Illinois Local Government Lawyers Association
27th Annual Conference
Naperville Campus, Northern Illinois University
February 17, 2020

SECTION 1983 AND ILLINOIS TORT IMMUNITY CASE LAW UPDATE 2019-2020

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UNITED STATES SUPREME COURT

SUPREME COURT CONTINUES TREND OF RECOGNIZING QUALIFIED IMMUNITY IN EXCESSIVE FORCE CASES

City of Escondido v. Emmons, 139 U.S. 500 (2019) (*per curiam)*

Police officers responded to 911 call about a domestic violence incident at victim's apartment and arrested the victim's husband. Two weeks later, the police received another domestic call this time from the victim's mother, who was not at the apartment but was on the phone with her daughter, who was at the apartment. The mother heard her daughter yelling and screaming for help, but the call then disconnected. The officers responded and learned that two children could be in the residence. The officers spoke with the victim through a window and tried to convince her to let them in to check on her welfare, but an unidentified man inside the home told the victim to back away. The man then exited the house and tried to brush past the officers, who quickly took him to the ground and cuffed him. The man turned out to be the victim's father and not the husband. The father sued the police under 42 U.S.C. § 1983 for excessive use of force. The Supreme Court reversed the denial of qualified immunity and held that the 9th Circuit applied the "clearly established" standard too broadly. The Court found that excessive force cases are very much dependent on the specific facts, and that qualified immunity should be afforded officers unless existing precedent squarely governs the specific facts at issue.

PROBABLE CAUSE BARS FIRST AMENDMENT RETALIATORY ARREST CLAIM

Nieves v. Bartlett, 139 S. Ct. 1715 (2019)

Plaintiff filed a Section 1983 lawsuit claiming that police officers violated his First Amendment rights by arresting him in retaliation for his protected speech. Plaintiff had yelled at the officers as they were speaking with others at a festival. He approached an officer in an aggressive manner while the officer was questioning a minor, stood between the officer and the minor, and yelled at the minor not to speak with the officer. The officer pushed him back, and a second officer arrested the plaintiff and forced him to the ground. After he was handcuffed, the officer said to the plaintiff "bet you wish you would have talked to me now." The Supreme Court reversed the Ninth Circuit and resolved a question left open the previous year in *Lozman v. City of Riviera Beach*, 138 U.S. 1945 (2018), and held that the existence of probable cause defeats a First Amendment retaliatory arrest claim. The Court cited the complexities of proving that the illicit motive was the "but for" cause of the arrest, because officers often consider a suspect's statements in making an arrest. The Court held therefore that the plaintiff must prove the absence of probable cause to prevail. The Court carved out a narrow exception where officers have probable cause to make arrests, but typically exercise their discretion not to do so. In that narrow circumstance, the plaintiff is required to present objective evidence that he was arrested when otherwise similarly situated individuals not engaged in the same protected speech had not been.

STATUTE OF LIMITATIONS FOR §1983 FABRICATED EVIDENCE CLAIM ACCRUES WHEN CRIMINAL PROCEEDING TERMINATES IN PLAINTIFF'S FAVOR

McDonough v. Smith, 139 S. Ct. 2149 (2019)

Former commissioner of county board of elections brought Section 1983 suit after he was acquitted for forging absentee ballots in local primary election. He claimed that the evidence was fabricated and thus his due process rights were violated. The district court dismissed based on statute of limitations, and the Second Circuit affirmed and held that the claim accrued earlier in time when the plaintiff knew that the prosecution was based on false evidence. The U.S. Supreme Court, however, reversed and held that the statute of limitations for a §1983 due process fabricated-evidence claim began to run when the criminal proceedings against him terminated in his favor—that is, when he was acquitted.

PROPERTY OWNER MAY BRING SECTION 1983 FIFTH AMENDMENT TAKINGS WITHOUT FIRST EXHAUSTING STATE LAW REMEDIES

Knick v. Twp. of Scott, Pennsylvania, 139 S. Ct. 2162 (2019)

A township passed an ordinance requiring that all cemeteries be kept open and accessible to the general public during daylight hours. Plaintiff owned rural property that included a small family graveyard. She was notified that she was violating the ordinance. She brought § 1983 action against township, alleging that ordinance authorizing officials to enter upon any property within the township to determine existence and location of cemetery constituted an unlawful taking without compensation in violation of the Fifth Amendment right. Overruling *Williamson County Regional Planning Comm'n v. Hamilton Bank of Johnson City*, 473 U. S. 172, the Supreme Court held that the plaintiff did not need to seek compensation under state law before bringing a federal taking claim under Section § 1983.

EIGHTH AMENDMENT'S EXCESSIVE FINES CLAUSE APPLIES TO STATES UNDER FOURTEENTH AMENDMENT'S DUE PROCESS CLAUSE

Timbs v. Indiana, 139 S. Ct. 682 (2019)

The State sought civil forfeiture of the criminal defendant's vehicle, charging that it had been used to transport heroin. The trial court denied the request because the value of vehicle was more than four times the maximum $10,000 monetary fine assessable against him for his drug conviction and therefore violated Eighth Amendment's Excessive Fines Clause. Reversing the Indiana Supreme Court, the U.S. Supreme Court held that the Clause is an incorporated protection applicable to the States under the Fourteenth Amendment's Due Process Clause.

SEVENTH CIRCUIT COURT OF APPEALS

COLOR OF LAW/PRIVATE CONDUCT

POLICE OFFICER WHO SUBMITTED COMPLAINT AS A PRIVATE CITIZEN THAT HE WAS A VICTIM OF A CRIME DID NOT ACT UNDER COLOR OF STATE LAW FOR PURPOSES OF SECTION 1983 CLAIM

Barnes v. City of Centralia, 943 F.3d 826 (7th Cir. 2019)

Plaintiff made verbal threats and yelled derogatory epithets at police officer and posted statements on social media that officer felt were threatening to him and his family. Officer submitted a criminal complaint as a private citizen, and plaintiff was arrested and prosecuted. The charges were later dropped by the prosecutor. Plaintiff sued under Section 1983 alleging a Fourth Amendment violation and a state law malicious prosecution claim. The Seventh Circuit affirmed summary judgment to the officer on the Section 1983 claim, because he did not act under color of law when he reported an alleged crime as a private citizen. The Court also rejected Plaintiff's *Monell* claim, because Plaintiff failed to present any evidence of inadequate training or supervision much less any evidence that any such practice was the "moving force" behind her arrest and criminal charges. Finally, the Court rejected the malicious claim because Plaintiff failed to show malice and that the charges were terminated in his favor. A mere *nolle prosequi* dismissal order is insufficient to show that the prosecution ended in a manner indicative of Plaintiff's innocence.

SECTION 1983 DOES NOT PERMIT LAWSUITS BASED ON PRIVATE CONDUCT

Spiegel v. McClintic, 916 F.3d 611, 619 (7th Cir.), cert. denied, 140 S. Ct. 51 (2019)

District Court did not err in granting motion by defendants-plaintiff's neighbor and Village to dismiss plaintiff's section 1983 action, alleging that defendants conspired to violate his First Amendment rights by neighbor filing false police reports complaining that plaintiff improperly photographed and filmed neighbor in and around shared condominium building and by police threatening plaintiff with arrest for disorderly conduct if he persisted in photographing and filming neighbor. Plaintiff could not bring section 1983 action against neighbor, since section 1983 does not permit lawsuits based on private conduct. Moreover, plaintiff failed to state viable claim that neighbor and Village acted in concerted effort to violate plaintiff's constitutional rights, since plaintiff did not allege that Village's police agreed to arrest plaintiff if directed to do so by neighbor. Also, plaintiff could not bring Monell claim against Village, since: (1) plaintiff did not allege that Village anticipated or intended that disorderly conduct ordinance would be enforced to chill lawful, expressive conduct like photography; and (2) plaintiff failed to plausibly allege existence of express policy by defendant to enforce disorderly conduct ordinance unconstitutionally.

SECTION 1983 – STATUTE OF LIMITATIONS

PLAINTIFF'S SECTION 1983 CLAIM AGAINST POLICE WHO ALLEGEDLY FRAMED HIM FOR DOUBLE MURDER WAS TIMELY BECAUSE IT ACCRUED AT TIME HE WAS PARDONED AND WAS BROUGHT WITHIN TWO YEAR LIMITATIONS PERIOD

Savory v. Cannon, 947 F.3d 409 (7th Cir. 2020)

Plaintiff spent 30 years in prison for double murder and was pardoned by Illinois Governor 8 years later. He sued Peoria police within two years of the pardon claiming that he was framed (suppression of exculpatory evidence and fabrication of false evidence). District court dismissed his suit as untimely, but Seventh Circuit, sitting *en banc*, reversed, citing *Heck v. Humphrey*, 512 U.S. 477 (1994) (accrual of section 1983 suit for damages is deferred until conviction or sentence is invalidated), and *McDonough v. Smith*, 139 S. Ct. 2149 (2019) (section 1983 suit accrued when suspect was acquitted). Court rejected defendants' argument that the claim accrued when Plaintiff was released from custody 8 years earlier. Plaintiff's suit did not accrue until he was pardoned, because until that moment his conviction remained intact and he had no cause of action under Section 1983 pursuant to the *Heck* bar.

