



Authority for California Cities Excess Liability
Litigation Review and Update
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EXCESSIVE FORCE

Corey Hughes v. Michael Rodriguez

Docket: 20-17144 (9th Circuit, Court of Appeals; Eastern District of CA)

Opinion Date: April 21, 2022

Summary Rules:

- 1. Where there is no evidence to clearly contradict plaintiff's version of events, such as BWC videos, then MSJ is not appropriate since there exists a material dispute of fact, even where evidence which does exist, refutes at least some of the plaintiff's version of events.***
- 2. Officers who were not directly involved in the physical struggle and could not have prevented excessive force, cannot be held liable for the failure to intercede.***

Facts:

Plaintiff Corey Hughes alleged that law enforcement officers used excessive force in apprehending him after he escaped from a County Jail highway work crew and lived on the lam for three weeks. Hughes was serving a 185-day sentence following a guilty plea to the unlawful possession of a loaded firearm with a large capacity magazine (misdemeanor). 10-days into his sentence, Hughes jumped a fence and ran away from the work crew. San Joaquin County Sheriff's and the CDCR Fugitive Apprehension Team lead the investigation to find Hughes. It was known that Hughes had prior convictions for stolen vehicles, evading police officers, he was affiliated with a violent street gang, he was trained in mixed martial arts, and he was possibly under the influence of methamphetamine. A team of officers from multiple agencies entered his mother's residence to apprehend Hughes. Hughes claims to have been sleeping but woke up as the officers entered. He yelled to the officers that he was coming out and raised his hands. Once he made eye contact with the officers and showed his empty hands, one officer released a police k-9 named Cain. Cain immediately attacked Hughes who collapsed in the hallway. Officers then restrained Hughes which efforts included punches to his head and face. BWC footage showed a substantially different story and refutes much of Hughes' version of events, but not all of it because one of the cameras stopped recording.

Analysis:

The Ninth Circuit affirmed in part and reversed in part the district court's summary judgment in favor of law enforcement officials. The court held that the bodycam footage and audio did not blatantly contradict all of Plaintiff's testimony. The court viewed the facts blatantly contradicted by the bodycam footage in the light depicted by the videotape and its audio to conclude that Plaintiff did not attempt to

surrender to the officers. However, the court viewed all other facts, including Plaintiff's allegation of the post-handcuff beating, in the light most favorable to Plaintiff on summary judgment.

The court found that there were genuine issues of material fact regarding whether the alleged post-handcuff beating and dog-biting were proportional to the threat the officer reasonably perceived by Plaintiff while handcuffed. The BWC video was silent after the hand cuffing and did not contain evidence clearly refuting Hughes' allegations.

The court also found that the canine-handler officer was not entitled to qualified immunity under Sec. 1983 as to the claimed post-handcuff beating and dog-biting because it was clearly established law that beating a handcuffed convict violates the Eighth Amendment. Finally, the court found that the excessive force claims based on failure to intervene and failure to intercede against the other defendants failed.

Summary judgment was reversed as to the canine-handler officer on the §1983 and Bane Act claims but affirmed as to all other claims.

QUALIFIED IMMUNITY – Jail Medical Staff

Patrick Russell v. Jocelyn Lumitap, et al.

Docket: 18-55831 (9th Circuit, Court of Appeals; Central District of CA)

Opinion Date: April 13, 2022

Plaintiff's counsel – Dale Galipo; Michael F. Sincich; Cameron Sehat

Defense counsel – S. Frank Harrell

Summary Rules:

1. ***Analysis of deliberate indifference to medical need hinges on the facts and knowledge pertaining to each identified defendant medical provider and whether their actions meet the standard of care.***
 - a. ***A jail doctor who never examined a patient demonstrating distress cannot be said to have delivered adequate care.***
 - b. ***A jail nurse (1) presented with clear symptoms demonstrating distress of an inmate is not entitled to qualified immunity when adequate care is not provided.***
 - c. ***A jail nurse (2) who responds to symptoms of distress by consulting with other nurses and with the jail doctor about the potential need for a change in treatment, is entitled to qualified immunity.***
 - d. ***A jail nurse (3) presented with obvious signs of significant distress is not entitled to qualified immunity where she relied on the jail doctor's recommendation which was 5 ½ hours old and in the face of serious changes in condition.***

