INTERNATIONAL MUNICIPAL LAWYERS ASSOCIATION



XII: Legal "Viruses" Sweeping the Nation

Work Session: _____

Hot Button Topics in Civil Rights Liability

Title: _____

by

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I. FIRST AMENDMENT

A. Employment

Garcetti v. Cebalos, 126 S. Ct. 1951 (2006). Prosecutor's report that affidavit supporting search warrant contained misrepresentations was not protected speech, because report was part of prosecutor's official duties.

Communication Workers of America v. Ecktor County Hospital, 392 F.3d 733 (5th Cir. 2004). County employees wearing pro-union pin was protected under First Amendment.

Lathom v. Office of Attorney General, 395 F.3d 26 (6th Cir. 2005). Assistant Attorney General was policymaking employee who could be terminated for her speech and/or political affiliation under First Amendment.

Ruiz Casillas v. Comacho-Morales, 415 F.3d 127 (1st Cir. 2005). Plaintiff, municipal administrative director of federal programs, was high level policymaker who did not have First Amendment protection from political discharge.

Simasko v. County of St. Clair, 417 F.3d 559 (6th Cir. 2005). Assistant County Attorney was policymaker and confidential employee, not First Amendment protected.

Hill v. City of Scranton, 411 F.3d 118 (3rd Cir. 2005). Officers terminated for violating residency ordinance could bring action alleging First Amendment retaliation for bringing lawsuit challenging residency requirement.

Miller v. Jones, 444 F.3d 929 (7th Cir. 2006). Police officer's transfer to a less desirable post because of opposition to the chief's position regarding a police athletic facility and merger between police and community organization was First Amendment violation. Denied qualified immunity.

Locurto v. Guilliani, 447 F.3d 159 (2nd Cir. 2006). Police officer and firefighters terminated for engaging in racially insulting parade not a violation of First Amendment.

Thaeter v. Palm Beach County Sheriff's Office, 449 F.3d 1342 (11th Cir. 2006). Three sheriffs terminated for engaging in pornographic acts on a pay-per-view internet site not protected by the First Amendment, and was grounds for termination.

Mills v. City of Evansville, Indiana, 452 F.3d 646 (7th Cir. 2006). Police officer's criticism of crime prevention plan not protected, since officer's dedication to the plan was necessary to his position.

B. Religion

Van Orden v. Perry, 125 S.Ct. 2854. Ten Commandments in state capital display had historical significance, not violation of First Amendment.

Mercier v. Fraternal Order of Eagles, 395 F.3d 693 (7th Cir. 2005). Ten Commandments monument in Lacrosse, Wisconsin park, which was sold with provision that the monument be kept in place, was constitutionally appropriate.

Books v. Elkhart County, 401 F.3d 857 (7th Cir. 2005). Ten Commandments in multi-faceted historical exhibit to educate on history of American law and politics, which did not overly emphasize Ten Commandments aspect of the display, did not violate First Amendment..

ACLU Nebraska Foundation v. City of Platsmouth, 419 F.3d 772 (8th Cir. 2005). Ten Commandments located in city park did not violate establishment clause.

Simpson v. Chesterfield County Board of Supervisors, 404 F.3d 276 (4th Cir. 2005). Board's policy beginning each meeting with a nonsectarian invocation was not violation of establishment clause.

Wynne v. Town of Great Falls, 376 F.3d 292 (4th Cir. 2004). Town council could not use "Jesus" in its invocational prayer before start of its meetings

Utah Gospel Mission v. Salt Lake City Corp., 425 F.3d 1249 (10th Cir. 2005). Sale by City of section of street to church which restricted expression, not First Amendment violation, where sale originally reserved an easement for public access and passage, but later eliminated it after an adverse court ruling.

Lambeth v. Board of Commissioners of Davidson County, 407 F.3d 266 (4th Cir. 2005), (cert. denied 2005 WL 3027724). Challenge to inscription "In God We Trust" on government center is not an unconstitutional endorsement of religion.

