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Police Officers Granted Immunity After Using TASER on Hallucinating Drug Addict

by Dustin S. Fisher
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In *Payne v. City of Chicago*, 2014 Ill.App (1st) 123010, the Illinois Appellate Court First District held that Police Officer defendants were entitled to absolute immunity under 4-102 of the Tort Immunity Act for providing a police service after using a TASER to subdue plaintiff after an emergency call for aid.

Plaintiff had been addicted to crack cocaine for several years. After using crack cocaine, the 48 year old plaintiff undressed and locked himself in his room at his mother's residence to watch pornography. Inside, he began acting erratically and smashing furniture. Plaintiff's brother broke in the door to find his nude brother yelling that others were coming to get him and that he needed help. Plaintiff's family dialed emergency assistance and both the police and EMTs were called to the scene. Upon arrival the police were informed that plaintiff was naked, under the influence of crack cocaine, and a third-degree black belt. The police decided to enter the room and physically take control of the plaintiff. Upon the entering the room the police ultimately shot the plaintiff with a TASER. The TASER did not deploy effectively and no electrical shock was applied to the plaintiff. Instead plaintiff pulled the metal contacts of the TASER from his skin, and jumped or fell out of the apartment window fracturing his spine at the C5 level causing paralysis from the neck down.

Defendants argued that the officers involved were entitled to blanket immunity under section 4-102 of the Tort Immunity Act. That provision of the Tort Immunity Act provides absolute immunity without exception for either intentional or willful and wanton conduct. Plaintiff countered that section 2-202 of the Tort Immunity Act, execution and enforcement of the law immunity, applied instead. The distinction is important as section 2-202 has a willful and wanton exception to immunity.

The First District Appellate Court held that responding to a call for emergency assistance was a "police service" and therefore within the scope of section 4-102 immunity. Plaintiff argument that by taking control of the scene, that the officers were executing and enforcing the law consistent with 2-202 immunity was rejected by the court as irrelevant to 4-102 immunity. In addition the court suggested that in order to argue 2-202 immunity applied, plaintiff must plead and prove what law the public employee was attempting to enforce or execute. As 4-102 immunity applied, summary judgment was affirmed in favor of defendants.

On the inside

Snowplows and Blocked Sidewalks

by John M. O'Driscoll
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The First District recently examined the issue of obstructions of sidewalks created by City snowplows *vis à vis* the Tort Immunity Act. *Pattullo-Banks v. The City of Park Ridge*, 2014 IL App (1st) 132856 (September 4, 2014). The plaintiff sued for personal injuries sustained when she was struck by a car while walking near a train station. The plaintiff alleged that the City negligently maintained its sidewalk and created an obstruction by plowing snow from the public streets onto the sidewalk thereby making the sidewalk impassable and requiring her to cross the street in a place where there was no marked crosswalk.

The City filed a motion for summary judgment based on section 3-102(a) of the Tort Immunity Act which provides that a public entity has a duty to exercise ordinary care to maintain its property in a reasonably safe condition only for the ordinary use of intended or permitted users. 745 ILCS 10/3-102(a). The City argued that plaintiff was not an intended or permitted user of the street especially as there was no crosswalk. Plaintiff argued that the breach of duty occurred on the sidewalk but the injury occurred in the street.

According to the Appellate Court, the trial court incorrectly focused on the issue of whether the plaintiff was an intended and permitted user of the street. Instead, the trial court should have focused on the sidewalk. Plaintiff's status as a permitted and intended user should be determined for the sidewalk, not for the street. It cannot be said that that plaintiff's injury arose from a breach of the City's duties to maintain the street. The Appellate Court determined that there was no immunity for the City under the Tort Immunity Act under this scenario and sent the case back to the trial court for further proceedings.

No Monkey Business with the Scope of the Tort Immunity Act's Coverage

by John M. O'Driscoll
Tressler LLP

The First District recently addressed the issue of who is covered by the Local Governmental and Governmental Employees Tort Immunity Act, 745 ILCS 10/1-101. *O'Toole v. The Chicago Zoological Society*, 2014 IL App (1st) 132652 (August 28, 2014). The plaintiff filed a negligence complaint against the Chicago Zoological Society d/b/a Brookfield Zoo within two years of sustaining personal injuries in a trip and fall over pavement. The trial court dismissed the complaint as untimely based on the Tort Immunity Act's one-year statute of limitation.

