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Airports: Plaintiff Must Exhaust All State Remedies Before Seeking Federal Relief; State Law Allowed "Continuing Physical Invasion" to Support Inverse Condemnation Claim

***Hadar v. Broward County*, No. 16-14569 (11th Cir. May 31, 2017).**

Affirming the district court, the Eleventh Circuit has found that Florida's state law

remedies for inverse condemnation, which recognize "continuing physical invasion" from direct overhead flights--as evidenced by direct precedent on point--are adequate and must be exhausted before federal relief is sought.

Plaintiff Noy Hadar (Hadar) filed a Section 1983 class action against Broward County (County) alleging that frequent low-level overhead flights into the Fort Lauderdale-Hollywood International Airport were causing extreme noise pollution, resulting in an unconstitutional taking. The district court granted the County's motion to dismiss, citing a lack of subject matter jurisdiction due to lack of ripeness because Hadar had not exhausted all his available state remedies. In order to bring a federal takings claim, Hadar needed to demonstrate that Florida law either (1) provided no process for obtaining just compensation or (2) provided inadequate process due to state interpretation. Hadar argued that Florida's state remedies were inadequate. Specifically, he claimed that the state remedy for inverse condemnation would have been futile because he had alleged "no property value loss," nor did he seek to have the County condemn the property.

On appeal, the Eleventh Circuit, following the district court, held for the County. The question addressed was whether the inverse condemnation procedure was inadequate because it required plaintiffs to allege (1) a deprivation of all beneficial use; or (2) a diminished market value of property. The court began by pointing out that Florida courts not only recognize inverse condemnation actions, but have specifically recognized inverse condemnation actions in the context of airport operations. As to the first issue, deprivation of beneficial use, the court pointed out that under Florida case law, Hadar could prove "continuing physical invasion" resulting from direct overhead flights in lieu of a deprivation of beneficial use. As to the question of alleging property value, the court was not convinced of the state procedure's inadequacies, particularly since there was case law nearly on point that indicates a remedy is available for airport inverse condemnation cases.

Further, the court pointed out that Hadar's failure to allege property value loss was indistinguishable from a previous similar case the court had found to lack merit. Hadar not only failed to offer alternative case law from the Eleventh Circuit, but also failed to provide persuasive case law from other circuits. Consequently, the court deemed Hadar's claim premature.

In addition, the court was also unpersuaded by Hadar's claims that dismissing his federal claim would deprive him of his chosen forum, affirming that he did not possess an absolute right to vindicate his federal claims in a federal forum.

LINK

Gender Identity: Seventh Circuit Affirms Lower Court Decision Allowing Transgender Student to Use School Bathroom Conforming to Gender Identity

Whitaker v. Kenosha Unified School District, no. 16-3522 (7th Cir. May 30, 2017).

Paving the way for potential further High Court action on the subject, the Seventh Circuit has found that requiring a transgender student to use a "single sex" bathroom, rather than the boys' room which conforms to his gender identity, violates Title IX.

The Kenosha, Wisconsin Unified School District (District) attempted to deny Ashton Whitaker (Whitaker), a 17-year old senior, the right to use the boys' bathroom at his high school. Whitaker, a transgender student who identifies as a male, challenged the prohibition as a violation of Title IX and an infringement of his Equal Protection rights under the Fourteenth Amendment, and

sought an injunction against the District's prohibition. The district court granted the injunction and the District appealed.

The Seventh Circuit affirmed. It found that Whitaker would suffer irreparable harm, lacked any sufficient remedy at law, and was likely to succeed on the merits. As to harm, Whitaker provided evidence that the anguish of having to use a girl's bathroom-or a specially designated non-gender bathroom, which caused even more scrutiny by others-was causing severe mental and emotional harm, including suicidal thoughts.

In terms of remedies, the Circuit disagreed, as had the district court, that monetary damages would constitute an adequate recompense for Whitaker's situation.

