“DO I HAVE A CASE?”

Introduction to Section 1983 Litigation: Causes of Action and Defenses

Presented by:

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A. **Section 1983 is a remedy, but not a source of substantive rights**

The Civil Rights Act of 1868, once called The Ku Klux Klan Act, is codified at 42 U.S.C. §1983, or “Section 1983” for short. Section 1983 is not a source of substantive rights—hence, there is no such thing as a “violation” of Section 1983. Rather, Section 1983 merely provides a private right of action against public officials for violations of federally protected rights. In order to assert a Section 1983 claim, it is necessary to assert a violation of federal constitutional rights. While most Section 1983 claims are either filed in federal court or removed there under federal question jurisdiction, state courts have concurrent jurisdiction to hear such cases. *Wyman v. Popham*, 252 Ga. 247, 249, 312 S.E.2d 795 (1984); *Turner v. Giles*, 264 Ga. 812, 814, 450 S.E.2d 421, 424 (1994).

B. **Every Tort is Not a Constitutional Violation**

It has been said that the Constitution is not “a font of tort law.” *Paul v. Davis*, 424 U.S. 693, 701 (1976). An even more familiar axiom is that there is not a remedy for every wrong, and that is certainly the case with the Constitution, which—as amended—sets forth certain enumerated limits on the power of government officials but does not create substantive tort law. Accordingly, not every tort is a constitutional violation. Just because your
client has been injured by the government does not mean that his or her constitutional rights have been violated. In order to make a Section 1983 claim, it is necessary to identify a specific constitutional right that has been violated with resulting injury to your client. Your client can have catastrophic injuries but no cause of action unless the defendant violated a legal duty arising under the Constitution.

C. Typical Causes of Action Recognized by the Constitution

While Section 1983 claims against public officials can arise in many contexts—including employment, education, and regulatory decisions—the cases that are most likely to find their way to a plaintiff’s personal injury lawyer are those involving allegations of police misconduct. Such cases often involve serious injury or death, and thus they are in the comfort zone of many trial lawyers who are not experienced civil rights litigators but find themselves with a substantial personal injury case against the police. For purposes of this case, I will focus on police misconduct claims under Section 1983 and the federal constitutional provisions under which they arise. Keep in mind that there are often pendant state tort claims that can also be pled, and they should be as long as there is a way around state tort law immunity, but that is outside the scope of this paper.
Most police misconduct claims under Section 1983 fall under the following categories:

1. **Excessive force**
   
a. **Fourth Amendment**

   This is the area of police work that is most likely to result in injury to citizens. Claims of excessive force against persons at liberty (as opposed to in a jail or prison context) are evaluated under the Fourth Amendment, which prohibits unreasonable searches and seizures of persons and property. Since the use of physical force, whether deadly or non-deadly, has the effect of seizing one's body, any excessive force is viewed as an unreasonable seizure of the person, which is prohibited by the Fourth Amendment. *Tennessee v. Garner*, 471 U.S. 1, 105 S. Ct. 1964 (1985); *Graham v. Connor*, 109 S. Ct. 1865 (1989). The *Garner* case prohibits the use of deadly force against a fleeing suspect who does not appear to be armed or otherwise dangerous; the *Graham* case held that all excessive force cases involving an arrest, investigative stop, or any other "seizure" of a person at liberty are governed under the reasonableness standard of the Fourth Amendment. That standard is an objective one--in other words, the reasonableness of the force must be judged from the perspective of a reasonable officer on the scene, not
based upon hindsight, and should taken into account that police officers are often forced to make split-second judgments about the amount of force needed.

Because of this language in *Graham*, Defendants will invariably ask for a charge to the jury about how officers are forced to make split-second judgments. Plaintiffs will need to counter this charge by pointing out that officers are trained to make split-second decisions in much the same way that drivers are trained to make split-second decisions about whether to slow down or speed up when a traffic light turns yellow. Most of us accept the fact that if we make a mistake in judgment that injures someone, we are ultimately responsible for the consequences, and accordingly, police officers are not held to any higher standard. Indeed, if the court gives the split-second decision charge for the defendant, then the plaintiff should also request a charge that police officers are not held to a higher standard under the law than anyone else.

