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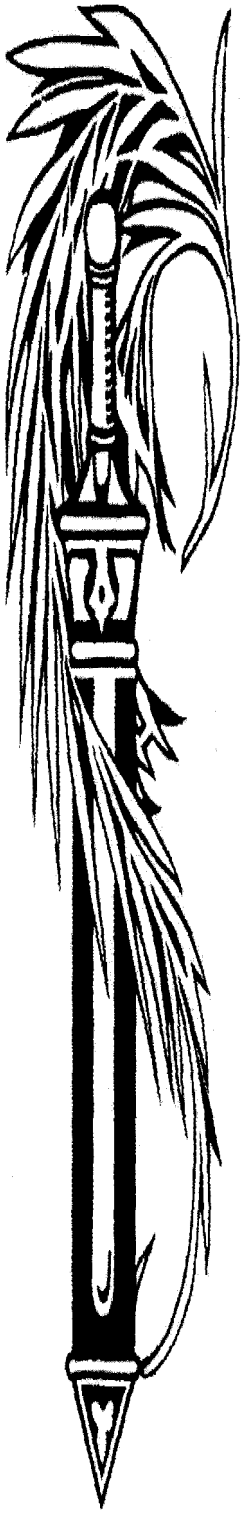
THE BADGER LAW GUIDE



QUICK REFERENCE: (Civil Case Citations)

- Volume 2—

This is a reference guide listing relevant civil case citations, statutes, and rules, with a primary focus on 7th Circuit and Wisconsin court decisions.

DECLARATORY RELIEF continued

o A declaratory judgment is a simple, ordinary remedy to be asked for and given whenever it removes uncertainty in the rights of a litigant or settle a controversy existing or incipient. ***Lay v. Bunderson,*** 107 Wis.2d 400, 320 N.W.2d 175 (1982).

o "Although immunity serves as a bar to both money damages and injunctive relief based in tort, municipalities do not benefit from the shield of immunity in actions seeking declaratory relief." ***Willow Creek Ranch, LLC*** v. ***Town of Shelby,*** 2000 WI 56, P36, 235 Wis.2d 409, 429 (2000).

O Declaratory judgments are not "suits" within the meaning of Wis. Stat. § 893.80(4), therefore governmental immunity does not apply. ***Schmeling v. Phelps,*** 212 Wis.2d 898, 914, 569 N.W.2d 784, 791 (Ct. App. 1997).

O "The circuit court has discretionary authority to order supplemental relief, including monetary damages, under Wis. Stat. § 806.04(8), if the party seeking the relief petitions the court to grant such relief and the relief is necessary to carry out a declaratory judgment." ***Watertown Tire Recyclers, LLC. v. Kurtzman,*** 411 U.S. 192, 200, 93 S.Ct. 1463 (1973)).

DEFAMATION

o Both libel and slander are forms of defamation, the distinction being that libel involves a written defamatory statement while slander is oral. ***Freer v. M&I Marshall and Ilsley Corp.,*** 2004 WI App. 201, ¦ 9, 276 Wis.2d 721.

O The elements of a common law action for defamation are: (1) a false statement; (2) communicated by speech, conduct, or in writing to a person other than the one defamed; and (3) the communication is unprivileged and tends to harm one's reputation, lowering him or her in the estimation of the community or deterring third persons from associating or dealing with him or her. ***Ladd v. Uecker,*** 2012 WI App 28, ¦ 8, 323 Wis.2d 798, 780 N.W.2d 216.

O A cause of action for defamation, slander or libel must be filed "within 2 years after the cause of action accrues." ***Wis. Stat. § 893.57.***

DELIBERATE INDIFFERENCE (Conditions of Confinement)

•. A plaintiff claiming a violation of the Eighth Amendment must satisfy both an objective test (whether the conditions can be considered cruel and unusual) and a subjective test (whether the defendants acted with a culpable state of mind). ***Wilson v. Seiter,*** 501 U.S. 294, 298, 111 S.Ct. 2321 (1991); ***McNeil v. Lane,*** 16 F.3d 123, 124 (7th Cir. 1994).

•. To prevail on an Eighth Amendment deliberate indifference claim, a plaintiff must produce evidence that satisfies two elements. ***Hall v. Bennett,*** 379 F.3d 462, 464 (7th Cir. 2004). The plaintiff has the burden of showing that: (1) the harm to the plaintiff was objectively serious; and (2) the official was deliberately indifferent to his health or safety. ***Board v. Farnham,*** 394 F.3d 469, 478 (7th Cir. 2005) (citing ***Cavalieri v. Shepard,*** 321 F.3d 616, 620 (7th Cir. 2003)).

•:. "[A] prison official may be held liable under the Eighth Amendment for denying humane conditions of confinement only if he knows that inmate faces a substantial risk of serious harm and disregards that risk by failing to take reasonable measures to abate it." ***Farmer v. Brennan,*** 511 U.S. 825, 847, 114 S.Ct. 1970 (1994).

•:. "Mechanical rules are not to be employed in determining whether an alleged deprivation violates the Eighth Amendment." ***Tittle v. Carver,*** 2007 U.S. Dist. LEXIS 27452, pg. 11 (E.D. Wis.).

•. Deliberate indifference can be established by inference from circumstantial evidence, including evidence that the risk was "so obvious that a jury may reasonably infer actual knowledge on the part of the defendants." ***Hall v. Bennett,*** 379 F.3d 462, 464 (7th Cir. 2004).

+ A finding of deliberate indifference requires evidence "that the official was aware of the risk and consciously disregarded it nonetheless." ***Glover v. Haferman,*** 2007 U.S. Dist. LEXIS 12459, pg. 45 (E.D. Wis. 2007) (quoting ***Chapman v. Keltner,*** 241 F.3d 842, 845 (7th Cir. 2001)).

DELIBERATE INDIFFERENCE (Conditions of Confinement) continued

+ Given the conditions of a floor covered with water, a broken toilet, feces and blood smeared along the wall, and no mattress to sleep on— a reasonable jury could infer that prison guards working in the vicinity necessarily would have known about the condition of the segregation cells. ***Vinning-El v. Long,*** 482 923, 925 (7th Cir. 2007).

•:. The right to toothpaste as an essential hygienic product is analogous to the established right to a nutritionally adequate diet. ***Board v. Farnham,*** 394 F.3d 469 (7th Cir. 2005).

+ "Sleep undoubtedly counts as one of life's basic needs. Conditions designed to prevent sleep, then, might violate the Eighth Amendment." ***Harper v. Showers,*** 174 F.3d 716, 720 (7th Cir. 1999).

+ Warmth is one of life's basic needs. ***Wilson v. Seiter,*** 501 U.S. 294, 304-305, 111 S.Ct. 2321 (1991). Prisoners have a right to protection from extreme cold. ***Dixon v. Godinez,*** 114 F.3d 640 (7th Cir. 1997). Prisoner plaintiff does not need to show that he suffered from "frostbite, hypothermia or similar infliction." ***Del Raine v. Williford,*** 32 F.3d 1024, 1035 (7th Cir. 1994).

• When a guard intends to humiliate or gratify himself through an unwanted touching of an inmate's private parts (i.e., improper pat search), the intrusion violates the prisoner's Eighth Amendment rights even if the force that a guard uses is slight. ***Washington v. Hively,*** 695 F.3d 641 (7th Cir. 2012).

•. "[T]he Eighth Amendment protects more than an inmate's physical health and safety. It also protects his dignity as a human being...." ***Bowers v. Pollard,*** 2009 U.S. Dist. LEXIS 21164, pg. 41-42 (E.D. Wis.).

+ To determine whether conditions rise to Eighth Amendment violations, the 7th Circuit examines the totality of the conditions of confinement. ***French v. Owens,*** 777 F.2d 1250, 1252 (7th Cir. 1985).

DELIBERATE INDIFFERENCE (Medical)

+ "Prison physicians will be liable under the Eighth Amendment if they intentionally disregard a known, objectively serious medical condition that poses an excessive risk to an inmate's health." ***Farmer v. Brennan,*** 511 U.S. 825, 837, 114 S.Ct. 1970 (1994). A defendant may "not escape liability if the evidence show[s] that he merely refused to verify underlying facts that he strongly suspected to be true, or declined to confirm inferences of risk that he strongly suspected to exist." ***Farmer,*** 511 U.S. 825, 843, n.8.

+ "A 'serious' medical need is one that has been diagnosed by a physician as mandating treatment or one that is so obvious that even a lay person would easily recognize the necessity for a doctor's attention." ***Gutierrez v. Peters,*** 111 F.3d 1364, 1373 (7th Cir. 1997) (citation omitted); see also ***Johnson v. Snyder,*** 444 F.3d 579, 584-85 (7th Cir. 2006) (A medical professional must take a prisoner's complaints seriously).

•. A medical need may be serious if it "significantly affects an individual's daily activities," ***Chance v. Armstrong,*** 143 F.3d 698, 702 (2d Cir. 1998), if it causes pain, ***Cooper v. Casey,*** 97 F.3d 914, 916-17 (7th Cir. 1996), or if it otherwise subjects the prisoner to a substantial risk of serious harm, ***Farmer v. Brennan,*** 511 U.S. 825 (1994).

+ Ignoring a request for medical treatment is a form of cruel and unusual punishment "provided that the illness or injury for which assistance is sought is sufficiently serious or painful to make the refusal of assistance uncivilized." ***Cooper v. Casey,*** 97 F.3d 914, 916 (7th Cir. 1996).

•. A plaintiff's receipt of *some* medical care does not automatically defeat a claim of deliberate indifference if a fact-finder could infer the treatment was "so blatantly inappropriate as to evidence intentional mistreatment likely to seriously aggravate" a medical condition. ***Snipes v. DeTella,*** 95 F.3d 586 (7th Cir. 1996).

.. A medical condition is deemed to be objectively serious if it is "one that has been diagnosed by a physician as mandating treatment or one that is so obvious that even a lay person would easily recognize the necessity for a doctor's attention." ***Henderson v. Sheahan,*** 196 F.3d 839, 846 (7th Cir. 1999); see also ***Jackson v. Illinois Medi-Car, Inc.,*** 300 F.3d 760, 765 (7th Cir. 2002).

DELIBERATE INDIFFERENCE (Medical) continued

•. "[T]here is no requirement that a prisoner provide 'objective' evidence of his pain and suffering— self-reporting is often the only indicator a doctor has of a patient's condition." ***Greeno* v. *Daley,*** 414 F.3d 645, 655 (7th Cir. 2005) (citing ***Cooper v. Casey,*** 97 F.3d 914, 916-17 (7th Cir. 1996)("The fact that a condition does not produce 'objective' symptoms does not entitle the medical staff to ignore it... Subjective, nonverifiable complaints are in some cases the only symptoms of a serious medical condition.")).

•:. The Eighth Amendment protects the mental, as well as physical, health of prisoners. In prison suicide cases, the objective element is met by virtue of the suicide itself, as "[i]t goes without saying that 'suicide is a serious harm." ***Sanville v. McCaughtry,*** 266 F.3d 724, 733-34 (7th Cir. 2001); see also ***Estate of Novack ex rel. Turbin v. County Fromm,*** 94 F.3d 254, 261 (7th Cir. 1996); ***Hall v. Ryan,*** 957 F.2d 402, 406 (7th Cir. 1992) (recognizing that prisoners have a constitutional right "to be protected from self-destructive tendencies," including suicide).

+ Delaying medical treatment may constitute deliberate indifference, depending on the seriousness of the condition and the ease of providing treatment. "Even a few days' delay in addressing a severely painful but readily treatable condition suffices to state a claim of deliberate indifference." ***Smith v. Knox County Jail,*** 666 F.3d 1037, 1040 (7th Cir. 2012).

• from ***McGowan v. Hulick,*** 612 F.3d 636,640 (7th Cir. 2010):
"The Eighth Amendment prohibits cruel & unusual punishment; that guarantee encompasses a prisoner's right to medical care. It is well established that 'deliberate indifference to serious medical needs of prisoners constitutes the unnecessary and wanton infliction of pain proscribed by the Eighth Amendment.' ***Estelle v. Gamble,*** 429 U.S. 97, 104, 97 S.Ct. 285 (1976) (quotation marks and citation omitted) ... A delay in treatment may constitute deliberate indifference if the delay exacerbated the injury or unnecessarily prolonged an inmate's pain. ***Estelle,*** 429 U.S. @ 104-05; ***Gayton v. McCoy,*** 593 F.3d 610, 619 (7th Cir. 2010) ... Delay is not a factor that is either always, or never, significant. Instead, the length of delay that is tolerable depends on the seriousness of the condition and the ease of providing treatment..."

•. "A delay in treating non-life-threatening but painful conditions may constitute deliberate indifference if the delay exacerbated the injury or unnecessarily prolonged an inmate's pain." ***Arnett v. Webster,*** 658 F.3d 742, 753 (7th Cir. 2011).

•. Expert testimony not needed if plaintiff can provide evidence that would help a jury determine whether the delay "unnecessarily prolonged and exacerbated" plaintiff's pain. ***Grieveson v. Anderson,*** 538 F.3d 763, 779 (7th Cir. 2008).

•. In federal court, no expert testimony is needed when the symptoms exhibited by the plaintiff are not beyond a layperson's grasp. ***Ledford v. Sullivan,*** 105 F.3d 354, 360 (7th Cir. 1997).

+ "... non-expert evidence is sufficient as long as it permits the fact-finder to determine whether the delay caused additional harm." ***Ortiz v. City of Chicago,*** 2011 U.S. App. LEXIS 17759, pg.9 (7th Cir.).

•. "[A] non-trivial delay in treating serious pain can be actionable even without expert medical testimony showing that the delay aggravated the underlying condition." ***Berry v. Peterman,*** 604 F.3d 435, 441 (7th Cir. 2010).

+ Deliberate indifference in the denial or delay of medical care is evidenced by a defendant's actual intent or reckless disregard. A prison official has a sufficiently culpable state of mind when the official "knew of a substantial risk of harm to the inmate and acted or failed to act in disregard of that risk." ***Norfleet v. Webster,*** 439 F.3d 392, 396 (7th Cir. 2006) (citing ***Walker v. Benjamin,*** 293 F.3d 1030, 1037 (7th Cir. 2002)).

•. "[I]t is implicit in the professional judgment standard itself ... that inmate medical care decisions must be fact-based with respect to the particular inmate, the severity and stage of his condition, the likelihood and imminence of further harm and the efficacy of available treatments." ***Roe v. Elyea,*** 631 F.3d 843, 859 (7th Cir. 2011).

+ "A plaintiff can show that the professional disregarded the need only if the professional's subjective response was so inadequate that it demonstrated an absence of professional judgment, that is, that no minimally competent professional would have so responded under those circumstances." ***Collignon v. Milwaukee County,*** 163 F.3d 982, 989 (7th Cir. 1998).

+ There is no requirement that the delay cause "substantial" harm. ***Hudson v. McMillian,*** 112 S.Ct. 995, 998 (1992).

DELIBERATE INDIFFERENCE (Medical) continued

+ "If a treatment is necessary to treat a medical condition, a defendant cannot escape Eighth Amendment liability by providing plainly ineffective alternative treatments." ***Sundstrom v. Frank,*** 2007 U.S. Dist. LEXIS 76597 (E.D. Wis.) (citing ***Edwards v. Snyder,*** 478 F.3d 827, 831 (7th Cir. 2007)).

•:. "[I]f a defendant consciously chose to disregard a nurse or doctor's directions in the face of medical risks, then he may well have exhibited the necessary deliberate indifference." ***Zentmyer v. Kendall County,*** 220 F.3d 805, 812 (7th Cir. 2000).

•:• "[W]e must examine the totality of an inmate's medical care when considering whether that care evidences deliberate indifference to his serious medical needs." ***Gutierrez v. Peters,*** 111 F.3d 1364, 1375 (7th Cir. 1997).

