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OHIO MUNICIPAL ATTORNEYS ASSOCIATION

"CASE LAW UPDATE"

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Employment

***Sandifer v. U.S. Steel Corp.*, 134 S.Ct. 870 (2014)**

Union steelworkers brought an action claiming that their employer violated the Fair Labor Standards Act (FLSA) by failing to compensate them for time spent donning and doffing protective gear. §203(o) of the FLSA allows employers to exclude from the compensable workday time spent "changing clothes" or washing at the beginning or end of a shift. The Court found that only three of the twelve articles of apparel cited by the union – safety glasses, earplugs, and a respirator – were "safety gear" and the time spent donning these items was minimal compared to the time spent donning and doffing the nine articles of "clothing". Accordingly, compensation for this time could be left to the collective bargaining process under §203(o).

***University of Texas Southwestern Medical Center v. Nassar* __ S.Ct. __ (2013); 2013 WL 3155234**

The US Supreme Court held that a Plaintiff claiming retaliation under Title VII must show that the adverse job action would not have occurred *but for* a retaliatory motive in contrast to status-based claims where the Plaintiff is merely required to show that discrimination was *a* motivating factor.

***Vance v. Ball State University* __ S.Ct. __ (2013); 2013 WL 3155228**

Under Title VII, a person is a "supervisor" for purposes of imposing vicarious liability only where the employer has given authority to the "supervisor" to take tangible employment actions against the victim. This means the authority to effect a significant change in employment status such as hiring, firing, failing to promote, reassignments or decisions causing a significant change in benefits.

***Coleman v. Court of Appeals of Maryland*, 132 S.Ct. 1327 (2012)**

A former employee brought an action against the Court of Appeals of Maryland alleging violations of the FMLA. The U.S. Supreme Court noted that Congress specifically abrogated the sovereign immunity of states from suits for money damages relative to the "family care provisions" of the FMLA (29 U.S.C. §2612(A)(1)(A)(B) and (C)). However, Congress failed to do so with respect to the "self care provision" of the Act (29 U.S.C. §2612(A)(1)(D)). The Court found that Congress did not satisfy the Enforcement Clause of the 14th Amendment by identifying a pattern of constitutional violations that would justify the abrogation of the immunity. Therefore, a state is still immune from suit for money damages relative to a claimed violation of the FMLA's self care provision.

***Keith v. Cty. of Oakland*, 703 F.3d 918 (6th Cir.2013)**

A deaf lifeguard applicant brought an action against the County alleging that its failure to hire him violated the Americans with Disabilities Act and the Rehabilitation Act. The lifeguard was offered employment by the County pending a physical. The doctor who performed the physical refused to pass Plaintiff because he was deaf and the County revoked its offer of employment. The Sixth Circuit held that genuine issues of material fact existed as to whether Plaintiff was otherwise qualified to be a lifeguard with or without reasonable

accommodation. The Court relied on the fact that the County never conducted an individualized inquiry to determine whether Plaintiff's disability or other condition disqualified him from being a lifeguard as required by the ADA. The Court found that reasonable minds could differ regarding whether the Plaintiff was "otherwise qualified" because he could perform the essential communication functions of a lifeguard. The Court further held that the modifications the County would need to make to its policies to accommodate Plaintiff could be found objectively reasonable. Finally, the Court ruled that the ADA's requirement that an employer engage in the interactive process with a disabled employee requires communication and a good-faith exploration of possible accommodations. The County failed to contact the Plaintiff or otherwise interact with him before revoking their offer of employment to him, despite knowledge that his deafness would require accommodation.

***Bibee v. Gen. Revenue Corp.*, 2013-Ohio-1753, 991 N.E.2d 298 (1st Dist.)**

A former employee brought an action against her former employer alleging claims for disability discrimination under state law and the Americans with Disabilities Act. The First District Court of Appeals held that Plaintiff failed to sufficiently prove that she was disabled because she did not show that she was substantially limited in the major life activities of performing manual tasks and working. Plaintiff alleged in her affidavit that her arthritis prevented her from grasping items for more than short periods of time, that she could not twist lids off bottles, that she had great difficulty closing her hands on smaller objects and that typing and writing were difficult and painful. The First District held that the allegations, even if true, did not show that Plaintiff was limited in performing tasks of central importance to most people's daily lives for purposes of the major life activity of manual tasks. Furthermore, her affidavit did not show that her condition disqualified her from a class or broad range of jobs for purposes of the major life activity of working.

***Garrison v. Nippert*, 2013-Ohio-1965 (1st Dist.)**

In a hostile environment gender discrimination case, the First District Court of Appeals affirmed a trial court finding that the Plaintiff's return for a second round of employment negated any possible inference that the alleged misconduct was sufficiently severe and pervasive to affect the terms, conditions or privileges of Plaintiff's employment.

***Hulsmeyer v. Hospice of Southwest Ohio, Inc.*, 2013-Ohio-4147 (1st Dist.)**

A former hospice employee alleged that she was fired for reporting suspected abuse of a patient to the patient's nursing facility, the hospice service that provided care to the patient and the patient's family. The employee filed a claim alleging illegal retaliation under R.C. 3721.24 and a common law wrongful discharge claim. The First District Court of Appeals held that the employee need not report suspected abuse or neglect of a nursing home resident directly to the Ohio Director of Health in order to state a claim for retaliation under R.C. 3721.24. However, the Court held that the trial court's dismissal of Plaintiff's wrongful discharge claim was proper because the remedies provided by R.C. 3721.24 were sufficient to vindicate the public policies at stake.

***Pearl v. Wyoming*, 2013-Ohio-2723 (1st Dist.)**

Plaintiffs were terminated after they were found to be consuming alcohol at the front desk of a city event held for middle school students. Plaintiffs filed claims of gender, disability and race discrimination against the City Manager claiming that employees outside their protected classes were treated differently for substantially similar behavior. The First District rejected this argument. The Court found that many of the comparators cited by Plaintiffs were raised by inadmissible hearsay testimony. The three admissible cited by Plaintiffs were insufficient because the comparators did not have the same supervisor as the Plaintiffs and were engaged in different activities (using marijuana outside of work, consuming a beer outside of work and consuming alcohol at a staff party while underage.)

***Schmidt v. Village of Newtown*, 2012-Ohio-890 (1st Dist.)**

A terminated employee raised multiple claims including the assertion that the progressive discipline process contained in the Village's employment manual created a legitimate expectation of continued employment protected by the Due Process Clause of the 14th Amendment. Since the manual stated that the disciplinary process was merely a guideline and the employer could begin discipline at any point, even termination, it did not create an implied contract term that would alter the employee's at will status and he had no due process rights. The court further found that the Open Meetings Act did not provide the employee with rights to notice of any meetings where his termination would be considered and that he was an exempt executive employee for purposes of the Fair Labor Standards Act.

***Baron v. Dayton Civ. Serv. Bd.*, 2013-Ohio-4723 (2nd Dist.)**

The Second District Court of Appeals held that a reviewing court does not have discretion to modify a termination to a suspension where a city charter and personnel policies call for mandatory forfeiture of an employee's position on violation of a dual employment prohibition.

***Griffin v. Springfield Regional Med. Ctr.*, 2013-Ohio-1819 (2nd Dist.)**

A nurse was terminated after the hospital at which she was employed determined that she padded her timesheets. The nurse filed an age discrimination claim alleging that the reasons for her termination were a pretext. The Court held that an offer by Plaintiff's supervisor to allow her to retire in lieu of termination was not direct evidence of discriminatory intent. Furthermore, Plaintiff was not able to make out a prima facie case because she did not demonstrate that substantially younger nurses were treated more favorably.

***Bower v. Henry Cty. Hosp.*, 2013-Ohio-2844 (3rd Dist.)**

A physician employed by a third party contractor brought an action against a hospital when the contractor terminated her after the hospital requested that she no longer be placed there. The Third District Court of Appeals held that the physician was not employed by the hospital for purposes of the statutes governing gender discrimination. The Court reviewed criteria for determining the existence of an employment relationship and noted that the hospital had very little control over the manner in which the physician practiced medicine, the

contractor rather than the hospital paid the physician's salary and benefits, the employment agreement signed by the physician identified the contractor as the physician's employer and the contract stated specifically that nothing in the agreement was intended to create an employer-employee relationship.

***Zwiebel v. Plastipak Packaging, Inc.*, 2013-Ohio-3785 (3rd Dist)**

The employer terminated an at-will employee because he left his position on the factory line to use the restroom without ensuring that someone was there to cover for him. The Third District Court of Appeals held that "it might appear that Zwiebel's termination was unfair, arbitrary, extreme, and perhaps, unwarranted. However, there is nothing that precludes an employer from terminating an at-will employee under those circumstances. What we do not find in the record are any facts that would support his contention that his termination was in contravention of public policy or that the firing would jeopardize the public policy requiring employers to provide adequate restroom facilities and allow employees to use them, subject to reasonable restrictions."

***Arnett v. Precision Strip, Inc.*, 2012-Ohio-2693 (3rd Dist.)**

A terminated employee brought suit alleging that his former employer violated the anti-retaliation provisions in the Workers' Compensation Act and Ohio public policy. Because of statute of limitations issues the employee dismissed the statutory retaliation claim and proceeded with the common law public policy claim asserting that his termination violated the public policy against retaliation expressed in the Workers' Compensation Act. The Third District Court of Appeals held that the statutory remedies found in R.C. §4123.90 are the sole potential source of relief. The court stated "Since the General Assembly specifically enacted a statutory cause of action for employees, like Arnett, alleging a termination of employment in retaliation for pursuing workers' compensation benefits, the General Assembly has supplanted the common-law on that issue."

***Caiazza v. Mercy Med. Ctr.*, 2014-Ohio-2290 (5th Dist.)**

Plaintiff and Defendant were former employees of Mercy Medical Center who regularly took smoke breaks together. On one such smoke break, Defendant offered Plaintiff the opportunity to touch her breast in exchange for a narcotic pill. Plaintiff informed Defendant that he did not have any narcotics, but Defendant allowed Plaintiff to touch her breast anyway. Subsequently, Plaintiff informed Defendant that he loved his wife and they could not continue their relationship. Defendant reported Plaintiff for touching her breast. Plaintiff was forced to resign, was charged criminally and later pled no contest to a reduced charge. Defendant received no discipline at all.

Plaintiff sued Defendant, Mercy Medical Center, and a number of other individuals for breach of duty, aiding and abetting, discrimination, harassment and retaliation. The Fifth District found that a genuine issue of material fact existed as to whether Plaintiff received disparate treatment. First, the Court accepted as true Plaintiff's version of events, which included the fact that the sexual encounter was consensual. Second, Plaintiff was clocked out at the time and Defendant was not. Further, the incident took place off hospital grounds. Accordingly the Court found that disparate treatment could be found and that summary judgment should be denied to the hospital on the discrimination claim.

The Court also held that the employee handbook and code of conduct did not modify the employment-at-will agreement and guarantee employment. Therefore, the mere assertion that a more thorough investigation was warranted was not sufficient to overcome Ohio's employment-at-will doctrine. Accordingly the breach of duty claim was dismissed.

***Hambuechen v. 221 Mkt. N., Inc.*, 2013-Ohio-3717 (5th Dist.)**

An employer filed a petition in the Stark County Common Pleas Court pursuant to R.C. 4112.06 seeking judicial review of an adverse Ohio Civil Rights Commission determination. The petition was filed within 30 days of the OCRC decision as required by the statute but the trial court dismissed the case because it was not served by the Clerk of Courts within that timeframe. The Court of Appeals, finding a lack of persuasive authority on the matter, referred to Civil Rule 3 and reversed the trial court finding that the employer had one year from the date petition was filed to serve parties through the Clerk of Courts.

***Price v. Kaiser Aluminum Fabricated Prods., L.L.C.*, 2013-Ohio-2420 (5th Dist.)**

Plaintiff was terminated at age sixty for violating his employer's computer use policy and filed a complaint alleging wrongful discharge, age discrimination, breach of contract and promissory estoppel. The Fifth District held that brief and innocuous inquiries about appellant's age, how long he had been with the company and when he planned on retiring were not direct evidence of age discrimination. Furthermore, even though Plaintiff may have established a prima facie case of age discrimination, he did not show that the non-discriminatory reasons for his termination were pretexts. The Court also held that language in Plaintiff's employment agreement to the effect that he would remain employed "for such a length of time as shall be mutually agreeable" did not overcome the presumption of at will employment. Finally, the Court held that the plant manager's statement that he "relied upon" Plaintiff was not a promise of job security for purposes of establishing a promissory estoppel claim.

***Winland v. Strasburg-Franklin Local School Dist. Bd. of Edn.*, 2013-Ohio-4670 (5th Dist.)**

A former teacher sought review of the decision of the board of education to terminate him. The Fifth District Court of Appeals held that board lacked good cause to terminate a tenured teacher who viewed sexually explicit images on a school issued laptop computer while participating in a non-school related football clinic on summer break. The Court found that the teacher did not commit a criminal act in viewing the images and his actions amounted to a private act that had no impact on his professional duties as a teacher and were not hostile to the school community.

***Sims v. Village of Midvale*, 2012-Ohio-6081 (5th Dist.)**

Midvale entered into an agreement with a neighboring municipality that required Plaintiff, as a clerk for the water company, to handle 100 new customers. Plaintiff met with two members of the Board of Public Affairs and told them that she would not handle the new accounts. She shoved a pile of papers on the floor and was terminated for insubordination. Plaintiff filed suit alleging that her termination was unlawful because the village failed to follow the disciplinary process outlined in the village's employee handbook. The Court of

Appeals noted the disclaimer on top of the front page of the handbook which stated "These policies are not to be considered an employment contract for any employee." The court went on to find that the disclaimer was effective to maintain Plaintiff's status as an at-will employee and it affirmed her termination.

***Gatsios v. Timken Company*, 2012-Ohio-2875 (5th Dist.)**

An employee brought an action against his company claiming that he suffered discrimination and retaliation due to his national origin. The trial court granted summary judgment on all claims. The Court of Appeals affirmed. Plaintiff's supervisor directed a number of crude comments and insults at Plaintiff, some of which made reference to his ancestry. However, the court noted that the supervisor was abusive to many other employees regardless of their backgrounds and there was insufficient evidence to show that the behavior was motivated by Plaintiff's national origin. Furthermore, the conduct was not sufficiently severe and pervasive to amount to an actionable hostile environment. Regarding the retaliation claim, the court found that Plaintiff's increased workload after another employee transferred out of the department and counseling that he received from supervisors were not adverse employment actions.

***Gaither v. Toledo Area Regional Transit Auth.*, 2013-Ohio-3181 (6th Dist.)**

Plaintiff alleged that she was terminated in retaliation for making race and gender discrimination complaints. Plaintiff pointed out that she was fired only eight days after she complained. The Sixth District noted that there was a lack of uniformity in its decisions but nevertheless held that temporal proximity alone does not support a claim of retaliation absent other compelling evidence.

***Inskeep v. W. Res. Transit Auth.*, 2013-Ohio-897 (7th Dist.)**

An employee brought an action alleging, among other things, sexual harassment based on the fact that he was homosexual. The Seventh District Court of Appeals recognized that sexual harassment can be actionable under Ohio law if the victim alleges that he was discriminated against because of gender but not when the claim is based solely on sexual orientation. Accordingly, the Court upheld the judgment on the pleadings granted to the Defendant.

***Campolieti v. Cleveland Dept. of Pub. Safety*, 2013-Ohio-5123 (8th Dist.)**

A firefighter filed an age discrimination action against a city's Department of Public Safety after his application for a transfer to the Fire Investigation Unit was denied. The trial court entered judgment for the firefighter and awarded back pay, compensatory damages for emotional distress, attorney fees and costs. On appeal, the Department of Public Safety argued that it was not a legal entity capable of being sued. The Eighth District held that the proper defendant, the City, was adequately represented by the City Attorney and in any event the City waived the issue by not asserting it in its answer. The Court went on to affirm the judgment granted in favor of the firefighter on the merits. However, it held that Plaintiff should not have been awarded compensatory damages for emotional distress as claimants alleging age discrimination under Ohio law are limited by R.C. 4112.14(B) to reinstatement, back pay and benefits, attorney fees and costs.

