

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA - WESTERN DIVISION

HONORABLE ANDRÉ BIROTTE JR., U.S. DISTRICT JUDGE

DOMINIC ARCHIBALD AND)
NATHANAEL PICKETT, I, AS)
INDIVIDUALS AND AS SUCCESSOR)
IN INTEREST TO NATHANAEL H.)
PICKETT, II, DECEASED,)

PLAINTIFFS,)

vs.) No. CV 16-1128-AB

COUNTY OF SAN BERNARDINO, ET)
AL.,)

DEFENDANTS.)

REPORTER'S TRANSCRIPT OF PROCEEDINGS

FRIDAY, SEPTEMBER 14, 2018

11:36 A.M.

LOS ANGELES, CALIFORNIA

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1 LOS ANGELES, CALIFORNIA; FRIDAY, SEPTEMBER 14, 2018

2 11:36 A.M.

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4 THE CLERK: Calling ED CV 16-1128-AB, Dominic
5 Archibald versus County of San Bernardino, et al.

6 MR. GALIPO: Good morning, Your Honor.
7 Dale Galipo on behalf of plaintiff, Dominic Archibald, who
8 is present today.

9 MS. LE: Hang Le on behalf of plaintiff,
10 Dominic Archibald.

11 MR. CONAWAY: Bob Conaway on behalf of
12 Mr. Pickett.

13 MR. OWENS: Stephen T. Owens on behalf of the
14 defendants, County of San Bernardino and Kyle Hayden Woods.

15 MS. GARCIA: Good morning, Your Honor.
16 Christy Garcia on behalf of the defendants.

17 THE COURT: All right. So correct me if I am
18 wrong. Mr. Owens and Miss Garcia, this is your first
19 appearance in this matter; correct?

20 MR. OWENS: That's true, Your Honor.

21 THE COURT: Welcome. And before I let the --
22 greetings to Miss Archibald and Mr. Pickett. I see you in
23 the audience as well.

24 I have issued a tentative on the defendants'
25 motion for a new trial or remittitur or altering the

1 judgment. So have the parties had a chance to review the
2 tentative? I will start with the plaintiffs.

3 MR. GALIPO: Yes, we have.

4 THE COURT: From the defense?

5 MR. OWENS: Yes. Briefly, Your Honor.

6 THE COURT: Do you need more time to review it?
7 We can take a recess if you need more time.

8 MR. OWENS: No, I don't need more time.

9 THE COURT: With that, I have got some questions.
10 And I, obviously, will allow both sides to be heard as it
11 relates to any other issues either side wishes to present.
12 So I don't know if -- who has drawn the short straw from the
13 defense? Is it Mr. Owens or Miss Garcia? Who is going to
14 take questions from the Court?

15 MR. OWENS: It will be me with assistance from
16 Miss Garcia.

17 THE COURT: If you could step to the lectern,
18 please. I have a few questions for you.

19 MR. OWENS: Yes, Your Honor. Thank you.

20 THE COURT: So I guess this is somewhat of a
21 procedural question in the sense that you are challenging
22 the adequacy of the evidence. Okay? And I thought the
23 standards under Rule 50 and 59(a) required to consider the
24 evidence that supported the verdict.

25 But in your papers, at least, my sense was there

1 was somewhat of a selective citation to the evidence that
2 weighed in the defense favor.

3 So I guess I would like to just hear your thoughts
4 as to what was the thought process in doing that because
5 certainly the evidence that you cite came in at trial, but
6 there was a lot of other evidence that also came into the
7 trial. And so, I guess, ultimately are you suggesting that
8 I ignore that evidence or not?

9 MR. OWENS: No, I'm not suggesting -- we're not
10 suggesting that the Court ignore any evidence that was
11 properly admitted at trial. But, on the other hand, given
12 the fact that, at least, as far as Ms. Garcia and I were
13 concerned, that time was pressing and the page limits and so
14 forth were in issue, and I had every confidence that
15 plaintiffs' able counsel would bring forth the evidence that
16 they did bring forth. But I'm not suggesting that the Court
17 ignore the contrary evidence -- that is, the evidence
18 contrary to our position.

19 THE COURT: All right. So I appreciate that.

20 Walk me through, if you could -- one of the issues
21 I talk about in the tentative, did you raise this clearly
22 established prong element of qualified immunity? Did you
23 preserve that to raise that in this motion?

24 MR. OWENS: Yes, Your Honor.

25 THE COURT: Tell me how.

1 MR. OWENS: Yes. I am glad you started there
2 because that's where I wanted to start.

3 THE COURT: I'm glad I am able to accommodate you.

4 MR. OWENS: No. I am just glad I am able to, kind
5 of, focus on where the Court's going or has issues.

6 Yes, Your Honor, under the Rule 50(a) motion that
7 we filed, I think it's important the timing here.

8 This Rule 50(a) motion for JMOL was filed on
9 March 12th, 2018. The Kisela case, Kisela versus Hughes,
10 was decided by the Supreme Court the following month in
11 April 2018; and we did raise the issue in the 50(a) motion.

