



**ARIZONA SUPREME COURT
ORAL ARGUMENT CASE SUMMARY**



**SUSAN RYAN v. NAPIER/KLEIN,
CV-17-0325-PR
243 Ariz. 277**

PARTIES:

Petitioners: Mark Napier, Pima County Sheriff, and Joseph Klein, Pima County Deputy Sheriff

Respondent: Susan E. Ryan, as Administrator of the Estate of Brian McDonald

Amici Curiae: League of Arizona Cities and Towns, Arizona Association of Chiefs of Police, Arizona Municipal Risk Retention Pool, Apache County Sheriff Joe Dedman, Cochise County Sheriff Mark Dannels, Coconino County Sheriff Jim Driscoll, Gila County Sheriff Adam Shepard, Graham County Sheriff Preston Allred, Greenlee County Sheriff Tim Sumner, La Paz County Sheriff Bill Risen, Maricopa County Sheriff Paul Penzone, Mohave County Sheriff Doug Schuster, Navajo County Sheriff Kelly Clark, Pinal County Sheriff Mark Lamb, Santa Cruz County Sheriff Tony Estrada, Yavapai County Sheriff Scott Mascher, and Yuma County Sheriff Leon Wilmot

Arizona Association for Justice/Arizona Trial Lawyers Association

FACTS:

Brian McDonald, a 48-year-old DPS trooper, was driving on a road in the Tucson foothills when he drove into the oncoming lane and nearly collided with a sheriff's deputy driving in the opposite direction. The deputy made a U-turn and pursued McDonald, who came to a stop. The deputy exited his marked vehicle and shouted commands to McDonald, who failed to respond.

A few minutes later, another deputy, Joseph Klein, arrived with his K-9. He shouted at McDonald to "talk to me now or I will send my dog." McDonald looked over toward Klein and his K-9, rolled up his window, and drove away. After law enforcement spikes flattened his tires, McDonald stopped. Deputy Klein got out of his squad car and resumed shouting commands. When McDonald exited his vehicle, Deputy Klein warned him to "stop or you will be bitten." McDonald slowly walked to the rear of his car and then continued walking to the passenger side. Deputy Klein released the K-9, which took McDonald down and dragged him on the ground while biting his leg for thirty-eight seconds. Paramedics who arrived suspected that McDonald was having a medical problem and took his blood sugar, finding it to be dangerously low. McDonald, a diabetic on insulin, was suffering from an acute hypoglycemic emergency and lacked advanced cognitive function. The County Attorney later decided not to prosecute McDonald for unlawful flight.

The K-9 bites chipped a bone in McDonald's leg and lacerated his tibial artery. He underwent three surgeries. During this process, he went into diabetic ketoacidosis and had to be transferred to the ICU. He also suffered serious disfigurement. McDonald ("plaintiff") sued the Pima County Sheriff and Deputy Klein ("defendants") for negligent, excessive, and unjustified use of force related to the use of the K-9 to apprehend him. Defendants moved for summary judgment. The trial court ruled that plaintiff was entitled to pursue his common law claim for negligent use of force despite that fact that Deputy Klein made an intentional decision to release the dog.

Before trial, defendants filed a motion in limine seeking to preclude references at trial to the Fourth Amendment legal standard governing use of force articulated in *Graham v. Connor*, 490 U.S. 386 (1989) (setting forth elements of a Fourth Amendment claim of excessive force under 42 U.S.C. § 1983). The trial court ruled allowing *Graham*-related testimony by Deputy Klein, his supervisors and/or expert witnesses but prohibiting it with respect to the testimony of Deputy Klein's peers.

The case proceeded to a jury trial. The trial judge rejected defendants' request for an instruction allocating the burden of proving lack of justification to plaintiff, and instead instructed the jury that defendants had the burden of proving justification. By a vote of 7 to 2, the jury returned a verdict of \$650,000 for plaintiff, attributing ninety-five percent of the fault to defendants and five percent to plaintiff. Defendants appealed. During the appeal, plaintiff died, and the administrator of his estate was substituted as appellee.

The Court of Appeals, over a dissent by one of the three-judge panel, affirmed the jury verdict. The majority held that plaintiff was entitled to bring a common law claim for negligence against a law enforcement defendant whose action in releasing a police dog was intentional. The Court of Appeals also affirmed the decisions to permit testimony about the *Graham* standards and to instruct the jury that defendants had the burden of proving justification. Defendants filed a Petition for Review to this Court, which granted review.

ISSUES:

1. "The undisputed facts showed the only act resulting from Defendant/Appellee Deputy Klein's decision to use force (the release of the police dog) was an intentional act (a battery) designed to effectuate a lawful arrest. Did the Court of Appeals err in concluding that Arizona recognizes a cause of action for the negligent decision to use force (commit a battery)?"
2. "A.R.S. § 13-409 sets forth the legal standard for determining whether a non-deadly use of force is justified. A.R.S. § 13-413 states there is no civil liability for justified conduct. Did the Court of Appeals err in holding Deputy Klein was not entitled to assert the protections of A.R.S. § 13-409 and A.R.S. § 13-413 in response to Plaintiff/Appellee Brian McDonald's claim that Deputy Klein's use of force—the release of a police dog—was a negligent, unjustified, and excessive use of force?"

3. “*Graham v. Connor*, 490 U.S. 386 (1989), sets forth a nonexclusive three-factor test for determining whether a use of force violates the Fourth Amendment. But McDonald never alleged a Fourth Amendment claim, nor did he request a *Graham* jury instruction. And Deputy Klein timely and repeatedly moved to have any *Graham* evidence or argument excluded from trial as being irrelevant under A.R.S. § 13-409. Did the Court of Appeals err in finding the trial court properly allowed McDonald’s police-practices expert to instruct the jury that Deputy Klein’s use of the police dog was governed by—and violated—*Graham*?”

4. “If Deputy Klein was entitled to assert a justification defense, did the trial court commit reversible error in instructing the jury that the Deputy bore the burden of proof under A.R.S. § 13-409?”

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