IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF IOWA
DAVENPORT DIVISION

GABRIEL STEELE, *et al*., **Plaintiff,** **v.** **CITY OF BURLINGTON and OFFICER JESSE HILL** **Defendants.**	**Case No.: 3:16-cv-105** **PLAINTIFFS' REPLY BRIEF IN SUPPORT OF SUMMARY JUDGMENT ON LIABILITY**

Comes now the Plaintiffs to submit their Reply Brief in Support of their Motion for Summary Judgment on Liability, as follows:

Defendant Hill admitted that Autumn, Gabriel and G.S. were not free to leave the scene. (Plaintiffs' App. p. 48). Gabriel Steele was never asked if he believed he was free to leave. (Defense App. pp. 2-12). G.S., a toddler, was not going anywhere without his mom or dad.

A show of "physical force or show of authority" constitutes a seizure." *United States v. Grant*, 696 F.3d 780, 784 (8th Cir. 2012). Defendant Hill firing his weapon in the direction of Autumn, Gabriel and G.S. far exceeds that standard and is considered the "use of lethal force" under Iowa law even without any intent to harm. I.C.A. 704.2(1)(c). Defendant Hill literally "got away with murder" by not being charged with involuntary manslaughter given I.C.A. 704.2 and I.C.A. 707.5(1)(b) (the person unintentionally causes the death of another person by the commission of an act in a manner likely to cause death or serious injury."). Anyone, not a law enforcement officer, who did what Hill did would, as Hill predicted, be "fucking going to prison." That is why a finding by this Court that Defendant Hill's conduct was objectively unreasonable, as a matter of law, is so important.

It is heartbreaking to read the facts of the cases cited by the Defendants to support Hill's reckless conduct because one comes to the inescapable conclusion that if any of those other law

enforcement officers had shown up at the Steele residence on January 6, 2015, Autumn Steele would be alive today. Each of those other officers faced a far greater threat and made significantly more effort to avoid using lethal force. Hill's reckless conduct pales in comparison.

In *Thompson v. Hubbard*, 257 F.3d 896, 898 (8th Cir. 2001), the law enforcement officer used lethal force in responding to an armed robbery where shots had been fired; the officer located a suspect fitting the description of the armed robbers in the location where the armed robbers would be expected given their direction of travel; the suspect initially appeared to surrender, but then ran and ended up into the space between two buildings where he fell, got up, looked over his shoulder at the officer and moved his arms as though reaching for a weapon at waist level; the officer yelled, "stop;" the suspect continued to move and the officer fired a single shot into the suspect's back just below the right shoulder blade.

In *Loch v. City of Litchfield*, 689 F.3d 961, 964 (8th Cir. 2012), the law enforcement officer used lethal force in response to an armed and out of control suspect who, unbeknown to the officer, had tossed his gun out of his truck prior to exiting the truck and going "nose-to-nose with another individual; fearing for the other individual the officer pointed his firearm at the suspect and ordered everyone to get on the ground; the suspect disobeyed the command, turned and began walking toward the officer with his hands raised above his head or extended out to his sides; the officer began to back up as the suspect turned toward him; the officer repeatedly ordered the suspect to the ground and the suspect did not comply; the officer heard the suspect say something that included the word "kill;" the officer did not hear others yelling that the suspect was unarmed; the suspect continued moving toward the officer, slipped and tried to right himself by moving his hand toward his side; the officer fired multiple times; the officer reported

seeing a black object on the suspect's hip and believed it was a holster. It turned out the suspect was wearing a cell phone holder on his side.

In *Estate of Morgan v. Cook*, 686 F.3d 494, 497 (8th Cir. 2012), the law enforcement officer was faced with a suspect holding a knife in his hand that he appeared to be trying to conceal; the distance separating the officer and the suspect was minimal, totaling twelve feet at most; the officer ordered the suspect to drop the knife, the suspect did not comply and moved toward the officer; the officer fired only one shot.

