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# Defending Bystander Excessive Force Claims: Is It Really Plaintiff's Personal Right?

BY: CYNTHIA WITHERS, *Assistant City Attorney, Arlington, Texas*



It is well settled that a civil rights claim for excessive force must be based on a violation of plaintiff's personal rights secured by the Constitution. So, when there are multiple people present at the scene of an incident involving police action, do bystanders have a claim?

**Constitutional Framework.**
The Fourth Amendment provides that "[t]he right of the people to be secure in their persons, houses, paper, and effects, against unreasonable searches and seizures, shall not be violated."[1] Bystander liability claims generally include allegations of witnessing excessive force in violation of Fourth Amendment rights or substantive due process rights under the Fourteenth Amendment. Since there is no constitutional right to be free from merely witnessing police action, what analysis must a court make to determine if a bystander claim under 42 U.S.C. §1983 withstands a Rule 12(b)(6) motion to dismiss? Circuit and district courts have tackled this issue in various fact scenarios involving police action, including a crowded store, a car loaded with passengers, and at houses with multiple family members present.

The Supreme Court has said many times that § 1983 "is not itself a source of substantive rights," but merely provides "a method for vindicating federal rights elsewhere conferred."[2] Analysis of an excessive force claim under § 1983 begins by identifying the specific constitutional right alleged to have been infringed.[3] The Court has held that all claims that law enforcement officers used excessive force— deadly or not—whether in the course of an arrest, investigatory stop, or other "seizure" of a free citizen should be analyzed under the Fourth Amendment's reasonableness standard,[4] which has arisen in a spectrum of fact patterns.

**Supreme Court.**
In *Tennessee v. Garner*, the Supreme Court addressed the constitutionality of police using deadly force, concluding that "[w]here 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."[5] In that regard, "Fourth Amendment jurisprudence has long recognized that 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."[6] The question of whether the force used was reasonable "requires careful attention to the facts and circumstances of each particular case, including the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight."[7] The "reasonableness" of a particular use of force must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight.[8] The calculus of reasonableness" must take into account 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."[9]

Twenty-five years after the Court decided *Graham v. Connor*, it issued a unanimous decision in *Plumhoff v. Rickard*, concluding that the officers acted reasonably in using deadly force while attempting to terminate a dangerous car chase that threatened the lives of innocent bystanders.[10] Donald Rickard led officers on a high-speed pursuit and the officers fired a total of 15 shots into his vehicle, striking Rickard and his passenger, Kelly Allen, both of whom died from

a combination of gunshot wounds and injuries sustained when their car crashed. Rickard's surviving daughter filed a § 1983 lawsuit alleging the officers used excessive force in violation of the Fourth and Fourteenth Amendments. No claim was made on behalf of passenger Allen, but Rickard's daughter argued that the officers acted unreasonably by firing too many shots at the car, in part because of Allen's presence in the front seat of the vehicle. The Court rejected this argument, determining Allen's presence did not change the analysis because "Fourth Amendment rights are personal rights which…may not be vicariously asserted."[11] The Court stated "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."[12] The Court noted that lower courts seemed to disagree about whether a passenger in Allen's situation could recover under a Fourth Amendment theory, but it expressed no view on this question.[13]

**Fifth Circuit.**

1. ***Grandstaff v. City of Borger.***

In 1985, the Fifth Circuit decided *Grandstaff v. City of Borger,* a case involving highly peculiar, extraordinary facts giving rise to claims asserted by bystanders to the deadly force used against Grandstaff.[14] Multiple police officers exchanged gunfire with a fugitive who had driven his pickup truck into the ranch where Grandstaff and his family lived. The gunfire awakened Grandstaff, along with his wife, minor daughter and two stepsons. He drove towards the scene to investigate after seeing police car emergency lights and hearing commands over a loudspeaker, and upon realizing the officers were searching for someone, he headed back towards his house to warn his family. Police then opened fire on his truck. Grandstaff was fatally shot in the back while trying to exit his vehicle.

