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**QUALIFIED IMMUNITY IN THE FOURTH AMENDMENT:
A PRACTICAL APPLICATION OF
§ 1983 AS IT APPLIES TO FOURTH AMENDMENT
EXCESSIVE FORCE CASES**

*Karen Blum**

I am going to be talking about qualified immunity, specifically addressing the problem of qualified immunity in the Fourth Amendment context.¹ One of the issues I will address is whether a judge or the jury should decide the issue of qualified immunity, and if the issue goes to the jury, what precisely gets decided by the jury. That seems to be a problem in the Second Circuit more than in other circuits.²

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¹ See *Saucier v. Katz*, 533 U.S. 194, 200 (2001).

² See, e.g., *Kent v. Katz*, No. 04-0880, 2005 U.S. App. LEXIS 2899, at *1 (2d Cir. Feb. 17, 2005) (unpublished) ("Plaintiff's second argument is that qualified immunity should have been decided by the court as a matter of law and not been given to the jury. We have indicated, though have not definitively held, that the ultimate question on qualified immunity should be resolved by the court as it is a question of law."). Compare *Cowan ex rel. Estate of Cooper v. Breen*, 352 F.3d 756, 764 (2d Cir. 2003) ("As the case proceeds to trial, it should be noted that although the factual disputes in the instant case that must be resolved by the jury go both to the excessive force and to the qualified immunity questions, the qualified immunity issue is a question of law better left for the court to decide. Thus, if the jury finds that Breen used excessive force against Cooper, the court should then decide whether Breen is entitled to qualified immunity.") (citations omitted), with *McCardle v. Haddad*, 131 F.3d

The starting point for qualified immunity in the Fourth Amendment is the Supreme Court's decision of *Saucier v. Katz*.³ In *Saucier*, the Supreme Court finally settled the controversial question of whether qualified immunity was available in a Fourth Amendment excessive force case.⁴ *Saucier* was a *Bivens* action,⁵ not a § 1983 action.⁶ Because a *Bivens* action is against federal officers, the same rules and laws that apply in the qualified immunity area also apply in *Bivens* actions.⁷

Saucier v. Katz involved the sixty-year-old veterinarian who went to demonstrate at the Presidio Army Base in San Francisco when it was being dedicated as a national park.⁸ Dr. Katz was an animal rights activist.⁹ He brought a banner that said something like please don't harm the animals.¹⁰ He was afraid that the Army's

43, 50 (2d Cir. 1997) ("Where the qualified immunity defense has not been resolved prior to trial, it may be presented to the jury or it may be decided by the court as a matter of law."), and *Oliveira v. Mayer*, 23 F.3d 642, 649 (2d Cir. 1994) ("[W]e think the District Court erred by not submitting the qualified immunity issue to the jury.").

³ 533 U.S. at 200.

⁴ *Id.* at 200 (reversing the Court of Appeals and rejecting the notion that qualified immunity does not apply to a violation of the Fourth Amendment that occurred by excessive force).

⁵ *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388, 389 (1971). A *Bivens* action is based directly on the Constitution and is brought against a federal officer. *Id.*

⁶ *Saucier*, 533 U.S. at 198-99.

⁷ *Corr. Servs. Corp. v. Malesko*, 534 U.S. 61, 82 (2001) (Stevens, J., dissenting). "It is true that we have never expressly held that the contours of *Bivens* [actions] and § 1983 [claims] are identical. The Court, however, has recognized sound jurisprudential reasons for parallelism, as different standards for claims against state and federal actors 'would be incongruous and confusing.'" *Id.* (quoting *Butz v. Economou*, 438 U.S. 478 (1978)).

⁸ *Katz v. United States*, 194 F.3d 962, 964-65 (9th Cir. 1999), *rev'd sub nom.* *Saucier v. Katz*, 533 U.S. 194 (2001).

⁹ *Id.* at 965.

¹⁰ *Id.* The sign read, "Please Keep Animal Torture Out of Our National Parks." *Id.*

Letterman Hospital would be used for experimenting on animals.¹¹ When Vice President Gore, who was speaking at the dedication, got out of his seat to give his speech, Dr. Katz unfurled his banner.¹² Two military police officers then walked over, tossed him into a van, and took him away.¹³ He was released shortly thereafter.¹⁴ The nature of Dr. Katz's excessive force claim was that he was forcibly taken away and tossed into the van.¹⁵ He even said he caught his own fall and did not suffer any serious injuries.¹⁶

In my view, it was no accident that *Saucier v. Katz*¹⁷ and *Hope v. Pelzer*,¹⁸ another qualified immunity case, went to the Supreme Court. The *Saucier* case went up from the Ninth Circuit; *Hope v. Pelzer* went up from the Eleventh Circuit. These two circuits were clearly on the extreme ends in the qualified immunity game.¹⁹ The Ninth Circuit sent almost everything to the jury when it came to an issue of excessive force,²⁰ while the Eleventh Circuit sent nothing

¹¹ *Saucier*, 533 U.S. at 197.

¹² *Id.* at 198.

¹³ *Id.* at 198.

¹⁴ *Id.*

¹⁵ *Katz*, 194 F.3d at 970.

¹⁶ *Saucier*, 533 U.S. at 198.

¹⁷ 533 U.S. 194 (2001).

¹⁸ 536 U.S. 730 (2002).

¹⁹ *Act Up!/Portland v. Bagley*, 988 F.2d 868, 874-75 n.1 (9th Cir. 1993) (Norris, J., dissenting) (stating that the Ninth Circuit and Eleventh Circuit differ on whether the reasonableness of an officer's conduct is strictly a matter of law).

