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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

JAMES MUNIZ,

Plaintiff and Respondent,

v.

CITY OF LOS ANGELES et al.,

Defendants and Appellants.

B265763

(Los Angeles County  
Super. Ct. No. BS149872)

APPEAL from a judgment of the Superior Court for the County of Los Angeles. Joanne O'Donnell, Judge. Affirmed.

Michael N. Feuer, City Attorney, and Kjehl T. Johansen, Deputy City Attorney, for Defendants and Appellants.

Stone Busailah, Michael P. Stone, Muna Busailah and Stephen Chulak for Plaintiff and Respondent.

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## **SUMMARY**

The Los Angeles Police Department's Board of Rights (the board) found police sergeant James Muniz (plaintiff) guilty of "fail[ing] to provide adequate supervisory oversight during the arrest/detention" of Alesia Thomas, who died in police custody. The board demoted plaintiff to Police Officer III. Plaintiff sought a writ of mandamus ordering the City of Los Angeles and Chief of Police Charles Beck (defendants) to set aside the board's decision.

The trial court, exercising its independent judgment as it was required to do, concluded the board's findings were not supported by the weight of the evidence. The court therefore granted the writ, ordering defendants to set aside the board's decision and restore plaintiff to his status as sergeant with full back pay.

Our review is limited to determining, from an examination of the record before the trial court, whether substantial evidence supports the trial court's findings. It does, and so we affirm the judgment.

## **FACTS**

This case arose from events that occurred during a six- or seven-minute period on July 22, 2012, and culminated in the death of Ms. Thomas while in police custody. The deputy medical examiner ascribed Ms. Thomas's death to "acute cocaine intoxication combined with her physical resistance and struggle with the [police] officers."

The sole issue for this court is whether there is substantial evidence that plaintiff, during the six minutes in question, did what he was supposed to do – that is, he did not fail in his duty to provide adequate supervisory oversight during Ms. Thomas's arrest. The record before the trial court included the following.

## **1. The Background Events**

The Force Investigation Division (FID) of the Los Angeles Police Department (the department) prepared a report dated January 30, 2013, on Ms. Thomas's death (the department's Exhibit 2). The investigative summary describes the events preceding Ms. Thomas's death.

At about 1:30 a.m. on July 22, 2012, Ms. Thomas drove her two children, 12 and three years old, to the police station, told them to go inside, and left. After various inquiries, Officers Derrick Ybarra and Warner Carias were dispatched to Ms. Thomas's residence, with the understanding they might need to detain and arrest her for child endangerment.

Ms. Thomas admitted them to her second-floor apartment, and Officer Ybarra questioned her about why she had left the children at the station. She said she could no longer take care of them and the 12-year-old was too much for her. Ms. Thomas was fidgety, wide eyed, sweating and appeared to be looking for something. She eventually located a set of keys and said she was leaving. Meanwhile, Officer Carias had reported by telephone to the station, and had been instructed to take Ms. Thomas into custody.

When the officers tried to detain her, Ms. Thomas pulled away and a struggle ensued. Officer Ybarra caused Ms. Thomas to trip, and all three of them fell forward, with Officer Carias landing on top of Ms. Thomas. The struggle continued with Ms. Thomas on the floor and both officers trying to place her in handcuffs. She continued to resist, but they eventually succeeded in handcuffing her and placing her in a seated position on the landing outside her apartment. At 2:16 a.m., Officer Carias requested a supervisor to respond because of the use of force.

About five minutes later, plaintiff arrived, responding to the request for a supervisor. After obtaining the officers' account of what had happened, plaintiff directed them to take Ms. Thomas to the station. She was "still non-compliant," and the officers had to lift her by her arms to her feet and then carry her down the stairs. After resting at the bottom of the stairs (Ms. Thomas was more than six feet tall and weighed about 230 pounds), they walked her to the passenger side of their police car.

Plaintiff monitored the officers as they carried Ms. Thomas down the stairs. Then he preceded them to the car, and activated the car's video system, which included a camera and microphone in the rear seat, where Ms. Thomas was to be placed. The officers opened the rear passenger door and tried to put Ms. Thomas in the car, but she began to kick at the door frame and the door, preventing them from getting her in the car.

Plaintiff decided the officers would need help, and at 2:38 a.m., he requested an additional unit to respond. Two minutes later, Officers Mary O'Callaghan and Jonathan Chavez arrived, and parked their police car behind the Ybarra/Carias vehicle. At 2:42 a.m., the forward-facing camera in Officer O'Callaghan's car was activated, focused on the area around the Ybarra/Carias police car.

Plaintiff's conduct during the ensuing six minutes or so is the issue in this case – specifically, plaintiff's oversight of Officer O'Callaghan.

