Illinois Local Government Lawyers Association
22nd Annual Conference
Naperville Campus, Northern Illinois University
February 16, 2015

Section 1983 Liability Case Law Update

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Fourth Amendment – Mistake of Law

Heien v. North Carolina, 135 S. Ct. 530 (2014)

Police pulled over a vehicle with one brake light. A consensual search revealed cocaine in the vehicle. The defendant moved to suppress the drugs arguing that the stop was illegal because state law only required one working stop light. The motion was denied, and the North Carolina Supreme Court affirmed, finding that the vehicle code could be read to require both brake lights to be working, and the officer's mistake of law did not invalidate the stop.

The U.S. Supreme Court agreed. A police officer's reasonable mistake of the law can justify a traffic stop so long as the mistake is reasonable. "The Fourth Amendment requires government officials to act reasonably, not perfectly in enforcing the law."

Fourth Amendment—Cell Phone Search

Riley v. California, 134 S. Ct. 2473 (2014)

In consolidated cases, defendants were arrested and their cell phones were seized and searched without a warrant and incriminating information was found. In one case, the information connected defendant with an earlier shooting. In the second case, the information led to a search warrant of a home where drugs and guns were found.

U.S. Supreme Court held that the police may not, without a warrant, search digital information on a cell phone following an arrest. The warrantless search exception following an arrest deals with officer safety and preservation of evidence, none of which were implicated. While some warrantless searches might be permitted in an emergency, the government's interests must be compelling.

Fourth Amendment---High Speed Pursuit/Deadly Force

Plumhoff v. Rickard , 134 S. Ct. 2012 (2014)

Donald Rickard led police officers on a high-speed car chase. The chase came to a halt in a parking lot. As he tried to escape again, the police fired three shots into the vehicle. The shots missed and Rickard drove away, almost striking an officer. Officers fired 12 more shots killing Rickard and his female passenger. Rickard's estate sued under Section 1983 claiming that the officers used excessive force in violation of the Fourth Amendment.

The U.S. Supreme Court held that the police may use deadly force to terminate a dangerous high speed car chase and may keep shooting until the threat to public safety has ended. Further, existing case law did not clearly establish that police could not use lethal force to end dangerous high speed car chase thus officers entitled to qualified immunity.

Fourth Amendment---Reasonable Suspicion---Anonymous Call

Navarrete v. California, 134 S. Ct. 1683 (2004)

Police dispatcher received an anonymous call that a truck had run an unidentified vehicle off the road. Officers stopped the truck and smelled marijuana. Search revealed thirty pounds of marijuana in the truck bed.

- The Supreme Court held that the traffic stop complied with the Fourth Amendment under the totality of the circumstances because the officers had reasonable suspicion, based entirely on the anonymous call, that the truck's driver was intoxicated or otherwise impaired.

- "An anonymous tip alone seldom demonstrates sufficient reliability, but may do so under appropriate circumstances. The 911 call in this case bore adequate indicia of reliability for the officer to credit the caller's account." The tip here created a reasonable suspicion of drunk driving and reasonable suspicion "need not rule out the possibility of innocent conduct."

Fourth Amendment –Consensual Search

Fernandez v. California, 134 S. Ct. 1126 (2014)

Investigating a robbery, police saw suspect running into apartment. Defendant's wife answered door and appeared battered. Defendant came to the door and objected to search. Police arrested him for battery to wife. He was later identified as the robber. Police returned later and got consent from wife to search the home and found items linking him robbery.

- U.S. Supreme Court held that wife's consent was given well after defendant was removed from home. She could validly consent to warrantless search in the absence of the defendant even where the defendant had previously objected to the search.

Fourth Amendment-Knock and Talk Exception

Carroll v. Carman, 135 S. Ct. 348 (2014)

- Looking for a suspect who had reportedly fled to Carman's residence, officers entered backyard and approached the house via a deck that looked like a customary entrance. The officers were confronted by Carman, who allowed search of residence for the suspect. Carman sued the officers under Section 1983 for unlawful warrantless entry.

- Third Circuit held that the "Knock and Talk" exception to the warrant requirement allows officers to knock on someone's door, but only if the officers are standing on property which the general public is allowed. The back door is not such a place. The court denied the officers' qualified immunity defense.

- The USSC reversed, holding that the officers were entitled to qualified immunity because there was no clearly established law that a police interaction must begin at the front door to be eligible for the exception to the warrant requirement.

