TERRY'S TAKES

May 14-20, 2023

Supreme Court of the United States

Twitter, Inc. v. Taamneh

Supreme Court of the United States
5/18/23, Justice Thomas
Topics: 18 U.S.C. § 2333

I never thought, when this case was issued, that by the time I got around to summarizing the case, Twitter would no longer exist. This case presents an unusual sort of claim, but it's in the personal injury sphere generally.

The family of a man killed by a terrorist acting on behalf of the Islamic State of Iraq and Syria ("ISIS") in Turkey sued in American courts, but they didn't sue ISIS or the terrorist himself. Instead, the sued Twitter (the social media giant rebranded as "X" a few short months later), Facebook, and Google (in its capacity as the owner of YouTube) under 18 U.S.C. § 2333, which allows U.S. nationals who have been "injured…by reason of an act of international terrorism" to file a civil suit for damages.

The family blamed Twitter, Facebook, and YouTube for allowing ISIS to use the social media platforms to coordinate their terrorist attacks. They even alleged that the algorithms that are part of the social media platforms—designed to show more and more of the same kind of content to viewers who keep clicking on it (giving you more of what you like)—actively assisted ISIS to spread its propaganda and advertisements.

The Supreme Court held, however, that the plaintiffs failed to state a claim. Yes, the law permits citizens to sue anyone who aids and abets or provides substantial assistance or conspires with terrorists, but case law requires that the person aiding and abetting do so with general awareness of his role as part of the illegal or tortious activity and that he knowingly and substantially assisted.

This specific cause of action is not like a RICO case where one aids an enterprise; here, the plaintiff had to show that Twitter, Facebook, and/or YouTube aided a specific act of terrorism—the bombing in Turkey. There was no evidence the social media companies gave knowing and substantial assistance to ISIS in carrying out that attack.

Justice Thomas brushed off the idea that social media giants helped ISIS with their algorithms that fed more of their content to engaged audiences, saying that the mere creation of social media platforms results in no more culpability than the creation of email, cell phones, or the internet generally. He also brushed off the idea that algorithms actively help drive more and more of the same or similar content to those to consume it (i.e. people who "like" or view ISIS posts will see more and more of them and become radicalized), describing the algorithms as merely part of the infrastructure through which all the content is filtered. He states that algorithms are agnostic as to the nature of the content (apparently holding that it doesn't matter that Twitter, Facebook, and YouTube were aware that some people are fed more and more ISIS videos because if those same people "liked" and clicked

on cute cat videos, the algorithm would have sent them more and more cat videos, not ISIS videos; it's all up to the user, not Twitter, Facebook, or YouTube). The facts don't rise to knowing assistance. The opinion was UNANIMOUS.

JUSTICE JACKSON CONCURRED SPECIALLY, adding a single paragraph to the 38-page opinion. She joined the opinion but noted that she did so only because the opinion was decided on narrow grounds at the motion-to-dismiss stage where the court was operating on the factual allegations without any factual record. She noted that in a different case with similar issues but better factual allegations, her opinion might be different. She also noted that much of the language about aiding and abetting and scienter came from criminal cases, which were not necessarily appropriate for application to a civil case. In other words, she might be open to applying a lower level of knowledge or *mens rea* in a similar civil claim, but there was just not enough even under a lower standard in this case.
https://www.supremecourt.gov/opinions/22pdf/598us2r22_hejm.pdf

Eleventh Circuit Court of Appeals

Hall v. Merola

11th Circuit Court of Appeals
5/17/23, Judge Rosenbaum
Topics: 1983 (Eighth Amendment); 1983 (First Amendment)

This 37-page opinion was chock full of issues. Apparently attempting to induce as many groans as possible, Judge Rosenbaum starts the opinion in this case by writing: "This is one *Heck* of an appeal. That's because resolution of the appeal turns in large part on the proper application of the Supreme Court precedent known as *Heck v. Humphrey*." Yikes. Heck, a 1994 case, bars a convict from pursing a civil claim for damages under 42 U.S.C. § 1983 if the proving the elements of his civil claim would necessarily call into question the validity of his criminal conviction.