FIRST AMENDMENT AND DUE PROCESS CLAIMS ACCRUED, FOR LIMITATIONS PURPOSES, ON THE DATE THE ORDINANCE WAS ENACTED

Paramount Media Grp., Inc. v. Vill. of Bellwood, 929 F.3d 914 (7th Cir. 2019)

The District court did not err in granting defendant-Village's motion for summary judgment in plaintiff's action, alleging that Village's ordinance that banned issuance of new permits to build new billboards violated its First Amendment, equal protection and due process rights, where plaintiff had leased land with intention to build new billboard. Plaintiff lost its lease during pendency of case, and thus its request for injunctive relief from sign ban became moot. Also, plaintiff's request for money relief arising out of sign ban was time-barred, where applicable limitations period was two years, and plaintiff waited four years from enactment of instant ordinance to file instant lawsuit. Also, plaintiff could not establish viable equal protection action, even though Village accepted competitor's bid to lease property that could have new billboard erected, since plaintiff was not similarly-situated to competitor, where competitor offered lump sum payment of $800,000 for said lease, while plaintiff offered $1.1 million in installments payments over 40-year period.

HOMELESS SEX OFFENDER FILED § 1983 ACTION ALLEGING THAT CITY VIOLATED HIS DUE PROCESS RIGHTS

Regains v. City of Chicago, 918 F.3d 529 (7th Cir. 2019)

District Court erred in dismissing as untimely plaintiff-former pretrial detainee's section 1983 action alleging that defendant-City violated his due process rights, where: (1) plaintiff was initially arrested on charge of failing to report change of address as required for sex offenders under Ill. Sex Offender Registration Act (SORA); and (2) plaintiff remained incarcerated for 17

months before Illinois trial court found him not guilty on said charge. Ct. of Appeals construed as malicious prosecution claim plaintiff's allegation that defendant's police officers used improper process when steering homeless sex offenders to shelters that caused plaintiff to violate SORA's sex offender registration requirements. As such, plaintiff's complaint was timely, since it was filed within two years of his acquittal on SORA charge. On remand, plaintiff will need to show that high-ranking members of police force knew of differing practices of registering sex offenders and allowed them to continue. Moreover, basis for any constitutional violation is 4th Amendment, rather than due process rights under 14th Amendment.

4TH AMENDMENT – USE OF FORCE

OFFICERS HAD PROBABLE CAUSE TO BELIEVE SUSPECT POSED THREAT OF SERIOUS PHYSICAL HARM TO OTHERS JUSTIFYING USE OF DEADLY FORCE TO PREVENT ESCAPE

Ybarra v. City of Chicago, 946 F.3d 975 (7th Cir. 2020)

Family of police shooting victim sued under Section 1983 for excessive force and wrongful death. Plain clothes officers in unmarked police vehicle saw rear passenger of suspect's vehicle fire gunshots at occupants of another vehicle. Suspect drove away at high speed and officers followed in unmarked vehicle. Suspect collided with another vehicle and came to stop in parking lot. As officer exited his vehicle, suspect reversed car and struck officer's vehicle. Suspect tried driving away and officers fired shots killing the suspect driver. Only 16 seconds elapsed between time officer entered parking lot and fatal shooting. Seventh Circuit affirmed summary judgment in favor of officers, finding that they used objectively reasonable force to prevent dangerous suspect's escape. Outrageously, reckless driving that posed grave public safety risk, alone, is enough to justify deadly force, citing *Plumhoff v. Rickard,* 572 U.S. 765 (2014), and *Scott v. Edinburg,* 346 F.3d 752 (7th Cir. 2003). In addition to the suspect's reckless driving, the officers had reason to believe there was a gun in the car and that all suspects in the vehicle may be armed and dangerous, citing *Horton v. Pobjecky*, 883 F.3d 941 (7th Cir. 2018). Under these circumstances, the use of force to prevent escape was justified.

OFFICER WAS ENTITLED TO QUALIFIED IMMUNITY FOR TAKEDOWN OF HANDCUFFED SUSPECT RESULTING IN BROKEN LEG BECAUSE THE FORCE USED WAS REASONABLY NECESSARY TO REGAIN CONTROL OF THE SUSPECT

Johnson v. Rogers, 944 F.3d 966 (7th Cir. 2019)

Plaintiff, who was drunk, was arrested and handcuffed and sat down on the ground. He stood up and began to walk away, yelling threats and racial taunts. Officer Rogers pulled him backward by his cuffed hands and Plaintiff fell to the ground and suffered a broken leg. He claimed the officer kicked him, while the officer stated he used a clean leg sweep. Video evidence was grainy and did conclusively resolve the dispute. Nonetheless, the Seventh Circuit affirmed summary judgment for the officers based on qualified immunity. First, there was no clearly established case law forbidding a clean takedown to end a suspect's mild resistance. The fact that the plaintiff suffered a serious injury does not lead to liability so long as the force used was reasonable. Second, even though there was a dispute as to how plaintiff was taken to the ground,

it was undisputed that plaintiff was not under control. Whether the officer kicked him or performed a leg sweep, either way it was an attempt to regain control. That effort, even if poorly executed, did not lead to liability.

POLICE ENTITLED TO QUALIFIED IMMUNITY FROM SUIT OVER SUSPECT WHO DIED IN HANDCUFFS FOLLOWING ARREST

Day v. Wooten, 947 F.3d 453 (7th Cir. 2020)

Terrell Day, who weighed 312 pounds, ran from a store after being accused of shoplifting and collapsed on the ground. He was handcuffed by officers and laid on the ground. He complained he could not breath. Paramedics told the police he did not need medical treatment. Another ambulance was called after Day was found unresponsive on the pavement. Paramedics performed CPR but to no avail. Day was pronounced dead at the scene. An autopsy report revealed he had a heart condition. His parents filed a Section 1983 suit claiming that the officers violated Day's Fourth Amendment rights. The Seventh Circuit reversed the denial of summary judgment based on qualified immunity, finding that there was no clearly established law that put the officers on notice that handcuffing Day under these factual circumstances violated his constitutional rights. While the use of excessively tight cuffs may violate the Fourth Amendment, there were no facts indicating that the cuffs were any tighter than usual, Day did not complain of tight cuffs, and he did not complain that the cuffs restricted his breathing.

DISTRICT COURT PROPERLY INSTRUCTED JURY IN SECTION 1983 EXCESSIVE FORCE TRIAL THAT PLAINTIFF COULD NOT DISPUTE PRIOR FACTUAL FINDING THAT FORMED BASIS FOR UNDERLYING CRIMINAL CONVICTION

Green v. Junious, 937 F.3d 1009 (7th Cir. 2019)

Plaintiff Dallas Green ran from the police. According to one officer, Green dropped and then picked up a handgun and later raised the gun in the officer's direction. The officer shot him five times and wounded him in the hand and chest. Green denied that he had a gun. However, he was on probation for a prior felony drug conviction. His probation was revoked based on the court's finding that he possessed the handgun in the current case. Green sued for money damages under 42 U.S.C. § 1983 alleging that the police used excessive force. The case went to trial and the jury returned a verdict for the defense. Green argued on appeal that the district court improperly instructed the jury that the state court's gun-possession finding was conclusive on the factual point of whether he had a gun. The 7th Circuit affirmed, holding that the instruction was sound under *Gilbert v. Cook*, 512 F.3d 899 (7th Cir. 2008), and other precedent holding that a Section 1983 plaintiff is bound by a prior finding of fact in an underlying criminal case.

4TH AMENDMENT – ILLEGAL SEARCH AND SEIZURE CLAIMS

POLICE ENTITLED TO QUALIFIED IMMUNITY FOR ENTRY INTO AIRBNB HOST HOME AT THE REQUEST OF BUILDING INSPECTORS WHO HAD OBTAINED CONSENT TO ENTER.

