

FOURTH AMENDMENT-USE OF DEADLY FORCE-QUALIFIED IMMUNITY

The Eleventh Circuit Court of Appeals recently decided Tarrell v. Smith, 668 F.3d 1244 (11th Cir. January 30, 2012), and provided an excellent overview of the law in this Circuit regarding qualified immunity and the Fourth Amendment. The facts as alleged by Plaintiff in Tarrell, supra, reveal that police officers for the City of Palm Bay, Florida, encountered the decedent and a passenger driving down the road, without headlights, in violation of Florida law. The police officers initiated a traffic stop and ordered to occupants out of the vehicle. Both initially complied, however the driver jumped back into the vehicle ignoring multiple verbal commands and attempted to drive away from the scene. During the course of the incident, one of the officers was struck by the vehicle and Officer Smith filed two rounds, killing the driver. The driver's estate filed suit alleging excessive force under the Fourth Amendment. The police officer filed motion for summary judgment on the basis of qualified immunity which the District Court denied and an appeal was taken to the Eleventh Circuit.



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In this decision, the Eleventh Circuit noted that the "objective reasonableness standard" established in Graham v. Connor, would govern their analysis of the excessive force claim. The Court also enumerated certain legal principles which should be followed during the course of this analysis as follows:

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CONGRATULATIONS TO TRANSIT MANAGEMENT, INC. ("VOTRAN") AND PREFERRED GOVERNMENT INSURANCE TRUST ON THEIR RECENT DEFENSE VERDICT

Christopher R. Fay and Anna E. Engelman obtained a defense verdict in Lee v. VOTRAN in Volusia County. VOTRAN admitted fault and the jury deliberated for approximately 20 minutes before returning a verdict in VOTRAN's favor and refusing to relate plaintiff's injuries. Plaintiff alleged neck and low back disc herniations and a shoulder injury from a VOTRAN bus accident with a pick-up truck in which he was a passenger. Plaintiff sought past medicals in the amount of \$27,785.77, and unspecified non-economic damages. Plaintiff treated with a chiropractor, two pain management physicians, an orthopedist, and a neurosurgeon. His medical expert admitted on cross that she relied on plaintiff's incorrect description of the accident and was not made fully aware of his medical history. VOTRAN played video of the accident and surveillance of plaintiff performing activities he claimed he could no longer do. VOTRAN's radiologist and orthopedic surgeon opined plaintiff's condition was degenerative and pre-existed the accident.

By: Christopher Fay

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- In determining whether a use of force was reasonable, the Court must look at the facts from the perspective of a reasonable officer on the scene with the same knowledge of the officer on the scene;
- The Court must balance the risk of bodily harm to the suspects against the seriousness of the threat that the officer sought to eliminate;
- Police officers are forced to make split-second judgments in circumstances that are tense, uncertain and rapidly evolving, regarding the amount of force to use in a particular situation; and
- The right to make an arrest or investigatory stop carries with it the right to use some degree of physical force to effect the stop or arrest.

The Court also reiterated the standard set forth in *Tennessee v. Garner*, with respect to a police officer's ability to use deadly force, as follows:

An officer may use deadly force to stop a fleeing felony suspect when the officer: (1) has probable cause to believe that the suspect poses a threat of serious physical harm, either to the officer or others or that he has committed a crime involving infliction or threatened infliction of serious physical harm; (2) reasonably believes that the use of deadly force was necessary to prevent escape; and (3) has given some warning about the possible use of deadly force, if feasible.

In applying the legal standards above to the facts in this case, the Court found that there was probable cause for the initial stop of the decedent's vehicle; that by continuing to flee in violation of the officers' verbal commands, decedent was committing a third degree felony; and, the officer was under no duty to retreat or abandon the effort to effect an arrest simply because the felony suspect was not being compliant.

