



A District Court grants summary judgment in police officers' favor and against the estate of a hostage who was mistakenly killed by the officers. On summary judgment, the District Court concluded that the police officers' use of deadly force was reasonable and did not violate the hostage's right to be free from excessive force

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In *Mason-Funk v. City of Neenah*, 2017 WL 5032651 (E.D. Wis. Nov. 1, 2017), the wife of a man who was being held hostage sued, under 42 U.S.C. § 1983, two of the City of Neenah, Wisconsin's police officers after the officers shot the man, mistaking him for the hostage taker rather than a hostage. The police officers moved for summary judgment on the wife's claim against them, arguing that they did not violate the man's Fourth Amendment rights and that the doctrine of qualified immunity protected them from liability from the suit. The District Court agreed with the officers; concluded that the police officers' use of deadly force was reasonable under the circumstances; and entered summary judgment in the officers' favor. The relevant facts are as follows.

On December 5, 2015, at approximately 8:35 a.m., Brian Flatoff entered Eagle Nation Cycles, a motorcycle shop located in the City of Neenah, Wisconsin, with a loaded MAC-10 machine pistol and took Michael Funk, Ryan Moderson, Ethan Moderson, and Michael Petersen hostage. Flatoff instructed Ryan Moderson to call Vance Dalton, with whom Flatoff had a dispute, and to tell Dalton to come to the motorcycle shop immediately. After placing the call, Moderson kept the telephone line with Dalton open, and Dalton relayed information about the situation to local authorities.

At approximately 8:56 a.m., Winnebago County Dispatch notified the Neenah Police Department ("NPD") about a "weapons call" at Eagle Nation and reported that a shot had been fired. The NPD alerted officers to the hostage situation and directed them to proceed to the scene. The responding officers included Lieutenant Shawn O'Bre; Officer Jonathan Kuffel, the NPD SWAT team leader; Officer Craig Hoffer, the assistant SWAT team leader; Officer Robert Ross; and Sergeant Angela Eichmann. Officers from the nearby City of Menasha Police Department also responded.

While on route to the scene, Lieutenant O'Bre learned there was a man inside Eagle Nation with a weapon and that he had several hostages. Beginning at 8:58 a.m., Officer Ross and other officers listening to the Main Channel dispatch learned that there were three possible hostages in the shop, that the hostage taker had a MAC-10 or MOC-10, and that the suspect was a white male with long hair and a beard, wearing a plaid jacket. The officers did not receive physical descriptions of any of the hostages.

Upon arrival at Eagle Nation, Lieutenant O'Bre advised area units to set up a perimeter around the shop. Shortly thereafter, dispatch informed the officers that an individual who was believed to be the shooter left the shop in a truck. Sergeant Eichmann and Officer Ross stopped the vehicle and identified the driver as Ethan Moderson, who left the shop undetected by Flatoff. Moderson confirmed that there was still a man in the shop

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with a gun. After the officers released Moderson, Lieutenant O'Bre asked Sergeant Eichmann to manage the perimeter and O'Bre began forming a "Hasty Team" consisting of Kuffel, O'Bre, Ross, Hoffer, and Lieutenant Tyrone Thompson to enter the shop if necessary. Officer Kuffel eventually took command of the Hasty Team.

At approximately 9:21 a.m., the officers learned that Flatoff had threatened to start shooting if Dalton did not show up to Eagle Nation within five minutes. Approximately eighteen (18) minutes later, dispatch reported that Flatoff was threatening to kill everyone if Dalton did not arrive in the next minute or so. Based on these facts, Officer Kuffel concluded it was necessary to forcibly enter the shop and prevent Flatoff from killing or seriously harming the hostages. At around 9:40 a.m., Officer Kuffel began "stacking" the team into formation to enter Eagle Nation through the rear door from the alley on the south side of the building.

A dashboard camera on a squad car parked at the west end of the alley facing in an easterly direction (Squad 1 video) captured the outdoor events that occurred next. The Hasty Team entered the shop at 9:42 a.m. Motorcycles and other items were scattered around the rear shop area, limiting the team's ingress. Shortly after the team entered the shop, Lieutenant Thompson and Lieutenant O'Bre fell down a set of stairs just inside the doorway. Upon entry, the officers called out in a loud voice: "Police," "get down," "get down on the ground right now," and "let me see your hands."

At the time the Hasty Team entered Eagle Nation, Funk was seated at a desk facing the rear entrance, and Flatoff stood close to Funk. Funk dropped to the floor face down, and Flatoff crawled behind Funk and began shooting at the Hasty Team. A bullet struck Officer Hoffer's helmet above his right eye. Six seconds later, a bullet struck a fire extinguisher, releasing powder into the air and obscuring the officers' view. The Hasty Team initially returned fire but, then, quickly withdrew from the shop.