The court spent significant time explaining its rationale for finding that Whitaker would likely win on the merits. It found Supreme Court precedent in Title VII cases going back to the 1989 decision in *Price Waterhouse v. Hopkins* that prohibited sexual stereotyping generally, and a robust line of circuit cases supporting the view that sexual stereotyping is equally prohibited when applied to transgender people. The Circuit found that making distinctions based on gender identity was also proscribed under Title IX:

> A policy that requires an individual to use a bathroom that does not conform with his or her gender identity punishes that individual for his or her gender non-conformance, which in turn violates Title IX. The School District's policy also subjects Ash, as a transgender student, to different rules, sanctions, and treatment than non-transgender students, in violation of Title IX. Providing a gender-neutral alternative is not sufficient to relieve the School District from liability, as it is the policy itself which violates the Act.

LINK

Malicious Prosecution: Probable Cause is Generally Supported by Grand Jury Indictment, But is Rebuttable Due to Reckless and False Evidentiary Statements

David Jones v. Clark County, No. 16-6281 (6th Cir. May 25, 2017).

Reversing a Kentucky federal district court, the Sixth Circuit has remanded a case which dismissed malicious prosecution charges against county officials who obtained a grand jury indictment despite failing to ascertain whether there was any evidence of child pornography possession by the arrestee, who wrongly spent 14 months in jail.

In October 2013 Clark County, Kentucky police identified a 39-second child pornography video and tracked it to an IP address and, ultimately, a subscriber names David Jones. The police obtained a search warrant for his home and garnered a computer, cellphone, modem, printer, and DVDs. The police never actually searched these items. Nonetheless, the police recommended charges and the prosecutor sought and obtained a grand-jury indictment. As trial approached, Jones had an expert evaluate the seized items and showed that there was no child pornography on any of it. The case against Jones was dismissed. He spent fourteen months in jail. Jones filed suit for malicious prosecution, which Clark County defended arguing the grand-jury indictment barred a malicious-prosecution claim. The district court granted the motion to dismiss, prompting Jones to appeal to the Sixth Circuit.

The Sixth Circuit agreed that, as a general rule, an indictment by a properly constituted jury conclusively determines the existence of probable cause and therefore overcomes a malicious prosecution claim, since lack of probable cause is a required element of such a case. However,

the *presumption* of probable cause gained from a grand jury indictment becomes rebuttable when "(1) a law-enforcement officer, in the course of setting a prosecution in motion, either knowingly or recklessly makes false statements (such as in affidavits or investigative reports) or falsifies or fabricates evidence; (2) the false statements and evidence, together with any concomitant misleading omissions, are material to the ultimate prosecution of the plaintiff; and (3) the false statements, evidence, and omissions do not consist solely of grand-jury testimony or preparation for that testimony (where preparation has a meaning broad enough to encompass conspiring to commit perjury before the grand jury)."

Jones alleged just such a set of circumstances - that the officer in the case recklessly made false statements about the evidence in Jones' case since he never examined the seized computer items and that this led to misleading statements material to Jones' prosecution and that this occurred outside of the officer's grand jury testimony. The Sixth Circuit agreed, reversing the lower court's dismissal, and remanding the case requiring Clark County to litigate further.

LINK

Preliminary Injunctions: Third Circuit Requires Plaintiff to Show Likelihood of Success and Irreparable Harm; In First Amendment Cases, Burden Shifts to Government to Discount Plaintiff's Proposed Alternatives

Reilly v. City of Harrisburg, No. 16-3722 (3d Cir. May 25, 2017).

Remanding to the court below, the Third Circuit has clarified that, as opposed to a four-part test for preliminary injunction, a narrower two-part test applies: likelihood of success on the merits and irreparable harm; in addition, once a plaintiff pleads that the government has infringed First Amendment rights, the burden of proof shifts to the government to demonstrate that its proposed act or ordinance is more effective than plaintiff's proposed alternatives.

Harrisburg, Pennsylvania (City) enacted an ordinance prohibiting anyone from "knowingly congregat[ing], patrol[ing], picket[ing] or demonstrat[ing] in a zone extending 20 feet from any portion of an entrance to, exit from, or driveway of a health care facility." The City describes the purpose as an effort to "promote the health and welfare of [Harrisburg] residents and visitors to [its] health care facilities, as well as the health and welfare of those who may wish to voice their constitutionally protected speech outside of such health care facilities . . . ." Additionally, the ordinance "appl[ies] to all persons equally regardless of the intent of their conduct or the content of their speech."