First Amendment Retaliation-Compelled Testimony

Lane v. Franks, 134 S. Ct. 2369 (2014)

Plaintiff sued his employer for allegedly terminating his employment in retaliation for testifying under subpoena in corruption trials involving another employee who Plaintiff had fired. Eleventh Circuit held that Plaintiff's testimony was not entitled to First Amendment protection because it was made pursuant to his official duties as a public employee, citing *Garcetti*. The USSC affirmed on qualified immunity:

- Plaintiff's sworn testimony was outside the scope of his ordinary job duties and was entitled to First Amendment protection. The testimony clearly constituted speech on a matter of public concern and, although learned through his position, was not part of his day-to-day duties.

- However, existing case law held that public employee testimony was unprotected speech. Thus, when employer terminated plaintiff, he was not violating a clearly established constitutional right.

Qualified Immunity

Tolan v. Cotton, 134 S. Ct. 1861 (2014)

Plaintiff sued police officer for excessive use of force. Plaintiff exited a car that the police suspected was stolen. An officer ordered plaintiff to the ground. Plaintiff's parents came out of house and protested. An officer grabbed plaintiff's mother roughly, prompting plaintiff to rise to his knees or feet and yell "get your f'ing hands off my mom." In response, an officer drew his weapon and shot plaintiff three times. Fifth Circuit affirmed summary judgment for officer on qualified immunity grounds.

- U.S. Supreme Court reversed. Fifth Circuit misapplied summary judgment and qualified immunity standards by improperly resolving fact questions in favor of defendant, i.e., whether the area was dimly lit, whether mother refused orders to remain quiet and calm, whether plaintiff was shouting and verbally threatening officer, and whether plaintiff was moving to intervene in officer's interaction with mother.

Fourth Amendment – Warrantless Entry and Arrest In Home

Hawkins v. Mitchell, 756 F.3d 983 (7th Cir. 2014)

- Police responded to a 9-1-1 domestic call. Plaintiff locked girlfriend out of house and did not want to talk with police. He tried closing door, but officer stuck foot out and entered the home. While on phone with his attorney, officers grabbed his wrists and a struggle ensued and he was arrested.
- Seventh Circuit reversed summary judgment:
  - Officers lacked exigent circumstances to enter house. There was no physical attack or injuries. Girlfriend just wanted her car keys back.
  - There was no probable cause to arrest for theft of keys, and fact questions existed as to arrest for disorderly conduct. Plaintiff claimed he was asleep when police arrived and did not yell or otherwise breach the peace.
  - Plaintiff had First Amendment right to consult with his attorney but fact questions existed as to whether he was arrested in retaliation.
  - Court reversed defense jury verdict on excessive force claim based on comments made to jury that officers had right to be in house.

Fourth Amendment---Qualified Immunity

Gibbs v. Lomas, 755 F.3d 529 (7th Cir. 2013)

Police responded to complaint that plaintiff was driving fast while pointing a gun at the ceiling of his car. Plaintiff was arrested for disorderly conduct, but the charge was later dismissed because Wisconsin recently exempted from prosecution carrying or going armed with a firearm whether concealed or openly carried. He sued under Section 1983 for unlawful search and seizure.

The Seventh Circuit reversed the denial of summary judgment, finding that the officer was entitled to qualified immunity. Law was not clearly established because Wisconsin courts had not yet ruled on whether plaintiff's conduct was unprotected and punishable under the disorderly conduct statute.

Fourteenth Amendment Due Process Violation
Wrongful Prosecution

- Allegation that police coerced witnesses into making statements implicating plaintiff does not state due process violation. *Petty v. City of Chicago*, 754 F.3d 416 (7th Cir. 2014).
- However, the fabrication of evidence that the police know to be untrue violates due process. *Fields v. Wharrie*, 740 F.3d 1107 (7th Cir. 2014).
- Except that, where plaintiff is acquitted, an officer's alleged silence about fabrication of evidence does not amount to a due process violation. *Saunders-El v. Rohde*, 2015 WL 400559 (7th Cir. 2015).

