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

BRIEF OF APPELLANT

Richard K. Strickland
Emily R. Hancock
Brown, Readdick, Bumgartner,
Carter, Strickland & Watkins, LLP
5 Glynn Avenue, Brunswick, Georgia 31520
(912) 265-8544
ATTORNEYS FOR APPELLANT

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

Ashleigh R. Madison	Attorney for Appellee/Plaintiff
Ben B. Mills, Jr.	Attorney for Appellee/Plaintiff
Jerry Rich	Plaintiff Below
Sean K. Scally	Attorney for Appellant/Defendant
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 twenty-third day of January, 2018.

/s/ Richard K. Strickland
Richard K. Strickland
Georgia Bar Number: 687830

/s/ Emily R. Hancock
Emily R. Hancock

Georgia Bar Number: 115145
ATTORNEYS FOR APPELLANT

BROWN, READDICK, BUMGARTNER,
CARTER, STRICKLAND & WATKINS, LLP
5 Glynn Avenue (31520)
Post Office Box 220
Brunswick, GA 31521-0220
(912) 264-8544
(912) 264-9667 FAX

Appeal Number: 17-15566-DD

Michael Vickers v. Amy Corbitt

STATEMENT REGARDING ORAL ARGUMENT

Appellant does not request oral argument.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Federal Cases

Federal Statutes

STATEMENT OF JURISDICTION

The U.S. District Court for the Southern District of Georgia had subject matter jurisdiction over Appellee/Plaintiff's Complaint by virtue of 28 U.S.C. § 1331 inasmuch as some of her purported claims arise under federal law. In particular, Appellee asserted a claim under 42 U.S.C. § 1983. The district court had jurisdiction over the state-law claims pursuant to 28 U. S. C. §1367.

This appeal challenges the denial of qualified immunity. As such, this Court has jurisdiction pursuant to 28 U.S.C. § 1291 and case law establishing that the denial of the defense of qualified immunity is immediately appealable to the extent that it turns on a question of law. *Winfrey v. Sch. Bd. of Dade Cty., Fla.*, 59 F.3d 155, 158 (11th Cir. 1995).

STATEMENT OF THE ISSUES PRESENTED FOR APPEAL

1. No court that can establish the law of this Circuit for the purposes of qualified immunity has held that a law-enforcement officer violates the constitutional rights of a person who is accidentally struck by a bullet with which the officer intended to hit an animal. Here, Appellant discharged his service weapon at a dog while making an arrest and the bullet struck the leg of Appellee's minor child. Is Appellant entitled to qualified immunity?

STATEMENT OF THE CASE

I. Statement of Facts

On July 10, 2014, Coffee County Deputy Sheriff Michael Vickers and other law enforcement officers were planning to apprehend a fleeing criminal suspect, Christopher Barnett. Dkt. No. 1, ¶¶ 23, 32. After conducting surveillance on the area where Barnett was believed to be evading capture, Vickers and the other officers planned to secure the property, which consisted of a mobile home and a yard owned by Appellee Amy Corbitt. Id., ¶ 24, 37. Appellee admits that Barnett was, in fact, on the property. *Id.*, ¶¶ 24, 29.

Vickers and the other officers entered the yard of the property. Dkt. No. 1, ¶ 24. The persons in the yard at that time were Christopher Barnett, the criminal suspect; an adult, Damion Stewart; Stewart's two minor children; and six other minor children. *Id.* The officers ordered everyone in the yard to get onto the ground, and they handcuffed Stewart. *Id.* Loaded guns were held to the backs of Stewart and four of the minor children as they lay on the ground; Stewart's two minor children were not restrained. *Id.*, ¶¶ 24, 25.

As the occupants of the yard lay on the ground, a dog on the property was acting in a manner such that Plaintiffs acknowledge that it would have been appropriate to "subdue" it with a Taser or pepper spray, although Plaintiffs claim that the dog did not pose "any immediate threat" to the officers. Dkt. No. 1, ¶¶ 28, 41, 44. Vickers discharged his firearm at the dog, but missed; the dog retreated under the residence. *Id.*, ¶ 28. Eight to ten seconds later, the dog had re-emerged, and Vickers again discharged his firearm at the dog as it approached its owners and the officers. *Id.*[1]

[1] Plaintiff alleges only that the dog was approaching its owners, but also acknowledges that the owners were on the ground in the immediate vicinity of the officers.

