**COURT OF APPEALS**
**DECISION**
**DATED AND FILED**

**November 17, 2010**

**A. John Voelker**
**Acting Clerk of Court of Appeals**



**Appeal No. 2010AP269** **Cir. Ct. No. 2008CV1405**

**STATE OF WISCONSIN** **IN COURT OF APPEALS**
**DISTRICT II**

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**RAYMOND J. BEDNAREK,**

**PLAINTIFF-APPELLANT,**

**V.**

**CITY OF OSHKOSH, KATHERINE J. MANN, MATTHEW J. KROENING, APRIL HINKE, ANDREW W. LECKER AND PAUL FREY,**

**DEFENDANTS-RESPONDENTS.**

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APPEAL from a judgment of the circuit court for Winnebago County: SCOTT C. WOLDT, Judge. *Affirmed*.

Before Brown, C.J., Neubauer, P.J., and Reilly, J.

¶1 PER CURIAM. Raymond J. Bednarek appeals from an order granting summary judgment to the City of Oshkosh and various police officers in this case alleging excessive use of force. Bednarek argues that summary judgment

was inappropriate because there were genuine issues of material fact and the court did not consider all of his claims against the City and the officers. We conclude that the circuit court properly granted summary judgment, and we affirm.

¶2 Bednarek, who is a retired police officer, lived in a condominium that was having problems with rabbits. A committee decided to solve the problem by having someone shoot the rabbits with a pellet gun. Bednarek volunteered to do it. On the day of the incident, someone saw rabbits near the Senior Center and told Bednarek. Bednarek took a pellet gun and got into his car. As he tried to get a good shooting position, his gun was sticking out of the car window.

¶3 The Oshkosh police received a report of a man in a car with a shotgun sticking out of the window. When the officers got to the scene, they saw Bednarek sitting in his car, told him to raise his hands, and to get out of his car. Bednarek, who is hard of hearing, did not respond. The police then pulled him out of the car and down onto the grass, where they handcuffed him.

¶4 Bednarek sued the City and the officers for use of excessive force under 42 U.S.C. § 1983. The defendants moved for summary judgment, the circuit court held a hearing, and granted the motion. The circuit court stated that in a situation such as this one in which police have a credible complaint of a shotgun being pointed out of the window of a vehicle, and when the police approach the vehicle, the person does not respond, then the police have a "100 percent absolute right to pull that person from the vehicle, put them on the ground, handcuff them, and freeze the situation for the sole reason of safety not only for the officers but for safety of the occupant in that vehicle."

¶5 Bednarek argues on appeal that summary judgment was inappropriate because there were disputed issues of fact, the court did not consider

any claim other than his claim that the police used excessive force, the officers were not entitled to receive qualified immunity, and the City should be held vicariously liable. We address first whether the court erred when it granted summary judgment on the excessive use of force claim.

¶6 Our review of the circuit court's grant of summary judgment is de novo, and we use the same methodology as the circuit court. ***M&I First Nat'l Bank v. Episcopal Home Management, Inc.***, 195 Wis. 2d 485, 496, 536 N.W.2d 175 (Ct. App. 1995). That methodology is well known, and we need not repeat it here. Summary judgment is appropriate when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. ***Id.*** at 496-97.

¶7 Bednarek argues that summary judgment was inappropriate because there were disputed issues of fact. Specifically, he alleges that his version of the events differed from the officers' version. Bednarek claims that he did not hear the officers tell him to raise his hands, and consequently, there is the possibility that the officers never gave him the command to do so. He goes on to argue that if the officers never gave him the command, then their decision to pull him from the car was unreasonable.

¶8 Bednarek has not averred that the officers did not direct him to get out of the car, only that he did not hear them. The possibility that Bednarek may not have heard the officers' command does not create a disputed issue of material fact. "The standard for determining whether a police officer's exercise of force is excessive is whether the officer's actions are objectively reasonable." ***Robinson v. City of West Allis***, 2000 WI 126, ¶27, 239 Wis. 2d 595, 619 N.W.2d 692 (citing ***Graham v. Connor***, 490 U.S. 386, 394 (1989). Excessive use of force is analyzed under a Fourth Amendment reasonableness standard. *See* ***Graham***, 490 U.S. at

396. "The 'reasonableness' of a particular use of force must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight." ***Id.*** (citation omitted).

¶9 When the police officers encountered Bednarek, they had been told that there was a man in a car with a shotgun sticking out of the window. They were not told that an elderly man with bad hearing and bad knees was going to shoot rabbits with a pellet gun. From the police officers' perspective, they were stopping a man who had a gun sticking out of his car window, and who was not responding to their commands. We agree with the circuit court that under these circumstances, it was objectively reasonable for the police to have pulled the man out of the car.

¶10 Because we have concluded that the police did not use excessive force, we do not need to address Bednarek's arguments concerning qualified immunity and vicarious liability. Bednarek also asserts that he has stated claims other than for excessive use of force. The record shows, however, that all of his claims are based on his assertion that the police acted unreasonably when they pulled him from his car onto the ground and handcuffed him. No matter how he has labeled the claims, the underlying facts are the same. Because we have concluded that the police acted reasonably under the circumstances, Bednarek's other claims must fail as well. For the reasons stated, we affirm the judgment of the circuit court.

*By the Court.*—Judgment affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5.