

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN**

JOHN SATAWA,

Plaintiff,

v.

BOARD OF COUNTY ROAD
COMMISSIONERS OF MACOMB
COUNTY, *et al.*,

Defendants.

Case No. 2:09-cv-14190

Hon. Gerald E. Rosen

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EMERGENCY MOTION FOR ENTRY OF JUDGMENT AND INJUNCTION

Pursuant to Rules 56 and 65 of the Federal Rules of Civil Procedure, the opinion of the U.S. Court of Appeals for the Sixth Circuit in *Satawa v. Macomb Cnty. Road Comm'n*, 689 F.3d 506 (6th Cir. 2012), the law of the case doctrine, and the “mandate rule,” Plaintiff John Satawa (“Plaintiff”), by and through his undersigned counsel, hereby moves this court for the entry of judgment on his free speech and equal protection claims and for an immediate injunction,

enjoining Defendants' unconstitutional restriction on Plaintiff's right to freedom of speech and thereby ordering the display of Plaintiff's nativity scene on the Mound Road median during the 2012 Christmas season.

Plaintiff requests the immediate entry of this injunction in advance of the upcoming Christmas season (November 29, 2012 to January 9, 2013), which is the time Plaintiff requested in his permit application to display his nativity scene and the time when his nativity scene has been traditionally displayed on the Mound Road median.

On August 1, 2012, the day the Sixth Circuit opinion issued, Plaintiff's counsel contacted opposing counsel via email, requesting that Defendants reconsider Plaintiff's permit request as applied to this upcoming Christmas holiday season. On August 7, 2012, Plaintiff's counsel sent correspondence to opposing counsel, stating the following:

In light of the recent ruling by the U.S. Court of Appeals for the Sixth Circuit in the above referenced matter, I am writing on behalf of Mr. John Satawa to confirm my earlier request by email that the Road Commission / County Department approve Mr. Satawa's permit application to display his nativity scene on the public median between Mound and Chicago Roads in Warren, Michigan during the 2012 Christmas season (November 29, 2012 to January 9, 2013).

A copy of his proposed display, which should be familiar to you, is attached. If you need additional information, please let me know as soon as possible to ensure that Mr. Satawa's request is approved in time for this upcoming Christmas season.

(Muisse Decl. at ¶ 3, Ex. A, at Ex. 1). Plaintiff's counsel followed-up with Defendants' counsel on August 24, 2012, and again on September 20, 2012, stating, "Once we hit October, I might have to file something with the court to get this going." (Muisse Decl. at ¶ 4 at Ex. 1).

On October 8, 2012, Plaintiff's counsel reached out to Defendants' counsel to conduct a meet-and-confer on this motion. That conference was held on October 15, 2012. (Muisse Decl. at ¶ 5 at Ex. 1).

Consequently, pursuant to LR 7.1, there was a conference between counsel in which Plaintiff's counsel explained the nature of this motion and its legal basis and requested but did not obtain concurrence in the relief sought.

WHEREFORE, Plaintiff respectfully requests that this court grant this motion and enter judgment in his favor on his free speech and equal protection claims and immediately enjoin Defendants' unconstitutional restriction on Plaintiff's speech, thereby ordering Defendants to display Plaintiff's nativity scene on the Mound Road median in Warren, Michigan during the 2012 Christmas season (November 29, 2012 to January 9, 2013).

Respectfully submitted,

AMERICAN FREEDOM LAW CENTER

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Robert J. Muise, Esq. (P62849)

THOMAS MORE LAW CENTER

/s/ Erin Mersino
Erin Mersino, Esq. (P70866)

Counsel for Plaintiff

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**PLAINTIFF'S BRIEF IN SUPPORT OF EMERGENCY MOTION
FOR ENTRY OF JUDGMENT AND INJUNCTION**

ISSUE PRESENTED

Whether the court should enter judgment in Plaintiff's favor and immediately grant the requested injunction in light of the Sixth Circuit's opinion in *Satawa v. Macomb Cnty. Road Comm'n*, 689 F.3d 506 (6th Cir. 2012), the law of the case doctrine, and the "mandate rule."

CONTROLLING AUTHORITY

Elrod v. Burns, 427 U.S. 347 (1976)

Satawa v. Macomb Cnty. Road Comm'n, 689 F.3d 506 (6th Cir. 2012)

Westside Mothers v. Olszewski, 454 F.3d 532 (6th Cir. 2006)

Fed. R. Civ. P. 56

Fed. R. Civ. P. 65

INTRODUCTION

The history of the proceedings before this court is well documented by the Sixth Circuit in *Satawa v. Macomb Cnty. Road Comm'n*, 689 F.3d 506, 514-15 (6th Cir. 2012), and so too are the undisputed, material facts, *see id.* at 511-14.

