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**SUPREME COURT OF NEW YORK**  
**APPELLATE DIVISION, FIRST DEPARTMENT**

Koeiman v. New York<sup>1</sup>  
(decided January 9, 2007)

Altagracia Koeiman successfully commenced an action against the City of New York for “excessive force in effecting the arrest” of decedent Luis Jiminez, for whose estate Koeiman served as administratrix.<sup>2</sup> A Bronx County Supreme Court jury found that the defendants utilized excessive force in violation of the Fourth Amendment of the United States Constitution,<sup>3</sup> “and that such force proximately caused injury to the decedent . . . .”<sup>4</sup> Accordingly, Koeiman was awarded damages in the sum of \$1,622,770.<sup>5</sup> The Appellate Division, First Department, unanimously reversed and held that Koeiman’s conclusory contentions were “insufficient as a matter of law” to sustain the jury’s finding of excessive force.<sup>6</sup>

On October 17, 1992, Luis Jiminez, under the influence of alcohol, “entered the 44th precinct station house in the Bronx.”<sup>7</sup> Police Officer Mondello asked Jiminez “whether he could assist him.

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<sup>1</sup> No. 23549/93, 2007 N.Y. App. Div. LEXIS 88, at \*1 (App. Div. 1st Dep’t Jan. 9, 2007).

<sup>2</sup> *Id.*, at \*3.

<sup>3</sup> U.S. CONST. amend. IV states in pertinent part: “The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated . . . .”; *see also* N.Y. CONST. art. I, § 12 provides in relevant part: “The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated . . . .”

<sup>4</sup> *Koeiman*, 2007 N.Y. App. Div. LEXIS 88, at \*3.

<sup>5</sup> *Id.*, at \*1.

<sup>6</sup> *Id.*, at \*5.

<sup>7</sup> *Id.*, at \*1.

. . . [and] without provocation or warning, [Jiminez] punched Officer Mondello in the face.”<sup>8</sup> Mondello then attempted to restrain Jiminez by grabbing him by the shoulders.<sup>9</sup> Officer Carson witnessed the altercation and accordingly “ ‘jumped’ on both [Jiminez] and Mondello”<sup>10</sup> in an attempt to prevent further injuries and restrain Jiminez. After the officers managed to get Jiminez to the floor and handcuff him, “Officer Carson noticed that one of [Jiminez’s] legs was injured.”<sup>11</sup> An ambulance was summoned and escorted Jiminez to a hospital where he “was diagnosed with a comminuted fracture of the left femur.”<sup>12</sup>

The Appellate Division, First Department, vacated the Bronx Supreme Court’s judgment, dismissed the complaint, and “reversed, on the law,”<sup>13</sup> reasoning that the decedent’s instigation was unprovoked and the force with which the officers responded was reasonable and necessary.<sup>14</sup> Further, the court emphasized that plaintiff’s burden was not met for want of “evidence--expert or otherwise--demonstrating that the force used by the officers” was unreasonable or excessive.<sup>15</sup>

In so finding, the court relied on *Graham v. Connor*,<sup>16</sup> where the United States Supreme Court held that “*all* claims that law

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<sup>8</sup> *Id.*

<sup>9</sup> *Koeiman*, 2007 N.Y. App. Div. LEXIS 88, at \*2.

<sup>10</sup> *Id.*

<sup>11</sup> *Id.*

<sup>12</sup> *Id.*, at \*3.

<sup>13</sup> *Id.*, at \*1.

<sup>14</sup> *Koeiman*, 2007 N.Y. App. Div. LEXIS 88, at \*5.

<sup>15</sup> *Id.*, at \*5.

<sup>16</sup> 490 U.S. 386 (1989).

enforcement officers have used excessive force -- deadly or not -- in the course of an arrest, investigatory stop, or other ‘seizure’ of a free citizen should be analyzed under the Fourth Amendment and its ‘reasonableness’ standard . . . .”<sup>17</sup> In *Graham*, Dethorne Graham, a diabetic, was attempting to prevent an insulin reaction by purchasing orange juice at a convenience store.<sup>18</sup> Upon entering the store, Graham became concerned about having to wait on the long line of customers and hurriedly exited.<sup>19</sup> Graham’s hasty exit prompted Officer Conner, one of the defendants, to follow Graham and subsequently conduct an investigatory stop.<sup>20</sup> Graham and his friend William Berry provided Conner with an explanation, but Conner sought backup assistance and continued the investigation.<sup>21</sup> Graham then fell unconscious.<sup>22</sup> Over Berry’s pleas to the contrary, the responding officers dismissed Graham as drunk.<sup>23</sup> The officers then subjected Graham to physical force by “shov[ing] his face down against the hood of the car. . . . [and throwing] him headfirst into the police car.”<sup>24</sup> Among other injuries, “Graham sustained a broken foot, cuts on his wrists, a bruised forehead, and an injured shoulder . . . .”<sup>25</sup>

Graham commenced an action against the individual officers

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<sup>17</sup> *Id.* at 395 (emphasis in original).

<sup>18</sup> *Id.* at 388.

