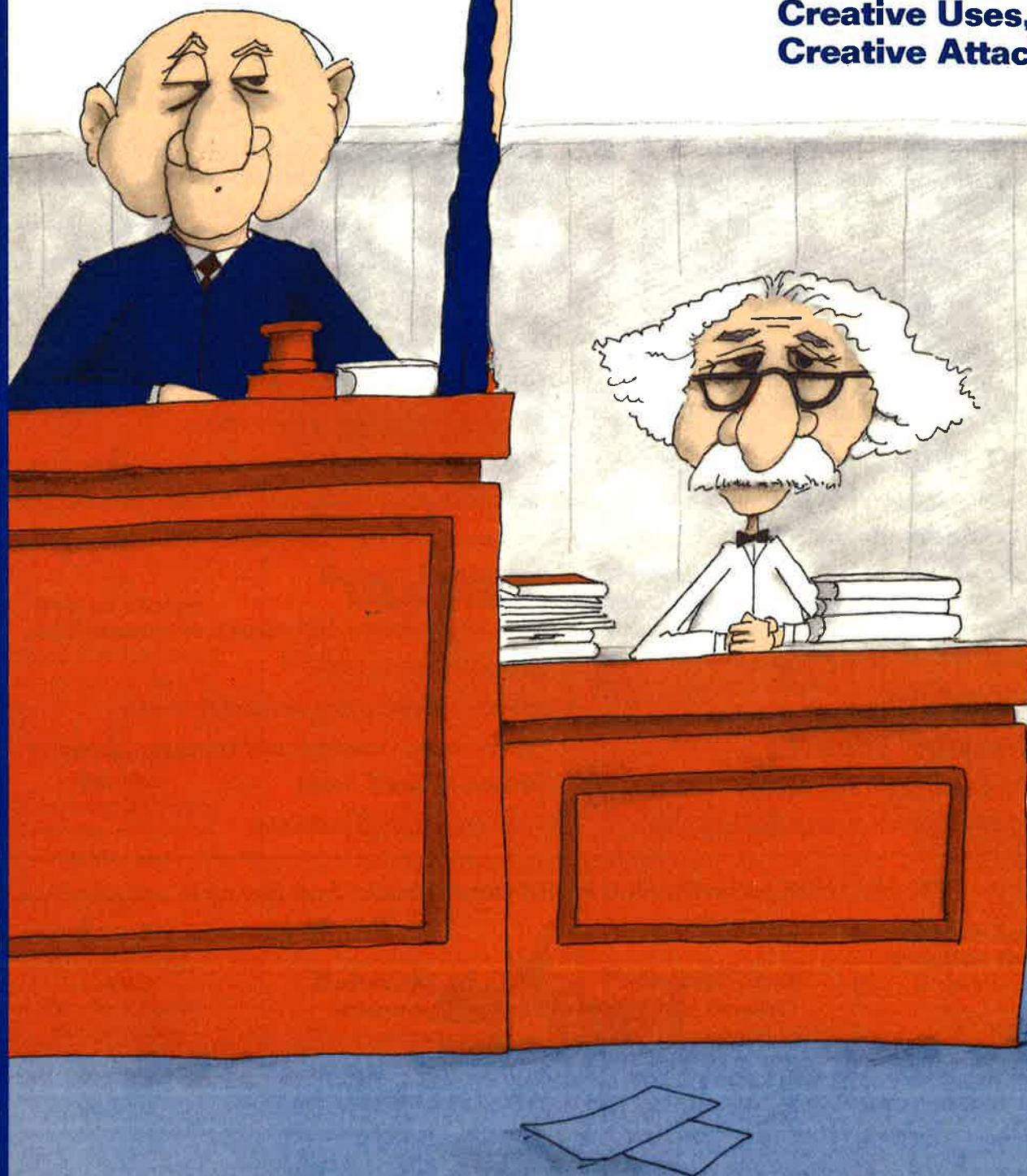


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# No Harm, No Foul: Excessive Force Claims Under Section 1983



By Howard M. Srebnick  
and Scott A. Srebnick

Not long ago, the nation watched in horror as the merciless beating of Rodney King by members of the Los Angeles Police Department (LAPD) was repeatedly shown on national television. The King beating drew considerable public attention to an issue which, but for the fortuity of a video recorder wielding citizen, would almost certainly have been ignored by the media, the public, and by city hall. While the raging public debate over the Rodney King beating appears to have subsided upon the resignation of the recalcitrant Los Angeles Police Chief, public scrutiny will likely intensify when the battle shifts to the courtroom.

