No. 15-1141

United States Court of Appeals for the First Circuit

EURIE A. STAMPS, JR.,
Co-administrator of the Estate of Eurie A. Stamps, Sr.;
NORMA BUSHFAN-STAMPS,
Co-administrator of the Estate of Eurie A. Stamps, Sr.
Plaintiffs - Appellees

v.

TOWN OF FRAMINGHAM; PAUL K. DUNCAN, individually and in his official capacity as a police officer of the Framingham Police Department
Defendants - Appellants

ON APPEAL FROM A JUDGMENT OF THE DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

REPLY BRIEF FOR THE DEFENDANTS - APPELLANTS TOWN OF FRAMINGHAM; PAUL K. DUNCAN, individually and in his official capacity as a police officer of the Framingham Police Department

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Pursuant to Fed. R. App. P. 28(c), the Defendants submit this brief in Reply to the Plaintiffs' Brief. In addition, they respond to certain arguments and assertions contained in the Brief of the Amicus Curiae.

ARGUMENT

I. Officer Duncan Is Entitled to Qualified Immunity Because (A) He Did Not Violate Stamps' Fourth Amendment Rights, and (B) The Plaintiffs Cannot Establish a Violation Of Any Clearly Established Right.

A. There Was No Violation of Stamps' Fourth Amendment Rights.

1. The Accidental Discharge of the Gun Did Not Violate the Fourth Amendment.

As the Plaintiffs acknowledge, Brower v. County of Inyo, 489 U.S. 593 (1989), provides the framework for determining whether an accidental discharge of a firearm by a law enforcement officer violates the Fourth Amendment. There is disagreement, however, between the parties, the courts, and the Circuits as to how to interpret and apply Brower and its requirement of "governmental termination of movement through means intentionally applied." Brower, at 597.

Under federal law, a seizure occurs when a police officer, either by means of physical force or a show of authority, has in some way restrained an individual's liberty. See California v. Hodari D., 499 U.S. 621, 626, 111 S.Ct. 1547, 1550-51 (1991). A seizure by means of physical force involves the application of physical contact. Id. The distinction between the two means is critical because Brower

speaks of the "means intentionally applied." Mr. Stamps' death – the injury at issue – undisputedly was not caused by means of physical force intentionally applied. Rather, it was caused by the accidental discharge of a weapon after Officer Duncan assumed cover of Mr. Stamps, who had been brought to the ground by other officers, by pointing his rifle at him. Both parties to this action agree that the firearm discharge was a pure accident. The discharge of the weapon was not for the purpose of seizing Stamps. The seizure of Mr. Stamps had already taken place prior to the time of the accidental shooting. Put differently, the Fourth Amendment does not apply in this case because Officer Duncan did not seize Mr. Stamps by unintentionally shooting him. Rather, Officer Duncan continued the seizure of Mr. Stamps by a show of force.

As the Second Circuit held in Dodd v. City of Norwich, 827 F.2d 1, 7 (2d Cir. 1987), "[i]t makes little sense to apply a standard of reasonableness to an accident" as it could result in a fourth amendment violation based on simple negligence. "The fourth amendment, however, only protects individuals against 'unreasonable' seizures, not seizures conducted in a 'negligent' manner." Id. at 7, 8. In so ruling, the Second Circuit noted that "[n]egligence, in fact, has been explicitly rejected as a basis for liability under the fourteenth amendment," (citing Daniels v. Williams, 474 U.S. 327, 106 S.Ct. 662, 88 L.Ed.2d 662 (1986)).

Importantly, the United States Supreme Court recently reiterated this principle, holding that "'liability for *negligently* inflicted harm is categorically beneath the threshold of constitutional due process.'" Kingsley v. Hendrickson, 135 S. Ct. 2466, 135 S.Ct. 2466, 2472, 192 L.Ed. 416 (2015) (quoting County of Sacramento v. Lewis, 523 U.S. 833, 849, 118 S.Ct. 1708, 140 L.Ed. 1043 (1998) (emphasis in original)). Like Dodd, the Kingsley court cites to Daniels v. Williams, 474 U.S. 327, 331, 106 S.Ct. 662, 88 L.Ed. 662 (1986), noting it's holding that the guarantee of due process "has been applied to *deliberate* decisions of government officials to deprive a person of life, liberty, or property." Id. (emphasis in original).

In Kingsley, the plaintiff sued officers at the county jail where he was detained awaiting trial, claiming that they used excessive force in violation of the Fourteenth Amendment due process clause. Id., 135 S.Ct. at 2470. While there was some disagreement about how events unfolded, the parties agreed that one officer directed another to stun Kingsley with a Taser and the weapon was applied to Kingsley's back. Id. at 2470.

The Supreme Court held that the determination of whether the use of force against Kingsley was excessive is a two-part inquiry. "The first concerns the defendant's state of mind with respect to his physical act—*i.e.*, his state of mind

with respect to the bringing about of certain physical consequences in the world." Id. at 2472.