Again, Vickers's shot missed, but the bullet unfortunately hit one of the minor children lying on the ground in the back of his knee, injuring the child. Id. Appellee acknowledges that Vickers was attempting to shoot the dog when he accidentally shot the child's leg. *Id.*, ¶¶ 28, 29, 41, 43. Barnett, who was present in the yard, was successfully apprehended.

II. Course of Proceedings

Corbitt filed suit, both individually and in her capacity as the mother of SDC, the minor child who was hit by the errant bullet. She was joined by other adults who were present on the property during the arrest of Barnett, as well as representatives of the other minor children. All Plaintiffs asserted claims under 42 U.S.C. §1983, 42 U.S.C. §1988, and Georgia law, against Vickers, Coffee County Sheriff Doyle Wooten, and Coffee County. Dkt. No. 1.

Appellant Vickers, along with his co-Defendants below, moved for dismissal. Dkt. No. 4. At oral argument on that motion, Plaintiffs dismissed all claims except those against Vickers and Wooten in their individual capacities under 42 U.S.C. §1983 and 42 U.S.C. §1988. Dkt. No. 19 at 3. On December 5, 2017, the trial court entered an order granting Defendants'

motion to dismiss with respect to all remaining claims but that of SDC against Vickers. *Id.* at 21. With respect to that claim, the trial court held that Vickers is not entitled to qualified immunity. *Id.* at 18. Vickers timely filed this appeal. Dkt. No. 20.

III. Standard of Review

An appeal from the denial of an immunity defense is reviewed *de novo*. *Tinker v. Beasley*, 429 F.3d 1324, 1326 (11th Cir. 2005).

Where a defendant challenges a complaint for failing to adequately state a claim upon which relief can be granted, the court should apply a "two-pronged approach" in analyzing the complaint. *See Am. Dental Ass'n v. Cigna Corp.*, 605 F.3d 1283, 1290 (11th Cir. 2010) (quoting *Ashcroft v. Iqbal*, 556 U.S. 662, 679 (2009)). First, the court should "eliminate any allegations in the complaint that are merely legal conclusions." *Id.* This first prong excludes "threadbare recitals of a cause of action's elements, supported by mere conclusory statements." *Iqbal*, 556 U.S. at 678. Second, the court should assume that all well-pleaded factual allegations are true "and then determine whether [those allegations] plausibly give rise to an entitlement to relief." *Am. Dental Ass'n*, 605 F.3d at 1290. In determining plausibility,

the court should "draw on its experience and common sense." *Iqbal*, 129 S.Ct. at 1950. Moreover, it is proper for the court to infer "'obvious alternative explanation[s]' which suggest lawful conduct rather than the unlawful conduct the plaintiff[s] would ask the court to infer." *Am. Dental Ass'n*, 605 F.3d at 1290 (quoting *Iqbal* and relying on *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007)). Ultimately, if the plaintiffs have not "nudged their claims across the line from conceivable to plausible, their complaint must be dismissed." *Id.* at 1289 (quoting *Twombly*, 550 U.S. at 570).

SUMMARY OF THE ARGUMENT

Appellant Vickers showed the trial court that there is no clearly established right to be free from the application of accidental force, and that he was thus entitled to qualified immunity on Corbitt's claims. Even with significant prompting and extra time from the trial court, Corbitt failed to file any substantive response to that argument. The trial court could and should have granted Vickers dismissal of Corbitt's claims on that basis alone.

Instead, the trial court took it upon itself to perform the qualified-immunity research that Corbitt did not do, but it came to the erroneous

conclusion that this Court requires an examination of the reasonableness of the intended use of force in cases involving accidental applications of force. It also rested its conclusion that Vickers was not entitled to qualified immunity on a case with a significant distinction from this one – there, the person accidentally shot was the person the officer was actually trying to apprehend rather than a bystander. This Court has made clear, in cases actually cited by the District Court for other purposes, that the accidental application of force to a bystander during an arrest is not an actionable violation of the Fourth Amendment. The trial court erred by denying qualified immunity.

