Blue to Gold
LAW ENFORCEMENT TRAINING

CASE LAW

Legal Survival

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112 F.3d 1
United States Court of Appeals,
First Circuit.

Maria Teresa DIAZ, et al., Plaintiffs, Appellees,

v.

Miguel Diaz MARTINEZ, et al., Defendants, Appellees, Tomas Vazquez Rivera, Defendant, Appellant.

No. 96–2108.
|
Heard April 9, 1997.
|
Decided April 24, 1997.

Synopsis

Survivors of decedent, who was killed by police officer, brought § 1983 action against officer, assistant superintendent of police force, and other supervisory police officials. The United States District Court for the District of Puerto Rico, Hector M. Laffitte, J., denied superintendent's motion for summary judgment. Superintendent appealed. The Court of Appeals, Selya, Circuit Judge, held that superintendent's conduct in failing to identify and take remedial action concerning "problem" officer who killed decedent, if proven, could create supervisory liability.

Affirmed.

Attorneys and Law Firms

***1** John M. Garcia, Hato Rey, PR, with whom José Javier Santos Mimoso and Totti, Rodrigues–Díaz & Fuentes, San Juan, PR, were on brief for defendant-appellant.

Peter Berkowitz, San Juan, PR, with whom Roberto Roldán Burgos, Rio Piedras, PR, was on brief, for plaintiffs-appellees.

Before SELYA, Circuit Judge, BOWNES, Senior Circuit Judge, and STAHL, Circuit Judge.

Opinion

***2** SELYA, Circuit Judge.

In *Johnson v. Jones,* 515 U.S. 304, —— – ——, 115 S.Ct. 2151, 2156–59, 132 L.Ed.2d 238 (1995), the Supreme Court discussed the circumstances in which a district court's denial of a public official's attempt to dispose of a claim for money damages by means of a pretrial motion asserting qualified immunity might be immediately appealable. Shortly thereafter, in *Stella v. Kelley,* 63 F.3d 71, 73–77 (1st Cir.1995), we applied *Johnson* and elaborated upon our understanding of it. The interlocutory appeal in this case requires us to reexamine *Stella* in light of *Behrens v. Pelletier,* 516U.S. 299, ——– – ——, 116 S.Ct. 834, 838–41, 133 L.Ed.2d 773 (1996). We conclude that our holding in *Stella* remains fully intact.

Before discussing the issue of appealability *vel non,* we first set the stage. In 1984, Miguel Díaz Martínez (Officer Díaz) became a member of the Puerto Rico Police Force.[1] He inspired approximately eighteen disciplinary complaints, many of which involved the profligate brandishing or use of his official firearm without adequate cause. The *pièce de résistance* occurred on August 17, 1989, when, after assaulting and threatening to kill his wife, Officer Díaz captured a police station at gunpoint and held several fellow officers hostage. As a result of this incident, he was cashiered and involuntarily committed to a mental institution for three weeks.

Little daunted, Officer Díaz pressed an administrative appeal. Despite his earlier escapades, he eventually regained his position on the force. At the time of his reinstatement (March 25, 1993), and throughout the period material hereto, the appellant, Tomás Vázquez Rivera (Vázquez), served as an assistant superintendent of the police force and the director of its "Auxiliary Superintendency for Inspections and Disciplinary Affairs" (having assumed that post in August 1990). In this capacity, Vázquez was responsible, *inter alia,* for maintaining administrative complaint records, identifying recidivist officers (those who repeatedly violated disciplinary standards), and ensuring that "problem" officers received special training. The plaintiffs allege that, when Officer Díaz rejoined the force, the personnel director ordered an investigation preliminary to authorizing him to carry a firearm, and that one of the appellant's subordinates gave Díaz a clean bill of health, informing the assigned investigator that Díaz's file did not contain any mention of past complaints or any other indicium of his disquieting history. They also

allege that Vázquez, in derogation of his assigned duties, did not maintain up-to-date files, and, consequently, neither identified Díaz as a recidivist officer nor recommended that he undergo remedial training. As a result, Officer Díaz returned to duty without enduring any probationary period, without receiving any remedial training, and, after a delay to permit the completion of the personnel director's investigation, without having any restrictions on his right to carry a firearm.[2]

On his second day of armed duty, September 8, 1993, Officer Díaz was stationed at the Barbosa Public Housing Project, a location which the police regarded as a high-tension area. That afternoon, while on guard duty, he accosted the plaintiffs' decedent, José Manuel Rosario Díaz (José), a 19–year–old resident of the project, and ordered him to retrieve identification documents from his apartment. When José did not comply with sufficient alacrity, Officer Díaz shouted obscenities at him. José's sister, María Rosario Díaz (María), attempted to intervene. A scuffle ensued. Officer Díaz drew his police revolver, fired a bullet at María (wounding her), and then shot and killed José.

In due season, María and other family members brought suit under 42 U.S.C. § 1983 (1994). They alleged that Officer Díaz and several supervisory police officials, including Vázquez, had violated María's and José's constitutional rights. Vázquez moved for summary judgment, raising, *inter alia,* a qualified immunity defense. The district ***3** court denied his motion. Vázquez now prosecutes this interlocutory appeal.

Section 1983 provides for a private right of action against public officials who, under color of state law, deprive individuals of rights declared by the Constitution or laws of the United States. Nonetheless, a public official accused of civil rights violations is shielded from claims for damages under section 1983 as long as his conduct did not violate rights that were "clearly established" under the Constitution or under federal law. *See Harlow v. Fitzgerald,* 457 U.S. 800, 818–19, 102 S.Ct. 2727, 2738–39, 73 L.Ed.2d 396 (1982); *Buenrostro* v. *Collazo,* 973 F.2d 39, 42 (1st Cir.1992). For purposes of this defense, a right is clearly established if the "contours of the right [are] sufficiently clear that a reasonable official would understand that what he is doing violates that right." *Anderson v. Creighton,* 483 U.S. 635, 640, 107 S.Ct. 3034, 3039, 97 L.Ed.2d 523 (1987).

Interlocutory orders (such as orders denying pretrial motions to dismiss or for summary judgment) ordinarily are not appealable as of right at the time they are entered. *See* 28 U.S.C. § 1291 (1994). But where, as here, a defendant seeks the shelter of qualified immunity by means of a pretrial motion and the nisi prius court denies the requested relief, a different result sometimes obtains. If the pretrial rejection of the qualified immunity defense is based on a purely legal ground, such as a finding that the conduct described by the plaintiff, assuming it occurred, transgressed a clearly established right, then the denial may be challenged through an interlocutory appeal. *See Johnson,* 515 U.S. at ——– ——, 115 S.Ct. at 2155–56. Conversely, "a defendant, entitled to invoke a qualified-immunity defense, may not appeal a district court's summary judgment order insofar as that order determines whether or not the pretrial record sets forth a 'genuine' issue of fact for trial." *Id.* at ——, 115 S.Ct. at 2159. The dividing line that separates an immediately appealable order from a nonappealable one in these purlieus is not always easy to visualize. In *Stella,* we attempted to illuminate it:

> Thus, on the one hand, a district court's pretrial rejection of a proffered qualified immunity defense remains immediately appealable as a collateral order to the extent that it turns on a pure issue of law, notwithstanding the absence of a final judgment. On the other hand, a district court's pretrial rejection of a qualified immunity defense is not immediately appealable to the extent that it turns on either an issue of fact or an issue perceived by the trial court to be an issue of fact. In such a situation, the movant must await the entry of final judgment before appealing the adverse ruling.

Stella, 63 F.3d at 74 (citations omitted). Under *Johnson* and *Stella,* then, a defendant who, like Vázquez, has unsuccessfully sought summary judgment based on qualified immunity is permitted to appeal the resultant denial on an interlocutory basis only to the extent that the qualified immunity defense turns upon a "purely legal" question.

Behrens marks the Supreme Court's latest effort to shed light upon the timing of qualified immunity appeals. There, the Court noted that "[d]enial of summary judgment often includes a determination that there are controverted issues of material fact" and admonished that *Johnson* "does not mean that every such denial of summary judgment is nonappealable." *Behrens,* 516 U.S. at ——, 116 S.Ct. at 842. Rather, when a court, in denying a motion for summary judgment premised on qualified immunity, determines that certain conduct attributed to a defendant, if proven, will suffice to show a violation of clearly established law, the defendant may assert on interlocutory appeal "that all of the conduct which the District Court deemed sufficiently

supported for purposes of summary judgment met the *Harlow* standard of 'objective legal reasonableness.' " *Id.* (quoting *Harlow*). To this extent, *Behrens* places a gloss on *Johnson* and reopens an appellate avenue that some had thought *Johnson* foreclosed. Still, this court anticipated the *Behrens* gloss in *Stella,* where we wrote that a summary judgment "order that determines whether certain given facts demonstrate, under clearly established law, a violation of some federally protected right" may be reviewed on an intermediate appeal, *Johnson* notwithstanding, without awaiting the ***4** post-trial entry of final judgment. *Stella,* 63 F.3d at 74–75. Thus, *Stella* survives the emergence of *Behrens* fully intact and remains the law of this circuit.

The appeal at hand withers in the hot glare of these precedents. Under section 1983, a supervisor may be found liable on the basis of his own acts or omissions. *See Maldonado–Denis v. Castillo–Rodriguez,* 23 F.3d 576, 581–82 (1st Cir.1994). Such liability can arise out of participation in a custom that leads to a violation of constitutional rights, *see, e.g., id.* at 582 (citing other cases), or by acting with deliberate indifference to the constitutional rights of others, *see, e.g., Gutierrez–Rodriguez v. Cartagena,* 882 F.2d 553, 562 (1st Cir.1989) (citing other cases). The plaintiffs' case against Vázquez hinges on his alleged deliberate indifference; they claim, in essence, that if he had minded the store, the shootings would not have transpired because Officer Díaz, given his horrendous record, would not have been rearmed (or, at least, would not have been rearmed without first having been retrained and rehabilitated), and therefore, that the tragic events of September 8 would not have occurred.

Vázquez's motion for *brevis* disposition challenged this theory, legally and factually. In adjudicating it, the district court made a binary determination. First, the court ruled that a reasonable official in Vázquez's position would have known that the "failure to take ... remedial actions concerning [a rogue officer] could create supervisory liability." This is a pure conclusion of law as to which, in the qualified immunity context, an immediate appeal lies. *See Behrens,* 516 U.S. at ——, 116 S.Ct. at 839; *Stella,* 63 F.3d at 77; *see also Mitchell v. Forsyth,* 472 U.S. 511, 528 n. 9, 105 S.Ct. 2806, 2816 n. 9, 86 L.Ed.2d 411 (1985) (acknowledging that the question of whether the conduct attributed by a plaintiff to a particular defendant violates a clearly established right is a "purely legal" question).

Nonetheless, we agree with the lower court that the applicable law was clearly established; it is beyond serious question that, at the times relevant hereto, a reasonable police supervisor, charged with the duties that Vázquez bore, would have understood that he could be held constitutionally liable for failing to identify and take remedial action concerning an officer with demonstrably dangerous predilections and a checkered history of grave disciplinary problems. *See Gutierrez–Rodriguez,* 882 F.2d at 562–64; *see generally Maldonado–Denis,* 23 F.3d at 582 (explaining that a showing of gross negligence on a supervisory official's part "can signify deliberate indifference and serve as a basis for supervisory liability if it is causally connected to the actions that work the direct constitutional injury"). To the extent that Vázquez's appeal seeks to contest this verity, it is baseless.

Having disposed of the purely legal question, we are left with Vázquez's asseveration that the district court erred in denying his motion for summary judgment because, regardless of legal theory, the evidence was insufficient to establish deliberate indifference on his part, and, thus, he was entitled (at the least) to qualified immunity. But Judge Laffitte rejected this argument on the basis that the record contained controverted facts and that, if a factfinder were to resolve those disputes favorably to the plaintiffs, he could then find that Vázquez's supervision of the disciplinary affairs bureau was so pathetic that his conduct constituted deliberate indifference to the plaintiffs' rights.[3] Since Vázquez does not argue that the facts asserted ***5** by the plaintiffs, even if altogether true, fail to show deliberate indifference—he argues instead what his counsel termed at oral argument "the absence of facts," i.e., that the facts asserted by the plaintiffs are untrue, unproven, warrant a different spin, tell only a small part of the story, and are presented out of context—the district court's determination is not reviewable on an interlocutory appeal. *See Behrens,* 516 U.S. at ——, 116 S.Ct. at 842; *Johnson,* 515 U.S. at —— – ——, 115 S.Ct. at 2156–59; *Berdecia–Perez v. Zayas–Green*, 111 F.3d 183, 184 (1st Cir.1997); *Santiago–Mateo v. Cordero,* 109 F.3d 39, 40–41 (1st Cir.1997); *Stella,* 63 F.3d at 75–77.

We need go no further. To the extent that Vázquez's challenge to the order denying summary judgment is ripe for review, it is impuissant.

Affirmed. Costs to appellees.

All Citations

112 F.3d 1

Footnotes

1 Although Officer Díaz is a defendant in the underlying suit, he is not a party to the appeal.

2 For purposes of his summary judgment motion, described *infra,* Vázquez did not contest these allegations, and we therefore must accept them as true.

3 This rejection was factbound. In denying Vázquez's motion for *brevis* disposition, Judge Laffitte, citing various exhibits, commented that "the record is replete with evidence that [Officer Díaz's] disciplinary file was poorly maintained." The judge then pointed to evidence indicating "that many of the police department's disciplinary files on its officers were incomplete," and noted specifically evidence to the effect "that Vázquez failed to maintain [Officer Díaz's] disciplinary records, failed to identify him as an officer [who had engaged in] repetitive conduct, and failed to refer him for training." Judge Laffitte further observed that, had the file been properly maintained, Officer Díaz likely would have been evaluated as unfit to return to regular duty. In the court's view, this (and other) evidence, taken in the light most complimentary to the plaintiffs, was "sufficient to create a genuine issue of material fact as to whether [Vázquez] was deliberately indifferent and whether this failure to maintain an accurate file on [Officer Díaz] caused [the plaintiffs'] injuries."

90 N.C.App. 128
Court of Appeals of North Carolina.

Wyand F. DOERNER, III, By and Through his Guardian, Doris PRICE
v.
CITY OF ASHEVILLE, Officer Beverly Lee, Sergeant Herbert J. Watts, and Robert Overman.

No. 8728SC992.
|
May 3, 1988.

Synopsis

Assault victim brought suit against police officer, sergeant, and city for failure to render first aid. The Superior Court, Buncombe County, Robert D. Lewis, J., granted summary judgment in favor of defendants, and victim appealed. The Court of Appeals, Eagles, J., held that assuming officer had duty of reasonable care to assault victim who accompanied officer to determine where assault took place, neither officer nor sergeant who gave officer permission to take victim back to victim's motel room breached duty.

Affirmed.

****356** ***128** Plaintiff appeals the trial court's grant of summary judgment in favor of Officer Beverly Lee (Lee), Sergeant Herbert J. Watts (Watts), and the City of Asheville (City). Plaintiff's complaint specifically alleges that defendant Lee and defendant Watts were grossly negligent in their duties as police officers in that they failed to render first aid or cause first aid to be rendered by others in order to assist plaintiff and prevent him from further injury. Plaintiff sues the City under the theory of *respondeat superior.* Summary judgment was not granted in favor of defendant Overman and he is not a party to this appeal.

Attorneys and Law Firms

McLean & Dickson by Russell L. McLean, III, Waynesville, for plaintiff-appellant.

Roberts Stevens & Cogburn by Frank P. Graham and Glenn S. Gentry, Asheville, for ****357** defendants-appellees City of Asheville, Officer Beverly Lee and Sergeant Herbert J. Watts.

Opinion

***129** EAGLES, Judge.

The issue before us is whether the trial court erred in granting summary judgment for the defendants. After careful examination of the record, we affirm the trial court's order.

In ruling on a motion for summary judgment, the trial court must consider the evidence in the light most favorable to the non-movant. *Caldwell v. Deese,* 288 N.C. 375, 218 S.E.2d 379 (1975). All inferences drawn from the evidence must be drawn in favor of the non-movant. *Id.* Only when the moving party shows that there is no genuine issue of material fact and that he is entitled to judgment as a matter of law, may the court grant summary judgment. *Ragland v. Moore,* 299 N.C. 360, 261 S.E.2d 666 (1980).

The facts here, in the light most favorable to plaintiff, show the following. On 5 January 1985 plaintiff became involved in a fight in an Asheville bar. Plaintiff left the bar. Shortly thereafter Donald Netherton observed him on Lexington Avenue. Netherton called the police and informed them that there was an injured person on Lexington Avenue who looked like his throat had been cut.

Officer Lee responded to the call. When she arrived, she observed plaintiff walking on Walnut Street, which runs perpendicular to Lexington Avenue. At that time plaintiff appeared to be fairly clean, conscious, and coherent. He was not bleeding then but there was dried blood on his face and clothing. When Lee asked plaintiff what had happened, he told her that he had been hit in the head with a stick in a bar but he could not remember just where it had happened. Lee then asked plaintiff to accompany her so that they might determine where the assault occurred. Before allowing plaintiff to get into the police car, Lee frisked him. She found only a motel room key. Lee next secured radio permission from the dispatcher to transport plaintiff.

Plaintiff got into the police car with Officer Lee. They first went to Wally's Bar on Lexington Avenue where Lee inquired and determined that the fight did not take place there. At this point Lee asked plaintiff if he wanted to “have his head checked” and if he wanted a report filed. Lee asked these

questions on at least three occasions. Further, Officer Lee told plaintiff that she "felt like he needed to go have his head checked." On each occasion, ***130** however, plaintiff refused treatment saying he just wanted to go back to his motel and go to bed. Officer Lee radioed Sergeant Watts and received permission to take plaintiff to his motel room. Lee drove plaintiff to his motel and watched him enter his room. Two days later plaintiff was discovered unconscious in his motel room. Plaintiff has suffered irreparable brain damage and is now totally disabled.

Plaintiff argues that Lee and Watts were negligent in dealing with plaintiff because they failed to render first aid or cause first aid to be rendered by others. To prevail on these negligence claims plaintiff must demonstrate (1) the existence of a legal duty by the defendants to the plaintiff, (2) a breach of the duty, and (3) that the negligent act or omission was the proximate cause of plaintiff's injury. *Meyer v. McCarley and Co.,* 288 N.C. 62, 215 S.E.2d 583 (1975). Plaintiff's claim against the City depends on the negligence of Watts and Lee through the theory of *respondeat superior.*

The threshold inquiry here is what duty does an investigating police officer owe to a conscious assault victim. Plaintiff concedes in his brief that in North Carolina there is no statutory duty on the part of the police to assist a conscious victim. We note that G.S. 15A–503 imposes a duty on police who *arrest* an unconscious or semiconscious person to make a reasonable effort to provide appropriate medical care. Plaintiff further acknowledges the rule that citizens generally have no duty to come to the aid of one who is injured. Restatement (2d) Torts, Section 314. Plaintiff argues, however, that Officer Lee's conduct in dealing with plaintiff was such ****358** that she took plaintiff into her custody or charge and, therefore, was under a duty to act. Restatement (2d) Torts, Section 314A(4); *cf. Klassette v. Mecklenburg County Mental Health,* 88 N.C.App. 495, 364 S.E.2d 179 (1988) (mental health facility supervisor's conduct precluded any other person from assisting victim of drug overdose). Plaintiff argues alternatively that a duty of reasonable care arose under Restatement (2d) Section 324 because plaintiff was helpless and Officer Lee took charge of him.

We believe the record is devoid of evidence tending to show that plaintiff was semiconscious, unconscious or helpless. We cannot say that there is no evidence from which a jury might find ***131** that plaintiff was in Officer Lee's custody so that a duty of reasonable care was owed to him.

Assuming *arguendo* that a duty of reasonable care arose under these circumstances; looking at the evidence in the light most favorable to plaintiff, we hold as a matter of law that neither Officer Lee nor Sergeant Watts breached their duty of reasonable care. On at least three occasions Officer Lee asked plaintiff whether he wanted medical assistance. At no time was plaintiff unconscious, semiconscious or other than coherent. Lee told plaintiff that it was her opinion that he needed medical attention. In each instance plaintiff affirmatively refused help and stated that all he wanted was to go to his motel room. Given plaintiff's apparent coherence and his adamant refusal to receive medical attention, Officer Lee and Sergeant Watts could do no more. Though distinguishable in part because Louisiana by statute explicitly allows all persons to refuse medical treatment, we are supported by the logic of *Ciko v. City of New Orleans,* 427 So.2d 80 (La.Ct.App.1983), that defendant police officers, on these facts, could do no more than offer assistance. We decline to insist that each police officer substitute his judgment for that of an injured but conscious, coherent person who has refused offers of medical assistance. Accordingly, we affirm the judgment of the trial court.

Affirmed.

COZORT and SMITH, JJ., concur.

All Citations

90 N.C.App. 128, 367 S.E.2d 356

785 F.Supp. 1343
United States District Court,
E.D. Wisconsin.

The ESTATE OF Konerak SINTHASOMPHONE, by its special administrator, Anoukone SINTHASOMPHONE, Sounthone Sinthasomphone, Somdy Sinthasomphone, Thavone Vong Phasouk, Anoukone Sinthasomphone, Nousone Sinthasomphone, Saysamone Sinthasomphone, Keisone Phalphouvong, Chanthalone Sinthasomphone, and Somsack Sinthasomphone, by his guardian ad litem, Dennis P. Coffey, Plaintiffs,
v.
The CITY OF MILWAUKEE, a municipal corporation, Joseph Gabrish, John A. Balcerzak, and Richard Porubcan, Defendants.
Cheryl BRADEHOFT and Sarah Mae Bradehoft, a minor, by Cheryl Bradehoft, her mother and natural guardian, Plaintiffs,
v.
CITY OF MILWAUKEE, a municipal corporation, John A. Balcerzak, Joseph T. Gabrish, and Richard Porubcan, Defendants.
Tracy EDWARDS, Plaintiff,
v.
CITY OF MILWAUKEE, a municipal corporation, and Three Unknown Milwaukee Police Officers, Defendants.
Catherine LACY, Plaintiff,
v.
CITY OF MILWAUKEE, a municipal corporation, Joseph Gabrish, John A. Balcerzak, Richard Porubcan, ABC Insurance Company, and XYZ Insurance Company, Defendants.

Civ. A. Nos. 91–C–1121, 91–C–942, 91–C–985 and 91–C–1337.
|
March 5, 1992.

Synopsis
Parents of child who had been returned to custody of assailant after being found naked and beaten on street brought civil rights action against police officers and city. Survivors of other victims killed by the assailant and one person who escaped from assailant also brought civil rights actions. On motions to dismiss, the District Court, Terence T. Evans, Chief Judge, held that: (1) complaint stated a basis for liability of the officers and the city with respect to parents of young boy whom police officers returned to the assailant, but (2) complaint of others did not state a cause of action against the officers.

Motion granted in part.

Attorneys and Law Firms

***1345** Robert A. Slattery, Paul R. Hoefle, Slattery & Hausman, Ltd., and Curry First, Lawrence G. Albrecht, Patrick O. Patterson, Hall, First & Patterson, S.C., Milwaukee, Wis., for plaintiffs in No. 91–C–1121.

David M. Kaiser and David I. Rothstein, Milwaukee, Wis., for plaintiffs in No. 91–C–942.

Syed A. Salat, Baton Rouge, La., for plaintiff in No. 91–C–985.

David M. Wittenberg, Wittenberg & Dougherty, Ltd., Chicago, Ill., and Curtis M. Kirkhuff, Pellino, Rosen, Mowris & Kirkhuff, Madison, Wis., for plaintiff in No. 91–C–1337.

Rudolph M. Konrad, Deputy City Atty., Milwaukee, Wis., for defendant City of Milwaukee.

D. Michael Guerin, Gimbel, Reilly, Guerin & Brown, Milwaukee, Wis., for defendant Porubcan.

Robert F. Johnson, Philip C. Reid, Cook & Franke, S.C., Milwaukee, Wis., for defendants Gabrish and Balcerzak.

DECISION AND ORDER

TERENCE T. EVANS, Chief Judge.

"I'm on 25th and State, and there is this young man. He's buck naked. He has been beaten up ... He is really hurt ... He needs some help."

With these words, a caller asked a Milwaukee Emergency 911 operator to send help to a person in need of assistance. When the call was made, on May 27, 1991, the name Jeffrey Dahmer was largely unknown. Today, everyone knows the story of the 31–year–old chocolate factory worker, a killing machine who committed the most appalling string of homicides in this city's history.

Dahmer's misdeeds have been widely chronicled. Dahmer, who is white, has confessed to killing 17 young men between the ages of 14 and 28. Eleven of the victims were black, and most were lured into Dahmer's web with promises of, among other things, a sexual experience. The case is incredibly gruesome and bizarre; the dismembered bodies of many of the victims—hearts in the freezer, heads in the fridge—were preserved in Dahmer's small near west-side apartment. The leftovers were deposited in a barrel of acid, conveniently stationed in the kitchen.

Dahmer pled guilty to 15 of his 16 Milwaukee County homicides[1]. The 15 murders were committed between January of 1988 and July of 1991. Last month, a jury rejected Dahmer's insanity plea. Today he is a guest of the state of Wisconsin, having been sentenced to life imprisonment without the possibility of parole.

Dahmer's recent well-publicized state court trial dealt with a narrow issue; his mental state at the time of the murders. These four federal civil cases raise broader issues, issues that concern the community at large. The issues here concern the conduct of several police officers, policies and attitudes of the police department toward minorities and gays, and the rights of some of the victims of Dahmer's madness. This decision will address some of the issues presented in the cases.

The telephone call for help on May 27 was made from a phone booth just a half a block away from Dahmer's apartment. The subject of the call was Konerak Sinthasomphone, a 14–year–old Laotian boy. Later that evening, after the police had responded to the call and determined that nothing was amiss, Dahmer killed Sinthasomphone. He went on to kill others, including ***1346** Matt Turner in June, Jeremiah Weinberger in early July, and Oliver Lacy and Joseph Bradehoft in mid-July. He terrorized Tracy Edwards before Edwards escaped and led the police to Dahmer, who was finally arrested on July 22, 1991. After the arrest, Dahmer confessed to 17 murders.

The estate of Konerak Sinthasomphone and his family have filed a lawsuit claiming that the police officers and the City of Milwaukee violated their constitutional rights. Catherine Lacy, Oliver Lacy's mother; Cheryl Bradehoft, Joseph Bradehoft's wife; Sarah Mae Bradehoft, his daughter; and Tracy Edwards are plaintiffs in the other lawsuits. The defendants include Joseph Gabrish, John Balcerzak, and Richard Porubcan, the three Milwaukee police officers who responded to the May 27 call, and the City of Milwaukee itself. The defendants have moved to dismiss the cases, under rule 12(b)(6) of the Federal Rules of Civil Procedure, arguing that the complaints fail to state claims upon which relief can be granted.

THE CLAIMS

The details of Dahmer's killings are widely known and undisputed. As to the details of what occurred on May 27, however, the facts and the inferences to be drawn from the facts are in dispute. In deciding on a rule 12 defense motion to dismiss a complaint, I must focus solely on the allegations as pleaded. All factual allegations must be accepted as true in analyzing a motion to dismiss a complaint. A motion to dismiss should not be granted "unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Conley v. Gibson,* 355 U.S. 41, 45–46, 78 S.Ct. 99, 101–02, 2 L.Ed.2d 80 (1955).

As alleged in the amended *Sinthasomphone* complaint, the facts, which at this time I must legally assume to be true, are as follows.

In May of 1991, the 31–year–old Dahmer was on probation following a 1988 conviction for sexual abuse of a male child. He brought young Sinthasomphone to his apartment. There he held the boy captive, drugged him, stripped him of his clothing, and committed acts of physical and sexual abuse. All the while, the remains of previous victims of Dahmer's madness lay decaying in another room of the apartment.

Somehow, shortly before 2 a.m. on May 27, 1991, Sinthasomphone escaped from the apartment and—although he was drugged, naked, and bleeding—made his way to the street. On the street, Nichole Childress and Sandra Smith, two young black women, saw him and called the police. Before the police arrived, Dahmer appeared and tried to reassert physical control over Sinthasomphone. Childress and Smith intervened.

Officers Balcerzak, Gabrish, Porubcan, and an unidentified MPD trainee came to the scene, as did Milwaukee Fire Department personnel, including paramedics. The police officers directed the fire department personnel to leave.

The complaint alleges, and again I must on this motion accept the allegations as true, that the officers intentionally and deliberately refused to listen to the following specific information conveyed by Nichole Childress, Sandra Smith, and others: that Sinthasomphone was a child; that he was trying to escape from Dahmer, that Dahmer had referred to Sinthasomphone by various names; that Dahmer was attempting to physically control Sinthasomphone; and that Sinthasomphone was drugged, hurt, and had been sexually abused. The officers threatened to arrest Childress and Smith if they persisted in trying to help Sinthasomphone or to provide information.

Another allegation is that the police officers took Dahmer and Sinthasomphone into actual, physical police custody and back into Dahmer's apartment, where they ultimately delivered Sinthasomphone into Dahmer's custody, without obtaining consent from Sinthasomphone or his parents. The police concluded that Dahmer and Sinthasomphone were adult homosexual partners ***1347** who, at least at that time, were staying together in Dahmer's apartment. By returning young Sinthasomphone to Dahmer, it is claimed that the police interfered with any potential rescue of Sinthasomphone by private persons.

The complaint also sets out allegations that the City of Milwaukee, through its police department, has a longstanding practice of intentional discrimination against and reckless disregard of the rights of racial minorities and homosexuals. The unlawful conduct of the officers in this case reflects, the complaint states, "practices and customs so permanent and well-settled as to constitute *de facto* City and MPD policy." The policy is established in part, it is claimed, by the use of excessive force against racial minorities; failure to adequately train police cadets; failure to discipline police officers for using excessive force against racial minorities; failure to respond to complaints by racial minorities; failure to hire and promote racial minorities unless ordered to do so by a court; and failure to train officers in interracial communication skills. In addition, the complaint points to substantial civil rights litigation, with incidents dating back to 1958, to reveal what it says is the discriminatory history of the Milwaukee Police Department. The department's history of discrimination is revealed, it is alleged, by the strong criticism of current chief Philip Arreola's "isolated condemnation" of the police conduct in this case, criticism heard from the police union, numerous officers, and two prior Milwaukee police chiefs.

The complaint further alleges that Officers Balcerzak, Gabrish, and Porubcan are products of the discriminatory policies, "which led them to the wrong conclusion that they stand in opposition to minority members of the community which they serve.... This caused them not to perceive that crimes had been committed before their arrival, and were continuing before their eyes on May 27, 1991." It caused them to treat "an obviously serious and grave incident with deliberate indifference, and jocularity, as if it were somehow comical." It caused them to disregard a call from a concerned black citizen, shortly after Sinthasomphone was returned to Dahmer, in which the caller insisted that Sinthasomphone was a child. It caused the police to disregard information that a reported missing person, Konerak Sinthasomphone, was the victim in the May 27 incident. All of these actions, it is alleged, deprived Sinthasomphone of his constitutionally protected rights to substantive due process and the equal protection of the laws and his family of their rights to familial association with him.

In the *Lacy, Bradehoft,* and *Edwards* cases, the allegations are that the plaintiffs' rights have been denied because of the actions of the police in the *Sinthasomphone* case. The essence of the claims is that the police ignored the complaints of citizens belonging to a racial minority and allowed Dahmer to escape from their grasp. Had Dahmer been stopped on May 27, Lacy, Bradehoft, and Edwards would not have been victimized.

SINTHASOMPHONE: Substantive Due Process and Equal Protection

The legal difficulties posed by these cases are immediately apparent to anyone with even a passing familiarity

with federal civil rights litigation. The genius of the *Sinthasomphone* complaint in trying to avoid those difficulties is also apparent. The question is whether it has succeeded.

A major difficulty is that posed by a doctrine reaffirmed in a recent case, *DeShaney v. Winnebago County Dept. of Social Services,* 489 U.S. 189, 109 S.Ct. 998, 103 L.Ed.2d 249 (1989). Essentially, it is that the purpose of the Constitution "was to protect the people from the State, not to ensure that the State protected them from each other." *Id.* at 196, 109 S.Ct. at 1003. Joshua DeShaney, who was 5 years old, was beaten and rendered profoundly retarded by his father, with whom he lived. Social workers and other local officials had received complaints that the father was abusing the boy, but they did not remove him from his father's custody. After he was beaten for the last time, Joshua and his mother brought a case in this court, pursuant to 42 U.S.C. § 1983, alleging that ***1348** Joshua's substantive due process right to liberty was abridged when the officials failed to intervene to protect him from his father. Judge John Reynolds, to whom the case was assigned, found that no constitutionally recognized claim was present. The court of appeals and the Supreme Court agreed, with the higher court noting that the state's failure to protect an individual against private violence does not constitute a violation of the due process clause.

In addition, the Court rejected the contention that the state officials had entered into a "special relationship" with Joshua because the officials knew he faced a special danger from his father, proclaimed their intention to protect him, and thus had a duty to do so in a reasonably competent fashion. A special relationship exists, the Court said, when "the State takes a person into its custody and holds him there against his will ...", most often in a prison or mental hospital, not when he is left with his father.

Other cases have reached a similar result. In *Archie v. City of Racine,* 847 F.2d 1211 (7th Cir.1988), the court of appeals for this circuit upheld my dismissal of claims that a Racine Fire Department dispatcher had failed to send a rescue vehicle to a woman who later died. In *Ellsworth v. City of Racine,* 774 F.2d 182 (7th Cir.1985), *cert. denied,* 475 U.S. 1047, 106 S.Ct. 1265, 89 L.Ed.2d 574 (1986), the court of appeals upheld Judge Myron Gordon's dismissal of a claim that the Racine Police Department, after agreeing to provide protection to the wife of an undercover narcotics officer, failed to protect her from a beating by a masked assailant. *Losinski v. County of Trempealeau,* 946 F.2d 544 (7th Cir.1991), involved a woman who, accompanied by a deputy sheriff, visited her estranged husband and was killed by him. The court of appeals upheld the dismissal, by Western District Judge John Shabaz, of the case on summary judgment. The court relied on two factors: that the State did not create the danger and that it did not subject her *involuntarily* to an existing danger.

However, the *DeShaney* doctrine is not without some small cracks in its surface; hairline, perhaps, but cracks nonetheless. In *White v. Rochford,* 592 F.2d 381 (7th Cir.1979), the court determined that Chicago police violated the constitution when they left three children, unattended, in a car on the Chicago Skyway after arresting the adult who had been driving the car in which the children were riding. After exposure to the cold, the children left the car, crossed eight lanes of traffic, and wandered around on the freeway at night searching for a telephone. Presumably, on those egregious facts, a violation would be found today, even after *DeShaney.*

Ross v. United States, 910 F.2d 1422 (7th Cir.1990), is, in fact, a case which was decided after *DeShaney.* A 12–year–old boy slipped into the water of Lake Michigan. A friend summoned help, and within 10 minutes two lifeguards, two fire fighters, one police officer, and two civilians, who were scuba-diving nearby, responded. However, before any rescue attempt could begin, a Lake County deputy sheriff arrived in a marine patrol boat. He insisted on enforcing an agreement between the city of Waukegan, Illinois, and Lake County, Illinois, which required the county to provide all police services on Lake Michigan. Pursuant to that agreement, the sheriff had promulgated a policy that directed all members of the sheriff's department to prevent any civilian from attempting to rescue a drowning person and contemplated that only divers from the city of Waukegan Fire Department could perform rescues. The deputy ordered all rescue attempts to stop. When the civilian scuba divers offered to attempt a rescue at their own risk, the deputy threatened to arrest them. Twenty minutes later, 30 minutes after the first would-be rescuers had arrived, the officially authorized divers pulled the boy from the water. He later died. The court found that the complaint stated a claim against both Lake County and the individual deputy.

The line between *DeShaney* and *Ross* may not be entirely clear, but it is discernable. Both courts, in fact, have articulated where it is. Justice Brennan, dissenting in *DeShaney,* points out that the result in a given case may depend on the characterization ***1349** of the violation: is it a failure to act or an affirmative act:

> In a constitutional setting that distinguishes sharply between action and inaction, one's characterization of the misconduct alleged under § 1983 may effectively decide the case. Thus, by leading off with a discussion (and rejection) of the idea that the Constitution imposes on the States an affirmative duty to take basic care of their citizens, the Court foreshadows—perhaps even preordains—its conclusion that no duty existed even on the specific facts before us.

489 U.S. at 204, 109 S.Ct. at 1008.

Threading its way through the action-inaction distinction, the court in *Ross* states that the actions of the deputy and the policy of the county did not constitute a simple failure to provide rescue services, as had occurred in *Archie.* Rather,

[t]he plaintiff complains of a much different type of constitutional wrong. The plaintiff does not allege that the county had a policy of refusing to supply rescue services. Rather, the wrong suffered by the plaintiff and her decedent is the county's forced imposition of services that William [the boy who drowned] did not want or need; the plaintiff alleges that the county had a policy of arbitrarily cutting off private sources of rescue without providing a meaningful alternative. 910 F.2d at 1431.

The distinction is not new. In 1982, in *Bowers v. DeVito,* 686 F.2d 616, 618 (7th Cir.1982), the court said:

> We do not want to pretend that the line between action and inaction, between inflicting and failing to prevent the infliction of harm, is clearer than it is. If the state puts a man in a position of danger from private persons and then fails to protect him, it will not be heard to say that its role was merely passive; it is as much an active tort-feasor as if it had thrown him into a snake pit.

Obviously, having dissected these cases, the *Sinthasomphone* plaintiffs have not merely alleged that the police officers failed to protect Konerak Sinthasomphone from Jeffrey Dahmer. Rather, they allege, among other things, that the officers actively prevented private citizens from helping Sinthasomphone and, in fact, delivered Sinthasomphone, who was a minor, not to his parents, but into Dahmer's custody. The police left him with Dahmer despite the persistent attempts of private citizens to urge them to investigate further. One of the officers assured a concerned private citizen, who later called the police station, that everything was under control. In other words, the allegations are not just of police inaction, but of police action, action which violated Konerak Sinthasomphone's substantive due process rights. I find that a claim is stated on this basis alone.

Nevertheless, other allegations deserve mention—allegations which also may serve to distinguish this case from *DeShaney.* As I stated above, in *DeShaney* the Court rejected the argument that Joshua DeShaney was in a "special relationship" with the state officials. Under the law, were a special relationship to be found, the officials could have been responsible for what happened to Joshua. The Court pointed out that Joshua had been temporarily in the custody of the state, but he was then returned to the custody of his father, where he lived for 15 months before he was injured. The Court found that no special relationship could be inferred from the state's knowledge of his predicament or its "expressions of intent to help him."

The *Sinthasomphone* case is different, but is it different enough? Sinthasomphone had escaped from Dahmer and had found persons to help him. He also, it is claimed, showed fear of Dahmer. However, he was then taken into what could be termed, at least, as brief police custody. During the time the police were in control, they prevented others from helping him. Then the police returned him to Dahmer's apartment. They were returning a minor, the complaint alleges, not to the custody of his parents, but to an unrelated adult with no legitimate claim to custody. That person then killed him almost as soon as the police left. It is a difficult question whether this creates a "special relationship."

***1350** Outside of prisons [*Estelle v. Gamble,* 429 U.S. 97, 97 S.Ct. 285, 50 L.Ed.2d 251 (1976)] or mental institutions [*Youngberg v. Romeo,* 457 U.S. 307, 102 S.Ct. 2452, 73 L.Ed.2d 28 (1982)] courts have been reluctant to find special relationships. For example, in *Harris v. District of Columbia,* 932 F.2d 10 (D.C.Cir.1991), the court considered whether police officers had a qualified immunity from suit. The officers took Derrick D. Harris into custody. He was suffering severe effects from an overdose of PCP. There was a delay in getting him admitted to a hospital and he died. The court determined that the police officers were not under "a clearly established constitutional obligation to obtain medical care for Harris" based on a special relationship with him and that they therefore were entitled to a qualified immunity. The majority opinion indicated, however, that they were deciding the qualified immunity issue: whether an obligation was "clearly established," not whether a constitutional obligation

existed. A fine point, and one which will no doubt arise again in this case.

In the *Sinthasomphone* case, at the motion to dismiss stage, I cannot say that no special relationship existed between Konerak and the three police officers.

Finally, the cases uniformly emphasize that if police action—or even police inaction is a product of intentional discrimination, it violates the equal protection clause. The *Sinthasomphone* complaint clearly states a claim that the actions of the officers and the policy of the City both are due to intentional discrimination on the "basis of race, color, national origin, or sexual orientation." ¶ 39.