The Fifth Circuit concluded that the officers were liable under Texas law for the wrongful death of Grandstaff and for the federal civil rights claim authorized by § 1983, given that he had been deprived of rights protected under the Constitution or federal statute by persons acting under color of law.[15] With respect to the City, the court concluded that because Borger enjoyed governmental immunity from the state law claim, liability depended on the scope of § 1983.[16] The court found a deprivation of a constitutional right when the officers took Grandstaff's life without due process of law and affirmed the jury's finding that the City's consciously indifferent training of its officers was found to be a proximate cause of Grandstaff's death. Grandstaff's widow and stepsons recovered damages from the City and the officers for the emotional injuries suffered as bystanders when witnessing the gunfire directed at Grandstaff. The Fifth Circuit concluded that under Texas law, bystander recovery was proper against the officers but was not permitted under § 1983 and therefore could not be recovered from the City. The court stated, "We fail to see, however, that these bystanders have proved an independent cause of action under § 1983. Negligent infliction of emotional distress is a state common law tort; there is no constitutional right to be free from witnessing this police action. 'Section 1983 imposes liability for violation of rights protected by the Constitution, not for violations of duties of care arising out of tort law.' "[17] The Fifth Circuit held the bystander plaintiffs could not recover damages for emotional injuries from the City.

*"Negligent infliction of emotional distress is a state common law tort; there is no constitutional right to be free from witnessing this police action. 'Section 1983 imposes liability for violation of rights protected by the Constitution, not for violations of duties of care arising out of tort law.' " The Fifth Circuit held the bystander plaintiffs could not recover damages for emotional injuries from the City.*

***2. Coon v. Ledbetter.***

A year later, the Fifth Circuit decided another case involving an innocent bystander claim. In *Coon v. Ledbetter*, sheriff's deputies went to the trailer home of Billy Dan Coon, who was suspected of being involved in a tavern shooting as well as a subsequent hit and run accident.[18] Just as the deputies were leaving the property, Coon drove up from behind the family's trailer. He then headed toward the neighbor's trailer, eventually arming himself with a shotgun. The deputy saw the gun and shouted a warning, after which Coon fired at least two shots as he ran around to the front of his trailer and struggled to get inside. One or more of the deputies fired into the trailer. Coon was treated for a wound at the hospital, his wife Dana received therapy for emotional problems, and their four-year old daughter Racheal, who was inside the trailer during the shoot-out, experienced sleeplessness and nightmares after the incident.

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Coon, Dana, and Racheal filed suit against the sheriff, deputies, and Jackson County alleging claims under § 1983. Following a jury trial, directed verdicts were entered in favor of the County and three of the deputies.[19] A verdict against the sheriff and three additional deputies awarded damages to each of the plaintiffs.[20] On appeal, the defendants argued that Coon's wife and daughter had not proved any deprivation of their own constitutional rights.

As to Dana and Racheal's bystander claims, the court stated that they, "like all persons who claim a deprivation of constitutional rights, were required to prove some violation of their personal rights."[21] The Fifth Circuit was persuaded that Racheal proved the personal loss required for a constitutional claim but that Coon's wife Dana had not. The court found:

> [T]here was no evidence that any act of the deputies was directed toward Dana; she was not directly involved in the shooting and was with the deputies when it occurred. Racheal, however, was in the trailer. There was evidence that Coon staggered into his trailer and while he was there attempted to protect Racheal from the gunfire, and there was evidence that deputy Gussberry fired a round of heavy buckshot into the trailer at that time. Further, the jury could have concluded that the deputies knew or should have known that other persons besides Billy Dan Coon were in the trailer, so that the requisite level of reckless conduct…was met.[22]

***3. Petta v. Rivera.***

*Petta v. Rivera* concerned the high-speed pursuit of Melinda Petta, who had fled the scene of a traffic stop with her two children inside the vehicle.[23] Texas Department of Public Safety (TDPS) Officer Rivera pulled Petta over for speeding, and after arguing with her about her speed, ordered her to get out of the vehicle, but she refused and rolled up her window. Officer Rivera allegedly became verbally and physically abusive to Petta, including attempting to jerk her car door open, smashing her driver's window, threatening to have her car towed, and menacing his handgun at her. Petta claimed Rivera shot at her car as she drove away and again during the chase, trying to blow out her vehicle's tires. Petta's children were never taken into custody when she was arrested nor were they ever touched by the officers when the pursuit ended at Petta's apartment.