For context, the general sequence of events during those six minutes is this: Because Ms. Thomas was kicking, the officers determined to place a hobble around her ankles. Officer Carias did so, but Officer O'Callaghan then had to readjust it

because the hobble could not be secured to the car. Initially, Officer O’Callaghan was on the driver’s side of the car trying to pull Ms. Thomas in while the other officers pushed. When that was unsuccessful, Officers O’Callaghan and Ybarra switched positions, with Officer O’Callaghan trying to get Ms. Thomas in the car from the passenger side. During these efforts, Officer O’Callaghan used “leg and foot thrusts” to push Ms. Thomas into the car. Officer O’Callaghan used profanity numerous times during the efforts to place Ms. Thomas in the car. Plaintiff was observing from a position behind the officers on the passenger side of the car most of the time, and then moved to the driver’s side of the car.

## **2. The Video Evidence**

According to the FID report, the videos from the two police cars were taken to the SID (Scientific Investigation Division), and a detective then “created a picture-in-picture video by editing copies” of the videos. The video evidence in the administrative record consists of an edited video clip, with a full screen view of the interior rear seat of the Ybarra/Carias vehicle (into which Ms. Thomas was placed), and a small inset (superimposed on the full-screen video) showing the Ybarra/Carias vehicle and some of the activity around it.

The video clip in the administrative record – the one viewed by the trial court – is not identical to the video viewed by the board during testimony at the board’s hearing. The trial court accurately described it this way:

“The configuration of the two videos – i.e., one full-screen, the other an inset – does not correspond to the references to the video made by the participants in the Board’s hearing, who speak of a ‘right-hand box’ and a ‘left

box.’ 2 AR 166. The second and smaller video is very dark and unclear. In his closing argument to the Board, [the department’s advocate] stated that ‘Department’s [Exhibit] 1 (the video) is really what tells the whole story.’ AR 262. The video does[] not, however, tell the whole story. The smaller video is so dark and unclear that it does not even depict Officer O’Callaghan’s movements. In addition, the time markers on the video that the Board used to guide witnesses through their testimony concerning the incidents depicted in the video do not correspond to the time markers on Exhibit 1. This further diminishes the evidentiary value of the video, particularly given (1) its lack of clarity and (2) the importance of the time sequencing of the events . . . .”

### **3. The Testimony**

Plaintiff testified before the board, as did Officers Ybarra and Carias. Transcripts of two interviews with plaintiff, two interviews with Officer O’Callaghan, three interviews with Officer Carias, and three interviews with Officer Chavez (a new officer being trained by Officer O’Callaghan) were also placed in evidence. Deputy Chief Robert Green, commanding officer of the South Bureau, testified as to his expectations of his field supervisors and his opinion on plaintiff’s conduct.

To place the testimony in context, we note that the trial court agreed with the board, as do we, that the weight of the evidence supported the finding “that Officer O’Callaghan used her feet and legs to push Ms. Thomas into the car on multiple occasions.” For our purposes, the principal disputed points involve the evidence on whether plaintiff observed or should have

observed all of Officer Callaghan’s “leg and foot thrusts,”<sup>1</sup> and therefore should have intervened to stop her. On these points, the board found plaintiff was in a position to observe Officer O’Callaghan’s conduct and failed to intervene. The trial court, on the other hand, found the weight of the evidence did not support those findings.

We summarize the pertinent testimony in the light most favorable to the trial court’s judgment.

**a. Officer Derrick Ybarra**

Officer Ybarra explained that, after Officers Callaghan and Chavez arrived, Ms. Thomas was hobbled, “and then we attempted to place her in the vehicle.” He was at the sidewalk, and he could not remember where plaintiff was, although he was “around.” Officer Ybarra viewed the videotape, and explained where he was and what he was doing at various points. At one point, he testified the videotape showed plaintiff standing next to him, but could not remember what plaintiff was saying. About 45 seconds later, the right rear passenger door was closed and Officer Carias came over to Officer Ybarra’s (the driver’s) side of the car, where Officer Ybarra was pulling Ms. Thomas into the back seat. At that point, the videotape showed plaintiff next to Officer Ybarra. By then Ms. Thomas’s shoulders and head were outside the driver’s side door, and Officer Ybarra “was attempting to get her in an upward position to be able to close the door . . . .” Officer Ybarra testified he did not believe he needed

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<sup>1</sup> In her interview with the FID, Officer O’Callaghan admitted she used her feet (“I’m using my feet ‘cause she’s [(Ms. Thomas)] kicking at me . . .”), but denied kicking Ms. Thomas.