The Tort Immunity Act protects "local public entities" such as a "not-for-profit corporation" organized for the purpose of conducting public business. 745 ILCS 10/1-06. This argument centered on whether the Zoo fell within that definition and, in particular, whether the defendant conducts public business.

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The Court reiterated that a corporation does not conduct public business absent evidence of local governmental control. Furthermore, the corporation must be subject to the kinds of organizational regulations and control that are typical of other governmental units (such as the Open Meetings Act, the Freedom of Information Act, ordinances dictating how business is conducted or governing bodies controlled by other local bodies).

Although the County Forest Preserve District had limited oversight of Defendant, the Court found that the Defendant had not shown that it is tightly enmeshed with the government through direct government ownership or the local government's operational control. It does not have control over daily operations and the Zoo is not owned by the District. Consequently, the Zoo was found not to be a local public entity to which the Tort Immunity Act's one-year statute of limitations applies.

Injured 13-Year Old Held Not Responsible for Knowing Ordinance Prohibited Her Use of Park District's Slide Without a Sign or Other Notice

by Howard L. Huntington
Bullaro & Carton, P.C.

In *Bowman v. Chicago Park District*, 2014 IL App (1st) 132122 (September 5, 2014), a 13-year old girl was playing tag with younger friends at a playground when she ran to a slide to avoid being tagged. She went up the slide and when she descended, her foot was fractured when it became caught in a hole in the surface of the slide near its bottom. There were no signs posted designating the age group for the playground. Several complaints about the hole in the slide had been lodged with the park district several months before the accident, but the slide was not repaired.

The First District Court of Appeals reversed the trial court's judgment, declining to charge a child with responsibility of knowing municipal ordinances without a sign or other notice. Additionally, the court found that even adult members of the public had no way of determining that the district had designated this particular playground for a certain age group.

The district filed a motion for summary judgment claiming that it did not owe any duty to the girl because she was not an intended user of the slide under 745 ILCS 10/3-102(a). The district argued that it had an ordinance stating that children age 12 and older should not use playground equipment designed for children under the age of 12. The district also argued the slide was an open and obvious risk that the 13-year old should have avoided.

The plaintiff responded that the park was open to the public and no sign was posted in the park prohibiting children age 12 and older from using the slide. The plaintiff also responded that the hole was not open and obvious because the girl was unable to see the hole prior to being injured due to the curvature of the slide.

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The trial court granted summary judgment to the defendant, finding that the girl had violated an ordinance and was not an intended user. The trial court did not discuss whether the damage to the slide was open and obvious, or whether the district's failure to the repair the slide amounted to willful and wanton conduct.

The First District Court of Appeals reversed the trial court's judgment, declining to charge a child with responsibility of knowing municipal ordinances without a sign or other notice. Additionally, the court found that even adult members of the public had no way of determining that the district had designated this particular playground for a certain age group. The court remanded for the trial court to decide whether the slide's condition was open and obvious and whether the district's failure to repair the slide was willful and wanton conduct.

Guidance Counselor Properly Terminated Based Upon the Content of His Self-Published Book

by Peter R. Jennetten
Quinn, Johnston, Henderson & Pretorius

If your idea of helping women is "It's her fault," you do not have a right to retain your position as a high school guidance counselor. *Craig v. Rich Township H.S. Dist. 227*, 736 F.3d 1110 (7th Cir. 2013), cert. den. 134 S.Ct. 2300 (2014). Bryan Craig was a high school guidance counselor at Rich Central High School in Chicago and a coach for the women's basketball teams for a number of years. In that position, after counseling "thousands of students, parents, clients, and friends," Craig came to a stunning realization regarding relationships: "It's her fault." In 2012, he self-published a book under that title with relationship advice directed primarily toward woman. While some of the advice was mundane, much of it explored "provocative" and sexually explicit topics. It encouraged women to explore "a certain level of promiscuity" and told women how to use sex to obtain power over their partner. He also undertook "a comparative analysis of the female genitalia of various races which goes into an excruciating degree of graphic detail" and recounted his own sexual exploits. His acknowledgements thanked his students and clients and referenced his school counseling. The foreword was written by another teacher at the high school.