ARGUMENT AND CITATION OF AUTHORITY

I. The trial court erred in holding that Appellant is not entitled to qualified immunity on Appellee's claims.[2]

Generally, for the convenience of the Court, Vickers would track the structure of the trial court's order as closely as possible in this brief. But the framework of the order here is both confusing and unnecessarily complex. The subheadings – the first section is titled "Seizure," the second "Qualified Immunity" – seem to suggest that the court first analyzed the constitutionality of Vickers's actions, and then went on to assess his entitlement to qualified immunity. Dkt. No. 19 at 7, 15. However, the court actually exercised its discretion to skip the question of the constitutionality of Vickers's conduct entirely, and the entire order is in fact an analysis of qualified immunity.[3]

---

[2] 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.

[3] While the trial court is certainly permitted to begin (and end) with the qualified-immunity prong, Vickers notes that the court could and should have held that no constitutional violation occurred for the reasons that will be set forth below. *See Pearson v. Callahan,* 555 U.S. 223, 236, 129 S. Ct. 808, 818, 172 L. Ed. 2d 565 (2009) (permitting lower courts "to exercise their sound

It appears that the trial court intended for the subheading on the second half of its order to be "Excessive Force," as the court promised to evaluate Vickers's entitlement to qualified immunity "under both prongs" of the Fourth Amendment. *Id.* at 7. This bifurcated approach needlessly complicates the court's analysis. There is only a single act at issue here – Vickers's discharge of his service weapon with the intent to strike a dog, which had the unintended result of striking SDC in the leg instead. Whether the bullet's contact with SDC is framed as a potential unlawful seizure or a potential use of excessive force, the analysis is the same – a fact the trial court tacitly acknowledges by relying on the same case in denying qualified immunity on both grounds.

In this brief, Vickers will set out the standard for granting qualified immunity, and will reiterate the showing he made in support of his motion below that the law did not clearly establish that he violated SDC's rights when he accidentally hit SDC with a bullet intended for a dog. Vickers will then summarize Corbitt's inadequate response to that showing, which

---

discretion in deciding which of the two prongs of the qualified immunity analysis should be addressed first").

amounts to a failure to carry her burden to show that qualified immunity is inapplicable. Finally, Vickers will identify the flaws in the trial court's analysis that led to its erroneous conclusion that Vickers is not entitled to qualified immunity.

A. The qualified-immunity standard.

Qualified immunity generally protects an officer from suit—even if his conduct was unlawful—so long as case law had not clearly established that his conduct was unlawful at the time it occurred. "The defense of qualified immunity requires courts to enter judgment in favor of a government employee unless the employee's conduct violates clearly established statutory or constitutional rights of which a reasonable person would have known." *Morse v. Frederick*, 551 U.S. 393, 429 (2007). In explaining when a right is "clearly established," the Supreme Court has held that the "contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right." *Anderson v. Creighton*, 483 U.S. 635, 640 (1987). A plaintiff cannot normally meet that burden unless he can point to previous case law holding that the specific conduct at issue is unlawful.

> [T]he burden is on the plaintiff to show that, when the defendant acted, the law established the contours of a right so clearly that a reasonable official would have understood his acts were unlawful. The line between lawful and unlawful conduct is often vague. [The] "clearly established" standard demands that a bright line be crossed. . . . If case law, in factual terms, has not staked out a bright line, qualified immunity almost always protects the defendant.
> *Post v. City of Fort Lauderdale*, 7 F.3d 1552, 1557 (11th Cir. 1993) (citations and some quotation marks omitted).

Thus, "to defeat summary judgment . . . a plaintiff facing qualified immunity must produce evidence that would allow a fact-finder to find that no reasonable person in the defendant's position could have thought the facts were such that they justified defendant's acts." *Id.*

B. Appellant's showing below regarding qualified immunity.

In support of his motion to dismiss, Vickers noted that this Court has repeatedly held that "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 Fed. Appx. 806 (11th Cir. 2015), citing *Sanders v. Duke*, 766 F.3d 1262, 1265 (11th Cir. 2014). Rather, a Fourth Amendment violation occurs where a law enforcement officer "*intentionally* uses gratuitous and excessive force against a suspect who is under control, not resisting, and obeying commands." *Id.* (punctuation

omitted) (emphasis in original). This requirement of intentionality has been described in detail by the Supreme Court, which also provided a hypothetical concerning harm to innocent bystanders:

