resolve this litigation short of a trial."

MUNICIPAL LIABILITY - NEW YORK

Vega v. 103 Thayer Street, LLC

Supreme Court, Appellate Division, First Department, New York - April 2, 2013 - N.Y.S.2d - 2013 N.Y. Slip Op. 02169

Appeals court finds that ambiguous symbol on city DOT map raised a triable issue of fact as to whether the city had prior written notice of pedestrian hazard.

Pedestrian who allegedly tripped and fell as result of hole in pedestrian ramp brought personal injury action against city.

The city moved for summary judgment on the ground that plaintiff could not prove prior written notice to the city as required under the administrative code because the Big Apple map received by the Department of Transportation on the date of the accident did not indicate the specific marking (a circle) for a "hole or other hazardous depression" at the location of the accident.

The trial court granted the city's motion for summary judgment dismissing the complaint. Plaintiff appealed.

The appeals court reversed on the ground that the city failed to make a prima facie showing of entitlement to judgment as a matter of law because the markings on the Big Apple map it submitted were ambiguous, thus raising an issue of fact as to whether it had prior written notice of the alleged defect.

TAX - OHIO

Akron City Sch. Dist. Bd. of Edn. v. Summit Cty. Bd. of Revision

Court of Appeals of Ohio, Ninth District, Summit County - April 10, 2013 - Slip Copy - 2013 - Ohio- 1419

Standing to challenge a county's property valuation, requires that one must be the legal title holder of real property within the county and not merely the holder of an equitable interest, in this case a long-term lease with a purchase option.

A nursing facility was sold twice in one year: first, for $17,620,000, and later for $6,497,886. The county had valued the property at $3,137,460 for that year.

The Board of Education for the Akron City School District filed a complaint with the Board of Revision, seeking an increase in the property's valuation. The Board of Revision found that the property's fair market value was $3,137,460. The School Board appealed the Board of Revision's decision to the Board of Tax Appeals, which determined that the true fair market value of the property was $17,620.000 as the second sale was not a true arms-length transaction.

The court of appeals confirmed the Board of Tax Appeals' ruling that lessee of the property did not have standing to challenge the valuation, even though its lease contained a purchase option. To have standing to challenge a valuation, one must be the legal title holder of real property within the county, and not merely the holder of an equitable interest. In the absence of standing, the challenge to the valuation was moot and the Board of Tax Appeals determination was affirmed.

UNIONS - ALASKA

Plumbers & Pipefitters, Local 367 v. Municipality of Anchorage

Supreme Court of Alaska - March 29, 2013 - P.3d - 2013 WL 1281791

Supreme Court of Alaska affirms superior court's holding that municipal code limited its equitable power to impose contract conditions as part of a permanent injunction in collective bargaining dispute.

Union and municipality entered into collective bargaining to renew the union's expiring contract. When negotiations broke down, the parties entered into arbitration, but the arbitrator's proposed decision failed to garner the necessary municipal assembly votes to become binding on the parties.

Under the municipality's labor ordinances, the assembly's failure to approve the arbitrator's decision resulted in an impasse, with each party given a remedy: the municipality could implement its last best offer presented at arbitration, and the union could go on strike. However, the union's statutory right to strike was limited and could be enjoined if the work stoppage threatened public health and safety.

Although the union voted to strike, it agreed to a preliminary injunction before the strike was scheduled to begin because work stoppage would threaten public health and safety almost immediately. The union then argued that the superior court should impose the arbitrator's decision as a condition of a permanent injunction to compensate for "taking away" the union's right to strike.

The superior court held that its equitable jurisdiction was constrained by the municipal code, which had no provision for imposing the arbitrator's decision, and entered an order permanently enjoining the strike and allowing the municipality to implement its last best offer. The union appealed, arguing the superior court erred as a matter of law in holding the municipal code limited its equitable power to impose contract conditions as part of a permanent injunction.

The Supreme Court of Alaska affirmed the superior court's decision.

MUNICIPAL LIABILITY - DISTRICT OF COLUMBIA

Woods v. District of Columbia

District of Columbia Court of Appeals - March 28, 2013 - A.3d - 2013 WL 1235465

Stroke victim's reliance on alleged misdiagnosis by District of Columbia ambulance crew did not give rise to a special relationship, as required in order to avoid the application of the public-duty doctrine.

Stroke victim brought negligent diagnosis action against the District. The superior court granted District's motion to dismiss, and stroke victim appealed.

The court of appeals held that stroke victim's reliance on alleged misdiagnosis by District ambulance crew did not give rise to a special relationship, as required in order to avoid the application of the public-duty doctrine.

The court stated that the public-duty doctrine barred a claim that a plaintiff's situation was made worse because the plaintiff relied upon actions taken by District emergency personnel in providing the kind of on-the-scene emergency assistance that the District normally provides to the general public.

ZONING - CONNECTICUT

Keepers, Inc. v. City of Milford, Conn.

United States District Court, D. Connecticut - March 30, 2013 - F.Supp.2d - 2013 WL 1297839

Court upholds the constitutionality of city ordinances regulating sexually-oriented businesses; strikes down posting provision as unconstitutionally broad.

Operators of strip club and sex shop challenged the constitutionality of two versions of a city ordinance regulating sexually-oriented businesses.

Plaintiffs argued that the ordinance violates the First Amendment (as an impermissible prior restraint, an undue burden on protected expression, overbroad, and an impermissible impairment on the right to freely associate); the Fourth Amendment; the Takings Clause of the Fifth Amendment; the Ninth Amendment; and the Fourteenth Amendment (as vague as-applied, facially vague, and causing a deprivation of liberty interests without due process). They also contend it violates Conn. Gen.Stat. § 8–2.

The court held that the ordinances in question were not an attempt to regulate the primary effects of the expression, but rather target secondary effects of the expression, the court concluded that the ordinances are content-neutral time, place, and manner regulations, and thus subject to intermediate scrutiny.

The court found that both ordinances satisfied all four elements established in *O'Brien*. Therefore, the ordinances are valid restrictions on speech.

However, the court concludes that the scope of the posting provision was unconstitutionally broad because there is not a substantial relationship between the governmental interest and the information required to be posted. While requiring the posting of the names of the individuals who manage, operate and/or control a sexually oriented business is substantially related to enforcement of the ordinance, posting the names of individuals based merely on their status as a 30% shareholder or an officer not involved in the management, operation or control of the sexually oriented business is not substantially related to the city's interest in enforcing the ordinance.

PUBLIC UTILITIES - GEORGIA

Georgia Power Co. v. Cazier

Court of Appeals of Georgia - March 29, 2013 - S.E.2d -

Court holds that public utility customers could not bring direct action against utility for refund of sales taxes, but claim for refund of allegedly miscalculated municipal franchise fees did not impermissibly intrude upon the Public Service Commission's exclusive rate-making authority.

Customers brought action against electric utility, alleging that utility had improperly collected certain sales taxes and fees that were allegedly not subject to sales tax. The trial court denied utility's motion to dismiss. Utility filed interlocutory appeal.

The court of appeals held that:

- Customers could not bring direct action against utility for refund of sales taxes, but
- Claim for refund of allegedly miscalculated municipal franchise fees did not impermissibly intrude upon the Public Service Commission's exclusive rate-making authority.

Statute governing procedures for claiming refund of erroneously collected taxes from Department of Revenue did not create a cause of action for customers against electric utility for refund of sales taxes utility had collected on certain fees that were allegedly not subject to sales tax. The statute allowed a person who had erroneously paid sales tax the opportunity to bypass the filing of a formal refund claim with Department by first simply requesting a refund from a dealer, while still preserving the person's right to later pursue an administrative remedy with the Department in the event the request for a dealer refund failed, but did not allow the person to bring a direct action against a dealer

Section of Uniform Sales and Use Tax Administration Act, providing time limits and notice requirements for a cause of action against dealers for over-collected sales or use taxes, did not create a direct cause of action against dealers.

Customers' claim did not impermissibly intrude upon the Public Service Commission's exclusive rate-making authority, as the claim did not challenge the validity or reasonableness of any utility rate set by the Commission, and instead simply challenged the method of calculating and collecting the fee.

BANKRUPTCY - GEORGIA

In re Montgomery

United States Bankruptcy Court, N.D. Georgia, Atlanta Division - March 28, 2013 - B.R. - 2013 WL 1342937

Court holds that school district satisfied its burden and was thus entitled to a determination that the judgment debt owed by debtor was nondischargeable under § 523(a)(2)(A).

This action involved a consulting contract between a California school district and debtor, in his capacity as a benefits specialist. The contract and other related causes of action between the parties were litigated in superior court, resulting in a judgment against debtor for $2 million.

The school district sought a determination that its judgment debt is nondischargeable. The school district also sought a determination that a portion of debtor's claimed exemptions, in the form of IRA accounts, were not property of the estate due to a constructive trust imposed upon funds as a result of the superior court order and judgment.

The court found that each of the § 523(a)(2)(A) elements had been satisfied by school district: 1) debtor made a false representation with intent to deceive; 2) reliance on the false representation; 3) the creditor's reliance was justifiable; and 4) resulting damages to the creditor. School district satisfied its burden and was entitled to a determination that the judgment debt owed by debtor was nondischargeable under § 523(a)(2)(A).

The court also agreed with school district that certain funds in debtor's IRA accounts are not property of the estate because these funds were placed in a constructive trust for school district's benefit.

PENSIONS - MICHIGAN

Welch v. Brown

United States District Court, E.D. Michigan, Southern Division - March 29, 2013 - F.Supp.2d - 2013 WL 1292373

Court issues preliminary injunction blocking implementation of modified municipal retiree health care benefits by appointed emergency city manager.

