

## Overview of Two Recent Changes in Michigan Public Sector Labor Law

Winter 2012, No. 1

c o n t e n t s

Overview of Two Recent Changes in Michigan Public Sector Labor Law –1

•

A Composite View of Courts and Attorney General Opinions Applying, Interpreting and Clarifying Michigan’s Medical Marihuana Law –4

•

State Law Update –19

•

Winter Seminar –22

•

Federal Law Update –24

•

Legislative Update –33

•

Opinions of Attorney General Bill Schuette –33

*By Steven H. Schwartz and John A. Schipper of Steven H. Schwartz and Associates, P.L.C.*

The Michigan Legislature recently enacted two major changes to Michigan labor law that will significantly impact collective bargaining over health insurance in the public sector. Although other legislative amendments passed in 2011 affect specific classifications of public employees (such as teachers, police officers, and firefighters), the two legislative changes discussed in this article affect virtually all public sector employees, including those who are not represented in collective bargaining.<sup>1</sup>

### Amendments to PERA

P.A. 54 of 2011 amends the Public Employment Relations Act (“PERA”) by changing three aspects of bargaining in the public sector.<sup>2</sup> First, unions and public employers are prohibited from agreeing to retroactive increases in wages and benefits after the expiration date of the prior collective bargaining agreement. Arbitration panels under Act 312 similarly are barred from ordering any such retroactive increase.<sup>3</sup> Second, “step” increases may not be implemented after a collective bargaining agreement expires. “Step” increases, which are common in public school and municipal contracts, provide for automatic wage increases based upon the employee’s service with the public employer.<sup>4</sup>

These first two changes are not dramatic, particularly because few public employers are agreeing to significant wage or benefit increases. Rather, most public employers are seeking economic concessions from their employees in response to the severe decline in revenues.

In contrast, the third change to PERA is significant to both the negotiating process and the bargaining position of the public employer. Under this amendment, a public employer is required to charge 100% of all increases in any insurance benefit - health, prescription drugs, dental, vision, life, disability - to the employee immediately after the collective bargaining agreement expires, until a successor agreement is reached.<sup>5</sup> The public employer may collect this payment by payroll deduction, without the prior written consent of the employee.<sup>6</sup>

The practical effect of this third change is profound on the process of public sector bargaining. In private sector labor relations, if the employer and union are unable to reach agreement before their contract expires, the usual result is that either the employees strike or the employer locks them out. Since this creates an actual deadline, contract

## Public Corporation Law Quarterly

The *Public Corporation Law Quarterly* is published by the Public Corporation Law Section of the State Bar of Michigan, Michael Franck Building, 306 Townsend Street, Lansing, Michigan 48933-2083.

Correspondence and submissions should be directed to Steven P. Joppich, Secrest Wardle Lynch Hampton Truex & Morley PC, 30903 Northwestern Hwy, PO Box 3040, Farmington Hills, MI 48333, phone (248) 851-9500. Articles must be in Word format, double-spaced, and e-mail to [sjoppich@secrestwardle.com](mailto:sjoppich@secrestwardle.com)

### Section Officers

Eric D. Williams, Chairperson  
Big Rapids

Philip A. Erickson, Vice Chairperson  
East Lansing

Catherine Mish, Secretary-Treasurer  
Grand Rapids

### Publications Committee

Steven P. Joppich and Thomas Schultz  
Editors  
Farmington Hills

Richard J. Figura  
Flint/Empire

Marcia Howe  
Farmington Hills

George M. Elworth  
Lansing

Phil Erickson  
East Lansing

The views expressed in the publication do not necessarily reflect those of the Public Corporation Law Section or the State Bar of Michigan. Their publication does not constitute an endorsement of the views.

negotiations usually are completed before the expiration date of the collective bargaining agreement.

Until now, the public sector had no such deadline, and contracts were rarely negotiated prior to the expiration of the collective bargaining agreement. If the public employer demanded concessions on benefits, particularly health insurance, it would lose potential cost savings while negotiations dragged on for months after the nominal expiration of the collective bargaining agreement.

Under the amendment, public employees and the unions that represent them have a strong incentive to settle prior to the expiration of the old collective bargaining agreement, even if some concessions are demanded. Health insurance premiums are typically increasing by 9 - 13% per year. Translated to typical public sector contracts, this increase frequently means a public employee would have to pay \$230 to \$290 per month in health insurance costs, in addition to the employee's existing contribution. As a result, the pressure to avoid this type of increased contribution has already, and will likely to continue, to encourage settlements prior to the expiration of collective bargaining agreements.

Public sector bargainers will need to adjust their bargaining strategies, and their calendars, to respond to this newly created deadline.

### Publicly Funded Health Insurance Contribution Act

Public employers are now starting to evaluate how to comply with the new Publicly Funded Health Insurance Contribution Act ("PFHIC"), which contains many ambiguities and will likely result in significant litigation in the appellate courts.<sup>7</sup> PFHIC requires "public employers" (a broadly defined term which includes the State of Michigan, local units of government, political subdivisions, school districts, community colleges, public sector universities, and various intergovernmental agencies) to share the cost of health insurance premiums with their current unionized and non-unionized employees (subject to the "opt-out" provision discussed below).<sup>8</sup> Retirees are exempted from the PFHIC.<sup>9</sup>

#### Effective Date

Public employers subject to PFHIC must comply with its provisions on or after January 1, 2012, depending on when their "medical benefit plan coverage year" begins.<sup>10</sup> This term is subject to at least two interpretations. It either means the twelve-month period starting when annual deductibles and copayments are retriggered under the "medical benefits plan", or it means the twelve-month period starting when the annual increases in premiums become effective.<sup>11</sup> For many public employers, these twelve-month periods are not identical.

The sole exception is that employees covered by collective bargaining agreements "executed" prior to September 15, 2011, are grandfathered until their agreement expires. At that point, those employees lose their grandfather status and their benefits must come into compliance with PFHIC.<sup>12</sup>

Thus, many public employers will be faced with charging their non-union employees, typically key management and administrative officials, with contributions months or years before the unionized employees they supervise.

#### Default Option

If a public employer takes no action to elect another option, it will automatically default to the "hard dollar cap".<sup>13</sup> Under this option, two calculations are required. First, the employer must calculate the number of employees enrolled in single, two-person and family coverage. Then the public employer must calculate the total of: \$5,500 for each employee enrolled in single coverage, \$11,000 for each

employee enrolled in two-person coverage and \$15,000 for each employee enrolled in family coverage.<sup>14</sup> The sum of this formula is the total amount the public employer may annually spend on health insurance coverage. Costs are inclusive of actual or illustrative premiums, reimbursements for prescription drugs, deductibles or co-payments, or employer payments into health savings or flexible spending accounts<sup>15</sup>

Within the hard dollar cap, the public employer is allowed to “allocate its payments for medical benefit plan costs among its employees and elected public officials as it sees fit”.<sup>16</sup> The ability to allocate total dollars within the hard cap raises several issues. First, in most situations, the cost of two-person coverage is much closer to the cost of family coverage; it is typically more than double the cost of single coverage. Thus, assuming the employer does not want two-person plan participants to pay disproportionate share of their costs, the employer will have no choice but to make allocation adjustments within its hard dollar cap.

Second, there is considerable controversy in the labor relations community regarding whether public employers have to, or even may, collectively bargain with unions, over such an allocation. Many management-side labor lawyers believe that public employers are prohibited from bargaining with unions about this allocation and must make this allocation unilaterally. Many union-side labor lawyers believe that this allocation is either a mandatory or, at least, permissive subject of bargaining. Mandatory subjects of bargaining are conditions that unions and public employers must bargain about, either to resolution or impasse; permissive subjects of bargaining are conditions that unions and public employers may agree to bargain about, or may lawfully refuse to bargain about.

Third, the allocation will likely encourage employees to change their levels of coverage, such as dropping a child from coverage, in order to move from family to two person coverage, or dropping a spouse from coverage, in order to move to single coverage. These types of individual changes will make it impossible for a public employer to actually ascertain the amount they will charge employees, until all coverage selections have been made.

### 80-20 Option

By a majority vote of its governing body, a local public employer may elect to adopt the “80-20” option.<sup>17</sup> As with the allocation of costs described in the previous section, there is considerable controversy in the labor relations community whether the choice between the Default Option, the 80-20 Option or the Opt-out Option (discussed below) is subject to bargaining, and if so, is it a mandatory or permissive subject of bargaining.

Under the 80-20 option, the public employer may not pay more than 80% of its total, aggregate costs for all medical

plans it offers to employees and elected officials. The remaining 20% must be borne by the employees and elected officials. As in the case of the Default Option, the public employer “may allocate the employees’ share of total annual costs of the medical benefit plans among the employees of the public employer as it sees fit”.<sup>18</sup> Under this option, elected officials must be charged at least 20% of the cost.

### Opt-Out Option

Some, but not all, “public employers” may elect a third option, to completely opt out of the PFHIC requirements. An entity falling within the definition of “local unit of government” may, with a 2/3 vote of its governing body, elect to exempt itself from the cost-sharing requirements of PFHIC.<sup>19</sup> Cities and counties with “strong mayor”/county executive forms of government may only opt out with the consent of that elected administrator.<sup>20</sup> “Local unit of government” include cities, villages, townships, county and several unique public authorities.<sup>21</sup> Significantly, institutions of higher education, school districts, and intergovernmental authorities do not fall within this definition; therefore, those public entities may not elect to opt out.<sup>22</sup> This distinction between public entities may come under constitutional attack in the courts.

The decision to opt out must be made annually by the governing body. It is problematical if a governing body opts out in the first year of a collective bargaining agreement, but later elects not to opt out in subsequent years of that agreement. It is unclear, in that event, whether the public employer would have to negotiate at least the impact of that decision and allow unionized employees to bargain over the level and types of coverage offered to them under the collective bargaining agreement.

### Conclusion

Both statutes discussed in this article create profound changes in the nature and process of public sector collective bargaining. Given the inherent ambiguities and the likely legal attacks on their constitutionality and interpretation, it will likely be years before the full meaning of these statutes is resolved. 🏰

### Endnotes

- 1 P.A. 103 of 2011 amends Section 15 of PERA, by expanding the list of prohibited subjects of bargaining for unionized school district employees. P.A. 116 of 2011 amends Act 312, which provides for binding arbitration of contractual disputes for police officers, firefighters and emergency dispatchers, by changing criteria the arbitration panel must apply and the arbitration process.
- 2 M.C.L. 423.201 *et seq.*
- 3 M.C.L. 423.215b.

- 4 *Id.*
- 5 *Id.*
- 6 *Id.*
- 7 P.A. 152 of 2011.
- 8 Section 2(f).
- 9 Section 2(e).
- 10 Sections 3, 4(2).
- 11 Section 2(e).
- 12 Section 5(1), (2).
- 13 Section 3.
- 14 *Id.*
- 15 Sections 3, 4(2).
- 16 *Id.*
- 17 Section 4. State employees are subject to the decision of the specified State officials.
- 18 Section 4(2).
- 19 Section 8.
- 20 Section 8(2).
- 21 Section 1(d).
- 22 Section 2(f).

---

## A Composite View of Courts and Attorney General Opinions Applying, Interpreting and Clarifying Michigan’s Medical Marihuana Law

By Steven P. Joppich, *Secret Wardle*

No matter where one stands on the issue of medical marihuana in Michigan, all sides would have to agree that it is one of the most intriguing, challenging and thought-provoking topics to confront citizens, lawyers and our legal system in quite some time.

To any careful observer, there can be little question that the Michigan Medical Marihuana Act (MMMA) is poorly written and leaves a multitude of issues and conflicts of law for resolution by the courts and legislature. Two unfortunate victims of this circumstance await such resolution. Namely, the very people the MMMA is intended to assist, who are left questioning whether they will be arrested for their activities which continue to be in violation of federal and possibly state laws; and also the law enforcement officers and other government officials, who have been strapped with uncertainties in terms of what they can and cannot do.

This was astutely recognized by Judge O’Connell of the Michigan Court of Appeals, who wrote the following in his concurring opinion in the case of *People v Robert Lee Redden* (discussed in detail below):

“The problem, however, is that the MMMA is inartfully drafted and, unfortunately, has created much confu-

sion regarding the circumstances under which an individual may use marihuana without fear of prosecution. Some sections of the MMMA are in conflict with others, and many provisions in the MMMA are in conflict with other statutes, especially the Public Health Code. Further, individuals who do not have a serious medical condition are attempting to use the MMMA to flout the clear prohibitions of the Public Health Code and engage in recreational use of marihuana. Law enforcement officers, prosecutors, and trial court judges attempting to enforce both the MMMA and the Public Health Code are hampered by confusing and seemingly contradictory language, while healthy recreational marihuana users incorrectly view the MMMA as a *de facto* legalization of the drug, seemingly unconcerned that marihuana use remains illegal under both state and federal law. In this opinion, I will attempt to cut through the haze surrounding this legislation.”

In his 29-page opinion, Judge O’Connell proceeded to identify and thoroughly examine a veritable laundry list of issues, problems, confusion, contradictions, and practicalities that are caused by the poorly worded MMMA, and he called

upon the legislature to revise it and the appellate courts to interpret and provide guidance regarding the applicability of the Act for the sake of all persons involved.

In apparent response, during the last 12 months, no less than seven more Court of Appeals decisions have been issued in the State of Michigan interpreting the MMMA, with many others currently pending on appeal from multiple trial court rulings across the state. The Attorney General has also weighed in on the issue with four opinions, and the state circuit courts and federal district courts in Michigan are also issuing decisions addressing various aspects of the law. Furthermore, this author is aware of at least three cases currently on appeal to the Michigan Supreme Court regarding the MMMA.

Watching the legal issues, theories, and law unfold in this area is fascinating from a legal perspective, and the pace and volume with which it is occurring may be unprecedented. It is not very often that so many decisions are rendered by so many legal system sources within such a short period of time. Whether one agrees with the decisions or not, it is clear that all relevant levels and branches of our state government acknowledge the problems created in our legal system by this poorly worded statute, and they are actively undertaking efforts towards addressing them.

The following is a comprehensive and descriptive assemblage of the most recognized appellate court rulings, attorney general opinions, federal court decisions, and county circuit court rulings issued since September 2010 concerning this topic. They are arranged in chronological order based on the source, starting with the Michigan Court of Appeals. When read together in this fashion, these materials provide not only an easy resource for future reference and guidance, but also a composite snapshot of the state of the law concerning the medical marijuana issues at this particular point in the law's evolutionary process in Michigan, which hopefully will be useful to citizens, lawyers and planners, as well as local law enforcement, code enforcement, and other governmental officials.

## Michigan Court of Appeals Decisions

### Registration After Arrest; Physician Statement; Amount of Marijuana

*Medical marijuana caregiver registry card issued after the date of arrest for growing medical marijuana did not provide a defense.* **People of the State of Michigan v Robert Lee Redden, et al.**, 290 Mich App 65 (2010). Case No. 295809. For Publication September 14, 2010.

Upon execution of a search warrant at defendants' residence, 1-1/2 ounces of marijuana and 25 marijuana plants were found. The search took place on March 30, 2009. During the search, defendants provided the police with letters from a doctor, dated March 3, 2009, and March 4, 2009, respectively. The physician's letters stated that he was treating the defendants for a debilitating condition as defined in Mich-

igan's medical marijuana law and had formed a professional opinion that the defendants were likely to receive therapeutic or palliative benefit from the medical use of marijuana to treat or alleviate a serious or debilitating medical condition or symptoms of their serious or debilitating medical condition.

Although the Michigan Medical Marijuana Act (MMMA) went into effect on December 4, 2008, the State of Michigan did not begin issuing registry identification cards until April 4, 2009. The Michigan Department of Community Health (MDCH) issued medical marijuana registry identification cards to each defendant in this case on April 20, 2009, which was *after* the search of defendants' residence in this case.

The defendants raised Section 8 (see inset) of the MMMA as an affirmative defense in the case, and the prosecution claimed that Section 8 did not apply unless the defendants had a valid registry identification card as required by Section 4 (see inset) of the MMMA. The prosecution also argued that the defendants possessed more than the amount of marijuana permitted under Section 4, and did not keep their marijuana plants in an "enclosed, locked facility," as is also required under Section 4.

The Court of Appeals, being a three-judge panel, issued a majority opinion of Judges Meter and Owens. Judge O'Connell issued a separate concurring opinion.

The majority opinion first ruled that the registry identification card required under Section 4 of the MMMA is *not* required in order to assert a defense under Section 8 of the Act. The Court examined Section 4 and Section 8 of the MMMA and concluded that the MMMA provides two ways in which to show legal use of marijuana for medical purposes in accordance with the Act, i.e., individuals may either obtain a registry identification card under Section 4, or remain unregistered and, if facing criminal prosecution, assert the affirmative defense in Section 8. The Court found that the "plain language of the statute establishes that Section 8 is applicable for a patient who does not satisfy Section 4." The Court also found that the language of the ballot proposal itself supports this conclusion.

The Court's analysis, however, did not end there. Instead, since the defendants did not have a registry identification card under Section 4 at the time of the incident, the Court analyzed whether the defendants qualified for a Section 8 defense in this case. The Court first concluded that there was evidence that the doctor's recommendations did not result from assessments made in the course of a bona fide physician-patient relationship. The Court acknowledged, in coming to this conclusion, that the doctor was board certified in ophthalmology, and his sole employment was to review people in at least six states to see whether or not he thought they can have marijuana under medical marijuana laws. The Court further noted that the doctor refused to divulge what defendants' debilitating medical conditions were.

As a result, the Court ruled that this issue must be returned to the trial court, but stated that the facts at least raise an inference that defendants saw the doctor not for good faith medical treatment, but instead in order to obtain marihuana under false pretenses.

Next the Court of Appeals analyzed whether Section 4 (see inset) of the MMMA could be applied to establish the amount of marihuana that is “reasonably necessary” under Section 8 (see inset). The Court noted that if the intent of the statute was to have the amount in Section 4 applied to Section 8, then the Section 4 maximum amount would have been reinserted into Section 8 instead of using the language “reasonably necessary to ensure uninterrupted availability” in Section 8. The Court of Appeals, therefore, returned this issue to the trial court, as well, for a determination of whether the amounts of medical marihuana and marihuana plants in defendants’ possession was reasonably necessary pursuant to Section 8 of the MMMA.