Ironically, although the Rodney King beating has received much attention, his legal claim against the LAPD officers would appear to be a relatively straightforward case of police brutality—officers using unreasonably excessive force to subdue and arrest a crime suspect. Indeed, the sheer brutality of the police behavior and the unambiguous hard evidence of King's injuries and physical pain make it unlikely that the King case will break new ground in Fourth Amendment jurisprudence.

The more interesting and difficult case arises when unreasonable or excessive force used by police in effecting an arrest leaves little or no trail of physical injury or damage. In that scenario, where there appears to be only a negligible physical injury, courts have differed as to whether the Fourth Amendment should afford monetary relief to the civil rights plaintiff. Specifically, two United States Courts of Appeal are diametrically opposed on the question of whether a civil rights plaintiff must demonstrate a significant physical injury as a threshold for the recovery of money damages under a Fourth Amendment "excessive force" claim. The discussion herein addresses the question of whether a "significant injury" requirement is consistent with Fourth Amendment principles and Supreme Court precedent.

## Excessive Force

A claim that law enforcement officers used excessive force in the context of an arrest or investigative stop of a free citizen is typically brought under 42 U.S.C. Section 1983 as a violation of the Fourth Amendment's prohibition against unreasonable seizures of the person.<sup>1</sup> In *Graham v. Connor*,<sup>2</sup> the Supreme Court held that the appropriate Fourth Amendment

inquiry in "excessive force" cases is "whether the officers' actions are 'objectively reasonable' in light of the facts and circumstances confronting them, without regard to their underlying intent or motivation."<sup>3</sup>

The Court reasoned that because "police officers are often forced to make split-second judgments—in circumstances that are tense, uncertain, and rapidly evolving..." the relevant determination is whether the force that was used exceeded the force necessary to effectuate the arrest *from the perspective of an objectively reasonable officer at the scene*.<sup>4</sup> In other words, "not every push or shove, even if it may later seem unnecessary in the peace of a judge's chambers" violates the Fourth Amendment.<sup>5</sup> Facts and circumstances of importance in assessing whether a particular use of force was objectively reasonable include the severity of the crime for which the suspect is being arrested, the degree of immediate threat that the suspect poses to the safety of the officers or others, and the degree to which the suspect is actively resisting arrest or attempting to evade arrest by flight.<sup>6</sup>

## Significant Injury

The Court in *Graham* did not set forth the type or level of injury required for a Section 1983 action to lie. In particular, the *Graham* Court was silent as to whether the Fourth Amendment provides civil rights defendants with "safe harbor" protection from liability for so-called "*de minimis*" injuries—e.g., minor cuts and bruises or transient emotional distress. Indeed, the Supreme Court has never suggested that an arrestee's injuries must satisfy a minimum threshold for purposes of a Fourth Amendment violation under Section 1983.

Nevertheless, in *Johnson v. Morel*,<sup>7</sup> decided after *Graham*, an *en banc* panel of the Fifth Circuit held that a plaintiff can prevail on a Fourth Amendment excessive force claim only by proving that he suffered a "significant injury" which resulted from objectively unreasonable excessive force. The court held that a significant injury was a necessary element of the cause of action for excessive force, not merely a factor to be considered by the jury in assessing damages.

In *Morel*, the plaintiff (Johnson), a black motorist, was stranded on the Mississippi River Bridge in his stalled vehicle, with four passengers who were also black. A white police officer (Morel) began pushing the stalled car with his police car, and used his loudspeaker to make racial slurs and insult their intelligence. Upon reaching the foot of the bridge, Johnson got out of his car only to be immediately handcuffed and placed under arrest by Morel. The handcuffs broke Johnson's skin and also left permanent scars on his wrists which disabled him from employment for two weeks.