SINTHASOMPHONE: Municipal Liability

Another major hurdle which must be overcome if the claim against the City of Milwaukee is to escape dismissal is that posed first in *Monell v. New York City Dept. of Social Services,* 436 U.S. 658, 98 S.Ct. 2018, 56 L.Ed.2d 611 (1978). In order to state a claim under section 1983, plaintiffs must allege that they held constitutionally protected rights; that they were deprived of those rights; that the defendants either intentionally caused the deprivation or were deliberately indifferent to it, and that the defendants acted under color of state law. If a claim is to be stated against a municipality, there must also be an allegation that the constitutional deprivation was caused by a municipal policy, practice, or custom.

The *Sinthasomphone* complaint goes to great lengths to plead that a *de facto* custom or policy exists which led the police officers to act as they did in this incident. The City has requested that these allegations be stricken as "immaterial and impertinent." That request is DENIED.

As outlined above, the complaint contends that dating back to 1958, the Milwaukee Police Department has been involved in discrimination against racial minorities. The custom alleged is revealed, the complaint states, by the reaction of police union officials to the disciplinary action taken by a relatively new police chief against the officers involved in this incident. It is also revealed, the complaint says, by the public reaction of prior police chiefs against that disciplinary action. Given this context, the officers were led to their perceptions both as to what the situation was on May 27 and the acceptability of their attitudes immediately following the incident.

The City contends that the alleged policies of the MPD do not bear any specific relationship to the allegations in the complaint and that the statement that the current chief disciplined the officers precludes the claim and shows that there is no custom or policy as alleged.

The complaint sets forth a very broad indictment of the Milwaukee Police Department. It asserts that over the years a mind-set has been established in the department: certain discriminatory behavior has been tolerated, giving officers the impression that they can get by with behavior which leads to incidents such as that of May 27. The impression is revealed again by what is said to be intemperate remarks of former police chiefs and by officials of the police union opposing the disciplinary action subsequently taken against the officers. ***1351** I find that the complaint states a claim that a *de facto* custom or policy exists, giving rise to section 1983 liability. Proving the claim may be a difficult task, but the difficulty of proof is not relevant at this stage of the proceedings. A jury will have to eventually resolve this issue.

SINTHASOMPHONE: Claims of Parents and Siblings

The defendants contend that the claims of the siblings and the parents of Konerak Sinthasomphone must be dismissed. The parties have thoroughly briefed this issue, analyzing recent cases from various circuits. Although several cases are discussed, the controlling precedent is *Bell v. City of Milwaukee,* 746 F.2d 1205 (7th Cir.1984). Relying on *Bell,* the claims of the siblings are dismissed. Those of the parents will be allowed to proceed.

COMPLAINTS OF LACY, BRADEHOFT, AND EDWARDS

Intuitively, looking at all four cases, one can see that the *Sinthasomphone* case is the strongest. The police had contact with and arguably an opportunity to save Konerak Sinthasomphone and they did not do so. Rather, it can be argued, they placed him in danger. The other cases are derivative: if Sinthasomphone had been rescued, Dahmer would not have been able to harm the others. One can also see by the discussion above that there are significant legal issues posed by the *Sinthasomphone* complaint. So much more, then, are the problems posed by the other cases.

The dispositive issue in the *Lacy, Bradehoft,* and *Edwards* cases is that decided in *Martinez v. California,* 444 U.S. 277, 100 S.Ct. 553, 62 L.Ed.2d 481 (1980). In that case a California parole board paroled a violent sex offender. Five months later he killed a 15–year–old girl. The Court pointed out that the parole board did not harm the girl; the parolee did. Furthermore, the Court stated:

> [T]he parole board was not aware that appellants' decedent, as distinguished from the public at large, faced any special danger.... we do hold that at least under the particular circumstances of this parole decision, appellants' decedent's death is too remote a consequence of the parole officers' action to hold them responsible under the federal civil rights law.

Id. at 285, 100 S.Ct. at 559.

It cannot be said, by any stretch of the imagination, that the City of Milwaukee or its police officers had a "special relationship" with Lacy, Bradehoft, or Edwards prior to Edwards' escape from Dahmer. In addition, the police had no way of knowing that these men, in the language of *Martinez,* "faced any special danger" from Dahmer. Those killed, or in Edwards' case terrorized, by Dahmer after he murdered Sinthasomphone present a consequence of the police action that is "too remote" under the law to establish liability on any of the defendants. The complaints growing out of the deaths of Oliver Lacy and Joseph Bradehoft must, under the law, be dismissed. The Edwards complaint has not been served. On my own motion, it is also dismissed. The only person they can look to for compensation under the law is Dahmer himself —the perpetrator of the vile crimes committed against them. The law does not make the City or the three police officers answerable to them.

IT IS THEREFORE ORDERED that the motions of the defendants for dismissal of the *Sinthasomphone* complaint are DENIED, with the exception of the claims of the siblings of Konerak Sinthasomphone.

IT IS FURTHER ORDERED that the complaints in 91–C–942, 91–C–1337, and 91–C–985, the cases of Lacy, Bradehoft, and Edwards, are DISMISSED.

IT IS FURTHER ORDERED that a scheduling conference will be held in court on the *Sinthasomphone* case on April 6, 1992, at 9 a.m.

All Citations

785 F.Supp. 1343, 60 USLW 2562

Footnotes

1 He was not charged with killing Steven Tuomi in Milwaukee in 1987. He is charged with killing Steven Hicks in Bath Township, Ohio, in 1978.

237 F.3d 156
United States Court of Appeals,
Second Circuit.

Jacqueline FORD, as Administratrix of the Estate of Robert Ford, deceased, and individually, Plaintiff–Appellee,

v.

Edward F. MOORE, individually and as a Lieutenant (agent and/or employee) of the Saratoga Springs Police Department, and Thomas W. Mitchell, individually and as a Lieutenant (agent and/or employee) of the Saratoga Springs Police Department, Defendants–Appellants.

Nos. 99–9303L, –9305(CON), –9315(CON).
|
Argued Oct. 16, 2000.
|
Decided Jan. 8, 2001.

Synopsis

Administratrix of estate of deceased subject of attempted suicide intervention brought civil rights action against various police officers, city, and police department, alleging that officers used unreasonable and excessive force during intervention and colluded to cover such misconduct after the fact, and that officers used substandard level of care in intervention due to subject's race. Defendants moved for summary judgment. The United States District Court for the Northern District of New York, Lawrence E. Kahn, J., granted motions except as to six police officers. Two officers appealed. The Court of Appeals, Jon O. Newman, Circuit Judge, held that: (1) lieutenant was entitled to qualified immunity on inadequate supervision claim, and (2) lieutenant was entitled to qualified immunity on claim based on alleged cover-up.

Reversed and remanded with instructions.

Attorneys and Law Firms

***158** Daniel J. Stewart, Dreyer Boyajian LLP, Albany, NY, on the brief, for defendant-appellant Edward F. Moore.

James B. Tuttle, Bohl, Della Rocca & Dorfman, P.C., Albany, NY, on the brief, for defendant-appellant Thomas W. Mitchell.

Kent J. Gebert, Schenectady, NY, on brief, for plaintiff-appellee.

Before MESKILL, JON O. NEWMAN, and CABRANES, Circuit Judges.

Opinion

JON O. NEWMAN, Circuit Judge.

This appeal by two supervisory police officers concerns their claim of qualified immunity in a case in which subordinate officers intervened in an attempt to avert the apparently imminent suicide of a distraught young man armed with a rifle. The young man was ultimately killed by a bullet fired, under disputed circumstances, from the pistol of one of the subordinate officers. Lt. Edward F. Moore and Lt. Thomas W. Mitchell of the Saratoga Springs, N.Y., Police Department appeal from the portion of the September 30, 1999, order of the District Court for the Northern District of New York (Lawrence E. Kahn, District Judge), that denied their motion to dismiss, on the ground of qualified immunity, a suit brought by the decedent's administratrix against them and others. The District Court's ruling rejected motions for summary judgment by various defendants but did not explicitly consider the Appellants' qualified immunity defense. We conclude that we should adjudicate the merits of the Appellants' qualified immunity defense, notwithstanding the lack of explicit consideration by the District Court, and that the defense should be upheld as a matter of law. We therefore reverse and remand with directions to dismiss the complaint against the Appellants.

Background

I. The Episode

The facts pertinent to a disposition of this appeal are those set forth in the Plaintiff–Appellee's ***159** complaint as well as those submitted by the Defendants–Appellants that are not

disputed by the Plaintiff. In the account that follows, any matters that are in dispute are identified as such.

On the evening of June 15, 1995, Robert Ford ("Ford"), a 20–year–old African–American, wrote two notes to his girlfriend Sommer Bethel ("Bethel") threatening to commit suicide and indicating that he could be found at a local outdoor recreational field. Bethel went to the police station, where at around 12:20 A.M., Lt. Moore, the ranking officer in charge of the police department that night, dispatched patrol officer Christopher Kuznia to search the field.

Kuznia drove to the field, but could not find Ford. He returned to the station and picked up patrol officer Daniel Mullan. The two officers drove to Bethel's residence, where Ford lived. While at the Bethel residence, the officers came upon another note written by Ford, this one accusing Bethel of not "having looked too hard" for him earlier at the recreation field, and calling her a name.

The officers then returned to the field, arriving at approximately a few minutes after 1 A.M. There they found a friend of Ford's who informed them that Ford was in a dugout at the baseball field, holding a rifle and ammunition. Kuznia radioed headquarters for backup. Moore dispatched Sergeant John King, an officer with mental health training, to the scene. Three other officers, Sergeant Michael Welch, Investigator David Levanites, and Patrolman Joseph Carey, were also dispatched. The four officers arrived at the field, and Sergeant Welch radioed for an ambulance to park at a stand-by location with its siren turned off.

Kuznia found Ford sitting in the dugout of the baseball field and observed that Ford had a rifle pointed at his own chin with the safety disengaged. He asked Ford for permission to sit with him in the dugout. Ford told Kuznia that he could come inside, and that Ford would not shoot him.

Ford then asked Kuznia if he could talk to Bethel, and when Kuznia refused unless Ford relinquished his rifle, Ford grew agitated. After Kuznia made excuses to get closer to Ford and engage him in conversation, Ford asked Kuznia for a cigarette, which Kuznia supplied. A short time later, Kuznia determined that Ford was about to shoot himself. Kuznia gestured to Mullan, who was outside the dugout, and counted from three down to zero with his fingers as a signal to disarm Ford. When he reached zero, Kuznia and Mullan together grabbed for the rifle.

As Ford, Kuznia, and Mullan struggled, the officers managed to keep the rifle pointed away from all members of the trio. However, Ford was able to get his finger on the trigger and discharge one round from the rifle. The bullet went out of the dugout, harming no one. As the struggle between Ford and the officers continued, Ford bit Kuznia's arm. Mullan finally seized the rifle, and so informed the other officers at the scene.

The parties dispute what happened next. According to the officers on the scene, Kuznia and Ford continued to fight. Kuznia had Ford in a headlock, but Ford was still biting Kuznia. Kuznia wrestled Ford down to the dugout bench, ending up on top of Ford. At that moment, Levanites, who was at the entrance to the dugout, saw a "glimpse of silver." A second shot rang out, and Ford, bleeding profusely from a wound to the head, stopped struggling. Levanites felt a flash of pain in his leg, thinking he was hit. Kuznia looked down, and saw that his sidearm was missing from its holster. The officers' conclusion, reflected in reports written later that day, is that Ford somehow got hold of Kuznia's pistol and shot himself.

The Plaintiff disputes the officers' account of how the second shot occurred. She relies on the opinions of experts who reached the conclusion that, from the physical dimensions of the dugout, Kuznia's ***160** position on top of Ford, and the trajectory of the bullet from Kuznia's pistol that killed Ford, it was at best unlikely and perhaps impossible for the second shot to have been fired by Ford. The Plaintiff's primary conclusion is that Kuznia shot Ford. It is not entirely clear whether her claim is that Kuznia shot Ford accidentally while both were struggling for Kuznia's pistol or whether, in her wording used at one point, the police "murdered" Ford. *See* Brief for Appellee at 26. Alternatively, the Plaintiff contends that, if Kuznia did not shoot Ford, the shooting was a suicide resulting from the officers' precipitous conduct in the dugout.

The parties agree that after the second shot was fired at approximately 1:30 A.M., Ford was taken to a hospital where he was pronounced dead. Officers Kuznia, Levanites, and Mullan remained at the scene until Lt. Mitchell arrived, at which time they went to the hospital where they were treated for various injuries.

Lt. Moore. During the entire altercation at the dugout, Lt. Moore remained at the police station. His only actions germane to the incident, prior to Ford's death, consisted of dispatching officers to the scene and listening on the police radio to whatever police communications were broadcast.

Moore acknowledged at his deposition that as the shift supervisor that night, he could have radioed commands to the officers at any point. However, the radio transmissions from the field, according to undisputed portions of Moore's deposition, did not convey the "blow by blow" escalation of the incident.

Ten minutes after the shooting, Lt. Moore went to the recreational field, and then called Lt. Mitchell. Officers at the scene began taking pictures of the dugout, but formal evidence-gathering was delayed until Lt. Mitchell arrived approximately a half hour later. In conjunction with a superior officer, Lt. Moore decided that Kuznia and Mullan would not write individual reports of the episode. Instead, Lt. Moore prepared a report "to set forth the combined recollections of myself, Officer Kuznia, and Officer Mullan." Moore conceded that this was not the customary practice, but that it was done in this instance because Kuznia and Mullan were "very upset that morning." Levanites completed his own report. Upon the arrival of Lt. Mitchell, Lt. Moore turned the investigation over to Mitchell and then left to take Kuznia and Mullan to the hospital.

Lt. Mitchell. Lt. Mitchell had no involvement with the episode until he arrived at the scene around 2:10 A.M. Upon arriving, he was briefed on the incident by Lt. Moore, and then began collecting evidence and assigning officers for further investigation. Most of the relevant evidence was bagged and placed in a police car, but the officers' and the decedent's bloody clothes were not retained. The guns and the dugout were not examined for fingerprints.

The follow-up investigation was less thorough than what might have been expected had the officers been gathering evidence for a criminal prosecution. The tapes used to record the evening's radio transmissions concerning the incident were reused, precluding preservation of the officers' radioed conversations. Interviews with hospital personnel were not taken, and no internal affairs review was conducted.

II. Proceedings in this case

Jacqueline Ford, individually and as the administratrix of Robert Ford's Estate, filed suit under 42 U.S.C. §§ 1981, 1983, and 1985(3) against the Saratoga Springs Police Department ("Police Department"), the City of Saratoga Springs ("City"), Lt. Mitchell, Lt. Moore, and several other police officers. Her complaint also contained tort and constitutional claims under New York law.

The suit alleges that the defendants used unreasonable and excessive force and then colluded to cover up their misconduct after the fact. The complaint also alleges ***161** that the defendants exercised a substandard level of care in the intervention because Ford was African–American. Finally, the complaint claims that several of the defendants (but not Mitchell or Moore) failed to adequately train the police officers who entered the dugout.

The complaint accuses the officers of using unreasonable force in "killing" Ford, "or in the alternative ... allowing him to kill himself." The complaint makes few specific factual allegations, instead broadly calling the defendants' conduct unreasonable and unconstitutional. Since filing the complaint, the Plaintiff has assembled a team of experts whose affidavits allege that Kuznia's actions in the dugout were reckless and unreasonable, that the investigation of the incident "fell far short of even minimally acceptable police procedures" and has frustrated current attempts to determine what happened in the dugout, that the police department's suicide training was "grossly deficient," and that it was "virtually impossible" for the defendant to have shot himself in the confined space of the dugout if the incident took place as the defendants described in their reports and depositions.

After the Plaintiff took numerous depositions and engaged in other discovery, all of the Defendants moved for summary judgment. Mitchell and Moore, along with most of the individual officers, argued that their actions were too remote (both physically and temporally) from the conduct at the field to support a finding that they were "personally involved" in any alleged misconduct, as required for liability under section 1983. They also argued, in the alternative, that they were entitled to qualified immunity from suit. The District Court dismissed all claims against the City and the Police Department. The Court also dismissed the complaint as to four officers who maintained positions "well outside" the dugout, and whose involvement was therefore "too remote" from the alleged unconstitutional conduct for them to be personally liable. However, the Court permitted the claims against Mitchell, Moore, and four other defendants,[1] in their individual capacities, to proceed past the summary judgment stage.[2] In its ruling, the Court made no mention of these defendants' requests for qualified immunity.

Mitchell and Moore now seek interlocutory review of the denial of their qualified immunity defense.

Discussion

I. Exercise of Appellate Jurisdiction

There is no doubt that we have appellate jurisdiction on this interlocutory appeal to consider the denial of the defense of qualified immunity to the extent that the defense turns on an issue of law, *see Mitchell v. Forsyth,* 472 U.S. 511, 105 S.Ct. 2806, 86 L.Ed.2d 411 (1985), even though the District Court did not explicitly consider the defense, *see Musso v. Hourigan,* 836 F.2d 736, 741 (2d Cir.1988). However, our precedents differ as to the appropriateness of exercising such jurisdiction in the absence of district court analysis of the issue. In some cases, we have sent the case back to the district court for consideration of the qualified immunity issue. *See Brown v. City of Oneonta,* 106 F.3d 1125, 1133–34 (2d Cir.1997); *Eng v. Coughlin,* 858 F.2d 889, 895 (2d Cir.1988); *Francis v. Coughlin,* 849 F.2d 778, 780 (2d Cir.1988); *Musso,* 836 F.2d at 741. In other instances, however, we have adjudicated the merits of the qualified immunity defense. *See X–Men Security, Inc. v. Pataki,* 196 F.3d 56, 66–67 (2d Cir.1999) (immunity defense not considered in district court because discovery not completed); *Dube v. State University of New York,* 900 F.2d 587, 596 (2d Cir.1990).

***162** Although a remand for initial district court consideration might be warranted in some cases, we think it appropriate to adjudicate the immunity defense at this time. The purpose of qualified immunity, where applicable, is to shield government officials from the distractions of drawn-out litigation. *See Mitchell,* 472 U.S. at 525, 105 S.Ct. 2806. This suit was filed more than four years ago, and Mitchell and Moore asserted their immunity defense in a summary judgment motion that awaited a ruling for fifteen months. After that ruling omitted consideration of the Appellants' immunity defense, we need not subject them to the delay of a remand to afford the District Court a second opportunity to adjudicate the defense where the resolution of the qualified immunity defense can be decided as a matter of law based on the undisputed facts in the record. *See In re Montgomery County,* 215 F.3d 367, 375 (3d Cir.2000) (adjudicating merits of qualified immunity claim, even though District Court ignored issue, where complaint was pending for four years and defendants had diligently pursued their immunity claim and their appeal). We caution, however, that our adjudication of the qualified immunity issue on appeal under the specific circumstances in this case should not be interpreted by future litigants and district judges as an invitation to modify the longstanding rule that district courts promptly adjudicate properly presented qualified immunity defenses in the first instance.

II. Qualified Immunity

A defendant official is entitled to qualified immunity if (1) the defendant's actions did not violate clearly established law, or (2) it was objectively reasonable for the defendant to believe that his actions did not violate such law. *See Salim v. Proulx,* 93 F.3d 86, 92 (2d Cir.1996). For a defendant to secure summary judgment on the ground of qualified immunity, he must show that no reasonable jury, viewing the evidence in the light most favorable to the Plaintiff, could conclude that the defendant's actions were objectively unreasonable in light of clearly established law. *See Lennon v. Miller,* 66 F.3d 416, 420 (2d Cir.1995). An officer's actions are objectively reasonable if "officers of reasonable competence could disagree on the legality of the defendants' actions." *See Salim,* 93 F.3d at 91 (quoting *Malley v. Briggs,* 475 U.S. 335, 341, 106 S.Ct. 1092, 89 L.Ed.2d 271 (1986)).

A. Lt. Moore

We focus initially on the qualified immunity defense of Lt. Moore to the Plaintiff's claim under section 1983.[3] The Plaintiff's claim against Lt. Moore has two parts. First, the Plaintiff argues that Moore failed to adequately supervise by radio his subordinates at the scene of the shooting, thereby contributing to their allegedly unconstitutional conduct. Second, the Plaintiff claims that Moore participated in a cover-up conspiracy that violated the decedent's rights.

Supervision by radio. In considering the supervision claim against Moore, we must distinguish between two aspects of Ford's claim against the subordinate officers at the scene. First, to whatever extent the Plaintiff is claiming that Kuznia shot Ford, no reasonable jury could possibly find that Moore was responsible for ***163** what, in essence, would be a claim of homicide. The evidence that Kuznia shot Ford, tenuous at best, is confined to the opinions of the Plaintiff's experts that Ford could not have shot himself with Kuznia's pistol, if the incident happened as the officers reported. Even if that evidence were to support an inference of Kuznia's liability, and we do not suggest that it does, it totally fails to indicate that Moore, sitting at his desk at police headquarters, had any opportunity to intercede in the struggle in the dugout, during which, the Plaintiff claims, Kuznia fired his pistol. *See O'Neill v. Krzeminski,* 839 F.2d 9, 11 (2d Cir.1988) (no rational juror could conclude that defendant had an opportunity to intercede when "blows were struck in rapid succession").

On the other hand, Moore has some peripheral involvement in the other aspect of Ford's claim—namely, that the officers on the scene violated Ford's rights by the nature of their response to his threatened suicide. More specifically, Ford's claim appears to be that the officers acted so precipitously as to increase the likelihood that Ford would shoot himself, or that they failed to take steps that would have minimized the risk of his suicide. As to the officers on the scene, this claim is not unlike those leveled at publicly employed social workers who are faulted by parents for removing an at-risk child too quickly from a dysfunctional home and faulted by children for failing to act until after abusive conduct has occurred. *See Doe v. Conn. Dep't of Child and Youth Services,* 911 F.2d 868 (2d Cir.1990); *van Emrik v. Chemung County,* 911 F.2d 863 (2d Cir.1990). It is not hard to imagine the claim Ford's mother would be making if the officers on the scene had delayed in removing the rifle from her son's grasp and he had succeeded with his initial plan to kill himself with the rifle.

However problematic might be the claim against the officers on the scene, the claim against Lt. Moore is plainly without merit. As to him, the issue is whether, in his supervisory capacity,[4] he could be found liable under section 1983 for any action or inaction of his that was causally related to Ford's death (assumed, for this aspect of the claim, to have been a suicide). The Plaintiff points to specific steps that she contends Moore should have taken to avert his subordinates' allegedly unconstitutional conduct. She claims that Moore should have ordered Kuznia out of the dugout because Kuznia had inadequate mental health training, should have ordered a psychiatrist or mental health specialist to the scene, and should have ordered a de-escalation after Ford's rifle had been taken ***164** away by Mullan. On the evidence presented, none of these arguments suffices to create a fact issue as to Moore's entitlement to qualified immunity.

Although the Plaintiff offers hundreds of pages of expert opinion attacking almost every facet of the conduct of the officers at the recreational field, only one expert is willing to question Moore's decision not to issue orders from the police station, and this expert does so only in passing, without identifying any specific steps he thinks Moore should have taken.[5] *See* Polio Supp. Report at 31. It is not surprising that the Plaintiff's otherwise highly critical experts have little to say about Moore's failure to direct his subordinates by radio: Moore testified at his deposition that the radio transmissions did not convey the "blow-by-blow" action at the field, and the Plaintiff offers no evidence contesting this credible claim. On the other hand, Moore dispatched an officer to the field, Sergeant John King, who had what one of the Plaintiff's own experts described as "useful[ ]" and "applicab [le]" mental health training.[6] It was objectively reasonable for Moore, who possessed necessarily limited information about the events at the field, to rely on the judgment of a subordinate trained in mental health issues who was at the scene, could see what was occurring, and could respond quickly to new developments. In fact, a strong argument could be made that it would have been objectively *unreasonable* for Moore to have issued directives from afar in a delicate, life-and-death situation, basing his orders solely on the incomplete information conveyed in scattered radio transmissions.

It is by no means clear that Moore could have done anything to prevent Ford's death, however it might have occurred. In any event, it was objectively reasonable, as a matter of law, for Moore to believe that all of his conduct in supervising the officers at the scene did not violate any of Ford's constitutional rights.

Alleged cover-up. The Plaintiff next contends that Moore participated in a conspiracy, after Ford's death, to cover up the officers' allegedly unconstitutional conduct at the field. The sole allegation against Moore as to this claim is that he ordered Kuznia and Mullan not to write individual reports of the episode, but instead to cooperate with Moore in preparing a joint report. Moore contends that he thought Kuznia and Mullan were upset by the night's events, a position consistent with the need to take those officers to the hospital. The Plaintiff implies, without any basis in the evidence, that Moore decided upon the joint report to assure consistency between the recollections of Kuznia and Mullan.

Whether or not any constitutional right is implicated by the preparation of a joint report when a supervisory officer has some reason to believe a crime has occurred, there is no clearly established constitutional law requiring the supervisor to make sure that police officers write individual reports of an incident that the supervisor reasonably believes does not involve a criminal investigation. Before arriving at the scene, Lt. Moore knew that Ford had written two suicide notes and been seen in the dugout, holding a rifle pointed at his head. When Moore arrived on the scene, he was told that Ford had succeeded in killing himself, apparently obtaining Kuznia's ***165** pistol during the struggle in the dugout. The evidence available to him reasonably indicated that Ford had committed suicide. The Plaintiff's theory that Kuznia killed Ford arises from the theories of experts who offered their

opinions long after the episode occurred. To whatever extent the Plaintiff might have evidence that the officers present at the dugout participated in a cover-up, the only evidence proffered to show that Lt. Moore participated in such a cover-up is that he authorized preparation of a joint report. In view of the circumstances as he reasonably perceived them at the scene, that evidence is wholly insufficient to create a factual dispute as to whether Lt. Moore joined such a cover-up, if one existed, or failed to act in an objectively reasonable manner.

Even if there were a viable claim against Moore for conduct after Ford's death, the death would have extinguished any claim of Ford's, see *Judge v. City of Lowell,* 160 F.3d 67, 76 n. 15 (1st Cir.1998) ("[A]ll of the actions that form the basis of Judge's claims occurred subsequent to Weems's death. At that time, Weems had no rights of which he could be deprived."); *Silkwood v. Kerr–McGee Corp.,* 637 F.2d 743, 749 (10th Cir.1980) (holding that a decedent cannot state a Bivens claim for post-death conduct because "the civil rights of a person cannot be violated once that person has died"), and whatever post-death claim the Plaintiff might have in her capacity as administratrix, *see Barrett v. United States,* 689 F.2d 324, 332 (2d Cir.1982) (protecting property right to be "fully compensated through a lawsuit"), has not been alleged.

B. Lt. Mitchell

Lt. Mitchell, who had no connection with the episode until his arrival on the scene after Ford's death, can have no liability whatsoever for Ford's death. The Plaintiff's sole claim against Mitchell is that, like Moore, he participated in an alleged cover-up of the circumstances of Ford's death. Mitchell is faulted for failing to conduct an adequate investigation at the scene, an investigation that the Plaintiff speculates might have provided support for the later-constructed theory that Kuznia shot Ford. This claim is as deficient as the "cover-up" claim against Moore.

Conclusion

The Plaintiff's claims against both Appellants are either legally deficient as pleadings, unsupported by evidence of a constitutional violation, or otherwise barred by the defense of qualified immunity. *See Salim,* 93 F.3d at 89–91 (outlining alternative bases for upholding qualified immunity defense). Since the federal claims fail at the outset, the pendent claims against these Appellants must also be dismissed. *See id.* at 92; *Lennon,* 66 F.3d at 426. Because Officers Kuznia, Mullan, and Levanites withdrew their appeals of the District Court's decision on summary judgment, we express no view as to whether they are entitled to qualified immunity defenses with respect to the claims against them. Accordingly, on remand, Defendants Kuznia, Mullan, and Levanites should be permitted to renew their motion for summary judgment on qualified immunity grounds. Should these Defendants do so, the District Court may decide the question of qualified immunity based on the parties' previous submissions on summary judgment, or request additional briefing from the parties in light of our decision.

We reverse and remand to the District Court with instructions to dismiss the complaint as to Lts. Moore and Mitchell.

All Citations

237 F.3d 156

Footnotes

1 These defendants were Kuznia, Mullan, Levanites, and Kenneth King, the Chief of the Police Department. The Plaintiff has since dropped King as a defendant.

2 The court dismissed the claims as to these defendants in their official capacities.

3 To whatever extent the Plaintiff is asserting claims under sections 1981 and 1985(3), those claims fail, as to both Appellants, for lack of any evidence of the requisite discriminatory intent. *See Oliveri v. Thompson,* 803 F.2d 1265, 1280 (2d Cir.1986). On a motion for summary judgment asserting a qualified immunity defense, the Plaintiff has an obligation to offer "particularized evidence of direct or circumstantial facts" supporting a claim of unlawful intent. *See Blue v. Koren,* 72 F.3d 1075, 1083 (2d Cir.1995); *see also Crawford–El v. Britton,* 523 U.S. 574, 600, 118 S.Ct. 1584, 140 L.Ed.2d 759 (1998) (requiring plaintiff to come forward with "affirmative evidence" of unlawful intent, if it is necessary element of plaintiff's claim, to defeat motion for summary judgment based on qualified immunity).

4 The application of qualified immunity law to supervisory liability claims presents important and unresolved questions. What law must be "clearly established" to defeat a qualified immunity defense: the law violated by the subordinates, or the supervisory liability doctrine under which the plaintiff hopes to hold the defendant liable, or both? And what must be "objectively unreasonable": the subordinates' acts, or the supervisor's failure to act, or both?

These questions have gone largely unexplored. The First Circuit, in a thoughtful opinion, recently appeared to conclude that a court should examine whether the constitutional right allegedly violated by the subordinates *and* the plaintiff's supervisory liability theory are clearly established, and if they are, then move on to evaluate the supervisor's objective reasonableness in failing to act. *See* *Camilo–Robles v. Hoyos,* 151 F.3d 1, 8 (1st Cir.1998). This Circuit has not explicitly discussed the issue, but has at least once used a rule different from the First Circuit's, looking to the clarity of the law allegedly violated by the subordinates, and then moving on to the objective reasonableness of the defendant's actions. *See* *Moffitt v. Town of Brookfield,* 950 F.2d 880, 885 (2d Cir.1991); *see also* *Ricciuti v. N.Y.C. Transit Authority,* 124 F.3d 123, 128 (2d Cir.1997) (applying a similar rule in the analogous context of an officer's "failure to intervene" to prevent a colleague's unconstitutional acts).

Because we hold that Lt. Moore is entitled to qualified immunity under even the narrow rendering of the doctrine favorable to the Plaintiff (one in which only the law violated by the subordinates must be clearly established, and only the supervisor's acts must be objectively unreasonable), we leave this matter to be resolved another day.

5 In fact, when the expert reports impugn Lt. Moore's decision to write a report together with Kuznia and Levanites, they do so precisely because Moore "had no direct personal knowledge of the incident." *See, e.g.,* John V. Polio, Supplemental Report on *Ford v. Saratoga Springs* ("Polio Supp. Report") at 35.

6 The Plaintiff's psychiatric expert, Dr. Thomas Qualtere, concedes that Sergeant King had the "relevant" mental health training, and that the "usefulness" of the training and its "applicability to the Robert Ford incident cannot be disputed." *See* Affidavit of Thomas A. Qualtere, at 7, 9.

The Plaintiff's police expert also commended the training of another officer Moore dispatched to the scene, Sergeant Michael Welch. *See* Polio Supp. Report at 29.

845 F.3d 659
United States Court of Appeals, Fifth Circuit.

Brandy HAMILTON; Alexandria Randle, Plaintiffs—Appellees,

v.

Aaron KINDRED, Defendant—Appellant.

No. 16-40611
|
Summary Calendar
|
January 12, 2017

Synopsis

Background: Vehicle driver and her female passenger brought § 1983 action against police officer, asserting claim of bystander liability for failing to act to prevent or stop fellow officer's roadside bodily cavity search of them in violation of their Fourth Amendment rights. The United States District Court for the Southern District of Texas, George C. Hanks, Jr., J., 184 F.Supp.3d 496, denied officer's motion for summary judgment, and officer filed interlocutory appeal.

Holdings: The Court of Appeals, Edward C. Prado, Circuit Judge, held that:

arrestees stated plausible Fourth Amendment excessive force claims, and

it was clearly established that officer could be liable under § 1983 as bystander in case involving excessive force.

Dismissed.

***660** Appeal from the United States District Court for the Southern District of Texas, USDC No. 3:13-CV-240

Attorneys and Law Firms

Allie R. Booker, Booker Law Firm, Joseph Kelly Plumbar, Law Office of Joseph K. Plumbar, Houston, TX, for Plaintiffs-Appellees.

Christopher Robert Garza, Assistant District Attorney, Jesse Mark Blakley, Jr., District Attorney's Office for the County of Brazoria, Angleton, TX, for Defendant-Appellant.

Before HIGGINBOTHAM, PRADO, and HAYNES, Circuit Judges.

Opinion

EDWARD C. PRADO, Circuit Judge:

Brazoria County Sheriff's Office Deputy Aaron Kindred appeals the district court's denial of qualified immunity in this case involving the roadside body cavity searches of two women during a traffic stop. This case arises from an investigatory traffic stop in 2012. Three officers were involved in the incident. The two Department of Public Safety ("DPS") officers, Nathaniel Turner and Amanda Bui, have reached settlement agreements with Plaintiffs Brandy Hamilton and Alexandria Randle. The question presented by this case is whether the third officer at the scene, Deputy Kindred, is liable under 42 U.S.C. § 1983 as a bystander for not intervening to prevent the body cavity searches. Because material issues of fact remain, we do not have appellate jurisdiction over this interlocutory appeal. Accordingly, we DISMISS.

I. BACKGROUND

A. Factual Background

On Memorial Day weekend in 2012, Hamilton and Randle were pulled over by DPS Officer Turner for speeding. Turner smelled marijuana and asked the women to exit the vehicle. Hamilton was wearing a bikini bathing suit, and Randle was similarly dressed. Turner did not allow the women to cover themselves before exiting the vehicle. He used his radio to request help from local law enforcement and a female officer to conduct a search of the women. On the radio, Turner stated that the car smelled like marijuana and that one of the women "had the zipper open on her pants, or Daisy Duke shorts, whatever they are." Turner handcuffed and separated the women before ordering Hamilton to sit in the front passenger seat of his patrol ***661** car. He then conducted a search of the vehicle. When Kindred arrived, Turner asked him to identify the drivers of several other cars that had arrived near the scene. When Bui arrived, she parked next to Turner's patrol car. When he had completed the vehicle search, Turner informed Bui and Kindred that he had finished the search but

wanted Bui to search the women. Bui asked the men if they had any gloves, and Turner gave her the gloves he had used to search the vehicle.

At that point, Kindred asked Turner, "Do you want me to make this easier and go in the back?" Turner agreed that Kindred should stand behind the car. Kindred stood behind Turner's patrol car and can be seen in that position in the video. Turner told Hamilton: "[Bui] is going to search you, I ain't going to do that ... cause I ain't getting up close and personal with your women areas." Turner and Kindred stood together behind the car while Bui performed the body cavity search. During the search, Turner told Kindred: "I don't know if she stuck something in her crotch or this one did."

After the search, Turner asked Bui if Hamilton had "[n]othing on her," and then requested she search Randle because "she is the one who had the zipper open." Hamilton immediately asked, "Do you know how violated I feel?" and said she felt so embarrassed. Turner replied that if they "hadn't had weed in the car they wouldn't be in this situation." Randle, who had been standing by Hamilton's car, was escorted to Bui's patrol car. Kindred was still standing behind Turner's vehicle. When Bui performed the body cavity search on Randle, Randle began to scream: "That is so fucked up! I am so done!" Hamilton yelled at her a couple times to "calm down" and "be quiet." Randle sounded as if she was crying when she again said, "Man, this is so fucked up!" After the searches were complete, Hamilton stated to Turner that "it was going to the extreme" to have someone "put their fingers up your stuff." In their complaint, Hamilton and Randle describe Bui's actions as "forcibly search[ing] in their vaginas and anus[es] against protest," and explain that the search was "physically and emotionally painful."

B. Procedural Background

Hamilton and Randle filed their complaint on June 27, 2013, asserting § 1983 claims against the officers involved and their employers. They alleged that the invasive cavity searches violated their Fourth Amendment rights to be free from unreasonable searches and seizures. Kindred moved for summary judgment, arguing that he was entitled to qualified immunity because at the time of the incident, bystander liability was not clearly established in the Fifth Circuit in cases not involving excessive force. The district court denied Kindred's motion for summary judgment on April 28, 2016. The district court found that the Plaintiffs had asserted an excessive force claim and that it was clearly established that bystander liability would apply. Additionally, the district court held that there was a "serious dispute as to material facts" in the case regarding the objective reasonableness of Kindred's actions. Kindred timely appealed.

II. DISCUSSION

We have jurisdiction to review a district court's denial of qualified immunity "only to the extent that the appeal concerns the purely legal question whether the defendants are entitled to qualified immunity on the facts that the district court found sufficiently supported in the summary judgment record." *Kinney v. Weaver*, 367 F.3d 337, 347 (5th Cir. 2004) ***662** (en banc). "[W]e lack the power to review the district court's decision that a genuine factual dispute exists" and "instead consider only whether the district court erred in assessing the legal significance of conduct that the district court deemed sufficiently supported." *Id.* at 348. We review the district court's conclusion de novo. *Id.* at 349.

A. Excessive Force

Kindred first argues that the district court erred in allowing the Plaintiffs to go forward on an excessive force theory of liability. He argues that the Plaintiffs never pleaded excessive force. In qualified immunity cases, plaintiffs must "rest their complaint on more than conclusions alone and plead their case with precision and factual specificity." *Nunez v. Simms*, 341 F.3d 385, 388 (5th Cir. 2003). "To bring a § 1983 excessive force claim under the Fourth Amendment, a plaintiff must first show that she was seized." *Flores v. Palacios*, 381 F.3d 391, 396 (5th Cir. 2004). The plaintiff must then "show that she suffered (1) an injury that (2) resulted directly and only from the use of force that was excessive to the need and that (3) the force used was objectively unreasonable." *Id.* We agree with the district court that Hamilton and Randle alleged facts in their complaint that meet this standard. The pleadings clearly stated that both Hamilton and Randle were seized during the course of the traffic stop when they were handcuffed and placed in patrol cars. They alleged that they were detained for over thirty minutes and were subjected to invasive body cavity searches during that time in violation of the Fourth Amendment. The Plaintiffs asserted that there were no warrants or exigent circumstances allowing the searches. Furthermore, the Plaintiffs alleged injuries resulting directly from the cavity searches that took place during the detention.

Additionally, Kindred argues that excessive force does not apply to the facts of this case because "[e]xcessive force is a seizure, not a search." This argument is meritless. The Plaintiffs were clearly seized when they were placed in handcuffs and escorted to the patrol cars. Furthermore, excessive force applies because Hamilton and Randle have alleged that they were subjected to a use of force—the insertion of Bui's fingers into their vaginas and anuses—during the course of an investigatory stop. The Supreme Court has recognized that excessive force is unconstitutional during such a seizure. *Graham v. Connor*, 490 U.S. 386, 388, 109 S.Ct. 1865, 104 L.Ed.2d 443 (1989) (holding that the Fourth Amendment protects against the use of excessive force during an "arrest, investigatory stop, or other 'seizure' of [the] person"). Likewise, "Fifth Circuit precedent [has] plainly established [that] ... [a] strip or body cavity search raises serious Fourth Amendment concerns." *Roe v. Tex. Dep't of Protective & Regulatory Servs.*, 299 F.3d 395, 409 (5th Cir. 2002). *See also Martin v. City of San Antonio*, No. SA–05–CA–0020, 2006 WL 2062283, at *5 (W.D. Tex. 2006) (cataloguing case law and finding no reasonable officer would have found a roadside body cavity search reasonable even if they "reasonably suspected that Plaintiff was concealing contraband in a body cavity" if "there were no exigent circumstances requiring the search to be conducted on the public roadside rather than at a medical facility"). Plaintiffs have alleged facts showing they were subjected to an unreasonable use of force excessive to its need. Therefore, the district court did not err in determining that excessive force was a viable theory in this case.

