

CONSTITUTIONAL LAW

Constitutional Law: Civil Rights Section 1983

Bogle v. McClure,
332 F.3d 1347 (11th Cir. 2003)

In a civil lawsuit under Title 42 United States Code Section 1983 for civil-rights violations, the Eleventh Circuit Court of Appeals will not extend Title VII punitive damages caps to Section 1983 litigation when neither the Eleventh Circuit nor the United States Supreme Court has previously done so.

FACTS AND PROCEDURAL HISTORY

The Atlanta-Fulton Public Library System (AFPLS) consisted of more than thirty branch libraries, including Central Library in Atlanta. The Board of Directors set AFPLS policy but hired a director as administrative head to oversee day-to-day management. During all times relevant, William McClure was Chairman of the Board and June Green was a Fulton County attorney.

In 1999, the Board hired Mary Hooker as director. Hooker soon “began planning a system-wide reorganization,” though she never developed a written plan. *Bogle*, 332 F.3d at 1349. She concluded that librarians who were displaced by technological advances at overstaffed Central Library could be moved to other understaffed branch libraries. At the same time, members of the Board openly and repeatedly expressed concern about the racial makeup at Central Library, particularly the fact that only one African-American manager worked there.

Months later, the Board held a meeting at which Hooker presented her reorganization plan. Although some Board members expressed reservations about the plan, the Board instructed Hooker to move forward toward implementation. One Board member stated that the reorganization would afford the opportunity to alter the current racial composition.

Over the next month, Hooker exchanged numerous correspondences with Green and members of the Board. In one memorandum, Hooker wrote to McClure that “[s]ignificant legal ramifications could be present” with the reorganization. *Id.* at 1351. Hooker also sent recent newspaper articles describing lawsuits

against governmental agencies engaged in racial discrimination. Green advised Hooker in a memorandum that the reorganization plan should be in writing so that its legal implications could be assessed. Green also warned Hooker that legal problems could arise if the reassignments amounted to demotions.

Nearly two weeks after Green's last memorandum, the Board met and voted on the reorganization plan. Although some dispute existed as to whether the Board understood what the vote entailed, Hooker issued the new assignments on the following day. Fifteen African-Americans and thirteen Caucasians received transfers under the new plan. Each of the African-American employees received a lateral transfer or promotion, except two who "had been critical of the Board in the past." *Id.* at 1354.

Seven Caucasian librarians, including Janet Bogle, (collectively, Plaintiffs) filed suit under Section 1983 against McClure and members of the Board (collectively, Defendants). Each of the Plaintiffs testified to significant emotional harm, which they claimed was based upon racial motivations and covered up as a reorganization plan. Defendants argued that race "had nothing to do" with the reorganization. *Id.* The district court found in favor of Plaintiffs and the jury awarded \$23 million in compensatory and punitive damages, which the court remitted to approximately \$17 million. Defendants then appealed to the Eleventh Circuit Court of Appeals.

ANALYSIS

In *Bogle*, the Eleventh Circuit addressed five issues. Three of those issues—qualified immunity, compensatory damages for emotional harm, and punitive damages—will be discussed here.

Qualified Immunity

In determining whether Defendants were entitled to qualified immunity, the Eleventh Circuit applied the United States Supreme Court's two-part test from *Hope v. Pelzer*, 536 U.S. 730 (2002). The test requires that "plaintiff's allegations, if true, establish the violation of a constitutional or statutory right." *Id.* at 1355. The court then asks whether the plaintiff clearly established that right. Here, the court found that Defendants violated Plaintiffs' constitutional rights by transferring librarians based upon race. Next, the court determined that such racial discrimination clearly violated federal law.

The court also disagreed with Defendants' contention that qualified immunity existed pursuant to *Foy v. Holston*, 94 F.3d 1528 (11th Cir. 1996). *Foy* stands for the proposition that, in a case involving mixed-motives, "the presence of a jury issue about a defendant's improper intent does not necessarily preclude qualified immunity." *Id.* The court interpreted *Foy* to apply qualified immunity "where, among other things, the record indisputably establishes that the defendant in fact was motivated, at least in part, by lawful considerations." *Id.* at 1356 (emphasis omitted) (quoting *Stanley v. City of Dalton, Ga.*, 219 F.3d 1289, 1296 (11th Cir. 1997)). Applied to the facts of *Bogle*, the Eleventh Circuit held that, when viewed in a light most favorable to Plaintiffs, the facts did not indisputably establish that Defendants were motivated by lawful considerations.

Compensatory Damages for Emotional Harm

The Eleventh Circuit reviewed the district court's award of punitive damages "with a presumption of validity" under the abuse of discretion standard. *Id.* at 1359 (quoting *Ferrill v. Parker Group, Inc.*, 168 F.3d 468, 476 (11th Cir. 1999)). The court recognized that intangible psychological injuries including humiliation and insult, as well as "financial, property, and physical harms," may be the basis for compensatory damages. *Id.* (quoting *Ferrill*, 168 F.3d at 476). At trial, Plaintiffs testified that Defendants' actions caused them emotional harm, but presented no medical evidence as support. Based solely upon this testimony, the district court awarded \$500,000 to each Plaintiff. The Eleventh Circuit found "no reason to substitute [its] judgment for that of the jury or the district court," and held that the court did not abuse its discretion in awarding compensatory damages for each of the Plaintiffs' emotional harm. *Id.*

Punitive Damages

The Eleventh Circuit addressed two of Defendants' objections in relation to the district court's \$2 million punitive-damage award to each of the Plaintiffs. First, Defendants "argued against imposing any punitive damages at all because they did not 'discriminate in the face of a perceived risk that [their] actions will violate federal law.'" *Id.* (quoting *Kolstad v. Am. Dental Assn.*, 527 U.S. 526, 536 (1999)). However, the court noted that Defendants knew racial discrimination violated federal law and were warned

about significant legal problems that could result from the proposed transfers. Accordingly, the court found “sufficient evidence for a reasonable jury to award punitive damages.” *Id.* at 1360.

Next, Defendants argued that the damages were excessive. The Eleventh Circuit analyzed whether the award amounted to “grossly excessive or arbitrary punishments” under *BMW of North America, Inc. v. Gore*, 517 U.S. 559 (1996). *Id.* The *BMW* test uses three guideposts: “(1) the degree of reprehensibility of the defendant’s misconduct; (2) the disparity between the actual or potential harm suffered by the plaintiff and the punitive damages award; and (3) the difference between the punitive damages awarded by the jury and the civil penalties authorized or imposed in comparable cases.” *Id.* The Eleventh Circuit used a *de novo* standard in applying the *BMW* guideposts.

Under the most important guidepost, the Eleventh Circuit determined Defendants’ degree of reprehensibility. The court observed that the Defendants intentionally discriminated by transferring librarians based upon race. Also, Defendants attempted to cover up this discrimination by labeling it a “reorganization.” This discrimination took place with the knowledge of recent lawsuits based upon similar discrimination, and because the United States Supreme Court has found that intentional discrimination may be reprehensible, the Eleventh Circuit found it to be so in *Bogle*.

Next, the Eleventh Circuit looked to the ratio of harm to punitive damages. Although the United States Supreme Court set no bright-line test as to what constitutes an excessive punitive-damages award, it has indicated that “few awards exceeding a single-digit ratio between punitive and compensatory damages, to a significant degree, will satisfy due process.” *Id.* at 1361 (quoting *State Farm Mut. Auto. Ins. Co. v. Campbell*, 123 S. Ct. 1513, 1524 (2003)). The Eleventh Circuit found that the ratio of punitive to compensatory damages was approximately four-to-one, and that this was both reasonable and proportionate to the harm inflicted upon the librarians.

Finally, Defendants argued that compensatory and punitive damages should be limited to \$300,000 per Plaintiff, analogous to Title VII limitations. The Eleventh Circuit cited *Swinton v. Potomac Corp.*, 270 F.3d 794, 820 (9th Cir. 2001), for the proposition that, although the Title VII cap may be instructive, it did not apply to Section 1983 litigation. Further, the Eleventh Circuit deferred to analogous Supreme Court precedent to find that, al-

though the damages in *Bogle* exceed the Title VII cap, that excess is not by itself enough to indicate that the punitive damages violate due process. Accordingly, the Eleventh Circuit declined to apply the Title VII cap to Section 1983 actions.

SIGNIFICANCE

Bogle reaffirms Eleventh Circuit precedent with regard to what constitutes correct jury instructions and interrogatories and the extent of the attorney-client privilege. In deciding appropriateness of punitive damages awards, the court, under *BMW's* precedent, will decline extending a Title VII punitive-damages-awards cap to cases arising under Section 1983.

RESEARCH REFERENCE

- 15 Am. Jur. 2d *Civil Rights* § 148 (2003).

Jason M. Bard

Constitutional Law: Civil Rights Section 1983

***Inyo County, California v. Paiute-Shoshone Indians of the
Bishop Community of the Bishop Colony,***
523 U.S. 701 (2003)

An Indian tribe does not qualify as a “person” under Title 42 United States Code Section 1983, and, therefore, cannot bring a claim under that Section for deprivation of its rights.

