



TO: Members of the Troy City Council

FROM: Lori Grigg Bluhm, City Attorney
Allan T. Motzny, Assistant City Attorney
Julie Quinlan Dufrane, Assistant City Attorney
Nicole MacMillan, Assistant City Attorney

DATE: October 6, 2016

SUBJECT: 2016 Third Quarter Litigation Report

The following is the quarterly report of pending litigation and other matters of interest. **Developments during the THIRD quarter of 2016 are in bold.**

A. ANATOMY OF THE CASE

Once a lawsuit has been filed against the City or City employees, the City Attorney's office prepares a memo regarding the allegations in the complaint. At that time, our office requests authority from Council to represent the City and/or the employees. Our office then engages in the discovery process, which generally lasts for several months, and involves interrogatories, requests for documents, and depositions. After discovery, almost all cases are required to go through case evaluation (also called mediation). In this process, three attorneys evaluate the potential damages, and render an award. This award can be accepted by both parties, and will conclude the case. However, if either party rejects a case evaluation award, there are potential sanctions if the trial result is not as favorable as the mediation award. In many cases, a motion for summary disposition will be filed at the conclusion of discovery. In all motions for summary disposition, the Plaintiff's version of the facts are accepted as true, and if the Plaintiff still has failed to set forth a viable claim against the City, then dismissal will be granted. It generally takes at least a year before a case will be presented to a jury. It also takes approximately two years before a case will be finalized in the Michigan Court of Appeals and/or the Michigan Supreme Court.

B. ZONING CASES

These are cases where the property owner has sued for a use other than that for which the land is currently zoned and/or the City is suing a property owner to require compliance with the existing zoning provisions.

There are no pending zoning cases for this quarter.

C. EMINENT DOMAIN CASES

These are cases in which the City wishes to acquire property for a public improvement and the property owner wishes to contest either the necessity or the compensation offered. In cases where only the compensation is challenged, the City

obtains possession of the property almost immediately, which allows for major projects to be completed.

There are no pending eminent domain cases for this quarter.

D. CIVIL RIGHTS CASES

These are cases that are generally filed in the federal courts, under 42 U.S.C. Section 1983. In these cases, the Plaintiffs argue that the City and/or police officers of the City of Troy somehow violated their civil rights.

1. Burley v. Gagacki. This is an excessive force case filed against a Troy police officer who was participating on a federal task force executing search warrants. The task force divided up and simultaneously executed search warrants on two houses located some distance from each other. Plaintiffs argue that they were injured by unidentified task force members at one of the houses. The incident report fails to specify which task force members were at Plaintiff's house and which task force members were simultaneously executing the search warrant at the other house. The Troy police officer and other task force members were initially represented by an Assistant U.S. Attorney, who obtained a dismissal of the case. Plaintiffs then successfully appealed to the Sixth Circuit Court of Appeals, which reinstated the case. The second trial is scheduled for February 2014. Due to a retirement of the Assistant U.S. Attorney and the possibility of conflicts between the task force team members, our office has assumed a more active role in the litigation, and will defend the Troy police officer task force member. The Court granted the request of one of the co-defendants to adjourn the trial, which is now scheduled to start on June 16, 2014. The parties have been addressing procedural items and preparing for trial. After picking a jury on June 10, 2014 and intense preparation for trial to begin on June 16, 2014, one of the Plaintiffs was hospitalized four days before the scheduled trial date. Trial has been rescheduled for October 6, 2014. The parties are preparing for the jury trial to begin on October 6, 2014. A week long jury trial was conducted from October 6, 2014 through October 15, 2014, in Federal District Court. After deliberating for 30 minutes, the jury returned a verdict of no cause of action, dismissing the case against the task force officers. The Judge also ordered payment of costs to all Defendants. Plaintiffs subsequently filed an appeal with the Sixth Circuit- U.S. Court of Appeals. Plaintiffs' appellate brief is due in April 2015. The Court of Appeals issued a briefing schedule in this matter. Plaintiff-Appellant's brief was filed on May 18, 2015, and the Troy Defendant-Appellee's brief is due on July 3, 2015. A timely brief on appeal was filed on behalf of the Troy police officer and the parties are waiting for the 6th Circuit Court of Appeals to schedule a date for oral argument. Defendant-Appellant's Reply Briefs were filed after numerous extensions, and the parties continue to wait for the Court of Appeals to schedule a date for oral argument. The Court scheduled oral argument for Thursday, August 4, 2016. **Oral argument**

occurred on August 4, 2016, and the Sixth Circuit Court of Appeals issued an Opinion and Order affirming the jury's verdict on August 22, 2016.