> Consider the series of physical events that take place in the world – a series of events that might consist, for example, of the swing of a fist that hits a face, a push that leads to a fall, or the shot of a Taser that leads to the stunning of its recipient. No one here denies, and we must assume, that, as to the series of events that have taken place in the world, the defendant must possess a purposeful, a knowing, or possibly a reckless state of mind.

Id. In other words, the defendant must have deliberately -- as opposed to accidentally or negligently -- used force.[1] Id. "Thus, *if an officer's Taser goes off by accident* or an officer unintentionally trips and falls on a detainee, causing him harm, the pretrial detainee cannot prevail on an excessive force claim." Id. (Emphasis added). The Kingsley Court noted that the defendant officers did not dispute that they purposefully or knowingly shot the Taser at Kingsley. It was only then that the Court went on to address the issue whether the force deliberately used (i.e. the purposeful shooting of the Taser) was, constitutionally speaking, "excessive" and it applied an objective standard to that analysis. Id. at 2472.

[1] Indeed, many courts have held that a plaintiff may not advance claims of excessive force and negligence predicated on identical facts as there is no such thing as a negligent commission of an intentional tort. See Lewis v. City of St. Petersburg, 260 F.3d 1260, 1263 (11th Cir. 2001).

Kingsley cites to County of Sacramento v. Lewis, supra. In County of Sacramento, the Court provided insight into the Brower intentionality requirement:

> [I]n *Brower v. County of Inyo,* [cite omitted], we explained 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.*" We illustrated the point by saying that no Fourth Amendment seizure would take place where a "pursuing police car sought to stop the suspect only by the show of authority represented by flashing lights and continuing pursuit," but accidentally stopped the suspect by crashing into him. [cite omitted].

Id., 523 U.S. at 844 (citing Brower, 489 U.S. at 596-97) (emphasis in original)). Thus, in County of Sacramento, although the police cruiser was intentionally placed in use as the means or instrumentality to stop the suspect with its flashing lights and sirens (the show of authority), and it was the vehicle that did in fact stop the suspect by accidentally crashing into him (physical contact), the Fourth Amendment did not apply.[2] See Toscano v. City of Fresno, 2015 WL 6163205 (E.D.Calif. Oct. 19, 2015) (whether there was a Fourth Amendment violation turns on whether the officer intentionally struck decedent with his cruiser during pursuit or whether he accidentally struck the Decedent). The same holds true here. Officer

[2] The Court undertook a due process analysis.

Duncan assumed the detention of Mr. Stamps by a show of authority (the pointing of his gun) and only accidentally and unintentionally applied means of physical force (the bullet). Accordingly, the Fourth Amendment does not apply to the present case.

The reasoning by the United States Supreme Court in these cases is in keeping with the line of cases that the Defendants cite as holding that an accidental discharge cannot constitute a violation of the Fourth Amendment. See Defendants' Brief, pp. 15-22, citing, among others, e.g., Dodd, supra, Troublefield v. City of Harrisburg, 789 F.Supp. 160 (M.D. Pa 1992), *aff'd* 980 F.2d 724 (3d Cir. 1992), Greene v. City of Hammond, 2007 WL 3333367 (N.D. Ind. Nov. 6, 2007), Clark v. Buchko, 936 F. Supp. 212, 219 (D.N.J. 1996), Glasco v. Ballard, 768 F. Supp. 176 (E.D. Va. 1991), Myrick v. Collingdale Borough, 2012 WL 484 9129 (E.D. Pa. 2012), Culosi v. Bullock, 596 F.3d 195 (4th Cir. 2011), as well as Gutierrez v. Massachusetts Bay Transp. Auth., 437 Mass. 396 (2002), Parker v. Swansea, 310 F. Supp. 2d 356 (D. Mass. 2004), and this Court's decision in Landol-Rivera v. Cruz Cosme, 906 F.2d 791, 795-96 (1st Cir. 1991).[3]

[3] Given these decisions, the Defendants do not present a "novel theory" as the Amicus Curiae contend. That the Amicus does not agree with the reasoning in this line of cases does not make application of that reasoning to the facts in this case – which are unusual in that the parties agree the shooting was accidental --

– footnote cont'd –

The Plaintiffs incorrectly argue that the Defendants "read too much into Dodd" and that Dodd is inapplicable as it was decided before Graham v. Connor, 496 U.S. 386 (1989) and Brower, supra. Plaintiffs' Brief, pp. 25-26. The Plaintiffs, however, wholly ignore the fact that this Court cited to Dodd in Landol-Rivera, a case decided one year *after* Graham and Brower. As noted in the Defendants' initial brief, other courts have also relied on Dodd after Graham and Brower.[4]

Meanwhile, the Plaintiffs say that Greene, supra, is contrary to Knight v. Thomas, 2008 WL 1957905 (N.D. Ind. May 2, 2008), decided in the same circuit. Knight, supra, however, is not contrary to Greene. In Knight, the officer intended to use his flashlight to hit the plaintiff in the leg (physical force as the means intentionally applied) but he hit the suspect in the head instead. In Greene, the officer had no intent to make physical contact with the plaintiff (no intent to use physical force as means intentionally applied) and did so wholly by accident.