Hinrichs v. Bosma, 440 F.3d 393 (7th Cir. 2006). Invocational prayer at Indiana House of Representatives sessions violated establishment clause.

Scoros v. City of New York, 437 F.3d 1 (2nd Cir. 2006). City did not violate establishment clause by displaying Menorah and Ramadan symbols

without including a creche. The court did not decide whether the city could have included creche, only that it was not required to.

American Civil Liberties Union v. Mercer County, 432 F.3d 624 (6th Cir. 2005). Display in courthouse on foundations of American law and government, which included Ten Commandments, Declaration of Independence, Magna Carta, Bill of Rights, and other documents, did not have a religious purpose and did not violate First Amendment.

C. Regulation of Expression

Parks v. Columbus, 395 F.3d 643 (6th Cir. 2005). Plaintiff maintained First Amendment speech right on public property being used for block party put on by private entity but open to the public.

American-Arab Anti-Discrimination Committee v. City of Dearborn, 418 F.3d 600 (6th Cir. 2005). Thirty day notice requirement for special event ordinance for parades on city streets and sidewalks was invalid as burden on First Amendment. Application for small groups was overly broad, as was requirement that each participant get permit.

Fouston v. City of Denver, 423 F.3d 1192 (10th Cir. 2005). City's unwritten policy not allowing banners or signs on highway overpasses was not unconstitutionally broad or vague.

Monteiro v. City of Elizabeth, 436 F.3d 397 (3rd Cir. 2006). City liable for violating First Amendment rights of citizen ejected from city council meeting, then arrested for disorderly conduct, where evidence showed city council president ejected plaintiff because she was angry at what plaintiff was saying, and failed to follow established procedure for ejection of unruly citizens at meetings.

McFadden v. City of Bridgeport, 422 F.Supp.2d 659 (N.D. Va. 2006). Time limit on display of political and temporary signs, more than 30 days before or 48 hours after voting day, violated First Amendment.

Deegan v. Ithaca, 444 F.3d 135 (2nd Cir. 2006). Noise ordinance prohibiting sounds audible 25 feet away violated street preacher's First Amendment rights.

II. TAKINGS

Lingle v. Chevron, 544 U.S. 528, 125 S.Ct. 2074 (2005). "Substantially advances" formula announced in Agins v. City of Tiburon, 447 U.S. 255 (1980), where the court declared that government regulation effects a taking if it does not

substantially advance legitimate state interest, is not a valid free standing takings test.

Kelo v. City of New London, 125 S.Ct. 2655 (2005). Use of eminent domain to acquire private property for economic development purposes is a public use under Fifth Amendment.

D.A.B.E., Inc. v. Toledo-Luca City, 96 Ohio St. 3d 250, 773 N.E.2d 536 (2002). Indoor smoking ban did not constitute taking.

Howard v. Marion, Ind., 832 N.E.2d 528 (Ind. Ct. App. 2005). Failure to seek special zoning exception barred takings claim under Williamson ripeness doctrine.

III. CLASS OF ONE

Lunini v. Grayeb, 395 F.3d 761 (7th Cir. 2005). Plaintiff's claim he was denied police protection from physical assault from city councilman as a violation of equal protection fails because failure to arrest is ordinary exercise of police discretion, and lack of evidence that police treated plaintiff differently from others.

Willis v. Town of Marshall, 426 F.3d 251 (4th Cir. 2005). Plaintiff could pursue class of one equal protection claim, after she was banned from Friday night concerts and dances at community center for sexually provocative dancing style. Plaintiff did not have a First Amendment right to engage in her own recreational dancing, but she had a right not to be singled out for punishment.

Lauth v. McCollum, 424 F.3d 631 (7th Cir. 2005). Class of one claim by police officer who botched missing child case alleging that he was only punished because he was "on the outs" with police chief, failed because could not establish disparate treatment.

