

2002

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### Recommended Citation

18 Touro L. Rev. 641 (2002)

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## NEW ISSUES ARISING UNDER SECTION 1983

*Martin A. Schwartz*<sup>1</sup>

We have held this program for so many years partly because the United States Supreme Court has rendered a truly extraordinary number of decisions dealing with so many facets of Section 1983 litigation.<sup>2</sup> The Supreme Court decisional law itself is very extensive, but there always seems to be a new issue waiting in the wings. Hence, my theme for this discussion is that there is always a new issue. Take the issue presented to the Seventh Circuit recently in a case entitled *Dye v. Wargo*.<sup>3</sup> *Dye* raised the issue of whether *Frei* could be sued under Section 1983.<sup>4</sup> You might ask, well, who is *Frei*? *Frei* is a police dog, and the Seventh Circuit was asked to decide whether *Frei*, who was named as a

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<sup>2</sup> 42 U.S.C. § 1983 (2000), which provides in part:

Every person who, under color of any statute, ordinance, 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. . . .

<sup>3</sup> 253 F.3d 296 (7th Cir. 2001).

<sup>4</sup> *Id.* at 299.

defendant in this case, was a "person" who could be sued under Section 1983.

The Seventh Circuit held that police dogs are not persons that can be sued under Section 1983, but their handlers are.<sup>5</sup> The Seventh Circuit opined that there would be some serious problems in holding that Frei could be sued as a person under Section 1983.<sup>6</sup> There would be issues concerning service of process.<sup>7</sup> Was there a valid retainer agreement?<sup>8</sup> The right to overtime pay under the Federal Fair Labor Standards Act would be an issue, and there also is a question of qualified immunity.<sup>9</sup> If Frei could be sued under Section 1983, would the relevant qualified immunity issue become, would a reasonable dog under the circumstances have known that his conduct violated the plaintiff's constitutional rights?<sup>10</sup>

Those are the issues that the Seventh Circuit identified, but other issues might arise. For instance, can a police dog engage in state action? Does Frei's alert to his handler constitute hearsay?<sup>11</sup> If Frei was named as a defendant, would the alert constitute an admission? Is Frei a form of property under the due process clause

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<sup>5</sup> *Id.* at 300.

<sup>6</sup> *Id.* at 299. The court went on to state:

A suit against a dog poses a whole host . . . of problems. Was Frei [the dog] served with process? Did he retain as his lawyer, Lynn E. Kalamaros, who purports to represent all three defendants? Was Frei offered the right of self-representation under 28 U.S.C. § 1654? What relief does Dye seek from the dog - Frei's awards perhaps? Could Frei claim qualified immunity? If a reasonable person in the defendant's position would not have understood that what he was doing violated the Constitution, damages are unavailable. Must we then ask whether a reasonable dog in Frei's position should have understood that he was violating Dye's constitutional rights?

*Id.*; 28 U.S.C. § 1654 (1994) states: "In all courts of the United States the parties may plead and conduct their own cases personally or by counsel, by the rules of such courts, respectively, are permitted to manage and conduct causes therein."

<sup>7</sup> *Dye*, 253 F.3d at 299.

<sup>8</sup> *Id.*

<sup>9</sup> *Id.*; see also 29 U.S.C. § 202 *et seq.* (2000).

<sup>10</sup> *Dye*, 253 F.3d at 299.

<sup>11</sup> This statement would not be hearsay because under the Federal Rules of Evidence, an out-of-court declarant must be a "person." See FED. R. EVID. 801.

of the Fourteenth Amendment? There is a First Circuit case that held that a pet raccoon was not a form of property, because the law of that particular jurisdiction made it illegal to possess a raccoon.<sup>12</sup>

The United States Supreme Court decided a broad array of questions dealing with Section 1983 last term, ranging from the question of state action, to attorneys' fees, to questions dealing with procedural due process, prisoners' rights, and the application of qualified immunity in excessive force cases.

