

**IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NORTH CAROLINA
STATESVILLE DIVISION
Civil Action No. 5:14-cv-187**

ERNESTINE HOUCK, EXECUTRIX OF THE
ESTATE OF WALTER MARK HOUCK,

Plaintiff,

v.

BRANDON PHIL HOWELL,
JOSHUA HOPKINS, each in his Individual
Capacity,

Defendants.

COMPLAINT

Plaintiff, requesting a jury trial and seeking damages for the wrongful death of her decedent husband, Walter Mark Houck, on November 19, 2012, alleges the following against Defendants:

PARTIES AND VENUE

1. Plaintiff is a citizen and resident of Ashe County North Carolina and has been duly designated by the Ashe County Clerk of Court as Executrix of the Estate of Walter Mark Houck.
2. Defendant Brandon Phil Howell (“Howell”) is a citizen and resident of Ashe County, North Carolina. At all times relevant to this Complaint, he was a detective of the Ashe County Sheriff’s Office. He is sued in his individual and official capacities for violating decedent’s Fourth Amendment rights. All actions complained of were taken under color of state law. He is also sued under the common law for wrongful death and obstruction of justice.
3. Defendant Joshua Hopkins (“Hopkins”) is a citizen and resident of Ashe County, North Carolina. At all times relevant to this Complaint, he was a deputy of the Ashe County Sheriff’s Office.

He is sued in his individual and official capacities for violating decedent's Fourth Amendment rights. All actions complained of were taken under color of state law. He is also sued under the common law for wrongful death and obstruction of justice.

JURISDICTION

4. The District Court has jurisdiction over the subject matter under 28 U.S.C. §1331 and §1343(a)(3). Venue is proper, in that the events described took place within the Statesville Division.

FACTS

5. Defendant Howell has lived most of his life on Gaither Poe Road in Ashe County near the home of decedent and Plaintiff. Their homes are approximately 200 yards apart across the road and an open field.

6. On information and belief, Defendant Howell grew up in the house where he now lives and bought the home from his parents in 2010, around the same time that he began employment with the Ashe County Sheriff's Office.

7. Defendant Howell grew up in that house knowing decedent, and knew in December 2012, like other neighbors, that decedent was legally blind and nearly deaf.

8. Decedent had a congenital condition called retinitis pigmentosa that destroys the neural light receptors in the retina that are called rods and cones, eventually leaving only the central core of those receptors active. The disorder leads to night blindness, complete loss of peripheral vision and a resulting "tunnel" vision – the ability to see only in the center of the visual field.

9. Decedent had to stop work in 2003, when he was in his 30s, because he lost his vision. He surrendered his driver's license, was assigned a social worker for the blind through the North Carolina Department of Social Services, and was awarded social security disability benefits.

10. Plaintiff still could see things in the center of his visual field with sufficient light, but had blurred vision even then. He still worked in his garden during the day, could watch television by sitting close enough to the screen, and could see written words with reading glasses. With that limited vision and his familiarity with his home, he could still get around the house and in and out of the front and rear doors and out to his garden.

11. Decedent also suffered from significant hearing loss. He had lost all hearing in one ear in an accident and had to wear a hearing aid due to significant loss in the other ear.

12. Decedent had been a law abiding citizen all of his life. He had no record of any arrest or other negative encounter with law enforcement.

13. Decedent did drink alcohol, but neighbors said that he kept to himself and did not drive due to his blindness, so his drinking did not concern them.

14. All of the neighbors, including Defendant Howell, told the SBI that decedent often shot a gun on his property.

15. Decedent routinely shot the gun when he let his dog out, to scare away any animals that the dog might chase and any possible predators that might attack the dog.

16. Plaintiff and decedent married in 2003. In 2012, they had no children living at home and Plaintiff worked two jobs – one during the day for the food service company that operates the cafeteria at the Tyson poultry plant in Wilkes County, and the other on second shift for Tyson, working in the processing plant.

17. Decedent had told others that he did not like being alone at night and that he feared being robbed because his vision and hearing were limited.