²⁰ *See, e.g., Ortega v. O'Connor*, 146 F.3d 1149, 1155-56 (9th Cir. 1998) ("Although the district court declared that it would not instruct the jury on qualified immunity, the plaintiff and the defendants jointly proposed to the district court, and the court accepted, a jury instruction that applied a reasonableness' test not, as the district court had suggested, to the search itself, but instead to the defendants' beliefs regarding the search. . . . Here, the district court's extra reasonableness test . . . constituted an appropriate and proper instruction to the jury on the second prong of the defendants' qualified immunity defense--whether a reasonable state official could have believed his conduct was lawful--the prong as to which the existence of factual disputes requires the jury's determination.").

to the jury; everyone was granted qualified immunity and essentially no cases went to trial in the Eleventh Circuit.²¹

In *Saucier v. Katz*, the Supreme Court made a couple of very important points. First, the Court established that qualified immunity was available in the Fourth Amendment excessive force context.²² Second, the Court discussed how to define the right in making the “clearly established” determination.²³ The Supreme Court in *Saucier* instructed the Ninth Circuit to define the contours of the right.²⁴ The Court explained that the Ninth Circuit’s approach should not consist of simply adhering to the law as was established by the earlier Supreme Court case, *Graham v. Connor*.²⁵ In other words, the Ninth Circuit’s approach prior to *Saucier* was that unreasonable force is excessive force, which is a violation of the Fourth Amendment.²⁶ The Supreme Court instructed the Ninth Circuit to look at the particulars and define the contours of the right, using more of the

²¹ This trend led one district court judge in the Eleventh Circuit to comment that, “[i]n fact, based upon the case law in this circuit, perhaps a more appropriate name for this defense would be unqualified immunity.” *Dowdell v. Chapman*, 930 F. Supp. 533, 550 (M.D. Ala. 1996).

²² *Saucier*, 533 U.S. at 200.

²³ *Id.* at 201-02. The Court noted that the right is not to be inferred from a general proposition of law, but from the totality of the facts in the case. *Id.* Additionally, the right must be sufficiently established so as to provide a reasonable officer with notice of wrongful conduct in a particular situation. *Id.* at 202. The existence of such notice must be determined from an objective officer’s view. *Id.* at 201.

²⁴ *Id.* at 200, 202 (stating that the Ninth Circuit’s approach has stymied the doctrine’s goal of allowing parties to avoid unnecessary litigation).

²⁵ *Graham v. Connor*, 490 U.S. 386, 397 (1989) (holding that excessive force claims are properly analyzed under the Fourth Amendment’s “objective reasonableness” standard, rather than a substantive due process standard).

²⁶ *Katz*, 194 F.3d at 970-71 (affirming the district court’s reliance upon circuit case law that consistently held that the reasonableness inquiry in a claim of excessive force under the Fourth Amendment is the same as the reasonableness inquiry on the merits of such a claim).

facts.²⁷

Hope v. Pelzer was the case where prison guards left an individual out on a hitching post for seven hours in the hot sun with no shirt, no bathroom breaks, and no water.²⁸ The Eleventh Circuit held that while this conduct might violate the Eighth Amendment, the so-called merit question, qualified immunity nevertheless applied because there was no case on point with similar facts that would give the officials notice that their conduct was unconstitutional.²⁹ The Supreme Court instructed the Eleventh Circuit in *Hope v. Pelzer* not to be too rigid in its requirement that a similar case must exist with facts on point.³⁰

The Ninth Circuit's disposition in *Saucier* regarding the use of force was that the law clearly established that objectively unreasonable force was a violation of the Fourth Amendment.³¹ In the Ninth Circuit, the question of what was objectively reasonable was an issue that was sent to the jury.³² In just about every excessive force case in the Ninth Circuit where there was a question of fact in dispute, the case would go to the jury for resolution.³³ The Supreme Court in *Saucier* explained that the Ninth Circuit's approach was in

²⁷ *Saucier*, 533 U.S. at 205 (adding that an inquiry must be undertaken in light of a specific context).

²⁸ *Hope v. Pelzer*, 240 F.3d 975, 976-77 (11th Cir. 2001), *rev'd*, 536 U.S. 730 (2002).

²⁹ *Id.* at 982.

³⁰ *Hope v. Pelzer*, 536 U.S. 730, 736 (2002) (quoting *Hope*, 240 F.3d at 981).

³¹ *Katz*, 194 F.3d at 970-71.

³² *Id.* at 970, n.5.

³³ *Alexander v. County of Los Angeles*, 64 F.3d 1315, 1323 (9th Cir. 1995). The court stated that if the jury believed that the defendants handcuffed the plaintiff for an unreasonable period of time, resulting in a walnut size protrusion more than nine months after the incident, then the jury could reasonably find that excessive force was used against

Alexander, *Id.*

error in two respects.³⁴ The Court said that first, the so-called constitutional or merits question should be addressed.³⁵ The Ninth Circuit did not do that.³⁶ The Court said that this is the first inquiry that the lower courts must complete before they can address the qualified immunity issue of whether the law was clearly established at the time.³⁷ In *Saucier*, the Ninth Circuit did not do the two-part approach.³⁸

Interestingly, the Supreme Court in *Saucier* also did not do the two-part approach.³⁹ The Court granted certiorari on the limited issue of whether the law was clearly established at the time.⁴⁰ I think the concurring opinions⁴¹ in *Saucier* were right. Had the Court addressed the merits question first, the facts alleged did not state a violation of a Fourth Amendment right.⁴² Therefore, *Saucier* could have been easily disposed of on the merits question. Probably, the simple little push into the van, as a matter of law, was not excessive force.⁴³

The *Saucier* Court explained that a court should look at the

³⁴ *Saucier*, 533 U.S. at 200.

³⁵ *Id.*

³⁶ *Id.*

³⁷ *Id.*

³⁸ *Katz*, 194 F.3d at 970-71.

³⁹ *Saucier*, 533 U.S. at 207.

⁴⁰ *Id.*

⁴¹ *Id.* at 210-17. Justices Ginsburg and Souter, in part, wrote the concurring opinion with whom Justices Stevens and Breyer joined. *Id.*

⁴² *Id.* at 216-17 (“Once it has been determined that an officer violated the Fourth Amendment by using objectively ‘unreasonable force’ as that term is explained in *Graham v. Connor*, there is simply no work for a qualified immunity inquiry to do.”).

⁴³ *Id.* at 212 (referring to the fact that not all physical contact between an officer and a suspect constitutes a violation of the Fourth Amendment, even though a judge may deem such conduct unnecessary).

specific context of the case and ask whether it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted.⁴⁴ In other words, given those circumstances would a reasonable officer understand that his conduct violated clearly established law?⁴⁵ The Court did not have to agree on a precise formulation, rather the message to the lower court was that you do not need a case on point and you do not need fundamental facts that are similar to facts in the case before you. The question, as the Supreme Court put it in *Saucier*, is whether the courts agreed that certain conduct constitutes a constitutional violation under facts not distinguishable in a fair way from the facts of the case at hand.⁴⁶ This question asks whether there was case law decided at the time of the challenged conduct that would have given an officer some kind of notice or fair warning that this conduct was unconstitutional.⁴⁷

One point that the Supreme Court made clear was that the inquiry on excessive force under the Fourth Amendment and the inquiry on qualified immunity are two different and distinct inquiries.⁴⁸ These inquiries do not meld into one question of whether the use of force was objectively reasonable.⁴⁹ The analysis that you

⁴⁴ *Saucier*, 533 U.S. at 205 (citing *Graham*, 490 U.S. at 393-97).

