



SUMMIT COUNTY PROSECUTING ATTORNEY
SHERRI BEVAN WALSH

WINTER 2009



NEWS FROM THE CIVIL DIVISION

A MESSAGE FROM PROSECUTOR SHERRI BEVAN WALSH

The Prosecutor



We read it in the paper. We see it on the news. Our government leaders speak of it. Our friends and families discuss it. It seems wherever we go “*the economy*” is the number one concern. And just when budgets have been adjusted and approved, and we think we have figured out how to meet our needs, yet another State or Federal budget cut is made that affects each one of us at a local level. It is at times like these that we as county officials and employees need to be the most careful to protect and fight against

litigation. We need to ensure that we are documenting any unusual incidents as they occur. We need to ensure that we are following the procedures and laws as they apply to our roles in county government and as they apply to personnel decisions we make. Unfortunately, at times like these we can do everything right and still be sued. The article in this quarter’s newsletter will address what happens when a suit is filed and how you can assist in resolving the matter promptly, thus saving the County, your agency, and ultimately the tax payers’ money.

Of course, our Civil prosecutors are not just here to handle situations *after* litigation has been filed. They are an

invaluable source of information and advice for those County departments and elected officials who do not have their own in-house legal counsel. If you are an elected official or a representative of one, it is recommended that you confer with our Civil prosecutors anytime you have a legal question – whether it be a question regarding a personnel situation, instituting or revising a policy and procedures manual, or responding to a public records request. Remember, an ounce of prevention is worth a pound of cure, or, put another way, an ounce of legal advice before taking action is worth a ton of statutory immunity!

COUNTY IMMUNITY FROM SUIT UNDER STATE LAW

The Civil Division of this office is statutory legal counsel for most County entities. Thus, whenever a lawsuit is filed against any department or agency of the County or the County itself, that paperwork must be promptly sent to the Civil Division for handling. There the case will be assigned to the Civil Division Prosecutor assigned to handle matters affecting your department or agency.¹ These experienced Attorneys will file an Answer to the Complaint on your behalf and will work diligently to obtain a dismissal of the suit. Statutory immunity provides the most common defense resulting in dismissal. Pursuant to Ohio law, R.C. Chapter 2744 provides statutory immunity to counties for acts performed by the counties and their employees. We will discuss these concepts briefly.

First, for purposes of determining tort liability, R.C. 2744 necessarily requires classification of a political subdivision's functions as either "governmental" or "proprietary". A "governmental function" is an act that is an obligation of a political subdivision, benefiting all of the people of the political subdivision. R.C. 2744.01(C)(1)(a). Alternatively, a proprietary function is a function that is not one described in 2744.01(C)(1) and is " ... [a] function that promotes or preserves the public peace, health, safety, or welfare and that involves activities that are customarily engaged in by non-governmental persons." R.C. 2744.01(G)(1)(a) and (b). (Emphasis added).

Next, the statutory scheme provides that a political subdivision is not liable in damages in a civil action for injury, death, or loss to persons or property allegedly caused by any act or omission of the political subdivision or an employee of the political subdivision in connection with a governmental or proprietary function. R.C. 2744.02(A)(1). In order to overcome the immunity from liability, a plaintiff must establish that an exception to immunity exists. Negligence is not a viable cause of action when dealing with governmental functions. Moreover, while most functions of government are immune from liability, R.C. 2744.02(B) sets forth five enumerated situations in which a political subdivision can be held liable as follows: (1) "... negligent operation of a motor vehicle ... ", (2) "... negligent performance of acts by their employees with respect to proprietary functions of the political subdivisions.", (3) "... negligent failure to keep public roads in repair ... except that it is a complete defense ... when a bridge ... is involved, that the municipal corporation does not have the responsibility for maintaining or inspecting the bridge", (4) "... negligence of their employees that occurs within or on the grounds of, *and is due to*

¹The Civil Division has recently been downsized to three attorneys. If you are not sure who currently represents your department or agency please contact the Civil Division Administrative Assistant Tracy Pletcher at (330) 643-2736 and she will assist you in determining this issue.

**COUNTY IMMUNITY FROM SUIT UNDER STATE LAW
(CONTINUED)**

physical defects within or on the grounds of, buildings used in connection with the performance of a governmental function...”, or (5) “... when civil liability is expressly imposed upon the political subdivision by a section of the revised code.” Moreover, even when one of these conditions is found to exist, there is still a possibility of immunity.

