Appeal No. 03-2316 **Cir. Ct. No. 98CV002857**

WISCONSIN COURT OF APPEALS
DISTRICT IV

CONNIE ANNE SHAW,

PLAINTIFF-APPELLANT,

v.

GREG LEATHERBERRY, ROGER L. FINCH AND AMY ELVE,

DEFENDANTS-RESPONDENTS.

FILED

FEB 10, 2005

Cornelia G. Clark
Clerk of Supreme Court

CERTIFICATION BY WISCONSIN COURT OF APPEALS

Before Deininger, P.J., Dykman and Vergeront, JJ.

We certify this appeal to the Wisconsin Supreme Court to determine what standard of proof applies to cases alleging excessive use of force by the police brought pursuant to 42 U.S.C. § 1983 in Wisconsin courts. The circuit court applied the middle burden of proof, relying on three Wisconsin Supreme Court cases, ***Johnson v. Ray***, 99 Wis. 2d 777, 299 N.W.2d 849 (1981), ***Wirsing v. Krzeminski***, 61 Wis. 2d 513, 213 N.W.2d 37 (1973), and ***Bursack v. Davis***, 199 Wis. 115, 225 N.W. 738 (1929). Based on the Supremacy Clause of the Federal Constitution, the plaintiff argues that the circuit court should have applied a lower burden of proof.

Connie Shaw brought this civil rights action against three Dane County deputies, alleging that they used excessive force when they stripped her

after her arrest because they believed her to be suicidal. The circuit court instructed the jury that the plaintiff had to establish by a middle burden of proof—clear and convincing evidence—both liability and causation. The jury returned a verdict in favor of the deputies.

Federal civil rights legislation creates "liability in favor of persons deprived of their federal civil rights by those wielding state authority." *See* ***Felder v. Casey***, 487 U.S. 131, 139, 108 S. Ct. 2302 (1988). The central objective of 42 U.S.C. § 1983 "is to ensure that individuals whose federal constitutional or statutory rights are abridged may recover damages." ***Id.*** To that end, it is well established that State courts must not apply procedures and practices that unduly burden the purposes of 42 U.S.C. § 1983. ***Id.*** at 138-39. For example, in ***Felder v. Casey***, the United States Supreme Court struck down Wisconsin's notice of claims statute and its exhaustion of administrative remedies requirement in § 1983 actions as unduly burdening the federal right of redress. ***Id.*** at 143-47.

Shaw contends that the United States Supreme Court and other Federal Courts apply the lower preponderance-of-the-evidence burden of proof to civil rights actions brought under 42 U.S.C. § 1983. *See*, *e.g.*, ***Crawford-El v. Britton***, 523 U.S. 574, 594-95, 118 S. Ct. 1584 (1998) (striking down a court of appeals decision applying the middle burden of proof to a § 1983 action alleging that prison officials retaliated for exercise of First Amendment rights); ***McNair v. Coffey***, 234 F.3d 352, 355 (7th Cir. 2000) (applying the lower preponderance-of-the-evidence burden to a § 1983 action alleging excessive use of force by the police), *vacated on other grounds*, 533 U.S. 925. 121 S. Ct. 2545 (2001); ***Stone v. City of Chicago***, 738 F.2d 896, 900-01 (7th Cir. 1984) (applying the lower burden to a § 1983 action alleging excessive use of force). Shaw contends the circuit court's failure to apply the lower burden in this § 1983 case violated the

Supremacy Clause of the Federal Constitution. Shaw also argues that the Wisconsin Supreme Court cases on which the circuit court relied, ***Johnson***, ***Wirsing***, and ***Bursack***, were common law tort actions, not actions brought under § 1983, so the court's discussion of the burden of proof in those cases is not applicable. Shaw's position is supported in amicus briefing by the American Civil Liberties Union of Wisconsin Foundation, the Wisconsin Academy of Trial Lawyers and the Wisconsin Employment Lawyers Association.

The deputies contend that the circuit court properly concluded that it was bound by Wisconsin Supreme Court precedent to instruct the jury on the middle standard of proof. *See* ***Johnson***, 99 Wis. 2d at 783; ***Wirsing***, 61 Wis. 2d 520-22; and ***Bursack***, 199 Wis. at 121-22. The deputies point out that the Wisconsin pattern jury instruction for federal civil rights cases involving excessive use of force by persons acting under state authority, Wis. JI-Civil 2155, provides for use of the middle burden of proof based on ***Johnson*** and ***Wirsing***. The deputies also argue that there is no direct controlling federal authority because the language in the Seventh Circuit cases to which Shaw points is dicta and the United States Supreme Court has never held that the lower preponderance-of-the-evidence burden applies to § 1983 cases *involving allegations of excessive force*.

In view of the Wisconsin common law that tort actions claiming excess use of force by police must apply the middle burden of proof, we think that the Wisconsin Supreme Court is better situated than this court to decide whether federal law requires that Wisconsin Courts use the lower burden of proof in cases involving allegations of excessive use of force by the police brought pursuant to 42 U.S.C. § 1983. *See* WIS. STAT. RULE 809.61 (2003-04).