FACTS AND PROCEDURAL HISTORY

The Bishop Paiute Indian Tribe in California operated a tribal gaming organization, the Paiute Palace Casino. The Inyo County California Department of Health and Human Services investigated three Casino employees for the crime of welfare fraud for failing to report their Casino earnings when applying for state welfare benefits. The County requested copies of the three employees’ employment records from the Casino, which the Tribe refused to release. After a showing of probable cause, the County obtained a search warrant and seized the employment records of the three employees under investigation.

To avoid the possibility of additional searches and seizures, the Tribe filed a suit in federal district court claiming, among

other things, that the County had violated its rights under the Fourth and Fourteenth Amendments of the United States Constitution, and had also violated its right to self-government. The Tribe sought compensatory damages under Title 42 United States Code Section 1983.

The district court balanced the interests of the County against those of the Tribe and dismissed the Tribe's complaint, holding that the Tribe's sovereign immunity did not prevent the search and seizure of the Casino's personnel records. The Tribe appealed to the Ninth Circuit Court of Appeal, which reversed the district court's ruling. The Ninth Circuit held that the Tribe had standing to bring an action under Section 1983 seeking protection from the unlawful search and seizure guaranteed by the Fourth Amendment.

The County appealed to the United States Supreme Court, which addressed the issue of whether the Tribe could bring an action under Section 1983 and, in an opinion by Justice Ginsburg, held that it could not, vacating the judgment of the Ninth Circuit and remanding the case on other issues.

ANALYSIS

The portion of Section 1983 at issue in *Inyo County* permits a "citizen of the United States or other person within the jurisdiction" to seek relief from a "person who, under the color of any statute, . . . subjects, or causes to be subject, [the citizen or other person] to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws." 42 U.S.C. § 1983 (2000). The Court addressed whether the Tribe qualified as a claimant by qualifying as an "other person within the jurisdiction" of the United States. *Id.*

The word "person" is used to describe both a claimant and a defendant under this Section. Although it was not presented as an issue in this case, the Court assumed, and both parties agreed, that the term "person," when being used to describe a defendant against a claim under Section 1983, does not include an Indian tribe, just as it does not include a state. This assumption was based on *Will v. Michigan Department of State Police*, 491 U.S. 59 (1989), in which the Court held that a state is not a "person" who can be sued under Section 1983.

The Tribe asserted sovereign immunity as its basis for fighting the County's processes under Section 1983. However, the

Court explained that the Section was designed to secure private rights against government infringement, not to secure a sovereign's right to withhold evidence in a criminal case. The Court held that the Tribe did not qualify as a claimant under Section 1983.

In a concurring opinion, Justice Stevens argued that the Tribe's complaint did not state a cause of action under Section 1983 because the County's alleged infringement on the Tribe's sovereign power was not an infringement of a right, privilege, or immunity secured by the United States Constitution and laws within the meaning of Section 1983. Instead, the Tribe relied on the judicially-created doctrine of tribal immunity. Justice Stevens also would have found the Tribe a "person" for the purpose of a valid Section 1983 claim.

SIGNIFICANCE

Inyo County addressed the issue of whether an Indian tribe could bring suit under Section 1983 to assert that its right to sovereign immunity was violated when a governmental unit sought evidence with a search warrant in a criminal case. This case is significant for municipalities because it holds that an Indian tribe cannot rely on Section 1983 as a basis for withholding evidence in a criminal case, and does not qualify as a "person" who can sue under the Section.

RESEARCH REFERENCE

- 41 Am. Jur. 2d *Indians* §§ 9, 11 (1995 & Supp. 2003).

Elizabeth G. Bourlon

Constitutional Law: Civil Rights Section 1983 Police: Training

Miami-Dade County v. Walker,
837 So. 2d 1049 (Fla. 3d Dist. App. 2002)

Inadequacy in the training or supervision of police officers can be the basis of a Title 42 United States Code Section 1983 civil-rights-violation claim only when the failure to train or supervise adequately amounts to a deliberate indifference to the

rights of people with whom the police come into contact, and the deliberate indifference is the proximate cause of the plaintiff's injuries.

FACTS AND PROCEDURAL HISTORY

Miami-Dade County police officers attempted to arrest Arthur Walker, the plaintiff, for lewd behavior. Walker, who suffered from schizophrenia and manic depression, resisted arrest, which resulted in a violent struggle with eight police officers. Walker sustained life-threatening injuries from this encounter.

Walker sued the County and included a federal claim of civil-rights violations under Section 1983. The complaint alleged that the County failed to train and supervise adequately its police officers in dealing with the mentally ill, and that this inadequacy was the proximate cause of Walker's injuries. A jury found that the County had violated Walker's civil rights, and the circuit court denied the County's motion for judgment with regard to the Section 1983 claim. The County appealed to the Third District Court of Appeal, where the lower court's holding was reversed.

ANALYSIS

In *City of Canton v. Harris*, 489 U.S. 378 (1989), the United States Supreme Court ruled that the failure to train and supervise can serve as a basis for a Section 1983 claim only when the municipality fails to train or supervise adequately its employees, the failure to train or supervise is a municipal policy, or the policy causes a municipal employee to violate a citizen's constitutional rights. The Court explained that, with regard to police officers, failure to train or supervise adequately can be the basis of a Section 1983 claim only when the failure results in a "deliberate indifference" to the rights of people with whom the police come into contact. *Walker*, 837 So. 2d at 1052 (citing *Harris*, 489 U.S. at 388). This deliberate indifference must be the proximate cause of the plaintiff's injuries.

Deliberate Indifference

The first prong of the test established in *Harris* is that the municipality's failure to train or supervise its police officers adequately must amount to deliberate indifference. To establish deliberate indifference, a plaintiff must present evidence that the municipality knew of a need to train or supervise in a particular

area, but made a deliberate choice to take no action. *Gold v. City of Miami Beach*, 151 F.3d 1346, 1350 (11th Cir. 1998). In *Gold*, the Eleventh Circuit Court of Appeals held that the plaintiff's burden in proving deliberate indifference is especially difficult when there is no evidence of prior, similar incidents in which constitutional rights were similarly violated. *Id.* at 1351–1352.

During the jury trial in *Miami-Dade County v. Walker*, the plaintiff provided no evidence that, prior to the Walker incident, the Miami-Dade police had violated the constitutional rights of the mentally ill. However, the plaintiff did present a copy of a police training text used by the County that included a chapter titled *How to Handle the Mentally Ill*. In closing arguments, the plaintiff's attorney pointed out that the police officers who arrested Walker violated the standards in the text for dealing with the mentally ill. The Third District held that this evidence proved that the County did, in fact, provide training to its police officers in dealing with the mentally ill. The court concluded that the County was not deliberately indifferent to the rights of the mentally ill because the County had no notice that other mentally ill citizens were victims of similar constitutional violations.

Causation

The second prong of the test established in *Harris* is that the inadequate training or supervision must be the proximate cause of the plaintiff's injuries. In *Walker*, it was undisputed that the police used excessive force against Walker. The plaintiff's expert testified that the degree of force necessary to arrest a mentally ill person was the same as the force necessary to arrest a person who was not mentally ill. The expert went on to testify that, even if Walker had not been mentally ill, the force used by the Miami-Dade police would have been excessive. Based on this testimony by the plaintiff's own expert, the Third District concluded that the plaintiff had not proven that his injuries were caused by inadequate training or supervision with regard to dealing with the mentally ill. (The plaintiff had not alleged that his rights were violated due to inadequate training or supervision with regard to excessive force.)

SIGNIFICANCE

A plaintiff must meet two requirements to use inadequate police training or supervision as grounds for a Section 1983 claim.

First, the plaintiff must prove that the municipality was deliberately indifferent to the training or supervision needs in a particular area. Second, the plaintiff must prove that the deliberate indifference was the proximate cause of his injuries.

Walker also serves as an excellent example to potential plaintiffs about what evidence not to produce when trying to prove a Section 1983 claim for inadequate police training or supervision. In *Walker*, the plaintiff produced evidence that the police officers involved had not followed the County's training with regard to dealing with the mentally ill. This, in effect, proved that the County did provide training, and was, therefore, not deliberately indifferent to the needs of the mentally ill. In addition, the plaintiff presented testimony that the force used by the police that caused his injuries was excessive, whether or not he was mentally ill. This proved that the lack of training with regard to the mentally ill was not the proximate cause of Walker's injuries.

RESEARCH REFERENCES

- Eugene McQuillin, *The Law of Municipal Corporations* vol. 4, § 12.210.15 (3d rev. ed., West 2002 & Supp. 2003).
- Adam S. Lurie, Student Author, *Ganging up on Police Brutality: Municipal Liability for the Unconstitutional Actions of Multiple Police Officers under 42 U.S.C. § 1983*, 21 Cardozo L. Rev. 2087 (2000).

Elizabeth G. Bourlon

Constitutional Law: Civil Rights Section 1983 Public Education: Discipline

***Scott v. School Board of Alachua County,* 324 F.3d 1246 (11th Cir. 2003)**

School administrators may properly forbid student speech otherwise protected by the First Amendment when they reasonably fear that such speech will appreciably disrupt school discipline or when they do so to confine student speech within the bounds of appropriate civil discourse.

