10TH CIRCUIT CASE NO. 16-4010

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

ESTATE OF JAMES D. REDD, M.D.,
Plaintiff/Appellant,
v.
DANIEL LOVE, ET AL.,
Defendant/Appellee.

On Appeal from the United States District Court
District of Utah, Central Division
The Honorable Ted Stewart Reassigned to the Honorable Robert J. Shelby
U.S. District Court for the District of Utah Case No. 2:11-cv-00478-RJS

REPLY BRIEF OF APPELLANT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES:

ARGUMENT

Pursuant to Fed. R. App. P. 28(c), Appellant states its argument as follows:

I. Appellee Love is Not Entitled to the Protection of Qualified Immunity.

a. Condition's Precedent to Performing the Required Legal Analysis.

In *Scott v. Harris*, 550 U.S. 372, 377-378 (2007). The Supreme Court held: "In resolving questions of qualified immunity, courts are required to resolve a 'threshold question: [(1)] Taken in a light most favorable to the party asserting the injury, do the facts show the officer's conduct violated a constitutional right?...[and (2)] whether the right was clearly established…in light of the specific context of the case"? *Scott* at 377, *citing Saucier v. Katz*, 553 U.S. 194, 201 (2001)[1].

The first step in determining this issue, if not all legal issues, is to determine the relevant facts. *See Scott*, at 378. In *Scott*, as here, and probably in most every case, the parties present substantially different versions of the facts. *Id*. at 378. Appellee Love argues that *Scott* allows a court to disregard a Rule 56 non-movant's version of the events if it is "contradicted" by Appellee's evidence. Neither *Scott*, nor any case, allow a court to do so.

Scott re-affirmed the longstanding rule that "courts are required to view the

[1] The issue in *Saucier* was also presented on summary judgment. See *Saucier*, 533 U.S. at 200.

facts and draw reasonable inferences 'in the light most favorable to the party opposing the summary judgment motion.'" *Id*. at 378 *citing United States v. Diebold, Inc*., 369 U.S. 654, 655 (1962). "In qualified immunity cases, this usually means adopting (as the [Eleventh Circuit] Court of Appeals did here) the plaintiff's version of the facts." *Id*. This case presents the usual and customary circumstance where the Court of Appeals must adopt the appellant's version of events.

Scott was a usual case with an unusual "wrinkle." *Scott* at 378. *Scott* involved a car chase. *Id*. at 379-380. The non-movant/plaintiff offered a sworn version of the facts that, if accepted, demonstrated he was driving carefully and prudently at all relevant times. *Id*. at 379. The record contained video footage of the events in question. *Id*. at 379, (the wrinkle that distinguished the case from others). "There [were] no allegations or indications that [the] videotape was doctored or altered in any way, nor any contention that what it depicts differs from what actually happened." *Id*. at 378. In contrast to the *Scott* plaintiff's characterization of his driving as safe or careful, the video "tells quite a different story." *Id*. at 379. The contradiction was such that "no reasonable jury could believe [non-movant's version]" and "[t]he Court of Appeals should not have relied on such visible fiction; it should have viewed the facts in the light depicted by the video." *Id*. at 380-381.

Appellee Love argues that a district court, and/or this Court, can reject facts

or versions of events submitted by the non-movant if same are "contradicted," or "blatantly contradicted," by the Movant. Parties often disagree on the facts and present contradictory, and sometimes opposite, versions of the facts. Appellee argues that, since *Scott*, a district or appellate court may now, on Rule 56, consider the weight of the evidence, resolve disputes, and make credibility determinations, to ascertain facts and then apply those facts to the relevant legal analysis. *Scott* does not allow or endorse such a procedure. A district court may not evaluate the credibility of witnesses in deciding a motion for summary judgment. *Seamons v. Snow*, 206 F.3d 1021, 1026 (10th Cir. 2000). These determinations "must be left for the jury." *Fogarty v. Gallegos*, 523 F.3d 1147, 1166 (10th Cir. 2008), *citing Anderson v. Liberty Lobby, Inc*., 477 U.S. 242, 255 (1986).

