



THE LOCAL GOVERNMENT LIABILITY BEAT

Presented by **Local Government Risk Management Services Inc.** A Service Organization of The
Association County Commissioners of Georgia and the Georgia Municipal Association Risk Management Programs

LAW ENFORCEMENT EFFORTS *to* CURB COVID-19

In this issue: SEVENTH CIRCUIT GRANTS QUALIFIED IMMUNITY
TO OFFICER WHO USED LEG SWEEP





WHAT CAN YOU DO?

SAVE A LIFE, IT MAY BE YOUR OWN!

by Julie Hyer

The Officer Down Memorial Page reports that as of December 2, 2020 in the United States, we had 265 Line of Duty Deaths. Over 60% (155) were due to COVID-19, a deadly force we cannot see. Physical force will not overcome this enemy. We must follow the advice of our medical experts to help us combat this unseen threat.

Many of us have known someone who has contracted COVID-19. You may have had it yourself. Some of these individuals were self-quarantined for a period, had symptomatic discomfort, recovered, and went back to daily life. On the other hand, there are some who were not so fortunate. They have been or are on ventilators in the hospital. They continue to have medical issues even after the virus is out of their system. And regrettably, some have lost their lives to COVID-19.



Agencies across Georgia have put orders in place for law enforcement officers and personnel to help reduce the threat of COVID-19. These orders either require or recommend wearing protective masks whenever reasonably possible. Wear protective masks over both the mouth and nose to be effective. Practice at least 6 feet social distancing whenever hands-on is not required. Frequently disinfect work areas, including vehicles. Cover nose and mouth with a tissue or elbow if need to sneeze or cough. Wash hands often with soap and water for at least 20 seconds. Use hand sanitizer when soap and water are not available.

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Cold weather will likely increase the risk of contracting COVID-19. More time will be spent in enclosed places instead of outside. Everyone must take personal responsibility in reducing the risk of this virus.

2021 is the new beginning. Vaccines will be available to help reduce the risk of contracting COVID-19. Life will take time to come back to some form of normalcy. We will need to continue all the protections we are currently encouraged to use in the interim. Yet, there is an end in sight.

Someone very close to me said “if there is one thing, we should take from 2020 as a positive thing, it is that we can make a difference.” She said her hope is that from now on, if we have a medical issue and we need to be in public; we will wear a mask, we will maintain social distancing, and we will continue to wash our hands and/or use hand sanitizer.



SEVENTH CIRCUIT GRANTS **QUALIFIED IMMUNITY** TO OFFICER WHO USED LEG SWEEP

HRCT Special Operations

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On December 17, 2019, the Seventh Circuit Court of Appeals decided *Johnson v. Rogers*, which serves as an excellent review regarding the law related to excessive force. The facts of *Johnson*, taken directly from the case, are as follows:

The events we describe were captured on video. The video lacks a sound track, but the officers' descriptions about what *Johnson* said are uncontested, because he was too inebriated to remember much about the encounter.

Despite being cuffed behind his back, *Johnson* managed to stand. The officers walked him backward about 10 feet and sat him down on a patch of grass. They returned to their cars to do some paperwork. In about a minute *Johnson* got to his knees and managed to stand again. He started to move away, shouting threats and racial taunts. Officer *Rogers* returned and pulled *Johnson* backward by his cuffed hands. When that did not return him to the ground, *Rogers* tried a different means. *Johnson* fell and suffered a compound fracture of one leg.ⁱⁱ

Johnson pleaded guilty to resisting arrest and subsequently sued the City of Indianapolis and Officer *Rogers*. The court granted summary judgment to the city and qualified immunity for Officer *Rogers*. *Johnson* appealed the grant of qualified immunity regarding Officer *Rogers* to the Seventh Circuit Court of Appeals.