⁴⁵ *Id.*

⁴⁶ *Id.* at 202-03 (2001) (stating that if various courts agreed that certain conduct was a constitutional violation under facts not distinguishable in a fair way from the facts presented in the case at hand, the officer would not be entitled to qualified immunity based simply on the argument that courts had not agreed on one verbal formulation of the controlling standard).

⁴⁷ *Gregory v. Oliver*, 226 F. Supp. 2d 943 (E.D. Ill. 2002).

⁴⁸ *Saucier*, 533 U.S. at 197 (holding that the ruling on qualified immunity requires “an analysis not susceptible of fusion with the question whether unreasonable force was used in making the arrest.”).

⁴⁹ *Id.* at 201-02.

do on the merits question is the analysis discussed in *Graham v. Connor* that protects an officer who makes a mistake of fact.⁵⁰ These are questions that would be put to the jury and factors that should be considered by the jury.⁵¹ The factors set out in *Graham* include: the severity of the crime, whether the individual was resisting or attempting to flee, and whether the officer reasonably perceived a threat to himself or to the public from this individual.⁵²

According to the Court in *Saucier*, qualified immunity adds another layer of protection by protecting the officer who makes a reasonable mistake regarding what legal constraints were applied to the conduct at the time.⁵³ Qualified immunity asks whether a reasonable officer would have understood that the law, as established at the time and applied to the officer's conduct, was clear enough to give him notice or fair warning that the officer's conduct was considered unreasonable under the Fourth Amendment.⁵⁴ The *Saucier* Court explained that the qualified immunity inquiry protects the officer from the "hazy border between acceptable and excessive force."⁵⁵

To better understand qualified immunity in the Fourth Amendment context, I will work through how a case might unfold. Qualified immunity is an affirmative defense; usually it is plead in the Answer pursuant to Rule 8(c) of the Federal Rules of Civil

⁵⁰ *Graham*, 490 U.S. at 396.

⁵¹ *Id.*

⁵² *Id.*

⁵³ *Saucier*, 533 U.S. at 205-06.

⁵⁴ *Id.* at 207-08.

⁵⁵ *Id.* at 206.

Procedure.⁵⁶ However, it is important to note that most courts will allow a qualified immunity defense to be raised like a statute of limitations defense—in a motion by way of Rule 12(b)(6) of the Federal Rules of Civil Procedure.⁵⁷

The Second Circuit recently came out with a decision recognizing that a motion to dismiss pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure was an appropriate avenue for raising the qualified immunity defense.⁵⁸ In *McKenna v. Wright*⁵⁹ the Second Circuit noted that the test for dismissal at the motion to dismiss stage is stringent because all of the plaintiff's allegations are taken as true.⁶⁰ Defendants raising qualified immunity at the motion to dismiss stage must be prepared to say that even if everything the plaintiff alleges is true and proven at trial, there was no violation of clearly established law of which a reasonable officer would have known.⁶¹

If qualified immunity is denied at the motion to dismiss stage, case law has held that defendants are entitled to an immediate interlocutory appeal.⁶² It is interesting to me that if you just filed a motion to dismiss for failure to state a claim pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure and that motion was denied, there would be no interlocutory appeal on the motion to

⁵⁶ FED. R. CIV. P. 8(c).

⁵⁷ FED. R. CIV. P. 12(b)(6).

⁵⁸ *McKenna v. Wright*, 386 F.3d 432, 436 (2d Cir. 2004) (stating that the qualified immunity defense may be raised on a 12(b)(6) motion to dismiss).

⁵⁹ *Id.* at 432.

⁶⁰ *Id.* at 436.

⁶¹ *Id.* at 437.

dismiss.⁶³ However, if you moved to dismiss on the basis of qualified immunity and that motion was denied, then an interlocutory appeal is permitted.⁶⁴ And sometimes it turns on the same thing; the court's decision that the plaintiff has or has not stated a constitutional violation under clearly established law.⁶⁵

The first question is the same in the qualified immunity analysis.⁶⁶ On a motion to dismiss, the allegations are taken as true, and the plaintiff is entitled to all reasonable inferences from the facts.⁶⁷ On the motion to dismiss, the court is going to ask if the allegations state a constitutional claim.⁶⁸ This so-called "constitutional question first" analysis has been criticized by five of the justices.⁶⁹

⁶² *Mitchell v. Forsyth*, 472 U.S. 511, 526-27 (1985).

⁶³ *McKenna v. Wright*, 386 F.3d 432, 433-34 (2d Cir. 2004).

⁶⁴ *Mitchell*, 472 U.S. at 516-18, 530.

⁶⁵ *Cottone v. Jenne*, 326 F.3d 1352, 1357 (11th Cir. 2003); *Bultema v. Benzie County*, No. 04-1772, 2005 U.S. App. LEXIS 17818, *13-14 (6th Cir. Aug. 17, 2005).

⁶⁶ *Bultema*, 2005 U.S. App. LEXIS 17818, at *14 (citing *Feathers v. Aey*, 319 F.3d 843, 848 (6th Cir. 2003)).

⁶⁷ *Id.*, at *14-15.

⁶⁸ *Id.*, at *14.

⁶⁹ In a denial of certiorari and dissent from the denial, some members of the Court commented on problems caused by the "constitutional-question-first rule." See *Bunting v. Mellen*, 541 U.S. 1019 (2004) (Stevens, Ginsburg & Breyer, JJ., respecting the denial of certiorari) (questioning "the wisdom of an inflexible rule requiring the premature adjudication of constitutional issues."); *id.* at 1023-26 (Rehnquist, C.J. & Scalia, J., dissenting from denial of certiorari).

The Fourth Circuit's determination that a state military college's grace before meals violates the Establishment Clause, creating a conflict with Circuits upholding state-university prayers, would normally make this case a strong candidate for certiorari. But it is questionable whether Bunting's request for review can be entertained, since he *won judgment* in the court below. For although the statute governing our certiorari jurisdiction permits application by any party to a case in a federal court of appeals, 28 U.S.C. § 1254(1), our practice reflects a settled refusal to entertain an appeal by a party on an issue as to which he prevailed. . . .

