

**IN THE COURT OF COMMON PLEAS  
LAKE COUNTY, OHIO**

<b>ROBERT KELLY</b>	)	<b>CASE NO. 00 CV 001199</b>
	)	
Plaintiff	)	<b>JUDGE EUGENE A. LUCCI</b>
	)	
vs.	)	
	)	
<b>CITY OF MENTOR</b>	)	<b><u>JUDGMENT ENTRY</u></b>
	)	<b>(FINDINGS OF FACT AND</b>
Defendant	)	<b>CONCLUSIONS OF LAW)</b>

This matter is before the Court upon Plaintiff Robert Kelley’s<sup>1</sup> complaint for declaratory relief and motion for permanent injunction. The case was tried before the bench on February 1, 2 and 9, 2001. The Court has considered the testimony and other evidence taken at trial as well as the law applicable to this case and makes the following findings, conclusions and judgment. The Court’s findings of fact and conclusions of law are not limited to the section of this judgment entry denoting the same.

**FINDINGS AND CONCLUSIONS**

**Background Prior to February 28, 2000:**

1. Plaintiff Robert Kelley is a resident and taxpayer of the Defendant City of Mentor with three minor children enrolled in skating programs that use the fee-based Mentor Civic Ice Arena, which is a public facility.
2. Plaintiff Kelley was involved in Defendant City of Mentor’s youth hockey league in the 1999-2000 season. In addition to having a son who played on a team, Mr. Kelley also served as that same team’s Mite A head coach at the start of the season. Mr. Kelley had been a coach for the previous five or so years, and was certified by USA Skate and the Mentor Hockey Program.
3. However, in November 1999, Mr. Kelley was removed from that position as coach due to complaints by some parents that he was too rigid or rough with the children, although there was ample evidence that Plaintiff did not abuse the children. The propriety of this removal is not before the Court.

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<sup>1</sup> Robert Kelley’s name incorrectly appears as “Kelly” in the complaint.

4. Also approximate to the time of Mr. Kelley's removal as head coach and subsequent to a December 3, 1999 incident involving Plaintiff and another parent, Mr. Mark Nichol – indeed partly in response to that incident – a meeting was called with the parents by Ms. Terri Rosenwald, the Mentor Civic Ice Arena manager of three years. The meeting was held on December 5, 1999. Plaintiff Kelley was in attendance at this meeting. During the course of the meeting – which can be characterized accurately as a “let's all get along” session with the parents – Ms. Rosenwald informed all the parents (several of whom were behaving poorly and not as proper role models) that this was not a smooth season, that differences needed to be aired with everyone speaking their piece, and that bickering, squabbling, swearing and other poor behavior would cause her to make the misbehaving parent sit out in the parking lot until the game or practice was over to wait for their children, or to remove a repeatedly misbehaving parent from the games or practices for the rest of this season, or to even disband the team if a number of parents misbehaved. Plaintiff Kelley was present when this announcement was made, but it was not obviously directed only at Mr. Kelley. No mention was made of a five-year banning from the Mentor Ice Arena in the event of swearing or losing one's temper in front of the children.

**Events of February 28, 2000:**

5. On February 28, 2000, an incident occurred in the locker room of the Garfield Heights Ice Arena, where the Cleveland Suburban playoff games were being played, after an overtime loss involving the hockey team from the City of Mentor, of which Mr. Kelley's son was a member. The evidence was that this incident took place after the game and occurred in the locker room as the children were changing.

6. Mr. Kelley was in attendance at that game as a parent of one of the players. Following the game, a verbal altercation occurred in the locker room. Present in the locker room were the team's players (ages 6 - 8) along with their parents who were customarily present to aid their children in dressing.

7. As the team made its way into the locker room after the difficult loss, the coaches and parents were congratulating the children on their play and having a good game. Linda Kelley, wife of the Plaintiff, made a comment, “except for the coaching,” implying that the coaches were responsible for the team losing the game. Jim Yager, one of the parent-coaches, who was seated in the locker room and heard Linda Kelley's statement, then commented, “Wah, wah, wah.”

8. Simultaneously, Plaintiff came into the locker room, and accused Mr. Yager of mocking Mrs. Kelley. Mr. Kelley angrily told Mr. Yager, “You’re nothing but a puss; I’m gonna kick your ass back in Mentor.” Mr. Kelley’s statement was made loud enough for most in the locker room to hear, including the children.

9. Mr. Yager responded, “Whatever” and turned away. Mr. Kelley did not stop his verbal outburst, and he continued to speak loudly. Accounts vary, but the majority of the witnesses have testified that further comments in the nature of kicking “ass” were made to Mr. Yager and that Mr. Kelley’s verbal tirade included some profanity, but witness accounts varied widely. The witnesses to this event agree that Mr. Kelley conveyed anger and acted in a manner best characterized as “losing his temper or composure.” He did this in the presence of 15 or 16 young children and about 20 parents.

10. There was no physical altercation, violence or untoward physical touching of any sort.

11. Robert Kelley told three adult coaches in the locker room that he would “kick their ass back in the City of Mentor,” and specifically called one of the coaches a “puss.” There was conflicting evidence as to whether Mr. Kelley used any other inappropriate language in the locker room. In the midst of this outburst, another of the parent-coaches, Mark Nicol, stepped into the fray and told Mr. Kelley “not in front of the kids” or words of similar effect. There was testimony that Mr. Nichol “got in Mr. Kelley’s face and threatened to kick (Mr. Kelley’s) ass,” to which Mr. Kelley responded that he would do as he pleased and he also commented to Mr. Nicol that he would “kick your ass, too.”

12. There was testimony by the City’s witnesses that Mr. Kelley said, “Let’s take this back to Mentor and settle this,” and that the only profanity used by Mr. Kelley was “ass” and “pussy,” and that he made no threats. The City’s witnesses were contradictory in the details of what occurred.

13. When cross-examined on the stand at trial as to why he wanted to take the altercation back to Mentor, Mr. Kelley testified that it was because he preferred to be jailed in Mentor as opposed to Garfield Heights in the event there were arrests for a breach of the peace. The Court believes that this remark by Mr. Kelley was truthful and innocuous.

14. Finally, at the end of the February 28, 2000 incident, and prior to exiting the Garfield Heights locker room, Mr. Kelley made one further comment of “kicking your ass” directed at Heath

Burkett, an adult who was at the time attending to his child and who, by all accounts, was minding his own business and never involved himself in the altercation of February 28. It was directed to him because of Mr. Burkett's involvement in the prior removal of Mr. Kelley as coach.

15. After Mr. Kelley left the Garfield Heights facility, the parents finished preparing their children and exited the facility. Testimony established that some of the children were upset and crying as a result of the incident, but no one required or sought any counseling.

16. Meanwhile, Mr. Kelley, by his cellular telephone, immediately phoned Andy Anderson, Assistant Manager of the Civic Arena, and informed him of what had occurred. Mr. Kelley admitted to Mr. Anderson that he had, in fact, lost his temper and made the comments suggesting a later physical altercation with some of the adult males, and he requested a meeting with Mr. Anderson.

17. The evidence also supported the conclusion that the conflict between Mr. Kelley and Mr. Nichol on February 28, 2000, was related to a prior altercation between the two men on December 3, 1999. This prior incident occurred just after Mr. Kelley and the other parents were informed of his removal as the team's coach. The testimony established that there was a verbal altercation between Mr. Kelley and Mr. Nicol in the lobby of the Mentor Civic Arena. Each man accused the other of making a threat, essentially to take their dispute outside for purposes of a physical altercation. The witnesses also stated that Mr. Kelley and Mr. Nicol did not have a good relationship. During the previous incident involving Mr. Kelley and Mr. Nichol in the Mentor Ice Arena, Terri Rosenwald, manager of the Mentor Ice Arena, was informed of an argument in progress and went out into the lobby. She observed little of the incident. She told Mr. Kelley to go on his way and informed Mr. Nicol to go to her office where she spoke to him. No action was taken against either person.

18. There were at least two "cliques" of parents involved in the Mentor Hockey League – those that associated with, favored, and were friendly towards Plaintiff, and those that did not and were not.

**Events Following Incident of February 28, 2000:**

19. No criminal charges were filed against Mr. Kelley, and none of the alleged victims or witnesses filed a police report in either the City of Garfield Heights or the City of Mentor. Plaintiff was not banned from the Garfield Heights ice arena, and continued to coach there. He was

not suspended by USA Hockey, and continued to coach. Plaintiff was not suspended by the Cleveland Suburban Hockey League.

20. In fact, the evidence does not support any potential criminal violation on the part of Plaintiff for menacing (that is, making threats of bodily harm); however, the most serious criminal violation could have been for disorderly conduct, punishable only by a fine of not more than \$100.<sup>2</sup>

21. None of the children who were present missed the six additional hockey games, three in the City of Mentor and three in the City of Parma, that were part of the tournament schedule. Mr. Kelley was present for five out of six of these games and no incidents took place.

**City of Mentor's Response to the February 28, 2000 Incident:**

22. Mr. Kelley was sent written notice by the City, on March 2, 2000, that an investigation would be conducted into the incident. He was provided a copy of the letter being sent to all the parents requesting that written statements of the facts be submitted by anyone who actually saw what occurred. Mr. Kelley likewise was requested to submit his own account. During the investigation, Mr. Kelley was prohibited from talking with players, parents, witnesses, or coaches.