Finally, the Court noted that the doctor did not identify the nature of defendants’ debilitating medical conditions beyond stating that (1) defendant had “pain” and the other defendant had “nausea.” The Court concluded that this evidence was insufficient to satisfy the definition of serious or debilitating medical conditions as required by the MMMA, but that this issue is yet another matter for further proceedings before the trial court.

This is a published opinion, meaning that it has binding precedential value as law in Michigan, but as mentioned previously there is also a concurring opinion issued by Judge O’Connell that is of significant note. While Judge O’Connell’s concurring opinion does not carry the weight of binding precedent (being an opinion issued by less than a majority of the Court), it is nonetheless significant in terms of exposing the vast number of poorly worded and otherwise questionable provisions contained in the MMMA.

It is worth noting that Judge O’Connell’s opinion is the first time that any member of the appellate courts in Michigan affirmatively stated that “the MMMA does not create any sort of affirmative *right* under state law to use or possess marihuana,” addressing claims that the MMMA had created a actual right, in Michigan, to manufacture, possess and use marihuana. In support of this conclusion, Judge O’Connell recognized that marihuana remains a Schedule 1 controlled substance under the Michigan Public Health Code. As such, Judge O’Connell recognized that “the MMMA functions as an *affirmative defense* to prosecutions under the Public Health Code, allowing an individual to use marihuana by freeing him or her from the threat of arrest and prosecution if that individual meets *all* the requirements of the MMMA, while permitting prosecution under the Public Health Code if the individual fails to meet any of the requirements set forth by the MMMA.” (Emphasis added).

This case is presently pending on appeal to the Michigan Supreme Court.

### Physician Statement After Arrest

*In order to qualify for a Section 8 defense, the physician’s statement of the benefit of medical marihuana must have been given prior to arrest.* **People of the State of Michigan v Alexander Edward Kolanek.** Case No. 295125. Dated January 11, 2011. For Publication.

On April 6, 2009, a search of defendant’s vehicle resulted in the seizure of eight marihuana cigarettes. On April 7, 2009, the defendant was charged with possession of marihuana in violation of the Michigan Public Health Code. Approximately two months later, he asserted an affirmative defense under Section 8 of the MMMA (see inset). At an evidentiary hearing in support of his affirmative defense, defendant testified that he used the marihuana for relief from pain and nausea caused by Lyme Disease. Defendant’s doctor testified that he had been treating defendant for nine years and confirmed that he suffers from Lyme Disease, which causes symptoms including chronic severe pain. Defendant’s doctor further testified that in his opinion the use of medical marihuana would likely provide a therapeutic benefit for the defendant and that, in his opinion, defendant would have been eligible to use marihuana on April 6, 2009, under the MMMA. This testimony occurred on June 12, 2009, and defendant’s doctor memorialized his statements in a signed document dated June 9, 2009.

The district court denied the defendant’s motion to dismiss the charges on the grounds that the defendant did not provide evidence to show that a physician had approved his use of medical marihuana *before* his arrest. The circuit court reversed the district court’s ruling interpreting the statute a different way.

The prosecution then appealed to the Michigan Court of Appeals which ruled that Section 8 of the MMMA requires that a physician’s statement of the benefit of medical marihuana must occur prior to arrest. In coming to this conclusion, the Court of Appeals examined the relevant language of Section 8(a)(1) (see inset), and noted that it refers to the statement of the physician in the past tense using the phrase “a physician *has stated*...” the medical benefit to the patient. From this, the Court concluded that Section 8 requires that the physician’s opinion occur prior to arrest. In other words, the physician must have rendered his or her opinion *prior to the arrest* of the individual for the possession of marihuana or other violation of the Public Health Code involving marihuana.

As part of its explanation in coming to this conclusion, the Court stated: “It is reasonable to assume that the affirmative defense created in Section 8 was intended to protect those who actually had a medical basis for marihuana use recognized by a physician *prior to said use* and was not intended to afford

defendants an after-the-fact exemption for otherwise illegal activities. The law generally denies defendants the ability to remedy a criminal violation post-arrest . . . . Otherwise, there is no incentive for anyone to utilize their time and money to go through the process; everyone would simply engage in the illegal activity, rolling the dice that they will not get caught, with the understanding that, if they do get arrested, they can subsequently receive a retroactive exemption.”

The Court remanded the case to the district court for further proceedings, but the defendant has appealed the matter to the Michigan Supreme Court where the case remains pending.

#### Enclosed, Locked Facility; Outside Dog Run; Closet

*A fenced-in area in a back yard and an unlocked closet inside a house do not satisfy the MMMA’s requirement that medical marihuana be grown in an “enclosed, locked facility.”* **People of the State of Michigan v Larry Steven King.** Case No. 294682. Dated February 3, 2011. For Publication.

Based on an anonymous tip that defendant was growing marihuana in the back yard of his house, the police visited his property to investigate. They saw a dog kennel behind the house that was covered with black plastic and, using binoculars, the police officers could see marihuana plants growing inside through areas of the kennel where the black plastic had fallen away.

The officers went to the door of the house and spoke to defendant, who produced a medical marihuana card issued by the State of Michigan. The defendant allowed the officers to inspect the kennel, which they found to be six feet tall, open at the top, and not anchored to the ground. It did, however, have a chain lock on the entry point.

The defendant also disclosed that he had more marihuana plants inside the house and, upon obtaining a search warrant, the officers found marihuana plants growing inside an unlocked living room closet.

### Excerpts from the Michigan Medical Marihuana Act (MMMA)

The two sections of the MMMA that form the “defenses” discussed in most of the court decisions thus far are Section 4 and Section 8. They read, in relevant part, as follows:

#### Section 4:

(a) A qualifying patient who has been issued and possesses a registry identification card shall not be subject to arrest, prosecution, or penalty in any manner, or denied any right or privilege, including but not limited to civil penalty or disciplinary action by a business or occupational or professional licensing board or bureau, for the medical use of marihuana in accordance with this act, provided that the qualifying patient possesses an amount of marihuana that does not exceed 2.5 ounces of usable marihuana, and, if the qualifying patient has not specified that a primary caregiver will be allowed under state law to cultivate marihuana for the qualifying patient, 12 marihuana plants kept in an enclosed, locked facility. Any incidental amount of seeds, stalks, and unusable roots shall also be allowed under state law and shall not be included in this amount.

(b) A primary caregiver who has been issued and possesses a registry identification card shall not be subject to arrest, prosecution, or penalty in any manner, or denied any right or privilege, including but not limited to civil penalty or disciplinary action by a business or occupational or professional licensing board or bureau, for assisting a qualifying patient to whom he or she is connected through the department’s registration process with the medical use of marihuana in accordance with this act, provided that the primary caregiver possesses an amount of marihuana that does not exceed: (1) 2.5 ounces of usable marihuana for each qualifying patient to whom he or she is connected through the department’s registration process; and (2) for each registered qualifying patient who has specified that the primary caregiver will be allowed under state law to cultivate marihuana for the qualifying patient, 12 marihuana plants kept in an enclosed, locked facility; and (3) any incidental amount of seeds, stalks, and unusable roots.

(c) A person shall not be denied custody or visitation of a minor for acting in accordance with this act, unless the person’s behavior is such that it creates an unreasonable danger to the minor that can be clearly articulated and substantiated.

(d) There shall be a presumption that a qualifying patient or primary caregiver is engaged in the medical use of marihuana in accordance with this act if the qualifying patient or primary caregiver: (1) is in possession of a registry identification card; and (2) is in possession of an amount of marihuana that does not exceed the amount allowed under this act. The presumption may be rebutted by evidence that conduct related to marihuana was not for the purpose of alleviating the qualifying patient’s debilitating medical condition or symptoms associated with the debilitating medical condition, in accordance with this act.

#### Section 8:

(a) Except as provided in section 7, a patient and a patient’s primary caregiver, if any, may assert the medical purpose for using marihuana as a defense to any prosecution involving marihuana, and this defense shall be presumed valid where the evidence shows that: (1) A physician has stated that, in the physician’s professional opinion, after having completed a full assessment of the patient’s medical history and current medical condition made in the course of a bona fide physician-patient relationship, the patient is likely to receive therapeutic or palliative benefit from the medical use of marihuana to treat or alleviate the patient’s serious or debilitating medical condition or symptoms of the patient’s serious or debilitating medical condition; (2) The patient and the patient’s primary caregiver, if any, were collectively in possession of a quantity of marihuana that was not more than was reasonably necessary to ensure the uninterrupted availability of marihuana for the purpose of treating or alleviating the patient’s serious or debilitating medical condition or symptoms of the patient’s serious or debilitating medical condition; and (3) The patient and the patient’s primary caregiver, if any, were engaged in the acquisition, possession, cultivation, manufacture, use, delivery, transfer, or transportation of marihuana or paraphernalia relating to the use of marihuana to treat or alleviate the patient’s serious or debilitating medical condition or symptoms of the patient’s serious or debilitating medical condition.

Defendant was charged with two counts of manufacturing marihuana. He moved to dismiss the charges under the MMMA. In response, the prosecutor argued that the defendant failed to comply with the MMMA because he did not keep the marihuana in an enclosed, locked facility. The trial court ruled in favor of the defendant and dismissed the charges. The prosecutor appealed.

The Court of Appeals began its opinion with the following quote from Judge O'Connell's concurrence in *People v Redden* (summarized above):

“[T]he [MMMA] does not create any sort of affirmative *right* under state law to use or possess marihuana. That drug remains a Schedule 1 substance under the Public Health Code, MCL 333.7212(1)(c), meaning that ‘the substance has a high potential for abuse and has no accepted medical use in treatment in the United States or lacks accepted safety for use and treatment under medical supervisor.’ MCL 333.7211. The [MMMA] does not repeal any drug laws contained in the Public Health Code, and all persons under this state’s jurisdiction remains subject to them. Accordingly, mere possession of marihuana remains a misdemeanor offense, MCL 333.7403(2) (d), and the manufacture of marihuana remains a felony, MCL 333.7401(2)(d).”

This quotation, being set forth in the majority opinion in the *King* decision, is significant because it establishes clear and binding precedent that, *as a matter of law*, the MMMA does not create any affirmative *right* to use or grow marihuana in the State of Michigan, unless it is reversed on appeal or by a subsequent decision.

The Court went on to explain that, instead of a right, the MMMA merely establishes an *affirmative defense* to any arrest or prosecution for the possession or growing of medical marihuana. The Court noted, however, that the MMMA “constitutes a determination by the people of this state that there should exist a very limited, highly restricted exception to the statutory proscription against the manufacture and use of marihuana in Michigan. As such, the MMMA grants narrowly-tailored protections to qualified persons as defined in the Act if the marihuana is grown and used for certain narrowly defined medical purposes. Further, the growing of marihuana is tightly constrained by specific provisions that mandate how, where, for what purpose, and how much marihuana may be grown.

Looking to the facts and issues of the case before it, the Court then continued by noting that the MMMA requires, under Section 4 (see inset), that the marihuana plants must be kept in an “enclosed, locked facility.” The MMMA defines “enclosed, locked facility” as follows:

*Enclosed, locked facility* means a closet, room, or other enclosed area equipped with locks or other security devices that permit access only by a registered primary caregiver or registered qualifying patient [MCL 333.26423(c)].

The Court noted that the defendant in this case grew marihuana plants in his backyard, within a chain-link dog kennel that was only partially covered on the sides with black plastic, had no fencing or other material over the top, and could be lifted off the ground. Considering these characteristics, the Court concluded that the dog kennel was not enclosed in a manner that would permit access only by a registered primary caregiver or registered qualifying patient. The Court found that the purpose of specifying that the marihuana be kept within a secure facility was to ensure that it is inaccessible to anyone other than a licensed grower or a qualifying patient. The Court also found that the provisions of the Act are meant to prevent access by the general public and, especially, juveniles.

The Court next considered whether the marihuana plants located inside a closet within plaintiff’s home met the requirements of the MMMA. The Court noted that the definition of an enclosed, locked facility did include a specific reference to a closet, but it was noted that the closet in this case did not have a lock on it. The Court concluded that the enclosed area itself must have a lock or other security device to prevent access by anyone other than the person licensed to grow marihuana under the MMMA, and since an unlocked closet would permit access by anyone else within the home it did not meet the requirements of the MMMA. In further support, the Court noted that the defendant’s home itself was not secured by locks on all of the doors.

Accordingly, the Court of Appeals reversed the decision of the trial court and remanded the case for further proceedings.

It is further noted that a dissenting opinion was written by Judge Fitzgerald in this case, who concluded that the dog kennel met the requirement of being an enclosed area with a lock on it, in accordance with the Act. Judge Fitzgerald also found that the closet constituted an enclosed locked facility because there was no evidence presented during the hearing that anyone other than defendant had access to the house.

The defendant has appealed this decision to the Michigan Supreme Court, where the matter currently remains pending.

#### Physician Statement After Arrest; Amount of Marihuana

*Because the defendant did not obtain a physician’s statement prior to his arrest, he cannot assert an affirmative defense under Section 8 of the MMMA. People of the State of Michigan v Benjamin Curtis Walburg, Case No. 295497. Dated February 10, 2011. Unpublished.*

The defendant was charged with the delivery and manufacture of marihuana based on the discovery of marihuana plants in his home. At the time of arrest, the defendant did not have a registry identification card under Section 4 (see inset) of the MMMA. However, *after his arrest* defendant obtained an affidavit from a doctor regarding his therapeutic use of marihuana for treatment of a severe anxiety disorder and insomnia. The trial court dismissed the charges based on Section 8 (see inset) of the MMMA, finding that the defendant did not need to have a registry card to assert that affirmative defense. The prosecutor appealed.

The Court of Appeals, citing its recent ruling in *People v Redden* (summarized above), affirmed the trial court's decision that defendant was not required to possess a registry identification card in order to assert an affirmative defense under Section 8 of the MMMA.

The Court of Appeals then analyzed the question of whether the defendant could still be prosecuted because he had 25 plants, allegedly in excess of the statutory maximum of 12 plants under Section 4 of the MMMA. The Court of Appeals found, however, the Section 4 limitation of 12 plants is inapplicable to a Section 8 affirmative defense, because Section 8 does not specify a precise number in its limitation on the number of marihuana that can be possessed. Instead, Section 8 provides for the possession of a "quantity of marihuana that is not more than was *reasonably necessary* to ensure the uninterrupted availability of marihuana for the purpose of treating or alleviating the patient's serious or debilitating medical condition or symptoms of the patient's serious or debilitating medical condition."

Without concluding whether or not the number of marihuana plants in defendant's possession was more than "reasonably necessary," the Court recognized its recent ruling in *People v Kolanek* (summarized above) and concluded that the defendant cannot submit his having obtained a physician's approval of use *after his arrest* to raise the affirmative defense under Section 8. The Court concluded that "because we are bound by the holding of [*Kolanek*] and [defendant] did not obtain a physician's statement before his arrest, we reverse the dismissal of the charges and remand to the trial court for further proceedings.

The defendant has appealed this decision to the Michigan Supreme Court, which has decided to hold the defendant's appeal in abeyance until it renders decisions on appeals in the cases of *People v Kolanek* and *People v King* (both summarized above).

#### Medical Marihuana Clubs; Patient-To-Patient Sales

*Defendants' operation of a medical marihuana dispensary does not comply with the provisions of the MMMA because the "medical use" of marihuana, as defined by the MMMA, does not include patient-to-patient "sales" of marihuana. State of*

**Michigan v Brandon McQueen, et al.** Case No. 301951. Dated August 23, 2011. For Publication.

Defendant McQueen and Defendant Taylor owned and operated Compassionate Apothecary, LLC (CA). McQueen held a registry identification card issued by the Michigan Department of Community Health, and was both a "qualifying patient" and a "primary caregiver" for three qualifying patients under the MMMA. Taylor was a registered "primary caregiver" for two qualifying patients.

CA has approximately 345 members. Each member is required to be either a qualifying patient or a primary caregiver with a valid registry identification card from the MDCH. A membership costs \$5.00 per month. CA has 27 lockers that it rents to its members at a cost of \$50.00 per month. The lockers are used for patients or caregivers who grow more marihuana than they, or their patients, can use. The excess marihuana is stored in the lockers, and the members give CA permission to facilitate delivery of the excess marihuana to other patients.

When a member (either a patient or a caregiver) comes to CA to purchase marihuana, a CA employee escorts them into the display room to view, smell, and touch samples of different "strains" of marihuana that are currently stored in the lockers. However, no marihuana is grown or smoked at the facility. After the member selects the marihuana he or she wants to purchase, the CA employee retrieves the desired amount from the locker, packages it, and records the purchase. The price of the marihuana is set by the member who rented the locker, but CA keeps at least 20% as a "service fee" for each transaction. In the first 2-1/2 months of its operation, CA sold approximately 19 pounds of marihuana, with its members making more than \$76,000.00 and CA earning approximately \$21,000.00 in gross revenues.

The county prosecuting attorney filed a civil complaint seeking an injunction against CA, McQueen, and Taylor on the basis that the operation of CA constituted a public nuisance because it was contrary to the provisions of the MMMA and the Public Health Code. The trial court denied the request for an injunction, and the plaintiffs appealed.

Quoting *People v King* and *People v Redden* (both summarized above), the Court of Appeals reiterated that "the MMMA did not legalize the possession, use, or delivery of marihuana . . . . Rather, the MMMA sets forth very limited circumstances in which persons involved with the use of marihuana, and who are thereby violating the PHC, may avoid criminal liability." Citing also, *People v Anderson*.

In connection with defendants' operation of the CA, the Court noted that the MMMA does not authorize marihuana dispensaries, and does not expressly state that patients may sell their marihuana to other patients. From this, the Court acknowledged that defendants are therefore left with "inferring" such authority to operate a dispensary from various provisions of the MMMA.

The Court first addressed defendants' argument that they are entitled to a presumption under Section 4(d) of the MMMA (see inset) that they are engaged in the "medical use" of marihuana when operating CA. Section 4(d) provides a presumption that a qualifying patient or primary caregiver is engaged in the "medical use" of marihuana in accordance with the MMMA if the patient or caregiver has a registry identification card and an amount of marihuana that does not exceed the amount stated by the MMMA. The Court noted, however, that the MMMA provides that the presumption "may be rebutted by evidence that conduct related to marihuana was not for the purpose of alleviating the qualifying patient's debilitating medical condition or symptoms associated with the debilitating medical condition, *in accordance with this Act.*"

Based on this provision, the Court held that the presumption cited by defendants may be rebutted with evidence that the conduct of the patient or caregiver at CA was not in accordance with the provisions of the MMMA. In other words, the "medical use" of marihuana defense under Section 8 is only permitted to the extent that such conduct is carried out in accordance with the provisions of the MMMA.