Hall sued two correctional officers under 1983 for violations of his First and Eighth Amendment rights for spraying a chemical agent on him in retaliation for protected speech. He alleged that the guards came to his cell, telling him they were going

> to "gas" him because he was "a black n[*****], who ha[d] many past disciplinary reports for masturbation" and because Hall had "file[d] [l]awsuits and grievances against correctional officers and [was] testifying in trial against [another correctional officer,] Officer Bennett."

And they did gas him. (NOTE: So, like, maybe this wasn't the best opinion to start with a dad-joke.) The guards claimed that they did it to stop Hall from tampering with a sprinkler in his cell, and Hall was eventually "found guilty of tampering with the sprinkler," though he denied tampering with the sprinkler. To be clear, the opinion later clarifies that he was found guilty of a *disciplinary infraction*, not a charged crime, but the opinion also notes that Heck was extended by the Supreme Court, in 1997, to bar 1983 claims that would undercut either convictions or prison disciplinary convictions.

Hall also alleged a separate 1983 First Amendment claim against a supervising officer, alleging that the supervisor approached him a week after the gassing and said he was going to order guards

not to feed Hall because he filed so many grievances. He claims he was denied food for two specific days. Hall sued that officer in a separate claim.

The district court dismissed both claims, concluding that Hall would have to disprove that he was maced to get him to stop tampering with the sprinkler in order to prevail on his civil claims and also concluding that the hunger pangs alleged as the injury for the two days he was denied food did not constitute a physical injury under the Prison Litigation Reform Act ("PLRA").

The procedural history of the claim is complicated, with the district judge repeatedly requiring amended complaints but barring additional claims or descriptions of physical injury of several topics. And then, over defense objection, the district judge read a jury instruction that concluded that the injury was minimal.

The Eleventh Circuit held that Heck does not apply to bar an excessive force claim. Hall eventually declined to argue that he had not tampered with the sprinkler, and he simply argued that the guards were excessive. That did not conflict with the disciplinary finding. The Eleventh Circuit brushed off an argument that Hall somewhat changed his story from the sprinkler thing being made up to not contesting it and pivoting to a mere excessive force overreaction to situation that called for a valid use of force.

The officers failed to preserve a claim of qualified immunity.

In regard to the First Amendment claim that argued that the motive for the gassing was retaliation for grievances, Heck does not apply. Regardless of whether Heck could ever apply now that Hall was no longer in custody, it is analogous to a claim of battery, not a claim of malicious prosecution. To state a 1983 First Amendment retaliation claim, a plaintiff generally must show: (1) she engaged in constitutionally protected speech, such as her right to petition the government for redress; **(2) the defendant's retaliatory conduct adversely affected that protected speech and right to petition; and** (3) a causal connection exists between the defendant's retaliatory conduct and the adverse effect on the plaintiff's speech and right to petition. **The second of those elements requires proof of retaliation in the form of a common law tort**. While a lot of retaliation Eighth Amendment cases rely on arrest or prosecution and courts analogize the claim to a common-law tort of false arrest or malicious prosecution (and might require that a prisoner rebut the valid basis for the prosecution as part of such a claim, which could result in a Heck issue), *First Amendment* retaliation claims can use any sort of adverse action as its second element (retaliation). Examples would be a civil action or termination of employment. And this case best fits with the tort of battery, not malicious prosecution. So there is no Heck issue.

Hall also appealed the denial of leave to amend his complaint under Rule 15(a) within 21 days of filing in order to add claims of deliberate indifference to serious medical needs stemming from being gassed (ordering a nurse not to treat his wounds). The court held that he was entitled to leave to amend.

