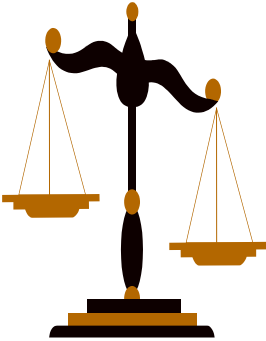


The Municipal Liability Update



A Publication of Siana, Bellwoar & McAndrew, LLP

Siana, Bellwoar & McAndrew, LLP Wins Major Victory for Police Officers!

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The police thought they had a would-be bank robber dead to rights. The judge in the criminal trial dismissed the charges after hearing the Commonwealth’s evidence. The criminal defendant/plaintiff then sued the police officers, claiming they misrepresented and withheld evidence from the judge when applying for the arrest warrant. Discovery in the civil suit revealed that a confidential informant promised the criminal defendant sex and drugs in order to push him to commit the bank robbery.

After almost two years of discovery, the federal trial court recently *granted* the officer’s Motion for Summary Judgment. The Motion was drafted by attorneys of Siana, Bellwoar & McAndrew, LLP.

In a lengthy seventy-four page opinion, the federal trial court exhaustively analyzed seven alleged misstatements of fact contained in the affidavits as well as thirty-five alleged omissions from the affidavits. The court concluded that none of the alleged misstatements or omissions were material to finding the existence of probable cause.

These types of claims are analyzed from the perspective of a reasonably objective officer and the facts available to the officer at the moment of arrest. The court affirmed the well settled principle that an officer is not obligated to include every single fact unearthed, or investigative procedure used, during the course of a criminal investigation.

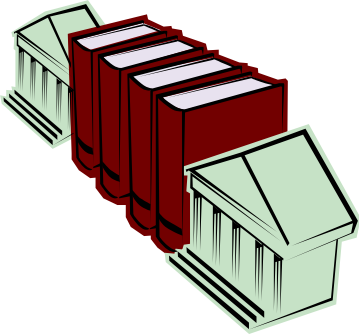
Notwithstanding the outcome of the case, and the general statement of law noted above, police officers should take extreme care when drafting affidavits of probable cause to ensure that *material* facts are not misstated, and that all relevant and material facts are included in the affidavit of probable cause. A fact is relevant if a reasonable person would want to know about the fact when considering whether to sign the warrant. In a criminal investigation involving complex facts or details, or in a case where a question of law exists as to what facts should be included in an affidavit, it is highly recommended that the police officer consult with supervisors or the district attorney’s office.

Teeple v. Cahill, et al., Civ. Act. No. 07-2976 (E.D. Pa. Dec. 22, 2009).

Legislative Update

Senate Bill 984 seeks to amend the Administrative Code to authorize municipalities without a police department to contract with the Pennsylvania State Police for police services by state troopers. The contracted troopers would remain under the command of the local State Police field office, but would not be ordered away from the municipality except during extreme emergencies. Not only would the contracted troopers continue to enforce state laws, they would, for the first time, be authorized to enforce local public safety ordinances. The Bill remains pending before the Senate Law and Justice Committee.

Senate Bill 1060 seeks to amend the Second Class Township Code to authorize an employment agreement between the Board of Supervisors and a Township Manager to set forth the terms and conditions of employment. The law would limit the employment agreement to no longer than two years after its effective date or the date of the Board’s organizational meeting following the next municipal election, whichever occurs first. This law may affect a board’s ability to terminate a township manager “at will.” The Bill is presently under consideration before the Senate Local Government Committee.



House Bill 1831 seeks to amend the Pennsylvania Municipalities Planning Code (“MPC”) to provide for the charging of review fees for municipalities’ evaluation of conditional use applications. The MPC presently only permits the reimbursement of review fees in connection with land development applications. (Some municipalities have attempted to circumvent existing law by assessing reimbursement of review fees as a condition for approval of the conditional use. This law would expand fees to review conditional use applications.) House Bill 1831 was approved by the House of Representatives on March 8, 2010 by a vote of 111 to 82. It is presently under consideration by the Senate Local Government Committee.