This case involved the alteration of lifetime health insurance benefits of retired municipal workers in the City of Flint. Plaintiffs allege that through a number of collective bargaining agreements ("CBAs") they were promised lifetime health benefits identical or comparable to the plans in place when they retired.

Defendant was appointed as Emergency Manager for Flint and subsequently issued several orders that unilaterally modified the terms of the CBAs. Plaintiffs filed for a preliminary injunction enjoining the enactment of the modifications.

The court found that plaintiffs demonstrated a likelihood of success on the merits as to their Contract Clause and Due Process claims with respect to those plaintiffs who derive their health care benefits from CBAs. The court also that plaintiffs had demonstrated a likelihood of success on the merits as to their Due Process claim with respect to those plaintiffs who derive their health care benefits from city ordinance.

Plaintiffs' motion for a preliminary injunction was granted. "Defendants are hereby enjoined from modifying the contracts and/or ordinances governing Plaintiffs' health-care benefits, and to the extent that modification has already occurred, the contracts and ordinances are restored to the status quo ante."

BONDS - MICHIGAN

Wells Fargo Advantage Nat. Tax Fee Fund v. Helicon Associates, Inc.

United States Court of Appeals, Sixth Circuit - April 2, 2013 - Slip Copy - 2013 WL 1316471

Appeals court reverses summary judgment in favor of Dorsey & Whitney on securities law and negligent representation allegations in connection with bond issuance for which the firm served as underwriters' counsel.

Michael Witucki ran a corporation that sold a building to a charter school of which he was the Chief Administrative Officer. Witucki's dual roles created a conflict of interest that violated Michigan law. Dorsey & Whitney, LLP acted as underwriters' counsel for a bond issue that financed the building purchase. Dorsey allegedly drafted the Preliminary Official Statement knowing of the conflict of interest but failed to disclose it.

As a result of the Michigan law violation and other problems with the bond issue, the chartering entity of the charter school forced the unwinding of the bond issue, which caused plaintiffs to lose several million dollars. Plaintiffs brought suit in federal district court, alleging that Dorsey & Whitney violated state and federal securities laws, and that Dorsey & Whitney was liable for common-law negligent misrepresentation.

The district court granted summary judgment to Dorsey & Whitney and the appeals court reversed, remanding the case for further proceedings

The appeals court held that plaintiffs had stated a plausible claim for relief under the Connecticut Uniform Securities Act. It was enough, at this early stage in the litigation, that Dorsey & Whitney allegedly drafted the Preliminary Official Statement and edited and revised the Official Statement knowing that the documents omitted material facts.

Under Michigan law, a third party may hold an attorney liable for negligent misrepresentation when the attorney negligently performed a contractual duty and the third party was either someone the attorney knew would rely on the information or someone the attorney should have reasonably foreseen would rely on the information. The appeals court ruled that the negligent misrepresentation claim should not have been dismissed at the summary judgment stage. Based upon the facts, a jury could determine that Dorsey & Whitney negligently performed a contractual duty when it failed to include the material conflict of interest in the Preliminary Official Statement and in the Official Statement.

MUNICIPAL LIABILITY - MISSOURI

Sasnett v. Jons

Missouri Court of Appeals, Western District - April 2, 2013 - S.W.3d - 2013 WL 1296725

Jury instruction that driver owed a higher standard of care than city was not warranted following grant of directed verdict as the jury was repeatedly and correctly advised throughout trial of driver's higher standard of care.

Family of deceased motorist brought a wrongful death action against driver and city after a fatal accident at an allegedly unreasonably dangerous intersection. The circuit court affirmed jury verdict finding driver 10% at fault and city 90% at fault.

On appeal, the family contended that the circuit court failed to instruct the jury that driver owed a higher standard of care than the city owed and this error resulted in the jury allocating a low percentage fault to driver. The family also contended that the court plainly erred in admitting driver's testimony that she has three children and that she understood that the family wanted her to go to jail. The family alleged that this testimony caused the jury to allocate too little fault to driver

and to award them less damages.

The court of appeals held that:

- Instruction that driver owed a higher standard of care than city was not warranted following grant of directed verdict as to driver's liability but not as to city's liability; and
- Any error in admitting driver's testimony about her family status, her inability to be a stay-at-home mom due to conditions of probation, and her belief that plaintiffs wanted her to go to jail was not plain error.

An instruction that driver owed a higher standard of care than city was not warranted following grant of directed verdict as to driver's liability but not as to city's liability, despite claim that without the instruction the jury could not properly compare the fault of city, which owed only ordinary care, with the fault of driver, who owed the highest degree of care. The verdict director against driver instructed the jury that driver was liable to plaintiffs as a matter of law and that the jury was required to assess a percentage of fault to driver. The verdict director against city instructed the jury to determine the city's liability under the ordinary care standard, and jury was repeatedly and correctly advised throughout trial of driver's higher standard of care.

There was a substantial amount of evidence showing that the intersection was dangerous, that the city had identified intersection as a high accident location several years before accident, that the city knew the poor visibility of the traffic signals at intersection was primarily to blame for the dangerousness of the intersection, and that city had done nothing to fix it.

ANNEXATION - NEBRASKA

U.S. Cold Storage, Inc. v. City of La Vista

Supreme Court of Nebraska - March 29, 2013 - N.W.2d - 285 Neb. 579

Court approves annexation, holding that previous annexation statute did not create a constitutionally protected vested right.

Property owner and sanitary and improvement district brought class action against city challenging validity of annexation ordinance that sought to annex district, which included industrial area.

The Supreme Court of Nebraska held that:

- City's failure to strictly comply with notice requirements for annexation did not render ordinance seeking to annex sanitary and improvement district invalid;
- City did not undertake annexation of sanitary and improvement district solely for purposes of obtaining revenue;
- Amended annexation statute permitted city to annex district regardless of industrial area's value;
- Previous annexation statute did not create a constitutionally protected vested right; and
- Statute regarding annexation of sanitary and improvement districts stayed merger of the district with city until determination on the merits of property owners' challenge to annexation.

Previous statute regarding annexation, which prevented annexation of an industrial area with a valuation of more than $286,000 absent the consent of the owners of a majority of the value of the area, did not create a contract between city and landowners in the industrial area that would preclude application of the amended statute, which allowed annexation of an industrial area regardless of actual valuation if it was located in a county with a population in excess of 100,000

persons and the city did not approve the original designation of such tract as an industrial area.

EMPLOYMENT - NEW JERSEY

Doyle v. Lakewood Tp.

Superior Court of New Jersey, Appellate Division - March 27, 2013 - Not Reported in A.3d - 2013 WL 1222679

Tax collector not entitled to employment protections that apply only to municipal chief financial officers.

Plaintiff was appointed tax collector for the township. The township served plaintiff with a preliminary notice of disciplinary action. She was suspended at the time the notice was served. Plaintiff demanded a hearing, which was held. The township's municipal manager, who had appointed plaintiff, acted as hearing officer. He sustained the charges and confirmed plaintiff's removal from the position of tax collector.

Plaintiff appealed the decision to the Civil Service Commission. The Commission declined jurisdiction because plaintiff was a non-tenured employee and was not entitled to civil service protection. She then filed an action seeking judicial review of the decision terminating her employment.

The township moved for dismissal, arguing that the Law Division lacked jurisdiction because plaintiff was an at-will employee without civil service or other statutory job protection.

Plaintiff conceded that she was not a tenured tax collector and, therefore, not entitled to the termination procedures set forth in N.J.S.A. 40A:9–145.8, which concerns the tenure rights of municipal tax collectors. Instead, she argues that she is entitled to judicial review of her termination pursuant to the procedures established by N.J.S.A. 40A:9–140.9, which she contends applies to any municipal employee. The court held that that statute applies only to municipal chief financial officers.

BONDS - NEW YORK

Municipality of Bremanger v. Citigroup Global Markets Inc.

United States District Court, S.D. New York - March 28, 2013 - Slip Copy - 2013 WL 1294615

Court declines to hold Citigroup liable for losses sustained by Norwegian municipalities that invested in a Citi fund, finding that Norwegian broker neglected to convey risk disclosures provided by Citi.

The Citi Tender Option Bond Fund ("Fund") is a hedge fund managed by Citigroup. The Fund purports to engage in a municipal bond arbitrage strategy by investing in long-term municipal bonds using funds obtained from the issuance of short-term tender option bonds. The Fund purported to capture the profit, or "positive carry," generated by the difference between long-term municipal bond rates and short-term lending rates. The Fund also entered into LIBOR interest rate swaps purportedly in an attempt to hedge the risk of its investments against adverse changes in municipal bond values as a result of interest rate movements.

A Citi affiliate and a Norwegian securities firm ("Terra") entered into a distribution agreement under which Terra was authorized to sell fund-linked notes issued by Banque AIG that provided indirect exposure to the Fund (the "Notes"). Citi's presentations and marketing materials provided to Terra contained extensive disclosures regarding risk.

Seven Norwegian municipalities, acting through Terra, invested in the Notes. In August 2007, the Fund and the Notes all dropped in value, tripping certain redemption triggers.

The Norwegian Financial Supervisory Authority subsequently launched an investigation into Terra regarding its sale of securities, including the sale of the Notes to the Municipalities. Terra admitted full responsibility for the misinformation which was presented to the Municipalities. Terra's license was revoked and it went bankrupt.

Citi then began the process of unwinding and redeeming the Notes.

The Municipalities brought suit against Citi alleging fraud and negligent misrepresentation under New York common law.