***Muhammad v. Ohio Civ. Rights Comm.*, 2013-Ohio-3730 (8th Dist.)**

Appellant filed a petition for judicial review of a decision by the Ohio Civil Rights Commission. The Common Pleas Court dismissed Appellant's petition because it was not served by the Clerk of Courts within the 30-day time period set forth in R.C. 4112.06(B). The Eighth District affirmed, apparently contradicting the Fifth District in *Hambuechen, supra.*

***Alexander v. Cleveland Clinic Foundation*, 2012-Ohio-1737 (8th Dist.)**

The Ohio Supreme Court ordered the Eighth District Court of Appeals to apply the *Dohme* decision in a wrongful termination action by a police officer who was allegedly fired in retaliation for enforcing the law. The Eighth District held the clarity element does not require citation to a statute or other statement of public policy specifically governing employer-employee obligations. It further found that a citation to statutes requiring police officers to enforce the law was sufficient to fulfill the clarity requirement and that the termination of a peace officer in retaliation for enforcing the law satisfied the jeopardy element of the claim.

***Hurd v. Blossom 24 Hour We Care Ctr., Inc.*, 2012-Ohio-3465 (8th Dist.)**

An employee who was terminated for failing to follow the company's background check procedure alleged that her former employer wrongfully terminated her and violated the Fair Labor Standards Act. The employee claimed that the company's failure to provide her with holiday and vacation pay violated the Ohio Prompt Payment Act, R.C. §4113.15. The trial court granted summary judgment and the Eighth Districted affirmed. The court stated that vacation and holiday pay are not mandatory and are to be based on the "agreement" between the employer and employee. An employee's claim for failure to pay holiday or vacation pay is properly brought as a breach of contract claim and not under R.C. §4113.15.

***Karsnak v. Chess Financial Corp.*, 2012-Ohio-1359 (8th Dist.)**

An employee who was laid off as part of a reduction in force brought this action alleging age discrimination, breach of express/implied contract, retaliatory discharge, wrongful discharge in violation of public policy and fraudulent misrepresentation. The trial court granted summary judgment in favor of the Defendants on all counts. The Eighth District affirmed. The court held that suggestions that an employee retire do not amount to direct evidence of age discrimination without additional evidence showing that the person's position was being eliminated based on retirement eligibility. The court further held that Plaintiff's claim for retaliatory discharge could not logically be based on her charge of discrimination which was filed with the EEOC one day after she was terminated. Additionally, the court found that there was no common law claim for wrongful discharge based on a policy against age discrimination because the remedies provided in R.C. Chapter 4112 are adequate to address this issue and it rejected Plaintiff's interpretation of the Ohio Supreme Court's decision in *Meyer v. United Parcel Service., Inc.,* 122 Ohio St.3d 104. As to the employee's contract-based claims, the court held that no implied contract arises out of a year-end review letter outlining the employee's job description and salary for the next year where the letter specifically states that continued employment is "at will."

***Chiancone v. City of Akron,* 2014-Ohio-1500 (9th Dist.)**

Plaintiff, a probationary fire lieutenant, suffered a manic episode in which he rammed his wife's car, drove erratically on the highway causing two accidents and then evaded police. After turning himself in, the Plaintiff was sent to a psychiatric hospital and diagnosed with severe bi-polar disorder. After being charged with multiple felonies Plaintiff was placed on indefinite suspension which was eventually converted to a definite suspension of approximately five months and he failed his probation. Plaintiff brought suit alleging that two similarly situated employees of the fire department who were not disabled received more favorable treatment. The Ninth District held that the two comparators were not similarly situated to the Plaintiff. The court first held that the comparators were nonsupervisory employees while the Plaintiff was a supervisor. Second, the Plaintiff was still in his 90-day probationary period as a lieutenant and the other two employees were not. Finally, the two other employees were not indicted by a grand jury. Accordingly, the Ninth District held that the Plaintiff failed to show that similarly situated non-disabled employees were treated more favorably them him**.**

***McMillan v. Global Freight Mgt., Inc.*, 2013-Ohio-1725 (9th Dist.)**

Plaintiff filed a common law wrongful discharge claim against his former employer and alleged that the remedies available to him under the anti-retaliation provisions of the Worker's Compensation Act (R.C. 4123.90) were inadequate to compensate him for his loss. The Court of Appeals held that the Plaintiff was limited to the remedies available for wrongful discharge in R.C. 4123.90, reinstatement with back pay.

***Weisfeld v. PASCO, Inc.*, 2013-Ohio-1528 (9th Dist.)**

The Court held that the administrative employee exemption to the Fair Labor Standards Act applied to a director of technology who exercised discretion in purchasing, procurement, research, personnel management and the administration of computer networks, internet usage and databases. Accordingly, the Act's overtime pay requirements did not apply.

***Munroe Falls v. State Emp. Relations Bd.*, 2012-Ohio-6212 (9th Dist.)**

The City of Munroe Falls and the Ohio Police Benevolent Association engaged in negotiations for a successor agreement between the city and the Munroe Falls' Police Sergeant Bargaining Unit. Negotiations ceased when the city refused to recognize the bargaining unit because it consisted of only one member. The city passed a resolution determining the pay of the police sergeant and then refused to hear the sergeant's grievances related to holiday pay and health insurance premiums. The OPBA filed an unfair labor practice charge against the city with SERB. SERB issued an opinion finding that the city violated R.C. §4117.11(A)(1) and (A)(5). The city appealed to the court of common pleas which affirmed the SERB decision.

On appeal the city argued that the bargaining unit abated as a matter of law because it had only one member and the trial court therefore erred in upholding SERB's decision. The Ninth District Court of Appeals rejected that argument. In doing so, it acknowledged that R.C. §4117.01(G) refers to "representatives" and "employees" in the plural. However, the court pointed out that basic rules of statutory construction provide that "the singular

includes the plural and the plural includes the singular." Moreover, the court found that the term "to bargain collectively" as used in the statute does not mean that the bargaining unit must contain more than one employee.

***Pintagro v. Sagamore Hills Twp.*, 2012-Ohio-2284 (9th Dist.)**

A former employee alleged, among other things, that her termination was in retaliation for complaints made about a co-employee's behavior. There were no allegations or evidence that the Plaintiff was opposing any unlawful gender or age based discrimination in making her complaints. The Ninth District Court of Appeals refused to extend the protections against retaliation contained in R.C. §4112.02(I) to complaints that an employee may have against a co-employee in a situation where the complaints do not arise from discriminatory conduct.

***Jenkins v. Giesecke & Devrient America, Inc.*, 2012-Ohio-4136 (9th Dist.)**

The Ninth District held that two events allegedly motivated by race that occurred eight years apart could not rise to the level of a hostile work environment.

***Chapa v. Genpak*, 2014-Ohio-897 (10th Dist.)**

Plaintiff was employed by Defendant Genpak as a machine operator. Defendant Ferguson was a quality control supervisor for Genpak but never directly supervised Plaintiff. During Plaintiff's employment, a production supervisor opening became available but the hiring manager determined that Plaintiff was not the most qualified applicant due to his excessive absenteeism, lack of dependability, lack of supervisory experience and failure to attend management classes. Plaintiff filed suit against Genpak and Ferguson alleging race and national origin discrimination, hostile work environment/harassment, retaliation and negligent supervision and retention. Specifically, Plaintiff alleged that Defendant Ferguson called him racially derogatory names, that he was not promoted due to his race and that Genpak should have known that Defendant Ferguson had a propensity to engage in harassment.

The Tenth District first held that a hostile work environment did not exist. While the court found that Ferguson frequently referred to Plaintiff in racially insensitive terms, it determined that this conduct was not sufficiently severe or pervasive to constitute a hostile work environment. The court relied on the fact that Plaintiff had four siblings apply to the business who were all hired, that Plaintiff rarely if ever complained to his actual supervisor about the comments, that the racially charged term "wetback" was only used one time out of the Plaintiff's presence and that the Plaintiff frequently socialized with Defendant Ferguson. Additionally, the Court found that Genpak did not have nor should it have had specific knowledge of the harassment as management was only informed of a fake "green card" that was given to Plaintiff and a vague comment made in reference to a television show. The court also rejected Plaintiff's direct discrimination claim relating to his non-promotion because the racially insensitive comments relied upon by Plaintiff were made by an employee who had no control or influence over the promotion decision.

The court also rejected Plaintiff's negligent retention and supervision claims. It found that Ferguson's single reference to an African American in racially derogatory terms did not make it foreseeable that Ferguson would

engage in harassment of another employee. Finally, the court held that the routine name calling that Plaintiff complained of only occurred a few times in front of supervisors and managers over the course of two to three years and was not sufficiently severe to cause a reasonably prudent person to anticipate that an injury was likely to result.

***Dalton v. Ohio Dept. Rehab. & Corr.*, 2014-Ohio-2658 (10th Dist.)**

Plaintiff was employed by the Ohio Department of Rehabilitation and Correction as a Psychologist Assistant 2. Upon earning his license, Plaintiff was informed that he could no longer be a psychologist assistant but instead needed to practice under his own license. At this point Plaintiff began exhibiting strange and paranoid behavior. His supervising doctor requested an independent medical examination (IME) to determine whether Plaintiff had a mental problem that would impair his ability to care for patients. The Plaintiff appeared for the IME but he refused to take certain tests claiming that "They would only use it against me!" Plaintiff was diagnosed with a number of different conditions but the doctor performing the IME indicated that he could not make an accurate DSM-IV diagnosis due Plaintiff's refusal to take some of the tests. Plaintiff was terminated for failing submit to the tests. Plaintiff grieved his termination and the arbitrator ultimately found just cause for termination. The Tenth District held that the Plaintiff failed to establish a prima facie case of perceived disability discrimination as the Plaintiff's only allegation was that he was sent for an IME. The Court stated that merely sending an employee to an IME is not evidence that the employer regarded the employee as disabled.

***Smith v. Superior Prod., L.L.C.*, 2014-Ohio-1961 (10th Dist.)**

Plaintiff was employed as a production supervisor at an automotive plant. Plaintiff alleged that his direct supervisor was a racist and at one point he complained about that supervisor's racism. Nine days later, Plaintiff was transferred to a different plant across the street and was demoted. When the economy entered a recession, Plaintiff was the 8th employee laid off out of 60 and the first employee out of the production department. Some months later, the employer began rehiring many of the recently terminated employees based on their skills and the needs of the company. Plaintiff was not rehired. A jury returned a verdict in favor of Plaintiff on his claims of race discrimination, retaliation, and hostile work environment. Defendant filed a post-trial motion seeking JNOV or, in the alternative, a new trial. The trial court found that there was insufficient evidence to support Plaintiff's claims. It granted Defendants JNOV and conditionally granted a new trial. The Tenth District Court of Appeals reversed the JNOV holding that there was plenty of evidence to support all three claims. It further found that the trial judge's determination that the damage award was excessive was not an abuse of discretion. The court remanded the case for re-instatement of the judgment imposing liability and for further consideration of damages.

***Bowditch v. Mettler Toledo*, 2013-Ohio-4206 (10th Dist.)**

The Tenth District Court of Appeals held that the age difference between a plaintiff and a comparator is to be measured at the time each received the adverse job action under scrutiny. The Court further held that it is an issue of fact for a jury to determine whether an age difference of six years or more is substantial. Because the

Plaintiff raised material issues of fact on all other elements of the prima facie case, the summary judgment granted to the employer by the trial court was reversed.

***DeGarmo v. Worthington City Schools Bd. of Edn.*, 2013-Ohio-2518 (10th Dist.)**

The Tenth District Court of Appeals held that an employee who misrepresents or inaccurately reports an incident is not similarly situated to a comparator who does not for purposes of establishing a prima facie case of gender discrimination.

***Elam v. Carcorp, Inc.*, 2013-Ohio-1635 (10th Dist.)**

The Tenth District Court of Appeals held that Ohio has no clear public policy that prevents an employer from terminating an employee for filing a lawsuit against a former employer. Accordingly, Plaintiff's common law wrongful termination claim failed.

***Mittler v. OhioHealth Corp.*, 2013-Ohio-1634 (10th Dist.)**

Plaintiff, a nurse for 21 years, filed an age discrimination claim after she was terminated from her job in a NICU for HIPPA violations and mistakenly administering eye drops to a newborn. The Tenth District Court of Appeals held that the Plaintiff failed to establish several elements of a prima facie case. First of all, Plaintiff failed to show that she was replaced by a substantially younger person or that her termination permitted the retention of a younger person because her duties were distributed among her former co-workers, several of whom were older than Plaintiff. Furthermore, Plaintiff failed to show that persons outside the protected class were afforded better treatment because one of her comparators was similar in age to Plaintiff and neither comparator was similarly situated because they owned up to the mistakes that Plaintiff denied or covered up. Finally, the Court found that the Plaintiff failed to establish that the Defendant's reasons for her termination were pretexts because they were factually true, they were sufficient to warrant termination and they actually were the reason that she was terminated.

***Moore v. Impact Community Action*, 2013-Ohio-3215 (10th Dist.)**

The Tenth District re-affirmed that the Plaintiff in a common law wrongful termination case must establish the existence of a clear public policy expressed in state or federal constitutions, statutes or administrative regulations. The Court rejected Plaintiff's argument that statements from a time clock policy contained in an employee handbook can suffice for this purpose.

***Morrissette v. DFS Servs., L.L.C.*, 2013-Ohio-4336 (10th Dist.)**

Plaintiff was terminated from his job and brought an action alleging age discrimination, breach of contract, promissory estoppel and wrongful termination in violation of public policy. Plaintiff was terminated after a co-worker complained that he made racially derogatory comments, joked about having a weapon in the office and displayed a small noose in his cubicle in violation of the company's Code of Conduct. Plaintiff claimed that the allegations against him were false and a pretext to justify his termination. The Tenth District held that the real

issue was whether the employer acted with discriminatory animus. Therefore, the reliability of the complaints was irrelevant as long as the employer reasonably believed them to be true. Because Plaintiff presented no evidence that the employer disbelieved the complaints or that it was acting based on some other motive, Plaintiff failed to make out his prima facie case.

***Tilley v. Dublin*, 2013-Ohio-4930 (10th Dist.)**

Plaintiff was terminated by his municipal employer for using racially offensive words toward an African-American coworker. He filed an age discrimination claim for his termination and the city's refusal to rehire him. The Tenth District held that Plaintiff was not comparable to four younger maintenance workers who were terminated for racially derogatory remarks but later reinstated. The labor union arbitrated the cases of the other four workers but refused to do so for Plaintiff. Two of the workers were reinstated pursuant to arbitration awards and the city entered settlements with other two workers because of potentially negative outcomes to arbitration.

***Vossman v. AirNet Sys.*, 2013-Ohio-4675 (10th Dist.)**

A pilot was under investigation by his employer due to complaints by other employees that he dangerously decreased airspeeds on two occasions. The pilot disobeyed a directive to cease communicating with his coworkers concerning the complaints. Even though the pilot established a prima facie case of age discrimination against his former employer, he failed to establish that his termination for disobeying the non-contact order was a pretext.

***Camp v. Star Leasing Co.*, 2012-Ohio 3650 (10th Dist.)**

A terminated employee brought suit against her former employer alleging sexual harassment, disability discrimination based on a failure to accommodate her depression and retaliation. The Court found that there were issues of fact concerning Plaintiff's sexual harassment claim where her supervisor required her to face him and place her hands in her lap when addressing him and he would put his hand in her face and tell her to stop talking. However, it affirmed the trial court's order granting summary judgment for the Defendants on the accommodation and retaliation claims. The court held that isolated bouts of depression that did not manifest themselves with sufficient frequency or duration to substantially limit a major life activity did not require accommodation under the Ohio Administrative Code and that Plaintiff had waived her retaliation claim by failing to pursue it in the trial court.

***Dautartas v. Abbott Laboratories*, 2012-Ohio-1709 (10th Dist.)**

A former employee brought suit alleging age discrimination, retaliation, invasion of privacy and vicarious liability claims. The Tenth District Court of Appeals affirmed the trial court's decision to grant summary judgment on all counts. The employee's retaliation claim was based on a termination that occurred two months after the alleged protected activity. The Court reasoned that "where some time elapses between the employer's discovery of a protected activity and the subsequent adverse employment action, the employee must produce other evidence of retaliatory conduct to establish causality." The Plaintiff's invasion of privacy claim based

upon the employer inadvertently posting her corrective action plan on the company calendar was rejected pursuant previous case law holding that "disclosure of facts or events about an individual's professional or business life…is not a disclosure of private facts for purposes of the publicity tort."