FACTS AND PROCEDURAL HISTORY

Franklin J. Scott, Jr., and Nicholas Thomas, two Santa Fe High School students, were suspended pursuant to an unwritten ban on displaying Confederate flags on school premises. The students brought a claim under Title 42 United States Code Section 1983, alleging that the ban and the suspensions violated their right to free speech as protected by the First Amendment. The two students had previously been told not to display the flags on school grounds, and the Alachua County School Board produced testimonial evidence of existing racial tensions at the school. The district court granted the School Board's motion for summary judgment. The two students appealed to the Eleventh Circuit Court of Appeals.

ANALYSIS

The court relied upon the reasoning of the district court, which stated that *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503 (1969), and *Bethel School District v. Fraser*, 478 U.S. 675 (1986), provided alternative theories that school administrators may use to justify policies and rules limiting the rights of students to engage in certain forms of speech while at school.

Under *Tinker*, officials are "on their most solid footing" when their rules are promulgated in response to a reasonable fear that the speech they prohibit would produce an "appreciable" disruption in school discipline. *Scott*, 324 F.3d at 1248 (citing *Tinker*, 393 U.S. at 514)). The School Board satisfied this reasonable-fear test by providing evidence of existing racial tensions at the school, along with testimony regarding recent fights with racial overtones.

Tinker is not the sole resort for administrators seeking to set enforceable limits upon student speech. Even in instances when there is no immediate threat of a breakdown in discipline, administrators may prohibit some speech that would be protected in extra-scholastic contexts. In such instances, administrators may rely upon the reasoning in *Fraser* to prohibit speech that falls outside the boundaries of "appropriate . . . civil discourse and political expression" because it is highly threatening or offensive to others. *Id.* at 1248 (citing *Fraser*, 478 U.S. at 683). When they do so, school officials fulfill their duty to inculcate the student body in the "values necessary to the maintenance of a democratic po-

litical system.” *Id.* (citing *Fraser*, 478 U.S. at 683). As to whether the School Board met the *Fraser* test, the court explained that one need only consult the evening news to appreciate the emotionally charged nature of the debate surrounding the place of the Confederate flag in public life to conclude that such a highly charged symbol could properly be excluded from a place where students learn appropriate modes of civil discourse through the examples of their peers as much as the instruction of their teachers.

SIGNIFICANCE

Scott clarifies the application of the United States Supreme Court’s rulings in *Tinker* and *Fraser*. The Eleventh Circuit reaffirmed both of those precedents as controlling law, and indicated that the two decisions should be seen as complementary, rather than in conflict. School administrators may thus justify restrictions on student speech by satisfying the conditions set forth in *either* of those decisions; they need not satisfy both.

Speech may be prohibited when school administrators reasonably fear that permitting the speech would likely result in an appreciable disruption of discipline at the school. Speech may also be forbidden without offending the Constitution when administrators are engaging in their duty to “closely contour the range of expression children are permitted regarding such volatile issues.” *Id.* at 1249.

For practitioners, this case stands for the proposition that school administrators enjoy broad discretion in the promulgation of policies designed to maintain the disciplined atmosphere of their institutions. So long as the concerns motivating the policies have substance, courts will not interfere with their enforcement, even when those policies would run afoul of the First Amendment in other contexts.

RESEARCH REFERENCES

- Rodney A. Smolla, *Smolla and Nimmer on Freedom of Speech* vol. 2, §§ 17:1-4, §17:17 (Thomson West 2003).
- 68 Am. Jur. 2d *Schools* § 284 (2000 & Supp. 2003).
- Mitchell J. Waldman, *What Oral Statement of Student Is Sufficiently Disruptive So As to Fall beyond Protection of First Amendment*, 76 A.L.R. Fed. 599 (1986).

Lauren W. Berns, Jr.

Constitutional Law: Due Process***Foxy Lady, Inc. v. City of Atlanta, Georgia,***

347 F.3d 1232 (11th Cir. 2003)

In administrative hearings regarding the revocation of alcoholic beverage licenses, licensees' procedural due-process rights are not violated by an inability to subpoena witnesses directly. Also, no federal claim for deprivation of procedural due process exists when an adequate remedy for that deprivation is generally available in state courts.

FACTS AND PROCEDURAL HISTORY

The License Review Board in the City of Atlanta subjected Foxy Lady, Inc., and other nude-dance clubs (collectively, the Clubs) to administrative proceedings to revoke the Club's alcoholic beverage licenses. The license revocations were based upon the Clubs' alleged violations of ordinances forbidding dancers or patrons in nude-dance clubs to engage in certain forms of dancing.

Pursuant to City ordinances, the Board notified the Clubs of the impending revocation hearing. Because the administrative procedures for the revocation hearings did not allow the Clubs to subpoena witnesses directly, they sued the City under Title 42 United States Code Section 1983, alleging a violation of their rights to procedural due process.

The City moved for summary judgment on the Clubs' Section 1983 claims. The district court denied the motion, stating that the revocation process violated the Clubs' due process rights because it did not grant the Clubs an absolute or independent right to subpoena witnesses. The district court also certified its order to allow the City to apply for an interlocutory appeal pursuant to Title 28 United States Code Section 1292(b). The Eleventh Circuit Court of Appeals granted that request.

ANALYSIS**Subpoenas and Due Process in Administrative Hearings**

The Eleventh Circuit began by setting forth the procedures controlling revocation hearings in the City. Among those procedures, City ordinances provide that licensees must be given five-days notice of the charge against them and any upcoming hear-

ings. Also, under Georgia law, licensees are given the right to present evidence, introduce testimony to support their case, and cross-examine adverse witnesses. Finally, pursuant to a City ordinance, a party can request that the Mayor issue a subpoena to compel the attendance of witnesses at the hearing. After a hearing, the Board provides a report of its conclusions and recommendations to the Mayor, and upon a finding of due cause, the Mayor may revoke, suspend, or renew the license.

The court explained that, to establish a due-process violation for the purposes of Section 1983 litigation, a plaintiff must prove that he or she has been deprived of a “constitutionally-protected liberty or property interest,” that the deprivation was effected via “state action,” and was the result of a “constitutionally inadequate process.” *Foxy Lady, Inc.*, 347 F.3d at 1236 (quoting *Cryder v. Oxendine*, 24 F.3d 175, 177 (11th Cir. 1994)). In the present case, the only question in dispute was whether an independent right to subpoena witnesses to the revocation hearings was necessary to provide “adequate process.” *Id.*

The court noted that procedural due process is flexible, demanding only those procedural protections required by the situation at hand, and that it had indicated in dicta in *Travers v. Jones* that parties have “no right to subpoena witnesses to . . . administrative hearings.” 323 F.3d 1294, 1297 (11th Cir. 2003). The Eleventh Circuit then expressly held that, in administrative hearings, “procedural due process . . . does not require an absolute or independent right to subpoena witnesses.” *Foxy Lady, Inc.*, 347 F.3d at 1237.

The court analyzed the City’s ordinance detailing the issuance of subpoenas, and determined that it provided an acceptable balance between providing a fair hearing and allowing the City “to place reasonable limitations on the content and duration of its . . . revocation hearings.” *Id.* It acknowledged that the ordinance did not guarantee that the Clubs would necessarily get a subpoena for every witness they wanted to call. Nonetheless, the Court found the ordinance’s language limiting witnesses to those who could “establish any fact” to be “a reasonable limitation on [which] witnesses should be present at the hearing.” *Id.* at 1238. The Eleventh Circuit also stated that the record did not suggest that the Mayor had deviated from those limitations, nor did it indicate that the adult-entertainment industry was subject to different standards than other licensees.

In concluding its due-process analysis, the court explained that placing the subpoena power in the hands of the Mayor was a perfectly sensible means of preventing licensees from subpoenaing hundreds of witnesses in an attempt to slow the revocation process, and noted that the Clubs still could produce any witnesses who would appear voluntarily, and introduce other evidence in support of their case.

Existence of an Adequate State Remedy Precludes Section 1983 Due Process Claim

Next, the court focused on the existence of an effective state remedy as an alternative bar to the Clubs' Section 1983 claim. Recalling its decision in *McKinney v. Pate*, 20 F.3d 1550 (11th Cir. 1994), the court noted that, so long as the state provides a remedy for procedural defects in its administrative proceedings, parties prejudiced by those defects have no Section 1983 claim. The court explained that the test of whether a remedy was available was not case specific, but general in scope. Thus, the mere fact that a particular party, dissatisfied with the process below, has been unable to secure an actual remedy in state courts was immaterial so long as the state courts would generally afford an adequate remedy for the procedural defect of which the party complains. Under that circumstance, federal procedural due-process rights had not been offended.

Finally, the Eleventh Circuit noted that the Clubs could petition Georgia's superior courts for discretionary review, and appeal any denial to the Georgia Supreme Court. This path, the Court concluded, provided a sufficient state-court process to correct defects in the administrative revocation process to the extent any existed.

SIGNIFICANCE

Foxy Lady, Inc., clarifies that parties in administrative proceedings are not entitled to absolute or independent right to subpoena witnesses to testify at those proceedings. Also, this case serves as a reminder that, so long as adequate state-court remedies are available to correct procedural defects in administrative processes, no federal claim exists to correct the defects under Section 1983.

RESEARCH REFERENCE

- 2A Fla. Jur. 2d *Alcoholic Beverages* §§ 70–79 (1998).