> A seizure occurs even when an unintended person or thing is the object of the detention or taking [cit.], but the detention or taking itself must be willful. This is implicit in the word "seizure," which can hardly be applied to an unknowing act. . . . Thus, if a parked and unoccupied police car slips its brake and pins a passerby against a wall, it is likely that a tort has occurred, but not a violation of the Fourth Amendment. And the situation would not change if the passerby happened, by lucky chance, to be a serial murderer for whom there was an outstanding arrest warrant—even if, at the time he was thus pinned, he was in the process of running away from two pursuing constables. It is clear, in other words, that a Fourth Amendment seizure does not occur whenever there is a governmentally caused termination of an individual's freedom of movement (the innocent passerby), nor even whenever there is a governmentally caused and governmentally desired termination of an individual's freedom of movement (the fleeing felon), but only when there is a governmental termination of freedom of movement through means intentionally applied.
> *Brower v. Cty. of Inyo*, 489 U.S. 593, 596–97, 109 S. Ct. 1378, 1381, 103 L. Ed. 2d 628 (1989).

This Court, relying on *Brower*, has held that "unintended consequences of government action cannot form the basis for a Fourth Amendment violation." *Ansley v. Heinrich*, 925 F.2d 1339 (11th Cir. 1991).

Vickers showed below that it is undisputed that he was trying to

shoot a dog when his bullet accidentally hit the leg of the minor child, SDC. Dkt. No. 1, ¶¶ 28, 29, 41, 43. Not only is there no controlling case law establishing that Vickers's conduct was clearly illegal; the right which Corbitt seeks to vindicate on SDC's behalf – the right to be free from the accidental application of force – is one that this Court has explicitly held is *not* clearly established. *Speight v. Griggs*, 620 Fed. Appx. 806 (11th Cir. 2015). Additionally, Vickers noted, foreign district courts presented with essentially identical facts have found no constitutional violation.[4] The existence of such rulings only strengthens the argument that Vickers cannot be expected to have reached the opposite conclusion about the legality of his conduct, as "[w]e cannot realistically expect that reasonable police officers know more than reasonable judges about the law." *Barts v. Joyner*, 865 F.2d 1187, 1193 (11th Cir. 1989), *cert. den.* 493 U. S. 831, 110 S.Ct. 101, 107 L.Ed.2d 65 (1989).

---

[4] *See, e.g., Brandon v. Vill. of Maywood*, 157 F. Supp. 2d 917, 924–25 (N.D. Ill. 2001) (no violation where bystander shot in leg by officer shooting at dog during arrest of third party); *Dahm v. City of Miamisburg*, No. C-3-95-207, 1997 WL 1764770, at *9 (S.D. Ohio Mar. 31, 1997) (no violation where officer intended to shoot dog and instead accidentally shot suspect during no-knock drug raid).

C. Appellee's response to Appellant's qualified-immunity showing.

Despite having been informed by Vickers's brief of her burden to identify factually analogous case law that put Vickers on notice that his specific conduct was unlawful, Corbitt did not even attempt to do so. The sum total of her response on this point was a vague statement that Vickers "acted willfully and unreasonably," and a citation to a substantively irrelevant First Circuit case in which the court held that officers were not entitled to qualified immunity. Dkt. No. 8 at 3-4. At oral argument, counsel for Corbitt freely volunteered that "that's one of the biggest issues I was struggling with while I was preparing for the hearing is that . . . *there is not a bright line really that I could find* in a lot of the decisions." Dkt. No. 25, 20:8-12 (emphasis supplied). That incredibly candid admission led the trial judge to acknowledge that the court had also been unable to locate a case among "the jurisdictions that count" that clearly established that Vickers had acted illegally. *Id.*, 21:1-5.

Corbitt was given five days after oral argument to file supplemental briefing with the trial court in response to the court's closing question: "Without such a case, how can you get beyond qualified immunity?" Dkt.

No. 25, 21:6-18. But in the supplemental brief, SDC is not even mentioned. Instead, the portions of the brief that do not simply recite constitutional rights in general terms address only two things: whether the detention of all of the persons in the yard during the arrest of the fleeing felon, Barnett, constituted an unlawful seizure of each person[5]; and whether the successful shooting of a dog would be an actionable seizure of property. Dkt. No. 17 at 2-5. Even after being given explicit instructions and extra briefing time by the trial court, Corbitt never did more than "point to sweeping propositions of law and simply posit that those propositions are applicable" with respect to the claims at issue in this appeal. *Belcher v. City of Foley, Ala.*, 30 F.3d 1390, 1395 (11th Cir. 1994). Consequently, she completely failed to carry her burden to show that the law clearly established that Vickers acted unlawfully.