DISCOVERY

•:• "When a party thinks it needs additional discovery in order to oppose a motion for summary judgment in the manner Rule 56(e) requires, Rule 56(f) of the Federal Rules of Civil Procedure provides a simple procedure for requesting relief: move for a continuance and submit an affidavit explaining why the additional discovery is necessary. ***Deere & Co. v. Ohio Gear,*** 462 F.3d 701, 706 (7th Cir. 2006) (citing ***Farmer v. Brennan,*** 81 F.3d 1444, 1449 (7th Cir. 1996)). "A rule 56(f) motion must state the reasons why the party cannot adequately respond to the summary judgment motion without further discovery and must support those reasons by affidavit." ***Deere & Co.,*** 462 F.3d © 706.

+ "A district court is obligated to permit discovery prior to granting summary judgment if 'discovery [was] needed to permit the opponent of a summary judgment motion to gather sufficient information to raise a material issue of fact, [and thus] elementary fairness requires that he have an opportunity to pursue discovery." ***Patricia P. v. Board of Educ.,*** 203 F.3d 462, 469 (7th Cir. 2000) (quoting ***Illinois State Employees Union v. Lewis,*** 473 F.2d 561, 565 n.8 (7th Cir. 1972)).

+ Rule 56(f) requires the party seeking relief to identify the "specific evidence which [he] might have obtained from [additional discovery] that would create a genuine issue [of] material fact." ***Davis v. G.N. Mortgage Corp.,*** 396 F.3d 869, 885 (7th Cir. 2005).

+ "[T]he purpose of discovery is to enable parties to obtain the factual information needed to prepare their cases for trial." ***Primos, Inc. v. Hunter's Specialties, Inc.,*** 451 F.3d 841, 851 (Fed. Cir. 2006).

4. "Mutual knowledge of all the relevant facts gathered by both parties is essential to proper litigation. To that end, either party may compel the other to disgorge whatever facts he has in his possession." ***Hickman v. Taylor,*** 329 U.S. 495, 507 (1947).

4• A request for discovery should be considered relevant if there is any possibility that the information sought may be relevant to the subject matter of the action. Wright & Miller, ***Federal Practice & Procedure*** § 2008 (1970).

4• "A party is charged with knowledge of what its agents know, or what is in records available to it, or even, for purposes of [Fed.R.Civ.P.] Rule 33, what others have told it on which it intends to rely in its suit." Wright & Kane, ***Federal Practice & Procedure,*** Chap. 10 § 92, pg. 843.

4• The purpose of Fed.R.Civ.P., Rule 36 (Requests for Admissions) "is to expedite the trial and to relieve the parties of the cost of proving facts that will not be disputed at the trial and the truth of which can be ascertained by reasonable inquiry." Wright & Kane, ***Federal Practice & Procedure,*** Chap. 10 § 95.

4. "District courts abuse their discretion when they fail to acknowledge a plaintiff's timely discovery request that would produce relevant and necessary information." ***Bryant v. City of Chicago,*** 746 F.3d 239, 242 (7th Cir. 2014).

o "[T]he purpose of discovery is identical to the purpose of our trial system— the ascertainment of truth." ***Sands v. Whitnall Sch. Dist.,*** 2008 WI 89, 1119, 312 Wis.2d 1 (quoted source omitted).

o "Parties need discovery to obtain relevant evidence from each other." ***State v. Halko,*** 2005 WI App 99, 1112, 281 Wis.2d 825.

DUE PROCESS

•:. A procedural due process violation occurs when (1) conduct by someone acting under the color of state law; (2) deprives the plaintiff of a protected interest; (3) without due process of law. ***Germano v. Winnebago County,*** 403 F.3d 926, 927 (7th Cir. 2005).

+ Issuing false and unjustified disciplinary charges can amount to a violation of substantive due process if the charges were issued in retaliation for the exercise of a constitutional right. ***Black v. Lane,*** 22 F.3d 1395, 1402-03 (7th Cir. 1994); ***Lagerstrom v. Kingston,*** 463 F.3d 621, 623 (7th Cir. 2006).

+ In the prison disciplinary context, "due process requires only that the prisoner receive advance written notice of the charges, an opportunity to present testimony and documentary evidence to an impartial decision-maker, and a written explanation for the discipline that is supported by 'some evidence' in the record." ***Piggie v. Cotton,*** 344 F.3d 674, 677 (7th Cir. 2003) (internal citations omitted).

+ "Due process requires that inmates receive fair notice of a rule before they can be sanctioned for its violation." ***Forbes v. Trigg,*** 976 F.2d 308, 314 (7th Cir. 1992); see also ***Grayned*** v. ***City of Rockford,*** 408 U.S. 104, 108, 92 S.Ct. 2294, 2298 (1972).

• "It is a violation of due process to punish inmates for acts which they could not have known were prohibited." ***Reeves v. Pettcox,*** 19 F.3d 1060, 1061 (5th Cir. 1994).

•. A prisoner's placement in segregation may create a liberty interest "if the length of segregated confinement is substantial and the record reveals that the conditions of confinement are unusually harsh." ***Marion v. Columbia Corr. Inst.,*** 559 F.3d 693, 697 (7th Cir. 2009).

•:. '[P]risoners are entitled to impartial decision makers..." ***White v. Ind. Parole Bd.,*** 266 F.3d 759, 767 (7th Cir. 2001).

•. The due process principle of impartiality "mandates the disqualification of an official who is directly involved in the incident or is otherwise substantially involved in the incident but does not require the disqualification of someone tangentially involved." ***Merritt v. De Los Santos,*** 721 F.2d 598, 601 (7th Cir. 1983).

+ Prisoners have a constitutional right to the "substance" of exculpatory evidence in a prison disciplinary proceeding. ***Chavis v. Rowe,*** 643 F.2d 1281, 1289 (7th Cir. 1981). "[Sjuppression by the prosecution of evidence clearly favorable to an accused violates due process where the evidence is material either to guilt or punishment..." *Id.* © pg. 1285.

+ "Failure to disclose exculpatory evidence constitutes a deprivation of due process." ***Milone v. Camp,*** 22 F.3d 693, 703 (7th Cir. 1994), cert. denied, 115 S.Ct. 720 (1995).

+ "For the purposes of the Due process Clause, property interests must be found in state or federal law." ***Campbell v. Miller,*** 787 F.2d 217, 222 (7th Cir. 1986) (citing ***Board of Regents v. Roth,*** 408 U.S. 564, 577, 92 S.Ct. 2701 (1972)).

O A substantive due process analysis considers whether state action is arbitrary or "interferes with rights implicit in the concept of ordered liberty." ***State v. Schulpius,*** 2006 WI 1, P33, 287 Wis.2d 44, 707 N.W.2d 495, cet. denied, 126 S.Ct. 2042 (2006) (citation omitted). Where there is a fundamental liberty interest at stake, substantive due process required a statute or administrative rule to be narrowly tailored. See ***Monroe county DHS v. Kelli B.,*** 2004 WI 48, P19, 271 Wis.2d 51, 678 N.W.2d 831.

EQUAL PROTECTION

+ "The Equal Protection Clause of the Fourteenth Amendment protects individuals from governmental discrimination. The typical equal protection case involves discrimination by race, national origin or sex. However, the Clause also prohibits the singling out of a person for different treatment for no rational reason. To state a class-of-one equal protection claim, an individual must allege that he was 'intentionally treated differently from others similarly situated and that there is no rational basis for the difference in treatment." ***Swanson v. City of Chetek,*** 719 F.3d 780, 783-84 (7th Cir. 2013) (quoting ***Vill. of Willowbrook v. Olech,*** 528 U.S. 562, 564, 120 S.Ct. 1073 (2000)).

EQUAL PROTECTION continued

+ At the pleading stage in an action raising an equal protection claim, a plaintiff must anticipate the burden of eliminating "any reasonably conceivable state of facts that could provide a rational basis" for the governments actions. ***Srail*** v. ***Village of Lisle, Ill.,*** 588 F.3d 940, 946 (7th Cir. 2009) (internal citation and quotation marks omitted).

EXHAUSTION OF REMEDIES

•:• The court determined that the 14-day deadline (for grievances) should not have any application to ongoing problems. ***Simpson v. Greenwood,*** 2007 U.S. Dist. LEXIS 26214 (W.D. Wis.)

•. Prison officials may not take unfair advantage of the exhaustion requirement, and a remedy becomes "unavailable" if prison employees do not respond to a properly filed grievance or otherwise use affirmative misconduct to prevent a prisoner from exhausting. ***Dole v. Chandler,*** 438 F.3d 804, 809 (7th cir. 2006).

+ Examples of when administrative remedies are not available include: (1) "if grievances must be filed on a particular form, but the forms are not provided"; (2) "threatening a prisoner with violence for attempting to use an administrative process"; (3) "if a prisoner is told to wait to file a grievance, and that wait makes the claim untimely"; and (4) not responding to a prisoner's grievance or engaging in affirmative misconduct. ***Wilder v. Suttofl,*** 310 Fed. Appx. 10, pg. 13 (7th Cir. 2009) (citing ***Woodford v. Ngo,*** 548 U.S. 81, 102, 126 S.Ct. 2378 (2006).

+ "A remedy must, to be 'available,' be available in fact and not merely in form." ***Schultz v. Pugh,*** 728 F.3d 619, 620 (7th Cir. 2013).

+ "A prisoner is required to exhaust only available administrative remedies, and a remedy is not available if essential elements of obtaining it are concealed." ***Hurst v. Hantke,*** 634 F.3d 409, 411-12 (7th Cir. 2011).

4. "The burden is on the Department of Corrections to make grievance procedures clear and easy to follow." ***Vasquez v. Hilbert,*** 2008 WL 22243, 2008 U.S. Dist. LEXIS 42011 (W.D.Wis.).

+ Prison administrators may not frustrate an inmate's efforts to comply with the administrative review process by imposing hurdles that are not part of the established grievance procedure. ***Strong v. David,*** 297 F.3d 646, 650 (7th Cir. 2002).

4. 'The grievance process is not intended to be a game of 'gotcha' or 'a test of the prisoner's fortitude or ability to outsmart the system." ***Shaw v. Jahnke,*** 607 F.Supp.2d 1005, 1010 (W.D. Wis. 2009) (citations omitted). "[W]hen a prisoner fails to complete the grievance process because of an error by the prison officials, his suit is not subject to dismissal for failure to exhaust." Id.; see also ***Westefar v. Snyder,*** 422 F.3d 570, 580 (7th Cir. 2005) (when prison officials fail to "clearly indentif[y]" proper route for exhaustion, they cannot later fault prisoner for failing to predict correct choice).

4. "In order to exhaust their remedies, prisoners need not file multiple, successive grievances raising the same issue (such as conditions or policies) if the objectionable condition is continuing." ***Turley v. Rèdnour,*** 729 F.3d 645, 650 (7th Cir. 2013). "Separate complaints about particular incidents are only required if the underlying facts or the complaints are different." *Id.* "[O]nce a prison has received notice of, and an opportunity to correct, a problem, the prisoner has satisfied the purpose of the exhaustion requirement." *Id.*

4• Correctional employees cannot exploit the exhaustion requirement by making it difficult or impossible to file a grievance. ***Parker v. Krause-Hengst,*** 2010 U.S. Dist. LEXIS 23905 (W.D. Wis.), citing ***Mitchell v. Horn,*** 318 F.3d 523, 529 (3d Cir. 2003) (holding that district court erred in failing to consider prisoner's claim that he was unable to submit a grievance, and therefore lacked available administrative remedies, because prison employees refused to provide him with the necessary forms); ***Miller v. Norris,*** 247 F.3d 736, 740 (8th Cir. 2001) ("[A] remedy that prison officials prevent a prisoner from 'utiliz[ing]' is not an 'available' remedy under § 1997e(a)." (alteration in original)).

4. In district court, when exhaustion of remedies is contested, the court must hold a hearing on the matter of exhaustion, thereby allowing appropriate discovery in preparation of the hearing. ***Pavey v. Conley,*** 544 F.3d 739, 742 (7th Cir. 2008).

EXHAUSTION OF REMEDIES continued

+ The doctrine of vicarious exhaustion is only available to plaintiffs in a class-action lawsuit. ***Chandler v. Crosby,*** 379 F.3d 1278, 1287 (11th Cir. 2004). "... in the PLRA context, the purpose of affording prison officials an opportunity to address complaints internally is met when one plaintiff in a class action has exhausted his administrative remedies. To require each inmate with the same grievance to exhaust their administrative remedies would be wasteful..." ***Flynn v. Doyle,*** 2007 U.S. Dist. LEXIS 22659, pg. 24 (W.D. Wis.).

EXPERT WITNESS

o "[T]he judge may appoint any expert witness agreed upon by the parties, and may appoint witnesses of the judge's own selection..... **Wis. Stat.** § 907.06(1). "[t]n civil cases the compensation shall be paid by the parties in such proportion and at such time as the judge directs." **Wis. Stat.** § 907.06(2).

•. "On a party's motion or on its own, the court may order the parties to show cause why expert witnesses should not be appointed and may ask the parties to submit nominations." **Fed.R.Evid.,** Rule 706(a). Compensation for expert witness, in civil cases, shall be made "by the parties in the proportion and at the time that the court directs..." **Fed.R.Evid.,** Rule 706(c)(2).

•. The Court assessed a 50%, one-time, tax on prisoner plaintiff's current trust account to help pay the up-front costs of retaining an expert witness, with a contingency that, if plaintiff prevailed on his claims, no additional payments would be required, but if defendants ultimately prevail then the court would continue to levy a 10% charge against plaintiff's account until he has repaid his one-half share of the expert's fees up to the maximum amount of $5,000. ***Goodvine v. Ankarlo,*** 2013 U.S. Dist. LEXIS 39727 (W.D. Wis.).

• "In this case, when the district court stated that no funds existed to pay for the appointment of an expert, it failed to recognize that it had the discretion to apportion all the costs to one side." ***Ledford v. Sullivan,*** 105 F.3d 354, 362 (7th Cir. 1997).

•:. "Assessing the potential bias of an expert witness, as distinguished from his or her specialized training or knowledge or the validity of the scientific underpinning for the expert's opinion, is a task that is properly left to the jury." ***Cruz-Vasquez v. Mennonite Gen. Hosp.,*** 613 F.3d 54, 59 (1st Cir. 2010).

•. An expert's bias goes to the weight of the testimony and should be allowed to be brought out on cross-examination. ***DiCarlo v. Keller Ladders, Inc.,*** 211 F.3d 465, 468 (8th Cir. 2000); see also ***Dixon v. Int'l Harvester Co.,*** 754 F.2d 573, 580 (5th Cir. 1985).

+ Expert bias is exacerbated when the expert's opinion "is offered in a form that is not subject to cross-examination." ***Phillips v. Awh Corp.,*** 415 F.3d 1303, 1318 (Fed. Cir. 2005).

FAILURE-TO-PROTECT

+ under the Eighth Amendment, prison officials have a duty "to protect prisoners from violence at the hands of other prisoners." ***Farmer v. Brennan,*** 511 U.S. 825, 833, 114 S.Ct. 1970 (1994) (internal quotation omitted); ***Brown v. Budz,*** 398 F.3d 904, 909 (7th Cir. 2005). An inmate can prevail on a claim that a prison official failed to protect him if the official showed "deliberate indifference"; that is, that the defendant was subjectively aware of and disregarded a "substantial risk of serious harm" to the inmate. ***Farmer,*** 511 U.S. @ 837; ***Dale v. Poston,*** 548 F.3d 563, 569 (7th Cir. 2008).

+ To make a guard subjectively aware of a serious risk of attack, the inmate must communicate a specific and credible danger. Compare ***Santiago v. Walls,*** 599 F.3d 749, 758-59 (7th Cir. 2010); ***Santiago*** v. ***Lane,*** 894 F.2d 218, 220 (7th Cir. 1990); ***Young v. Selk*** 508 F.3d 868, 873-74 (8th Cir. 2007); ***Horton v. Cockrell,*** 70 F.3d 397, 401 (5th Cir. 1995); with ***Dale,*** 548 F.3d @ 569 (prisoner's "vague statements that inmates were 'pressuring' him and 'asking questions" were insufficiently specific to put guards on notice that he was in danger). But even when he is aware of a substantial risk of serious harm to an inmate a prison guard is not liable if he responds reasonably to the risk whether or not his response ultimately prevents the harm ***Farmer,*** 511 U S @ 844 ***Borello v Allison*** 446 F 3d 742, 747-48 (7th Cir. 2006).

