7-1-2011

Response To Motions In Limine, Knuth v. City of Lincoln et al, Docket No. 3:11-cv-03185 (C.D. Ill. Jul 01, 2011)

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E-FILED
Thursday, 03 April, 2014 11:53:59 PM
Clerk, U.S. District Court, ILCD

No. 11-CV-3185

IN THE UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF ILLINOIS

MICHAEL C. KNUTH,	)	
Plaintiff,	)	
v.	)	11-CV-3185
STUART ERLENBUSH and MICHAEL FRUGE,	)	
Defendants.	)	

PLAINTIFF'S RESPONSES TO DEFENDANTS' MOTIONS *IN LIMINE*

Plaintiff, Michael C. Knuth ("Knuth"), by and through his attorneys, F. Willis Caruso, and 711-Licensed Senior Law Student Tanvi Sheth, respond to Defendants' Motions in Limine as follows:

I. Summary of Rulings for Defendant's Motions in Limine

Previously, this Court granted, reserved ruling, or denied Defendants' following Motions in Limine. Attached as Exhibit 1 is a summary of these rulings.

II. Defendants' Motion in Limine No. 1 to Exclude Evidence of Liability Insurance or Indemnification by City of Lincoln

Plaintiff does not oppose Motion in Limine No. 1 seeking to bar evidence of liability insurance or indemnification, in general.

Evidence of, or a reference to, a party's right of indemnification is irrelevant and prejudicial on the issues of a party's liability. *Lawson v. Trowbridge*, 153 F.2d 368, 379 (7th Cir. 1998). However, if the defendants attempt to portray themselves as financially strained and unable to pay a compensatory or punitive damage award, the plaintiff is entitled to introduce into evidence that the individual defendants are indemnified by the relevant municipality for compensatory damages. *See id.; see also Galvan v. Norberg*, 2006 U.S. Dist. LEXIS 32386, at *7-8 (N.D. Ill. May 10, 2006) ("if defendants themselves inject the issue of their claimed

inability or limited ability to pay an award, evidence of their right to indemnification by the City will become relevant.") In this case, Plaintiff is seeking both compensatory and punitive damages awards against the individual Defendants. If the Defendants seek to introduce evidence of their inability to pay damage awards, Plaintiff requests that the jury be instructed that the City of Lincoln is responsible for paying any compensatory damage award. *See Galvan*, 2006 US. Dist. LEXIS 32386, at *8 ("[D]efense counsel should be aware that if they plan to apprise the jury of the fact that the individual officers will have to bear [punitive] damages out of their own pockets, fairness would dictate that the jury also be informed of the true situation (indemnification) as to compensatory damages").

III. Defendants' Motion in Limine No. 2 to Bar any Previously Undisclosed Witnesses/Evidence and to Exclude Non-party Witnesses from the Courtroom

Plaintiff does not oppose Motion in Limine No. 2 seeking to bar any previously undisclosed witnesses/evidence and to exclude non-party witnesses from the courtroom. However, an order excluding witnesses should run as to both Plaintiff's and Defendants' witnesses.

IV. Defendants' Motion in Limine No. 3 to Bar Evidence of Citizen Complaints Involving Defendants

Plaintiff does not oppose this Motion and Limine No. 3 and will not present evidence of other, unrelated Citizen Complaints involving Defendants.

However, if Defendants or their counsel open the door by testifying or otherwise mentioning other citizen's complaint, or by introducing evidence or argument that other citizens have not complained about one or more of the defendants, then the Plaintiff should be allowed to comment, respond, or offer evidence in rebuttal to the Defendants' or their counsel's testimony or comments or references in that regard.

V. Defendants' Motion in Limine No. 4 to Bar Comparison of Standards of Proof

Plaintiff does not oppose Motion in Limine No. 4 seeking to bar evidence, testimony, argument, or any innuendo regarding comparisons of standards of proof.

However, this ruling on Motion in Limine No. 4 should be mutual.

VI. Defendant's Motion in Limine No. 5 to Bar Any References to Settlement

Plaintiff does not oppose Motion in Limine No. 5 seeking to bar evidence, testimony, argument, or any innuendo regarding settlement negotiations.

However, this ruling on Motion in Limine No. 5 should be mutual.

VII. Defendants' Motion in Limine No. 6 to Bar References to Objections and Motions

Plaintiff does not oppose Motion in Limine No. 6 seeking to bar evidence, testimony, reference, comment, or innuendo on anything previously barred by the Court.

If, however, the Defendants or their counsel open the door by testifying or otherwise mentioning barred issues, then the Plaintiff should be allowed to comment, respond, or reference the Defendants' or their counsel's references to that issue.

Aloso, this ruling on Motion in Limine No. 6 should be mutual.