E. PERSONAL INJURY AND DAMAGE CASES

These are cases in which the Plaintiff claims that the City or City employees were negligent in some manner that caused injuries and/or property damage. The City enjoys governmental immunity from ordinary negligence, unless the case falls within one of four exceptions to governmental immunity: a) defective highway exception, which includes sidewalks and road way claims; b) public building exception, which imposes liability only when injuries are caused by a defect in a public building; c) motor vehicle exception, which imposes liability when an employee is negligent when operating their vehicle; d) proprietary exception, where liability is imposed when an activity is conducted primarily to create a profit, and the activity somehow causes injury or damage to another; e) trespass nuisance exception, which imposes liability for the flooding cases.

1. Wierzbicki, et. al. v. City of Troy- This suit was filed in Oakland County Circuit Court, and assigned to Judge Denise Langford Morris. Plaintiffs are seeking an amount in excess of \$600,000 for damages resulting from a sewage back up in the Somerset North subdivision. These Plaintiffs have previously filed and settled a lawsuit against the Somerset Collection and the Capital Grille in which the City provided significant discovery related to the sewage back-up that occurred on November 9, 2013. In response to the complaint, the City filed a response and a motion for summary disposition. The parties met in front of Judge Langford Morris on November 25, 2015, where the Judge gave Plaintiffs 90 days to respond to the City's motion for summary disposition. Plaintiff filed his response to the City's motion for summary disposition, and the City filed a timely reply. The motion has been adjourned to accommodate schedules, and is now scheduled to be argued on May 4, 2016. Shortly after oral arguments, Judge Langford Morris issued a written opinion granting the City's motion for summary disposition and dismissing the case in favor of the City. On May 25, 2016, Plaintiff filed a motion for reconsideration, which was denied on June 2, 2016. On June 23, 2016, Plaintiff filed a claim of appeal with the Michigan Court of Appeals. **The transcript was filed with the Court of Appeals on September 20, 2016. Plaintiffs have eight weeks to file their brief, and the City will have five weeks to file a response.**

F. MISCELLANEOUS CASES

1. Michigan Association of Home Builders; Associated Builders and Contractors of Michigan; and Michigan Plumbing and Mechanical Contractors Association v. City of Troy – The Plaintiffs filed a complaint for Declaratory and Injunctive Relief

in the Oakland County Circuit. On the date of filing the Plaintiffs also filed a Motion for Preliminary Injunction and Order to Show Cause. The Plaintiffs allege that the City of Troy has violated Section 22 of Michigan's Stille-DeRossett Hale Single State Construction Code Act by collecting fees for building department services that are not reasonably related to the cost of providing building department services. They are alleging that the City of Troy has illegally entered into a contract with Safe Built of Michigan, Inc. for building services that provides that 20% of each building permit fee be returned to the City to cover services that are not "reasonably related to the cost of building department services," as required by state statute. The Plaintiffs also assert a violation of the Headlee Amendment, arguing that the 20% returned to the City is a disguised tax that was not approved by voters. The Plaintiffs are asking for a declaratory judgment, as well as a return of any "surplus" building department service funds collected to date. Plaintiffs also request an order requiring the City to reduce its building department fees. The City of Troy was served with the Complaint and the Motion for Preliminary Injunction and Order for Show Cause on Wednesday, December 15, 2010. The parties were required to appear at Court on Wednesday, December 22, 2010, but the Court did not take any action at that time. Instead, the Court adjourned the matter to January 19, 2011. In the interim, the parties may engage in preliminary discovery in an attempt to resolve this matter. The parties are conducting discovery. The parties have completed discovery. Trial in this matter is scheduled for January 30, 2012. After being presented with motions for summary disposition, the Court ordered the parties to engage in mediation with a neutral municipal audit professional. Financial documents concerning this case are now being reviewed by an independent CPA. It is expected that the April 19, 2012 trial date will be postponed until after this review is complete. Mediation was unsuccessful in resolving this case, and therefore the Court is expected to issue an order on the pending Summary Disposition Motions. The trial date has been adjourned. On November 13, 2012, Oakland County Circuit Court Judge Shalina Kumar issued her order in favor of the City, and dismissed this case. Plaintiffs filed an appeal, which is now pending in the Michigan Court of Appeals. Appellant's brief is expected to be filed soon. The parties timely filed their appellate briefs, and are now waiting for the Court of Appeals to schedule a date for oral argument. The Court of Appeals has not yet scheduled oral argument for this case. The parties are still waiting for a date for oral argument. Oral argument was held on March 4, 2014. On March 13, 2014, the Court of Appeals issued its opinion ruling in the City's favor and affirming the Circuit Court's decision dismissing the case. On April 23, 2014, Plaintiff Home Builders filed an Application for Leave to Appeal with the Michigan Supreme Court. Troy's response was filed on May 19, 2014. The Michigan Supreme Court considered the application for leave to appeal and ordered that the matter be scheduled for oral argument. The Court also permitted the parties to submit supplemental briefs, which are due October 29, 2014. The City timely filed its supplemental brief with the Michigan Supreme Court. The parties are now waiting for the Court to set a date for oral argument on the application. The Michigan Supreme Court entertained oral arguments on the application for leave