“more intervention from Sergeant Muniz on how to handle the situation.”

**b. Officer Warner Carias**

Officer Carias also testified while viewing the videotape. At the beginning, he was at the right rear passenger door, “trying to assist in getting her, Ms. Thomas, into the vehicle.” Officer Carias testified that when he initially put the hobble on Ms. Thomas, he did not leave enough slack to secure it under the driver’s side door and prevent Ms. Thomas from kicking. Officer O’Callaghan asked him to help her readjust the hobble, and eventually they were able to do so.

At the rear door, there was not enough room “for two people to be in there to deal with Ms. Thomas,” so Officer O’Callaghan took the lead. On the videotape, Officer Carias heard Ms. Thomas say “I can’t,” but he was not able to hear her at the time; he was positioned “towards the right rear quarter panel and towards the trunk area.” Officer Carias was asked at several points in the videotape whether he heard what Officer O’Callaghan and Ms. Thomas were saying, but he did not remember hearing what they said.

Later, Officer Carias went to the left side of the vehicle, where Officer Ybarra was attempting to pull Ms. Thomas in. He was standing right behind Officer Ybarra, “just monitoring what . . . my partner was doing. Obviously, I couldn’t get in there to assist him because it’s a confined space.” He could see plaintiff from that angle. “I don’t know exactly what he’s doing, but I did know he was standing on the right side of the car, on the sidewalk,” “maybe five feet” from the door. Officer Carias said, “I don’t know exactly if he was just observing or what.” Later,



plaintiff came to the driver's side of the vehicle and spoke to Officer Ybarra, but Officer Carias could not hear what was said.

Officer Carias testified that "at one point [plaintiff] told [Officer O'Callaghan] to stop what she was doing." This occurred "when she was using her foot to try and shove [Ms.] Thomas into the car." "[W]hen he said that," Officer O'Callaghan stopped. Officer Carias testified, "I don't recall if [plaintiff] was on the passenger's side or if he was on the driver's side, but I do recall him making that specific comment." Plaintiff's statement was "[s]omething to the effect of 'That's enough. Stop.'"

Officer Carias testified that while plaintiff was on the passenger side of the car, "he was kind of towards the front, by the front door, off to the side," and the rear door was between the car and him. Plaintiff was watching, and did not appear distracted.

**c. Officer Jonathan Chavez**

Officer Chavez was working with Officer O'Callaghan, who was his training officer. He helped with the initial efforts to get Ms. Thomas into the police car; he was holding her legs while Officer O'Callaghan was trying to pull her in from the driver's side. (Initially, there were three officers trying to put Ms. Thomas in the car feet-first, and it was not working because of Ms. Thomas's size and the limited room.) He did not see any officer using his or her legs to push Ms. Thomas into the car, and he heard no cursing (referred to as "tactical language"). When Officer O'Callaghan was readjusting the hobble, Officer Chavez was standing on the other side of the rear passenger side door, where the front passenger compartment was, "trying to assist her." He saw Officer O'Callaghan use her hand against Ms. Thomas's chest to push her in. He never saw Officer

O'Callaghan use her feet to push Ms. Thomas into the car. (When he was shown the videotape depicting Officer O'Callaghan using her feet, he testified he was focused on securing the hobble in the front passenger door area.) Officer Chavez did not recall seeing plaintiff until after Ms. Thomas "was secure in the vehicle."

**d. Plaintiff**

Plaintiff also testified while the videotape was played. He said he was never more than 10 feet away from the car. At the beginning, he was "to the right near that right rear passenger area," and was "trying to monitor what's going on."

Plaintiff was asked whether he had a vantage point "to see that open area of the door" when Officer O'Callaghan was readjusting the hobble. He replied affirmatively, and said: "I think that when I'm standing out there, I'm picking a spot that's going to allow me to see what's going on, you [know], it's always on – most of the action is always on the passenger's side and not the other side. But I think I'm in a position that lets me see what's best going on over there."

Plaintiff testified there was "constant movement of the officers back and forth" that at times would obstruct his view as they were working on Ms. Thomas. He explained: "That scenario that's going on, it's not stagnant, the officers not merely immobile, they're moving and trying to do stuff that's going on. And this activity that takes place is oftentimes below that back seat area, so if you move to the left to try to look through that rear window, your view of what's going to go on is that upper portion that's in that . . . . [¶] . . . [¶] . . . rear window. And as you come to the side, oftentimes your view is going to be obstructed by either that door that doesn't swing open or the

officers are kind of in the middle of everything. So I'm in that area, I'm never really truly stationary, I'm moving around and moving my head and trying to see what's going on."<sup>2</sup>

As to whether he was standing five to six feet away from the rear door, plaintiff testified: "Five to six feet, I'd have to reanalyze that, because five to six feet away from the door puts me like two to three feet right behind them. I was not two to three feet from them. I think a better estimate was five feet behind whatever officer is there. At that point I become a hindrance to them if I put myself in the mix." He concluded he was "approximately eight feet" from the door.