[5] The trial court correctly held that the detention of the bystanders in the yard incidental to the arrest of Barnett was proper and lawful. Dkt. No. 19 at 19.

D. The trial court's order.

1. The trial court need not, and should not, have done the work Appellee failed to do with respect to qualified immunity.

Vickers has provided a more detailed chronology of the discussion of qualified immunity in this case than he would normally have done because it lays bare the first problem with the trial court's order. Again, "[o]nce an officer raises the defense of qualified immunity, *the plaintiff bears the burden to show that the officer is not entitled to it*." *Keating v. City of Miami*, 598 F.3d 753, 762 (11th Cir. 2010) (emphasis supplied). "Plaintiffs cannot carry their burden of proving the law to be clearly established by stating constitutional rights in general terms." *Dartland v. Metropolitan Dade County*, 866 F.2d 1321, 1323 (11th Cir.1989). Where a plaintiff offers no meaningful response to a defendant's assertion of qualified immunity, the trial court's inquiry should end, as "the onus is on the parties to formulate arguments." *Resolution Trust Corp. v. Dunmar Corp.*, 43 F.3d 587, 599 (11th Cir.1995).[6]

---

[6] *See, e.g., Wall-DeSousa v. Johnson*, No. 614CV1959ORL41DAB, 2016 WL 9444142, at *4 (M.D. Fla. Jan. 19, 2016), *aff'd sub nom. Wall-DeSousa v.*

Here, Corbitt's initial response to Vickers's showing that he is entitled to qualified immunity comprised a single, largely nonsensical paragraph identifying constitutional rights in general terms, and a single paragraph discussing a substantively unrelated case from the First Circuit. Dkt. No. 8 at 3-4. Given additional time and substantial prompting by the trial court to carry her burden in response to Vickers's assertion of qualified immunity, Corbitt filed a brief that discusses *only* the legality of the detention of the bystanders in the yard and the potential property loss that would ensue if a pet dog were actually shot. Dkt. No. 17 at 2-5. To this day, Corbitt still has not even *attempted* to identify any authority demonstrating that the specific right allegedly violated here – the right to be free from the accidental application of force that was intended for another – was clearly established at the time SDC was injured. There can be no legitimate disagreement that Corbitt utterly failed to carry her burden

---

Florida Dep't of Highway Safety & Motor Vehicles, 691 F. App'x 584 (11th Cir. 2017) (finding that plaintiffs failed to carry their burden and granting dismissal where plaintiffs' response to defendants' assertion of qualified immunity "span[ned] little more than a single page," "[made] no attempt to particularize the constitutional right at issue" by providing a fact-specific analysis, and did not "sincerely attempt" to show that the case fell within either exception to the requirement to produce analogous case law establishing the conduct at issue as unlawful).

in response to Vickers's assertion of qualified immunity, and the trial court's analysis should have ended there.

2. This Court has repeatedly and consistently held that an accidental shooting does not violate the Fourth Amendment, and this Court has never employed a "reasonableness" test in cases regarding accidental shootings.

For reasons that are unclear from the face of the order, the trial court decided to do Corbitt's job for her, and went searching for a case that could have put Vickers on notice that his conduct was unlawful. The trial court begins its analysis by distinguishing between "an accidental *firing* case" and "an accidental *shooting* case," but it cites no authority establishing that there is a meaningful difference between the two for the purposes of a §1983 claim. Dkt. No. 19 at 10 n. 4. The order then goes on to state that this Court "has not been faced with the question" of how the Fourth Amendment should be applied to an injury that results from the accidental discharge of a weapon. *Id*. at 10. The trial court identifies 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 reasonableness standard even to accidental discharges resulting in injury.[7] *Id.* at 10-11.

