

## The Courts Speak:

- Handling Mentally Ill
- Operating an Emergency Vehicle
- Using Force on Dogs



By Gene King, Law Enforcement Action Forum Coordinator

All three cases involve activities that are high frequency and high risk for police officers when performing their regularly assigned job tasks. Here are some reasons for the high risk:

- A December, 2015 report by the Treatment Advocacy Center titled *Overlooked in the Undercounted*, said that nearly 8 million Americans suffer from a serious mental illness that “disorders their thinking”, such as schizophrenia or bipolar disorder. On any given day, half of these patients are not taking medications or receiving other care. About one in ten police encounters involve someone with mental illness. One in five people in prison suffer from mental illness.
- The FBI Law Enforcement Officers Killed In Action report of October, 2016 states that traffic related incidents killed 45 officers in 2015, the second-leading cause of officer fatalities. Excessive speed, unbuckled officers and failure to wear body armor were the most frequently cited factors in police officer deaths in traffic accidents according to a COPS report. During the decade, 2006–2015, one officer a week, on average, was killed on U.S. roads. The Michigan Traffic Crash Reporting System Crash Statistics from 2006 to 2015 show 23,405 emergency vehicles were in traffic crashes.
- As tactical teams and raids became more prevalent, so did dog shootings, public outrage and litigation because of them. A Police Magazine article, published on Oct. 29 2014, *Can Police Stop Killing Dogs?*, reported that Laurel Matthews, a supervisory program specialist with the Department of Justice’s Community Oriented Policing Services (DOJ COPS) office, said an awful lot of dogs are killed. She calls fatal police vs. dogs encounters an “epidemic” and estimates that law enforcement officers kill 25 to 30 pet dogs each day. DOJ COPS published a guide, “The Problem of Dog-Related Incidents and Encounters” to help law enforcement in handling incidents involving dogs. The National Canine Research Council produced short videos titled “Police & Dog

Encounters”, distributed by DOJ COPS, explaining how to assess a dog’s body language, tactical options for dealing with dogs, and the potential legal ramifications of shooting dogs.

This edition of the LEAF Newsletter will discuss three cases from the Sixth Circuit Court of Appeals that speak to all three of these regularly performed job tasks for police officers. These cases focus on what officers need to know when making decisions and taking action when encountering a mentally ill person, operating an emergency vehicle or when encountering a dog.

## ENCOUNTERING THE MENTALLY ILL

In *Zucker v. City of Farmington Hills*, 643 F. App’x 555, 562 (6th Cir. 2016), the police were dispatched to a home invasion complaint at the subject’s apartment. The officer found no evidence of a break-in but found the apartment in disarray. In conversation with the subject, officers determined the subject might suffer from a mental illness. Officers contacted the apartment complex management and asked them to contact a family member to regularly check up on the subject. A daughter ultimately had a telephone conversation with the subject, who she knew was bi-polar, and decided to visit.

Before the daughter could arrive, the subject’s neighbors began to complain of bad smells coming from the subject’s apartment. An apartment maintenance employee went to the subject’s apartment and found it “in total disarray and filthy beyond what I’ve seen in a lot of units.” The sinks held food and garbage, there was little room to walk, and the toilet contained boxes, plastics, and other materials. The daughter arrived and found the toilet inoperable and the apartment was full of trash. The subject told his daughter that the maintenance staff had entered his property illegally and had shoved him against a wall. The subject showed his daughter a gun he had obtained to protect his family and property if they tried something again. The daughter promptly went to the office to warn staff. After sharing what each had experienced, the police were called.

After telling dispatch of the conditions, threats and fears the daughter told officers her father had a triggering event about six weeks earlier and was threatening and unpredictable. She was afraid to return to the apartment because of the gun and his threatening behavior. Dispatch assured the daughter that the officers would contact her before engaging the subject.