Fourth Amendment-Police Emergency Aid-Qualified Immunity

Sutterfield v. City of Milwaukee, 751 F.3d 542 (7th Cir. 2014)

A psychiatrist called 9-1-1 stating that patient had just left her office and threatened to go home and blow her brains out. The police were also informed that the patient had an empty holster, presumably meaning she had a gun. The psychiatrist called back hours later stating that the patient called and said she did not need assistance, but the psychiatrist did not state that she no longer posed a danger to herself or others. Officers prepared detention petition and forcibly entered patient's home and detained her. A gun was later found in the home. She sued for warrantless search and seizure.

- The Seventh Circuit affirmed summary judgment for the police. Officers were entitled to qualified immunity because the law as to the appropriate legal framework for warrantless intrusions motivated by purposes other than law enforcement and evidence-gathering was not clearly established.

Fourth Amendment---False Arrest---Qualified Immunity

White v. Stanley, 745 F.3d 237 (7th Cir. 2014)

Officers came to the plaintiff's house without a warrant looking his live-in girlfriend on a suspicion that she had stolen a license plate registration. While talking to plaintiff at the door, the officers smelled burning marijuana coming from inside the house. Plaintiff tried to shut the door, but the officers forced entry. Plaintiff was tackled and arrested for obstruction. Plaintiff sued under Section 1983. The district court found that there was no exigency allowing the deputies to enter the apartment, and they were not entitled to summary judgment.

- The Seventh Circuit agreed that the smell of marijuana was not a sufficient exigency to justify the warrantless entry. However, the officers were entitled to qualified immunity because the case law at the time of the incident was unsettled as to whether or not the smell of burning marijuana established such an exigency. Thus, the Seventh Circuit reversed the denial of summary judgment.

Fourth Amendment---Search and Seizure

Vinson v. Vermilion Cnty, Ill., 2015 WL 343673 (7th Cir. 2015)

Detectives executed a search warrant at the Olson home looking for stolen items. They found nothing. They then met a Vermilion County Deputy and went to the Vinson's home. The record indicates that they had no reason to believe that the Vinson's were involved in the theft and possessed no warrant for the property. They arrived at the home in unmarked cars and saw the Vinson's daughter. The daughter was alarmed, went inside, locked the door and called her parents. She saw a man peering through the window who said he was an officer and that they had to conduct a search. She went upstairs and watched from a video as the officers search the attached garage and curtilage. The officers found nothing and left. The family sued under Section 1983 based upon an illegal search and seizure. The district court dismissed all claims on a motion to dismiss.

- The Seventh Circuit reversed and held that the family did not consent to a search merely by the daughter walking away from the officers. Instead, the officers statement that he "had to search" the residence was an affirmative statement that failed to allow a reasonable person to consent. The fact that there was no forced entry and that nothing was actually seized is irrelevant to the Fourth Amendment claim.

Fourth Amendment-Investigatory Stop/Arrest
Huff v. Reichert, 744 F.3d 999 (7th Cir. 2014)

Officer conducted traffic stop on plaintiff driver who had crossed white divider line without signaling, which plaintiff denied. After 16 minutes, he gave plaintiff a written warning. The officer then detained plaintiff and his plaintiff passenger for an additional 34 minutes while both men were patted down and drug sniffing dog search was conducted on the vehicle's exterior followed an interior search. Plaintiffs sued, and the district court denied summary judgment to the officers based on qualified immunity.

- The Seventh Circuit affirmed the denial of summary judgment and qualified immunity. Once officer gave written warning, plaintiffs could not be detained any longer without turning stop into a full blown arrest requiring probable cause, which did not exist. Thus continued detention for another 34 minutes violated plaintiffs' Fourth Amendment rights.

Due Process—GPS Tracking Device

United States v. Brown, 744 F.3d 474 (7th Cir. 2014)

Brown was convicted of conspiring to distribute more than five kilograms of cocaine. A confidential informant allowed the police to place a GPS monitor on the informant's Jeep in preparation for a meeting with Brown. Although the GPS monitor cannot determine the vehicle's contents, only its locale, Brown asserted that the court should have prevented the prosecution from presenting evidence traceable to information gathered from the GPS monitor based upon the 2012 Supreme Court case of *United States v. Jones* in which the court held that the intrusion on the property interest of a car's owner is a "search."

The Seventh Circuit refused to extend *Jones* to facts such as monitoring a car's location for an extended time if the owner consents to the installation of the GPS monitor. The court reasoned that no property rights had been invaded and that the situation was no different than having a confidential informant wearing a wire that secretly records a conversation.