***Warden v. Dept. of Natural Resources*, 2012-Ohio-3854 (Ohio Court of Claims); 2014-Ohio-35 (10th Dist.)**

The Ohio Court of Claims concluded that an ODNR policy prohibiting the rehiring of retired individuals would have a disparate impact upon those over the age of 40 given that the rules applicable to retirement of public employees. The court rejected the employer's "double dipping" public relations argument and found for the employee. The Tenth District Court of Appeals reversed. The Court first held that evidence of a memorandum restricting the re-hiring of retired employees did not mention age and testimony of a manager that stated it was the policy of the ODNR to not re-hire retired employees was not direct evidence of age discrimination. Second, the Court held that Plaintiff failed to prove that ODNR's reason for hit hiring him (its policy designed to prevent double dipping) was pretext for intentional age discrimination. Third, the Court found that the Plaintiff failed to plead, litigate or prove a disparate impact claim because his complaint contained no allegations that ODNR had a facially neutral employment practice that fell more harshly on a protected class than others. Finally, the Court held that a plaintiff cannot make a disparate impact claim when the policy impacts only one person rather than a protected class. See also: ***Dunaway v. University of Cincinnati, infra***

***Dunaway v. University of Cincinnati*, 2012-Ohio-1248 (Ohio Court of Claims)**

The University was sued by a retired employee for age discrimination after the it declined to rehire him for an open position. The Plaintiff claimed that the University's policy against rehiring retirees illegally discriminated against him because of his age and had a disparate impact on similarly situated applicants. The University contended that the policy served legitimate non-discriminatory purposes including 1) the prevention of morale problems caused by supervisors retiring and returning to the same positions 2) issues caused by supervisory employees reporting to their former subordinates and 3) avoiding the perceived unfairness of employees collecting both a salary and a pension. The court agreed and dismissed Plaintiff's claims.

***Spencer v. Central State University*, 2012-Ohio-1245 (Ohio Court of Claims)**

The court held that an employee was not "replaced" by a substantially younger employee for purposes of an age discrimination claim where the employee's position was eliminated and a new position created in its place entailed more than just "minor cosmetic changes".

Federal Civil Rights Issues

First Amendment

***Lane v. Franks*, 2014 WL 2765285, (US S. Ct.)**

The former director of a community college's program for underprivileged youth discovered that a state representative was on the payroll for the program that he directed. He also discovered that the state representative had never done any work for the program. The state representative was subsequently prosecuted in federal court and the director was subpoenaed to testify at the trial. The director was later terminated from his job and brought a §1983 claim against president of the college. The Supreme Court determined that the testimony at the criminal trial was clearly speech on a matter of public concern engaged in as a citizen rather than as a public employee. Therefore the speech was protected under the First Amendment. However, the Court found that the right was not clearly established at the time the director was fired and, therefore, the college president was entitled to qualified good faith immunity.

***McCullen v. Coakley* 2014 WL 2882079 (US S. Ct.)**

Massachusetts made it a crime to knowingly stand on a public way or sidewalk within 35 feet of an entrance or driveway to a reproductive health care facility (defined as a place where abortions are offered or performed other than within or on the grounds of a hospital). The Supreme Court in a 9-0 decision struck down the law. The Court found that the law was content-neutral even though it distinguished between facilities at which the conduct was prohibited, it exempted clinic employees acting within the scope of their duties and it may have had a disproportionate impact on abortion protesters. However, the Court found that the areas involved (public sidewalks and rights of way) were traditional public fora requiring that the measures be narrowly tailored to serve a significant government interest. The Court found that the expressed purposes of protecting public safety and access to reproductive care facilities were substantial governmental interests. However, the Court also found that the statute was not narrowly tailored because other laws addressed most of the problems at which the statute was aimed and the Commonwealth had not shown that it seriously undertook to address the issues by less intrusive means.

***Town of Greece, N.Y. v. Galloway*, 134 S.Ct. 1811 (2014)**

Plaintiffs brought a civil rights action alleging that a town's practice of opening its board meetings with a prayer led by members of the local clergy violated the Establishment Clause of the First Amendment. The Supreme Court held that the Establishment Clause was not violated. The Court relied on the fact that this practice is consistent with the tradition long followed by Congress and state legislatures, that the town did not discriminate against minority faiths in determining who may offer a prayer and that the custom did not coerce participation by non-adherents. The Court noted that a number of the prayers contained references to beliefs or doctrines followed by various denominations but held that the government cannot mandate a civic religion stifling all but the most generic references to the sacred any more that it could establish an approved religious orthodoxy. The Court found that a challenge to the content of the prayers would not likely be successful absent a pattern over time of prayers that denigrate, proselytize or betray an impermissible governmental purpose.

***Wood v. Moss*, 134 S.Ct. 2056 (2014)**

A group of protesters were attempting to get close to President George W. Bush when he made a spur of the moment decision to eat on the outdoor patio of a restaurant. Two Secret Service agents forced the protesters to move farther away than a competing group of supporters. The protesters brought a §1983 action against the agents alleging that the agents violated their First Amendment rights. The Supreme Court ruled that at the time of the incident, it was not clearly established that the agents bore an obligation to ensure that groups with different viewpoints were at comparable locations to the President at all times. Additionally, the Court held that the agents had a valid security reason to request or order protesters to move away since they were within view and weapons range of the patio while the supporters were not. Accordingly, the Court held that the agents were entitled to qualified immunity

***Reichle v. Howards*, 132 S.Ct. 2088 (2012)**

Following the dismissal of criminal charges of harassment for comments made to Vice President Richard Cheney, an arrestee filed §1983 and *Bivens* claims against several Secret Service agents alleging violations of his First and Fourth Amendment rights. The Tenth Circuit found that a retaliatory arrest violates the First Amendment even if supported by probable cause and it held that the agents were entitled to qualified immunity on the Fourth Amendment issues but not on the First Amendment claims. The Supreme Court reversed and granted the agents qualified immunity on both constitutional claims. The Court noted that it has never held that an arrest with probable cause can serve as the basis for a First Amendment retaliation claim. It also pointed out that it found that a *prosecution* with probable cause cannot support a First Amendment retaliation claim. *Hartman v. Moore,* 547 U.S. 250 (2006). Accordingly, the Court held that the agents were entitled to qualified immunity because, at the time of the arrest, it was not clearly established that an arrest supported by probable cause could give rise to a violation of the arrestee's First Amendment Rights.

***State v. Romage* 138 Ohio St.3d 390 (2014)**

A Defendant asked a child under 14 years old if he would carry some boxes to his apartment in return for some money. This request allegedly violated Ohio's child enticement statute, R.C. 2905.05(A). The Defendant challenged the constitutionality of the statute arguing that it was overbroad. The Supreme Court of Ohio found that the statute, as written, forbade anyone other than the legal custodian of a child or those who have the legal custodian's express permission to solicit a child under the age of 14 to accompany the person "in any manner" for any purpose. The Ohio Supreme Court ruled that the language of the statute was overbroad and violated the First Amendment.

***Rodriguez v. Greater Dayton Regional Transit Auth.*, 2013-Ohio-3463 (2nd Dist.)**

A Deputy Director of Operations for the Greater Dayton RTA was terminated after she made certain statements in response to negotiations between the RTA and a union concerning a return to work by an employee after three violations of the RTA's text messaging policy. The Second District found that the statements were made in the Deputy Director's professional capacity rather than as a private citizen speaking on a matter of public interest and, therefore, the statements were not entitled to protection under the First Amendment.

Fourth Amendment – Excessive Force

***Plumhoff v. Rickard*, 134 S.Ct. 2012 (2014)**

A suspect was pulled over because the car he was driving only had one operating headlight. The officer asked the suspect to step out of the car and the suspect sped away. The officer and at least five other cruisers chased the suspect at high speeds through two different states. When the suspect pulled off the highway, he struck two cruisers and found himself cornered. Officers approached the suspect's car and the suspect once against stepped on the accelerator causing his car to strike and subsequently push a police cruiser. At that point, one of the officers fired three shots into the suspect's car. The suspect then reversed the car and maneuvered himself onto another street almost striking a second officer. As the suspect sped away, two other officers fired 12 shots towards the suspect's car. The suspect then lost control of the car and crashed into a building. Both the suspect and the passenger in the car died from some combination of gunshot wounds and injuries suffered in the crash. The Supreme Court ruled that the actions of the officers were reasonable as a matter of law and, consequently, they did not violate the driver's Fourth Amendment protections against the use of excessive force. The Court ruled that the driver was able to get his car moving after the initial three gunshots which proved that the threat was not over yet and thus justified the additional 12 shots. The Court specifically stated that this would be a different case had it been abundantly clear that the first round of shots had incapacitated the driver before the second round of shots occurred or if the driver had clearly given himself up.

***Tolan v. Cotton*, 134 S.Ct. 1861 (2014)**

Plaintiff was shot by police officers when he was unarmed outside his own home. He brought a §1983 action against the officers that shot him alleging excessive force. The trial court ruled that the use of force by the police officer was reasonable and granted summary judgment. On appeal the Fifth Circuit declined to decide whether the officer's actions were reasonable and instead held that the officer was entitled to qualified immunity because he did not violate a clearly established right under the Fourth Amendment. The Supreme Court reversed. In doing so, it acknowledged that the determination of whether a law is "clearly established" for qualified immunity purposes is an issue of law for the court. However, the Court found that the lower courts did not properly resolve disputed material facts in the non-movant's favor as required in all summary judgment proceedings**.**

***Bodager v. Campbell*, 2013-Ohio-4650 (4th Dist.)**

A motorist brought an action against a city and its police officers alleging a § 1983 excessive force claim under the 4th Amendment and state law claims arising out of his arrest. The Fourth District held that the force employed by police officers including pushing the motorist against his automobile, shoving the motorist to the ground and instructing a police canine to bark at the motorist were objectively reasonable and did not violate motorist's Fourth Amendment rights. The Court relied on the fact that, prior to the use of force, the motorist pushed back against the arresting officer three times and refused to surrender his free hand to be handcuffed.

Fourth Amendment – Search and Seizure

***Fernandez v. California*, 134 S.Ct. 1126 (2014)**

Police observed a suspect in a violent robbery run into an apartment building, and then heard screams coming from one of the apartments. They knocked on the apartment door and a female who appeared battered and bleeding answered the door. The officers requested that she exit the apartment so they could do a protective sweep of the premises. The petitioner came to the door and objected to the officers' presence and to any search of the apartment. The officers suspected that the petitioner had assaulted the female, and they placed him under arrest. While petitioner was in custody, the officers returned to the scene and, with the female's consent, they searched the apartment. In a previous decision the Court held that when one of the occupants of premises objects to a search, the search is impermissible without a warrant. *Georgia v. Randolph*, 547 U.S. 103 (2006). However, the Court narrowed the *Randolph* decision by stating that the joint occupant who objects to the warrantless search must actually be present in order for his/her objection to overcome the permission of the consenting occupant on the scene. Because petitioner was no longer present at the premises and because his removal from the premises was "objectively reasonable" the female occupant's consent to search the premises was valid.

***Navarette v. California*, 134 S.Ct. 1683 (2014)**

An anonymous caller telephoned the police department to say that a driver had run her off the road. Police were dispatched, found the truck and followed it for a period of time before pulling the driver over. After pulling the truck over, the officers smelled marijuana and conducted a search that turned up four large, closed bags of marijuana in the truck. The Supreme Court ruled that there was no Fourth Amendment violation in pulling the truck over based only on the tip. The Court noted that an anonymous tip alone can rarely supply reasonable suspicion for a stop. In this case, however, the Court found that the tip included sufficient indicia of reliability for it to support reasonable suspicion based on the fact that the caller described the truck and reported the license plate number, the caller had called 911 and was therefore identified by the 911 call system, the caller described a near accident and the officers located the truck shortly after the report in an area consistent with the tip. Because reasonable suspicion existed based on the tip, it was not necessary for the officers themselves to observe the truck being driven erratically.

***Riley v. California* 2014 WL 2864483 (2014)**

The Supreme Court ruled that police officers may not, without a warrant, search digital information on a cell phone seized from an individual who has been arrested. The Court left open the possibility that exigent circumstances or the imminent destruction of evidence could provide a valid warrant exception

***Bailey v. United States* 133 S.Ct. 1031 (2013).**

The Supreme Court held that officers were not entitled to detain a former occupant of premises incident to the execution of a search warrant where the occupant was confronted about one mile from the premises and five minutes after the former occupant had left. The warrant exception for detention incident to a search announced

in *Michigan v. Summers* 452 U.S. 692 (1981) must occur within the immediate vicinity of the premises being searched.

***Florida v. Harris* 133 S.Ct.1050 (2013).**

The Court held that the state is not required to present an exhaustive set of records to establish the reliability of a drug sniffing dog because that would be inconsistent with a "flexible, common-sense standard of probable cause." The Court held instead that evidence of satisfactory completion of a formal or informal certification or training program which includes testing of proficiency in locating drugs satisfies the standard in the absence of conflicting evidence.

***Stanton v. Sims*, 134 S.Ct. 3 (2013)**

The occupant of a home was injured when a police officer kicked down her front gate while pursuing a suspected misdemeanant. The occupant brought a Section 1983 action seeking damages for the officer's warrantless entry into her yard. The Supreme Court granted qualified immunity to the officer finding that there was no clearly established law indicating that hot pursuit of the suspect violated the Fourth Amendment.

***Florence v. Board of Chosen Freeholders of County of Burlington*, 132 S.Ct. 1510 (2012)**

Plaintiff was arrested on a bench warrant for a minor offense. When he was booked into two jails he was subjected to strip search procedures that were applied to all inmates who were admitted into the general populations. Plaintiff alleged violations of his Fourth and Fourteenth Amendment rights claiming that the searches were inappropriate because he was only being held on minor charges. The U.S. Supreme Court held that the searches did not violate the Fourth or Fourteenth Amendment. The Court reasoned that corrections officers have legitimate safety concerns for themselves and the general population of the jail. The degree of the offense can be a poor predictor of potential smuggling problems and, in any event, the individuals processing the prisoners do not always have all of the charging information when the person is processed. Therefore, it is not unreasonable for all inmates to be searched pursuant to a set intake process.

***Messerschmidt v. Millender*, 132 S. Ct. 1235 (2012)**

Following a report of a violent attack involving a shotgun, officers investigated and applied for a night time warrant to search the home of the suspect. The warrant authorized a search of the residence for "all" firearms and gang-related materials. The Plaintiffs filed a §1983 action against the officers alleging violations of their Fourth Amendment Rights claiming that the warrant was "overbroad". The Supreme Court held that the officers were entitled to qualified immunity because the warrant was not obviously defective on its face. The Court held that the officers had no duty to conduct a detailed comparison of the warrant application to the warrant itself to uncover any possible defects in the warrant. Therefore, the officers reasonably relied on the validity of the warrant and were entitled to qualified immunity.

***Ryburn v. Huff*, 132 S. Ct. 987 (2012)**

During the investigation of a rumor of potential school violence, officers visited the house of the suspect. During the encounter, the mother of the suspect ran into the house when asked if there were guns inside. Out of fear for their safety, two officers followed her into the house. No items were searched, nothing was taken from the home as evidence and the officers found that the rumors regarding the suspect were false. However, the parents of the suspect brought a §1983 action against the officers alleging that their entry into the house without permission or a warrant violated their Fourth Amendment rights. The officers moved for summary judgment based on qualified immunity. The Court held that the established case law could be read to permit officers to enter a residence when there is an imminent threat of violence. Under the circumstances of the case, reasonable officers could have come to the conclusion that their entry into the house did not violate the Fourth Amendment.

***U.S. v. Jones*, 132 S.Ct. 945 (2012)**

The Court held that the use of a GPS tracking device, even when the vehicle to which it was attached was traveling upon public roadways, was a search subject to the warrant requirements of the Fourth Amendment.

