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SIXTH CIRCUIT COURT OF APPEALS No. 23-1259 Decided and Filed February 29, 2024 19

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JERRY LAWLER, as father, next friend, and personal representative/administrator of the estate of Brian Christopher Lawler, Deceased v. HARDEMAN COUNTY, TENNESSEE, ELLEN FUTRELL; WILLIAM GONZALEZ; JUDY WIGGINS
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one extreme generally, an officer without forewarning generally will not have the ability to stop a colleague's force if the force continues for ten seconds or less, and at the other extreme an officer generally can stop ongoing force that lasts for a minute or more - A few other factors have been considered by the court including did the force continue unabated or occur at discrete moments, what were the observing officers doing during the encounter, did prior statements reveal the risk of force or did it come without warning

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9. Section 1983 claim - Failure to train - There is no dispute that 'a governmental entity can be held liable under section 1983 for its failure to properly train and supervise its employees - However, a municipality can be liable under section 1983 only if there is some underlying constitutional violation for which it could be held responsible - To hold the board liable under section 1983 for this claim, Appellants are required to establish two essential elements: (1) that the Board negligently trained or supervised Coach Root; and (2) that this inadequate training or supervision caused a violation of Tyler's rights - There was no constitutional violation found, so school system cannot be liable under section 1983

LISA KELLEY ET AL. v. NATHANIEL ROOT ET AL.
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10. Municipal liability - A municipality cannot be held liable under § 1983 simply because it employs a tortfeasor, nor can it be liable for an injury inflicted solely by its employees or agents - A plaintiff asserting a municipal liability claim under *Monell* must connect the employee's conduct to a municipal policy or custom - To do so, a plaintiff must demonstrate

one of the following: (1) the existence of an illegal official policy or legislative enactment; (2) that an official with final decision making authority ratified illegal actions; (3) the existence of a policy of inadequate training or supervision; or (4) the existence of a custom of tolerance or acquiescence of federal rights violations - A plaintiff then must also demonstrate that, through its *deliberate* conduct, the municipality was the moving force behind the injury alleged - Based on the concession made by plaintiff's attorney in oral argument the court determined that plaintiff had abandoned the appeal - In this case plaintiff alleged a failure-to-screen which was a single hiring decision so the plaintiff must show that this officer was highly likely to inflict the particular injury suffered by the plaintiff - To prevent municipal liability for a hiring decision from collapsing into *respondeat superior* liability, the plaintiff alleging failure to screen must show that the decisionmaker was deliberately indifferent to the known or obvious consequence of the hiring decision and that the link between the applicant's background and the specific constitutional violation was sufficiently strong - Simply choosing not to inquire into an applicant's background does not amount to deliberate indifference - Plaintiff was required to plead facts plausibly alleging that a known or obvious consequence of the hiring decision was that *this* officer was highly likely to inflict the *particular* injury suffered by the plaintiff (being held at gunpoint following an unconstitutional stop) Allegations of issues, concerns about the office demeanor and professionalism, and his failure to complete a training program fall short of plausibly linking the danger of hiring the officer to plaintiff being held at gunpoint by the officer following an unconstitutional stop - More specifically, the mere fact that the officer may have been likely—even exceedingly likely—to commit unconstitutional conduct in general would not have put the city on notice that the officer would commit the specific constitutional violation here

ILYA KOVALCHUK v. CITY OF DECHERD, TENNESSEE and MATHEW WARD
SIXTH CIRCUIT COURT OF APPEALS No. 23-5229 Decided and Filed: March 18, 2024 67

CLASS ACTION

1. Attorney sent solicitation letters to members of a proposed class, which class had not been approved by the district court - District court issued a protective order preventing further communication by the attorney with prospective class members - There was no class certified by the court - The Supreme Court has held that attorney communications with potential clients is attorney speech and, as such, is accorded a measure of First Amendment protection - The district court was mistaken when it found, in the protective order, that potential members of the proposed class were represented by class counsel after the court's preliminary approval of the class in its Rule 23(e)(1) order - That order did not create a class - Even after certification, class counsel do not possess a traditional attorney-client relationship with absent class members - Upon entry of the district court's 23(e)(1) order, lass counsel' was only plaintiffs' counsel—because the only people that counsel represented then (and now) were the named plaintiffs themselves - Communications with potential class members, then, were not communications with persons already represented by another lawyer - The district court's entry of its Rule 23(e)(1) order therefore was not a valid ground on which to restrict those communications - The importance of truthful, non-misleading information for members of a proposed (or actual) class is increased when, as here, the named parties propose a class-wide settlement - A lawyer's truthful, non-misleading criticisms of a proposed settlement are not a valid reason to proscribe his communications with members of a proposed (or actual) class

WAYSIDE CHURCH, an Illinois, Not-For-Profit (Ecclesiastical) Corporation, individually and on behalf of a class of all others similarly situated; HENDERSON HODGENS, Van Buren County, individually and on behalf of a class of all others similarly situated, et al. v. VAN BUREN COUNTY, MICHIGAN, in its individual Michigan municipal capacity and on behalf of a class of all other Michigan counties similarly situated, et al
SIXTH CIRCUIT COURT OF APPEALS No. 23-1471 Decided and Filed: June 6, 2024 71

CONSTITUTIONAL LAW (U.S.)

