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DEFENSE OF
SECTION 1983 ACTIONS

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SUPREME COURT OF THE UNITED STATES CASES

I. CONVICT'S REQUEST FOR DNA TESTING COGNIZABLE UNDER SECTION 1983

Skinner v. Switzer, 2011 U.S. LEXIS 1905 (U.S. Mar.7, 2011)

A Texas inmate, Skinner, sentenced to death for a triple murder unsuccessfully sought state and federal post-conviction relief. He sought DNA evidence for testing under §1983. The fifth circuit dismissed the inmate's suit, but the Supreme Court reversed.

The question presented was whether a convicted state prisoner seeking DNA testing of crime scene evidence may assert that claim in a civil rights action under §1983, or whether such a claim is cognizable in federal court only when asserted in a petition for writ of habeas corpus under 28 U.S.C. §2254.

Skinner challenged a Texas post-conviction DNA statute as construed by Texas courts. In two separate actions the Texas courts had denied him relief. In one case, the court denied relief because Skinner failed to show that he would not have been convicted if exculpatory results had been obtained through DNA testing. In the other case, the court reasoned that Skinner had not established, as required by the statute, that the evidence was not previously tested through no fault on his part.

Preliminarily the Supreme Court held that the *Skinner* suit was not barred by the so-called *Rooker-Feldman* doctrine (which bars state court losers under certain circumstances from seeking district court review of a state court judgment). Skinner presented an independent basis for the exercise of federal jurisdiction. Just because the same or a related question was earlier aired between the parties in state court does not bar a constitutional challenge in federal court.

The court held that habeas relief is not the sole remedy. Cases holding that §1983 actions are barred where any civil rights award would necessarily imply the invalidity of the plaintiff's conviction are inapposite. Skinner's suit for DNA testing would not necessarily imply the invalidity of his conviction. Test results might prove exculpatory, but those results could also prove inconclusive or incriminating.

The court also found "implausible" the state's claim that there may be a flood of litigation seeking post-conviction discovery of evidence associated with the questions of guilt or punishment.

II. QUALIFIED IMMUNITY DEFENSE NOT REVIEWABLE AFTER FULL TRIAL ON THE MERITS WHERE THE DEFENDANTS FAIL TO IMMEDIATELY APPEAL DENIAL OF SUMMARY JUDGMENT OR MOVE PURSUANT TO RULE 50(B)

Ortiz v. Jordan, 131 S.Ct. 884 (2011)

Ortiz, a former Ohio inmate, was sexually assaulted by a corrections officer on two consecutive nights. Although she promptly reported the first assault, the case manager, Jordan, did nothing to ward off the second sexual assault despite Jordan's awareness of the substantial risk of that occurring. A prison investigator, Bright, also allegedly retaliated against Ortiz by shackling and handcuffing her in solitary confinement without adequate clothing, bedding, or blankets. Ortiz sued Jordan and Bright under §1983.

Both defendants moved for summary judgment on the basis of qualified immunity. The district court found factual disputes and denied the motions. At trial a jury awarded Ortiz $350,000 against the defendants. Although they had moved for judgment as a matter of law pursuant to Federal Rule of Civil Procedure 50(a) at the close of Ortiz's evidence and at the close of their own presentation, they failed to renew their request for judgment as a matter of law post-verdict pursuant to Rule 50(b). Also they did not request a new trial under Rule 59(a).

On appeal the sixth circuit held that the district court should have granted their motion for summary judgment based on their qualified immunity defense. The Supreme Court reversed and held that a party may not appeal a denial of summary judgment after a district court has conducted a full trial on the merits.

Ordinarily orders denying summary judgment are interlocutory and not appealable as final decisions. Qualified immunity pleas are an exception, but not where the district court determines that factual issues genuinely in dispute preclude summary adjudication. If such a qualified immunity plea is denied at the summary judgment phase, it may be pursued at trial, but at that stage the plea must be evaluated in light of the character and quality of evidence received in court.

Jordan and Bright sought no immediate appeal from the denial of their summary judgment motion. Nor did they avail themselves of Rule 50(b), which permits the entry of judgment, post-verdict, for the verdict loser if the court finds the evidence legally insufficient to sustain a verdict. Absent such a motion an appellate court is powerless to review the sufficiency of the evidence after trial.

SIXTH CIRCUIT COURT OF APPEALS CASES

I. POLICE LIABILITY

A. SUMMARY JUDGMENT FOR DEPUTY SHERIFF REVERSED WHERE QUESTIONS OF FACT EXISTED

Miller v. Sanilac County, 606 F.3d 240

Miller was stopped after running a stop sign on an icy surface. The deputy sheriff claimed that he detected a slight odor of alcohol coming from Miller's breath, so Miller was ordered to perform field sobriety tests. The deputy claimed that Miller failed that field sobriety test. Miller alleged that the officer spun him around, kicked his feet apart, and slammed him against his vehicle.

