

THE LOCAL GOVERNMENT LIABILITY BEAT



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Deadly Force: Man With Knife Shot By Police

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On April 3, 2019, the Fifth Circuit Court of Appeals decided the *Estate of Shepherd v. City of Shreveport*,¹ in which the court examined whether an officer acted reasonably under the Fourth Amendment when he shot and killed a man with a knife. The relevant facts of Shepherd, taken directly from the case, are as follows:

On October 15, 2013, Corporal Tucker was dispatched to Mr. Shepherd's home to assist the Shreveport Fire Department with a 911 call. Corporal Tucker was informed by dispatch that there was a potentially violent male who had possibly suffered a stroke and who the female caller feared might hurt her. While Corporal Tucker was en route, firefighters entered Mr. Shepherd's home, encountered Mr. Shepherd with a knife in his hand, and fled the home. Mr. Shepherd followed them out into the yard but stopped at the sidewalk. The knife was later determined to be eight inches long with a four-inch blade. Dispatch updated Corporal Tucker that the subject was armed with a knife and directed that he expedite. During this time, a neighbor called 911 to erroneously report that shots had been fired, and dispatch then notified Corporal Tucker that there were reports of shots fired in the area.

Shortly after receiving the report of possible shots fired, Corporal Tucker arrived at Mr. Shepherd's home. He was the first police officer at the scene and the dash-mounted camera in his patrol car captured much of what followed in the next two minutes. Corporal Tucker retrieved his



shotgun and approached the firetruck around which the firefighters had gathered. At that time, Mr. Shepherd was standing in the yard with a knife in his hand, positioned between the firetruck and the house. The firefighters identified Mr. Shepherd as the person with a knife and informed Corporal Tucker there was at least one person—the female caller—inside the home.

Corporal Tucker made multiple commands for Mr. Shepherd to “get down” and “lay down.” Mr. Shepherd did not comply with those commands. During the entire encounter, Mr. Shepherd did not directly engage in dialogue with Corporal Tucker, but he cursed aloud at multiple times, stating “f-k you.” After approximately thirty seconds of ignoring commands to get down in the yard, Mr. Shepherd began moving back towards the residence—where the female caller was believed to be—and Corporal Tucker commanded him to “come to me now.” That was the only time during the encounter that Corporal Tucker directed Mr. Shepherd to move towards him. Mr. Shepherd did not comply with that command and walked into the residence’s garage.

Mr. Shepherd was in the garage for approximately a minute. During that time, Corporal Tucker proceeded partially up the driveway to keep a visual on Mr. Shepherd and gave him multiple commands to put his hands up. Mr. Shepherd disregarded those commands as well. Mr. Shepherd then exited the garage and began moving down the inclined driveway towards Corporal Tucker. At approximately 19:53:45 on the videotape captured by the patrol car’s dash-mounted camera, Corporal Tucker can be seen backing down the driveway’s incline. At approximately 19:53:49, Mr. Shepherd comes into the videoframe and can be seen moving down the driveway towards Corporal Tucker. At the same time, Corporal Tucker can be heard commanding Mr. Shepherd to “get back.” However, Mr. Shepherd continued to move towards Corporal Tucker at a relatively quick speed, while Corporal Tucker continued to move backwards.

The parties dispute whether Mr. Shepherd had the knife raised over his head or at his side at this point. The parties also dispute whether Mr. Shepherd was accelerating or “stumbling” toward Corporal Tucker. On appeal, the appellant also alleges that there is a dispute over whether Mr. Shepherd and Corporal Tucker were ten feet or ten yards apart. But what is undisputed is that Mr. Shepherd continued to move towards Corporal Tucker with a knife in his hand, disregarded a command to get back, and Corporal Tucker shot him once with his shotgun at approximately 19:53:51 on the videotape. Mr. Shepherd died from the injury. He was fifty years old at the time.ⁱⁱ

Shepherd’s mother filed suit on behalf of his estate against the city and the officer for excessive force under the Fourth Amendment and Louisiana state law. The district court granted summary judgment on behalf of city and the officer and dismissed the case because it held that the officer did not violate the Fourth Amendment. Shepherd appealed the grant of summary judgment and qualified immunity to the Fifth Circuit Court of Appeals. [Note: Only the Fourth Amendment claims will be discussed in this article.]