1. First Amendment - Billboards - Strict scrutiny applies - The exemption of public service signs from the requirements in the ordinance is content based and a subject of a strict scrutiny - Village must then go further when implementing the ordinances, by inquiring into

whether the content displayed on an off-premises sign meets the criteria of the public-service exemption - This cannot be done in a content-neutral fashion - The threshold inquiry of the public-service exemption—whether the content of a given sign serves a public service—is laden with the types of content-based and value-judgment determinations that call for strict scrutiny under the First Amendment - As a matter of aesthetics, public-service signs that can utilize variable messaging create the same problem as other outdoor advertising signs - In other words, outdoor advertising signs utilizing variable messaging are no greater an eyesore, yet are banned from doing so - So, too, for safety: the Village has offered no reason to believe that outdoor advertising signs pose a greater threat to safety than do public-service signs - When a municipality promulgates exceptions to a general prohibition that meaningfully undermine its stated goals, it leaves appreciable damage to those supposedly vital interests

NORTON OUTDOOR ADVERTISING, INC. v. VILLAGE OF ST. BERNARD, OHIO; GERALD L. STOKER, Building Commissioner, BOARD OF ZONING APPEALS, Village of St. Bernard, Ohio

SIXTH CIRCUIT COURT OF APPEALS No. 23-3623 Decided and Filed: April 19, 2024..... 75

2. First and Eleventh Amendments - Retaliation claim - State actor is not entitled to 11th Amendment immunity - University police officer was suspended without pay for comments made to the press that the department ignored a student’s claim of sexual assault by a professor - The Eleventh Amendment prohibits suits against states unless they consent to be sued or Congress, pursuant to a valid exercise of its power, unequivocally expresses its intent to abrogate sovereign immunity - The doctrine of sovereign immunity extends to entities acting on behalf of the state, as well as to state officers acting in their official capacity - This court has previously held that the University of Michigan is a state agency and is therefore entitled to claim sovereign immunity - Sovereign immunity precludes suits against states and their entities or officers for monetary damages or retrospective relief but permits claims for prospective relief when brought against state officers in their official capacities - This court has held that expunging disciplinary records is, as a practical matter, prospective relief - Looking to the bottom line in the court’s Eleventh Amendment jurisprudence, granting plaintiff his requested relief would incur expenses that are, at most, minimal and ancillary to plaintiff’s main goals of preventing future discrimination and retaliation and removing negative disciplinary entries from his record - The district court did not err in denying the Defendants’ motion for summary judgment based on sovereign immunity -Qualified immunity denied as law was clearly established that there is no doubt that there is a clearly established constitutional right to speak, even as a government employee, on a matter of public concern regarding issues outside of one’s day-to-day job responsibilities, absent a showing that *Pickering* balancing favors the government’s particular interest in promoting efficiency or public safety - To determine whether a public employee like plaintiff has engaged in private protected speech, we engage in a three-part inquiry: (1) was the relevant speech on a matter of public concern; (2) was the employee’s speech made pursuant to their official duties; and (3) did the employee’s interest in speaking, on balance, outweigh the government’s interest in promoting an efficient workplace and providing public services (*Pickering* balancing test) - Statements reporting instances of maladministration, to authorities both within and outside of an employee’s chain of command, constitute speech on a matter of public concern - Officer’s speech was a matter of public concern and was not part of his job duties - Public safety employers do not have a greater weight placed on their interests in order and discipline than other employers have in their institutional interests - Police administrator do not have any greater interest in regulating employee speech to promote their force’s efficiency than does any other government employer

WILLIAM ELLIOTT ASHFORD v. UNIVERSITY OF MICHIGAN; UNIVERSITY OF MICHIGAN-DEARBORN; GARY GORSKI; JEFFREY EVANS

SIXTH CIRCUIT COURT OF APPEALS No. 22-2057 Decided and Filed: January 9, 2024 81

3. First Amendment - This is a case of poor pleadings - No First Amendment violation shown by the complaint and defendant failed to plead the qualified immunity defense - If the First Amendment protects past speech, employees must establish two other well-known elements to prove a retaliation claim under § 1983, (1) they must show that their employer took a harmful adverse action against them—meaning one that would deter the average employee from speaking, and (2) they must show that their protected past speech at least partially

motivated this harmful action - Section 1983 bars plaintiffs from holding one official liable for another's actions, so plaintiffs must show that each sued official engaged in unlawful conduct - Lumping all the actors together treats them as a single actor - This strategy might forfeit § 1983 claims if it requires the court to scour the record to identify how a jury could find a defendant liable based on that defendant's acts - The filing of the operative complaint fixes the controversy as of that date, and federal courts will not consider post-complaint factual developments - To decide whether the First Amendment protects past speech, the Supreme Court proceeds in two steps - At step one, the Court's doctrine protects past speech only if the speech survives two bright-line rules (1) Employees must speak as private citizens, not as part of their official job duties, and (2) they must speak on a topic of public concern, not personal concern - If the speech passes these two tests, the Supreme Court engages in a balance of interests at the second step - Even if employees speak off the clock on a matter of public concern, the employer can punish them for their speech if its interests in its operations outweigh the employees' interests in speaking - Freedom of association - When considering whether state action violates this right of expressive association, our cases ask three questions: (1) can the identified group seek freedom-of-association protection because its members associate partly to express a message, (2) does the challenged state action significantly burden the group's ability to spread its message, and (3) does this burden on speech outweigh any governmental interests justifying the burden

SHANNON M. BLICK v. ANN ARBOR PUBLIC SCHOOL DISTRICT; ANN ARBOR BOARD OF EDUCATION; SHONTA A. LANGFORD; DAWN LINDEN; JEANICE KERR SWIFT
SIXTH CIRCUIT COURT OF APPEALS No. 23-1523 Decided and Filed: June 27, 2024..... 89

4. First Amendment - Due process - Equal protection - Candidate challenged term limits requirement - Challenges to term-limit laws receive rational basis review - In general, under rational basis review, a defendant has no obligation to produce evidence to sustain the rationality of its actions; its choice is presumptively valid and may be based on rational speculation unsupported by evidence or empirical data - Because the term-limit amendment was supported by multiple legitimate interests, and because plaintiff has not negated the rationality of the amendment in any way, he cannot succeed on his First and Fourteenth Amendment challenge - The term-limit amendment did not violate plaintiffs' due process rights because it does not operate retroactively and does not deprive him of any property or liberty interest protected by the Due Process Clause - It impairs no rights that plaintiff had before enactment because plaintiff never had a right to run for mayor, and it imposes no new liabilities or duties on plaintiff because it merely requires him to refrain from serving as mayor, rather than requiring any affirmative act on his part - The term-limit law only prospectively prohibits plaintiff from running for a fifth term because it draws upon antecedent facts for its operation - Merely considering these prior terms does not make the amendment apply retroactively - No equal protection class of one violation

JAMES R. FOUTS v. WARREN CITY COUNCIL; SONJA BUFFA; ANTHONY FORLINI; CITY OF WARRENELECTION COMMISSION
SIXTH CIRCUIT COURT OF APPEALS No. 23-1826 Decided and Filed: April 2, 2024 100