***Bradley v. Reno*, 749 F.3d 553 (6th Cir. 2014)**

Officers arrested a truck driver after determining that he was driving while intoxicated. The truck driver moved to suppress the results of a breathalyzer test claiming there was no probable cause for his arrest. The trial court found probable cause and overruled the motion to suppress. At the subsequent trial a jury acquitted the driver. The truck driver then filed suit in federal court under §1983 for an alleged arrest without probable cause in violation of his Fourth and Fourteenth Amendment rights. The defendants asserted that issue preclusion prohibited the truck driver from re-litigating the prior determination of probable cause in his §1983 action. The court recognized that issue preclusion is governed by state law and that Ohio law was unsettled as to whether a decision denying a motion to suppress can trigger issue preclusion. The court noted that un-appealable decisions generally cannot support issue preclusion. Because the decision on the motion to suppress was not subject to an appeal, the court predicted that Ohio law would not permit it to serve as the basis for issue preclusion and it allowed the case to go forward.

***State v. Hobbs*, 2012-Ohio-3886 (Supreme Court)**

The Defendant pled no contest to a burglary charge then appealed her conviction claiming that the arrest warrant under which she was taken into custody was not issued by a neutral and detached magistrate. The warrant was issued by a deputy clerk of courts who was also employed by the arresting agency as a deputy sheriff. The Supreme Court of Ohio held that the warrant was invalid. However, since no evidence was secured under the warrant, the appeal was dismissed.

***State v. Coleman*, 2012-Ohio-6042 (2nd Dist.)**

Police received an anonymous tip that the Defendant was running a marijuana growing operation at his house in Harrison Township which was within the territorial jurisdiction of the Vandalia Municipal Court. One of the

investigating officers obtained an order from the Dayton Municipal Court to obtain the Defendant's utility records housed at DP&L headquarters in Dayton. Defendant argued that the Dayton Municipal Court did not have jurisdiction to issue the order. The trial court overruled the defendant's motion to suppress and the court of appeals affirmed finding that the Dayton Municipal Court's territorial jurisdiction extended to the records that were maintained in Dayton.

***State v. Moten,* 2012-Ohio-6046 (2nd Dist.)**

Defendant was convicted of aggravated robbery and kidnapping with firearm specifications. He moved to suppress evidence obtained from a cell phone that he abandoned at the scene of another crime. The motion to suppress was overruled and the Court of Appeals affirmed. Because he had abandoned the cell phone, the Defendant had no standing to object to evidence that evidence taken from the phone without a warrant.

***State v. Dulaney*, 2013-Ohio-3985 (3rd Dist.)**

The Third District Court of Appeals invalidated a warrant signed by a County Court judge authorizing the retrieval of blood samples being held at a medical center in a different county. The Court noted that a County Court judge may only issue warrants within his or her territorial jurisdiction. Because the warrant was invalid, the evidence was obtained in violation of the Fourth Amendment's protections against illegal searches and seizures. The Court then remanded the matter to the trial court so that it could consider whether suppression was appropriate.

Fifth Amendment – Liberty

***United States v. Windsor*, 133 S.Ct. 2675 (2013)**

The United States Supreme Court held that DOMA's definition of marriage was unconstitutional as a deprivation of the liberty of the person protected by the Fifth Amendment.

Fifth Amendment - Takings

***Koontz v. St. Johns River Water Management District* 2013 WL 3184628 (US S.Ct., 2013)**.

A landowner seeking to develop part of his property objected to the water district's alternate demands to reduce the size of the development and increase a conservation easement or hire a contractor to make improvements on district-owned wet lands several miles away. Florida courts held that the US Supreme Court's requirement of a nexus and rough proportionality between the government's demands and the effects of the proposed land use did not apply because the requested permits were denied and because the demand for money did not qualify as a taking. The Court rejected both of these holdings. The Court found that an extortionate demand for property impermissibly burdens protections against takings even if no property is actually exchanged. The Court further rejected the contention that monetary demands cannot be reliably distinguished from permissible property taxes.

Fifth Amendment – Self Incrimination

***Salinas v. Texas*, 133 S.Ct. 2174 (2013)**

The Court held that a prosecutor's use of a suspect's non-custodial silence in response to questions did not violate the suspect's rights against self-incrimination.

***Howes v. Fields*, 132 S.Ct. 1181 (2012)**

A prisoner was convicted based on a confession that he gave without *Miranda* warnings while incarcerated on a previous conviction. *Habeas* relief was granted by the District Court and affirmed by the Sixth Circuit. The Supreme Court reversed. The Court held that taking an incarcerated individual aside and questioning him about events that occurred outside of the jail did not automatically rise to the level of custodial interrogation. As in situations involving traditional interviews, courts must look at the totality of the circumstances and address the restrictions placed on a prisoner's movement to determine whether a "custodial interrogation" has occurred.

***State v. Graham*, 136 Ohio St.3d 125 (2013)**

The Ohio Supreme Court held that the United States Supreme Court's holding in *Garrity v. New Jersey*, 385 U.S. 493 (1967) required the trial court to suppress statements made by employees of the Ohio Department of Natural Resources during an investigation conducted by the Ohio Inspector General. The Court held that because the public employees answered questions after receiving a warning that they could be fired for failing to do so, they were improperly coerced into making the statements, and using the statements against them in a criminal proceeding was a violation of their Fifth Amendment protections against self-incrimination.

Fourteenth Amendment – Due Process

***Jones v. Norwood*, 2013-Ohio-350 (1st Dist.)**

A building inspector and a police officer involved in a program addressing blighted and nuisance properties in the city gave Plaintiff an emergency citation for "overcrowding" at 11:00 AM which required her vacate her apartment at 5:00PM on the same day without a hearing. Plaintiff sued the city, the inspector and the officer alleging a §1983 claim for violations of her 14th Amendment procedural and substantive due process rights as well as several state law tort claims.

The Court of Appeals found on an interlocutory appeal that the inspector and the officer were not entitled to qualified immunity because the order violated Plaintiff's procedural due process rights by denying her a hearing before depriving her of her property interest in the leased apartment. However, the Court found that the interest in the apartment was not a "fundamental" right protected by substantive due process and held that claim should have been dismissed.

The Court also made several rulings of note on the state law claims. First of all, it found that the city's attempt to appeal on the merits of Plaintiff's claims was improper since R.C. Sec. 2744.02(C) only permits interlocutory

appeals from denials of immunity. Secondly, the Court discussed the differences between official and individual capacity claims under state law and held that immunity under R.C. Ch. 2744 for official capacity claims must be evaluated under standards applicable to political subdivisions rather than those for employees. Finally, the Court reiterated numerous other cases holding that employees of political subdivisions are generally immune from liability for negligent acts under R.C. Sec. 2744.03(A)(6).

State Action

***Hurst v. Jobes, Henderson Assoc.* 2014-Ohio-2548 (5th Dist.)**

A former employee was convicted on child pornography charges based on materials found on his work computer. The employee subsequently sued his former employer alleging a violation of his Sixth Amendment rights because the employer accessed his work computer, found incriminating material on it and reported it to the authorities. The Fifth District noted that §1983 requires a violation of federal rights by a person acting "under color of law". Because the employer was not a state official, acting together with or obtaining significant aid from a state official and its conduct was not otherwise chargeable to the state, the employer was not acting under color of state law and the case was dismissed.

Qualified Immunity

***Filarsky v. Delia*, 132 S.Ct. 1657 (2012)**

A firefighter who was the subject of an internal investigation brought a §1983 action against, among others, a private attorney hired to assist City officials in the investigation. The District Court granted qualified immunity to the attorney but the Ninth Circuit reversed finding that qualified immunity is only available to public employees. The Court reviewed historical grants of immunity to persons performing part time work for the government at the time §1983 was enacted in the 19th century as well as modern cases describing the purposes for granting qualified immunity. The Court then reversed and held that private individuals temporarily retained by the government to carry out its work are entitled to assert qualified immunity as a defense in §1983 suits. In doing so, the Court stated, "Though not a public employee, Filarsky was retained by the City to assist in conducting an official investigation into potential wrongdoing. There is no dispute that government employees performing such work are entitled to seek the protection of qualified immunity. The Court of Appeals rejected Filarsky's claim to the protection accorded … solely because he was not a permanent, full-time employee of the City. The common law, however, did not draw such distinctions, and we see no justification for doing so under § 1983." *Id*. at 1667-1668.

Stanton v. Sims*, *supra

***McCullum v. Tepe*, 693 F. 3d 696 (6th Cir. 2012)**

An inmate committed suicide while incarcerated at the Butler County jail. The inmate's mother brought a §1983 action against jail officials and the psychiatrist who provided services at the jail. Plaintiff alleged that the psychiatrist, a private contractor, was deliberately indifferent to the inmate's serious medical needs. The

Defendants sought summary judgment based on qualified immunity. The District Court held that the psychiatrist was not entitled to qualified immunity and the Sixth Circuit affirmed. The Sixth Circuit acknowledged the Supreme Court's decision rendered months earlier in *Filarsky*. After doing so, however, it launched into a review of 19th century case law in which physicians acting on behalf of the government were held liable for malpractice. At the same time it studiously ignored *Filarsky's* historical citations to immunity being granted to part time government employees during the same era and its categorical statements indicating that private contractors performing governmental functions should be entitled to assert qualified immunity. The Circuit then denied qualified immunity to the psychiatrist.

Jones v. Norwood*, 2013-Ohio-350 (1st Dist.), *supra

Testimonial Immunity

***Rehnberg v. Paulk*, 132 S.Ct. 1497 (2012)**

The subject of a dismissed indictment brought a §1983 action against multiple individuals, including an investigator who testified in the grand jury hearing. The target alleged that the witness and others conspired to fabricate evidence against him. The witness moved for summary judgment asserting absolute immunity for the testimony. The Supreme Court held that the absolute immunity available to trial witnesses is also available to individuals giving testimony in a grand jury proceeding.

Attorney Fees

***Lefemine v. Wideman*, 133 S.Ct 9 (2012)**

A member of a religious group protesting abortion was informed by a law enforcement agency that he was not permitted to use graphic depictions in the group's demonstrations. Plaintiff filed a §1983 action against the Defendants seeking injunctive relief, nominal damages, and attorney fees under §1988 for alleged violations of his First Amendment right to free speech. The trial court found that the Plaintiff's rights were violated and issued a permanent injunction against the Defendants but denied the request for nominal damages and attorney fees. The Court of Appeals affirmed regarding the attorney fees holding that the Plaintiff was not a "prevailing party" under §1988 because the relief had not "altered the relative positions of the parties." The Supreme Court reversed, stating that injunctive and declaratory judgments will usually satisfy the test for determining who is a "prevailing party". A party prevails "when actual relief on the merits of his claim materially alters the legal relationship between the parties by modifying the defendant's behavior in a way that directly benefits the plaintiff."

Voting Rights – Federal Preemption

***Arizona v. Intertribal Council of Arizona, Inc.* 133 S.Ct. 2247 (2013).**

The National Voter Registration Act pre-empted Arizona's requirement that persons registering to vote present proof of citizenship.

Municipal Liability Issues – State Law

RC Chapter 2744

Political Subdivision

***Cunningham v. Star Academy of Toledo*, 2014-Ohio-428 (6th Dist.)**

The Sixth District Court of Appeals held that a private for-profit management company hired to run a community school was not a political subdivision under R.C. 2744.01(F). While community schools are specifically included in the term "political subdivision" as defined by the statute, the court found that for-profit management companies running community schools are not.

Governmental Functions – R.C. Sec. 2744.01(C)

***Coleman v. Portage County Engineer*, 2012-Ohio-3881 (Supreme Court)**

Homeowners brought a negligence action alleging that the County's failure to upgrade a storm sewer system resulted in damage to their property. The Common Pleas Court granted the County's motion to dismiss based on immunity under R.C. Ch. 2744. The Court of Appeals reversed in part holding that the homeowners' claim was not barred to the extent that the upgrade constituted negligent maintenance of the sewer system. The Supreme Court of Ohio held that upgrades to a sewer system constitute construction and design, an immune governmental function rather than a non-immune proprietary function.

***Evans v. Cincinnati*, 2013-Ohio-2063 (1st Dist.)**

Plaintiff tripped and fell over a broken metal pole that was formerly part of a signpost on a city sidewalk. She filed suit against the city alleging that the maintenance of the sidewalk and signpost were proprietary functions. The First District Court of Appeals disagreed holding that maintenance and regulation of sidewalks are immune governmental functions.

***Crafton v. Shriner Bldg. Co., L.L.C.*, 2013-Ohio-4236 (2nd Dist.)**

The Second District Court of Appeals held that a political subdivision was immune from liability for the placement of a sewer manhole and a fire hydrant. The Court held that immunity applied because the placement of the manhole cover, as part of a sewer system, and the placement of the fire hydrant, as part of fire protection, as well as the inspection of those items were governmental rather than proprietary functions.

***Guenther v. Springfield Twp. Trustees*, 2012-Ohio-203 (2nd Dist.)**

A family brought an action against the Township alleging that it negligently caused their basement to flood. The family claimed that the Township's design and installation of two tile pipes and a drainage ditch in a residential area amounted to the maintenance of a "sewer system", a non-immune proprietary function. The Second District found that the drainage tiles were located entirely on private property and there was no evidence that they were part of a larger system so they were not a "sewer system" under R.C. C. 2744. Furthermore, even if the improvements were considered to be a "sewer system", their design and installation were immune governmental functions rather than non-immune proprietary functions.

***State ex rel. Rohrs v. Germann*, 2013-Ohio-2497 (3rd Dist.)**

The lessees of farmland brought an action against a county engineer and county employees alleging that negligence in performance of a road improvement project caused their cropland to flood. The Third District held that the county engineer and employees were entitled to immunity. The Court found that the road improvement project amounted to the reconstruction of the road and adjoining drainage and was therefore an immune governmental function rather than a proprietary function.

***Nihiser v. Hocking Cty. Bd. of Commrs.*, 2013-Ohio-3849 (4th Dist.)**

The Fourth District Court of Appeals held that the designation of street numbers and street names was a governmental rather than a proprietary function. The court further held that the function could properly be delegated to an employee of the political subdivision.

Fields v. Bickle*, 2014-Ohio-2634 (5th Dist.), *infra

***Maluke v. Lake Township*, 2012-Ohio-3661 (5th Dist.)**

A property owner filed an action against a municipality for seizing scrap vehicles and other items that the owner allowed to accumulate on his property. The court held that the City and its employees were immune under R.C. Ch. 2744 since the declaration of a particular property as a nuisance and the process to arrive at the nuisance determination are immune government functions. The court stated: "The trial court found there were no exceptions to the immunity, and the township cannot be held civilly liable for the removal of junk vehicles after it had found the vehicles and other property were a public nuisance threatening the public health, safety, and welfare. We find no error."

Fedarko v. Cleveland*, 2014-Ohio-2531 (8th Dist.), *infra

***Everett v. Parma Hts.*, 2013-Ohio-5314 (8th Dist.)**

Plaintiffs sued the City of Parma Heights and Cuyahoga County alleging negligence and a taking after their house experienced sanitary sewer flooding. The Eighth District Court of Appeals affirmed the dismissal of the lawsuit because the problems cited by Plaintiffs' engineer related to the planning, design, construction or

reconstruction of the sewer system, all of which are immune governmental functions. The Court further affirmed the dismissal of the taking claim because Plaintiffs failed to bring the claim in the form of a petition for a writ of mandamus ordering the institution of appropriation proceedings.

***Fink v. Twentieth Century Homes, Inc.*, 2013-Ohio-4916 (8th Dist.)**

A homeowner brought an action against the City and County when a storm water outlet pipe drained into a ravine next to his property allegedly caused erosion that damaged his house. The Eighth District held that the proprietary function exception to immunity did not apply because the area surrounding the outlet pipe was not a part of the city's sewer system and but instead was a "natural drainage corridor." Even if it was considered to be part of the sewer system, the remedy for the problem was not simple maintenance (a proprietary function) but instead amounted to the construction or reconstruction of the ravine, an immune governmental function.

***Puffenberger v. Cleveland*, 2013-Ohio-4479 (8th Dist.)**

Plaintiff filed suit against city for injuries sustained when he fell down a manhole after stepping on an unsecured cover. Plaintiff claimed negligent maintenance of the manhole by the city and its employees. The Eighth District held that the maintenance of a sewer system, including the manholes, is a non-immune proprietary function. However, there was no evidence that the manhole was negligently maintained. The Court further held that the city had no actual or constructive notice of the unsecured manhole cover and therefore it was immune from liability.