12 The Court quotes in its tentative, which I read
13 and, obviously, a lot of time and thought went into it, and
14 I appreciate that, but the tentative quotes only one
15 sentence of the paragraph.

16 The paragraph is on page 14 of the Rule 50(a)
17 motion, and it does cite Harlow versus Fitzgerald. It also
18 cites Wilkins versus City of Oakland.

19 It certainly could be said correctly that we
20 didn't belabor the issue, but, on the other hand, it is a
21 well-established proposition. I mean, the Harlow versus
22 Fitzgerald case was decided in 1982.

23 So it's hardly new law that law enforcement
24 officers are shielded from suit unless clearly established
25 statutory or constitutional rights of which a reasonable

1 person would have known indicate otherwise.

2 And as I mentioned a moment ago, a month after
3 this motion was made on behalf of the defendants, the U.S.
4 Supreme Court came down with the Kisela case which really
5 added some clarity to the scope of the qualified immunity
6 defense. And so naturally we hit that much harder in the
7 Rule 50(b) motion because we felt that was new law,
8 obviously, and we thought it very important to emphasize
9 that to the Court.

10 But I don't think it's correct to say that the
11 reasonable -- reasonably established, clearly established
12 statutory or constitutional rights issue was not raised in
13 the Rule 50(a) motion. That would be my response to that.

14 THE COURT: All right.

15 MR. OWENS: Now, with regard to -- and I know time
16 is short --

17 THE COURT: Look. This is an important case. I
18 am here. So I will let you know if we -- when there is no
19 more time.

20 MR. OWENS: All right. I appreciate that.

21 With regard -- my point is regardless of how much
22 time the Court is kind enough to allow or not. It's not my
23 proposal to repeat what's already set forth in the papers.
24 And so I am going to refrain from doing that.

25 But I did want to emphasize or at least respond to

1 the waiver argument on the -- with respect to the 50(a)
2 motion and the fact that the Kisela case came down a month
3 later.

4 Now, the -- and that is relevant because the
5 tentative on page 8 does assert or state that the defendants
6 had waived that issue as to whether the relevant law had
7 been clearly established.

8 Now, that same case, the Kisela versus Hughes
9 case, is also -- and I know I am going to jump now to the
10 Rule 59(e) motion because we're talking about Kisela. And
11 as the Court correctly states, of course, correctly in its
12 tentative, says there are four grounds upon which a
13 Rule 59(e) motion may be granted, and the fourth ground
14 cited is there is an intervening change in controlling law.

15 I think that's very important because we do assert
16 that Kisela versus Hughes constitutes an intervening change
17 in controlling law.

18 THE COURT: Tell me why you believe -- is it
19 really new law?

20 MR. OWENS: I think that the -- I think that they
21 make very clear -- the Court made very clear that immunity
22 of law enforcement officers is to be construed very, very
23 carefully and very broadly in the sense that, unless there
24 is existing precedent on the existing facts of a particular
25 case that indicate to the officer acting in the heat of the

1 moment and making a split second decision that his or her
2 conduct is patently unreasonable, that that officer is, in
3 fact, entitled to qualified immunity.

4 THE COURT: It seems to me that -- doesn't that
5 ignore the totality of the facts in this case? This case
6 was not only about the ultimate unfortunate killing of
7 Mr. Archibald but what about the stop, the detention, and
8 the Fourth Amendment rights?

9 MR. OWENS: The stop was not, as the plaintiffs
10 have asserted, was not a detention and it certainly not a
11 seizure.

12 THE COURT: That's what you think. Is it fair to
13 say that the jury agreed in that? My memory is a little
14 fuzzy on this. Did the parties agree to that point?

15 MR. OWENS: I don't think -- I wasn't at the
16 trial, but I don't think the parties agreed on much of
17 anything other than there was a death. And, obviously, I
18 agree with the Court that that's unfortunate, to say the
19 least.

20 But my point is that the original stop was a
21 consensual encounter. Deputy Woods did not throw him up
22 against the squad car and say, "Put your hands behind your
23 back," and put the cuffs on him. He pulled the cruiser
24 over, and he got out, and he engaged Mr. Pickett in
25 conversation.

1 And he asked, "Is it okay if I pat you down?"

2 Mr. Picked said, "No," and so Deputy Woods did not
3 pat him down, and so on and so forth.

4 But getting back to the point that I really want
5 to emphasize, in Kisela versus Hughes, as the Court said,
6 "In other words, immunity protects all but the plainly
7 incompetent or those who knowingly violate the law."

8 And then it goes on. It says, "Thus police
9 officers are entitled to qualified immunity unless existing
10 precedent squarely governs the specific facts at issue."