HOWARD M. SREBNICK is serving as a law clerk to the Honorable Irving L. Goldberg, United States Senior Circuit Judge for the Fifth Circuit, Dallas, Texas.

SCOTT A. SREBNICK is serving as a law clerk to the Honorable Sidney M. Aronovitz, United States Senior District Judge for the Southern District of Florida, Miami, Florida.

The district court granted summary judgment in favor of the defendant police officer, holding that Johnson had failed to show that he had suffered "severe injuries"<sup>8</sup> for purposes of an excessive force claim. The Fifth Circuit reversed and, expressly overruling all previous decisions to the contrary, held that the plaintiff was required to show that he had suffered a "significant injury," not a "severe injury," to prevail on his excessive force claim. Yet, even this requirement was imposed "without so much as a citation of authority or a statement of reasons for imposing them."<sup>9</sup> The court stated simply that an officer's "use of excessive force does not give constitutional import to...minor harms."

In cases subsequent to *Morel*, the significant injury threshold has been difficult to satisfy, often preventing the plaintiff from proceeding past the summary judgment or directed verdict stage. For example, in *Wisniewski v. Kennard*,<sup>10</sup> the court found that the significant injury requirement had not been met where a police officer handcuffed an arrestee, and thereafter punched him in the stomach three times, shoved a cocked loaded revolver in his mouth, and threatened to blow his head off. In *Mouille v. City of Live Oak*,<sup>11</sup> the court refused to find a constitutionally significant injury where an officer admittedly pushed a pregnant woman into a wall, left a temporary red mark under her left breast when his hand impacted her chest, and caused her to fear for the safety of her unborn fetus. Finally, in *Hudson v. McMillian*,<sup>12</sup> the court held that the significant injury element of an excessive force claim was not satisfied where an officer's punches cracked the plaintiff's partial dental plate, split his lip, loosened his teeth, and bruised his body.

By contrast, the Seventh Circuit has refused to make a significant injury a necessary element of Section 1983 liability. In *Titran v. Ackman*,<sup>13</sup> the court expressly rejected the significant injury requirement set forth in *Morel*, reasoning that a "state is not free to inflict...pains without cause just so long as it is careful to leave no marks."<sup>14</sup> Likewise, other circuits have implicitly refused to consider the extent of the plaintiff's injuries, focusing only the reasonableness of the force used in determining whether plaintiff had stated a cognizable claim under 42 U.S.C. Section 1983.<sup>15</sup>

Interestingly, the Court in *Graham* shunned the opportunity to preempt a potential split in the circuits and consider this question. In an *amicus* brief filed by the United States in *Graham*, the Solicitor General had argued that a "severe injury" requirement was inappropriate under Section 1983 in that it would allow a police officer, without justification, to beat a person on the head with a club if the beating causes only a bruise.<sup>16</sup> Nonetheless, in the October 1991 term, the Court will consider the question of whether the significant injury requirement is a proper element of

an Eighth Amendment excessive force claim under Section 1983 in the above mentioned case of *Hudson v. McMillian*.<sup>17</sup> Because there is no meaningful distinction between the Fourth and Eighth Amendments with respect to this requirement, the decision in *Hudson* will likely be determinative of Fourth Amendment excessive force claims as well.

In our opinion, the significant injury requirement should not be an element of a constitutional violation under Section 1983. Such a requirement frustrates Section 1983's stated goals of deterrence and compensation, is inconsistent with established Supreme Court precedent, and prevents the proper vindication of constitutional rights.