The Board became aware of the book after receiving concerns from the community. The Board found that his book "caused disruption, concern, distrust and confusion among members of the School District community," that it violated the Board's policy against "conduct that creates an intimidating, hostile, or offensive educational environment" and that Craig was not "a positive role model and failed to properly comport himself in accordance with his professional obligations as a public teacher." *Id.* at 1115. Craig sued, asserting a claim pursuant to 42 U.S.C. §1983 that his First Amendment rights were violated.

The Seventh Circuit noted that the bar for determining whether speech addressed a "matter of public concern" was fairly low. It is anything "that is a subject of legitimate news interest; that is, a subject of general interest and of value and concern to the public at the time of publication." The Court found that "It's her fault" did touch on a matter of public concern because it "addresses adult relationship dynamics, a subject that interests a significant segment of the public."

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The Court noted that a government employer "is entitled to restrict speech that addresses a matter of public concern 'if it can prove that the interest of the employee as a citizen in commenting on the matter is outweighed by the interest of the government employer in promoting effective and efficient public service." *Id.* at 1117. The Court found that the school district's "interests in remedying the potential disruption caused by his book outweighed Craig's speech interest" using the *Connick-Pickering* balancing test, which applied because Craig linked his book to his work as a high school counselor. Craig's "view of relationships is not the sort of topic of expression that Defendants would require a compelling reason to restrict." Craig took "deliberate steps" to link his book to his government employment by referencing his work for them, thanking his students, and including a foreword from another teacher. Applying the *Connick-Pickering* balancing test, the Court recounted the possible negative repercussions of the publication for the School District and concluded that the Board's "interests in remedying the potential disruption caused by his book outweighed Craig's speech interest."

First District Finds Shooting Range a Private Recreational Activity for Zoning

by Andrew R. Makauskas
Brady, Connolly & Masuda P.C.

On August 18, 2014, the First District Appellate Court decided *Platform I Shore, LLC v. Village Of Lincolnwood*, 2014 IL App (1st) 133923. Platform I Shore, LLC ("Platform") leased the second floor of a property owned by 3318 West Devon, LLC in Lincolnwood for the purposes of operating a shooting range above an existing firearms dealership. The property was located in a "B-2 zone district" ("B-2"). The application was submitted under the permitted-use provision for "health club or private recreation". The next day, 3318 West Devon, LLC, filed an application to obtain a building permit for Platform's shooting range.

On November 1, 2012, Zoning Officer Cook denied the application, stating that the shooting range did not fall within the ordinance's permitted-use provision for "health club or private recreation". The decision was appealed to the Village Board ("Board"), where the plaintiff provided definitions for the word "recreation" and contended that Zoning Officer Cook read a non-existent exception into the ordinance. Plaintiff also argued that another shooting range was present within the Village, located within an area designated in the "B-1 zone district" ("B-1"), a more restrictive district than B-2.

According to the Village, the zoning ordinance, which was rewritten in 2008, did not intend to reverse its policy opposing firearms dealers and shooting ranges in the B-2 zone district. The Village submitted evidence that the plaintiff had applied for permits on three occasions, two of which were rejected and one which was withdrawn. Also of note, on November 9, 2012, the Village adopted Resolution No. R 2012-1710, which initiated amendments to the Ordinance which would formally codify the Village's decision that the phrase "health club or private recreation" excluded shooting ranges.

The Board affirmed the denial of the plaintiff's application, finding that a shooting range did not fall within the intended meaning of the ordinance's definition of "health club or private recreation". One member of the Board dissented, saying that under the plain language of the current ordinance, a shooting range fell within the definition of "private recreation" and was a permitted use. The dissenting member pointed out that the past applications by plaintiff had been assessed under a different ordinance. Finally, this member noted there was no evidence refuting that another shooting range had been permitted in a more restrictive zoning area of the Village.

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The matter was appealed to the Circuit Court and the Board's decision was affirmed. The Circuit Court deferred to the Board's expertise in interpreting its own ordinances and agreed that the "health club or private recreation" provision did not include a shooting range within its meaning. The Court specifically stated that it did not need to determine whether the zoning ordinance was ambiguous in making its ruling.

