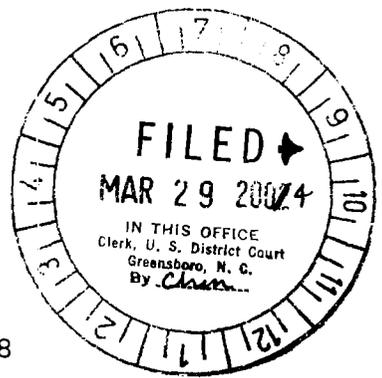


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IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA

STATE OF NORTH CAROLINA)
 ex rel. DAVID M. WELLINGTON)
 and AUDREY JEAN WELLINGTON,)
)
 Plaintiffs,)
)
 v.)
)
 L.F. ANTONELLI, Deputy Sheriff,)
 individually and in his)
 official capacity; A.W.)
 CALIENDO, Deputy Sheriff,)
 individually and in his)
 official capacity; B.J. BARNES,)
 Sheriff of Guilford County, in)
 his official capacity; PEERLESS)
 INSURANCE COMPANY, Surety; and)
 GUILFORD COUNTY,)
)
 Defendants.)



1:01CV1088

MEMORANDUM OPINION AND ORDER

OSTEEN, District Judge

Plaintiffs David M. Wellington and Audrey Jean Wellington bring this action against Defendants Guilford County, Sheriff B.J. Barnes, Deputies A.W. Caliendo, and L.F. Antonelli, and Peerless Insurance Company, alleging constitutional violations pursuant to 42 U.S.C. § 1983 and a state law claim for infliction of emotional distress. This matter is before the court on Defendants' Motion for Summary Judgment. For the reasons set

forth herein, Defendants' motion will be granted in part and denied in part.

I. BACKGROUND

The following facts are stated in the light most favorable to Plaintiffs:

On December 10, 1998, Deputies Antonelli and Caliendo entered Plaintiffs' property with the intention of serving a civil arrest order on Mr. Wellington for nonpayment of child support. Officers from the Guilford County Sheriff's Office visited the Wellingtons' home on previous occasions, and were aware that the Wellingtons owned firearms and other military equipment. On more than one occasion, the Wellingtons called the Sheriff's Office to report the presence of unidentified persons in camouflage hiding in the trees near their home.

Deputies Antonelli and Caliendo knocked on the door and were answered by Audrey Wellington. They informed Mrs. Wellington of their intention to serve a civil arrest order on Mr. Wellington. Mrs. Wellington eventually let the deputies enter the residence. Upon entering the home, the deputies called for Mr. Wellington to come out, but were not answered. Deputy Caliendo came to the doorway of a bedroom and found Mr. Wellington inside. According to Deputy Caliendo, Mr. Wellington was seated with a blue cloth draped over his hand concealing an item that looked like a gun. In a statement made approximately one week later, Mr. Wellington

stated that he was looking for radio parts at the time Deputy Caliendo entered the bedroom.

Mr. Wellington exited the bedroom with his hands up and "pivoted" his hands to show he did not have a weapon. (Dep. David Wellington at 36.) According to Deputy Caliendo, Mr. Wellington had his hands together in front of him still concealed by a blue cloth when Mr. Wellington exited the room. Immediately thereafter, Deputy Caliendo fired his pistol; the bullet passed through Mr. Wellington's hand, and he fell to the floor.

After the shooting occurred, the deputies observed a nine millimeter pistol on the kitchen table, near Audrey Wellington. Mrs. Wellington was handcuffed by Deputy Antonelli and thereafter escorted to the deputies' patrol car.

Mr. Wellington was subsequently charged with assault on a law enforcement officer, a charge to which he pleaded guilty.

II. STANDARD OF REVIEW

Summary judgment is appropriate where an examination of the verified pleadings, affidavits, and other proper discovery materials before the court demonstrates that there is no genuine issue of material fact, thus entitling the moving party to judgment as a matter of law. See Fed. R. Civ. P. 56(c); Celotex Corp. v. Catrett, 477 U.S. 317, 322-23, 106 S. Ct. 2548, 2552 (1986). Where such evidence could lead a reasonable juror to find for the party opposing summary judgment, a genuine issue of

material fact exists and summary judgment may not be granted. Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 585-86, 106 S. Ct. 1348, 1355-56 (1986). In deciding whether there is a genuine issue of material fact, the evidence of the non-moving party is to be believed and all justifiable inferences must be drawn in his favor. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255, 106 S. Ct. 2505, 2513 (1986). The basic question in a summary judgment inquiry is whether the evidence "is so one-sided that one party must prevail as a matter of law." Id. at 252, 106 S. Ct. at 2512.