Facts:

Plaintiff Patrick Russell was arrested on 1/8/16 for probation violation and booked at Orange County Jail where he denied any chronic or medical conditions. On 1/23/16, he was seen by a jail nurse for hyperventilating, vomiting and dry heaving with the complaint that he was having an anxiety attack. Nurse provided Pepto Bismol but did not notify a doctor. At 12:04 on 1/24/16, plaintiff returned to the same nurse with chest pain which he thought was muscular from push-ups he had performed. He also

complained of nervousness, anxiety, and inability to calm down. He was in distress. Nurse 1 advised on stretching and referred to mental-health screening. At 1:08am, Russell arrived by bus at the Intake Release Center for the mental-health screening and saw nurse no. 2. He still complained of chest pain which extended to his throat, jaw, and arm. He was short of breath and his feet were numb. Nurse 2 gave him nitroglycerin. He continued to worsen over the next 12 hours. Jail doctors were consulted but did not change the treatment or perform a physical evaluation. Plaintiff reported to Nurse 3, and later Nurse 4, which also did not hospitalize plaintiff per policy and despite clear physical distress and symptom worsening. At 12:28 pm, paramedics finally were called and transported him to the hospital where plaintiff died of hemothorax and hemopericardium, both caused by aortic dissection/rupture.

Analysis:

The Ninth Circuit affirmed in part and reversed in part the district court's denial of qualified immunity to medical providers at Orange County Jail in 1983 claims alleging that Defendants were deliberately indifferent to the medical needs of Plaintiff, a detainee who died from a ruptured aortic dissection.

The court stated that to defeat qualified immunity, Plaintiff must show that a reasonable official would have understood that their actions presented an unconstitutional substantial risk of harm to Plaintiff. Defendant jail doctor, the on-call physician at the time, could not have reasonably believed that he could provide constitutionally adequate care without even examining a patient with Plaintiff's symptoms. Therefore, the district court was correct in denying summary judgment on qualified immunity to this Defendant.

The court further held that the first nurse to see Plaintiff had access to facts from which an inference could be drawn that Plaintiff was at serious risk. The court held that the district court was correct in denying summary judgment on qualified immunity to Defendant.

The court also held that the second nurse to see Plaintiff was entitled to summary judgment on qualified immunity. Reasoning that a jury could not reasonably conclude that this Defendant was deliberately indifferent. Finally, the court held that the third nurse to see Plaintiff was not entitled to qualified immunity because a reasonable person in Defendant's position would have inferred that Plaintiff was at serious risk if not hospitalized.

CIVIL RIGHTS

Thompson v. Clark

Docket: 20-659 (U.S. Supreme Court)

Opinion Date: April 4, 2022

Judge: Brett M. Kavanaugh

2nd Circuit Court of Appeals; Eastern District of New York

Summary Rules:

1. ***A malicious prosecution claim under §1983 does not require that the underlying criminal case include an affirmative finding of innocence, only that the case end without a conviction.***

Facts:

Plaintiff Larry Thompson was living with his fiancée and their newborn baby in a Brooklyn apartment. Thompson's sister-in-law, apparently suffering from mental illness, called 911 to report that Thompson was sexually abusing the baby. When Emergency Medical Technicians arrived, Thompson denied that anyone had called 911. The EMTs returned with police officers, Thompson told them that they could not enter without a warrant. The police nonetheless entered. Thompson was arrested and charged with obstructing governmental administration and resisting arrest. EMTs took the baby to the hospital where medical professionals examined her and found no signs of abuse. Thompson was detained for two days. The charges against Thompson were dismissed without any explanation. The Second Circuit affirmed the dismissal of Thompson's 42 U.S.C. 1983 claim.