The Court granted Citi summary judgment because the Municipalities could not set forth a theory of reliance supported by any facts. The Municipalities could not demonstrate direct reliance, because Citi did not directly communicate the alleged misrepresentations to them.

The Court also found that the Municipalities failed to set forth a theory of causation supported by any facts. The Municipalities could not demonstrate that Citi's alleged misrepresentations and omissions "were the direct and proximate cause of the losses claimed." Terra's decision to remove key risk disclosures contained in the Citi presentation and to make oral representations that contradicted certain of those risk disclosures constituted an "intervening act" that was not "a normal or foreseeable consequence of the situation created" by Citi's acts.

MUNICIPAL LIABILITY - NEW YORK

Figueroa v. New York City Bd. of Educ.

Supreme Court, Appellate Division, First Department, New York - March 19, 2013 - N.Y.S.2d - 2013 N.Y. Slip Op. 01793

Appeals court affirms directed verdict in favor of school board, confirming absence of liability in personal injury action as there was no evidence of a dangerous condition in the classroom.

Visitor at public school who tripped and fell over legs of blackboard easel brought personal injury action against school board.

The trial court granted school board's motion to set aside jury verdict and directed entry of judgment in favor of board. The appeals court affirmed, concluding that there was no evidence of a dangerous condition in the classroom.

SCHOOLS - NEW YORK

D.K. ex rel. Mrs. K. v. Mahopac Cent. School Dist.

Supreme Court, Putnam County, New York - March 28, 2013 - N.Y.S.2d - 2013 N.Y. Slip Op.

23092

Court declines school board's request that mother be compelled to undergo forensic psychiatric examination in connection with her lawsuit against the district.

Mother brought action, in her individual capacity and on behalf of her autistic son, against school district for negligence, negligent hiring, training and retention, fraud and misrepresentation, intentional infliction of emotional harm, false imprisonment, assault and battery, and loss of services, society and companionship arising from the alleged physical, sexual, and emotional abuse of her son by teachers. School district moved for order compelling discovery and compelling both parents to appear for psychiatric examination.

The court held that:

- School district could not compel father to appear for psychiatric examination, and
- Mother would not be compelled to undergo forensic psychiatric examination.

Various factors for consideration in motions to compel testing include: 1) whether the information sought is speculative; 2) whether it would delay proceedings by turning the fact-finding process into a series of mini-trials about what may have contributed to the findings sought to be introduced at trial; 3) whether, upon consideration of the crucial search for truth, the relief sought would create undue delay occasioned by battling experts; and 4) the burden imposed and the personal nature of the information sought.

OPEN MEETINGS ACT - RHODE ISLAND

Anolik v. Zoning Bd. of Review of City of Newport

Supreme Court of Rhode Island - April 2, 2013 - A.3d - 2013 WL 1314947

Supreme Court of Rhode Island holds that the zoning board agenda item violated Open Meeting Act's requirement that supplemental written public notice contain statement specifying nature of business to be discussed.

Zoning board received a letter from counsel for Congregation Jeshuat Israel requesting an extension of the time in which to substantially complete certain improvements to its property that had been approved by a previous zoning board decision.

The request for an extension of time was referenced in one of the items contained in the agenda that was posted with respect to the board's next meeting. That agenda item reads in its entirety as follows:

"IV. Communications:
Request for Extension from Turner Scott received 11/30/08
Re: Petition of Congregation Jeshuat Israel"

The zoning board approved the extension.

Plaintiffs brought action under Open Meetings Act against city zoning board of review and members of board, alleging that agenda item for board's meeting violated the Act.

The Supreme Court of Rhode Island held that the agenda item violated Open Meeting Act's

requirement that supplemental written public notice contain statement specifying nature of business to be discussed.

Designating agenda item under rubric of "Communications" did not even remotely indicate that any action would be taken with respect to agenda item, and agenda item did not give notice that named individual's request for extension was to extend time periods then in effect for purpose of completing or substantially completing improvements that had previously been approved by board.

ZONING / PLANNING - RHODE ISLAND

Lloyd v. Zoning Bd. of Review for City of Newport

Supreme Court of Rhode Island - March 29, 2013 - A.3d - 2013 WL 1285881

Court finds special-use permit, not dimensional variance, appropriate form of relief for construction of addition to dimensionally nonconforming residence.

Adjoining landowners appealed decision of city zoning board of review that granted property owners' application for special-use permit for construction of addition to dimensionally nonconforming residence.

The Supreme Court of Rhode Island held that:

- Special-use permit, not dimensional variance, was appropriate form of relief;
- Property owners were entitled to utilize expanded lot coverage that was authorized by prior dimensional variance;
- Zoning ordinance did not contemplate calculation of building mass or three-dimensional spaces in criteria for alterations of dimensionally nonconforming structures; and
- Decision to accept testimony of property owners' expert witness was within board's discretion.

City zoning ordinance did not contemplate calculation of building mass or three-dimensional spaces in criteria for alterations of dimensionally nonconforming structures, and thus increase in three-dimensional space and building mass that would result from proposed addition to dimensionally nonconforming residence could not be considered by city zoning board of review when determining whether to grant special-use permit for construction of addition.

SOVEREIGN IMMUNITY - TEXAS

Wight Realty Interests, Ltd. v. City of Friendswood

Court of Appeals of Texas, Houston (1st Dist.) - April 4, 2013 - S.W.3d - 2013 WL 1341216

Court agrees with city on the applicability of Texas law restricting land acquisition outside county but upholds developers right to seek damages for the services that it was required to render for the city pursuant to the underlying contract.

Developer and city executed an earnest money contract providing that developer would construct and develop for the city youth recreational sports facilities on a tract of land owned by developer and two adjoining tracts, which were to be acquired by developer. Upon completion, the City was to purchase all of the land and facilities.

City terminated the contract prior to the transfer of any land or facilities from developer to the city. City refused to pay developer for the costs it incurred for constructing the recreational facilities. Developer filed suit against the city, asserting claims for breach of contract and estoppel and seeking recovery for its costs of construction and land acquisition and the contractual-termination damages.

The City asserted that it was immune from suit, arguing that a statutory provision that waives a city's immunity from suit for breach-of-contract claims involving the provision of "goods or services" did not apply because its contract with developer involved real property. In response, developer argued that because it had provided the city with acquisition, development, and construction services, the city's immunity was waived.

In a prior proceeding, this court, concluded that the contract "plainly" required developer to provide "services" and contained "the essential terms of the parties' agreements," held that the city's immunity was waived and remanded for further proceedings.

Following remand, the city filed another summary-judgment motion and plea to the jurisdiction, arguing, in part, that the contract that it drafted and entered into was illegal and void because the city did not have the authority to acquire the pertinent tracts of land for use as a park as they were situated outside of the counties in which the city is located.

The court agreed with developer that, as a home-rule municipality the city possess "broad powers" derived from the Texas Constitution, but concluded that the legislature has with "unmistakable clarity" imposed geographical limits upon a municipality's, including a home-rule municipality, acquisition of land for parks purposes.

However, these provisions do not, given the contract at issue, deprive the trial court of jurisdiction to determine developer's claim pertaining to the services that it rendered pursuant to the contract. Nor does the applicability of these provisions demonstrate that the city is entitled to judgment as a matter of law on developer's claim. This is because developer did not bring a suit for specific performance of the contract, i.e., it is not seeking an order compelling the city to acquire land in violation of the Local Government Code. Developer was seeking damages for the services that it was required to render for the city pursuant to the contract.

The court concluded that developer was entitled to a remand on its breach-of-contract claim related to its provision of services under the contract.

EMINENT DOMAIN - TEXAS

El Dorado Land Co., L.P. v. City of McKinney

Supreme Court of Texas - March 29, 2013 - S.W.3d - 2013 WL 1276045

Supreme Court of Texas holds that reversionary interest retained by vendor in deed to city was property interest capable of being taken by condemnation under state Takings Clause.

Property owner that had sold land to city, pursuant to special warranty deed restricting city from using land for anything other than a community park, and providing owner with an option to repurchase the land in the event that city violated the restriction, brought inverse condemnation action against city, alleging that city had violated restriction and then wrongfully failed to reconvey the land to him or condemn his interest.

The Supreme Court of Texas held that reversionary interest retained by vendor in deed to city was property interest capable of being taken by condemnation under state Takings Clause, even though the interest was not a possibility of reverter, since the interest effectively functioned as a power of termination or a right of reentry, and vendor's deed conveyed a defeasible estate to the city with the vendor retaining a conditional future interest.

A "possibility of reverter" is a term of art for a future interest retained by a grantor that conveys a determinable fee; it is the grantor's right to fee ownership in the real property reverting to him if the condition terminating the determinable fee occurs. Under Texas law, the possibility of reverter and the right of reentry are both freely assignable like other property interests.

EMPLOYMENT - WASHINGTON

In re Recall of Bolt

Supreme Court of Washington, En Banc - March 28, 2013 - P.3d - 2013 WL 1286213

Court finds charges levied against mayor in recall petition factually insufficient.

Three town council members filed recall petition against mayor and a fourth council member. The superior court found that only one charge against mayor and council member was factually and legally sufficient to support a recall election. The council members appealed.

The Supreme Court of Washington held that:

- Mayor's failure to impose progressive discipline before discharging town employee was factually insufficient for recall;
- Bullying allegations were factually insufficient for recall;
- De minimis personal use of town vehicle was insufficient for recall;
- Alleged improper approval of construction before council member took office was not proper basis for recall;
- Mayor's alleged clerical work for town was legally insufficient for recall;
- Supreme Court would review superior court's finding that a charge was sufficient for recall; and
- Purchases of used equipment for town without advance authorization were legally insufficient for recall.