Wonsey v. City of Chicago, 940 F.3d 394 (7th Cir. 2019)

Chicago police entered an Airbnb hose home based on consent by a guest who reported a theft. The officers observed residents scattered throughout the first floor who appeared to have been sleeping in the living room areas. Five days later, city building code inspectors returned with the police and the owner let them into the house where they observed code violations and evacuated the house with the assistance of the police. The owner filed a Section 1983 suit alleging that her Fourth Amendment rights were violated. The Seventh Circuit affirmed summary judgment for the defendants. The owner failed to rebut the existence of valid consent for the entry into the home. Also, the police entered at the request of the code inspectors. Under these facts, a reasonable officer could have believed the entry was lawful. Thus, the officers were entitled to qualified immunity from suit.

OFFICERS WERE ENTITLED TO QUALIFIED IMMUNITY BECAUSE THE STOP DID NOT VIOLATE CLEARLY ESTABLISHED LAW

Torry v. City of Chicago, 932 F.3d 579 (7th Cir. 2019)

District Court did not err in granting defendants-police officials' motion for summary judgment on qualified immunity grounds in plaintiffs' section 1983 action alleging that defendant-police officer lacked reasonable suspicion to conduct Terry stop, after officer had stopped plaintiffs riding in grey car during their investigation of nearby shooting. Officer had received dispatch that shooting involved three black males riding in grey car, and officer told plaintiffs that reason for stop was fact that shooting had occurred earlier that day. As such, defendants were entitled to qualified immunity where instant stop did not clearly violate established law. Fact that officer could not remember instant stop, that make of plaintiffs' car did not match make of car in dispatch, or that shooting occurred hours before stop did not require different result. Also, defendants could use police report to support instant qualified immunity claim, because statements contained in report were not offered for truth of matters asserted, but rather were offered to establish defendants' mind set at time of instant stop.

MOTORIST COULD NOT RECOVER DAMAGES, IN SUBSEQUENT § 1983 FOR OFFICERS' VIOLATION OF HIS FOURTH AMENDMENT RIGHTS, FOR HIS POST-ARREST INCARCERATION, BUT WAS LIMITED TO DAMAGES ASSOCIATED WITH HIS BRIEF ILLEGAL DETENTION

Martin v. Marinez, 934 F.3d 594 (7th Cir. 2019)

The District Court did not err in granting defendants-police officials' motion for partial summary judgment, in section 1983 action alleging that defendants unlawfully stopped his car in traffic stop and subjected him to false arrest and unlawful search. While plaintiff could receive damages

for unlawful stop, since trial court had previously granted defendant's motion to suppress evidence based on said stop, plaintiff could not receive damages for false arrest and for unlawful search, where plaintiff's arrest (and subsequent incarceration) was supported by probable cause when defendants found gun and drugs in defendant's car. Moreover, given jury's verdict for defendants as to plaintiff's false arrest and unlawful search claims, plaintiff could only receive damages for his brief seizure occasioned by stop of his car prior to officers seeking production of plaintiff's driver's license, and that jury accounted for such brief seizure by awarding plaintiff one dollar in nominal damages on his unlawful stop claim.

14TH AMENDMENT DUE PROCESS – WRONGFUL PROSECUTION/CONVICTION

PLAINTIFF WHO SPENT 13 YEARS IN PRISON FOR A TRIPLE MURDER CONVICTION GETS ANOTHER DAY IN COURT

Camm v. Faith, 937 F.3d 1096 (7th Cir. 2019)

He was tried twice but acquitted the third time. After being released, he filed a Section 1983 suit alleging that several investigators, two prosecutors, and a forensic assistant willfully or recklessly made false statements in three probable-cause affidavits that led to his arrest and continued custody while he awaited trial and retrial. He also claimed evidence suppression and that the defendants induced the real killer to give a false account implicating him in the murders. The judge entered summary judgment for the defendants, and the Appellate Court reversed in part. The Court found that the Plaintiff presented enough evidence to proceed to trial on the Fourth Amendment claim relating to the first probable-cause affidavit. The Court also found that a trial was warranted on the aspects of the Brady claim: whether some of the defendants suppressed evidence that the forensic assistant lacked qualifications and their failure to follow through on a promise to run a DNA profile through a law enforcement database to check for a match.

THREE MEN SPENT MORE THAN A DECADE IN PRISON BEFORE AN ILLINOIS COURT ORDERED A NEW TRIAL BASED ON THE DELAYED DISCLOSURE OF BRADY MATERIAL

Anderson v. City of Rockford, 932 F.3d 494 (7th Cir. 2019)

Former inmates whose murder convictions were vacated based in part on a Brady violation brought § 1983 action against city and several police officers, alleging defendants violated their constitutional rights by withholding exculpatory information and fabricating evidence during their original prosecutions. Plaintiff presented sufficient evidence of Brady violations committed by defendants to withstand instant summary judgment, where: (1) defendants failed to disclose impeachment evidence indicating that key govt. witness, who had identified defendants as shooters, was actually unaware who had shot victim; (2) state's case against defendants had no physical or forensic evidence linking plaintiff to instant murder; and (3) one defendant generated false statement for witness to hide fact that said witness had identified another individual as culprit in murder. Court similarly noted as Brady violation, fact that one defendant-police officer delayed tender (until eve of trial) of 40 hours of jail telephone calls from key witness, which effectively precluded defense counsel from discovering that said witness had claimed that he had

been threatened and coached as to what to say to police. District Court did not err, though, in granting portion of summary judgment motion with respect to plaintiff's claim that defendants had fabricated evidence by coercing witness to generate false statements, where plaintiff failed to presented evidence that defendants knew that said statements, although coerced, were false.

AFTER NINETEEN YEARS BEHIND BARS, PLAINTIFF SUES THE CITY AND ITS OFFICERS ACCUSING THEM OF CONSTITUTIONAL VIOLATIONS AND STATE TORTS

Coleman v. City of Peoria, Illinois, 925 F.3d 336 (7th Cir. 2019)

The District court did not err in granting defendants-police officials' motion for summary judgment in section 1983 action, alleging that defendants deprived plaintiff of fair trial by eliciting false testimony through coercive interrogation techniques and suggestive identification procedures and by suppressing impeachment evidence that led to his wrongful conviction that was eventually overturned. Although one witness reluctantly identified plaintiff as one of several culprits, plaintiff failed to show that defendants knew that said identification was false, even though coercive techniques were used, since coercive testimony is not necessarily fabricated. Moreover, one victim's identifications of plaintiff as culprit were sufficiently reliable for defendants to rely on them, where victim stated that she observed plaintiff's face for three minutes during incident that led to charged offenses and had been previously acquainted with plaintiff for number of years. Also, plaintiff failed to establish that withheld line-up photo that showed discrepancy in wristbands worn by line-up participants was material or played any role in witness's identification of plaintiff as culprit, where witness did not notice wristbands, but based identification on her recognition of defendant's face.

DISTRICT COURT DID NOT ERR IN GRANTING DEFENDANT-CITY'S MOTION FOR SUMMARY JUDGMENT IN PLAINTIFF'S SECTION 1983 ACTION

Ruiz-Cortez v. City of Chicago, 931 F.3d 592 (7th Cir. 2019)

After his conviction for possession of cocaine was vacated, plaintiff filed § 1983 action alleging that city and police officer violated his due process by withholding evidence of officer’s crimes and his conspiracy with informant, and by fabricating evidence against him. While plaintiff argued that City could be liable for actions taken by police officer because it had practice of using paid criminal informants, and because it had failed to supervise officer's use of said informant that played role in officer's criminal convictions, fact that City used informants did not constitute violation of any federal right. Also, plaintiff failed to show that City engaged in any deliberate indifference to fact that City's use of criminal informants would lead to officer's violation of federal law. However, while jury found in favor of police officer, plaintiff was entitled to new trial, where: (1) District Court erred in failing to instruct jury to disregard officer's claim on witness stand that he would "love to testify" but was invoking his 5th Amendment right due to pending nature of his own criminal charges; and (2) District Court failed to properly instruct jury that only time witness can invoke 5th Amendment is when witness has reasonable fear that truthful answers may incriminate him.

STATE AND LOCAL OFFICIALS WHO PURSUED PLAINTIFF FOR A 1993 MURDER FAILED TO COMPLY WITH *BRADY* OBLIGATIONS

Goudy v. Cummings, 922 F.3d 834 (7th Cir. 2019)

The District Court erred in granting defendants-police officials' motion for summary judgment in plaintiff's section 1983 action alleging that defendants denied him due process/committed Brady violation by withholding videotape showing lineup in which several witnesses identified different individual as shooter, as well as interview notes showing that other suspect in instant murder had switched his story about his whereabouts at time of shooting. Plaintiff had previously obtained writ of habeas corpus, after court found that Brady violation had occurred, and state decided not to re-try him. Moreover, record contained evidence of possible due process/Brady violation with respect to suppression of videotape, where trier-of fact could conclude that defendant had intentionally withheld videotape from prosecutors after holding said videotape for 14 months and otherwise concealing said videotape from prosecutors. Also, District Court erred in finding, with respect to suppression of interview notes, that: (1) deposition of third-party indicating that he was aware that other suspect had changed his story relieved defendants of any liability for withholding of notes; and (2) there was no Brady violation by instant defendants since prosecution was aware of information found in notes. The Court. further found that withholding of such evidence was material, and that defendants were not entitled to qualified immunity.