Scott re-affirmed the longstanding rule that a court must view the evidence in a light most favorable to the non-movant, but in doing so, it need not close its eyes to the obvious, or employ "visible fiction." *See Scott,* 550 U.S. at 381. *Scott* held that while the non-movant's evidence was entitled to be believed under most any circumstance, in *Scott*, there was a video that so "blatantly contradicted," (*See Id* at 380), the evidence of the non-movant that no reasonable jury could accept the evidence and rule in favor of the non-movant[2]. Such is not the record presented by

[2] Justice Stevens, in his dissent, opined that the events depicted in the videotape were equivocal and a reasonable jury could have watched it and interpreted it favorably to the non-movant. *Scott,* 550 U.S. at 389-396.(Stevens, J., dissenting).

this Appeal.

In the case at bar, there is no evidence as clear or indisputable as a videotape. There is a Sign-In log. Aplt. App., Vol. 16, at 967-970. Unlike the video tape in *Scott*, the Sign-in Log is only as accurate as the officers on the scene chose to make it, and it is not as unequivocal as video images of the events in question. A video, absent tampering (and no tampering occurred in *Scott*), faithfully records the events that take place in front of the camera lens. Conversely, a Sign-In Log only records the signatures of those agents who chose to place their name on the log. Unlike the video in *Scott*, in the case at bar, there ***are*** "allegations [and] indications that what [the Sign In Log] depicts differs from what actually happened." *See Scott,* 550 U.S. at 378. Those allegations and indications are as follows:

Appellant submitted evidence that there were 150 or more total agents, plus an unknown number of additional non-agent employees, involved in all of the Cerberus raids on June 10, 2009. See Appellant's Opposition to Motion for

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Justice Breyer, in a concurrence, responded that anyone considering the case should simply watch the video (available on the Court's website). *Scott*, 550 U.S. at 387, (Breyer, J., concurring). Justice Stevens, while in an eight to one minority, responded to any viewer of the video by noting that his findings were the same as those of all the judges on the District Court and Court of Appeals Panel, and criticized the majority for failing to meet its "duty to view the evidence in the light most favorable to the nonmoving party…" and using "its observation of the video as an excuse for replacing the rule of law with its ad hoc judgment." *Scott,* 550 U.S. at 394 and 396. (Stevens, J., dissenting). All the the jurists in *Scott*, from District to Supreme Court, agreed that the facts must be viewed in a light most favorable to the non-movant and did their best to implement that obligation.

Summary Judgment, Aplt. App., Vol. 17, at 1041-1043 (Response to Paragraph 35); Aplt. App., Vol. 17, at 1065 (Paragraph 87); *See Also* Aplt. App., Vol. 17, at 1237 (FBI Press Release). Of those 150 agents, there were 12 known to be at the Redd Home (SJ Order, Aplt. App., Vol. 19, at 1479), and there were 69 additional agents whose location were not determined or assigned by the Appellee. Jerrica Redd, who was at the Redd Home observing the events of June 10, 2009, estimated that she saw no fewer than 50 agents. Jericca Redd Decl., Aplt. App. Vol. 17, at 1243, at ¶6(c). Other evidence, or inferences therefrom, indicated that there could have been as many as 100 or more agents at the Redd Raid. Appellant's Opposition to Motion for Summary Judgment, Aplt. App., Vol. 17, 1064-1065 (Paragraph 86). Not only did the Appellant's evidence indicate and suggest that the Sign In Log did not depict the events as they actually occurred, but the Sign In Log was demonstrated to be inaccurate in at least one respect: Agent Vander Veer was absent from the Sign In Log even though she was with Dr. Redd and interrogating him in the Garage. Appellant's Opposition to Motion for Summary Judgment, Aplt. App., Vol. 17, at 1070-1072 (Paragraphs 106-108)[3].

In sum, Appellant argues that not every agent signed the log. This allegation

[3] Agent Vander Veer signed in eventually, noting a time 3 hours after her proven arrival, but the evidence was clear that the Sign In Log was not accurate. In addition, no evidence contradicted the reasonable inference that Agents did not sign the Sign In Log if they were outside the windows or doors or walls, but did not enter the confines of the living portion of the home.

is consistent with the known facts, Jerrica Redd's testimony, Agent Vander Veer's known presence at the scene even though absent from the log, Attorney General Holder's testimony, and the absence of any evidence (policy or procedure) that everyone present was required or forced to, and did, sign the Log. Under the facts presented, a reasonable jury could conclude that there were more agents than reflected in the Sign In Log. Appellant's evidence is not "blatantly contradicted" by the record and Appellant does not ask the Court to adopt a "visible fictions" by presuming the Sign In Log to be less than entirely accurate. The sign in log hardly equates to video footage of the events in question, and a reasonable jury could consider all the evidence and conclude that the Sign In Log did not depict the events as they actually happened.