Finally, Kindred contends that even if excessive force applies, the Plaintiffs abandoned it as a theory of liability. In support, Kindred points to statements the Plaintiffs ***663** made that suggest they were not asserting an excessive force claim. In particular, in their response to Kindred's motion for summary judgment, the Plaintiffs stated that " 'excessive force' is not an element of 'bystander liability' but a cause of action, and the Defendants cannot choose which causes of action for Plaintiffs to plead in a suit against Defendant." Additionally, when the Plaintiffs submitted proposed jury instructions, those instructions explicitly stated that "excessive force does not apply in this case."

Judge Hanks held a lengthy hearing on this issue on February 9, 2016. At that time, "counsel for Hamilton and Randle unequivocally stated that they [had] not abandoned their bystander liability claim under an excessive force theory." Kindred argued that the Plaintiffs' vague arguments "show an obvious intent to remove excessive force from this case," but he was unable to point to an exact document in the record evidencing waiver. After reviewing the pleadings and motions and hearing argument from the parties, the district court noted that the pleadings exhibited a lengthy and "rather confusing debate ... as to whether excessive force is an essential element of a bystander liability claim or a separate cause of action, whether bystander liability can be based on theories other than excessive force, and whether Hamilton and Randle have a claim for 'direct' liability." But the district court concluded that the excessive force claim had not been waived.

After reviewing the record, we agree with the district court's determination. While the Plaintiffs never used the words "excessive force" in their complaint and were less than clear during the proceedings about exactly which theories they were advancing, the district court did not err in finding that excessive force had not been waived. Throughout the case, Plaintiffs have clearly argued that they were subject to an unreasonable search and seizure in violation of the Fourth Amendment, and have alleged facts that support a claim for excessive force.

B. Bystander Liability

Kindred argues that the district court erred in denying summary judgment because even if bystander liability applied in this case, there is no genuine issue of material fact as to the elements of bystander liability. In *Whitley v. Hanna*, 726 F.3d 631 (5th Cir. 2013), this Court stated that "an officer may be liable under § 1983 under a theory of bystander liability where the officer '(1) knows that a fellow officer is violating an individual's constitutional rights; (2) has a reasonable opportunity to prevent the harm; and (3) chooses not to act.' " *Id.* at 646 (quoting *Randall v. Prince George's Cty.*, 302 F.3d 188, 204 (4th Cir. 2002)). At the time of the incident, it was clearly established in the Fifth Circuit that an officer could be liable as a bystander in a case involving excessive force if he knew a constitutional violation was taking place and had a reasonable opportunity to prevent the harm. *See Hale v. Townley*, 45 F.3d 914, 918 (5th Cir. 1995). And "[o]fficials can still be on notice that their conduct violates established law even in novel factual circumstances." *Roe*, 299 F.3d at 409 (quoting *Hope v. Pelzer*, 536 U.S. 730, 741, 122 S.Ct. 2508, 153 L.Ed.2d 666 (2002)).

The district court found that "there [was] a serious dispute as to the material facts" regarding each element of bystander liability. We lack jurisdiction to review the district court's determination that a genuine factual dispute exists. *Kinney*,

367 F.3d at 347–48. Because we find that excessive force applies in this case and disputes ***664** of material fact remain, Kindred's appeal is DISMISSED.

All Citations

845 F.3d 659

End of Document

1994 WL 589617
United States District Court, D. Maine.

Roland JACKSON, Plaintiff,

v.

INHABITANTS OF THE TOWN OF SANFORD and Craig Sanford, Defendants.

Civ. No. 94–12–P–H.
|
Sept. 23, 1994.

Attorneys and Law Firms

Ronald D. Bourque, Bourque & Clegg, Sanford, ME, for plaintiff.

Daniel Rapaport, Preti, Flaherty, Beliveau & Pachios, Portland, ME, for defendants.

ORDER ON DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

HORNBY, District Judge.

***1** On July 21, 1992, Sanford Police Officer Craig Sanford arrested Roland Jackson for operating a motor vehicle while under the influence of alcohol or drugs. In fact, Jackson was not under the influence of alcohol or drugs; his behavior reflected certain physical disabilities caused by a stroke. Jackson claims that Officer Sanford arrested him without probable cause, used excessive force in making the arrest, unlawfully detained him after the arrest, and unjustifiably charged him with a crime. He also asserts that the Town of Sanford failed to train its police officers in recognizing disabilities. I now Grant summary judgment to both defendants on all state and federal claims except Jackson's claim against the Town under the Americans with Disabilities Act of 1990 ("ADA"), 42 U.S.C. §§ 12101–12213.

Facts

The facts stated in the light most favorable to Jackson are as follows. On the morning of July 21, 1992, Roland Jackson was driving his car down Main Street in Sanford, Maine, when he was involved in a collision with another vehicle. Sanford police officer Craig Sanford arrived at the scene shortly after the accident and was told by the other driver that he thought Jackson was drunk. In fact, Jackson was not drunk but suffered from some physical difficulties, including partial paralysis of his right side and slurred speech, as a result of a stroke several years earlier. Upon approaching Jackson, Officer Sanford noticed that he was unsteady on his feet, swayed noticeably, slurred his speech, and appeared confused. Officer Sanford asked Jackson whether he had been drinking. Jackson replied that he had not been drinking, but that he had suffered a brain aneurysm that left him with some physical difficulties, and that he was using a prescription medication for high blood pressure.

Without further inquiry as to the type of medication and any side effects, Officer Sanford asked Jackson to perform field sobriety tests, which Jackson performed poorly due to his disabilities. Believing that Jackson might be impaired by the medication, Officer Sanford arrested him for operating under the influence of intoxicating liquor and/or drugs ("OUI"). Sanford handcuffed Jackson pursuant to standard procedure and placed him in the back seat of the cruiser, where Jackson slipped face down onto the seat.[1] He was unable to sit up while being transported to the police station a few blocks away.

Once at the station, Officer Sanford contacted Officer Craig Andersen, the Drug Recognition Technician on duty, and requested that he evaluate Jackson. While waiting for Officer Andersen to arrive, Officer Sanford tested Jackson and determined that Jackson had not consumed any alcohol. Officer Sanford did not inquire further as to Jackson's disabilities, or afford him the opportunity to explain them. After about an hour, Officer Andersen arrived at the station and performed a drug influence evaluation on Jackson, in spite of Jackson's explanation that the observed symptoms of OUI actually were the result of a disability. The evaluation took approximately one hour. Officer Andersen then concluded that Jackson was not under the influence of drugs and so informed both Officer Sanford and Jackson. After Jackson's wife arrived, Jackson remained in police custody for an additional 30 to 45 minutes before he was released to go home. Officer Sanford gave Jackson a summons to appear in court on a charge of operating under the influence of intoxicating drugs. Officer Andersen, however, advised the District Attorney not to prosecute the OUI/drug charge, and it was dismissed in October 1992. After releasing Jackson, Officer Sanford filed an adverse driver's report on

Jackson to notify the Secretary of State that his driving skills may need to be re-evaluated. Jackson has been found to be a safe driver by certified driving instructors, both before and after the incident on July 21, 1992.

State Law Claims

Officer Sanford

***2** Jackson asserts state law claims against Officer Sanford for assault, false arrest, false imprisonment, malicious prosecution, and intentional and negligent infliction of emotional distress, seeking compensatory and punitive damages. *See* Complaint ¶ 1. Officer Sanford qualifies for immunity from suit on all these claims under the Maine Tort Claims Act. 14 M.R.S.A. §§ 8101–8118. Under 14 M.R.S.A. § 8111(1)(C), a police officer is absolutely immune from liability when performing any "discretionary function or duty." This section confers "absolute immunity" and is "applicable whenever a discretionary act is reasonably encompassed by the duties of the governmental employee in question, regardless of whether the exercise of discretion is specifically authorized...." 14 M.R.S.A. § 8111(1). As the Law Court has stated, an officer enjoys immunity, regardless of whether he has assessed correctly the legality of his conduct, so long as the officer's conduct does not "clearly exceed[ ], as a matter of law, the scope of any discretion he could have possessed in his official capacity as a police officer." *Polley v. Atwell,* 581 A.2d 410, 414 (Me.1990).

A police officer performs a "discretionary function" within the meaning of section 8111(1)(C) when making a warrantless arrest. *Leach v. Betters,* 599 A.2d 424, 426 (Me.1991). The undisputed facts establish that Officer Sanford had probable cause to arrest Jackson because, given the extent of his knowledge, he reasonably believed that Jackson had been driving while impaired by drugs or alcohol. Prior to arresting him, Officer Sanford had observed Jackson's slow response, slurred speech and swaying, unsteady movements. Jackson's statement that he had suffered a brain aneurysm was insufficient by itself to defeat probable cause. *See Thompson v. Olson,* 798 F.2d 552, 557 (1st Cir.1986), *cert. denied* 480 U.S. 908 (1987) (police officers not required to give significant weight to suspects' self-exonerating claims in determining whether probable cause has dissipated). Thus, Officer Sanford acted within his discretion in arresting Jackson and is entitled to immunity under the Maine Tort Claims Act.

Further, Officer Sanford has discretion under Maine law to use a reasonable degree of force when making an arrest and is entitled to immunity for his actions under 14 M.R.S.A. § 8111(1)(C) as long as his conduct does not clearly exceed the scope of that discretion. *See Leach,* 599 A.2d at 426, *citing* 17–A M.R.S.A. § 107 (authorizing a reasonable degree of nondeadly force in making an arrest). Jackson alleges that he was "placed" in the back seat of the cruiser handcuffed where he "slipped face down into the seat" and remained there while being transported to the station a few blocks away. Jackson Affidavit ¶ 18. On these facts, Officer Sanford acted within the scope of his discretion and is entitled to immunity under section 8111(1)(C).[2]

Jackson also claims that his post-arrest detention, after the officers had determined that he was not impaired by drugs or alcohol, constitutes false imprisonment. The First Circuit has interpreted Maine law to state the following rule concerning false imprisonment claims based on post-arrest detention: "[F]ollowing a legal warrantless arrest based on probable cause, an affirmative duty to release arises only if the arresting officer ascertains *beyond a reasonable doubt* that the suspicion (probable cause) which forms the basis for the privilege to arrest is unfounded." *Thompson v. Olson,* 798 F.2d 552, 556 (1st Cir.1986), *cert. denied* 480 U.S. 908 (1987) (citing *Restatement (Second) of Torts* § 134, cmt. f) (emphasis added). In *Thompson* the court held that police officers who arrested a blind diabetic while in insulin shock, mistaking his behavior for drunkenness, were not liable for false imprisonment for the time it took to transport him to the police station because the officers had not learned of sufficient information to negate clearly their earlier probable cause determination. The court explicitly declined to reach the question when such a post-arrest duty arises or how much investigation is necessary to meet that duty. *Thompson,* 798 F.2d at 557.

***3** Jackson claims that he was detained for 30 to 45 minutes after the completion of the drug tests in which Officer Andersen concluded that Jackson was not under the influence of drugs. I find that this limited additional detention was not long enough to create a genuine issue of fact as to whether Officer Sanford's failure to release him earlier "clearly exceeded, as a matter of law, the scope of any discretion he could have possessed in his official capacity as a police officer," *Polley v. Atwell,* 581 A.2d at 414. Officer Sanford is thus entitled to immunity under section 8111(1)(C) on Jackson's false imprisonment claim.

Jackson's malicious prosecution claim is based on Officer Sanford's issuance of a summons and an adverse driver's report after it had been determined that Jackson was not impaired by drugs or alcohol. It too is barred by the immunity provided to Officer Sanford under 14 M.R.S.A. § 8111(1)(C). *See Dall v. Caron,* 628 A.2d 117, 119 (Me.1993) (section 8111(1)(C) "confers immunity on the police officers for their decision to prosecute the criminal charges on which the malicious prosecution claims are based").

Because I find that Officer Sanford's conduct did not clearly exceed the scope of his discretion as an officer, he is also entitled to section 8111(1)(C) immunity on Jackson's claim of intentional and/or negligent infliction of emotional distress. *Bowen v. Dep't of Human Servs.* 606 A.2d 1051, 1055 (Me.1992) (holding that section 8111(1)(C) provides immunity from intentional and negligent torts, in particular intentional infliction of emotional distress, when government employee did not clearly exceed scope of discretion).

Town of Sanford

The Town of Sanford is immune from suit under section 8103 of the Maine Tort Claims Act. Section 8103 grants all governmental entities immunity from tort claims except for four narrow exceptions listed in section 8104–A, none of which applies here.[3] Furthermore, governmental entities are immune for the performance of an employee's discretionary function under section 8104–B.[4] Since Officer Sanford's conduct relating to Jackson's arrest falls within the scope of his discretionary function immunity, the Town of Sanford is entitled to immunity under section 8104–B as well.

The Town of Sanford has not waived its immunity by obtaining insurance coverage. As a member of the Maine Municipal Association Risk Pool, the Town of Sanford has *not* obtained liability insurance for violations of state law for which it would be entitled to immunity under the general grant of immunity in the Act. Thus, there is no liability under 14 M.R.S.A. § 8116.[5] Instead, the Town's insurance policy specifically limits coverage to "those areas for which governmental immunity has been expressly waived by 14 M.R.S.A. § 8104–A." Exs. 24 and 25 to Defendants' Statement of Uncontroverted Facts ("Defendants' Statement"), Affidavits of John Webb and Pamela Cheeseman. *Accord Roy v. City of Lewiston,* 1994 WL 129774 (D.Me. Feb. 16, 1994); *McPherson v. Auger,* 842 F.Supp. 25 (D.Me.1994).

***4** Finally, since Jackson cannot proceed on any of his state law claims, his request for punitive damages on these claims fails as well.

Federal Claims

Officer Sanford

Section 1983 Claim—Fourth and Fourteenth Amendments

A police officer is entitled to qualified immunity against § 1983 liability if "a reasonable officer could have believed" that the officer's conduct was lawful "in light of clearly established law and the information the [officer] possessed." *Anderson v. Creighton,* 483 U.S. 635, 641 (1987). *See also Prokey v. Watkins,* 942 F.2d 67 (1st Cir.1991). Taken in the light most favorable to Jackson, the undisputed facts clearly show that Officer Sanford's warrantless arrest of Jackson and use of force, if any, were "objectively reasonable" under the circumstances. First, after observing Jackson's behavior, it was reasonable for Sanford to suspect that Jackson was under the influence of drugs or alcohol. As I stated in analyzing the state law claim, given what he knew Officer Sanford was not required to accept Jackson's explanation. At the very least, a reasonable police officer could have believed that he was violating no clearly established constitutional right by arresting Jackson for OUI under these circumstances. *See Anderson v. Creighton,* 483 U.S. at 641. Second, Jackson's allegations that he was "placed" in the cruiser where he "slipped face down into the seat" are insufficient, as a matter of law, to make out a constitutional violation based on excessive force. *See Johnson v. Glick,* 481 F.2d 1028, 1033 (2d Cir.1973) ("Not every push or shove, even if it may later seem unnecessary in the peace of a judge's chambers violates an arrestee's constitutional rights."). *See also Graham v. Connor,* 490 U.S. 386, 396 (1989) ("the right to make an arrest or investigatory stop necessarily carries with it the right to use some degree of physical coercion or threat thereof to effect it").

As to Jackson's 30– to 45–minute post-arrest detention, the *Thompson v. Olson* standard described above supplies guidance. *Thompson v. Olson,* 798 F.2d 552 (1st Cir.1986), *cert. denied* 480 U.S. 908 (1987). Although the *Thompson*

court was interpreting Maine law under a claim of false imprisonment, other federal courts have adopted the *Thompson* standard to determine whether a constitutional violation under the Fourth Amendment has occurred. *See Duckett v. City of Cedar Park,* 950 F.2d 272, 278 (5th Cir.1992); *McConney v. City of Houston,* 863 F.2d 1180, 1184 (5th Cir.1989). *Thompson v. Olson* provides that a police officer has an affirmative duty to release an arrestee if he "ascertains beyond a reasonable doubt" that the probable cause for the arrest is unfounded. *Thompson,* 798 F.2d at 556. Certainly a detention of several hours after probable cause has disappeared raises obvious Fourth Amendment concerns, but I know of no constitutional principle that requires a detainee to be released *immediately* from custody under these circumstances.[6] Here, even if a factfinder could conclude that Officer Sanford had determined "beyond a reasonable doubt" that Jackson was not under the influence of drugs or alcohol yet still held him in custody for 30 to 45 minutes thereafter, I find that such a period of delay, although not ideal, is objectively reasonable, given the various demands on police officers and the inevitability that some bureaucratic slippage will occur. In any event, these facts do not create a genuine issue for trial as to whether the detention violated a clearly established constitutional right of which a reasonable police officer would have known. *Anderson v. Creighton,* 483 U.S. at 641.

***5** Jackson also claims that Officer Sanford's decision to issue a summons for OUI after it had been determined that Jackson was not under the influence of alcohol or drugs "shocks the conscience" and violates Jackson's substantive due process rights.[7] Officer Sanford believed, according to his affidavit, that once he had arrested Jackson, he had no choice but to issue the summons and have the arrest report evaluated by the District Attorney. Ex. 2 to Defendants' Statement, Affidavit of Craig Sanford ¶ 17. Moreover, according to Officer Sanford, he believed that Officer Andersen, the Drug Recognition Technician involved, would advise the District Attorney not to prosecute the charge. *Id.* Since Jackson offers no evidence to refute those beliefs or their reasonableness, I find no genuine issue for trial as to whether a reasonable officer in that situation could have believed it lawful to charge Jackson in light of clearly established law. *See Anderson v. Creighton,* 483 U.S. at 641. Therefore, I find that Officer Sanford is entitled to qualified immunity against all the claims under § 1983.

Town of Sanford

Section 1983 Claim

There is no respondeat superior or vicarious liability under § 1983. *City of Canton v. Harris,* 489 U.S. 378, 385 (1989). Thus, the Town of Sanford cannot be held liable for Officer Sanford's conduct relating to Jackson's arrest. To recover against the Town, Jackson must show that the Town maintained an unlawful custom or policy that caused a deprivation of Jackson's rights.[8] *Id.* Jackson must prove both that "(1) there existed a municipal custom or policy of deliberate indifference to the commission of constitutional violations by police officers; and (2) this custom or policy was the cause of, and moving force behind, the particular constitutional deprivation of which he was complaining." *Foley v. City of Lowell,* 948 F.2d 10, 14 (1st Cir.1991). *See also Monell v. New York City Dept. of Social Servs.,* 436 U.S. 658, 694 (1978).

Jackson bases his claim against the Town of Sanford on a failure to train its police officers in recognizing disabilities that may otherwise resemble conduct of persons under the influence of alcohol or drugs. "Only where a municipality's failure to train its [police officers] in a relevant respect evidences a 'deliberate indifference' to the rights of its inhabitants can such a shortcoming be thought of as a city 'policy or custom' that is actionable under § 1983." *Rodriques v. Furtado,* 950 F.2d. 805, 813 (1st Cir.1991), *quoting Canton v. Harris,* 489 U.S. 378, 388 (1989). Inadequate training rises to the level of municipal custom or policy only when "the need for more or different training is so obvious, and inadequacy so likely to result in the violation of constitutional rights, that the policymakers of the city can reasonably be said to have been reasonably indifferent to the need." *Bordanaro v. McLeod,* 871 F.2d 1151, 1159 (1st Cir.1989), *cert. denied sub nom. City of Everett v. Bordanaro,* 493 U.S. 820 (1989). "[A]n arguable weakness in police training [does] not amount to a 'policy of failure to train arising from deliberate indifference to citizen's constitutional rights.' " *Rodriques v. Furtado,* 950 F.2d at 812, *quoting Burns v. Loranger,* 907 F.2d 233, 239 (1st Cir.1990). "Only where a failure to train reflects a 'deliberate' or 'conscious' choice by a municipality—a 'policy' as defined by our prior cases—can a city be liable for such a failure under § 1983." *Canton v. Harris,* 489 U.S. at 389.

***6** Jackson's evidence tends to show that the Town did not train its police officers in distinguishing symptoms of a disability from criminal behavior. However, Jackson has produced no evidence that such failure was a "deliberate" or "conscious" choice by Town policymakers. Jackson has no evidence that, prior to Jackson's arrest, any Town official deliberately or recklessly decided against training police to deal with disabled persons with the knowledge that their rights would likely be violated. *See* Plaintiff's Statement of Controverted Facts ("Plaintiff's Statement") ¶¶ 13, 65–76. There is no evidence that any Town official was aware of any previous improper arrests of disabled persons, nor that Town officials were aware prior to Jackson's arrest that special training might be advisable.

Jackson cites the passage and effective date, January 26, 1992, of Title II of the Americans with Disabilities Act of 1990 ("ADA"), 42 U.S.C. §§ 12101, 12131–12134, as evidence that Town officials must have been conscious of the risk of false arrests of disabled persons. The deposition testimony, however, reveals that Town officials believed the ADA only imposed handicapped access requirements on the Town and did not apply to police practices. Plaintiff's Statement ¶ 69, 76. This uncontroverted evidence shows at most that Town officials may have been negligent in not reading or understanding the ADA anti-discrimination provisions and the related regulations. Had they done so, they might have become aware that disabled drivers in Sanford were at risk of being unconstitutionally arrested. Ignorance of the ADA's scope may be no shield against liability under that statute, but such ignorance does not satisfy or even contribute to the necessary showing of deliberate indifference for section 1983 liability on the part of a Town sued for failure to train its police officers. Because Jackson offers no evidence that Town of Sanford policymakers were, prior to Jackson's arrest, deliberately indifferent to inadequate training policies likely to result in constitutional violations, summary judgment must be granted to the Town of Sanford on the § 1983 claim.

Americans with Disabilities Act Claim

Jackson makes two claims against the Town of Sanford under the Americans with Disabilities Act of 1990 ("ADA"), 42 U.S.C. §§ 12101–12213.[9] First, he claims that his arrest was an act of discrimination based on his disability, in violation of 42 U.S.C. § 12132.[10] Second, he contends that the Town failed to train its police officers to recognize symptoms of disabilities and failed to modify police policies, practices and procedures to prevent discriminatory treatment of the disabled, as required by the anti-discrimination regulations promulgated pursuant to 42 U.S.C. § 12134.[11]

The Town claims that the ADA is simply not applicable to the facts of this case, arguing that the only controlling law is the Fourth Amendment reasonableness test. Defendants' Motion for Summary Judgment pp. 16–18. That contention is plainly wrong. Title II of the ADA clearly applies to acts of discrimination by a public entity against a disabled individual. 42 U.S.C. § 12132. The Town and its police force are a public entity and the plaintiff is a qualified individual with a disability as those terms are defined in Title II of the ADA. 42 U.S.C. § 12131. The legislative history of the ADA demonstrates that Congress was concerned with unjustified arrests of disabled persons such as Jackson alleges here.[12] Therefore, summary judgment is Denied as to Jackson's claims against the Town of Sanford based on alleged violations of the ADA.

***7 So Ordered.**

All Citations

Not Reported in F.Supp., 1994 WL 589617, 63 USLW 2351, 3 A.D. Cases 1366, 7 A.D.D. 211, 5 NDLR P 443

Footnotes

1 Ex. 1 to Plaintiff's Statement of Controverted Facts ("Plaintiff's Statement"), Affidavit of Roland Jackson ("Jackson Affidavit") ¶ 18. The complaint alleges that Jackson was "thrown into the back seat of the police cruiser with his face down and his hands cuffed behind his back." Complaint ¶ 18. There is no evidence on this factual record, however, that Jackson was "thrown" into the cruiser. Jackson claims no physical injuries as a result of his arrest.

2 Jackson also refers to 15 M.R.S.A. § 704, an ancient Maine statute recognizing a cause of action for an arrest without a warrant where it is performed in a wanton or oppressive manner. The Maine Law Court has avoided ruling on whether this cause of action survives the enactment of the Maine Tort Claims Act. *See Leach,* 599 A.2d at 426. I conclude, however, that the Maine Legislature enacted the Maine Tort Claims Act as a comprehensive measure to define the standard of

liability under state law for governmental entities and employees, thus superseding 15 M.R.S.A. § 704. If an exception to immunity for "wanton and oppressive" conduct existed still existed, I would find that Officer Sanford's conduct falls well short of that standard.

3 Section 8104–A lists four exceptions to governmental immunity from tort suits for claims that fall in the areas of: (1) "[o]wnership; maintenance or use of vehicles, machinery and equipment," (2) "[p]ublic buildings," (3) "[d]ischarge of pollutants," and (4) "[r]oad construction, street cleaning or repair." 14 M.R.S.A. § 8104–A.

4 Section 8104–B states in relevant part:

> Notwithstanding section 8104–A, a governmental entity is not liable for any claim which results from:
>
> ....
>
> 3. Performing discretionary function. Performing or failing to perform a discretionary function or duty, whether or not the discretion is abused and whether or not any statute, charter, ordinance, order, resolution or policy under which the discretionary function or duty is performed is valid or invalid.

5 Section 8116 provides in pertinent part: "If the insurance provides coverage in areas where the governmental entity is immune, the governmental entity shall be liable in those substantive areas but only to the limits of the insurance coverage."

6 In a similar case, the Fifth Circuit has stated, "[w]e do not suggest that such a detainee need be released forthwith upon ascertainment that he is clearly not intoxicated; reasonable time for administrative processing, return of property, making bail (if and where appropriate), etc., would be permissible." *McConney v. City of Houston,* 863 F.2d 1180, 1185 n. 4 (5th Cir.1989).

7 Jackson claims that the totality of the circumstances of his arrest, detention, and charging comprise a substantive due process violation. However, the U.S. Supreme Court ruled in *Graham v. Connor,* 490 U.S. 386 (1989) that all claims of unlawful search and seizure or excessive use of force are to be analyzed as Fourth Amendment claims. Only the charging decision by Officer Sanford falls outside the Fourth Amendment net cast in *Graham,* and I therefore consider Jackson's substantive due process claim only as it relates to the charging decision.

8 An action under § 1983 may be predicated upon a violation of federal constitutional or statutory rights. *Maine v. Thibotout,* 448 U.S. 1 (1980); *Albiston v. Maine Comm'r of Human Servs.,* 7 F.3d 258 (1st Cir.1993). Jackson bases his § 1983 municipal liability claim only on his purportedly unconstitutional arrest and detention, not upon an ADA violation. He refers to the ADA in this connection only to argue the egregiousness of the Town's failure to train for purposes of the constitutional violation. *See* Plaintiff's Memorandum Opposing Summary Judgment pp. 19–21.

9 Jackson does not appear to be bringing a claim against Officer Sanford under the ADA, but rather argues that the actions of Officer Sanford are to be considered the actions of the Town for purposes of the ADA. Plaintiff's Memorandum Opposing Summary Judgment p. 23. In any event, a claim against Officer Sanford would fail because a police officer is not a "public entity" within the meaning of the ADA. *See* 42 U.S.C. § 12131(1).

10 The relevant portion of Section 12132 provides that "no qualified individual with a disability shall, by reason of such disability, ... be subjected to discrimination by [a public entity.]" 42 U.S.C. § 12132.

11 The pertinent regulations established by the Department of Justice provide:

> A public entity shall, within one year of the effective date of this part, evaluate its current services, policies, and practices, and the effects thereof, that do not or may not meet the requirements of this part and, to the extent modification of any such services, policies, and practices is required, the public entity shall proceed to make the necessary modifications.

28 C.F.R. § 35.105(a);

> A public entity shall make reasonable modifications in policies, practices, or procedures when the modifications are necessary to avoid discrimination on the basis of disability, unless the public entity can demonstrate that making the modifications would fundamentally alter the nature of the service, program, or activity.

28 C.F.R. § 35.130(b)(7).

12 The House Judiciary Committee stated: "In order to comply with the non-discrimination mandate, it is often necessary to provide training to public employees about disability. For example, persons who have epilepsy, and a variety of other disabilities, are frequently inappropriately arrested and jailed because police officers have not received proper training in the recognition of and aid of seizures. Such discriminatory treatment based on disability can be avoided by proper training." H.R.Rep. No. 101–485(III), 101st Cong., 2nd Sess. 50, *reprinted in* 1990 U.S.C.C.A.N. 473.

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New York Official Reports

16 N.Y.3d 217, 945 N.E.2d 461, 920 N.Y.S.2d 268, 2011 N.Y. Slip Op. 01069

****1** Yasmin Kabir, Respondent

v

County of Monroe et al., Appellants.

Court of Appeals of New York
28
Argued January 13, 2011

Decided February 17, 2011

CITE TITLE AS: Kabir v County of Monroe

SUMMARY

Appeal, by permission of the Appellate Division of the Supreme Court in the Fourth Judicial Department, from an order of that Court, entered December 30, 2009. The Appellate Division (1) reversed, on the law, so much of an order of the Supreme Court, Monroe County (Thomas A. Stander, J.; op 21 Misc 3d 1107 [A], 2008 NY Slip Op 52000[U]), as had granted those parts of defendants' motion seeking summary judgment dismissing the complaint as against defendant County of Monroe and dismissing the amended complaint, and denied plaintiff's cross motion seeking partial summary judgment with respect to liability, (2) denied those parts of the motion seeking summary judgment dismissing the complaint as against defendant County of Monroe and dismissing the amended complaint, (3) reinstated the complaint as against defendant County of Monroe and the amended complaint, and (4) granted plaintiff's cross motion. The following question was certified by the Appellate Division: "Was the order of this Court entered December 30, [2009] properly made?"

Kabir v County of Monroe, 68 AD3d 1628, affirmed.

HEADNOTE

Municipal Corporations
Tort Liability
Police

The reckless disregard standard of care in Vehicle and Traffic Law § 1104 (e) only applies when a driver of an authorized emergency vehicle involved in an emergency operation engages in the specific conduct exempted from the rules of the road by Vehicle and Traffic Law § 1104 (b); any other injury-causing conduct of such a driver is governed by the principles of ordinary negligence. Section 1104 empowers the driver of an "authorized emergency vehicle," when involved in an emergency operation, to exercise the rules-of-the-road privileges set forth in subdivision (b) subject to the conditions in subdivision (c). Subdivision (e) specifies that the "foregoing provisions" shall not relieve the driver of an authorized emergency vehicle from the duty to drive safely "nor shall such provisions protect the driver from the consequences of his reckless disregard for the safety of others." Thus, subdivision (e) cautions those drivers to operate their vehicles as safely as possible in an emergency and makes them answerable in damages if their reckless exercise of a privilege granted in subdivision (b) causes personal injuries or property damage. If the conduct causing the accident resulting in injuries and damages is not privileged under Vehicle and Traffic Law § 1104 (b), the standard of ***218** care for determining civil liability is ordinary negligence. Moreover, the legislative history supports the view that the reckless disregard standard of care of subdivision (e) is limited to accidents or incidents caused by exercise of a privilege identified in subdivision (b). That history confirms that those provisions are interrelated such that subdivision (e) does not create a reckless disregard standard of care independent of the privileges enumerated in subdivision (b).

RESEARCH REFERENCES

Am Jur 2d, Automobiles and Highway Traffic §§ 224, 296, 829, 945, 946, 1115; Am Jur 2d, Municipal, County, School, and State Tort Liability §§ 194, 436.

McKinney's, Vehicle and Traffic Law § 1104 (b), (c), (e).

NY Jur 2d, Automobiles and Other Vehicles §§ 711, 1029; NY Jur 2d, Government Tort Liability § 148.

Prosser and Keeton, Torts (5th ed) § 34.

ANNOTATION REFERENCE

See ALR Index under Automobiles and Highway Traffic; Counties; Police and Law Enforcement Officers.

FIND SIMILAR CASES ON WESTLAW

Database: NY-ORCS

Query: reckless /2 disregard /s authorized /2 emergency /2 vehicle & momentary /4 lapse

POINTS OF COUNSEL

William K. Taylor, County Attorney, Rochester (*Howard A. Stark* of counsel), for appellants.

I. Deputy DiDomenico was engaged in an emergency operation of a police vehicle and an authorized emergency vehicle. (*Saarinen v Kerr*, 84 NY2d 494; *Szczerbiak v Pilat*, 90 NY2d 553; *O'Banner v County of Sullivan*, 16 AD3d 950; *Criscione v City of New York*, 97 NY2d 152; *Allen v Town of Amherst*, 8 AD3d 996.) II. The Vehicle and Traffic Law § 1104 (e) "reckless disregard" standard is applicable to driving in compliance with the rules of the road. (*Saarinen v Kerr*, 84 NY2d 494; *Szczerbiak v Pilat*, 90 NY2d 553; *Criscione v City of New York*, 97 NY2d 152; *Badalamenti v City of New York*, 30 AD3d 452; *Alvarado v Dillon*, 67 AD3d 1214; *Ham v City of Syracuse*, 37 AD3d 1050, 8 NY3d 976; *Campbell v City of Elmira*, 84 NY2d 505; *Lorber v Town of Hamburg*, 225 AD2d 1062; *O'Banner v County of Sullivan*, 16 AD3d 950; *Tutrani v County of Suffolk*, 64 AD3d 53.) III. Deputy DiDomenico's conduct was not in reckless disregard for the safety of ***219** others. (*Szczerbiak v Pilat*, 90 NY2d 553; *Saarinen v Kerr*, 84 NY2d 494; *Hughes v Chiera*, 4 AD3d 872.)

Brenna, Brenna & Boyce, PLLC, Rochester (*Robert L. Brenna, Jr.*, and *Donald G. Rehkopf, Jr.*, of counsel), for respondent.

I. The majority in the Appellate Division decision below, as a matter of law, correctly interpreted Vehicle and Traffic Law § 1104 (b) as creating a limited statutory privilege against ordinary negligence for the specifically enumerated exceptions in section 1104 (b). (*Riley v County of Broome*, 95 NY2d 455; *Sanders v Winship*, 57 NY2d 391; *Ayers v O'Brien*, 13 NY3d 456; *Saarinen v Kerr*, 84 NY2d 494; *Szczerbiak v Pilat*, 90 NY2d 553; *Criscione v City of New York*, 97 NY2d 152; *Tutrani v County of Suffolk*, 42 AD3d 496.) II. The majority below was correct as a matter of law in rejecting the argument that Vehicle and Traffic Law § 1104 (e) exempts any and all activity of a driver of an authorized emergency vehicle engaged in an emergency operation absent reckless conduct. (*Town of Massena v Niagara Mohawk Power Corp.*, 45 NY2d 482.)

Christine Malafi, County Attorney, Hauppauge (*Christopher A. Jeffreys* of counsel), for County of Suffolk, amicus curiae.

I. The provisions of the Vehicle and Traffic Law demonstrate that the ""reckless disregard" standard set forth in Vehicle and Traffic Law § 1104 (e) applies to all authorized emergency vehicles. (*Saarinen v Kerr*, 84 NY2d 494; *Rangolan v County of Nassau*, 96 NY2d 42; *Matter of Robert J.*, 2 NY3d 339.) II. This Court's prior interpretations of Vehicle and Traffic Law § 1104 (e) demonstrate that the "reckless disregard" standard applies to all authorized emergency vehicles. (*Stanton v State of New York*, 29 AD2d 612, 26 NY2d 990; *Abood v Hospital Ambulance Serv.*, 30 NY2d 295; *Saarinen v Kerr*, 84 NY2d 494; *Williams v City of New York*, 2 NY3d 352; *Gonzalez v Iocovello*, 93 NY2d 539; *Campbell v City of Elmira*, 84 NY2d 505; *Gervasi v Peay*, 254 AD2d 172; *Daly v County of Westchester*, 63 AD3d 988; *Lupole v Romano*, 307 AD2d 697; *Palmer v City of Syracuse*, 13 AD3d 1229.) III. This Court's interpretation of the "reckless disregard" provision of Vehicle and Traffic Law § 1103 is applicable to Vehicle and Traffic Law § 1104 (e). (*Riley v County of Broome*, 95 NY2d 455; *Bliss v State of New York*, 272 AD2d 567, 95 NY2d 911; *Saarinen v Kerr*, 84 NY2d 494; *Primeau v Town of Amherst*, 5 NY3d 844.)

Andrew M. Cuomo, Attorney General, Albany (*Robert M. Goldfarb, Barbara D. Underwood* and *Andrew D. Bing* of counsel), ***220** for New York State Division of State Police, amicus curiae.

Vehicle and Traffic Law § 1104 applies a reckless disregard standard of civil liability to all conduct of a driver of an emergency vehicle engaged in an emergency operation. (*Saarinen v Kerr*, 84 NY2d 494; *Campbell v City of Elmira*, 84 NY2d 505; *Criscione v City of New York*, 97 NY2d 152; *Riley v County of Broome*, 95 NY2d 455; *Szczerbiak v Pilat*, 90 NY2d 553.)

OPINION OF THE COURT

Read, J.

On this appeal, we hold that the reckless disregard standard of care in Vehicle and Traffic Law § 1104 (e) only applies when a driver of an authorized emergency vehicle involved in an emergency operation engages in the specific conduct exempted from the rules of the road by Vehicle and Traffic Law § 1104 (b). Any other injury-causing conduct of such a driver is governed by the principles of ordinary negligence.

I.

At 3:57 p.m. on September 20, 2004, defendant John DiDomenico, a road patrol deputy in the Monroe County Sheriff's Office, was on routine patrol in a marked police

vehicle **2 when he received a radio dispatch from the Office of Emergency Communications dispatch or "911 center" directing him to respond to a stolen vehicle report at an address in Henrietta, New York. At the time, he was heading south on West Henrietta Road, nearing a traffic light at the intersection of West Henrietta Road and Brighton Henrietta Town Line Road, which marks the border between the Towns of Brighton (on the north side) and Henrietta (on the south side).

DiDomenico soon received a second radio dispatch, which requested backup for another officer who was responding to a burglary alarm at a location in Henrietta. Because the 911 center categorized the burglary alarm as ""classification one"—meaning "a serious call . . . that . . . needs immediate attention"—the deputy acknowledged the request, telling the dispatcher that he would assist with the burglary alarm before addressing the stolen vehicle report, which was assigned a higher classification and therefore a lower priority. At 4:02 p.m., the dispatcher transmitted information about the burglary call, including the address and the names of cross streets, to the mobile data terminal inside the deputy's vehicle.

DiDomenico did not activate the emergency lights or siren on his vehicle; he was traveling at a speed of 25 to 30 miles per *221 hour in a 40-mile-per-hour zone, and does not recall if he speeded up or slowed down after receiving the dispatch. The deputy explained that he was not familiar with the location of the burglary alarm, and "due to the amount of traffic during that time of day, [he] didn't want to initiate any emergency equipment without knowing where [he] was positively going." He therefore touched the terminal and "looked down for two to three seconds" at the display "to view [the names of] the cross streets." When the deputy lifted his gaze, he realized that "traffic had slowed." Although he immediately applied his brakes, he was unable to stop before rear-ending the vehicle in front of him, which was driven by plaintiff Yasmin Kabir.

There are three southbound lanes—two through lanes and a lefthand-turn lane—at the intersection of West Henrietta Road and Brighton Henrietta Town Line Road. Kabir testified that she was traveling in the left travel lane. She had stopped for a red traffic light, and was just beginning to move forward slowly toward the congested intersection when her car was hit.

In October 2005 and February 2006 Kabir brought actions, subsequently consolidated, against Monroe County, DiDomenico and others, alleging serious injury under New York's No-Fault Law. In May 2008, defendants moved for summary judgment to dismiss the complaints, and in July 2008, Kabir cross-moved for partial summary judgment on liability. The parties disputed whether Vehicle and Traffic Law § 1104 applied, making DiDomenico liable for the accident only if he acted with "reckless disregard for the safety of others" (Vehicle and Traffic Law § 1104 [e]; *see also Saarinen v Kerr*, 84 NY2d 494 [1994] [holding that the standard of care under Vehicle and Traffic Law § 1104 is reckless disregard and addressing the conduct required to show recklessness]). **3 On September 26, 2008, Supreme Court awarded summary judgment to defendants (21 Misc 3d 1107[A], 2008 NY Slip Op 52000[U] [Sup Ct, Monroe County 2008]).[1] The court concluded that DiDomenico's conduct was covered by section 1104, and that Kabir had not raised a triable issue of fact as to whether he acted with reckless disregard.

On December 30, 2009, the Appellate Division reversed, with two Justices dissenting (68 AD3d 1628 [4th Dept 2009]). The majority held that the reckless disregard standard in section 1104 (e) is limited to accidents caused by conduct privileged *222 under section 1104 (b). Because DiDomenico's injury-causing conduct was not exempt under this provision, the majority concluded that "the applicable standard for determining liability [was] the standard of ordinary negligence" (*id.* at 1633). The court further observed that "a rear-end collision with a vehicle in stop-and-go traffic creates a prima facie case of negligence with respect to the operator of the rear vehicle"; therefore, "partial summary judgment on liability in favor of the person whose vehicle was rear-ended is appropriate in the absence of a nonnegligent explanation for the accident" (*id.*). Concluding that Kabir had met her burden on the cross motion and that defendants had not put forward a nonnegligent explanation, the court reinstated the complaint against defendants and granted Kabir's cross motion for partial summary judgment on liability.[2] The dissent interpreted section 1104 differently, taking the position that the reckless disregard standard was applicable to any injury-causing conduct of a driver of an emergency vehicle involved in an emergency operation. On March 19, 2010, the Appellate Division granted defendants leave to appeal, and certified to us the question of whether its order was properly **4 made (71 AD3d 1548 [4th Dept 2010]). We now affirm and therefore answer the certified question in the affirmative.

