

No. 22-2815

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UNITED STATES COURT OF APPEALS  
FOR THE EIGHTH CIRCUIT

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BRANDEE BUSCHMANN, *et al.*, Plaintiff-Appellant

v.

KANSAS CITY POLICE DEPARTMENT, *et al.*, Defendant-Appellee.

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Appeal from the United States District Court,  
Western District of Missouri  
The Honorable Beth Phillips, U.S. District Judge  
No. 4:21-cv-00340-BP

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APPELLANT'S BRIEF

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## Summary of the Case and Request for Oral Argument

This is an action arising under 42 U.S.C. § 1983. Late on the evening of July 30, 2016 Appellee John Beck, an officer with Appellee Kansas City Missouri Police Department, responded to a potential domestic disturbance call at the home of Appellants. At the initiation of the visit, Beck encountered Buschmann's fourteen-year-old dog Sierra, which resulted in him shooting twice and hitting her once, killing her.

Appellants assert Beck's conduct violated Appellants' Fourth Amendment rights to be free from unlawful seizure; and that Kansas City Police Department had failed to train, supervise, and discipline its officers.

The district court, on defendants' motion for summary judgment, erroneously granted qualified immunity to Beck and dismissed the claim against the department, having found no underlying individual liability. Appellants request oral arguments be heard and that they be permitted twenty minutes for oral argument.

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## Jurisdictional Statement

Buschmann filed their complaint pursuant to 28 U.S.C. § 1983 alleging a violation and deprivation of their Fourth Amendment rights by unlawfully seizing their property. The district court had jurisdiction over the claims pursuant to 28 U.S.C. §§ 1331 and 1343. On July 26, 2022, the district court granted Beck, KCBPC, and another defendant's motion for summary judgment and issued a final order disposing of all the Buschmann claims. On August 25, 2022 Appellants filed their notice of appeal from that order. As the order is a final disposition of the claims by the district court and the notice of appeal was timely filed, this Court has jurisdiction pursuant to 28 U.S.C. § 1291.

## Statement of Issues

- I. Was the District Court correct in holding that Officer Beck's actions in shooting Appellants' dog were those of a reasonable officer and therefore he was entitled to qualified immunity?

Apposite Authority:

*Anderson v. Creighton*, 483 U.S. 635, 641 (1987)

*Lemay v. Mays*, 18 F.4th 283, 288 (8th Cir. 2021)

- II. Was the District Court correct in holding that there was no individual liability and therefore there could be no municipal liability for the Kansas City Board of Police Commissioners?

Apposite Authority:

*Moore v. City of Deslodge, Mo.*, 647 F.3d 841, 849 (8th Cir. 2011)

## Statement of the Case

### **I. The Shooting**

Late on the evening of July 30, 2016, Officer Beck and another officer, Jeffrey Lagud, were dispatched to the Buschmann home following a phone call about a potential domestic disturbance. (App. 7-8; R. Doc. 3, at 4-5.). The officers spoke with the complaining party, who advised them as to what he heard and that he believed it was coming from the Buschmann property. (App. 8; R. Doc. 3 at 5). He also told the officers there was a dog on the premises, and that she was friendly and would not harm them. (App. 8; R. Doc. 3 at 5). Sierra was, at the time of her death, an approximately fourteen-year-old, mixed breed rescue dog. (App. 7; R. Doc. at 4).

On the walk to the house, neither officer heard any sounds of commotion or disturbance coming from the Buschmann home. (App. 117; R. Doc. 29-2 at 56). Beck drew his firearm while Lagud drew his TASER. (App. 263; R. Doc. 29-4 at 22). Upon arriving at the house, the officers observed the front door was “cracked open.” (App. 8; R. Doc. 3 at 5). Officer Lagud approached and knocked on the door, but neither officer announced that it was the police at the door. (App. 192; R. Doc.

