

Grant v6

Absent more evidence of supervisory indifference, such as acquiescence in a prior pattern of conduct, official policy such as to impose liability on the City of Oklahoma City under the Civil Rights Act cannot ordinarily be inferred from a single incident of illegality such as a first excessive use of force to stop a suspect; but a single, unusually excessive use of force may be sufficiently out of the ordinary to warrant an inference that it was attributable to inadequate training or supervision amounting to 'deliberate indifference' or 'gross negligence' on the part of the officials in charge.

On appeal, petr challenges this instruction as erroneous and contends that a single isolated incident of use of excessive force by a police officer is insufficient to establish municipal liability under 42 U.S.C. §1983. Resp, on the other hand, argues that (1) the instruction is correct and (2) even if the instruction is incorrect, petr did not lodge a proper objection

February 15, 1985 Conference
List 9, Sheet 4

No. 83-1919

CITY OF OKLAHOMA CITY

v.

TUTTLE, etc.

Motion of Respondent for
Leave to File Supplemental
Brief After
Argument

SUMMARY: Resp seeks leave to file a post-argument supplemental brief and affidavit of trial counsel on the issue of whether petr properly lodged an objection to the jury instruction which is the subject of this appeal.

FACTS: Resp's husband was shot and killed by a police officer. Resp filed suit against the officer and petr in federal DC under 42 U.S.C. §1983. At trial, resp maintained that the police officer was inadequately trained and that this lack of training caused the death of resp's husband. The jury was instructed that:

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Absent more evidence of supervisory indifference, such an acquiescence in a prior matter of conduct, official policy such as to impose liability on the City of Oklahoma City under the Civil Rights Act cannot ordinarily be inferred from a single incident of illegality such as a first excessive use of force to stop a suspect; but a single, unusually excessive use of force may be sufficiently out of the ordinary to warrant an inference that it was attributable to inadequate training or supervision amounting to 'deliberate indifference' or 'gross negligence' on the part of the officials in charge.

On appeal, petr challenges this instruction as erroneous and contends that a single isolated incident of use of excessive force by a police officer is insufficient to establish municipal liability under 42 U.S.C. §1983. Resp, on the other hand, argues that (1) the instruction is correct and (2) even if the instruction is incorrect, petr did not lodge a proper objection to the instruction at trial.

During oral argument, the Court asked petr whether a legally sufficient objection to the instruction had been made below. In response to the Court's question, petr's attorney asserted that a legally sufficient objection had been made off-the-record at a jury instruction conference in the trial judge's chambers. The attorney argued that this off-the-record was sufficiently specific to preserve petr's challenge. This is apparently the first time petr has alleged the existence of an off-the-record objection.

The Court also questioned petr at oral argument about the continued viability of municipal liability based on inadequate training and supervision in light of Rizzo v. Goode, 423 U.S. 362 (1976).

CONTENTIONS: By this motion, resp seeks leave to file a supplemental brief and affidavit stating that petr did not make an off-the-record objection to the "single occurrence" instruction and expressly agreed to an instruction confirming municipal liability based on failure to provide adequate training or supervision. Resp maintains that petr's failure to properly object to these jury instructions precludes it from challenging the jury's decision on appeal.

DISCUSSION: Supreme Court Rule 35.6 provides that: "No brief will be received through the Clerk or otherwise after a case has been argued or submitted, except from a party and upon leave of the Court."

Resp's supplemental brief disputes the accuracy of a factual representation made by petr at oral argument. The authority of the Court to hear and decide petr's constitutional challenge to the "single occurrence" instruction, as well as the issue of municipal liability based on inadequate police training, may depend on the adequacy of the objections lodged by petr in the trial court. Resp's brief may be useful to the Court in deciding these preliminary questions. I therefore recommend that the motion be granted.

There is no response.

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particular objection to the Court's instructions was voiced to the trial court in an off the record discussion during the trial of this case and that before the trial court was well aware of the City of Oklahoma City's objection to the instruction presently at issue.

