Section 1983 Update

IACP Annual Conference
Boston, 2006

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Table of Contents
2006-2007 Revision

INVESTIGATIVE DETENTION:

FALSE ARREST:

SEARCH AND SEIZURE:

EXCESSIVE FORCE:

FAILURE TO PROTECT

SUPERVISORY:

INVESTIGATIVE DETENTION:

Smoak v. Hall, 460 F.3d 768 (6th Cir.)

A woman called the police to say a car passed her at 110 miles per hour and money was flying all over the interstate. The dispatcher told officers to look for a green station wagon traveling at a high rate of speed and sent a teletype inquiring of recent robberies. Another dispatcher issued a second BOLO stating that the vehicle was possibly involved in a robbery. Troopers found a wallet with the plaintiff's identification which was apparently left on the roof of his car by mistake when he stopped for gas. When a trooper spotted the vehicle a dispatcher reported to municipal officers, "We're fixing to have a felony stop on a vehicle…possibly armed robbery out of Nashville." The videotape recorded the felony stop.

Mr. & Mrs. Smoak were taken out of the car at gunpoint, told to get on their knees, put their hands behind their backs and were handcuffed. They asked the troopers to shut their doors so the dogs inside the car would not escape. Their one year old dog bulldog/bull terrier mix jumped from the car and was shot by one of the officers. At that point James Smoak jumped up in horror at which point he was wrestled back to the ground badly injuring his knee requiring surgery. When the officers reported that they had the plaintiffs in custody, Nashville reported that the Smoaks were not wanted for any crimes. Realizing their mistake they released the Smoaks 29 minutes from the time of the stop.

The Court first determined that the seizure was based on reasonable suspicion. The next question was whether or not the nature of the seizure resulted in a custodial situation. "When police actions go beyond checking out the suspicious circumstances that led to the original stop, the detention becomes an arrest that must be supported by probable cause." To determine this, the Court looked at the length of the detention and the manner in which it was conducted. Because the Troopers possessed nothing more than a bare inference that the Smoaks had been involved in a robbery and the dispatchers did not properly relay all the relevant data at hand, plus the fact that the Smoaks had obediently complied with the Trooper's orders, the Court concluded that the seizure violated their Fourth Amendment rights because it became an arrest without probable cause. The Court also found that the use of force by the police was excessive in that Mr. Smoak was handcuffed and jumped up only after his dog had been shot in front of him. It was unreasonable for the officers to knock his legs out from under him and throw him to the pavement facedown. Upon further analysis of clearly established law the Court determined that the officers were entitled to qualified immunity with regard to the investigative detention but not on the excessive force claim.

Thurman v. Village of Homewood, 446 F.3d 682 (7th Cir. 2006)

Homewood Police responded to Home Depot stopping a man who was reported as wearing a gun. The plainclothes individual stated that he was a Chicago police officer and produced a badge and identification showing employment with the department but not indicating he was a police officer. He also showed them a firearm registration card, but the serial number was whited-out with another written over it. When he said he worked at the 21st District, the

officers erroneously contacted State Police District #21, which replied that he was not employed there. After approximately twenty to twenty-five minutes he was released when the officers called the correct department and they confirmed he was an officer.

Thurman sued claiming an unreasonable investigative detention. The court determined, however, that the officers acted with reasonable diligence pursuing actions designed to elicit information as to whether he was actually a police officer. He also brought a claim against the officers and their attorney alleging that they acted unconstitutionally in making a complaint to his department. The court determined that this complaint was not made under color of law as any citizen can make a complaint and, therefore, the action was not taken with the power and authority of the officer's position or in conspiracy with their attorney.

Gray ex. rel. Alexander v. Bostic, 458 F.3d 1295 (11th Cir. 2006)

A school resource officer was sued for handcuffing a nine year old child who was not doing her jumping jacks and threatened one of the coaches, Williams, by stating that she was going to punch him or hit him the face. Coach Horton, a witness, testified that Gray said "I bust you in the head." SRO Bostic took Gray out in the hallway and handcuffed her for at least five minutes, to persuade her to get rid of her disrespectful attitude and impress upon her the serious nature of committing crimes. The court found that Bostic's handcuffing of the child was not reasonably related to the investigative detention. Prior to taking her out into the hallway the incident was over; the child had cooperated with her coaches and did not pose a threat to anyone's safety. Even though the court found no factually similar cases warning Bostic that his contact was unconstitutional, this case came within the sphere of those "obvious clarity" cases, which are well beyond the hazy border that separates lawful conduct from unlawful conduct. The handcuffing was an obvious violation of the child's Fourth Amendment rights.

Sheriff Sexton was sued for failure to train and supervise Bostic on the proper use of force in this elementary school setting. The court found that there was no evidence of the record of widespread or obvious handcuffing detentions of students by Bostic or other deputy sheriffs. There had been a claim of one prior isolated incident but there was no evidence that the Sheriff was aware of this incident.

Plaintiff also claimed that the Sheriff instituted a policy instructing deputies to detain, handcuff, arrest and incarcerate individuals who are not suspected of committing a crime. However, plaintiff failed to provide evidence that Sexton instituted such a policy or that any other policy would have led Bostic to believe that he could detain a student in handcuffs absent safety concerns. Finally, with regard to the training issue, even though Bostic received no specific training addressing detention of students, it was not a highly predictable consequence of failure to train that a violation of a student's Fourth Amendment rights would occur. While the lack of this training may have been a possible imperfection, it was not a glaring omission from the training regimen.

MacWade v. Kelly, 2006 WL 2424788 (10th Cir.)

The plaintiffs challenged the constitutionality of the *New York City Subway System Container Inspection Program*. The plaintiffs appealed the district court's decision determining that the searches were constitutional under the Special Needs Doctrine. The appellate court

stated that the first aspect of the doctrine is that the search must serve as its immediate purpose and objective distinct from the ordinary evidence gathering associated with crime investigation. The Court determined that the program was developed in response to a string of bombings on commuter trains in subway systems abroad and is directly aimed at discovering concealed explosives. Therefore, the prophylactic purpose in protecting public safety on the nation's busiest subway system fulfilled the special need that was distinct from ordinary criminal investigations.

The Court next evaluated the factors determining whether the searches as conducted were reasonable.

1. The government's interest is immediate and substantial: Rejecting the plaintiff's claim that the government interest is weakened because there was no specific threat to the system, the Court explained that a specific threat is not necessary. "It is sufficient that the Government have a compelling interest in preventing an otherwise pervasive societal problem from spreading…where the risk to public safety is substantial and real, blanket suspicionless searches calibrated to the risk may rank as 'reasonable' - for example, searches now routine at airports and at entrances to courts and other official buildings." They concluded that the threat in this case was sufficient, "In light of prior thwarted plots to bomb New York City subway system, its continued desirability as a target and the recent bombings of public transportation systems."

2. A subway rider has a full expectation of privacy in his containers: This factor weighed in favor of the plaintiffs as a person carrying closed containers possessed an undiminished expectation of privacy.

3. The search is minimally intrusive: The manner in which the program was exercised weighed in favor of the defendants.

    a. Passengers received notice of the search and may decline to be searched as long as they leave the system;
    b. Police search only those containers capable of concealing explosives, inspect containers only to determine whether they contain explosives, the inspection is usually visible unless necessary to manipulate contents and officers do not read printed or written material or request personal information;
    c. The typical search lasts only for a matter of seconds;
    d. Uniformed personnel conduct searches out in the open;
    e. Police exercise no discretion in selecting whom to search but employ a formula that insures that they do not arbitrarily exercise their authority.

4. The program is reasonably effective: In evaluating this factor, the Court would not second guess the decisions of experts and public officials who determined that such a program would be reasonably effective. They refused to consider four months of data and statistical manipulations presented by the plaintiffs. What they did consider was the design of the program. Expert testimony established that terrorists seek predictable and vulnerable targets, and the program generates

uncertainty that frustrates the goals of terrorists and deters attacks. The fact that the City could not provide a formal study of the program's effectiveness was of no concern as deterrents by definition results in the absence of data.

It was also of no concern that notification allowed passengers to walk away and reenter at another subway point. The Court hypothesized that if a would-be bomber declines a search and leaves the subway station such "unexpected change of plans might well stymie the attack, disrupt the synchronicity of multiple bombings or at least reduce casualties by forcing the terrorists to detonate in a less populated location." Finally, rejecting the plaintiff's claim that the program must be effective as no other City had employed a similar program was flawed as other cities must design programs according to their own resources and needs.

FALSE ARREST:

Panetta v. Crowley, 460 F.3d 388 (2d Cir. 2006)

A state trooper received a complaint from two well-credentialed horse experts detailing the physical condition of a horse which they claim was due to abuse and neglect of the plaintiff. After personally observing the poor condition of the horse, the trooper arrested the plaintiff for animal cruelty. The plaintiff complained that the trooper ignored the horse's age, which might have explained some of its symptoms. Further, the trooper ignored multiple statements that the horse was under veterinary care and refused to speak on the phone with the veterinarian which would have cleared her of wrong doing.

The court explained that the detailed complaints from apparently credible and knowledgeable witnesses plus the officer's own observations, which confirmed the complaint, were sufficient to support probable cause. Once an officer has probable cause, he or she is not required to continue investigating, nor was the officer required to accept explanations of innocence or speak to the veterinarian after the plaintiff was taken into custody.

Quoting prior case law, "We consider only information [the officer] relied on in concluding that there was probable cause to arrest…not every theoretically plausible piece of exculpatory evidence or claim of innocence that might have existed." "It is therefore of no consequence that a more thorough or more probing investigation might have cast doubt upon the situation."

Brown v. Abercrombie, 151 Fed.Appx. 892 (11th Cir. 2005)

Detective Abercrombie investigated several robberies at an apartment complex. She interviewed two security guards who saw the suspects and identified a brown van seen at the apartment complex on two occasions when it was burglarized. The van was registered to Brown's cousin, but documents indicated that Brown co-purchased the van with another individual. When brought in for questioning, he did not acknowledge the burglary and refused to be photographed or provide fingerprints. A security guard positively identified Brown as a suspect he had seen at the scene.

Brown claimed that Abercrombie failed to include exculpatory information in the warrant application including his cousin's statement that he had never loaned the van to Brown, the security guard's initial description which indicated the suspect weighted 170 lbs. when Brown weighed 230 lbs., and a gas receipt with no name showing that gas had been purchased at the same time that the second burglary occurred, but fifty miles away.

The court ruled that "she need not have included every bit of information gleaned by her investigation in her application so long as she did not knowingly omit any information that would be material to the finding of probable cause."

Mustafa v. City of Chicago, 442 F.3d 544 (7th Cir. 2006)

Three months after 9-11, Anna Mustafa, a fifty-six year old American of Palistinean descent and Muslim faith, was at O'Hara Airport on her way to attend her father's funeral, with nineteen members of her immediate family. She complained to a manager that she believed her two pieces of luggage were taken to a bomb detection machine based on discriminatory ethnic or racial profiling. Mustafa was screaming in the crowded area, and tried to point out that her purse had not been inspected saying "you already checked my luggage. Maybe I have a bomb in my purse. Nobody has checked that." An officer responded to the commotion two or three minutes later and during the ensuing twenty to thirty minutes of argument, a sergeant and other officers arrived. Mustafa was arrested, spent two days in jail, and was released on a $50,000.00 bond. She was acquitted following a bench trial. "Probable cause to arrest is an absolute defense to any claim under Section 1983 against police officers for wrongful arrest, false imprisonment or malicious prosecution." Plaintiff's claims that the officer's actions were racially motivated, that the airport personnel did not actually believe she had a bomb, that she only said "Maybe I have a bomb.", did not diminish probable cause to believe that she had violated a statute which forbids any "false alarm to the effect that a bomb… is concealed."

Mustafa also claimed that the officers failed to do a complete investigation. The court noted that officers are under no duty to investigate extenuating circumstances or search for exculpatory evidence once probable cause has been established.

John Doe v. Metropolitan Police Department of D.C., 445 F.3d 460 (D.C. Cir. 2006)

John Doe was stopped carrying a package of closed containers of beer. He was taken to the police station where he was held for seven hours before being issued a summons and released. He and several others claimed that they were falsely arrested because the statute violated called for only civil penalties in the nature of fines. The court agreed reversing the district court's dismissal of the charges indicating that violation of the local law amounted to a civil offense and therefore did not justify a custodial arrest.

Lopez v. City of Chicago, 2006 WL 2707970 (2d Cir.)

Mr. Lopez was wrongfully arrested because of an eyewitness identification for the accidental drive-by murder of a 12 year old innocent bystander. Following his warrantless arrest, he claims he was shackled to a wall in an interrogation room for four days and nights, had nowhere to sleep, no toilet, and was given only one bologna sandwich and juice during the entire four days. After two and a half days he became disoriented, gave a false confession, and on the

fifth day was moved to the city lockup. The following day, detectives obtained a confession from the actual murderer. During this period of time Lopez was not presented before the court. The detectives deny the treatment with the exception of Lopez' not being brought before court.