29-2 at 131-33). Officer Lagud positioned himself closest to the house and slightly to the side, while Beck was positioned further away from the house but in front of the door. (App. 301; R. Doc. 29-4 at 63; App. 133; R. Doc. 29-2 at 72-73; App. 430; R. Doc. 31-5 at 1).

The officers heard Sierra barking inside the house and running toward the door after they knocked, and Beck commented about how large the dog sounded. (App. 133; R. Doc. 29-2 at 72; App. 135; R. Doc. 29-2 at 74-75). At that time, Beck raised his firearm toward the lower portion of the door and prepared for Sierra to emerge, while Lagud did not. (Add. 24-25; App. 302; R. Doc. 29-4 at 61-62; App. 304; R. Doc. 29-4 at 63; App. 430; R. Doc. 31-5 at 1).

Sierra emerged from the door before Buschmann did, making it into the front yard where the officers were. (App. 358; R. Doc. 29-5 at 28). Before or concurrently with Sierra emerging from the door, Beck raised his firearm and aimed at her. (Add. 24-5; App. 301-02; R. Doc. 29-4 at 61-2; App. 206-207; R. Doc. 29-2 at 145-146; App. 430; R. Doc. 31-5). Sierra passed by Lagud and ran, barking, toward Beck. (App. 430; R. Doc. 31-5). Beck fired his first shot, a miss, causing Sierra to turn around toward the house. (Add. 19; App 207; R. Doc. 29-2 at 146).



At that time, Beck fired the second shot, which struck Sierra and ultimately killed her. (App. 207-208; R. Doc. 29-2 at 146-47; App. 430; R. Doc. 31-5). By this point, Ms. Buschmann had begun to open the door and witnessed the second shot, followed by Sierra slamming into the door. (App. 430; R. Doc. 31-5; App. 361; R. Doc. 29-5 at 31).

Mr. Morrison came out of the house shortly after and spoke with the officers while Ms. Buschmann cradled Sierra in her last moments. (App. 430; R. Doc. 31-5). The officers spoke to him about the possible disturbance and left soon after. (App. 430; R. Doc. 31-5). Buschmann and Morrison were not charged for any crime and no follow up investigation was performed.

## **II. The Firearm Discharge Report and Subsequent Testimony**

Following the shooting, Beck completed a mandatory “Discharge of Firearm Report detailing the incident. (App. 160; R. Doc. 29-2 at 99). That report was completed during the same shift, hours after the shooting. (App. 164-65; R. Doc. 29-2 at 103-04). Lagud reviewed Beck’s report for factual accuracy. (App. 287; R. Doc 29-4 at 46). After review, the report was signed off by Beck’s supervisor at the time, Captain Trout. (App. 181; R. Doc. 29-2 at 120). Beck has not amended, changed,

or provided supplemental information for that report. (App. 165; R. Doc. 29-2 at 104).

According to Beck's discharge of firearm report, Sierra first lunged for Lagud before turning toward Beck. (Add. 18; App. 170; R. Doc. 29-2 at 109). Beck's report also states he struck Sierra twice, once in the abdomen and once in the head. (App. 171; R. Doc. 29-2 at 110). The report indicates the complaining party, Brandon Daniels, stated Sierra was a "pretty big pit bull mix." (App. 167; R. Doc. 29-2 at 106). The complainant, also according to the report, was unequivocal in identifying Buschmann and Morrison as the source of the noise, saying, "No it was those two yelling, screaming and breaking glass." (App. 200; R. Doc. 29-2 at 139).

Despite the strong language used in his signed report, the information contained therein has turned out to be less than correct. Among other things, Sierra was only struck once, and only in the abdomen – not the head as Beck's report indicated. (App. 361-62; R. Doc. 29-5 at 31-32). Beck's testimony has changed based on review of the surveillance video, and he has indicated that the initial discharge report stating Sierra first went after Lagud is incorrect. (Add. 18; App.

