

original

Case No. 35815-8-II

COURT OF APPEALS - DIV II
OF THE STATE OF WASHINGTON

PATRICK ALLEN,
Appellant

v.

BRIAN GEORGE, ET AL
Respondant

APPELLANT'S BRIEF

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COURT OF APPEALS
DIVISION II
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STATE OF WASHINGTON
BY: *[Signature]*
DEPUTY

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A. Assignments of Error

1. The trial court erred in entering an order of December 8, 2006, denying the plaintiff's motion to for Relief From Summary Judgment entered on Nov. 18, 2005
2. The trial court erred when it repeatedly stopped the plaintiff's attempts to present his prepared oral argument and new case law during the December 8, 2006 hearing on plaintiff's motion for Relief from Judgment.

Issues Pertaining to Assignments of Error

1) Plaintiff's attending doctor for handcuff injury referred Plaintiff to an EMG specialist for a nerve conduction study after pain and numbness in plaintiff's hands and wrists did not subside after 2 years. EMG test was completed prior to summary judgment but contained only raw data and a highly technical description. Subsequent to summary judgment a DHS Doctor incidentally reviewed plaintiff's EMG study and discovered that the plaintiff's handcuff injury was serious and possibly permanent. Did the court abuse its discretion when it ruled the plaintiff's EMG evidence was not newly discovered, and that the plaintiff's injury is not significant? (Assignment of Error 1.)

2) Did the court abuse its discretion when it repeatedly stopped the plaintiff's efforts to present his prepared oral argument, and thus eliminated plaintiff's chance to reveal then recently discovered new case law and how that case law applies to the facts?

(Assignment of Error 2.)

3) Does new and intervening case law, establishing the threshold test for handcuff injury claims at summary judgment, apply and control in this case, and if so, justify remand of this case for a jury trial? (Assignment of Errors 1 and 2.)

B. Statement of the Case

This is a U.S.C. 1983 action for violation of Civil Rights under the Fourth Amendment for the use of excessive force. Defendants moved for summary judgment with pleadings which included qualified immunity. Defendants were awarded summary judgment on the trial court's stated perception of a lack of showing of serious injury. Plaintiff timely filed a 60(b) motion for Relief From Judgment under (3) newly discovered evidence and (11) any other reason. The hearing on the 60(b) motion was held, but the Plaintiff was not allowed to present essential oral argument and case law discovered just before the hearing, and the motion was dismissed. Plaintiff now appeals from that ruling on the basis of abuse of discretion.

Factual Background

On June 11, 2003, plaintiff, Patrick Allen, was driving near State Route 3 in Poulsbo, Washington, when Defendant, State Patrol Cadet Trooper Brian George stopped Mr. Allen for a minor traffic infraction. Cadet Trooper George eventually arrested Mr. Allen on suspicion of driving under the influence, handcuffed him, placed him in the back of the patrol car then proceeded to search Mr. Allen's car. [cp 56,57,422]

During the arrest procedure Cadet George improperly synched the cuffs tightly around Mr. Allen's hands rather than applying them loosely about on his wrists. [cp 422] During this time, Mr. Allen was cooperating fully and presented no risk for flight¹. [cp 57]

Within a few minutes, as a consequence of improper placement and application of the cuffs, Mr. Allen began to feel a burning pain emanating from his hands as the cuffs were cutting into his skin on the back of his hands.[cp 422] The pain in Mr. Allen's hands became extreme as Cadet George searched Mr. Allen's car. [cp 57]

When Cadet George returned to the patrol car some 15 minutes later Mr. Allen protested that his handcuffs were too tight. [cp 66,422] Mr. Allen stated that the cuffs were cutting into the back of his hands and asked Cadet Trooper George to loosen them. [cp 422] Cadet Trooper George replied "That's as loose as they get" taking no action then or at any other time to check for excessive tightness or proper application of the handcuffs. [cp 66,423,423]

Approximately 25 minutes later Cadet George opened the back door of the patrol car and instructed Mr. Allen to turn sideways to relieve the pressure he then shut the door

¹ "Graham provides direction to the kinds of facts and circumstances a court needs to consider when applying the 'test of reasonableness': (1) severity of the crime at issue; (2) whether the suspect poses an immediate threat to the safety of the officers or others; and (3) whether he is actively resisting arrest or attempting to evade arrest by flight." (Graham v. Conner, 490 U.S. at 396).

without examining the cuffs for proper tightness. [cp 67,423] George remained seated the patrol car for the next 10 minutes until WSP Sergeant Hitchings arrived on scene.

Leaving the car, George spoke briefly with Sergeant Hitchings after which George returned to the patrol car and proceeded to leave the scene. [cp 423]

As they were leaving the arrest scene, Mr. Allen again pleaded with Cadet George to loosen the cuffs as they had been on and tight for 45 minutes. Once again Cadet George ignored Mr. Allen's plea for relief. [cp 229, 423]

After a five minute drive to the Poulsbo Police station Mr. Allen was removed from the back of the patrol car and walked into the station. [cp 62,423]

Even though Allen reminded Cadet George about the tight cuffs as he was being walked into station and George had ample opportunity to inspect them, George made no effort adjust the cuffs or inspect them for proper tightness. [cp 62,66,423]

Once in the station, Allen was forced to remain cuffed for 25 additional minutes. [cp 238,423] While seated for DUI processing Allen continued his complaints about the pain from the cuffs without acknowledgment or relief. [cp 66,423]

The first and only time Cadet George handled the cuffs after placing them on Mr. Allen was when they were removed to allow Mr. Allen to sign the DUI citation, approximately 20 minutes after arriving at the Poulsbo Police station. [cp 245,423]