## I. STATE ACTION

State action is a threshold question because without state action there can be no Fourteenth Amendment claim, and without a Fourteenth Amendment claim, there is no Section 1983 claim for relief. The state action decision of last term was *Brentwood Academy v. Tennessee School Athletic Association*.<sup>13</sup> In a five to four decision, written by Justice Souter, the Court held that the defendant Athletic Association was engaged in state action because its members consisted of virtually all of the public schools in the state of Tennessee.<sup>14</sup> Given the make-up of the association, there was an almost overlapping identity between the state public schools and the association.<sup>15</sup> The association carried out a regulatory function that the state itself otherwise would have carried out, and this regulatory function was performed overwhelmingly by state officials.<sup>16</sup> The dominant rationale of the decision was that state action was present because of the state's pervasive entwinement with the operations of the association.<sup>17</sup>

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<sup>12</sup> *Bilida v. McCleod*, 211 F.3d 166 (1st Cir. 2000).

<sup>13</sup> 531 U.S. 288 (2001).

<sup>14</sup> *Id.* at 291.

<sup>15</sup> *Id.* at 299-300.

<sup>16</sup> *Id.*

<sup>17</sup> *Id.* at 302. The Court stated:

The entwinement down from the State Board is therefore unmistakable, just as the entwinement up from the member public schools is overwhelming. Entwinement will support a conclusion that an ostensibly private organization ought to be charged with a public character and judged by constitutional standards; entwinement to the degree shown here, requires it.

*Id.*

In finding state action in *Brentwood Academy*, the Court distinguished its earlier decision in *National Collegiate Athletic Association v. Tarkanian*,<sup>18</sup> on the ground that the NCAA was a nationwide association that did not exercise the power of a particular state; rather, the NCAA was a national organization of colleges and universities.<sup>19</sup> Perhaps, more importantly, the NCAA included in its membership large numbers of private colleges and universities. I think the result in *Brentwood Academy* is correct. The Athletic Association in *Brentwood Academy* came very close to being a governmental agency without actually being one, considering the make-up of the association, the officials of the association, and the nature of the function carried out by the association.

Even though I believe the result in *Brentwood Academy* is correct, there are several troubling analytical problems with the Court's decision. First of all, I find it somewhat troubling that, on these facts, four justices would vote to find no state action. These justices emphasized the private nature of the association.<sup>20</sup> Therefore, in future state action cases, where the state involvement is not as pervasive, the decision in *Brentwood Academy* could create difficulty for plaintiff's lawyers. I also think there are problems with the way the decision was written, and with its consistency with prior decisional law. At one point, early in the decision, Justice Souter wrote that state action is a question that is determined on a case-by-case, fact intensive basis; that there is no rigid formulation, and that it is necessary to look at all the circumstances of the particular case.<sup>21</sup> However, just a year earlier, in *American Manufacturers Mutual Insurance Co. v. Sullivan*,<sup>22</sup> Chief Justice Rehnquist, writing for the Court, identified two state action doctrines.<sup>23</sup> He referred to the public function doctrine, which asks the question of whether the private entity is engaged in a function that is historically, traditionally, and

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<sup>18</sup> 488 U.S. 179 (1988).

<sup>19</sup> *Brentwood Academy*, 531 U.S. at 297-98.

<sup>20</sup> *Id.* at 305 (Thomas, J., dissenting, joined by Chief Justice Rehnquist, Justices Scalia and Kennedy).

<sup>21</sup> *Id.* at 295-96.

<sup>22</sup> 526 U.S. 40, 58 (1999) (finding that a private insurer reviewing state worker's compensation claims is not a state actor).

<sup>23</sup> *Id.* at 49.

exclusively governmental in nature.<sup>24</sup> He also referred to the close nexus state action test, which asks the question of whether the state had ordered, coerced or at least significantly encouraged the private activity.<sup>25</sup>

If one looks at the Supreme Court state action decisional law, two other lines of state action doctrines can be identified. There is a joint action or joint participation doctrine.<sup>26</sup> There is also, whatever is left of it, a symbiotic relationship test.<sup>27</sup> Just a year ago, at this program, Erwin Chemerinsky<sup>28</sup> and I had a mini-debate; a fairly congenial debate, I might add, but we debated whether there were two state action tests, as Erwin thought, or whether there were four state action tests, as I thought. The question is: What does one say now? Does one say that there are, to follow Erwin's theory, maybe three state action tests; two plus pervasive entwinement?<sup>29</sup> Or if you follow my analysis of the decisions, are there five state action tests? Or maybe it is more accurate to say that there are no state action tests. In addition, I believe the dissent in *Brentwood Academy* was quite correct in pointing out that the majority was derelict in failing to provide any type of definition of pervasive entwinement.<sup>30</sup>

I find it odd that just a year after the Court in *American Manufacturers* was so derogatory and critical of the earlier

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<sup>24</sup> *Id.* at 50.

