Civil Litigation Trends in Local Government

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West Jordan City
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Takings Cases

Issue: Can a plaintiff bring a Takings Claim under Section 1983 for damage caused by lawful use of police powers?

Lech v. Jackson, 791 Fed. Appx. 711 (10th Cir. 2019)

- Shoplifting allegation results in highspeed chase. Suspect barricades himself inside plaintiff's residence (innocent third party). Plaintiff's live in Greenwood Village, Colorado.
- Officers arrive and position themselves to barricade suspect inside. As an officer gets out of his vehicle, suspect shoots at him from inside the garage. The situation was then escalated to a "high-risk barricade suspect situation."
- Officers tried numerous tactics to get suspect out safely over the course of 19 hours. (Spoke to him on his cell, had his family talk to him, shut off power, water, shot in gas munitions, sent a robot into the house).
- After many hours, officers then attempted to reach the second floor of the house and suspect fired at them several times, so they retreated.
- After another 7 hours of unsuccessful negotiations, officers used a BearCat to open up holes in the home so they could locate the suspect inside and they were then able to send in a tactical team to arrest the suspect.
- The good news was, nobody was hurt!

The Bad News…

While insurance was willing to provide about $300,000 for the home and the City offered to pay the deductible, the Lechs claimed it cost more to rebuild and sued.

Plaintiffs, the homeowners, sue the City of Greenwood under Section 1983 for a Taking without just compensation, in violation of the Fifth Amendment.

The Court Ruled:

- Because the house was damaged by the police acting pursuant to the State's police power rather than the power of eminent domain, no Taking occurred. The home "had become instrumental to the criminal activity" by serving as the hideout for the fugitive.
- "[W]hen the State acts to preserve the 'safety of the public,' the state 'is not, and consistent with the existence and safety of organized society, cannot be, burdened with the condition that the state must compensate affected property owners for pecuniary losses they may sustain' in the process."
- "[a]s unfair as it may seem, the Takings Clause simply does not entitle all aggrieved owners to recompense."

reason.com/2020/06/29/swat-team-police-leo-lech-supreme-court-5th-amendment/

reason

POLICE ABUSE

A SWAT Team Blew Up This Family's House While Chasing a Shoplifter. The Supreme Court Won't Hear the Case.

And no, it wasn't the shoplifter's home.

npr.org/2019/10/30/774788611/police-owe-nothing-to-man-whose-home-they-blew-up-appeals-court-says

npr WAMU 88.5 DONATE

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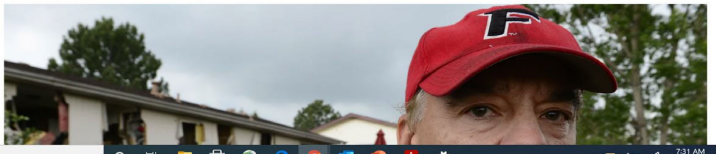
HOURLY NEWS LISTEN LIVE PLAYLIST

NATIONAL

Police Owe Nothing To Man Whose Home They Blew Up, Appeals Court Says

October 30, 2019 · 5:21 PM ET

BOBBY ALLYN



forbes.com/sites/instituteforjustice/2021/03/12/police-wrecked-an-innocent-womans-home-and-left-her-with-the-repair-bill/?sh=1691f52353

rbes

Mar 12, 2021, 07:00am EST | 6,432 views

Police Wrecked An Innocent Woman's Home And Left Her With The Repair Bill

Andrew Wimer Contributor
Institute For Justice Contributor Group

Policy

washingtonpost.com/nation/2019/10/30/police-blew-up-an-innocent-mans-house-search-an-armed-shoplifter-too-bad-court-rules/

The Washington Post
Democracy Dies in Darkness

Amanda Kellar

Morning Mix

Police blew up an innocent man's house in search of an armed shoplifter. Too bad, court rules.

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Baker v. City of McKinney, 571 F.Supp3d 625 (E.D.Tx 2021)

- Armed fugitive shows up at a house with a teenage hostage seeking to hide. Police are called. Suspect releases hostage, but won't come out.
- Police ultimately break windows, knock down the garage, fire dozens of tear gas canisters inside the home.
- Damage cost over $50,000 and insurance did not cover it.
- Plaintiff brings Firth Amendment Takings claim.

The district court refused to dismiss the Takings claim, even though the parties did not dispute that the police were exercising valid / lawful police powers.