18. On November 19, 2012, decedent was alone at home and, on information and belief, had drunk alcohol and became upset about something.

19. On information and belief, at about 10:50 p.m., decedent discharged a shotgun several times from the front porch of his house, and then went back inside.

20. On information and belief, Defendant Howell heard the shots in his home and believed it was decedent. He later told others that he looked out a window across the field and could see that decedent's front porch light was on and that Plaintiff was either going inside or was already back inside his house.

21. Defendant Howell later told others that he went into his unlit basement to watch decedent and, about 10 minutes later, saw him come out on the porch and shoot a shotgun four times.

22. Defendant Howell called the Ashe County dispatcher. On an audio tape of the call, Defendant Howell is low key, stating in a matter of fact manner that decedent was shooting his gun again and appeared drunk and that multiple deputies should come check on decedent to be safe.

23. On information and belief, Defendant Hopkins responded to the call and asked Jake Howell of the West Jefferson Police Department to assist him as backup. The two police forces have a mutual aid agreement. According to reports, they met near the Lowes in West Jefferson and began the drive out to Gaither Poe Rd. in separate police vehicles. It took about 15 minutes to arrive at decedent's house, according to dispatch records.

24. Deputy Jeremy Munday also responded to the call, and began driving to Gaither Poe Road. It would take him about 18 minutes to arrive at decedent's house.

25. Defendant Howell called dispatch back about ten minutes later, stating in a calm voice that decedent had shot a third round of shots and that Howell was going to join the other officers in responding to the call, and offered that they could call his landline phone to speak with him if they wished.

26. Defendant Howell did not tell the dispatcher in either call that decedent was legally blind and almost deaf.

27. On information and belief, Deputies Hopkins and Munday and Officer Jake Howell were not told that decedent was blind and deaf when asked to go to his home.

28. Instead, Defendant Howell told the dispatcher in the second call to direct the responding officers to approach stealthily, without any sirens or flashing dome lights.

29. On information and belief, Defendant Howell decided to put on tactical gear issued to him in a training he had completed.

30. He also called decedent's closest neighbors, Darlene and Darryl Poe, and told them to stay inside, that decedent was shooting his gun and that deputies were coming. Darryl Poe had not heard the shots, but was awoken instead by Howell's phone call.

31. Though he was only 200 yards from the house, in the process of donning his tactical gear and calling the neighbor, the responding officers arrived at decedent's house before Defendant Howell could get into his Sheriff's Department vehicle.

32. Defendants Hopkins and Jake Howell arrived first, at 23:18:22, according to dispatch records. They initially drove past decedent's house. Hopkins pulling into the neighbors' driveway below decedent's house, and Jake Howell drove down the road, turned around and then parked in the road. His DVR, if operating, would have had a view of what ensued.

33. By their report to others, the officers got out of their cars and stood together near the front of Hopkins vehicle, about 35 yards from decedent's house, which was built on a ridge or bank that rose above where the officers stood.

34. Defendant Jake Howell would later state that it was dark where they stood and visibility was limited outside the house.

35. But the two officers could see into decedent's house, as the lights were on in all the downstairs rooms.

36. They could see decedent moving about the house and then saw him pick up and carry a single-shot, bolt-action rifle in a hunter-safe position, muzzle up toward the ceiling and the stock at his waist. The officers could see it was not a semi-automatic weapon but a bolt action, single shot rifle.

37. On information and belief, completely unaware that the officers were present in the dark watching him, decedent opened the back door, let his dog out and stepped outside. A floodlight at the backdoor was on, which illuminated decedent and the cement walkway. Decedent took a few steps away from the door. The walkway ran parallel to the driveway where the officers were standing, so decedent was facing away from them as he walked. He had no peripheral vision.

38. On information and belief, he was wearing night clothes, including shorts. By records from that date, the temperature was in the low 40s.

39. As he stepped out of the house he was held his gun in the same safety position, stock at his waist and the muzzle up in the air. The chamber of the rifle held a single bullet. He had no other ammunition.

