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SECTION 1983 CIVIL RIGHTS LITIGATION FROM THE OCTOBER 2006 TERM

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Section 1983 affords protection against the unconstitutional actions of state or local officials and authorizes a full range of relief for victims.[1] Potentially, that means compensatory damages, punitive damages, equitable relief, and recovery of statutory attorneys' fees.[2] Section 1983 provides by far the most significant remedy for constitutional violations. This does not mean, however, that there will be recovery every time individuals' constitutional rights have been vio-

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[1] Section 1983 provides, in pertinent part:

> Every person who, under color of any statute, ordinance, or regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress . . . .

42 U.S.C.A. § 1983 (West 2003).

[2] *Id.* *See also* Smith v. Robinson, 468 U.S. 992, 1006 (1984) ("[T]his Court has recognized, § 1988 is a broad grant of authority to courts to award attorney's fees to plaintiffs seeking to vindicate federal constitutional and statutory rights."); City of Newport v. Fact Concerts, Inc., 453 U.S. 247, 267-68 (1981) (recognizing the availability of punitive damages in certain circumstances); Carey v. Piphus, 435 U.S. 247, 254-55 (1978) (recognizing availability of compensatory damages).

lated.

We have all heard the old adage: "for every right, there is a remedy." This does not hold true for violations of constitutional rights. In a large number of cases where constitutional rights are violated, the plaintiff is denied recovery, either because of an immunity defense, and there are many immunities,[3] or even because of some other non-merits defense, such as the statute of limitations, preclusion, and abstention. While the remedies provided are meaningful, the most basic principle of Section 1983 is that, by itself, it does not create any rights. It only provides the authority to enforce rights created by the Federal Constitution or, in some cases, by federal statute other than Section 1983.[4]

There were a large number of Section 1983 cases decided by the Supreme Court last Term. This Article divides the Supreme Court's Section 1983 decisions into three categories: first, decisions involving constitutional rights enforceable under Section 1983; second, decisions involving the "procedural aspects" of Section 1983 litigation; and third, a decision involving statutory attorneys' fees.

I. CONSTITUTIONAL RIGHTS ENFORCEABLE UNDER SECTION 1983

First is the constitutional rights issue. Though other Section 1983 cases, such as *Morse v. Frederick*,[5] alleged constitutional viola-

[3] *See, e.g.*, MARTIN SCHWARTZ, SECTION 1983 LITIGATION: CLAIMS AND DEFENSES chs. 9 and 9A (4th ed. 2005).

[4] *See* Baker v. McCollan, 443 U.S. 137, 145 n.3 (1979).

[5] 127 S. Ct. 2618 (2007).

tions by state or local officials or a municipal government,[6] this Part focuses on *Scott v. Harris*,[7] a Fourth Amendment excessive force claim against a law enforcement officer.[8] Fourth Amendment police misconduct claims constitute a very large percentage of Section 1983 claims.[9] In prior excessive force cases, the Supreme Court was very sympathetic to difficult decisions that law enforcement officers must make and gave them a significant amount of discretion and leeway.[10] That did not change last Term in this case.[11]

The *Scott* case arose out of a high speed police pursuit,[12] which is something that takes place with great frequency and often ends in some type of tragedy. In *Scott*, a teenager named Victor Harris was driving seventy-three miles per hour in a fifty-five mile per hour zone.[13] An officer pulled up behind him, and tried to pull him over. Instead, Harris sped away.[14] Before you knew it, a high speed police chase was on. It ended in tragedy when Officer Scott termi-

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[6] *Id.* at 2623. Frederick brought a Section 1983 claim after being disciplined by his high school principal for displaying a banner that read, "BONG HiTS 4 JESUS." *Id.* at 2622.

[7] 127 S. Ct. 1769 (2007).

[8] *Id.* at 1773.

[9] *See, e.g.*, Graham Miller, Note and Comment, *Right of Return:* Lee v. City of Chicago *and Continuing Seizure in the Property Context*, 55 DEPAUL L. REV. 745, 748 n.25 (2006) (quoting WAYNE R. LAFAVE, SEARCH AND SEIZURE § 1.10 (4th ed. Supp. 2004)).

[10] *See, e.g.*, County of Sacramento v. Lewis, 523 U.S. 833, 854 (1998) ("[H]igh-speed chases with no intent to harm suspects physically or to worsen their legal plight do not give rise to liability under the Fourteenth Amendment, redressible by an action under § 1983."); Graham v. Connor, 490 U.S. 386 (1989).