"remarkable" or "dangerous." Also, that the Amicus considers the application of this reasoning in this case as somehow being "untimely" is wholly irrelevant. The issue is whether the Fourth Amendment applies to an undisputed accidental use of physical force. Hysteria and hyperbole has no place in the analysis of this issue.

[4] Dodd also was cited in Koetter v. Davies, 2010 WL 3791482, * 5 (D. Utah Sept. 22, 2010) ("As other courts have recognized, the Fourth Amendment prohibition on excessive force during arrest does not apply to unintentional or incidental applications of force.").

These two cases in fact highlight the Defendants' point that whether the means intentionally applied was by physical force or by show of authority is the critical distinction.

The Plaintiffs' argue that Guiterrez v. MBTA, supra, supports their position, but Guiterrez cites to Troublefield, supra, and Glasco, supra – two cases that support the Defendants' position that an accidental use of force cannot be a "means intentionally applied." Indeed, Guiterrez holds that the force that seizes a person must be the force that injures her before the Fourth Amendment can be said to apply. Here, again, the "force" that detained Mr. Stamps was a show of authority, not physical contact. The "force" that injured him was the accidental discharge of the weapon. Accordingly, this case does not support the Plaintiffs' position.

The Plaintiffs' effort to depict Parker v. Swansea, supra, as favorable to them fares no better. In Parker, the District Court for the District of Massachusetts expressly says that the proper inquiry under the Fourth Amendment is "whether the officer intended to perform the underlying violent act [the firing of the weapon] at all." Parker, 310 F. Supp.2d at 367 (citing Glasco v. Ballard, 768 F. Supp. 176, 179 (E.D. Va. 1991) and Landol-Rivera, supra, at 796 n. 9). Again, the evidence is undisputed that Officer Duncan never intended to perform the underlying violent act – the unintentional firing of his weapon.

The Plaintiffs argue that, if this Court follows the foregoing interpretation of Brower, "every police officer that engages in objectively unreasonable and even reckless conduct causing injury or death could escape liability by simply proclaiming that he did not intend the harmful or deadly consequences of his actions." Plaintiffs' Brief, p. 17.[5] This argument holds no water, especially as applied in this unique case. First, that an officer simply claims that he did not intend the harmful consequences does not absolve him or her of liability. If there is evidence (unlike the present case) that the act was intentional, it then becomes an issue of fact. See Loria v. Town of Irondequoit, 775 F. Supp. 599 (W.D.N.Y.

[5] The Amicus Curiae makes a similar argument, suggesting that adherence to the numerous decisions holding that the Fourth Amendment does not apply to an accidental or unintentional use of force would "supply an incentive" for accidents. This argument fails on its face inasmuch as any "incentivized" accident implicitly would not, in fact, be an accident. Moreover, the Amicus continually argues against granting a blanket "immunity" for accidental discharges. However, it is not a question of immunizing an officer from all liability; just whether an officer's unintentional and accidental discharge of a weapon implicates the Fourth Amendment. Finally, the Amicus' claim that holding an accidental discharge of a weapon when no physical force or contact undisputedly was ever intended does not implicate the Fourth Amendment "will endanger lives" does not make sense in the context of an accident. They reference a Seventh Circuit case that involved a mistake in the execution of a search (the wrong house). A mistake differs from an accident. With a mistake, the end was sought, but it turns out to be wrong. In an accident, the result is unintended. Beyond dispute, this case involves an accident. The Amicus' concerns about the risk of mistakes by SWAT teams and the alleged effect on certain races is misplaced in the context of this case involving a shooting that all agree was unintentional.

1990) (court observes that Brower requires intentional acquisition of physical control but denies summary judgment on the factual question of whether the discharge of a firearm was accidental); Thomas v. Roberts, 2014 WL 4961669 * 5 (N.D. Ind. 2014) (parties' dispute as to whether officer intentionally fired his gun presented a jury question); Bowman v. Jones, 2015 WL 1040114 (N.D. Ohio March 10, 2015) (court has before it directly contradictory declarations, describing an intentional shooting versus an accidental discharge of a service firearm, wounding Plaintiff).

