[Cite as *Kelly v. Mentor,* 2002-Ohio-7342.]

THE COURT OF APPEALS

ELEVENTH APPELLATE DISTRICT

LAKE COUNTY, OHIO

ROBERT KELLY,	:	**O P I N I O N**
Plaintiff-Appellee,	:	**CASE NO. 2001-L-066**
- vs -	:	
THE CITY OF MENTOR,	:	
Defendant-Appellant.	:	

Civil Appeal from the Court of Common Pleas, Case No. 00 CV 001199

Judgment: Affirmed.

Mark A. Ziccarelli and Thomas J. Mayernick, Gibson, Brelo, Ziccarelli & Martello, 8353 Mentor Avenue, #2, Mentor, OH 44060 (For Plaintiff-Appellee).

I. James Hackenberg, City of Mentor Law Director, 8500 Civic Center Boulevard, Mentor, OH 44060 (For Defendant-Appellant).

ROBERT A. NADER, J.

{¶1} Appellant, the city of Mentor, appeals a judgment of the Lake County Court of Common Pleas, permanently enjoining it from enforcing an order issued by appellant's Director of Parks, Recreation and Public Lands, banning appellee, Robert Kelly, from entering the Mentor Civic Arena for five years.

{¶2} Appellant's ban on appellee stems from an incident which occurred on February 28, 2000, when appellee engaged in an altercation in a locker room in the Garfield Heights Ice Arena.

{¶3} Appellant was involved in the youth hockey league in the city of Mentor. Appellee was the head coach, and his son played on the team. In November 1999, appellee was removed from that position due to allegations that he was too physically and verbally rough with the children.

{¶4} Approximately one month after appellee was removed from his head coaching position, the manager of the Civic Arena, Terri Rosenwald, called a meeting, to allow the parents to air their differences. Ms. Rosenwald warned the parents that poor behavior would cause her to have to ask the parent to leave the arena, to remove a parent from watching practices or games for the season, or to disband the team.

{¶5} On February 28, 2000, the team on which appellee's child played was involved in a game at the Garfield Heights Ice Arena. After the game, which the Mentor team lost in overtime, the children were in the locker room removing their equipment, with parental assistance. Appellee's wife came into the locker room and made a comment about the coaching being bad. One of the coaches replied: "wah, wah, wah."

{¶6} Appellee then came into the locker room and accused the coach of mocking his wife. Appellee said to the coach, "[y]ou're nothing but a puss; I'm gonna kick your ass back in Mentor," During the same incident, appellee also told three other coaches that he would "kick their ass [sic] back in the City of Mentor." No altercations occurred at the Mentor Civic Arena or in the city of Mentor.

{¶7} After the Garfield Heights incident, Ms. Rosenwald sent appellee a letter notifying him that it would be investigated. Ms. Rosenwald also sent letters to all the

parents who were present, requesting a written statement describing what occurred that evening. Appellee also submitted his account of what had happened.

{¶8} After reading these accounts, Ms. Rosenwald made a recommendation to the Director of Parks, Recreation and Public Lands, Kurt Kraus ("Kraus"). She recommended that appellee be banned from entering the locker room and the bench area for five years. Kraus reviewed the statements and the recommendation and sent a letter to appellee informing him that he was prohibited from entering the entire Mentor Civic Arena for five years. Kraus told appellee, in his letter, that appellee was permitted to pick up and drop off his wife and children in front of the arena, but that, should he enter the arena, he would be arrested and prosecuted for trespassing. Kraus intended this penalty to punish appellee for his actions, on February 28, 2000.

{¶9} Appellee filed suit, seeking a declaratory judgment that appellant's actions had deprived him of due process of law and seeking an injunction prohibiting appellant from enforcing its ban on him. After a trial, the court held that appellant's actions had violated appellee's due process rights, and enjoined appellant from enforcing its ban.

{¶10} Appellant timely appealed, asserting the following assignments of error:

{¶11} "[1.] The trial court erred in concluding that plaintiff-appellee's behavior on February 28, 2000 did not constitute "threats" to harm others. (T.d. 34).

{¶12} "[2.] The trial court erred in holding that plaintiff-appellee possessed a property interest protected by the due process clause. (T.d. 34).

{¶13} "[3.] The trial court erred in holding that plaintiff-appellee has a protected liberty interest to enter and remain in the Mentor Civic Arena. (T.d. 34).

{¶14} "[4.] The trial court erred in holding that the plaintiff-appellee's right to procedural due process was violated. (T.d. 34).

{¶15} "[5.] The trial court erred in holding the City of Mentor acted in an arbitrary and capricious manner in denying the plaintiff-appellee access to the civic arena. (T.d. 34)."

{¶16} In appellant's assignments of error, it argues that the trial court erred in determining that its five-year ban on appellee violated appellee's right to due process of law. We affirm the trial court's judgment on grounds other than those asserted by the court.

{¶17} Under Ohio law, when a governmental agency is performing a proprietary function, it possesses all the same rights and privileges, and is subject to the same restrictions as a private citizen performing that same function. *State ex rel. White v. Cleveland* (1932), 125 Ohio St. 230, paragraph one of the syllabus.

