

NINTH CIRCUIT ANALYZES USE OF FORCE INVOLVING MULTIPLE VOLLEYS OF SHOTS AND CONCLUDES OFFICER IS ENTITLED TO QUALIFIED IMMUNITY

March 26, 2024 | Law Alerts, News



Estate of Hernandez v. City of Los Angeles
United States Court of Appeals, Ninth Circuit
March 21, 2024
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In a published opinion, the Ninth Circuit affirmed in part and reversed in part a grant of summary judgment in a use of force case involving a fatal shooting. The officer had fired six shots, which the court analyzed as three separate uses of force. The court held that the first two were reasonable as a matter of law, and that the officer was entitled to qualified immunity for the third. The court also affirmed a grant of summary judgment on related Fourteenth Amendment and *Monell* claims.

Officers arrived to a multi-vehicle accident and learned from bystanders that one of the drivers was trying to hurt himself and had caused the accident. A broadcast on the police radio also stated that the suspect was “cutting himself” in his vehicle. The suspect climbed out of the window of his vehicle holding a weapon. Officers commanded him to stop four times, and he continually advanced on one of the officers. She backed up several steps until she was standing in front of a patrol car. The suspect started yelling and raised his arms out to his sides in a 45-degree angle as he advanced on her. The officer fired an initial volley of two shots, which caused the suspect to fall. When he started to get up, the officer fired a second volley of shots. The suspect then tried to roll over, so the office shot him again. She fired a last time as he appeared to try and push himself up again. He died on the scene, and the knife turned out to be a box cutter with two short blades.

The suspect’s parents and his minor daughter sued the City of Los Angeles, the Los Angeles Police Department, and the officer involved in the shooting, alleging a Fourth Amendment excessive force claim, a Fourteenth Amendment claim for interference with familial relations, a *Monell* claim, and several related state law claims. The district court granted summary judgment for Defendants on all claims. It held that the officer did not use excessive force but, even if she did, she was entitled to qualified immunity. It also concluded that plaintiffs’ Fourteenth Amendment claim failed because the officer’s actions “did not shock the conscience,” and that plaintiffs’ *Monell* claim failed because there was no underlying constitutional violation and plaintiffs had not established a basis to hold the city liable. Finally, the district court granted summary judgment on the state law claims because they were also based on the reasonableness of the use of force. Plaintiffs appealed.

In reviewing the Fourth Amendment excessive force claim, the Ninth Circuit explained that the officer’s use of force should be viewed as three separate volleys of shots. The first volley, when the suspect was advancing, was reasonable as a matter of law because the suspect posed a “substantial and imminent threat.” The second volley occurred before the threat had ended, and thus was also reasonable. But the court explained that the third volley was a closer call, as the threat may have ended by that point. The court acknowledged that the suspect appeared to shift his weight and try to get up, but a reasonable jury could have found that he no longer posed a threat.

The court then held that the officer was nevertheless entitled to qualified immunity because no case put her on notice that she could not shoot a suspect who was clearly still trying to get up. Plaintiffs had relied on one of the court’s previous cases which had held that an officer cannot keep shooting if the threat is over. But the Ninth Circuit reiterated that a court must look at the differences in material facts between the cases. Because there were too many differences in critical facts of prior cases, no precedent clearly established a general rule that placed the outcome of the case beyond debate.

The court also affirmed the grant of summary judgment on plaintiffs' related Fourteenth Amendment and *Monell* claims. As to the Fourteenth Amendment claim, the Ninth Circuit explained that the officer did not have time to deliberate and there was no evidence that she acted with a purpose to harm without regard to legitimate law enforcement objectives. Plaintiffs' *Monell* claim failed because there was no evidence to establish municipal liability. Finally, the court remanded plaintiffs' California state law claims because the grant of summary judgment was based only on reasonableness, and there was a question of fact regarding whether the officer's last volley was reasonable.

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[Ashley Caballero-Daltrey](#) is part of the firm's appellate team where she 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 focuses her practice on municipal law, personal injury, bad faith, and premises liability. Ashley has published articles and spoken on appellate issues including appeals for grazing permits on public lands, unique citation issues, and special action procedures.

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