"Factual sufficiency" of a recall petitioner's charges means that the charges: 1) "state the act or acts complained of in concise language" and "give a detailed description including the approximate date, location, and nature of each act complained of;" and 2) enable the public and the challenged public official to identify the acts or failure to act which without justification would constitute a prima facie showing of misfeasance, malfeasance, or a violation of the oath of office.

REDISTRICTING - TEXAS

In re Rodriguez

Court of Appeals of Texas, Beaumont - March 18, 2013 - S.W.3d - 2013 WL 1189005

Court of appeals holds that school board has a mandatory duty imposed by law to accept applications for the positions that came open as a result of census-based redistricting.

The results of the 2010 federal census required that the board redivide the district. The board apparently adopted a plan, the 5–2 plan, within the explicit deadline contained in the education code, but an objection by the Department of Justice prevented the initial redistricting. It is undisputed that the board officially recognized and acted upon the 2010 federal census. The board anticipated completing the redistricting process for the May 2013 election. The board entered into an election services agreement for a joint election with the City of Beaumont for May 2013, and set a deadline for the filing of applications to be placed on the ballot. It is also undisputed that the plaintiffs timely filed applications. The ultimate issue in this proceeding is whether the Board could properly reject those applications at a time when the Board planned to hold an election after redistricting.

The court of appeals held that the school board had a mandatory duty imposed by law to accept the applications for the positions that were timely presented.

PLANNING / ZONING - TEXAS

Town of Bartonville Planning and Zoning Bd. of Adjustments v. Bartonville Water Supply Corp.

Court of Appeals of Texas, San Antonio - March 27, 2013 - S.W.3d - 2013 WL 1222939

Court of appeals agrees with zoning board's assertion that question of applicability of local ordinance to water supply corporation exceeds the board's authority; board possesses only the authority to enforce ordinance.

Town planning and zoning board of adjustments denied water supply corporation's application for a building permit for the construction of a water tower.

At trial, the water supply corporation argued that the board's order was illegal because the board should have determined that its own zoning ordinances do not apply to the corporation because of provisions in the Texas Water Code. The board replied that it had no authority to make any such determination. It only had the authority to enforce the ordinance.

The court of appeals held that it was not within the board's jurisdiction to make a determination concerning the applicability of the zoning ordinances, nor was it within the trial court's jurisdiction in a limited petition for writ of certiorari review. The court agreed with the board that the trial court exceeded its subject matter jurisdiction and remanded.

TAX - NORTH CAROLINA

In re Blue Ridge Housing of Bakersville LLC

Court of Appeals of North Carolina - March 19, 2013 - S.E.2d - 2013 WL 1110672

In case of first impression, court holds that nonprofit organization was the "owner" of low income housing development and thus development entitled to property tax exemption, even though nonprofit had only a 0.1% legal ownership interest in the development.

County appealed Property Tax Commission decision finding that housing development qualified for ad valorem tax exemption as a low income housing development owned by a nonprofit organization.

The court of appeals held that:

- As a matter of first impression, nonprofit organization was the "owner" of the development; and
- Decision did not violate equal protection or tax uniformity principles.

Legal title is not determinative as to the question of ownership for purposes of a property tax exemption; instead, where an entity qualifying for a tax exemption possesses a sufficient interest in the property, the property is said to belong to that entity, even where legal title to the property is held by another party.

Factors suggesting ownership of a property by an entity otherwise qualified for a tax emption may include, but are not limited to: 1) the entity's control of the venture's operations; 2) the entity's status as trustee of LLC property; 3) the possibility of future increased actual ownership interest; and 4) the intent of the participating parties.

In this case, the court found that nonprofit organization was the "owner" of low income housing development and thus development entitled to property tax exemption, even if nonprofit had only a 0.1% legal ownership interest in the development. Nonprofit was the sole manager of the development and made the operational decisions. Nonprofit was the trustee of the active trust involved with the development. Nonprofit had the right of first refusal to purchase the entire 100% legal ownership interest in the development. Nonprofit spearheaded the development of the project and only partnered with other owner to finance the project.

LAND USE - NEW YORK

Marinaccio v. Town of Clarence

Court of Appeals of New York - March 21, 2013 - N.E.2d - 2013 N.Y. Slip Op. 01868

In case of intentional flooding, court finds considerable injury and undeniably intentional tortious acts but holds that evidence is insufficient for an award of punitive damages.

Property owner brought action against town and subdivision developer asserting causes of action for trespass and private nuisance and seeking damages for flooding on his property allegedly caused by intentional flow of water onto his property.

The question in this case was whether the evidence was sufficient to find defendant liable for punitive damages. The court found that, although the injury was considerable and the tortious acts undeniably intentional, the evidence was insufficient for an award of punitive damages.

Because the standard for imposing punitive damages is a strict one and punitive damages will be awarded only in exceptional cases, the conduct justifying such an award must manifest spite or malice, or a fraudulent or evil motive on the part of the defendant, or such a conscious and deliberate disregard of the interests of others that the conduct may be called wilful or wanton.

In this case, developer of subdivision did not willfully and wantonly cause danger to health, safety, and welfare of public through diversion of storm water to mitigation pond. Although developer failed to ensure that town followed through with plan to obtain an easement from property owner to allow water to flow onto his property, developer complied with all federal, state, and local planning and development laws and regulations, and worked closely with Army Corps, town engineer, and town planner to secure all required permits and approvals, and hired wetlands expert, engineering expert, and soil expert to assist in those regards.

SCHOOLS - NEW YORK

Board of Educ. of Mineola Union Free School Dist. v. Mineola Teachers Ass'n

Supreme Court, Appellate Division, Second Department, New York - March 27, 2013 - N.Y.S.2d - 2013 N.Y. Slip Op. 02070

Appeals court finds that policy granting paid days off for observance of religious holidays violates Establishment Clause.

Collective bargaining agreement between school district and teachers association provided that members of the association could receive up to five religious holidays as paid days off.

In October 2010, the school district advised the association that it would no longer abide by the religious holidays provision because it was unconstitutional. The association filed a grievance, which was denied, and then sought to invoke its contractual right to arbitration. The school district then commenced a proceeding pursuant to permanently stay the arbitration, and the association moved to compel arbitration.

The appeals court stated that, "There is no firmer or more settled principle of Establishment Clause jurisprudence than that prohibiting the use of the State's power to force one to profess a religious belief." Here, the clear wording of the religious holidays provision rewarded members of the association who claimed to be religiously observant with more paid days off than those afforded to agnostics, atheists, and members who were less observant. As a result, the religious holidays provision violated the Establishment Clause.

MUNICIPAL LIABILITY - MARYLAND

Ross v. Housing Auth. of Baltimore City

Court of Appeals of Maryland - March 22, 2013 - A.3d - 2013 WL 1164525

Court finds that expert witness was not qualified to provide expert testimony as to source of lead paint exposure, however, expert testimony not sole means of establishing causation as circumstantial evidence could suffice.

Former resident of home owned by city housing authority brought action against housing authority, alleging claims for negligence and unfair trade practices under the Consumer Protection Act, and alleging that resident had been injured by being exposed to lead in home while living there as a child.

The circuit granted housing authority's motion in limine to exclude testimony of resident's expert on source of resident's lead exposure, and entered summary judgment in favor of housing authority. Resident appealed.

The court of appeals held that:

- Expert testimony lacked factual basis; but
- Causation was not required to be established by expert testimony.

Pediatrician was not qualified to provide expert testimony as to source of plaintiff's lead exposure that resulted in elevated lead levels. Pediatrician's training and experience was to determine blood

lead level and to treat patients with elevated blood lead levels, and she was not trained or experienced in quantifying lead exposure, identifying lead hazards, abating lead hazards, or in determining causality with respect to relative exposures.

However, proof of causation – the link between property owned by city housing authority and plaintiff's exposure to lead paint and dust – was not required to be established by expert testimony, but instead could be established through circumstantial evidence. Remanded.

ANNEXATION - MARYLAND

Koste v. Town of Oxford

Court of Appeals of Maryland - March 26, 2013 - A.3d - 2013 WL 1197204

Petition seeking to bring a municipal annexation resolution to referendum could not be circulated and signed by members of the relevant electorate before final enactment of the targeted resolution.

The Town of Oxford, Maryland introduced a resolution proposing to annex a sizable number of acres of submerged lands adjacent to the Town's boundaries. Following first publication in a local newspaper of a legal notice of the pendency of the resolution and of the date and time of a public hearing, as required by the governing annexation statute, petition circulators among the voters of Oxford prepared and began circulating a petition for referendum regarding the proposed resolution.

A registered voter filed a complaint for declaratory judgment and writ of mandamus that sought a determination that referendum petition signatures could be lawfully obtained before final enactment of an annexation resolution.

The court of appeals held that a petition seeking to bring a municipal annexation resolution to referendum could not be circulated and signed by members of the relevant electorate before final enactment of the targeted resolution.

The annexation statute's 45-day period following the final enactment of the resolution for obtaining the signatures of registered voters to petition for a referendum on resolution acted as a substantial restriction on when petitions could be circulated, as only after enactment of a resolution could voters be fully informed about all pertinent information of the given resolution.

PUBLIC EMPLOYEES - LOUISIANA

West Monroe Firefighters Local 1385 v. City Of West Monroe

Supreme Court of Louisiana - March 19, 2013 - So.3d - 2012-1937 (La. 3/19/13)

Court holds that nothing in the statute governing minimum monthly salaries of firemen in certain municipalities requires the "minimum monthly salary" to independently meet the federal minimum wage laws.