Colleen Reilly (Reilly) and associated other plaintiffs say they provide "sidewalk counseling" - described as "leafletting, prayer, and conversation in attempts to dissuade patients from getting abortions" - to those entering abortion clinics and that the law creates an unconstitutional buffer zone, making it impossible for them to engage in "counseling," thus violating their First Amendment rights. The lower court found the ordinance content-neutral since it applied to all and thus subjected it to intermediate scrutiny and did not grant the request for a preliminary injunction, holding plaintiffs failed in their burden of showing likely success on the merits. The Third Circuit declined the plaintiffs' request that it decide the case - saying the district court still has the case pending on the merits and will thus have the first opportunity to render a decision - but did take the case to set precedent on preliminary injunction procedure for the Third Circuit, specifically to "clear up confusion caused by opinions in our Court that are in tension."

The Circuit began by announcing that the moving party in a preliminary injunction case must show

"(1) a reasonable probability of eventual success in the litigation, and (2) that it will be irreparably injured . . . if relief is not granted . . . . [In addition,] the district court, in considering whether to grant a preliminary injunction, should take into account, when they are relevant, (3) the possibility of harm to other interested persons from the grant or denial of the injunction, and (4) the public interest." It followed up recognizing that there "is an inconsistent line of cases within our Court holding that all four factors must be established by the movant and the failure to establish any element in its favor renders a preliminary injunction inappropriate." The court then reported that "compounded subtle misinterpretations" of case law led to the problem before detailing Supreme Court precedent and sister circuit case law on what the standard *should be*.

> The court announced the Circuit standard:
>
> [A] movant for preliminary equitable relief must meet the threshold for the first two "most critical" factors: it must demonstrate that it can win on the merits (which requires a showing significantly better than negligible but not necessarily more likely than not) and that it is more likely than not to suffer irreparable harm in the absence of preliminary relief. If these gateway factors are met, a court then considers the remaining two factors and determines in its sound discretion if all four factors, taken together, balance in favor of granting the requested preliminary relief. In assessing these factors, Judge Easterbrook's observation bears repeating: "How strong a claim on the merits is enough depends on the balance of the harms: the more net harm an injunction can prevent, the weaker the plaintiff's claim on the merits can be while still supporting some preliminary relief."

Turning to the preliminary injunction at hand, the Circuit held the lower court had erred. While plaintiffs *normally* bear the burden of demonstrating a sufficient likelihood of prevailing on the merits, in First Amendment cases where the government bears the *ultimate* burden on constitutionality, plaintiffs prevail *unless the Government shows that plaintiff's proposed less restrictive alternatives are less effective than the statute*. Since neither party in the case *sub judice* were aware of this applicable burden-shifting scheme, and the lower court did not raise it, the Circuit ordered that on remand the City be afforded the opportunity to meet this burden and show the ordinance is narrowly tailored.

LINK

Procedure: Inmate's Inability to Obtain Police Officer's Address and File Lien for Section 1983 Recovery is Excusable Procedural Error and Requires Appointment of Counsel for Assistance

Aruanno v. Caldwell, No. 16-4019 (3d Cir. May 25, 2017).

Where the district court found that an inmate's failure to properly file a lien to collect a Section 1983 judgment from a police officer required dismissal, the Third Circuit disagreed, holding that such failure was due to an inability to obtain the officer's address, and requiring the lower court to appoint counsel to assist the inmate in his efforts.

In April 2015 Joseph Aruanno (Aruanno) succeeded in his §1983 excessive force suit against Officer Corey Caldwell (Caldwell), winning a $5,000 judgment. The Third Circuit affirmed the judgment in the case, but simultaneously denied Aruanno's argument that he "should not have to file liens against Caldwell in order to collect the judgment [because] he believe[d] that the state should pay." Still unable to collect from Caldwell, in May 2016 Aruanno filed a "Motion to Reinstate/Reopen and/or Motion to Enforce/Compel" in an effort to get the lower court to force Caldwell to pay the judgment.