Blowing in the Wind: Municipal Regulation of Windmills and Windmill Farms

With the “green” movement well underway, the availability of state and federal economic incentives for “clean” energy technology has driven an explosion of windmill farm applications throughout the Commonwealth. Indeed, wind power constituted 42% of all new electricity-generating capacity in 2008, and is expected to double by 2011. By the end of 2011, wind power is expected to provide enough electricity for 14 million U.S. homes. This movement is likely to gain further momentum based upon the recent oil spill crisis in the Gulf of Mexico.

An increasing number of individual property owners have also begun exploring stand-alone windmills as a means to generate on-site electricity. Many municipal zoning ordinances, however, lack provisions to regulate windmill farms or stand-alone windmills, and otherwise contain general standards (such as height limitations) that would preclude such uses. The absence of any such standards often leads to confusion by the municipal staff in fielding inquiries from residents and developers, and exposes municipalities to the potential for exclusionary challenges brought by windmill farm operators.

While windmills and windmill farms are perceived as a clean, low-pollutant alternative to other energy sources, their use raises a number of potential public health, safety and welfare concerns for a municipality and its residents. Concerns over windmill farms range from viewshed protection, to the impact on birds and wildlife, to noise and vibration controls. In at least one matter, residents opposed to a windmill farm project have provided testimony that the constant vibration and low-frequency noise emanating from a proposed windmill farm may cause headaches, sleep deprivation, vertigo and nausea. Setbacks, ongoing maintenance obligations, and structural issues also raise potential concerns for municipalities and their residents facing windmill farms and properties proposing stand-alone windmills.

Municipalities should act now to assess and update their ordinances to meet this new challenge. In order to assist in this effort, Siana, Bellwoar & McAndrew, LLP has established a model ordinance that is available to any member municipality upon request. The model ordinance attempts to address a wide range of concerns attendant to the use of both stand-alone windmills and windmill farms. While it may be impossible to completely satisfy objecting residents, the model ordinance seeks to mitigate their impact by providing regulations governing height, noise, vibration, shadow flicker, setbacks, design certification, structural stability, and decommissioning. Please contact us immediately to obtain a copy of the model ordinance for your consideration.



Defectively Designed Guardrails

In Stein v. Pennsylvania Turnpike Commission, ___ A.2d ___ (Pa. Cmwlth. 2010), the Commonwealth Court recently decided a case involving a claim of a defectively designed guardrail brought under the sovereign immunity real estate exception. On September 15, 2003, Paul Stein (the “Decedent”) was driving eastbound on the Pennsylvania Turnpike near Exit 56, where the road bends. The eastbound highway surface is made of asphalt. There are two travel lanes and a paved berm which is the width of the travel lane. There is a gap in the guardrail on the outside of the road, leaving the highway open to an adjacent hill which slopes upward from the road. The guardrail resumes at the east end of the gap in the adjacent hillside and then turns down the hill to meet the road. The end of the guardrail and the hillside are protected by a U-shaped piece of metal (commonly known as a “boxing glove”). There was heavy rain at the time of the accident. The Decedent’s car hydroplaned and spun off the road between the gap and the guardrail and onto the grassy hill. The Decedent’s vehicle spun as it turned down the hill and hit the “boxing glove” end of the guardrail. The metal impaled the vehicle on the passenger side and amputated the Decedent’s right leg below the knee. The Decedent died from loss of blood.

Pamela Stein filed a wrongful death and survival action against the Pennsylvania Turnpike Commission (the “Commission”) asserting that the Commission was negligent for its design of the guardrail. On appeal, Plaintiff raised four issues, the most important of which was whether sovereign immunity barred a wrongful death action under the real estate and streets exceptions to the Sovereign Immunity Act. Continuing to uphold the line of cases that began with Dean v. Department of Transportation, 561 Pa. 503, 751 A.2d 1130 (2000), the Court held that the subject guardrail could not be a basis to impose liability on a Commonwealth agency, determining that the real estate exception of sovereign immunity was inapplicable and that Plaintiff further failed to demonstrate a claim under the highway exception because the incident did not occur on the highway itself.

Therefore, until the legislature changes the language of the streets exception to governmental immunity, it appears that the courts will continue to refrain from imposing liability for any incidents which occur off the street or highway.

