No. 13-14393-E

IN THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

COLIN A. EDWARDS,

Plaintiff-Appellant,

v.

BRYAN C. SHANLEY and JUSTIN E. LOVETT,

Defendants-Appellees.

On Appeal from the United States District Court
for the Middle District of Florida, Orlando Division
Case No. 6:10-cv-554-GKS-DAB, Hon. G. Kendall Sharp

REPLY BRIEF

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I. THE OFFICERS CANNOT AVOID THE REQUIREMENTS OF THE MANDATE RULE AND RULE 50

Contrary to the Officers' contentions, this Court must reverse the judgment as a matter of law in favor of Officer Lovett due to the mandate rule and Rule 50.

A. The Mandate Rule Controls Despite The Officers' Mistaken Contention That The Trial Evidence Was New And Substantially Different

Despite the Officers' mistaken contention that the trial evidence was new and substantially different (Officers Br. at 12-13), the mandate rule controls.

As an initial matter, the Officers contend that the first appeal "only impliedly ruled upon" Officer Lovett's failure to intervene because "this specific issue was never presented for consideration." Officers Br. at 12. This argument is mistaken in every respect.

In the first appeal, the appellant's brief's statement of the issues provided that one issue was "Whether the District Court erred in finding that Defendant, Justin Lovett, was entitled to qualified immunity?" Appellant's Br. at 1, *Edwards* v. *Shanley*, No. 11-11512-DD (11th Cir.). Resolving this issue, the first appeal expressly ruled that Officer Lovett

was "no more entitled to qualified immunity than Officer Shanley" because "Officer Lovett was present for the entire attack" and "made no effort to intervene and stop the ongoing constitutional violation." *Edwards* v. *Shanley*, 666 F.3d 1289, 1298 (11th Cir. 2012). Moreover, even if the Officers' argument were factually correct, it legally misses the mark altogether because it does not matter whether a prior appeal expressly or impliedly resolved an issue; either way, the mandate rule still "preclude[s] courts from revisiting issues that were decided explicitly or by necessary implication in a prior appeal." *Schiavo ex rel. Schindler* v. *Schiavo*, 403 F.3d 1289, 1291 (11th Cir. 2005).

Shifting gears, the Officers contend more specifically that in the first appeal, the "record evidence as it related to Lovett and whether he was in a position to intervene was nonexistent." Officers Br. at 13. This too is factually incorrect. Edwards testified at deposition that during the bite, Officer Lovett and Officer Shanley were near him:

> Q. That's fine. Do you recall how many officers were around you while the dog was biting you?
>
> A. There was two.

Doc. 29.1 at 45:10-12.

But all these mistaken factual and legal contentions are just prelude to the Officers' central contention (Officers Br. at 12-13) that the trial evidence was new and substantially different. The Officers, however, identify only one new fact (which Edwards had already identified in his appellant's brief at pages 24-25): at trial, it emerged that Officer Lovett did not know K-9 Rosco's German commands. (Docs. 93 at 170, 90 at 65.) That, however, is a straw man argument in this appeal. Edwards has never contended that Officer Lovett knew or should have given the German release command. Rather, Edwards contends Officer Lovett should have either asked Officer Shanley to command K-9 Rosco to release the bite or offered to handcuff Edwards himself. Indeed, as this Court can judge for itself, the trial evidence was not new or substantially different: both at summary judgment and at trial, Edwards testified that (1) he did not fight K-9 Rosco (*compare* Doc. 29.1 at 47:19-21, *with* Doc. 93 at 107), (2) the bite lasted 5-7 minutes (*compare* Doc. 29.1 at 47:11-15, *with* Doc. 93 at 145), (3) Officer Lovett was present the entire time in the nearby vicinity (*compare* Doc. 29.1 at 45:10-20, *with*

Doc. 93 at 113-14), and (4) Officer Lovett made no effort to intervene[1] (*compare* Doc. 29.1 at 46:15-47:8, *with* Doc. 93 at 113-14).

The analysis is simple. The mandate commanded that Officer Lovett would be liable for failing to intervene if a jury determined he was present for a 5-7 minute attack and made no effort to intervene or stop it. By taking this issue away from the jury, the District Court disobeyed the mandate. This Court must therefore reverse.

