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Litigating Excessive Force Cases Involving Police Officers

Recently, the media has been flooded with stories involving excessive force claims by police officers. However, the media fails to address how these types of claims are litigated and judged by courts. There are several important standards that apply to nearly all excessive force claims.

Most importantly, excessive force claims are judged by an objective reasonableness standard based on the totality of the circumstances. What does this? It means that the reasonableness of an officer's conduct is judged from the perspective of a reasonable officer at the scene. It is not judged from the actual officer's perspective. The question is whether the officer's actions are objectively reasonable in light of the facts and circumstances surrounding him or her, without regard to the officer's underlying intent or motivation.

Because this standard requires an analysis of the facts and the inferences that can be drawn from them, it is difficult to convince a court to dismiss a lawsuit against an officer or police department at the summary judgment stage. This means that most excessive force cases are resolved by settlement or by a jury. That being said, courts still grant some leniency to police, understanding that "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." *Graham v. Connor*, 490 U.S. 386, 397 (1989).

Because the reasonableness of an officer's use of force is a fact intensive inquiry, courts consider the following factors: (1) whether the suspect poses an immediate threat to the safety of others; (2) the severity of the underlying crime; (3) whether the suspect is actively resisting arrest or attempting to evade arrest by flight; (4) whether the suspect is incapacitated due to drugs, alcohol or mental illness, whether the officer knew this or should have realized this, and if so, whether the officer followed acceptable police practices in dealing with the incapacitated suspect; and (5) the officer's pre-seizure conduct leading up to the use of force.

Deadly force is reasonable when there is an imminent danger to a third party. "Deadly force may be used if the officer has probable cause to believe that the armed suspect (1) 'poses a threat of serious physical harm, either to the officer or to others,' or (2) 'committed a crime involving the infliction or threatened infliction of serious physical harm,' and is about to escape." *Weinmann v. McClone*, 787 F.3d 444, 448 (7th Cir. 2015), citing *Muhammed v. City of Chicago*, 316 F.3d 680, 683 (7th Cir. 2002).

Applying these concepts, the Wisconsin Court of Appeals recently denied a motion for summary judgment that sought dismissal of an excessive force claim on the grounds that there were issues of fact surrounding the officer's conduct. In *Wilson v. City of Kenosha*, 2015AP904, the plaintiff, Daniel Wilson, was arrested at his home for disorderly conduct. He had undergone back surgery nine days before his arrest. He alleged that he told the arresting officer that he had recently undergone "major surgery." He further alleged that the arresting officer used excessive force against him when she (1) used one set of handcuffs, instead of two, to cuff his hands behind his back despite a complaint of pain; (2) dragged him to the police car; (3) violently pushed his chest causing him to

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Cable Companies Fail to Convince PSC City's Pole Attachment Rates Hinder Broadband Deployment

Cable companies, such as Time Warner and Charter Communications, have long been engaged in a state-by-state battle over the pole attachments rates charged by municipal electric utilities and electric cooperatives, entities which are exempt from the Federal Communications Commission's ("FCC") rules governing pole attachment rates. Among their claims is that such entities have taken advantage of the exemption, charging much higher rates than what the FCC rules would allow. These higher rates, the cable companies claim, are a detriment to the deployment of broadband services.

The chosen target in Wisconsin was the City of Oconomowoc, where Time Warner and Charter Communications were each paying less than $10,000 a year in pole attachment fees to the the City's electric utility. The two companies, along with the Wisconsin Cable Communications Association, brought a complaint before the Public Service Commission of Wisconsin ("PSC" or "Commission"), claiming that the City's pole attachment rates were unreasonable because they were several times greater than the roughly $4.00 rate the FCC rules would allow. At hearing, the cable companies' oft-used expert witness testified that the Commission should order the City to lower its rate to the FCC level because the City's rates were a roadblock to broadband deployment and were the result of the City's leveraging its "much superior" bargaining power.