Lauren W. Berns, Jr.

Constitutional Law: Due Process

Kupke v. Orange County,
838 So. 2d 598 (Fla. 5th Dist. App. 2003)

An individual's right to due process is violated when a local government's Code Enforcement Board limits or denies the individual's right to present evidence in defending against a board-issued citation.

FACTS AND PROCEDURAL HISTORY

Farmer Warren R. Kupke owned agriculturally zoned property in a rural area of Orange County. The Code Enforcement Board of Orange County cited Kupke for creating a nuisance—an unauthorized junkyard—because he stored equipment, including a backhoe, bulldozer, crane, and bushhog, on his property.

At the citation hearing, the County presented Kupke's neighbors as witnesses. Although they complained about sanitary conditions on the property, they did not address the equipment. Kupke argued that, under Florida Statutes Section 823.14(4), a farm operation generally shall not be considered a nuisance. However, the Board denied him the opportunity to present any witnesses offering evidence that the equipment was used in a farming operation. The Board found Kupke to be in violation of the zoning and ordered him to remove the equipment from his property within thirty days or pay a daily fine of \$250. Kupke appealed the Board's decision to the circuit court sitting in its appellate capacity. The circuit court agreed with the Board, prompting Kupke to file a petition for writ of certiorari to the Fifth District Court of Appeal. On reconsideration, the Fifth District found that the Board had violated Kupke's right to procedural due process when it denied him the opportunity to present witnesses at the hearing. The Fifth District quashed the lower court's decision and remanded the case with instructions to allow Kupke to present witnesses to address the use of the equipment.

ANALYSIS

Florida's Local Government Code Enforcement Boards Act requires a local government's code-enforcement board to hear testimony from both the code inspector and an alleged code violator during a code-enforcement-board hearing. Florida Statutes Section 162.07(3) (2002) provides that formal rules of evidence do not apply to the hearings, but that "fundamental due process shall be observed and shall govern the proceedings."

In *Kupke*, the Fifth District Court of Appeal relied on previous caselaw when it determined that the Board should have allowed Kupke to present witnesses. The Fifth District Court of Appeal relied on *Lee County v. Sunbelt Equities, II, Ltd. Partnership*, 614 So. 2d 996 (Fla. 2d Dist. App. 1993), which held that parties must be able to present witnesses in quasi-judicial proceedings, and *O'Neil v. Pallot*, 257 So. 2d 59 (Fla. 1st Dist. App. 1972), which held that those tried by administrative bodies must be able to present witnesses. Because the County's witnesses never addressed the issue of the equipment, and because Kupke was never allowed to present his evidence, the Fifth District found that the Board failed to establish that the equipment was not used in a farming operation before determining that the equipment was a nuisance. The Fifth District held that the Board violated Kupke's right to due process because if the Board had heard Kupke's evidence, it may have determined that the equipment was used in a farming operation, thereby exempting it from being a nuisance.

SIGNIFICANCE

Kupke addresses whether a local government code-enforcement board violates an individual's right to due process when it limits his or her opportunity to present evidence at a citation hearing. This case is significant to practitioners because it indicates that code-enforcement boards must allow alleged code violators the opportunity to present evidence defending their positions against citations to avoid denying the cited individuals their rights to due process.

This case is also significant in that it reminds municipalities that farm operations generally cannot be a nuisance.

RESEARCH REFERENCES

- *Local Government Code Enforcement Boards Act*, Fla. Stat. §§ 162.01–163.13 (2002).

- 12A Fla. Jur. 2d *Counties and Municipal Corporations* § 101 (1996).
- 12A Fla. Jur. 2d *Building, Zoning, and Land Controls* § 41 (1996).

Elizabeth G. Bourlon

Constitutional Law: Due Process

Massey v. Charlotte County, 842 So. 2d 142 (Fla. 2d Dist. App. 2003)

When a government imposes fines and liens on a property owner for not complying with a county building code-enforcement board's mandate, due process requires that the property owner have the right to address factual findings that may lead to a deprivation of property.

FACTS AND PROCEDURAL HISTORY

Frank and Stephen Massey owned property in Charlotte County. The Charlotte County Code Enforcement Board determined, in a hearing, that, before renovating their property, the Masseys failed to obtain proper permits in compliance with the County building code. The Masseys received notice, attended the hearing, and had an opportunity to be heard. The Board issued an order stating that they had violated the County code, that they must apply for the proper permits within thirty days, and that they must have a final inspection within six months, or alternatively, that the Masseys must receive a demolition permit and remove the constructed improvements. Nearly four months later, a building inspector submitted an affidavit to the Board that stated that the Masseys had not complied with the Board's previous order, and requested the imposition of fines and costs.

The Board met nearly six months after its original order. At this meeting, the Board heard from the building inspector, but neither notified the Masseys nor offered them an opportunity to be heard. The Board issued an order assessing fines and costs and imposed a lien against the Masseys' nonexempt property in the County. The order did not include "any avenue by which the Masseys could challenge" the action. *Massey*, 842 So. 2d at 144.

Some indication exists that the Masseys applied for the proper permits before the Board issued the final order.

The Masseys appealed the Board's order to the circuit court acting in its appellate capacity. After the circuit court affirmed the Board's order, the Masseys sought a petition for writ of certiorari to quash the Board's order. The Second District Court of Appeal affirmed the Board's order.

ANAYLSIS

Florida Statutes Chapter 162 controls the enforcement of local building codes and ordinances by code-enforcement boards. Chapter 162 provides, in relevant part, that after an initial opportunity to correct a code violation, a violator must be notified by a code-enforcement board, and may attend a hearing. Chapter 162 also requires that, at the hearing, the board take testimony from the code inspector and the violator, make factual determinations, and issue an order. If the violator fails to comply with the order, the board may, *without a hearing*, fine the violator for each day he or she is not in compliance with the order after evaluating "(1) the gravity of the violation, (2) any actions taken by the violator to correct the violation, and (3) any previous violations committed by the violator." *Id.* at 145 (citing Fla. Stat. § 162.09(2)(b), (2000)). Then, the order may be recorded as a lien.

In *Massey*, the court noted "procedural gaps" in Chapter 162 and, after finding no caselaw on point that addressed whether a hearing was required to issue a lien, used a "common-sense application of basic principles of due process" to reach its conclusion. *Id.* (quoting *City of Tampa v. Brown*, 711 So. 2d 95, 96 (Fla. 2d Dist. App. 1998)). Generally, due process requires "fair notice and a real opportunity to be heard 'at a meaningful time and in a meaningful manner'" to insure fair treatment when parties face "governmental decisions that deprive individuals of liberty or property interests." *Id.* at 146 (quoting *Keys Citizens for Responsible Govt., Inc. v. Fla. Keys Aqueduct Auth.*, 795 So. 2d 940, 948 (Fla. 2001), and citing *County of Pasco v. Riehl*, 620 So. 2d 229, 231 (Fla. 2d Dist. App. 1993)). This due-process requirement must be based upon, at least,

- (1) the private interest that will be affected by the official action;
- (2) the risk of erroneous deprivation of such interest through the procedures used and the probable value, if any, of

additional or substitute safeguards; and (3) the government's interests, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirements would entail.

Id. (citing *Keys Citizens*, 795 So. 2d at 948–949, and *Riehl*, 620 So. 2d at 229). If required, either a pre- or post-deprivation hearing may satisfy due process.

The Masseys had a compelling interest in keeping their property; thus, the court found that a hearing was necessary to safeguard that interest. Also, the court found that the Board did not use the least restrictive means by which to deprive the Masseys of their property. Accordingly, the court concluded that the Masseys were deprived of appropriate due process. Due process required that the Masseys be given an opportunity to address findings that they had not complied with the Board's original order, upon which the penalties were based. Either a pre- or post-deprivation hearing would satisfy the due-process requirements.

SIGNIFICANCE

Although not expressly found in the language of Florida Statutes Chapter 162, the Second District in *Massey* used common sense to expand the due-process requirement to include an opportunity for a party to be heard when a county code-enforcement board attempts to deprive that party of property through a lien or fines imposed for violation of the county code. However, the court stopped short of dictating a particular time within which the hearing must occur, stating that the deprivation hearing may occur either before or after a county board orders the penalty.

RESEARCH REFERENCE

- 7 Fla. Jur. 2d *Building, Zoning, and Land Controls* § 41 (1998 & Supp. 2003).

Jason M. Bard

2004]

Recent Developments

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Constitutional Law: Equal Protection***City of Cuyahoga Falls, Ohio v. Buckeye Community
Hope Foundation,
538 U.S. 188 (2003)***

As long as a municipality is following provisions of its charter and there is no evidence of a racially-discriminatory motive, the municipality does not violate the Equal Protection Clause or the Due Process Clause when it submits to voters a referendum petition attempting to repeal an ordinance authorizing construction of a low-income housing project, and when it denies building permits for the project during the time the referendum is pending.

FACTS AND PROCEDURAL HISTORY

The City of Cuyahoga Falls in Ohio passed an ordinance approving a site plan for the construction of a low-income housing project by Buckeye Community Hope Foundation. The City's charter gave voters the power to approve or disapprove any ordinance passed by the City within thirty days of its passing. Following the City's approval of the site plan, a group of citizens filed a petition requesting that the ordinance be repealed because of concerns that the development would cause an increase in crime and drug activity, that families with children would move in, and that the complex would attract a population similar to the City's only African-American neighborhood.