II.

Section 1104 was put in place in 1957 as part of what is now title VII of the Vehicle and Traffic Law, which was intended to "creat[e] a uniform set of traffic regulations, or the 'rules of the road' . . . to update and replace the former traffic regulations, and bring them into conformance with the Uniform Vehicle Code adopted in other states" (*Riley v County of Broome*, 95 NY2d 455, 462 [2000] [citations omitted]; *see also* L 1957, ch 698). Subdivision (a) of this provision empowers the driver of an ***223** "authorized emergency vehicle" (defined in Vehicle and Traffic Law § 101)[3] when involved in an "emergency operation" (defined in Vehicle and Traffic Law § 114-b)[4] to "exercise *the privileges set forth in this section [1104]*, but subject to *the conditions herein stated*" (emphases added]). The statute then lists these privileges in subdivision (b):

> "1. Stop, stand or park irrespective of the provisions of this title [VII];
>
> "2. Proceed past a steady red signal, a flashing red signal or a stop sign, but only after slowing down as may be necessary for safe operation;
>
> "3. Exceed the maximum speed limits so long as he does not endanger life or property;
>
> "4. Disregard regulations governing directions of movement or turning in specified directions" (Vehicle and Traffic Law § 1104 [b]).

The privileges correspond generally with articles in title VII of the Vehicle and Traffic Law, entitled "Rules of the Road" (*see* arts 32 ["Stopping, Standing, and Parking"], 29 ["Special ****5** Stops Required"], 24 ["Traffic Signs, Signals and Markings"], 30 ["Speed Restrictions"], 25 ["Driving on Right Side of Roadway, Overtaking and Passing, Etc."], 26 ["Right of Way"], 28 ["Turning and Starting and Signals on Stopping and Turning"]).

Subdivision (c) of section 1104 sets out prerequisites or conditions upon the exercise of the privileges listed in subdivision (b): except in the case of police vehicles or bicycles "the exemptions herein granted" are available only when the authorized emergency vehicle is making use of prescribed audible and visual signals.

Finally, subdivision (e) of section 1104 specifies that "*[t]he foregoing provisions* shall not relieve the driver of an authorized emergency vehicle from the duty to drive with due regard for the safety of all persons, nor shall such provisions protect the driver from the consequences of his reckless disregard for the safety of others" (emphasis added). Thus, subdivision (e)cautions ***224** these drivers to operate their vehicles as safely as possible in an emergency and makes them answerable in damages if their reckless exercise of a privilege granted by subdivision (b) causes personal injuries or property damage.

But defendants and the dissent do not see it that way. They understand subdivision (e) to apply the reckless disregard standard of care to *all* injury-causing conduct of drivers of authorized emergency vehicles involved in emergency operations, whether or not that conduct is exempt under subdivision (b). But subdivision (e) links the reckless disregard standard of care to ""[t]he foregoing provisions," which include the conditions in subdivision (c) and the privileges in subdivision (b).

The dissent complains that we have "interpret[ed] Vehicle and Traffic Law § 1104 (e) as if it read: 'When the driver of an emergency vehicle engages in privileged conduct, that driver will be protected from liability unless he or she acts in reckless disregard of the safety of others' " (dissenting op at 236-237). The dissent, however, interprets subdivision (e) to mean "The driver of an authorized emergency vehicle involved in an emergency operation shall be protected from liability unless he or she acts in reckless disregard of the safety of others." As the dissent acknowledges, though, subdivision (e) is written in the negative; it refers only to "[t]he foregoing provisions"; and the "foregoing provisions" only privilege the conduct identified in subdivision (b), not any and all conduct of a driver.

Further, the dissent opines that the "evident intent" of the reference to ""foregoing provisions" in Vehicle and Traffic Law § 1104 (e) "was to ensure that the creation of the privileges earlier in the statute would not be misinterpreted as precluding an emergency responder from being held accountable when he or she caused an accident while engaged in privileged conduct" (dissenting op at 237). Thus, such emergency responder "cannot receive a traffic citation" for conduct enumerated under section 1104 (b) (*id.* at 232); and "the fact that a driver failed to conform to a traffic law" would not "constitute prima facie evidence of ****6** negligence," or "be viewed as recklessness per se" (*id.* at 237-238). Assuming this interpretation of the interplay between subdivisions (b) and (e) is correct, it does not follow that section 1104 (e) creates a reckless disregard standard of care for unprivileged conduct. Indeed, the logical implication of the dissent's reading of section 1104 is that the standard

of care for *all* ***225** emergency driving—even if privileged under subdivision (b)—is negligence.[5]

The Legislature certainly knew how to create the safe harbor from ordinary negligence envisioned by defendants and the dissent. For example, the Legislature might simply have structured section 1104 (a) and (b) along the lines of section 1103 (b). As originally adopted in 1957, this provision stated in relevant part that

> "*[u]nless specifically made applicable, the provisions of this title [VII] shall not apply* to persons, teams, motor vehicles, and other equipment while actually engaged in work on a highway . . . but shall apply to such persons and vehicles when traveling to or from such work" (former Vehicle and Traffic Law § 1103 [b] [emphasis added]).

Thus, rather than taking the approach of section 1104 (a) and (b)—excusing the driver of an authorized emergency vehicle from complying with certain rules of the road when ****7** involved in an emergency operation—the Legislature in section 1103 (b) exempted "persons, teams, motor vehicles, and other equipment while actually engaged in work on a highway" from *all* the rules of the road, subject to any statutory exceptions. Subsequently, the Legislature "soften[ed] the outright exemption" in section 1103 (b) by adding the due regard/reckless disregard language of section 1104 (e) (*Riley*, 95 NY2d at 465; *see also* L 1974, ch 223). In addition, in 1987 the Legislature created a statutory exception, making "specifically . . . applicable" those ***226** provisions in title VII regarding driving under the influence of drugs or alcohol (L 1987, ch 528).[6]

Legislative history further supports the view that the reckless disregard standard of care in Vehicle and Traffic Law § 1104 (e) is limited to accidents or incidents caused by exercise of a privilege identified in Vehicle and Traffic Law § 1104 (b). In its 1954 report, the New York State Joint Legislative Committee on Motor Vehicle Problems described section 114 of its proposed text—adopted by the Legislature in 1957 as Vehicle and Traffic Law § 1104 with minor, nonsubstantive changes (*see* L 1957, ch 698), and current Vehicle and Traffic Law § 1104 (a), (b), (c) and (e)[7]— as follows:

> "Section 114 *lists certain privileges accorded* drivers of authorized emergency vehicles *when responding to an emergency call or when in pursuit of an actual or suspected violator of the law*. They may park in prohibited places, pass stop signs or signals, exceed speed limits and disregard turning restrictions, but in all cases only with due regard for the safety of others. The special privileges are granted, except in the case of police vehicles, only when the driver . . . is giving such audible signal as may be reasonably necessary and when his vehicle is displaying the proper warning lights" (1954 NY Legis Doc No. 36, at 35 [emphases added]).

Further,

> ***227** ****8** "Section 114 [i.e., section 1104] is divided into four subsections. Subsection (a) [i.e., section 1104 (a)] states *when, and under what circumstances, the driver of an authorized emergency vehicle may exercise the special privileges conferred by subdivision (b)* . . .
>
> "Subsection (b) [i.e., section 1104 (b)] sets forth *four immunities which are granted* to emergency vehicles when they satisfy all the other prerequisites of section 114 . . .
>
> "[T]hese privileges are conditioned [in subsection (c); i.e., section 1104 (c)] upon proper identification of the emergency vehicle so that motorists will have sufficient warning of their approach. The exemption given to police vehicles is required because they may need to approach suspected criminals without giving advance notice. . . .
>
> "Finally, subsection (d) [i.e., section 1104 (e)] again repeats the caveat of paragraph (b) of section 224[8] by requiring safe driving from the drivers of emergency vehicles under all circumstances. It makes it clear that *the exemptions shall not be construed* to relieve a driver of an authorized emergency vehicle from the duty to drive with due regard for the safety of all persons, nor shall *the grant of these privileges* protect the driver from the consequences of his reckless disregard for the safety of others" (*id.* at 36-37 [emphases added]).

This discussion confirms that these provisions are interrelated such that subdivision (e) does not create a reckless disregard standard of care independent of the privileges enumerated in ****9** subdivision (b).

Additionally, we note that this is the first time we have been asked to decide the question presented by this appeal. This is ***228** not entirely surprising: subdivision (b) exempts the conduct most likely to lead to a motor vehicle accident severe enough to prompt a lawsuit; for example, speeding or running a red light. Defendants and amici curiae insist, however, that in our prior decisions, particularly *Saarinen* and *Szczerbiak v Pilat* (90 NY2d 553 [1997]), we have held that the reckless disregard standard of care applies when the conduct of an emergency vehicle driver involved in an emergency operation causes personal injuries or property damage, regardless of whether that conduct is privileged under Vehicle and Traffic Law § 1104 (b).[9] Amicus curiae New York State Division of State Police, for example, argues that ""[w]hile the facts of

[*Saarinen*] involved a police officer who exceeded the speed limit during a chase . . . [the] Court's holding was broad and unambiguous," quoting the following passage:

"*Faced squarely with this question of statutory interpretation for the first time*, we hold that a police officer's conduct in pursuing a suspected lawbreaker may not ****10** form the basis of civil liability to an injured bystander unless the officer acted in reckless disregard for the safety of others" (*Saarinen*, 84 NY2d at 501 [emphasis added]).

Whether the police officer in *Saarinen* was entitled to have his actions judged by the standard of care in section 1104 (e) was not at issue, as the Division acknowledges. The dispute was over what that standard entailed. Thus, in the paragraph preceding the quoted language, we explained that "[b]ecause the ***229** statute makes reference to both 'due regard' and 'reckless disregard' for the safety of others, the courts of this State have had some difficulty articulating the precise test for determining a driver's liability for injuries resulting from the operation of an emergency vehicle" (*id.* at 500). We observed that some New York courts had settled on "recklessness" as the standard, while others adopted " 'unreasonable under the circumstances' . . . and 'negligen[ce]' . . . , either alone or interchangeably with 'recklessness,' to describe the level of culpability that will support liability under Vehicle and Traffic Law § 1104 (e)" (*id.* [citations omitted]). The "question of statutory interpretation" that we referred to in the language cited by the State Police was therefore the nature of the standard of care established by section 1104 (e) in a situation where the police officer was clearly entitled to its benefit.

And notwithstanding arguments made to the contrary, dicta in *Saarinen* undercut, rather than support, defendants' view of section 1104. For example, the very first paragraph of the opinion includes the following language:

"Vehicle and Traffic Law § 1104 . . . qualifiedly exempts [drivers of authorized emergency vehicles] from *certain traffic laws* when they are "involved in an emergency operation.' At issue in this appeal are the meaning and effect of the statute's provisions for civil liability in the event of an accident. Consistent with its language and purpose, we hold that Vehicle and Traffic Law § 1104 (e) precludes the imposition of liability for *otherwise privileged conduct* except where the conduct rises to the level of recklessness" (*id.* at 497 [citation omitted and emphases added]).[10]

****11** Importantly, we later noted that "[t]he touchstone of our analysis" in *Saarinen* was Vehicle and Traffic Law § 1104 ***230** "which permits the driver of an 'authorized emergency vehicle' to proceed past red traffic lights and stop signs, exceed the speed limit and disregard regulations regarding the direction of traffic, as long as certain safety precautions are observed. *The privileges afforded by the statute are circumscribed by section 1104 (e)* . . . [which] establishes the standard for determining an officer's civil *liability* for *damages resulting from the privileged operation of an emergency vehicle*" (84 NY2d at 499-500 [citations and internal quotation marks omitted; emphases added]).

In *Szczerbiak*, a case that went to trial about six weeks after we handed down our decision in *Saarinen*, the sole question on appeal was "whether [the police officer's] conduct in driving the automobile rose to the level of "reckless disregard' for the safety of others required by Vehicle and Traffic Law § 1104 (e)" (*Szczer- biak*, 90 NY2d at 555). The accident at issue was arguably caused by the police officer's failure to keep a proper lookout: just as he took his eyes off the road to activate his emergency lights and siren, the officer hit and killed a 16-year-old pedestrian/bicyclist. As a result, the plaintiffs in *Szczerbiak* might have contended that the officer's conduct was not to be evaluated under the reckless disregard standard of care in Vehicle and Traffic Law § 1104 (e) because the fatality did not result from his exercise of a privilege granted by section 1104 (b). But they never made this argument and we therefore did not decide this issue; we merely remarked that even if the officer "were negligent in glancing down, this "momentary judgment lapse' does not alone rise to the level of recklessness required of the driver of an emergency vehicle in order for liability to attach" (90 NY2d at 557).

Finally, the dissent devotes several pages to a discussion of the many supposed "practical problems" presented by our interpretation of the statute (dissenting op at 240-242). Simply put, section 1104 (e) establishes a reckless disregard standard of care "for determining . . . civil liability for damages resulting from the privileged operation of an emergency vehicle" (*Saarinen*, 84 NY2d at 500); if the conduct causing the accident resulting in injuries and damages is not privileged under ***231** Vehicle and Traffic Law § 1104 (b), the standard of care for determining civil liability is ordinary negligence.

Accordingly, the order of the Appellate Division should be affirmed, with costs, and the certified question should be answered in the affirmative.

Graffeo, J. (dissenting). By concluding that the conduct of a driver of an emergency vehicle involved in an emergency operation should be assessed under the reckless disregard standard of care under Vehicle and Traffic Law § 1104 (e) only when the driver is engaged in one of the activities privileged in section 1104 (b), the majority reads a limitation into section 1104 (e) that I believe is unworkable, incompatible with our precedent and unwarranted given the language in the statute. The majority's new rule is also inconsistent with the public policy underlying section 1104 because it creates an unjustifiable distinction that extends the protection of qualified immunity only to police, fire or ambulance personnel who speed, run a red light or violate a handful of other traffic laws while responding to emergency calls. Thus, the majority holding has the perverse effect of encouraging conduct directly adverse to the public policy of requiring emergency responders to exercise the utmost care during emergency operations. As we observed in *Saarinen v Kerr* (84 NY2d 494 [1994]), section 1104 (e) provides emergency responders with the benefit of the heightened "reckless disregard" standard of liability in recognition of the fact that these responders must make split-second decisions (that sometimes may include violating traffic laws) in service of a greater good. Because the majority undermines this proposition, I respectfully dissent.

I.

While driving a marked police vehicle, and in the course of responding to a radio call of a possible burglary in progress, Monroe County Deputy Sheriff John DiDomenico collided with a vehicle operated by plaintiff Yasmin Kabir after he momentarily took his eyes off the road to consult a data terminal in his vehicle. Because DiDomenico was operating an "authorized emergency vehicle" as defined in Vehicle and Traffic Law § 101 while engaged in an "emergency operation" as defined in Vehicle and Traffic Law § 114-b, any liability arising from his conduct must be assessed under the standard set forth in Vehicle and Traffic Law § 1104. That statute contains two provisions that are at the heart of this controversy. The first— ***232** section 1104 (b)— creates four categories of "privileged" conduct, specifically permitting an emergency responder to disregard a variety of traffic laws, including proceeding through red lights and exceeding maximum speed limits. In other words, section 1104 (b) exempts emergency responders from compliance with certain rules of the road. As a result, the operator of a fire truck who, for example, drives through a red light while responding to a call cannot receive a ****12** traffic citation since that conduct is permitted under section 1104 (b).

But section 1104 (b) says nothing about the standard of liability that applies when an emergency responder is involved in an accident giving rise to a lawsuit seeking civil damages. That issue is addressed in section 1104 (e), which provides:

> "The foregoing provisions shall not relieve the driver of an authorized emergency vehicle from the duty to drive with due regard for the safety of all persons, nor shall such provisions protect the driver from the consequences of his reckless disregard for the safety of others."

Although we have previously recognized that this provision is not a model of clarity, in *Saarinen* (84 NY2d 494) we determined that it imposes a heightened "reckless disregard" standard of care applicable to police officers and other responders engaged in emergency operations. We held that

> "a police officer's conduct in pursuing a suspected lawbreaker may not form the basis of civil liability to an injured bystander unless the officer acted in reckless disregard for the safety of others. This standard demands more than a showing of a lack of 'due care under the circumstances'—the showing typically associated with ordinary negligence claims. It requires evidence that 'the actor has intentionally done an act of an unreasonable character in disregard of a known or obvious risk that was so great as to make it highly probable that harm would follow' and has done so with conscious indifference to the outcome" (*id.* at 501 [citations omitted]).

This statement of the relevant standard was unconditional and encompassed every aspect of a police officer's "conduct"—we did not suggest that an emergency responder's actions are to be assessed under the reckless disregard standard only if, at the time of the accident, he or she was engaged in conduct privileged under section 1104 (b). Prior to the Appellate Division decision ***233** in this case, no court had imposed such a limitation on the scope of section 1104 (e).

Since *Saarinen*, Vehicle and Traffic Law § 1104 has been understood to impose a two-part test: if the driver was operating an "authorized emergency vehicle" and was involved in an "emergency operation" as those terms are defined in the statutory scheme, the driver was entitled to the qualified immunity afforded by the reckless disregard standard (*see e.g. Herod v Mele*, 62 AD3d 1269 [4th Dept 2009], *lv denied* 13 NY3d 717 [2010]; *Gonyea v County of Saratoga*, 23 AD3d 790 [3d Dept 2005]; *Rodriguez v Incorporated Vil. of Freeport*, 21 AD3d 1024 [2d Dept 2005]).

The majority now adds a third component to the equation, precluding emergency ****13** responders from obtaining the benefit of the reckless disregard standard unless—ironically—they violated one of the traffic rules listed in section 1104 (b). Police officers, firefighters or ambulance drivers who manage to obey traffic signals or travel within the speed limit are out of luck if they are involved in an accident. Their conduct will be assessed under the ordinary negligence standard, making it much easier for these "law abiding" emergency responders to be held liable for damages. Does this make sense?

The precise issue presented in this case was not raised by the parties in *Saarinen* and the police officer whose conduct was under review in that case had apparently exceeded the speed limit, thereby engaging in privileged conduct. But our explanation of the legislative policy underlying the statute—as well as our analysis in that case and others—is antithetical to the approach now taken by the majority. We explained that Vehicle and Traffic Law § 1104

> "represents a recognition that the duties of police officers and other emergency personnel often bring them into conflict with the rules and laws that are intended to regulate citizens' daily conduct and that, consequently, they should be afforded a qualified privilege to disregard those laws where necessary to carry out their important responsibilities. Where the laws in question involve the regulation of vehicular traffic, the exercise of this privilege will inevitably increase the risk of harm to innocent motorists and pedestrians. Indeed, emergency personnel must routinely make conscious choices that will necessarily escalate the over-all risk to the public at large in the service of an immediate, specific law enforcement or public safety goal.
>
> ***234** "Measuring the 'reasonableness' of these choices against the yardstick of the traditional 'due care under the circumstances' standard would undermine the evident legislative purpose of Vehicle and Traffic Law § 1104, i.e., affording operators of emergency vehicles the freedom to perform their duties unhampered by the normal rules of the road . . . [T]he possibility of incurring civil liability for what amounts to a mere failure of judgment could deter emergency personnel from acting decisively and taking calculated risks in order to save life or property or to apprehend miscreants" (84 NY2d at 502).

Saarinen's public policy analysis is inconsistent with the majority's holding here which apparently requires parsing the specific conduct that a police officer was engaged in during an emergency operation to distinguish privileged acts from nonprivileged acts for the purpose of altering the standard of liability depending on which immediate conduct caused the accident. ****14** This approach is incompatible with *Saarinen*'s concern that emergency responders be given appropriate latitude to make the quick decisions that are necessary when responding to police calls and other emergency situations. Under the rule the majority now adopts, police officers are free to make such decisions without fear of reprisal only when the judgment involves running a red light or exceeding the speed limit; if drivers choose instead to adhere to the rules of the road, any accompanying lapse in judgment may give rise to civil liability.

We have never applied different standards of liability to an officer's conduct depending on whether it did or did not fit within one of the privileges articulated in Vehicle and Traffic Law § 1104 (b). In *Saarinen*, when the police officer observed a car being driven recklessly, he began to follow the vehicle, activating his siren and emergency lights. When the vehicle failed to pull over, instead speeding away, the officer gave chase, driving above the speed limit in pursuit. During the chase, the suspect's car crashed into a vehicle operated by a civilian bystander, causing injury. The civilian sued both the suspect and the officer's municipal employer. After finding that section 1104 (e) imposed a reckless disregard standard, the Court held that the municipality was entitled to summary judgment dismissing the complaint. As is common in section 1104 cases, resolution of whether the officer's conduct met the reckless disregard standard (i.e., whether there was a question of fact on that score) turned not ***235** on the so-called privileged conduct—there, speeding—but on other actions taken by the driver. We explained:

> "[A]s a matter of law, Officer McGown's pursuit of [the suspect] did not overstep the limits of the statutory qualified privilege. It is true that McGown exceeded the posted speed limit, but that conduct certainly cannot alone constitute a predicate for liability, since it is expressly privileged under Vehicle and Traffic Law § 1104 (b) (3). The other circumstances on which plaintiff and defendant [suspect] rely—the wet condition of the road, the possibility of other vehicular traffic in the vicinity, the over-all speed of McGown's vehicle and McGown's purported delay in calling his headquarters—are similarly unpersuasive, particularly in the context of an inquiry based on the "reckless disregard' standard" (*Saarinen*, 84 NY2d at 503).

We thus applied the reckless disregard standard to *all* of the officer's conduct, including claims that he failed to properly

consider the fact that other traffic might be in the area and failed to promptly report the chase to his supervisors (who might have ordered him to desist). We did not analyze the privileged conduct under the heightened standard and then apply another, less stringent standard to conduct not addressed in section 1104 (b). **15

We followed the same approach in *Szczerbiak v Pilat* (90 NY2d 553 [1997]), a case similar to this case because it involved an allegation that an accident was caused by an officer momentarily removing his eyes from the roadway. There, while driving his police vehicle in response to a radio call of a fight in progress at a nearby location, a police officer struck and killed a teenager riding a bicycle. Just prior to the collision, the officer had

> "accelerated past the drivers in the passing lane, and then pulled into the passing lane himself with the intention of activating his emergency lights and siren. Officer Pilat testified that he did not have his siren on at the time of the impact, and he appears to have struck [the decedent] while glancing down from the road momentarily to turn on his emergency lights and headlights" (*id*. at 555).

The decedent's estate sued and, at trial, the trial court issued a directed verdict in favor of the defense at the close of plaintiff's *236 case, finding that plaintiff's evidence did not meet the reckless disregard standard as a matter of law. This Court agreed, reasoning:

> "It can by no means be said that the risk which Officer Pilat took in accelerating down Dick Road was unreasonable, especially in light of his duty to respond to the report of five males engaged in a melee, or that he had created a great risk of probable harm by driving 800 feet before attempting to engage his emergency lights and siren. When Officer Pilat did glance down from the road to activate his emergency lights, there was no pedestrian traffic in sight and he was several blocks from the next intersection . . . *At any rate, even if Officer Pilat were negligent in glancing down, this 'momentary judgement lapse' does not alone rise to the level of recklessness required of the driver of an emergency vehicle in order for liability to attach*" (*id*. at 557 [citation omitted and emphasis added]).

Although the officer's act of "glancing down" was not conduct enumerated in Vehicle and Traffic Law § 1104 (b), we nonetheless applied the reckless disregard standard to that conduct in determining whether that act could give rise to liability, concluding that it did not meet the heightened standard of liability as a matter of law. Consistent with the analysis in *Szczerbiak*, I would hold that Deputy DiDomenico's similar conduct of glancing down to check the data **16 terminal in his vehicle does not rise to the level of reckless disregard as a matter of law.[1] In my view, the majority's treatment of DiDomenico's conduct is difficult to square with our analysis in *Saarinen* and *Szczerbiak*.

II.

I might be able to overlook these concerns if the majority's conclusion was compelled by the plain language of the statute. But I find its construction of the statutory language unpersuasive. The majority interprets Vehicle and Traffic Law § 1104 (e) as if it read: "When the driver of an emergency vehicle engages *237 in privileged conduct, that driver will be protected from liability unless he or she acts in reckless disregard of the safety of others." But that is not what section 1104 (e) says. Rather than identifying a set of circumstances when an emergency responder *is* protected by the reckless disregard standard, the provision does just the opposite. Written in the negative, the subdivision carves out the single situation when an emergency responder *is not* protected from liability. As we explained in *Saarinen*, that circumstance is when the driver is operating the vehicle with "reckless disregard for the safety of others."

I agree with the majority that it is significant that the Legislature began section 1104 (e) with a reference to the "foregoing provisions," a phrase that clearly refers to the privileges and conditions listed in other subdivisions such as section 1104 (b). The evident intent in beginning section 1104 (e) with a reference to the "foregoing provisions" was to ensure that the creation of the privileges earlier in the statute would not be misinterpreted as precluding an emergency responder from being held accountable when he or she caused an accident while engaged in privileged conduct. If the Legislature had not cross-referenced the other statutory privileges and conditions in section 1104 (e), a case could be made that the privileges were absolute and that a driver was immune from suit whenever engaged in such exempt conduct. In other words, by referencing the "foregoing provisions" in section 1104 (e), the Legislature clarified that, notwithstanding its decision to exempt emergency responders from compliance with certain traffic laws, a driver could be liable for any "consequences" flowing from his or her **17 reckless disregard for the safety of others regardless of whether the driver was or was not engaged in privileged conduct.

Plaintiff argues that an interpretation of section 1104 (e) that permits an emergency responder to receive the benefit

of the reckless disregard standard regardless of the nature of his or her conduct renders the privileges articulated in section 1104 (b) superfluous. But this is not true. The privileges prevent police officers, firefighters and ambulance drivers from being prosecuted when they find it necessary to violate certain vehicle and traffic laws during emergency operations. Moreover, the privileges provide a significant benefit for drivers (and the state and municipal entities that are vicariously liable for their conduct) in civil actions. In the typical motor vehicle accident case, the fact that a driver failed to conform to a traffic law—particularly a driver's disregard of a traffic signal or the speed limit—would ***238** constitute prima facie evidence of negligence, ensuring that the case would go to the jury and providing strong evidence in plaintiff's favor. Absent the section 1104 (b) privileges, conduct such as running through a red light—frequently found to be reckless when it occurs in other contexts—might be viewed as recklessness per se.

By creating the privileges, the Legislature has precluded a plaintiff from relying solely on the fact that an emergency responder drove through a red light or exceeded the speed limit to establish a prima facie case. Because the statute expressly permits this conduct, a plaintiff must offer additional evidence demonstrating why the emergency responder's actions rose to the ""reckless disregard" standard under the circumstances presented. As noted above, our previous cases reflect that it is often the driver's "nonprivileged" conduct that is cited to prove the requisite heightened recklessness. There can be no doubt that the section 1104 (b) privileges are an important part of the statutory scheme—but there is no basis to conclude, as the majority has, that an emergency responder's participation in exempt conduct is a condition precedent to the application of section 1104 (e)'s reckless disregard standard.

III.

Also unpersuasive is the majority's reliance on legislative history. None of the legislative history cited in the opinion reflects an intent to restrict the applicability of Vehicle and Traffic Law § 1104 (e)'s reckless disregard standard to the conduct specified in the section 1104 (b) privileges. The quoted passages express points about the statute that are not in dispute.[2] ****18** The legislative history confirms that section 1104 (b) ""lists certain privileges ***239** accorded drivers of authorized emergency vehicles when responding to an emergency call or when in pursuit of an actual or suspected violator of the law" (*see* 1954 NY Legis Doc No. 36, at 35). And it clarifies

> "that the exemptions shall not be construed to relieve a driver of an authorized emergency vehicle from the duty to drive with due regard for the safety of all persons, nor shall the grant of these privileges protect the driver from the consequences of his reckless disregard for the safety of others" (*id*. at 36-37).

This latter point is precisely why it was necessary for the Legislature to cross-reference the section 1104 (b) privileges in the "reckless disregard" provision. What the legislative history does not say is that the reckless disregard standard was intended to be applicable *only* when an emergency responder is engaged in privileged conduct.

Nor does the majority's reference to Vehicle and Traffic Law § 1103 (b), applicable to road workers, lend support to its conclusion. That provision was adopted in 1957 at the same time as section 1104, although the two provisions were originally very different (*see* L 1957, ch 698). Section 1103 (b) generally exempted vehicles engaged in road work from all rules of the road and it did not include a reckless disregard provision but instead was silent on the standard of care applicable to road workers. In contrast, in its original form, section 1104 permitted emergency responders to violate only specified vehicle and traffic laws, but it adopted a "reckless disregard" standard that provided some measure of protection against civil liability—just as it does today. The legislative history does not reveal why the drafters of these statutes initially took such different approaches to these classes of drivers. ****19**

The Legislature later concluded that the liability of road workers should be assessed in the same manner as emergency responders and, in 1974, it added ""reckless disregard" language to section 1103 (b) (*see* L 1974, ch 223).[3] We held in *Riley v County of Broome* (95 NY2d 455 [2000]) that, in the wake of ***240** this amendment, road workers and emergency responders would now enjoy the same qualified immunity under the heightened "reckless disregard" standard. Reiterating the rationale behind limiting the liability of emergency responders that we had established in *Saarinen*, we noted that it was ""unclear" whether the extension of the reckless disregard standard was ""similarly justified" for road workers (*id*. at 467). Nonetheless, the Court concluded that "the Legislature ha[d] spoken clearly, giving vehicles engaged in road work the benefit of the same lesser standard of care as emergency vehicles" (*id*. at 468).

Given this observation, it is ironic that, relying in part on the language in Vehicle and Traffic Law § 1103 (b), the majority accepts a view of section 1104 (e) that grants road ****20** workers substantially broader protection from civil liability than is enjoyed by emergency responders. Since the majority keys the applicability of the reckless disregard standard to the exercise of privileged conduct, it has now excluded a category of emergency responder conduct from the qualified immunity umbrella. Because road workers are exempt from all of the provisions of the Vehicle and Traffic Law (except DWI and DWAI laws), the end result is that the "reckless disregard" standard will be applied to virtually all accidents involving vehicles engaged in road work but only a subset of accidents involving emergency responders. Nothing in the legislative history of either statute supports such a result.

IV.

Finally, I am also troubled by the fact that the majority imposes its new limitation on the scope of the reckless disregard ***241** standard without explaining how the standard is to be applied or responding in any way to the practical problems presented by its new rule, which are highlighted in the Appellate Division dissent and the briefs submitted by the amici. The questions the majority has chosen not to answer demonstrate the unworkable nature of the new rule. Does the liability standard fluctuate within the course of an emergency route depending on whether, at a particular moment, an officer is speeding or running a red light? Or is the reckless disregard standard triggered with respect to the entire emergency operation once the officer initiates that standard by violating one of the laws cited in section 1104 (b)? Is the jury to parse through the different acts of a driver that might have contributed to the accident, applying the reckless disregard standard to the conduct privileged under section 1104 (b) and the ordinary negligence standard to the remainder? How will the standard be applied when the accident is attributed to multiple causes, some involving privileged acts and some not? The majority doesn't say.

In this case, for example, the majority finds that Deputy DiDomenico's conduct must be assessed under the ordinary negligence standard since he took his eyes off the roadway when approaching the intersection and was not speeding or running a red light at the time. But what if DiDomenico had testified at his deposition that the light had been red when he and the plaintiff approached the intersection? Would he then be entitled to have his conduct assessed under the reckless disregard standard on the theory that he was attempting to run a red light when he caused the accident? What if DiDomenico had been driving one mile above the speed limit when he looked up and saw plaintiff's car? Would the jury apply the reckless disregard standard to all of his conduct or only to the speeding component, judging his momentary glance away from the roadway under the ordinary negligence standard?

One thing is certain—the majority's new rule will engender much confusion as litigants attempt to sort out these issues. It will also lead to an unusual shifting of positions: plaintiffs will now argue that the emergency responder that caused the accident scrupulously ****21** adhered to the rules of the road (meaning that liability should be determined under the ordinary negligence standard) while emergency responders will emphasize all the traffic laws they violated on the way to the accident (in an effort to gain the benefit of the reckless disregard standard). Indeed, one could say that the majority's rule encourages police ***242** officers, firefighters and ambulance drivers to violate the rules of the road, thus ensuring that their actions will be assessed under the qualified immunity standard in Vehicle and Traffic Law § 1104 (e) in the event they are in an accident (we are all fortunate that the people attracted to jobs of this nature are not likely to be motivated by such self-interest). And it has created a situation where traffic violators are rewarded with greater protection than is available to those who conform to the rules of the road. I am confident that this was not what the Legislature had in mind when it adopted a statute meant to cloak emergency responders with qualified immunity. To this end, perhaps this case will provide the Legislature an opportunity to review the statute to assess whether revision is necessary to clarify its intent.

For all of these reasons, I would reverse the order of the Appellate Division and reinstate Supreme Court's judgment dismissing plaintiff's complaint.

Chief Judge Lippman and Judges Pigott and Jones concur with Judge Read; Judge Graffeo dissents and votes to reverse in a separate opinion in which Judges Ciparick and Smith concur.

Order affirmed, etc.

FOOTNOTES

Footnotes

1 At that point, the defendants remaining in the action were the County, DiDomenico and Monroe County Sheriff Patrick M. O'Flynn.

2 We note that Kabir must still prove that she sustained a "serious injury" within the meaning of New York's No-Fault Law in order to recover damages from defendants for her alleged personal injuries (*see* Insurance Law § 5104 [a]). The dissent takes us to task for supposedly "transform[ing DiDomenico's momentary glance] into a basis for driver liability as a matter of law" (dissenting op at 236 n 1). As explained in the text, after determining that section 1104 was inapplicable, the Appellate Division granted plaintiff's cross motion because defendants did not offer a nonnegligent explanation to rebut the prima facie case of negligence made out by the happening of a rear-end collision. On appeal, defendants did not challenge the Appellate Division's decision on that score.

3 Vehicle and Traffic Law § 101 defines an "Authorized emergency vehicle" to include "[e]very . . . police vehicle"; and for purposes of section 101, a "[p]olice vehicle" includes a vehicle "operated by . . . a sheriff, undersheriff or regular deputy sheriff" (Vehicle and Traffic Law § 132-a).

4 An "[e]mergency operation" includes "[t]he operation . . . of an authorized emergency vehicle, when such vehicle is engaged in . . . responding to . . . [a] police call" (Vehicle and Traffic Law § 114-b).

5 This is exactly what the majority of states have decided, contrary to our decision in *Saarinen* (*see e.g. Tetro v Town of Stratford*, 189 Conn 601, 609, 458 A2d 5, 9 [1983] ["(E)mergency vehicle legislation provides only limited shelter from liability for negligence. The effect of the statute is *merely to displace the conclusive presumption of negligence* that ordinarily arises from the violation of traffic rules. The statute does not relieve operators of emergency vehicles from their general duty to exercise due care for the safety of others" (emphasis added)]; *City of Little Rock v Weber*, 298 Ark 382, 389, 767 SW2d 529, 533 [1989] [the "driver of an emergency vehicle is held to a standard of ordinary care in the exercise of (the) statutory privileges"]; *Barnes v Toppin*, 482 A2d 749, 755 [Del 1984] [if police officer "was found to be excused from obeying the speed limit" under the statute, he was still required "to drive with due regard for the safety of all persons" and thus was "governed by the usual rules of negligence" (internal quotation marks omitted)]; *Lee v City of Omaha*, 209 Neb 345, 307 NW2d 800 [1981]; *Rutherford v State*, 605 P2d 16 [Alaska 1979]; *Doran v City of Madison*, 519 So 2d 1308 [Ala 1988]).

6 This exception to the exemption granted by section 1103 (b) was intended to allow highway workers to be prosecuted if they operated vehicles while in an intoxicated or impaired condition (*see* Mem in Support, Bill Jacket, L 1987, ch 528, at 6 ["(a)lthough present (s)ection 1103 (b) does not relieve (highway workers exempted) from the provisions of (t)itle VII . . . from the duty to proceed with due regard for the safety of all persons and from the consequences of their reckless disregard of the safety of others, this provision is applicable only with respect to civil actions against the operators or their employers and not to the accountability of the operator under the Vehicle and Traffic Law"]; *see also* Letter of Michael Colodner, Unified Court System, to Evan A. Davis, Counsel to the Governor, July 9, 1987, Bill Jacket, L 1987, ch 528, at 20 [noting that "(u)nder current law, highway work crews are exempt from prosecution for reckless driving or for driving while intoxicated"]). Under our view of section 1104, intoxicated or impaired emergency vehicle operators involved in an accident when engaged in an emergency operation would be subject to prosecution and to civil liability for ordinary negligence.

7 Section 1104 (d) was identical to the Committee's proposed section 114 (d). The wording of subdivision (d) has never changed, although it was relettered subdivision (e) in 1968 when a new subdivision (d) was added to the statute (L 1968, ch 336).

8 Section 224 set out the rules governing ordinary vehicles when an authorized emergency vehicle approaches in performance of emergency duties. Paragraph (b) provided that "[t]his section [224 would] not operate to relieve the driver of an authorized emergency vehicle from the duty to drive with due regard for the safety of all persons using the highway." Vehicle and Traffic Law § 1144, entitled "Operation of vehicles on approach of authorized emergency vehicles," originally included the same language (*see* L 1957, ch 698). In 1960, section 1144 (b) was amended slightly to substitute "reasonable care for" for "due regard for the safety of" (*see* L 1960, ch 300, § 48).

9 The dissent likewise suggests that since our decision in *Saarinen*, section 1104 (e) has been universally understood in this way. The fact is, though, that in the majority of cases implicating section 1104, the conduct allegedly causing the accident is, in fact, listed in subdivision (b). For example, the dissent cites *Herod v Mele* (62 AD3d 1269, 1270 [4th Dept 2009]), decided by the Fourth Department seven months before its decision in *Kabir*, to support the thesis that our interpretation (and the Fourth Department's) in this case is novel. The issue on this appeal did not arise in *Herod*, however, because there the deputy was "exceeding the posted speed limit at the time of the collision" (*id.* at 1270). The same is true of *Gonyea v County of Saratoga* (23 AD3d 790 [3d Dept 2005]), also cited by the dissent. In *Gonyea*, a deputy responding to a two-car accident parked her vehicle such that it protruded into the travel lane of the roadway by about 18 inches, allegedly causing a motorist to swerve and hit a motorcyclist traveling in the opposite lane. The third case mentioned by the dissent—*Rodriguez v Incorporated Vil. of Freeport* (21 AD3d 1024 [2d Dept 2005])—is a memorandum decision with few facts where the parties evidently focused on whether the police officer was engaged in an "emergency operation" at the time of the accident, which occurred while she was parking her patrol car.

10 Similar descriptions of section 1104 appear in dicta in other cases (*see e.g. Gonzalez v Iocovello*, 93 NY2d 539, 551 [1999] ["Vehicle and Traffic Law § 1104 *excuses the violation of certain traffic laws* by authorized vehicles involved in an emergency operation" (emphasis added)]; *Criscione v City of New York*, 97 NY2d 152, 156 [2001] ["(T)he driver of an "authorized emergency vehicle' engaged in an 'emergency operation' is *exempt from certain 'rules of the road*' under Vehicle and Traffic Law § 1104" (citing *Riley*, 95 NY2d at 462 [emphasis added])]; *Williams v City of New York*, 2 NY3d 352, 364 [2004] [section 1104 "creates *a privilege exempting drivers* of authorized emergency vehicles *from certain provisions* in the Vehicle and Traffic Law" (emphases added)]; *Ayers v O'Brien*, 13 NY3d 456, 457 [2009] ["Operators of authorized emergency vehicles are *protected from liability for conduct privileged under Vehicle and Traffic Law § 1104*, unless their conduct rises to the level of reckless disregard" (emphasis added)]).

1 Indeed, in this case, not only does the majority conclude that reversal of the judgment dismissing the complaint was warranted but it also upholds the grant of partial summary judgment in favor of plaintiff. But DiDomenico's momentary glance down at his data terminal—an action that, at worst, would amount to nothing more than a lapse in judgment under *Saarinen* and *Szczerbiak* insufficient to withstand a motion for summary judgment—has been transformed into a basis for driver liability as a matter of law.

