school football coaches on behalf of the estate of their son. The son had attended a voluntary outdoor workout session for his high school football team, and died the next day due to the intensity of the condition drills and the heat. The parents alleged that their son's substantive due process rights were violated because he was deprived of water after exhibiting signs of overheating, and there was a delay in his receiving medical attention after he collapsed, and these decisions resulted in the deprivation of his life, liberty, health and safety. The district court dismissed all the charges except the charges against the coaches. The court allowed the charges against the coaches to stand on the basis that the claims, if proven, would be enough to support a finding that the coaches acted willfully or maliciously with an intent to injure the son.

The U.S. Court of Appeals for the Eleventh Circuit vacated the order below and remanded the case back to the district court. Starting its analysis with *DeShaney v. Winnebago County Dep't of Soc. Servs.*, 489 U.S. 189 (1989), that "nothing in the language of the Due Process Clause itself requires the State to protect the life, liberty, and property of its citizens against invasion by private actors," the court further found that conduct by a government actor would only rise to the level of a substantive due process violation if the act could be characterized as arbitrary or conscience-shocking in a constitutional sense, pursuant to *County of Sacramento v. Lewis*, 523 U.S. 833 (1998). There were some cases where a high school coach's conduct was found to have met this standard, such as *Neal v. Fulton County Bd. of Educ.*, 229 F.3d 1069 (11th Cir. 2000) (where a coach intentionally struck a student with a metal lock as a form of punishment). In the instant case, however, the defendant coaches did not engage in corporal punishment, and "the complaint's allegations of deliberate indifference, without more, [did] not rise to the conscience-shocking level required for a constitutional violation." Accordingly, the claim should "be confined to the realm of torts." *Davis v. Carter*, 555 F. 3d 979 (11th Cir. 2009).

Land Use

Takings – Standing – Optionee

In a case addressing whether Toll Bros., Inc., a real estate developer with an option to buy a parcel of land, had standing to challenge zoning restrictions that prevent its planned development from going forward, the Third Circuit held that it did. Toll described itself as "the nation's leading builder of luxury homes," and carefully chose "the most scenic areas" in which to build. This included a 160-acre tract of land in the Township of Readington, owned by Readington Properties, LLC. In 2001, Toll entered into an option contract with the landowner that gave it an exclusive option to buy the tract at a fixed price, and barred the owner from entering into any lease, agreement of sale, or any other agreement affecting the property during the life of the agreement. In exchange, Toll promised to make periodic payments to Readington Properties. At the time, the land was zoned "research-office" and "rural-residential." Toll developed plans and submitted the first one for approval to the Township in 2002. The Town denied approval and passed an ordinance rezoning the entire tract as "agricultural residential." The only residential use allowed under this zoning was "one residential dwelling per six acres," which effectively ended the developments Toll had in mind. Toll apparently viewed this move as part of a nefarious plot hatched by Township officials to "reduce the fair market value of properties held by disfavored landowners." Toll maintained its option by rendering periodic payments to Readington Properties. It sued the Township, its planning commission, and various officials, claiming under the Equal Protection Clause; the Due Process Clause; the Takings Clause; The Fair Housing Act of 1968, and others, seeking to set aside the rezoning ordinance, and damages. The defendants moved to dismiss the complaint for lack of standing, pointing to the fact that Toll did not have any present interest in the Readington Properties parcel. The district court granted the motion.

On appeal, the Third Circuit held that the owner of an unexercised option to develop had Article III standing. Referring to *Warth v. Seldin*, 422 U.S. 490 (1975), and *Village of Arlington Heights v. Metropolitan Housing Dev. Co.*, 429 U.S. 252 (1977), the court found that Toll had satisfied the injury requirement. Toll had paid substantial sums in planning its proposed developments, and the rezoning thwarted its specific development, one for which a formal application had been submitted, on land for which it held the exclusive option to purchase. These economic harms amounted to a legally cognizable injury-in-fact, as the option was more than just a "phantom connection" to the affected parcel, being itself a "valuable property right." By driving down the value of the Readington Properties parcel, the Township had also driven down the value of the option. Dealing with the third element in standing, redressability, the court held it was sufficient for the plaintiff to establish a "substantial likelihood" that the requested relief would remedy the alleged injury in fact. Here, striking the ordinance would redress the injury by increasing the value of both the underlying real property and the option. Further, while all developments were subject to inherent uncertainties, the court did not require a guarantee of successful completion. Toll had stated its intent to exercise the option and move forward with construction if and when the Township approved its plans. This was sufficient to show that a favorable decision was substantially likely to result in construction of its planned developments. *Toll Bros., Inc v. Township of Readington*, 555 F. 3d 131 (3d Cir. 2009).