There is no precise, mechanical standard for determining what is reasonable. That determination must be made on a case-by-case basis, requiring "careful attention to the facts and circumstances of each particular case, including the severity of the crime at issue, whether the suspect
imposes an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight."
109 S. Ct. at 1872; see also Harrell v. Decatur County, 22 F.3d 1570, 1575 (11th Cir. 1994); Montoute v. Carr, 114 F. 3d 181 (11th Cir. 1997); Priester v. City of Rivera Beach, 208 F. 3d 919, 924 (11th Cir. 2000); and Vaughan v. Cox, 343 F.3d 1323 (11th Cir. 2003).

b. Fourteenth and Eighth Amendments

On the other hand, the use of excessive force against an inmate or prisoner is not a Fourth Amendment seizure because the inmate is not a person at liberty who is being seized.

The Eighth Amendment applies to excessive force claims and conditions of confinement claims brought by convicted prisoners, so the defendants are typically prison guards and administrators rather than police officials per se. Hope v. Pelzer, 536 U.S. 730 (2002); Hudson v. McMillian, 503 U.S. 1 (1992). Under Hudson, the standard for evaluating the use of force under the Eighth Amendment is whether force was applied in good-faith effort to maintain or restore discipline, or maliciously and sadistically to cause harm. Id. At first blush, one would think that excessive force is excessive force whether it occurs on the roadside or in the cellblock, but the
difference in setting between Fourth Amendment and Eight Amendment claims is legally important because of the different constitutional sources of the right that is at issue. The presence of the word “unreasonable” in the Fourth Amendment has led to the development of an objective reasonableness standard for evaluating the constitutionality of force used against free citizens in the course of an arrest, investigatory stop, or other “seizure” of the person, while the phrase “cruel and unusual” in the Eighth Amendment has come to require proof of malice in order to make out a violation.

With respect to the use of force against pretrial detainees, the Eleventh Circuit applies a subjective standard that is based upon the analysis set forth in Johnson v. Glick, 481 F.2d 1028, 1033 (2d Cir.1973), cert. denied, 414 U.S. 1033 (1973), which looks at both the objective reasonableness of the force used in proportion to the threat posed by the offender and whether the force was used in a good faith effort to restore order and discipline or maliciously for the purpose of causing harm. Eleventh Circuit cases have referred to the right of a pretrial detainee to be free from excessive force in terms of a right to be free from “cruel and unusual punishment,” even though the origin of that right is the substantive due process clause of the
Fourteenth Amendment rather than the Eighth Amendment. See, e.g., *Danley v. Allen*, 540 F.3d 1298 (11th Circ. 2008) (jailer’s use of force will necessarily shock the conscience, so as to be excessive and to violate pretrial detainee's Fourteenth Amendment right to be free from cruel and unusual punishment, where force is applied maliciously and sadistically for very purpose of causing harm).

Accordingly, the Eleventh Circuit has come to equate conduct that “shocks the conscience” under the Fourteenth Amendment substantive due process clause with “cruel and unusual punishment” under the Eighth Amendment. I am not aware of any Supreme Court cases that have yet addressed the standard for pretrial detainees, but there is no reason to believe they will be viewed any different that convicted prisoner claims since the same standard have evolved for denial of medical care to inmates under both the Eighth and Fourteenth Amendments (see section below on deliberate indifference to serious medical needs).

2. False arrest

   a. Fourth Amendment

   Like the use of excessive force during the course of an arrest or investigatory stop, an arrest without probable cause constitutes an
unreasonable seizure of the person in violation of the Fourth Amendment that is actionable under 42 U.S.C. §1983. Under the Fourth Amendment, it is axiomatic that the reasonableness of an arrest or other seizure is determined from the standpoint of a reasonable officer under similar circumstances. See, e.g., Pierson v. Ray, 386 U.S. 547 (1967); Reeves v. City of Jackson, 608 F. 2d 644 (5th Cir. 1979); Motes v. Myers, 810 F. 2d 1055 (11th Cir. 1987); see also Tennessee v. Garner, 105 S. Ct. 1694 (1985). As is the case with use of force claims, the reasonableness of an arrest or other bodily seizure turns upon the particular facts, although there are some general principles which provide guidance. For instance, an officer who makes an arrest pursuant to a warrant is typically insulated from liability by the intervening determination of probable cause by the judicial officer issuing the warrant; however, the rule does not apply if the arresting officer knows that the warrant was based upon false information but makes the arrest anyway. Malley v. Briggs, 475 U.S. 335 (1986); Barts v. Joyner, 865 F. 2d 1187 (11th Cir. 1989). Similarly, an officer who gives false testimony in support of an application for an arrest warrant is not insulated from liability by the warrant. Olsen v. Tyler, 771 F.2d 277 (7th Cir. 1985); compare Franks v. Delaware, 438 U.S. 154 (1978).
b. First Amendment