As can be seen on review of R.C. 2744.03(A), the County will still be immune, even for the negligent performance of governmental or proprietary functions, if any of the following apply: (1) if the employee was engaged in the performance of a judicial, quasi-judicial, prosecutorial, legislative or quasi-legislative function; (2) the action or failure to act by the employee involved that gave rise to the claim of liability was within the discretion of the employee with respect to policy-making, planning or enforcement powers by virtue of duties and responsibilities of the office or position of the employee; or (3) if the loss ... of property resulted from the exercise of judgment or discretion in determining ... how to use equipment, supplies, materials, personnel, facilities and other resources unless the judgment or discretion was exercised with malicious purpose, in bad faith or in a wanton or reckless manner. While employees in the official capacity bear the same immunity as the County, there is a separate standard to determine whether an employee is immune in their personal capacity.²

During the course of the litigation, our Attorneys will work with you to determine which portions of the immunity law apply to your situation. In some cases, the lawsuit will be promptly dismissed. In others, it may take some time and additional effort to resolve the case. You may be asked to assist with discovery, including depositions, in order to resolve factual issues that lead to the ultimate favorable dismissal. In either instance, please be assured that the Attorneys in the Civil Division will act diligently on your behalf in order to obtain the best possible outcome.

²It is a rare case where an employee will be held liable in their personal capacity. This will only occur where the employee has acted outside the scope of their employment, recklessly, in bad faith or with malicious purpose.

WE'RE ON THE WEB!
WWW.CO.SUMMIT.OH.US/PROSECUTOR

CIVIL CASE REVIEW

As you can glean in the cases decided below, most cases would have involved money damages that were not paid.

Robin Ashford v. Summit County Sheriff, Case No. 5:07CV1491

Mr. Ashford alleged that he was the victim of excessive force while he was an inmate in the Summit County Jail. The County disputed his allegations. The case was dismissed with prejudice when he failed to appear at two consecutive hearings scheduled by the Court.

Charles Plinton v. County Summit, 6th Circuit Court of Appeal No. 07-4103

Mr. Plinton was a student at the University of Akron and was the subject of drug charges initiated by the Summit County Drug Unit. He was ultimately found not guilty of the criminal charges and moved home to Pennsylvania. He committed suicide 18 months later and his Estate sued the County alleging that the drug charges were the cause of his death. After extensive discovery, the case was dismissed on Summary Judgment as previously reported in this Newsletter. He then appealed to the Sixth Circuit Court of Appeals. After full briefing and argument, the appellate Court upheld the dismissal. No further appeals were taken and the decision in favor of the County is now final.

Ranita Mitchell v. Sheriff, Ohio Civil Rights Commission

Ms. Mitchell was fired from her job during her probationary period with the Summit County Jail and alleged that she was terminated due to her race. The County responded with documentation demonstrating that she was terminated for performance issues completely unrelated to her race. The O.C.R.C. dismissed the matter, finding that there was No Probable Cause to believe that race had been an issue in the decision to terminate her employment.

Frances Blankenship v. State of Ohio, Case No. CV 2008 02 1418

This case was the first Senate Bill 10 appeal filed in Summit County challenging the constitutionality of the act as applied to those who had already been convicted of their crime. This bill is Ohio's version of the Federal Ohio's Adam Walsh Act. Following full briefing on the constitutional issues, the Court ruled that Senate Bill 10 could be applied to those who had been previously convicted of their crimes and that such an application was not unconstitutional. The decision was not appealed.

84 Video/Newsstand, Inc., et al. v. Thomas Sartini, in his official capacity as Ashtabula County Prosecutor, et al.
Case No. 1:07C V3190

Several adult bookstores and dance establishments (sexually-oriented businesses) sued over 50 county prosecutors and city law directors to enjoin enforcement of Ohio's newly enacted anti-nudity statute, R.C. 2907.40. The statute regulates sexually-oriented business and contains restrictions on hours of operation and a "no touch" provision (as to patrons and other dancers). Plaintiffs allege that the statute is an unconstitutional infringement upon their First Amendment rights and that the statute is vague and overbroad. The Ohio Attorney General intervened as a party. The court denied the Plaintiffs' Motion for Temporary Restraining Order and Motion for a Preliminary Injunction. A Motion for Summary Judgment is before the Sixth Circuit Court of Appeals.

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IN MY OPINION

Below is a compilation of recent opinions from Prosecutor Sherri Bevan Walsh. If you would like a copy of any of these opinions, please call Tracy Pletcher at (330) 643-2736.

Prosecutor Opinion Number 08-036 (Revised)

Re: Pre-employment Drug and Alcohol Testing

Syllabus: It is our opinion that because there exists no constitutional right to a job offer, that pre-employment drug and alcohol testing for all applicants does not pose a Fourth Amendment concern provided valid consent is obtained, as applicants who do not consent to be tested may simply seek alternative employment.

Prosecutor Opinion Number 08-059

Re: Meadowvale Court Road Dedication

Syllabus: Absent an agreement to the contrary, each abutting property and easement owner alongside Meadowvale Court must sign the dedication petition.

