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Employment: EEOC Did Not Have Authority to Revive Employee's Title VII and ADA Suit

Stamper v. Duval County School Board, No. 15-11788 (11th Cir. July 18, 2017).

If the EEOC grants a reconsideration request within a plaintiff's 90 day right-to-sue period, the plaintiff's right to bring suit is revoked but may restart at a later time; if reconsideration is granted outside the 90-day period, the plaintiff's right to sue is not considered revoked--but it cannot be revived later.

Tyquisha M. Stamper (Stamper) worked for the Duval County School system and in 2007 sought to pursue claims that she was discriminated against based on her race and disability. The Equal

Employment Opportunity Commission (EEOC) dismissed her administrative case and issued Stamper a notice of right to sue her employer within 90 days. Stamper did not file her case against the employer. In 2011 Stamper filed a request for reconsideration of the dismissal with the EEOC and it vacated the dismissal of the first charge. The Department of Justice then granted Stamper a new right-to-sue notice for the same allegations of discrimination and gave her 90 days to file; this time she did, prompting the Duval County School Board to cry foul, arguing the EEOC could not revive a claim otherwise barred by the statute of limitations by reversing a two-year old dismissal.

The Eleventh Circuit began with the plain rule that the EEOC rules do allow it to reconsider a decision, but with the caveat that when reconsideration is granted, it affects the timing of a plaintiff's civil action. If the EEOC grants the reconsideration request within the 90 day right-to-sue period, the plaintiff's right to bring suit is revoked; if it is outside that 90-day period, the plaintiff's right to sue is not revoked. Only in the former circumstance can the plaintiff's 90-day right-to-sue period restart. Since Stamper's situation was the latter, the EEOC's action did not revive right to sue and it was without authority to issue the second right-to-sue notice. Stamper had an alternative argument, positing her mental health condition equitably tolled the statute of limitations, but the Circuit disagreed, noting that though mental incompetence can give rise to tolling, Stamper did not show a causal connection between her schizophrenia and her delay in filing the complaint. In fact her deposition testimony was clear that when she received her right-to-sue notice she called an attorney hotline and understood that she had 90 days to file her claim in a federal court. The Circuit affirmed the lower court.

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Guns: DC's "Good Reason" Requirement for Public Carry License Violates Second Amendment

Wrenn v. District of Columbia, No. 16-7025, 16-7067 (D.C. Cir. July 25, 2017).

Breaking with the Second, Third and Fourth Circuits and striking down a "good reason" public carry license law, the DC Circuit has concluded that the prevailing attitude at the time the Second Amendment was drafted would have allowed the carrying of handguns in public for personal defense, a right equally sacrosanct to the home-based right identified in *Heller*.

Following the Supreme Court's 2008 determination in *Heller* that Washington DC's law prohibiting private handgun ownership violated the Second Amendment, the District has attempted less draconian measures to rein in gun usage. In 2014, the District implemented a Code provision allowing its police chief to promulgate regulations limiting licenses for the concealed carry of handguns to those showing a "good reason to fear injury to [their] person or property" or "any other proper reason for carrying a pistol." Persons who had been previously attacked or threatened with bodily harm, or who were responsible for a close relative unable to provide for their own self-defense, or who worked in a business involving the transport of large sums of money or other valuables were prime candidates for concealed carry licenses under the DC framework.

Two gun-rights plaintiffs (Gun Owners) brought actions challenging the "good reason" law. In one, the district court denied a preliminary injunction; in the other, the injunction was granted. The two appeals were consolidated.

Before the DC Circuit, the Gun Owners argued that good-reason regulation was analogous to the

District's "total ban" which the Supreme Court struck down in *Heller*. The District asserted that the law warranted no particular scrutiny because it did not burden protected rights at all-but if scrutiny was required, it should be intermediate at most. The Gun Owners advised that, because the law substantially impacted the Second Amendment's "core," strict scrutiny would apply.

Central to the decision was a determination of whether, and to what degree, the right to carry arms outside the home had been encompassed in the Second Amendment. The Circuit revisited many of the historical documents which the *Heller* court had examined, and concluded that the "parade of early English, Founding-era, antebellum, and late-nineteenth century cases and commentaries" required the conclusion "that the Second Amendment squarely covers carrying beyond the home for self-defense."

