MUNICIPAL LIABILITY NEWSLETTER

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POLICE USE OF FORCE

Welcome to the April, 2016 edition of the Gallagher Sharp municipal liability newsletter. After discussing *Graham v. Connor*, the leading Supreme Court case on use of force, we review Sixth Circuit case law. We note that the public, media, and even the courts, tend to question the conduct of the police. We finally comment on how that tendency may influence the defense of these cases.

I. Use of Force Standard

The landmark case on use of force is *Graham v. Connor*, 490 U.S. 386 (1989), where the United States Supreme Court held that use of force claims are analyzed under the Fourth Amendment using an "objective reasonableness" standard. The test of reasonableness is not capable of precise definition or mechanical application, but rather depends on the facts and circumstances of each particular case. The question is whether the "totality of the circumstances" justifies a particular use of force.

The Court provided three factors to consider when analyzing an officer's use of force:

1. The severity of the crime at issue;

2. Whether the suspect poses an immediate threat to the safety of the officer or others; and

3. Whether the suspect is actively resisting arrest or attempting to evade arrest by flight.

These are commonly known as the "Graham Factors."

Courts should view the reasonableness of a particular use of force in light of the totality of the circumstances and examine the facts from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight. The calculus of reasonableness must embody allowance for the fact that police officers are often forced to make split-second judgments -- in circumstances that are tense, uncertain, and rapidly evolving -- about the amount of force that is necessary in a particular situation

An officer's actual intent is irrelevant as to whether force was excessive because the standard is objective. As the *Graham* Court stated: "An officer's evil intentions will not make a Fourth Amendment violation out of an objectively reasonable use of force; nor will an officer's good intentions make an objectively unreasonable use of force constitutional."

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Because an officer needs to have acted reasonably in light of the information the officer had at the time, even an officer who is in error may not be liable. Indeed, qualified immunity may protect an officer from liability for mistakes of law and fact. *Chappell v. City of Cleveland*, 585 F.3d 901 (6th Cir. 2009). "[T]he Fourth Amendment does not require officers to use the best technique available as long as their method is reasonable under the circumstances." *Dickerson v. McClellan*, 101 F.3d 1151, 1160 (6th Cir. 1996); *Lyons v. City of Xenia*, 417 F.3d 565, 576 (6th Cir. 2005).

In the past, federal courts in the Sixth Circuit and elsewhere tended to give officers fairly broad deference in use of force cases. Nowadays, however, the public, the media, and increasingly the courts, question the conduct of the police.

The case *Summerland v. County of Livingston*, 240 Fed. Appx. 70 (6th Cir. 2007), illustrates how officers may make a reasonable mistake and nonetheless be entitled to immunity. In that case a mentally disturbed man was holding a shovel, a metal L-shaped bracket, and a plastic framing square, although the police believed he was brandishing an axe. As he was moving toward the police in the dark, he was shot by two officers. In affirming summary judgment for the defendants, the Sixth Circuit observed that there was no evidence to support the plaintiff's contention that the suspect was unarmed and posed no threat to the defendants. The court noted that at the time of the shooting, one officer was approximately 23.8 feet from the suspect and the other officer was about 35 feet from him.

II. Recent Sixth Circuit Case Law

In the past, federal courts in the Sixth Circuit and elsewhere tended to give officers fairly broad deference in use of force cases. Nowadays, however, the public, the media, and increasingly the courts, question the conduct of the police. Accordingly, motions for summary judgment in use of force cases are being denied more frequently than in the past.

For example, the Sixth Circuit in *Lopez v. City of Cleveland*, 625 Fed. Appx. 742 (6th Cir. 2015), reversed the district court's grant of qualified immunity to officers in a use of force claim. In that case the police, after encountering a man wielding a machete in the middle of a street, shot him after trying repeatedly to get him to drop the weapon. Immediately before the shooting, the man's sister approached him. The two were only a few feet apart, although the officers testified that they did not know that they were siblings. All of the officers testified that the man then raised the machete, and that they believed the woman was in imminent danger. Several witnesses stated that he raised the machete, but that it appeared that he was only threatening to harm himself. Only one person, the sister, testified that he did not raise the weapon. The court found that because the reasonableness of the officers' actions depended on whose version of events one accepts, the case should go to a jury.

In *Brown v. Chapman*, 2016 U.S. App. LEXIS 2827 (6th Cir. 2016), the district court granted partial summary judgment to two officers after a traffic stop that resulted in the tasing of a suspect and his ultimate death. The Sixth Circuit reversed, first finding that the stop itself was improper; while the officers testified that the suspect's headlights were not turned on, there was witness testimony that the headlights were on immediately after the stop and the officers

testified that they never told the suspect to turn them on. The court believed that it was reasonable to infer that the headlights were on the whole time. The Sixth Circuit also reversed summary judgment on the tasing. The court reasoned that the crimes, driving without headlights and/or drug use, were not severe, and that the suspect was not an immediate threat to anyone. The court additionally found that the suspect was compliant until an officer struck his neck, at which time he "broke away to avoid injury." Furthermore, there was testimony that the suspect was standing still at the time he was tasered.

For other examples, see *Withers v. City of Cleveland*, 2016 U.S. App. LEXIS 707 (6th Cir. 2016) (reversing summary judgment for an officer who fatally shot a man during the execution of an arrest warrant where there was a genuine dispute as to how quickly the officer shot the man after entering the room); *Godawa v. Byrd*, 798 F.3d 457 (6th Cir. 2015) (reversing summary judgment for an officer who shot a man in a car when accounts differed as to whether the man accidentally struck the officer or did so on purpose); and *Foster v. Patrick*, 806 F.3d 883 (6th Cir. 2015) (affirming denial of summary judgment for an officer who shot a woman who was fleeing in the officer's police cruiser after a scuffle).

III. Conclusion

Although the Sixth Circuit has not reversed any legal precedent, its recent opinions have not favored the police. Courts do not decide cases in a vacuum, and it may be that the Sixth Circuit has been influenced by the tendency to question -- even second guess -- the actions of the police.

Now more than ever, police officers and their claims professionals must be sensitive to the perceptions of the public, the media, and the courts in preparing motions for summary judgment, trying cases before juries, and arguing matters on appeal.

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