Approximately one hour and 20 minutes after the cuffs were improperly synched about Allen's hands [cp 62,423], they were finally removed. [cp 66] At this point, Allen was able to see swelling and deep marks across the back of his hands from the cuffs, these

visible injuries were attested to by Gary Olford who picked up Mr. Allen at the Poulsbo Police station shortly after he was released. [cp 82,83,]

On June 12th, 2003, the day following his arrest, Mr. Allen was admitted to the emergency room at the Jefferson County Hospital for treatment of injuries to his hands, including swelling, numbness, and lacerations. [cp 424] Mr. Allen's hands and wrists were examined by Dr. Kent Smith, the attending physician, who gave Allen a prescription for pain, swelling and neuritis, then released him. [cp 73-76]

The Dr. Smith indicated in his report that there were lacerations, swelling, neuritis, and contusions to both of Mr. Allen's hands from handcuffs. [cp 76,424]

On June 16th, 2003, Mr. Allen filed a formal complaint at the WSP Poulsbo detachment against Cadet George. [cp 63,424] The basis of Allen's complaint was George's use of excessive force while handcuffing Mr. Allen on June 11th, 2003. With WSP Sgt. Troy Tamarez attending, Mr. Allen gave an audio taped statement detailing the nature of his complaint against Cadet George. This deposition was conducted, taped, and transcribed by the WSP. [cp 62-72,424]

Two weeks after his handcuff injury, on June 25, 2003, Mr. Allen was examined by Dr. John Sack at the Seattle Hand Surgery Group in Seattle. [cp 147,424] Dr. Sack noted in his report that Mr. Allen's hands were still slightly swollen, some bruising, and nerve pain in both hands with limited nerve pain in his elbows. Allen was instructed to return if the symptoms persisted beyond a month or two. [cp 317,424]

On September 4, 2003, Mr. Allen again returned to Dr. Sack with additional symptoms including nerve pain which had then spread from his hands up to in his elbows.

Dr. Sack diagnosed the condition in Mr. Allen's elbows as lateral epicondylitis, commonly known as tennis elbow. [cp 160,319,424,425]

On January 14, 2005, Mr. Allen's attorney, Randy Loun, filed suit in Kitsap County Superior Court serving summons and complaint on WSP Cadet Trooper Brian George. [cp 425]

A final follow-up visit to Dr. Sack was undertaken by Mr. Allen on March 30th of 2005. Dr. Sack indicated to Mr. Allen that an EMG study for further diagnosis of his condition was in order to determine if Mr. Allen was suffering from carpal tunnel. [cp 321,425]

In June 2005, still faced with continued problems using his hands and uncertain if he was able to be employed during summer break from college, Mr. Allen went to DSHS Disabilities Vocational Rehabilitation Office (DVR) in Port Angeles to seek assistance with his return to college. [cp 346,425] The handcuff injury precluded Mr. Allen from returning to his former professional occupation in the Information Technology field because of his now limited keyboarding ability. [cp 425] Having no choice, Allen began educating himself for another possible future profession, not knowing at that time, that he would be considered disabled by DVR, then by DSHS, and finally, Social Security. [cp 348,350]

Kathleen Dodson, the DSHS Vocation Rehabilitation Counselor, determined Mr. Allen to be "Priority Category #1 - Individual with a most significant disability" and worked out a plan to assist Mr. Allen with his education efforts in obtaining a possible new career. [cp 348,425]

Mr. Allen was then referred by DVR counsel to seek assistance with the main DSHS office. In June of 2005 the DSHS office recommended that Mr. Allen get an EMG study to confirm the seriousness of the injury, and to determine if he was able to work. [cp 346,426]

Mr. Allen then called back to Dr. Sack for a referral to an EMG specialist and was given a referral to Dr. Jennifer Carl in Port Townsend. Mr. Allen called Dr. Jennifer Carl's office and set-up the first EMG study for June 22, 2005, in Port Angeles where Mr. Allen was then living and attending college. [cp 321,426]

The highly technical results from the June 22, 2005 EMG which were mailed to Dr. Sack [cp 426] included pages of raw data and the following description:

"Electrodiagnostic findings support diagnosis of bilateral past median nerve injuries, most likely at the wrist, and the past right ulnar nerve injury at the wrist. These injuries were severe enough to cause partial denervation of median and/or ulnar innervated muscles of the hands and would be expected to cause persistently decreased fine motor control and endurance in the affected muscles, c/w patient history. There might be persistent neuropathic pain associated with the old nerve injuries..." [cp 278-280]

At the November 18, 2005 Summary Judgment hearing, Plaintiff's attorney argued that the severity of injury was a question best left for the jury. [cp 296,297] However, summary judgment was handed down in favor of the defendants. Judge Haberly noted in her decision that "...looking at the evidence in the light most favorable to the plaintiff here, as to the extent of the injury, besides his testimony, there is medical testimony in the record that is unrebutted that this was a minor injury, and the court will grant summary judgment to the defendant". [cp 298]

Newly discovered evidence in this matter came in the form of Dr. Staker's incidental review on 12/27/05 of the Mr. Allen's 6/22/05 EMG, approximately 6 weeks after summary judgment. [cp 335,429] By product of this incidental review, Mr. Allen became aware for the first time that his injuries were in fact significant, and likely permanent. [cp 335,429]

Mr. Allen had sought DSHS assistance in part because he was limited in his ability to use his hands since his handcuff injury and this condition affected his ability to work. [cp 425]

At the end of September 2005 Mr. Allen was required to provide the Olympia DSHS office with his medical records, including the first EMG study from 6/22/05. DSHS contacted Mr. Allen in December of 2005 [cp 325] and directed him to Dr. Staker to determine if his inability to use his hands remained, and how that would affect his ability to gain employment. Mr. Allen's first opportunity to see Dr. Staker was 12/27/05. [cp 331]

During this visit to Dr. Staker on December 27th of 2005, Dr. Staker examined Mr. Allen's condition and his first EMG study of June 22, 2005. After reviewing Mr. Allen's June 22, 2005 EMG study Dr. Staker determined that Allen's handcuff injuries were serious and possibly permanent. Dr. Staker then notified DSHS of his diagnosis and recommended Mr. Allen repeat the EMG and nerve conduction study to determine if his nerve injuries were permanent. [cp 336]

C. Summary of Argument

Appellate review of a CR60(b) (3), (11) motion is generally performed on the basis of an abuse of the trial court's discretion. If in fact the trial court is found to have made its decision on untenable grounds then relief is justified. Appellate Court may also grant relief for any other reason that it deems in the interest of substantial justice.

