IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF INDIANA
Hammond Division

ANNE RICHMOND, Plaintiff	)	
v.	)	
OFFICER DAVID SWINFORD, individually, OFFICER JOSEPH CINKO, individually, and DYER CHIEF OF POLICE RICHARD QUINN, in his Representative capacity, and and the TOWN OF DYER, INDIANA Defendants.	)	Case No. 2:12-cv-243-RLM-PRC

PLAINTIFF'S RESPONSE TO DEFENDANTS'
MOTION FOR SUMMARY JUDGMENT ON QUALIFIED IMMUNITY

Overview

On November 22, 2010, Robert Kingdollar, son of plaintiff Anne Richmond, called 911, seeking an ambulance for his mother who he reported suffered from bipolar disorder and was having a nervous breakdown. When police arrived, Anne came out of her home with hands flailing in the air and yelling repeatedly that no one was listening to her. Undisputed evidence shows that Anne was unarmed, did not touch the officers, and made no verbal threats.

Within two minutes, Sgt. David Swinford had enough. To impose "control," he grabbed Anne and then took her to the ground, causing her left forearm to break and splinter. Swinford asserts that he had just observed Anne shove her elderly father off his feet, justifying his violence against a woman who he knew suffered from mental illness. Anne, her two sons present and her father dispute Swinford's account. None of three other emergency responders confirm it.

This Court has stayed discovery by plaintiff pending a decision on defendants' motion

for summary judgment on qualified privilege grounds. Many facts are known based on testimony in Anne's criminal case, where she was found guilty of Resisting Law Enforcement and innocent of Disorderly Conduct for allegedly pushing her father.

Failure to set forth undisputed facts

L.R. 56-1, requires defendants to include a Statement of Material Facts "that identifies the facts that the moving party contends are not genuinely disputed." While defendants include in their summary judgment brief a lengthy section called "Statement of Material Facts," they fail to identify which of the alleged facts are undisputed.

STATEMENT OF GENUINE DISPUTES

Anne contends that the following "material facts" asserted by defendants are subjects of genuine dispute:

1) The alleged violence against her father did not happen.

a) Only Swinford claims Anne pushed her father down.

Witnesses testified to the following in pre-trial depositions and during Anne's criminal trial:

Swinford said he saw Anne at the threshold of her house forcefully push her father back into the house, knocking him backwards off his feet and that she immediately grabbed the door and slammed it closed. (Exhibit 1 - Excerpts from Trial Transcript ("Tr."), pp. 33-34; Exhibit 2 - Swinford deposition excerpts, p. 11)

Robert Kingdollar said his mother brushed by her father, but did not push him to the floor as she left the house to call the police. (Exh. 1, Tr. 245) Christopher Kingdollar said she touched her father's shoulder as she left, but did not push him down. (Exh. 1, Tr. 260-

261)

Victor Amaloo also said his daughter did not push him down. (Exh. 1, Tr. 269-270)

Anne said she touched her father as she went out the door, but did not do so violently or in a manner that could injure him. (Exh. 1, Tr. at 212)

In pre-trial deposition testimony, Dyer Emergency Medical Technician Jeffrey Zendzian said Anne's house sits on the corner of Old Beach Road and Calumet Avenue. (Exhibit 3 - Zendzian deposition excerpts., p.9) Swinford parked directly in front of the house, while Zendzian parked on Calumet Avenue to the side. *Id.* Zendzian said he had an "absolutely" good view of the house, about 25 feet away, and saw that nobody was in front of the house. (Id. pp. 8-9)

Zendzian said he saw Swinford get out and walk around his car to the parkway between the street and the sidewalk. (Id., p.10)

Swinford said he saw Anne push her father down as he exited and went around his car. (Exh. 1, Tr. 33)

Zendzian said he saw Anne come out of the house, arms flailing and speaking loudly; "She came to him [Swinford]. He never made it to the sidewalk," (Exh. 3, pp. 10-11) At that point, he said, two other people - he believed one of Anne's sons and her father – came out of the front door. (Id. at 11) Zendzian said he did not see Anne have any contact with either of them. (Id.)