B. The Officers' Defense Of The District Court's Application Of Rule 50 Is Incorrect

As an initial matter, the Officers do not even attempt to defend the District Court's credibility determination about the first testimonial conflict (whether Edwards fought with K-9 Rosco or did not resist) that "[t]he physical evidence [as interpreted by Prof. Mesloh] and the testimonies of both Shanley and Lovett show that Edwards did not comply with any verbal commands, but instead struggled with Rosco." (Doc. 85 at 9.) Instead, the Officers parrot the District Court's credibility determination about the second testimonial conflict (whether K-9 Rosco bit

[1] The mandate required Officer Lovett to make some "effort to intervene." *Edwards*, 666 F.3d at 1298. Even if Officer Lovett's hypothetical effort to curtail the bite would have been ignored, it is the "effort" that would terminate Officer Lovett's liability, not its ultimate efficacy.

Edwards for a short duration, 5-7 minutes, or something in between) that Officer Shanley would not order K-9 Rosco to release the bite until Edwards was handcuffed. Officers Br. at 11. But as Edwards explained, implicit in the District Court's faulty syllogism was the credibility determination that the Officers handcuffed Edwards immediately after a bite of short duration during which he was struggling. *See* Edwards Br. at 30-32. That faulty syllogism improperly disbelieved Edwards's and Dr. Gupta's contrary testimonies, which thereby renders the Officers' Rule 50 argument incorrect.

C. The Jury Verdict Does Not Render Moot Edwards's Mandate-Rule And Rule 50 Arguments

The Officers contend Edwards's mandate-rule and Rule 50 arguments are moot because the jury verdict "specifically and unequivocally rejected" Edwards's "claim that he suffered a constitutional injury." Officers Br. at 7. For this reason, the Officers contend, Edwards's failure-to-intervene claim cannot prevail where his police brutality claim did not. Officers Br. at 6-9. Again, this argument is factually and legally incorrect.

The Officers misread the jury verdict (Doc. 79), ignore the jury instructions (Doc. 80), disregard the requirement that district courts must

harmonize inconsistent verdicts, and fail to distinguish *Williams* v. *Slade*, 431 F.2d 605 (5th Cir. 1970).[2] If the Officers really wanted to take the position they now take in this Court, they needed to propound a specific verdict form with special jury interrogatories in the District Court instead of acquiescing to a general verdict form without any special jury interrogatories.

The jointly proposed jury instructions required the jury to determine Edwards's § 1983 claim by considering three elements:

> First: That the Defendant intentionally committed acts that violated the Plaintiff's federal constitutional right not to be subjected to excessive force during the arrest;
>
> Second: That in so doing the Defendant acted "under color" of state law; and
>
> Third: That the Defendant's acts were the proximate or legal cause of damages sustained by the Plaintiff.

(Doc. 80 at 19 (punctuation omitted); *see also* Doc. 61 at 21.)[3] The verdict form, in turn, did not ask the jury to determine each of these elements specifically, but rather asked the jury to determine generally

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[2] In *Bonner* v. *City of Prichard*, this Court adopted as binding precedent all decisions of the former Fifth Circuit handed down by close of business on September 30, 1981. 661 F.2d 1206, 1209 (11th Cir. 1981) (en banc).

[3] The parties stipulated to the second element (Doc. 80 at 19), so the jury had to determine only the first and third elements.

whether "the Defendant, Bryan C. Shanley, intentionally committed acts which violated the federal constitutional rights of Plaintiff, Colin A. Edwards, not to be subject to excessive and unreasonable force during an arrest." (Doc. 79 at 1.)

As such, the Officers are factually incorrect when they contend the jury "specifically and unequivocally rejected" Edwards's "claim that he suffered a constitutional injury." Officers Br. at 7. The jury could have determined that Officer Shanley did not "intentionally" commit the acts, or that Officer Shanley's acts were not the "proximate or legal cause of damages." (Doc. 80 at 19.) And such determinations would not necessarily undercut Edwards's failure-to-intervene claim against Officer Lovett because district courts "must make all reasonable efforts to reconcile an inconsistent jury verdict." *Burger King Corp.* v. *Mason*, 710 F.2d 1480, 1489 (11th Cir. 1983).

