IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

DOCKET NO. 17-15566-DD

MICHAEL VICKERS,

Appellant/Defendant Below

v.

AMY CORBITT,

Appellee/Plaintiff Below

Appeal from the United States District Court
for the Southern District of Georgia
Waycross Division

Case No. 5:16-CV-51

REPLY BRIEF OF APPELLANT

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Appeal Number: 17-15566-DD

Michael Vickers v. Amy Corbitt

CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

The undersigned Counsel of Record for Defendant/Appellant Michael Vickers, in accordance with Rule 26.1 of the United States Court of Appeals, Eleventh Circuit, certify that the following is a full and complete list of all persons, firms, associations, partnerships, and corporations, including subsidiaries, conglomerates, affiliates, parent corporations, and other legal entities having an interest in the outcome of this case:

Association of County Commissioners of Georgia-Interlocal Risk Management Agency ("ACCG-IRMA")	Risk Management Pool Fund Administrator for Coffee County
Elizabeth Bower	Plaintiff Below
Brown, Readdick, Bumgartner, Carter, Strickland & Watkins, LLP	Attorneys for Appellant/Defendant
Coffee County, Georgia	Defendant Below
Amy Corbitt	Appellee/Plaintiff
Emily R. Hancock	Attorneys for Appellant/Defendant
Tonya Johnson	Plaintiff Below

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Jerry Rich	Plaintiff Below
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Southeast Law, LLC	Attorneys for Appellee/Plaintiff
Damion Stewart	Plaintiff Below
Strickland, Richard K.	Attorney for Appellant/Defendant
Michael Vickers	Appellant/Defendant
Honorable Lisa G. Wood	Judge, U. S. District Court for the Southern District of Georgia
Doyle Wooten	Defendant Below

This seventh day of March, 2018.

/s/ Richard K. Strickland
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/s/ Emily R. Hancock
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ARGUMENT AND CITATION OF AUTHORITY

I. The trial court erred in holding that Appellant is not entitled to qualified immunity on Appellee's Fourth Amendment claims.[1]

Appellee's brief repeats an admission, made several times in Appellee's submissions to the lower court, that is fatal to Appellee's case. Specifically, Appellee states that "Defendant was grossly negligent when he unreasonably shot *at the family pet* while restraining Plaintiff's minor child." Appellee's Brief at 3 (emphasis supplied).

Much of Appellee's brief is spent in evaluating the reasonableness of a decision by Appellant Vickers to shoot at SDC, the minor child who was struck by the bullet intended for the dog. *See* Appellee's Brief at 6-8. Appellee argues that the factors set forth in *Graham v. Connor* were not met with respect to SDC, and that SDC was "an unarmed, unsuspected child." *Id.* at 8. But this analysis is meaningless, as it is undisputed that Vickers was not *trying* to shoot SDC. Appellee cites no authority for the proposition that an accidental application of force should be evaluated by

[1] For the sake of brevity, the phrase "Appellee's claims" or "Corbitt's claims" will be used in this brief to refer only to Corbitt's claims against Vickers on behalf of her minor child, SDC. The additional claims asserted by Corbitt in the Complaint are not at issue in this appeal.

determining whether that same application of force would have been reasonable had it been intentional. There is no such authority, and although the trial court erred in its analysis, it did not go so far as to suggest that the appropriate question is whether Vickers would have been justified in intentionally shooting SDC.

Instead, the trial court focused on whether it was reasonable for Vickers to shoot the dog, which is undisputedly what he was trying to do.[2] As Vickers outlined in his principal brief, this incorrect approach stems from the trial court's reliance on a decision from a sister court that was invalidated by this Court on appeal. To reiterate, the trial court held that there is a "circuit split" between courts that hold that an accidental use of force does not ever violate the Fourth Amendment, and courts that apply a

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[2] Although there is no need to examine the reasonableness of Vickers's decision to shoot the dog, and indeed no authority that even permits consideration of the reasonableness of that decision, Vickers notes that Appellee's statement that "the family pet showed no signs of aggression and there is no indication that Defendant faced any imminent threat from the dog" is contradicted by Appellee's own pleadings. Appellee acknowledges that the dog (which the Complaint neglects to mention was a pit bull) was coming toward Vickers and the persons detained on the ground, and admits that Vickers may have discharged his weapon to "subdue" the dog. Dkt. No. 1, ¶¶28, 41; Dkt. No. 25, 8:22-24. A docile, nonaggressive dog that is wandering aimlessly does not need to be "subdued."

reasonableness standard even to accidental discharges resulting in injury, and identified an opinion from the Northern District of Georgia acknowledging that circuit split and electing to apply the reasonableness standard. Dkt. No. 19 at 11. However, in a subsequent opinion in that same case, this Court held unequivocally that "In this circuit, there is no clearly established right to be free from the accidental application of force during arrest, even if that force is deadly."*Speight v. Griggs*, 620 F. App'x 806, 809 (11th Cir. 2015).