These facts, and those set forth in Appellants opening brief, are the facts to which the Court must apply its Qualified Immunity analysis. The district court erred when it failed to do so.

b. Analysis of Qualified Immunity Based on the Facts to Which Appellant is Entitled to be Presumed.

Having assessed the facts as it must, in a light most favorable to the non-movant Appellant, this Court can address the questions imposed upon it by any Qualified Immunity defense: (1) do those facts demonstrate a violation of a

constitutional right and (2) was the right clearly established. *Scott*; *Pearson v. Callahan*, 555 U.S. 223, 232 (2009).

i. The Facts Demonstrate a Violation of a Constitutional Right.

Appellant addressed this issue in Section 1 of its Opening Brief, at pages 31-36 and makes no additional argument in reply.

ii. The Right was Clearly Established.

The law is clearly established if a reasonable official in the Appellee's circumstances would understand that his or her conduct violated the plaintiff's constitutional right. *Moore v. Guthrie,* 438 F.3d 1036, 1042 (10th Cir. 2006). *Hope v. Pelzer*, 536 U.S. 730, 122 S. Ct. 2508, 153 L. Ed. 2d 666 (2002) "shifted the qualified immunity analysis from a scavenger hunt for prior cases with precisely the same facts toward the more relevant inquiry of whether the law put officials on fair notice that the described conduct was unconstitutional." *Pierce v. Gilchrist*, 359 F.3d 1279, 1298 (10th Cir. 2004) (*discussing Hope v. Pelzer*, 536 U.S. 730, 122 S. Ct. 2508, 153 L. Ed. 2d 666 (2002)). "It is not necessary, however, for plaintiffs to find a case with exact corresponding factual circumstances; defendants are required to make "reasonable applications of the prevailing law to their own circumstances." *Currier v. Doran,* 242 F.3d 905, 923 (10th Cir. 2001) *quoting Murrell v. School District No. 1,* 186 F.3d 1238, 1251 (10th Cir. 1999). Officers

"can still be on notice that their conduct violates established law even in novel factual circumstances." *Hope*, 536 U.S. at 741.

In sum, a constitutional violation can be clearly established in three ways: (1) by showing that a materially similar case has already been decided on point. *Schwartz v. Booker*, 702 F.3d 573, 587 (10th Cir. 2012); (2) that the conduct is "obviously egregious." *Pierce v. Gilchrist*, 359 F.3d 1279, 1298 (10th Cir. 2004); *Keating v. City of Miami,* 598 F.3d 753, 766 (11th Cir. 2010); or (3) a violation may be clearly established based on general constitutional principles. *Anderson v. Blake*, 469 F.3d. 910, 914 (10th Cir. 2006). Appellant submits this case falls into the third category.

In *Wilson v. City of Lafayette*, 510 Fed. Appx. 775, 791 (10th Cir. 2013)(Unpublished)(Matheson, J. concurring), Judge Matheson noted that

> Courts have found police conduct to violate clearly established law absent case law on point and without labeling the behavior egregious if the *Graham* factors tilt so clearly in favor of the plaintiff that any reasonable officer would have been on notice that the force used was unlawful. *Anderson v. Creighton*, 483 U.S. 635, 640, 107 S. Ct. 3034, 97 L. Ed. 2d 523 (1987); *see also, e.g., Keating*, 598 F.3d at 766; *Orem v. Rephann,* 523 F.3d 442, 448 (4th Cir. 2008). In other words, if the *Graham* analysis is decidedly in favor of the Wilsons, the violation can be clearly established.

In *Fogarty v. Gallegos*, 523 F.3d 1147 (10th Cir. 2008), this court analyzed whether a right was clearly established because it was based on general constitutional principles. The court found that (it was) because "under [the claimant]'s version of events each of the *Graham* factors lines up in his favor, this

case is not so close that our precedents would fail to portend the constitutional unreasonableness of defendants' alleged actions." *Id* at 1161 (regarding use of pepper balls and tear gas against non-violent offender). *See Also Buck v. City of Albuquerque*, 549 F.3d 1269, 1291 (10th Cir. 2008). In *Wilson*, the *Graham* analysis was less than one sided and Judge Matheson opined that the plaintiff therefore failed to meet the clearly established requirement. In the case at bar, the district court below determined that the *Graham* analysis was one sided in favor of Appellant. SJ Order, Aplt. App., Vol. 19, at 1494-1495. This conclusion was supported by the clear weight of the evidence in the record.