Third Circuit Rules in Favor of Considering Public Records

In a recent Third Circuit opinion, the Court held that when ruling upon a motion to dismiss, it is proper to consider matters of public record. Crawford v. Frimel, 2009 WL 1904613 (C.A.3 (Pa.) 2009). Such holding is contrary to the general rule that courts are limited in their review on a motion to dismiss to the facts alleged within the Complaint. The impact that this ruling has upon the general rule is most apparent when there was a prior criminal trial and the argument of collateral estoppel is available.

In Crawford, the plaintiff was arrested and charged with drug and firearm-related crimes. At the criminal trial, Mr. Crawford sought to suppress evidence gathered during the search of his apartment on the grounds that the FBI lacked probable cause. The District Court denied Mr. Crawford’s motion, holding that there was probable cause for both the arrest and the search. Mr. Crawford then filed a Civil Complaint arguing that his constitutional rights were violated. The District Court granted the defendants’ Motion to Dismiss. Upon appeal, the Circuit Court held that since Mr. Crawford previously and unsuccessfully litigated these issues during the course of his criminal proceedings, he was precluded from pursuing the probable cause issue in his subsequent civil rights action. By utilizing this approach, attorneys will have a better chance of dismissing frivolous cases at the pleading stage rather than having to wait until discovery commences.

Employers Struggle With New Disability Law

The expansion of coverage under the Americans with Disabilities Act (“ADA”) last year has resulted in confusion over what actually constitutes a “disability.” Congress’ new law essentially wipes out a decade of court opinions that attempted to provide an understandable definition. Siana, Bellwoar & McAndrew, LLP attended seminars hosted by the Pennsylvania Employment Law Institute addressing the new law hoping to gain some insight. Unfortunately, not one judge, attorney or member of the Equal Employment Opportunity Commission in attendance was able to offer practical guidance on how to define a covered disability. Since it appears that just about any medical condition arguably qualifies for protection, the question of compliance will likely focus on whether employers provide *reasonable accommodations* to employees who *claim* to be disabled.

Employers who become aware of a disabled employee’s need for assistance to perform the job must engage in an *interactive process* with the employee to determine whether a reasonable accommodation is feasible. Employers who refuse to provide an accommodation they deem to be unreasonable bear the burden of proving it! For this reason, it is critical that the employer engage in this interactive dialogue with the employee *timely* and *in good faith*. Proper designation of the players in this process, together with effective documentation is key.

Here are some practical tips on handling an employee’s request for accommodations:

- implement a written policy acknowledging the obligation to comply with the ADA and defining procedures on how to address requests;
- ensure that written job descriptions identifying the essential functions of the job are adopted and properly conveyed to all employees;
- if an employee presents a vague or confusing medical note, request that the employee provide written clarification from the physician;
- in cases where the medical documentation is confusing, it may be appropriate to request from the employee the authority to confer directly with his or her physician in order to clarify the employee’s needs (this is an aggressive approach and should be carefully documented).

This new law is bound to lead to litigation, especially when no one really knows its boundaries. Therefore, it is recommended that employers seek advice from competent counsel in order to ensure compliance. The attorneys at Siana, Bellwoar & McAndrew, LLP would look forward to advising you in connection with this evolving area of the law.

Liability, or Lack Thereof, for Independent Contractors

A recent Commonwealth Court decision reaffirmed the rule that a local agency is not liable for the negligence of an independent contractor who creates a dangerous condition of agency real property that the agency fails to discover or correct. In Nardo v. City of Philadelphia, 988 A.2d 740 (Pa.Cmwlth. 2010), the City of Philadelphia contracted with a management company to maintain the Franklin Delano Roosevelt Golf Course. While an employee of the management company, Nardo was digging a flowerbed when his pitchfork hit a concrete slab that subsequently injured his back.

Nardo brought a civil action against the City, alleging that the City owed an employee of an independent contractor the same duty owed to a business invitee for a defect in the real estate. Nardo’s argument rested on public policy: that the doctrine relieving the City of responsibility for defects of real estate created by independent contractors should not be extended where the City has contracted with an independent contractor to perform the work and the contractor’s work is accepted by the City as an integral part of the real estate.

