



Fourth and Fourteenth Amendment Claims

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Jody C. Corbett has been practicing law in Phoenix, Arizona for 17 years. She has represented numerous public entities throughout Arizona in cases involving the following issues: civil rights pursuant to 42 U.S.C.1983, premises liability, construction and maintenance liability, road design, personal injury, and intentional torts. She also has experience in contract law, insurance, and collections, including garnishment actions. Jody has extensive experience representing clients in state, federal, and tribal appellate courts regarding numerous issues some of which include jurisdiction, immunities, proper jural entities, and res judicata.

Robert D. Meyers is certified as a Civil Trial Specialist by the National Board of Trial Advocacy. Mr. Meyers has a breadth of employment litigation experience. He has defended companies and individuals before courts in Tennessee, Mississippi, Arkansas, Alabama, Texas, Georgia, Louisiana, Indiana and Virginia. He has been instrumental in assisting clients in dealing with employee medical issues including ADA, FMLA and workers' compensation concerns. Mr. Meyers also has extensive experience representing public employers in claims brought under the Title VII, Section 1981 and Section 1983. He served as Chairman of the Shelby County Election Commission from 2009-2019 and is a Peer Reviewer for "America Votes! A Guide to Modern Election Law and Voting Rights," Second Edition 2012 ABA Section of State and Local Government Law. While in law school, Mr. Meyers was a member of the Tennessee Law Review and president of the Student Bar Association.

Civil rights claims arising under the Fourth and Fourteenth Amendments involve a myriad of factual settings: excessive force; unlawful seizure; conditions of confinement; failure to protect; failure to investigate and wrongful conviction, to name just a few.

Fourth Amendment

The Fourth Amendment protects “[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures.” “The ‘basic purpose of this Amendment,’ our cases have recognized, ‘is to safeguard the privacy and security of individuals against arbitrary invasions by governmental officials.’” *Carpenter v. United States*, 138 S.Ct. 2206, 2213 (2018) quoting *Camara v. Municipal Court of City and County of San Francisco*, 387 U.S. 523, 528 (1967).

In 1989 the United States Supreme Court considered “what constitutional standard governs a free citizen's claim that law enforcement officials used excessive force in the course of making an arrest, investigatory stop, or other ‘seizure’ of his person.” *Graham v. Connor*, 490 U.S. 386, 388 (1989). The Court stated this “analysis begins by identifying the specific constitutional right allegedly infringed by the challenged application of force.” *Id.* at 394. In most instances, that will be either the Fourth Amendment’s prohibition against unreasonable seizures, or the Eighth Amendment’s ban on cruel and unusual punishments. *Id.* *Graham* specifically held all claims that law enforcement officers have used excessive force in the course of an arrest of a free citizen are to be analyzed under the Fourth Amendment. *Id.* at 395. The Court further held this standard was to be applied in lieu of “some generalized ‘excessive force’ standard.” *Id.* at 394.

Today we make explicit what was implicit in *Garner*'s analysis, and hold that *all* claims that law enforcement officers have used excessive force – deadly or not – in the course of an arrest, investigatory stop, or other “seizure” of a free citizen should be analyzed under the Fourth Amendment and its “reasonableness” standard, rather than under a “substantive due process” approach.

Graham, 490 U.S. at 395 (emphasis in original).

“The test of reasonableness under the Fourth Amendment is not capable of precise definition or mechanical application.” *Bell v. Wolfish*, 441 U.S. 520, 559 (1979), *quoted in Graham*, 490 U.S. at 396. Under the *Graham* analysis, courts should determine the “objective reasonableness” of a seizure by balancing “the nature and quality of the intrusion” against the “governmental interest at stake.” *Graham*, 490 U.S. at 396.