The court concluded that it would not foreclose the possibility that a takings claim may be available for the destruction of private property resulting from the valid exercise of a local government's police powers.

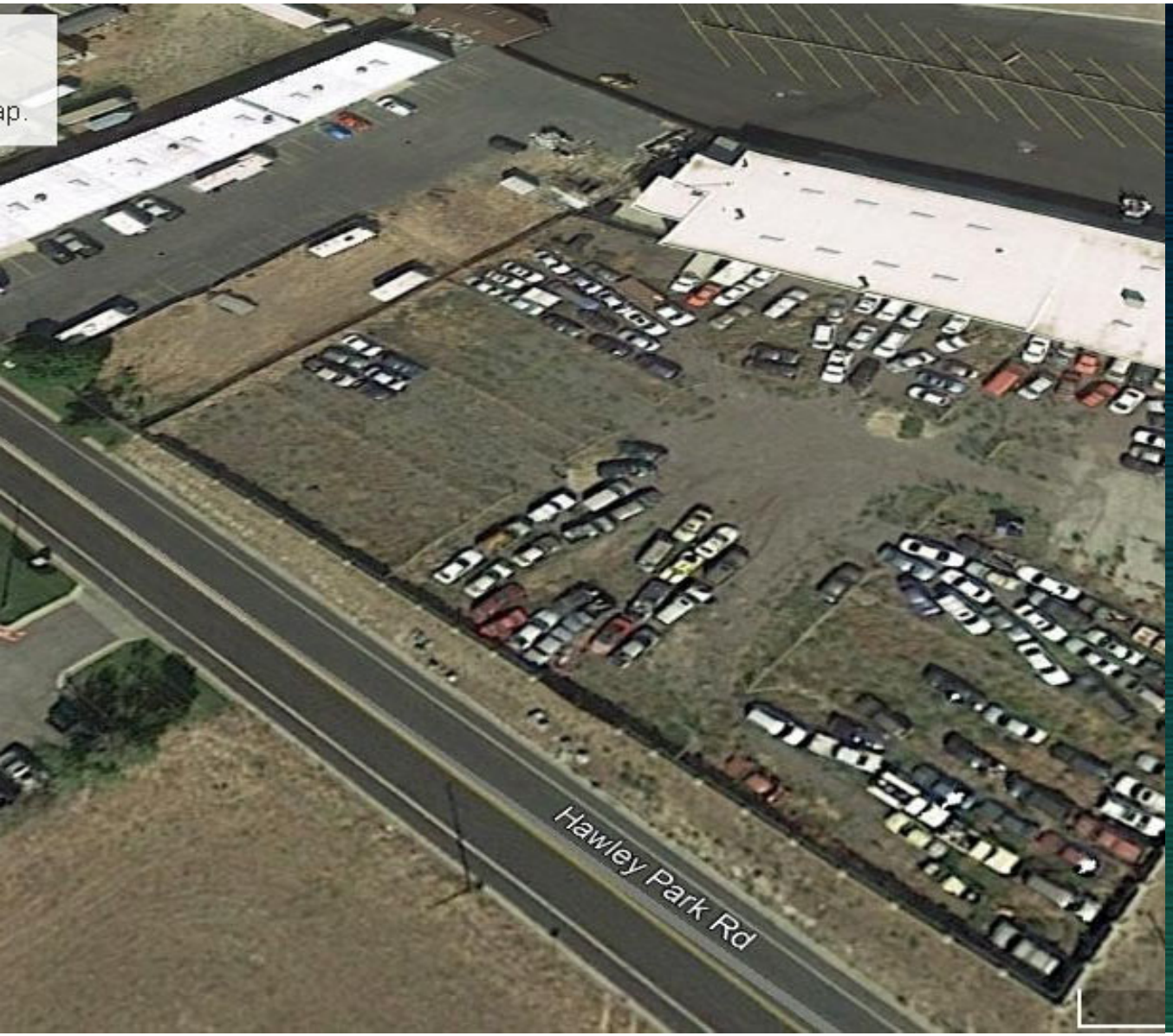
Baker v. City of McKinney, 571 F.Supp3d 625 (E.D.Tx 2021)

In June of 2022, a federal Jury in Texas awarded Vicki Baker $59,656 in damages for her 5th Amendment Takings claim.

An appeal of the Jury's verdict has not been decided.