23. A deadline of March 10, 2000 was established for submission of the statements. Just over a dozen statements were submitted. Mr. Kelley did submit a statement. In his written statement, Mr. Kelley again admitted to his behavior. In his own words: "I called (Jim Yager) a puss and told him I would kick his ass back in Mentor." Further, there were allegations in other statements submitted that Mr. Kelley had threatened physical harm to parents; and there were letters supportive of Mr. Kelley. Some parents even wanted other parents (other than Mr. Kelley) banned from the Mentor Ice Arena. Some wrote to the Cleveland Suburban Hockey League to have Mr. Kelley's license to coach revoked – the League refused to revoke it.

**The City's Alleged "Zero Tolerance" Policy:**

24. The City of Mentor did not have a specific "zero tolerance" policy, in that the only no tolerance policy that was testified to by any of the witnesses related to the USA Skate policy, which had consisted solely of a placard on the wall of the Mentor Ice Arena. This policy indicated

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Although Defendant City of Mentor has conceded that Plaintiff Kelley committed no criminal violation of law on February 28, 2000, the Court finds that it could be alleged that Mr. Kelley recklessly caused inconvenience, annoyance or alarm to another by engaging in turbulent behavior or taunting another under circumstances in which that conduct is likely to provoke a violent response, as set forth in the Ohio disorderly conduct statute, R.C. Section 2917.11.

that if anything happened during the game, the City had the right to ask the violator to leave the indoor recreational facility. The policy mentioned nothing of any consequence beyond removal from the facility on the day of the infraction. There was no mention of any infraction or consequence which could bring about a lengthy “banning” from the facility, nor a five-year ban. The testimony of Terri Rosenwald, the rink manager, who investigated the incident, indicated that this zero tolerance policy applied only during the games, that the actions of Mr. Kelley occurred after the game, and that the City had no policy regulating conduct after the game.

**The Procedures That the City Followed:**

25. Terri Rosenwald made a written recommendation on March 16, 2000, to the Director of Parks, Recreation, and Public Lands, Kurt Kraus. She recommended that Mr. Kelley be banned from coaching and from entering the locker room and the coaches’ and players’ benches for a period of five years, based upon Mr. Kelley’s conduct over the entire season – not for *only* the February 28<sup>th</sup> incident but rather for his entire history of conduct – but her recommendation did not require that Mr. Kelley be banned totally from the ice arena or the upstairs community center. She felt that this action would adequately protect the children and accomplish the purposes of the City and its program.

26. However, Defendant City, through Mr. Kraus, declined to have any sort of “hearing,” took no testimony under oath from any of the witnesses, and expressly prohibited Plaintiff from approaching or speaking to any of his accusers or supporters. Defendant did not show or exhibit the letters from the witnesses to Plaintiff before Plaintiff provided his own account or before the decision to ban him for five years was made.

27. Plaintiff was not permitted to have an oral hearing or to make his defense verbally or by counsel. Defendant did not tell Plaintiff that it intended to ban him for five years, so that he could respond to the charges and the penalty, before it was finally imposed.

28. Once the City’s investigation was complete, the matter was reviewed by Kurt Kraus, Director of the Department of Parks, Recreation and Public Lands. Mr. Kraus reviewed the letter statements that had been submitted as well as a recommendation from his own staff. Mr. Kraus testified that his decision was based solely on the incident of February 28, 2000. That decision was to prohibit Mr. Kelley from entering the Mentor Civic Ice Arena for a period of five years. Mr. Kraus testified that he based this decision on the “egregiousness” of Mr. Kelley’s conduct, inclusive of the fact that he behaved as he did in front of small children. The basis for a five year prohibition

was that Mr. Kelley would not then be able to have contact with the children involved with the program during the remaining part of their youth. Mr. Kelley was informed of the decision by correspondence addressed to him on March 30, 2000.

29. Mr. Kraus indicated at trial that the City of Mentor had no written or unwritten policy concerning any post-game conduct, nor any such policy as to consequences for any post-game conduct. Further, he testified that he had no written or express authority to ban anyone from the ice arena.

30. Mr. Kraus testified that his actions were solely based on his reasoning, and that it was his intent in banning Mr. Kelley from the ice arena to punish him solely for his actions of February 28, 2000.

**The Procedures That Were Denied Plaintiff:**

31. The action taken by Kurt Kraus was done without Robert Kelley having an opportunity to testify, and without Mr. Kelley having the opportunity to cross-examine or ask any questions of any of the witnesses that submitted witness statements that were negative to Mr. Kelley. None of the witness statements were notarized. Robert Kelley requested on two occasions to meet with the city about this incident, but the city refused this request. Mr. Kelley raised the issue of Mr. Nichol challenging him to a fight in the Garfield Heights locker room on February 28, 2000, and he raised the issue of Mr. Nichol threatening him in the Mentor Ice Arena in December 1999, at which time the alleged (but non-existent) zero tolerance policy was not enforced.

**The Nature of the Ban:**

32. The evidence indicated that pursuant to the letter sent by the City of Mentor on March 30, 2000, Mr. Kelley was banned from the Mentor Civic Ice Arena completely for a period of five years, until December 31, 2004. This ban was based exclusively on the incident that occurred at Garfield Heights on February 28, 2000. Mr. Kelley could only drop off and pick up his wife and children at the front doors of the ice arena, and he was also prohibited from using the upstairs community center, under penalty of arrest and criminal prosecution for trespassing.

33. The action taken by Kurt Kraus in banning Robert Kelley from the Mentor Civic Ice Arena was solely his decision and went further than the recommendation of his employee, Terri Rosenwald, the rink manager.

34. The decision was premised upon the “findings” of Mr. Kraus, based upon letters provided by witnesses. Mr. Kraus found: that Mr. Kelley did “verbally threaten” several parents and

coaches in the locker room at Garfield Heights, did in fact lose control of his temper and “threatened adults” in the locker room, and the “verbal threats” were made in front of the entire Mite A team. Mr. Kraus further stated, “Verbally threatening to harm another human being in front of children will not be tolerated in our programs or facilities. Sportsmanship is stressed at all levels of competition in city-sponsored programs.” There was no finding or mention of the use of profanity by Mr. Kelley in the letter by Mr. Kraus of March 30, 2000.

35. The evidence indicated that this was the first time that a ban like this was imposed.

36. A prior ban that had occurred was due to inappropriate behavior between an eight-year-old female and her alleged skating coach who was a male in his mid-fifties. The evidence indicated that the conduct between this eight-year-old and fifty-year-old involved inappropriate touching in front of other children and skaters at the Mentor Ice Arena. In response to this incident, the Mentor Police escorted the man out of the ice arena, but there was no written documentation or letter banning this individual from the Mentor Ice Arena by the City of Mentor.

37. The evidence indicated that the actions of Kurt Kraus were the most restrictive means to punish or discipline Mr. Kelley, as the recommendation from his own staff constituted a less severe suspension. Hence, the sanction imposed by the City was not the least restrictive alternative available to accomplish whatever purposes that were validly sought to be achieved by the City in the operation of its youth ice hockey program.

38. The evidence also indicated that there were other incidents that involved actual physical fights and foul language, and that on none of those occasions were any parties restricted from the ice arena for more than one game.

39. During the period of the five-year ban, Plaintiff also coached children’s soccer and baseball in the City of Mentor leagues – these leagues are not operated by the Defendant, as it does for ice hockey – and he was never suspended or banned from coaching or entering other City of Mentor property.

**The Inconsistent Testimony:**

40. The testimony presented at trial was materially *inconsistent* with the information provided in the written statements, which constituted the sole evidence relied upon by the City. In fact, the testimony presented at trial contradicted the letters regarding what had occurred and what was said, and the letters injected opinions and emotion. The letters also contradicted each other in material respects. *Most of the content of the letters from witnesses dealt with conduct of Mr.*

*Kelley that occurred before February 28, 2000, and which was previously dealt with when the City removed Mr. Kelley as a hockey coach. This had nothing to do with the total five-year ban of Mr. Kelley, according to the testimony of Mr. Kraus.*

**The Plaintiff's Complaint:**

41. On July 24, 2000, the instant complaint was filed seeking declaratory relief. Mr. Kelley requested an order declaring:

- a. That he cannot be prohibited from entering the Mentor Civic Ice Arena for an incident occurring outside city limits, and
- b. That he is entitled to a formal hearing before such "punishment" can be made.

42. Plaintiff also filed a Motion for Preliminary and Permanent Injunction on August 29, 2000, seeking to restrain and enjoin the City from prohibiting him from entering the Civic Ice Arena and Community Center.

**The Nature of the Facility:**

43. The Mentor Ice Arena is an "indoor recreational facility." As such, by statute, R.C. Section 2744.01(C)(2)(u), the operation of such a facility is a "governmental" function and the city enjoys sovereign immunity from suit as a result of incidents or injuries occurring at the ice rink. With this immunity comes the responsibility of conducting operations as the government would. It is incongruous and disingenuous for the city to claim and enjoy governmental immunity on the one hand – thus escaping liability for injuries occurring at the facility – while asserting in this case that it can operate with the freedom and arbitrariness that a private landowner enjoys.<sup>3</sup>

**Legal Conclusions:**

44. The Court finds that the language used by Mr. Kelley on February 28, 2000 at the Garfield Heights ice arena locker room does not constitute "threats" to harm other human beings, but rather invitations to join him at another time, in another place, in Mentor, Ohio, to a mutual physical fight, where Mr. Kelley believed he would "win."