The District argued that, even if public carry was protected by the Second Amendment, it did not protect carrying in densely populated or urban areas like Washington, D.C. It cited the Statute of Northampton, a law that banned carrying firearms in crowded areas, and Northampton-like laws that had migrated to some colonies by the late 1700s, and then to several states in the mid-to-late 1800s. The Circuit disagreed: "For one thing, the history showcased in Heller I contradicts the main scholar whose work the District cites for the idea that Northampton banned all carrying in crowded areas . . .").

The District also argued that the Second Amendment excluded public carrying except for special self-defense needs, because carrying was always cabined by English "surety laws." These laws required that persons believed to pose a threat to others had to post a bond before they could carry publicly. Again, the Circuit was unswayed: Surety laws did not require that the public gun carrier show a special need for self-defense--they only burdened someone reasonably accused of posing a threat. "Under surety laws, put simply, everyone started out with robust carrying rights."

In sum, the right to public carry, even in an urban area like Washington D.C., was a core element of the Second Amendment:

> Reading the Amendment, applying Heller I's reasoning, and crediting key early sources, we conclude: the individual right to carry common firearms beyond the home for self-defense-even in densely populated areas, even for those lacking special self-defense needs-falls within the core of the Second Amendment's protections.

This result conflicted with the conclusions drawn by other circuits, which found that the right to carry was not core, and merited only intermediate scrutiny. The DC court attributed this view to a lack of thoroughness in studying the relevant history:

> Each circuit court justifying this modest review of good-reason laws has relied on an inference from the tolerance in American law for certain other carrying regulations. But each of these courts has also dispensed with the historical digging that would have exposed that inference as faulty-digging that Heller I makes essential to locating the Amendment's edge, or at least its core.

The DC Circuit identified its fellow tribunals which were applying inept reasoning. The Second Circuit had relied on a "hasty inference" in upholding New York's "good reason" law in *Kachalsky v. City of Westchester*, 701 F.3d 81 (2d Cir. 2012). Likewise, the Fourth Circuit had erred in applying intermediate scrutiny to a good-reason law in *Woollard v. Gallagher*, 712 F.3d 865 (4th Cir. 2013). And the Third Circuit, compounding the problem, had relied on the reasoning of the Second and Fourth Circuits for its decision to submit good-reason laws to intermediate scrutiny in *Drake v. Filko*, 724 F.3d 426 (3d Cir. 2013).

Other circuits had also critiqued this alleged lack of an historical study. The Ninth Circuit, in *Peruta v. City of San Diego,* 824 F.3d 919 (9th Cir. 2016) (en banc) had stated:

> [T]he Second, Third, and Fourth Circuits . . . declined to undertake a complete historical analysis of the scope and nature of the Second Amendment right outside the home. . . . As a result, they misapprehend both the nature of the Second Amendment right and the implications of state laws that prevent the vast majority of responsible, law-abiding citizens from carrying in public for lawful self-defense purposes. . . . [They] failed to comprehend that carrying weapons in public for the lawful purpose of self-defense is a central component of the right to bear arms.

And the Seventh Circuit, "the only other circuit that has surveyed the relevant history through the lens of Heller I" had also stricken a carrying ban (admittedly broader than the one confronting the DC Circuit) in *Moore*.

Having found that the right to public carry was "core," the Circuit could not countenance even an ostensibly limited restriction on that right. In actuality, the good-reason law was "necessarily a total ban on most D.C. residents' right to carry a gun in the face of ordinary self-defense needs . . ."

The DC Circuit vacated both orders below and remanded with instructions to permanently enjoin the Washington DC "good reason" public carry licensing law.

DISSENT: Judge Henderson disagreed. The sole Second Amendment "core" right identified in *Heller I* was the right to possess arms for self-defense in the home. In stating that "the need for defense of self, family, and property is most acute" in the home, the Supreme Court had clearly created a tiered taxonomy of gun rights. Public carry was necessarily subordinate: "A right that is less notable and less acute cannot reside at the Second Amendment's core." She characterized her colleagues as viewing history "with blinders on"-a view "contradicted by our sister circuits' extensive review of the same historical record." She would join the Second, Third and Fourth Circuits in finding that the "core" Second Amendment right does not extend beyond the home; the correct standard of review would be intermediate scrutiny at most. In that context, the DC law would reveal a narrowly tailored measure intended to promote a substantial governmental interest.

