No.

IN THE

Supreme Court of the United States

TIMOTHY SCOTT, A COWETA COUNTY, GEORGIA, DEPUTY SHERIFF, PETITIONER

v.

VICTOR HARRIS

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether a law enforcement officer's conduct is "objectively reasonable" under the Fourth Amendment when the officer makes a split-second decision to terminate a high-speed pursuit by bumping the fleeing suspect's vehicle with his push bumper, because the suspect had demonstrated that he would continue to drive in a reckless and dangerous manner that put the lives of innocent persons at serious risk of death.

2. Whether, at the time of the incident, the law was "clearly established" when neither this Court nor any circuit court, including the Eleventh Circuit, had ruled the Fourth Amendment is violated when a law enforcement officer uses deadly force to protect the lives of innocent persons from the risk of dangerous and reckless vehicular flight.

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PETITION FOR WRIT OF CERTIORARI

Petitioner Timothy Scott, a Coweta County, Georgia, deputy sheriff, respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit.

OPINIONS BELOW

The opinion of the Court of Appeals is reported as *Harris v. Coweta County*, 433 F.3d 807 (2005), *vacating* 406 F.3d 1307 (2005). It is reproduced in the Appendix at 1a-29a. The opinion of the District Court is unreported and reproduced in the Appendix at 30a-58a.

JURISDICTION

On December 23, 2005, the Eleventh Circuit entered judgment. Deputy Scott filed a timely petition for rehearing *en banc* on January 11, 2006. The Eleventh Circuit entered an order denying the petition on February 17, 2006. Appendix at 59a. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

RELEVANT PROVISIONS INVOLVED

Respondent Victor Harris seeks damages for an alleged violation of his Fourth Amendment rights pursuant to 42 U.S.C. § 1983. The Fourth Amendment to the United States Constitution provides that "[t]he right of people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated . . . ."

STATEMENT

This is a case of **first** impression for this Court involving the application of *Tennessee v. Garner*, 471 U.S. 1 (1985) to the force used to terminate the serious risk of death posed by a high-speed pursuit. Based on the reasoning of the Eleventh Circuit, law enforcement officers have **no** discretion under the Fourth Amendment to pursue and seize reckless and dangerous drivers, even where there are felonious violations of traffic laws.

In essence, the Eleventh Circuit's decision prohibits the use of force to terminate the serious risk posed of death posed by a reckless and dangerous

driver. Thus, law enforcement officers are forced into the untenable position of waiting until a fleeing suspect engaged in reckless and dangerous driving, i.e. violating state traffic laws, actually maims or kills an innocent bystander before initiating a seizure. As addressed below, this result defies Supreme Court precedent and creates a split in the circuits.

Moreover, given that **every** high-speed pursuit involves violations of state traffic law, the Eleventh Circuit decision has far reaching public policy implications that cries out for review by this Court. If left unreviewed, the Eleventh Circuit's decision will have a chilling effect on seizures of **all** fleeing suspects across the nation, not only in Alabama, Florida, and Georgia.

1. High-Speed Pursuit Giving Rise To Case

As the pursuit was captured on videotape[1], there are few material issues of fact. Scott, however, urges the Court to review the videotape in order to truly appreciate the rapidly evolving circumstances from the perspective of the officers on the scene.

On March 29, 2001, at approximately 10:42 p.m., Deputy Clinton Reynolds of the Coweta County Sheriff's Office flashed his light to alert a driver that he was traveling almost 20 miles per hour over the speed limit. (R. 49, Reynolds Depo., pp. 72-73 and 75). When the driver failed to respond, Reynolds activated his

[1] References to the video recording from the two vehicles are denoted by vehicle number (No. 78 for Reynolds, No. 66 for Scott) with the time as reflected on the video counter.

blue lights. Instead of stopping, the vehicle picked up speed (R. 49, Reynolds Depo., pp. 73 and 76) and headed toward residential and commercial districts of Peachtree City, Georgia.

The fleeing vehicle reached speeds in excess of 100 miles per hour on a two-lane road, and passed other motorists by crossing over double yellow traffic control lines in the process. (R. 36, Exhibit A, 78-22:42:48; 78-22:44:09; R. 49, Reynolds Depo., p. 50, Exhibit 6). The vehicle also ran through a busy red light by passing several vehicles in the turning lane that were stopped at the light. (R. 36, Exhibit A, 78-22:44:36; R. 49, Reynolds Depo., p. 50, Exhibit 6).

Reynolds radioed dispatch that he was pursuing a fleeing vehicle. He did not know the driver's identity. (R. 49, Reynolds Depo., p. 81; R. 48, Scott Depo., p. 115). Scott responded with backup assistance. (R. 36, Exhibit A, 66-22:43:01; R. 49, Reynolds Depo., p. 82; R. 49, Scott Depo., p. 118).

As the vehicle headed towards downtown Peachtree City, the fleeing vehicle continued to travel on the wrong side of the road while passing other motorists on double yellow traffic control lines at a high rate of speed. (R. 36, Exhibit A, 78-22:45:26; 78-22:45:28; 78-22:45:32; 78-22:45:37; and 78:22:45:43).

After the pursuit crossed into Peachtree City, the fleeing vehicle swerved into a shopping center parking lot near a drugstore. (R. 36, Exhibit A, 78-22:46:02; Reynolds Depo., p. 87). With two Peachtree City police vehicles joining in, the fleeing vehicle weaved through the shopping complex, while Scott

proceeded around the opposite side of the complex to block the exit. (R. 52, Brown Depo., pp. 8 and 14; R. 36, Exhibit A, 66-22:46:39; 66-22:46:39; R. 49, Reynolds Depo., pp. 87-88 and 91-92; R. 48, Scott Depo., pp. 171-73). Although he was boxed-in by three law enforcement vehicles (R. 38, Harris Depo., p. 103), the driver collided with Scott's vehicle and escaped onto Highway 74. (R. 36, Exhibit A, 78-22:46:20; 78-22:46:23; and 66-22:46:57)

Despite being pursued by four law enforcement officers from two separate jurisdictions, the vehicle proceeded south on Highway 74, once again at speeds approximating 90 to 100 miles per hour. (R. 49, Reynolds Depo., p. 112 and Exhibit 6). He continued to pass vehicles while crossing over double yellow control lines, and raced through more controlled intersections, including a red light. (R. 36, Exhibit A, 66-22:47:49; 78-22:46:56; 66-22:47:55; 66-22:48:28).

Given the perceived increased and ongoing danger to the public, the deputies decided to raise the level of force. (R. 49, Reynolds Depo., p. 114; R. 48, Scott Depo., pp. 186-187; R. 50, Depo. of Fenninger, pp. 54-56 and Exhibits 4 and 6). Scott obtained approval from his supervisor, Sgt. Mark Fenninger, to make physical contact with the vehicle in what is termed a "PIT" ("Precision Intervention Technique") maneuver. (R. 36, Exhibit A, 79-22:47:35; R. 48, Scott Depo., pp. 143-44; R. 50, Depo. of Fenninger, p. 53). Due to the high rate of speed, Scott backed off at the last moment and instead slowed his vehicle and tapped the rear bumper of the vehicle with his push bumper. (R. 48, Scott Depo., pp. 146-47). **Scott decided to make this contact while no other motorists appeared to be in**

the immediate area to prevent an accident with innocent motorists. (R. 48, Scott Depo., p. 147).

After the vehicles made contact, the fleeing suspect lost control of his vehicle and left the roadway, ending the pursuit. (R. 36, Exhibit A, 66-22:48:47). It was only then that the officers learned the driver's identity was Victor Harris. (R. 50, Depo. of Fenninger, Exhibit 5).

The entire pursuit covered approximately nine miles, and lasted approximately six minutes. (R. 36, Exhibit A; R. 49, Depo. of Reynolds, p. 78). Although Harris, who was unbelted, was rendered a quadriplegic (R. 38, Depo. of Harris, pp. 166-68), he fortunately survived, and no officer or innocent bystander were harmed as a result of his reckless and dangerous driving. **Indeed, even Harris and his own expert agree that his driving was reckless and a danger to the public.** (R. 38, Harris Depo., pp. 127, 129, 138; R. 37, Alpert Depo., pp. 68-69, 71-72, 74-85).

2. District Court Proceedings

Even though Harris crossed double yellow lines, ran through stop signs and traffic lights and collided with a police vehicle before he was ultimately stopped, the district court found the "underlying crime" of speeding meant the force used by Scott was not "in proportion" to the risk posed. Appendix at 40a-41a. Based on this, the district court denied Scott qualified immunity. Appendix at 41a-42a.

3. Decisions of the Eleventh Circuit

Scott appealed the district court's denial of qualified immunity. The Eleventh Circuit affirmed, finding that Harris' reckless driving did not provide "probable cause to believe that he posed a substantial threat of imminent physical harm to motorist and pedestrians." *Harris v. Coweta County*, 406 F.3d 1307, 1316 (11th Cir. 2005). The court also denied qualified immunity because it found that the "*Garner* requirements for the use of deadly force were [not] present when Scott rammed Harris." *Id.* at 1318.

Scott timely filed a petition for rehearing *en banc*, based on the panel's explicit overruling of Eleventh Circuit *en banc* precedent and misapplication of Supreme Court pronouncements. The petition was not resolved; instead, the panel decided to "*sua sponte*" grant rehearing, after which it reached the identical outcome on identical reasoning. *Harris v. Coweta County*, 433 F.3d 807 (11th Cir. 2005). The reissued decision is essentially the same, with the exception of section B where the panel expounded on the same discussion of the *Garner* standard that was presented in the first decision. Appendix at 15a-22a.

REASONS FOR GRANTING OF THE PETITION

A writ of certiorari is warranted because the Eleventh Circuit decision creates a split among the circuits that have considered the underlying constitutional question of whether a law enforcement officer violates a fleeing suspect's Fourth Amendment rights by using deadly force to terminate a dangerous high-speed pursuit. The decision also conflicts with

decisions of other circuits and this Court that have held that qualified immunity protects officers from liability for Fourth Amendment violations unless the officer had "fair and clear warning" that his conduct violated clearly established rights. Finally, this case has significant public policy implications because it essentially creates strict liability if an officer uses force to terminate a pursuit before the fleeing suspect has an opportunity to kill or seriously injure an innocent bystander.

I. THE DECISION CREATES A SPLIT IN THE CIRCUITS BY CONCLUDING THAT SCOTT'S DECISION TO USE DEADLY FORCE TO TERMINATE THE HIGH-SPEED PURSUIT COULD VIOLATE THE FOURTH AMENDMENT

The Eleventh Circuit's denial of qualified immunity contradicts every other court that has considered the same Fourth Amendment issue, and thus creates a split among the circuits on the use of force to terminate the serious risk of death posed by the reckless and dangerous driving of a vehicular pursuit. Every other circuit has held that the Fourth Amendment is not violated under similar circumstances

"The threshold inquiry a court must undertake in a qualified immunity analysis is whether [the] plaintiff's allegations, if true, establish a constitutional violation." *Hope v. Pelzer*, 536 U.S. 730, 735 (2002) (citing *Saucier v. Katz*, 533 U.S. 194 (2001)). "If a constitutional right would have been violated under the plaintiff's version of the facts, 'the next, sequential step is to ask whether the right was clearly

established.'" *Saucier*, 533 U.S. at 201. Stated another way, "the salient question" is whether the state of the law at the time of this incident gave a defendant "fair and clear warning" that his conduct with respect to plaintiff was unconstitutional. *Hope*, 536 U.S. at 746 (citing *United States v. Lanier*, 520 U.S. 259 (1997)).

Under the threshold inquiry, the Eleventh Circuit's decision conflicts with Supreme Court precedent that requires courts to judge an officer's use of force from the perspective of the officer on the scene. In *Graham v. Connor*, 490 U.S. 386 (1989), the Court cautioned courts to view police force from the "perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight." *Graham*, 490 U.S. at 396-9.

In an apparent violation of *Graham*, the Eleventh Circuit viewed the facts from the perspective of the fleeing driver **and** with the benefit of hindsight by focusing on Harris' initial traffic offense of speeding and the fortuitous outcome of no resulting injuries to bystanders.[2] **Here, even Harris and his own expert agree that his driving was reckless and a danger to the public**. (R. 38, Harris Depo., pp. 127, 129, 138; R. 37, Alpert Depo., pp. 68-69, 71-72, 74-85). That Scott made contact at a point when he did not know if Harris was about to mow someone down does not mean that the risk was over. From Scott's perspective, there easily could very well be another motorist (or pedestrian) in Harris' path, just over the next hill or around the next curve. Indeed, Scott made the split-

[2]In addition, it appears the Eleventh Circuit reasoned that a speeding violation alone does not warrant the use of deadly force in light of the severity of Harris' injury.

second decision to terminate the pursuit when no other motorists appeared to be in the area in order to avoid an accident. (R. 48, Scott Depo., p. 147 ("there was either a – a red light or a vehicle ahead of us and I needed to get that car stopped now while there was nobody around, so I decided to made direct contact with the vehicle with my push bumper").