11 And I don't think that either of those two
12 propositions that I read apply here. I don't think that the
13 evidence established that Deputy Woods was, quote, "plainly
14 incompetent," and I don't believe that there was any
15 evidence that he knowingly violated the law.

16 In fact, the video -- and I watched the video a
17 number of times myself -- the video showed that, when
18 Mr. Pickett fell to the ground, he rolled over on his back,
19 Mr. -- Deputy Woods pulled out the Taser.

20 Did he tase him? No, he didn't tase him. He
21 could have, but he knew from regulations and from his
22 training that to tase somebody in a frontal position could
23 injure the eyes, the heart, and other -- so he didn't. He
24 put the Taser away.

25 That does not indicate to me, based on the

1 evidence that every one at the trial saw, that this was an
2 officer that was acting in knowing violation of the law or
3 acting incompetently.

4 THE COURT: What's your response that I assume
5 Mr. Galipo or someone from the plaintiffs' side will
6 reference? If my memory serves me correctly, I think
7 Officer Woods stated during the trial that he had been
8 punched numerous times by Mr. Pickett but the photographic
9 evidence suggested or at least put that into large question
10 and then the video didn't show any, sort of, evidence of
11 Mr. Pickett using -- punching him as frequently as
12 Mr. Woods -- in fact, there is no evidence in the video of
13 Mr. Pickett punching Deputy Woods.

14 I recognize there was a skip in the video, but
15 even if you take that skip into account, which was maybe a
16 second, I thought Deputy Woods said he was hit in excess of
17 10 times or I thought it was -- it might have even been as
18 high as 20 times.

19 How does that factor into the analysis? I mean,
20 it raises some credibility questions that ultimately get
21 into arguably the deputy's competence and ultimately his use
22 of force, doesn't it?

23 MR. OWENS: Well, there was controverted evidence,
24 yes. Deputy Woods testified one way, and this -- not
25 terribly clear. In fact, I didn't find it very clear at

1 all, and as the Court just acknowledged, there was a skip in
2 the video. You know, it -- that video is not a full -- it's
3 not complete, and it's not a fully reliable record of what
4 actually occurred. I will leave it at that.

5 But I think that it's important to recognize that
6 the Kisela case sets a very, very, very high burden before
7 the Court can deny a law enforcement defendant the qualified
8 immunity defense. And I believe that, in this case, that
9 Deputy Woods is definitely clearly entitled to invoke the
10 qualified immunity defense and that he properly did so.

11 With regard to some of the other issues here in
12 the tentative, I want to take exception to -- if I might,
13 excuse me, Your Honor.

14 THE COURT: Take your time.

15 MR. OWENS: Thank you. You are very indulgent.

16 -- I want to take exception to the fundamental
17 point that we raised in the new trial motion, the Rule 59
18 motion. And that has to do with this -- what I have
19 attempted to call a free floating \$7 million.

20 THE COURT: All right.

21 MR. OWENS: I think that really goes to the heart
22 of this. The plaintiffs wanted a Bane Act jury instruction.
23 They got a Bane Act jury instruction.

24 They put forth in the special verdict a claim for
25 Mr. Pickett's damages, quote, "for his loss of enjoyment of

1 life and for his predeath pain and suffering." That was
2 Question 1 in the special verdict form for damages, clearly
3 applicable to Mr. Pickett, the decedent, and clearly
4 applicable under the Bane Act.

5 And as we pointed out in the papers back in April,
6 on April 4th, 2018, the plaintiffs were urging the Court to
7 treble those Bane Act damages awarded to Mr. Pickett.

8 The Court was spot on when it said, "No, I can't
9 do that because this is in gross. It's a \$7 million award
10 rendered in gross against," not the Court's words, those are
11 my words, but "against both Deputy Woods and the County.
12 And since these are arguably punitive in nature, that is the
13 trebling aspect. I can't impose those against the County so
14 that -- properly so under Government Code 818." So the
15 Court refrained from doing that, properly so.

16 Now here we are months later, and the plaintiffs
17 say, and they say it quite clearly in their papers, they
18 say, "No, no, no. Those aren't Bane Act damages. Those are
19 1983 damages, those -- that \$7 million."

20 Well, there is a problem with that because, first
21 of all, that's not the position they took at trial. The
22 Bane Act was presented to the jury as a civil rights
23 violation that -- violation of the decedent's civil rights.
24 That's what was presented to the jury.

25 Also presented to the jury was Ms. Dominic

1 Archibald's claims for the wrongful death and also
2 Mr. Pickett, Sr.'s claims.

3 THE COURT: As relates to that, aren't the Bane
4 Act and the 1983 Act, aren't they the same?

5 MR. OWENS: The standard is the same, but the
6 party entitled to raise them is fundamentally different.

7 THE COURT: Okay. Let's play this out for a
8 second. If I did what you are suggesting, we parsed out the
9 question, wouldn't that be inviting error in the sense that
10 there could be multiple recoveries? I mean, if we put a
11 question for the Bane Act, for 1983, and they came out with
12 five and eight, couldn't there be a question as to what the
13 jury was thinking about in awarding those? Or are you
14 suggesting that that's what the Court should have done, done
15 a separate line item on the verdict form for both the Bane
16 Act and the 1983?