FIRST AMENDMENT continued

•+ The First Amendment "requires prison authorities to show more than a formalistic logical connection between a regulation and a penological objective." ***Beard v. Banks,*** 126 S.Ct. 2572, 2581 (2006). Rather, they must show "a reasonable relation" between the restriction and legitimate penological intersts. *Id.* © 2580. see also ***King v. Federal Bureau of Prisons,*** 415 F,3d 634, 639 (7th Cir. 2005) ("the government must present some evidence to show that the restriction is justified.").

+ A court "must determine whether the government objective underlying the regulation at issue is legitimate and *neutral,* and that the regulations are rationally related to that objective." ***Thornburgh v. Abbott,*** 490 U.S. 401, 414-15,109 S.Ct. 1874, 1882.

•. Administrators may not "avoid court scrutiny by reflexive, rote assertions that existing conditions are dictated by security concerns." ***Williams v. Lane,*** 851 F.2d 867, 686 (7th Cir. 1988). While the ultimate burden of persuasion with regard to the reasonableness of a regulation resides with those challenging it, ***Overton v. Bazzetta,*** 539 U.S. 126, 132, 1223 S.Ct. 2162 (2003), the defendant administrator must "put forward" the legitimate government interest alleged to justify the regulation, ***Turner v. Safely,*** 482 U.S. 78, 89, 107 S.Ct. 2254 (1987), and "demonstrate' that the policy drafters 'could rationally have seen a connection' between the policy and [that interest]." ***Wolf v. Ashcroft,*** 297 F.3d 305, 308 (3d Cir. 2002). "[T]his burden, though slight, must 'amount []to more than a conclusory assertion." Id. (quoting ***Waterman v. Farmer,*** 183 F.3d 208, 218 (3d Cir. 1999)).

•. The court should not substitute its judgment for theirs unless there is "substantial evidence in the record to indicate that the officials have exaggerated their response to these considerations." ***Singer v. Frank,*** 2007 U.S. Dist. LEXIS 55663, pg. 57 (E.D. Wis) (citing ***Caldwell v. Miller,*** 790 F.2d 589, 596 (7th Cir. 1986)). But "a court's deference to the administrative expertise and discretionary authority of correctional officials must be schooled, not absolute." ***Williams v. Lane,*** 851 F.2d 867 (7th Cir. 1988) (quoting ***Campbell v. Miller,*** 787 F.2d 217 (7th Cir. 1986).

JUDGE SUBSTITUTION

0 ***Wis. Stat. § 801.58*** provides for a preemptory challenge of a judge without the need to file an affidavit of prejudice. A simple, timely request by a party is all that is required; there is no need for a supporting affidavit. If the request is made by the plaintiff, it must be made no later than 90 days after the summons and complaint are filed.

•:. Two federal statutes exist for disqualifying a federal judge in a particular case— **28** ***U.S.C. § 144*** and § **455.** Section 144 requires a federal judge to recuse himself for "personal bias or prejudice." Section 455(a) requires a federal judge to "disqualify himself in any proceeding in which his impartiality might reasonably be questioned," and section 455(b)(1) provides that a judge shall disqualify himself of he "has a personal bias or prejudice concerning a party." >>> In deciding whether a judge must disqualify herself under 28 U.S.C. § 455(b)(1), the question is whether a reasonable person would be convinced the judge was biased. ***Hook v. McDade,*** 89 F.3d 350, 355 (7th Cir. 1996).

• 28 U.S.C. § 144 provides that when a party makes and files a timely and sufficient affidavit alleging that the judge has a personal bias or prejudice either against him or in favor of the adverse party, the judge should proceed no further and another judge should be assigned to the proceeding. The affidavit is to "state the facts and the reasons for the belief that bias or prejudice exists." The factual statements of the affidavit must support an assertion of actual bias. ***United States v. Balistrieri,*** 779 F.2d 1191, 1199 (7th Cir. 1985). They must be definite as to times, places, persons and circumstances. *Id.* Only those facts that are "sufficiently definite and particular to convince a reasonable person that bias exists" need be credited. ***United States v. Boyd,*** 208 F.3d 638, 647 (7th Cir. 2000).

JUDICIAL ESTOPPEL

•' Judicial Estoppel "generally prevents a party from prevailing in one phase of a case on an argument and then relying on a contradictory argument to prevail in another phase." ***New Hampshire v. Maine,*** 532 U.S. 742, 749, 121 S.Ct. 1808 (2001) (citing ***Pegram v. Herdrich,*** 530 U.S. 211, 227, n.8 (2000)).

+ Judicial estoppel is a flexible equitable doctrine designed to prevent 'The perversion of the judicial process." ***In re Cassidy,*** 892 F.2d 637, 641 (7th Cir. 1990). The doctrine may be raised by any party, regardless of whether the party was prejudiced by the inconsistency. *Id.* 892 F.2d @ 641.

JUDICIAL ESTOPPEL continued

+ "Judicial estoppel is an equitable concept that prevents parties from playing 'fast and loose' with the courts by prevailing twice on opposing theories." ***In re Airadigm Communications, Inc.,*** 616 F.3d 642, 661 (7th Cir. 2010) (citation omitted). Although there is no formula for judicial estoppel, the Supreme Court has identified at least three pertinent factors for courts to examine: "(1) whether the party's later position was 'clearly inconsistent' with its earlier, position; (2) whether the party against whom estoppel is asserted in a later proceeding has succeeded in persuading the court in the earlier proceeding; and (3) whether the party 'seeking to assert an inconsistent position would derive an unfair advantage or impose an unfair detriment on the opposing party if not estopped." *Id.* (quoting ***New Hampshire v. Maine,*** 532 U.S. 742, 750-01(2001)).

JURISDICTION / VENUE

+ A federal district court may exercise jurisdiction over a state law claim under 28 U.S.C. § 1367 only if the federal claim and state law claim "derive from a common nucleus of operative facts." ***Ammerman v. Sween,*** 54 F.3d 423, 424 (7th Cir. 1995).

4. Federal court can hear both federal and state law claims when the central facts of the federal claim are also the central facts of the state law claim. ***United Mine Workers v. Gibbs,*** 383 U.S. 715, 725 (1966).

4. "It may be proper to retain jurisdiction over state law claims under § 1367 when, for example, the statute of limitations has run on a state law claim, substantial judicial resources have been expended on the claims or resolution of the claims is clear." ***Brach v. City of Wausau,*** 617 F.Supp.2d 796, 805 (W.D. Wis. 2009) (citing ***Wright v. Associated Ins. Companies Inc.,*** 29 F.3d 1244, 1251-52 (7th Cir. 1994)).

4. "[Sjubject-matter jurisdiction can never be waived or forfeited." ***Gonzalez v. Thaler,*** 132 S.Ct. 641, 648 (2012).

4. Generally, courts hesitate to disturb a plaintiff's choice of forum unless the transfer factors balance strongly favors defendant. ***In re National Presto Indus., Inc.,*** 347 F.3d 662, 663-64 (7th Cir. 2003).

4. The "interest of justice" analysis focuses on whether transfer would promote the efficient administration of the court system, including whether transfer would insure or hinder a speedy trial. ***Coffey v. Van Dorn Iron Works,*** 796 F.2d 217, 219 (7th Cir. 1986).

LEGAL MALPRACTICE

0 In order to establish a viable legal malpractice claim, a plaintiff must prove: (1) the existence of an attorney-client relationship; (2) acts constituting negligence; (3) negligence as the proximate cause of the alleged injury; and (4) the existence and extent of the injury alleged. ***Thiery v. Bye,*** 228 Wis.2d 231, 239, 597 N.W.2d 449 (Ct.App. 1999); see also ***Lewandowskl v. Continental Cas.*** **Co.,** 88 Wis.2d 271, 277 (1979).

0 "[As a matter of public policy, persons who actually commit the criminal offenses for which they are convicted should not be permitted to recover damages for legal malpractice from their former defense attorneys." ***Hicks v. Nunnery,*** 2002 WI App 87, P48, 253 Wis.2d 721. Proof of actual innocence is required to succeed on legal malpractice claim. *Id.*

LIABILITY

4. "{Pjublic officials have an obligation to follow the Constitution even in the midst of a contrary directive from a superior or in a policy." ***N.N. ex rel. S.S. v. Madison Metro. School Dist.,*** 670 F.Supp.2d 927, 933 (W.D. Wis. 2009).

4• "Public officials owe their allegiance to the Constitution first, federal laws second, and state laws third. Even a command from the President of the United States does not relieve public employees of their duty to follow the Constitution." ***Alleghany Corp. v. Haase,*** 896 F.2d 1046, 1055 (7th Cir. 1990).

4• Public official may be held liable under 42 U.S.C. § 1983 if he "had a realistic opportunity to intervene to prevent the harm from occuring." ***Windle v. City of Marion, Indiana,*** 321 F.3d 658, 663 (7th Cir. 2003).

LIABILITY continued

+ "Under § 1983, supervisory liability can be established if the conduct causing the constitutional deprivation occurs at the supervisor's direction or with the supervisor's knowledge and consent." ***Nanda* v. *Moss,*** 412 F.3d 836, 842 (7th Cir. 2005).

+ "An official capacity suit is tantamount to a claim against the government entity itself." ***Guzman v. Sheahan,*** 495 F.3d 852, 859 (7th Cir. 2007).

•. Defendants "may be sued for constitutional deprivation visited pursuant to governmental 'custom' even though such a custom has not received formal approval through the body's official decisionmaking channels." ***Monell* v. *Dept of Soc. Servs.,*** 436 U.S. 658, 690-91 (1978).

•:• A government entity causes a constitutional injury by implementing a constitutionally unsound policy, ordinance or regulation, or by condoning an unconstitutional custom or practice. ***Bd. of County Comm'rs of Bryan County v. Brown,*** 520 U.S. 397, 404, 117 S.Ct. 1382 (1997). A plaintiff, however, must not only show an unconstitutional custom or practice, but also that the custom or practice "actually caused" him to suffer a constitutional injury. ***City of Canton v. Harris,*** 489 U.S. 378, 391,109 S.Ct. 1197 (1989).

+ "If the same problem has arisen many times and the municipality has acquiesed in the outcome, it is possible (though not necessary) to infer that there is a policy at work." ***Lewis v. City of Chicago,*** 496 F.3d 645, 656 (7th Cir. 2007) (citing ***Phelan v. Cook County,*** 463 F.3d 773, 789 (7th Cir. 2006)).

• A municipality can be held liable under § 1983 "for constitutional violations resulting from its failure to train municipal employees." ***Collins v. City of Harker Heights,*** 503 U.S. 115, 123-24,112 S.Ct. 1061 (1992).

•:. Plaintiff can satisfy the failure-to-train standard by demonstrating that defendant affirmatively told the other defendants in training or in a policy that defendants' conduct was appropriate or if defendant failed to provide any training on these issues. ***Ghashryah v. Frank,*** 2007 U.S. Dist. LEXIS 57060, pg. 6 (W.D. Wis.).

•. If the answer to a complaint or to a request for admissions admits liability, the defendant cannot then deny liability on the ground that there is evidence that the admission was mistaken. ***U.S. v. Kasuboski,*** 834 F.2d 1345, 1350 (7th Cir. 1987).

O "... the defendant's ignorance of the law or negligence as to the existence of the law is not a defense." ***State v. Collova,*** 79 Wis.2d 473, 488, 255 N.W.2d 581 (1977).

O "The operative facts, not the consequences, are determinative of a cause of action. 'It is the wrongful act, and not the injury, that creates liabilty." ***Caygill v. Ipsen,*** 27 Wis.2d 578, 582, 135 N.W.2d 284 (1965) (quoting ***Northern Finance Corp. v. Midwest Commercial Credit Co.,*** 59 S.D. 282, 285, 239 N.W.2d 242 (1931)).

MAILBOX RULE

•. *Pro se* prisoner filings are considered "filed" when the documents are placed in institution mailbox or given to staff for mailing. "[O]nce a *pro se* prisoner's filing leaves his hands he loses control over its processing." *Ray* **v. Clements,** 700 F.3d 993, 1002 (7th Cir. 2012) (citing ***Houston v. Lack,*** 487 U.S. 266, 275-76, 108 S.Ct. 2379 (1988)).

O [W]hen a prisoner inmate places a certiorari petition in the institution's mailbox for forwarding to the circuit court, the forty-five day time limit in Wis. Stat. § 897.735(2) is tolled." ***State ex rel. Shimkus v. Sondalle,*** 2000 WI App. 238, 239 Wis.2d 327.

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MANDAMUS

0 Mandamus is an exceptional remedy to be applied in extraordinary cases where there is no other adequate remedy. ***State ex rel. Burg v. Milwaukee Med. College,*** 128 Wis. 7, 12, 106 N.W. 116 (1906). If the applicant has an adequate remedy by another avenue, the writ will not be awarded. While mandamus is the appropriate remedy to compel public officials to perform certain duties, those duties must be clear and unequivocal and not discretionary. ***State ex rel. Oman v. Hunkins,*** 120 Wis.2d 86, 88, 352 N.W.2d 220, 221 (App. 1984).

O A party seeking a writ of mandamus must show that (1) the party has a clear legal right, (2) the duty sought to be enforced is positive and plain, (3) the party will be substantially damaged by nonperformance of such duty, and (4) there is no other adequate specific legal remedy for the threatened injury. ***Miller v. Smith,*** 100 Wis.2d 609, 621, 302 N.W.2d 468, 474 (1981); see also ***Lake Bluff Housing Partners v. South Milwaukee,*** 197 Wis.2d 157, 170, 540 N.W.2d 189, 194 (1995).

MOOTNESS

+ Voluntary cessation of unlawful activity does not moot every request for prospective relief; the court must decide whether the complained-of conduct may be resumed. ***United States v. W.T. Grant Co.,*** 345 U.S. 639, 73 S.Ct. 894 (1953); ***United States v. Raymond,*** 228 F.3d 804, 813-15 (7th Cir. 2000).

• "If voluntary cessation were treated as mooting a case, any government official being sued could cease a challenged practice to thwart the lawsuit, and then return to his old tricks once the coast is clear." ***Kikimura v. Turner,*** 28 F.3d 592, 597 (7th Cir. 1994).

•) "Voluntary cessation of challenged conduct moots a case ... only if it is absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur." ***Adarand Constructors, Inc. v. Slater,*** 528 U.S. 216, 222, 120 S.Ct. 722 (2000) (per curiam). And the "heavy burden of persuading' the court that the challenged conduct cannot reasonably be expected to start up again lies with the party asserting mootness." *Id.* (quoting ***United States v. Concentrated Phosphate Export Assn, Inc.,*** 393 U.S. 199, 203 (1968)).

•. The party claiming mootness bears a "heavy burden" of persuading the court that there is no reasonable expectation that the challenged conduct will reappear in the future. ***Pleasureland Museum, Inc. v. Buettner,*** 288 F.3d 988, 999 (7th Cir. 2002).

+ When a policy provides no assurance that the complained-of conduct will cease, the case is not moot. ***Associated General Contractors v. Jacksonville,*** 113 5.Ct. 2297, 2301, 500 U.S. 656 (1993); ***Rembert v. Sheahan,*** 62 F.3d 937, 940-41 (7th Cir. 1995).

+ ***Global Relief Foundation, Inc. v. O'Neill,*** 315 F.3d 748, 751 (7th Cir. 2002) (case was not moot "while any possibility remained" that defendant would revert to past conduct).

+ "This exception to the mootness doctrine is applicable ... where the challenged situation is likely to recur and the same complaining party would be subjected to the same adversity." ***Krislov v. Rednour,*** 226 F.3d 851, 858 (7th Cir. 2000).

•. An exception to the mootness doctrine is when secondary or collateral injuries survive after resolution of the primary injury. ***Moon gate Water Co. v. Dana Ana Mut. Domestic Water Consumers Ass'n,*** 420 F.3d 1082, 1089-90 (10th Cir. 2005); see also ***Felster Publ'g v. Burrell,*** 415 F.3d 994, 998 (9th Cir. 2005).