40. Decedent had not committed and was not committing any crime. He was not threatening anyone; indeed, he did not know anyone else was present. He had walked outside his house holding a gun for protection.

41. Defendant Hopkins called out from the darkness 35 yards away to the nearly deaf and completely night-blind decedent and told him to throw down his gun.

42. The officers claim that decedent turned in their direction and lowered his rifle as if to protect himself.

43. On information and belief, the decedent could not hear what Hopkins had said and, due to night-blindness, could not see the two officers standing in the darkness, let alone know that they were law enforcement.

44. Defendant Hopkins and Jake Howell did not take cover behind Hopkins' car. Instead, standing in the open, Hopkins opened fire at decedent, just as Defendant Munday arrived in his vehicle at 23:21:42.

45. The DVR in Munday's car was on and Hopkins' gunshots are audible on the tape as Munday drives up to the house.

46. Defendant Brandon Phil Howell had finally gotten into his vehicle and reported that he could hear the shots as he drove towards decedent's house. He radioed dispatch that shots had been fired.

47. Munday stopped his car with the video camera facing Hopkins and Jake Howell. The video shows Hopkins and Howell advancing towards decedent, shooting a steady stream of bullets from their semi-automatic handguns, stopping their advance only to reload.

48. Decedent can be heard on Munday's video howling a primal scream as he is being shot. By the officers' reports, by the location of the bullets holes on the wall and railing, and by the location of decedent's body and blood from his wounds, he had tried to get back into the house but died at the door.

49. Decedent was hit nine different times. He first fell to a knee and the officers kept shooting as he crawled toward the house.

50. On Munday's video Defendant Hopkins can be heard yelling at decedent to drop the rifle and become enraged as he advanced towards him, yelling, "I'll f---ing kill you!" as he unloaded at least two magazines of bullets at decedent, who howled in pain and bewilderment.

51. Defendant Munday had exited his vehicle and joined in the gunfire thinking it would protect his fellow officers, shooting at decedent at almost a 90 degree angle from the other two officers.

52. By the time Defendant Howell arrived, the shooting was over and decedent was lying by the back door in a pool of blood, going through gurgling, agonal respirations.

53. On Munday's video, the shooting stops and Defendant Hopkins can be heard saying, "cover me." By reports, he climbed the embankment to get to decedent's body.

54. Bruises found on decedent's body at the autopsy suggest that Hopkins, in his rage, beat or kicked the decedent while getting the rifle from him. Munday told SBI investigators that he went to decedent to help Hopkins get the rifle from under decedent's body.

55. Munday took the rifle down into the yard and pulled back the bolt. The single bullet was still in the chamber. Decedent had not shot the rifle.

56. Paramedics and the SBI were called. The paramedics confirmed that decedent was dead but left his body where it lay so the SBI could investigate.

57. On information and belief, Defendant Howell tried to calm Hopkins, who remained very agitated. He still did not disclose to him that decedent was legally blind and near-deaf.

58. Instead, at some point after the shooting, according to Hopkins, Howell told him that decedent had previously stated that he would kill the police if they ever came to his house – perhaps to reassure him that his actions were necessary. That statement lacked any basis.

59. The decedent's body lay at the door through the night and was not moved until after daylight the next morning.

60. The dog was found later on the front porch.

61. SBI officers arrived during the night and began the investigation. They collected bullet fragments. Over 40 bullets were identified, all of them from the officers' weapons and none from decedent's.

62. Though decedent was night blind and nearly deaf and had not fired a single shot, the Sheriff issued a public statement that decedent had refused commands and shot at the officers, and thus the shooting was justified and all procedures had been followed.

63. The SBI then interviewed each of the officers involved.

64. Defendant Howell told the SBI that he had known decedent since Howell was a little boy, but did not disclose that decedent was virtually blind and near-deaf.

65. He instead told a deliberately false story that he saw Plaintiff come outside and aim his gun at Howell's house, making Howell feel threatened; that numerous neighbors had called him to complain about the shooting; and, that he asked the dispatcher to have the deputies communicate with him by phone because decedent had a scanner.