17 MR. OWENS: Well, no, that's not exactly what I'm
18 suggesting. What I am suggesting is -- and this is a
19 disputed issue of law in this case. What I'm suggesting,
20 what I'm stating flatly is that the Bane Act, as courts have
21 said, is not a wrongful death statute. It is not.

22 And the courts that have addressed it, both state
23 and federal, have consistently stated that family members
24 are not entitled to sue for the death of their loved one
25 under the Bane Act, and that's what we have here.

1 Now, they cite Chaudhry. Let's talk about
2 Chaudhry. The Ninth Circuit was very, very clear in
3 Chaudhry to differentiate between who were the plaintiffs in
4 that case. There were Mr. Chaudhry's parents,
5 Mr. Chaudhry's siblings, Mr. Chaudhry's estate, and then a
6 number of nonfamily plaintiffs, organizational plaintiffs.

7 The Court never said -- first of all, Chaudhry has
8 nothing to do with standing. The word is not even used in
9 the decision. So it's no support for the proposition that
10 decedent's parents can sue under the Bane Act for damages.
11 That's not an issue in Chaudhry.

12 But what is interesting in Chaudhry is the
13 plaintiff parents did not sue under the Bane Act. It was
14 the estate. The estate is a different legal entity than the
15 parents. That's quite obvious.

16 If I die at this lectern, my parents are not --
17 they're not co-extensive with my estate. My wife and my
18 three children probably are going to inherit my estate.
19 It's a separate entity with its own creditors and its own
20 beneficiaries. So it's just fundamentally wrong to say that
21 Chaudhry says the parents are -- the successors-in-interest
22 can sue under the Bane Act. That's not what it says.

23 And I think it's fundamentally an error to simply
24 say, "Oh, well" -- I'm not suggesting this was the Court's
25 thought process. I am speaking colloquially. I have too

1 much respect for the Court as is reflected in this tentative
2 ruling and its other rulings.

3 But one could characterize it as I think the
4 plaintiffs do more or less. They say, "Well, what the heck.
5 If it's not Bane Act damages" -- which they concede they're
6 not entitled to recover. They conceded that. They said,
7 "What the heck. It's wrongful death damages under 1983. So
8 let's just split it fifty-fifty and call it a day." No.
9 No.

10 The standard, the standard for 1983 damages and
11 Bane Act may well be co-extensive. But the parties entitled
12 to raise the issues of Bane Act or 1983 are not the same.
13 That's my point.

14 THE COURT: Okay. Thank you.

15 MR. OWENS: All right.

16 THE COURT: Anything further?

17 MR. OWENS: Well, yes, Your Honor. Give me a
18 moment because I don't want to be redundant --

19 THE COURT: Take your time.

20 MR. OWENS: Thank you. I don't want to skip
21 things either.

22 (Brief pause in the proceedings.)

23 MR. OWENS: It's just following up on that point,
24 and then I think I am going to let it rest. But I do want
25 to state that, if I don't address it here at the lectern, I

1 don't mean to waive any other points that we've raised in
2 our papers. I think that's clear.

3 But the net effect of what the plaintiffs' amended
4 judgment would do is to say jury made an award of
5 6.5 million wrongful death damages to Dominic Archibald,
6 \$2 million wrongful death damages to the father,
7 Mr. Pickett, Sr.

8 And by taking this -- that's what the jury
9 decided. The jury decided that -- made that award. We
10 think it's excessive. We've argued that the 6.5 million is
11 excessive, but I'm not going to belabor that point. That's
12 something for the Court to consider, and I am sure the Court
13 has.

14 But by taking the Bane Act damages of 7 million
15 and just divvying them up fifty-fifty and then treating them
16 as though they're additional wrongful death damages has the
17 effect then of raising what the jury awarded, 6.5 -- now we
18 are up to 10 million for Ms. Archibald, and we're up to
19 5.5 million for Mr. Pickett.

20 Well, that's not what the jury decided. That
21 wasn't presented to the jury that way. And as I just
22 mentioned at some length, they don't have the right, they
23 don't have the standing under the law to seek those damages
24 that -- in that fashion.

25 So that's one thing that I think is just -- cries

1 out for the Court to consider because that's not what --
2 that's not consonant with what the jury actually considered
3 and what it awarded, and I think we can all agree that what
4 it awarded was quite -- well, it was certainly adequate and
5 sufficient. It doesn't need to be enhanced by 3 million
6 here 3.5 million on this side and 3.5 million on that side.

7 One last thing I would ask the Court please, just
8 as an accommodation, if you will -- we refrained from -- we
9 had submitted a proposed amended judgment together with our
10 moving papers.