VIII. Defendants' Motion in Limine No. 7 to Bar Lay Opinion Testimony Regarding Causation of Injuries

Plaintiff does not oppose that he should be barred from testifying as to any diagnoses or medical opinion as to his injuries or treatment or the causation of the injuries. However, plaintiff is entitled to testify to the nature of his injuries, which include descriptions of the pain and injuries he suffered, the treatment he received, and the inability to lead a normal life as a result of his injuries.

IX. Defendants' Motion in Limine No. 8 to Bar Counsel's Personal Beliefs

Plaintiff does not oppose the Motion in Limine No. 8 seeking to bar counsel's personal beliefs.

If, however, the Defendants or their counsel open the door by testifying or otherwise mentioning defendants' or their counsel's personal beliefs, then the Plaintiff should be allowed to comment, respond, or reference the Defendants' or their counsel's references to that issue.

Additionally, this ruling on Motion in Limine No. 8 should be mutual.

X. Defendants' Motion in Limine No. 9 to Bar Reference to Other Publicized Incidents

Plaintiff does not generally oppose this Motion in Limine No. 9 seeking to bar other publicized incidents. However, if something specific to the City of Lincoln occurs involving Section 1983 litigation, Plaintiff would like the right to explore this information, as it is relevant to the case at bar.

In any event, the ruling on this Motion in Limine No. 9 should be mutual.

XI. Defendants' Motion in Limine No. 10 to Bar "Golden Rule" Comments

Plaintiff does not oppose Motion in Limine No. 10 seeking to bar "Golden Rule" comments.

However, the ruling on this Motion in Limine No. 10 should be mutual.

XII. Defendants' Motion in Limine No. 11 to Bar Unrelated Litigation Involving Defendants

Plaintiff does not oppose Motion in Limine No. 11 seeking to bar unrelated litigation involving defendants.

If, however, the Defendants or their counsel open the door by testifying or otherwise mentioning unrelated litigation involving the defendants, then the Plaintiff should be allowed to comment, respond, or reference the Defendants' or their counsel's references to that issue.

XIII. Defendants' Motion in Limine No. 12 to Bar Testimony Concerning Alleged Police "Code of Silence"

Plaintiff opposes Motion in Limine No. 12 seeking to bar use of "Code of Silence" evidence, testimony, reference, comment, or argument.

"Proof of bias is almost always relevant because the jury, as finder of fact and weight of credibility, has historically been entitled to assess all evidence which might bear on the accuracy and truth of a witness' testimony." *Cooper v. Daily,* 2012 WL 1748150, *8 (N.D. Ill.) Quoting *United States v. Abel*, 469 U.S. 45, 52 (1984). Indeed, "a party's and a witness's common group membership is probative of bias" *Id.* Quoting *Townsend v. Benya,* 287 F.Supp.2d 868, 876 (N.D.Ill. 2003). Thus the plaintiff should not be barred from exploring the possibility that the defense witnesses in this case are biased because of loyalty to one another. *Id*., citing *Saunders v. City of Chicago*, 320 F.Supp. 2d 735, 7410 (N.D.Ill. 2004); *Galvan v. Norberg*, 2006 WL 1343680, *3 (N.D.Ill. 2006).

Furthermore, the 7th Circuit has already recognized in *Obrycka v. City of Chicago 913 F. Supp. 2d 598, 604-05*, that there is a potential that a "code of silence" exists within a police department. As such, Plaintiff should be allowed to explore this theory throughout trial. Motions in limine should only be granted before trial if the evidence seeking to be excluded is clearly inadmissible on all potential grounds. Here, a police "code of silence" is highly relevant and

would be admissible due to the probative value of this evidence regardless of how prejudicial the inclusion of would be against the defendants. Fed. R. Evid. 403.

As such, this Motion in Limine should be denied.

XIV. Defendants' Motion in Limine No. 13 to Bar Evidence and/or Testimony Concerning General Orders, City Codes, or Department Procedures

Defendants' argument that violations of the City of Lincoln Police Department General Orders regarding the use of force are necessarily irrelevant to any issue at trial, confusing to the jury and unfairly prejudicial to Defendants is unavailing. Defendants are obviously correct insofar as violations of general orders do not equal proof of a constitutional violation. But that is not the same thing as a conclusion that Defendants' disregard of the Department's rules is irrelevant to any of the issues in dispute here. *See Edwards v. Thomas*, 31 F. Supp.2d 1069, 1075-76 (1999) (finding that violations of Chicago Housing Authority orders "could be both relevant and probative" to finding a constitutional violation noting that "objective reasonableness, the standard for excessive force claims (*Graham v. Connor*, 490 U.S. 386, 396-97, 104 L. Ed. 2d 443, 109 S. Ct. 1865 (1989)), requires an analysis of what a hypothetical reasonable officer would have known and done in light of the circumstances confronting the actual officer in the case. Police regulations, general orders and officer training provide a relevant (although not conclusive) benchmark for making such a comparison. Any potential for the jury's automatically finding regulatory violations to equal constitutional violations can be curbed by appropriate jury instructions.").