From this, the Court examined whether the defendants, by way of their operation of CA, were in violation of the requirements of the MMMA. The Court noted that the defendants, through their operation of CA, were actively engaged in patient-to-patient sales of marihuana, and the MMMA does not authorize those sales. Accordingly, the Court concluded that the defendants were not entitled to the presumption that they are engaged in the "medical use" of marihuana. The Court also noted that by virtue of the number of lockers and sheer amount of sales in the first 2-1/2 months of operations, that the defendants must have been in possession of an amount of marihuana in excess of that which is permitted under the Act, although it noted that there was no absolute testimony regarding this as part of the lower court proceedings.

The Court then proceeded by acknowledging that even though the presumption did not exist, the Court must still determine whether, in fact, the defendants' operation of CA was in accordance with the provisions of the MMMA. The defendants claimed that patients are engaged in the "medical use" of marihuana when they transfer marihuana to other patients, because the definition of "medical use" includes the "delivery" and "transfer" of marihuana.

The Court noted, however, that the "members, aided by the services of defendants, do not simply 'deliver' or 'transfer' marihuana to other members. Rather the members and CA employees 'deliver' or 'transfer' the marihuana to other members for a price." The Court found that transferring or delivering marihuana for a price constitutes a "sale" of the excess marihuana. The Court then noted that the definition

of "medical use" in the MMMA specifically does not include the "sale" of marihuana. Therefore, the Court concluded that the "medical use" of marihuana does not include the "sale" of marihuana (i.e., the conveyance of marihuana for a price), and the defendants were therefore in violation of the MMMA by allowing such sales to occur.

The Court concluded by very succinctly stating that "the medical use of marihuana does not include patient-to-patient 'sales' of marihuana . . . . Defendants, therefore, have no authority under the MMMA to operate a marihuana dispensary that actively engages in and carries out patient-to-patient sales of marihuana. Accordingly, defendants' operation of CA is not in accordance with the provisions of the MMMA."

Defendants' next claimed that they are entitled to immunity under Section 4(i) of the MMMA, which states that "[a] person shall not be subject to arrest, prosecution, or penalty in any manner, or denied any right or privilege . . . solely for . . . assisting a registered qualifying patient with *using or administering* marihuana." According to defendants, they assist registered qualifying patients with using or administering marihuana when they transfer marihuana between CA members.

The Court looked to the dictionary definition of the terms "use" and "administer" and found the following:

To "use" means "to drink, smoke, or ingest habitually: *to use drugs.*" Random House Webster's College Dictionary (1992). To "administer" means "to give or apply: *to administer medicine.*" This definition of "administer" is consistent with the [Public Health Code] definition of "administer." The [Public Health Code] defines "administer" as "the direct application of a controlled substance, whether by injection, inhalation, ingestion, or other means, to the body of a patient or research subject by a practitioner . . . ". MCL 333.7103(1). Employing these definitions, we hold that a person assists a registered qualifying patient with "using or administering" marihuana when the person assists the patient in preparing the marihuana to be consumed in any of the various ways that marihuana is commonly consumed or by physically aiding the patient in consuming the marihuana."

The Court concluded that there is no evidence that the defendants assisted patients in preparing the marihuana to be consumed or physically aided the patients in consuming marihuana. Instead, the Court found that the defendants were engaged in "selling" marihuana, which is not the "using or administering" of marihuana, and defendants were therefore not entitled to immunity granted by Section 4(i) of the MMMA. The Court reversed the decision of the trial court and remanded the case for entry of a judgment in favor of plaintiff.

### Physician Statement After Commission of Crime

*The Court of Appeals extended its ruling in Kolanek (summarized above) to hold that for a Section 8 affirmative defense to apply, the physician's statement must occur before the commission of the criminal offense. People of Michigan v Brian Bebout Reed.* Case No. 296686. Dated August 30, 2011. For Publication.

Defendant suffered from chronic back pain due to a degenerative disk disease. Upon passage of the MMMA, he sought certifications from his doctors for the use of medical marijuana, but was denied because they were concerned about putting their federal funding in jeopardy. While searching for another doctor to receive certification from, the Huron Undercover Narcotics Team (HUNT), during an aerial surveillance, spotted six marijuana plants growing at defendant's residence. This surveillance took place on August 25, 2009. On September 16, 2009, defendant received certification to use medical marijuana from a doctor. He then received a registry identification card from the Michigan Department of Community Health on October 6, 2009. On October 16, he was arrested and charged with the manufacture of marijuana, based upon the HUNT surveillance.

Defendant filed a motion to dismiss the charge, citing the affirmative defense under Section 8 of the MMMA (see inset). The trial court denied the motion.

On appeal, the defendant argued that he received his doctor's certification to use medical marijuana, in accordance with Section 8 of the MMMA, prior to his arrest. In support of his position, the defendant cited the Court of Appeals recent decision in *People v Kolanek* (summarized above), in which the Court interpreted Section 8 to require that the physician's statement be received *prior to the arrest*.

In disagreeing with the defendant's arguments, the Court of Appeals found that in *Kolanek*, the discovery of the criminal offense was simultaneous with the arrest, and the Court refused to place substantial emphasis on its use of the term "arrest" in describing its prior holding. Instead, the Court focused on its following statements in *Kolanek*:

"It is reasonable to assume that the affirmative defense created in [section] 8 was intended to protect those who actually had a medical basis for marijuana use recognized by a physician *prior to said use* and was not intended to afford defendant an *after-the-fact exemption for otherwise illegal activities*."

Based on its above statements, it was concluded that the Court in *Kolanek*, "was clearly focusing on a defendant's purportedly illegal *conduct*, not on the defendant's arrest." Accordingly, the Court clarified that, for a Section 8 affirmative defense to apply, the physician's statement must occur *before the purportedly illegal conduct*.

The defendant also argued that at the time of his arrest he had a valid registry identification card. The Court again disagreed with defendant, finding that defendant's argument failed because at the time of the offense he did not possess a registry identification card. In sum, an individual must have a valid registry identification card in accordance with Section 4 of the MMMA or a physician's opinion in accordance with Section 8 prior to engaging in the medical use or growing of medical marijuana in order to be afforded the protections of the Act.

The case was remanded back to the trial court for further proceedings, and no record of an appeal has been identified.

### Possession of Plants Belonging to Others

*Because defendant possessed marijuana plants that were being grown and cultivated for registered, qualifying patients that were not connected to him through the Michigan Department of Community Health's registration process, defendant was not entitled to immunity under Section 4(b) of the MMMA. Also, because defendant did not comply with the requirements of Section 4(b), he was not entitled to assert the Section 8 affirmative defense of medical purpose. People of the State of Michigan v Ryan Michael Bylsma.* Case No. 302762. Dated September 27, 2011. For Publication.

On September 15, 2010, the police executed a search warrant seizing 88 marijuana plants in some sort of a storage unit that was leased to defendant. The police also discovered five ounces of usable marijuana, fertilizer, soil, a water osmosis system, grow lights, and security cameras. Defendant was charged with manufacturing marijuana in violation of the Public Health Code. Defendant moved to dismiss the charge under Section 4 of the MMMA (see inset) and reserved his right to raise the affirmative defense under Section 8 of the MMMA (see inset). The trial court held a two-day evidentiary hearing regarding defendant's motion to dismiss.

Defendant asserted that, as a registered primary caregiver of two patients, he was allowed to possess 24 marijuana plants, and he claimed that the remainder of the plants seized by the police belonged to other primary caregivers and qualifying patients, whom he was either helping get plants started growing and/or teaching them how to grow plants. He argued that the MMMA permitted him to share a common grow area for their marijuana plants, as long as it was an enclosed, locked facility. He testified that the unit had a large steel door and a lock on the front of the building. The trial court denied the motion to dismiss, and defendant appealed.

The Court of Appeals began its analysis by providing a helpful summary:

"The MMMA provides a registration system for "qualifying patients" and "primary caregivers." See

MCL 333.26426. When applying for a “registry identification card” with the MDCH, a qualifying patient must indicate whether the patient will have a primary caregiver and, if so, must designate “whether the qualifying patient or primary caregiver will be allowed under state law to possess marihuana plants for the qualifying patient’s medical use.” MCL 333.26426(a)(5), (6). If the MDCH approves the qualifying patient’s application, it must issue a registry identification card to the patient and, if the patient has designated a primary caregiver, it must also issue a registry identification to the primary caregiver. MCL 333.26426(a), (d). However, a qualifying patient may have no more than one primary caregiver, and a primary caregiver may assist no more than five qualifying patients. MCL 333.26426(d).”

The Court then explained that Section 4 of the MMMA provides immunity from arrest and prosecution to patients and caregivers in possession of a valid registry identification card,

“provided that the qualifying patient *possesses* an amount of marihuana that does not exceed 2.5 ounces of usable marihuana and, if the qualifying patient is not specified that a primary caregiver will be allowed under state law to cultivate marihuana for the qualifying patient, 12 marihuana plants kept in an enclosed, locked facility, and provided that the primary caregiver *possesses* an amount of marihuana that does not exceed: (1) 2.5 ounces of usable marihuana for each qualifying patient to whom he or she is connected through the [MDCH’s] registration process; and (2) for each registered qualifying patient who has specified that the primary caregiver will be allowed under state law to cultivate marihuana for the qualifying patient, 12 marihuana plants kept in an enclosed, locked facility . . . .”

Interestingly, defendant did not dispute that he was in *possession* of all 88 plants, and the Court found that the evidence produced at the evidentiary hearing showed that the defendant did, in fact, possess all 88 plants. Defendant, however, claimed that he was entitled to immunity under Section 4(b) because nothing in the MMMA prohibited him from letting other registered primary caregivers and registered qualifying patients to utilize his storage unit to grow marihuana plants. The Court disagreed, stating as follows:

“Because §§ 4(a) and 4(b) only allow either the registered qualifying patient or the qualifying patient’s registered primary caregiver to possess 12 marihuana

plants, we conclude that the plain language of §§ 4(a) and 4(b) unambiguously provides that only one person may possess 12 marihuana plants for the registered qualifying patient’s medical use of marihuana. That person is either the registered qualifying patient himself or herself . . . or the qualifying patient’s registered primary caregiver . . . .”

The Court also rejected the defendant’s reliance on the fact that the MMMA is silent about whether registered patients and caregivers may utilize the same enclosed, locked facility to grow and cultivate marihuana plants. In doing so, the Court stated:

“Because the MMMA did not repeal any drug laws [citation omitted], any possession of marihuana that does not fall within the ‘narrowly tailored protections’ of the MMMA [citation omitted] remains illegal under the PHC. . . . Defendant was not authorized to possess the marihuana plants that were being grown and cultivated for registered qualifying patients that he was not connected to through the MDCH’s registration process; those marihuana plants could only be possessed by the registered qualifying patient for whose treatment they were grown or the qualifying patient’s registered primary caregiver. Consequently, defendant’s possession of all 88 marihuana plants seized from Unit 15E was not permitted by the MMMA. Defendant, therefore, is not entitled to the presumption of § 4(d) that he was engaged in the medical use of marihuana or to the immunity granted in § 4(b) to primary caregivers who have been issued and possess a registry identification card.”

Lastly, the defendant asserted the “medical purpose” affirmative defense under Section 8 of the MMMA. Citing the Court of Appeals decision in *People v King* (summarized above), the Court concluded that

“because defendant possessed more than 12 marihuana plants for each qualifying patient that he was connected to through the MDCH registration process, defendant failed to comply with the requirements of Section 4(b). Having failed to comply with the requirements of Section 4(b), the defendant is not entitled to the Section 8 affirmative defense[,] because Section 8 requires the defendant to comply with the growing provisions in Section 4 of the MMMA.”

The case was remanded back to the trial court for further proceedings, and no record of an appeal has been identified.

## United States District Court Decision

### Drug Testing; Termination of Employment

*The MMMA does not eliminate or provide a special exception to the general rule of at-will employment in Michigan, nor does it create a new protected class for medical marihuana users.* **Joseph Casias v Wal-Mart Stores, Inc., et al.**, Western District of Michigan, Case No. 1:10-CV-781. Dated February 11, 2011.

Plaintiff worked at a Wal-Mart store in Battle Creek, Michigan, from 2004 until 2009. During his employment, Wal-Mart had a drug use policy for employees, which required testing in certain situations. In accordance with this policy, plaintiff was required to be tested after a workplace injury in November 2009.

At the time of his testing, plaintiff showed a Michigan medical marihuana registry identification card to the drug testing staff and his shift manager at Wal-Mart. The test results came back positive for marihuana, and plaintiff was informed that Wal-Mart's drug use policy has no exception for the MMMA and his employment was terminated.

Plaintiff sued claiming that private employees are protected from disciplinary action for the use of medical marihuana under Section 4(a) of the MMMA (see inset) and as a matter of public policy in Michigan.

The Court focused on the following portion of Section 4(a) of the MMMA: "A qualifying patient who has been issued and possesses a registry identification card shall not be subject to arrest, prosecution, or penalty in any manner, or denied any right or privilege, including but not limited to civil penalty or disciplinary action by a business or occupational or professional licensing board or bureau, for the medical use of marihuana in accordance with this Act . . ." (Emphasis added).

In reading this provision of the MMMA, the Court concluded that the word "business" is not intended to stand alone, but instead modifies the words "licensing board or bureau" in Section 4(a). The Court also found that "this is thoroughly consistent with the overall structure and purpose of the Act to address potential criminal prosecution or other adverse action *by the State*." (Emphasis added).

The Court concluded that "it is clear from the examples put forth that the statute contemplated discipline from boards and bureaus of the state—whether described as business boards, occupational boards, or professional licensing boards—not the entire realm of private employment." The Court also noted that "local governments in Michigan issue business licenses, which are distinguishable from professional or occupational licenses."

Finally, the Court found that "the MMMA does not indicate a general policy on behalf of the State of Michigan to create a special class of civil protections for medical marihuana users. The MMMA contains no 'explicit legislative statements prohibiting the discharge, discipline, or other adverse treat-

ment of employees who act in accordance with a statutory right or duty,' because the MMMA does not confer any statutory rights."

In dismissing plaintiff's case, the Court concluded that "the MMMA meant to provide some limited protection from medical marihuana user from state actions, primarily arrest and prosecution. . . . Nothing in the language or the purpose of the MMMA indicates an intent of the Michigan voters to regulate private employment, and the MMMA does not address private employment directly. Whatever protection the MMMA does provide users of medical marihuana, it does not reach to private employment."

## Michigan Attorney General Opinions

### Registration Processing and Confidentiality

*The MDCH is permitted to contract with an outside vendor to handle the processing of applications for registry identification cards under the MMMA, and the confidentiality provisions of the MMMA do not prevent the MDCH from entering into such a contract with an outside vendor, but the administrative rules adopted by the MDCH prohibit same.* **Opinion No. 7250, dated August 31, 2010.**

*Issues:* In this Opinion, the Attorney General addressed two questions regarding the authority of the Michigan Department of Community Health (MDCH) to contract out certain responsibilities under the MMMA in connection with the processing of applications for registry identification cards. The first question was whether the MDCH is permitted to contract with an outside vendor to handle the processing of applications and issuance of registry identification cards under the MMMA. The second question is whether the confidentiality provisions of the MMMA prevent the MDCH from entering into such a contract with an outside vendor for purposes of assisting the Department in administering the medical marihuana program.

With respect to the first question, the Attorney General noted that the MMMA is silent with respect to the question of contacting with the third party to carry out its duties to process applications and issue registry identification cards. The AG, however, noted that MCL 333.2226(c) of the Public Health Code provides the MDCH with authority to enter into contracts with other parties necessary or appropriate to assist the Department in carrying out its duties and functions. Based on this, the AG concluded that the MDCH may contract with a third party for such purposes under the MMMA, but noted that the outside vendor can only "assist" the MDCH in processing registry applications because the Department cannot delegate its discretionary authority to make a final determination with respect to the issuance of

registry identification cards. In other words, the MDCH may delegate “ministerial duties” such as receiving and processing patient applications to an outside vendor, but it cannot delegate the task of actually denying or granting registry identification cards.

With respect to the second question, the AG opined that the confidentiality provisions found in Section 6(h) of the MMMA implicitly authorize the MDCH to disclose confidential information regarding patients, primary caregivers, and physicians to the extent necessary to fully perform its duties under the Act, and, as such, concluded that the MMMA would not prohibit the MDCH from sharing the information with an outside vendor under contract with the Department to assist it in carrying out the application and registration process, so long as the contractual arrangement protected the confidentiality of the information.

The AG noted, however, that the MDCH had adopted separate administrative rules which go farther in terms of protecting confidentiality than the provisions of the MMMA. Those administrative rules state that the information disclosed on medical marijuana registry identification card applications may *only be accessed or released to authorized employees of the MDCH*. Accordingly, the AG concluded that under these administrative rules, the MDCH had prohibited itself from contracting with outside vendors for purposes of assisting in the processing of such applications. The AG suggested that to remedy this situation, the MDCH could amend its administrative rules or the legislature could amend the MMMA confidentiality provisions, but until that happens, the MDCH may, in the AG’s opinion, not contract with an outside vendor to process registry applications since it may not give the vendor access to the necessary information.

### Medical Marijuana Cooperatives

*The MMMA prohibits the joint cooperative cultivation or sharing of marijuana plants. Opinion No. 7259, dated June 28, 2011.*

*Issue:* Whether the MMMA authorizes patients and primary caregivers to form cooperatives to jointly cultivate, store, and share medical marijuana, or whether the marijuana must be separately cultivated for and provided to a specific patient.

The Attorney General initially noted that the MMMA does not provide for the operation of cooperatives.

“Nothing in the language of the MMMA suggests that the majority of voters, in adopting the Act, intended that patients, primary caregivers, or any other individuals could form and operate cooperatives to jointly cultivate, store, and share medical marijuana. Rather, the express terms of the Act contemplate that permitted activities, including the cultivation of

marijuana, will occur on an individual basis, and in one of two ways.”