The Court held that the police officer acted reasonably within the Fourth Amendment when he used deadly force and stated in pertinent part as follows:

Officer Smith was forced to make a split-second decision concerning whether the use of lethal force was necessary. Beyond himself, two other people were within a few feet of the moving vehicle as these rapidly unfolding and uncontrolled events transpired. "Even if in hindsight the facts show that [the officer] perhaps could have escaped unharmed" *Robinson*, 415 F.3d at 1256, an objectively reasonable law enforcement officer could well have perceived that the moving vehicle was being used as a deadly weapon, especially after the driver had been repeatedly ordered to stop. In short, Smith was attempting to make an arrest that he had the legal right to make while standing in a position where he was legally entitled to be. [Decedent] refused to heed Smith's commands to stop the vehicle and turned the car "in a dangerous and aggressive manner which provided the officers with probable cause to believe that [decedent]... posed a threat of serious physical harm or death to the officers, or other passersby, especially in light of the speed with which the incident unfolded." *McCullough*, 559 F.3d at 1208. The use of lethal force was objectively reasonable under the Fourth Amendment.

Although not necessary for resolution of the case, the Eleventh Circuit also found that there was no precedent from either the United States Supreme Court, the Eleventh Circuit Court of Appeals or the Supreme Court of Florida which would have placed Officer Smith on notice that shooting the decedent was unreasonable under the Fourth Amendment. Accordingly, the Court found that there was no "clearly established law" which would have placed Officer Smith on notice that his actions were unreasonable. In light of the above, the Eleventh Circuit reversed the District Court's denial of qualified immunity for the police officer.

By: Michael Roper

FIRM WIN!

On Nov. 22, 2011, Michael J. Roper and Gail C. Bradford obtained an Order granting Summary Judgment for Bell & Roper client, Dixie County, in *Citizens State Bank v. Dixie County*, Case No. 1:10-cv-224-SPM-GRJ, in the United States District Court, Northern District of Florida, Gainesville Div.

Citizens State Bank filed suit alleging 14th Amendment substantive due process violations related to the County's approval of a residential subdivision in 2005 and a county attorney's handling of a development bond for the subdivision. Unbeknownst to the County, the county attorney was representing both the subdivision developer and the County at the time the subdivision was approved. The Bank asserted that the County was deliberately indifferent in allowing its county attorney to engage such dual representation. Moreover, the subdivision as approved violated the County's land development regulations. The Bank's interest was based on a substantial loan made to the subdivision developer in 2007. The loan was secured in part by lots in the subdivision. The Bank also alleged that the County negligently retained the county attorney; however, that claim was dismissed with prejudice early in the case.

Shortly before trial, the Bank voluntarily dismissed claims related to the development bond, leaving only one count of substantive due process violations related to the approval of the subdivision. The Court entered summary judgment on behalf of the County, holding that the Bank's substantive due process claim was not viable. The Bank had no substantive due process protection to a state-created right in real property. In addition, the Bank's claim was based on non-legislative, executive action, which was also not entitled to substantive due process protection.

The Bank then moved for rehearing and requested that it be allowed to amend its Complaint to add a claim that its liberty interests guaranteed by the 14th Amendment were violated in that it was deprived of a right to a fair trial before an impartial tribunal. The Bank argued that because the county attorney represented both the developer and the County at the time the subdivision was approved, the County's actions in approving the development were "infected with bias," therefore depriving the Bank of its right to a fair trial before an impartial tribunal.

Defense counsel vigorously opposed the Motion, arguing that the Bank failed to set forth any information to justify a rehearing or to obtain relief from the summary judgment, that the Bank's Motion was a procedurally improper attempt to amend its Complaint to add a claim, and that the

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Bank did not have a liberty interest subject to substantive due process protection in the right to develop the subdivision property. The Court denied the Bank's Motion.

The Bank has declined to appeal the Court's decisions. In addition, the Court has awarded select costs to the County.

By: Gail Bradford

PGIT SEMINAR FEATURING OUR VERY OWN: MICHAEL BOWLING

On April 26, 2012, Preferred Governmental Insurance Trust (PGIT) will host a seminar at the Hilton University of Florida Conference Center in Gainesville, Florida. The seminar will focus on Risk Management Priorities for 2012: "What Every Public Entity Needs to Know" including a bonus presentation: "The Challenging EEOC Arena". RSPV now by contacting Kurt or Niki:

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CORPORATE 5K

Team Bell & Roper Bolts Past the Competition!



TEAM BELL & ROPER took 1st place in the mixed division and 4th place in the women's division at the 18th Annual Corporate 5K held on Thursday, April 12, 2012 in downtown Orlando. Great job team!

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Questions, comments or suggestions regarding our newsletter, please let us know your thoughts by contacting Sherry Hopkins at shopkins@bellroperlaw.com.

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