To make this point in more concrete terms, suppose the jury had rendered a defense verdict for Officer Shanley and a plaintiff verdict for Officer Lovett. The District Court could have easily reconciled those verdicts, in light of the jury instructions and verdict form, by concluding that Officer Lovett did not intentionally commit his acts or cause the

damages whereas Officer Shanley did. For example, perhaps the jury could have concluded that it was a lengthy bite of a compliant suspect (i.e., a constitutional injury), but the jury nevertheless determined Officer Shanley's perspective in the woods was obstructed and made it look like Edwards was struggling with K-9 Rosco, whereas the jury found Officer Lovett's perspective was unimpeded and made it clear that Edwards was compliant. Given that state of affairs, the jury could reasonably absolve Officer Shanley of responsibility for Edwards's injuries while holding Officer Lovett accountable. Per *Burger King*, the District Court would then be required to uphold both verdicts. *Cf. Rodriguez* v. *City of New York*, 2012 U.S. Dist. LEXIS 66548, 13 (S.D.N.Y. May 10, 2012) (harmonizing plaintiff battery verdict with defense failure-to-intervene verdict).

If the Officers really wanted to contend the jury rejected Edwards's claim of constitutional injury (i.e., a lengthy bite of a compliant suspect), it needed to propound a special verdict form with special jury interrogatories that inquired more specifically about what happened: for example, how long was the bite, was Edwards struggling, and what did the Officers perceive? Absent that information, this Court cannot

know precisely what the jury "specifically and unequivocally" (Officers Br. at 7) determined. Instead, all this Court knows for sure is that the jury followed its instructions and determined that Officer Shanley was not liable. It is principally for that reason that the Officers misplace their reliance (Officers Br. at 7-9) on *City of Los Angeles* v. *Heller*, 475 U.S. 796, 106 S. Ct. 1571 (1986), *Cook* v. *Tadros*, 312 F.3d 386 (8th Cir. 2002), and *Sanders* v. *City of Union Springs*, 207 Fed. App'x 960 (11th Cir. 2006).[4]

Heller stands for the sole proposition that a municipality cannot be liable if its officers are not. 475 U.S. at 799, 106 S. Ct. at 1573 (the municipality was "sued only because [it was] thought legally responsible for [the officer's] actions; if the [officer] inflicted no constitutional injury on [the plaintiff], it is inconceivable that [the municipality] could be liable"). But it does not stand for the proposition that one officer cannot be liable if another officer is not. (And as explained above, such a proposition would be inconsistent with the requirement that district courts harmonize inconsistent verdicts in any event.)

[4] Unpublished Eleventh Circuit opinions are "not binding precedent." *Bravo* v. *United States*, 532 F.3d 1154, 1164 n.5 (11th Cir. 2008).

Cook, in turn, stands for the sole proposition that "[i]n the absence of a [constitutional] violation, there is no actionable conspiracy claim." 312 F.3d at 388. The Officers' efforts to analogize that holding to this case are unavailing. *Cook* involved one defendant, not two, and the parasitic relationship between conspiracy claims and constitutional claims, *Koch* v. *Royal Wine Merchs., Ltd.*, 907 F. Supp. 2d 1332, 1346 (S.D. Fla. 2012) ("Unlike a criminal conspiracy, which is an offense in itself, a civil conspiracy is not a separate or independent tort but is a vehicle for imputing the tortious actions of one co-conspirator to another." (citation and punctuation omitted)), is unlike the independent relationship between police brutality and failure-to-intervene claims. Accordingly, *Cook* had no choice but to conclude that if one defendant did not commit a constitutional violation, he could not also have committed a conspiracy violation. But this case has no such procedural hurdle. Indeed, it bears mention once again that the District Court would have had to harmonize inconsistent verdicts between Officer Shanley and Officer Lovett.

And *Sanders* does not mend this disconnect between civil conspiracy liability and failure-to-intervene liability for several reasons. Aside

from the fact it is unpublished, it is distinguishable. There, the plaintiffs claimed a police chief failed to intervene in his officer's high-speed car chase. 207 Fed. App'x at 965-66. This Court held "given that the plaintiffs are unable to establish [the officer committed] a constitutional violation, their claim for failure to intervene must fail." *Id.* at 966. The difference between *Sanders* and this case is that there was no possibility that the police chief knew more about the chase's circumstances than the officer. Rather, the police chief "heard about the chase through dispatch" and "drove towards the chase keeping in touch through dispatch," but "due to radio defects, he was unable to contact Officer Johnson directly and had trouble hearing his transmissions." *Id.* at 962. For that reason, it would have been impossible to reconcile inconsistent verdicts between the police chief and the officer, and this Court properly affirmed the grant of summary judgment. *Id.* at 966. Here, however, the jury could have determined that Officer Lovett had a clear view of the bite while Officer Shanley did not.