Under *Graham*, the proper question should be whether the information known by Scott **at the time** allowed him to reasonably believe that the fleeing driver posed a risk of death or serious bodily harm to the public. Common sense dictates that driving on the wrong side of the road at a high rate of speed and racing through red lights and stop signs can cause death or serious bodily harm to the public (despite the use of turn signals).[3] *See, e.g., Garrett v. Athens-Clarke County*, 378 F.3d 1274, 1280 (11th Cir. 2004) (fleeing suspect that sped up to 75 miles per hour "placed officers' lives and innocents' lives in danger thereby justifying use of force); *Pace v. Capobianco*, 283 F.3d 1275, 1281 (11th Cir. 2002) (deadly force (shooting) authorized after fleeing suspect turned in front of an officer, swerved at officers coming from opposite direction, almost hit a motorist head-on, and drove 50-60 miles per hour through private property); *see also Durrance v. Georgia*, 549 S.E.2d 406, 408 (Ga. Ct. App. 2001) (intent to commit felonious assault evidenced where fleeing suspect "had crossed the centerline and

[3]The panel's violation of *Graham* is perhaps most evident in its conclusion that Harris' use of his turning signal when he drove on the wrong side of the road proved he was not a danger to the public. App. at 12a. A blinking turning signal would be of little solace to the injured or killed passenger of an oncoming vehicle.

speeding").

The Sixth and Eighth Circuits have also held that law enforcement officers may use deadly force when a fleeing suspect appears likely to drive in a manner that places the officer or others at risk. *Scott v. Clay County*, 205 F.3d 867, 877 (6th Cir. 2000) (after fleeing car crashed into a guardrail, officer shot into car as it began to resume a high speed flight); *Smith v. Freland*, 954 F.2d 343, 347-48 (6th Cir. 1992) (officer shot suspect after brief stop where suspect had appeared trapped" at end of street); and *Cole v. Bone*, 993 F.2d 1328, 1330-33 (8th Cir. 1993) (held, decision to shoot driver of speeding tractor-trailer truck who had made multiple dangerous maneuvers toward officers and other motorists did not violate the Fourth Amendment). In all these decisions, the court was rightfully concerned with providing the officer on the street with the discretion to make split-second decisions instead of second-guessing the decision with the benefit of 20/20 vision of hindsight. As succinctly stated by the Sixth Circuit:

> We must never allow the theoretical, sanitized world of our imagination to replace the dangerous and complex world that policemen face every day. What constitutes 'reasonable' action may seem quite different to someone facing a possible assailant than to someone analyzing the question at leisure.

Smith v. Freland, *supra* at 347.

Contrary to the common sense reasoning of its sister circuits, the Eleventh Circuit decision **requires**

law enforcement officers to either call off the pursuit and allow the fleeing suspect to drive as recklessly as he desires **or** wait until the fleeing suspect actually injures or kills a bystander before initiating a "seizure" to terminate the pursuit. The conundrum that will heretofore result from the Eleventh Circuit decision defies common sense, as either scenario would exponentially **increase** the harm to the public that law enforcement officers are sworn to protect. This result is simply untenable.

II. THE ELEVENTH CIRCUIT DECISION IS CONTRARY TO THIS COURT'S QUALIFIED IMMUNITY PRECEDENT

In addition to creating a split in the circuits, the Eleventh Circuit decision is contrary to this Court's precedent in its inexplicable result in the second step of the qualified immunity analysis. The Eleventh Circuit essentially held that the general deadly force standard of *Garner* was sufficient to provide "fair and clear warning" that Scott's use of force to end Harris' undisputed reckless and dangerous driving violated clearly established law.

The second inquiry of the qualified immunity analysis asks whether the law was so "clearly established" at the time of the incident that every reasonable officer would know his conduct violated the Fourth Amendment. *See Malley v. Briggs*, 475 U.S. 335, 341 (1986) (if "officers of reasonable competence could disagree on th[e] issue, immunity should be recognized"). The standard for qualified immunity reasonableness, however, is quite different from the substantive *Graham* reasonableness inquiry:

> The concern of the immunity inquiry is to acknowledge that reasonable mistakes can be made as to the legal constraints on particular police conduct. It is sometimes difficult for an officer to determine how the relevant legal doctrine, here excessive force, will apply to the factual situation the officer confronts. An officer correctly perceive all of the relevant facts but have a mistaken understanding as to whether a particular amount of force is legal in those circumstances. If the officer's mistake as to what the law requires is reasonable, however, the officer is entitled to the immunity defense.

Saucier, 533 U.S. at 205. The Court then summed up the distinction between the *Graham* and qualified immunity reasonableness standards as follows:

> Officers can have reasonable, but mistaken, beliefs as to the facts establishing the existence of probable cause or exigent circumstances, for example, and in those situations courts will not hold that they have violated the Constitution. Yet, even if a court were to hold that the officer violated the Fourth Amendment, . . . *Anderson* still operates to grant officers immunity for reasonable mistakes as to the legality of their actions. The same analysis applies in excessive force cases, where in addition to the deference officers received on the underlying constitutional claim, qualified immunity can apply in the event the mistaken belief was reasonable.

In the first decision, the Eleventh Circuit denied qualified immunity on ground that the general *Garner*

standard alone "applies with 'obvious clarity'" to defeat Scott's claim of qualified immunity. 406 F.3d at 1307. On rehearing, the panel retreated from this stance by concluding that it "need not conclude that the facts in *Harris* present just such an 'obvious' case to deny Scott qualified immunity," but then proceeded to again deny qualified immunity based on *Garner* alone. App. 19a. In so ruling, the panel acknowledged that "every objectively reasonable police officer" in Scott's position would need to have known that Harris' reckless driving did not pose a "significant threat of death or serious physical injury"; "that an automobile can be used as deadly force"; and "that deadly force cannot be used in the absence of the *Garner* preconditions." App. at 17a-18a.

Distilled to its essence, the cases cited by the Eleventh Circuit reveals that the general tests enunciated in *Garner* and *Graham* serve as the **sole** basis for finding that Scott had "fair and clear" warning that his conduct was unconstitutional. Id. The panel so ruled even though the Court cautioned that the *Graham* and *Garner* tests are "cast at a high level of generality" because they follow "the lead of the Fourth Amendment's text." *Brosseau v. Haugen*, 125 S. Ct. 596, 599 (2004). Thus, in *Saucier v. Katz*, the Court noted:

> *Graham* does not always give a clear answer as to whether a particular application of force will be deemed excessive by the courts. This is the nature of a test which must accommodate limitless factual circumstances. This reality serves to refute respondent's claimed distinction between excessive force and other Fourth Amendment contexts; in both spheres the law must be elaborated from case to case. **Qualified immunity operates in this case, then, just as it does in others, to protect officers from the sometimes 'hazy border between excessive and acceptable force,' *Priester v. Riviera Beach*, 208 F.3d 919, 926-927 (C.A. 11 2000), and to ensure that before they are subjected to suit, officers are on notice their conduct is unlawful.**

533 U.S. 194, 205-06 (2001) (emphasis added).

Under the Court's qualified immunity precedent, the Eleventh Circuit's denial of qualified immunity based on the broad parameters of *Graham* and *Garner* is questionable at best given the rapidly evolving and volatile circumstances that Harris himself created by continuing to evade arrest at the risk of great harm to the public. Moreover, there has been **no** decision from this Court or any other circuit that addresses the use of push bumpers to terminate a pursuit.

Given the absence of clearly established law, Scott certainly had at least "**arguable probable cause**" in light of the information he possessed that Harris posed a threat of immediate harm to the public. Indeed, the Eleventh Circuit's conclusion that an automobile can be used as deadly weapon applies equally to Harris' reckless driving to support a finding of qualified immunity. To begin and end the qualified immunity analysis with *Garner*, despite Harris' admission of reckless and dangerous driving, effectively eliminates the application of qualified immunity to police pursuit cases.

III. THIS CASE HAS SIGNIFICANT PUBLIC POLICY IMPLICATIONS FOR LAW ENFORCEMENT IN PURSUIT CASES

The Eleventh Circuit decision evinces a policy preference that law enforcement officers should allow reckless and dangerous drivers to escape if the underlying violation consists of a traffic law violation. This policy undermines the very purpose of traffic laws, i.e. to protect the lives of the motoring public. Certainly, there may be circumstances when allowing a suspect to escape is preferable; but if the escape itself puts others at serious risk of harm, officers should be given the **discretion** to use force to terminate the risk and protect innocent bystanders. Indeed, the ability to exercise discretion to combat the threat of serious injury or death to others is at the very heart of qualified immunity. As stated by this Court, qualified immunity should provide an "accommodation for reasonable error," and " 'officials should not err always on the side of caution' because they fear being sued." *Hunter v. Bryant*, 502 U.S. 224, 229 (1991).

As noted, the facts of this case are a compelling demonstration of the reason for the qualified immunity doctrine. Scott was forced to make the split-second decision of whether to terminate the pursuit through a seizure or do nothing and run the risk that Harris' **continued** reckless and dangerous driving would seriously injure or kill an innocent bystander. This situation was not of Scott's making, and he had to make a split-second choice without the luxury of a second chance. Whatever the choice, death or serious bodily injury to someone could certainly have followed.

CONCLUSION

Particularly given the significance of the case for the law enforcement community-- above and beyond simply the interests of the parties to this lawsuit -- the Court should grant *certiorari* review. The orderly administration of justice, and the gravity of the implications of the decision nationwide, demands no less than the Court's attention.

For the foregoing reasons, Scott respectfully requests that the decision of the Eleventh Circuit denying qualified immunity be summarily reversed, or alternatively, that a writ of certiorari be granted.

Respectfully submitted,
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No. 03-15094

UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

VICTOR HARRIS,
Plaintiff-Appellee,

Versus

COWETA COUNTY, GEORGIA, et al.,
Defendants,

MARK FENNINGER, Sgt., TIMOTHY C. SCOTT,
Deputy, Defendants-Appellants.

December 23, 2005, Decided

December 23, 2005, Filed

COUNSEL: For Sgt. Mark Fenninger, Appellant: Philip Wade Savrin, FREEMAN, MATHIS & GARY, LLP, ATLANTA, GA.

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JUDGES: Before BIRCH, BARKETT and COX, Circuit Judges.

OPINIONBY: BARKETT

OPINION: ON PETITION FOR REHEARING

BARKETT, Circuit Judge:

We sua sponte grant rehearing in this case, vacating our prior opinion, 406 F.3d 1307 (11th Cir. 2005), in its entirety and substituting the following in its place.

Coweta County Deputy Timothy Scott ("Scott") and Coweta County Sergeant Mark Fenninger ("Fenninger") appeal from the denial of summary judgment on their claims of qualified immunity on Victor Harris' ("Harris") 42 U.S.C. § 1983 action based on Harris' allegations that Scott violated his Fourth Amendment rights by using excessive force during a high-speed car chase, and that Fenninger violated his Fourth Amendment rights by authorizing that use of force.

I. BACKGROUND

Viewed in the light most favorable to the non-movant, Harris, the facts pertaining to the chase that covered approximately nine miles and lasted approximately six minutes are as follows. Between 10:30 and 11:00 pm on March 29, 2001, a Coweta County deputy clocked Harris' vehicle at 73 miles per hour in a 55 mile-per-hour zone. The vehicle that Harris was driving was registered in Harris' name and at his proper address. Although the deputy flashed his blue lights, Harris continued driving. The deputy pursued, and in attempting to flee, Harris drove in excess of the speed limit, at speeds between 70 and 90 miles per hour, passed vehicles on double yellow traffic control lanes, and ran through two red lights. Harris stayed in control of his vehicle, utilizing his blinkers while passing or making turning movements.

After Harris refused to stop, the deputy radioed dispatch and reported that he was pursuing a fleeing vehicle, and broadcast its license plate number. He did not relay that the underlying charge was speeding. Scott heard the radio communication and joined the pursuit, as it proceeded toward the county line into Fayette County, Georgia.

After crossing into Peachtree City in Fayette County, Harris slowed down, activated his blinker, and turned into a drugstore parking lot located in a shopping complex, where two Peachtree City police vehicles were already stationed. Scott proceeded around the opposite side of the complex in an attempt to prevent Harris from leaving the parking lot and getting onto Highway 74, driving his vehicle directly into Harris' path. Harris attempted to turn to the left to avoid hitting Scott's car, but the two vehicles came into contact with each other, causing minor damage to Scott's cruiser.[1] Harris then entered Highway 74 and continued to flee southward at a high speed.