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In fact, it was (at the time the issue was considered and decided by Mr. Kraus) and is the City's contention (at trial) that its operation of the Ice Arena is a proprietary rather than governmental function, and perhaps that may be the reason for its "short-circuiting" of procedural due process.

45. The Courts findings are in stark contrast with the findings of Mr. Kraus, set forth at paragraph 34 hereof, which were based solely on unsworn witness statements which were not subject to the test of cross-examination.

46. Defendant City charged Plaintiff with violating a zero-tolerance policy that does not exist; solicited written statements from eyewitnesses but made no effort to inform Plaintiff of the contents of those statements; invited Plaintiff to testify against himself and used his written statement against him; empowered its Director of Parks with seemingly unlimited power and authority to punish; decided to punish Plaintiff for “egregious” behavior but is unable or unwilling to define what constitutes “egregious” behavior; selected a punishment that is more severe than that recommended by its own investigating staff member; and selected a punishment that is simultaneously under-inclusive and over-inclusive of fulfilling the City’s stated purposes.

47. 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.

48. The City of Mentor Director of Parks, Recreation and Public Lands has no authority to *punish* non-criminal conduct occurring in Garfield Heights.<sup>4</sup>

49. This Court believes that Mr. Kraus was sincere and acted without actual malice towards Mr. Kelley, that Mr. Kraus sincerely believed that what he was doing was in the best interests of the children who participated in the Mentor hockey program while at the Mentor Ice Arena, and that he sincerely believed he was providing the process that was due Mr. Kelley.

50. The City has over-stepped its constitutional bounds, and its action was “arbitrary and capricious.”

### OPINION

This is an action for declaratory judgment. The Plaintiff alleges that the Defendant, City of Mentor, intentionally and unconstitutionally deprived the Plaintiff of his liberty and property interests without due process of law when, without a hearing and in the absence of a governing

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Although Plaintiff has conceded that the Mentor Director of Parks has the authority to take action for conduct occurring in Garfield Heights in connection with the Mentor Ice Hockey program, the Court finds that strictly punitive action without due process of law is not within the purview of Plaintiff’s concession.

policy, the Director of Parks banned the Plaintiff for five years from entering the City's indoor recreational facility (known as the Mentor Civic Ice Arena) as a punishment for Plaintiff's profanity-laced, verbal tirade that occurred after a hockey game in a locker room at another indoor recreational facility in the presence of young children and other parents.

**Declaratory Judgment Rather Than Chapter 2506 Appeal:**

Plaintiff filed a Complaint For Declaratory Judgment under Section 2721.01 *et seq.* of the Ohio Revised Code. Pursuant to Section 2721.02(A), "Courts of record may declare rights, status, and other legal relations whether or not further relief is or could be claimed." The declaratory judgment laws are to be liberally construed especially where they promote judicial economy. *Owens-Corning Fiberglas Corp. v Allstate Insurance Co.*, 74 Ohio Misc. 2d 159 (1993).

Although the Defendant has argued that Plaintiff should have filed a Chapter 2506 appeal, R.C. Section 2506.01 specifically states that the appeal provided in this chapter is in addition to any other remedy of appeal provided by law. To be appealable under R.C. Section 2506.01, an administrative decision must be rendered in a quasi-judicial proceeding. The earmarks of such proceedings include requirements of notice, a hearing, and an opportunity to introduce evidence. *Lakota Local School Dist. Bd. of Education v. Brickner*, 108 Ohio App, 637, 671 N.E.2d 578 (Wood, 1996). Clearly, none of these procedural safeguards were present in this case, and as such, a Chapter 2506 appeal would not have been appropriate. A Chapter 2506 appeal is not the exclusive remedy, and a complaint for declaratory judgment is the proper form for the plaintiff's cause of action.

**Factual and Legal Issues:**

At the outset, it is important to note that this case does not involve allegations of random or unauthorized conduct by employees of the City. This case clearly involves allegations that the City, through the authorized exercise of authority delegated to the Director of Parks, deprived the Plaintiff of liberty and property pursuant to operation of law under circumstances where a pre-deprivation hearing was both feasible and practical. Hence, there is no need for this Court to engage in any analysis of the availability or adequacy of post-deprivation remedies. *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 102 S.Ct. 1148, 71 L.E.2d 265 (1982); *Zinermon v. Burch*, 494 U.S. 113, 110 S.Ct. 975, 108 L.Ed.2d 265 (1982); *Moore v. Board of Education*, 134 F.3d 781 (6<sup>th</sup> Cir., 1998).

The testimony at trial established that – although the City of Mentor had a “no tolerance” policy posted for the conduct of players and observers *during* a hockey game – the City had no policy in place for regulating the conduct of parents *after* a hockey game had concluded.

Specifically, the City of Mentor did not have a policy that would place a parent on notice that he might be banned from the Mentor Civic Ice Arena for a period of five years if he became involved in a verbal, profanity-laced tirade in the locker room of a facility in another municipality after a hockey game in the presence of young children who had just participated in the hockey game.

Plaintiff never had notice, prior to the rendering of the City's decision, of the written accusations made by eyewitnesses to the incident on February 28, 2000. The letters that were solicited by the City were submitted directly to the City. There is evidence in the record that Plaintiff never saw those letters prior to the City rendering its decision. There is no evidence to indicate that the City ever informed the Plaintiff – even in summary form – of the specific allegations made against him. This was not “notice of the charges” as that term is understood in light of the Fifth and Fourteenth Amendments to the United States Constitution.

Furthermore, the only “opportunity to be heard” that was provided by the City consisted of the City's invitation for the Plaintiff to submit his version of the events in writing. Without knowing the specific accusations that had been made against him, this “opportunity to be heard” was little more than an opportunity to testify against himself.

Thus, Plaintiff was deprived of meaningful notice of the charges against him, a meaningful opportunity to be heard, and a meaningful opportunity to confront the witnesses against him. In addition, Director Kraus made his decision to punish without reference to any objectively verifiable standard. Director Kraus also selected a five-year total-facility ban as the appropriate punishment, regardless of the recommendations of his staff for a more limited ban that would have banned Plaintiff from locker rooms and coach's boxes only. When asked why he decided to punish and why he selected this particular punishment, Director Kraus stated that he felt that the Plaintiff's conduct was “egregious,” but he refused to define what he meant by “egregious.” Director Kraus also refused to compare the Plaintiff's conduct with any other incident, whether real or hypothetical. For instance, he refused to say whether the Plaintiff's verbal tirade was worse than a hypothetical incident involving a parent physically attacking a referee during a hockey game. The only guideline for appropriate punishment was what was “fair and reasonable” in the mind of Director Kraus. This was not due process.

The punishment selected by Director Kraus was both under-inclusive and over-inclusive of the City's purposes stated at trial.

The punishment was under-inclusive in that the City claimed it was trying to protect the children who were exposed to the incident on February 28, 2000, from being exposed to another tirade by Mr. Kelley. Yet, the punishment made no attempt to protect those same children from continuing exposure to Mr. Kelley at away games in other facilities. Similarly, the punishment failed to protect children in other recreational programs (*e.g.*, baseball) that were run by or occurred in the City. The testimony established that even after the imposition of the City's punishment, Mr. Kelley has attended any number of away games to watch his children play hockey, and he has coached in the City's baseball little league. The punishment was also under-inclusive in that it failed to protect the children who will be participating in the City's skating and hockey programs once the ban is lifted.

The punishment was over-inclusive in that it banned Mr. Kelley not only from locker room areas after the games, but from the entire indoor recreational facility – denying him the opportunity to observe his own children participate in the fee-based municipal programs or to attend weddings or other events that could be held in the community center located in the same building.

**Recent History of Procedural Due Process:**

In *Parratt v. Taylor*, 451 U.S. 527, 101 S.Ct. 1908, 68 L.Ed.2d 420 (1981), the Supreme Court held that an inmate was improperly deprived of property where prison officials negligently caused the loss of hobby materials he had ordered through the mail. However, although the Court found that procedural due process issues were raised by this property deprivation (*i.e.*, the absence of a hearing was challenged by the plaintiff), the Court held that a pre-deprivation hearing was not feasible for random and unauthorized negligent conduct, and therefore it was not required. The Court held that, because the state provided an apparently adequate and available post-deprivation remedy in the form of a tort action, it thereby satisfied the requirements of procedural due process. However, in *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 435-436, 102 S.Ct. 1148, 71 L.E.2d 265 (1982), the Court declined to apply the *Parratt* “post-deprivation” holding to cases involving *intentional* deprivations of property by operation of law. In *Logan*, the state, by operation of law, destroyed the plaintiff's property interest through the failure to convene a timely conference to consider plaintiff's claim of unfair employment practices. Hence, the plaintiff's due process rights were violated.