When officers arrived, the daughter indicated she was “just absolutely terrified of her father.” The officers learned the subject was “living in filth” and that the daughter saw her father “carrying a gun within his apartment,” though he had not threatened her with it. The officer in charge said he was “confident that we have enough to do a commitment on our own,” noting that the subject could not care for himself, was “using a toilet as the trash bin that is so overflowing it will not flush, . . . the whole apartment’s in filth and he’s got water standing in the kitchen floor, which is leaking into other apartments.” The officer later radioed to another officer that the subject “clearly has a gun” and that the daughter was “scared to death of her father, but will not articulate why.”

Officers called the subject by telephone and convinced him to exit his apartment and meet them in the hallway. The officers explained that his daughter was concerned about him and the officers asked the subject to go to the hospital with them. In reaction to the request, the subject made an unintelligible remark, started to reach for his jacket pocket and headed back toward the apartment. Fearing that the subject was reaching for his gun, the officers grabbed the subject’s arm and all went to the floor. One of the officers warned the subject to remove his hands or he would be tasered. He did not and was tasered once. The subject was handcuffed, searched and transported to a hospital where he was admitted after being diagnosed as mentally unsound and in need of treatment.

Subsequent to the incident the subject brought a civil rights claim in Federal District Court that the officers had deprived him of “liberty or property without due process of law” and “the right to be free from excessive force, and to be secure in his person” in violation of the Fourth and Fourteenth Amendments; that the City adopted a pattern or practice of allowing unconstitutional actions and failed to supervise or train the individual officers; that the Chief and a Sergeant “acquiesced in unconstitutional conduct”; and all conspired to cause the subject’s constitutional injuries. A major part of the plaintiff’s claim was that the Fourth Amendment protects individuals from state-sanctioned detention for a psychiatric evaluation absent “probable cause to believe that the person is dangerous to himself or others”. All defendants moved for Summary Judgment in the district court and it was granted. The subject appealed the district court’s denial of his post-judgment motion to the Sixth Circuit Court of Appeals.

### Taking Custody

Audrey Forbush, LEAF Legal Advisor, said the appeals court looked at the issue of whether the officers had probable cause to take the subject in custody by citing that “It is well established that absent suspected criminal activity, a law-enforcement agent may not seize a person simply in order to assess his mental fitness.” *McKenna v. Edgell*, 617 F.3d 432, 440 (6th Cir. 2010); *Fisher v. Harden*, 398 F.3d 837, 842 (6th Cir. 2005)”. Forbush went on to explain that the court in *Monday v. Oullette*, 118 F.3d 1099 (6th Cir. 1997), held that the Fourth Amendment protects individuals from state-sanctioned detention for a psychiatric evaluation absent “probable cause to believe that the person is dangerous to himself or others.” She continued that in this case a showing of probable cause “requires only a ‘probability or substantial chance’ of dangerous behavior, not an actual showing of such behavior”, as outlined in *Illinois v. Gates*, 462 U.S. 213, 243 n.13 (1983). Citing language from *Fisher*, Forbush said the court looks at probable cause in these cases as fluid, which requires the courts to evaluate the facts known to officers from the perspective of a “reasonable and objective person” in the officers’ position.

In developing probable cause in *Zucker*, the officers had the daughter who was scared not only because the subject had a gun, but rather because he produced a gun after “something triggered something,” sending him into a “delusional” and “manic” state. In addition, the apartment maintenance people stated they had been in the unit that day and observed the subject to be “totally unstable” and the daughter told them the subject had his gun out waiting for them to come back. Another factor is that one of the officers had recently been to the apartment on a home invasion complaint and had firsthand knowledge of the conditions. Out of concern, the officer taking the home invasion call had an impression that the subject suffered from mental illness, which prompted contact with the family, which is why the daughter was present. Putting all the pieces together, Forbush said, a reasonable officer would have concluded that the subject, being in a manic-delusional state and having produced a firearm and made threats, had a distinct probability of engaging in dangerous behavior.