Having decided Aruanno failed to comply with the procedural rules under which he could get a writ of execution, the district court denied his requested relief, but left him the opportunity to refile. Aruanno did so twice, in which he alleged the lack of a law library, lack of access to a lawyer, and without legal education he did not understand what the court was asking. The lower court was not persuaded and denied the relief again and again, and denied that he had shown "extraordinary circumstances," under Fed.R.Civ.P. 60(b)(6) since Aruanno demonstrated his ability to represent himself in the past, thus previously demonstrating "an ability to adequately follow the rules and procedures of this Court."

On appeal, the Third Circuit disagreed. It found the lower court abused its discretion because it ignored Aruanno's lack of access to legal materials and inability to determine Caldwell's address due to security concerns. This, the Circuit found, was an extraordinary circumstance. Since Aruanno was an inmate and could not get access to Caldwell's address - a unique circumstance - it meant "any victory won against Caldwell would be hollow, as Aruanno has no way to file liens . . . ." The Circuit reversed, encouraging the lower court to provide counsel to Aruanno to recover his judgment against the officer.

LINK

Procedure: Removal to Federal Court Does Not Cure Lapse Under State Law Statutes of Limitation

Whidbee v. Pierce County, No. 14-36094 (9th Cir. May 26, 2017).

A Washington plaintiff has been rebuffed in his argument that, once his case was removed by the defendant to federal court, the federal statute of limitations for service of process should apply and override his prior failure to serve process within Washington state time limits.

In November 2010 the Pierce County Sheriff's Department executed a search warrant at the home of Clifton Whidbee (Whidbee). In doing so a flashbang was used that burned Whidbee on various parts of his body. Whidbee was arrested and jailed for approximately 2 weeks. In October 2013 he filed suit alleging 1983 claims against Pierce County (County). Under Washington state law Whidbee was required to serve process within 90 days after filing the complaint, which he failed to do. Once the case was commenced in state court, the County removed to federal court, where the County argued immediately that Whidbee had failed to accomplish service properly under Washington law, and thus fell short of the statute of limitations period, resulting in a dismissal. Whidbee appealed.

The Ninth Circuit began with the fact that Washington law requires actions for injury to another to be initiated within three years and for service to be accomplished within 90 days after the complaint is filed, meaning, based on his jail release date, Whidbee had to file and serve the County by January 8, 2014. Whidbee - who hired a process server - missed the state deadline and did not serve the correct County Department - he served Risk Management, rather than the Auditor. Whidbee argued, however, that once the case was removed to federal court, since he *did meet* the service timeline set under the federal rules of procedure and controlling federal statute and served the Auditor as well, the case was properly filed and therefore could go forward.

The Ninth Circuit rejected this argument, holding Whidbee conflated federal service of process with the state statute of limitations: while the federal rules of procedure and state statute provide time to serve process so all parties know of the federal removal, they *do not* change state

statutes of limitation. The Ninth Circuit affirmed the dismissal, leaving Whidbee unable to refile the case at all.

LINK

Public Records: County's Request for Reasonable Fees as Condition to Performing Massive Data Search is Not "Knowing and Willful" Violation of Public Information Act

Glass v. Anne Arundel County, No. 20 (Md. Ct. App. May 26, 2017).

Capping more than five years of litigation which began with a traffic citation, Maryland's highest court has upheld a lower court determination that a county acted reasonably in requiring payment of reasonable search fees before undertaking an exhaustive review of thousands of emails as demanded by the plaintiff, and in refusing to turn over personnel records of the officer involved.