She made two additional points. First, that the legislature should be accorded substantial deference in matters of firearm regulation, and second, that Washington DC as a metropolis full of government officials, diplomats, protests, and most pertinent "countless government buildings where citizens are almost universally prohibited from possessing firearms." In her view, the District's good reason regulation passed muster under intermediate scrutiny.

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Loren L. AliKhan, District of Columbia Deputy Solicitor General, argued the District's case. Attorneys General for 10 states (Maryland, California, Connecticut, Hawaii, Illinois, Iowa, Massachusetts, New York, Oregon, and Washington) filed as amici curiae in support of the District; Deepak Gupta was also on an amicus brief supporting the District.

David H. Thompson argued the cause for appellees, supported on the brief by John Ohlendorf, among others. Attorneys General for 16 states (Arizona, Alabama, Arkansas, Indiana, Missouri, Montana, Nevada, Ohio, Oklahoma, South Carolina, South Dakota, Texas, Utah, West Virginia, Wisconsin, and Wyoming) signed as amici opposing the District's law. Paul Clement and William Olson were among those on amicus briefs supporting gun rights groups.

Immigration: Massachusetts Supreme Court Prohibits Holding Detainees Solely Pursuant to Civil ICE Detainers

Lunn v. Commonwealth, No. SJC-12276 (Mass. July 24, 2017).

Echoing the findings of a growing number of jurisdictions, the Massachusetts Supreme Court has ruled that the State's court officers do not have authority to arrest someone at the request of Federal immigration authorities pursuant to a civil immigration detainer, and hold them beyond the time that the individual would otherwise be entitled to be released from State custody, solely because the Federal authorities believe the person is subject to civil removal.

Srenyoun Lunn (Lunn) was arraigned in Boston Municipal Court in October 2016, on a single count of unarmed robbery. The United States Department of Homeland Security (DHS) issued a civil immigration detainer (ICE Detainer) against Lunn, requesting that Massachusetts (State) authorities continue to hold Lunn for up to two days after he would otherwise be released.

In February 2017, the case was dismissed for lack of prosecution. At that point there were no longer any criminal charges pending against Lunn in the State; however the judge declined counsel's request to release Lunn and he was detained in a holding cell in the court house for several hours until DHS officials arrived and took Lunn into custody. The next day, Lunn's counsel brought an action seeking Lunn's freedom and challenging the detention under the Fourth and Fourteenth Amendments and articles 12 and 14 of the State's Declaration of Rights. Given that Lunn was already in Federal custody, the single justice considered the matter moot but--recognizing that the petition raised important and recurring legal issues--reserved and reported the case to the full court.

The State's highest court found that the lower court's holding of Lunn after he had no further pending charges violated his rights under State law. In so doing, it provided a concise compendium of the relevant legal issues in such cases:

First, "it is not a crime for a removable alien to remain present in the United States," and the Federal administrative process for removing someone from the country "is a civil, not criminal, matter." *Arizona v. United States,* 567 U.S. 387 (2012). Accordingly, ICE detainers "are not criminal detainers or criminal arrest warrants. They do not charge anyone with a crime, indicate that anyone has been charged with a crime, or ask that anyone be detained in order that he or she can be prosecuted for a crime."

Second, "There is no Federal statute that confers on State officers the power to make this kind of [civil] arrest." And "nothing in the statutes or common law of Massachusetts authorizes court officers to make a civil arrest in these circumstances."

Third, ICE detainers "are not commands, and they impose no mandatory obligations on the State authorities to which they are directed." The Immigration and Naturalization Act (Act) "nowhere purports to authorize Federal authorities to require State or local officials to detain anyone . . . even if the Federal government wanted to make State compliance with immigration detainers mandatory, the Tenth Amendment likely would prevent it from doing so."

Fourth, "The requested detention constitutes an arrest." While a temporary stop to briefly detain an individual for investigatory purposes is permissible (*Terry v. Ohio*, 392 U.S. 1 ((1968)), "that is not what happens with a Federal immigration detainer."