An arrest is unreasonable per se if it is in retaliation for speech directed toward to the officer that is protected under the First Amendment. See Duran v. City of Douglas, 904 F. 2d 1372 (9th Cir. 1990); Losch v. Borough of Parksburg, 736 F. 2d 903 (3rd Cir. 1984); Leslie v. Ingraham, 686 F. 2d 1533 (11th Cir. 1986); Freeman v. Blair, 862 F. 2d 1330 (8th Cir. 1988); Wilson v. Thompson, 593 F. 2d 1375 (5th Cir. 1979), on remand, 638 F. 2d 777 (5th Cir. 1981); compare Durruthy v. Pastor, 351 F. 3d 1080 (11th Cir. 2003). If the interplay between the Fourth and First Amendments does not seem significant at first blush, consider the number of people who get arrested—or have additional charges tacked on—because they mouthed off to a police officer.

3. Deliberate indifference to serious medical needs

a. Eighth and Fourteenth Amendments

Once an offender is in custody, the Constitution nonetheless imposes a duty upon jail and prison officials to not be deliberately indifferent to his serious medical needs. Estelle v. Gamble, 42 U.S. 97 (1976); Mandel v. Doe, 888 F. 2d 783 (11th Cir. 1989); Waldrop v. Evans, 871 F. 2d 1030, 1033 (11th Cir. 1989). The deliberate indifference standard applies to both pretrial detainees
(under the Fourteenth Amendment) and convicted prisoners (under the Eighth Amendment). \textit{Lancaster v. Monroe County}, 116 F. 3d 1419 (11\textsuperscript{th} Cir. 1997); \textit{Hill v. Dekalb Regional Youth Detention Ctr.}, 40 F. 3d 1176, n. 19 (11\textsuperscript{th} Cir. 1994). ‘Deliberate indifference’ has three (3) components: “(1) subjective knowledge of a risk of serious harm; (2) disregard of that risk; (3) by conduct that is more than negligence.” \textit{McElligot v. Foley}, 182 F. 3d 1248 (11\textsuperscript{th} Cir. 1999). Accordingly, it is necessary to prove more than malpractice. It is clearly established law in the Eleventh Circuit “that an official acts with deliberate indifference when [he or she] delays providing an inmate with access to medical treatment, knowing that the inmate has a life-threatening condition or an urgent medical condition that would be exacerbated by delay.” 116 F. 3d 1419 (emphasis added). The Constitution requires that “urgent” and “life-threatening” conditions not be ignored; however, there is not constitutional mandate that every medical condition, no matter how trivial, be treated while in custody.

\textbf{b. Risk of suicide is a serious medical need}

Since suicide is a life-threatening condition, the psychiatric needs of a suicidal inmate are a serious medical need which officials are not free to ignore. Accordingly, jail and prison officials cannot act with deliberate
indifference to an inmate’s suicidal threats under the Eighth Amendment (which applies to convicted prisoners) or the Fourteenth Amendment (which applies the same "deliberate indifference" standard in a pretrial detention context). See Greason v. Kemp, 891 F. 2d 829 (11th Cir. 1990) (deliberate indifference to inmate's psychiatric needs resulting in suicide violated plaintiff's clearly established constitutional rights in 1985). However, in order for the defendant's indifference to qualify as deliberate, the inmate must outwardly manifest signs of suicidal ideation--such as prior attempts or threats to kill himself. Edwards v. Gilbert, 867 F. 2d 1271 (11th Cir. 1989). The fact that the inmate could have been identified as a possible suicide risk through better screening is not sufficient to impose liability, and expert testimony on whether a given inmate was a suicide risk will not carry the case past summary judgment unless the decedent expressed suicidal intentions. Id. However, expert testimony is essential to establish what the defendants should have done in the face of such knowledge, and whether better policies and procedures would have saved the life of an inmate who was a known suicide risk.
4. **High Speed Pursuits**

   a. **Fourth Amendment**

   There have historically been two types of vehicular pursuit cases brought as constitutional violations under Section 1983: (1) Those in which the officer's car is used as an offensive weapon to ram a suspect's vehicle and force it stop fleeing, perhaps with disastrous consequences for the offender or an innocent third party; and (2) Those in which the officer's car makes no contact with the suspect's vehicle but may escalate the chase and cause the suspect to behave in a manner which he would not have but for the officer's intervention.