In this matter, the Trial Court initially granted summary judgment to the Defendant, disregarding those significant facts which remained at issue relating to; when, where, and how many times the Plaintiff requested relief from excessively tight handcuffs; whether the handcuffs were properly installed initially, whether the Defendant re-inspected the handcuffs for proper tightness and application; whether the length of time plaintiff was left handcuffed was excessive; and whether injury to plaintiff's hands and wrist which remained 2 years later inhibiting his ability to use his hands constitute significant injury.

Plaintiff further argues the trial court abused its discretion in initially awarding summary judgment to the Defendant as the trial court trivialized his injury and disregarded his testimony and his witness, and the medical testimony from the emergency room physician. Further the trial court provided no written findings of fact or conclusions of law supporting Summary Judgment to the Defendant.

Plaintiff also argues that when the DSHS ordered him to a specific doctor, for a determination of his level of disability, that DSHS doctor was the "agent" of discovery, and that the highly technical pre-summary judgment EMG study was "newly discovered" by this doctor. The doctor's assessment, by product of the DSHS directive, was that the pre summary judgment EMG indicated serious and possibly permanent damage from the Defendants use of excessive force in handcuffing and restraining the Plaintiff.

Under 1983 excessive force injury standards existing at the time of Summary Judgment, the plaintiff argues that even without consideration of the EMG test, his injury was sufficiently demonstrated as “significant” to have survived summary judgment. By not leaving the question of level of injury for the jury, the plaintiff argues that the trial court abused its discretion.

Shortly before the hearing on plaintiffs 60(b) motion for Relief From Summary Judgment, but after briefing materials had been submitted, Plaintiff discovered Patrick v. Vrablic, 2005 U.S. Dist. LEXIS 30275 (E.D.Mich. Nov. 16, 2005), 2005 WL 3088346 (E.D.Mich.) where the United States District Court decided, two days prior the Summary Judgment Order in the instant case, a nearly identical handcuff injury case Patrick v. Vrablic establishes a new standard, or threshold, of injury and circumstance beyond which an excessive force handcuff injury claim would survive Summary Judgment. Although Patrick v. Vrablic was not published by summary judgment in Allen v. George 2 days later, later on, during the hearing on plaintiff’s 60(b) motion for Relief of Summary Judgment, the plaintiff made repeated efforts to present oral arguments containing this new case law, but each time was shut down by the court after just a couple of sentences, thus prejudicing the plaintiff in a clear abuse of the courts discretion.

Plaintiff further argues that during the hearing on Plaintiff’s 60(b) motion for Relief From Summary Judgment that the court stated that it was very familiar with the case, but then later demonstrated that with statements and questions that it was not sufficiently familiar to make an informed judgment. Even though the plaintiff’s 60(b) motion was based in part on newly discovered evidence found within the EMG Study, the court was

unaware of that the Plaintiff had an EMG Study performed. Ignorance of Mr. Allen's EMG study clearly demonstrates the court's wholesale lack of knowledge relating to Plaintiff's 60(b) motion and the case. Plaintiff argues that ruling on the 60(b) motion without any significant oral presentation from either side is a clear and manifest abuse of discretion.

D. Argument

NEWLY DISCOVERED EVIDENCE

Authority for Review

Applicable to this matter, Washington State Court Rules CR. 60(b) provides that this court may provide relief from summary judgment for; "Mistakes; Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud; etc. On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons:" (relative to this appeal) "(3) Newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under rule 59(b);" and "(11) Any other reason justifying relief from operation of Judgment:"

Review of a CR 60(b) motion to vacate judgment is performed under the abuse of discretion standard. Abuse of discretion is found when the court's decision is based on

untenable grounds. In this case the trial court abused its discretion when it ruled against plaintiff's motion for Relief of Summary Judgment.

In considering whether to grant a motion to vacate, a trial court "should exercise its authority 'liberally, as well as equitably, to the end that substantial rights be preserved and justice between the parties be fairly and judiciously done.'" Griggs, 92 Wash.2d at 582, 599 P.2d 1289 (quoting White v. Holm, 73 Wash.2d 348, 351, 438 P.2d 581 (1968)).

Background and Discussion

Newly discovered evidence in this matter relates to the discovery by Dr. Lynn Staker on December 27, 2005 that Mr. Allen's June 22, 2005 nerve conduction study shows significant injury and the possibility of permanent nerve damage. This conclusion is also validated by Dr. Jennifer Carl's Declaration dated 8/10/06 [cp 137] and Dr. Carl's second EMG Test dated 1/19/06 [cp 282] with descriptive conclusion, and the subsequent assessment by Washington State Department of Social and Health Services, as well as the federal Social Security Administration that Mr. Allen was found to be permanently disabled from his 2003 handcuff injury. [cp 350]

On March 30, 2005, Mr. Allen returned for a last follow up visit to Dr. Sack as his handcuff injury was not improving and in fact was worsening. Dr. Sack repeated the test he had performed on Mr. Allen in his earlier examination, and noted that those rudimentary reflex tests showed little difference in results. At a loss for action, Dr. Sack then suggested an EMG and nerve conduction test be performed to eliminate the possibility of carpal tunnel as the cause of Mr. Allen's condition.