Through Peachtree City, Scott took over as the lead vehicle in the chase. After getting on Highway 74, Scott radioed a general request for "Permission to PIT him." A "PIT" ("Precision Intervention Technique") maneuver is a driving technique designed to stop a fleeing motorist safely and quickly by hitting the fleeing car at a specific point on the vehicle, which throws the car into a spin and brings it to a stop.[2] Harris' expert's report attests that "national law enforcement standards require than [sic] an officer be trained in all deadly force applications before being permitted to use those applications." R. 24, at 9-10. Scott had not been trained in executing this maneuver. He and the other Coweta

officers did not undergo a training on PITs until after the incident.

Fenninger was the supervisor who responded to Scott's radio call and granted Scott permission to employ the PIT, telling him to: "Go ahead and take him out. Take him out." Fenninger--who tuned into the transmissions about the pursuit late--did not know how the pursuit originated, the speeds of the vehicles, the numbers of motorists or pedestrians on the roadways, or how dangerously Harris was driving. Fenninger also did not request further details about the pursuit prior to authorizing the PIT.

After receiving approval, Scott determined that he could not perform the PIT maneuver because he was going too fast. Instead, however, he rammed his cruiser directly into Harris' vehicle, causing Harris to lose control, leave the roadway, run down an embankment, and crash. As a result, Harris was rendered a quadriplegic.

II. STANDARD OF REVIEW

We review the denial of summary judgment de novo. *Cagle v. Sutherland*, 334 F.3d 980, 985 (11th Cir. 2003). In conducting our review, we apply the same legal standards as the district court. *Vaughan v. Cox*, 343 F.3d 1323, 1328 (11th Cir. 2003). Thus, we view the facts in the light most favorable to the non-moving party, and draw all reasonable inferences in his favor. Id. Summary judgment is not appropriate unless the evidence demonstrates that "there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ.P. 56(c)).

A defendant's entitlement to qualified immunity is a question of law, also to be reviewed de novo. *Cagle*, 334 F.3d at 985.

III. DISCUSSION[3]

As we have often stated, "qualified immunity offers complete protection for government officials sued in their individual capacities as long as their conduct violates no clearly established statutory or constitutional rights of which a reasonable person would have known." *Lee v. Ferraro*, 284 F.3d 1188, 1193-94 (11th Cir. 2002) (internal citations and quotation marks omitted). This immunity "allow[s] government officials to carry out their discretionary duties without the fear of personal liability or harassing litigation[.]" Id. (citing *Anderson v. Creighton*, 483 U.S. 635, 638, 107 S. Ct. 3034, 97 L. Ed. 2d 523 (1987)). Thus, in order to receive its protections, the government official must first prove that he was acting within the scope of his discretionary authority when the allegedly wrongful acts occurred. *Kesinger v. Herrington*, 381 F.3d 1243, 1248 (11th Cir. 2004) (citing *Vinyard v. Wilson*, 311 F.3d 1340, 1346 (11th Cir. 2002)). In this case, there is no dispute that when Scott rammed Harris' vehicle during the high-speed pursuit on March 29, 2001, he did so as part of his discretionary functions as deputy of the Coweta County Sheriff's Department (CCSD). It is likewise clear (and uncontested) that Fenninger's authorization of Scott's use of a PIT maneuver was a decision made in his capacity as supervisor to Scott and sergeant of the CCSD.

The defendants having established their eligibility for qualified immunity, the burden then shifts to the plaintiff to show that qualified immunity is not appropriate. *Lee*, 284 F.3d at 1194. This next step consists of a two-part inquiry, set forth in *Saucier v. Katz*, 533 U.S. 194, 201, 121 S. Ct. 2151, 150 L. Ed. 2d 272 (2001). First we ask, "taken in the light most favorable to the party asserting the injury, do the facts alleged show the officer's conduct violated a constitutional right?" Id. If, assuming the plaintiff's allegations were true, no such right would have been violated, the analysis is complete. However, if a constitutional violation can be made out on the plaintiff's facts, we then must determine "whether, at the time of the incident, every objectively reasonable police officer would have realized the acts violated already clearly established federal law." *Garrett v. Athens-Clarke County*, 378 F.3d 1274, 1278-79 (11th Cir. 2004) (citing *Saucier*, 533 U.S. at 201-02, 121 S. Ct. 2151). We address these questions in turn.

A. Did Scott and Fenninger Violate Harris' Constitutional Right To Be Free From An Unreasonable Seizure?

Harris alleges that Scott violated his Fourth Amendment right to be "free from the use of excessive force in the course of an investigatory stop or other 'seizure' of the person." *Kesinger*, 381 F.3d at 1248 (citing *Graham v. Connor*, 490 U.S. 386, 109 S. Ct. 1865, 104 L. Ed. 2d 443 (1989)). To establish an excessive force claim, Harris must show first that he was subjected to a "seizure" within the meaning of the Fourth Amendment. *Vaughan*, 343 F.3d at 1328.

The district court concluded, and Scott does not contest, that Harris was seized by Scott when the latter rammed his vehicle, causing him to lose control and crash. Pursuant to *Brower v. County of Inyo*, 489 U.S. 593, 596-99, 109 S. Ct. 1378, 103 L. Ed. 2d 628 (1989), using a vehicle to stop and apprehend a suspect is a seizure. In Brower, the Supreme Court held that a fleeing suspect who fatally crashed into a so-called "deadman" roadblock[4] during a high-speed chase had been "seized" by the police who set up the roadblock.[5] The Court defined a seizure as "a governmental termination of freedom of movement through means intentionally applied." *Brower*, 489 U.S. at 597, 109 S. Ct. 1378 (emphasis omitted). The Court reasoned that "it [is] enough for a seizure that a person be stopped by the very instrumentality set in motion or put in place in order to achieve that result ... Brower was meant to be stopped by the physical obstacle of the roadblock--and ... was so stopped." *Id.* at 599, 109 S. Ct. 1378. The Court noted that if "the police cruiser had pulled alongside the fleeing car and sideswiped it, producing the crash, then the termination of the suspect's freedom of movement would have been a seizure." *Id.* at 597, 109 S. Ct. 1378. See also *Hernandez v. Jarman*, 340 F.3d 617, 623 (8th Cir. 2003) ("As we have held, a Fourth Amendment seizure occurs as a result of a car collision only where the police officer intended the collision to be the result."); *Donovan v. City of Milwaukee*, 17 F.3d 944, 949 (7th Cir. 1994) (finding a Fourth Amendment "seizure" where officer intentionally backed up squad car into the path of a fleeing motorcycle and provoked collision, sending both driver and passenger airborne).

Having determined that Harris was seized, we turn to the question of whether the force used by Scott to

effectuate the seizure was reasonable, in light of the facts according to Harris.[6] In *Tennessee v. Garner*, 471 U.S. 1, 8, 105 S. Ct. 1694, 85 L. Ed. 2d 1 (1985), the Supreme Court made clear that the reasonableness of a seizure "depends on not only when a seizure is made, but also how it is carried out." In Garner, as in this case, the Court considered a suit for damages under 42 U.S.C. § 1983 on the grounds that the manner of the seizure violated Garner's constitutional rights. The police argued that because Garner was a fleeing felon, any force necessary to capture him was permissible. The Supreme Court held that the use of deadly force may not be used to seize a fleeing felon "unless it is necessary to prevent the escape and the officer has probable cause to believe that the suspect poses a significant threat of death or serious physical injury to the officer or others." *Id.* at 3, 105 S. Ct. 1694 (emphasis supplied). The Court concluded that:

> the use of deadly force to prevent the escape of all felony suspects, whatever the circumstances, is constitutionally unreasonable. It is not better that all felony suspects die than that they escape. Where the suspect poses no immediate threat to the officer and no threat to others, the harm resulting from failing to apprehend him does not justify the use of deadly force to do so. It is no doubt unfortunate when a suspect who is in sight escapes, but the fact that the police arrive a little late or are a little slower afoot does not always justify killing the suspect. A police officer may not seize an unarmed, nondangerous suspect by shooting him dead.

Id. at 11, 105 S. Ct. 1694.

The Court recognized that limited circumstances might justify the use of deadly force, to wit: (1) "where the officer has probable cause to believe that the suspect poses a threat of serious physical harm, either to the officer or to others," or "if the suspect threatens the officer with a weapon or there is probable cause to believe that he had committed a crime involving the infliction or threatened infliction of serious physical harm," and (2) if deadly force is "necessary to prevent escape," and, (3) "if, where feasible, some warning has been given." *Id.* 471 U.S. at 11-12, 105 S. Ct. 1694. See also *Vaughan*, 343 F.3d at 1329-30. Without meeting all of these conditions, the use of deadly force is constitutionally unreasonable.

"Deadly force" is force that creates "a substantial risk of causing death or serious bodily injury." *Pruitt v. City of Montgomery*, 771 F.2d 1475, 1479 n. 10 (11th Cir. 1985) (citing Model Penal Code (MPC) § 3.11(2) (1962)).[7] The Coweta County Sheriff Department's Use of Force Policy provides an analogous definition - "force which, under the circumstances in which it is used, is readily capable of causing death or other serious injury." R. 48 at Ex. 12, at 82. In Pruitt, we found that shooting a suspect in the legs to stop him was a "use of deadly force" in the constitutional sense, even though the officer did not necessarily shoot to kill. We reasoned that the MPC and Alabama Code definitions of deadly force "clearly encompassed" the force used in that case because "[the officer], at the least, purposely fired his shots at Pruitt's legs, and in doing so used force capable of causing serious physical injury." 771 F.2d at 1479 n. 10.

Like other instrumentalities, the use of an automobile

cannot be construed in every circumstance as deadly force. However, an automobile, like a gun, can be used deliberately to cause death or serious bodily injury. See *Pace v. Capobianco*, 283 F.3d 1275, 1282 (11th Cir. 2002) (suspect "used the automobile in a manner to give reasonable policemen probable cause to believe that it had become a deadly weapon with which [suspect] was armed"); *United States v. Gualdado*, 794 F.2d 1533, 1535 (11th Cir. 1986) ("Almost any object which as used or attempted to be used may endanger life or inflict great bodily harm, or which is likely to produce death or great bodily injury, can in some circumstances be a 'dangerous weapon.' ... An automobile has been held to constitute a deadly weapon when used to run down a law enforcement officer. Likewise, in this instance appellants' boat, used in an attempt to ram the vessel of Customs officials, also could properly be considered a deadly weapon.") (internal citations omitted). See also *Hernandez*, 340 F.3d at 624 (officer had probable cause to shoot suspect where suspect "posed an imminent threat of serious physical harm to himself and to others as evidenced by [suspect's] driving head-on into [the officer's] vehicle"); *Ludwig v. Anderson*, 54 F.3d 465, 473 (8th Cir. 1995) (an attempt to hit an individual (not in a vehicle) with a moving squad car "is an attempt to apprehend by use of deadly force"); *Donovan*, 17 F.3d at 949-50 (backing up of a squad car into path of a fleeing motorcycle was an application of deadly force); *Smith v. Freland*, 954 F.2d 343, 347 (6th Cir. 1992) (citing *United States v. Sanchez*, 914 F.2d 1355 (9th Cir. 1990)) ("even unarmed, [the plaintiff] was not harmless; a car can be a deadly weapon."). Cf. *Brower v. County of Inyo*, 884 F.2d 1316, 1317-18 (9th Cir. 1989) (assuming without deciding that deadman roadblock to stop a fleeing vehicle during a high-speed chase was an application of

"deadly force" and applying Garner analysis).

Under an objective view of the facts of this case, there is little dispute that the ramming of Harris' car could constitute a use of "deadly force" and that a jury could so reasonably conclude.[8] See *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 252, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986) ("The judge's inquiry [at the summary judgment stage], therefore, unavoidably asks whether reasonable jurors could find by a preponderance of the evidence that the plaintiff is entitled to a verdict."). Moreover, none of the limited circumstances identified in Garner that might render this use of deadly force constitutional are present here. Scott did not have probable cause to believe that Harris had committed a crime involving the infliction or threatened infliction of serious physical harm, nor did Harris, prior to the chase, pose an imminent threat of serious physical harm to Scott or others.