Petta, on behalf of her two minor children sued the TDPS and Officer Rivera asserting state law claims and § 1983 claims for use of excessive force under the Fourth and Fourteenth Amendments.[24] All claims against TDPS and Officer Rivera in his official capacity were dismissed and the district court granted summary judgment on plaintiffs' § 1983 Fourth Amendment claim, finding that no "seizure" of the children had occurred that would trigger Fourth Amendment protections.[25]

While plaintiffs did not appeal the district court's dismissal of their Fourth Amendment claims,[26] the Petta children further claimed that Officer Rivera's "abusive behavior and use of excessive force during the initial stop and ensuing chase caused them severe emotional harm and thus deprived them of liberty without due process in violation of the Fourteenth Amendment."[27] The Circuit concluded that the children had asserted a valid claim under §1983 for a constitutional violation of excessive force under the Fourteenth Amendment, acknowledging explicitly that "where a plaintiff's excessive force claim, whether he be a prisoner, arrestee, detainee, or an innocent bystander of tender years, falls outside the specific protections of the Bill of Rights, that plaintiff may still seek redress under the due process clause of the Fourteenth Amendment."[28] The court's inquiry was very narrow, merely asking whether a § 1983 plaintiff at that time had a *clearly established* right under the Fourteenth Amendment to be free from purely emotional harm resulting from an officer's use of excessive force, *not* whether the Petta children's psychological injuries were redressable under the Fourteenth Amendment.

The Fifth Circuit reversed and granted Officer Rivera's motion for summary judgment on the qualified immunity grounds because it was not clearly established in the Circuit at the time of the events on January 15, 1990 that non-physical harm gave rise to a constitutional tort.[29]

The *Petta* court explained that it had previously applied Fourth Amendment standards to excessive force claims that may have in part implicated the Due Process clause. In *Mouille v. City of Live Oak*, 918 F.2d 548 (5th Cir.1990), the Circuit addressed excessive force claims of several plaintiffs who were allegedly terrorized by a police officer bursting into an office building in search of a suspect, with only one of the plaintiffs arrested while the remaining bystanders were subjected to the officer's violent behavior.[35] The court did not consider whether all of the *Mouille* plaintiffs were "seized" within the meaning of the Fourth Amendment, stating, "[i]t is at least arguable, however, that some of the plaintiffs in *Mouille* were not "seized" and that, therefore, their claims would have been more properly analyzed under the due process clause."[30] The *Petta* Court applied the same reasoning to the bystander children's claims, stating:

> We find it impractical and illogical to draw a line between their due process claims and those of an arrestee who claims, under the Fourth Amendment, that a police officer has used excessive force in effecting his arrest. Whether Officer Rivera's use of force was 'objectively reasonable' largely implicates Fourth Amendment concerns, even though the fortuity of his bullet going astray removed this case from the purview of 'seizure' cases."[31]

**Tenth Circuit.**

***Archuletta v. McShan.***

The Tenth Circuit has also held that a § 1983 claim for violating Fourteenth Amendment liberty interests could not be maintained without proof that a bystander was an object of the complained-of conduct or that there was any deliberate deprivation of the bystander's rights. In *Archuleta*, the minor plaintiff was a passenger in a truck being driven by his father along with his mother and an adult family friend.[32] Plaintiff's father was pulling the truck into his driveway when he was stopped by a police officer for having a headlight out and not having plaintiff in a child restraint. The officer repeatedly asked plaintiff's father to step out of the car after smelling alcohol on the father's breath but he refused, so the officer attempted to forcibly removed him and an altercation ensued. Plaintiff was being held by the adult friend about 20 feet away and was crying but never physically touched or threatened by the officer.