[11] *See Scott*, 127 S. Ct. at 1779. "[W]e lay down a . . . sensible rule: A police officer's attempt to terminate a dangerous high-speed car chase that threatens the lives of innocent bystanders does not violate the Fourth Amendment, even when it places the fleeing motorist at risk of serious injury or death." *Id.*

[12] *Id.* at 1772.

[13] *Id.*

[14] *Id.*

nated the pursuit by ramming Harris' vehicle from behind.[15] Officer Scott's action caused Harris' vehicle to slide down an embankment and overturn. Harris was severely injured and rendered a paraplegic.[16] He brought suit under Section 1983 against Officer Scott in federal district court in Georgia. The district court judge denied Officer Scott's motion for summary judgment, finding that there were factual issues as to whether he acted in an objectively reasonable fashion under the Fourth Amendment and as to whether Officer Scott was entitled to qualified immunity.[17]

The United States Court of Appeals for the Eleventh Circuit affirmed, determining that a jury could find that Officer Scott violated Harris' Fourth Amendment rights, and that the facts could support a finding that Officer Scott had "fair warning" that his conduct was unlawful, therefore disentitling him to qualified immunity.[18] Law enforcement officers do not frequently lose on qualified immunity in the Eleventh Circuit.[19] It is, thus, somewhat notable that the Eleventh Circuit ruled against the officer, sending the case back for trial. But, in an eight-one decision, the United States Supreme Court reversed, holding, as a matter of law, that Officer Scott did not vio-

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[15] *See id.* at 1773.

[16] *Scott*, 127 S. Ct. at 1773.

[17] Harris v. Coweta County, No. CIVA 3:01CV148, 2003 WL 25419527, at *5-6 (N.D. Ga. Sept. 25, 2003).

[18] Harris v. Coweta County, 433 F.3d 807, 816, 820 (11th Cir. 2005).

[19] *See, e.g.*, Priester v. City of Riviera Beach, 208 F.3d 919, 926 (11th Cir. 2000). "In the context of Fourth Amendment excessive force claims, we have noted that generally no bright line exists for identifying when force is excessive; we have therefore concluded that unless a controlling and materially similar case declares the official's conduct unconstitutional, a defendant is usually entitled to qualified immunity." *Id.* (citing Smith v. Mattox, 127 F.3d 1416, 1419 (11th Cir. 1997)).

late the Fourth Amendment.[20]

Now, what is the analysis? The Court agreed that the officer's actions constituted a seizure within in the meaning of the Fourth Amendment because Harris' freedom of movement was curtailed through the means intentionally adopted by the officer.[21] Justice Scalia, who authored the majority opinion, agreed that there was a "seizure," but found that the seizure was objectively reasonable.[22]

The seizure was objectively reasonable because, focusing on the relative culpability of the parties, Harris was the culpable party.[23] It was Harris who did not obey the demand to pull over. It was Harris who placed the safety and lives of innocent individuals in danger. The Court concluded that Officer Scott's actions (the seizure) were objectively reasonable and, therefore, did not violate the Fourth Amendment.[24]

Perhaps the most important principle applied in *Scott* is the Warner Wolf principle: "let's go to the videotape."[25] To determine the facts, the Court relied entirely on the videotape of the police chase that was taken from the police cruiser.[26] It was this videotape that led Justice Scalia to say that the chase "on the video . . . closely resembles a Hollywood-style car chase of the most frightening

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[20] *Scott*, 127 S. Ct. at 1776.

[21] *Id.* (quoting Brower v. County of Inyo, 489 U.S. 593, 596-97 (1989)).

[22] *Scott*, 127 S. Ct. at 1778.

[23] *Id.*

[24] The Court employed this standard in other excessive force cases as well. *Id.* at 1779. *See also Graham*, 490 U.S. at 388 ("We hold that such [excessive force] claims are properly analyzed under the Fourth Amendment's objective reasonableness standard . . . .").

[25] Iconic New York City sportscaster Warner Wolf famously introduces a highlight reel with this catchphrase. *See, e.g.*, Richard Sandomir, *The No-Braking Ball: CBS Versus Physics*, N.Y. TIMES, Oct. 22, 1991, at B11.

