TERRY'S TAKES

June 25-July 1, 2023

Announcements

On July 1, 2023, Chief Judge James A. Edwards begins his service as Chief Judge of the Fifth District Court of Appeal. Chief Judge Edwards was appointed to the court in 2014. He is past-Chair, as of July 2019, of the Judicial Ethics Advisory Committee and was recognized in 2017 as Jurist of the Year by the Central Florida Chapter of the American Board of Trial Advocates. During his 35 years in private practice, he represented clients in state and federal courts throughout Florida and the Caribbean in litigation and appeals in cases involving products liability, pharmaceuticals, legal malpractice, complex commercial issues, railroads, banking, bail bonds, trucking, auto accidents, and insurance. Judge Edwards is a Florida Bar Board Certified Civil Trial Specialist (Inactive). He also served as a neutral mediator for state and federal cases. His appellate practice included cases before all five district courts of appeal in Florida, the Florida Supreme Court, and the United States Courts of Appeals for the Third, Fifth, and Eleventh Circuits.

Judge Edwards graduated with high honors from Auburn University, where he majored in psychology and received minors in economics and French. He graduated from the University of Florida College of Law with high honors and was inducted into the Order of the Coif. Judge Edwards is admitted to practice in Florida and the United States Virgin Islands.

Supreme Court of the United States

Counterman v. Colorado

Supreme Court of the United States
6/27/23, Justice Kagan
Topics: First Amendment True Threat

Summarizing criminal cases is beyond the scope of Terry's Takes, a personal injury law update. That said, Counterman v. Colorado is the kind of case that will be taught in law schools. It could also have effects in tort cases or even in 1983 civil actions.

In this case, a guy kept harassing a singer by creating new Facebook profiles every time she blocked him. He kept sending messages with fantasies about violence involving her, but the messages were phrased in a way that did not make it explicit that he planned to inflict this violence on her. Regardless, she eventually reported the harassment to the cops after she started essentially living in fear of going out in public. He was charged with—and convicted of—a crime under Colorado state law that had, as its *mens rea* element, whether the statements would place an objectively reasonable person in fear, and he argued that the crime violated the First Amendment right to free speech due to the lack of any requirement of intent to threaten.

The State countered that a "true threat" is exempted from First Amendment protection. Counterman..um…countered with the argument that without a showing of any subjective understanding that he was threatening her, there could be no "true threat."

For the first time, the United States Supreme Court has held that in order to prosecute someone for a crime involving a threat, in order to qualify for the "true threat" exception to the First Amendment, the State must show at least a "reckless" *mens rea* in terms of the person making the threat. In this context, a recklessness standard is shown by demonstrating that a person consciously disregarded a substantial and unjustifiable risk that his conduct will cause harm to another. Because the state crime had an objective standard and no element of subjective *mens rea*, his conviction violated the First Amendment. Interestingly, JUSTICE KAGAN wrote the majority, and C.J. ROBERTS, and JUSTICES ALITO, KAVANAUGH, and JACKSON joined. JUSTICE SOTOMAYOR CONCURRED SPECIALLY, and JUSTICE GORSUCH JOINED HER OPINION. JUSTICES THOMAS and BARRETT both wrote separate DISSENTS, though JUSTICE THOMAS joined Barrett's dissent.
https://www.supremecourt.gov/opinions/22pdf/22-138_43j7.pdf

Mallory v. Norfolk Southern Railway Co.

Supreme Court of the United States
6/27/23, Justice Gorsuch
Topics: Consent Jurisdiction, Personal Jurisdiction

This is another case that will likely appear in law school civil procedure classes, and Justice Barrett thinks the majority (or plurality) has effected a "sea change" for obtaining personal jurisdiction over corporate defendants.

Mallory is a retired former employee of Norfolk Southern Railway Company ("Norfolk Southern"). Over 20 years, he worked for the company in both Ohio and Virginia. He performed work that exposed him to carcinogens.

When he retired, Mallory moved to Pennsylvania and then back to Virginia. When he was diagnosed with cancer that he thinks was caused by his employment, he sued Norfolk Southern in Pennsylvania under the Federal Employers' Liability Act (45 U.S.C. §§55-60). That law creates a workers compensation scheme permitting railroad employees to recover damages for their employers' negligence.

