

***Excessive Force/ Use of Deadly Force/Shooting/ Qualified Immunity/ Interlocutory Appeal/Plaintiff's Version of Facts***

Berube v. Conley, 2007 WL 3171641 (1st Cir. 2007)

The First Circuit Court of Appeals recently held the police officers named in the plaintiff's Complaint did not use excessive force and were entitled to immunity. The Court of Appeals reversed the District Court and remanded for an entry of judgment for the defendants.

In this case, the plaintiff, Vincent Berube, on the evening of December 17, 2003, set out to commit suicide. He parked his truck in a vacant parking lot and began to slit his wrists and stab himself in the chest. The plaintiff was interrupted when a car pulled up behind him. The plaintiff then left the lot and drove behind the Lewiston Police Station. The plaintiff proceeded to smash car windows with a hammer. Officer Carley Conley approached the plaintiff and radioed for back up. Conley saw the plaintiff raise a shiny object, which appeared to her to be a large hammer. Conley yelled to the plaintiff to stop and put his weapon down. Believing that the plaintiff would strike her, Conley fired at the plaintiff.

Officers Eric Syphers and Matthew Vierling then arrived at the scene with their weapons drawn. Syphers ordered the plaintiff to stay down and show his hands. The plaintiff then began to roll over towards the officers. At that time, the plaintiff's hand became visible and Syphers saw a silver/colored object in the plaintiff's hand. "Vierling and Syphers, having heard the shots and seeing a metallic object, believed that Berube was armed and was positioning himself to fire." Because the plaintiff failed to respond to the order to stop moving and show his hands, "Vierling and Syphers fired until Berube stopped trying to get up." The court found approximately ten seconds elapsed between Conley calling for assistance and the end of the incident.

Plaintiff filed suit against Conley, Syphers, and Vierling, alleging the use of excessive force in violation of 42 USC §1983 and state law. The defendants moved for summary judgment on the ground of qualified immunity.

The court began by restating the general rule that an officer's use of deadly force is subject to reasonableness requirement under the Fourth

Amendment. The test requires a determination that the officer had probable cause to believe that the suspect posed a significant threat of death or serious physical injury to the officer or others. Qualified immunity shields a reasonable officer which is premised upon the above-mentioned objective standard.

The court held that Conley was entitled to qualified immunity. Because the plaintiff had a hammer and posed an imminent threat, Conley was entitled to make a split second judgment and respond to that threat, by firing her weapon at the plaintiff. The court held it was reasonable for Syphers and Vierling to use force because when they arrived at the scene, Syphers and Vierling believed that the plaintiff was disobeying orders to stay on the ground and show his hands, and plaintiff had a metal object that appeared to be a gun. The court held Syphers and Vierling were faced with a tense and uncertain situation when they rushed to the scene because they heard gunfire and then witnessed the plaintiff rolling on the ground, refusing to obey orders, and potentially preparing to fire a weapon at the officers.

Additionally, in this case, the plaintiff objected to the court of appeals asserting its jurisdiction over an appeal from the denial of a Motion for Summary Judgment. The plaintiff argued the district court's denial of the defendant's Motion for Summary Judgment on the grounds that issues of facts existed precluded interlocutory review. The court of appeals rejected the argument. Accepting the plaintiff's version of the event, the court found a question of law on the facts existed as to whether there was any violation of law. The court found it could consider the appeal on the facts offered or not disputed by the plaintiff. The court found it was entitled to determine whether the set of assumed facts constituted a constitutional violation which posed a question of law for the Court's review *de novo*. The Berube case is of interest as it demonstrates an exception to the bar against interlocutory appeals when the issue of law involves whether qualified immunity applies.