5. First Amendment - Prior restraint on speech - Court order nonparty grandfather not discuss case against his son with his granddaughter - Nonparty grandfather file a writ of certiorari on the order of the trial court - A writ of certiorari is an order from a superior court to an inferior tribunal to send up a complete record for review, so that the reviewing court can ascertain whether the inferior tribunal has exceeded its jurisdiction or acted illegally, fraudulently, or arbitrarily - Where a petitioner alleges that the trial court has acted without legal authority and there is no other plain, speedy, or adequate remedy, a writ of certiorari may be warranted - Strict scrutiny applies - There was no specific finding of danger to the child in this case - Instead, the trial court appears to have based its decision to restrict petitioner's speech simply on its subjective view about what children should or should not hear - That will not suffice - A trial court's personal opinion is not a basis for restricting a person's constitutional right to free speech

PATRICK M. MALONE v. JAMES WILLIAM ROSE, ET AL.
COURT OF APPEALS No. M2023-01453-COA-WR-CV Filed March 26, 2024..... 103

6. First Amendment - Standing - Plaintiff pre-enforcement challenge to state law that prohibiting displaying a photograph of an individual's ballot - Plaintiff had Article III standing to bring the action - Although the law had not been enforced against the plaintiff she can establish an imminent injury in fact under the First Amendment by demonstrating (1) an intent to engage in expression that the Free Speech Clause arguably protects, (2) that this expression is arguably prohibited by Ohio's ballot laws, and (3) that there exists a credible threat of enforcement for engaging in that expression

ALISON KAREEM v. CUYAHOGA COUNTY BOARD OF ELECTIONS; FRANK LAROSE, Ohio Secretary of State; MICHAEL C. O'MALLEY, Cuyahoga County Prosecuting Attorney
SIXTH CIRCUIT COURT OF APPEALS No. 23-3330 Decided and Filed: March 14, 2024 106

7. Fourth Amendment - There was probable cause to arrest the plaintiff - Probable cause is not a high bar, it requires more than a reasonable suspicion but less than a preponderance of the evidence, far less than guilt beyond a reasonable doubt - Because probable cause requires much less evidence than is sufficient to establish guilt beyond reasonable doubt, the mere fact that plaintiff lived at and owned the site of the grow operation was likely enough to arrest her - Probable cause does not require conclusive proof; and does not require that officers possess evidence sufficient to establish a prima facie case at trial - There must be enough evidence for the officers to have concluded that there was a probability or substantial chance that plaintiff constructively possessed the illegal quantity of marijuana in the garage, a low bar the officers easily cleared

LESLIE FISHER v RANDALL JORDAN, MATTHEW RICE, and JOHN TRAFELET, Michigan State Police
SIXTH CIRCUIT COURT OF APPEALS No. 23-1246 Decided and Filed: January 18, 2024..... 110

8. Fourth Amendment Excessive force and 14th Amendment Right to adequate medical care - Qualified immunity denied - Fatal shooting by officer - Officer Bowers used deadly force, shooting Mr. Heeter five times with an assault rifle. That was unconstitutional unless Officer Bowers had probable cause to believe Mr. Heeter posed a significant threat of death or serious physical injury to the officers in the room - Since a jury could find a reasonable officer would not have perceived Mr. Heeter to pose a deadly threat, Officer Bowers is not entitled to summary judgment on the excessive force claim - The mere failure of a citizen—not arrested for any crime—to follow the officer's commands' does not give the officer probable cause to use *deadly* force against him - any officer would have known it violated the Constitution to shoot a suicidal individual that had moved slightly, even if the person held a gun in their pocket or could grab a gun within reach - The due process clause of the Fourteenth Amendment requires government officials to provide adequate medical care to pretrial detainees and others in their custody who are not serving a sentence and that includes a person who, like the deceased, has been injured while being apprehended by the police - As deceased lay face down, bleeding from multiple gunshot wounds, it was unreasonable for Officer Bowers to stand idle—even for a few minutes and even while paramedics were on their way—rather than administer the first aid he was trained to provide - As a matter of common sense and precedent, there is no bright-line rule that officers never have to provide care after calling for help - The Court has never held that calling for a paramedic always terminates a police officer's constitutional obligations to a pretrial detainee—irrespective of the time it will take for help to arrive, how urgently help is needed, how the officer has been trained, or even how easy it would be for the officer to help

KAREN HEETER, as administrator of the estate of Bill G. Heeter, deceased; JONATHAN HEETER, individually and as heir to the estate of Bill G. Heeter, deceased; STEPHANIE HEETER, individually and as heir to the estate of Bill G. Heeter, deceased; BRANDON HEETER, individually and as heir to the estate of Bill G. Heeter, deceased v. KENNETH BOWERS, individually and in his capacity as an employee of the City of Columbus, Ohio; COLUMBUS POLICE Department
SIXTH CIRCUIT COURT OF APPEALS No. 23-3296 Decided and Filed: February 1, 2024..... 115

9. Fourth Amendment - Qualified immunity denied and granted in part - Traffic stop - Since there was a dispute of material facts a jury could conclude that officers lack probable cause to make the traffic stop so summary judgment was not appropriate - This circuit has denied

summary judgment based on conflicting evidence as to whether drivers committed the traffic violations that formed the bases for subsequent stops - By the time of the 2019 stop, this circuit recognized the right to be free from a traffic stop unsupported by probable cause as clearly established - Excessive force claim - The reasonableness of a use of force is assessed from the perspective of a reasonable officer on the scene without the benefit of 20/20 vision of hindsight - This inquiry entails consideration of the totality of the circumstances, including, but not limited to: (1) the severity of the crime at issue; (2) whether the suspect poses an immediate threat to the safety of the officers or others; and (3) whether the suspect is actively resisting arrest or attempting to evade arrest by flight - Jury could find plaintiff did not actively resist arrest so excessive force claim survives summary judgment - Take down of plaintiff during the arrest - Officers granted qualified immunity on the use of the take down of plaintiff - There is no clearly established principle that prevents officers from taking individuals to the ground during an investigatory detention who have acted aggressively, failed to follow an officer's commands, and whose actions suggest they were trying to flee - Because the district court's partial denial of the City and Department's motion for summary judgment is not a final decision for purposes of appeal, and because the City and Department's appeal does not entail a claim inextricably intertwined with another claim properly before this court, we lack jurisdiction to assess King's *Monell* claim - A *Monell* claim is inextricably intertwined with a qualified immunity appeal properly before this court if the resolution of the qualified immunity appeal necessarily resolves the *Monell* appeal