Fifth, court officers-whose authority is no greater than that of police officers generally-have no authority to make such an arrest. Warrantless arrests are permitted only where the officer has probable cause to believe the arrestee has committed a felony, or where the arrestee commits a misdemeanor involving an actual or imminent breach of the peace in officer's presence. "Conspicuously absent from our common law is any authority (in the absence of a statute) for police officers to arrest generally for civil matters, let alone authority to arrest specifically for

Federal civil immigration matters." And "no party or amicus has identified a single Massachusetts statute that authorizes a Massachusetts police officer or court officer, directly or indirectly, to arrest in the circumstances here, based on a Federal civil immigration detainer. Simply put, there is no such statute in Massachusetts."

Sixth, the DHS argument that officers in the State have "inherent authority" to carry out requests in ICE detainers - "essentially, to make arrests for Federal civil immigration matters as a form of cooperation with the Federal authorities" is suspect, particularly after the Supreme Court's decision in *United States v. Arizona*"which severely curtailed, on Federal preemption grounds, the power of State and local police to act in Federal immigration matters." To hold otherwise would create an anomalous situation where police officers in the State had latitude to make arrests for Federal immigration matters on less substantial grounds than required under the State's common law or statutes. And although the INA allows states to enter into voluntary cooperation agreements with Federal immigration authorities (Section 287(g) agreements), those agreements are not mandatory and the State has not entered any such agreement.

In sum, "The prudent course is not for this court to create, and attempt to define, some new authority for court officers to arrest that heretofore has been unrecognized and undefined. The better course is for us to defer to the Legislature to establish and carefully define that authority if the Legislature wishes that to be the law of this Commonwealth."

The matter was remanded to the lower court for entry of a judgment dismissing Lunn's case as moot, and declaring that "Massachusetts law provides no authority for Massachusetts court officers to arrest and hold an individual solely on the basis of a Federal civil immigration detainer, beyond the time that the individual would otherwise be entitled to be released from State custody."

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Qualified Immunity: Issues of Fact to be Determined Where Arresting Officer had Insufficient Knowledge of Relevant Law to Form Probable Cause

Carter v. Hamaoui, No. 16-3107 (6th Cir. July 20, 2017).

Where an officer lacked sufficient familiarity with the applicable legal standards to have probable cause to stop a truck on the interstate, he could not obtain dismissal of a § 1983 claim on qualified immunity grounds.

In August of 2013 an anonymous tip was called in to police that a flatbed truck carrying scrap aluminum was travelling on Ohio's I-90 and had marijuana on it. Simultaneously, David Carter and Robert Thomson were driving on I-90 with a flatbed truck with scrap metal on it. Rocky River, Ohio police officer Monte Hamaoui (Hamaoui) heard the tip and was told to "make his own probable cause" should he see something. He saw Carter and Thomson and stopped the truck for weaving, driving too slowly, and travelling with an overweight vehicle. A drug dog was called in and alerted and the truck was impounded. No drugs were ultimately found. Carter and Thomson filed suit and the district court granted the defendants' motion for summary judgment and the officer's qualified immunity claim.

Carter and Thomson argued that summary judgment was inappropriate because there were genuine issues of material fact with regard to the stop that deprived Hamaoui of reasonable suspicion-thereby depriving him of qualified immunity since he violated clearly established law. Taking Hamaoui's three reasons for the stop in turn, the court first noted that Hamaoui had never

been trained on enforcing overweight loads, did not know the vehicle's load limit, or the elements of the law that he used to pull Carter and Thomson over for this violation. The Circuit held Hamaoui lacked reasonable suspicion for the stop based on this law, going through an elaborate discussion of the overweight law and how enforcing it requires more objective facts that he had, not to mention knowing the elements of the law. As for the remaining two reasons Hamaoui provided - the truck's low speed and its weaving - Carter and Thomson disagreed with his observations, noting the vehicle was set to cruise control at the 55 mph speed limit and was not weaving. Importantly for the court, the police car video did not support Hamaoui's statements since it did not show any weaving. As a result, the court found there were genuine issues of material fact.