In cases, like this one, where it is undisputed that the officer did *not* intend to discharge his weapon and did *not* intend to inflict physical and deadly force, the officer is not be liable under the *Fourth Amendment,* but the plaintiff still has a remedy at law.[6]

In arguing this Court to follow a different analysis, the Plaintiffs inaccurately state that the weight of authority holds that an unintentional firearm

[6] For example, negligence is a tort with remedies. Indeed, the Plaintiffs' Complaint contains a count against the Town for wrongful death under the Massachusetts Torts Claims Act, Mass. Gen. Laws c. 258, § 2, predicated on Duncan's negligence. See generally Lewis v. City of Petersburg, 260 F.3d at 1263 (Florida law recognizes a cause of action for the negligent handling of a firearm and the negligent decision to use a firearm separate and distinct from an excessive force claim as there is no negligent commission of an intentional tort).

discharge during "an intentional seizure" constitutes a Fourth Amendment violation if the officer's actions leading up to the shooting were objectively unreasonable. In support, the Plaintiffs inaccurately claim this analysis is supported by "five Federal Circuit Courts of Appeals." The Plaintiffs rely on Henry v. Purnell, 501 F.3d 374, 379 (4th Cir. 2007), however, Culosi v. Bullock, 596 F.3d 195, 200 (4th Cir. 2010) later characterized the Henry decision as one of a "mistaken" use of force - i.e. not an unintended one -, inasmuch as the officer shot the decedent with a handgun while intending to shoot him with a Taser gun.

The Plaintiffs also rely on Torres v. City of Madera, 524 F.3d 1053 (9th Cir. 2008), which likewise involved a situation in which the officer intended to deploy a Taser but mistakenly shot the plaintiff with her pistol. Torres, 524 F.3d at 1054-55. These cases do not support the Plaintiffs' arguments here for the reasons explained in Conner v. Rodriguez, 891 F. Supp. 2d 1228, 1238-39 (D. N.Mex. 2011).[7] In Conner, the defendant officer mortally shot the plaintiff when he intended to use a less-lethal beanbag shotgun. Id. at 1231. After evaluating the Henry and Torres cases, the Conner court ruled that the two cases did not suffice to

[7] Indeed, in these "Taser cases," the officers involved intended to use physical force on the plaintiffs, but mistakenly used the wrong weapon. In the instant case, Officer Duncan did not intend to use any physical force on Mr. Stamps. The situations are materially different.

show that "the clearly established weight of authority from other courts" agreed with them. Instead, as discussed above, Conner held that, "if there is any weight of authority, it appears still to lean in the opposite direction: that unintentional negligent conduct cannot establish a Fourth Amendment claim." Id. at 1239.

The Plaintiffs also rely on Pleasant v. Zaminski, 895 F.2d 272, 275-76 (6th Cir. 1990). However, courts have specifically declined to follow Pleasant and its interpretation of Brower:

> This court declines to follow *Pleasant,* as its discussion of excessive force requirements is troubling conclusory. In reviewing plaintiff's post-trial motions, the Sixth Circuit panel essentially assumes that plaintiff's claim presented a jury issue on objective reasonableness, without making any inquiry as to whether fourth amendment rights were implicated at all. *Pleasant* appears to ignore the strong language found in *Brower* with regard to the necessity of intentional conduct to state a fourth amendment claim even as it reviewed dicta from that decision cited by the plaintiff.[2] In addition, the *Pleasant* court appears to give the short shrift to the heavy load of case decisions holding that accidental shootings in identical circumstances did not constitute seizures. The *Pleasant* court does not identify or discuss any of these cases.

Troublefield v. City of Harrisburg, Bureau of Police, 789 F. Supp. 160, 165 (M.D. Pa.) *aff'd sub nom.* Troublefield v. City of Harrisburg, 980 F.2d 724 (3d Cir. 1992).

Accordingly, it is clear that the Plaintiffs' claim that there is an "overwhelming weight of authority" in support of their position as to the line of reasoning this Court should follow is inaccurate.

2. The Pointing of the Gun Did Not Violate the Fourth Amendment.

Perhaps in acknowledgment of the deficiencies of any § 1983 claim as to the accidental discharge of the gun, the Plaintiffs contend that an officer's decision to point a gun at an unarmed person in a house being searched itself always violates the Fourth Amendment and sustains a claim of excessive force. Plaintiffs' Brief, pp. 12, 20-21 n.6. This assertion is also incorrect.

In executing search warrants, police officers have the authority to detain occupants, including by holding at gunpoint. It is clearly established that "officers executing a search warrant for contraband have the authority 'to detain the occupants of the premises while a proper search is conducted.'" Muehler v. Mena, 544 U.S. 93, 98, 125 S.Ct. 1465, 161 L.Ed.2d 299 (2005) (quoting Michigan v. Summers, 452 U.S. 692, 705, 101 S.Ct. 2587, 69 L.Ed.2d 340 (1981)), and cited in Mlodzinski v. Lewis, 648 F.3d 24, 33-34 (1st Cir. 2011). Such authority is reasonable in order to protect the police, to prevent flight, and generally to avoid dangerous confusion: "The risk of harm to both the police and the occupants is

minimized if the officers routinely exercise unquestioned command of the situation." Michigan, at 702-03. Indeed, "[t]he dangerousness of chaos is quite pronounced in a drug raid, where the occupants are likely to be armed, where the police are certainly armed, and the nature of the suspected drug operation would involve a great deal of coming and going by drug customers." Baker v. Monroe Twp., 50 F.3d 1186, 1191 (3d Cir. 1995).

