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FEATURED CASE:

Settlement: Effect on Grant of Summary Judgment by Intervening Settlement Offer

Kubiak v. County of Ravalli, No. 21-35542, 9th Cir. May 3, 2022.

Affirming the decision below, the Ninth Circuit holds that, despite the District Court's grant of a summary judgment motion in favor of a county defending a § 1983 action, the plaintiff's acceptance of the county's FRCP 68 settlement offer before the final summary judgment had been entered took precedence and would be enforced.

A woman in Missoula, Montana obtained a Temporary Order of Protection Robert Kubiak. When Kubiak thereafter served a motion by mail on the woman who had sought protection, a sheriff's deputy concluded that Kubiak violated the terms of the Order. Kubiak was arrested and held overnight in the Ravalli County Detention Center. In March 2020, he sued the county, its sheriff, and the sheriff's, (collectively, County) under 42 U.S.C. § 1983. Kubiak claimed, among other things, that his arrest and detention violated his First, Fourth, and Fourteenth Amendment rights. On April 20, 2021, the County filed a motion for summary judgment, but on June 3, 2021, it made Kubiak a Rule 68 offer: judgment would be entered against the County for $50,000 plus costs, including reasonable attorney's fees. The offer stated that if it was "not accepted within the time prescribed by Rule 68(a)," it would be deemed withdrawn.

FRCP 68(a) provides a 14-day window for acceptance of an offer of judgment.

Less than a week after the offer, on June 9, 2021, the District Court entered an order stating that Kubiak's claims failed and that "Defendants' motion for summary judgment . . . is GRANTED." The order further provided, "A reasoned decision will follow in due course. Judgment will be entered at that time." The District Court entered the summary judgment

order without knowing about the County's outstanding Rule 68 offer. This comports with Rule 68 procedures: the defendant serves its offer on the plaintiff but does not file it with the court; the offer is filed only upon acceptance.

Six minutes after the District Court entered its non-final order granting summary judgment, the County's counsel emailed Kubiak's counsel: "Given the Court's ruling granting our Motion for Summary Judgment, the Offer of Judgment is hereby withdrawn." Within an hour, Kubiak filed with the court a notice of acceptance of the offer of judgment. The County objected, and requested that the District Court "deem the Offer a nullity as of the issuance of its Order granting summary judgment to Defendants." The District Court overruled the County's objection, saying that the County's Rule 68 offer would have been mooted only "if judgment had been entered in [the County's] favor." because the summary judgment order said that judgment would be entered sometime in the future, the offer of judgment was required to remain open for the full 14-day period provided by Rule 68. The court ordered that, "[p]ursuant to Rule 68, the Clerk will enter judgment for Kubiak," which the clerk did.

Rule 68 presents a challenge for plaintiffs: if a § 1983 plaintiff turns down a Rule 68 offer, goes to trial, and wins a judgment less favorable than the rejected offer, he loses his entitlement to attorney's fees as of the date of the offer. Rule 68 can be a high-stakes proposition for defendants, too. "It is widely accepted that '[t]he [Rule 68] offer, once made, is non-negotiable. . . .'" The text of the rule does not allow exceptions to the 14-day period; it simply provides that "[i]f, within 14 days after being served, the [plaintiff] serves written notice accepting the offer," the acceptance may be filed and judgment must be entered. As the Circuit put it, "The rule contains no exception for the entry of a non-final order granting summary judgment on all claims, and we decline to create one."

The Ninth Circuit found support in "other Circuits' uniform interpretations of the rule." Reviewing Eighth, Eleventh, and DC Circuit precedents, the Ninth Circuit stated "We agree with all of our sister Circuits to have considered the questions posed by this case: an offer of judgment must remain open for the full period provided by Rule 68 and, when a notice of acceptance is filed, the clerk must enter judgment accordingly."

But it declined to discuss what might have arisen if a final order of summary judgment had been entered. "We need not weigh in on the split between Perkins (Eighth Circuit) and Collar (Eleventh Circuit) over whether Rule 68 continues to operate after final judgment, because we are not presented with that circumstance. The Eighth Circuit case, which concluded that the plaintiff could still accept the Rule 68 offer after the entry of final judgment, emphasized the fact that the defendant landed where it did through its own litigation choices.

> By making a Rule 68 offer, the defendant 'assumed the risk that the District Court would rule favorably on [the] summary judgment motion during the . . . period for acceptance of its Rule 68 offer. [The defendant] took the chance that it could bring an end to this litigation' for the amount of its offer and 'was unpleasantly surprised to find that, had it

> waited . . . , it could have brought an end to this litigation for much less.' The same thing happened here.

Despite the seemingly absolute provisions of Rule 68, the court left open what the outcome might have been if final judgment had already been entered on the summary judgment order:

> We conclude with a brief note about what we do not decide today. **First, as we have made clear, we express no view on whether an entry of final judgment would nullify an outstanding Rule 68 offer.** And second, we do not decide the fate of Rule 68 offers in exceptional factual situations,' such as when the plaintiff's claim is fraudulent. This appeal does not present those issues, so we do not consider them.

21-35542.pdf (uscourts.gov)

Short Summaries:

4th Circuit – First Amendment – Advertising on Buses – State Actor *White Coat Waste Project v. Greater Richmond Transit Company*, nos. 20-1710/1740 (4th Cir. May 20, 2022).

