CASES

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More Than a Mere Scintilla

***Grant v. City of Syracuse,* No. 19-cv-00738 (2d Cir. Appeal filed Mar. 25, 2019).**

The Background:

On a Saturday evening in June 2014, Alonzo Grant entered his Syracuse home to discover disarray and dirty dishes left by his adult daughter Alyssa. A heated argument ensued between Alonzo, his daughter and his wife Stephanie. Alonzo demanded that Alyssa leave his home, which she did—only to begin an altercation with a neighbor. Alonzo then called 911, yelling for the dispatcher to "send the cops over here right now," because Alyssa was "acting like a f**king asshole and is just f**king with my house, okay."

Syracuse Police Department Officers Lockett and Montalto arrived at the 105 Hudson Street residence in less than five minutes. What transpired next is described very differently by the parties. The Grants assert that their conflict had ended and there was no further need for law enforcement. The officers say that they heard loud arguing inside, requiring Lockett to enter the home. Regardless, Alonzo was asked to go outside and speak with officer Montalto. In so doing, Alonzo slammed the door violently, causing Lockett to initiate an arrest on the porch. The officers say he resisted; they allegedly struck him repeatedly and threw him to the ground over a railing so they could apply handcuffs. The Grant's version of the facts is that Alonzo did not resist and that no such violence would have been needed to subdue him.

Charges against Alonzo for disorderly conduct and resisting arrest were were ultimately dismissed. The Grants then brought section 1983 actions against the individual officers for false arrest, false imprisonment, excessive force, unlawful entry and malicious prosecution, a section 1985 conspiracy claim, and state law claims for trespass, defamation, intentional infliction of emotional distress. They also named Syracuse and its police department, asserting *Monell* claims: a custom and policy of lax disciplinary oversight and deliberate indifference to overzealous arrest behavior by law enforcement.

In November 2017, the US District Court for New York's Northern District denied most of defendants' motions for summary judgment. Except for malicious prosecution and intentional infliction of emotional distress, all of plaintiffs' claims survived. [1]

In October 2018, after an 11-day trial, a jury awarded Alonzo and Stephanie Grant a total of $1,580,000 in damages and$662,000 in attorney's fees and costs.

Flaws in the Trial Proceedings:
What might otherwise have passed as a case with bad facts and a discouraging outcome caught IMLA's attention. Upon a closer reading of the specifics, it appeared that the trial court had countenanced some serious improprieties. Two items in particular stood out. First, the court had allowed the jury to hear information about the defendant officers from disciplinary reports issued by the Syracuse Citizen Review Board ("CRB"). Second, the trial of the individual defendants had not been bifurcated from the *Monell* proceedings against the municipal defendants. These flaws were part of the argument on appeal by Syracuse and its related defendants—and became the basis for IMLA's use of internal resources to write an amicus brief on their behalf.

The CRB Miscarriage:
Municipal law enforcement entities increasingly face mistrust, no doubt fueled by numerous highly-publicized instances of excessive force which undermine the much larger cohort of responsible officers. A 2018 Gallup poll finds that 46% of Americans have only "some" or "very little/[no]" confidence in the police. One mechanism which has arisen over the years to cultivate greater trust are citizen review panels, which allow constituents an outlet to criticize police actions and demand accountability, without requiring the strictures and time needed to litigate in a true court of law. Today, more than 150 citizen review entities are operating across the country. [2]

The CRB affords Syracuse residents such a forum. It is an administrative body comprised of eleven civilian members, three of whom are appointed by the Mayor and eight by the Common Council. [3] There is no requirement that any appointees to the CRB have legal training or any particular expertise.[4] The CRB is a far less formal setting than a courtroom, and does not ob-

serve many of the procedures and standards which would be required for due process in a bona fide trial. For example, it does not place witnesses under oath, does not produce transcripts of its proceedings, holds secret "hearings," [5] does not allow for cross-examination of witnesses--and there are no appeals from its decisions.

The CRB also employs a lower evidentiary threshold than the preponderance standard required in a civil trial: "substantial evidence," which has been defined as "more than a mere scintilla." [6] Syracuse lawmakers implicitly recognized these due process deficiencies by legislating that the CRB's actions could not be used for more than their advisory value. [7]

Despite these shortcomings, counsel for the Grants was allowed to admit into evidence various damaging and inflammatory materials from the CRB. This included a letter from the CRB Administrator to Alonzo Grant stating that the CRB had found that the defendant officers used excessive force, made a false arrest and had been untruthful. That same CRB Administrator testified during trial that "[T]he CRB panel found the officers' reports and a responding sergeant's use of force report to contain inaccuracies and intentional misrepresentations" which "were an attempt …to justify the actions of the officers and sustained the untruthfulness allegations against the responding officers…"

This evidence had never survived a preponderance standard; it was merely "substantial." As Chief Fowler of the Syracuse Police Department testified as to the substantial evidence during trial:

> Counsel: "Okay, and so if the CRB's standard that they use to sustain a finding is less than fifty percent, does that mean they can sustain a finding even if the majority of the evidence points in favor of the police officer?
> Chief Fowler: Yes, that's accurate." [8]

IMLA argues in its amicus brief that the impropriety of providing the jury with this CRB evidence--derived in the absence of due process safeguards--is abundantly clear. It seems beyond question that, despite a perfunctory instruction from the court that jurors disregard it, the finding by a citizen's tribunal that the officers had used excessive force and were lying would immutably color the jurors courtroom assessment of these defendants.

