

CONFLICT OF LAW/FLORIDA LAW APPLIED TO SOUTH CAROLINA AUTOMOBILE ACCIDENT

In Ward v. Morlock, 42 Fla. L. Weekly D1038 (5th DCA, May 7, 2017), the Fifth District Court of Appeal reversed an Order of the trial court granting summary judgment in favor of the defendant based on South Carolina law.



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Keith Morlock, a Florida resident, was vacationing in South Carolina with family members.

Mr. Morlock allowed his brother-in-law, Paul Behrens, a Pennsylvania resident, to borrow his vehicle to drive to the airport. In route, Mr. Behrens rear-ended a vehicle operated by Leah Ward, a Florida resident.

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THE USE OF FORCE AGAINST A PASSIVELY RESISTING PERSON

In Hanks v. Rogers, 853 F.3d 738 (5th Cir. 2017), the Fifth Circuit Court of Appeals addressed the use of force against a "passively" resisting person. Hanks' encounter with law enforcement occurred after he was pulled over while driving 20 miles per hour along Interstate 30 in Grand Prairie, Texas. Hanks accidentally left his cellular phone on top of his car at the outset of his trip, and, upon realizing his mistake, aimed to find where the phone slid off along the roadway.

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Officer Rogers stopped his patrol car a short distance behind Hanks's vehicle and walked to Hanks's passenger-side front window. Officer Rogers advised Hanks that he had stopped him because Hanks was driving 20 miles per hour below the speed limit. Hanks told Officer Rogers that he was searching for his phone. After a brief exchange regarding the phone, Officer Rogers asked Hanks to produce his driver's license and insurance. Hanks immediately presented his driver's license but was unable to locate an insurance card for the vehicle. After waiting silently at the window for almost one minute, Officer Rogers stated that he would "be right back." Only a second or two later, Officer Rogers instructed Hanks to "step out of the vehicle and come to the back." Officer Rogers claimed Hanks cursed and/or acted aggressively, while Hanks denied the same.

Hanks did not immediately exit his vehicle but, instead, questioned the basis for Officer Rogers's instruction. Officer Rogers repeated his instruction six times during the approximately 45-second exchange and calmly told Hanks to "put his stuff up." Hanks exited the vehicle after Officer Rogers adopted a more assertive tone and added "do it now" to his instruction. As Hanks exited the vehicle, Officer Rogers turned his back to Hanks's car for about three seconds and walked towards his patrol car.

Officer Rogers next instructed Hanks to stand there and Hanks silently complied with that instruction. While walking to the spot Officer Rogers indicated, Hanks pulled his shirt sleeves up to his elbows. Hanks also placed his right hand into his pants pocket for about three seconds. Officer Rogers instructed Hanks to take his hands out of his pockets, but by that time Hanks only had his thumbs tucked inside his pockets. In response to the instruction, Hanks said, "What?" Officer Rogers repeated his instruction and Hanks lifted his hands to his waist, palms towards Officer Rogers, while saying "my hands aren't in my pockets." Officer Rogers then instructed Hanks to place his hands on the rear of Hanks's vehicle. In response, Hanks moved towards the rear of his vehicle while saying, "For what? I ... did nothing." Hanks initially leaned back against the rear of his vehicle, but after about one or two seconds, and in response to Officer Rogers repeating his commands while drawing his taser, Hanks turned his back to Officer Rogers and placed his hands on the trunk of his car.

Within two or three seconds, Officer Rogers next instructed Hanks to put his hands behind his head. Hanks immediately raised his left hand to the back of his head, and placed his right hand behind his head moments later, simultaneously with Officer Rogers's repetition of the command. As soon as Hanks's hands reached the back of his head, Officer Rogers instructed Hanks to go to his knees. In response, Hanks looked over his right shoulder and asked, "For what?" Hanks simultaneously moved his hands to his rear, so that they were folded behind his back with his empty palms facing Officer Rogers. Officer Rogers repeated his command twice more over the next five seconds, and, with his hands still plainly visible behind his back, Hanks looked over his left shoulder to ask whether he was under arrest. Officer Rogers responded by repeating his command and Hanks said something inaudible on the recording

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before again asking whether he was under arrest. Officer Rogers only responded by repeating his command.