Norfolk Southern argued that the Due Process clause of the Fourteenth Amendment barred Pennsylvania courts from finding personal jurisdiction over the railroad company. The "place of the wrong" was alleged to be Ohio and Virginia, the there was arguably no "specific jurisdiction." The company was incorporated in Virginia and had its headquarters there, so there was arguably no "genera jurisdiction."

Mallory answered that the railroad operates and has repair shops in Pennsylvania and—probably more importantly—that it was registered to do business in Pennsylvania. Pennsylvania requires out-of-state companies to register to do business there and agree to appear in its courts on "any cause of action" against them, so the corporation had waived any defense about lack of personal jurisdiction.

The Pennsylvania courts found that the statute consented to jurisdiction when it obeyed the registration statute, but that forcing them to do so offended Due Process and the requirement of minimum contacts with the forum state for purposes of establishing personal general jurisdiction.

Georgia's highest court had found, in a similar case, that a similar statute operated to consent to jurisdiction and that it did ***not*** offend due process. In light of that split of authority, the Supreme Court agreed to hear the case.

Citing a precedent from 1917, Fire Ins. Co. of Philadelphia v. Gold Issue Mining & Milling Co., 243 U. S. 93 (1917), the Supreme Court held that state statutes like those in Pennsylvania and Georgia that require corporations to consent in some way to personal jurisdiction in the state as a cost of doing business do not offend due process's personal jurisdiction requirements. Consent to be sued—part of the registration process--waives the objection to personal jurisdiction.

The court rejected the argument that International Shoe Co. v. Washington, 326 U. S. 310 (1945), had quietly overruled Fire Ins. Co. of Philadelphia. Justice Gorsuch summarized International Shoe as holding that even a corporation who did ***not sign*** any sort of consent to be sued in a foreign state could be haled into that state's courts if its activities in the state made it reasonable and just to sue the out-of-state corporation there. In other words, before International Shoe, general jurisdiction was the only game in town, but International Shoe essentially invented the concept of "specific jurisdiction." But this case is premised on the same sort of facts in the 1917 case—consent to personal jurisdiction—not the activity of the corporation in Pennsylvania or minimum contacts. Mallory's case did not turn on specific jurisdiction.

Essentially, this decision confirms that in addition to "general" and "specific" forms of personal jurisdiction, registration and "consent-based jurisdiction" to be sued in the forum state is a third path to establishing personal jurisdiction. (NOTE: Honestly, they should just lump this in as a subset of "general" jurisdiction, which is premised on the out-of-state corporation having such a presence in the state that it can be considered like a home resident. That is exactly what the registration and consent to be sued accomplishes.)

The court rejected any notion that suing the railroad in Pennsylvania was unfair, citing the company's website where it boasts about its presence in Pennsylvania. The court also noted that it employed 5,000 people in the state[1]. It operates more train track in that state than anywhere else, and it employs more people there than its supposed home in Virginia.

The closest Norfolk Southern came to scoring points with the majority—in an argument Justice Gorsuch called "half right"—is by insisting that Pennsylvania infringed the right of sovereignty and principles of federalism by taking jurisdiction over a case that should be brought in Virginia where the headquarters was located (or one of the states that was a place where the exposure to carcinogens occurred). Justice Gorsuch conceded that there are cases along those lines, but none of them involved one of these register-in-the-state, consent-to-jurisdiction agreements. In a statement sure to be quoted in many briefs going forward, Justice Gorsuch rejects the state's-rights/federalism theory by stating, "After all, personal jurisdiction is a *personal* defense that may be waived for forfeited."

[1] I'm not gonna call it a "commonwealth." There are 50 states. It's a state with a cute nickname.

JUSTICE JACKSON CONCURRED SPECIALLY, noting that personal jurisdiction is an "individual, waivable right." Whether a defendant waives personal jurisdiction explicitly, implicitly, or constructively, none of this offends the Due Process clause of the Fourteenth Amendment. Norfolk Southern agreed to register as a foreign corporation in Pennsylvania in exchange for the ability to conduct business within the Commonwealth and receive associated benefits, which constituted a valid waiver. She did not think they were forced into it, as she opined that they could have conducted the railroad business without meeting the requirements of the statute to register.