Louisiana pays firefighters a state supplement of $500 per month beginning after a firefighter's first year. The legislature in 2006 amended the law to allow a municipality to pay first-year firefighters a supplemental monthly payment "in the amount equivalent to the state supplemental pay, or any portion thereof." City of West Monroe paid a city supplement in the amount of $300 to its first-year firefighters.

State law sets forth the minimum salaries to be paid to the differing ranks of firefighters, basing the pay differential on specified percentages above the "minimum monthly salary" of a first-year firefighter. The City did not include the $300 supplemental payment in its computation of the "minimum monthly salary."

City firefighters brought action against city alleging failure to comply with statute setting forth minimum salary requirements for firefighters, and failure to comply with the Louisiana Wage Act

The Supreme Court of Louisiana held that city supplemental pay of $300 per month to firefighters in their first year of employment was not included in the calculation of a first-year firefighters' "minimum monthly salary" for purposes of determining wage differentials for higher-ranking firefighters.

Nothing in the statute governing minimum monthly salaries of firemen in certain municipalities requires the "minimum monthly salary" to independently meet the federal minimum wage laws. If the legislature had intended for the base pay of firemen to be governed by the mandates of the Fair Labor Standards Act, it could have directly referenced it therein.

TAX - GEORGIA

City of Atlanta v. City of College Park

Supreme Court of Georgia - March 28, 2013 - S.E.2d - 2013 WL 1247932

Court holds that city can levy an occupation tax on Atlanta for its proprietary operations occurring within the city; municipalities not "local authorities."

The Cities of Atlanta and College Park entered into an agreement in 1969 for purposes of expanding Atlanta Hartsfield–Jackson International Airport. One of the provisions of the agreement granted Atlanta the exclusive right to collect and levy occupation taxes from businesses located at the airport that were within the city limits of College Park. In 2007, after commissioning a study for the purpose of reassessing this relationship, College Park informed Atlanta and airport businesses that it would no longer honor the 1969 Agreement and that it would now seek to collect occupation taxes from the airport businesses including Atlanta's proprietary business operations.

Atlanta filed a declaratory action seeking a judgment that the 1969 Agreement controlled the collection of occupation taxes from businesses operating at the airport within College Park.

The court of appeals affirmed the trial court's judgment invalidating the 1969 Agreement, but reversed the trial court's finding that the term "local authority" as used in the Georgia statute included municipalities. Accordingly, because Atlanta was not a "local authority" that was exempt from the imposition of occupation taxes, the court of appeals found that College Park could properly levy an occupation tax on the City of Atlanta for its proprietary operations occurring within College Park. The Supreme Court of Georgia affirmed.

TAX - GEORGIA

First Congregational Church v. Fulton County Bd. of Tax Assessors

Court of Appeals of Georgia - March 27, 2013 - S.E.2d - 2013 WL 1223852

Court finds that primary purpose of church's income-producing parking lot is commercial, not charitable, and thus taxable.

Tax-exempt church purchased a parking lot for use by its parishioners. The church subsequently entered into a lease agreement with a company that operated a commercial parking business on those days on which it was not used for church parking.

The superior court ruled in favor of the county board of tax assessors, holding that an income-producing parking lot did not qualify for an exemption from ad valorem property taxation.

The church appealed, arguing that it had purchased the property for the purpose of creating a parking lot, and that after it converted the property into a paved parking lot, it indeed used the property for overflow parking for its parishioners and guests attending religious activities or obtaining charitable services. The church acknowledged that it derived income from the property by way of its contract with a third party, but pointed out that the income received by it (as opposed to whatever income was received by the commercial operator) was used to support its religious services and charitable pursuits. In light of these circumstances, the church maintained that the property's "primary" use was the provision of overflow parking, that income production of $90,000 yearly was an "incidental" use of its property its property was entitled to the claimed tax exemptions.

The appeals court concluded that most of the activities that took place on the church's property were patently not at the core of its religious or charitable purposes, affirming the trial court's opinion.

BONDS - GEORGIA

Sherman v. Development Authority of Fulton County

Court of Appeals of Georgia - March 22, 2013 - S.E.2d - 2013 WL 1165280

Appeals court rejects sufficiency of trial court's findings of fact and conclusions of law in bond validation proceeding.

This case arose from a bond validation proceeding in which the State of Georgia petitioned a superior court for a judgment approving the issuance of certain taxable revenue bonds by the Development Authority of Fulton County ("DAFC") and validating the bonds and various bond security documents.

Mr. Sherman, a taxpayer and citizen of Fulton County appealed from the order of the trial court validating and confirming the bonds and bond security. Mr. Sherman asserting that the trial court erred by failing to set forth therein findings of fact or conclusions of law sufficient to support its ultimate holdings that: 1) the method used by DAFC to value the leasehold estate was valid under the requirements of Harris and Sherman I; 2) the structure of the bond transaction did not violate OCGA § 36–62–8; 3) the Memorandum was not ultra vires, in violation of OCGA § 36–30–3(a);9 and 4) the structure of the bond transaction did not create an unconstitutional tax exemption.

The court of appeals largely agreed with Mr. Sherman regarding the insufficiency of the findings of fact or conclusions of law. The appeals court found that the trial court labeled some of its holdings as "findings of fact." Instead of being actual factual findings, however, these statements were summary conclusions that contain no hint about the evidence or analysis the court relied on to arrive at them. Similarly, the trial court's "conclusions of law" challenged by Sherman on this appeal cite

no legal authority and contain no analysis that explains them. Accordingly, these findings of fact and conclusions of law fail to satisfy the requirements of OCGA § 9–11–52(a).

The appeals court vacated the trial court's order and remanded to allow the trial court to enter a new order on the Bond Validation Petition. Such order to contain specific factual findings and conclusions of law necessary to explain any ultimate holdings of the trial court that: 1) the method used by DAFC to value the leasehold estate is valid under the requirements of Harris and Sherman I; 2) the structure of the bond transaction does not violate OCGA § 36–62–8(b); 3) the execution of the Memorandum did not violate OCGA § 36–30–3(a) and therefore did not constitute an ultra vires act; and 4) the structure of the bond transaction does not create an unconstitutional tax exemption.

MUNICIPAL GOVERNANCE - FLORIDA

Atheists of Florida, Inc. v. City of Lakeland, Fla.

United States Court of Appeals, Eleventh Circuit - March 26, 2013 - F.3d - 2013 WL 1197772

Court holds that city's practice of allowing clergy to perform invocations at city commission meetings did not violate federal or state establishment clauses; validates city's new procedures for selecting invocation speakers.

Atheist organization brought §1983 action against city and mayor, alleging that practice of allowing religious ministers to perform invocations before city commission meetings violated establishment clauses of First Amendment and Florida Constitution.

The court of appeals held that:

- Defendants' new practices for selecting invocation speakers did not violate establishment clauses;
- Organization's claims related to defendants' former practices for selecting invocation speakers were moot; and
- Defendants' expenditures toward selecting invocation speakers did not violate no–aid provision of Florida's establishment clause.

City commission's selection of speakers to deliver invocation at commission's did not proselytize, advance, or disparage any one faith or belief and did not affiliate city with any discrete faith or belief, and thus did not violate establishment clauses of First Amendment and Florida Constitution. Procedures required commission to update congregations list annually, based on search of local phone books and Internet listings, potential speakers from congregations outside county were included on list if city resident who was member of that congregation requested it, and every congregation on list then received invitation to give invocation at commission meetings.

City commission's expenditure of $1,200 to $1,500 per year to arrange for speakers to give invocation before commission meetings did not advance religion, precluding Atheist organization's §1983 claim that commission violated no–aid provision in Establishment Clause of Florida Constitution. Funds merely went to mailing invitations to various religious leaders in community, and no religious group received any pecuniary benefit, either direct or indirect, from those expenditures or received financial assistance from commission for promotion and advancement of its theological views.

EMINENT DOMAIN - CALIFORNIA

Monks v. City of Rancho Palos Verdes

Court of Appeal, Second District, California - March 28, 2013 - Not Reported in Cal.Rptr.3d - 2013 WL 1248251

City not liable to landowners for decline in their property value during the pendency of a long-running eminent domain dispute.

On remand in a long-running eminent domain dispute, city opted to allow plaintiffs to build homes on their lots. Plaintiffs asserted they were also entitled to compensation for the decline in the fair market value of their properties. The trial court disagreed, stating that the city had remedied the permanent taking by repealing the offending resolution and enacting a new resolution allowing plaintiffs to develop their properties.

The court of appeal agreed, stating that the city did not have to pay compensation to plaintiffs for the permanent taking because it provided a constitutionally acceptable alternative remedy – allowing plaintiffs to build homes on their lots.

MUNICIPAL GOVERNANCE - CALIFORNIA

Rubin v. City of Lancaster

United States Court of Appeals, Ninth Circuit - March 26, 2013 - F.3d - 13 Cal. Daily Op. Serv. 3357

Court finds preponderance of Christian prayers at city council meeting a function of demographics, rather than an unconstitutional establishment of religion.

Attendees of city council meetings brought action against city in a California state court requesting declaratory and injunctive relief from the city's policy of permitting prayers that mention Jesus, arguing that both the invocations and the policy amounted to an establishment of religion.

The court of appeals held that city council's facially neutral practice of opening its meetings with privately led prayers did not effect an unconstitutional establishment of religion in violation of First Amendment and California constitution.