The Michigan Mental Health Code at MCL 330.1427(1), Forbush reported, states that an officer can take a person into protective custody if the officer himself observes the individual conducting himself or herself in a manner that causes the peace officer to reasonably believe that the individual is a person requiring treatment. Though this is a true statement, nothing in the Fourth Amendment prohibits an officer from relying on a third party’s observation when ascertaining whether probable cause to conduct a seizure exists, so long as it would be reasonable to conclude that the third party is reliable. (See *Boykin v. Van Buren Township*, 479 F.3d 444, 450 (6th Cir. 2007).

Forbush was very specific to caution that officers need to know they can investigate and seize a subject based on third party information especially when a threat exists, but in order to commit a person for treatment, an officer must observe an individual conducting himself or herself in a manner which causes the peace officer to reasonably believe that the individual is a “person requiring treatment”.

The issue of excessive force was also addressed in *Zucker* and the court pointed to the objectively reasonable officer standard found in *Graham v. Connor*, 490 U.S. 386, 396 (1989) and the “the nature and quality of the intrusion on the individual’s Fourth Amendment interests” against “the countervailing governmental interests at stake.” See *Tennessee v. Garner*, 471 U.S. 1, 8 (1985) ruling that the officers did not use unreasonable or excessive force in bringing the subject into custody. Based on all the information and proofs presented by the participants, the court found no constitutional violations and affirmed the judgment of the district court in granting the City, the Chief and Sergeant and all the officers’ summary judgment on all claims.

## OPERATING AN EMERGENCY VEHICLE

Although it is an unpublished decision, *Stieve v City of Dearborn*, 2017 WL 942992 (Mich App 2017), is an example of officers performing a high frequency, regularly assigned job task that carries with it a high risk of an incident occurring due to officers making inappropriate decisions with bad outcomes. In *Stieve*, officers were heading to assist a disabled vehicle whose young, female occupants reported that an armed man was “looking at” them, even though the officers were aware another patrol unit was closer. As the officers responded, they did not activate the vehicle’s warning siren. The evidence conflicts regarding whether the officers employed the vehicle’s flashing lights and if so, when the lights were activated. Evidence does establish that the officers travelled in the left lane of the median-divided residential street at between 60 and 65 miles an hour in a 35-mph zone, but other evidence suggests the patrol vehicle accelerated to 79 mph. Though supported by video and witness statements, the actual speed and light activation is disputed.

Stieve was traveling on a cross street and says he stopped at a stop sign at the same street the officers were traveling upon. Stieve pulled out at what he thought was a clear path and was struck by the officers’ vehicle. The officers claim that Stieve did not stop entirely and pulled in front of them causing the accident. No injuries were reported at the scene but Stieve later claimed to have suffered head, neck, and spinal injuries. He filed suit against the City alleging negligent operation of a motor vehicle in violation of various traffic laws and against the officer driving, alleging gross negligence. Defendants sought summary disposition on governmental immunity grounds, but the county circuit court found several factual questions precluded such relief. The defendants appealed to the Michigan Court of Appeals.

Forbush said these incidents are becoming more common and are a hot button issue for the public and municipal insurers. Officers do not seem to know what constitutes an emergency in their department and do not seem to understand their responsibilities in the operation of a motor vehicle or the specific actions required by law. Based on the frequency of these incidents and as a general statement, Forbush opined that top command seems unable or unwilling to proactively apply administrative controls to regularly audit the activity of their officers when operating the employer’s vehicles. It is clearly established by MCOLES and most municipal entities with a police department that, for a police officer, operating a motor vehicle is an essential job function and regularly performed task. Officers must have and maintain the knowledge, skill and ability to do so. Failing to maintain that ability can be grounds for termination.

The MML Pool and Fund has discovered that technology imbedded within in-car recording equipment used by many departments, GPS monitoring used by dispatch centers and services available from cellphone service providers, offers the means to regularly monitor and receive notifications of the activity of a vehicle, so to audit is a matter of discretion by top command. Requiring officers to write a report of any incident where they exceed a department established top end speed limit creates an accountability that indicates how important safe vehicle operation is to the department. When it is important to the boss, it suddenly becomes important to the employee. This is especially true when decisions will be scrutinized against the discretion allowed by department policy, command expectation and good judgment.