The minor plaintiff sued the officer and his superiors alleging the officer acted with intentional or reckless disregard and indifference to his emotional well-being during the arrest.[33] The district court granted defendants' summary judgment, holding plaintiff was not deprived of any right secured by the Constitution or laws of the United States: "[S]ection 1983 imposes liability for violations of rights protected by the constitution or laws of the United States, not for violations of duties of care arising out of tort law."[34] On appeal, the Tenth Circuit's analysis of plaintiff's excessive force claim began with identifying the specific constitutional right allegedly infringed upon by the challenged application of force. Given the well-settled principle that a section 1983 claim must be based upon the violation of plaintiff's personal rights, not the rights of someone else, the court's analysis turned upon whether the plaintiff personally suffered any deprivation of a constitutional right possessed by him individually, regardless of what happened to plaintiff's father.[35] Plaintiff asserted a liberty interest under the Due Process Clause of the Fourteenth Amendment to be free from emotional trauma suffered as a result of observing allegedly excessive police force directly entirely at his father. The court held plaintiff had no such liberty interest and therefore the district court correctly granted summary judgment on this ground. The court further stated:

> The problem with plaintiff's claim is that no state conduct was directed at him, and he cannot establish that defendants had the requisite intent to violate *his* rights. He was merely a bystander who was asserting indirect and unintended injury as a result of police conduct directed toward another. We use the term bystander to mean someone who witnesses police action but who is not himself or herself an object of that action. As such, a bystander is unable to assert the kind of deliberate deprivation of his or her rights necessary to state a due process claim under section 1983.[36]

*We use the term bystander to mean someone who witnesses police action but who is not himself or herself an object of that action. As such, a bystander is unable to assert the kind of deliberate deprivation of his or her rights necessary to state a due process claim under section 1983.*

The Tenth Circuit recognized that it must provide a logical stopping place for §1983 claims and that line requires a plaintiff who asserts a due process claim under §1983 to prove that he or she is the deliberate object of the state action which caused the injury.[37] The court concluded that there was neither the *required conduct directed* nor *requisite intent to injure plaintiff* that would give rise to a due process claim under § 1983.[38]

**Fourth Circuit.**

***Schultz v. Braga.***

In *Schultz v. Braga*, plaintiffs Schultz and Harkum alleged that FBI Special Agent Braga unconstitutionally employed excessive force against them when he shot Shultz, who was seated next to Harkum in the passenger seat of her vehicle after it was stopped by an FBI team investigating a bank robbery.[39] The Fourth Circuit evaluated Agent Braga's use of deadly force from the perspective of what the agent and his colleagues believed at the time they stopped the vehicle, without regard to the fact that it was later discovered that the occupants were an innocent couple tragically mistaken as the suspects being investigated. The district court ruled that plaintiff Harkum could not prevail on her excessive force claim because she was not "seized" by Agent Braga within the meaning of the Fourth Amendment, and the Fourth Circuit agreed: "Because a seizure within the meaning of the Fourth Amendment always 'requires an intentional acquisition of physical control,'it does not extend to 'accidental effects' or 'unintended consequences of government action.' "[40] Further, "[a]lthough a seizure may 'occur[] even when an unintended person or thing is the object of the detention or taking, …the detention or taking [of the person or thing] itself must be willful. This is implicit in the word 'seizure,' which can hardly be applied to an unknowing act."[41]

*Continued on page 36*

The Fourth Circuit, relying on *Brower*, declined to extend Fourth Amendment protections to an innocent bystander who was unintentionally killed by a police officer attempting to seize a fleeing criminal.[42] (Other courts have also refused to allow hostages to bring Fourth Amendment claims against police officers who accidently shot them while attempting to seize their captors, even though the means applied, ie: gunfire, was intentional, because there was no intent to seize the hostage).[43] The Fourth Circuit held:

> A Fourth Amendment seizure does not occur whenever there is a governmentally caused termination of an individual's freedom of movement, such as in the case of an innocent passerby who is injured when he is inadvertently struck by the force employed, 'nor even whenever there is a governmentally caused and governmentally *desired* termination of an individual's freedom of movement,' such as in the case of a fleeing felon who is unknowingly and unintentionally stopped by an officer. Rather, a Fourth Amendment seizure occurs 'only when there is a governmental termination of freedom of movement though means intentionally applied.' [44]

Harkam argued that, unlike the case of an innocent bystander or hostage, she was an intended target of seizure by the FBI agents and was entitled to recover for any injuries (including purely emotional injuries) she sustained as a result of Agent Braga firing his weapon at Schultz, the passenger. The court rejected this argument, holding that for an officer to be personally liable for violation of the Fourth Amendment, the plaintiff must at a minimum be able to demonstrate that the officer actually terminated her freedom of movement by means of the alleged excessive force. The Court distinguished Harkum's claim from Schultz's claim because "the force employed was not directed towards her, not intended to seize her, and did not seize her." [45]

The Fourth Circuit further explained that it was not holding that a suspect must be physically struck by a bullet (or any other object) to state a claim for excessive force; however, to hold an officer personally liable for violation of the Fourth Amendment, the plaintiff must at a minimum be able to demonstrate that the officer actually terminated her freedom of movement by means of the alleged excessive force. "The Fourth Amendment protects persons who have been personally subjected to a "governmental termination of freedom of movement through means intentionally applied" that are unreasonable.[46] Harkum relied on cases from other circuits that allowed suspects to pursue Fourth Amendment claims of excessive force against police officers who inadvertently shot them, but the Court determined those cases were allowed to proceed not because the plaintiff was a "foreseeable victim" of the officer's gunfire, but rather because each was a desired target of seizure and in fact, stopped or seized by the bullet intentionally fired by the officer. [47]

**United States District Courts-Southern, Northern, and Western Districts of Texas.**

1. ***Young v. Green.***

Two cases decided by the U.S. District Court for the Southern District of Texas, Houston Dividion, within a few years of each other addressed bystander liability claims. The first, *Young v. Green*, was brought against the City of Houston and Officer Green by multiple plaintiffs who alleged that Green used excessive force against Michael Young, which was witnessed by the other plaintiffs.[48] The underlying facts arose out of a crowd gathered for a midnight athletic shoe sale in December of 2010. Joseph Young and his two cousins, Christopher and Christian Bell bought their shoes but could not leave the store due to the crowd outside. Michael Young alleged that as another officer was helping move the crowd, Officer Green "hit him in the back of the head with a nightstick, then began to shove and yell at him." When Joseph Young and Michelle Bell tried to intervene, Officer Green grabbed Joseph's throat "momentarily" and pushed Michelle in the chest.[49] Michael was not placed in custody and he and the other bystander plaintiffs drove away from the store.

The seven bystander plaintiffs allegedly suffered mental distress by witnessing the use of force against Michael Young. The district court held Officer Green was entitled to summary judgment on the bystander plaintiffs' claims which were based on witnessing the use of force against Michael Young. The district court stated, "case law holds that a bystander who witnesses a police action, but who is not himself or herself an object of that action, cannot recover for resulting emotional injuries under § 1983, although there may be such a claim under state tort law. There is no constitutional right to be free from witnessing police action, apart from the question of whether that action physically injured the target of that action."[50] Subsequently, the City of Houston also moved for summary judgment on plaintiffs' bystander claims.[51] Because summary judgment was previously granted for Officer Green on plaintiffs' bystander claims, the district court held the City of Houston was entitled to summary judgment on the federal bystander claims for observing the officer's use of force against Michael Young, for the reasons set forth in its prior opinion. [52]