When he walked up to Officer Ybarra, plaintiff told him "something to the effect that we need to get the feet inside trapped and secured so that they're immobile, and then once that's done, we can come to the driver's side and push her into that car so we can get the door closed, because the feet had been a problem."

Plaintiff was asked when he said "enough" to Officer O'Callaghan (as Officer Carias had testified). Plaintiff answered, "I think it was just within those few seconds right before I made

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<sup>2</sup> When he was interviewed by the FID, plaintiff said: "I'm at the back of that team [(the four officers)], so they are between me and the car. So that's my [vantage] point with pretty much everything. I think during the incident I end up moving to the driver's side maybe once or twice. But I'm always behind somebody. I can't really see exactly what's going on 'cause I don't have a – I don't have a clear line of sight inside there 'cause of the car and the officers." And, "I don't think I ever remained stationary in that like five to six feet. But I would move to try to see what was going on. But I never really found a position where I continually seeing everything. So I'm positioned to move."

the transition from the passenger side and went to the other side.” He did not remember saying “enough”; “what I remember saying is just, “Mary [O’Callaghan], stop.”

When asked, “Why did you say that?” plaintiff replied: “What I seen was that [Officer O’Callaghan] had lifted up her legs and it looked like she was getting ready to block from getting kicked, ‘cause I’d seen this woman kick out and kick her feet out. And in the scenario that was unfolding, to use the feet was going to be ineffective. Our intent is to get her in the car, and I’m just reading into what [Officer Callaghan’s] intent is gonna be, which is to push her in there. [Officer O’Callaghan] didn’t have any success in – success in pushing her in, we’re going to have even less chances of success with the feet. [¶] Because, once again, we don’t have – we can’t grip with her feet. All we can do is body weight or push or whatever. And whatever she had intended was not going to work. So thus, my plan was to go back to the other side and focus in on getting her pulled in and her feet trapped first.” He did not think of his instruction to “stop” as intervention at the time, but “it was just guidance on what to do.” Plaintiff thought Officer O’Callaghan heard him, and thought she complied with the command to stop. When asked how he knew that Officer O’Callaghan heard him, he said, “Because there was no further use of the feet.”

Plaintiff testified: “I knew there was a use of force in there [(the back seat)]. The true extent of it, I didn’t know that, because my vision was partially obscured at times, but I knew these officers were exerting force and pulling and pushing in there, at the very least, their firm grips and body weight. I also knew that at the end of it, I was going to be able to do those required interviews of them individually to get their version of

what happened. And then I also had that camera footage that I know where the camera is situated that it's going to give a view that is the complete opposite of where I was positioned on the outside of the car, so I knew I had a use of force, and I knew I could gather information that I need for that use of force."

Plaintiff was asked: "And is it your testimony that you said 'stop' after [Officer O'Callaghan's] second use of her feet," and he replied: "It was the final time that I seen, because then the feet wasn't used at all after." A board member then asked if there was "any video that [Officer O'Callaghan] used her feet after this?" and the department's advocate said "No." Plaintiff never saw Officer O'Callaghan kick Ms. Thomas, and never saw her feet touch Ms. Thomas.<sup>3</sup>

Plaintiff testified that at one point, he heard Officer O'Callaghan say "'stop fucking kicking, fucking kicking.'" While Officer O'Callaghan used offensive language many times throughout the videotape, plaintiff did not recall hearing any other of her remarks. If he had heard some of the language

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<sup>3</sup> When he was interviewed, plaintiff said that he saw Officer's Callaghan's "foot go in, but I don't know what's going on." He thought she was using her foot as a blocking agent, "to keep from getting hit." He could not see "where the foot goes or what it's doing," because the other officers were blocking his view. "They're both – they're both right in front of me." He saw the foot movement only once, and never saw the foot make contact with Ms. Thomas. "[F]or the most part I never had a truly – truly unobstructed view inside that. The only . . . place I think I would get that is if . . . I was right up in that trunk area and I was peering in to one of the open windows. And I was not doing that. [¶] I was . . . back behind the team monitoring their activities."

Officer O'Callaghan used, "quite surely I would have told her to stop and knock it off."