In *Stieve*, the court ruled, “A police officer’s physical handling of a motor vehicle even during the course of responding to an emergency call may constitute negligent operation of a motor vehicle.” The court went on to say a violation of a civil statute, ordinance, rule, or regulation can establish a prima facie case from which the jury may infer negligence. Forbush emphasized the court’s listing of several overlapping statutes within the Motor Vehicle Code that address the standard of care expected of an officer while operating a police cruiser:

- MCL 257.627(1) generally provides that “[a] person driving a vehicle on a highway shall drive at a careful and prudent speed not greater than nor less than is reasonable and proper, having due regard to the traffic, surface, and width of the highway and of any other condition then existing.”

- MCL 257.603(3)(c), a police vehicle may exceed the speed limit “when responding to an emergency call” so long as life or property is not endangered.

- MCL 257.603(3)(c) for the exemption to apply, the driver must employ “an audible signal by bell, siren, air horn, or exhaust whistle as might be reasonably necessary” unless he is “engaged in an emergency run in which silence is required” and has “activate[d] at least 1 lighted lamp displaying a flashing, oscillating, or rotating red or blue light visible under normal atmospheric conditions from a distance of 500 feet.” MCL 257.603(4)-(5).

- MCL 257.632 provides a similar exemption for police vehicles that are “operated with due regard for safety” and are “traveling in emergencies or in the chase or apprehension of violators of the law or of persons charged with or suspected of a violation.” Under this provision, the driver of a police vehicle is required to employ an audible signal or a flashing red and blue light visible from 500 feet, “unless the nature of the mission requires that a law enforcement officer travel without giving warning to suspected law violators.” The statute also provides that the “exemption shall not . . . protect the driver of the vehicle from the consequences of a reckless disregard of the safety of others.”

- Additionally, MCL 257.653 requires drivers to pull over upon the approach of an emergency vehicle when the emergency vehicle’s lights and siren are activated, but does not relieve the driver of an emergency vehicle “from the duty to drive with due regard for the safety of persons using the highway.”

Forbush reported that the appeals court cited *City of Kalamazoo v Priest*, 331 Mich 43, 46; 49 NW2d 52 (1951) saying these rules afford emergency vehicle drivers protection from liability for specific acts that would otherwise constitute negligence, such as speeding. The statutes do not relieve drivers from the duty of exercising due care, but stress that visible and audible signals are of paramount importance. She said the Michigan Supreme Court considered the statutory duties of an emergency vehicle driver in *Fiser v Ann Arbor*, 417 Mich 461; 339 NW2d 413 (1983) overruled on other grounds by *Robinson v Detroit*, 462 Mich 439 (2000), explaining that the speed limit exemptions applied only if the officers “reasonably believed an emergency existed” that triggered the statutes’ operation. The Supreme Court reasoned, “[t]he chase or apprehension of violators of the law or persons suspected of a violation does not necessarily constitute an emergency situation . . . . The finder of fact must determine whether the circumstances of this case brought the emergency provisions of the statute into play.” The Supreme Court concluded that even when the officers were “excused by statute from obeying most of the rules of the road, the officers must not endanger life or property. The legislative intent is expressed in these statutes—emergency vehicles must be driven with due regard for the safety of others.”

Forbush said it is very important for operators of emergency vehicles to know that the statutes exempting the police and other emergency vehicle operators from various rules of the road apply only when an officer drives

with due care under the facts presented and while maintaining the standard of care required of an officer responding to an emergency.

In *Stieve*, the court said the officers clearly owed a duty to innocent bystanders and other persons using the highways. In determining whether the officer breached that duty, the officer's conduct should be compared to that care which a reasonably prudent man would exercise in the discharge of official duties of like nature under like circumstances as cited in *Fiser*. The *Fiser* court listed a number of factors relevant to whether an officer in these circumstances met his duty of due care, including the officer's speed, the area of the pursuit, weather and road conditions, the presence of pedestrians or other traffic, the presence or absence of audible and visible warnings, and the nature of the emergency.