[26] *Scott*, 127 S. Ct. at 1776.

sort,"[27] and, ultimately, that there was no violation of the Fourth Amendment.[28]

There was, however, an issue which the Court treated as a non-issue: whether Officer Scott used deadly force. Why might that be an issue? If one goes back to the 1985 decision of *Tennessee v. Garner*,[29] the Supreme Court said an officer may use deadly force against a suspect only when "the officer has probable cause to believe that the suspect poses [an imminent danger] of serious physical harm, either to the officer or to others."[30] Justice Scalia indicated whether Officer Scott's use of force was deadly or not did not matter because it is the same Fourth Amendment objective reasonableness test in either event.[31]

I wonder whether it does matter. If you are involved in a case involving deadly force applied by the police, is the district court judge required to give the jury an instruction that tracks *Tennessee v. Garner*? Does the principle that deadly force may only be used when there is immediate danger of serious harm, or a threat to the life of officers or others, require a separate instruction? Or is it sufficient to give the jury a general reasonableness test instruction? That may be a significant issue post-*Scott v. Harris*. There are pre-*Scott v. Harris* decisions that require the trial judge to give the jury a *Garner* instruction, but that may now change.[32]

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[27] *Id.* at 1775-76.

[28] *Id.* at 1776.

[29] 471 U.S. 1 (1985).

[30] *Id.* at 11-12.

[31] *Scott*, 127 S. Ct. at 1776.

[32] *See, e.g.*, Acosta v. Hill, 504 F.3d 1323, 1324 (9th Cir. 2007) ("*Scott* held that there is no special Fourth Amendment standard for unconstitutional deadly force."). *Acosta* specifi-

There is an interesting battle of the concurring Justices in *Scott v. Harris*. Justice Scalia did articulate a specific holding: an officer can terminate a police pursuit when the pursuit places innocent individuals in danger, even if the termination presents a danger to the safety, or even the life, of the suspect.[33] Justice Ginsburg, however, read the Court's opinion as based upon the very particular facts and circumstances of this case.[34] Justice Breyer, however, found that the majority articulated an absolute rule, but in his view, the constitutionality of a high-speed chase should be more fact-dependant than the majority's per se rule allows, finding it "too absolute."[35] Here are two Justices of the United States Supreme Court, and each is reading the same decision differently.

Justice Stevens, the sole dissenter, argued strongly that the Court improperly decided this case on an issue of fact which should have been left to a jury.[36] Very sarcastically, he referred to the other Justices as "[m]y colleagues on the jury."[37] Justice Stevens reasoned that the majority usurped the function of the jury in finding that the videotape precluded a reasonable jury from adopting the plaintiff's version of the facts.[38]

This decision in *Scott v. Harris* is already being applied by

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cally invoked *Scott* to overrule *Monroe v. City of Phoenix*, which, prior to *Scott*, held that "[a]n excessive force instruction is not a substitute for a *Garner* deadly force instruction." *Id.* *See* Monroe v. City of Phoenix, 248 F.3d 851, 859 (9th Cir. 2001).

[33] *Scott*, 127 S. Ct. at 1779.

[34] *Id.* at 1779 (Ginsburg, J., concurring).

[35] *Id.* at 1781 (Breyer, J., concurring).

[36] *Id.* at 1784 (Stevens, J., dissenting).

[37] *Id.* at 1782.

[38] *Scott*, 127 S. Ct. at 1784-85.

lower courts,[39] and is making it more difficult for plaintiffs to recover on Fourth Amendment excessive force claims. It is worth noting that many high speed police pursuits do not end with a "seizure." They end with an accident, at times with an innocent pedestrian or other driver getting hurt, or worse.[40] When there is no seizure, the Fourth Amendment does not apply, and the constitutional protection that the injured party has is substantive due process.[41] Success on such a claim requires a showing that the officer's conduct "shocks the conscience,"[42] which is almost impossible to show in such a context. It requires showing that the officer acted with a purpose to harm that is not related to a valid law enforcement interest.[43]

II. PROCEDURAL ASPECTS OF SECTION 1983 LITIGATION

Like *Scott v. Harris*, *Wallace v. Kato*[44] is a Section 1983 case from the last Term decided in favor of the defendant.[45] *Wallace*, which has already been frequently cited by the lower courts,[46] addressed "procedural aspects" of Section 1983. The plaintiff claimed that he was subjected to a warrantless arrest without probable cause, in violation of the Fourth Amendment.[47] The question was when the

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[39] *See, e.g.*, *Hill*, 504 F.3d at 1324; Stackhouse v. Township of Irvington, No. 04-5964, 2007 WL 2769617, at *7 (D.N.J. Sept. 21, 2007).