2. ***Khansari v. City of Houston.***

In *Khansari v. City of Houston*, the parents of Corey Khansari, who was tased by Houston Police officers, alleged bystander claims for severe emotional distress they suffered as a result of the defendants' unreasonable conduct.[53] The officers responded to a 911 call at the Khansari's home after Corey was believed to have attempted suicide. The first officer to arrive pulled a long gun out of her squad car and appeared to load the chamber. When Mrs. Khansari asked,

"what are you doing," Officer Vaughn replied, "I might have to kill someone" or some similar words. [54] Corey came out of the house while his parents tried to explain the situation to the officers and the Khansaris could see red laser beam dots from the officers' weapons on him. Mrs. Khansari positioned herself between Corey and the officers and the red laser beam dots appeared on her so Corey, fearing his mother was in danger, pushed her out of the line of fire and was immediately tased by officers, resulting in taser darts piercing his eye. He became severely disoriented and fell but was tased several more times when he tried to get up a few seconds later.

Plaintiffs alleged that Mrs. Khansari was a witness to the entire terrifying even and was herself a subject of the Officers' conduct, including "being pointed at with guns, being grabbed by the neck or shoulder, and being told threatening statements."[55] Furthermore, "She was within feet of her son when he was shot by taser guns" and "[s]he suffered shock as a result of the direct emotional impact upon her from the Officers' actions directed specifically at her and from her contemporaneous observance of the events."[56] Further, Plaintiffs alleged that Mr. Khansari was also a subject of the Officers' actions, with Officers yelling at him in a threatening manner for interfering with police work, yelling at him to get away, and threatening to arrest him if he didn't comply, which he did.

The district court concluded that Plaintiffs' claims for excessive use of force asserted against the individual officers should be dismissed for failure to state a claim because these bystander Plaintiffs did not allege facts capable of showing that the police actions were directed at them or that they suffered a "seizure" as required for a violation of rights protected by the Fourth Amendment.[57] Mr. and Mrs. Khansari cited to *Petta v. Rivera* in support of their argument that they were the subjects of the Officers' excessive force, but the district court found this argument misplaced, stating "[a] civil rights claim must be based upon a violation of a plaintiff's personal rights secured by the Constitution, and a bystander who is not the object of police action cannot recover for resulting emotional injuries under § 1983."[58]

The court held that the Khansaris asserted claims for emotional distress arising from witnessing police action against their son Corey and had failed to alleged facts capable of establishing a cognizable claim for excessive use of force against them; thus, it granted the individual defendants' motions to dismiss the bystander claims for emotional distress under § 1983 arising from force witnessed by Mr. and Mrs. Khansari.The court also granted the City's motion to dismiss the
§ 1983 bystander actions for failure to state a claim for which relief may be granted, restating its conclusion that the facts alleged by Mr. and Mrs. Khansari were not capable of establishing that they were targets, as opposed to mere witnesses, of a police action.[59]

3. ***Cole v. Hunter.***

In *Cole v. Hunter,* the parents of Ryan Cole asserted bystander claims, alleging they had a contemporaneous perception of the shooting of their son by virtue of having heard the shots fired from their front yard, and experienced significant emotional and mental anguish resulting from this perception in the past.[62] Defendants argued that the federal bystander claims of Plaintiffs Randy and Karen Cole must be dismissed because they failed to allege a deprivation of their own constitutional rights. The United States District Court for the Northern District of Texas agreed and granted Defendants' motion to dismiss to the extent Plaintiffs sought to assert a § 1983 bystander claim for their emotional injuries based on police action directed at their son. The district court stated, "A civil rights claim must be based upon a violation of a plaintiff's personal rights secured by the Constitution, and a bystander who is not the object of police action cannot recover for resulting emotional injuries under § 1983. [63]

4. ***Dantzler v. Hindman.***

Further, in *Dantzler v. Hindman*, Plaintiffs brought an excessive force claim against deputies alleging that "in the course of executing a seizure of Plaintiff Huntly Dantzler, they used excessive and unreasonable force which resulted in severe physical and emotional injuries, thereby depriving them of their rights under the Fourth Amendment.[62] Deputies went to the Dantzler's residence to conduct a welfare check after it had been reported that Huntly Dantzler, Jr. had been seen placing pills in a woman's drink and then leaving the bar with her highly intoxicated. His parents Huntly, Sr. and Mrs. Dantzler refused to allow the Deputies inside their home and Huntly, Sr. was subsequently handcuffed by Deputy Westbrook for resisting but then unhandcuffed after they briefly searched the home.