I think it plain that this general rule should not apply where a

A court may grant qualified immunity on the first prong of the *Saucier* analysis as a matter of law.⁷⁰ Take the following facts as I am giving them to you. A plaintiff alleges he was chased by the police in a high-speed pursuit that started out as a simple traffic violation. He pulled over to the side of the road, and ran out of the

favorable judgment on qualified-immunity grounds would deprive a party of an opportunity to appeal the unfavorable (and often more significant) constitutional determination. That constitutional determination is not mere dictum in the ordinary sense, since the whole reason we require it to be set forth (despite the availability of qualified immunity) is to clarify the law and thus make unavailable repeated claims of qualified immunity in future cases. . . .

Not only is the denial of review unfair to the litigant (and to the institution that the litigant represents) but it undermines the purpose served by initial consideration of the constitutional question, which is to clarify constitutional rights without undue delay.

This problem has attracted the attention of lower courts. Two Circuits have noticed that if the constitutional determination remains locked inside a § 1983 suit in which the defendant received a favorable judgment on qualified immunity grounds, then government defendants, as the prevailing parties, will have no opportunity to appeal for review of the newly declared constitutional right in the higher courts, *Horne v. Coughlin*, 191 F.3d 244, 247 (2d Cir. 1999).

Id. (citations omitted). See also *Brosseau v. Haugen*, 125 S. Ct. 596, 598, 600-01 (2004) (per curiam) (Breyer, Scalia, & Ginsburg, JJ., concurring) (expressing concern “that the current rule rigidly requires courts unnecessarily to decide difficult constitutional questions when there is available an easier basis for the decision (e.g., qualified immunity) that will satisfactorily resolve the case before the court.”); *Lyons v. City of Xenia*, 417, F.3d 565, 581-84 (6th Cir. 2005) (Sutton & Gibbons, JJ., concurring) (“By multiplying constitutional holdings that are not subject to review in the normal course, a rigid application of the two-step inquiry may do as much to unsettle the law as to settle it. . . . [I]n *Brosseau* itself, the very case that prompted the Court to ask us to take a second look at this case, the Court did not address the constitutional question but only the clearly established question. Lower federal courts ought to have the same authority.”); *Kwai Fun Wong v. United States*, 373 F.3d 952, 956, 957 (9th Cir. 2004) (“The confluence of two well-intentioned doctrines, notice pleading and qualified immunity, give rise to this exercise in legal decision making based on facts both hypothetical and vague. . . . The unintended consequence of this confluence of procedural doctrines is that the courts may be called upon to decide far-reaching constitutional questions on a nonexistent factual record, even where, as the government defendants contend and as may be the case here, discovery would readily reveal the plaintiff’s claims to be factually baseless.”).

⁷⁰ See *Russell v. Harms*, 397 F.3d 458, 468 (2d Cir. 2005) (holding that none of the plaintiff’s Fourth Amendment rights were violated, thus defendants were entitled to summary judgment as a matter of law).

car into a wooded area. The police follow him, using a bite and hold dog. The dog is trained to bite whatever it finds and hold it until the police release or give the release order. They used a bite and hold dog to find and seize the plaintiff. In the Complaint the plaintiff alleged he was unarmed, presented no threat to the officer's safety, and that after the police said they were coming after him with the dog, he hid in the woods. In other words, the police announced and gave him warning they were going to let the dog go after him. These are the facts that the plaintiff alleges. Looking at the Complaint on those facts, when the officer raises qualified immunity, the court may say on the first question, which asks whether the plaintiff alleges a violation of a constitutional right, that the use of a bite and hold dog, where appropriate verbal warning was given, is not unlawful given the facts as alleged. At this point, the officer should get qualified immunity on the first ground because the plaintiff has not stated a constitutional claim. In addition, the court may also grant immunity on the second prong of *Saucier* as a matter of law.⁷¹

Now, assume that the plaintiff alleged in the Complaint that the police gave no verbal warning. On these facts, when applying the first prong of *Saucier*, the court may say that the use of the bite and hold dog when no verbal warning was given was unlawful.⁷² Accordingly, the court will hold that plaintiff has claimed a violation

⁷¹ See *Lawyer v. City of Council Bluffs*, 631 F.3d 1099, 1108 (8th Cir. 2004) (holding that although defendant's actions were unconstitutional, the right was not clearly established thus immunity was granted as a matter of law).

⁷² See *Kuha v. City of Minnetonka*, 328 F.3d 427, 440 (8th Cir. 2003) (stating that the use of the bite and hold dog with no verbal warning violated plaintiff's constitutional rights).

of his constitutional rights.⁷³

However under the second prong, a court might hold that the legal constraints were not clear at the time.⁷⁴ A reasonable officer, therefore, would not have understood that letting a dog go under said circumstances without giving the verbal warning, was a violation of the Fourth Amendment.⁷⁵

Next, assume the plaintiff alleged he was unarmed, in a confined space and instead of running into the woods he runs into a garage. He said he was sandwiched between two cars with his hands up, and still no verbal warning was given that the bite and hold dog was being released. If the defendant filed a motion to dismiss on those facts, the court could very well say that letting the dog go without a warning violated the Fourth Amendment and constituted excessive force, and the law was clearly established such that a reasonable officer would have understood that the conduct was unlawful.⁷⁶

Suppose that the case goes beyond the motion to dismiss stage and the defendant answers. In his Answer the defendant claimed that a verbal warning was given, the suspect was armed and was not standing between two cars with hands up, but was under a car. At the

⁷³ *Saucier v. Katz*, 533 U.S. 194, 199 (2001).

⁷⁴ *Szabla v. City of Brooklyn Park*, No. 03-866, 2004 U.S. Dist. LEXIS 9013, at *11 (citing *Kuha v. City of Minnetonka*, 365 F.3d 590 (8th Cir. 2003)); *see also* *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982).

⁷⁵ *Graham v. Connor*, 490 U.S. 386, 396 (1989) (stating that reasonableness must be based on the totality of the circumstances and is fact-specific).