**e. Deputy Chief Robert Green**

Deputy Chief Robert Green, who had 34 years experience in field operations, testified he was familiar with the incident and had reviewed the videotape. The first five minutes of the videotape was played during Chief Green's testimony. He testified that Officer O'Callaghan appeared to be frustrated and struggling. "[T]here's profanity and then there's some use of force that should be apparent to anybody standing, . . . so at some point, my expectation is that [plaintiff] step up and control it, provide some direction so that the cops don't continue to escalate and get in trouble."

Deputy Green did not know where plaintiff was positioned, because "it's not depicted on the videotape." When asked if Officer O'Callaghan should have been "taken out of the mix" when she used her leg and "appears to kick or push or strike" Ms. Thomas, Deputy Green said: "At the point where she starts to use the type of profanity that she does . . . . At that point it needs to stop, because from there, it will only escalate; so the precursor to the kick is the language." "My expectation[] [is] that [plaintiff] would have intervened before she [Officer O'Callaghan] did something to get her in trouble, which is the physical strikes." But Deputy Green conceded that "that's provided that he heard that," and it was fair to conclude that "[i]f you're behind somebody, you're not necessarily going to be able to hear everything they're saying . . . ." Further, "I can understand not hearing it, I get that completely. But as it starts to escalate, that's when we need immediate intervention . . . ."

#### **4. The Board's Decision**

After the evidence was presented, the board made findings of fact, including these:

“The videotape showed on three separate and distinct occasions Officer O’Callaghan, while standing just outside the rear passenger door of the vehicle, inserted her leg and foot in a forward thrusting motion into the vehicle and into A. Thomas’ leg, upper thigh and groin area in what appeared to be an effort to push her further into the vehicle. There were a total of 11 such leg and foot thrusts that made contact with A. Thomas. The three separate and distinct instances of leg thrusts occurred as follows:

“One, at 3:02 to 3:06 of the videotape police officer Mary O’Callaghan is seen thrusting her leg/foot three times into A. Thomas in an effort to push her further into the vehicle. Sergeant Muniz testified that he did not observe this conduct.

“Two, at 4:36 to 4:41 of the videotape evidence, Officer O’Callaghan is seen thrusting her leg and foot four times into A. Thomas in an effort to push her into the vehicle. Sergeant Muniz testified that he stood between five and ten feet away from the rear of the passenger door of the vehicle. Sergeant Muniz further testified that at approximately 4:34 of the videotape he told Officer O’Callaghan to stop as she raised her leg in what he believed was Officer O’Callaghan’s effort to defend herself from being kicked by A. Thomas. Officer Carias corroborated Sergeant Muniz’ statement.

“Third, the videotape shows that approximately 23 seconds later at 4:56 to . . . 5:01 Officer O’Callaghan is

seen thrusting her leg and foot four times into A. Thomas in another effort to push her into the vehicle. On page 33 of his August 15th interview Sergeant Muniz stated to F.I.D. investigator Detective Greg McKnight that, ‘All I see is arms extended and pushing – grabbing or pushing or whatever they had in front of them,’ end quote. Because Muniz stated he was able to observe Officer O’Callaghan’s arms extending into the patrol vehicle, we believe he also observed or should have observed Officer O’Callaghan thrusting . . . her legs and feet into the vehicle in each of the three instances. The videotape even showed O’Callaghan bracing her arms on the rooftop of the patrol vehicle so as to maintain her balance while she pushed A. Thomas with her foot. We acknowledge that A. Thomas was engaged in some resistance towards the officers. However, this did not justify O’Callaghan’s use of her legs and feet to push A. Thomas.”<sup>4</sup>

After finding these facts, the board cited a provision of the Manual of the department, entered into evidence, which states in part that: “A supervisor shall exercise the control over his or her subordinates necessary to the accomplishment of Department objectives.” The board continued:

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<sup>4</sup> The board’s attribution of plaintiff’s statement that he could see “arms extended and pushing” as specifically referring to Officer O’Callaghan appears to be mistaken. Plaintiff seems to be describing what he saw other officers doing during the time, early on, when Officer O’Callaghan was inside the vehicle on the driver’s side, trying unsuccessfully to pull Ms. Thomas into the vehicle while the others were pushing her from the passenger side.



“Sergeant Muniz was Officer O’Callaghan’s supervisor with respect to the incident involving A. Thomas. The evidence established that by not observing and/or intervening when Officer O’Callaghan thrust her leg and foot into the vehicle, he failed to exercise control over a subordinate to accomplish the Department objectives. Even if Sergeant Muniz told Officer O’Callaghan to ‘stop’ just prior to the second incident, Sergeant Muniz failed to intervene when Officer O’Callaghan engaged in the same a mere 23 seconds later.