14TH AMENDMENT DUE PROCESS – STATE CREATED DANGER CLAIMS

LIABILITY FOR INJURY FROM A STATE-CREATED DANGER IS AN EXCEPTION TO THE GENERAL RULE THAT THE DUE PROCESS CLAUSE CONFERS NO AFFIRMATIVE RIGHT TO GOVERNMENTAL AID

Estate of Her v. Hoeppner, 939 F.3d 872 (7th Cir. 2019)

A six-year-old was found unresponsive on the bottom of a man-made public swimming pond. She never regained consciousness and died a few days later. Her family filed a Section 1983 suit and alleged a deprivation of life without due process in violation of rights secured by the Fourteenth Amendment. The family's theory was that: (1) the City's swimming pond is a state-created danger and (2) the defendants acted or failed to act in a way that increased the danger by creating and operating a dangerously murky pond and failing to follow established lifeguarding rules. The Seventh Circuit affirmed summary judgment for the city, finding that the general rule is that liability for injury from a state-created danger is an exception to the general rule that the Due Process Clause confers no affirmative right to governmental aid pursuant to *DeShaney v. Winnebago Cty. Dep't of Soc. Servs.*, 489 U.S. 189 (1989). This exception is construed narrowly. The Seventh Circuit held that no reasonable jury could find that the defendants created a danger just by operating a public swimming pond or that they did anything to increase the danger to the girl before she drowned. Nor was their conduct so egregious and culpable that it "shocks the conscience." At most, this was a negligence case.

CORRECTIONAL OFFICER ENTITLED TO QUALIFIED IMMUNITY FOR HARM CAUSED BY PRISONER WHO ESCAPED FROM CUSTODY AT HOSPITAL

Weiland v. Loomis, 938 F.3d 917 (7th Cir. 2019)

A county correctional officer was sued by hospital patients who claimed they suffered from PTSD as a result of an inmate who escaped the officer's custody while the officer was guarding the inmate following a surgery at the hospital. The officer had unshackled the inmate so he could use the bathroom. When the inmate emerged from the bathroom, he jumped the officer, took his gun, ran down the hall and eventually took a nurse hostage and sexually assaulted her. The two plaintiff hospital patients were on the same floor as the incident and either heard the commotion or saw the police response. The Seventh Circuit reversed the denial of the officer's motion to dismiss, finding that the government does not owe a duty to protect the public from harm caused by third parties unless the government itself created the danger. The case law relating to this so-called "state created danger" exception to non-liability was not clearly established and therefore the correctional officer would not have known that his conduct violated the plaintiffs' substantive due process rights.

14TH AMENDMENT EQUAL PROTECTION – "CLASS OF ONE" CLAIMS

RIGHT TO EQUAL PROTECTION UNDER "CLASS OF ONE" THEORY WAS CLEARLY ESTABLISHED UNDER SUPREME COURT AND SEVENTH CIRCUIT PRECEDENT WARRANTING DENIAL OF QUALIFIED IMMUNITY DEFENSE

Frederickson v. Landeros, 943 F.3d 1054 (7th Cir. 2019)

Plaintiff, who was homeless, filed Section 1983 suit claiming that a Joliet police detective violated his Equal Protection rights under a "class of one" theory by preventing him from updating his Illinois sexual offender registration out of personal dislike. Specifically, the detective refused to transfer a LEADS file to adjacent Bolingbrook where plaintiff had obtained employment and would be living. The district court denied qualified immunity to the detective, and the Seventh Circuit affirmed, finding that the Supreme Court's decision in *Village of Willowbrook v. Olech*, 528 U.S 562 (2000) clearly established that a successful "class of one" claim existed where the plaintiff was intentionally treated differently from others similarly situated and there was no rational basis for that different treatment. Indeed, it was clearly established in the Seventh Circuit that a "class of one" plaintiff had a right to police protection uncorrupted by personal animus, citing *Hilton v. City of Wheeling*, 209 F.3d 1005 (7th Cir. 2000).

14TH AMENDMENT – PROCEDURAL DUE PROCESS

PLAINTIFFS WHO CHALLENGED RED LIGHT CAMERA PROGRAM FAILED TO STATE A CLAIM EITHER FOR VIOLATION OF DUE PROCESS

Knutson v. Vill. of Lakemoor, 932 F.3d 572 (7th Cir. 2019)

Recipients of traffic violation notices brought putative class action against village, challenging village's red-light camera program, asserting a § 1983 claim for a due process violation and a

state-law claim for unjust enrichment, and seeking declaratory relief. Defendant provided plaintiff with adequate due process, where permitted defenses in code allowed plaintiffs to refute or alleviate their culpability, while plaintiffs' desired notice defense had no bearing on plaintiffs' culpability. The court rejected plaintiffs' claim that notices were void ab initio due to failure to cite specific code violation, since any requirement for specific reference to code violation was merely directory, as opposed to mandatory. Moreover, plaintiffs had ample information to generate defense, where notices had multiple pictures of plaintiffs' registered vehicle, along with time, date and location of violation. Affirmed.

SECTION 1983 EMPLOYMENT CLAIMS

POLICE INVESTIGATOR WHO SPOKE OUT PURSUANT TO HIS OFFICIAL DUTIES AND NOT AS A PRIVATE CITIZEN DID NOT HAVE FIRST AMENDMENT PROTECTION

Lett v. City of Chicago, 946 F.3d 398 (7th Cir. 2020)

Investigator employed in Chicago's Civilian Office of Police Accountability (COPA) refused to follow supervisor's directive to write in report that officers had planted gun on victim. He was allegedly disciplined as a result. He sued under Section 1983 claiming First Amendment retaliation. Seventh Circuit affirmed dismissal of the suit, because his alleged speech was not constitutionally protected. Citing *Garcetti v. Caballos*, 547 U.S. 410 (2006), and *Davis v. City of Chicago,* 889 F.3d 842 (7th Cir. 2018) (barring COPA employee's claim based on similar facts), Court held that the plaintiff's alleged speech owed its existence to his official duties and thus he was not speaking as a private citizen. The fact that he had good reason to refuse to amend his report does not grant him First Amendment protection. The fact that the report *may* be used in litigation did not alter the Court's conclusion.

EMPLOYER'S DISMISSAL FOR PUBLISHING CONTROVERSIAL BOOK VIOLATED FIRST AMENDMENT RIGHTS

Harnishfeger v. United States, 943 F.3d 1105 (7th Cir. 2019)

Federal employee sued the government claiming that she was removed from her position with the Indiana National Guard, in retaliation for publishing a book about her time as a phone-sex operator, an expose of sorts on the horrible nature of that industry. The book was published online and, even though it was published pseudonymously, she posted a link to the book on her Facebook page under a private setting. She subsequently friended her boss on Facebook, and the boss later found the post to the publication and discovered that plaintiff was the author. This led to her termination. The Seventh Circuit reversed summary judgment to the government and found that the plaintiff's speech was protected under the First Amendment. The book was published before she was employed by the government, it was written for a general audience, and was never deliberately linked to her employment. Furthermore, the government failed to carry its burden under the *Pickering* balancing test, as there was no evidence that the book reflected anything about the National Guard, positive or negative. Therefore, the Guard's purported interests did not outweigh the protected nature of the speech.

SCHOOL PRINCIPAL'S RESIGNATION DID NOT VIOLATE FIRST AMENDMENT OR DUE PROCESS RIGHTS.

Ulrey v. Reichhart, 941 F.3d 255 (7th Cir. 2019)

Assistant principal filed Section 1983 suit claiming that suffered retaliation for speaking out about a school discipline issue, and that her due process rights were violated when she was forced to resign. The Seventh Circuit affirmed summary judgment for the school district. Citing *Garcetti v. Caballos*, 547 U.S. 410 (2006), the court held that the plaintiff's speech was not protected because she spoke out as an employee and not a private citizen. The plaintiff's job description was to coordinate and administer student discipline policies and, therefore, her alleged speech fell within the scope of her job. The Court also rejected the due process claim. She had no due process protections unless her resignation was involuntary, i.e., constructive discharge or coerced resignation. The former required evidence of a hostile work environment which the evidence did not support. The latter required proof of a Hobson's choice: quit or suffer some severe consequence, such as criminal charges or physical harm. The most that the plaintiff proved was that the school superintendent threatened to fire her because she did not have the proper licensing to work as an assistant principal. The mere possibility of a termination without more did not amount to an involuntary resignation.