⁷⁶ *Chew v. Gates*, 27 F.3d 1432, 1442 (holding that it was unconstitutional to a release a dog when the suspect was wedged between two oil cans in a vacant scrap yard and posed no immediate threat).

summary judgment stage the court will look beyond the pleadings.⁷⁷ Therefore, the question is no longer whether the plaintiff alleged a violation of a constitutional right. The question is whether the plaintiff expounded on the facts, evidence, and on all other information from which a jury could find that the facts were as the plaintiff stated them.⁷⁸ In other words, at this point is there a genuine issue of material fact in dispute?⁷⁹

If the case goes to trial, there will be material issues of fact in dispute, and the plaintiff may have some evidence from which the jury could find in plaintiff's favor. If it is an issue of credibility, the court may decide not to grant summary judgment and will allow the jury to decide whom they believe.⁸⁰ At trial, interrogatories are presented to the jury on the material issues of fact.⁸¹ The jury returns from deliberation and decides, based on these special interrogatories, that a warning was not given when the bite and hold dog was released, but that the plaintiff was armed and hiding under the car. The jury decides the question on the merits of whether this use of force—releasing the bite and hold dog without warning where the plaintiff was armed and concealed, was objectively reasonable under *Graham*.⁸²

⁷⁷ *Vathekan v. Prince George's County*, 154 F.3d 175, 179 (4th Cir. 1991) (citing *Rainey v. Conerly*, 973 F.2d 321, 324 (4th Cir. 1992)) (stating summary judgment is inappropriate when resolution of the issue depends on key facts in dispute).

⁷⁸ *Id.* at 180.

⁷⁹ *Id.*

⁸⁰ *Carmody v. Kohl's Dep't Stores, Inc.*, 3:03CV456(MRK), 2004 U.S. Dist. LEXIS 22421, at *4-5 (stating that summary judgment was improper when ascertainment of facts turned on witness credibility).

⁸¹ *Id.*, at *5 (citing *Colby v. Klune*, 178 F.2d 872 (2d Cir. 1950)).

⁸² *Graham*, 490 U.S. at 397 (stating a determination of reasonableness is based on

Assume the jury decides that the use of the dog under these circumstances was unreasonable and a warning was warranted, even though the plaintiff was armed and hiding. At this point, assuming the defendant has taken the proper pre-verdict motions with regards to the issue of qualified immunity, *Saucier* allows the defendant to make a motion for a renewed judgment as a matter of law.⁸³ The court could consider this motion, taking into consideration the jury's findings of fact by which the judge is bound.⁸⁴ Given the jury's findings of fact that a verbal warning was not given when the bite and hold dog was released, and the individual was armed and under cover, a judge might decide that a reasonable officer would not have understood that letting the dog go without a verbal warning, in that scenario, violated a clearly established Fourth Amendment right.⁸⁵ In this situation, the court might decide, based on the jury's findings of fact, that the defendant might still be entitled to qualified immunity as a matter of law.

*Stephenson v. Doe*⁸⁶ is a Second Circuit case that illustrates the problems of giving the qualified immunity question to the jury.⁸⁷ Asking a jury to decide a qualified immunity issue leads to all kinds of problems. To avoid confusion, when there are material issues of

whether the officers had an objective reason for believing force was necessary in light of the surrounding circumstances).

⁸³ *Saucier*, 533 U.S. at 201 (concluding that the court cannot reach the issue of lawful conduct until after the determination of immunity).

⁸⁴ *Id.* (holding that the reversal of summary judgment was warranted where the determination of qualified immunity and excessive force were independent of each other).

⁸⁵ *Saucier*, 533 U.S. at 202 (citing *Malley v. Briggs*, 475 U.S. 335, 341 (1986)) (holding that the reasonableness of a situation was contingent upon "all but the plainly incompetent").

⁸⁶ *Stephenson v. Doe*, 332 F.3d 68 (2d Cir. 2003).

⁸⁷ *Id.* at 80.

fact in dispute, both sides should give specific interrogatories to the jury.⁸⁸ The interrogatories help the jury decide whether the use of force was objectively unreasonable under *Graham*.⁸⁹ Whereas the jury makes determinations of fact, the judge makes the determination of qualified immunity.⁹⁰

Most circuits now understand that giving the qualified immunity question to the jury is not the best way to proceed.⁹¹ In *Stephenson* there was a situation where the police had a warrant for an individual, Stephenson, who was wanted for second-degree murder.⁹² Five plainclothes officers got word that Stephenson was seen in the area of a particular housing project in Brownsville where he lived with his family.⁹³ When the officers arrived at the specified location, they spotted Stephenson.⁹⁴ Stephenson took off running

⁸⁸ See *Stephenson*, 332 F.3d at 81 (stating that juror confusion could be avoided through specific interrogatories that assist the jury in determining the ultimate issues of fact, while the judge should be left to decide the legal question of whether qualified immunity applied to the jury's factual findings).

⁸⁹ See *Id.* at 77-78 (noting that the use of excessive force is measured by the jury under objective standards of reasonableness); *id.* at 78 n.11 (citing *Graham v. Connor*, 490 U.S. 386, 396-97 (1989)).

⁹⁰ *Id.* at 80-81 (citing *Warren v. Dwyer*, 906 F.2d 70, 76 (2d Cir. 1990)).

⁹¹ *Suboh v. Dist. Attorney's Office*, 298 F.3d 81, 90 (1st Cir. 2002) (deciding not to give the question of qualified immunity to the jury because qualified immunity is a question of law, though it may entail factual determinations left to the jury); *Carswell v. Borough of Homestead*, 381 F.3d 235, 242 (3d Cir. 2004) (holding that the court must decide whether qualified immunity is available to a defendant because it is a matter of law); *Knussman v. Maryland*, 272 F.3d 625, 634 (4th Cir. 2001) (finding that the court should make the determination as to whether qualified immunity is available to a defendant); *Warlick v. Cross*, 969 F.2d 303, 305 (7th Cir. 1992) ("[T]he question of a defendant's qualified immunity is a question of law for the court, not a jury question."); *Johnson v. Breeden*, 280 F.3d 1308, 1318 (11th Cir. 2002) (deciding that while the jury makes factual determinations determinative of a qualified immunity defense, ultimately the court decides whether the qualified immunity defense is available to the defendant as a matter of law).

⁹² *Stephenson*, 332 F.3d at 72.

