

STATE OF MICHIGAN  
COURT OF APPEALS

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NIZAR ZOMA,

Plaintiff-Appellee,

v

CITY OF RIVER ROUGE,

Defendant-Appellant.

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UNPUBLISHED  
March 14, 1995

No. 161785  
LC No. 88-805121-CZ

Before: Hood, P.J., and Jansen and A.T. Davis, Jr.,\* JJ.

PER CURIAM.

Defendant appeals as of right from the February 2, 1993 judgment entered in favor of plaintiff in the amount of \$23,253 following a jury trial in the Wayne Circuit Court. We affirm.

This case concerns defendant's act of closing down plaintiff's arcade. On May 5, 1987, plaintiff applied for a license to operate a video arcade in River Rouge. Plaintiff was given a certificate of license on August 24, 1987, and he began to operate his arcade the following day. On September 2, 1987, plaintiff was informed that the arcade had been closed because of fire code violations. Plaintiff corrected the violations by September 11, 1987, but he was still not permitted to reopen his business. Because the area was not zoned for an arcade, Roland Bowdler (the licensing committee chair) made a motion before the city council to rescind the license at a September 15, 1987 meeting. At the meeting, the city council voted to deny or rescind the license. Plaintiff and his lawyer attended this meeting, however, plaintiff maintains that he did not receive notice from the city, but was told by his attorney to be present.

Plaintiff filed suit in the Wayne Circuit Court alleging that his due process rights under Const 1963, art 1, § 17 were violated and that he was entitled to damages. Plaintiff also alleged a violation of the Michigan Anti-Trust Reform Act, MCL 445.771, *et seq.*; MSA 28.70(1) *et seq.*, but the trial court granted defendant's motion for summary disposition regarding the anti-trust claim. The case proceeded to trial and a jury found in plaintiff's favor in the amount of \$48,035.

Defendant appealed from the jury verdict in plaintiff's favor and from the trial court's order denying its motion for summary disposition regarding the constitutional tort claim. This Court affirmed the trial court's denial of defendant's motion for summary disposition, and reversed the trial court's directed verdict in plaintiff's favor on the issue of whether plaintiff had received a valid license to operate an arcade. This Court found that there was a factual issue on the evidence presented for the jury to determine whether the license was valid. Accordingly, this Court reversed and remanded for a new trial. Zoma v River Rouge, unpublished opinion per curiam of the Court of Appeals, decided July 27, 1992, (Docket No. 124664).

The second trial commenced on November 24, 1992. At the close of the proofs, plaintiff moved for a directed verdict regarding liability based on a lack of notice and hearing concerning the city council's decision to not grant plaintiff a license to operate the video arcade. The trial court granted the

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\* Circuit judge, sitting on the Court of Appeals by assignment.

motion finding that there was not sufficient notice given plaintiff for purposes of due process. Defendant also moved for a directed verdict arguing that a municipality cannot be liable for a constitutional tort where there is no evidence of custom or policy and further that a municipality is not estopped from enforcing its licensing ordinances when a certificate of license is issued in error. The trial court denied defendant's motions for directed verdict.

## I

Defendant first claims that the trial court erred in granting plaintiff's motion for directed verdict on the question of whether plaintiff had notice of the September 15, 1987 city council meeting. When evaluating a motion for directed verdict, the court must consider the evidence in a light most favorable to the nonmoving party and make all reasonable inferences in the nonmoving party's favor. Locke v Pachtman, 446 Mich 216, 223; 521 NW2d 786 (1994). A directed verdict is appropriate only when no factual question exists upon which reasonable minds may differ. Brisboy v Fibreboard Corp, 429 Mich 540, 549; 418 NW2d 650 (1988). We find that the trial court did not err in granting plaintiff's motion for directed verdict because there was no factual question for the jury to resolve with regard to whether plaintiff received notice of the September 15, 1987 city council meeting.

At trial, plaintiff testified that he was present at the city council meeting because he received a telephone call from his attorney. According to plaintiff, his attorney informed him that there would be a city council meeting and that plaintiff had to attend. Plaintiff claimed that his attorney did not tell him why he had to attend the city council meeting, but plaintiff stated that he believed that the meeting probably involved his license. It is undisputed that plaintiff and his attorney did attend the city council meeting where plaintiff's license was rescinded. However, there was no direct evidence that plaintiff himself received notice of the city council meeting concerning his license from defendant.