The three *Graham* factors are not exclusive, and a court may consider additional factors as the circumstances of a particular case may require. *Casey v. City of Federal Heights,* 509 F.3d 1278, 1281 (10th Cir. 2007). In the case at bar, no circumstances or indication is presented that the force applied was objectively reasonable under the circumstances despite Appellant's positive performance under the *Graham* analysis. "[T]here will almost never be a previously published opinion involving exactly the same circumstances." *Casey* at 1284. "[This Court] cannot find qualified immunity wherever [it encounters] a new fact pattern." *Id. citing Anderson v. Blake,* 469 F.3d 910, 914 (10th Cir. 2006) "Thus, when an officer's violation of the Fourth Amendment is particularly clear from *Graham* itself, we do not require a second decision with greater specificity to clearly

establish the law. *Casey* at 1284. Appellant's case demonstrates a clear violation under *Graham,* and there was no fact or circumstance that demonstrated objective reasonableness despite the clarity of the analysis under *Graham.*

This case presents the typical circumstance that most excessive force claims present: "unreasonable force claims are generally fact questions for the jury. *Buck* at 1288 *citing Quezada v. County of Bernalillo,* 944 F.2d 710, 715 (10th Cir.1991). *Quezada* held that the question "whether the police used excessive force in a § 1983 case has always been seen as a factual inquiry best answered by the fact finder."[4]. The lower court erred when it ruled otherwise.

II. Irrelevant and Improper Arguments by the Appellee Love

Appellant Love compares Dr. James Redd to Law Enforcement's most notorious enemies and also suggests that he may or could have been a member of an organization whose goal it is to overthrow the Government or just inflict

[4] The *Quezada* Court relied upon the following cases for the proposition asserted: *Street v. Parham*, 929 F.2d 537, 541 n.2 (10th Cir. 1991) (in excessive force cases the fact finder determines if the force used was excessive under the circumstances); *Trujillo v. Goodman*, 825 F.2d 1453, 1458-59 (10th Cir. 1987) (question of excessive force is a factual inquiry properly reserved, in most instances, for the jury); *Hammer v. Gross*, 932 F.2d 842, 846 (9th Cir. 1991) (*en banc*) (question of whether force applied by police officers was reasonable is a jury question); *Pleasant v. Zamieski*, 895 F.2d 272, 275 (6th Cir. 1990) (factual determinations of jury in § 1983 damages suit alleging excessive force reviewed for clear error), *cert. denied*, 498 U.S. 851, 112 L. Ed. 2d 110, 111 S. Ct. 144 (1990); *Calamia v. City of New York*, 879 F.2d 1025, 1035 (2d Cir. 1989) (jury determines whether police officer conduct is objectively reasonable); *Fitzgerald v. McDaniel*, 833 F.2d 1516, 1518-19 (11th Cir. 1987) (same).

random harm. See Appellee Brief at page 30, notes 17-19. There is no evidence, or even suggestion that Dr. James Redd was involved in the Sovereign Citizen Movement, or that he was associated in any way with Terry Nichols or Cliven Bundy, or that he was involved in any group in Southern Utah that was, by hearsay account, attacking and harassing BLM workers in bars, grocery stores or at home. In fact, Dr. James Redd was characterized to the Attorney General of the United States of America as "an upstanding member of his community, a decent, honorable man…" whom "everybody respected [and] everybody loved." *See* Appellant's Opposition to Motion for Summary Judgment, Aplt. App. Vol. 17, at 1063-1064 (Paragraph 85). Mr. Holder offered no contrary assessment, or otherwise attempted to lessen Dr. Redd's character or esteem or liken him to someone who would throw a firebomb at a campground host. See Appellee Brief at Page 19, Note 19. The district court performed the *Graham* analysis below and made clear, Dr. Redd in no way endangered the officers or created a concern for officer safety, his crime severity level was low and rather than resist or flee, he was cooperative, and even polite. SJ. Order, Aplt. App., Vol. 19, at 1494-1495. While other individuals at other locations for other crimes may have presented a variety of objectively reasonable exercises of force, and a different result under the *Graham* analysis, the only circumstance presented for review is that which occurred at the Redd Home on June 10, 2009.

CONCLUSION

For the reasons argued by Appellant, this Court should reverse the judgment of the district court below and order that Appellee Love's summary judgment motion be denied.

Dated: June 6, 2016

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