THURMAN KING v. CITY OF ROCKFORD, MICHIGAN; ROCKFORD DEPARTMENT OF PUBLIC SAFETY; ZACHARY ABBATE and JASON BRADLEY, Officers, in their individual capacities

SIXTH CIRCUIT COURT OF APPEALS No. 22-2038 Decided and Filed: March 28, 2024 125

10. Fourteenth Amendment - Due process - Fitness for duty evaluation - Summary judgment for defendants upheld - Plaintiff was a maintenance worker whose position for reclassified to a lower pay - Plaintiff made statements to co-workers about killing those responsible for the reclassification - Plaintiff claims requirement to attend fitness for duty exam violated ADA and due process - Plaintiff specifically argued that he had a right to refuse his fitness-for-duty evaluations under the Due Process Clause and that Defendants deprived him of this right without any process - Plaintiff did not demonstrate a violation of his federal statutory or constitutional rights - A plaintiff's procedural due process rights are violated when (1) he is deprived (2) of a constitutionally protected interest in life, liberty, or property (3) through state action and (4) the deprivation occurs without adequate process - Under the Americans with Disabilities Act, fitness-for-duty evaluations must be job-related, consistent with business necessity, and based on evidence that could cause a reasonable person to inquire as to whether an employee is still capable of performing his job - The ability to refuse medical treatment is indeed protected by the Due Process Clause - Plaintiff was not forced to accept any treatment - The evaluations sought to collect information from plaintiff and render a conclusion based on that information, rather than order him to make particular treatment decisions - Plaintiff was not required to attend counseling, nor was counseling made a condition of his employment - The sole issue plaintiff briefed and which he asked the court to decide is whether his fitness-for-duty evaluations violated his procedural due process rights under the Constitution - In the Sixth Circuit, legitimate requests for medical information do not constitute an invasion of the right to privacy

JEFFREY CAPEN v. SAGINAW COUNTY, MICHIGAN; ROBERT V. BELLEMAN

SIXTH CIRCUIT COURT OF APPEALS No. 23-1665 Decided and Filed: June 5, 2024 132

CONSTITUTIONAL LAW (Tennessee)

1. Fifty-Dollar penalty clause - While acknowledging that remedial measures naturally have some aspect of deterrence, the Tennessee Supreme Court determined that when the *predominant* purposes served by the judicially imposed penalty are to provide general and specific deterrence and to ensure overall future compliance with the law, then the monetary penalty should be deemed as serving punitive purposes, which brings it into conflict with the Fifty-Dollar Clause - Under the circumstances of the present case sanctioning Ms. Reguli based upon her anticipated speech regarding a public record transgresses the legal bounds of permissible Rule 11 sanctions

CONNIE REGULI v. ROGERS ANDERSON AS MAYOR OF WILLIAMSON COUNTY,
TENNESSEE
COURT OF APPEALS No. M2022-00705-COA-R3-CV Filed April 22, 2024 136

GTLA

1. On remand the trial court heard the testimony of expert witnesses - The law of the case was that the city did not have constructive notice of the defect in the sidewalk - The doctrine does not necessarily apply: (1) when the evidence offered at a trial or hearing following the remand is substantially different from the evidence in the earlier proceeding; (2) when the prior decision was clearly erroneous and would result in manifest injustice if allowed to stand; or (3) when the prior decision is contrary to a change in the controlling law which has occurred between the first and second appeal - To determine the applicability of the law of the case doctrine here, we must examine what was decided by the court in *Mitchell I*. After an extended discussion of the evidence regarding constructive notice, this Court stated: We conclude here that the evidence before this Court preponderates in favor of the trial court’s finding that the City had no constructive notice of the unsafe condition of the sidewalk

RUTH MITCHELL v. CITY OF FRANKLIN, TENNESSEE
COURT OF APPEALS No. M2023-00736-COA-R3-CV Filed May 2, 2024 152

2. Assault and battery - A governmental entity may not be held vicariously liable for an assault and battery committed by its employee, as the general removal of immunity under the section 29-20-205 addresses only negligent acts or omissions - A governmental entity *may* be liable for an injury caused by its employee’s assault and battery *if* there is also a showing of some negligence by the entity itself - Although the intentional torts exception does not include assault and battery, it does include civil rights violations - Consequently, this Court has previously held that where the underlying acts which a plaintiff alleges to be negligent are predicated on intentional tortious conduct involving the violation of the plaintiff’s civil rights’ by government employees, the civil rights exception in section 29-20-205(2) is applicable - Thus, even where a complaint couches the claims contained therein as negligent training and supervision claims, if the gravamen of the claim involves a violation of civil rights, then immunity is preserved - The immunity offered by section 29-20-205 is broad, preserving immunity for negligence claims so long as the ‘injury arises out of civil rights

LISA KELLEY ET AL. v. NATHANIEL ROOT ET AL.
COURT OF APPEALS No. W2022-01625-COA-R3-CV Filed January 29, 2024 152

3. Pedestrian crossing the street at a place other than a cross walk - In addition to the typical elements of a negligence claim, a plaintiff pursuing a claim for negligent hiring and retention must show that the employer knew, or should have known, that the employee was unfit for their job - No evidence that city employee was unfit for his job - Allocation of fault - The court found that the evidence preponderates in favor of a finding that Ms. Easley was at least 50% at fault for the incident at issue - For the evidence to preponderate against a trial court’s finding of fact, it must support another finding of fact with greater convincing effect - Section 55-8-135 of the Tennessee Code Annotated states that every pedestrian crossing a roadway at any point other than within a marked crosswalk or within an unmarked crosswalk at an intersection *shall yield the right-of-way* to all vehicles upon the roadway - Ms. Easley failed to yield the right of way to Mr. Haynie, stepped into a significantly trafficked roadway between two vehicles without taking proper notice of her surroundings, and did so despite a nearby available stoplight and crosswalk - Remarkably, Ms. Easley attempted to pass in front of Mr. Haynie even though she was unsure if he could see her - In light of the foregoing, we conclude that the evidence preponderates against the trial court’s determination that Ms. Easley is only 10% at fault - Veritably, the evidence demonstrates considerably more fault on the part of Ms. Easley, and as such, we conclude that Ms. Easley is, at least, 50% at fault in this matter