“The ‘reasonableness’ of a particular use of force must be judged from the perspective of a reasonable police officer on the scene, rather than with the 20/20 vision of hindsight.” *Graham*, 490 U.S. at 396 (citing *Terry v. Ohio*, 392 U.S. 1, 20-22 (1968)). “The calculus of reasonableness must embody allowance 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 396-97. “[T]he question is whether the officers’ actions are ‘objectively reasonable’ in light of the facts and circumstances confronting them, without regard to their underlying intent or motivation.” *Id.* at 397. The Supreme Court has

provided lower courts with guidance as to this balancing test. Specifically, the facts to be examined include (but are not limited to)

1. The severity of the crime at issue;
2. Whether the suspect poses an immediate threat to the safety of the officer or others, and
3. Whether he is actively resisting arrest or attempting to evade arrest by flight.

Graham, 490 U.S. at 396; *Carswell v. Borough of Homestead*, 381 F.3d 235, 240 (3rd Cir. 2004). See also *Henderson v. Munn*, 439 F.3d 497, 502 (8th Cir. 2006) (stating circumstances such as the severity of the crime, whether the suspect posed a threat to the safety of the officers or others, and whether the suspect was resisting arrest are all relevant to the reasonableness of the officer's conduct). Moreover, it is clear this analysis involves an "objective" test as opposed to Monday-morning quarterbacking. "Reasonableness is to be evaluated from the 'perspective of a reasonable officer on the scene rather than with 20-20 vision of hindsight.'" *Carswell*, 381 F.3d at 240; *Graham*, 490 U.S. at 396. See also, *Mercado v. City of Orlando*, 407 F.3d 1152, 1157 (11th Cir. 2005); *Carswell v. Borough of Homestead*, 381 F.3d 235, 240 (3rd Cir. 2004); *Gaddis v. Redford Township*, 364 F.3d 763, 772 (6th Cir. 2004). "Our vantage point must be that of a reasonable officer on the scene, not the 20/20 vision of hindsight. 'The calculus of reasonableness must embody allowance 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.'" *Wertish v. Krueger*, 433 F.3d. 1062, 1066 (8th Cir. 2006) quoting *Graham*, 490 U.S. at 396-97.

Fourteenth Amendment

The substantive due process clause of the Fourteenth Amendment provides: "[N]or shall any State deprive any person of life, liberty, or property, without due process of law."

A cognizable claim asserting a Fourteenth Amendment substantive due process violation must depict governmental conduct so egregious that it "shocks the conscience." *County of Sacramento v. Lewis*, 523 U.S. 833, 847 (1998). This conscience-shocking standard is reserved for egregious and heinous behavior. *Id.* at 847 n. 8. This is consistent with the Supreme Court's observation that "conduct intended to injure in some way unjustifiable by any government interest is the sort of official action most likely to rise to the conscience-shocking level." *Id.* at 849.

Determining whether conduct is sufficiently conscience shocking is a fact-intensive analysis. The answer often lies in whether the situation requires the official to make a split-second judgment call, or whether there is time for contemplation and reflection.

For example, in deciding how to conduct a high-speed pursuit the involved officer has only a brief moment to make critical decisions. In those situations the burden plaintiff must meet to satisfy the "conscience-shocking" standard is extraordinarily high. The plaintiff must demonstrate the officer acted without any legitimate law enforcement purpose. In *Lewis*, the Supreme Court

held that “in a high-speed automobile chase aimed at apprehending a suspected offender. . . only a purpose to cause harm unrelated to the legitimate object of arrest will satisfy the element of arbitrary conduct shocking to the conscience.” 523 U.S. at 836.

However, the Fourteenth Amendment also has application to such relatively common tasks as how pretrial detainees are to be housed and cared for. Decisions concerning those issues usually do not require the type of split-second decision making as police pursuits or officer-involved-shootings. Thus, the “intent to cause harm” standard does not exist. Instead, “deliberate indifference” provides the appropriate analytical framework. In *Estelle v. Gamble*, 429 U.S. 97 (1976), the Supreme Court held that in order to state a cognizable deliberate indifference claim a prisoner must demonstrate “acts or omissions sufficiently harmful to evidence deliberate indifference to serious medical needs.” *Id.*, at 106. The Supreme Court has also stated:

[W]e see no significant distinction between claims alleging inadequate medical care and those alleging inadequate "conditions of confinement." Indeed, the medical care a prisoner receives is just as much a "condition" of his confinement as the food he is fed, the clothes he is issued, the temperature he is subjected to in his cell, and the protection he is afforded against other inmates. There is no indication that, as a general matter, the actions of prison officials with respect to these nonmedical conditions are taken under materially different constraints than their actions with respect to medical conditions. Thus, as retired Justice Powell has concluded: "Whether one characterizes the treatment received by [the prisoner] as inhumane conditions of confinement, failure to attend to his medical needs, or a combination of both, it is appropriate to apply the 'deliberate indifference' standard articulated in *Estelle*."