11 We refrained from filing objections to the
12 proposed amended judgment lodged by the plaintiffs because I
13 wanted to await the outcome of this hearing today.

14 And what I would ask the Court, just as a
15 professional accommodation, if you will, is I would like to
16 have the opportunity this afternoon now that I have got the
17 tentative ruling to file formal objections to the proposed
18 amended judgment before the Court enters whatever judgment
19 it decides to enter.

20 So if the Court would take the matter under
21 submission for the rest of the afternoon, I would be very
22 grateful.

23 THE COURT: Look. I will do that. That's not an
24 issue although -- well, that's not an issue.

25 MR. OWENS: Well, it's going to pass from my hands

1 to the hands of an appellate specialist if the case proceeds
2 as I assume it will. But I would just like, for want of a
3 better word, I would like my skirts to be as clean as I
4 could make them before the judgment is finally entered.

5 THE COURT: Fair enough.

6 MR. OWENS: I appreciate it, Your Honor.

7 THE COURT: Thank you, Mr. Owens.

8 Mr. Galipo, are you going to address the Court at
9 this time?

10 MR. GALIPO: Yes.

11 THE COURT: I assume you have much to say. I
12 guess one area just, to start it off, I seem to recall we
13 went back and forth at length on this issue with the
14 Probate Code and that -- the parents being
15 successors-in-interest. Is my memory off on that?

16 MR. GALIPO: Let me address that because I think
17 counsel may be a little bit confused about the law that
18 relates to that. Maybe having done this so many times, it's
19 a little more clear to me.

20 The \$7 million are the survival damages, not
21 wrongful death damages. Those are recoverable under the
22 federal claims without question. And they found in favor of
23 the plaintiff on all four federal claims.

24 And I think counsel is confusing survival damages
25 with wrongful death damages. And it's very clear under the

1 law that the successors-in-interest, in this case the
2 parents because he was not married or had no children or the
3 estate, has standing to bring claims for survival damages
4 under federal law and also has standing to bring the
5 Bane Act which is technically a survival claim under state
6 law.

7 So there is no question they have standing. There
8 is no question those damages were appropriately awarded.
9 There is no question they're supported by the finding on the
10 liability of all four federal claims.

11 They also found on the Bane Act, but it clearly --
12 the predeath pain and suffering and the loss of enjoyment of
13 life are clearly recoverable under the federal law. And
14 it's surprising because, as I read their initial motions, I
15 don't even know if there was an attack on the \$7 million at
16 all. The only thing I read was that somehow the wrongful
17 death damages should be remitted to 3.5, and it appeared
18 that they never even read Miss Archibald's trial testimony
19 in the second phase.

20 So does that answer the Court's question on that?

21 THE COURT: It does.

22 MR. GALIPO: It's very clear, and with respect to
23 the Court's tentative, it's obviously very well reasoned and
24 thought out.

25 THE COURT: Even a broken clock is right twice a

1 day.

2 MR. GALIPO: Right. And I just want to make a few
3 comments.

4 THE COURT: Yes.

5 MR. GALIPO: First of all, as the Court pointed
6 out, not only was there substantial evidence to support all
7 the claims in the damage awards, but the evidence was
8 extremely compelling in this case, having handled many
9 cases.

10 And I think as you recall, Your Honor, we filed a
11 motion for summary judgment. The evidence was so
12 compelling, and I think this honorable Court encouraged the
13 parties at various stages to try to settle this case.

14 That's number one.

15 Number two is the credibility of Deputy Woods was
16 so questioned on so many material points that the jury may
17 have disbelieved his entire testimony. So for the defense
18 to argue, well, qualified immunity should somehow apply,
19 first of all, I think they waived it -- we agree with the
20 Court -- in their Rule 50(a) motion. I think it's waived,
21 and I think that's very important, and we're hoping it's
22 part of your final ruling. It's part of your tentative
23 ruling.

24 Secondly, I mean, from everything from "He looked
25 at me five or ten times" to "he kind of glanced at me, I saw

1 him running and hop the fence" to "Okay. I never saw that,"
2 to being punched 10 or 20 times full force in the face --
3 and there wasn't one frame on the video -- their own video
4 expert looked at every frame, not one punch and not one sign
5 of visible injury.

6 And then the touching the gun was so weak they
7 literally abandoned that when they got him back up on
8 redirect and closing argument. And the only two possible
9 explanations were being knocked out or him grabbing the gun,
10 and I think it was clear that neither one of those happened.

11 THE COURT: I think in addition -- I am just
12 looking through some of my notes in the file -- there was a
13 lot of testimony about the thought that Mr. Pickett was
14 under the influence. There was very, at least to me, very
15 little evidence to support that and no follow-up questions
16 about narcotics evidence. And, again, I am just trying to
17 look at --

18 MR. GALIPO: Right.

19 THE COURT: -- pull up some of this -- there was a
20 lot of issues clearly with Deputy Woods's testimony.

21 MR. GALIPO: It started as a consensual encounter
22 because there was no reasonable suspicion, but it elevated
23 into a detention where Nate wanted to go and the deputy
24 didn't let him go.