⁹³ *Id.*

⁹⁴ *Id.*

and the officers chased after him.⁹⁵ He climbed over a chain link fence, at which point one of the officers shot him.⁹⁶ The bullet hit Stephenson through the chain link fence and he was severely paralyzed as a result.⁹⁷ The excessive force claim was brought against the officer who shot Stephenson and the defense of qualified immunity was raised in various pretrial submissions.⁹⁸

The case went to the jury.⁹⁹ A mistrial was called when the jury was deadlocked.¹⁰⁰ At trial there were questions of fact in dispute.¹⁰¹ The officer said that all five of the plainclothes officers were told Stephenson was armed and that someone had seen him with a gun.¹⁰² When Stephenson jumped over the fence and hit the ground, the officer said he saw a glint of steel and thought it was a gun.¹⁰³ It turned out that the glint of steel the officer saw, was a knife.¹⁰⁴

The plaintiff claimed that he did not have a gun and that the

⁹⁵ *Id.*

⁹⁶ *Id.*

⁹⁷ *Stephenson* 332 F.3d at 72.

⁹⁸ *Id.* at 71 (stating that qualified immunity was raised in various pre-trial and post-trial submissions including the parties' joint pre-trial order, the parties' trial memorandum of law, and proposed jury instructions).

⁹⁹ *Id.*

¹⁰⁰ *Id.*

¹⁰¹ *Id.* at 72-73 (noting that the parties disputed whether Stephenson was armed, whether the object seen by the police officer was a gun, whether the knife found at the scene was planted, and whether the police that pursued Stephenson gave adequate warnings before shooting).

¹⁰² *Stephenson*, 332 F.3d at 72.

¹⁰³ *Id.*

¹⁰⁴ *Id.*

other officers planted the knife.¹⁰⁵ Clearly, there were genuine issues of material fact in dispute. The plaintiff said he was unarmed, climbing over the fence and running away.¹⁰⁶ Shooting such a suspect would have been a clear violation of the law derived from *Tennessee v. Garner*,¹⁰⁷ which held that you cannot shoot an unarmed man.¹⁰⁸ The officer said that he shot Stephenson based upon what he perceived, which led him to believe that the plaintiff was armed and therefore, the officer feared for his own safety.¹⁰⁹ The questions of fact in dispute are whether Stephenson had a knife, whether Dingler reasonably perceived a threat, and whether a warning was given before Dingler shot the fleeing felon.¹¹⁰

The district judge announced to the attorneys that he was going to send the factual questions to the jury and that after the jury came back with its verdict, he was going to decide the immunity question as a matter of law.¹¹¹ The jury instructions contained the language of *Garner* on the merits question, the Fourth Amendment standard, and the propriety of using deadly force.¹¹² However, the

¹⁰⁵ *Id.*

¹⁰⁶ *Id.*

¹⁰⁷ 471 U.S. 1, 11 (1985) (“Where the suspect poses no immediate threat to the officer and no threat to others, the harm resulting from failing to apprehend him does not justify the use of deadly force to do so.”).

¹⁰⁸ *Id.* (“A police officer may not seize an unarmed, non-dangerous suspect by shooting him dead.”).

¹⁰⁹ *Stephenson*, 332 F.3d at 72.

¹¹⁰ *Id.* at 72-73.

¹¹¹ *Id.* at 73-74.

¹¹² *Tennessee v. Garner*, 471 U.S.1 (1985); *Stephenson*, 332 F.3d at 74.

Where the suspect poses no immediate threat to the officer and no threat to others, the harm resulting from failing to apprehend him does not justify the use of deadly force to do so. However, where the officer has probable cause to believe that the suspect poses a threat of serious physical harm, either to the officer or to others, it is not constitutionally

jury instructions also stated that even if the jury found the defendant used excessive force, the defendant might still be entitled to qualified immunity.¹¹³

The jury came back from deliberation and asked that the court clarify what it meant by qualified immunity.¹¹⁴ The court explained that given the clearly established law on the elements of excessive force, the jury must decide whether it was objectively reasonable for the officer to believe that his actions were lawful.¹¹⁵ This was a difficult concept to explain to the jury. The parties also submitted special interrogatories that never got to the jury.¹¹⁶

I would be very careful when litigating these cases. Regardless of whether you are a plaintiff or a defendant you should be very careful about what facts the jury has to decide that are going to be material to both the merits holding on excessive force and to the qualified immunity holding. Here, the verdict form asked whether the plaintiff proved that the defendant used excessive force.¹¹⁷ The jury answered yes.¹¹⁸ The form also asked whether the defendant proved he was entitled to qualified immunity.¹¹⁹ The jury answered

unreasonable to prevent escape by using deadly force, provided that, where feasible, some warning has been given.

Id.

¹¹³ *Stephenson*, 332 F.3d at 74-75 (stating that qualified immunity will be proven by the defendant if he could show, “[h]e neither knew nor should have known that his actions were contrary to federal law . . . and if a competent fellow police officer could not have been expected at the time to know that the conduct violated federal law”).

¹¹⁴ *Id.* at 75.

¹¹⁵ *Id.* (expressing to the jury, that in making their determination, they must assess the surrounding circumstances and the conduct of the officer).

¹¹⁶ *Id.* at 79-80.

¹¹⁷ *Id.* at 75.

¹¹⁸ *Stephenson*, 332 F.3d at 75.

¹¹⁹ *Id.*

yes.¹²⁰ Those were the two questions. It was unnecessary to go beyond that.¹²¹ The plaintiff in *Stephenson* appealed because the verdict on qualified immunity was inconsistent with the jury's finding of excessive force.¹²²

The Second Circuit agreed with *Stephenson* and held that there was no basis by which the jury could assess whether qualified immunity attached to the officer's use of excessive force.¹²³ The court explained that in order for the jury to find excessive force based upon the jury instructions at the close of trial, the jury must have believed that the plaintiff was not given an adequate warning.¹²⁴

Stephenson illustrated that in order to distinguish the merits

¹²⁰ *Id.* (stating that the jury answered affirmatively to the second general question posed as to whether the officer was entitled to qualified immunity by a preponderance of the evidence).

¹²¹ *Id.* at 75 n.7 (noting that the jury never reached the third question regarding damages because the court dismissed *Stephenson*'s complaint after the questions were posed to the jury).

¹²² *Id.* at 75 (arguing that the court erred in permitting the jury to decide qualified immunity because granting qualified immunity would be inconsistent with the holding that there was excessive force and "because the definition [of qualified immunity] . . . [is] inconsistent with the jury's verdict of excessive force").