Analysis:

The U.S. Supreme Court reversed, resolving a split among the Circuits. To demonstrate favorable termination of criminal prosecution for purposes of a section 1983 Fourth Amendment malicious prosecution claim, a plaintiff need not show that the criminal prosecution ended with some affirmative indication of innocence but need only show that his prosecution ended without a conviction. The American tort-law consensus as of 1871 did not require a plaintiff in a malicious prosecution suit to show that his prosecution ended with an affirmative indication of innocence; similarly construing Thompson's claim is consistent with "the values and purposes" of the Fourth Amendment. Questions concerning whether a defendant was wrongly charged, or whether an individual may seek redress for wrongful prosecution, cannot reasonably depend on whether the prosecutor or court explained why charges were dismissed. Requiring a plaintiff to show that his prosecution ended with an affirmative indication of innocence is not necessary to protect officers from unwarranted civil suits.

POLICE - EMPLOYMENT**Perez v. City and County of San Francisco**

Docket: A161279 (First Appellate District)

Opinion Date: March 1, 2022

Summary Rules/Issues:

1. ***Where an employer authorizes conduct outside of work because it may at some point relate to work, it is not unreasonable to conclude that liability arising out of that regulated work may be found within the scope of employment.***
2. ***The Court may consider policy arguments in deciding public entity liability such as whether imposition of respondeat superior would prompt law enforcement departments to use more selective hiring practices, impose stricter regulations, and provide more training.***

Facts:

The San Francisco Police Department allowed officers to carry secondary firearms when on duty, and to carry loaded handguns when off duty. A Department bulletin stated officers are responsible for ensuring that firearms under their control are secure at all times and provided specific guidelines for securing firearms in an unattended vehicle. Officer Cabuntala regularly carried an approved secondary firearm on duty and regularly transported it in his vehicle. On August 11, 2017, the city assigned Cabuntala to a training session in a different county. He drove his personal vehicle to the site, with his personal firearm in the vehicle. Firearms were not allowed at the training session. When the training was over, Cabuntala drove home but failed to follow his usual practice of securing his personal firearm inside his house. He

left it unsecured inside his vehicle. Cabuntala's vehicle was broken into and the personal firearm was stolen. A short time later that stolen gun was used to kill Plaintiff's son. The trial court entered summary judgment in favor of Defendant San Francisco, finding Cabuntala was not acting within the scope of his employment. Plaintiff appealed.

Analysis and Holding:

The court of appeal reversed. In the context of policing, a jury could reasonably find the officer's failure to safely secure his weapon is "not so unusual or startling that it would seem unfair to include the loss resulting from it among other costs of the employer's business." The Court ruled that the officer had carried the weapon to a work-required training, the department authorized the carry of such weapons off duty, and the officer believed that he may need to use the weapon for policing related purposes. For those reasons, a reasonable juror could conclude that the failure to secure the weapon after the training fell within the scope of employment. **Considering policy objectives, the Court reasoned that imposition of respondeat superior would prompt departments to use more selective hiring practices, impose stricter regulations, and provide more training for handling firearms on and off duty.**

PUBLIC RECORDS ACT

Riskin v. Downtown L.A. Property Owners Assn.

Docket: B309814 (Second Appellate District)

Opinion Date: March 17, 2022

Summary Rules/Issues:

- 1. A trial court has discretion to decide the issues related to an award of attorney fees under the CPRA, including the discretion to deny fees and/or award nominal fees.**

Facts:

Plaintiff Adrian Riskin is a self-described "open records activist." He submitted CPRA requests for 3 categories of documents related to Defendant Association and other entities. The Association responded and claimed some of the records were exempt from production. After meet and confer efforts, Riskin filed a petition for writ of mandate. The trial court ordered disclosure of some of the documents and denied the rest of the petition. The Association then filed its own petition for writ of mandate concerning the documents ordered to be produced. The Court denied that petition for failure to demonstrate entitlement to extra ordinary relief. Riskin moved for attorney fees of \$123K which the court granted but reduced to \$71K. Association appealed.

Analysis:

The Court of Appeal concluded that the trial court has discretion to deny attorney fees under the California Public Records Act (CPRA) in some circumstances and held that the minimal or insignificant standard is applicable when the requester obtains only partial relief under the CPRA. In this case, the Association contends the trial court erred in concluding it had no discretion under the CPRA to deny attorney fees. The court reversed and remanded for the trial court to exercise the discretion it believed it lacked in deciding the attorney fee issue.

Kinney v. Super. Ct.