In *Zinermon v. Burch*, 494 U.S. 113, 110 S.Ct. 975, 108 L.Ed.2d 265 (1982), the Court held that due process was violated when state officials failed to provide a pre-deprivation hearing prior

to the plaintiff's confinement to a mental hospital in order to determine whether plaintiff was competent to give consent to the confinement.<sup>5</sup> The focus of the majority in *Zinermon* was the idea that (1) the potential deprivation was foreseeable in the standard admission process (*i.e.*, they might accept a patient who purports to give consent, but who actually lacks the capacity to do so), (2) a pre-deprivation procedure was feasible and practical, and (3) the challenged conduct was not unauthorized, but rather resulted from the exercise of delegated authority.

The presence of a post-deprivation hearing was held to be sufficient to cure an alleged due process violation in cases of *intentional* deprivation of property where the deprivation was caused by random and unauthorized intentional conduct (as opposed to the ordinary operation of a state procedure). *Hudson v. Palmer*, 468 U.S. 517, 104 S.Ct. 3194, 82 L.Ed.2d 393 (1984) (prison guard intentionally destroyed inmate's personal property during shakedown search of cell). The *Hudson* court distinguished *Logan v. Zimmerman, supra*, noting that the deprivation in *Logan* was effected pursuant to a state procedure. Also, in *Hudson*, the concurring opinion of Justices Stevens, Brennan, Marshall, and Blackmun expressly stated that the *Hudson* holding did not apply to "cases in which it is contended that the established prison procedures themselves create an unreasonable risk that prisoners will be unjustifiably deprived of their property." *Hudson* at 3208.

In *Daniels v. Williams*, 474 U.S. 327, 106 S.Ct. 662, 88 L.Ed.2d 662 (1986), the Court re-examined and partially overruled *Parratt*, holding that negligent conduct is insufficient to establish a procedural due process violation involving a claimed deprivation of property. The Court also went further and held that something more than negligence is required to establish all due process violations – both substantive and procedural – regardless of whether they involve deprivations of property or liberty. In *Daniels*, the Court reasoned that the due process clause requires for its violation some abuse of governmental power, and negligent conduct does not constitute such an abuse of power.

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It should be noted that the 5-4 majority in *Zinermon v. Burch* no longer exists. The majority opinion was joined in by Justices Brennan, Marshall, and Blackmun – none of whom is still on the Court. In contrast, the dissent, consisting of Justices O'Connor, Rehnquist, Scalia, and Kennedy, remains intact, and will probably be joined by at least Justice Thomas should the Court ever revisit the issues decided in *Zinermon*. The dissenters would have held that there was no violation of due process because (1) the defendants' wanton and unauthorized departure from established procedure caused the deprivation, and (2) state post-deprivation remedies were adequate.

After *Daniels*, the Fifth Circuit held that the consideration of abuse of power should take into account the exact responsibilities of a particular official or his power to take certain actions, and the nature and types of discretion which different government officials must be allowed to exercise if they are to have the freedom to carry out their duties without undue interference. *Love v. King*, 784 F.2d 708, 713 (5<sup>th</sup> Cir., 1986).

In *Mertik v. Blalock*, 983 F.2d 1353 (6<sup>th</sup> Cir., 1993), the Sixth Circuit Court of Appeals reversed the District Court's granting of the defendant city's 12(b)(6) motion to dismiss, and held that the plaintiff – a figure-skating coach – had alleged a sufficient contractual interest in continuing to teach at the city's rink to constitute a property interest deserving of procedural due process protection under the Fourteenth Amendment. There, the plaintiff's complaint alleged: (1) a municipal employee had denied plaintiff access to a municipal skating rink because of false allegations of sexual child abuse, (2) plaintiff had a right under Ohio's law of implied contract to use the ice rink for instructional purposes, and (3) plaintiff had complied with all conditions of the contract to allow her to use the ice rink for instructional purposes.

Expressly distinguishing the post-deprivation requirements of *Parratt v. Taylor*, 451 U.S. 527, 101 S.Ct. 1908, 68 L.Ed.2d 420 (1981), the *Mertik* Court further held that the Plaintiff was entitled to notice and a pre-deprivation hearing before defendants could take action to curtail her access to and her right to teach at the city's rink. The Court reasoned that the municipal employee who denied plaintiff access was alleged to have acted on the instructions of the city's Director of Recreation, and therefore the employee's actions were neither random, nor unauthorized. This approach was recently confirmed by the Sixth Circuit Court of Appeals in *Moore v. Board of Education*, 134 F.3d 781 (6<sup>th</sup> Cir., 1998).

Hence, as noted above, this case is not governed by the post-deprivation analysis of *Parratt v. Taylor* because this case does not involve allegations of random or unauthorized conduct by employees of the City. The actions of Director Kraus in banning Plaintiff from the Mentor Civic Center were purposeful, deliberate, and were part of the Director's normal procedure. Accordingly, there was every opportunity for a pre-deprivation hearing.

**Governmental Function:**

The Mentor Civic Center ice arena is an indoor recreational facility, owned and operated by the City of Mentor. It was constructed and paid for, and is maintained and operated with tax money for the use and benefit of Mentor citizens and non-citizens alike. R.C. § 2744.01(G)(2)(e) is cited

by the defendant in its trial brief<sup>6</sup> as authority for the proposition that the operation of the Mentor Civic Ice Arena “neither carries on nor promotes any governmental functions.” Defendant alleges further that the Mentor Civic Ice Arena “is a recreational and leisure facility designed and operated for these purposes. The operation and control of a civic arena is a proprietary function of the municipality per statutory definition. R.C. §2744.01(G)(2)(e).”

This attempted classification of the operation of the Mentor Civic Ice Arena is an important part of Defendant’s argument. If the activity is proprietary, then Ohio case law states that the municipality possesses the same rights and powers as other like proprietors. *State, ex rel. White v. Cleveland* (1932), 125 Ohio St. 230. In short, therefore, if the activity is proprietary, then the Defendant is entitled to ban individuals with the same freedom that a private landowner has to do so. Id.

The language referenced by the Defendant states:

(G)(2) A “proprietary function” includes, but is not limited to, the following: . . .

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

However, although this language states that the operation and control of a “civic or social center” is proprietary, there is more specific language elsewhere in the statute that contradicts Defendant’s claim. R.C. §2744.01(C)(2)(u) states:

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It is worth noting that Defendant’s proposed findings of fact and conclusions of law (submitted as a proposed Judgment Entry) contradicts its trial brief and acknowledges that Section 2744.01 labels a facility such as the Mentor Civic Ice Arena as a “governmental” function.

Defendant attempts to argue that the governmental function characterization applies only to cases arising under the political subdivision tort liability sections of Chapter 2744 of the Ohio Revised Code. Defendant then urges this Court to resolve this classification question by adopting a “practical” approach that looks to the activities that take place in the facility to determine whether it is, in fact, a governmental function.

However, Defendant’s argument is disingenuous at best. In classifying this type of facility as a governmental function, the General Assembly enacted Chapter 2744 of the Ohio Revised Code to give such facilities immunity from suit for personal injuries occurring in the facility. Had the General Assembly wished to, it could easily have enacted a statute stating that for purposes of suits based on alleged constitutional violations, the municipal operation of an indoor recreational facility is a proprietary function.

- (C)(2) A “governmental function” includes, but is not limited to, the following:
- (u) The design, construction, reconstruction, renovation, repair, maintenance, and **operation** of any park, playground, **indoor recreational facility**, zoo, zoological park, bath, swimming pool, pond, water park, wading pool, wave pool, water slide, and other type of aquatic facility, or golf course;”

In *Maxel v. City of Cleveland Heights*, No. 74851 (8<sup>th</sup> Dist. Ct. App., Cuyahoga, 9-30-1999), the Court held that the operation of a civic indoor recreational facility known as the Pavilion by the City of Cleveland Heights constituted a governmental function under R.C. §2744.01(C)(2)(u). The facts in *Maxel* arose when a minor suffered an eye injury while attending an ice hockey game at the Pavilion. The trial court concluded that the operation of the Pavilion was a governmental function. The Court of Appeals agreed, reasoning that:

For purposes of determining whether or not Cleveland Heights was performing governmental or proprietary functions, this court is unable to find any characteristics distinguishing an indoor swimming pool from an indoor ice hockey rink. Pursuant to *Cater [v. City of Cleveland]* (1998), 83 Ohio St. 3d 24, 697 N.E.2d 610 (operation of an indoor swimming pool is a governmental function under R.C. §2744.01(C)(2)(u)), this court finds that the trial court did not err in placing the Pavilion in the category of a governmental function.

In reaching this conclusion, the Court expressly reviewed and rejected the application of R.C. §2744.01(G)(2)(e) to the operation of an indoor recreational facility within a civic center. Similar conclusions have been reached in other appellate decisions. *Hodge v. City of Cleveland*, No. 72283 (8<sup>th</sup> Dist. Ct. App., Cuyahoga, 1-22-1998) (City’s operation of an “indoor recreation center” known as the “Kovasic Center” was a governmental function under R.C. §2744.01(C)(2)(u)); *Doyle v. Akron* (11<sup>th</sup> District, Portage, 1995), 104 Ohio App. 3d 479, 662 N.E.2d 825 (operation of park utilized for camping was a governmental function under R.C. §2744.01(C)(2)(u), and fact that park charged a user fee did not change this classification). C.f., *Schirger v. City of Brook Park*, No. 71739 (8<sup>th</sup> Dist. Ct. App., Cuyahoga, 10-23-1997) (bingo game operated by City at Armory was a proprietary function under R.C. §2744.01(G)(2)(e)) .