Unconstitutional Duration of Confinement

Gerstein v. Pugh, 420 US 103 (1975) and County of Riverside v. McLaughlin, 500 US 44 (1991) held that if a probable cause hearing is not held within 48 hours of a warrantless arrest, the government must demonstrate the existence of an emergency or other extraordinary circumstance to justify its failure to properly present the person arrested to a judicial officer. In this case there were no circumstances to justify the failure to present Mr. Lopez. Prior precedent indicates the plaintiffs may show that being held for even less than 48 hours might be unreasonable, but that under McLaughlin if a person is held more than 48 hours, the burden shifts to the government to justify the extensive hold.

Unconstitutional Conditions of Confinement

The district court's application of deliberate indifference on this issue was erroneous. The Court described the lines drawn amongst the constitutional standards applied at various stages of detention. **The Fourth Amendment applies from the time of a warrantless arrest until a Gerstein probable cause hearing.** The Fourteenth Amendment's due process standard of deliberate indifference applies after the judicial determination of probable cause, and the Eighth Amendment "Cruel and Unusual" test applies following conviction.

If a jury credits Lopez' testimony, they could find liability under the Fourth Amendment test under objective unreasonableness.

Note: Lopez obtained 14 affidavits from others arrested without warrants and held in an interrogation rooms under similar conditions. The City entered a Monell waiver consenting to the entry of judgment against it, if the finder of fact concluded that any City employee violated plaintiff's rights. This precluded the presentation of evidence of treatment of the other detainees.

Alexander v. City of South Bend, 433 F.3d 550 (7th Cir. 2006)

Following a series of sexual assaults, police put together a composite sketch of a young black male. Alexander was stopped by the police who took his photograph and let him go after he refused to surrender a blood sample. He was ultimately arrested after witness identifications and spent more than five years in prison following a conviction for attempted rape.

Plaintiff claimed flawed identification procedures. None of the three victims identified him from an individual photo or an array. A female witness participated in three photo procedures. She first picked out another individual who she said she was 70% sure was the perpetrator and later failed to pick out Alexander's picture from a photo array. In a third photo array, she now claimed she was sure he was the attacker, because of the facial features that she had never previously described. A male witness who was the fiancé of one of the victims identified Alexander from a mug shot taken five years earlier. During the incident he was approached from behind, forced to lie on the ground, and his glasses were knocked off during the

commotion. Finally, Alexander and five other men, some of whom did not match certain aspects of the descriptions given by the witnesses, were put in a line up. Nine of the victims and witnesses viewed the line up and several identified Alexander.

Alexander's first claim was that his constitutional rights were violated through investigative shortcomings, faulty photo arrays, flawed witness interviews and a suggestive line up. The court stated that the Constitution does not require that police line ups, photo arrays and witness interviews meet a particular standard of quality. The issue was whether the plaintiff was denied a right to a fair trial. Under Manson v. Brathwaite, 432 U.S. 98 (1997), the issue was whether the unduly suggestive identification tainted the trial. Flawed identification procedures in and of themselves do not amount to constitutional violations. The plaintiff must show how the flawed procedures compromised his constitutional right to a fair trial. In this case, the plaintiff failed to provide evidence about how the identification procedures were used or challenged at trial. The plaintiff recited a number of poor investigative practices, but did not direct the court to anything that occurred during the pretrial or trial proceedings and therefore failed to "connect the dots" between the identification procedures and inadequate investigation and the denial of his right to a fair trial.

The plaintiff also complained that his constitutional rights were violated when the DNA analysis of samples in the rape kit related to charges which were dismissed before trial, were thrown out. The court could not find that plaintiff suffered any injury by the destruction of evidence related to a crime for which he was not tried.

Plaintiff claimed the officers conspired under Section 1985. His evidence was supported by a claim that the officers picked up at least three black males and made phone calls to each other. While this is true, there was no evidence of racial animus because as the court pointed out, the general description of the attacker included his race.

Sornberger v. City of Knoxville, Illinois, 434 F.3d 1006 (7th Cir. 2006)

Three employees of a bank observed the tape of a bank robbery. One thought that the robber looked like Scott Sornberger who was an acquaintance and former customer whose account had been closed for lack of funds. When re-reviewing the tape, he was less sure of the likeness. The robber's description was given as a male, 5'9", approximately 160 lbs., dark complexion, dark eyes, dark hair, clean shaven, and in his thirties. Police interviewed Scott who was 5'11", blonde hair, blue eyes, a fair complexion, and a mustache. Despite the discrepancies, both Scott and his wife were brought to the police station for questioning. Their alibi was that at the time of the robbery they were at Scott's parents' home using the computer. Both were charged with robbery based, in part, on an alleged coerced confession taken from Teresa. While in prison, awaiting trial, another man who had committed a string of robberies was identified as more closely resembling the individual committing the robbery on the tape. In a closer examination by the FBI of Scott's ear and the one on the videotape, he was excluded as a suspect.

Police Lacked Probable Cause to Arrest Scott

The court first determined there was insufficient probable cause to arrest Scott as his physical description did not even come close to matching the robbery suspect. The only other evidence was the grainy video and his financial situation.

The fact that the police were advised by the State's Attorney that they had probable cause did not entitle them to qualified immunity because the information they provided was incomplete and one sided. They told him that one bank employee remarked that Scott resembled the perpetrator on tape, however, neglected to say that he questioned the resemblance upon viewing the tape from another angle. Nor did they comment on the witness discrepancies in the description. Although reliance on a prosecutor's advice is normally powerful evidence of good faith and deserving of qualified immunity, here it appeared that the officers realized the weakness of their case and attempted to manipulate the available evidence to mislead the prosecutor.

The court further criticized the police for making an arrest prior to evaluating the computer evidence which would have confirmed or dispelled the alibi. "A police officer may not close her or his eyes to facts that would help clarify the circumstance of an arrest."

The First Question Was Whether Or Not Teresa Was Arrested At The Time She Was Taken To The Police Department.

The court determined that the circumstances of Teresa's arrest matched the custodial finding in Dunaway v. New York, 442 U.S. 200 (1979). In both cases, the defendants were taken from a private dwelling, transported unwillingly to the police station and subjected to custodial interrogation resulting in a confession. Therefore, there are genuine issues of material fact precluding summary judgment on Teresa's arrest claim. The court did find that the supervisor could not be held liable because he instructed his officers to request that she come to the police station voluntarily and that they should not take her from the house unless she agreed.

Teresa's Coerced Confession

She claims she was psychologically coerced into confessing claiming six acts of misconduct.

1) Police falsely informed her that witnesses placed her at the scene of the robbery;

2) They repeatedly told her to think about her kids;

3) They yelled at her and accused her of lying;

4) They falsely promised her that if she implicated her husband she would not be charged with any crime;

5) They threatened to call DCF to take her children away if she continued to maintain her innocence;

6) They refused to honor her request to speak to an attorney.

In Chavez v. Martinez, 538 U.S. 760 (2003), the Supreme Court held that the police officers questioning the suspect without Miranda warnings did not violate his constitutional rights under the self incrimination clause of the Fifth Amendment, because the compelled statement had not been used against him in a criminal case. Although charges against Teresa were dropped before trial, her confession was used against her in evidence in a probable cause hearing, bail hearing, and an arraignment proceeding, precluding summary judgment on behalf of the officers.

Municipal Liability

Plaintiffs claim a widespread practice of coercing confessions out of female suspects by threatening to have their children taken away. Evidence provided by the testimony of a criminologist, who evaluated complaints lodged against the department, supported this claim. An officer testified that it is a policy and practice of the police department to tell people in Teresa's position that "You need to come with me to the police department." Such a policy would support municipal liability when officers take persons to the police department for investigations without probable cause. This evidence was sufficient to create a triable issue of fact with regard to failure to train and refusing to correct complained of behavior.

Swiecicki v. Delgado, 2006 WL 2639793 (6th Cir.)

Plaintiff led a group of bleacher hecklers at a Cleveland Indians baseball game at Jacobs Field. Delgado, a Cleveland officer, working in a private security capacity in uniform, with his badge and carrying a department issued weapon, heard the plaintiff yell to a player, "Branyon, you suck!" and "Branyon, you have a fat ass!" It appeared to Delgado that the plaintiff was intoxicated. He told the plaintiff to "cut it out" and then motioned to him to stop again. When the heckling continued, he approached Swiecicki, stating "we can either do this the easy way or the hard way." and grabbed his arm, placing him in an escort position leading him toward the tunnel to exit the stadium. The plaintiff and four of his companions repeatedly asked what he had done wrong. Delgado claims that the plaintiff jerked his arm away to break the grasp at which point he was placed in an arm bar hold and wrestled to the ground.

Plaintiff's conviction for disorderly conduct and resisting arrest were reversed based on insufficient evidence.

The officer first claimed that the statute of limitations had run, however, the court found pursuant to Heck that the statute of limitations did not begin running until after the convictions were overturned. The court then rejected the officer's contention that he was acting in a private security position, and therefore not under color of law. The facts indicated that although Delgado was off duty, he was in a police uniform, carrying his official weapon and employed police procedures from the beginning of the confrontation and therefore, was acting under color of law.

The court first determined that there were issues of fact as to whether the arrest for disorderly conduct and resisting arrest were based on probable cause. Even if the plaintiff's speech was profane, it would still be afforded protections under the Fourth Amendment, which under Champlinsky denies First Amendment protection only for fighting words. Because the plaintiff claimed that his behavior was not inappropriately loud or offensive, that other persons

were also heckling and that no one complained about his conduct, Delgado may not have had probable cause that his speech rose to a level prohibited by the noise conduct ordinance.

Delgado argued that the First Amendment protections did not apply because the park was private, and that a private entity cannot deny a citizen of First Amendment rights. The court did not agree finding that Delgado's decision to threaten and later actually arrest the plaintiff was made as a state actor. If the arrest was based on the content of the heckling then the arrest constituted a violation of the plaintiff's First Amendment rights. Given the lack of evidence that any one was incited to become violent, the First Amendment provided protection for the plaintiff's words.

With regard to the plaintiff's verbal protests regarding his forcible removal, the court stated, "[t]here can be no doubt that the freedom to express disagreement with state action, without fear of reprisal based on the expression, is unequivocally among the protections provided by the First Amendment."

Note: Barnes v. Wright, 449 F.3d 709 (6th Cir. 2006) held that in order to state a successful First Amendment retaliation claim under Section 1983, the plaintiff must prove a lack of probable cause for his arrest. McCurdy v. Montgomery County, 240 F.3d 5, 12 (6th Cir. 2001) holding that an officer violated the plaintiff's First Amendment rights where the arrest was based on the plaintiff's verbal challenge of "what the f**k do you want?"; Greene v. Barber, 210 F.3d 889 (6th Cir. 2002), holding that the First Amendment prohibited a police officer from retaliating against a plaintiff who called him an a**hole.

Bashir v. Rockdale County, GA, 445 F.3d 1323 (11th Cir. 2006)

Deputy Ricks responded to a call from Bashir's neighbor stating her juvenile son had run away and might be in the Bashir home. The Deputy approached two teenagers sitting on the trunk of a car parked in the carport of the Bashir residence. The older youth told his brother that they didn't have to answer Ricks' questions and that he should talk with their mother. Moments after Deputy Shirley arrived, the older brother told the deputies his mother was coming to talk to them and instructed his brother to come inside. After being told not to move, the older brother was grabbed by the deputy resulting in the younger brother jumping off the trunk. He was grabbed, thrown to the grass and pepper sprayed. Mrs. Bashir came out and during the course of the struggle, ran into the house followed by the officers who arrested her. Saleem Bashir arrived home twenty minutes after his wife's arrest. Seeing several police cars and an ambulance, he inquired as to what was going on but did not receive a satisfactory explanation. Bashir carried his seven-year-old son into the house followed by Deputy Davis who had no warrant and did not ask for permission to enter. Following a brief argument, he was also arrested, thrown to the floor, pepper sprayed and handcuffed.

Plaintiff claimed false arrest and excessive use of force. The key issue was whether Bashir's warrantless arrest in his home based on probable cause was lawful when the officer entered without consent or exigent circumstances. According to the officer's testimony, Bashir was not disorderly prior to entering the home, and did not commit a crime outside. Once inside, he might have raised his voice, but did not rise out of the chair or physically threaten the officer. Because the officer was neither invited into the home and there was no evidence of exigent circumstances, the warrantless arrest in the home was unlawful. Because the law existed at the

time (Payton) was clearly established, the officer was not entitled to qualified immunity. The court found that Bashir's excessive force claim was subsumed within his false arrest claim.

Wallace v. City of Chicago, 440 F.3d 441 (7th Cir. 2006)

Plaintiff spent from age 15 until 23 in prison for his alleged involvement in a murder. When the state appellate court reversed his guilty finding based on alleged coerced confessions, he sued the police for false arrest. The police claimed that the two year statute of limitations had run. The court noted that the second, fourth, fifth, sixth and ninth circuits have held that false arrest claims that would undermine the defendant's conviction cannot be brought until the conviction is nullified. (Heck) The first, third, eighth, tenth and eleventh circuits have held that false arrest claims accrue at the time of the arrest. The Second Circuit decided to join the second group ruling in favor of the officers on the basis of the statute of limitations defense.