The first is for a patient who does not designate a primary caregiver, and instead cultivates up to 12 marijuana plants for personal medical use under the MMMA. In addressing the question at hand with regard to patient growers, the AG turned to the provision of the MMMA that requires the patient to keep his or her plants in an “enclosed, locked facility,” which is defined by the MMMA as “a closet, room, or other enclosed area equipped with locks or other security devices that permit access only by a registered primary caregiver or registered qualifying patient.” MCL 333.26423(c). The Attorney General opined that

“the use of the indefinite article ‘a’ before the noun phrase ‘registered primary caregiver or registered qualifying patient,’ indicates that the nouns are singular . . . . In other words, access to an enclosed locked facility is limited to a single, or one, registered primary caregiver or registered qualifying patient. Thus, a patient cultivating marijuana plants must keep the plants in a facility that is only accessible to the patient.”

The second manner of cultivating marijuana is for a patient who designates a registered primary caregiver from whom the patient will acquire his or her marijuana. The AG opined that

“...once a patient designates that single primary caregiver, the Act does not authorize the patient to acquire marijuana from anyone else. MCL 333.26426(d). Further, if the patient specifies that the caregiver shall cultivate the patient’s marijuana plants, the patient relinquishes any right to possess and cultivate marijuana plants for medical use.”

The AG continued by recognizing that the primary caregiver is expressly limited to assisting no more than five patients and must keep those patients’ plants in an “enclosed, locked facility,” pursuant to Section 4(b)(2) of the MMMA. The AG also found that because the MMMA only authorizes a patient to have 12 marijuana plants at any given time, “primary caregivers assisting more than one patient must keep each patient’s plants segregated and in a separate enclosed, locked facility.” Again, referring to the MMMA’s definition of “enclosed, locked facility,” the AG concluded that only the registered primary caregiver can access the facility containing the individual patient’s plants, and not even the caregiver’s patients can be allowed access to the plants being grown for him or her.

From all the above, the AG concluded that

“[T]he plain language of the MMMA thus prohibits

the joint cooperative cultivating or sharing of marihuana plants because only the individual authorized to cultivate the marihuana plants, either the registered patient or the patient's registered primary caregiver, may have access to the enclosed, locked facility housing the marihuana plants intended for the individual patient's use. It is my opinion, therefore, that the Michigan Medical Marihuana Act . . . prohibits the joint cooperative cultivation or sharing of marihuana plants because each patient's plants must be grown and maintained in a separate enclosed, locked facility that is only accessible to the registered patient or the patient's registered primary caregiver."

Of interest, the AG indicated in a footnote that his office is also looking into two additional questions concerning the operation of commercial enterprises to sell or transfer medical marihuana, and whether warrantless administrative searches of persons or property of registered patients or primary caregivers may be conducted.

#### Smoking Ban; Use/Growing in Public Places

*Michigan's smoking ban does not apply to medical marihuana, but the MMMA prohibits the smoking of medical marihuana in public places such as food service establishments, motels, hotels, or apartment buildings. The MMMA also does not prohibit a private property owner from prohibiting the use and/or growing of medical marihuana in private areas of the owner's property, including private units of motels, hotels, and apartment buildings. Opinion No. 7261, dated September 15, 2011.*

In this Opinion, the AG took up three issues related to the smoking or cultivation of medical marihuana in public places.

*Issue 1:* Does Michigan's statutory prohibition against smoking in public places and food service establishments include the smoking of medical marihuana?

In answering this question, the AG first noted that the smoking ban statute defines the term "smoking" as meaning "the burning of a lighted cigar, cigarette, pipe, or any other matter or substance that contains a *tobacco* product." MCL 333.12601(r) (emphasis added). Because marihuana is not included within the definition of a "tobacco product" under the smoking ban law, the AG rendered the opinion that the smoking ban does not apply to the smoking of medical marihuana.

*Issue 2:* Does the MMMA's prohibition against smoking marihuana in a public place apply to food service establishments, motels, hotels, or apartment buildings?

The AG cited MCL 333.26427(b)(3) of the MMMA as prohibiting a person from smoking marihuana "*in any public place.*" The AG noted, however, that the MMMA does not

define the term "public place." Accordingly, the AG turned to *Black's Law Dictionary* (6<sup>th</sup> Ed.), which defines "public place," in part, as "[a] place to which the general public has a right to resort; not necessarily a place devoted solely to the uses of the public, but a place which is in point of fact public rather than private, a place visited by many persons . . . ."

The AG applied the above definition and opined that "it could not reasonably be disputed that the public areas of food service establishments, hotels, motels, and apartment buildings are public places as that term is used in the MMMA. Thus, the plain language of the MMMA would apply to prohibit the smoking of marihuana within these places . . . and any other place open to the public."

*Issue 3:* May the owner of a food service establishment, hotel, motel, or apartment building prohibit the smoking and cultivation of medical marihuana in what would be considered nonpublic areas, such as individual rooms, units, or any other area not open to or accessible to or by the public?

The AG acknowledged that the MMMA is silent regarding the rights of private property owners with respect to the smoking of marihuana or cultivating of marihuana plants on property or portions of property not open to the public. With reference to the portions of the MMMA that provide that registered patients and primary caregivers shall not be "denied any right or privilege," the AG, citing *People v Redden* (summarized above) concluded that this language is inapplicable because it presumes the existence of a right or privilege outside of the MMMA and the MMMA does not establish any *right* to use or grow marihuana.

The AG also analyzed and concluded that the MMMA does not give rise to a new protected class of individuals in terms of housing or other public accommodations.

Accordingly, the AG opined "that an owner of a hotel, motel, apartment building, or other similar facility can prohibit the smoking of marihuana and the growing of marihuana plants anywhere within the facility, and imposing such a prohibition does not violate the [MMMA]."

#### Forfeiture Prohibition Preempted

*The provision of the MMMA that prohibits the forfeiture of marihuana possessed for medical use is determined to directly conflict with the federal Controlled Substances Act and is therefore preempted to the extent the state law provision requires law enforcement officers to return marihuana to a registered patient or caregiver upon release from custody. Opinion No. 7262, dated November 10, 2011.*

The question presented to the Attorney General was whether a law enforcement officer who arrests a patient or caregiver, who is properly registered under the MMMA, must

return marihuana found in the person's possession upon his or her release from custody.

Section 4(h) of the MMMA reads as follows:

“Any marihuana, marihuana paraphernalia, or licit property that is possessed, owned, or used in connection with the medical use of marihuana, as allowed under this act, or acts incidental to such use, shall not be seized or forfeited.”

The AG acknowledged that the plain reading of this provision specifically prohibits the forfeiture of marihuana if the person in possession is registered under and otherwise in complete compliance with the MMMA, and it requires a law enforcement officer to return the marihuana to the person upon his or her release from custody.

However, the AG noted that the analysis does not stop there, because the federal Controlled Substances Act prohibits the manufacture, distribution, or possession of marihuana, and makes it a federal crime to do so. After reviewing relevant sections of the Controlled Substances Act (CSA) and numerous cases regarding federal preemption, the AG noted the following:

“If a law enforcement officer returns marihuana to a patient or caregiver as required by section 4(h), the officer is distributing or aiding and abetting the distribution or possession of marihuana by the patient or caregiver in violation of the CSA. Thus, a Michigan law enforcement officer cannot simultaneously comply with the federal prohibition against distribution or aiding and abetting the distribution or possession of marihuana and the state prohibition against forfeiture of marihuana. In other words, it is “impossible” for state law enforcement officers to comply with their state-law duty not to forfeit medical marihuana, and their federal-law duty not to distribute or aid in the distribution of marihuana...By returning marihuana to a registered patient or caregiver, a law enforcement officer is exposing himself or herself to potential criminal and civil penalties under the CSA for the distribution of marihuana or for aiding or abetting the possession or distribution of marihuana.”

Based on the above, the AG rendered his opinion that section 4(h) of the MMMA directly conflicts with and is thus preempted by the federal CSA to the extent section 4(h) requires a law enforcement officer to return marihuana to a registered patient or primary caregiver upon release from custody.

## State Circuit Court Local Ordinance Decisions\*

### Zoning Ordinance; Standing; State and Federal Preemption

*Plaintiffs desired to be marihuana growers under the Michigan Medical Marihuana Act and brought suit challenging city's prohibition of land uses contrary to federal law. The circuit court ruled that while plaintiffs had standing, and an issue ripe for review, state law preempted the city's ordinance, but federal law preempted the state law and made plaintiffs proposed use unlawful. **Lott v City of Livonia and State of Michigan**, Wayne County Circuit Court, Case No. 10-013917-CZ. Decided Friday July 22, 2011. Case is on appeal to the Michigan Court of Appeals.*

Linda and Robert Lott, plaintiffs, are both registered medical marihuana users under the Michigan Medical Marihuana Act (MMMA), and Robert Lott wished to be a registered caregiver under the Act and grow marihuana in a building the Lott's were majority owners of. Section 3.08 of Article III of the Livonia Zoning Ordinance prohibits such action; it reads: “*Uses not expressly permitted are prohibited. Uses for enterprises or purposes that are contrary to federal, state or local laws or ordinance are prohibited.*”

The Lott's sued claiming the zoning ordinance provision put them in danger of prosecution, and sought an injunction prohibiting the city from enforcing the ordinance. The city counter-sued alleging the Lott's had no standing, their claim was not ripe, and they could not prevail because of federal preemption of the MMMA. The circuit court ruled the Lott's did have standing to sue, their claim was ripe for review and the city was right on the federal preemption, so it granted the city's motion for summary disposition and permitted the city to present an injunctive order restraining violation of Section 3.08 of the zoning ordinance.

The circuit court reached its conclusion after considering each of the issues listed above.

While the Lott's never applied nor were denied approval to grow marihuana on their property, they met the standing test because they suffered an “*injury-in-fact*” because the ordinance would “*expose them to local fines, federal arrest, prosecution, and criminal liability, despite the fact that they both qualify for state immunity under the state statute. \*\*\* Hence, the mere existence of the ordinance creates standing by virtue of the invasion of rights created in the MMMA...*”

- The Lott's ripeness claim was met because it was a “*facial challenge*” to the ordinance. The judge said “*Here there is absolutely no permitted use of marihuana in Livonia under the ordinance because it envelops the federal criminal code that prohibits any legal use of marihuana whatsoever. The*

language of the ordinance is ‘an express prohibition of a lawful land use within the ordinance itself.].’ Livonia’s final decision on marihuana’s total prohibition from any and all uses—medical, excused, immunized or otherwise—within the city definitely exacts an actual or concrete injury ripe for judicial review.” \*\*\* “Therefore, because of the futility of attempting to exhaust whatever administrative remedies that may or may not be available to plaintiffs, the instant case is, in fact, ripe for review and summary disposition on this ground is inappropriate.” [references omitted.]

- The Lott’s argued that the Livonia ordinance was preempted by the state MMMA and hence the ordinance prohibition against growing marihuana was unlawful. The city countered by arguing the MMMA was preempted by federal law, the Controlled Substance Act, 21 USCS 801, et seq, which “completely criminalizes marihuana use, possession, manufacture, distribution or delivery—obliterating any and all legitimate legal use whatsoever for marihuana—medical or otherwise...”. The circuit court judge said, “Even where there is no direct conflict between the two schemes of regulation, a municipality is precluded from enacting an ordinance if the ordinance is in direct conflict with the statutory scheme, or if the statutory scheme occupies the field of regulation which the municipality seeks to enter. The municipalities’ powers to adopt regulations are always subject to the Constitution and the law. The MMMA regulates the use, distribution, and maintenance of medical marihuana and ‘occupies the field of regulation’ while Livonia’s ordinance directly conflicts with it because the ordinance prohibits, due to federal law, what the statute permits. Therefore, plaintiffs are correct in their assertion that the MMMA preempts Livonia’s ordinance.” [references omitted.]
- However, the city argued that while the MMMA preempted its ordinance, the federal Controlled Substance Act preempted the MMMA under the Supremacy Clause of the Constitution. The circuit court judge agreed. The judge noted that Oregon’s medical marihuana statute, which it said was similar to Michigan’s law, was ruled preempted by federal law by the Oregon Supreme Court. The judge noted, “the Oregon court held that, as a Schedule I drug, Congress did not intend to carve out an exception for states to enact laws permitting the use of marihuana for medical purposes.”

For the reasons cited on each of the issues above, the circuit court judge ruled that the Lott’s “have failed to state a claim for which relief can be granted and ‘no factual development could possibly justify recovery.’” It then granted Livonia’s motion for summary disposition and dismissed the case.

## Zoning Ordinance; Federal Preemption

The MMMA is preempted by the Federal Controlled Substances Act. **John Tere Beek v City of Wyoming.** The Honorable Dennis B. Leiber. Kent County Circuit Court Case No. 10-11515-CZ. Dated September 1, 2011.

Plaintiff suffered from diabetes, which resulted in neuropathy in his foot and leg causing severe and chronic pain. He also experienced severe and chronic pain as a result of an inherited neurological disorder known as Charcot-Marie-Tooth Syndrome. He was registered under the MMMA as a qualified patient, and he desired to grow, possess, and use medical marihuana at his home. On December 6, 2010, however, the City of Wyoming adopted the following zoning ordinance:

“Uses not expressly permitted under this article are prohibited in all districts. Uses that are contrary to federal law, state law or local ordinance are prohibited.”

Plaintiff filed suit in the Kent County Circuit Court seeking an injunction prohibiting the City from enforcing this zoning ordinance on the grounds that is in conflict with the MMMA and is therefore preempted by Michigan state law and void.

On September 1, 2011, Circuit Court Judge Dennis B. Leiber issued an opinion in the case addressing the issue of whether the MMMA is preempted by the Federal Controlled Substances Act, 21 USC § 801, et seq.

Initially, the Court recognized this to be a case of first impression in Michigan, and therefore looked to the Oregon Supreme Court ruling in *Emerald Steel Fabricators, Inc. v Bureau Labor and Industries*, 348 Or 159 (2010), for guidance. In that case, the Oregon Supreme Court ruled that because the Oregon Medical Marihuana Act affirmatively authorized the use of medical marihuana it was preempted by the Federal Controlled Substances Act, which explicitly prohibited marihuana use without regard to medicinal purpose.

The Kent County Circuit Court also noted that the Oregon opinion was based on an opinion in a Michigan case presenting the same issue before the United States Supreme Court known as *Michigan Canners & Freezers Association v Agricultural Marketing and Bargaining Bd.*, 467 US 461 (1984). The *Michigan Canners’* case involved a situation where federal law prohibited food producers associations from interfering with individual food producer’s decisions about whether to bring their products to the market themselves or to sell them through an association. Michigan law, however, allowed these types of associations to apply to a state board for approval to act as the exclusive bargaining agent for producers of a particular commodity. The U.S. Supreme Court ruled

## Volunteers Needed for the 2012 Michigan High School Mock Trial Tournament

Presented with the Michigan Center for Civic Education

March 24—State Finals, Lansing  
May 5-8—National Mock Trial Championship, Phoenix, Arizona

### Attorney Volunteers Needed

Volunteer attorneys are needed to serve as judges and bailiffs for the March 24 state finals. The Tournament requires 180 volunteer judges and bailiff/timekeepers. [Volunteer Online](#)

This year's case is a criminal case surrounding the death of a famous musician. Was it murder, suicide, or something else . . .

Martin Louis Siriusz was found slumped over his piano listening to a playback of his latest (and as it turned out, his last) recording, entitled "Hanging at Death's Door." [A copy of the recording is available as evidence] The people of the State of New Michigan have charged Thomas "Duke" Osiski, Siriusz's former bandmate, with murder. The people allege that Osiski was furious over Siriusz's eleventh-hour decision to cancel a reunion tour that would have provided Osiski with much-needed financial relief.

Osiski denies shooting his long-time friend, contending that he went to the recording studio in an attempt to persuade Siriusz to reconsider his decision, but when he entered the room, he found Siriusz slumped forward on the piano with the "Death's Door" soundtrack still playing. Seeing a bottle of alcohol and an open bottle of pills on the piano, Osiski assumed that Siriusz had accidentally OD'd. Feeling no pulse, Osiski ran out of the studio and out to the back patio, where he saw Siriusz's 23-year-old son standing naked in the shallow end of the pool cleaning off with a bar of soap.

that federal law preempted state law when the

"state law actually conflicts with federal law and such a conflict arises when compliance with both state and federal law is impossible . . . or when the state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress."

In the Kent County case, the Circuit Court concluded that

"The Controlled Substances Act, 21 USC § 801, *et seq.* classifies marihuana as a Schedule 1 substance, 21 USC § 1812(c)(10), meaning that Congress intended to broadly prohibit the use of marihuana. See, *Gonzales v Raich*, 545 US 1, 27, 125 SCt 2195, 162 Led2d 1 (2005). This prohibition on the use of marihuana exists because Congress recognizes no accepted medical use for marihuana. *US v Oakland Cannabis Buyers' Co-op*, 532 US 483, 497, 121 SCt 1711, 1721 (2001); 21 USC § 1812(b)(1). Here, the MMMA recognizes medical uses for marihuana even though these uses are illegitimate under The Controlled Substances Act [citations omitted]. This means that the MMMA stands as an obstacle to the implementation and execution of the full purposes and objectives of The Controlled Substances Act [citation omitted].

Further, the MMMA is preempted by Congress' intent to occupy the entire field regulated. See, 21 USC § 903. Section 903 expresses the legislative intent to occupy the field of drug regulation entirely except as to state laws that are consistent with The Controlled Substances Act. See, *id.* Therefore, state laws permitting the use of marihuana stand in that field occupied by The Controlled Substances Act because the Act makes no exception for the medical use of marihuana. To the contrary, Congress classified marihuana as a Schedule 1 substance for which no medical use is recognized [citations omitted].

In sum, "[i]t is indisputable that state medical-marihuana laws do not, and cannot, supercede [sic] federal laws that criminalize the possession of marihuana." *US v Hicks*, 722 FSupp2d 829, 833 (EDMich, 2010)."

Accordingly, the Kent County Circuit Court denied plaintiff's request for injunctive relief and granted summary disposition in favor of the defendant, dismissing the case. 🏠

\*NOTE: To this author's knowledge, there are at least four other cases presently pending in the Oakland County Circuit Court concerning ordinances adopted by communities that are allegedly in conflict with and preempted by the MMMA. They are the cases of *Lott v Bloomfield Hills and Birmingham*, *John Doe v Bloomfield Township*, *Frizzo v City of Royal Oak*, and *Green v Lyon Township and Oakland County*. If this is any indication, it is highly likely that there are numerous cases filed in many other trial courts across the State of Michigan that are also currently pending.