In *Schulz v. Long*, 44 F.3d 643, 646 (8th Cir. 1995), the law enforcement officer faced a mentally ill suspect barricaded in the basement of his parent's home; the suspect refused to voluntarily come out from behind the barricade; one officer became entangled in the barricade; the suspect retrieved a long-handled, double-bladed ax and began approaching the officer "at a very deliberate" pace holding the ax with both hands, in a cocked position, with the blade at the top and at about head level; another officer pointed his gun at the suspect, and warned him twice to drop the axe; the suspect did not respond to these warnings and continued to approach; when the suspect got within 6-8 feet of the entangled officer the other officer started to fire.

Defendant Hill was obviously mistaken about the threat level Sammy posed, but that does not matter. Defendant Hill's subjective beliefs, whether mistaken or not, do not apply to judge the objective reasonableness of his conduct. "The reasonableness inquiry is an objective one: 'the question is whether the officers' actions are 'objectively reasonable' in light of the facts and circumstances confronting them.'" *Brown v. City of Golden Valley*, 574 F.3d 491, 496 (8th Cir. 2009)

Plaintiffs agree that law enforcement officers are not required to use less lethal force, prior to the use of lethal force, but that is only true "where deadly force can be justifiably used"

in the first place. *Plakas v. Drinski*, 19 F.3d 1143 (7th Cir. 1994). Defendant Hill's use of lethal force, however, was not justified in the first place. Therefore, assessing the objective reasonableness of Hill's conduct requires the consideration of other means he had readily available to ward off the minimal threat he faced from Sammy.

The Defendants claim "Plaintiffs have no evidence that the dog was not acting aggressively or did not reasonably appear to be acting aggressively towards Officer Hill *at the time he applied lethal force*" (emphasis included). Defense Brief pp. 9 and 10. We are not talking about 7 hours of time passing with Sammy displaying varying degrees of aggressiveness. Nor are we talking about 7 minutes passing. The entire event, from the time Defendant Hill exited his cruiser with "the dog on [his] mind," to shooting at Autumn Steele, lasted 7 seconds. (Plaintiffs' App. pp. 41 and 47). According to three neutral eyewitnesses Sammy was not aggressive during that precise time period. The Defense argument that somehow Sammy completely changed his aggressiveness level, within that 7 second window, without any of the eyewitnesses noticing, has no merit. The Defense argument is also completely contradicted by Defendant Hill's body camera video where he admits only one "jump" on his body by the dog. (Plaintiffs' App. pp. 4-10). Although Hill describes the one jump as an "attack" he provided no additional facts to justify that description beyond the one jump. (Plaintiffs' App. pp. 4-10).

The Defendants cite *Rollins v. Smith*, 106 F. App'x 513, 514 (8th Cir. 2004), for the proposition that "preseizure conduct is not relevant." It is difficult to comprehend a reasonable basis for the claim that what Sammy was doing in the 7 seconds leading up to Defendant Hill shooting in the direction of Autumn Steele is not relevant. In *Rollins* the defendant police officer was called "twice" to the scene by the deceased's mother prior to the tragic shooting. *Id.* In *Greenidge v. Ruffin*, 927 F.2d 789, 792 (4th Cir. 1991), the Fourth Circuit noted that "the

officer's liability [is to] be determined exclusively upon an examination and weighing of the information [the officers] possessed **immediately prior to** and at the very moment [they] fired the fatal shots." (Emphasis added). The Eighth Circuit favorably cited this exact quote in *Schulz v. Long*, 44 F.3d 643, 648-49 (8th Cir. 1995). Certainly, "immediately prior to" includes the preceding 7 seconds.

CONCLUSION

For all the reasons stated above, the Plaintiffs' Motion for Summary Judgment on liability should be granted.

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PROOF OF SERVICE

The undersigned certifies that the foregoing instrument was served upon all parties to the above cause to each of the attorneys of record herein at their respective addresses disclosed on the pleadings on the 9th day of February, 2018, by:

xEDMS/ECF ☐ FAX
☐ Hand Delivered ☐ Certified Mail
☐ FedEx/Airborne Express Email

Signature: ____/s/ David A. O'Brien_____