66. The audio record of his calls show, however, that he told the dispatcher that he could not tell where decedent was aiming and never stated that he felt threatened personally. He also had not received numerous calls from neighbors, but had called the Poe home himself. He also said nothing in his phone calls to the dispatcher that decedent might have a scanner and not to use radio traffic.

67. The SBI report does not note or address these discrepancies, just indicates that the audio recordings are included.

68. Hopkins supported Howell's story. He told the SBI that Defendant Howell had felt that decedent had aimed a rifle at his house and felt threatened and that he may have a scanner to listen to officers communicate.

69. He also said that the street was well lit and that decedent should have been able to see that he and Howell were police officers. He further said that he believed that decedent intended to kill him and had shot at Hopkins, and thus he killed him. He also told the SBI that Defendant Howell later told him that decedent had said he would kill any officer who came to his home.

70. The SBI never asked Howell if decedent have ever made such a statement.

71. Jake Howell told the SBI that it was dark; there was some lighting outside but that visibility was affected. He explained that he had been instructed not to use blue lights or sirens. He saw decedent walking inside the house and come out the backdoor with the rifle in the safe position, and then walk along the walkway holding the gun the same way. Hopkins ordered decedent to drop his weapon and decedent did not but turned towards them. Hopkins fired first, then Jake Howell fired. Decedent did not fall initially but moved back toward the house, so they walked towards him, firing their weapons. He reported that when Munday pulled up in his car, decedent had fallen to one knee and was trying to crawl toward the house, but then collapsed and expired.

72. Munday told the SBI that he heard gunshots when he arrived at the house. He got out of his car and saw decedent about 10 feet from the house. He saw the gunfire and believed that decedent was shooting at Hopkins, so he became afraid and started shooting at and advancing when decedent fell to the ground. Munday helped Hopkins get the rifle from decedent, who died with the gun in his grasp. Munday cleared the single live round from the chamber.

73. Decedent's body was taken to Winston-Salem for autopsy. The medical examiner contacted the SBI and stated that decedent's medical records showed that he was legally blind.

74. The SBI investigators spoke with decedent's neighbors, all but one of them described decedent as having vision and hearing problems.

75. The SBI never asked Defendant Howell – who had known decedent all of his life – about his vision and hearing problems.

76. The narrative of the investigation recounts Howell and Hopkins' version of the incident -- that Howell was fearful because decedent shot at his house and that he asked not to use the scanner, without noting that the dispatch recordings do not support this rendition.

77. On August 23, 2013, the District Attorney finished his review of the file and declared that the shooting was justified.

FIRST CLAIM FOR RELIEF
(Fourth Amendment)

78. All prior paragraphs are incorporated by reference.

79. Defendant Howell initiated the violent and deadly seizure of decedent, asking for officers to respond to decedent's home, instructing them to arrive without blue lights or sirens, but without disclosing that decedent was legally blind and almost deaf.

80. Defendant Howell gave instruction to other officers without disclosing those critical facts that directly led to the shooting death of decedent. He could not see that police standing were 35 yards from his home in the dark and could not hear Defendant Hopkins order and then was shot repeatedly for not complying.

81. The seizure of decedent by shooting and killing him thus was abjectly unreasonable and violated the Fourth Amendment rights of Plaintiff's decedent as a proximate result of Howell's actions and omissions.

82. Defendant Hopkins also acted unreasonably in ordering decedent to drop his weapon and then shooting him when he did not.

83. Decedent had walked out of his own home with his dog at night carrying a rifle with a single bullet in it for protection. He had not committed any crime, was not threatening anyone, and

was on his own property moving away from the officers. Hopkins lacked any legal justification to order decedent to drop his rifle.

84. Further, Defendant Hopkins gave the order from a darkly lit area some 35 yards from decedent. It was not reasonable to expect any person to understand and respond to such a command from the darkness, let alone someone who had night blindness and was nearly deaf.