For the foregoing reasons, it is the opinion of this Court that the City’s operation of the indoor recreational facility known as the Mentor Civic Ice Arena, together with the figure skating and ice hockey programs there, is a governmental function under Ohio law. Accordingly, Defendant’s analysis of proprietary function is inapplicable.

### **Property Interest:**

Prior to addressing the adequacy of the procedures followed by the defendant, the Court's first step is to identify a property or liberty interest entitled to due process protection. *Brock v. Roadway Express, Inc.*, 481 U.S. 252, 107 S.Ct. 1740, 95 L.Ed.2d 239 (1987).

The federal constitution does not create property interests. Rather, it extends various procedural safeguards to certain interests that stem from an independent source such as state law. *Leis v. Flynt*, 439 U.S. 438, 441, 99 S.Ct. 698, 700, 58 L.Ed.2d 717 (1979). To have a property interest in a benefit, a person must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it. *Board of Regents v. Roth*, 408 U.S. 564, 577, 92 S.Ct. 2701, 2709 (1972). In *Board of Regents*, the Court held that in order to determine whether due process requirements apply in the first place, the court must look not to the "weight" of the interest, but rather to the "nature" of the interest at stake, and whether that kind of interest is within the Fourteenth Amendment's protection of liberty or property. In determining whether a plaintiff has a protected property interest, it is proper for the court to look to all applicable precedents, not just those involving the specific loss alleged by the plaintiff. *Mertik v. Blalock*, 983 F.2d 1353, 1359 (6<sup>th</sup> Cir., 1993).

In *Brock v. Roadway Express, Inc.*, *supra*, the Court held that a private contractual right can constitute a property interest entitled to due process protection from governmental interference under federal constitutional law. However, in addition to showing the existence of a private contractual right, in order for that contractual right to rise to the level of a constitutionally protected property right, there must be a showing that the contractual right may not be taken away or terminated without cause and/or some form of process. *Lowe v. Scott*, 959 F.2d 323, 335-336 (1<sup>st</sup> Cir., 1992) (physician staff privileges at public hospitals are not protected property rights if the hospital allowed for termination without just cause). Under Ohio law, the right to contract is a property right specifically guaranteed by Section 1, Article I of the Ohio Constitution and is within the protection of the Fourteenth Amendment to the United States Constitution. It is a property right. Similarly, an interest in a contract has been held to be a property interest. *Joseph Brothers v. Brown*, 65 Ohio App. 2d 43, 415 N.E.2d 987, 990 (1979). It is one of the purposes of the ancient institution of property to protect those claims upon which people rely in their daily lives, and that reliance must not be arbitrarily undermined. It is one of the purposes of the constitutional right to a hearing to provide an opportunity for a person to vindicate those claims. *Board of Regents v. Roth*, 408 U.S.

564, 577, 92 S.Ct. 2701, 2709 (1972). It does not matter that the alleged contract is oral; nor does it matter that the alleged contract may be founded in the law of implied contract. *Bishop v. Wood*, 426 U.S. 341, 344, 96 S.Ct. 2074, 2077, 48 L.Ed.2d 684 (1976).

In the present case, Plaintiff Robert Kelley had an implied contract with the City of Mentor in the form of fees that he paid for his children to participate in hockey and figure skating programs at the Mentor Civic Arena indoor ice rinks. Implicit in the payment of these fees is the right of the paying parent to observe his children as they participate in the City's programs. Indeed, for many parents it is the right to observe their children that forms the main *quid pro quo* for the payment of the fees. Certainly, Mr. Kelley testified that this was one of the main reasons why he enrolled his children in the City of Mentor's ice hockey and figure skating programs. He wanted to watch his children participate. And his conduct – both prior to the imposition of the City's five-year ban (when he attended most or all of the hockey games in which his children played), and after the imposition of the ban (when he attended all of the away games in which his children played) – further supports this conclusion.

This Court finds, under these circumstances and based on the evidence, that Robert Kelley's implied contractual right to observe his children as they participated in a fee-based, municipal program of ice hockey is a property right within the protection of the Fourteenth Amendment to the United States Constitution. For the reasons set forth in this opinion, the Court further finds that Plaintiff's property was deprived by the City of Mentor without due process of law.

### **Liberty Interest:**

In determining whether Plaintiff has established a protected liberty interest, the Court's analysis must focus on the precise "liberty" interest which Plaintiff claims was abridged. *Mertik v. Blalock*, 983 F.2d 1353, 1361 (6<sup>th</sup> Cir., 1993) Plaintiff describes his liberty interest in the following terms:

1. "Plaintiff was deprived of his liberty interest in attending his child's hockey game at the Mentor Civic Arena." (Proposed findings of fact and conclusions of law, at 7).
2. "Plaintiff's liberty interest also encompasses his freedom of association and freedom of assembly." (Proposed findings of fact and conclusions of law, at 7).
3. "Defendant's action deprived Plaintiff of his liberty interest by preventing him from entering a public facility to watch his children play hockey, and associate with the parents of the other players or other members of the general public." (Proposed findings of fact and conclusions of law, at 7).

In its proposed findings of fact and conclusions of law (styled as a “Judgment Entry”), Defendant acknowledges that the City is not permitted to act in a manner that runs afoul of protected constitutional rights such as the freedom to travel. In support of this proposition, Defendant cites *People v. DeClemente*, 442 N.Y.S.2d 931, 110 Misc.2d 762 (Queens, 1981). The specific facts of the *DeClemente* case, and the legal analysis by the New York Court, are instructive.

In *DeClemente*, the Queens County Criminal Court held that, where the defendant had been identified by police as soliciting taxi passengers in violation of specific, existing Port Authority rules, an order by the Port Authority Police – banning the defendant from entering or remaining on the premises of the J.F.K. International Airport – was unconstitutionally broad in that it prohibited the defendant from entering a public building even if he were engaging in lawful activities. The Court’s reasoning is worth quoting at length:

When an individual enters upon premises which are open to the public, he does so with license and privilege unless he defies a lawful order not to enter or remain, personally communicated to him by the owner of such premises or other authorized person. Penal Law §140.00(5). Since the premises in question is open to the public, the defendant entered under a claim of legal right unless a lawful order not to remain was communicated to him and he defied such a lawful order. *People v. Brown*, 25 N.Y.2d 374, 306 N.Y.S.2d 449, 254 N.E.2d 755 (1969). In determining the lawfulness of the order, one must necessarily examine the reason for the issuance of the initial order. **Did the defendant’s conduct . . . justify the issuance of an order excluding him from the premises?** From the testimony adduced at trial, it is clear that the defendant was seen by Officer Winslow soliciting rides. In fact, the officer overheard the defendant asking an elderly gentleman if he wanted a taxi. The Court is satisfied that this conduct is proscribed by the Port Authority Rules and Regulations and that the defendant was lawfully stopped for this activity and issued a warning. (See The Port Authority of New York and New Jersey Airport Rules and Regulations §220/0-10 and § 230/0-05).

**The lawfulness of the initial order given must also be determined by examining its scope.** The order given the defendant by the Port Authority Police was introduced into evidence and provided in part that the defendant was:

“ordered to leave the premises, including the terminal building-sidewalk and passenger pick-up area forthwith. You are *further ordered not to enter or remain at any time upon the premises*. If you fail to comply with this order *or if you re-enter the premises at any time*, including the terminal building, sidewalks, and passenger pickup areas, you will be arrested, charged with an offense of trespass and subject to penalties prescribed by law.” (Emphasis in original).

This order placed a blanket prohibition upon the defendant from ever returning to the airport. As indicated by defense counsel, such innocuous conduct as picking a family member up from an incoming flight or dropping someone off at the airport terminal would, by the terms of this order, subject the defendant to arrest. **This order was defective in that it prohibited the defendant from engaging in lawful activities.** The order should only prohibit the violation of federal, state and local laws or rules of the Port Authority of New York and New Jersey.

The scope of an order excluding an individual from a particular area must be reasonably related to the nature of the area involved. *People v. Nunez*, 106 Misc.2d 236, 431 N.Y.S.2d 650 (1980). An individual may be excluded from premises and a subsequent conviction for trespass may be had for a violation of this order. *People v. Licata*, 28 N.Y.2d 113, 320 N.Y.S.2d 53, 268 N.E.2d 787 (1971).