Mr. Allen was never presented any analysis from Dr. Sack relating to the June 22, 2005 EMG test. Although Dr. Sack appears to be reviewing the EMG data for the first time during his deposition, he does not examine the test data from the median nerve, which was most extensively damaged of the nerves. Even at the time of deposition it would take a second medical expert to analyze Dr. Sack's deposition and the first EMG to determine that the median nerve damage was indicated in the test, and meanwhile Mr. Allen had no reason to lose faith in Dr. Sack. There is no lack of diligence in this regard.

Under some circumstances, medical evidence such as Mr. Allen's follow up EMG and medical diagnosis, which were developed after summary judgment, is accepted by the court for consideration on review or reconsideration. The issue of latent medical evidence was made clear in *Jamie L. Stanek v. United States of America* (November 17, 2005, 399 F.Supp2d 1025), where "The court further agreed with decisions of other circuits that 'a known injury can worsen in ways not reasonably discovered by the claimant and his or her treating physician'" (claim id at 688-89 (interim quotations omitted)). This case also states "The court also agreed with the Eighth Circuit that "[a]n unforeseen worsening of a known injury may constitute 'newly discovered evidence' or 'intervening facts' under § 2675(b)" (id. At 739-40). In the instant case, "The key symptom of [complex regional pain syndrome] is continuous, intense pain out of proportion to the severity of the injury (if an injury has occurred), which gets worse rather than better over time "Thus, it appears to be a crucial key in the diagnosis of the syndrome that a period of time after the initial injury has passed. Such a diagnosis may be "newly discovered evidence" under § 2675(b)".

As with the plaintiff's post summary judgment medical submission "The evidence is material because it is probative of the extent of the injury or disability during the relevant period." Kemp v. Wienberger, 522 F.2d 967, 969 (9th Cir.1975)."

Medical evidence presented within the Plaintiff's 60(b) motion clearly establishes that Mr. Allen's condition gradually continued to deteriorate from the original handcuff nerve injury in June of 2003 through 2006. It is now apparent from the medical diagnosis that this increase in the severity of Mr. Allen's injury was due to the incorrect reorganization of nerves that were severed during the handcuff injury. "While, as a general rule, a new trial will not be granted upon the ground of newly discovered evidence which is merely cumulative, yet such rule has its exceptions, and should not be invoked where its application would tend to defeat the accomplishment of substantial justice." Brennan v. City of Seattle 39 Wash. 640, 81 P. 1092 Wash. 1905

Shortly after being injured by Brian George's use of excessive force, Mr. Allen sought Washington State Department of Social and Health Services (DSHS) assistance in part because he was limited in his ability to use his hands and this condition affected his ability to work. DSHS assistance was sporadic but ongoing from a period shortly after his handcuff injury through the time of summary judgment. [cp 323]

Mr. Allen transferred his DSHS case in September 2005 to the Olympia DSHS office as he had moved to live in the dormitory at The Evergreen State College in Olympia. At DSHS request, near the end of September 2005, Mr. Allen provided the Olympia DSHS office with his first EMG study of June 2005 along with other medical records. DSHS contacted Mr. Allen in December of 2005 [cp 278] and directed him to

Dr. Lynn Staker. Dr. Staker was to make a determination regarding his inability to use his hands, the degree to which the condition remained, and how that would affect Mr. Allen's ability to gain employment. [cp 331]

During his visit to Dr. Staker on December 27th of 2005, [cp 336] Dr. Staker examined Mr. Allen's first EMG data from June 22, 2005 and determined that Allen's handcuff injuries were serious and possibly permanent. The results of that visit were that Dr. Staker notified DSHS of his diagnosis and recommended Mr. Allen repeat the EMG and nerve conduction study to determine if his nerve injuries were permanent. [cp 331]

Mr. Allen next called Dr. Jennifer Carl's office December 28th 2005 stating that Dr. Staker directed him to repeat the EMG and nerve conduction study to determine if the handcuff injury was indeed permanent.. Dr. Carl's office assistant set an appointment for January 19th 2005 to repeat the EMG and nerve conduction study.

As directed by DSHS, through Dr. Staker, Dr. Carl performed the second EMG 1/19/06 study and determined that Mr. Allen's injury was serious and permanent. [cp 282] After review of the second EMG test, Dr. Staker found that Mr. Allen's handcuff injuries were significant and permanent. [cp 336]

Washington courts have established the courts acceptance of evidence as newly discovered when the following conditions being met; (1) the new evidence will probably change the outcome of the case if a new trial is granted; (2) the evidence was discovered since trial; (3) it could not have been discovered before trial by exercise of due diligence; (4) the evidence is material to the issue; and (5) it is not merely cumulative or

impeaching." State v. Hobbs, 13 Wash.App. 866, 538 P.2d 838, Wash. App. Div. 2, July 09, 1975.

Applying the five tests required for relief of summary judgment on the basis of Newly discovered evidence are, 1) any reasonable jury would conclude that the Dr. Staker's medical diagnosis of the EMG evidence is clear and conclusive and would be considered crucial to Mr. Allen's claim; 2) the issue of permanency of Mr. Allen's injury was discovered after summary judgment; 3) Determination of permanency required an initial discovery of damage to Mr. Allen, followed by a reasonable amount of time to see if the injury would "heal with time"; 4) the newly discovered evidence is material to Mr. Allen's claim of excessive force by the defendant(s) because the extent of the injury and could not have been known until Mr. Allen sought additional testing from his doctor upon his injury's taking a turn for the worse and consulting social services for assistance; 5) the evidence is not cumulative by way of issues of "extent" of the injury.