   The first type of case is analyzed as a seizure or use of force, with the officer's control car being the weapon, and accordingly, such cases should be asserted under the objective reasonableness standard of the Fourth Amendment. *See, generally Brower v. County of Inyo, 109 S. Ct. 1378 (1989)* (while mere high speed pursuit is not a seizure, placing a roadblock in the path of a fleeing vehicle may constitute an unreasonable seizure under the Fourth Amendment). However, those cases are difficult if not impossible to win based upon the Supreme Court’s decision in *Scott v. Harris, 127 S. Ct. 1769 (2007)*, where the Court held that it was reasonable as a matter of law.
for an officer to deliberately crash into a fleeing traffic offender where the officer knew his actions would likely cause death or serious injury, even where the officer admittedly had no probable cause to use deadly force under the criteria of Tennessee v. Garner, supra. While the Scott court limited the scope of its ruling to the facts of that case, it is difficult to reconcile the decision with Brower and Garner.

b. Fourteenth Amendment

Conduct during pursuits that does not constitute a seizure of the plaintiff must be analyzed under a Fourteenth Amendment substantive due process standard. County of Sacramento v. Lewis, 118 S. Ct. 1708 (1998). Under Lewis, police have no liability for injuries caused by pursuits that do not "shock the conscience," such as where the officer deliberately causes unjustified harm.

In analyzing the plaintiffs' claim in Lewis, the Supreme Court ruled that the "denial of due process is to be tested by an appraisal of the totality of the facts in a given case." Id. at 1720. (Emphasis added). Under the facts of Lewis, the Supreme Court held that a brief pursuit "with no intent to harm suspects physically OR worsen their legal plight do[es] not give rise to liability." Id. at 1711. Lewis makes it clear that in order to
prevail under the substantive due process component of the Fourteenth Amendment, a plaintiff must prove that the conduct of the defendant ‘shocks the conscience.’ This determination must be based upon the totality of the circumstances. As the Supreme Court noted in *Lewis*, conduct that ‘shocks the conscience’ in one setting may not do so in another. Since it is difficult to shock the conscience of a federal judge, Fourteenth Amendment substantive due process claims rarely succeed. An innocent bystander injured by a high-speed pursuit usually fares better under state tort law. See O.C.G.A. §40-6-6(d)(2) and *City of Winder v. McDougald*, 276 Ga. 866, 583 S.E.2d 879 (2003) (officer may be held liable to bystander for reckless disregard for established police procedures, but fleeing offender may only sue if officer intended to cause harm); however, there are thorny state law immunity issues to contend with (official immunity for the officer and/or sovereign immunity for the employing entity) that are outside the scope of this paper. See, e.g., *Nichols v. Prather*, 286 Ga. App. 889, 650 S.E.2d 380 (2007); *Gardner v. Rogers*, 224 Ga.App. 165, 480 S.E.2d 217 (1996); *Kidd v. Coates*, 271 Ga. 33, 34, 518 S.E. 2d 124 (1999).

5. **Failure to protect**

The opposite of a false arrest case is when the police are sued for *not*
arresting someone, typically a spurned lover or other malcontent who commits a violent act of unspeakable violence that arguably could have been foreseen and prevented had the authorities taken the threat seriously. So far, crime victims have only limited success in holding the police liable for violating their federal constitutional rights by failing to protect them from a known risk.

a. Special relationship vs. special danger

The contours of the state's duty to provide police protection for its citizens have only been described in the most general terms by the Supreme Court's decision in DeShaney v. Winnebago County Dept. of Social Services, 489 U.S. 189, 109 S. Ct. 998 (1989). In DeShaney, which involved the state's alleged failure to prevent the abuse of a foster child who was not in state custody, held that "[a]s a general matter, ... a State's failure to protect an individual against private violence simply does not constitute a violation of the Due Process Clause." 109 S. Ct. at 1004. However, DeShaney did recognize the existence of a duty to protect under the Due Process Clause where there is a "special relationship" between the victim and the state, such as when the former is in the custody of the latter. While this rule has been applied to inmates and mental patients, it has not been applied to students, employees,
or others whose relationship with the state is voluntarily rather than custodial. See, e.g., Wright v. Lovin, 32 F.3d 538 (11th Cir. 1994); Collins v. City of Harker Heights, 503 U.S. 115 (1992).