In this recent case the Fourth Circuit concluded that the Greater Richmond Transit Company was a state actor subject to suit under Section 1983 for restricting an advocacy group from advertising on its buses. The court concluded that the Company was not a private company as it had been created by "special law" and that its directors were all appointed by local government. Concluding thus, the court considered whether its policy to preclude "political" advertising violated the First Amendment. The court noted that the Supreme Court had allowed such restrictions almost 50 years ago in *Lehman v. City of Shaker Heights*, 418 U.S. 299, (1974) but concluded that the decision had been clarified by *Minn. Voters All. v. Mansky, 138 S. Ct. 1876, 1892* (2018). Footnote 13 offers a nice description of the various public forums to help distinguish between them and recognized the debate as to whether there are three or four categories of these types of forums. Long story short when you ban "political" advertising you need to describe what you mean in detail including rather specific criteria to allow a person to know what is allowed and what isn't as the term "political" can have many different meanings.

201710.P.pdf (uscourts.gov)

7th Circuit – Equal Protection – Disability Pensions - ADA *Ostrowski v. Lake County,* nos.21-1674/2580 (7th Cir. May 11, 2022).

The Seventh Circuit recently reaffirmed that rational basis review applies to disparities between disability pension plans when compared with regular pensions. In this case the Plaintiff had been employed by the Sheriff and retired on disability. Among many complaints, the Plaintiff sought to cure over the years, this case involved whether the disparity in the disability plan

when compared with the regular pension plan violated Equal Protection and the ADA. The regular plan provided for regular cost of living adjustments (pretty important now) while the disability plan did not. The court noted that employees who participate in the retirement plan pay into the plan each pay period and their retirement benefits are paid after years of service. Unlike that plan, a person who retires on disability can retire upon occurrence of the disability regardless of years of service and the plan refunds that person all monies paid into the retirement plan. That seems pretty rational.

21-1674 & 21-2580(2) Wood.pdf (uscourts.gov)

7th Circuit – Brady – Fabrication of Evidence – Due Process
Jones v. York, no. 21-1989 (7th Cir. May 16, 2022).

The Seventh Circuit concluded that a suit against a city and an arson investigator failed for multiple reasons. The facts are interesting and a bit complicated. A woman's house caught on fire and was essentially destroyed. The fire investigator interviewed the owner and concluded that the fire had accidental origins. Unfortunately, for the owner, she and a "friend" spent the few nights following the fire in a hotel and argued. The friend then attempted to extort the owner by claiming to have an incriminating recording of a conversation in which she admitted to torching the house. When the woman refused to return her friend's calls, he alerted the fire investigator and the insurance company. After months of back and forth, the investigator eventually sent the case to the prosecutor who charged the woman with arson and convicted her. Post-conviction relief ensued and her conviction was overturned without a retrial – thus, begins the Section 1983 saga. The lower court granted summary judgment on all claims based on the conclusion that the facts would not support a finding of a constitutional violation by any of the defendants. The Seventh Circuit upheld that result and wrote some interesting thoughts about *Brady* and liability for fabrication of evidence.

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8th Circuit – Qualified Immunity – Detention of Witnesses
Davis v. Dawson, no. 21-2419 (8th Cir. May 10, 2022).

A family dispute concluded with one family member stabbing another. The police came and the family members told the police what happened and who did the stabbing. The victim was transported to the hospital where he died. Several family members including the victim's wife were taken to the police station despite their protests that they wanted to get to the hospital. At the station they asked to leave but were told they could not. They sued and the court concluded that unless the police have probable cause to detain someone they cannot and doing so violates the Constitution. Indeed, the concurrence notes that rarely are rights so clearly established.
Do a legal audit and training to make sure the police understand they cannot detain witnesses beyond what might be allowed for an investigatory stop under *Terry.*

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10th Circuit – First Amendment – Filming Police – Interfering with Police *Bustillos v. City of Carlsbad*, no. 21-2129 (10th Cir. May 9, 2022).

Unfortunately this is an unreported opinion but offers some good insight into what looks like how police officers should handle a difficult situation. Basically, the police were called to deal with a mentally deranged person. As they arrived, the Plaintiff known locally as "Stray Dog the Exposer" interposed himself into the scene. Apparently, the woman who the police had calmed was incited by seeing Stray Dog and became agitated again – seeming calling him a pedophile and telling the police to keep him away. One of the officers who had been walking near Stray Dog, cautioned him that his presence was agitating the woman and interfering with their efforts to help her. The officer asked Stray Dog to leave, but he didn't. Stray Dog was filming the interactions and the officer did not try to stop him from doing so, but focused commands on the issue of how Stray Dog's presence was agitating the woman and interfering. Eventually, the officer detained Stray Dog and moved him away. Suit followed and the court concluded that the officer did not violate Stray Dog's rights.

Microsoft Word - 21-2129 (uscourts.gov)

11th Circuit – Confederate Statues – Protection from Psychic Injury – Standing *Ladies Memorial Association, Inc. v. City of Pensacola*, no. 20-14003 (11th Cir. May 16, 2022).

Briefly, the Eleventh Circuit concluded that the District Court erred in dismissing Plaintiffs' suit against the City of Pensacola because the court lacked jurisdiction and should have, instead, remanded the case back to state court. Several folks upset with the City's intent to remove a really large statue honoring either the Confederacy or rebel soldiers, sued the city asserting a bunch of injuries, including constitutional violations. The City removed the case to federal court. The lower court dismissed the case. The Eleventh Circuit held dismissal was wrong as the various claims by the plaintiffs were insufficient to allege that they had Article III standing. The case should have been remanded to state court.

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