The district court dismissed Plaintiffs' section 1983 excessive force claim against Deputy Hindman for failure to state a claim and based on qualified immunity. That holding was similar to other courts' rejections of claims of emotional injuries for observation of excessive force used against another person, holding "a bystander who is not the object of police action cannot recover for resulting injuries under § 1983.") [63]

## Conclusion

The foregoing examples illustrate that bystanders often assert § 1983 claims which are derivative from underlying claims that might be brought by the actual victims of excessive force. It is therefore critical to thoroughly review and analyze the facts plead in a federal lawsuit involving multiple plaintiffs, including bystanders alleging an excessive force claim under § 1983. If the bystander plaintiff is not the object of police action but merely witnesses an officer's use of force on another person, the municipality and officer defendants may well be able to get the claim dismissed early in the litigation on a motion to dismiss or for summary judgment. ML

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## Notes

1. U.S. Const. amend. IV.
2. Graham v. Connor, 490 U.S. 386, 393-394 (1989) (citing Baker v. McCollan, 443 U.S. 137, 144, n. 3 (1979)).
3. *Id*. at 394.
4. *Id*. at 395.
5. Tennessee v. Garner, 471 U.S. 1, 11 (1985).
6. *Graham*, 490 U.S. at 396 (citing Terry v. Ohio, 392 U.S. 1, 22-27 (1968)).
7. *Id.*
8. *Id*. (citing *Terry* at 20-22).
9. *Id*. at 396-397.
10 Plumhoff v. Rickard, 572 U.S. 765, 766 (2014).
11. *Id*. at 778 (quoting Alderman v. United States, 394 U.S. 165, 174(1969)) (see also Rakas v. Illinois, 439 U.S. 128, 138-143 (1978)).
12. *Id.*
13. *Id*. at n. 4, (citing Vaughan v. Cox, 343 F.3d 1323 (11th Cir. 2003)) (suggesting yes); (see also Fisher v. Memphis, 234 F. 3d 312 (6th Cir. 2000)) (same); (see Milstead v. Kibler, 243 F. 3d 157 (4th Cir. 2001)) (suggesting no); (see also Landol-Rivera v. Cruz Cosme, 906 F. 2d 791 (1st Cir. 1990)) (same). (See also County of Sacramento v. Lewis, 523 U.S. 833, 836 (1998)) (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.")
14. Grandstaff v. City of Borger, 767 F.2d 161 (5th Cir. 1985).
15. *Id*. at 167.
16. *Id*. at 168-69.
17. *Id*. at 172 (quoting Baker v. McCollan, 443 U.S. 137, 146 (1979)).
18. Coon v. Ledbetter, 780 F. 2d 1158 (5th Cir. 1986).
19. *Id*.at 1160.
20. *Id.*
21. *Id*. (citing Dohaish v. Tooley, 670 F. 2d 934 (10th Cir. 1982) (right to bring action under civil rights act is personal in nature and does not accrue to a relative), cert. denied, 459 U.S. 826 (1982)).
22. *Id*. at 1161.
23. Petta v. Rivera, 143 F.3d 895, 897-898 (5th Cir. 1998) (per curiam).
24. *Id*.
25. *Id.*
26. *Id*. at 898, n.3 ("Whether the district court correctly found no "seizure" of the children under these facts is therefore not before us.").
27. *Id*. at 900.
28. *Id*. at 910, n.25 (citing *Graham*, 490 U.S. at 395, n.1).