The deputy wrote seven tickets for Miller, including failure to use a seat belt, no proof of registration, no proof of insurance, reckless driving, refusal to submit to a breath test, minor in possession, and 0.02% blood-alcohol-no-tolerance-law violation. A blood test the following week indicated a 0.00% blood alcohol level. A few days later the deputy requested that the lab test Miller's blood for controlled substances. That test also came back negative. All charges against Miller were dismissed.

Miller sued the deputy for three constitutional violations pursuant to §1983 (use of excessive force, Fourth Amendment search and seizure violations, and malicious prosecution) and four state tort claims (assault and battery, false arrest/false imprisonment, malicious prosecution, and gross negligence). Miller also sued the county alleging that it inadequately trained and supervised its officers. The district court granted the defendants summary judgment, and Miller appealed.

Summary judgment was reversed as to the federal claims of malicious prosecution, unlawful arrest, and excessive force (in part) and state claims of false arrest/false imprisonment, malicious prosecution, and assault and battery. The negative blood-alcohol reading cast doubt on the deputy's claims that he smelled alcohol coming from Miller's breath and that Miller failed the field sobriety test. A jury could reasonably conclude that the deputy was being untruthful about his observations and did not have probable cause to believe Miller was drinking. As to excessive force, summary judgment was not appropriate because there were allegations that the officer kicked and threw Miller against his vehicle.

The court of appeals, however, affirmed summary judgment as to the claim that the deputy violated his Fourth Amendment rights by requesting a lab test of his blood for controlled substances. The officer obtained a search warrant to perform that testing, which on its face

clearly authorized the testing. The court also affirmed summary judgment as to that part of the excessive force claim that the deputy failed to loosen the handcuffs. In order for a handcuffing claim to survive summary judgment the plaintiff must offer sufficient evidence to create a genuine issue of material fact that 1) he or she complained that the handcuffs were too tight; 2) the officer ignored those complaints; and 3) the plaintiff experienced "some physical injury" resulting from the handcuffing. See, *Lyons v. City of Xenia*, 417 F.3d 575, 575-67 (6th Cir. 2005). Miller failed to satisfy those prongs. Further, the court of appeals affirmed summary judgment on claims that the deputy was grossly negligent in exposing Miller to cold weather during the field sobriety test.

Summary judgment for the county was affirmed because Miller had not shown that a policy or custom was the moving force behind the alleged violations or that there was deliberate indifference based on prior instances of unconstitutional conduct.

B. ARRESTEE WHO PLED NO CONTEST TO DISORDERLY CONDUCT ESTOPPED FROM CLAIMING UNLAWFUL SEIZURE OR PURSUING CONSTITUTIONAL CLAIM

Jackim v. Sam's East, Inc., 378 F. Appx. 556, 2010 U.S. App. LEXIS

Husband and wife shoppers at a Brooklyn, Ohio Sam's Club were arrested for disorderly conduct after a confrontation with security officers over whether they were required to pay taxes on their purchases. The wife pled no contest to attempted disorderly conduct, and the husband was found guilty at trial.

The plaintiffs filed suit alleging civil rights claims and state claims for reckless infliction of emotional distress and negligence. The defendants filed for summary judgment, and the district court granted those motions.

On appeal the sixth circuit held that the wife's no contest conviction collaterally estopped her from pursuing her claim for unlawful seizure. The court held that the plea of no contest barred a §1983 lawsuit alleging an arrest without probable cause and wrongful imprisonment.

The Sam's Club defendants were dismissed because they were not "state actors." The court of appeals noted that a private party's actions may constitute state action under §1983 where those actions may be fairly attributable to the state, for example, if there is a conspiracy between a private actor and state actors. The plaintiffs, however, failed to support that claim with evidence, so summary judgment was affirmed.

C. POLICE OFFICERS AND MUNICIPALITY APPROPRIATELY GRANTED SUMMARY JUDGMENT IN SHOOTING DEATH CASE

Steele v. City of Cleveland, 375 F. Appx. 536, 2010 U.S. App. LEXIS 8791

Plaintiff's decedent was driving a car with expired license plates. He was playing music loudly when six Cleveland police officers initiated a stop. According to the police, the decedent started sliding his hand down his right side and disobeyed repeated orders to keep his hands in plain view. The officers also alleged the decedent dove into the back of the vehicle, grabbed a gun, and wrestled with an officer. The decedent was shot sixteen times.

The decedent's mother filed a §1983 action alleging the officers used excessive force in violation of the Fourth Amendment, and that the City of Cleveland failed to adequately train them in the use of deadly force. Pendent state court claims also were asserted. Summary judgment was granted to all defendants, and the court of appeals affirmed.