Anne "makes her way down the front steps, down the front walk, past the sidewalk, to the parkway; all four of us are there, with officer Cinko and officer Swinford right by her and me and Rob [Poortenga] probably 10 feet away," Zendzian said. (Id. at 19) He said that Cinko and Robert Poortenga, the other Dyer emergency medical technician who

responded, probably arrived within a minute after he arrived. (Id. at 10, 18)

Zendzian said it took Anne 30 seconds to go from her house to Swinford; then, after two or three minutes of Anne flailing her arms and yelling and Swinford trying to calm her down, Swinford grabbed one of her arms and brought it behind her. Anne, he said, jerked away and fell. (Id., pp. 19, 23-26)

At trial, Zendzian gave a somewhat different account. He said after Swinford arrived he was turning his vehicle so there was a point that he did not see everything that happened. He said he did not see Anne exit the front door and did not remember whether he saw her come down the front stairs. (Exh. 1, Tr. 293-294)

The jury found Anne innocent on the Disorderly Conduct charge based on her alleged pushing her father down. (Defense Exhibit E - Lake County Docket.)

b) Anne was not physically violent toward her father earlier that day.

Robert Kingdollar called 911 to send an ambulance for his mother. On questioning by the 911 operator, Robert said his mother was having a nervous breakdown and was being violent with his grandfather." (Defendants' Exhibit B)

At trial, Robert said his mother had been verbally but not physically violent toward her father that day. (Exh. 1, Tr. 239, 244-245).

Christopher said that his mother had been acting a "a little crazy" but had not physically attacked anyone on November 22, 2010. (Exh. 1, Tr. 258)

Anne said she was agitated that day, but did not attack her father or shove him to the ground. (Exh. 1, Tr. 211) She said she touched him as she went by, but did nothing violent. (Exh. 1, Tr. 212)

Responding officers did not hear Robert's 911 call. (Exh. 2, Swinford Dep. p.88)

Instead, they heard the police dispatcher announce, *"Ambulance and PD requested for elderly female subject who's having a 10-96 episode per 10-16 at 2301 Calumet Avenue."* (Exhibit 5, excerpts from deposition of Joseph Cinko, p. 9 Italics added ; Exh. 1, Tr. 29)

Dyer Police Department's signal codes chart show 10-96 means "possible mental condition" and 10-16 means "domestic trouble". (Exhibit 6 - Dyer PD 10-codes) Cinko interpreted the 10-16 signal to either refer to either physical or verbal violence. (Exh. 5, p.9) The dispatcher did not use the word "violence". Exh. 1, Tr. 29. Officer Nester said the code used did not show whether it was a verbal or nonverbal disturbance. (Exhibit 7, Nester deposition excerpts, p. 8)

Officer Swinford said he acted out of concern for the elderly man who was knocked back off his feet. (Exh. 1, Tr. 82) Swinford investigated after Anne's injury. (Exh. 2, p. 30)

Robert Kingdollar recalled an officer approached and asked him whether he had touched his mother's arm. (Exhibit 8, Robert Kingdollar deposition excerpts, p.72)

Amaloo recalled speaking with the first responding officer (Swinford), who mentioned his plan to press charges, but who did not ask whether Amaloo was okay. (Exhibit 9, Amaloo deposition excerpts, pp. 39-40) Christopher Kingdollar also testified that he was three or four feet away, and did not hear the officer ask whether his grandfather needed medical attention. (Exhibit 10, Christopher Kingdollar deposition excerpts, pp.21-22)

2) Officer Swinford quickly lost his patience.

Anne disputes defendants' claim that officer "Swinford tried to calm Richmond during the entire the incident." (Br. at 4, citing Exh. 1, Tr. 34.) Anne also disputes that Swinford "did not lose his patience." (Br. 5) Documentary evidence indicates Swinford and Cinko brought Anne to the ground within two minutes of their arrival at the scene.

The dispatcher's Main Radio Log Table (see Exhibit 4) shows the dispatcher's contemporaneous notes showing times of events. (Exh. 1, Tr. 55; Exh. 2, pp.12-13) Swinford drove the police car numbered DY19. (Exh. 2, pp.12-14) Cinko drove DY 11 (Exh. 5, p. 10); Officer Richard Nester drove DY 33. (Exh. 1, Tr. 58). The log shows the following arrival times at Anne's home:

DY 19 (Swinford) - 28 seconds after 3:03 p.m.

DY 11 (Cinko) - 41 seconds after 3:03 p.m.

DY 33 (Nester) - 17 seconds after 3:05 p.m.