In addition to the special relationship approach, a plaintiff may also show a duty on the state's part under §1983 by establishing that the plaintiff, as opposed to the general public, faced a special danger." Cornelius v. Town of Highland Lake, 880 F. 2d 348, 354 (11th Cir. 1989), cert. den., (1990); but see also Mitchell v. Duval County School Bd., 107 F. 3d 837, 838-839 (11th Cir. 1997).

"The language of DeShaney does indeed 'leave room' for state liability where the state creates a danger or renders an individual more vulnerable to it." Wyke v. Polk County School Bd., 129 F. 3d 560, 567 (11th Cir. 1997) (emphasis added). Even before DeShaney, the Eleventh Circuit had "acknowledged that a constitutional right to protection may exist where there has been some showing that the victim faced a special danger distinguishable from that of the public at large." 880 F. 2d at 354, citing Jones v. Phyfer, 761 F. 2d 642 (11th Cir. 1985).

The basis for the "special danger" analysis--as distinguished from the "special relationship" approach--is derived from the Supreme Court's recognition that the governmental defendant in DeShaney, despite being
aware of the risk of danger to the plaintiff, "played no part in [its] creation, nor did it do anything to render [the plaintiff] any more vulnerable to it." 489 U.S. at 201, 109 S. Ct. at 1006. The special danger approach has been alternatively called the "state-created danger" or "snake pit" doctrine. See Bowers v. DeVito, 686 F. 2d 616, 618 (7th Cir. 1982). The latter term originates from the following quotation: "If the state puts a man in a position of danger from private persons and then fails to protect him ... it is as much an active tortfeasor as if it had thrown him into a snake pit." Id. It is not necessary the special danger itself be created by the state; it is only necessary that the state be in a position to recognize the particular dangers faced by the victim and then, in the words of DeShaney, "render him ... more vulnerable to them." 489 U.S. at 201, 109 S. Ct. at 1006

b. **Equal protection**

In DeShaney, the Supreme Court noted that the Equal Protection Clause of the Fourteenth Amendment would be violated by any selected denial of protective services to "certain disfavored minorities." DeShaney v. Winnebago County Dept. of Social Services, 489 U.S. 189, 197, n. 3, 109 S. Ct. 998, 1004, n.3 (1989). The general rule is that while there is no general constitutional right to police protection from domestic violence, the state may not discriminate in
providing such protection. *Watson v. City of Kansas City, Kansas, 857 F. Supp. 690 (10th Cir. 1988)*. If it can be shown that police department had a pattern of treating domestic assaults differently than other assaults, an equal protection claim may lie. *Cellini v. City of Sterling Heights, 856 F. Supp. 1215 (E.D. Mich. 1994)*.

D. The Two Most Common Defenses to Section 1983 Claims

1. **The Defendant officer has qualified immunity**

Assuming that the facts make out a constitutional violation, on the plaintiff’s side, the first step toward recovery is to overcome the defense of qualified immunity that will be asserted by the individual defendant. Qualified immunity is a judge-made doctrine that balances the need to vindicate constitutional deprivations, which in many instances can only occur through substantial monetary awards, against the need to insulate officials from fear of personal liability and the burdens of litigation when performing their duties in areas where the law does not provide clear guidance. *Harlow v. Fitzgerald, 457 U.S. 800 (1982)*; *Anderson v. Creighton, 483 U.S. 635, 638 (1987)*.

Under the doctrine of qualified immunity, even a government official who has willfully and capriciously violated civil rights will escape liability
for monetary damages unless the official’s conduct violates clearly established constitutional principles of which a reasonable official should have known. *Anderson*, supra; *Saucier v. Katz*, 121 S. Ct. 2151 (2001). To demonstrate that a government official violated “clearly established” law and is not entitled to immunity, a plaintiff must show that the rights at stake were sufficiently “apparent” or “obvious” to give the official “fair warning” of what the law required. *Anderson*, supra, 483 U.S. at 640; *United States v. Lanier*, 520 U.S. 259, 270 (1997). In showing “fair warning,” it is not necessary that there be a prior litigated case involving similar facts if a rule articulated by prior law applies with obvious clarity to the facts at hand. *Hope v. Pelzer*, 536 U.S. 730 (2002).