None of the antecedent conditions for the use of deadly force existed in this case. Harris' infraction was speeding (73 mph in a 55 mph zone). There were no warrants out for his arrest for anything, much less for the requisite "crime involving the infliction or threatened infliction of serious physical harm." *Garner*, 471 U.S. at 11-12, 105 S. Ct. 1694. Indeed, neither Scott nor Fenninger had any idea why Harris was being pursued. The use of deadly force is not "reasonable" in a high-speed chase based only on a speeding violation and traffic infractions where there was little, if any, actual threat to pedestrians or other motorists, as the roads were mostly empty and Harris remained in control of his vehicle, and there is no question that there were alternatives for a later arrest. *Vaughan*, 343 F.3d at

1330. The Garner Court specifically recognized that it would be an anomaly to transform "every fleeing misdemeanant into a fleeing felon ... solely by virtue of his flight." 471 U.S. at 10 n. 9, 105 S. Ct. 1694.[9] A high-speed chase of a suspect fleeing after a traffic infraction does not amount to the "substantial threat" of imminent physical harm that Garner requires before deadly force can be used. Garner made clear that "it is not better that all ... suspects die than that they escape." 471 U.S. at 11, 105 S. Ct. 1694.[10]

We reject the defendants' argument that Harris' driving must, as a matter of law, be considered sufficiently reckless to give Scott probable cause to believe that he posed a substantial threat of imminent physical harm to motorists and pedestrians. This is a disputed issue to be resolved by a jury. As noted by the district court judge, taking the facts from the non-movant's viewpoint, Harris remained in control of his vehicle, slowed for turns and intersections, and typically used his indicators for turns. He did not run any motorists of the road. Cf. *Pace*, 283 F.3d at 1282 (officer had probable cause to believe that car had become a deadly weapon with which defendant was armed where suspect drove through residential neighborhood at 50 to 60 mph, swerved at oncoming police cars, nearly hit elderly motorist head-on when driving on wrong side of road, and accelerated towards police car roadblock forcing officer off of the road to avoid collision); *Cole v. Bone*, 993 F.2d 1328, 1331-1334 (8th Cir. 1993) (deadly force was reasonable to stop high-speed chase where truck forced more than one hundred cars off the road or out of the truck's way and endangered the lives of many other motorists during the pursuit, chase lasted 50 miles, and officers

attempted to slow the vehicle using several types of roadblocks). Nor was he a threat to pedestrians in the shopping center parking lot, which was free from pedestrian and vehicular traffic as the center was closed. Significantly, by the time the parties were back on the highway and Scott rammed Harris, the motorway had been cleared of motorists and pedestrians allegedly because of police blockades of the nearby intersections.[11]

Nor can we countenance the argument that by continuing to flee, a suspect absolves a pursuing police officer of any possible liability for all ensuing actions during the chase. The Supreme Court rejected such an argument in Brower, where it was suggested that the plaintiff in that case "had a number of opportunities to stop his automobile prior to the impact" and thus, could have avoided his own injuries. *Brower*, 109 S. Ct. at 1380-81 (citation omitted). Justice Scalia noted that essentially the same thing could have been said about the suspect in Garner, that is, the plaintiff's "independent decision to continue the chase can no more eliminate respondents' responsibility for the termination of his movement effected by the roadblock than Garner's independent decision to flee eliminated the Memphis police officer's responsibility for the termination of his movement effected by the bullet." Id. at 1381.

We conclude that ramming Harris' vehicle under the facts alleged here, if believed by a jury, would violate Harris' constitutional right to be free from excessive force during a seizure. Accordingly, a reasonable jury could find that Scott violated Harris' Fourth Amendment rights.

With respect to Fenninger, however, we cannot come to the same conclusion. Although the use of deadly force cannot be authorized under Garner without knowing that the Garner conditions have been met, the facts of this case do not establish that Fenninger authorized deadly force. Rather, the evidence shows that Fenninger authorized a PIT--defined by the district court as "a driving technique designed to stop a fleeing motorist safely and quickly by hitting the fleeing car at a specific point on the vehicle, which throws the car into a spin and brings it to a stop." This definition assumes that the maneuver will be executed at lower speeds by properly trained officers, and therefore can terminate a flight "safely." See, e.g., Geoffrey Alpert's Expert Report, R. 24 at 5 (stating that the PIT requires a set of defined circumstances in order for it to be performed safely (i.e., at low speeds on wide straightaways, on dry pavement by a properly trained driver)); National Law Enforcement and Corrections Technology Center Bulletin, U.S. Department of Justice, October 1996, at 4-5 (stating that the PIT "is not applicable in every situation, the key to its effective use is to carefully choose a favorable spot before attempting PIT and to first consider the possible effects on other traffic and pedestrians"); National San Diego Police Department Use of Force Task Force Recommendations, Executive Summary at 37 ("Utilized at speeds of 35 mph or less, the PIT maneuver improves officer and public safety by removing the threat of pursuit as quickly and safely as possible."). Scott, however, chose not to execute a PIT at all, but rather to ram the car at a very high speed from behind. Because this ramming was not authorized by Fenninger, we cannot say that Fenninger's conduct -

authorization of a safe PIT that was not executed - violated Harris' constitutional rights. Thus, since Fenninger is not liable for a constitutional violation, summary judgment should be granted in his favor. The district court's ruling as to Fenninger is therefore reversed.

B. Is Scott entitled to qualified immunity?

Having determined that a jury could have reasonably found the violation of a constitutional right by Scott, we now ask whether the law as it existed on March 29, 2001, was sufficiently clear to give reasonable law enforcement officers "fair notice" that ramming a vehicle under these circumstances was unlawful. *Hope v. Pelzer*, 536 U.S. 730, 741, 122 S. Ct. 2508, 153 L. Ed. 2d 666 (2002); *Anderson v. Creighton*, 483 U.S. 635, 640, 107 S. Ct. 3034, 97 L. Ed. 2d 523 (1987). "The essence of qualified immunity is notice." *Holmes v. Kucynda*, 321 F.3d 1069, 1077 (11th Cir. 2003) (citing *Hope v. Pelzer*, 536 U.S. 730, 122 S. Ct. 2508, 153 L. Ed. 2d 666 (2002)).

For at least twenty years, since Garner was decided, officers have been on notice that they may not use deadly force to seize a fleeing suspect unless the suspect poses a significant threat of death or serious physical injury. See *Garner*, 471 U.S. at 11-12; see also *Garner*, 471 U.S. at 10-11 ("the fact is that a majority of police departments in this country have forbidden the use of deadly force against nonviolent suspects."). Moreover, prior to the incident in question the law was clearly established that an automobile, like a gun, could be used as a deadly instrument. See also *Pace v. Capobianco*, 283 F.3d 1275, 1282 (11th Cir. 2002) (concluding that fleeing felon in 1998 had used car in a

way that made it a "deadly weapon"); *United States v. Gualdado*, 794 F.2d 1533, 1535 (11th Cir. 1986) ("Almost any object which as used or attempted to be used may endanger life or inflict great bodily harm, or which is likely to produce death or great bodily injury, can in some circumstances be a 'dangerous weapon'" concluding that appellants' boat, used in an attempt to ram the vessel of Customs officials, [could] . . . properly be considered a deadly weapon.") (internal citations omitted).[12]

It was also clearly established at the time of the instant circumstances that the Fourth Amendment requires a seizure of a fleeing suspect to be reasonable and that deadly force cannot be employed in a situation that requires less-than-lethal force. *Garner*, 471 U.S. at 8, 11-12 (holding that "the use of deadly force to prevent the escape of all felony suspects, whatever the circumstances, is constitutionally unreasonable... A police officer may not seize an unarmed, nondangerous suspect by shooting him dead"; "it is plain that reasonableness depends on not only when a seizure is made, but also how it is carried out") (emphasis added); *Brower v. County of Inyo*, 489 U.S. 593, 109 S. Ct. 1378, 1381, 103 L. Ed. 2d 628 (1989). See *Terry v. Ohio*, 392 U.S. 1, 19-20, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968) (requiring reasonableness of seizure based on the circumstances, including scope and intensity of seizure); *United States v. Ortiz*, 422 U.S. 891, 895, 95 S. Ct. 2585, 45 L. Ed. 2d 623 (1975) (same); *Evans v. Hightower*, 117 F.3d 1318, 1320 (11th Cir. 1997) (holding Fourth Amendment violated if seizure occurred and force used to effect the seizure was unreasonable); see generally *Mercado v. City of Orlando*, 407 F.3d 1152, 1160 (11th Cir. 2005) (holding that in 2002 there was a "clearly

established principle that deadly force cannot be used in non-deadly situations.").[13]

Impacting our review of reasonableness is a "careful attention to the facts and circumstances of each particular case, including the severity of the crime at issue." *Graham*, 490 U.S. at 396 (emphasis added); *Lee v. Ferraro*, 284 F.3d 1188, 1197-98 (11th Cir. 2002) (denying qualified immunity to officer on excessive force claim partially because of low level of plaintiff's offense; "Graham dictates unambiguously that the force used by a police officer in carrying out an arrest must be reasonably proportionate to the need for that force, which is measured by the severity of the crime ...."); *Jackson v. Sauls*, 206 F.3d 1156, 1170 n. 18 (11th Cir. 2000) ("A court may also factor in 'the severity of the crime ....'") (quoting *Gold v. City of Miami*, 121 F.3d 1442, 1446 (11th Cir. 1997); *Post v. City of Fort Lauderdale*, 7 F.3d 1552, 1559 (11th Cir. 1993) (same); see generally *United States v. Kaplan*, 286 F. 963, 974 (D.C. Ga. 1923) (holding that "in the case of a misdemeanor, the general rule that an officer has no right, except in self-defense, to kill the offender to effect his arrest, and that the 'killing of a fleeing person under such circumstances would amount to murder.'"); *King v. State*, 91 Ga.App. 825, 828, 87 S.E.2d 434 (Ga. App. 1955) ("no arresting officer has any right to kill a person for trying to escape in the commission of a misdemeanor").

Thus, by 2001 the law was clearly established that a seizure must be reasonable under the circumstances, which include a review of the offense charged; that an automobile can be used as deadly force; and that deadly force cannot be used in the absence of the Garner

preconditions.

The establishment of these principles distinguishes this case from *Brosseau v. Haugen*. In Brosseau, the Supreme Court reversed the denial of qualified immunity to an officer sued for Fourth Amendment violations under § 1983 for shooting a suspected felon as he attempted to flee in a vehicle, where the officer had arguable probable cause to believe that the suspect posed an imminent threat of serious physical harm to several officers and citizens in the immediate surrounding area.[14] Unlike Harris, Haugen, the suspect in Brosseau, was a suspected felon with a no-bail warrant out for his arrest, with whom Brosseau, the officer, had a violent physical encounter prior to the shooting. Believing that Haugen had entered a Jeep to retrieve a gun, Brosseau broke the windowpane of the Jeep, and attempted to stop Haugen by hitting him over the head with the butt and barrel of her gun. Haugen was undeterred, however, and began to take off out of the driveway, without regard for the safety of those in his immediate vicinity - the three officers on foot (Haugen at his immediate left and two others with a K-9 somewhere nearby), a woman and her 3-year-old child in a small vehicle parked directly in front of the Jeep and 4 feet away, and two men in a parked vehicle 20 to 30 feet away. In addition, prior to shooting, Brosseau warned Haugen that she would shoot by pointing her gun at the suspect while commanding him to get out of the car, and then using the gun to shatter the glass of the car window and hit Haugen in an attempt to get the keys.

Looking to Garner, the Brosseau Court recognized that its clearly established deadly force rule (i.e., that "it is

unreasonable for an officer to 'seize an unarmed non dangerous suspect by shooting him dead'") was limited by the Court's further instruction that "where the officer has probable cause to believe that the suspect poses a threat of serious physical harm, either to the officer or to others, it is not constitutionally unreasonable to prevent escape by using deadly force." *Brosseau v. Haugen*, 543 U.S. 194, 125 S. Ct. 596, 598, 160 L. Ed. 2d 583 (quoting *Garner*, 471 U.S. at 11, 105 S. Ct. 1694). Thus, the Brosseau Court held that Garner did not provide a reasonable officer with fair notice of a Fourth Amendment violation in "the situation [Brosseau] confronted: whether to shoot a disturbed felon, set on avoiding capture through vehicular flight, when persons in the immediate area are at risk from that flight." *Id.* at 600 (emphasis supplied).[15]

Scott also argues that Garner does not apply because in that case, the officer applied the deadly force with a gun. Scott relies on our holding in Adams that in 1985, the caselaw was insufficiently developed to give notice to every objectively reasonable officer that a police car ramming another car during a high-speed pursuit would constitute an unreasonable seizure. However, the facts in Adams occurred before Brower was decided, and thus, at a time before the Supreme Court made clear that the intentional use of a vehicle to apprehend a suspect was a Fourth Amendment seizure. That principle is now settled. Garner made clear that the use of deadly force against an unarmed and nondangerous fleeing felony suspect was unlawful and set out the specific criteria necessary before the application of deadly force is warranted. This law clearly applied to the use of a vehicle to seize a suspect at the time of the incident in this case.