+ A defendant's change in conduct cannot render a case moot so long as the plaintiff makes a claim for damages. ***Buckhannon Board & Care Home, Inc. v. W.Va. Dept. of Health and Human Res.,*** 532 U.S. 598, 608-09, 121 S.Ct. 1835 (2001).

+ A court may grant declaratory relief even though it chooses not to issue an injunction because that claim is moot. ***Powell v. McCormack,*** 395 U.S. 486, 499, 89 S.Ct. 1944 (1969); see also ***Brown v. Bartholomew Consol. Sch. Corp.,*** 442 F,3d 588, 596 (7th Cir. 2006).

NEGLIGENCE

0 Ordinary negligence is a failure to exercise ordinary care, that is, "the care which a reasonable person would use in similar circumstances." ***WIS JI-CIVIL 1005*** (Jury Instructions). "A person is not using ordinary care and is negligent, if the person, without intending to do harm, does something (or fails to do something) that a reasonable person would recognize as creating an unreasonable risk of injury or damage to a person or property." *Id.*

O A person is negligent if the person, without intending to cause harm, either acts affirmatively or fails to act in a way that a reasonable person would recognize as creating an unreasonable risk of injury. ***Rockweit v. Seneca!,*** 197 Wis.2d 409, 424, 541 N.W.2d 742 (1995) (citation omitted).

O Under the principles of common law negligence, every person owes a duty of care to the world at large to protect others from foreseeable harm. ***Jankee v. Clark County,*** 2000 WI 64, 235 Wis.2d 700. Put another way, every person has a duty to use ordinary care in all of his or her activities, and a person is negligent when that person fails to exercise ordinary care. ***Gritzner v. Michael R.,*** 2000 WI 68, 235 Wis.2d 781. In Wisconsin, a duty to use ordinary care is established whenever it is foreseeable that a person's act or failure to act might cause harm to some other person. *Id.*

O from ***Behrendt v. Gulf Underwriters Ins. Co.,*** 2009 WI 71, P14,768 N.W.2d 568,573:
The analysis of the four elements necessary to state a claim for actionable negligence is the first consideration for a court when deciding motions for summary judgment....' ***Hoida, Inc. v. M & I Midstate Bank,*** 2006 WI 69, P25, 291 Wis.2d 283, 717 N.W.2d 17. The four elements are '(1) duty of care on the part of the defendant; (2) a breach of that duty; (3) a causal connection between the conduct and the injury; and (4) an actual loss or damage as a result of the injury.' ***Rockweit v. Seneca!,*** 197 Wis.2d 409, 418, 541 N.W.2d 742 (1995). 'However, in Wisconsin, the elements of duty and breach are usually presented to the trier of fact in a question asking whether the defendant was negligent, and then the elements of causation and damages are addressed.' ***Nichols v. Progressive Ins. Co.,*** 2008 WI 20, P12, 308 Wis.2d 17, 746 N.W.2d 220."

O To maintain a cause of action for negligent supervision, a plaintiff must show: (1) the employer owed a duty of care to the plaintiff; (2) the employer breached its duty; (3) a wrongful act or omission of an employee was a cause-in-fact of the plaintiff's injury; and (4) an act or omission of the employer was a cause-in-fact of the wrongful act of the employee. ***Hansen v. Tex. Roadhouse, Inc.,*** 2012 Wisc. App. LEXIS 951.

O "[I]n negligent hiring, training or supervision ... the causal question is whether the failure of the employer to exercise due care was a cause-in-fact of the wrongful act of the employee that in turn caused the plaintiff's injury. In other words, there must be a nexus between the negligent hiring, training, or supervision and the act of the employee. This requires two questions with respect to causation. The first is whether the wrongful act of the employee was a cause-in-fact of the plaintiff's injury. The second question is whether the negligence of the employer was a cause-in-fact of the wrongful act of the employee." ***Miller v. Wal-Mart Stores, Inc.,*** 219 Wis.2d 2501, 262, 580 N.W.2d 233(1998).

O "The common law classification, rather than the definition in a regulatory scheme, controls the applicable standard of care in a negligence case." ***Hunt v. Clarendon Nat'! Ins. Serv.,*** 2005 WI App 11, P13, 270 Wis.2d 439.

O Common law negligence is failure to exercise reasonable care to avoid the risk of foreseeable harm to others. "A party is negligent when he commits an act when some harm is foreseeable. Once negligence is established, the defendant is liable for unforeseeable consequences as well as unforeseeable plaintiffs." ***A.E. Inv. Corp. v. Link Builders, Inc.,*** 62 Wis.2d 479, 484, 214 N.W.2d 764 (1974).

O From ***Taft v. Derricks,*** 2000 WI App 103, P11, 235 Wis.2d 22: Negligence per se arises when the legislature defines a person's standard of care in specific instances. "When a statute provides that under certain circumstances particular acts shall or shall not be done, it may be interpreted as fixing a standard for all members of the community, from which it is negligence to deviate." See ***Burke v. Milwaukee & Suburban Trans. Corp.,*** 39 Wis.2d 682, 689, 159 N.W.2d 700 (1968). Wisconsin courts have said that in negligence per se cases, foreseeability is not an element of negligence. That is, the defendant is foreclosed upon the question of foreseeability or reasonable anticipation. ***Dippel v. Sciano,*** 37 Wis.2d 443, 461-62, 155 N.W.2d 55 (1967). When conduct is negligent per Se, the legislature has substituted its judgment for that of the jury for purposes of determining the defendants standard of care. See ***Id.*** Thus, the only issues are whether the statute has been violated, causation and damages.

NEGLIGENCE continued

0 As a general rule, "public officers are immune from liability for damages resulting from the negligence or unintentional fault in the performance of discretionary functions." ***Lister v. Board of Regents of Univ. of Wis. Sys.,*** 72 Wis.2d 282, 301, 240 N.W.2d 610 (1976). But immunity does not apply if the act or omission on which a claim for liability is predicated is ministerial rather than discretionary. ***Ottinger v. Pine!,*** 215 Wis.2d 266, 273, 572 N.W.2d 519, 521 (Ct. App. 1997). Also, immunity does not apply if the act complained of is "malicious, willful and intentional." ***Kierstyn v. Racine Unified Sch. Dist.,*** 228 Wis.2d 81, 596 N.W.2d 417, 421 (1999).

O "A public officer's duty is ministerial only when it is absolute, certain and imperative, involving merely the performance of a specific task when the law imposes, prescribes and defines the time, mode and occasion for its performance with such certainty that nothing remains for judgment or discretion." ***Lister v. Board of Regents of Univ. of Wis. Sys.,*** 72 Wis.2d 282, 301, 240 N.W.2d 610 (1976).

O A ministerial duty must be imposed "by law". ***Meyers v. Schultz,*** 2004 WI App 234, P14, 277 Wis.2d 845, 690 N.W.2d 873. The source of the law may be statutes, regulations, written policies, or even job descriptions, see ***Pries v. McMillon,*** 2010 WI 63, ¶¶ 31, 326 Wis.2d 37 (collecting cases).

O Whether a statute or a regulation or policy imposes a ministerial duty requires an analysis of the precise wording to determine whether it does impose a duty that is "absolute, certain and imperative, involving merely the performance of a specific task[.] " ***Scott v. Savers Prop. and Cas. Ins. Co.,*** 2003 WI 60, P27, 262 Wis.2d 127, 663 N.W.2d 715.

O "[TJhe 'law' that is the source of a ministerial duty need not specify the employee position responsible for carrying out the duty; it is sufficient if the 'law' imposes a duty that is ministerial and other evidence establishes that a particular employee is responsible for carrying out that duty." ***Umansky v. ABC Ins. Co.,*** 2008 WI App 101, P2, 756 N.W.2d 601.

O "[S]imply allowing for the exercise of discretion does not suffice to bring the actions under the blanket of immunity provided by Wis. Stat. § 893.80(4), when the facts or the allegations reveal a duty so clear and absolute that it falls within the concept of a ministerial duty." ***Domino v. Wa!worth County,*** 118 Wis.2d 488, 491, 347 N.W.2d 917 (Ct. App. 1984); ***Voss v. Elkhorn Area Sch. Dist.,*** 2006 WI App 234, P15, 297 Wis.2d 389.

O "A ministerial duty is present when a situation indisputably calls for a specific response." ***Estate of Brown v. Mathy Constr. Co.,*** 2008 WI App 114, P16, 313 Wis.2d 497, 756 N.W.2d 417.

O "When a statute provides that under certain circumstances particular acts shall or shall not be done, it may be interpreted as fixing a standard ... from which it is negligence to deviate." ***Prosser on Torts,*** § 36 © 190; see also ***Restatement (2nd) of Torts,*** § 285 (1965).

O A showing of medical malpractice requires expert testimony to establish the standard of care, except in the rare instance in which common knowledge affords a basis for finding negligence. ***Carney-Hayes v. Northwest Wisconsin Home Care, Inc.,*** 2005 WI 118, P35, 284 Wis.2d 56.

O *Res ipsa loquitur is* a doctrine of circumstantial evidence that permits an inference of negligence to be drawn by the jury. ***McGuire v. Stein's Gift*** & ***Garden Ctr., Inc.,*** 178 Wis.2d 379, 389 (Ct. App. 1993).

O "Negligence may, like other facts, be proved by circumstantial evidence, which is evidence of one fact from which the existence of the fact to be determined may reasonably be inferred ... One rule of circumstantial evidence is the doctrine of *res ipsa loquitur."* ***Lambrecht*** v. ***Kaczmarczyk,*** 2001 WI 25, 241 Wis.2d 804. "The following conditions must be present before the doctrine of *res ipsa Joquitur is* applicable: (1) the event in question must be of a kind which does not ordinarily occur in the absence of negligence; and (2) the agent of instrumentality causing the harm must have been within the exclusive control of the defendant. When these two conditions are present, they give rise to a permissible inference of negligence...." ***Id.*** © P34.

•• *"Res ipsa loquitur* is meant to bridge an evidentiary gap when an inquiry could not have happened but for the defendant's negligence." ***Buechel v. United States,*** 2014 U.S. App. LEXIS 4260, pg. 32.

0 When a complaint alleges a negligence claim against a state officer or employee, it does not state a claim for relief unless it alleges circumstances that warrant an exception to the general rule of immunity. ***C.L. v. Olson,*** 143 Wis.2d 701, 706-07, 422 N.W.2d 614 (1988).

PERSONAL INVOLVEMENT

•. "In order to satisfy the personal involvement requirement, a plaintiff need not show direct participation." ***Palmer v. Marion County,*** 327 F.3d 588 (7th Cir. 2003). However, he must show that the defendant knew about the violation and facilitated it, approved it, condoned it or turned a blind eye for fear of what he or she might see. ***Mor fin v. City of Chicago,*** 349 F.3d 989 (7th Cir. 2003). A prison official may be held liable for a constitutional violation if he knew about and had the ability to intervene but failed to do so. ***Fillmore v. Page,*** 358 F.3d 496 (7th Cir. 2004).

+ Omissions can violate civil rights, and "under certain circumstances a state actor's failure to intervene renders him or her culpable under § 1983." ***Yang v. Hardin,*** 37 F.3d 282, 285 (7th Cir. 1994).

+ "A prison warden can be held liable for policy decisions which create unconstitutional conditions." ***Martin v. Sargent,*** 780 F.2d 1334, 1338 (8th Cir. 1985); see also ***Black v. Stephens,*** 662 F.2d 181 (3d Cir. 1981).

•. "If inmate complaint examiners have authority to find in favor of an inmate on the ground that they believe a regulation or practice is unconstitutional, this might be sufficient to satisfy the personal involvement regulation." *Lily* ***v. Torhorst,*** 2006 U.S. Dist. LEXIS 5670, pg. 14-15 (W.D. Wis.).

PRELIMINARY INJUNCTION

•. When considering whether to grant a preliminary injunction, the court must first consider "whether the moving party has demonstrated: (1) a reasonable likelihood of success on the merits; and (2) no adequate remedy at law and irreparable harm if preliminary relief is denied." ***Aircraft Owners & Pilots Assn. v. Hinson,*** 102 F.3d 1421, 1424-25 (7th Cir. 1996). If the moving party has demonstrated those items to the satisfaction of the court, then it must look at: (3) the irreparable harm the non-moving party will suffer if the injunction is granted balanced against the irreparable harm the moving party will suffer if the injunction is denied; and (4) the public interest, i.e., the effect that granting or denying the injunction will have on non-parties. ***Id.*** The Court of Appeals for the Seventh Circuit has adopted a sliding scale approach where the greater the movant's chances of success on the merits, the less he must show that the balance of hardships tips in his favor. ***Ty, Inc. v. Jones Group,*** 237 F.3d 891, 895-96 (7th Cir. 2001).

•. Showing irreparable harm is "probably the most common method of demonstrating that there is no adequate legal remedy." 11 A Wright, Miller & Kane, ***Federal Practice and Procedure*** § 2944. See also ***Fleet Wholesale Supply Co. v. Remington Arms Co.,*** 846 F.2d 1095, 1098 (7th Cir. 1998) ("To say that the injury is irreparable means that the methods of repair (remedies at law) are inadequate.").

+ 'The purpose of a preliminary injunction is to minimize the hardship to the parties pending the ultimate resolution of the lawsuit." ***Faheem-El v. Klincar,*** 841 F.2d 712, 717 (7th Cir. 1988). "The more likely the plaintiff is to win, the less heavily need the balance of harm weigh in his favor in order to get the injunction; the less likely he is to win, the more it need weigh in his favor." ***Ping v. National Educ. Assn,*** 870 F.2d 1369, 1371-72 (7th Cir. 1989).

•• "Even a temporary deprivation of First Amendment freedom of expression rights is generally sufficient to prove irreparable harm." ***National People's Action v. Village of Wilmette,*** 914 F.2d 1008, 1013 (7th Cir. 1990).

•:. Fed.R.Civ.P., Rule 56, allows emergency injunctive relief before service of process. ***H-D Michigan, LLC. v. Hellenic Duty Free Shops,*** 694 F.3d 827, 842 (7th Cir. 2012).

+ 'Defendants also cite budgetary concerns in response to plaintiff's request for injunctive relief. However, matters of administrative convenience must ultimately give way when constitutional rights are in jeopardy." ***Flynn v. Doyle,*** 630 F.Supp.2d 987, 993 (E.D. Wis.). "[V]indication of conceded rights cannot be made dependent upon any theory that it is less expensive to deny than to afford them." ***Watson v. City of Memphis,*** 373 U.S. 526, 537 (1963).

QUALIFIED IMMUNITY

•. "If the law was clearly established, the immunity defense should fail, since a reasonably competent public official should know the law governing his conduct." ***Harlow v. Fitzgerald,*** 457 U.S. 800, 102 S.Ct. 2727 (1982).

•. To successfully defeat defendants' qualified immunity defense, plaintiff must establish (1) that "the facts, taken in the light most favorable to the plaintiff[], show that the defendants violated a constitutional right; and (2) whether that constitutional right was clearly established at the time of the alleged violation." ***Gonzalez v. City of Elgin,*** 578 F.3d 526, 540 (7th Cir. 2009).

•. A plaintiff may defeat a qualified immunity defense by showing that "the conduct [at issue] is so egregious that no reasonable person could have believed that it would not violate clearly established rights." ***Smith v. City of Chicago,*** 242 F.3d 737, 742 (7th Cir. 2001).

• "[L]iability is not predicated upon the existence of a prior case that is directly on point." ***Nabozny v. Podlesny,*** 92 F.3d 446, 456 (7th Cir. 1996); see also ***Charles v. Verhagen,*** 220 F.Supp.2d 937, 954 (W.D. Wis. 2002).

•:• Plaintiff may show that "a general constitutional rule already identified [applies] with obvious clarity to the specific conduct in question, even though the very action in question has not previously been held unlawful." ***Michael C. v. Gresbach,*** 526 F.3d 1008, 1017 (7th Cir. 2008).

•. "This is not to say that an official action is protected by qualified immunity unless the very action in question has previously been held unlawful, but it is to say that in light of pre-existing law the unlawfulness must be apparent." ***Hope v. Pelzer,*** 536 U.S. 730, 739, 122 S.Ct. 2508 (2002).

