**9.31 Particular Rights—Fourteenth Amendment—Pretrial**

**Detainee’s Claim of Failure to Protect**

As previously explained, the plaintiff has the burden of proving that the [act[s]] [failure to act] of the defendant [name] deprived the plaintiff of particular rights under the United States Constitution. In this case, the plaintiff alleges the defendant deprived [him] [her] of [his] [her] rights under the Fourteenth Amendment to the Constitution when [insert factual basis of the plaintiff’s claim]. Under the Fourteenth Amendment, a pretrial detainee has the right to be protected while in custody. In order to prove the defendant deprived the plaintiff of this right, the plaintiff must prove the following additional elements by a preponderance of the evidence:

1. The defendant made an intentional decision regarding the conditions under which the plaintiff was confined;

2. Those conditions put the plaintiff at substantial risk of suffering serious harm;

3. The defendant did not take reasonable available measures to abate or reduce that risk, even though a reasonable officer in the circumstances would have appreciated the high degree of risk involved—making the consequences of the defendant’s conduct obvious; and

4. By not taking such measures, the defendant caused the plaintiff’s injuries.

With respect to the third element, the defendant’s conduct must be objectively unreasonable.

**Comment**

*See Castro v. County of Los Angeles*, 833 F.3d. 1060 (9th Cir. 2016) (en banc). After the Supreme Court decided *Kingsley v. Hendrickson*, 576 U.S. 389 (2015), the Ninth Circuit decided *Castro v. County of Los Angeles*, 833 F.3d 1060 (9th Cir. 2016) (en banc). In *Castro*, the Ninth Circuit held that Castro, who was injured by an inmate while detained in a sobering cell, "had a due process right to be free from violence from other inmates." *Id.* at 1067. The Ninth Circuit focused its discussion on the Fourteenth Amendment, but "neither Castro nor the majority claim[ed] that any other constitutional right [was] at issue." *Id*. at 1067-70, 1084 (Ikuta, J., dissenting). Analogizing to the Supreme Court’s excessive force analysis in *Kingsley*, the Ninth Circuit approved the following elements for a pretrial detainee’s failure-to-protect claim under the Fourteenth Amendment:

(1) The defendant made an intentional decision with respect to the conditions under which the plaintiff was confined; (2) Those conditions put the plaintiff at substantial risk of suffering serious harm; (3) The defendant did not take reasonable available measures to abate that risk, even though a reasonable officer in the circumstances would have appreciated the high degree of risk involved—making the consequences of the defendant’s conduct obvious; and (4) By not taking such measures, the defendant caused the plaintiff’s injuries.

*Id.* at 1071.

In *Alexander v. Nguyen*, 78 F.4th 1140, 1144 (9th Cir. 2023), the Ninth Circuit noted that “the law governing pretrial detainees’ claims of inadequate medical care and other dangerous conditions of confinement is still developing in the wake of the Supreme Court’s decision in *Kingsley v. Hendrickson*, 576 U.S. 389 (2015).”

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