### Goal of Deterrence

One of the primary purposes and goals of 42 U.S.C. § 1983 is to deter abuses of power by persons acting under the color of state law.<sup>18</sup> Under Fourth Amendment excessive force claims, awarding compensation to the plaintiff is the appropriate deterrent since the suppression of evidence—the relief generally associated with Fourth Amendment violations—is inapplicable to these claims. As an added deterrent, punitive damages may be available under Section 1983 when the defendant's conduct is shown to be motivated by evil motive or intent or when it involves reckless or callous indifference to the federally protected rights of others.<sup>19</sup>

The significant injury requirement leaves certain abhorrent police conduct undeterred by allowing objectively unreasonable police acts of force to go unpunished.<sup>20</sup> It permits the state to "injure in ways that will remain legally invisible—albeit morally arrestive."<sup>21</sup> And if the holding in *Wisniewski, supra*, is taken to its logical extreme, it essentially places officers on notice that they are entitled to throw at least three "free" punches into a handcuffed arrestee's stomach and shove a loaded revolver down his throat without being subject to Section 1983 liability.

This is incompatible with the deterrence principle for several reasons. First, it allows a defendant who has used objectively unreasonable force yet has caused no significant injury to avoid facing a jury on the issue of compensatory damages. Although the jury's compensatory damage award for an insignificant injury would presumably be slight, even a minor damage award *and the threat of an overtly sympathetic jury* will deter more effectively than no award at all.

More subtly, a granting of summary judgment or a directed verdict in favor of the defendant prevents the issue of punitive damages from reaching the jury. Courts have uniformly held that punitive damages may be assessed against the defendant in Section 1983 actions even though the plaintiff has not

suffered an actual loss or injury.<sup>22</sup> Courts have reasoned that the purpose of the punitive relief is to punish the willful violator of constitutional rights and to deter future abuses of those rights, not to compensate the victim.

Under the significant injury test, however, a defendant is not liable for a Fourth Amendment violation as a matter of law if the plaintiff does not suffer a compensable (i.e., significant) injury. Absent such an injury, the plaintiff cannot survive a directed verdict (and perhaps not even summary judgment), and his case never reaches the jury for its consideration of punitive damages.

Thus, a defendant can escape a punitive damage assessment for even the most intentional and malicious acts of physical and mental abuse, simply because the abuse failed to leave a trace of significant physical injury. This, despite the fact that one purpose of punitive damages should be to insure that a malicious officer will not benefit from the fortuity of a thick-skulled plaintiff. The significant injury requirement, perhaps unintentionally, limits this deterrent by covertly erecting a barrier to an award of punitive damages—a barrier that the Supreme Court and circuit courts have already rejected.

### Goal of Compensation

Another important purpose of Section 1983 is to compensate persons for injuries caused by the deprivation of constitutional rights.<sup>23</sup> The significant injury requirement frustrates this stated goal as well.

In the first place, it permits minor physical injuries to go uncompensated—injuries that under common law tort rules would normally be compensated by the jury. More important, it bars recovery for significant non-physical injuries. In particular, it is well-established that compensatory damages for violations of Section 1983 may include such injuries as personal humiliation, emotional distress, and mental anguish and suffering.<sup>24</sup> Yet, it is unlikely that mental anguish or emotional distress alone would satisfy the significant injury requirement.<sup>25</sup> Thus, non-physical injuries suffered by the plaintiff may go uncompensated if not accompanied by a significant physical injury.

This is incompatible with the goal of compensation and ignores the expanded recognition that courts have afforded to claims of emotional distress.<sup>26</sup> Equally important, this shield from liability for non-physical damages provides police officers with a license to unreasonably threaten to use force or engage in mental abuse during the course of an arrest.

### Goal of Vindication

The significant injury requirement contravenes the Supreme Court's recognition that nominal damages "are the appropriate means of 'vindi-

cating' rights whose deprivation has not caused actual, provable injury."<sup>27</sup> Because a jury will never even consider the propriety of nominal damages absent a significant injury (see discussion of punitive damages, *supra*), the significant injury requirement frustrates the function of nominal damages as the vindicator of constitutional rights.