SEARCH AND SEIZURE:

Hardesty v. Hamburg, 461 F.3d 646 (6th Cir. 2006)

A little after 2:00 a.m. officers arrested a female minor for drunk driving who told them where she consumed the alcohol. Officers went to the Hardesty home, knocked on the door, but received no response. A dispatcher telephoned the home to no avail. Officers then, believing someone was home, walked onto the back deck and looked through sliding glass doors seeing a young male lying on the couch with blood on his hands and pants. They pounded on the window but received no response. They then found a garage door opener in a car parked in the driveway and entered the home through the garage.

The state criminal court found that the officers' search was illegal. Noting there was some split in the circuits on the issue of preclusion, the Court determined that because the officer defendants in a Section 1983 case are not in privity with the prosecution of a related criminal case, they do not share a personal stake in the outcome and, therefore, the state's court's decision would not preclude them from issuing an independent decision on the legality of the search.

There was no question that the officers entered the curtilage of the home when they went up on the back deck. The 6th Circuit decided to join the 3rd, 4th, 8th, and 9th Circuits which upheld that under certain circumstances a knock and talk can be extended to the back door or backyard. Therefore, the officers' entry into the curtilage did not violate the plaintiff's Fourth Amendment rights. Once at the back door they had sufficient reason to believe there was a medical emergency and given the known dangers of excessive alcohol consumption they could have reasonably believed that the individual on the couch was suffering from alcohol poisoning justifying an entry into the home.

Doran v. Eckold, 409 F.3d 958 (8th Cir. 2005)

Eight Circuit Court of Appeals sitting en banc overturned the original panel affirming a jury verdict in excess of two million dollars against officers executing a "dynamic entry" during a drug search. After the RAM officer broke down the front door yelling, "police, search warrant" the point man entered the house and was confronted by the home owner, Doran, running at him with a hand gun. The plaintiff and officer disputed whether the homeowner put

the gun down before being shot and seriously injured. The issue on appeal was whether exigent circumstances justified the "no knock" entry.

The court first explored controlling Supreme Court precedent. In Wilson v. Arkansas, the Supreme Court held that the common law "knock and announce rule" formed part of the reasonableness inquiry under the Fourth Amendment. The court noted the flexible requirement of reasonableness should not require a rigid rule of announcement that ignores countervailing law enforcement interests and provided examples of justifiable unannounced entries including threat of physical violence or likely destruction of evidence. In Richards v. Wisconsin the court acknowledged that felony drug investigations frequently present justifications for no knock entries, however, each case must be analyzed on its own facts. In order to justify a no knock entry police must have "reasonable suspicion" that knocking and announcing would be dangerous or futile or would inhibit the effective investigation of a crime. In United States v. Banks, the court held that the risk of imminent drug disposal was an exigency justifying a forcible entry.

The court held that exigent circumstances did exist since the officers had information that the house contained a clandestine methamphetamine lab, that ongoing drug street sales were being conducted and that numerous weapons were kept in the house.

The dissenting opinion relied on the original panel's ruling. Essentially, the erroneous informant information from an anonymous tip that led to the above noted conclusions were not corroborated by the investigating officers. There was no evidence that officers investigated any of the following factors: (1) Plaintiff's arrest history of which there was none; (2) the anonymous tip that Doran's son who was in his mid-twenties had been arrested for possession of a sawed off shotgun; (3) whether the son lived at the house; (4) whether the officers observed any drug traffic at the residence; (5) whether any officer engaged in a controlled buy; (6) any evidence that any officer had observed anything that would point to the existence of a methamphetamine lab as erroneously reported by the anonymous tip.

Note: The search turned up one ounce of marijuana in the son's bedroom.

Sterling v. Weaver, 146 Fed.Appx. 136 (9th Cir. 2005)

The court rejected plaintiff's claims in a conclusory fashion without much factual explanation. Plaintiff's first claim was that the affidavit supporting the application for a search warrant, was not supported by probable cause because the informant, Taylor backed out of a controlled buy, was told that the information that she provided in a previous investigation was useless, and that her reliability was undermined by the fact that the officers told her that social services might remove her daughter if she did not cooperate. Still, the court under an Illinois v. Gates totality of the circumstances test, found that the warrant was supported by probable cause.

Plaintiff conceded that the use of deadly force once the officers entered the home was not unreasonable, as Williams pointed a weapon at them, however, the officers' actions prior to their entry, were unreasonable and led to the shooting. Their primary claim was that the officers entered the home without a sufficient knock and announce entry. The court justified the officers' entry in two ways. First, Taylor consented and the officers could have reasonably believed that she had common authority over the premises. Second, given the exigent circumstances that

drugs would be destroyed and the presence of weapons the officer's short wait between the knock and announce and the decision to break down the door, was constitutional.

Burr v. Hasbrouck Heights Police Department, 131 Fed.Appx. 799 (3rd Cir. 2005)

Plaintiff claimed that officers illegally entered her home and used excessive force in taking her into protective custody. Officers responded to a loud music complaint at Burr's residence. After knocking and ringing the doorbell after approximately one minute, the officer opened the unlocked door and entered the residence to abate the putative nuisance and to make sure everything was okay. He found Burr sitting alone, intoxicated and acting in a bizarre manner. The officer was aware of prior incidents of eccentric but benign behavior and domestics between her and her sister. When the officers were taking Burr downstairs, she admitted that she, "started for the door and two neighbors testified that she ran toward the door." The officers grabbed her by the arms causing some bruising.

In discussing the warrantless entry, the court noted the 6th Circuit's adoption of an extension of the community caretaking function, which allowed officers to enter a home to abate an ongoing nuisance. In United States v. Rohrig, 98 F.3d 1506 (6th Cir. 1996) the court found no Fourth Amendment violation when officers entered a home in the early morning hours on a noise complaint. "…a compelling governmental interest supports warrantless entries where, as here, strict adherence to the warrant requirement would subject the community to a continuing and noxious disturbance for an extended period of time, without serving any apparent purpose." The court noted that no other Circuits have followed this decision and that they, in this case, did not have to, as the entry of the home, given the facts to make sure everything was okay, had not yet been determined to violate a citizen's constitutional right and therefore, there was no clearly established law precluding qualified immunity.

With regard to the excessive force, even though the plaintiff claims that she was not trying to run away, the court ruled that the officers could have perceived based on her admission and the neighbors' statements that she was trying to escape.

Causey v. City of Bay, 442 F.3d 524 (6th Cir. 2006)

The court found that officers forced entry into a house based on a call from a neighbor that she heard shots fired, was reasonable. The neighbor reported that she heard six shots, had seen no one come in or leave the home, and that shots had been fired from the residence on July 4th and on New Year's Eve. Officers knocked on the front door, went to the back patio deck, knocked some more and found bullet casings in the snow. The sergeant telephoned but no one answered. The sergeant authorized the forced entry and officers waited for fifteen to thirty minutes for back up to arrived. They knocked loudly on the doors before forcing the front door with a battering ram. Plaintiffs claim that they came through a window and told the officers they were fine and showed no visible signs of injuries. The facts that shots had been fired, previously during holidays, or that the officers waited fifteen to thirty minutes, did not mean that they did not have exigent circumstances. Also, the fact that plaintiffs claimed they came to the window and told the officer they were fine, did not diminish exigent circumstances, since they could have been concealing another person, perhaps incapacitated by gunshots, or may have been intimidated by an unseen attacker.

Mazuz v. Maryland, 442 F.3d 217 (4th Cir. 2006)

University officers executing a search on several student apartments for narcotics erroneously entered the wrong apartment not noticing the number above the door. Mazuz claims he opened the door to find an officer's firearm pointed at him. More armed officers entered the room, ordered him and his roommate onto the floor, and handcuffed them. When they attempted to ascertain what was going on they were told to shut up. Shortly after entering the room, one of the officers believing something was amiss, checked the room number and informed the other officers that they were in the wrong room. They removed the handcuffs from Mazuz and his roommate, and left.

The court found that the officers' entry was based on a reasonable mistake in failing to observe the proper room number. Having determined that the entry was reasonable, the next question was whether the officers subjected Mazuz to an unreasonable seizure, arrest and use of excessive force. Citing Summers and Mena, the court explained that when a warrant authorizes officers to enter a premises to conduct a search, it implicitly carries limited authority to detain occupants and with such authority to detain reasonable force may be employed to effectuate the detention. Although this was the wrong room the court evaluated the officers' actions based on what they would have been allowed to do had they entered the correct room. The brief detention was appropriate incident to the search, and there was no evidence that any excessive use of force was used during the detention and, upon discovering the mistake, the officers immediately left the premises.

Mack v. City of Abalene, 461 F.3d 547 (5th Cir. 2006)

The plaintiff claims false arrest and illegal search of his two vehicles. Based on informant information, police obtained an arrest and search warrant for the plaintiff. When plaintiff left his place of employment, officers stopped him in the parking lot as he walked toward his Suburban. They searched the Suburban then drove him to his apartment complex where they searched his apartment and his Cadillac, which was in the apartment complex lot. Finding no more than one marijuana seed they released him and no charges were filed.

The Court found that the warrant was valid as there was an appropriate basis confirming the knowledge of the informant as he was familiar with the odor and knew what marijuana looked like and that, from his personal observation, he had seen marijuana in the plaintiff's apartment within the past 48 hours. The veracity and reliability of the informant was also substantiated as the officer had been supplied previously with truthful and correct information about criminal activity. The informant was also described as lawfully employed and having no felony convictions. Therefore, the arrest of the plaintiff was constitutional.

The Court found that two searches of the Suburban were lawful because the informant had stated that the plaintiff sometimes hid marijuana in his Suburban bearing the particular license plate. Therefore, the officers had probable cause to search the Suburban for contraband at the time of the arrest and again later at the apartment complex.

The Court ruled that the search of the Cadillac was unconstitutional and that the officers were not afforded qualified immunity because the search took place in an open parking lot (not within the curtilage of the home) and without probable cause, consent or concern for officer's safety.

Clouden v. Duffy, 446 F.3d 483 (3rd Cir. 2006)

This case evaluates whether the plaintiffs were illegally stopped, their house illegally searched, or excessive force was used against one of them. Federal and municipal officials involved in a fugitive task force, set up surveillance to arrest a fugitive wanted by the county police department for drug and weapons charges. Task force members sitting in unmarked vehicles and wearing plainclothes, watched plaintiff, Pamela Clouden, drive up to her house two doors away from the fugitive with five of her six children in the vehicle. When her fourteen year old son, Adam, entered the garage to put his skateboard away before summoning his seventeen year old sister to go to dinner, police approached the vehicle and the house, resulting in the alleged constitutional violations.

Seizure of Pamela and Her Children:

The court found that when Officer Armstrong approached the vehicle with his gun drawn, he clearly restrained the plaintiffs. They did note prior law in the third circuit indicating that if police make a show of authority and the suspect does not submit, there is no seizure. The exception did not apply here since Clouden alleged the officer never identified himself or displayed a badge. Armstrong claimed that he had reasonable suspicion of criminal activity because of Adam's strange behavior and they believed the vehicle parked near the house was a get-away car. Because the Clouden residence was not the house under surveillance, the officer had no reason to believe that Adam was a fugitive, and given the fact that Adam was carrying a skateboard, walked directly into the garage and looked through a window into the house, did not indicate reasonable suspicion of any criminal activity. Further, the car contained four small children and Pamela indicated that when she pulled into the driveway she turned on her car's high beams and honked which would not be indicative of a get-away car. Although innocent activities can amount to reasonable suspicion, the court noted, "there are limits…to how far police training and experience can go towards finding latent criminality in innocent acts." The court noted that Officer Armstrong could have presented a badge, identified himself and approached in a non-threatening manner.

Search of Clouden Residence:

When Armstrong attempted to get in the car, Pamela panicked and drove her car toward an officer who threw his flashlight at the vehicle breaking the passenger side window. The court found that although the plaintiffs did not initially act in a suspicious manner, once Pamela sped away, the officers had reasonable concern and their decision to approach the house to investigate further was heightened by Tiffany, the seventeen year old daughter inside the house, who exclaimed that no one else was home. The court found that this provided probable cause and exigent circumstances for a warrantless search of the house.

Excessive Force Against Adam

While Adam was in the garage, he saw a man charging toward him with a gun. He and his sisters stated that four officers jumped on him, pointed their guns at his head, handcuffed him and sprayed him with mace. The court found that although the officer may have believed that Adam was an intruder, at this time, the level of force was unnecessary and constitutionally excessive. There was no evidence that Adam was resisting arrest or attempting to flee and he did what the officers told him to do. They had no reason to believe he was armed or that there were any accomplices, and there were four officers available.