Personnel and Employment

Discrimination – "Secondhand" Motive

In a case of first impression in the circuit, the U.S. Court of Appeals for the Ninth Circuit considered the question of whether a final decision-maker's wholly independent, legitimate decision to terminate an employee could insulate, from liability, a lower-level supervisor involved in the process, who had a retaliatory motive to have the employee fired. Scott, the plaintiff, had been employed as an information systems specialist at Multnomah County's Department of Community Justice (DCJ). Her direct supervisor was Hogue, who reported to Gorton, who reported to Brown, who, in turn, reported to the DCJ director, Fuller. Scott complained to Hogue and Gorton about her coworkers' violations of County policies (including violations by Brown), and also accused Brown of favoring gay and lesbian employees in hiring and promotion decisions. Scott also filed a formal complaint with the Oregon Bureau of Labor and Industries ("BOLI complaint") about the

continued on page 34

alleged preferential treatment that Brown gave to gays and lesbians in hiring and promotions. Brown knew of this complaint. When Brown was investigating another employee, his e-mails turned up a copy of a diary prepared by Scott that contained discriminatory comments and excerpts of other employees' work documents. This prompted Brown to order an investigation of Scott. This was done by another employee, and his report, recommending that all of the charges against Scott be sustained, went to Fuller. Fuller decided to fire Scott, ostensibly for her improper use of DCJ's computers and e-mail system. Scott sued, claiming that her termination was actually in retaliation for her engaging in speech – the complaints to supervisors and the BOLI complaint – protected under the First Amendment and by the state's whistleblower protection statute. Fuller maintained that, while Brown played a role in the investigation leading to the termination, Brown had no say in the decision to fire Scott. Scott did not produce any evidence to the contrary, but claimed that Brown wanted to retaliate against her and, thus, unlawfully influenced Fuller's decision. For her part, Brown argued that Scott's protected conduct was not a "substantial or motivating factor" in her termination, which would have occurred even in the absence of the conduct. After Brown moved unsuccessfully for summary judgment, a jury found in Scott's favor and awarded her economic damages of $140,000, non-economic damages of $10,000, and punitive damages of $500,000.

On appeal, the Ninth Circuit reversed and remanded. Fuller's legitimate and independent reasons for her decision to terminate Scott eliminated any causal link to Brown's alleged retaliatory bias. Causation was the dispositive issue. Even taking into account Brown's role in bringing the diary or journal to Fuller's attention, the evidence negated any inference that Fuller would not have taken any action against Scott but for Brown's retaliatory motivation. Brown was engaged in activities that were "typical and appropriate" for her position when she became aware of the diary, which was itself accidentally discovered during an investigation of another employee. Scott did not allege that Brown had targeted her for investigation or had selectively reported her misconduct. The record showed that Brown played a very limited role in the investigation and was, at most, "part of a process." Moreover, given the "numerous potential rules violations revealed" by the diary and the actions taken by the human resources department, it was unreasonable to conclude that Fuller (who had already initiated the inquiry into another employee's misuse of e-mails) would not have been informed of or reacted to the diary "but for" Brown's animus against Scott. "To say that the County's investigative process was fatally and irrevocably tainted by Brown's overall limited involvement would stymie legitimate corporate management and discipline, which must necessarily involve and rely upon supervisory staff."

Accordingly, the court declined to impute the subordinate's unlawful motivation "upstream" to the final decision-maker. *Lakeside-Scott v. Multnomah County*, 556 F. 3d 797 (9th Cir. 2009).

Search and Seizure

Warrants – Probable Cause

A law enforcement officer applied for, and was granted, a search warrant to authorize the aerial use of a thermal imaging device for a home owned by Mohammed Kattaria, based on, among other things, a cooperating defendant (CD) with first-hand knowledge of the facts reporting that Kattaria had been an indoor marijuana grower some year earlier, and current utility records showing an unusual and excessive consumption of electricity at the residence. The officer's affidavit stated that the search would be for a single type of "property," namely the "excess amount of heat emitting from the residence and garage relative to comparable structure[s] in the same neighborhood," and would be conducted at night in a specified manner. When the search resulted in thermal imaging consistent with an indoor marijuana grow operation, police obtained and executed three warrants to enter and search homes owned by Kattaria. The searches uncovered 548 marijuana plants, bags of harvested marijuana, and other incriminating evidence. Kattaria attacked all four warrants, but focused on the thermal imaging warrant (the later three warrants were supported by considerably greater probable cause, including the results of the thermal imaging). The district court upheld the warrants, and a panel of the U.S. Court of Appeals for the Eighth Circuit affirmed. Kattaria petitioned for rehearing en banc, which was granted. He claimed that the district court erred in concluding that the first warrant was supported by probable cause because the affidavit contained no statement as to the CD's reliability, the CD's observation of a grow operation in Kattaria's basement was uncorroborated and stale, and other reasons.

The en banc court concluded first, that the initial thermal imaging search was supported by traditional probable cause, being a "fair probability that contraband or evidence of a crime will be found in a particular place;" alternatively, that the evidence obtained by executing those warrants could not be suppressed under the good-faith exception to the exclusionary rule adopted in *United States v. Leon*, 468 U.S. 897 (1984). Although the CD's information was "quite dated," it provided the impetus for further investigation, and the recent, abnormally high power consumption provided a "substantial basis" to conclude that probable cause existed to issue the warrant. In any event, evidence seized pursuant to a warrant that was later determined to be invalid would not be suppressed if the officers executing the warrant acted in good faith reliance on its validity. *U.S. v. Kattaria*, 553 F. 3d 1171 (8th Cir. 2009).

Section 1983 – Credibility and Evidence

Two Town of Townsend police officers found LaFrenier sitting in his car by the side of the road. When questioned, he appeared disoriented, confused, unresponsive, and uncooperative. This was due to the medications he had been taking, but was not clear at the time. When the officers asked LaFrenier to get out of the car, he resisted and fought, leading to his being charged with assault and battery, resisting arrest, and disorderly conduct. These charges were eventually dismissed. LaFrenier then sued the Town and the officers in a Section 1983 suit, alleging excessive force, a failure to provide medical treatment, and false arrest. The defendants moved for summary judgment, relying on evidence of the officers' version of the events. LaFrenier said he had no memory of the key events and offered no contradictory evidence,