Notwithstanding that the majority of city-council invocations had been Christian, city council's facially neutral practice of opening its meetings with privately led prayers did not effect an unconstitutional establishment of religion in violation of First Amendment and California constitution. The court found that the city had taken proactive measures to deliver on its promise of inclusivity, stressing, both to the public and to invited prayer-givers, the policy's nonsectarian aims. The fact that most so far had been Christian was merely a function of local demographics and the choices of the religious leaders who responded out of their own initiative to the city's invitation.

MUNICIPAL GOVERNANCE - CALIFORNIA

Harris v. Rizzo, et al.

Court of Appeal, Second District, Division 3, California - March 20, 2013 - Cal.Rptr.3d - 13

Cal. Daily Op. Serv. 3209

Court concludes that state Attorney General has standing, on behalf of city, to bring an action against allegedly corrupt individuals, to remove the city from their control, and require them to pay restitution to the city.

"When it appears that a charter city is under the control of individuals who are looting the city's coffers for their own benefit, can the Attorney General, on behalf of the city, bring an action against the allegedly corrupt individuals, to remove the city from their control and require them to pay restitution to the city? We conclude that the Attorney General may bring such an action, and seek recovery from the corrupt individuals to the extent their acts were unauthorized."

This case concerned the city of Bell. The appeals court concluded that the Attorney General does have standing to pursue an action on behalf of the City. It further concluded that, although separation of powers and legislative immunity bar pursuit of this action with respect to acts within the discretion of City officials, these doctrines do not prevent the action from proceeding with respect to defendants' allegedly ultra vires acts.

EMPLOYMENT - ALASKA

Mills v. Hankla

Supreme Court of Alaska - March 22, 2013 - P.3d - 2013 WL 1165508

Supreme Court of Alaska finds that genuine issue of material fact exists as to whether police chief was a "supervisor" of employees during alleged acts of sexual harassment, precluding summary judgment.

In 2008, city promoted a police officer to police chief. The city's hiring determination and the officer's subsequent conduct led four police department employees to sue the police chief and the city. The employees asserted several claims including wrongful termination, sexual harassment, and negligent hiring.

The Supreme Court of Alaska held that:

- Evidence supported finding that employer did not engage in spoliation of evidence;
- Genuine issue of material fact as to whether employee was constructively discharged precluded summary judgment on wrongful termination claim;
- Genuine issue of material fact as to whether police chief was a "supervisor" of employees during alleged acts of sexual harassment precluded summary judgment on sexual harassment action;
- State Human Rights Act does not provide for individual liability of employees for hostile work environment sexual discrimination or hostile work environment sexual harassment; and
- Employer's hiring decision in hiring of police chief was discretionary, and thus official immunity applied to decision.

VOTER INITIATIVE - WASHINGTON

League of Educ. Voters v. State

Supreme Court of Washington, En Banc - February 28, 2013 - P.3d - 2013 WL 791807

Voter-enacted initiative that required any bill containing a tax increase to be passed by a two-thirds majority vote of the legislature held unconstitutional, but severable.

Voter associations, individual legislators, and individual taxpayers brought action challenging constitutionality of voter-enacted initiative requiring supermajority vote on any tax . The superior court determined that challenge to both provisions was justiciable and that both provisions violated state constitution. State appealed.

The Supreme Court of Washington held that:

- Challenge to supermajority provision was justiciable controversy;
- Challenge to referendum provision was not justiciable controversy;
- Challenge to referendum provision did not constitute matter of great public importance;
- Supermajority provision violated state constitution; and
- Supermajority provision was severable from remainder of statute.

The court concluded that the voter-enacted initiative requiring any bill containing a tax increase to be passed by a two-thirds majority vote of the legislature violated the state constitutional provision governing legislature's passage of bills. But it also found that the supermajority provision was severable from the remainder of the statute. The initiative contained a severability clause. The purpose of the initiative was to make passing tax increases more difficult and the remainder of the statute served that purpose, even without the supermajority requirement, as another provision of the legislation required a referendum for passage of a tax increase.

LITIGATION – AUCTION RATE SECURITIES - MARYLAND

Mayor and City Council of Baltimore, Md. v. Citigroup, Inc.

United States Court of Appeals, Second Circuit - March 5, 2013 - F.3d - 2013 WL 791397

City fails to establish requisite elements of an antitrust conspiracy in connection with the collapse of the ARS market.

City's mayor and council brought putative class action against banks and various financial institutions, alleging conspiracy to stop buying auction rate securities for their own proprietary accounts, in violation of the Sherman Act, which then triggered collapse of market for such securities. The United States District Court for the Southern District of New York granted defendants' motion to dismiss. Plaintiffs appealed.

The U.S. Court of Appeals held that:

- Plaintiffs pled only parallel conduct on part of defendants, with no common motive to conspire, and
- Plaintiffs failed to allege "high level" of inter–firm communications.

In the absence of "smoking gun" proving the existence of an antitrust conspiracy, the complaint may, in order to survive a motion to dismiss, present circumstantial facts supporting the inference of a conspiracy. This circumstantial evidence might include the existence of a horizontal agreement based on conscious parallelism. When such interdependent conduct is accompanied by circumstantial evidence and additional factors, including a common motive to conspire, evidence that shows that the parallel acts were against the apparent individual economic self–interest of the alleged conspirators, and evidence of a high level of inter–firm communications, will help a complaint survive a motion to dismiss.

City's mayor and council pled only parallel conduct on part of banks and various other financial institutions that had no common motive to conspire. Although defendants withdrew from the market "in a virtually simultaneous manner," plaintiffs' allegations were consistent with finding that market was already collapsing when defendants withdrew, so that defendants acted rationally and in anticipation of similar actions taken by competitors.

PARCEL TAX - CALIFORNIA

Borikas, et al. v. Alameda Unified School District

Court of Appeal, First District, Division 1, California - March 6, 2013 - Cal.Rptr.3d - 2013 WL 820593

Court finds that parcel tax's residential/commercial property classifications and differential tax burdens based on property size exceed the school district's taxing authority.

This case involves the validity of a parcel tax approved by Alameda Unified School District (District) voters as Measure H. The issue before the court was whether the tax violates Government Code section 50079, which authorizes school districts to levy "qualified special taxes." Such taxes are statutorily defined as "taxes that apply uniformly to all taxpayers or all real property within the school district, except that 'qualified special taxes' may include taxes that provide for an exemption from those taxes for taxpayers 65 years of age or older or for persons receiving Supplemental Security Income for a disability, regardless of age." Measure H provides exemptions for some senior and disabled taxpayers. It also imposes different tax rates on residential and commercial/industrial properties, as well as different rates on different sized commercial/industrial properties.

Plaintiffs contended that Measure H's property classifications, differing tax rates and conditional exemptions violated section 50079's definitional language that special taxes apply "uniformly" to all taxpayers or all real property within the district. The District contended that this statutory language reflected long-established equal protection principles which allow a governmental entity to create reasonable tax classifications, so long as all taxpayers within a classification are treated the same.

After examining the language and legislative history of section 50079, and that of the correlative enabling statutes, the court of appeal concluded that the legislature did not include this definitional language in order to acknowledge established equal protection principles. Rather, the language at issue was intended to be a constraint on the extent of the taxing authority delegated to the local governmental entities. The court therefore concluded Measure H's property classifications and differential tax burdens exceed the District's taxing authority under section 50079. The court also concluded that these provisions could be severed from the measure and that Measure H's exemptions for senior and disabled taxpayers are permissible under the statute.

EMINENT DOMAIN - TEXAS

Texas Municipal Power Agency v. Johnston

Court of Appeals of Texas, Houston (1st Dist.) - February 28, 2013 - S.W.3d - 2013 WL 744395

Landowner's petition for injunctive relief premature, as municipal power agency had initiated negotiations regarding easement but had taken no concrete steps to condemn his property.

Landowner sought temporary and permanent injunctive relief against the Texas Municipal Power Agency (TMPA) to prohibit TMPA from entering onto his property to conduct surveys and inspections and attempting to condemn a portion of his property. TMPA contended that landowner's petition was premature and did not present a justiciable controversy.

TMPA is a municipal power agency created pursuant to Texas Utilities Code and is a political subdivision of the State. As a political subdivision, TMPA thus possesses eminent domain powers, but before TMPA can initiate condemnation proceedings, it must first authorize the initiation of such proceedings at a public meeting by a record vote.

Although TMPA had indicated its desire to use its eminent domain powers to obtain an easement on a portion of landowner's property, the board had not yet authorized the initiation of a condemnation proceeding. Until it authorized such a proceeding, TMPA could not file a petition initiating condemnation. Thus, until the Board authorized the condemnation of landowner's property and TMPA actually filed a condemnation proceeding, the landowner had not suffered a concrete injury. The court concluded that landowner's claim for injunctive relief, at that point, presented an "abstract, hypothetical, and remote dispute" that was not ripe for adjudication.

TAX INCREMENT FINANCING - COLORADO

Northglenn Urban Renewal Authority v. Gil Reyes, in His Official Capacity As Adams County Assessor; and Board of County Commissioners of the County of Adams

Colorado Court of Appeals, Div. V - February 28, 2013 - P.3d - 2013 WL 781920

Appeals court rejects county assessor's TIF calculation that included property in the base value while removing that same property from the newly assessed value.

City council approved an urban renewal plan created by for the redevelopment of blighted areas. The plan included tax increment financing (TIF). "TIF is a form of public funding that allows for the sale of municipal bonds to raise money for public improvements pursuant to the Colorado Urban Renewal Law."

The city council subsequently passed a resolution that substantially amended the urban renewal plan, adding several tracts of new property to the Urban Renewal Area. No significant redevelopment activity occurred, however, on much of the newly added property. Therefore, the city council passed another resolution to suspend TIF for those properties within the renewal area without active urban renewal projects.