*This article originally appeared in the November issue of the Planning & Zoning News ([www.pznews.net](http://www.pznews.net)). It has been updated by the author and reprinted here with permission of Mark A. Wyckoff, Editor of the Planning & Zoning News.*

# State Law Update

By Ronald D. Richards, Jr. of Foster, Swift, Collins & Smith, PC

## FOIA Fees Upheld As Consistent With the FOIA

*Bloch v Davison Community Schools*,  
unpublished per curiam opinion of the Court of Appeals  
(dec'd 4-26-11)

The Court of Appeals upheld the fees that a school charged for responding to a FOIA request, clarifying when labor fees may and may not be charged. In *Bloch*, the plaintiff FOIA'd attorney bills and attorney contracts from the defendant school. The school's FOIA Policy said it would only charge labor costs for search, examination, review, and deleting or separating exempt material from non-exempt material, if the request requires more than \$50 labor. The policy also allowed the school to charge a deposit of ½ of its estimated cost up front without processing the request. The plaintiff challenged the fees, unsuccessfully, and then filed an action in circuit court over the fees. The trial court ruled in favor of the school.

The Court of Appeals affirmed. It held that the school's charging of the deposition was consistent with the FOIA since the FOIA allows a body to require a deposition if the fees estimated exceed \$50. Because the school estimated the fees at about \$120, it could charge the deposit of up to ½ of the estimated fee.

The Court next ruled that the school's charges for the labor fees were valid. The Court noted that the FOIA always allows a body to charge for labor costs associated with copying documents responsive to a request. But as to labor costs associated with searching, examining, reviewing, and deleting and separating information, the FOIA says that one may charge for those labor costs only if failure to charge them would result in "unreasonably high" costs to the body. Though the plaintiff claimed the labor costs charged were not unreasonably high, the Court disagreed. It found the school's charges valid since (1) the labor costs for the plaintiff's FOIA request were more than all other FOIA response costs in the prior year; and (2) the request caused a labor-intensive review process. As a result, the Court upheld the fees charged.

## Court Remands For Hearing On Whether Attorney Has Conflict of Interest In Representing Private Persons Suing a College Board That the Attorney Sits On

*Vermilya v Delta Coll Bd of Trs*,  
unpublished per curiam  
of the Court of Appeals (dec'd 3-1-11)

The Court recently took up an issue of whether an attorney is disqualified from representing private taxpayers in a damages

suit against a college board of trustees on which the attorney sits as a board member. In that case, attorney Higgs represented taxpayers suing the Delta College Board of Trustees and Delta College Presidents Compensation Committee for violating the Open Meetings Act and making allegedly unlawful expenditures. The defendants moved to disqualify Higgs on three grounds, none of which the trial court bought.

The Court of Appeals reversed and found fact questions existed, and so remanded for an evidentiary hearing. The Court of Appeals first ruled that MRCP 1.11 squarely applied, given Higgs' undisputed position as a public officer. The trial court erred in not holding an evidentiary hearing on whether Higgs had a personal and substantial involvement as a public officer in the same matters that were the root of plaintiffs' complaint. So the Court remanded for a hearing on that issue.

The Court also ruled that fact questions existed as to whether Higgs complied with MRCP 1.7. The Court noted that the record was not clear whether Higgs consulted with each plaintiff and explained any potential conflict between representing them and his duties to the defendant board. So remand was necessary on that issue too.

Finally, the Court found no clear error in the trial court's finding that Higgs was "not an essential witness in the matter, at this time," so that disqualification under MRCP 3.7 was not warranted.

## City's Stated Reason to Buy Foreclosed Property Need Not Be Carried Out Quickly

*City of Bay City v Bay County Treasurer*,  
\_\_\_ Mich App \_\_\_ (2011)

A city can state reasons to buy foreclosed property but not act on those reasons quickly, and still meet statutory requirements to buy foreclosed property. In 2008, the defendant county foreclosed on 16 parcels within the plaintiff city's limits. The city told the county that it wished to buy four of the parcels, and gave a check to the city in the amount of the total of the minimum bids for the four parcels. The county determined that it did not have to sell the parcels to the city if it was not satisfied that the city would be returning the property to a position in which the property would generate tax revenue. After no agreement to resolve the fight, the city sued. The city sought a declaration that its stated public purpose for the parcels was valid and asked for a writ of mandamus directing the county to transfer title to the parcels. The trial court denied both relief requests.

The Court of Appeals reversed, and ruled for the city. It first held that the city's purpose for buying the property was a public purpose – to reduce the number of vacant tax reversed properties and minimize dangers associated with them. The Court rejected the county's argument that the statutory scheme requires that the public purpose be capable of being efficiently and expeditiously carried out. The terms efficiently, expeditiously, and speculative are not found in MCL 711.78a. Therefore, courts may not read into that statute restrictions or conditions on what is a public purpose that are not within the language. Because the trial court read those restrictions into the statute, the Court reversed the trial court.

#### 18-Hour Notice Under OMA Doesn't Have to Be Viewable By the Public For 18 Hours

*Citizens for Public Accountability v Northville Charter Twp*, unpublished per curiam (dec'd 5-26-11)

The Michigan Court of Appeals recently handed down a decision on both the 18-hour special meetings notice requirement and the detail required to be in open session minutes that follow a closed session where litigation or settlement strategy is discussed. There are two key points:

1. The 18-hour requirement for special meetings *does not* require posting for 18 business hours. Nor does it mean putting the notice in a spot that is publicly available for 18 hours. (In *Northville Twp*, the Court upheld the notice even though it was posted in a part of the township hall that was not accessible to the public for the full 18 hours the notice was posted.)
2. The *Northville Twp* Court ruled the township violated the Open Meetings Act because its minutes of the open session that followed the closed session were too skimpy and did not reflect the actual "decision." On July 24<sup>th</sup>, the township held a closed session to consider settlement of pending litigation. The agenda item merely said "REIS litigation." The minutes of the July 24<sup>th</sup> meeting state that the purpose of the closed session was to "discuss with the twp attorneys the litigation and settlement issues..." Minutes of the open session that followed the closed session then say this about the "decision" made: "Township Board authorizes the Township Supervisor and Clerk to execute any appropriate docs, if presented as outlined, and recommended by the Township attorney." In reality, the Township Board's decision was to sign a consent judgment to settle the REIS litigation. The Court held that the minutes do not adequately reflect the actual decision made, and so do not meet the Open Meeting Act's requirements. The Court suggested that the proper way would be to (1) state the actual decision to settle the case; (2) state the documents the attorney

presented during the closed session; or (3) state if the documents presented were full, final, or draft settlement proposals.

#### Michigan Medical Marihuana Act Does Not Allow Dispensaries

*State of Michigan v McQueen*,  
\_\_\_ Mich App \_\_\_ (Docket No. 301951, dec'd 8-23-11)

In a published opinion, the Michigan Court of Appeals held that patient-to-patient sales of medical marihuana – which occur in medical marihuana "dispensaries" – are not permitted under the Michigan Medical Marihuana Act (the Act) and are therefore public nuisances that must be enjoined. In *McQueen*, two individuals opened a medical marihuana dispensary in Isabella County. The dispensary "facilitated" patient-to-patient transfers of medical marihuana by allowing members of the dispensary to rent lockers and make marihuana available to other members. All members were required to be qualifying patients or primary caregivers of patient members. A patient member was permitted to visit the dispensary, examine and select from various available strains of marihuana, and then buy up to a certain amount of marihuana from the lockers. The dispensary kept a minimum 20% "service fee" for each sale of marihuana.

The State of Michigan sought an injunction against the dispensary operators, arguing it violated the Act and was therefore a public nuisance under the Public Health Code. The trial court ruled that the dispensary complied with the Act because the patient-to-patient transfers constituted the "medical use" of marihuana.

The Court of Appeals reversed and held, as a matter of first impression, that the dispensary operation was *not* in compliance with the Act. The Court reasoned that nothing in the Act legalizes the possession, use, or delivery of marihuana, which remains prohibited under the Public Health Code. Rather, the Act sets forth "very limited circumstances in which persons involved with the use of marihuana, and who are thereby violating the PHC, may avoid criminal liability." *Id.* at 7. The Act's limited exemption from criminal liability applies only if the defendant is engaged in the "medical use" of marihuana in accordance with the Act.

The Court held that the dispensary was not engaged in the "medical use" of marihuana and therefore did not operate in accordance with the Act. Although the definition of "medical use" in the Act includes the delivery and transfer of marihuana, the Court emphasized that the definition does not include the *sale* of marihuana – nor does any other part of the Act authorize the sale of marihuana. The medical use of marihuana "does not include patient-to-patient sales," and the defendants therefore had no authority under the Act to operate a dispensary.

### City Zba's Two-To-One Vote Is Not Sufficient To Reverse City Manager's Decision

*Edw C. Levy Co v Marine City Bd of Zoning Appeals*,  
unpublished per curiam opinion of the Court of Appeals  
(Docket No. 301951, dec'd 7-19-11)

The Court of Appeals recently upheld a strict interpretation of a part of the Michigan Zoning Enabling Act dealing with ZBA decisions. There, the plaintiff obtained a business license from the city manager to operate a bulk storage operation on property. The ZBA denied the appeal (affirming the manager's decision), by a three-to-two vote. The circuit court reversed, ruling that one of the ZBA members who was also a member of the City Commission, should have recused himself from voting. The circuit court vacated the ZBA's decision and remanded for a new vote based on the same record made below.

At the remand hearing and based on the circuit court's ruling, only four of the five ZBA members were eligible to vote. But only three ZBA members were present for the meeting. The ZBA voted two-to-one to reverse the city manager's decision. The circuit court ruled that the city manager's decision was still effective since two ZBA members' votes were not sufficient under MCL 125.2603 to reverse the manager's decision.

The Court of Appeals affirmed. The Court noted that MCL 125.2603 requires a "majority of the *members*" of the ZBA to reverse a certification of the city manager. Because there were 5 ZBA members, three had to vote to reverse. The vote of two members to reverse the city manager's certification was insufficient. For that reason, the Court upheld the trial court's ruling.

### Library Need Not Provide Same Services To Non-Residents

*Herrick v Dep't of Educ*, \_\_\_ Mich App \_\_\_  
(Docket No. 300393, dec'd 8-16-11)

The Court of Appeals recently ruled that citizens who pay taxes to support their local library are not required to provide identical services to citizens of another jurisdiction who do not pay taxes or fees for those library services. There, the Herrick District Library, a public library, provided services to individuals living within its jurisdictional area and maintains outside-service contracts with outlying municipalities. In some cases, Herrick offered different library services to residents of the contractual service area than those provided to residents of its district. The Michigan Department of Education passed

a rule that a public library could not get state aid if it offered different services to outside-service area residents compared to residents in its jurisdictional area. Herrick sued for declaratory judgment to invalidate the rule. The trial court ruled the rule was invalid as outside the Department's clear and express authority.

The Court of Appeals affirmed. The Court agreed with Herrick that the Department could *not* rely on inferred rulemaking authority. The Court noted that an agency may infer a degree of implied rulemaking authority from an enabling statute, but may do so only when that implied authority is "necessary to the due and efficient exercise of the powers expressly granted" by the enabling statute. The Court ruled that the Department's rule was invalid since its enabling statutes did not give it express power to formulate rules for state aid eligibility. The Court added that any Legislative act requiring libraries to give equal services to all individuals, regardless of where they live and their financial contribution, would "be of dubious constitutionality." If the Legislature's authority to pass such a statute is highly questionable, an agency certainly cannot claim an implied ability to do so.

### Temporary Takings Claim Fails Since There Was No Purposeful Bureaucratic Delay

*Otsego Cty v Bradford Scott Corp*,  
unpublished per curiam opinion of the Court of Appeals  
(Docket No. 295828, dec'd 7-21-11)

The Court of Appeals recently rejected a temporary takings claim that a developer brought against a county. In *Otsego Cty*, the developer sought permission for a bridge construction project. After a couple of years of litigation, the County ZBA and Planning Commission gave permission. The developer sued for temporary takings, claiming the delays in getting permission caused it to suffer financial losses. The circuit court dismissed in the County's favor.

The Court of Appeals affirmed the dismissal of the developer's temporary takings claim. The Court noted that the case did not entail purposeful bureaucratic delay, bad faith, intentional stalling, or obfuscation by the County. Both parties genuinely struggled with how to properly address the developer's desire to build a bridge under the zoning ordinance; it was not an everyday request. Further, the developer never established that there was no economically-beneficial use of the property without the bridge. Also, the County did not prohibit the construction of the bridge. Thus, the Court upheld dismissal of in the County's favor. 🏰



## PUBLIC CORPORATION LAW SECTION

### Winter Seminar: The Times They Are A'Changin'

February 10, 2012 • 8:30 a.m. - 4 p.m.

The Baronette Renaissance Hotel • Novi, Michigan

Location and lodging information is available at [www.thebaronette.com](http://www.thebaronette.com)

- 8:30 a.m.**                    **Registration/Continental Breakfast**
- 9:00 -9:05 a.m.**           **Welcome**  
[Philip A. Erickson](#), Chair–Public Corporation Law Section, State Bar of Michigan
- 9:05 – 9:30 a.m.**           **Internet Sweepstakes Cafes – Attorney General and Gaming Board Warnings**  
[Donald McGehee](#)–Assistant Attorney General Division Chief, Alcohol and Gambling Enforcement
- 9:30 – 10:00 a.m.**        **New Faces on and New Procedures of the Michigan Supreme Court**  
[Marcia L. Howe](#) and [Michael Rosati](#)–Johnson, Rosati, LaBarge, Aseltyene and Field, PC
- 10:00 – 10:15 a.m.**       **Break**
- 10:15 – 11:45 a.m.**       **New Rules at the Michigan Tax Tribunal - How does it change the practice?**  
Speakers: [Philip A. Erickson](#)–Plunkett Cooney  
[Jack L. Van Coevering, Esq.](#)–Miller Canfield, Paddock and Stone, PLC
- 11:45 – 12:00 noon**      **Questions and Answers**
- 12:00 – 1:15 p.m.**        **Lunch**  
*PCLS Section Council Immediately Following Lunch*
- 1:15 – 2:00 p.m.**        **What Do We Do Now? - Changes Affecting the Collective Bargaining and Employee Relations Of Public Employers**  
[Stephen O. Schultz](#)–Fahey, Schultz, Burgych, Rhodes, PLC
- 2:00 – 2:15 p.m.**        **Break**  
*After Lunch Dessert Served*
- 2:15 – 3:45 p.m.**        **Just What the Governor Ordered - Intergovernmental Cooperation and Agreements**  
Speakers: [William B. Beach](#)–Miller, Canfield, Paddock and Stone, PLC  
[Eric D. Williams](#)–City Attorney, City of Big Rapids  
[Andrew J. Mulder](#)–Cunningham, Dalman, PC
- 3:45 – 4:00 p.m.**        **Questions and Answers**
- 4:00 – 4:30 p.m.**        **Cracker Barrel**  
Moderator: [Charles R. McKone](#)–Henneke, McKone, Fraim and Dawes, PC
- 4:30 – 6:00 p.m.**        **Reception/Networking** (Cocktails/Appetizers)



# PUBLIC CORPORATION LAW SECTION

## Registration Winter Seminar

February 10, 2012 • 8:30 a.m. - 4 p.m.

The Baronette Renaissance Hotel  
27790 Novi Road • Novi, Michigan 48377

Register online at <http://e.michbar.org>

**PRE-REGISTRATION DEADLINE February 8, 2012**  
**Limited onsite registration available.**

P #: \_\_\_\_\_

Name: \_\_\_\_\_

Your Firm: \_\_\_\_\_

Address: \_\_\_\_\_

City: \_\_\_\_\_ State: \_\_\_\_\_ Zip: \_\_\_\_\_

Telephone: ( \_\_\_\_\_ ) \_\_\_\_\_

E-mail Address: \_\_\_\_\_

Enclosed is check # \_\_\_\_\_ for \$ \_\_\_\_\_

Please make check payable to: STATE BAR OF MICHIGAN

Please bill my:  Visa  MasterCard for \$ \_\_\_\_\_

Card #: \_\_\_\_\_

Expiration Date: \_\_\_\_\_

Please print name as it appears on credit card:

\_\_\_\_\_

Authorized Signature: \_\_\_\_\_

### Cost

- \$75 for government employees
- \$125 for Public Corporation Law Section members
- \$150 for non-section members

### Questions

Contact Chuck McKone at [cmckone@hmfldlaw.com](mailto:cmckone@hmfldlaw.com) or  
Steve Joppich at [sjoppich@secrestwardle.com](mailto:sjoppich@secrestwardle.com)

### Submit Your Form

Mail your check, or credit card information, and completed registration form to:

State Bar of Michigan  
Attn: Seminar Registration  
Michael Franck Building  
306 Townsend Street, Lansing, MI 48933

Fax (ONLY if paying by credit card) the completed form and credit card information to:

Attn: Seminar Registration at (517) 346-6365

**Cancellations Policy:** Cancellations must be received at least 48 business hours before the start of the event and registration refunds are subject to a \$20 cancellation fee. Cancellations must be received in writing by e-mail ([tbellinger@mail.michbar.org](mailto:tbellinger@mail.michbar.org)), fax (517-346-6365 ATTN: Tina Bellinger) or by U.S. mail (306 Townsend St., Lansing, MI 48933 ATTN: Tina Bellinger.) No refunds will be made for requests received after that time. Refunds will be issued in the same form payment was made. Please allow two weeks for processing. Registrants who cancel will not receive seminar materials.

# Federal Law Update

By Marcia Howe of Johnson, Rosati, LaBarge, Aseityne & Field, PC and Crystal L. Morgan of Law Weathers

## Supreme Court

### RLUIPA

*Sossamon v Texas, et al.*,

United States Supreme Court

(Slip Opinion, decided April 20, 2011 - Justice Thomas)

Harvey LeRoy Sossamon III, an inmate in a Texas correctional institution, sued the State of Texas and other prison officials under the Religious Land Use and Institutionalized Persons Act (RLUIPA), 42 USC §2000cc *et seq.*, seeking injunctive and monetary relief in response to two prison policies which: 1) prevented inmates on cell restriction for disciplinary infractions from attending religious services; and 2) barred use of the prison chapel for religious worship. The district court found that Sossamon's claim for monetary relief was barred by sovereign immunity and granted summary judgment in favor of the Texas defendants. The Fifth Circuit Court of Appeals affirmed. The United States Supreme Court affirmed, finding that Texas' acceptance of Federal funds did not constitute an express and unequivocal waiver of its sovereign immunity defense to prisoner suits seeking money damages pursuant to RLUIPA.