***Doe v. Cleveland Metro. School Dist.*, 2012-Ohio-2497 (8th Dist.)**

Inexplicably, the School District decided to set up a program in which former gang members and convicted felons interacted with students as "facilitators" in a mentoring-style relationship. One of the "facilitators" sexually assaulted a student who then sued the District. The 8th District Court of Appeals found that the School District's decision to institute the program was an immune governmental function and that the Plaintiff did not successfully invoke the immunity exception for proprietary functions because she did not plead "facts sufficient to demonstrate that the activities performed by the City were those customarily engaged in by nongovernmental persons that can be demonstrated by showing that the function was in pursuit of private and corporate duties for the City's benefit, as opposed to those things in which the whole state has an interest."

***Duncan v. Cuyahoga Community College*, 2012-Ohio-1949 (8th Dist.)**

A police officer was injured while participating in a training class at a community college. She brought a negligence action against the school claiming that the self-defense training class she attended was a proprietary rather than a governmental function. After the trial court denied the school's motion for judgment on the pleadings, it took an interlocutory appeal on the political subdivision immunity issue. The Eighth District reversed the trial court's decision finding that the provision of training classes to police officers is a governmental function akin to the "provision of a system of public education." As such, the community college was entitled to immunity. Further, the Court held that the lack of mats on the training room floor did not amount to a "defect" in the condition of the property.

***Lemley v. Cleveland*, 2012-Ohio-1544 (8th Dist.)**

Homeowners brought an action against the City alleging a taking without just compensation, denial of due process and related claims arising out of historical preservation guidelines. The City's motion for summary judgment was granted on political subdivision immunity grounds and the homeowners appealed. The Eight District Court of Appeals held that a City's decision to issue a Certificate of Appropriateness under historical guidelines squarely falls under the definition of a "governmental function" for political subdivision immunity purposes, as it is a function in connection with "building, zoning, issuance or revocation of building permits…"

***Needham v. Columbus*, 2014-Ohio-1457 (10th Dist.)**

Plaintiff was injured when he was walking on a sidewalk and tripped over the mounting bracket of a city trash can. Plaintiff brought suit alleging that the placement of the trash can was a negligently-performed proprietary function. The Tenth District disagreed finding the placement of the trash can and the bracket amounted to the regulation, maintenance and repair of sidewalks, a governmental function under R.C. 2744.01(C)(2)(e).

Immunity Exceptions – R.C. Sec. 2744.02(B)

Motor Vehicle Operation- R.C. Sec. 2744.02(B)(1)

***Anderson v. City of Massillon*, 2012-Ohio-5711 (Supreme Court)**

Plaintiff filed suit after her husband and grandson were killed when their vehicle collided with a fire engine. The trial court granted summary judgment in favor of all Defendants, holding that the city was immune because the operation of the emergency vehicle as not willful or wanton under R.C. §2744.02(B)(1)(b) and that the employees were immune because their conduct was not wanton or reckless under R.C. §2744.03(A)(6). The Court of Appeals reversed. It held that there were issues of fact as to whether the firefighters were reckless and, as to the city, that the terms willful and wanton were "functional equivalents" of reckless. The city and employees appealed to the Supreme Court objecting to the "functional equivalent" standard adopted by the appellate court.

The Supreme Court held that the terms "willful," "wanton" and "reckless" have separate meanings under the law. "Willful misconduct" implies an intentional deviation from a clear duty or from a definite rule of conduct, a deliberate purpose not to discharge some duty necessary to safety, or purposefully doing wrongful acts with knowledge or appreciation of the likelihood of resulting injury. "Wanton misconduct" is the failure to exercise any care toward those to whom a duty of care is owed in circumstances in which there is great probability that harm will result. "Reckless conduct" is characterized by the conscious disregard of or indifference to a known or obvious risk of harm to another which is unreasonable under the circumstances and substantially greater than negligent conduct.

The case was then remanded to the trial court for proceedings consistent with the Supreme Court's decision.
See: Anderson v. Massillon*, 2014-Ohio-2516 (5th Dist.) (Anderson II), *infra.

***Sallee v. Watts*, 2014-Ohio-717 (1st Dist.)**

Plaintiff, a minor student, was riding a bus home from her school. When the student got off the bus, she did not cross the street and head home but instead lingered at the bus stop with another student. The bus driver honked her horn and motioned for the student to head home but the student ignored the instructions and ran down the street. The driver called to inform school officials that the student had left with another student and then continued on her route. The student subsequently crossed the street and was struck by a car driven by a different defendant. The First District held that the trial court erred in determining that the case did not involve the negligent operation of a motor vehicle. While bemoaning the statute as being unwise and poorly drafted, the court nevertheless held that the bus driver committed negligence *per se* by violating R.C. 4511.75(E) which provides that a school bus driver may not start his/her bus until after "any child who may have alighted therefrom has reached a place of safety on the child's . . . residence side of the road." The court noted that the bus driver had little choice in the situation as the child ran away without following directions and the driver had a responsibility to the other passengers on her bus. The court also noted that, on remand, the trial court could conclude that the exception denoted in R.C. 2744.02(B)(1) does not apply if it determines that the bus driver's conduct did not cause the Plaintiff's injuries.

***Munday v. Lincoln Hts.*, 2013-Ohio-3095 (1st Dist.)**

Plaintiff alleged that after being arrested, he fell out of the back door of a police vehicle that that was transporting him. The Court apparently held that the officer was engaged in an "emergency call" as he was transporting his prisoner. Because Plaintiff alleged only negligence, both the city and the officer were entitled to judgment in their favor.

***Hopkins v. Porter*, 2014-Ohio-757 (3rd Dist.)**

A county employee was operating a chip spreader during a road improvement project. The employee was moving the chip spreader across a road when a motorcycle struck the machine and the driver was killed. The Third District found that the chip spreader was not a "motor vehicle" for purposes of R.C. 2744.02(B)(1) based on the definition supplied in R.C. 4511.01(B): "every vehicle propelled or drawn by power . . . except . . . other equipment used in construction work and not designed for or employed in general highway transportation . . ." The Third District also held that the chip spreader was not an obstruction in the roadway for purposes of R.C. 2744.02(B)(3). The Court reasoned that to find a political subdivision liable for its negligent failure to remove an obstruction, the obstruction must already exist in the roadway prior to the accident – the obstruction cannot occur simultaneous with the occurrence of the accident. Finally, the Third District held that the employee operating the chip spreader did not act in bad faith, maliciously, or in a wanton or reckless manner as he looked both ways before moving the chip spreader into the road and, when he was informed that a motorcycle was approaching, he immediately attempted to back the spreader off the road.

***Anderson v. Massillon*, 2014-Ohio-2516 (5th Dist.) (Anderson II)**

On remand the Fifth District revisited this case in light of the definitions of wanton and reckless misconduct supplied by the Supreme Court in *Anderson v. City of Massillon*, 2012-Ohio-5711, *supra.* The court held that the speed of the fire engine, the configuration of the intersection where the accident occurred and the fact that the firefighters entered the intersection in violation of local ordinances and departmental policies was not reckless or wanton misconduct per se but created genuine issues of material fact.

***Burlingame v. Estate of Burlingame*, 2013-Ohio-3447 (5th Dist.)**

The Fifth District Court of Appeals found that violations of internal departmental policies are relevant to determining whether a firefighter on an emergency call engaged in bad faith, wanton, malicious or reckless misconduct.

***Mashburn v. Dutcher*, 2012-Ohio-6283 (5th Dist.)**

A volunteer firefighter was responding to a multi-vehicle accident in his personal vehicle with lights and siren activated. The firefighter was traveling 60 mph in a 55 mph zone and moved left of center to pass vehicles. He successfully passed two vehicles, but a third vehicle proceeded to make a left hand turn in front of him causing a collision and the death of the third vehicle's driver. Plaintiff filed suit against the firefighter and the joint fire district for which he worked. Plaintiff argued that the firefighter acted recklessly and wantonly. The trial court granted summary judgment to both the firefighter and the fire district and the appellate court affirmed. The Court noted that there was no evidence that the firefighter failed to utilize his lights and siren, no evidence that the he violated any departmental policies or regulations and no evidence that he violated any provisions of Ohio law.

***Bell v. Cleveland*, 2013-Ohio-2093 (8th Dist.)**

A police officer responded to a call to assist in breaking up several fights outside a party center. While driving to the scene of one of the fights, the officer ran over Plaintiff's foot. The Eighth District held that the officer was responding to an a call to duty and therefore was on an "emergency call" under RC Sec 2744.02(B)(1) regardless of whether the emergency situation had dissipated by the time the accident occurred or if the accident had occurred as the officer was pulling away from the situation.

***Gilbert v. Cleveland*, 2013-Ohio-5317 (8th Dist.)**

A police officer testified that he was "pacing" a car to determine whether it was speeding when he struck and killed a person attempting to push a disabled vehicle off the road. The Eighth District Court of Appeals held that "pacing" constitutes an "emergency call" requiring the plaintiff to prove that the officer engaged in willful or wanton misconduct in order to invoke the exception to political subdivision immunity listed at RC Sec 2744.02(B)(1). However, the Court ruled that there was a genuine issue of material fact as to whether the officer was actually engaging in the practice of "pacing" at the time of the accident. The Court also held that a genuine issue of material fact remained regarding whether the officer engaged in willful or wanton misconduct.

***N.A.D. v. Cleveland Metro.School Dist.*, 2012-Ohio-4929 (8th Dist.)**

The Plaintiffs brought suit against the School District and a bus driver for an alleged sexual assault that took place on a school bus. In *Doe v. Marlington Local School Dist. Bd. of Edn*., 122 Ohio St.3d 12 (2009), the Ohio Supreme Court held that failure to supervise children on a school bus does not fit within the immunity exception for negligent operation of motor vehicles. Nevertheless the Eighth District inexplicably held in *N.A.D.* that the driver's alleged failure to "inspect" the children potentially fell within the immunity exception.

***Perry v. Liberty Twp.*, 2013-Ohio-741 (11th Dist.)**

The parents of children who were struck by a vehicle that was fleeing from township police officers filed a negligence action against the township. The Eleventh District Court of Appeals found as a matter of law that the pursuit was not the proximate cause of the injuries to the children. The Court further found that the suit, in reality, questioned the decision to pursue the suspect rather than the operation of the police vehicle and that this decision was an immune governmental law enforcement function that was not subject to the immunity exception for the operation of motor vehicles.

Proprietary Functions – R.C. Sec. 2744.02(B)(2)

***Collias v. Redburn*, 2012-Ohio-2128 (3rd Dist.)**

Plaintiff sued, among others, the Wyandot County Agricultural Society after receiving an electrical shock due to allegedly substandard wiring installed by the Society's independent contractor. The Third District Court of Appeals held that the immunity exception for proprietary functions listed at R.C. §2744.02(B)(2) did not apply because it only encompasses negligent acts of political subdivision *employees*. The Court further held that there is no immunity exception for "inherently dangerous" activities.

***Fedarko v. Cleveland*, 2014-Ohio-2531 (8th Dist.)**

Plaintiff was walking on a sidewalk when she stepped on a cover which gave way causing her to fall waist deep into a manhole. The manhole was a common city water meter vault that was no longer in use by the city. The Eighth District held that the manhole cover was used for the city's water system and, as such, its maintenance was a proprietary function as contemplated in R.C. 2744.02(B)(2) rather than the governmental function of sidewalk maintenance. The court further held that the city was charged with constructive notice of the defect given the amount of time it would have taken for the defect to develop.

***Reinhold v. Univ. Hts.*, 2014-Ohio-1837 (8th Dist.)**

Plaintiffs brought suit against a city after a sewer back up and subsequent water main break during the repair of the sewer caused their basement to flood. The Eighth District first held that it was not necessary for the Plaintiffs to name a specific employee in order to utilize the exception to immunity found in R.C. 2744.02(B)(2). Second, the Court held that upkeep and maintenance of a sewer system was a proprietary function, thus removing the shield of immunity from the city.

***Nelson v. Cleveland*, 2013-Ohio-493 (8th Dist.)**

Plaintiff filed suit against the city after attempting to drive through standing water, losing control of her vehicle and colliding with a median. The trial court granted summary judgment but the appellate court reversed. The appellate court found that the standing water was not an obstruction under the immunity exception listed at R.C. §2744.02(B)(30. However, the Court also held that Plaintiff had produced sufficient evidence that the city failed to properly maintain its sewer system, in particular, the drainage system along the road. Because the maintenance of a sewer is a proprietary function, the Court held that the exception to immunity contained in R.C. §2744.02(B)(2) applied to defeat summary judgment.

***Riscatti v. Prime Properties Ltd. Partnership*, 2012-Ohio-2921 (8th Dist.)**

Several homeowners sued several governmental entities after an explosion caused by leakage of gasoline into the sewer system. The Eighth District Court of Appeals held that failure to monitor the sanitary sewer in a manner that would allow the leaking gasoline to be identified and corrected potentially amounts to negligent maintenance of the sewer system, a non-immune proprietary function under R.C. §2744.02(B)(2). The Court stated: "A complaint is properly characterized as a maintenance, operation, or upkeep issue when 'remedying the sewer problem would involve little discretion but, instead, would be a matter of routine maintenance, inspection, repair, removal of obstructions, or general repair of deterioration.'" The court further held that the denial of a dispositive motion on statute of limitations grounds is not eligible for immediate appeal under R.C. §2744.02(C).

***Sheperd v. Akron*, 2012-Ohio-4695 (9th Dist.)**

Two individuals were injured when they drove their vehicle into a hole in a public roadway that was caused by a water main break. The water department assessed the area prior to the accident and decided to repair the break the following week. The trial court denied the City's motion for summary judgment and the City appealed. The court of appeals held that the water leak under the roadway was not negligence in the maintenance of a public roadway as contemplated by R.C. §2744.02(B)(3) but the City could be liable for negligent maintenance of the water system, a proprietary function as provided in R.C.§2744.02(B)(2).

Needham v. Columbus*, 2014-Ohio-1457 (10th Dist.), *supra

Roadway Repair and Obstruction Removal – R.C. Sec. 2744.02(B)(3)

***Darby v. Cincinnati*, 2014-Ohio-2426 (1st Dist.)**

The First District held that the immunity exception for negligent failure to keep roadways in repair and free of obstructions has no application to the placement of a stop sign that is not a mandatory traffic control device under the Ohio Manual of Uniform Traffic Control Devices (OMUTCD).

Hopkins v. Porter*, 2014-Ohio-757 (3rd Dist.), *supra

***Mansfield v. Defiance,* 2013-Ohio-1391 (3rd Dist.)**

Plaintiff tripped over a raised concrete seam located in a cross walk and suffered injuries. Plaintiff sued the city alleging negligence for failing to repair the alleged defect. The Third District Court of Appeals held that the evidence indicated that the offset was less than one inch and Plaintiff offered no evidence of attendant circumstances. Accordingly, the two-inch rule relieved the city of any obligation to repair the defect.

***Mender v. Alvis*, 2012-Ohio-2113 (4th Dist.)**

The Plaintiff was injured after stepping in a rut in a dark public alley. The trial court granted summary judgment to the Village based on the "step-in-the-dark rule". On appeal, the Fourth District held that the political subdivision was not protected by the step-in-the-dark rule because it was under a statutory duty to refrain from negligently failing to keep its roads in repair under R.C. §2744.02(B)(3).

***Shope v. Portsmouth*, 2012-Ohio-1605 (4th Dist.)**

The Plaintiff was injured in an accident that occurred off the paved section of a roadway. The Fourth District Court of Appeals relied on prior decisions stating that "the traveling public has no right to drive upon that portion of a public road which is not dedicated, improved, and made passable for vehicular use…a political subdivision cannot negligently fail to keep a road in repair that has not *already been made passable for vehicular use*…and a political subdivision cannot negligently fail to remove something that obstructs or impedes the progress of a driver who has no right to be traveling on a particular road."

***Ervin v. Willison*, 5th Dist. 2014-Ohio-482 (5th Dist.)**

A pedestrian was struck by an automobile while she crossed the street at a cross walk. The executor of the deceased pedestrian's estate brought an action against a driver, the city, and the city's traffic signal supervisor for personal injury and wrongful death claiming that the "WALK/DON'T WALK" signal governing the crosswalk was not set at the recommended timing for a pedestrian to safely cross a street. The Court determined that the timing issue within the pedestrian signal was nothing more than a mistake that the city was unaware of. Additionally, the Court determined that the timing of the signal was a discretionary decision, and therefore the defenses listed at R.C. 2744.03(A)(3) and (5) applied.