SANDRA EASLEY v. CITY OF MEMPHIS
COURT OF APPEALS No. W2023-00437-COA-R3-CV Filed May 1, 2024 153

4. High speed chase by police officer resulted in an accident by the car being chased and a third party injured - An officer's decision to commence or continue a high-speed chase may form the basis of liability in an action brought by a third party who is injured by the fleeing suspect, if the officer's decision was unreasonable - To hold a governmental entity liable for negligently initiating or proceeding with a police pursuit, a plaintiff must show that the police officer's decisions were unreasonable - The court must determine whether the officer decision to initiate or continue pursuit was unreasonable - If his actions were unreasonable, they may form the basis of liability against the government under Tennessee Code Annotated section 55-8-108(e) - If the officer's actions were unreasonable and a claim against the government may lie, the court must also consider whether the essential elements of negligence were proven, including proximate cause - The officer could have reasonably interpreted plaintiff's speed of fifty to sixty miles per hour, refusal to pull over, and erratic driving as reckless endangerment and evading arrest—both of which pose a danger to the public beyond a simple traffic violation - Officer violated a police regulation in pursuing the vehicle in the manner that he pursued - However, applicable police regulations are but one factor in the *Haynes* analysis, which is not a black and white test - Rather, the factors are non-exhaustive - Although the officer violation of the police regulations militates against the County under *Haynes*, this single factor does not carry the day in this particular case; indeed, essentially every other factor weighs in the officer favor - Accordingly, we cannot agree with Appellants that the applicable police regulations factor is dispositive here or that the trial court erred by not weighing this factor most heavily

CAPRICE MCLEMORE ET AL. v. KNOX COUNTY, TENNESSEE
COURT OF APPEALS No. E2022-01754-COA-R3-CV Filed March 27, 2024 157

5. Public duty doctrine - Summary judgment standard - When a motion for summary judgment is made, the moving party has the burden of showing that there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law - When the party moving for summary judgment does not bear the burden of proof at trial, the moving party may satisfy its burden of production either (1) by affirmatively negating an essential element of the nonmoving party's claim, or (2) by demonstrating that the nonmoving party's evidence at the summary judgment stage is insufficient to establish the nonmoving party's claim or defense - The festivalgoers and the public at large were one and the same - Thus, the undisputed evidence shows that the Town owed a duty to the public at large when it designed and implemented the traffic-control plan - Accordingly, the public-duty doctrine applied in this case and would provide the Town with immunity from Appellees' negligence claims absent a special-duty exception - The special-duty exception removes immunity under the public-duty doctrine when, *inter alia*, a public official affirmatively undertakes to protect a plaintiff and the plaintiff relies on that undertaking - Current case law makes clear that the special-duty exception does not apply unless a public employee affirmatively undertakes to protect the plaintiff, *specifically* - For the special-duty exception to apply, the duty must be particular to the *Plaintiffs*, not to a class of individuals of which Plaintiffs happen to be members - No joint venture was created - There is simply no language in section 29-20-205 to show that the Legislature intended to remove a governmental entity's immunity so it could be held liable for a separate legal entity's negligence

LARRY KING ET AL. v. TOWN OF SELMER, TENNESSEE
COURT OF APPEALS No. W2023-00390-COA-R9-CV Filed January 8, 2024 161

IMMUNITY

1. Tort claim against state employee drug agents for accident due to high speed chase - One defendant was acting as a federal employee - The other two defendants were not acting as federal employees and are subject to suit - Individuals are employees of the federal government under the FTCA if they are: (1) officers or employees of any federal agency; or (2) persons acting on behalf of a federal agency in an official capacity, temporarily or permanently in the service of the United States, whether with or without compensation - Under the official capacity clause, a state employee can meet the definition of a federal employee if they can prove that they acted on behalf of a federal agency in an official capacity, temporarily or permanently in the service of the United States, whether with or without compensation - Two state employees were not under direct control of the federal agency and were not immune from suit - Under the operational plan, the those two state

employees were never under direct ATF supervision, so they were not acting on behalf of the ATF - Whether an employee was acting within the scope of their federal employment under the Westfall Act is governed by the agency law of the state in which the incident occurred

JASON LAIBLE, Executor of the estates of Raymond Laible and Gayle Laible; STEVEN KLEIN; MARIBETH KLEIN v. TIMOTHY LANTER; BRETT THOMAS; DONALD SCALF
SIXTH CIRCUIT COURT OF APPEALS No. 22-5496 Decided and Filed January 23, 2024..... 168

MOOTNESS

1. Party tried to intervene after the case was settled - Court held the party could not intervene as the matter was moot, and plaintiff was not a party to the action - A nonparty does not become a party under Rule 41 as soon as it moves to intervene, rather a nonparty does not become a party until the district court grants the motion to intervene

JONATHAN MOSES; LIBERTY WELLNESS, LLC v. CITY OF PERRY, MICHIGAN
SIXTH CIRCUIT COURT OF APPEALS No. 23-1262 Decided and Filed: January 4, 2024 172

OPEN RECORDS

1. There was no violation of the public records law since the records were destroyed prior to the request - It does not appear to be necessary under the particular facts presented by this case to assess whether the records of the attorney for were actually subject to disclosure under the Act - Those records were not in existence at the time that the city received the plaintiff's records request - The court's on this matter is limited by the particular facts presented by this case, and our holding is further limited to addressing only what is necessary to resolve plaintiff's present requests for relief - Accordingly, the court did not express an ultimate opinion as to the propriety of the destruction of the investigatory records that occurred before plaintiff's public records request was received, nor did it express an opinion as to whether other consequences might stem, or could have stemmed, from those records' present unavailability - The court merely held that, inasmuch as plaintiff faults the city for failing to disclose its records in connection with his public records request and seeks attorney's fees in relation thereto, his concerns on appeal are respectfully without merit - The case was remanded to consider attorney fees for plaintiff for other records that were requested were not released - The burden of proof for providing a justification for not disclosing the records sought lies with the governmental entity