Before the referendum-petition vote, Buckeye requested building permits from the City to commence construction of the project. The City engineer denied the building permits after the City law director advised the City engineer that the permits could not be issued because, pursuant to the City charter, ordinances that are challenged do not take effect until approved by voters. The vote on the referendum repealed the ordinance approving the site plan. However, in other litigation, the Ohio Supreme Court held the referendum invalid, resulting in the City issuing the building permits, and construction on the project subsequently commencing.

While the State action was pending, Buckeye also filed a federal suit against the City, claiming that the City's submission of the site plan approval to voter referendum and its refusal to grant

building permits during the period the referendum was pending violated the Equal Protection Clause and the Due Process Clause. After the Ohio Supreme Court invalidated the referendum, a federal district court granted the City's motion for summary judgment, which was reversed on appeal by the Sixth Circuit Court of Appeals. After granting certiorari, the United States Supreme Court held in favor of the City and reversed the Sixth Circuit's decision, finding that Buckeye did not present a claim that could survive summary judgment because there was no proof of discriminatory intent.

ANALYSIS

The Equal Protection Claim

Buckeye alleged that, by submitting the site plan to voter referendum for approval, and by denying the building permits while the referendum was pending, the City violated the Equal Protection Clause. In an opinion by Justice O'Connor, the Supreme Court stated that, in prior opinions, including *Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252, 265 (1977), the Supreme Court explained that evidence of racially discriminatory intent or purpose is essential to show a violation of the Equal Protection Clause.

The Court offered three reasons why Buckeye had no Equal Protection claim. First, in presenting the referendum petition to voters, the City acted according to a facially neutral provision of its charter. The City did not ratify the referendum by merely placing the referendum on the ballot, and the City could not be said to have caused the voters' possible discriminatory motivation for supporting the repeal of the site plan approval. Buckeye presented no evidence that the referendum was racially motivated. Second, in denying the building permits while the referendum was pending, the City engineer performed a nondiscretionary, ministerial act pursuant to a provision of the City's charter prohibiting approval of a challenged site plan until a voter referendum. Again, the Court found that Buckeye presented no evidence that the denial of the building permits was racially motivated. Finally, in an effort to prove that the City had the requisite discriminatory intent, Buckeye looked to evidence indicating a racially-discriminatory motivation by the voters. The Court dismissed this argument, explaining that violations of the Equal Protection Clause can be attributed only to the state. Buckeye

presented no evidence that the voters' discriminatory motives, which may have initiated the referendum petition effort, were attributable to the City.

The Court also went a step further and held that, by adhering to its charter's referendum procedure, the City had actually advanced significant First Amendment rights by facilitating public debate.

The Substantive Due Process Claim

Buckeye contended that, by denying building permits during the period in which the referendum was pending, the City violated Buckeye's right to substantive due process. The Sixth Circuit agreed with Buckeye and held that, because the City approved the site plan, Buckeye had a legitimate entitlement to, and property interest in, the building permits. In addition, Buckeye argued that the City's denial of building permits constituted arbitrary conduct.

The Court refused to address the property-right issue because it found that the denial of the building permits in no way constituted egregious behavior, and cited *County of Sacramento v. Lewis*, 523 U.S. 833, 846 (1998) for the proposition that only the most egregious behavior can be found to be arbitrary. Because the City was following a provision outlined in its charter, the action of denying the building permits was rational and not a violation of substantive due process. In dicta, the Court explained that the substantive result of a referendum might be invalid if it is found to be arbitrary and capricious, but that Buckeye had not challenged the *result* of the referendum, only the referendum *process*.

In a concurring opinion, Justice Scalia explained that, even if the denial of the building permit had been found to be arbitrary and capricious, Buckeye still would not have a substantive due process claim. This is because the judicially-created right to substantive due process applies only to fundamental liberty rights, and freedom from delay in the issuance of a building permit is not a fundamental liberty right.

SIGNIFICANCE

Buckeye County Hope Foundation clarifies that, when a municipality follows a facially neutral provision of its charter authorizing challenged ordinances to be submitted to voter referendum, the municipality will not violate the Equal Protection Clause

unless there is evidence of a racially-discriminatory intent or purpose. This is true even if the citizens who initiated the petition drive that resulted in the referendum, may have had discriminatory motivations.

In addition, this case points out that a municipality's denial of building permits while a referendum challenging the approval of the site plan is pending does not violate a builder's right to substantive due process when the municipality's charter provides that challenged ordinances are not effective until approved by voters.

RESEARCH REFERENCES

- David M. Bonelli, Student Author, *If You Build It "They" Will Come: Intentional Discrimination and Disparate Impact Theory in Buckeye Community Hope Foundation v. City of Cuyahoga Falls—Does a Municipality's Use of Referendum to Block an Approved Housing Project Violate Equal Protection and Title VIII?* 26 Hamline L. Rev. 631 (2003).
- Eugene McQuillin, *The Law of Municipal Corporations* vol. 5, § 19.01–19.17 (3d rev. ed., CBC 1996).

Elizabeth G. Bourlon

Constitutional Law: Fifth Amendment, Inverse Condemnation Takings

Agripost, Inc. v. Metropolitan Miami-Dade County,
845 So. 2d 918 (Fla. 3d Dist. App. 2003)

A county's revocation of a conditional and revocable unusual-use permit does not offend the Fifth Amendment of the United States Constitution when a waste-management plant operating under the permit violates its terms. Further, a county is not required to accept a proposal that increases compensation for the offender to remedy a problem. Finally, Florida Statutes Section 403.7063 (1989) does not provide a right to increase compensation for a private waste-management plant that contracted with a county.

FACTS AND PROCEDURAL HISTORY

Miami-Dade County accepted a proposal by Agripost, Inc., and Agri-Dade, Ltd. (collectively, Agripost), to build an environmentally safe waste-management plant. To that end, Agripost leased twenty acres of land, which was zoned for agricultural use, from the Florida Department of Health and Rehabilitative Services. The County issued a “conditional, revocable unusual use zoning approval” to allow the plant to operate on the land. *Agripost, Inc.*, 845 So. 2d at 919. The unusual-use-zoning permit included an allowance for its revocation upon the occurrence of a number of conditions, include nuisance.

Subsequently, the County entered into a contract with Agripost under which the County would transport garbage to the facility and pay a “tipping” fee for each ton of garbage it delivered to the plant. The contract also stated that “objectionable odors” were not permitted at the plant and that Agripost had a “reasonable time” to correct odor problems before the County would consider Agripost to be in default of the agreement.

Soon after the plant began operating, neighbors attributed mold and odor problems to Agripost. Also, Agripost stored waste products in a manner inconsistent with its use plan. To correct the odor problem, Agripost submitted a plan under which it proposed that the County allow the plant to expand to an adjacent thirty acres and increase the County’s tipping fee. The County Commission rejected Agripost’s corrective plan and ordered County officials to pursue revocation of Agripost’s conditional zoning permit. The Zoning Appeals Board conducted a hearing, determined that Agripost had violated its unusual-use permit, and revoked the permit. The Third Circuit Court of Appeal affirmed the revocation, and Agripost ceased operating.

After having a previous inverse-condemnation action in federal court dismissed as unripe due to its failure to pursue an inverse-condemnation action under Florida law, Agripost filed suit in state court. Agripost claimed, *inter alia*, that: (1) the County took Agripost’s private property through inverse condemnation in violation of the Florida Constitution; (2) the County breached its contract by not accepting Agripost’s proposal to correct the nuisance; and (3) the County discriminated against a “privately owned solid waste management facilit[y]” in violation of Florida Statutes Section 403.7063. 845 So. 2d at 920–921. Agripost ap-

pealed the circuit court's entry of summary judgment in favor of the County.

ANALYSIS

The Third District Court of Appeal found that, “[g]enerally, when a government entity acts to create property rights yet retains the power to alter those rights, the property right is not considered ‘private property,’ and the exercise of the retained power is not considered a ‘taking’ for Fifth Amendment purposes.” *Id.* at 920 (quoting *Democratic C. Comm. v. Wash. Metro. Area Transit Commn.*, 38 F.3d 603, 606 (D.C. Cir. 1994)). Accordingly, the Third District reasoned that, because the County made the unusual use permit conditional and revocable, the property upon which Agripost operated could not be considered private property. Therefore, the court held “that the revocation of the permit did not amount to a compensable taking for inverse condemnation purposes.” *Id.*

Additionally, the court agreed with Agripost that the County was required to provide a reasonable time to correct the odor problem. However, the court noted that Agripost did not request time to correct the problem at Agripost's expense. Instead, Agripost sought to solve the problem by acquiring an additional thirty acres and by raising the County's tipping fee. The court found that the County was within its rights to reject Agripost's proposal, and, therefore, held that the County's rejection did not amount to a breach of contract.