In September 2010, Gary Glass was involved in a "road rage" incident with Arundel County Maryland (County) police officer Mark Collier ((Collier). Although no action was taken against Collier and Glass obtained an acquittal of the citation he received for following too closely, Glass subsequently served various discovery requests on the County under the Maryland Public Information Act (PIA), a statute modeled after the federal Freedom of Information Act. Initially, these requests were focused on the traffic incident but soon escalated to a series of searches for "any and all" records at the County relating to Glass-and then beyond. He initiated no fewer than seven separate PIA-based lawsuits against the County and various of its officials over a five-year period-creating a labyrinthine history which consumes 20 pages in the instant decision.

Glass was dissatisfied with the County's response to his requests, some of which indicated that no such documents existed or that the requested materials were privileged. When Glass was informed that a search of "Glass" within the County's email database returned more than 7,000 hits which would require over $4,000 to review, he demanded that the custodian refine the search to remove any records which had merely asked County officials to find "Glass" documents. The County initially demurred but was required by a lower court to deliver a USB stick containing such an edited set of search results, free of charge. When Glass discerned, from later searches, that the County had not turned over materials responsive material to his initial requests, he charged the County with willfully withholding information and sought damages.

The case ultimately made its way to the Maryland Court of Appeals, the state's highest judicial tribunal. Under consideration were three questions: had the County conducted reasonable searches initially; had it improperly denied Glass access to non-privileged records to which he was entitled; and did the County have the right to assert privilege with respect to certain personnel records?

The court reviewed the standard required of a custodian of public records-to exercise good faith. The duty is not unlimited: "This does not mean that the agency must robotically examine every record in its possession, running up an extravagant fee and diverting public resources in furtherance of a futile effort; rather, the search should be focused on where responsive records are likely to be found."

The court disagreed with the County's assertion that records which had been transferred to the Office of Information Technology (OIT) were no longer in Police Department custody or control (the County's characterization of the archived emails as "discarded" appeared to equate OIT to the "County dump," when it was more analogous to a "County warehouse," which the original

custodian could still access. But that factor did not shift the County's behavior to "knowing and willful" violation of the PIA, as one lower court had found. Instead, the evidence was that the County remained willing to cull through the emails to exclude privileged entries, subject to Glass' payment of the appropriate fees.

Glass had challenged the County's assertion that Officer Collier's Internal Affairs (IA) reports could not be disclosed because they were personnel records-a recognized exception to the PIA's expansive discovery principle. The court disagreed with Glass. Although some caselaw existed where IA documents were released, those had not revealed any personally-identifiable information.

In sum, the court found no clear and convincing evidence that the County had mishandled Glass' PIA requests. It affirmed the Court of Special Appeals and required Glass to pay costs.

LINK

RLUIPA: Delay in Requiring Orthodox Meals for Three Years After Becoming Messianic Jewish Believer Dooms Prisoner's RLUIPA Claim

Powers v. Secretary, No. 16-14889 (11th Cir. May 31, 2017).

A Florida inmate who asserts that he became a Messianic Jewish believer in 2012--but waited until 2015 to begin demanding orthodox Shabbat meals--has been denied an injunction requiring such meals because the court found inadequate evidence of irreparable harm.

Clinton Lee Powers (Powers) is a prisoner in Florida. Though he entered the prison system in the mid-1990s he only became a Messianic Jewish believer in 2012. In December of 2015 he alleged his right to freely exercise his religion was substantially burdened in violation of the Religious Land Use and Institutionalized Persons Act (RLUIPA) because his Shabbat meals were not pre-prepared before Sabbat. His motion for a preliminary injunction ordering such pre-preparation was denied by the district court, resulting in an appeal to the Eleventh Circuit.

The Circuit set forth a deferential standard for preliminary injunction review, noting that such review is "justifiably limited because the grant or denial of a preliminary injunction is almost always based on an abbreviated set of facts, requiring a delicate balancing of the probabilities of ultimate success with the consequences of immediate irreparable injury which could possibly flow from the denial of preliminary relief." After this disclaimer it waded into the meat of the denial - the lower court's point that Powers had been a practicing Messianic Jewish prisoner since 2012, but did not request pre-prepared meals until 2015. Powers argued that "his knowledge of the tenets of his belief system are evolving, and that the district court should not have dissected his religious beliefs."