Under the present analysis prescribed by the Supreme Court, there are two steps to the qualified immunity inquiry: (1) The court must determine whether the facts alleged, taken in the light most favorable to the plaintiff, show that the official’s conduct violated a constitutional right; and (2) If a violation can be made out, the court must then ask whether the right was clearly established. *Saucier v. Katz*, 121 S. Ct. 2151 (2001). *Saucier* required that the two (2) inquiries be made in the order set forth above, thereby requiring a court to first rule on whether the Plaintiff has stated a
cognizable claim for a constitutional violation before ruling on whether the relevant law was clearly established. But in *Pearson v. Callahan*, 129 S. Ct. 808 (2009), the Supreme Court recently loosened that requirement, recognizing that it may be more prudent to resolve some cases on the question of whether existing law was clearly established without being forced to decide whether the plaintiff had established a possible constitutional violation, thereby giving courts the leeway to find qualified immunity without first ruling on a constitutional question.

*Pearson* is based on the rationale that it does not always make sense to rule on a constitutional question if the case can be disposed of on more narrow grounds. On the other hand, if lower courts are allowed to dispose of cases on grounds that the law is not clearly established, it is possible that the courts will never address the constitutional issue and the law will remain undeveloped—meaning that no defendant could ever be held liable for such conduct until a court decided to make a constitutional ruling. Now that courts have leeway to vary the order of inquiry, the parties are free to argue for whichever approach is most reasonable from a public policy standpoint given the circumstances of the case and the constitutional right in question.
Once the Court reaches the issue of whether the law is clearly established, “The contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right.” *Anderson v. Creighton*, 483 U.S. 635, 640 (1987). All that is required is that "in the light of pre-existing law, the unlawfulness must be apparent." *Id.* In *Hope*, supra, the Supreme Court ruled that the Eleventh Circuit had in some cases applied an overly restrictive standard in determining whether prior law was clearly established by requiring that the plaintiff point to a precedent with materially similar facts. 536 U.S. 730. Rather than requiring factually similar precedent, the Supreme Court ruled that “the salient question that the Court of Appeals ought to have asked is whether the state of the law [at the time of the alleged conduct] gave [officials] fair warning that their alleged [conduct] was unconstitutional.” 536 U.S. at 741.

One way to show ‘fair warning’ is by pointing to a prior case with similar facts, but that is not the only way to do so. *Lanier*, 520 U.S. at 271 (citing *Anderson*, supra, for the proposition that a general constitutional rule “identified in the decisional law” may apply with "obvious clarity to the specific conduct in question" even though the challenged conduct has
not previously been held unlawful); see also Hope, 536 U.S. at 739. A “rule already identified by the decisional law” can even be derived from dicta in view of Hope’s reliance upon “the reasoning, but not the holding,” of prior litigated cases. 536 U.S. at 743. In order for the law to be clearly established, it is not necessary to show that “the very action in question has been held unlawful, but it is to say that in light of pre-existing law the unlawfulness must be apparent.” Anderson, 483 U.S. at 640.

As the Supreme Court ruled in Hope, a factually identical precedent is not required if “rule already identified by the decisional law” is articulated with sufficient clarity that it is not dependent upon the peculiar facts of the case from which it arose.

[I]f some authoritative judicial decision decides a case by determining that “X Conduct” is unconstitutional without tying that determination to a particularized set of facts, the decision on “X Conduct” can be read as having clearly established a constitutional principle: put differently, the precise facts surrounding “X Conduct” are immaterial to the violation. These judicial decisions can control “with obvious clarity” a wide variety of later factual circumstances.