2 The same is true of the quotations from *Saarinen* cited in the majority opinion (*see* majority op at 229). In *Saarinen*, the Court observed that section 1104 "qualifiedly exempts [drivers of emergency vehicles] from certain traffic laws when they are 'involved in an emergency operation' " (84 NY2d at 497). This is an accurate observation about section 1104 (b) over which there is no controversy. The *Saarinen* Court further noted that section 1104 (e) "precludes the imposition of liability for otherwise privileged conduct except where the conduct rises to the level of recklessness" (*id*.). Again, we all agree that an emergency responder can be held liable under the reckless disregard standard even when he or she engages in privileged conduct. As the majority explains, the issue raised here was not presented in *Saarinen* so the Court never had the opportunity to address the crux of our disagreement—whether an emergency responder must engage in privileged conduct in order to gain the benefit of the heightened "reckless disregard" standard. But nothing in our *Saarinen* decision undermines my conclusion that qualified immunity is not contingent on exercise of one of the section 1104 (b) privileges —and much of the analysis in that case supports it.

3 As the majority notes, section 1103 (b) was also amended in 1987 to clarify that road workers are not exempt from compliance with DWI and DWAI laws and may be prosecuted criminally for such violations (*see* L 1987, ch 528). It was obviously unnecessary to similarly amend section 1104 since that statute never exempted emergency responders from compliance with this category of laws. Based on the amendment to section 1103 (b), the majority extrapolates that emergency responders who engaged in such conduct would be subject to civil liability under an ordinary negligence standard (*see* majority op at 226 n 6). It is clear from the legislative history, however, that the amendment to section 1103 (b) was intended to facilitate criminal prosecution of road workers that violated DWI laws; there's no indication that it was meant to address the civil liability of intoxicated road workers—much less the civil liability of emergency responders. This amendment to another statute lends no support to the majority's claim that emergency responders should be subject to an ordinary negligence standard unless they are engaged in privileged conduct. Moreover, I think it likely that a plaintiff who proved that an emergency responder violated DWI or DWAI laws would have little difficulty establishing liability under

the section 1104 (e) reckless disregard standard as few courses of conduct more clearly evince a conscious disregard for the safety of others than operating an emergency vehicle in an impaired or intoxicated condition.

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934 F.3d 594
United States Court of Appeals, Seventh Circuit.

Sherard MARTIN, Plaintiff-Appellant,

v.

Davis MARINEZ, et al., Defendants-Appellees.

No. 17-2667
|
Argued November 2, 2018
|
Decided August 12, 2019
|
Rehearing and Rehearing En Banc
Denied September 13, 2019*

Synopsis

Background: Motorist whose vehicle was unlawfully stopped, before he was arrested and incarcerated for 65 days based on his admitted possession of cocaine and of firearm with defaced serial number, brought § 1983 action against detaining officers to recover for alleged violation of his Fourth Amendment rights. The United States District Court for the Northern District of Illinois, No. 15-CV-04576, Amy J. St. Eve, J., 2017 WL 56633, granted officers' motion for partial summary judgment in limiting damages to those associated with motorist's brief illegal detention after his vehicle was stopped and before he was arrested, and ultimately entered judgment in motorist's favor on jury verdict, awarding him $1.00 in damages for the unlawful vehicular stop. Motorist appealed.

The Court of Appeals, Rovner, Circuit Judge, held that as matter of first impression, motorist could not recover damages, in subsequent § 1983 for officers' violation of his Fourth Amendment rights, for his post-arrest incarceration, but was limited to damages associated with his brief illegal detention.

Affirmed.

***595** Appeal from the United States District Court for the Northern District of Illinois, Eastern Division. No. 15-CV-04576 — **Amy J. St. Eve**, *Judge.*

Attorneys and Law Firms

Stephen L. Richards, Attorney, Joshua Richards, Attorney, Law Offices of Stephen L. Richards, Chicago, IL, for Plaintiff-Appellant.

Julian Nunes Henriques, Jr., Attorney, City of Chicago Law Department, Chicago, IL, for Defendants-Appellees.

Before Ripple, Kanne, and Rovner, Circuit Judges.

Opinion

Rovner, Circuit Judge.

***596** Sherard Martin appeals the district court's grant of partial summary judgment, Fed. R. Civ. P. 56, on his suit under 42 U.S.C. § 1983 against the City of Chicago and several of its police officers for false arrest and unlawful search. Martin's suit proceeded to trial, where a jury awarded him $1.00 in damages after finding that two of the defendants lacked reasonable suspicion or probable cause to detain him. The jury found against Martin and in favor of the officers on the remainder of his claims. Martin appeals, challenging only the district court's pretrial grant of partial summary judgment to the defendants, which limited the damages Martin could seek at trial. We affirm.

I.

Martin's suit arises from a traffic stop in May 2013. We recount the facts surrounding the stop and subsequent events in the light most favorable to Martin, noting disputed facts where relevant and viewing the facts on which the jury reached a verdict in the light most favorable to the verdict. On the evening of May 24, 2013, Martin was driving in Chicago when Officers Davis Marinez and Sofia Gonzalez pulled him over. According to Martin, he had not committed any traffic violations when the officers stopped him, although the officers claim they initiated the stop because Martin's tail and brake lights were not working. When Officer Gonzalez approached the car and asked Martin for his license and insurance, Martin explained that he did not have his driver's license because it had been "taken for a ticket." At that point both officers asked Martin to step out of the car as the other defendants, Officers Armando Chagoya and Elvis Turcinovic, arrived on the scene.

According to Martin, the officers forced him from the car, conducted a pat-down search, handcuffed him, and put him into a police car. At that point, they searched his car, where they recovered a 9 mm semiautomatic handgun with a defaced serial number, and a plastic baggie of crack cocaine.[1]

Officers then took Martin into custody. At the police station, Officer Marinez learned that Martin had previously been convicted of first-degree murder and unlawful use of a weapon by a convicted felon. Ultimately Martin was transferred to Cook County Jail and charged with four Illinois felonies: (i) being an armed habitual criminal in violation of 720 ILCS § 5/24-1.7; (ii) being a felon in possession of a firearm in violation of 720 ILCS § 5/24-1.1; (iii) possessing a firearm with a defaced serial number in violation of 720 ILCS § 5/24-5(b); and possessing cocaine in violation of 720 ILCS § 570/402. He also received traffic citations under Chicago Municipal Code Section 9-76-050 (taillight operation) and 625 ILCS § 5/6-112 (outlining requirement to carry a driver's license). *Id.*

Martin spent sixty-five days—from May 24 through July 29, 2013—incarcerated in connection with the charges resulting from the traffic stop. On July 29th, a different court revoked Martin's bond when he was convicted in an unrelated criminal case. During the course of the criminal proceedings for the felony charges arising from the traffic stop, Martin filed a motion to ***597** suppress the evidence, which the trial court granted on November 7, 2013. The state then dismissed the charges against Martin through a nolle prosequi motion.

Martin filed this suit in federal court under 42 U.S.C. § 1983 against all of the officers involved in the stop as well as the City of Chicago (on a *respondeat superior* theory of liability), seeking money damages for violations of his Fourth Amendment rights. Martin sought civil damages totaling $110,500: $1,000 per day of his 65-day incarceration and $45,500 in lost business income—calculated at $700 per day—from his automobile dealership.

Before trial, the defendants moved for partial summary judgment, arguing that even if the stop was unlawful, once the officers saw the handgun and cocaine, they had probable cause for Martin's arrest, which limited Martin's damages to the short period between his stop and his arrest. The district court agreed, granting the defendants' motion for partial summary judgment and concluding that although Martin's § 1983 case could proceed as to the initial stop of his car and seizure of his person—before the defendants discovered the illegal gun and cocaine—he could not seek damages for conduct post-dating the discovery of contraband, including his 65-day incarceration.

Martin's case proceeded to a jury trial, limited as described above by the grant of partial summary judgment. At trial, the facts largely tracked those described above, with the same basic areas of conflicting testimony: (1) Martin testified that his tail and brake lights were both functioning when he was stopped; (2) he also testified that he handed Officer Gonzalez his traffic ticket when he was unable to produce his license; and (3) Martin maintained that the handgun was under the driver's seat, as opposed to on it and visible when he stepped out of the car as directed by Officers Gonzalez and Marinez.

The district court instructed the jury to decide the following Fourth Amendment questions: (1) whether the officers "unlawfully seized" Martin without reasonable suspicion to support a traffic stop; (2) whether they falsely arrested him without probable cause; or (3) whether they unlawfully searched his person or car without probable cause. The court also instructed the jury that if they found that Martin proved his claims, they could not award him damages for any time spent in custody after officers found the handgun, and should limit their consideration to the period of detention beginning with his traffic stop and ending when they found the gun. The jury found in favor of Martin and against Officers Marinez and Gonzalez on the unlawful seizure claim and awarded him $1.00 in compensatory damages. On that same claim, they found in favor of Officers Chagoya and Turcinovic, and on the remaining claims for false arrest and unlawful search, they found against Martin and in favor of all four officers.

Martin now appeals from the district court's grant of partial summary judgment before trial limiting the scope of damages available.

II.

We review the district court's grant of summary judgment *de novo*, considering the record in the light most favorable to Martin and construing all reasonable inferences from the evidence in his favor. *E.g.* *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986); *Tolliver v. City of Chicago*, 820 F.3d 237, 241 (7th Cir. 2016). Summary judgment is appropriate when there are no genuine disputes of material fact and the movant is entitled to judgment as a matter of law. ***598** Fed. R. Civ. P. 56(a). As

for those issues presented to the jury, we view the evidence in the light most favorable to its verdict. *Matthews v. Wis. Energy Corp., Inc.*, 642 F.3d 565, 567 (7th Cir. 2011).

Martin challenges only the district court's grant of partial summary judgment before trial. He does not dispute the jury's verdict in his favor as to the initial traffic stop and against him on all of his remaining claims. His appeal thus raises the narrow issue of what type of damages he can recover as a result of his unlawful seizure by Officers Marinez and Gonzalez. In considering this issue, we are mindful of the jury's verdict rejecting Martin's false arrest claim as well as his claim for unlawful search based on the officers' search of his vehicle. We thus consider solely whether Martin's initial unconstitutional seizure can support his claim for damages arising from losses from his subsequent incarceration on the weapon and drug charges.

Martin argues that the district court erroneously based its conclusion that he was barred from collecting damages from his wrongful incarceration on the premise that a § 1983 claimant may not recover damages as a result of the "fruit of the poisonous tree" doctrine. According to Martin, when assessing available damages under § 1983, we should begin by asking whether the plaintiff's alleged damages were proximately caused by the constitutional violation. From that starting point, Martin maintains that he is, at the very least, entitled to have a jury decide whether his incarceration and any consequential damages arising from it were proximately caused by the unconstitutional stop.

The "basic purpose" of damages under § 1983 is to "compensate persons for injuries that are caused by the deprivation of constitutional rights." *Carey v. Piphus*, 435 U.S. 247, 254, 98 S.Ct. 1042, 55 L.Ed.2d 252 (1978); *see also Memphis v. Cmty. Sch. District v. Stachura*, 477 U.S. 299, 306, 106 S.Ct. 2537, 91 L.Ed.2d 249 (1986). The Supreme Court has "repeatedly noted that 42 U.S.C. § 1983 creates a species of tort liability." *Heck v. Humphrey*, 512 U.S. 477, 483, 114 S.Ct. 2364, 129 L.Ed.2d 383 (1994) (quoting *Stachura*, 477 U.S. at 305, 106 S.Ct. 2537)(internal quotation marks omitted)). Thus, the appropriate starting place for the damages inquiry under § 1983 is the common law of torts. *Carey*, 435 U.S. at 253, 98 S.Ct. 1042.

Using the available common-law torts as a starting point, Martin's damages claim immediately runs into trouble. His complaint asserts claims for "false arrest" as well as "unlawful search" arising from the defendants' violation of his Fourth Amendment right to be free from "unreasonable searches and seizures," U.S. Const. Amend. IV. But a claim for false arrest cannot succeed because it is undisputed that officers discovered an illegal handgun and cocaine in Martin's vehicle, which gave them probable cause for his arrest, notwithstanding the previous unlawful stop. *See Holmes v. Village of Hoffman Estates*, 511 F.3d 673, 679 (7th Cir. 2007) ("A police officer has probable cause to arrest an individual when the facts and circumstances that are known to him reasonably support a belief that the individual has committed, is committing, or is about to ... commit a crime."). Given this, Martin's claim runs headlong into the rule that if an "officer had probable cause to believe that the person he arrested was involved in criminal activity, then a Fourth Amendment claim for false arrest is foreclosed." *Id.* at 679–80; *Morfin v. City of East Chicago*, 349 F.3d 989, 997 (7th Cir. 2003) (collecting cases); *see also Maniscalco v. Simon*, 712 F.3d 1139, 1143 (7th Cir. 2013) ("Probable cause is an absolute bar to a claim of false arrest asserted under the Fourth Amendment and section 1983.") ***599** (quoting *Stokes v. Bd. of Educ.*, 599 F.3d 617, 622 (7th Cir. 2010)). Moreover, the fact that the evidence was the fruit of an illegal detention does not make it any less relevant to establishing probable cause for the arrest because the exclusionary rule does not apply in a civil suit under § 1983 against police officers. *See Vaughn v. Chapman*, 662 Fed.Appx. 464, 465 (7th Cir. 2016) (unpublished order); *see also Lingo v. City of Salem*, 832 F.3d 953, 958–59 (9th Cir. 2016); *Black v. Wigington*, 811 F.3d 1259, 1267–68 (11th Cir. 2016); *Townes v. City of New York*, 176 F.3d 138, 145 (2d Cir. 1999); *Wren v. Towe*, 130 F.3d 1154, 1158 (5th Cir. 1997). And although Martin's complaint is limited to claims for false arrest and unlawful search, it bears noting that the existence of probable cause for the arrest would also bar recovery on a theory of malicious prosecution. *See Stewart v. Sonneborn*, 98 U.S. 187, 194, 25 L.Ed. 116 (1878) ("The existence of a want of probable cause is, as we have seen, essential to every suit for a malicious prosecution."); *Thompson v. City of Chicago*, 722 F.3d 963, 969 (7th Cir. 2013) (noting that malicious prosecution claim under Illinois law requires proof that underlying criminal proceeding concluded in manner indicating innocence).

Ignoring the insurmountable hurdles to his claim presented by possible tort law analogs, Martin insists that he is entitled to damages for his incarceration solely on a theory of proximate cause—under the general rule of *Carey* that a damages award under § 1983 should compensate for what Martin characterizes as any injuries arising as a result of a constitutional deprivation. Although the district court

considered Martin's claim that his entitlement to damages for post-arrest incarceration should be resolved using a proximate cause analysis, after reviewing the cases Martin cited, the court deemed such an approach unnecessary in light of its conclusion that the existence of probable cause after the initial detention foreclosed any further damages.

Citing *Carey*, Martin points out that he should not be barred from recovering § 1983 damages simply because recovery would not be permitted under a common-law tort such as false arrest. As the Court explained in *Carey*, "the interests protected by a particular constitutional right may not also be protected by an analogous branch of the common law torts." *Carey*, 435 U.S. at 258, 98 S.Ct. 1042. Thus, the Court recognized that although the common law elements of damages and the prerequisites for their recovery are the appropriate "starting point for the inquiry under § 1983," those common-law tort theories may not "provide a complete solution to the damages issues in every § 1983 case." *Id.* at 258, 98 S.Ct. 1042. The Court accordingly set out an approach to handling those situations where the common-law tort theories would not allow recovery but there were constitutional interests implicated that might nonetheless warrant redress when violated. *Carey* explained that "to further the purpose of § 1983, the rules governing compensation for injuries caused by the deprivation of constitutional rights should be tailored to the interest protected by the particular right in question—just as the common-law rules of damages themselves were defined by the interests protected in the various branches of tort law." *Id.* at 258–59, 98 S.Ct. 1042. Under that rationale, we must determine whether the post-arrest damages for incarceration Martin seeks would effectively redress the interests the Fourth Amendment is intended to protect.

We have not resolved the specific question whether a plaintiff may recover damages for post-arrest incarceration following ***600** a Fourth Amendment violation when probable cause supported the ultimate arrest and initiation of criminal proceedings, but the application of the exclusionary rule spared the plaintiff from the criminal prosecution. As Martin notes, there is a split of authority on the question of whether a defendant whose Fourth or Fifth Amendment rights have been violated can recover damages for incarceration, legal defense fees, or emotional distress in a subsequent civil suit under § 1983. *Compare Townes v. City of New York*, 176 F.3d 138, 148 (2d Cir. 1999) (no damages for costs associated with defending against gun possession charges when evidence for charges arose from unlawful search); *Hector v. Watt*, 235 F.3d 154, 155–59 (3d Cir. 2000) (no damages for costs incurred in criminal prosecution for drug possession charges arising from unconstitutional search) *with Borunda v. Richmond*, 885 F.2d 1384, 1389–90 (9th Cir. 1988) (allowing admission of acquittal of criminal charges in plaintiffs' subsequent § 1983 suit to recover money spent on attorneys' fees defending criminal charges); *see also Train v. City of Albuquerque*, 629 F. Supp.2d 1243, 1255 (D.N.M. 2009) (allowing jury to determine whether unlawful search that led to gun possession charges proximately caused plaintiff's criminal defense costs, loss of income, and emotional distress damages).

Martin, however, insists that in *Kerr v. City of Chicago*, 424 F.2d 1134 (7th Cir. 1970), we held that such damages are recoverable and that here the district court was obligated under *Kerr* to allow his damages claim. The district court rejected *Kerr* as controlling here given "factual differences" and case law developments since it was "decided nearly 47 years ago." (Appellant's App. at A-14.)

Like the district court, we reject Martin's claim that *Kerr* is dispositive on the question of allowable damages. Martin relies almost exclusively on a sentence from *Kerr* stating without further explanation that "[a] plaintiff in a civil rights action should be allowed to recover the attorneys' fees in a state criminal action where the expenditure is a foreseeable result of the acts of the defendant." *Kerr*, 424 F.2d at 1141. The minor plaintiff in *Kerr* alleged that Chicago police had violated his Fifth Amendment constitutional rights by using physical force to obtain an involuntary confession, which was used to detain him for 18 months awaiting and during trial, when a nolle prosequi was entered after the jury was unable to reach a verdict. *Kerr*, 424 F.2d at 1136–37. The precise issue in *Kerr* was thus whether the plaintiff should have been allowed to present evidence in his civil case of attorneys' fees expended in his underlying criminal case, which hinged entirely on his involuntary confession. *Id.* at 1141.

So although in the abstract *Kerr* stands for the proposition that foreseeable damages arising from a constitutional violation may be recovered, it sheds no light on the precise question Martin's appeal poses.[2] ***601** Using the framework of *Carey,* it is easy to see that the interest protected by the Fifth Amendment right against self-incrimination was directly implicated by the coerced confession and resulting criminal trial. *Kerr* is thus entirely in keeping with *Carey* in the sense that the damages sought—expenses of defending the criminal trial prosecuted on the strength of the involuntary confession—arise directly from the constitutional violation and redress

the precise interest the Fifth Amendment protects: the right not to be compelled in a criminal case to be a witness against oneself. Simply put, nothing in *Kerr* sheds any light on Martin's claim that he is entitled to pursue damages for his post-arrest incarceration.

That leaves us with the handful of appellate courts that have considered the specific issue of the proper scope of civil damages for damages following an illegal search or seizure. In *Townes*, the Second Circuit considered whether to award compensatory damages in a § 1983 civil suit after police stopped a taxi without probable cause and discovered an illegal firearm and cocaine. The plaintiff's motion to suppress the firearm was initially denied, and he was convicted of unlawful possession of a firearm by a felon. Over two years later, the state appellate division reversed the conviction on the grounds that police had lacked probable cause to stop and search the taxicab. In his subsequent civil suit, the *Townes* plaintiff sought to recover compensatory damages arising from his conviction and incarceration. *Id.* at 149.

Citing *Carey,* the panel in *Townes* rejected the plaintiff's damages claim. After ruling out recovery under any common-law tort theories, the Second Circuit also rejected proximate cause as a possible basis for recovery. In doing so, the court noted that "the chain on causation between a police officer's unlawful arrest and a subsequent conviction and incarceration is broken by the intervening exercise of independent judgment"—specifically, the trial court's failure to suppress the incriminating evidence before trial. *Id.* at 147. In an attempt to distinguish *Townes*, Martin seizes this causation analysis, but ignores the rest of the holding in *Townes,* which would squarely foreclose Martin's claim.

In addition to concluding that the trial court's refusal to suppress the evidence of the unlawful search was an intervening and superseding cause of the conviction, the Second Circuit noted that the plaintiff was "foreclosed from recovery for a second, independent reason: the injury he pleads (a violation of his Fourth Amendment right to be free from unreasonable searches and seizures) does not fit the damages he seeks (compensation for his conviction and incarceration)." *Id.* Bearing in mind the Supreme Court's directive in *Carey* to tailor § 1983 liability to match the affected constitutional rights, *see Carey*, 435 U.S. at 258, 98 S.Ct. 1042, *Townes* pointed out a "gross disconnect" between the constitutional violation (the Fourth Amendment right to be free from unreasonable searches and seizures) and the injury for which recovery was sought (the subsequent conviction and incarceration). *Townes*, 176 F.3d at 148. As the panel in *Townes* observed, "[t]he evil of an unreasonable search or seizure is that it invades privacy, not that it uncovers crime, which is no evil at all." *Id.*

Townes thus reasoned that to award damages for a conviction and incarceration that followed an illegal search would be ***602** tantamount to awarding a windfall benefit in that the plaintiff "already reaped an enormous benefit by reason of the illegal seizure and search to which he was subjected: his freedom, achieved by the suppression of evidence obtained in violation of the Fourth Amendment." *Id.*; *cf. United States v. Calandra*, 414 U.S. 338, 347, 94 S.Ct. 613, 38 L.Ed.2d 561 (1974) ("The purpose of the exclusionary rule is not to redress the injury to the privacy of the search victim ... [i]nstead, the rule's prime purpose is to deter future unlawful police conduct and thereby effectuate the guarantee of the Fourth Amendment against unreasonable searches and seizures[.]"). The district court found the rationale of *Townes* persuasive and noted that it had been cited repeatedly by district courts in our circuit assessing civil damages for Fourth Amendment violations. *See Cannon v. Christopher*, No. 1:06-CV-267, 2007 WL 2609893, at *4 ("Several federal courts in the Seventh Circuit have adopted the *Townes* principle and applied it to dismiss cases where probable cause existed despite an allegation of an improper initial stop and search."); *see also Williams v. Carroll*, No. 08 C 4169, 2010 WL 5463362, at *4–5 (N.D. Ill. Dec. 29, 2010) (collecting cases and observing that although "holding of *Townes* has not been expressly adopted here in the Seventh Circuit, it has not been meaningfully challenged in this (or any other) circuit. On the other hand, it has been relied upon in numerous district court opinions.").

The following year, the Third Circuit reached a similar conclusion in *Hector v. Watt*, *supra*. In *Hector*, the plaintiff brought a § 1983 suit to recover compensation for expenses incurred during his criminal prosecution based on 80 pounds of hallucinogenic mushrooms seized from his airplane. Like Martin, the plaintiff had successfully litigated a suppression motion for the seized drugs and the prosecution against him was dismissed.

The Third Circuit first concluded, as we did above, that existing common-law torts could not provide the basis for the requested damages. *Hector*, 235 F.3d at 156 ("Given the Supreme Court's mandate that we look to similar common-law causes of action, Hector appears to be on the horns of a dilemma. If his claim is categorized as being like false

arrest, then his claim fails because false arrest does not permit damages incurred after an indictment, excluding all the damages he seeks. But if his claim is treated as resembling malicious prosecution, then he would face the problem that a plaintiff claiming malicious prosecution must be innocent of the crime charged in the underlying prosecution.")

In rejecting proximate cause as a theory for recovery, the Third Circuit, like the Second Circuit in *Townes*, concluded that the policy reasons behind the exclusionary rule would not be served by allowing the plaintiff to "continue to benefit from the exclusionary rule in his § 1983 suit and be relieved of defense costs from a prosecution that was terminated only because of the exclusionary rule." *Id.* at 158. Specifically, the court in *Hector* carefully considered the competing policy concerns that might be served by allowing damages arising from defending a criminal proceeding triggered by the discovery of contraband via an unconstitutional search. Bearing in mind the goal of the exclusionary rule to deter Fourth Amendment violations, the court concluded that policy considerations militated against any incremental contribution to such deterrence that might be had by allowing for civil damages arising well after the initial constitutional privacy violation that led to the discovery of contraband. *Id.* at 159.

The court in *Hector* thus ultimately concluded that although there would admittedly ***603** be some deterrent value to imposing liability for *all* consequences that unfold from a search or seizure unsupported by probable cause, the downsides of such an approach would outweigh its benefits. Specifically, the magnitude of the potential liability would routinely be unrelated to the seriousness of the underlying Fourth Amendment violation, in the sense that the damages award would often turn not on the nature of the unconstitutional invasion of privacy but on whatever contraband officers happened to uncover. *Id.* Noting that it would be irresponsible to impose potential liability so disproportionate to the underlying constitutional violation and that neither the scholarly authority nor any common-law tort supported such a theory of recovery, the Third Circuit concurred with *Townes* to hold that, "Victims of unreasonable searches or seizures may recover damages directly related to the invasion of their privacy–including (where appropriate) damages for physical injury, property damage, injury to reputation, etc.; but such victims cannot be compensated for injuries that result from the discovery of incriminating evidence and consequent criminal prosecution." *Id.* at 148 (*quoting Townes*, 176 F.3d at 148).

As Martin notes, however, the Ninth Circuit has concluded that damages for incarceration and legal fees arising from an unlawful detention and search may be recoverable in a § 1983 suit. In *Borunda v. Richmond*, 885 F.2d 1384 (9th Cir. 1988), the court rejected police officers' appeal from a civil damages award in favor of the plaintiffs after a finding that the officers arrested them without probable cause. The precise issue on appeal was whether the district court erred by admitting evidence that the plaintiffs had been acquitted of the underlying criminal charges as well as evidence of the plaintiffs' attorneys' fees incurred defending against the charges. *Borunda*, 885 F.2d at 1386. The court concluded that a "plaintiff who establishes liability for deprivations of constitutional rights actionable under 42 U.S.C. § 1983 is entitled to recover compensatory damages for all injuries suffered as a consequence of those deprivations." *Id.* at 1389.

In *Borunda*, the court concluded that the plaintiffs were entitled to recovery because the "jury was entitled to find, amidst the striking omissions in the police report, as well as the two officers' conflicting accounts of the incident, that appellants procured the filing of the criminal complaint by making misrepresentations to the prosecuting attorney." *Id.* at 1390. The attorneys' fees incurred defending the criminal prosecutions were thus directly attributable to the defendant officers' misconduct—i.e., falsifying information in order to obtain a criminal complaint. *Id.*

Thus, while *Borunda*, like *Kerr*, may in the abstract stand for the proposition that civil damages may be recoverable for expenses related to a wrongful search or arrest, nothing about *Borunda*'s rationale is particularly helpful to Martin. First, in *Borunda*, the very basis for the damages award was the jury's finding that the defendant officers had arrested the plaintiffs *without* probable cause and had likely fabricated facts to secure a criminal complaint against the plaintiffs. *Id.* at 1386–88. On the contrary, the jury here concluded that although Officers Marinez and Gonzalez unlawfully seized Martin without reasonable suspicion, it found *against* Martin on the claim that officers either arrested him or searched him or his car without probable cause. So unlike the plaintiffs in *Borunda*, whose claim succeeded precisely because the jury concluded that the defendant officers manufactured a tale to support probable cause for both the arrest and subsequent prosecutions, the jury here concluded that probable cause existed for *both* Martin's arrest and any search of his ***604** automobile that yielded contraband. The holding in *Borunda* is thus a far cry from supporting the outcome Martin seeks

here. Although Martin asserts that *Borunda* supports his theory that he may recover damages under a proximate cause analysis, *Borunda* adds little to the question of foreseeability given the jury's finding there that the defendant officers "procured the filing of the criminal complaint by making misrepresentations to the prosecuting attorney." *Id.* at 1390. That finding leads fairly uncontroversially to the conclusion that the plaintiffs' attorney fees "incurred during the criminal prosecutions was a direct and foreseeable consequence of the appellants' unlawful conduct." *Id.* Not so for Martin.

Martin's scenario is far more like those in *Townes* and *Hector*, where probable cause for an arrest existed despite an encounter that initially violated the Fourth Amendment. First, the precise relevant questions in *Borunda* were evidentiary: whether the district court had erred in admitting evidence of the plaintiffs' prior acquittal of the criminal charges and evidence of attorneys' fees spent during the criminal proceeding. *Id.* at 1389. And in *Borunda*, the court considered the jury's finding that the officers lacked probable cause and concluded it was defensible in light of general tort principles of recovery; the jury's verdict here cuts in the opposite direction given that, with the exception of the initial traffic stop, the jury concluded that the defendants *did* have probable cause for everything that followed.

Finally, Martin relies heavily on a case from the District of New Mexico holding that a plaintiff raising a constitutional claim based on an illegal search may be permitted to recover damages for post-indictment proceedings if the constitutional deprivation proximately caused the damages. *See generally Train v. City of Albuquerque*, 629 F. Supp.2d 1243 (D.N.M. 2009). The district court in *Train* concluded that in addition to protecting privacy, as the courts in *Townes* and *Hector* recognized, the Fourth Amendment had been described in the Tenth Circuit as protecting " 'liberty, property, and privacy interests—a person's sense of security and individual dignity.' " *Id.* at 1252 (quoting *Holland ex rel. Overdorff v. Harrington*, 268 F.3d 1179, 1196 (10th Cir. 2001)). Believing that the Tenth Circuit did not "take such a narrow view of the Fourth Amendment" as the one advanced in *Townes* and *Hector*, the district court in *Train* concluded as follows:

> According to the Tenth Circuit's guidance on the Fourth Amendment, any damage award available for a Fourth-Amendment violation under 41 U.S.C. § 1983 should be tailored to compensating losses of liberty, property, privacy, and a person's sense of security and individual dignity. While it may not be an evil to uncover crime, the drafters obviously did not think uncovering crime was a higher value than protecting and securing a person's home from unreasonable searches. Federal criminal charges, federal detention, and all of the negative consequences of those charges and attendant to federal custody implicated Train's interest in liberty and his sense of security and individual dignity. That imprisonment occasioned economic losses. Such losses should be compensable, given that they implicate the interests that the Tenth Circuit has explained the Fourth Amendment protects.

Id.

Although Martin urges us to reject the logic of both *Townes* and *Hector* in favor of that found in *Train*, he fails to identify any Seventh Circuit law urging the broad view of interests protected by the Fourth Amendment that drove the district court's ***605** conclusion in *Train*. Nor did *Train* analyze the plaintiff's claim in light of common-law false arrest. Because Martin explicitly framed his claim as one for false arrest, (Pl. Compl. 1), we are bound by our own precedent limiting damages regardless of what we might conclude under a proximate cause analysis. *See Gauger v. Hendle*, 349 F.3d 354, 362–63 (7th Cir. 2003), *overruled* on other grounds by *Wallace v. City of Chicago*, 440 F.3d 421 (7th Cir. 2006) (citing *Heck v. Humphrey*, 512 U.S. 477, 484, 114 S.Ct. 2364, 129 L.Ed.2d 383 (1994)) (available damages for false arrest cover only time of detention until issuance of process or arraignment). And although *Train* ably sets forth the competing rationale for an expansive view of both the interests protected by the Fourth Amendment as well as damages available for their breach, the rationale in *Townes* and *Hector*, in addition to being more widely accepted as discussed *infra*, is also more applicable to the facts here.

Given the jury's verdict against Martin on his claims for false arrest and unlawful search, the only Fourth Amendment injury being redressed is the brief initial seizure before officers asked Martin for his license. Allowing Martin to recover damages for his subsequent imprisonment, set in motion by an arrest supported by probable cause, would amount to precisely the sort of mismatch between the violation and the damages that *Townes* and *Hector* sought to avoid. We do not go so far as to hold that post-arrest damages may *never* be recovered, only that here such damages would be inconsistent with the rule in *Carey* that damages should be tailored to protect the right in question, 435 U.S. at 258, 98 S.Ct. 1042. Here, the right in question is Martin's Fourth Amendment right not to be stopped by officers without reasonable suspicion. That right was vindicated by the nominal damages the jury awarded Martin.

It is thus ultimately unnecessary to delve into the thorny question of proximate cause. *See Hector*, 235 F.3d at 161 ("Given that the cases on intervening causes are legion and difficult to reconcile ... and that we have other, sufficient grounds for resolving this case, we will not reach the issue of intervening causation."). That said, it is worth noting that there is no reason Martin's claim would fare any better under that analysis. Martin's stop was certainly the but-for cause of his imprisonment in the sense that but for the stop officers would never have discovered the handgun and cocaine and arrested him. But that tells us little about whether the stop was the *proximate cause* of his incarceration. *See CSX Transp., Inc. v. McBride*, 564 U.S. 685, 691, 131 S.Ct. 2630, 180 L.Ed.2d 637 (2011) ("The *term* 'proximate cause' is shorthand for a concept: Injuries have countless causes, and not all should give rise to legal liability."). Any number of superseding, intervening events could have broken the chain of causation, from the discovery of the contraband itself to the independent decision to deny bail, which was undoubtedly predicated in part on Martin's criminal history and other factors unrelated to the initial stop.

Moreover, consideration of proximate cause takes us back around to where we began: with the observation that probable cause for Martin's arrest, which the jury concluded existed shortly after Martin was pulled over, forecloses Martin's claim for damages from all that followed. *See Townes*, 176 F.3d at 146 (recognizing that "ordinary principles of tort causation" apply to initial stop and search but concluding that allowing the fruit of the poisonous tree doctrine to "elongate the chain of causation" would "distort basic tort concepts of proximate causation"); *accord Williams v. Edwards*, 2012 WL 983788 at *7–8 (noting the same). In short, the damages ***606** arising from Martin's incarceration are simply too attenuated from and unrelated to the Fourth Amendment violation he has proven: a brief detention unsupported by probable cause or reasonable suspicion. His damages award was thus properly limited to the harm arising from his unconstitutional detention before his lawful arrest. The decision regarding those damages was left to the jury, which determined one dollar was the proper amount.

III.

For the foregoing reasons, we AFFIRM the judgment of the district court.

All Citations

934 F.3d 594

Footnotes

* Judge Amy J. St. Eve did not participate in the consideration of this petition.

1 In the officers' version of events, they spotted a handgun between Martin's legs as he stepped out of his car and placed him immediately into custody. Officer Chagoya claims to have found the plastic baggie of crack cocaine as well as $400 when he searched the car prior to having it impounded.

2 The same is true for a much more recent case from our circuit cited by Martin in his reply brief, *Johnson v. Winstead*, 900 F.3d 428 (7th Cir. 2018). Martin characterizes *Johnson* as holding that damages could be recovered for incarceration subsequent to a failure to provide *Miranda* warnings, despite the fact that a failure to provide such warnings is itself not a violation of the Fifth Amendment right against self-incrimination. But Martin misreads *Johnson*, which specifies that an actual Fifth Amendment violation occurs only when the information acquired without *Miranda* warnings is introduced at trial to secure a criminal conviction. Martin claims *Johnson* would allow damages based on a violation of a prophylactic rule–the failure to give *Miranda* warnings itself—but he misreads *Johnson*. The damages *Johnson* contemplates would be those arising from incarceration for the actual Fifth Amendment violation of admitting the statements at trial to secure a criminal conviction, *not*, as Martin suggests, for a violation of a prophylactic rule. *Id.* at 434–35.

352 So.2d 270
Court of Appeal of Louisiana, Second Circuit.

Bennie MOORE, Sr., et ux., Plaintiffs-Appellants,

v.

The TRAVELERS INDEMNITY COMPANY et al., Defendants-Appellees.

No. 13366.
|
Oct. 31, 1977.
|
En Banc. Rehearing Denied Dec. 5, 1977.
|
Writ Refused Feb. 10, 1978.

Synopsis

Plaintiffs brought wrongful death action against state trooper, his employer and latter's insurer, to recover for death of their son, who was killed in collision that occurred when his vehicle crossed highway in front of oncoming police car traveling at 90 miles per hour without flashing lights or siren in pursuit of speeding motorists. State trooper reconvened for his own injuries. The First Judicial District Court, Parish of Caddo, James E. Clark, J., found that accident resulted from joint negligence of plaintiffs' son and state trooper, and rejected demands of both plaintiffs and defendant, and plaintiffs appealed. The Court of Appeal, Bolin, J., held that: (1) defendant state trooper, by driving at speed of 90 miles an hour without flashing lights or siren in pursuit of speeding motorists, was guilty of negligence which was cause of fatal accident; (2) defendants failed to prove that plaintiffs' son was contributorily negligent and therefore trooper's negligence was sole cause of accident and resulting death; (3) award of $20,000 to each parent as damages for wrongful death of their son was reasonable and (4) plaintiffs were entitled to legal interest on amount of judgment from judicial demand until paid.

Reversed and judgment rendered in favor of plaintiffs.

Marvin, J., dissented from refusal to grant rehearing and assigned written reasons.

Attorneys and Law Firms

***271** Leon M. Pliner, Shreveport, for plaintiffs-appellants.

***272** Blanchard, Walker, O'Quin & Roberts by William Timothy Allen, III, Shreveport, for defendants-appellees.

Before BOLIN, PRICE and HALL, JJ.

Opinion

BOLIN, Judge.

Plaintiffs' son was killed when the car he was driving was struck by a state police vehicle. For his wrongful death plaintiffs sued the state trooper-driver of the patrol car, his employer, and the latter's insurer. The state trooper reconvened for his own injuries. The trial court found the accident resulted from the joint negligence of plaintiffs' son and the state trooper, and rejected the demands of both plaintiffs and defendant. Plaintiffs alone appealed. We reverse and render judgment in favor of the plaintiffs.

Since we find the state trooper's negligence in driving a police car at an excessive rate of speed without using flashing lights or siren was a cause of the accident, the principal question is whether the deceased driver was contributorily negligent in crossing a highway in front of the oncoming police car.

Trial on the merits was held in 1971 before the late Judge Eugene B. Middleton. After Judge Middleton's death his successor decided the case from the record. Since the judge who rendered the decision had no opportunity to hear or observe the witnesses, the rule of according great weight to his factual findings is not applicable. Allstate Insurance Co. v. Shemwell, 142 So.2d 866 (La.App. 2d Cir., 1962).

Shortly before midnight on April 25, 1969, plaintiffs' 18-year-old son, accompanied by two companions, was driving the family automobile south on U.S. Highway 171, a four-lane thoroughfare with its northbound and southbound lanes separated by a grassy median. At the same time Sgt. Hill of the Louisiana State Police was driving north on U.S. 171 in pursuit of two speeding vehicles.

Intending to turn left onto a private road leading to a local dragstrip, plaintiffs' son drove into the median at a crossover and brought his vehicle to a stop before crossing the northbound lanes of traffic. At this point the highway was straight and level to the south for a distance of at least 0.7 of a

mile. Weather conditions were clear and dry. There was little traffic in either direction on this rural stretch of road.

The state trooper testified his new police car was "semi-marked": only decals on the front doors and a public license plate identified it as a state police unit. The car was equipped with a siren, which could be engaged by depressing a dimmer-like switch on the floorboard, and a portable flashing red light, which could be mounted on the dash and activated by plugging a cord into the cigarette lighter. However, the trooper used neither siren nor flashing light while pursuing the two speeding automobiles. He testified concerning difficulties experienced with the portable light, including his inability to properly secure it to the dash. He also said that, to prevent evasion by the violators, it was his "practice" to refrain from using siren and flashing lights during pursuit on the open highway until apprehension was imminent.

The trooper testified that when he saw the Moore vehicle stop at the crossover ahead of him his car's speedometer indicated a speed of 90 miles per hour. He said he immediately lifted his foot from the accelerator and began to pump his headlight dimmer switch to give warning of his approach. However, according to Sgt. Hill's testimony, the Moore automobile entered the traveled portion of the northbound lanes when his police car was approximately 150 feet south of the crossover and, although he immediately applied his brakes with full force, he could not avoid the resulting collision. The collision occurred near the middle of the outside or right lane. The point of impact was over the right rear wheel of the Moore vehicle. Plaintiffs' son was thrown from the car on impact and killed instantly. The police car left 53 feet of skidmarks prior to impact. Both vehicles came to rest off the highway approximately 150 feet northeast of the point of impact.