Such a detention can include holding an occupant at gunpoint. The Plaintiffs cite Mlodzinski, 648 F.3d at 37-39 and Holland ex rel. Overdorff v. Harrington, 268 F.3d 1179, 1195 (10th Cir. 2001), as support for their contention that pointing a firearm at a person constitutes excessive force. It is clear from a reading of these cases, however, that the key factors are the ages of the occupants and the length of detention – i.e. whether it extended beyond the time it took the officers to secure the premises and arrest and remove any suspect (and/or whether, for example, the officer verbally threatened to pull the trigger). Mlodzinski, 648 F.3d at 38. See also Holland, 268 F.3d at 1193 (court held that SWAT team's initial show of force may have been reasonable, but "*continuing* to hold the children directly at gunpoint *after* the officers had gained complete control of the situation outside the residence was not justified under the circumstances at that point.")(emphasis added); McDonald ex rel. McDonald v. Haskins, 966 F.2d 292, 295 (7th Cir. 1992)

(denying qualified immunity to officer who during search of residence held gun to head of nine-year-old and threatened to pull trigger). For example, in Mlodzinski, the officer pointed an assault rifle at the head of an innocent and handcuffed teenager for seven to ten minutes, far beyond the time it took to secure the premises and arrest and remove the suspect.

In sharp contrast here, Officer Duncan took over the detention of Mr. Stamps, a large adult who was not secured in handcuffs. The accidental discharge occurred while police officers were still in the process of securing the premises and locating suspects.[8] Unlike in Mlodzinski and Holland, Officer Duncan detained Mr. Stamps at gunpoint during an ongoing service of a search warrant for drugs in a volatile environment given the suspects' criminal records, which included violent offenses and weapons charges.[9] Also, at no time did Officer Duncan verbally threaten to shoot Mr. Stamps.

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[8] Despite the foregoing, the Amicus Curiae conclusorily assert that "Stamps was held at gunpoint longer than could possibly have been reasonable …."

[9] The Plaintiffs say that the SWAT team knew that Mr. Stamps had no history of criminal activity but the sources they cite don't fully support that assertion. Events were rapidly evolving, and Duncan testified that he does not recall that information. In any event, other persons (and their associates) at that apartment were known to have violent criminal histories that included armed assault.

Given the justification of a residential search for drugs at a point where neither the residence nor the suspects were secured, as a matter of law Officer Duncan's pointing of his weapon at Mr. Stamps cannot be considered excessive force. See Aponte Matos v. Toledo Davila, 135 F.3d 182, 191 (1st Cir. 1998) (officer did not act in objectively unreasonable manner when he displayed his weapon to residents' daughter and threatened to kill her if she did not stay behind police barricade while search warrant for residence was being executed, and thus was entitled to qualified immunity against excessive force civil rights claim).[10] Even the Plaintiffs acknowledge at page 35 that detention by a rifle under "exigent circumstances" would not violate the Fourth Amendment. Thus, even assuming *arguendo* that the pointing of a firearm at a person in this type of a situation can amount to a seizure, see Tirado v. Cruz, 2012 WL 525450 (D. P.R. Feb. 2012)

[10] Aponte Matos undercuts the Plaintiffs' assertion (at note 6) that the absence of physical harm or contact is irrelevant to consideration of a claim of excessive force. In Aponte Matos, this Court expressly noted that there was "no dispute that no physical force was used" and that the "threat may well have been reasonably intended to avoid the need to use any physical force to restrain" the plaintiff. Moreover, the Court cites to Hinojosa v. City of Terrell, 834 F.2d 1223, 1230 (5th Cir. 1988), wherein the Court found the lack of physical contact in a similar situation to be highly relevant.

(court only assumed the pointing of firearm amounted to a seizure), the case law shows that Officer Duncan's conduct in so doing here was reasonable.[11]

3. Even If Assessed, No Other Conduct of Officer Duncan Can Be Considered Objectively Unreasonable under the Constitution.

Officer Duncan acted reasonably. Nevertheless, the Plaintiffs argue that Officer Duncan's handling of his rifle was unreasonable under the Fourth Amendment. They rest this claim on their assertion that Officer Duncan pointed his weapon at Stamps "with his finger on the trigger." Critically, however, there is no evidence that Duncan intentionally placed his finger inside the trigger guard.[12] (In fact, Duncan testified that his finger was outside the guard until he fell. Defendants' Brief, pp. 9, 26, 28-29). The Plaintiffs' expert, Kim Widup, acknowledges that there is no way to know when Officer Duncan's finger went

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[11] The Amicus Curiae likewise rely on Mlodzinski and their argument that Officer Duncan violated the Fourth Amendment thus is similarly deficient. Contrary to Amicus' assertion, the case law is not clearly established that Mr. Stamps had a right not to have a firearm pointed at him.

