



## PRE-TRIAL DETAINEES, EXCESSIVE FORCE AND THE FOURTEENTH AMENDMENT

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©2010 Brian S. Batterton, Attorney, Legal & Liability  
Risk Management Institute, *Nasseri v. City of Athens,  
Alabama et al.* (11<sup>th</sup> Circuit, Decided April 8, 2010 Unpub).

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When a pre-trial detainee alleges excessive force against jail personnel, the standard for the use of force is governed under the *Fourteenth Amendment*. This varies significantly from a *Fourth Amendment* excessive force claim and is much more difficult for a plaintiff to prove.

The Eleventh Circuit Court of Appeals recently decided *Nasseri v. City of Athens, Alabama et al.*<sup>1</sup>, which illustrates the *Fourteenth Amendment* standard. The facts of *Nasseri*, viewed in a light most favorable to the plaintiff as is required at a motion for summary judgment, are as follows:

Nasseri was handcuffed, with his hands behind his back, and seated in a chair in the booking room at the jail. Three officers and approximately 11-12 inmates were present at the jail. Defendant Millward went to discuss charges with Shelnut, an arrestee in a room adjacent to the booking room where Nasseri was sitting in handcuffs. Shelnut attacked Millward. Non-defendant officer Wesley Jarrett, who was at the time in the booking room with Plaintiff Nasseri, moved to assist Millward in the other room. As Jarrett went to assist Millward, arrestee Solomon, who also was in the booking room with Plaintiff Nasseri, attacked Officer Jarrett from behind. [Officer] Little was in the adjacent dispatch room during these two altercations, and he heard the fight in the booking room between Officer Jarrett and arrestee Solomon. Little came to the booking room, found Jarrett and Solomon struggling with each other on the floor, and sprayed Solomon with a burst of pepper spray. Nasseri, then only a few feet away from [Officer] Jarrett and Solomon, told [Officer] Little to "stop that mess." According to Nasseri,

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[Officer] Little took a few steps toward Nasserri and sprayed him in the face from a close distance with pepper spray, telling Nasserri to "shut up." [Note: Officer Little denies being aware of Nasserri and denies spraying Nasserri with pepper spray.]...

After Defendant Little sprayed Nasserri and Solomon, ambient pepper spray contaminated the rest of the jail. Defendant Millward and Officer Jarrett evacuated all detainees and prisoners, including Nasserri, from the jail in order to wait for the air to clear. Defendant Millward placed Nasserri in the back of a patrol car while all of the other approximately 11-12 inmates were placed outside standing against the wall of the jail. Once outside, the officers permitted the other detainees to decontaminate themselves from the pepper spray, including allowing them fresh air and access to running water (a hose outside) to use on their faces. The record does not reflect that the other detainees, who, except for Solomon and Shelnutt, were unsecured, caused any commotion outside the jail or threatened the officers.

After [Officer] Millward placed the choking and gasping Nasserri in the patrol car, Nasserri tried to stick his head through an eight to ten inch opening in a rear window of the car and yelled for medical help. Millward heard Nasserri yelling and returned to the car twice; at one point, Millward closed the window that separates the front and rear portions of the patrol car. Nasserri called for help throughout the time that he was in the vehicle, stating that he could not breathe. Although Millward claims he did not know Nasserri had been subjected to pepper spray, Nasserri states Millward did know. Nasserri remained in the car for around an hour and was never permitted to decontaminate. When Nasserri was later removed from the car, he repeatedly complained to Millward of breathing problems and requested medical care during the booking process, but Millward did not provide it. Nasserri claims he has since developed Reactive Airway Dysfunction Syndrome (RADS), more likely than not from his prolonged exposure to pepper spray.<sup>ii</sup>

The district court granted the jail personnel qualified immunity. Nasserri appealed to the Eleventh Circuit Court of Appeals.

The court first noted that plaintiff Nasserri filed suit under the *Fourteenth Amendment* and stipulated that he was a pre-trial detainee. As such, his status as a pre-trial detainee was not at issue.

## **The Excessive Force Claim**

The court then identified the legal standard that applied in the case. Particularly, the court stated

**An excessive force claim under the *Fourteenth Amendment* requires application of the same standard as under the *Eighth Amendment*. The test is whether the use of force shocks the conscience and it necessarily will if the force was applied**

. . . **maliciously and sadistically for the very purpose of causing harm.**<sup>iii</sup> [internal citation omitted]

The Eleventh Circuit then observed that the United States Supreme Court, in *Whitley v. Albers*<sup>iv</sup>, identified a five factor test that must be satisfied under the “shocks the conscience” test. The five factors a court must consider are (1) the need for force, (2) the relationship between the need and the amount of force used, (3) the extent of the resulting injury, (4) the extent of the threat to the safety of the staff and inmates viewed from the perspective of a reasonable jail official on the scene, and (5) any efforts made to temper the severity of the forceful response.<sup>v</sup>

In applying the above factors to the facts of *Nasseri*, the court first noted that the initial use of pepper spray on Nasseri was not sufficient to show that the defendant jail official acted maliciously and sadistically. Thus, the court held, with respect to defendant Little, that qualified immunity was appropriate. This was because Officer Little was permitted to use some force to control the situation and prevent it from escalating. Even if, in hindsight, the use of the pepper spray was not necessary, the use of the pepper spray does not “shock the conscience.”