EIGHT-YEAR DELAY IN EMPLOYMENT TERMINATION PROCEEDINGS DID NOT VIOLATE SUBSTANTIVE DUE PROCESS

Campos v. Cook Cty., 932 F.3d 972 (7th Cir. 2019)

Plaintiff, a County correctional officer was twice terminated, and his termination was twice vacated by the circuit court upon judicial review. After eight years of termination proceedings and suspension without pay, the officer brought a federal section 1983 lawsuit claiming that the termination proceedings violated his substantive due process rights. The district court dismissed the complaint, and Seventh Circuit affirmed. The court began by reaffirming the limited scope of substantive due process and the reluctancy of the courts to expand the concept due to the "scarce and open-ended" nature of this "unchartered area." A plaintiff must allege a violation of a fundamental right or liberty and the violation must be arbitrary.

Unfortunately for the county correctional officer in this case, the appellate court held that employment rights are not fundamental under the due process clause of the Fourteenth Amendment; therefore, to state a wrongful termination claim for substantive due process, the employee must allege a violation of some other constitutional right and that his state law remedies are inadequate to address the arbitrary deprivation of a state created property interest in the employment. The officer no doubt had a state created property interest in his employment (he could only be fired for cause). However, he failed to allege an independent constitutional claim to support his substantive due process theory. Further, despite the protracted nature of the termination proceedings, the officer did avail himself of state law remedies and, in fact, convinced the circuit court twice to vacate his termination. The eight-year delay is not so arbitrary or outrageous so as to violate substantive due process.

BANNING SOMEONE FROM COUNTY BUILDING DUE TO CONCERN THAT PERSON POSES PUBLIC SAFETY RISK WAS REASONABLE AND NOT RETALIATORY OF FIRST AMENDMENT ASSEMBLY AND SPEECH RIGHTS

Lavite v. Dunston, 932 F.3d 1020 (7th Cir. 2019).

Bradley Lavite is a combat veteran who worked as superintendent of the Madison County's Veteran's Assistance Commission but was not a county employee. He was banned from the administration building after a PTSD episode in which he threatened a police officer and then kicked out the windows of a squad car. He filed a Section 1983 suit and claimed he was banned because he had refused the county administrator's request to divert some of the Commission's budget to pay for county budget shortfalls. The Seventh Circuit affirmed summary judgment for the county. The county administration building was an office building and not a traditional public forum open and therefore the county could impose regulations on public assembly and speech if reasonable and viewpoint neutral. Banning Lavite from entering the building because he posed a safety risk was reasonable. The Court also held that it was not retaliatory because he objected to the proposed spending request in 2013 but was not banned from the building until 2015. Given this gap in time, it was speculative to conclude a causal connection. The Court also rejected Lavite's due process claim that he was banned in violation of county policy. Local procedural rules do not give rise to constitutionally protected property or liberty interests.

FIRST AMENDMENT DOES NOT GOVERN HOW EMPLOYERS RESPOND TO SPEECH THAT IS PART OF PUBLIC EMPLOYEE'S JOB

Wozniak v. Adesida, 932 F.3d 1008 (7th Cir. 2019)

Dist. Court did not err in granting defendants-University officials' motion for summary judgment in plaintiff-tenured professor's action alleging that defendants violated his First Amendment rights by terminating him for making public certain details surrounding students' decision not to designate him for teaching award. The Court of Appeals held that plaintiff was fired for intentionally causing harm to two students and for refusing to follow Dean's instruction to remove material identifying identities of students, and under *Garcetti*, 547 U.S. 410, First Amendment does not cover how employers respond to speech that is part of public employee's job. Also, plaintiff's First Amendment claim failed because instant speech that concerned personal job-related matter is outside scope of First Amendment, even if that speech is not among plaintiff's job duties. The Court also rejected plaintiff's procedural due process claim, where plaintiff received formal notice of revocation proceeding and had two hearings during which plaintiff was represented by counsel and had opportunity to call witnesses and present argument. Plaintiff's claim that defendant did not follow all of defendant's rules for tenure-revocation proceeding did not require different result, since instant constitutional due process claim is not way to enforce state law claim.

COURT RECOGNIZES POLICE CHIEF'S DUE PROCESS TERMINATION CLAIM

Bradley v. Vill. of Univ. Park, Illinois, 929 F.3d 875 (7th Cir. 2019)

Plaintiff-former police chiefs brought a section 1983 action alleging that defendants violated

plaintiff's due process rights by terminating him as police chief without due process of law. Parties agreed that plaintiff had protected property interest in his continued employment, and that although there was ample opportunity for hearing prior to his termination, plaintiff received no notice of charges or hearing prior to his termination. As such, plaintiff stated valid due process claim under section 1983, where Village acted through Mayor and other high-ranking officials with policy-making authority to effectuate plaintiff's termination. Ct. rejected Dist. Ct.'s determination that plaintiff was not entitled to section 1983 relief, even though District Court found that: (1) instant termination was "random unauthorized state" act that affected plaintiff's federal and state due process rights; and (2) plaintiff had available state-court post-deprivation procedure to remedy his loss. It further held that: (1) public employee's decision to violate both state and federal procedural requirements was insufficient grounds to excuse instant federal due process liability; and (2) in cases alleging due process violations by municipal policymakers, there is no need to inquire into whether municipal employee's actions were "random and unauthorized." District Court erred in granting defendant-Village and Village Mayor's motion for summary judgment. Reversed and remanded.

OFFICER WHO WAS SUBJECTED TO UNFAIR PROMOTIONAL TEST HAD NO CONSTITUTIONALLY PROTECTED PROPERTY INTEREST TO STATE PROMOTIONAL PROCEDURES NOR A VALID "CLASS OF ONE" EQUAL PROTECTION CLAIM

Word v. City of Chicago, 946 F.3d 391 (7th Cir. 2020)

Police officer claimed that high ranking police administrative officials gave their wives or paramours early access to sergeant's promotional exam resulting in officer not getting promotion. Seventh Circuit dismissed the officer's Section 1983 procedural due process and equal protection claims. Officer had alleged that the defendants' actions violated Illinois Municipal Code's prohibition against willfully furnishing special or secretive information for purpose of improving or injuring prospects or chances of any person taking promotional exam. Seventh Circuit held that the statute did not create a property interest protected under the 14th Amendment. There is no constitutionally protected property interest to state promotional procedures. His "class of one" equal protection claim fared no better, as it was barred by *Engquist v. Or. Dep't of Agric.*, 553 U.S. 591 (2008) (class of one equal protection theory has no place in public employment context). Court also rejected gender discrimination claim. The fact that he was allegedly discriminated against because he was not romantically involved with administrators does not suffice is not gender discrimination.

SECTION 1983 – SIGN ORDINANCES

ORDINANCE LIMITING SIZE OF SIGNS ON BUILDINGS WAS PERMISSIBLE TIME, PLACE, AND MANNER RESTRICTION UNDER THE FIRST AMENDMENT

Leibundguth Storage & Van Serv., Inc. v. Vill. of Downers Grove, Illinois, 939 F.3d 859 (7th Cir. 2019)

A building owner brought action alleging that village's sign ordinance violated First Amendment. Dist. Court did not err in finding that defendant's ordinance, which limited size and

location of signs located in Village, did not violate plaintiff-business's First Amendment rights as applied to plaintiff. Limitations of size and presentation of signs are standard time, place and manner rules that are acceptable for First Amendment purposes. While instant ordinance contains content discrimination in form of exclusions of certain signs from coverage under ordinance, said discrimination did not aggrieve plaintiff, since plaintiff's issues with ordinance only concerned size limitations, as opposed to any of ordinance's content distinctions. Moreover, although ordinance's size limitation for plaintiff's sign was less than what it preferred to use, instant 159-square foot limitation was still large enough for plaintiff to use for his business. Also, ordinance left open other means for plaintiff to communicate through advertising in print and on internet.