The trial court identifies an opinion from the Northern District of Georgia as one that applies the reasonableness standard. Dkt. No. 19 at 11. The problem is that that case – *Speight v. Griggs* – made two appearances in this Court, the second of which seems to have escaped the trial court's notice despite the fact that it was cited prominently in Vickers's brief below. In its second *Speight* opinion, this Court made quite clear where it falls on the question of whether an accidental use of force is ever actionable as a Fourth Amendment violation: "In this circuit, there is no clearly established right to be free from the accidental application of force during

[7] Even if the trial court were correct that this Court has not ruled on the matter, which it is not, the existence of a circuit split between the courts that have addressed it should have ended the trial court's inquiry. *See Pearson v. Callahan*, 555 U.S. 223, 245, 129 S. Ct. 808, 823, 172 L. Ed. 2d 565 (2009) (holding that where a circuit split on the relevant issue has developed, qualified immunity should be upheld on that issue, because "if judges thus disagree on a constitutional question, it is unfair to subject police to money damages for picking the losing side of the controversy.").

arrest, even if that force is deadly."[8] *Speight v. Griggs*, 620 F. App'x 806, 809 (11th Cir. 2015). A case involving a plaintiff who may have been shot accidentally "turns on the issue of whether [the officer] intended to shoot [the plaintiff]" – if he didn't, there can be no Fourth Amendment violation. *Id.*

While the *Speight* court denied summary judgment after finding, from all of the evidence in the record, that there was a question of fact as to whether the officer had actually intended to shoot the plaintiff whom he claimed to have shot accidentally, there is no room for such a possibility here. 620 F. App'x at 809. Corbitt has alleged consistently and unwaveringly that Vickers intended to shoot the dog, and struck SDC by accident. Dkt. No. 1, ¶¶ 28, 29, 41, 43. *See also* Dkt. No. 8 at 3 (stating that "Defendant Vickers' [sic] negligently shot SDC"). As *Speight* makes clear, the only way that an accidental application of force can be actionable is if it wasn't actually accidental at all. The pleadings in this case foreclose any

[8] The *Speight* Court's framing of the issue as "the accidental *application* of force" exposes the meaninglessness of the trial court's distinction between an accidental discharge and an accidental hit from an intentional discharge. The question in either case is the same: whether the officer intended to apply force to the person it was actually applied to.

such conclusion, and *Speight* leaves no room for any finding that Vickers is not entitled to qualified immunity.

3. The cases cited by the trial court did not put Vickers on notice that his actions were illegal, and any conclusion that Vickers shot the dog as a means of maintaining control over SDC is not reasonable.

The trial court goes on to discuss two cases which it believes preclude qualified immunity here. Vickers will analyze each of those cases in turn, and will then show that the trial court's bizarre attempt to shoehorn the facts of this case into the framework of a case where qualified immunity was properly denied defies reason and goes far beyond what is plausible from Corbitt's Complaint.

i. Vaughan v. Cox

In this case, an officer spotted a vehicle that matched the description of one that had been reported stolen, and upon pulling up next to the moving vehicle on the highway, noted that the passenger matched the description of the alleged thief. *Vaughan v. Cox*, 343 F.3d 1323, 1326 (11th Cir. 2003). This confirmed the officer's suspicions that the truck was the

one that had been stolen, and that the passenger was the one who had stolen it. *Id.* Two officers then tried a variety of tactics to stop the vehicle, but this only resulted in the driver of the vehicle ramming a police car at high speed and then accelerating. *Id.* at 1326-27. Without warning, one of the officers then fired three shots at the vehicle, hoping to disable either the driver or the vehicle and thereby stop the pursuit. *Id.* at 1327. Instead, one of the bullets hit the passenger – the man whose physical similarity to the description of the thief is what convinced the officer to stop the vehicle in the first place. *Id.*

The trial court held that the passenger had not been seized because the officer had not intended to shoot him, but this Court reversed. Noting that the officer's purpose in firing his weapon was to stop both the driver and the passenger, the Court found that the passenger was "hit by a bullet that was meant to stop him**."** *Id.*, 1329. Thus, the requirement of *Brower v. County of Inyo* – "that a person be stopped by the very instrumentality set in motion or put in place in order to achieve that result." – was met. *Id.*, citing 489 U.S. 593, 109 S.Ct. 1378, 103 L.Ed.2d 628 (1989).