.. For a right to be clearly established, you need not show a prior case that is founded on materially similar facts; officials may still be on notice in "novel factual circumstances." ***Finsel v. Cruppernink,*** 326 F.3d 903, 906 (7th Cir. 2003).

+ If the legal question of qualified immunity is dependant upon which view of the facts is accepted by the trier of fact, then summary judgment is not appropriate on the issue of qualified immunity. See ***Cowan ex rel. Estate of Cooper v. Breen,*** 352 F.3d 756, 762-63 (2d Cir. 2003); ***Adams v. Metiva,*** 31 F.3d 375, 387 (6th Cir. 1994).

+ The invocation of qualified immunity depends on the "objective legal reasonableness" of the actions taken by the defendants. ***Hall v. Ryan,*** 957 F.2d 402, 404 (7th Cir. 1992) (quoting ***Anderson v. Creighton,*** 483 U.S. 635, 639, 107 5.Ct. 3034, 3038 (1987)). Actions taken by local officials are considered objectively unreasonable if the right allegedly violated is clearly established in a "sufficiently particularized sense at the time of the actions at issue." ***Hall,*** 957 F.2d © 404.

+ Neither qualified immunity nor the Eleventh Amendment shield state actors from a claim for injunctive relief. Qualified Immunity only shields defendants in their individual capacity from money damages. ***Knox v. McGinnis,*** 998 F.2d 1405, 1412-13 (7th Cir. 1993); ***Moss v. Martin,*** 614 F.3d 707 (7th Cir. 2010).

RECONSIDERATION MOTION

+ Fed.R.Civ.P., Rule 59(e) allows the court to alter or amend a judgment if the judgment reflects a manifest error of law. ***Cosgrove v. Bartolotta,*** 150 F.3d 729, 732 (7th Cir. 1998). A "manifest error" is a "wholesale disregard, misapplication, or failure to recognize controlling precedent." ***Oto v. Metro Life Ins. Co.,*** 224 F.3d 601, 606 (7th Cir. 2000) (quotations & citations omitted).

+ Reconsideration is appropriate when the court overlooks or misunderstands something. ***Moro v. Shell Oil Co.,*** 91 F.3d 872, 876 (7th Cir. 1996).

+ The purpose of Rule 59(e) is "to allow the district court to correct its own errors, sparing the parties and appellate courts the burden of unnecessary appellate proceedings." ***Charles v. Daley,*** 799 F.2d 343, 348 (7th Cir. 1986).

RECRUITMENT (APPOINTMENT) OF COUNSEL

+ "When confronted with a request under § 1915(e)(1) for pro bono counsel, the district court is to make the following inquiries: (1) has the indigent plaintiff made a reasonable attempt to obtain counsel or been effectively precluded from doing so; and if so, (2) given the difficulty of the case, does the plaintiff appear competent to litigate it himself?" ***Pruitt v. Mote,*** 503 F.3d 647, 654 (7th Cir. 2007). "The question is whether the plaintiff appears competent to *litigate* his own claims, given their degree of difficulty, and this includes the tasks that normally attend litigation: evidence gathering, preparing and responding to motions and other court filings, and trial. Recruitment of pro bono counsel under § 1915 (e)(1) is not limited to the trial phase of the case." *Id.* @ pg. 655.

•:. When considering motions for recruitment of counsel, district courts must avoid using "boilerplate language" and they must apply the "individualized analysis" that *Pruitt* requires. ***Nave/ar v. lyiola,*** 718 F.3d 692, 696-97 (7th Cir. 2013). *"Pruitt* nowhere suggests that a district court should consider whether recruiting counsel would affect the outcome of a case; instead, that inquiry is reserved for the appellate court's review for prejudice." *Id.*

+ "[T]he fact that an inmate receives assistance from a fellow prisoner should not factor into the decision whether to recruit counsel." ***Henderson v. Ghosh,*** 2014 U.S. App. LEXIS 11816, *14 (7th Cir.).

•. Factually and legally complex cases, such as those raising medical malpractice and Eighth Amendment claims, necessitate the recruitment of counsel. ***Santiago v. Walls,*** 599 F.3d 749, 761 (7th Cir. 2010) ("cases involving complex medical evidence are typically more difficult for pro *so* [litigants]."); see also ***Greeno v. Daley,*** 414 F.3d 645, 658 (7th Cir. 2005) (the court concluded that *pro so* prisoner's case was "legally more complicated than a typical failure-to-treat claim because it require[d] an assessment of the adequacy of the treatment that [the plaintiff] did receive, a question that will likely require expert testimony."); see also ***Olson v. Morgan,*** 750 F.3d 708, 2014 WL 1687802, *3 (7th Cir. 2014) (acknowledging that "some state-of-mind issues may involve subtle questions too complex for pro se litigants.").

•. "[A] plaintiff's inability to investigate crucial facts by virtue of his being a prisoner ... is a familiar ground for regarding counsel as indispensable to the effective prosecution of the case." ***Junior v. Anderson,*** 724 F.3d 812, 815 (7th Cir. 2013).

RELIGION

•. "RLUIPA [The Religious Land Use & Institutionalized Act] forbids prisons that receive federal funding to burden a prisoner's exercise of religion substantially unless the prison both has a compelling interest and employs the least restrictive means possible for protecting that interest." ***Lindell v. McCallum,*** 352 F.3d 1107, 1109-10 (7th Cir. 2007). The Wisconsin prison system receives federal funding. Id. @ 1110 (citing ***Charles v. Verhagen,*** 348 F.3d 601, 606 (7th Cir. 2003)). "[T] state a claim under RLUIPA a Wisconsin prisoner need allege only that the prison has substantially burdened a religion belief". ***Lindell,*** 352 F.3d @ 1110.

•. Under the First Amendment's Free Exercise Clause, an inmate retains the right to exercise his religious beliefs in prison. ***Kaufman v. McCaughtry,*** 419 F.3d 678, 681 (7th Cir. 2006) (citing ***Tarpley v. Allen County, Ind.,*** 312 F.3d 895, 898 (7th Cir. 2002)). To prevail under the Free Exercise Clause, a plaintiff must show a "substantial burden" on a "central religious belief or practice." ***Kaufman,*** 419 F.3d @ 6883 (citing ***Hernandez v. Comm'r of Internal Revenue,*** 490 U.S. 680, 699, 109 S.Ct. 2136 (1989)).

•:. A "substantial burden" is "one that necessarily bears a direct, primary and fundamental responsibility for rendering religious exercise ... effectively impracticable." ***Civil Liberties for Urban Believers v. City of Chicago,*** 342 F.3d 752, 761 (7th Cir. 2003).

+ Under RLUIPA, defendants hold a heavier burden in proving that their restrictions are reasonably related to a legitimate penological interest. ***Procknow v. Schueler,*** 2006 U.S. Dist. LEXIS 79191, pg. 56-57 (E.D. Wis.).

RETALIATION

•. from ***Bridges v. Gilbert,*** 557 F.3d 541 (7th Cir. 2009):

"To prevail on a First Amendment retaliation claim, [plaintiff] must ultimately show that (1) he engaged in activity protected by the First Amendment; (2) he suffered a deprivation that would likely deter First Amendment activity in the future; and (3) the First Amendment activity was 'at last a motivating factor' in the Defendants' decision to take the retaliatory action." [pg. 546] (citing ***Woodruff v. Mason,*** 542 F.3d 545, 551 (7th Cir. 2008) (quoting ***Massey v. Johnson,*** 457 F.3d 711, 716 (7th Cir. 2006)).

we conclude that a prisoner's speech can be protected even when it does not involve a matter of public concern. We will apply the ***Turner*** legitimate penological interests test to determine whether [plaintiff] has alleged that he engaged in protected speech." [pg. 552]

+ To prevail on a retaliation claim, a prisoner must prove that his constitutionally-protected conduct was a substantial or motivating factor in a defendant's actions. ***Hasan v. United States Dep't of Labor,*** 400 F.3d 1001, 1005-06 (7th Cir. 2005); ***Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle,*** 429 U.S. 274, 287 (1977).

"A motivating factor is a factor that weighs in the defendant's decision to take the action complained of—in other words, it is a consideration present to his mind that favors, that pushes him toward, the action." ***Hasan,*** *400* F.3d @ 1006.

"Once the plaintiff proves that an improper purpose was a motivating factor, the burden shifts to the defendant ... to prove by a preponderance of the evidence that the same actions would not have occurred in the absence of the protected conduct." ***Spiegla v. Hull,*** 371 F.3d 928, 943 (7th Cir. 2004).

•. "Conduct that does not independently violate the Constitution can form the basis for a retaliation claim, if that conduct is done with an improper retaliatory motive." ***Hoskins v. Lenear,*** 395 F.3d 372, 375 (7th Cir. 2005).

•:• A prisoner's retaliation claim is subject to a liberal notice pleading standard; the complaint need specify only the bare minimum facts necessary to notify the defendants and the Court of the nature of the claims. ***Higgs v. Carver,*** 286 F.3d 437, 439 (7th Cir. 2002). The "bare minimum" in a retaliation claim are the facts that would apprise the defendants of what the plaintiff did to provoke the alleged retaliation and what they did in response. *Id.*

•. "The First Amendment forbids prison officials from retaliating against prisoners for exercising the right of free speech." ***Farrow v. West,*** 320 F.3d 1235, 1248 (11th Cir. 2003); see also ***Dobbey v. Ill. Dep't of Corr.,*** 574 F.3d 443, 446 (7th Cir. 2009).

•. "Penalties that follow speech are forbidden. This includes, but certainly is not limited to, reactions to what has already been said." ***Fairley v. Andrews,*** 578 F.3d 518, 525 (7th Cir. 2009).

•:. "A government entity ... runs afoul of the First Amendment when it punishes an individual for pure thought." ***Doe v. City of Lafayette,*** 377 F.3d 757, 765 (7th Cir. 2004).

+ Prison officials transferring inmate as a way of retaliating against him for his exercise of a federal constitutional right states a federal claim. ***Higgason v. Farley,*** 83 F.3d 807, 810 (7th Cir. 1996); ***Johnson v. Kingston,*** 292 F.Supp.2d 1146, 1152 (W.D. Wis. 2003).

+ The question is not whether plaintiff has been deterred or is likely to be, it is whether plaintiff's injury from the defendant's retaliatory conduct is enough to deter "a person of ordinary firmness" from exercising his constitutional rights. ***Pieczynski v. Duffy,*** 875 F.2d 1331, 1333 (7th Cir. 1989)

•• The proper inquiry under a First Amendment retaliation claim asks "whether an official's acts would chill or silence a person of ordinary firmness from future First Amendment activities." ***Mendocino Envtl. Ctr. v. Mendocino County,*** 192 F.3d 1283, 1300 (9th Cir. 1999). Plaintiff need not show that his speech was "actually inhibited or suppressed." *Id.*

+ "Penalizing a prisoner's exercise of the constitutional right to petition for redress of grievances is a constitutional tort." ***Simpson v. Nickel,*** 450 F,3d 303, 305 (7th Cir. 2006).

+ Disparaging comments made about a plaintiff's protected conduct followed shortly by adverse treatment is sufficient evidence to defeat defendants' motion for summary judgment. ***Magyar v. Saint Joseph Regional Medical Center,*** 544 F.3d 766, 773 (7th Cir. 2008).

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RETALIATION continued

•. "Nothing in the First Amendment itself suggests that the right to petition for redress of grievances only attaches when the petitioning takes a specific form." ***Pearson v. Welborn,*** 471 F.3d 732, 741 (7th Cir. 2006). Legitimate complaints do not lose their protected status simply because they are spoken. *Id.* "We are {] unconvinced that the form of expression - i.e, written or oral - dictates whether constitutional protection attaches." *Id.*

4. "[A]n act of retaliation for the exercise of a constitutionally protected right is actionable under Section 1983 even if the act, when taken for different reasons, would have been proper." ***Howland*** **v.** ***Kilquist,*** 833 F.2d 639, 644 (7th Cir. 1987).

• "To survive summary judgment on his First Amendment retaliation claim, [plaintiff] must produce evidence from which a jury could conclude that he engaged in constitutionally protected speech and that the speech was a substantial motivating factor in his [discipline]." ***Salas v. Wisconsin Dept. of Corr.,*** 493 F.3d 913, 925 (7th Cir. 2007).

•:• When assessing a retaliation claim, the court must "apply an objective test: whether the alleged conduct by the defendants would likely deter a person of ordinary firmness from continuing to engage in protected activity." ***Surita v. Hyde,*** 665 F.3d 860, 878 (7th Cir. 2011).

RIGHT OF ACTION

o "[A] private right of action is only created when (1) the language or the form of the statute evinces the legislature's intent to create a private right of action, and (2) the statute establishes private civil liability rather than merely providing for protection of the public." ***Grube v. John L. Daun,*** 210 Wis.2d 681, 689, 563 N.W.2d 523 (1997).

O "It is well settled ... that a private right of action may be predicated upon the violation of a statute containing a mandate to do an act for the benefit of another ... even though no such right of action is given by the express terms of such statute..." ***Yanta v. Montgomery Ward, Co.,*** 66 Wis.2d 53, 61, 224 N.W.2d 389, 393-94 (1974) (citations omitted).

ROOKER-FELDMAN DOCTRINE

•:• The Rooker-Feldman doctrine bars "state-court losers complaining of injuries caused by state-court judgments rendered before the district court proceedings commenced" from pursuing an action asking the federal court to review and reject those judgments. ***Exxon Mobil Corp. v. Basic Indus. Corp.,*** 544 U.S. 280, 284, 125 S.Ct. 1517 (2005). Not only are direct attacks upon state court judgments barred by the Rooker-Feldman doctrine but so too are claims that are inextricably intertwined with the state-court judgment ..... ***Lewis v. Anderson,*** 308 F.3d 768, 772 (7th Cir. 2002). In determining whether a claim is inextricably intertwined, the crucial question is whether the court is, in essence, being called upon to review that state court judgment. ***Manley v. City of Chicago,*** 236 F.3d 392, 396 (7th Cir. 2001).

1. under the Rooker-Feldman doctrine, federal courts lack subject matter jurisdiction to hear cases that require them to review or set aside a state court judgment. ***Skinner v. Switzer,*** 131 S.Ct. 1289, 1297 (2011).

•:. "The doctrine arises out of our system of federalism, which respects the authority of state courts to decide the cases before them. State court decisions may be reversed only by higher courts in the state judicial hierarchy or, after all the appeals within the state system have been exhausted, by the Supreme Court of the United States, and then only in limited circumstances. 28 U.S.C. § 1257. Federal district courts and courts of appeals play no role in the state court system and lack jurisdiction to reverse a state court judgment." Grisham v. Integrity First Bank, 2014 U.S. Dist. LEXIS 45452 (W.D. Wis.) (citation omitted).

• A plaintiff "may not attempt to circumvent the effect of Rooker-Feldman" by casting his complaint in the form of federal claims. ***Long v. Shorebank Development Corp.,*** 182 F.3d 548, 557 (7th Cir. 2004). Rooker-Feldman does not bar claim about injuries that state court failed to remedy. *Id. @* pg. 555.

4. Rooker-Feldman does not apply if plaintiff is alleging that defendants violated his rights independently of state court judgment. ***Brokaw v. Weaver,*** 305 F.3d 660, 665 (7th Cir. 2002).

SMALL CLAIMS

0 The present value of personal property may be established by the non-expert opinion of its owner. ***Trible v. Tower Ins.* Co.,** 43 Wis.2d 172, 187, 168 N.W.2d 148 (1969). "The weight to be given to a non expert owner's testimony is for the trier of facts." *Id.*

O Trial proceedings are informal and the judge shall establish the order of the hearing. The rules of evidence do not apply except for privileges, although irrelevant or repetitious evidence or arguments may be excluded. Hearsay evidence is admissible; however, an essential finding of fact may not be based solely on oral hearsay unless it would be admissible under the rules of evidence. ***Wis. Stat.*** § 799.209(2).

STATUTE OF LIMITATIONS

•. 'The continuing violation doctrine acts as a defense to the statute of limitations, delaying its accrual or start date." ***Kovacs v. United States,*** 614 F.3d 666, 676 (7th Cir. 2012) (citation omitted).