The City, however, argued that the garden had been previously constructed by an unknown independent contractor, and that this unknown independent contractor created the dangerous condition. Thus, as a matter of law, the City is not liable for the negligence of an independent contractor who creates a dangerous condition.

In ruling, the Court interpreted Section 8541 of the Tort Claims Act and held that the City can only be liable for the acts of its employees, not the acts of an independent contractor. Thus, the Court reaffirmed the general rule that a local agency cannot be held liable for a dangerous condition created by an independent contractor.



When Does a Municipality "Approve" a Contract or an Application?

In Wolfson-Verrichia Group, Inc. v. Board of Supervisors of West Whiteland Township, the Court of Common Pleas of Chester County recently decided an issue of significance for every municipality in Pennsylvania. At what point during a public meeting does a municipality "approve" a contract or plan of development? In this case, a developer and a municipality resolved a land use appeal by entering into a written agreement, whereby the municipality approved a concept plan attached to the agreement. Once the developer went through the land development process, he received approval to develop a large commercial property, including the construction of a hotel. Thereafter, the developer wanted to change the approved use from a hotel to apartments. After numerous discussions and presentations to the municipality, the developer claimed that at a public meeting the elected officials approved the use, density and layout for apartments, with a written document to follow, and all open issues to be addressed in land development. According to the municipality, it accepted the use, density and layout subject to the developer resolving remaining issues -- such as grading and preservation of historic trees -- before the municipality would approve the requested change to the concept plan.

The developer claimed that the municipality thereafter failed to follow through on its approval and sued for breach of contract, declaratory judgment and specific performance. The developer presented an expert report that concluded that the developer had suffered \$5 million in damages because the township refused to allow the developer to move ahead with the "approved" plan for apartments.



The issues in this case joined at the intersection of contract law and land use law. Andrew Bellwoar and Susan DiGiacomo, as counsel for the municipality, presented a dual defense: No contract was formed at the open meeting as there was no meeting of the minds, and a municipality cannot enter into a contract and/or approve a land development plan unless there is a formal motion and vote by the elected officials.

The importance of this case for municipalities lies in the manner in which a municipality takes action. If the Court had agreed with the developer, then any words of approval by board members concerning a proposal -- or even nods of the head -- could be argued as constituting the municipality's agreement to the proposal. Instead, the Court agreed with the municipality that Pennsylvania law (including the Sunshine Act) requires a motion and a vote for any "official action" to take place. Of note, the minutes of the municipality revealed that all actions taken by the governing body on other matters were the subject of a motion, a second, and an affirmative vote of a majority of elected officials. The minutes of the meeting for this matter showed consensus by the Board members, but no motion or vote.

Practice pointer: When discussing a project or proposal with a developer (in a staff meeting or in a Board meeting), clearly state (both verbally and in the minutes or in a follow-up letter) that any approval or agreement is subject to a formal decision by the elected body, and that until such a decision is rendered through formal action by the Board, no approval has been granted and no agreement has been made.

Siana, Bellwoar & McAndrew, LLP Prevails in First Amendment Case

On April 14, 2010, the Third Circuit Court of Appeals affirmed summary judgment in favor of Chalfont Borough in Knight v. Drye et al. where the Plaintiff police officer claimed that Borough officials unlawfully terminated him in retaliation for allegedly complaining about fellow officers' misconduct. Since Knight claimed that his complaints were made within the course of his duties through the chain of command, the Court ruled that his speech is not protected by the First Amendment. The Court explained that speech may be protected under the First Amendment only when expressed by citizens outside the scope of government employment. The Knight decision should help to insulate local governments in the Third Circuit from similar lawsuits in the future.

Use of Underlying Criminal Proceedings to Defeat Civil Rights Claims

The doctrine of collateral estoppel or issue preclusion can be used to prevent a civil rights claimant from attempting to litigate in a federal civil rights lawsuit what has already been determined in a state court criminal proceeding. Long-standing United State Supreme Court and Third Circuit jurisprudence holds that if a party would be collaterally estopped from denying a set of facts in a Pennsylvania State Court, he is precluded from denying or otherwise controverting these facts in Federal Court. (See Allen v. McCurry, 449 U.S. 90 (1980); Anela v. City of Wildwood, 790 F.2d 1063, (3d Cir.1986).