Another source for training materials, said Forbush, is the July 2014 LEAF Newsletter titled *Officers Are No Help If They Crash Going To An "Emergency"!* that expands on the discussion of the statutes and court cases surrounding the operation of motor vehicles.

The Michigan Court of Appeals in *Stieve* agreed with the circuit court that the record supports various disputes regarding key elements of *Stieve's* and the police officer's potential negligence, which demand resolution by a jury and affirmed the denial of the defendants' motion for summary disposition.

## SHOOTING DOGS

*Brown v Battle Creek Police Department, 844 F.3d 556 (6<sup>th</sup> Cir. 2016)*, involves a police department investigation that discovered hard evidence that led them to believe a subject living in a house in their City was distributing controlled substances from inside the residence. Another person owned the residence and relatives were known to live at the residence. A search warrant was obtained and the officers met with the City's Emergency Response Team (ERT) before it was served. The officers discussed the possibility of the presence of the subject, other gang members, associates, family members and children who may be in the residence when they served the warrant. Because of the subject's gang, drug, gun and violent history he was considered a bad guy, recently released from prison and rarely alone and armed gang members were known to always be lurking near the subject. Due to the dangerous potential of the raid, it was decided the ERT would participate in serving the search warrant.

On the way to serve the warrant, officers were informed the subject in question left the residence and was arrested holding drugs. They were also told that a dog was in the back yard. A subject leaving the residence was identified as living there and detained just prior to the arrival of the main entry team. The subject told officers he was only there to let out the dog. When the team arrived, they found a Beware of Dog sign on the front of the house. The subject who had been detained at the house told the officer no one was home but there were two dogs in the house. The message did not reach the team before they breached the door.

The officer who approached the house first testified that he could see the dogs barking aggressively, "digging and pawing," and "jumping" at the window. The subject held at the residence testified the smaller of the two dogs did not bark and was timid. The officers breached the door and the two pit bull dogs reacted. One ran through the kitchen to the basement and the other lunged at the officer and was fired upon. The wound was non-fatal and the dog ran away from the officers through the kitchen and into the basement. Once the kitchen was cleared, officers went to the basement and were confronted by the dog that had been fired upon. It started barking and the officers did not feel they could safely clear the basement with the dogs present, so they again fired upon the barking dog killing it. The second dog was standing in the basement not barking or moving. The officers, concerned for their safety, fired upon the dog and it ran to the back of the basement behind a furnace. Seeing the dog bleeding profusely, an officer fired a round into the dog so it would not suffer.

The Browns filed suit in Federal District Court against the City, the police department and the officers for unlawfully seizing their property in violation of the Fourth Amendment when the officers entered the residence then shot and killed their two dogs while executing a search warrant. The defendants' filed a motion for summary judgment and the district court entered judgment in favor of the defendants. Plaintiffs appealed the judgment to the Sixth Circuit Court of Appeals.

Forbush said that the courts have long held that a dog is property, and the unreasonable seizure of that property is a violation of the Fourth Amendment. She went on to say that the courts have said a seizure of property occurs when there is some meaningful interference with an individual's possessory interests in that property. In this case, Forbush wanted to make clear, the Sixth Circuit Court of Appeals held that as a matter of first impression there is a constitutional right under the Fourth Amendment to not have one's dog unreasonably seized. In doing so, the court noted that the United States District Court of the Eastern District of Michigan, in an unpublished opinion, held that "the federal courts 'have consistently recognized that a law enforcement officer's killing of a pet dog constitutes a destruction of property and therefore a seizure under the Fourth Amendment.'" *Bateman v. Driggett*, No. 11-13142, 2012 WL 2564839, at \*7 (E.D. Mich. July 2, 2012). Therefore, the Appeals court ruled this right was clearly established in 2013 when the conduct in *Brown* occurred.