<sup>25</sup> *Id.* at 52.

<sup>26</sup> See *Adickes v. S.H. Kress & Co.*, 398 U.S. 144 (1970) (explaining that a private person who conspires with state officials can be liable under § 1983; "To act "under color" of law does not require that the accused be an officer of the State. It is enough that he is a willful participant in joint activity with the State or its agents," (quoting *United States v. Price*, 383 U.S. 787, 794 (1966))).

<sup>27</sup> See, e.g., *Burton v. Wilmington Parking Auth.*, 365 U.S. 715, 722-24 (1961) (holding that due to the special facts and circumstance of the Delaware law, under the symbiotic relationship test the restaurant's conduct constituted state action).

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<sup>29</sup> See *Brentwood Academy*, 531 U.S. at 295.

<sup>30</sup> *Brentwood Academy*, 531 U.S. at 314 (Thomas, J., dissenting).

decision in *Burton v. Wilmington Parking Authority*<sup>31</sup> for its vague state action language, that the Court would now render another state action decision that adopts a new theory of state action, pervasive entwinement, that is equally ambiguous and vague.

The reality is that if one looks at the range of United States Supreme Court decisions dealing with the question of state action, there are two lines of decisions. There is a group of decisions, and most decisions fall into this category of cases, which apply what I would call a type of structured approach.<sup>32</sup> These cases employ a state action test or series of tests, and they apply the facts of the case to the particular issue before the Court.<sup>33</sup> There is a second line of state action decisions, such as *Brentwood Academy*, which are more ad hoc in nature.<sup>34</sup> The second line of cases examines the totality of the circumstances, rather than employ particular tests.<sup>35</sup> Given these two lines of state action decisions, one never knows how the next state action decision from the Supreme Court will be decided. It certainly puts litigators and lower court judges in a very difficult position.

There are unlimited numbers of other state action questions that the United States Supreme Court has yet to decide. For example, there is the important unresolved question of whether a private prison corporation is engaged in state action.<sup>36</sup>

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<sup>31</sup> *Burton*, 365 U.S. at 715.

<sup>32</sup> *See, e.g.*, *Blum v. Yaretsky*, 457 U.S. 991, 1004-05 (1982). The Court, applying more structured tests, held that a private entity's actions will only be deemed state action when the state has either "exercised coercive power or has provided such significant encouragement, either overt or covert, that the choice must in law be deemed to be that of the State." *Id.*

<sup>33</sup> *See, e.g.*, *Burton*, 365 U.S. at 722.

<sup>34</sup> *See, e.g.*, *Brentwood Academy*, 531 U.S. at 288.

<sup>35</sup> *See id.* at 295.

<sup>36</sup> *See* *Corr. Serv. Corp. v. Malesko*, 534 U.S. 61, 63 (2001) (refusing to extend the *Bivens* doctrine to a private halfway house that housed federal prisoners); *Richardson v. McKnight*, 521 U.S. 399, 401 (1997) (holding that prison guards who are employees of a private prison management firm are not entitled to qualified immunity from suit for alleged violations of 42 U.S.C. § 1983). *See also* *Street v. Corr. Corp. of Am.*, 102 F.3d 810, 814 (6th Cir. 1996) (holding that the "'public function test' requires that the private entity exercise powers which are traditionally exclusively reserved to the state" and that the defendant private prison corporation and individual defendant prison guards were state actors "in that they were performing the 'traditional state function' of operating a prison.") (citing *Hicks v. Frey* 992 F.2d 1450, 1458 (6th Cir. 1993)); *Giron v.*