The district court also dismissed claim for compensatory and punitive damages based on 42 U.S.C. 1997e(e), which provides a limitation on recovery for claims federal civil actions brought by a prisoner for mental or emotional injury without showing a physical injury or commission of a sexual act. Presumably, this pertained to the hunger claim, not the battery. The court noted in dicta that section 1997e(e) DOES NOT APPLY to a complaint filed in STATE court and then REMOVED to

federal court, only cases "brought" in federal court. The statement is dicta only because the court did not reverse due to the jury's finding that Hall was not even entitled to nominal damages, so the error was harmless.

The court did affirm the trial court's denial of a motion to amend three years after commencement of the case and two months before trial. Leave to amend should be "freely given when justice so requires it," but it is not an automatic right, and the trial judge did not abuse discretion in finding that the timing of the requested amendment and the need to trigger a new round of depositions justified denying permission to amend.

The court also reviewed the denial of a Rule 15(b) motion. That rule allows a party who move to amend the pleadings to conform to the evidence if the amendment "will aid in presenting the merits and the objecting party fails to satisfy the court that the evidence would prejudice that party's action or defense on the merits." To prevent prejudice, the court may grant a continuance to enable the objecting party to meet the evidence. And when the non-amending party does not object, the court must treat the proposed amendment as something raised in the pleadings. A Rule 15(b) motion can be made at any time—even AFTER judgment—to conform them to the evidence and to raise an issue that did not appear in the pleadings. "But failure to amend does not affect the result of the trial of that issue." Here, there was no error because the jury heard all of the medical evidence and still held for the lieutenant, so the denial of leave to amend was harmless.

Finally, the district court agreed that a jury instruction on nominal damages that stated, "where, AS HERE, the damages are nominal," crossed the line into instructing the jury to find the damages nominal. That said, the court again found no harm was done by the bad instruction because Hall's counsel argued that the damages in the case were indeed nominal.

The court vacated the dismissal of Hall's claims against the officers and remanded for leave to plead, but affirmed the verdict in favor of the lieutenant who supposedly ordered Hall to be starved in light of the verdict in the lieutenant's favor and the lack of prejudicial error.
https://media.ca11.uscourts.gov/opinions/pub/files/202014247.pdf

First DCA

Beasley v. United Casualty Insurance Company of America

1st DCA
5/17/23, Per Curiam (C.J. Rowe, and Judges Lewis and Long)
Topics: Continuance; Summary Judgment Standard

Beasley moved for a continuance of a summary judgment hearing. He argued that he had surgery a month before the hearing, and the surgery prevented him from responding to the motion. "But Counsel was cleared to work by a physician 17 days before the hearing and had over 50 days before his surgery to respond. Counsel was also one of two attorneys working for Beasley and Beasley did not explain why the second attorney could not handle the response." The appellate court noted that the denial of the continuance was reasonable, and the court found no abuse of discretion and affirmed. Apparently this was the only issue raised in a direct appeal.
https://supremecourt.flcourts.gov/content/download/868936/opinion/download%3FdocumentVersionID=982b400c-2ddf-4be8-b451-8a3a3b5581ad

Second DCA

Pocock v. Pocock

2nd DCA
5/19/23, Judge Northcutt
Topics: Venue

Transferring venue may have just gotten harder in the Zoom era. The litigation arises from an intrafamily dispute over proceeds from the sale of the Tallahassee home of Pocock's late son, John Pocock. One of the parties sought a transfer of venue under section 47.122, Fla. Stat, which permits a transfer of venue for the convenience of the parties or witnesses in the interests of justice. But part of this case was rooted in promissory notes, and the notes contained a venue selection clause stating that each party consented to be sued in circuit court in Pinellas County or the Middle District of Florida Tampa Division.

The motion sought to transfer the case to Leon County (Tallahassee), and the trial judge granted the motion. But on appeal, the DCA reminds us that forum selection clauses between parties waive venue rights that are based on inconvenience unless there is a compelling reason for a court to disregard it.