(Exh. 4)

Swinford called into dispatch upon his arrival. (Exh. 1, Tr. 55-56)

Nester arrived less than two minutes after Swinford arrived, according to the dispatch log. Upon arrival, Nester saw Anne on the ground with Sgt. Swinford kneeling over her, with his hands on her and telling her to be calm and stay down. At that point the ambulance was arriving. (Exh. 7, Nester deposition, p.9) The dispatch log shows the ambulance (DYPRO2) arrived at six seconds after 3:06, or less than a minute after Nester. (Exh. 4; Exh. 5, p.37)

Swinford doubted so little time could have passed, saying that In his deposition prior to Anne's criminal trial, Swinford repeatedly testified that "it felt like" he spent several minutes trying to calm Anne. (Exh. 1, Tr. 57) In his pre-trial deposition, Swinford was not able to estimate passage of time during the incident, including how much time passed from his getting out of his car to his grabbing of Anne. (Exh. 2, Swinford deposition, pp.23, 34, 59, 73)

Robert Kingdollar estimated two to three minutes passed from the time police arrived

to the time they brought her to the ground. (Exhibit 8, R. Kingdollar deposition, p. 69) Zendzian said two to three minutes passed from the time Swinford arrived to the time he grabbed Anne. (Exh. 3, p.24)

In contrast, officer Cinko guessed four to five minutes passed from the time of his arrival to the time officer Swinford grabbed Anne's right wrist, which she pulled away "in seconds". (Exh. 5, p.31)

Cinko said that the officers let Anne vent longer than they would with a normal person, and that "we don't have to wait hours and hours and hours." (Id., p.51) Cinko acknowledged that he and Swinford could have simply waited for the ambulance to arrive to take care of Anne. (Exh. 1, Tr. 179-180)

Police standards emphasize patience when dealing with mentally ill persons.

In 1998, the International Association of Chiefs of Police National Law Enforcement Policy Center issued a model policy ("Model Policy" attached as Exhibit 11) supported by a grant by the U.S. Department of Justice. (Exh.11, p.3) The stated purpose of the policy was "to provide guidance to law enforcement officers when dealing with suspected mentally ill persons."

Officers Swinford and Cinko studied dealing with mentally ill persons in state-mandated annual training sessions, and at the Indiana Law Enforcement Academy. (Exh. 2, Swinford deposition, p.7; Exh. 5, Cinko deposition, p.46) Cinko testified that the following guidance contained in the Model Policy comport with his understanding of how mentally ill persons ought to be handled. (Exh. 5, p.48, Exh. 1, Tr. 171, 175-176) Those passages include :

*"Take steps to calm the situation. ... Where violence or destructive acts have not occurred, avoid physical contact, and take time to assess the situation.

*"Move slowly and do not excite the disturbed person. Provide reassurance that the police are there to help and that he will be provided with appropriate care."

*"Communicate with the individual in an attempt to determine what is bothering him. Relate your concern for his feelings and allow him to ventilate his feelings." ...

*Do not threaten the individual with arrest or in any other manner, as this will create additional fright, stress, and potential aggression."

(Exh. 11, C3, C4 and C5; Exh. 5, p.48)

Officer Swinford said he was not familiar with such standards. (Exh. 2, pp. 68-70) He did say patience is important when dealing with people who are mentally ill. He said that would have been true with Anne, "If she hadn't committed a crime." (Exh. 1, Tr. 93)

Swinford justified not simply letting Anne vent her emotions, saying, "She committed a battery. You are not talking about somebody we're on a medical call to assist medically. She committed a battery in my presence." (Exh. 2, p.73) He did not know where Anne's father was when he grabbed her. (*Id.*, p.74)

Swinford insisted he handled the situation "how it had to be handled. There was no other way, in my opinion, to handle it, or I would have." (*Id.*)

Commander Cinko was in charge of internal affairs investigation for the Dyer Police, but "never thought of initiating one because I was present during the incident and observed what happened." (Exh. 5, p. 7) He never wrote or recorded anything concerning the matter. (*Id.*)

3) No need existed for police to seize Anne.

Anne disputes defendants' allegations that she was "completely out of control" and

that any need existed to "Immediately Take Control of a Domestic Violence Situation." (Br. 5)

First, as discussed above, except for officer Swinford's testimony, there is no evidence that any domestic violence had occurred prior to or at the time of the Dyer police response to Anne's home, and the dispatch report did not allege violence.