Docket: F082845 (Fifth Appellate District)

Opinion Date: April 7, 2022

Summary Rules/Issues:

1. ***The names of arrestees are not subject to disclosure under the CPRA. Such information involves two competing rights, the public right to know and the individual's right to privacy.***

Facts:

Petitioner sent a request to the real party in interest, the County of Kern (the "County"), under the California Public Records Act (the "Act") seeking the names of all persons arrested by the Kern County Sheriff's Department for driving under the influence (DUI) from March 1, 2020, to April 1, 2020. The County provided some information but did not provide the arrestees' names since such information was exempt from disclosure under the Act. Kinney filed a petition for writ of mandate. County demurred. The trial court sustained the demurrer without leave to amend.

Analysis:

The Fifth Appellate District concluded the trial court could have correctly sustained the demurrer without leave to amend based on the holding in *County of Los Angeles v. Superior Court*, 18 Cal.App.4th. (1993). Furthermore, although the Legislature has not defined what "contemporaneous" means in this context, the court concluded the information sought by the petitioner, which was nearly a year old when she filed her request, should not be considered "contemporaneous" information. Thus, the court denied the petition finding that the arrest information sought in this case is not subject to disclosure. However, the court noted that the conclusion should be limited as much as possible to the facts of the case.

PERSONAL INJURY - SCHOOLS

Brown v. El Dorado Union High School Dist.

Docket: C088204 (Third Appellate District)

Opinion Date: March 29, 2022

Summary Rules/Issues:

2. ***A school district is not liable for a student's TBI injury resulting from his participation in a football game following execution of a waiver and release signed by the student and his father before the start of the season. The claim is also barred by the principal of primary assumption of the risk.***

Facts:

Plaintiff Nicholas Brown (Nick), through his mother and Guardian ad Litem Laurie Brown (Laurie), brought a personal injury action against defendant El Dorado Union High School District (the District) after Nick suffered a traumatic brain injury during a football game. Nick played most of the game in numerous positions. No one noted any specifically hard hits or tackles. He may have been bumped on the head but nothing of significance was seen. Following the game, Nick began to demonstrate symptoms of TBI.

After the District brought a summary judgment motion, the trial court granted summary judgment in favor of the District on two grounds: (1) the case was barred by the affirmative defense of an express assumption of risk due to a release and waiver Nick and his father signed prior to the football season; and (2) the action was barred by the principle of the primary assumption of risk. Nick appealed, challenging the trial court's decision to accept a less-than-perfect separate statement of undisputed material facts filed by the District, evidentiary rulings, and the substance of the trial court's ruling on the motion for summary judgment.

Analysis:

The Court of Appeal found the trial court acted within its discretion in accepting the separate statement, Nick failed to sufficiently develop his arguments regarding the court's evidentiary rulings, and summary judgment was proper due to the Browns' express assumption of the risks associated with Nick's participation in the football program.

Cleveland v. Taft Union High School District

Docket: F079926 (Fifth Appellate District)

Opinion Date: March 25, 2022

Summary Rules/Issues:

- 1. A school district is liable for shooting injury sustained by a student since the District had sufficient information for such a period of time as to have taken steps to prevent the incident but failed to properly perform a threat assessment.***

Facts:

A 16-years-old boy brought a loaded shotgun to school and shot plaintiff Bowe Cleveland in the stomach near the start of the first period science class. Prior to the shooting, in March 2011, the boy had been bullied and actively talked about shooting students at the school and/or blowing up the school. One girl asked him directly if he would shoot her and he said yes. Incident reports were filed. A threat assessment was performed and the boy was assessed by several people including the school psychologist. The boy denied intent to shoot anyone. Next, he drew pictures of shooting students. More incident reports were filed. More incident occurred in 2012. The boy obtained a shotgun from his brother in December of 2012 and the shooting occurred in January 2013. The boy shot plaintiff. Plaintiff then filed suit in April 2013. The case proceeded to trial in July 2019 with a \$2M verdict in favor of the plaintiff, assigning 54% liability on the school.

Analysis:

In the published portion of the opinion, the Court of Appeal concluded that the specific acts and omissions identified by plaintiff's expert as below the standard of care for conducting a threat assessment are properly characterized as administrative and not as a mental examination. Thus, those negligent acts and omissions fall outside the scope of Government Code section 855.6 immunity. The court affirmed the judgment.