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Arizona Court of Appeals

Immunity under A.R.S. § 12-820.03

***Glazer v. State of Arizona*, --P.3d--, 2014 WL949114 (Ariz.App. 2014)**

This case arises out of a cross-over crash on I-10 south of Phoenix that injured plaintiff Glazer and killed her husband and daughter. The driver of an eastbound SUV lost control, crossed the median and into oncoming westbound traffic, and crashed head-on into the Glazer's van. Glazer sued the State, alleging the State was negligent for failing to install median barriers separating the eastbound and westbound lanes of I-10 in the area of the crash. The State moved for summary judgment pursuant to A.R.S. § 12-820.03, an affirmative defense that applies to claims for injuries arising out of a plan or design for construction of a highway. The trial court found that the statute did not apply to Glazer's claim and denied the motion. The case proceeded to trial and the jury entered a verdict for Plaintiff. The State appealed and argued, among other things, that the trial court erred in denying summary judgment based on A.R.S. § 12-820.03. The Court of Appeals found that the trial court did not err, and that A.R.S. § 12-820.03 did not apply.

A.R.S. § 12-820.03 provides that neither a public entity nor a public employee is liable for an injury arising out of a plan or design for construction, maintenance, or improvement of a highway, if the plan or design is prepared in conformance with generally accepted engineering or design standards in effect at the time of the plan or design. The portion of I-10 where the crash occurred was built in 1967 and, at that time, its plan and design conformed to accepted engineering and design standards.

But Glazer did not claim that that the injury arose out of a negligent plan or design for I-10's construction. Glazer's claim was based on the theory that: (1) the State has a duty to keep public highways reasonably safe for travel; and (2) it breached this duty when material changes on I-10 necessitated that a median barrier be installed and the State failed to do so. Arizona law is clear that the duty to keep streets safe for travel includes an obligation to erect railings or barriers along highways at places where they are necessary to make travel safe. Glazer's claim was based on a change in roadway conditions that occurred long after the roadway was designed and built, not on its original plan. Because Glazer's claim was not related to I-10's design, but to the State's failure to keep I-10 safe in light of changes in that occurred in the decade or so before the crash, the Court of

Appeals held that A.R.S. § 12-820.03's affirmative defense did not apply.

United State Supreme Court

First Amendment freedom of religion – prayer in public meetings

***Town of Greece v. Galloway*, 134 S.Ct. 1811 (May 5, 2014)**

Since 1999, Greece, New York's town board has begun its monthly meetings with an invocation delivered by a local clergyman. The prayer is intended to place town board members in a solemn and deliberative frame of mind, invoke divine guidance in town affairs, and follow a tradition practiced by Congress and dozens of state legislatures. The prayer givers are unpaid volunteers. To select the monthly prayer giver, a town employee calls the congregations listed in a local directory until she finds an available minister. Although the majority of prayers are delivered by Christian ministers, the town does not exclude or deny an opportunity to any would-be prayer giver. A minister or layperson of any persuasion, even an atheist, can give the invocation. Indeed, prayer givers have included a Jewish layman, the chairman of the local Baha'i temple, and a Wiccan priestess. Greece does not review the prayers in advance or provide any guidance as to their tone or content.

The plaintiffs, Susan Galloway and Linda Stephens frequently attended town board meetings and objected that the prayers violated their religious and philosophical views. They sued Greece, alleging that the town's practice violated the First Amendment's establishment clause by preferring Christians over other prayer givers. They sought an injunction that would limit the town to prayers that referred only to a "generic God" and would not associate the government with any one faith or belief.

The Supreme Court upheld Greece's prayer practice as consistent with the First Amendment. In so doing, the Court noted the long tradition of legislative prayer, which previous Supreme Court decisions have found to be a tolerable acknowledgement of widely held beliefs. The Court emphasized that in examining this issue, courts should not concern themselves with the content of the prayer so long as the prayer opportunity is not exploited to proselytize or advance any one, or to disparage any other, faith or belief. The Court noted that Greece town officials made reasonable efforts to identify all the congregations within its borders and welcomed any minister or layman who wished to give a prayer. The fact that most of the congregations in town—and thus most of the ministers who prayed—were Christian does not change the analysis. So long as the town maintains a policy of nondiscrimination, the Constitution does not require it to search beyond its borders for non-Christian prayer givers in an effort to achieve religious balancing. Also important to the Court's decision was the fact that town board members did not direct the public to participate in the prayers, single out dissidents, or indicate that their decisions might be influenced by a person's acquiescence in the prayer opportunity. As the Court noted, adults often encounter speech they find to be disagreeable but an Establishment Clause violation is not made out any time a person is affronted by the expression of contrary religious views in a legislative forum, especially where, as in Greece, any member of the public is welcome to offer an invocation reflecting his or her own convictions. Accordingly, the Court held that Greece did not violate the First Amendment by opening its meetings with prayer that comports with legislative tradition and does not coerce participation.

Qualified immunity for high-speed pursuit and shooting

***Plumhoff v. Rickard*, 134 S.Ct. 2012 (May 27, 2014)**

Just before midnight, police lieutenant Forthman stopped a car, driven by Donald Rickard, because it had only one operating headlight. Rickard appeared nervous and would not produce his driver's

license upon request. Forthman asked Rickard to step out of the car. Rickard sped away. Forthman gave chase and was joined by five other police cruisers, including cars driven by Sergeant Plumhoff and Officer Evans. During the pursuit down I-40, the vehicles swerved through traffic, passed more than a dozen vehicles, and attained speeds over 100 m.p.h.