to appeal on March 11, 2015. On June 4, 2015, the Michigan Supreme Court reversed the decisions of the Court of Appeals and the Circuit Court and ruled there was no requirement for Plaintiffs to exhaust their administrative remedies. The case was remanded to Circuit Court for further proceedings. A status conference was held on June 18, 2015 with Judge Kumar. During the status conference, Judge Kumar scheduled a hearing for September 2, 2015, allowing the parties to address the issues that were previously raised in the motion for summary disposition but were not decided since the case was initially dismissed for failure to exhaust administrative remedies. At the hearing on September 2, 2015, Judge Kumar allowed Plaintiffs to request additional discovery within 30 days. Thereafter, both parties are allowed to file supplemental briefs. Supplemental briefs have been filed and we are awaiting a decision. On February 5, 2015, Judge Kumar issued her opinion and order ruling in favor of the City and dismissing the case. Plaintiffs filed a Claim of Appeal with the Michigan Court of Appeals on February 23, 2016. The Plaintiffs and the City have both filed appellate briefs. Based on our request, the Michigan Municipal League Legal Defense Fund, Public Corporations Section of the State Bar of Michigan, Michigan Townships Association and also Safe Built have filed a motion asking for permission to file amicus briefs supporting the City's position. The Michigan Association of Realtors has sought permission to file an amicus brief supporting Plaintiffs' position. The Plaintiffs filed a reply brief. We are waiting for the Court of Appeals to rule on the motions for amicus briefs and to schedule a date for oral argument. **Oral argument has not yet been scheduled.**

2. *Daniel E. Katayama v City of Troy.* Plaintiff filed this lawsuit under the Freedom of Information Act (FOIA) claiming that the City did not fully comply with a FOIA request he submitted on March 26, 2013. Plaintiff's FOIA request sought particular documents related to his arrest on suspicion of driving while intoxicated. The City filed an Answer to the Complaint, and the parties are conducting discovery. Discovery continues. The Court scheduled a mandatory settlement conference for March 10, 2014. The City filed a Motion for Summary Disposition on February 14, 2014. The Court scheduled oral argument on this Motion for June 5, 2014. The Court granted in part and denied in part the City's Motion for Summary Disposition. Plaintiff filed a Claim of Appeal in the Michigan Court of Appeals on September 3, 2014. A briefing schedule has not been issued by the Court of Appeals. A timely response brief will be filed once the date is set by the Court. Plaintiff ordered the transcript of proceedings, and the date of the receipt of the transcript dictates the appellate briefing schedule. The parties are still waiting for the court transcript to be completed. The final transcript was filed with the Court on May 1, 2015. Plaintiff-Appellant's brief was due on May 19, 2015, but has not yet been filed. Plaintiff-Appellant's Appeal was at first dismissed by the Court of Appeals for lack of progress, however, Plaintiff-Appellant's subsequent Motion to Reinstate Appeal was granted. Plaintiff-Appellant filed a brief on appeal on July 23, 2015. The City of Troy timely filed its brief on appeal on September 24, 2015. The Michigan Court of Appeals scheduled Oral Argument for November 9, 2015. On December 10, 2015,

the Michigan Court of Appeals released its order, affirming the circuit court but remanding the case.