More importantly, the DCA expressly held that even without the forum selection clause, the movant failed to show that a transfer of venue was justified. The plaintiff lives in Pinellas and he is old and in poor health. The court expressly noted that the fact that a lot of the lawyers live in Leon County is not something the court should take into account. Also, there was no demonstration of real inconvenience to witnesses who lived in Leon County, **especially in light of the new rules like Rule 2.530, allowing for remote testimony.** Plaintiffs get to choose the forum, and parties seeking a change in venue have the burden to "demonstrate the impropriety of the plaintiff's selection." The DCA specifically held that even without the forum selection clause, it would have reversed for lack of satisfaction of the movant's burden. Reversed and remanded.
https://supremecourt.flcourts.gov/content/download/869068/opinion/221180_DC13_05192023_080717_i.pdf

Third DCA

Shapiro v. WPLG, LLC

3d DCA
7/x/23, Chief Judge Fernandez
Topics: 57.105 Sanctions

Yikes. This case appears to hold that all attorneys who file a notice of appearance should be on the hook for sanctions if sanctions for a pending document are ultimately imposed under section 57.105, Fla. Stat.

Because WPLG, the defendant, thought that Plaintiff Readon's complaint for defamation was frivolous and filed in bad faith, it filed a 57.105 motion seeking fees. At the time that WPLG filed the 57.105 motion, Attorney Kassier was Plaintiff Readon's sole attorney. Attorney Shapiro was added as

co-counsel just before a third amended complaint was filed. Attorney Eric Brumfield also appeared as co-counsel towards the end of litigation.

When the defamation case went down in flames, the trial court granted the 57.105 motion. The order specified that the client would pay 50 percent, and the three attorneys would pay the other 50 percent jointly and severally.

DCA Judge Bokor was the judge who entered the original order of sanctions, but then he was elevated to the DCA. A successor judge entertained a rehearing motion and made one important change. The judge let Attorney Shapiro off the hook, as Shapiro's name was not on any of the three complaints and Attorney Shapiro claimed to represent the plaintiff only in some sort of limited capacity. The judge also noted that the 57.105 motion was served prior to Attorney Shapiro filing a notice of appearance.

The two other attorneys appealed, and WPLG filed a separate appeal challenging the order that let Attorney Shapiro off the hook. The appeals were consolidated.

The DCA affirmed the order against the two attorneys without further comment. In regard to whether Attorney Shapiro should be let off the hook, the DCA disagreed with the trial judge that Attorney Shapiro represented the plaintiff only in a limited capacity because the notice of appearance requested that he receive "copies of all notices and pleadings" and in no way limited his representation. The DCA also did not care that Attorney Shapiro's name was not on any of the complaints targeted by the sanctions motion. Attorney Shapiro had been co-counsel for three months when the third and final amended complaint was filed. The lack of his signature on the complaint was "irrelevant" because he was co-counsel. Attorney Shapiro was named in the 57.105 motion, and he was served with the motion. The DCA reversed the part of the order letting Shapiro off the hook and remanded with instructions to reinstate his responsibility to pay fees. The joint and several apportionment of 50% of the fees was also affirmed.
https://supremecourt.flcourts.gov/content/download/868893/opinion/211733_DC08_05172023_095948_i.pdf

Fourth DCA

HRB Tax Group, Inc. v. Florida Investigation Bureau, Inc.

4th DCA
5/17/23, Judge Damoorgian
Topics: Amendment of Pleadings; Punitive Damages

The Fourth DCA shot down a claim for punitive damages. The Florida Investigation Bureau, Inc. sued HRB Tax Group, Inc., alleging fraud from one of the defendant's employees telling the plaintiff that their tax liability could be reduced by investing $250,000 to a bank account in Hong Kong. The plaintiff alleges that it never received any returns on the investment and that the third party and the defendant's employee ignored multiple requests to return the money.

The trial court permitted the amendment adding a claim for punitive damages, and the defendant appealed An amendment to permit a claim of punitive damages is one of the non-final orders that can be immediately appealed. The DCA reminds us review of an order allowing a claim of punitive damages is reviewed *de novo*.