***Camp v. Sandusky*, 2013-Ohio-3053 (6th Dist.)**

Plaintiff was injured when he ran his bicycle into a cable that was placed by the city to prevent pedestrians from entering a sidewalk next to an empty warehouse. The Court held that the maintenance and regulation of sidewalks is an immune governmental function and the immunity exception for roadway repairs and obstruction removal did not apply because sidewalks were excluded from the definition of "public roads."

***Rastaedt v. Youngstown*, 2013-Ohio-750 (7th Dist.)**

Plaintiff was crossing a street when her foot slipped down a slope that led into a sewer catch basin. The Seventh District Court of Appeals made it clear that the nuisance standard contained in the former version of RC Sec.

2744.02(B)(3) is no longer in effect and that the immunity exception applies only in cases involving the negligent failure to remove obstructions or keep roads in repair . Because Plaintiff presented no evidence that her injuries were caused by a negligent lack of repair or an obstruction the city was entitled to immunity.

***Todd v. Cleveland,* 2013-Ohio-101 (8th Dist.)**

Plaintiff filed suit after she hit a pothole, lost control of her vehicle and struck a telephone pole. Plaintiff alleged that the city negligently maintained its roads. The city filed a motion for summary judgment claiming immunity under R.C. Ch. 2744 arguing that the exception to immunity found at R.C.§2744.02(B)(3) did not apply because a pothole was not an "obstruction." The trial court denied the motion and the appellate court affirmed. The Court held that the issue of whether a pothole was an obstruction is debatable but did not need not reach that issue because R.C. §2744.02(B)(3) also creates an immunity exception for failure to keep roads in repair. The Court held that the evidence indicated that the city had failed to repair its road and that there was a genuine issue of material fact as to whether the city had notice of the need for repair. Accordingly, it affirmed the denial of the summary judgment motion.

Nelson v. Cleveland*, 2013-Ohio-493 (8th Dist.), *supra

***Gomez v. Cleveland*, 2012-Ohio-1642 (8th Dist.)**

The Eighth District Court of Appeals affirmed that actual or constructive notice of a defect is necessary to impose liability for negligently failing to maintain or remove obstruction from a road under R.C. Sec. 2744.02(B(3).

***Repasky v. Upper Arlington*, 2013-Ohio-2516 (10th Dist.)**

The Tenth District Court of Appeals held that a two-foot to four-foot wide cut in the pavement that was filled to grade with gravel during the installation of a replacement storm sewer line was not an obstruction under RC Sec. 2744.02(B)(3).

Defects on Public Grounds – R.C. Sec. 2744.02(B)(4)

***M.H. v. Cuyahoga Falls*, 2012-Ohio-5336 (Supreme Court)**

The Supreme Court of Ohio overruled its prior decision in *Cater v. Cleveland*, 83 Ohio St.3d 24 (1998) when asked to decide if the immunity exception found in R.C. §2744.02(B)(4) applied to a public pool. In doing so, however, the Court may have caused further confusion by focusing only on the issue of negligence while completely ignoring the requirement that the injuries be caused by a physical defect.

***R.K. v. Little Miami Golf Ctr.*, 2013-Ohio-4939 (1st Dist.)**

A minor was injured at a County golf course when a tree limb fell onto his head during a windstorm. The First District Court of Appeals held that the physical defect exception can apply to unmaintained trees. The court also engaged in an extended review of various acts that can and cannot be considered to be discretionary acts subject to the defenses listed at RC Sec. 2744.03(A)(3) and (5).

***Moon v. Trotwood Madison City Schools*, 2014-Ohio-1110 (2nd Dist.)**

All of the school's sixth grade teachers were on approved professional leave and were replaced by six substitute teachers when Plaintiff was trampled by a group of students who were running down the hallway at the end of the day. Plaintiff and her mother brought an action against the school district, the elementary school principal and vice principal, and the six substitute teachers. The Second District held that all parties were entitled to sovereign immunity. As to the school district, the Second District held that there existed no physical defect that caused the injury to the student and, therefore, the district was entitled to immunity. The court found that the individuals were all acting within the course and scope of their duties and that there was no evidence that their conduct was malicious, bad faith, wanton or reckless. The court relied on the fact that the student to teacher ratio was 1:29, that the missing teachers were granted permission to be on professional leave and that the school had established and attempted to execute dismissal procedures.

***Leasure v. Adena Local School Dist.*, 2012-Ohio-3071 (4th Dist.)**

An individual was injured on bleachers at a school's gymnasium that were not properly extended. The Fourth District contrasted cases defining a physical defect under R.C. §2744.02(B)(4) as "a perceivable imperfection that diminishes the worth or utility of the object at issue" with cases holding that no physical defect exists when an object operates as intended. The court then found that an issue of material fact existed as to whether the bleachers were defective.

***Jones v. Delaware City School Dist. Bd. of Edn.*, 2013-Ohio-3907 (5th Dist.)**

A high school student was injured when he fell into an orchestra pit in his school auditorium. The orchestra pit was normally covered by a set of stage expanders and had LED night lights and phosphorescent glow tape around the edge of the stage that were removed at the time of the accident. The Fifth District held that the removal of the lights and reflective tape could diminish the worth or utility of the stage and pit and, therefore, their absence could be considered to be a defect precluding immunity for the board of education.

***Rosenbrook v. Board of Lucas County Commissioners*, 2012-Ohio-6247 (6th Dist.)**

Plaintiff filed suit after tripping and falling on a floor mat at the county courthouse. In the complaint Plaintiff stated that the county failed to warn her of hazardous conditions and that the county failed to inspect and maintain the premises. The county filed a motion for judgment on the pleadings arguing that Plaintiff had failed to plead that her injuries arose from a physical defect in the courthouse. The trial court denied the motion, and the appellate court affirmed. The Court of Appeals held that Plaintiff could have been more precise in her choice of words but the language in the complaint was sufficient to survive a motion for judgment on the pleadings.

***Roberts v. Switzerland of Ohio Local School Dist., 2014-Ohio-78 (*7th Dist.)**

A student participating in track and field practice, was standing in an area designated as a "safe zone" when she was stuck by a discus thrown by another student. The Seventh District Court of Appeals held that the allegations were sufficient to allege the existence of a physical defect to overcome a motion to dismiss.

***Brister v. Cleveland,* 2014-Ohio-1232 (8th Dist.)**

A man was injured at a city-owned recreational facility when a faulty exercise machine broke. The city was granted summary judgment on the theory that the physical defect immunity exception only applied to the building and fixtures and not to the exercise machine. Additionally, the city argued that it was immune because the operation of its indoor recreational facility was a governmental function under R.C. 2744.01(C)(2)(u)(ii). The Eighth District rejected these arguments. The court held that the physical defect exception to immunity applied to the building, fixtures and other property owned and maintained by the city within the structure, including the exercise machine. The court further held that the former interpretation limiting the physical defect exception to office buildings and court houses had been discredited by the Ohio Supreme Court in *Moore v. Lorain Metropolitan Housing Authority*, 2009-Ohio-1250.

***Bush v. Cleveland Mun. School Dist.*, 2013-Ohio-5420 (8th Dist.)**

Plaintiff's daughter was injured when she jumped on a planter and fell while running away from another student. Plaintiff's complaint cited the height difference between the planter and the ground as a defective and hazardous condition. The Eighth District granted the school district immunity citing the Plaintiff's failure to show that the planter was defective and that the school district was responsible for any defective condition.

***Gibbs v. Columbus Metro. Hous. Auth.*, 2012-Ohio-2271 (10th Dist.)**

The estate of an individual who died in a trash chute belonging to the Columbus Metropolitan Housing Authority brought an action claiming that the chute was defective within the meaning of R.C. §2744.02(B)(4). The Tenth District held that a physical defect did not exist because there was no "imperfection that diminished the worth or utility of the object at issue."

***Nicholas v. Lake Cty.*, 2013-Ohio-4294 (11th Dist.)**

Plaintiff stepped off a sidewalk into a hole outside a courthouse and suffered significant injuries. The drop from the sidewalk to the ground was more than one foot and the area was obscured by tall grass. The Eleventh District Court of Appeals upheld the denial of summary judgment. The Court reasoned that the area would foreseeably be traversed by pedestrians and the hole amounted to an actionable defect. The Court also rejected the county's argument that the failure to repair the area prior to the accident was a discretionary decision subject to the defense listed at RC Sec. 2744.03(A)(5).

Liability Expressly Imposed by Statute R.C. §2744.02(B)(5)

***Riffle v. Physicians and Surgeons Ambulance Service, Inc.* 135 Ohio St.3d 357 (2013).**

The Ohio Supreme Court held that R.C. § 4765.49(B) stating that providers of EMS services can be held liable only for willful or wanton misconduct qualifies under the immunity exception provided by R.C. § 2744.02(B)(5) for civil liability expressly imposed by another provision of the Ohio Revised Code. It should be kept in mind that a similar statute exists concerning the provision of emergency dispatching services. *See:* R.C. § 4931.49.

***Fediaczko v. Mahoning County Children's Services (Fediaczko II)*, 2012-Ohio-6095 (7th Dist.)**

Plaintiff filed suit against three county social workers, and Mahoning County Children Services and the Mahoning County Children Services Board after the Plaintiff's decedent, a 15 year old boy, was murdered by one of his guardians and another guardian helped to dispose of the body. Plaintiff argued that liability was expressly imposed on the agencies by R.C. §2743.02 thereby bringing into play the immunity exception listed at R.C. §2744.02(B)(5). R.C. §2743.02 provides that the *state* is not entitled to immunity if a special relationship can be established between the state and the injured party. The 7th District held that this statute did not expressly impose liability on a political subdivision because it only applied to the State of Ohio. The Court recognized that the definition of the word "state" expressly excludes political subdivisions. Accordingly, the statute could not be used to defeat Children Services' immunity under R.C. Ch. 2744.

Political Subdivision Defenses – R.C. Sec. 2744.03(A)(1)-(5)

Discretion in Use of Resources and Equipment R.C. §2744.03(A)(5)

Ervin v. Willison*, 5th Dist. 2014-Ohio-482 (5th Dist.), *supra

***Ohio Bell Telephone Co. v. Cleveland*, 2013-Ohio-270 (8th Dist.)**

Plaintiff filed suit claiming that the city was negligent in repairing a water main break. The city's supervisor declared the situation an emergency and began the repairs prior to the arrival of OUPS to mark all underground utilities. The city conceded that it was engaged in a proprietary function and that the exception to immunity at R.C. §2744.02(B)(2) applied. However, the city asserted that the defense listed at R.C. §2744.03(A)(5) reinstated immunity because the decision made by the supervisor was an exercise of discretion regarding the use of personnel and resources. The trial court denied the summary judgment motion and the appellate court agreed. The Court found that the supervisor's decisions, particularly the declaration of an emergency, were discretionary. However, the Court held that there was a genuine issue of material fact as to whether the supervisor's exercise of that discretion was reckless.

Nicholas v. Lake Cty.*, *supra

R.K. v. Little Miami Golf Ctr., supra)

Anderson v. City of Massillon*, 2012-Ohio-5711 (Supreme Court), *supra

Jones v. Norwood*, 2013-Ohio-350 (1st Dist.), *supra

***Hauser v. Dayton Police Department*, 2012-Ohio-11 (2nd Dist.)**

Plaintiff, a detective in the city's police department filed suit against the major who was in charge of the detective bureau claiming discrimination based upon sex and sexual harassment. The major claimed that he was entitled to immunity under R.C. §2744.03(A)(6). The trial court denied immunity and the appellate court affirmed. The Court concluded that liability of a manager or supervisor is expressly imposed by Chapter 4112 of the Ohio Revised Code. Specifically, the court relied upon the definition of the term "employer" under R.C. §4112.02(A)(2) which defines the term as including the state, a political subdivision, any person employing four or more persons within the state and any person acting directly or indirectly in the interest of an employer. The Second District also relied upon a 1999 Ohio Supreme Court case, *Genaro v. Central Transport, Inc.*, 84 Ohio St. 3d 293, which held that individual managers and supervisors are liable for their own discriminatory conduct in the workplace. As a result, the exception to immunity listed at R.C. §2744.03(A)(6)(c) applied and the employee not entitled to summary judgment.

Moon v. Trotwood Madison City Schools*, 2014-Ohio-1110 (2nd Dist.), *supra

Hopkins v. Porter*, 2014-Ohio-757 (3rd Dist.), *supra

***Fields v. Bickle*, 2014-Ohio-2634 (5th Dist.)**

An inmate convicted of drug trafficking and drug abuse, was appointed counsel to pursue an appeal. The inmate submitted to the County Clerk of Courts a motion for "interim determination of appellate jurisdiction" without the assistance of his counsel. The clerk did not file the motion, but instead forwarded it on to the inmate's appointed counsel. The inmate filed suit and the trial court held that the clerk was immune in his official and individual capacities. With respect to the official capacity claims, the Fifth District held that the filing of motions was a governmental function. Even though Plaintiff used the words "malicious purpose, bad faith, wanton and reckless" throughout the complaint, he alleged no facts that would implicate anything more than negligence so the court also affirmed the dismissal of the individual capacity claims.

Anderson v. Massillon*, 2014-Ohio-2516 (5th Dist.) (Anderson II), *supra

***Fondale v. Guernsey Cty. Children's Servs.*, 2012-Ohio-3621 (5th Dist.)**

The Fifth District held that several Children Services employees were not liable to the Plaintiff because, as a matter of law, they did not act wantonly or recklessly as required by R.C. §2744.03(A)(6). In doing so, the court explained the difference between wantonness, recklessness and mere negligence: "The court found recklessness is subject to a high standard and refers to conduct committed when the person knows or has reason to know of facts that would lead a reasonable man to realize not only that his conduct creates an unreasonable

risk of harm to another, but that the risk is substantially greater than necessary. *Mere negligence is not converted into misconduct unless the evidence establishes a disposition to perversity*, such that the actor must be conscious that his conduct will in all probability result in injury." (emphasis added).

***Lewis v. Toledo*, 2014-Ohio-1672 (6th Dist.)**

A suspect filed suit after a police officer hit him with her cruiser while assisting with his apprehension. The Sixth District noted that it is a police officer's duty to apprehend fleeing suspects rather than letting them escape. The court further held that expert testimony was necessary to establish whether the officer breached any law enforcement standards of care in order to raise a material issue of fact as to whether the officer acted maliciously, in bad faith, wantonly or recklessly. Because Plaintiff and his lay witnesses were not qualified to offer this testimony, the court held that immunity should be granted to the officer

***Trucco Construction Co. v. City of Fremont*, 2013-Ohio-415 (6th Dist.)**

The Court held that a private construction company and its employees were independent contractors of the city rather than "employees" and therefore they were not entitled to immunity under R.C. §2744.03(A)(6).

***Fediaczko v. Mahoning County Children's Services (Fediaczko II)*, 2012-Ohio-6090 (7th Dist.)**

Plaintiff filed suit against three county social workers after her decedent, a 15 year old boy, was murdered by one of his guardians and another guardian helped to dispose of the body. The trial court denied summary judgment to the social workers and they appealed.

Plaintiff claimed that one of the social workers should be liable for the child's death because she was the executive director of the agency. The appellate court rejected this argument and held that respondeat superior liability is not an exception to employee immunity under R.C. §2744.03(A)(6). The appellate court held that Plaintiff had not produced evidence to support the assertion that the supervisor acted recklessly and, because employees are immune for negligent acts, it held that summary judgment should have been granted to the supervisor.

The appellate court also reversed the trial court's decision concerning the caseworker who performed the initial assessment of the child's guardians. The Court held that hindsight proved the caseworker' recommendation to be regrettable but the caseworker had no reason to believe that the placement would put the child in jeopardy. Accordingly, there was no evidence that the caseworker acted with the requisite degree of culpability to overcome the immunity provisions contained in R.C. §2744.03(A)(6).