MARVIN L. MILLER v. CITY OF LAFOLLETTE ET AL.
COURT OF APPEALS No. E2023-00197-COA-R3-CV Filed January 24, 2024..... 174

POLITICAL QUESTION DOCTRINE

1. In addressing the political question doctrine under the Tennessee Constitution in relation to separation of powers principles, prominent on the surface of any case held to involve a political question is found [1] a textually demonstrable constitutional commitment of the issue to a coordinate political department; or [2] a lack of judicially discoverable and manageable standards for resolving it; or [3] the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or [4] the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or [5] an unusual need for unquestioning adherence to a political decision already made; or [6] the potentiality of embarrassment from multifarious pronouncements by various departments on one question

PARENTS' CHOICE TENNESSEE ET AL. v. JASON GOLDEN, IN HIS OFFICIAL CAPACITY AS SUPERINTENDENT OF WILLIAMSON COUNTY SCHOOLS ET AL.
COURT OF APPEALS No. M2022-01719-COA-R3-CV Filed April 18, 2024 179

RECUSAL

1. Where a bias stems from an extrajudicial source, rather than from events or observations during litigation of a case, it may be sufficient to justify recusal if the judge's

behavior raises reasonable questions about the judge’s impartiality - If the bias is alleged to stem from events occurring in the course of the litigation of the case, the party seeking recusal has a greater burden to show bias that would require recusal, *i.e.*, that the bias is so pervasive that it is sufficient to deny the litigant a fair trial - A pervasive bias is one that reflects an utter incapacity to be fair - The court readily conclude that Shelby County has demonstrated pervasive bias to warrant recusal - Some of the statements made by Chancellor Jefferson throughout this litigation could be characterized as mere dissatisfaction, annoyance, or anger toward counsel, the parties, and this case - However, the fact remains that she approached Mr. Gallagher in the common area of the clerk’s office, within earshot of numerous employees, in an extremely angry and upset manner, stating that she did not like being threatened and that he and his boss could both “Bring it” - During this same timeframe, however, Mr. Gallagher appeared at a routine court tax docket and addressed the court to obtain a hearing on the Rule 59 motion, but Chancellor Jefferson responded that she was not going to set the Rule 59 motion for a hearing - Mr. Gallagher offered to file a written motion to request a hearing date, but she said she would strike it from the calendar - It was only after Shelby County filed a written motion for a hearing date, and appeared for a hearing on it, that the motion to alter or amend, filed in September, was finally set for a hearing date in March - These inexplicable actions reflect an utter incapacity to be fair

SHELBY COUNTY, TENNESSEE v. DELINQUENT TAXPAYERS 2021
 COURT OF APPEALS No. W2024-00504-COA-T10B-CV Filed April 25, 2024..... 179

SANCTIONS

1. Pro se attorney litigant made false statements in the law suit for public records - Lawyers are not free to knowingly make false statements simply because the statement is made in a petition under the Public Records Act - Sanctions for file in the public records conclusion were not proper - A citizen’s reason for wishing to review a public record is immaterial - County did not disclose that the records requested did not exist - Reguli did not failed to make inadequate inquiry prior to filing a petition - Where a citizen requesting a record is informed in her denial letter/form that non-existence of the records requested is a basis upon which a public records request could be denied in general but that is not the basis for denial of her request and instead the reason that her public records request is being denied is some other unrelated reason, the citizen is entitled to proceed in filing her statutorily authorized petition with an understanding that the basis of denial is what the government has asserted it to be and not what the government has not asserted it to be - Absent the citizen knowing the records do not exist, where the custodian impliedly indicates the records exist and denial is instead on another basis, a citizen is not subject to sanctions under Rule 11 for failing to inquire further whether the records exist prior to filing a statutorily authorized petition under the Public Records Act - Preemptive sanctioning of speech that has not yet been uttered also raises serious questions related to constitutional safeguards against prior restraints upon speech - Under the circumstances of the present case sanctioning Ms. Reguli based upon her anticipated speech regarding a public record transgresses the legal bounds of permissible Rule 11 sanctions

CONNIE REGULI v. ROGERS ANDERSON AS MAYOR OF WILLIAMSON COUNTY,
 TENNESSEE
 COURT OF APPEALS No. M2022-00705-COA-R3-CV Filed April 22, 2024 185

SCHOOLS

1. Section 1983 claim - Failure to train - There is no dispute that a governmental entity can be held liable under section 1983 for its failure to properly train and supervise its employees - However, a municipality can be liable under section 1983 only if there is some underlying constitutional violation for which it could be held responsible - To hold the board liable under section 1983 for this claim, Appellants are required to establish two essential elements: (1) that the Board negligently trained or supervised Coach Root; and (2) that this inadequate training or supervision caused a violation of Tyler’s rights - There was no constitutional violation found, so school system cannot be liable under section 1983