Nor was there evidence of violence by Anne after police arrived and before she was grabbed. Cinko and Swinford testified Anne did not hit or otherwise assault or threaten either officer. (Exh. 1, Tr. 71-72; 176) She did nothing to cause Commander Cinko to perceive that she posed any immediate danger or threat. (Exh. 1, Tr. 178) He did not see any weapon. He did not feel personally threatened. (Exh. 1, Tr. 164-165) Anne did not resist and attempt to pull away from officer Cinko's grip after he grabbed her right arm. (Exh. 1, Tr. 167) He did not see anyone who was in imminent danger; Anne was just being loud and boisterous and would not calm down, and would not listen to direct commands. (Exh. 1, Tr. 169) Cinko did not see her be physically violent with anyone. (Exh. 1, Tr. 185)

Swinford recalled, "She was just throwing her hands up. She was so agitated that she was throwing her hands up as vigorously as you can imagine and screaming at the top of her lungs, "No one's listening to me," over and over and over." (Exh. 2, pp. 24-25, Exh. 1, Tr. 38) She made no verbal threat, but refused to get into Swinford's car. (*Id*. at p.25) Swinford did not see any weapon on her, and did not discover a weapon in his subsequent investigation. (*Id.* at 29-30)

Before bringing Anne to the ground, Swinford was able to keep between Anne and her house continually. (Exh. 1, Tr. 93-94) He maintained a five-to-seven foot distance from her no matter how she moved, and did not recall Anne moving towards him. (Exh. 2, pp 23-24)

He made sure he was between her and the house to prevent Anne and her father fighting. (*Id.* at p.28) He did not recall Anne moving toward himself. (*Id.* at p.24)

5) Swinford did not take Anne down consistent with procedures

Anne disputes defendants' contention that officer Swinford used an "arm-bar takedown technique, consistent with his training at the Indiana Law Enforcement Academy. (Br. 8) Based on the procedures set forth in the Model Policy and in the annual training as acknowledged by Cinko, the arm-bar takedown was inappropriate under the circumstances. In fact, any touching of her was wrong. Police should have let her vent her frustration and waited for the ambulance to arrive.

Further, Anne was brought down and injured in a quick maneuver, not after a struggle that caused Swinford to lose his balance and fall as defendants claim. Dyer Emergency Medical Technician Robert Poortenga testified he did not see Anne attack anyone or threaten to do so. (Exh. 1, Tr. 202) He was three to five feet away at the time. He saw Anne's hands go up, flailing, and officer Swinford grabbed her wrist from behind and took her down in one fluid motion. (Exh. 1, Tr. 202) He did not see Swinford grab Anne's other wrist and her pulling away before he took her down. (Exh. 1, Tr. 203) Anne's arm was broken. (Exh. 13, Poortenga deposition, p. 35) That evening, an X-ray of her arm was taken at St. Margaret Mercy hospital in Dyer, showing the breaks and splintering of Anne's left forearm. (Exhibit 12) EMT Zendzian also said Swinford took her arm behind her in a single motion, and Anne jerked away and fell to the ground. (Exh. 3, pp.25-26) He did not recall Swinford previously grabbing the other arm. (*Id.* at p 26)

Robert Kingdollar also testified that the officer grabbed his mother and took her to the ground in one continuous motion; she wasn't fighting. (Exh. 1, Tr. 247) Anne did shrug and

dip when the officer grabbed her shoulder; the officer then twisted her arm behind her back and she fell to the ground. (Exh. 8, p.87)

Anne testified she did not threaten, assault, batter or touch Swinford, and that she did not struggle when she was brought to the ground. (Exh. 1, Tr. 213-215)

6) Anne was treated improperly.

Anne disputes defendants' assertion that she was not treated in a way she perceived was improper. (Br. 9) This lawsuit arose from the improper treatment that led to her left forearm being shattered. Under the circumstances no justification existed for officers Swinford and Cinko to grab Anne and for officer Swinford to bring her to the ground.

7) Anne had not hurt people in prior incidents.

Anne disputes defendants' claim that Swinford was aware of other "use of force situations" where Anne allegedly "had battered her oldest son." (Br. 3) She notes she had never previously been arrested for anything, despite the many police responses to her residence. Defendants cite no underlying documents showing that Swinford had responded to any such incident, or how he came to know details of any such incident prior to November 22, 2010.

Swinford's testimony cited by defendants shows that the officer Swinford knew that Anne had prior problems with mental illness and knew she had been taken away by ambulance. (Exh. 1, Tr. 79) He also knew that out of 60 prior involvements with police, Anne had never previously been arrested. (*Id.*) Swinford responded affirmatively to the prosecutor's question as to whether "there might have been an alleged battery involved". (Exh. 1, Tr. 112). The trial court affirmed objection to the testimony as speculative. (*Id.*)

Pages 79 and 112 of the trial transcript was the only “evidence” the defendants cite in alleging that Swinford was aware that Anne had previously battered her oldest son, Robert Kingdollar. Robert testified his mother never physically injured himself and he had never seen her injure anyone. (Exh. 8, p.88)

8) The situation required patience, not an urgent need for action.