JUSTICE ALITO CONCURRED IN PART, writing that he agreed with the holding because he *assumed* that it was Constitutional for a state to demand that a corporation register in order to do business there. He noted that Norfolk Southern had asserted a Dormant Commerce Clause argument in the trial court and that they could argue that theory on remand, but the Pennsylvania Supreme Court had not addressed it, so it wasn't part of the consideration in this case.

Alito's opinion hints strongly that he'll be willing to find that the register-to-do-business requirement is unconstitutional, which would then likely render the waiver invalid. He notes that "[u]nder our modern framework, a state law may offend the Commerce Clause's negative restrictions in two circumstances: when the law discriminates against interstate commerce or when it imposes "undue burdens" on interstate commerce." He adds: "Discriminatory state laws are subject to 'a virtually *per se* rule of invalidity.'" He opines that there "is reason to believe" that mandatory registration is a form of discrimination against out-of-state companies or significantly burdens them because it obligates them to defense against civil actions with no connection to the forum state. (NOTE: I hate to say it, but I feel like Alito is right. The idea that an American company has to specially register to do business in an American state feels wrong).

JUSTICE BARRET DISSENTED, and she was JOINED BY CHIEF JUSTICE ROBERTS, JUSTICE KAGAN, and JUSTICE KAVANAUGH. Justice Barrett essentially says that these consent-to-be-sued registration statutes are a dirty trick and an unfair way of creating a loophole where personal jurisdiction to sue a corporation would otherwise be lacking.

Justice Barrett argues that this third form of jurisdiction, consent-based jurisdiction, is illegitimate. She writes that Supreme Court case law divides personal jurisdiction into two categories: specific and general. Both are subject to the demands of the Due Process Clause. Specific jurisdiction, as its name suggests, allows a state court to adjudicate specific claims against a defendant. When a defendant "purposefully avails itself of the privilege of conducting activities within the forum State," that State's courts may adjudicate claims that "'arise out of or relate to the defendant's contacts' with the forum." (NOTE: The most typical type of specific jurisdiction is proof that the forum state is the place of the wrong). General jurisdiction, by contrast, allows a state court to adjudicate "'any and all claims' brought against a defendant." This sweeping authority exists only when the defendant's connection to the State is tight—so tight, in fact, that the defendant is "'at home'" there. An individual is typically "at home" in her domicile, and a corporation is typically "at home" in both its place of incorporation and principal place of business. Absent an exceptional circumstance, general jurisdiction is cabined to these locations. But now the majority/plurality has identified a way for states to circumvent either of these paths to jurisdiction and strong-arm corporations into agreeing to be sued somewhere far from "home" even if the case does not arise out of actions taken in the forum state.

The dissent thinks the mandatory registration is a far cry from actual consent, agreeing with the Pennsylvania Supreme Court that it's really "compelled submission to general jurisdiction by

legislative command." (NOTE: See? Four justices agree with me that this consent stuff is really just a subset of general jurisdiction, not a third theory. Justice Gorsuch really needs to start reading Terry's Takes.)

The dissent pokes at the logic of the majority by asking whether a State could simply skip the registration process altogether and adopt a statute that says that any corporation doing business in the state consents to jurisdiction. The dissent then notes that such a statute would run afoul of prior precedents.

The dissent notes that Fire Ins. Co. of Philadelphia was decided before the theory of specific jurisdiction was created back when the only form of personal jurisdiction was general jurisdiction. The dissent viewed Fire Ins. Co. of Philadelphia as overruled. She writes that International Shoe was a game-changer, and cases before it are overruled or unreliable when they pertain to jurisdiction questions. Alternatively, she did not think the forced consent in this case was similar to the express consent in Fire Ins. Co. of Philadelphia, so she would have found the case distinguishable.