Themes and Trends here

- Be prepared for more of these Takings claims related to property destruction when police are acting pursuant to their police powers.
- The Supreme Court may rule on this issue at some point since different Circuits have had different rulings.
- Be prepared for intense media scrutiny of these cases as well as special interest groups acting as counsel for the plaintiffs and others coming in as amici.
- Make sure your story is told in the court of public opinion as well as the actual court. Did the homeowner have insurance (like the Lechs) but want a bigger house? Did the police save people in the process of the property destruction? How is the media framing the issue (shoplifter v. armed suspect firing at police).
- How do these takings claims differ from Government Mandated Covid Policies used under the police power to shut down businesses for public health? Those types of cases were denied. Would the Baker v. McKinney case change that?



Mountain West Towing v. West Jordan City

Does a City Tow Rotation Policy Create a Binding Contractual Relationship?

Our Tow Rotation Policy stated:

- "inclusion on the towing rotation is voluntary and a discretionary privilege extended by the West Jordan Chief of Police . . . and is not a legal right."
- It specifically stated it did not create a contractual right.
- "The Chief of Police, or his designee, retains sole discretion in determining the selection of authorized tow companies for the Department."
- We could limit the number on the rotation and remove from the rotation.

The City Argued:

Did not meet basic elements of contract:

"An enforceable contract . . . consists of the terms of a bargained-for exchange between the parties. And the terms of the bargain are defined by the meeting of the minds of the parties—through an offer and acceptance upon consideration." *Rossi v. University of Utah*, 2021 UT 43, ¶ 31,

"Consideration sufficient to support the formation of a contract requires that a performance or a return promise must be bargained for." *Aquagen Int'l*, 072 P.2d at 413.

What Consideration did the City receive? The City received zero income or monetary benefit from the rotation.

6th Circuit Court of Appeals case faced a similar question about a tow rotation policy creating a contractual relationship and the court in *Nationwide Recovery, Inc. v. City of Detroit*, 336 F.Supp.3d 790 (E.D. Mich. 2018) held that there was not "any evidence of consideration." The court further held that the "payment of a simple license or permit fee is not such consideration that will support the existence of a contractual relationship."

City also argued that we followed the terms of the policy so if it did create a contract we did not breach.

And City argued that if there was a contract, Plaintiffs breached first.

Plaintiffs Argued:

There was consideration:

"Consideration is an act or promise, bargained for and given in exchange for a promise." *Resource Management Co. v. Weston Ranch*, 706 P.2d 1028, 1036 (Utah 1985).

They argued that the tow policy created a mutual promise for consideration.

They argued they had to sign the tow policy and agree to follow the terms of the tow policy and that the City also agreed by the language in the policy to follow the terms of the tow policy.

They also argued that the city received a benefit by having wrecked and inoperable vehicles removed from their streets in a timely and efficient manner.

The Court Ruled on Our Motion for Summary Judgment:

Questions of material fact remain if there was sufficient consideration.

Whether the contract, if any, was breached and by whom.

Wait, What? How are there disputed facts as to consideration when the written policy is the alleged consideration?

5th Amendment Due Process Claim

1. That Plaintiffs had a protected property interest in being on the tow rotation, and
2. That Plaintiffs were not afforded proper notice and opportunity to be heard.

What is a Protected Property Interest?

U.S. Supreme Court stated:

That a person may also have “a property interest in a benefit” when the person has “a legitimate claim of entitlement” to that benefit. A legitimate claim of entitlement is “more than an abstract need or desire for it” and “more than a unilateral expectation of it.” A benefit in property interest must be created and defined “by existing rules or understandings that stem from an independent source such as state law—rules or understandings that secure certain benefits and that support claims of entitlement to those benefits.” *Board of Regents of State Colleges v. Roth*, 408 U.S. 564, 569–70 (1972)

Is there a Protected Property Interest in being on a tow Rotation?

Several jurisdictions have addressed this issue and the decisions are split based on differences in state laws regulating tow companies.

Property interests "arise from sources such as state statutes, local ordinances, established rules, or mutually explicit understandings." *Dickeson v. Quarberg*, 844 F.2d 1435, 1437 (10th Cir. 1988)

Federal case law on this issue is clear that a tow rotation creates a property interest only when state law or local ordinances or rules that regulate the tow rotation create an expectation of a claim of entitlement by the towing companies to be on the rotation.
Abercrombie v. City of Catoosa, 896 F.2d 1228, 1231 (10th Cir. 1990)

The City Argued:

The cities tow rotation was not mandated or closely regulated by state law at that time. (A recent amendment to state statute has changed some of this). U.C.A. § 72-9-607

It was regulated by West Jordan's own Tow Rotation Policy

The Policy was clear that it did not create an expectation of a claim of entitlement to being on the tow rotation.

