

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

FILED
United States Court of Appeals
Tenth Circuit

APR 14 1989

JIMMY ALLEN, Personal Representative
of the estate of Shirley Tinsley,

Plaintiff-Appellant,

v.

CITY OF ALBUQUERQUE, SOUTHWEST
COMMUNITY HEALTH SERVICES, doing
business as Kaseman Presbyterian
Hospital, RICHARD GOMEZ, TROY
BALDONADO, EDWARD M. SAGER, M.D.,
BERNALILLO COUNTY HEALTH CARE
CORPORATION, doing business as
Albuquerque Ambulance Service,

Defendants-Appellees.

ROBERT L. HOECKER
Clerk

No. 87-1923
(D.C. No. 86-844SC)
(D. N.M.)

ORDER AND JUDGMENT*

Before SEYMOUR and SETH, Circuit Judges, and SEAY, District
Judge.**

**Honorable Frank H. Seay, Chief Judge, United States District
Court for the Eastern District of Oklahoma, sitting by
designation.

Shirley Tinsley filed this action under 42 U.S.C. § 1983
(1982) alleging a deprivation of her right to liberty without due

*This order and judgment has no precedential value and shall not
be cited, or used by any court within the Tenth Circuit, except
for purposes of establishing the doctrines of the law of the case,
res judicata, or collateral estoppel. 10th Cir. R. 36.3.

process based on defendants' conduct in involuntarily transporting and admitting her to the hospital. She further claimed defendants used excessive force in returning her to the hospital and detaining her against her will. She also brought pendent state claims for false imprisonment, assault and battery. The defendants in this action are the City of Albuquerque (City), Richard Gomez and Troy Baldonado, police officers, the Southwest Community Health Services d/b/a Kaseman Presbyterian Hospital (Kaseman Hospital), Edward Sager, the treating physician, and Bernalillo County Health Care Corporation d/b/a Albuquerque Ambulance Service (Albuquerque Ambulance).

The claims against the various defendants were resolved as follows:

On the Due Process Issue § 1983:

The court directed a verdict for Dr. Sager and Albuquerque Ambulance.

Summary judgment was given to Kaseman Hospital.

This claim against the police officers and the City was submitted to the jury which held for those defendants.

On the Liberty Claim:

Directed verdicts were entered for the defendants against whom the claim was directed.

On the Constitutional Unreasonable Force Claim:

The court entered directed verdicts for each defendant.

On The False Imprisonment, Assault and Battery Claims:

These issues were submitted to the jury and it returned a verdict for each defendant.

Mrs. Tinsley appeals the district court's entry of summary judgment in favor of Kaseman Hospital, and its granting a directed verdict on any of the § 1983 claims. She also alleges that the district court committed error in giving improper jury instructions on several of the claims.

We have examined the record and we must conclude that under the prevailing doctrines the trial court was correct in directing verdicts for all the parties on the unreasonable force claim. In brief, there was no evidence of force sufficient to support this claim to submit it to the jury.

In *Hewitt v. City of Truth or Consequences*, 758 F.2d 1375, 1379 (10th Cir.), we said:

"Factors relevant to whether the use of force is excessive are the relationship between the amount of force used and the need presented, the extent of the injury inflicted, and the motives of the state officer. Force inspired by unwise, excessive zeal amounting to an abuse of official power that shocks the conscience, or by malice rather than mere carelessness, may be redressed under section 1983." (Citations omitted.)

See also *Trujillo v. Goodman*, 825 F.2d 1453 (10th Cir.), and *Wise v. Bravo*, 666 F.2d 1328 (10th Cir.). Again, as we said in Hewitt, at 1379:

"We need not decide how egregious police conduct must be to rise to a substantial denial of due process. Wherever that line may be drawn, the conduct complained of here simply is not an abuse of power condemned by the Constitution." (Citation omitted.)

As mentioned, the jury ultimately found for all the defendants on the assault and battery and the false imprisonment claims.

As to the basic § 1983 claims, the record contains no evidence as to color of state law, *Adickes v. S. H. Kress & Co.*, 398 U.S. 144, to permit this issue to go to the jury as to Dr. Sager and Albuquerque Ambulance. The § 1983 claims as to the City and the police officers did go to the jury, as mentioned, and the jury found for these defendants. We must conclude that considering the instructions as a whole there were none given and no omissions which would have prejudiced plaintiff's case.

The issue relating to the New Mexico Health Emergency Commitment statute, N.M. STAT. ANN. § 43-1-10 (1978), was significant. However, the only objection plaintiff made at the proper time during trial as to this instruction was that the instruction omitted "important sections of the statute." Based on our review of the record, the instruction adequately stated the law as it applied to the facts of this case. Those portions of the statute Mrs. Tinsley claims should have been included were not relevant to this case.

The plaintiff also objects to instructions as to the use of a consent form she signed, but we find no error. We find no proper objection to an omission from a damage instruction of specific expenses for ambulance and medical bills. We have examined this issue but must conclude that the record contains no proper

objection to the instructions which could serve as a basis for this issue on appeal.

AFFIRMED.

Entered for the Court

PER CURIAM