LISA KELLEY ET AL. v. NATHANIEL ROOT ET AL.
 COURT OF APPEALS No. W2022-01625-COA-R3-CV Filed January 29, 2024..... 186

2. Parents challenged the school curriculum claiming it violated state law pertaining to, among other things, common core and critical race theory -There were a number of issues raised, but trial court dismissed due to a lack of standing and exhaustion of remedies - Exhaustion of remedies - Administrative rules and regulations have the force and effect of law in Tennessee No error in the trial court's conclusion that the Department of Education regulations render exhaustion of administrative remedies mandatory for the parents who are bringing complaints regarding the teaching of prohibited concepts in violation of Tennessee Code Annotated Section 49-6-1019 - Court found standing, except for the parents who had left the school district - Court affirmed the trial court's dismissal of the prohibited concepts claim for failure to exhaust administrative remedies, but reversed the dismissal of the Common Core claim and remanded - Plaintiffs have a private right of action - The Tennessee Supreme Court has observed that in determining if a private right of action exists to enforce a statutory requirement a court can find that the legislature created a private right of action in one of two ways: based on the express terms of a statute or by implication through the statute's structure and legislative history - In other words, the private right of action for enforcement of a statute is a legislative creation that is express or implied. - The Tennessee Supreme Court has indicated that the ultimate touchstone for analysis is whether the General Assembly intended for a private right of action to exist - While there is no private right of action created by the Common Core statute, plaintiffs' Common Core claim fits precisely within the contours of a private right of action created by Tennessee Code Annotated section 1-3-121 - Plaintiffs have a private right of action - The Tennessee Supreme Court has observed that in determining if a private right of action exists to enforce a statutory requirement a court can find that the legislature created a private right of action in one of two ways: based on the express terms of a statute or by implication through the statute's structure and legislative history - In other words, the private right of action for enforcement of a statute is a legislative creation that is express or implied. - The Tennessee Supreme Court has indicated that the ultimate touchstone for analysis is whether the General Assembly intended for a private right of action to exist - While there is no private right of action created by the Common Core statute, plaintiffs' Common Core claim fits precisely within the contours of a private right of action created by Tennessee Code Annotated section 1-3-121

PARENTS' CHOICE TENNESSEE ET AL. v. JASON GOLDEN, IN HIS OFFICIAL CAPACITY AS SUPERINTENDENT OF WILLIAMSON COUNTY SCHOOLS ET AL.
COURT OF APPEALS No. M2022-01719-COA-R3-CV Filed April 18, 2024 186

STANDING

1. For conventional constitutional standing in Tennessee courts, a plaintiff must establish three elements: 1) a distinct and palpable injury; that is, an injury that is not conjectural, hypothetical, or predicated upon an interest that a litigant shares in common with the general public; 2) a causal connection between the alleged injury and the challenged conduct; and 3) the injury must be capable of being redressed by a favorable decision of the court - In general, courts are precluded from adjudicating an action at the instance of one whose rights have not been invaded or infringed - Standing may not be predicated upon an injury to an interest that the plaintiff shares in common with all other citizens - To the extent that the trial court concluded that the parents could not have standing because all Williamson County children were injured by the School Board's actions, which seems to have been the central basis of its decision, it misapplied the generalized grievance limitation on standing - The proper question is not whether many other Williamson County children were injured but instead whether the Parents alleged specific injuries to their children that are sufficient to meet the constitutional demands of constituting an injury for purposes of standing - Plaintiffs are not upset about the violations of Tennessee law in which the children share a generalized grievance with all citizens who may wish to see the School Board adhere to the law. Plaintiffs are instead alleging that their children are personally and actually being directly harmed by the violations of Tennessee law - In the context of the statutory violations alleged, these are not generalized grievances but distinct and palpable injuries

PARENTS' CHOICE TENNESSEE ET AL. v. JASON GOLDEN, IN HIS OFFICIAL CAPACITY AS SUPERINTENDENT OF WILLIAMSON COUNTY SCHOOLS ET AL.
COURT OF APPEALS No. M2022-01719-COA-R3-CV Filed April 18, 2024 198

2. Motion to dismiss - Plaintiff's have standing and case is ripe for judicial review - to establish standing, three elements must be satisfied: 1) a distinct and palpable injury; that is, an injury that is not conjectural, hypothetical, or predicated upon an interest that a litigant shares in common with the general public; 2) a causal connection between the alleged injury and the challenged conduct; and 3) the injury must be capable of being redressed by a favorable decision of the court - Plaintiffs have alleged that, as parents of children in the only two school districts where the ESA Act applies, they are distinctly and palpably injured by the diversion of funds from their districts to private education purposes - Plaintiffs emphasize that it is only Davidson and Shelby County parents and students who are affected thusly - Plaintiffs alleged further that their injury is traceable to the ESA Act's requirement that the funds be diverted - Regarding redressability, Plaintiffs' alleged injury could be redressed judicially in the form of a court order declaring the ESA Act unconstitutional and ordering an injunction against the ESA Act's implementation. Plaintiffs have thus met each of the elements of standing as parents - Plaintiffs have alleged enough at the motion to dismiss stage to establish standing as parents and taxpayers to challenge the constitutionality of the ESA Act for violating the requirement of a single system of public schools mandated by the Education Clause of the Tennessee Constitution

THE METROPOLITAN GOVERNMENT OF NASHVILLE & DAVIDSON COUNTY, ET AL. v. TENNESSEE DEPARTMENT OF EDUCATION, ET AL.
 COURT OF APPEALS No. M2022-01786-COA-R3-CV Filed January 10, 2024 199

TAX SALE

1. Trial court refused to extend the statute of limitations in a tax sale beyond the one year statute of limitations - Mr. Motamedi had constructive notice of the sale - Mr. Motamedi provides no authority, and we have found none, instructing that an order confirming a tax sale must be recorded with a register of deeds immediately upon entry to provide proper notice of a tax sale to a property owner. Rather, this Court has repeatedly held that a tax sale purchaser is assured title and the redemption period begins upon entry of the order with the trial court

CROCKETT COUNTY v. FARHAD MOTAMEDI v. MICHAEL MOORE
 COURT OF APPEALS No. W2023-00553-COA-R3-CV March 28, 2024 204

2. Property owner impliedly allowed a person at the property address to sign for receipt of service of process for a delinquent tax lawsuit - A person that is impliedly authorized to receive mail on behalf of a delinquent taxpayer is also authorized to sign a certified mail return receipt containing a summons or notice that has been or is to be filed in a tax proceeding - Sending notice of a tax sale to the address provided by the property owner was reasonably calculated to apprise the property owner of the pending tax sale - County was not required to take additional steps to notify Trustee unless it learned that an otherwise reasonably calculated attempt to notify Trustee had failed - The inquiry before the court was whether section 67-5-2502(a)(4), which allows for notice to a delinquent taxpayer to be received and signed for by an individual otherwise authorized to receive mail for the taxpayer, is reasonably calculated to apprise a delinquent taxpayer of an enforcement action brought by the county - Court found that it is and, therefore, that it does not violate the requirements or purposes of constitutional due process - The notice provision for property tax lawsuit while different from other lawsuits does not violate equal protection - Because taxes produce the revenue by which the government operates, the legislature has wide discretion in the adoption of tax measures, and its judgment must be accorded great respect - This deference must also be extended to the methods fixed by the legislature for the collection of such taxes - Administrative convenience and expense in the collection or measurement of the tax' alone is a sufficient justification for treating delinquent taxpayers differently than defendants in other actions - The State has a rational, legitimate interest in effecting service upon delinquent taxpayers in an efficient and cost-effective manner that justifies the distinction between defendants in delinquent tax proceedings and defendants in other legal proceedings - Because section 67-5-2502(a)(4) passes the rational basis test, Trustee's equal protection challenge fails