[12] Throughout their brief, the Amicus Curiae likewise mistakenly assert that Officer Duncan "placed" his finger on the trigger, suggesting it was a deliberate action on his part despite the absence of any such evidence. They also erroneously suggest that Officer Duncan had his finger on the trigger for a period of time while pointing the rifle and before firing the weapon. There is no support for that contention.

inside the trigger guard and that venturing an opinion on that issue would be speculative. Defendants' Brief, p. 9; A. 257-261.

Moreover, the Plaintiffs claim that it is uncontroverted that their expert, Mr. Widup, opined that Officer Duncan acted unreasonably when he pointed the weapon at Stamps. However, a reasonableness determination is for this Court to decide, and the District Court held that the only issue in that regard was whether Officer Duncan acted unreasonably in not conforming to department policies or trainings – i.e. in turning the safety off. Importantly, this issue is not relevant to a constitutional analysis. See Defendants' Brief, pp. 28-29.[13] See also Smith v. Freland, 954 F.2d 343, 347 (6th Cir. 1992) ("Under § 1983, the issue is whether [the officer] violated the Constitution, not whether he should be disciplined by the local police force."), *cert. denied*, 504 U.S. 915, 112 S.Ct. 1954, 118 L.Ed.2d 557 (1992). Indeed, whether the events prior to Officer Duncan's accidental shooting violated policies and procedures of the Framingham Police Department is not relevant as to whether the shooting violated the Fourth Amendment. "That an arrest violated police department procedures does not make it more or less likely that the arrest implicates the Fourth Amendment, and evidence of the violation is

[13] The Defendants cite a 2014 case in support of this point, a more recent case than those cited in the Plaintiffs' Brief.

therefore irrelevant." Tanberg v. Sholtis, 401 F.3d 1151, 1163-64 (10th Cir. 2005). See also Giannetti v. City of Stillwater, 216 Fed.Appx. 756, 766, 2007 WL 441887216, *10 Fed.Appx. 756 (10th Cir. 2007) (fact that officers violated department procedures governing the use of force in effecting arrest "is not relevant to determining if [Defendant] arrest violated the reasonableness requirement of the Fourth Amendment"). "In evaluating whether an officer's use of force is constitutional under Graham [v. Connor, 490 U.S. 386, 394-95 (1989)], the issue is whether it was objectively reasonable under all of the circumstances confronting the officer, not whether the officer violated a city or departmental policy. Whether an officer followed or violated police department policy and guidelines is not relevant under Graham." (internal citations omitted). Woods v. Jefferson County Fiscal Court, 2003 WL 145213 *4 (W.D.Ky. 2003), citing Smith v. Freland, 954 F.2d 343 (6th Cir.1992). "Officials sued for constitutional violations do not lose their qualified immunity merely because their conduct violates some statutory or administrative provision." Davis v. Scherer, 468 U.S. 183, 193, 104 S.Ct. 3012, 3019 (1984).

B. Plaintiffs Have Not Met Their Burden to Show That A Constitutional Right Was "Clearly Established" At The Relevant Time Of January 4, 2011.

When a defendant asserts qualified immunity at summary judgment, the burden shifts to the plaintiff to show that: (1) the defendant violated a constitutional right and (2) the constitutional right was clearly established. Pearson v. Callahan, 555 U.S. 223, 232, 129 S.Ct. 808 (2009).[14] The Supreme Court does "not require a case directly on point, but existing precedent must have placed the statutory or constitutional question *beyond debate*." Ashcroft v. al-Kidd, 563 U.S. 731, 131 S.Ct. 2074, 2083 (2011) (emphasis added). Plaintiffs have not met this burden.

1. It Is Not Clearly Established That Pointing The Rifle At Stamps During The Service Of The Search Warrant Violated The Fourth Amendment.

The Plaintiffs rest their argument that it was clearly established that holding Stamps at gunpoint violated the Fourth Amendment on the Mlodzinski case. In light of the Defendants' foregoing discussion of Mlodzinski and other cases on the

[14] Throughout their brief, the Amicus Curiae appears to misunderstand that in the qualified immunity analysis the burden of producing cases establishing that the law is beyond debate this lies with the Plaintiffs. Instead, they inaccurately suggest that the Defendants bore the burden of establishing the constitutionality of the conduct.

issue of detaining an occupant of a home during the service of a search warrant, the Plaintiffs' argument necessarily fails. The Plaintiffs simply cannot sustain their burden of showing that it was clearly established that holding Mr. Stamps at gunpoint during an ongoing service of a search warrant for drugs, and while the officers were still trying to gain control of a scene that involved suspects with violent criminal backgrounds and weapons charges, would violate the Fourth Amendment. As noted, the cases relied upon by the Plaintiffs are distinctly different, involving the detention of children extending beyond the point where the suspects are arrested or an officer threatening to kill the person detained.

Additionally, Mlodzinski was decided in June 2011 -- *after* the January 2011 events in question here. Mlodzinski's holding thus does not answer "both subparts of the clearly established inquiry in favor of the decision below" as the Plaintiffs contend. Plaintiffs' Brief, p. 35.