3. **Parris v City of Troy.** Plaintiff filed this claim and delivery action in the 52-4 District Court seeking return of several firearms that were turned over to the Police Department, as ordered by the Court in separate criminal case involving Plaintiff. The City filed an answer to the complaint and a response to Plaintiff's interim motion for possession. The case was assigned to Judge Maureen M. McGinnis and scheduled for a hearing on July 27, 2016. After the hearing, the Court signed an order returning the guns to Plaintiff. This case is now concluded.
4. **Noble v City of Troy.** Plaintiff filed this claim and delivery action in the 52-4 District Court seeking return of two long guns that were confiscated by the Troy Police after responding to a call involving a possible suicide. The City filed an answer to the complaint and a response to Plaintiff's interim motion for possession. The case was assigned to Judge Kirsten Nielsen Hartig and scheduled for a hearing on August 30, 2016. After the hearing, the Court entered a consent judgment, allowing the Troy Police Department to return the firearms to a third party who is authorized to sell them and give the proceeds to the Plaintiff. This case is now concluded.
5. **Simovski v City of Troy.** Plaintiff filed this claim and delivery action in the 52-4 District Court seeking return a pistol that was confiscated when Plaintiff was arrested for operating while intoxicated. The City has filed an answer to the complaint and a response to the motion for immediate possession. The case was assigned to Judge Maureen McGinnis. At a hearing held on September 14, 2016, the Court denied Plaintiff's motion for immediate possession. The Court case will now proceed to a pretrial, which will scheduled in October.
6. **Niedzwiecki v City of Troy.** Plaintiff Niedzwiecki filed this claim and delivery action in the 52-4 District Court seeking return a three handguns, five rifles, and a shotgun that were confiscated when Plaintiff was arrested for domestic assault and battery. The City filed an answer to the complaint and a response to the motion for immediate possession. The case was assigned to Judge Maureen McGinnis and is scheduled for a hearing on the motion on October 5th.

G. CRIMINAL APPEALS/ DISTRICT COURT APPEALS

These are cases involving an appeal from a decision of the 52-4 District Court in an ordinance prosecution case.

1. **City of Troy v Gappy.** Defendant was arrested on an outstanding warrant after a traffic stop. Since he was the only occupant of the vehicle, it was necessary to impound the vehicle and inventory the property found in the vehicle, which included marijuana. Defendant had a valid medical marijuana card at the time of the traffic stop and under state law, he is immune from prosecution for possession of

marijuana. Defendant filed a motion for return of property, specifically 22.54 grams of marijuana, which was granted by District Court Judge Hartig. The City appealed the decision to the Oakland County Circuit Court and the case has been assigned to Judge Chabot. The Court granted the City's application for leave to appeal and has entered an order establishing a briefing schedule and setting oral argument for November 23, 2016.

2. **City of Troy v Tomina**. Defendant is charged with Possession and/or Use of Marijuana. He filed a motion claiming the charge should be dismissed under the Michigan Medical Marihuana Act, MCL 333.2641 *et seq.*, ("MMMA") because he has a Michigan medical marihuana registry card. However, the motion was denied because the evidence presented at an evidentiary hearing indicated he failed to comply with the provisions of state law regulating the transport of usable marihuana in or upon a motor vehicle. The Defendant has filed an application for leave to appeal with the Oakland County Circuit Court and contends the state law regulating the transport of usable marijuana in a vehicle is invalid because it conflicts with the MMMA and that it violates the Michigan Constitution. The case was assigned to Judge Chabot. On September 14, 2016, Judge Chabot entered an Order Denying the Defendant's Application for Leave to Appeal. Absent any further appeal, the case will proceed to trial in the 52-4 District Court.

H. ADMINISTRATIVE PROCEEDINGS

There are no pending Administrative Proceedings at this time.

If you have any questions concerning these cases, please let us know.