We are satisfied that, under Hope, the requirement that the officers have "fair warning" that their conduct violates a constitutional right through a general constitutional rule, "even through the very action in question has [not] previously been held unlawful," has been satisfied. 536 U.S. at 740-41, 122 S. Ct. 2508 (internal quotation marks and citations omitted). A reasonable police officer would have known in 2001 that a vehicle could be used to apply deadly force, n16 could be used to effectuate a seizure, n17 and that deadly force could not be used to apprehend a fleeing suspect unless the conditions set out in Garner existed. *Garner*, 471 U.S. at 11-12, 105 S. Ct. 1694. See also *Vaughan*, 343 F.3d at 1329-30. The Garner Court used the term "deadly force," not "handgun," in enunciating its rule. Garner, 471 U.S. at 11-12, 105 S. Ct. 1694 ("Thus, if the suspect threatens the officer with a weapon or there is probable cause to believe that he has committed a crime involving the infliction or threatened infliction of serious physical harm, deadly force may be used ...") (emphasis supplied). Moreover, the opinion recognizes the obvious principle that "deadly force" can be inflicted through other means. *Id.* at 14, 105 S. Ct. 1694 (observing that in times when weapons were rudimentary, "deadly force could be inflicted almost solely in a hand-to-hand struggle ..."). See *Vaughan*, 343 F.3d at 1332 ("the Supreme Court in Hope cautioned that we should not be unduly rigid in requiring factual similarity between prior cases and the case under consideration"). See also *Gutierrez v. City of San Antonio*, 139 F.3d 441, 446 (5th Cir. 1998) (applying Garner "deadly force" rule to determine whether officers were qualifiedly immune for hog-tying suspect).

By 2001, it was well-established in this circuit that "deadly force" means force that creates a substantial risk of causing death or serious bodily injury. *Pruitt*, 771 F.2d at 1479 n. 10. The CCSD policy in 2001 employed a near-identical definition. Moreover, by 1986, we had recognized the potentially lethal nature of an automobile. See *Gualdado*, 794 F.2d at 1535, and other cases cited on pages, supra.

We are also satisfied that common sense would inform any reasonable officer that there would be substantial risks of death or bodily harm if he used his vehicle to ram another vehicle at high speeds in the manner employed in this case. See CCSD Use of Force Policy, R. 48, Ex. 12 at 82 (restricting the use of deadly force to "when the Deputy reasonably believes it is necessary to defend their [sic] own life or the life of another or to prevent grave bodily injury to themselves [sic] or another, and all other available means of defense have failed or would be inadequate or dangerous," or "when necessary to prevent the commission of ... any felony which involves the use or threat of physical force or violence against any person."). See also Ga.Code Ann., § 17-4-20(b) ("Sheriffs and peace officers ... may use deadly force to apprehend a suspected felon only when the officer reasonably believes that the suspect possesses a deadly weapon or any object, device, or instrument which, when used offensively against a person, is likely to or actually does result in serious bodily injury; when the officer reasonably believes that the suspect poses an immediate threat of physical violence to the officer or others; or when there is probable cause to believe that the suspect has committed a crime involving the infliction or threatened infliction of serious physical harm."); *Garner*, 471 U.S.

at 10-11, 105 S. Ct. 1694 ("The fact is that a majority of police departments in this country have forbidden the use of deadly force against nonviolent suspects."). Cf. CCSD Pursuit Policy, R. 48, Ex. 11, at 94 (categorizing roadway barricades as the use of deadly force and limiting their use "only by order of a supervisor and then only as a last resort when the person pursued has proven by his method of flight a total disregard for the lives and safety of the public"). See *Vaughan*, 343 F.3d at 1332-33 ("Applying Garner in a common-sense way, a reasonable officer would have known that firing into the cabin of a pickup truck, traveling at approximately 80 miles per hour on Interstate 85 in the morning, would transform the risk of an accident on the highway into a virtual certainty. The facts of this case bear out these foreseeable consequences. Thus, Deputy Cox is not entitled to . . . qualified immunity grounds, regarding Vaughan's § 1983 claim predicated on the Fourth Amendment.").

For the foregoing reasons, a jury could conclude that Scott unreasonably used deadly force to seize Harris by ramming him off the road under the instant circumstances, and we find no reversible error in the denial of qualified immunity to Scott at this stage in this case. n18

Consistent with the above conclusions, the district court opinion is

REVERSED IN PART and AFFIRMED IN PART.

Footnotes

n1 Scott disputes this version of events. For purposes

of summary judgment, we accept Harris' version.

n2 At the time of the chase, the Coweta County Sheriff's Department had a vehicle pursuit policy, which stated that "deliberate physical contact between vehicles at anytime may be justified to terminate the pursuit upon the approval of the supervisor." R. 48, Ex. 11, at 93.

n3 We reject Harris' first argument that we are without jurisdiction over this interlocutory appeal. This appeal goes beyond the evidentiary sufficiency of the district court's decision.

n4 A deadman or "blind" roadblock is an obstacle (usually a police car or truck) placed on the road in a manner that prevents an oncoming driver who is being pursued by the police from knowing the road is blocked.

n5 This court held in *Adams v. St. Lucie County Sheriff's Dep't*, 998 F.2d 923, 923 (11th Cir. 1993) (en banc) that as of 1985 it was not "clearly established" that striking a car during a police chase constituted a seizure. That case was decided before Saucier and did not decide the first question which must be answered in a qualified immunity case pursuant to Saucier: whether a constitutional right had been violated. See *Adams v. St. Lucie County Sheriff's Dep't*, 962 F.2d 1563, 1577-78 ("To resolve the question of qualified immunity, we need not decide today whether the Fourth Amendment was violated."). In addition, the question in Adams - whether the striking of a car during a police chase constituted a seizure - has been unequivocally answered in the affirmative by the Supreme Court in Brower. See *Brower*, 109 S. Ct. at 1381. Moreover, the fact that

striking the car during the police chase constituted a seizure is not in dispute in this case, as the officer who rammed Harris does not, and could not under the circumstances of this case, contest that he seized Harris.

n6 In applying the test, we must take "the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight." *Graham v. Connor*, 490 U.S. 386, 396-97, 109 S. Ct. 1865, 104 L. Ed. 2d 443 (1989). The reasonableness inquiry is an objective one: "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, 109 S. Ct. 1865.

n7 In Pruitt we also looked to the Alabama Code, which defined "deadly force" as "force which, under the circumstances in which it is used, is readily capable of causing death or serious physical injury." 771 F.2d at 1479 n. 10.

n8 See also Scott's Depo., R. 48 at 157-58, (testifying that ramming Harris' vehicle at high speeds constituted a use of deadly force under the CCSD Deadly Force Policy); Fenninger's Depo., R. 50 at 62-63 (testifying that he gave authorization to make contact with the understanding that he was authorizing the use of deadly force). See also testimony of other Coweta County and Peachtree City officers stating that they considered that ramming a vehicle at 90 mph could constitute a use of "deadly force." Reynold's Depo., R.49 at 118-119; Yeager's Depo., R. 54 at 59; Kinsey's Depo., R. 51 at 44; Ercole's Depo., R. 47 at 37-40.

n9 As recognized in Vaughan:

Under Garner, a police officer can use deadly force to prevent the escape of a fleeing non-violent felony suspect only when the suspect poses an immediate threat of serious harm to police officers or others. In this case, the danger presented by [the suspects'] continued flight was the risk of an accident during the pursuit. Applying Garner in a common-sense way, a reasonable officer would have known that [ramming a car when both automobiles were] traveling at approximately 80 miles per hour ... would transform the risk of an accident on the highway into a virtual certainty.

343 F.3d at 1332-33.

n10 We recognize that whether or not Harris would have escaped has no bearing on the excessive force analysis, as Garner specifically based its holding on the assumption that a fleeing suspect would escape. 471 U.S. at 11, 105 S. Ct. 1694. We note, however, as did the district court, that there were other means to track Harris down as the pursuing officers had a description of the vehicle as well as the license plate number. We also note that absolutely no warning was given that Scott intended to use deadly force.

n11 Nor does the evidence show that Scott or the other officers were in immediate danger or threatened with imminent harm. Accepting Harris' version of events, Harris did not attempt to ram, run over, side-swipe, or swerve into any of the officers (which might have put their lives in danger in the parking lot), nor did he

attempt any such conduct once he was back on the highway immediately before the seizure. Cf. *Hernandez*, 340 F.3d at 623 (evidence of plaintiff's attempts to intentionally drive his car directly into officer's vehicle supported finding that officer's use of deadly force was reasonable); *Smith*, 954 F.2d at 347 (use of deadly force not unreasonable where suspect "posed a major threat" to officers manning roadblock by driving directly into them on a residential dead-end street and "had proven he would do almost anything to avoid capture").

n12 See also *Hawkins v. City of Farmington*, 189 F.3d 695, 703 (8th Cir. 1999); *Ludwig*, 54 F.3d at 473 (an attempt to hit an individual (not in a vehicle) with a moving squad car "is an attempt to apprehend by use of deadly force"); *Donovan*, 17 F.3d at 949-50 (backing up of a squad car into path of a fleeing motorcycle was an application of deadly force); *Sturges v. Matthews*, 53 F.3d 659, 661 n.1 (4th Cir. 1995); *Smith*, 954 F.2d at 347 (citing *Sanchez*, 914 F.2d 1355 ("even unarmed, [the plaintiff] was not harmless; a car can be a deadly weapon.").

n13 To determine the constitutionality of a seizure "we must balance the nature and quality of the intrusion on the individual's Fourth Amendment interests against the importance of the governmental interests alleged to justify the intrusion." *Graham*, 490 U.S. at 396 (citing *United States v. Place*, 462 U.S. 696, 703, 103 S. Ct. 2637, 2642, 77 L.Ed.2d 110 (1983); *Delaware v. Prouse*, 440 U.S. 648, 654, 99 S.Ct. 1391, 1396, 59 L. Ed. 2d 660 (1979); *United States v. Martinez-Fuerte*, 428 U.S. 543, 555, 96 S. Ct. 3074, 3081, 49 L. Ed. 2d 1116 (1976)).

n14 These facts are not comparable to those in Harris. In the light most favorable to Harris, there is no comparable evidence that Scott had arguable probable cause to believe that Harris posed an immediate risk of death or serious danger to Scott, other officers, or nearby citizens. Harris was being chased for a traffic violation, not a "crime involving the infliction or threatened infliction of serious physical harm." *Garner*, 471 U.S. at 11, 105 S. Ct. 1694. Unlike the situation in Brosseau, the parties were not in close physical proximity nor had they had a one-on-one struggle. In fact, Scott and the other pursuing officers were following Harris from behind in their squad cars. At the time of the ramming, apart from speeding and running two red lights, Harris was driving in a non-aggressive fashion (i.e., without trying to ram or run into the officers). Moreover, unlike Haugen, who was surrounded by officers on foot, with other cars in very close proximity in a residential neighborhood, Scott's path on the open highway was largely clear. The videos introduced into evidence show little to no vehicular (or pedestrian) traffic, allegedly because of the late hour and the police blockade of the nearby intersections. Finally, Scott issued absolutely no warning (e.g., over the loudspeaker or otherwise) prior to using deadly force.

n15 We also note that the Court in Brosseau acknowledged that the standard in Garner can "clearly establish" whether or not the use of deadly force is unconstitutional in an "obvious case." *Brosseau*, 125 S. Ct. at 599; *United States v. Lanier*, 520 U.S. 259, 271, 117 S. Ct. 1219, 137 L. Ed. 2d 432 (1997) ("general constitutional rule already identified in the decisional law ... applied with obvious clarity to [his conduct]."). It

is well-established that "general statements of the law" are perfectly capable of giving clear and fair warning to officers even where "'the very action in question has [not] previously been held unlawful.'" *Lanier*, 520 U.S. at 271 (quoting *Anderson*, 483 U.S. at 640, 107 S.Ct. 3034); *Vinyard*, 311 F.3d at 1350-51. While we need not conclude that the facts in Harris present just such an "obvious" case to deny Scott qualified immunity, this case may present such circumstances, since the evidence shows that Scott lacked the sufficient probable cause to warrant the use of deadly force. In this way, Harris is more like Vaughan than Brosseau or the cases cited therein. See *Vaughan*, 343 F.3d at 1333 ("applying Garner in a common-sense way" to hold that a reasonable officer would have known that it was unconstitutional to use deadly force during a high-speed pursuit where the suspect posed no immediate threat of harm to police officers or others). In the cases relied upon in Brosseau, the officer had arguable probable cause to believe that the suspects presented an immediate risk of danger to the officers or others. See *Brosseau*, 125 S. Ct. at 600 (citing *Cole v. Bone*, 993 F.2d 1328 (8th Cir. 1993) and *Smith*, 954 F.2d 343). Without the existence of an immediate threat of harm to the officers or others that could justify the officer's probable cause, the Garner rule prohibiting deadly force may apply with "obvious clarity."

n16 See citations on pages, supra.

n17 *Brower*, 489 U.S. at 596-99, 109 S. Ct. 1378.

n18 Scott is not foreclosed from seeking to assert a qualified immunity defense at trial if the facts proven at trial differ from those we consider here for summary

judgment purposes.