170-71; R. Doc. 29-2 at 109-110). He has acknowledged the complainant in fact did not call Sierra a pit bull. (App. 188-89; R. Doc. 29-2 at 127-28). He has acknowledged Daniels did not insist it was Buschmann and Morrison fighting. (App. 200-01; R. Doc. 29-2 at 139-140). Moreover, Beck has admitted the video tells a story that is different than his recollection of the event. (Add. 19-20; App. 208-09; R. Doc. 29-2 at 147-48). The reality of what happened is that Sierra was running away and trying to escape; she was not going for Lagud. (Add. 20; App. 207-08; R. Doc. 29-2 at 146-47).

However, despite numerous errors and inconsistencies in his report, at no time after viewing the surveillance video in the days following the incident did Beck amend or supplement his report. (App. 165-66; R. Doc. 29-2 at 104-05). Due to Beck's carelessness in reviewing and writing the report, he was apparently placed on administrative duty. (App. 170; R. Doc. 29-2 at 106).

### **III. Two Different Reactions**

The other officer on the scene, Jeffrey Lagud, had been an officer with KCPD for approximately twenty-six years at the time of the shooting. (App. 252; R. Doc. 29-4 at 11). He has never discharged his

firearm in the line of duty. (App. 241; R. Doc. 29-3 at 2). He has also never had to use force against an aggressive dog despite encountering them. (Add. 21-22; App. 271-72; R. Doc. 29-4 at 30-1). He and Beck had known each other for Beck's entire career, and Lagud trained Beck on DUI at the academy. (App. 127-28; R. Doc. 29-2 at 66).

Beck has full faith and trust in Lagud's ability to protect himself and to protect his fellow officers. (App. 144; R. Doc. 29-2 at 83). This included believing Lagud would use the TASER to protect Beck should the need arise on this call. (App. 121; R. Doc. 29-2 at 60). However, Lagud did not personally prepare to use lethal force, instead opting for the non-lethal option. (App. 266; R. Doc. 29-4 at 25). When Sierra came out of the home however, Lagud barely moved, and he visually appeared to be unafraid of her. (Add. 23; App. 430; R. Doc. 31-5).

He did not raise his TASER at any point, nor did he deploy any other weapon. (App. 430; R. Doc. 31-5). He cannot articulate why he did not raise or aim his TASER at Sierra once she was out the door in his line of sight or after Beck took the first shot and she turned toward the house. (App. 274; R. Doc. 29-4 at 33). Lagud claims that he believed he

was in danger despite taking no action whatsoever. (App. 276; R. Doc. 29-4 at 35).

Despite Beck's original written statement indicating Sierra went for Lagud first, Beck's current testimony is that she instead attacked him first, then disengaged him and approached Lagud. (App. 143-44; R. Doc. 29-2 at 88-9). At that point, Beck was no longer in danger, by his own admission. (App. 144; R. Doc. 29-2 at 83). Now, he claims he was protecting Lagud, which is why he fired the second shot at a fleeing dog. (App. 145; R. Doc. 29-2 at 84). However, Beck admitted that he always shoots twice per his training, and that he did so despite Lagud not deploying his weapon. (App. 144-45; R. Doc. 29-2 at 83-4). Moreover, Beck rarely deploys his TASER in favor of his firearm. (App. 101; R. Doc. 29-2 at 40). Finally, despite Beck's professed confidence in Lagud's abilities to defend himself and others, and the comfort he had with Lagud's use of the TASER, he still opted to shoot Sierra, believing Lagud could not manage to hit her despite being only feet from her. (App. 146; R. Doc. 29-2 at 85).

#### **IV. Procedural History**

The district court granted qualified immunity to Beck and Lagud and Defendants' motion for summary judgment on all counts. (App. 463-476; R. Doc. 34 at 1-14). Appellants appealed the district court's ruling on the qualified immunity as to Beck and the dismissal of the claim against KCPD.