The county assessor later calculated the TIF revenue by removing the suspended property from the total assessed value but including the suspended property in the base value. The Assessor also concluded that the TIF period for all properties, including the later added properties, would expire in 2017, a date twenty-five years after the effective date of the original 1992 renewal plan.

The urban renewal authority filed a complaint alleging that, a) the assessor improperly calculated the base value of the property in the urban renewal area, and b) the assessor improperly shortened the duration of the applicable TIF period for the additional properties.

The court of appeals agreed, concluding that a calculation that creates an imbalance in an authority's TIF by including property in the base value while removing the same property from the

new assessed value impedes the goals of addressing and financing renewal of blighted areas.

ANNEXATION - LOUISIANA

Little Capitol of Louisiana, Inc. v. Town of Henderson

Court of Appeal of Louisiana, Third Circuit - March 6, 2013 - So.3d - 2012-1089 (La.App. 3 Cir. 3/6/13)

Reasonableness of annexation is a fact-driven inquiry that requires a weighing of evidence and is thus not suited to summary judgment proceedings.

Opponents objected to town's annexation of land, filing a Petition in Opposition to Annexation and Extension of the Corporate Limits of the Town. Plaintiffs asserted that the annexation was solely for the purpose of providing revenue to the town, that the town could not provide any services to the area to be annexed, and that, as a result, the annexation was unreasonable.

The trial court granted plaintiff's motion for summary judgment, stating that, "Plaintiffs have sustained their burden of proof that the annexation is unreasonable by an abundance of the evidence."

The court of appeal reversed, stating, "In an annexation contest, what is reasonable or unreasonable depends largely upon the particular facts in any given situation. Such a fact-driven inquiry necessarily involves a weighing of evidence. Consideration of the weight of the evidence is improper on a motion for summary judgment, and it is not the function of the trial court on a motion for summary judgment to determine or even inquire into the merits of the issues raised."

"After reviewing the 'the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits submitted,' this court cannot, without weighing the evidence, assess the reasonableness of the annexation. Therefore, we find that a grant of summary judgment is not appropriate. Accordingly, the judgment of the trial court is reversed, and the matter is remanded to the trial court for further proceedings."

LITIGATION - ARIZONA

In re Allstate Life Ins. Co. Litigation

United States District Court, D. Arizona - March 1, 2013 - Not Reported in F.Supp.2d - 2013 WL 789106

Court finds that genuine issue of material fact exists as to defendant's control person status in ongoing bond issuance litigation.

At issue in this lawsuit was the offering and sale of $35 million in revenue bonds used to finance the construction of a 5,000 seat event center. Plaintiffs are entities and individuals who purchased in the bond offering.

The relevant Defendants for the purposes of this portion of the ongoing litigation were Prescott Valley Event Center LLC ("PVEC–LLC"), Global Entertainment Corporation ("Global"), and Treliving. PVEC–LLC is the entity that received the proceeds of the bond sale and was responsible for managing the construction and financing of the Event Center. Global was the majority shareholder

of PVEC–LLC, owning between 50% of PVEC–LLC's stock during the times relevant to this suit. In turn, the majority shareholder of Global was a holding company named Western Professional Hockey League ("WPHL"). Treliving is the chairman and a minority shareholder of both Global and WPHL.

This suit was based on a number of misstatements purportedly made by the defendants. These misstatements were allegedly made in the Preliminary Official Statement and the Official Statement. Plaintiffs alleged that Defendants Global and PVEC–LLC contributed to the allegedly misleading statements in the OS. They asserted claims against Treliving as a control person of Global and thus PVEC–LLC under Section 20(a) of the Exchange Act, A.R.S. § 44–1999(B) of the Arizona Securities Act, and 815 ILCS § 5/13 of the Illinois Securities Law. Plaintiffs also asserted a claim against Treliving for negligent misrepresentation. Treliving moved for summary judgment on all claims.

The court concluded that the plaintiffs had shown that a genuine issue of material fact exists as to whether Treliving was a control person of Global under both Section 20(a) of the Exchange Act and § 44–1991 of the Arizona Securities Act. However, Plaintiffs had failed to establish any fact issue as to Treliving's liability under the Illinois Securities Law or Arizona's common-law negligent misrepresentation claim. Thus, Treliving's Motion for summary judgment was denied as to the Section 20(a) and § 44–1991 claims, but granted as to the Illinois Securities Law and negligent misrepresentation claims.

ZONING - MAINE

Summerwind Cottage, LLC v. Town of Scarborough

Supreme Judicial Court of Maine - March 5, 2013 - A.3d - 2013 ME 26

Town's shoreland zoning map entitled to deference by the zoning board of appeal and the court even though ordinance stated that map was "merely illustrative" of boundary locations.

Neighbors appealed decision of town zoning board of appeals to grant a setback variance to landowners.

The Supreme Judicial Court of Maine held that:

- Shoreland zoning map was entitled to deference;
- Lot was not required to meet minimum lot width requirement or obtain a variance from width requirement in order to obtain setback variance;
- Evidence was sufficient to support finding that lot required variance from setback requirement due to the unique circumstances of the property; and
- Evidence was sufficient to support finding that variance was required in order to allow a reasonable return.

Town's shoreland zoning map was part of shoreland zoning ordinance such that it was the result of the legislative process by the town council and was entitled to deference by the zoning board of appeals and the court, even though ordinance stated that map was "merely illustrative" of boundary locations.

In the interest of judicial economy the Supreme Judicial Court agreed to consider neighbors' challenge to the validity of town's shoreland zoning map, although the proper method of challenging the map's validity was through a declaratory judgment action. By hearing the challenge, the Supreme Judicial Court could avoid remand to the Superior Court to amend the complaint and to address an issue that the court had already heard.

ZONING - ARIZONA

Stagecoach Trails MHC, L.L.C. v. City of Benson

Supreme Court of Arizona, En Banc - March 5, 2013 - P.3d - 2013 WL 792825

Court holds that mobile home park operator was not required to appeal again to the city's board of adjustment after the zoning administrator reaffirmed his earlier denial of a permit; remanded on issue of nonconforming use.

Mobile home park operator brought action seeking judicial review of city zoning administrator's denial of a permit to install a new mobile home, and to challenge zoning ordinance.

The Supreme Court of Arizona held that:

- Park operator was not required to appeal again to the city's board of adjustment after the zoning administrator reaffirmed his earlier denial of a permit, and
- Park operator was not entitled mandamus relief or attorney fees.

The park operator argued that the entire park is the nonconforming use and replacing individual manufactured homes within the park is merely a continuation of the existing use that does not alter the park's nonconforming status. In contrast, the city argued that, because the individual space is the nonconforming use, placing a new home on the space is a different use that must satisfy current zoning requirements. The City did not argue, however, that if the park is the nonconforming use, replacing an individual home would alter the use and subject the park, and each space, to current zoning regulations. The court remanded to a lower court to decide these issues.

TAX - NEW JERSEY

Borough of Paramus v. County of Bergen

Tax Court of New Jersey - February 22, 2013 - 2013 WL 706315

Tax court holds that leasing tax-exempt hospital property to a third-party on a for-profit basis does not affect the exempt status of the property since the hospital continues to serve the public purpose set forth by the tax statute.

Property at issue is a public hospital exempt from local property taxes based on a provision of the New Jersey code which provides an exemption for county owned property put to public use. In 1997 the county elected to transition the management of the hospital to a for-profit third party health care management firm.

The property continued to be designated as exempt on the tax rolls. In 2001, the manager entered into contracts to lease space within the hospital to service providers. The borough assessor placed a partial assessment on the property in 2005 meant to tax those spaces within the hospital buildings leased by the manager to for-profit service providers. The Borough filed a tax appeal in 2008, and for later years, challenging the exempt status of the hospital and seeking to increase both the non-taxed assessment on the exempt portion of the property and the taxed assessment on the hospital's leased spaces.

The tax court found that the act of leasing the property to a third-party on a for-profit basis does not affect the exempt status of the property since the hospital continues to serve the public purpose set

forth by the statute. Because the exemption statutes at issue require that the property be used for a public purpose, the tax exemption code provision has no application to these facts. In addition, the nature and use of the leased spaces remain to be determined at trial, the outcome of which will either render the property wholly exempt or wholly taxable.

SCHOOL BOARD - KENTUCKY

Banks v. Breathitt County Bd. of Educ.

United States District Court, E.D. Kentucky, Central Division, at Lexington - February 28, 2013 - F.Supp.2d - 2013 WL 716315

While school board employees may be sued for constitutional violations in two capacities – official and individual, suing government employee in his or her official capacity is simply another way of pleading action against entity of which employee is an agent.

County school system employee filed suit asserting violation of his substantive due process rights under Fourteenth Amendment, wrongful abridgement of his rights under First Amendment, discrimination in violation of Kentucky statute prohibiting teachers and school board employees from being discriminated against because of their political opinions, violation of Kentucky statute prohibiting employers from subjecting public employees to reprisal for reporting information relating to employer's violation of the law, alleged fraud, or abuse, and intentional infliction of emotional distress.

The district court held that:

- 1983 claims against individual school board members in their official capacities were redundant of claim against school board itself;
- Board of education was not entitled to immunity from claims based on Kentucky statute prohibiting teachers and school board employees from being discriminated against because of their political opinions;
- Kentucky statute prohibiting employers from subjecting public employees to reprisal for reporting information relating to employer's violation of the law, alleged fraud, or abuse waived any government immunity to which school board might otherwise be entitled;
- School board was not entitled to governmental immunity on claim for intentional infliction of emotional distress;
- Official capacity state law claims against individual school board members were redundant of claims against school board itself; and
- Complaint sufficiently stated claims against interim superintendent and two school board members at time of alleged discriminatory events.