III. ANALYSIS

Plaintiffs respond to Defendants' motion by stating that "[a]ll claims not addressed in this response are abandoned." (Pls.' Resp. Mot. Summ. J. at 6.) Accordingly, Plaintiffs have voluntarily withdrawn their equal protection claim (Count 2), due process claim (Count 3), state constitutional claim (Count 4), and infliction of emotional distress claim (Count 5). Furthermore, because Plaintiffs have not discussed in their response brief any Fourth Amendment violation except excessive force, all other potential Fourth Amendment claims are voluntarily withdrawn. Because Plaintiffs have not discussed any claim against Guilford County, the County will be considered voluntarily dismissed from the case. Deputy Antonelli will also be considered voluntarily dismissed since Plaintiffs have not

discussed any claims against him. Plaintiffs' Fourth Amendment claims against Sheriff Barnes in his official capacity are likewise voluntarily dismissed. However, since Plaintiffs have argued a basis for their excessive force claim against Deputy Caliendo, the court will not consider that claim to have been voluntarily dismissed.

In North Carolina, a sheriff and his or her surety are liable for the official acts of a deputy. Jenkins v. Medford, 119 F.3d 1156, 1163 (4th Cir. 1997); State ex rel. Cain v. Corbett, 235 N.C. 33, 38, 69 S.E.2d 20, 23 (1952). As such, Sheriff Barnes and his surety, Peerless Insurance Company, are necessary parties and will not be dismissed. Cain, 235 N.C. at 39, 69 S.E.2d at 24. However, all other of Plaintiffs' claims against Sheriff Barnes, not having been addressed, are withdrawn.

When determining whether a Fourth Amendment violation has occurred, the first question is whether "the officers' actions are 'objectively reasonable' in light of the facts and circumstances confronting them, without regard to their underlying intent or motivation." Graham v. Connor, 490 U.S. 386, 397, 109 S. Ct. 1865, 1872 (1989) (citing Scott v. United States, 436 U.S. 128, 137-39, 98 S. Ct. 1717, 1723-24 (1978)). Where, as here, the defendant has raised a qualified immunity defense, and "a violation could be made out on a favorable view of the parties' submissions, the next, sequential step is to ask

whether the right was clearly established." Saucier v. Katz, 533 U.S. 194, 201, 121 S. Ct. 2151, 2156 (2001).

The first step of the analysis requires the court to determine whether the alleged offending actions were unreasonable. The reasonableness of an officer's conduct is not determined through the perfect clarity of hindsight. Graham, 490 U.S. at 397, 109 S. Ct. at 1872. Instead, "[t]he court's focus should be on the circumstances at the moment force was used." Anderson v. Russell, 247 F.3d 125, 129 (4th Cir. 2001) (quoting Elliott v. Leavitt, 99 F.3d 640, 642 (4th Cir. 1996)). Such an inquiry requires the court to consider that an officer must make difficult decisions with only the briefest deliberation. Id.

The facts as portrayed by the parties present distinctly different accounts of events on the day in question. On the night the shooting occurred, Mr. Wellington was interviewed at Moses Cone Emergency Room by Detective D.K. Jones and stated that "he came out [of the bedroom] with [his] hands up." (Pls.' Resp. Mot. Summ. J. Ex. 2.) Later, during Mr. Wellington's deposition on October 16, 2003, he testified that he exited the bedroom with his hands in a "natural hands up position." (Id. Ex. 1 at 36.) On the night of the shooting, Mrs. Wellington was interviewed by Detective S.J. McBride and stated, "I remember David coming out of the back bedroom with a dark T-shirt flopped over one hand, both of his hands were out in front of him." (Id. Ex. 3.)

During Mrs. Wellington's deposition on October 16, 2003, she stated that her husband did not have a shirt draped over his hands and reiterated that his hands were in front of him. (Defs.' Br. Supp. Mot. Summ. J. Ex. 5 at 22.) In contrast, Deputy Caliendo gave a statement the night of the shooting indicating that he saw David Wellington's "right side, shoulder and right hand with the blue thing draped over the right hand." (Id. Ex. 2A at 2.)

Due to a material factual dispute regarding the position of Mr. Wellington's hands as he exited the bedroom, it is not possible to determine, for purposes of summary judgment, whether Deputy Caliendo's actions were constitutionally reasonable. Assuming, as Defendants contend, Mr. Wellington's hand was draped with a cloth, Deputy Caliendo may reasonably have suspected that Mr. Wellington was concealing a gun. However, viewing the facts in the light most favorable to Plaintiffs, the court must accept Mr. Wellington's assertion that he had his hands raised in the air. Assuming these facts detracts from the reasonableness of Deputy Caliendo's response.