About five seconds after Hanks asked whether he was under arrest for the second time, and immediately after Officer Rogers repeated his command for Hanks to “go to [his] knees,” Hanks made a small lateral step with his left foot. When Hanks took this small step, his empty hands remained surrendered behind his back. He continued to face away from Officer Rogers, so his hands stayed in Officer Rogers’s view. Officer Rogers still had his taser trained on Hanks.

Almost simultaneously with Hanks’s small step, Officer Rogers rushed towards Hanks and administered a blow to Hanks’s upper back or neck (the parties refer to this as a “half spear”). The blow forced Hanks’s upper body onto the trunk of his vehicle. Officer Rogers maintained contact with Hanks as Hanks shifted onto the ground. Once on the ground, Hanks laid face-down and placed his hands behind his back. Hanks offered no resistance while Officer Rogers handcuffed him.

Hanks was later transported to the hospital where he received treatment for “Assault; Contusion; Strain; [and] Acute Myofascial Strain” and received prescriptions for pain medications. Hanks asserts that the blow administered by Officer Rogers has caused him “continuous pain in [his] upper back, neck, head, and ribs,” as well as psychological fear.

The Fifth Circuit determined that Hanks had established a violation of his Fourth Amendment right to be free from excessive force during a seizure because the constitutional right at issue was clearly established at the time of the incident. Further, Officer Rogers’ conduct was objectively unreasonable in light of then-existing clearly established law. The Court held that Hanks had met his burden of rebutting Officer Rogers’s qualified immunity defense.

In conducting the analysis as to whether a constitutional violation had occurred, the Court noted, “[W]e no longer require ‘significant injury’ for excessive force claims,’ *Tarver v. City of Edna*, 410 F.3d 745, 752 (5th Cir. 2005) (citing *Harper v. Harris County, Tex.*, 21 F.3d 597, 600 (5th Cir. 1994)), but ‘the injury must be more than *de minimis*,’ *id.* (citing *Williams v. Bramer*, 180 F.3d 699, 703 (5th Cir.1999)).” *Hanks*, 853 F.3d at 744-45. Officer Rogers contended that Hanks’s injuries “are *de minimis*, and are thus insufficient to support a claim for excessive force.” *Id.* at 745. However, the Court disagreed on the basis that Hanks had received medical treatment, received a diagnosis noting contusions, acute strains, and bruised ribs, received two prescriptions for pain medication and a form releasing him from work for two days and according to Hanks, he still experiences pain in his upper back, neck, head, and ribs as a result of the encounter. Thus, this stated more than a *de minimis* injury.

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The Court also concluded that under the circumstances documented in the recording in this case, a reasonable officer on the scene would have known that suddenly resorting to physical force as Officer Rogers did would be clearly excessive and clearly unreasonable.

First, the “minor traffic violation[s] ... ma[de] the need for force substantially lower than if [Hanks] had been suspected of a serious crime.” *Id.* (quoting *Deville*, 567 F.3d at 167). Second, there was little basis from which Officer Rogers could have reasonably viewed Hanks as “an immediate threat to the safety of [Officer Rogers] or others,” at the moment Officer Rogers applied the “half spear.” *Id.* At 746. The Court found that Hanks’s resistance “was, at most, passive,” and consisted chiefly of remaining on his feet for about twenty seconds after Officer Rogers’ first order to kneel, during which time Hanks twice asked whether he was under arrest. *Id.* Thus, the Court was unable to conclude that a reasonable officer would have, under these circumstances, perceived an “immediate threat” warranting a physical takedown. Third, in the moment before Officer Rogers administered the “half spear,” the recording shows that Hanks took a small lateral step with his left foot which was not accompanied by any obvious signs of violence or flight. Thus, under the circumstances reflected in the recording, the Court was again unable to conclude that a reasonable officer would have perceived active resistance or an attempt to flee. In considering the *Graham* factors, as it applies to the facts at hand, the Court determined that Officer Rogers applied clearly excessive and unreasonable force when he employed the “half spear” takedown against Hanks.