“Though much of this case involved Officer O’Callaghan’s use of profanity during the incident, our decision is based upon the repeated thrusting of her leg and foot into A. Thomas, Sergeant Muniz having been in a position to observe such conduct and his failure to intervene.”

After reviewing plaintiff’s personnel records (described as “replete with commendations” and “extremely positive”), and hearing testimony from eight character witnesses (with an “overall consensus . . . that Sergeant Muniz has had a quality 21-year career”), the board concurred with the Chief’s recommendation for demotion. The board summarized: “The Board . . . found that because Muniz stated he was able to observe Officer O’Callaghan’s arms extending into the patrol vehicle, we believe he also observed and should have observed O’Callaghan thrusting her feet or legs into the vehicle in each of the three instances. This raises doubt as to the recollection on part of Sergeant Muniz. We believe that training is not the appropriate remedy for this misconduct.”

## **5. The Trial Court's Decision**

On July 11, 2014, plaintiff filed a verified petition for peremptory writ of mandamus under Code of Civil Procedure section 1094.5.<sup>5</sup> The trial court agreed with the board's finding that Officer O'Callaghan used "leg and foot thrusts" to push Ms. Thomas into the police car. But the court concluded the weight of the evidence did not support the board's finding that Officer O'Callaghan's use of "leg and foot thrusts" was unjustified, and did not support the board's finding that plaintiff observed or should have observed O'Callaghan's foot thrusts and failed to intervene. We pause to note that later (after the trial court's decision in this case) Officer O'Callaghan was convicted of assault by a police officer, a conviction now on appeal (B265928).

Judgment granting a peremptory writ of mandamus was entered on May 19, 2015, and this timely appeal followed.

### **DISCUSSION**

#### **1. The Standard of Review**

The principles of review governing the trial court and this court are well established.

Under section 1094.5, the trial court's inquiry includes whether there was any prejudicial abuse of discretion by the board. (*Id.*, subd. (b).) "Abuse of discretion is established if the [board] has not proceeded in the manner required by law, the order or decision is not supported by the findings, or the findings are not supported by the evidence." (*Ibid.*) When the trial court is authorized by law to exercise its independent judgment on the evidence, "abuse of discretion is established if the court

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<sup>5</sup> Further statutory references are to the Code of Civil Procedure.

determines that the findings are not supported by the weight of the evidence.” (*Id.*, subd. (c).)

This is a case where the trial court was “required to exercise its independent judgment on the evidence.” (§ 1094.5, subd. (c); *Melkonians v. Los Angeles County Civil Service Commission* (2009) 174 Cal.App.4th 1159, 1167 [discipline of public employees affects their fundamental vested right in employment]; *Fukuda v. City of Angels* (1999) 20 Cal.4th 805, 816, fn. 8 (*Fukuda*) [“when a trial court reviews a final administrative decision that substantially affects a fundamental vested right, the court ‘not only examines the administrative record for errors of law but also exercises its independent judgment upon the evidence’ ”].)

“In exercising its independent judgment, a trial court must afford a strong presumption of correctness concerning the administrative findings, and the party challenging the administrative decision bears the burden of convincing the court that the administrative findings are contrary to the weight of the evidence.” (*Fukuda, supra*, 20 Cal.4th at p. 817.) “[T]he presumption provides the trial court with a starting point for review--but it is only a presumption, and may be overcome. Because the trial court ultimately must exercise its own independent judgment, that court is free to substitute its own findings after first giving due respect to the agency’s findings.” (*Id.* at p. 818; see also see *Morrison v. Housing Authority of the City of Los Angeles Bd. of Comrs.* (2003) 107 Cal.App.4th 860, 868 (*Morrison*) [“In exercising its independent judgment the trial court had the power to draw its own reasonable inferences from the evidence and to make its own determinations as to the credibility of the witnesses.”].)

We review the trial court’s findings using the substantial evidence test. (*Fukuda, supra*, 20 Cal.4th at p. 824; *Morrison, supra*, 107 Cal.App.4th at p. 868 [“Where the evidence supports more than one reasonable inference, we are not at liberty to substitute our deductions for those of the trial court.”].)

## **2. The Issues**

Defendants make three arguments on appeal.

### **a. The unreasonable force issue**

Defendants first contend the trial court improperly granted relief based in part on a legal theory not presented to the board: namely, that Officer O’Callaghan’s use of force was justified, so plaintiff had no obligation to intervene.<sup>6</sup>

We need not consider this claim, and consequently have not recited or considered the extensive evidence and argument on whether Officer O’Callaghan’s conduct was justified. The trial court expressly held that, even if the evidence supported the board’s finding the conduct was unjustified, “it does not support the finding that [plaintiff] observed or should have observed all of Officer O’Callaghan’s conduct.” The court also found the evidence did not support the board’s finding that plaintiff was in a position to observe the conduct yet failed to intervene. Accordingly, if there is substantial evidence to support these conclusions – and there is (pt. c., *post*) – we must affirm the trial court’s judgment.