The significant injury requirement is also inconsistent with the courts' treatment of other Section 1983 claims for Fourth Amendment violations, which allow for nominal damages. A plaintiff who has been arrested without probable cause, for example, can seek redress under Section 1983 for "false arrest."<sup>28</sup> He need only show that the officer, in bad faith, procured his arrest without probable cause, but need not demonstrate a significant injury—it is enough that the plaintiff has been unreasonably seized, without regard to the amount of actual injury he may have incurred.<sup>29</sup> Similarly, a plaintiff may allege a cognizable Fourth Amendment claim based upon an unreasonable strip search or unlawful search of his home, regardless of the extent of his injury.<sup>30</sup>

An excessive force claim should be treated no differently. A seizure effectuated through excessive force, like a false arrest or unlawful search, is actionable precisely because it is objectively unreasonable within the meaning of the Fourth Amendment, not because the plaintiff boasts a black eye or broken rib. There is no principled basis for imposing on a victim of unreasonably excessive force the added burden of proving a significant injury. It is the quality of the *force*, not the gravity of the *injury*, which is central to the reasonableness of the seizure; even the most severe injuries are not actionable when occasioned by the application of reasonable force.<sup>31</sup>

The significant injury requirement will also discourage the prosecution of otherwise meritorious lawsuits. Because an award of attorney's fees under Section 1983 is contingent upon the plaintiff prevailing at trial, victims of excessive force will be unable to recover fees absent a significant injury even in cases involving egregious police conduct. The practical effect is that plaintiffs' counsel will be increasingly reluctant to serve in their congressionally vested role as "private attorney generals."<sup>32</sup> Even more disturbing is the threat that the plaintiff will be assessed with the prevailing defendant's attorney fees if his claim is viewed as frivolous based on the insignificance of the injury. Surely, this runs afoul of the entire scheme of Section 1983 which Congress synthesized as a vehicle for vindicating constitutional rights.<sup>33</sup>

Moreover, the significant injury requirement provides the defendant with two bites at the apple to avoid liability. The defendant can, at the summary judgment or directed verdict stage, contend that the injuries sustained by



the plaintiff are insignificant as a matter of law. The trial judge may then foreclose any review of the reasonableness of the force based on his own subjective view of the significance of the injury, allowing the officer to escape liability for even the most egregious acts of force.

Yet even if this argument fails before the judge, the defendant will still be able to take his second bite by suggesting to the jury that the absence of any noticeable physical injury is proof that the force used was not excessive or objectively unreasonable. This bite, unlike the first, is proper and consistent with the Fourth Amendment, since it focuses on the objective reasonableness of the act, not on the injury caused, for purposes of liability.<sup>34</sup> It simply makes little sense to incorporate the damage element into the consideration of liability and to substitute the court's judgment about the extent of the plaintiff's injuries and suffering for that of the jury.

## Conclusion

Perhaps the significant injury requirement can best be explained as an efficient means of ferreting out those cases where excessive force has been falsely alleged, even if occasionally done at the expense of arguably

meritorious claims. When the Supreme Court addresses the significant injury requirement in the October 1991 term, it should consider that such a tradeoff—judicial efficiency for vindication of constitutional rights—cannot be squared with Section 1983's stated goals. For it is the excess of *force*, not the excess of *injury*, which the Constitution forbids and which Section 1983 seeks to vindicate. ■

## Notes

1. Claims of excessive force arising after arrest but before conviction are typically brought as violations of the Due Process Clause. After conviction, the Eighth Amendment "serves as the primary source of substantive protection...in cases...where the deliberate use of force is challenged as excessive and unjustified." *Whitney v. Albers*, 475 U.S. 312, 327 (1986).

2. 109 S.Ct. 1865, 1872 (1989).

3. By contrast, a prisoner's claim that prison officials violated his Eighth Amendment rights ultimately turns on whether the prison officials intended to inflict unnecessary and wanton pain as a means of cruel punishment. See *Whitley v. Albers*, 475 U.S. 312, 327 (1986).

4. *Id.*

5. *Graham v. Connor*, 109 S.Ct. at 1872 (quoting *Johnson v. Glick*, 481 F.2d 1028, 1033 (2d Cir. 1973)).

6. *Id.* at 1871—72.

7. 876 F.2d 477, 480 (5th Cir. 1989).