Harman v. Pollock, 446 F.3d 1069 (10th Cir. 2006)

Agent Pollock obtained a search warrant for the single-family residence of Pawoo and Isabell regarding the possession and selling of narcotics. The single residence had a detached garage. When the SWAT team simultaneously entered the house and the garage, they found the plaintiff Harman and Overton, in the garage apartment lying naked on a mattress. Ms. Harman claims she was so terrified she urinated on herself and was not given the opportunity to clean herself. They claimed they were handcuffed for an hour in the February cold air before being allowed to dress.

The first question was whether the warrant sufficiently described the areas to be searched. The court found that despite some inconsistencies the affidavit and warrant provided accurate physical descriptions of the structures to be searched.

The next question was whether Agent Pollock intentionally omitted or misstated material information. The court found that the Agent did not knowingly or intentionally misstate or exclude material information regarding the structure.

Did the officers make a reasonable mistake upon their initial entry? It is undisputed that the warrant was overbroad, but this alone did not render the warrant invalid. Plaintiffs argued that there was sufficient evidence indicating that the apartment and the garage was a separate residence. There were two mailboxes, the agent never saw suspects go in or out of the garage apartment, county records indicated that the garage had a finished main floor, the deed showed two addresses, one for 44 and the other for 44 ½, 44 ½ had a gas account, the postal service had 44 ½ listed in its database, the phone company sent bills to 44 1/2, the plot plan indicated two lots, plaintiff's vehicles parked in the front were not used by the suspects, the out building had a door and a window that looked residential, members of the scout team expressed concern that the out building might be used as a residence because there were lights on and voices inside, and the operations order listed the residence as, "single family dwelling with detached garage/residence."

The defendants argued the mistake was reasonable in that Agent Pollock thought the second mailbox was for a newspaper, the officers did not think the door and window were signs of a residence, the county records offices showed only a single family dwelling, they didn't' check the gas records, the officer's research did not indicate anything other than a single family dwelling, the agent encouraged members to do there own investigation to verify whether there was a second residence and information from the city planner indicated that it was a single occupied residence with one address.

As in Maryland v. Garrison, 480 U.S. 79 (1987), the officers' conduct was consistent with a reasonable effort to ascertain and identify the place intended to be searched.

Did the officers discontinue their detention and search in a reasonable amount of time? Officers are required to discontinue their search and detention as soon as they know or reasonably should know that they have made a mistake. Here, the record indicated that the defendants knew early on that there was a possibility that the garage was a separate residence. The possibility became a strong suspicion upon entry and their initial interview of the plaintiffs. Although officers have a limited authority to detain persons occupying the premises to be searched, in this case officers detained the plaintiffs during the execution of what had become a questionably valid warrant. The officers claim that upon entry they observed the presence of a small amount of marijuana and that they gave the plaintiffs a summons. Unfortunately, there was nothing in the record to suggest that the subsequent questioning was related to the discovery of marijuana, and the issuance of a citation would not require the handcuffing and detention that occurred.

Finally, the court refused to consider the additional justification of probable cause to arrest based on Atwater v. City of Lago Vista, 532 U.S. 318 (2001), because this argument had not been raised in the officer's brief.

Evans v. Stephens, 407 F.3d 1272 (11th Cir. 2005)

Officer Stephens stopped two black males in their early to mid-twenties, for speeding. Stephens, suspecting that Evans, the driver, was operating under the influence, ordered him out of the vehicle, searched his pockets and claimed he found a beer bottle top in one of his pockets. The officer did not show the top or an alleged open container which he found in the car to his recording camera, which was his normal practice. Upon running a check on the passenger, Jordan, an outstanding arrest warrant came back with an individual with the same date of birth, but a different first name. The officer advised Jordan that if the warrant was for someone else he would be released. When Evans refused to take a breathalyzer, he was arrested and a tow truck was called. A search of the vehicle revealed nothing. A check at the station indicated Jordan was not the correct individual wanted. It was alleged that Stephens took them both into a room that appeared to be a supply closet and conducted strip searches on both of them. He allegedly used a cold black object to lift their testicles and separate their butt cheeks. Stephens admits to the strip searches, but denies touching or taunting them.

The first question the court determined is whether the post-arrest investigatory strip search by the police looking for evidence in this case was constitutional. The court distinguished this from the jailer's search of pretrial detainees, which was found not to be a Fourth Amendment violation by the Supreme Court in Bell v. Wolfish, 441 U.S. 520 (1979). The officer claimed that because the plaintiffs were nervous, gave a story about being lost and were traveling in a rental car, he had reasonable suspicion to believe that they were in possession of drugs. The court did not agree, noting that the plaintiffs were arrested for DUI and an unspecified warrant and the personal pat downs and two searches of the vehicle revealed nothing and undermined any potential reasonable suspicion that they possessed drugs. However, the court determined that in 1999 the law on post-arrest investigatory strip searches was not clearly established and therefore the officers were entitled to qualified immunity.

The court next addressed the manner in which the strip searches were conducted. Considering the place (a broom closet or supply room, not a search cell or medical examination

room, or even a bathroom) the lack of respect for privacy (both were forced to disrobe and ridiculed in front of each other) and the physical aspect of the searches (plaintiffs' claim that they were pushed around and the activities with the same baton being used in a disturbing and unsanitary fashion) led to the conclusion that the manner of the searches were unconstitutional. The officers were not entitled to qualified immunity as the Fourth Amendment prohibits unreasonable searches and the manner of the searches were well beyond the hazy border that sometimes separates lawful conduct from unlawful conduct.

Finally the court commented on the words allegedly used by the officer. The officer during the encounter allegedly made comments including: "he was judge and jury; he would put you niggers away for a long time", "you boys are in my town, I don't want niggers here anyway." And when he used the baton, "better get used to this, this is how it is in the big house, this is where you getting ready to go. Somebody is going to be butt-fucking you for the next twenty years, all because you got a smart mouth." Although words alone could not make an otherwise lawful search unconstitutional they could be taken into consideration in evaluating the totality of the circumstances regarding the reasonableness of the officer's conduct.

Ames v. Brown, 2006 WL 1875374 (10th Cir.)

After spending the night in the mobile home of some friends, Ames was present the next morning when officers executed a search warrant looking for methamphetamine and equipment to manufacture the drug. He was handcuffed and moved outside the trailer where his pants and underwear were removed. He was left naked from the waist down until being transported to the county jail where he was given jail clothing. Defendant Bruning, the supervisor, testified that Ames clothing was visibly stained and the officers were unsure as to whether or not the stains were from dirt or dangerous chemicals. He claimed that officers were concerned about the safety of Ames wearing contaminated clothing and the potential of it being transmitted to the back seat of the police car. In evaluating the supervisory liability, the court first stated that a detention may be unreasonable if it is unnecessarily painful, degrading, or prolonged or involves an undo invasion of privacy. Where the constitutional right to bodily privacy is implicated, the reasonableness of the officer's conduct receives special scrutiny. Supervisory liability turns on whether there was an affirmative link between the constitutional deprivation and either the supervisor's personal participation, his exercise of control or direction, or his failure to supervise. Although the decision to remove Ames' pants might be reasonable and not motivated by evil conduct or callous indifference, the court could not conclude that there was no basis to suspect that the decision to remove his pants was false. A reasonable jury could conclude that this decision was not motivated by safety concerns.

There was no evidence in the record that suggests the removal of the clothing of the other three men was based on evidence that their clothing was equally contaminated. Also, a jury could find that the T-Shirt was similarly contaminated but not removed, therefore, undercutting Bruning's assertion. The clothing was not bagged or taken from the scene with other lab items and according to Bruning, a person's contact with contaminated clothing could be lethal, yet the officers left it at the residence. Most compelling is the fact that Ames was not provided with other clothing but a duffel bag of his clothing was found inside the trailer. Finally, plaintiff claimed that he was teased and taunted while his clothing was removed and that Bruning was present during this taunting. Therefore, sufficient evidence was available from which a jury

could conclude that there existed a causal link between the constitutional violation and his failure to supervise.

EXCESSIVE FORCE:

Szabla v. City of Brooklyn Park, Mn., 429 F.3d 1168 (8th Cir. 2005)

At about 1:20 a.m., police found a wrecked car rammed against a tree with the imprint of a head in the windshield and hair sticking out of the lining of the car's roof. A canine was summoned to track the operator of the vehicle who police suspected might be drunk, ill or injured. The dog was commanded to "track" which means to find the person and bite and hold. A search command would have instructed the dog to range out over an area, but not to bite. The canine, which was held on a tracking harness, found the plaintiff who was a homeless man sleeping in a shelter for portable toilets. He suffered twenty three tooth punctures on his leg and hip. After handcuffing the plaintiff, officers determined, in two minutes or less, that he was not involved in the vehicle collision. The issue was whether the handler could be held liable for not issuing a warning prior to tracking and whether the department could be held liable for not having a policy for requiring such a warning. The court found as it had in Kuha v. City of Minnetonka, 365 F.3d 590 (8th Cir. 2003) that since the law was not clearly established with regard to the duty to give a prior warning that the officer was entitled to qualified immunity. As in Kuha the court also found that there were issues of fact with regard to the constitutionality of the department policy, which authorized the use of dogs to bite and hold but did not mandate a verbal warning.

Chatman v. City of Johnstown, 131 Fed.Appx. 18 (3rd Cir. 2005)

The plaintiff, a well-known criminal who had an outstanding warrant, ran when police officers attempted to apprehend him. When the canine was released he ran behind the dumpster where the dog bit him on the arm until the handler could control the situation. He claimed that he ran to escape the animal and that the officers gave no warning. The appellate court viewed the inconsistency in the plaintiff's versions of events as issues of credibility and found that a material issue of fact, which precluded summary judgment, was whether a warning was issued before the dog was released. The Court did grant summary judgment on the failure to train claim as the City submitted documentary evidence of extensive training for the canine.

Ciminillo v. Streicher, 434 F.3d 461 (6th Cir. 2006)

The Plaintiff was in the area of a crowd of people moving up a street in Cincinnati throwing bottles at police and civilians and setting fires. Fifteen officers in riot gear attempted to clear the crowd ordering them to disperse via megaphones. The plaintiff who claimed that he was attempting to leave his friend's home in the neighborhood after seeing officers fire bean bags at the crowd, tried to leave through the backyard, but was stopped by a property owner with a bat. He claims that as he slowly walked toward an officer with his hands over his head he was shot by an officer approximately ten feet away. He was hit in the face and the chest resulting in twenty (20) stitches, a bruised lung and a permanent facial scar. Although he was shot during the course of a riot, that alone did not make the officers use of force objectively reasonable.

Applying the Graham factors in the light most favorable to the plaintiff the court found at the time he was not committing a crime subjecting the officers or others to immediate harm or resisting or attempting to escape, therefore, the force could be found to be objectively unreasonable.

The City of Cincinnati had entered into an agreement with the Department of Justice a month before the incident regarding, among other things, the use of bean bag propellants. The officer who fired the bean bag testified that he received training each year at the police firing range on the use of the bean bag shot gun. His affidavit also indicated that the training included a review of policy and procedure of when to deploy the bean bag, what distances it could be fired at and appropriate areas of the body to aim for. Entering into an agreement, plus the officer's affidavit suggest that the City took affirmative steps to train its officers in the use of bean bags. The plaintiff failed to provide any evidence on the misuse of the bean bags or that the City's training was constitutionally defective.

Mongeau v. Jacksonville Sheriff's Office, 2006 WL2645116 (11th Cir.)

Plaintiff lost control of his vehicle after driving over stop sticks and crashing into a light pole. Earlier in the day, he had engaged in a two hour motor vehicle pursuit escaping into a local mall. Several hours later he was involved in a more reckless pursuit including the running of red lights and entering a highway going in the wrong direction. After being stopped, he told officers that he couldn't get out of the car because the seatbelt was jammed and could not raise his hands because of his injuries. Officers twice released the police dog through the window in attempts to get him to comply. They also pepper sprayed him. Following the use of the canine the second time, he complied by putting his hands in the air. Officers then reached into a window and pulled him out of the vehicle, slamming him to the ground and beating his head and back in an attempt to subdue him. Eventually, once handcuffed, an officer placed his knee on plaintiff's upper back and neck to keep him on the ground. The entire incident was captured on a video camera.

Applying the Graham standards, the court found that under the totality of the circumstances the officers did not use excessive force. (1) the crimes involved included grand theft auto, reckless driving and felony fleeing; (2) plaintiff acted in a reckless manner posing a great danger to the officers and numerous civilians. He demonstrated little regard for his own life or the life of others and officers could have justifiably believed that he might be armed; (3) he resisted arrest by refusing to get out of the car and repeatedly refusing to raise his hands, reasonably leading the officers to believe that he might reach for a weapon.