However, Nasseri’s allegations do not end with him being sprayed. He further alleged that he was then placed in the back of a patrol car and not allowed fresh air or water to decontaminate, as were the other inmates. He further alleges that he yelled for help to the jail officers and they were aware that he had been sprayed. He also alleged that his lack of decontamination and treatment caused him to develop RADS.

The court then held

Under Nasseri's version of events, Officer Millward's continued confinement of him in an unventilated patrol car without decontamination constituted excessive force. Under this version, after being sprayed, Nasseri was cooperating, was not posing a threat to himself, the officers, or other detainees, and repeatedly cried out for medical help. Although Little's initial use of pepper spray does not "shock the conscience," there was no need to then confine Nasseri in a poorly-ventilated car for an hour without decontamination. It is excessive force for a jailer to continue using force against a prisoner who already has been subdued.<sup>vi</sup>

At this point the court also noted that a plaintiff is not required to show that the law was clearly established in an *Fourteenth Amendment* excessive force claim, as they are in a *Fourth Amendment* excessive force claim. This is because, in order to find a *Fourteenth Amendment* excessive force violation, the conduct required is so extreme that no reasonable person could believe the conduct to be lawful.

## **The Deliberate Indifference Claim**

A suit for a “deliberate indifference to medical needs” claim is filed under the *Eighth Amendment* for convicts and the *Fourteenth Amendment* for pre-trial detainees. However, the legal requirements are the same. As the court stated

**To prove deliberate indifference, a plaintiff must show: (1) a serious medical need; (2) the defendant's deliberate indifference to that need; and (3) causation between that indifference and the plaintiff's injury.**<sup>vii</sup>

The court then looked at the first factor, the serious medical need. There are two ways to show there was a serious medical need. The first way is to show that a delay in treating the condition worsened the condition. The second way is to show that a physician has mandated treatment or the medical condition is so obvious that even a lay person would recognize the need for a doctor's care.<sup>viii</sup>

The court found that Nasserri met both criteria for a serious medical condition. First, assuming Nasserri's version of events, his delay in treatment worsened his condition. Second, Nasserri claims that while he was in the back of a patrol car, he was coughing, having breathing trouble, and spitting blood. Thus, the second criterion was also met. Therefore, Nasserri properly showed that he had a serious medical condition.

The second thing Nasserri had to show was that the officers were deliberately indifferent to his serious medical condition. To meet this factor, Nasserri must prove “(1) subjective knowledge of a risk of serious harm, (2) disregard of that risk, (3) by conduct that is more than *gross negligence*.”<sup>ix</sup> The court did note that regarding the third requirement, there is an intra-circuit split with some cases only requiring “more than *mere negligence*.”<sup>x</sup>

Regarding the first prong of this test, the court noted that Nasserri was in a patrol car choking, gagging and spitting blood (according to Nasserri's version of the facts). Other prisoners were allowed to decontaminate. Thus, the officers must have known that Nasserri was exposed to pepper spray and, as such, should have allowed him to decontaminate like the others.

The second prong was met by officers not allowing Nasserri to decontaminate and not getting Nasserri medical attention.

Considering the third prong, the court noted

**When prison guards ignore without explanation a prisoner's serious medical condition that is known or obvious to them, the trier of fact may infer deliberate indifference.**<sup>xi</sup>

The officer's explanation for not decontaminating Nasserri was that he did not believe Nasserri was sprayed directly. He also said that he did not know that Nasserri was yelling because of contact with pepper spray. The court found that this was not reasonable in light of the totality of the circumstances, and the other prisoners that had been contaminated.

The last element of a deliberate indifference claim is that the deliberate indifference must be the cause of the plaintiff's injury. This is referred to as "causation." Here, the lack of decontamination and medical treatment caused Nasserri to develop RADS. Thus, causation is present.

In conclusion, the court found that the defendants were not entitled to qualified immunity (with the exception of Officer Little) for the excessive force claim and the deliberate indifference claim. Thus, the judgment of the district court was reversed.

**Note: Court holdings can vary significantly between jurisdictions. As such, it is advisable to seek the advice of your agencies legal advisor regarding questions on specific cases. This answer is not intended to constitute legal advice on a specific case.**

## **CITATIONS:**

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<sup>i</sup> No. 09-11473, 2010 U.S. App. LEXIS 7297 (11<sup>th</sup> Cir. Decided April 8, 2010 Unpub)

<sup>ii</sup> Id. at 4-8

<sup>iii</sup> Id. at 2

<sup>iv</sup> 475 U.S. 312 (1986)

<sup>v</sup> Nasserri, No. 09-11473 at 3

<sup>vi</sup> Id. at 8-9

<sup>vii</sup> Id. at 10 (citing Goebert v. Lee County, 510 F.3d 1312, 1326 (11<sup>th</sup> Cir. 2007))

<sup>viii</sup> Id.

<sup>ix</sup> Id. at 11 (quoting Goebert, 510 F.3d at 1312)

<sup>x</sup> Id. at fn 6

<sup>xi</sup> Id. at 12