In light of the Sixth Circuit's opinion, the law of the case doctrine, and the "mandate rule," Plaintiff is entitled to judgment as a matter of law on his free speech claim under the First Amendment and on his equal protection claim under the Fourteenth Amendment. *See Fed. R. Civ. P.* 56. Moreover, Plaintiff is entitled to the immediate grant of an injunction that would permit him to display his nativity scene during this upcoming Christmas holiday season. *See Fed. R. Civ. P.* 65.

On August 1, 2012, the day the Sixth Circuit opinion issued, Plaintiff's counsel contacted opposing counsel via email, requesting that Defendants reconsider Plaintiff's existing permit request as applied to this upcoming 2012 Christmas season. On August 7, 2012, Plaintiff's counsel sent correspondence to opposing counsel, stating the following:

In light of the recent ruling by the U.S. Court of Appeals for the Sixth Circuit in the above referenced matter, I am writing on behalf of Mr. John Satawa to confirm my earlier request by email that the Road Commission / County Department approve Mr. Satawa's permit application to display his nativity scene on the public median between Mound and Chicago Roads in Warren, Michigan during the 2012 Christmas season (November 29, 2012 to January 9, 2013).

A copy of his proposed display, which should be familiar to you, is attached. If you need additional information, please let me know as soon as possible to ensure that Mr. Satawa's request is approved in time for this upcoming Christmas season.

(Muisse Decl. at ¶ 3, Ex. A, at Ex. 1). Attached to the correspondence was a copy of Plaintiff's permit request, which had been updated to include the 2012 Christmas season. (Muisse Decl. at ¶ 3, Ex. A, at Ex. 1).

To this day, Defendants refuse to permit Plaintiff to display his nativity scene on the

Mound Road median. Consequently, in addition to the entry of judgment in Plaintiff's favor on his free speech and equal protection claims, Plaintiff is seeking an immediate injunction to permit the display of his nativity during the 2012 Christmas season pursuant to his permit request.

ARGUMENT

I. THE LAW OF THE CASE DOCTRINE AND THE "MANDATE RULE" REQUIRE THE ENTRY OF JUDGMENT IN PLAINTIFF'S FAVOR ON HIS FREE SPEECH AND EQUAL PROTECTION CLAIMS AND THE ENTRY OF AN INJUNCTION TO PERMIT PLAINTIFF'S NATIVITY DISPLAY.

Pursuant to the law of the case doctrine and the "mandate rule," the Sixth Circuit's decision in *Satawa v. Macomb Cnty. Road Comm'n*, 689 F.3d 506 (6th Cir. 2012), requires this court to enter judgment as a matter of law in favor of Plaintiff on his free speech claim under the First Amendment and on his equal protection claim under the Fourteenth Amendment. And as part of this judgment, Plaintiff is entitled to an immediate injunction, permitting the display of his nativity scene during this upcoming Christmas holiday season. *Elrod v. Burns*, 427 U.S. 347, 373 (1976) (holding that "[t]he loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury" sufficient to warrant injunctive relief); *Newsome v. Norris*, 888 F.2d 371, 378 (6th Cir. 1989) ("The Supreme Court has unequivocally admonished that even minimal infringement upon First Amendment values constitutes irreparable injury sufficient to justify injunctive relief.") (citing *Elrod*).

Under the law of the case doctrine, "when a court decides upon a rule of law, that decision should continue to govern the same issues in subsequent stages in the same case." *Westside Mothers v. Olszewski*, 454 F.3d 532, 538 (6th Cir. 2006). The doctrine precludes reconsideration of issues "decided at an early stage of the litigation, either explicitly or by necessary inference from the disposition." *Id.* (quotation omitted).

“Pursuant to the law of the case doctrine, and the complementary ‘mandate rule,’ upon remand the trial court is bound to proceed in accordance with the mandate and law of the case as established by the appellate court.” *Id.* at 538. Accordingly, the trial court is obligated to “implement both the letter and the spirit of the appellate court’s mandate, taking into account the appellate court’s opinion and the circumstances it embraces.” *Id.* (internal quotations and citation omitted); *see, e.g., United States v. Rayborn*, 495 F.3d 328, 337 (6th Cir. 2007) (holding that the law of the case doctrine barred the court from reexamining the issue of whether there existed sufficient evidence of interstate commerce activity to satisfy an element of the federal arson statute, noting that the evidence before the district court was not materially different from the evidence considered by the previous Sixth Circuit panel that decided the issue); *see also Lyons v. Fisher*, 888 F.2d 1071 (5th Cir. 1989) (holding that a prior panel’s reversal of summary judgment granted in favor of the defendant was law of the case permitting summary judgment in favor of the plaintiffs on remand).

The purpose of the law of the case doctrine is “to promote judicial comity, the judicial system’s interest in finality, and the efficient administration of cases.” *In re George Worthington Co.*, 921 F.2d 626, 628-29 (6th Cir. 1990). The “mandate rule” is an important corollary to this doctrine, which together seek to preserve the finality of judgments, to prevent continued re-argument of issues, and to preserve scarce court resources. No doubt Defendants would like to re-argue issues that the Sixth Circuit decided against them. However, the law of the case doctrine and the “mandate rule” prohibit them from doing so. By entering judgment in Plaintiff’s favor on his free speech and equal protection claims, this court will be following the Sixth Circuit’s mandate and fulfilling the worthy purposes of the law of the case doctrine.