The *Monell* Miscue:

The Grant proceedings were tainted by a second error, in IMLA's estimation: the court's failure to bifurcate the actions against the individual officers from the claim against the municipal entities. The *Monell* claim here involved plaintiffs' allegation that Syracuse had a "custom, policy, and pattern and practice of failing to exercise reasonable care in training, supervising and hiring its officers…" as well as a custom and practice of "inaction regarding disciplining police officers for excessive force…"

In a failure to train or supervise case, plaintiffs must demonstrate that the need to act is "so obvious, and the inadequacy of current practices so likely to result in a deprivation of federal rights, that the municipality or official can be found deliberately indifferent to the need."[9] This requirement necessitates amassing evidence of widespread wrongdoing by the municipality, much of which will have nothing to do with a specific case of excessive force against an individual officer.

Given these evidentiary factors, it would rarely be appropriate for a jury to assess excessive force claims against a particular officer in the same trial where a *Monell* custom and practice claim is being litigated. And the Federal Rules provide a ready solution; as Fed. R. Civ. P. 42(b) states "[f]or convenience, to avoid prejudice, or to expedite and economize, the court may order a separate trial of one or more separate issues, claims, crossclaims, counterclaims, or third-party claims." (emphasis added). Due to the likelihood of prejudice, courts in the Second Circuit have often bifurcated *Monell* claims from those against individual officers. [10] As one court instructed, "evidence of other incidents that may be admissible solely against the City to prove *Monell* liability could dangerously infect the jury's consideration of the individual claim against defendant." [11]

Here, the Grants' counsel worked assiduously to cause such an infection. They cherry-picked, for exposure to the jury, some of the most inflammatory allegations that had been brought before the CRB in the years surrounding the Grant incident--again, subject to the "substantial evidence" threshold. These included allegations that other Syracuse police officers had tased a disabled man and had used excessive force against a minister and a seventy-six-year old woman. Plaintiffs' *Monell* evidence also included statistics from the 2012, 2013 and 2014 CRB Annual Reports, which illustrated a growing number of police misconduct allegations over time—a large percentage of which were for excessive force. Testimony was also introduced before the jury that, in 2014, "eighteen out of forty-three excessive force complaints were sustained by the CRB panels, which represented a large portion of the sustained findings, seventy-two percent…" and that from 2012-2014, the head of the CRB "never saw an excessive force case sustained by the chief."

While bifurcation is a matter of discretion, that discretion is not unlimited. In an excessive force action, testimony about wrongdoing by other officers, supported only by the barest of evidentiary thresholds, cannot become the basis for liability and supplant the role of the jury. IMLA argues that this is clearly a case where the failure to bifurcate, given the extraordinarily damaging *Monell* evidence placed before factfinders responsible for determining the individual officers' liability, is an abuse of discretion, requiring reversal by the Second Circuit.

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Endnotes

1. Grant v. City of Syracuse, No. 5-15 cv 445 (N.D. N.Y. Nov. 17, 2017).
2. Olugbenga Ajilore, "How Civilian Review Boards Can Further Police Accountability and Improve Community Relations," *Scholars Strategy Network*, June 25, 2018 https://scholars.org/brief/how-civilian-review-boards-can-further-police-accountability-and-improve-community-relations.
3. Syracuse Code of Ordinances 12-184(1), (5); Syracuse CRB Bylaws, section 3 (http://www.syrgov.net/uploadedFiles/City_Hall/CRB/CRB%20by-laws%202012.pdf)
4. *Id.*
5. Syracuse Code of Ordinances, Section 12-187(3)(f)(3).
6. "Substantial evidence" means "more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Richardson v. Perales,* 402 U.S. 389, 401 (1971), (admitting report by physician in disability hearing: "despite its hearsay character and an absence of cross-examination, and despite the presence of opposing direct medical testimony and testimony by the claimant himself, may constitute substantial evidence . . . ") *Id.*
7. "The actions of the board do not preclude action by the judicial system. *A finding or decision by the board shall not have any collateral effect upon a subsequent administrative or judicial proceeding."* Syracuse NY Code of Ordinances §12-187(3)(f)10 (emphasis added)
8. *Id.* at 1025.
9. Reynolds v. Giuliani, 506 F.3d 183, 192 (2d Cir. 2007).
See e.g., Walker v. City of New York, No. 14-CV-680, 2018 U.S. Dist. LEXIS 58380, at *12-13 (E.D.N.Y. Mar. 30, 2018); Amato v. City of Saratoga Springs, 972 F. Supp. 120, 123-24 (N.D.N.Y. 1997).
11. Mineo v. City of New York, No. 09-CV-2261, 2013 U.S. Dist. LEXIS 46953, at *4-5 (E.D.N.Y. Mar. 29, 2013)"
12. Although bifurcation is discretionary, that "discretion is not unfettered" and the trial court's decision should be reversed if it abused that discretion. *Brown v. Junction Pool Commons, Inc.*, 301 F. App'x 24, 26 (2d Cir. 2008).