Finally, the court recognized that the County was paying Agripost a lower tipping fee than it paid at other facilities. Florida Statutes Section 403.7063 requires that “no county or municipality shall adopt or enforce regulations that discriminate against privately owned solid waste[-]management facilities because they are privately owned.” *Id.* at 921 (quoting Fla. Stat. § 403.7063 (1989)). However, the court found that Agripost freely contracted with the County for the tipping fee. The court also found that the statute did not provide a right for Agripost to raise a contractually negotiated tipping fee. Accordingly, the court held that the County had not violated Florida Statutes Section 403.7063.

SIGNIFICANCE

The Third District Court of Appeal applied a general interpretation of federal inverse-condemnation law to determine that a

conditional and revocable unusual use permit precluded Agri-post's leasehold interest from being considered private property. Therefore, the court held that the County's revocation of the permit to operate a waste-management plant did not support a Fifth Amendment claim for inverse condemnation. The court also held that the County was not in breach of contract when it rejected the waste-management plant's offer to correct the problem—which it created—for increased compensation. The County's rejection of this offer did not violate the County's contractual obligation to provide a reasonable time for the waste-management plant to correct the problems. Finally, the court held that, if a waste-management plant contracts for fees lower than those a County pays to other plants, the plant does not automatically possess a right under Florida Statutes Section 403.7063 to increase its compensation.

RESEARCH REFERENCES

- James J. Brown, *Condemnation and Eminent Domain: Inverse Condemnation—An In-Depth Look*, 29 Stetson L. Rev. 829 (2000).
- Eugene McQuillan, *The Law of Municipal Corporations* vol. 11A, § 32.132.20 (3d rev. ed., West 2000 & Supp. 2002).

Jason M. Bard

Constitutional Law: First Amendment

Illinois ex rel. Madigan v. Telemarketing Associates, Inc.,
123 S. Ct. 1829 (2003)

Although the First Amendment guarantees the right to engage in charitable solicitations, it does not protect fraudulent misrepresentations made during those solicitations.

FACTS AND PROCEDURAL HISTORY

VietNow National Headquarters, a nonprofit organization, employed Illinois telemarketing companies Telemarketing Associates, Inc., and Armet, Inc. (collectively, Telemarketers) “to solicit donations to aid Vietnam veterans.” *Illinois ex rel. Madigan*, 123 S. Ct. at 1833. The contract provided for Telemarketers to re-

tain up to eighty-five percent of the gross funds collected, and for VietNow to receive, at most, fifteen percent of the total collected. Between 1985 and 1997, Telemarketers raised nearly \$7.1 million, keeping approximately \$6 million and giving close to \$1.1 million to VietNow.

In 1991, Illinois Attorney General Lisa Madigan filed suit against Telemarketers in state court. Madigan's complaint "dominantly concerned alleged misrepresentation." *Id.* at 1834. Madigan based her misrepresentation claims on Telemarketers' statements that the donors' funds would go primarily to Vietnam veterans, including the statement that ninety percent of the money or more went to veterans, and other statements that the money would support certain veterans' programs. Further, Madigan stated that Telemarketers claimed that the donations "would go to further Viet[N]ow's charitable purposes," when in reality, less than fifteen percent of the funds were actually given to VietNow. *Id.* at 1835. Therefore, Madigan argued that the money paid to VietNow was incidental to the Telemarketers' fundraising efforts, making Telemarketers' statements "knowingly deceptive and materially false." *Id.*

Telemarketers moved to dismiss the fraud claim on the grounds that the First Amendment of the United States Constitution protected their speech. The circuit court granted the motion, and an Illinois appellate court sustained the dismissal. The Illinois Supreme Court addressed the issue, placing a heavy emphasis on three United States Supreme Court decisions barring laws that restrict free speech based upon the percentage of money retained by those soliciting donations: *Schaumburg v. Citizens for a Better Environment*, 444 U.S. 620 (1980); *Secretary of State of Maryland v. Joseph H. Munson Co.*, 467 U.S. 947 (1984); and *Riley v. National F. of Blind of North Carolina, Inc.*, 487 U.S. 781 (1988). The Illinois Supreme Court found that, although *Illinois ex rel. Madigan* did not contain a prophylactic measure to restrain speech, as was the situation in these United States Supreme Court cases, sustaining the action would ultimately constitute a prophylactic restriction on Telemarketers' free speech based on the percentage of money retained by the fundraisers. The Illinois Supreme Court also held that allegations of fraud cannot be construed to require Telemarketers to disclose the percentage of money actually given to the charity. Madigan appealed to the United States Supreme Court.

ANALYSIS

The United States Supreme Court began by stating that “[t]he First Amendment protects the right to engage in charitable solicitation.” *Id.* at 1836. However, the Court included the caveat that the First Amendment does not protect the right to engage in fraud. Hence, “fraudulent charitable solicitation is unprotected speech.” *Id.*

In deciding *Illinois ex rel. Madigan*, the Court distinguished the three cases relied upon by the Illinois Supreme Court. In *Schaumburg*, *Munson*, and *Riley*, the Court struck down state legislation mandating percentages that fundraisers could collect, or that needed to be paid, to a charitable organization. In those cases, the Court found “that fraud may not be inferred simply from the percentage of charitable donations absorbed by fundraising costs.” *Id.* at 1838. The Court stated that each of those cases amounted to a decision striking down prior restraint, but that none of the cases prevented fraud enforcement in the area of charitable solicitations. Further, in *Riley*, the Court struck down a law that required solicitors to disclose upfront the percentage of money given to charitable organizations in the past year, as unduly burdensome on the solicitor.

Under the facts of *Illinois ex rel. Madigan*, the Court found that Madigan’s complaint was not based upon the percentage that Telemarketers retained for their services. Instead, the Court noted the Attorney General’s complaint was based on claims that Telemarketers made intentionally misleading statements “regarding the use of [their] contributions.” *Id.* at 1840. The Court noted that prior restraint was not a factor, as Madigan retained the burden of proof by a clear and convincing standard that Telemarketers’ actions amounted to fraud. Further, the Court stated that, although *Riley* stood for the proposition that laws may not require upfront disclosure of percentages retained by solicitors, requiring solicitors to answer truthfully when asked about percentages did not amount to an undue burden.

SIGNIFICANCE

In *Illinois ex rel. Madigan*, the United States Supreme Court addressed for the first time whether the First Amendment protects charitable solicitations from fraud actions. The Court held that, although charitable solicitations generally receive First Amendment protection, fraudulent speech is not protected. Al-

though solicitors seeking charity may be prosecuted for fraud, the Court reaffirmed that attempts to restrain such solicitors through prophylactic legislation are unconstitutional.

RESEARCH REFERENCES

- 16A Am. Jur. 2d *Constitutional Law* § 471 (2003).
- Errol Copilevitz, *The Historical Role of the First Amendment in Charitable Appeals*, 27 Stetson L. Rev. 457 (1997).

Jason M. Bard

Constitutional Law: First Amendment

King v. Richmond County, Georgia, 331 F.3d 1271 (11th Cir. 2003)

In determining the constitutionality of a government-sponsored religious symbol, courts apply the test from *Lemon v. Kurtzman*, 403 U.S. 602 (1971). Under the first prong of that test, when a symbol's original purpose cannot be established, the Eleventh Circuit will apply a burden-shifting test through which the government must establish plausible secular purpose for the symbol, thus shifting the burden to the challenging party to show that the purported purpose is insincere.

FACTS AND PROCEDURAL HISTORY

Since 1852, Georgia law has required clerks of State superior courts to use an individualized "substantial seal of office." *King*, 331 F.3d at 1273. Richmond County, Georgia, has used the same Seal, containing the County and court name, since at least 1872. The Seal depicts a sword and two tables bearing Roman numerals I through V and VI through X. While two sizes of the Seal exist, the tables in both are centered and occupy approximately two-thirds the size of the overall Seal. The clerk's use of the Seal is as either a stamp or embossment exclusively to authenticate legal documents.

The Reverend Daniel King, E. Ronald Garrett, and Shirley Fencl (collectively, Plaintiffs) filed suit in federal district court pursuant to Title 42 United States Code Section 1983 against Richmond County and Elaine Johnson, Clerk of Superior Court

(collectively, the County). Plaintiffs argued that the County's Seal violated the First Amendment of the United States Constitution's Establishment Clause. Also, Plaintiffs claimed that the Seal violated Georgia's Constitution.

After a summary-bench trial, the district court concluded that the Seal did not violate the First Amendment's Establishment Clause, and that Plaintiffs' claims under Georgia's Constitution were without merit. In addressing the federal issue, the district court applied a three-prong test articulated by the United States Supreme Court in *Lemon v. Kurtzman*. Accordingly, the district court found in favor of the County because: (1) the Seal had a secular purpose; (2) the primary effect of the Seal was not to advance religion; and (3) the Seal did not "foster excessive entanglement between government and religion." *Id.* at 1275. Most notably, while addressing the first prong, the district court found, and both parties agreed, that the original purpose behind the County's adoption of the Seal was unknown.