The court of appeals first discussed the relevant legal principles considered by the Fifth Circuit. The court stated:

To prevail on a Section 1983 excessive force claim, “a plaintiff must establish: (1) injury (2) which resulted directly and only from a use of force that was clearly excessive, and (3) the excessiveness of which was clearly unreasonable.” *Harris v. Serpas*, 745 F.3d 767, 772 (5th Cir. 2014) (quoting *Ramirez v. Knoulton*, 542 F.3d 124, 128 (5th Cir. 2008)); see also *Graham v. Conner*, 490 U.S. 386, 393-97 (1989). In this circuit, “the excessive force inquiry is confined to whether the officer was in danger at the moment of the threat that resulted in the officer’s shooting. Therefore, any of the officers’ actions leading up to the shooting are not relevant[.]” *Harris*, 745 F.3d at 772 (internal quotation marks, citation, and alterations omitted). “Use of deadly force is not unreasonable when an officer would have reason to believe that the

suspect poses a threat of serious harm to the officer or others.” *Mace v. City of Palestine*, 333 F.3d 621, 624 (5th Cir. 2003).ⁱⁱⁱ [emphasis added]

The court then set out to examine Shepherd’s arguments against summary judgment for the officer on appeal. First, it is important to note that summary judgment is appropriate when there is no genuine dispute as to material facts and those facts show that the officer did not violate the Fourth Amendment. Thus, if Shepherd can establish a relevant dispute of fact, then summary judgment for the officer would not be appropriate.

Shepherd’s first argument on appeal was that her son (the decedent) was not eight to ten (8-10) feet from the officer when he was shot, but rather thirty (30) feet from the officer. Shepherd’s attorney argued that at one point the officer testified that he tried to maintain a ten (10) yard distance from the decedent. However, the officer and several witnesses further testified that the decedent was approximately ten (10) feet from the officer when the officer fired his weapon. Further, the officer’s patrol car’s dash camera showed the distance between the officer and the decedent was much closer to ten (10) feet than thirty (30) feet. In light of the dash camera video, the court of appeals held that there was no dispute to material fact on this argument.

Shepherd’s second argument on appeal was that there is a material dispute of fact as to whether the decedent was obeying the officer’s commands to leave the garage and stumbling when he was shot. The dash camera video does show, at one point when the decedent appeared to be going into the garage, the officer ordered him to “come to me now.” However, the moments immediately before he was shot, the dash camera video shows that the officer commanded the decedent to “get back.” The court noted that in the Fifth Circuit, they look at the facts immediately preceding the use of force. Additionally, the video showed that the decedent was “advancing down the driveway relatively quick” rather than stumbling, as Shepherd alleged.^{iv} The court of appeal thus held that there was no dispute to material fact on this argument.

Shepherd’s third argument was that the decedent did not pose a threat to the officer when he was shot because the knife was being held down by his side