Privately-owned premises which provide public accommodation may exclude individuals provided the exclusion is not based upon a violation of a civil right such as race, color, creed or national origin. *Madden v. Queens County Jockey Club*, 296 N.Y. 249, 72 N.E.2d 697 (1947), cert. den., 332 U.S. 761, 68 S.Ct. 63, 92 L.Ed. 346 (1947). Accordingly, one may be convicted for mere presence upon the grounds of a department store after a prior order has been given excluding an individual from the premises. *Matter of Florette D.*, 58 Misc.2d 1093, 296 N.Y.S.2d 825 (1968). Likewise a conviction for criminal trespass will lie where an individual enters a racetrack after an order to stay out has been issued to him as his status as a licensee has been revoked. *People v. Licata, supra*. These decisions are based primarily upon the fact that the premises are private property. The status of the Port Authority Terminal, however, differs significantly from either a racetrack or a department store. It is a portal of entry into the United States for millions of people each year and its facilities contain numerous shops, restaurants, and concessions. *People v. Velasquez*, 77 Misc.2d 749, 354 N.Y.S.2d 975 (1974). **Where a facility is public in nature, an individual has a right to enter and remain in that building unless he engages in some unlawful activity.** Innocent entry upon the Port Authority premises cannot be prohibited as this is violative of an individual's right to travel freely. *Kent v. Dulles*, 357 U.S. 116, 78 S.Ct. 1113, 2 L.Ed.2d 1204 (1958); *Zemel v. Rusk*, 381 U.S. 1, 85 S.Ct. 1271, 14 L.Ed.2d 179 (1965); *United States v. Guest*, 383 U.S. 745, 86 S.Ct. 1170, 16 L.Ed.2d 239 (1966). **This right is part of the "liberty" of which a citizen cannot be deprived without due process of law. It has been described as being "as close to the heart of the individual as the choice of what he eats, or wears, or reads."** *Kent v. Dulles, supra*, 357 U.S. at 126, 78 S.Ct. at 1118. Since this right is so basic, it cannot be curtailed on an arbitrary basis, even though a prior warning may have been given. It follows then that an arrest at the airport may only be made upon an ascertainable standard, i.e. probable cause. Given the public nature of the terminal, an arrest may be made only upon an observation of some illegal activity and not simply for setting foot on the premises after a warning has been issued. The effect of the prior warning, then, will satisfy

the due process requirement of serving notice upon the defendant that **any further illegality** will subject him to arrest.

The warning given the defendant in this matter was defective in that it barred him absolutely and for all purposes from the airport facilities. It is the opinion of the Court that the warning should be modified to forbid an individual's entry upon the airport premises only for an illegal purpose. *People v. DeClemente*, at 110 Misc.2d 764-766. (Emphasis added).

The law in Ohio is similar. See *State v. Shelton*, 63 Ohio App. 3d 137, 578 N.E.2d 473 (Highland 1989). In *Shelton*, the Court held that, as a general rule, an individual has the right to enter and to be upon public areas of public property, and that right cannot be taken away simply because the public officials in charge of the facility are annoyed by the presence of the individual. *State v. Richardson*, No. C-980860 (1<sup>st</sup> Dist Ct. App., Hamilton, 8-20-1999). To establish criminal trespass, the state must prove lack of privilege. *State v. Newell*, 93 Ohio App. 3d 609, 639 N.E.2d 513 (Hamilton 1994). The state must also show that the individual was given actual notice that he was not permitted to enter the facility. *State v. Craft*, No. 97 CA 53 (4<sup>th</sup> Dist. Ct. App., Athens, 5-14-1998).

In the present case, the City's five-year ban of the Plaintiff from the Mentor Civic Ice Arena was even more constitutionally defective than the ban in *People v. DeClemente*, *supra*.

First, unlike the Port Authority of New York and New Jersey, the City of Mentor did not have any existing rules or policies that applied to the behavior of the Plaintiff after the hockey game in Garfield Heights on February 28, 2000. Hence, the only prohibitions that could have applied to Plaintiff on that date were found in the Ohio Revised Code and the ordinances of the City of Garfield Heights, Ohio<sup>7</sup>. Plaintiff is not charged with violating the provisions of any criminal statute or ordinance, and it was conceded by the Defendant that the Plaintiff's conduct on the date in question did not rise to the level of criminal menacing.

Second, the defendant in *DeClemente* was given a specific warning regarding the consequences he would face if he returned to the airport. In contrast, in the present case, the Plaintiff was never given any warning that an angry outburst in a locker room at another facility in

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It is worth noting in passing that even if the Plaintiff's conduct had violated provisions of the Ohio Revised Code or the ordinances of the City of Garfield Heights, the City of Mentor was without jurisdiction to prosecute or punish the Plaintiff for such conduct occurring in Garfield Heights.

another city in another county might result in his being banned from the Mentor Civic Ice Arena for five years.

This Court finds Plaintiff's behavior on February 28, 2000 to be boorish, immature, bullying, anti-social, insulting, belligerent, rude, loud, profane, pugnacious, disrespectful, and ill-tempered. The Plaintiff's behavior was certainly "inappropriate," especially in the presence of young children. It may even have violated the disorderly conduct provisions of the Ohio Revised Code. However, in the absence of criminal complaints by the people and jurisdictions involved, and in the absence of any effort by the City of Garfield Heights to prosecute the plaintiff, this Court must conclude that the plaintiff's conduct in Garfield Heights was not illegal.

Since the Plaintiff did not do anything illegal, and since he did not violate any applicable conduct policy or rule of the City of Mentor, the City can not punish him by depriving him of his constitutional right to enter a public building and watch his own children participate in a fee-based, municipal recreational program.

It is this Court's opinion that the laws of the State of Ohio are adequate to protect the rights of all parties involved in the City's recreational programs. For instance, if the Plaintiff engages in behavior at the Mentor Civic Ice Arena that violates the disorderly conduct provisions of the Ohio Revised Code, he may be arrested and charged accordingly.

If the City finds that the provisions of the Ohio Revised Code are inadequate, the City is free – within the bounds of the Constitution of the United States and the Constitution of the State of Ohio – to enact specific municipal ordinances to provide additional protection of the comfort, safety, health, morals, or welfare of all concerned. *State v. McLaughlin*, 4 Ohio App. 2d 327, 212 N.E.2d 635 (Cuyahoga 1965). In addition, the City's Director of the Department of Parks, Recreation & Public Lands is also free – again within constitutional limits – to create, promulgate, and enforce specific policies, rules, and procedures to govern the behavior of those who enter and remain in any of its indoor recreational facilities, or who participate in any of its programs. If an individual should violate any such municipal ordinance, or any such promulgated policy or rule, the City will then be free to issue an appropriate warning, or take such other action as may be appropriate and constitutional under the circumstances.

But where, as here, the City: (1) charges the Plaintiff with violating a zero-tolerance policy that does not exist, (2) solicits written statements from eyewitnesses but makes no effort to inform the accused of the contents of those statements, (3) invites the accused to testify against himself and

uses his written statements against him, (4) empowers its Director of Parks with seemingly unlimited power and authority to punish, (5) decides to punish the accused for “egregious” behavior but is unable or unwilling to define what constitutes “egregious” behavior, (6) selects a punishment that is more severe than that recommended by its own investigating staff member, and (7) selects a punishment that is simultaneously under-inclusive and over-inclusive of fulfilling the City’s stated purposes, the City has over-stepped its constitutional bounds.

With regard to municipal regulations that attempt to exercise the police power of the state, it is the law in Ohio that the means adopted must: (1) be suitable to the end in view, (2) be impartial in operation, (3) not be unduly oppressive upon individuals, (4) have a real and substantial relation to their purpose, and (5) not interfere with private rights beyond the necessities of the situation. 21 O.Jur.3d *Counties* §708; *Froelich v. City of Cleveland*, 99 Ohio St. 376, 124 N.E. 212 (1919). The City, through the imposition of the five-year ban, has failed to meet this standard.

Article I, Section 1, of the Ohio Constitution declares that, “All men ... have certain inalienable rights, among which are those of enjoying ... liberty, ... property, and seeking and obtaining happiness.” Before the government may deprive a person of such liberty or property, it must provide procedural due process consisting of notice and meaningful opportunity to be heard.

Accordingly, this Court concludes that the City of Mentor’s five-year ban was unreasonable, and that it unconstitutionally deprived Plaintiff of his liberty without due process of law.

**Due Process Requires Balancing:**

The Due Process Clause of the Fourteenth Amendment forbidding states to deprive individuals of life, liberty, or property without due process of law is a limit upon state power meant to prevent its abuse and prevent government oppression of the citizenry. *DeShaney v. Winnebago County Dept. of Social Services*, 489 U.S. 189, 109 S.Ct. 998, 103 L.Ed.2d 249 (1989).

Once it is determined that the plaintiff has been deprived of a protected property or liberty interest, the procedural due process question concerns what kind of notice and hearing is required to permit the deprivation of such an interest. This inquiry is addressed through the use of a cost-benefit analysis. *Mathews v. Eldridge*, 424 U.S. 319, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976). Usually, procedural due process requires a pre-deprivation hearing. *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 105 S.Ct. 1487, 84 L.Ed.2d 494 (1985); *Parratt v. Taylor*, 451 U.S. 527, 101 S.Ct. 1908, 68 L.Ed.2d 420 (1981).

The fundamental requirement of due process is the right to be heard “at a meaningful time and in a meaningful manner.” *Matthews v. Eldridge*, 424 U.S. 319, 333, 96 S.Ct. 893, 902, 47 N.E.2d 18 (1976). Generally, property-based, procedural due process violations can be shown in one of two ways: (1) by demonstrating that the plaintiff was deprived of property as a result of an established state procedure that violates due process rights, or (2) by proving that the defendant deprived the plaintiff of property pursuant to a “random and unauthorized act” and that available state remedies would not adequately compensate for the loss. *Macene v. MJW, Inc.*, 951 F.2d 700, 706 (6<sup>th</sup> Cir., 1991).