Wertish v. Krueger, 433 F.3d 1062 (8th Cir. 2006)

Chief Krueger was at a gas station when he received a complaint from a citizen that he had been forced off the road by a red pick-up truck driving erratically. Krueger located the truck and attempted to pull it over. The truck took off resulting in a pursuit during which Krueger contacted the adjoining town to ask them to attempt to place stop sticks. After about 5 ½ miles the truck stopped thirty feet short of the stop sticks. The driver was pulled from the car, thrown on the ground, and forcibly handcuffed. The plaintiff was unable to refute the Chief's version as he suffered from Type 1 Diabetes and remembers little about the incident. After being subdued, Wertish told the officers that he was having a diabetic reaction and asked if they could remove

the cuffs so that he could check his blood sugar level. Instead, the Chief took him to a nearby hospital where it was determined that his blood sugar level was seriously low. The Chief afterwards drove Wertish to his truck and released him without charges. The court found that the Chief's actions to be objectively reasonable. There was nothing visible to indicate that he was dealing with a diabetic. Officer's safety concerns made it objectively reasonable for the Chief and other officers to assume they were dealing with a belligerent drunk or a fleeing criminal who required forcible detention. His diminimus injuries amounting to scrapes and bruises supported the conclusion that the Chief did not use excessive force.

Although a concurring judge agreed that the Chief was entitled to qualified immunity, he did find that the evidence showed that Krueger used excessive force when Wertish was not resisting which amounted to a constitutional violation. After Wertish stopped and opened his car door, the Chief forcibly threw him to the ground, handcuffed him, pinned him down by placing his weight on his back and picked him up and threw him in his own vehicle with sufficient force to cause Wertish's body to produce insulin.

Henderson v. Munn, 439 F.3d 497 (8th Cir. 2006)

During a traffic stop, two officers discovered that the plaintiff, a passenger in the vehicle, had given them a false name and was wanted on two "failure to appear" warrants. While arresting him, the officers claimed Henderson resisted, which he denied. The district court citing facts most favorable to the plaintiff found that the officers pulled Henderson from the car, applied a chokehold and after they all fell to the ground, one of the officers placed his knee in the center of Henderson's back. Henderson's right hand was cuffed while the other was pinned under his body. He was struck in the ankle with a baton or flashlight, causing him to release his left hand. After being cuffed he was pepper sprayed.

The Court denied summary judgment finding disputed issues of fact. Even assuming that Henderson was resisting at the time he was sprayed, he was face down, handcuffed and in pain due to his leg injury (dislocated ankle and fracture). The negligible severity of the offenses did not justify the use of force of someone subdued and restrained and may have been a "gratuitous and completely unnecessary act of violence".

Dodd v. Corbett, 154 Fed.Appx. 497 (7th Cir. 2005)

Dodd was one of two suspects who shot at a police officer striking his bullet proof vest after he observed them escaping from a gas station they were burglarizing. Commander Corbett testified that after a three hour manhunt, he chased the suspects to a snow covered tree line that was perfect for an ambush. He shouted for them to come out and Dodd emerged with one hand up and the other at mid-breast. When Dodd refused to show his hands, Corbett kicked him in the ribs and then kneed him in the head six times, as hard as he could. In the meantime, Officer Digester arrived with his canine that bit Dodd's lower calf for less than 5 seconds. A jury found for the defendant officers.

Dodd appealed claiming the officer's testimony regarding his being shot was intended only to inflame the jury and should not have been allowed. The court disagreed stating that the reasonableness of an officer's use of force is determined by assessing the need to use force in light of the surrounding circumstances. Events leading up to the use of force are relevant

because the need to use force is judged from the perspective of a reasonable officer at the scene. Dodd's other claim that the force was used after he was handcuffed was dismissed as the court would not challenge the credibility issue determined by the jury.

Alpha v. Hooper, 440 F.3d 670 (5th Cir. 2006)

The jury found that Sheriff Hooper did not violate Anderson's constitutional rights when he shot and killed him as Hooper believed he was being run down by Anderson's truck. Plaintiffs claimed that the court erred in omitting the plastic bag containing methamphetamine found on Anderson and information in the autopsy report concluding that he had ingested the drug. Plaintiffs claim that such evidence was irrelevant and, even if it had some relevancy, the probative value was outweighed by its prejudicial impact. The court ruled that it was relevant to the Sheriff's mental state and impressions of Anderson at the time of the shooting, as he testified that he believed Anderson was under the influence of methamphetamine based on his glimpses of Anderson's face, the erratic driving, and Anderson's connection to a known drug house.

Rahn v. Hawkins, 2006 WL 2707642 (8th Cir.)

The plaintiff claimed that officers used unreasonable force when they shot and maced him several times while arresting him during a bank robbery, because he was surrendering. The district court granted qualified immunity which was reversed based on the question of whether Rahn was indeed surrendering without a struggle. A jury found for the defendants, but the appellate court held that the jury instructions were improper.

The model jury instruction given directed the jury to consider factors including the need for the application of force, the relationship between the need and the amount of force that was used, the extent of the injury inflicted, and whether a reasonable officer on the scene, without the benefit of 20/20 hindsight would have used such force under similar circumstances. The plaintiff argued, and the Court agreed, that a more specific charge on the Garner rule was applicable because this was a deadly use of force case.
(A police officer may constitutionally employ such force only when the officer has probable cause to believe that the suspect poses a threat of serious physical harm, either to the officer or to others.)

An interesting evidentiary issue involved the Court's refusal to allow the introduction or questioning about a commemorative booklet commending the involved officer. The booklet described the incident as one in which the plaintiff held the bank employee in front of him and used the employee as a shield while holding a gun to his head. The officer testified the bank employee was behind the plaintiff and she never saw a gun in the plaintiff's hand. The appellate court ruled that the booklet was not hearsay because it was not presented to prove the truth of the matter and that questioning should have been allowed as proper impeachment, even if the officer did not state her agreement about the version of events. If she remained silent when knowing of a statement attributable to her under circumstances wherein a natural response would be to deny it as untrue, such a failure to comment may amount to a prior inconsistent statement.

McKinney v. Duplain, 2006 WL 2597855 (7th Cir.)

Four officers from the Muncie Police Department and another four from the Ball State University Police Department were dispatched to a burglary in progress at a home close to where a number of bars adjacent to the University were located. Evidence was submitted that a substantial number of calls involved intoxicated students in the area. In fact, this was not a burglary, but an intoxicated student who thought the home he was trying to enter was his. When Officer Duplain entered the backyard he saw the plaintiff standing near a tree, and according to him, identified himself as a police officer and told him to show his hands and get on the ground. Two neighbors on a deck above recognized Duplain as a police officer, but thought they heard the officer say "Hey, hey" and possibly "stop right there." The female complainant indicated that she only heard the word, "Hey". As the student charged at the officer, he fired his weapon hitting the student four times and killing him.

The Court found material issues of fact regarding whether the use of force was reasonable. First, whether it was reasonable for Duplain to believe the situation posed a threat of serious physical harm. While it was true that this was a burglary and a number of officers were sent, and the dispatcher lost contact with the complainant, it was known that frequent incidents in the neighborhood involved intoxicated students. Second, there was conflicting evidence as to whether the officer sufficiently alerted the student to his presence on the scene. Third, the officer testified that he shot the student as he charged toward him, but there was contradictory forensic evidence. Finally, there was an issue as to whether the number of shots fired was reasonable under the circumstances.

Because the officers were willing to concede some of the issues of fact for the purposes of summary judgment, the Court analyzed whether it had jurisdiction to consider the case at all. What was not conceded was expert testimony challenging the officer's claim that the student was running toward him when he fired his shots. Although the Court found it unlikely that this evidence would be admissible under Daubert, it found that it did not have jurisdiction to evaluate this issue under Johnson v. Jones, 515 U.S. 304 (1995) as the pretrial records set forth a genuine issue of fact for trial.

Smith v. Cupp, 430 F.3d 766 (6th Cir. 2005)

Deputy Dunn arrested Smith for making harassing phone calls. He cuffed Smith and placed him in the backseat of his police cruiser secured by a seatbelt. Smith was cooperative, but Dunn believed that he was somewhat impaired. Dunn left the engine running to provide air conditioning, when he left the vehicle to speak to the tow truck operator who had arrived to tow Smith's vehicle. Because the car did not have a security partition, Smith was able to get into the front seat and start to drive away with the police cruiser. Dunn ran toward the exit of the parking lot and fired four times in rapid succession. Three of the shots hit the car and one hit Smith above his left ear resulting in his death.

Viewing the facts in the light most favorable to the plaintiffs, the court determined that Dunn was not entitled to qualified immunity. According to the plaintiffs, Smith, who was arrested for making harassing phone calls, was up to the point of his attempted escape, cooperative, and neither Dunn nor others were in immediate danger while Smith drove off in the

stolen police car. The court cited a number of cases where the shooting of suspects driving away from officers were found to be objectively reasonable. In some of these cases, the suspects endangered others seconds before their attempted flight, in others, there were persons in the vicinity who could reasonably be thought to be endangered by the fleeing suspect. No such facts were present in the instant case.

The court also found that Brosseau v. Haugan, did not preclude them from denying qualified immunity as in Brosseau, the officer had arguable probable cause to believe the suspect posed an imminent threat of serious physical harm to others in the immediate surrounding area and he was a suspected felon with a no-bail warrant, who had just been involved in a violent physical encounter. Further, the officer believed that he entered his jeep to retrieve a gun prior to the officer breaking the window pane and attempted to stop him by hitting him with the butt of her gun. Undeterred, Hogan drove off with officers on foot and in the immediate vicinity, a woman and her three year old child were in a small vehicle four feet away and two men in a parked vehicle were twenty to thirty feet away.

Robinson v. Arrugueta, 415 F.3d 1252 (11th Cir. 2005)

After being arrested for a drug offense, one of the suspects agreed to cooperate by arranging a meeting with his suppliers. During the surveillance, the suspect identified a Ford Escort carrying three passengers as the suppliers. Upon parking in the doughnut shop the occupants exited the Escort at which time the units converged upon them. Two suspects were arrested and one reentered the vehicle. Officer Arrugueta positioned himself between the Escort and another vehicle approximately two to four feet apart. He pointed his gun at Walters, identified himself as a police officer and told him to put his hands up. Walters made eye contact, grinned and the Escort began to move forward at a speed of around 1 to 2 mph. It was estimated that the officer had at most 2.72 seconds to react before being crushed between the vehicles. He tried to get out of the way and shot Walters through the windshield. Although the plaintiff claimed that the officer could have avoided the vehicle by stepping aside, the court viewed the reasonableness of the officer's conduct from his perspective. The court considered that under Georgia law one who aims a motor vehicle at another person may be convicted of aggravated assault, regardless of whether the victim sustained any injuries. Also, an officer is justified in using deadly force to prevent death or great injury to himself/herself or to third parties. The court concluded that a reasonable officer could have perceived that Walters was using the vehicle as a deadly weapon and the officer had probable cause to believe he was about to be subjected to the threat of serious physical harm, therefore justifying the use of deadly force. Although there were some facts in dispute, none were sufficiently material to deny the officer qualified immunity.

Sigley v. City of Parma Heights, 437 F3d 527 (6th Cir. 2006)

Benedict, a confidential informant, arranged for a controlled purchase from Davis who was thought to be a high level dealer. Benedict and Davis parked their vehicles side by side and after conducting the cash and drug exchange patrolmen Jackson, riding in the jeep with Benedict, signaled the other officers to arrest David. Two unmarked vehicles boxed the Davis vehicle in while two other cruisers blocked the egress at the parking lot. Mockler exited his vehicle dressed in plain clothes and he and another officer identified themselves and told Davis to stop. Davis yelled 'bust" and attempted to flee resulting in Mockler shooting him in the back and killing him.

Mockler claimed that Davis started to reverse and then accelerated and as Mockler tried to run to a position of safety, with the vehicle traveling toward him, he fired one shot without aiming as he jumped out of the way.

Davis' mother claims that Mockler chased her son as he drove away from the scene, pointed his gun down into the open driver's window and shot her son in the back. The autopsy showed that Davis was shot in his mid-back.

The principal issue was whether Davis posed an immediate threat to Mockler and the safety of others on the night of the shooting. The Court found disputed issues of fact precluding the granting of summary of judgment on behalf of Mockler. Mockler's post statement differed from his subsequent deposition and an expert witness found that his description of the events was inconsistent with the undisputed fact that the incident took only 4.5 seconds. Viewing the facts in the light most favorable to the plaintiff. "Mockler was running behind Davis's car out of danger, and Davis drove in a manner to avoid others on the scene in an attempt to flee." Therefore, the Court reversed the district court's ruling granting Mockler summary judgment as well as the granting of summary judgment on behalf of the City on plaintiff's failure to train claims.

Harris v. Coweta County, GA, 433 F. 3d 807 (11th Circuit 2005)

The officer clocked Harris driving 73 miles per hour in a 55 mile per hour zone. He pursued Harris at speeds of 70 to 90 miles an hour. Harris slowed down and entered a shopping complex. At some point his vehicle came into contact with the police vehicle causing minor damage to the cruiser. Harris then re-entered the highway. Upon request the deputy was given permission to PIT Harris' vehicle. The supervisor responded, "Go ahead and take him out." Given the speed of the vehicles the deputy could not perform a PIT maneuver, so he rammed Harris' vehicle rendering him a quadriplegic.

