UNITED STATES DISTRICT COURT
FOR THE
DISTRICT OF VERMONT

KENNETH O'BERT, as Administrator of the estate of RICHARD O'BERT Plaintiff v. SERGEANT ROBERT J. VARGO and SERGEANT JOHN G. FAGERHOLM, III Defendants	:	Docket No. 1:01-CV-44

RULING ON DEFENDANT FAGERHOLM'S MOTION FOR SUMMARY JUDGMENT
(Paper 86)

The relevant facts are set forth in this Court's Opinion and Order of April 25, 2002 (Paper 63), in which the Court ruled on cross motions for summary judgment. In that Opinion and Order, the Court instructed Plaintiff to amend his complaint to add all state law claims. Plaintiff amended his complaint by adding an assault claim against Fagerholm. (Paper 65). In response to the amended complaint, Fagerholm filed a motion to dismiss the wrongful death (Count III) and assault (Count IV) claims against him under FED. R. CIV. P. 12(b)(6). (Paper 86). In the alternative, Fagerholm requested the Court to examine the entire record and construe his motion as one for summary judgment. The Court will consider the entire

record and construe this motion as a motion for summary judgment. For the reasons discussed below, Defendant Fagerholm's motion for summary judgment is GRANTED.

DISCUSSION

A motion for summary judgment is properly granted when there is no genuine issue as to any material fact, and the moving party is entitled to judgment as a matter of law. FED. R. CIV. P. 56(c); Lipton v. Nature Co., 71 F.3d 464, 469 (2d Cir. 1995). The burden is on the moving party to demonstrate there are no material facts genuinely in dispute. See Weinstock v. Columbia Univ., 224 F.3d 41 (2d Cir. 2000). In deciding a motion for summary judgment, the court must view the facts and all the inferences to be drawn therefrom in the light most favorable to the party opposing the motion. Howley v. Town of Stratford, 217 F.3d 141, 150-51 (2d Cir. 2000).

The facts relevant to the present motion are undisputed. Fagerholm argues that even if all of Plaintiff's factual allegations are taken as true, the wrongful death claim is barred by the doctrine of qualified immunity. As to the assault claim, Fagerholm argues that it is barred by qualified immunity and the common law privilege of law enforcement officers to use necessary force for a lawful purpose. Upon a review of the record in the light most favorable to Plaintiff, the Court agrees.

I. Plaintiff's Wrongful Death Claim (Count III)

In Vermont, the doctrine of qualified immunity protects lower-level government employees from tort liability when they perform discretionary acts in good faith during the course of their employment and within the scope of their authority. see Sabia v. Neville, 165 Vt. 515, 520 (1996). Fagerholm clearly was acting within the scope of his employment, See Long v. L'Esperance, 166 Vt. 566, 571 (1997); and there is no doubt his actions in investigating and attempting to arrest O'Bert for domestic violence were discretionary acts. See Amy's Enterprises v. Sorrell, et al, 817 A.2d 612, 617 (Vt. 2002). The sole remaining issue is whether Fagerholm acted in good faith.

The Vermont Supreme Court has adopted the federal good faith standard. Cook v. Nelson, 167 Vt. 505, 509 (1998). The determination of good faith depends upon the objective reasonableness of the official's conduct in relation to settled, clearly-established law. See id.; Murray v. White, 155 Vt. 621, 630 (1991). Thus, if the official's conduct does not violate clearly-established rights of which a reasonable person would have known, then qualified immunity protects him from tort liability. 167 Vt. at 510. Conduct is said to be objectively unreasonable only when "no officer could have made

the same choice in similar circumstances." Long, 166 Vt. at 571.

Plaintiff does not allege a violation of a clearly-established right. Instead, he bases the wrongful death claim on Fagerholm's gross negligence and recklessness as the proximate cause of O'Bert's death. (Paper 65, ¶ 32). Presumably, the right which Fagerholm violated is the right to be free from gross negligence and recklessness. A lack of good faith is not established, however, by merely asserting that the right to be free from the alleged tort is clearly established. See Cook, 167 Vt. at 512. Rather, the contours of the right must be sufficiently clear in light of pre-existing law in order for the official to understand his actions violate that right. Id. The law is not sufficiently clear that a reasonable person would understand that a right to be free from gross negligence and recklessness existed and was violated.

More importantly, it cannot be said that "no officer could have made the same choice in similar circumstances." See Long, 166 Vt. at 571. According to Plaintiff, Fagerholm's decision to forego O'Bert's arrest outside the home in favor of the confrontational arrest inside the home; his actions in pointing a gun at O'Bert during the arrest; and his attempt to grab O'Bert to effectuate the arrest, amount to gross

negligence. (Paper 89, pp. 5-6).

Fagerholm's decision to forego the arrest when O'Bert was outside occurred when Fagerholm was the only officer at the scene and was attempting to interview the victim. O'Bert appeared intoxicated, agitated, and belligerent. (See Paper 45, at ¶ 23; Paper 48, at ¶ 6). Fagerholm's decision to interview the victim and await police backup before arresting O'Bert was not so unreasonable that no officer could have made the same decision.

Additionally, as this Court held in its previous Opinion and Order (Paper 63), exigent circumstances existed justifying the warrantless entry into O'Bert's home to arrest him. (Id. at 31). The exigent circumstances included, inter alia, probable cause to arrest O'Bert for domestic assault, O'Bert's threat of violence toward police and confirmation that he kept weapons in his home. (Id. at 32).

In light of this previous finding by the Court, Fagerholm's entry into O'Bert's home with gun drawn was not so unreasonable that no officer in like exigent circumstances would have made the same decision. Lastly, Fagerholm's attempt to grab O'Bert in order to peacefully arrest him was objectively reasonable. Therefore, qualified immunity shields Fagerholm from Plaintiff's wrongful death claim.

II. Plaintiff's Assault Claim (Count IV)

Fagerholm argues that the assault claim against him also is barred by the doctrine of qualified immunity. The Court need not address the effects of qualified immunity on this claim, however, because "under Vermont law public officials are privileged to use such force as is necessary to accomplish a lawful purpose." Robinson v. Via, 821 F.2d 913, 927 (2d Cir. 1987)(citing Cahes v. Watson, 75 Vt. 385, 387 (1903)). The basis of the assault claim seems to be Fagerholm's act of forcibly entering O'Bert's home with his gun drawn to arrest him for domestic abuse. The door to O'Bert's trailer was locked (Paper 48, ¶ 27), and O'Bert answered the officers' numerous attempts to communicate with a threat to "blow [their] fucking heads off." (Paper 45, ¶ 42; id. Ex. 5, at 48-49). For these reasons and the exigent circumstances justifying entry, Fagerholm's actions were necessary to attempt an arrest of O'Bert. He used appropriate force for a lawful purpose and, therefore, Plaintiff's assault claim against him fails.

CONCLUSION

For the reasons stated above, Defendant Fagerholm's Motion for Summary Judgment is GRANTED as to Counts III and IV of Plaintiff's Amended Complaint.

SO ORDERED.

Dated at Brattleboro, Vermont this ____ day of October, 2003.

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J. Garvan Murtha, U.S. District Judge