•:. The continuing violation doctrine applies in situations in which a claim is premised on a cumulative effect of individual, repeated acts, with the last event being timely. ***National Railroad Passenger Corp. v. Morgan,*** 526 U.S. 101, 115-16, 122 S.Ct. 2061 (2002).

•. [T]he [statute-of-]limitations period is tolled while a prisoner completes the administrative grievance process." ***Walker v. Sheahan,*** 526 F.3d 973, 978 (7th Cir. 2008) (citing ***Johnson v. Rivera,*** 272 F.3d 519 (7th Cir. 2001)).

•:. When a civil rights action is "based on a medical injury arising from deliberate indifference, the relevant injury for statute-of-limitations purposes is not the intangible harm to the prisoner's constitutional rights but the physical injury caused by the defendant's indifference to the prisoner's medical needs." ***Richards v. Mitcheff,*** 696 F.3d 635 (7th Cir. 2012); see also ***Devbrow v. Kalu,*** 705 F.3d 765 (7th Cir. 2013) (a deliberate indifference claim accrues when the plaintiff knows of his physical injury and its cause).

•. "If despite the exercise of reasonable diligence [the plaintiff] cannot discover his injurer's (or injurers') identity within the statutory period, he can appeal to the doctrine of equitable tolling to postpone the deadline for suing until he can obtain the necessary information." ***Fid. Nat. Title Ins. Co. of N.Y. v. Howard Say. Bank,*** 436 F.3d 836 (7th Cir. 2006).

O Six-year statute of limitation governs § 198:3 claims. ***Hemberger v. Bitzer,*** 216 Wis.2d 509, 519, 574 N.W.2d 56 (1998).

STATUTORY INTERPRETATION

• "No agency may promulgate a rule which conflicts with state law." **Wis. Stat.** § 227.10(2)

• Administrative rules and regulations are construed in the same manner as statutes. ***Moonlight v. Boyce,*** 125 Wis.2d 298, 303, 372 N.W.2d 479 (Ct. App. 1985).

O An agency acts beyond its authority when it abandons its own rules. "When the department sets and publishes its own rules ... it should be held to follow them." ***State ex rel. Riley v. DHSS,*** 445 N,W.2d 693, 696, 151 Wis.2d 618, 627 (Ct.App. 1989).

O An administrative agency has only those powers given to it by statute and an agency may not promulgate a rule that conflicts with a statute. ***Mallo v. DOR,*** 2002 WI 70, P15, 253 Wis.2d 391, 645 N.W.2d 8533.

O "It is elementary that an agency must follow its own rules made in conformity with an enabling statute." ***Stern by Mohr v. Wis. Dept. of Health & Family Services,*** 212 Wis.2d 393, 400, 569 N.W.2d 79, 83 (Wis.App. 1997).

O 'The court ordinarily accords deference to a state agency's interpretation and application of its own administrative regulation unless the interpretation is inconsistent with the language of the regulation or is clearly erroneous." ***Bergmann v. McCaughtry,*** 564 N.W.2d 712, 714, 211 Wis.2d 1,7 (Wis. 1997).

ABUSE OF DISCRETION

•. "[A] court abuses its discretion when its decision is premised on an incorrect legal principle or a clearly erroneous factual finding, or when the record contains no evidence on which the court rationally could have relied." ***Corporate Assets, Inc. v. Paloian,*** 368 F.3d 761, 767 (7th Cir. 2004).

+ Traditionally, decisions on "questions of law" are "reviewable de novo," decisions on "questions of fact" are "reviewable for clear error," and decisions on "matters of discretion" are "reviewable for 'abuse of discretion." ***Pierce v. Underwood,*** 487 U.S. 552, 558, 108 S.Ct. 2541 (1988).

O "The term discretion contemplates a process of reasoning. This process depends on facts that are of record or that are reasonably derived by inference from the record and a conclusion based on a logical rationale founded upon proper legal standards... the circuit court must make a record of its reasoning to ensure the soundness of its own decision making and to facilitate judicial review." ***Klinger v. Oneida County,*** 149 Wis.2d 838, 846 (1989).

AMERICANS WITH DISABILITIES ACT

+ Title II of the Americans with Disabilities Act (ADA), 42 U.S.C. § 12132, prohibits a "public entity" from discriminating against a "qualified individual with a disability" on account of that disability. State prisons fall squarely within the statutory definition of "public entity", and thus, the Americans with Disabilities Act (ADA) is applicable to state prisoners. ***Pa. Dept of Corr. v. Yeskey,*** 524 U.S. 206, 210, 118 S.Ct. 1952 (1998).

•. The purpose of Title II of the Americans with Disabilities Act is to direct governmental entities that they must provide a "reasonable accommodation" so that a person can participate in a program. ***Tennessee v. Lane,*** 541 U.S. 509, 537, 124 S.Ct. 1978 (2004). "The Court ... is faithful to the Act's demand for reasonable accommodation to secure access and avoid exclusion." *Id.*

— APPEAL

•. In most civil cases, plain error review is unavailable; if a party fails to object at trial, the issue cannot be raised on appeal. ***Stringel v. Methodist Hosp. of Indiana, Inc.,*** 89 F.3d 415, 421 (7th Cir. 1996). A narrow exception to this general rule permits review where a party can demonstrate (1) exceptional circumstances exist, (2) substantial rights are affected, and (3) a miscarriage of justice will result if the doctrine is not applied. ***Estate of Moreland v. Dieter,*** 395 F.3d 747, 756 (7th Cir. 2005).

+ "[A] party has waived the ability to make a specific argument for the first time on appeal when the party failed to present that specific argument to the district court, even though the issue may have been before the district court in more general terms." ***Fednav Int'l Ltd. v. Cont'! Ins. Co.,*** 624 F.3d 834, 841 (7th Cir. 2010); see also ***Puffer v. Allstate Ins. Co.,*** 675 F.3d 709, 718 (7th Cir. 2012) ("It is a well-established rule that arguments not raised to the district court are waived on appeal if they are underdeveloped, conclusory, or unsupported by the law." (citations omitted)).

BRIEF WRITING

•. "[A]rguments raised in a conclusory or underdeveloped manner [are] waived." ***Pond v. Michelin North America, Inc.,*** 183 F.3d 592, 597 (7th Cir. 1999).

+ "Arguments not developed in any meaningful way are waived." ***Central States, S.E. & S.W. Areas Pension Fund v. Midwest Motor Express, Inc.,*** *181* F.3d 799, *808* (7th Cir. 1999).

O A respondent's failure to dispute a proposition in the appellant's brief may be taken as a concession on that point. ***Charolais Breeding Ranches, Ltd. v. FPC § Corp.,*** 90 Wis.2d 97, 109, 279 N.W.2d 493 (Ct. App. 1979).

O "[A] plaintiff seeking to avoid dismissal must fully develop in its briefs a legal analysis to support its contentions." ***Clear Channel outdoor, Inc. v. City of Milwaukee,*** 2011 WI App., P17, 336 Wis.2d 707.

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STATUTORY INTERPRETATION continued

0 An administrative rule cannot be applied in isolation. ***McGarrity v. Welch Plumbing Co.,*** 104 Wis.2d 414, 427, 312 N.W.2d 37, 43 (1981). If it is part of a comprehensive statutory and regulatory scheme, it must be applied in conjunction with its companion statutes and rules. ***Sommerfield v. Sommerfield,*** 154 Wis.2d 840, 847, 454 N.W.2d 55, 58 (Ct.App. 1990).

O "The Department [of Corrections] made the rules it did so that its employees could act pursuant to them and the inmates could count on those rules being followed.., we must express our frustration with the way some employees of the Department continue to ignore the Department's own rules." ***State ex rel. Anderson v. Gamble,*** 647 N.W.2d 402, 404, 254 Wis.2d 862, 866 (Wis.App. 2002).

o A statute shall be construed to give effect to its leading idea. ***State v. Okray Produce Co.,*** 132 Wis.2d 145, 150, 389 N.W.2d 825, 827 (Ct.App. 1986). The Courts have a duty to construe a statute to avoid potential constitutional violations. ***United States Fire Ins. Co. v. E.D. Wesley Co.,*** 105 Wis.2d 305, 320, 313 N.W.2d 833, 840 (1982).

O An agency rule cannot defeat the plain language of an unambiguous statute. ***Lincoln Say. Bank v. DOR,*** 215 Wis.2d 430, 443, 573 N.W.2d 522 (1988).

o In those cases in which a conflict arises between a statute and an administrative rule, the statute prevails. ***Richland Sch. Dist. v. DILHR,*** 166 Ws.2d 262, 278, 479 N.W.2d 579 (Ct.App. 1991), aff'd 174 Wis.2d 878 (1993).

o "[T]he purpose of statutory interpretation is to determine what the statute means so that it may be given its full, proper, and intended effect." ***State ex rel. Kalal v. Circuit Court for Dane County,*** 271 Wis.2d 633, 681 N.W.2d 110 (Wis. 2004).

SUMMARY JUDGMENT

•:. "One of the principal purposes of the summary judgment rule is to isolate and dispose of factually unsupported claims and defenses." ***Cleotex v. Catrett,*** 477 U.S. 317, 323-24 (1986).

•. A party will be successful in opposing summary judgment only when they "present definite, competent evidence to rebut the motion." ***Smith v. Severn,*** 129 F.3d 419, 427 (7th Cir. 1997). The opposing party must set forth specific facts showing a genuine issue for trial and may not rest upon mere allegations or denials of its pleadings. ***First Nat'l Bank v. Cities Service Co.,*** 391 U.S. 253, 289 (1968). Thus, "the question is whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." ***Smith,*** 129 F.3d @ 427.

•:. "When opposing parties tell two different stories, one of which is blatantly contradicted by the record, so that no reasonable jury could believe it, a court should not adopt that version of the facts for purposes of ruling on a motion for summary judgment." ***Scott v. Harris,*** 550 U.S. 372, 380, 127 S.Ct. 1769 (2007).

+ Where there is a factual dispute about a material issue, summary judgment is inappropriate and the matter is for the jury to decide. ***Pries v. Honda Motor Co. Ltd.,*** 31 F.3d 543, 544 (7th Cir. 1994).

+ Conclusory allegations, unsupported by specific facts, will not suffice. ***Lujan v. Nat'l Wildlife Fed'n,*** 497 U.S. 871, 888, 110 S.Ct. 3177 (1990).

+ Where the material facts specifically averred by one party contradict the facts averred by a party moving for summary judgment, the motion must be denied. ***Payne v. Pauley,*** 337 F.3d 767, 773 (7th Cir. 2003).

•:. The Courts must construe all facts in the light most favorable to the party opposing summary judgment. ***McNeal v. Ostrov,*** 368 F.3d 667 (7th Cir. 2004).

+ A "genuine" issue exists if there is "sufficient evidence supporting the claimed factual dispute" to require a choice between "the parties' differing versions of the truth at trial." ***First National Bank v. Cities Service Co.,*** 391 U.S. 253, 289,88 S.Ct. 1575 (1968).

SUMMARY JUDGMENT continued

+ A "material" issue is one that "affects the outcome of the suit", that is, an issue which needs to be resolved before the related legal issues can be resolved. ***Anderson v. Liberty Lobby Inc.,*** 477 U.S. 242, 248, 106 S.Ct. 2505 (1986). "Credibility determinations, the weighing of evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge, whether he is ruling on a motion for summary judgment or for a direct verdict." ***Id.,*** 477 U.S. @ 255. "[T]he court has one task and one task only: to decide, based on the evidence of record, whether there is any material dispute of fact that requires a trial." ***Waidridge v. Am. Hoechst Corp.,*** 24 F.3d 918, 920 (7th Cir. 1994).

+ "In considering cross-motions for summary judgment, [the courts] are obliged to view all facts and draw all reasonable inferences in a light most favorable to the party against whom the motion under consideration is made." ***Gazarkiewicz v. Town of Kingsford Heights, Indiana,*** 359 F.3d 933, 939 (7th Cir. 2004).

+ "It is, of course, well settled that the filing of a cross-motion for summary judgment does not warrant a court in granting summary judgment unless one of the moving parties is entitled to judgment as a matter of law on the basis of the material facts not in dispute."-Mitchell ***v. McCarthy,*** 239 F.2d 721, 723 (7th Cir. 1957).

•. When the parties have filed cross-motions for summary judgment, each party's motion must be analyzed separately. Cross-motions do not withdraw questions of facts from the jury. ***Lac Courte Oreilles Band of L. Superior* Chippewa *Indians* v. Voight,** 700 F.2d 341, 349 (7th Cir. 1983).

+ When disputed issues of fact exist, an inmate should be given time to conduct an adequate discovery. ***Farmer v. Brennan,*** 81 F.3d 1444, 1449 (7th Cir. 1996).

+ Summary judgment is only proper when there is no reasonably contestable issue of fact that is potentially outcome determinative. ***EEOC v. Sears, Roebuck & Co.,*** 233 F.3d 432, 436 (7th Cir. 2000). A court may not choose between competing inferences or balance the relative weight of conflicting evidence. ***Abdullah v. City of Madison,*** 423 F.3d 763, 773 (7th Cir. 2005).

+ "Rule 56 does not provide a method by which the presence of an issue of fact can be determined, therefore, each case depends on the facts peculiar to it. A district court under the rule is not authorized to try issues of fact, but has the power to penetrate the pleadings and look at any evidential source to determine whether there is an issue of fact to be tried. The rule does not permit trial of disputed questions of fact..." ***First Nat'! Bank Co. v. Insurance Co. of North* America,** 606 F.2d 760, 767 (7th Cir. 1979).

+ "If the record shows ... that genuine issues of fact exist and that the evidence on those issues is conflicting, of uncertain weight, in part incompetent, and itself susceptible of various interpretations, only by a trial can the court ascertain the pertinent facts and move on to decide such questions of substantive law as those facts present. In such a situation entry of summary judgment is not the proper method." ***American Security Co. v. Hamilton Glass* Co.,** 254 F.2d 889, 892 (7th Cir. 1958).

•. The plaintiff gets the benefit of the doubt "only if the record contains competent evidence on both sides of a factual question." ***Patel v. Allstate Ins. Co.,*** 105 F.3d 365. 367 (7th Cir. 1997).

+ A plaintiff may defeat summary judgment with his own deposition. ***Williams v. Seniff,*** 342 F.3d 774, 785 (7th Cir. 2003).

•• Affidavits are evidence for purposes of determining whether genuine issue of material facts exist. **Jackson *v. Duckworth,*** 955 F.2d 21, 22 (7th Cir. 1992).

+ Sworn affidavits, particularly those that are detailed, specific, and based on personal knowledge are "competent evidence to rebut [a] motion for summary judgment." ***Dale v. Lappin,*** 376 F.3d 652, 655 (7th Cir. 2004).

•. "[P]arties cannot thwart the purposes of Rule 56 by creating 'sham' issues of fact with affidavits that contradict their prior depositions." ***Bank of Ill. v. Allied Signal Safety Restraint* Sys.,** 75 F.3d 1162, 1168 (7th Cir. 1996).

+ A party's "filing of a motion for summary judgment does not waive its right to a jury trial if the motion is denied." ***Clarin Corp. v. Massachusettes Gen. Life Ins. Co.,*** 44 F.3d 471, 473-74 (7th Cir. 1994).

+ Summary judgment is not a vehicle for resolving factual disputes. 10 Charles A. Wright, Arthur A. Miller & Mary K. Kane, ***Federal Practice and Procedure: Civil*** § 2712, @ 574 (2d Ed. 1983).

KEY: + = References to Federal law 0 = References to State law

SUMMARY JUDGMENT continued

•. "Rule 56 demands something more than the bald assertion of the general truth of a particular matter {;J rather it requires affidavits that cite specific concrete facts establishing the existence of the truth of the matter *asserted."* ***Drake v. Minnesota Mining*** & ***Manufacturing Co.,*** 134 F.3d 878, 887 (7th Cir. 1998).

•. Arguments not presented to the district court in response to summary judgment motions are waived. ***Laborers' Int'l Union of N. Am. v. Caruso,*** 197 F.3d 1195, 1197 (7th Cir. 1999).