Finally, the Officers do not even attempt to distinguish *Williams*, which held plenary new trials are required when reversing the partial grant of judgment as a matter of law "as to one defendant and not as to

the other" whenever "the decision on the other issues could in any way have been infected by the error." 431 F.2d at 608. Critically, in *Williams*, the district court granted a directed verdict to one defendant, and the jury rendered a defense verdict for the other. *Id.* at 606, 608. Nevertheless, this Court reversed and ordered a plenary retrial as to both defendants on remand. *Id.* at 610.

As Edwards already explained (Edwards Br. at 34-36), *Williams* illustrates how the partial grant of judgment as a matter of law to Office Lovett could have infected the jury's resolution of the remaining claim against Officer Shanley. Moreover, "injustice would result" from a partial retrial because the interrelatedness of the police tactics required the jury "tak[e] into its vista the acts and omissions of both" Officers to give the jury a "binocular rather than a monocular view" of the bite so the jury can comprehensively assess § 1983 liability. *Williams*, 431 F.2d at 608-09. Accordingly, on remand both Officers must face a plenary retrial. (And this is yet another reason to distinguish *Cook*, which concluded there was "no evidence that the district court's dismissal of Cook's conspiracy claim created any adverse inference with regard to Cook's First Amendment claim." 312 F.3d at 389.)

II. MR. BERMAN'S OPINION WAS NEITHER CUMULATIVE NOR LACKING IN SPECIFICITY, AND ITS EXCLUSION CAUSED A SUBSTANTIAL PREJUDICIAL EFFECT

The Officers argue (Officers Br. at 17) the District Court properly excluded Mr. Berman's opinion as cumulative and lacking specificity. Both arguments are incorrect. And the Officers do not contest that the exclusion of his opinion caused a substantial prejudicial effect.

The Officers parrot the District Court's conclusion that Mr. Berman's opinion was cumulative. But this position is not factually defensible. Edwards testified at deposition that the bite lasted 5-7 minutes, and Dr. Gupta did not testify about the number of bites or their duration, whereas Mr. Berman opined at deposition that the bite was a prolonged attack that "did not happen in 60 seconds," "probably didn't happen in 90 seconds," and involved "four to seven [bites], possibly even more." (Doc. 51-1 at 27:9-10, 42:4-6, 25:4-13.) Edwards, Dr. Gupta, and Mr. Berman were not saying the same things; ergo, Mr. Berman's testimony was unique, not cumulative.

Like the District Court, the Officers also challenge Mr. Berman's specificity by mischaracterizing his testimony as offering to opine only that the bite was a "prolonged attack." Officers Br. at 16. Once again,

that simply is not what Mr. Berman said. Rather, Mr. Berman would have opined that the bite was a prolonged attack that "did not happen in 60 seconds," "probably didn't happen in 90 seconds," and involved "four to seven [bites], possibly even more." (Doc. 51-1 at 27:9-10, 42:4-6, 25:4-13.) That is quite specific.

Finally, the Officers do not contest that Mr. Berman's exclusion caused a substantial prejudicial effect to Edwards. *See* Edwards Br. at 41-42. This prejudicial effect is apparent, because Prof. Mesloh was able to testify that a 5-7 minute bite would sever Edwards's limb (Doc. 90 at 98-99), whereas Mr. Berman was unable to testify that Edwards's perception of the duration and extent of the bite had evidentiary support. This asymmetric expert testimony led to an unfair trial on an unequal playing field such that the "error 'probably had a substantial influence on the jury's verdict.'" *Proctor* v. *Fluor Enters.*, 494 F.3d 1337, 1352 (11th Cir. 2007) (ordering new trial). The Court should vacate the judgment for this reason as well.

CONCLUSION

For the foregoing reasons, the Court should vacate the judgment and remand for further proceedings.

March 27, 2014

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

1. This brief complies with Federal Rule of Appellate Procedure 32(a)(7)(B)'s type-volume requirement. As determined by Microsoft Word 2010's word-count function, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii) and 11th Circuit Rule 32-4, this brief contains 2,815 words.

2. This brief further complies with Federal Rule of Appellate Procedure 32(a)(5)'s typeface requirements and with Federal Rule of Appellate Procedure 32(a)(6)'s type-style requirements. Its text has been prepared in a proportionally spaced serif typeface in roman style using Microsoft Word 2010's 14-point Century font.

March 27, 2014

/s/ Thomas Burns
Thomas A. Burns

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I filed the original and six copies of the foregoing brief with the Clerk of Court via CM/ECF and regular mail on this 27th day of March, 2014, to:

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I FURTHER CERTIFY that I served a true and correct copy of the foregoing brief via CM/ECF and regular mail on this 27th day of March, 2014, to:

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