***273** The passengers in the Moore vehicle both testified their driver waited in the median until two speeding cars, traveling side by side, passed in front of them and reached a small bridge one-tenth of a mile north of the crossover. Each testified young Moore then looked to his right (south) before attempting to cross the northbound lanes. Both passengers said they also looked right but saw no vehicle approaching.

Plaintiffs' expert witness testified the accident would not have happened had the police vehicle been traveling at the legal speed limit (70 miles per hour at the time of the accident). This expert's conclusions were based on calculations derived from a hypothetical set of facts.

As did the trial court, we find the state trooper's negligence in driving at an excessive speed patent on the face of the record. Ponville v. Travelers Insurance Co., 340 So.2d 331 (La.App. 1st Cir., 1976). Since he had neither his siren nor his flashing red light in operation while driving at a high rate of speed in pursuit of speeding motorists, he is not entitled to the protection of the emergency vehicle statute, Louisiana Revised Statutes 32:24.

Practical difficulties which the officer confronted in the use of his portable light and his "practice" of pursuing violators silently so as to remain undetected did not relieve this driver of his duty to exercise due regard for the safety of plaintiffs' son and his passengers.

We find the trooper's repeated use of his dimmer switch was not sufficient warning to the driver of the Moore vehicle to place defendant under the protection of La.R.S. 32:24C. The alternate flashing of high and low beam headlights is at best a signal fraught with ambiguity. The trooper's use of the dimmer switch only serves as a painful reminder that a siren switch was located only inches away; its use could have saved a life. In summary, defendant driver was guilty of negligence which was a cause of the accident.

Defendants pled the contributory negligence of plaintiffs' son as a bar to recovery for his wrongful death. As with other affirmative defenses, defendants bear the burden of proving contributory negligence by a preponderance of the evidence. Prestenbach v. Sentry Insurance Co., 340 So.2d 1331 (La.1976); Carpenter v. Hartford Accident and Indemnity Co., 333 So.2d 296 (La.App. 1st Cir., 1976).

There is no evidence in the record that young Moore did not look to the south before entering the traveled portion of the northbound lanes from the median. Although his companions testified they looked but did not see the police car approaching, we cannot assume Moore also looked and was oblivious, absent positive evidence of that fact. Rather, since the Moore vehicle was visible to the state trooper, it must likewise be assumed Moore saw or should have seen the police car's approach. See Gulotta v. Toups, 183 So.2d 383 (La.App. 4th Cir., 1966). Moore was then entitled to presume the approaching vehicle was traveling at a lawful rate of speed. Ponville v. Travelers Insurance Co., supra.

In crossing a favored street in front of an oncoming automobile, the test is whether a driver acts as a reasonably prudent and cautious person under the circumstances. Camet v. Guillot, 291 So.2d 438 (La.App. 4th Cir., 1974). The only evidence suggesting deceased did not satisfy this test

is the uncorroborated testimony of the state trooper that he was approximately 150 feet south of the crossover when he noticed the Moore vehicle begin to enter the northbound lanes in front of him. However, to infer from the trooper's testimony that Moore was negligent in crossing a favored highway, when he should have known such a maneuver was unsafe, is to ignore the preponderance of the evidence. The admittedly excessive speed of the trooper's vehicle, the location of the collision near the middle of the outside lane, and the testimony of plaintiffs' expert in accident analysis lead us to conclude defendants have failed to prove plaintiffs' son was contributorily negligent. We therefore find the trooper's negligence was the sole cause of the accident and resulting death.

Wellman's Funeral Parlors, Inc.	$ 500.00
Forest Park West, Inc. (Interment)	75.00
Value of 1961 Chevrolet sedan less salvage ($50)	445.00
Total	$1020.00

Plaintiffs are entitled to legal interest on the amount of the judgment from judicial demand until paid. Since demand was made on August 25, 1969, the rate of interest will be 5%, which was the legal rate on the date of demand. O'Donnell v. Fidelity General Insurance Co., 344 So.2d 91 (La.App.2d Cir., 1977); Winzer v. Lewis, 251 So.2d 650 (La.App.2d Cir., 1971).

The judgment of the trial court is reversed and set aside. There is judgment in favor of Bennie Moore, Sr. against defendants June R. Hill, the State of Louisiana through the Department of Public Safety, Division of State Police, and The Travelers Indemnity Company, individually and in solido, for $21,020, with 5% interest from date of judicial demand until paid.

There is also judgment in favor of Josephine Rachel Moore against the same defendants for $20,000 with 5% interest from date of judicial demand until paid.

Appellees are to pay all costs.

***274** 10] While no amount of money can compensate Mr. and Mrs. Moore for the loss of their son, this court must nevertheless assess a reasonable amount as damages for his wrongful death. The record shows Bennie Moore, Jr. was the oldest of six children. At the time of his death he was a high school student with part-time employment. His employer intended to hire him full-time during the summer months. There is evidence that young Moore willingly assisted his parents financially from the proceeds of his employment. An especially close relationship was shown to exist between both parents and their first-born son. Mindful of these factors and that this action was tried in 1971, we hold an award of $20,000 as damages for each parent is reasonable.

We find the following special damages were proved:

MARVIN, J., dissented from refusal to grant rehearing and assigned written reasons.

MARVIN, Judge, dissents.

I respectfully dissent from the refusal to grant a rehearing because I believe that the decedent driver, plaintiff's son, was clearly contributorily negligent under the facts as found by this court.

1. The scene is essentially rural and there were no distracting conditions on the night in question.

2. The northbound trooper on a divided four-lane highway saw the decedent's vehicle stop in the median neutral area between the divided lanes. When the trooper saw this, he decelerated from 90 mph to a speed not determined during the one or more seconds the decedent's vehicle remained stopped. The two speeding vehicles which passed in front of

the decedent traveled 528 feet before the decedent pulled out in front of the oncoming trooper.

3. It is assumed in the opinion that the decedent looked and saw the approaching police car sometime after the decedent stopped. It is also assumed that the decedent saw the "pumping" (continuous on and off flashing) of the high and low beams of the trooper's vehicle.

4. At this time, the trooper's vehicle was going less than 90 mph. The speed limit at this time was 70 mph.

5. When the decedent pulled out into the favored highway (it was not legally an "intersection") the trooper's vehicle was approximately 150 feet away by the trooper's estimate with its lights flashing as they had been for some length of time.

6. While the opinion has characterized the continuous flashing of the lights as "fraught with ambiguity," this certainly afforded notice to the decedent (however "ambiguous") that the oncoming vehicle on the favored highway was not proceeding in the usual or unambiguous manner. There is something unusual, in my opinion, about an oncoming automobile on a favored thoroughfare which continuously flashes its lights at a vehicle sitting perpendicular to the favored thoroughfare.

***275** 7. When there is no other traffic involved and where the speed limit is 70 miles an hour, it is patently unsafe and imprudent for a driver of a vehicle perpendicular to the favored thoroughfare and in the median area of the thoroughfare, to drive his vehicle into the thoroughfare in the face of an oncoming vehicle which is continuously flashing its lights at the vehicle in the median.

8. Time and distance factors support a conclusion that the trooper's vehicle had slowed considerably from the speed of 90 mph when the decedent stopped in the median. The passing speeding vehicles covered 528 feet (1/10 mile) before the decedent started to pull out. The fact that the oncoming vehicle with its lights flashing (at whatever speed) was following two vehicles which were obviously speeding past the decedent, should have served as additional and further warning that the oncoming vehicle with flashing lights was proceeding other than in an ordinary manner.

9. Even assuming arguendo, that the trooper was negligent in speeding and in not using his siren and red light (and this question as to cause in fact is extremely close in my mind), the decedent driver was contributorily negligent in entering the highway under the circumstances.

10. The location of the collision near the middle of the outside northbound lane does not negate contributory negligence or lead me to conclude that the defendants failed to prove contributory negligence because the comparative speed of each vehicle is not found, except by the assumption of the expert for plaintiff.

I would grant the rehearing.

All Citations

352 So.2d 270

141 F.3d 1185
Unpublished Disposition
NOTICE: THIS IS AN UNPUBLISHED OPINION.
(The Court's decision is referenced in a "Table of Decisions Without Reported Opinions" appearing in the Federal Reporter. See CTA 10 Rule 32.1 before citing.)
United States Court of Appeals, Tenth Circuit.

Clarence Michael PAUL, Plaintiff-Appellant,

v.

The CITY of Altus; Todd Gilpatrick; Randall Howland; Ronald Myers; Charles Digiacomo; Mike White; John Doe Police Officers; Jackson County Memorial Hospital, Defendants-Appellees, Dr. George ANDREWS, Defendant.

No. 96-6376.
|
March 5, 1998.

Before BRORBY, BARRETT, and BRISCOE, Circuit Judges.

ORDER AND JUDGMENT*

***1** After examining the briefs and appellate record, this panel has determined unanimously that oral argument would not materially assist the determination of this appeal. *See* Fed. R.App. P. 34(a); 10th Cir. R. 34.1.9. The case is therefore ordered submitted without oral argument.

Plaintiff-appellant Clarence Michael Paul brought this action pursuant to 42 U.S.C. § 1983, alleging that the defendants violated his civil rights. The district court granted summary judgment in favor of the City of Altus (City) and Officers Myers, Digiacomo and White. Claims against Officers Gilpatrick and Howland proceeded to trial, where the jury reached verdicts in favor of the defendants. Plaintiff now appeals from the district court's order of summary judgment on his claims against the City and the individual officers, and from various orders and rulings concerning the trial of his other claims. We affirm in part, reverse in part, and remand for further proceedings.

I.

Plaintiff is a partial quadriplegic. On the evening of October 11, 1993, he was riding as a passenger in an automobile driven by Lloyd Gildon. Mr. Gildon's wife had reported the automobile stolen. Officer Gilpatrick of the Altus, Oklahoma, police department saw the Gildon vehicle and called in a request to run the tag number, which came back showing that the vehicle was stolen. Officer Gilpatrick stopped the Gildon vehicle.

According to plaintiff, the following events occurred after Officer Gilpatrick stopped the vehicle. After the driver and another passenger were removed, Officer Gilpatrick ordered plaintiff out of the vehicle. Plaintiff told Officer Gilpatrick that he could not get out because he was paralyzed. Gilpatrick and Howland yelled at plaintiff to get out of the car. Gilpatrick chambered his shotgun and told plaintiff "I've been waiting to pop you." Plaintiff finally was able to roll down the window whereupon he informed Gilpatrick that he was paralyzed and could not get out of the car on his own.

Plaintiff says Officers Gilpatrick and Howland then grabbed him by his neck and throat, jerked him out of the vehicle, and threw him to the ground. While he was lying on the ground, one or more of the officers kicked him. Officer Gilpatrick placed his knees on plaintiff's neck and back while handcuffing him. During this ordeal, plaintiff became unconscious and urinated on himself. He requested an ambulance, telling Officer Howland that his neck and hip were hurt. Officer Howland allegedly responded with a joke concerning plaintiff's sexual vulnerability in the penitentiary. Plaintiff says he heard the other officers laughing at him after this joke. Eventually, an ambulance arrived, and plaintiff was transported to Jackson County Memorial Hospital. Plaintiff was subsequently treated at a VA hospital, where he was informed that his neck was fractured and that he had a strained hip.

II.

Summary judgment on City's failure to train

We review summary judgment rulings de novo, applying the same standard as the district court. Summary judgment is proper when "the pleadings, depositions, answers to

> interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed.R.Civ.P. 56(c). When a moving party makes a properly supported summary judgment motion, the nonmoving party has the burden of showing a genuine issue for trial, by any of the kinds of evidentiary materials listed in Rule 56(c), except the mere pleadings themselves.
>
> ***2** *Pietrowski v. Town of Dibble,* --- F.3d ----, No. 97-6012, 134 F.3d 1006, 1998 WL 19862, at *1 (10th Cir. Jan.21, 1998) (further citations and quotations omitted).

We consider first plaintiff's argument that the district court improperly granted summary judgment to the City on his "failure to train" claim.

> To establish a city's liability under 42 U.S.C. § 1983 for inadequate training of police officers in the use of force, a plaintiff must show (1) the officers exceeded constitutional limitations on the use of force; (2) the use of force arose under circumstances that constitute a usual and recurring situation with which police officers must deal; (3) the inadequate training demonstrates a deliberate indifference on the part of the city toward persons with whom the police officers come into contact, and (4) there is a direct causal link between the constitutional deprivation and the inadequate training.

Allen v. Muskogee, Okla., 119 F.3d 837, 841 (10th Cir.1997), *cert. denied,* 66 U.S.L.W. 3428, 3434 (1998).

A civil rights plaintiff ordinarily cannot rely on a single incident of unusually excessive force to prove failure to train. *See id.* at 844. However, the city's liability may arise from a single incident where there is other evidence of inadequate training. *See id.* at 844-45.

Plaintiff asserts that the City improperly trained Officer Gilpatrick to place his knee on plaintiff's neck while handcuffing him. In support of its motion for summary judgment, the City presented materials from the Council of Law Enforcement Educational Training (CLEET). The CLEET materials specifically included instructions not to apply pressure in the neck area while handcuffing a suspect, "for obvious medical reasons." Appellant's App. Vol. II at 208-09. The City also presented records showing that Officer Gilpatrick had received the CLEET training. Thus, the City argued, if Officer Gilpatrick placed his knee on plaintiff's neck, it was in violation of his training.

If this were all that was presented, summary judgment for the City would have been appropriate. However, the City also presented an incident report from Officer Howland, who was on the scene during the handcuffing. Officer Howland's statement reads in part as follows: "Gilpatrick then brought the subjects [sic] right arm around to the middle of his back *and had his knee on the subject's neck. The way we're instructed to handcuff* from the felony prone position." *Id.* Vol. II at 148 (emphasis added). Officer Howland's statement creates a material issue of fact concerning whether the City, or CLEET itself, instructed its officers to place their knees on suspects' necks while arresting them, even though the CLEET manual instructs them to do otherwise.

***3** Given Officer Howland's statement, the summary judgment materials demonstrated a genuine issue of material fact concerning each of the four criteria required for a failure to train claim. Placing a knee on the vulnerable area of an arrestee's neck could be considered excessive force. Police officers obviously must handcuff people as a regular part of their duties. Training officers to place their knees on an arrestee's neck shows deliberate indifference to public safety. Plaintiff's neck injuries could have been the result of this improper training. We must therefore reverse summary judgment against the City on the failure to train claim, and remand for further proceedings as to this claim.[1]

Summary judgment on officers' failure to intervene

Plaintiff next argues that the district court erred in granting summary judgment for the individual officers. His claim is that Officers Digiacomo, White and Myers failed to intervene to prevent Officers Gilpatrick and Howland from employing excessive force against him. The jury returned a verdict in favor of Officers Gilpatrick and Howland on plaintiff's excessive force claims against them. Having failed to establish a case of excessive force against Officers Gilpatrick and Howland, plaintiff has no claim against the remaining officers for "failure to intervene" to prevent the use of such force. *See generally Mick v. Brewer,* 76 F.3d 1127, 1136 (10th Cir.1996) (defining scope of failure to intervene claim).[2]

Bifurcation of trial

Plaintiff next raises several claims concerning the trial against Officers Gilpatrick and Howland. He claims that the district court improperly bifurcated his trial, by requiring him to try his claims against the police officers and the hospital

separately, and by requiring separate trials on the issues of liability and damages.

> The trial court has considerable discretion in determining how a trial is to be conducted. We therefore will not disturb the trial court's bifurcation order absent an abuse of discretion.
>
> A court may order a separate trial of any claim or separate issue in furtherance of convenience or to avoid prejudice, or when separate trials will be conducive to expedition and economy. Bifurcation is not an abuse of discretion if such interests favor separation of issues and the issues are clearly separable. Regardless of efficiency and separability, however, bifurcation is an abuse of discretion if it is unfair or prejudicial to a party.

Angelo v. Armstrong World Indus., Inc., 11 F.3d 957, 964 (10th Cir.1993) (further citations, quotations, and footnote omitted).

Plaintiff does not argue that the bifurcation was inefficient, or that the matters bifurcated were inseparable. Rather, his claim is based solely on the prejudice he claims resulted from the bifurcation.

The district court's order requiring bifurcation was entered on the day of trial. Plaintiff asserts that the majority of his witnesses were from out of town, and that he was forced to make unspecified "major last minutes [sic] changes which adversely affected his case." Appellant's Br. at 9. These generalized and conclusory assertions of prejudice are insufficient to show that the district court's bifurcation order prejudiced plaintiff's presentation of his case to such an extent as to require reversal of the jury's verdict. We therefore reject plaintiff's bifurcation argument. *Motion for mistrial/ trial objections/evidence to support verdict*

***4** Plaintiff's remaining contentions are not adequately supported for purposes of review. He argues that the district court should have granted his motion for mistrial. He has not included the transcript of the motion argument or the district court's ruling, nor any record citations to the events causing counsel to move for mistrial. It is plaintiff's responsibility to order and provide those portions of the transcript necessary for our review. *See* 10th Cir. R. 10.1.1. If the evidentiary record is insufficient to permit us to assess an appellant's claims of error, we must affirm. *See Deines v. Vermeer Mfg. Co.,* 969 F.2d 977, 979-80 (10th Cir.1992). Moreover, plaintiff's argument fails to persuade us that reversal on this issue was proper in any event.

Plaintiff also contends that the district court should have sustained his objections and that the jury verdict was not supported by the evidence. Plaintiff is counseled on this appeal. His entire appellate argument on these issues consists of the following statements:

> The plaintiff made his objections about the questioning of Plaintiff and his mother about the nolo contendere plea, and him about the prior use of drugs. Many other objections were made but not sustained.
>
> The evidence presented in this case did not support jury's verdict, see Plaintiff argument of evidence Transcript Addendum "E".

Plaintiff's Br. at 10.

Plaintiff's comment about the nolo contendere plea and the prior use of drugs presumably is intended as an argument that this evidence was improperly admitted at this trial. Plaintiff offers no record citation, an incomplete record, and no argument with reference to pertinent authorities.

Plaintiff's cryptic complaint that "[m]any other objections were made but not sustained" also provides us with no basis for review. Perfunctory complaints which fail to frame and develop an issue are insufficient to invoke appellate review. *See Murrell v. Shalala,* 43 F.3d 1388, 1389 n. 2 (10th Cir.1994).

Plaintiff's argument concerning sufficiency of the evidence is equally unsupported by any record citation-other than a reference to his own closing argument at trial. Challenges to the sufficiency of the evidence to support a jury's verdict ordinarily require submission of the entire trial transcript for our review. *See Scheufler v. General Host Corp.,* 126 F.3d 1261, 1268 (10th Cir.1997). Plaintiff has provided us with only bits and pieces of the trial transcript, and no specific indication of why he believes the verdict is unsupported by the evidence. Accordingly, we affirm as to this issue as well.

The judgment of the district court is AFFIRMED, with the exception of the district court's order granting summary judgment to the City, which is REVERSED and REMANDED for further proceedings.

All Citations

141 F.3d 1185 (Table), 1998 WL 94606, 98 CJ C.A.R. 1152

Footnotes

* This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. The court generally disfavors the citation of orders and judgments; nevertheless, an order and judgment may be cited under the terms and conditions of 10th Cir. R. 36.3.

1 The remand we now order does not necessarily entail a further trial on plaintiff's claim against the City. A failure to train claim cannot go forward unless the plaintiff can show that he actually suffered a constitutional injury at the hands of the police. *See City of Los Angeles v. Heller,* 475 U.S. 796, 799, 106 S.Ct. 1571, 89 L.Ed.2d 806 (1986). That issue may already have been decided against plaintiff, by virtue of the jury verdict against him. We cannot determine if this issue has been resolved because the record before us does not contain the jury instructions or the verdict form. The jury's verdict in favor of Officers Gilpatrick and Howland could mean that it decided plaintiff suffered no constitutional injury in connection with their actions. In that case, plaintiff's claim against the City could not go forward. On the other hand, the jury could have decided that plaintiff's constitutional rights *were* violated, but that the officers were entitled to qualified immunity because the law was not so clearly established as to hold them liable. In that case, plaintiff would still have a claim against the City, even though the individual officers were not liable. *See id.* at 798-99. On remand, if it is clear from the instructions and the verdict form that the jury found no constitutional violation, the claim against the City should be dismissed. If not, the claim against the City should go forward.

2 This is true regardless of whether plaintiff's claims against Officers Gilpatrick and Howland failed because the jury found there was no constitutional violation, or because it believed that Officers Gilpatrick and Howland were entitled to qualified immunity. In either case, plaintiff would not have a claim against officers who failed to intervene. This differentiates this claim from plaintiff's claim against the City, which could go forward if the jury found in favor of the officers on the basis of qualified immunity.

End of Document

134 S.Ct. 2012
Supreme Court of the United States

Officer Vance PLUMHOFF, et al., Petitioners
v.
Whitne RICKARD, a Minor Child, Individually, and as Surviving Daughter of Donald Rickard, Deceased, By and Through Her Mother Samantha Rickard, as Parent and Next Friend.

No. 12–1117
|
Argued March 4, 2014.
|
Decided May 27, 2014.

Synopsis

Background: Estate of suspect who was killed by police in a high-speed car chase brought § 1983 action against officers, alleging they used excessive force in firing 15 shots into his vehicle in violation of Fourth and Fourteenth Amendments. The United States District Court for the Western District of Tennessee, Samuel H. Mays, Jr., J., 2011 WL 197426, entered an order denying officers' motions for summary judgment based on qualified immunity, and they appealed. The Court of Appeals for the Sixth Circuit, Guy, Jr., Circuit Judge, 509 Fed.Appx. 388, affirmed, and certiorari was granted.

Holdings: The Supreme Court, Justice Alito, held that:

Court of Appeals had jurisdiction to review district court's order;

officers acted reasonably in using deadly force; and

officers' conduct in firing 15 shots into suspect's vehicle did not amount to excessive force.

Reversed and remanded.

****2014** *Syllabus*[*]

***765** Donald Rickard led police officers on a high-speed car chase that came to a temporary halt when Rickard spun out into a parking lot. Rickard resumed maneuvering his car, and as he continued to use the accelerator even though his bumper ****2015** was flush against a patrol car, an officer fired three shots into Rickard's car. Rickard managed to drive away, almost hitting an officer in the process. Officers fired 12 more shots as Rickard sped away, striking him and his passenger, both of whom died from some combination of gunshotwounds and injuries suffered when the car eventually crashed.

Respondent, Rickard's minor daughter, filed a 42 U.S.C. § 1983 action, alleging that the officers used excessive force in violation of the Fourth and Fourteenth Amendments. The District Court denied the officers' motion for summary judgment based on qualified immunity, holding that their conduct violated the Fourth Amendment and was contrary to clearly established law at the time in question. After finding that it had appellate jurisdiction, the Sixth Circuit held that the officers' conduct violated the Fourth Amendment. It affirmed the District Court's order, suggesting that it agreed that the officers violated clearly established law.

Held :

1. The Sixth Circuit properly exercised jurisdiction under 28 U.S.C. § 1291, which gives courts of appeals jurisdiction to hear appeals from "final decisions" of the district courts. The general rule that an order denying a summary judgment motion is not a "final decision[n]," and thus not immediately appealable, does not apply when it is based on a qualified immunity claim. *Johnson v. Jones,* 515 U.S. 304, 311, 115 S.Ct. 2151, 132 L.Ed.2d 238. Respondent argues that *Johnson* forecloses appellate jurisdiction here, but the order in *Johnson* was not immediately appealable because it merely decided "a question of 'evidence sufficiency,' " *id.,* at 313, 115 S.Ct. 2151, while here, petitioners' qualified immunity claims raise legal issues quite different from any ***766** purely factual issues that might be confronted at trial. Deciding such legal issues is a core responsibility of appellate courts and does not create an undue burden for them. See, *e.g., Scott v. Harris,* 550 U.S. 372, 127 S.Ct. 1769, 167 L.Ed.2d 686. Pp. 2018 – 2019.

2. The officers' conduct did not violate the Fourth Amendment. Pp. 2020 – 2023.

(a) Addressing this question first will be "beneficial" in "develop[ing] constitutional precedent" in an area that courts

typically consider in cases in which the defendant asserts a qualified immunity defense, *Pearson v. Callahan,* 555 U.S. 223, 236, 129 S.Ct. 808, 172 L.Ed.2d 565. P. 2020.

(b) Respondent's excessive-force argument requires analyzing the totality of the circumstances from the perspective "of a reasonable officer on the scene." *Graham v. Connor,* 490 U.S. 386, 396, 109 S.Ct. 1865, 104 L.Ed.2d 443. Respondent contends that the Fourth Amendment did not allow the officers to use deadly force to terminate the chase, and that, even if they were permitted to fire their weapons, they went too far when they fired as many rounds as they did. Pp. 2021 – 2023.

(1) The officers acted reasonably in using deadly force. A "police officer's attempt to terminate a dangerous high-speed car chase that threatens the lives of innocent bystanders does not violate the Fourth Amendment, even when it places the fleeing motorist at risk of serious injury or death." *Scott, supra,* at 385, 127 S.Ct. 1769. Rickard's outrageously reckless driving—which lasted more than five minutes, exceeded 100 miles per hour, and included the passing of more than two dozen other motorists—posed a grave public safety risk, and the record conclusively disproves that the chase was over when Rickard's car came to a temporary standstill and officers began shooting. Under ****2016** the circumstances when the shots were fired, all that a reasonable officer could have concluded from Rickard's conduct was that he was intent on resuming his flight, which would again pose a threat to others on the road. Pp. 2021 – 2022.

(2) Petitioners did not fire more shots than necessary to end the public safety risk. It makes sense that, if officers are justified in firing at a suspect in order to end a severe threat to public safety, they need not stop shooting until the threat has ended. Here, during the 10–second span when all the shots were fired, Rickard never abandoned his attempt to flee and eventually managed to drive away. A passenger's presence does not bear on whether officers violated Rickard's Fourth Amendment rights, which "are personal rights [that] may not be vicariously asserted." *Alderman v. United States,* 394 U.S. 165, 174, 89 S.Ct. 961, 22 L.Ed.2d 176. Pp. 2022 – 2023.

3. Even if the officers' conduct had violated the Fourth Amendment, petitioners would still be entitled to summary judgment based on qualified immunity. An official sued under § 1983 is entitled to qualified immunity ***767** unless it is shown that the official violated a statutory or constitutional right that was " 'clearly established' " at the time of the challenged conduct. *Ashcroft v. al–Kidd,* 563 U.S. ——, ——, 131 S.Ct. 2074. *Brosseau v. Haugen,* 543 U.S. 194, 201, 125 S.Ct. 596, 160 L.Ed.2d 583, where an officer shot at a fleeing vehicle to prevent possible harm, makes plain that no clearly established law precluded the officer's conduct there. Thus, to prevail, respondent must meaningfully distinguish *Brosseau* or point to any "controlling authority" or "robust 'consensus of cases of persuasive authority,' " *al–Kidd, supra,* at ——, 131 S.Ct. 2074, that emerged between the events there and those here that would alter the qualified-immunity analysis. Respondent has made neither showing. If anything, the facts here are more favorable to the officers than the facts in *Brosseau* ; and respondent points to no cases that could be said to have clearly established the unconstitutionality of using lethal force to end a high-speed car chase. Pp. 2023 – 2024.

509 Fed.Appx. 388, reversed and remanded.

ALITO, J., delivered the opinion of the Court, in which ROBERTS, C.J., and SCALIA, KENNEDY, THOMAS, SOTOMAYOR, and KAGAN, JJ., joined, in which GINSBURG, J., joined as to the judgment and Parts I, II, and III–C, and in which BREYER, J., joined except as to Part III–B–2.

Attorneys and Law Firms

Michael Mosley, North Little Rock, AR, for Petitioners.

John F. Bash, for the United States as amicus curiae, by special leave of the Court, supporting the petitioners.

Gary K. Smith, Memphis, TN, for Respondent Whitne Rickard.

Michael A. Mosley, Counsel of Record, John Wesley Hall, Little Rock, AR, for Petitioners.

Opinion

Justice ALITO delivered the opinion of the Court.[*]

***768** The courts below denied qualified immunity for police officers who shot the driver of a fleeing vehicle to put an end to a ****2017** dangerous car chase. We reverse and hold that the officers did not violate the Fourth Amendment. In the alternative, we conclude that the officers were entitled to qualified immunity because they violated no clearly established law.

I

A

Because this case arises from the denial of the officers' motion for summary judgment, we view the facts in the light most favorable to the nonmoving party, the daughter of the driver who attempted to flee. *Wilkie v. Robbins,* 551 U.S. 537, 543, n. 2, 127 S.Ct. 2588, 168 L.Ed.2d 389 (2007). Near midnight on July 18, 2004, Lieutenant Joseph Forthman of the West Memphis, Arkansas, Police Department pulled over a white Honda Accord because the car had only one operating headlight. Donald Rickard was the driver of the Accord, and Kelly Allen was in the passenger seat. Forthman noticed an indentation, " 'roughly the size of a head or a basketball' " in the windshield of the car. *Estate of Allen v. West Memphis,* 2011 WL 197426, *1 (W.D.Tenn., Jan. 20, 2011). He asked Rickard ***769** if he had been drinking, and Rickard responded that he had not. Because Rickard failed to produce his driver's license upon request and appeared nervous, Forthman asked him to step out of the car. Rather than comply with Forthman's request, Rickard sped away.

Forthman gave chase and was soon joined by five other police cruisers driven by Sergeant Vance Plumhoff and Officers Jimmy Evans, Lance Ellis, Troy Galtelli, and John Gardner. The officers pursued Rickard east on Interstate 40 toward Memphis, Tennessee. While on I–40, they attempted to stop Rickard using a "rolling roadblock," *id.,* at *2, but they were unsuccessful. The District Court described the vehicles as "swerving through traffic at high speeds," *id.,* at *8, and respondent does not dispute that the cars attained speeds over 100 miles per hour.[1] See Memorandum of Law in Response to Defendants' Motion for Summary Judgment in No. 2:05–cv–2585 (WD Tenn.), p. 16; see also Tr. of Oral Arg. 54:23–55:6. During the chase, Rickard and the officers passed more than two dozen vehicles.

Rickard eventually exited I–40 in Memphis, and shortly afterward he made "a quick right turn," causing "contact [to] occu[r]" between his car and Evans' cruiser. 2011 WL 197426, at *3. As a result of that contact, Rickard's car spun out into a parking lot and collided with Plumhoff's cruiser. Now in danger of being cornered, Rickard put his car into reverse "in an attempt to escape." *Ibid.* As he did so, Evans and Plumhoff got out of their cruisers and approached Rickard's car, and Evans, gun in hand, pounded on the ***770** passenger-side window. At that point, Rickard's car "made contact with" yet another police cruiser. *Ibid.* Rickard's tires started spinning, and his car "was rocking back and forth," *ibid.,* indicating that Rickard was using the accelerator even though his bumper was flush against a police cruiser. At that point, Plumhoff fired three shots into Rickard's car. Rickard then "reversed in a 180 degree arc" and "maneuvered onto" another street, forcing Ellis to "step to his right to avoid the vehicle." ****2018** *Ibid.* As Rickard continued "fleeing down" that street, *ibid.,* Gardner and Galtelli fired 12 shots toward Rickard's car, bringing the total number of shots fired during this incident to 15. Rickard then lost control of the car and crashed into a building. *Ibid.* Rickard and Allen both died from some combination of gunshot wounds and injuries suffered in the crash that ended the chase. See App. 60, 76.

B

Respondent, Rickard's surviving daughter, filed this action under Rev. Stat. § 1979, 42 U.S.C. § 1983, against the six individual police officers and the mayor and chief of police of West Memphis. She alleged that the officers used excessive force in violation of the Fourth and Fourteenth Amendments.

The officers moved for summary judgment based on qualified immunity, but the District Court denied that motion, holding that the officers' conduct violated the Fourth Amendment and was contrary to law that was clearly established at the time in question. The officers appealed, but a Sixth Circuit motions panel initially dismissed the appeal for lack of jurisdiction based on this Court's decision in *Johnson v. Jones,* 515 U.S. 304, 309, 115 S.Ct. 2151, 132 L.Ed.2d 238 (1995). Later, however, that panel granted rehearing, vacated its dismissal order, and left the jurisdictional issue to be decided by a merits panel.

The merits panel then affirmed the District Court's decision on the merits. *Estate of Allen v. West Memphis,* 509 Fed.Appx. 388 (C.A.6 2012). On the issue of appellate jurisdiction, ***771** the merits panel began by stating that a "motion for qualified immunity denied on the basis of a district court's determination that there exists a triable issue of fact generally cannot be appealed on an interlocutory basis." *Id.,* at 391. But the panel then noted that the Sixth Circuit had previously interpreted our decision in *Scott v. Harris,* 550 U.S. 372, 127 S.Ct. 1769, 167 L.Ed.2d 686 (2007), as creating an "exception to this rule" under which an immediate appeal may be taken

to challenge " 'blatantly and demonstrably false' " factual determinations. 509 Fed. Appx., at 391 (quoting *Moldowan v. Warren,* 578 F.3d 351, 370 (C.A.6 2009)). Concluding that none of the District Court's factual determinations ran afoul of that high standard, and distinguishing the facts of this case from those in *Scott,* the panel held that the officers' conduct violated the Fourth Amendment. 509 Fed.Appx., at 392, and n. 3. The panel said nothing about whether the officers violated *clearly established* law, but since the panel affirmed the order denying the officers' summary judgment motion,[2] the panel must have decided that issue in respondent's favor.

We granted certiorari. 571 U.S. ——, 134 S.Ct. 635, 187 L.Ed.2d 415 (2013).

II

We start with the question whether the Court of Appeals properly exercised jurisdiction under 28 U.S.C. § 1291, which gives the courts of appeals jurisdiction to hear appeals from "final decisions" of the district courts.

An order denying a motion for summary judgment is generally not a final decision within the meaning of § 1291 and is thus generally not immediately appealable. *Johnson,* 515 U.S., at 309, 115 S.Ct. 2151. But that general rule does not apply ****2019** when the summary judgment motion is based on a claim of qualified immunity. *Id.,* at 311, 115 S.Ct. 2151; *Mitchell v. Forsyth,* 472 U.S. 511, 528, 105 S.Ct. 2806, 86 L.Ed.2d 411 (1985). "[Q]ualified immunity is 'an immunity from suit ***772** rather than a mere defense to liability.' " *Pearson v. Callahan,* 555 U.S. 223, 231, 129 S.Ct. 808, 172 L.Ed.2d 565 (2009) (quoting *Mitchell, supra,* at 526, 105 S.Ct. 2806). As a result, pretrial orders denying qualified immunity generally fall within the collateral order doctrine. See *Ashcroft v. Iqbal,* 556 U.S. 662, 671–672, 129 S.Ct. 1937, 173 L.Ed.2d 868 (2009). This is so because such orders conclusively determine whether the defendant is entitled to immunity from suit; this immunity issue is both important and completely separate from the merits of the action, and this question could not be effectively reviewed on appeal from a final judgment because by that time the immunity from standing trial will have been irretrievably lost. See *ibid* ; *Johnson, supra,* at 311–312, 115 S.Ct. 2151 (citing *Mitchell, supra,* at 525–527, 105 S.Ct. 2806).

Respondent argues that our decision in *Johnson,* forecloses appellate jurisdiction under the circumstances here, but the order from which the appeal was taken in *Johnson* was quite different from the order in the present case. In *Johnson,* the plaintiff brought suit against certain police officers who, he alleged, had beaten him. 515 U.S., at 307, 115 S.Ct. 2151. These officers moved for summary judgment, asserting that they were not present at the time of the alleged beating and had nothing to do with it. *Id*., at 307–308, 115 S.Ct. 2151. The District Court determined, however, that the evidence in the summary judgment record was sufficient to support a contrary finding, and the court therefore denied the officers' motion for summary judgment. *Id*., at 308, 115 S.Ct. 2151. The officers then appealed, arguing that the District Court had not correctly analyzed the relevant evidence. *Ibid*.

This Court held that the *Johnson* order was not immediately appealable because it merely decided "a question of 'evidence sufficiency,' *i.e.,* which facts a party may, or may not, be able to prove at trial." *Id*., at 313, 115 S.Ct. 2151. The Court noted that an order denying summary judgment based on a determination of "evidence sufficiency" does not present a legal question in the sense in which the term was used in *Mitchell,* the decision that first held that a pretrial order rejecting ***773** a claim of qualified immunity is immediately appealable. *Johnson,* 515 U.S., at 314, 115 S.Ct. 2151. In addition, the Court observed that a determination of evidence sufficiency is closely related to other determinations that the trial court may be required to make at later stages of the case. *Id*., at 317, 115 S.Ct. 2151. The Court also noted that appellate courts have "no comparative expertise" over trial courts in making such determinations and that forcing appellate courts to entertain appeals from such orders would impose an undue burden. *Id*., at 309–310, 316, 115 S.Ct. 2151.

The District Court order in this case is nothing like the order in *Johnson*. Petitioners do not claim that other officers were responsible for shooting Rickard; rather, they contend that their conduct did not violate the Fourth Amendment and, in any event, did not violate clearly established law. Thus, they raise legal issues; these issues are quite different from any purely factual issues that the trial court might confront if the case were tried; deciding legal issues of this sort is a core responsibility of appellate courts, and requiring appellate courts to decide such issues is not an undue burden.

****2020** The District Court order here is not materially distinguishable from the District Court order in *Scott v. Harris,* and in that case we expressed no doubts about the jurisdiction of the Court of Appeals under § 1291. Accordingly, here, as in *Scott,* we hold that the Court of

Appeals properly exercised jurisdiction, and we therefore turn to the merits.

III

A

Petitioners contend that the decision of the Court of Appeals is wrong for two separate reasons. They maintain that they did not violate Rickard's Fourth Amendment rights and that, in any event, their conduct did not violate any Fourth Amendment rule that was clearly established at the time of the events in question. When confronted with such arguments, we held in ***774** *Saucier v. Katz,* 533 U.S. 194, 200, 121 S.Ct. 2151, 150 L.Ed.2d 272 (2001), that "the first inquiry must be whether a constitutional right would have been violated on the facts alleged." Only after deciding that question, we concluded, may an appellate court turn to the question whether the right at issue was clearly established at the relevant time. *Ibid.*

We subsequently altered this rigid framework in *Pearson,* declaring that "*Saucier* 's procedure should not be regarded as an inflexible requirement." 555 U.S., at 227, 129 S.Ct. 808. At the same time, however, we noted that the *Saucier* procedure "is often beneficial" because it "promotes the development of constitutional precedent and is especially valuable with respect to questions that do not frequently arise in cases in which a qualified immunity defense is unavailable." 555 U.S., at 236, 129 S.Ct. 808. *Pearson* concluded that courts "have the discretion to decide whether that [*Saucier*] procedure is worthwhile in particular cases." *Id*., at 242, 129 S.Ct. 808.

Heeding our guidance in *Pearson,* we begin in this case with the question whether the officers' conduct violated the Fourth Amendment. This approach, we believe, will be "beneficial" in "develop[ing] constitutional precedent" in an area that courts typically consider in cases in which the defendant asserts a qualified immunity defense. See *Pearson, supra,* at 236, 129 S.Ct. 808.

B

A claim that law-enforcement officers used excessive force to effect a seizure is governed by the Fourth Amendment's "reasonableness" standard. See *Graham v. Connor,* 490 U.S. 386, 109 S.Ct. 1865, 104 L.Ed.2d 443 (1989); *Tennessee v. Garner,* 471 U.S. 1, 105 S.Ct. 1694, 85 L.Ed.2d 1 (1985). In *Graham*, we held that determining the objective reasonableness of a particular seizure under the Fourth Amendment "requires a careful balancing of the nature and quality of the intrusion on the individual's Fourth Amendment interests against the countervailing governmental interests at stake." 490 U.S., at 396, 109 S.Ct. 1865 (internal quotation marks omitted). The inquiry requires analyzing the totality of the circumstances. See *ibid*.

***775** We analyze this question from the perspective "of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight." *Ibid*. We thus "allo[w] for the fact that police officers are often forced to make split-second judgments—in circumstances that are tense, uncertain, and rapidly evolving—about the amount of force that is necessary in a particular situation." *Id.,* at 396–397, 109 S.Ct. 1865.

In this case, respondent advances two main Fourth Amendment arguments. First, she contends that the Fourth ****2021** Amendment did not allow petitioners to use deadly force to terminate the chase. See Brief for Respondent 24–35. Second, she argues that the "degree of force was excessive," that is, that even if the officers were permitted to fire their weapons, they went too far when they fired as many rounds as they did. See *id*., at 36–38, 109 S.Ct. 1865. We address each issue in turn.