•:• Summary judgment should not be entered "until the party opposing the motion has had a fair opportunity to conduct such discovery as may be necessary to meet the factual basis for the motion." ***Celotex Corp. v. Catrett,*** 477 U.S. 317, 326 (1986).

6. To prevail on a Rule 56(f) motion, the party seeking a continuance or stay of decision must state why it cannot respond to the motion for summary judgment and support its allegations by affidavits. ***Waterloo Furniture Components, LTD. v. Haworth, Inc.,*** 467 F.3d 641, 648 (7th Cir. 2006).

4. "A motion to strike is appropriate if affidavits contain inadmissible hearsay or are not made on the basis of personal knowledge; only those portions of the affidavit that lead to admissible evidence and that are based on per sonal knowledge will survive the motion." 2-17 Moore's Manual – ***Federal Practice*** & ***Procedure*** § 17.43.

O The purpose of summary judgment is to avoid a trial "where there is nothing to try." ***Yahnke v. Carson,*** 2000 WI 74, ⊺ 10, 236 Wis.2d 257, 613 N.W.2d 102 (quoting other sources). "The summary judgment procedure is designed to eliminate unnecessary trials. The procedure is not a substitute for a trial, but rather a determination that there is no triable issue of fact presented.... Any reasonable doubts as to the existence of a factual issue must be resolved against the moving party." ***Maynard v. Port Publ'ns, Ins.,*** 98 Wis.2d 555, 562-63, 297 N.W.2d 500 (1980) (citations omitted).

o "The party moving for summary judgment is not entitled to limit consideration to the legal theories that party chooses if other legal theories are supported by the factual submissions of the parties." ***Gennrich v. Zurich Am. Ins. Co.,*** 2010 WI App 117, P9, 329 Wis.2d 91, 100. See also ***State v. Holmes,*** 106 Wis.2d 31, 39-40, 315 N.W.2d 703 (1982) (holding that it is well recognized that courts may sua sponte consider legal issues not raised by the parties).

o "The inferences to be drawn from the underlying facts contained in the moving party's material should be viewed in the light most favorable to the party opposing the motion.... If the material presented on the motion is subject to conflicting interpretations or reasonable people might differ as to its significance, it would be improper to grant summary judgment." ***Grams v. Boss,*** 97 Wis.2d 332, 339, 294 N.W.2d 473 (1980).

o "Even when evidence is not disputed, if there are conflicting reasonable inferences from that evidence, those conflicting inferences may create genuine material factual disputes that entitle one party to a trial." ***Sauk County v. Gumz,*** 2003 WI App 165, ⟟ 40 n.17, 266 Wis.2d 758. "Whether an inference is reasonable is a question of law." ***Hennekens v.Hoerl,*** 160 Wis.2d 144, 162, 465 N.W.2d 812 (1991).

O "[T]he issue of intent is generally not readily susceptible of determination on summary judgment. 'We have stated "...the issue of ... intent is not one that properly can be decided on a motion for summary judgment. Credibility of a person with respect to his subjective intent does not lend itself to be determined by affidavit." ***Tr-Tech Corp. of Am. v. Americomp Servs., Inc.,*** 2002 WI 88, ⟊ 30 n.5, 254 Wis.2d 418, 646 N.W.2d 822.

O Summary judgment is a drastic remedy and is usually inappropriate to resolve negligence issues. ***State Bank of La Crosse v. Eisen***,, 128 Wis.2d 508, 517, 383 N.W.2d 916, 920 (Ct. App. 1986).

O "[N]egligence is almost always inappropriate for summary judgment." ***Brown v. Sandeen Agency, Inc.,*** 2009 WI App 11, P23, 316 Wis.2d 253.

O "As a general rule ... the existence of negligence is a question of fact which is to be decided by the jury summary judgment does not lend itself well to negligence questions and should be granted in actions based on negligence only in rare cases." ***Ceplina v. South Milwaukee Sch. Bd.,*** 73 Wis.2d 338, 342-43, 243 N.W.2d 183 (1976) (footnotes omitted).

TIME EXTENSION

0 If a moving party fails to act within the required time, a motion to enlarge the time, in accordance with Wis. Stat. § 801.15, may be granted only if the failure to act was the result of "excusable neglect." ***Connor v. Connor,*** 2001 WI 49 1116, 243 Wis.2d 279,290. The term "excusable neglect" is not synonymous with neglect, carelessness or inattentiveness, but rather is that neglect that might have been the act of a reasonably prudent person under the same circumstances.

TRIAL

• Under a de novo review of jury instructions, the 7th Circuit must "determine whether, taken as a whole, [the instructions] correctly and completely informed the jury of the applicable law." ***Huff v. Sheahan,*** 493 F.3d 893, 899 (7th Cir. 2007). "We defer to the district court's phrasing of an instruction that accurately states the law; however, we shall reverse when the instructions misstate the law or fail to convey the relevant legal principles in full and when those shortcomings confuse or mislead the jury and prejudice the objecting litigant." *Id.* (citation and internal quotation marks omitted).

•. "Improper remarks during a closing argument warrant reversal of the judgment only if the remark influenced the jury in such a way that substantial prejudice resulted to the opposing party." ***Gruca v. Alpha Therapeutic Corp.,*** 51 F.3d 638, 644 (7th Cir. 1995) (internal quotation marks omitted). Reversible error occurs only if the statement was "plainly unwarranted and clearly injurious." ***Jones v. Lincoln Elec. Co.,*** 188 F.3d 709, 730 (7th Cir. 1999).

•. When a party intentionally destroys evidence in bad faith, the judge may instruct the jury to infer the evidence contained incriminatory content. ***Faas v. Sears, Roebuck & Co.,*** 532 F.3d 633, 644 (7th Cir. 2008). When considering the propriety of such an adverse inference instruction, "[tjhe crucial element is not that the evidence was destroyed but rather the reason for the destruction." ***Park v. City of Chicago,*** 297 F.3d 606, 615 (7th Cir. 2002) (quoting **S.C.** ***Johnson*** *& Son, Inc.* ***v. Louisville*** *&* ***Nashville R.R. Co.,*** 695 F.2d 253, 258 (7th Cir. 1982)). A party destroys a document in bad faith when it does so "for the purpose of hiding adverse information." ***Faas,*** 532 F.3d @ 644 (quoting ***Rummery v.*** *Ill.* ***Bell Tel. Co.,*** 250 F.3d 553, 558 (7th Cir. 2001)).

•'Evidence should be excluded under Fed.R.Evid. 403 if its probative value is substantially outweighed by the danger of unfair prejudice. ***Cobige v. City of Chicago,*** 651 F.3d 780, 784 (7th Cir. 2011). Evidence is unfairly prejudicial where "its admission makes it likely that the jury will be induced to decide the case on an improper basis, commonly an emotional one, rather than on the evidence presented." ***Thompson v. City of Chicago,*** 472 F.3d 444, 456-57 (7th Cir. 2006).

THE BADGER LAW GUIDE'S Quick Reference (Civil Case Citations) is intended to provide you with a jump-off point for your research. The material included within this guide is not all-inclusive and does not cover every topic related to civil law. Please read the actual cases before using them within your legal briefs and memorandums. And be mindful that most courts do not allow citations of their own *unpublished* opinions for precedential or persuasive value.

Remember to double-check all of the legal references, rule and case citations listed in this guide because the LAW is forever in a constant state of change. Please continue to be brave and brilliant in your pursuit of fairness, righteousness and justice.

KEY: References to Federal law 0 = References to State law

ABUSE OF DISCRETION

•. "[A] court abuses its discretion when its decision is premised on an incorrect legal principle or a clearly erroneous factual finding, or when the record contains no evidence on which the court rationally could have relied." ***Corporate Assets, Inc. v. Paloian,*** 368 F.3d 761, 767 (7th Cir. 2004).

•. Traditionally, decisions on "questions of law" are "reviewable de novo," decisions on "questions of fact" are "reviewable for clear error," and decisions on "matters of discretion" are "reviewable for 'abuse of discretion." ***Pierce v. Underwood,*** 487 U.S. 552, 558, 108 S.Ct. 2541 (1988).

0 "The term discretion contemplates a process of reasoning. This process depends on facts that are of record or that are reasonably derived by inference from the record and a conclusion based on a logical rationale founded upon proper legal standards... the circuit court must make a record of its reasoning to ensure the soundness of its own decision making and to facilitate judicial review." ***Klinger v. Oneida County,*** 149 Wis.2d 838, 846 (1989).

AMERICANS WITH DISABILITIES ACT

+ Title II of the Americans with Disabilities Act (ADA), 42 U.S.C. § 12132, prohibits a "public entity" from discriminating against a "qualified individual with a disability" on account of that disability. State prisons fall squarely within the statutory definition of "public entity", and thus, the Americans with Disabilities Act (ADA) is applicable to state prisoners. ***Pa. Dep't of Corr. v. Yeskey,*** 524 U.S. 206, 210, 118 S.Ct. 1952 (1998).

+ The purpose of Title II of the Americans with Disabilities Act is to direct governmental entities that they must provide a "reasonable accommodation" so that a person can participate in a program. ***Tennessee v. Lane,*** 541 U.S. 509, 537, 124 5.Ct. 1978 (2004). "The Court ... is faithful to the Act's demand for reasonable accommodation to secure access and avoid exclusion." *Id.*

APPEAL

•. In most civil cases, plain error review is unavailable; if a party fails to object at trial, the issue cannot be raised on appeal. ***Stringel v. Methodist Hosp. of Indiana, Inc.,*** 89 F.3d 415, 421 (7th Cir. 1996). A narrow exception to this general rule permits review where a party can demonstrate (1) exceptional circumstances exist, (2) substantial rights are affected, and (3) a miscarriage of justice will result if the doctrine is not applied. ***Estate of Moreland v. Dieter,*** 395 F.3d 747, 756 (7th Cir. 2005).

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0 "[A] plaintiff seeking to avoid dismissal must fully develop in its briefs a legal analysis to support its contentions." ***Clear Channel outdoor, Inc. v. City of Milwaukee,*** 2011 WI App., P17, 336 Wis.2d 707.

CERTIORARI (Writ)

•:. Petition for Writ of Certiorari in state court does not bar later civil rights action because "certiorari is a limited form of review, while a claim under § 1983 exists as a uniquely federal remedy that is to be accorded a sweep as broad as its language." ***Wilhelm v. County of Milwaukee,*** 325 F.3d 843, 846 (7th Cir. 2003).

O Certiorari review is limited to considering: (1) whether the agency kept within its jurisdiction; (2) whether it proceeded on a correct theory of law; (3) whether its action was arbitrary, oppressive or unreasonable, representing its will rather than its judgment; and (4) whether it could reasonably make the determination in question based upon the evidence before it. ***State v. Waushara County Bd. of Adjustment,*** 2004 WI 56, P12, 271 Wis.2d 547.

O "Statutory certiorari review is not for resolving disputes." ***Winkelman v Town of Dela field,*** 2000 WI App. 254, P3, 239 Wis.2d 542 (Ct. App. 2000). Unlike civil litigation, which attempts to resolve a controversy between parties, the purpose of certiorari review is to merely test the validity of an agency's decision. ***Hanlon v. Town of Milton,*** 2000 WI 61, P22, 235 Wis.2d 597 (2000).

O An administrative body may not base an administrative finding on uncorroborated hearsay. ***Village of Menomonee Falls v. DNR,*** 140 Wis.2d 579, 610, 412 N.W.2d 505, 518 (Ct. App. 1987).

O "[C]ertiorari review is limited to the record created before the administrative agency." ***State ex rel. Whiting v. Kolb,*** 158 Wis.2d 226, 233, 461 N.W.2d 816 (Ct. App. 1990).

O "[I]f an agency on certiorari fails to return a record sufficient to demonstrate that the proceedings before it were procedurally proper, we may vacate the agency's decision. We would otherwise invite an agency subject to certiorari review to evade judicial review of their procedural violations. Evasion would be simple. The agency could hide its procedural violations by failing to develop the record regarding them" ***State ex rel. Lomax v. Leik,*** 154 Wis.2d 735, 740, 454 N.W.2d 18, 20-21 (Ct. App. 1990) (citations omitted).

O Certiorari review is available for the purpose of reviewing a final determination. ***State ex rel. Czapiewski v. Milwaukee City Serv. Comm'n,*** 54 Wis.2d 535, 529, 196 N.W2d 742 (1972).

O As a general rule, a certiorari court may affirm or reverse the action of an agency, ***Snajder v. State,*** 74 Wis.2d 303, 311, 246 N.W.2d 665, 668 (1976), and therefore cannot order the agency to perform a certain act. ***State ex rel. Richards v. Leik,*** 175 Wis.2d 446, 455 (Ct. App. 1993).

O The evidentiary test on certiorari review is the substantial evidence test, under which the court determines whether reasonable minds could arrive at the conclusion the agency reached. ***Ortega v. McCaughtry,*** 221 Wis.2d 376, 386, 585 N.W.2d 640 (Ct. App. 1998).

O Consolidation of separate administrative decisions in single certiorari action is allowed. ***State ex rel. Rio v. Hamblin,*** 2013 Wisc. App. LEXIS 212.

CIVIL COMPLAINT I PLEADINGS

• *Prose* pleadings are to be liberally construed. ***Haines v. Kerner,*** 404 U.S. 519, 92 S.Ct. 594 (1972).

•:. It is not necessary for the plaintiff to plead specific facts and his statement need only "give the defendant fair notice of what the ... cOaim is and the grounds upon which it rests." ***Bell Atlantic Corp. v. Twombly,*** 550 U.S. 544, 555, 127 S.Ct. 1955 (2007) (quoting ***Conley v. Gibson,*** 355 U.S. 41, 47 (1957)). However, a complaint that of fers "labels and conclusions" or formulaic recitation of the elements of a cause of action will not do." ***Ashcroft v. lqbal,*** 556 U.S. 662, 678, 129 S.Ct. 1937 (2009) (quoting ***Twombly,*** 550 U.S. @ 555). To state a claim, a complaint must contain sufficient factual matter, accepted as true, "that is plausible on its face." Id. (quoting ***Twombly,*** 550 U.S. @ 570). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." (citing ***Twombly,*** 550 U.S. @ 556).

• At the pleadings stage, plaintiff is not required to plead all the elements of his claim. ***Scott v. City of Chicago,*** 195 F.3d 950, 951-52 (7th Cir. 1999); ***Evans v. Morgan,*** 304 F.Supp.2d 1100, 1105 (W.D. Wis. 2003).

CIVIL COMPLAINT / PLEADINGS continued

+ A complaint is not required to allege all, or any, of the facts logically entailed by the claims. A plaintiff does not have to plead evidence. ***Bennett v. Schmidt,*** 153 F.3d 516, 518 (7th Cir. 1998).

•:. "Plaintiffs need not lard their complaints with facts; the federal system uses notice pleading rather than fact pleading." ***Burks* v. *Raemisch,*** 555 F.3d 592, 594 (7th Cir. 2009) (citation omitted).

•:. A district court may strongly suspect that an inmate's claims lack merit, but that is not a legitimate ground for dismissal under § 1915A. ***Simpson v. Nickel,*** 450 F.3d 303, 307 (7th Cir. 2006). A complaint is sufficient if it gives notice of the plaintiff's claims. *Id.* @ 306. It cannot be dismissed for failure to state a claim unless "it appears beyond doubt that the plaintiff can prove no set of facts that would entitle him to relief." ***Marshall v. Knight,*** 445 F.3d 965, 968 (7th Cir. 2006).

•. It is not for the courts to pick and choose legal theories for a plaintiff on the ground that one is better fit than another. ***Soldal v. Cook County, Illinois,*** 506 U.S. 56, 70-71 (1992).

•:. "[I]t is well established that plaintiffs are under no obligation to plead legal theories." ***McCullah v. Gaderat,*** 344 F.3d 655, 659 (7th Cir. 2003).