Plaintiffs appealed to the Eleventh Circuit Court of Appeals, arguing that the district court erred by finding for the County under the first and second prongs of the *Lemon* test "because: (1) the Seal has a religious purpose and (2) the use of the Seal has the primary effect of endorsing religion." *Id.*

ANALYSIS

The Eleventh Circuit reviewed the district court's factual findings under the clear error standard of review, and reviewed its legal conclusions under the de novo standard. The court addressed broadly the issue of "whether the use of the Seal violates the Establishment Clause of the First Amendment." *Id.* In so doing, the Eleventh Circuit applied the *Lemon* test. The court interpreted *Lemon* to hold that "a governmental practice violates the Establishment Clause if it does not have a secular purpose, its primary effect is to advance or inhibit religion, or if it fosters excessive government entanglement with religion." *Id.* However, the court also stated that *Lemon* did not provide a bright-line rule because each case must be evaluated "on a fact-specific, case-by-case analysis." *Id.* at 1276. Finally, the Eleventh Circuit limited its inquiry because Plaintiffs only appealed the district court's holding on the first and second prongs.

First Prong: Secular Purpose

Under *Lemon's* first prong, "a statute of practice [that] touches upon religion, if it is to be permissible under the Establishment Clause, must have a secular purpose." *Id.* at 1276. The Eleventh Circuit looked to *Stone v. Graham*, in which the United States Supreme Court invalidated a statute that required the posting of the Ten Commandments in school rooms because the statute's purpose was "plainly religious." 449 U.S. 39, 41 (1989). Applying the *Stone* rationale to *King*, the Eleventh Circuit explained that the relevant inquiry was "to determine the government's purpose for adopting this particular [S]eal." *King*, 331 F.3d at 1277. However, as the district court found, and both parties agreed, the purpose behind the original Seal design had "been lost in the mists of history." *Id.* (internal citations omitted). Thus, without binding precedent on point, the Eleventh Circuit faced an issue of first impression.

To address this novel issue, the Eleventh Circuit created a two-part burden-shifting test from analogous caselaw. First, the government may articulate a secular purpose for its practice, then the challenging party should have an opportunity to prove that the offered reason "is insincere or a sham." *Id.* at 1277 (quoting *Edwards v. Aguillard*, 482 U.S. 578, 587 (1987)) (internal citations omitted).

In applying this new test to *King*, the Eleventh Circuit found that the Ten Commandments on the Seal provided a recognizable symbol by which viewers could identify legal documents, and therefore the Seal served a secular purpose. The court then determined that Plaintiff failed to prove this secular purpose insincere. Accordingly, the Eleventh Circuit concluded that the County's Seal passed *Lemon's* first prong.

Second Prong: Effect

Under *Lemon's* second prong, the relevant inquiry "is whether the principal or primary effect of a challenged law or conduct is to advance or inhibit religion." *Id.* at 1278 (quoting *Lynch v. Donnelly*, 465 U.S. 668, 679 (1984) (internal citations omitted)). In *Lynch*, the United States Supreme Court determined the effect of a Christmas crèche sponsored by the City of Pawtucket, Rhode Island. The Court noted that in determining effect, the relevant inquiry must account for the context in which the religious symbol was placed, because not all government-

sponsored, religious symbolism is unconstitutional. Accordingly, the Court held that the government's acknowledgement of religious heritage through the crèche did not, in context of the Christmas season, "have the primary effect of advancing or endorsing religion." *Id.* at 1279. Further, Justice O'Connor concurred that each religious symbol should be judged by both a subjective and objective component.

In applying *Lynch's* context-based analysis to *King*, the Eleventh Circuit addressed "whether, given the context in which the Seal is used and the Seal's overall appearance, the pictograph representing the Ten Commandments conveys a message of religious endorsement." *Id.* at 1282. Accordingly, using *Lynch's* majority opinion and Justice O'Connor's concurrence, the Eleventh Circuit analyzed the context of four of the Seal's characteristics, as well as people's perceptions, to determine whether the Seal subjectively or objectively had the effect of endorsing religion.

First, the Eleventh Circuit found that the clerk's limited use of the Seal on legal documents promoted people's understanding of the document itself as legal in nature. Second, the court determined that the Seal's use of a sword intertwined with the Ten Commandments bolstered people's perception of the symbol as secular. Third, the court established that the small size and remote placement of the Seal near the end of legal documents minimized people's possible perception of the Seal as a religious endorsement. Fourth, the court found that, by not including the Ten Commandment's text but rather only using Roman numerals, all explicit references to God were eliminated, and a reasonable observer would interpret the Seal as symbolic of the force of law.

Finally, the Eleventh Circuit explained that one of the four factors alone could not have satisfied *Lemon's* effects prong. However, the court held that the collective effect of all four factors, which provided a subjective and objective context for determining the Seal's effect, together with the historical use of the Seal, sufficiently satisfied *Lemon's* second prong.

SIGNIFICANCE

When the original purpose of a government-sponsored symbol, facing *Lemon*-test analysis, cannot be established, the Eleventh Circuit will apply a burden-shifting test. First, the government must articulate its secular purpose. Then, the challenging

party will have the opportunity to rebut by showing that the purported secular purpose is a sham.

RESEARCH REFERENCES

- 16A Am. Jur. 2d *Constitutional Law* § 419 (1998 & Supp. 2003).
- Julian Kossow, *Preaching to the Public School Choir: The Establishment Clause, Rachel Bauchman, and the Search for the Elusive Bright Line*, 24 Fla. St. U. L. Rev. 79 (1996).

Jason M. Bard

Constitutional Law: First Amendment

Town of Sewall's Point v. Rhodes, 852 So. 2d 949 (Fla. 4th Dist. App. 2003)

Pure expressions of opinion are afforded First Amendment protection, and are therefore not actionable as defamation. To constitute a pure expression of opinion, the opinion must be based upon a set of facts that is disclosed in a publication or otherwise known or accessible to members of the public.

FACTS AND PROCEDURAL HISTORY

Blaine and Sally Rhodes (Plaintiffs) were residents of the Town of Sewall's Point. During the holiday season, a town resident took pictures of Plaintiffs' backyard and framed the photograph bearing the caption, "Our View of the Hillbilly Hellhole—Merry Christmas—Happy Hanukkah—Happy New Year—Welcome 1999." *Rhodes*, 852 So. 2d at 950. The resident brought the captioned photograph to Town Hall, where the Town's clerk displayed the photograph on the front counter. The photograph remained for nearly two days, until the mayor discovered that Plaintiffs were upset about it and ordered it removed.

Plaintiffs sued the Town, clerk, and mayor on claims of defamation and invasion of privacy. At trial, Plaintiffs obtained a verdict of \$50,000. On appeal, Florida's Fourth District Court of Appeal reversed the circuit court's decision and entered judgment in favor of the Town and its officials.

ANALYSIS

The issue on appeal was whether the photograph and caption constituted a nonactionable pure opinion. The Fourth District found that the photograph and caption were expressions of pure opinion, protected by the First Amendment, and therefore were nonactionable as defamation.

The Fourth District explained that the First Amendment protects pure expressions of opinion; however, it does not protect mixed expressions of opinion. Expressions of pure opinion relate either to facts stated in a publication, or to facts that are known or otherwise accessible to members of the public. Mixed expressions of opinion relate to facts regarding an individual, or his or her conduct, which are neither declared in a publication, nor are assumed to exist by those exposed to the publication.

In deciding whether a published statement is actionable as defamation, the court considered the context and the totality of the circumstances surrounding the publication. One method of making this determination was to analyze whether the declarant accurately portrayed the facts of the situation before making the alleged defamatory statements. Liability arises when the declarant does not provide the audience with the necessary factual background of the published statement before engaging in the alleged defamatory conduct. This form of liability flows from the notion that an alleged defamatory statement based on a concealed set of facts inhibits an individual from forming his or her own opinion regarding the circumstances surrounding that statement.

In looking at the context and the totality of the circumstances surrounding the photograph and caption, the Fourth District found that both were statements of pure opinion protected by the First Amendment. The court reasoned that the caption was merely commentary on the facts in the photograph, with no implication that the opinion was based on undisclosed defamatory facts. The court further found that any individual could “confirm the condition” of Plaintiffs’ property and draw their own conclusions regarding the “Hillbilly Hellhole” caption. *Id.* at 951.

SIGNIFICANCE

Rhodes expands upon the law because it allows offensive statements, surrounding an honest and accurate portrayal of a publication, to constitute nonactionable pure expressions of opinion. If a defamatory statement includes an adequate, factual

background of the circumstances surrounding the statements, then the declarant cannot be liable for defamation. This conclusion is based on the notion that those exposed to the statement and its factual background would be able to draw their own conclusions about the publication without being swayed by the offensive statement.

Essentially, whether statements are nonactionable pure expressions of opinion depends on whether the defamatory statements are mere commentary on the facts presented in the publication, or whether they are based on concealed or undisclosed facts that would inhibit an individual from making an untainted or uninformed conclusion about the publication. In *Rhodes*, if the photograph did not provide an accurate depiction of Plaintiffs' backyard, then the statements would not have been pure expressions of opinion because they would have been based on a concealed set of defamatory facts, and individuals viewing the photograph would not have been able to make independent, unbiased opinions concerning whether the backyard was, in fact, a "Hill-billy Hellhole." *Id.*

RESEARCH REFERENCE

- 19 Fla. Jur. *Defamation and Privacy* §§ 15–16 (1998 & Supp. 2003).