The plaintiff's expert testified that National Law Enforcement Standards require officers to be trained in all deadly use of force applications before being permitted to use these applications. The deputy and other officers in the department were not trained in PIT maneuvers. The Court determined that in ramming the vehicle, the officer employed deadly force and given the facts presented, such force was not objectively reasonable under Tennessee v. Garner. They did find that the supervisor was entitled to qualified immunity as he did not authorize the ramming and that the PIT maneuver authorized was a technique designed to stop fleeing motorists safely and quickly by hitting the fleeing car at a specific point on the vehicle, which causes the car to spin and stop.

Troupe v. Sarasota County of Florida, 419 F.3d 1160 (2005)

A SWAT team converged around Hart's home to execute a warrant while municipal officers blocked the surrounding streets. Hart, who was out on bond for attempted murder, had forty previous arrests, nineteen convictions, and was known to run from the police and be violent. As Hart, Robinson and Waiters entered an Oldsmobile; a SWAT team surrounded the vehicle yelling commands and attempting to open the locked doors. Hart revved the engine and the car began jerking backwards and forwards. A lineman twenty-five feet above on a telephone

pole was surprised that no one got hit. (Later one officer claimed his foot was run over and another claimed the car struck his left leg.)

The Oldsmobile suddenly made a hard turn facing the road driving directly toward Bauer who, thinking the vehicle would run through him, fired two shots while jumping out of the way. One bullet went through the driver's side window hitting Hart in the back. He then accelerated for about .3 miles before maneuvering through an intersection and striking a concrete wall. Hart and Robinson were pronounced dead at the scene, while Waiters remained in a coma for two and a half months.

The Appellate Court affirmed the district court's finding that the acts of the defendants were not the proximate cause of plaintiffs' Robinson or Waiters' injuries. Although the gunshot ultimately caused Hart's death, his reckless driving preceded the shots, continued as shots were taken, and continued after the shots were fired. Thus, the causal relation between the defendant's action and the ultimate harm was broken by Hart's decisions and actions. Further, the shooting did not constitute a Fourth Amendment seizure of the passengers.

The Supreme Court cited Brusseau v. Haugan for the proposition that it is objectively reasonable to use deadly force against a suspect in an attempt to prevent a suspect's escape and potential harm to others. The officers in this case perceived that Hart was attempting to escape and could potentially endanger more lives, justifying the shot through the driver side window which hit Hart in the back.

Untalan v. City of Lorain, 430 F.3d 312 (6th Cir. 2005)

Ronnie Untalan, who suffered from schizophrenia, grabbed a butcher knife while at home with his mother and father. While his father tried to calm him, his mother called the police. Four officers arrived and tried to speak to him for approximately forty-five minutes. Ronnie, who was in the kitchen barricading himself with as waste-level cart, moved the cart aside and lunged at Officer Wolford. Ronnie stabbed the officer who stumbled back and fell to the ground. The officer then threw Ronnie onto a couch, where his father tried to restrain him and wrestled for control of the knife. Officer Kopronica believing that Ronnie was continuing to attack Officer Wolford, fatally shot him in the upper chest. Ronnie's father claimed that just prior to the shooting he had gained possession of the knife. The court found that the use of deadly force was objectively reasonable, even if Ronnie had lost control of the butcher knife just before being shot. This did not occur until between a few seconds or as little as a split second prior to the use of deadly force, where a reasonable officer could have perceived that Ronnie still had the knife.

Ballard v. Burton, 444 F.3d 391 (5th Cir. 2006)

An emotionally disturbed plaintiff who was shot and rendered a paraplegic by officers sued under Section 1983 for excessive force and failure to train officers on how to handle a suicidal person without killing him. The plaintiff was convicted of aggravated assault but his conviction was overturned on the basis that the trial court erred in not allowing testimony on the insanity defense. He subsequently pled guilty under the Alford Doctrine for simple assault. The first issue was whether or not his conviction for simple assault precluded a Section 1983 claim under Heck v. Humphrey. The court first determined that an Alford plea was the equivalent of an ordinary guilty plea. It then held that the conviction for simple assault would not bar his

Section 1983 claim, since no elements of the simple assault conviction would undermine the conviction if he prevailed on his excessive force claim. The court cited earlier cases where convictions for aggravated assault did bar such claims because such a conviction would be supported by a finding of threat of serious bodily injury, which would in turn, would justify deadly use of force.

The court then held that there was no Fourth Amendment violation. In analyzing an excessive force claim plaintiff must show (1) he suffered an injury; (2) the injury resulted directly and only from the use of force that was excessive to the need; and (3) that the force used was objectively unreasonable.

In this case, plaintiff was an emotionally disturbed suicidal individual who had failed to get treatment at a hospital, armed himself with a 30/30 rifle, irrationally drove his vehicle, stopped at least twice getting out of his truck and firing shots in the air, before ultimately stopping to confront the officers. Officers asked him to put down his rifle but he refused, firing another shot in the air. Holding the rifle at port arms he pulled up his shirt and told the officers to shoot him using his chest as a target. He then lowered the rifle at a distance of ten to fifteen from the officers' feet when he was shot with one round of shotgun pellets. When this had seemingly no effect, a second round of pellets was fired simultaneously with a single shot from Officer Ballard which struck him in the mouth rendering him a paraplegic.

Plaintiff claimed he had not pointed the rifle at the officers at the time of the shooting and that the officers should have known that his rifle was not cocked and that he had expended all of his lives rounds. The court found that regardless of the direction that the rifle was pointed in, under the circumstances, officers would have reason to believe that Ballard posed a threat of serious harm to himself or to officers and that a reasonable officer may or may not have known how many rounds had been fired, therefore, making these factual claims immaterial.

FAILURE TO PROTECT

Howard ex rel. Estate of Howard v. Bayes, 457 F.3d 568 (6th Cir.)

Officer Bayes responded to a 911 call regarding a possible drug overdose at the home of Tammy Howard. He found Howard with her boyfriend Gerald Williams and four EMTs. Both Howard and Williams said there had been no violence, but Williams was concerned that Howard had taken some pills. Two of the EMTs said there was a little mark under Ms. Howard's eye that appeared to have been present for several days. Another officer arrived and testified that he did not observe any physical injuries nor did she complain of any injuries or an assault. All indicated that it was obvious that she had been drinking but was alert and refused treatment prior to the Sheriffs and EMTs leaving the residence. The next morning an ambulance again arrived at her home where she was found beaten and unconscious. She died several days later and Williams was convicted of her murder.

Plaintiffs claim that Bayes breached his duty under Kentucky Law to arrest Williams the night before. One Kentucky statute instructs officers to use all reasonable means to prevent further abuse including remaining at the location, assisting the victim and advising the victim of

their rights. The other statute instructs officers to make an arrest when they have probable cause to believe that a person has violated a condition of release.

The court analyzed liability under Town of Castle Rock. Colorado v. Gonzales, 125 S.Ct 2796 (2005). The Supreme Court "rejected out of hand the possibility that the mandatory language…afforded the police no discretion. It is …simply common sense that all police officers must use some discretion in deciding when and where to enforce city ordinances." Chicago v. Morales, 527 U.S. 41, 62 n. 32, 119 S.Ct. 1848, 144 L. Ed.2d 67 (1999). "The court concluded that a true mandate of police action would require some stronger indication from the legislature than 'shall use every reasonable means to enforce a restraining order' (even shall arrest….or …seek a warrant)."

As in Castle Rock, the Kentucky statute contained no express language mandating police action and, therefore, the officer's decision to arrest would be discretionary, thus creating no property interest under the due process clause.

Pena v. Deprisco, 432 F.3d 98 (2d Cir. 2005)

Plaintiffs alleged that 2 sergeants and several off duty officers drank either in the police department parking lot or at a strip club. One of the officers, Deprisco, went to the station house to use the toilet and was asked by a sergeant to drive him to the strip club. Later an intoxicated Deprisco drove through several red lights before striking and killing a pregnant mother, her son and her sister.

A "State's failure to protect an individual against private violence simply does not constitute a violation of the Due Process Clause." DeShaney v. Winnebago County Dep't of Soc. Servs., 489 U.S. 189 (1989), however, an allegation that police in some way assisted in creating or increasing the danger to the victim would implicate those rights. Dwares v. New York City, 985 F.2d 94 (2nd Cir. 1993)
The supervisors implicitly but affirmatively condoned the officer's behavior and indicated that he would not be disciplined. Even though the officers were off-duty their work relationship provided them with the opportunity to communicate their encouragement and approval of the behavior.

The Court concluded "WHEN STATE OFFICIALS COMMUNICATE TO A PRIVATE PERSON THAT THAT HE OR SHE WILL NOT BE ARRESTED, PUNISHED, OR OTHERWISE INTERFERED WITH WHILE ENGAGING IN MISCONDUCT THAT IS LIKELY TO ENDANGER THE LIFE, LIBERTY, OR PROPERTY OF OTHERS, THOSE OFFICIALS CAN BE HELD LIABLE UNDER 42 U.S.C. 1983 FOR INJURY CAUSED BY THE MISCONDUCT UNDER DWARES," EVEN WITHOUT AN ALLEGATION OF EXPLICIT APPROVAL.

Here the alleged conduct was shocking to the conscience of the community because it occurred over an extended period of time, the defendants had time to deliberate and the extreme danger of drinking and driving is widely known.

TIP: Even when off-duty make a reasonable attempt to try to prevent other off-duty officers and private citizens from driving while intoxicated.

Rios v. Del Rio Texas, 444 F3d 417 (5th Cir. 2006)

Officer Wilson left a prisoner unintended in the backseat of his cruiser with the vehicle running. The prisoner escaped from the backseat and commandeered the vehicle leading other officers on a pursuit before striking the plaintiff, Rios. The Court found no constitutional violation regarding Williams' conduct or that of the Chief of Police. First, there was no special relationship between the officer and the plaintiff, as Rios was not incarcerated or institutionalized or under some similar restraint of his personal liberty. Also, the Fifth Circuit reiterated its position that it would not adopt the State Created Danger Theory.

As for the Chief's liability, there is no vicarious or *respondeat superior* liability for supervisors under Section 1983 and since there was no finding that the officers' actions or inactions constituted a constitutional violation, there could be no liability against the municipality pursuant to City of Los Angeles v. Heller. Finally, there was no evidence of a pattern of similar violations.

Baker v. Lenawee County, et al., 452 F3d 472 (6th Cir. 2006)

Deanna Tanner had taken in Deanna's sister, Cindy Baker, who was involved in a domestic dispute with her husband Keith. At about 3:00 a.m. as Baker was approaching their house Deanna told the 911 operator that he was drunk and armed. After Baker knocked on the door he was told the police were on the way and started to kick the door yelling and then pounded on the walls and windows. The officers were two or three miles away when they received the call, passed by the house twice as there was no number and it was down a 400 foot driveway. When Officers Hunt and Adams were driving down the driveway, Baker was backing out. Upon seeing the officers he started moving toward the house. Officer Hunt testified that as they got out of their vehicles he yelled at Baker to show his hands but Baker ran in the opposite direction and pulled a handgun from his waist. Hunt started chasing him but fell and as he got back up he heard gun shots. Adams also testified that he saw Baker's weapon and started chasing him with his own gun drawn. When Baker disappeared into the darkness, Adams headed back to the squad car to radio the dispatcher and retrieve a rifle. The officers did not enter the residence because they were instructed to await the arrival of the ERT Commander. Mr. Tanner was shot five times. Mrs. Tanner was shot twice. (Both lived). Mrs. Baker was shot and killed and then Keith committed suicide. Mrs. Tanner ran out of the house and two of her children made their way to the police officers who were standing in the driveway and told them that Uncle Keith had shot himself in the head. At 3:30, a field interview was conducted of the children. They told them that their father had been shot at least four times and was lying on the floor in the living room. The ERT Commander was not convinced that Baker was dead and did not order the ERT into the house until 4:35 a.m. to rescue Mr. Tanner.

The Tanners sued under the State Created Danger Theory. They claimed three affirmative acts which increased the risk of harm. First, the officers responded to the 911 call; second, they made their presence known to Baker when they blocked him in the Tanner's driveway and pursued him up the driveway; and third, they took no further action by remaining in the car as Baker approached the home with a loaded gun in sight. Although it was disputed as to whether or not the officers did or did not take action as Baker approached the home. The

affirmative acts of responding to a 911 call and driving up the driveway, allegedly trapping Baker when he was leaving, failed to support the state created danger exception. The court found that the state created danger exception has never been extended to cover situations where police simply respond to a scene of a 911 call. Also, there was no reason to believe that the officers would have known that by driving in the driveway their actions would endanger the Tanners.

Caldwell v. City of Louisville, 2006 WL2661144 (6th Cir.)