The standard for claiming punitive damages is well settled. Section 768.72(1), Florida Statutes (2020) and Rule 1.190(f) provide that no claim for punitive damages shall be permitted unless there is a reasonable showing by evidence in the record or proffered by the claimant which would provide a reasonable basis for recovery of such damages. And section 768.72(2) provides that a "defendant may be held liable for punitive damages only if the trier of fact, based on clear and convincing evidence, finds that the defendant was personally guilty of intentional misconduct or gross negligence." § 768.72(2), Fla. Stat. To impute an employee's conduct on an employer under the punitive damages statute, a plaintiff must establish that the employee's conduct constituted "intentional misconduct" or "gross negligence," and establish one of the following:

> (a) The employer, principal, corporation, or other legal entity actively and knowingly participated in such conduct;
>
> (b) The officers, directors, or managers of the employer, principal, corporation, or other legal entity knowingly condoned, ratified, or consented to such conduct; or
>
> (c) The employer, principal, corporation, or other legal entity engaged in conduct that constituted gross negligence and that contributed to the loss, damages, or injury suffered by the claimant.

§ 768.72(3)(a)–(c), Fla. Stat.

The DCA reversed the trial court's order allowing the punitive damages claim for two separate reasons. First, the proposed amended complaint sought to add a claim for punitive damages to the existing vicarious liability claim only. The trial court, however, partially relied on evidence relating to the direct negligence claim asserted against the defendant, which was based on the defendant's creation and handling of the reciprocal referral program. The direct negligence claim, however, did not include a request for punitive damages. All of the facts supporting the punitive damages request for the vicarious liability had to be tied to facts regarding that count, not a different count.

Second, the vicarious liability claim in the amended complaint contained no allegations of wrongdoing by the defendant. For example, the vicarious liability claim did not allege that: (1) the defendant "actively and knowingly participated in" the employee's conduct; (2) the defendant's officers, directors, or managers "knowingly condoned, ratified, or consented to" the employee's conduct; or (3) the defendant engaged in its own conduct that constituted "gross negligence" and contributed to the plaintiff's damages. Instead, the vicarious liability count alleges misconduct only by the employee. There was no allegation that the officers, directors, or managers knowingly participated in or condoned, ratified, or consented to the employee's conduct, or that the defendant engaged in conduct constituting gross negligence.

Reversed.
https://supremecourt.flcourts.gov/content/download/868923/opinion/222981_DC13_05172023_104503_i.pdf

Saunders v. The Baseball Factory, Inc.

4th DCA

5/17/23, Judge Gross
Topics: Duty, Negligence

The Baseball Factory, a company that hosts youth baseball games, did not have a duty to protect an umpire from being punched in the face by a 17-year-old baseball player who was dissatisfied by the umpire's call of a "strike." The attack was not in the foreseeable zone of risk created by hosting a baseball game. The risk was not created by the defendant's conduct; instead, it was a third party. Generally, defendants don't have to guard against intentional or criminal conduct by third parties unless there is a special relationship between the defendant and the injured party or the defendant has some ability to control the criminal act.

Examples of such recognized special relationships include businesses toward their customers, employers toward their employees, jailers toward their prisoners, hospitals toward their patients, and schools toward their pupils." A special relationship typically arises in narrow circumstances where the relationship places the defendant in a superior position to control the risk, such as where the defendant has substantial control over the plaintiff so as to deprive the plaintiff of his or her normal opportunities for protection.

Another exception to the rule that a defendant does not have to protect a person from the intentional or criminal acts of a third party is if the defendant is in actual or constructive control of: (1) the instrumentality; (2) the premises on which the tort was committed; or (3) the tortfeasor. But none of that was the case here. The fact that the defendant published rules against violence did not mean that the attack was foreseeable. Just as it may reasonably be assumed under ordinary circumstances that no one will violate the criminal law, so too may it reasonably be assumed under ordinary circumstances that players will not violate game rules prohibiting violence against officials.

Dismissal in the defendant's favor on the element of duty was affirmed.
https://supremecourt.flcourts.gov/content/download/868925/opinion/220399_DC05_05172023_100828_i.pdf