Vinyard v. Wilson, 311 F.3d 1340, 1351 (11th Cir. 2002) (citing Hope and Lanier). For example, the “salient question” in a Fourth Amendment excessive force case is not whether there is a binding precedent that is factually on “all fours” with the case at bar, but whether the contours of the
law existing at the time of the incident were sufficiently clear to give a reasonable law enforcement officer “fair warning” that he or she could be liable for using the degree of force that was used under the circumstances. *Hope*, 536 U.S. at 741 (citing *Lanier*, supra). Even before *Hope*, the Eleventh Circuit noted that where “the official’s conduct lies so obviously at the very core of what the Fourth Amendment prohibits that the unlawfulness of the conduct was readily apparent to the official, not withstanding the lack of case law,” the official is not entitled to the defense of qualified immunity.” *Priester v. City of Riviera Beach*, 208 F. 3d 919, 924 (11th Cir. 2000), citing *Smith v. Mattox*, 127 F. 3d 1416, 1419 (11th Cir. 1997).

Whether prior law was clearly established is a legal question, not a factual one. Generally it must be shown by reference to court decisions that are binding precedent in the jurisdiction where the alleged constitutional violation occurred. In the Eleventh Circuit, only decisions of the Supreme Court, the Eleventh Circuit Court of Appeals, or the highest court of the state in question can be relied upon as sources of clearly established law. See, e.g., *Haygood v. Johnson*, 70 F.3d 92, 95 (11th Cir. 1995). However, extrajudicial sources can be considered on a limited basis as evidence that the law was clearly established—for example, cease and desist
letters from the Department of Justice were considered relevant in *Hope* because they were based on an interpretation of the law by those charged with enforcing it, and the internal rules and procedures of the U.S. Marshal Service were considered evidence of what the law was in *Wilson v. Layne*, 526 U.S. 603 (1999), where the alleged unconstitutional misconduct was inconsistent with those rules and procedures. In *Hope*, the Supreme Court suggested that even dicta could be relevant in determining whether the law is clearly established, because it held that “the reasoning, but not the holding” of cases relied on by the plaintiff gave fair warning that the subject conduct was unconstitutional. 536 U.S. at 743. Likewise, you should look to out-of-circuit cases if there is no binding precedent, and you can argue that the consensus of the courts that have ruled on the issue is not only favorable to you, but is a sufficient consensus to allow you to argue that the law is clearly established even if it has not yet come up in an Eleventh Circuit or Georgia case. *Hope* suggests that the law can be clearly established by the consensus of legal authority if there is no binding precedent in the applicable jurisdiction, but the *Hope* court found that the law in question was clearly established by past decisions of the Supreme Court, the Eleventh Circuit, and old Fifth Circuit.
Most civil rights cases are lost on qualified immunity grounds, so it is very important to find as many cases as possible involving similar facts to construct the argument that the law is clearly established. Indeed, the Eleventh Circuit has said the immunity is the rule, rather than the exception, so it will take all of your skills as an advocate (as well as a strong case and a dose of luck) in order to prevail. Sanders v. Howze, 177 F.3d 1245, 1249 (11th Cir. 1999). While Hope stands for the proposition that a factually similar prior case is not essential if a rule articulated by prior case law applies with “obvious clarity” to the case being litigated, it doubtful that many cases will be decided on that basis and you must look for factually similar precedent wherever it exists.

Finally, please remember that qualified immunity is a defense that is available only to individual public officials. The fact that an individual defendant has qualified immunity, that does not preclude you from holding the municipality liable—assuming you have proven a constitutional violation and have also established grounds for municipal liability (which are briefly touched on below and discussed in greater detail in another paper presented at this seminar). Owen v. City of Independence, 445 U.S. 622 (1980); compare City of Los Angeles v. Heller, 475 U.S. 796 (1986).
2. **No governmental or respondeat superior liability**

A municipality can only be held liable for the unconstitutional act of one of its officers to the extent that the officer was acting pursuant to some custom, policy, or practice of the municipality. *Monell v. Department of Social Services*, 436 U.S. 658 (1978); *Owen v. City of Independence*, 445 U.S. 622 (1980). It is usually necessary to sue the individual official as well as the governmental entity because there is no *respondeat superior* under 42 U.S.C. §1983. Since the governmental defendant will only be liable if its official customs or policies were the moving force behind the constitutional violation, it is difficult to prove entity liability. *See Monell v. Department of Social Services*, 436 U.S. 658 (1978); *City of Canton v. Harris*, 489 U.S. 378 (1989). However, it is the practice of most government agencies to insure or indemnify their employees against Section 1983 claims.