In Caldwell v. City of Louisville, 120 Fed.Appx. 566 (6th Cir. 2004), the appellate court somehow found potential liability under the State Created Danger Theory, because police detectives failed to serve a warrant for six days resulting in the murder of Caldwell by her live in boyfriend. Prior to the murder, the investigating detectives took extraordinary steps at trying to take enforcement action against the boyfriend including an arrest with a warrant and after his release the submission of a subsequent warrant. They also attempted to obtain restraining orders, but Caldwell resisted their efforts to the extent of making an internal affairs complaint against them due to their efforts in attempting to protect her. The Town of Castlerock v. Gonzalez case was decided by the Supreme Court after the appellate court decision resulting in a subsequent summary judgment motion which was granted by the district court.

In a second appeal to the 6th Circuit, the court described the law of the case doctrine. This doctrine precludes reconsideration of issues decided at an earlier stage of the case. There are three exceptions: when substantially different evidence is raised at a subsequent trial; where subsequent contrary view of the law is decided by the controlling authority; or where a decision is clearly erroneous and would work a manifest injustice. The court determined that because Castlerock did not rule on the State Created Danger Theory, the law of the case doctrine applied and the case was remanded for further proceedings.

Snow ex. rel. Snow v. City of Citronella, AL , 420 F3d 1262 (11th Cir. 2005)

After being arrested for driving under the influence, Poiroux was placed in a cell. Force had to be used to place her in the cell as she was approximately six feet tall and weighed 150 to 160 pounds. In the cell she began behaving irrationally beating the walls and the door with her shoe, climbing on top of the bunk bed to hit a light fixture, crunching a Pepsi can and complaining of seizures. The Court found that taking the evidence most favorable to the plaintiff, a jury could find that one of the booking officers had subjective knowledge that there was a strong risk that Poiroux would attempt suicide and deliberately did not take any action to prevent that suicide. There was evidence that Poiroux phoned another jailer in another jurisdiction who stated that the previous month she had tried to cut her wrist while in custody and had given them a lot of trouble. Second, Poiroux's father testified that the officer told them that Poiroux was suicidal. Third, the officer did not communicate any information regarding his belief that she was suicidal to anyone else at the jail, and finally, he did not take any actions he would have taken had he regarded her as a suicide risk.

The officer did not tell the relieving booking officer to check on Poiroux every fifteen minutes, did not remove items from the cells with which Poiroux could have harmed herself and did not place her in a drunk tank or return her to a medical center for treatment. In short, the evidence most favorable to the plaintiff showed that the officer did nothing. The court concluded

that a jury could find that the officer subjectively believed that there was a strong risk that Poiroux would commit suicide and deliberately did not take any action to prevent her suicide.

The court did find that summary judgment in favor of the City and its officials was appropriate. Although the City did not have a suicide policy the court found that under the circumstances the failure to have such a policy did not constitute deliberate indifference, because the officers stated that an unwritten policy existed regarding suicidal detainees. Also, the aforementioned booking officer stated that he would have taken actions that a suicide policy would have required had he suspected that Poiroux was suicidal. As for other officers on duty, there was no reason to believe that they would have put her on suicide watch since they were never informed of the strong likelihood that she was suicidal.

Drake ex. rel. Cotton v. Coss 445 F3d 1038 (8th Cir. 2006)

After being arrested on domestic violence assault charges, Cotton denied any suicidal tendencies or past suicide attempts. Two days later, the jailor found that Cotton had stabbed himself in the wrist approximately twelve times with a pencil and admitted to drinking cleaning solution. He was taken to a local hospital where he admitted to suicidal intentions resulting in his transfer to a state psychiatric hospital. The next day a doctor evaluated him determining that he was not suicidal, but simply experiencing anxiety and acting out. He was returned to the jail where he stayed for two weeks before again stabbing himself and consuming more cleaning solution. At the same psychiatric facility, they discharged Cotton finding that he denied any suicidal ideation, was adjusting to a situation in jail and was mildly depressed and had mild anxiety. He also stated that Cotton was attempting to manipulate the system by malingering. The doctor recommended that he not be exposed to any sharps or cleaning solution and he should be closely monitored. Cotton was placed in lock down status. Jailors performed thirty (30) minute checks. During one check, he was found hanging by a bed sheet from a ceiling vent and not breathing. He survived but suffered serious brain injuries.

Plaintiff pointed to three specific decisions of the jailors as proof of deliberate indifference. The jailers only conducted welfare checks every thirty (30) minutes, failed to remove bedding and clothing and failed to fill Cotton's prescription in a timely matter. The Court concluded that these decisions were not unreasonable in light of the risks that the jailors understood at the time. The risk of the plaintiff was shaped by the discharge and recommendations of the psychiatric doctor who did not indicate that Cotton was suicidal and instead called his behavior manipulative. The Court concluded that it was not deliberate indifference when an official relies on recommendations of a trained professional.

Bradley v. City of Ferndale, 1**48 Fed.Appx. 499 (6th Cir. 2005)**

Due to a barricaded gunman situation, Officer Simpson was the only available patrol officer in Ferndale. At approximately 7:53, he responded to a suspicious person complaint and found plaintiff, Bradley, wandering along the street with an open container of alcohol. A computer check showed that Bradley was wanted on an outstanding bench warrant. While being processed, Bradley told Simpson that he should give him his gun so that he could shoot himself. Although Simpson thought he was joking he reported it to Lt. Thompson who had also heard the remark. During booking, the officers learned that Bradley suffered from Hepatitis C and based on his medical condition they marked his jail card with a red sticker indicating the need to apply

universal and suicide precautions. The arresting department asked Ferndale to hold Bradley until Monday, but Thompson said that due to Bradley's intoxication, Hepatitis C, the barricade situation, and the fact that he might be suicidal, that they should pick him up as soon as possible. Bradley, age forty, was placed in a biohazard cell. Simpson had removed his belt, money, wallet and jacket. He was allowed to keep his shirt and pants and was given two blankets. Simpson went back on patrol and White, the dispatcher, set a timer so he would be reminded to check on Bradley in an hour. Upon checking the cell thirty-six minutes later, White found Bradley lying on the cell floor with a blanket tied around his neck. Thompson began administrating CPR but Bradley was later pronounced dead from self-asphyxiation.

The Court applies a subjective standard for determining whether an official acted or failed to act with deliberate indifference, Farmer v. Brennan, 511 U.S. 825 (1994). The standard requires conscious disregard of a substantial risk of serious harm.

As to Officer Simpson, the plaintiff claimed that he acted with deliberate indifference when he gave Bradley the blankets. The undisputed facts indicated that Simpson notified his Lieutenant about the remark, took Bradley's property, and gave him two blankets before going back on patrol. These facts were insufficient to support a claim of conscious disregard for Bradley's safety.

As for Dispatcher White, while he was busy tending to the barricaded gunman situation, monitoring the phones and radio, he also watched six (6) CCTV Monitors. He flagged Bradley as being a suicide risk and set a timer to check on him within an hour. Because he was concerned for Bradley's behavior, he checked on him thirty-six (36) minutes later finding him unconscious. These facts did not support a finding that White acted with conscious disregard of Bradley's suicidal tendencies.

Claims against Lt. Thompson included that he failed to remove the blankets or establish fifteen minute checks in conformance with department policy. He did participate in labeling Bradley as a suicide risk and expedited Bradley's transfer to the county jail. He also provided CPR in spite of knowing that Bradley had Hepatitis C. His actions also failed to evidence a conscious disregard of Bradley's suicidal tendencies.

Plaintiff relied heavily on the violations of department policies, however, the Court noted 6th Circuit opinions and Davis v. Scherer, 468 U.S. 183 (1984) "holding that officials do not lose their qualified immunity merely because their conduct violates some statutory administrative provision."

SUPERVISORY:

Turner v. City of Taylor, 412 F.3d 629 (6th Cir. 2006)

Turner was arrested after a domestic violence complaint at 1:00 a.m. on January 6, 2000. Sometime during the afternoon of January 7th he claims that when he said he should not be moved to a cell without a blanket and mattress because he would get sick, 4 officers beat him. Paramedics examined him in response to his complaint that he was short of breath due to asthma. He was treated but officers refused to allow him to go to the hospital in contradiction to the paramedics' suggestion. The paramedics' report stated that he denied having any other

problems. 80 hours into his detention he complained about not being arraigned. An officer agreed and said he would talk to the Lieutenant, but the Lieutenant just waived his hand. The officer shrugged and told the plaintiff he had tried. At about 6 p.m. on Sunday he was told he was going to be arraigned. When he expressed skepticism because it was Sunday, Officer Minard said "What the Fuck did I tell you", sprayed him with mace and pushed his face into a steel post. At 8 a.m. on Monday he was released and confronted by two officers at his home who told him he had 2 minutes to get what he wanted out of the house or face arrest. He called the department and was told by a lieutenant that if he didn't leave the house he would be arrested.

UNLAWFUL DETENTION: The City has a policy to hold persons arrested for domestic violence a minimum of 20 hours unless arraigned and released by the court. Persons arrested without a warrant generally should be brought before the court within 48 hours for a determination of probable cause. If held beyond 48 hours the burden shifts to the government to demonstrate a bona fide emergency or other extraordinary circumstance to justify the otherwise unreasonable delay. There were no reasons why the plaintiff should not have been arraigned or released and therefore the question was which supervisors could be held liable? Sgt. Tapp could be held liable for as little as a 20 hour delay because he was on duty the first day and ten other inmates were arraigned. Lt. Canning, as jail supervisor, and Lt. Zachary, as O.I.C., who by policy was charged with knowledge of information within the jail log could also be held liable.

EXCESSIVE FORCE: Plaintiff failed to provide competent evidence that identified any supervisor who implicitly authorized, approved or knowingly acquiesced to the use of excessive force.

EXTRA-JUDICIAL EVICTION: Lt. Canning could be held liable as the plaintiff claimed that when the officers ordered him from his house he called and spoke to a male lieutenant who told him to leave or he would be arrested. Defendants failed to present evidence that any other lieutenant was on duty at the time of the call.

MEDICAL TREATMENT: Plaintiff failed to present evidence that Lt. Canning participated directly or indirectly in the decision not to send the plaintiff to the hospital. Further, there was inadequate evidence of a serious medical need to support a claim for denial of medical attention. The paramedics' report stated that the plaintiff's breathing was brought under control, he did not complain of any other problem, and he said he felt fine.

Barham v. Ramsey, 434 F3d 565 (D.C. Cir. 2006)

In the weeks leading up to a Washington D.C. annual meeting of The World Bank, Chief Ramsey, anticipating an influx of protestors, told his staff that officers should overlook minor violations of the law in order to accommodate demonstrators. Deputy Chief Newsham was assigned to an area which included Pershing Park. Members of the civil disturbance unit were aware that some demonstrators intended to shut the City down by using obstructive tactics including clogging traffic arteries. Newsham observed demonstrators unlawfully marching through the streets, knocking over trash containers and newspaper vending machines, and at least one store window was smashed. He surveyed the scene for approximately forty-five (45) minutes at Pershing Park observing a steady stream of individuals entering the park. The demonstrators were taunting police, beating drums, and chanting and dancing in an organized manner. Newsham conferred with U.S. Park Major Murphy who said that although there were

no permits issued for the assembly in the park, his officers would not initiate arrests. He explained that if he issued an order to arrest without first issuing three (3) successive warnings he would violate his agency's mass arrest policy.

After cordoning off the park, Newsham advised Ramsey that he believed there was probably cause to arrest the persons who entered the park based on offenses committed previously. Without warning to disperse, 386 people were arrested and charged with failure to obey an officer.

In evaluating Newsham's qualified immunity the Court found that no reasonable officer in his position could have believed that probable cause existed to order the sudden arrest of every individual in Pershing Park. The law is clearly established that a warrantless search or seizure must be predicated on particularized probable cause and that mere propinquity to others independently suspected of criminal activity does not justify an arrest. (Ybarra v. Illinois). The Court did go on to explain that police may be justified in detaining undifferentiated protestors only after providing a lawful order to disperse followed by a reasonable opportunity to comply with that order. In fact, the MPD's Manual for Mass Demonstrations provided guidelines instructing officers to attempt to verbally persuade the crowd to disperse of its own accord by issuing an initial warning followed by a final warning then after a reasonable amount of time direct that the violators be arrested. Standing alone, an internal procedure may not create a predicate for piercing an officer's qualified immunity." Groh v. Ramirez, 540 U.S. 551, 564 n, 7, 124 S. Ct. 1284, 157 L.Ed.2d 1068 (2004), but framed as a response to "court ordered prescriptions, it is further proof that the rights violated by Newsham were clearly established when he acted." The manual in question recognizes that the procedures were developed in cooperation with the Court's.

In evaluating Ramsey's qualified immunity, the Court determined that the critical question was whether he knew all of the salient facts that rendered the mass arrest unconstitutional. "A supervisor who merely fails to detect and prevent a subordinate's misconduct…cannot be liable for that misconduct. The supervisor must know about the conduct and facilitate it, approve it, condone it, or turn a blind eye for fear of what they might see." Ramsey's statement that he did not realize that the park had not been cleared was not enough to establish undisputed facts entitling him to qualified immunity. The district court opined "at worst, Chief Ramsey knew the dispersal order had not been given and thus deliberately flaunted existing law and MPD Policies; at best, he turned a blind eye to the situation and refused to ask the questions necessary to ascertain whether arrests were constitutionally permitted."