Section 3 of RLUIPA provides that “[n]o government shall impose a substantial burden on the religious exercise” of an institutionalized person unless the government demonstrates that the burden is in furtherance of a compelling governmental interest and is the least restrictive means of furthering that interest. Section 3 applies in any case in which the substantial burden is imposed pursuant to a program or activity that receives federal financial assistance. And Section 4 of RLUIPA provides for a private cause of action “to obtain appropriate relief against a government.”

Based on these provisions, the question before the Court was whether Texas' receipt of federal funds constituted an express and unequivocal waiver of its sovereign immunity and consent to suits for money damages under RLUIPA. The Court answered this question in the negative. The Court found the term “appropriate relief” in Section 4 of RLUIPA to be open-ended and ambiguous and inherently context-dependent, and thus, did not clearly authorize a damages remedy for prisoners suing under RLUIPA. Relying on Justice Kennedy's dissenting opinion in *West v Gibson*, 527 US 212 (1999), which reasoned that the phrase “appropriate

remedies” did not expressly and unequivocally authorize money damages under Title VII, the Court concluded that the phrase “appropriate relief” in Section 4 of RLUIPA did not unambiguously authorize money damages against Texas. The Court further reasoned that because the term “appropriate relief” is susceptible to multiple plausible interpretations, that a State's receipt of federal funds cannot be implied to rise to the level of an unequivocal and express waiver of sovereign immunity.

The Court then distinguished its previous opinions in *Franklin v Gwinnett County Public Schools*, 503 US 60 (1992), and *Barnes v Gorman*, 536 US 181 (2002), which concluded that damages were an available remedy based on similar phrases in different statutes. Those cases involved question about whether Congress had provided clear intent, through its legislation, to exclude money damages as a form of relief, while the case at hand involved the question of whether Congress, in the text of RLUIPA, had given clear intent to include money damages as an available remedy.

The Court also rejected Sossamon's argument that RLUIPA, as Spending Clause legislation, operated as an implied contract and that money damages are always an available remedy in a breach of implied contract claim. The Supreme Court remarked that the breach of implied contract argument could not be reconciled with the requirement that a waiver of sovereign immunity be express and unequivocal. Lastly, the Court rejected the argument that the residual clause in Section 1003 of the Rehabilitation Act Amendments of 1986, which makes damages an available remedy, applies to Section 3 of RLUIPA. The Court explained that Section 1003 applies only to statutes prohibiting discrimination and that Section 3 of RLUIPA does not prohibit discrimination, but rather, prohibits substantial burdens on religious exercise; therefore, Section 1003 did not clearly extend to Section 3 of RLUIPA.

The dissent, authored by Justice Sotomayor, responded that the majority found ambiguity in the term “appropriate relief” where none existed, and that its conclusion was contrary to the general remedies principles found in Supreme Court precedent. The dissent pointed out that, while the majority clearly acknowledged that RLUIPA conditioned the State's receipt of federal funds on its consent to suits for declaratory and injunctive relief pursuant to Section 4, which provided

for a private cause of action, it then disregarded this point and concluded that the term “appropriate relief” was ambiguous as to the availability of a damages remedy. It also stated that the majority opinion limits RLUIPA plaintiffs to prospective relief and deprives them of the ability to obtain relief for past violations thus insulating unlawful policies and practices from judicial review. The dissent further raised concerns that the majority’s opinion unnecessarily requires plaintiffs to show that the State has waived its sovereign immunity in a particular manner before they will be allowed to vindicate their rights which it termed a “formalization barrier.” The dissent further remarked that the majority conclusion is contrary to RLUIPA’s intent, which is to afford the broadest protection available under the Constitution to religious exercise.

#### Establishment Clause

*Arizona Christian School Tuition Organization v Winn, et al.*,  
563 US \_\_\_\_

(Slip Opinion decided April 4, 2011 - Justice Kennedy)

In this case, the respondent taxpayers sought to bring an Establishment Clause challenge to an Arizona state law that provides tax credits to individuals who contribute money to school tuition organizations (STOs), which use those funds to provide scholarships to students attending private schools, many of which are religious. The United States Supreme Court reversed the Court of Appeals and held that, because the taxpayers sought to challenge a tax credit rather than a governmental expenditure, they lacked Article III standing. The majority opinion, authored by Justice Kennedy, ruled that the taxpayers failed to meet the two conditions necessary to fall within the narrow exception to the general rule against taxpayer standing established in *Flast v Cohen*, 392 US 83 (1968). Pursuant to *Flast*, a taxpayer may establish standing if she shows: i) a logical link between her status as a taxpayer and the type of legislative enactment being challenged; and ii) a nexus between her taxpayer status and the precise nature of her claimed constitutional injury. The Court reasoned that Arizona’s use of a tax credit to fund STOs, rather than a direct expenditure of tax revenues, allows individuals to retain control over the use of their own funds, thus leaving the government, and thus its taxing and spending authority, out of the question. As such, the financial injury to an objector allegedly resulting from another individual’s contribution to a STO and receipt of the tax credit is too speculative to establish a cognizable injury and taxpayer standing under Article III. Further, the Court explained that any alleged injury could not be traced to a State tax expenditure because of the individual’s control over whether and to whom to contribute, which in turn determines whether she is entitled to the STO tax credit or some other tax deduction or credit.

The dissent, authored by Justice Kagan, disagreed with the majority’s rationale that a tax credit, such as Arizona’s STO tax credit, does not injure objecting taxpayers on the basis it does not extract and spend the taxes they pay to the

State. The dissent explained that direct expenditures of tax revenues and targeted tax breaks are both means of providing governmental financial support to selected recipients, and the majority disregarded precedent by distinguishing between tax expenditures and subsidies and tax credits. The dissent further stated that the majority’s distinction between tax credits and direct expenditures allows the government to do an end-run around *Flast*, which significantly alters the law of taxpayer standing and severely limits taxpayers’ access to the federal courts to challenge government tax credits, subsidies, and appropriations where a taxpayer believes that the government has violated the Establishment Clause.

#### Fourth Amendment; Exigent Circumstances - Entry Without a Warrant

*Kentucky v King*,

\_\_ U.S. \_\_; 131 S.Ct. 1849 (May, 2011 - Justice Alito)

Based upon objective factors, a warrantless search is reasonable under “exigent circumstances” if the officers do not create the exigent circumstances through actual or threatened Fourth Amendment rights. In the past, the Supreme Court had recognized that it is objectively reasonable to “enter a home without a warrant to render emergency circumstances” and “to prevent imminent destruction of evidence. In *Kentucky*, an undercover officer arranged for and watched a “controlled buy” of crack cocaine outside an apartment complex. He radioed the uniformed officers that were waiting for his signal to “move quickly.” But by the time they reached the apartment complex breezeway, the suspects had entered an apartment, although the officers did not see which apartment was entered. But, they could smell marijuana. To prevent destruction of evidence, the officers kicked the door of one of the apartments open and found Mr. King, his girlfriend, and a guest smoking marijuana. During a protective sweep, additional drugs and drug paraphernalia was found. Mr. King was charged with trafficking in drugs. Although his conviction was reversed by the time this matter was presented to the Supreme Court, the Court concluded the issue was not moot because the Supreme Court could reinstate the conviction. The question was whether the observation of the buy, the smell outside the apartment, and the sounds of people moving around inside were sufficient to reasonably believe evidence was being destroyed. Judge Alito’s decision held that exigent circumstances justified the Officers’ entry. Although a search warrant is generally required before the search and seizure is permissible, exigent circumstances such as “emergency aid” or the “prevention of the destruction of evidence,” do justify a warrantless entry. Because five different tests have been used by the various circuits, the Supreme Court narrowed the test to permit law enforcement agents to seize the evidence in plain view if they do not violate the Fourth Amendment “in arriving at the spot from which the observation of the evidence is

made.” 131 S.Ct. at 1858. An officer may go to a particular spot to get a view of potential evidence, try a consent-based encounter, or obtain evidence by mere happenstance. “[E]xigent circumstance rule applies when the police do not gain entry to the premises by means of an actual or threatened violation of the Fourth Amendment.” 131 S.Ct. at 1862. Upon remand, the Kentucky Supreme Court must consider whether the question of “whether an emergency actually existed.” 131 S.Ct. at 1863. Only Justice Ginsburg dissented.

### Sixth Circuit Court of Appeals

#### RUIPA - Impermissible Amendment to a Consent Judgment

*Northridge Church v Charter Township of Plymouth*,  
\_\_\_ F3d \_\_\_, 2011 WL 3180566(6<sup>th</sup> Cir Mich)

July 28, 2011 - Case No. 09-2388 - Judges Cole, Clay and Gilman.

Plaintiff Northridge Church, formerly known as Temple Baptist Church, sought to modify or set aside the consent judgment it had agreed to 17 years earlier and which continued to govern various aspects of the church’s use of its property located in Plymouth Township, Michigan.

The Sixth Circuit Court of Appeals affirmed the district court’s denial of Northridge Church’s motion, holding that the district court had properly denied the church’s motion under Rule 60(b)(4) where there was no indication that the consent judgment was void because the district court lacked jurisdiction to enter it or that the district court entered it in violation of due process. The Court of Appeals also observed that the cases Plaintiff relied upon to argue that the Consent Judgment was void because it violated the Religious Freedom Restoration Act (RFRA) and/or the subsequently enacted Religious Land Use and Institutionalized Persons Act (RLUIPA) were inapposite.

Next, the Court of Appeals held that relief under Rule 60(b)(5), based on changed legal or factual circumstances, was not warranted. Northridge Church argued that the enactment of RLUIPA constituted a significant change in the legal landscape justifying relief under the rule. While a change in the law may satisfy the rule in some cases, Northridge Church raised its initial claims under the Religious Freedom Restoration Act (RFRA) alleging that the Township’s actions substantially burdened its religious exercise. The Court found that, because both statutes prohibited the government from substantially burdening religious exercise, RLUIPA was identical to the RFRA in that respect, and the subsequent invalidation of RFRA and enactment of RLUIPA did not constitute a significant change in the law which would entitle the church to relief under Rule 60(b)(5).

The Court of Appeals also rejected Plaintiff’s argument that changed factual circumstances warranted modification of the consent judgment. First, the Court rejected the church’s

argument that its growth in membership was unanticipated at the time the consent judgment was entered, and it noted that the sizable development allowed under the consent judgment demonstrated that the parties foresaw the church’s future growth. Northridge Church argued that the consent judgment’s limitation on the number of seats in the main worship hall was unduly onerous. The Court held that while the church now desired to have all of its members worship together, by entering into the consent judgment, it had agreed to conduct several services to accommodate its growing membership, thus conceding that such a restriction was not a substantial burden on its religious exercise. Furthermore, the Court noted that a church is not free to disregard reasonable zoning restrictions on building size. The Court next opined that, contrary to Plaintiff’s assertions, limitations on the number of annual musical events and the timing restrictions on worship services did not make the consent judgment unduly onerous. Certain limitations on the timing of activities are entirely reasonable when the surrounding neighborhood is considered.

Plaintiff also argued that the consent judgment had to be modified or set aside because it precluded it from operating a soup kitchen or homeless shelter on the property. However, the Court recognized that the church failed to explain how its core beliefs changed such that it was willing to forego such charitable services in 1995 but deemed them necessary now. The Court also noted that Northridge was not prevented from providing those charitable services elsewhere.

The Court also rejected Plaintiff’s argument that parking limitations in the consent judgment required modification because it was spending nearly \$300,000 annually and expending substantial volunteer time to provide off-site parking and shuttle members to the property for various activities. The Court noted that, while not insignificant, the amount was only three percent of the Northridge’s annual budget. Further, the limitation still allowed for one parking spot for every three to four persons on the property, assuming a full service and other individuals attending other functions.

The Court held that development of an area, including population growth, improvements in infrastructure, and increases in population, are phenomena to be anticipated. Northridge Church failed, however, to demonstrate a sufficiently dramatic change to justify modification of the consent judgment. Also, apparently understanding that allowing Northridge Church to modify or set aside a 17-year old consent judgment would work as a massive disincentive for municipalities considering entering into such agreements in the future, the Court observed that “to allow a party to escape a consent judgment based on its own voluntary actions strikes us as unjustified.” Additionally, in response to Northridge’s request for remand and further evidentiary hearing before the district court, the Court properly remarked that the Church had an opportunity to make its record in the district court and,

to the extent it failed to do so, the Court of Appeals would not allow it a second bite at the apple or a “do over.”

### Challenge to a Consent Judgment

*East Brooks Books, Inc, et al v Cooper, et al,*  
633 F3d 459 (6<sup>th</sup> Cir, Tenn)

February 24, 2011 - Judges Clay, Kennedy and Kethledge

Plaintiffs Steve Cooper and Southern Entertainment Management Company sought relief, pursuant to Rule 60(b) (5) and (6), from a 1996 consent judgment which declared a 1991 City of Memphis ordinance regulating sexually-oriented businesses (SOBs) unconstitutional. Plaintiffs argued that, due to intervening changes in statutory and case law, the Memphis ordinance was no longer unconstitutional and that the consent judgment should no longer be applied.

With the stated intent of promoting the public health, safety, and welfare and minimizing the secondary effects of sexually-oriented businesses, such as increased crime and neighborhood deterioration, the City of Memphis adopted an ordinance regulating SOBs in 1991. The Memphis ordinance included an elaborate scheme for permitting, reviewing, and revoking SOB permits which required, among other things, disclosures regarding the business, every owner, and employees. It also included provisions precluding the concentration of sexually-oriented businesses.

Plaintiffs sued, alleging a number of constitutional violations, and in 1995, on appeal, the Sixth Circuit Court of Appeals declared numerous provisions of the Memphis SOB ordinance to be unconstitutional. The parties agreed to a consent judgment which adopted the Sixth Circuit’s opinion as the final judgment as to the constitutionality of the Memphis SOB ordinance.

In 2007, Shelby County, in which the City of Memphis is located, adopted its own ordinance regulating Adult-Oriented Establishments, which required a permit, disclosures, payment of fees, and inspections. The Shelby County ordinance also included a preemption clause for other municipalities that enforced their own ordinance.

Realizing that their businesses would be regulated more stringently under the Shelby County ordinance than under the Memphis ordinance, in 2008, Plaintiffs sought relief from the consent judgment pursuant to Rule 60(b)(5) and (6) which, if granted, would have triggered the preemption clause and allowed Plaintiffs to be regulated under the Memphis ordinance, which Plaintiffs apparently preferred, rather than the Shelby County ordinance. In support of their motion, Plaintiffs claimed that due to statutory changes and court opinions interpreting the law since entering into the consent judgment, the Memphis SOB ordinance was no longer unconstitutional and that the parties should be relieved of the consent judgment. The district court disagreed that

intervening changes had rectified all unconstitutional defects in the Memphis ordinance and denied the motion.

The Court of Appeals affirmed the district court denial of Cooper’s motion finding that it properly determined that the shareholder disclosure provision, the peaceful manner provision and the unlawful amortization provision in the Memphis ordinance remained unconstitutional and could not be severed from the remainder of the ordinance. Further, the Court of Appeals concluded that Plaintiffs failed to explain, in any credible manner, how it would be inequitable to continue to apply the consent judgment. The Court observed that Plaintiffs failed to show that not being regulated under the Memphis ordinance was somehow unfair to SOBs or that being regulated by Shelby County’s constitutional ordinance would be unjust. The Court of Appeals also found no exceptional circumstances that would warrant relief under Rule 60(b)(6).

### American Disability Act

*Whitfield v Tennessee,*  
639 F3d 253 (6<sup>th</sup> Cir, 2011)

(Judges Boggs, Suhrheinrich, with concurring Opinion by  
Judge Jane B Stranch)

Judge Boggs authored the majority Opinion affirming the District Court’s Order Granting Summary Judgment, but also recognized that the existing opinions suggest the courts are currently confused about the proper test for establishing a *prima facie* case of employment discrimination under this Act. Here, the court presumed Plaintiff was disabled because she was blind in one eye and suffered from cerebral palsy thereby demonstrating a *prima facie* claim of employment discrimination under the Americans with Disability Act (ADA). 42 USC §12211, *et al.* Her ex-employer discharged the Plaintiff because her work allegedly contained multiple clerical errors and organization mistakes. She argued those reasons were merely a pretext. The appellate court disagreed because she failed to provide admissible evidence supporting that contention. Granted, some of her mistakes may have been attributed to the employer’s rearrangement of her work area that could not be arranged to accommodate her physical abilities. But the employer did demonstrate by admissible evidence its dissatisfaction with her included her other organizational clerical and filing mistakes that were unrelated to her location or the position of her work area.

In a concurring Opinion, Judge Stranch noted that the courts have “grappled with how to articulate the standards applicable to ADA litigation.” For that reason, she encouraged the Court delegate to an *en banc* panel of the Sixth Circuit the task of examining the relationship and applicability of the analysis relied upon in the *Rehabilitation Act of 1973* to a claim brought under the ADA. This Courts’ *en banc* consideration is necessary because its current case law precedent failed to

include a review of the Legislative history of both statutes or compare the specific language in each of those two Acts. Rather, the current Sixth Circuit precedent, as a practical matter, “results in less protection for the ADA plaintiff than that protection afforded to employees covered by the Title VII.” In this Circuit, the court requires proof that the the disability was the “sole” reason for their employer’s actions. The majority of Circuits, however, rely on the lesser standard of proof found in the “motivating factor” test.