¹²³ *Stephenson*, 322 F.3d at 79 (noting a distinction between situations where an officer can have a reasonable, yet mistaken belief as to the facts that establish the existence of probable cause and a qualified immunity inquiry which concerns an officer's mistake as to what the law is or requires; considering reasonable mistakes of fact was not a part of the jury instruction, the court therefore concluded that the qualified immunity verdict was legally inconsistent with the excessive force verdict); *see also* *Warren v. Dwyer*, 906 F.2d 70, 75, 76 (2d Cir. 1990) (citing *Mitchell v. Forsyth*, 472 U.S. 511 (1985)) (stating that the question of qualified immunity should remain distinct from the question of probable cause and expressing the difficulty that may arise in separating the immunity issue from the merits); *Cowan*, 352 F.3d 756, 758 (2d Cir. 2003) (concluding that if the jury were to find that the officer used excessive force the court should then decide the question of qualified immunity).

¹²⁴ *Stephenson*, 332 F.3d at 78 (instructing the jury that when considering the issue of excessive force, the use of deadly force was considered unlawful unless the officer "had probable cause to believe . . . that the suspect posed a serious physical threat to him or to others and sufficient warnings were given," and in light of the jury instructions, the jury must have relied on *Stephenson*'s account of the incident and that he was not given adequate warnings due to the jury's verdict of liability on excessive force).

issue from the qualified immunity issue, specific questions must be put to the jury.¹²⁵ Specifically, the jury should have been asked whether they found that Stephenson had a knife, whether they found that a warning was given and whether they found that Stephenson was unarmed and fleeing at the time he was shot. If those were the facts the jury had to find in order to hold that there was excessive force in this case, then how could they have come to the conclusion that there was qualified immunity? The defense argued that the jury could have found that the facts were as the plaintiff alleged, but that the defendant made a reasonable mistake as to what those facts were, and believed that Stephenson posed a threat to him.¹²⁶

This is where the Second Circuit properly interpreted the *Saucier* case. The court clarified that a reasonable mistake of fact goes to the merits question.¹²⁷ Therefore, if the jury believed the officer made a reasonable mistake of fact, then the jury could not have found that the use of force was objectively unreasonable.¹²⁸ But, if the jury found the facts were as the plaintiff alleged, then no reasonable mistake of law could be made.¹²⁹ In other words, if the

¹²⁵ *Id.* at 81 (stating that the use of special interrogatories resolves the difficulty of both requiring the jury to decide facts such as what the officer faced or perceived, and requiring the court to make the ultimate legal determination of whether qualified immunity attaches on those facts (quoting *Warren v. Dwyer*, 906 F.2d 70, 76 (2d Cir. 1990)).

¹²⁶ *Id.* at 78 (arguing that although the jury may have believed that plaintiff posed no threat of harm, the jury may also have believed that the officer's mistake of fact as to the threatened harm was reasonable, therefore substantiating a finding of qualified immunity).

¹²⁷ *Saucier*, 533 U.S. at 205 (citing *Graham*, 490 U.S. 386) (stating that the facts and circumstances of the particular case are important in determining whether an officer reasonably, but mistakenly believed there was a threat of harm).

¹²⁸ *Stephenson*, 332 F.3d at 78-79 (reiterating the justification of an officer using more force than necessary where the officer reasonably, but mistakenly believes there is a threat of harm (citing *Saucier*, 533 U.S. at 206)).

¹²⁹ *See id.* at 79 (stating that a qualified immunity inquiry involves acknowledgement

jury found that there was, in fact, no knife, that Stephenson was fleeing, that he was unarmed, and that he didn't present a danger to the officer, then there was no reasonable mistake of law because the law clearly states that you cannot use excessive force when a suspect is unarmed.¹³⁰ The Second Circuit concluded by stating that given this confusion, a new trial was in order.¹³¹

It is unknown what really went on here and how much of the excessive force verdict was affected by the instructions with respect to qualified immunity.¹³² The jury should be given special interrogatories based on key factual disputes and the judge should then make the ultimate qualified immunity determination based on the jury's findings of fact.¹³³ This was the procedure that the Second Circuit recommended and it is the proper procedure to follow in excessive force cases where material issues of fact are in dispute.¹³⁴

If on retrial the jury decides that Stephenson was unarmed and was fleeing, but that the officer gave warning, the court would have to decide, as a question of law, whether it was clearly established that deadly force could not be used to prevent the escape of a murder

"that reasonable mistakes can be made as to the legal constraints on particular police conduct" (quoting *Saucier*, 533 U.S. at 205)).

¹³⁰ *Id.* at 74 (noting that deadly force cannot be justified where a suspect poses no threat).

¹³¹ *Id.* at 80 (emphasizing the likelihood of confusion when a jury is given an excessive force charge and is additionally told to consider qualified immunity).

¹³² *Id.* at 79 (analyzing whether the excessive force verdict should stand even though the court had concluded that the qualified immunity verdict should be set aside).

¹³³ *Stephenson*, 332 F.3d at 81.

¹³⁴ *See id.*; *see also Warren*, 906 F.2d at 75 (stating that the jury should decide unresolved factual issues on special interrogatories and upon those facts, the court should make the ultimate legal decision of whether a reasonable officer should have had knowledge of the unlawful act); *Cowan*, 352 F.3d 756 (supporting the determination that the jury should be given interrogatories on the key factual disputes).

suspect.¹³⁵ This language comes from the *Garner* case.¹³⁶ Most police department policies are actually more restrictive than what *Garner*, as a matter of constitutional law, might allow.¹³⁷ *Garner* says that if the police officer perceives a threat to his safety or the safety of others, or if the plaintiff has threatened serious bodily harm or just committed a crime involving the infliction of serious bodily harm, then deadly force may be used as long as the police officer gives warning.¹³⁸ The language in *Garner* may even be construed to mean that if the individual does not present an imminent threat to the officer or to the public, a police officer may still be able to use deadly force.¹³⁹ An example would be if the person in question is a serial murderer and is running away.¹⁴⁰ This is where there may be potential ambiguity in the law. However, most police departments

¹³⁵ *Stephenson*, 332 F.3d at 81 n.17 (noting that a qualified immunity inquiry involves an officer's mistake as to what the law is and the court will have to make a determination as to whether the state of the law was unclear as to the use of deadly force to prevent the murder suspect's escape); *Garner*, 471 U.S. at 11-12 (finding that the Tennessee statute relied upon by the officer was unconstitutional because it authorized the use of deadly force against non-dangerous fleeing suspects).