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<sup>6</sup> The trial court disagreed with the board’s statement that, while Ms. Thomas “was engaged in some resistance towards the officers,” her resistance “did not justify O’Callaghan’s use of her legs and feet to push A. Thomas.” The trial court stated it was “not the Court’s role to determine whether Officer O’Callaghan’s conduct was justified or unjustified,” but that the board’s finding was important because if Officer O’Callaghan’s conduct was justified, plaintiff had no obligation to intervene.

**b. Adequacy of the administrative record**

Next, defendants contend plaintiff “failed to provide an adequate record upon which the trial court could fairly decide the case.” This refers to the fact that the video clip in the administrative record is in a format and has time markers different from the videotape used in the board proceedings. Defendants cite the principle that plaintiff is responsible for providing a record of the administrative proceedings adequate to show the board’s findings were wrong. (*Elizabeth D. v. Zolin* (1993) 21 Cal.App.4th 347, 355 [“The [agency] is not required to show it was right. It was up to [the plaintiff] to supply a sufficient record to show the [agency] was wrong.”].) Defendants say the trial court should have either ordered plaintiff to produce a copy of the video in the same format as reviewed by the board, or should have presumed the findings of the board were supported by substantial evidence. (See *id.* at p. 354 [“ ‘[I]n the absence of an evidentiary record, sufficiency of the evidence is not an issue open to question. Rather, we must presume that the findings were supported by substantial evidence.’ ”].)

We reject this claim. First, defendants do not deny that the administrative record plaintiff lodged with the trial court “contained the copy of the video that had been provided by [defendants] to [plaintiff] pursuant to Code of Civil Procedure section 1094.6 (c).”<sup>7</sup> We agree with plaintiff it is “pretty cheeky”

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<sup>7</sup> Section 1094.6 states: “The complete record of the proceedings shall be prepared by the local agency or its commission, board, officer, or agent which made the decision and shall be delivered to the petitioner within 190 days after he has filed a written request therefor. . . . Such record shall include . . . all admitted exhibits . . . .” (*Id.*, subd. (c).)

for defendants to provide plaintiff with a record that it now says “deprived the trial court of the necessary evidence needed to fully and fairly evaluate the Board’s decision.”

Defendants assert they were not aware of the court’s concerns about the video until after its decision. This assertion is unpersuasive. The court told counsel at oral argument that “I have looked at that video 10 times, at least, beginning to end,” and “the problem the Court is having with the video is it doesn’t depict [plaintiff]” – even though several witnesses at the board hearing said it did. Yet defendants did nothing, neither objecting nor submitting the version of the video that the board reviewed.

In any event, defendants do not identify what parts of the videotape, had it been in the format viewed by the board, might have changed the court’s conclusion on the dispositive issue: the evidence whether plaintiff saw or should have seen the leg and foot thrusts used by Officer O’Callaghan and, if he saw, whether he did or did not intervene. There is no doubt the videotape showed that Officer O’Callaghan “used her foot and legs to push Ms. Thomas into the car on multiple occasions” – the trial court so found. But the videotape does not show what plaintiff was able to see and hear from his vantage point – behind four officers trying to place an uncooperative person into the back seat of a car. Defendants do not explain how the videotape viewed by the board would have been probative on that point.

**c. The substantial evidence issue**

That brings us to the dispositive point: defendants’ contention that substantial evidence does not support the trial court’s rejection of the board’s findings that (1) plaintiff observed or should have observed Officer O’Callaghan’s leg and foot thrusts and (2) failed to intervene.

We have recited the evidence at length, including plaintiff's testimony that he did not see Officer O'Callaghan using her feet to push Ms. Thomas, and that his view was blocked by the car door and the constant movement of the officers. (See pp. 10-11, *ante*.) The court found plaintiff's testimony "that he was unable to see what O'Callaghan was doing inside the car to be quite believable." The court noted plaintiff's testimony "gave no appearance of being coached" and no other witness contradicted his testimony.

The court acknowledged that the board "apparently did not believe [plaintiff's] testimony," but declined to defer to the board's credibility finding, noting its responsibility to make its own credibility determination. The court stated the board's justification for discounting plaintiff's testimony was that "[b]ecause Muniz stated he was able to observe Officer O'Callaghan's arms extending into the patrol vehicle, we believe he also observed or should have observed Officer O'Callaghan thrusting . . . her legs and feet into the vehicle in each of the three instances." The court found this "conclusory inference questionable" because of the "extensive evidence that [plaintiff's] view was blocked by the car door and the constant movement of the three [other] officers . . . ."

