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“Kettling” and Keeping the Peace

By **Daigle Law Group**

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Baude v. Leyshock from the Eighth Circuit has a lot of legal issues that we have discussed and a new term that we have not, which is “kettling.” First let’s start with what we have discussed before: our case today brings to question excessive use of force during a protest. As a reminder, a court evaluates the reasonableness of the force by examining the severity of the crime at issue, whether the suspect poses an immediate threat to the officer or others, and whether the suspect is actively resisting arrest or attempting to evade arrest by flight. This case also highlights the duty to intervene and the claim from the plaintiff that supervisory officers did not do so: Officers have an affirmative duty to protect individuals from constitutional violations by fellow officers. To hold an officer liable for failure to intervene it must be shown that the officer knew a person’s rights were being violated, had an opportunity to intervene, and chose not to do so.

The one new term that we have not discussed is “kettling.” The court brings up this term and states that “kettling” may be considered excessive during protests if there is no need for it. “Kettling” (also known as containment or corraling) is a police tactic for controlling large crowds during demonstrations or protests. It involves the formation of large barricades of police officers who then move to contain a crowd within a limited area.

On September 17, 2017, between 8:00 p.m. and 9:00 p.m., a “handful” of individuals protesting the acquittal of a police officer charged with murder broke windows and destroyed flowerpots on Olive Street in downtown St. Louis, Missouri. Twice before 9:00 p.m., a police officer gave dispersal orders to the small number of protestors who were present. Over the next two hours, police officers of the St. Louis Metropolitan Police Department began blocking roads and directing civilians to the intersection of Washington Avenue and Tucker Boulevard, an area containing condominiums, apartment buildings, and businesses, including restaurants and bars.

Brian Baude, who lived near the intersection, saw reports on social media that protesters had destroyed property in the area, so he decided to investigate. He left his home around 9:30 p.m., unaware of the earlier dispersal orders. According to Baude, Lieutenant Colonel Gerald Leyshock approved a plan in which St. Louis Metropolitan officers would prohibit anyone from leaving the vicinity of Washington Avenue and Tucker Boulevard and arrest everyone present. Afterwards, officers surrounded, squeezed, and eventually blocked anyone from leaving the intersection of Washington Avenue and Tucker Boulevard using a technique Baude described as “kettling.” When Baude saw the

police herding the bystanders into a confined space, he asked to leave the intersection but was informed by officers that it was too late. In addition to Baude, those being contained by the SLMPD officers included downtown residents, business patrons, protesters, observers, and members of the press. Video evidence documented multiple citizens approaching officers and requesting permission to leave, which was denied. After Baude was herded into the intersection by SLMPD officers, he was pepper-sprayed by an officer and arrested as part of a mass arrest. Baude claimed that, during the course of his arrest and detention, his hands were zip-tied and he was transported to the City Justice Center, where he was searched and held for 14 hours. Baude was eventually released, and charges against him were dismissed.

Baude sued Lieutenant Colonel Gerald Leyshock and several other SLMPD supervisory and subordinate officers for violating his constitutional rights. First, Baude claimed that the subordinate officers unlawfully seized him in violation of the Fourth Amendment by arresting him without probable cause that he had committed a crime.

Second, Baude claimed that the officers violated his Fourth Amendment right to be free from excessive force when they “kettled” him, pepper-sprayed him, and zip-tied his hands.

Third, Baude claimed that supervisory officers either observed the excessive use of force by subordinate officers or intended for subordinate officers to use excessive force and subsequently did not intervene to stop it. After the district court denied the officers qualified immunity, they appealed.

Eighth Circuit Court Opinion

Concerning Baude’s unreasonable seizure claim, the Eighth Circuit Court of Appeals found that it was undisputed that Baude was seized when the officers indiscriminately encircled all individuals in the area, including protestors, observers, business patrons, and residents who were simply walking by, and then refused to allow anyone to leave voluntarily. Specifically, Baude alleged that the officers failed to warn him and the allegedly peaceful group that they were about to be surrounded, herded into a confined area, and arrested. Baude also alleged that, even though he was at all times peaceful, the officers denied his request to leave the area and then arrested him without probable cause.

After being seized, Baude alleged that subordinate officers relayed information about the crowd to their supervisors, who directed the subordinate officers to arrest Baude without probable cause that he had committed a criminal offense. The court noted that the subordinate officer was not entitled to qualified immunity because his claim that he was just following his superiors’ allegedly lawful orders to arrest Baude was contradicted by Baude’s allegations regarding his own conduct.

The court stated that it was required to consider Baude's allegations and accompanying exhibits as true and view them in Baude's favor. As a result, the court concluded that Baude's allegations and the accompanying video of the encounter stated a "plausible claim" that the officers' conduct constituted an unlawful arrest; therefore, the officers were not entitled to qualified immunity.

Regarding Baude's excessive force claim, the court found that Baude's allegations and the video evidence submitted established that Baude was a compliant individual among a generally peaceful and compliant crowd who was boxed into an intersection by police, pepper-sprayed, and forcefully arrested. The court added that, at this stage of the proceedings, some specific questions such as whether "kettling" a crowd was in-and-of itself excessive force, whether the application of zip-ties caused any injury, or whether Baude was actually compliant could not be determined. Consequently, the court held that when viewing the alleged facts in a light most favorable to Baude, which it was required to do, the court could not conclude that the use of force against Baude was objectively reasonable.

Concerning Baude's claim that the officers failed to intervene, Baude alleged that it was the coordinated actions of the officers in surrounding the assembly and using chemical agents that made it clear that these tactics were planned and that senior officials of the SLMPD not only had notice of, but actually sanctioned the conduct of the officers. Although the officers disputed these allegations, the court noted that at this stage of the proceedings, it was required to accept as true all facts pleaded by Baude. Therefore, the court held that the supervisory officers were not entitled to qualified immunity on Baude's failure to intervene claim.

Takeaways

The recent years have seen an increase in protests and the use of social media has made it easy for crowds to gather quickly. In this case, the officers only informed the original protesters about the dispersal orders. Just because a crowd had formed earlier to protest something, it does not mean that those who are passing through later should be corralled. The officers in this situation indiscriminately encircled all individuals in the area, including protestors, observers, business patrons, and residents who were simply walking by, and then refused to allow anyone to leave voluntarily. This type of conduct is unacceptable for officers. Their role is to keep the peace and protect the community, not to impose unnecessary sanctions. In this situation, the supervisors had a responsibility to intervene and prevent this kind of conduct. Under no circumstances should officers prevent residents from leaving an area if there is no credible safety concern.

Baude v. Leyshock, 23 F.4th 1065 (8th Cir. 2022)