Eventually Rickard exited I-40 and made a quick right turn which caused him to contact Evan's cruiser and spin out. Rickard then collided with Plumhoff's cruiser. Rickard put his car in reverse, presumably to escape. Plumhoff and Evans approached Rickard's car on foot. Evans, gun in hand, pounded on the passenger-side window. At that point Rickard's car made contact with another cruiser. Rickard's tires were spinning and his car was rocking back and forth, indicating that he was using the accelerator even though his bumper was flush against a police cruiser. Plumhoff fired three shots into the car. Rickard reversed and maneuvered away and onto another street, forcing an officer to step out of his way to avoid being hit. Two other officers fired 12 shots toward Rickard's car. Rickard lost control and crashed into a building. Both he and his passenger died from a combination of gunshot wounds and injuries from the crash. Rickard's surviving daughter sued the officers for excessive force in violation of the Fourth Amendment. The officers moved for summary judgment based on qualified immunity. The District Court denied summary judgment and the Court of Appeals upheld that decision.

The Supreme Court held that the officers' use of force did not violate the Fourth Amendment. Citing to *Scott v. Harris*, 550 U.S. 372 (2007), the Court noted that it has already held that a police officer's attempt to terminate a dangerous high-speed car chase that threatens the lives of innocent bystanders does not violate the Fourth Amendment, even when it places the fleeing motorist at risk of serious injury or death. Here, Rickard's outrageously reckless driving posed a grave public safety risk. And under the circumstance of the moment, the only conclusion a reasonable police officer could have reached was that Rickard intended to resume his flight and that, if allowed to do so, he would again pose a deadly threat for others on the road. Thus, police acted reasonably in using deadly force to end the risk. Moreover, the officers were reasonable in firing a total of 15 shots. Rickard never abandoned his attempts to flee, even as shots were being fired. If officers are justified in firing at a suspect to end a severe threat to public safety, they need not stop shooting until the threat is over.

Ninth Circuit Court of Appeals

§ 1983 liability for inducing a private party to violate constitutional rights

***George v. Edholm*, --F.3d--, 2014 WL 2198581 (May 28, 2014)**

Officers Freeman and Johnson arrested Plaintiff George for a parole violation and took him to the city jail. Once at the jail, Freeman and Johnson took George to the "strip tank" for a strip search. George removed his clothes but when he was asked to turn around, he started shaking and went to the ground like he was having a seizure. When George was on the ground, Freeman saw George reach under his body with his right hand and push a baggie into his anus with his finger. Freeman and Johnson believed the baggie contained cocaine. Freeman believed George was faking a seizure so he could conceal the drugs. Paramedics were called and they took George to the hospital.

Freeman and Johnson told intake personnel at the hospital that George had swallowed cocaine, put cocaine into his rectum, and possibly had a seizure. The officers then told the treating doctor, Edholm, that there was a medical emergency because George may have swallowed drugs and inserted a baggie of drugs in his anus. Based on the officers' statements, Dr. Edholm believed that there was a possibility of cocaine toxicity and that George's life was in danger, so he engaged in

"aggressive management." Dr. Edholm was able to feel a plastic type of material in George's rectum but George's resistance prevented him from removing it by hand. So Dr. Edholm inserted a metal anoscope into George's rectum and removed the bag with long forceps. He then inserted a tube through George's nose and into his stomach. Through the tube, George was given one gallon of a liquid laxative that "flushes and washes everything out of your intestines." George did not consent to any of the medical procedures.

George sued, claiming that Freeman and Johnson's conduct violated his Fourth Amendment rights. The district court granted summary judgment to the officers on the ground that Dr. Edholm acted as a private citizen whose conduct could not be imputed to Freeman and Johnson.

The Ninth Circuit disagreed and reversed. It is well-established that liability under § 1983 can only arise against state actors. But private action may be attributed to the state where there is a close nexus between the state and the challenged action, so that seemingly private action may be fairly treated as state action. Such a nexus may exist, for example, where private action results from the state's exercise of coercive power, or when the state provides significant encouragement to the private actor.

Police officers cannot avoid Fourth Amendment liability by inducing a private actor to do an unlawful search. The Ninth Circuit found that a reasonable jury could conclude that Freeman and Johnson gave false information about George's medical condition to hospital staff and Dr. Edholm with the intent of inducing Edholm to perform an invasive search, and could be liable for Edholm's cavity search.

The Ninth Circuit also found that a jury could find for George on his Fourth Amendment claim. In evaluating a nonconsensual physical body search, courts examine three factors: (1) the extent to which the procedure may threaten the individual's safety or health; (2) the extent of intrusion on the individual's interests in privacy and bodily integrity; and (3) the community's interest in fairly and accurately determining guilt and innocence. *See Winston v. Lee*, 470 U.S. 753 (1985). Weighing these factors, a jury could find that Dr. Edholm's nonconsensual search of George's body violated the Fourth Amendment. First, although the procedures presented only a slight danger to George's health and safety, the anoscopy caused him significant pain and bleeding that persisted after he left the hospital. Second, the procedures were highly intrusive and humiliating. The search invaded George's anus, nostrils, throat, stomach, and intestines, and targeted an area of the body that is highly personal and private. This type of intrusion was not justified under the circumstances. A reasonable jury could conclude that the only actual risk to George's health was the possibility that the baggie of cocaine could rupture. But that sort of speculative, generalized risk cannot, by itself, justify nonconsensual procedures as invasive as those Dr. Edholm performed. Finally, although the community has a strong interest in prosecuting those who sell cocaine, a jury could reasonably conclude that the baggie of cocaine could have been removed through far less intrusive means.

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