Anne was surrounded by officers Swinford and Cinko as well as the two paramedics. Swinford and Cinko were each six feet tall, weighing about 215 and 240 pounds respectively. (Exh. 2, p.6; Exh. 5, p.4) Anne, in contrast, stood five feet, three inches tall. For 17 years, she had been a labor and delivery nurse. (Exh. 1, Tr. 209-210) It was Swinford and Cinko who were trained as law enforcement officers.

The ambulance was on its way, and officers Swinford and Cinko knew that from the dispatch announcement. As Cinko acknowledged, there was no immediate danger or threat. (Exh. 1, Tr. 178) They could have waited for the ambulance to arrive. (Exh. 1, Tr. 179-180)

The evidence discussed above shows there was no need for a split-second decision by Swinford to seize Anne. To the contrary, the need was for patience.

ARGUMENT

Summary Judgment standard

A party is entitled to summary judgment "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). The moving party bears the burden of

demonstrating the absence of a genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986). The non-moving party, however, may not rest on mere allegations or denials in its pleadings, but rather "must set forth specific facts showing that there is a genuine issue for trial." Fed. R. Civ. P. 56(e).

When determining whether a genuine issue of material fact exists, the court views the record and all reasonable inferences in the light most favorable to the nonmoving party. *Heft v. Moore*, 351 F.3d 278, 283 (7th Cir. 2003). Summary judgment is proper when it is mandated, when it is clear that the plaintiff will be unable to satisfy the legal requirements necessary to establish his case. *See Celotex*, 477 U.S. at 322.

Excessive force and qualified immunity

Excessive-force claims relating to an arrest fall under the Fourth Amendment's objective-reasonableness standard. *Graham v. Connor*, 490 U.S. 386, 395, 109 S. Ct. 1865, 104 L. Ed. 2d 443 (1989); *Abdullahi v. City of Madison*, 423 F.3d 763, 768 (7th Cir. 2005). “Determining whether the force used to effect a particular seizure is ‘reasonable’ under the Fourth Amendment requires a careful balancing of ‘'the nature and quality of the intrusion on the individual's Fourth Amendment interests’ against the countervailing governmental interests at stake. ... “[I]ts proper application requires careful attention to the facts and circumstances of each particular case, including the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight.” *Graham*, 490 U.S. at 396 (citations omitted).The 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." *Id.* at 397.

To prove an excessive force case, the plaintiff must not only show injury but must identify the specific unreasonable conduct that caused the injury. *Cyrus v. Town of Mukwonago*, 624 .3d 856, 864 (7th Cir. Wis. 2010) When material facts are in dispute as to whether police "responded overzealously with too little concern for safety" the case must go to a jury. *Id.* at 862, *citing Catlin v. City of Wheaton,* 574 F.3d 361, 367 (7th Cir. 2009).

The affirmative defense of qualified immunity is defeated where an official *"knew or reasonably should have known* that the action he took within his sphere of official responsibility would violate the constitutional rights of the [plaintiff], *or* if he took the action with the malicious intention to cause a deprivation of constitutional rights or other injury. . . ." *Harlow v. Fitzgerald*, 457 U.S. 800, 815 (U.S. 1982) (emphasis in original), *quoting Wood v. Strickland,* 420 U.S. 308, 322 (1975).

Qualified immunity analysis involves determination of whether 1) the defendant has violated a constitutional right and 2) whether that right in question was clearly established at the time of its alleged violation in the order the court determines is appropriate to the case at hand. *Pearson v. Callahan*, 555 U.S. 223, 236 (U.S. 2009) "[T]he "driving force" behind creation of the qualified immunity doctrine was a desire to ensure that ''insubstantial claims' against government officials [will] be resolved prior to discovery.'" *Pearson v. Callahan*, 555 U.S. 223, 231 (U.S. 2009)

DISCUSSION

A. Taking the facts in the light most favorable to Anne, the officers' actions were objectively unreasonable and in violation of her clearly established constitutional rights.

Courts have long recognized individuals' constitutional right to be free of unreasonable and excessive force. In *Graham v. Connor,* the Court held that excessive force claims fall under the protections of the Fourth Amendment right guaranteeing citizens the right "to be secure in their persons ... against unreasonable ... seizures" of the person." *Id.,* 490 U.S. at 394 (U.S. 1989). Anne alleges that her Fourth Amendment right to be free of excessive force were violated. The first prong of the qualified immunity test is met.