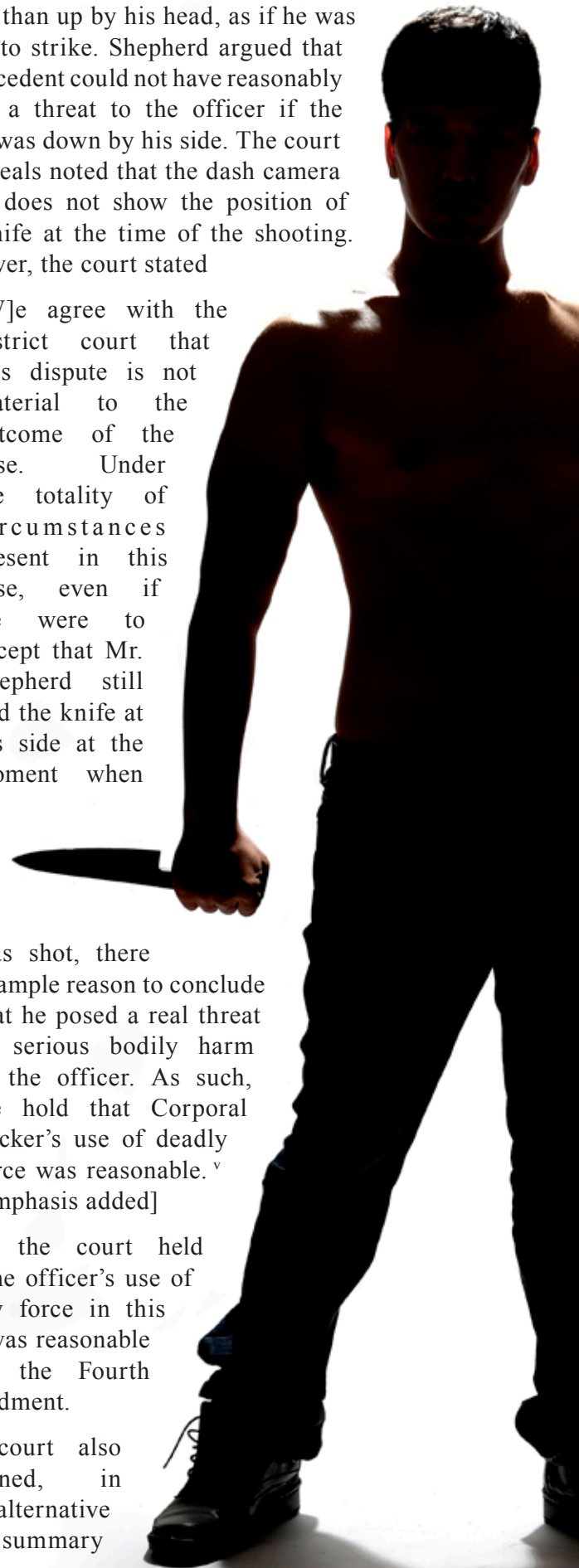
rather than up by his head, as if he was about to strike. Shepherd argued that the decedent could not have reasonably posed a threat to the officer if the knife was down by his side. The court of appeals noted that the dash camera video does not show the position of the knife at the time of the shooting. However, the court stated

[W]e agree with the district court that this dispute is not material to the outcome of the case. Under the totality of circumstances present in this case, even if we were to accept that Mr. Shepherd still had the knife at his side at the moment when

he was shot, there is ample reason to conclude that he posed a real threat of serious bodily harm to the officer. As such, we hold that Corporal Tucker’s use of deadly force was reasonable.^v [emphasis added]

Thus, the court held that the officer’s use of deadly force in this case was reasonable under the Fourth Amendment.

The court also examined, in the alternative to summary



judgment, whether qualified immunity was appropriate for the officer. The court of appeals first discussed qualified immunity and stated:

Qualified immunity protects officers from suit unless their conduct violates a clearly established constitutional right.” *Mace*, 333 F.3d at 623. For a right to be clearly established, “existing precedent must have placed the statutory or constitutional question beyond debate.” *Kisela v. Hughes*, 138 S. Ct. 1148, 1152 (2018) (quoting *White v. Pauly*, 137 S. Ct. 548, 551 (2017)). The Supreme Court has repeatedly told courts not to define clearly established rights “at a high level of generality.” *Mullenix v. Luna*, 136 S. Ct. 305, 308 (2015) (quotation marks and citation omitted). “The dispositive question is ‘whether the violative nature of particular conduct is clearly established.’ . . . Such specificity is especially important in the Fourth Amendment context[.]” *Id.* (quoting *Ashcroft v. al-Kidd*, 563 U.S. 731, 742 (2011)).^{vi} [emphasis added]

Shepherd argued that the Fourth Amendment right to be free from excessive force is clearly established. However, the court of appeals noted that that is precisely the type of “generality” discussed above that cannot “clearly establish” a legal right. Rather, the particular conduct committed by the officer must have been placed beyond debate as a violation of the constitution.