In the present case, it is manifest from the evidence that the established state procedure that was followed by Director Kraus violated the plaintiff’s due process rights and deprived the plaintiff of his property right to observe his children as they participated in the fee-based, municipal program of ice hockey. The City also unconstitutionally deprived the Plaintiff of his liberty interest of being free to enter the public areas of a public building. The procedure violated the procedural due process rights of the Plaintiff for the following reasons:

1. The City gave the Plaintiff no notice of the existence of a post-game policy against using profanity and taunting language;
2. The City gave the Plaintiff no notice of the possibility of being banned for using profanity and taunting language in the presence of children;
3. The City gave the Plaintiff no notice of the accusations made against him by those who responded to the City’s invitation for eyewitnesses to write letters;
4. The City gave the Plaintiff no meaningful notice of a hearing on the issue to be heard, including the potential consequences of a total five-year ban from a public building;
5. The City failed to provide the Plaintiff with a meaningful opportunity to be heard (question accusers, present testimony, be represented by counsel, plead for leniency);
6. The City’s choice of punishment was unreasonably harsh;
7. The City failed to apply a meaningful or rational standard relating the punishment to alleged behavior, which rendered the punitive process unconstitutionally vague on its face, and as applied to Plaintiff;
8. The City does not have the authority to “punish” a citizen for non-criminal conduct occurring outside of its jurisdiction;

9. The seriousness of the prohibition suggests that more formal procedures for this hearing should be established; and
10. The City's action in this case was arbitrary and capricious.

Generally, the police power of a state permits a municipality to pass laws and implement policies which have reference to the comfort, safety, health, morals, or welfare of society. *State v. McLaughlin*, 4 Ohio App. 2d 327, 212 N.E.2d 635 (Cuyahoga, 1965). The exercise of the police power must bear a real and substantial relationship to the public health, safety, morals, or general welfare and cannot be unreasonable or arbitrary. *Benjamin v. City of Columbus*, 167 Ohio St. 103, 146 N.E.2d 854, 4 O.O.2d 113 (1957); *State v. Gowdy*, 64 Ohio Misc.2d 38, 639 N.E.2d 878 (1994). Accordingly, Defendant has several legitimate interests to protect in regulating access to and conduct within the Mentor Civic Arena ice rink. Chief among these interests – as they relate to the facts of this case – is the City's interest in protecting the safety and well-being of the children who participate in skating programs operated by the City.

However, the actual threat presented by the conduct and speech of Mr. Kelley on February 28, 2000, was apparently minimal. If the safety of the children was truly threatened by the presence of Mr. Kelley, then the five-year ban would have included all away games as well. Similarly, if the City truly believed that the safety of the children was threatened by Mr. Kelley, it would not have waited for letters from eyewitnesses, but would have banned Mr. Kelley immediately. The evidence established that subsequent to February 28, 2000, and prior to the imposition of the five-year ban, Mr. Kelley freely attended other hockey games sponsored by the City. And, it is noted, at none of these games did Mr. Kelley engage in any verbal tirades. Similarly, the well-being of the children was apparently not seriously threatened by the events on February 28, 2000. None of the parents whose children were enrolled in the hockey program decided to withdraw their children, notwithstanding the fact that the City did not impose its ban immediately. Also, the City allowed Mr. Kelley to participate in a coaching capacity during its little league baseball program, even while the five-year ban was in effect. In light of the apparently slight threat that Mr. Kelley's behavior presented, the imposition of a five-year ban was severe. This Court notes that even minor high school students – facing a mere ten-day suspension – are entitled to more notice and opportunity to be heard than was provided to the Plaintiff in this case. *Goss v. Lopez*, 419 U.S. 565, 42 L.Ed.2d 725, 95 S.Ct. 729 (1975) (prior to imposing a ten-day suspension, due process requires notice of the

charges, an explanation of the evidence the school has against the student, and an opportunity for the student to present his side of the story).

This Court is also mindful of the stigmatizing effect that the City's punishment has had on the Plaintiff. The record contains testimony to the effect that this is the first time the City has ever formally banned a parent from its facility for a protracted period of time. The record also shows that there have been other incidents involving much more serious conduct by other individuals. One incident, in particular, struck this Court as being far more "egregious" than anything done by the Plaintiff in this case. Apparently, an adult male skating instructor was verbally asked to leave the Mentor Civic Ice Arena after engaging in what the City described as inappropriate physical touching with a minor female student. Notwithstanding the fact that these other incidents actually occurred at the Mentor Civic Ice Arena, the City has not chosen to formally investigate or ban any of the offending individuals. Without addressing the possible equal protection aspects of this disparate treatment of the Plaintiff, it is clear to this Court that the City has – through its imposition of a five-year ban on the Plaintiff – stigmatized the Plaintiff as having engaged in behavior far worse than any previous incident occurring at the Mentor Civic Ice Arena. Before the City may impose such a stigma or badge of disgrace, due process requires that the person be given meaningful notice and a meaningful opportunity to be heard. *State v. Constantineau*, 400 U.S. 433, 27 L.Ed.2d 515, 91 S.Ct. 507 (1971).

**Familial Right of Association - Substantive Due Process:**

In the present case, Plaintiff seeks to watch his children as they participate in a fee-based municipal program of ice hockey and figure skating in an indoor recreational facility that is owned and operated by the City of Mentor. Plaintiff claims that in depriving him of this opportunity, the City has violated his substantive due process rights.

The U.S. Supreme Court has consistently recognized the important interest of a parent in the companionship, care, custody, and management of his or her children. *Stanley v. Illinois*, 405 U.S. 645, 651, 92 S.Ct. 1208, 1212, 31 L.Ed.2d 551 (1972).

The familial right of association is properly based on the concept of liberty in the Fourteenth Amendment. *Griffin v. Strong*, 983 F.2d 1544 (10<sup>th</sup> Cir., 1993). It is a subset of the broader substantive due process right of freedom of intimate association, *Id.*, at 1547; *Shondel v. McDermott*, 775 F.2d 859, 865-866 (7<sup>th</sup> Cir., 1985), which "substantially overlaps" the right of privacy. *Fleisher v. City of Signal Hill*, 829 F.2d 1491, 1499 (9<sup>th</sup> Cir., 1987).

In classic fourteenth amendment liberty analysis, a determination that a party's constitutional rights have been violated requires "a balancing of liberty interests against the relevant state interests." *Youngberg v. Romeo*, 457 U.S. 307, 321, 102 S.Ct. 2452, 2461, 73 L.Ed.2d 28 (1982). This balancing of interests has been applied in cases involving intimate association rights. *Winston ex rel. Winston v. Children & Youth Services*, 948 F.2d 1380, 1391 (3d Cir., 1991), *cert denied*, \_\_\_ U.S. \_\_\_, 112 S.Ct. 2303, 119 L.Ed2d 225 (1992). Courts weigh these interests to determine whether the state's conduct in the particular case constituted an undue burden on the Plaintiff's associational rights. *Hodgson v. Minnesota*, 497 U.S. 417, 446, 110 S.Ct. 2926, 2943, 111 L.Ed.2d 344 (1990).

The right to associate with one's family is a very substantial right, *Morfin v. Albuquerque Pub. Sch.*, 906 F.2d 1434, 1439 (10<sup>th</sup> Cir., 1990), but it is not absolute. *Kraft v. Jacka*, 872 F.2d 862, 871 (9<sup>th</sup> Cir., 1989). Family relationships by their nature, involve deep attachments and commitments to the necessarily few other individuals with whom one shares not only a special community of thoughts, experiences, and beliefs, but also distinctly personal aspects of one's life. *Arnold v. Bd. of Educ.*, 880 F.2d 305, 312 (11<sup>th</sup> Cir., 1989). However, not every statement or act that results in an interference with the rights of intimate association is actionable. Rather, to rise to the level of a constitutional claim, the defendant must direct his or her statements or conduct at the intimate relationship with knowledge that the statements or conduct will adversely affect that relationship. *Griffin v. Strong*, 983 F.2d 1544 (10<sup>th</sup> Cir., 1993); *Trujillo v. Board of County Commissioners*, 768 F.2d 1186, 1190 (10<sup>th</sup> Cir., 1985). For instance, at least one federal Court of Appeals has held that a parent cannot maintain a claim for loss of familial association under 42 U.S.C. §1983 unless the government action in question is directly aimed at the relationship between a parent and *young* child. *Valdiviesco Ortiz v. Burgos*, 807 F.2d 6 (1<sup>st</sup> Cir., 1986) (stepfather and siblings did not have constitutionally protected liberty interest in companionship of *adult* son and brother, such as would permit them to recover from prison authorities under Section 1983 for death of *adult* son allegedly beaten to death by guards). In *Valdiviesco Ortiz*, the court distinguished an entire line of Supreme Court cases – in which the Court had recognized a substantive right in the parent-child relationship – on the basis that those cases involved the child-rearing relationship between a parent and a *young* child, and not the relationship between a parent and an adult child. Hence, the Supreme Court has protected the parent's substantive due process rights only when the

government directly acts to sever or otherwise affect his or her *legal* relationship with a young child. *Valdiviesco Ortiz v. Burgos*, 807 F.2d 6, 9 (1<sup>st</sup> Cir., 1986).