Courts have also consistently recognized that violations of general orders or rules are relevant to other issues in the case, and have thus denied this same motion in limine. See *Galvan v. Norberg*, 2006 U.S. Dist. LEXIS 32386 at *6 (N.D. Ill. 2006) ("Galvan is certainly correct in urging the relevance of defendants' claimed violations of City's Police Department's General Orders, Rules and Regulations. Although any such asserted violations do not as such equate to a constitutional violation, they may bear, for example, on [other issues at trial]"; *Regalado v. City of Chicago*, 1998 U.S. Dist. LEXIS 20528 at *6 (N.D.Ill. 1998); *Lopez v. City of Chicago*, 2005 WL 563212, *10 (N.D. Ill. March 8, 2005) (Defendants may raise objections on a case by case basis at trial"). See also *Via v. Lagrand*, 2007 U.S. Dist. LEXIS 10080 at *17 (N.D. Ill. Feb. 12, 2007) (*Thompson v. City of Chicago*, 472 F.3d 444, 453 (7th Cir. 2006) "did not address the potential admissibility of evidence showing a violation of internal agency rules and procedures

with regard to a claim for punitive damages. The considerations may not be the same; a claim for punitive damages typically requires a showing that the defendant acted maliciously.") While Plaintiff has no intention of arguing that disregard of a general order is proof that the constitution has been violated, breaches of protocol may nevertheless be probative to punitive damages and facts and issues in dispute. For example, evidence of general orders that proscribe police officers from engaging in behavior such as that alleged in this lawsuit, goes to the Defendants' interest, bias, and motive to falsely testify in this case to avoid discipline or termination from the department, which is extremely relevant. Finally, the general orders may be relevant for such purposes as impeachment or refreshing recollection.

Therefore, Plaintiff requests that Defendants' Motion in Limine be denied or reserved depending on the evidence introduced by the Defendants at trial.

XV. Defendants' Motion in Limine No. 14 to Bar any Argument That the Jury Should Punish the City of Lincoln and Motion to Strike City of Lincoln and City of Lincoln Police from the Case Caption

Plaintiff does not oppose Motion in Limine No. 14 seeking to bar any argument that the jury should punish the City of Lincoln or the Motion to Strike the City of Lincoln and City of Lincoln Police Department from the case caption.

If, however, the Defendants or their counsel open the door by testifying or otherwise mentioning punishment of the City of Lincoln or the City of Lincoln Police Department, then the Plaintiff should be allowed to comment, respond, or reference the Defendants' or their counsel's references to that issue.

XVI. Defendants' Motion in Limine No. 15 to Bar any Argument that any Non-defendant County Deputies, County Employees, City Police Officers, City Employees, or State of Illinois Employees Engaged in Misconduct

Plaintiff does not oppose Motion in Limine No. 15 seeking to bar any argument that any non-defendant county deputies, county employees, city police officers, city employees or state of Illinois employees engaged in misconduct.

If, however, the Defendants or their counsel open the door by testifying or otherwise mentioning misconduct by non-defendant county deputies, county employees, city police officers, city employees, or state of Illinois employees, then the Plaintiff should be allowed to comment, respond, or reference the Defendants' or their counsel's references to that issue.

XVII. Defendants' Motion in Limine No. 16 to Bar any Evidence of Training of Employees or Police Officers by the City of Lincoln

Plaintiff does not oppose Motion in Limine No. 16 seeking to bar argument regarding training of employees or police officers related to any *Monell* claim to impose liability on the city for failure to train. Clearly, Plaintiff has not pled, nor is pursuing a *Monell* claim.

However, training of defendants may certainly be relevant to other issues. While District Courts have broad discretion when ruling on Motions in Limine, evidence should not be excluded before trial unless it is clearly inadmissible on all potential grounds. Otherwise, rulings should be deferred until trial so questions of foundation, competency, relevancy, and potential prejudice may be resolved in proper context. *Haack v. Bongorno*, 2011 WL 862239, *1 (N.D.Ill.). And the movant in a Motion in Limine has the burden of demonstrating that the evidence is inadmissible on any relevant ground for any purpose. *Id*.

Since evidence of the defendants' training may become relevant, as the evidence unfolds, as to issues of excessive force, or other issues, the Court should defer ruling on this motion in limine at this time, other than to bar arguments as to the *Monell* claim that was not pled and is not being argued.

XVIII. Defendants' Motion in Limine No. 17 to Bar any evidence that Defense Counsel Works for the City

Plaintiff does not oppose Motion in Limine No. 17 seeking to bar any evidence that defense counsel works for the city.