The appellate court affirmed the denial of summary judgment as to the third defendant. This defendant was assigned to investigate the child's well-being on June 18, 2001. Her case notes indicated that she attempted to contact the child and his guardians for several weeks and conducted a face-to-face interview with the child on August 6, 2001. It was subsequently discovered that the child was murdered on June 15 or 16 and that the caseworker lied when she stated that she had interviewed the child. On appeal the caseworker argued that she could not be held liable because her falsification of the report did not cause the child's death since he was already dead when she was assigned the case. The appellate court held that this was not a proper argument for

an interlocutory appeal since the caseworker was arguing proximate cause rather than immunity. Accordingly, Court remanded the claims against the third social worker to the trial court.

***Sheffey v. Flowers*, 2013-Ohio-1349 (8th Dist.)**

The Eighth District Court of Appeals reversed the decision of the trial court and granted immunity to a government employee in a case arising from a motor vehicle accident. The Court found that the Plaintiff used the term reckless or wanton three times in her 45 paragraph complaint which generally read as a claim for negligence. More importantly, the Court noted that the Plaintiff did not respond to a motion for summary judgment. It held that Plaintiff could not rest on the mere allegations contained in her complaint but was required to demonstrate through specific facts that a genuine issue existed on her claims that the individual employee was wanton or reckless.

***Owens v. Haynes*, 2014-Ohio-1503 (9th Dist.)**

The Ninth District denied immunity to a public employee holding, among other things, that the Defendant failed to point to any authority standing for the proposition that a complaint must explicitly use the words "bad faith" or "wanton" or "reckless" in order to trigger the immunity exception contained in R.C. 2744.03(A)(6)(b).

***Atrim v. Lorain Cty. Bd. Of Dev. Disabilities* 2013-Ohio-2372 (9th Dist.)**

The Ninth District held that the violation of safety rules can be considered in determining whether an employee has acted wantonly or recklessly.

***Lackey v. Noble*, 2012-Ohio-2554 (9th Dist.)**

In reviewing the definition of "wanton" and "reckless", the Ninth District Court of Appeals held that an employee of a political subdivision was not entitled to summary judgment because there was a genuine issue of material fact as to whether the employee failed to exercise any care toward the Plaintiff "under circumstances in which there was great probability that harm would result."

***Fox v. Bryan*, 2014-Ohio-1253 (10th Dist.)**

Plaintiff was rear ended by a police officer who was not in uniform while driving an unmarked police vehicle to pick up equipment for the department at a local supply store. The Tenth District held that the officer was acting within the course and scope of his duties as the officer was driving a police department vehicle, he was running an errand on behalf of the department and he was on duty at the time of the accident. Accordingly, Plaintiff's negligence claims against the officer were dismissed.

***Hayes v. Columbus*, 2014-Ohio-2076 (10th Dist.)**

The estate of a suspect who was fatally shot during a foot chase filed claims against the police officer who fired the fatal shots. During the foot chase, the officer saw that the suspect was armed and at one point the suspect turned the gun toward the police officer. The suspect, unbeknownst to the officer, discarded

the gun then slowed down and yelled "please don't shoot me," as another officer also yelled not to shoot. Believing the suspect to still be armed and threatening the police officer fatally shot the suspect as the suspect turned toward the officer in what was perceived to be a threatening manner in a dark area. The Tenth District held as a matter of law that the officer acted reasonably and without malicious purpose, in bad faith, or in a wanton or reckless manner. The court found that the officer acted in line with police department policy because he saw the suspect was in possession of a firearm, the suspect at one point turned the gun back toward the pursuing officer, he commanded the suspect to drop the gun and the suspect did not comply and the officer believed that the suspect was still carrying a gun when he fired upon him. Additionally the court considered the fact that the entire incident only lasted 10 seconds.

Prosecutorial Immunity - R.C. §2744.03(A)(7)

***Moore v. Cleveland*, 2014-Ohio-1426 (8th Dist.)**

The Eighth District reiterated that reviewing evidence and making determinations as to whether to pursue charges against suspects are part of the advocacy process and subject to absolute prosecutorial immunity.

***Tuleta v. Med. Mut. Of Ohio*, 2014-Ohio-930 (8th Dist.)**

Plaintiff brought suit against prosecutors after his criminal conviction for drug possession was overturned on appeal based on the fact that he had lawful prescriptions for all the drugs he possessed. The Eighth District held that the prosecutors were absolutely immune as all of their actions in initiating the underlying case and advocating the state's position are covered by absolute immunity. Additionally, the Court stated that absolute immunity extends to the preparation necessary to evaluate and present a case.

***Anderson v. Smith*, 2012-Ohio-6159 (10th Dist.)**

Plaintiff was convicted of several crimes and filed suit against the prosecuting attorney. Plaintiff asserted "professional torts" alleging that Defendant, among other things, suppressed material evidence, failed to produce exculpatory evidence and conspired with a witness to provide false testimony. Defendant moved for judgment on the pleadings asserting that he was absolutely immune from Plaintiff's claims under R.C. §2744.03(A)(7) which provides that "a county prosecuting attorney…is entitled to any defense or immunity available at common law or established by the Revised Code." The appellate court affirmed the trial court's decision dismissing the case recognizing that prosecuting attorneys are entitled to absolute immunity for initiating a prosecution and presenting the state's case even where a prosecutor's malicious or dishonest actions deprive a criminal defendant of his liberty.

Statute of Limitations – R.C. Sec. 2744.04(A)

***Davis v. Clark Cty. Bd. of Commrs.*, 2013-Ohio-2758 (2nd Dist.)**

The Second District Court of Appeals held that the maximum two year statute of limitations provided by R.C § 2744.04(A) prevails over the general statutes of limitations provided by other sections of the Revised Code.

Employee Indemnity/Defense – R.C. Sec. 2744.07

***Cantwell v. Franklin Cty. Bd. Of Commrs.*, 2012-Ohio-2273 (10th Dist.)**

A corrections officer, terminated for playing a "joke" on an inmate, brought a declaratory judgment action against the county claiming that it had a duty to defend him in an action filed by the inmate. The Common Pleas Court granted summary judgment for the County and the officer appealed. The Tenth District affirmed finding that the County had no duty to defend. Under R.C. §2744.07, a political subdivision has a duty to defend when the employee acted in good faith and his or her actions are not manifestly outside the scope of his or her employment or official responsibilities. The Court stated that whether an employee's actions are within the scope of employment "turns on the fact finder's perception of whether the employee acted, or believed himself to have acted, at least in part, in his employer's interests" but in this particular instance the "joke" was clearly outside the scope of his employment.

Interlocutory Appeal – R.C. Sec. 2744.02(C)

Jones v. Norwood*, 2013-Ohio-350 (1st Dist.), *supra

Fediaczko v. Mahoning County Children's Services (Fediaczko II)*, 2012-Ohio-6090 (7th Dist.), *supra

***Riscatti v. Prime Properties Ltd. Partnership*, 2012-Ohio-2921 (8th Dist.)**

The Eighth District determined that denial of a dispositive motion asserting the statute of limitations is not an order denying a political subdivision the benefit of an immunity and is not a final appealable order under R.C. §2744.02 (C).

Official and Individual Capacity Claims

Jones v. Norwood*, 2013-Ohio-350 (1st Dist.), *supra

Damage Setoffs – R.C. Sec. 2744.05

***Jontony v. Colegrove*, 2012-Ohio-5846 (8th Dist.)**

Plaintiffs filed suit against a city and a police sergeant after Mr. Jontony was seriously injured in a collision with a vehicle driven by the sergeant. The sergeant asserted immunity pursuant to Chapter 2744 in his answer but the city did not. The sergeant was voluntarily dismissed and the case proceeded against the city. Defense counsel stated in a letter to Plaintiff's counsel that the city admitted liability and that the only remaining issues were damages and setoffs. Seven weeks prior to trial the city requested leave to file an amended complaint to assert immunity under R.C. Ch. 2744 claiming that the sergeant was responding to an emergency call. The trial court denied the motion for leave as well as a subsequent request by replacement counsel. The Court of Appeals affirmed. The appellate court held that denial of the motion for leave was proper because the potential immunity defense should have been obvious from the face of the complaint and the delay in asserting it unfairly prejudiced Plaintiff.

The Court also made several interesting rulings on requests for damage setoffs pursuant to R.C. Sec. 2744.05(B). First, the Court held that union disability pension benefits paid to Mr. Jontony because of his injuries were not eligible for setoff. The Court found that the pension payments were not from insurance or a public program and therefore did not qualify for setoff under the dictionary definition of "benefits" adopted by *Vogel v. Wells,* 57 Ohio St.3d 91, 98 (1991). The problem is that this ignores the plain statutory language requiring the disclosure and setoff of benefits received "from a policy or policies of insurance *or any other source*". R.C. Sec. 2744.05(B)(1) (emphasis added). Second, the Court held that it was precluded from setting off the vast majority of Mr. Jontony's Social Security benefits against his lost wage claims because a jury interrogatory providing a single figure for lost wages and loss of services did not permit the trial court to determine with sufficient clarity the amount of lost wages that were awarded.

Subrogation Prohibitions – R.C. Sec. 2744.05

***Ohio Bur. of Workers' Comp. v. Shaffer*, 2013-Ohio-4570 (10th Dist.)**

The Tenth District ruled that a county employee was entitled to immunity under 2744.03(A)(6) and that the BWC statutory right to subrogation under R.C. 4123.931(I) applied only to political subdivisions, not employees of political subdivisions.

Exempt Claims

Contractual Matters- R.C. Sec. 2744.09(A)

***Today & Tomorrow Heating & Cooling v. Greenfield*, 2014-Ohio-239 (4th Dist.)**

The Fourth District Court of Appeals held that a Political Subdivision is not entitled to immunity because R.C. 2744 does not apply to actions to recover damages against political subdivisions or their employees for contractual liabilities.

Employment Matters – R.C. Sec. 2744.09(B)

***Vacha v. N. Ridgeville*, 136 Ohio St.3d 199, 2013-Ohio-3020, 992 N.E.2d 1126**

A municipal employee, who was allegedly raped by a co-worker, brought an action against the city alleging vicarious liability, negligent and reckless hiring and supervision and employer intentional tort. The Supreme Court of Ohio held that in order to determine whether an exception found in 2744.09(B) applies, the court must consider whether there was a causal connection or causal relationship between the claims raised by the employee and the employment relationship. The Court held that because the employee alleged intentional misconduct by the city in its selection, supervision and control of the co-worker there could be a causal connection or causal relationship between that alleged conduct and the employee's employment relationship. The Court found that the trial court and the court of appeals failed to fully resolve whether the evidence established a causal connection to the employment relationship under the standards established in *Sampson* and it remanded the case for further proceedings.

Federal Claims – R.C. Sec. 2744.09(E)

***Pruce v. Sleasman*, 2012-Ohio-2427 (9th Dist)**

Following the investigation and arrest of an individual as a result of two false citizen complaints, the trial court denied the Sheffield Lake's motion for judgment on the pleadings. The trial court held that the complaint implied federal due process violations and, therefore, the exemption from immunity found in R.C. §2744.09(E) applied. The Ninth District disagreed with the trial court's decision. The Ninth District held that the Plaintiff must specifically allege a violation of a federal right in order for R.C. §2744.09(E) to apply.

Waiver

Jontony v. Colegrove*, 2012-Ohio-5846 (8th Dist.), *supra

Capacity for Suit

Campolieti v. Cleveland Dept. of Pub. Safety*, 2013-Ohio-5123 (8th Dist.), *supra

Civil Service

***Cleveland Firefighters Assn. v. Cleveland*, 2013-Ohio-5439 (8th Dist.)**

The Cleveland Charter was amended in 2012 to provide that bona fide residents of the city for at least one year would be awarded five bonus points on a passing grade for civil service promotional examinations. A firefighters union challenged the provision as a violation of merit selection provisions contained in Art. XV, Sec. 10 of the Ohio Constitution and RC Sec. 9.481 prohibiting the imposition of residency requirements for employees of political subdivisions. The Eighth district agreed and invalidated the charter provision.

***Denvir v. Donham*, 2013-Ohio-5837 (11th Dist.)**

The Eleventh District Court of Appeals held that the post-deprivation hearings provided to suspended village police officers by RC 737.19(B) satisfy Constitutional procedural due process requirements. However, the Court found that the police department's policy manual mandated a pre-disciplinary hearing. Because the police chief failed to conduct the hearing a suspension given to a police officer was reversed.

Home Rule

***Cleveland v. State*, 2014-Ohio-86 (Ohio Supreme Court)**

The City of Cleveland challenged the constitutionality of R.C. Sec. 4921.25, a law that granted the Public Utilities Commission of Ohio authority to regulate towing companies as "for-hire motor carriers." The Supreme Court held that the second sentence of the statute violated the Ohio Constitution's Home Rule Amendment by prohibiting the "licensing, registering, or regulation" of entities that tow motor vehicles.

***Cleveland v. State*, 2013-Ohio-1186 (8th Dist.)**

The Eighth District Court of Appeals held that R.C. Sec. 3717.53 prohibiting municipal regulation of food service operations based on nutritional information was not a general law. Accordingly, the Court found that Cleveland City Ordinance 241.42, a ban on industrially-produced trans fats at certain food service establishments was permitted under the city's home rule powers.

Open Meetings

***State ex rel. Patrick Bros., A Gen. Partnership v. Putnam Cty. Bd. Of. Comm.* 2014-Ohio-2717 (3rd Dist.)**

The Third District held that posting notice of an official meeting on a whiteboard at the back of an office, outside the view of the general public, 24 hours in advance of the meeting was not reasonable notice to the public. The court relied on the fact that anyone could add to the whiteboard at any time of day and the white board did not indicate the time and location of any meeting that was to be held. The court also held that the lack of pre-published agendas violated Ohio's Open Meeting Act. The fact that there was also an internet calendar available was irrelevant because it was infrequently updated and did not carry all the required information. Finally, the court gave no merit to the claim that the board clerk would occasionally call individuals who requested notice of the meetings, if she could remember. The Third District also held that the practice of keeping two separate books, one for meeting minutes and one for "discussion notes" did not comply with the statutory requirements of R.C. 121.22(C) as the general public was not informed that "discussion notes" were also available, nor were they given the "discussion notes" when they requested meeting minutes. The court held that it was improper to enter "executive session" to generally discuss "personnel" and that R.C. 121.22(G)(1) permitted executive sessions only to consider a specific employee's employment or dismissal. Finally, the court noted that "economic development" could be an appropriate reason for an executive session but the lack of accurate minutes made it impossible to determine the propriety of the session.

***Stewart v. Lockland School Dist. Bd. of Edn.*, 2013-Ohio-5513 (1st Dist.)**

A non-teaching employee brought an action against a board of education alleging a violation of the Open Meetings Act as well as an administrative appeal challenging his termination. The First District held that R.C. 3319.081 does not authorize a nonteaching employee to request a public pre-termination hearing.

***Paridon v. Trumbull Cty. Children Servs. Bd.*, 2013-Ohio-881 (11th Dist.)**

Members of the public brought an action seeking injunctive relief against a county Children Services Board alleging that the Open Meetings Act was violated by a requirement that attendees at Board meetings enter their names on a sign-in sheet. The Eleventh District Court of Appeals ruled that the Children Services Board did not abuse its discretion by requiring members of the public to sign in as a security measure. Additionally the Court ruled that the sign-in policy did not violate Ohio Sunshine Laws.

Public Records

***McBurney v. Young* 133 S.Ct. 1709 (2013)**

Virginia's statute limiting the right to make public records requests to persons or entities who are citizens of the state did not violate the Privileges and Immunities Clause.

***State ex rel. DiFranco v. S. Euclid*, 2014-Ohio-538 (Ohio Supreme Court)**

Plaintiff brought an action seeking a writ of mandamus requiring the city to produce public records as well as damages and attorney fees. The city delayed two months before making a partial response to the records request and eight months before fully responding. The Supreme Court held that the Plaintiff did not need to show a "public-benefit" to be awarded statutory damages. Because a full response to the records request was made before orders to do so were issued by the lower court, Plaintiff was not entitled to attorney fees under the statute.