Rather than addressing Vickers's showing that the trial court improperly relied on an invalid district-court opinion, Appellee simply repeats the trial court's analysis of that opinion. Appellee's Brief at 6. But the most information in Appellee's brief, with respect to analyzing the case pursuant to this Court's opinion in *Speight*, is the admission in the introduction that Vickers was trying to shoot the dog. *Speight* establishes that in this circuit, a case involving an accidental application of force turns entirely on whether the application was truly accidental; there can be no constitutional violation unless there is evidence that the officer actually intended to shoot the person who was shot. *Speight v. Griggs*, 620 F. App'x

806, 809 (11th Cir. 2015). Appellee's admission that Vickers discharged his firearm for the purpose of shooting the dog precludes any finding that Vickers actually intended to shoot SDC, and, under *Speight*, means that Vickers cannot be held liable for a constitutional violation.

Appellee likewise does not respond to Vickers's showing that *Vaughan v. Cox*, which the trial court relied on in denying qualified immunity, is readily distinguishable from this case. Again, Appellee simply repeats the trial court's analysis, and does not respond to Vickers's discussion of the flaws in that analysis. As shown in Vickers's principal brief, the rule that must be taken away from *Vaughan* is that an application of force is not accidental if its purpose is to seize a suspect and it achieves that goal, albeit in an unexpected manner. Under such circumstances, the application of force is not truly accidental, and a court should then go on to analyze the reasonableness of the force. *Vaughan v. Cox,* 343 F.3d 1323, 1326 (11th Cir. 2003). Here, again, Appellee's admission that Vickers was trying to shoot the dog – not trying to shoot SDC – is fatal to any attempt to analogize the two cases.

Both *Speight v. Griggs* and *Vaughan v. Cox* establish that the only way

an accidental application of force can be actionable as a violation of the Fourth Amendment is if it was not, in fact, accidental. This can be because, as in *Speight*, there is some question as to whether the officer actually meant to shoot the person he ended up shooting, or because, as in *Vaughan*, the officer meant to seize the person he ended up shooting by different means and ended up seizing him directly by shooting him. This Court has never held that a truly accidental application of force – such as here, where Vickers shot at the dog, planning to hit the dog, for the purpose of subduing it, and instead hit a bystander who had already been lawfully detained[3] – can be a constitutional violation.

It was not clearly established on the day of the incident that Vickers's accidental application of force to SDC as he tried to shoot the approaching dog transformed the lawful detention of SDC into an unlawful seizure or use of excessive force. Consequently, the trial court erred in denying qualified immunity to Vickers.

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[3] While Appellee makes several remarks about the possible impropriety of SDC and the other bystanders being "accosted by armed men [and] forced to the ground with guns in their backs," she does not actually contest the trial court's correct ruling that the seizure of SDC and the other bystanders by ordering them to lie on the ground was warranted and lawful. Appellee's Brief at 9.

II. The trial court properly declined to allow Appellee to proceed on a claim under the Fourteenth Amendment.

Citing a 1949 case from the United States Supreme Court, Appellee argues that Vickers may be held liable for violation of SDC's rights under the Fourteenth Amendment. But the Supreme Court has indicated that claims alleging the use of excessive force during an arrest must be evaluated entirely under the Fourth Amendment framework, and that a separate due-process analysis under the Fifth or Fourteenth Amendment is inappropriate. *Graham v. Connor*, 490 U.S. 386, 395, 109 S. Ct. 1865, 1871, 104 L. Ed. 2d 443 (U.S. 1989). To the extent that Appellee is now claiming that the trial court erred by failing to find a violation of SDC's rights as a result of the fact that SDC was "forcibly seiz[ed] at gunpoint," that claim fails, because Appellee did not file an appeal of the trial court's order. Appellee's Brief at 12. Appellee's apparent claim for "attempting to deprive Plaintiffs of their property by shooting at the family dog" fails for the same reason, and additionally fails because there is no allegation in the complaint that the dog was ever actually shot.

CONCLUSION

For the foregoing reasons, the Judgment of the District Court should be reversed with respect to Corbitt's claims against Vickers, and the case should be remanded to the District Court with instructions to enter dismissal of all claims against Vickers.

Respectfully submitted, this seventh day of March, 2018.

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CERTIFICATE OF COMPLIANCE

The undersigned attorney, counsel for Appellant, certifies that this brief complies with the type volume limitation set forth in FRAP 32(a)(7)(B). Pursuant to FRAP 32(a)(7)(C)(i), the undersigned further certifies that the foregoing brief contains 1,374 words, exclusive of those portions of the brief which are not considered for word count purposes, as measured by the word count of the word processing system used to prepare the brief (Corel Word Perfect 12.0 for Windows). The type size and style used in this brief is 14-point Book Antiqua.

Respectfully submitted, this twenty-third day of January, 2018.

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the above and foregoing pleading has been served upon all counsel of record through the Court's Electronic Case Filing System, or by placing the same in the United States mail, properly addressed and postage prepaid, this seventh day of March, 2018.

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