Aida's Food & Liquor, Inc. v. City of Chicago, 439 F.3d 397 (7th Cir. 2006). After owner of liquor store was advised that property would be taken by eminent domain, several public health inspections and building code violations were found, power was shut off, and store was closed until repairs were made, but class of one claim failed with the absence of evidence that plaintiff was treated differently from other establishments.

Jicarilla Apache Nation v. Rio Arriba County, 440 F.3d 1202 (10th Cir. 2006). Plaintiff's class of one equal protection claim, alleging that plaintiff's property was reassessed agricultural to non-agricultural after plaintiff purchased the property to open an upscale hunting resort, failed. Even if similarly situated properties were not reassessed, where the state did not have knowledge of activities at those properties, class of one claim fails.

Maulding Development, LLC v, City of Springfield, 453 F.3d 967 (7th Cir. 2006). Class of one claim by developer whose development plan met all technical requirements but was nevertheless rejected failed because of lack of evidence of other similarly situated persons being treated differently.

IV. EXCESSIVE FORCE

Smith v. City of Hemet, 394 F.3d 689 (9th Cir. 2005). A resisting and obstructing conviction did not preclude §1983 excessive force claim since factual question existed on whether the excessive force either preceded or succeeded the conduct leading to the conviction.

Harris v. Coweeta County, 433 F.3d 807 (11th Cir. 2005). Officer denied qualified immunity for using "precision intervention technique" ("PIT") maneuver to stop fleeing motorist, which involves striking the fleeing car on a specific point throwing it into a spin. Officer did it improperly, and an accident occurred rendering the plaintiff a quadriplegic. Qualified immunity denied on whether technique was excessive force.

Mercado v. City of Orlando, 407 F.3d 1152 (11th Cir. 2005). Firing Sage SL6 Launcher, a "less lethal" ammunition which fires a polyurethane baton 1.5 inches wide, travels approximately 240 feet per second, and delivers a force of 154/lbs. of energy (approximately the energy of a professionally thrown baseball), hitting plaintiff in head, was excessive force. Although the Sage SL6 Launcher projectile is not designed to penetrate the body, but only leave bruises, firing at plaintiff's head was a form of deadly force.

St. John v. Hickey, 411 F.3d 762 (6th Cir. 2005). Officers could be liable for excessive force for attempting to force wheelchair bound arrestee suffering from muscular dystrophy into backseat of police cruiser, and injuring him by trying to force his legs into the vehicle. Court rejects an argument that at best officers were negligent.

Robinson v. Arrugueta, 415 F.3d 1252(7th Cir. 2005). Police officer not liable for excessive force for shooting decedent who was moving vehicle toward police officer.

Janis v. Biesheuvel, 428 F.3d 795 (8th Cir. 2005). Rolling roadblock and forcible removal of plaintiff from his vehicle, then throwing him to the ground, after plaintiff seen driving erratically and pursuit, was excessive force. Plaintiff was suffering from diabetic shock.

Estate of Smith v. Marasco, 430 F.3d 140 (3rd Cir. 2005). Police responded to Vietnam veteran suffering from PTSD who was shining a light into his neighbor's yard. Officers illegally entered his property and searched for him, then called in a

SWAT team. Plaintiff was found a week later in the woods behind his home, dead of a heart attack. The court found claim for excessive force.

Untulan v. City of Lorain, 430 F.3d 312 (6th Cir. 2005). Police responding to 9-1-1 call shot decedent, a schizophrenic, after he grabbed a knife and lunged at an officer. Evidence showed that by the time the shot was fired the decedent had dropped the knife and was no longer lunging at the officer, and the shot occurred a few seconds later. The court found the shooting reasonable based on the officer's perceptions. The case demonstrates the "reactionary gap."

Ciminillo v. Streicher, 434 F.3d 461 (6th Cir. 2006). Shooting bean bag propellants into a crowd to break up street riot was excessive force.