Using an analysis found in *Garner and Graham*, Forbush said the court evaluated in *Brown* whether the use of force on the dogs was reasonable by balancing the nature and quality of the intrusion on the individual's Fourth Amendment interests against the importance of the governmental interest alleged to justify the intrusion. They also evaluated whether 'the totality of the circumstances justified the particular sort of seizure as viewed from the perspective of an objectively reasonable officer'. The analysis led the court to set the standard that a police officer's use of deadly force against a dog while executing a warrant to search a home for illegal drug activity is reasonable under the Fourth Amendment when, given the totality of the circumstances and viewed from the perspective of an objectively reasonable officer, the dog poses an imminent threat to the officer's safety.

Part of the allegations by plaintiffs was that the officers were not trained in handling animals encountered during their job tasks. Forbush said the court spoke to the issue by pointing out the police department did have a policy on Resistance and General Firearms Policy which defined dangerous animals and vicious dogs, and discussed when the use of a firearm may be drawn. The court stated that the resistance policy "is consistent with protecting the officers from hostile animals." This led to the court ruling the plaintiffs failed to provide evidence showing that the need for a specific policy and/or training "was so obvious and the likelihood that the inadequacy would result in the violation of constitutional rights was so great that the City can be held liable here for the extent of plaintiffs determined damages."

Another issue raised by the plaintiffs was that it was not uncommon for officers to encounter animals during searches or in the scope of their duties and there was an unofficial tally system maintained wherein officers would post a running list of the animals they shot by putting stickers on their lockers to brag about it. There was deposition testimony that it was very common that officers would talk about how many animals they shot and that all the officers who did this could not be identified individually because there were so many of them just bragging about it.

Forbush was adamant when she said that this type of behavior is inappropriate and reflects badly on everyone. It is obvious that if an officer shoots a person's pet, the person will be angry and it is personal, no matter the justification of the officer. Making jokes, crude comments or running tally systems or competitions are inflammatory, cause's public relation problems and complicates any litigation that might occur. Top management and supervisors need to monitor for this behavior and take steps to eliminate any of the described activity they hear rumors of or identify. In the *Brown* case, the courts ruled while not an example of

model police behavior, there was no evidence indicating that participation in the tally system was systemic or widespread and there was no evidence that the police department's supervisory personnel sanctioned such a system or even knew of its existence. The Sixth Circuit Court of Appeals affirmed the district courts granting of the defendants' motion for summary judgment and entered a judgment in favor of defendants.

Forbush commented that the rulings in this case are very important. Though *Brown* was favorable to the defendant police department, this case represents the first time the Sixth Circuit Court of Appeals has set the standard for a police officer's use of deadly force against a dog while executing a warrant to search a home for illegal drug activity. Such force is reasonable under the Fourth Amendment when, given the totality of the circumstances and viewed from the perspective of an objectively reasonable officer, the dog poses an imminent threat to the officer's safety. She went on to explain that like other use of force incidents, officers must identify the reason a dog is considered an imminent threat and the behavior the officer observed that led them to conclude force was necessary to eliminate the threat. Forbush remarked that departments should evaluate their policy for using force on animals and ensure they provide guidance and training consistent with this ruling.

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LEAF continues to develop policies and resource documents designed to help Law Enforcement Executives manage their risk exposure. Do not hesitate to contact the Michigan Municipal League's, Loss Control Services at 800-482-2726, for your risk reduction needs and suggestions.

*While compliance to the loss prevention techniques suggested herein may reduce the likelihood of a claim, it will not eliminate all exposure to such claims. Further, as always, our readers are encouraged to consult with their attorneys for specific legal advice.*

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The LEAF Committee meets several times yearly to exchange information and ideas relating to law enforcement issues and, specifically, to address risk reduction efforts that affect losses from employee accidents and incidents resulting from officers' participation in high-risk police activities.

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