## II. PROCEDURAL DUE PROCESS

The issue of procedural due process presents an interesting question when a dispute arises between the government and a governmental contractor. *Lujan v. G & G Fire Sprinklers*<sup>37</sup> involved a California statute that regulates the relationships between the State of California and its contractors, and between the contractors and its subcontractors.<sup>38</sup> The statute provides that if the subcontractor is in violation of state law, such as a state law setting forth a minimum wage requirement, the State of California is authorized to withhold payments due to the contractor.<sup>39</sup> The contractor, in turn, is authorized to withhold payments due to the subcontractor.<sup>40</sup> That is exactly what happened in *Lujan*. The case came to the United States Supreme Court because the contractor had withheld payments that the subcontractor claimed were due and owing under the subcontract.<sup>41</sup> The subcontractor claimed that since it was not paid under the contract, and was not given an opportunity to be heard, it was deprived of procedural due process.<sup>42</sup> The Ninth Circuit agreed with that contention.<sup>43</sup> Here is a useful rule of thumb: if the Supreme Court grants certiorari in a civil rights case in which the Ninth Circuit ruled for the plaintiff, the overwhelmingly likelihood is that the decision will be reversed. True to form, that is exactly what happened.

It was a short opinion and an easy reversal. It is an opinion, which from the standpoint of a law school professor, is a model of issue avoidance. There were some sticky questions in this case that the Court avoided answering. For instance, there was a question as to whether the contractor's withholding of payments

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Corr. Corp. of Am., 14 F. Supp. 2d 1245, 1250 (D.N.M. 1998) (holding that the government function doctrine applies in New Mexico when the state delegates the running of a prison to a private contractor and that the defendant prison guard was a state actor).

<sup>37</sup> 532 U.S. 189 (2001).

<sup>38</sup> *Id.* at 191.

<sup>39</sup> *Id.* (citing CAL. LAB. CODE ANN. § 1727 (West Supp. 2001)).

<sup>40</sup> *Id.*

<sup>41</sup> *Id.*

<sup>42</sup> *Lujan*, 532 U.S. at 193.

<sup>43</sup> *G & G Sprinklers v. Bradshaw*, 204 F.3d 941, 943 (9th Cir. 2000).

constituted state action. The Court assumed that it did, but did not decide the question.<sup>44</sup> Another question was whether the subcontractor was deprived of a protected property interest. Again, the Court assumed there was a deprivation of property,<sup>45</sup> but did not decide this question either.

The Court held that there was no violation of procedural due process because the subcontractor could bring suit in state court for breach of contract either against the State of California or against the contractor.<sup>46</sup> The Court held that an action for breach of contract would provide an adequate remedy and satisfies procedural due process.<sup>47</sup> The subcontractor was not satisfied with this remedy because a contract action in state court would likely take a very long time to litigate. The Supreme Court said it did not care about the delay.<sup>48</sup> The Court said that a breach of contract action is the ordinary remedy in this context.<sup>49</sup>

The Court stated that the subcontractor was not being denied any present entitlement, but only payment he contended was due under the contract.<sup>50</sup> I have no idea what that means. I asked Professor Erwin Chemerinsky over the summer (I think of Erwin as knowing everything), however, he was similarly puzzled. I cannot make any sense of it at all: The subcontractor is claiming payment under the contract.

I suspect that the rationale for the decision, which is not articulated by the Supreme Court, but had been set forth in several lower court opinions, is that the Court did not want an ordinary breach of contract claim turned into a Section 1983 constitutional claim. The Court essentially stated that this is a breach of contract claim, so the subcontractor's remedy is to bring suit in state court under state law for breach of contract.<sup>51</sup>

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<sup>44</sup> *Lujan*, 532 U.S. at 195.

<sup>45</sup> *Id.* at 198.

<sup>46</sup> *Id.* at 197.

<sup>48</sup> *Id.* at 198.

<sup>48</sup> *Id.*

<sup>49</sup> *Lujan*, 532 U.S. at 197.

<sup>50</sup> *Id.* at 196.

<sup>51</sup> *Id.* at 197.

### III. PRISONERS' RIGHTS

The third issue I will discuss concerns a prisoner's claim for damages for constitutional violations. Another rule of thumb is that if the Supreme Court grants certiorari in a prisoners' rights case, it is probably not going to be decided favorably for the prisoners. That happened twice last term. The first case was *Shaw v. Murphy*.<sup>52</sup> The Supreme Court held that prisoners do not have a First Amendment<sup>53</sup> right to give legal advice to fellow prisoners, and if the prison authorities seek disciplinary action against a prisoner for giving such legal advice, the only constitutional limitation is that the action by the prison official must be reasonably related to a legitimate penological interest.<sup>54</sup> Now, you know how that standard usually plays out. It is highly deferential to prison officials.