Wilson v. Seiter, 501 U.S. 294, 303 (1991).

Practical Suggestions

§ 1983 CIVIL RIGHTS LITIGATION OUTLINE FROM RECEIPT OF FILE

Case will be staffed with managing attorney (MA), and associate(s) (A), and/or a paralegal (P). If the client has been primarily serviced by a particular timekeeper other than the MA or A, then that timekeeper will be part of the litigation team. The individual first identified below will be responsible for the task unless otherwise agreed, e.g., P or A, if there is both a paralegal and associate on the case, the paralegal is primarily responsible for that task unless decided otherwise.

Copies to Clients/Others: All correspondence, pleadings and documents should be copied to client at the time they are served or filed, or the next day. If there is a separate timekeeper who has primarily assisted the client in the past, determine nature/frequency of updates. Copies of all correspondence, pleadings and documents should be distributed to the paralegal and all attorneys assigned to the case.

Review by Client: There should be advance communication with the client regarding their expectations on the particular case regarding reviewing documents.

Litigation Updates: A status report between those assigned to the case should occur every thirty days.

1. Run Conflicts Check
 - _____ 2. Acknowledgment/Retainer Letter to Client/Insurance/Police Officer(s) - P for MA signature or MA's legal assistant
 - _____ 3. Open file in firm's case management system
 - _____ 4. Establish contact information for client contacts and opposing counsel on the network - P, or A's or MA's legal assistant
 - _____ 5. Send Preservation of Evidence Letter to client (advising them to preserve all documents, electronic evidence, tape backups, etc.) P for MA signature or MA's legal assistant
 - _____ 6. File Notice of Appearance - P or A
 - _____ 7. Contact Plaintiff's counsel regarding representation; letter to Plaintiff's counsel confirming representation
 - _____ 8. Review Complaint for content, removal possibilities, initial deadlines, and defenses - MA, A and P
 9. Review case file received from client and send list to client of additional documents you would like client to send to you
 - _____ 10. Meeting to discuss preliminary factual and legal issues (initial deadlines, identify areas of research needed and additional facts that will need to be developed - all individuals staffing case
 - _____ 11. Calendar Initial Deadlines - Removal/Answer - with advance reminders – P or A
 - _____ 12. Review Local Rules - P or A gets copy of local rules if we don't already have them and P and/or A review for service, discovery timing and filing requirements. Send memo to all on team with special requirements.
- * If electronic filing is permitted or required, A and P and Legal Assistants go through training/review to ensure all know how to file electronically. Put detailed instructions in separate folder labeled "Electronic Filing"
- * Review pros/cons of removal, research judge's decisions/disposition, confer with client
- _____ 13. Research causes of action, potential defenses, potential counterclaims, and create initial research files - A or P

- _____14. Notice of Removal- Draft prepared by P for A's or MA's review
 - _____ a. Diversity
 - _____ b. Federal Question

- _____15. If removed, calendar deadline for Answer/Motion to Dismiss

- _____16. Motion for Extension of Time to Answer, or Otherwise Plead – A or P

- _____17. Conduct Investigation - A and/or P
 - _____ a. Obtain all documents and things - P or A
 - _____ b. Identify and Interview Potential Witnesses - P or A
 - _____ c. Check for liens, i.e. hospital liens, child support liens, etc.
 - _____ d. Have background check run on Plaintiff(s)

- _____18. Consider entering into Joint Defense Agreement with Defendant Officers

- _____19. Meeting to discuss developments prior to pleading (good and bad facts, strength of case, early settlement possibilities, etc.) – all individuals staffing case

