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IN THE CIRCUIT COURT OF THE STATE OF OREGON
FOR THE COUNTY OF MULTNOMAH

MARGARET ZEBROSKI, an individual,

Plaintiff,

v.

CITY OF PORTLAND, a municipal
corporation,

Defendant.

Case No. 18CV08255

**PLAINTIFF’S MOTION
FOR A NEW TRIAL**

(HON. JUDITH MATARAZZO)

Introduction

This is a case about the government’s use of physical force and about a jury’s concomitant review of that force. On February 20, 2017, Defendant City of Portland arrested Plaintiff Margaret “Peggy” Zebroski while she was protesting the City’s fatal shooting of 17-year-old Quanice Hayes. Peggy is a 68-year-old grandmother who weighs 117 pounds. In arresting her, the City pulled Peggy out of a crowd, pinned her to the ground face-first, and broke her nose. Peggy sued the City so that the People, speaking through a civil jury, could assess whether the police used excessive force to arrest her.

This is a motion about a jury that never performed that critical task. The jury never reached the fundamental question of excessive force because it found that the police’s actions did not constitute a battery. However, by the City’s own testimony at trial, the police intended to: pull on Peggy’s arm to separate her from the crowd, pin her to the ground face-first, and hold her on the ground by pressing a knee into her shoulder. Such actions constitute battery as a matter of law.

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1 The jury's verdict to the contrary thus lacks any support in evidence and is against
2 law. Notably, the City argued throughout the trial that police never intended to harm Peggy.
3 But that was not the question before the jury. Rather, the question of battery concerned
4 whether the police intended to *contact* Peggy in a way that was harmful or offensive. The
5 undisputed evidence at trial established that the City did so. Plaintiff thus moves for a new
6 trial under ORCP 64 B(5) so that a jury can properly determine whether the City's use of
7 physical force on Peggy was reasonable or excessive.

8 **Background**

9 Most of the facts underlying this case were undisputed at trial. On February 20, 2017,
10 Peggy and her friend Beverly Swan, who is 74, attended a demonstration to protest the fatal
11 shooting of Quanice Hayes by Portland police officers. A group of 50–60 people gathered at
12 the intersection of SW Third Avenue and Madison Street. Peggy and others stood in the
13 street holding a banner that read, "Don't Shoot Portland."

14 Portland police responded to the unpermitted protest. A police truck made repeated
15 announcements directing demonstrators to leave the street or face arrest for disorderly
16 conduct. When protestors lingered in and around the side of the street, the police called in
17 their "hard squad," a team of armed officers in riot gear and full body armor. The hard
18 squad, backed by a squad of bicycle officers already on the scene, charged into the crowd and
19 began making arrests.

20 The City, acting through Portland Police Officer Adi Ramic, arrested Peggy. Peggy
21 testified that, in the melee, she attempted to help her friend Beverly, who had a bad knee and
22 previously had suffered a stroke. Ramic testified that he believed that he saw Peggy
23 attempting to unarrest a large man. As a result, Ramic testified that he intentionally:
24 grabbed Peggy by the arm, pulled her out of the crowd, pinned her to the ground face-first in
25 a prone position, and held her on the ground by placing his knee against her shoulder. Video
26 of the incident also showed Ramic dragging Peggy across a berm and grinding her face into

1 the pavement with his leg while holding her in the prone position. The force used by Ramic
2 broke Peggy's nose and scraped her face.

3 Peggy sued for economic and noneconomic damages caused by Ramic's use of force
4 in arresting her. At trial, Ramic testified that he intended to arrest Peggy using the
5 intentional acts of contact described above. But Ramic testified, and the City argued, that
6 Ramic never intended to hurt Peggy.

7 The verdict form asked the jury three questions: (1) did the use of force by police
8 constitute a battery; (2) if yes, was the force excessive; and (3) if yes, what were Peggy's
9 damages? The jury found that the use of force by police on Peggy did not constitute a
10 battery. The jury thereby did not reach the question of whether the force was excessive.

11 Argument

12 The Court should order a new trial under ORCP 64 B(5). Under that Rule, the Court
13 may order a new trial if there is an "[i]nsufficiency of the evidence to justify the verdict or
14 other decision, or that it is against law."