The second prisoner case, *Booth v. Churner*,<sup>55</sup> dealt with the exhaustion requirement of the Prison Litigation Reform Act ("PLRA").<sup>56</sup> In Section 1983 cases, the general rule is that administrative remedies do not have to be exhausted in order for the plaintiff to commence suit. However, the PLRA does require that prisoners exhaust their administrative remedies when seeking to challenge the conditions of confinement.<sup>57</sup> In *Booth*, the Supreme Court held that this exhaustion requirement applies when the prisoner is seeking monetary relief, even if monetary relief is not available administratively.<sup>58</sup> There is a follow up PLRA exhaustion case before the Supreme Court this term that comes out of the Second Circuit, *Porter v. Nussle*.<sup>59</sup> This case raised the question of whether a prisoner's excessive force claim against a

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<sup>52</sup> 532 U.S. 223 (2001).

<sup>53</sup> U.S. CONST. amend. I, which provides in pertinent part: "Congress shall make no law . . . abridging the freedom of speech."

<sup>54</sup> *Shaw*, 532 U.S. at 225 (citing *Turner v. Safley*, 482 U.S. 78, 96 (1987)).

<sup>55</sup> 532 U.S. 731 (2001).

<sup>56</sup> Prison Litigation Reform Act of 1995, codified at 42 U.S.C. § 1997e (a) (2000).

<sup>57</sup> *Booth*, 532 U.S. at 733-34.

<sup>58</sup> *Id.* at 741 n.6.

<sup>59</sup> 534 U.S. 516 (2002).

prison guard is to be characterized as a challenge to prison condition requiring the exhaustion of administrative remedies.<sup>60</sup>

There was a split among the circuits on this issue. The Second Circuit in *Nussle* held that because the challenge was not to prison conditions, (emphasis on the plural), but a challenge to a prison condition, exhaustion was not required.<sup>61</sup> The Supreme Court reversed the Second Circuit and held that the exhaustion requirement applies to prisoner excessive force claims.<sup>62</sup>

#### IV. QUALIFIED IMMUNITY

In *Saucier v. Katz*,<sup>63</sup> the United States Supreme Court held that a police officer who is charged with using excessive force in violation of the Fourth Amendment,<sup>64</sup> either when making an arrest or conducting an investigatory stop, is entitled to assert the defense of qualified immunity.<sup>65</sup> In order to understand the issue and the holding, it may be helpful to think of this as a puzzle. The first part of the puzzle is that when it is alleged that a police officer used excessive force during an arrest or investigatory stop, the test under the Fourth Amendment is whether the police officer's use of force was objectively reasonable.<sup>66</sup> In other words, given all the circumstances facing the officer, was this the type of force that an objectively reasonable police officer could have used under the circumstances? This Fourth Amendment test gives leeway and deference to the judgment of the police officer.<sup>67</sup> The police officer gets the benefit of the doubt under this test. That is the first piece of the puzzle.

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<sup>60</sup> *Id.* at 985.

<sup>61</sup> *Nussle v. Willette*, 224 F.3d 95, 105-06 (2d Cir. 2000), *rev'd* 534 U.S. 516 (2002).

<sup>62</sup> *Nussle*, 534 U.S. at 531.

<sup>63</sup> 533 U.S. 194 (2001).

<sup>64</sup> U.S. CONST. amend. IV provides in pertinent part: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated."

<sup>65</sup> *Saucier*, 533 U.S. at 209.

<sup>66</sup> *Id.* at 205 (referring to the holding in *Graham v. Connor*, 490 U.S. 386 (1989)).