¹³⁶ *See Garner*, 471 U.S. at 11, 18.

¹³⁷ *Id.* at 18 (noting a trend in police departments implementing more restrictive policies than the common-law rule (citing C. MILTON, J. HALLECK, J. LARDNER & G. ABRECHT, *POLICE USE OF DEADLY FORCE* 45-46 (Catherine H. Milton ed., Police Foundation 1977))).

¹³⁸ *Id.* at 11-12.

¹³⁹ *See* Dr. Abraham N. Tennenbaum, *Criminology: The Influence of the Garner Decision on Police Use of Deadly Force*, 85 J. CRIM. L. & CRIMINOLOGY 241, 244 (1994) (noting the differing interpretations of the *Garner* decision among scholars).

¹⁴⁰ *Garner*, 471 U.S. at 20 (noting the practical difficulties of application of the felony/misdemeanor distinction for officers); *see also* Michael Douglas Owens, Comment, *The Inherent Constitutionality of the Police Use of Deadly Force to Stop Dangerous Pursuits*, 52 MERCER L. REV. 1599, 1634-1635 (2001) (offering the hypothetical of a serial murderer being pulled over for a traffic violation and the officer shoots to avoid the risk of the suspect getting away and murdering again).

don't authorize action of that sort unless the officer feels there is an imminent threat to himself or the public.¹⁴¹

Another case out of the Second Circuit where there were material facts in dispute was *Cowan v. Breen*.¹⁴² In *Cowan*, an officer pulled a vehicle over for suspected drunken driving.¹⁴³ The driver got out of the car and took off into the woods.¹⁴⁴ The officer pursued the driver and lost him in the woods, while the female passenger stayed in the car.¹⁴⁵ The officer walked back to his car, which was behind the suspect's car.¹⁴⁶ The female passenger moved over into the driver's seat and the officer alleged she was driving towards him.¹⁴⁷ Fearing for his safety, he shot at her and as a result she died.¹⁴⁸ The court, following the *Stephenson* approach, recommended that the interrogatories on key factual disputes should go to the jury.¹⁴⁹ The court instructed that the interrogatories should include questions such as: did the plaintiff drive her car towards the defendant, was the officer in the danger zone, and could the officer

¹⁴¹ *Harris v. Cowetta County*, 406 F.3d 1307, 1316 n.9 (11th Cir. 2005) ("[A] police officer can use deadly force to prevent the escape of fleeing . . . suspect only when the suspect poses immediate threat of serious harm to police or others); *see also* *Vaughan v. Fox*, 343 F.3d 1323, 1332 (11th Cir. 2003) (requiring that there be an immediate threat of serious harm before an officer may use deadly force against fleeing suspect); *Carter v. Chattanooga*, 850 F.2d 1119, 1122 (6th Cir. 1988) (declaring municipal policy favoring deadly force unconstitutional when fleeing felon does not reasonably pose threat to officer or community).

¹⁴² 352 F.3d 756 (2d Cir. 2003).

¹⁴³ *Id.* at 758.

¹⁴⁴ *Id.*

¹⁴⁵ *Id.*

¹⁴⁶ *Id.*

¹⁴⁷ *Cowan*, 352 F.3d at 758.

¹⁴⁸ *Id.*

¹⁴⁹ *Id.* at 764.

have safely gotten out of the way.¹⁵⁰ The court said that these questions were key because they would help focus the jury's attention on the excessive force issue and help the court decide the question of whether a reasonable officer in the officer's position would understand that his conduct was unlawful in the situation he confronted.¹⁵¹

Finally I will briefly discuss *Littrell v. Franklin*¹⁵² the recent 8th Circuit case. This case is important because it demonstrates how courts should handle the excessive force issue.¹⁵³ In *Littrell*, the court held that it was error to submit the issue of qualified immunity

¹⁵⁰ *Id.*

¹⁵¹ *Cowan*, 352 F.3d at 764-65 (noting that such facts are necessary as to "help the court resolve the ultimate question of whether it would be clear to a reasonable officer in [his] position that his conduct was unlawful in the situation he confronted"). On remand, the court sent the following questions to the jury and received the following responses:

1. At the moment Officer Breen irrevocably decided to fire his second shot (this is the shot that struck Ms. Cooper) did he have an objectively reasonable belief that he was in immediate danger of serious injury or death because the driver of the Camaro was trying to hit him?

Yes ☒ X ☐ No ☐

2. At the moment Officer Breen irrevocably decided to fire the second shot did he have an objectively reasonable belief that he could not safely get out of the way to avoid being hit?

Yes ☐ No ☒ X ☐

3. Do you find an award of punitive damages is appropriate?

Yes ☐ No ☒ X ☐

According to Attorney Thomas Gerarde, who represented the defendant officer, the judge informed the jury that if they answered "No" to either question 1 or question 2 they would be returning a verdict for the plaintiff. The judge reserved the qualified immunity decision. The case has settled, so the judge never reached the qualified immunity determination, but one would think that an affirmative answer to question 1 would have made qualified immunity appropriate for the officer. (E-mail communication with Attorney Gerarde, Sept. 18, 2005).

¹⁵² 388 F.3d 578 (8th Cir. 2004).

¹⁵³ *Id.* at 582-85 (analyzing the two part qualified immunity test, which first asks whether the officer's conduct violated a constitutional right, such as a right to be free from excessive force, and second, asks whether the constitutional right was clearly established).

to the jury.¹⁵⁴ While the issue of excessive force is one to be decided by the jury, the court must decide the question of qualified immunity.¹⁵⁵ The court then explained that when the issue of qualified immunity is “intertwined” with unresolved factual questions, carefully crafted interrogatories should be put to the jury.¹⁵⁶ At this point the court can rely upon the factual findings of the jury to decide the issue of qualified immunity.¹⁵⁷ This Eighth Circuit opinion should be followed because it walks you through the excessive force analysis and makes a lot of sense.

¹⁵⁴ *Id.* at 584-85.

¹⁵⁵ *Id.*

¹⁵⁶ *Id.* at 585-86. (deciding that special interrogatories related to the qualified immunity defense are not improper when the interrogatories are carefully drafted to enable the jury to make necessary factual determinations, while leaving the legal determination to the court).

¹⁵⁷ *Littrell*, 388 F.3d at 585.