- City retained sole discretion in determining who was selected on the rotation
- Stated that being in the rotation was a privilege and created no legal rights
- Stated that being on the rotation was voluntary and discretionary and could be revoked at any time

The City argued that our local policy created no expectation of a claim of entitlement, so no protected property interest existed.

The Plaintiffs Argued:

That When a government entity establishes a policy that limits its discretion to revoke a benefit, it creates a legitimate claim of entitlement to that benefit and thus, a protected property interest. *Brown v. Eppler*, 725 F.3d 1221, 1227 (10th Cir. 2013).

They argued that our tow policy limited the City's own discretion on how and when we would remove tow companies from the tow rotation so therefore, they had a protected property interest in remaining on the rotation.

The Court Ruled on Our Motion for Summary Judgment:

Questions of material fact remain if there was an established property interest in being on the rotation.

Questions of material fact remain in regard to Plaintiffs being afforded due process of law during their removal from the tow rotation.

Again, how are there disputed facts as to an established property interest when Plaintiffs argued the written policy created the property interest?

Summary of this case:

Your tow policies may create a contractual agreement.

(Are their ways to address this? New clauses in the Policy?)

Under current state law, there is a very high likelihood that a protected property interest exists in being on a tow rotation so due process would be required in removing from the rotation.

Other Cases

Austin, TX v. Reagan National Advertising, *142 S. Ct. 1464, No. 20-1029(April 21, 2022).*

A City Code section that permitted the digitizing of on-premises signs, but not off-premises signs, was facially "content-neutral" for First Amendment purposes even if it requires the city to read the signs at issue, since it does not discriminate based on the topic or message expressed

Shurtleff v. Boston, *142 S. Ct. 1583, No. 20-1800 (May 2, 2022).*

When a city allows community groups to raise their particular group flag on a city flagpole when holding an event in the city's public plaza but is not meaningfully involved in the selection of these group flags or their messages, these third-party flag raisings are private speech, not government speech. As such, the city's refusal to allow a Christian group to raise a Christian flag on the city's flagpole during their plaza event constitutes "viewpoint discrimination" in violation of the First Amendment's Free Speech Clause.

Thompson v. Clark, 142 S. Ct. 1332*, No. 20-659 (April 4, 2022).*

To demonstrate the favorable outcome of a criminal prosecution for purposes of a Section 1983 "malicious prosecution" claim, a plaintiff need not show that the criminal prosecution ended with an affirmative indication of innocence, but merely that it ended without a conviction.

Other Cases

Brewer v. City of Albuquerque, *__ F3d. __, No. 19-2140 (10th Cir., Nov. 24, 2021).*

A municipal ordinance prohibiting congregating within six (6) feet of a highway entrance or exit ramp occupying any median deemed "unsuitable" for pedestrian use, and from engaging in any kind of exchange with motorists in a traffic lane violated the First Amendment because it was not narrowly tailored to address pedestrian safety concerns and because alternatives that would be less burdensome on protected expressive speech and activities was not seriously considered.

Avent v. Doke, *__ Fed. Appx. __, No. 21-7031 (10th Cir., Jun. 23, 2022)(Unpub.).*

The First Amendment protects against employer retaliation for protected speech as well as for "perceived speech" that the adverse action taker mistakenly *thought* an employee said.

Bustillos v. City of Carlsbad, *__ Fed. Appx. __, No. 21-2129 (10th Cir., May 9, 2022)(Unpub.).*

The fact that a person has a First Amendment right to film the police during their encounters with the public does not allow him to disobey lawful police commands or conceal his identity.

Irizarry v. Yehia, *__ F3d. __, No. 21-1247 (10th Cir., Jul. 11, 2022).*

Qualified immunity was denied as to a First Amendment claim stemming from an officer standing in front of reporters filming a DUI stop, then shining his flashlight into their cameras and driving his squad car at them.

Other Cases

Swanson v. Griffin, *__ Fed. Appx. __, No. 21-2034 (10th Cir., Feb. 24, 2022)(Unpub.).*

Qualified immunity is granted to an elected official on a claimed First Amendment violation stemming from his blocking a critic from his Facebook page. The law is unclear as to if and when an individual government official's social media profile becomes a "public forum" and subject to viewpoint discrimination liability.