Substantive due process rights are created by the Constitution, not by state law.<sup>8</sup> *Mansfield Apartment Owners Assn. v. City of Mansfield*, 988 F.2d 1469, 1477 (6<sup>th</sup> Cir., 1993). Generally, for a Plaintiff to establish a violation of his substantive due process rights, he must do more than show that the government actor intentionally or recklessly caused injury by abusing or misusing government power. That is, the plaintiff must demonstrate a degree of outrageousness and a magnitude of potential or actual harm that is truly conscience shocking. *Uhlrig v. Harder*, 64 F.3d 567, 574 (10<sup>th</sup> Cir., 1995). However, in the Sixth Circuit, where physical abuse by government actors is not involved, the standard for determining whether a substantive due process right has been violated is whether the government actor's conduct constituted at least "gross negligence." *Simescu v. Emmet County Dept. of Social Services*, 942 F.2d 372, 375 (6<sup>th</sup> Cir., 1991). In *Simescu*, the Court defined gross negligence as occurring when a person intentionally does something unreasonable with disregard to a known risk or a risk so obvious that he must be assumed to have been aware of it, and of a magnitude such that it is highly probable that harm will follow. *Id.* But see, *Mertik v. Blalock*, 983 F.2d 1353 (6<sup>th</sup> Cir., 1993) (substantive due process claim denied because it was not conscience-shocking).

In the present case, although the City of Mentor certainly affected the relationship between the Plaintiff and his children by banning him from being able to attend their skating activities in the Mentor Civic Ice Arena for five years, that ban had no affect whatsoever on the *legal* relationship between Plaintiff and his children. Hence, Plaintiff's substantive due process rights were not violated by the City of Mentor.

**Equal Protection of the Laws:**

Plaintiff's complaint alleges only that his substantive and procedural due process rights were violated by Defendant City of Mentor. During the course of trial, Plaintiff advanced an equal protection argument which, over objection, the Court ruled it would consider.

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Although the Court believes that the freedom of travel is implicated here as a substantive due process right, the Court declines to so hold, as Plaintiff has not raised it and it is not necessary in light of the procedural due process violations.

Preliminarily, it is necessary to note that, independent of any substantive due process concerns, the City may not act in a manner so as to run afoul of protected constitutional rights; such as freedom of speech (*Kreimer v. Bureau of Police for Town of Morristown* (3<sup>rd</sup> Cir. 1992), 958 F.2d 1242); discrimination against protected classes (*Gilmore v. City of Montgomery* (1974), 417 U.S. 556); or the freedom to travel (*People v. DeClemente* (1981), 442 N.Y.S.2d 931).

The Plaintiff has not asserted a violation of these or any other enumerated constitutional rights and this Court finds no other such rights are implicated in this case. The Court then turns to Plaintiff's claim that the City has violated the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution and Article I, §2, of the Ohio Constitution. These sections prohibit the state from treating persons differently when those persons are, in all relevant respects, alike. *Nordlinger v. Hahn* (1992), 505 U.S. 1. It does not, however, prohibit all classifications. It requires that a classification rationally further a legitimate state interest. *Cleburne v. Cleburne Living Center, Inc.* (1985), 473 U.S. 432.

Plaintiff's case is not about classifications. He does not claim, nor is there any evidence, that the City's actions were based on race, gender, religious affiliation, nor any other of the recognized suspect classifications. Plaintiff claims that he was singled out, and that fact alone is the basis for his claim of an equal protection violation.

Plaintiff's claim is that of selective prosecution. Selective prosecution has been recognized as an affirmative defense in criminal prosecutions. The defense consists of proving that (1) others similarly situated have not generally been prosecuted for conduct of the type which forms the basis of the charge against the accused and, (2) that the government's discriminatory selection of the accused for prosecution has been invidious or in bad faith; in other words, based on such impermissible considerations as race, religion, or the desire to exercise constitutional rights. *State v. Flynt* (1980), 63 Ohio St.2d 132, 134, *writ dismissed*, 451 U.S. 619. *See, also, State v. Lawson* (1992), 64 Ohio St.3d 336. The mere showing that another person similarly situated was not prosecuted is insufficient to establish this defense. *State v. Freeman* (1985), 20 Ohio St.3d 55, 58.

It is questionable at best whether this doctrine applies in the context of this case. However, even if it did, Plaintiff has not established even a *prima facie* case of selective prosecution.

Plaintiff proffered four instances which he claims demonstrate the City acted selectively. The first such incident involved an alleged occurrence in Jamestown, New York, involving a person named Peggy Greenley (sp). This is all the evidence presented on this issue. There was no

testimony presented as to what, if anything, specifically took place in Jamestown and this Court is not in a position to draw conclusions from a silent record. Further, the testimony of all the City officials who were witnesses in this case was that they had no knowledge prior to being cross-examined by Plaintiff's counsel that anything happened in Jamestown involving Mrs. Greenley. Accordingly, this incident – if there was one – provides no support for Plaintiff's argument.

Secondly, Plaintiff asserted that an incident occurred at the Mentor Civic Ice Arena between two men named Alesci (sp) and Nicholson (sp). As with the Greenley situation, there is no evidence before this Court as to what, if anything, occurred between these two men and, further, the City officials who testified had no knowledge until cross-examined by Plaintiff's counsel of any incident involving these men. Again, the Court cannot draw any conclusions from this asserted incident.

Next, Plaintiff asserts the confrontation of December 3, 1999, between himself and Mr. Nicol demonstrates the City's purported disparate treatment of him. The testimony established that there was a verbal altercation between Plaintiff Kelley and Mr. Nicol in the lobby of the Civic Ice Arena. It occurred after Mr. Kelley was informed of his removal as the team's head coach. Each man accused the other of making a threat, which was essentially to take their dispute outside.

From the testimony, it is obvious that there are two different stories about what occurred between Mr. Kelley and Mr. Nicol. What is apparent is that the City did not take sides. The City did not opt to believe one man's word over that of the other and take action. Under this set of facts, it cannot be said that Mr. Nicol received preferential treatment. Mr. Nicol received the same treatment as Mr. Kelley – they both received the benefit of the doubt. Accordingly, Plaintiff's claim of unequal treatment lacks one critical element – actual disparate treatment.

Some evidence was introduced relative to an incident occurring at the Mentor Civic Ice Arena while this trial was pending. The Court has heard no evidence about what specifically transpired except for the accounts of a few witnesses who were not there and who cannot agree on what is even alleged to have happened. The Court places no weight on this incident. According to the testimony, an investigation is pending and being headed by the Mentor Public Schools as it was a school-sponsored event. It is purely speculative as to what action the City may or may not take in the future, and the Court draws no conclusions from this situation.

Finally, Plaintiff has argued that no one else has been ordered to have no contact with the Civic Ice Arena. Part of this argument related to the above-referenced incidents. The testimony of the City officials was that behavior such as that which Mr. Kelley demonstrated on February 28 has

not occurred before. Only once before did a person have to be ordered to have no contact with the Ice Arena and that was in response to inappropriate contact between himself and a minor child. The testimony established that the man was escorted from the Ice Arena by Mentor police officers and orally told not to come back. That occurrence is not analogous to that of Plaintiff Kelley, but it does undermine his assertion that he is alone in being ordered to have no contact with the Ice Arena in response to problem behavior.

There is absolutely no evidence the City had a discriminatory intent based on considerations such as race, religion, or the desire to exercise constitutional rights. The Court finds that Plaintiff has failed to establish any violation of his equal protection rights.

### **CONCLUSION**

For the foregoing reasons, this Court finds that the Defendant City of Mentor, in the exercise of a governmental function, and using an undefined and arbitrary standard called “egregiousness,” banned Plaintiff Robert Kelley, a citizen-taxpayer-parent for five years from entering the city-owned ice arena, a recreational indoor facility, where his minor children are enrolled in fee-based programs, and under circumstances where he had recognizable property and liberty interests. This was done as a punishment and penalty for Plaintiff’s conduct on February 28, 2000 in front of sixteen children, ages 6 to 8 years, in a locker room at a recreational ice facility in Garfield Heights after a youth hockey game, where Plaintiff lost his temper, swore, and challenged three adults to a future physical fight in another place, in the City of Mentor. The punishment was handed out, without Defendant having any rules of conduct or specified consequences for breaking the rules, without giving Plaintiff a meaningful notice of the contemplated punishment, and without giving him an opportunity to be heard in response to allegations against him or the contemplated punishment.

The Court finds that this action of the City of Mentor violates due process of law under the U.S. and Ohio Constitutions, is arbitrary and capricious, and the action of the City should be vacated, and the City permanently enjoined from enforcing its ban. It is, therefore, ordered, adjudged, and decreed that the City’s five-year ban be and is hereby vacated, that the City be and is permanently restrained and enjoined from enforcing its ban, and that the Plaintiff’s right to enter and remain at the Mentor Civic Ice Arena be and is hereby fully restored.

**IT IS SO ORDERED.**

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**JUDGE EUGENE A. LUCCI**

c: Mark A. Zicarelli, Esq.  
I. James Hackenberg, Esq. & Joseph Szeman, Esq.