Standing as a layman, and not as a medical expert, Mr. Allen could not have known prior to summary judgment that his injuries from handcuffing could be deemed permanent until Dr. Staker consulted him and directed him, on December 27, 2005, to get a second EMG and nerve conduction study as part of a DSHS directive. "To warrant a new trial the evidence must not have been known to the movant at the time of the trial; and, moreover, the movant must have been excusably ignorant of the facts, i.e., the evidence must be such that it was not discoverable by diligent search." 6A Moore's Federal Practice para. 59.08(3), p. 59-100 (1984). Mr. Allen clearly had no opportunity

to know what the DSHS doctor, Dr. Staker, would determine when he would review the June 22, 2005 EMG study.

Through the time of summary judgment Mr. Allen had been repeatedly told by his hand specialist, Dr. Sack, that his handcuff injury was minor and should go away with time. [cp 319] Clearly Mr. Allen was excusably ignorant of the facts that lay buried in the highly technical EMG study that was commissioned by Dr. Sack in June of 2005.

Again, the validity of the serious nature of Mr. Allen's hand injuries were confirmed by the second EMG, to which both Dr. Carl and Dr. Staker were of the opinion that Allen's nerve injuries to his hands were serious and permanent. [cp 431]

Dr. Staker directed that a second EMG was performed on Mr. Allen by Dr. Jennifer Carl on January 19, 2006 to determine if the denervation injuries would be considered permanent. The conclusions from the second or follow-up EMG test on January 19, 2006 were as follow:

"Needle EMG again shows enlargement, polyphasicity and rapid firing of motor units in the right and left median innervated APB muscles in the hand, but not in median innervated muscles of the forearm. The EMG changes are indicative of past partial denervation and subsequent motor unit reorganization due to past median nerve injury at the wrist based their presence in the hand but not the forearm...There is also EMG evidence of past partial denervation and subsequent motor unit reorganization in the right ulnar innervated FDI muscle of the hand but not the forearm. There is no evidence of recurrent or ongoing focal right ulnar nerve compression. Taking these findings and those of 06/22/05 into account, it can be deduced that, on a more probable than not basis, there was injury to the right ulnar nerve at the wrist causing permanent nerve fiber damage which occurred no later than 03/05." [cp 282]

As a consequence of this then more recent and extensive neurological testing and analysis ordered by DSHS and Social Security Administration medical doctors, the

forgoing agencies determined September 25th, 2006 that Mr. Allen was permanently disabled from his June 2003 handcuff injury, and they have awarded Mr. Allen benefits and subsistence accordingly.

The question before this court is whether due diligence would have discovered the injury to Mr. Allen was permanent in nature, the basis of the November 18th, 2005 Haberly decision, and just when such a determination of Allen's permanent injury was in fact discovered. Mr. Allen diligently did everything that he was instructed to do by his doctor. He had sought out a had specialist shortly after his hand cuffing injury and had followed all treatment and testing procedures as hew was directed by his doctor. It is not reasonable to expect a patient to abandoned his treating physician without good cause.

Mr. Allen could not have known that his injuries could be permanent as he had been examined by Dr. Sack three times in the period June 2003 to March 2005 during which time Dr. Sack was not able to accurately diagnose Allen's condition. Dr. Sack prescribed no drugs or therapy for Allen's condition, and repeatedly informed Allen that his injuries were not major and further stated that his condition should improve with time.

[cp 319]

On January 19, 2006 a second test was undertaken by Dr. Jennifer Carl at the request of Dr. Staker in which she diagnosed Mr. Allen's denervation injuries to be permanent, two months after the original Summary Judgment of November 18th, 2005.

Abuse of Discretion by the Trial Court in Summary Judgment

Authority of Review

Appellate review of a motion for Summary Judgment is De Novo.

“Consequently, upon the presentation of newly discovered evidence or case law, the trial court may exercise its discretion to reconsider issues previously raised in a summary judgment motion.” State v. Scott, 92 Wn.2d 209, 212, 595 P.2d 549 (1979).

In considering whether to grant a motion to vacate, a trial court "should exercise its authority 'liberally, as well as equitably, to the end that substantial rights be preserved and justice between the parties be fairly and judiciously done.' " Griggs, 92 Wash.2d at 582, 599 P.2d 1289 (quoting White v. Holm, 73 Wash.2d 348, 351, 438 P.2d 581 (1968)).

Background and Discussion

In awarding Summary Judgment to the Defendant, Judge Haberly stated in her November 18th, 2005 ruling in this matter "...looking at the evidence in the light most favorable to plaintiff here, as to the extent of the injury, besides his testimony, there is medical testimony in the record that is unrebutted that this was a minor injury, and the court will grant summary judgment to the defendant." (emphasis added)

"As the moving party, defendants initially had the burden of establishing that plaintiff did not sustain a serious injury within the meaning of Insurance Law § 5102(d) (see, Gaddy v. Eycler, 79 N.Y.2d 955, 956-957, 582 N.Y. 2d 990, 591 N.E.2d 1176, Richards v. Toomey, 221 A.D. 2d 754, 755, 633 N.Y.S. 2d 946) Once defendants have met this burden, plaintiffs must, in order to successfully oppose the motion for summary judgment, set forth " 'competent medical evidence based upon objective medical findings

and diagnostic tests to support [their] claim * * * [because] subjective complaints of pain * * * absent other proof [are] insufficient to establish a ‘serious injury’” Tankersley v. Szesnat, 235 A.D.2d 1010, 1012, 653 N.Y.S. 2d 184 quoting Hawkey v. Jefferson Motors, 245 A.D. 2d 785, 786, 665 N.Y.S. 2d 766)” [Evans v. Hahn 255 A.D.2d 751, 680 N.Y.S.2d 734 (1998)]