[40] *See, e.g.*, Powell v. City of Mount Vernon, 644 N.Y.S.2d 766, 767 (App. Div. 2d Dep't 1996); Gachelin v. City of Phila., No. 1598, 1996 WL 1358468 (Ct. Com. Pl. 1996).

[41] *See Lewis*, 523 U.S. at 843-44.

[42] *Id.* at 846.

[43] *Id.* at 849 ("[C]onduct intended to injure in some way unjustifiable by any government interest is the sort of official action most likely to rise to the conscience-shocking level.").

[44] 127 S. Ct. 1091 (2007).

[45] *Id.* at 1100.

[46] *See, e.g.*, Fox v. DeSoto, 489 F.3d 227, 231 (6th Cir. 2007); Watts v. Epps, 475 F. Supp. 2d 1367, 1368 (N.D. Ga. 2007).

[47] *Wallace*, 127 S. Ct. at 1096-97.

claim accrued. This is a huge issue for lawyers because it may mean the difference between dismissal and litigation on the merits.

The *Wallace* Court held that the claim accrued when the arrestee was subject to legal process.[48] In other words, the claim accrued when the arrestee was brought before the magistrate and the magistrate made a finding that there was sufficient evidence to hold the arrestee for further proceedings.[49] The plaintiff argued, however, that the claim should have accrued later—when his conviction was reversed on appeal, or when the prosecutor ultimately dismissed the charges, but the Court rejected those arguments.[50] The result was, under the Court's holding, that the plaintiff's claim was untimely.[51]

There are four points of *Wallace* that are notable. The first is a very pragmatic point. This is one in a series of cases that the Supreme Court decided dealing with accrual of a civil rights claim.[52] When there are several arguable accrual dates, the Supreme Court is strongly inclined to pick the earlier date. That is very significant because it means that a plaintiff's lawyer should file the "claim" early enough to avoid dismissal on limitations grounds.

The second point is that the Court said accrual of a Section 1983 claim presents an issue of federal law, not an issue of state law.[53] As a matter of federal law, what is the standard for accrual? The Court said that the claim accrues when the plaintiff has a "com-

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[48] *Id.* at 1096.
[49] *Id.*
[50] *Id.* at 1098.
[51] *Id.* at 1100.
[52] *See, e.g.*, Chardon v. Soto, 462 U.S. 650 (1983); Delaware State Coll. v. Ricks, 449 U.S. 250 (1980).
[53] *Wallace*, 127 S. Ct. at 1095.

plete and present" cause of action.[54] What does that mean? It really begs the question: when does someone have a "complete and present" cause of action? Not only is this not helpful, but it is fairly inconsistent with what the Supreme Court has said in a number of prior cases, and what circuit courts consistently say, which is that a federal claim accrues when the plaintiff either knows or should have known of her injury.[55] That is the basis for the claim. The issue is whether *Wallace v. Kato* changed the federal accrual principle. I think not. Post-*Wallace*, courts are still saying that the correct point of accrual is when the claimant knows or should have known of the injury.[56]

The third point is that to determine when a party has a present and complete Section 1983 cause of action, a court should look to common law analogies.[57] The closest common law analogy in this case is the common law tort of false imprisonment based upon the claim of detention without legal process.[58] Under common law, a claim of detention without legal process accrues at the time process was issued.[59] That explains why the claim in *Wallace* accrued when the magistrate issued process.

The fourth and final point about this case addresses the doctrine of *Heck v. Humphrey*. This doctrine provides that when a Sec-

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[54] *Id.*

[55] *See, e.g.*, Klehr v. A.O. Smith Co., 521 U.S. 179, 186 (1997).

[56] *See, e.g.*, *DeSoto*, 489 F.3d at 233 (finding the appropriate accrual time under federal law is when the plaintiff knows or should have known of the injury upon which the claim is based); Bartelli v. Nagy, 230 Fed. Appx. 127, 129 (3d Cir. 2007).

[57] *Wallace*, 127 S. Ct. at 1095 (citing Heck v. Humphrey, 512 U.S. 477, 483 (1994)) (explaining that when state law is not controlling in Section 1983 cases, federal rules which conform to common-law tort principles control).

[58] *Wallace*, 127 S. Ct. at 1095.