An examination of the circumstances of Anne's arrest and injury shows that at the least contested factual issues the preclude dismissal based on the second prong of the qualified immunity test. The facts discussed above show that at the time of her injury, Anne posed no immediate danger to anyone, except, as it turned out, to herself because of the officers' terrible judgment. She was surrounded by two heavyset police officers who towered over her. Two Dyer paramedics stood a few feet away. Officer Swinford was able to stay between Anne and her house, and, until he decided to approach and grab her, he maintained a distance of five to seven feet from her. (Exh. 2, pp 23-24, 28) Anne repeatedly flailed her open hands in the air, and yelled that nobody was listening to her. But she made no verbal threats, and she had no weapon. She did not hit the officers. (Exh. 1, Tr. 71-72; 176) Officer Swinford knew Anne suffered bouts of mental illness (Exh. 1, Tr. 79), and he and officer Cinko had heard the dispatch announcement showing an ambulance was on its way. Had the officers exercised patience and waited, as provided

by police training, the ambulance would have arrived, and Anne have been taken away without incident, as she had been taken away by ambulance in prior calls.

The key "fact" offered by defendants to excuse the force they used against Anne was officer Swinford's claim that he had seen her turn around and push her father off his feet and shut the door immediately after she exited her house. But Anne, her two sons present and her father each deny that account, and nobody else supports it. She was found innocent of the Disorderly Conduct charged based on her alleged shove. Thus, fact questions preclude summary judgment for defendants on the claim that Anne had posed an immediate threat to her father and, thus, had to be immediately controlled. In fact, when he grabbed Anne, officer Swinford did not even know where Victor Amaloo was located. (Exh. 2, Swinford deposition, p.74)

The International Chiefs of Police Model Policy on Dealing with the Mentally Ill provides objective, common sense standards by which to consider the reasonableness of defendants' action. (Exhibit 11) Officer Cinko acknowledged that the Model Policy's principles emphasizing the importance of patience, slow movement, communication and empathy were the same principles presented in annual training sessions attended by Dyer police officers. (Exh. 5, p.48, Exh. 1, Tr. 171, 175-176) These objective standards were violated when officer Swinford grabbed Anne instead of listening to her and waiting for an ambulance, and when Cinko joined Swinford in using physical force against her.

The times recorded on the Dyer Police dispatcher's Main Radio Log Table show that less than two minutes passed between the time Swinford arrived at the scene and the officers taking her to the ground. (Exh. 4) This alone raises an issue of fact as to whether the officers exercised requisite patience before grabbing Anne and taking her to the

ground.

The dispatch log fits Robert Kingdollar's memory of how much time passed before his mother was taken to the ground. Swinford and Cinko suggested more time must have passed. But Swinford noted he called in his position when he arrived at Anne's house. So, the log shows his actual arrival time. Had Cinko and Nester and the ambulance arrived earlier than shown by the log, even less time would have passed between Swinford's arrival and Anne's being taken to the ground.

Other than her allegedly pushing her father down, the only action Swinford cited to justify his use of force was Anne's flailing her hands in the air and yelling over and over and over again that nobody was listening to what she was saying. It's difficult to envision a stronger illustration of the common-sense wisdom of the Model Policy's guidance to "Communicate with the individual in an attempt to determine what is bothering him. Relate your concern for his feelings and allow him to ventilate his feelings." (Exhibit 11) Had officer Swinford allowed Anne to continue to ventilate, time would have passed, and, the dispatch log shows, the ambulance would have arrived within a minute, bringing the professional medical help originally requested in Robert Kingdollar's 911 call.

Swinford was the one who violated common sense and guidelines by grabbing a woman he knew to suffer mental illness instead of simply listening to her as she insisted. In his misguided attempt to control her immediately, Swinford, with Cinko joining him, caused the situation to immediately go out of control.

Whether Anne struggled when Swinford grabbed her is a matter of factual dispute. Anne denies she struggled when Swinford grabbed her. (Exh. 1, Tr. 213-215) Testimony by Robert Kingdollar, Poortenga and Zendzian shows she went to the ground upon

Swinford taking her arm behind her back in one fluid motion. (Exh. 1, Tr. 202, 247; Exh. 3, pp.25-26) The jury in Anne's criminal trial had evidence before it on which it could have determined that Anne resisted law enforcement simply by refusing Swinford's prior request that she enter his car. Its guilty verdict on that count does not detail how she resisted law enforcement. (Defense Exhibit E) Because the evidence is mixed, it must be viewed in light most favorable to Anne at this stage, and summary judgment must be denied.