BUSINESS OWNER WHO SOUGHT TO BUILD A DIGITAL BILLBOARD ON PROPERTY IT LEASED BROUGHT § 1983 ACTION CHALLENGING THE CONSTITUTIONALITY OF CITY SIGN ORDINANCE

GEFT Outdoors, LLC v. City of Westfield, 922 F.3d 357 (7th Cir. 2019)

District Court did not err in granting defendant-City's motion to preliminarily enjoin plaintiff from installing billboard without complying with ordinance that required plaintiff to obtain sign permit prior to constructing billboard. While plaintiff argued that ordinance's ban on plaintiff constructing instant "off premises" sign or instant pole sign constituted violation of 1st Amendment, District Court could properly enter instant restraining order until District Court could rule on plaintiff's 1st Amendment claims. Moreover, District Court properly rejected plaintiff's motion for entry of preliminary injunction on its procedural due process claim based on its contention that stop work order drafted by defendant failed to include certain information, since such claim had no likelihood of success, where: (1) plaintiff had no constitutional due process right to defendant's compliance with state mandated procedures; and (2) plaintiff had post-deprivation remedy under Indiana Tort Claims Act to address its alternative procedural due process claim that defendant's issuance of arrest threats improperly served to stop plaintiff from constructing billboard. District Court also observed that defendant's threats of arrest were too tepid to support substantive due process claim.

UNION BROUGHT ACTION AGAINST TOWN ALLEGING TOWN'S SIGN ORDINANCE, VIOLATED THE UNION'S FREE SPEECH RIGHTS UNDER THE FIRST AMENDMENT

Constr. & Gen. Laborers' Union No. 330 v. Town of Grand Chute, 915 F.3d 1120 (7th Cir. 2019)

Dist. Ct. did not err in granting defendant's motion for summary judgment in plaintiff-union's section 1983 action alleging that defendant's ordinance, which banned all signs on public right-of-way, violated plaintiff's First Amendment rights, where plaintiff attempted to place six-foot, "Scabby the Rat" inflatable balloon in public right-of-way at construction site to protest fact that masonry company in defendant's town was not paying area standard wages and benefits. While plaintiff argued that said ordinance allowed inspector to selectively enforce instant ban so as to render any enforcement as discrimination based on content of speech, Dist. Ct. could properly reject said argument, where inspector testified that he reviewed for compliance all signs that were brought to his attention and enforced ban whenever he saw violation. However, Dist. Ct.

improperly acted on plaintiff's claim that 2015 ordinance, which replaced 2014 ordinance, also violated First Amendment, since plaintiff's contention regarding protests it might have conducted under 2015 ordinance was too speculative to create concrete dispute.

ANTI-ABORTION SIDEWALK COUNSELORS AND ADVOCACY GROUPS FILED § 1983 ACTION ALLEGING THAT CITY'S ABORTION CLINIC BUFFER-ZONE ORDINANCE VIOLATED THEIR FIRST AMENDMENT AND DUE PROCESS RIGHTS

Price v. City of Chicago, 915 F.3d 1107 (7th Cir. 2019)

District Court did not err in dismissing plaintiff's section 1983 action, alleging that defendant's "bubble zone" ordinance that precluded plaintiffs from approaching within eight feet of person in 50-foot vicinity of abortion clinic, if plaintiffs' purpose was to engage in counseling, education, leafleting, hand billing or abortion protesting, facially violated their First Amendment rights. Dismissal was proper, where Supreme Court, in *Hill*, 530 S.Ct. 703, upheld nearly identical Colorado law based upon similar challenge. Under *Hill*, a floating bubble zone like this one is not considered a content-based restriction on speech and thus is not subject to strict judicial scrutiny. Court further observed that while Supreme Court, in *McCullen*, 134 S.Ct. 2518, and *Reed*, 135 S.Ct. 2218, subsequently rendered opinions that substantially undermined basis for *Hill* Court's ruling, it was nevertheless bound by *Hill* Court's ruling where Supreme Court had not expressly overruled *Hill*.

FIFTH AMENDMENT – RIGHT TO COUNSEL

APPEALS WERE DISMISSED FOR LACK OF JURIDICATION BECAUSE THEY PRESENTED FACTUAL CHALLENGES THAT WERE OUTSIDE OF THE COURT'S JURISDICTION OVER AN APPEAL OF AN ORDER DENYING QUALIFIED IMMUNITY ON SUMMARY JUDGMENT

Koh v. Ustich, 933 F.3d 836 (7th Cir. 2019)

The Court of Appeals dismissed appeals of defendants-police officials and interpreter, who challenged District Court's denial of their motions for summary judgment on qualified immunity grounds in plaintiff's section 1983 action, alleging that defendants violated his 5th Amendment rights by coercing him to say that he killed son in self-defense. Dist. Ct found that plaintiff, who spoke Korean with limited understanding of English, did not understand Miranda warnings that were given in English, and record contained dispute as to whether interpreter accurately informed plaintiff of his Miranda rights. Moreover, police officials' claim on appeal, that there was no prior case law establishing that their conduct violated 5th Amendment, was impermissible factual challenge on Dist. Ct's findings regarding plaintiff's confusion during two interrogations, as well as impact of plaintiff's lack of medications and sleep on statements made by plaintiff during said interrogations, that could not be challenged in instant interlocutory appeal. Similarly, defendant interpreter also participated in interrogation of plaintiff and could not challenge in instant appeal District Court's factual determinations regarding his role in alleged coerced interrogations.

SETTLEMENT RELEASE

SETTLEMENT RELEASE IN PRIOR SECTION 1983 SUIT BARRED SUBSEQUENT SUIT ARISING FROM SAME INCIDENT

Crosby v. City of Chicago, 2020 WL 562279

Plaintiff settled section 1983 use of force suit in 2015 against police officer and released officer and city (which was not named as a defendant in the suit) from "all claims he had, has, or may have in the future ... arising either directly or indirectly out of the incident." Plaintiff filed a new suit in 2018, alleging that the city and its officers covered up the first officer's misconduct which led to a wrongful pretrial detention, conviction and imprisonment. The Seventh Circuit affirmed dismissal and rejected plaintiff's argument that the language of the release narrowed its scope to just the claim for excessive force. The agreement was designed to resolve all claims related to the incident, not only the ones that plaintiff asserted in his first suit. The Court also rejected plaintiff's argument that the coverup was a distinct incident and involved different damages. Citing *Cannon v. Burge*, 752 F.3d 1079 (7th Cir. 2014), which involved a similar release language, the court held that the plaintiff's claims regarding the coverup plainly arose from the incident that was being covered up as well as its attendant damages, as both were foreseeable claims and well within the release contemplated by the parties.

ILLINOIS TORT IMMUNITY CASE LAW

STATUTE OF LIMITATIONS

DELAY IN THE PLAINTIFFS' FILING OF THEIR ORIGINAL COMPLAINTS AGAINST THE CHARTER SCHOOL ALSO BARRED THE DANCE ACADEMY FROM LATER SEEKING CONTRIBUTION FROM THE CHARTER SCHOOL

Danzig v. Univ. of Chicago Charter Sch. Corp., 2019 IL App (1st) 182187

Patrons injured when bench they were seated on collapsed during school play filed action against dance academy and public charter school, alleging claims for negligence and willful and wanton misconduct. Charter school moved to dismiss on statute of limitations grounds and dance academy filed counterclaim for contribution against charter school, which charter school also moved to dismiss. The Circuit Court granted charter school's motions. Dance academy appealed. The Appellate Court held that patrons' failure to file tort claims against charter school within one year of incident precluded dance academy's counterclaims for contribution against charter school.

DUTY OF CARE

LAW WHICH ABOLISHED COMMON-LAW PUBLIC-DUTY RULE APPLIED RETROACTIVELY TO LANDOWNERS' ACTION

Tzakis v. Berger Excavating Contractors, Inc., 2019 IL App (1st) 170859, appeal allowed, (Ill. 2019)

This case presents question as to whether trial court properly dismissed plaintiffs-homeowners' action against defendants-municipal entities, alleging that defendants breached variety of duties to plaintiffs with respect to construction/maintenance of drainage system that resulted in plaintiffs experiencing storm water flooding on their property. Trial court dismissed action after finding that public duty rule applied, because defendants owed only duty to community at large, as opposed to individual plaintiffs, and that although public duty rule had been abolished in 2016 under *Coleman*, 2016 IL 117952, Coleman could not be applied retroactively. Appellate Court, in reversing trial court, found that new law set forth in *Coleman* could be applied retroactively so as to allow plaintiffs' action to proceed. In their petition for leave to appeal, defendants argue that *Coleman* could not be applied retroactively, and that Appellate Court erred in finding that flooding that could have been caused by nearby private entity could constitute unconstitutional taking.