Grant
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5. That counsel have searched their recollection for

STATE OF OKLAHOMA)
) ss
COUNTY OF OKLAHOMA)

AFFIDAVIT OF MICHAEL GASSAWAY
AND CARL HUGHES

Come now Michael Gassaway and Carl Hughes, of lawful age, upon oath and depose and state as follows:

1. That they were counsel of record for Plaintiff in the trial of this case in the United States District Court for the Western District of Oklahoma.

2. That they were present throughout the course of the trial of this case including in camera proceedings relating to the jury instructions which were ultimately given to the trial jury in this case.

3. That affiants were also both present at the oral argument before the Supreme Court of the United States on January 8, 1985.

4. That at the oral argument before the Supreme Court of the United States the appellate counsel for the City of Oklahoma City, Burck Bailey, represented to the Court that a particular objection to the Court's instructions was voiced to the trial court in an off the record discussion during the trial of this case and that therefore the trial court was well aware of the City of Oklahoma City's objection to the instruction presently at issue.

5. That counsel have searched their recollection for

the specifics of the instruction conferences held in this case. Counsel would represent that to the best of their recollection the following occurred:

a) That the trial court advised all counsel that its proposed instructions were prepared and that counsel were invited to discuss these proposed instructions with his law clerk.

b) That counsel for Plaintiff, Michael Gassaway and counsel for the City of Oklahoma City, Richard Mahoney, did meet with Judge West's law clerk for the purpose of resolving objections to instructions. That counsel, Carl Hughes, was present most of the time during these conferences. Affiants cannot recall Dan Brummet, a counsel for the City of Oklahoma City, being present at the instruction conference although he may have been.

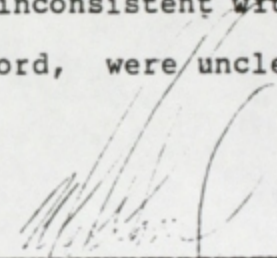
c) That the parties did meet with Judge West's law clerk and whatever objections the City of Oklahoma City had to the instructions were worked out at the conference among the above named counsel.

d) That it was always understood among counsel for both parties that in the event any objections remained that they should be clearly and expressly voiced on the record at the appropriate time after the instructions had been given but prior to the time the case was submitted to the jury. That this is the standard practice in the Western District of Oklahoma and was adhered to in this case.

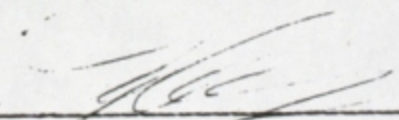
e) That the City of Oklahoma City, through Richard Mahoney did agree to all of the Court's instructions in the case. Initially the City of Oklahoma City did object to Plaintiff's requested instructions, however, to the extent that those instructions were modified and given, the City of Oklahoma City's objections were abandoned or withdrawn.

f) That a second but shorter instruction conference was held with Judge West. At that time the City did not avail itself of the opportunity to object to any instruction but in fact agreed to the instructions that the Court proposed to give to the jury.

6. That the instructions, as agreed to by the City of Oklahoma City were given to the jury in this case as illustrated by the transcript of the proceedings. That the statements of Dan Brummet, which are contained in the record (and quoted at footnote 62, p. 45 of Respondent's brief) and the City now claims to be an objection to the instructions simply did not and does not rise to that dignity. The statements of Brummet were inconsistent with the position of Mahoney stated off the record, were unclear and served no benefit to the Court.

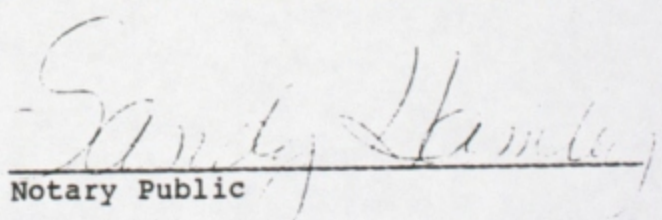


MICHAEL GASSAWAY



CARL HUGHES

Subscribed and sworn to before me this 15 day of
January, 1985.



Notary Public

My Commission Expires:

12/17/85