Further, officer Swinford's decision to grab Anne was unreasonable and excessive from the outset. Swinford could have asked Cinko to check on Amaloo. Or he could have called for additional backup, as the Model Policy recommends. (Exh. 11, item C1) Or he could have simply waited for the ambulance to come and take Anne away. Instead, he grabbed and took her down, causing her left forearm to splinter in multiple breaks. (Exh. 12) Defendants; actions cannot, as a matter of law, be deemed objectively reasonable, given the totality of the circumstances.

B. Anne need not prove evil intent to defeat defendants' summary judgment motion.

Defendants rely upon *Smith v. Augustine,* 2009 WL 481639 (N.D. Ill.), in arguing that also argue that "there is no constitutional violation without evidence that the police intended to injure the arrestee gratuitously." Br. at 14. But *Smith*'s reasoning stands contrary to the holding of *Graham* that whether officers' actions are "objectively reasonable" must be determine based on the total circumstances confronting them and "without regard to their underlying intent or motivation." *Id.*, 490 U.S. at 397.

Smith also stands counter to the Supreme Court's holding in *Harlow* that the affirmative defense of qualified immunity is defeated where an official *"knew or reasonably should*

have known that the action he took within his sphere of official responsibility would violate the constitutional rights of the [plaintiff], *or* if he took the action with the malicious intention to cause a deprivation of constitutional rights or other injury. . . ." *Harlow, supra*, 457 U.S. 800, 815. The Court's use of the disjunctive shows that a showing of malice is not necessary to defeat qualified immunity.

In *Phillips v. Cmty. Ins. Corp.*, 678 F.3d 513 (7th Cir. Wis. 2012), the court overturned a jury verdict for the defense, and found that a woman who was shot four times in her leg by police was entitled to judgment as a matter of law on her excessive force claim. The woman had disregarded police orders to get out of her car, which was pointing towards the officers. The 7th Circuit accepted the officers' testimony that their ultimate goal in shooting her

> was "to gain compliance and control," rather than to hurt or punish Phillips gratuitously. But this goes principally to the question of intent. "The officers' intent in using force is irrelevant in a Fourth Amendment case. Only its reasonableness matters—which means whether it was excessive in the circumstances, because if it was, it was unreasonable . . . ." *Richman v. Sheahan*, 512 F.3d 876, 882 (7th Cir. 2008) (citations omitted); see also *Graham*, 490 U.S. at 397 ("An officer's evil intentions will not make a Fourth Amendment violation out of an objectively reasonable use of force; nor will an officer's good intentions make an objectively unreasonable use of force constitutional.").
>
> *Phillips* 678 F.3d at 526-527.

Phillips also underscores the need for police to restrain themselves when dealing with persons who suffer mental illness or other diminished capacity. The court stated,

> There is a commonsense need to mitigate force when apprehending a non-resisting suspect, particularly when the suspect is known to have diminished capacity. An arrestee may be physically unable to comply with police commands. *See Smith*, 295 F.3d at 770; see also *Cyrus*, 624 F.3d at 863 (noting that officer was "aware of [arrestee's] mental illness"); *McAllister*,

> 615 F.3d at 883 (finding knowledge of arrestee's diabetic condition relevant to excessive force analysis); *Champion v. Outlook Nashville, Inc.*, 380 F.3d 893, 904 (6th Cir. 2004), ("The diminished capacity of an unarmed detainee must be taken into account when assessing the amount of force exerted.").

Id, 678 F.3d at 526.

Here, officer Swinford ignored this commonsense principle when he grabbed Anne, who he knew to suffer from mental illness. Whether Anne resisted after he grabbed her is in dispute. But even if she did, there was no need to grab her. As Cinko acknowledged, she posed no immediate threat to anyone. Given the totality of the circumstances, summary judgment for defendants is inappropriate on qualified privilege grounds.