15 The verdict in this case was against law, and the evidence was legally insufficient to
16 justify it. As this Court instructed, "[t]o constitute liability for a battery, the conduct which
17 brings about the harm must be an act of volition on the actor's part, and the actor must have
18 intended to bring about a harmful or offensive contact or put the other party in apprehension
19 thereof." *Bakker v. Baza'r, Inc.*, 275 Or 245, 249, 551 P2d 1269 (1976). The relevant
20 question of intent under the law is about the contact, not about causing harm: "It is not
21 necessary that the contact do actual physical harm—it is sufficient if the contact is offensive
22 or insulting." *Id.*

23 Police officers do not enjoy a different standard for what level of force constitutes a
24 battery. A battery is a battery. Instead, officers are exempted from *liability* for a battery for
25 "using physical force when he or she believes it is reasonably necessary to make an arrest."
26 *Ballard v. City of Albany*, 221 Or App 630, 642, 191 P3d 679 (2008). In such cases,

1 “whether the evidence established that excessive force was used in arresting plaintiff is for
2 the jury to decide.” *Id.* at 643. The People thus act as a check on the government’s use of
3 physical force by speaking through a civil jury as to whether the force was excessive.

4 Here, the City conceded to intending physical contact that was indisputably offensive
5 if not harmful. Ramic testified that he intentionally grabbed Peggy by the arm, pulled her out
6 of the crowd, pinned her to the ground face-first in a prone position, and held her on the
7 ground by placing his knee against her shoulder. Such actions constitute a battery as a matter
8 of law—whether performed by a stranger passing on the street, or by a uniformed police
9 officer effectuating an arrest. The key difference is that, unlike a stranger, the City cannot be
10 held liable for the battery against Peggy as long as Ramic used reasonable force to arrest her.
11 *See id.* at 642. But that does not mean that a battery did not occur. Rather, a jury should
12 decide “whether the evidence established that excessive force was used in arresting plaintiff.”
13 *Id.* at 643. The jury never reached that critical question.

14 Instead, the jury got derailed on the first question. In doing so, the jury apparently
15 decided a question not before it. The City argued throughout the trial, and emphasized
16 during closing arguments, that Ramic never intended to harm Peggy. But the question of
17 battery concerned whether the City intended to *contact* Peggy in a way that was harmful or
18 offensive; the undisputed evidence at trial established that Ramic did so as a matter of law, as
19 discussed above. Whether Ramic intended to harm Peggy was inapt in this case. Nor can the
20 City argue that any juror confusion was harmless. The excessive-force question similarly did
21 not ask the jury whether Ramic intended to harm Peggy. That question concerned whether
22 “the physical violence exerted by the officers against plaintiff was no more than necessary.”
23 *Gigler v. City of Klamath Falls*, 21 Or App 753, 763, 537 P2d 121 (1975). The People get to
24 speak on that question in our justice system through a civil jury. The People were prevented
25 from doing so here.

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Conclusion

For the foregoing reasons, the Court should order a new trial under ORCP 64 B(5) so that a jury can properly decide whether the government used excessive force in arresting Peggy Zebroski.

DATED this 13th day of May, 2019.

TONKON TORP LLP

By /s/ Michael C. Willes
Steven M. Wilker, OSB No. 911882
Direct Telephone: 503.802.2040
E-mail: steven.wilker@tonkon.com
Frank J. Weiss, OSB No. 991369
Direct Telephone: 503.802.2051
E-mail: frank.weiss@tonkon.com
Michael C. Willes, OSB No. 141806
Direct Telephone: 503.802.5737
E-mail: michael.willes@tonkon.com

Mathew dos Santos, OSB No. 155766
Direct Telephone: 503.227.6928
E-mail: mdossantos@aclu-or.org
Attorneys for Plaintiff
Cooperating attorneys of the ACLU
Foundation of Oregon

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CERTIFICATE OF SERVICE

I hereby certify that I served the foregoing **PLAINTIFF’S MOTION FOR A NEW**

TRIAL on:

J. Scott Moede (*scott.moede@portlandoregon.gov*)
Chief Deputy City Attorney
Robert Yamachika (*rob.yamachika@portlandoregon.gov*)
Assistant Deputy City Attorney
Portland Office of the City Attorney
1221 SW Fourth Avenue, Room 430
Portland, OR 97204

Attorney for The City of Portland

by causing a copy thereof to be e-mailed to said attorney at his last-known email address on the date set forth below; and

by electronic means through the Court's File & Serve system on the date it is accepted by the court.

Dated this 13th day of May, 2019.

TONKON TORP LLP

By /s/ Michael C. Willes
Steven M. Wilker, OSB No. 911882
Frank J. Weiss, OSB No. 991369
Michael C. Willes, OSB No. 141806
Attorneys for Plaintiff

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