***State ex rel. Cincinnati Enquirer v. Lyons*, 2014-Ohio-2354 (Ohio Supreme Court)**

A newspaper brought an action against a county court judge seeking a writ of mandamus to compel the judge to vacate his order sealing records related to the prosecution of a John Doe defendant. The newspaper also asked for a separate writ requiring the judge to produce other improperly sealed records over a five year period as well as a writ of prohibition to prevent the judge from enforcing his orders sealing the records. As to the John Doe case, the Supreme Court held that the immediate sealing of criminal case records upon disposition was not possible. In order to effectively seal a minor misdemeanor conviction, a hearing must be set either one or three years from the date of the final disposition. If a party is not convicted, a hearing must still be set to seal the official record. Because the John Doe records were not properly sealed the writ was granted. As to the five years' worth of records, the Court pointed out that the actions of the lower court were presumed to be correct until otherwise demonstrated and, having presented no evidence on that point, the newspaper was not entitled to relief.

***State ex rel. Davis v. Metzger*, 2014-Ohio-2329 (Ohio Supreme Court)**

Three days after making a public records request for information from personnel files, Plaintiff filed a mandamus action in the Fifth District Court of Appeals. The records were produced on the same day the Plaintiff filed his mandamus action. The Fifth District held that the production of the documents within three days was reasonable. The Supreme Court agreed that the three days was reasonable as sensitive information in the personnel files required redaction.

***State ex rel. Richfield v. Laria*, 2014-Ohio-243 (Ohio Supreme Court)**

A village filed a petition for writ of mandamus seeking an order compelling the presiding judge of a municipal court and its clerk to produce sealed criminal records that the village claimed were public. The Supreme Court of Ohio held that Superintendence Rules 44-47 controlled access to court records as opposed to R.C. Sec. 149.43. Therefore, the village was not entitled to a writ of mandamus even if it had properly requested records

under Rules of Superintendence, rather than the Public Records Act. Additionally, the Court ruled that even if records had been improperly sealed, the village had an adequate remedy at law by way of appeal.

***State ex. rel. Dunlap v. Sarko, et. al.*, 2013-Ohio-67 (Ohio Supreme Court)**

Relator submitted multiple public records requests to various officials of Violet Township. When he felt that the records were not appropriately produced, he filed multiple lawsuits with the Court of Appeals and the Ohio Supreme Court. The first case filed was with the Court of Appeals and the Supreme Court therefore held that it did not have jurisdiction due to the "jurisdictional priority rule".

***State ex rel. Gambill v. Opperman* 135 Ohio St.3d 298 (2013)**

The Scioto County Engineer maintained the county's tax maps as raw data in a proprietary data base from which the tax maps could be created. Traditionally, members of the public could request the raw data and interpret it with a free reader but, due to software updates, the reader no longer worked. After the software changes, the petitioner sought copies of tax maps for all property in Scioto County and objected to a $2,000 charge for compiling and copying the information to a hard drive or, alternatively, charges of $1 to $2 per page for 11x17" hard copies. The Supreme Court denied the petitioner a writ of mandamus. The Court first found that the electronic database was a "public record" subject to R.C. §149.43. However, it held that the database was exempt from disclosure because it would violate Federal copyright laws. The Court further held that the $2,000 cost of compiling and downloading the requested information could be charged under the Act and that the Plaintiff produced no clear and convincing evidence that the charges for hard copies were not the "actual costs" of reproduction. Because the mandamus action lacked merit, the petitioner was not entitled to attorney fees.

***State ex. rel. Lanham v. DeWine*, 2013-Ohio-199 (Supreme Court)**

Relator submitted a public records request to the Ohio Attorney General's Office. The Attorney General responded to the request by producing 172 documents and an explanation that several documents were being withheld because they were exempt from disclosure due to the attorney-client privilege. The Supreme Court denied the writ of mandamus and found that the records were appropriately withheld because they were exempt from disclosure under the Public Records Act.

***State ex rel. Luken v. Corporation for Findlay Market of Cincinnati* 135 Ohio St.3d 416 (2013)**

The Supreme Court held that subleases between the operator of a public market and its tenants were trade secrets exempt from disclosure under Ohio's Public Records Act.

***State ex rel. Miller v. Ohio State Hwy. Patrol*, 136 Ohio St.3d 350 (2013)**

The Ohio Supreme Court made it clear that a requester's burden in a mandamus action under the Public Records Act is to establish his or her case by clear and convincing evidence.

***State ex rel. Motor Carrier Service, Inc. v. Rankin* 135 Ohio St.3d 395 (2013)**

The Plaintiff sought un-redacted copies of its employees' driving records without filing certain certifications and a $5 fee enacted by the General Assembly and the Ohio Bureau of Motor Vehicles in part to comply with the Federal Driver's Privacy Protection Act. The Supreme Court held that the General Assembly was permitted to enact exceptions to the Ohio Public Records Act to comply with the DPPA. Furthermore, the Court held that the $5 charge did not violate the Act's requirement that records be produced "at cost" because, under prior precedent, the fee was a cost "otherwise set by statute." *State ex rel. Slagel v. Rogers* 103 Ohio St.3d 89 (2004).

***State ex rel. Ullmann v. JobsOhio*, 2013-Ohio-5188 (Ohio Supreme Court)**

The Supreme Court of Ohio held that JobsOhio is specifically exempted from the requirements of the Ohio Public Records Act pursuant to R.C. 149.43 and R.C. 187.04(C)(1).

***State ex rel. Anderson v. City of Vermilion*, 2012-Ohio-5320 (Supreme Court)**

The Relator filed a mandamus action seeking itemized bills to the City from the law director's law firm. The Sixth District held that the itemized bills were exempt from a public records request as they were protected by the attorney-client privilege. The Supreme Court reversed finding that non-exempt portions of the billings should have been provided in redacted form including the title of the matter being handled, dates services were performed, the hours expended, the rates charged and the fee. In doing so, the Supreme Court rejected an argument by the City to the effect that the records would be "meaningless" after redaction of the narrative description of services holding that there could be value in the remaining information and, in any event, there was no exemption in the act for "meaningless" information. The Supreme Court did, however, reject Relator's request for attorney fees because a large part of the records were exempt from disclosure and because a "well-informed public office" could have reasonably believed that the non-exempt information could be withheld based on the decision in *Dawson v. Bloom-Carroll Local School District*, 131 Ohio St. 3d. 10 (2011).

***State ex rel. Data Trace Information Servs., L.L.C. v. Cuyahoga County Fiscal Officer*, 131 Ohio St.3d 255 (2012)**

The Supreme Court held that documents filed with the County Recorder's Office were subject to the Ohio Public Records Act and, therefore, they must be provided to the requesting party. Further, the Court held that the $2.00 statutory photocopying charge for documents from the Recorder's office did not apply to electronic copies requested under the Public Records Act.

***State ex rel. Watson v. Mohr*, 131 Ohio St.3d 338 (2012)**
The Tenth District Court of Appeals granted a writ of mandamus but held that the requestor was not entitled to statutory damages regarding the requested records. The Ohio Supreme Court stated that the court of appeals did not abuse its discretion when it determined that the requestor was not entitled to damages, but was entitled to the writ. The request included nonpublic documents that would not be subject to damages and the Relator did not establish that "the public office or the person responsible for public records failed to comply with an obligation in accordance with R.C. §149.43(B)."

***State ex. rel. Zidonis v. Columbus State Community College,* 2012-Ohio-4228 (Supreme Court)**
A terminated employee filed a mandamus action seeking public records that she requested from her former public employer. The employee's requests included broad categories of documents such as "complaint and litigation files" and emails between her and another employee. The employer asked on multiple occasions for the employee to narrow the scope to ensure that they could respond to her request. She narrowed the time frame but not the description of the documents she sought. The Supreme Court held that the court of appeals had not abused its discretion in denying the writ. The Court reasoned that the duty to properly identify the desired documents rests with the requestor.

***State ex. rel. Moore v. Montgomery County Clerk of Courts* 2012-Ohio-5782 (2nd Dist.)**

Relator, an incarcerated inmate, sent a public records request to the Montgomery County Clerk of Courts requesting various records. The clerk, mistakenly believing that the inmate was requesting criminal records, responded with a letter stating that, pursuant to R.C. §149.43(B)(8), the Relator would need to obtain approval from a the sentencing judge in the relator's criminal case before he could receive the records that he requested. Relator filed a mandamus claim on December 7, 2011. On December 13, 2011 the Respondent forwarded copies of the records retention policy and the list of employees to the Relator along with a letter stating that he could not find a case matching the name that the Relator had provided. The appellate court awarded the Relator $400.00 in statutory damages. The appellate court recognized that the clerk mistakenly believed that the request was for criminal records, but held that "we have found no instance where mistake warrants delay and excuses the custodian of its duty to promptly disclose public records once a proper request has been made."

***State ex rel. Rhodes v. Chillicothe*, 2013-Ohio-1858 (4th Dist.)**

An independent contractor was hired by an attorney to make a public records request. The contractor sought a writ of mandamus compelling the city to provide "rejected" digital images that were forwarded to the city by the independent contractor operating its traffic photo enforcement program. The rejected images were deemed by the camera operator to clearly show no violation. The court held that rejected images not forwarded to the city were not subject to the public records act. The court further held that any images that were forwarded to the city, including "rejected" images, were public records and ordered their disclosure. Finally, the court ruled that the requestor was not an "aggrieved party" and therefore was not was not entitled to statutory forfeitures.

***State ex rel. Davis v. Metzger*, 2013-Ohio-1620 (5th Dist.)**

Plaintiff made a public records request for employment records of six different firefighters. The requested records were provided within three business days of the request. Plaintiff filed a mandamus action before the records were provided and later argued that they were not provided promptly and that certain requested documents were missing. The Fifth District Court of Appeals ruled that the documents were provided in a reasonable amount of time as the statute allows the public office to examine records prior to inspection in order to make appropriate redactions of exempt materials. The Court found that Plaintiff's conduct was frivolous and awarded attorney fees to the fire department.

***State ex rel. Toledo Blade Co. v. Toledo*, 2013-Ohio-3094 (6th Dist.)**

A newspaper petitioned for a writ of mandamus seeking to compel disclosure of a gang map used by the police department. The city argued that the gang map was exempt from disclosure because it was a confidential law enforcement investigatory record. The Sixth District Court of Appeals held that the map did not reveal any specific confidential investigatory technique or procedure. The Court found that the map only identified the locations where certain gangs operate. The Court denied statutory damages and attorney fees however, because it ruled that it was reasonable for the city to believe that the map may be exempt from disclosure.

***State ex rel. DiFranco v. S. Euclid*, 2012-Ohio-5158 (Ohio 8th Dist.)**

The Relator in a mandamus action sought damages under R.C. §149.43. The Eighth District Court of Appeals determined that email was not a method for requesting records that would implicate the damages provision of R.C. §149.43. The section provides "[i]f a requestor transmits a written request by hand delivery or certified mail to inspect or receive copies of any public records ***, the requestor shall be entitled to recover the amount of statutory damages set forth in this division." Since the section specifically mandates the form of request, the court declined to extend it to an email request such as the one that the Relator made.

***State ex. rel. Morabito v. Cleveland*, 2012-Ohio-6012 (8th Dist.)**

Apparently believing that her son had been physically abused, Relator submitted a public records request on April 29, 2011requesting a copy of all videotapes of the sixth floor detention center while her son was confined at the jail on February 18, 2011. The city responded on May 20, 2011 that it was unable to comply with the request because there was an on-going investigation. One year later Relator made a public records request for all documents, papers, and records related to her son's detention. The city provided 113 pages of records, but did not produce the videotape stating that there were mechanical difficulties that were being addressed. Relator made another request on May 18, 2012 and, when she did not receive the records, filed a mandamus action. The city provided the video that it had on August 20, 2012. Relator subsequently asked for written confirmation that her son was not interrogated, that the only videotape that had existed had been released or destroyed, an explanation of how, when and by whom the videotape was destroyed and whether the tape had been digitally stored so that it could be available through forensic retrieval.

The Court denied the mandamus petition as moot and further denied the Relator's claim for statutory damages. The Court held that there was no evidence that the requests were ever sent by certified mail, a prerequisite for damages. The Court held that the city had produced all of the records that it possessed and that the additional information that Relator was seeking was outside the scope of R.C. §149.43. The Court further denied the Relator's request for attorney fees, finding that the public records request did not serve a public benefit.

***State ex. rel. Hartkemeyer v. Fairfield Twp.*, 2012-Ohio-5842 (12th Dist.)**

After making a public records request, Relator filed a petition for a writ of mandamus on April 12, 2012. The requested records were provided to the relator on or about July 20, 2012. The appellate court held that the relator was entitled to $1,000 in statutory damages, the maximum permissible under the Ohio Public Records

Act. The Court rejected the township's argument that the relator was not entitled to statutory damages because the township had previously provided the records in response to a discovery request in a separate mandamus action. The Court likewise rejected the township's argument that it had been overwhelmed by the Relator's public records requests noting that the statute does not offer exceptions to public offices that are understaffed or are otherwise unable to comply with statutory mandates because of the way they choose to utilize their resources.

Streets and Highways

***State ex rel. Wilson v. Beljon*, 2013-Ohio-4753 (11th Dist.)**

The Eleventh District Court of Appeals found that the city was entitled to a prescriptive easement for a city street built partially outside the platted right of way and continuously used in that configuration since the 1920's.

Taxpayer Actions

***McQueen v. City of Cincinnati* 2013-Ohio-2424 (Supreme Court).**

The Court held that the Plaintiffs were not entitled to pursue a taxpayer's action because they failed to comply with the security requirements of R.C. § 733.59. The Court further held that the Cincinnati City Charter followed state law prohibiting referenda on emergency ordinances by stating "such power (referenda and initiatives) shall be exercised in the manner provided by the laws of the state of Ohio".

Zoning

***Clifton v. Blanchester*, 131 Ohio St.3d 287 (2012)**

A property owner objected to rezoning that occurred in an adjacent municipality. The Supreme Court held that a property owner does not have "standing to bring a regulatory taking claim against a municipality when the affected property is outside the municipality's corporate limit." The Court reasoned that the regulation in question was not directed at the plaintiff's property and that it caused only incidental damages that could not be attributed to the government actor. Further, the Court stated "a municipality's liability for a regulatory taking is limited to the property that it is authorized to regulate." However, the court cautioned: "we emphasize that we do not hold that an adjoining property owner may never have standing. Instead, we hold that a property owner lacks standing under the facts and circumstances presented."

***Moore v. City of Middletown*, 2012-Ohio-3897 (Supreme Court)**

Property owners residing in Monroe, Ohio brought suit against the City of Middletown for declaratory judgment challenging the constitutionality of the City of Middletown's zoning code. The Court of Appeals stated that the Plaintiffs lacked standing to bring the case because they were not residents of the City of Middletown and their property was merely adjacent to the City. The Ohio Supreme Court reviewed the decision in *Clifton* and held that the property owners could not maintain a regulatory takings claim. However, it determined that the property owners did have standing to bring a constitutional challenge.

Class Actions

***Genesis Healthcare Corp. v. Symczyk* _ U.S. _ (2013).**

A potential class representative who has rejected an FRCP 68 offer of judgment that fully satisfies the Plaintiff's individual claim is no longer an appropriate representative because he or she has no personal interest in representing other potential class members.

***The Standard Fire Insurance Company v. Knowles* 133 S.Ct. 1345 (2013).**

A potential class representative cannot prevent removal under the Class Action Fairness Act by stipulating prior to prior to class certification that he and the class will not seek damages exceeding $5m.

Malicious Prosecution

***Pierce v. Woyma*, 2012-Ohio-3947 (8th Dist.)**

An officer accused of malicious prosecution, abuse of process, and intentional infliction of emotional distress moved for summary judgment asserting immunity under R.C. Ch. 2744. The officer's motion was denied by the trial court and he appealed. The court of appeals held that the officer merely wrote a report that was given to his commanding officer and subsequently to the prosecutor before any charges were filed. Accordingly, he was not the party that initiated the prosecution and he could not be found liable for the claims that the plaintiff asserted against him.

Recreational Users Statute – R.C. Sec. 1533.18, et seq.

***Pauley v. Circleville*, 137 Ohio St.3d 212 (2013)**

The Plaintiff suffered a broken neck when he allegedly struck an object that looked like a railroad tie while sledding in a city park. The Supreme Court of Ohio ruled that the sled rider was a recreational user since he entered the park free of charge to engage in a recreational activity (sledding). The Court rejected Plaintiff's contention that the owner of recreational premises loses the protections of the statute when alterations to the property render it more dangerous without promoting or preserving its recreational uses. Instead, the Court held that the owner loses the benefit of the statute only when alterations change the property's essential character as recreational space.

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