9/23/2003
NO. 3:01-CV-148-WBH
UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

VICTOR HARRIS,
Plaintiff,

v.

COWETA COUNTY, GEORGIA, SHERIFF MICHAEL S. YEAGER, SGT. MARK FENNINGER, DEPUTY CLINTON D. REYNOLDS, and DEPUTY TIMOTHY SCOTT,
Defendants.

ORDER

Before the Court is Defendants' motion for summary judgment [36]. Also before the Court is Defendants' motion to amend answer [65], which is granted as unopposed. For the reasons set forth below, Defendants' motion for summary judgment is granted in part and denied in part.

BACKGROUND

As this case is before the Court on Defendants' motion for summary judgment, the Court must view the facts in the light most favorable to Plaintiff, the non-movant. Hairston v. Gainesville Sun Publ'g Co., 9 F.3d 913, 918 (11th Cir. 1993). Viewed in this light, the following facts emerge.

The chase

At 10:42 p.m. on March 29, 2001, Deputy Clinton Reynolds of the Coweta County Sheriff's office was stationed on Highway 34 when he clocked Plaintiff Victor Harris's vehicle traveling at 73 miles per hour in a 55 miles-per-hour zone. The vehicle that Harris was driving was registered in Harris's name and at his proper address. Although Reynolds flashed his blue lights, Harris refused to slow down and continued driving. According to Harris, he refused to stop because he was scared, wanted to get home, and was hoping to avoid an impound fee for his car.

Reynolds made a decision to pursue Harris, and followed the vehicle in the direction of Peachtree City, using his flashing lights in an attempt to get Harris to stop. Just past Sullivan Road, Reynolds caught up with Harris and tuned on his lights and siren, which activated his video camera. Harris still refused to stop and then sped up, beginning a high speed chase. Harris admits that during the course of the pursuit, he drove well in excess of the speed limits, passed vehicles on a double yellow line, and ran a red light at the intersection of Highway 34 and Fisher Road. Despite these traffic violations, Plaintiff contends that he used his turn signals when passing or turning, and maintained control over his vehicle.[1]

After Harris refused to stop, Reynolds radioed dispatch and reported that he was pursuing a fleeing vehicle, and he broadcast its license plate number. Reynolds did not, however, broadcast the underlying charge (speeding). Although not specifically requested to join the pursuit, Coweta County Deputy Chuck Scott heard

Reynolds' radio communication and decided to join the pursuit.

After crossing into Peachtree City, Harris slowed down, activated his blinker, and turned into a drugstore parking lot located in a shopping complex. Reynolds followed Harris as he drove through the parking lot toward Highway 74 while Scott proceeded around the opposite side of the complex in an attempt to prevent Harris from leaving the parking lot and getting onto Highway 74. The parties dispute what happened next. According to Harris, Scott drove his vehicle directly into Harris's path, while Reynolds was in pursuit from behind. When he realized that Scott was in his lane of traffic, Harris attempted to turn to the left to avoid hitting Scott's car, but the two vehicles carne in contact with each other, causing minor damage to Scott's cruiser.[2] Harris then entered Highway 74 and continued to flee at a high speed. At that time, Sgt. Mark Brown of the Peachtree City Police Department ordered his fellow Peachtree City officers to block intersections from cross-traffic.

As the pursuit continued through Peachtree City, Scott took over as the lead vehicle. After leaving the parking lot and getting on Highway 74, Scott requested and obtained approval from his supervisor, Sergeant Mark Fernninger, to make physical contact with Harris's vehicle in what is termed a "PIT" maneuver.[3] Although unaware of the underlying offense of which Harris was suspected, Scott wanted to use the PIT maneuver to end the chase as soon as possible because he felt that Harris was acting in a reckless and extremely dangerous manner. At the time the request was made, there were no motorists or pedestrians in the area,

which was due, in part, to the Peachtree City officers' decision to blockade intersections.

While it is disputed whether Fenninger knew about the collision between Harris and Scott in the parking lot, the evidence indicates that Fenninger was concerned about the safety of pedestrians and felt that Harris had to be stopped. In granting Scott permission to make contact with Plaintiffs vehicle, Fenninger stated over the radio, "Go ahead and take him out. Take him out." According to Harris's version of the facts, Fenninger was never made aware that the pursuit originated with a speeding violation.

After receiving approval from Fenninger to snake contact with Harris's vehicle, Scott determined that he could not perform the PIT maneuver because he was going too fast. Scott then decided to hit Harris's bumper, presumably in a mariner different from a PIT maneuver. The parties dispute whether Scott slowed down or sped up, but they agree that he ran his cruiser into Harris's vehicle, causing Harris to lose control. Harris's vehicle left the roadway, ran down an embankment, and crashed. As a result, Harris was rendered a quadriplegic. No one else was injured.

Coweta County's policies

Under the vehicle pursuit policy of the Coweta County Sheriff's Office in effect at the time of the incident, decisions regarding the initiation, continuation, and termination of pursuits were left to the discretion of the officer and supervisor in the field. Specifically, the policy states that "the pursuing deputy should keep in. mind his personal safety and try everything within his

authority to apprehend the violator without resorting to a high-speed chase." This type of policy, which leaves the decision about pursuits to the discretion of the officer in the field and the supervisor, is called a "judgmental policy." Across the country, a majority of police departments had such judgmental policy in force at the time of the incident involving Harris.

Included in the pursuit policy is a provision that "deliberate physical contact between vehicles at any time may be justified to terminate the pursuit upon the approval of the supervisor." Additionally, the policy states that the officer should discontinue the pursuit when "upon weighing the pertinent factors, the gravity of the offense and the prospect of losing the suspect will not balance with the hazards to the Deputy and the public" or "upon receipt of additional information once the pursuit has begun that would allow later apprehension and successful prosecution."

Training

It is undisputed that Coweta County Sheriff's Deputies had all of the training required by the State of Georgia, including emergency vehicle operations ("EVOC") training. EVOC training focuses solely on the physical aspects of driving a vehicle in an emergency setting and not on the philosophy of pursuits or pursuit policies. The County also required its officers to have an additional twenty hours of training. The County, however, did not provide any training in high-speed pursuits or the use of deadly force other than that included in basic officer training provided by the state police academy. The only deadly force training provided to Coweta County officers related to firearms.

Although the pursuit policy authorized the deputies to make "deliberate physical contact between vehicles" under certain circumstances, the officers were not trained in how to determine whether to make such contact or in how to safely make such contact. Additionally, Scott admitted that he never received any training on the County's policies and procedures, including the pursuit policy.

The lawsuit

On October 16, 2001, Harris fled a Complaint against Scott, Reynolds, and Fenninger, as well as Coweta County and Sheriff Michael Yeager. Pursuant to 42 U.S.C. § 1983, Harris alleges a violation of his rights under the Fourth and Fourteenth Amendments. Furthermore, under state law, he asserts claims under the Georgia Constitution as well as various common law tort claims.

In his response to the motion for summary judgment, Harris concedes that summary judgment is appropriate on the following claims: all claims against Reynolds, all state law claims against Sheriff Yeager, and all other state law claims except for the negligence and battery claims against Scott, Fenninger, and Coweta County. The Court will address each of the remaining claims in turn.

DISCUSSION

Summary judgment standard

Summary judgment is proper when no genuine issue as to any material fact is present, and the moving party is

entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c). The movant carries the initial burden and must show that there is "an absence of evidence to support the nonmoving party's case." Celotex Corp. v. Catrett, 477 U.S. 317, 325 (1986). "Only when that burden has been met does the burden shift to the non-moving party to demonstrate that there is indeed a material issue of fact that precludes summary judgment." Clark v. Coats & Clark, Inc., 929 F.2d 604, 608 (11th Cir. 1991). The nonmovant is then required "to go beyond the pleadings" and present competent evidence in the form of affidavits, depositions, admissions and the like, designating "specific facts showing that there is a genuine issue for trial." Celotex, 477 U.S. at 324. "The mere existence of a scintilla of evidence" supporting the nonmovant's case is insufficient to defeat a motion for summary judgment. Anderson v. Liberty Lobby, Inc., 477 U.S. 242,252 (1986). Resolving all doubts in favor of the nonmoving party, the court must determine "whether a fair-minded jury could return a verdict for the plaintiff on the evidence presented." Id.

Defendants' motion

I. Federal Claims

A. Fourth Amendment claim against Defendant Scott

In Count I of his Complaint, Harris alleges that Defendant Scott violated his Fourth Amendment rights by using excessive force to stop his vehicle. "The first step in reviewing an excessive force claim is to determine whether the plaintiff was subjected to the `intentional acquisition of physical control' by a government actor - that is, whether there was a

`seizure' within the meaning of the Fourth Amendment." Vaughan v. Cox, No. 0014380, 2003 U.S. App. LEXIS 18066, at *9-10 (11th Cir., August 29, 2003) (quoting Brower v. Countv of Inyo , 489 U.S. 593, 596 (1989)). The Supreme Court has held that a seizure occurs "when there is a governmental termination of freedom of movement through means intentionally applied." Brower, 489 U.S. at 597. It is clear to the Court that the Brower standard has been met in this case. Scott rammed Harris's vehicle for the purpose of stopping it, and the ramming did, in fact, cause the vehicle to come to a stop. A seizure, therefore, occurred.[4]

Having concluded that Harris was subjected to a seizure, the Court now turns to the merits of Harris's Fourth Amendment claim that he was subjected to an unreasonable seizure because of Scott's use of excessive force. Such claims are subject to an objective reasonableness inquiry: "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." Graham v. Connor, 490 U.S. 386, 397 (1989). "The `reasonableness' of a particular use of force must be judged from the perspective of a reasonable officer on the scene, rather than with the 20120 vision of hindsight. . . . The calculus of reasonableness must embody allowance for the fact that police officers are often forced to make split-second judgments--in circumstances that are tense, uncertain, and rapidly evolving--about the amount of force that is necessary in a particular situation." Id. at 396-97.

In their motion, Defendants argue that there was no

constitutional violation because Scott's use of force was non-deadly and was objectively reasonable.[5] They contend that Harris presented a significant danger because he was driving recklessly at high speeds and had hit Scott's vehicle. Plaintiff responds that Scott used deadly force, and that such force was unreasonable because Harris was a traffic offender, and the officers could have used alternative means to arrest him at a later time.

Regardless of whether the force was deadly or not, Harris's excessive force claim is judged by the "objective reasonableness" standard set forth in Graham v. Connor. See 490 U.S. 395.[6] Graham instructs that the Court must examine the facts carefully and provides three examples of questions relevant to the inquiry: (1) how severe was the crime at issue; (2) whether the suspect posed an immediate threat to the safety of the officers or others; and (3) whether he was attempting to evade arrest by flight. See Graham, 490 U.S. at 396. Applying the Graham analysis to the facts of this case, the Court concludes that a reasonable jury could find, under Harris's version of the facts, that Scott's use of force was unconstitutional because it was not an objectively reasonable use of force.

The central fact that guides this Court's decision is that, prior to Reynolds' decision to instigate a high-speed chase, Harris's only crime was driving 73 miles per hour in a 55 miles-per-hour zone. A rational fact finder could find that a reasonable officer would not have believed that because of his traffic offense, Harris posed an immediate threat to the safety of others. The record does not reflect that he had menaced or was likely to menace others.

Defendants do not address this point in their brief, rather focusing exclusively on Harris's conduct during the chase. The Court is mindful that traffic laws are designed for public safety and that by breaking these laws -- by speeding, improper passing, and even failing to stop -- Harris acted in an unsafe manner; however, the record reflects that he maintained control over his vehicle, used his turn signals, and did not endanger any particular motorist on the road. With the exception of the incident with Scott's vehicle in the parking lot, which is addressed below, Harris did not use his vehicle in an aggressive manner.

Defendants argue that the crash in the parking lot between Harris's car and Scott's cruiser demonstrated that Harris presented a significant danger to others. Viewing the facts in Harris's favor, however, it appears that either Scott hit Harris, or that the crash was an accident. According to the official report submitted by Sgt. Mark Brown of the Peachtree City Police Department as well as the testimony of Harris, Scott rammed Harris's car. These facts rebut Defendants' assertion that Harris aggressively used his vehicle to strike Scott's cruiser. Additionally, the decision to ram the vehicle came minutes later, when Harris was driving away from officers, and when there were no other motorists or pedestrians nearby, thus casting doubt on Defendants' assertion that at the time of the ramming, Harris posed an immediate threat of harm to others. Finally, the Court has also considered the fact that the officers had the license plate number for Harris's vehicle, and the vehicle had not been reported stolen. Reasonable officers, therefore, would have known that they could have followed up on the license

plate information at a later time.