25 There was clearly no reasonable suspicion. There

1 was abundant evidence on that on every single issue from the
2 name to the intoxication. He claims he didn't see dilated
3 pupils for five or seven minutes, never asked him a question
4 about it.

5 I mean, every single point was so strongly opposed
6 and the credibility -- and we would ask perhaps for part of
7 your finding that the credibility of Deputy Woods was very
8 much in question based on the evidence presented.

9 The verdict form, this is something submitted by
10 both sides and agreed upon. I mean, any claim --

11 THE COURT: We spent a lot of time. There was a
12 lot of fighting back and forth, if my memory serves me
13 right, about this verdict form.

14 MR. GALIPO: The jury instructions, the verdict
15 form, if anything, we would submit would be waived with
16 respect to that as well.

17 Dividing damages, it makes no sense at all. I
18 think the way it was done was entirely appropriate.

19 They haven't hit on the Batson challenge issue,
20 but I would say two things. This Court correctly used its
21 discretion. And it should be noted that this Court was here
22 and able to judge body language, credibility -- everything
23 going on.

24 It was also particularly noted that defense
25 counsel asked that juror no questions on voir dire and the

1 Court granted that opportunity. But more importantly, as
2 the Court pointed out, and we would ask that this be part of
3 your final decision in this case, any error -- and there
4 wasn't any -- would clearly be harmless.

5 In this case, you had the unanimous verdict on
6 every single claim; the punitive damage entitlement question
7 and no contributory negligence at all, zero, on Nate's
8 part -- that's how compelling --

9 THE COURT: With a -- original decision that was
10 quite large.

11 MR. GALIPO: Right.

12 THE COURT: I think, at least from this Court's
13 opinion, I think the jury was sending a message that this
14 conduct was just not acceptable.

15 MR. GALIPO: Right. And so, I mean, to even
16 discuss qualified immunity under the context of this case is
17 somewhat offensive because if you are going to apply it to
18 this case, then we might as well not even have 1983
19 litigation. Because the facts of this case, if you assume
20 and take all reasonable inferences in the plaintiffs' favor
21 and in support of the verdict, the conduct was so far below
22 what we would want or expect of a reasonable police officer.

23 I also don't think this Kisela case is any new law
24 at all. It's not a new law. We cited in our case the law
25 that's been around and even similar-type cases than this --

1 even Deputy Woods himself admitted, "If he wasn't grabbing
2 my gun and I wasn't passing out," based on his training it
3 would be inappropriate to shoot him, and I think it was
4 pretty clear from the evidence that neither one happened.

5 Regarding the proposed amended judgment, we are in
6 agreement with the Court that that one amendment should be
7 made.

8 I am quite frankly a little wary about counsel now
9 wanting to contact appellate counsel to lodge some type of
10 written objection that we then may need to respond to and so
11 on and so forth.

12 I think any objections, any filings, now was the
13 time or before today. And if he has a particular objection,
14 he could state it on the record.

15 I quite frankly am not comfortable with the
16 thought of getting appellate counsel involved. I don't know
17 the scope of what their objections are going to be.

18 It might be an attempt to raise issues that
19 haven't been properly raised before, and I think that's
20 inappropriate, and then we're in a spot to have to address
21 it.

22 So at least, from our position, I don't think that
23 should be permitted. If counsel has a specific thought or
24 objection, I think he should voice it now.

25 So in short, we agree with the tentative. We

1 think the evidence, quite frankly, is overwhelming to
2 support the verdict on liability and damages; and we also
3 would suggest there has been a lot of waver on the other
4 side with respect to verdict form, with respect to qualified
5 immunity, and with respect to several of the other
6 arguments. So unless the Court has any questions of me,
7 that would be my comment.

8 THE COURT: I don't think I have any additional
9 questions.

10 Mr. Owens, I will allow you one final opportunity
11 to be heard, if you like.

12 MR. OWENS: Thank you, Your Honor. I will be
13 brief.

14 Starting with the -- the argument that I was
15 confused -- and I don't take offense at that. I have been
16 confused before in life. That's for sure. But I'm not
17 confused because the case that we cited -- one of the cases
18 we cited for the proposition that I tried to articulate was
19 *Bresaz versus County of Santa Clara* 136 F.Supp.3d 1125.
20 It's a Northern District of California case, 2015.

21 In that case, there was a death by -- at the hands
22 of police officers. The wife who was identified in the
23 opinion as the successor-in-interest to the decedent was
24 ruled not to have standing, not to have the right to recover
25 under the Bane Act.

1 So the idea that, well, because Mr. Pickett
2 wasn't -- the decedent wasn't married, that his parents --
3 had no offspring, that his parents would, therefore, be the
4 successors-in-interest and, therefore, entitled to recover
5 under the Bane Act is -- it's contrary to established law.

