

October 22, 2010

Memorandum of Law on Attorney Tort Claim

**To: Mayor Sandi Bloem, City Council Members and
City Attorney Mike Gridley**

From: Scott W. Reed and Peter C. Erbland

**Re: Brannon v. Susan K. Weathers, City Clerk and
Mike Kennedy, Incumbent Candidate for City
Council Seat No. 2**

All the time the amended complaint was served on defendants in December of 2009, the parties defendant were the City, Mike Kennedy, the Mayor and City Council members. Subsequently, Judge Simpson granted the city's motion to be dismissed. Upon reconsideration, Judge Hosack reinstated Susan K. Weathers as a defendant for the contingency of having an entity which could conduct a new election if the November 3rd election was voided. That did not happen.

Because attorney Kelso refused to concede the validity of the delegation of conduct to the county and refused to amend his complaint to bring the county back in the cases, the burden of defending the conduct of the election fell almost entirely upon us. Attorney Mike Haman properly took the position that the city had nothing to do with the conduct of the election.

We undertook defense of conduct by preparing numerous affidavits for Dan English, Deedie Beard, Don Bloem and Tim Hurst plus lengthy briefs, motions, pleadings and attendance and arguments at hearings.

Those of you who attended the 5½ day trial saw that we, Peter in particular, carried the burden of lead defendant. Mike Haman was very involved and much appreciated, but it was the Kennedy team which provided the major defense.

Ever since the federal civil rights case, *Will v. Michigan Department of State Police*, 491 U.S. 58, 109 S.Ct. 2304, 105 L. Ed. 2d 45 (1989), it has been made clear across the

country that elected and appointed local government officials when sued in their official capacities, rather being named for some alleged personal wrongdoing, are to be legally regarded as city, county, state or other local government entity and not personally liable.

Under 42 U.S.C. §1983, a "person" who deprives an individual of his or her constitutional rights under color of law shall be liable to that individual. Will sued the Michigan Director of State Police in his official capacity for denying him a promotion for an improper purpose. The Michigan appellate courts held that the Director was not a "person." The United States Supreme Court affirmed:

Petitioner asserts, alternatively, that state officials should be considered "persons" under §1983 even though acting in their official capacities. In this case, petitioner named as defendant not only the Michigan Department of State Police but also the Director of State Police in his official capacity.

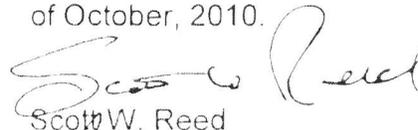
Obviously, state officials literally are persons. But a suit against a state official in his or her official capacity is not a suit against the official but rather is a suit against the official's office. *Brandon v. Holt*, 469 U.S. 464, 471, 105 S. Ct. 873, 877, 83 L.Ed.2d 878 (1985). As such, it is no different from a suit against the State itself. See, e.g., *Kentucky v. Graham*, 473 U.S. 159, 165-166, 105 S.Ct. 3099, 3104-3105, 87 L.Ed.2d 114 (1985); *Monell, supra*, at 690, n. 55, 98 S. Ct., at 2035, n. 55.

In this case, Mike Kennedy was not charged with any personal wrongdoing. He did not sign any affidavit, was never deposed and was not called as a witness in the trial. Brannon's amended complaint was not against Kennedy personally, but his amended complaint "...rather is a suit against the official's office" as council position No. 2. The suit against Mike Kennedy is no different than a suit against the city itself.

Our time as spent is solely attributable to Starr Kelso's legal strategy and tactics. However, every thrust had to be parried.

Our hope is that Judge Hosack's final opinion will serve as a major deterrent across the state to forestall future, futile election lawsuits.

Respectfully submitted, this 22nd day
of October, 2010.



Scott W. Reed



Peter C. Erbland

Attorney for Mike Kennedy