The First District agreed with plaintiff that the application unambiguously provided that a shooting range was permissible under the "health club or private recreation" permitted-use provision and that the zoning application should not have been denied. The court further noted the zoning ordinance defined a "permitted use" as a use "permitted as of right", provided that use complies with all other applicable standards of the ordinance.

The First District agreed with plaintiff that the application unambiguously provided that a shooting range was permissible under the "health club or private recreation" permitted-use provision and that the zoning application should not have been denied.

The ordinance in question defined "health club or private recreation" as:

> "A building or portion of the building designed or equipped for the conduct of sports, exercise, leisure time activities, or other customary or usual recreational activities, operated for profit or not-for-profit and which can be open only to members or guests of the organization or open to the public for a fee." Lincolnwood Zoning Ordinance art. 2.02 (adopted Nov. 6, 2008).

The First District noted in *McNames v Rockford Park Dist.*, 185 Ill. App. 3rd 291, 295 (1989), shooting ranges for pistol and rifle shooting and target practice were held to constitute a recreational activity, even though not specifically enumerated in the statute at issue.

Further support for the decision included the definition of "Recreation" listed as:

> "the act of recreating or the state of being recreated: refreshment of the strength and spirits after toil: DIVERSION, PLAY" or a "means of getting diversion or entertainment" or "one that provides recreations or amusement." Webster's Third New International Dictionary 1899 (1993).

The fact that the Village amended the zoning ordinance after the plaintiff's application was of no consequence, as the Court was only to interpret the statute in effect at the time of the plaintiff's application. The First District acknowledged that its decision did not address whether the application complied with all other applicable standards of the Ordinance. This is significant in that Lincolnwood Zoning Ordinance Art. 4.04 (adopted Nov. 6, 2008) said that a permitted-use is a use permitted as of right provided that use complies with all other applicable standards of the Ordinance. The Circuit Court's decision was therefore reversed and the case was remanded for further proceedings.

Failure to Assert ADEA Claim in Appeal of Termination Barred Federal ADEA Suit

by Peter R. Jennetten
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Harriet Walczak taught in the Chicago Public Schools for over thirty years. A new principal placed her in a performance-remediation program and eventually instituted termination proceedings. She filed an EEOC charge alleging age discrimination. A hearing officer for the School Board recommended that Walczak be reinstated, but the Board of Education disagreed and terminated her. She appealed to the Circuit Court, but did not raise her ADEA claim in that proceeding. Shortly after the Circuit Court affirmed her termination, the EEOC issued a right to sue letter. She then filed an ADEA claim in federal court.

The district court dismissed her case and the Seventh Circuit affirmed the dismissal because Walczak did not raise the ADEA claim in her appeal to the circuit court. *Walczak v. Chicago Bd. of Educ.*, 739 F.3d 1013 (7th Cir. 2014). The Court held that "Walczak could have brought her ADEA claim in conjunction with her state-court suit for judicial review of the Board's decision to terminate her employment" and that her failure to do so precluded the assertion of a claim in federal court. The Court did note that a Rule 12(b)(6) motion such as the one filed by the School Board was not the proper vehicle to raise this defense. The Board should have raised the defense and then filed a motion for judgment on the pleadings pursuant to Rule 12(c). See *Walczak*, 739 F.3d at 1016, fn. 2.

Federal Courts are required to give the same preclusive effect to a state court decision as the state courts would. Claim preclusion "provides that a final judgment on the merits rendered by a court of competent jurisdiction bars any subsequent actions between the same parties or their privies on the same cause of action."

Federal Courts are required to give the same preclusive effect to a state court decision as the state courts would. Claim preclusion "provides that a final judgment on the merits rendered by a court of competent jurisdiction bars any subsequent actions between the same parties or their privies on the same cause of action." *Id.* Addressing each of Walczak's arguments, the Court held that the circuit court's decision affirming her termination was a final judgment on the merits and that she could have raised the ADEA claim in state court. *Id.* at 1017. The Court rejected Walczak's contention that the Board consented to a separate federal case for the ADEA claim by failing to object or move for a stay of the proceedings in state court. The Court additionally held that it was not inequitable to apply the doctrine of claim preclusion.

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This publication was generated by the **IDC Local Government Law Committee – Chair: John M. O'Driscoll**, *Tressler LLP*, and **Vice Chair: Dustin S. Fisher**, *Judge, James & Kujawa LLC.*

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