Justice Barrett predicts that states will all pass registration statutes and that specific jurisdiction with respect to corporations will be superfluous. She calls the case a "sea change" in the way corporate personal jurisdiction is handled.
https://www.supremecourt.gov/opinions/22pdf/21-1168_f2ah.pdf

Students for Fair Admissions, Inc. v. President and Fellows of Harvard College

Supreme Court of the United States
6/29/23, Justice Kagan
Topics: Civil Rights

The Supreme Court handed down another historic case that will be read in law school for years to come. The total of the opinions is 237 pages. I'm not going to summarize them, but it's important to know that the court, in an opinion written by CHIEF JUSTICE ROBERTS, struck down race-based college admissions as violative of the Equal Protection Clause of the Fourteenth Amendment. His lengthy opinion concludes:

> Both [university] programs lack sufficiently focused and measurable objectives warranting the use of race, unavoidably employ race in a negative manner, involve racial stereotyping, and lack meaningful end points. We have never permitted admissions programs to work in that way, and we will not do so today. At the same time, as all parties agree, nothing in this opinion should be construed as prohibiting universities from considering an applicant's discussion of how race affected his or her life, be it through discrimination, inspiration, or otherwise.
>
> But, despite the dissent's assertion to the contrary, universities may not simply establish through application essays or other means the regime we hold unlawful today. A dissenting opinion is generally not the best source of legal advice on how to comply with the majority opinion. What cannot be done directly cannot be done indirectly. The Constitution deals with substance, not shadows, and the prohibition against racial discrimination is levelled at the thing, not the name. A benefit to a student who overcame racial discrimination, for example, must be tied to that student's courage and

> determination. Or a benefit to a student whose heritage or culture motivated him or her to assume a leadership role or attain a particular goal must be tied to that student's unique ability to contribute to the university. In other words, the student must be treated based on his or her experiences as an individual—not on the basis of race. Many universities have for too long done just the opposite. And in doing so, they have concluded, wrongly, that the touchstone of an individual's identity is not challenges bested, skills built, or lessons learned but the color of their skin. Our constitutional history does not tolerate that choice.

JUSTICE THOMAS CONCURRED SPECIALLY. JUSTICE GORSUCH CONCURRED SPECIALLY, AND HE WAS JOINED BY JUSTICE THOMAS. He wrote on why Title VI of the Civil Rights Act of 1964 also should be construed to forbid race or diversity from being considered in college admissions. JUSTICE KAVANAUGH CONCURRED SPECIALLY, trying to argue that race-based university admissions was always something that case law stated would only be tolerated for long enough to set things on a path to equality, and he figures it's been long enough.

JUSTICE SOTOMAYOR DISSENTED and was JOINED BY JUSTICE KAGAN AND JUSTICE JACKSON. The dissent can be boiled down to the view that the requirement of racial equality cannot be achieved by being "colorblind." Instead, the law can be used to advance previously disadvantaged races to a position of equality by doing equity.

JUSTICE JACKSON DISSENTED (and was also JOINED BY JUSTICES KAGAN AND SOTOMAYOR) to point out that "[g]ulf-sized race-based gaps exist with respect to the health, wealth, and well-being of American citizens" based on race. Near the end of her dissent, she writes:

> With let-them-eat-cake obliviousness, today, the majority pulls the ripcord and announces "colorblindness for all" by legal fiat. But deeming race irrelevant in law does not make it so in life. And having so detached itself from this country's actual past and present experiences, the Court has now been lured into interfering with the crucial work that UNC and other institutions of higher learning are doing to solve America's real-world problems.
>
> No one benefits from ignorance. Although formal racelinked legal barriers are gone, race still matters to the lived experiences of all Americans in innumerable ways, and today's ruling makes things worse, not better. The best that can be said of the majority's perspective is that it proceeds (ostrich-like) from the hope that preventing consideration of race will end racism. But if that is its motivation, the majority proceeds in vain. If the colleges of this country are required to ignore a thing that matters, it will not just go away. It will take longer for racism to leave us. And, ultimately, ignoring race just makes it matter more.
>
> The only way out of this morass—for all of us—is to stare at racial disparity unblinkingly, and then do what evidence and experts tell us is required to level the playing field and march forward together, collectively striving to achieve true equality for all Americans. It is no small irony that the judgment the majority hands down today will forestall the end of race-based disparities in this country, making the colorblind world the majority wistfully touts much more difficult to accomplish.