Deluna v. City of Rockford, 447 F.3d 1008 (7th Cir. 2006). Police officer's shooting partially naked, unarmed man, fighting with the officer, was justified, based on danger that the decedent might get control of the officer's gun.

Shreve v. Jessamine County Fiscal Court, 453 F.3d 681 (6th Cir. 2006). Allegations by arrestee about police officer's use of force against her, which were inconsistent with physical evidence and photographs, sufficient to defeat summary judgment on excessive force claim.

V. SEARCH AND SEIZURE/POLICE RAIDS

Hudson v. Michigan, 126 S.Ct. 2159 (2006). Violation of knock and announce requirement for execution of search warrant did not require suppression of the evidence.

Georgia v. Randolph, 126 S.Ct. 1515 (2006). Where tenant consents, but co-tenant also on premises objects, to police entry on premises, warrantless entry violated Fourth Amendment.

Brigham City, Utah v. Stuart, 126 S.Ct. 1943. Exigent circumstances justified warrantless entry into home where police saw juvenile punch adult in face during party.

United States v. Grubbs, 126 S.Ct. 1494 (2006). Anticipatory warrant not categorically unconstitutional, and warrant need not recite triggering condition.

United States v. Bruce, 397 F.3d 587 (6th Cir. 2005). Police search of trash removed from plaintiff's hotel room by hotel cleaning staff is not a search requiring a warrant.

Greenawalt v. Indiana Dept. of Corrections, 397 F.3d 587 (7th Cir. 2005). Requiring Department of Corrections employee to undergo psychological

examination as a condition of her employment is not a search. The Fourth Amendment does not reach questioning of an individual.

Fisher v. Harden, 398 F.3d 837 (6th Cir. 2005). Reasonable suspicion that an individual suffers from a mental illness absent criminal activity, does not create grounds for detention or arrest.

United States v. Kempf, 400 F.3d 501 (7th Cir. 2005). Exigent circumstances existed to enter arrestee's bedroom after teenage resident of the house allowed police into the home to investigate suspicious shooting.

Doran v. Eckold, 409 F.3d 958 (8th Cir. 2005). Operation of a meth lab justified no-knock entry to execute search warrant, based on fear of shoot-out.

Decena v. San Jose Charter of Hells Angels, 402 F.2d 962 (9th Cir. 2005). Poor planning of raid on motorcycle gang headquarters requiring police to shoot plaintiff's dogs violated Fourth Amendment.

U.S. v. Quampts, 411 F.3d 1046 (9th Cir. 2005). Threshold arrest was illegal absent a warrant.

Causey v. City of Bay City, 442 F.3d 524 (6th Cir. 2006). After police responded to 9-1-1 call about gunshots, received no response when they knocked on the front door, called the residence, and forced the front door open, police had exigent circumstances for warrantless entry.

VI. POLICE PURSUIT

Terrell v. Larson, 396 F.3d 975 (8th Cir. 2005). Officer responding to an emergency domestic disturbance call driving through a red light at 60 to 65 mph. did not violate substantive due process. The officer lacked an intent to injure, and even using a deliberate indifference standard, the conduct did not shock the conscience.

Graves v. Thomas, 450 F.3d 1215 (10th Cir. 2006). High speed chase which was allegedly purposely induced by the police officer is not actionable under due process clause because it did not shock the conscience.

VII. DUTY TO PROTECT/PRISONERS/DOMESTIC SITUATIONS

Town of Castle Rock v. Gonzales, 125 S.Ct. 2796 (2005). Due process clause did not create duty for police to enforce a state law restraining order against husband who had taken then murdered children.

Gray v. City of Detroit, 399 F.3d 612 (6th Cir. 2005). Police department holding arrestee in a cell, even one characterized as a "suicide" cell, based on violent

behavior of the decedent, did not have a constitutional duty to screen or monitor the cell to prevent suicide.