XIX. Defendants' Motion in Limine No. 18 to Bar any Evidence of Defendant's Alleged Failure to Call Witnesses

Plaintiff does not oppose Motion in Limine seeking to bar any evidence of defendants' alleged failure to call witnesses.

However, the ruling on this Motion in Limine should be mutual.

XX. Defendants' Motion in Limine No. 19 to Bar Improper Argument by Plaintiff's Counsel in Opening Statement

Plaintiff does not oppose Motion in Limine No. 19 seeking to bar any improper argument by Plaintiff's counsel in opening statement.

However, the ruling on this Motion in Limine should be mutual, and defendants' counsel should also be barred from any improper arguments in his opening statements.

XXI. Defendants' Motion in Limine No. 20 to Bar Evidence Relating to Defendants' Subjective Intent

Plaintiff should be allowed to show evidence of the Defendants' subjective intent during the incident that occurred on July 20, 2009.

The standard for a Section 1983 claim is objective standard of what a reasonable officer would have done in the defendants' position. *Graham v. Connor*, 490 U.S. 386, 396-97, (1989) This includes what a reasonable officer's intent would be at the time of the shooting. *Id.* Therefore, the defendants' intent when making the decision is part of the totality of circumstances surrounding the objective reasonableness of their actions.

As such, the plaintiff respectfully requests the Court deny this Motion in Limine.

XXII. Defendants' Motion in Limine No. 21 to Admit Plaintiff's Criminal Felony Convictions

Federal Rule of Evidence 609 allows only for the introduction of convictions for crimes directly related to a witness's credibility and felony convictions that survive a Fed. R. Evid. 403 relevancy examination. The probative value of the felony conviction must outweigh its prejudicial effect. No conviction of any potential witness in this case invokes concerns of the witness' capacity for truthfulness. The prejudicial effect of any potential introduction of evidence regarding prior convictions in this case would far outweigh its probative value therefore all evidence of plaintiff's prior felony convictions should be excluded.

Furthermore, Fed. R. Evid. 404 specifically prohibits the use of character evidence to show conformity with that character on a particular occasion or propensity to act in a certain way. "The rationale behind this rule is the notion that this evidence has slight probative value but has a tendency to be highly prejudicial or confuse the issues." There is absolutely no valid reason for Defendants to elicit testimony of prior felony convictions of Plaintiff. Any attempt by Defendants to introduce this evidence is nothing more than an improper attempt to show a witness's propensity to have acted as the defendants allege took place on July 20, 2009, and it should not be allowed. *Brandon v. Village of Maywood*, 179 F.Supp. 2d 847, 853-55 (N.D. Ill. 2001) (rejecting all evidence of arrest report after careful consideration of arguments for admission, including bias and damages, because the prejudice outweighed the probative value of

the evidence). Although that case discusses an arrest report, if an arrest report is considered highly prejudicial, then a felony conviction would likely be even more prejudicial. As noted in the Fed. R. Evid. 404 Advisory Committee Notes,

> Character evidence is of slight probative value and may be very prejudicial. It tends to distract the trier of fact from the main question of what actually happened on the particular occasion. It subtly permits the trier of fact to reward the good man and to punish the bad man because of their respective characters despite what the evidence in the case shows actually happened.

Notes of Advisory Committee on Proposed Rules, *Fed. R. Evid. 404* (citation omitted), *accord Lovergine v. Willerth,* 1986 WL 10352 (N.D.Ill. 1986).

Specifically, the felony convictions Plaintiff was found guilty of surrounding the incident that occurred on July 20, 2009 would be highly prejudicial. If the trier of fact were to hear that he was convicted of attempted first-degree murder, unlawful discharge of a firearm, and unlawful possession of a weapon by a felon, the jury will likely focus on Plaintiff's convictions rather than focusing on the actual events that took place. Plaintiff is not seeking to keep out the events that unfolded during the incident that led to these felony convictions, but simply the fact that he was found guilty of felony convictions as this would be highly prejudicial, and the jury would likely be distracted from the detailed account of the events that will be presented and the prejudicial nature of this information could lead to an unfounded conclusion by the jury. Additionally, it has no probative value because the main issue in this case is not what Plaintiff is liable for, but rather whether the defendants' actions were excessive. The only evidence the jury needs to determine the issue of defendants' liability in this case are the events that took place at approximately 8:00 p.m. July 20, 2009, and the actions of the parties involved. The ultimate charges are therefore of no probative value in determining if the defendants' are liable in the case at bar.

Therefore, the plaintiff requests that this motion in limine be denied.

XXIII. Conclusion

Wherefore, Plaintiff respectfully requests this Court deny the above objected to motions in limine.

By:

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