<sup>19</sup> *Id.*

<sup>20</sup> *Id.* at 389.

<sup>21</sup> *Graham*, 490 U.S. at 389.

<sup>22</sup> *Id.*

<sup>23</sup> *Id.*

<sup>24</sup> *Id.*

<sup>25</sup> *Id.* at 390.

and the City of Charlotte pursuant to section 1983,<sup>26</sup> arguing a deprivation of his Fourteenth Amendment<sup>27</sup> liberty interest.<sup>28</sup> The district court applied a four factor test to determine that there was no excessive force, and thus granted the defendants' motion for a directed verdict;<sup>29</sup> the Fourth Circuit Court of Appeals affirmed.<sup>30</sup> The Supreme Court rejected the standard applied by the lower courts, vacated the judgment, and remanded the matter.<sup>31</sup> The Court found the Fourth Amendment's "objective reasonableness" standard proper, distinguishing it from post-conviction excessive force matters, which are subject to Eighth Amendment analysis.<sup>32</sup> The Court reasoned that a free citizen's excessive force claim that arises "in the context of an arrest or investigatory stop . . . is most properly characterized as one invoking the protections of the Fourth Amendment."<sup>33</sup>

Comparably, in *Ostrander v. New York*,<sup>34</sup> the Appellate Division, Second Department, held that the State Troopers' refusal to loosen or remove claimant Ostrander's handcuffs during the course

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<sup>26</sup> 42 U.S.C. § 1983 (2000).

<sup>27</sup> U.S CONST. amend. XIV.

<sup>28</sup> *Graham*, 490 U.S. at 390.

<sup>29</sup> *Id.* at 391.

[T]he District Court considered the following four factors, which it identified as the '[t]he factors to be considered in determining when the excessive use of force gives rise to a cause of action under [§] 1983': (1) the need for application of force; (2) the relationship between that need and the amount of force that was used; (3) the extent of the injury inflicted; and (4) "[w]hether the force was applied in a good faith effort to maintain and restore discipline or maliciously and sadistically for the very purpose of causing harm.

*Id.* (citations omitted).

<sup>30</sup> *Id.*

<sup>31</sup> *Id.* at 399.

<sup>32</sup> *Id.* at 395.

<sup>33</sup> *Graham*, 490 U.S. at 394.

<sup>34</sup> 735 N.Y.S.2d 163 (App. Div. 2d Dep't 2001).

of an arrest did not constitute excessive force.<sup>35</sup> The second department affirmed the Court of Claims' application of the Fourth Amendment's "standard of objective reasonableness"<sup>36</sup> because the "Troopers followed standard police procedure, which requires double-locking of handcuffs and prohibits the removal of handcuffs once they are applied, to reduce the risk of flight."<sup>37</sup>

Likewise, the Appellate Division, Third Department, in *Passino v. New York*,<sup>38</sup> held that a State Trooper's use of oleoresin capsicum (pepper spray) did not amount to excessive force when the claimant "kicked the exterior door of the . . . barracks," refused to remove his hands from his pockets, and ignored the Trooper's warnings regarding administering the pepper spray.<sup>39</sup> The third department affirmed the Court of Claims' dismissal of the claim, reasoning that the Trooper "followed State Police policy governing the use of force by complying with levels one through three of the guidelines before employing the use of pepper spray."<sup>40</sup> The court explained that, under the circumstances, the Trooper's conduct was appropriate "under the [Fourth] Amendment and its standard of objective reasonableness."<sup>41</sup>

In summary, the First, Second, and Third Departments of the Appellate Division unanimously adopt the federal standard set forth

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<sup>35</sup> *Id.* at 164.

<sup>36</sup> *Id.*

<sup>37</sup> *Id.*

<sup>38</sup> 689 N.Y.S.2d 258 (App. Div. 3d Dep't 1999).

<sup>39</sup> *Id.*

<sup>40</sup> *Id.*

<sup>41</sup> *Id.*

by the United States Supreme Court in *Graham*: objective reasonableness pursuant to the Fourth Amendment. The breadth of *Graham's* scope is substantial and necessarily lends itself to varied results. For instance, in *Passino*, the reasonableness of the conduct was determined to be in accordance with Keeseville State Police protocol.<sup>42</sup> Accordingly, the trooper's use of pepper spray was found objectively reasonable under those circumstances because a fellow Keeseville trooper would have followed the same procedures; the reasonableness, *vel non*, of the underlying conduct (the allegedly excessive force) was not addressed. In other words, although New York jurisprudence affords excessive force claimants the protection of the *Graham* standard, within New York jurisdictions that standard is so malleable that it may provide either more or less *actual* protection from excessive force than that which was afforded in *Graham*, either of which may still be deemed "objectively reasonable."

*Gennaro Savastano*

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<sup>42</sup> *Id.* at 258. The *Passino* court explained that:

Police guidelines governing the use of force to subdue an arrestee include six steps; namely, the physical presence of an officer, employment of a verbal command, placement of a hand on the arrestee, the use of pepper spray, the use [sic] of physical force and the use of deadly physical force.

*Id.*