At its November 5, 2015 open meeting, all three Commissioners rejected the cable companies' request that the PSC impose the FCC rate. Commissioner Nowak rejected the cable companies' arguments with clear and unequivocal language, stating that she did "not believe the cable companies have demonstrated that the FCC compensation rate when compared to the City's methodology is reasonable based on the facts developed in this record."

Commissioner Nowak went on to state that Oconomowoc's rate methodology "more fairly attributes the costs to attachers and ensures the City's electric customers are not subsidizing attachers." She also rejected the cable companies' claim that the City had exercised its monopoly power to charge excessive compensation. Commissioner Nowak also found unpersuasive the cable companies' public policy arguments that the FCC rate was necessary to facilitate broadband deployment, citing Oconomowoc's evidence that broadband penetration in the Oconomowoc area is over 99%.

The Commission ultimately approved a rate methodology that would allow Oconomowoc to charge rates in the $10.00 to $12.00 range. The Commission's written decision is expected to be issued in early February.

— Anita T. Gallucci

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topple onto the backseat of the police car; and (4) twisted his legs resulting in a loosening of the hardware in his back.

Wilson testified that the officer's actions caused him so much pain that he blacked out for a couple of seconds. Another witness testified that the officer was very rough with Wilson despite the officer having been told that Wilson recently had surgery.

Applying the objective reasonableness test discussed above, the court of appeals ruled in Wilson's favor by not dismissing the case. However, the court noted that Wilson did not appear to have a strong case.

— Kathryn A. Harrell

Solar and Wind Energy Tax Credits Extended

President Obama recently signed into law the 2016 Consolidated Appropriations Act, an omnibus bill that revised and extended both the wind and solar energy tax credits.

The Business Energy Investment Tax Credit (ITC) allows commercial, industrial, and non-public utility taxpayers to claim a tax credit in the amount of 30% of the total qualified installed cost of a solar photovoltaic system. The ITC was set to decrease to 10% for projects placed in service beginning in 2017, but the Appropriations Act extended the credit through 2024, with a gradual phase out beginning in 2020. The Act also revised the ITC's eligibility criteria so it is now based on when a project begins construction rather than when it is placed in service, allowing for more predictability in planning and financing solar projects.

In addition, the Act extended the Renewable Electricity Production Tax Credit (PTC) for eligible wind projects, which had expired in 2015. The PTC extension applies retroactively to January 1, 2015 and allows companies that generate electricity using qualified energy resources (most notably wind) to take a tax credit of 2.3 cents per kilowatt-hour (kWh). To qualify for the full amount of the credit, construction on the project must begin before January 1, 2017, after which point the value of the credit will gradually decrease through 2020.

These long-term extensions are a boon for the renewable energy industry, which had become accustomed to last-minute, shorter-term extensions of these and similar credits. The long-term extension of the ITC and PTC will make it easier for project developers to plan and finance large-scale wind and solar projects, and will provide a bridge for the expansion of renewable energy between now and the first set of deadlines for state compliance with the EPA's Clean Power Plan in 2022.

— Julia Potter

PSCW Hits Pause Button on Innovative MGE Solar Tariff

Citing concerns for rate payer fairness and setting accurate price signals, the Public Service Commission of Wisconsin (PSCW) has laid over a decision on an innovative community solar pilot project proposed by Madison Gas & Electric (MGE) in partnership with the City of Middleton (City).

The MGE/Middleton project contains several unusual features intended to enable MGE to build the facility as a dedicated resource on behalf of customers who want to invest in community solar, even if they cannot or, for whatever reason, do not want to put solar panels on their homes.

Under the proposed plan, MGE would construct, own and operate a 500 kW solar facility located on the roof of the Middleton Municipal Operations Center. Interested customers would pay an upfront, non-refundable subscription fee representing ten percent of the estimated capital cost of the installation on a per-kW basis. Subscriptions would be limited to 3 kW, or half the customer's annual energy use, whichever is lower. Participating customers would then be charged a levelized "Community Solar Rate" of $.012/kWh over the 25 year life of the project for their share of project output. Remaining energy needs would be charged out to customers at the standard retail rate, which is just under 10 cents per kWh.