It is plain to us that substantial evidence supports the trial court's conclusion. Like the trial court, we think it is unreasonable to infer that, because plaintiff at one point could see " 'arms extended and pushing – grabbing or pushing or whatever they had in front of them,' " he necessarily saw or should have seen what Officer O'Callaghan was doing with her

legs and feet “in each of the three instances.”<sup>8</sup> There is simply no evidentiary or logical support for that conclusion, and plaintiff’s testimony is to the contrary.

In the end, defendants’ argument depends on the notion that plaintiff’s testimony was inherently incredible. It was not. The three incidents the videotape shows of Officer O’Callaghan’s foot and leg thrusts last for a few seconds each. Plaintiff had to remain behind the officers to avoid hindering their efforts. Plaintiff was supervising four officers, not just Officer O’Callaghan, and continued to move around in his efforts to observe what they were doing. It is not surprising, much less incredible, that he did not see “each of the three instances” in which Officer O’Callaghan used her feet to push Ms. Thomas. (He did see Officer O’Callaghan raise her leg in the final instance, and told her to stop.)

In a related point, defendants argue that substantial evidence does not support the trial court’s findings “with regard to [plaintiff’s] purported intervention.” This refers to the testimony from plaintiff (and Officer Carias) that plaintiff told Officer O’Callaghan to “stop.” Plaintiff testified that he did so on the one occasion he saw Officer O’Callaghan raise her leg, and

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<sup>8</sup> Defendants point out the board also said the videotape showed Officer O’Callaghan “bracing her arms on the rooftop of the patrol vehicle so as to maintain her balance while she pushed A. Thomas with her foot.” The trial court observed that the video inset (showing the activity around the police car) was “so dark and unclear that it does not even depict most of Officer O’Callaghan’s movements, and thus provides little support for the Board’s inference that [plaintiff] observed or should have observed her movements.” We concur with this assessment of the videotape.



that she complied with the order. But the board found that “[e]ven if Sergeant Muniz told Officer O’Callaghan to ‘stop’ just prior to the second incident, Sergeant Muniz failed to intervene when Officer O’Callaghan engaged in the same a mere 23 seconds later.”

The trial court found the board’s inference that plaintiff failed to intervene was not supported by the evidence. Substantial evidence supports the trial court’s conclusion. As the trial court pointed out, the video does not depict plaintiff’s instruction to stop, so is of no help in determining the timing of the instruction. Plaintiff testified, after viewing the videotape, that he gave the instruction “just within those few seconds right before I made the transition from the passenger side and went to the other side.” (This was at approximately the five-minute mark on the videotape the board used, and is just after the final set of foot and leg thrusts.) Plaintiff was asked specifically if he said “stop” after Officer O’Callaghan’s second use of her feet as shown on the videotape, and replied that “[i]t was the final time that I seen, because then the feet wasn’t used at all after.” And the videotape did not show any further use of Officer O’Callaghan’s feet against Ms. Thomas. The trial court was clearly correct that the board’s finding on this point was not supported by the evidence.

Finally, defendants argue that the court “failed to address the board’s findings that by not observing when Officer O’Callaghan thrust her leg and foot into the vehicle, [plaintiff] failed to exercise control over O’Callaghan.” That is, “even if [plaintiff] did not see O’Callaghan’s use of force against Thomas, he was nevertheless guilty” of failing to provide adequate supervisory oversight, because “he should have placed himself in

a position where he could see her actions . . . .” Defendants conclude that, “[b]ecause the trial court did not address this additional basis for finding Muniz guilty, its findings are not supported by substantial evidence.”

Again, we cannot agree. Defendants’ characterization of the board’s finding is erroneous. The board made no finding that plaintiff should have placed himself in a different position. The board explicitly stated: “*Because Muniz stated he was able to observe Officer O’Callaghan’s arms extending into the patrol vehicle, we believe he also observed or should have observed Officer O’Callaghan thrusting . . . her legs and feet into the vehicle in each of the three instances.*” Further: “[O]ur decision is based upon the repeated thrusting of her leg and foot into A. Thomas, *Sergeant Muniz having been in a position to observe such conduct and his failure to intervene.*” (Italics added.) In short, nothing in the board’s decision faulted plaintiff for not placing himself in a different position, and in any event no evidence was presented to suggest he could or should have done so.

#### **DISPOSITION**

The judgment is affirmed. James Muniz shall recover his costs on appeal.

GRIMES, J.

WE CONCUR:

RUBIN, Acting P. J.

FLIER, J.