The Circuit acknowledged the delicate nature of the case, saying it "certainly agree[s] that it is not a court's role to question the viability of a litigant's religious beliefs or his adherence to the dictates of his faith," but nevertheless upheld the lower court's decision. In light of the heavy burden on Powers to change the status quo when not all the facts are clear - the inherent posture of a preliminary injunction case - and the Circuit's role of limited review, it refused to say the district court abused its discretion by denying the "extraordinary" remedy. Powers' argument that his religious education is "evolving" was not available to the lower court on its initial review, but was only made known on appeal, and Powers' failure to articulate to the lower court the irreparable harm he suffered was fatal to the appeal.

LINK

Short-Term Rentals: One-Week Rentals of Single Family Residence are not Permitted "Accessory Use"

Lytle v. Swiec, 13 MISC 480974 (Ma. Land Ct. May 23, 2017).

Although it disagreed with a zoning board's focus on interpreting "transient rentals"-because that term does not appear in the relevant bylaw--a Massachusetts court has upheld the board's determination that one-week commercial rentals of a particular residence are not permitted as an "accessory use" under the bylaw.

In 2011, Plaintiff Robert Lytle, as Trustee of a realty trust (Lytle) purchased a lot and two residential units in Hull, Massachusetts (Town). The two-unit configuration was grandfathered in the Town's zoning maps. As Trustee, Plaintiff began to rent the second unit through Vacation Rental by Owner (VRBO) for one-week periods under the name "Nantasket Beach Rentals."

Although the prior owner had similarly rented out the second residence to short-term vacationers, the Hull Building Commission (Commission) began to receive complaints asserting that Lytle's rentals did not conform to the Town's Bylaw regarding real property use. The relevant language of the Bylaw stated that except otherwise provided "no building, structure or land shall be used except for the purpose(s) permitted in the district as described in this section. *Any use not listed shall be construed to be prohibited*." (italics added.) The Bylaw did allow for "certain allowed accessory uses customarily incidental to a permitted main use on the same [Single-Residential] premises, and defined "Accessory Building or Use" as "[a] building or use on the same lot with, and *clearly incidental and subordinate* to the principal use or structure.... " (italics added.) The Bylaw was silent as to short term rentals.

In 2013 the Commission issued Lytle a Violation Notice stating that "one of the family units at [Locus] has been and/or is being used and/or made available for *transient rental* purposes/uses and/or business/commercial use" in apparent violation of the Bylaw. The Hull Zoning Board of Appeals (Board) upheld the Commission's action.

On appeal, the Massachusetts Superior Court initially found that the Board had improperly focused on the words "transient rental" in the Violation Notice.

> [T]he Board's analysis is not supported by the Bylaw. There was no reason to turn to the Building Code for the definition of the word "transient" as that word does not appear in any applicable Bylaw provision regarding residential uses, and where the word "transient" does appear, it does not inform the question before the Board and this court.

However, the court found alternative grounds which supported the Board's decision, in the definition of "accessory use." Under Section 22-1 of the Bylaw, an accessory use is "*clearly incidental and subordinate* to the principal use or structure ..." While Lytle had argued that seasonal weekly rentals were a customary practice for many homeowners in Hull, the court found "[w]hether that is so remains undetermined and beyond the scope of this summary judgment motion and the record" and held that the Board had properly determined that Plaintiff's short term rental use of one dwelling unit was not allowed as an accessory use. The court also agreed with the Board's reasoning that unless a particular property use was specifically authorized in the Bylaw, it was not permitted.

The court was mindful of the larger controversy represented by this one suit:

> This court limits its determination, as did the Board, to this particular property, without considering the still-heavily disputed allegations as to the custom and practice throughout Hull raised as an issue in this and the related case. The issues remaining in this case are indicative of the tensions in Hull and other municipalities between property owners utilizing shared hotel and accommodation applications, such as Airbnb, HomeAway, or, in this particular case, Vacation Rental By Owner (VRBO), and their neighbors, town, zoning boards, and others concerned with short-term rentals in residential zoning districts.
>
> While this court does not adopt all of the Board's analysis, this court must uphold the Board's decision if it determines, which this court does, that the Board's ultimate conclusion is supported by the facts presented on this summary judgment record. This court finds the Board's Decision was not arbitrary, capricious, whimsical or unreasonable and should be affirmed.