Heard v. Dulayev, *__ F3d. __, No. 191461 (10th Cir., Mar. 29, 2022).*

Qualified immunity was granted to an officer on an "excessive force" claim that arose when she ordered the plaintiff to crawl out of the bushes and then stop, but he instead rose to his feet and walked towards the officer, who then tased him and took him to the ground.

George v. Beaver Cty., *32 F4th 1246, No. 21-4006 (10th Cir., May 3, 2022).*

Failing to follow a county jail's suicide prevention policy does not, in and by itself, violate the Fourteenth Amendment without a showing of "deliberate indifference." Summary judgment was properly granted because a deceased inmate's mother could not establish that County was deliberately indifferent by failing to train its corrections officers on preventing suicide,, or failing to install monitoring cameras in certain cells. Officers needing additional training does not rise to the standard of failure to train. Failure to follow prison policy does not rise to the level of constitutional violation, in that officers ignored portions of the county's suicide-prevention policy was not enough to raise a factual issue that the sheriff knew about a generalized risk to suicidal detainees because no inmate had ever successfully committed suicide.

Other Cases

Chilcoat v. San Juan County, 41 F.4th 1196 (July 22, 2022)

District court was correct in dismissing plaintiff's claims against the prosecutor based on absolute prosecutorial immunity, which is a complete bar to suit for damages under § 1983, because plaintiff's claims were based solely on the prosecutor's courtroom conduct. District court was correct in dismissing plaintiff's municipal liability claims against the county because the prosecutor made the allegedly false statements at issue while prosecuting plaintiff for retaliation against a witness, victim, or informant, a felony under Utah law; the prosecutor thus acted on behalf of the state as an advocate; District court erred in denying plaintiff leave to amend under Fed. R. Civ. P. 15(a)(2); the proposed amended complaint stated a plausible municipal liability claim under 42 U.S.C.S. § 1983 against the county.

Shively v. Utah Valley U.*, 2022 U.S. App. Lexis 9193, No. 20-4088 (10th Cir., Apr. 5, 2022)(Unpub.).*

The court declines an invitation to expand due process rights to include the "indirect economic effects" of an employee who was suspended for five (5) months with pay but killed himself on account of the emotional stress of his job suspension. University officials did not deprive a professor of his property interest in continued employment because the professor's suspension with pay did not offend 14th amendment due process. Because the professor's injuries flowed from defendants' infliction of mental anguish, they retained immunity under the Governmental Immunity Act of Utah for the professor's wife's Negligent Infliction of Emotional Distress (NIED) claim. Because the Governmental Immunity Act immunized defendants for the NIED claim, it did so for a wrongful death claim as well. Plaintiff's failure to allege that the professor sought employment at other universities which was foreclosed by defendants' purported sham investigation, the district court had no basis on which to accept plaintiff's argument for damages for her breach-of-implied-contract claim.

Other Cases

Paugh v. Uintah County 47 F.4th 1139 (September 7, 2022)

Denial of summary judgment to individual defendants on their § 1983 qualified immunity defense was proper because estate of deceased pretrial detainee raised triable issues of fact including showing that a doctor had ordered medical care if the detainee's condition worsened, and it would have been obvious to any reasonable jail official that his condition was worsening but they had all abdicated their gatekeeping role, including failing to follow jail policy. Deliberate indifference to an inmate's serious medical need was a clearly established constitutional right, despite no caselaw involving alcohol withdrawal. The court lacked jurisdiction to consider the county's appeal because the individual defendants were not entitled to qualified immunity, so a ruling on qualified immunity would not resolve the claims against the county.

Cunningham v. Weber County, 506 P.3d 575 (February 17, 2022)

A preinjury release that a firefighter signed to attend SWAT training was unenforceable with respect to his negligence claim where the release used broad, general language that did not specifically nor unequivocally evince an intent to hold the released party blameless for its own negligent conduct. UCA § 63G-7-301(2)(i) grants governmental immunity for gross negligence claims as gross negligence differs from ordinary negligence only in degree, and thus, the statute waives immunity for negligence in all of its forms; UCA §63G-7-301(2)(i) waives immunity for any injury proximately caused by an employee's negligent act or omission including loss of consortium as described in UCA § 30-2-11(8).