In its order, the trial court largely avoids the fact that the passenger

in *Vaughan* was the person whom the officers were actually trying to stop in the first place. Instead, the court classifies the case as one in which "the officer aimed to hit either the driver [] or the truck itself," "hit the passenger instead," and thus "shot a person he was not aiming to hit." Dkt. No. 19 at 16. These facts, the court held, "did not stop the Eleventh Circuit from conducting an excessive force analysis" – but the only reason the Court went on to perform that analysis is because of the additional fact, omitted from the trial court's synopsis, that the passenger was the person the officer wanted to apprehend. The passenger's status as a person the officer wanted to detain transformed what would otherwise have been an accidental application of force to a bystander to an application of force that achieved exactly what the officer intended. *Vaughan* stands only for the rule 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.

ii. Cooper v. Rutherford

This case involves a mother and child shot by officers who fired on a fleeing bank robber as he attempted to carjack the mother's vehicle. *Cooper v. Rutherford*, 503 F. App'x 672, 674 (11th Cir. 2012). The trial court denied

qualified immunity to one of the officers on the plaintiffs' Fourth Amendment claims, but this Court reversed. *Id.* In so doing, the Court explicitly rejected any argument that *Vaughan* can be used to defeat qualified immunity for an officer whose shot aimed at someone else unintentionally struck a bystander:

> Meanwhile, this court in *Vaughan* certainly clearly established that if a passenger-suspect is shot by a bullet intended to stop his fleeing during a chase with police officers, then he is seized for purposes of Fourth Amendment analysis. [cit.] However, this court just as clearly acknowledged the difference between the events in *Vaughan* and the exact situation in this case – when an innocent bystander or hostage is accidentally shot by police officers chasing a fleeing suspect. *Vaughan*, 343 F.3d at 1328 n. 4 (noting that the innocent bystander and hostage cases from other circuits were unhelpful in deciding Vaughan because the passenger shot during the chase was also a suspect that the police officers were trying to apprehend). Therefore, preexisting case law does not clearly establish that Appellees were seized when Officer Black's bullet accidentally struck them during the confrontation with the armed bank robber. *Id.* at 675-76.

Unsurprisingly, the trial court ignored this portion of *Cooper*, which is plainly dispositive of the immunity issue here. Instead, the trial court cited *Cooper* to establish that the Court there "examined the excessiveness of the force as though it was exerted against the suspect the officer aimed to hit" and evaluated whether it would have been reasonable force if it had

hit the intended target. Dkt. No. 19 at 17. But the portion of the Court's opinion in *Cooper* cited by the trial court is dicta – the referenced paragraph, which begins with "Moreover, even if we determine that it is clearly established that Appellees were seized for the purposes of the Fourth Amendment, we are unaware of any case that clearly establishes that Officer Black's actions were constitutionally unreasonable," appears only after the Court has made abundantly clear that it is *not* clearly established that the appellees were seized. *Cooper v. Rutherford*, 503 F. App'x 672, 676 (11th Cir. 2012). Far from establishing a rule that courts should evaluate the constitutionality of an accidental application of force by determining whether it would have been reasonable if applied to its intended target, *Cooper* merely confirms that a bystander who is struck by a bullet intended to hit someone else does not have a viable claim for violation of his Fourth Amendment rights.

iii. This case.

The trial court rounds out its order by finding that a jury could conclude that SDC is more like the truck thief in *Vaughan* than the bystanders in *Cooper*. Rather than risk misconstruing the trial court's

convoluted reasoning by attempting to paraphrase it, Vickers will produce it verbatim:

> In the present case, Vickers had ordered Plaintiffs to the ground at gunpoint *before* any "accident" occurred. A reasonable inference from the allegations in the Complaint, drawn in Plaintiffs' favor for the purpose of this Motion, is that Vickers fired his weapon at the animal in order to keep control of SDC, AMB, ERA, and Rich – that is, in order to continue their seizure. In other words, a jury could find that Vickers intended to shoot the animal in order to maintain his control of the situation and keep Plaintiffs from escaping while the animal distracted Plaintiffs. And his action had the *effect* of continuing to seize the Plaintiffs—they did not budge when he fired his gun. Because Vickers shot his gun for the purpose of carrying out the seizure, and a seizure occurred, Vickers's not intending to shoot SDC does not negate that seizure. Just as in Vaughan, while the *result* of discharging the weapon may be an accident, the *actual discharge* was intentional. And the force he exerted intentionally is certainly capable of excess. . . . a reasonable jury could conclude that Vickers shot at Bruce in order to prevent any of the Plaintiffs from escaping from his control. Shooting Bruce would have ensured that.
> Dkt. No. 19 at 12-14 (all emphasis in original).