It granted Summary Judgment to the Board members, but declined "to set any minimum rental period, as that question is beyond the scope of this summary judgment motion, and the court did not agree with the Board's analysis that the Bylaw inferentially mandates a minimum rental period of thirty days by incorporating the definition of the word 'transient' from the Building Code."

LINK

NOTE: We congratulate IMLA member Jim Lampke, who argued and won this case on behalf of the Town of Hull.

Speech: Mere Association with Fellow Street Performer Who May be Violating Prohibition Against Soliciting Payment Does Not Create Grounds for Arrest

Santopietro v. Howell, No. 14-16324 (9th Cir. May 24, 2017).

The Ninth Circuit has reversed a Nevada federal district court which had upheld the arrest of two women who were performing as "sexy cops" on Las Vegas sidewalks, finding that such performance, even if tips are occasionally solicited, cannot be prohibited commercial activity-and that even if such behavior is proscribed, one performer who was not observed doing anything to violate the "no commercial activity" rule cannot be arrested merely for being "associated" with the actual miscreant.

Michele Santopietro (Santopietro) is an actress. She occasionally travelled to Las Vegas from California to do street performance with a friend, dressing up as "sexy cops" and posing for photos. On one such occasion, plain-clothes police officers approached the ladies and asked the cost for a picture. Though some discrepancy in the stories exist, Santopietro's version is that the ladies said there was no cost, just the request for a tip. This prompted one of the three officers to pose, get a photo snapped, and then refuse to tip which, in turn prompted Santopietro's friend to ask - in the police officers' words "demand" - that the photo then be deleted. The police then revealed their badges and handcuffed the friend, only arresting Santopietro *after* she protested that her friend could not be arrested since she did nothing wrong. The ladies were officially arrested for doing business without a license - a violation of county code. The charges against Santopietro were ultimately dropped.

The Las Vegas Police Department (Department) has had trouble with First Amendment street performance on the Strip before, perhaps not surprisingly, and previously entered into a Memorandum of Understanding (MOU) wherein the Department agreed (a) that sidewalks and bridges of the Strip are traditional public for a; (b) on the definition of street performer; and (c)

that street performing is expressive speech or expressive conduct protected under the First Amendment. All the officers involved in the case were trained on this MOU.

Santopierto alleged the officers violated her First Amendment rights, a challenge met by a motion to dismiss by the police, which was granted by the district court with little comment on the First Amendment and with the holding that "the officers did not arrest Santopietro because she was a street performer who was soliciting tips in a non-coercive manner, but because the Officers reasonably had determined that [her friend], and *by association, Santopietro*, were no longer acting as street performers, but . . . were conducting business without a license . . . ."

The Circuit Court reversed the grant of summary judgment beginning with the "principal question . . . [of] whether it is constitutionally permissible under the First Amendment to require that a person hold a business license to conduct the activities in which Santopietro was engaged at the time of her arrest." The Circuit found street performance is indeed protected activity, and especially so on a public sidewalk, and that solicitation of tips is entitled to "some" constitutional protection. From there the court delved into the heart of the problem it found with the district court - the idea that Santopietro's *association* with her friend, who may have engaged in an illegal demand for money without a license, made Santopietro's conduct illegal.

On this front, the Circuit said there were no facts from which the officers could have had probable cause to believe the entire sexy cop *association* fell outside the ambit of the First Amendment or that Santopietro intended to engage with her friend for anything other than First Amendment activity. No evidence showed that there was an agreement between the ladies to demand quid-pro-quo payment for photos and no evidence of such a pattern. Given the Supreme Court's clear command that First Amendment protections are not lost "merely because some members of the group may have participated in conduct or advocated doctrine that itself is not protected," the Circuit rejected the lower court's probable cause reasoning and, ultimately, also held that there were genuine issues of material fact still in dispute that made summary judgment inappropriate.

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