The revocation of a license must comply with procedural due process. Tally v Detroit (On Rehearing), 58 Mich App 261, 264; 227 NW2d 214 (1975). Procedural due process requires (1) notice of the time and place of the hearing, (2) a hearing before a properly authorized body, (3) a reasonably definite statement of the charge or charges preferred against the accused, (4) the right to cross-examine the witnesses who testify against the accused, (5) the right to produce witnesses in the accused's own behalf, and (6) a full consideration and fair determination according to the evidence of the controversy by the body before whom the hearing is had. Id.

Plaintiff's testimony established that he knew of the city council meeting where his license was being considered by the city council because his attorney informed him of the meeting. A fact finder, in drawing all reasonable inferences from the evidence, could not conclude that plaintiff received notice of the time and place of the hearing and the reason for the hearing from defendant. Plaintiff received no written notice of the time and place of the meeting and he received no written notice of a reasonably definite statement of the reason for the meeting or the fact that the city council would rule on his license.

Accordingly, there was no factual issue for the jury to resolve. There was no evidence presented that plaintiff received timely written notice of the time, place, and reasons for the city council meeting from defendant. Verbison v Auto Club Ins Ass'n, 201 Mich App 635, 641; 506 NW2d 920 (1993). The trial court, therefore, did not err in granting plaintiff's motion for directed verdict on the issue of notice of the city council meeting.

## II

The second issue raised by defendant presents a thorny constitutional issue. Defendant argues that the trial court erred in denying its motion for directed verdict with regard to plaintiff's constitutional

tort or violation claim. Defendant maintains that in order to sustain such a claim, plaintiff had to present evidence of a custom or policy of the municipality in denying his license. The trial court ruled that plaintiff did not have to present evidence of a custom or policy in order to maintain his constitutional tort claim.

We affirm the trial court's denial of defendant's motion for directed verdict on this issue, but for a different reason. Gray v Pann, 203 Mich App 461, 464; 513 NW2d 154 (1994). This Court has recently held that a showing of a custom or policy is a requirement in order for a plaintiff to maintain a constitutional tort claim against a governmental unit. Marlin v Detroit (After Remand), 205 Mich App 335, 338; 517 NW2d 305 (1994). However, in reviewing the evidence set forth by plaintiff, we find that he presented evidence of a custom or policy that defendant did not follow in this case. Therefore, plaintiff satisfied his burden of proof and the trial court did not err in denying defendant's motion for directed verdict.

We first note that at the time of trial (November 1992), there was no clear answer regarding whether a custom or policy was a requirement in order for a plaintiff to maintain a constitutional tort claim against a governmental unit. In Smith v Dep't of Public Health, 428 Mich 540, 544; 410 NW2d 749 (1987), *aff'd sub nom Will v Michigan Dep't of State Police*, 491 US 58; 109 S Ct 2304; 105 L Ed 2d 45 (1989), four justices, in a memorandum opinion, agreed that a claim for damages against the state arising from a violation by the state of the Michigan Constitution may be recognized in appropriate cases. Two of those justices opined that liability should be imposed on the state only where the action of the state agent implements or executes a policy statement, ordinance, regulation, or decision officially adopted and promulgated by that body's officers or governmental custom. Id., pp 642-643. However, two other justices would not limit liability to only those situations where the alleged constitutional violation occurred by virtue of a governmental custom or policy. Id., p 658.

Although Smith provides no definitive answer regarding whether a constitutional tort requires the showing of a governmental custom or policy, the trial court's decision was not without other support. In Burdette v Michigan, 166 Mich App 406, 408; 421 NW2d 185 (1988), this Court held that governmental immunity is not available as a defense to the state in an action based on the alleged violation by the state of a right conferred by the Michigan Constitution. In Burdette, the plaintiffs also claimed a violation of the due process clause under Const 1963, art 1, § 17. This Court did not require a showing of a governmental custom or policy in order to support a constitutional violation claim under that constitutional provision.

Further, in Davis v Passman, 442 US 228; 99 S Ct 2264; 60 L Ed 2d 846 (1979), the United States Supreme Court recognized an implicit right to sue federal officials for damages for a violation of the Due Process Clause of the Fifth Amendment. The Court ruled that the plaintiff had a cause of action under the Fifth Amendment and could recover money damages for any injuries resulting from a violation of her Fifth Amendment rights. In Davis, the plaintiff claimed that she was discharged from her job on the basis of gender discrimination. The Court did not require that there be a showing of governmental custom or policy in order for the plaintiff to maintain her cause of action.