1

In *Scott,* we considered a claim that a police officer violated the Fourth Amendment when he terminated a high-speed car chase by using a technique that placed a "fleeing motorist at risk of serious injury or death." 550 U.S., at 386, 127 S.Ct. 1769. The record in that case contained a videotape of the chase, and we found that the events recorded on the tape justified the officer's conduct. We wrote as follows: "Although there is no obvious way to quantify the risks on either side, it is clear from the videotape that respondent posed an actual and imminent threat to the lives of any pedestrians who might have been present, to other civilian motorists, and to the officers involved in the chase." *Id*., at 383–384, 127 S.Ct. 1769. We also wrote:

> "[R]espondent's vehicle rac[ed] down narrow, two-lane roads in the dead of night at speeds that are shockingly fast. We see it swerve around more than a dozen other cars,

> cross the double-yellow line, and force cars traveling in both directions to their respective shoulders to avoid being hit. We see it run multiple red lights ***776** and travel for considerable periods of time in the occasional center left-turn-only lane, chased by numerous police cars forced to engage in the same hazardous maneuvers just to keep up." *Id*., at 379–380, 127 S.Ct. 1769 (footnote omitted).

In light of those facts, "we [thought] it [was] quite clear that [the police officer] did not violate the Fourth Amendment." *Id*., at 381, 127 S.Ct. 1769. We held that a "police officer's attempt to terminate a dangerous high-speed car chase that threatens the lives of innocent bystanders does not violate the Fourth Amendment, even when it places the fleeing motorist at risk of serious injury or death."[3] *Id*., at 386, 127 S.Ct. 1769.

We see no basis for reaching a different conclusion here. As we have explained *supra,* at ——, the chase in this case exceeded 100 miles per hour and lasted over five minutes. During that chase, Rickard passed more than two dozen other vehicles, several of which were forced to alter course. Rickard's outrageously reckless driving posed a grave public safety risk. And while it is true that Rickard's car eventually collided with a police car and came temporarily to a near standstill, that did not end the chase. Less than three seconds later, Rickard resumed maneuvering his car. Just before the shots were fired, when the front bumper of his car was flush with that of one of the police cruisers, Rickard was obviously pushing down on the accelerator because the car's wheels were spinning, and then Rickard threw the car into reverse "in an attempt to escape." ***777** Thus, the record conclusively ****2022** disproves respondent's claim that the chase in the present case was already over when petitioners began shooting. Under the circumstances at the moment when the shots were fired, all that a reasonable police officer could have concluded was that Rickard was intent on resuming his flight and that, if he was allowed to do so, he would once again pose a deadly threat for others on the road. Rickard's conduct even after the shots were fired—as noted, he managed to drive away despite the efforts of the police to block his path—underscores the point.

In light of the circumstances we have discussed, it is beyond serious dispute that Rickard's flight posed a grave public safety risk, and here, as in *Scott,* the police acted reasonably in using deadly force to end that risk.

2

We now consider respondent's contention that, even if the use of deadly force was permissible, petitioners acted unreasonably in firing a total of 15 shots. We reject that argument. It stands to reason that, if police officers are justified in firing at a suspect in order to end a severe threat to public safety, the officers need not stop shooting until the threat has ended. As petitioners noted below, "if lethal force is justified, officers are taught to keep shooting until the threat is over." 509 Fed.Appx., at 392.

Here, during the 10–second span when all the shots were fired, Rickard never abandoned his attempt to flee. Indeed, even after all the shots had been fired, he managed to drive away and to continue driving until he crashed. This would be a different case if petitioners had initiated a second round of shots after an initial round had clearly incapacitated Rickard and had ended any threat of continued flight, or if Rickard had clearly given himself up. But that is not what happened.

In arguing that too many shots were fired, respondent relies in part on the presence of Kelly Allen in the front seat ***778** of the car, but we do not think that this factor changes the calculus. Our cases make it clear that "Fourth Amendment rights are personal rights which ... may not be vicariously asserted." *Alderman v. United States,* 394 U.S. 165, 174, 89 S.Ct. 961, 22 L.Ed.2d 176 (1969); see also *Rakas v. Illinois,* 439 U.S. 128, 138–143, 99 S.Ct. 421, 58 L.Ed.2d 387 (1978). Thus, the question before us is whether petitioners violated Rickard's Fourth Amendment rights, not Allen's. If a suit were brought on behalf of Allen under either § 1983 or state tort law, the risk to Allen would be of central concern.[4] But Allen's presence in the car cannot enhance Rickard's Fourth Amendment rights. After all, it was Rickard who put Allen in danger by fleeing and refusing to end the chase, and it would be perverse if his disregard for Allen's safety worked to his benefit.

C

We have held that petitioners' conduct did not violate the Fourth Amendment, but even if that were not the case, ****2023** petitioners would still be entitled to summary judgment based on qualified immunity.

An official sued under § 1983 is entitled to qualified immunity unless it is shown that the official violated a statutory or constitutional right that was " 'clearly established' " at the time of the challenged conduct. *Ashcroft v. al–Kidd,* 563 U.S. ——, ——, 131 S.Ct. 2074, 2080, 179 L.Ed.2d 1149 (2011). And a defendant cannot be said to have violated a clearly established right unless the right's ***779** contours were sufficiently definite that any reasonable official in the defendant's shoes would have understood that he was violating it. *Id.,* at 2083–2084. In other words, "existing precedent must have placed the statutory or constitutional question" confronted by the official "beyond debate." *Ibid.* In addition, "[w]e have repeatedly told courts ... not to define clearly established law at a high level of generality," *id.,* at 2074, since doing so avoids the crucial question whether the official acted reasonably in the particular circumstances that he or she faced. We think our decision in *Brosseau v. Haugen,* 543 U.S. 194, 125 S.Ct. 596, 160 L.Ed.2d 583 (2004) (*per curiam*) squarely demonstrates that no clearly established law precluded petitioners' conduct at the time in question. In *Brosseau,* we held that a police officer did not violate clearly established law when she fired at a fleeing vehicle to prevent possible harm to "other officers on foot who [she] believed were in the immediate area, ... occupied vehicles in [the driver's] path[,] and ... any other citizens who might be in the area." *Id.,* at 197, 125 S.Ct. 596 (quoting 339 F.3d 857, 865 (C.A.9 2003); internal quotation marks omitted). After surveying lower court decisions regarding the reasonableness of lethal force as a response to vehicular flight, we observed that this is an area "in which the result depends very much on the facts of each case" and that the cases "by no means 'clearly establish[ed]' that [the officer's] conduct violated the Fourth Amendment." 543 U.S., at 201, 125 S.Ct. 596. In reaching that conclusion, we held that *Garner* and *Graham,* which are "cast at a high level of generality," did not clearly establish that the officer's decision was unreasonable. 543 U.S., at 199, 125 S.Ct. 596.

Brosseau makes plain that as of February 21, 1999—the date of the events at issue in that case—it was not clearly established that it was unconstitutional to shoot a fleeing driver to protect those whom his flight might endanger. We did not consider later decided cases because they "could not have given fair notice to [the officer]." *Id.,* at 200, n. 4, 125 S.Ct. 596. To defeat immunity here, then, respondent must show at a minimum ***780** either (1) that the officers' conduct in this case was materially different from the conduct in *Brosseau* or (2) that between February 21, 1999, and July 18, 2004, there emerged either " 'controlling authority' " or a "robust 'consensus of cases of persuasive authority,' " *al-Kidd, supra,* at 2084 (quoting *Wilson v. Layne,* 526 U.S. 603, 617, 119 S.Ct. 1692, 143 L.Ed.2d 818 (1999); some internal quotation marks omitted), that would alter our analysis of the qualified immunity question. Respondent has made neither showing.

To begin, certain facts here are more favorable to the officers. In *Brosseau,* an officer on foot fired at a driver who had just begun to flee and who had not yet driven his car in a dangerous manner. In contrast, the officers here shot at Rickard to put an end to what had already been a lengthy, high-speed pursuit that indisputably posed a danger both to the officers involved and to any civilians who happened to be nearby. Indeed, the lone dissenting Justice in *Brosseau* emphasized that in ****2024** that case, "there was no ongoing or prior high-speed car chase to inform the [constitutional] analysis." 543 U.S., at 206, n. 4, 125 S.Ct. 596 (opinion of Stevens, J.). Attempting to distinguish *Brosseau,* respondent focuses on the fact that the officer there fired only 1 shot, whereas here three officers collectively fired 15 shots. But it was certainly not clearly established at the time of the shooting in this case that the number of shots fired, under the circumstances present here, rendered the use of force excessive.

Since respondent cannot meaningfully distinguish *Brosseau,* her only option is to show that its analysis was out of date by 2004. Yet respondent has not pointed us to any case—let alone a controlling case or a robust consensus of cases—decided between 1999 and 2004 that could be said to have clearly established the unconstitutionality of using lethal force to end a high-speed car chase. And respondent receives no help on this front from the opinions below. The District Court cited only a single case decided between 1999 and 2004 that identified a possible constitutional violation by ***781** an officer who shot a fleeing driver, and the facts of that case—where a reasonable jury could have concluded that the suspect merely "accelerated to eighty to eighty-five miles per hour in a seventy-miles-per-hour zone" and did not "engag[e] in any evasive maneuvers," *Vaughan v. Cox,* 343 F.3d 1323, 1330–1331 (C.A.11 2003)—bear little resemblance to those here.

* * *

Under the circumstances present in this case, we hold that the Fourth Amendment did not prohibit petitioners from using the deadly force that they employed to terminate the dangerous car chase that Rickard precipitated. In the alternative, we note that petitioners are entitled to qualified immunity for the

conduct at issue because they violated no clearly established law.

The judgment of the Court of Appeals is reversed, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

All Citations

572 U.S. 765, 134 S.Ct. 2012, 188 L.Ed.2d 1056, 82 USLW 4394, 14 Cal. Daily Op. Serv. 5681, 2014 Daily Journal D.A.R. 6482, 24 Fla. L. Weekly Fed. S 790

Footnotes

* The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Timber & Lumber Co.,* 200 U.S. 321, 337, 26 S.Ct. 282, 50 L.Ed. 499.

* Justice GINSBURG joins the judgment and Parts I, II, and III–C of this opinion. Justice BREYER joins this opinion except as to Part IIIB–2.

1 It is also undisputed that Forthman saw glass shavings on the dashboard of Rickard's car, a sign that the windshield had been broken recently; that another officer testified that the windshield indentation and glass shavings would have justified a suspicion " 'that someone had possibly been struck by that vehicle, like a pedestrian' "; and that Forthman saw beer in Rickard's car. See App. 424–426 (Response to Defendant's Statement of Undisputed Material Facts in No. 2:05–cv–2585 (WD Tenn.), ¶¶ 15–19).

2 After expressing some confusion about whether it should dismiss or affirm, the panel wrote that "it would seem that what we are doing is affirming [the District Court's] judgment." 509 Fed.Appx., at 393.

3 In holding that petitioners' conduct violated the Fourth Amendment, the District Court relied on reasoning that is irreconcilable with our decision in *Scott*. The District Court held that the danger presented by a high-speed chase cannot justify the use of deadly force because that danger was caused by the officers' decision to continue the chase. *Estate of Allen v. West Memphis,* 2011 WL 197426, at *8 (W.D.Tenn., Jan. 20, 2011). In *Scott,* however, we declined to "lay down a rule requiring the police to allow fleeing suspects to get away whenever they drive so recklessly that they put other people's lives in danger," concluding that the Constitution "assuredly does not impose this invitation to impunity-earned-by-recklessness." 550 U.S., at 385–386, 127 S.Ct. 1769.

4 There seems to be some disagreement among lower courts as to whether a passenger in Allen's situation can recover under a Fourth Amendment theory. Compare *Vaughan v. Cox,* 343 F.3d 1323 (C.A.11 2003) (suggesting yes), and *Fisher v. Memphis,* 234 F.3d 312 (C.A.6 2000) (same), with *Milstead v. Kibler,* 243 F.3d 157 (C.A.4 2001) (suggesting no), and *Landol–Rivera v. Cruz Cosme,* 906 F.2d 791 (C.A.1 1990) (same). We express no view on this question. We also note that in *County of Sacramento v. Lewis,* 523 U.S. 833, 836, 118 S.Ct. 1708, 140 L.Ed.2d 1043 (1998), the Court held that a passenger killed as a result of a police chase could recover under a substantive due process theory only if the officer had "a purpose to cause harm unrelated to the legitimate object of arrest."

557 F.Supp.2d 771
United States District Court,
W.D. Texas,
San Antonio Division.

Maria SALINAS, Plaintiff,

v.

CITY OF NEW BRAUNFELS, Defendant.

Civil Action No. SA–06–CA–729–XR.
|
Dec. 18, 2006.

Synopsis

Background: Deaf resident brought action against city, seeking declaratory, injunctive, and monetary relief for city's alleged unlawful discrimination based on her hearing disability, arising out of communication failures with police and other city personnel after she called 911 to report an emergency. City moved to dismiss.

The District Court, Xavier Rodriguez, J., held that resident's allegations were sufficient to state a claim against city under Americans with Disabilities Act (ADA) and Rehabilitation Act.

Motion denied.

Attorneys and Law Firms

***772** Lucy D. Wood, Advocacy, Inc., Austin, TX, Thomas Joseph Crane, Law Office of Thomas J. Crane, San Antonio, TX, for Plaintiff.

Charles Straith Frigerio, Attorney at Law, Hector Xavier Saenz, Law Ofcs. of Chas. S. Frigerio, San Antonio, TX, for Defendant.

ORDER

XAVIER RODRIGUEZ, District Judge.

On this date, the Court considered Defendant City of New Braunfels' Motion to Dismiss. For the reasons discussed below, the motion is DENIED (Docket No. 4).

I. Factual and Procedural Background

Plaintiff Maria Salinas filed this civil action for declaratory, injunctive, and monetary relief against Defendant City of New Braunfels ("the City") for alleged unlawful discrimination based on Plaintiff's hearing disability. Plaintiff asserted that Defendant discriminated against her in violation of Section 504 of the Rehabilitation Act of 1973 ("Section 504") and Title II of the Americans with Disabilities Act of 1990 ("ADA").

Plaintiff has bilateral, profound hearing loss, is deaf, and relies on the use of American Sign Language ("ASL") to communicate. She relies on ASL interpreters to communicate with people who do not sign. Plaintiff alleges that the City failed to provide her with appropriate auxiliary aids and services, failed to provide her with the opportunity for effective communication, and failed to ensure the reasonable accommodation of her disability during her interaction with the New Braunfels police and other city personnel after she called "911" to report an emergency.

On September 23, 2004, Plaintiff returned home to her apartment after work and found her boyfriend, Ed Spencer, lying motionless on her couch. It was later determined that Mr. Spencer was deceased. Unable to rouse him, Plaintiff went to her neighbor's apartment for assistance, who returned with her to her apartment and called 911 to request emergency assistance and the services of a qualified ASL interpreter. Plaintiff alleges that although the police knew from the ***773** 911 call that Plaintiff was deaf and needed interpreter services, the police did not attempt to locate an interpreter and failed to assign this task to another City employee. As a consequence, none of the responding officers were able to communicate effectively with Plaintiff.

After the police arrived at the scene and determined that Plaintiff needed interpreter services, Plaintiff alleges that the police refused to attempt to locate two interpreters whose names were given to them. Apparently, one of those two interpreters contacted the police at the scene by phone and informed an officer that Plaintiff would need an interpreter in order to communicate. This interpreter allegedly told the officer the phone number to call to obtain paid interpreter

services because the interpreter speaking on the phone was unable to leave her work and interpret at the scene. The officer allegedly refused to seek paid interpreter services after being given that phone number.

Without an interpreter present, Plaintiff was unable to understand what was going on in her apartment, did not know what functions the police were performing, remained unsure about Mr. Spencer's prognosis, and became increasingly distraught as she was left out of the many communications taking place around her.

Not having succeeded in obtaining free interpreter services, the officer next attempted to communicate with Plaintiff by going to the manager of the apartment complex to learn if anyone on the premises knew sign language. The manager was familiar with the sign language alphabet, but was not able to communicate in ASL. The assistant manager's knowledge of the alphabet was so limited that she could not communicate effectively with Plaintiff, who became frustrated from being unable to communicate with the police.

Plaintiff alleges that the officer relied on the apartment manager's minimal knowledge of the alphabet in order to obtain her permission to conduct a search of her home and to ask her questions about her boyfriend's illness and use of medications. Instead of obtaining an interpreter, the officer allegedly directed Plaintiff to her bedroom and motioned for her to wait there. A police officer eventually came back into the room and indicated on a written note that he needed to search her bedroom.

An ASL interpreter eventually arrived in response to Plaintiff's earlier communication via her pager. The police allegedly did not give this interpreter access to Plaintiff. The police eventually gave the interpreter access in order to facilitate communication, but the police did not pay her. Plaintiff alleges that prior to the interpreter arriving at the scene, no officers were successful in communicating any information concerning Mr. Spencer's condition or the purpose, phase, or results of their investigation.

Plaintiff alleges that as a result of the New Braunfels police and emergency personnel's actions and inactions and discriminatory conduct, she has sustained damages including but not limited to loss of self esteem, emotional distress, mistrust of the police, continued feelings of isolation, and segregation. Plaintiff alleges that the police never provided her with the name of their ADA or Section 504 Coordinator or information concerning how she could obtain appropriate auxiliary aids or services in order to follow-up on the results of their investigation. Furthermore, she alleges that the City's police department lacks a coherent policy for responding to the basic and consistent communication needs of deaf and hard of hearing residents, in violation of Section 504 and the ADA.

***774** Plaintiff brought a claim against the City under Section 504, claiming that she is a qualified individual with a disability. She seeks to enjoin the City from committing further violations of Section 504, which she claims are likely to be repeated due to the City's alleged deficient police practices in servicing individuals who are deaf or hard of hearing. Plaintiff also brought a claim under the ADA, claiming that the city failed to ensure that communications with her were as effective as communications with non-disabled individuals, failed to provide auxiliary aids and services, failed to modify policies, practices and procedures to avoid discrimination, and failed to provide notice of the designated ADA Coordinator, all in violation of the ADA's implementing regulations.

In its motion to dismiss, the City argues that its officers did attempt to locate an interpreter but were unsuccessful. The City points out that an interpreter did eventually arrive on the scene in order to facilitate communication. Based on the Fifth Circuit case of *Hainze v. Richards,* the City argues that Plaintiff's ADA and Section 504 claims, which arose in the context of law enforcement activity, must be dismissed. Additionally, the City asserts that Plaintiff's reporting of an incident wherein she requested [that] police respond to her apartment does not fall in the category of "services, programs or activities of a public entity" of Title II as contemplated in *Hainze.*

II. Legal Analysis

A. Legal standard for motion to dismiss

In considering a motion to dismiss pursuant to Fed.R.Civ.P. 12(b)(6), the Court must accept all well-pleaded facts as true and view them in the light most favorable to the plaintiff. *Baker v. Putnal,* 75 F.3d 190, 196 (5th Cir.1996). The issue is not whether the plaintiff will prevail but whether the plaintiff is entitled to pursue his complaint and offer evidence in support of his claims. *Doe v. Hillsboro Indep. Sch. Dist.,* 81 F.3d 1395, 1401 (5th Cir.1996). The Court may not look beyond the pleadings in ruling on the motion. *Baker,* 75 F.3d at

196. Motions to dismiss are disfavored and are rarely granted. *Beanal v. Freeport–McMoran, Inc.,* 197 F.3d 161, 164 (5th Cir.1999). Dismissal should not be granted "unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Id.* at 164 (quoting *Conley v. Gibson,* 355 U.S. 41, 45–46, 78 S.Ct. 99, 2 L.Ed.2d 80 (1957)). However, the Court does not accept conclusory allegations or unwarranted deductions of fact as true. *Tuchman v. DSC Commc'ns Corp.,* 14 F.3d 1061, 1067 (5th Cir.1994).

B. The City's motion to dismiss Plaintiff's ADA and Section 504 claims is DENIED

Title II of the ADA provides that "no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity." 42 U.S.C. § 12132. A "public entity" includes "any department, agency, special purpose district, or other instrumentality of a State or States or local government." 42 U.S.C. § 12131(1)(B). The language of Title II generally tracks the language of Section 504 of the Rehabilitation Act of 1973[1], and ***775** Congress' intent was that Title II extend the protections of the Rehabilitation Act "to cover all programs of state or local governments, regardless of the receipt of federal financial assistance" and that it "work in the same manner as Section 504." H.R.Rep. No. 101–485, pt. III at 49–50 (1990), reprinted in 1990 U.S.C.C.A.N. 445, 472–73. In fact, the statute specifically provides that "[t]he remedies, procedures and rights" available under Section 504 shall be the same as those available under Title II. 42 U.S.C. § 12133. The Fifth Circuit has held that jurisprudence interpreting either section is applicable to both. *Hainze v. Richards,* 207 F.3d 795, 799 (5th Cir.2000). Title II further directs the Attorney General to promulgate regulations to effectuate the statute's purpose. 42 U.S.C. § 12134(a) (*see* 28 C.F.R. § 35, *et seq.*).

Courts have broadly construed the "services, programs, or activities" language in the ADA and the Rehabilitation Act to encompass "anything a public entity does." *Barden v. City of Sacramento,* 292 F.3d 1073, 1076 (9th Cir.2002) (quoting *Lee v. City of Los Angeles,* 250 F.3d 668, 691 (9th Cir.2001)); *Yeskey v. Pa. Dep't of Corr.,* 118 F.3d 168, 171 (3d Cir.1997), *aff'd* 524 U.S. 206, 118 S.Ct. 1952, 141 L.Ed.2d 215 (1998); *see Johnson v. City of Saline,* 151 F.3d 564, 569 (6th Cir.1998)(concluding that "services, programs, and activities include all government activities" and that the language "encompasses virtually everything that a public entity does"); *Innovative Health Sys., Inc. v. City of White Plains,* 117 F.3d 37, 45 (2d Cir.1997), *superseded on other grounds by Zervos v. Verizon New York, Inc.,* 252 F.3d 163, 171 n. 7 (2d Cir.2001) (stating that the "services, programs, activities" language of Title II "is a catch-all phrase that prohibits all discrimination by a public entity, regardless of the context"); 29 U.S.C. § 794(b)(*l*)(A) (defining "program or activity" as used in the Rehabilitation Act as "all of the operations of" a qualifying local government); H.R.Rep. No. 101–485(II), at 84 (1990), reprinted in 1990 U.S.C.C.A.N. 303, 367 (noting that Title II "simply extends the anti-discrimination prohibition embodied in Section 504 [of the Rehabilitation Act] to all actions of state and local governments"). It would appear that a municipality's 911 emergency response services would fall within the category of "services, programs, or activities" covered by the ADA and Section 504.

A disabled plaintiff can succeed in an action under Title II if she can show that, by reason of her disability, she was either "excluded from participation in or denied the benefits of the services, programs, or activities of a public entity," or was otherwise "subjected to discrimination by any such entity." *Hainze,* 207 F.3d at 799. A municipal police department qualifies as a public entity. *See id.* "The broad language of the statute and the absence of any stated exceptions has occasioned the courts' application of Title II protections into areas involving law enforcement." *Id.*

Hainze stands for the limited proposition that an on-the-street police response to a disturbance involving a mentally or physically disabled suspect does not fall within the ambit of Title II prior to the officer's securing of the scene and ensuring that there is no threat to human life. *Id.* at 800. The Court does not believe that Plaintiff's case falls within this category. The Fifth Circuit stated that "[a] necessary ***776** prerequisite to a successful claim under Title II is that a disabled person be denied the benefits of a service, program or activity by the public entity that provides such service, program or activity." *Id.* at 801. The Fifth Circuit further stated:

> [W]e hold that Title II does not apply to an officer's on-the-street responses to reported disturbances or other similar incidents, whether or not those calls involve subjects with mental disabilities, prior to the officer's securing the scene and ensuring that there is no threat to human life. Law enforcement personnel conducting in-the-field investigations already face the onerous task of frequently having to instantaneously identify, assess, and react to potentially life-threatening situations. To

> require the officers to factor in whether their actions are going to comply with the ADA, in the presence of exigent circumstances and prior to securing the safety of themselves, other officers, and any nearby civilians, would pose an unnecessary risk to innocents. While the purpose of the ADA is to prevent the discrimination of disabled individuals, we do not think Congress intended that the fulfillment of that objective be attained at the expense of the safety of the general public.

207 F.3d at 801.

> Once the area was secure and there was no threat to human safety, the Williamson County Sheriff's deputies would have been under a duty to reasonably accommodate Hainze's disability in handling and transporting him to a mental health facility. That would have put this case squarely within the holdings of *Pennsylvania Dep't of Corrections v. Yeskey* and the cases that have followed. But that was not the situation at bar.

207 F.3d at 802. Plaintiff has alleged that the City is a recipient of federal funds and is subject to the ADA and Section 504. Complaint, Docket No. 1, ¶ 6. Plaintiff has also alleged that she is a disabled person who has been denied the benefits of a service, namely the City's 911 emergency response services. The City has not alleged that Plaintiff was a suspect in the death of her boyfriend, and even if she was, there is no evidence that she was a threat to the safety of the officers or that the scene was not secure. Furthermore, the City has not denied that it is the recipient of federal funds. Viewing the facts in the light most favorable to Plaintiff, the scene was secure shortly after the police arrived, Plaintiff did not pose a threat to the safety of the officers, and Plaintiff requested reasonable accommodations for her disability, which were denied to her.

The City cites to *Bircoll v. Miami–Dade County,* 410 F.Supp.2d 1280 (S.D.Fla.2006) for the proposition that Plaintiff's claims must be dismissed. *Bircoll* held that "the ADA does not apply to on-the-street DUI stop" of a deaf individual, which is a holding in line with *Hainze.* 410 F.Supp.2d at 1285. Both *Hainze* and *Bircoll* suggest that after the New Braunfel's police arrived at a scene in response to Plaintiff's 911 call and discovered that she was deaf and needed an interpreter, the officers were under a duty to reasonably accommodate her disability, so long as the area was secure and there was no threat to human safety.

The Court also notes that this case is extremely similar to the case cited by Plaintiff in her response: *Center v. City of West Carrollton,* 227 F.Supp.2d 863 (S.D.Ohio 2002). This case, read in conjunction with *Hainze,* strongly supports the argument that a City's 911 emergency response services fall within the category ***777** of "services, programs or activities of a public entity" covered by the ADA and Section 504. In *Center,* the plaintiff sued the City of West Carrollton for its alleged failure to provide appropriate auxiliary aids and services to a deaf 911–caller after the police arrived at the scene. *Id.* at 864. The plaintiff alleged that the officer denied her request for a qualified interpreter, that she could not adequately communicate with the officer, and that she suffered emotional distress. *Id.* The City of West Carrollton argued that the officer who responded to Plaintiff's call was able to communicate effectively with her and did not need the assistance of an interpreter. *Id.* at 866. In denying the City's motion for summary judgment, the district court held that the effectiveness of auxiliary aids and/or services is a question of fact precluding summary judgment, and a jury was necessary to determine whether the officer's use of handwritten notes to communicate with Plaintiff was effective. *Id.* at 870. For purposes of this motion to dismiss, the Court is not holding that the auxiliary aids or services provided to Plaintiff were, in fact, ineffective for purposes of the ADA and Section 504; rather, the Court is merely holding that Plaintiff has stated a valid claim, which if proven, would entitle her to relief. Viewing the evidence in the light most favorable to Plaintiff, the Court finds that she has alleged viable ADA and Section 504 claims against the City of New Braunfels.

III. Conclusion

The City's motion to dismiss is DENIED (Docket No. 4).

It is so ORDERED.

All Citations

557 F.Supp.2d 771, 33 NDLR P 251

Footnotes

1 29 U.S.C. § 794(a). Section 504 provides that "[n]o otherwise qualified individual with a disability ... shall, solely by reason of her or his disability, be excluded from the participation in, or be denied the benefits of, or be subjected to

discrimination under any program or activity receiving Federal financial assistance....” *Id.* A “program or activity” includes “all of the operations of ... a department, agency, special purpose district, or other instrumentality of a State or of a local government....” 29 U.S.C. § 794(b)(1)(A).

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127 S.Ct. 1769
Supreme Court of the United States

Timothy SCOTT, Petitioner,

v.

Victor HARRIS.

No. 05–1631.
|
Argued Feb. 26, 2007.
|
Decided April 30, 2007.

Synopsis

Background: Motorist brought § 1983 action against county deputy and others, alleging, inter alia, use of excessive force in violation of his Fourth Amendment rights during high-speed chase. The United States District Court for the Northern District of Georgia, No. 01-00148-CV-WBH-3, Willis B. Hunt, Jr., J., 2003 WL 25419527, denied deputy's motion for summary judgment based upon qualified immunity. Deputy appealed. The United States Court of Appeals for the Eleventh Circuit, 433 F.3d 807, affirmed decision to allow Fourth Amendment claim against deputy to proceed to trial. Deputy petitioned for writ of certiorari, which was granted, 549 U.S. 991, 127 S.Ct. 468, 166 L.Ed.2d 333.

Holdings: The Supreme Court, Justice Scalia, held that:

in considering deputy's motion for summary judgment, courts had to view the facts in the light depicted by videotape which captured events underlying excessive force claim, and

deputy acted reasonably when he terminated car chase, and thus did not violate motorist's Fourth Amendment right against unreasonable seizure.

Reversed.

Justices Ginsburg and Breyer each concurred in separate opinions.

Justice Stevens dissented in a separate opinion.

****1771 *372** *Syllabus* [*]

Deputy Timothy Scott, petitioner here, terminated a high-speed pursuit of respondent's car by applying his push bumper to the rear of the vehicle, causing it to leave the road and crash. Respondent was rendered a quadriplegic. He filed suit under 42 U.S.C. § 1983 alleging, *inter alia,* the use of excessive force resulting in an unreasonable seizure under the Fourth Amendment. The District Court denied Scott's summary judgment motion, which was based on qualified immunity. The Eleventh Circuit affirmed on interlocutory appeal, concluding, *inter alia,* that Scott's actions could constitute "deadly force" under *Tennessee v. Garner,* 471 U.S. 1, 105 S.Ct. 1694, 85 L.Ed.2d 1; that the use of such force in this context would violate respondent's constitutional right to be free from excessive force during a seizure; and that a reasonable jury could so find.

Held: Because the car chase respondent initiated posed a substantial and immediate risk of serious physical injury to others, Scott's attempt to terminate the chase by forcing respondent off the road was reasonable, and Scott is entitled to summary judgment. Pp. 1773 – 1779.

(a) Qualified immunity requires resolution of a "threshold question: Taken in the light most favorable to the party asserting the injury, do the facts alleged show the officer's conduct violated a constitutional right?" *Saucier v. Katz,* 533 U.S. 194, 201, 121 S.Ct. 2151, 150 L.Ed.2d 272. Pp. 1773 – 1774.

(b) The record in this case includes a videotape capturing the events in question. Where, as here, the record blatantly contradicts the plaintiff's version of events so that no reasonable jury could believe it, a court should not adopt that version of the facts for purposes of ruling on a summary judgment motion. Pp. 1774 – 1776.

(c) Viewing the facts in the light depicted by the videotape, it is clear that Deputy Scott did not violate the Fourth Amendment. Pp. 1776 – 1779.

(1) *Garner* did not establish a magical on/off switch that triggers rigid preconditions whenever an officer's actions constitute "deadly force." The Court there simply applied the Fourth Amendment's "reasonableness" test to the use of a particular type of force in a particular situation. That case has scant applicability to this one, which has vastly different

facts. Whether or not Scott's actions constituted "deadly force," what matters is **1772 whether those actions were reasonable. Pp. 1776 – 1778.

*373 (2) In determining a seizure's reasonableness, the Court balances the nature and quality of the intrusion on the individual's Fourth Amendment interests against the importance of the governmental interests allegedly justifying the intrusion. *United States v. Place,* 462 U.S. 696, 703, 103 S.Ct. 2637, 77 L.Ed.2d 110. In weighing the high likelihood of serious injury or death to respondent that Scott's actions posed against the actual and imminent threat that respondent posed to the lives of others, the Court takes account of the number of lives at risk and the relative culpability of the parties involved. Respondent intentionally placed himself and the public in danger by unlawfully engaging in reckless, high-speed flight; those who might have been harmed had Scott not forced respondent off the road were entirely innocent. The Court concludes that it was reasonable for Scott to take the action he did. It rejects respondent's argument that safety could have been ensured if the police simply ceased their pursuit. The Court rules that a police officer's attempt to terminate a dangerous high-speed car chase that threatens the lives of innocent bystanders does not violate the Fourth Amendment, even when it places the fleeing motorist at risk of serious injury or death. Pp. 1777 – 1779.

433 F.3d 807, reversed.

SCALIA, J., delivered the opinion of the Court, in which ROBERTS, C.J., and KENNEDY, SOUTER, THOMAS, GINSBURG, BREYER, and ALITO, JJ., joined. GINSBURG, J., *post,* p. 1779, and BREYER, J., *post,* p. 1780, filed concurring opinions. STEVENS, J., filed a dissenting opinion, *post,* p. 1781.

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Opinion

Justice SCALIA delivered the opinion of the Court.

*374 We consider whether a law enforcement official can, consistent with the Fourth Amendment, attempt to stop a fleeing motorist from continuing his public-endangering flight by ramming the motorist's car from behind. Put another way: Can an officer take actions that place a fleeing motorist at risk of serious injury or death in order to stop the motorist's flight from endangering the lives of innocent bystanders?

I

In March 2001, a Georgia county deputy clocked respondent's vehicle traveling at 73 miles per hour on a road with a 55–mile–per–hour speed limit. The deputy activated his blue flashing lights indicating that respondent should pull over. Instead, respondent sped away, initiating a chase down what *375 is in most portions a two-lane road, at speeds exceeding 85 miles per hour. The deputy radioed his dispatch **1773 to report that he was pursuing a fleeing vehicle, and broadcast its license plate number. Petitioner, Deputy Timothy Scott, heard the radio communication and joined the pursuit along with other officers. In the midst of the chase, respondent pulled into the parking lot of a shopping center and was nearly boxed in by the various police vehicles. Respondent evaded the trap by making a sharp turn, colliding with Scott's police car, exiting the parking lot, and speeding off once again down a two-lane highway.

Following respondent's shopping center maneuvering, which resulted in slight damage to Scott's police car, Scott took over as the lead pursuit vehicle. Six minutes and nearly 10 miles after the chase had begun, Scott decided to attempt to terminate the episode by employing a "Precision Intervention Technique ('PIT') maneuver, which causes the fleeing vehicle to spin to a stop." Brief for Petitioner 4. Having radioed his supervisor for permission, Scott was told to " '[g]o ahead and take him out.' " *Harris v. Coweta Cty.,* 433 F.3d 807, 811 (C.A.11 2005). Instead, Scott applied his push bumper to the rear of respondent's vehicle.[1] As a result, respondent lost control of his vehicle, which left the roadway, ran down an

embankment, overturned, and crashed. Respondent was badly injured and was rendered a quadriplegic.

Respondent filed suit against Deputy Scott and others under Rev. Stat. § 1979, 42 U.S.C. § 1983, alleging, *inter alia,* a violation of his federal constitutional rights, viz. use ***376** of excessive force resulting in an unreasonable seizure under the Fourth Amendment. In response, Scott filed a motion for summary judgment based on an assertion of qualified immunity. The District Court denied the motion, finding that "there are material issues of fact on which the issue of qualified immunity turns which present sufficient disagreement to require submission to a jury." *Harris v. Coweta Cty.,* No. 3:01–CV–148–WBH, 2003 WL 25419527 (N.D.Ga. Sept. 23, 2003), App. to Pet. for Cert. 41a–42a. On interlocutory appeal,[2] the United States Court of Appeals for the Eleventh Circuit affirmed the District Court's decision to allow respondent's Fourth Amendment claim against Scott to proceed to trial.[3] Taking respondent's view of the facts as given, the Court of Appeals concluded that Scott's actions could constitute "deadly force" under *Tennessee v. Garner,* 471 U.S. 1, 105 S.Ct. 1694, 85 L.Ed.2d 1 (1985), and that the use of such force in this context "would violate [respondent's] constitutional right to be free from excessive force during a seizure. ****1774** Accordingly, a reasonable jury could find that Scott violated [respondent's] Fourth Amendment rights." 433 F.3d, at 816. The Court of Appeals further concluded that "the law as it existed [at the time of the incident], was sufficiently clear to give reasonable law enforcement officers 'fair notice' that ramming a vehicle under these circumstances was unlawful." *Id.,* at 817. The Court of Appeals thus concluded that Scott was not entitled to qualified immunity. We granted certiorari, 549 U.S. 991, 127 S.Ct. 468, 166 L.Ed.2d 333 (2006), and now reverse.

***377** II

In resolving questions of qualified immunity, courts are required to resolve a "threshold question: Taken in the light most favorable to the party asserting the injury, do the facts alleged show the officer's conduct violated a constitutional right? This must be the initial inquiry." *Saucier v. Katz,* 533 U.S. 194, 201, 121 S.Ct. 2151, 150 L.Ed.2d 272 (2001). If, and only if, the court finds a violation of a constitutional right, "the next, sequential step is to ask whether the right was clearly established ... in light of the specific context of the case." *Ibid.* Although this ordering contradicts "[o]ur policy of avoiding unnecessary adjudication of constitutional issues," *United States v. Treasury Employees,* 513 U.S. 454, 478, 115 S.Ct. 1003, 130 L.Ed.2d 964 (1995) (citing *Ashwander v. TVA,* 297 U.S. 288, 346–347, 56 S.Ct. 466, 80 L.Ed. 688 (1936) (Brandeis, J., concurring)), we have said that such a departure from practice is "necessary to set forth principles which will become the basis for a [future] holding that a right is clearly established," *Saucier, supra,* at 201, 121 S.Ct. 2151.[4] We therefore turn to the ***378** threshold inquiry: whether Deputy Scott's actions violated the Fourth Amendment.

III

A

The first step in assessing the constitutionality of Scott's actions is to determine the relevant facts. As this case was decided on summary judgment, there have not yet been factual findings by a judge or jury, and respondent's version of events (unsurprisingly) differs substantially from Scott's version. When things are in such a posture, courts are required to view the facts and draw reasonable inferences "in the light most favorable to the party opposing the [summary judgment] motion." ****1775** *United States v. Diebold, Inc.,* 369 U.S. 654, 655, 82 S.Ct. 993, 8 L.Ed.2d 176 (1962) *(per curiam); Saucier, supra,* at 201, 121 S.Ct. 2151. In qualified immunity cases, this usually means adopting (as the Court of Appeals did here) the plaintiff's version of the facts.

There is, however, an added wrinkle in this case: existence in the record of a videotape capturing the events in question. There are no allegations or indications that this videotape was doctored or altered in any way, nor any contention that what it depicts differs from what actually happened. The videotape quite clearly contradicts the version of the story told by respondent and adopted by the Court of Appeals.[5] For example, the Court of Appeals adopted respondent's assertions that, during the chase, "there was little, if any, actual threat to pedestrians or other motorists, as the roads were mostly empty and [respondent] remained in control of his vehicle." 433 F.3d, at 815. Indeed, reading the lower court's opinion, one gets the impression that respondent, ***379** rather than fleeing from police, was attempting to pass his driving test:

"[T]aking the facts from the non-movant's viewpoint, [respondent] remained in control of his vehicle, slowed for turns and intersections, and typically used his indicators for turns. He did not run any motorists off the road. Nor was he a threat to pedestrians in the shopping center parking lot, which was free from pedestrian and vehicular traffic as the center was closed. Significantly, by the time the parties were back on the highway and Scott rammed [respondent], the motorway had been cleared of motorists and pedestrians allegedly because of police blockades of the nearby intersections." *Id.,* at 815–816 (citations omitted).