THERE WAS NO LEGAL DUTY OWED BY THE CTA TO DECEDENT WHO WAS ELECTROCUTED ON TRACKS

Anderson v. Chicago Transit Auth., 2019 IL App (1st) 181564

Plaintiff filed a wrongful death and Survival Act suit against CTA, alleging that CTA failed to properly monitor activities of her brother on the platform and assess his physical/medical condition while he lingered there for about 30 minutes without ever boarding a train. Video shows that decedent then drank from a bottle or can, then dropped it, shoved it to the platform edge, then tripped or stepped on it and toppled over the track and landed facedown on the 3rd rail and was electrocuted. Court properly granted CTA's Section 2-619 motion to dismiss, as Plaintiff failed to establish a legal duty. Decedent was not a passenger, and the CTA lacked knowledge of his condition. Even if a medical condition and injury like that present here were reasonably foreseeable, the magnitude of guarding against the injury was too great, as the CTA was not duty-bound to intervene, assess, diagnose, or obtain medical assistance for decedent's condition, as that fell within the ambit of first responders and it was unduly burdensome for normal CTA employees.

DISCRETIONARY IMMUNITY

MUNICIPAL DEFENDANT DID NOT MEET ITS BURDEN OF ESTABLISHING DISCRETIONARY IMMUNITY UNDER SECTIONS 2-109 AND 2-201 OF THE TORT IMMUNITY ACT

Andrews v. Metro. Water Reclamation Dist. of Greater Chicago, 2019 IL 124283

Employee of a contractor hired by MWRD was severely injured when he fell when transitioning between two ladders while descending to the bottom of a 29-foot effluent chamber. Illinois Supreme Court affirmed judgment of Appellate Court which had reversed summary judgment of trial court which had granted MWRD discretionary immunity pursuant to Section 2-201 of Tort Immunity Act. The only issue was whether senior civil engineer for MWRD exercised discretion and made a policy determination in connection with the plaintiff's injuries. Citing the Court's 2018 decision in *Monson v. City of Danville,* the Court held that the MWRD presented

no evidence documenting that the engineer exercised any discretion, judgment or skill in making any decision about ladders or access platforms. Nor was there any evidence that the engineer balanced any competing interests in deciding what solution would best serve the district. In fact, he was totally unaware of the ladder setup that caused the fall and injuries. Thus, no conscious decision was made, and section 2-201 discretionary immunity was not available to shield the district from liability.

CITY WAS NOT ENTITLED TO IMMUNITY FOR METHODS USED TO REPLACE WATER MAINS AND SERVICE LINES

Berry v. City of Chicago, 2019 IL App (1st) 180871, appeal allowed, (Ill. 2019)

This case presents question as to whether trial court properly dismissed plaintiffs' class action, alleging negligence and inverse condemnation arising out of defendant's replacement of water main and/or water meters serving plaintiff's homes, where plaintiffs claimed that defendant's actions caused release of high levels of lead into their water supply. The Appellate Court, in reversing trial court with respect to both counts, found that plaintiffs had sufficiently alleged present injury through drinking of contaminated water, even though plaintiff. had not alleged that they had developed any physical ailments at time of lawsuit. Also, defendant could not properly invoke any immunity under section 2-201 of Tort Immunity Act, where defendant failed to assert facts demonstrating that its actions in repairing water main were discretionary. Plaintiffs could proceed on inverse condemnation action, where they asserted that they incurred damages in excess of what general public experienced.

INTENDED AND PERMITTED USER DEFENSE

PLAINTIFF WAS NOT INTENDED AND PERMITTED USER OF STREET AFTER STEPPING INTO POTHOLE NEAR PARKED CAR

Ramirez v. City of Chicago, 2019 IL App (1st) 180841

Pedestrian and husband brought action against city based on claims for negligence and loss of consortium when she tripped and fell into a 5-foot-long pothole when she was returning to her parked car. A portion of her car extended into area with a yellow-painted line indicating a no parking zone due to nearby fire hydrant. Court properly granted summary judgment for City, as Plaintiff was not an intended and permitted user of the street area where she fell. Here, because Ramirez's negligence claim fails as a matter of law, her husband could not recover for loss of consortium.

ACTUAL OR CONSTRUCTIVE NOTICE DEFENSE

VILLAGE DID NOT HAVE ACTUAL OR CONSTRUCTIVE NOTICE OF PIPELINE CONDITION

Enbridge Energy, Ltd. v. Village of Romeoville, et al., 2020 IL App 3d 180060

Pipeline company sued village and private brick manufacturing company for damages stemming from the rupture of a 34' crude oil pipeline located under a public street. The cause of the pipeline rupture was linked to a corroding water service line which sprung a leak and impinged a hole into the oil pipeline. The water service line ran from brick manufacturing company's building and under the oil pipeline (within 5") and connected to a public water main in the street. The trial court granted summary judgment to the village based on tort immunity defenses. The case went to trial against the brick manufacturing company on a breach of contract claim (the rupture occurred within an easement granted by the brick manufacturing company to the oil company), and the jury returned a $45 million verdict in favor of the oil company. The Appellate Court reversed the verdict against the brick manufacturing company on evidentiary grounds.

The Court also affirmed the summary judgment order in favor of the village. The village lacked actual or constructive notice of the specific defective condition of the water service line that caused the rupture of the oil pipeline and, therefore, was not liable pursuant to section 3-102(a) of the Tort Immunity Act. Even though there had been prior leaks on the same line, there was insufficient evidence of the location or cause of the prior leaks. Nor was there evidence that the village knew that the water line was corroding let alone within inches of the oil pipeline. Indeed, the cause of the oil line rupture was so unique and rare that none of the oil company's experts had ever encountered it before this incident, and one expert even testified that there was no way the village would have known about the water leak or its impingement on the oil pipeline.

GENUINE ISSUES OF MATERIAL FACT EXISTED AS TO WHETHER VILLAGE HAD NOTICE OF DEFECTIVE SIDEWALK THAT CAUSED PLAINTIFF'S INJURIES

Cook v. Vill. of Oak Park, 2019 IL App (1st) 190010

Plaintiff was injured when she tripped and fell on an uneven seam in a sidewalk owned by the Village. Evidence was presented from which a jury could conclude that the defect existed for a sufficient length of time such that the Village should have been aware of its existence. A witness (owner of home near the defect) testified that the deviation existed for at least 2 years and that Village personnel were in front of his house near sidewalk more than 10 times. Questions of fact exist as to size of sidewalk defect and whether Village should have known of its existence. There was evidence of aggravating circumstances: poor lighting conditions and heavy foot traffic around the sidewalk where Plaintiff fell. Court erred in granting summary judgment for Village on de minimus doctrine.

PARK DISTRICT DID NOT HAVE ACTUAL OR CONSTRUCTIVE NOTICE OF AN UNSAFE CONDITION AND IT DID NOT ENGAGE IN WILLFUL OR WANTON CONDUCT

Murphy v. Springfield Park Dist., 2019 IL App (4th) 180662

Plaintiff filed suit alleging that Park District willfully and wantonly permitted a dangerous condition to exist on a bike path that caused serious injury to Plaintiff. While riding on bike path, Plaintiff struck a round, metal collar which was in the middle of the path and which was designed to hold a steel bollard which had been removed. Plaintiff admitted that it would be speculation to say that Park District employees removed the bollard. At most, Park District's

conduct regarding the bollards would be negligent, which is insufficient to support willful and wanton standard. Nothing indicates that bollard was exceptionally dangerous in place or if it was missing. Park District was aware that bollards on rare occasions had been removed in the past, but it was not aware that this bollard was removed or that removal of any bollard had ever caused injury. Court properly granted summary judgment for Defendants, as no reasonable jury could find that Park District acted in a willful and wanton manner.

POLICE IMMUNITY FOR ENFORCING/EXECUTING THE LAW

POLICE OFFICER AND CITY WERE IMMUNIZED UNDER DOMESTIC VIOLENCE ACT AND TORT IMMUNITY ACT

Romito v. City of Chicago, 2019 IL App (1st) 181152

Plaintiff filed suit for injuries she sustained after rear ending a double-parked, marked police vehicle, alleging negligence. Officers had just completed domestic violence call and were in police vehicle completing their report and intended to return inside and provide a copy of report to victim. Under Domestic Violence Act, officers had not finished their assignment as to domestic violence call, and thus were still engaged in a course of conduct that was enforcing or executing a law and officers and City were immunized under Tort Immunity Act.

WILLFUL AND WANTON CLAIMS

BOARD OF EDUCATION VOLUNTARILY UNDERTOOK DUTY OF PROTECTING BASKETBALL GAME ATTENDEES BY ASSURING PARENTS OF INCREASED SAFETY MEASURES

Wright-Young v. Chicago State Univ., 2019 IL App (1st) 181073

Administrator of estate of minor who was fatally shot outside a high school basketball game brought wrongful death and survival action against city board of education and chief of police for university that hosted game. Trial court granted board's motion to dismiss in part, striking claims based on allegations of failure to provide adequate police protection services pursuant to Tort Immunity Act, and subsequently denied board's motion for summary judgment. Following jury trial, the Circuit Court, having denied board's directed verdict motion, entered judgment on jury's findings that board, but not chief of police, was liable and engaged in willful and wanton conduct, and awarded estate $3,500,000 in damages. After denial of its posttrial motion, board appealed. The judgment was affirmed.