Turning to the next step of the analysis, the Court concluded that on the night Officer Rogers stopped Hanks, clearly established law demonstrated that an officer violates the Fourth Amendment if he abruptly resorts to overwhelming physical force rather than continuing verbal negotiations with an individual who poses no immediate threat or flight risk, who engages in, at most, passive resistance, and whom the officer stopped for a minor traffic violation. *See Deville*, 567 F.3d at 167–69 (finding qualified immunity inappropriate where, taking the facts in the light most favorable to the plaintiff, an officer making a minor traffic stop overpowered an individual who displayed, at most, passive resistance, and presented no safety threat or flight risk); *see also Doss v. Helpenstell*, 626 F.App’x. 453, 459–60 (5th Cir. 2015) (construing *Deville* as clearly establishing that an officer should receive no qualified immunity if he “quickly escalate[s]” an encounter with a non-threatening, passively-resisting driver who posed little risk of escape by employing overwhelming force “rather than continu[ing] to negotiate”); *Brothers v. Zoss*, 837 F.3d 513, 520 (5th Cir. 2016) (“In denying qualified immunity, we have placed weight on the quickness with which law enforcement personnel have escalated from negotiation to force.”) (citing *Newman v. Guedry*, 703 F.3d 757, 763 (5th Cir. 2012) and *Deville*, 567 F.3d at 167–68). This is, moreover, an “obvious case” in which the *Graham* standards independently and clearly establish the basis for our decision.

Summary judgment entered in favor of Officer Rogers was reversed and the case was remanded to the district court for further proceedings consistent with the opinion.

By: Cindy Townsend

APPROPRIATE AUXILIARY AIDS FOR THE HEARING IMPAIRED UNDER THE ADA

Silva v. Baptist Health South Florida, Inc., 26 Fla. L. Weekly F. C1509
(11th Cir. May 8, 2017)

This was an appeal by two deaf Plaintiffs of a summary judgment granted against them on their Americans with Disability Act claim against Baptist Health South Florida. In their complaint, they claimed that they were discriminated against due to the failure of the hospital to provide appropriate auxiliary aids for hearing impaired patients. Though this is a Title III case under the ADA, which is a statute that deals primarily with disability claims related to hospitals and places of public accommodation, these decisions may be relevant to Title II ADA cases, which are cases dealing with the provision of public services by public entities. The remedies and prohibitions of both statutes are similar and courts sometimes use decisions under one as guidance for the other.

The District Court granted summary judgment for the hospital, concluding that there was no evidence that the alleged failure of the hospital to provide appropriate aids resulted in deficient medical treatment to the Plaintiffs. The Eleventh Circuit reversed, holding that the correct legal analysis was whether the hospital failed to provide the hearing-impaired patients with auxiliary aids appropriate to exchange medically relevant information with hospital staff. More specifically, the Eleventh Circuit held that the hospital was required to provide auxiliary aids so as to afford deaf patients a sufficient level of communication for the exchange of medically relevant information “that is substantially equal to that afforded to non-disabled patients.” The Court was clear that this did not mean that deaf patients were entitled to an on-site interpreter every time they ask for it.

In this case, the hospital typically provided an alternative communication method called video remote interpreting (VRI) a system where an internet connected machine contacts a live American Sign Language (ASL) interpreter remotely located and who communicates with the doctor and patient through a portable screen located at the hospital. However, the VRI machine at the hospital routinely suffered technical difficulties which either prevented it from being turned on or disrupted the exchange of information.