**Criminal Prosecution of a Police Officer for his Violation of Civil Rights**

*US v Sease*,  
659 F.3d 519(6<sup>th</sup> Cir, 2011) (Judges Cole, Rogers and Griffin)

This appeal of the criminal conviction of a police officer is noteworthy. Officer Sease was convicted under the tough criminal standard of whether “*any* rationale trier of fact could have found the essential elements of the crime beyond a reasonable doubt.” This panel refused to allow the criminal Defendant in this case, who was a police officer that was charged with willful violations of the alleged drug dealers’ civil rights, to rely on the fact that probable cause to arrest the drug dealer existed. The appellate court reviewed the evidence presented against this ex-police officer “in the light most favorable to the prosecution.” Despite the fact that probable cause to arrest the third-party criminal defendants existed, the Officer cannot rely on the probable cause to arrest for his defense where “...that officer’s actions are inherently and objectively illegal.” Under 18 U.S.C. §242, “...whoever, under the color of law...willfully subjects any person in any State...to the deprivation of rights, privileges and immunities secured by the Constitution or law of the United States, or to different punishments or immunities secured by the Constitution...by reason of his color or race, shall be fined...or imprisoned.” When officers are not engaged in “*bona fide* law enforcement activities, but instead acted with a corrupt, personal, and pecuniary interest, the officers violate the civil rights of those that are stopped, searched, or have their property seized.” *Id*, p9. Because Officer Sease deprived those that he targeted of their constitutional rights “his conviction under 18 USC §241 and 242 are supported by sufficient evidence.” Officer Sease contended his convictions for conspiracy to possess controlled substances with the intent to distribute, his possession with the intent to possess and distribute a controlled substance must be overturned because the “victim” was engaged in criminal activity. The court disagreed. The fact he had robbed someone who was, in fact, a drug dealer, was not a defense to the criminal action against the officer.

**Police Officer’s Illegal Entry into a Residence**

*Wheeler v City of Lansing*,  
\_\_\_ F.3d \_\_\_, 2011 WL 5345402(6<sup>th</sup> Cir, 2011)  
(Judges Batchelder, Sutton and authored by Rogers)

The plaintiff tenant filed this 42 USC §1983 lawsuit claiming the City and Officer Wirth violated her constitutional rights when Officer Wirth prepared a search warrant and executed a no-knock entry into her apartment, because the warrant referenced the wrong street and contained non-particularized descriptions of the items to be seized. The Officer argued that her claims were barred by qualified immunity. He did not seize property, did not prepare or sign the affidavit, and he was entitled to rely on the assistant prosecutor’s signature. Moreover, the search warrant had been reviewed and submitted to a magistrate, who was the individual that authorized it. Plaintiff challenged the dismissal of Officer Wirth only because “no reasonably trained and experienced officer would have relied upon a warrant authorizing search and seizure of her apartment.”

In 2008, the City of Lansing and Eaton County Sherriff’s Deputy investigated several home invasions at an apartment complex, where they arrested two suspects, including Ms. Wheeler’s boyfriend. The Officers suspected they were involved in the multiple break-ins around that area and had stashed the stolen items in Ms. Wheeler’s apartment. Although multiple officers were involved in the search and seizure, Plaintiff’s appeal addressed only those claims against Officer Wirth. Prior to the search, Officer Wirth had met with the assistant prosecutor, who typed up the affidavit supporting the search warrant. Officer Sharp signed it, even though he had knowledge of a number of other break-ins in the area involving circumstances that were not consistent with the nature of this break-in. In fact, the warrant referencing Plaintiff’s apartment contained the right numerical address on the wrong street. Even though Officer Sharp noticed inaccuracies in the warrant’s information, he logged the items taken into the department’s property room.

On appeal, Plaintiff challenged the dismissal of Officer Wirth based upon qualified immunity. Her appeal does not challenge his entry into the apartment, only the seizure of items. The appellate panel presumed for purposes of argument the Plaintiff’s constitutional rights were violated. The search warrant was drafted by the prosecutor and approved by a state magistrate. Plaintiff acknowledged that the affidavit contained sufficient factual support to permit the search and that the deficiency was not apparent to a reasonable officer. Moreover, legal precedent permits the seizure of items not specifically listed in the warrant if they are reasonably related to offense. In fact, Officer Wirth’s belief that the warrant permitted the seizure of items as evidence of the commission of home invasions was deemed permissible.

Nonetheless, the appellate panel concluded that Officer Wirth was not entitled to qualified immunity from the claim that the warrant failed to adequately describe the items with “sufficient particularity.” Here, the descriptions relied on broad categories rather than specific items. The nature of the categories listed in the search warrant were overbroad and too general, which created the danger of unlimited discretion in its execution. Such “broad categories” in a warrant prevent an officer from distinguishing the “stolen home items” from these prior invasions from this Plaintiff’s personal property. Although Officer Wirth personally did not take any items and did not sign the affidavit, he did play a major role in presenting the information to the prosecutor and obtaining the warrant. Consequently, he is responsible even when he did not sign the affidavit or take any property. The case law precedent requires invalidation of this warrant as overbroad because it merely lists “common items,” which could be found in any apartment. Because a reasonable officer should have known of the deficiencies in the warrant, the unconstitutionality of this warrant was clearly established, and thus qualified immunity did not bar the lawsuit. See *US v Henson*, 848 F.2d 1374, 1382(6<sup>th</sup> Cir., 1988); *US v Campbell*, 256 F3d 381, 288-89 (6<sup>th</sup> Cir., 2001). *Malley v Briggs*, 475 US 335; 106 S Ct 1092; 89 L Ed 2d (1986).

#### Qualified Immunity, Motion for Summary Judgment, Appellate Jurisdiction, Scope of Record

*Bomar v City of Pontiac, et al*,  
643 F3d 458 (6th Cir.)

Plaintiff filed this civil rights’ lawsuit against the defendant police officer on the grounds that he violated her 4<sup>th</sup> Amendment rights during the course of his investigation and pursuit of suspected drug dealers. Specifically, Plaintiff claimed that the officer used excessive force when he pepper-sprayed her and then punched her in the eye after she was restrained, handcuffed, and lying on the ground. Plaintiff’s son supported Plaintiff’s version of the incident. Her daughter testified the police officer had pepper-sprayed her mother after she was already lying on her back. The officer denied ever punching Plaintiff, but conceded he did pepper-spray her after handcuffing her. Within moments, the officers realized the Plaintiff’s 12-year old son was not the assault-rifle-toting suspect they were pursuing and released both the Plaintiff and her son.

The trial court denied the officer’s motion for summary judgment based on qualified immunity. According to the District Court, a genuine issues of material fact existed as to whether the officer utilized excessive force. On appeal, the Sixth Circuit appellate court noted that an officer’s interlocutory appeal cannot dispute a plaintiff’s version of the facts. Instead, an officer must be willing to concede the facts in the light most favorable to the Plaintiff to permit this interlocutory appeal.

The appellate court’s jurisdiction only extends to consideration of the legal issue. Thus, if the appellant disputes the facts, the appellate court lacks jurisdiction over the appeal. The officer contends the facts may be considered if it considers only those facts alleged by the plaintiff and her children, whose testimony suggests that she continued to resist after she was down on the ground. Here, Plaintiff Bomar relied on the entire record, not only her testimony. In fact, the appellate court has a more liberal position on appeal than at the trial court, because the appellate court cannot review the lower court decision *de novo*. The appellate court jurisdiction permits review of the “entire” record produced during discovery in the light most favorable to the plaintiff. It is not restricted to those facts solely “gleaned from the plaintiff’s deposition testimony.” Because the district court concluded that outstanding issues of material fact exist, appellate review is precluded. To hold otherwise is inconsistent with the requirements set forth in Rule 56 of the Federal Court Rules.

#### Admissibility of Evidence/Punitive Damage/Remittitur

*Arnold v Wilder*,  
657 F.2d 353 (6th Cir, 2011)  
(Keith, Gibbons and White)

This 42 USC 1983 lawsuit arose out of an incident that occurred when Plaintiff Maria Arnold’s son, Jacob, and his friends were accused by a neighbor of repeatedly running through her yard and causing damage to her flower beds. Defendant Officer Wilder, a police officer with the Strathmoor, Kentucky, Police Department, was directed by his supervisor to go to the neighborhood to address the complaint.

Arnold’s and Officer Wilder’s accounts of what happened when he arrived at her residence differ substantially. When the officer approached, she told the boys to go inside and call their parents. Although she told the officer she would speak to him, the Officer became angrier and angrier. He allegedly placed her into a chokehold and dragged her across the street to put her in his police car. The children, including Jacob and Wilder’s daughter, Caroline, came out of the house and became distressed at what they saw. Arnold claimed that the Officer never told her that she was under arrest or that he was going to arrest her. She claimed that she was compliant but nevertheless was pepper sprayed in the back of the police car. Then she was locked her in the back of the vehicle until one of her son’s friends quickly freed her. She and the children ran to the house. The boys called 911. The Louisville Metro PD Officer arrived shortly thereafter. Officer Wilder informed them that “a prisoner had escaped from his car and had gone into the house and locked the house and was not coming out.”

Eventually, Arnold did allow the officers to enter the home and told them about her altercation with Officer Wilder. Arnold was again placed in the back of Wilder’s squad car and taken to the police station. She contends that Officer Wilder

asked another officer - “How can I make this a felony?” After five or six hours, she was released. She did have some bruises on her neck and wrists, but did not sustain permanent injuries.

Plaintiff was arraigned on one count of disorderly conduct, two counts of assault in the third degree of a police officer, one count of resisting arrest and one count of escape in the second degree. She pled not guilty on all counts, several of which were felonies. The prosecutor approached her with an agreement, pursuant to which all criminal charges would be dismissed if she promised not to “initiate, pursue or otherwise become involved in a civil or criminal action in any form against “[City of] Strathmoor . . . or against Officer James Wilder.” She refused to sign the agreement. Her felony charges were ultimately amended to misdemeanors, but she found not guilty on all counts.

Following resolution of the criminal matter, Arnold filed suit against Wilder, Strathmoor, the Mayor of Strathmoor, and the neighbor that complained about Jacob. Subsequent to Defendants’ Motions for Summary Judgment, and dismissals by the court at trial, the following claims remained: Arnold’s claims against Wilder for (a) false arrest, (b) malicious prosecution, and (c) battery. Following a trial, the jury awarded Arnold \$2,400 for physical injury, including pain and suffering, \$5,000 for legal expenses, \$50,000 for mental pain and suffering, and \$1,000,000 in punitive damages.

Post-trial motions, including those arguing for the reduction of the jury’s punitive damages award, argued that trial court’s admission of evidence regarding settlement discussions in Arnold’s criminal prosecution warranted a new trial. The district court granted Defendants’ Motion to reduce Arnold’s punitive damages, lowering the award to \$229,000. The lower court denied Defendants’ motion regarding the admission of settlement discussions. Both parties appealed.

In upholding the trial court’s decision to allow evidence and testimony regarding the settlement discussions between the prosecutor and Plaintiff Arnold in the criminal case, the Sixth Circuit held that Federal Rule of Civil Procedure 408, which typically excludes settlement evidence, “does not require exclusion if the evidence is offered for another purpose,” such as showing a witness’s state of mind. Fed. R. Civ. P. 408. The court found that, because the settlement evidence was not offered to “prove liability for, invalidity of, or amount of a claim that was disputed as to validity or amount,” but rather, “to show that Wilder participated in the process of settling Arnold’s *criminal* charges,” because he was present at the settlement discussions and his name was on the Settlement Agreement, thereby potentially establishing an element of Arnold’s malicious prosecution claim—specifically the damages element, as Plaintiff alleged that she suffered “emotional distress in deciding to proceed to trial in light of the charges she was facing.” The appellate court held that that District Court Judge did not abuse its discretion in admitting that evidence.

In reviewing the trial court’s reduction of the jury’s \$1,000,000.00 in punitive damages award to \$229,000, the appellate court noted that the punitive damages award was 17.4 times larger than the compensatory damages award. Applying a *de novo* standard, the appellate court noted that, although states have discretion to impose punitive damages, “it is well established . . . there are procedural and substantive constitutional limitations on these awards.” Specifically, an excessive punitive-damages award can violate the Fourteenth Amendment.

The *Arnold* Court noted that the Supreme Court has “rejected the notion that the constitutional line is marked by a simple mathematical formula, even one that compares actual *and potential* damages to the punitive award.” *BMW of N. Am. Inc. v Gore*, 517 U.S. 559, 583 (1996). However, the Court also acknowledged that, “in practice, few awards exceeding a single digit ratio between punitive and compensatory damages, to a significant degree, will satisfy due process.” *State Farm Mut. Auto Ins. Co. v Campbell*, 538 U.S. 408, 416 (2003).

The Court recognized that in §1983 cases involving constitutional violations, a higher ratio of punitive to compensatory damages is to be expected, but also recognized the reality that the municipality would be responsible for paying the punitive damages on behalf of Officer Wilder although it is not a wealthy business enterprise. While remittitur was appropriate, the District Court erred in mechanically applying a four to one ratio. The Sixth Circuit increased the trial court’s punitive damage award to \$550,000, without offering an explanation for how it arrived at this figure.

#### Fourth Amendment Rights Violation - Conspiracy, Malicious Prosecution, False Arrest

*Bazzi v City of Dearborn*,  
658 F.3d 509 (6<sup>th</sup> Cir, 2011)

Plaintiff Bazzi, who had been convicted and served his time for his involvement in a conspiracy to possess cocaine and intent to distribute, was assigned to a supervised release program. Plaintiff Bazzi claims that Mr. Haidar, who was an acquaintance, had conspired with three Dearborn Police Officers to file false charges against him, unlawfully arrest him, unjustifiably causing him to be removed from the supervised release program and returned to prison. Apparently, Bazzi threw a bottle at Haidar’s van and broke its window. Bazzi also mailed a copy of the federal fraud indictment against Haidar to Haidar’s girlfriend.

At first, Ofc. Thompson refused to answer Haidar’s repeated phone calls to his personal phone. Officer Saab, however, urged him to answer. Ofc. Saab had filed a false report that Bazzi’s was involved in illegal activity so that Bazzi would be returned to prison. When Ofc. Thompson did answer Haidar’s call, but refused to participate in any

conspiracy. Haidar then reported that Bazzi was carrying guns and drugs in his white Nissan Altima and provided its exact location. Ofc. Thompson drove to the designated location and stopped Bazzi for speeding and running a stop sign. No contraband or guns were found. He apologized and Bazzi was allowed to leave. Ofc. Cox submitted the report and Bazzi was arrested and returned to jail for violations of the terms of his release in 2007. Bazzi's charges were subsequently dismissed on January 28, 2008.

Plaintiff Bazzi filed this 42 USC §1983 claim under the Fourth Amendment and Due Process Clause against the Officers. The District Court dismissed the claims against Ofc. Thompson. The appellate decision reversed, because the alleged circumstances surrounding Ofc. Thompson's stop presented questions of fact as to whether the stop was supported by probable cause or even a reasonable suspicion. Plaintiff testified he was "driving carefully." Ofc. Thompson apologized for stopping him. Thompson's partner's report stated that Bazzi was stopped for suspicion of a stolen vehicle. These inconsistencies prevented dismissal. The appellate court concluded that a reasonable jury could conclude Thompson lied about the Plaintiff's purported traffic violations. A jury could find that Ofc. Thompson's stop was not based upon a "particularized and objective basis" of "criminal activity." The validity of the traffic violations were in dispute. A jury could conclude that he lied about the reasons for the investigatory stop and therefore the stop was not supported by either probable cause or a reasonable suspicion. If Ofc. Thompson's reasons were merely a pretext for the stop, probable cause was not established.

Officer Thompson argued that his stop could be based upon a reasonable suspicion based upon Hairdar's tip that Bazzi had guns and drugs in the car. Although Ofc. Thompson was aware of Bazzi was a convicted felon, he had no corroborating evidence that Bazzi had guns or drugs. No reasonable suspicion for the stop was shown. More importantly, specific and contradictory facts were presented that would allow a jury to infer that Ofc. Thompson agreed to their illegal plan because he did, in fact, stop Bazzi.

Although Ofc. Thompson may not have stopped Bazzi because he "agreed to the *greater* harm of having Bazzi arrested, a reasonable jury could find that Thompson lied about the reason for the stop and thus, lacked probable cause to do so." Although Ofc. Thompson knew Bazzi was a felon, a reasonable suspicion cannot be based upon the mere fact that Bazzi was a convicted felon. Rather, to be reliable, a tip must be based upon evidence that Bazzi was involved in some form of illegality activity. Here, while the evidence may not permit "reasonable jury to infer that Thompson agreed to the general conspiratorial objective of violating [Bazzi's] constitutional rights" by issuing a false report, sufficient evidence was

produced to overcome summary judgment on the conspiracy to stop him without reasonable suspicion. Bazzi's testimony contradicted the Officer's reasons for his stop. Because these questions of fact were shown supporting Plaintiff's contention that Ofc. Thompson lied about the reasons for the stop, the evidence must be submitted to a jury to determine if Ofc. Thompson lacked probable cause to stop Bazzi's vehicle.

#### Civil Rights—Qualified Immunity

*O'Malley v. City of Flint*,  
652 F.3d 662 (6<sup>th</sup> Cir, 2011)

Judges Griffin and Collier; Concurring in part, Dissenting in part - Gilman

While Chief Hagler was driving an unmarked police car, he noticed a blue Tahoe resembling a Michigan State Police (MSP) vehicle. The Tahoe had several features regularly found on MSP vehicles, including a large, whip-like antenna on the roof, an emergency vehicle push-bar, "Call 911" decals on its rear panels, red emergency lights in the rear window, a tinted rear window, and the number "47" stenciled in white on the rear tailgate. But the vehicle did not have a municipal plate and was missing the MSP "shields" typically located on the doors of these State of Michigan's Police Tahoes.

Chief Hagler called the local MSP post to determine whether they had a unit in the area that matched the description of this vehicle. When the State Officer advised him that it was not an MSP Tahoe, Chief Hagler followed the vehicle to dispel or confirm his suspicions it was being used to facilitate the impersonation of a law enforcement officer.

At that point, the vehicle turned into a residential neighborhood, allegedly taking an indirect route to a private residence. The driver (Plaintiff) pulled the Tahoe into the back of the driveway, exited the car, and began walking quickly toward the back of the house. Chief Hagler parked his vehicle in the driveway behind the Tahoe, approached Plaintiff, identified himself as a police officer, and said he would like to speak to Plaintiff about the Tahoe. Plaintiff advised Chief Hagler that he was a security guard, had a CCW permit, and owned the handgun, which is located on the front seat of the Tahoe under a T-shirt. Since the tinted windows prevented Chief Hagler from determining if any passengers were inside who might have access to the handgun, the Chief asked Plaintiff to keep his hands in view, walk toward him, and called for backup.