{¶18} R.C. 2744.01 defines the terms "governmental function" and "proprietary function." Though this section of the Code provides for sovereign immunity, and does not directly apply to the case at bar, we find the definitions contained in R.C. 2744.10 instructive. We see no reason why the definitions enacted by the legislature for use in determining sovereign immunity should not apply to this situation as well. The limitation of liability that comes as a result of an act being classified as a governmental function should be accompanied by the reciprocal responsibility of performing that function as a governmental actor rather than as a private actor.

{¶19} R.C. 2744.01(G) provides that:

{¶20} "(2) A 'proprietary function' includes, but is not limited to, the following:

{¶21} "***

{¶22} "(e) The operation and control of a public stadium, auditorium, civic or social center, exhibition hall, arts and crafts center, band or orchestra, or off-street parking facility."

{¶23} At the time of the incident and the trial court's judgment entry, R.C. 2744.01(C) provided that:

{¶24} "(2) A 'governmental function' includes, but is not limited to, the following:

{¶25} ***

{¶26} "(u) The design, construction, reconstruction, renovation, repair, maintenance, and operation of any park, playground, playfield, indoor recreational facility, zoo zoological park, bath, swimming pool, or pond, and the operation and control of any golf course[.]"

{¶27} We agree that an ice rink is an indoor recreational facility. *Maxel v. Clevelan*d *Hts*. (Sept. 30, 1999), 8th Dist. No. 74851, 1999 Ohio App. LEXIS 4672, at *9-10. Thus, we believe that appellant's operation of the rink is a governmental function.

{¶28} Kraus, as the Director of Parks, Recreation and Public Lands, was delegated the authority by appellant to "be responsible for the maintenance and operation of municipal public lands and related programs." Mentor Municipal Ordinance 31.52. The powers possessed by Kraus are only those which were delegated to him. Nowhere in appellant's delegation of authority is the Director of Parks, Recreation and Public Lands given unilateral authority to gather evidence, hold quasi-judicial proceedings, punish patrons for bad behavior, or prohibit someone from entering the public properties under his control. See *State v. McGroarty* (Oct. 31, 1997), 11th Dist. No. 96-L-158, 1997 Ohio App. LEXIS 4837, at *6-7. The director may utilize available

lawful means to accomplish these ends, but he or she cannot independently perform these functions.

{¶29} At the time that evidence of appellee's bad behavior was solicited and Klaus determined that appellee was guilty of "egregious behavior," neither the City of Mentor nor the Department of Parks, Recreation and Public Lands had established a conduct policy or guidelines as to what the consequences would be if the policy were violated. A "zero tolerance policy," published by USA Skate, the organization that sanctioned the league, was posted on a wall of the arena, but there is no evidence that this policy was ever adopted by the city or the Department of Parks, Recreation and Public Lands. Further, this policy only covered actions occurring during a game, and only provided that a violator could be asked to leave the arena.

{¶30} In addition, Klaus lacked the authority to punish appellee for acts committed in another arena in another city. Thus, Klaus personally lacked the authority to ban appellant from entering the Mentor Civic Arena. See *Mertik v. Blalock* (C.A.6, 1993), 983 F.2d 1353, 1357. Appellant's ban on appellee is, therefore, void ab initio and unenforceable. The trial court did not err in vacating the ban and enjoining appellant from enforcing it.

{¶31} Because appellant's action was taken without authority, and was void ab initio, appellant's assignments of error with regard to the due process consequences of its acts are moot.

{¶32} Given the recent tragedies involving out-of-control parents and spectators at youth sporting events, Klaus' desire to prevent a similar tragedy from occurring in the Mentor Civic Arena is commendable; however, this laudable goal must be pursued from within the structure of lawful authority.

{¶33} Appellant is not left powerless to take reasonable steps to provide for the safety and welfare of those using the Mentor Civic Arena. Appellant possesses the authority to maintain, operate, and police its facilities. Security officers can be provided. Appellant has at its disposal the full panoply of criminal law. Should a similar incident occur in the Mentor Civic Arena, the offender should be charged with disorderly conduct or menacing, or another appropriate charge. If appellant wished to prevent an offender from entering its property, it could secure a restraining order. Furthermore, appellant could adopt rules governing the conduct of persons in the arena and delegate the authority to enforce those rules.

{¶34} For the foregoing reasons, the judgment of the Lake County Court of Common Pleas is affirmed.

Judgment affirmed.

JUDITH A. CHRISTLEY, J., concurs.

WILLIAM M. O'NEILL, P.J., dissents with a dissenting opinion.

WILLIAM M. O'NEILL, P.J., dissenting.

{¶35} With due respect to both the majority and the trial court, I must dissent for I believe this matter is clearly being "over-thought." In a well-written thirty-three-page opinion, I believe the trial court has lost sight of the forest while examining the individual trees.