[59] *Id.* at 1096.

tion 1983 plaintiff asserts a claim that necessarily attacks the validity of a conviction, the claim is not cognizable unless and until the conviction has been overturned in some way—overturned on appeal, overturned on collateral review, or overturned by executive order.[60] This doctrine, when it is applicable, is typically a pro-defendant doctrine because the plaintiff cannot assert the Section 1983 claim until the conviction is overturned because, until then, it is not cognizable.[61]

Sometimes, the *Heck* doctrine works in the plaintiff's favor by delaying the accrual date. In *Wallace v. Kato*, the plaintiff argued that the claim was not cognizable and could not have accrued until the conviction was overturned.[62] The *Wallace* Court, however, rejected that argument because there was no conviction on the date of accrual (when the arrestee was bound for trial) which could have been subject to the *Heck* doctrine.[63] Significantly, the Court ruled that the *Heck* doctrine does not apply to *future* convictions. The bottom line is that the claim was held to be untimely.

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[60] *Heck*, 512 U.S. at 486-87.

> [T]o recover damages for allegedly unconstitutional conviction or imprisonment, or for other harm caused by actions whose unlawfulness would render a conviction or sentence invalid, a [Section] 1983 plaintiff must prove that the conviction or sentence has been reversed on direct appeal, expunged by executive order, declared invalid by a state tribunal authorized to make such determination, or called into question by a federal court's issuance of a writ of habeas corpus [under] 28 U.S.C. § 2254.

Id.

[61] *Id.* at 487.

[62] The prosecutors in *Wallace* dropped the charges against the plaintiff on April 10, 2002, and the plaintiff argued that the statute of limitations for his claim did not accrue until that date. *See Wallace*, 127 S. Ct. at 1094. The Court, however, rejected this argument, and found that the statute of limitations began to run the minute that "legal process was initiated against him." *Id.* at 1096.

[63] The Court dismissed this as a "bizarre extension of *Heck*," and explained that if a plaintiff should file a claim for false arrest before conviction, the district court has the power to stay the civil action until the criminal case, or likelihood thereof, is terminated. *Id.* at 1098.

Jones v. Bock[64] was a somewhat surprising Section 1983 case because it dealt with the requirement, under the Prison Litigation Reform Act ("PLRA"),[65] that prisoners challenging conditions of confinement must exhaust their administrative remedies and because the plaintiffs won.[66] The purpose of the PLRA, which was very explicitly articulated by Congress, was to cut down on prisoner litigation.[67] The reason that *Jones v. Bock* was surprising was that the Court had found in favor of the government in all three prior decisions that interpreted the PLRA exhaustion requirement.[68]

In one case, the Court said that prisoners have to satisfy the exhaustion requirement even if they seek money damages, which are not available administratively.[69] In addition, the Court ruled that prisoners must exhaust administrative remedies even when asserting excessive force claims.[70] The Court also held that exhausting administrative remedies means exhausting remedies in compliance with the procedural aspects of the state's administrative remedy; a prisoner must file within the time set by the prison system, and the contents

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[64] 127 S. Ct. 910 (2007).

[65] The Prison Litigation Reform Act of 1995 sought to deter voluminous prisoner complaints by mandating an early judicial screening as well as requiring prisoners to exhaust prison grievance procedures before filing suit in federal court. *See* Prison Litigation Reform Act of 1995, 42 U.S.C.A. § 1997e(a) (West 2003).

[66] *Bock*, 127 S. Ct. at 915.

[67] The PLRA was passed partially on the finding that in 1978 alone, the district court judges were swamped with over 10,000 prisoner suits. *See* S. REP. NO. 96-416, at 34 (1979), *as reprinted in* 1980 U.S.C.C.A.N. 787, 816.

[68] *See* Woodford v. Ngo, 126 S. Ct. 2378, 2387 (2006) (denying a prisoner's claim for failure to first exhaust all administrative procedures); Porter v. Nussle, 534 U.S. 516, 532 (2002) (denying a prisoner's claim for assault and battery on same grounds); Booth v. Churner, 532 U.S. 731, 741 (2001) (denying a prisoner's Eighth Amendment claim of cruel and unusual punishment on same grounds).

[69] *See Booth*, 532 U.S. at 740-41.