So far as Vickers can discern, the trial court believes that a jury could find he shot the dog to prevent it from helping the detained bystanders – who, by all accounts, immediately complied with Vickers's order to get on the ground and stayed there without any trouble for the duration of the incident – to "escape." This is an attempt to fit the facts of this case into the

framework of *Vaughan*, where the officer's overarching goal was to seize the plaintiff even if that was not his specific intent in firing the shot that ended up hitting the plaintiff. But there is simply no plausible way to conclude from the pleadings that Vickers's overarching goal in shooting the dog was to prevent SDC from escaping the lawful temporary detention incidental to the arrest of Barnett.

While the undersigned find a "hero dog" story as heartwarming as anyone else, the trial court's hypothesizing goes well beyond what can reasonably be inferred from Corbitt's Complaint. Although Corbitt initially feigns ignorance as to why Vickers would have wanted to shoot the dog, she later acknowledges that he may have been trying to "subdue" it.[9] Dkt. No. 1, ¶ 41. Corbitt further admits that the dog was shot as it approached its owners, all of whom were in the immediate vicinity of the officers. *Id.*, ¶ 28. The only *reasonable* inference that can be drawn from these allegations is that Vickers shot the dog because it was approaching him, the officers, and the detained bystanders in a manner that led him to conclude that he

[9] Given Corbitt's allegation that Vickers was standing only eighteen inches away from SDC, it is understandable why Vickers did not take Corbitt's suggestion that he use pepper spray to subdue the dog. Dkt. No. 1, ¶41.

needed to subdue it.

Even if the Complaint left open a possibility that Vickers somehow shot the dog in furtherance of his detention of the bystanders, which it does not, this would not be enough to bring this case within the ambit of *Vaughan v. Cox* for qualified-immunity purposes. Prior to the shooting of the dog, SDC and the other persons who had been standing in the yard were lying obediently on the ground pursuant to the officers' orders. Dkt. No. 1, ¶ 24. There is no indication whatsoever that SDC (or any other bystander) was contemplating fleeing, resisting, or otherwise suddenly disobeying the officers and getting up. Shooting the dog, then – even if for the purpose of "continuing the seizure" – would have accomplished nothing, as there is no allegation from which a plausible conclusion can be drawn that the seizure would not have continued anyway.

The trial court correctly held that Vickers and the other officers acted lawfully in ordering SDC and the other bystanders to the ground during the arrest of Barnett. Dkt. No. 19 at 19. The only question before the Court is whether it was 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 this lawful detention into an unlawful seizure or use of excessive force. For the reasons set forth by this Court in *Speight, Vaughn,* and *Cooper*, the answer is "no." The trial court erred in denying qualified immunity to Vickers.

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 twenty-third day of January, 2018.

s/ Richard K. Strickland
Richard K. Strickland
Georgia Bar No. 687830
rstrickland@brbcsw.com
s/ Emily R. Hancock
Emily R. Hancock
Georgia Bar No. 115145
ehancock@brbcsw.com

ATTORNEYS FOR APPELLANT

BROWN, READDICK, BUMGARTNER, CARTER, STRICKLAND & WATKINS, LLP
P. O. Box 220
Brunswick, GA 31521
(912) 264-8544

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 6,061 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.

s/ Emily R. Hancock
Emily R. Hancock
Georgia Bar No. 115145
ehancock@brbcsw.com

BROWN, READDICK, BUMGARTNER,
CARTER, STRICKLAND & WATKINS, LLP
P. O. Box 220
Brunswick, GA 31521
(912) 264-8544

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 twenty-third day of January, 2018.

/s/ Emily R. Hancock
Emily R. Hancock
Georgia Bar No. 115145
ehancock@brbcsw.com

BROWN, READDICK, BUMGARTNER
CARTER, STRICKLAND & WATKINS, LLP
ATTORNEYS FOR APPELLANT RIVERA
5 Glynn Avenue (31520)
Post Office Box 220
Brunswick, GA 31521-0220
(912) 264-8544