2. It Is Not Clearly Established That An Accidental Discharge Of A Firearm Constitutes a Fourth Amendment Violation.

The Plaintiffs attempt to minimize the divide in the case law on the issue of an accidental discharge of a firearm, arguing that "a consensus of the circuits all establish that Duncan had fair notice" that his conduct toward Stamps violated his Fourth Amendment rights. In so arguing, the Plaintiffs recite their interpretation of

Brower and note this Court's reference to Brower in Landol-Rivera v. Cruz Cosme, 906 F.2d 791, 796 n.9 (1st Cir. 1990), identifying it as "controlling authority" as to their contentions. However, as Defendants noted, (1) Landol-Rivera cites to Dodd v. City of Norwich, 827 F.2d 1 (2d Cir. 1987) wherein the Second Circuit held that an accidental shooting does not support an excessive force claim and (2) various courts thereafter cited to Landol-Rivera as indicating that non-intentional conduct by a police officer did not implicate the Fourth Amendment. Defendants' Brief, pp. 18-22. Under the analysis in these cases, Landol-Rivera clearly falls in line with those cases that hold that an accidental discharge of a weapon does not constitute a violation of the Fourth Amendment because it is not "means intentionally applied." Id. In this respect, the Plaintiffs' entire argument that the law was "clearly established" is inaccurate and rests on false footing.

The Plaintiffs' claim that a "consensus" of persuasive authority from other circuits "existing at the time of the shooting" gave Officer Duncan fair warning that an accidental discharge of his gun exposed him to Fourth Amendment liability is likewise inaccurate. The Plaintiffs again cite to the Fourth Circuit's decision in Henry v. Purnell, 501 F.3d at 379, a case that produced multiple opinions and ended with a decision in which three judges dissented. See Defendants' Brief,

pp. 30-31. As discussed, three years later, in Culosi v. Bullock, 596 F.3d at 200, the Fourth Circuit characterized the Henry decision as one of a "mistaken" use of force, not an unintended one, as the officer shot the decedent with a handgun while intending to shoot him with a Taser. Moreover, in Culosi, the parties agreed that the qualified immunity inquiry turned on whether the shooting death of the plaintiff was the result of an intentional act by a police officer, or an accidental discharge of the officer's gun, and that this presented a factual issue. See Ussery v. Mansfield, 786 F.3d 332, 337 (4th Cir. 2015) (citing Culosi). This was the state of the Fourth Circuit case law at the time of the 2011 incident at hand. The Plaintiffs' citation to Henry thus does not aid them.

The Plaintiffs also cite to Torres v. City of Madera, supra, on the "clearly established" issue but that case too involved an officer who, intending to deploy a Taser, mistakenly shot the plaintiff with her pistol. Torres, 524 F.3d at 1054-1055. As discussed, supra, these two cases do not support the Plaintiffs' position and thus do not aid them on the "clearly established" prong.[15]

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[15] The Plaintiffs also cite to Torres and Henry at page 43 of their Brief, arguing that a plaintiff need only show it was clearly established that the force actually used, intended or unintended, was excessive. In these cases, however, the assessment is whether the officer's mistaken belief that he was holding a Taser instead of a gun was unreasonable. If the mistake is unreasonable, the use of force is excessive. These cases have no application here.

This leaves only the Plaintiffs' reference to two Sixth Circuit decisions – which is not a "consensus of persuasive authority from other circuits."[16] Neither of those two decisions would have put all reasonable officers in Officer Duncan's shoes on notice that their accidental conduct could violate a clearly established constitutional right.

The actual consensus among the circuits is that an unintentional discharge of a firearm by an officer does not meet the intentionality requirement for a Fourth Amendment claim. This consensus includes the Second Circuit (Dodd v. City of Norwich, supra), and the Fourth Circuit (Culosi, supra). It also includes this Court,

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[16] While the Plaintiffs also cite to Watson v. Bryant, 532 Fed. Appx. 453, 457-58 (5th Cir. 2013) and Bleck v. City of Alamosa, 540 Fed. Appx. 866, 874-76 (10th Cir. 2013) elsewhere in their Brief, they properly do not rely on either in arguing that the case law was clearly established. Both of these cases were decided after the January 4, 2011 incident. Notably, in Bleck, officers confronted the plaintiff with weapons drawn. Still holding his gun in his right hand, the officer's weapon discharged when he went "hands on," accidently shooting the plaintiff in the hip. On appeal, the Tenth Circuit held that "we decline to consider whether the district court erred in concluding no constitutional violation occurred and instead opt to address whether the rights at issue were clearly established at the time of the alleged violation." Id. "We ultimately conclude that, even assuming that [the officer's] conduct amounted to a seizure of [the plaintiff] under the Fourth Amendment (based on the current state of the law), that legal outcome would not have been forecasted by clearly established law at the time. Consequently, [the officer] is entitled to qualified immunity. Id. Certainly then, this 2013 case would not have put all reasonable officers in Officer's Duncan's shoes in 2011 on notice that his conduct implicated the Fourth Amendment and/or violated a clearly established constitutional right.