Purcell v. Toombs County, 400 F.3d 1313 (11th Cir. 2005). Jail administrator is not liable for beating of inmate by other inmates, and policy allowing inmates to have money while incarcerated did not create duty.

Cook v. Sheriff of Monroe County, 402 F.3d 1092 (11th Cir. 2005). Estate of arrestee who had anxiety attack while incarcerated and asked for and was treated, then committed suicide, lacked proof of deliberate indifference, but court allowed a negligence claim. Evidence of other suicides and testimony of an expert were excluded.

Bradich v. City of Chicago, 413 F.3d 688 (7th Cir. 2005). Officers could not be faulted for not preventing a suicide, but failure to provide CPR, waiting ten minutes to call medical personnel, and post-hanging alteration of scene was evidence of deliberate indifference.

Swipies v. kofka, 419 F.3d 709 (8th Cir. 2005). Plaintiff's due process rights were violated by sheriff who improperly ended plaintiff's court-ordered visitation with his daughter.

Abdouch v. Burger, 426 F.3d 982 (8th Cir. 2005). Police and social workers had probable cause to remove child from parents' care after she was brought to emergency room with 17 fractures.

Pepper v. Village of Oak Park, 430 F.3d 805 (7th Cir. 2005). Police responded to call from woman to remove her husband from home based on his threats of violence. Police escorted husband out of home, along with his belongings. Plaintiff sued, claiming husband was allowed to take items that were not his. Police did not cause or participate in any constitutional deprivation, and had no constitutional duty to prevent any criminal activity by husband.

May v. Franklin County Commissioners, 437 F.3d 579 (6th Cir. 2006). Decedent called 9-1-1 three times relating to an altercation with her boyfriend. When the police arrived, they knocked, waited, then left when there was no response, while the boyfriend was restraining the decedent in the apartment, then later killed her. Plaintiff alleged state created danger in that the police increased the risk of harm by responding without intervening, giving boyfriend the go ahead to escalate violence.

Kennedy v. City of Ridgefield, 440 F.3d 1091 (9th Cir. 2006). After plaintiff's complaint of neighbor molesting her daughter, police assured plaintiff that they would be notified before any police contact took place with the neighbor, and that they would patrol the neighborhood and keep an eye on him. Eight hours after

police spoke with the neighbor, he killed plaintiff and her husband. State created danger theory, based on false sense of security given to plaintiff, did not apply.

VIII. POLICE RESTRAINTS

Owensby v. City of Cincinnati, 414 F.3d 596 (6th Cir. 2005). Due process violation shown for restraining, cuffing and placing the arrestee in a head wrap and then spraying him with mace and leaving him in the backseat of a cruiser, even after it looked like he could not breathe.

Abdullahi v. City of Madison, 423 F.3d 763 (7th Cir. 2005). Issue of fact on whether police officer placing his knee on the back of decedent's shoulder and applying his weight for 30 seconds was excessive force.

Tatum v. City and County of San Francisco, 441 F.3d 1090 (9th Cir. 2006). Use of a control hold in which cocaine intoxicated arrestee was placed on his stomach, allegedly causing asphyxiation, was not excessive use of force. The police action was objectively reasonable under the circumstances.

IX. STATE CREATED DANGER

Rivera v. State of Rhode Island, 402 F.3d 27 (1st Cir. 2005). Defendant not liable under state created danger theory where it induced the minor plaintiff to act as a witness at a murder trial, promising her, in spite of death threats, to protect her, but failed to do so, leading to her murder. Other witness was placed in the state's witness protection program, but the decedent was not. Nevertheless, no violation of due process.

Schroder v. City of Fort Thomas, 412 F.3d 724 (6th Cir. 2005). City's failure to take action to stop routine speed limit violations on residential street, resulting in child being struck and killed by speeding vehicle, was not due process violation. Knowledge of a hazard does not create a duty to protect against it.

Jackson v. Schultz, 429 F.3d 586 (6th Cir. 2005). Decedent who was shot was placed by paramedics into ambulance, but did not transport him to trauma center. Decedent not in custody, so no duty owed to him, and state created danger not established, because facts failed to support a claim that private aid was cut off.