Once outside, the Hasty Team shouted into the shop, but their shouts were met with more gunfire. Officers Kuffel and Hoffer thought at the time that there were no hostages inside Eagle Nation and, instead, believed that the officers had walked into an ambush. In any event, Lieutenant O'Bre, Lieutenant Thompson, and Officer Kuffel retreated to Gord's Bar parking lot on the same side of the alley and to the west of Eagle Nation's rear entrance.

At approximately 9:45 a.m., Flatoff instructed Funk to close the shop's rear door, which the Hasty Team had left open, and warned Funk that he would shoot him if he tried to escape. Funk proceeded to the door, started to close it, but then dove out of the shop onto the ground outside. As he did so, Flatoff fired in his direction. Once outside the shop, Funk scrambled behind a truck parked directly behind the shop in an apparent attempt to take cover from Flatoff in the event that Flatoff followed him out the door. From his position behind the truck and facing the door to the shop he had just exited, Funk drew his silver-colored handgun from his waistband holster and held it in both hands in a lowered position.

In the meantime, upon hearing the shots Flatoff had fired at Funk when he dove out the door, Officers Hoffer and Ross moved back toward the alley and joined City of Menasha Police Officer Raymond Berna, who was stationed at the southeast corner of Vicky's Beauty Salon, where they could see the rear door of the motorcycle shop. By the time Officers Hoffer and Ross arrived at that position, Funk had already exited the shop and had drawn his pistol. As Funk turned in a counter-clockwise direction and began running away from the truck and across the alley, Officers Hoffer and Ross fired at him, striking him first in the left hip and leg, and then continuing to strike him as he fell to the ground. Over a five-second period, Officer Hoffer fired eight shots, striking Funk twice, and Officer Ross fired eleven shots, hitting Funk with five.

From the time that Funk exited Eagle Nation until he was shot, neither Officer Hoffer, Officer Ross, nor any other police officer gave him a warning or any sort of instruction. Officer Hoffer told Wisconsin Department of

Justice investigators shortly after the incident that he thought he ordered Funk to show his hands, but he later conceded he did not do so. Officer Ross did not believe that it was feasible to issue a warning to Funk between the time he first saw Funk with the gun in his hand and the time Funk began turning toward the officers. The only statement directed by the police to Funk after he entered the alley was given fourteen seconds after the officers finished shooting and Funk had stopped moving.

After Funk was down in the alley, Officer Hoffer and Sergeant Eichmann discussed whether an officer should retrieve Funk to provide medical attention. Officer Hoffer instructed the officers to leave Funk because “he could care less right now if he sits there and dies.” Officer Hoffer claimed that he chose not to retrieve Funk because the officers did not have proper equipment and cover if Funk was lying on the ground merely waiting for an opportunity to shoot at them. Funk ultimately passed away as a result of the shooting.

Thereafter, Funk’s wife (as the representative of Funk’s estate) sued the City of Neenah and the two officers who shot Funk under 42 U.S.C. § 1983 for violating Funk’s Fourth Amendment rights by exerting excessive force against him. At the close of the discovery period, the officers moved for summary judgment on the wife’s claim, arguing that they did not violate Funk’s Fourth Amendment rights and that they were immune from this suit based upon the doctrine of qualified immunity.

In considering the officers’ motion for summary judgment, the District Court began by noting that a Fourth Amendment excessive force claim is reviewed under the reasonableness standard. The inquiry requires a careful balancing of the nature and quality of the intrusion on the individual’s Fourth Amendment interests against the countervailing governmental interests at stake. This inquiry is highly fact-intensive and requires careful attention to the facts and circumstances of each particular case, including the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight. A court’s analysis of the objective reasonableness of an officer’s actions must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight.

In excessive force claims, 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. Finally, the question is whether the officers’ actions are objectively reasonable in light of the facts and circumstances confronting them, without regard to their underlying intent or motivation.

In this case, the District Court concluded that the officers were mistaken in shooting Funk but that their mistake, while tragic, was understandable and reasonable. Just a few minutes earlier, Flatoff had opened fire on the officers, and the officers were unsure whether Funk was an accomplice sent to do them harm. Had the individual in the alley been Flatoff or someone working with him, the District Court opined that the officers clearly would have been justified in using deadly force against that individual given what had just happened when the officers attempted to enter the motorcycle shop and Flatoff’s threats to kill the hostages. In short, the District Court held that Officers Hoffer and Ross made a mistake, a tragic mistake, but it did not follow that they violated Funk’s Fourth Amendment rights. Accordingly, the District Court entered summary judgment in the officers’ favor and against Funk’s estate, finding that the officers had not violated Funk’s Fourth Amendment rights and that the officers were entitled to immunity from this suit based upon the doctrine of qualified immunity.