8. Prior to *Graham*, the Fifth Circuit had imposed a "severe injury" requirement for Fourteenth Amendment excessive force claims. See *Shillingford v. Holmes*, 634 F.2d 263 (5th Cir. 1981).

9. *Morel*, 876 F.2d at 480 (dissenting opinion). 10. 901 F.2d 1276 (5th Cir. 1990).

11. 918 F.2d 548 (5th Cir. 1990).

12. 929 F.2d 1014 (5th Cir.), *cert. granted*, 111 S. Ct. 1679 (1991) (applying significant injury test under Eighth Amendment excessive force claim).

13. 893 F.2d 145 (7th Cir. 1990).

14. See *Titran v. Ackman*, 893 F.2d at 147 (7th Cir. 1990) (quoting *Williams v. Boles*, 841 F.2d 181 (7th Cir. 1988)).

15. See, e.g., *Hansen v. Black*, 885 F.2d 642 (9th Cir. 1989);

*Calamia v. City of New York*, 879 F.2d 1025 (2nd Cir. 1989).

16. Brief of the United States as amicus curiae in *Graham v. Connor*, 109 S.Ct. 1865 (1989).

17. 929 F.2d 1014 (5th Cir.), *cert. granted*, 111 S.Ct. 1679 (1991).

18. *City of Newport v. Fact Concerts*, 453 U.S. 247 (1981).

19. *Smith v. Wade*, 461 U.S. 30, 56 (1983).

20. While a plaintiff may have conventional tort remedies available to him, this is no justification for taking the bite out of Section 1983.

21. *Wisniewski v. Kennard*, 901 F.2d 1276, 1280 (5th Cir. 1990) (dissenting opinion).

22. *Smith v. Wade*, 461 U.S. 30, 56 n.21 (1983); *Davis v. Mason County*, 927 F.2d 1473, 1485 (9th Cir. 1991); *Erwin v. County of Manitowoc*, 872 F.2d 1292, 1299 (7th Cir. 1989).

23. *Carey v. Piphus*, 435 U.S. 247 (1978).

24. *Id.* at 264.

25. While the Fifth Circuit has never expressly ruled that a non-physical injury cannot satisfy the "significant injury" test, it has clearly hinted as much. See *Johnson v. Morel*, 876 F.2d at 480, n.1 ("We think it unlikely that such a significant injury will be caused by unnecessary force without significant physical injury"); *Wisniewski v. Kennard*, 901 F.2d at 1277 (finding no significant injury where officer placed revolver in handcuffed arrestee's mouth and threatened to blow his head off); *Mouille v. City of Live Oak*, 918 F.2d at 554 (holding that "transient distress" is not a constitutionally significant injury).

26. See Prosser and Keeton, *The Law of Torts*, Section 12 (Fifth Ed. 1984).

27. *Memphis Community School Dist. v. Stachura*, 477 U.S. 299, 308 n.11 (1986) (citing *Carey v. Piphus*, 435 U.S. 247, 266 (1978)).

28. *Hand v. Gary*, 838 F.2d 1420, 1427 (5th Cir. 1988).

29. *Williams v. Divittoria*, 760 F. Supp. 564 (E.D. La. 1991).

30. See *Gray v. Spillman*, 925 F.2d 90, 93 n.1 (4th Cir. 1991); *Hill v. McIntyre*, 884 F.2d 271 (6th Cir. 1989).

31. *Reese v. Anderson*, 926 F.2d 494, 500 (1991).

32. *Texas State Teachers v. Garland Indep. School Dist.*, 109 S. Ct. 1486, 1494 (1989).

33. *Estate of Farrar v. Cain*, 941 F.2d 1311. (5th Cir. 1991) (holding that plaintiff who wins only nominal damages is not "prevailing party" entitled to attorney's fees where sole relief sought was money damages; court acknowledged that its holding conflicted with decisions of six other circuits.)

34. See Note, *Excessive Force Claims: Is Significant Bodily Injury the Sine Qua Non to Proving a Fourth Amendment Violation*, 58 Fordham L. Rev. 739 (1990).