### Summary of the Argument

In deciding the qualified immunity issues as to Beck (and by extension KCPD), the district court erred by: (1) Disregarding genuine issues of material fact relevant to the qualified immunity analysis and accepting as true the officers' subjective version of events despite substantial evidence to the contrary; (2) Incorrectly found Beck's actions to be those of a reasonable officer in the circumstances; and (3) Incorrectly granted KCPD's motion for summary judgment having not found an individual violation.

Officer Beck is not entitled to qualified immunity for shooting Sierra, as his actions deviated from those of a reasonable officer with the same information in those circumstances. In particular, Officer Lagud provides an excellent "reasonable officer" comparator to Beck and shows the two very different approaches taken to this call. Despite

the direct notice of a non-dangerous dog on the property, Beck only prepared to use fatal force while Lagud prepared non-lethal tools. The totality of his actions – from pre-aiming at the door to shooting a fleeing dog under the auspices of protecting his partner – show this was not an objectively reasonable decision, and as such he should not have received qualified immunity at the summary judgment stage.

### Argument

#### **I. Standard of Review**

This Court reviews issues of qualified immunity de novo. *Lambert v. City of Dumas*, 187 F.3d 931, 935 (8<sup>th</sup> Cir. 1999). The entry of summary judgment is also reviewed de novo with every inference from the evidence going to the nonmovant. *Yowell v. Combs*, 89 F.3d 542, 544 (8<sup>th</sup> Cir. 2021). If there are genuine disputes of predicate facts related to the qualified immunity issue, then summary judgment is not appropriate. *Lambert* at 935.

#### **II. The District Court Erred in Granting Beck Qualified Immunity at the Summary Judgment Stage**

The District Court properly recognized that dogs are property under the Fourth Amendment and that killing one amounts to a seizure. (App. 470; R. Doc. 34 at 8). Thus, the only questions before this

Court are whether the district court improperly resolved inferences and disputes of fact in favor of Beck, and whether Beck's actions are those of a reasonable officer in the circumstances.

A. The District Court Improperly Resolved Inferences in Favor of Movant

At the summary judgment stage, the Court's responsibility is to determine if there are any triable issues of material fact. *Carrington v. City of Des Moines, Iowa*, 527 F.3d 711, 719 (8<sup>th</sup> Cir. 2008). A genuine issue of fact exists "if it has a real basis in the record." *Hartnagel v. Norman*, 953 F.2d 394, 395 (8<sup>th</sup> Cir. 1992) (internal citations omitted). The substantive law determines the materiality of the facts, but any fact that may affect the outcome of the case will preclude summary judgment if that fact is disputed. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). In resolving the summary judgment, the court is to give the non-moving party the benefit of all reasonable inferences, which merely means inferences that can be drawn without resorting to speculation.

In its order granting the motion for summary judgment (App. 471-72; R. Doc. 34 at 9-10), the district court outlines a litany of "undisputed evidence" that shows the objective reasonableness of Beck's actions. In



doing so, the Court expressly accepted the facts and evidence proffered by the officers and disregarded Appellants' contrary facts and evidence that throw into question the reasonableness of Beck's actions. In particular, the court specifically accepted Beck and Lagud's assertions they believed they were in danger, and that Beck's assessment of Lagud's abilities with the TASER were reasonable. (App. 471-72; R. Doc. 34 at 9-10).

The evidence offered by Buschmann and Morrison at summary judgment, and supported herein by the record, shows substantial disputes of facts that ultimately bear on the predicate facts, namely whether officer Beck's actions were reasonable. However, because those inferences were resolved in his favor and the facts favorable to the movant accepted as true, the district court erred and the cause should be reversed and remanded.

**B. Beck's Actions Were Not Those of a Reasonable Officer in the Circumstances**

The qualified immunity analysis largely hinges on determining whether an action is objectively legally reasonable based upon the clearly established law at the time of the act. *Anderson v. Creighton*,

483 U.S. 635, 641 (1987). This mythical “reasonable police officer” is analyzed based on the facts available to the officer at the time and the circumstances of the situation. *Gladden v. Richbourg*, 759 F.3d 960, 964 (8th Cir. 2014).