Continuing to the second element of the qualified immunity analysis - whether Hamaoui's actions violated clearly established law - the Circuit held that "Hamaoui has failed to demonstrate anything more than a tenuous connection between the facts he observed and the alleged violation. This failure, in conjunction with the insufficiency of the anonymous tip to provide adequate independent cause to pull over the truck, means that a genuine issue of material fact exists as to whether Hamaoui violated clearly established law."

The court thus reversed the qualified immunity granted by the lower court and remanded the case.

LINK

Sovereign Immunity: Contracts Clause Limiting Enforceability to Georgia Governmental Parties Does Not Eliminate Liability to Out-of-State Third Party Beneficiaries

Chattanooga-Hamilton County Hospital Authority v. Walker County, No. 16-15656 (11th Cir. July 13, 2017).

The Eleventh Circuit has found that an intergovernmental agreement between a Georgia hospital authority and various Georgia counties to facilitate a loan from a Tennessee hospital is valid and enforceable by the out of state entity, and may not be avoided on the grounds of sovereign immunity.

Erlanger Health System, a public hospital in Tennessee, entered an agreement to lend the Georgia hospital authority $20 million. To facilitate the loan the Georgia hospital authority and the three counties it was to serve - Walker County, Dade County, and Catoosa County - entered into an intergovernmental agreement that provided "in the event of an uncured default by the [Georgia hospital] [a]uthority under the [loan], Walker [County] agrees to pay to the [a]uthority or its assigns an amount equal to one-half (1/2) of the principal of and interest then due and payable on the [loan]."

A few years into the life of the loan, the Georgia hospital authority defaulted, triggering Walker County's financial liability. Walker County refused to pay, triggering Erlanger to sue to force payment - and Erlanger won summary judgment. Walker County appealed, arguing the whole intergovernmental agreement was void, meaning it did not have to pay, and, even if the agreement was valid, it was entitled to sovereign immunity and should not have to pay.

The Eleventh Circuit began by reviewing the Georgia constitutional provision providing for intergovernmental contracts, noting it requires all parties be Georgia governmental entities. Walker County argued since the benefit of the intergovernmental contract at issue was to Erlanger - a non-Georgian entity - it was void. The Circuit flatly disagreed, highlighting that there

is a difference between parties to a contract and third-party beneficiaries of a contract. Erlanger was the latter, thus negating Walker County's argument. As for the second argument, it did not get far either, as the Eleventh Circuit noted up front that "[i]n Georgia, sovereign immunity is . . . waived as to any action . . . for the breach of any written contract, . . . and this is an action for the breach of a written contract." Walker County sought a way around this seemingly-clear rule by arguing that Erlanger is not a party -turning its first argument on its head. The Circuit was curt to say the least, holding only that "by entering into the [Agreement], [Walker County] waived the defense of sovereign immunity for any breach of the [Agreement] for which it could be held liable...."

Walker County was liable for the payment of $8,705,000 plus interest.

LINK

Speech: Ordinance Regulating All Commercial Activity in Public Park is Not Content-Specific and Does Not Violate First Amendment Rights of Photographer

Havlak v. Village of Twin Oaks, no. 16-3377 (8th Cir. July 25, 2017).

In a case in which IMLA participated as an amicus, the 8th Circuit has affirmed the lower court's decision upholding the city's licensing ordinance that regulated the use of the city's park by commercial photographers.

In 1994, the Village of Twin Oaks, Missouri (Village) dedicated an 11-acre park, passing an ordinance restricting commercial activities within the park. In 2011, the Village upgraded the park, attracting a much greater influx of users, including a considerable number of commercial photographers drawn to its many scenic backdrops. In response, the Village instituted a commercial use permit system, requiring a 48-hour prior reservation and a $100 fee, and limiting the number of people and time limit for any such use. One photographer, Josephine Havlak (Havlak) brought suit challenging the permitting system as a facial violation of her First Amendment rights. The district court denied her Free Speech claims, and the Eighth Circuit affirmed, holding that the Ordinance met constitutional scrutiny.

The Circuit found that the Village's commercial activity permit policy was facially content neutral and there was no indication of any governmental purpose to burden any particular message. The lack of a permit exception for groups smaller than 10 people did not create a constitutional infirmity, the deadlines for obtaining a permit were reasonable, the fee was narrowly tailored to the actual costs the Village incurred, and there were numerous many alternative locations in the St. Louis area where Havlak could conduct her commercial photography business and communicate her message. Finally, the policy did not provide the Village with unbridled discretion.

