Excessive force – Should You Take the Case?

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Andrew Thomas borrowed the wrong car. He was seventeen and wanted to cruise around town with his buddies, but the car was stolen. Police officers recognized the car and followed him into a strip mall. Andrew and his friends went into a candy store, and when they came out three police officers were running towards them. Andrew froze in his tracks, holding an Icee in his hand. Officer Parker grabbed him, lifted him off his feet, body-slammed him to the ground, and then kicked him in the ribs. The Icee splashed everywhere as Andrew broke his fall with his hand, breaking his wrist, leading to surgery, and a permanent impairment. Now Andrew is on the other end of your phone asking, "Can I sue the police?" What do you say…

To answer that question you start with the Fourth Amendment, asking yourself was this an "unreasonable seizure?" You quickly run through the excessive force factors from the seminal Supreme Court case of *Graham v. Connor*[1] – the police officers suspected Andrew of theft, a property crime – not a severe crime; Andrew didn't do or say anything aggressive so he did not pose an immediate threat to the safety of the officers or anyone else; and Andrew just stood there holding an Icee so he was not actively resisting arrest or attempting to evade arrest by flight. These factors tend to cut in Andrew's favor – since he wasn't threatening anyone and wasn't resisting, the government interest in using force was probably outweighed by his right to be free from unreasonable uses of force. So maybe he has a case.

Just to be sure, you check 6th Circuit cases with similar facts. And you find *Baker v. City of Hamilton*, where an officer stopped a 17 year-old suspecting him of car break-ins.[2] The kid ran, officer gave chase, kid slowed and yelled, "I'm stopping!" and then the Officer hit him in the back of his head with his asp, tackled him, and sat on his back applying a choke hold. The Sixth Circuit denied the officer summary judgment because the suspect was "in the act of surrendering when struck by [the] officer" so the use of force was "unjustified and gratuitous." Now you are feeling more confident about Andrew's case. Especially since *Baker* was decided in 2006, and Andrew was beat up in 2016. That means you will likely defeat Officer Parker's defense of qualified immunity, which immunizes the officer if slamming and striking a non-resisting suspecting was not clearly established in Sixth Circuit case law as a constitutional violation.

So… should you take the case? Not quite yet. The statute of limitations on a Section 1983 case in Ohio is two years,[3] so that gives you time to do a thorough investigation before signing up Andrew. You tell him you will investigate the case and send public record requests to the police department for all police reports, video/audio, and personnel files of the involved officers. You request records from the dispatch operator, EMS, jail, and Andrew's medical records. After you get the records, Andrew's story holds up, but you do learn a not-so helpful fact. Turns out Andrew was wearing a t-shirt at the time that Officer Parker approached that said

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[1] Graham v. Connor, 490 U.S. 386, 396 (1989)

[2] Baker v. City of Hamilton, Ohio, 471 F.3d 601, 604 (6th Cir. 2006)

[3] But you may want to bring intentional tort claims such as assault and battery that have a one-year statute. Also, in Kentucky, Section 1983 cases have a one year statute of limitations.

"Fuck the Police." Not good, but litigating an excessive force case requires you to teach a jury that police officers are not vigilantes and cowboys, they are professionals who are required to act reasonably at all times, even when confronting people they despise.

At some point along this journey you should ask yourself if you feel confident litigating an excessive force case on your own. Do you practice in federal court often?[4] Have you done an excessive force case before? Do you have the available time to learn an unfamiliar body of law? Do you really understand the defense of qualified immunity? Can you handle the delay of the officer's interlocutory appeal when summary judgement is denied? These are all important questions, because the margin for error in excessive force cases is slim. *Graham* itself says that an officer cannot be judged with "the 20/20 vision of hindsight" and the calculus of an officer's reasonableness must allow "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." The law cuts police officers a lot of slack, so your complaint must be artfully crafted to survive a 12(b)(6) motion and your depositions must be deliberately planned to survive summary judgment.

Now you bring Andrew in. You explain to him that suing the police is very difficult. The majority of excessive force cases get kicked out of court or result in a defense verdict. It could take three or four years to get to trial if the defendant appeals a district court's ruling denying him qualified immunity. Then he tells you he wants to pursue the case despite the risks because he does not want this to happen to anyone else. You discuss some creative solutions, other than money, and he is interest in policy changes, officer training, and an apology.[5] Then you assure him that you believe in his case and you want to help him get justice. And he hires you to represent him.

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[4] You can file constitutional claims in state court but the defendants will often just remove the case to federal court.

[5] *See* Alphonse A. Gerhardstein, *Making a Buck While Making a Difference*, 21 Mich. J. Race & L. 251 (2016) available at http://repository.law.umich.edu/mjrl/vol21/iss2/5/.