Moore v. Guthrie, 438 F. 3d 1036 (10th Cir. 2006)

Officer partially blinded when a "Simunition bullet" flew up during a training exercise sued his chief for failing to provide appropriate available protective equipment. The chief was advised by 3 different firearms instructors on 3 occasions that the manufacturer required its own face mask to be worn during exercises with Simunition rounds. The face mask protected the neck and face. The chief authorized the use of riot helmets which did not protect the neck and left a 3 inch gap between the face and plastic shield.

The court affirmed the motion to dismiss citing Collins v. Harker Heights, 503 U.S. 115 (1992) holding that due process protections do not extend to safe working conditions and a

City's failure to train its employees about known workplace hazards was not conscience shocking.

Whitfield v. Melendez-Rivera, 431 F.3d 1 (1st Cir. 2005)

Plaintiff, a Navy serviceman, was shot in the legs when running away from a parking garage after a friend of his lit several cars on fire. The court upheld a jury award against two officers who did not accept the story that he was carrying a metal object and turned with it in his hand when they shouted "alto policia". Another officer who allegedly found a metal object in the street did not testify and the defendant officers could not say this was the object that had been in plaintiff's hand. The court found no basis to upset the jury finding and the law at the time was clearly established that "A police officer may not seize an unarmed, nondangerous suspect by shooting him dead." Tennessee v Garner, and Ellis v. Wynalda, 999 F.2d 243 (7th Cir. 1993), shooting of burglary suspect who threw bag and jacket at officer and ran, and Davis v. Little, 851 F.2d 605 (2nd Cir.1988), shooting of felon who punched and shoved officer and ran.

The court reversed the verdicts against the City, Mayor and Chief, finding that although the City did not have a policy on deadly force, the Commonwealth did, and officers were trained on this policy. Also the fact that the City had found that the officers' conduct was appropriate and no disciplinary action would be taken did not create a "well-settled and widespread custom or policy" when the decisions of the City and jury were based on conflicting versions of the events.

The court also reduced the award of compensatory damages to $3,000,000.00 to the plaintiff and $100,000 each to the parents and reversed the award of punitive damages against the Chief and Mayor, but affirmed the punitive damage award against the officers of $15,000.00 each.

Way v. County of Ventura, 445 F3d 1157 (9th Cir. 2006)

An officer arrested plaintiff at 2:10 a.m. on the misdemeanor charge of being under the influence of cocaine or methamphetamine based on his observation of her dilated pupils, rapid pulse rate, nervous attitude and rapid speech. The department's booking policy allowed for a visual body cavity search of all persons arrested on fresh misdemeanor drug charges. The manner in which the search was conducted was not an issue, and the plaintiff was released on bail several hours later without entering the jail's general population. The district court denied the booking officers qualified immunity holding that "a reasonable officer viewing Ventura's policy and the established law would have recognized that the Sheriff Department's policy was unconstitutional because it did not further any legitimate penalogical interest."

Because the legislature found that law enforcement policies and practices regarding strip or body cavity searches of detained persons vary widely, it passed the following provision of California Penal Code Section 40-30 (f) "[n]o person arrested and held in custody on a misdemeanor …offense, except those involving weapons, controlled substances or violence…shall be subjected to a strip search or visual body cavity search prior to placement in the general jail population" without "reasonable suspicion based on specific and articulable facts to believe such person is concealing a weapon or contraband, and a strip search will result in the discovery of the weapon or contraband." To conduct such a search requires authorization of the

supervising officer on duty, which "shall include the specific and articulable facts and circumstances upon which the reasonable suspicion determination was made by the supervisor." While the Court recognized the difficulty of operating detention facilities safely including the seriousness of the risk of smuggled weapons and contraband, it determined that such institutional security did not justify a blanket policy allowing for strip searches of all detainees merely based on the nature of the offense charge. In this case, the offense was a misdemeanor, the officer was in control of the plaintiff at all times, the plaintiff was never placed in the general population and there were no independent facts indicating that she was concealing a weapon or drugs. Therefore, an arrest for being under the influence of drugs does not supply reasonable suspicion that drugs are concealed in a body cavity.

Further, the department's policy could not serve as a proxy for reasonable suspicion. However, the officer's reliance on the policy under these circumstances was not unreasonable given prior case law. Before this case, there was no clearly established law with regard to the constitutionality of a body cavity search policy premised on the nature of a drug offense. Also, the Court had previously held that the nature of an offense may provide reasonable suspicion.

The Court concluded that subjecting Way to a strip search with visual cavity inspection on the misdemeanor charge was not justified by the jail's blanket policy and, therefore, amounted to a constitutional violation. The officers in this case would not have reasonably known that reliance on this policy was unconstitutional and are therefore entitled to qualified immunity.

Whitewater v. Goss, 2006 WL2424788 (10th Cir.)

Plaintiff claims that the blanket policy to use the SWAT Team during all executions of searches involving drugs and requiring SWAT Team members to secure all occupants at gunpoint, including juveniles, until the residence has been secured, led to the unconstitutional act of holding a 12 year old at gunpoint for 15 minutes. The plaintiffs failed to present evidence that the sheriff knew the team would use excessive force intended to cause harm or that he instructed the team to use excessive force. Without such evidence a mere decision to deploy a blanket rule did not offend the Fourth Amendment. Further, the common sense interpretation of the policy regarding holding occupants at gunpoint would not authorize an officer to hold a 12 year old at gunpoint for 15 minutes. Without a showing of a direct causal link between the policy and the alleged constitutional deprivation, the plaintiff could not prevail on their official capacity claim.

Skehan v. Village of Mamaroneck, 2006 WL 2734318 (2d Cir.)

Skehan alleged that he was told by several high level supervisors to ignore future violations of an individual because Skehan was white and the individual was black. Days later attended a meeting with the chief and other supervisors where he expressed concern that the department was making decisions based on race. He was told that they had a problem with his judgment and he was asked to forfeit ten days for failure to disclose reasons for taking sick leave. He refused and approximately two months later was suspended for refusing to provide the sick leave information, and failure to report properly to a meeting.

A month later he was assisting an officer with an investigation in which she made an arrest of a minor for driving while intoxicated and told Skehan that she did not have probable

cause, but was directed to make the arrest by Sgt. Gaffney who doesn't like kids and went nuts. Skehan met with an assistant district attorney to report concerns over this arrest and the racial decision making issue. Skehan reported this conversation to a Lieutenant and Sgt. Monachelli, his direct supervisor and vice president of the PBA. Monachelli sent a memo to his Lieutenant expressing concerns regarding enforcement decisions being made on the basis of race. An internal investigation exonerated Sgt. Gaffney who allegedly required all officers to attend a meeting where he had threatened retaliation against Skehan. Skehan wrote to the local PBA president, DiCioccio, who along with Monachelli, posted a memo in the police locker room disputing the IA findings regarding Sgt. Gaffney's conduct, reiterating support for Skehan that the department was engaged in race based enforcement. A copy was sent to the Police Board and Chief Flynn. Both DiCioccio and Monachelli refused to answer questions with regard to the memo. Finally, Officer Micalizzi wrote to the Board expressing belief that the charges against Skehan, DiCioccio and Monachelli were unjustified and alleged that Chief Flynn had filed charges to retaliate against and silence the officers. He also testified at the disciplinary hearings. Thereafter, the Chief suspended Micalizzi. All four filed lawsuits which were consolidated. The district court denied summary judgment motions based on qualified immunity concerning Board Members and the Chief.

First Amendment Claims

In Garcetti v. Ceballos, 126 S. Ct. 1951 (2006), the Supreme Court held that, "when public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes, and the Constitution does not insulate their communications from employer discipline." In order for a plaintiff to succeed they must show that, (1) they engaged in a constitutionally protected speech because they spoke as citizens on a matter of public concern; (2) they suffered an adverse employment action; and (3) the speech was a motivating factor in the adverse employment decision.

Once the plaintiff has prevailed on these issues, defendants may escape liability if the adverse action would have been taken regardless of plaintiff's speech or the expression was likely to disrupt the government's activities and the harm caused by the disruption outweighs the value of the plaintiff's expression.

The Court determined that Garcetti would only possibly apply to Skehan's comments to the district attorney; however, there was insufficient factual record to determine the scope of Skehan's duties.

Chief Flynn claimed that he had constitutionally permissible reasons for charging the plaintiffs and that he was not personally responsible in the suspension, as this was the Board's responsibility. The Court denied his qualified immunity in that proffering of charges is sufficient to constitute an adverse employment decision and if his alleged animus was a substantial and motivating factor behind his charging the officers, it would be irrelevant that he had other legitimate reasons to take such action. The Court also denied summary judgment on the part of the Board finding that the plaintiff's claims, if accepted, were sufficient to support a First Amendment violation if the Board intended to further Chief Flynn's desire to retaliate against the plaintiff based on his free speech bid.

Equal Protection Claims:

The Court questioned the officer's claims that they were treated differently by others through their examples of officers who committed different types of misconduct and were not as severely disciplined. In order to prevail on a selective treatment claim the Court noted the plaintiffs must show that they were treated differently from others similarly-situated and that the differential treatment was based on impermissible consideration such as race, religion, intent to inhibit or punish the exercise of constitutional rights, or malicious or bad faith intent to injure a person.

Wilson ex rel. Estate of Wilson v. Miami-Dade County, 2005 WL 3597737 (S.D. Fla. 2005)

Wilson and Storr, both members of the Miami-Dade Police Department, were engaged in a fifteen year intimate relationship that ended in 2003. After the relationship ended, Storr became emotionally upset and began stalking Wilson. Plaintiff claims the emotional problems were known to his direct supervisors, who visited him at his home and suggested that he see a department psychologist. Storr used his firearm to stalk Wilson by calling her at work and firing warning shots into the phone. He showed up at a party attended by other officers and displayed a firearm. He told other officers he was distraught over his break-up, couldn't take it anymore and life was not worth living. Throughout, he was permitted to retain his firearm and remain on active status.

Wilson met with the Chief of the Administration and Technology Division complaining of the harassment. He indicated that he would intervene on her behalf. It was alleged that Storr's attempt to convince Patterson that Wilson was still interested him was a red flag indicating that Storr needed psychological help as well as suspension or reassignment and confiscation of his firearm. Plaintiff further alleged that the department had knowledge of Storr's severe emotional problems, that he had missed work and court, and avoided psychological treatment while harassing Wilson. The department took no steps to protect Wilson resulting in Storr shooting Wilson to death and then himself three weeks after his conversation with the Chief.

The Court ruled on defendant's Motion to Dismiss for failure to state a claim which merely tests the sufficiency of the Complaint and does not decide the merits of the case. In the 11th Circuit, a municipality is not liable as a matter of law for failure to train or supervise without notice of a need to train or supervise in a particular area. Such knowledge arises out of a history of wide spread prior abuse or a prior incident in which constitutional rights were similarly violated. Absent such evidence a municipality could not be deliberately indifferent unless the need to train or supervise was so obvious and the likelihood of constitutional violations was highly predictable. The plaintiff alleged that the failure to train or supervise employees in the detection and/or treatment of officers such as Storr is outlined in the department manual was evidence of deliberate indifference of constitutional rights of Wilson to be protected from dangerous officers such as Storr. Although plaintiffs had not alleged any history of widespread prior abuse putting the department on notice, her pleading survived the motion to dismiss allowing for factual development on this issue. The Court also allowed plaintiff to proceed on State claims involving negligent supervision/retention and negligent implementation of policy.

Perez v. Miami-Dade County, 168 Fed.Appx. 338 (11th Cir. 2006)

An undercover detective was struck by a sergeant as he ran after several suspects who had robbed a Radio Shack. The undercover officer who was Hispanic claimed that the sergeant intentionally hit him because he is a racist. The Court found sufficient genuine issues of material fact with respect to the plaintiff's excessive force and First Amendment claims.

The officer presented evidence that the sergeant was involved in numerous automobile collisions and was known to use racially derogatory terms. Further, during a ten year time frame, the county disciplined only 16 officers for use of excessive force, six of whom received written reprimands and only ten of whom were suspended for periods ranging from one to ten days. The plaintiff also presented sworn statements from other officers that it was understood that there would be no punishment for use of excessive force.

The plaintiff also alleged a cover-up as evidenced by the officers moving the vehicle to conceal evidence. In addition, the County's corporate representative admitted a systematic practice of covering up incidents of excessive force. Finally, the sergeant was never disciplined for the incident, but instead was given an award for professionalism, and after his retirement the County stated it would rehire him.

Other officers were aware of the sergeant's practice of apprehending suspects by hitting them with his car and his statements that this was acceptable. The plaintiff also presented evidence of numerous excessive force settlements and evidence of a failure to prepare use of force reports in numerous incidents.

With regard to the First Amendment claim Perez claimed that his disability time was taken away from him and his phone was tapped, and that he was told that his career would be over if he complained about a cover-up. These claims were sufficient to support his First Amendment claim.

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