In the instant case Mr. Allen deposition indicates not only indicates pain but chronic numbness, spasm, cramping, and at the time of the hand cuff injury swelling and contusions. The time of injury testimony from Dr. Kent Smith and Gary Olford also support and demonstrate injury other than “complaints of pain”

“Extent of injuries may be considered, for purposes of excessive force claim under <section> 1983 in connection with an arrest, in determining whether the force used was reasonable under the facts and circumstances of a particular case.” U.S.C.A. Const.Amend. 4; 42 U.S.C.A. <section> 1983. (Supreme Judicial Court of Maine, Karen RICHARDS v. TOWN OF ELIOT et al. No. Y0R-00-405.)

There were no written finding of fact or conclusions of law issued by Judge Haberly to discern what the basis of here ruling, which leave open the possibility that she did not consider the extent of injury when judging the defendant George’s use of excessive force in Mr. Allen’s 1983 claim.

There also remained significant material facts in dispute in this case, and at the time of summary Judgment. Any reasonable jury would draw inferences from the outstanding factual disputes in this matter which would lead to a judgment for the plaintiff. There is clear dispute in the record relating to; when, where, and how many times the Plaintiff

requested relief from excessively tight handcuffs²; whether the handcuffs were properly installed initially, whether the Defendant re-inspected the handcuffs for proper tightness and application; whether the length of time plaintiff was left handcuffed was excessive; and whether injury to plaintiff's hands and wrist which remained 2 years later inhibiting his ability to use his hands constitute significant injury.

Plaintiff further argues the trial court abused its discretion in initially awarding summary judgment to the Defendant as the trial court trivialized his injury and disregarded his testimony and his witness, and the medical testimony from the emergency room physician. Further the trial court provided no written findings of fact or conclusions of law supporting Summary Judgment to the Defendant.

As the Habery Court did not place weight to significant issues of fact in this matter, and excluded the Plaintiffs evidence from consideration while summary judgment should have been viewed in a light most favorable the Plaintiff, and filed no written findings of fact or law, the trial court award of summary judgment for the defendant was based on untenable grounds and was an abuse of discretion.

New Case Law Controlling

Authority of Review

Appellate court has authority to review Under CR 60(b) (11). The court may relieve the plaintiff from summary judgment "for any other reason justifying relief"

² Within his taped testimony during the WSP investigation Cadet Trooper George contradicts himself with regard to how many times Plaintiff complained about excessively tight handcuffs and thus discredits himself.

“Consequently, upon the presentation of newly discovered evidence or case law, the trial court may exercise its discretion to reconsider issues previously raised in a summary judgment motion.” State v. Scott, 92 Wn.2d 209, 212, 595 P.2d 549 (1979).

“In considering whether to grant a motion to vacate, a trial court "should exercise its authority 'liberally, as well as equitably, to the end that substantial rights be preserved and justice between the parties be fairly and judiciously done.' " Griggs, 92 Wash.2d at 582, 599 P.2d 1289 (quoting White v. Holm, 73 Wash.2d 348, 351, 438 P.2d 581 (1968)).

Background and Discussion

The day before the hearing on plaintiffs 60(b) motion for Relief of Summary Judgment, but after briefing materials had been submitted, Plaintiff discovered Patrick v. Vrablic, 2005 U.S. Dist. LEXIS 30275 (E.D.Mich. Nov. 16, 2005), 2005 WL 3088346 (E.D.Mich.) where the United States District Court decided, two days prior the Summary Judgment Order in the instant case, a nearly identical handcuff injury case.

Patrick v. Vrablic was brought to summary judgment parallel in time with the instant matter, Allen v. George. However, in Patrick v. Vrablic the U.S. District court establishes a new standard, or threshold, of injury and circumstance beyond which an excessive force handcuff injury claim would survive Summary Judgment. It is clear that in the instant case Mr. Allen meets or exceeds those standards with or without the newly discovered evidence, and should thus be granted relief accordingly.

In Patrick v. Vrablic police officer handcuffed the plaintiff and the plaintiff suffered nerve damage to this hands and wrists alleging the use of unreasonable and excessive force

in his Forth Amendment 1983 claim for use of excessive force. Defendant claimed qualified immunity and moved for summary judgment. Summary judgment was denied on all basis as the U.S. District Court established the standard for considering Fourth Amendment excessive force claims relating to handcuff injuries.

In Patrick v. Vrablic the standard for injury relating to handcuffing is that the injury simply must be demonstrated, and not necessarily be “serious” It has always been the plaintiff’s position that his injury was at least “significant” as compared to “minor injury” assessment put forth in summary judgment by the Haberly Court. Further, similar issues of material fact relating to proper handcuffing, complaints of excessively tight cuffs and pain, and length of detention in cuffs, were considered to be significant questions of fact to be left for the jury, which were not in Allen v. George.

Although the Patrick v. Vrablic decision occurred 2 days earlier on November 16, 2005, it was not published in time for summary judgment in Allen v. George. Later on, during the hearing on plaintiff’s 60(b) motion for Relief of Summary Judgment, the plaintiff made repeated efforts to present oral arguments containing Patrick v. Vrablic as new and intervening case law each time Judge Spearman shut down his oral presentation after just a couple of sentences,[rp 2 line 17, p3 line 19, p 4 line 7,p5 line 1,p 6 line 3] thus prejudicing the plaintiff in a abuse of the courts discretion.