In *Satawa*, the Sixth Circuit held as a matter of law the following:

- Plaintiff's nativity scene is protected speech under the First Amendment. *Satawa*, 689 F.3d at 517.¹
- The Mound Road median is a traditional public forum. *Id.* at 520 ("On balance, we hold that the Mound Road median is a traditional public form."); *see also id.* at 522 ("In sum, the Mound Road median is best categorized as a traditional public forum.").
- Because the forum at issue is a traditional public forum, a content-based restriction on Plaintiff's speech must survive strict scrutiny and a content-neutral time, place, and manner restriction must be narrowly tailored to serve a significant government interest. *Id.* at 522.
- Defendants' denial of Plaintiff's request to display his nativity scene on the Mound Road median does not survive strict scrutiny nor was it a reasonable, content-neutral time, place, and manner restriction because it was not narrowly tailored to serve a significant government interest.² *Id.* at 524-25.
- Defendants' fear of an Establishment Clause violation is unfounded and thus does not justify restricting Plaintiff's speech. *Id.* at 524-25.
- Defendants' proffered traffic safety concern does not provide a compelling reason for denying Plaintiff's permit request nor does it qualify as a significant government interest to satisfy a content-neutral, time, place, and manner restriction on Plaintiff's speech. *Id.* at 525-26.

¹ This issue was never in dispute. *See Satawa*, 689 F.3d at 517 ("The Board concedes that the crèche is protected religious expression.").

² As the Sixth Circuit noted and as the undisputed record reveals, there are only two justifications proffered by Defendants for the denial of Plaintiff's permit request: (1) that the display conveyed a religious message and thus would violate the Establishment Clause and (2) that the display caused a traffic safety concern. *See Satawa*, 689 F.3d at 523 ("The parties first dispute whether religion or traffic safety was the 'real' reason that the Board denied Satawa's permit application."). The Sixth Circuit rejected both justifications as a matter of undisputed fact and law. *See id.* at 524-25 (rejecting Defendants' proffered Establishment Clause justification) & *id.* at 525-26 (rejecting Defendants' traffic safety concern and holding that it did "not qualify as a significant government interest" sufficient to justify a content-neutral time, place, and manner restriction).

As the Sixth Circuit held, “To deny the permit based on traffic safety, the Board would have to show that it did no more than enforce compliance with a reasonable, content-neutral time, place, and manner restriction, narrowly tailored to serve a significant government interest, which left open ample alternative channels of communication.” *Id.* at 525 (internal quotations and punctuation omitted). However, “[a] hypothetical traffic-safety concern resting on aberrant behavior, which has never happened—nor has there been any record of it being threatened—in sixty years does not qualify as a significant government interest.” *Id.* at 526. Consequently, “[d]enial of the permit, therefore, would not pass muster even if we accepted the general validity of the Board’s proffered traffic-safety justification.” *Id.*

- In light of the undisputed facts, Defendants’ restriction on Plaintiff’s speech violated the equal protection guarantee of the Fourteenth Amendment. *Id.* at 529. As the Sixth Circuit held, “For the County to have treated [the crèche] differently than other items on the median, therefore, the decision to ban the crèche would have to advance a compelling governmental interest and be a narrowly tailored means to achieve that interest. . . . [T]he Board cannot meet this standard.” *Id.* (internal citation omitted).

In sum, pursuant to “both the letter and the spirit of the appellate court’s mandate, taking into account the appellate court’s opinion and the circumstances it embraces,” which were the undisputed, material facts set forth in the record, this court is obligated to enter judgment in Plaintiff’s favor on his free speech and equal protection claims. Consequently, Plaintiff is entitled to an injunction, permitting the display of his nativity scene on the Mound Road median in Warren, Michigan during the 2012 Christmas season.

CONCLUSION

WHEREFORE, Plaintiff respectfully requests that this court grant this motion, enter judgment in Plaintiff's favor on his free speech and equal protection claims, and immediately enter the requested injunction, thereby permitting Plaintiff to display his nativity scene on the Mound Road median in Warren, Michigan during the 2012 Christmas season (November 29, 2012 to January 9, 2013).

Respectfully submitted,

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THOMAS MORE LAW CENTER

/s/ Erin Mersino
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Counsel for Plaintiff

CERTIFICATE OF SERVICE

I hereby certify that on October 18, 2012, a copy of the foregoing was filed electronically. Notice of this filing will be sent to all parties for whom counsel has entered an appearance by operation of the court's electronic filing system. Parties may access this filing through the court's system. I further certify that a copy of the foregoing has been served by ordinary U.S. mail upon all parties for whom counsel has not yet entered an appearance electronically: None.

AMERICAN FREEDOM LAW CENTER

/s/ Robert J. Muise

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