The court of appeals first noted that, while officers are on notice that excessive force violates the Fourth Amendment, there must be clear precedent that makes it known a particular action or use of force is considered excessive force under the Fourth Amendment in order to defeat qualified immunity. Specifically, the court stated

[A]n officer is entitled to immunity for a takedown that enables the officer to control a suspect during an arrest. Only when precedent places the invalidity of a particular action beyond debate may damages be awarded. *Emmons*, 139 S. Ct. at 504, quoting from *District of Columbia v. Wesby*, 138 S. Ct. 577 (2018).ⁱⁱⁱ

The court of appeals then examined precedent related to “leg sweep” takedowns. The court stated

Many decisions hold that there is no clearly established rule forbidding a clean takedown to end mild resistance of the sort that *Johnson* displayed. See, e.g., *Kelsay v. Ernst*, 933 F.3d 975 (8th Cir. 2019) (qualified immunity for a bear-hug takedown when an angry suspect walked away from the officer for the second time); *Shafer v. Santa Barbara*, 868 F.3d 1110 (9th Cir. 2017) (qualified immunity for a leg-sweep takedown when the intoxicated suspect tried to pull away); *Hedgpeth v. Rahim*, 893 F.3d 802 (D.C. Cir. 2018) (qualified immunity for an arm takedown accompanied by a knee to the rear of the leg of a suspect who had pulled his hands away from the cuffing procedure).^{iv}

The court of appeals also discussed the principle that, if an officer uses reasonable force in a particular situation, but that force results in an injury, the injury does not render the force “excessive” under the Fourth Amendment. The court stated

Any takedown can go awry—some suspects fall clumsily, while others have fragile bones—but, if the officers use steps reasonably likely to effect a clean takedown, an injury does not lead to liability. Assessment under *Graham* is objective; a court asks whether the force used was reasonable, not whether things turned out badly. See, e.g., *Kelsay*, 933 F.3d 975 (suspect suffered a broken collarbone); *Hogan v. Cunningham*, 722 F.3d 725 (5th Cir. 2013) (qualified immunity for a tackle

takedown in which officer landed awkwardly on suspect, causing two broken ribs); *Becker v. Bateman*, 709 F.3d 1019 (10th Cir. 2013) (qualified immunity for a clean throw-down takedown in which the suspect suffered a brain injury). See also *Dockery v. Blackburn*, 911 F.3d 458, 468-69 (7th Cir. 2018), which discusses the need for a margin of error in arrest procedures.^v

With the above legal principles in mind, the court of appeals then applied the principles above to the facts of Johnson's case. Johnson alleged that Officer Rogers kicked him to punish him and that caused a compound fracture in his leg. The court examined the video recording of the incident and noted that it was too grainy to conclusively determine what had occurred. However, the court also noted that the video was clear that Officer Rogers did not kick Johnson or use force on him when he was on the ground. Additionally, the court stated that the video showed that Rogers first tried to use his knee to imbalance Johnson and, when that failed, the officer appeared to use his foot, either to trip Johnson or possibly kick him in the lower shin area. The video was not clear whether it was a trip or a kick to the lower shin.

The court then stated that, viewing the facts most favorable Johnson, as they are required to do at this stage of the litigation, a jury could conclude that Rogers kicked Johnson. The court also noted that a kick to a suspect who is not resisting and is under control clearly violates the Fourth Amendment. However, the court also observed that that was not the case with Johnson. Specifically, the court stated

What resolves this appeal in Rogers's favor is this: Johnson, who had told the officers that he wanted to run away, was not under control when Rogers tried to use his knee to unbalance Johnson, who remained on his feet until Rogers took a further step. If that further step is best understood as a kick, it must also be understood as an attempt to regain control. That such an attempt causes injury, perhaps because poorly executed, does not lead to liability.

Nor does the possibility that Rogers had two things in mind: regaining control and punishing Johnson for abusive language. Graham holds that the excessive-force inquiry is objective. If the force used was objectively allowable, the officer's state of mind can't make it unconstitutional. *Lester v. Chicago*, 830 F.2d 706, 712 (7th Cir. 1987).

vi

Thus, the court held that the officer's use of a lower leg kick or leg sweep to render Johnson off balance so he could be placed on the ground since he had said he was going to flee was not unreasonable (excessive) force under the circumstance, even if it was executed in such a manner as to cause an injury. Additionally, since the force used was reasonable, even if the officer wanted to punish Johnson, that ill intent does not change a reasonable use of force into an unreasonable use of force.

Thus, the court of appeals affirmed the grant of qualified immunity to Officer Rogers.

i No. 19-1366 (7th Cir. Decided December 17, 2019)

ii Id. at 2

iii Id. at 5 (emphasis added)

iv Id. (emphasis added)

v Id. at 5-6 (emphasis added)

vi Id. at 8 (emphasis added)

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This Month:

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