SCHOOL BOARDS – TAX - MISSISSIPPI

Jones County School Dist. v. Mississippi Dept. of Revenue

Supreme Court of Mississippi - March 7, 2013 - So.3d - 2013 WL 829010

Supreme Court of Mississippi holds that school districts are not liable for oil and gas severance taxes on sixteenth-section royalty interests.

This case concerned three main issues: 1) whether a school district is liable for oil and gas severance

taxes on its royalty interests derived from oil and gas production on sixteenth-section land; 2) whether the statute of limitations restricts the time period in which a school district can seek a refund of severance taxes that it had paid erroneously; and 3) whether a school district is liable for administrative expense taxes on its royalty interests derived from oil and gas production on sixteenth-section land.

The Supreme Court of Mississippi found that:

- School districts are not liable for oil and gas severance taxes on sixteenth-section royalty interests, as political subdivisions of the state are not included within the definition of "persons" made subject to these taxes.
- Pursuant to Article 4, Section 104 of the Mississippi Constitution, statutes of limitation in civil causes do not run against the state or its subdivisions.
- School districts are liable for administrative expense taxes on sixteenth-section royalty interests. These assessments are "fees," not "taxes"; the legislature has expressly made the state and its subdivisions subject to these fees; and no constitutional provision or other law is violated by requiring school districts to pay them.

EMPLOYMENT - OREGON

Webber v. First Student, Inc.

United States District Court, D. Oregon., Medford Division - February 26, 2013 - F.Supp.2d - 2013 WL 773732

Bus driver fails to establish sufficient nexus between his private contractor employer and school district to sustain civil rights action; Confederate flags frowned upon.

Employee was terminated by his employer, First Student, Inc., for insubordination after he refused to remove a 3–by–5 foot Confederate flag from his pickup truck while the truck was parked on school district property. First Student is a private contractor that provides transportation services to the school district. Employee claimed the termination violated his First Amendment rights and that First Student and the district acted together to deprive him of his right to freedom of speech and expression.

To state a claim for violation of his First Amendment rights under § 1983, employee must first show that First Student acted under color of state law. The court begins with the presumption that conduct by private actors is not taken under color of state law. Thus, the plaintiff bears the burden of establishing that a nominally private entity was a state actor. The basic question under the color of state law inquiry is whether the necessary "close nexus" between the state, the private entity, and the challenged conduct exists.

The Supreme Court has articulated four tests for determining whether a private entity's actions amount to state action: 1) public function; 2) compulsion; 3) joint action; and 4) governmental nexus. The district court's analysis revealed that the employee failed to meet any of these tests.

INVERSE CONDEMNATION - GEORGIA

Barngrover v. City of Columbus

Supreme Court of Georgia - March 4, 2013 - S.E.2d - 2013 WL 776731

Equitable relief granted to homeowner in inverse condemnation action against city entitled the city to raze and rebuild homeowner's house.

Property owner filed suit seeking monetary and equitable relief for inverse condemnation and a continuing nuisance and trespass on his property resulting in sinkholes and the presence of fecal coliform bacteria allegedly caused by leakage from the City's network of storm water and sewage pipes running under his property. A special master was appointed, issued a report, the superior court adopted the special master's recommendation as to equitable relief, and ordered that the structures on the property be razed and rebuilt. Property owner appealed.

The Supreme Court of Georgia held that:

- The trial court had the discretion to enter an order requiring house to be razed and rebuilt, and
- The trial court's failure to remove special master was not an abuse of discretion.

The Supreme Court found that the jury's equitable remediation verdict effectively revoked the city's existing pipeline easements through homeowner's property and re-directed said pipelines and easements through another portion of his property. This was not an illegal exercise of the power of eminent domain, was not an illegal seizure of his property, and was not a violation of his right to equal protection of the laws.

ANNEXATION - TEXAS

City of Harlingen v. Lee

Court of Appeals of Texas, Corpus Christi–Edinburg - February 28, 2013 - S.W.3d - 2013 WL 772661

Texas appeals court declines to recognize re-annexation as a power separate and distinct from annexation.

A Texas home-rule municipality purported to enact three separate ordinances: (1) Ordinance Number 08–65, annexing two tracts of land; (2) Ordinance Number 11–44, disannexing the area in question; and (3) Ordinance Number 12–1, repealing and rescinding Ordinance Number 11–44.

Local resident challenged the validity of these ordinances. The court found that the resident had standing to sue for disannexation because he alleged a distinct injury, traceable to the municipality's conduct, which is likely to be redressed by the requested relief.

The court of appeals found that the municipality had not offered any authority to establish that, in addition to its power to annex and power to disannex, it has a third power to re-annex. The court reviewed the relevant provisions of the Texas Local Government Code and the case law interpreting and applying those provisions and found no authority to establish that the city has a third and distinct power to re-annex. Accordingly, the court declined to recognize re-annexation as a power separate and distinct from annexation.

The court also held that the resident lacked standing to prosecute refund claims on behalf of third parties.

ZONING - NEW JERSEY

Motley v. Borough of Seaside Park Zoning Bd. of Adjustment

Superior Court of New Jersey, Appellate Division - March 4, 2013 - A.3d - 2013 WL 776544

Total destruction of a non-conforming structure, whether by the owner's design or by accident, terminates a nonconforming use and terminates the owner's right to continue that use.

Property owner, who sought to restore nonconforming house after pipes burst and caused significant water damage, filed action in lieu of prerogative writs seeking to overturn decision of borough zoning board of adjustment denying owner's application to lift stop work order.

The superior court held that:

- Owner, by removing every part of structure except foundation and footings, effected a total destruction of property, and
- "Stop work" order was justified by owner's improper conduct in exceeding limitations of zoning permit.

Given the statutory objective to eradicate nonconforming uses over time, local governing bodies may not adopt ordinances that authorize the restoration or replacement of all nonconforming structures, even on the condition that the cubic size of the replacement structure does not exceed the size of the existing structure. A nonconforming use or structure may be restored or repaired in the event of partial destruction thereof; by contrast, total destruction of such a structure, whether by the owner's design or by accident, terminates a nonconforming use and the owner's right to continue that use likewise ceases.

MUNICIPAL GOVERNANCE - NEW JERSEY

In re Advisory Letter No. 7-11 of Supreme Court Advisory Committee on Extrajudicial Activities

Supreme Court of New Jersey - March 6, 2013 - A.3d - 2013 WL 811863

Judge allowed to serve in the same municipality where his son had been sworn in as police officer, but with significant limitations.

Chief municipal court judge petitioned for review of opinion issued by Advisory Committee on Extrajudicial Activities that judge could no longer serve as judge in same municipality where judge's son had been sworn in as police officer.

The Supreme Court of New Jersey held that chief municipal court judge could serve, but was disqualified from presiding over any case in which his son or any fellow police officers or coworkers were party or witness in any case in municipal court, and was disqualified from acting in any supervisory capacity over other municipal court judges.

FORECLOSURE - MAINE

Stoops v. Nelson

Supreme Judicial Court of Maine - March 5, 2013 - A.3d - 2013 ME 27

Court upholds town's foreclosure of property for unpaid taxes and subsequent conveyance via

municipal quitclaim deed.

Town foreclosed on property for unpaid taxes and subsequently conveyed the property via municipal quitclaim. Original owners brought action to quiet title against subsequent purchaser and town, alleging violations of their due process rights.

The Supreme Judicial Court of Maine held that:

- Town complied with statutory notice requirements for imposition of tax lien, as prerequisite to automatic foreclosure;
- Provision of tax lien foreclosure statute that municipality "shall notify" record property owner of automatic foreclosure did not require that taxpayers received actual notice of pending foreclosure; and
- Automatic foreclosure on tax lien did not violate due process.

MUNICIPAL GOVERNANCE - TEXAS

In re Lee

Court of Appeals of Texas, Austin - February 28, 2013 - S.W.3d

City Secretary does not have the authority to determine the legal sufficiency of the allegations contained in a recall petition.

Citizens completed a petition to recall town mayor. Upon completion, the recall petition was filed with the City Secretary, who reviews the petition to determine if it is sufficient or insufficient. In this case, the City Secretary deemed the petition insufficient. The next day, at its next regular session, the city council approved the City Secretary's certification of insufficiency and refused to order a mayoral recall election. Citizens brought a motion to compel.

The city did not contend that the recall petition lacked the required number of valid signatures. Rather, it contended that the City Charter authorized the City Secretary to review the factual allegations supporting the recall and to determine, in his or her discretion, if the allegations are sufficient to give rise to a claim "for reason of incompetence, noncompliance with this Charter, misconduct or malfeasance in office."

The court roundly rejected this contention, finding that a review of the sufficiency of the allegations supporting recall would, in essence, amount to a non-judicial determination by the City Secretary and the City Council of whether the facts as alleged give rise to a legal basis for recall under the City Charter.

"The Charter for the City of Brady creates a ministerial duty for the City Secretary to certify a recall petition upon determining that it contains the requisite number of signatures. Likewise, the City Charter creates a ministerial duty for the City Council to order a recall election if the official whose removal is sought refuses to resign. Here, there is no dispute that the recall petition included the correct number of signatures. Further, there is no explicit discretionary duty relied upon by the City Secretary for refusing to certify the recall petition as sufficient or by the City Council for refusing to order a recall election. Under these facts, we conclude that mandamus relief is warranted."

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