(Landol-Rivera's indication it would follow the Dodd line of cases). There also is the Seventh Circuit's ruling in Campbell v. White, 916 F.2d 421, 423 (7th Cir. 1990), which the Plaintiffs ignore. In Campbell, the court held that while it was clear that the officer intended to stop the plaintiff driver for speeding and that the officer's actions caused, or contributed to, a "termination of [Campbell's] freedom of movement," there was no evidence that the officer intended physically to stop or detain the driver by running over him with his car in the event the driver refused to pull over voluntarily. The collision between the officer and the driver thus was not "*the means intentionally applied*" to effect the stop, but was rather an unfortunate and regrettable accident. Id.

Additionally, just over two months ago, the Eleventh Circuit, in Speight v. Griggs, ___ Fed. Appx. ___, 2015 WL 4759988, * 3 (11th Cir. Aug. 13, 2015), stated that "[i]n 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" and that the outcome in such a case turns on whether the officer "intended to shoot" the person.[17] And, within the Fifth Circuit, the district court in Diamond-Brooks v.

[17] Also supporting qualified immunity for Officer Duncan are the decisions in Powell v. Slump, 525 Fed. Appx. 427 (9th Cir. 2014) discussed at Defendants' Brief, pp. 37-39, and McCoy v. City of Monticello, 342 F.3d 842 n.3 (8th Cir. 2003), discussed at Defendants' Brief, p. 40.

City of Webster, Tex., 2014 WL 1761612 (S.D. Tex. 2014), noted that it was not clearly established at the time of the February 2011 shooting in the case before it that an accidental discharge could implicate the Fourth Amendment.

Certainly, at a minimum, the state of the law as of January 2011 as to accidental discharges of a gun by a police officer, and whether such an accident could implicate the Fourth Amendment, was in no way "clearly established." Officer Duncan thus is entitled to qualified immunity in this case.

3. All Reasonable Officers In Duncan's Shoes Would Not Have Understood that His Conduct Violated Stamps' Constitutional Rights.

As Defendants cite in their initial brief, and supra, a failure to follow proper procedure or police policy does not prove excessive force and are not determinative of constitutional analysis. In arguing to the contrary, the Plaintiff again rely on the speculative assertion that Officer Duncan "point[ed] a live weapon at Stamps' head *with his finger on the trigger*" and claim that such conduct was objectively unreasonable. This is completely inappropriate. So, too, is their claim that Officer Duncan's removal from his position on the SWAT team "speaks to the unreasonableness of his actions." As Defendants have stated, the issue is whether the officer violated the Constitution, not whether he was disciplined by the police force. Smith v. Freland, supra. The Plaintiffs lose sight of this distinction.

This is also evident in reference to the state court criminal case of Commonwealth v. Wallace, 346 Mass. 9 (1963). The facts of the Wallace case demonstrate that it has no applicability in this civil rights case. In Wallace, a teenager -- for no legitimate reason -- criminally pointed a firearm at a school caretaker before firing the weapon. Here, the facts are undisputed that Officer Duncan's weapon accidently discharged during the ongoing execution of a high-risk search warrant by a law enforcement team. The warrant was based on probable cause that Joseph Bushfan and others were selling crack cocaine out of Mr. Stamps' Fountain Street apartment. Framingham police detectives believed three of the males in Mr. Stamps' apartment had affiliations to Boston gangs and had criminal histories including armed robbery, armed assault, assault with a dangerous weapon, assault and battery with a dangerous weapon, theft of a firearm and cocaine related charges. One of these men was believed to be an associate of the person who previously shot Framingham Police Sergeant Phil Hurton.

Officer Duncan is entitled to qualified immunity because a reasonable officer in his position would not have known that his conduct violated the Constitution.

CONCLUSION

For the reasons stated herein and in Defendants' initial Brief, the Defendants respectfully request that this Honorable Court reverse the lower court's ruling and grant summary judgment in favor of the Defendants on Counts II and III, and enter judgment in Defendants' favor in this case.

Respectfully submitted,
Defendants-Appellants,
By their attorneys,

/s/ Leonard H. Kesten

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CERTIFICATE OF COMPLIANCE UNDER FED. R. APP. P. 32(a)(7)

I hereby certify that this brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because: (1) this brief contains 6,766 words excluding the parts of the brief exempted by Fed. R. App. 32(a)(7)(B)(iii); and (2) this brief complies with the typeface requirements of Fed. R. App. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in 14 point proportionally spaced using Times New Roman font.

/s/ Leonard H. Kesten

LEONARD H. KESTEN

CERTIFICATE OF SERVICE

I hereby certify that on this 4th day of November, 2015, this document was filed through the Electronic Case Filing system, and that copies will be sent electronically to the registered participants identified on the Notice of Electronic Filing:

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