85. The shooting of decedent under those circumstances was an unreasonable seizure in violation of the Fourth Amendment, taken under color of state law.

86. Plaintiff, in her capacity as Executor of the Estate of Walter Mark Houck, is entitled to recover under 42 U.S.C. §1983 all damages allowed by N.C.G.S. § 28A-18-2(b), including damages for the pain and terror that decedent suffered in that violent death.

87. Those damages include punitive damages, for actions that demonstrated malice and willful and wanton disregard for Plaintiff's rights and safety.

SECOND CLAIM FOR RELIEF
(Wrongful Death)

88. All prior paragraphs are incorporated by reference.

89. Defendant Howell owed a duty of reasonable care in initiating the violent, fatal police encounter with decedent, asking for officers to respond to decedent's home, instructing them to arrive without blue lights or sirens, but without disclosing that decedent was legally blind and almost deaf and, thus, would not be able to see or hear them.

90. Defendant Howell gave instruction to other officers without disclosing critical facts that directly led to the shooting death of decedent, who could not see that police were standing 35 yards from his home in the dark, and could not hear the orders of Defendant Hopkins from that distance and then was shot repeatedly for not complying.

91. The seizure thus was abjectly unreasonable and grossly negligent and directly and proximately caused decedent's violent death. Howell acted with implied malice and outside the scope of his authority in directing officers to approach the house in the manner in which they did.

92. Defendant Hopkins also owed a duty of care in contacting decedent at his home to investigate Howell's call.

93. Decedent had walked out of his own home with his dog at night carrying a rifle with a single bullet in it for protection. He had not committed any crime, was not threatening anyone, and was on his own property moving away from the officers. Further, Defendant Hopkins gave the order from a darkly lit area, some 35 yards from decedent, after a stealth approach to his home. It was not reasonable to expect any person to understand and believe the command in the darkness was from a law enforcement officer, let alone someone who had night blindness and was nearly deaf.

94. Hopkins lacked any legal justification to order decedent to drop his weapon and was grossly negligent in intentionally shooting decedent for not doing so. Hopkins acted outside the scope of his authority and showed actual malice in repeatedly shooting decedent after he was wounded and yelling that he would kill him.

95. The shooting involved gross negligence as well as assault and battery.

96. Plaintiff, in her capacity as Executor of the Estate of Walter Mark Houck, is entitled to recover all damages allowed by N.C.G.S. § 28A-18-2, including damages for the pain and terror decedent suffered in being shot to death in this manner.

97. Those damages include punitive damages under Chapter 1D of the General Statutes, for actions that exhibited malice as well as willful and wanton disregard for Plaintiff's rights and safety.

THIRD CLAIM FOR RELIEF
(Obstruction of Justice)

98. All prior paragraphs are incorporated by reference.

99. The false statements that Howell and Hopkins made to the SBI, and Howell's deliberate omissions, were made in an effort to impede public justice to protect themselves from criminal and civil liability.

100. As a result of their false statements, the Sheriff and District Attorney publicly declared their actions justified, creating a shield from criminal and civil liability and attempting to prevent this action, and falsely portray decedent as assaulting and shooting at the police.

101. Such dishonest conduct was corrupt and outside scope of lawful authority.

102. Plaintiff is entitled at least to nominal damages for such conduct, and to punitive damages under Chapter 1D for conduct that involved fraud (deceit for personal advantage) and malice toward decedent and Plaintiff.

JURY DEMAND

103. Plaintiff requests a trial by a jury of her peers on all issues.

PRAYER FOR RELIEF

WHEREFORE, upon the trial of this matter, Plaintiff prays for the following relief from the Court:

1. An award of wrongful death damages available under N.C.G.S. § 28A-18-2, including punitive damages
2. An award of compensatory and punitive damages for the obstruction of justice.
3. The costs and expenses in this action, including reasonable attorneys' fees under 42 U.S.C. §1988; and,
4. Such other and further relief as the Court deems just and necessary.

This the 18th day of November, 2014.

s/ S. Luke Largess

S. Luke Largess (N.C. Bar #17486)

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