> Because the Village ordinance is content neutral, has been narrowly tailored to serve the Village's significant governmental interests, leaves ample alternatives for Havlak to communicate her message, and does not provide the Village with unbridled discretion, we find the permit process survives Havlak's challenge.

The case reflects the superlative work by Paul Rost, City Attorney for Twin Oaks who drafted the ordinance; John Hessel at Lewis Rice, who represented the City and developed a successful trial strategy and record for appeal; and Helmut Starr of Curtis, Heinz, Garrett and O'Keefe who represented IMLA pro bono. IMLA thanks the Missouri Municipal League for its support through the IMLA Lite program that made the small

village of Twin Oaks, an IMLA member, IMLA eligible for our assistance.

LINK

State-Created Danger: New Jersey Borough Not Liable For Drowning Death of Local Woman during Hurricane Irene

Van Orden v. Borough of Woodstock, No. 16-4295 (3d Cir. July 18, 2017).

The Third Circuit has declined to hold a local government accountable for a drowning death where the municipality did not have jurisdiction to block a highway which flooded after the municipality opened the flood gates of a dam; its actions lacked a sufficient causal link required for a state-created danger claim.

The Veteran's Memorial Dam in New Jersey is owned and operated by the Borough of Woodstock (Borough). In 2011 an emergency plan was in place that set forth cooperation between the Borough, the Salem County (Salem) and the State of New Jersey (State) in case of an emergency. That emergency came in the form of Hurricane Irene and the plan went into action, with all parties performing their respective parts. This included Salem issuing a travel ban beginning at 10pm the night before Irene was due to hit, noting that there was significant flooding already taking place. Despite the travel ban, Celena Sylvestri (Sylvestri), the plaintiff's daughter, drove from her house at about 11pm that night. At 1am she called police saying her car had been swept off the road by flood waters. She ultimately drowned. Sylvestri's mother brought suit against the Borough, Salem, the State, and individual government departments alleging that the decision to open the flood gates of the Veteran's Memorial Dam (Dam) without physically closing Highway 40 - on which her daughter's car was caught - was a state-created danger.

The Third Circuit began by reviewing the elements of the state-created danger doctrine, but never got past the first element, which requires that the plaintiff prove that "the harm ultimately caused was foreseeable and fairly direct." The Circuit, noting that both parts of this element must be shown - foreseeability and directness - held, even assuming the drowning was a foreseeable result of the defendant's actions, it was not direct enough to support liability under the law. An official's actions are direct when they "precipitated or were the catalyst for the harm that occurred," and here, the affirmative act of opening the floodgates was not enough.

The Circuit noted, as did the lower court, that before this hurricane, a previous storm already saturated the ground, that the water overflowed the Dam even though the flood gates were opened, that a pipe was blocked at a smaller creek causing an extra surge of water to Highway 40, and that the Borough lacked jurisdiction to close the Highway 40 (it only issued a travel ban). In short, the defendant's actions were "but one of many factors that resulted in the harm and therefore were too far removed from the eventual harm to be deemed a fairly direct cause by a reasonable juror." It affirmed the lower court.

LINK

Trials: Losing State Court Litigants Barred from Challenging Outcome in Federal Court Under *Rooker-Feldman*

Lennon v. City of Carmel, No. 16-3836 (7th Cir. July 25, 2017).

Citing the *Rooker-Feldman* doctrine, the Seventh Circuit has affirmed the lower court dismissal of a § 1983 action brought by a group of Indiana drivers against various Carmel officials claiming conspiracy in connection with a traffic enforcement system after they had paid fines in Carmel courts.

A slew of motorists were cited under Carmel City Ordinance § 8-2 (Ordinance), which (previously) adopted and incorporated the state of Indiana's traffic regulations so they could be enforced within Carmel via ordinance. These motorists - plaintiffs in this case - all resolved their various traffic violations either through paying the fine, being convicted at a trial, or entering into a deferred prosecution agreement. In 2015 a motorist challenged his citation under the Ordinance and the Indiana Court of Appeals held that Carmel's adoption of the Ordinance violated Indiana's Home Rule laws.