Though the Court reversed the summary judgment order, it remanded the case not for trial but for the District Court to consider the issue unaddressed in its summary judgment order, that of deliberate indifference. For a plaintiff to be entitled to monetary relief under Title III, he or she must prove that the defendant exhibited deliberate indifference. That is, the plaintiff must show that the defendant knew that harm of a federally protected right was substantially likely to occur and yet failed to act on that likelihood.

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CIVIL RIGHTS—EXCESSIVE FORCE—“PROVOCATION RULE”

In *County of Los Angeles v. Mendez*, 581 U.S. ___ (May 30, 2017), a recently issued opinion, the U.S. Supreme Court overturned the so-called “provocation rule” which had been developed as a novel and distinct theory of police liability by the notoriously liberal Ninth Circuit Court of Appeals. The provocation rule afforded citizens an additional legal theory to sue law enforcement agencies for alleged excessive force.

The rule had held that police officers who had used force not deemed excessive under the circumstances, may be found liable nonetheless if it could be demonstrated that they had provoked the citizen to respond in a way that caused the officer to reasonably fear for his safety, thus justifying his use of force. Under the rule articulated by the Ninth Circuit, the provocation by the officer was considered to be a separate Fourth Amendment violation.

The facts in *Mendez* reflect that the Los Angeles County Sheriff’s Department received word from a confidential informant that a potentially armed and dangerous parolee-at-large had been seen at a certain residence. While other officers searched the main house, two deputies searched the back of the property where, unbeknownst to the deputies, respondents Mendez and Garcia, his wife, were napping inside a shack where they lived. Without a search warrant and without announcing their presence, the deputies opened the door of the shack. Mendez rose from the bed, holding a BB gun that he used to kill pests. One deputy yelled, “Gun!” and the deputies immediately opened fire, shooting Mendez and Garcia multiple times. The parolee was not found in the shack or elsewhere on the property.

Mendez and Garcia sued the deputies and County under 42 U. S. C. §1983, asserting three separate Fourth Amendment claims, namely: a warrantless entry claim, a knock-and-announce claim, and an excessive force claim. On the first two claims, the District Court awarded Mendez and Garcia nominal damages. On the excessive force claim, the court found that the deputies’ use of force was reasonable under the precedent of *Graham v. Connor*, 490 U. S. 386, but held them liable nonetheless under the Ninth Circuit’s provocation rule, which made an officer’s otherwise reasonable use of force unreasonable if (1) the officer intentionally or recklessly provokes a violent confrontation and (2) the provocation is an independent Fourth Amendment violation. On appeal, the Ninth Circuit held that the officers were entitled to qualified immunity on the knock-and-announce claim and that the warrantless entry violated clearly established law. It also affirmed the District Court’s application of the provocation rule.

Justice Alito wrote the decision for a unanimous court rejecting the provocation rule, with Justice Gorsuch taking no part in the consideration or decision of the case. In rejecting this new theory of police liability, Justice Alito wrote that the rule “...provides a novel and

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2017 LEGISLATIVE SESSION UPDATE

The 2017 Legislative Session ended with various proposed changes and additions to the laws of the State of Florida. The following is a list of relevant bills that were either passed or signed into law, as indicated, which are of particular interest or which will have an impact on local government entities and/or certain constitutional officers.

GOVERNMENT FEES AND TAXES

Boat Registration (SIGNED INTO LAW): Expands registration-fee discounts for boat owners who have locator beacons. (HB 711) **Effective Date: 7/1/17**

Homestead Exemption (PASSED): Asks voters, in a 2018 ballot initiative, if they support increasing the homestead exemption on primary residences from \$50,000 to \$75,000. (HB 7105/SB 1774)

Tax Cut Package (SIGNED INTO LAW): A series of \$75 million in tax breaks, including a 0.2 reduction in the state's 6 percent tax on commercial real estate leases, sales-tax holidays for shoppers and the elimination of sales tax on feminine hygiene products and hurricane supplies. (HB 7109) **Effective Date: 7/1/17**