Under this version of the facts, a fact finder could conclude that when Scott rammed Harris's vehicle, he faced a fleeing suspect who, but for the chase, did not present an immediate threat to the safety of others since the underlying crime was driving 73 miles per hour in a 55 miles-per-hour zone. A jury could also find that Scott's use of force --- ramming the car while traveling at high speeds - was not in proportion to the risk that Harris posed, and therefore was objectively unreasonable. See Vaughan, 2003 U.S. App. LEXIS 18066, at * 16 (stating that a reasonable jury could conclude that an officer's use of deadly force against two fleeing suspects was unreasonable where the officer "simply faced two suspects who were evading arrest and who had accelerated to eighty to eighty-five miles per hour in a seventy-miles-per-hour zone in an attempt to avoid capture.") Thus, a fact issue remains regarding whether Scott violated the Fourth Amendment by using excessive force to seize Harris.

Having concluded that the facts alleged could establish a constitutional violation, the Court now turns to Scott's defense of qualified immunity. In deciding whether Scott is protected by qualified immunity, the Court must determine whether Harris's rights were clearly established - that is, whether it would have been clear to a reasonable officer that Scott's conduct was unlawful. See Saucier v. Katz, 533 U.S. 194, 201-202 (2001). "It is well-settled that a constitutional right is clearly established only if its contours are `sufficiently clear that a reasonable official would understand that what he is doing violates that right.'" Vaughan, 2003 U.S. App. LEXIS 18066, at *19 (quoting Anderson v.

Creighton, 483 U.S. 635, 640 (1987)). Thus, "qualified immunity is appropriate in close cases where a reasonable officer could have believed that his actions were lawful." Lee v. Ferraro, 284 F.3d 1188, 1200 (11th Cir. 2002). The Supreme Court, however, has cautioned that in applying the qualified immunity analysis, courts should not be unduly rigid, but rather should see if the law gave the defendant "fair warning" that the alleged conduct was unconstitutional. See Hope v. Pelzer, 536 U.S. 730, 741 (2002).

At the time of the incident, the law was clearly established that the level of force appropriate in a situation depended, at least in part, on the crime that the fleeing suspect was thought to have committed. See Tennessee v. Garner, 471 U.S.1,11-12 (1985) (setting forth the standard for the use of deadly force to subdue a fleeing felon and recognizing that common law prohibited the use of deadly force to apprehend a misdemeanant); Graham, 490 U.S. at 396 (stating that one of the factors that an officer should consider is the severity of the crime in issue). In the present case, the facts indicate that Scott did not know the underlying charge when he decided to join in the chase or at the time that he rammed the vehicle. Defendants rely heavily upon the crash in the parking lot to show that Harris was dangerous, but the evidence, when viewed in Harris's favor, indicates that a large part of the responsibility for the parking lot incident rests with Scott who deliberately drove into Harris's line of traffic. Although the Court is loath to question the judgment of police officers and recognizes that Defendants' version of the facts is quite different from Plaintiff's version, the Court is compelled to conclude that there are material issues of fact on which the issue

of qualified immunity turns which present sufficient disagreement to require submission to a jury. Anderson, 477 U.S. at 25152. Defendants' motion for summary judgment on this claim is DENIED.

B. Fourth Amendment claim against Defendant Fenninger

It is undisputed that, at the time Scott rammed Plaintiff s car, his supervisor, Defendant Fenninger, was miles away from the accident. "Supervisory officials are not liable under section 1983 on the basis of respondent superior or vicarious liability." Hardin v. Hayes, 957 F.2d 545, 849 (11th Cir. 1992). To recover individually from a person such as Fenninger in a supervisory administrative capacity, the plaintiff must show that the supervisor is liable either through personal participation in the acts comprising the alleged constitutional violation, or the existence of a causal connection linking the supervisor's actions with the violation. See Hill v. DeKalb Regional Youth Detention Ctr., 40 F.3d 1176, 1192 (11th Cir.1994) (overruled in part by Hope v. Pelzer, 536 U.S. 730, 739 n.9 (2002)).

Here, Plaintiff argues that Fenninger is liable for the Fourth Amendment violation because he explicitly authorized Scott to use unreasonable force to stop the vehicle, and, therefore, personally participated in the use of excessive force. Defendants respond that Fenninger cannot be held liable because he did not effect a "seizure" of the vehicle.

The evidence shows that Scott requested and obtained approval from Fenninger to make physical contact by executing a PIT maneuver. Fenninger granted

permission without inquiring about the underlying crime for which Harris was being pursued, and without asking whether there were any motorists or pedestrians in the area. Fenninger authorized the force, even though neither he nor Scott were trained in how to safely carry it out. In granting Scott permission to undertake this dangerous act, Fenninger stated over the radio, "Go ahead and take him out. Take him out."

The Court agrees with Plaintiff that, to the extent a jury may find a Fourth Amendment violation on the part of Scott, they may also find that Fenninger is liable because he personally participated in the decision to use the excessive use of force by explicitly authorizing it. The fact that he was not physically present at the scene does not absolve him of liability, since a reasonable inference can be drawn that but for his authorization, Scott would not have struck Plaintiffs vehicle. Defendants' motion for summary' judgment on this claim is DENIED.[7]

C. Fourteenth Amendment claim against Defendants Scott and Fenninger

It appears that Plaintiff brought the Fourteenth Amendment claims as alternatives to his Fourth Amendment claims. See Pl.'s Br. at 16-17 (stating that the Court need not address the Fourteenth Amendment claims if it finds a Fourth Amendment violation). Because the Court has denied Defendants' motion for summary judgment on the Fourth Amendment claims, the Court need not address Plaintiffs Fourteenth Amendment claims, and Defendants' motion for summary judgment with respect to these claims, therefore, is GRANTED.[8]

D. Individual liability against Sheriff Yeager

Plaintiff concedes that Sheriff Yeager did not personally participate in any actions leading to the seizure of Harris, but he contends that Sheriff Yeager may be held liable in his individual capacity for acts or omissions which proximately led to the violation of Harris's rights. Specifically, Plaintiff claims that the Sheriff should have trained his deputies in how to conduct high speed chases; in how to safely effect ramming techniques such as the PIT maneuver, and in how to determine when chases and ramming techniques are appropriate. In some situations, supervisors may be held liable for failing to train and supervise their subordinates adequately. See Dolihite v. Maughon by and through Videon, 74 F.3d 1027, 1052 (11th Cir. 1996).

Even assuming, for purposes of this Order, that there was a causal connection between Sheriff Yeager's failure to train and Plaintiffs injuries, this claim fails because the Sheriff is entitled to qualified immunity. The undisputed evidence shows that Coweta County Sheriff s Deputies had all of the training required by the State of Georgia. Plaintiff cites to no law or constitutional right that required Sheriff Yeager to train his employees in the manner suggested by Plaintiff. hi the absence of such authority, Sheriff Yeager is entitled to immunity from suit. See Riley v. Newton, 94 F.3d 632, 637 (11th Cir.1996) (granting to sheriff summary judgment on qualified immunity grounds and distinguishing the qualified immunity standard for failure to train claims from the standard applicable to such claims against municipalities Defendants' motion for summary judgment on this

claim is GRANTED.

E. Municipal liability against Coweta County[9]

In order for Harris to snake out a claim for municipal liability under Section 1983, he must identify a municipal policy or custom that caused his injury. See Grech v. Clan County, 335 F.3d 1326,1329 (11th Cir. 2003). To establish a county policy, a plaintiff may identify either an officially-promulgated county policy or an unofficial custom or practice of the county shown through the repeated acts of a final policymaker for the county. See id. "Because a county rarely will have an officially-adopted policy of permitting a particular constitutional violation, most plaintiffs . . . must show that the county has a custom or practice of permitting it and that the county's custom or practice is the moving force behind the constitutional violation." Id. (internal quotations omitted). Plaintiff has articulated two theories for municipal liability: (1) the County had an unconstitutional policy of engaging in high-speed chases to pursue fleeing offenders which is evidenced by the County's failure to discipline its officers and others involved in similar incidents; and (2) the County's failure to properly train and supervise its officers in the face of an obvious need to train constitutes deliberate indifference to the safety of county residents.

1. Failure to discipline

Harris contends that Coweta County has an informal policy or custom allowing its deputies to engage in high-speed chases and use deadly force in inappropriate circumstances. Plaintiff's expert opined that "the custom and practice of the Coweta County Sheriff's

Office is to ratify and encourage the use of deadly force against fleeing offenders without regard for the underlying offense or the immediacy and severity of the threat posed by the offender." As evidence of this informal policy or custom, Plaintiff relies upon the fact that the officers involved in this case were not disciplined and that Defendants have admitted the officers violated no official county policy. Plaintiff's expert also states that the County was on notice of this problem because of two prior incidents involving a deputy named Cox, who he claims had been involved in two prior pursuits in which deadly force was used against violators who were not suspected of violent felonies.

Defendants respond, and the Court agrees, that Plaintiff has not presented sufficient evidence to male out a claim against Coweta County on this basis. First, Plaintiff has presented no evidence that any officially-adopted policy was unconstitutional. Rather, Plaintiff's evidence is that the County's high-speed pursuit policy, described as a "judgmental policy," is widely used throughout the country, and in fact is adopted by the majority of the jurisdictions.

Second, Plaintiff has not presented sufficient evidence that there was any unofficial custom or practice of engaging in high-speed chases and improperly using excessive force. Plaintiff s expert referenced only two prior high-speed pursuits, and presented no specific evidence regarding the facts of these two incidents.[10] Vague references to two prior incidents do not constitute ratification and encouragement of an unconstitutional policy. See Bannum, Inc. v. City of Ft. Lauderdale, 901 F.2d 989, 998 n.29 (11th Cir. 1990)

(noting that an employee's unconstitutional decisions must have been made repeatedly to have become a "custom or usage" of which his or her supervisor must have known and approved.); see also Gilmere v. Atlanta, 737 F.2d 894, 904-05 (11th Cir. 1954)("occasional acts of untrained policemen standing alone are not attributable to city policy or custom). Additionally, the failure of the County to discipline the officers or conduct an investigation into this particular incident is insufficient evidence to establish a custom. Without evidence that the County persistently failed to discipline officers for such known unconstitutional conduct, such a policy cannot be inferred from the County's isolated decision not to discipline the officers involved in this incident. See McQurter y. City of Atlanta, 572 F. Supp. 1401, 1420 (N.D. Ga. 1953) (Forrester, J.) (internal citations omitted) (refusing to infer a policy of using excessive force based on evidence of a failure to discipline in one case only). For these reasons, Defendants' motion for summary judgment on this claim is GRANTED.

2. Failure to train

A municipality can be held liable under Section 1983 for inadequately training or supervising its employees only in limited circumstances. The inadequate training or supervising must evidence the municipality's "deliberate indifference" to the rights of the inhabitants so as to amount to a policy or custom that is actionable under Section 1983. See Gold v. City of Miami Fla., 151 F.3d 1346, 1350 (11th Cir. 1998) (quoting City of Canton v. Harris, 489 U.S. 378, 388-89-(1989)). Deliberate indifference is shown by "evidence that the municipality knew of a need to train and/or supervise in a particular

area and the municipality made a deliberate choice not to take any action." Id.

One of the ways a plaintiff may demonstrate a county's deliberate indifference is by showing that the need for a particular type of training is obvious, even without prior incidents to place the municipality on notice. Young v. City of Augusta, Ga., 59 F.3 d 1160, 1172 (11th Cir.1995). One example of such an obvious need is the use of deadly force where firearms are provided to police officers. See Gold, 151 F.3d at 1352. Here, Plaintiff argues, and the Court agrees, that there was an obvious need for training with respect to high-speed chases since the Coweta County officers were vested with the discretion to embark on high-speed chases and were allowed to ram vehicles under certain circumstances.[11] Indeed, the official pursuit policy authorized this conduct.

At his deposition, Sheriff Yeager testified that high-speed pursuits and PIT maneuvers are high risk activities that create an obvious need for training. Plaintiff's expert has also opined that pursuit driving and ramming techniques such as that used by Scott against Harris are high-risk activities which obviously require training. Thus, the Court concludes that Plaintiff has provided sufficient evidence to create a fact issue as to whether giving a police officer a vehicle and the discretion to use it in an offensive - and perhaps deadly manner creates a need to train that is so obvious' that, even without notice of prior constitutional violations, the County had a duty to train. See Gold, 151 F.3d at 1352; see also Brown v. Bryan County, 219 F.3d 450, (5th Cir. 2000) (finding that the need to train officers in how to make arrests

with force is so obvious that the failure to train in this area amounts to deliberate indifference to constitutional rights). Thus, a fact issue remains on the issue of whether the County's failure to train amounted to deliberate indifference.

As a final argument, Defendants respond that Plaintiff has failed to present competent evidence that the lack of training was the "moving force" behind, i.e., directly caused, the injuries suffered by Harris. The Court is not persuaded by this argument. A reasonable inference can be drawn from Plaintiff s evidence that a training course would have taught the officers to consider the underlying offense and whether other means - such as tracing the license plate number -- could be used to capture the suspect at a later time. Another reasonable inference is that, had the officers attended such a training course, they would have considered these factors, applied them in a reasonable manner, and decided against ramming Harris's car, and perhaps even against embarking on the chase in the first place.