Therefore, it follows that a claimant in a civil rights lawsuit who entered a guilty plea or was found guilty of certain criminal charges cannot later contradict this finding of guilt in his civil rights action arising out of the same occurrence. The recent matter of Cole v. Mistick, 2009 WL 1160962 (W.D.Pa. Apr. 28, 2009) venued in the Western District of Pennsylvania directly addressed this issue. In the Cole matter, a pro se inmate who was involved in a violent altercation while incarcerated was precluded from adopting a position in his subsequent civil rights claim for excessive force that contradicted the facts to which he entered a guilty plea at a plea colloquy. Following this incident, the inmate was charged with aggravated assault, and he entered a guilty plea to simple assault. The State Court accepted the inmate's plea and the **facts** upon which it was based.

In brief, Plaintiff's guilty plea in connection with the alleged incidents of excessive force estopped him from claiming certain facts set forth in his sworn complaint and in his response to a summary judgment motion-which *contradicted* facts that he previously admitted in his guilty plea colloquy. The Court was critical of Plaintiff for taking a position clearly inconsistent with his guilty plea and cautioned that Plaintiff opened himself to a prosecution for perjury, in so doing. Plaintiff's claim of excessive force was almost wholly contradicted by the facts established in his plea colloquy and the Court determined that Plaintiff was precluded from proceeding with such a claim. Furthermore, the Court found that the inmate would have received an *unfair advantage* if he were allowed to subsequently assert a position that contradicted his position in the plea colloquy.

As underlying criminal proceedings often form the basis for subsequent civil rights lawsuits, what occurred in the criminal matter must be carefully examined. Guilty plea colloquies often involve a recitation of certain facts by a prosecutor to which a criminal defendant must admit before the criminal trial court will accept a guilty plea. Furthermore, as a practical matter, the plea colloquy transcript is often *not* generated if the plea was accepted by the court and there was no subsequent appeal of the guilty plea. In addition to obtaining the underlying criminal file documents, a separate request may be needed in order to have the transcript generated, so that it can be reviewed vis-à-vis the allegations in the civil rights complaint.

Independent Code Enforcement Entitled to Immunity Based Upon Current Status of Law

In Higby Development, LLC, 954 A.2d 77 (Pa. Cmwlth. 2008), Pennsylvania Commonwealth Court held that a code enforcement officer who contracted with a municipality to provide code enforcement services was an employee of the municipality for purposes of the Political Subdivision Tort Claims Act ("PSTCA") and entitled to immunity under the PSTCA.

In a recent application of the Higby case, Siana, Bellwoar & McAndrew, LLP successfully defended an independent code enforcement officer in two lawsuits. Five landowners sought thousands of dollars in purported damages from the code enforcement officer and the builder of the development. Plaintiffs asserted that the code enforcement officer was negligent and failed to ensure that the homes were compliant with applicable building and construction codes. Moreover, they reported the code enforcement officer to the Pennsylvania Department of Labor & Industry, which conducted an investigation.

However, the Court rejected these arguments outright. It relied on Higby to hold that the code enforcement officer was entitled to immunity under the PSTCA. Code enforcement officers everywhere should be encouraged to know that Higby is being interpreted and applied favorably by lower courts. However, there is still some cause for reservation. Higby remains pending on appeal to the Pennsylvania Supreme Court and could be overturned in that venue.

Siana, Bellwoar & McAndrew, LLP News

Michael G. Crotty, Esquire has been named a Partner effective January 1, 2010. Mr. Crotty joined the Firm in July of 2004 as an Associate. Prior to joining Siana, Bellwoar and McAndrew, LLP, Mr. Crotty served as a law clerk to the Honorable President Judge Emeritus Stephen J. McEwen, Jr., of the Pennsylvania Superior Court. Mr. Crotty concentrates his practice in municipal law with an emphasis on zoning, land use, and federal civil rights issues pertaining to the same.