LAW ENFORCEMENT

Body Cameras (SIGNED INTO LAW): Allows law enforcement officers to review footage from their body cameras before filling out reports. (HB 305) **Effective Date: 7/1/17**

PUBLIC RECORDS

Campus Emergency Plans (SIGNED INTO LAW): Exempts from disclosure public college and university campus emergency response plans -- including materials such as photographs, presentations, sheltering arrangements, training manuals and equipment and supplies related to emergency response strategies. (HB 1079) **Effective Date: 7/1/17**

Sealed Records (PASSED): Sets up process to automatically seal criminal history records of adults and minors charged with felonies and misdemeanors if the prosecutor declines to file charges, charges were dismissed before trial, or the person was acquitted or found not guilty. (SB 118)

Attorney Fees (SIGNED INTO LAW): Allows judges to refuse attorneys' fees in public records lawsuits if the judge determines they are "frivolous" cases or intended to draw high legal fees from government entities. (SB 80) **Effective Date: 5/23/17**

Murder Witnesses (SIGNED INTO LAW): Shields from disclosure the identity of murder witnesses in public records for two years after the crime. (HB 111) **Effective Date: 7/1/17**

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Fire Fighter Exemption (SIGNED INTO LAW): Expanding an exemption from public records requirements for the personal identifying and location information of certain firefighters and their spouses and children to include the personal identifying and location information of former firefighters and their spouses and children, and the names of spouses and children of current and former firefighters. (SB 1108) **Effective Date:** 10/1/2017

Protective Injunction Petitions Exemption (SIGNED INTO LAW): Provides exemption from public records requirements for petitions and contents thereof, for certain protective injunctions that are dismissed in certain circumstances; provides statement of public necessity. (HB 239) **Effective Date:** 7/1/2017

Inmate Exemption (SIGNED INTO LAW): Provides that certain protected health information held by DOC is confidential and exempt from public records requirements; authorizes release of protected health information and other records of an inmate to certain entities, subject to specified conditions. (HB 1203) **Effective Date:** 7/1/17

Victim of Alleged Sexual Harassment Exemption (PASSED): Provides exemption from public records requirements for personal identifying information of alleged victim in allegation of sexual harassment; authorizes disclosure of such information in certain instances. (HB 397)

Substance Abuse Impaired Persons Exemption (SIGNED INTO LAW): Provides an exemption from public records requirements for petitions for involuntary assessment and stabilization, court orders, related records and personal identifying information regarding substance abuse impaired persons. (HB 886) **Effective Date:** 7/1/17

Victim of Violence Exemption (SIGNED INTO LAW): Extends repeal dates for exemptions from public record requirements for personal identifying and location information of petitioner who is requesting notification of service of injunction for protection against domestic violence, repeat violence, sexual violence and dating violence or other court actions related to injunction held by clerks and law enforcement agencies. (HB 7087) **Effective Date:** 10/1/17

Government Employee Exemption (SIGNED INTO LAW): Expands the government employee personal information exemption to include spouses and children of protected employees and adds personal telephone numbers and dates of birth for all protected employees and their spouses and children. (HB 7093) **Effective Date:** 10/1/17

Liability Limitation Clerk of Court (SIGNED INTO LAW): Stipulates that the Clerk of Court is not liable for inadvertent release of confidential information contained in a court record if the filer of the record failed to disclose the existence of such information as required by court rule. (HB 441) **Effective Date:** 7/1/17

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SCHOOLS

Religious Expression (SIGNED INTO LAW): Fortifies the right of students to express their religious beliefs in public schools, while requiring school districts to adopt policies allowing "limited public forums" for students to pray at school events. (SB 436) **Effective Date: 7/1/17**

Textbook Challenges (SIGNED INTO LAW): Makes it easier for parents and school district residents to challenge educational material used in classroom instruction or school libraries, including books, pamphlets and presentations that a parent or resident finds objectionable, offensive or inappropriate for the age of the student. (HB 989) **Effective Date: 7/1/17**