She ends with calling the majority's decision "truly a tragedy for us all."
https://www.supremecourt.gov/opinions/22pdf/20-1199_l6gn.pdf

Supreme Court of Florida

Tsuji v. Fleet

Supreme Court of Florida
6/29/23, Justice Couriel
Topics: Statute of Limitation, Statute of Repose, Vicarious Liability

The Supreme Court of Florida resolved an express and direct conflict between the First and Fourth DCA regarding the statute of limitations for a negligence case against a deceased defendant. Section 733.710(1), Fla. Stat. (2013), allows two years to bring such a case, and this case was filed three years after the death, so it was barred.

The First DCA's 2021 opinion certified conflict with Pezzi v. Brown, 697 So. 2d 883 (Fla. 4th DCA 1997), which had held that section 733.702(4)(b), Florida Statutes (1995), provided an exception to the 2-year statute of limitation where a plaintiff in a negligence action sought money damages from the decedent's insurer rather than from the decedent himself (or from his estate, his personal representative, or his beneficiaries). The Court found that the brand new opinion extinguishing a plaintiff's right to a suit was correct and that the precedent that stood for over a quarter century, without ever being amended by the Legislature, was wrong. The First DCA's holding that section 733.710(1) bars the petitioners from bringing claims based on negligence against an estate beyond the two-year time limit barred this suit alleging that the decedent's employer was vicariously liable for the decedent's negligence under both respondeat superior and dangerous instrumentality theories.

The DCA expressly noted that the plaintiff's had no knowledge that the defendant had died from causes unrelated to the car accident only weeks after the 2014 accident, but that did not result in them excusing the plaintiff's delay in filing the civil action.

The Supreme Court held that section 733.710 barred the plaintiff's claims against the personal representative of the decedent's estate. The statute of repose is two years after death. There are statutory exceptions, but none of them apply. Plaintiffs filed their claims more than two years after the driver's death.

The court expressly addressed the plaintiff's argument that the legislature's failure to correct the 1997 opinion from the Fourth DCA weighed in favor of adopting its interpretation of the law. Ignoring cases that support that argument, the court instead cited different cases and portions of the Florida Constitution that seem to state that, at least when there is no Supreme Court of Florida holding directly on point, legislative inaction in response to a DCA opinion is "irrelevant."

And in regard to the decedent's employer, LBC, when a statute of repose bars claims against an agent for negligence, the principal is exonerated from vicarious liability arising solely from that agent's negligence.

Because an alleged vicariously liable employer and its employee "are in no sense joint tort-feasors," a party must establish an employee's liability in a vicarious liability action against the employer. If a party fails to do so, exonerating the employee, "a principal cannot be held liable" either.

Now, here's the weird wrinkle. Applying this common law rule—the "exoneration rule"—for vicarious liability claims against an employer has always turned on whether the underlying claims against the employee have been "**adjudicated on the merits**," and this is the first claim brought regarding this car accident. One would think that it has never been "adjudicated on the merits," so the employer's vicarious liability is not barred. But then the Court stated that the "pertinent question" was whether section 733.710, a "jurisdictional statute of nonclaim that automatically bars untimely claims," constitutes (apparently just by existing) "such an **adjudication** where the provision bars the petitioners' claims against" the decedent's estate. The existence of a statute "constituting" an ADJUDICATION ON THE MERITS is a bizarre reading of the law, but it's now Florida law. This will apparently apply to statutes of repose that time-bar claims. One wonders if parties can now claim collateral estoppel in a first case against each other since the law simply existing on the books now somehow constitutes an "adjudication on the merits."

JUSTICE LABARGA wrote a 6-page DISSENT (and JUSTICE SASSO did not participate in the case at all). He agreed that IF the claims against the estate were barred, then the employer could not be held vicariously liable. But he would have followed the Fourth DCA's interpretation and found an exception to the 2-year statute of repose. He would have held that the term "liable" in section 733.710 refers to pay-money liability, that sections 733.702 and 733.710 do not bar suit against the decedent's estate, and accordingly that suit may be brought against the employer under a theory of vicarious liability
https://supremecourt.flcourts.gov/content/download/872081/opinion/SC2021-1255.pdf

Fifth DCA

City of Winter Park v. Veigle

5th DCA
6/30/23, Judge Jay
Topics: Sovereign Immunity

An officer from the Winter Park Police Department got into a car accident while driving home from work. The other driver involved in the accident sued the City of Winter Park ("Winter Park"), alleging that the city was vicariously liable for the officer's purportedly negligent driving. Winter Park moved for summary judgment on sovereign immunity grounds, arguing that the officer was not acting within the scope of his employment when the accident occurred. The trial court denied summary judgment, finding there was a question of fact. Winter Park appealed. Orders on sovereign immunity are authorized for immediate interlocutory appeal.