Deficiencies in training are one manner in which a custom, policy, or practice of condoning excessive can be established. *City of Oklahoma City v. Tuttle*, 471 U.S. 808 (1985) (custom or policy cannot be inferred from a single example of police misconduct); *City of Canton v. Harris*, 489 U.S. 378, 109 S. Ct. 1197 (1989) (it is not necessary that the policy be unconstitutional on its face, only that it be the moving force behind the violation of the plaintiff's rights).
Under *City of Canton*, it is not necessary that a department's use of force policy be unconstitutional on its face if as long as the policy caused the officer to behave unconstitutionally—for example, if training under the policy did not go far enough to inform officers of the constitutional limits on their authority.

A custom, policy, or practice may be inferred from a pattern of excessive force. If the defendant's department has a pattern of failing to discipline officers who have committed acts of excessive force, then a case can be made that the true policy of the department is to condone excessive force rather than to prohibit it—regardless of what the department's written policy might say. *See Gilmere v. City of Atlanta*, 774 F. 2d 1495, 1503 n. 9 (11th Cir. 1985). Having no policy at all may impute liability to the municipality under *City of Canton*, which states in a footnote that a city can be held liable for deliberate indifference in failing to train officers with respect to a serious law enforcement problem for which the need for training is obvious. 489 U.S. 378, 109 S. Ct. 1197 at n. 10; *see Vineyard v. Murray County, Georgia*, 990 F. 2d 1207, 1212 (11th Cir. 1993) ("the evidence demonstrates that the Sheriff's Department had inadequate procedures for recording and following up complaints against individual officers ... no policies and procedures manual
... [and] inadequate policies of supervision, discipline and training of deputies”); but see also Gold v. City of Miami, 151 F. 3d 1346, 1351-52 (11th Cir. 1998) (“this Court has held that without notice of a need to train or supervise in a particular area, a municipality is not liable as a matter of law for any failure to train and supervise...").

Another way is to determine whether the defendant is a problem officer or "bad apple" who should have never been hired or retained in the first place, in which case you may not only be able to prove liability based upon deficient policies pertaining to hiring and supervision of officers, but also based upon the very hiring decision which led to the employment of the officer and placed him or her in a position to violate citizen's rights. In Bryan County v. Brown, 117 S. Ct. 1382 (1997), the Supreme Court held that a municipality may be held liable under Section 1983 in the context of a single bad decision to hire an officer who violated constitutional rights. In that case, it was stipulated that the county sheriff who hired the officer (who was the sheriff's own nephew and who had an extensive criminal record) was the final policymaker for the county with regard to law enforcement, so that the actions of the sheriff with regard to law enforcement could be deemed to represent official county policy. This is consistent with the final
decisionmaker/policymaker line of cases holding that "it is when execution of a government's policy or custom, whether made by its lawmakers or by those whose edicts or acts may be said to represent official policy, inflicts the injury that the government as an entity is responsible under [Section] 1983."

Monell, supra, 436 U.S. at 694 (1978); Owen, supra; see also Pembaur v. City of Cincinnati, 475 U.S. 469, 106 S. Ct. 1292 (1986); City of St. Louis v. Praprotnik, 485 U.S. 107, 108 S. Ct. 915 (1988); but compare McMillian v. Monroe County, 520 U.S. 781 (1997) (under Alabama law, a sheriff is a state constitutional officer rather than a county official so that liability for his unconstitutional acts cannot be imputed to the county) and Manders v. Lee, 338 F. 3d 1304 (2003), cert. denied (2004) (holding pursuant to McMillian and Georgia law that a sheriff is a state rather than county officer in context of use of force at the jail, and thus has Eleventh Amendment immunity).

CONCLUSION

Before filing a Section 1983 claim, it is first important to identify the constitutional provision that is applicable and determine whether a cognizable claim can be brought. Then it is necessary to establish the legal elements of the constitutional violation, and to plead facts supporting the claim. It is also important to anticipate possible defenses and to plead your
case and plan discovery accordingly. You will always encounter a qualified immunity defense by the individual defendant, and you will always encounter a *Monell* defense by the governmental entity, so you need to hit them head on from the outset. Otherwise you may find yourself in the Eleventh Circuit trying to appeal the dismissal of your case before you have taken a single deposition or sent a single interrogatory. That is the reality of representing plaintiffs in federal court, particularly in the Section 1983 arena.