GAMBLING

Lottery Warning (SIGNED INTO LAW): Players of the state lottery would be warned about the addictive nature of state-sponsored games. Vendors and retailers would be required to print or place warnings on all lottery tickets stating "Warning: Gambling can be addictive." (HB 937/SB 1370) **Effective Date: 1/1/18**

GOVERNING

Wireless Technology (SIGNED INTO LAW): Limits local government regulation of certain types of equipment, known as "small wireless facilities", in public rights of ways that are used for new 5G wireless technology. (HB 687) **Effective Date: 7/1/17**

Ridesharing (SIGNED INTO LAW): Prohibits local governments from regulating ridesharing companies such as Uber and Lyft while setting statewide requirements for insurance and background checks for those companies. (HB 221) **Effective Date: 7/1/17**

LABOR/EMPLOYMENT

Retirement (PASSED): Changes the default retirement options for newly hired public employees, including school teachers, county workers and state employees. New workers who do not purposely join the traditional pension plan, or a 401(k)-type investment plan, will default into the investment plan. (SB 7030)

Contractors (SIGNED INTO LAW): Prohibits cities and counties from requiring contractors to provide certain benefits and wages to workers on state-funded public works projects. (SB 534/HB 599) **Effective Date: 7/1/17**

If you have any questions regarding any of these bills or the effects of same on your local government, you should contact your general counsel or feel free to contact our office directly.

By: Sherry G. Sutphen

10a

Leah Ward filed suit against Keith Morlock in Orange County, Florida. Ms. Ward did not sue Mr. Behrens. Ms. Ward moved for summary judgment arguing that as the accident occurred in South Carolina, South Carolina law applied. As South Carolina has not adopted the dangerous instrumentality doctrine, Morlock's counsel argued that he had no liability to Ward for Mr. Behrens's negligent operation of his vehicle.

The trial court agreed with Morlock's counsel and granted summary judgment, determining that Ward had no viable claim against Morlock based on South Carolina law.

On appeal, the Fifth District Court of Appeal reversed. The Court indicated that Florida had abandoned the rule of *lex loci delicti* (which applies to the law of state where the injury occurred) in favor of the significant relationships test. *Bishop v. Fla. Specialty Paint Co.*, 389 So. 2d 999 (Fla. 1980). The Fifth District determined that as the instant case involved two Florida residents, Mr. Morlock and Ms. Ward, Florida had the most significant relationship to the occurrence and the parties.

Occasionally, claims professionals are asked to handle lawsuits which involve an accident that occurred in a state other than a state where the lawsuit was filed. In these situations, the substantive law of each state should be carefully considered, so counsel can attempt to utilize the more favorable state law in defending the action.

By: Michael M. Bell

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There are three primary takeaways from this case. The first is that a deaf or otherwise handicapped individual is not necessarily entitled to the accommodation of his or her choice. The second is that the accommodation provided must be functionally equivalent to the service provided to the non-disabled. The third is that it is not a bar to the lawsuit that the handicapped individual can show no specific harm resulting from the denial of his or her right to be accommodated.

By Michael H. Bowling

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unsupported path to liability” and was incompatible with the Supreme Court’s excessive force jurisprudence and precedent. He further noted that, “The rule’s fundamental flaw is that it uses another constitutional violation to manufacture an excessive force claim where one would not otherwise exist.”

Justice Alito noted that the provocation rule may be motivated by the notion that it is important to hold police officers liable for the foreseeable consequences of their constitutional torts. “However, there is no need to distort the excessive force inquiry in order to accomplish this objective,” Alito said. “To the contrary, both parties accept the principle that plaintiffs can—subject to qualified immunity—generally recover damages that are proximately caused by any Fourth Amendment violation.”

The Supreme Court directed that, on remand, the Ninth Circuit should revisit the question whether proximate cause permitted Mendez and Garcia to recover damages for their injuries based on the deputies’ failure to secure a warrant for entry onto the premises at the outset.

By: Michael J. Roper

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