THERE WAS NO WILLFUL AND WANTON CONDUCT ON THE PART OF THE CITY'S EMPLOYEE WHO WRECKED AMBULANCE ON WAY TO HOSPITAL

Hicks v. City of O'Fallon, 2019 IL App (5th) 180397

On November 11, 2015, an ambulance, driven by a paramedic employed by the City of O'Fallon, was involved in a single vehicle accident. Two minors were passengers in the ambulance and sustained injuries. The trial court granted summary judgment for the City, and the Appellate

Court affirmed. The Court first found that under Section 5-106(a) of the Tort Immunity Act, the City and the ambulance driver were immune from liability of the operation of the ambulance except if his conduct was willful and wanton. The Court then found that a reasonable jury could not conclude that there was willful and wanton conduct. Although there was evidence that the driver may have been going over 75 mph (speed limit was 65 mph), speed is just one factor in assessing willful and wanton conduct. While the speed may have violated departmental rules, this alone did not constitute evidence of willful and wanton conduct. Finally, to prove willful and wanton conduct based on the reckless disregard for the safety of others, the plaintiff has to demonstrate that the defendant had notice that would alert a reasonable person that a substantial danger was involved but failed to take reasonable precautions under the circumstances. There was no such evidence in this record.

INJURED CHEERLEADER BROUGHT A COMPLAINT ALLEGING SCHOOL DISTRICTS WILLFUL AND WANTON CONDUCT CAUSED HER INJURIES

Biancorosso by Biancorosso v. Troy Cmty. Consol. Sch. Dist. No. 30C, 2019 IL App (3d) 180613

A sixth-grade student was injured at cheerleading practice and sued the School District for willful and wanton conduct. The Appellate Court affirmed summary judgment for the District. Samantha's claims of inadequate safety precautions, supervision, and proper equipment were belied by the record. The District used cheer mats for cheerleading practice, and the mats were inspected by the coaches prior to practice and on a weekly basis by the athletic director. The District had not received any complaints regarding the mats. Samantha did not present any facts that the mats were in disrepair or not positioned properly at practice. The District took sufficient safety precautions to protect Samantha from injury and the fact that she was injured despite its efforts does not equate to a finding of willful and wanton conduct. The evidence also demonstrated that there was sufficient supervision during the practice. Staff worked with Samantha until she was comfortable with the stunt. Samantha did not feel she needed additional spotters and felt ready to perform the stunt. Spotters were used, and the cheer coach remained in the general area where Samantha's group was practicing. The facts are not in dispute that the District employed adequate supervision. Samantha did not offer any evidence that the District was aware of impending danger regarding the cheerleading stunts. She did not present any instances of prior injuries to other cheerleaders. There were no complaints regarding the condition or use of the mats during practice.

PARENTS OF STUDENT BROUGHT ACTION AGAINST SCHOOL BOARD, TEACHER, AND SCHOOL BUS AIDE, ALLEGING WILLFUL AND WANTON ACTS IN RECKLESS DISREGARD FOR STUDENT'S SAFETY AND WELFARE

Reyes v. Bd. of Educ. of City of Chicago, 2019 IL App (1st) 180593

Parents and plenary guardians of a disabled female student sued after student was sexually assaulted, while on a special needs school bus, by a minor male student. Plaintiffs alleged that male student was not a person with disabilities but rode the bus with his brother, allegedly under the sibling transportation policy. The Circuit Court granted board's motion to dismiss with prejudice, pursuant to the Local Governmental and Governmental Employees Tort Immunity Act (the Act). Parents appealed. Sections 2-205 and 2-103 of Tort Immunity Act apply to bar

Plaintiffs' claim that bus driver and bus aide failed to enforce the Abused and Neglected Child Reporting Act, but do not apply to the Board's failure to enforce the 3 policies (sibling transportation policy, guidelines for principals, and sexual harassment policy), as they are not laws under the Act. Sections 4-102 and 2-201 of the Act do not bar Plaintiffs' claims. Affirmed in part, reversed in part, and remanded.

EVIDENCE WAS SUFFICIENT TO SUPPORT FINDING THAT DEPUTY'S HIGH-SPEED CHASE AMOUNTED TO WILLFUL AND WANTON CONDUCT

Dayton v. Pledge, 2019 IL App (3d) 170698, reh'g denied (May 15, 2019)

Plaintiff filed wrongful death and negligence complaint against deputy and sheriff's department seeking damages related to a high-speed pursuit, which resulted in death of passenger and bodily injury to driver, when deputy's squad car struck their vehicle. Jury verdict for Plaintiffs, but court granted Defendants' motion for judgment n.o.v. and a new trial. Evidence was sufficient to create issue of fact as to whether deputy's conduct was willful and wanton such that deputy was liable for his actions as employee of sheriff's department. Deputy had radioed that he was driving at 100 mph. Based on witness testimony and department's pursuit policy, jury had a basis for concluding that crash was of the type that a reasonable person would foresee as a likely result of a high-speed pursuit through an intersection, and thus proximate cause element was met. Jury could have reasonably determined that driver's failure to seek and follow advice of her doctor contributed to her emotional pain and suffering, and thus assessed a percentage of fault to her for her own claim but not to passenger's claim.

IMMUNITY FOR INJURIES CAUSED BY ESCAPING PRISONER

CITY AND POLICE OFFICERS WERE IMMUNE FROM LIABILITY WHERE DRIVER WAS AN ESCAPING PRISONER WHEN HE CAUSED A TRAFFIC ACCIDENT

Townsend v. Anderson, 2019 IL App (1st) 180771, appeal denied, 135 N.E.3d 578 (Ill. 2019)

Plaintiff was injured when vehicle in which he was a passenger was struck by another vehicle driven by a man who had fled the scene of a traffic stop effectuated by several city police officers. Court properly granted summary judgment for Defendants, as Section 4-106(b) of Tort Immunity Act immunizes public entities and their employees from liability for injuries inflicted by escaped or escaping prisoners. Driver of other vehicle was a passenger who maneuvered into the driver's seat when officers' attention was diverted, evaded officer's attempts to grab at him, and drove away at a high rate of speed. The fact that he had not been handcuffed or formally arrested prior to felling scene does not preclude a finding that he was in custody within the meaning of Section 4-106(b) of Tort Immunity Act.

EMS IMMUNITIES

DEFENDANTS WERE NOT IMMUNE FROM LIABILITY FOR ANY NEGLIGENT ACT OR OMISSION BY AMBULANCE DRIVER UNDER EMS ACT

Hernandez v. Lifeline Ambulance, LLC, 2019 IL App (1st) 180696, appeal allowed (Ill. 2019)

Driver brought negligence action against ambulance company and employee of company after ambulance being driven by employee allegedly struck the driver's vehicle, resulting in injuries to the driver. The Circuit Court, Cook County, granted defendant's motion to dismiss under an immunity provision of the Emergency Medical Services Systems Act (EMS Act). Plaintiff appealed. This case presents question as to whether trial court properly dismissed plaintiff's claims against defendants-ambulance owner and driver even though instant ambulance was in transit to pick up patient for non-emergency medical transport. Appellate Court, in reversing trial court, found that defendants were not entitled to said immunity, where: (1) there was no patient being transported at time of accident; and (2) Act did not provide immunity while in route to pick up patient.

INDEMNIFICATION

Elston v. Kane County, 2020 WL 428940

Off duty deputy sheriff used excessive force on rowdy teenager at kids' soccer game. Officer pled guilty to battery (ordinance violation). Teenager sued deputy in federal court under section 1983 and obtained default judgment for $110,000. He also sued county for indemnification under section 9-102 of the Tort Immunity Act, claiming that the county owed the judgment because the deputy was acting within scope of his employment. Demeter was not acting substantially within the time and space limits authorized by his employment. Seventh Circuit affirmed judgment for county, finding that the deputy was not on duty during his altercation; he was spending his day off with his family, watching his child's soccer game; he was not in uniform when he attacked the teenager; he was dressed in a t-shirt and shorts; and, the assault took place in DuPage County, while deputy was authorized as a sheriff's deputy only in Kane County. Thus, Demeter was neither on the clock nor within his jurisdiction when he attacked Elston. Likewise, no reasonable jury could find the the deputy's conduct was caused by a purpose to serve the Sheriff's Office.