<sup>67</sup> *Id.*

The other piece of the puzzle is qualified immunity, which is a defense that is generally entitled to be asserted by state and local officials who carry out executive and administrative functions.<sup>68</sup> The heart of qualified immunity asks whether the defendant official violated clearly established federal law.<sup>69</sup> But that test itself is a test of objective reasonableness.<sup>70</sup> The idea is that an official who acted in an unconstitutional manner, but did not violate clearly established constitutional law, acted in an objectively reasonable fashion and is protected by qualified immunity. Conversely, an official who violated clearly established federal law acted in an objectively unreasonable fashion, and is not protected by qualified immunity.

When you put the pieces of the puzzle together, the issue then becomes, is it possible for a police officer, who used force that violated the Fourth Amendment, which was objectively unreasonable for Fourth Amendment purposes, to nevertheless be protected by qualified immunity? Can an officer act unreasonably for Fourth Amendment purposes, but objectively reasonably for qualified immunity purposes? If you turn the issues around, the question becomes, is it possible for the officer to act reasonably for qualified immunity purposes even though the officer acted unreasonably for Fourth Amendment purposes?

The United States Supreme Court held, yes, it is possible.<sup>71</sup> That means a police officer's use of force could be found by a federal court to be reasonably unreasonable. It was reasonable for qualified immunity purposes, though unreasonable for purposes of the Fourth Amendment. It is not the way we normally think out our problems in our lives and in our relations with other people. We normally do not say to people we are close to, "I know you treated me unreasonably, but I understand that you were reasonable in the unreasonable treatment." We do not usually evaluate things that way.

The idea here under *Saucier*, is that the officer is given two levels of reasonableness protection, one under the Fourth Amendment, and the other under qualified immunity. The

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<sup>68</sup> *Saucier*, 533 U.S. at 199.

<sup>69</sup> *Id.*

<sup>70</sup> *Id.*

<sup>71</sup> *Id.* at 206.

Supreme Court is of the view that a police officer's use of force that turns out to be unconstitutional under the Fourth Amendment may reflect a reasonable mistake, either in evaluating the facts or in evaluating the state of the law.<sup>72</sup>

It is definitely semantically awkward to think of an official as acting reasonably unreasonable. I do not think, however, that the decision is going to have great impact in terms of the way the immunity defense is going to play out in a very large percentage of cases. In the truly egregious brutality cases, the qualified immunity defense is not going to help the police officer. In the close cases, at least most of the close cases, the police officer will get the benefit of the doubt anyway under the Fourth Amendment. There may be a narrow range of cases in which the police officer's use of force is found to violate the Fourth Amendment, but because it is a close case, qualified immunity will tip the case in favor of the officer. I do not think there are a large number of these types of cases.

The decision may be important, however, because it places pressure on district court judges to try to dismiss excessive force claims against police officers early in the litigation. But, on a summary judgment qualified immunity motion, if district court judges do their jobs correctly, this should not be an important factor, because excessive force cases usually have sharp factual underlying disputes. The plaintiff claims, "I was just minding my business; I was whistling some patriotic song and the officer shot me in the leg." The officer responds, "No, the plaintiff was not whistling a patriotic song; the plaintiff was cursing, threatening, lunging at me, and had a knife." It seems to me that neither the Fourth Amendment nor the qualified immunity issues can be resolved until the relevant facts are resolved.

The immunity issue the Supreme Court did not decide in *Saucier* was: what should a district court judge do when a summary judgment qualified immunity motion is made and there are disputed issues of fact that have to be resolved in order to decide the qualified immunity defense? We will be talking about that, I am sure, throughout the program.

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<sup>72</sup> *Id.*

## V. ATTORNEY'S FEES

In *Buckhannon Board and Care Home v. West Virginia*,<sup>73</sup> the Supreme Court held that in order for the plaintiff to be a prevailing party under a federal fee shifting statute, the plaintiff must secure either a favorable judgment on the merits or a consent decree.<sup>74</sup> This means that a showing by the plaintiff that the lawsuit served as a catalyst that prompted the defendant to take some type of corrective action, giving the plaintiff what the plaintiff was seeking, will not qualify the plaintiff as a prevailing party. For instance, if the government defendant granted the plaintiff a public benefit or some type of license, this will not qualify the plaintiff as a prevailing party, even though the lawsuit accomplished its goal.