While the officer's affidavit stated that "part of his employment" was that he was assigned "a take-home patrol vehicle to drive to and from work and during each shift," the DCA held that driving to and from work was not in the officer's scope of employment. Merely driving a government-owned vehicle, which the government has authorized for personal use, does not transform an otherwise off-the-clock government employee into one acting within the scope of his employment. Neither did the

fact that he was still in uniform even though his job required him to drive the patrol car in uniform, not in civilian clothes. He was done with work and heading home.

Section 768, 28(9)(a), Fla. Stat. (2019), provides that the state or its subdivisions are not liable for torts committed by employees outside the course and scope of their employment or committed in bad faith or with malicious purpose or in a manner exhibiting wanton and willful disregard of human rights, safety, or property. In any given situation, either the government or the employee can incur liability, but not both. And the court has to act as a gatekeeper to stop claims barred by sovereign immunity from going to trial. REVERSED AND REMANDED.
https://supremecourt.flcourts.gov/content/download/872155/opinion/221757_DC13_06302023_090652_i.pdf

Frazier v. Panera, LLC

5th DCA
6/30/23, Judge
Topics: Premises Liability; Slip and Fall

This is a premises liability slip-and-fall case.

Frazier and her husband parked their vehicle in a Panera's parking lot. Panera is a salad/bread/sandwich restaurant chain. They exited their car with the intent of walking into the Panera, but as Mrs. Frazier walked up onto the sidewalk, she tripped on a "weighted base" that is normally used for holding a sign in place. This base had no sign or pole inserted, so it was essentially a heavy lump on the sidewalk.

Panera moved for summary judgment, arguing that the sign base was open and obvious and, therefore, Panera had no duty to warn its invitee of the hazard. The trial court agreed and entered summary judgment against the plaintiff. She appealed.

The DCA reminds us that a landowner and occupier owes two distinct duties to invitees: (1) to give warning of concealed perils which are known or should be known to the owner, but which are not known to the invitee, and (2) to maintain the premises in a reasonably safe condition.

Here, the trial court held that the danger was "open and obvious," not a "concealed peril," because it was black and the sidewalk was white and it was a sunny day where the sign base would be visible if one was looking down. Frazier failed to look down as she walked. That did not matter to the DCA, which saw the issue less in terms of physical concealment and more in terms of whether the sign base was something one would normally encounter. The DCA stated:

> Many cases cited by the court and Panera involving uneven pavement, traffic bumps, landscape features, and steps within business premises or residences were decided in favor of the defendant on the grounds that the conditions were a matter of common knowledge or everyday life. The same cannot be said for the weighted sign base in this case. A weighted base without a sign attached to it is not so common that people encounter it on a daily basis.

Part of what makes this not something that is open and obvious is that it is so low to the ground and not in a place one would normally look for obstructions. The base was located on the entry way into the restaurant. The employees had just removed the sign portion and were soon coming back for the base, which indicated "that it was not intended to be left there in the first place." All of this constituted a genuine issue of material fact on the question of whether the base was open and obvious. Thus, this is a great case to cite to shoot down an "open and obvious" defense if the hazard was something unusual or out of the ordinary or unexcepted.

The DCA stated that even if the base were open and obvious, that did not resolve the question about the SECOND duty of a landowner. There is a genuine issue of material fact as to whether leaving the base out there unattended without a sign sticking out of it meant that the landowner created a hazardous condition and failed to maintain the premises in a safe condition. Whether the hazardous condition is open and obvious **does not matter** for the second duty except for purposes of comparative negligence.

REVERSED AND REMANDED.
https://supremecourt.flcourts.gov/content/download/872154/opinion/221496_DC13_06302023_090347_i.pdf