Prosecutor Opinion Number 08-070

Re: Condemnation and Demolition Proceedings

Syllabus: The board of trustees may proceed with the demolition of a private residence provided it first obtains a condemnation order from the proper authority and follows the notification requirements contained in R.C. § 505.86.

Prosecutor Opinion Number 08-081

Re: Rehabilitative services offered to misdemeanor offenders

Syllabus: A Community Based Correctional Facility may not contract to provide rehabilitative services to misdemeanor offenders.

Prosecutor Opinion Number: 09-007

Re: Akron Law Library Association

Syllabus: Akron Law Library Association's Board of Trustees has the authority to hire and fix the compensation for a librarian and up to two assistants. Compensation includes salary and fringe benefits such as paid leave, medical insurance, and life insurance. Compensation does not include Medicare contributions. Up through 2010, Summit County remains obligated to pay its proportion of the librarian's and the assistants' compensation.

Prosecutor Opinion Number: 09-015

Re: County employee payroll deductions

Syllabus: The Summit County Fiscal Office currently lacks the authority to deduct real estate taxes from its employees' paychecks. However, upon the passage of a duly enacted ordinance pursuant to Summit County's Home Rule Authority, the Fiscal Office may deduct real estate taxes from its employees' paychecks on a voluntary basis and pursuant to a written agreement.

Prosecutor's Opinion Number: 09-019

Re: Property Tax Installment Payment Plan

Syllabus: The statutory scheme in the Ohio Revised Code does not currently provide the Summit County Fiscal Office with the authority to implement the proposed Tax Installment Plan. However, upon passage of a duly enacted ordinance pursuant to Summit County's Home Rule Authority, the Fiscal Office may implement the proposed Tax Installment Plan.

NEW SUMMIT COUNTY LEGISLATION

Below is a partial list of legislation passed by Summit County Council which may be of interest to you. A full copy of the legislation may be obtained from the Summit County Web site at www.co.summit.oh.us/council.

Resolution No. 2008-450

A Resolution approving and authorizing the County Executive to execute and submit a substantial amendment to the 2008 Annual Action Plan for the Community Development Block Grant ("CDBG), HOME Investment Partnership ("HOME") and American Dream Down Payment Initiative ("ADDI") Programs to the United States Department of Housing and Urban Development to apply for funds pursuant to the Housing and Economic Recovery Act of 2008, in the amount of \$3,767,144.00, to address the impact of the housing and foreclosure crisis in the County of Summit, for the Executive's Department of Community and Economic Development.

Resolution No. 2008-468

A Resolution authorizing the County Executive to execute a cooperative agreement with the City of Akron ("Akron") for a term of five (5) years and renewable for an additional five (5) years, whereby the County and Akron shall share the County's office services facilities, share the expenses of equipment and combine purchase of supplies, for the Executive's Department of Finance and Budget.

Resolution No. 2008-478

An amended Ordinance repealing Section 113.08 of the Codified Ordinances of the County of Summit, entitled "Dog Kennel, Licensing and Service Fees," amending Section 505.56 of the Codified Ordinances of the County of Summit, entitled "Kennel, Licensing and Service Fees," and amending Section 505.58 of the Codified Ordinances of the County of Summit, entitled "Fees for Mandatory Treatment of Adopted Cats, Dogs, Kitten and Puppies" to increase dog kennel, dog licensing and certain service fees associated with the operation of the Animal Control Facility, for the Executive's Department of Administrative Services.

Resolution No. 2009-004

A Resolution authorizing the County Executive to execute an agreement with the City of Akron, setting forth the scope of duties, manner of performance and all essential terms and conditions whereby the County of Summit will exercise County Building Code enforcement, inspecting and permitting authority on behalf of, and within, the City of Akron, for the Executive's Department of Community and Economic Development.

Resolution No. 2009-009

A Resolution confirming an award by the Board of Control of a lease between the County of Summit and Congressman Tim Ryan, for approximately 200 square feet of office space at 1040 East Tallmadge Avenue, Akron, Ohio, in Council District 2, for a two-year term, from 1/2/09 through 1/2/11, at an annual rent of \$1.00 per year, for the Executive.

Resolution No. 2009-011

A Resolution appropriating funds as required by Ohio Revised Code (ORC) §3113.35, for the Domestic Violence Trust Fund, in the amount of \$186,000.00 which includes \$60,804.13 paid into the fund for the period 7/1/08 through 12/31/08 and the balance being for the fund's receipts projected for the period 1/1/09 through 12/31/09 for the Battered Women's Shelter, for the Executive.

Resolution No. 2009-050

An Ordinance enacting Chapter 174 of the Codified Ordinances of the County of Summit, entitled "Current Real Estate Tax Installment Payment Plan," to provide for the monthly installment payment of current real estate taxes and assessments for residential owner-occupied real property, for the Fiscal Officer.