In the trial court and court of appeals the plaintiff argued there were genuine issues of material fact precluding summary judgment. Those assertions, however, were not supported by record evidence. The appellate court observed that the use of deadly force is objectively reasonable under the Fourth Amendment where an officer has probable cause to believe that the suspect poses a threat of serious physical harm, either to the officers or others. See, *Tennessee v. Garner*, 471 U.S.1 (1985) and *Williams v. City of Grosse Pointe Park*, 496 F.23d 482 (6th Cir. 2007). The court also noted that the reasonableness of the use of force must be judged from the perspective of a reasonable officer on the scene rather than with 20/20 hindsight. *Graham v. Connor*, 490 U.S. 386 (1989).

The plaintiff failed to make the requisite showing of a constitutional right violation. The court, therefore, did not consider the second prong of a qualified immunity analysis, i.e., whether the asserted right was clearly established in a particularized sense at the time of the fatal shooting. For the same reasons, summary judgment was appropriate with respect to plaintiff's state law claims.

Finally, the City was properly granted summary judgment on the failure to train claim because without a constitutional violation, plaintiff's municipal liability claim failed as a matter of law.

D. DISPATCHER AND ARRESTING OFFICERS ENTITLED TO SUMMARY JUDGMENT IN MISTAKEN IDENTITY CASE

Fettes v. Hendershot, 375 F. Appx. 528, 2010 U.S. App. LEXIS 8784

The owner of a pizza shop, Robert Fettes, Jr., failed to pay workers' compensation premiums for several years. The BWC obtained a warrant for the arrest of "Robert Fettes" without a Jr. or Sr. designation.

A police officer pulled over Robert Fettes, Sr. for running a stop sign. The officer called the dispatcher to run a warrant check. The check came back with a hit, and the officer arrested the father for the workers' compensation violation. During the ten minute car ride to the station the officer ignored Fettes' complaints that his handcuffs were too tight. Fettes was detained for a total of two hours before the police recognized the mistake and freed him. He sued the dispatcher for violating his Fourth Amendment right to be free from unlawful arrests, and the police officer for using excessive force in not loosening the handcuffs which caused "handcuff neuropathy," a permanent damaging of nerves in his wrist.

The sixth circuit held that summary judgment was appropriate for both officials based on qualified immunity. As to the claim against the dispatcher, while he was arguably negligent in not checking the address on the warrant which would have revealed the error, "negligence does not equal a constitutional violation." The dispatcher would have had to act willfully, and there was no evidence to that effect. As to the excessive force claim, although there is a generalized right to be free from unduly tight handcuffs, the facts in the instant case did not show a violation. An officer should not be required to stop every time a suspect complains about handcuffs.

II. MEDICAL TREATMENT

A. SUMMARY JUDGMENT AFFIRMED FOR ALL DEFENDANTS EXCEPT TWO NURSES IN FAILURE TO PROVIDE MEDICAL TREATMENT CASE

Jones v. Muskegon County, 625 F.3d 935, 2010 U.S. App. LEXIS 23034

A prisoner was detained for approximately one year. Over that period his weight dropped from 170 to 117 pounds. He made repeated complaints to officials of abdominal pain. The prison doctor treated him for constipation and provided him with a laxative. He was finally sent to the hospital and diagnosed with cancer. He then returned to jail and died within a month.

The prisoner's representative sued the doctor, the nursing staff, the prison guards, and the county alleging Eighth Amendment cruel and unusual punishment for denial of medical care. The district court awarded all defendants summary judgment.

The sixth circuit affirmed summary judgment for all parties, except the nurses. The court began by noting that a denial of medical care claim requires the plaintiff show that the official (1) subjectively knew of a risk to the inmate's health, (2) drew the inference that a substantial risk of harm existed, and (3) consciously disregarded that risk with a state of mind similar to recklessness. *Farmer v. Brennan,* 511 U.S. 825 (1994).

The claim failed against the guards because there was no evidence they were responsible for providing medical care, and it appeared they relayed the prisoner's health complaints to the medical staff. To prevail against the doctor the plaintiff had to show that he purposefully ignored the distress "knowing that an adverse outcome was likely to occur." The court found that while the doctor's diagnosis may have been negligent, negligence alone is insufficient for an actionable claim.

The claim against the nurses, however, was sufficient to withstand summary judgment. The court cited an affidavit from an inmate who overheard the nurses discussing that the deceased thought he had cancer but the nurses believed that he was faking it. The nurses ignored the deceased's complaints and waited months before providing him with an examination. This delay was sufficient to establish a factual issue.