[70] *See Porter*, 534 U.S. at 532.

must accord with the state's requirements.[71]

In *Jones v. Bock*, however, the Court ruled favorably on two issues for the prisoner. One is that the prisoner need not plead compliance with the exhaustion requirement.[72] Instead, it is an affirmative defense that the state has the burden of raising. The second ruling was that if you have a prisoner who asserts two claims, *A* and *B*, and the prisoner exhausted administrative remedies on claim *A*, but failed to do so on claim *B*, the court may still adjudicate the merits of claim *A*.[73] It is another way of saying the Court rejected a total exhaustion rule.

III. SECTION 1983 LITIGATION AND ATTORNEYS' FEES

The third and final category of discussion involves attorneys' fees. Attorneys' fees are an extremely important aspect of Section 1983 because they often provide the financial motivation for attorneys to bring these cases. Under the fee shifting provision of Section 1988,[74] prevailing plaintiffs are entitled to attorneys' fees almost as a matter of course, with limited exceptions under special circumstances.[75]

The key issue, though, is what makes the plaintiff a prevailing party. There is a lot of decisional law on this. The Supreme Court

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[71] *Id.*

[72] *Jones*, 127 S. Ct. at 921.

[73] The Court reasoned that finding an implied total exhaustion rule in the PLRA would only encourage prisoners to file multiple suits and circumvent the Act's main purpose, which is to limit and condense the amount of prisoner suits. *Id.* at 925.

[74] 42 U.S.C.A. § 1988(b) (West 2003).

[75] Section 1988(b) gives the court discretion to award attorneys' fees in all cases, except in actions commenced by the United States, and in actions against judicial officers not found to have acted clearly in excess of their jurisdiction. *Id.*

last faced this issue in 2001 in *Buckhannon Board and Care Home, Inc. v. West Virginia Department of Health and Human Resources*,[76] where the Court's very restrictive definition of prevailing party required the plaintiff to obtain either a judgment on the merits or a consent decree.[77] The Court rejected the catalyst theory of attorneys' fees.[78] In other words, although the litigation may have served as a catalyst, prompting the defendant to take the action that the plaintiff is seeking, this does not qualify the plaintiff as a prevailing party.

Last Term, in *Sole v. Wyner*,[79] the Court reviewed another aspect of the meaning of "prevailing party." The Court held that if a plaintiff in federal court obtains a preliminary injunction, but the ultimate decision on the merits is in favor of the defendant, the plaintiff is not a prevailing party.[80] This was another way of saying that the preliminary injunction was only temporary.

In *Wyner*, the plaintiffs' goal was to hold a nude antiwar peace rally on a beach in Florida on Valentine's Day. They had one little obstacle; Florida law requires the wearing of bathing suits.[81] They convinced the district judge to issue a preliminary injunction

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[76] 532 U.S. 598 (2001).

[77] *Buckhannon*, 532 U.S. at 604.

[78] *Id.* at 605. The Court found that under the catalyst theory, an award of attorneys' fees could be made even "where there is no judicially sanctioned change in the legal relationship of the parties." *Id.* A defendant's voluntary alteration of conduct does not give rise to the "necessary judicial *imprimatur* on the change." *Id.*

[79] 127 S. Ct. 2188 (2007).

[80] *Wyner*, 127 S. Ct. at 2196. The Court explained that being granted a preliminary injunction but prevailing with a judgment on the merits is like " '[winning] a battle, but [losing] the war.' " *Id.* (quoting Watson v. County of Riverside, 300 F.3d 1092, 1096 (9th Cir. 2002)).

[81] FLA. ADMIN. CODE ANN. r. 62D-2.014(7)(b) (2005) provides: "In every area of a park including bathing areas no individual shall expose the human, male or female genitals, pubic area, the entire buttocks or female breast below the top of the nipple, with less than a fully opaque covering."

that entitled them to hold the rally.[82] Therefore, they accomplished the purpose of the litigation. But when it came to the final ruling on the merits, the district judge found that there was nothing unconstitutional about the Florida statute, so the plaintiffs were not entitled to attorneys' fees.[83]

The decision, however, leaves open the issue of whether a Section 1983 plaintiff who obtains a preliminary injunction, but never litigates the matter to a final determination on the merits afterwards is a prevailing party. For example, is a plaintiff who obtains a preliminary injunction a prevailing party when the case subsequently settles or is rendered moot?

[82] *See* Wyner v. Struhs, 254 F. Supp. 2d 1297, 1304 (S.D. Fla. 2003) (granting plaintiff's request for preliminary injunction).

[83] *Wyner*, 127 S. Ct. at 2196.