Pena v. Deprisco, 432 F.3d 98 (2nd Cir. 2005). Plaintiff stated a state created danger claim, based on allegations that police officer had several prior instances of drunk driving, which were not addressed by the department, allowing police officer to drive drunk, causing accident. State created danger was the belief created in the officer that he could drive drunk with impunity, but officers had qualified immunity.

Jones v. Reynolds, 438 F.3d 685 (6th Cir. 2006). Police response to drag racing on a public street and allowing the drag race to proceed, did not make police responsible for accident that occurred after police left, under state created danger theory. Officer's participation did not increase the risk, and decedent was not in custody.

Bright v. Westmoreland County, 443 F.3d 276 (3rd Cir. 2006). State created danger claim was rejected where probation department delayed processing a probation revocation petition for probationer's violating order prohibiting any contact with the victim's family. While the petition was pending, the probationer murdered one of the victim's family members. The delay did not create the danger.

Rios v. City of Del Rio, 444 F.3d 417 (5th Cir. 2006). State created danger theory rejected where plaintiff struck by a police vehicle driven by an escaping prisoner.

X. WRONGFUL CONVICTION

Hartman v. Moore, 126 S.Ct. 1695 (2006). Probable cause trumps retaliatory prosecution claim.

McConkie v. Nichols, 446 F.3d 258 (1st Cir. 2006). Statements solicited from arrestee by trick without physical harm or abuse were not coerced and did not violate due process.

Tinker v. Beasley, 429 F.3d 1324 (11th Cir. 2005). Police telling arrestee during interrogation her lawyer "bailed out" on her, and she was better off without one, did not violate due process.

McCabe v. Newsome, 319 F.3d 301 (7th Cir. 2003). Defendant police liable for inducing witness to falsely accuse plaintiff, causing conviction.

XI. MISCELLANEOUS

In Re Grand Jury Investigation, 399 F.3d 527 (2nd Cir. 2005). Attorney-client privilege between governmental attorney and a public official is as broad as attorney-client privilege in private sector context.

Lawrence v. Reed, 406 F.3d 1224 (10th Cir. 2005). Police chief's consultation with City Attorney on whether vehicles could be towed from property near fairground did not create qualified immunity. Police officer is responsible for knowing the law in the first place, and consultation with the city attorney cannot be seen as interfering with that knowledge.

Diva's, Inc. v. City of Bangor, 411 F.3d 30 (1st Cir. 2005). Section 1983 action brought to redress injuries to a corporation are subject to the requirement that action cannot be maintained by stockholder in his own name.

Wilson v. Flynn, 429 F.3d 465 (4th Cir. 2005). Despite claim by plaintiff that officer slammed his face into the fireplace screen and beat him up, police granted summary judgment, based on totality of the circumstances.

Gast v. Singleton, 402 F.Supp.2d 794 (So. Dist. Tex. 2005). *Res Ipsa Loquitur* does not apply to §1983 claim.

Wallace v. Chicago, 440 F.3d 421 (7th Cir. 2006). Accrual of false arrest claim; damages for false arrest terminate at charging.

Russ v. Watts, 414 F.3d 783 (7th Cir. 2005); Robertson v. Heckel, 420 F.3d 1254 (11th Cir. 2006). Parents constitutional liberty interest in parent-child relationship involving adult child not violated by wrongful death of child.

Gates v. Akins, 420 F.3d 1293 (11th Cir. 2005). Facts need not be "materially similar" to clearly establish law to defeat qualified immunity, based on rule of Hope v. Pelzer, 536 U.S. 730 (2002).

National Advertising Co. v. Miami, Fla., 402 F.3d 1329 (11th Cir. 2005). Amendment of challenged zoning ordinance after suit filed to make sign restrictions content neutral mooted plaintiff's First Amendment claim.