At that point, Plaintiff approached Chief Hagler in a combative manner. The Plaintiff admitted that he was angry and had raised his voice. He shouted: "This is bullsh\*\*t." Chief Hagler asked Plaintiff to calm down, but Plaintiff continued to approach in an aggressive manner. As a result, Chief Hagler handcuffed him for safety reasons so he could

safely investigate whether there were other people in the Tahoe. By this time, other officers arrived on the scene and assisted in verifying the CCW permit, driver's license, proof of insurance, and registration. They located the Plaintiff on the LIEN system while the Chief was on the phone with the MSP.

Plaintiff claims he advised Chief Hagler the handcuffs were too tight, but admittedly did not ask him to loosen them. During the search, the police recovered a .45 caliber, semi-automatic handgun. The LIEN check indicated an arrest warrant for Plaintiff was outstanding in another jurisdiction. Chief Hagler told the officers to arrange for Plaintiff's transport to that facility before leaving the scene.

Approximately an hour and a half later, the officers at the scene were contacted by the other department and notified it was a mistaken identity—Plaintiff was not the individual with the outstanding arrest warrant. Chief Hagler called one of the officers that was still at the scene and told him to release the Plaintiff and return his property.

Plaintiff, who was in custody about two hours, filed a Complaint asserting relief under 42 USC §1983 for numerous Constitutional violations. The district court granted the City's motion for summary judgment, but denied the Chief's Motion for qualified immunity on the excessive force-in-handcuffing, and the search and seizure claims. Based upon the totality of the circumstances, the appellate court concluded the Plaintiff was not seized for Fourth Amendment purposes at the time of the initial encounter and questioning. Alternatively, it held that, even if he was temporarily seized, the brief investigatory stop was constitutional. Likewise, the handcuffing and search of Plaintiff's vehicle were proper under the Fourth Amendment. Importantly, the court held that it would not have been clear to a reasonable officer that his conduct in failing to immediately loosen the handcuffs was unlawful. Thus, the appellate court reversed the district court's ruling and remanded for entry of a judgment for Chief Hagler.

## Western District of Michigan

### Billboards; Moratoria; Due Process

*Lamar OCI North Corp v City of Walker*  
\_\_\_ F Supp 2d \_\_\_ (July 21, 2011)  
Slip Copy, 2011 WL 2945831

The plaintiff billboard owner ("Lamar") sued the city after it failed to grant applications to convert two of Lamar's static billboards to digital or electronic billboards. The city's sign ordinance did not list digital billboards as a permitted use and generally did not allow flashing, blinking, scrolling or intermittent illumination signs. After Lamar's applications were received, the city adopted a six-month moratorium on digital or electronic billboards. The city notified Lamar that it was not taking any action on the applications because the

applications were incomplete and because digital billboards were not allowed under the current ordinance. Lamar then resubmitted its applications and the city extended the moratorium for an additional six months.

Lamar filed suit in state court asserting that the city's denial of the permits, its failure to approve the applications in a timely manner, and its enactment of the moratorium violated the plaintiff's First and Fourteenth Amendment rights to free speech and due process. The city removed the action to federal court and then sought summary judgment.

The court recognized that content-neutral prohibitions and restrictions on billboards can be constitutional, but the court declined to rule on the issue of whether digital billboards were allowed under the ordinance until after the moratorium expired. "The Court is satisfied that where, as here, the City is faced with an application to apply its Ordinance to new technology, the City is constitutionally permitted to enact a moratorium for a reasonable period of time so that it may study and determine what effect the new technology might have on traffic safety, aesthetics, and other legitimate municipal concerns, and what regulations, if any, are necessary to address those concerns."

The court granted summary judgment in favor of the city on Lamar's due process claim based on the city's arguments that Lamar did not have a viable due process claim because it did not obtain a vested and constitutionally protected property interest in any particular zoning provision, and that no property rights vested because Lamar did not obtain a building permit or begin substantial construction prior to the adoption of the moratorium.

### First Amendment; Retaliation

*Timmon v Robinson*  
Slip Copy, 2011 WL 3879484  
WD Mich (August 17, 2011)

The plaintiff brought a civil rights action under 42 USC §1983 and a state-law tort claim of assault and battery against the defendant Lansing City Council president. The plaintiff alleged that the defendant poked her in the back immediately before the start of a City Council meeting, causing her to suffer an injury. The plaintiff also alleged that her First Amendment right to free speech was violated when the defendant interrupted her three-minute time allotment for public comments during the City Council meeting. The First Amendment violation was supposedly an act of retaliation for ongoing litigation between plaintiff and the city. The defendant maintained that she verbally greeted the plaintiff at the meeting and did not touch her.

The court granted summary judgment in favor of the defendant on the retaliation claim. The court found that while the plaintiff had a substantial history of litigation with members of the City Council, the defendant was not aware of any unresolved litigation at the time of the alleged incident.

The court also found that at the meeting in question, the plaintiff was allowed over five and a half minutes of uninterrupted speaking time over the course of the meeting. The defendant interrupted the plaintiff only briefly after a personal allegation of an actionable wrongdoing was made against her. The court concluded “[a]ssuming arguendo that defendant’s interruption of plaintiff constituted an adverse action at all, the loss of twenty seconds or less remains a trivial deprivation....Defendant went on the record to correct the statement that she had touched plaintiff. It was natural, and potentially wise, for defendant to wish to avoid leaving such an unchallenged accusation on the record.” The court made clear that the plaintiff’s allotted speaking time “does not constitute a license to make serious accusations uninterrupted” and that the City Council “has the right and responsibility to keep order during its meetings.” The court declined to exercise supplemental jurisdiction over the plaintiff’s state-law claims.

#### Zoning; Ripeness

*VVQ Land Holdings, LLC v Charter Twp of Portage*  
Slip Copy, 2011 WL 4005882, 2001 WL 4004830  
WD Mich (July 22, 2011)

The plaintiffs own property in the township, which was used for mining, aggregate, and gravel operations. In an earlier lawsuit filed in state court, the township sought injunctive relief and abatement of a nuisance per se, specifically seeking an order prohibiting the plaintiffs from using their property for mining and

gravel extraction in violation of the zoning ordinance. The circuit court granted summary disposition in favor of the township and ordered the plaintiffs to cease and desist their operation of the quarry, and close the mine, on the property. The plaintiffs appealed the orders to the Michigan Court of Appeals.

While the appeal was pending, the plaintiffs filed an action in federal court asserting a takings claim against the township. The township sought dismissal for lack of jurisdiction, arguing that the plaintiffs’ takings claim was not ripe by virtue of the plaintiffs’ failure to exhaust state-court remedies as required by *Williamson Co Regional Planning Comm’n v Hamilton Bank of Johnson City*, 473 US 172 (1985). The court agreed, explaining that “The Sixth Circuit requires Michigan plaintiffs to pursue a state inverse condemnation action to satisfy the ripeness requirement....Since Plaintiffs have not pursued an inverse condemnation action in the Michigan state court, their takings claim is not ripe for adjudication in this Court, and therefore should be dismissed without prejudice.”

The court also held that dismissal was appropriate on the basis of the abstention doctrine announced in *Younger v Harris*, 401 US 37 (1971), which states that considerations of comity, equity and federalism require a federal court to abstain from enjoining pending state criminal prosecutions in the absence of extraordinary circumstances. The court found that abstention was appropriate because there was a state proceeding that (1) was currently pending, (2) involved an important state interest, and (3) afforded the plaintiffs an adequate opportunity to raise constitutional claims. 🏠

## Legislative Update

*By Kester K. So and Wendy R. Underwood of Dickinson Wright PLLC*

*Over the course of the last several months, the Michigan Senate and House of Representatives have considered numerous bills of municipal interest. The following are summaries of some of those bills:*

#### Laws Enacted

- **Financial Recovery Bonds. SB 318** amends The Home Rule City Act to modify provision regarding financial recovery bonds. Amends section 36a, 1909 PA 279 (MCL 117.36a).
- **Downtown Development Authorities. HB 4248** amends the Downtown Development Authority Act to allow refinancing of certain qualified refunding obligations. Amends 1975 PA 197 by amending section 1 (MCL 125.1651).
- **Commercial Redevelopment. HB 4759** amends the Commercial Rehabilitation Act to modify the definition of qualified facility. Amends section 2, 2005 PA 210 (MCL 207.842).

#### Bills Passed By the Senate and the House of Representatives

- **Government Construction. SB 165** would create the Fair and Open Competition in Governmental Construction Act to provide for fair and open competition in governmental construction contracts, grants, tax abatements and tax credits; to prohibit requirements for certain terms in government contracts and contracts supported through government grants and

tax subsidies and abatements; to prohibit expenditure of public funds under certain conditions; to prohibit certain terms in procurement documents for certain expenditures involving public facilities; and to provide for powers and duties of certain public officers, employees, and contractors.

- **Public School Health Insurance.** **SB 446** would amend the Public Employees Health Benefit Act to clarify claims data provided to policyholder of school district's health insurance plans. Amends sections 5 and 15, 2007 PA 106 (MCL 124.75 and 124.85).
- **City Minimum Staffing.** **SB 485** would amend The Home Rule City Act to prohibit minimum staffing requirements for city employees. Amends section 5, 1909 PA 279 (MCL 117.5). See also **SB 486**, **SB 487**, **SB 488**, **SB 489**, **SB 490**, **SB 491** and **SB 492** for similar bills relating to county employees, charter county employees, employees of an optional unified form of county government, charter township employees, general law township employees, village employees and general law village employees, respectively.
- **Local Government Consolidation.** **SB 493** would amend the Public Employment Relations Act to exempt the decision by public employers to consolidate services with other public employers from collective bargaining. Amends section 15, 1947 PA 336 (MCL 423.215).
- **Lake Boards.** **HB 4379** would amend the Natural Resources and Environmental Protection Act to expand procedure for dissolution of lake improvement boards to include a petition of property owners being assessed by the lake board for 2/3 of cost. Amends section 30929, 1994 PA 451 (MCL 324.30929).
- **Police/Fire Arbitration.** **HB 4522** would amend the Compulsory Arbitration of Labor Disputes in Police and Fire Departments Act to revise arbitration award factors and arbitration procedures. Amends sections 2, 3, 5, 6, 8, 9 and 10, 1969 PA 312 (MCL 423.232 et seq.).
- **Public School Group Insurance.** **HB 4700** would amend The Revised School Code to require school district to be policyholder for group insurance benefit provided for employees. Amends 1976 PA 451 (MCL 380.1 to 380.1852) by adding section 1255a.

#### Bills Passed By the Senate

- **Public Employee Benefits.** **SJR C** would allow the legislature to regulate health benefits of public employees and officers. Amends the Constitution of Michigan of 1963 by adding section 9 to article XI.
- **Municipal Partnerships.** **SB 8** would create the Municipal Partnership Act to provide for certain municipal joint

endeavors; to provide standards for, and powers and duties of, municipal joint endeavors; to authorize the levy of a property tax by a municipal joint endeavor; and to provide for the powers and duties of certain government officials. Tie barred with **SB 9**.

- **Municipal Partnerships.** **SB 9** would amend the Public Employment Relations Act to provide for reference to the Municipal Partnership Act. Amends 1947 PA 336 (MCL 423.201 to 423.217) by adding section 1a. Tie barred with **HB 4309**, **HB 4311**, **HB 4312** and **SB 8**.
- **Sidewalk Defect Liability.** **SB 201** would amend the Governmental Liability for Negligence Act to clarify that inference regarding a defect of less than 2 inches applies to any sidewalk maintained by a municipal corporation. Amends sections 1, 2 and 2a, 1964 PA 170 (MCL 691.1401 et seq.) and adds section 2b.
- **Municipal Employees.** **HB 4309** would amend the Emergency Services to Municipalities Act to revise content of contracts for intergovernmental transfers of municipal emergency service employees. Amends title and section 10, 1988 PA 57 (MCL 124.610).
- **Intergovernmental Transfers.** **HB 4311** would amend the Intergovernmental Transfers of Functions and Responsibilities Act to revise content of contracts for intergovernmental transfers of functions and responsibilities. Amends section 4, 1967 (Ex Sess) PA 8 (MCL 124.534).
- **Intergovernmental Transfers.** **HB 4312** would amend the Urban Cooperation Act of 1967 to revise content of contracts for intergovernmental transfers of employees and responsibilities. Amends section 5, 1967 (Ex Sess) PA 7 (MCL 124.505).

#### Bills Passed By the House of Representatives

- **Transportation Employees.** **HB 4310** would amend the Metropolitan Transportation Authorities Act of 1967 to revise content of contracts for intergovernmental transfers of metropolitan transportation employees. Amends section 13, 1967 PA 204 (MCL 124.413).
- **Public Employee Insurance.** **HB 4572** would create the Public Employer Health Insurance Cap Act to limit a public employer's expenditures for health insurance benefits.
- **Sidewalk Defect Liability.** **HB 4589** would amend the Governmental Liability for Negligence Act to clarify that inference regarding a defect of less than 2 inches applies to any sidewalk maintained by a municipal corporation. Amends sections 1, 2 and 2a, 1964 PA 170 (MCL 691.1401 et seq.).

- **Financial Recovery Bonds.** **HB 4716** would amend The Home Rule City Act to modify provision regarding financial recovery bonds. Amends 1909 PA 279 by amending section 36a (MCL 117.36a).
- **Competitive Bidding.** **HB 4790** would amend the Public Highways and Private Roads Act to require competitive bidding by county road commissions on certain projects involving townships. Amends 1909 PA 283 (MCL 220.1 to 239.6) by adding section 19c to chapter IV.
- **Road Commissions.** **HB 4031** would amend the Public Highways and Private Roads Act to provide option to elect county road commissioners by geographic districts of equal population. Amends sections 6 and 8 of chapter IV, 1909 PA 283 (MCL 224.6 and 224.8).
- **Fire Chiefs.** **HB 4458** would amend the Incompatible Public Offices Act to permit dual positions in municipalities of 3,000 or less for fire chiefs. Amends section 3, 1978 PA 566 (MCL 15.183).

### Bills Introduced In the Senate

- **Medical Marihuana.** **SB 377** would amend the Michigan Medical Marihuana Act to make registry information available to law enforcement officers upon issuance of a medical marihuana card. Amends section 6, 2008 IL 1 (MCL 333.26426).
- **Medical Marihuana.** **SB 418** would amend the Michigan Medical Marihuana Act to clarify the permissible causes of action thereunder. Amends section 7, 2008 IL 1 (MCL 333.26427).
- **School Elections.** **SB 426** would amend the Michigan Election Law to require school elections to be held in November of even-numbered years. Amends sections 302 and 644g, 1954 PA 116 (MCL 168.302 and 168.644g) and adds section 642c.
- **Delinquent Taxes.** **SB 453** would amend The General Property Tax Act to revise the delinquent tax collection process. Amends 1893 PA 206 (MCL 211.1 to 211.155) by adding section 57b.
- **Enhancement Millage.** **HB 4568** would amend The Revised School Code to allow school districts to levy 3-mill enhancement millage. Amends section 1211c, 1976 PA 451 (MCL 380.1211c).
- **Plant Rehabilitations.** **HB 4620** would amend the Plant Rehabilitation and Industrial Development Districts Act to expand the definition of industrial property. Amends section 2, 1974 PA 198 (MCL 207.552).
- **Neighborhood Enterprise Zones.** **HB 4641** would amend the Neighborhood Enterprise Zone Act to revise the population requirements for certain homestead facilities. Amends section 2, 1992 PA 147 (MCL 207.772).
- **Domestic Partner Benefits.** **HB 4770** would create the Public Employee Domestic Partner Benefit Restriction Act to prohibit public employers from providing medical benefits and other fringe benefits for domestic partners of public employees.
- **Domestic Partner Benefits.** **HB 4771** would amend the Public Employment Relations Act to make domestic partner benefits a prohibited subject in collective bargaining. Amends section 15, 1947 PA 336 (MCL 423.215). Tie barred with **HB 4770.** 🏢

### Bills Introduced In the House of Representatives

- **Road Commissions.** **HB 4029** would amend the Apportionment of County Boards of Commissioners Act to specify that the duties of a county apportionment commission include establishing single-member county road commission districts. Amends section 3, 1966 PA 261 (MCL 46.403). Tie barred with **HB 4030** and **HB 4031**.
- **Road Commissions.** **HB 4030** would amend the Michigan Election Law to require a person representing a single-member county road commission to be a resident of the district. Amends sections 252, 254, 267 and 269, 1954 PA 116 (MCL 168.252 et seq.). Tie barred with **HB 4031**.



STATE BAR OF MICHIGAN

MICHAEL FRANCK BUILDING  
306 TOWNSEND ST.  
LANSING, MI 48933-2012

---

# Opinions of Attorney General Bill Schuette

*Editor's note: Assistant Attorney General George M. Elworth of the Finance Division and a member of the Publications Committee furnished the text of the headnotes of these opinions. The full text of these opinions may be accessed at [www.mi.gov/ag](http://www.mi.gov/ag).*

## Firearms

### Possession of firearm silencers or mufflers

The possession, manufacture, or sale of a firearm silencer is permitted in Michigan under MCL 750.224(1)(b) if the person is licensed or approved to possess, manufacture, or sell such a device by the federal Bureau of Alcohol, Tobacco, Firearms and Explosives, as required by MCL 750.224(3)(c). Possession, manufacture, or sale of a firearm silencer by an unlicensed or unapproved person is a felony, punishable by up to five years imprisonment under MCL 750.224(2).

Opinion No. 7260  
September 2, 2011

## Medical Marihuana Act

### Smoking marihuana is prohibited in public places

2009 PA 188, which prohibits smoking in public places and food service establishments, applies exclusively to the smoking of tobacco products. Because marihuana is not a tobacco product, the smoking ban does not apply to the smoking of medical marihuana.

The Michigan Medical Marihuana Act, Initiated Law 1 of 2008, MCL 333.26421 et seq, prohibits qualifying registered patients from smoking marihuana in the public areas of food service establishments, hotels, motels, apartment buildings, and any other place open to the public.

An owner of a hotel, motel, apartment building, or other similar facility can prohibit the smoking of marihuana and the growing of marihuana plants anywhere within the facility, and imposing such a prohibition does not violate the Michigan Medical Marihuana Act, Initiated Law 1 of 2008, MCL 333.26421 et seq.

Opinion No. 7261  
September 15, 2011