Equal Protection---Class of One

Fares Pawn, LLC v. IN Dep't of Fin. Insts., 755 F.3d 839 (7th Cir. 2014)

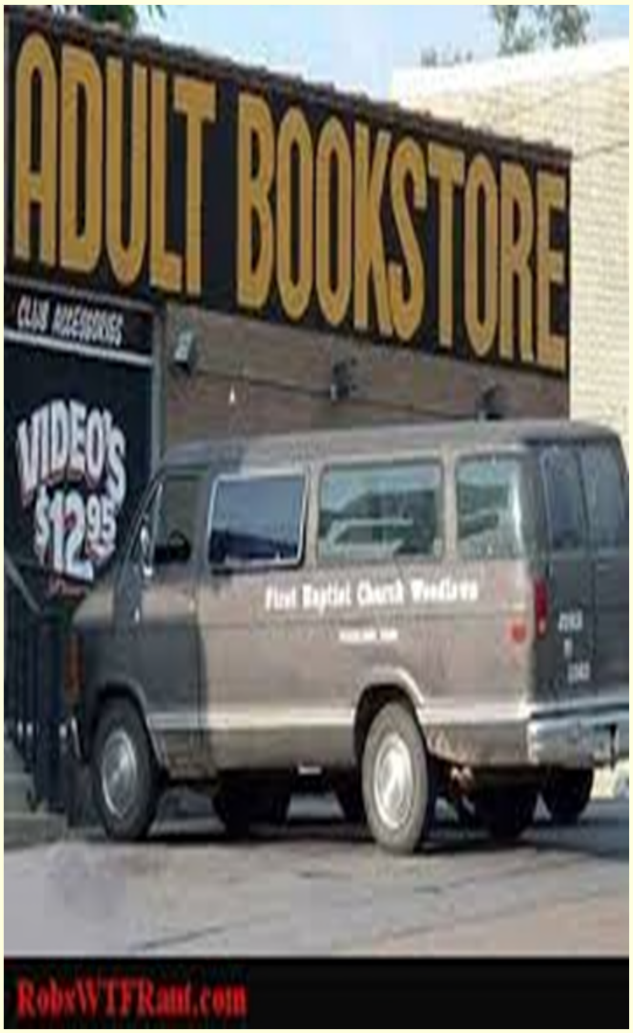
State of Indiana Department of Financial Institutions granted plaintiff a pawnbroker license conditioned on plaintiff's agreement not to hire a store manager who had a criminal history. Plaintiff sued under Section 1983, alleging a "class of one" Equal Protection discrimination claim. The district court granted the Department summary judgment, and the Seventh Circuit affirmed.

- Plaintiff had the burden to prove that the Department treated him differently that similarly situated pawnbrokers. The court found that the plaintiff's proposed comparators were treated with as much scrutiny relative to their application process as the plaintiff. Plaintiff was rigorously examined by the Department because it was concerned about a "straw license," i.e. allowing a convicted felon to essentially run and own the pawn shop, but in his friend's name. The court also refused to extend *Enquist v. Oregon Department of Agriculture* – prohibiting "class of one" claims in the public employment context – to state licensing processes.

First Amendment – Adult Bookstores

Annex Books, Inc. v. City of Indianapolis, 624 F.3d 368 (7th Cir. 2014)

Indianapolis required adult bookstores to remain closed between 12 a.m. and 10 a.m. every day and closed on Sunday. Other businesses are not subject to the same restrictions. Indianapolis contended that closure would curtail the secondary effects, including violence in the area and other criminal action. The district court held a trial and accepted the City's reasoning that fewer armed robberies happened near adult bookstores.



- The Seventh Circuit reversed, holding that the difference in the number of armed robberies is not statistically significant and did not show that robberies are more likely at adult bookstores than other late-night retailers such as liquor stores or adult entertainment theaters. Those establishments are not subject to the hours imposed on adult bookstores. The Seventh Circuit stated that you could not regulate adult books stores in this fashion based solely on their content under the time, place and manner test.

