

## ARIZONA APPEALS COURT UPHOLDS JUSTIFICATION DEFENSE UNDER A.R.S. § 13-409



### AGAINST CITY

*Paz v. City of Tucson*

Arizona Court of Appeals, Division II

November 6, 2023

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In an opinion on Monday, the Arizona Court of Appeals addressed a number of issues related to Arizona's justification defense under A.R.S. § 13-409, including the proper jury instructions for a justification defense in a police assault and battery case and related evidentiary rulings after an appeal from a jury verdict. In this regard, the court of appeals affirmed almost all of the trial court's rulings, but reversed and remanded the trial court's denial of sanctions.

In 2014, three Tucson Police Officers went to check on Plaintiff Samuel Paz's welfare. He appeared to be intoxicated, was nude from the waist down, and was pacing in an alleyway near a public park and middle school. The officers attempted to detain him without the use of force, but Paz pushed them and started running away. The officers pursued Paz and used a takedown maneuver to subdue him.

Paz sued the City and initially lost the trial. However, he filed a motion for new trial that the City had improperly introduced results of a drug test despite a pretrial ruling precluding introduction of that evidence. In 2020, the court of appeals affirmed that ruling. In the second trial, the City conceded the officers used force but argued that the officers were justified in their use of force. The jury found in favor of the City and agreed the officers' use of force was justified.

Paz filed motions for a new trial and for judgment as a matter of law on the City's justification defense, which the trial court denied. Paz then appealed and raised a number of issues relating to the trial.

First, Paz objected to the jury instructions on the City's justification defense. He argued that the jury should have been instructed as to each separate assault and battery and that the justification instruction was improperly phrased. The City had conceded the incident involved one assault and four batteries in the first trial, but it did not do so in the second trial. The trial court accordingly instructed the jury as to the incident as a whole. The court of appeals reasoned that the instruction mirrored the language of the justification statute, A.R.S. § 13-409, and thus correctly reflected the applicable law on justification. Additionally, the court found that the jury was implicitly instructed that the officers' actions could have become unjustified at any point during the encounter, which was helpful to Paz. Paz also argued the instruction should not have included the words "to arrest" because the officers were not trying to arrest Paz and, instead, were trying to take him into custody to provide him help. The court of appeals found that even if the inclusion of term was in error, Paz did not show any prejudice. The jury was told that "arrest" could also mean "detention," and that the justification defense and instruction did not have a different standard based on whether the officers were attempting to arrest or detain Paz.

Second, Paz argued that the City's closing argument, which mentioned a contested issue regarding prior psychiatric diagnoses, violated a court order from the first trial. The court of appeals pointed out that neither party requested renewal of the order from the first trial before the second trial and did not offer any authority on whether that ruling was still in effect in the second trial. However, the court of appeals nevertheless held that Paz was not prejudiced by the introduction of this information.

Third, Paz argued that the trial court had made a number of incorrect evidentiary rulings regarding: (1) the admissibility of a police report; (2) his own testimony from a prior deposition; and (3) the City's Expert testimony. The court of appeals found that Paz was not prejudiced by any of these rulings. It found that the trial court properly excluded the police report because, even if it did not contain inadmissible hearsay, it was needlessly cumulative evidence under Rule 403 because several officer witnesses discussed whether they believed he had a mental illness, which was the only reason he wanted to introduce the report. The court of appeals next stated that Paz did not sufficiently brief the issue regarding his own testimony and that it could not review the issue. As to the City's expert, the court of appeals explained that an expert may rely on otherwise inadmissible statements and those statements may be

disclosed to the jury if their probative value substantially outweighs their prejudicial effect. And in this case, the City's expert had relied on numerous data points and not just the out-of-court statements made by one of the officers. Paz also argued that the City's expert attempted to vouch for a witness by stating that he was "very honest." However, the court of appeals found this to be harmless error because Paz did not actually present a case that the witness was dishonest and the jury had an independent basis to assess the witness's honesty.

Finally, the court of appeals reversed the trial court's ruling denying sanctions against the City under A.R.S. § 12-349 based on the City's improper use of the drug screen during the first trial. Under the circumstances, the court of appeals found that sanctions were mandatory because the City violated a clear order, thereby unreasonably expanded the proceeding, which led to a new trial. The court held that the relevant question is not whether a party intended to delay proceedings, but whether it actually did so.

Accordingly, the court of appeals reversed and remanded only as to the sanctions issue so that the trial court could calculate the fees and costs owed by the City. Judge Brearcliffe dissented in part as to that issue, arguing that the trial court should have been allowed to apply the correct standard to determine whether sanctions were appropriate.

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**Justin Ackerman** represents clients in federal and state appellate matters in cases involving excessive force, wrongful death, personal injury, bad faith, and premises liability. After graduating as the valedictorian of his class from Phoenix School of Law, Justin worked as a law clerk for the Hon. Michael J. Brown in Division One of the Arizona Court of Appeals. Following his clerkship, Justin has handled over 75 appeals, successfully arguing before the Arizona Court of Appeals, Arizona Supreme Court, and U.S. Court of Appeals for the Ninth Circuit. Justin has spoken at many seminars on appellate preservation topics and is recognized as a *Southwest Super Lawyers* Rising Star and Best Lawyers Ones to Watch in the area of Appellate Practice. He currently serves as the Chair of the Appellate Group at JSH.

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As part of the firm's appellate team, **Ashley Caballero-Daltrey** represents clients in federal and state appellate matters and dispositive motions. Before joining JSH, Ashley worked as a law clerk for Vice Chief Justice Ann Scott Timmer of the Arizona Supreme Court. She has extensive experience researching and drafting memos across several different areas of law, as well as completing dozens of research projects and memos in torts, civil procedure, government claims, contracts, and land use.

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