C. Anne's conviction for resisting law enforcement does not justify excessive force.

As a matter of note, defendants now separately argue in their brief opposing the filing of Anne's proposed Amended Complaint that her excessive force claim must be dismissed because of her conviction for resisting law enforcement. Since it's unclear to plaintiff which judge of this Court will decide Anne's motion to file her amended complaint, she notes that this adoption of this argument would authorize police to use any excessive force once an individual resisted. The Seventh Circuit has rejected this notion. In *Vangilder v. Baker*, 435 F.3d 689, 691 (7th Cir. 2006), where the defendant officer had argued that under *Heck v. Humphrey*, 512 U.S. 477, 114 S. Ct. 2364, 129 L. Ed. 2d 383 (1994), plaintiff's conviction for resisting law enforcement barred his excessive force claim. The Seventh Circuit held to the contrary:

> Were we to uphold the application of *Heck* in this case, it would imply that once a person resists law enforcement, he has invited the police to inflict any reaction or retribution they choose, while forfeiting the right to sue for damages. Put another way, police subduing a suspect could use as much

> force as they wanted--and be shielded from accountability under civil law--as long as the prosecutor could get the plaintiff convicted on a charge of resisting. This would open the door to undesirable behavior and gut a large share of the protections provided by § 1983.

Vangilder v. Baker, 435 F.3d 689, 692 (7th Cir. Ind. 2006) *See also, Evans v. Poskon,* 603 F.3d 362 (7th Cir. Ind. 2010)*, Hardrick v. City of Bolingbrook,* 522 F.3d 758 (7th Cir. Ill. 2008).

D. Facts need further development.

In *Chelios v. Heavener*, 520 F.3d 678, 691 (7th Circuit 2008), the plaintiff, a bar owner, and defendant officers disputed the issue of whether the plaintiff had first touched the police officer who threw him to the ground. The court reversed a summary judgment in defendants favor on qualified immunity grounds, finding that the factual record was not sufficiently developed to decide the issue:

> "Our prior cases indicate that "[i]t is clear . . . that police officers do not have the right to shove, push, or otherwise assault innocent citizens without any provocation whatsoever." *Id.* Although there are not many cases that are closely analogous to this one ..., Mr. Chelios, nonetheless, may show that the force that Sergeant Heavener used in effectuating the arrest was so plainly excessive that a reasonable police officer would have been on notice that such force is violative of the Fourth Amendment. ...
>
> "Establishing that the use of force in a particular case was 'so plainly excessive" requires a fair amount of factual development. Thus, "if the facts draw into question the objective reasonableness of the police action under the alleged circumstances, they must be developed in the district court before a definitive ruling on the defense can be made."

Chelios, 520 F.3d at 691- 692 (7th Cir. Ill. 2008).

Defendants quote *Chelios* out of context. (Br. at 12) The "plainly incompetent" quote (which Anne believes would apply to Swinford's rash actions) in fuller context follows:

> The doctrine of qualified immunity shields from liability public officials who

> perform discretionary duties. *Belcher v. Norton*, 497 F.3d 742, 749 (7th Cir. 2007). Qualified immunity shields from liability police officers "who act in ways they reasonably believe to be lawful." *Anderson v. Creighton*, 483 U.S. 635, 638-39, 107 S. Ct. 3034, 97 L. Ed. 2d 523 (1987). The defense provides "ample room for mistaken judgments" and protects all but the "plainly incompetent and those who knowingly violate the law." *Hunter v. Bryant*, 502 U.S. 224, 227, 112 S. Ct. 534, 116 L. Ed. 2d 589 (1991) (*quoting Malley v. Briggs*, 475 U.S. 335, 343, 106 S. Ct. 1092, 89 L. Ed. 2d 271 (1986)); *Clash v. Beatty*, 77 F.3d 1045, 1048 (7th Cir. 1996) (noting, in the excessive force context, that the "police cannot have the specter of a § 1983 suit hanging over their heads when they are confronted with a dangerous fugitive, possible escapee, or as long as their behavior falls within reasonable limits"). Qualified immunity thus protects those officers who make a reasonable error in determining whether there is probable cause to arrest an individual. *Anderson*, 483 U.S. at 643; *Belcher*, 497 F.3d at 749.

Chelios, 520 F.3d at 690-691.

Anne was not a dangerous fugitive or escapee. She was a woman who suffered mental illness. The totality of the circumstances, and the known facts viewed in the light most favorable to Anne, show police should have exercised patience and restraint, not split-second decision making and Rambo tactics.

WHEREFORE, plaintiff ANNE RICHMOND respectfully asks this Court deny defendants' Motion for Summary Judgment on Qualified Immunity.

Respectfully submitted,

s/William Lazarus

Certificate of Service

I hereby certify that on Feb. 5, 2013, a copy of the foregoing response was filed electronically. Notice of this filing will be sent to the following persons by operation of the Court's electronic filing system. Parties may access this filing through the Court's system.

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