In Patrick v. Vrablic, “Plaintiff has proffered more than merely his own testimony of having repeatedly complained to Trooper Vrablic that his handcuffs were too tight as evidence of the use of excessive force. He also has presented evidence of having sustained physical injury. Both Plaintiff’s daughter and his friend, Pat Ragan, testified that the

swelling and scars on his wrist were still visible two to three weeks after his arrest, and photographs taken by Ms. Ragan bear this out. Further, his doctor testified that Mr. Patrick was still suffering from paresthesia and numbness in his right wrist nearly a month later and an electromyograph showed that he suffered from neuropathy and nerve damage which the doctor opined was the result of being handcuffed too tightly at the time of his arrest in early June. This is far more evidence of excessive force than the mere testimony of the plaintiff of having complained about the handcuffs being too tight which was found insufficient in *Nemeckay* to sustain a Section 1983 claim.” *Patrick v. Vrablic*, 2005 U.S. Dist. LEXIS 30275 (E.D.Mich. Nov. 16, 2005), 2005 WL 3088346 (E.D.Mich.)

A Sixth Circuit precedent that has developed in this area since the time of the *Nemeckay* decision. See e.g., *Martin v. Heideman*, 106 F.3d 1308 (6th Cir.1997); *Kostrzewa v. City of Troy*, 247 F.3d 633 (6th Cir.2001); *Neague v. Cynkar*, 258 F.3d 504 (6th Cir.2001); *Burchett v. Kiefer*, 310 F.3d 937 (6th Cir.2002); *Lyons v. City of Xenia*, 417 F.3d 565 (6th Cir.2005); see also *Meadows v. Thomas*, 117 Fed. Appx. 397 (6th Cir.2004); *Grooms v. Dockter*, 1996 WL 26917 (6th Cir.1996) (unpublished opinion; text available on WESTLAW). These post-1995 appellate court decisions further establish that summary judgment in this case would be inappropriate.

In *Martin v. Heideman*, the Court of Appeals reversed the district court's directed verdict in favor of the defendant police officer on the plaintiff's claim that the officer had handcuffed him too tightly. The appellate court found that an issue of fact existed as to whether the officer used excessive force under the circumstances where the plaintiff presented evidence in the form of his own testimony that, after he was handcuffed, he

complained to the officer several times over the course of a 35-minute period-- 20 minutes in the police cruiser and 15 minutes in a holding cell at the police station--that the handcuffs placed on him were too tight and that his hands were becoming numb and were swelling.

Similar to Mr. Allen's injury and circumstance in the instant matter, the plaintiff in *Martin* also presented the deposition testimony of his family physician about the emergency room records on the day after his arrest which showed that the plaintiff complained of a sore wrist and contusions on his right arm, and the deposition testimony of an orthopedic surgeon who had diagnosed the plaintiff as having nerve entrapment neuropathy.

The Sixth Circuit also reversed the district court's grant of summary judgment for failure to state a claim in favor of the defendant police officers in *Kostrzewa v. City of Troy*. In that case the plaintiff pointed to his repeated complaints to the officers that the handcuffs placed on him were too tight and were causing him pain and evidence that when he was taken to the hospital for treatment after being booked, his wrists were extremely swollen, red and painful for which the doctor recommended that his wrists be elevated and that ice be applied to reduce swelling. Based upon the foregoing, the appellate court determined that "there is no question that [the plaintiff] has stated a legally sufficient claim for which relief can be granted." 247 F.3d at 641.

"By contrast, in *Neague v. Cynkar*, the Court of Appeals reversed the district court's denial of the defendant's motion for summary judgment in a handcuffing/excessive force case because of the absence of evidence of physical injury to the plaintiff due to his

being handcuffed by the police. The court explained: This court's opinion in Kain v. Nesbitt, 156 F.3d 669 (6th Cir.1998), supports our view that the handcuffing of a person in the course of an otherwise lawful arrest fails as a matter of law, to state a claim for excessive force. * * * ... We now make explicit what this court in Kain implied: when there is no allegation of physical injury, the handcuffing of an individual incident to a lawful arrest is insufficient as a matter of law to state a claim of excessive force under the Fourth Amendment. *7 258 F.3d at 508. See also, Burchett v. Kiefer, supra ("Our precedents allow the plaintiff to get to a jury upon a showing that officers handcuffed the plaintiff excessively and unnecessarily tightly and ignored the plaintiff's pleas that the handcuffs were too tight." 310 F.3d at 944-45; Lyons v. City of Xenia, supra ("Not all allegations of tight handcuffing, however, amount to excessive force. In order to reach a jury on this claim the plaintiff must allege some physical injury from the handcuffing, and must show that officers ignored plaintiff's complaints that the handcuffs were too tight." 417 F.3d at 575 (citations omitted).) "Patrick v. Vrablic, 2005 U.S. Dist. LEXIS 30275 (E.D.Mich. Nov. 16, 2005), 2005 WL 3088346 (E.D.Mich.)

Summarizing the law extrapolated from the foregoing precedents, in Meadows v. Thomas, the court stated that, for a plaintiff to establish a viable Fourth Amendment claim for excessively forceful handcuffing, he must:

(1) allege that he complained to the officers that the handcuffs were too tight (or that there is evidence to infer that the officers should have known that the handcuffs were too tight); and (2) as a result of being left in handcuffs that were applied too tightly, he

incurs injury to his wrists. Patrick v. Vrablic, 2005 U.S. Dist. LEXIS 30275 (E.D.Mich. Nov. 16, 2005), 2005 WL 3088346 (E.D.Mich.)

In both Patrick v. Vrablic and in Allen v. George the plaintiffs have met the above standard. Therefore, to the extent that Defendant's motion for summary judgment is predicated upon his claim that Plaintiff's excessive force claim fails as a matter of law and fact, and the plaintiffs' motion for Relief of Summary Judgment should have been granted, and yet may be granted under CR 60(b) (11).