First Amendment---Panhandling
Norton v. City of Springfield, 768 F.3d 713 (7th Cir. 2014)

- Springfield enacted a city ordinance prohibiting panhandling in its downtown historic district, which comprised less than 2% of the city's area, but had the premier shopping district and entertainment zone of the city, as well as government buildings. The ordinance defined panhandling as an oral request for money. Signs requesting money were allowed. Plaintiffs received citations under the ordinance. The district court denied a preliminary injunction, and the Seventh Circuit affirmed.
    - The court found that the ordinance was "indifferent to the solicitor's stated reason for seeking money, or whether the requester states any reason at all…Springfield has not meddled with the marketplace of ideas." The prohibition is instead based on whether a person orally requests money rather than a position a person takes. According to the court, there was no such expression that was being limited, and the fact that the ordinance allowed plaintiffs to make non-verbal requests for money in the form of signs did not change the analysis to content-based.

Section 1983---Prevailing Attorney's Fees

- Jury verdict of $1 nominal damages and $3,000 punitive damages. Plaintiff submitted $675,000 attorney fee petition. District court reduced petition to $123,000, and Seventh Circuit affirmed. *Richardson v. City of Chicago*, 740 F.3d 1099 (7th Cir. 2014)
- Jury verdict for $1,000 compensatory damages and $1,000 punitive damages. Plaintiff's fee petition was $426,380.00. The district court reduced the award to $109,000.00, and the Seventh Circuit affirmed. *Montanez v. Simon*, 755 F.3d 547 (7th Cir. 2014).
- Jury awarded $1 compensatory and $7,500 punitive damages against individual police officer. His attorney filed $336,916 fee petition. City refused to pay the fees on behalf of officer. District court reduced fees to $187,467 and ordered City to pay. Seventh Circuit reversed, holding that Section 9-102 of Tort Immunity Act did not mandate indemnification of attorney's fees. *Winston v. O'Brien*, 773 F.3d 809 (7th Cir. 2014)

Biography

Mike Bersani is a partner with Hervas, Condon & Bersani, P.C. Mike received his undergraduate degree from the University of Illinois, Urbana-Champaign in 1985, and his law degree from John Marshall Law School in 1988. Following law school, Mike clerked for the Honorable Judge Edward T. Barfield, State of Florida Court of Appeals, 1st District. In 1990, Mike entered private practice and has concentrated his practice in defending local governments in federal civil rights and municipal tort litigation. His typical case load includes claims involving police misconduct, jail conditions, wrongful termination, employment discrimination and retaliation, and premises and vehicular liability. Mike is admitted to the bars of the U.S. Supreme Court, Seventh Circuit, and the U.S. District Courts for the Northern and Central Districts of Illinois. He is co-contributor to the IICLE chapter on Civil Rights Liability and is rated AV Preeminent® in Martindale-Hubbell. Mike also practices in the area of municipal and park district law, and he served as the 2013-14 Chairman of the Illinois State Bar Association Local Government Law Section Council.

Biography

Anthony Becknek is an Associate Attorney with Hervas, Condon & Bersani, P.C. Anthony graduated from Michigan State University College of Law in 2011. While attending law school, Anthony served as an extern for the United States Attorney's Office in Detroit, Michigan, as well as serving as a General Counsel clerk for the Department of Justice, Interpol in Washington, D.C. while studying at Georgetown University Law Center. At Michigan State University, Anthony was President of the Spartan Law Student Society, Editor-in-Chief of the MSU legal newspaper *Res Ipsa*, an editorial associate of the Journal of Medicine and Law, and a member of the Michigan State Moot Court and Trial Advocacy team, finishing eighth best individual oralist out of 120 competitors at the Jessup Moot Court Championship. Anthony also participated in the prestigious Geoffrey Fieger Trial Practice Institute, earning a trial practice certificate. While in college at DePaul University, Anthony was an Academic All-American and USA Track and Field All-American while serving as Captain of DePaul Universities Track and Cross Country teams. Anthony has also obtained a Master's of Science Degree in Criminal Justice from the University of Cincinnati.

Anthony is admitted to practice in Illinois, as well as the Seventh Circuit Court of Appeals and the U.S. District Courts for the Northern and Central Districts of Illinois. Anthony sits on the Board of Directors for the Michigan State University College of Law Alumni Association, as well as on the Young Professional Council and Board for the Legal Assistance Foundation in Chicago, as well as St. Vincent Catholic Charities and is the Special Projects Coordinator for the Chicago Bar Association Young Lawyers Division. Anthony also performs *pro bono* work throughout Cook and DuPage Counties for Chicago Volunteer Legal Services and the Lawyers Committee for Better Housing.