That means solar customers would initially pay more, but because the solar charge is fixed, it would act as a hedge against future tariff increases. Customers would also pay a reduced transmission charge to reflect the value of directly interconnecting a utility scale installation on MGE's distribution system. MGE estimates that the some 250 customers expected to participate in the project would see net positive benefits after seventeen years.

The proposed tariff includes provisions to address undersubscription and customer movement within MGE's service territory.

The project is also expected by MGE to provide overall system benefits, chiefly by equipping the installation with smart inverters designed to smooth out intermittent power flow, gather additional data for use in future solar projects, and provide ancillary services to the grid such as VAR support and voltage reduction. In recognition of such system benefits, MGE's proposal allocates half the cost of the inverters to MGE's other, non-participating customers.

The product of extensive discussions between MGE and the City of Middleton to address the city's carbon reduction goals, the proposal also includes construction of a 100 kw solar array on the roof of the Middleton police department, which would provide approximately 25% of the building's annual energy usage. MGE's agreement with Middleton provides that the city would be able to purchase the array after a seven year initial term.

At their January 21, 2016 open meeting, all three PSCW Commissioners lauded MGE's effort to bring forward an innovative program, and underscored their support for utility-owned renewable generation and community solar. However, while Commissioner Huebsch appeared ready to support MGE's proposal as filed, Commission Chair Ellen Nowak expressed significant misgivings, opining that the proposal's status as a pilot project did not mean that "anything goes."

Noting that MGE's proposal differed from solar pilot tariffs previously approved for WPPI Energy on behalf of New Richmond City Utilities and River Falls Municipal Utilities, and for Northern States Power-Wisconsin -- all of which employ a monthly bill credit for subscribing customers, rather than a long-term levelized charge, Commissioner Nowak singled out several features of MGE's proposal as potentially problematic.

First, MGE did not adequately explain why the proposal would not discriminate against MGE customers who had already installed rooftop solar, since those customers would be ineligible to participate in the new program. Second, Commissioner Nowak raised concerns about MGE's *quid pro quo* arrangement with the City of Middleton for the 100 kW array, and wondered whether the smart inverter would actually provide enough system benefits to warrant charging half its costs to non-participating MGE customers. Finally, Commissioner Nowak questioned the long payback associated with the $0.12/kWh solar charge, suggesting the company had not yet adequately demonstrated that the rate would not result in cross-subsidization by non-participating MGE customers.

Commissioner Montgomery agreed that a closer look was warranted given the precedent-setting nature of the project, and following a suggestion by Commissioner Huebsch, the Commission agreed to give MGE an additional thirty days to address Commissioner Nowak's concerns and ensure that the program's price signals are properly established and fair to all customers.

Industry stakeholders, renewable energy advocates and interested observers have been following the proceeding because it represents an alternative path for utilities interested in developing utility-scale community solar. MGE will now have an additional 30 days to refine its proposal and address the Commission's concerns.

— Richard A. Heinemann

Boardman & Clark LLP Welcomes Attorney Eileen Brownlee

Boardman & Clark LLP is pleased to announce that Eileen Brownlee has become a member of our firm. Eileen joins Boardman & Clark with an established practice and over 30 years of experience in the areas of municipal law, school law, and public sector employment law.

Prior to joining Boardman & Clark, Eileen was the sole member of her firm, Kramer & Brownlee LLC, located in Fennimore, Wisconsin, where she has served cities, villages, school districts and other municipal corporations throughout the state of Wisconsin. Eileen has a wide practice that includes policy and ordinance drafting and implementation, labor negotiations, salary and benefit analyses, grievance and prohibited practice hearings, employee misconduct investigations, advice on employee improvement plans and performance evaluations, and analysis of and application of all major federal and state labor and employment statutes, including FMLA, ADA, ADEA and other discrimination laws. Eileen has received numerous recognitions for contributions to her practice areas, including the George Tipler Award for Distinguished Service in School Law from the Wisconsin School Attorneys Association (WSAA) and Fellowship of the Wisconsin Bar Foundation. Eileen is a 1984 graduate cum laude of Marquette University Law School. She will maintain her office in Fennimore.

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