As a result, the motorist-plaintiffs filed in district court against Carmel officials arguing the officials violated 42 U.S.C. § 1983 by engaging in a "wide-ranging conspiracy to deprive them of their civil rights through misuses of the Carmel traffic justice system." The district court granted the defendants' motions to dismiss on several grounds - standing and the *Rooker-Feldman* doctrine - and any that survived that evaluation were dismissed based on other jurisdictional grounds.

The Seventh Circuit affirmed. *Rooker-Feldman* holds that "[f]ederal courts do not have the power to hear cases brought by state-court losers complaining of injuries caused by state-court judgments rendered before the district proceedings commenced and inviting district court review and rejection of those judgments," and this is where the Seventh Circuit focused. It noted the "plaintiffs lost in state court, their injuries flowed from the state-court judgments, the injuries occurred prior to the federal proceedings, and they want the federal courts to review and reject the state-court judgments." The plaintiffs tried in vain to fight this conclusion, arguing the Ordinance was void and therefore the State judgments against them "meaningless," resulting in no need for the Circuit to "overturn" the judgments.

The Circuit rejected this, noting that "to declare that the state-court judgments are void is to review those judgments-precisely the step that *Rooker-Feldman* says we cannot take." It affirmed the dismissals.

LINK

Trials: Witness's Video Statement Recorded Shortly after Inmate's Suicide Attempt is Likely More Probative than Live Testimony Seven Years Later and Should be Admitted

Pittman v. County of Madison, No. 16-3291 (7th Cir. July 14, 2017).

Overturning the lower court, the Seventh Circuit has ruled improper the exclusion of a videotaped interview with a witness made three hours after an Illinois inmate attempted suicide in favor of the same witness' providing live courtroom testimony seven years later, particularly given counsel's stipulation that the video could be aired.

In 2007 Reginald Pittman (Pittman) hung himself in his cell in the Madison County (Illinois) Jail. He left a note saying he killed himself because the guards were harassing him and would not let him see the crisis counselors. He did not die, but suffered severe brain damage that left him in a vegetative state. His guardian filed suit alleging that deliberate indifference by guards and other jail staff to the risk of his attempting suicide, in violation of the Eighth Amendment, caused his injury. In 2011 the district court granted summary judgment in favor of all the defendants, but the

Seventh Circuit reversed as to the two guards guarding Pittman. The case went to trial and the jury found in favor of the guards. Pittman's guardian appealed, seeking a retrial based on evidentiary issues.

Judge Posner wasted no time delving into the merits of the appeal and found it had merit. The Circuit focused entirely on the trial judge's decision not to allow the plaintiff to show a 2007 video of the key witness's interview three hours after the suicide. Although the witness-an occupant of a cell adjoining Pitman's-- testified in the trial, that testimony took place *seven years* after Pittman's suicide attempt, and the witness's demeanor and memory were substantially and meaningfully different than the video interview. Critically, the Circuit said "[i]t was senseless to think that testimony by [the witness] seven years after Pittman's suicide attempt was as or more reliable than his recorded testimony made *three* hours after the attempt."

The court also found objectionable the fact that the defense had stipulated to showing the video if the witness was allowed to testify and then, just before it was to be shown, objected. This the court would not countenance, noting "the stipulation between the parties entitled the plaintiff to play the tape at the trial." It vacated the judgment, holding that there was "no assurance that Pittman's claim was fairly tried" and remanded for a retrial.

DISSENT: Judge Manion dissented. The judge summed up the majority position as holding that "when a party seeking to admit evidence asserts the existence of an out-of-court agreement to allow that evidence, it is an abuse of discretion for [a] district judge to exclude that evidence, even when the judge believes that evidence is inadmissible hearsay and the moving party has made no showing to the contrary." This he disagreed with, noting the witness was available to testify at trial, did so, and that the plaintiff's attorney failed to lay a proper foundation for the video to be shown. Judge Manion would have found the "informal out-of-court agreement" - e.g. the stipulation that the video could be played if the witness was allowed to testify- insufficient to justify admitting the video. He would have upheld the trial result, given that the district judge in the case was not persuaded that the videotape was admissible under any of the hearsay exceptions and had made a reasonable decision to exclude it.

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