The videotape tells quite a different story. There we see respondent's vehicle racing down narrow, two-lane roads in the dead of night at speeds that are shockingly fast. We see it swerve around more than a dozen other cars, cross the double-yellow line, and force cars traveling in both directions to their respective shoulders to avoid being hit.[6] We see it run multiple red lights and travel for considerable periods of time in the occasional center left-turn-only lane, chased by numerous police cars forced to engage in the same hazardous ***380** maneuvers just to keep up. Far from being the cautious and controlled driver the lower court depicts, what we see on the video more closely resembles a Hollywood-style car chase of the most ****1776** frightening sort, placing police officers and innocent bystanders alike at great risk of serious injury.[7]

At the summary judgment stage, facts must be viewed in the light most favorable to the nonmoving party only if there is a "genuine" dispute as to those facts. Fed. Rule Civ. Proc. 56(c). As we have emphasized, "[w]hen the moving party has carried its burden under Rule 56(c), its opponent must do more than simply show that there is some metaphysical doubt as to the material facts .... Where the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party, there is no 'genuine issue for trial.' " *Matsushita Elec. Industrial Co. v. Zenith Radio Corp.,* 475 U.S. 574, 586–587, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986) (footnote omitted). "[T]he mere existence of *some* alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no *genuine* issue of *material* fact." *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 247–248, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986). 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. That was the case here with regard to the factual issue whether respondent was driving in such fashion as to endanger human life. Respondent's version of events is so utterly discredited by the record that no reasonable jury could have believed him. The Court of Appeals should not have relied ***381** on such visible fiction; it should have viewed the facts in the light depicted by the videotape.

B

Judging the matter on that basis, we think it is quite clear that Deputy Scott did not violate the Fourth Amendment. Scott does not contest that his decision to terminate the car chase by ramming his bumper into respondent's vehicle constituted a "seizure." "[A] Fourth Amendment seizure [occurs] ... when there is a governmental termination of freedom of movement through means intentionally applied." *Brower v. County of Inyo,* 489 U.S. 593, 596–597, 109 S.Ct. 1378, 103 L.Ed.2d 628 (1989) (emphasis deleted). See also *id.,* at 597, 109 S.Ct. 1378 ("If ... the police cruiser had pulled alongside the fleeing car and sideswiped it, producing the crash, then the termination of the suspect's freedom of movement would have been a seizure"). It is also conceded, by both sides, that a claim of "excessive force in the course of making [a] ...'seizure' of [the] person ... [is] properly analyzed under the Fourth Amendment's 'objective reasonableness' standard." *Graham v. Connor,* 490 U.S. 386, 388, 109 S.Ct. 1865, 104 L.Ed.2d 443 (1989). The question we need to answer is whether Scott's actions were objectively reasonable.[8]

****1777** 1

Respondent urges us to analyze this case as we analyzed *Garner,* 471 U.S. 1, 105 S.Ct. 1694, 85 L.Ed.2d 1. See Brief for Respondent 16–29. We must first decide, he says, whether the actions Scott took ***382** constituted "deadly force." (He defines "deadly force" as "any use of force which creates a substantial likelihood of causing death or serious bodily injury," *id.,* at 19, 105 S.Ct. 1694.) If so, respondent claims that *Garner* prescribes certain preconditions that must be met before Scott's actions can survive Fourth Amendment scrutiny: (1) The suspect must have posed an immediate threat of serious physical harm to the officer or others; (2) deadly force must have been necessary to prevent escape;[9] and (3) where feasible, the officer must have given the

suspect some warning. See Brief for Respondent 17–18 (citing *Garner, supra,* at 9–12, 105 S.Ct. 1694). Since these *Garner* preconditions for using deadly force were not met in this case, Scott's actions were *per se* unreasonable.

Respondent's argument falters at its first step; *Garner* did not establish a magical on/off switch that triggers rigid preconditions whenever an officer's actions constitute "deadly force." *Garner* was simply an application of the Fourth Amendment's "reasonableness" test, *Graham, supra,* at 388, 109 S.Ct. 1865, to the use of a particular type of force in a particular situation. *Garner* held that it was unreasonable to kill a "young, slight, and unarmed" burglary suspect, 471 U.S., at 21, 105 S.Ct. 1694, by shooting him "in the back of the head" while he was running away on foot, *id.,* at 4, 105 S.Ct. 1694, and when the officer "could not reasonably ***383** have believed that [the suspect] ... posed any threat," and "never attempted to justify his actions on any basis other than the need to prevent an escape," *id*., at 21, 105 S.Ct. 1694. Whatever *Garner* said about the factors that *might have* justified shooting the suspect in that case, such "preconditions" have scant applicability to this case, which has vastly different facts. "*Garner* had nothing to do with one car striking another or even with car chases in general .... A police car's bumping a fleeing car is, in fact, not much like a policeman's shooting a gun so as to hit a person." *Adams v. St. Lucie County Sheriff's Dept.,* 962 F.2d 1563, 1577 (C.A.11 1992) (Edmondson, J., dissenting), adopted by 998 F.2d 923 (C.A.11 1993) (en banc) *(per curiam)*. Nor is the threat posed by the flight on foot of an unarmed suspect even remotely comparable to the extreme danger to human life posed by respondent in this case. Although respondent's attempt ****1778** to craft an easy-to-apply legal test in the Fourth Amendment context is admirable, in the end we must still slosh our way through the factbound morass of "reasonableness." Whether or not Scott's actions constituted application of "deadly force," all that matters is whether Scott's actions were reasonable.

2

In determining the reasonableness of the manner in which a seizure is effected, "[w]e must balance the nature and quality of the intrusion on the individual's Fourth Amendment interests against the importance of the governmental interests alleged to justify the intrusion." *United States v. Place,* 462 U.S. 696, 703, 103 S.Ct. 2637, 77 L.Ed.2d 110 (1983). Scott defends his actions by pointing to the paramount governmental interest in ensuring public safety, and respondent nowhere suggests this was not the purpose motivating Scott's behavior. Thus, in judging whether Scott's actions were reasonable, we must consider the risk of bodily harm that Scott's actions posed to respondent in light of the threat to the public that Scott was trying to eliminate. Although there is no obvious way to quantify ***384** the risks on either side, it is clear from the videotape that respondent posed an actual and imminent threat to the lives of any pedestrians who might have been present, to other civilian motorists, and to the officers involved in the chase. See Part III–A, *supra*. It is equally clear that Scott's actions posed a high likelihood of serious injury or death to respondent—though not the near *certainty* of death posed by, say, shooting a fleeing felon in the back of the head, see *Garner, supra,* at 4, 105 S.Ct. 1694, or pulling alongside a fleeing motorist's car and shooting the motorist, cf. *Vaughan v. Cox,* 343 F.3d 1323, 1326–1327 (C.A.11 2003). So how does a court go about weighing the perhaps lesser probability of injuring or killing numerous bystanders against the perhaps larger probability of injuring or killing a single person? We think it appropriate in this process to take into account not only the number of lives at risk, but also their relative culpability. It was respondent, after all, who intentionally placed himself and the public in danger by unlawfully engaging in the reckless, high-speed flight that ultimately produced the choice between two evils that Scott confronted. Multiple police cars, with blue lights flashing and sirens blaring, had been chasing respondent for nearly 10 miles, but he ignored their warning to stop. By contrast, those who might have been harmed had Scott not taken the action he did were entirely innocent. We have little difficulty in concluding it was reasonable for Scott to take the action that he did.[10]

***385** But wait, says respondent: Couldn't the innocent public equally have been protected, and the tragic accident entirely avoided, if the police had simply ceased their pursuit? We think the police need not have taken that chance and hoped for the best. Whereas Scott's action—ramming respondent off the road—was *certain* ****1779** to eliminate the risk that respondent posed to the public, ceasing pursuit was not. First of all, there would have been no way to convey convincingly to respondent that the chase was off, and that he was free to go. Had respondent looked in his rearview mirror and seen the police cars deactivate their flashing lights and turn around, he would have had no idea whether they were truly letting him get away, or simply devising a new strategy for capture. Perhaps the police knew a shortcut he didn't know, and would reappear down the road to intercept him; or perhaps they

were setting up a roadblock in his path. Cf. *Brower,* 489 U.S., at 594, 109 S.Ct. 1378. Given such uncertainty, respondent might have been just as likely to respond by continuing to drive recklessly as by slowing down and wiping his brow.[11]

Second, we are loath to lay down a rule requiring the police to allow fleeing suspects to get away whenever they drive *so recklessly* that they put other people's lives in danger. It is obvious the perverse incentives such a rule would create: Every fleeing motorist would know that escape is within his grasp, if only he accelerates to 90 miles per hour, crosses the double-yellow line a few times, and runs a few red lights. The Constitution assuredly does not impose this ***386** invitation to impunity-earned-by-recklessness. Instead, we lay down a more sensible rule: A police officer's attempt to terminate a dangerous high-speed car chase that threatens the lives of innocent bystanders does not violate the Fourth Amendment, even when it places the fleeing motorist at risk of serious injury or death.

* * *

The car chase that respondent initiated in this case posed a substantial and immediate risk of serious physical injury to others; no reasonable jury could conclude otherwise. Scott's attempt to terminate the chase by forcing respondent off the road was reasonable, and Scott is entitled to summary judgment. The Court of Appeals' judgment to the contrary is reversed.

It is so ordered.

Justice GINSBURG, concurring.

I join the Court's opinion and would underscore two points. First, I do not read today's decision as articulating a mechanical, *per se* rule. Cf. *post,* at 1781 (BREYER, J., concurring). The inquiry described by the Court, *ante,* at 1777 – 1779, is situation specific. Among relevant considerations: Were the lives and well-being of others (motorists, pedestrians, police officers) at risk? Was there a safer way, given the time, place, and circumstances, to stop the fleeing vehicle? "[A]dmirable" as "[an] attempt to craft an easy-to-apply legal test in the Fourth Amendment context [may be]," the Court explains, "in the end we must still slosh our way through the factbound morass of 'reasonableness.' " *Ante,* at 1778.

Second, were this case suitable for resolution on qualified immunity grounds, without reaching the constitutional question, Justice BREYER's discussion would be engaging. See *post,* at 1780 – 1781 (urging the Court to overrule *Saucier v. Katz,* 533 U.S. 194, 121 S.Ct. 2151, 150 L.Ed.2d 272 (2001)). In joining the Court's opinion, ****1780** ***387** however, Justice BREYER apparently shares the view that, in the appeal before us, the constitutional question warrants an answer. The video footage of the car chase, he agrees, demonstrates that the officer's conduct did not transgress Fourth Amendment limitations. See *post,* at 1780. Confronting *Saucier,* therefore, is properly reserved for another day and case. See *ante,* at 1774, n. 4.

Justice BREYER, concurring.

I join the Court's opinion with one suggestion and two qualifications. Because watching the video footage of the car chase made a difference to my own view of the case, I suggest that the interested reader take advantage of the link in the Court's opinion, *ante,* at 1775, n. 5, and watch it. Having done so, I do not believe a reasonable jury could, in this instance, find that Officer Timothy Scott (who joined the chase late in the day and did not know the specific reason why the respondent was being pursued) acted in violation of the Constitution.

Second, the video makes clear the highly fact-dependent nature of this constitutional determination. And that fact dependency supports the argument that we should overrule the requirement, announced in *Saucier v. Katz,* 533 U.S. 194, 121 S.Ct. 2151, 150 L.Ed.2d 272 (2001), that lower courts must first decide the "constitutional question" before they turn to the "qualified immunity question." See *id.,* at 200, 121 S.Ct. 2151 ("[T]he first inquiry must be whether a constitutional right would have been violated on the facts alleged"). Instead, lower courts should be free to decide the two questions in whatever order makes sense in the context of a particular case. Although I do not object to our deciding the constitutional question in this particular case, I believe that in order to lift the burden from lower courts we can and should reconsider *Saucier's* requirement as well.

Sometimes (*e.g.,* where a defendant is clearly entitled to qualified immunity) *Saucier's* fixed order-of-battle rule wastes judicial resources in that it may require courts to ***388** answer a difficult constitutional question unnecessarily. Sometimes (*e.g.,* where the defendant loses the constitutional question but wins on qualified immunity) that order-of-battle rule may immunize an incorrect constitutional ruling

from review. Sometimes, as here, the order-of-battle rule will spawn constitutional rulings in areas of law so fact dependent that the result will be confusion rather than clarity. And frequently the order-of-battle rule violates that older, wiser judicial counsel "not to pass on questions of constitutionality ... unless such adjudication is unavoidable." *Spector Motor Service, Inc. v. McLaughlin,* 323 U.S. 101, 105, 65 S.Ct. 152, 89 L.Ed. 101 (1944); see *Ashwander v. TVA,* 297 U.S. 288, 347, 56 S.Ct. 466, 80 L.Ed. 688 (1936) (Brandeis, J., concurring) ("The Court will not pass upon a constitutional question although properly presented by the record, if there is also present some other ground upon which the case may be disposed of "). In a sharp departure from this counsel, *Saucier* requires courts to embrace unnecessary constitutional questions not to avoid them.

It is not surprising that commentators, judges, and, in this case, 28 States in an *amicus* brief have invited us to reconsider *Saucier's* requirement. See Leval, Judging Under the Constitution: Dicta About Dicta, 81 N.Y.U. L. Rev. 1249, 1275 (2006) (calling the requirement "a puzzling misadventure in constitutional dictum"); *Dirrane v. Brookline Police Dept.,* 315 F.3d 65, 69–70 (C.A.1 2002) (referring to the requirement as "an uncomfortable exercise" when "the answer whether there was a violation may depend on a kaleidoscope ****1781** of facts not yet fully developed"); *Lyons v. Xenia,* 417 F.3d 565, 580–584 (C.A.6 2005) (Sutton, J., concurring); Brief for State of Illinois et al. as *Amici Curiae*. I would accept that invitation.

While this Court should generally be reluctant to overturn precedents, *stare decisis* concerns are at their weakest here. See, *e.g., Payne v. Tennessee,* 501 U.S. 808, 828, 111 S.Ct. 2597, 115 L.Ed.2d 720 (1991) ("Considerations in favor of *stare decisis*" are at their weakest in cases "involving procedural and evidentiary rules"). The ***389** order-of-battle rule is relatively novel, it primarily affects judges, and there has been little reliance upon it.

Third, I disagree with the Court insofar as it articulates a *per se* rule. The majority states: "A police officer's attempt to terminate a dangerous high-speed car chase that threatens the lives of innocent bystanders does not violate the Fourth Amendment, even when it places the fleeing motorist at risk of serious injury or death." *Ante,* at 1779. This statement is too absolute. As Justice GINSBURG points out, *ante,* at 1779 – 1780, whether a high-speed chase violates the Fourth Amendment may well depend upon more circumstances than the majority's rule reflects. With these qualifications, I join the Court's opinion.

Justice STEVENS, dissenting.

Today, the Court asks whether an officer may "take actions that place a fleeing motorist at risk of serious injury or death in order to stop the motorist's flight from endangering the lives of innocent bystanders." *Ante,* at 1772. Depending on the circumstances, the answer may be an obvious "yes," an obvious "no," or sufficiently doubtful that the question of the reasonableness of the officer's actions should be decided by a jury, after a review of the degree of danger and the alternatives available to the officer. A high-speed chase in a desert in Nevada is, after all, quite different from one that travels through the heart of Las Vegas.

Relying on a *de novo* review of a videotape of a portion of a nighttime chase on a lightly traveled road in Georgia where no pedestrians or other "bystanders" were present, buttressed by uninformed speculation about the possible consequences of discontinuing the chase, eight of the jurors on this Court reach a verdict that differs from the views of the judges on both the District Court and the Court of Appeals who are surely more familiar with the hazards of driving on Georgia roads than we are. The Court's justification for this unprecedented departure from our well-settled standard of ***390** review of factual determinations made by a district court and affirmed by a court of appeals is based on its mistaken view that the Court of Appeals' description of the facts was "blatantly contradicted by the record" and that respondent's version of the events was "so utterly discredited by the record that no reasonable jury could have believed him." *Ante,* at 1776.

Rather than supporting the conclusion that what we see on the video "resembles a Hollywood-style car chase of the most frightening sort," *ante,* at 1775 – 1776,[1] the tape actually confirms, rather than contradicts, the lower courts' appraisal of the factual questions at issue. More importantly, ****1782** it surely does not provide a principled basis for depriving the respondent of his right to have a jury evaluate the question whether the police officers' decision to use deadly force to bring the chase to an end was reasonable.

Omitted from the Court's description of the initial speeding violation is the fact that respondent was on a four-lane portion of Highway 34 when the officer clocked his speed at 73 miles per hour and initiated the chase.[2] More significantly

—and contrary to the Court's assumption that respondent's vehicle "force[d] cars traveling in both directions ***391** to their respective shoulders to avoid being hit," *ibid.*—a fact unmentioned in the text of the opinion explains why those cars pulled over prior to being passed by respondent. The sirens and flashing lights on the police cars following respondent gave the same warning that a speeding ambulance or fire engine would have provided.[3] The 13 cars that respondent passed on his side of the road before entering the shopping center, and both of the cars that he passed on the right after leaving the center, no doubt had already pulled to the side of the road or were driving along the shoulder because they heard the police sirens or saw the flashing lights before respondent or the police cruisers approached.[4] A jury could certainly conclude that those motorists were exposed to no greater risk than persons who take the same action in response to a speeding ambulance, and that their reactions were fully consistent with the evidence that respondent, though speeding, retained full control of his vehicle.

The police sirens also minimized any risk that may have arisen from running "multiple red lights," *ibid*. In fact, respondent and his pursuers went through only two intersections with stop lights and in both cases all other vehicles in sight were stationary, presumably because they had been warned of the approaching speeders. Incidentally, the videos do show that the lights were red when the police cars passed through them but, because the cameras were farther away when respondent did so and it is difficult to discern the color of the signal at that point, it is not entirely clear that ***392** he ran either or both of the red lights. In any event, the risk of harm to the stationary vehicles was minimized by the sirens, and there is no reason to believe that respondent would have disobeyed the signals if he were not being pursued.

My colleagues on the jury saw respondent "swerve around more than a dozen other cars," and "force cars traveling in both directions to their respective shoulders," *ibid.,* but they apparently discounted the possibility that those cars were already out of the pursuit's path as a result of hearing the sirens. Even if that ****1783** were not so, passing a slower vehicle on a two-lane road always involves some degree of swerving and is not especially dangerous if there are no cars coming from the opposite direction. At no point during the chase did respondent pull into the opposite lane other than to pass a car in front of him; he did the latter no more than five times and, on most of those occasions, used his turn signal. On none of these occasions was there a car traveling in the opposite direction. In fact, at one point, when respondent found himself behind a car in his own lane and there were cars traveling in the other direction, he slowed and waited for the cars traveling in the other direction to pass before overtaking the car in front of him while using his turn signal to do so. This is hardly the stuff of Hollywood. To the contrary, the video does not reveal any incidents that could even be remotely characterized as "close calls."

In sum, the factual statements by the Court of Appeals quoted by the Court, *ante,* at 1774 – 1775, were entirely accurate. That court did not describe respondent as a "cautious" driver as my colleagues imply, *ante,* at 1776, but it did correctly conclude that there is no evidence that he ever lost control of his vehicle. That court also correctly pointed out that the incident in the shopping center parking lot did not create any risk to pedestrians or other vehicles because the chase occurred just before 11 p.m. on a weekday night and the center was closed. It is apparent from the record (including ***393** the videotape) that local police had blocked off intersections to keep respondent from entering residential neighborhoods and possibly endangering other motorists. I would add that the videos also show that no pedestrians, parked cars, sidewalks, or residences were visible at any time during the chase. The only "innocent bystanders" who were placed "at great risk of serious injury," *ibid.,* were the drivers who either pulled off the road in response to the sirens or passed respondent in the opposite direction when he was driving on his side of the road.

I recognize, of course, that even though respondent's original speeding violation on a four-lane highway was rather ordinary, his refusal to stop and subsequent flight was a serious offense that merited severe punishment. It was not, however, a capital offense, or even an offense that justified the use of deadly force rather than an abandonment of the chase. The Court's concern about the "imminent threat to the lives of any pedestrians who might have been present," *ante,* at 1778, while surely valid in an appropriate case, should be discounted in a case involving a nighttime chase in an area where no pedestrians were present.

What would have happened if the police had decided to abandon the chase? We now know that they could have apprehended respondent later because they had his license plate number. Even if that were not true, and even if he would have escaped any punishment at all, the use of deadly force in this case was no more appropriate than the use of a deadly weapon against a fleeing felon in *Tennessee v. Garner,* 471 U.S. 1, 105 S.Ct. 1694, 85 L.Ed.2d 1 (1985). In any event, any

uncertainty about the result of abandoning the pursuit has not prevented the Court from basing its conclusions on its own factual assumptions.[5] ***394** The Court attempts ****1784** to avoid the conclusion that deadly force was unnecessary by speculating that if the officers had let him go, respondent might have been "just as likely" to continue to drive recklessly as to slow down and wipe his brow. *Ante,* at 1779. That speculation is unconvincing as a matter of common sense and improper as a matter of law. Our duty to view the evidence in the light most favorable to the nonmoving party would foreclose such speculation if the Court had not used its observation of the video as an excuse for replacing the rule of law with its ad hoc judgment. There is no evidentiary basis for an assumption that dangers caused by flight from a police pursuit will continue after the pursuit ends. Indeed, rules adopted by countless police departments throughout the country are based on a judgment that differs from the Court's. See, *e.g.,* App. to Brief for Georgia Association of Chiefs of Police, Inc., as *Amicus Curiae* A–52 ("During a pursuit, the need to apprehend the suspect should always outweigh the level of danger created by the pursuit. When the immediate danger to the public created by the pursuit is greater than the immediate or potential danger to the public should the suspect remain at large, then the pursuit should be discontinued or terminated.... [P]ursuits should usually be discontinued when the violator's identity has been established to the point that later apprehension can be accomplished without danger to the public").

Although *Garner* may not, as the Court suggests, "establish a magical on/off switch that triggers rigid preconditions" ***395** for the use of deadly force, *ante,* at 1777, it did set a threshold under which the use of deadly force would be considered constitutionally unreasonable:

> "Where the officer has probable cause to believe that the suspect poses a threat of serious physical harm, either to the officer or to others, it is not constitutionally unreasonable to prevent escape by using deadly force. Thus, if the suspect threatens the officer with a weapon or there is probable cause to believe that he has committed a crime involving the infliction or threatened infliction of serious physical harm, deadly force may be used if necessary to prevent escape, and if, where feasible, some warning has been given." 471 U.S., at 11–12, 105 S.Ct. 1694.

Whether a person's actions have risen to a level warranting deadly force is a question of fact best reserved for a jury.[6] Here, the Court has usurped the jury's factfinding function and, in doing so, implicitly labeled the four other judges to review the case unreasonable. It chastises the Court of Appeals for failing to "vie[w] the facts in the light depicted by the videotape" and implies that no reasonable person could ****1785** view the videotape and come to the conclusion that deadly force was unjustified. *Ante*, at 1776 – 1777. However, the three judges on the Court of Appeals panel apparently did view the videotapes entered into evidence[7] and described a very different version of events:

> "At the time of the ramming, apart from speeding and running two red lights, Harris was driving in a non-aggressive ***396** fashion (i.e., without trying to ram or run into the officers). Moreover, ... Scott's path on the open highway was largely clear. The videos introduced into evidence show little to no vehicular (or pedestrian) traffic, allegedly because of the late hour and the police blockade of the nearby intersections. Finally, Scott issued absolutely no warning (e.g., over the loudspeaker or otherwise) prior to using deadly force." 433 F.3d 807, 819, n. 14 (C.A.11 2005).
>
> If two groups of judges can disagree so vehemently about the nature of the pursuit and the circumstances surrounding that pursuit, it seems eminently likely that a reasonable juror could disagree with this Court's characterization of events. Moreover, under the standard set forth in *Garner,* it is certainly possible that "a jury could conclude that Scott unreasonably used deadly force to seize Harris by ramming him off the road under the instant circumstances." 433 F.3d, at 821.

The Court today sets forth a *per se* rule that presumes its own version of the facts: "A police officer's attempt to terminate a dangerous high-speed car chase *that threatens the lives of innocent bystanders* does not violate the Fourth Amendment, even when it places the fleeing motorist at risk of serious injury or death." *Ante,* at 1779 (emphasis added). Not only does that rule fly in the face of the flexible and case-by-case "reasonableness" approach applied in *Garner* and *Graham v. Connor,* 490 U.S. 386, 109 S.Ct. 1865, 104 L.Ed.2d 443 (1989), but it is also arguably inapplicable to the case at hand, given that it is not clear that this chase threatened the life of any "innocent bystande[r]."[8] In my view, the risks inherent in justifying unwarranted police conduct on the basis of unfounded assumptions ***397** are unacceptable, particularly when less drastic measures—in this case, the use of stop sticks[9] or a simple warning issued from a loudspeaker—could have avoided such a tragic result. In my judgment, jurors in Georgia should be allowed to evaluate the reasonableness of the decision to ram respondent's speeding vehicle in a manner

that created an obvious risk of death and has in fact made him a quadriplegic at the age of 19.

I respectfully dissent.

All Citations

550 U.S. 372, 127 S.Ct. 1769, 167 L.Ed.2d 686, 75 USLW 4297, 07 Cal. Daily Op. Serv. 4666, 20 Fla. L. Weekly Fed. S 225

Footnotes

* The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Timber & Lumber Co.,* 200 U.S. 321, 337, 26 S.Ct. 282, 50 L.Ed. 499.

1 Scott says he decided not to employ the PIT maneuver because he was "concerned that the vehicles were moving too quickly to safely execute the maneuver." Brief for Petitioner 4. Respondent agrees that the PIT maneuver could not have been safely employed. See Brief for Respondent 9. It is irrelevant to our analysis whether Scott had permission to take the precise actions he took.

2 Qualified immunity is "an *immunity from suit* rather than a mere defense to liability; and like an absolute immunity, it is effectively lost if a case is erroneously permitted to go to trial." *Mitchell v. Forsyth,* 472 U.S. 511, 526, 105 S.Ct. 2806, 86 L.Ed.2d 411 (1985). Thus, we have held that an order denying qualified immunity is immediately appealable even though it is interlocutory; otherwise, it would be "effectively unreviewable." *Id.,* at 527, 105 S.Ct. 2806. Further, "we repeatedly have stressed the importance of resolving immunity questions at the earliest possible stage in litigation." *Hunter v. Bryant,* 502 U.S. 224, 227, 112 S.Ct. 534, 116 L.Ed.2d 589 (1991) *(per curiam)*.

3 None of the other claims respondent brought against Scott or any other party are before this Court.

4 Prior to this Court's announcement of *Saucier's* "rigid 'order of battle,' " *Brosseau v. Haugen,* 543 U.S. 194, 201–202, 125 S.Ct. 596, 160 L.Ed.2d 583 (2004) (BREYER, J., concurring), we had described this order of inquiry as the "better approach," *County of Sacramento v. Lewis,* 523 U.S. 833, 841, n. 5, 118 S.Ct. 1708, 140 L.Ed.2d 1043 (1998), though not one that was required in all cases. See *id.,* at 858–859, 118 S.Ct. 1708 (BREYER, J., concurring); *id.,* at 859, 118 S.Ct. 1708 (STEVENS, J., concurring in judgment). There has been doubt expressed regarding the wisdom of *Saucier's* decision to make the threshold inquiry mandatory, especially in cases where the constitutional question is relatively difficult and the qualified immunity question relatively straightforward. See, *e.g., Brosseau, supra,* at 201, 125 S.Ct. 596 (BREYER, J., joined by SCALIA and GINSBURG, JJ., concurring); *Bunting v. Mellen,* 541 U.S. 1019, 124 S.Ct. 1750, 158 L.Ed.2d 636 (2004) (STEVENS, J., joined by GINSBURG and BREYER, JJ., respecting denial of certiorari); *id.,* at 1025, 124 S.Ct. 1750 (SCALIA, J., joined by Rehnquist, C.J., dissenting). See also *Lyons v. Xenia,* 417 F.3d 565, 580–584 (C.A.6 2005) (Sutton, J., concurring). We need not address the wisdom of *Saucier* in this case, however, because the constitutional question with which we are presented is, as discussed in Part III–B, *infra,* easily decided. Deciding that question first is thus the "better approach," *Lewis,supra,* at 841, n. 5, 118 S.Ct. 1708, regardless of whether it is required.

5 Justice STEVENS suggests that our reaction to the videotape is somehow idiosyncratic, and seems to believe we are misrepresenting its contents. See *post,* at 1783 (dissenting opinion) ("In sum, the factual statements by the Court of Appeals quoted by the Court ... were entirely accurate"). We are happy to allow the videotape to speak for itself. See Record 36, Exh. A, available at http://www.supremecourtus. gov/opinions/video/scott_v_harris.html and in Clerk of Court's case file.

6 Justice STEVENS hypothesizes that these cars "had already pulled to the side of the road or were driving along the shoulder because they heard the police sirens or saw the flashing lights," so that "[a] jury could certainly conclude that those motorists were exposed to no greater risk than persons who take the same action in response to a speeding ambulance." *Post,* at 1782. It is not our experience that ambulances and fire engines careen down two-lane roads at 85–plus miles per hour, with an unmarked scout car out in front of them. The risk they pose to the public is vastly less than what respondent created here. But even if that were not so, it would in no way lead to the conclusion that it was unreasonable to eliminate the threat to life that respondent posed. Society accepts the risk of speeding ambulances and

fire engines in order to save life and property; it need not (and assuredly does not) accept a similar risk posed by a reckless motorist fleeing the police.

7 This is not to say that each and every factual statement made by the Court of Appeals is inaccurate. For example, the videotape validates the court's statement that when Scott rammed respondent's vehicle it was not threatening any other vehicles or pedestrians. (Undoubtedly Scott *waited* for the road to be clear before executing his maneuver.)

8 Justice STEVENS incorrectly declares this to be "a question of fact best reserved for a jury," and complains we are "usurp[ing] the jury's factfinding function." *Post,* at 1784. At the summary judgment stage, however, once we have determined the relevant set of facts and drawn all inferences in favor of the nonmoving party *to the extent supportable by the record,* see Part III–A, *supra,* the reasonableness of Scott's actions—or, in Justice STEVENS' parlance, "[w]hether [respondent's] actions have risen to a level warranting deadly force," *post,* at 1784—is a pure question of law.

9 Respondent, like the Court of Appeals, defines this second precondition as " 'necessary to prevent escape,' " Brief for Respondent 17; 433 F.3d 807, 813 (C.A.11 2005) (quoting *Garner,* 471 U.S., at 11, 105 S.Ct. 1694). But that quote from *Garner* is taken out of context. The necessity described in *Garner* was, in fact, the need to prevent "serious physical harm, either to the officer or to others." *Ibid.* By way of example only, *Garner* hypothesized that deadly force may be used "if necessary to prevent escape" when the suspect is known to have "committed a crime involving the infliction or threatened infliction of serious physical harm," *ibid.,* so that his mere being at large poses an inherent danger to society. Respondent did not pose that type of inherent threat to society, since (prior to the car chase) he had committed only a minor traffic offense and, as far as the police were aware, had no prior criminal record. But in this case, unlike in *Garner,* it was respondent's flight itself (by means of a speeding automobile) that posed the threat of "serious physical harm ... to others." *Ibid.*

10 The Court of Appeals cites *Brower v. County of Inyo,* 489 U.S. 593, 595, 109 S.Ct. 1378, 103 L.Ed.2d 628 (1989), for its refusal to "countenance the argument that by continuing to flee, a suspect absolves a pursuing police officer of any possible liability for all ensuing actions during the chase," 433 F.3d, at 816. The only question in *Brower* was whether a police roadblock constituted a *seizure* under the Fourth Amendment. In deciding that question, the relative culpability of the parties is, of course, irrelevant; a seizure occurs whenever the police are " 'responsib[le] for the termination of [a person's] movement,' " 433 F.3d, at 816 (quoting *Brower, supra,* 489 U.S. at 595, 109 S.Ct. 1378), regardless of the reason for the termination. Culpability *is* relevant, however, to the *reasonableness* of the seizure—to whether preventing possible harm to the innocent justifies exposing to possible harm the person threatening them.

11 Contrary to Justice STEVENS' assertions, we do not "assum[e] that dangers caused by flight from a police pursuit will continue after the pursuit ends," *post,* at 1784, nor do we make any "factual assumptions," *post,* at 1783, with respect to what would have happened if the police had gone home. We simply point out the *uncertainties* regarding what would have happened, in response to *respondent's* factual assumption that the high-speed flight would have ended.

1 I can only conclude that my colleagues were unduly frightened by two or three images on the tape that looked like bursts of lightning or explosions, but were in fact merely the headlights of vehicles zooming by in the opposite lane. Had they learned to drive when most high-speed driving took place on two-lane roads rather than on superhighways—when split-second judgments about the risk of passing a slowpoke in the face of oncoming traffic were routine—they might well have reacted to the videotape more dispassionately.

2 According to the District Court record, when respondent was clocked at 73 miles per hour, the deputy who recorded his speed was sitting in his patrol car on Highway 34 between Lora Smith Road and Sullivan Road in Coweta County, Georgia. At that point, as well as at the point at which Highway 34 intersects with Highway 154—where the deputy caught up with respondent and the videotape begins—Highway 34 is a four-lane road, consisting of two lanes in each direction with a wide grass divider separating the flow of traffic.

3 While still on the four-lane portion of Highway 34, the deputy who had clocked respondent's speed turned on his blue light and siren in an attempt to get respondent to pull over. It was when the deputy turned on his blue light that the dash-mounted video camera was activated and began to record the pursuit.

4 Although perhaps understandable, because their volume on the sound recording is low (possibly due to sound proofing in the officer's vehicle), the Court appears to minimize the significance of the sirens audible throughout the tape recording of the pursuit.

5 In noting that Scott's action "was *certain* to eliminate the risk that respondent posed to the public" while "ceasing pursuit was not," the Court prioritizes total elimination of the risk of harm to the public over the risk that respondent may be seriously injured or even killed. *Ante,* at 1778 – 1779 (emphasis in original). The Court is only able to make such a statement by assuming, based on its interpretation of events on the videotape, that the risk of harm posed in this case, and the type of harm involved, rose to a level warranting deadly force. These are the same types of questions that, when disputed, are typically resolved by a jury; this is why both the District Court and the Court of Appeals saw fit to have them be so decided. Although the Court claims only to have drawn factual inferences in respondent's favor "*to the extent supportable by the record,*" *ante,* at 1776 – 1777, n. 8 (emphasis in original), its own view of the record has clearly precluded it from doing so to the same extent as the two courts through which this case has already traveled, see *ante,* at 1773 – 1774, 1774 – 1775.

6 In its opinion, the Court of Appeals correctly noted: "We reject the defendants' argument that Harris' driving must, as a matter of law, be considered sufficiently reckless to give Scott probable cause to believe that he posed a substantial threat of imminent physical harm to motorists and pedestrians. This is a disputed issue to be resolved by a jury." *Harris v. Coweta Cty.,* 433 F.3d 807, 815 (C.A.11 2005).

7 In total, there are four police tapes which captured portions of the pursuit, all recorded from different officers' vehicles.

8 It is unclear whether, in referring to "innocent bystanders," the Court is referring to the motorists driving unfazed in the opposite direction or to the drivers who pulled over to the side of the road, safely out of respondent's and petitioner's path.

9 "Stop sticks" are a device which can be placed across the roadway and used to flatten a vehicle's tires slowly to safely terminate a pursuit.

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153 Fed.Appx. 252
This case was not selected for
publication in the Federal Reporter.
Not for Publication in West's Federal Reporter.
See Fed. Rule of Appellate Procedure 32.1 generally
governing citation of judicial decisions issued on or after
Jan. 1, 2007. See also Fifth Circuit Rules 28.7, 47.5.3,
47.5.4. (Find CTA5 Rule 28 and Find CTA5 Rule 47)
United States Court of Appeals,
Fifth Circuit.

UNITED STATES of
America, Plaintiff–Appellee,
v.
Miguel Angel MONTALVO–
NUNEZ, Defendant–Appellant.

No. 04–40330.
|
Summary Calendar.
|
Decided Oct. 19, 2005.

Synopsis

Background: Defendant pleaded guilty to one count of possession with intent to distribute marijuana, and the United States District Court for the Southern District of Texas imposed sentence. The Court of Appeals, 111 Fed.Appx. 779, affirmed. On grant of certiorari, the Supreme Court, 544 U.S. 917, 125 S.Ct. 1683, 161 L.Ed.2d 473, vacated and remanded for consideration in light of its *United States v. Booker* decision.

Holdings: On remand, the Court of Appeals held that:

Court of Appeals would not consider *Booker* claim presented for first time in writ of certiorari, absent extraordinary circumstances, and

sentencing of defendant under mandatory sentencing guidelines regime did not amount to plain error.

Affirmed; prior opinion reinstated.

Attorneys and Law Firms

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Marjorie A. Meyers, Federal Public Defender, Paul G. Hajjar, Samy K. Khalil, Federal Public Defender's Office, Southern District of Texas, Houston, TX, for Defendant–Appellant.

Appeal from the United States District Court for the Southern District of Texas, USDC No. 1:03–CR–755–ALL.

Before JONES, BARKSDALE, and PRADO, Circuit Judges.

ON REMAND FROM THE SUPREME COURT OF THE UNITED STATES

PER CURIAM:[*]

****1** Miguel Angel Montalvo–Nunez pleaded guilty to one count of possession with the intent to distribute 96.6 kilograms of marijuana in violation of 21 U.S.C. § 841(a)(1) & (b)(1)(C). Pursuant to his guilty-plea conviction, the district court sentenced Montalvo–Nunez to forty-one months of imprisonment, to be followed by three years of supervised release. This Court affirmed Montalvo–Nunez's judgment of conviction. *United States v. Montalvo–Nunez,* 111 Fed.Appx. 779 (5th Cir.2004). Montalvo–Nunez filed a petition for certiorari. The Supreme Court granted Montalvo–Nunez's petition, vacated this Court's judgment, and remanded the case for consideration in light of *United States v. Booker,* 543 U.S. 220, 125 S.Ct. 738, 160 L.Ed.2d 621 (2005). *Montalvo–Nunez v. United States,* —— U.S. ——, 125 S.Ct. 1683, 161 L.Ed.2d 473 (2005). We requested and received supplemental letter briefs addressing the impact of *Booker* and *United States v. Mares,* 402 F.3d 511 (5th Cir.2005).

On remand, Montalvo–Nunez argues that the district court's belief that the sentencing guidelines were mandatory constituted error. Montalvo–Nunez advanced this argument for the first time in his petition for certiorari. Absent extraordinary ***254** circumstances, we will not consider a *Booker*-related claim when it is presented for the first time in a writ of certiorari. *United States v. Taylor,* 409 F.3d 675, 676 (5th Cir.2005). Montalvo–Nunez has presented no evidence of extraordinary circumstances which would enable him "to show a 'possibility of injustice so grave as to warrant disregard of usual procedural rules.' " *United States*

v. Ogle, 415 F.3d 382, 383–84 (5th Cir.2005)(quoting *McGee v. Estelle,* 722 F.2d 1206, 1213 (5th Cir.1984)).

Even if showing such extraordinary circumstances were not required, because Appellant did not raise his *Booker*-related claims in district court, any review would be for plain error. *See Mares,* 402 F.3d at 520. In order to establish plain error, Montalvo–Nunez must show: (1) error, (2) that is clear and obvious, and (3) that affects substantial rights. *Id.; United States v. Infante,* 404 F.3d 376, 394 (5th Cir.2005). " 'If all three conditions are met an appellate court may then exercise its discretion to notice a forfeited error but only if (4) the error seriously affects the fairness, integrity, or public reputation of judicial proceedings.' " *Mares,* 402 F.3d at 520 (quoting *United States v. Cotton,* 535 U.S. 625, 631, 122 S.Ct. 1781, 152 L.Ed.2d 860 (2002)).

Montalvo–Nunez acknowledges that, under *Mares,* his claim fails at the third step of the plain error analysis because he cannot demonstrate that the alleged error affected his substantial rights. However, Appellant contends that because the district court committed "structural error" by sentencing him under a mandatory Guidelines regime, prejudice to his substantial rights should be presumed. This Court has rejected that contention as inconsistent with *Mares. United States v. Malveaux,* 411 F.3d 558, 550 n. 9 (5th Cir.2005), *petition for cert. filed* (U.S. July 11, 2005)(No. 05–5297). Moreover, there is no indication in the record that the district court would have imposed a lower sentence if the Guidelines had been advisory. *See Infante,* 404 F.3d at 394–95. Hence, Montalvo–Nunez cannot carry his "burden of demonstrating that the result would have likely been different had the judge been sentencing under the *Booker* advisory regime rather than the pre-*Booker* mandatory regime." *Mares,* 402 F.3d at 522.

**2 Because Appellant fails to demonstrate either plain error or extraordinary circumstances, we reinstate our prior opinion affirming Montalvo–Nunez's conviction and sentence.

AFFIRMED.

All Citations

153 Fed.Appx. 252, 2005 WL 2662439

Footnotes

* Pursuant to 5th Cir. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5th Cir. R. 47.5.4.

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