In Marlin, this Court held that the plaintiff's claim (that her procedural due process rights were violated by the City of Detroit under Const 1963, art 1, § 17) depended upon a showing that, by virtue of a custom or policy, the city deprived her of her property rights without due process of law. Marlin, *supra*, p 338. Thus, in light of Marlin, we must determine if plaintiff showed that, by virtue of defendant's custom or policy, defendant deprived him of his property right without due process of law.

Plaintiff introduced sufficient evidence to conclude that defendant consistently did not follow its own procedure of having licenses approved by the mayor and city council after it was approved by the

licensing committee. Plaintiff introduced an exhibit of the city council minutes from August 4, 1987, through October 27, 1987. The minutes reflected a lack of action taken by city council after the license was approved by the appropriate licensing committee. Further, plaintiff introduced 123 license applications received by defendant in 1987. A line for the city council's approval on the application was left blank on all the license applications. That is, none of the 123 license applications received by defendant in 1987 indicated that the city council approved or denied the applications. Finally, there was testimony that some licenses were issued even when one of the departments reviewing the application had not signed it.

This evidence presented by plaintiff directly contradicted Bowdler's testimony that licenses are always referred to department heads for recommendation and then to the mayor and city council for approval. Also, the mayor of the city in 1987 testified that if licenses were acted upon by the mayor or city council, then they would be reflected in the minutes. However, the minutes reflected that no action was taken upon the license applications by the mayor or city council.

Plaintiff's evidence showed that there was a custom or policy on the part of defendant, at least in 1987, that the mayor and city council would not take any further action on license applications once the appropriate licensing committee approved the application. In plaintiff's case, he was given a certificate of license to operate the arcade and the certificate was signed by Bowdler, the licensing committee chair. However, the city council then acted upon plaintiff's application and denied or rescinded it. This was clearly a break from its past practice or custom to not take any action on the license once the licensing committee approved the license. Therefore, plaintiff presented sufficient evidence that, by virtue of a custom or policy, defendant deprived plaintiff of his property without due process because the city provided no notice to plaintiff of the meeting on September 15, 1987, where his license was rescinded.

There is also the question of whether money damages are appropriate in this case where plaintiff has claimed a constitutional violation of his due process rights. First, plaintiff's license is a property right. Bundo v Walled Lake, 395 Mich 679, 691-692; 238 NW2d 154 (1976); Brown v Yousif, 445 Mich 222, 228-229; 517 NW2d 727 (1994). Second, and more importantly, plaintiff has no other recourse or remedy since the area is apparently zoned as residential. Davis, *supra*, p 245. Therefore, because plaintiff sustained his showing that, by virtue of a custom or policy, defendant deprived him of his property right without due process, money damages are an appropriate remedy.

### III

Finally, we address defendant's claim that the trial court erred in denying its motion for directed verdict regarding whether it was estopped from enforcing its licensing ordinances when the license was issued in error. Defendant's claim in this regard is premised on the assumption that the license, as issued, was not valid.

We find that the law of the case doctrine applies to this issue. The doctrine of law of the case arises where an appellate court has passed on a legal question and remanded the case for further proceedings. Under this doctrine, the legal question determined by the appellate court will not be differently determined on a subsequent appeal in the same case where the facts remain materially the same. Thorin v Bloomfield Hills Bd of Ed, 203 Mich App 692, 697; 513 NW2d 230 (1994).

In the previous appeal, this Court ruled that the issue of whether the license was valid was a factual question for the jury to determine. Specifically, this Court stated that reasonable jurors could reach different results regarding whether the license was valid. Thus, the trial court improperly granted plaintiff's motion for directed verdict in the previous trial. Accordingly, because the issue of whether the license was valid was deemed to be a factual question for the jury, and because there is evidence to

establish that plaintiff received a valid license from defendant, the trial court did not err in denying defendant's motion for directed verdict on this issue.

Therefore, the trial court properly allowed the jury to resolve the numerous factual issues in this case. First, the jury had to determine whether plaintiff received a valid license. If finding that he did receive a valid license, then the jury had to determine whether, by virtue of a custom or policy, defendant deprived plaintiff of his property right in the license without due process of law. Because there was evidence to support plaintiff's position, the trial court did not err in denying defendant's motion for directed verdict.

Affirmed.

/s/ Harold Hood  
/s/ Kathleen Jansen  
/s/ Alton T. Davis, Jr.