{¶36} The core issue to be decided by this court is found at paragraph forty-seven of the trial court's opinion, which states:

{¶37} "The means adopted by Defendant City were not suitable to the end in view; were not impartial in operation; were unduly oppressive upon individuals, including Plaintiff; did not have a real and substantial relation to their purpose; and interfered with private rights beyond the necessities of the situation."

{¶38} I must respectfully disagree based upon the facts if this case. And what are those relevant facts? A parent went into a locker room full of six to eight-year-old hockey players who had just lost an away game. The parent then proceeded, in front of the children, to inform the coach that he was "gonna kick [his] ass" when they returned to Mentor. Curiously, the trial court found this language not to constitute a threat, but characterized it as an invitation to fight later. I would suggest this is a distinction without a difference. It is the threatening behavior, not the outcome of physical violence, which is at the core of this matter. Based upon this behavior the City of Mentor conducted an informal inquiry, and then banned the parent from its ice arena for five years.

{¶39} Although the incident occurred in Garfield Heights, rather than Mentor, there was a clear nexus to the City of Mentor Civic Center. The incident occurred in the locker room of a Mentor youth hockey team, which plays its home games at the Mentor Civic Center. Defendant city of Mentor clearly has the right to regulate the conduct of athletic teams that use its facilities.

{¶40} Clearly, no one would claim a due process deprivation if they were prohibited from walking on a basketball floor with golf spikes. Would someone who maliciously announced a bomb-scare at Gund Arena have the right to buy a ticket to the next Cleveland Cavalier's game? Of course not. Why, therefore, does appellee feel he has the right to threaten a coach in a locker room in front of children? I do not get it. In a civilized society, someone must make the rules.

{¶41} Here is the rule that the city of Mentor has announced. If you go into a children's locker room and threaten the coach with physical violence, you lose your right to be there. It really is that simple.

{¶42} The city of Mentor, acting through its agent declared that the subject conduct warranted a five-year "penalty" for the offending parent. Pursuant to R.C. 2506.01 that is a "decision" from a "political subdivision of the state" which could have and should have been appealed to the common pleas court. Had the court recognized this administrative appeal for what it was, the court then, pursuant to R.C. 2506.04 could "*** affirm, reverse, vacate, or modify the order ***." This is a matter where a taxpayer would like to have the court review the actions of a governmental body; nothing more, nothing less.

{¶43} It would appear to me that the trial court's lengthy analysis of due process and property rights is at best misplaced. The same due process standards do not apply to all instances where an individual's rights are terminated. Rather, the following test is to be used to determine the amount of due process protection a particular situation warrants: (1) the individual's interest that will be affected by the action; (2) the risk of error that could arise without providing additional procedural safeguards; and (3) the cost to the government agency to provide the additional procedural safeguards.[1]

{¶44} There is a wide range of adjudicatory decisions made throughout this country on a daily basis which warrant a varying degree of due process consideration. They range from a city employee requiring that an individual spit out their chewing gum before playing basketball at a city facility; to a tenured government employee losing

1. *Mathews v. Eldridge* (1976), 424 U.S. 319, 335.

their job;[2] to someone's public assistance benefits being terminated;[3] and to a person being sent to prison. Obviously, the same procedural safeguards are not required for each of these situations.

{¶45} The city of Mentor invited the whole world, including appellee, to provide statements regarding what happened in that locker room. And the most important statement came from the offending parent, when he freely admitted he made his threat in Garfield Heights -- for the fight to happen in Mentor -- so that he would not run the risk of ending up in jail in Garfield Heights. By submitting this statement, appellee was given an opportunity to be heard. In addition, the fact that he gave a statement demonstrates that he had notice of the investigation.

{¶46} The procedural safeguards employed by the city were more than adequate. Appellee was not going to jail. His children were not being taken away from him. He was not being removed from his home. Applying the *Mathews v. Eldridge* test, the value of appellee's right to enter the municipal building was minimal. There was little risk of error by the process involved, because appellee was given the opportunity to present his side of the story and, in fact, admitted that he was involved in the locker room incident. Finally, the cost to the city would be excessive if a full, trial-like evidentiary hearing was required every time the city attempted to enforce its rules. Due process is defined as a right to be heard in a meaningful fashion. That's what happened here.

{¶47} The city of Mentor acted properly in banning this parent from their facility. What were they to do? Wait until the fisticuffs erupted in the locker room? If the trial

2. See *Cleveland Bd. of Education v. Loudermill* (1985), 470 U.S. 532.
3. See *Goldberg v. Kelley* (1970), 397 U.S. 254.

court's ruling is upheld, a new question will arise. When a lifeguard in Mentor sees one child "dunking" another child in the pool…will they be able to put them in "time-out?" Or would that require a hearing with the right to confront witnesses. Then an evidentiary hearing would ensue, poolside, to determine whether the offending lifeguard had somehow ventured into the forbidden "quasi-judicial" arena when they put the youngster in "time-out." As I said, in a civilized society, someone has to make the rules.

{¶48} The trial court got it wrong, and the city of Mentor's order should be upheld.