Rachel L. Soffin

Constitutional Law: Standing

***Alachua County v. Sharps*, 855 So. 2d 195 (Fla. 1st Dist. App. 2003)**

A plaintiff may establish standing to bring an action: (1) when he or she can show that a government expenditure violates constitutional limitations on taxing and spending power; (2) when the government's action violates his or her own First Amendment rights under the United States Constitution; (3) when he or she personally suffered discrimination as a result of a government act; or (4) when a person can demonstrate that he or she suffered a special injury different from that suffered by the public at large.

FACTS AND PROCEDURAL HISTORY

The Alachua County Board of Commissioners adopted a resolution and directed that a nonbinding referendum concerning legislation to create a universal health-care system in Florida be placed on the November 2000 Alachua County general-election ballot. Howard Scharps filed a complaint alleging that the resolution was invalid because the County had no power under the Florida Statutes to conduct a referendum designed to gauge voter sentiment on the issue of universal health care. Scharps also asserted that the referendum violated both the First Amendment and the Fourteenth Amendment Equal Protection Clause. He sought declaratory judgment and injunctive relief either to keep the referendum off the ballot or seal its results. The County asserted that Scharps had no standing to bring declaratory action against it. The circuit court denied Scharp's request for injunctive relief, but reserved judgment on declaratory relief. The referendum appeared on the election ballot, and four months later, the circuit court entered final judgment declaring the resolution invalid. However, the judgment failed to address the issue of standing. The County filed a motion for rehearing, which the circuit court denied, and the County appealed.

ANALYSIS

The First District Court of Appeal reversed the circuit court's decision and dismissed Scharp's complaint, holding that he lacked standing. The First District held that for a plaintiff to establish standing, the person must show that he or she has suffered or will suffer a special injury. As the court explained, however, there is an exception to this injury requirement. When a plaintiff attacks a government expenditure on constitutional grounds based on the Legislature's power to tax and spend, standing to sue exists, regardless of whether the plaintiff has suffered any special injury. The exception may be utilized when the taxpayer can demonstrate that a government taxing measure or expenditure violates constitutional limits on the Legislature's taxing and spending power. The court reasoned that Scharps failed to achieve taxpayer standing because his claims alleged only that the government expenditures fell outside of its *statutory* authority. By contrast, the claims alleged nothing about *constitutional* violations concerning the power to tax or spend.

Next, the First District addressed Scharps' standing under the First Amendment. The court relied on the rule that a plaintiff lacks standing to allege violations of First Amendment rights when the facts fail to show that his or her own First Amendment rights have been violated. The court held that Scharps lacked First Amendment standing. The court reasoned that because Scharps claimed that the potential for violating some *else's* freedom of speech existed, he could neither prove that his expression had been chilled nor that he had been denied access to the referendum process.

Finally, the court addressed Scharps' Equal Protection argument. Scharps argued that the referendum was unconstitutional because guidelines did not restrict the County Commissioner's discretion to pick and choose among petitions for referendum adequately. The court reasoned that, because Scharps did not try to get a substitute petition on the ballot or submit his own ballot, he was unable to demonstrate that he suffered any discrimination. The court emphasized that, for Equal Protection standing purposes, it is insufficient that others may be discriminated against in the future. Furthermore, the court noted that when a party is not adversely affected by a statute, that party has no standing to argue that the statute is invalid unless that party is asserting the claim to protect the rights of nonparties who are unable to challenge the statute on their own. The court concluded that, because Scharps was unable to assert that he personally suffered discrimination, and because citizens who were denied the right to place their nonbinding referenda on ballots could have made the argument for themselves, Scharps had no standing.

SIGNIFICANCE

Scharps clarifies the doctrines under which a plaintiff may establish standing to bring lawsuits. The general rule regarding standing requires that the plaintiff allege that he or she has suffered or will suffer a special injury. An exception to this rule is taxpayer standing, which applies to situations involving government expenditures that violate constitutional limitations on the Legislature's power to tax and spend. In these kinds of cases, violations of statutes are not enough to invoke the taxpayer standing exception. The government expenditure must violate the taxing and spending powers outlined in the constitution to qualify. A plaintiff may also establish standing if a government action vio-

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lates his or her First Amendment rights. However, potential violations of other people's First Amendment rights are not enough to generate First Amendment standing. Finally, a plaintiff may achieve standing based on violations of the Equal Protection Clause only when a person demonstrates that he or she, personally, has been discriminated against as a result of the government's action. The fact that others may face discrimination in the future will not suffice to establish Equal Protection standing.

RESEARCH REFERENCES

- Russell W. Galloway, *Basic Free Speech Analysis*, 31 Santa Clara L. Rev. 883 (1991).
- 10 Fla. Jur. 2d *Constitutional Law* §§ 82, 84–87 (2003).
- Thomas C. Marks, Jr., *Adhere Resolutely to a Mistake: The Florida Taxpayer-Standing Cases*, 33 Stetson L. Rev. 401 (2004).

Nicole M. Panitz

Constitutional Law: State Action Constitutional Law: Standing

***Focus on the Family v. Pinellas Suncoast Transit Authority,* 344 F.3d 1263 (11th Cir. 2003)**

The causal element necessary to establish standing in a Title 42 United States Code Section 1983 action is a less strict requirement than proximate cause, and can be satisfied by harms that are “fairly traceable” to the actions of which the person complains. *Focus on the Family*, 344 F.3d at 1273 (quoting *Loggerhead Turtle v. County Council*, 148 F.3d 1231, 1250–1251 (11th Cir. 1998)). Contractual provisions requiring a private company to refuse advertisements based upon their content establishes “state action” sufficiently to survive summary judgment. *Id.* at 1276.

FACTS AND PROCEDURAL HISTORY

Eller Media, Inc., an outdoor advertising company that owned and operated bus-stop shelters pursuant to a contract with Pinellas Suncoast Transit Authority (PSTA), refused advertisements for a conference presented by Focus on the Family (Focus). The

conference was devoted to “preventing homosexuality in youth.” *Id.* at 1264. Eller refused the advertising based upon its controversial content. Contradictory evidence produced during discovery attributed the refusal either directly to PSTA or to Eller’s internal “offensiveness” policies. *Id.* at 1274. The internal policies cited would proscribe substantially the same advertisements as would be proscribed by terms of the bus-shelter contract between PSTA and Eller.

Focus sued PSTA, asserting a violation of its freedom of speech and requesting both damages and injunctive relief. The district court granted summary judgment in favor of PSTA. The court held that Focus did not have standing to sue PSTA for Eller’s refusal of the advertisements. It also found that Focus had failed to satisfy Section 1983’s state-action requirement. The Eleventh Circuit Court of Appeals found error on both of these points, vacated the order, and remanded the case to the district court.

ANALYSIS

The Eleventh Circuit began its reasoning by addressing the threshold matter of standing. Quoting its discussion in *National Parks Conservation Assn. v. Norton*, 324 F.3d 1229 (11th Cir. 2003), the court set forth the three-prong test to establish standing. A plaintiff must show that he or she has suffered an injury in fact, demonstrate a causal connection between the conduct complained of and the injury, and establish that the outcome will likely address the injury. Furthermore, when requesting injunctive relief, the injury-in-fact requirement is satisfied only when the plaintiff can demonstrate a real and immediate threat of future harm.

The court then explained that the district court had improperly applied this analysis to the present facts by combining the injury-in-fact and causation prongs of the standing test. This mistake arose when the district court misapprehended the standard of causality to be satisfied in the standing analysis. The Eleventh Circuit clarified that, for standing purposes, a plaintiff is not required to satisfy proximate-cause requirements and that indirect harms will satisfy the causation prong so long as they are shown to be fairly traceable to the acts or omissions of the defendant. The court found that this was easily satisfied by record evidence of PSTA’s direct participation in Eller’s refusal to post the an-

nouncements. The court also found that causation was indirectly shown because Eller's policy grounds for refusing the advertisements were the same as those expressly designated in its bus-shelter contract with PSTA.

The court then turned to the question of whether Focus had made a sufficient showing of state action in the refusal of the advertisements so as to hold PSTA liable for that refusal. The court began this analysis by outlining the three tests the United States Supreme Court has employed in state-action analyses: "(1) the public function test; (2) the state compulsion test; and (3) the nexus/joint action test." *Id.* at 1277 (quoting *Willis v. Univ. Health Servs., Inc.*, 993 F.2d 837, 840 (11th Cir. 1993)).

The court found the present facts most amenable to an application of the "nexus/joint action test" and explained that state action could be found in the actions of a private party when the private party and the state entity were "intertwined in a symbiotic relationship . . . involv[ing] the 'specific conduct of which the plaintiff complains.'" *Id.* at 1278 (quoting *Rayburn ex rel. Rayburn v. Hogue*, 241 F.3d 1341, 1348 (11th Cir. 2001)). Citing the same facts that supported the finding of causation in the standing question, the court found sufficient evidence of such a relationship between PSTA and Eller to overturn the district court on this issue.

SIGNIFICANCE

Focus on the Family is useful to practitioners in helping them understand the relationship between standing and state action and in distinguishing the appropriate tests to apply to a given set of facts when considering a challenge to the existence of either.

RESEARCH REFERENCE

- Eugene McQuillin, *The Law of Municipal Corporations* vol. 5, § 19.04 (Beth A. Buday & Victoria A. Braucher eds., 3d rev. ed., CBC 1996 & Supp. 2003).

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