29. *Id*. at 911.
30. *Id*. (citing Brower v. Inyo County, 489 U.S. 593, 596-97, 103 L. Ed. 2d 628, 109 S. Ct. 1378 (1989)), (*Graham*, 490 U.S. at 395 n.10). *See also* Ikerd v. Blair, 101 F. 3d 430, 433 n.6 (5th Cir. 1996) (applying Fourth Amendment standards to excessive force claim where police officer grabbed child's arm; child's father, and not the child herself, was the object of the arrest); Stroik v. Ponseti, 35 F. 3d 155, 156-57 (5th Cir. 1994) (applying Fourth Amendment to excessive force claim where hostage was shot by police officer as officer fired at her captor).
31. *Id*. at 913-914 (citing *Brower*, 489 U.S. at 596-597).
32. Archuleta v. McShan, 897 F. 2d 495 (10th Cir. 1990).
33. *Id*. at 496.
34. *Id*. at 497 (citing Wise v. Bravo, 666 F.2d 1328, 1333 (10th Cir. 1981)).
35. *Id*. (citing Dohaish v. Tooley, 670 F.2d 934, 936 (10th Cir. 1982)) ("The § 1983 civil rights action is a personal suit. It does not accrue to a relative, even the father of the deceased."), cert. denied, 459 U.S. 826, 74 L.Ed. 2d 63, 103 S. Ct. 60 (1982); *see also* Coon v. Ledbetter, 780 F. 2d 1158, 1160-61 (5th Cir. 1986); Trujuillo v. Board of County Commissioners, 768 F.2d 1186, 1187 (10th Cir. 1985).
36. *Archuleta* at 498.
37. *Id*. at 499 (citing *Trujillo v. Board of County Commissioners*, 768 F.2d at 1190).
38. *Id*. at 500 (emphasis added).
39. Shultz v. Braga, 455 F. 3d 470, 472 (4th Cir. 2006).
40. *Id*. (quoting Brower v. County of Inyo, 489 U.S. 593, 596 (1989)).
41. *Id.*
42. *Id*. at 480 (quoting Rucker v. Harford County, 946 F.2d 278, 281 (4th Cir. 1991)).
43. *Id*. at 480 (citing Childress v. City of Arapaho, 210 F. 3d 1154, 1157 (10th Cir. 2000)); Medeiros v. O'Connell, 150 F.3d 164, 168-69 (2d Cir. 1998*);* Landol-Rivera v. Cosme, 906 F. 2d 791, 798 (1st Cir. 1990) (holding that the Fourth Amendment is not implicated when a hostage is inadvertently shot during a police pursuit of a robbery suspect because "the individual alleging harm was [not] the object of the challenged police conduct").
44. *Id*. at 481 (quoting *Brower*, 489 U.S. at 597) (emphasis omitted)).
45. *Id*. at 483.
46. *Id*. at 482 (quoting *Brower*, 489 U.S. at 597 (emphasis omitted)).
47. *Id*. at 482 (citing Vaughan v. Cox, 343 F.3d 1323, 1329 (11 Cir. 2003); Fisher v. City of Memphis, 243 F. 3d 312, 318-19 (6th Cir. 2000); Yang v. Murphy, 796 F. Supp, 1245, 1250 (D. Minn. 1992).
48. Young v. Green, 2012 U.S. Dist. Lexis 115027 *1-2, 2012 WL 3527040 *1 (S.D. Tex. 2012).
49. *Id.*
50. *Id*. at *4.
51. Young v. Green, 2013 U.S. Dist. Lexis 27252 *2, 2013 U.S. Dist. Westlaw 775388 *2 (S.D. Tex. 2013) (mem. op.).
52. *Id*. at *22.
53. Khansari v. City of Houston, 14 F. Supp. 3d 842 (S.D. Tex. 2014) (mem. op.).
54. *Id*. at 850.
55. *Id*. at 862.
56. *Id.*
57. *Id.*
58. *Id*. at 863 (citing Grandstaff v. City of Borger, 767 F. 2d 161, 172 (5th Cir. 1985)), cert. denied, 480 U.S. 916 (1987)); (*Coon v. Ledbetter*, 780 F. 2d