*Buckhannon* was brought under the Americans with Disabilities Act<sup>75</sup> and the Federal Fair Housing Act.<sup>76</sup> However, the Court's decision<sup>77</sup> made it quite clear that its rejection of the catalyst doctrine applies to civil rights fee shifting statutes across the board, including the fee shifting statute that applies to Section 1983 cases.<sup>78</sup>

The question of who is a prevailing party should be strictly a question of statutory interpretation and congressional intent. But, look at the lineup of the justices in this five to four decision. For the majority, batting first, the author, Chief Justice Rehnquist (it is World Series time, so I did it as a lineup). Batting second, Justice O'Connor; batting third, Justice Scalia; batting fourth Justice Kennedy; and batting fifth, Justice Thomas. The dissenters are the so-called more moderate justices of the Court: Justices Ginsberg, Stevens, Souter, and Breyer. If you think about that alignment of the justices, we have often seen that before in the federalism cases, and in *Bush v. Gore*.<sup>79</sup> Perhaps the particular alignment of the

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<sup>73</sup> 532 U.S. 598 (2001).

<sup>74</sup> *Id.* at 600.

<sup>75</sup> Pub. L. No. 101-336, 104 Stat. 327, codified at 42 U.S.C. § 12101 – 12213 (2000).

<sup>76</sup> Pub. L. No. 100-430, 102 Stat. 1619, codified at 42 U.S.C. § 3601 – 3631 (2000).

<sup>77</sup> *Buckhannon*, 532 U.S. at 610.

<sup>78</sup> 42 U.S.C. § 1988 (b).

<sup>79</sup> 531 U.S. 98 (2000).

justices was mere coincidence, but one has to wonder: was the *Buckhannon* decision truly based upon congressional intent? Further, the decision effectively reversed the holdings of no less than eleven circuit courts of appeals. The catalyst theory had been rejected by only one circuit, the Fourth Circuit Court of Appeals.<sup>80</sup> It could be another coincidence that only the most conservative circuit in the country had rejected the catalyst doctrine.

Putting these coincidences aside, I think it was a very damaging decision for civil rights plaintiffs. After all, a civil rights plaintiff can litigate a case for many years, and on the eve of trial, the defendant's attorney can say, here is your license, here are your benefits, and then seek to have the case dismissed as moot. The plaintiff, who argues that her case served as the catalyst that brought about the result she was seeking, will be denied fees, which could be very substantial.

In a recently reported decision, a prisoner's rights case, the plaintiff's attorney got \$470,000 in attorneys' fees.<sup>81</sup> In a short opinion, the circuit court said those fees were awarded under the catalyst doctrine, but since the catalyst doctrine is no longer good law, the fee award must be reversed.<sup>82</sup>

The Court in *Buckhannon* stated in dicta that the plaintiff will not be able to obtain fees even if the plaintiff obtains significant relief pursuant to a private settlement agreement.<sup>83</sup> Even that will not qualify the plaintiff as a prevailing party.

*Buckhannon* is bad law because the purpose of the civil rights fee-shifting statute is to encourage the enforcement of the civil rights laws by private parties. This decision retards that purpose. It is bad logic. I am having difficulty understanding why, for example, in my license illustration, it is less valuable for the plaintiff to actually have the license than it is to have a judgment declaring that the plaintiff is entitled to the license. I remember a saying; "A bird in hand is worth two in the bush."<sup>84</sup>

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<sup>80</sup> *Buckhannon*, 532 U.S. at 627 (referring to S-1 & S-2 v. State Bd. of Educ., 21 F.3d 49, 51 (4th Cir. 1994)).

<sup>81</sup> *Johnson v. Rodriguez*, 260 F.3d 493, 495 (5th Cir. 2001).

<sup>82</sup> *Id.*

<sup>83</sup> *Buckhannon*, 532 U.S. at 694 n.7.

<sup>84</sup> The American Heritage Dictionary of Idioms, available at <http://www.xrefer.com/entry/629583> (last visited January 7, 2003) An ancient

Why is it that if the plaintiff has a license, the plaintiff is not a prevailing party but, if the plaintiff has a judgment declaring the plaintiff is entitled to the license, the plaintiff is a prevailing party? It is also a decision that is bad for the administration of justice, because it will make it harder to settle cases.

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Greek proverb meaning "a benefit available now is more valuable than some possibly larger future benefit."

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