The law in this circuit – and in most of the other circuits – is clear: an officer must have an objectively legitimate and imminent threat to himself or others before using lethal force against a dog. *Lemay v. Mays*, 18 F.4th 283, 288 (8th Cir. 2021). If the dog does not pose an imminent danger and the owners are available and want to regain custody, the officer cannot kill the dog. *Id.* If the pet is not an immediate danger and where non-lethal methods of handling the encounter could have been used, an officer who shoots and kills a dog has committed a warrantless – and therefore unreasonable – seizure. *Id.* at 283. This Court has made it abundantly clear: “An officer cannot lawfully destroy a pet who does not pose an objectively legitimate and imminent danger to him or others.” *Id.* at 288 (internal citations omitted) (emphasis added). Doing so is a warrantless seizure, which is *per se* unreasonable. *U.S. v. Place*, 462 U.S. 696, 701 (1983).

Here, the district court incorrectly determined that, because Beck and Lagud testified they believed they were in danger, Beck was entitled to qualified immunity as a reasonable officer in the circumstances. However, as the record shows, there is myriad evidence – including Beck and Lagud’s own testimony – that casts doubt on the reasonability of his actions. Assuming, *arguendo*, the first shot was justified, the uncontroverted testimony and evidence shows the second fatal shot came while Sierra was running away and no longer posing a danger to either officer.

Although the district court listed numerous factors that led it to determine Beck’s actions were those of a reasonable officer, it missed two very important points: first, that the threat must be **objectively legitimate and immediate**. Here, Beck was warned by the calling party that Sierra was on the property but would not attack; he pre-aimed at the door where Sierra would emerge; Buschmann was immediately behind Sierra coming out the door and could have gained control of Sierra; and he instinctively fired two shots – per his training – despite the fact Sierra was running back toward the house.

Second, the court's opinion creates an odd conundrum: if Beck's actions were those of a reasonable officer under the circumstances, what does that make Lagud's actions? While Beck prepared to use lethal force, Lagud did not; Beck prepared to fire before Sierra made it out the door, while Lagud never raised his TASER or attempted to get out of the way even when Sierra approached. The corollary of the proposition is that Lagud's actions were either unreasonable, or that there is no singular "reasonable officer" in these circumstances. Here, two officers on the same call took two entirely different approaches to a dog they knew they were likely to encounter. One officer never deployed his non-lethal weapon while the other fired a fatal shot at a fleeing dog. Both officers' actions cannot simultaneously be considered those of a reasonable officer under the circumstances, nor can Lagud's actions be seen as unreasonable when he exercised restraint.

Ostensibly, there is substantial evidence that either directly contradicts Beck's assertion that he feared for his and Lagud's safety and was therefore justified in shooting Sierra, or that makes the reasonableness of his seizure doubtful.

The district court erred by finding officer Beck acted as a reasonable officer under the circumstances with all the information he had, particularly considering his partner engaging in the exact opposite behaviors. For these reasons, Buschmann and Morrison respectfully request this Court reverse and remand.

### **III. The District Court Erred in Granting KCPD Summary Judgment**

Appellants do not take issue with the legal analysis by the district court in terms of its assertion that individual liability must attach before municipal liability may. (App. 181; R. Doc. 34 at 13) (quoting *Moore v. City of Deslodge, Mo.*, 647 F.3d 841, 849 (8<sup>th</sup> Cir. 2011)). However, if this Court determines the district court incorrectly granted qualified immunity and judgment to Beck, Appellants respectfully request the court also reverse and remand the dismissal as to KCPD.

### **Conclusion**

For the foregoing reasons, Appellants Buschmann and Morrison respectfully request this Court reverse the district court's grant of qualified immunity to Beck and reverse the grant of summary judgment as to KCPD.

Respectfully submitted,

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Respectfully submitted,

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