- _____20. Budget (if required by client) and First Case Report - A or P

- _____21. Research ability to File Motion to Dismiss - A or P

- _____22. Draft Answer/Motion to Dismiss - A or P prepares draft for MA review

- _____23. Consider serving Offer of Judgment

- _____24. Rule 26 Parties' Planning Meeting and Report - A

* A and MA meet prior to Rule 26(f) meeting to discuss any special issues (length of time between discovery and dispositive motion deadline, need to modify normal discovery limitations, consent to trial by magistrate, issues regarding electronic data (all decisions need to be approved by client))

- _____25. Rule 26 Disclosures (if in Federal Court or required in State Court) - P or A prepares draft for MA review
(Bates label documents produced by both parties)

- _____26. First Set of Interrogatories - P or A

- _____27. First Request for Production of Documents - P or A

- _____28. First Request for Admissions (optional) - P or A

_____29. Attend Case Management Conference or Teleconference - A and/or whoever the Court requires to attend (if attendance required)

Calendar dates set by Court (including deadline for serving discovery – determine whether discovery has to be served by discovery deadline or 33 days before)

_____30. Meeting to discuss updates following the Case Management Conference – all individuals staffing case

_____31. Determine the need for an Expert/Review Expert Reports/Prepare Expert Disclosures – A or P with MA

_____32. Consider joining Officers’ appeal of denial of qualified immunity

_____33. Analyze Plaintiff’s Initial Disclosures and discovery responses – A or P

_____34. Conduct conference/draft letter to opposing counsel regarding deficiencies (Review Rule 37 for “attempt to resolve” requirements)

_____35. Draft Motion to Compel (if necessary) – A for MA review

_____36. Issue Subpoenas for employment/medical/other records – P or A

_____37. Schedule Plaintiff’s Deposition (send Notice to confirm agreed date) - P or A (Consider whether to videotape. Invite client representative/schedule with client representative)

_____38. Outline for Plaintiff’s Deposition - A

_____39. Take Plaintiffs Deposition - A or MA

_____40. Consider mediation/settlement conference/ADR

_____41. Meeting to discuss updates, strategy and additional discovery required following Plaintiff’s deposition - all individuals staffing case

_____42. Summarize deposition transcript - P

_____43. Draft additional Interrogatories, Requests for Production, Requests for Admission, notice additional depositions, draft additional deposition outlines and take additional depositions - P or A

_____44. If *noticed*, schedule Company’s/City’s witnesses for depositions – send confirming letters or emails with date, time, and location of deposition preparation and deposition

- _____45. Prepare Company's witnesses for depositions - A or MA
- _____46. Defend Company witness depositions - A or MA
- _____47. Meeting between 5-7 weeks before the close of discovery to discuss additional required discovery and discovery supplementation prior to close of discovery – all individuals staffing case
- _____48. File Motion to Sever (if Officer(s) are also individual defendants)
- _____49. Consider moving to bifurcate damages and liability stages
- _____50. Motion for Summary Judgment – A and P prepare draft for MA review
 - _____ a. Review local rules regarding page limits, organization requirements, etc.
 - _____ b. Contact individuals from whom affidavits needed to confirm availability
- _____51. Review Plaintiff's Response to Motion for Summary Judgment – P, A and MA
- _____52. Meeting to discuss strategy re: Reply – all individuals staffing case
- _____53. Motion for Leave to file Reply (if needed to file Reply)
- _____54. Summary Judgment Reply - P and A prepare draft for MA review (within 1 week of receipt of Response or by date set by Court)
- _____55. Trial Preparation – P, A and MA
 - _____ a. Jury Instructions – A
 - _____ b. Motion(s)-in-Limine – A
 - _____ c. Opening – MA
 - _____ d. Closing – MA
 - _____ e. Direct/Cross Examinations – A
 - _____ f. Briefs on Anticipated Evidentiary Issues – A
 - _____ g. Pretrial Brief – A
 - _____ h. Trial Notebooks – P
 - _____ i. Preparation of Witnesses and Exhibits – A and P
 - _____ j. Mock Trial (optional)
- _____56. Post-Trial Motions – A and P for MA review
- _____57. Bill of Costs
- _____58. Notice of Appeal - A