B. SUMMARY JUDGMENT FOR ALL DEFENDANTS AFFIRMED IN FAILURE TO PROVIDE MEDICAL ATTENTION TO INTOXICATED ARRESTEE CASE

Meier v. County of Presque Isle, 376 Fed. Appx. 524, 2010 U.S. App. LEXIS 9281

A man drove his car into a ditch and admitted to drinking alcohol. His arrest report noted that he had a BAC of 0.31%, bloodshot eyes, slurred speech, smelled of alcohol, and staggered when he walked. However, he understood the questioning and did not appear to be in danger of alcohol poisoning. The officers called a doctor who told them to monitor the prisoner's condition throughout the night. The following day the prisoner became comatose while still incarcerated; he subsequently died. His widow sued the county, the deputy, and the attending officers for deliberate indifference to his medical needs.

There was a department policy that required the officers to transport an arrestee to a medical facility if that person had a BAC of 0.30% or above. It was undisputed that this policy was violated.

The district court granted summary judgment to all of the officers, and the sixth circuit affirmed. The court began by noting that even if the officers were aware of the policy and failed to comply, such a "failure is not a per se constitutional violation." The focus remains on whether the officer violated a constitutional right. In that case while the actions of the officers "might not have been preferable," they were not reckless.

III. FIRST AMENDMENT

A. VIABLE CLAIM WHERE COUNTY EMPLOYEE FIRED AFTER PUBLICLY CRITICIZING COUNTY HIGHWAY PROJECT

Paige v. Coyner, 614 F.3d 273, 2010 U.S. App. LEXIS 15329

Martha Paige spoke out against an interstate-highway project at a public meeting where she identified herself as a resident of Warren County and the president of the Residents' Association. The Director of the Warren County Office of Economic Development, Kimberly Coyner, had proposed the project and overheard her complaints. Coyner then called Paige's employer, Bunnell Hill, a commercial development corporation. Coyner falsely claimed that Paige identified herself as an employee of the company when she spoke out at the meeting and "sought clarification of Bunnell Hill's commitment to development in the region." Bunnell Hill fired Paige over the incident, specifically referencing the false allegation that she used the company's name to oppose the project.

Paige brought suit against Coyner in her individual and official capacities and also sued the municipal entities for which Coyner worked. The district court dismissed the complaint via 12(b)(6) because the firing was caused by a private employer, not anyone acting under color of state law. The court relied on *Blum v. Yaretsky*, 457 U.S. 991 (1982), where the Supreme Court found there can be no liability if a private entity is ultimately responsible for the impermissible action.

The sixth circuit reversed and remanded, framing the issue as whether the defendants retaliated against Paige for exercising her First Amendment rights by making false statements to her employer with the intention of having Paige fired. The court distinguished *Blum* because in that case the state actors took no action themselves, while in the present case Coyner personally "initiated the entire chain of events" by actively making the phone call. Whether the firing was a reasonably foreseeable consequence of that call was a question of fact.

The court also reversed the dismissal for the municipal entity because whether there was a policy or procedure behind Coyner's action could not be decided at that early stage of the suit.

B. CLAIMS ARISING FROM REMOVAL OF BUSINESS FROM MUNICIPAL TOWING LIST SURVIVE SUMMARY JUDGMENT

Briner v. City of Ontario, 370 Fed. Appx. 682, 2010 U.S. App. LEXIS 6271

The plaintiffs owned a towing business in the City of Ontario and became dissatisfied with the police department for, amongst other things, failing to solve two thefts. They were vocal in their criticism, and even initiated a political campaign to establish a police review board. They posted a sign on their front yard supporting the cause along with the message: "Ask the Chief about his past." The police chief responded by sending the plaintiffs a letter stating that during the department's investigation into one of the thefts "it appears there is some questionable conduct on the part of [the company]," and as a result he was removing them from the City's approved towing list. The chief admitted at one point that he did so in retaliation for the criticism. The chief also requested that the prosecutor file baseless criminal charges against one of the plaintiffs for tampering with auto title records and lying under oath.

The plaintiffs filed suit against the chief and other county actors and entities for First Amendment retaliation, alleging that the arrest and removal from the towing list were retaliation for their constitutionally protected speech, i.e., the criticism and political drive. The district court granted summary judgment on all claims.

The sixth circuit reversed. The court began by noting that a retaliation claim requires plaintiffs to show that (1) they were engaged in protected speech, (2) the action of the defendant would chill a normal person from engaging in that speech, and (3) the adverse action was motivated in part by the speech. *Lucas v. Monroe County*, 203 F.3d 964, 973 (6th Cir. 2000). The court cited the extensive factual record in finding that there was evidence of each element, specifically the testimony of the chief that he had retaliated against the plaintiffs, insufficient evidence for the criminal charges, and proof the police department regularly parked a squad car in front of the plaintiffs' home while they had the yard sign up.