6 THE COURT: Let me ask you this, if you will
7 indulge me.

8 MR. OWENS: Yes, of course.

9 THE COURT: If the Court finds that the parents
10 have no standing under the Bane Act -- okay? -- how would
11 that change the judgment?

12 MR. OWENS: Good question. That goes to the heart
13 of my argument here. The jury was presented with a Bane Act
14 violation.

15 THE COURT: And a 1983 violation. Or not?

16 MR. OWENS: Yes. But when you look at how the
17 Number 1 in the special verdict form is worded here, it's
18 worded as "for his loss of enjoyment of life and for his
19 predeath pain and suffering."

20 Now, that is -- that is not 1983 language. That's
21 presented as though his civil rights were violated under the
22 Bane Act.

23 And do you know what's interesting is that
24 immediately following the Bane Act instruction in the jury
25 instructions, we go straight to the deputy's conduct and so

1 forth. So there was clearly a linkage in the mind of the
2 jury that, oh, okay. When we talk about, you know,
3 Nathanael Pickett in his loss of enjoyment of life and
4 predeath pain and suffering, we're talking about Bane Act
5 damages.

6 I think it's fundamentally wrong to, first of all,
7 redesignate the damages than redesignate or redefine the
8 source of those damages and, then, to reassign or reallocate
9 to whom those damages go. It's just one error after
10 another.

11 There is no estate here that can bring -- that --
12 they could have actually. I don't know why they didn't. In
13 Chaudhry, they had an estate that brought a Bane Act claim,
14 and the Ninth Circuit said "okay." But that's not what we
15 have here.

16 THE COURT: Let me ask, if I could, Mr. Owens.
17 What should that question have read? How should it have
18 been rephrased?

19 MR. OWENS: I'm not quarreling so much with the
20 question as with the judgment and the way that the -- you
21 got -- when you think about it, you would say, okay. They
22 come in, they say, in April. "Bane Act damages, treble
23 them. We get 21 million on this 7 million. It's
24 21 million."

25 We come back, we say, "No, no, no, no. You don't

1 have standing to seek these damages under the Bane Act."
2 Now they come in on their opposition, they say, "Oh, those
3 aren't Bane Act damages. Those are 1983 damages and they're
4 not particular to Mr. Pickett or his estate, they can be --
5 as survival damages they can go to the mother and the
6 father."

7 And it's all -- it's all this free floating
8 7 million is kind of like funny money, and I don't think
9 it's correct, and I don't think it's supported by the case
10 law.

11 I refer the Court again to the Bresaz case where
12 they dealt with the wife as designated as
13 successor-in-interest, said, "No." You don't get to bring
14 that kind of derivative liability under the Bane Act. It's
15 personal to the individual.

16 THE COURT: All right.

17 MR. OWENS: All right. Anyway, waiver, Mr. Galipo
18 mentioned waiver. Waiver is -- and I won't belabor the
19 point, but the Court well knows waiver is a concept that's
20 predicated on prejudice to the other side. Mere delay does
21 not constitute waiver. It has to be delay coupled with
22 prejudice or some reliance.

23 And here what we have is we have them saying the
24 judgment that was entered in May can't stand, it's got to be
25 corrected, it's got to be amended. They asked for it. We

1 asked for it.

2 I say this now throws the door open, not my
3 request but their request as well, throws the door open for
4 discretion by the Court.

5 And the case they cite which we repeat in our
6 reply papers, they even cite a case for that proposition --
7 that is, that at this point it's in the hands of the Court
8 to refashion a judgment that is supported by the evidence
9 and can withstand scrutiny on appeal.

10 I don't think there is any basis for saying, "Oh,
11 well, there is waiver," and blah, blah, blah. We're both
12 here seeking -- that is, both sides here are seeking an
13 amendment, a modified judgment.

14 Of course, we have different views about how it
15 should be modified, but there is no waiver. I am not here
16 begging three months later for a change and they're saying,
17 "no, no, no, stand fast on the judgment entered." It's not
18 that situation. Okay. I made that point.

19 THE COURT: Before you move to your last point, I
20 guess your comments suggest to me -- both sides cited the
21 case. I read the case -- that the Court can fashion the
22 judgment that it believes appropriate based on the evidence
23 that would withstand scrutiny, which is what I did.

24 MR. OWENS: I --

25 THE COURT: You don't like it, and that's fine,

1 but I guess the only reason why I raise it is that the case
2 law seems to suggest that I can alter or amend the judgment
3 consistent with the evidence to make it withstand this, you
4 say, scrutiny. So what's wrong with that?

5 MR. OWENS: I agree with that.

6 THE COURT: Okay.

7 MR. OWENS: I am just very respectfully suggesting
8 that the additur really -- we're thinking about
9 remittitur -- but it's really to take the \$7 million and say
10 3.5 here and 3.5 there is wrong.