Given these conclusions, the Court finds that Harris has carried his summary judgment burden of showing that the County's failure to train its officers constituted a policy decision for which the County can be held liable under Section 1983. Defendants' motion for summary judgment on this claim, therefore, is DENIED.

II. State Claims

A. Negligence and battery claims against Defendants Scott and Fenninger

Plaintiff alleges that Scott was negligent by (1)

attempting a PTT maneuver at high speeds on a two-lane road without any training; (2) operating his vehicle in an unsafe manner; and (3) ramming Plaintiff's vehicle. Plaintiff alleges that Fenninger was negligent in authorizing Scott's conduct without first obtaining the information necessary to evaluate the situation and make a proper decision. Defendants do not dispute that Plaintiff has made out a prima facie case of negligence, but rather respond that the officers are entitled to official immunity.

County employees are immune from liability unless they negligently perform ministerial tasks or act with actual malice in performing discretionary tasks. See Ga. Const. of 1983, Art. I, See. 11, Par. IX (d); Gilbert v. Richardson, 264 Ga. 744, 747 (1994). The decision to make an arrest is a discretionary act. See Anderson v. Cobb, 258 Ga. App. 159, 160 (2002). Plaintiff contends that his evidence supports a finding that Defendants Scott and Fenninger acted with actual malice because (1) both officers admit that the ramming of the car was deliberate and likely to cause harm and (2) Fenninger stated "take him out."

The evidence in this case demonstrates that Scott and Fenninger's intention was to stop Plaintiff's car - not to injure him. While Plaintiff may credibly argue that the officers violated his constitutional rights, his evidence simply does not support a conclusion that the officers intended to harm him. See Anderson, 258 Ga. App. at 160 (stating "[i]ll will alone is insufficient to establish actual malice; [the plaintiff] must show that [the defendant] acted with the deliberate intent to commit a wrongful act or with the deliberate intent to harm [him]."). In the absence of evidence of actual malice,

Scott and Fenninger are immune from the state law claims, and Defendants' motion for summary judgment on these claims is GRANTED.

B. Negligence claim against Coweta County

Despite the general rule that counties have sovereign immunity from tort claims, Plaintiff asserts that Coweta County nevertheless can be held liable for the state-law torts allegedly committed by Defendants Scott and Fenninger because Coweta County has waived its immunity pursuant to O.C.G.A. § 33-24-51. That Code section provides, in part, that: The sovereign immunity of local government entities for a loss arising out of claims for the negligent use of a covered motor vehicle is waived as provided in Code Section 36-92-2. Whenever a municipal corporation, a county, or any other political subdivision of this state shall purchase the insurance authorized by subsection (a) of this Code section to provide liability coverage for the negligence of any duly authorized officer, agent, servant, attorney, or employee in the performance of his or her official duties in an amount greater than the amount of immunity waived as in Code Section 36-92-2, its governmental immunity shall be waived to the extent of the amount of insurance so purchased. Neither the municipal corporation, county, or political subdivision of this state nor the insuring company shall plead governmental immunity as a defense; and the municipal corporation, county, or political subdivision of this state or the insuring company may make only those defenses which could be made if the insured were a private person.

O.C.G.A. 33-24-51(b). Thus, by purchasing liability

insurance to cover the negligence of county employees arising from the use of a motor vehicle, a county waives sovereign immunity pursuant to O.C.G.A. § 33-24-51 (b), but only to the extent of the amount of insurance. See Woodard v. Laurens County, 265 Ga. 404, 406 (1995).[12]

Here, it is undisputed that Coweta County maintains insurance to cover it and its employees for any state tort liability arising from the use of county vehicles driven by its sheriff s deputies. It is also undisputed that the vehicle driven by Scott was owned by Coweta County and was covered by the County's insurance. It is clear to the Court that, pursuant to O.C.G.A. § 33-24-61(b), Coweta County has waived sovereign immunity with respect to Plaintiffs negligence claims against Defendants Scott and Fenninger.

Defendants next argue that even if there is a waiver of sovereign immunity, the general negligence standard does not apply and that Plaintiff must show that the officers acted with "reckless disregard" of public safety. In support of this argument, Defendants rely upon O.C.G.A. § 40-6-6 which, among other things, governs the operation of a law enforcement vehicle when pursuing a suspected law violator. This code section gives police officers authority to proceed past a red signal or stop sign after slowing down, exceed the maximum speed limits so long as life and property are not endangered, and disregard regulations governing direction. See O.C.G.A. § 40-6-6(b). "By these provisions, the legislature intended to grant police officers and drivers of emergency vehicles exceptional rights in operating motor vehicles, but also to protect travelers from an officer's or driver's reckless disregard

of the public's safety on the highways." Cameron v. Lang, 274 Ga. 122, 127-28 (2001). The code section also specifically addresses police pursuits:

When a law enforcement officer in a law enforcement vehicle is pursuing a fleeing suspect in another vehicle and the fleeing suspect damages any property or injures or kills any person during the pursuit, the law enforcement officer's pursuit shall not be the proximate cause or a contributing proximate cause of the damage, injury, or death caused by the fleeing suspect unless the law enforcement officer acted with reckless disregard for proper law enforcement procedures in the officer's decision to initiate or continue the pursuit. Where such reckless disregard exists, the pursuit may be found to constitute a proximate cause of the damage, injury, or death caused by the fleeing suspect, but the existence of such reckless disregard shall not in and of itself establish causation.

O.C.G.A. § 40-6-6(c)(2) (emphasis supplied).

Plaintiff responds, and the Court agrees, that this statute is inapplicable to the present case. The statute specifically provides that "the law enforcement officer's pursuit" shall not be the proximate cause of an injury unless the officer acts with reckless disregard. Here, Plaintiffs negligence claim is not based on the officers' decision to initiate and pursue the chase; rather, it is based on the officers' decisions to ram Plaintiffs vehicle. Moreover, section § 40-6-6(b) provides law enforcement officers with specific "exceptional rights," and the right to ram another car is not listed as one of those rights.

As stated previously, Defendants do not dispute that

Plaintiff has made out a prima facie case of negligence. The Court concludes that Plaintiff has provided sufficient evidence to mare out a prima facie case of negligence against Scott for ramming Plaintiff's vehicle at high speeds on a two-lane-road without any training and against Fenninger for authorizing Scott's allegedly negligent use of his county vehicle without first obtaining the information necessary to evaluate the situation and make a proper decision. Accordingly, Defendants' motion for summary judgment on the negligence claim against Coweta County is DENIED.

CONCLUSION

Defendants' motion for summary judgment [36] is GRANTED IN PART and DENIED IN PART. After this ruling, the following claims remain pending: Fourth Amendment claim against Defendants Scott and Fenninger in their individual capacities; municipal liability claim for failure to train against Coweta County; and negligence claim against Coweta County based on the acts of Defendants Scott and Fenninger All other claims are hereby dismissed.

Defendants' motion to amend their answer [65] is GRANTED AS UNOPPOSED. It is so ORDERED this 25th day of September, 2003.

Willis B. Hunt, Jr.
Judge, United States District Court

Footnotes

fn1The speed of the chase is disputed. Defendants contend that it was in excess of 100 miles per hour.

Plaintiff denies that he drove that fast, but agrees that Scott, in his "overzealousness to join the pursuit" drove his cruiser at speeds well over 100 miles per hour.

fn2Defendants assert that Harris was boxed in by the officers and deliberately rammed Scott's cruiser in an attempt to get away. Harris maintains that the crash was unintentional.

fn3A PIT maneuver is a driving technique designed to stop a fleeing motorist safely and quickly by hitting the fleeing car at a specific point which throws the car into a spin the driver cannot control, bringing the car to a stop.

fn4Defendants essentially concede that a seizure occurred. In their brief, they argue that officers Reynolds and Fenninger did not seize Plaintiff, but they do not include Scott in this argument. See Defs.' Br. [36] at 10-12.

fn5In support of this argument, Defendants rely exclusively upon dicta from Adams v. St. Lucie County Sheriffs Dept., 962 F.2d 1563 (11th Cir.1992); rev'd, 998 F.2d 923 (11th Cir. 1993 (per curiam). In Adams, the defendant officer intentionally rammed a fleeing misdemeanant several times following a high-speed pursuit through a residential neighborhood, and the final blow caused the car to go out of control. The car crashed, and the passenger was killed. The Eleventh Circuit struggled with this case, initially affirming the denial of summary judgment on qualified immunity grounds, see 962 F.2d at 1572, and then issuing a subsequent opinion reversing the denial of summary judgment for the reasons set forth in Judge

Edmonson's dissent in the original opinion, see 998 F.2d 923. Judge Edmonson reasoned that the officers were entitled to qualified immunity because in 1985, the law was not clearly established that ramming a vehicle constituted a seizure. See id. at 1576. He then goes on to opine that ramming a fleeing vehicle did not constitute a violation of the Fourth Amendment. See id. at 1577.

In the two-sentence second opinion, the Court did not adopt Judge Edmonson's dissent as its opinion, but rather reversed the district court based on the "reasoning" of the dissent. This Court concludes that the reasoning of the dissent focused on qualified immunity and whether the law with respect to seizures was clearly established. Thus, Judge Edmonson's discussion of whether ramming a vehicle constitutes a Fourth Amendment violation is dicta. Moreover, the Court's "reasoning" with respect to qualified immunity is called into question by the Supreme Court decision in Hoe v. Pelzer, 536 U.S. 730, 741 (2002), and the Eleventh Circuit's recent decision in Vaughan, 2003 U.S. App. LEXIS 18066.

fn6 Because the "objective reasonableness" standard applies regardless of whether the force applied was deadly or not, this Court need not decide whether Scott used deadly force.

fn7 Defendants do not specifically argue that Fenninger is entitled to qualified immunity, but the Court has considered this issue. For the same reasons that Scott is not entitled to qualified immunity as a matter of law, the Court concludes that Fenninger is not entitled to qualified immunity as a matter of law.

fn8Additionally, the Court concludes that the Fourteenth Amendment claim, based on Scott's alleged conscience-shocking conduct, lacks merit. There is no evidence that Scott had "a purpose to cause harm unrelated to the legitimate object of arrest." See Lewis, 523 U.S. at 836; see also County of Sacramento v. Lewis, 523 U.S. 833, 845-46 (1998) (stating that the Fourteenth Amendment applies to high-speed pursuits only if there has been no seizure to implicate the Fourth Amendment).

fn9Harris has also sued Sheriff Yeager and the deputies in their official capacities. A claim against these defendants in their official capacities is the same as a claim against Coweta County. See Kentucky v. Graham, 473 U.S. 159 (1985). Because suits against county officials in their official capacities are the functional equivalent of a suit against the county, there is no need to bring official-capacity actions against local governmental officials. Defendants' motion for summary judgment on these claims, therefore, is GRANTED. See Busy v. City of Orlando, 931 F.2d 764, 776 (11th Cir. 1991).

fn10 The Court, of course, is familiar with the facts of at least one of Deputy Cox's highspeed chases, which are recounted in the various opinions issued by the Eleventh Circuit. See Vaughan, 2003 U.S. App. LEXIS 18066. The Court, however, does not have sufficient facts before it to determine as a matter of law, that the County had a custom or practice of permitting such chases or permitting the inappropriate use of deadly force. Moreover, Plaintiff has presented no competent evidence concerning the County's alleged failure to

discipline Cox.

fn11 While the Court has discounted Plaintiff's vague evidence regarding prior Incidents, the facts of Vaughan demonstrate that, at the time of the incident involving Harris, Coweta County certainly knew that its officers had the means as well as the discretion to embark on dangerous high-speed chases and to use force during those chases.

fn12 Plaintiff asserts that sovereign immunity is waived not only for the negligent acts of county employees, but also for the intentional torts of those employees, but he has provided no authority for this position. Accordingly, Defendants' motion for summary Judgment on all state law claims other than negligence against the County is GRANTED.

Filed 2/17/06
No. 03-15094

UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

VICTOR HARRIS,
Plaintiff-Appellee,

Versus

COWETA COUNTY, GEORGIA, et al.,
Defendants,

MARK FENNINGER, Sgt., TIMOTHY C. SCOTT,
Deputy, Defendants-Appellants.

Appeal from the United States District Court for the Northern District of Georgia. D. C. Docket No. 01-00148-CV-WBH-3.

JUDGES: Before BIRCH, BARKETT and COX, Circuit Judges.

PER CURIAM:

The Petition(s) for Rehearing are DENIED and no Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 25, Federal Rules of Appellate Procedure), the Petition(s) for Rehearing En Banc are DENIED.