Under the doctrine of qualified immunity, a police officer will not be held liable on a plaintiff's claim for civil damages under Section 1983 so long as his conduct does not violate clearly established statutory or constitutional rights of which a reasonable officer in the defendants' position would have known. See Harlow v. Fitzgerald, 457 U.S. 800, 818, 102 S.Ct. 2727, 2738, 73 L.Ed.2d 396 (1982); Kostrzewa v. City of Troy, supra, 247 F.3d at 641.

"The Sixth Circuit has held that the right to be free from excessive force, including "excessively forceful handcuffing," is a clearly established right. See, Martin v. Heideman, supra, 106 F.3d at 1313; Kostrzewa v. City of Troy, supra; Walton v. City of Southfield, 995 F.2d 1331, 1342 (6th Cir.1993). As explained by the Kostrzewa court, When making a qualified immunity analysis, it is important to remember that the defendant is, in essence, saying: "If the plaintiff's version is credited, what I did, judged today, arguendo would be wrongful, but at the time I acted, no reasonable officer would have known he was acting wrongfully." As this circuit has analyzed the qualified immunity issue in excessive force

cases, the question of whether the reasonable officer would have known his conduct violated clearly established constitutional rights can be answered by the initial inquiry of whether the officer's use of force was objectively reasonable. It is clear from this circuit's analyses in various excessive force decisions that, having concluded that the right to be free from excessive force is clearly established, whether we grant qualified immunity in a particular case depends upon whether the officer did, in fact, use excessive force. (i.e., force that was not objectively reasonable). To put it another way, if there is a genuine issue of fact as to whether an officer's use of force was objectively reasonable, then there naturally is a genuine issue of fact with respect to whether a reasonable officer would have known such conduct was wrongful. ... *8 247 F.3d at 641-42 (citations omitted). See also *Martin v. Heideman*, supra (where a genuine issue of fact exists as to whether the defendant police officer used excessive force in handcuffing the plaintiff, it is error to grant the officer qualified immunity. 106 F.3d at 1313).” *Patrick v. Vrablic*, 2005 U.S. Dist. LEXIS 30275 (E.D.Mich. Nov. 16, 2005), 2005 WL 3088346 (E.D.Mich.)

As in *Martin* and *Kostrzewa*, in this case a genuine issue of fact exists as to whether Defendant George’s handcuffing of Plaintiff amounts to excessive force. This same factual issue precludes summary judgment on qualified immunity grounds.

CONCLUSION

By the time the cuffs were finally removed from Mr. Allen at the Poulsbo Police station, Mr. Allen had suffered approximately one hour and 20 minutes in handcuffs without any relief from the pain and swelling caused by WSP Cadet Brian George improperly applying them. Due to the injuries caused by excessive force and prolonged handcuffing at the hands of Brian George, Mr. Allen has suffered permanent nerve injuries to his hands and is presently only able to type, write, or perform other repetitive tasks for a matter of minutes before his hands cramp up, develop nerve pain, and spasms.

From the time of his hand cuff injury and through the present day Mr. Allen is frequently suffers from nerve pain and is unable to use his hands any extended period of time. Quite clearly, Mr. Allen's handcuff injury has made him unemployable in his principal field of occupation, Information Technologies. Mr. Allen has been recently classified as permanently disabled because of his handcuff injury by DVR, DSHS, and now the Social Security Administration.

Plaintiff has demonstrated that the trial court abused its discretion when it issued an order awarding summary judgment when significant issue of fact remained unsettled and the court disregarded the plaintiff's testimony and evidence.

Plaintiff has further demonstrated that the trial court clearly abused its discretion when it issued an order dismissing plaintiff's 60(b) motion for relief from judgment when the trial court demonstrated that it was not sufficiently aware of the facts and argument submitted in briefs to rule, and severely restricted plaintiff's attempts to make his oral presentation which included recently discovered and intervening case law.

Trial court has abused its discretion and newly discovered evidence and intervening case law presented by the plaintiff demonstrates that the court should re-open judgment in this matter on the basis of rule 60(b), relieving the Plaintiff from summary judgment previously ordered for the Defendant, and remand this case for jury trial.

For all of the reasons stated above, Mr. Allen prays that this Court will grant relief from summary judgment which was granted in favor of the Defendant, so as to provide Mr. Allen satisfaction of a jury trial.

Respectfully Submitted,

_____ DATED _____, 2007

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DATED May 18, 2007

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IN THE COURT OF APPEALS FOR THE STATE OF WASHINGTON
DIVISION II

PATRICK ALLEN,
Plaintiff/Appellant,
vs.
BRIAN GEORGE, et al.,
Defendants/Appellees.

NO. 35815-8-II

PROOF OF SERVICE

07 MAY 18 PM 3:17
STATE OF WASHINGTON
DEPUTY
COURT CLERK
KATHLEEN M. HARRIS

I Patrick Allen, declare under penalty of perjury of the laws of the State of Washington that I am a citizen of the United States of America, over the age of 21 years, and competent to be a witness herein.

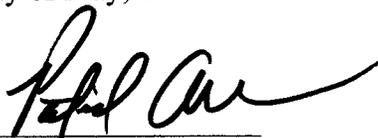
That on the 18th day of May, 2007, I deposited in the United States Mail, First Class, postage prepaid, copies of the following documents:

APPELLATE'S BRIEF

Addressed to:

Kenneth Orcutt
Attorney General of Washington
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7141 CLEANWATER DR. SW
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DATED at Poulsbo, Washington, this 18th day of May, 2007.



Patrick Allen
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