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26, 2018) (accord); *City of Los Angeles v. Sessions*, No. 18-7347, 2019 WL 1957966, at *4-5 (C.D. Cal. Feb. 15, 2019) (permanently enjoining notice, access, compliance, harboring, and questionnaire conditions); *City & County of San Francisco v. Sessions*, No. 18-5146, 2019 WL 1024404, at *2 (N.D. Cal. Mar. 4, 2019) (accord); *City & County of San Francisco v. Sessions*, 349 F. Supp. 3d 924, 934 (N.D. Cal. 2018) (permanently enjoining the notice, access, and compliance conditions); *City of New York v. Dep't of Justice*, 343 F. Supp. 3d 213, 246 (S.D.N.Y. 2018) (permanently enjoining notice, access, and compliance conditions); *City of Providence v. Sessions*, No. 18-437, ECF No. 30 at 7-8 (D.R.I. June 10, 2019) (permanently enjoining notice, access, and compliance conditions).
6. *See* Chicago Decision, p. 9.
7. *See* Chicago Decision, p. 27.
8. *City of Chicago*, 888 F.3d at 293; *City of Chicago*, 321 F. Supp. 3d at 879; *City of Evanston & United States Conference of Mayors v. Sessions*, No. 18 C 4853, 2018 U.S. Dist. LEXIS 204500, at *1 (N.D. Ill. Aug. 9, 2018); *United States Conference of Mayors v. Sessions,* No. 18-2734 (7th Cir. Aug. 29, 2018) (lifting stay from injunction as to USCM members).
9. Chicago Decision, p. 26; USCM Decision, p. 13.
10. Chicago Decision, p. 31; *see also* USCM Decision, p. 24.
11. Chicago Decision, p. 32.
12. *Id.* at 35, *citing City of Chicago*, 888 F.3d at 286.
13. Chicago Decision, p. 44-46; USCM Decision, p. 28.
14. Chicago Decision, p. 44.
15. *Id.* at 46.
16. USCM Decision, p. 28.
17. *Id.* at 29.
18. The City of Los Angeles also received a nationwide injunction in its FY18 Byrne Jag litigation, but the nationwide aspect of that injunction is currently stayed pending Ninth Circuit review.

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tion in limiting plaintiffs' [voir dire] inquiries on specific sums of money" but allowing "inquiring of jurors, in a less particularized fashion, whether they had any prejudice against large verdicts"); Juarez v. Commonwealth Med. Assoc., 742 N.E.2d 386, 388 (Ill. Ct. App. 2000) (trial court properly exercised discretion in limiting plaintiff's counsel to inquiring whether potential jurors "could award 'substantial damages'"); Jones v. Parrott, 143 S.E.2d 393, 395 (Ga. Ct. App. 1965) (voir dire questions to prospective jurors about verdict size "should be phrased in general terms," not in specific dollar amounts).
8. See also Beagle v. Vasold, 417 P.2d at 681 ("the trial court can and should instruct the jury that the argument of counsel as to the amount of damages claimed by the plaintiff is not evidence and that its duty is only to award such damages as will reasonably compensate the plaintiff for his pain and suffering" and "may also, if it deems appropriate, advise the jury it is not bound by any particular method of calculation in assessing damages for pain and suffering"; Johnson v. Brown, 345 P.2d 754, 759 (Nev. 1959) (inasmuch as a per diem argument "may be used only for illustrative purposes, the trial court should insist that it be premised . . . by an admonition that the suggestions of counsel are not to be taken as evidence but are merely the thoughts of counsel as to what would be proper damages to award for this item. It should not hesitate to limit counsel whenever it feels that the rights of the jury to determine for itself what fair and reasonable compensation for such items of damages, are being invaded, or to give such further admonition as it deems necessary.") (emphasis added); Olsen v. Preferred Risk Mut. Ins. Co., 354 P.2d 575, 576 (Utah 1960) (if counsel presents a mathematical per diem formula to jury for is consideration in determining damages for pain and suffering, the propriety of such argument is left to the sound discretion of the trial court with a "cautionary instruction that if permitted such presentation is but lawyer talk").