Assuming a constitutional violation occurred, Defendants' motion may still succeed on the basis of qualified immunity. Defendants are entitled to qualified immunity if the right violated was not clearly established. Saucier, 533 U.S. at 202, 121 S. Ct. at 2156. A right is clearly established if "it would

be clear to a reasonable officer that his conduct was unlawful in the situation he confronted." Id. Due to the nature of the factual dispute in this case, the court cannot conclude, considering the facts in the light most favorable to Plaintiffs, that Deputy Caliendo was justified in shooting a suspect whose hands were raised. The right thus framed is clearly established in that any reasonable officer would find it unlawful to shoot a person appearing as Mr. Wellington contends. For this reason, the court cannot find that Deputy Caliendo is entitled to qualified immunity at this stage of the proceeding.

As a third basis for granting summary judgment, Defendants argue that Mr. Wellington is prohibited from proceeding against Deputy Caliendo because such suit would undermine Mr. Wellington's conviction for criminally assaulting Deputy Caliendo. In Heck v. Humphrey, the Supreme Court held that:

in order to recover damages for . . . harm caused by actions whose unlawfulness would render a conviction or sentence invalid, a § 1983 plaintiff must prove that the conviction or sentence has been reversed on direct appeal, expunged by executive order, declared invalid by a state tribunal authorized to make such determination, or called into question by a federal court's issuance of a writ of habeas corpus.

512 U.S. 477, 486-87, 114 S. Ct. 2364, 2372 (1994). Defendants' application of Heck is misguided in the present case. Mr. Wellington's conviction for assault does not prove that Caliendo's use of force was reasonable. See Willingham v. Loughnan, 261 F.3d 1178, 1183 (11th Cir. 2001), vacated by 537

U.S. 801, 123 S. Ct. 68 (2002), remanded to 321 F.3d 1299 (11th Cir. 2003); see also Packer v. Hayes, No. 03-1064, 2003 WL 22451775, at *1 (4th Cir. Oct. 29, 2003) (holding that the Heck decision did not bar Plaintiff's claim where a question remained as to whether the officer's use of force under the circumstances was excessive). Heck does not bar Plaintiffs' claim for excessive force. Therefore, Defendants' motion for summary judgment is denied regarding Plaintiffs' excessive force claim against Deputy Caliendo in his individual capacity.

Finally, Defendants' motion for summary judgment in regard to Plaintiffs' § 1983 claim against Deputy Caliendo in his official capacity will be granted. Official-capacity suits "generally represent only another way of pleading an action against an entity of which an officer is an agent." Kentucky v. Graham, 473 U.S. 159, 165, 105 S. Ct. 3099, 3104 (1985) (quoting Monell v. Department of Soc. Servs. of the City of New York, 436 U.S. 658, 690 n.55, 98 S. Ct. 2018, 2035 n.55, (1978)). Plaintiffs' claim against Deputy Caliendo in his official capacity cannot survive summary judgment because Plaintiffs fail to provide any evidence that a custom or policy was the basis of the purported constitutional violation. Greensboro Prof'l Fire Fighters Ass'n, Local 3157 v. City of Greensboro, 64 F.3d 962, 964 (4th Cir. 1995); Gordon v. Kidd, 971 F.2d 1087, 1097 (4th Cir. 1992). Furthermore, Plaintiffs have failed to provide any

evidence of policy-making authority sufficient to sustain § 1983 liability against Deputy Caliendo in his official capacity. City of St. Louis v. Praprotnik, 485 U.S. 112, 123, 108 S. Ct. 915, 924 (1988). Therefore, summary judgment is granted on Plaintiffs' § 1983 claim against Deputy Caliendo in his official capacity.

III. CONCLUSION

For the reasons stated above,

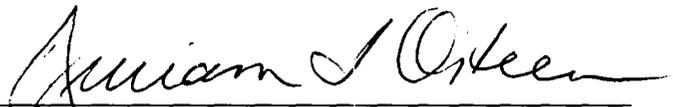
IT IS ORDERED that Defendants' Motion for Summary Judgment [37] is **GRANTED** in part and **DENIED** in part. Defendants' motion for summary judgment in regard to Plaintiffs' excessive force claim against Deputy Caliendo in his official capacity is **GRANTED**. Defendants' motion in regard to Plaintiffs' excessive force claim against Deputy Caliendo in his individual capacity is **DENIED**. Summary judgment is **DENIED** on Plaintiffs' claim against Peerless Insurance Company's bond on behalf of Sheriff Barnes. Both Sheriff Barnes and Peerless Insurance Company remain as necessary parties.

IT IS FURTHER ORDERED that, pursuant to Plaintiffs' voluntary withdrawal of all claims against Defendants Guilford County and Deputy Antonelli, these parties are dismissed from the case.

IT IS FURTHER ORDERED that Plaintiffs' equal protection claim (Count 2), due process claim (Count 3), state

constitutional claim (Count 4), emotional distress claim (Count 5), and Plaintiffs' § 1983 claim against Sheriff Barnes are **DISMISSED**, pursuant to Plaintiffs' voluntary withdrawal of these claims.

This the 29 day of March 2004.



United States District Judge