Susan L. DiGiacomo, Esquire joined the Firm as a Partner effective January 4, 2010. Mrs. DiGiacomo previously worked in the Chester County District Attorney's Office as Chief Deputy District Attorney and the United States Department of Justice as Assistant United States Attorney. She has also worked for a Philadelphia-based law firm specializing in civil defense of professional liability claims. She is admitted to practice in the Commonwealth of Pennsylvania, the Eastern District of Pennsylvania, and the U.S Court of Appeals for the Third Circuit. Mrs. DiGiacomo will concentrate her practice in the areas of civil litigation, municipal defense with an emphasis on police and professional liability, and civil rights claims.

Julie M. Hess, Esquire joined the firm in March of 2010. Ms. Hess previously worked in the Chester County District Attorney's Office as Assistant District Attorney and with the United States District Attorneys' Offices in Chester County (PA), Albany County (NY), and Worcester County (MA). Ms. Hess is admitted to practice in the Commonwealth of Pennsylvania and the State of New York, the United States District Court, and the United States Supreme Court.

Ryan M. Jennings joined the firm as a law clerk in June of 2010. Mr. Jennings is a 2010 graduate of Seton Hall University School of Law. He earned a Bachelor of Arts degree, *summa cum laude*, in Political Science and Journalism from Seton Hall University in 2007. Ryan's legal experience includes several internships, including serving as a law clerk in the Chester County Court of Common Pleas (West Chester, PA), the Essex County Prosecutor's Office (Newark, NJ) and a general practice law firm (Chester County, PA).

Seminars and Speaking Engagements

On June 7, 2010, Stephen V. Siana, Michael G. Crotty, Eric M. Brown and Michael T. Taylor presented a seminar entitled "Collecting Delinquent Municipal Fees" on behalf of Pennsylvania State Association of Boroughs at the Franklin Commons in the Borough of Phoenixville. The program was hosted by the Borough of Phoenixville and provided municipal officials, administrators and attorneys with an understanding of the basic framework of the various municipal collections laws, together with some practical tips for identifying and addressing collection issues before and after they arise. Included in the seminar were topics such as: the effects of delinquent accounts on a municipal budget, types of costs and fees that can be collected, methods to collect delinquent accounts and municipal bankruptcy.

Members of the firm are available to present at seminars and workshops on virtually any topic involving or impacting municipalities. If you have a request or wish to obtain further information regarding seminars or speaking engagements please contact Stephen V. Siana, Esquire at (610) 321-5500 or ssiana@sianalaw.com.

Going Green

As part of our GOING GREEN initiative, Siana, Bellwoar & McAndrew, LLP, is now posting "The Municipal Liability Update" on our webpage, www.sianalaw.com. To better and more efficiently serve our clients, going forward we intend to send The Update to our clients via email only. Please forward your email address to info@sianalaw.com so as not to miss future Updates and other important announcements from Siana, Bellwoar & McAndrew, LLP. Thank you.





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**The
Municipal
Liability
Update**

SIANA, BELLWOAR & MCANDREW, LLP is a full-service law firm. Located in Chester County approximately equidistant between Philadelphia and Harrisburg, our attorneys regularly appear in the Courts of Common Pleas in the eastern half of Pennsylvania. We regularly represent clients in federal courts in the Eastern District and the Middle District of Pennsylvania. The firm's areas of practice include municipal liability, employment practices, corporate and partnership law, commercial and general litigation, professional malpractice, real estate, land development, zoning, workers' compensation and estate planning. In addition, our practice extends to representation of clients in disputes including complex commercial litigation as well as arbitration and other forms of alternative dispute resolution. The Firm is committed to providing quality service in the representation of municipalities, police departments, fire departments, public officials and other insureds and in matters involving risk management and loss control. The Firm emphasizes proactive involvement by municipalities and other insureds in risk management and loss control to avoid unnecessary expenses and costs associated with claims.

This newsletter is a publication of SIANA, BELLWOAR & MCANDREW, LLP and is intended to alert the recipients to new developments in municipal law. It does not constitute legal advice or a legal opinion on any specific facts or circumstances. The contents are intended as general information only. You are urged to consult a lawyer concerning your situation and specific legal questions you may have.