The court of appeals then examined relevant precedent and stated:

Caselaw at the time of the shooting (and at the time of this opinion) has not clearly established that it violates the Constitution for a police officer to shoot someone who is behaving erratically, advancing toward the police officer with a knife in his hand, and disregarding a command to get back. Indeed, caselaw supports the opposite conclusion. See, e.g., *Kisela*, 138 S. Ct. at 1150-55 (holding that it was not clearly established that an officer’s use of deadly force was excessive when used against someone who continued to approach a bystander after ignoring commands to drop a knife); *Elizondo v. Green*, 671 F.3d 506, 510 (5th Cir. 2012) (holding that an officer did not use excessive force when the individual “ignored repeated instructions to put down the knife, . . . [was] in close proximity to [the officer], and [was] moving closer”).^{vii} [emphasis added]

Thus, the court of appeals held that the officer, in the alternative, would be entitled to qualified immunity from suit in this case.

Therefore, the court of appeals affirmed the decision of the district court in favor of the officer and the city.

Citations

- i. No. 18-30528 (5th Cir. Decided April 3, 2019).
- ii. *Id.* at 1-3.
- iii. *Id.* at 5-6.
- iv. *Id.* at 7.
- v. *Id.* at 8.
- vi. *Id.* at 8-9.
- vii. *Id.* at 9.

Public Safety Defense Against Our Driving Culture

By Julie Hyer

Public safety drivers need to realize it is time for change. The National Highway Traffic Safety Administration (NHTSA), in their report titled *On the Road to a Healthier Future*, stated that death and injury from traffic crashes continue to be among the most serious public health problems facing our country. Motor vehicle injuries constitute 99% of non-fatal transportation injuries and 94% of transportation deaths. The statistics for 1996 alone offer a grim reality: there were over 6.8 million crashes, in which

over 41,000 were killed and another 3.5 million were injured. With yearly increases in travel and no improvement over our current safety performance, fatalities and injuries could increase by 50 percent by 2020.

Public safety drivers are not exempt from these statistics. A public safety driver’s risks increase when driving in emergency mode. The probability of having a collision greatly increases due to many factors, including their speed, increases in tunnel vision, not

slowing down enough to clear intersections, following too close, and distractions.

The Below 100 initiative to reduce line of duty deaths for law enforcement has five tenets.

- Wear Your Vest
- Wear Your Seatbelt
- Watch Your Speed
- WIN: Ask Yourself “What’s Important Now?”
- Remember, Complacency Kills

These are tenets to live by. Even though the Below 100 initiative was designed for law enforcement, fire and EMS personnel should follow the second through fifth tenets to increase their chances of survival. All public individuals are in high risk professions. Driving is one of our top serious injury or loss of life issues.

When our public safety individuals consider and put to use this “Five A” formula, they will increase the chances for preventing motor vehicle collisions.

Aim

- Look down the road at least 15 seconds.
- Reduce speed in poor weather conditions.
- Maintain safe following distance.
- Vehicle placement.
- Look down the road for hazards and potential hazards.

Anticipate

- Smooth steering in turns and accident avoidance – no jerking of the wheel.
- Anticipate the moves of nearby drivers.

- Slow down before entering intersections.
- Slow down or stop for hazards/potential hazards.

Alert

- Constantly scan changing traffic conditions.
- Avoid other drivers.
- Limit distractions while driving – cell phone, tag reader, and other devices.
- Scan the area before changing lanes

Avoid

- Always leave yourself an out
- Do not tailgate
- Safe passing – space, visibility, and distance
- Spatial awareness

Awareness

- Make sure other drivers see you - make eye contact
- Do not hang out in blind spots
- Constant awareness of your surroundings
- Constant awareness of who is around you

There is a high probability that a public safety individual will encounter a situation where there exists the potential for loss of life or severe bodily injury when they are driving in emergency mode. Any driver who follows the Five A formula would make themselves and everyone else safer.

Consider this . . . as the driver, you choose how you will operate a vehicle. Drive safe, and go home at the end of your shift.





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This Issue . . .

Use of Force Defensive Driving