•. With respect to any defendant whom a prisoner plaintiff is unable to locate on his own, two options are available: "First, plaintiff could hire a private process server to locate the defendants by conducting an Internet search of public records for each defendant's current address or both... Second, plaintiff may ask the court to request the United States Marshals Service to locate and serve the defendants with his complaint. Rule 4©(2) of the [Fed.R.Civ.P.] authorizes courts to 'direct that service be effected by a united States marshal, deputy united States marshal, or other person or officer specifically appointed by the court for that purpose." ***Ammons v. Lemke,*** 2006 U.S. Dist. LEXIS 55474 *7 (W.D. Wis.).

•:. "Our holding today clarifies that a strike is incurred under § 1915(g) when an inmates case is dismissed in its *entirety* ...." ***Turley v. Gaetz,*** 2010 U.S. App. LEXIS 21200, *21 (7th Cir.) (emphasis added).

+ § 1915(g) does not apply when plaintiff files § 1983 in state court. ***Henderson v. Raemisch,*** 2010 U.S. Dist. LEXIS 76923 (W.D. Wis).

+ The service period is tolled while the Court is screening the complaint under 28 U.S.C. § 1915A. ***Paulk v. Dept. of Air Force,*** 830 F.2d 79 (7th Cir. 1987); see also ***Robinson v. Clipse,*** 602 F.3d 605 (4th Cir. 2010).

+ With regards to a defendant's Answer, the failure of aparty to frankly reply on a matter which it has within its knowledge "exhibits a lack of fairness which completely discredits its statement that it is without knowledge of or information sufficient to form a belief as to the truth of said averment..." ***American Photocopy Equipment Co. v. Rovico, Inc.,*** 359 F.2d 745, 746-47 (7th Cir. 1966). "[A]n answer asserting want of knowledge sufficient to form a belief as to the truth of facts alleged in a complaint does not serve as a denial if the assertion of ignorance is obviously sham. In such circumstance, the facts alleged in the complaint stand admitted." ***Harvey Aluminum (Incorporated) v. N.L.R.B.,*** 335 F.2d 749, 758 (9th Cir. 1964).

+ "{T{he decision to grant or deny a motion to file an amended pleading is a matter purely within the sound discretion of the district court." ***Brunt v. Serv. Employees Int'l Union,*** 284 F.3d 715, 720 (7th Cir. 2002). The 7th Circuit Court will overturn a denial of a motion for leave to amend a complaint only if the district court "abused its discretion by refusing to grant the leave without any justifying reason." *Id.*

+ A Rule 12(b)(6) motion-to-dismiss must be decided solely on the face of the complaint and any attachment that accompanied its filing. ***Miller v. Herman,*** 600 F.3d 726, 733 (7th Cir. 2010). Rule 12(d) states that where matters outside the pleadings are provided and considered, the motion must be treated as one for summary judgment under Rule 56.

o Pro se complaints are to be liberally construed. ***State ox rel. L'Minggio v. Gamble,*** 2003 WI 82, 263 Wis.2d 55, 66 (2003). "Therefore, a court should not deny a prisoner's pleading based on its label rather than it's allegations." *Id.*

o For the purpose of testing whether a claim has been stated, the facts pleaded must be taken as admitted. ***Morgan v. Pennsylvania Gen. Ins. Co.,*** 87 Wis.2d 723, 731, 275 N.W.2d 660 (1979).

CIVIL COMPLAINT / PLEADINGS continued

o "[A] cause of action is not constituted by labeling the operative facts with the name of a legal theory. The operative facts themselves, if they show the invasion of a protected right, constitute the cause of action. What they are called is immaterial." ***Jost v. Dafryland Power Cooperative,*** 45 Wis.2d 164, 169, 172 N.W.2d 647, 650 (1969).

o Under Wisconsin's liberal notice pleading rule, "[aJll pleadings shall be so construed as to do substantial justice." Wis. Stat. § 802.02. A complaint must be read "most favorably to the plaintiff." ***Bowen v. Lumbermens Mut. Cas. Co.,*** 183 Wis.2d 627, 517 N.W.2d 432 (1994). This fundamental approach to pleading reflects a determination that the resolution of legal disputes should be made on the merits of the case rather than on the technical niceties of pleading... Pleading is not to become a "game of skill in which one misstep by counsel may be decisive of the outcome." ***Korkow v. General Cas. Co.,*** 117 Wis.2d 187,193 (1984).

o To determine whether there is an identity of claims, Wisconsin has adopted the "transactional approach" from the Restatement (2nd) of Judgments § 24 (1982). ***Menard, Inc. v. Liteway Lighting Products,*** 2005 WI 98, 282 Wis.2d 582, 598 (2005); ***N. States Power Co. v. Bugher,*** 189 Wis.2d 541, 553 (1995). "Under this analysis, all claims arising out of one transaction or factual situation are treated as being part of a single cause of action." ***A.B.C.G. Enters., Inc. v. First Bank S.E.,*** *N.A.,* 184 Wis.2d 465, 480-81, 515 N.W.2d 904 (1994) (quoting ***Parks v. City of Madison,*** 171 Wis.2d 730, 735, 492 N.W.2d 365 (Ct.App. 1992). A transaction "connotes a natural grouping or common nucleus of operative facts." ***Id.*** @ 481 (quoting Restatement (2nd) of Judgments § 24 cmt. b). To determine whether claims arise from one transaction, courts "may consider whether the facts are related in time, space, origin, or motivation." *Id.*

O "When a plaintiff is faced with a motion to dismiss for failure to state a claim and recognizes that the complaint does not allege all facts necessary to state a claim, the proper procedure is to amend the complaint or seek permission to amend the complaint." ***Broome v. State Dept of Corr.,*** 2010 WI App 176, P13, 330 Wis.2d 792 (Ct.App. 2010).

o A prisoner's amendment of an initial pleading is subject to the judicial screening requirement of Wis. Stat. § 802.05(3), and a court must review the proposed amendment pleading under that subsection before granting the prisoner leave to amend. ***Lindell v. Litscher,*** 2005 WI App. 39, 280 Wis.2d 159.

COLOR OF STATE LAW

4. "Action is taken under color of state law when it is made possible only because the wrongdoer is clothed with the authority of state law." ***Hughes v. Meyer,*** 880 F.2d 967, 971 (7th Cir. 1989) (quoting ***United States v. Classic,*** 313 U.S. 299, 326,61 S.Ct. 1031 (1941)).

4. To establish liability in a § 1983 action, "it is enough to show that the official, acting under color of state law, caused the deprivation of a federal right." ***Kentucky v. Graham,*** 473 U.S. 159, 166, 105 S.Ct. 3099 (1985); *Hill* **v. *Shelander,*** 924 F.2d 1370 (7th Cir. 1991).

4• A private person who is a willful participant in a joint activity with the state is acting under color of state law. ***Lugar v. Edmonson Oil Co.,*** 102 S.Ct. 2744, 2756, 457 U.S. 922, 941 (1982). In order to establish that the defendants acted under "color of state law", plaintiff must assert that they acted in concert with a state actor. ***Fried v. Helsper,*** 146 F.3d 452, 457 (7th Cir.), cert. denied, 525 U.S. 930 (1998).

4. To act "under the color of' state law for § 1983 purposes does not require that the defendant be an officer of the State. It is enough that he is a willful participant in joint action with the State or its agents. ***Dennis v. Sparks,*** 449 U.S. 24, 27-28, 101 S.Ct. 183 (1980); see also ***Leahy v. Board of Trustees of Community College,*** 912 F.2d 917, 921 (7th Cir. 1990). The Seventh Circuit has held that to establish joint action, a plaintiff must demonstrate that the public and private actors shared a common, unconstitutional goal to deprive another of federal rights. See Cunningham v. ***Southlake Ctr. for Mental Health, Inc.,*** 924 F.2d 106, 107 (7th Cir. 1991).

COSTS

4• Unlike prevailing plaintiffs in § 1983 actions, who receive attorney's fees as a matter of course, prevailing defendants in such actions may recover fees only upon a finding that the plaintiff's action was frivolous, unreasonable, or groundless. ***Christiansburg Garment Co. v. EEOC,*** 434 U.S. 472 (1978); ***Esposito v. Piatrowski,*** 223 F.3d 497 (7th Cir. 2000).

+ Rule 54 of the Federal Rules of Civil Procedure creates a strong presumption that the prevailing party will be awarded those costs of litigation identified in 28 U.S.C. § 1920. See ***U.S. Neurosurgical, Inc. v, City of Chicago,*** 572 F.3d 325, 333 (7th Cir. 2009). Recoverable costs include "[f]ees for ... transcripts necessarily obtained for use in the case," § 1920(2), "[f]ees ... for printing," § 1920(3), and "the costs of making copies of any materials where the copies are necessarily obtained for use in the case," § 1920(4).

+ "A judgment silent about costs is a judgment allowing costs to the prevailing party." ***Specht v. Google Inc.,*** 747 F.3d 929, 936 (7th Cir. 2014).

O "Costs are allowable to a prisoner who obtains prospective injunctive relief against an individual defendant when that defendant is sued in an official capacity and to a prisoner who obtains a judgment against a defendant when that defendant is sued in his or her personal capacity." **Wis. Stat.** § 814.25(2)(b).

CROSS-APPEAL

+ Without cross-appeal, an appellee may not "attack the decree with a view to either enlarging his own rights thereunder or of lessening the rights of his adversary, whether what he seeks is to correct an error or to supplement the decree with respect to a matter not dealt with below." ***United States v. Am. Ry. Express Co.,*** 265 U.S. 425, 435, 44 SCt. 560 (1924); see also ***Lee v. City of Chicago,*** 330 F.3d 456, 471 (7th Cir. 2003).

+ "...an appellee's brief is not the appropriate place for a victorious party to contest one adverse finding by the district court— that is the province of a cross-appeal." ***Meridian Mut. Ins. co, v. Meridian Ins. Group, Inc.,*** 128 F.3d 1111, 1117 (7th Cir. 1997) (cited by III. ***Sch. Dist. Agency v. Pac. Ins. Co.,*** 471 F.3d 714, 722 (7th Cir. 2006)).

+ ***United States ex rel. Stachulak v. Coughlin,*** 520 F.2d 931, 937 (7th Cir. 1975) (rejecting an attempt by an appellee to contest a district court's finding without filing a cross-appeal when "it [was] plain" that the appellee was "not merely attempting to support the judgment but rather to expand his rights under the decree," as the effect of the appellee's argument would alter the judgment in a manner favorable to the appellee).

DAMAGES

•. "[I]llegal conduct may support an award of punitive damages when the application of the law to the facts at hand was so clear at the time of the act that reasonably competent people would have agreed on its application." ***Williamson v. Handy Button Machine Co.,*** 817 F.2d 1290 (7th Cir. 1987). "[E]vidence that suffices to establish an intentional violation of protected civil rights also may suffice to permit the [fact finder] to award punitive damages, provided the [court], in its discretionary moral judgment, finds that the conduct merits a punitive award. No additional evidence [of reckless indifference] is needed." ***Merriweat her v. Family Dollar,*** 103 F.3d 576 (7th Cir. 1996).

+ "A jury may be permitted to assess punitive damages in a § 1983 action when the defendant's conduct involves reckless or callous indifference to the plaintiff's federally protected rights." ***Smith v. Wade,*** 103 S.Ct. 1625 (1983).

+ The purpose of punitive damages is to punish the wrongdoer and serve as a deterrent to him and others who might commit similar violations in the future. ***Exxon Shipping Co.*** *i.'.* ***Baker,*** 128 S.Ct. 2605, 2621 (2008).

+ "Acts are reckless when they represent a gross departure from ordinary care in a situation where a high degree of danger is apparent. If the defendant was in a position in which he certainly should have known that his conduct would violate the plaintiff's rights, and proceeded to act in disregard of that knowledge and of the harm or the risk of harm that would result to the plaintiff, then he acted with reckless disregard for the plaintiff's rights." ***Walker v. Covance Clinical Research Unit, Inc.,*** 2009 U.S. Dist. LEXIS 17952, *5152 (W.D. Wis.).

DAMAGES continued

•. "[I]t is not necessary in order to justify awarding punitive damages to show that the defendant ought to have known he was violating the plaintiff's federal rights." ***Soderbeck v. Burnett County,*** 752 F.2d 285, 292 (7th Cir. 1985).

•. A prisoner "can still obtain injunctive relief, nominal damages and punitive damages" in the absence of physical injury. ***Calhoun v. DeTella,*** 319 F.3d 936 (7th Cir. 2003); ***Washington v. Hively,*** 695 F.3d 641 (7th Cir. 2012).

o ***Wis. Stat. § 895.043*** states that a plaintiff may receive punitive damages "if evidence is submitted showing that the defendant acted maliciously toward the plaintiff or in an intentional disregard of the rights of the plaintiff."

o Plaintiff must show by clear and convincing evidence that the defendant's course of conduct was deliberate, actually disregarded the rights of the plaintiff, and was sufficiently aggravated to warrant punishment by punitive damages. ***Strenke v. Hogner,*** 2005 WI 25, ¶¶ 38,41, 279 Wis.2d 52, 694 N.W.2d 296.

o "Punitive damages cannot be awarded in the absence of other damages." ***Musa v. Jefferson Cnty. Bank,*** 2001 WI 2, ¶J 35, 240 Wis.2d 327.

O A plaintiff must prove compensatory damages to a reasonable certainty, by the greater weight of credible evidence. ***Ellsworth v. Schelbrock,*** 2000 WI 63,] 17, 235 Wis.2d 678, 611 N.W.2d 764.

DECLARATORY RELIEF

+ Injunctions and declaratory judgments are different remedies. An injunction is a coercive order by a court directing a party to door refrain from doing something, and it applies to future actions. A declaratory judgment states the existing legal rights in a controversy, but does not, in itself, coerce any party or enjoin any future action. ***Ulstein Maritime, Ltd. v. United States,*** 833 F.2d 1052, 1055 (1st Cir. 1987). Declaratory relief is distinct from injunctive relief. ***American Association of Cosmetology Schools v. Riley,*** 170 F.3d 1250, 1254 (9th Cir. 1999).

+ A declaratory judgment is a milder remedy which is frequently available in situations where an injunction is unavailable or inappropriate. ***Steffel v. Thompson,*** 415 U.S. 452, 94 S.Ct. 1209 (1974); see also ***Dickinson v. Indiana State Election Bd.,*** 933 F.2d 497, 503 (7th Cir. 1991).

•:. Although the district court is given the discretion, in declaratory judgment actions, to dismiss the case, there are boundaries to that discretion. ***Wilton v. Seven Falls Co.,*** 515 U.S. 277, 289, 115 S.Ct. 2137 (1995).

+ Declaratory judgments are meant to define the legal rights and obligations of the parties in anticipation of some future conduct. ***Bontkowski v. Smith,*** 305 F.3d 757, 761 (7th Cir. 2002); see also lOB Charles Alan Wright, et al., ***Federal Practice and Procedure*** § 2751 (3d Ed. 1998).

+ Laws and regulations must contain a "reasonable degree of clarity" to reduce the risk of arbitrary interpretation and enforcement. ***Gresham v. Peterson,*** 225 F.3d 899, 907-08 (7th Cir. 2000).

0 Declaratory relief is appropriate wherever it will serve a useful purpose, and the fact that another remedy exists is only one factor to consider in determining whether to entertain an action for declaratory relief. ***Lister v. Board of Regents of University Wisconsin System,*** 72 Wis.2d 282, 240 N.W.2d 610 (1976); see also ***Bellile v. American Family Mut. Ins.*** **Co.,** 272 Wis.2d 324, 679 N.W.2d 827 (App. 2004).

0 The underlying philosophy of the uniform Declaratory Judgments Act is to enable controversies of a justiciable nature to be brought before the courts for settlement and determination before a wrong has been threatened or committed. ***Putnam v. time Warner Cable of Southeastern Wis., Ltd. Partnership,*** 255 Wis.2d 447, 473-74, 649 N.W.2d 626, 639.40 (2002).

0 "[A] plaintiff seeking declaratory judgment need not actually suffer an injury before availing himself of the Act. What is required is that the facts be sufficiently developed to allow a conclusive adjudication." ***Olson v. Town of Cottage Grove,*** 2008 WI 51, P43, 309 Wis.2d 365.

KEY: + = References to Federal law 0 = References to State law