11 I am not going to belabor the 6.5 million wrongful
12 death. That's in the papers. It's in the evidence. The
13 Court will make its decision on that.

14 I am emphasizing, though, that I don't think the
15 reallocation and the redesignation, the recharacterization
16 of what the \$7 million was awarded for by the jury, I don't
17 think that's correct. I don't think that will withstand
18 scrutiny.

19 Now, the last point I want to make -- I don't want
20 to be misunderstood. I'm not asking -- I'm not going to
21 contact appellate counsel. Appellate counsel has already
22 been retained months ago by the County. I tell this Court
23 right now and opposing counsel I have no intention of
24 contacting appellate counsel.

25 All I am saying is I would like the afternoon to

1 scurry back to my office and formalize the objections rather
2 than stand here at the microphone, as Mr. Galipo has invited
3 me to do, and recite them into the record. I can do that,
4 but it would be a lot more convenient --

5 THE COURT: I have a heavy calendar this
6 afternoon. It's unlikely I will get an order out before the
7 close of business. I will let you file your objections that
8 you feel are appropriate.

9 MR. OWENS: Thank you.

10 THE COURT: This case raises a lot of issues on
11 both sides. I want to make sure the record is clear. The
12 Ninth Circuit may ultimately disagree with one or more
13 things that we have done in this case, and I will leave that
14 up to them, but I want them to have as full a record as
15 possible.

16 Having said that, I will encourage again -- and
17 maybe I am speaking to the wrong messenger here -- this case
18 should settle. I've said it repeatedly. This case should
19 settle.

20 You weren't at the trial. I know you read the
21 transcript, but being here and seeing the witnesses and, you
22 know, sort of, arguably poster child looking deputy just did
23 not go over well, and I think this jury spoke loudly and
24 clearly.

25 I recognize, whether it's my reputation or my own

1 anecdotal, sort of, information in dealing with these police
2 shootings in and around the city of Los Angeles, that there
3 may be hesitancy to settle these cases. But this case, I am
4 of the belief that this case should be resolved in a manner
5 that both sides -- I would think this case should be
6 resolved in a manner that would be agreeable to both sides.
7 The facts of the case just warrant that.

8 MR. OWENS: I couldn't agree with you more
9 fulsomely. Unfortunately, the people that I believe should
10 hear that message are not here. Those are county officials.

11 THE COURT: I hope you can convey that message to
12 some of those people. Because I see the plaintiffs here. I
13 am not criticizing you for not having the defendants here.
14 So I know they're hearing this. I have not seen any city
15 managers or representatives from the county, and, again, I
16 am not criticizing the defense for not having them here, but
17 I would hope you would convey my message.

18 And you may want to add, for whatever it's worth,
19 I have reviewed hundreds, if not thousands, of
20 officer-involved shooting cases in my prior life. I have
21 been to shooting scene after shooting scene after shooting
22 scene. I have reviewed transcripts, forensic evidence.

23 I think I have got a good handle on these types of
24 cases. I have seen them all. And with that said, I
25 strongly urge the County of San Bernardino to really

1 consider trying to resolve this case.

2 MR. OWENS: I really appreciate your saying that.
3 I am going to immediately order a copy of the transcript on
4 an expedited basis and furnish it to the powers that be with
5 my own cover inviting them to read those pages that the
6 court reporter has just transcribed, and I welcome that, and
7 I thank you very much.

8 THE COURT: Thank you, Counsel.

9 This matter --

10 Mr. Galipo, anything further?

11 MR. GALIPO: The last two comments.

12 I think amending the judgment and the issue of
13 waiver with respect to qualified immunity, the clearly
14 established part of it, is apples and oranges. And the law
15 is very, very clear that survival damages are recoverable in
16 this type of case under the constitutional violations that
17 were found by the jury.

18 THE COURT: All right. Thank you all. It's good
19 to see you. Nice to meet you all from the County this time
20 around.

21 The matter will remain under submission until the
22 Court issues its final ruling. Like I said, it's unlikely
23 that that will occur until at least early next week. So
24 have a wonderful weekend, everyone.

25 MR. GALIPO: Thank you, Your Honor.

1 THE CLERK: All rise. This Court is in recess.

2 (Proceedings concluded at 12:24 p.m.)

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CERTIFICATE

I hereby certify that pursuant to Section 753,
Title 28, United States Code, the foregoing is a true and
correct transcript of the stenographically reported
proceedings held in the above-entitled matter and that the
transcript page format is in conformance with the
regulations of the Judicial Conference of the United States.

Date: September 26, 2018.

/S/ CHIA MEI JUI _____

Chia Mei Jui, CSR No. 3287

MR. CONAWAY: [1] 3/10 MR. GALIPO: [14] 3/5 4/2 19/9 19/15 20/21 21/1 21/4 22/17 22/20 23/13 24/10 24/14 34/10 34/24 MR. OWENS: [38] MS. GARCIA: [1] 3/14 MS. 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