STATE OF TENNESSEE EX REL. SULLIVAN COUNTY TENNESSEE ET AL. v. AMY S. TOCHEV ET AL.
COURT OF APPEALS No. E2023-00072-COA-R3-CV Filed March 27, 2024 210

TENNESSEE RECREATIONAL USE STATUTE (TRUS)

1. In determining whether a party properly asserted an affirmative defense under § 102 of the TRUS based on the facts of that case, the Tennessee Supreme Court employed a two-pronged analysis: (1) whether the activity alleged is a recreational activity as defined by the statute; and if so, (2) whether any of the statutory exceptions or limitations to the immunity defense are applicable - The Appeals Court then determined that applying Tennessee Code Annotated §§ 70-7-101 and -105 required a three-step analysis: First, the court must determine whether the party asserting the Tenn. Code Ann. § 70-7-102 defense is a landowner; Second, the court must determine whether the activity in which the injured party was engaged at the time of the injury is a recreational activity; Third, the court must determine whether any of the exceptions in Tenn. Code Ann. § 70-7-104 are applicable to the case - The TRUS expressly provides that land or premises includes any structure located on the land or premises, owned by any governmental entity - Both the pool and the diving board at issue are structure', and it is undisputed that these structures are located on land owned by the city, a governmental entity - Accordingly, a city pool is land or premises under § 101(1)(B) of the TRUS - Water sports include swimming -tthe TRUS applies so that the city was immune from suit for the injury to the plaintiff while diving in a city own pool - The list of recreational activities' in Tenn. Code Ann. § 70-7-102 is neither exclusive nor exhaustive and activities similar to those explicitly enumerated in § 102 may also fall within the purview of the recreational use statute

ROBERT H. BECKHAM ET AL. v. CITY OF WAYNESBORO, TENNESSEE
COURT OF APPEALS No. M2023-00654-COA-R3-CV Filed May 14, 2024 219

UNIFORM SERVICES EMPLOYMENT AND REEMPLOYMENT RIGHTS ACT (USERRA)

1. An agreement by the parties released plaintiff's claims under the Act - Federal law controls the validity of a release of a federal cause of action - The relevant language here is that Ward agreed to release *any and all claims whatsoever* as to his termination - Those words speak for themselves: to know that the release applied to Ward's USERRA claim, one needed to know only that it was a claim - Whether a particular settlement agreement provides greater benefits than a USERRA claim is for the servicemember to decide - Plaintiff was aware of his USERRA claim and represented by counsel when he entered into the settlement agreement - Plaintiff also testified that the agreement was presented to him on a take it or leave it basis, potentially akin to an adhesion contract; and he testified that he had been out of work for 18 months when he entered into it - On this record, a reasonable jury could find that plaintiff's decision to enter into the agreement reflected a considered decision on his part, or instead that it reflected only desperation - The issue whether plaintiff believed benefits from the settlement agreement outweighed his USERRA claim is therefore one for a jury to decide whether the service member benefited from the waiver - There was a significant dissent in this case

SEDRIC WARD v. SHELBY COUNTY, TENNESSEE
SIXTH CIRCUIT COURT OF APPEALS No.22-6054 Decided and Filed: April 11, 2024..... 223

ZONING

PERMISSION TO APPEAL HAS BEEN GRANTED BY THE TENNESSEE SUPREME COURT JUNE 27, 2024, SO TINSLEY PROPERTIES, LLC ET AL. v. GRUNDY COUNTY, TENNESSEE IS NOT EFFECTIVE.

1. A distance location requirement for location of a quarry was not a zoning regulation, so it did not have to comply with laws regarding zoning - Substantial effects test - The substantial effects test requires courts to consider both the terms and the effects of the challenged ordinance: The first step requires courts to review the terms of the challenged ordinance and the municipality's comprehensive zoning plan to determine whether the ordinance is so closely related to the zoning plan that it can be fairly characterized as

tantamount to zoning; the second step requires the courts to determine whether the challenged ordinance substantially affects the use of the property that is the subject of the litigation - Both parts of the test must be satisfied before a challenged ordinance may be held to be tantamount to zoning

TINSLEY PROPERTIES, LLC ET AL. v. GRUNDY COUNTY, TENNESSEE
COURT OF APPEALS No. M2022-01562-COA-R3-CV Filed February 8, 2024 226

2. Variances - As set out in Tennessee Code Annotated § 13-7-207 the board of zoning appeals can if granted the authority by the city governing body, authorize a variance based on the following circumstances: where, by reason of exceptional narrowness, shallowness or shape of a specific piece of property at the time of the enactment of the zoning regulation, or by reason of exceptional topographic conditions or other extraordinary and exceptional situation or condition of such piece of property the strict application of any regulation enacted under this part and part 3 of this chapter would result in peculiar and exceptional practical difficulties to or exception or undue hardship upon the owner of such property, a board can authorize, upon an appeal relating to the property, a variance from such strict application so as to relieve such difficulties or hardship; provided, that such relief may be granted without substantial detriment to the public good and without substantially impairing the intent and purpose of the zone plan and zoning ordinance - Tennessee Code Annotated § 13-7-207(3) requires a showing of some peculiar physical characteristic of the subject land in order to grant a variance - Plaintiff has conceded that no such characteristics are present on the subject real property, so the record lacks material evidence to support the BZA’s grant of the variance here - Additionally, there was no special exception as allowed by Tennessee Code Annotated § 13-7-207

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